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**IDEAS, INTERESTS AND INSTITUTIONS IN THE GLOBALISING  
ECONOMY:  
THE EVOLUTION AND INTERNATIONALISATION OF ANTITRUST**

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## ABSTRACT

The aim of this thesis is to generate an understanding of antitrust and its evolution in the context of the globalising economy of the 20th and early 21st centuries. I do this by focusing on the role of economic ideas and more specifically, conceptual approaches to competition policy, in the international context. Existing legal and economic studies have mainly framed antitrust as the disciplinary tool regulating market competition according to criteria of efficiency and/or economic welfare. So far, few researchers have addressed the enforcement of policies - and specifically, of market competition regulations, without resorting to pure rational-choice or reflectivist arguments. This thesis aims to fill this gap by examining the ways in which abstract economic concepts and theories on the one hand and material interests on the other, by influencing political actors' understanding of reality, have shaped the decision-making process behind specific antitrust policies and laws. My analysis develops on the basis of what I call a pan-institutional methodology, a synthesis of an institutional understanding of antitrust and sociological theories of isomorphism. Pan-institutionalism is employed here to examine the development of antitrust policies in the US, Europe and Japan during the Great Depression of the 1930s, the oil crises of the 1970s and the current recession. My study reveals that the corpus of ideas and institutions of antitrust of the 20<sup>th</sup> and early 21<sup>st</sup> century can be identified as Harvard, Chicago and Post-Chicago paradigms of competition policy. To a degree, these US-originated approaches have been internalised by Europe and Japan through formal and informal institutions, and adapted in light of major economic crises. At the same time however, the reliance of Europe and Japan on their traditional understanding of market practices has prevented a total harmonisation of their antitrust policies with the dominant American ones.

## INTRODUCTION

According to the philosopher Immanuel Kant, ideas – or the ‘rose-coloured glasses of morality’ we are all wearing – are the tools we use to perceive and determine our understanding of reality.<sup>1</sup> However beholden to this view, this thesis does not seek to analyse Kant’s philosophical thought, nor does it attempt to understand why reality should be necessarily perceived as ‘rose’. Rather, it is aimed at investigating a much narrower topic: namely, the role ideas play in inspiring and sustaining the development of antitrust policies.

The *raison d’être* of this thesis has a twofold explanation. On the one hand, antitrust has been normally framed by legal or economic studies as a discipline designed to regulate market competition according to criteria of efficiency and/or economic welfare. On the other hand, there are very few researchers who undertake to understand the enforcement of market regulations without resorting to pure rational-choice arguments; in other words, the role of the ideological framework in influencing policy- and rule-making is typically dismissed by many rational-choice theories as irrelevant and inconsistent. To be sure, many scholars of different theoretical persuasion, such as Berger, Luckmann or Mead, have tried to better comprehend quite how ideas, in addition to economic interests or needs, might drive the institutionalisation of specific regulations.<sup>2</sup> However, these efforts have been challenged on two main fronts. First, it is not clear how ideas, and their effects over the social realm, are to be conceptualised. In John Campbell’s words, ‘many scholars agree that an analytic distinction should be drawn between ideas and interests as determinant of policy, but what they mean by ideas has

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<sup>1</sup> See Immanuel Kant, *The Critique of Practical Reason*, trans. Thomas Kingsmill Abbott, 2008, (1788) Forgotten Books.

<sup>2</sup> Anthony Giddens, *The Constitution of Society: Outline of the Theory of Structuration*, 1984, University of California Press. George Herbert Mead, *Mind, Self and Society*, 1934, University of Chicago Press, 162. Peter L., Berger and Thomas Luckmann, *The Social Construction of Reality*, 1967, New York, Doubleday.

varied widely from broad notions of culture, shared belief systems and world views to specific strategies of action and policy programs.<sup>3</sup> Secondly, it has not been empirically proven whether ideas can ever affect policy outcomes independently of material interests.<sup>4</sup>

In order to address those challenges, this thesis is going to contextualise the analysis of ideas into a narrower framework. It will attempt to explain the extent to which abstract economic concepts and theories contribute to the political decision-making behind particular antitrust policies and regulations. In other words, it will seek to trace the impact of economic theories on the institutionalisation of antitrust policies and laws. In particular, this research sets out to explore the paths through which such economic ideas as the ones constructed by the Harvard, Chicago and Post-Chicago Schools have determined not only the evolution and understanding of US antitrust policy, but also the development of European and Japanese competition regulations by altering collective perceptions of reality and, therefore, of interests.

To illustrate the power of antitrust ideas in shaping the market and the political implications thereof, it is necessary to examine both the government institutions and the historical context behind every policy under analysis.<sup>5</sup> On the one hand, the social actors governing the organisation of the state are indispensable to interpret ideas in a specific way and to convert them into defined institutions, thereby allowing for the perception of interests. On the other hand, the historical context plays a vital role in creating a sense of general uncertainty, which pushes individuals to intervene in reinterpreting the social

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<sup>3</sup> John L. Campbell, 'Institutional Analysis and the Role of Ideas in Political Economy', 1998, 27 *Theory and Society* 3, 377–409.

<sup>4</sup> Margaret R. Somers, 'What's Political or Cultural about Political Culture and the Public Sphere? Toward an Historical Sociology of Concept Formation', 1995, 13 *Sociological Theory* 2, 113–144. Kathleen Thelen and Sven Steinmo, 'Historical Institutionalism in Comparative Politics', in Svein Steinmo, Kathleen Thelen and Frank Longstreth (eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis*, 1992, New York, Cambridge University Press, 1–32.

<sup>5</sup> Lawrence A. Sullivan and Wolfgang Fikentscher, 'On the Growth of Antitrust Ideas', 1998, 16 *Berkley Journal of International Law*, 197–233.

realm, defining its problems and converting possible solutions into a restructured institutional framework. With that in mind, this thesis specifically analyses the instruments employed by Washington in constructing the institutional framework of antitrust in the context of three crises: the Great Depression, the 1970's oil crises and the 2008 credit crisis.

Since the role of ideas cannot be restricted to a single national arena, this project will also investigate the possible influence of American antitrust principles on the evolution and development of European and Japanese competition policy after the above-mentioned downturns – and vice-versa. In doing so, this thesis will not only analyse the institutionalisation process of antitrust ideas, but will also focus on the process of internationalisation of said ideological framework. Here, Europe and Japan can be safely considered countries of reference as they represented, at the time in question, the most important American economic partners situated in the Pacific and Atlantic side.

The three economic crises were primarily chosen on account of their timing; they have a time lag of 30-40 years between one and the other and can therefore offer a coherent historical framework for my theoretical hypothesis. The choice of economic and financial downturns *per se*, on the other hand, is due to their very nature. Indeed, they are particularly well placed to provide unique insights not only into the complex trends and processes that shaped previous market relations, but also into the contradictions within them, which, *ex ante*, were not readily noticeable.

All economic downturns to date have been a great source of uncertainty and, as such, have often marked the end of specific models of antitrust and, broadly speaking, of capitalism. Nonetheless, they also constitute an interesting case of analysis in themselves. This is because overcoming these crises may require either a new set of ideas or such a reinterpretation of the same ideological principles that can inspire the reorganisation of

material practices and institutional arrangements according to principles of efficiency or welfare.

This thesis, however, does not purport to study the role of crises in institutional change. On the contrary, it takes crises as the trigger events that paved the way to the latter-mentioned phenomenon. This allows to see institutional change as resulting not only from the crises themselves, but also from those political and economic factors that likely altered the perception of economic interests. Kovacic, for instance, interprets the evolution of antitrust policy as a pendulum that shifts from efficiency - to welfare-oriented approaches. These fluctuations can result in different grades of overregulation or, on the other extreme, in a lack of state intervention and *laissez faire*.<sup>6</sup>

This is particularly apparent when taking into consideration the above-mentioned crises and the several modifications applied to antitrust policies. In this frame, the progression of antitrust policies is understood to parallel the evolution of specific antitrust theoretical frameworks. Indeed, from one crisis to the next, theoretical biases have always been there to offer a determined set of solutions to the economic troubles of the time by calling for different levels of state interventionism.<sup>7</sup> For instance, the current recession – the causes and developments of which will be followed, for the sake of analytical accuracy, until the year 2010 – has manifestly questioned the world neo-liberal economic order. It has argued that the US neo-liberal model of political economy is no longer effective and its institutional framework has to be adapted to new social exigencies. Although a number of Chicago economists maintain that the neo-liberal model is still largely efficient, increasingly there are calls for change. They point to the

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<sup>6</sup> William E. Kovacic, 'Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement', 2009, 5 *Competition Policy International* 1, 129–150. William E. Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking', 2009, *Competition Policy Centre Working Paper CPC99-09*, UC Berkeley, <http://escholarship.org/uc/item/5zb4g387>. William E. Kovacic, 'Modern Evolution of U.S. Competition Policy Enforcement Norms', 2003, 71 *Antitrust Law Journal* 2, 377–478.

<sup>7</sup> John J. Flynn, 'Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy: Introduction', 1977, 125 *University of Pennsylvania Law Review* 6, 1182–1190.

prevailing new theoretical orientations that support a much wider state interventionism over the market in order to promote more general social welfare. Alternatively, they may also aim at the replacement of the old key practitioners who work in the high echelons of bureaucracy. In that event, the process will probably generate a new interpretation of the same neo-liberal ideas without necessarily challenging the core *laissez faire* principles of the current economic orientation<sup>8</sup>.

It is probably too early to analyse any kind of change in the current crisis. Yet, following Kovacic's ideas, it may be suggested that antitrust reforms should be oriented towards the support and the implementation of stricter regulations of the market in order to redress the unintended consequences of neo-liberal policies.<sup>9</sup> However, states, in the face of globalisation, have been disempowered of their traditional generic function of promoters of the public interest and social justice.<sup>10</sup> Hence, considering the remarkable international expansion of corporations and the erosion of power and legitimacy at the national level, it appears impractical to envision any kind of strict state intervention or Neo-Keynesian policy<sup>11</sup>.

Even though it is problematic to make any prediction as to how the current recession will be overcome, it is clear that such precedents as the Great Depression and the 1970s oil crises have caused radical changes in the application of antitrust policies. Here, by calling for more or less state interventionism, economic ideas have influenced political actors in enforcing specific antitrust institutions in line with broader political economic plans. For instance, the Great Depression was overcome through the

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<sup>8</sup> See Henk Overbeek and Bastiaan van Apeldoorn, (eds.), *Neoliberalism in Crisis*, 2012, International Political Economy Series, London, Palgrave Macmillan.

<sup>9</sup> See Karl Polanyi, *The great transformation: the political and economic origins of our time*, 1957, (1944), Boston: Beacon.

<sup>10</sup> Philip G. Cemy and Mark Evans, 'New Labour, Globalization, and the Competition State', 2000, *Center for European Studies Working Paper Series*, 70, Harvard University. <http://www.ces.fas.harvard.edu/publications/docs/pdfs/evans.pdf>. Martin Wolf, 'Will nation-state survive globalization?', 2001, 80 *Foreign Affairs* 1, 178–190.

<sup>11</sup> Stephanie Farmer and Sean Noan, 'Post-Neoliberalism or Deepened Neoliberalism? The Chicago Public Transportation Service and Elite Response during the Great Stagnation', 2011, 10 *Perspectives on Global Development & Technology* 1, 73–84.

application of Keynesian macro-economic policies, the Fordism production system and the Harvard antitrust model. The overall outcome resulted in a major national involvement in the economy in support of general welfare. On the contrary, the oil crises registered the implementation of a monetarist approach that, in line with the antitrust theoretical framework developed by the Chicago School, maintained a bold *laissez faire*.

Therefore, the aim of my research is to analyse the process of antitrust institutionalisation, or, more precisely, to find out how various antitrust theoretical frameworks have influenced the socio-political realm, and the way social and political actors perceive economic interests. Put differently, this thesis aims to provide a conceptual and historical understanding of antitrust and its evolution in the globalising economy.

Traditionally, every human action or economic transaction has been interpreted as an attempt to reach a final purpose or to achieve a significant profit. It follows that every political accomplishment or market regulation should accordingly promote specific outcomes, such as efficiency or social welfare. Proceeding from this general premise, many economists and political scholars have been analysing antitrust institutions only in function of the particular purpose they were meant to serve, be it economic efficiency, profits, welfare, market power, or the like.

While the role of personal returns in the analysis of competition regulations cannot be undermined, a deeper investigation of social and economic transactions may demand more analysis not of interests *per se*, but of aspects that go beyond the practical but reductive characterisation of persons, organisations or governments as just interest seekers. For instance, such aspects as culture, faith, and other beliefs play a fundamental role in shaping what is conceived as a utility and, consequently, what is considered to be competitive or not. While actors may tend to operate rationally in order to achieve results, their cultural environment constantly modifies the collective perception of reality.

Against this conceptual background, this thesis aims to demonstrate that, while antitrust regulations and policies have been implemented in order to face specific market issues before or after the above-mentioned crises, the perception of possible solutions resulted from the projection of the ideas and the cultural framework of each historical period into the social realm. In other words, if it is generally correct to assume that governments design regulations in order to pursue specific objectives, however, it is also necessary to consider that every environment is likely to modify the social perception of needs. Indeed, while both economic efficiency and social welfare have traditionally been the object of antitrust enforcement, their meaning and relevance have varied according to the historical period analysed, the interpretation attributed thereto, and the theoretical framework of reference.

This approach promises to be rather innovative, as there are few studies that take into consideration the evolution of the *meaning* of antitrust policy, rather than just its legal content or the effect on the market. Among the most relevant contributors to this discussion is Marc Allen Eisner, who attempted to provide an interpretation of antitrust institutions by studying the development of American competition policy up until Reagan's economic revolution.<sup>12</sup> Equally noteworthy is the work of Freyer who admirably traced the historical improvement of antitrust and competition regulations from the 1930s to the late 1990s in the US, Europe, Japan and Australia.<sup>13</sup> Recently, Hubert Buch-Hansen and Angela Wigger have published a book entitled "The Politics of European Competition Regulation",<sup>14</sup> which examines the spread of neo-liberalism across Europe as well as the current European response to the crisis in the fields of state aid, cartel prosecution and merger control.

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<sup>12</sup> Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise & Policy Change*, 1991, Chapel Hill, The University of North Carolina Press.

<sup>13</sup> Tony Alan Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press.

<sup>14</sup> Hubert Buch-Hansen and Angela Wigger, *The Politics of European Competition Regulation*, 2011, London and New York, Routledge.

In the absence of any substantive analysis of antitrust institutionalisation from the particular political economic perspective hitherto described, this research sets out to fill this gap in the literature by applying what I call a pan-institutional methodology, a synthesis of an institutional understanding of antitrust and sociological theories of isomorphism. The thesis explores institutionalism from a political, sociological and economic point of view. Among the several institutional scholars, Douglass North appears to be the one providing the most useful definition to explain the above-mentioned process. First of all North solved the dichotomies dividing institutional economics. In fact, while old institutionalists, such as Veblen and Commons, believed that institutions could control individuals; new institutionalists, on the contrary, theorise the power of each individual's rationality to shape the institutional environment in conformity to his interests.<sup>15</sup> Instead, according to North, institutions are 'humanly devised constraints' that rule a society by shaping human interactions and the way those interactions have to evolve.<sup>16</sup> However, by simply acting, the individual can change the institutional framework itself according to his necessities. Indeed, while institutions are the rules of the game, organisations and their actors shape the institutional environment or the 'fundamental political, social, and legal ground rules that govern economic and political activities'.<sup>17</sup> In other words, North maintains that institutions are the product of models used by actors to interpret the world around them. By not disposing of all the necessary information, human beings cannot acquire a perfect knowledge and elaborate it, thus it is clear that those models and the institutions that derive from them cannot be

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<sup>15</sup> Thorstein Veblen, *The instinct of workmanship : and the state of industrial arts*, 1964, New York: B. W. Huebsch. John R. Commons, *Institutional Economics: Its place in Political Economy*, 2005, Transaction Publishers, 58.

<sup>16</sup> Douglass C. North, 'Economic Performances through time', June 1994, 84 *The American Economic Review* 3, 359-368, 360, Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, 1990, 3.

<sup>17</sup> Douglass C. North, 'Institutional Change and American Economic Growth: A First Step towards a Theory of Institutional Innovation', March 1970, 30 *The Journal of Economic History* 1, 131-149.

perfect, but they can perfectly represent the structural culture, knowledge and ideas that characterised a particular society.<sup>18</sup> Although scholars have not paid much attention to study the process through which ideas affect policy-making, North has also the merit to introduce those variables in the institutional analysis.<sup>19</sup> Hence, I found that North's interpretation of the role of organisations and actors in the institutionalisation process could be linked to the sociological theories of isomorphism on policy diffusion. In fact, although the two approaches start from different theoretical basis they both outline the role of ideas in shaping institutional frameworks. However, in North's prospective human actors use their knowledge, culture or ideas to institutionalise what are believed to be efficient regulations. From a general sociological point of view, instead, ideas directly shape individuals. Hence, Goldstein and Keohane, by outlining the role of ideas and interests in shaping human actions can be the bridge between the two above-mentioned different interpretations.<sup>20</sup> Indeed, they maintain the importance of interests in determining and leading human actions and so the institutionalisation of efficient rules. However, they also argue that what is efficient or not is determined by the mental models or the set of ideas that influence a society. This set of ideas, beliefs and tradition is what I here define as general culture or, in the words of Geertz, the "webs of significance that individual themselves have spun".<sup>21</sup>

The link between ideas and interests underlined by Goldstein and Keohane allows me to use Douglas North definition of institutions, while analysing the power of ideas in the policy diffusion process that invested Europe and Japan. Indeed, although isomorphism

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<sup>18</sup> Douglass C. North, 'Institutional Change and American Economic Growth: A First Step towards a Theory of Institutional Innovation', March 1970, 30 *The Journal of Economic History* 1, 131-149. Douglass C. North, 'Institutional Change: A framework of Analysis' in Sven-Erik Sjostrand (ed.) *Institutional Change: Theory and Empirical findings*, 1993, Studies in Socio-Economics, M.E. Sharpe, Chapter 2.

<sup>19</sup> John L. Campbell, 'Ideas, Politics, and Public Policy', 2002, 28 *Annual Review of Sociology*, 21-38.

<sup>20</sup> Judith Goldstein and Robert Keohane, (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, 1993, Ithaca, N.Y.: Cornell University Press.

<sup>21</sup> Clifford Geertz, *The Interpretation of Culture, Selected Essays*, 1973, Basic Books, INC. Publishers.

explain how the EU and Japan were influenced by American ideas, the institutionalisation process *à la* North, permits me to understand why their general competition policies are different from the US one. Their peculiarities, in fact, are attributable both to contingent economic needs and to the influence of local cultures in defining what had to be considered efficient or not. In this sense, both exogenous and endogenous factors influenced the institutionalisation of specific rules. Moreover, in the case of Europe and Japan, the internalisation of US antitrust approaches within traditional market understanding produced a set of policies and regulations, which changed the way competition had to be understood and safeguarded in coordination with US interests. Indeed, although the literature on varieties of capitalism suggests that all states tend to develop a form of capitalism that conforms to their cultural, social, political and economic necessities. By contrast, I first argue that the US has coercively implanted an antitrust frame of reference in Europe and Japan and I define the process that came to influence competition policy in the above-mentioned countries a coercive isomorphic one. In this sense, the US is understood to have favoured the development of the European and Japanese models of capitalism – insofar as a European model of capitalism can be identified at all – along a well-defined track, such that it would not damage US commercial interests or the free-market agenda. Secondly, I maintain that, to some extent, Europe and Japan have voluntarily implemented antitrust policies inspired to US-based ideas and institutions for mimetic, normative and competitive reasons. Moreover, I proceed to argue that, while Europe and Japan took inspiration from the US, the latter never looked at their competition practices and generally gave European and Japanese ideas a wide berth. The absence of a reciprocal exchange in matters of antitrust practices is probably due to the older and more business-oriented US antitrust tradition. Furthermore, the creation of international organisations able to spread US-

based ideas at a global level allowed Washington to maintain legitimacy as the antitrust champion.

In order to address the research agenda set out above, my thesis focuses on the following questions:

- How was the antitrust institutionalisation process formalised in different political-economic contexts?
- To what extent has the implementation (internalisation) of antitrust in Europe and Japan been inspired by American ideas?
- Why could the US influence global antitrust policies, and yet not be influenced by the competition disciplines applied by the rest of the world?

The argument of the thesis unfolds through the following steps:

- Antitrust institutions normally pursue efficiency and welfare. Both ideas and interests play a fundamental role in shaping the institutions of antitrust.
- The ways in which welfare and efficiency are interpreted depend on legal, cultural and theoretical frames of reference, as well as on contingent interests in the countries in question.
- The notion of isomorphism, or institutional emulation, can help us examine the way the US has been able to influence other countries' understanding of competition and antitrust regulation.
- While many national antitrust laws gravitate towards their American origins, persistent variations in legal norms, ideological frameworks, and national economic cultures prevent the complete harmonisation of antitrust regulations, even in the age of globalisation.

- The Americanisation of antitrust and institutional isomorphism in Europe and Japan shaped a path-dependent pattern of competition policy in these countries.

With this research agenda, the thesis is organised in two main parts. Part I provides a theoretical overview of antitrust and introduces methodological pathways for understanding the way ideas and interests have influenced the development of US antitrust policies over the course of history and determined what was to be considered economically efficient and welfare maximising. Additionally, it also seeks to explain how those ideological frameworks have shaped the evolution of competition policies in Europe and Japan. This part of the thesis identifies three broad paradigms that have encapsulated the ideas, interests and institutions of antitrust in the US during three distinct periods of the 20<sup>th</sup> century, as the Chicago, Harvard and post-Chicago approaches to antitrust.

Within this framework, the chapters are organised in an order that will allow the reader to acknowledge first the meaning of competitiveness, antitrust and competition policy, as well as the main theoretical approach I have adopted to explain the evolution of antitrust policies, and subsequently the process that led to the institutionalisation of antitrust in the US. The documents used in the last two analytical chapters are primary and secondary sources. These include, for instance, a few US Presidents' speeches used to further validate the relevance of the sort of antitrust evolution here hypothesised. Indeed, they are normally very specific statements concerning market-wide antitrust reforms.

In Part II, the thesis draws on historical data to illustrate the evolution of antitrust and competition policy during economic and financial crises. This part of the thesis traces the evolution of the three main paradigms of antitrust in different national

(Europe and Japan) and international contexts. Specifically, the first three chapters describe the process of antitrust emulation and internalisation in Europe and Japan. The last chapter concludes the thesis with a comprehensive overview of the general dynamics behind the process of antitrust institutionalisation in the US, Europe and Japan and the global arena.

Specifically, the first chapter in Part I introduces and explains the concepts of competition and antitrust policy in relation to the interests they are supposed to serve, namely, efficiency and welfare. It then proceeds to discuss which theoretical approach is best suited to the study of antitrust and its development. Most research on antitrust is conducted from an economic or juridical point of view and normally through the economic discourses of efficiency and welfare analysis. There are few studies that underline the political nature of competition policy, because the methodologies of most political analysis are generally not as precise. Hence, this thesis adopts a political-economy approach to emphasise the very political aspects of competition policy while relying on the scientific accuracy of economic analysis to describe the consequences of each antitrust decision.

To date, International Political Economy (IPE) is generally thought of as falling under any one of the classical, liberal or Marxist approaches. However, these schools are unable to provide an inclusive enough answer to contain and interconnect all the different economic and political issues raised by my research question.<sup>22</sup> Indeed, the aim of this research is to understand antitrust regulations as a product of specific theoretical frameworks and of the interpretation policy-makers make of them in response to contingent necessities. Consequently, among the different IPE schools of thought, this

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<sup>22</sup> Ronen Palan, 'New Trends in Global Political Economy', in Ronen Palan (ed.) *Global Political Economy: Contemporary Theories*, 2000, London and New York, Routledge, 1–18, 3. John Groenewegen, Frans Kerstholt and Ad Nagelkerke, 'On Integrating New and Old Institutionalism: Douglass North Building Bridges', 1995, xxix *Journal of Economic Issues*, 2, 467–475.

thesis adopts an institutional approach and it considers antitrust laws and policies as the institutionalisation of theoretical or ideological frameworks.

The chapter proceeds to introduce a working definition of institutions by taking into consideration three theoretical perspectives provided by the political, sociological and economic disciplines. Indeed, institutions can generally be identified in different ways: from a political point of view they comprise a normative essence, which shapes the behaviours of society. From a sociological angle, they have a cognitive nature and therefore depend upon the socio-cultural dimension. Finally, from a strictly economic perspective, they can be identified as the laws and the formal or informal conventions and agreements that lead or direct economic performances. According to this approach, national regulations vary between states as each country develops its own ideological framework and academic theoretical structure, which in turn influences the institutionalisation of rules. In this view, the economic definition seems particularly well suited to the purpose of my research. Indeed, it defines antitrust institutions as the set of competition regulations and policies that, inspired by theoretical frameworks, can shape economic performances and respond to the main market interests of each historical period.

Having defined antitrust as an institution, the second chapter conceptualises the evolution of antitrust within the context of the varieties-of-capitalism theories. Indeed, according to Hall and Soskice, a ‘nation with a particular kind of coordination in one sphere of the economy should tend to develop complementary practices in other spheres as well.’<sup>23</sup> The rationale of this chapter is to provide a basic understanding of the extent to which perceptions on how competition should be regulated diverge across the US, Europe and Japan and how those differences are embodied into their model of

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<sup>23</sup> Peter A. Hall and David Soskice, *Varieties of Capitalism, The institutional Foundations of Comparative Advantage*, 2001, Oxford, Oxford University Press, 18.

capitalism. It points out that the different interpretations of competition and capitalism can be traced to the different cultures – and corresponding theoretical frameworks – across the US, Europe and Japan. In this vein, it goes on to describe the main ideas and schools of thought in these countries in order to show how the perception of competition differed between them. In essence, this chapter provides the instruments to understand why competition can be defined as a product of the cultural environment of a given social realm and how, in turn, it can influence society itself.

Laying aside any hope of antitrust harmonisation, the third chapter describes the process of antitrust institutionalisation by taking into consideration the genesis of ideas and how this substratum is converted into institutional change. Next, it explores the process of internationalisation of antitrust ideas in order to understand, from a theoretical point of view, whether – and, if so, how – Europe and Japan came to adopt similar antitrust conceptions after the three crises here considered, even though their traditional model of capitalism was rather different from that of the US. Was it because of economic efficiency or was it because those antitrust ideas were so powerful that they could convince those countries to adopt them? If so, what is this power? How can it be identified? This chapter is going to address those questions.

The fourth chapter provides the historical examples necessary to support the previous theoretical observations. Specifically, the development of US antitrust regulations is analysed chronologically by examining speeches and other primary sources in order to provide a better understanding of the cultural substratum influencing political actors and their decisions. The chapter describes the processes that characterised American antitrust institutionalisation during the Great Depression, the 1970s oil crises and the current credit crisis. It aims to describe the procedures through which specific economic theories influenced social reality and how, at the same time, precise economic interests led to the triumph of particular ways of thinking. In other words, it attempts to

show that ideas were as fundamental as interests in the process of US antitrust institutionalisation. In particular, starting from the Roosevelt administration, this chapter analyses Washington's national implementation of antitrust policies through the National Recovery Act (NRA) plans and the final adoption of Harvard-oriented competition policies by Thurman Arnold. Subsequently, it investigates the two oil crises of the 1970s by focusing on the antitrust policies implemented by Nixon, Ford, Carter and, finally, Reagan. After explaining what led to the triumph of Chicago theories over the US antitrust culture, the chapter attempts to analyse US antitrust policies during the current crisis. Here, the chapter overviews Bush's and Obama's antitrust policies to try to investigate the possible institutionalisation of a Post-Chicago antitrust approach. This would no doubt confirm the hypothesis advanced by Overbeek and Van Apeldoorn, among others, whereby the current downturn, far from spelling the end of neo-liberalism, has created the conditions for the development of a new sort of neo-liberal system, such as the one theorised by the Post-Chicago antitrust school of thought.<sup>24</sup>

Having analysed the process through which ideas are institutionalised, the first chapter in Part II investigates the antitrust internalisation processes that characterised Europe and Japan during the three crises under analysis through the sociological concept of isomorphism. The aim of chapter is to highlight the impossibility of pinpointing a single isomorphic explanation as the main cause of every antitrust institutional change that occurred in those two regions. Starting from the Great Depression, this section analyses the European Coal and Steel Community's antitrust institutionalisation and it explains why this process has to be considered as led mainly by mimetic and coercive reasons. The analysis that follows is specifically focused on the cases of Germany and

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<sup>24</sup> Henk Overbeek and Bastiaan van Apeldoorn (eds.), *Neoliberalism in Crisis*, 2012, International Political Economy Series, London, Palgrave Macmillan.

Japan and it concludes that Harvard antitrust institutionalisation was unquestionably forced into those countries.

The second section in the chapter turns to the processes of competitive and normative emulation that characterised Europe after the end of the oil crises. Based on my analysis, those processes were the factors that led Europe to convert its antitrust institutions into neo-liberal ones. As for Japan, it is argued the adoption of the SII's agreement was again led primarily by force. However, competitive factors will be also mentioned as being partially responsible for the Japanese switch to a more neo-liberal system. The final part, pertaining to the current downturn, will be limited to an analysis of the current antitrust institutions enforced in Europe and Japan and to a brief examination of their main political trends. It would seem premature, and somewhat pretentious, to undertake an analysis of the possible antitrust trends in those countries at this point in time.

The final chapter within Part I aims to conclude the thesis with a sort of chiasmic structure. It firstly conducts an historical analysis of the processes that allowed the US to influence the antitrust perceptions at the global level. It is argued that, through the creation of international organisations, the US allowed the development of a path-dependent process that supported the legitimacy of its antitrust ideas in the international arena. With that in mind, the chapter then provides a conclusive analysis of the relation between interests and ideas. It explains the power of ideologies and why the US antitrust models triumphed over other countries' traditional practices, without being reciprocally influenced by them. The chapter also underlines the different characteristics of each isomorphic process and it emphasises how each of those models is dependent on the others. Firstly, by taking into account coercive isomorphism, it explains why political conceptualisations of power, such as in the Gramscian concept of hegemony, can only partially explain the triumph of US-based ideas over the international arena. For instance,

the Gramscian theoretical school, while linking ideological predominance to material strength, does not properly investigate the power of ideas *per se* and shows a limited appreciation of the role of interests<sup>25</sup>. Secondly, it claims that competition, understood as an isomorphic mechanism, can hardly completely explain why states adopt specific institutions, because it fails to demonstrate how individuals and governments can be considered rational actors. The theory of mimetic and normative processes, advanced and developed mostly by the sociological school, offers an interesting insight into how imitation and cultural sharing can influence the perceptions of material interests. However, without a proper discussion of the role of strength and competition in motivating human actions, this approach cannot provide an adequate explanation of the above-mentioned isomorphic processes.

The chapter concludes by outlining why the sociological theory of isomorphism is better suited to explain the power of the US ideological substratum, through the study of the normative, mimetic, competitive and coercive reasons underpinning every institutional process of influence. However, it also maintains that, differently from what is held by DiMaggio and Powell, all four factors play an equal role in the process.<sup>26</sup> The latter approach, leaving aside pure power-dynamics explanations of political decisions and pure rational-choice interpretations of economic strategies, allows to better analyse interests as the engines of both ideas and government decisions. The conclusion, then, defines the influence of antitrust ideas and the process of antitrust institutional change by filtering the empirical findings through this theoretical framework.

The assumptions upon which this research is based revolve around the fact that the interests pursued by antitrust initiatives are economic efficiency and welfare and that

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<sup>25</sup> In fact, Neo-Gramscian scholars maintain that hegemony refers to a consensual order based on institutions reflecting specific ideas. In this context, state dominance may be necessary but not fundamental to the existence of hegemony. However, the initial institutionalisation of ideologies at the base of the hegemonic order needs to be based on material strength.

<sup>26</sup> Paul J. DiMaggio and Walter W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', 1983, 48 *American Sociological Review* 2, 147–60.

the meaning of antitrust lies in the satisfaction of those two socio-economic needs. Still, the interpretation of these interests varies between countries according to the model of capitalism implemented *in loco*. Those differences can however be attributed to the cultural and theoretical framework that dominates the political economic stance of every country. Therefore, theoretical conceptualisations – or ideas – have the power to change the perception of antitrust interests, but, at the same time, they are influenced by the need of individuals to meet those specific needs. Yet, the purpose of ideas is to inspire governments and social actors to enforce specific institutions so as to allow the provision of contingent social necessities. It remains, however, that every country has its own way of understanding and perceiving interests, which is embodied in the set of institutions underpinning its own model of capitalism.

The analysis of this thesis unfolds in two key stages. First, I explain how and why certain ideas about market and competition have matured into three distinct paradigms of antitrust and competition policy. These paradigms are defined here as the Harvard (1930-1960), Chicago (1960-1990) and Post-Chicago (1990-2000) traditions of antitrust. Second, through historical analysis, I trace the set of processes by which each of these US-centred paradigms has been internalised in national political-economies of Europe and Japan, and the processes which have shaped the fate of the three paradigms in the international regulatory realm.

## PART I

### CHAPTER 1

#### PERSPECTIVES ON ANTITRUST

According to Harvey, ‘Competition is one of those vague terms which are freely used in all discussion of social subjects; it conveys some meaning to all who utter or hear it; but this meaning as a rule is undefined and therefore inconstant; the word has different suggestions for different people’.<sup>27</sup> Proceeding from Harvey’s definition, this chapter attempts to understand why antitrust policies can be perceived in different ways and how ideas can influence their evolution. Scholars such as Dabbah or Amato maintain that, when examining antitrust policy, it is essential to regard ideas, culture, political ideologies, or economic theories as the basis of what inspires politicians to enact or re-interpret different competition and antitrust laws.<sup>28</sup>

Therefore, in order to explain how ideas have been able to modify political actors’ perceptions of antitrust or competition regulations over the course of history, we need to clarify the essence of competition as well as its general connotations. The notions of antitrust, competition policy and competitiveness are all semantically eclectic. They do not only refer to a condition of rivalry in the market; they are also considered natural promoters of economic efficiency and welfare. Thus, this chapter will first seek to achieve a broader understanding of those main concepts, forming as they do the backbone of this research.

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<sup>27</sup> John Harvey et Al., *Competition, a study in human motive*, (London 1917), 6, citation from Bastian De Gaay Fortman, *Theory of Competition Policy, A Confrontation of Economic, Political and legal Principles*, 1966, North Holland Publishing Company, 1.

<sup>28</sup> Maher M. Dabbah, *The Internationalisation of Antitrust Policy*, 2003, Cambridge University Press 2003, 4-6. Manfred Neumann and Jorgen Weigand, (eds.), *The International Handbook of Competition*, 2004, Edward Elgar, 9-10. Giuliano Amato, *Antitrust and the Bounds of Power*, 1997, Hart Publishing.

Secondly, the chapter will offer a theoretical framework to explain how ideas influenced the evolution of antitrust policies. Indeed, competition policy can be interpreted as an attempt to translate into reality economic principles and ideas that aim at reaching not only economic efficiency, but also social welfare and other political-economic objectives to do with fairness, democracy and freedom in the market. While legal, economic, or political analyses provide different interpretations of the subject, they all confine their investigation to the extent to which policies or regulations are implemented in order to satisfy specific social, economic, or political needs. In other words, they consider competition policy only as the outcome of specific material interests. By contrast, an institutional-IPE interpretation that takes into consideration the role of ideas provides an adequate theoretical perspective to frame the analysis of the above-mentioned economic concepts and antitrust policies from a more ontological angle. This will build upon the ideas of Douglas North who, among the many institutional-IPE scholars, provides the most valuable insights into how to frame a different understanding of the evolution of antitrust. From this perspective, it will be possible to argue that, while the meaning of competition is rivalry and its objective should be efficiency and welfare, the way regulators and politicians perceive those economic concepts changes according to the body of ideas that influences them.

In conclusion, the aim of this chapter is not only to define competition as a condition in the market but also as a political and regulatory framework of conduct, whose meaning, in turn, is also determined by the relevance of ideas in the political decision-making process.

The notion of competition, or market competition, dates back to the ancient world; the very term originates from the Latin word *competitio*, meaning rivalry. This ‘rivalry’ normally refers to the ways in which firms play in the market in order to achieve a particular business objective. Additionally, it can also be perceived as part of an individual’s free will to use his or her property in any way that does not affect others’ property rights.<sup>29</sup>

Competition policy – or antitrust – can be defined as the political and regulatory framework that dictates the rules of conduct in the market. While most countries refer to the discipline that controls economic rivalry as ‘competition law’, the US uses the term ‘antitrust’ instead. The American peculiarity is due to the different evolution of the meaning of the word ‘trust’ in the US. Originally denoting a common law arrangement whereby a property could be managed by one person or organisation for the benefit of another, the word changed meaning when, from the second half of the nineteenth century, ‘trust’ started to be associated with concentrations of economic power. Indeed, from the mid-1800s the US faced a time of great economic and social transformations that created opportunities for companies to expand and abuse their economic freedom in order to maximise their private interests<sup>30</sup>. Because many corporations began to create cartels and to name them ‘trusts’ to conceal the nature of their business, the American response against the formations of this kind of economic arrangements came to be referred to as antitrust law and policy.<sup>31</sup>

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<sup>29</sup> Francis M. Scherer, ‘Antitrust: Ideology or Economics’ in Francis M. Scherer (ed.), *Competition Policy, Domestic and International*, 2000, Economists of the Twentieth Century Edward Elgar, Part I, chapter 3, 28-43, 29.

<sup>30</sup> Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Political Change*, 1991, University of North Carolina Press, 1.

<sup>31</sup> Rudolph J.R. Peritz, *Competition Policy in America. 1818-1992, History, Rhetoric, Law*, 1996, Oxford University Press.

Although competition policy has a broader meaning than antitrust policy – as it may include intellectual property law, subsidies and antidumping law – in most cases the terms can be used synonymously.<sup>32</sup> They both aim to foster competitive market conditions with a view to enhancing economic freedom, improving rivalry among competitors, maximising consumer welfare, promoting growth, and providing economic stability and social prosperity.<sup>33</sup>

Competition policies generally institute an overall code of conduct that all business actors are required to observe; however, the need to limit such practices as mergers,<sup>34</sup> cartels<sup>35</sup> and monopolisations<sup>36</sup> implies that additional regulations are indispensable.<sup>37</sup> This is because laws can establish special rules of behaviour in economic sectors where firms are not expected to operate in the respect of competitiveness.<sup>38</sup> It follows that, while the objective of competition should be efficiency and welfare, any antitrust regulatory framework ought to include provisions against business practises with high social costs in terms of loss of economic efficiency and/or social welfare.<sup>39</sup> Yet, competition law could restrict individual market freedom when actors perform in a way that might produce negative economic externalities for the society as a whole.

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<sup>32</sup> Massimo Motta, *Competition Policy, Theory of Practice*, 2004, Cambridge University Press. Peter Morici, *Antitrust in the Global Trading System: Reconciling U.S. Japanese and EU Approaches*, 2000, Economic Strategy Institute, 3-4.

<sup>33</sup> Manfred Neumann, *Competition Policy: History, Theory and Practice*, 2001, Edward Elgar, 1.

<sup>34</sup> Mergers and acquisitions can be defined as trade practices based on the merging of two companies operating in the same market. Although these practices can be economically efficient, as they might help the combining firms to save costs and integrate their market power, they can be considered illegal when they reduce competition and create dominant positions over a market sector.

<sup>35</sup> Cartels are agreements among firms operating in the same market sector and selling similar products. Those agreements are anti-competitive when they result in price fixing or market sharing quotas that enhance the cooperating firms' profits impeding other firms from accessing the market.

<sup>36</sup> Monopoly is a market condition where one firm is the only supplier of a particular commodity. This might result in higher prices, scarcity of products and reduced economic efficiency.

<sup>37</sup> Doris Hildebrand, *The role of economic analysis in EC Competition Rules*, 2009, Klower Law International, 1.

<sup>38</sup> Massimo Motta, *Competition Policy, Theory of Practice*, 2004, Cambridge University Press 2, Preface, XIX.

<sup>39</sup> Edward M. Graham and J. David Richardson, *Competition Policies for the Global Economy*, November 1997, 51 Policy Analyses in International Economics, Institute for the Global Economy, 7.

In this perspective, antitrust regulation should not be understood as the antithesis of economic freedom, but as its ally: competition law, in fact, should allow industries to be free to invest and operate in the market without hindrance and it should avoid the negative externalities produced by unfair agreements and anticompetitive practices.<sup>40</sup> Competition regulations act as a sort of channel that contains, but does not stop or restrict, the flow of business activities in the market. On the contrary, its mission is to maximise efficiency not only of production but also of consumption, according to the necessities of the market. Indeed, the peculiarity of competition law lies in the fact that while economics is generally concerned with reaching efficiency at lower costs, antitrust is also concerned with competition and its effect on the markets. In other words, efficiency is as much an objective of antitrust as are equity or a fairer distribution of economic opportunities.<sup>41</sup> That is the reason why competition policy is a fundamental tool in the hands of the regulator to maintain a specific kind of social order.

### *The Meanings of Competition Policy*

Having defined competition not only as a way to support preserve economic rivalry but also as a guarantee of both economic efficiency and welfare, or fairness, I believe it is necessary to briefly define these two concepts.

Generally speaking, economic efficiency and welfare are strictly connected. Efficiency is the outcome of the competitive pressure that pushes companies to perform to the best of their capacity. This results in the production of goods marketed at prices that are in Paretian equilibrium and equal to both the marginal profits from the buyer side and marginal cost from the seller side. In the long term, therefore, economic

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<sup>40</sup> Ernest Gellhorn, William Kovacic, *Antitrust Law and Economics*, 1994, St. Paul, Minn. West Publishing Co. Michael A. Utton, *International Competition Policy, Maintaining Open Markets in the Global Economy*, 2008, Edward Elgar edition, Cheltenham, UK, 24.

<sup>41</sup> Eleanor Fox, Laurence Sullivan, Rudolph Peritz, *Cases and Material on U.S. antitrust in global context*, 2004, American Casebook Series, Thomson West, 57-58.

efficiency can enhance consumer welfare because it allows products to be sold at a price that maximises consumer profits. Moreover, this condition should be long-lasting because market actors, in conditions of perfect economic equilibrium, have no incentives to change their performances unless an external element modifies their status. In other words, under the principles of unconstrained economics, the market should move automatically toward this efficient and fair balance – and maintain it.<sup>42</sup>

On the other hand, welfare is defined as the sum of consumer and producer surpluses and, in economics, it is an important indicator of whether an action is economically optimal for society or not<sup>43</sup>. According to Massimo Motta, consumer surplus is, in fact, given by the difference between the value attributed to a product by consumers and the price it is purchased for. In contrast, producer welfare results from the profit producers register upon selling goods or rendering services. Hence, rising commodity prices reduce consumer welfare while increasing producer welfare. However, the reduction of consumer benefits is never inversely proportionate to producer benefits, once these are enjoyed. Briefly put, higher prices cause customers to lose more than what manufacturers gain.

Producers can normally play with prices if they have market power or, in other words, if they are able to choose their own prices without taking competitors into account. This favourable condition can allow a big company to become a monopoly and sell the same good for a higher price. Yet, firms, in the absence of any rivals or in case they enjoy a dominant position or sell an exclusive product (one that is non-substitutable with any other), may also decide to sell goods at a price that is below their marginal costs. Not only would this practice deter other companies from entering the market, but it

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<sup>42</sup> Herbert Hovenkamp ‘The Neoclassical Crisis in U.S. Competition Policy, 1890-1960’, September 2008, *From Selected Works of Herbert Hovenkamp, University of Iowa*, 1-53, 3. ([http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=herbert\\_hovenkamp](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=herbert_hovenkamp))

<sup>43</sup> Massimo Motta, *Competition Policy, Theory of Practice*, 2004, Cambridge University Press, Preface, XIX.

would also make it impossible for them to survive the competition. Admittedly, firms only have some degree of price setting freedom and cannot generally exert absolute market power. However, when markets are characterised by price inefficiencies, the regulator should intervene and make sure that competition is respected by avoiding the rise of restrictive business practices.<sup>44</sup> The abuse of market power by firms is typically cited as the reason why competition law should prosecute those anti-competitive behaviours that raise the possibility of unfair prices and reduce general social welfare.<sup>45</sup> Nevertheless, apart from controlling market trends, competition policy ought to enhance welfare by fostering economic freedom, rather than blocking it. The protection of economic freedom can translate either in *laissez-faire* policies or in the defence of those smaller firms that have fewer possibilities to invest in the market. The latter practice does not necessarily imply recourse to protectionist measures. On the contrary, it may ensure the possibility for everyone to be active in the market and not to be limited by the power exerted by big corporations. However, as it will be discussed in the following chapters, both the power and the extent to which antitrust law should or should not intervene in the market depend on how welfare is conceptualised in each country. This varies according to the interests perceived by a state, its local culture, and the predominant ideas of the time. Indeed, Robbins maintains that defining welfare as the sum of consumer and producer surpluses *per se* is not very precise because it does not allow for a distinction between the benefits produced by material and immaterial goods. For instance, some professions, such as doctors and teachers, create a kind of wealth that is not quantifiable and cannot be quantitatively measured. On the contrary, there are

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<sup>44</sup> Edward M. Graham and J. David Richardson, 'Competition Policies for the Global Economy', November 1997, 51 Policy Analyses in International Economics, Institute for The Global Economy, 14.

<sup>45</sup> Lorenz Gotte and Armin Schmutzler, 'Eric Merger policy: what can we learn from experiments?' in Jeroen Hinloopen, Hanstheo Normann, (eds.), *Experiments and Competition Policy*, 2009, Cambridge University Press, Part III, Chapter 8, 185- 216, 189. Van Damme, Pierre Larouche, Wieland Muller, 'Abuse of a dominant position: cases and experiments' in Jeroen Hinloopen, Hanstheo Normann, (eds.), *Experiments and Competition Policy*, 2009, Cambridge University Press, Part II, Chapter 6, 107-159, 109.

material products, such as drugs, alcohol or cigarettes, which may enhance economic gains but reduce social benefits, rather than fostering them.<sup>46</sup> Against this background, it is very difficult to provide a precise and consistent definition of welfare, since it is not easy to identify social utilities and negative externalities. The impossibility to even quantify social benefits or general efficiency partly explains why the ways in which economic interests are pursued vary according to the country taken into consideration, especially its culture, beliefs and the resulting theoretical framework of reference. These factors make a compelling case for a deeper investigation into the different ways of studying and understanding antitrust.

#### *How to analyse antitrust*

As previously pointed out, competition can be defined both as a condition in the market and a political and regulatory framework of conduct, whose meaning, in turn, is determined by the relevance of the interpretation of such economic concepts as welfare, efficiency or fairness in the political decision-making process.<sup>47</sup> Traditionally, both the judicial and the economic approach developed in the courtrooms and in academia have always been fruitful in defining antitrust policies and it may even be possible to identify a sort of intimate bond that links them to the study of market competition.<sup>48</sup> However, while they provide a material background on the evolution of antitrust, their analysis is limited by the fact that they do not explain the empirical mechanism by which the very ideas that were implemented and applied changed, in turn, the perception of reality and, once transposed into appropriate regulations, influenced policy-outcomes.

An economist would indeed evaluate antitrust policies by applying an analysis of

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<sup>46</sup> Lionel Robbins, *An essay on the nature and significance of economic science*, 1984, London, Macmillan.

<sup>47</sup> Kenneth G. Elzinga 'The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?', Jun 1977, 125 *University of Pennsylvania Law Review* 6 ,1191-1213.

<sup>48</sup> Lawrence Anthony Sullivan 'Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?' Jun. 1977, 125 *University of Pennsylvania Law Review* 6, 1214-1243.

efficiency or social utilities to any given fact, thereby assessing the evolution of antitrust as simply the outcome of the pursuit of economic interests in each historical period. However, while the quantified empirical evidence offered by that kind of analysis seems to be able to provide some sort of order and to square potential policy effects with actual reality, it fails to explain why specific antitrust institutions develop instead of others.<sup>49</sup> In other words, it cannot clarify why particular interests or particular interpretations of efficiency prevail over others at any given time. That would also escape any legal analysis. Indeed, a judicial perspective would be limited to the study of the legal framework where rules should or should not be applied and competition would be considered an element that exists *per se* in the market. If traditional economic analyses of regulations focus on how to obtain efficiency in the market through antitrust policies and how to balance economic benefits with social welfare, judicial studies typically deal with the legal application of competition law and the violations thereof. However, none of those approaches brings into focus the evolution of the meaning of antitrust itself.

In this sense, economics and law are undoubtedly useful to appreciate the technical effects of antitrust regulation on the market; nevertheless, for want of a problem-solving approach, neither of the two questions ‘the existing order of things’, nor do they challenge the ‘prevailing discourses against the background of which competition policy is formulated’.<sup>50</sup> Besides, those approaches are also often accused of concealing, and limiting our understanding of, ‘the profoundly political nature of competition policy’.<sup>51</sup> Apparently, the reason why politics is not often encountered in the study of

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<sup>49</sup> Richard C. Bernhard, ‘Competition in Law and Economics’, 1967, 12 *Antitrust Bulletin* 1099. John J. Flynn ‘Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy: Introduction’, Jun. 1977, 125 *University of Pennsylvania Law Review* 6, 1182-1190.

<sup>50</sup> Hubert Buch-Hansel and Angela Wigger, ‘Revisiting 50 years of market-making: The neoliberal transformation of European competition policy’, February 2010, 17 *Review of International Political Economy* 1, 20-44, 23.

<sup>51</sup> Robert Pitofsky, ‘The Political Content of Antitrust’, April 1979, 127 *University of Pennsylvania Law Review* 4. See also: Louis B. Schwartz ‘Justice and Other Non-Economic Goals of Antitrust’, April 1979, 127 *University of Pennsylvania Law Review* 4, 1076-1081.

antitrust is linked to the fact that politics does not offer a quantifiable definition of its assumptions.

Political considerations, indeed, are hardly measurable and the lack of any mathematical or empirical consistency may cause political biases to go unnoticed or not be properly accounted for.<sup>52</sup> However, it is not possible to exclude ‘political values’ of any sort from the study of antitrust and, even though its role has been underestimated, politics is still present in any antitrust consideration. According to Giuliano Amato, ‘antitrust law has not been invented by technicians of commercial law [...] nor by economists themselves. It was instead desired by politicians [...]’.<sup>53</sup> As a product of political desire and implementation, antitrust policy cannot just be understood as the outcome of a rational calculation of economic efficiency. Rather, it is best understood as the result of the interpretation of specific political-economic interests by political actors. However, political studies do not supply a coherent analysis of how those interests are to be perceived and why. In fact, by simply taking into consideration the social meaning of antitrust, without any of the economic or legal precision, they produce vague and less notable findings.

It follows that neither a pure economic-juridical analysis nor a political one is sufficient to understand antitrust and its effect on society, because none of them can simultaneously take into consideration the role exerted both by ideas and by material interests in influencing political decisions processes. Indeed, antitrust policy cannot only be interpreted as the set of regulations implemented to allow the achievement of precise interests; it can be also defined as the product of ideological frameworks identifying the ‘metaphysical constructs of rules stating what the law is and the ethical constructs of the

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<sup>52</sup> Robert H. Bork, Ward S. Bowman, ‘The Goals of antitrust: A Dialogue on Policy’, March 1965, 65 *Columbia Law Review* 3, 363-760. Kenneth G. Elzinga, ‘The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?’, Jun 1977, 125 *University of Pennsylvania Law Review* 6, 1191-1213.

<sup>53</sup> Giuliano Amato, *Antitrust and the Bounds of Power*, 1997, Hart Publishing, 7-19.

reasoning stating what it ought to be'.<sup>54</sup> In order to comprehend the profound meaning of each antitrust rule, it is necessary to investigate their process of conversion into regulation and the role played by doctrines and ideas that shape the perception of real necessities. The antitrust decision-making process and its translation into laws remain often ambiguous and concealed behind abstruse legal concepts or complex market analyses. However, every time a policy is adopted or a court judges an antitrust case, a specific interpretation of a broader theoretical framework is applied to reality in order to respond to a precise social-economic issue.<sup>55</sup> In this framework, any antitrust regulation can be understood as a concrete response to well-defined necessities, which is however embedded in a theoretical interpretation.

In order to study antitrust from this particular viewpoint, it is necessary to examine it through a political-economy methodology. IPE deals with the analysis of the interrelation between politics and economics.<sup>56</sup> This approach is not so innovative; until a century ago, according to Frieden and Lake, all the most prominent economic thinkers, such as Adam Smith, John Stuart Mill and Karl Marx, did not distinguish economics from politics, but considered economics as 'eminently political' and vice versa. In this view, since economics deals with the system of 'producing, distributing and using wealth' and politics 'is the set of institutions and rules by which social and economic interactions are governed', a proper antitrust analysis ought to consider both points of view.<sup>57</sup> As IPE

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<sup>54</sup> John J. Flynn 'Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy: Introduction', Jun. 1977, 125 *University of Pennsylvania Law Review* 6, 1182-1190.

<sup>55</sup> John J. Flynn 'Antitrust Jurisprudence: A Symposium on the Economic, Political and Social Goals of Antitrust Policy: Introduction', Jun. 1977, 125 *University of Pennsylvania Law Review* 6, 1182-1190. See also: Donald Dewey, 'The Economic Theory of Antitrust: Science or Religion?', Apr., 1964, 50 *Virginia Law Review* 3, 413-434. Robert H. Bork, 'Goals of Antitrust: A Dialogue on Policy', 1956, 65 *Columbia Law Review* 3, 363-376, Louis B. Schwartz, "'Justice" and Other Non-Economic Goals of Antitrust', 1979, 127 *University of Pennsylvania Law Review* 4, 1076-1081, Bernhard, C. Richard 'Competition in Law and in Economics' 1967, 12 *Antitrust Bulletin* 4, 1099-1166.

<sup>56</sup> Mark Blyth, 'International Political Economy as a Global Conversation', in Mark Blyth (ed.), *Routledge Handbook of International Political Economy (IPE): IPE as a global conversation*, 2009, Routledge, Introduction, 1.

<sup>57</sup> Jeffry A. Frieden, David A. Lake, *International political economy: perspectives on global power and wealth*, 2000, Routledge, London, New York, 1-3.

may be approached from a number of theoretical perspectives, the thesis will illustrate which specific approach is best suited to frame the complex interrelation of economic interests, political decision-making processes and ideas that shapes the social construction and formulation of antitrust policy.<sup>58</sup>

## ANTITRUST AND IPE

International Political Economy is the discipline that studies the ‘interplay of economics and politics in the world arena’.<sup>59</sup> Specifically, IPE offers analytical tools to investigate political decision-making processes and their economic effects.

According to Keohane, IPE can be defined as the set of theories that examine the dynamic interaction behind the pursuit of wealth and power. It explores the relations between the substantive core of economics, including the ideas of production and exchange of marketable means of want satisfaction, and the political dynamics connected with the exertion of power.

IPE is associated with any situation where economic actors exert power over one another and where the economy becomes a political affair. This includes the majority of international interactions; indeed in the real world the ‘most significant issues are simultaneously political and economic’.<sup>60</sup>

In the past 50 years, the study of IPE has advanced significantly, moving from a peripheral and undefined niche to become a central social science discipline, alongside other established fields such as Politics, Economics and International Relations.<sup>61</sup> Indeed,

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<sup>58</sup> Raymond C. Miller, *International Political Economy: Contrasting world views*, 2008, Routledge, 2.

<sup>59</sup> Jeffrey A. Frieden, David A. Lake, *International political economy: perspectives on global power and wealth*, 2000, Routledge, London, New York, 1.

<sup>60</sup> Robert O. Keohane, *After Hegemony Cooperation and Discord in the World Political Economy*, 1984, Princeton University Press, Princeton New Jersey, 20-21.

<sup>61</sup> Benjamin J. Cohen, *International Political Economy: An Intellectual History*, 2008, Princeton University Press, Princeton and Oxford. Roger Tooze, ‘In search of “international political economy”’, 1984, XXXII *Political Studies*, 637-46, 637 quoted in André C. Drainville ‘International Political

most attempts to analyse the complexity of the world have been dominated by traditional disciplines, which, however, are unable to understand, the different sides of global scenarios, from a more multifaceted perspective.<sup>62</sup> For instance, Robert Gilpin uses the term IPE to indicate a discipline focused on the relation between states and markets through ‘an eclectic mixture of analytic methods and theoretical perspectives’.<sup>63</sup> From a critical viewpoint, Susan Strange maintains that IPE is concerned with ‘the social, political and economic arrangements affecting the global systems of production, exchange and distribution, and the mix of values reflected therein’.<sup>64</sup>

Generally speaking, IPE is a discipline that covers the domains pertaining to international politics and international economics, as economics or politics *per se* cannot define global market without being too abstract.<sup>65</sup> Usually, it covers a various range of issues dealing with the interaction between governments and markets across countries. Those can include the analysis of rational individualism, as in the case of liberalism, or the debates around the role of power in determining economic strength and vice versa, as in the case of realism and Marxism.<sup>66</sup> Historically, realism, liberalism and Marxism have dominated the dialogue within IPE for several years.<sup>67</sup> However, IPE will be used here not to analyse the simple interrelation between power and the economy, but to understand the origins of the economic and political preferences, or interests, that

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Economy In The Age Of Open Marxism’, Spring 1994, 1 *Review of International Political Studies* 1, 105-132, 105.

<sup>62</sup> Roy Smith, Imad El-Anis, Christopher Farrands, *International Political Economy in the 21<sup>st</sup> Century: Contemporary Issues and Analyses*, 2001, Longman-Pearson, 1-2.

<sup>63</sup> Robert Gilpin, *Political Economy of International Relations*, 1987, Princeton, Princeton University Press, 11.

<sup>64</sup> Susan Strange, *State and Markets an Introduction to International Political Economy*, 1988, London, Pinter Publishers, 18.

<sup>65</sup> Craig N. Murphy and Roger Tooze, ‘Introduction’ in Craig N. Murphy and Roger Tooze (eds.), *The New International Political Economy*, 1991, Lynne Rienner Publishers, Boulder, 1-8. Robert O. Keohane, *After Hegemony Cooperation and Discord in the World Political Economy*, 1984, Princeton University Press, Princeton New Jersey, 20-21.

<sup>66</sup> Ngaire Woods, ‘The Political Economy of Globalization’ in Ngaire Woods (ed.), *The Political Economy of Globalization*, 2000, St. Martin Press, New York, chapter 1, 1-19, 1.

<sup>67</sup> Rawi Abdelal, ‘Constructivism as an approach to International Political Economy’, in Mark Blyth (ed.) *Routledge Handbook of International Political Economy (IPE): IPE as a global conversation*, 2009, Routledge, chapter 4, 62-75.

characterise a given group in a given society and how and whether ideas can provide mental models to interpret and eventually modify social interests.<sup>68</sup> Antitrust policy and regulations are studied as illustrative examples of how ideas, beliefs and general theoretical frameworks can influence the general social way of perceiving reality.

Despite the differences in the theoretical routes adopted, what is common to the traditional IPE schools is that they analyse the relations between power and economics only by reference to such elements as material incentives, the fight for achieving power and wealth, and inequalities among social groups and classes.<sup>69</sup> Traditional IPE approaches have a limited ability to analyse the role of theories and economic beliefs in influencing the policy-making process. In other words, by drawing attention to power and material conditions, they tend to underestimate the latent pressures exerted by shared ideas and beliefs over the policymaking process and global political-economic trends. Additionally, they do not regard those elements as socially constructed coordination devices able to influence the ways in which agents interpret the material reality around them and the consequent political and economic outcomes.<sup>70</sup> Indeed, classical IPE scholars understand international relations as a rivalrous process in an anarchic international arena where states use their power to maximise their welfare and vice versa. Within this framework, individual interests are rarely considered, as welfare is interpreted and understood only in terms of national prosperity. Although those classical schools paid a huge contribution to the development of the discipline, they construct very rigid models based on the concepts of power and supremacy. These two elements are perceived as the sole factors that allow, or indeed drive, countries to achieve a

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<sup>68</sup> Thomas Oatley, *International Political Economy: Interests and Institutions in the Global Economy*, 2010, 4<sup>th</sup> edition, Longman, 12.

<sup>69</sup> Rawi Abdelal, 'Constructivism as an approach to International Political Economy', in Mark Blyth (ed.) *Routledge Handbook of International Political Economy (IPE): IPE as a global conversation*, 2009, Routledge, chapter 4, 62-75.

<sup>70</sup> Rawi Abdelal, 'Constructivism as an approach to International Political Economy', in Mark Blyth (ed.) *Routledge Handbook of International Political Economy (IPE): IPE as a global conversation*, 2009, Routledge, chapter 4, 62-75.

dominant position in the international arena. Hence, since welfare came to acquire the very broad meaning of national wealth and the achievement of satisfaction, those scholars did not engage with a deeper analysis of interests and did not explain what causes and engenders satisfaction.<sup>71</sup> Similarly, the liberal political-economic approach interprets market trends, and therefore competition, both as a result of rational necessities and as the consequent outcome of a sort of middle ground whereby consumers and producers promote the maximisation of their economic incentives, while maintaining a perfect equilibrium among their different wills.<sup>72</sup> Again, there is neither a discussion of rationality *per se* nor a discussion of the role of ideas or social beliefs as determining factors of social rationality.

By contrast, scholars of Marxism understand competition as the driving force of the capitalist system.<sup>73</sup> In particular, Neo-Gramscian scholars have been among the most successful proponents of a Marxian approach to IPE. They conceive reality as a dialectic

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<sup>71</sup> Robert G. Gilpin 'The Richness of the Tradition of Political', spring 1984, 38 *International Organization*, 2, 287-304. Theodore H. Cohen, *Global Political Economy: Theory and Practice*, 2005 (third edition) Pearson and Longman, 65-66. Ronen Palan, 'New Trends in Global Political Economy' in Ronen Palan (ed.) *Global Political Economy: Contemporary Theories*, 2000, Routledge, London, 1-18, 5. Jonathan Kirshner, 'Realist Political Economy: Traditional Themes and Contemporary Challenges' in Mark Blyth (ed.) *Routledge Handbook of International Political Economy (IPE): IPE as a global conversation*, 2009, Routledge, chapter 2, 36-47. Robert Gilpin, *Us Power and Multinational Corporation*, 1975, New York, Basic Books, 23. Robert O. Keohane, *After Hegemony Cooperation and Discord in the World Political Economy*, 1984, Princeton University Press, Princeton New Jersey, 19. Robert Gilpin, *Us Power and the Multinational Corporation*, 1975, New York Basic Books, 43. Robert O. Keohane and Joseph S. Nye, *Transnational Relations and World Politics*, 1972, Cambridge, Harvard University Press.

<sup>72</sup> See Thomas Oatley, *International Political Economy: Interests and Institutions in the Global Economy*, 2010, 4<sup>th</sup> edition, Longman, 8. Theodore H. Cohn, *Global Political Economy: Theory and Practice*, 2005 (third edition) Pearson Longman, 89. Roy Smith, Imad El-Ans, Christopher Farrands, *International Political Economy in the 21<sup>st</sup> Century: Contemporary Issues and Analyses*, 2011, Pearson Education Limited, Harlow, 13. Roy Smith, Imad El Anis, Christopher Farrandas, *International Political Economy in the 21<sup>st</sup> century: Contemporary Issues and Analyses*, 2011, Pearson Education Limited, Harlow, 11. Robert Gilpin, *Global Political Economy: Understanding the International Economic Order*, 2001, Princeton University Press, Princeton and Oxford, 65-66.

<sup>73</sup> Robert Gilpin, *Global Political Economy: Understanding the International Economic Order*, 2001, Princeton University Press, Princeton and Oxford. Ronen Palan, 'New Trends in Global Political Economy' in Ronen Palan (ed.) *Global Political Economy: Contemporary Theories*, 2000, Routledge, London, 1-18, 6. Jason P. Abbott, Owen Worth, 'Introduction: The 'Many Worlds' of Critical International Political Economy' in Jason P. Abbott, Owen Worth (eds.), *Critical Perspectives on International Political Economy*, 2002, Palgrave Macmillan, 1-13. Jonathan Nitzan and Shimshon Bichler, 'Capital Accumulation: Breaking the Dualism of Economics and Politics', in Ronen Palan (ed.), *Global Political Economy: Contemporary Theories*, 2000, Routledge London and New York, 67-87, 74-75.

process, in which every social arena, such as the market, is the result of an ontological primacy of social relations of production and knowledge dominance. In contrast to traditional IPE mainstream perspectives, 'Neo-Gramscianism' breaks with state-centrism and maintains that both state formation and interstate politics are to be perceived and analysed as moments within the transnational dynamics of capital accumulation and class formation.<sup>74</sup> As Robert Cox puts it, each society is characterised by a specific hierarchically ordered configuration of production modes. The latter generate a particular understanding, and therefore a specific configuration, of social forces, which in turn determines the structure of the state and its position in the international division of labour at the global state-system level. Thus, there is a sort of duality between production and the understanding of production modes formalised through institutions.<sup>75</sup> Consequently, the Neo-Gramscian approach is particularly instructive in that it considers the role of ideological and moral elements, transformed into 'universal' procedures by a ruling class, as a determining factor in constraining subordinate groups into an existing order. Power, *per se*, is not the product of coercive actions exerted by the state, but rather the result of the diffusion of specific institutionalised relationships inside a social arena.

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<sup>74</sup> See: Robert Cox., 'Gramsci, Hegemony and International Relations: an essay in method (1983)', in Cox R., Sinclair T. (eds.), *Approaches to World Order*, 1996, Cambridge University Press, 124-143. Henk Overbeek and Kees Van Der Pijl, 'Restructuring Capital and Restructuring Hegemony: Neo-Liberalism and the Unmaking of the Post-War Order' in Henk Overbeek (ed.), *Restructuring Hegemony in the Global Political Economy: The rise of Transnational Neo-Liberalism in the 1980s*, 1993, Routledge London and New York, chapter 1, 1-27, 3. Adam David Morton 'Social Forces in the Struggle over Hegemony: Neo-Gramscian Perspectives in International Political Economy', April 2003, 15 *Rethinking Marxism* 2, 153-179, 155-156. Barbara Jenkins, 'Creating global Hegemony: Culture and the Market', in Mary Ann Tetreault, Robert A. Denemark, Kenneth P. Thomas, Kurt Burch (eds.), *Rethinking Global Political Economy: Emerging Issues, Unfolding Odysseys*, 2003, Routledge, London and New York, Part II, Chapter 4, 65-87, 65. Robert Cox, *Power Production and World Order: Beyond International Relations Theory*, 1987, New York, Columbia University Press. Robert W. Cox, *Production, Power and World Order: Social Forces in the Making of History*, New York: Columbia University Press, 1987, 7. Stephen Gill, *American Hegemony and the Trilateral Commission*, Cambridge Studies in International Relations, 1990, 58. Barbara Jenkins, 'Creating Global Hegemony: Culture and the Market' in Mary Ann Tetreault, Robert A. Denemark, Kenneth P. Thomas, Kurt Burch (eds.), *Rethinking Global Political Economy*, 2003, Routledge, London and New York, Chapter 4, 65-85, 65. Henk Overbeek, 'Transnational historical materialism: 'Neo-Gramscian' theories of class formation and world order', in Ronen Palan (ed.) *Global Political Economy: Contemporary Theories*, 2000, Routledge London and New York, chapter 13, 180-194.

<sup>75</sup> Henk Overbeek, 'Transnational historical materialism: 'Neo-Gramscian' theories of class formation and world order', in Ronen Palan (ed.) *Global Political Economy: Contemporary Theories*, 2000, Routledge London and New York, chapter 13, 180-194, 184.

In other words, hegemony is based on a form of consent, which is only in the last instance sustained by the coercive apparatus of the state.<sup>76</sup>

Neo-Gramscian transnational historical materialism offers a relatively coherent framework for the analysis of trends in global political economy; furthermore, the importance attributed to ideologies and moral elements is particularly relevant for my analysis. Yet, the limit of this approach, like the other classical ones, rests on its tendency to engage too much with the creation and construction of a rigid and omnicomprehensive general framework for understanding international power dynamics without engaging with the strength of knowledge and culture *per se*.

Nonetheless, the role of ideas is significant in the study of antitrust because the institutional framework that regulates market competition seems to be determined less by power than by interests. In turn, these are perceived through a specific social way of understanding and observing reality and reflect, at the same time, material necessities based on the market, which is itself an institution.<sup>77</sup>

In light of the above, this thesis is going to adopt an institutional IPE approach; this discipline seems able to offer enough room to engage with the analysis of how ideas shape realities by being institutionalised into formal or informal market practices. This appears to be the optimal loophole for the study of this process as antitrust, when not analysed according to a purely economic or juridical approach, is typically approached from an institutional perspective. In fact, it is not at all accidental that many of the most important institutional scholars, such as Commons or Corwin Edwards, were, at some

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<sup>76</sup> Henk Overbeek 'Transnational historical materialism: 'Neo-Gramscian' theories of class formation and world order', in Ronen Palan (ed.) *Global Political Economy: Contemporary Theories*, 2000, Routledge London and New York, chapter 13, 180-194, 186.

<sup>77</sup> Daniel Rush Finn, 'Institutional Processes from J. R. Commons to Michael Wlazer: An Image of the Market as a Sphere of Human Interaction', Jun. 1997, 31 *Journal of Economic Issues*, 2, 409-15, 415. Jim Y. Jin, Juan Perote-Pena, Michael Troege, Learning by Doing, Spillovers and Shakeouts', 2004, *Journal of Evolutionary Economics*, 14, 85-98. Glen Atkison, 'Going Concerns, Furity and Reasonable Value', June 2009, XLIII *Journal of Economic Issues* 2, 433-40. Geoffrey M. Hodgson, The Evolution of Institutions: An Agenda for Future: Theoretical Research', 2002, 13 *Constitutional Political Economy*, 111- 127, 111.

point, engaged with the study of antitrust. Specifically, old institutional scholars were able to influence many other theoretical areas by applying the outcomes of their research. For instance, as underlined by Marc Tool in his prominent paper, the theories related to pricing behaviours in imperfectly competitive markets have to be re-conducted to the regulatory framework developed by those social networks defined by old institutional models.<sup>78</sup>

In conclusion, the analysis of antitrust policy through institutional IPE will allow for a better understanding of its evolution. Indeed, the development of competition cannot be studied only by considering the rivalry dynamics that characterises the pursuit of power and economic interests by economic and political agents. On the contrary, in order to appreciate the evolving meaning of antitrust, it is necessary to investigate its process of institutionalisation. This can be done not only by highlighting the influence exerted by culture, beliefs and ideas, but also by taking into consideration the role of the state as the leading actor of the regulatory and political trends of a country.<sup>79</sup>

#### SOCIO-POLITICAL APPROACHES TO ANTITRUST

Institutionalism can offer a solid theoretical framework for examining antitrust models and their practical implementation. Competition can be analysed as a pattern of behaviour, as a body of theoretical models and as a set of empirical regulations that settle the market according to specific necessities – and the three are not mutually exclusive. For instance, the different antitrust policies adopted by the US cannot only be interpreted as a set of antitrust working rules in response to the economic necessities of

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<sup>78</sup> Marc Tool, “Contributions to an Institutional Theory of Price Determination,” in Geoffrey M. Hodgson and Ernesto Screpanti (eds.), *Rethinking economics: Markets, Technology and Economic Evolution*, 1991, Aldershot, Edward Elgar, 19–39.

<sup>79</sup> Gerald M. Meier, ‘Trade Policy, development and the new political economy’, in Ronald.W. Jones and Anne.O. Krueger (eds.), *The Political Economy of International Trade: essays in Honor of Robert E. Baldwin*, 1990, Oxford, Basil Blackwell, 185.

the time: they were also institutional frameworks that reflected a particular set of economic ideas. Moreover, competitive behaviours cannot be interpreted as the product of an absolute profit-maximising rationale; rather, they result from a specific interpretation of reality, which changes according to the historical period, the geographical context and the local institutions.

However seemingly uncontroversial, this point needs emphasising as contrary to institutional IPE scholars, traditional approaches towards competition – such as those advanced on the one hand by Marx and on the other by scholars such as Milton Friedman – tended to see competition as a process through which business actors were forced to choose the most effective means of maximising their profits and to inexorably push less efficient rivals out of the market. As Hodgson points out, the ‘strategy, structure and goals of the firm are uniquely determined by competition’.<sup>80</sup> While this is generally correct, this view lacks a more in-depth understanding of the whole rivalry process. As underlined by Tomlinson, profit cannot be considered the unique cause of the growth or decline of firms. While profit is the objective, the possible ways to achieve it, as well as the possible strategies to adopt, are legion. In this sense, the behaviour of firms proves to be highly variable in that they implement different manoeuvres, calculations, rationales and practices.<sup>81</sup> Following from this, Hodgson goes on to assert that there is a variety of modalities through which competitiveness is pursued because, as argued by Cyert, March and others, actors are most of the time ‘profit-seeking and not strictly profit-maximising’.<sup>82</sup> This allows the adoption of several practices in accordance

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<sup>80</sup> Geoffrey M. Hodgson, ‘The Evolution of Capitalism from the Perspective of Institutional and Evolutionary Economics’ in Geoffrey M. Hodgson, Makoto Itoh, Nobuharu Yokokawa (eds.), *Capitalism in Evolution: Global Contentions--East and West*, 2001, Edward Elgar Publishing Limited, Part II, Chapter 5, 63-82, 68.

<sup>81</sup> James Tomlinson, ‘The Unequal Struggle? British Socialism and the Capitalist Enterprise’, 1982, *London: Methuen*, 34, quoted in Geoffrey M. Hodgson, ‘Varieties of Capitalism and Varieties of Economic Theory’, autumn 1996, 3 *Review of International Political Economy* 3, 380-433.

<sup>82</sup> Richard Cyert and James March, *A Behavioral Theory of the Firm*, 1963, Englewood Cliffs, NJ: Prentice-Hall. Geoffrey M. Hodgson, ‘Varieties of Capitalism and Varieties of Economic Theory’, autumn 1996, 3 *Review of International Political Economy* 3, 380-433, 391.

to the cultural contexts in which economic actors operate or to what Veblen defines as habits. It follows that since culture varies from country to country, the practices of firms differ accordingly and are formalised into different institutions.

In this view, an institutional IPE approach can be used to build a theoretical framework of reference that would allow a more in-depth understanding of actors' particular modes of sensory perception. In other words, institutional IPE would provide us with efficient instruments to comprehend how actors perceive reality and build regulatory frameworks to constrain or enable particular practices. The advantage of this approach lies in its flexibility and potential adaptability to all social contexts. On the contrary, traditional IPE tends to create a fixed and theoretically perfect system, where all actors are understood as following the same rules.

Hence, it is easy to understand the critiques of neo-classical and Marxian IPE theorisation of capitalist systems. Indeed, although their contribution to our understanding of general economic systems is invaluable, their incapacity to engage with individuals and individual choices remains a strong limitation. Indeed, they take up a purely rational stance on social-economic transactions, whereby rules are stacked into rigid normative schemes of understanding reality. On the contrary, human behaviour, and the way people perceive reality and respect rules, is constantly transformed according to the surrounding social, historical, cultural and economic context.

In this sense, an institutional interpretation of competition is fundamental since it can offer the lenses through which we see reality in all its complexity.<sup>83</sup> Institutions become the necessary tool to understand the existing variety of different forms of capitalist and, in this specific case, competition practices as they are not only the

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<sup>83</sup> Geoffrey M. Hodgson, 'Varieties of Capitalism and Varieties of Economic Theory', autumn 1996, 3 *Review of International Political Economy* 3, 380-433.

backbone of market economy and competition, but also a product of social contexts and cultures that do not pre-exist the market, but rather follow from it.<sup>84</sup>

Although institutions are interpreted according to different perspectives, one of the things that connect almost all the different approaches is the impossibility of recollecting everything to an abstract and absolute rule. It was the institutional sociological school to specifically address this issue. For instance, Durkheim rejected the existence of universal laws by maintaining that 'between the confused multitude of historic societies and the single, but ideal concept of humanity, there are intermediaries, namely social species'.<sup>85</sup> Weber, too, affirmed the necessity of constructing a theoretical framework to understand reality through, not universalistic concepts, but ideal types, which, like Durkheim's social species, were more flexible than the classical universal laws applied before him.<sup>86</sup> This suggests that although the interpretations of institutions differ, the impossibility of categorising evolution through unifying principles is an idea shared by virtually all of them.<sup>87</sup>

Institutions can be defined as the structure that delineates the anatomy of a social realm; they constrain human behaviour but, because they evolve, they do not consist of permanent and absolute dogmas. They are a set of formal and informal rules that shape political-economic and social interactions by limiting or enabling particular patterns of behaviour and are the product of a specific ideological, cultural and theoretical substratum.<sup>88</sup> Institutions provide some structure but, at the same time, they

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<sup>84</sup> Harrison C. White, 'Varieties of markets', in Barry Wellman and S. D. Berkowitz (eds.), *Social Structure: a Network Approach*, 1998, Cambridge, Mass: Harvard University Press. Quoted in Geoffrey M. Hodgson, 'Varieties of Capitalism and Varieties of Economic Theory', autumn 1996, 3 *Review of International Political Economy* 3, 380-433.

<sup>85</sup> Emile Durkheim, *The Rules of Sociological Method*, 1964, translated from the French edition of 1895, London, Macmillan, 77.

<sup>86</sup> Geoffrey M. Hodgson, 'Varieties of Capitalism and Varieties of Economic Theory', autumn 1996, 3 *Review of International Political Economy* 3, 380-433.

<sup>87</sup> See also Ervin Laszlo, *Evolution: The Grand Synthesis*, 1982, Boston, Shambhala.

<sup>88</sup> Masahiko Aoki, *Toward a Comparative Institutional Analysis*, 2001, Cambridge, MA: MIT Press, 1-29. Victor Nee and Paul Ingram, 'Embedness and Beyond: Institutions, Exchange and Social structure' in Mary C. Briton and Victor Nee (eds.), *The New Institutionalism in Sociology*, Russell Sage

also reflect the general ideas of a given social context. They are not fixed, but change and, by changing, they modify human reality and its rules.

Antitrust law fits perfectly into this definition. While its objective is to develop competitiveness by limiting or fostering the individual freedom to operate in the market, its institutionalisation depends on the main ideological context behind the policy-making process of every government.

However, the limitations of this approach are to do with the broad nature of the institutional concept itself. As pointed out by Arrow, trying to provide a precise definition of institutions is not only practically impossible but also useless, as the nature and meaning of institutions change according to the theoretical background adopted.<sup>89</sup> Moreover, 'the only idea common to all usages of the term [...] is that of some sort of establishment of relative permanence of a distinctly social sort'.<sup>90</sup> Keohane defines the concept of institution as a 'general pattern or categorisation of activity or a particular human constructed arrangement, formally or informally organised'.<sup>91</sup> For instance, language, currencies, systems of weights, measures and conventions can be considered institutions typical of a given country or a given society.<sup>92</sup> The term 'institution' also encompasses a wide range of organisations, such as the WTO, and international agreements, such as the GATT, Bretton Woods and the like, but it can also refer to laws, norms and *ad hoc* regulations.

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Foundation 19-45, quoted in Erik G. Furubotn & Rudolf Richter, *Institutions & Economic Theory: The Contribution of the New Institutional Economics*, 1998, The University of Michigan Press, 7. Geoffrey M. Hodgson, 'What Are Institutions?', March 2006, *XL Journal of Economic Issues* 1, 1-25. Jack Knight, *Institutions and Social Conflict*, 1992, Cambridge University Press. Alan Wells, *Social Institutions*, 1970, Heinemann London, 7-8.

<sup>89</sup> Kenneth J. Arrow, *Essay in the Theory of Risk-Bearing*, Amsterdam, North Holland, 224; quoted in Erik G. Furubotn & Rudolf Richter, *Institutions & Economic Theory: The Contribution of the New Institutional Economics*, 1998, The University of Michigan Press, 7.

<sup>90</sup> E.C. Hughes, 'The Ecological Aspect of Institutions', 1936, 1 *American Sociological Review*, 180-89; quoted in Robert O. Keohane, 'International Institutions: Two Approaches', 1988, 32 *International Studies Quarterly*, 379-396, 382.

<sup>91</sup> Robert O. Keohane, 'International Institutions: Two Approaches', 1988, 32 *International Studies Quarterly*, 379-396, 383.

<sup>92</sup> Geoffrey M. Hodgson, 'What Are Institutions?', March 2006, *XL Journal of Economic Issues*, 1, 1-25, see also Sugden, Robert *The Economics of Rights, Co-operation, and Welfare*, 2004, Palgrave MacMillan. John R. Searle, *The Construction of Social Reality*, 1995, London, Allen Lane.

According to Scott, institutions are multifaceted systems and they include, in and of themselves, cognitive constructions, normative rules and regulatory structures that supply stability and meaning to social behaviour.<sup>93</sup> Normally, each social science discipline analyses institutions according to one of those perspectives. Thus, scholars in politics and economics tend to consider a more normative/universalistic and regulatory approach, respectively; sociologists, on the other hand, prefer to underline the role of cognitions in influencing human behaviour and, therefore, institutions.

Yet, because the objective of this research is to analyse antitrust policies during economic and financial crises, the theoretical framework here adopted will favour an economic approach as opposed to a purely sociological or political one. Indeed, an economic point of view seems particularly suited for a more accurate analysis of how political actors, however inspired by ideas, institutionalise antitrust policies with the deliberate intention of pursuing specific interests in the market. Nonetheless, since institutional IPE encompasses and combines different social-scientific perspectives, the next sections will briefly introduce the main differences among them and it will subsequently explain why this thesis will adopt what I call a ‘pan-institutional’ approach. Indeed, while some elements of economic institutionalism seem best suited for the aims of this research, other disciplines can also provide alternative tools of analysis and offer valuable interpretations.

#### *Institutionalism: a Political Approach*

The first attempt to analyse economic and juridical institutions from a political perspective was developed by historical-institutional scholars. This approach, while hardly a political theory on its own, counts as a compelling conceptualisation of institutional development through time, in that it attempts to identify and create

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<sup>93</sup> W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications.

theoretical models for the sequence of events that shape political processes.<sup>94</sup> According to Scott, the first political institutional approach was developed in the 19<sup>th</sup> century, when scholars such as John Burgess, Woodrow Wilson and Westel Willoughby started to apply a juridical and philosophical analysis to the historical evolution of political institutional frameworks, which included formal organisations, informal rules and the procedures that shaped social behaviours.<sup>95</sup> While John Burgess investigated American democratic issues, Wilson analysed the structures, functions and forms of political systems and Willoughby provided some critiques to the different theories concerning the origins of the state, the nature of law, and sovereignty.<sup>96</sup> These authors are commonly identified as the pioneers of historical institutionalism because their analysis encompassed the study of the state and how state institutions structure interests and power relations around political actors.<sup>97</sup> Outside of this circle, however, historical institutionalism hardly generated any interest in political science and its study was only picked up at the beginning of the 1980s, with the advent of a new historical-institutional wave. At that time, many scholars, such as March, Olsen and Hall, began to investigate the extent to which institutions could shape political strategies, influence political outcomes and empower social actions.<sup>98</sup>

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<sup>94</sup> Orfeo Fioretos, 'Historical Institutionalism in International Relations', Spring 2011, *International Organization* 65, 367–99.

<sup>95</sup> James G. March and Johan P. Olsen 'The New Institutionalism: Organizational Factors in Political Life', Sep. 1984, 78 *The American Political Science Review* 3, 734-749. W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications 5, 6.

<sup>96</sup> Rogers M. Smith 'Still Blowing in the Wind: The American Quest for a Democratic, Scientific Political Science' Winter, 1997, 126 *Daedalus, American Academic Culture in Transformation: Fifty Years, Four Disciplines* 1, 253-287. David Brian Robertson, 'The return to History and the New Institutionalism in American Political Science', Spring 1993, 17 *Social Science History* 1, 1-36. John William Burgess, *Political Science and Comparative Constitutional Law*, 1890 Volume 1, Baker and Taylor Company. Bert James Loewenberg, 'John William Burgess, the Scientific Method, and the Hegelian Philosophy of History', Dec. 1955, 42 *The Mississippi Valley Historical Review*, 3, 490-509. Woodrow Wilson, *The State and Federal Government of the United States*, Boston DC Head. Westel Woodbury Willoughby, *An Examination of the Nature of the State*, 1986, New York MacMillan.

<sup>97</sup> Kathleen Thelen and Svein Steinmo, 'Historical Institutionalism in Comparative Politics', in Svein Steinmo and Kathleen Thelen and Frank Longstreth (eds.), *Structuring Politics, Historical Institutionalism in Comparative Analysis*, 1992, Cambridge University Press, 2.

<sup>98</sup> Kathleen Thelen, 'Historical Institutionalism in Comparative Politics', 1999, 2 *Annual Review Political Science*, 369-404.

Institutions were not considered as a simple sort of agreement or structure created by individuals; they were also rules with an autonomous character: they provided codes of behaviour and conduct and legitimised specific beliefs or ideas among society by specifying what had to be expected from a particular situation.<sup>99</sup>

Such attention to the role of temporality was crucial for understanding and comparing political events. According to the above-mentioned scholars, while the rationale behind every political action, as well as the nature of the constraints under which individuals act, varies constantly over time, these changes are influenced by previous events. In this sense, an historical analysis becomes essential for a proper understanding of politics because each decision and political action is conceived as a reflection of previous ones, rather than just as a mere result of interests or of the contingent constraints of the time.<sup>100</sup> Usually, policymaking systems tend to be conservative and to defend their *status quo* through institutions that create enduring patterns, thereby making any alteration of the political configuration difficult.<sup>101</sup> Historical institutionalism, indeed, interprets public policymaking and political change as a distinct process. Generally speaking, policy-making follows previously established paths, while radical political change, and therefore institutional modification, occurs during the ‘formative moments’ that punctuate long periods of stability.<sup>102</sup>

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<sup>99</sup> James G. March, Johan P. Olsen, ‘Elaborating the “New Institutionalism”’, March 2005 Working Paper No.11, *Arena, Centre for European Studies, University of Oslo*.

<sup>100</sup> Orfeo Fioretos, ‘Historical Institutionalism in International Relations’, Spring 2011, *International Organization* 65, 367–99. James G. March and Johan P. Olsen ‘The New Institutionalism: Organizational Factors in Political Life’, Sep. 1984, 78 *The American Political Science Review* 3, 734–749. Sven Steinmo, Kathleen Thelen, Frank Longstreth (eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis*, 1992, Cambridge University Press. Peter A Hall, *Governing the Economy: The Politics of State Intervention in Britain and France*, 1986, Cambridge, UK: Polity Press. Skocpol Theda, ‘Bringing the State Back In: Strategies of Analysis in current research’, in Peter B. Evans, Dietrich Rueschmeyer and Theda Skocpol (eds.), *Bringing the state Back In*, 1985, Cambridge UK, Cambridge University Press, 3–37.

<sup>101</sup> Paul Pierson, ‘Increasing Returns, Path Dependence, and the Study of Politics’, 2000, 94 *American Political Science Review* 1, 251–66, 252.

<sup>102</sup> B. Guy Peters, Jon Pierre, Desmond S. King, ‘The Politics of Path Dependency: Political Conflict in Historical Institutionalism’, Nov. 2005, 67 *The Journal of Politics* 4, 1275–1300, 1276.

The main critique levelled at historical institutionalism relates to its rigid normative nature. Indeed, while the investigation of past and current events seems to offer a clear frame of reference, it only provides a limited comparative analysis of different institutional frameworks, which does not allow for a sufficient examination of institutions themselves or of the ways in which those elements conceal and limit the boundaries of individual actions.<sup>103</sup> In other words, by describing policy change as a process tied to institutional alteration – which, in turn, depends upon an intermittent path-dependent process – historical scholars tend to analyse political events according to a retrospective analysis that conceals the profound complexity of decision-making process in times of change.<sup>104</sup>

The historical school has found its main theoretical rival in the behaviourist school, which from the beginning of the 1930s started to develop an alternative approach to the interpretation of policy change. Those scholars attempted to separate politics from philosophy, and to rebuild political science as a theoretically guided empirical discipline. In other words, ‘behaviourists argued that in order to understand politics and explain political outcomes, analysts should focus not on the formal attributes of government institutions but instead on informal distribution of power, attitudes and political behaviour’.<sup>105</sup>

According to those scholars, actors have a fixed set of preferences and tastes, so their actions are led by the need to maximise these utilities, rather than by impersonal historical forces. Here, the role of political institutions is fundamental in solving

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<sup>103</sup> Kathleen Thelen and Svein Steinmo, ‘Historical Institutionalism in Comparative Politics’, in Svein Steinmo and Kathleen Thelen and Frank Longstreth (eds.), *Structuring Politics, Historical Institutionalism in Comparative Analysis*, 1992, Cambridge University Press 2.

<sup>104</sup> B. Guy Peters, Jon Pierre, Desmond S. King, ‘The Politics of Path Dependency: Political Conflict in Historical Institutionalism’, Nov. 2005, 67 *The Journal of Politics* 4, 1275-1300, 1277.

<sup>105</sup> Kathleen Thelen and Svein Steinmo, ‘Historical Institutionalism in Comparative Politics’, in Svein Steinmo and Kathleen Thelen and Frank Longstreth (eds.), *Structuring Politics, Historical Institutionalism in Comparative Analysis*, 1992, Cambridge University Press 4. Quoted in W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications, 7.

collective-action dilemmas because, while an individual action can be efficient for the single individual, it can be detrimental for the community as a whole. Hence, institutional arrangements need to adjust regulatory boundaries so as to guarantee complementary behaviours, avoid the rise of negative externalities and reduce uncertainties.<sup>106</sup>

By understanding institutions as a rational form of governance, rational-choice theorists from the New Institutionalism School, such as Moe, Shepsle, Weingast and Johnsen, have recently adopted an economic-oriented neo-institutional model to study political structures.<sup>107</sup> Indeed, in the political arena, much as in the market, individuals are seen as acting in pursuance of their personal interests. According to Moe, economic organisations and institutions can be explained in the same way: 'they are structures that emerge and take the specific forms they do because they solve collective-action problems and thereby facilitate gains from trade. They are good things. They make every-one involved better off'.<sup>108</sup> Similarly, Herbert Simon maintains that every single action is rational and that any behaviour 'can be adjudged objectively to be optimally adapted to the situation'.<sup>109</sup>

The rationalistic approach has also been used in International Relations to emphasise the conditions and the extent to which cooperation at a global level is possible and to investigate the function of international institutions in that context.<sup>110</sup> As Simon

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<sup>106</sup> Peter Hall and Rosemary C. Taylor, 'Political Science and the Three New Institutionalism', 1996, XLIV *Political Studies*, 936-957.

<sup>107</sup> Terry M. Moe, 'The New Economics of Organization', Nov. 1984, 28 *American Journal of Political Science* 4, 739-777. Barry R. Weingast, Kenneth A. Shepsle, Christopher Johnsen, 'The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics', Aug. 1981, 89 *Journal of Political Economy* 4, 642-664. Barry R. Weingast, 'Rational Choice Perspective on Congressional Norms', May, 1979, 23 *American Journal of Political Science* 2, 245-262.

<sup>108</sup> Terry M. Moe, 'Political Institutions: The Neglected Side of the Story', April 1990, 6 *Journal of Law, Economics, & Organization*, Special Issue: Papers from the Organization of Political Institutions Conference, 213-253, 217.

<sup>109</sup> Herbert A. Simon, 'Human Nature in Politics: The Dialogue of Psychology with Political Science', 1985, 79 *American Political Science Review*, 293-304, 294. Quoted also in Robert O. Keohane 'International Institutions: Two Approaches', Dec. 1988, 32 *International Studies Quarterly*, 4, 379-396, 381.

<sup>110</sup> Robert Axelrod, *The Evolution of Cooperation*, 1984, New York: Basic Books. Robert O. Keohane, *After Hegemony Cooperation and Discord in the World Political Economy*, 1984, Princeton University Press, Princeton New Jersey, 246.

argues, by combining the principle of substantive rationality with the range of individual convenience and his or her expectations, it is possible to hypothesise the outcomes of actual human behaviour. Indeed, individual reason is always contextual to contingent factors and to the acquisition of imperfect or limited information. Hence, the rational-choice approach is fundamental in contributing to the understanding of institutionalised behaviours in politics and in international relations.<sup>111</sup>

The main critiques of this approach revolve around the fact that it tends to consider politics from a social science perspective, in its description, for example, of the voting process as directed towards the maximisation of interests – when in fact political dynamics are far more complex as they are generally inclusive of many other elements, such as material resources, power, competitive dynamics among actors, interests, and legitimacy. Moreover, politics cannot always be interpreted as an extension of economics, as it involves dynamics that cannot be solved through the principle of utility. Political decisions, for example, can be dictated also by cultural and ideological patterns.

In conclusion, it is possible to identify two major and opposite interpretations of institutions in political science: one associated with historical institutionalism and one derived from rational choice theory. The political analysis of institutions, however, even in its rational-institutional version, tends to interpret institutions more as a normative/universalistic system, and it does not conceptualise them in a more precise frame. Therefore, even though institutional economists such as Douglas North employ the concepts of path dependence and rational choice, traditional historical institutionalism seems to provide an interpretation of institutions that is too soft and

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<sup>111</sup> Herbert A. Simon, 'Human Nature in Politics: The Dialogue of Psychology with Political Science', 1985, 79 *American Political Science Review*, 293-304, 294. Robert O. Keohane 'International Institutions: Two Approaches', Dec. 1988, 32 *International Studies Quarterly* 4, 379-396, 381.

broad to be applicable to the very technical nature of those antitrust laws and policies analysed here as the outcome of different antitrust theoretical frameworks.<sup>112</sup>

*Institutionalism: a Sociological Approach*

Sociology has invested more effort than politics in analysing the deep interactive dynamics between individuals and institutions and the set of formal or informal rules that constrain their behaviour. For example, Cooley and Hughes link the very existence of institutions to individual legitimisation; in other words, institutions become real only if they are supported and used as a behavioural reference by social actors.<sup>113</sup> Specifically, according to Cooley, institutions are symbols produced by human interactions because they are the cause of specific behaviours and, at the same time, the effect of human conduct.<sup>114</sup> Similarly, Hughes understands them as a set of beliefs able to regulate the behaviour of those who share the same set of symbols and discourses. According to him, the limitation and the constraint of actions on the part of institutions is guided more by the individual's internal perceptions than by direct external norms.<sup>115</sup> In Europe, too, scholars of the likes of Emile Durkheim and Max Weber examined the notion of institutions. In Durkheim's later works, institutions are described as social systems of beliefs, or collective representations. They are a product of human interaction but, at the same time, they are perceived as coercive rules by single individuals and they are realised

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<sup>112</sup> Kathleen Thelen, 'Historical Institutionalism in Comparative Politics', 1999, 2 *Annual Review Political Science*, 369-404, 377-9.

<sup>113</sup> Charles Horton Cooley, *Social Organization: a study of the larger mind*, 2005, Transaction Publisher. Everett C. Hughes, 'The Ecological Aspect of Institutions', Apr. 1936, 1 *American Sociological Review* 2, 180-189.

<sup>114</sup> Charles Horton Cooley, *Social Organization: a study of the larger mind*, 2005, Transaction Publisher, 314. Charles E. Bidwell, 'Varieties of Institutional Theory: Traditions and Prospects for Educational Research', in Heinz-Dieter Meyer, Brian Rowan (eds.), *The New Institutionalism in Education*, 2006, Albany, State University of New York Press, chapter 2, 33-50,35.

<sup>115</sup> Everett C. Hughes, 'The Ecological Aspect of Institutions', Apr. 1936, 1 *American Sociological Review* 2, 180-189.

only in individuals.<sup>116</sup> Although Weber has never directly used the term institution, his work is permeated with a concern for understanding how cultures and beliefs determine society. In his view, in order to appreciate the essence of each social action it is necessary to comprehend the meaning that mediates it. For instance, although he strongly believed in the importance of economic models, he was convinced that in order to comprehend the development of economic transactions it was necessary to understand the historical and cultural environments where they took form. Indeed, by analysing specific and concrete events and by abstracting their characteristics, scholars could create ideal-types that can be used to better understand social interactions and the social realm.<sup>117</sup>

Following Weber, Talcott Parsons defined institutions as a system of norms that not only regulates social interactions, but also defines them: ‘Thus, institutions, in so far as they regulate the relations of individuals to each other, become a fundamental element of social structure which consists precisely in such a set of determinate relations of individuals’.<sup>118</sup> On the one hand, individuals obey institutions because the latter exert a sort of moral authority over society. On the other hand, an institutionalised action acquires a moral meaning because it becomes internal to the set of beliefs that characterises a particular society.<sup>119</sup> To advance this school of thought further, the new institutionalism in sociology has started to analyse the importance of cognitions more in depth. For instance, Berger and Luckmann, inspired by the work of George Herbert Mead – who stressed the importance of symbolic systems in giving meaning to social

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<sup>116</sup> Emile Durkheim, *The Division of Labour in Society*, 1984, translated by Lawis A. Coser, The Free Press, 39, 55, 56. Emile Durkheim, *The Elementary Forms of Religious Life*, 1915, George Allen & Unwin LTD.

<sup>117</sup> Max Weber, *Economy and Society: An interpretive Sociology*, 1978, University of California Press, 755. W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications 11-12.

<sup>118</sup> Talcott Parsons, ‘Prolegomena to a Theory of Social Institutions’, Jun. 1990, 55 *American Sociological Review* 3,319-333 327.

<sup>119</sup> W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications 11-12. Talcott Parsons, *The Structure of Social Action*, 1937, The Free Press. Talcott Parsons ‘Suggestions for a Sociological Approach to the Theory of Organizations’, Jun., 1956, 1 *Administrative Science Quarterly* 1, 63-85.

interactions – emphasise the role of knowledge in defining the social realm.<sup>120</sup> In their view, reality, as understood by society, is a human construction, a product of social interaction; consequently, ‘institutionalisation occurs whenever there is a reciprocal typification of habitualised actions by types of actors’.<sup>121</sup>

Languages, symbols and cognition are crucial in defining the ways in which reiterated actions evoke stable and similar meanings in the self and in others, thus becoming institutionalised processes of social interactions.<sup>122</sup> This approach has recently been followed by many International Relations scholars, such as Friedrich Kratochwil and John Ruggie, who underline the importance of the ‘inter-subjective meanings’ of international institutional activities.<sup>123</sup> In their view, in order to understand international political dynamics and behavioural changes, it is necessary to understand how people think about institutional norms and rules and the discourse they engage in. Proceeding from Max Weber’s notorious assumption that ‘we are cultural beings, endowed with the capacity and the will to take a deliberate attitude towards the world and to lend it significance’, Ruggie and social constructivist scholars revolutionised IR theories.<sup>124</sup> According to their view, the “inter-subjective” dimension of human actions creates a class of facts that do not exist in the physical world. These are classified as social facts, or as explained by philosopher John Searle, facts that subsist within an institutional framework because social actors believe in them. Because of the existence of humanly

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<sup>120</sup> George Herbert Mead, *Mind, Self and Society*, 1934, University of Chicago Press, 162. Peter L., Berger and Thomas Luckmann, *The Social Construction of Reality*, 1967, New York, Doubleday. Andrew Cherlin ‘Remarriage as an Incomplete Institution’, Nov. 1978, 84 *American Journal of Sociology* 3, 634-650, 634.

<sup>121</sup> Peter L., Berger and Thomas Luckmann, *The Social Construction of Reality*, 1967, New York: Doubleday, 54, quoted in W. Richard Scott ‘The Adolescence of Institutional Theory’, Dec., 1987, 32 *Administrative Science Quarterly* 4, 493-511, 495.

<sup>122</sup> Nelson Phillips, Thomas B. Lawrence, Cynthia Hardy, ‘Discourse and Institutions’, Oct. 2004, 29 *The Academy of Management Review* 4, 635-652.

<sup>123</sup> Friedrich Kratochwil and John Gerard Ruggie, ‘International Organization: A State of the Art on an Art of the State’, Autumn 1986, 40 *International Organization* 4, 753-775.

<sup>124</sup> Max Weber, *Methodology of Social Science*, in Edward A. Shils and Henry A. Finch (eds.), 1949, ed. 2011, Transactions Publisher, New Jersey, 81. Quoted also in John Gerard Ruggie, ‘What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge’, Autumn, 1998, 52 *International Organization* 4, 855-885, 856.

created facts such as money, assets or marriages, Ruggie denied the absolute reliability of utilitarian and neo-utilitarian theories and maintains that interests can be socially constructed, and thus influenced by beliefs and ideas.<sup>125</sup>

Apart from those IR authors, other influential sociological contributions come from DiMaggio and Powel. These scholars have turned attention from institutions *per se* to the concept of organisation, interpreted as a structure that defines social goals. Specifically, by maintaining that different set of structured establishments can share similar institutions, DiMaggio and Powel started to analyse the dynamics that influence institutional change inside organisations and why those tend to assume similar structures.<sup>126</sup> To them, organisations' isomorphism, or the tendency to assume similar connotations, can be explained according to three mechanisms: a coercive, a mimetic and a normative one.<sup>127</sup> These will be better described in the following section.

By following Talcott Parsons' interpretation of states as organisations, the concept of isomorphism will be used in the following sections, where and when applicable, to understand why specific antitrust ideas have been adopted by Europe and Japan, even though their own traditional theoretical perspectives and cultural contexts were different.<sup>128</sup> However, the analysis offered by the old and specifically the new sociological institutional school is too focused on the dimension of knowledge and culture and it tends to identify institutions with cultural belief systems operating in a specific environment. By denying, or just disregarding, the role of interests or social necessities in influencing the social realm, sociological institutionalism lacks the

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<sup>125</sup> John Gerard Ruggie, 'What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge', Autumn, 1998, 52 *International Organization* 4, 855-885, 856.

<sup>126</sup> Nelson Phillips, Thomas B. Lawrence, Cynthia Hardy, 'Discourse and Institutions', Oct. 2004, 29 *The Academy of Management Review* 4, 635-652, 647.

<sup>127</sup> Paul J. DiMaggio and Walter W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', Apr. 1983, 48 *American Sociological Review* 2, 147-160. W. Richard Scott 'The Adolescence of Institutional Theory', Dec. 1987, 32 *Administrative Science Quarterly* 4, 493-511, 498.

<sup>128</sup> Talcott Parsons 'Suggestions for a Sociological approach to the theory of Organizations' Jun. 1956, 1 *Administrative Science Quarterly* 1, 63-85, 63.

fundamental empiricism required to conduct a deep analysis of antitrust and its implication on the policy-making process.

*Institutionalism: An Economic Approach*

Having generally defined the political and sociological institutional constructions, this section will introduce the economic interpretation of institutionalism. This approach seems to be particularly suitable for the analysis of antitrust as it provides a much more precise explanation of institutions and because it takes into consideration the role of interests in influencing actors' decisions.

The earliest economic institutional arguments were developed in Germany and Austria in the late 19<sup>th</sup> century as part of a general debate on the scientific method (*Methodenstreit*). Indeed, building on Kantian and Hegelian philosophical insights, a group of economists, later identified as the historical school, challenged the idea that economics could be reduced to a set of collective laws. On the contrary, according to Gustav Schmoller, one of the most prominent historical scholars, economics follows the rules shaped by the cultural and historical substratum of the social realm.

Despite some theoretical differences, Austrian economist Carl Menger explained the existence and the development of political, legal, or social institutions through a model of individual behaviour.<sup>129</sup> For instance, he considered the creation and institutionalisation of money the result of individual necessities. In his view, since barter economy had the inconvenience of not reflecting demand and of creating the need for a 'double coincidence of wants', individuals started to use a prominent good or commodity

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<sup>129</sup> Carl Menger was strongly criticised by Gustav Schmoller, who identified him and his students as Austrian School to underline their departure from the mainstream economic thought developed in Germany by the Historical School. For more information about the debate among German and Austrian scholars see (in German) Carl Menger, *Irrthümer des Historismus in der deutschen Nationalökonomie*, 1884, Wien, or alternatively see Mark Louzek, 'The Battle of Methods in Economics: The Classical Methodenstreit—Menger vs. Schmoller', 14 Apr. 2011, 70 *American Journal of Economics and Sociology* 2, 439-63.

to facilitate exchange with others. Once the usage of this commodity began to spread, it became a sort of informal prototype of money, which led to the emergence of the institution of money itself.<sup>130</sup>

Many of those ideas were embraced and further developed by American institutional economists, who are generally identified as the old and new schools of institutionalism.<sup>131</sup> For instance, while criticising conventional economic models for being too abstract and for neglecting to address the issue of historical change, the old school of institutionalism understood institutions, and their evolution, as a constant process of change influenced by a complex structure of social and economic issues.<sup>132</sup>

Although sympathetic to Marx's analysis of capitalism, Veblen, one of the most prominent scholars of old institutionalism, maintained that the problem of both the neo-classical and the Marxian interpretations of reality was the absence of any tangible connection between the role of human beings acting in a definite capitalistic structure and the leading motivations that should push them to act in a certain way. Specifically, Veblen moved away from the neo-classical and Marxian understanding of capitalism as well as from those rational-behaviour theories that had dominated 19<sup>th</sup>-century Western thinking. Indeed, as Hodgson, in agreement with Veblen, pointed out, 'human agents do not gravitate to a single view of the truth simply on the basis of empirical evidence and rational reflection', thus, there must be another explanation of human actions.<sup>133</sup> Hence, Veblen took inspiration from pragmatist philosophers such as Charles Sanders Peirce and from the concept of habit.<sup>134</sup> Peirce maintained that habits and customs – not

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<sup>130</sup> Geoffrey M. Hodgson, 'The Evolution of Institutions: An Agenda for Future: Theoretical Research', 2002, 13 *Constitutional Political Economy*, 111– 127, 111.

<sup>131</sup> W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications, 2.

<sup>132</sup> John Groenewegen, Frans Kerstholt, Ad Nagelkerke, 'On Integrating New and Old Institutionalism: Douglass North Building Bridges', June 1995, *XXIX Journal of Economic Issues* 2, 467-475, 468.

<sup>133</sup> Geoffrey M. Hodgson, 'Varieties of Capitalism and Varieties of Economic Theory', autumn 1996, 3 *Review of International Political Economy* 3, 380-433, 409.

<sup>134</sup> Geoffrey M. Hodgson, 'Varieties of Capitalism and Varieties of Economic Theory', autumn 1996, 3 *Review of International Political Economy* 3, 380-433, 409.

intellect and sensations – had to be considered at the basis of any theoretical interpretation of reality and therefore at the foundation of all science. Specific habits must be interpreted as habitual patterns of thought, which construct a sort of general framework used by social actors to attribute particular meaning to the world. In other words, habits are the products of beliefs and they materialise ideas into accepted practices. By linking thought to actions and ideas to practices, Peirce had the merit of dissolving the Cartesian division between mental projections and physical experiences.<sup>135</sup> Following from this, Veblen maintained that institutions are ‘settled habits of thought common to the generality of men’ that constrain human behaviour but are not a product of its instincts or propensities. In fact, they are determined by usual and customary ‘ways of doing and thinking’ originated by material technological and economic means.<sup>136</sup>

In other words, Veblen and the old school understood institutions as a set of rules that becomes effective once they turn into shared habits of thought and behaviour.<sup>137</sup> Habits are common tendencies or inclinations that forge the way of thinking of a particular social realm; they can be created by repeated patterns of behaviour, but cannot be identified as behaviour in and of themselves. Indeed, a ‘habit is a disposition to engage in previously adopted or acquired behaviour or thoughts, triggered by an appropriate stimulus or context’.<sup>138</sup> Habits determine the malleability of individuals’ preferences; the habits of today determine the institutions of tomorrow by

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<sup>135</sup> Charles Sanders Peirce, ‘Collected Papers of Charles Sanders Peirce’, in C. Hartshorne and P. Weiss (eds.), *Pragmatism and Pragmaticism*, 1934, Vol. 5, Cambridge, Mass.: Harvard University Press. John R. Commons, *Institutional Economics- Its Place in Political Economy*, 1934, New York, Macmillan, 150, quoted also in Geoffrey M. Hodgson, ‘Varieties of Capitalism and Varieties of Economic Theory’, autumn 1996, 3 *Review of International Political Economy* 3, 380-433, 410.

<sup>136</sup> Thorstein Veblen, *The instinct of workmanship : and the state of industrial arts*, 1964, New York: B.W. Huebsch, 7, quoted in Malcolm Rutherford, ‘Thorstein Veblen and the Processes of Institutional change’, 1984, 16 *History of Political Economy* 3, 331-348, 332-3. Thorstein Veblen, ‘The Limitations of Marginal Utility’, November 1989, 17 *Journal of Political Economy* 9, 620–36.

<sup>137</sup> Geoffrey M. Hodgson, ‘Some myths of Veblenian institutionalism’, in Janet T. Knoedler, Robert E. Prasch, Dell P. Champlin (eds.), *Thorstein Veblen and the Revival of Free Market Capitalism*, 2007, Edward Elgar, Chapter 6, 127-148.

<sup>138</sup> Geoffrey M. Hodgson, ‘What Are Institutions?’, March 2006, *XL Journal of Economic Issues* 1, 1-25, 6.

shaping ‘men’s habitual view of things’ through the selective and coercive processes established by institutions themselves.<sup>139</sup> Indeed, the institutional channelling and constraining of behaviour results in the construction of new habits on the part of social actors. In other words, institutions limit human actions on the one hand and, on the other, favour the development of new habits. In fact, according to Hodgson, ‘people do not develop new preferences, wants or purposes simply because “values” or “social forces” control them. What does happen is that the framing, shifting and constraining capacities of social institutions give rise to new perceptions and dispositions within individuals. Upon new habits of thought and behaviour, new preferences and intentions emerge’.<sup>140</sup> Hence, the role of individuals is minimal in developing institutions and the institutionalisation process itself acts as a sort of *deus ex machina*.

Following Veblen, John R. Commons interpreted institutions as social structures that are uniquely characterised by their capacity to change the purposes and preferences of social actors.<sup>141</sup> However, moving on from the previous static and holistic approach, Commons regarded institutions as the framework where the transactions made in social groups are regulated by a set of working rules or laws that fixes the boundaries of individual actions.<sup>142</sup> Institutions, in Commons’ analysis, have a broader meaning and their evolution depends on a constant deliberative collective decision-making process. Their shape results from the working rules of transactions that are set out by society in order to establish the rights of future ownership of physical things, to constrain economic power, or to liberate individuals from the coercion of others.

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<sup>139</sup> Geoffrey M. Hodgson, ‘The Evolution of Institutions: An Agenda for Future Theoretical Research’, 2002, 13 *Constitutional Political Economy*, 111– 127, 117.

<sup>140</sup> Geoffrey M. Hodgson, ‘The Evolution of Institutions: An Agenda for Future Theoretical Research’, 2002, 13 *Constitutional Political Economy*, 111– 127, 117. See also Thorstein Veblen, *The Theory of the Leisure Class: An Economic Study in the Evolution of Institutions*, 1899, New York, Macmillan. Thorstein Veblen, *The Place of Science in Modern Civilisation and Other Essays*, 1919, New York, Huebsch.

<sup>141</sup> Geoffrey M. Hodgson, ‘What Are Institutions?’, March 2006, *XL Journal of Economic Issues* 1, 1-25, 3.

<sup>142</sup> John R. Commons, *Institutional Economics: Its place in Political Economy*, 2005, Transaction Publishers, 58.

In other words, Commons understood social order as the result of collective institutions where transactions, as the main moment of social interactions, are the unit of analysis.<sup>143</sup> Indeed, every transaction reflects the principle of an institution controlling, liberating, and expanding individual action.<sup>144</sup> It follows that institutional change is caused by the institutional environment and that institutions act as constraints as well as catalysts for change in the economic structure.<sup>145</sup> In other words, while the modification of institutions is spontaneously influenced by the evolution of customs, norms and rules, at the same time, the collective role of governments and court is fundamental in shaping institutions through legislatures.<sup>146</sup>

Both Veblen and Commons singled out the importance of change as one of the principal objects of study in economics. However, Veblen adopted a more evolutionary perspective and emphasised the role of technological change in modifying economics and economic performances. Commons, instead, stressed the centrality of transactions made by social groups in ‘giving, taking, persuading, coercing, defrauding, commanding,

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<sup>143</sup> John Commons, ‘The Problem of Correlating Law, Economics and Ethics’ 1932-33, 8 *Wisconsin Law Review* 1, 3-26, 3. Oliver E. Williamson, ‘The New Institutional Economics: Taking Stock, Looking Ahead’, 2000, XXXVIII *Journal of Economic Literature*, 595-613, 599. Transactions can be interpreted as bargaining transactions, managerial transactions and rationing transactions and they are based and stimulated by a going concern. According to Commons, “A *going concern* is a joint expectation of beneficial bargaining, managerial and rationing transactions, kept together by ‘working rules’. When the expectations cease, the concern quits going.’ Bargaining Transactions deal with exchange processes of the pre-capitalistic period. Managerial transactions are made between two actors, one is the legal superior who commands, the other is a legal inferior who has to obey. Rational transactions are instead made between different actors to obtain a compromise among the parts. John Commons, ‘The Problem of Correlating Law, Economics and Ethics’, 1932-33, 8 *Wisconsin Law Review* 1, 3-26, 5.

<sup>144</sup> A. Yngve Ramstad, ‘Pragmatist’s Quest for Holistic Knowledge: The Scientific Methodology of John R. Commons’, Dec., 1986, 20 *Journal of Economic Issues* 4, 1067-1105.

<sup>145</sup> John Groenewegen, Frans Kerstholt, Ad Nagelkerke, ‘On Integrating New and Old Institutionalism: Douglass North Building Bridges’, June 1995, XXIX *Journal of Economic Issues* 2, 467-475, 470.

<sup>146</sup> John R. Commons, *Legal Foundations of Capitalism*, 1924, Macmillan. John R. Commons, *Institutional Economics - Its Place in Political Economy*, 2005, (1934), Transaction Publishers, New Brunswick, New Jersey. Richard R. Nelson, Bhaven N. Sampat, ‘Making sense of institutions as a factor shaping economic performance’, 2001, 44 *Journal of Economic Behavior & Organization*, 31-54.

obeying, competing (and) governing, in a world of scarcity, mechanisms and rules of conduct'.<sup>147</sup>

While Commons and Veblen considered institutions as the imposition of collective rules over individuals, the emergence of new generation of institutional economic scholars challenged this holistic approach and shifted attention to the individual himself.<sup>148</sup> Like its older counterpart, the new institutional economics (NIE) analyses the social, economic and political institutions that characterise everyday life. However, similarly to neoclassical economics, new institutional theories are constructed upon methodological individualism. Indeed, every neoclassical economic analysis was principally based on the primary role of single actors and on the consequent deduction that every social outcome can be explained through the study of individual choices. According to this approach, since human beings were considered to be rational profit-maximising players and to operate constantly in the most efficient way possible, collective outcomes were expected to be always optimal.<sup>149</sup>

Not only do new institutional scholars consider individuals as the centre of their analysis, but they also believe that all social phenomena, including institutions and governance structures, can only be analysed through the study of human beings' behaviour and their perfectly rational calculations. In this framework, institutions are created not only to serve social actors' interests, but also to limit and, at the same time, to enable the ways in which desired ends become achievable.<sup>150</sup>

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<sup>147</sup> John R. Commons, *Legal Foundations of Capitalism*, 1924, Macmillan, 7. W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications, 3.

<sup>148</sup> Malcolm Rutherford, 'Introduction to the Transaction Edition' in John R. Commons *Institutional Economics: Its place in Political Economy*, 2005, Transaction Publishers, XX.

<sup>149</sup> Terry Moe, 'The new economics of organization', 1984, *American Journal of Political Science* 28, 739-77, 741. Cited in Hendrik Spruyt, 'New institutionalism and International Relations' Ronan Palan (ed.), *Global Political Economy: Contemporary Theories*, 2000, Ripe Series in Global Political Economy, Routledge, chapter 9, 134-35.

<sup>150</sup> Thrainn Eggertson, *Economic Behavior and Institutions*, 1990, New York, Cambridge University Press, chapter one. Cited in Hendrik Spruyt, 'New institutionalism and International Relations' in Ronan Palan (ed.), *Global Political Economy: Contemporary Theories*, 2000, Ripe Series in Global Political Economy, Routledge, chapter 9, 134-35.

However, differently from neoclassical economics, NIE scholars maintain that although individuals are rational, they live in the context of uncertainty; thus, while their outcomes are always satisfactory, they are not constantly and perfectly efficient.<sup>151</sup> Accordingly, individuals and organisations try to operate in the most suitable way by repeating usual practices. In other words, instead of acquiring new information every time a transaction is forthcoming – as postulated by the neo-classical model – social actors usually tend to comply with standard or tested patterns of behaviour, which may not produce perfect outcomes but are sure to generate acceptable results.<sup>152</sup>

In the main, NIE – also known as new economics of organisations or new institutional economics – focuses on those arrangements that modify or otherwise affect the institutional environment, namely the ‘rules of the game’, such as political or judicial decisions, laws and regulations, and the institutions of governance – in other words, the way the game is played by markets, economic actors and firms.<sup>153</sup> As mentioned *supra*, in contrast to the old institutional school, NIE scholars adopt a strict methodological individualism. Indeed, even though they do not deny the importance of collective facts such as corporate culture, organisational memory, and the like, they understand those phenomena more as the outcome than as the explanation of historical events.

For instance, Ronald Coase asks why some economic transactions, instead of following a price-mechanism dynamic, tend to comply with a sort of regulatory framework or a hierarchical enforcement mechanism. In his analysis, this is because the transactions that follow the price mechanism have always a cost in terms of the

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<sup>151</sup> Hendrik Spruyt, ‘New institutionalism and International Relations’ in Ronan Palan (ed.), *Global Political Economy: Contemporary Theories*, 2000, Ripe Series in Global Political Economy, Routledge, chapter 9, 134-35.

<sup>152</sup> Graham Allison and Philip Zelikov, *Essence of Decision: Explaining the Cuban Missile Crisis*, 1999, Longman. Jonathan Bendor, and Terry Moe, ‘An adaptive model of bureaucratic politics’, 1985, *American Political Science Review* 79, 755–74, cited in Hendrik Spruyt, ‘New institutionalism and International Relations’ in Ronan Palan (ed.), *Global Political Economy: Contemporary Theories*, 2000, Ripe Series in Global Political Economy, Routledge, chapter 9, 134-35.

<sup>153</sup> Oliver E. Williamson, ‘The Institutions of Governance’, May 1998, 88 *The American Economic Review*, 2, 75-79, 75. W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications, 25.

negotiation times and procedures necessary to conclude separate agreements, therefore actors may prefer to adopt usual practices in order to save resources and obtain a satisfactory result.<sup>154</sup> In fact, since individual rationality is limited by uncertainty, transactions are usually made within an organisational framework, as this is likely to provide a sense of control and security.<sup>155</sup>

Coase's transaction-cost approach originates from Oliver Williamson's work. Williamson studied the dynamics of hierarchical relations and vertical integration that characterise transactions in certain industries. In his analysis, structured relations and institutions originate when actors, engaged in particular transactions, manage hardly deployable goods. As Hendrik Spruyt maintains, 'when transactions are frequent and assets are specific, the individual firms involved in the transactions will demand greater formal governance structures' and, therefore, institutions.<sup>156</sup>

In light of the above, New Institutionalists have moved the centre of their analysis from the nearly omniscient neo-liberal *homo-economicus* of rational choice theory to a *homo psychologicus* that does not always act efficiently and does not have complete market information.<sup>157</sup> Since decision makers cannot be assumed to be omniscient, they can be

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<sup>154</sup> Ronald H. Coase, 'The Nature of the Firm' 1937, *Economica* 4, 385-405.

<sup>155</sup> This is in contrast with the mainstream neoclassical vision, which sustained that competition or economic rivalry should produce efficient outcomes, even in the absence of hierarchical governance structures, which would rule transactions. Indeed, individuals, by bargaining, always balance demand and offers according to the most rational and possible way because it is assumed that transaction and information costs are low and that property rights can be clearly assigned. However, in reality, transaction costs- such as the costs of preparing, negotiating, and concluding agreements, transportation and meeting costs- are high and information barriers usually exist. Hence, at this condition, formal institutional structures, by reducing those costs, are necessary to foster more efficient outcomes. Oliver Williamson, *The Economic Institutions of Capitalism*, 1985, New York, Free Press. Oliver Williamson, *Markets and Hierarchies and Antitrust Implications*, 1975, New York, Free Press.

<sup>156</sup> Hendrik Spruyt, 'New institutionalism and International Relations' Ronan Palan (ed.), *Global Political Economy: Contemporary Theories*, Ripe Series in Global Political Economy, 2000, Routledge chapter 9, 138.

<sup>157</sup> Oliver E. Williamson, 'The Institutions and Governance of Economic Development and Reform', September 2000, XXXVIII, *Journal of Economic Literature*, 595-613, 600. Peter G. Klein, 'New Institutional Economics' 2000, *Encyclopaedia of Law and Economics*, 456-89.

described as ‘intendently rational, and not hyperrational’.<sup>158</sup> In other words, NIE theorists refuse the neo-classical assumption that individuals have access to perfect information and apply unbounded rationality when operating in the market. On the contrary, individuals have limited mental capacities, face the uncertainty of unexpected events and sustain transaction costs to acquire information, which is never perfect.<sup>159</sup> Because of this endemic incertitude, actors create institutions to make the market more predictable, to facilitate economic transactions and to foster cooperation. Those institutions can be formal ones, such as constitutions, laws, contracts and regulations, or informal ones, such as culture, beliefs and habits. They are not only analysed and studied as constraining or determining factors, but also as the product of individual choices. They are the outcome of specific decisions and their characteristics reflect deliberate necessities and contingent interests.<sup>160</sup> In other words, NIE studies how those institutions are created, how they work and develop, and how they shape production and exchange trends. Moreover, it investigates also the evolutionary nature of such arrangements by analysing the extent to which they modify the rules of the market game.<sup>161</sup> In Kenneth Arrow’s words, NIE tries to answer questions that neoclassical economics does not address; in fact, the scope of ‘the new institutional economics movement [...] does not consist primarily of giving answers to the traditional questions of economics – resource allocation and the degree of utilisation. Rather, it consists of answering new questions, why economic institutions have emerged the way they did and

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<sup>158</sup> See Herbert A. Simon *Models of Man: Social and Rational*, 1957, New York John Wiley and Sons, Inc. Erik G. Furubotn & Rudolf Richter, *Institutions & Economic Theory: The Contribution of the New Institutional Economics*, 1998, The University of Michigan Press, 5-6.

<sup>159</sup> Claude Menard and Mary M. Shirley ‘Introduction’, in Claude Menard and Mary M. Shirley (eds.), *Handbook of New Institutional Economics*, 2008, Springer, 1-61 1-3

<sup>160</sup> Hendrik Spruyt, ‘New institutionalism and International Relations’ Ronan Palan (ed.), *Global Political Economy: Contemporary Theories*, Ripe Series in Global Political Economy, 2000, Routledge chapter 9, 139.

<sup>161</sup> Claude Menard and Mary M. Shirley ‘Introduction’, in Claude Menard and Mary M. Shirley (eds.), *Handbook of New Institutional Economics*, 2008, Springer, 1-61 1-3.

not otherwise'.<sup>162</sup> Indeed, both Arrow and Williamson ascribe the growing influence of NIE to the recognition of the basic assumption of neoclassical economics as the condition of scarcity in the market.<sup>163</sup> However, New Institutional Economics, by trying to expand the range of applicability of neoclassical theory, reinterpret the role of individuals in decision-making processes.<sup>164</sup> As individuals have become the centre of analysis, institutions begin to be explained only in reference to their behaviour. Because actors have different tastes, ambitions, intentions and ideas, the social realm and its institutional establishment cannot be understood only by considering collective organisations. On the contrary, in order to comprehend institutional change, it is necessary to explain individual behaviour.<sup>165</sup>

However, according to Hodgson, individual choices or behaviours need to refer to a general and shared conceptual framework in order to make sense of the world. In other words, each action or transaction cannot be perceived as the result of human rationality, in a context of imperfect information, without a general frame of reference.

‘Individual choice requires a conceptual framework to make sense of the world. The reception of information by an individual requires a paradigm or cognitive frame to process and make sense of that information. The acquisition of this cognitive apparatus involves processes of socialisation and education, involving extensive interaction with others. As well as language, these interactions require other, pre-existing institutions.

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<sup>162</sup> Kenneth Arrow ‘Reflections on the essays’, in George Feiwel (ed.), *Arrow and the Donations of the Theory of Economic Policy*, 1987, New York University Press, 734, quoted in Oliver E. Williamson, ‘The Institutions and Governance of Economic Development and Reform’, September 2000, XXXVIII, *Journal of Economic Literature*, 595-613, 602.

<sup>163</sup> Claude Menard and Mary M. Shirley ‘Introduction’, in Claude Menard and Mary M. Shirley (eds.), *Handbook of New Institutional Economics*, 2008, Springer, 1-61 1-3.

<sup>164</sup> Claude Menard and Mary M. Shirley ‘Introduction’, in Claude Menard and Mary M. Shirley (eds.), *Handbook of New Institutional Economics*, 2008, Springer, 1-61 1-3.

<sup>165</sup> As it has been already outlined in the sociological analysis of institutions supra, behavioural economics indeed, try to understand human interactions by analysing human way of acting and by applying psychology, anthropologies and classical social science subjects to the economic analysis.

Individual choice is impossible without them. We cannot understand the world without concepts and we cannot communicate without some form of language.<sup>166</sup>

Even though Douglass North, one of the founding fathers of NIE, did not completely deny the neoclassical assumptions of perfect rationality and profit-maximising behaviour, he strongly criticised them.<sup>167</sup> To be sure, by advancing those interpretations, he provided a sort of bridge between the different schools.<sup>168</sup> Accordingly, he interpreted institutions as the ‘humanly devised constraints’ that govern a society by shaping human interactions and the way those interactions evolve.<sup>169</sup> ‘They are made up of formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behaviour, conventions, self-imposed codes of conduct), and their enforcement characteristics. Together they define the incentive structure of societies and specifically economies’.<sup>170</sup>

In North’s perspective, the actions of single individuals are controlled by institutional framework; however, the individual, simply by acting, can change the framework itself to suit his own necessities. ‘Economic change is a ubiquitous, on-going, incremental process that is a consequence of the choices individual actors and entrepreneurs of organisations are making every day’.<sup>171</sup> Indeed, while institutions serve

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<sup>166</sup> Geoffrey M. Hodgson, ‘The Evolution of Institutions: An Agenda for Future: Theoretical Research’, 2002, 13 *Constitutional Political Economy*, 111– 127, 111.

<sup>167</sup> Hendrik Spruyt, ‘New institutionalism and International Relations’ in Ronan Palan (ed.), *Global Political Economy: Contemporary Theories*, 2000, Ripe Series in Global Political Economy, Routledge, chapter 9, 136.

<sup>168</sup> John Groenewegen, Frans Kerstholt, Ad Nagelkerke, ‘On Integrating New and Old Institutionalism: Douglass North Building Bridges’, June 1995, XXIX *Journal of Economic Issues* 2,467-475, 470.

<sup>169</sup> Douglass C. North, ‘Economic Performances through time’, June 1994, 84 *The American Economic Review* 3, 359-368, 360, Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, 1990, 3.

<sup>170</sup> Douglass C. North, ‘Economic Performances through time’, June 1994, 84 *The American Economic Review* 3, 359-368, 360.

<sup>171</sup> Douglass C. North, ‘Economic Performances through time’, June 1994, 84 *The American Economic Review* 3, 359-368, 361.

as the rules of the game, it is organisations and their actors that shape the institutional environment, i.e. the ‘fundamental political, social, and legal ground rules that govern economic and political activities’.<sup>172</sup> In this sense, Douglas North’s conceptualisation of institutions is in line with old institutionalism, Commons and new institutionalism. As individuals have the ability to change the institutional structure that constraints them according to their needs, the overall outcome of their actions can create an efficient or inefficient institutional structure that can only be understood and evaluated by reference to the ideologies and the historical specificity of that particular period.<sup>173</sup>

In contrast to the neo-classical school, North does not interpret institutions as instruments of efficiency. On the contrary, he emphasises the role of incentives in the operation of the market as well as of political and legal systems. He maintains that such factors as imperfect information and transaction costs can alter the rules of the game, thereby producing an outcome that does not in fact favour those who are expected to benefit most from it. Efficiency may be an outcome of institutions, but institutions are themselves the product of models that human beings use to interpret the world around them. Lacking access to all the necessary information, individuals cannot acquire, let alone elaborate, perfect knowledge. It follows that those models, and the institutions that derive from them, cannot be perfect, although they can perfectly represent the structural culture, knowledge and ideas that characterise a particular society.<sup>174</sup> In common with the prominent American economist Corwin Edwards, who outlined the importance of ideology in explaining the diverse international patterns of antitrust regimes, North

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<sup>172</sup> Douglass C. North, ‘Economic Performances through time’, June 1994, 84 *The American Economic Review* 3, 359-368, 361. Douglass C. North, ‘Institutional Change and American Economic Growth: A First Step towards a Theory of Institutional Innovation’ March 1970, 30 *The Journal of Economic History*, 1, 131-149, 133.

<sup>173</sup> Douglass C. North, ‘Economic Performances through time’, June 1994, 84 *The American Economic Review* 3, 359-368, 362.

<sup>174</sup> Douglass C. North, ‘Institutional Change and American Economic Growth: A First Step towards a Theory of Institutional Innovation’, March 1970, 30 *The Journal of Economic History* 1, 131-149. Douglass C. North, ‘The new institutional economies and development’, 1993, *EconWPA Economic History*.

maintains that individuals or organisations may often hold different perceptions of self-interest because of their ideological differences, and may therefore produce outcomes that can be either economically productive or adverse.<sup>175</sup> Consequently, political or economic actors who can directly or indirectly shape outcomes through short-term decisions may be responsible for long-term economic transformations. Those decisions inevitably reflect the ideas, ideologies, and beliefs that characterise a particular social realm, which in turn frames them into a logical political-economic theory.<sup>176</sup> Hence, ideas and ideologies, as well as their logical theoretical organisation, play a very important role in shaping those models of understanding reality; they may be created by social actors, and reflect their modes of thinking, but they can in turn shape their actions by being converted in appropriate institutional environments.<sup>177</sup>

#### *Antitrust, Institutions and Pan-Institutionalism*

Traditionally, scholars have focused their interests either on the juridical technicalities of antitrust law or on the empirical economic effects of specific antitrust regulations on the market. Yet, they have omitted or denied the political elements and institutional aspects of competition regulation.

The institutional aspect of antitrust deals with the economic theories and frameworks of reference that, by influencing the substratum of internal political decision-making processes, allows the enforcement of laws and the determination of the boundaries of social economic actions. However, to speak about the institutional aspect of antitrust can generate confusion: not only regulations, but also general policies, courts

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<sup>175</sup> See Corwin D. Edward, *Trade Regulations Overseas: the national Laws*, 1966, Dobbs Ferry, quoted in Tony A. Freyer, 'Restrictive Trade Practices and Extraterritorial Application of Antitrust Legislation in Japanese-American Trade' 1999, 16 *Ariz. J. Int'l and Comp.L.* 159-134, 166-68.

<sup>176</sup> Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, 1990, 104.

<sup>177</sup> Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*, 2002, Cambridge University Press.

decisions, international agreements, and many other formal and informal relations can each be considered an institution, or at least the product of the evolution of one.<sup>178</sup>

Consequently, it is necessary to adopt a specific working definition. According to Douglass North, institutions are characterised by formal constraints (e.g., rules, laws, constitutions), informal constraints (e.g., norms of behaviour, conventions, self-imposed codes of conduct), and their enforcement characteristics. The term constraint *per se* can partially explain the nature of antitrust law. Indeed, firms, while competing in the market, try to make an effective use of the scarce resources they have in order to acquire higher profits. However, in order to obtain efficiency it is necessary to build an institutional framework able to contain – but not stop – individual actions.<sup>179</sup> This is the mission of antitrust institutions: to set out rules of competition that constrain the behaviour of economic actors, while maximising efficiency and welfare.

To this end, Commons' institutional analysis is perhaps the most complete, as he argues that the role of the central government, or of collective actions, in defining institutions is more than a mere constraint. It is, at one and the same time, a form of coercion and liberation of the individual action from unfair competitive practices adopted by other economic actors.<sup>180</sup> In other words, the 'regulatory and collective institutionalism of Commons assumes a man-made social order with a high degree of constructivism'.<sup>181</sup>

Commons integrates his economic analysis with a more cognitive one. In his view, institutions reflect and, at the same time, conceal society, being as they are both

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<sup>178</sup> Oliver E. Williamson, 'The Institutions and Governance of Economic Development and Reform', September 2000, XXXVIII, *Journal of Economic Literature*, 595-613, 600. Daniel Sokol, Antitrust, Institutions and Merger Control, 2010, 17 *Geo, Mason L. Review*, 4.

<sup>179</sup> Glen Atkinson, 'Going Concerns, Futurity and Reasonable Value' June 2009, XLIII *Journal of Economic Issues* 2, 433-440.

<sup>180</sup> John R. Commons 'Institutional Economics', December 1931, 21 *The American Economic Review* 4, 648-57, 651, quoted in Daniel Rush Finn, 'Institutional Processes from John R. Commons to Michael Walzer: An Image of the Market as a Sphere of Human Interaction', June 1997, Vol. XXXI, *Journal of Economic Issues*, 2, 409-15.

<sup>181</sup> John Groenewegen, Frans Kerstholt, Ad Nagelkerke, 'On Integrating New and Old Institutionalism: Douglass North Building Bridges', June 1995, vol. XXIX *Journal of Economic Issues* 2, 467-475, 469.

constraints and instruments. However, building on Commons' insights, Douglas North maintains that the nature of pursuable interests changes according to the social conventions and ideologies that are predominant in a specific period. For instance, in the case of antitrust regulations, if in the Keynesian era it was convenient to avoid the rise of mergers, in the neo-liberal period, on the contrary, it was rational to demand the exact opposite. Indeed, economic change and the rise of new interests can be the result of an 'interplay of institutions, reality and perceptions: institutions shape reality; reality shapes the perceptions of actors, who, in turn, gradually change the institutions of the respective society'.<sup>182</sup>

The constructivist elements underlined by North allow to switch the analysis towards a sociological interpretation of policy diffusion, which, in turn, can offer an interesting key of analysis for understanding the nature and the development of antitrust institutions in Europe and Japan. Indeed, while North can brilliantly describe the essence of the antitrust institutions here analysed, he does not explain the process of institutional diffusion that invested Europe and Japan.

Nonetheless, by giving great emphasis to the cognitive aspect of institutionalism, sociologists interpret cognitions as a determining factor of social regulations and this might be in an ontological and epistemological conflict with what Douglas North maintains. In fact in North's perspective human actors create institutions to pursue their interests and, in doing that, they are inspired by their mental models. Sociological scholars, instead, attribute great importance to ideas, which, according to them, directly forge reality and so individuals.

However, I believe that a pan-institutional approach can overcome those epistemological differences. By following Goldstein and Keohane, pan-institutionalism

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<sup>182</sup> Harm G Schröter, *Americanization of the European Economy: A Compact Survey of American Economic Influence in Europe since the 1880s*, 2005, Springer, 11.

outlines that both ideas and interests can play a central role in shaping human actions.<sup>183</sup> Indeed, while interests are fundamental in leading to the institutionalisation of efficient rules, ideas determine what is believed to be efficient. In other words, ideas are the glasses human actors use to see and understand the realm. They do not create reality but they are the instrument that allows a better comprehension of what are the pursuable and efficient interests among several.

By linking ideas and interests, pan-institutionalism allows to overcome the above-mentioned ontological and epistemological dichotomies and to apply Douglas North's definition of institutions to the study of antitrust, while using sociological theories to understand the diffusion of competition policies in Europe and Japan. For instance, the isomorphic model developed by DiMaggio and Powell provides interesting insights into the process by which states tend to adopt similar institutions. Isomorphism can explain why Europe and Japan adopted similar paths in the regulation of competition even though their conventional understanding was different. Additionally, the concept of path-dependence developed by historical-institutional scholars is fundamental in tracing the evolution of antitrust policies throughout different historical periods and in determining whether and how past decisions influenced present dynamics. However, while this approach has the merit of offering a clear frame of analysis, its understanding of antitrust is limited by the fact that it does not consider political actors and their inclinations as key elements in defining institutions. Indeed, over the course of history antitrust regulations have been shaped by policy makers according to their interests, which are always dependent on the social contexts and the ideas framing them. The role of politicians, then, cannot be underestimated because political decisions and the ideas

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<sup>183</sup> Judith Goldstein and Robert Keohane, (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, 1993, Ithaca, N.Y.: Cornell University Press.

inspiring them are the main promoters of institutional change.<sup>184</sup> Hence, path dependence won't be interpreted as a unique trail to be followed but, as it is maintained by Bernhard Ebbinghaus, it will be considered as a 'road *junction*', where actors can shape their future by choosing the path they see fit.<sup>185</sup>

In this sense, pan-institutionalism by attributing importance to both ideas and interests in influencing human actors' decisions can allow a deeper comprehension of how antitrust institutions develop in the course of history. On the one hand, Douglass North's interpretation of institutions, being consistent with Commons' ideas, offers a clear definition of what are antitrust institutions. On the other, some of the cognitive aspects underlined by North can be used to reinterpret the traditional sociological understanding of ideas by introducing the role of interests in the analysis of policy diffusion. In fact, the sociological school *per se* cannot perfectly explain the reason why certain antitrust approaches developed because it does not consider economic interests to be relevant in determining institutional change. However, isomorphism theories can provide a clear explanation of why Europe and Japan adopted certain antitrust policies. Moreover, the path dependence aspect underlined by some of the political theories can explain why Europe and Japan still maintain their peculiarities in the regulation of competition. Indeed, since past actions influence present conditions, the European and Japanese traditional way to perceive interests and market needs will always influence their policies.

In conclusion, a pan-institutional approach overcome the methodological differences underlined above because it uses elements developed by the three schools to understand how interests push individuals to pursue an institutional change and how

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<sup>184</sup> Wiley and Erik G. Furubotn & Rudolf Richter, *Institutions & Economic Theory: The Contribution of the New Institutional Economics*, 1998, The University of Michigan Press, 7.

<sup>185</sup> Bernhard Ebbinghaus 'Can Path Dependence Explain Institutional Change? Two Approaches Applied to Welfare State Reform', March 2005, *Max Planck Institute for the Study of Societies Cologne, Discussion Paper 05/2*.

ideas help to figure out how to efficiently reach them through institutions. In fact, while antitrust regulations may have been adopted because they were economic efficient, it is also true that economic interests, and therefore efficiency, change according to the social conventions and ideas developed in society. Those ideas can be developed because of isomorphic influence by an external country or because they are part of a tradition, which will always influence local political choices. The modalities explaining how this happens will be better elucidated in the following chapter.

## CONCLUSION

Hence, within the institutional IPE framework, competition policy, having both economic and political objectives, can be understood and investigated from different angles. For this reason, this thesis will apply what I defined here as a pan-institutional approach by combining elements of political, sociological and economic institutionalism. In fact, as outlined *supra*, economic institutionalism, especially in the version espoused by Douglas North, seems to offer a clearer definition and a more structured theoretical framework for analysing antitrust both as simply a law, an agreement or a policy and as a theoretical model. On the other hand, the sociological point of view provided by Powell and DiMaggio is best suited to explain the adoption by Europe and Japan of institutions that paralleled the ones enforced by the US. At the same time, a political perspective on institutions may shed some light onto how mechanisms of path dependence have frequently impeded a complete assimilation of US antitrust norms in Europe and Japan. Indeed, as will be explained in the historical chapters, while it is true that Europe and Japan adopted antitrust approaches similar to those of the US, it is also true that the structure of competition policy and law in those countries is completely different from the American one. This can be explained by looking at the local ideological or cultural

framework that underpins their model of capitalism and that is therefore inherently unique and difficult to change. In conclusion, a pan-institutional approach, by integrating different perspectives, promises a better understanding of the role played by ideas and interests in shaping national and international antitrust institutional frameworks.

## CHAPTER 2

### ANTITRUST: VARIETY OF APPROACHES

The choice of an institutional approach to study the development of national and international antitrust institutions invites an extended explanation of the theories of ‘varieties of capitalism’. Theories of varieties capitalism are key to understand how and why particular antitrust regulations developed in the US, Europe and Japan in the wake of the crises here discussed. As Hodgson pointed out, varieties-of-capitalism theories portray socio-economic systems as a ‘combination of multiple types of subsystems or modes of production’.<sup>186</sup> Their importance lies in the fact that ‘neither neoclassical, nor Hayekian nor, to some extent, Marxian economics’ were able to detect the existence of impurity principles in each capitalistic system. Furthermore, none of those theories could explain how the presence of those peculiarities in each capitalistic model made each economic organisation different from the rest.<sup>187</sup> Indeed, according to Nolke and Vliegthart, theories on varieties of capitalism have in fact been driven by the awareness that the specific institutions of each system of capitalism diverge from one another and that these dissimilarities are not accidental, but related to precise cultural and behavioural bonds.

Besides leading to the development of a very ‘sophisticated, holistic, and easily understandable picture of the institutional complexity of advanced capitalism’, these assumptions are also relevant in the context of antitrust, as they are easily applicable to the analysis of the evolution and the internationalisation of the antitrust institutional

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<sup>186</sup> Geoffrey M. Hodgson, ‘Varieties of Capitalism and Varieties of Economic Theory’, autumn 1996, 3 *Review of International Political Economy* 3, 380-433, 417.

<sup>187</sup> As Hodgson maintains, Marx ‘recognizes some key differences between one type of mode of production and another’. See Geoffrey M. Hodgson, ‘Varieties of Capitalism and Varieties of Economic Theory’, autumn 1996, 3 *Review of International Political Economy* 3, 380-433, 417.

sets.<sup>188</sup> With this in mind, this chapter aims to define the meaning of ‘varieties of antitrust’ and to clarify the different cultural and theoretical backgrounds from which market and antitrust institutions developed. Here, institutions refer to the set of formal or informal practices and regulations governing the specific structure of a capitalistic system. As an institution, therefore, antitrust can be an effective tool to lay bare the model of capitalism in each country.

For many years now, scholars have been investigating how different models of capitalism come to be embodied in any given country. Their theories conceptualise the structure of every model of capitalism as depending on the institutionalisation of both traditional practices and cultural backgrounds and as reflecting the empirical necessities of each economic environment. In this vein, the variety of antitrust systems seems to reflect different theoretical conceptualisations and cultural understandings of efficiency and welfare, which shaped antitrust institutions themselves as much as the general structure of local capitalistic systems. Consequently, an analysis of the main ideas underpinning national understandings of competition and competitiveness is also provided. Indeed, it is because of their different cultural and ideological traditions that the US, Europe and Japan could develop distinct antitrust institutions and maintain structural peculiarities in their antitrust regulations.

#### VARIETIES OF CAPITALISM AND VARIETIES OF ANTITRUST

The development of antitrust policies and regulations in the US, Europe and Japan can be interpreted as a result of the evolution of traditional theories of competition. This evolution, however, can be contextualised in the specific variety of capitalistic structures of each country. As advanced by Weber and Marx, models of capitalism are determined

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<sup>188</sup> Andreas Nölke, Arjan Vliegenthart, ‘Enlarging the Varieties of Capitalism: The Emergence of Dependent Market Economies in East Central Europe’, 2009, 61 *World Politics*, 670-70.

by economic institutions, which, in turn, are defined by the system of values, culture, norms and politics of each country. In other words, specific institutions are embedded in specific economic systems.<sup>189</sup> Similarly, Hall sustained that states, having adopted particular types of institutions in one sphere of their economy, tend to enforce similar practices in other areas as well. In short, national institutional frameworks may not develop arbitrarily, but tend to follow a precise path.<sup>190</sup> The evolution of competition cultures and their implementation into appropriate policies, in fact, reflect the need to reach those general objectives of economic growth and welfare that are shared also by the specific variety of economic structures of each country.<sup>191</sup>

Proceeding from this assumption, it may be possible to talk about ‘varieties of antitrust’ because, despite the strong influence from the US, those countries developed their own form of policy according to their previous traditions. For instance, together with the American Harvard School, the role of the German Ordoliberal School has been important in inspiring European competition policy.<sup>192</sup> In this vein, even though the US has profoundly influenced common competition policy in Europe, this system cannot be assimilated to the American one. On the contrary, its strong German roots have allowed Europe to maintain a typified competition policy.

Varieties of capitalism is a theoretical framework that explains why countries all over the world have applied and enforced capitalistic systems through different institutions, which, in turn, reflect specific – and local – logics of growth and interests.<sup>193</sup>

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<sup>189</sup> David Lane, ‘Emerging Varieties of Capitalism in Former State Socialist Societies’, 2005, 9 *Competition & Change* 3, 227–247. Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, 1970, London, Unwin Books. Karl Marx, *Capital* [preface to the first German edition, 1956, Volume 1, Moscow, Foreign Languages Publishing House.

<sup>190</sup> Peter A. Hall, and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, 2001, Oxford University Press, 18.

<sup>191</sup> Oliver Budzinski, ‘Monoculture versus diversity in competition economics’, 27 October 2007, 32 *Cambridge Journal of Economics*, 295-324.

<sup>192</sup> Oliver Budzinski, ‘Monoculture versus diversity in competition economics’, 27 October 2007, 32 *Cambridge Journal of Economics*, 295-324, 208.

<sup>193</sup> Chris Howell, ‘Varieties of Capitalism and Then There Was One?’, October 2003, 36 *Comparative Politics* 1, 103-124. Peter A. Hall and David Soskice (eds.), *Varieties of Capitalism: The Institutional*

Historically, therefore, there has been a fluctuating process of convergence among the different systems, as each institutional structure has tended to evolve along similar lines; however, each country has managed to remain distinctive according to a path-dependence ratio.<sup>194</sup> Chandler and Schroter, among others, maintain that this process has favoured a sort of Americanisation of other countries' capitalistic systems.<sup>195</sup> In contrast, Hall and Soskice point out that the variety of capitalistic structures demonstrates the inconsistency of a single neo-liberal culture. In this view, each country has developed its own interpretation of liberal or neo-liberal capitalism and its own institutions to develop it. These scholars have even identified specific ideal-types of capitalistic structures. According to Hall, the US is a liberal market economy (LME), also referred to as 'competitive capitalism' by Chandler or 'Anglo-Saxon model' by Albert, while Germany is a coordinated market economy (CME), also known as cooperative or Rhenan capitalism.<sup>196</sup> For its part, Japan reveals traces of cooperative capitalism.<sup>197</sup>

Even though, to some extent, Germany and Japan can be ascribed similar institutional frameworks, such as long-term cooperative relations among economic actors and minor attention to short-term allocative efficiency, they also exhibit several differences. For instance, after World War II, Japan enforced certain political economic arrangements with a view to overcoming Western competitiveness, while West Germany

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*Foundations of Comparative Advantage*, 2001, Oxford University Press.

<sup>194</sup> Ronald Rone, William Lazonick, Mary O' Sullivan, 'Varieties of Capitalism in the Twentieth Century', 1999, 15 *Oxford Review of Economic Policy* 4, 102-119, 103.

<sup>195</sup> Alfred A. Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism*, 1994, Harvard University Press. David J. Teece, 'Dynamics of Industrial Capitalism: Perspectives on Alfred Chandler's Scale and Scope', Mar., 1993, 31 *Journal of Economic Literature* 1, 199-225, 200. Harm G Schroeter, *Americanization of the European Economy: A Compact Survey of American Economic Influence in Europe since the 1880s*, 2005, Springer, 12.

<sup>196</sup> Michel Albert *Capitalisme contre capitalisme*, 1991, Paris, Éditions du Seuil, Coll. L'Histoire Immédiate. Colin Crouch, 'Models of Capitalism', 2005, 10 *New Political Economy* 4, Special Issue: *Key Debates in New Political Economy*, 439-456. Alfred A. Chandler, *Scale and Scope: The Dynamics of Industrial Capitalism*, 1994, Harvard University Press. David J. Teece, 'Dynamics of Industrial Capitalism: Perspectives on Alfred Chandler's Scale and Scope', Mar. 1993, 31 *Journal of Economic Literature* 1, 199-225, 200.

<sup>197</sup> Harm G. Schröter, *Americanization of the European Economy: A Compact Survey of American Economic Influence in Europe since the 1880s*, 2005, Springer, 12.

focused on building and strengthening national cohesion and social solidarity. In this context, Japan can be identified as a developmental model, while Germany may rate as a consensus economy.<sup>198</sup>

Beside these historical evaluations, the LME and CME models have more generally been defined as a set of institutions that either regulate or constrain market interactions so as to preserve, or to reach, a sufficient degree of equilibrium.

While the LME model is identified with neo-liberal policies, the CME model is characterised by the presence of social and political institutions engaged directly with the shaping mechanisms of economic actions.<sup>199</sup> In liberal market economies (LME), firms that aim to be as efficient as possible have to rely on market means and to modify their economic strategies in conformity with market trends. For instance, as will be exemplified in the next sections, regulatory regimes, such as the US, have been historically more tolerant of mergers and acquisitions; by the logic of this approach, if a firm is not competitive enough, it simply has to be absorbed by another one in order to promote efficiency and, along with it, social welfare.<sup>200</sup> By contrast, in coordinated market economies (CME), firms resolve market problems through strategic interactions, which non-market institutions, such as the apparatus of the state, normally support. In other words, public institutions play a pivotal role in helping the regulation of the market and in leading economic transactions. In these economies, competition, general

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<sup>198</sup> Wolfgang Streeck and Kozo Yamamura, 'Introduction: Convergence or Diversity? Stability and Change in German and Japanese Capitalism' in Kozo Yamamura and Wolfgang Streeck (eds.), *The End of Diversity? Prospects for German and Japanese Capitalism*, 2003, Ithaca and London, Cornell University Press, 1-50, 2. For more information regarding the evolution of the German model see: Sigurt Vitols, 'Globalization: A Fundamental Challenge to the German Model', in Richard Stubbs and Geoffrey R.D. Underhill (eds.), *Political Economy and the Changing Global Order*, 2000, Oxford University Press, Chapter 31, 373-381. See also Wlater Hatch, 'Regionalization Trumps Globalization: Japanese Production Networks in Asia' in Richard Stubbs and Geoffrey R.D. Underhill (eds.), *Political Economy and the Changing Global Order*, 2000, Oxford University Press, Chapter 32, 382-391.

<sup>199</sup> Colin Crouch, 'Models of Capitalism', 2005, 10 *New Political Economy*, Special Issue: *Key Debates in New Political Economy*, 439-456, 441.

<sup>200</sup> Gregory Jackson, Hideaki Miyajima, 'Varieties of capitalism, varieties of markets: mergers and acquisitions in Japan, Germany, France, the UK and USA', 2007, Discussion paper 07 E054, *Research Institute of Economy, Trade and Industry (RIETI)*.

economic policies and institutions are not only dictated by considerations of pure efficiency, but also by such non-market, but still very much economic, indicators as general welfare.<sup>201</sup> In Germany, and more broadly in Europe, the term ‘welfare’ is often conceptualised as the achievement of individual freedom from market power through a fair access to basic resources. Differently, in Japan, the concept of welfare entails the necessity of the nation to safeguard national enterprises from competitive outsiders that would damage local businesses and generate negative externalities for the society as a whole.

Scholars engaged with sociological, political and economic disciplines have been analysing these typological constructs of capitalism in order to understand how they come to create structural frameworks that perpetuate the difference between them.<sup>202</sup> The kind of analysis advanced by Hall and Soskice as well as by Chandler makes specific reference to the role of firms and private enterprises in the construction of specific capitalistic structures. Chandler, in his analysis of market development from 1850 to 1970, concludes that firms and markets, by evolving together, shape industrial outcomes and frame capitalistic prototypes of modern industrial economy. According to Schröter, Chandler’s analysis demonstrates ‘how profoundly business systems influenced the development of the society and vice versa’.<sup>203</sup> In other words, ‘institutional structure follows firm strategy’.<sup>204</sup> In the same vein, Crouch and Streeck maintain that globalisation may produce an international arena made up of capital regimes that will not vary according to national policies, but rather according to market and private

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<sup>201</sup> Peter A. Hall, and David Soskice, *Varieties of Capitalism, The institutional Foundations of Comparative Advantage*, 2001, Oxford, Oxford University Press, 21-33.

<sup>202</sup> Gerhard Lehbruch, ‘The Institutional Embedding of Market Economies: The German ‘Model’ and its Impact on Japan’, in Wolfgang Streeck, Kōzō Yamamura (eds.), *The origins of nonliberal capitalism: Germany and Japan in comparison*, 2001, Cornell University Press, Chapter 2, 39-93, 40.

<sup>203</sup> Harm G Schröter, *Americanization of the European Economy: A Compact Survey of American Economic Influence in Europe since the 1880s*, 2005, Springer, 12.

<sup>204</sup> Peter A. Hall, and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, 2001, Oxford University Press, 15.

necessities.<sup>205</sup> However, Hall and Soskice observe that it is ‘unrealistic to regard the overarching institutional structures of the political economy [...] as constructs created or controlled by a particular firm. Because they are collective institutions, a single firm cannot create them; and because they have multifarious effects, it may be difficult for a group of firms to agree on them’.<sup>206</sup> Following Calvert, Hall and Soskice maintain that governments play a very important role in coordinating firms’ desires, necessities, and interests within a common supra-structure.<sup>207</sup> Companies are expected to construct strategies using the advantages offered by just such supra-structures. In short, the institutional arrangements of each country are not under the control of firms (even though they can be inspired by them), but are the result of state regulatory actions.<sup>208</sup>

Similarly, Streeck observes that the state plays a fundamental role in enforcing the institutions that, beholden to a specific theoretical frame of reference, shape a distinctive model of capitalism.<sup>209</sup> The approach developed by Streeck is easily applicable to the kind of research conducted here. This is because the analysis of antitrust institutions deals with the kind of decision-making process conducted by states in their attempt to act in accordance with a shared theoretical frame of reference and to enforce policies that respond to particular market problems or conditions.

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<sup>205</sup> Colin Crouch and Wolfgang Streeck, ‘Introduction: The future of Capitalist Diversity’ in Colin Crouch and Wolfgang Streeck (eds.), *Political Economy of Modern Capitalism: Mapping Convergence and Diversity*, 1997, Sage Publications, 1-18, 16.

<sup>206</sup> Peter A. Hall and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, 2001, Oxford University Press, 15.

<sup>207</sup> Randall A. Calvert, ‘The Rational Choice Theory of Social Institutions: Cooperation, Coordination, and Communication’ in Jeffrey S. Banks, Eric Alan Hanushek (eds.), *Modern Political Economy: Old Topics, New Directions*, 1995, New York, Cambridge University Press, 216-67. Quoted also in Peter A. Hall, and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, 2001, Oxford University Press, 15.

<sup>208</sup> Peter A. Hall, and David Soskice, *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, 2001, Oxford University Press, 15.

<sup>209</sup> Wolfgang Streeck, ‘Introduction: Explorations into the Origins of Nonliberal Capitalism in Germany and Japan’ in Wolfgang Streeck and Kozo Yamamura (eds.), *The Origins of Nonliberal Capitalism: Germany and Japan in Comparison*, 2002, Cornell University Press, 37-38. Quoted also in Chris Howell, ‘Varieties of Capitalism and Then There Was One?’, October 2003, 36 *Comparative Politics* 1, 103-124, 110.

By pursuing this theoretical line of enquiry, it is possible to maintain that the US, Europe and Japan have been characterised by a distinctive set of institutions developed to face market issues in distinctive ways. In this respect, each of those states has adopted a model of capitalism in conformity to the variety of antitrust framework to which the country subscribes. However, since antitrust regulations have first been adopted by the US, and only later enforced in Europe and Japan after the Allies' intervention in the post-World-War-II era, it is hard to deny that the foundations of antitrust regulation in those countries have been at the very least influenced by the US.

Because of the heterogeneity of its membership, Europe cannot be identified as a cooperative capitalism *in toto*. Nevertheless, it is often thought of as a conservative 'continental' model, in no small part comparable to the German system. Generally, this is applicable in the antitrust context and also in the way in which market and welfare are regulated.<sup>210</sup> In other words, the general European competition framework can be described as a cooperative capital structure of German origins, where the state mediates between the necessity of maintaining economic freedom and that of safeguarding citizen welfare.

Although the Japanese model is to some extent akin to the German one, the influence of US antitrust culture on the one hand and Confucian traditions on the other make it a sort of hybrid. Generally, Tokyo attributes a moral value to competition and it tends to enforce it more by fostering internal rivalry than by merely opening the market to external investments.

Every model of antitrust is embedded in a specific model of capitalism, and its evolution goes in line with the general development of capitalistic practices. However, while it is clear that antitrust models contribute to typifying national varieties of

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<sup>210</sup> Gøsta Esping Andersen, *The Three Worlds of Welfare Capitalism*, 1990, Cambridge, Polity press. Colin Crouch, 'Models of Capitalism', 2005, 10 *New Political Economy* 4, Special Issue: *Key Debates in New Political Economy*, 439-456, 446-7.

capitalism, it is less clear what kind of ideas influenced them in particular. Hence, the following sections will address the economic theories that have helped to shape national antitrust frameworks.

#### AMERICAN COMPETITION POLICY AND ANTITRUST

The US is the country where all the major contributions to the theorisation of antitrust were first put forth and applied. The development of antitrust policy dates back to July 2, 1890 when President Benjamin Harrison signed Bill S. 1, which later became known as the Sherman Act, the first antitrust law applied in the American territory.<sup>211</sup> Even though the Canadian antitrust law, namely the Canada's Combines Investigation Act, was promulgated before the Sherman Act, it was less rigorous and never quite received the same degree of public attention.

Initially, the decision to address trusts through an appropriate regulation was very controversial, hard to justify and strongly resisted. Indeed, in light of the liberal environment where American companies used to operate, the Sherman Act raised the spectre of a condensed form of state interventionism over the market.

The debate on whether antitrust should regulate competition was finally settled once it became obvious that in order to protect the efficiency of the American market it was necessary to fix the boundaries of companies' freedom and to avoid any concentration of economic power that could negatively affect individual economic opportunities and consumer welfare.

By the middle of the twentieth century, antitrust regulation started to be accepted as the 'American religion', the 'Magna Carta of Free Enterprise', or the 'Bill of Rights' that would preserve – not limit – the possibilities of economic initiative.<sup>212</sup>

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<sup>211</sup> Robert H. Boork, *The Antitrust Paradox, A Policy at War with Itself*, 1978, The Free Press, 19.

<sup>212</sup> Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Political Change*, 1991, University of North Carolina Press, 1. Andrew Shonfield, *Modern Capitalism*, 1994,

As soon as antitrust became widely accepted, a political, economic and juridical debate on how deeply antitrust should regulate the market began to develop. From that moment, American policymakers had to learn how to balance the necessity to maintain freedom in the market with the need for regulation. The advent of economic crises, namely the Great Depression, the oil crises and the current credit crunch, caused several shifts in the enforcement and application of competition law and policy. In this respect, the promotion and implementation of different theoretical approaches by the American government over the course of history can be interpreted as an oscillating pendulum. That is because American perspectives on how antitrust is to be interpreted and adopted have repeatedly changed in attempts to safeguard competitiveness and tackle economic downturns.<sup>213</sup>

Among the various causes of the three economic crises, it is necessary to include the malfunctioning of particular antitrust policies and the symptomatic failure of the theoretical approaches of reference. In this context, the U.S. government has been trying to intervene in the market through a new set of antitrust institutions in an attempt to change the way business activities are conducted and, therefore, to correct the deficiencies of the system.

This was not the only cause of the three economic downturns; the failures of distinct antitrust approaches and institutions can be linked to the broader inefficiency of the economic system as a whole. In addition, those shifts in the application or interpretation of antitrust policy paralleled shifts in many other policy areas.<sup>214</sup> For

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London, W. Pickering, 329. Alan D. Neale and Daniel. G. Goyder, *The antitrust laws of the United States of America: A study of competition enforced by law*, 1980, Cambridge and New York, Cambridge University Press, 439-74.

<sup>213</sup> William E. Kovacic, 'The Modern Evolution of U.S. Competition Policy Enforcement Norms', 2003-2004, 71 *Antitrust Law Journal*, 377-478. William E. Kovacic, Shapiro Carl 'Antitrust Policy: A Century of Economic and Legal Thinking', February 1999, *Competition Policy Centre, Institute of Business and Economic Research, UC Berkeley*.

<sup>214</sup> Marc Allen Eisner, *Antitrust and the Triumph of Economics: Institutions, Expertise, and Political Change*, 1991, University of North Carolina Press, 4-5.

instance, the particular antitrust institutions applied after the Great Depression by Thurman Arnold were inspired by a more Harvard-oriented theoretical approach. Yet, this theoretical approach can be incorporated into a broader interpretation of market regulation that finds affinities in the Keynesian and Fordist models. Similarly, the Chicago theories implemented in the 1980s by Reagan through appropriate institutional arrangements reflected a more general neo-liberal system.

Hence, in order to appreciate the role of the different antitrust institutional frameworks before and after the crises of the 1930s, the 1970s and of the present years, it is important to conceive every alteration of antitrust institutions as a product of alterations of the theoretical frames of reference.<sup>215</sup>

#### *Anglo-American Perspectives on Competition*

The outbreak of the Great Depression in the early 1930s inevitably questioned the faith in the ability of the neoclassical perfect-competition model to provide macroeconomic stability and equity. The growth of large corporations, which became predominant in Western markets but contrasted the perfectly competitive and entrepreneurial firms described in the neoclassical model, only reinforced those doubts. In fact, the identification of industrial concentrations and cartels as one of the causes of the recession, as well as of the rise of fascist regimes, led academic researchers to explore new economic models in search of effective antitrust policies that could offset the under-consumption and recessionary trends of the late 1930s.<sup>216</sup>

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<sup>215</sup> Nicola Giocoli, 'Competition vs. property rights: American antitrust law, the Freiburg School and the early years of European competition policy', 2009, 5 *Journal of Competition Law & Economics* 4, 747-786, 750. Harry First, 'Antitrust's Goals: Theories of Antitrust in the United States and Japan' in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 10, 175-6. Hubert Buch-Hanse1 and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy', February 2010, 17 *Review of International Political Economy* 1, 20-44.

<sup>216</sup> Robert Bell 'Professional values and Organizational decision-making', May 1985, *Administration and Society* 17, 21-60, 21-22.

These new economic models emerged out of marginalist economic theory. By drawing attention to the behaviour of agents in the market, marginalism proved to be more receptive of the new economic necessities than the Smithian theoretical tradition. The classical approach, while largely coherent and well structured, was poorly applicable to the reality of the time because it was mainly based on an economic landscape featuring actors as small enterprises with low initial investment and little product differentiation<sup>217</sup>.

Marginalism explicitly questioned the effectiveness of *laissez faire* in favour of its own theory of competition.<sup>218</sup> Building on the neoclassical economic approach, scholars like Alfred Marshall and his student Joan Robinson began to develop new competition models based on the idea that markets can reach an equilibrium where prices are above the competitive level and competition can be constrained by entry barriers.

According to Marshall, when demand is low, concerns of spoiling the market can result in a scenario where firms do not cut prices. By not reducing the level of prices, companies can eventually experience growth in the long term and enjoy economies of scale. Once their profits start to rise, the internal economies of firms would then lower average costs of production and prices would decrease, benefiting consumers. Marshall believed that by growing strong, a firm could ultimately establish a monopoly, but that this condition would not last. He maintained that a firm is like a family; while the father invests time and energy to grow his business, his children, spoiled by the condition of welfare they have become accustomed to, do not work to develop it further and so the company loses market power. To overcome the inaccuracies in Marshall's model, and on the back of previous studies conducted by the Italian jurist P. Sraffa and by R.F. Khan, Joan Robinson introduced in 1933 the concept of imperfect competition. This challenged the notion of pure competition and affirmed the existence of market

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<sup>217</sup> Herbert Hovenkamp 'The Neoclassical Crisis in U.S. Competition Policy, 1890-1960', September 2008, *From Selected Works of Herbert Hovenkamp, University of Iowa*, 1-53, 5.

<sup>218</sup> Herbert Hovenkamp 'The Neoclassical Crisis in U.S. Competition Policy, 1890-1960', September 2008, *From Selected Works of Herbert Hovenkamp, University of Iowa*, 1-53, 21.

imperfections.<sup>219</sup> In her *Economics of Imperfect Competition*, Joan Robinson argued that, unlike neoclassical economic thought, a marginalist analysis could demonstrate how perfect competition is not the norm and monopoly is not an exception. On the contrary, ‘it is more proper to set out the analysis of monopoly, treating perfect competition as a special case.’<sup>220</sup>

Robinson’s work was the first methodical application of marginalist approach to product-differentiated markets.<sup>221</sup> In her view, both perfect and imperfect competition models are characterised by an open market where there are no barriers to entry or exit. However, contrary to perfect competition, the imperfect competition model allows buyers and sellers to deal with highly differentiated products so that they can exert a certain level of discretion over prices. In other words, because companies produce slightly differentiated goods, they can also decide the price of each commodity. This discretion allows firms to charge higher prices without losing competitiveness, as in the case of the perfect competition model. Indeed, those firms may opt to sell fewer products while charging marginally higher prices or vice versa; the uniqueness of their goods allows them to stay in the market and to avoid head-to-head competition.<sup>222</sup> Robinson claimed that corporations, in virtue of this kind of functional differentiation, could only maximise their interests by subtracting wealth from those who could not differentiate their output, notably the labour force. For that reason, soon after the publication of her book, she became one of the foremost followers of Keynes.

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<sup>219</sup> See: Edward Chamberlin, *A Theory of Monopolistic Competition, a Re-orientation of the Theory of Value*, 1960, Harvard University Press. Piero Sraffa, ‘The Laws of Returns under Competitive Conditions’, 1936, 144 *The Economics Journal*, XXXVI, 535-550. Joan Robinson, *The Economics of Imperfect Competition*, 1969, Macmillan, St. Martin Press, Second Edition, XIII-XVI.

<sup>220</sup> Joan Robinson, *The Economics of Imperfect Competition*, 1969, MacMillan St. Martin’s Press, Second Edition, 307, quoted in Herbert Hovenkamp ‘The Neoclassical Crisis in U.S. Competition Policy, 1890-1960’, September 2008, *From Selected Works of Herbert Hovenkamp*, University of Iowa, 1-53, 3.

<sup>221</sup> Joan Robinson, *The Economics of Imperfect Competition*, 1969, MacMillan St. Martin’s Press, Second Edition.

<sup>222</sup> Joseph A. Schumpeter and A. J. Nichol, ‘Robinson’s Economics of Imperfect Competition’, 1934, 42 *Journal of Political Economy* 2, 249, 249-250.

A few years later, Edward Chamberlin developed a monopolistic competition model. This was based on a synthesis of monopolistic and competitive theories and on the idea that large corporations that enjoy differentiated products, excess capacity and considerably fixed investment costs in specific equipment may end up dominating the market.<sup>223</sup> Chamberlin maintained that the idea that competition cannot entail monopolies was wrong, as markets are normally constituted by a combination of the two. From this perspective, the model of imperfect competition appeared exceptionally realistic, because situations of perfect competition subsisted only in markets where a number of firms produce an almost identical commodity.<sup>224</sup> However, according to a marginalist approach, perfect competition – or the condition where prices are driven by marginal costs and where goods are produced at the most efficient rate possible – was not a normal effect of the market; it was an exceptional one, which could only be exerted through government intervention.

Chamberlin's monopolistic competition model soon became one of the most elegant approaches of the time. By incorporating functional product differentiation into competitive economic models, he maintained that ruinous competition could affect only those industries that, unable to differentiate their merchandises, could only compete on price level. Monopolistic competition allowed firms to differentiate their outputs, charge higher prices and sell fewer wares. However, in the face of stiff competition, those firms were compelled to invest in the differentiation process because other companies would eventually duplicate what they were producing and sell the same manufactured articles at a lower price; this would limit firms' 'monopolies' over their own goods.

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<sup>223</sup> See Edward Chamberlin, *A Theory of Monopolistic Competition, a Re-orientation of the Theory of Value*, 1960, Harvard University Press, 3. The demand for each good is not perfectly elastic. Monopolistic firms command brand loyalty and therefore are not price-takers. Under this form of competition, total product equals the sum of marginal cost and marginal revenue. Frank Fetter, 'Planning for Totalitarian Monopoly', Feb. 1937, 45 *The Journal of Political Economy* 1, 95-110, 95.

<sup>224</sup> Sigrid Stroux, *US and EC Oligopoly Control*, 2004, 14 International Competition Law Series, Kluwer Law International, 8.

These two models, along with the broader marginalist approach, apart from strongly challenging the classic idea of perfect competition<sup>225</sup>, became of fundamental importance for the development of the Harvard school of thought.<sup>226</sup> From the vantage point of a more empirical perspective, this school refused to take into consideration the perfect competition model because of its inapplicability to practical reality.<sup>227</sup>

The Harvard School gained ground in the aftermath of the Great Depression and World War II, when Keynesian economic theories started to be used to rebuild macroeconomic assets and Fordist principles began to be applied across the productive system.

#### *The Great Depression and the Rise of the Harvard School*

According to Kovacic, the theoretical dispute animating the intellectual basis of US competition policy has revolved for many years, or at least until the 1970s, around two schools of thought: the Chicago and the Harvard. While the Chicago School started to influence more persistently US antitrust policy during the 1980s, the Harvard School inspired the antitrust trends that dominated the economic thinking toward competition from the 1940s through the 1970s.<sup>228</sup>

Since the 1930s, the Harvard School, specifically Edward S. Mason, developed a 'structuralist approach of competition analysis' based on the idea that markets may fail to be efficient because the behaviour of sellers and their performances are not persistently rational. As early as 1937, Mason claimed that monopolies are a structural and not a

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<sup>225</sup> See: Arthur Burns, *The Decline of Competition, A Study of the Evolution of American Industry*, 1936, Mc Graw- Hill Book Company, Inc, 24-25. (He advocates national regulation to control the rise of what he saw as inevitable monopoly).

<sup>226</sup> Oliver Budzinski 'Monoculture versus diversity in competition economics' 2008, 32, *Cambridge Journal of Economics*, 295–324, 298.

<sup>227</sup> Katalin Judit Cseres, *Competition law and consumer protection*, 2005, Kluwer Law International, 43.

<sup>228</sup> William E. Kovacic, 'The Intellectual DNA of Modern U.S. Competition Law for Dominant Firm Conduct: The Chicago/ Harvard Double Helix' 2007, 1 *Columbia Business Law Review*, 1-80, 34.

behavioural problem of market economy; indeed, since pure competition rarely exists, the majority of market has *de facto* monopolistic elements: ‘Such markets, which may be said to be purely competitive in the sense of being completely devoid of any element of control over price, are comparatively rare. In most markets some sellers or buyers (or both) exercise some degree of control’.<sup>229</sup>

Because such control is perfectly compatible with the existence of some degree of competition, it is the responsibility of public policy not to eliminate monopolies, but to differentiate those market conditions and business practices that maximise public interests from those that do not.<sup>230</sup> Building on this, Bain added that competition might not be workable in concentrated oligopolistic industries.<sup>231</sup> Consequently, together with Mason, he developed a model that formally attempts to relate industrial structures to their performance, i.e. their degree of competitiveness. The powerful evaluation tool that resulted from their research is known today as the ‘structure-conduct performance’ (SCP) paradigm. According to Harvard economists, the number of sellers and the size of their activities are what make up the structure of any market. The latter component is influenced by such factors as the existence of mergers and acquisitions, product differentiation, and conditions of entry into the market. The behaviour of sellers can be either pro- or anti-competitive and their consequent performance has profound effects on the distribution of goods, on the level of efficiency in terms of costs and technological progress, and on consumer welfare. However, as Hovenkamp explains:

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<sup>229</sup> Edward S. Mason, ‘Monopoly in Law and Economics’, 1937-1938, 47 *The Yale Law Journal*, 34-49, 46.

<sup>230</sup> Edward S. Mason, ‘Monopoly in Law and Economics’, 1937-1938, 47 *The Yale Law Journal*, 34-49.

<sup>231</sup> Quoting Bain: ‘*I would suggest the following general signs of non-workable competition in oligopoly: a profit rate averaging quasi-perpetually well above an established normal return on investment (or falling persistently below it); 2 scale of many firms seriously outside the optimal range’s considerable chronic excess capacity not justified by secular change or reasonable stand-by provision; competitive selling costs exceeding a stated proportion of total cost; persistent lag in adoption of cost-reducing technical changes or persistent suppression of product changes which would advantage buyers*’ Joe S. Bain, ‘Workable Competition in Oligopoly, Theoretical considerations and some empirical evidence’, 1950, 40 *American Economic association* 2, 35-47.

Firms in concentrated industries with high fixed costs could not avoid comparing their prices with those of rivals and determining whether to match or undercut them, or they could not avoid deciding whether a new product differentiation in a market was necessary to their own success or how others might meet it. This conduct was in turn thought to dictate performance. Given an expression in which structure entails conduct and conduct entails performance, conduct itself dropped out as a variable of interest. One could predict performance simply by knowing something about structure.<sup>232</sup>

According to Bain, the US market was subjected to high levels of concentration, which would never grind to a halt; on the contrary, it would tend to increase.<sup>233</sup> This phenomenon could be made worse by a flexible antitrust policy permitting mergers and acquisitions among firms. Yet, governments can re-establish competition by using regulations, laws and other institutions to avoid the emergence of such anticompetitive practices as mergers, cartels, or price agreements, which have a deleterious effect on the market.<sup>234</sup> Indeed, if competition is not perfect, public intervention represents the only way to make it workable.<sup>235</sup>

Economist J.M. Clark developed the concept of workable competition in the 1940s. In essence, he held that, since pure competition is not applicable to reality, the only effective action that policy can pursue is not to make it perfect, but to make it

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<sup>232</sup> Herbert Hovenkamp 'The Neoclassical Crisis in U.S. Competition Policy, 1890-1960', September 2008, *From Selected Works of Herbert Hovenkamp, University of Iowa*, 1-53, 35.

<sup>233</sup> Joe S. Bain, P. David Qualls, *Industrial Organization: a treatise*, 1987, Greenwich, Conn., JAI Press., 160.

<sup>234</sup> John M. Clark, 'Toward a Concept of Workable Competition', June 1940, 30 *American Economic Review* 2, 241-56.

<sup>235</sup> William S. Comanor, Robert H. Smiley, 'Monopoly and the Distribution of Wealth', 1975, 89 *Quarterly Journal of Economics* 2, 177-94. Ingo L.O. Schmidt and Jan B. Rittaler, *A critical evaluation of the Chicago School of antitrust analysis*, 1989, Dordrecht Boston, Studies in Industrial Organization, Kluwer Academic Publisher, XIV.

‘workable’.<sup>236</sup> Given that competition is not purely perfect, functional differentiation advanced ‘some of the healthiest vases of workable competition in large scale industry’.<sup>237</sup> Indeed, competition based on prices and not on products, in a market characterised by imperfect knowledge, will damage the sellers and the quality of goods.

As Vanderbilt University economist George W. Stocking argued, ‘Pure competition is not generally attainable’ and ‘pure monopoly rarely exists’.<sup>238</sup> In this sense, insofar as perfect competition is not applicable to reality, governments should intervene through the law in order to adjust imperfect competition and eliminate anticompetitive forms of conduct, which have a negative impact on economic trends.<sup>239</sup> This follows the theory that if it is not possible to achieve the ideal result, it is better to try to reach the second-best solution by using the law to discipline market operations.<sup>240</sup> The ‘workable competition’ model supported the development of American antitrust policy as a set of rules that should preserve and serve competition in the market.<sup>241</sup>

As illustrated in the following chapter, the Harvard School developed a much stronger competition approach in the 1940-50s, which inspired US antitrust regulation until the beginning of the Oil crises of the 1970s. Especially in merger policy matters, the SCP model led the US government and the courts to adopt a stricter approach. Examples of Harvard’s influence over antitrust policy-making are, first, the 1950 Celler-Kefauver Act, which amended section 7 of the Clayton Act and extended the application

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<sup>236</sup> Herbert Hovenkamp ‘The Neoclassical Crisis in U.S. Competition Policy, 1890-1960’, September 2008, *From Selected Works of Herbert Hovenkamp, University of Iowa*, 1-53, 7. ([http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=herbert\\_hovenkamp](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=herbert_hovenkamp))

<sup>237</sup> John M. Clark, ‘Toward a Concept of Workable Competition’, June 1940, 30 *American Economic Review* 2, 241-56 quoted in Joe S. Bain ‘Workable Competition in Oligopoly, Theoretical considerations and some empirical evidence’, 1950, 40 *American Economic association* 2, 35-47.

<sup>238</sup> George W. Stocking, *Workable Competition and Antitrust Policy*, 1961, Nashville, TN, 190.

<sup>239</sup> John M. Clark, ‘Toward a Concept of Workable Competition’, June 1940, 30 *American Economic Review* 2, 241-56.

<sup>240</sup> Richard G. Lipsey and Kelvin Lancaster, ‘The General Theory of Second Best’, 1956, 24 *The Review of Economic Studies* 1, 11-32.

<sup>241</sup> Herbert Hovenkamp ‘The Neoclassical Crisis in U.S. Competition Policy, 1890-1960’, September 2008, *From Selected Works of Herbert Hovenkamp, University of Iowa*, 1-53, 7. ([http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=herbert\\_hovenkamp](http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=herbert_hovenkamp))

of merger controls over cases of market dominance, and, second, the 1968 Merger guidelines approved when Harvard-trained economist Donald F. Turner became the head of the Antitrust Division of the Justice Department.<sup>242</sup>

The success of the Harvard School model can also be linked to a broader wave of new economic thinking, such as Keynesianism and Fordism, which was generally oriented towards the development of general welfare. In other words, while marginalism, and later the Harvard school of economic theory, inspired the regulation of competition in the international market towards a more welfare oriented approach, Keynesianism and Fordism dictated policies pertaining to production and social wellbeing. This theoretical framework led to the development of a post-war international liberal economic and productive system based on government intervention against market dysfunction. This order, established during the 1944 Bretton Woods Conference, is usually identified as the Golden Age of capitalism, because it supported the development of the international economy by fostering the diffusion of shared liberal values and by promoting, in the majority of industrialised capitalist countries, especially in Europe and Japan, the development of institutions modelled after the American tradition.<sup>243</sup>

#### *Neo-liberalism, Chicago School and the Oil Crises*

The oil crises of the 1970s underlined the ineffectiveness of the liberal model as applied during the Golden Age. Indeed, in addition to the economic stagnation caused by oil shortages, the US also had to face the kind of competition from Europe and Japan that,

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<sup>242</sup> Nicola Giocoli, 'Competition vs. property rights: American antitrust law, the Freiburg School and the early years of European competition policy', 2009, 5 *Journal of Competition Law & Economics* 4, 747-786, 758.

<sup>243</sup> David M. Kotz, 'The State, 'Globalization and Phases of Capitalist Development', in Albritton R., Makoto I., Westra R. and Zuege A (eds.), *Phases of Capitalist Development: Booms, Crises and Globalizations*, 2001, Palgrave, 93-109.

since the 1950s, had been rising ‘from the ashes of World War II’.<sup>244</sup> In order to face the economic downturn, Washington appraised a number of different theoretical responses and policies. These included proposals for increasing the level of state intervention in the market or for developing national economic planning, guarantying full employment and protecting investors and consumers.<sup>245</sup> However, despite those ‘state-centred’ ideas, by the early 1980s the pressure exerted by major business leaders and lobbying groups representing all segments of business capital was accommodated by the rise of neo-liberal theories that advocated a greater reliance on the market allocation of resources and the reduction of state interventionism in the economy.

Neo-liberalism can be generally defined as a model, or ‘paradigm’, built upon classical and neoclassical liberal economic theories. According to Foucault, neo-liberalism was primarily driven by the devolution of state power in favour of self-regulating free markets, and it was taken as the model of ideal government.<sup>246</sup> In the US, this economic approach was translated into political reforms that emphasised the importance of individual freedom of choice and allowed a transnational circulation of capital.<sup>247</sup>

The first methodical expression of neo-liberal economic ideas dates back to the Mont Pelerin Society. The Mont Pelerin Society was founded in 1947 under the aegis of the economist Friedrich August von Hayek, an influential member of the early 20th-century Austrian School of Economics. In contrast to Keynesian ideas of state interventionism in the economy, the Society believed in self-regulation and in a market-

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<sup>244</sup> Stephen Gill, *American Hegemony and the Trilateral Commission*, 1990, Cambridge Studies in International Relations, 60.

<sup>245</sup> David R. Cickel, ‘The Antitrust Division’s Adoption of a Chicago School Economic Policy Calls for some ReOrganization: But is the Division’s New Policy Here to Stay?’, 1983, *20 House L. Rev.*, 1083-1126, 1084.

<sup>246</sup> Michel Foucault, ‘Governmentality’, in Graham Burchell, Colin Gordon, & Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality - With Two Lectures By And An Interview With Michel Foucault*, 1991, Harvester Wheatsheaf, 87-104.

<sup>247</sup> Henk Overbeek and Kees van der Pijl, ‘Restructuring Capital and Restructuring Hegemony: Neo-liberalism and the Unmaking of the Post-War Order’, in Henk Overbeek (ed.), *Restructuring Hegemony in the Global Political Economy: The rise of Transnational neo-liberalism in the 1980s*, 1993, Routledge, chapter 1, 1-17.

oriented economic system driven by a 'free society'. According to Hayek, since economic freedom is as important as political liberty, government interventionism cannot be considered as a simple attempt to control material production; rather, it counts as a serious venture of despotism.

The Chicago School of Economics shared the neo-liberal principles advocated by Hayek's Mont Pelerin Society and thus supported the body of antitrust reforms adopted by Reagan in response to the crises.<sup>248</sup> Reinterpreting competition in a dynamic way, the School developed a 'behaviouralist approach' of antitrust policy inspired to the neoclassical price theory and based on the faith in the long-term efficacy of the market mechanism.<sup>249</sup> According to an economic Darwinist interpretation, developed by Stigler in his 1964 seminal article *Theory of Oligopoly*, the market is an arena where different firms compete freely, namely without any governmental or public intervention, and where only the best players survive.<sup>250</sup> In this context, the essential role of competition is to allow more efficient firms to 'take business away from the less efficient'.<sup>251</sup>

Indeed, the Chicago School, resting on the neoclassical assumptions about the rational behaviour of market participants, rejected the idea propounded by the Harvard School that economic actors do not always act rationally.<sup>252</sup> On the contrary, actions that were originally considered inefficient or anticompetitive were believed to promote, rather than harm, competition. As the Chicago School postulates the ability of markets to 'work themselves toward the competitive solution', government intervention was considered

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<sup>248</sup> Manfred B. Steger, Ravi K. Roy, *Neoliberalism: A Very Short Introduction*, 2010, Oxford University Press, 21.

<sup>249</sup> Robert H. Bork, *The Antitrust Paradox: A Policy at War with itself*, 1978, The Free Press. Sigrid Stroux, *US and EC Oligopoly Control*, 2004, 14 International Competition Law Series, Kluwer Law International, 8.

<sup>250</sup> George Stigler, 'Theory of Oligopoly', 1964, *Journal of Political Economy* 72, 44, Ingo L. O. Schmidt, Jon B. Rittaler, *A Critical Evaluation of the Chicago School of Antitrust Analysis*, 1989, Studies in Industrial Organization, Kluwer Academic Publisher, XIII.

<sup>251</sup> Robert H. Bork, Ward S. Bowman, 'The Goals of antitrust: A Dialogue on Policy', March 1965, 65 *Columbia Law Review* 3, 363-760.

<sup>252</sup> Richard A. Posner, 'The Chicago School of Antitrust Analysis', 1979, 129, *University of Pennsylvania Law Review*, 925, 930.

hardly, if ever, effective.<sup>253</sup> State intervention could be tolerated only in case of cartels fixing prices, mergers creating monopolies, and dominant firms pricing predatorily. All other practices, such as vertical agreements and price discriminations, which would not damage consumer welfare, were to be permitted.

As a result, the best antitrust policy is the one that guarantees and does not negatively affect the effective possibility to compete. Market has in fact the capability to adjust itself since competition among companies can undermine inefficient economic behaviour.

As one of the prominent exponents of the Chicago School, Robert Bork, argued: the principal meaning of competition law and its original intention was consumer protection, therefore ‘consumer-oriented law must employ basic economic theory to judge which market structures and practices are harmful and which beneficial’.<sup>254</sup> However, the Chicago School definition of consumer welfare deals with economic efficiency, not with wealth transfers from producers to consumers. Even when anticompetitive arrangements as mergers or acquisition decrease general utilities, they are still considered convenient and legal as long as they promote economic efficiency.<sup>255</sup>

The Chicago school of antitrust analysis is interpreted by many economists as one of the most structured, elegant and coherent theory of antitrust regulation.<sup>256</sup> Its

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<sup>253</sup> Herbert Hovenkamp, ‘Post-Chicago Antitrust: A reviewed and Critique’, 2001, *Columbia Business Law Review*, 257-338, 265.

<sup>254</sup> Katalin Judit Cseres, *Competition law and consumer protection*, 2005, Kluwer Law International, 48. Robert H. Bork, *The Antitrust Paradox: A Policy at War with itself*, 1978, The Free Press, 7.

<sup>255</sup> Lloyd Constantine, ‘An Antitrust Enforcers Control the New Economics’, August 6-9 1989, 58 *Antitrust Law Journal* 2, 661-668.

<sup>256</sup> Herbert Hovenkamp, ‘Post-Chicago Antitrust: A reviewed and Critique’, 2001, *Columbia Business Law Review*, 257-338. Katalin Judit Cseres, *Competition law and consumer protection*, 2005, Kluwer Law International, 48. Robert H. Bork, *The Antitrust Paradox: A Policy at War with itself*, 1978, The Free Press, 7. Herbert Hovenkamp, ‘Post-Chicago Antitrust: A reviewed and Critique’, 2001, *Columbia Business Law Review*, 257-338. Herbert Hovenkamp, *Federal Antitrust Policy. The Law of Competition and its Practices*, 2005, 3th Edition, Gale Cengage Learning. Frank H. Easterbrook, ‘Ignorance and Antitrust’, in T. Jorde & D. Teece (eds.), 1992, *Antitrust Innovation and Competitiveness* 119. Frank H. Easterbrook, ‘The Limits of Antitrust’, August 1984, 63 *Texas Law Review* 1, 1-40, 2. William Landes, ‘Optimal Sanctions for Antitrust Violations’, 1983, 50 *University Chicago Law Review*, 652-58. Edward Kitch, ‘The Fire of Truth: A Remembrance of Law and Economics at Chicago 1932-70’, 1983, 26 *Journal of Law & Economics*, 163-234. Harold Demsetz, ‘Barriers to Entry’, Mar. 1982, 72

optimism and pro-market confidence inspired the main reforms applied by President Reagan in antitrust policy and became the theoretical base for a neo-liberal stage of capitalism that favoured the rapid development of big corporations.<sup>257</sup> For instance, in 1986 the US government enforced the Merger Modernization Act, which, by amending section 7 of the Clayton Act – the one previously revised by the 1950 Celler-Kefauver Act – allowed corporations to easily reorganise their business activities through mergers and acquisition.<sup>258</sup>

The crisis of the 1970s caused the collapse of the Keynesian economic system of the Golden Age and favoured the development of new capitalistic institutions that, from the beginning of the 1980s, would become intellectually and ideologically dominant in leading the new neo-liberal stage of capitalism.<sup>259</sup> The Chicago institutional framework represented not only the basis upon which the US could overcome the crisis, but also the structure through which the rest of the world started to regulate the market in order to ‘re-establish the conditions for capital accumulation’.<sup>260</sup>

### *The Post-Chicago School*

The Chicago School antitrust theories dominated American antitrust regulations and international economic working rules for almost three decades. This doctrine was so

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*American Economic Review* 1, 47-57. Lloyd Constantine, ‘An Antitrust Enforcer Confronts the New Economics’, 1989-1990, 58 *Antitrust Law Journal* 3, 661-70.

<sup>257</sup> Mike Davis, ‘Reagonomics Magical Mystery Tour’, 1985, 149 *New Left Review* 47, 45-65. William K. Carroll, ‘Tracking the Transnational capitalist class: the view from on high’, in Yildiz Atasoy (ed.), *Hegemonic Transitions, the State and Crisis in Neoliberal Capitalism*, 2009, Routledge, 43-64. Stephen Hymer, *The Multinational Corporation: A radical Approach*, 1979, Cambridge University Press, 262.

<sup>258</sup> Alan A. Fisher; Frederick I. Johnson; Robert H. Lande, ‘Price Effects of Horizontal Mergers’, July 1989, 77 *California Law Review* 4, 777-827; Walter Adams, James W. Brock, ‘Reagonomics and the transmogrification of merger policy’, Summer 1988, 33 *The Antitrust Bulletin*, 309-59.

<sup>259</sup> James Fulcher, *Capitalism: A Very Short Introduction*, 2004, Oxford University Press, 5.

<sup>260</sup> Patrick J. Akard, ‘Corporate Mobilization and Political Power: The Transformation of U.S. Economic Policy in the 1970s’, Oct. 1992, 57 *American Sociological Review* 5, 597-615. David Harvey, *A Brief History of Neoliberalism*, 2005, Oxford University Press 2005, 19. Stephen Gill, *American Hegemony and the Trilateral Commission*, 1990, Cambridge Studies in International Relations, 88.

entrenched in the American ways of doing business that even though the Clinton administration went some way to challenge it, the Chicago approach endured until the Bush presidency, when the world economy was shaken by the outbreak of the worst financial crisis since the 1930s.

The credit crunch has been principally caused by the international spread of a mortgage crisis linked to the US housing construction sector. However, the wide-ranging permissive policy towards mergers applied in the previous years, by allowing big companies to acquire enough shares to control the financial sector, resulted in a general overturn of governmental policies and in a well spread systemic risks that led to the crisis.<sup>261</sup>

After his election in 2008, President Obama had to face a difficult economic situation. Not only did the US seem to have lost its economic power, as other countries such as China, India and Brazil were – and are – growing much faster than the West, but its neo-liberal model of capitalism, the one that had been adopted by (and that benefited) much of the rest of the world, turned out to have contributed to a deep recession in the US.

In the aftermath of the crisis, President Obama has acknowledged the necessity to enforce new antitrust institutions in order to face those market problems and the approach that he is apparently keen to use is a so-called Post-Chicago one. The Post-Chicago School can indeed represent ‘another swing to [the] antitrust ideological pendulum’ because, by having less confidence in the capacity of markets to face the ‘strategic anticompetitive behaviours’ of dominant firms, it significantly re-established the belief in the effectiveness of government intervention.<sup>262</sup>

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<sup>261</sup> Nelson D. Schwartz and Julie Creswell, *What Created this Monster?*, Mar. 23, 2008, N.Y. TIMES.

<sup>262</sup> Herbert Hovenkamp, ‘The reckoning of Post Chicago antitrust’, in Antonio Cucinotta, Roberto Pardolese, Roger Van Den Bergh (eds.), *Post-Chicago developments in antitrust law*, 2002, Edward Elgar Publishing Limited, 3.

This school of thought developed at the end of the 1970s, during the ‘height of Chicago School influence’, when some economists started to criticise the absolute efficiency of a *laissez-faire* antitrust approach and to call for a new antitrust policy.<sup>263</sup> Those academics developed a model that did not challenge or refute the Chicago-School doctrine *per se*. On the contrary, neo-liberal principles were used as a starting point for a new model that more effectively responded to market imperfections as well as mergers and other anticompetitive practices.<sup>264</sup>

While Post-Chicago scholars trusted the effectiveness of free markets, they also believed that its internal dynamics were much more complex than those conceived by a traditional Chicago-School perspective. In their view, the extreme dynamism of global commercial trends had produced more anticompetitive practices and antitrust-violation cases than tribunals and courts were able to judge upon. Thus, Post-Chicago researchers accepted the free-market assumptions of the Chicago School, but also recognised the necessity to explain competition procedures in a far more complex market environment. This led to the adoption of methodologies and research approaches based on econometrics and game theory.<sup>265</sup>

The Post-Chicago School econometrics analysis can be linked to the Harvard-School structure, conduct, and performance model because it is based on the statistical interpretation of the effects of anticompetitive practices, such as how a merger can affect prices. For instance, network theory derives from the analysis of the behaviour of

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<sup>263</sup> Harry First, ‘Antitrust’s Goals: Theories of Antitrust in the United States and Japan’ in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 10, 175-6.

<sup>264</sup> Herbert Hovenkamp, ‘Antitrust Policy After Chicago’, 1985, 84 *Michael Law Review*, 213-284. Harry First, ‘Antitrust’s Goals: Theories of Antitrust in the United States and Japan’ in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 10, 181-4.

<sup>265</sup> Harry First, ‘Antitrust’s Goals: Theories of Antitrust in the United States and Japan’ in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 10, 175.

companies operating in the technological sector. Most of the time, the production activities of those firms, which is usually very dynamic, is submitted to specific standards that are dictated by a dominant corporation. Although this process of standardisation of production can create economic benefits – indeed, final products can be interchangeable – it can also cause the exclusion of outsider competitors. Network theory can help to shed some light on whether the gains in network effects overcome the negative externalities.<sup>266</sup>

The form of game theory used in network analysis is based on the study of firms' goal-oriented strategic plans. In other words, Post-Chicago researchers analysed how firms can be expected to act and how they anticipate the behaviour of other enterprises in order to calculate the best possible choice for all the players. The game model can be cooperative and non-cooperative. In cooperative game theory models, competitors can decide to make binding agreements, which restrict their feasible strategies, but help them obtain medium gains. On the other hand, non-cooperative games theory is based on the assumption that firms cannot communicate, let alone cooperate, and therefore adopt strategies that result in a suboptimal equilibrium. This game theory approach is different from previous models because it is based on the assumption that competitors make their decisions on the basis of other players' strategies.

Even though the Post-Chicago model has been applied in a number of court trials over the past few years, many scholars found it to be inconsistent and hardly applicable to reality as it lacks a coherent and unified theoretical body.<sup>267</sup> Currently, it is

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<sup>266</sup> Harry First, 'Antitrust's Goals: Theories of Antitrust in the United States and Japan' in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 10, 175; see James W. Friedman, 'Oligopoly and the Theory of Games', 1997, North-Holland, New York; Martin Shubik, 'Game Theory in the Social Science: Concepts and Solutions', 1982, MIT Press, Cambridge. Sigrid Stroux, *US and EC Oligopoly Control*, 2004, 14 International Competition Law Series, Kluwer Law International, 13.

<sup>267</sup> See *Federal Trade Comm'n v. Staples, Inc.*, 970 F Supp 1066 (DDC 1997) quoted in Harry First, 'Antitrust's Goals: Theories of Antitrust in the United States and Japan' in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan*

probably too early to predict whether the Post-Chicago model will soon be dominating the field of US competition regulation. Yet, Christine Varney, the current head of the US Antitrust Division, has recently maintained that the actions of the Department of Justice (DOJ) were likely inspired by Thurman Arnold, who was the first to foster ‘a sustained program of antitrust enforcement on a nationwide scale’.<sup>268</sup> However, it is very unlikely that Obama will be able to enforce Harvard-oriented regulations; the Merger Guidelines adopted in 2010 are a perfect illustration of this dilemma: on the one hand, they have not consistently reformed the material but, on the other, they have introduced a more flexible interpretation of mergers.<sup>269</sup> Even so, while still based on the 1982 version, the Guidelines surely reflect an on-going trend of change in merger enforcement practices.<sup>270</sup> It may be argued that Obama is trying to promote Post-Chicago antitrust institutions based on efficiency analysis, but not on outright *laissez faire*.<sup>271</sup> This could reflect the general economic regulatory trends emerging within current neo-liberal policies.

#### EUROPE AND JAPAN: ALTERNATIVE COMPETITION THEORETICAL FRAMEWORK

Since the approval of the Sherman Act in 1890, the US has been one of the main promoters of competition policy. Even though examples of European or Japanese antitrust regulations date back to the interwar period or earlier, those countries only

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*and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 10, 185. Harry First, ‘Antitrust’s Goals: Theories of Antitrust in the United States and Japan’ in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 10, 182.

<sup>268</sup> Corwin D. Edwards, ‘Thurman Arnold and the Antitrust Law’, Sep., 1943, 48 *The Academy of Political Science, Political Science Quarterly* 3, 33. Alan Brinkley, *The End of Reform, New Deal Liberalism in Recession and War*, 1996, New York, Vintage Books Edition, 106-125.

<sup>269</sup> Daniel A. Crane, ‘Chicago, Post-Chicago, and Neo-Chicago’, 2009, 76 *University of Chicago Law Review*, 1911-33.

<sup>270</sup> Carl Shapiro, ‘The 2010 Horizontal Merger Guidelines: from Hedgehog to Fox in Forty Years’ September 10, 2010, *University of California, Berkeley - Economic Analysis & Policy Group* (<http://ssrn.com/abstract=1675210>)

<sup>271</sup> Herbert Hovenkamp, ‘The reckoning of Post Chicago antitrust’, in Antonio Cucinotta, Roberto Pardolese, Roger Van Den Bergh (eds.), *Post-Chicago developments in antitrust law*, 2002, Edward Elgar Publishing Limited, 3.

developed an appropriate competition system after World War II, when the US intervened directly and leant on them to adopt a body of regulations suitable to its own economic and political interests.

For instance, in 1957, Western European nations ratified the Treaty of Rome, whose antitrust measures resulted in a reinterpretation of the Ordoliberal principles suggested by Harvard professor Robert Bowie. Similarly, in 1947 Japan enforced an Antimonopoly Act, which was the outcome of a long negotiation between the Allied forces and the local government.

Although the US has repeatedly attempted to shape competition policy in those countries, they managed to maintain the institutional peculiarities that typify their model of capitalism. Most scholars of competition policy, such as Eleanor Fox, consider the process of antitrust harmonisation among the US, Japan and Europe as a chimera. To be sure, the process may be still on-going, and many antitrust rules are indeed similar on a textual level, but fundamental differences remain.<sup>272</sup>

The difficulty in promoting a unique international antitrust system is related to the differences of economic and juridical structures across different countries. For instance, while European states (with the exception of the UK) have generally adopted a civil law system, where the rule of law counts more than the rule of reason, the US has a common law system. This can explain why European interpretation of competition was usually not as oriented towards economic efficiency as the American one. Indeed, the Commission and the Court of Justice, in interpreting any violation of competition regulations, focused mainly on the extent to which a particular economic behaviour was

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<sup>272</sup> Eleanor Fox, 'Harmonization of Law and Procedures in a Globalized World: Why, What, and How' 1991-1992, 60 *Antitrust Law Journal*, 593-601. Spencer Weber Waller, 'The Internationalization of Antitrust Enforcement, 1997, 77 *Boston University Law Review*, 343-368, 347. H. Stephen Harris Jr., 'Competition Law and Patent Protection in Japan: A Half Century of Progress, A New Millennium of Challenge', 2002-2003, 16 *Colum J. Asian L.* 71, 74-140.

at odds with European laws, rather than how profitable it was in terms of economic performance.<sup>273</sup>

Moreover, although Japan has a constitution, its Confucian traditions influence the way the administration understands and interprets reality. For example, even though Japanese legislation envisages criminal sanctions and prosecutions in the form of fines or imprisonment, they have been barely applied in over thirty years of antitrust law enforcement. This trend can be explained by the fact that Japanese firms' fears of losing their reputation has typically led them to follow the recommendations of the Japanese Fair Trade Commission, to admit their violations, and to directly subject themselves to possible sanctions. In fact, according to Kawashima Takeyoshi, Japanese law can be compared to an heirloom samurai sword: it is to be held dear but not to be made use of.<sup>274</sup>

Apart from the juridical system *per se*, the major obstacles to antitrust standardisation are represented by culture and traditions and the way efficiency and welfare are interpreted and perceived in each country. For example, one of the aims of the European competition regulations is to develop a common market by breaking down trade barriers between European member states. This would guarantee efficiency and promote welfare. In fact, the cardinal values of European regulations are embodied not only in the principle of free movement of goods and people, but also in the strict control of *beggar-your-neighbour* policies. This is normally enforced by limiting and controlling those anticompetitive practices, such as concentrations, dominant positions and national grants, that may be detrimental to the general effectiveness of the common market. This European propensity may be linked to the influence of the German Freiburg's vision of

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<sup>273</sup> This difference is related to the different legal system in Europe and US. The rule of reason prevailing in the U.S. makes the decision of what is right or wrong dependable very much on the judge interpretation of facts and on the jury.

<sup>274</sup> Kawashima Takeyoshi, *Nihonjin no hoishiki* (Legal consciousness of the Japanese), 1967 Iwanami, 47, quoted in John O. Haley, 'Sheathing the Sword of Justice in Japan: An Essay on Law Without Sanctions', Summer 1982, 82 *Journal of Japanese Studies, Society for Japanese Studies* 2, 265-81.

economics that exalted the need to protect individual freedom from government and market despotisms. In particular, the Freiburg school has historically aimed at creating a political economic structure, which had to position itself into a sort of middle way between the pure American liberal system and the Soviet one: a model, in which the state would, at the same time, protect and enhance individual freedom in the market through the application of appropriate rules.<sup>275</sup>

Although the feeble competition tradition, which has characterised Japan prior to any US intervention in the country, the essence of Japanese antitrust policy lays in the necessity to foster efficiency and welfare by safeguarding the internal market from external pressures. Competition among companies operating in the same environment guarantees efficiency in and of itself; indeed, since losers are socially unacceptable, firms have to perform to the best of their capability. Even though the introduction of an antimonopoly law attenuated this trend, these ideas could not be completely repudiated as they stood as the basis of Japanese culture.

Thus, it is safe to argue that those competition systems are indeed different: they are products of specific cultural and political frameworks and, although they might pursue similar interests, they employ different means to reach them. Hence, before investigating the role of American antitrust theories in the construction of those competition regimes, I believe it useful to first explore the meaning of antitrust in those countries. This can only be done by analysing how welfare and efficiency were conceived

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<sup>275</sup>The accent over individual freedom implemented by the social market system can also be noticed in the propensity of the economic system to produce individuals fostering innovations and new products and not just the adaptation of existing products to new necessities as it is more common in *laissez faire* system. Probably thanks to the social market system and its coordinative structure Germany became one of the strongest European economy and also the corner stone of the European political economic system. However, since the mid-1960s, the Freiburg School influence ceased in most parts of economic policy, as the liberal and then the neo-liberal efficiency oriented discourses started to catch on Oliver Budzinski 'Monoculture versus diversity in competition economics', 2008, 32, *Cambridge Journal of Economics*, 295–324, 308. Doris Hildebrand, 'The European School in EC competition law', 2002, 25 *World Competition* 1, 3–23.

and obtained in those countries according to their local antitrust theoretical conceptualisations.

### *European Competition Policy*

European competition policy does not only have a slightly differentiated structure, as compared to the US antitrust regulatory body, but also a very different meaning. According to Gerber and others, the essence of European Competition policy lies in the necessity to foster primarily the political and economic integration of the member states in the common market.<sup>276</sup> Above all, European competition law was designed to defend the economic freedom of market players, regardless of their economic efficiency. The reasons for this stems from the necessity to prevent the aggregation of big businesses that would harm the economic performance of smaller competitors and ultimately reduce market integration.<sup>277</sup> For this reason, European competition policy is the sole policy area where the Commission – a central bureaucratic organ that is not influenced by the national interests of member states – exerts a preponderant power.

The history behind the European competition policy as well as its theoretical background dates back to the Ordoliberal movement. Originally, Ordoliberalism encompassed many different schools of thought that were generally identified as liberal. However, as the Freiburg School was the most influential among them, after the end of World War II, the whole Ordoliberal movement began to be identified mainly with this specific school of thought.

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<sup>276</sup> Liza Lovdahl Gormsen, 'Article 82 EC: Where are we coming from and where are we going to?', March 2006, 2 *The Competition Law Review* 2, 6-25. David J. Gerber, *Law and Competition in the Twentieth Century Europe: Protecting Prometheus*, 1998, Oxford, Clarendon Press. Eleanor M Fox, 'Monopolization and Dominance in the United States and the European Community: Efficiency, opportunity, and Fairness', 1986, 61 *Notre Dame Lawyer* 981-1017.

<sup>277</sup> Giuliano Amato, *Antitrust and the Bounds of Power*, 1997, Hart Publishing, 69. Eleanor M Fox, 'Monopolization and Dominance in the United States and the European Community: Efficiency, opportunity, and Fairness', 1986, 61 *Notre Dame Lawyer*, 981-1017.

Even though the first general idea of a body of laws that would protect competition developed in Austria a century ago, it was the Freiburg scholars, and among them Walter Eucken, who debated and developed its arguments under the aegis of the 1920s Weimar Republic. For instance, Eucken suggested a rather innovative competition model, which underlined the necessity of enforcing a set of national competition laws able to direct the market without limiting individual freedom to invest. At the time, this approach was rather original considering the protectionist and mercantilist policies adopted by the majority of European countries.

Apart from the Freiburg researchers, other scholars also contributed to the development of Ordoliberalism. For instance, the ideas of Wilhelm Röpke, and of his followers, were often regarded as part of Ordoliberalism as they had been heavily influenced by the Freiburg School.<sup>278</sup> However, even though Röpke shared its fundamental principles, he adopted a more humanistic point of view at the expense of the technical and doctrinal approach developed by the Freiburg School. The school influenced economist Alfred Müller-Armack as well, although his ideas were more oriented towards a social-market structure where economic welfare had to be equally redistributed in society. Nevertheless, the differences between the social-market economic model and the Ordoliberal one were minimal, so much so that many researchers used the terms interchangeably.<sup>279</sup>

What is often referred to as the third branch of Ordoliberalism is known as the classical, or 'pure', liberalism approach. This was in large part developed by Friedrich von Hayek, the founder of the Mont Pelerin Society and the scholar who inspired the Chicago School. Even though Hayek generally agreed with Eucken's assumptions concerning the importance of competition, he rejected any active role of the state in

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<sup>278</sup> David J. Gerber, 'Constitutionalizing the Economy: German Neoliberalism, Competition Law and the "New" Europe', 1994, 42 *American Journal of Comparative Law*, 25-84.

<sup>279</sup> David J. Gerber, 'Constitutionalizing the Economy: German Neoliberalism, Competition Law and the "New" Europe' 1994, 42 *American Journal of Comparative Law*, 25-84.

fostering and maintaining the best possible conditions for competition because he believed in the neoclassical hypothesis that the market is self-adjusting.<sup>280</sup>

On the back of this vast theoretical framework, the first European competition law was approved in Germany in 1923 in order to face the post–World-War-I crisis and to develop a fair economic system that would help to restore the German market and to face inflation problems.<sup>281</sup> According to the Ordoliberal school, competition played a fundamental role in fostering the development of a free market economy and consequently of economic development, individual freedom, and price stability.<sup>282</sup> In advancing liberal assumptions, they theorised the necessity to use an appropriate ‘constitutional framework’ to protect individuals from the authority of the state and to safeguard the society as a whole from the power exerted by private economic actors.<sup>283</sup>

In other words, Ordoliberals, by applying a sort of Kantian approach to economics, emphasised the importance of enforcing an *ad hoc* legal framework to preserve individual freedom from excessive political controls or unfair economic dominance.<sup>284</sup> Accordingly, competition law had to fix the boundaries of individual actions and build a sort of behavioural system of reference that would not limit but enhance competition with a view to promote economic progress.<sup>285</sup> Thus, the means of competition policy lay in the prevention of any kind of economic abuse by those firms that understood economic rivalry not as a way to foster their profits but as an obstacle to

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<sup>280</sup> David J. Gerber, ‘Constitutionalizing the economy: German Neo-liberalism, Competition Law and the “New” Europe’, 1994, 42 *American Journal of Competition Law*, 25-84.

<sup>281</sup> David J. Gerber, *Law and Competition in twentieth Century Europe: Protecting Prometheus* 1998, Oxford, Clarendon Press, 7.

<sup>282</sup> Liza Lovdahl Gormsen, ‘Article 82 EC: Where are we coming from and where are we going to?’, March 2006, 2 *The Competition Law Review*, 6-25.

<sup>283</sup> David J. Gerber, ‘Constitutionalizing the economy: German Neo-liberalism, Competition Law and the “New” Europe’, 1994, 42 *American Journal of Competition Law*, 25-84.

<sup>284</sup> One of the most important economists of the Ordo-liberal School, Walter Eucken, was inspired by Immanuel Kant in framing the methodological and philosophical structure of ordoliberalism. According to Eucken, the state has in fact the responsibility to balance the individual need of freedom with social-collective development.

<sup>285</sup> David J. Gerber, ‘Constitutionalizing the economy: German Neo-liberalism, Competition Law and the “New” Europe’, 1994, 42 *American Journal of Competition Law*, 25-84, 29.

their business interests. In fact, according to Walter Eucken, one of the central problems of modern economic thought and its institutional application was the general detachment from the social and political reality. In other words, while classical economists, such as Adam Smith, interpreted economics as a discipline imbedded in the legal and the political system, over the course of the nineteenth century liberal theorists started to lose sight of the political and social necessities of the time and began to focus purely on *laissez-faire* economics.<sup>286</sup>

Because it linked competition not only to economic efficiency but also to the kind of economic welfare that could be obtained through political freedom and market equality, the Ordoliberal School could be argued to simply have sprung up in the wrong place at the wrong time. The collapse of the Weimar Republic and the rise to power of the Nazis resulted in the exclusion of the much too liberal Freiburg scholars from the economic regulatory process.

To be sure, Ordoliberal thinkers envisioned an institutional change that would restructure society as a whole. In their rejection of past economic models, they attempted to build a sort of third way between democracy and socialism and between American capitalism and Soviet economic planning. On the one hand, they accepted classical liberal principles of competition and economic freedom as necessary for economic welfare; on the other, they advanced liberalism and drew attention to individual economic welfare, rather than efficiency, and freedom, rather than state control. In other words, Ordoliberal scholars dreamed of a society where the state had to protect, not to limit, individual economic and political freedom and had to do so through a general public dispersion of power so as to ensure the broadest participation to the decision-making

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<sup>286</sup> David J. Gerber, 'Constitutionalizing the economy: German Neo-liberalism, Competition Law and the "New" Europe', 1994, 42 *American Journal of Competition Law*, 25-84.

process.<sup>287</sup> In addition, competition had to be ‘complete’, i.e. markets should ensure firms enjoy equal levels of influence in order to prevent any possibility of coercion between them.<sup>288</sup>

Although the application of Freiburg competition ideas into appropriate laws proved to be too weak to resist the Nazi protectionist and cartel-oriented propaganda, the German experience was fundamental in developing adequate legislation in the rest of Europe and in sparking debates on the effectiveness of competition regulation.<sup>289</sup>

Yet, a true revival of Ordoliberalism began only after World War II, when the US, by identifying cartels as one of the reasons that allowed the Nazi regime to acquire power, started to reevaluate Ordoliberal economists and compelled Germany to adopt an Anti-Cartel Law based on a combination of Freiburg ideas and American antitrust principles. Ordoliberalism has remained one of the main sources of inspiration of European Competition Policy ever since.

Thus, it is undeniable that European competition policy has a very different history and a dissimilar approach from American antitrust policy; however, it is also true that the US has always tried to influence European regulation over competition regulation. For instance, the first European antitrust law enforced through the European Coal and Steel Community was drafted by Harvard School professor Richard Bowie and, according to Jean Monnet, was an adaptation of the Sherman Act principles to a European context.<sup>290</sup> Thus, the resulting competition policy would partially reflect a

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<sup>287</sup> David J. Gerber, ‘Constitutionalizing the economy: German Neo-liberalism, Competition Law and the “New” Europe’, 1994, 42 *American Journal of Competition Law*, 25-84.

<sup>288</sup> David J. Gerber, ‘Constitutionalizing the economy: German Neo-liberalism, Competition Law and the “New” Europe’, 1994, 42 *American Journal of Competition Law*, 25-84.

<sup>289</sup> David J Gerber, *Law and Competition in twentieth Century Europe: Protecting Prometheus*, 1998, Clarendon Press, 7.

<sup>290</sup> The US Secretary of State Dean Acheson was convinced that the Schuman Plan for the creation of the European Coal and Steel Community was anything but a bright excuse to conceal a huge European Cartel. Consequently, the antitrust principles introduced in the ECSC Treaty resulted to be an accommodation of U.S. antitrust provisions to the European market made by Harvard Law Professor Robert Bowie, and supported by Jean Monnet. Professor Bowie, an antitrust specialist from Harvard Law School, was a member of the German High Committee and he was involved in the drafting

European tradition of thought, such as the Ordoliberal one, while complying with the American wish to abolish cartelisation in Europe. This instrumental use of a European theoretical framework represented the beginning of American direct and indirect guidance over the European institutionalisation of competition policy. The extent and depth of this influence will be analysed in the following chapters.

### *Japanese Competition Policy: Theoretical Foundations*

Japan, too, can be argued to have a cooperative capitalistic structure; even the feeble competition tradition that has characterised the country prior to any US intervention seems to follow this route. The peculiarity of the Japanese economic system lies mainly in its Confucian tradition, which encourages particular forms of economic activities and a different understanding of market issues from the one inspired by the Western Christian tradition.<sup>291</sup> Confucian influenced over Japanese society became very strong during the Sakoku period. Literally Sakoku means “closing the country” and it refers to the two and a half centuries when the federal government -Tokugawa shogunate (bakufu)- severed links with the outside world.<sup>292</sup> In fact, since the 1630s, the enforcement of five directives limited the rights of Japanese to leave their country, prohibited Christianity and authorised the expulsion of Europeans with the exception of

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process of the German Anti-Cartel Act of 1947. In June 1950, he also drafted the preliminary version of the ECSC antitrust provisions that would become articles 60 and 61 of the final ECSC Treaty. Article 60 prohibited cartels and loose agreements that could be authorized by the High Authority only in case of crisis. Art. 61 dealt with concentrations and the abuse of market power, prohibiting, as in the American tradition, only unreasonable concentration. Finally, in 1957 these articles were changed as part of the Treaty of Rome, thus, becoming article 85 and 86. Jones A. Clifford, ‘ Foundation of Competition Policy in the EU and USA: Conflict, Convergence and Beyond’, in Ullrich Hans (ed.), *The Evolution of European Competition Law: Whose Regulation, Which Competition?*, 2006, Ascola, Competition Law Series, 24; see also: Dean Acheson, *Present at the Creation: My years in the State Department*, 1969, New York, Norton. Desmond Dinan, *Ever closer union?: An introduction to the European Community*, 1994, Basingstoke, Macmillan Press.

<sup>291</sup> David Coates, *Models of Capitalism: Growth and Stagnation in the Modern Era*, 2000, Polity Press Cambridge, 54-55.

<sup>292</sup> Tashiro Kazui and Susan Downing Videen, “Foreign Relations during the Edo Period: Sakoku Reexamined”, Summer 1982, 8 *Journal of Japanese Studies* 2, 283-306.

a limited number of Dutchmen, who were transferred from Hirado to Deshima in Nagasaki bay.<sup>293</sup> This closure was led more by a political decision than a real cultural threat. Indeed it was believed that the spread of Christianity was a weapon used by Spain and Portugal to back their influence over the region.<sup>294</sup> As a result of the Tokugawa Bakufu era and the extreme closure from the outside western world, allowed Japanese market to develop a national distribution system that would overcome regionalisms and to be more strongly influenced by Confucianism principles. This is very important because the spread of Confucianism, understood in Japan as an ethical system rather than a mere religion, provided the cultural tools that would give origin to the Japanese capitalist spirit. In fact, by stating that frugal behavior was a noble behavior, Confucianism taught to the Japanese society the first prerequisite for capital accumulation: make efficient economic decisions to foster savings. According to Roderick MacFarquhar and Morishima, Confucianism had a similar role to the rise of Japanese economy to Protestantism in the West, with the only difference that Confucian economic man “works hard and plays hard, buys much, but saves more”.<sup>295</sup>

The Confucian recipe for economic success lies not only in frugality but also in good governance.<sup>296</sup> Good governance was associated with filial devotion, humaneness, and ritual decorum. Thus, on the one hand frugality allowed Japanese society to start a process of savings, which in turn allowed the beginning of a capital accumulation and investments practices. On the other hand, since Confucius’ understanding of good governance is based on the transposition of good family behaviour onto a macro-level,

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<sup>293</sup> Chalmers Johnson, “The ‘Internationalization’ of the Japanese Economy”, Spring 1983, XXV *California Management Review* 3, 5-26.

<sup>294</sup> Kees Camfferman and Terence E. Cooke, “The Profits of the Dutch East India Company’s Japan Trade”, 2004, 40 *Abacus* 1, 49-75.

<sup>295</sup> Morishima, M., *Why has Japan "succeeded"?*, 1982, Cambridge University Press, Roderick MacFarquhar, "The Post-Confucian Challenge", in *Korea: Past, Present and Future*, 1985, Queenstown, MD: Aspen Institute for Humanistic Studies. Quoted in Heng-fu Zou, *The Spirit of Capitalism and Long-run Growth*, March 1991, Policy, Research, and External Affairs, Working Papers, Public Economics, Country Economics Department, The World Bank.

<sup>296</sup> Heng-fu Zou, ‘The spirit of capitalism and savings behavior’, 1995, 28 *Journal of Economic Behavior and Organization*, 131 -143.

these conducts symbolize the main practices that a state should apply in leading its country. It should in fact maintain filial devotion by providing for social stability. It should also foster humaneness by respecting social fairness and class positions. Lastly, it should preserve ritual decorum by encouraging dignity and responsiveness among its citizens.<sup>297</sup>

Hence frugality and the above mentioned governance practices resulted in economic policies with developmental functions. While business actors had to work, save and reinvest, the state had to coordinate the economy and maintain socio-economic equilibrium. Thus, it had to take into consideration the will and interests of industrial groups, encouraging competitiveness among national businesses, and leading the industrialisation process.<sup>298</sup> The government could influence the type and the frequency of investments as well as the direction and diffusion of technological innovation. It had to coordinate companies' activities according to a national plan of industrial and economic reconstruction, which would privilege long-term growth instead of short-term efficiency in order to turn the Japanese economy into a leading economic force in the international arena. In doing so, the state would abide by all the Confucian principles while guiding the developmental process of the Japanese economy and fostering competition among firms. The Japanese economy was indeed characterised by a sort of business networking system among the main industries: the *kereitsu*.

Until the 1990s, thanks to the intense competition among the *kereitsu* members and the state direct investments into industries and technologies, Japan has been growing at the rate of a so-called economic miracle.<sup>299</sup> The Confucian economic structure that has created a cooperative economic model survives still today. Despite the many attempts to

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<sup>297</sup> William Theodore de Bary and Irene Bloom, *Sources of Chinese Tradition: from Earliest Times to 1600*, 1999, Volume I, Columbia University Press, 43.

<sup>298</sup> Chalmers Johnson, *Japan: Who Governs? The rise of the Developmental State*, 1995, W.W. Northon, 19.

<sup>299</sup> David Coates, *Models of Capitalism: Growth and Stagnation in the Modern Era*, 2000, Polity Press Cambridge, 54-55.

completely open its market to external interventions, Japan still remains attached to a traditional interpretation of competition and efficiency based on close government ties with enterprises, powerful bureaucracy, and business networking.<sup>300</sup>

Contrary to what is generally believed, the first example of Japanese competition policy was not introduced by the US; indeed, Japanese regulation over competition dates back to the sixteenth century when the *rakuichirazuka* policies promoted by Oda Nobunaga (1534-1562) and Toyotomi Hideyoshi (1536-1598) allowed the country to abolish unions and eliminate local customs barriers and market fees.<sup>301</sup> As Hideaki Kobayashi, the Deputy Secretary-General of Japan Fair Trade Commission, has stated in one of his speech to the American Bar Association:

Everyone who studied high-school-level Japanese history knows the phrase, “raku-ichi-raku-za”, “raku” meaning easy or liberal, “ichi” the market, and “za” the guild or trade association. In total, it means “liberalizing markets and liberalizing guilds”. This was the policy taken up by Oda Nobunaga, a warlord who started the process of reunification of war-torn Japan. It was pushed further by Toyotomi Hideyoshi who completed the reunification. The purpose of the policy was (i) to abolish customs duties levied on people entering the market in each city, and (ii) to abolish monopolistic privileges, which trade associations had enjoyed. All this took place, as a matter of fact, between 1570 to 1600. So we Japanese had competition policy in the late 16th century. Could someone tell me when the Pilgrim Fathers got to New England?<sup>302</sup>

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<sup>300</sup> Steven K. Vogel, *Japan Remodelled: How Government and Industry are Reforming Japanese Capitalism*, 2006, Cornell University Press. Michael A. Witt, *Changing Japanese: Capitalism: Societal Coordination and Institutional Adjustment*, 2006, Cambridge University Press.

<sup>301</sup> H. Stephen Harris Jr., ‘Competition Law and Patent Protection in Japan: A Half Century of Progress, A New Millennium of Challenge’ 2002-2003, 16 *Colum J. Asian L.*, 74-140.

<sup>302</sup> Hideaki Kobayashi, Deputy Secretary-General, Japan Fair Trade Commission, "Japan's Views on International Cooperation in the Field of Competition Policy," Remarks before American Bar

Apart from those first attempts to enforce adequate competition regulations, the real opening towards the western world was forced by the 1858 American Commodore Matthew Perry's "gunboat diplomacy", which pushed Japan to abandon its isolationism. The consequent 1867 Meiji restoration allowed Japan to switch towards a strong policy of openness and westernisation.<sup>303</sup> It is at this time that such concepts as market economy and economic freedom gained currency, together with a first understanding of the Western classical economic theories and the idea that free competition could promote economic welfare and efficiency. A West-oriented legal system was adopted and many treaties were signed between the Japanese government and its Western counterparts: little by little, Japan allowed its markets to experience and join the Western competition game.

Thus, the merit of the Meiji's government was to open Japan and to integrate its tradition with a necessary measure of modernisation. In this vein, Japan started to use industrial policies to catch up and compete with the West by reducing import restrictions and other tariffs. However, a close relationship between the government and businesses resulted in national subsidies to the developing entrepreneurial class and allowed the formation of cartels to counterbalance excessive competition. According to David Landes:

It was the State that conceived modernization as a goal and industrialization as a means, that gave birth to the new economy in haste and pushed it unrelentingly as an ambitious mother her child prodigy. And though the child grew and developed its own resources, it never overcame the deformity imposed by this forced nurture.<sup>304</sup>

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Association Section of Antitrust Law, Midwinter Meeting, Hawaii, Jan. 27, 1997, [http://www.jftc.go.jp/en/policy\\_enforcement/speeches/97-0127.html](http://www.jftc.go.jp/en/policy_enforcement/speeches/97-0127.html)

<sup>303</sup> Peter Morici, *Antitrust in the Global Trading System: Reconciling U.S., Japanese and EU Approaches*, 2000, Economic Strategy Institute, 7-8.

<sup>304</sup> David S. Landes, 'Japan and Europe: Contrasts in Industrialization', in William W. Lockwood (ed.),

In fact, the economy mainly developed thanks to those industry associations that allowed Japan to be economically efficient and to use private resources to promote welfare by solving public problems such as unemployment, recessions and high start-up costs. The power of industrial associations was so great that from 1931 to 1940 Japan heavy-industrial growth rate was steeper than any other developed nations.<sup>305</sup>

In this sense, the meaning of competition in Japan was very similar but at the same time also very different from the Western one; the Anglo-Saxon tradition of free competition and its rejection of any government intervention were both considered harmful. In contrast to the Western culture, traditional Japanese interpretation of competition encouraged efficiency and welfare through the implementation of internal competition among local enterprises, which were at the same time protected by the state from any external economic menace. Those practices, which from an American perspective were considered collusive and anticompetitive, helped to strengthen Japanese competitiveness. Indeed, since 1853, when the US started to force the country to open to foreign trade, the strong relation between government and business firms had safeguarded the internal market even more than protectionism.

The Japanese strategy consisted in the partial adoption of European and American technology, education and institutions, while retaining its own traditions. Accordingly, Japan developed a unique capitalistic system, characterised by the coexistence of property rights and extensive government interventions in the economy. The Japanese internal market was mostly controlled by the *Zaibatsu*, a group of holding

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*The State and Economic Enterprise in Japan*, 1965, Princeton, Princeton University Press, 182. Quoted in Bruce Cumings, 'The Origins and Development of the Northeast Asian Political Economy: Industrial Sectors, Product Cycles, and Political Consequences', Winter 1984, 38 *International Organization* 1, 1-40, 11.

<sup>305</sup> Bruce Cumings, 'The Origins and Development of the Northeast Asian Political Economy: Industrial Sectors, Product Cycles, and Political Consequences', Winter 1984, 38 *International Organization* 1, 1-40, 11

companies structured in an oligopolistic organisational system, which was owned by members of single families, such as Mitsui, Mitsubishi, Sumitomo, Yasuda, Furukawa, and Okura.<sup>306</sup>

This approach toward competition was dictated by a more general Japanese Confucian idea of order and harmony, where the exertion of power had to be centralised. Thus, since the market mechanism and *laissez faire* were not compatible with any kind of central planning, free competition was not considered the best strategy for economic development because it rewards luck, recklessness and unscrupulousness and because it creates losers.<sup>307</sup> As explained by Naohiro Amaya, unlike in the US, where if someone fails he or she can still have the possibility to rebuild his future somewhere else, in Japan it is very hard for people to accept and deal with failure.<sup>308</sup> Hence, Japanese Confucian traditions were transferred to the management of the market: the state exerted a strong power over business practices and provided protection for local enterprises from external threats; at the same time, this system encouraged order and cohesion among companies, by fostering efficiency and competitiveness among them.<sup>309</sup>

However, as will be better explained in the historical chapters below, over the course of history, the US has been challenging the Japanese competition system time and again. Indeed, the US has been pushing Tokyo to partially abandon its restrictive interpretation of capitalism, by coercively imposing *ad hoc* antitrust institutions in the form of law or bilateral agreements. However, Japan has also found it convenient to adopt a few Western antitrust conceptions. Even though those external influences –

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<sup>306</sup> Jennifer L. Frank ‘An Analysis of Japanese Corporate Structure, 1915-1937’, Dec. 1999, 59 *Cambridge University Press, The Journal of Economic History* 4, 997-1015.

<sup>307</sup> Eleanor M. Hadley, *Antitrust in Japan*, 1970, Princeton University Press, Princeton, New Jersey, 13-14. Mitsuo Matsushita and Douglas E. Rosenthal, ‘Competition in Japan and in the West: Can the Approaches be reconciled?’ in Graham, Edward M., and J. David Richardson (eds.), *Global Competition Policy*, 1997, Washington DC: Institute for International Economics, chapter 9, 313-317.

<sup>308</sup> Naohiro Amaya, ‘Harmony and the Antimonopoly Law’, 1981, 3 *Japan Echo*, 85-95. Clifford A. Jones, Mitsuo Matsushita, *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, 23.

<sup>309</sup> Naohiro Amaya, ‘Harmony and the Antimonopoly Law’, 1981, 3 *Japan Echo*, 85-95.

whether coercively imposed or voluntarily applied – have forced Japan to reform its antitrust system several times, the core institutional structure of the Japanese competition system is still maintaining its peculiarities.

## CONCLUSION

From a varieties-of-capitalism (VoC) perspective, it is possible to maintain that each country develops specific institutions according to its cultural background and its particular economic interests. Generally speaking, the US model of capitalism has been identified as a liberal system, whereas Germany and, in part, Europe, or at least continental Europe, have been considered cooperative models of capitalism as they were originally influenced by Ordoliberal principles of state interventionism. Japan, too, despite its hybrid system, could be identified as a cooperative system, as the government in Tokyo has always played a very strategic role in managing the economy and enhancing market performance.

In this vein, the varieties of antitrust institutions and competition cultures of US, Europe and Japan can be ascribed both to the different models of capitalism as well as to the national or local way to perceive concepts such as efficiency and welfare. For instance, European competition law is more concerned with the direct enhancement of the common market through the promotion of fairness and general welfare.<sup>310</sup> By contrast, US antitrust law is usually more focused on the promotion of efficiency, which is believed to create welfare on its own<sup>311</sup>. Indeed, an efficient society seeks to maximise

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<sup>310</sup> Eleanor Fox, 'US and EU Competition Policy' in Edward M. Graham and J David Richardson (eds.), *Global Competition Policy*, 1997, Institute for International Economics, Washington, chapter 10, 339-354, 340.

<sup>311</sup> Lawrence J. White, 'The Growing influence of Economics and Economists on Antitrust: An Extended Discussion', Mar 2010, 5 *Economics, Management & Financial Markets* 1, 26-63. Alfred R. Oxenfeldt, *Industrial Pricing and Market Practices*, 1951, New York, Prentice Hall, 406–407. Stephen Martin "The goals of antitrust policy", in Collins W.D. (ed.), *Issues in Competition Law and Policy*, 2007, ABA Antitrust Section, 39. Oliver Budzinski, 'A note on Competing Merger Simulation Models

the values of each economic action and thereby creates higher standards of living within the limits of with its available resources.<sup>312</sup> Accordingly, the role of antitrust law should lie in the implementation of freedom in the market and not in the direct protection of economic actors. In Japan, on the other hand, the role of competition is not explicitly one of protecting consumers. This objective is in fact subordinated to the goals of ensuring that businesses are not harmed and that jobs are not threatened by what Japanese economic policymakers view as excessive competition or free market.<sup>313</sup>

Hence, while the nature of antitrust lays in the promotion of fair market rivalry, which would allow all the members of society to participate and profit of market investments' possibilities, its real application changes according to cultural background. Therefore, it can generally be maintained that antitrust is the institutional tool used by governments to define the limits of business conducts according to what is conceived as efficient or socially beneficial by the general background and the economic necessities of each country. The institutionalisation of specific antitrust approaches indeed goes in line with the characteristic of the different models of capitalism.

Despite the difference in the way capitalism, and specifically competition, is perceived and institutionalised, this thesis will demonstrate that a process of antitrust internalisation and internationalisation has pushed – or allowed, depending on the stance taken – for the adoption of specific antitrust regulations and conceptualisations by Europe and Japan, which has modified their antitrust institutions. Indeed, as it will be better explain in the next chapter, processes of ideological diffusions have contributed to alter traditional interpretation of market and trade practices.

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in *Antitrust Cases: Can the Best Be Identified?*, 03-2008, *Joint Discussion Paper Series in Economics*, 1.

<sup>312</sup> Edward M. Graham and J. David Richardson, *Competition Policies for the Global Economy*, November 1997, 51 *Policy Analyses in International Economics*, Institute for the Global Economy, 7.

<sup>313</sup> Peter Morici, *Antitrust in the Global Trading System: Reconciling U.S. Japanese and EU Approaches*, 2000, Economic Strategy Institute, 73.

## CHAPTER 3

### ANTITRUST: IDEAS, INSTITUTIONS AND CHANGE

It is evident that the role of culture, beliefs and, more generally, of ideas is fundamental in determining the general background upon which specific models of capitalism develop. Ideas seem to be extremely influential tools in shaping reality. In Hall's words, John Maynard Keynes once observed that the 'ideas of economists and political philosophers, both when they are right and when they are wrong, are more powerful than is commonly understood'.<sup>314</sup>

In order to understand the evolution of antitrust institutions and the models of capitalism that evolved in the aftermath of the above-mentioned crises, one should investigate the policy-making process that determined the institutionalisation of specific decisions and how each of those political choices was necessarily influenced by the beliefs political leaders hold about macroeconomic dynamics.

In this sense, it is essential to analyse the specific functions played by ideas in this process. Even so, the scholarly attention received by ideas should by no means overshadow the role of interests. For instance, historical institutionalist Peter Hall, in his analysis of the influence of economic ideas on the Conservative Thatcher governments of the 1980s, maintained that the bold changes that invested the UK during those years were caused by major clashes among economic needs. Specifically, the shift from Keynesian policy to neo-liberalism was justified by the rise of new interests that were not pursuable through the previous political imprinting because of the incapacity of the old ideological structure to provide the basic tools to understand the crisis. However, ideas, and the consequent policy paradigms constructed by policymakers, are the means

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<sup>314</sup> John Maynard Keynes, *The General Theory of Employment, Interests and Money*, 1936, London MacMillan, 383. Quoted in Peter A. Hall, *The Political Power of Economic Ideas: Keynesianism across Nations*, 1989, Princeton University Press, 1.

through which it is possible to mobilise alliances, foster collective action and, at the same time, maintain the fundamental requirements for the two latter conditions. While material circumstances may help to discern what is possible and what is needed, policy paradigms are the only beacons of clarity in any given political struggle.<sup>315</sup>

Academics have long tried to balance the capacity of both material and ideological elements to influence policy outcomes; nonetheless, many scholars, such as Blyth, have criticised ‘ideas-matter’ enthusiasts for ignoring the important role of interests as determinants of change.<sup>316</sup> In fact, according to Blyth, ‘attributing a change in behaviour to a change in ideas is tenable only if it is counter factually demonstrated that the change could not have occurred without the ideas. The lack of such a methodological check is a weakness on two counts.’<sup>317</sup>

As a result, the main critique on the part of the functional-interest supporters is that the role of ideas in influencing policy-making is largely epiphenomenal. Indeed, according to a functional approach, every time there is a situation of instability, actors modify the institutional framework in order to maximise their interests. Ideas have a purely utilitarian role: individuals, specifically political actors, use them to build strategies, pursue specific utilities, and overcome problems. The capacity to enact reforms depends on the policymakers’ capability to construct ‘coordinative’ and ‘communicative’ discourses and, in this process, the ideological frame of reference does not shape interests; these exist *per se*, as part of the individual free will.<sup>318</sup> However, according to

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<sup>315</sup> Peter A. Hall, *The Political Power of Economic Ideas: Keynesianism across Nations*, 1989, Princeton University Press. Mark Blyth, “Any More Bright Ideas?” The Ideational Turn of Comparative Political Economy, Jan. 1997, 29 *Comparative Politics* 2, 229-250, 237.

<sup>316</sup> Christian Albrekt Larshen and Jorgen Goul Andersen, ‘How New Economic Ideas Changed the Danish Welfare State: The Case of Neoliberal Ideas and Highly Organized Social Democratic Interests’, Apr. 2009, 22 *Governance: An International Journal of Policy, Administration, and Institutions* 2, 239–261, 240.

<sup>317</sup> Mark Blyth, “Any More Bright Ideas?” The Ideational Turn of Comparative Political Economy’, 1997, 29 *Comparative Politics* 2, 229–250, 236.

<sup>318</sup> Judith Goldstein and Robert O. Keohane, *Ideas and Foreign Policy, Beliefs, Institutions and Political Change*, 1993, Ithaca and London, Cornell University Press, 4-5; see Vivien Schmidt, ‘Does

Vivien Schmidt, discourses, as a set of ideas, serve to promote an ‘interactive consensus for change’, as they may be a ‘reflection of the interests of key policy actors and an expression of institutional path dependencies’. They also ‘exert a causal influence on policy change, serving to overcome entrenched interests and institutional obstacles to change by altering perceptions of interest and showing the way to new institutional paths’.<sup>319</sup>

Furthermore, in each historical period, ideas and discourses have been used to formulate strategies and to respond to specific social and economic necessities. However, at the same time, they have also defined actors’ perceptions of the costs and benefits of particular political choices and influenced the way they identify achievable objectives.<sup>320</sup>

Therefore, both ideas and interests have a causal weight in the explanation of human actions; indeed, while each individual acts rationally to pursue his or her interests, their rationality is always influenced by the social beliefs of the time.<sup>321</sup> In the case of antitrust, it is evident that the interests pursued by competition regulation and reflected by theories revolve around the maintenance of an effective level of competitiveness in the interest of efficiency and welfare. Nonetheless, the way in which efficiency and welfare are perceived, and therefore institutionalised, are determined by ideas. For instance, Roosevelt, along with his successors, made references to Keynes and the Harvard School theories to justify the embedded liberal economic order they wanted to create in order to foster efficiency and social welfare so as to kick-start growth. Similarly, Reagan’s business-oriented reforms were supported by the neo-liberal views held by the Chicago

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Discourse Matter in the Politics of Welfare State Adjustment?’, 2002, 35 *Comparative Political Studies* 2, 168–193. Vivien Schmidt, ‘How, Where and When Does Discourse Matter in Small States’ Welfare State Adjustment?’, 2003, 8 *New Political Economy* 1, 127–146.

<sup>319</sup> Vivien Schmidt, ‘Does Discourse Matter in the Politics of Welfare State Adjustment?’, 2002, 35 *Comparative Political Studies* 2, 168–193, 169.

<sup>320</sup> See Kathryn Sikkink, *Ideas and Institutions: Developmentalism in Brazil and Argentina*, 1991, Cornell University Press, Ithaca and London and Judith Goldstein, *Ideas, Interests and American Trade Policy*, 1993, Cornell University Press Ithaca and London.

<sup>321</sup> Judith Goldstein and Robert O. Keohane, *Ideas and Foreign Policy, Beliefs, Institutions and Political Change*, Cornell University Press, Ithaca and London, 4.

School and were meant to promote efficiency by liberalising market transactions. In this sense, ideas and interests are always intrinsically linked and never mutually exclusive.

Ideas 'do not float freely'; on the contrary, they develop through individual interactions within the social environment and they can be theoretically organised by schools of thought.<sup>322</sup> What makes the mechanism evolutionary is the fact that not all ideas survive; they are implemented into policy only if they are 'politically salient', in other words, only if they respond to specific and contingent necessities.<sup>323</sup> Therefore, although it is assumed that all political decisions are driven by specific interests, the definition of interests, such as the achievement of economic efficiency or welfare, is influenced by the cultural, theoretical, and ideological background of each specific social organisation. Still, the dilemma of why and how some economic beliefs will likely define interests and others will not, needs further analysis.

#### ECONOMIC IDEAS, CULTURE AND ANTITRUST THEORIES

Scholars have not paid much attention to the study the process through which ideas affecting policy-making and thus become powerful tools in themselves.<sup>324</sup> As outlined above, the traditional Gramscian approach emphasised the material nature of ideologies and their capacity to originate apparatuses or institutions. Indeed, the effectiveness of the role played by ideas has been subordinated to the existence of a hegemonic class capable

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<sup>322</sup> Thomas Risse-Kappen 'Ideas Do Not Float: Transnational Coalitions, Domestic Structures, and the End of the Cold War', Spring 1994, 48 *International Organization*, 185-214; quoted in Kathleen R. McNamara, *The Currency of Ideas: Monetary Politics in the European Union*, 1998, Cornell University, 5.

<sup>323</sup> Thomas Risse-Kappen 'Ideas Do Not Float: Transnational Coalitions, Domestic Structures, and the End of the Cold War', spring 1994, 48 *International Organization*, 185-214. Kathleen R. McNamara, *The Currency of Ideas: Monetary Politics in the European Union*, 1998, Cornell University, 5. Peter John, 'Ideas and interests; agendas and implementation: an evolutionary explanation of policy change in British local government finance', 1999, 1 *British Journal of Politics & International Relations* 1, 39- 63.

<sup>324</sup> John L. Campbell, 'Ideas, Politics, and Public Policy', 2002, 28 *Annual Review of Sociology*, 21-38.

to use its knowledge dominance to legitimise its own supremacy.<sup>325</sup> From a Gramscian perspective, many scholars, such as Cox and Gill, have related such analysis of culture, belief and knowledge to the study of hegemony in the international arena without taking into account the power of ideas *per se* in originating specific policy choices.<sup>326</sup>

The second common approach in the analysis of ideas is behaviourism, especially the rational-choice versions, which, however, do not directly investigate the role of ideas in the process of institutionalisation. While ideas are taken as facts, in particular as a rational response to economic necessities, the concept that receives most attention is institution, as well as its effect on the market in terms of interest-seeking behaviour. In other words, there is no need to analyse ideas, because 'behaviour can be adjudged objectively to be optimally adapted to the situation'.<sup>327</sup> As maintained by Goldstein and Keohane, the rational explanation of beliefs and policy outcomes

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<sup>325</sup> Paul Ego Roerich 'Economic Culture and Foreign Policy: The Cognitive Analysis of Economic Policy Making', winter 1987, 41, *International Organization* 1, 61-92. Arthur Stein, 'The Hegemon's Dilemma', spring 1984, *International Organization* 38, 357.

<sup>326</sup> Kathryn Sikkink. *Ideas and Institutions: Developmentalism in Brazil and Argentina*, 1991, Cornell University Press, quoted in John Kurt Jacobsen 'Review: Much Ado about Ideas: The Cognitive Factor in Economic Policy', Jan 1995, 47 *World Politics* 2, 283-310; see also Antonio Gramsci, *The Modern Prince*, 1971, New York: International Publishers, 112. Stephen Gill and David Law 'Global Hegemony and Structural Power of Capitalism', in Stephen Gill (ed.), *Gramsci, historical materialism and international relations*, 1993, Cambridge University Press, Part 1, 93-126. Antonio Gramsci, *Il Materialismo Storico e la Filosofia di Benedetto dalla Corce*, 1948, Einaudi, Torino, 26, and Giorgio Nardone, *Il pensiero di Gramsci*, 1971, De Donato Editore, 139. Stephen Gill, *American Hegemony and the Trilateral Commission*, 1990, Cambridge Studies in International Relations, 55. William I. Robinson, 'Gramsci and Globalisation, from National to Transnational Hegemony', December 2006, 8 *Critical Review of International Social and Political Philosophy* 4, 1-16. Joseph V. Femia, *Gramsci's Political Thought: Hegemony, Consciousness and the Revolutionary Process*, 1981, Oxford, Clarendon Press, 24. Giorgio Nardone, *Il pensiero di Gramsci*, 1971, De Donato Editore, 127-8. Howard H. Lentner, *Power and Politics in globalization: the indispensable State*, 2004, Routledge, 73. Robert Cox, 'Gramsci, Hegemony and International Relations: an essay in method (1983)' in Cox R. Sinclair T. (eds.), *Approaches to World Order*, Cambridge University Press, 1996, 124-143, 11. Quintin Hoare, Geoffrey Nowell Smith, *Selections from the Prison Notebooks of Antonio Gramsci*, 1971, International Publishers, 138 and 337. Robert W. Cox 'Gramsci, Hegemony and International Relations: an Essay in Method' ,1983, 12 *Millennium: Journal of International Studies* 2, 162-175, 168. Antonio Gramsci, *Note sul Macchiavelli, sulla Politica e sull'Organizzazione dello stato moderno*, 1955, Einaudi, Torino, 128-30, Antonio Gramsci, *Il Materialismo Storico e la Filosofia di Benedetto Croce*, 1948, Einaudi, 92.

<sup>327</sup> Herbert A. Simon, 'Human Nature in Politics: The Dialogue of Psychology with Political Science', 1985, 79 *American Political Science Review*, 293-304; quoted in Ngaire Woods 'Economic Ideas and International Relations: Beyond Rational Neglect', June 1995, 39 *International Studies Quarterly* 2, 161-180.

questions the influence of ideas on policy-making.<sup>328</sup> Similarly, Sikkink argues that the prevalence of interest-based explanations of political decisions underestimated the role played by ideas and that ‘much theoretical energy is expended demonstrating that it is not necessary to know what political actors think in order to explain how they will act’.<sup>329</sup>

Rational-choice analysis has been criticised because its interests-based model has repeatedly failed in explaining or predicting policy outcomes so a large number of scholars, from different political economic backgrounds, have begun to take into consideration the role of ideas and the power exerted over the social realm.<sup>330</sup> For instance, traditional rational-choice proponents such as North and Knight have started to abandon a purely behaviourist angle for a broader approach in which emphasis is given as much to the role of material needs as to that of ideas.<sup>331</sup>

Reflectivists, too, consider the impact of ideas in explaining international dynamics. Specifically, they study the process through which language, culture and beliefs can impose constraints on the individual ability to define and act in line with objective interests. Indeed, according to Wendt, interests are not as exogenous to social actors as rationalists maintain; rather, they are an endogenous part of individuals. In this sense, knowledge itself becomes the subject of analysis.<sup>332</sup>

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<sup>328</sup> Judith Goldstein and Robert Keohane (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*. 1993, Ithaca, N.Y.: Cornell University Press, 4.

<sup>329</sup> Kathryn Sikkink, *Ideas and Institutions: Developmentalism in Brazil and Argentina*, 1991, Cornell University Press, 1.

<sup>330</sup> John Kurt Jacobsen, ‘Review: Much Ado about Ideas: The Cognitive Factor in Economic Policy’, Jan. 1995, 47 *World Politics* 2, 283-310.

<sup>331</sup> Jack Knight and Douglas North ‘Explaining economic change: the interplay between cognition and institutions’, 1997, *Cambridge University Press, Legal Theory* 3, 211-26, Margaret Levi, *Consent, Dissent, and Patriotism*, 1997, New York, Cambridge Univ. Press, 22-23. Elinor Ostrom *Governing the Commons: the evolution of institutions for collective action*, 1990, New York, Cambridge University Press. Douglass North, *Institutions, Institutional Change and Economic Performance*, 1990, New York, Cambridge Univ. Press.

<sup>332</sup> Alexander Wendt, ‘Anarchy is What the State Make of It: The Social Construction of Power Politics’, spring 1992, 46 *International Organization*, 391-425, 392. Robert O Keohane, ‘International Institutions: Two Approaches’, December 1988, 32 *International Studies Quarterly*, 379-96. Richard Ashley and R.B. J. Walker ‘Speaking the Language of Exile: Dissident Thought in International Studies’, September 1989, 34 *International Studies Quarterly*, 259-68.

However, the reviews provided by reflectivists are most of the time too abstract and therefore lack empirical foundations. Hence, the theoretical line adopted in this chapter will follow the one outlined by Goldstein and Keohane. These scholars do not reject rational-choice theory and strongly believe that individuals are driven by the will to fulfil their needs; however, they do not underestimate the role of the ideological substratum. In their view, ideas and interests play an equal role in determining social actions and are never mutually exclusive.<sup>333</sup>

Generally, ideas, economic ideas or economic knowledge are the set of shared values that determine the social understanding of how the market should work or be regulated and what the objectives to be reached should be.<sup>334</sup> They comprise social conventions as well as theories; indeed, the latter only represents the logical organisation of ideas by experts. Goldstein and Keohane have formulated a workable definition of 'idea' by splitting the concept into three different components. They have identified principled beliefs, which allow the distinction between right and wrong, causal beliefs, which 'derive authority from shared consensus of recognised elites', and 'world views' on how theories influence what should be regulated and how.<sup>335</sup>

Accordingly, a principled economic belief might, for instance, underpin the moral necessity to avoid market concentrations in order to allow for equal participation in the market. A causal economic belief can be thought of as the conviction that antitrust regulations will reduce anticompetitive practices. Lastly, world views normally denote a general ideological framework, such as the sort of liberalism embodied in the

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<sup>333</sup> Judith Goldstein and Robert Keohane, (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, 1993, Ithaca, N.Y.: Cornell University Press.

<sup>334</sup> John Kurt Jacobsen 'Review: Much Ado about Ideas: The Cognitive Factor in Economic Policy', Jan. 1995, 47 *World Politics* 2, 283-310. Paul Egon Rohrlich, 'Economic Culture and Foreign Policy: The Cognitive Analysis of Economic Policy Making', winter 1987, 41 *International Organization*.

<sup>335</sup> Judith Goldstein and Robert Keohane, 'Ideas and Foreign Policy: An Analytical Framework' in Judith Goldstein and Robert Keohane, (eds.), *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, 1993, Ithaca, N.Y.: Cornell University Press, 3-30, 8-11, quoted in John Kurt Jacobsen 'Review: Much Ado about Ideas: The Cognitive Factor in Economic Policy', Jan. 1995, 47 *World Politics*, 2, 283-310.

Harvard antitrust theory or the kind of neo-liberalism of the Chicago School. The definition of ‘economic ideas’ used in this thesis encompasses all three aspects. Indeed, ideas become a powerful tool for policy-making when the principled, causal or worldwide beliefs they embody are used by political actors to define the directive of a specific policy, to provide precise goals to be reached, or to define possible solutions through embedded political institutions. In fact, according to McNamara, political actors use those shared beliefs as a ‘crucial guidance’ because they provide them with the means-end knowledge for setting up macroeconomic policies. In this sense, ideas work as ‘flashlights’ that delineate a framework of reference for policymakers to follow.<sup>336</sup>

It is possible to argue that the power of ideas is ascribable to their ability to promote what philosopher Thomas Kuhn defined as a paradigm shift, i.e. the capacity to transform the way people live and understand the social realm.<sup>337</sup> This happens when ideas become shared beliefs and are supported by specific elites. Indeed, the choice of an ideological framework is not politically neutral, but always influenced by the interests of the actors involved in the decision-making process.

In conclusion, the variety of antitrust institutions, which reflects the variety of models of capitalism, is a product on the one hand of the material interests pursued and on the other hand of the set of ideas that influence the decision-makers’ perception of reality. Hence, European, Japanese and American individuals pursue efficiency and economic welfare by acting in specific, distinct ways. This *modus operandi* is determined by not only the specific economic needs or interests that individuals wish to pursue, but also by their cultural background. Indeed, ideas, theories and the general understanding of reality inspire political actors to institutionalise specific practices. At the same time,

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<sup>336</sup> Kathleen R. McNamara, *The Currency of Ideas: monetary politics in the European Union*, 1998, Ithaca, NY, Cornell Univ. Press, 57-58.

<sup>337</sup> Peter A. Hall, ‘Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain’, Apr. 1993, 25 *Comparative Politics* 3, 275-296.

however, the very existence of interests requires political actors to look for possible ways to reach them. Considering the importance of political actors in the construction of institutions, the following section will analyse their role in the institutional process.

#### INSTITUTIONALISATION AND INSTITUTIONAL CHANGE

Douglas North maintains that the actors involved in the process of institutional change are the decision-makers of institutional organisations. At a macro-level, it is possible to interpret these 'organisations' as *political* organisations or 'the complex of political parties and interest intermediaries that stand at the intersection between the state and society in democratic polities'.<sup>338</sup> The actors, on the other hand, can be thought of as the politicians and the experts of national political discourse at any given time.<sup>339</sup> Their knowledge and their ability to manage political discourses give them the legitimacy to represent social interests, to frame state policy, and to influence the public perception of social issues.<sup>340</sup> Gourevitch suggests that policymakers are influenced by a combination of ideas and that their actions are a reflection of such principles.<sup>341</sup> In other words, the choices made by those actors are determined by their 'mental models', i.e. the combination of ideas and culture that defines their way of thinking, understanding and perceiving reality.<sup>342</sup> Indeed, culture can generally be defined as the 'raw material in the

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<sup>338</sup> Douglas North, 'Institutional Change: A framework of Analysis' in Sven-Erik Sjostrand (ed.), *Institutional Change: Theory and Empirical findings*, 1993, Studies in Socio-Economics, M.E. Sharpe, Chapter 2, 45.

<sup>339</sup> Peter A. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain', Apr. 1993, 25 *Comparative Politics* 3, 275-296, 288.

<sup>340</sup> Peter A. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain', Apr. 1993, 25 *Comparative Politics* 3, 275-296, 289.

<sup>341</sup> Peter A. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain', Apr. 1993, 25 *Comparative Politics* 3, 275-296, 289. Peter Gourevitch, *Politics in Hard Time: Comparative Responses to International Economic Crises*, 1986, Cornell University Press, 35-68.

<sup>342</sup> Douglas North, 'Institutional Change: A framework of Analysis' in Sven-Erik Sjostrand (ed.), *Institutional Change: Theory and Empirical findings*, 1993, Studies in Socio-Economics, M.E. Sharpe, Chapter 2, 35.

on-going crystallisations of institutions in a society'.<sup>343</sup> In this sense, from a reflectivist point of view, it is possible to define society's forms as culture's substance. Indeed, according to Goodenough, society's culture consists of whatever it is one has to know or believe in order to operate in a manner acceptable to its members. So culture consists of the "(i) criteria for categorizing phenomena as meaningful stimuli, (ii) criteria for deciding what can be, (iii) criteria for deciding how one feels about things (preferences and values), (iv) criteria for deciding what to do about things, (v) criteria for deciding how to go about doing things, and (vi) the skills needed to perform acceptably".<sup>344</sup> Hence, culture is the set of criteria for regulating society and defining its institutions; it is a socially established structure of meaning. However, it is not clear how culture can be changed and what is the role of individual actors in this process.

Hence, I believe that the most workable interpretation of culture is the one provided by Geertz. Geertz points out that culture is the ensemble of "webs of significance that individual themselves have spun".<sup>345</sup> I think this definition is the most complete, because it provides an intuitive interpretation of culture, which is considered a product of individuals' manipulation. It is also an inclusive definition, because the webs of significance at the basis of a cultural environment defining individuals way of behaving, can refer to several elements such as ideas, theories, habits. Moreover, while human beings are lead by their culture, they are also active in shaping and reshaping it according to their interests or needs.

In the context of antitrust, it is possible to say that experts, or political actors, have to conjure up new ideas and so modify the cultural framework of reference because

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<sup>343</sup> Sven-Erik Sjostrand, 'On Institutional Thought in the Social and Economic Sciences', in Sven-Erik Sjostrand (ed.), *Institutional Change: Theory and Empirical findings*, 1993, Studies in Socio-Economics, M.E. Sharpe, Chapter 1, 12.

<sup>344</sup> Ward H. Goodenough, *Cooperation in Change: an Anthropological Approach to Community Development*, 1963, New York: Russell Sage Found, 258–59. Ward H. Goodenough. "Cultural anthropology and linguistics", P.Garvin (ed.) *Report of the Seventh Annual Round Table Meeting on Linguistics and Language Study*, 1957, Washington, DC: Georgetown Univ. Press, 167-73.

<sup>345</sup> Clifford Geertz, *The Interpretation of Culture, Selected Essays*, 1973, Basic Books, INC. Publishers.

the social realm constantly presents problems that need to be solved. According to Hall, it is however too simplistic to assume that antitrust experts theorise antitrust ideas as impartially as neutral analysts who try to interpret reality and transmit their knowledge to policymakers.<sup>346</sup> However, it is also excessively cynical to consider theories as merely a means to justify specific political strategies or interests.

As the Romans used to say, *in media stat virtus*: there is a sort of equilibrium between the duty of experts to transmit knowledge and the will of political actors to fulfil their agenda. On the one hand, experts employ their expertise to access and influence the policy discourse, while on the other hand political interests are mediated by the cultural environment where they develop.<sup>347</sup> Consequently, it is hardly possible to separate ideas from interests, because interests derive and develop from specific cultural and theoretical conceptions. As Woods argues, 'it is true that different sets of economic ideas promulgate and legitimate different sets of interests. However, this is not to say that ideas are no more than an embodiment of interests. [...] Actors redefine their interests in the face of new institutions or ideas'.<sup>348</sup>

In the context of US antitrust policy, the process of antitrust institutionalisation involves many actors, both experts and practitioners; a sort of 'policy community' defined by John Kingdon as a group of 'specialists'.<sup>349</sup> Following Hecló's definition, it is also possible to name this community as an issue network, or a 'shared-knowledge group having to do with some aspect of public policy'.<sup>350</sup>

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<sup>346</sup> Peter A. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain', Apr., 1993, 25 *Comparative Politics* 3, 275-296.

<sup>347</sup> Judith Goldstein, *Idea, Interests and American Trade Policy*, 1993, Cornell University Press, 9. Peter A. Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain', April 1993, 25 *Comparative Politics* 3, 275-296.

<sup>348</sup> Ngaire Woods, 'Economic Ideas and International Relations: Beyond Rational Neglect', June 1995, 39 *International Studies Quarterly* 2, 161-180, 171.

<sup>349</sup> John Kingdon, *Agendas, Alternatives and Public Policies*, 1984, Boston Little Brown, 122.

<sup>350</sup> Hugh Hecló 'Issue Network and the Executive Establishment', in Anthony King (ed.) *The American Political System*, 1978, Washington DC, American Enterprise Institute, 103-104.

This antitrust community, or issue network, consists primarily of past and present policymakers, members of the Federal Trade Commission (FTC) and the Antitrust Division (DOJ), lobby groups, corporations and courts. The knowledge they shared is antitrust knowledge. However, because the juridical interpretation of antitrust has been increasingly influenced by economics, it is possible to maintain that the debates around antitrust theories and its institutionalisation have been framed primarily in economic terms. Thus, economics, or rather the language of economics, is the shared body of knowledge that unites the community of experts and that governs the interaction of its members. With that in mind, the history of the different economic schools of thought can be thought to trace the ideological material that has influenced throughout the decades the institutionalisation of antitrust policies and the consequent evolution of the various models of capitalism. This process is always implemented by the same experts that, upon becoming part of the policy-making process as members of the Federal Trade Commission or the Department of Justice, are able to promote specific competition policies. The appointment of these practitioners is normally a duty of the President of the United States; once again, this selection is obviously influenced by contingent political and economic reasons, interest groups, and business corporations.

For example, the nomination of Thurman Arnold as head of the Antitrust Division of the Department of Justice by Roosevelt in 1938 was driven by the felt need to re-launch American free competition by means of a new antitrust program.<sup>351</sup> Inspired by a marginalist-structural perspective, Thurman Arnold wanted to raise the impact of the Sherman Act by prosecuting national and international cartels, which were considered the cause of the Great Depression. Accordingly, under Arnold's

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<sup>351</sup> Alan Brinkley, *The End of Reform, New Deal Liberalism in Recession and War*, 1996, New York, Vintage Books Edition, 106-125.

administration, the first extraterritorial application of antitrust was made against one of the most important cartels of the time: the Aluminium Company of America (Alcoa).<sup>352</sup>

Arnold's campaign against cartels marked a significant change in American antitrust policy. By promoting principled beliefs of free market and free competition, Arnold also spread the causal beliefs about the need to establish a more rigid control over international cartels, considered one of the causes of the recession. Moreover, through the extraterritorial application of antitrust and anti-cartel laws, he contributed to the worldwide triumph of the liberal principles embodied in the Harvard antitrust school. In those years, Thurman Arnold had gained a large number of legal victories against the monopolization and price-fixing practices of American and foreign firms.<sup>353</sup> From this angle, Arnold can be considered an expert who was directly invited to join the political arena by a political actor (Roosevelt) in virtue of his expertise.

In contrast, Chicago-School theories were the main inspiration for the reforms adopted in the 1980s by Baxter and Miller on their appointment by Reagan at the head of the FTC and the Antitrust Division. The Chicago School became the theoretical foundation of the institutions that envisaged a neo-liberal stage of capitalism. For instance, in 1986 the US government passed the Merger Modernization Act. This Act, by amending section 7 of the Clayton Act, affected the efficacy of merger policies so as to 'not interfere with the ability of American firms to freely reorganize through mergers and acquisition'.<sup>354</sup>

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<sup>352</sup> U.S. v. Aluminum Co. of America, 44 F. Supp. 97 (Dis.Ct.S.D.N.Y.,1941); "Memorandum For Attorney General, RE: U.S. v. Aluminum Co. of America et al., March 16 1937," RHJ Legal File, Alcoa, Box 77, LC.

<sup>353</sup> Cordwin D. Edwards, 'Thurman Arnold and the Antitrust Law', Sep. 1943, 48 *The Academy of Political Science, Political Science Quarterly* 3, 33.

<sup>354</sup> S. 2160, 99th Cong., 2d Sess. 5 2(a) (1986). U.S. Department of Commerce, 'Merger Modernization Act of 1986: Analysis' 1, quoted in Alan A. Fisher; Frederick I. Johnson; Robert H. Lande, 'Price Effects of Horizontal Mergers', July 1989, 77 *California Law Review* 4, 777-827, and in Walter Adams, James W. Brock, 'Reaganomics and the transmogrification of merger policy', Summer 1988, 33 *The Antitrust Bulletin*, 309-59.

The causal belief of Reagan's neo-liberal antitrust policies lay in the conviction that by allowing a growth in concentration, or a merger, within certain economic sectors, big corporations would rapidly develop and restore an American economic dominance over the international arena.<sup>355</sup> The liberalisation of markets promoted by what became known as *Reagonomics* was meant to strengthen enterprises headquartered in the United States, which in the 1980s allowed the US to control 36.8% of the world total output in manufacturing and 51.5% in services.<sup>356</sup> Moreover, those corporations contributed to the worldwide expansion of the American antitrust approach that indirectly strengthened the influence of the Chicago School and of Reagan's antitrust policy on other states' competition regulations.

In conclusion, it is possible to define the actors that facilitated the institutionalisation process of antitrust as an issue network that promoted the conversion of specific antitrust ideas into proper institutions. After the above analysis of the genesis of ideas, their transposition into theory, and the actors that are involved in the process, it is now necessary to explain how theories are institutionalised in such times of change as the Great Depression of the 1930s, the Oil Crises in the 1970s and the current downturn.

#### *The role of Crises in Institutional Change*

Each of the three crises discussed here represents a very interesting example of the power of antitrust ideas over the US decision-making process in times of cultural, political, and economic changes. All of them gave way to an exceptional historical

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<sup>355</sup> Stephen R. Gill, 'Neo-liberalism and the shift towards a US-Centred Transnational Hegemony', in Henk Overbeek (ed.), *Restructuring Hegemony in the Global Political Economy: The rise of Transnational neo-liberalism in the 1980s*, 1993, Routledge, chapter 10, 246-280. Mark Davis, 'Reagonomics Magical Mystery Tour', 1985, *New Left Review* 149, 47, 45-65. William K. Carroll, 'Tracking the Transnational capitalist class: the view from on high', in Yildiz Atasoy (ed.), *Hegemonic Transitions, the State and Crisis in Neoliberal Capitalism*, 2009, Routledge, 44,43-64. Stephen Hymer, *The Multinational Corporation: A radical Approach*, 1979, Cambridge University Press, 262

<sup>356</sup> Susan Strange, 'The Persistent Myth of Lost Hegemony', Autumn 1987, 41 *International Organization* 4, 566-7, 551-574.

juncture that witnessed profound transformations in the institutionalisation of antitrust. Yet, in order to understand their role in the process of institutional change, one should first question their nature and their meaning.

Giving a precise definition of crises is notoriously difficult; Colin Hay himself maintains that crises are one of the most understudied concepts in political theory.<sup>357</sup> Blyth provides us with a very interesting definition: he associates crises to situations of Knightian uncertainty since their exceptionality makes agents incapable of recognising and pursuing their needs.<sup>358</sup> As interests cannot be immediately recognised, they become 'something to be explained', rather than something that can help explain or resolve the crisis itself.<sup>359</sup> In this context, social actors, or issue networks, take it upon themselves to analyse the situation and come up with a general notion of what the crisis is all about.

The constant interplay between agents and their environment provides society with a first basic institutional mechanism for overcoming uncertainty.<sup>360</sup> Here, ideas play a pivotal role, in that they offer a diagnosis of the problem and a shared interpretation of the causes of the crisis; in addition, not only do they identify what has to be done, but they also provide institutional resolutions with the necessary legitimacy to become workable.

Although the analysis offered by Bay and Hay is very coherent and well structured, interests are not interpreted as the mere outcomes of ideas. They are instead

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<sup>357</sup> Colin Hay, 'Crisis and the structural transformation of the state: interrogating the process of change', 1999, 1 *British Journal of Politics & International Relations* 3, 317-345.

<sup>358</sup> Mark Blyth, 'Great Transformations, Economic ideas and Institutional change in the twentieth century', 2002, *Cambridge University Press*, 9-10. John L. Campbell, 'Institutional Analysis and the Role of Ideas in Political Economy', 3 Jun 1998, 27 *Theory and Society*, 377-409. John L. Campbell, *Institutional Change and Globalization*, 2004, Princeton University Press. Robert C. Lieberman, 'Ideas, Institutions, and Political Order: Explaining Political Change', 2002, 96 *The American Political Science Review* 4, 697-712.

<sup>359</sup> Mark Blyth, 'Great Transformations, Economic ideas and Institutional change in the twentieth century', 2002, *Cambridge University Press*, 9-10. John L. Campbell, 'Institutional Analysis and the Role of Ideas in Political Economy', 3 Jun 1998, 27 *Theory and Society*, 377-409. John L. Campbell, *Institutional Change and Globalization*, 2004 Princeton University Press. Robert C. Lieberman, *Ideas, Institutions, and Political Order: Explaining Political Change*, 2002, 96 *The American Political Science Review* 4, 697-712.

<sup>360</sup> Peter Kerr, 'Saved from Extinction: Evolutionary Theorising, Politics and the State', Jun 2002, 4 *British Journal of Politics & International Relations* 2, 330-59.

conceptualised as co-participants in the formation of those institutional reforms that are inspired by the predominant ideological framework. In other words, ideas, like a pair of lenses, allow individuals to see more clearly how they can achieve their objectives. Interests, on the other hand, require individuals to think about how to reach them, thereby allowing the development of ideas.<sup>361</sup> According to this interpretation, the Knightian uncertainty described by Blyth does not deal with interests themselves, but with how to pursue them. In this sense, ideas and interests play a crucial role in causing, and therefore in offering, an interpretation of the crisis. On the one hand, crises are due to the fact that the institutional framework does not reflect or follow the new economic interests. In other words, since human rationality is not perfect, institutions may fail to be efficient and crises are the manifestation of deficiencies within the system. On the other hand, ideas provide different solutions and interpretations on how to reach new objectives and overcome the downturn; these suggestions, if shared, become institutionalised into institutional frameworks.

Hence, crises themselves are not the main *cause* of change, but rather the *outcome*. What plays a strategic role in the institutional revision is not the crisis *per se*, but the perception of failure. In other words, the awareness of institutional inefficiency, in terms of the extent to which interests can be achieved, pushes social groups to develop or reinterpret ideas in order to understand their environment, to reduce uncertainty, and to offer solutions that are in turn re-institutionalised.

It is not always the crisis itself that generates the need to push for institutional change, but it is the perception of failure, along with the instability of political institutions, that creates room for change. In other words, when a political institution is

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<sup>361</sup> Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*, 2002, Cambridge University Press, 9-10. Colin Hay, 'Crisis and the Structural Transformation of the State: Interrogating Processes of Change', October 1999, 1 *British Journal of Politics and International Relations* 3, 317-344, 321.

thought to be crumbling, political actors may try to adopt new policy prescriptions.<sup>362</sup> However, while the insight of failure is a necessary condition, it is no guarantee of an effective modification in the set of institutions of a given country – and neither is a crisis *per se*. For instance, not all the institutional changes in the US antitrust policies that are here analysed have followed an economic crisis.

While the enforcement of the Sherman and Clayton Act were anticipated by economic difficulties, these could not be associated with a real crisis. Yet the adoption of Harvard-oriented ideas, after the Great Depression, or of the Chicago ideas after the oil crises, can be understood as the necessity to embrace a different economic vision to respond to the new economic interests that were emerging out of the economic downturns. Since those crises manifested the inadequacy of the entire institutional settlements, or *mode de régulation*, in every political economic aspect, the changes applied in the context of antitrust were in accordance with the enforcement of general economic policies.<sup>363</sup> For instance, while Harvard ideas were institutionalised into competition policies that promoted general welfare, Keynesianism was translated into social policies. In the same way, Chicago principles gave birth to a more *laissez-faire* antitrust approach in accordance with neo-liberal economic policies. Similarly, while the current crisis appears to have not triggered any major institutional change, it has forced political leaders to wake up to the need for reforms. However, adapting institutions to the exigencies of the economic system is not automatic and requires time.<sup>364</sup>

In conclusion, while crises do not ensure institutional change, they embody the

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<sup>362</sup> Theda Skocpol, 'Bringing the State Back In: Strategies of Analysis in Current Research', in Dietrich Rueschemeyer and Theda Skocpol (eds.), *Bringing the State Back In*, 1985, New York: Cambridge University Press, chapter 1, 3-40. Theda Skocpol, 'Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal', 1982, *Politics and Society* 10, 151-201.

<sup>363</sup> Aglietta Michel, *Régulation et crises du capitalisme*, 1976, Paris, Calmann-Lévy.

<sup>364</sup> Robert Boyer, Yves Saillard, 'A Summary of Régulation Theory' in Robert Boyer, Yves Saillard (eds.), *Régulation theory: The State of the Art*, 2002, Routledge, chapter 5, 36-55.

general conditions and prerequisites for generating one.<sup>365</sup> Indeed, when there is a crisis involving historical, political, economic or cultural variables, individuals look for a modification of the relevant institutional arrangements.<sup>366</sup> Furthermore, because economic and financial crises represent a downturn not only of economic and financial transactions but also of the knowledge structures that shape the social realm, every economic downturn can potentially produce an ideological change.<sup>367</sup>

### *Institutional Change: When, How and Why?*

As outlined above, crises, by varying the dynamics of social transactions, can be a source of institutional adjustments driven by the new ideas, or knowledge models, that shape the way individuals or organisations perceive their environments.<sup>368</sup> However, what motivates political actors to modify the institutional framework is not the crisis itself, but the opportunity to overcome the general feeling of failure. Those opportunities usually originate from external changes in the environment or from the acquisition by the individual of new knowledge that becomes part of its mental model, or construction. From a strictly economic point of view, the most commonly perceived source of institutional revision is generally linked to the modification of prices; however, changes in taste also come into play. Moreover, knowledge *per se* can transform the mental model of individuals, thereby compelling them to reshape the institutional environment.

According to North, institutional alterations are always linked to internal and external factors. However, the need for change is normally triggered by an external factor, specifically one that is perceived to be too costly for individuals. In this context,

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<sup>365</sup> Judith Goldstein, *Ideas, Interests and American Trade Policy*, 1993, Cornell University Press, 13.

<sup>366</sup> Judith Goldstein, *Ideas, Interests and American Trade Policy*, 1993, Cornell University Press, 13. Albert S. Yee, 'The Causal Effects of Ideas on Policies', 1996, 50 *International Organization* 1, 69-108.

<sup>367</sup> Mark Blyth, *Great Transformations: Economic Ideas and Institutional Change in the Twentieth Century*, 2002, Cambridge University Press 10.

<sup>368</sup> Peter A. Hall 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain', Apr. 1993, 25 *Comparative Politics* 3, 275-296, 289.

actors would compare the costs and benefits of structural variation within the existing institutional framework and, in doing so, they would employ the ‘set of beliefs’ – i.e. the revolutionary ideas – of their historical moment. While these sorts of institutional change normally preserve the core of the institutional system, they are still likely to lead to a modification of formal rules or to a progressive alteration of informal social norms and behaviour.<sup>369</sup>

This process of institutional change may be linked to a path-dependent mechanism whereby every action that occurs in a particular environment is the product of previous some behaviour. Indeed, because each political or economic establishment has its own structure, and because this structure shapes the mental models of the individual inside of it, every change is likely to depend on previous choices. Moreover, because organisations’ members are usually apprehensive about external factors that would make them lose power, they might try to adjust the institutional framework in such a way as to maximise their interests, protect their assets, and serve their past decisions. Those assumptions are in line with the theories of varieties of capitalism, in which economic structural models are normally considered embedded in the general cultural environment and where, despite recurrent institutional modifications, a complete alteration of the model as a whole is difficult to come about. However, changes can happen; it typically occurs when parties inside the organisation are not able to find a compromise and thereby let the entire institutional framework collapse.<sup>370</sup>

Sewell defines path dependence as a process where past actions shape the future because ‘what has happened at an earlier point in time will affect the possible outcomes

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<sup>369</sup> Douglas North, ‘Institutional Change: A framework of Analysis’ in Sven-Erik Sjostrand (ed.), *Institutional Change: Theory and Empirical findings*, 1993, Studies in Socio-Economics, M.E. Sharpe, Chapter 2, 35.

<sup>370</sup> Douglas North, ‘Institutional Change: A framework of Analysis’ in Sven-Erik Sjostrand (ed.) *Institutional Change: Theory and Empirical findings*, 1993, Studies in Socio-Economics, M.E. Sharpe, Chapter 2, 35.

of a sequence of events occurring at a later point in time'.<sup>371</sup> In this sense, what happens at time 'one' is related to what happens at time 'zero'. Consequently, every political change set in motion to respond to contingent social and economic exigencies follows the trail established by past decisions. Indeed, according to Weir and Skocpol, 'policy legacies', or 'meaningful reactions to previous policies', shape the interests that political actors pursue at any moment in time.<sup>372</sup>

In political studies, the concept of path dependence is normally applied to emphasise the role of specific patterns of timing, sequences and events in producing social outcomes and influencing political development.<sup>373</sup> According to Bernhard Ebbinghaus, the different interpretation of path dependence can be encapsulated in two metaphors: the first one is that of an unplanned '*trodden* trail' where every spontaneous action is consistently shaped by previous behaviours without any possibility for individuals to consciously modify it. The second metaphor is one of a 'road *junction*', where actors can shape their future by choosing the path they see fit.<sup>374</sup>

The notion of path dependence and its consequences over social processes of change can therefore be interpreted in different ways. Indeed, while the first model underlines that each institution evolves spontaneously according to a structure traced by past actions, the second approach, by positing the existence of alternative choices,

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<sup>371</sup> William Sewell, 'Three Temporalities: Toward a Sociology of the Event' *Social Organization*, Oct 1990, Working Paper Series (CRSO), 16. James Mahoney, 'Path Dependence in Historical Sociology', Aug. 2000, 29 *Theory and Society*, 4, 507-548.

<sup>372</sup> Margaret Weir and Theda Skocpol, 'State Structures and the Possibilities for 'Keynesian' Responses to the Great Depression in Sweden, Britain and the United States,' in Peter Evans, Dietrich Rueschemeyer and Theda Skocpol (eds.), *Bringing the State Back In*, 1985, New York: Cambridge University Press, chapter 4, 117-168, 119; quoted also in Peter A. Hall 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policymaking in Britain', Apr. 1993, 25 *Comparative Politics* 3, 275-296, 277.

<sup>373</sup> Paul Pierson, 'Increasing Returns, Path dependence and the Study of Politics', 1997, *European University Institute, The Robert Shuman Centre, Jean Monnet Chair Papers* 44, 9.

<sup>374</sup> Bernhard Ebbinghaus 'Can Path Dependence Explain Institutional Change? Two Approaches Applied to Welfare State Reform', March 2005, *Max Planck Institute for the Study of Societies Cologne, Discussion Paper* 05/2.

affirms the possibility of individuals to have a say in the development of institutions and in the process of institutional change.<sup>375</sup>

The theory of path dependence has been developed from the Polya urn model, a mathematical modelling technique that demonstrates how past events can determine future change. According to this approach, once an action is repeated and reiterated in time, it is more likely to shape future performances.<sup>376</sup> Following this pattern, the old school of institutionalism suggests that because habits and patterns of behaviour shape individual choices, institutional change is similarly shaped by the environment according to the direct consequentiality of previous actions.

However, according to a more evolutionist interpretation of institutional change, individuals matter in the alteration process insofar as they can decide which 'road juncture' they wish to take. In the process of institutional construction, individuals are influenced by their framework of thought, in other words, by the ideas, ideology and culture of a particular environment as well as by how they all come to be theorised into a single logical system. In this respect, knowledge is fundamental in determining which institutions are going to be built.<sup>377</sup>

According to Judith Goldstein, once an idea is selected to be the theoretical framework of reference, it will leave its 'vestiges'. In other words, 'political rules and norms formed in response to and in support of an economic idea fundamentally influence the environment for future political choices'.<sup>378</sup> Consequently, the institutional changes registered in the US during and after the above-mentioned crises have been

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<sup>375</sup> Bernhard Ebbinghaus, 'Can Path Dependence Explain Institutional Change? Two Approaches Applied to Welfare State Reform', March 2005, *Max Planck Institute for the Study of Societies Cologne, Discussion Paper 05/2*.

<sup>376</sup> W. Brian Arthur 'Increasing Returns and Path Dependence in the Economy', 1994, *University of Michigan Press*. Colin Crouch and Henry Farrell, 'Breaking the Path of Institutional Development? Alternatives to the New Determinism', 2004, 16 *Rationality and Society* 5, 1-40.

<sup>377</sup> Mark M. Blyth, "Any More Bright Ideas?" The Ideational Turn of Comparative Political Economy, Jan. 1997, 29 *Comparative Politics* 2, 229-250, 236.

<sup>378</sup> Judith Goldstein, *Ideas, Institutions and the Politics of Protectionism*, 1993, Cornell University Press, Ithaca and London, 3.

possible because of the development of new ideas, which, once incorporated into appropriate theories, have been used as frameworks of reference in political decision-making. Both the Great Depression and the Oil Crises, for example, have been characterised by the development of antitrust theories that have inspired the main institutional change within the US model of capitalism.

### *Internationalisation of Institutions*

Having understood the process of institutional change and the role of crises, I believe it is necessary now to examine why institutions can be implemented at a global level, and why and how institutional arrangements can be formalised internationally. In other words, it is essential to explain why the European Union and Japan came to adopt similar antitrust approaches to those of the US, even though their ideological frameworks of reference and models of capitalism were completely different.

The internationalisation of antitrust institutions can be understood through the analysis of the process of policy diffusion as the basis of the spread and the institutionalisation of specific ideas. The first scholars to attempt an analysis of policy diffusion among US states, in the first half of the 20th century, were McVoy and Davis.<sup>379</sup> According to Gilardi, McVoy interpreted US states as ‘policy laboratories in which innovations can be tested and, if successful, spread across the country’.<sup>380</sup> Several other intellectuals, such as Gray, Walker, Berry and Berry, or Rose and Bennett, have later brought the study of policy diffusion to a regional or cross-national level.<sup>381</sup> In their

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<sup>379</sup> Edgar C. McVoy, ‘Patterns of Diffusion in the United States’, 1940, *American Sociological Review* 5, 219-27. Ada J. Davis, ‘The Evolution of the Institution of Mothers’ Pensions in the United States’, 1930, *American Journal of Sociology* 35, 573-82.

<sup>380</sup> Fabrizio Gilardi, ‘Transnational diffusion: Norms, ideas, and policies’ in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds.), *Handbook of International Relations*, 2012, SAGE Publications, chapter 18, 456.

<sup>381</sup> Virginia Gray, ‘Innovation in the States: A Diffusion Study’, 1973, 67 *American Political Science Review* 4, 1174-85. Jack L. Walker, ‘The Diffusion of Innovations among the American States’, 1969, 63 *American Political Science Review* 3, 880-99. Frances Stokes Berry and William D. Berry, ‘State Lottery Adoptions as Policy Innovations: An Event History Analysis’, 1990, 84 *American Political*

analysis, policy diffusion, besides creating an institutional environment for achieving specific interests, increases the legitimacy of specific patterns of behaviour and shapes actors' understanding of the social realm. At an international level, this can be assimilated to what Keohane and Nye defined as an international regime, i.e. a network of rules that regulate and control the behaviour of actors.<sup>382</sup> From this perspective, the study of policy diffusion may shed some light on the way antitrust policies have been institutionalised and emulated outside the US.<sup>383</sup>

The mechanisms of policy diffusion are thoroughly explained by the sociological theory of organisational isomorphism. Although theories related to isomorphism are normally applied to general organisations, it is possible to interpret these as political ones, to assimilate them to states, and ultimately to explain why Europe and Japan adopted antitrust policy connotations and regulatory structures similar to those of the US.<sup>384</sup> For instance, Talcott Parsons defines organisations as 'a social system oriented to the attainment of a relatively specific type of goal, which contributes to a major function of a more comprehensive system, usually the society'.<sup>385</sup> Similarly, Aldrich identifies them as 'goal-directed, boundary-maintaining, activity systems'.<sup>386</sup>

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*Science Review* 2, 395-415. Charles R. Shipan, Craig Volden, 'Bottom-Up Federalism: The Diffusion of Antismoking Policies from U.S. Cities to States', 2006, 50 *American Journal of Political Science* 4, 825-843. Richard Rose, 'Lesson-Drawing in Public Policy', 1993, Chatham, NJ: *Chatham House*. Colin J. Bennett, 'What Is Policy Convergence and What Causes It?', 1991, 21 *British Journal of Political Science*, 215-33, Christopher Z. Mooney, 'Modeling Regional Effects on State Policy Diffusion', Mar. 2001, 54 *Political Research Quarterly*, 1, 103-124.

<sup>382</sup> Robert O. Keohane and Joseph S. Nye, Jr., *Power and Interdependence: World Politics in Transition*, 1989, Little-Brown, 17.

<sup>383</sup> Eva Boxenbaum and Stefan Jonsson 'Isomorphism, diffusion and decoupling' in Royston Greenwood, Christine Oliver, Roy Suddaby, Kerstin Sahlin-Andersson (eds.), *The SAGE Handbook of Organizational Institutionalism*, 2008, Sage Publication, chapt. 2, 78.

<sup>384</sup> Douglas North, 'Institutional Change: A framework of Analysis' in Sven-Erik Sjostrand (ed.), *Institutional Change: Theory and Empirical findings*, 1993, Studies in Socio-Economics, M.E. Sharpe, Chapter 2, 45.

<sup>385</sup> Talcott Parsons, 'Suggestions for a Sociological approach to the theory of Organizations', Jun. 1956, 1 *Administrative Science Quarterly* 1, 63-85, 63.

<sup>386</sup> Howard E. Aldrich, *Organizations & Environments*, 1979, Prentice Hall, Inc., Englewood Cliffs, 4.

Organisations can be described as the structure that defines actors' goal orientations;<sup>387</sup> thus, it is possible to consider the state an organisation itself or 'a bureaucratically organised administrative structure empowered to govern a geographically delimited territory'.<sup>388</sup> However, while it is plausible to interpret the state as an organised unit, states or governments themselves differ from normal organisations because they can exercise authority over the latter. Even so, the state can be described as a special organisation with unusual powers but normal internal dynamics.

The theory of organisational isomorphism can be interpreted according to two different schools of thought. From a sociological perspective isomorphism is a mimetic or normative process in which organisations tend to copy each other. Mimetic isomorphism occurs as a response to uncertainty, for instance when organisational technologies are poorly understood, or when the goals are vague, or again, when the very environment creates uncertainty.<sup>389</sup> In other words, in a situation of uncertainty organisations tend to follow similar patterns, which are believed to be successful. The advantage of this approach is that it can provide a convenient and practicable solution with little expense.<sup>390</sup> Indeed, while the organisation that is imitated may not be aware of being taken as a model, it directly or indirectly allows other groups to take advantage of its more advanced expertise and to borrow its practices. Moreover, as Alchian maintains, the process of imitating can *per se* originate innovations, which might allow the organisation to become, in its turn, a successful model of reference.<sup>391</sup> For instance, the

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<sup>387</sup> See also Charles Perrow, *Organizational Analysis: A Sociological Views*, 1970, Belmont, Calif: Wadsworth; quoted in Jeffrey Pfeffer and Gerald R. Salancik, *The External Control of Organizations, A Resource Dependence Perspective*, 1978, Harper and Row Publisher, 23.

<sup>388</sup> W. Richard Scott, *Institutions and Organizations*, 1995, Sage Publications, Thousand Oaks, London and New Delhi, 94-95. Charles E. Lindblom, *Politics and Markets: The World's Political Economic Systems*, 1977, New York, Basic Books, 21.

<sup>389</sup> James G. March and Johan P. Olsen, *Ambiguity and Choice in Organizations*, 1976, Bergen, Norway: Universitetsforlaget.

<sup>390</sup> See: Richard M. Cyert, and James G. March, *A Behavioural Theory of the Firm*, 1963, Balckwell Business, Cambridge Massachusetts.

<sup>391</sup> Armen A. Alchian, 'Uncertainty, Evolution, and Economic Theory', Jun. 1950, 58 *The Journal of Political Economy* 3, 211-221.

Japanese trajectory of modernisation was a mimetic process. Indeed, since the Meiji Restoration in 1867, Tokyo promoted several industrial policies to catch up and compete with Europe and the US.<sup>392</sup> Japan partially emulated American economic institutions by integrating the concepts of competitiveness or economic efficiency with its traditional government control over the economy.

For instance, the concept of competition was incorporated with the one of Confucian social order. This resulted in the government encouraging the development of cartelising practices, such as the Japan Paper Manufacturers Federation and the Japanese Cotton Spinning Federation, in order to promote economic efficiency and maintain control over trade practices.<sup>393</sup> By copying Western capitalistic models, Tokyo adjusted liberal and neo-liberal systems in a way that was convenient to its interests. As a result, it produced new schemes and methods to understand capitalism. This explains why the Japanese model of capitalism differs remarkably from the German one, although they are both considered coordinated ideal-types.

Normative isomorphism, in contrast, originates primarily from professionalization. According to DiMaggio and Powell as well as Larson and Collins, professionalization is characterised by a specific body of knowledge and a 'market of services'.<sup>394</sup> In other words, actors within organisations have similar backgrounds, and they tend to share similar ideas concerning the various problems at hand: this allows them to develop similar worldviews.

Those ideas are then internationally diffused through the networking processes developed by the actors involved in professional and trade associations, which become

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<sup>392</sup> Peter Morici, *Antitrust in the Global Trading System: Reconciling U.S. Japanese and EU Approaches*, 2000, Economic Strategy Institute, 7.

<sup>393</sup> Jeffrey Fear, 'Cartels and Competition: Neither Markets nor Hierarchies', 2006, *Working Paper Harvard Business School*, 11.

<sup>394</sup> Magali S. Larson, *The Rise of Professionalism: A Sociological Analysis*, 1977, Berkeley, Los Angeles, London, University of California Press, 49-52. Randall Collins, *The Credential Society: an historical sociology of education and stratification*, 1979, New York, Academic Press, 58-59.

the *de facto* 'empirical arena' where ideas are spread.<sup>395</sup> Professions can be defined as structures, which link the production of knowledge to its application while establishing a cognitive framework that legitimises its own autonomy.<sup>396</sup> Professionalization, in turn, becomes a source of organisational isomorphism through universities and professional networks. On the one hand, formal education allows individuals to share a corpus of specific knowledge, to become part of a specific professional group, and to understand things by reference to similar concepts. On the other hand, the creation of professional networks allows models to be diffused very rapidly because their members share the same frames of reference regarding the ways to solve problematic situation.

As will be better explained in the following chapter on the internationalisation of antitrust, the creation of the International Competition Network by the U.S. in 2001 can be considered an attempt to build an arena where antitrust practitioners can share information. Indeed, the establishment of the ICN and its study groups has allowed the development of a form of normative isomorphism among states that has led to processes of harmonisation between antitrust practices.<sup>397</sup>

Differently from the sociological perspective, population ecologist scholars interpret isomorphism as a competitive phenomenon, which 'involves pressures toward similarity resulting from market competition'.<sup>398</sup> Building on Durkheim and Hawley,

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<sup>395</sup> Magali S. Larson, *The Rise of Professionalism: A Sociological Analysis*, 1977, Berkeley, Los Angeles, London, University of California Press, 48-49. Mark S. Mizruchi and Lisa C. Fein, 'The Social Construction of Organizational Knowledge: A Study of the Uses of Coercive, Mimetic, and Normative Isomorphism', Dec. 1999, 44 *Administrative Science Quarterly* 4, 653-683.

<sup>396</sup> Magali S. Larson, *The Rise of Professionalism: A Sociological Analysis*, 1977, Berkeley, Los Angeles, London, University of California Press, 49-52. Randall Collins, *The Credential Society: an historical sociology of education and stratification*, 1979, New York, Academic Press, 58-59.

<sup>397</sup> For more information about the ICN:

<http://www.internationalcompetitionnetwork.org/about/history.aspx>

Mario Todino, 'International Competition Network: The State of Play after Naples', 2003, 26 *World Competition* 2, 283-302. Oliver Budzinski, 'The International Competition Network: Prospect and Limits on the Road Towards International Competition Governance', September 2004, 8 *Competition and Change* 3, 223-242. Eleanor Fox, 'International Antitrust and the Doha Dome', October 2003, 43 *Virginia Journal of International Law*, 911-32 .

<sup>398</sup> Mark S. Mizruchi and Lisa C. Fein 'The Social Construction of Organizational Knowledge: A Study of the Uses of Coercive, Mimetic, and Normative Isomorphism', Dec. 1999, 44 *Administrative Science Quarterly* 4, 653-683, 656-7.

Hannan and Freeman point out how competitive pressure forces organisations to adopt similar patterns of behaviour and parallel structures in the interest of economic efficiency.<sup>399</sup> For instance, US liberal market institutions have spread around the world because the Anglo-Saxon liberal model of capitalism was considered to be the most efficient one.<sup>400</sup> Even though the current financial crisis has been caused by a similarly extreme interpretation of this model, whose superiority is now in question, many countries are still hard-pressed to find alternatives.

Since the competitive explanation has failed to clarify why specific models are adopted despite being inefficient, many scholars, including Kanter, DiMaggio and Powell, have tried to offer other explanations to supplement the institutionalised interpretation of isomorphism.<sup>401</sup> With reference to utopian communities, Kanter suggests that, while the concept of institutional isomorphism is a useful tool to understand organisational life, it is limited. Indeed, organisations do not copy and compete among themselves just to obtain better economic results or performances; there are also other elements that need to be taken into consideration when investigating the process of organisational homologation: political power and institutional legitimacy are two of them.<sup>402</sup>

In a nutshell, coercive isomorphism occurs when an organisation is in a condition of dependency from another one because the latter can exert formal and

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<sup>399</sup> See Emile Durkheim, *The Division of Labor in Society*, 1947, translated by W.D.Halls, 1984 Free Press, New York, 338. Amos Henry Hawley, *Human Ecology: A Theory of Community Structure*, 1950, The Ronald Press Company, New York, 201-3. Hannan, Michael T. and John H. Freeman, 'The population ecology of Organizations', 1977, 82 *American Journal of Sociology*, 929-64.

<sup>400</sup> Michale Carney, 'Varieties of Asian capitalism: Toward an institutional theory of Asian enterprise', 2009, 26 *Asia Pacific Journal of Management* 3, 361-80.

<sup>401</sup> Rosabeth M. Kanter, *Commitment and Community: communes and utopias in sociological perspective*, 1972, Cambridge, Mass, Harvard University Press, 152-56.

<sup>402</sup> Paul J. DiMaggio and Walter W. Powell, 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', 1983, 48 *American Sociological Review* 2, 147-60.

informal pressure.<sup>403</sup> This pressure can come in the form of persuasion or it can be a simple invitation to adopt a collusive arrangement.

The most powerful organisation can exert pressure over the weaker one to compel it to conform to its cultural, ideological standard. In fact, according to Pfeffer and Salancik, coercive isomorphism can be understood as a resource-dependency model. Organisations are obliged to homogenise their characteristics because they find themselves in a situation of dependency from those who can provide resources.<sup>404</sup>

Thus, according to Di Maggio and Powell, the effects of mimetic, normative and coercive mechanisms on the social realm are not always easily identifiable because they can coexist and can cause organisational isomorphism by operating through different routes.<sup>405</sup> In the same vein, this thesis will demonstrate that the competitive mechanism is equally important and can coexist with the sociological definition of isomorphism; in fact, states can adopt similar patterns also for competitive reasons. Both economic and sociological approaches emphasises that material resources or competitiveness *per se* cannot totally explain the internationalisation of ideas, and therefore of antitrust ideological frameworks and institutions. However, taken together, all of the isomorphic mechanisms may be instrumental to better understand why, in the wake of the three economic crisis here considered, Europe and Japan, despite their different traditions in terms of economic ideas and theories, implemented a very similar approach to the one adopted by the U.S. Indeed, even though their models of capitalism were and are different from the American one, it is not possible to deny that their antitrust regulations have been directly and indirectly influenced by the US.

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<sup>403</sup> Mark S. Mizruchi and Lisa C. Fein 'The Social Construction of Organizational Knowledge: A Study of the Uses of Coercive, Mimetic, and Normative Isomorphism', Dec. 1999, 44 *Administrative Science Quarterly* 4, 653-683, 657.

<sup>404</sup> Jeffrey Pfeffer and Gerald R. Salancik, *The External Control of Organizations, A Resource Dependence Perspective*, 1978, Harper and Row Publisher, 46-47.

<sup>405</sup> Paul J. DiMaggio and Walter W. Powell 'The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields', 1983, 48 *American Sociological Review* 2, 147-60.

Hence, the development of an antitrust institutional isomorphism in Europe and Japan can be explained not only in terms of the power relations with the US, but also through mimetic, normative or competitive mechanisms. For instance, an example of coercive isomorphism is the US intervention in post-war Germany and Japan. At the time, those countries were in a situation of dependency from the US in terms of financial economic aid and protection. In this context, the U.S. could compel them to adopt specific competition policies in order to abolish the level of cartelisation and protectionism that were believed to have caused both the recession and the war. In 1957, Germany adopted the Restraint of Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), which complied with the American antitrust tradition by declaring cartels and trade-restricting combinations illicit.<sup>406</sup> In Japan, by contrast, the Antimonopoly Law was passed in 1947 as part of the process of post-war market opening promoted by the US.<sup>407</sup> Moreover, the US-driven construction of antitrust institutions, in turn, set in motion a normative mechanism of isomorphism, as those countries started to adopt a similar language of reference.

McNamara singled out another example of mimetic and competitive mechanism. In his analysis, the adoption of monetarism by Germany after the oil crises of the 1970s and the achievement of efficient economic results were vital to persuade policymakers in other countries to implement similar schemes.<sup>408</sup> This can also be seen in the promotion of Chicago-oriented antitrust policies in the UK and later in the European Union, which had traditionally followed a very different pattern. For instance, the enforcement of the

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<sup>406</sup> Ulf Boge, 'Competition Law in Germany', Vinod Dhall (ed.), *Competition Law Today*, 2007, Oxford University Press, 299. see also Volker R. Berghahn, *The Americanisation of West Germany Industry, 1946-1973*, 1986, Cambridge University Press, and Marie-Laure Djelic, *Exporting the American Model: The Post-war Transformation of European Business*, 1998, Oxford, Oxford University Press.

<sup>407</sup> Mitsuo Matsushita, 'The Antimonopoly Law of Japan', in Edward Montgomery Graham, J. David Richardson (eds.), *Global Competition Policy*, 1997, Institute for International Economics, chapter 5, 151-190.

<sup>408</sup> Kathleen R. McNamara, *The Currency of Ideas : monetary politics in the European Union*, 1998, Ithaca, NY, Cornell Univ. Press.

1990 Merger Regulation (MCR) was the first European step towards a neo-liberal efficiency-oriented competition policy. Even though the Ordoliberal cause of common market protection was still to be found in the MCR, Hubert Buch-Hanse and Angela Wigger maintain that with the approbation of this regulation the interests of the Member States began to be conspicuously excluded from the competition policy-making process in favour of a sort of efficiency-oriented discourse.<sup>409</sup> Japan, too, followed the neo-liberal trend. Even though the government tried to reject any Western influence in their response to the crisis, competitive pressures led to the adoption of a stronger antimonopoly policy in 1990. The measure adopted was the product of a close cooperation between American antitrust officials and their counterparts in the Japan Fair Trade Commission (JFTC) and a perfect example of a mimetic and competitive mechanism, which allowed Japan to integrate into a transnational antitrust institutional culture.<sup>410</sup>

In conclusion, those trends can be explained through different isomorphic mechanisms that can hardly be singled out or separated from one another. There is indeed a common ground shared by all those different combinations of isomorphic mechanisms. On the one hand, those countries aspired to be as economic efficient as the US and, at the same time, the latter was free to exert a form of coercive pressure on them. On the other hand, by adopting similar ideological frameworks and institutions, those countries started to share a common language. This process facilitated the mimetic and especially the normative isomorphic trends that, through a path-dependence cycle, influenced the overall antitrust policy-making process.

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<sup>409</sup> Hubert Buch-Hanse and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy', February 2010, 17 *Review of International Political Economy* 1, 20-44.

<sup>410</sup> Mitsuo Matsushita and Douglas E. Rosenthal, 'Competition in Japan and in the West: Can the Approaches be reconciled?' in Graham, Edward M., and J. David Richardson (eds.), *Global Competition Policy*, 1997, Washington DC: Institute for International Economics, chapter 9, 313-317.

## CONCLUSION

Ideas, cultures, beliefs and their conversion into theoretical conceptualisations are crucial to understand the evolution of the meaning of competition. Indeed, while the rationale of antitrust lies in the maximisation of efficiency and the protection of welfare, the interpretation of how to reach these objectives can produce different outcomes. Goals and objectives are assessed by taking into consideration the contingent necessities and the interests of each historical period as well as the frame of theoretical conceptions and cultural variables that influence the social realm. For this reason, competition policies have a different meaning according to the country where they are applied and the cultural environment of reference.

Douglas North defines the state as the organisational centre where institutions are constructed by specific actors or member of governments. In time of change, political actors alter their behaving by shaping institutions according to the new interests that have to be reached. In the case of the US, the actors involved in the process are the experts, who, by virtue of their expertise, are called on to play an effective and active role in the antitrust decision-making process by the politicians, whose decisions, in turn, are embedded within the specific theoretical frameworks sustained by their community of experts. This issue network has favoured the creation of particular antitrust models that normally reflect the characteristics of the general model of capitalism. In this sense, the institutionalisation of antitrust is enforced in the respect of the cultures and ideas that shape the specific model of capitalism.

Nevertheless, this approach does not explain why countries have in time switched from a liberal to a neo-liberal interpretation of antitrust policy. VoC schools interpret this as a competitive phenomenon in which countries adopt common practices in the interest of efficiency. However, as outlined above, efficiency discourses vary from

country to country; for instance, in Germany, efficiency has also welfare components, while in the US it does not. Again, the Japanese interpretation of the meaning of welfare differs from the European one. In this sense, while the competitive system can partially explain the development of specific institutions, it does not answer completely the question of why states have adopted similar antitrust institutions or at least institutions that followed similar ideological paths.

According to scholars from a sociological background, this process has also been caused by mimetic, normative and coercive isomorphism. In fact, it is possible to maintain that the four processes of isomorphism have set off a form of antitrust convergence – even though a complete harmonisation is not forthcoming and the differences among capitalistic structures are still conspicuous.

In conclusion, this chapter has illustrated the institutionalisation of common antitrust approaches in the US, Europe and Japan, despite the embedded structures of different models of capitalism. It explained how the processes of isomorphism have contributed to the alteration of the general capitalistic models and to the trend of partial convergence of antitrust policy. Having defined the general theoretical hypothesis, the next chapter will introduce an analysis of the antitrust institutionalisation process during the Great Depression, the Oil Crises and the Credit Crunch in order to provide an empirical demonstration of these assumptions.

## **PART II**

### **CHAPTER 4**

#### **THE INSTITUTIONAL FOUNDATIONS AND THE EVOLUTION OF AMERICAN ANTITRUST POLICIES**

This chapter aims to offer a historical illustration of the theory of pan-institutional development hitherto presented, with specific reference to the foundations and evolution of American antitrust policy.

Since the beginning of the 20<sup>th</sup> century, American administrations have been enforcing various antitrust approaches through the appointment of *ad hoc* experts at the head of the Federal Trade Commission and/or the Antitrust Division. By acting as a sort of issue network, this group favoured the translation of particular antitrust ideas into institutionalised policies, regulations, and practices in order to overcome economic downturns and address business needs.

The main arguments in support of this thesis are structured as follows: the first part of each section will frame the historical context of analysis, by explaining the relevant events causing the US institutional change process. The chapter starts with an investigation into the role of ideas in the institutionalisation of the first antitrust regulations in the US and goes on to follow the evolution of the discipline throughout the administrations that dealt with the three crises, namely, Roosevelt for the Great Depression; Nixon, Ford, Carter and Reagan for the Oil crises; and Bush and Obama for the current downturn. As previously stated, these three historical periods are relevant here not for their role in the collapse of the institutional framework of the time, but because they created the conditions for the emergence of new interests and, along with them, of new antitrust practices.

In conclusion, this chapter traces the process of antitrust institutional development in chronological sequence. This approach will help to verify the consistency of path dependency and to clarify the position of the state and governments at the intersection between interests and ideas.

#### 1900s: THE SHERMAN ACT AND THE CLAYTON ACT

The earliest form of institutionalisation of antitrust in the US dates back to the nineteenth century, when the US Congress approved its first antitrust law, the Sherman Act, in order to discipline unfair economic activities, such as monopolies or cartels. Specifically, the extended public negotiations for the approval of the Act took place in 1888 and lasted until 1890.<sup>411</sup> At that time, no other country, apart from Canada, had adopted a similar juridical body to regulate monopolies and restrictive business practices; views on the necessity of such antitrust provisions were initially polarized and this instigated two years of contentious debates.<sup>412</sup> On the one hand, it was deemed necessary to foster competitiveness but, on the other, confidence in classical economic *laissez faire* and the neoclassical perfect-competition model remained high, as trusts were generally believed to lead to large-scale economies and productive efficiency gains.<sup>413</sup>

Even though these were not times of real crisis, such disputes took place in a period of political and economic uncertainty. In the wake of the Civil War, the burden of the northern industrial model over the country produced an increase in the number

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<sup>411</sup> Canada's Combines Investigation Act was promulgated before the Sherman Act. However, because of the differences in the legal processes, in the mechanism of interpretation used by the Courts, and the resourced applied to enforce the law, Canada antitrust regulations was less rigorous than that of the US.

<sup>412</sup> Rudolph Peritz, *Competition Policy in America, 1818-1992, History, Rhetoric, Law*, 1996, Oxford University Press, 14.

<sup>413</sup> Mary S. Morgan, 'Competing notions of 'competition' in late Nineteenth-Century American economics', 1993, 25 *History of Political Economy* 4, 563-604. Francis M. Scherer, 'Efficiency, fairness, and the early contributions of economists to the antitrust debate', 1990, *Washburn Law Journal*, 29, 247. Luca Fiorito and John Henry, 'John Bates Clark on trusts: new light from the Columbia archives', 2005, *Quaderni del Dipartimento di Economia Politica, Università di Siena* 462, 5.

of trusts and cartels. This phenomenon brought about a rapid change in the production system at a time when industrial activities benefited from such technological innovations as the development of national transportation and communication systems. According to Peritz, 'while these revolutionary developments presaged much greater economic efficiency than had been known in the past, at the same time, entire industries were increasingly controlled by monopolies or cartels', slipping out of the grip of the state.<sup>414</sup> Railroads were the first instances of these huge consolidations, followed by processing and distribution firms, and then by massive integrated manufacturing enterprises.<sup>415</sup>

By 1890, while great trusts like John D. Rockefeller's Standard Oil dominated the markets, the American response to anticompetitive practices was twofold. States such as Kansas and Missouri pushed an anti-monopoly agenda by prosecuting corporations for restraining trade, while in the same year New Jersey, Delaware and New York approved new regulations allowing trusts and holding companies.<sup>416</sup> This phenomenon was due to a different conception of competition. While American economic *laissez faire* essentially forbade any attempt to regulate trade practices, the growing economic power of corporations and the mounting social inequality were constantly challenging the belief that markets were self-policing.<sup>417</sup> Thus, the ideas that inspired the creation of an appropriate antitrust law were bound to come from outside the economic orthodox perspective. Indeed, as long as competition was considered perfect and naturally inherent in the market, no need was felt for a discipline studying it.

Absent a coherent theoretical background to the study of competition and market behaviour, the Sherman Act, even as it was approved, was influenced by

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<sup>414</sup> Rudolph Peritz, 'The Sherman Anti-Trust Act of 1890, a more dynamic and open American economic system', 2008, *Historians on America, U.S. Department of State publication*, 30-38.

<sup>415</sup> David Millon, 'The Sherman Act and the Balance of power', in E. Thomas Sullivan (ed.), *The Political Economy of the Sherman Act*, 1991, Oxford University Press, 88.

<sup>416</sup> Rudolph Peritz, *Competition Policy in America, 1818-1992, History, Rhetoric, Law*, 1996, Oxford University Press, 10.

<sup>417</sup> Ellis W. Hawley, *The New Deal And The Problem Of Monopoly, A Study In Economic Ambivalence*, 1966, Princeton University Press.

economists of all stripes. For instance, while orthodox economists regarded any attempt to rule competition as futile, in 1887 Clark informally maintained the necessity for an appropriate antitrust regulation. He held that all firms, if subjected to high fixed costs and economies of scale, would naturally end up merging to avoid ruinous bankruptcies.<sup>418</sup> Other scholars, such as Commons, Stockings and Fetter, maintained the necessity to appropriately institutionalise antitrust regulations. According to Commons, antitrust law was a ‘viable means of collective actions to control corporate power’.<sup>419</sup>

For this reason, when the Sherman Act was approved in 1890, it contained two substantive sections: section one disposed that ‘every contract, combination [...] or conspiracy, in restraint of trade [...]’ was illegal, while section two declared illegitimate all activities associated with monopolisations or any ‘attempt to monopolise’.

Even though Peritz maintained that marginalism only began to influence antitrust doctrine with the Clayton Act, it is clear that the Sherman Act counts as the first attempt to institutionalise general marginalist principles.<sup>420</sup> Indeed, although the first marginalist models could not clearly explain how a competitive enterprise could ever recover its fixed costs without colluding, it is not accidental that the Sherman Act was approved the same year in which Alfred Marshall declared his ‘marginalist revolution’ in economics.<sup>421</sup>

This early marginalist influence is particularly apparent in the ideas that drove Congress to enforce the law. These were underpinned by the realisation that, since competition is not perfect, economic egalitarianism cannot subsist. In this sense, some form of regulation was deemed necessary to protect not just competition and efficiency,

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<sup>418</sup> Herbert Hovenkamp, ‘The Reckoning of Post-Chicago Antitrust: the Long History of Economics in Antitrust’ in Antonio Cucinotta, Roberto Pardolesi, Roger van den Bergh (eds.), *Post-Chicago developments in antitrust law*, 2002, *Edward Elgar Publishing Limited*, chapter 1, 1-33.

<sup>419</sup> Willard F. Mueller, ‘Antitrust in a Planned Economy: An Anachronism or an Essential Complement?’ June 1975, *IX Journal of Economic Issues*, 2, 159-179, 160-3.

<sup>420</sup> Rudolph Peritz, ‘Antitrust Policy and Aggressive Business Strategy: A Historical Perspective on Understanding Commercial Purposes and Effects’, 2002, 21 *Journal of Public Policy & Marketing* 2, 237-242.

<sup>421</sup> Rudolph Peritz, ‘Antitrust Policy and Aggressive Business Strategy: A Historical Perspective on Understanding Commercial Purposes and Effects’, 2002, 21 *Journal of Public Policy & Marketing* 2, 237-242.

but also economic opportunity and, along with it, the distribution of wealth.<sup>422</sup> The primary aim of Congress was to keep firms from acquiring enough market power to raise prices artificially and to restrict output, making it impossible for consumers to purchase products at competitive prices. In fact, artificially high prices were condemned not for causing allocative inefficiency, but for ‘unfairly’ transforming consumer wealth into monopoly profits.<sup>423</sup> This approach was maintained by Judge Robert Bork's 1966 *Legislative Intent and the Policy of the Sherman Act*. In his view, the American government approved antitrust regulations in an attempt to promote, above all, social welfare.<sup>424</sup> Indeed, the majority of trusts operating in 1890 were highly productive and even Senator Sherman himself considered large corporations to be already quite efficient.<sup>425</sup>

Experience has shown that they are the most useful agencies of modern civilization. They have enabled individuals to unite to undertake enterprises only attempted in former times by powerful governments. The good results of corporate power are shown in the vast development of our railroads and the enormous increase of business and production of all kinds.<sup>426</sup>

Hence, despite their efficiency, trusts were condemned for generating an unequal distribution of wealth. However, a number of researchers have argued, from a public-choice perspective, that the Sherman Act dispositions had strong private interest components and that the decision of Congress was more producer- than consumer-

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<sup>422</sup> Hans B. Thorelli, *The Federal Antitrust Policy: Origination of an American Tradition*, 1955, Johns Hopkins Press, quoted in James May, ‘Historical analysis in Antitrust Law’, 1990, 35 *New York Law School Law Review*, 857-77.

<sup>423</sup> Phillips A., ‘Antitrust Policies: Could they be tools of the establishment?’, in Werner Sichel (eds.), *Antitrust Policy and Economic Welfare*, 1970b, 56 Bureau of Business Research, University of Michigan, 58.

<sup>424</sup> See, Robert Bork, ‘Legislative Intent and the Policy of the Sherman Act’, October 1966, 9 *The Journal of Law and Economics*, 7-48.

<sup>425</sup> John S. Mc Gee, ‘Predatory Price Cutting: The Standard Oil (N.J.) Case’, 1958, 1 *Journal of Law & Economics*, 137-169.

<sup>426</sup> 21 CONG. REC. 2457 (1890)

oriented.<sup>427</sup> In other words, the Congress aimed to support competition in order to stimulate production efficiency.

In addition to promoting social welfare, many economists have hypothesised that the Sherman Act was also aimed at restraining the economic power of large corporations and at fostering greater competition among small firms.<sup>428</sup> As Judge Hand stated in the ALCOA<sup>429</sup> case, the Sherman Act was promulgated with a view to favour ‘a system of small producers, each depending for his success on his own skill and character, to one in which the great mass of those engaged must accept the direction of the few’<sup>430</sup>.

We can conclude that the approval of the Sherman Act was primarily due to Congress’ desire to promote economic efficiency and welfare. Its implementation is to be considered a unique juridical projection of the economic interests of the time, which were stimulated and sustained by the emergence of new marginalist economic ideas of imperfect competition.

#### *Institutional Evolution: The Clayton Act and the Twenties*

The second most significant change in the political and ideological perspectives on American competition policy occurred during the early twentieth century, when it became evident that the new industrial and financial empires were destroying the American dreams of freedom and equal possibilities. The interests that pushed for the enforcement of new antitrust rules were motivated by the need to control mergers more strictly, by creating specific agencies in charge of supervising and enforcing antitrust.

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<sup>427</sup> Christopher Grandy, ‘Original Intent and the Sherman Antitrust Act: A re-examination of the Consumer Welfare Hypothesis’, 1993, 53 *Journal of Economic History* 2, 359-376.

<sup>428</sup> Robert H. Lande, ‘Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged’, September 1982, 34 *Hastings Law Journal* 65, 71-84.

<sup>429</sup> ALCOA is the acronym for “The Aluminium Company of America” firms that, under President F. D. Roosevelt, was charged by the Justice Department with illegal monopolization, and demanded to be dissolved in 1938.

<sup>430</sup> Alan D. Neale, *The antitrust law of the U.S.A. A study of competition enforced by law*, 1968, Cambridge University Press.

This is because a large number of firms were starting to consolidate their trusts and cartels and, absent an institutionalised antitrust bureau, they could easily elude the restrictions imposed by the Sherman Act and *de facto* render void many of its dispositions.

Since Clark's ideas on workable competition reflected a general sense of urgency for some kind of national control over unfair competition practices, they soon began to gain enough influence and credibility to inspire policymakers on the ground. For instance, Woodrow Wilson's New Freedom Plan, clearly inspired by Clark, supported the enforcement of a new legislation that could restore safe competition and erase all the special privileges and unfair practices associated with the trusts. The plan emphasised the need to guarantee economic freedom by implementing 'a body of laws which will look after the men who are on the make rather than the men who are already made'.<sup>431</sup> According to the supporters of New Freedom ideas, prosperity was a direct result of competitive behaviour in the market. They believed that, in order to overcome the recession, it was necessary to decentralise business structures and to allow competitive forces so as to maintain economic balance through the investigation and prosecution of antitrust and anticompetitive practices; capitalists, here, were seen as the main cause of the on-going recession.

Similarly, Theodore Roosevelt's New Nationalism Plan regarded the concentration of economic power as a consequence of mass production and advancing technologies. According to Roosevelt, competition wasted resources and produced social inequality, thus the state had a right to intervene in order to ensure a more equal distribution of the benefits of modern industrialisation. The New Nationalists supported a planned-economy scheme; they claimed that some form of concentration of economic

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<sup>431</sup> Eleanor Fox, Lawrence Sullivan, Rudolph Peritz, *Cases and Materials on U.S. Antitrust in Global Context*, American Casebook Series, 2004, Thomson West, 48.

power was essential to achieve market efficiency. Business concentrations may have been one of the main causes of the Great Depression, but they had also accelerated mass production and technical progress in the years leading up to it. At the same time, however, the New Nationalists believed that central administrations had a duty to organise and control business activities in order to restore the economic balance and to prevent future breakdowns. Furthermore, Arthur Jerome Eddy's New Competition theory highlighted the need for government supervision of business agreements.<sup>432</sup> The government would thus become responsible for the proper functioning of fair competition. In a nutshell, New Competition supporters argued that some form of business–government cooperation – short of full government intervention – could be highly effective.

These different approaches, while presenting contrasting takes on the economic recovery, all subscribed to Clark's call for greater state control on trade practices. As soon as Wilson became president, these ideas were quickly put to the test with the enforcement of the Clayton Act and the Federal Trade Commission Act.<sup>433</sup> The implementation of the Clayton Act in 1914 reflected the need to add further substance to the US antitrust regime by seeking to prevent anticompetitive practices in their incipiency.<sup>434</sup> The law contained provisions against price discriminations, restrictive deals, as well as mergers and acquisitions. In addition, it provided a right to injunctive relief

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<sup>432</sup> Arthur J. Eddy, *The New Competition*, 1920, Chicago, Mc Clurg. Alvin S. Johnson, 'The New Competition by Arthur J. Eddy', 1913, 28 *Political Science Quarterly* 1, 142-145. Mark Tadajewski, Competition, cooperation and open price associations: Relationship marketing and Arthur Jerome Eddy (1859-1920), 2009, 1 *Journal of Historical Research in Marketing* 1, 122 – 143.

<sup>433</sup> Willard F. Mueller, 'Antitrust in a Planned Economy: An Anachronism or an Essential Complement?' June 1975, *IX Journal of Economic Issues*, 2, 159-179, 164. John Clark, *Toward a Concept of Workable Competition*, 30 *Am. Econ. Rev.* 241 (1940). George W. Stocking, 'The Rule of Reason, Workable Competition and the Legality of Trade Association Activities', 1954, 21, *The University of Chicago Law Review*, 4, 527-619.

President Wilson attributed a lot of importance to academia. For example, in 1917, he established a study group, called The Inquiry and made up of 150 academics, which was aimed at preparing the peace negotiations drafts that would have been used after the end of World War I.

<sup>434</sup> Phillips A., 'Antitrust Policies: Could they be tools of the establishment?', in Werner Sichel (eds.), *Antitrust Policy and Economic Welfare*, 1970b, 56 Bureau of Business Research, University of Michigan, 61.

‘against threatened loss or damage by a violation of the antitrust laws’ by sanctioning private remedies.<sup>435</sup> Secondly, the Federal Trade Commission Act established the Federal Trade Commission, a body in charge of suing large corporations involved in anticompetitive trade practices, carrying out investigations, and issuing cease-and-desist orders.<sup>436</sup>

Despite such substantial reforms to the body of antitrust law, the Great Depression, together with the level of mass unemployment and declining incomes that came with it, divided public opinion once again and marked the emergence of new economic interests and of the consequent need for an institutional response. Thus, at the beginning of his mandate, Roosevelt was faced with the need to push forward new economic reforms and to formulate a consistent set of business policies in order to increase economic welfare while preserving democratic values, restoring competition, and regulating the market.<sup>437</sup>

#### 1930-1960S: THE GREAT DEPRESSION AND HARVARD COMPETITION POLICY

The Great Depression and the subsequent economic and political upheavals offer another interesting example of antitrust institutionalisation in times of change. At that time, the need to foster the American economy and to overcome the recession pushed President Roosevelt to radically intervene in the market with a new set of fiscal and economic policy reforms collectively known as the New Deal.

Although historians have paid considerable attention to Roosevelt's policies and his attempts to reduce the negative consequences of the recession, comparatively little has been said about the American approach to antitrust changed during the crisis.

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<sup>435</sup> Sect.26, 15 USC § 19.

<sup>436</sup> FTC Act §5 (a) (1). Clifford A. Jones., *Private Enforcement of Antitrust Law, in the EU, UK and USA*, 1999, Oxford University Press, 10.

<sup>437</sup> Arthur M. Schlesinger, *The Coming of New Deal 1933-1935 (The Age of Roosevelt)*, 1959, Volume 2, Boston, Houghton Mifflin, 179-84.

Inspired by interventionist ideas, the New Deal introduced various provisions embodied in the National Industry Recovery Act (NIRA), which aimed to establish governmental control over private economic powers in order to promote free competition, social equity, and economic development.<sup>438</sup> Approved by the Congress on June 16, 1933, with a small majority of the Senate, the NIRA was considered, especially on account of its social policy aspirations, the symbol of national mobilisation against the common enemy of the Great Depression.<sup>439</sup> However, the Act was not in force for long as it was considered an attempt to establish central control on private investments and was therefore declared unconstitutional by the Supreme Court with the *ALA Schechter Poultry Decision* of 1935.<sup>440</sup>

However, during the NIRA era, antitrust faced ‘its darkest moment’, as the plan had essentially replaced fair competition with a system in which government and business ‘cooperated’ against the recession.<sup>441</sup> The core of the NIRA, touted by President Roosevelt as ‘the most important and far-reaching [policy] ever enacted by the American Congress’, was to promote a national industrial recovery plan with a combination of two strategies: the implementation of public works, incorporated in the Public Work Act (PWA), and the promotion of fair competition among economic actors, embodied in the National Recovery Act (NRA).<sup>442</sup> The NRA had to promote economic recovery by eliminating the destructively cut-throat competition practices that allowed

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<sup>438</sup> Rudolph Peritz, *Competition Policy in America. 1818-1992, History, Rhetoric, Law*, 1966, Oxford University Press, 111.

<sup>439</sup> Robert Dallek, *Franklin D. Roosevelt and American Foreign Policy, 1932-1945*, 1979, New York, Oxford University Press, 160.

<sup>440</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>441</sup> Willard F. Mueller, ‘Antitrust in a Planned Economy: An Anachronism or an Essential Complement?’ June 1975, *IX Journal of Economic Issues* 2, 159-179, 165.

<sup>442</sup> Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt, Volume two, The year of crisis, 1933: with a special introduction and explanatory notes by President Roosevelt*, 1938, New York, Random House, 246. Fair Competition is a liberal economic ideal that literally means ‘loyal competition’. The aim of fair competition is to stimulate practices that enhance competition through the share of information between parties and the maintenance of prices and quality standards so as to maximise customer utility. For this reason, antitrust law has to allow central control over the behaviour of competing parties.

companies to create cartels and had thus worsened the recession and stimulated negative externalities, such as drastic wage reductions, low quality products, and predatory price-cutting.

The Act, in its attempt to promote a fair competition model, allowed the suspension of the application of antitrust laws in favour of more central control of private investments and closer cooperation between the manufacturing and labour sectors.<sup>443</sup> According to Havley, the major objective of the Act seemed to be the promotion of a cartelised risk-free economic order, a system whereby the government could help business groups to fix prices, restrict production, and protect capital investments. However, those who supported the New Deal regarded the NRA as an attempt to organise the previous anarchical competitive system in order to promote social reforms through the development of a centrally planned collectivist democracy.<sup>444</sup> Indeed, Edward Chamberlin, Harvard economists, and members of the Consumers' Advisory Board for the NRA administration condemned the neoclassical price theory as inadequate and not applicable to most markets, so they challenged the notion of price competition and introduced an alternative interpretation of concentrated markets.<sup>445</sup>

Under the influence of these ideas, the NRA authorised the reorganisation of American business and labour markets through 'codes of fair competition'. By fixing minimum prices, minimum wages, and maximum workweek hours, the codes kept a tight rein on many anticompetitive practices. Indeed, it was believed that higher prices would generate larger business profits and thereby increase labour wages.<sup>446</sup> The codes were to be drafted by groups of firms and associations in collaboration with governmental

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<sup>443</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 10.

<sup>444</sup> Hawley E.W., (1966), *Op. Cit.*, pp. 19-20.

<sup>445</sup> Rudolph J. R. Peritz, 'Antitrust Policy and Aggressive Business Strategy: A Historical Perspective on Understanding Commercial Purposes and Effects', 2002, 21 *Journal of Public Policy & Marketing* 2, 237-242.

<sup>446</sup> Adam Smith, Richard E. Wagner, and Bruce Yandle, 'A Theory of Entangled Political Economy, with application to TARP and NRA', February 2010, 10 *Working Paper, Mercatus Center, George Mason University* 05, 32.

agencies led by General Hugh Johnson, and they had to abide by generic dispositions of the law that did not specify time limitations. This allowed, for example, to prevent the imposition of inequitable restrictions over other companies and to limit the membership of the group in charge of drafting the codes. Moreover, it would also prevent any form of monopoly or any practice that would be damaging to small enterprises.<sup>447</sup>

Many economists, including Clark, welcomed the NRA and its codes as an effective plan to overcome the recession caused by the big corporations. At the time, this kind of strict state intervention was considered the only solution to the recession. Writing in March 1934, Clark expressed general sympathy for the NRA and maintained that while the Act would not promote an immediate recovery, it would certainly allow the creation of a more enduring basis for economic prosperity that would encourage the development of an alternative system to the previous liberal one. In his view, the NRA was ‘probably one of the things necessary to reasonable economic stability in the decades ahead’.<sup>448</sup>

Indeed, the NRA gave the President unprecedented powers to reorganise and regulate competition. Roosevelt could intervene directly and impose his own conditions in the redaction of the codes as well as make additions or deletions prior to their approval. Although he could not force industrialists to sign the codes, he used propaganda to cajole businesses into adopting them. Exhortations to join the President in his war against depression were broadcast through radio and the press. According to Hawley, popular symbolisms started to portray competition in terms of ‘economic cannibalism’ and both conservative industrialists and classical economists became known as ‘Old Dealers’ or ‘corporal disasters’. The practice of reducing prices to gain a larger share of the market became ‘cut-throat and monopolistic price slashing’. At the same

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<sup>447</sup> Alan Brinkley, *The End of Reform, New Deal Liberalism in Recession and War*, 1996, New York, Vintage Books Edition, 86-200.

<sup>448</sup> William J. Barber, *Designs within disorder: Franklin D. Roosevelt, the economists, and the shaping of American economic policy, 1933-1945*, 1996, Cambridge, Cambridge University Press, 70.

time, monopolistic collusions, price and cartelisation agreements started to be cooperative or associational activities.<sup>449</sup>

Despite the *bona fide* intentions, the codes started, over time, to resemble a strategy designed to eliminate competition through cartels rather than a plan for more efficient and fair workable competition.<sup>450</sup> Edward Chamberlin joined a rapidly rising chorus of discontent when, in 1934, he pointed out that the ‘NRA has little to do with economic recovery’ and that ‘it has become increasingly apparent that the means chosen were not adapted to the ends. Restrictive measures such as price fixing, the prohibition of sales below cost, and the limitations of output are being abandoned, although a year ago these were represented as the only means of curing a demoralised state of industry.’<sup>451</sup>

#### *Workable Competition and the NRA Codes*

Propelled by the propaganda machine, the first NRA codes were drafted for the textile and shipbuilding industries. Electrical manufacturing and the coat and suit trades were codified in July 1933. By the end of August, the President had signed the codes for steel, petroleum, lumber, and automobile industries. On September 18, the promulgation of the Bituminous Coal Code completed the codification of most of the major industries.

Without precise guidelines, the code-drafting process often resulted in a bargaining exercise between businessmen and government officials.<sup>452</sup> Moreover, the NRA program director, General Hugh Johnson, seemed to have a sympathetic attitude

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<sup>449</sup> Ellis W. Hawley, *The New Deal And The Problem Of Monopoly, A Study In Economic Ambivalence*, 1966, Princeton University Press, 54-55.

<sup>450</sup> Wyatt Wells, *Antitrust and the Formation of the Post-War World*, 2002, Columbia University Press, 35

<sup>451</sup> The Harvard Crimson, ‘Chamberlin Says N.R.A. Has Little To Do With Recovery, Near Finale, Government Not To Discontinue Code System For Present At Least’ Saturday, October 27, 1934, <http://www.thecrimson.com/article/1934/10/27/chamberlin-says-nra-has-little-to/>.

<sup>452</sup> Lewis L. Lorwin L., A. Ford Hinrichs, *Nationals Economics and social Planning*, 1935, Washington: GPO.

towards businesses. He allowed almost every attempt on the part of firms to establish cartels or to fix prices as he considered anticompetitive behaviour a means of pursuing public utility and overcoming the crisis.<sup>453</sup>

However, in 1933, as economic indices started to fall again and the cost of living increased more than wages, it began clear that the recovery plan had failed and that firms were in fact using codes to suit their own priorities, limit production, and maintain high prices.<sup>454</sup> Critiques were mounted from every political and social faction: business leaders were convinced that the NRA codes represented an attempt to establish a bureaucratic socialist control on business, while the supporters of antitrust policy believed that the program was fostering monopolies and cartels. Finally, economic planners, who initially were not opposed to economic regulation, refused the idea of such controls being exerted on business cartels. Intellectuals and economists, such as Henry Simons, Jacob Viner, and Frank Knight from Chicago University, started to call for stronger antitrust enforcement measures.<sup>455</sup>

For these reasons, the NRA went through several reorganisations during the course of 1934. Even though in 1935 the GNP climbed from about fifty six billion dollars to approximately seventy-two billion, and unemployment had dropped by about two million, the Act had already lost its support.

In 1935, the US Supreme Court, in the *A.L.A. Schechter Poultry Corp. v. United States* case, declared the NRA unconstitutional. The Schechter Corporations have been

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<sup>453</sup> Indeed fixed-price provisions were designed only for firms operating in the natural resources, transportation and services sectors. Most of the time the NRA officials suggested an average price provision prohibiting sales below cost; however, many industrialists started to use the word 'cost' instead of 'price' in order to fix a sufficiently high level of price and to avoid the majority of industries to make profit. Other provisions prohibited sales below invoice cost by adding a percentage mark-up, or by fixing the resale prices. Sometimes an open exchange of prices statistic was imposed. In theory, this last provision was taken in order to increase knowledge among competitors, but in practice it stabilised prices and decreased competition.

<sup>454</sup> Ellis W. Hawley, *The New Deal And The Problem Of Monopoly, A Study In Economic Ambivalence*, 1966, Princeton University Press, 71.

<sup>455</sup> William E. Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking', 2000, 14 *Journal of Economic Perspectives* 1, 43-60.

accused of failing to observe code provisions by fixing minimum wages and maximum hours for employees and by signing some dealings with slaughterers and dealers not licensed under the code.

The Supreme Court judged that the provisions of the Act were not a valid exercise of federal authority, because they lacked the system of checks and balances that characterises every American institution. Indeed, both the Congress, by regulating wages and working hours, and the President, by heavily influencing the approbation of these codes, affected interstate commerce and invaded the administrative jurisdiction of federal states.<sup>456</sup>

By the time the NRA was overturned, more than 700 industries had been codified and nearly 23 million workers were under codes; however, 20% of the workforce was still unemployed. The National Recovery Act was considered a failure because it did not stimulate economic recovery or an economic reorganisation; instead, it caused the rise of prices and monopolies. However, Roosevelt's administration, after the Court declared the NRA unconstitutional, approved a series of new Little NRA bills targeted at specific industries, such as coal mining and oil refining. The approbation of the Robinson-Patman Act of 1936 and the Miller-Tydings Act of 1937, both of which prohibited 'unfair' price competition in the retail trades, promoted the idea that more state interventionism was needed in market and private business conducts.<sup>457</sup> Indeed, through the NRA provisions, Roosevelt's administration tried to organise the market by introducing in the US a cartelised system similar to the one prevailing in Europe and Japan, where the state not only had no special provisions against those practices, but

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<sup>456</sup> Rudolph Peritz, *Competition Policy in America. 1818-1992, History, Rhetoric, Law*, 1996, Oxford University Press, 130-131.

<sup>457</sup> For instance, the government approved the Agricultural Adjustment Administration (AAA). The AAA was based on Rexford Tugwell's plan of control over agriculture production. The aim of the plan was to raise prices and lower production, in order to augment the farmers' income and stimulate the demand. In the years immediately following 1933 the agricultural revenue rose by nearly 50% and by 1936 the Supreme Court declared certain key provisions of the AAA unconstitutional.

even encouraged them.<sup>458</sup> For instance, while Tokyo supported the *Zebaisu*, a family industrial group that owned the main national firms, the UK and Germany allowed the creation of the Federation of British Industries (FBI) and of the German equivalent, the Reichsgruppe Industrie.<sup>459</sup>

However, neither the protectionist provisions approved by Hoover nor Roosevelt's NRA stimulated much economic recovery. While the problem of over-production was not solved, the US government could not sustain a high level of prices. It would take new antitrust institutions and a world war to overcome the crisis.

*Thurman Arnold Revolutionary Antitrust Approach: The Incipient Institutionalisation of Harvard Ideas*

True to its isolationistic tendencies, Roosevelt's first mandate was committed more to the domestic recovery than to the development and expansion of US international cartels and international anticompetitive practices.<sup>460</sup> This resulted in the absence of a real opposition to international cartels that involved American corporations, such as IBM, GM, Ford, Alcoa, Du Pont and Standard Oil.<sup>461</sup> In fact, according to Stocking and Watkins, the term cartel, during the inter-war period, was commonly referred to as 'international marketing arrangements' and often seen as a way to alleviate the effects of the global recession.<sup>462</sup>

In this environment, Roosevelt could hardly have launched an international antitrust campaign.<sup>463</sup> However, the deepening of the recession in 1937 and the critical

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<sup>458</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 8-9.

<sup>459</sup> Jeffrey Fear, 'Cartels and Competition: Neither Markets nor Hierarchies', 2006, *Working Paper Harvard Business School*.

<sup>460</sup> Spencer W. Brewster and James R. Atwood, *Antitrust and American Business Abroad*, 1958, New York, McGraw Hill, 26

<sup>461</sup> Spencer W. Brewster and James R. Atwood, *Antitrust and American Business Abroad*, 1958, New York, McGraw Hill, 13-14.

<sup>462</sup> George W. Stocking and Myron W. Watkins, *Cartels or Competition? The Economics of International Controls by Business and Government*, 1948, Twentieth Century Fund, New York.

<sup>463</sup> Wells Wyatt, *Antitrust and the Formation of the Post-war World*, 2002, Columbia University Press,

and unstable international dynamics at the dawn of World War II pushed the President, in April 1938, to advocate to Congress the need to enforce antitrust policy at a national and transnational level. His concern was to preserve American free competition and to avoid the rise of a *fascist collective* system of the kind promoted by some European countries.<sup>464</sup> To do so, it was necessary to abandon the scheme of planned cartelisation embedded in the NRA and to adopt a new market-competition perspective that promoted vigorous antitrust measures. Many economists of the time fell under just such a rubric; Means, for instance, in his 'Administrative Price' thesis, underlined the undesirable externalities caused by the market power of big businesses, which were affecting the monetary and fiscal policies formulated in response to the depression.<sup>465</sup> In view of the failure of the NRA, Roosevelt was increasingly receptive to such economic ideas and eventually resolved to make an about-turn over the centralised system of planning that had sparked the system of business cartelisation. In line with this renewed attention to market competition, he appointed Thurman Arnold as a successor to Jackson with a view to implementing a new antitrust programme.<sup>466</sup>

Arnold's antitrust policy was inspired by the economic theories of Berle and Means and by the idea that the rise of unrestricted corporate power could distort democracy; broadly speaking, he held a more Harvard-oriented vision of antitrust policy.<sup>467</sup> Rejecting the classical and neoclassical models, he was also influenced by the works of Thorstein Veblen and Walton Hamilton and was convinced of the need to introduce new elements to economic analysis, such as law, technology, psychology, and

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New York, 37.

<sup>464</sup> Franklin D. Roosevelt, 'Recommendations to Congress to Curb Monopolies and The Concentration of Economic Power, April 29, 1938', in *The Public Papers and Addresses of Franklin D. Roosevelt*, (1938, Volume 7), *The Continuing Struggle for Liberalism*, 1941, New York, Macmillan, 305-32, Tony Alan Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 8-9.

<sup>465</sup> Willard F. Mueller, 'Antitrust in a Planned Economy: An Anachronism or an Essential Complement?', June 1975, IX *Journal of Economic Issues* 2, 159-179, 166-168.

<sup>466</sup> Alan Brinkley, *The End of Reform, New Deal Liberalism in Recession and War*, 1996, New York, Vintage Books Edition, 106-125.

<sup>467</sup> Adolf A. Berle, Gardiner C. Means, *The modern corporation and private property*, 1933, New York, Macmillan.

property studies.<sup>468</sup>

Arnold's idea of pro-competition action was to combine policing consumer prices and social welfare goals with the prosecution of national and international cartels, which considered the cause of the 1937 recession. Indeed, even if American antitrust law declared *per se* illegal every cartel affecting the internal market, the antitrust doctrine on international cartel arrangements was less clear. Indeed, on the one hand, the American Banana Co. case established that US antitrust policy could not exert any extraterritorial authority.<sup>469</sup> On the other hand, in 1924, the Federal Trade Commission (FTC), in its reinterpretation of the 1918 Webb Pomerane Act, declared that 'there was no reason why export associations could not enter into agreements with foreign cartels providing there were no unlawful effects on the American domestic market'.<sup>470</sup> The Act was originally enforced in order to provide exemption for some cooperative agreements from antitrust restrictions in order to increase US exports by allowing exporters to deal more effectively with foreign cartels.<sup>471</sup> However, according to Fournier and Suslow, the interpretation provided by the FTC, allowed many 'Webb-Pomerane associations' during

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<sup>468</sup> Lerner M., *The Shadow World of Thurman Arnold*, March 1938, 47 *Yale Law Journal* 47, 698-9,701. According to Kovacic and Shapiro: 'The trust-busting revival drew intellectual strength from the work of University of Chicago economists Henry Simons, Jacob Viner, and Frank Knight. Simons in particular assailed the statist assumptions of New Deal planning experiments such as the NIRA and advocated robust antitrust enforcement, including steps to deconcentrate American industry. Here we see champions of free markets promoting antitrust and competition as preferable to government regulation, planning, or ownership'. William E. Kovacic and Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking", 10-02-1999, *Competition Policy Center, Institute of Business and Economic Research, UC Berkeley*, 11.

While the prominence of the Chicago School ideas is undeniable, the antitrust reforms of the time were not inspired by a neo-liberal approach or the perfect competition model. On the contrary, the greatest influence was played by Robinson and Chamberlain and their imperfect competition models, as well as Clark's workable competition theory. Apparently, many scholars tend to attribute less importance to the Harvard School despite its central role in paving the way for the Golden Age of capitalism.

<sup>469</sup> AMERICAN BANANA CO. v. UNITED FRUIT CO., 213 U.S. 347 (1909)

<sup>470</sup> Leslie T. Fournier, 'The purposes and results of the Webb-Pomerene Law', 1932, *American Economic Review* 22, 25-27.

<sup>471</sup> David A. Larson, 'An Economic Analysis of the Webb Pomerania Act', Oct. 1970, 13 *Journal of Law and Economics* 2, 461-500.

the inter-war period to act as cartels by fixing prices and allocating sales.<sup>472</sup>

Nonetheless, during the late 1920s and early 1930s the Antitrust Division won several cases that partly challenged this interpretation. One of the first applications of extraterritoriality was in the Aluminium Company of America's (Alcoa) case,<sup>473</sup> one of the most important cartels of the time. According to Freyer, in 1937, 'studies concerning the international cartel movement, in conjunction with NRA and other data, revealed the extent of Alcoa's monopoly' of aluminium.<sup>474</sup> During the Wilson administration, Alcoa had not been persecuted because, according to the *rule of reason*, the Court declared that its activities did not constitute a restriction of competition. However, by the onset of the Great Depression, Alcoa's adjustments to international price instability had resulted in companies gaining a monopoly in the domestic market. Moreover, the production of aluminium, being indispensable in the economic and industrial life of the Nation and in its military and naval defence, was correlated to national security issues. Consequently, it was deemed necessary to persecute Alcoa also because, in the international political turmoil of 1937, it had negotiated a deal with the Nazis to supply Germany with war machines.<sup>475</sup>

Arnold's campaign against cartels represented a major change in American antitrust policy. Despite the international expansion of American corporate capitalism in the years following the end of World War I, the Department of Justice had prosecuted only seventeen cases of international anticompetitive conduct by 1930 and, from 1932 to 1937, Alcoa was the only case under international antitrust investigation.<sup>476</sup> Arnold, by

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<sup>472</sup> Valerie Suslow, 'Cartel contract duration: empirical evidence from inter-war international cartels', Oct. 2005, 14 *Industrial & Corporate Change* 5, 705-744, Leslie T. Fournier, 'The purposes and results of the Webb-Pomerene Law', 1932, *American Economic Review* 22, 18-32.

<sup>473</sup> U.S. v. Aluminium Co. of America, 44 F. Supp. 97 (Dis.Ct.S.D.N.Y.,1941); "Memorandum for Attorney General, RE: U.S. v. Aluminium Co. of America et al., March 16 1937," RHJ Legal File, Alcoa, Box 77, LC.

<sup>474</sup> Tony Alan Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 15.

<sup>475</sup> Wells Wyatt, *Antitrust and the Formation of the Post-war World*, 2002, Columbia University Press, New York, 67.

<sup>476</sup> Wilbur L. Fugate, *Foreign Commerce and the Antitrust law*, 1958, Boston, Little, Brown, 502-5.

promoting the idea of free markets, established a more rigid control over competition and international cartels and secured a considerable number of legal victories against the monopolisation and price-fixing practices of American firms. The appropriation of the Antitrust Division, which stood at about \$473,000 in 1938, rose to \$1,800,000 in 1943, while personnel grew from 111 to 496.<sup>477</sup>

Arnold promoted rigid antitrust measures to foster free markets in the interest of US competitiveness. Indeed, despite the failure of the NRA provisions, the crisis and the beginning of World War II had strengthened the idea that competition had to be controlled and regulated. The Great Depression was in fact aggravated by the kind of anticompetitive behaviour exerted by American corporations in the national and international markets. Moreover, the increasingly international reach of American firms had guaranteed many countries an easy access to strategic goods and materials.

According to Hofstadter, thanks to Thurman Arnold antitrust became an accepted institution, and its institutionalisation process was ‘an excellent illustration of how a public idea [...] can become embodied in institutions with elaborate, self-preserving rules and procedures, a defensible function and an equally stubborn capacity for survival’.<sup>478</sup> In short, starting from the 1930s, imperfect and monopolistic competition models first, and Harvard-oriented ideas later, led to the beginning of an era of major state control over anticompetitive practices. In particular, Edward Mason’s structure-conduct performance (SCP) model, by interpreting anticompetitive behaviours as an unavoidable consequence of non-perfectly competitive markets, influenced the US government to adopt a stricter approach to competition. This was formally institutionalised in the congressional amendment of section 7 of the Clayton Act merger

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<sup>477</sup> Corwin D. Edwards, ‘Thurman Arnold and the Antitrust Law’, *The Academy of Political Science, Political Science Quarterly*, Vol. 58, No. 3 (Sep., 1943), pp. 33.

<sup>478</sup> Richard Hofstadter, ‘What Happened to the Antitrust Movement? Notes on the Evolution of an American Creed’, in Earl Frank Cheit, ed., *The Business Establishment*, 1964, New York, 113–51, quotes at 116.

provision in 1950. This provision extended the application of merger controls to cases of market dominance. Additionally, in 1968, Harvard economist Donald F. Turner, on becoming the head of the Antitrust Division at the Department of Justice, institutionalised its Harvard principles through the Merger Guidelines.<sup>479</sup> The Merger Guidelines included very few efficiency-boosting provisions and stated that ‘unless there are exceptional circumstances, the Department will not accept as a justification for an acquisition normally subject to challenge under its horizontal merger standards the claim that the merger will produce economies’.<sup>480</sup> In particular, the 1968 Merger Guidelines provided three reasons for only accepting efficiency claims in exceptional circumstances:

- (i) The Department’s adherence to the standards will usually result in no challenge being made to mergers of the kind most likely to involve companies operating significantly below the size necessary to achieve significant economies of scale; (ii) where substantial economies are potentially available to a firm, they can normally be realized through internal expansion; and (iii) there usually are severe difficulties in accurately establishing the existence and magnitude of economies claims for a merger.<sup>481</sup>

The validity of efficiency claims is of fundamental importance for understanding the role played by Harvard ideas. It was under the influence of Harvard ideas that regulators promoted the institutionalisation of antitrust policies that benefited social welfare as much as individual market players.

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<sup>479</sup> See: <http://www.justice.gov/atr/hmerger/11247.htm>; Nicola Giocoli, ‘Competition vs. property rights: American antitrust law, the Freiburg School and the early years of European competition policy’, 2009, 5 *Journal of Competition Law & Economics* 4, 747-786, 758.

<sup>480</sup> William J. Kolasky, Andrew R. Dick ‘The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers’, October 2003, 31 *Wilmer Cutler Pickering Hale and Dorr Antitrust Series*, 3.

<sup>481</sup> U.S. Dep’t of Justice, Merger Guidelines § 10, quoted in William J. Kolasky, Andrew R. Dick ‘The Merger Guidelines and the Integration of Efficiencies into Antitrust Review of Horizontal Mergers’, October 2003, 31 *Wilmer Cutler Pickering Hale and Dorr Antitrust Series* 3.

In conclusion, while the Harvard antitrust era only reached its zenith under Turner and his successors, its institutionalisation began with the implementation of anti-cartel policies by Arnold, who first enforced state interventionism over competition and anticompetitive practices. By placing social welfare above efficiency, Arnold's translation of marginalist and Harvard ideas into antitrust policies paved the way for the Golden Age of capitalism.

#### 1970S-1990: THE CHICAGO INSTITUTIONAL REVOLUTION

##### *Nixon and the Harvard Approach*

In the aftermath of the Great Depression and World War II, the US had built an internal economic order congenial to its interests, Keynesianism was applied in macroeconomic policies and Fordism in production, and Harvard ideas began to be the source of inspiration of the main antitrust institutions. Despite the positive connotations of a 'Golden Age' of capitalism, the beginning of the 1970s witnessed a deterioration of the economic performance of all the major capitalist countries.<sup>482</sup>

When Nixon won the 1968 presidential elections against his democratic rival Hubert Humprey by 500,000 votes, he was confronted with the cost of the detrimental war in Vietnam, in addition to the trials of the Cold War itself. Moreover, rising unemployment and lower growth rates pointed to a general American loss of economic power and influence on the international arena.<sup>483</sup>

While Nixon, together with Henry Kissinger, his Security Adviser, tried to face the political crisis through the strategy of *Détente*, on the economic front, he focused on boosting American performance and international competitiveness.<sup>484</sup> The US share of world gross domestic product (GDP) had decreased from half in 1946 to just about one-

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<sup>482</sup> Gerard Dumenil, Dominique Levy, 'The Nature and Contradictions of Neoliberalism', 2002, 32 *Social Register*, 43-70.

<sup>483</sup> Fred Halliday, *The Making of the Second Cold War*, 1986, Verso Editions NLB, 204-5.

<sup>484</sup> Fred Halliday, *The Making of the Second Cold War*, 1986, Verso Editions NLB, 206.

third in 1970. Between 1947 and 1965 American productivity had grown at an annual rate of 3.3%, but in the 1966-70 and 1971-80 periods the average rates dropped to 1.5% and 0.2% respectively. As Japan, Germany and other EU member states started to outperform US productivity in both quantity and quality, American companies suffered stiff trade competition and their economic supremacy progressively declined.

Consequently, on August 15, 1971, without consulting the leaders of the rest of the world, Richard Nixon unveiled a 'New Economic Policy' and abandoning the Bretton Wood system.<sup>485</sup> The value of the dollar was depreciated in order to provide banks and corporations with all the liquidity necessary to improve American competitiveness and trade balance.<sup>486</sup> Letting the dollar fluctuate in the international markets meant that most nations had to raise the value of their currencies against the dollar. Thus, their firms could not benefit from low exchange rates in their exports to the US market. Rather, foreign products sold in the US would become more expensive, thereby creating a competitive advantage for local firms.<sup>487</sup>

Additionally, pressure from American companies and the Congress led Nixon to enforce a temporary 10% 'additional tax' on imports to ensure 'that American products will not be at a disadvantage because of unfair exchange rates'.<sup>488</sup>

Although Nixon's shock strategy gave new *impetus* to the US economy, the American internal market was negatively affected by an unprecedented rise of business conglomerations and mergers. From 1963 to 1969, there had been 13,880 acquisitions

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<sup>485</sup> Dewey W. Grantham, *Recent America, The United States Since 1945*, 1998, Harlan Davidson 2nd, 323. Chris J. Dolan, John Frenreis, Raymond Tatolovich, *The Presidency and Economic Policy*, 2008, Rowman & Littlefield Publishers, INC, 80.

<sup>486</sup> Giovanni Arrighi, Beverly J. Silver, Benjamin. D. Brewer, 'Industrial Convergence, Globalization, and the Persistence of the North-South Divide', Spring 2003, 38 *Studies in Comparative International Development* 1, 3-31.

<sup>487</sup> Franklin Tutwell, *The Energy Crisis and the American Political Economy: Politics and Markets in the Management of Natural Resources*, 1988, Stanford: Stanford University Press, 100. Price V. Fishback, 'Seeking Security in the Postwar Era', foreword by Douglas C. North, *Government and the American Economy: A new History*, 2007, Chicago, The University Chicago Press, 536.

<sup>488</sup> Destler I. M. *American Trade Politics*, June 2005, Institute for International Economics, Washington, 41.

announcements globally.<sup>489</sup> In 1972, the 200 biggest US corporations controlled 60% of national manufacturing assets, as opposed to 48% in 1949. The concentration of profit shares was very high; among more than 200,000 manufacturing corporations, only the 422 largest registered 71% of the profits.<sup>490</sup> The formation of mergers was partially encouraged by the state after World War II, in order to allow US companies to take advantage of favourable market conditions and enlarge their business.<sup>491</sup> However, under the influence of the Harvard School workable competition ideas, the Antitrust Division started, during the Nixon presidency, an unprecedented crackdown on what was considered at the time an incredible mergers boom. According to Nixon, the US was becoming a country of ‘a few hundred business suzerainties under whose influence a multitude of small, weak, quasi-independent corporations will be permitted a subsidiary and supplemental role’.<sup>492</sup>

By appointing John Mitchell as attorney general at the DOJ and Richard McLaren as head of the FTC, Nixon intended to make clear that his antitrust approach would be based on government initiatives ‘to stop this merger trend that was leading more and more toward economic concentration’.<sup>493</sup> McLaren, in particular, was an antitrust lawyer who had been engaged in defending big corporations from antitrust charges. He knew the tricks of the trade and planned to use them to ‘attack the conglomerate mergers with great vigour’.<sup>494</sup> In his view, conglomerates were economically inefficient because they stifled innovation and promoted large concentrations of power.<sup>495</sup>

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<sup>489</sup> Matthew Rhodes-Kropf and S. Viswanathan, ‘Market Valuation and Merger Waves’, Dec. 2004, 59 *The Journal of Finance* 6, 2685-2718.

<sup>490</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 137.

<sup>491</sup> Tony A. Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990*, 1992, Cambridge University Press, 273.

<sup>492</sup> William Kleinknecht, *The man who sold the world: Ronald Reagan and the betrayal of main street America*, 1960, A Member of the Perseus Books Group, New York, 140.

<sup>493</sup> Neil Filgstein, *The Transformation of Corporate Control*, 1993, Harvard University Press, 220

<sup>494</sup> Neil Filgstein, *The Transformation of Corporate Control*, 1993, Harvard University Press, 207. William Kleinknecht, *The man who sold the world: Ronald Reagan and the betrayal of main street America*, 1960, A Member of the Perseus Books Group, New York, 140.

<sup>495</sup> Robert M. Goolrick, ‘Public Policy Toward Corporate Growth: The Itt Merger Cases, Multi-

This strict antitrust approach was not supported by everyone. For instance, Robert Bork and Richard Baxter, from the Chicago School, criticised the Antitrust Division's corporate de-concentration policy.<sup>496</sup> According to Bork, the Supreme Court, antitrust agencies, and Congress were saving less efficient small firms at the expense of both competition and efficiency.<sup>497</sup> Similarly, Chicago School economist George Stigler expressed much the same idea and called on the government to change the orientation of its antitrust policy.

Although Goorlick argues that this anti-conglomerate policy was applied against Nixon's will, Fligsetin maintains that many White House documents demonstrate the contrary. Nixon was aware of the anti-merger policy pursued by Mitchell-McLaren – and he supported it. For instance, on May 11, 1969, during a meeting at the White House, Nixon maintained that 'antitrust law should protect the small firms from the large firms', and that he 'would rather deal with an entrepreneur than a pipsqueak manager of a big store'.<sup>498</sup>

Nevertheless, as McLaren's strict antitrust policy started to create malcontent among the business community, Nixon began to prefer a more liberal approach and by September 1969 he was directly supporting Chicago scholar Robert Bork and the idea that anti-merger legal actions were 'one of the most disappointing developments of antitrust history'.<sup>499</sup> This change of tendency is made clear also in the speech that Peter Flanigan, one of Nixon's advisors on economic affairs, did in 1971:

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disciplinary studies in the law', 1978, *Kennikat Press*, 59-60.

<sup>496</sup> The Neal Report was commissioned by President Lyndon Johnson in late 1967 and it dealt with the level of competition among US companies. The Report, written by six professors of law, two economists and three antitrust attorneys intended to promote huge antitrust reforms. For instance, the Concentrated Industries Act allowed the Attorney General to consider every company with a market share exceeding 12% to be a monopoly.

Herbert J. Hovenkamp 'The Neal Report and the Crisis in Antitrust', March 2009, *University of Iowa Legal Studies Research Paper, Number 09-09*, College of Law, University of Iowa

<sup>497</sup> Neil Filgstein, *The Transformation of Corporate Control*, 1993, Harvard University Press, 220.

<sup>498</sup> Neil Filgstein, *The Transformation of Corporate Control*, 1993, Harvard University Press, 220-1.

<sup>499</sup> Tony Alan Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990*, 1992, Cambridge University Press, 318.

On April 12, the President met with the Secretary Stans and Undersecretary Lynn to receive from them a report on areas of government harassment of business. The President directed the action be taken to reduce any such harassment, apparent or real. As a result, I have met with Attorney General Mitchell and told him that a less antagonistic attitude towards business must be taken by the antitrust division. Mitchell has agreed in this area. More specifically, I have discussed with him several pending mergers and received his assurances that he will personally monitor any antitrust activity in their regard<sup>500</sup>.

President Nixon's, and his White House administration's, about-turn in support of conglomerate mergers was a product not only of the neo-liberal ideas developed at the time, but also of specific interests. This is easily understandable by taking into account the controversial ITT settlement. In 1971, the Department of Justice settled an antitrust case against International Telephone and Telegraph Corp (ITT). This corporation, having acquired three other companies, had created a merger that, according to McLaren, was going 'to have an adverse effect on competition'.<sup>501</sup> Nixon's adoption of Chicago School ideas in his condemnation of merger lawsuits coincided with the ITT contribution of 400,000 dollars to the Republican National Convention of 1972 in San Diego. Sure enough, President Nixon and his White House administration made pressure to the Department of Justice to drop the antitrust action, so ITT was judged on relatively favourable terms.<sup>502</sup> Once Nixon and his administration had come under investigation on corruption charges in relation to ITT, the earlier interventionist antitrust policy was permanently abandoned and McLaren was replaced with the less militant

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<sup>500</sup> Memorandum from Peter Flanigan to Staff Secretary, June 7, 1971, subjectlog no. P-1598

<sup>501</sup> Neil Filgstein, *The Transformation of Corporate Control*, 1993, Harvard University Press, 209.

<sup>502</sup> The Time, 'The Nation: Reopening ITT', (Monday, Nov. 12, 1973)

Thomas E. Kauper.

According to the Time magazine, this was ‘a prelude to a relaxation of antitrust policy’; in fact, throughout his four-year tenure, Thomas Kauper initiated only three merger cases. Although the Justice department declared that it would apply ‘the same vigorous enforcement’ of antitrust law as under McLaren, by the 1974 the anti-merger fervour was over and in 1979 the number of mergers rose once again.<sup>503</sup>

Nonetheless, the Watergate scandal soon replaced the echoes of the ITT case.<sup>504</sup> In 1972, after a political campaign that presented the Republican Party as the party of order against corruption, Nixon was re-elected. However, a few months before his election the police had arrested five men for trespassing an office of the Watergate building that belonged to an organisation affiliated with the Democratic Party. Later, Washington Post reporters Bob Woodward and Carl Bernstein uncovered the scandal: Nixon and his collaborators had systematically spied on democrat officials with the help of the FBI in order to set up campaigns of disinformation against their adversaries. Nixon had to resign and leave the presidency to his vice-president, Gerald Ford.<sup>505</sup>

#### *Ford and Carter: a Transition towards Chicago Ideas*

When President Ford took office, the conglomerate merger wave was effectively over, but economic recession, rising unemployment and high inflation were still taking their toll on the American economy. In addition, between 1973 and 1974 the Yom Kippur war precipitated the first oil crisis of the 1970s. Meanwhile, the cost of the Vietnam War, combined with the high government expenditure needed to support the social policies of

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<sup>503</sup> The Time: ‘Antitrust: McLaren Out, Monday’, (Dec. 20, 1971), Neil Filgstein, *The Transformation of Corporate Control*, 1993, Harvard University Press, 212.

<sup>504</sup> Tony A. Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990*, 1992, Cambridge University Press, 317-319.

<sup>505</sup> Oliviero Bergamini, *Storia degli Stati Uniti, Storia degli Stati Uniti*, 2002 Editori Laterza, 221. Price V. Fishback, ‘Seeking Security in the Postwar Era’, foreword by Douglas C. North, *Government and the American Economy: A new History*, 2007, Chicago, The University Chicago Press, 536.

post-war Keynesianism, caused an unprecedented inflation wave.<sup>506</sup> Being influenced by a Harvard antitrust framework, Ford aimed at facing the economic downturn by adopting a strict control over the market to counter monopolistic and merger behaviours and their inflationary effects.<sup>507</sup> In this respect, he promoted a specific plan to reduce inflation, namely the Whip Inflation Now (WIN). The WIN was an attempt to promote grassroots voluntary programmes designed to encourage people to change their spending habits in order to make anti-inflation measures more effective. However, in 1974, since congressional elections gave the Democrats a majority in both houses and the economic situation was still deteriorating, Ford was forced to change his economic policy. In 1975, the Democratic majority rejected Ford's proposal to reduce the domestic budget and pushed him to apply a massive tax cut and increase federal spending. Between the 1975 and 1976 many other bills were passed, including a compromise energy bill, a four-billion-dollar Public Works Act and a tax revision bill. By mid-1975, the American economy gave the first signs of recovery: the rate of unemployment dropped and the cost of living fell from 11% in 1974 to 5.8% in 1976.

In an attempt to rein in rising prices, Ford tried to apply the same conservative antitrust policy pursued by Nixon during his first mandate. Therefore, even though the Chicago School was already gaining a foothold in the antitrust policy scene, within a few months of taking office, President Ford promised a harsh crackdown of illegal antitrust conspiracies in order to fight business practices that 'diminish competition and force price up for consumer'.<sup>508</sup> Indeed, Ford maintained that the government had an important role in promoting 'an environment where free enterprises [could] operate

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<sup>506</sup> Yanek Mieczkowski, *Gerald Ford and the Challenges of the 1970s*, 2005, The University Press of Kentucky.

<sup>507</sup> Marc Allen Eisner and Kenneth J. Meier, 'Presidential Control versus Bureaucratic Power: Explaining the Reagan Revolution in Antitrust', Feb. 1990, 34 *American Journal of Political Science* 1, 269-287.

<sup>508</sup> Times Daily, Oct 9 1974, 31.

without a monopolistic development'.<sup>509</sup> Harvard ideas were again institutionalised in the Antitrust Procedures and Penalties Act, which was designed to 'strengthen significantly antitrust laws and the ability to enforce them'. Furthermore, in September 1976, President Ford signed into law a set of amendments to the Clayton Act, also known as the Hart-Scott-Rodino Antitrust Improvements Act (HSR Act).<sup>510</sup>

The Act was important because it reinforced antitrust controls by requiring 'firms to notify the FTC and the Justice Department before carrying out mergers that exceeded certain size thresholds'.<sup>511</sup> For instance, title II of the Act maintained that any company attempting specified acquisitions had to communicate its decision *a priori* to the Federal Trade Commission and to the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice at least thirty days before starting the operation.<sup>512</sup> The law also established a mandatory waiting period for firms that wanted to acquire or merge with another company.<sup>513</sup> Title III stated that federal states could sue companies in the Federal Court for monetary compensation on behalf of their citizens. For this purpose, the *Parens Patriae* provision allowed federal funds to be allocated to the state attorney general for antitrust purposes. This provision was very innovative as previously only persons directly affected by anticompetitive activity could sue for damages.

These laws were the result of a common anti-merger tendency supported by part of the Congress and by the Harvard school of antitrust. They all served a specific objective: to enforce antitrust law in order to facilitate a process of de-concentration.

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<sup>509</sup> Marc Allen Eisner *Antitrust and the triumph of economics: institutions, expertise, and policy change*, 1991, Chapel Hill: University of North Carolina Press, 148. Gerald R. Ford, *Public Papers of the President of the United States*, 1976, Washington, DC: Government Printing Office.

<sup>510</sup> Gerald R. Ford, 'Statement on Signing the Antitrust Procedures and Penalties Act', December 23, 1974, Washington, DC: Government Printing Office. B. Dan Wood, John E. Anderson, 'The Politics of U.S. Antitrust Regulation', Feb. 1993, *37 American Journal of Political Science* 1, 1-39. John Warren 'Stop, Look and Listen: Premerger Notification under the Hart-Scott-Rodino Antitrust Improvements Act' 1979, *Duke Law Journal* 1, Tenth Annual Administrative Law Issue, 355-381.

<sup>511</sup> 15 U.S.C. § 18a(a) in William E. Kovacic, 'Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration', July 1989, *Iowa Law Review* 74, 1126.

<sup>512</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 319.

<sup>513</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 319.

Indeed, as it maintained in 1975 by Oregon Republican Senator Robert Packwood:

The present antitrust laws [...] even if rigorously enforced, will not achieve what is necessary in this country: A breakup of the concentrations of power in the major industries in this country, oil and otherwise, so that we might return to the numerous, small- and medium-size competitive industries that made this country grow, and continue to be needed to make this country great.<sup>514</sup>

Following this view, the Senate Judiciary Subcommittee on Antitrust and Monopoly under the Chairmanship of Senator Philip Hart became very active in proposing de-concentration regulations, such as the Industrial Reorganisation Act, which aimed at promoting industrial de-concentration in order to strictly limit collusion, and the Monopolisation Reform Act of 1976, which would have allowed the state to intervene against irresponsible conducts.<sup>515</sup> Many other legislative drafts, such as the Interfuel Competition Act of 1975 (S. 489), were proposed in order to re-launch state interventionism in different economic sectors. However, those bills have never been approved as the necessity to improve economic performances of American companies resulted in a growing influence of the ‘efficiency’ antitrust theory maintained by the Chicago scholarship.<sup>516</sup>

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<sup>514</sup> *Hearings on S. 2387 and Related Bills before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 50 (1975) (statement of Sen. Packwood) quoted in William E. Kovacic, ‘Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration’, July 1989, *Iowa Law Review* 74, 1126.

<sup>515</sup> George A. Hay and Daniel Kelley, ‘An Empirical Survey of Price Fixing Conspiracies’, 1974, 17 *The Journal of Law and Economics*, 13-38. Alfred F. Dougherty, John B. Kirkwood, James D. Hurwitz, ‘Elimination of the Conduct Requirement in Government Monopolization cases’, 1980, 37 *Washington and Lee Law Review*, 83-104. The Senate Antitrust and Monopoly Subcommittee was created in 1950 as a forum for congressional inquiry concerning deconcentration.

<sup>516</sup> See also: *Hearings on S. 489 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 6 (1975) (reprinting S. 489, the Interfuel Competition Act of 1975). S. 489 would have forced producers or refiners of petroleum or natural gas to divest their interests in other energy sources, including coal, nuclear power, geothermal steam, and solar power. This bill was the subject of limited hearings and never came up for a vote within committee. A similar

As Gerald Ford left his office in 1977, without completely solving many of the problems affecting the American economy, newly elected President Carter proclaimed ‘a new beginning’ in his inaugural speech.<sup>517</sup> At that time, the US economy was still characterised by stagflation, high unemployment, adverse trade balance and increasing dependence on foreign sources of energy. However, to face the economic downturn, Carter adopted policies similar to those of his predecessor. On the one hand, he tried to increase federal spending to finance public works and, on the other, he reduced taxes in order to stimulate employment. While these initiatives had a positive effect on the level of unemployment (which dropped from 7.9% in December 1976 to 6.4% in 1977 and to less than 6% by mid-1978), inflation and federal deficits were on the rise.

Carter failed also to apply a coherent antitrust policy. Indeed, although in 1979 anti-merger positions were still persisting in the National Commission for the Review of Antitrust Laws and Procedures (NCRALP), the first extensive, and official, adoption of Chicago School ideas by antitrust policymakers occurred under his administration.<sup>518</sup> Freyer, in fact, argues that the wave of antitrust prosecutions during Carter’s administration was based on an informal acceptance of the idea that most mergers were economically efficient.<sup>519</sup> Indeed, in 1979 the Congress defeated the proposed Small and Independent Business Protection Act (also known as Anti-Conglomerate Merger Bill, or S. 600), which would have forbidden mergers or acquisition among companies disposing of assets or sales above a certain limit (either two billion dollars or 350 million dollars, according to the purpose).<sup>520</sup>

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proposal, however, received 39 votes on the Senate floor in October 1975 when submitted as an amendment to a pending piece of natural gas legislation. *See* 121 CONG. REC. 33,635 (1975). In William E. Kovacic, ‘Failed expectations: The troubled past and uncertain future of the Sherman Act as a tool for deconcentration’, July 1989, *Iowa Law Review* 74, 1126.

<sup>517</sup> Jimmy Carter Speech: Inaugural Address, Thursday, January 20, 1977.

<sup>518</sup> The NCRALP was chaired by John Shenefield, Carter’s Assistant Attorney General of the Antitrust Division.

<sup>519</sup> Tony A. Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990*, 1992, Cambridge University Press, 321.

<sup>520</sup> S. 600, 96<sup>th</sup> Cong., 1<sup>st</sup> sess., 1979

The defeat of the act was a clear sign of the popularity of Chicago School ideas in Congress. Indeed, although the apparent purpose of the bills was to substantially enhance market competition and efficiency, the main interest of most legislative representatives was to promote new statutory limitations of merger activities and to justify those on political and social grounds.<sup>521</sup> Indeed, when Senator Edward M. Kennedy introduced the legislation, he stated that the aim of S. 600 was ‘to help preserve the integrity of a political and economic system committed to diversity’. In his view, the bill was ‘far more than a narrow technical concern within a given market structure’, indeed it had ‘a far broader perspective’ that dealt with ‘a social concern’ of ‘the impact of corporate power not only upon the character and responsiveness of individual economic market, but upon the very social and political fabric of a nation committed to diversity and individual freedom of choice’.<sup>522</sup>

However, the defeat of this act confirmed the growing acceptance of the Chicago efficiency doctrine within the Carter administration. There are many factors that can be used to explain why Congress abandoned its social role in controlling the market and checking the power of corporations. First of all, the economic downturn of 1974, and the consequent economic instability fostered the Chicago School’s ideas stating that the exclusive promotion of allocative efficiency was more than necessary to boost the market. Secondly, as the number of private antitrust cases increased under the aegis of the Hart-Scott-Rodino Improvements Act, the Department of Justice had to concentrate its resources on criminal (particularly price-fixing) rather than civil (merger) cases. These elements form the basis of the radical change of approach to antitrust occurred under

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<sup>521</sup> S. 600, sec. 3(a) and 3 (b)

<sup>522</sup> Opening statement of Senator Edward M. Kennedy upon introduction of the Small (and independent) Business Protection Act, Press Release, Office of Senator Kennedy, March 8, 1979, 1, quoted in Edwin M. Epstein ‘PACs and the Modern Political Process’ in Betty Bock, Harvej J. Goldschmid, Ira M. Millstein, and Frederic M. Scherer (eds.), *The impact of the Modern Corporation*, 1984, New York, Columbia University Press, 399-405.

the Reagan administration.<sup>523</sup>

### *Reagan and the Chicago Institutional Revolution*

After the second oil shock in 1979, the seizure of the Teheran embassy, and Ronald Reagan's election in November 1980, free market ideas and Chicago School pro-market theories were suddenly in the ascendant and soon came to dominate the deregulation movement of the 1980s. Chicago School ideas started to gain political support by the mid-1970s, when many US firms were losing competitiveness in the international markets in the midst of the on-going American recession.<sup>524</sup> However, the direct institutionalisation of the Chicago antitrust approach only began in 1981-82, when the former Hollywood actor Ronald Reagan was elected president and the economic recession rekindled popular demand for greater market efficiency.<sup>525</sup>

The central asset of the Reagan presidency was to 'make America great again' both by implementing a liberal economic programme and by supporting a patriotic arms race in reaction to the Vietnam defeat.<sup>526</sup> For instance, Reagan raised military expenditure by 51% in order to modernise the US strategic forces and implement general defence programmes.<sup>527</sup>

While Reagan invested in the US military forces to restore the American international projection of power, he applied strong deregulation measures in the economic field in order to promote a neo-liberal system that would globally re-launch the American economy.<sup>528</sup> More than ten years after Nixon took office, government

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<sup>523</sup> Tony Alan Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990*, 1992, Cambridge University Press, 321.

<sup>524</sup> William E. Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking', Winter 2000, 14 *Journal of Economic Perspectives* 1, 43-6.

<sup>525</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 140.

<sup>526</sup> Rudolph J. Peritz, *Competition Policy in America: History, Rhetoric, Law*, 1996, Oxford University Press, 265-67.

<sup>527</sup> Fred Halliday, *The Making of the Second Cold War*, 1986, Verso Editions NLB, 235.

<sup>528</sup> David Harvey, *A Brief History of Neoliberalism*, 2005, Oxford University Press, 79-81.

spending and taxes were still high. In 1981 the GDP diminished by 5% and in 1982 the unemployment rate reached 10% – the highest level since the 1940s.

In order to face the economic downturn, Reagan suggested a new approach inspired by Friedman's monetarist doctrine and supply-side economics.<sup>529</sup> This approach was condensed in his inaugural address in this statement: 'Government is not the solution to our problem; government *is* the problem' [emphasis added].<sup>530</sup> The plan consisted in a drastic cut of the federal budget and a massive reduction of taxes. These provisions would at first favour the leisure class and corporations, as they provided them with the means to implement new investments and production. Subsequently, profits would gradually trickle down to the poorest. 'Reagonomics' promoted a tax cut of 750 billion dollars in five years while simultaneously reducing welfare state spending.<sup>531</sup>

In matters of antitrust policy, Reagan applied a 'revolution' by maintaining an open fight against excessive regulation.<sup>532</sup> He was seemingly not concerned about excessive concentrations of economic size and power:

There is nothing written in the sky that says that the world would not be perfectly satisfactory place if there were only 100 companies(...) I certainly do not see a war against aggregate concentration as part of this department mission. <sup>533</sup>

Under his presidency, the structural antitrust approach experienced a definite

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<sup>529</sup>Milton Friedman monetarism theory linked the money supply, in other words the total amount of money circulating in an economy, to the level of economic activities. The more money circulates the more the economy is doing well. Consequently, this theory supported free markets and individualism rather than the 'welfare state' vision. Supply-side economics instead highlighted that economic growth can be stimulated by lowering tax or other economic barriers to stimulate production.

<sup>530</sup>Ronald Reagan, inaugural address, January 20,1981, Chris J. Dolan, John Frenndreis, Raymond Tatolovich, *The Presidency and Economic Policy*, 2008, Rowman & Littlefield Publishers, INC, 39.

<sup>531</sup>Oliviero Bergamini, *Storia degli Stati Uniti, Storia degli Stati Uniti*, 2002 Editori Laterza, 230-31.

<sup>532</sup>Terry Calvani, Michael L. Sibarium, 'Antitrust today: Maturity or decline', Spring 1990, 35 *The Antitrust Bulletin*, 125.

<sup>533</sup>Quoted in Walter Adams, James W. Brock, 'Reagonomics and the transmogrification of merger policy', Summer 1988, 33 *The Antitrust Bulletin*, 309-59.

turnaround. Reagan and his administration informally abandoned any strict antitrust controls over big corporations, as ‘bigness doesn’t necessarily mean badness’.<sup>534</sup> While the number of mergers rose from 1,565 to 4,323 between 1980 and 1986, their value grew even faster, from 33 billion dollars in 1980 to more than 204 billion in 1986. There was no American firm that had not been involved in merger agreements; the period between 1981 and 1984 witnessed the creation of 75 of the 100 largest corporate mergers in American history.<sup>535</sup> In fact, Reagan maintained that ‘vertical and conglomerate mergers have ceased to be a major enforcement focus of the [Antitrust] division’.<sup>536</sup>

Thanks to William Baxter, Reagan’s new appointee at the head of the Antitrust Division, the room for action of the Department of Justice Antitrust Division was reduced. On the one hand, Baxter blocked many antitrust suits; on the other, he guaranteed the revision of twelve hundred old verdicts. Moreover, in order to limit and control the FTC power, Reagan appointed James Miller III, a free-market conservative lawyer, to lead the Commission. Under Baxter and Miller’s direction, both the FTC and the Antitrust Division significantly reduced their activities. Between 1981 and 1987, 10,723 mergers came to the attention of the Justice Department, but only 26 were suited in court by the Antitrust Division. In the same period, the FTC’s filing of only seventeen administrative complaints amply demonstrated its unwillingness to be more proactive.

In addition, in 1982 Baxter published a set of guidelines on President Ford’s 1976 HSR Act. Here, he explained how to analyse the prior-notification and waiting-period provisions to predict whether or not a merger would result in prosecution. Under these

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<sup>534</sup>R. E. Taylor & S. Crock, ‘Reagan Team Believes Antitrust Legislation Hurts Big Business’, July 8, 1981, *Wall Street Journal*, 1. Quoted in Walter Adams, James W. Brock, ‘Reaganomics and the transmogrification of merger policy’, Summer 1988, 33 *The Antitrust Bulletin*, 309-59.

<sup>535</sup> Thomas G. Krattenmaker, Robert Pitofsky, ‘Antitrust Merger Policy and the Reagan Administration’, summer 1988, 33 *The Antitrust Bulletin* 211. William L. Baldwin, ‘Efficiency and competition: The Reagan administration’s legacy in merger policy’, Summer 1990, 5 *Review of Industrial Organization* 2, 159-174.

<sup>536</sup> *Oversight of Government Merger Enforcement Policy: Hearings Before the Senate Comm. on the Judiciary*, 97<sup>th</sup> Cong., 1<sup>st</sup> sess. 51 (1982), quoted in Walter Adams, James W. Brock, ‘Reaganomics and the transmogrification of merger policy’, Summer 1988, 33 *The Antitrust Bulletin*, 309-59.

merger guidelines, the possibility for a merger to be judged legal increased from 14% to 18%. In the case of low barriers, where access to competitors was easy, a merger could consolidate up to 48% of market share. At bottom, the new guidelines underlined that the size of vertical and conglomerate mergers would rarely be challenged.<sup>537</sup> In addition, Baxter replaced Turner's measure of concentration with the Herfindahl Index. Through mathematically determined thresholds, the index indicated that most vertical and conglomerate mergers – unlike horizontal mergers – would in fact be free from prosecution.<sup>538</sup> According to the Department of Justice,

The 1982 Guidelines did not simply clarify the Department's merger policy [...] The 1982 Guidelines recognised that most mergers do not threaten competition and that many are in fact precompetitive and benefit consumers [...] One of the most important advances of the 1982 Guidelines was the increased freedom they gave to American industries to enhance efficiency through mergers.<sup>539</sup>

Moreover, after Reagan was re-elected with 68% of the vote in 1985, his Administration launched the Merger Modernisation Act of 1986 in order to amend section 7 of the Clayton Act. As mergers were likely to 'increase the ability to exercise market power', it was believed that merger policy should 'not interfere with the ability of American firms to freely reorganise through mergers and acquisition'.<sup>540</sup> The proposed bill was the most serious attempt made by the Reagan administration to revise the Clayton Act, the

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<sup>537</sup> Joel Davidow, 'The worldwide influence of U.S. antitrust', 1990, 35 *The Antitrust Bulletin*, 603-630.

<sup>538</sup> Donald F. Turner, 'Observations on the New Merger Guidelines and the 1968 Merger Guidelines', august 1982, 51 *Antitrust law journal*, 305-315. Tony A. Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990*, 1992, Cambridge University Press, 322.

<sup>539</sup> Walter Adams, James W. Brock, 'Reaganomics and the transmogrification of merger policy', Summer 1988, 33 *The Antitrust Bulletin*, 309-59.

<sup>540</sup> S. 2160, 99th Cong., 2d Sess. 5 2(a) (1986). U.S. Department of Commerce, 'Merger Modernization Act of 1986: Analysis' I, quoted in Alan A. Fisher, Frederick I. Johnson, Robert H. Lande, 'Price Effects of Horizontal Mergers', July 1989, 77 *California Law Review* 4, 777-827.

foundation of US mergers policy, and institutionalise an efficiency-oriented system.<sup>541</sup>

According to the ABA Task Force Report, whose contributors included former Antitrust Division chiefs from the Nixon and Carter eras, the Reagan antitrust administration adopted an uncritical attitude towards mergers, which were again on the rise.<sup>542</sup> This new wave of mergers was also encouraged by the corporate tax cuts promoted by President Reagan in his first term. This provision helped corporations to overcome the shortage of capital that prevented them from investing in innovations and from competing in the international markets.

However, since the Chicago antitrust approach was oriented towards market efficiency and consumer welfare, the government, while formally adopting a neo-liberal approach against market concentrations, employed the Hart-Scott-Rodino Act to monitor mergers considered less efficient or anticompetitive while increasing its control over price-fixing agreements.<sup>543</sup> In federal district courts, Baxter and his successors initiated 94 cases annually, 80 criminal and 14 civil, while the Carter's Department of Justice brought 67.5 cases annually, 30 civil and 37.5 criminal. Hence, Reagan's DOJ not only increased the average number of cases considered, but also pushed for more legal actions against criminal cases.<sup>544</sup>

The effects of Reaganomics are still objects of debate, but it must be said that by 1982 the recession was overcome, the level of employment started to rise, and inflation rate fell to 7% – which amounted to a very positive economic outlook. Moreover, the institutionalisation of the Chicago School antitrust theory and its conversion into free-

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<sup>541</sup> Youri Devuyt, 'Transatlantic Competition Relations' in Mark A. Pollack, M. A. and Gregory C. Shaffer (eds.), *Transatlantic Governance in the Global Economy*, 2001, Boulder CO and Oxford: Rowman and Littlefield, Part III, chapter 5, 128.

<sup>542</sup> Tony A. Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990*, 1992, Cambridge University Press, 321.

<sup>543</sup> Clifford A. Jones, Mitsuo Matsushita, *Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA*, 2002, Kluwer Law International, 19.

<sup>544</sup> Terry Calvani and Michael L. Sibarium, 'Antitrust today: Maturity or decline', Spring 1990, 35 *The Antitrust Bulletin*, 179-183.

market institutions allowed the US to increase its economic transactions and to establish the basis for a durable economic model by according an unprecedented number of consolidations to big businesses and multinational corporations, which ultimately helped to overcome the crises of the 1970s.<sup>545</sup> The institutionalisation of Chicago ideas into antitrust policies proved to be durable and, more broadly, put antitrust policy on a more permanent footing. The success of those ideas was so great that they persisted up until the end of the Bush Presidency – and they arguably still do.

#### 1990 -2010: THE CHICAGO AND POST-CHICAGO COMPETITION TRADITION

##### *Bush and the durable path of Chicago Ideas*

Since the Reagan Administration, Chicago ideas have been shaping – with varying degrees of success – US antitrust policies for almost 30 years. Despite Bill Clinton's moderately interventionist rhetoric during his 1992 presidential campaign, the neoliberal agenda of free market was set on a durable institutional path.<sup>546</sup> With the policy of fiscal austerity of the late 1980s, the US began to loosen national control on corporate behaviour in both the domestic and international spheres and allowed a wave of business privatisations.<sup>547</sup> The implementation of neo-liberal antitrust policy was related to a number of reasons, both pragmatic and ideological. From a pragmatic point of view, rising global competition required a more aggressive strategy. From an ideological perspective, the triumph of Chicago ideas over Keynesianism engendered blind faith in the free market. Any kind of state interventionism policy began to be perceived as a constraint on market activity that would generate imbalances and restrict growth.

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<sup>545</sup> William Kleinknecht, *The man who sold the world : Ronald Reagan and the betrayal of main street America*, 1960, New York, Nation Book, 135-154. William R. Nester, *American Industrial Policy: Free or Managed Markets*, 1997, Palgrave Mac Millans, 7.

<sup>546</sup> Robert Pollin, 'Anatomy of Clintonomics', May/June, 2000, 2 *New Left Review* 3, 17-46.

<sup>547</sup> David Kotz 'Neoliberalism and the US Economic Expansion of the 1990s', 2003, *Economics Department and Political Economy Research Institute Thompson Hall, University of Massachusetts*.

The triumph of Chicago ideas was also fed by the positive economic outcomes experienced in the 1990s, when the US experienced its longest period of continuous economic expansion and extraordinary rates of growth.<sup>548</sup> In 1995, the US real GDP was growing at a rate of more than 4% a year. While this trend continued through the 2000s, the level of unemployment fell by 4% and inflation remained low. At the same time, stock prices increased at an incredible rate, which seemed to vindicate the faith in a newfound wealth among the middle class. Meanwhile, the collapse of the Soviet Union resulted in a drastic reduction of defence spending and encouraged Federal Reserve Chairman Alan Greenspan to cut interest rates. At a global level, the world GDP increased by one-third and many of the world leading economies reached macroeconomic stability and high levels of employment. Neo-liberal and Chicago ideas, by pushing for a global system of deregulation and privatisation, deepened the integration of international markets and fostered an unprecedented expansion of big American businesses. According to the 2002 Global Powers of Retailing report, in 2000 39% of the 250 largest retail companies in the world were based in the United States and, globally, 48.9% of the 200 most active companies in consumer markets were American.<sup>549</sup>

The US economic performance of the 1990s seemed to demonstrate that neoliberalism, and the ideas of the Chicago School, was the only way to build an effective capitalist economy, but in the last quarters of the year 2000 the US rate of economic growth began to noticeably slow down. At the beginning of March 2000, the stock market began to contract and the Federal Trade Reserve responded to the slowing economy by slashing interests' rates. By the start of 2001, 'rates were at their lowest level in four decades. A recession, however, could not be avoided. The economy's ten year

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<sup>548</sup> Paul J.J. Welfens, John T. Addison, David B. Audretsch, Thomas Gries, Hariolf Grupp (eds.), *Globalization, economic growth and innovation dynamics*, 1999, Springer, V.

<sup>549</sup> John Fingleton, 'Competition policy in troubled times', 20 January 2009, *CEO, Office of Fair Trading*, 3.

expansion was officially declared to have ended in March 2001.<sup>550</sup> Therefore, since the beginning of his presidential mandate in 2001, George W. Bush was already confronted with very difficult challenges.

Not only did Bush inherit an economic expansion that was on its last legs, but he also won the elections by a tiny margin.<sup>551</sup> This meant that the Republican Party did not gain the majority of seats in both the houses of Congress. While this should have suggested a cautious and moderate policy approach, the Bush administration defied expectations with the promotion of bold neo-liberal turns in the economy and daring political strategies in foreign policy.

On the one hand, Bush resumed Reagan's policies by supporting huge tax relief programmes embodied in the Economic Growth and Tax Relief Reconciliation Act of the June 7, 2001. The purpose of the Act was to allow middle and upper-middle classes, considered the backbone of American wealth, to dispose of more money to invest in the economy.<sup>552</sup> In his *Remarks on Signing the Economic Growth and Tax Relief Reconciliation Act*, Bush affirmed that, 'we cut taxes for every income-tax payer. We target nobody in; we target nobody out'.<sup>553</sup>

The plan not only should have provided strong economic growth but it should have also created jobs. Both of those promises did not materialise. On the contrary, under Bush's tax agenda, America suffered its weakest economic expansion since World War II. George W. Bush's economic policies resulted in a net loss of private-sector jobs and in

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<sup>550</sup> 2002 Global Power Retailing, Deloitte Touche Thomatsu.

[http://www.deloitte.com/view/en\\_AU/au/industries/consumerbusiness/e2781160f279d210VgnVCM300001c56f00aRCRD.htm](http://www.deloitte.com/view/en_AU/au/industries/consumerbusiness/e2781160f279d210VgnVCM300001c56f00aRCRD.htm)

<sup>551</sup> John C. Fortier and Norman J. Ornstein, 'President Bush: Legislative Strategist', in Fred I. Greenstein (ed.), *The George W. Bush Presidency: An Early Assessment*, 2003, Baltimore and London, The Johns Hopkins University Press, Chapter 6, 138-72.

<sup>552</sup> Jan Nederveen Pieterse, 'Political and Economic Brinkmanship', Aug.2007, 14 *Review of International Political Economy*, 3, 467-486, 477. William G. Gale and Samara R. Potter, 'An Economic Evaluation of the Economic Growth and Tax Relief Reconciliation Act of 2001', March 2002, *Brookings Institution*.

<sup>553</sup> George W. Bush 'Remarks on Signing the Economic Growth and Tax Relief Reconciliation Act' 7 June 2001, <http://millercenter.org/president/gwbush>

the increase of public debt. The cost of tax-cutting amounted to neglected infrastructures and growing social inequality.<sup>554</sup> The creation of public deficits, in turn, culminated in the reduction of government social programmes and the consequent removal of those Democrat ‘policy tools’ that helped to win the elections.<sup>555</sup> On top of tax cuts, Bush also increased security costs because of the wars fought in Iraq and Afghanistan.<sup>556</sup> While the war on terrorism caused one of the highest public deficits ever registered in the US, it allowed corporation incomes to grow. For instance, 80% of Pentagon spending was allocated to six major corporations operating in the military and security sectors.<sup>557</sup>

The general triumph of the *laissez-faire* ideas embodied in the enthusiastic adoption of the Chicago School and in the vilification of state interventionism allowed big corporations to drive the development of American economy, and its job market, according to private, rather than collective, interests. In other words, *laissez-faire* policies allowed corporations to abandon any commitment to the national interest; this created negative externalities and systemic economic risks.<sup>558</sup> For example, in order to maintain profits, corporations started to reduce prices by lowering wages or exploiting cheaper labour force. This phenomenon diminished consumers’ purchasing power, either because real salaries were too low or because they had to face unemployment and unstable working conditions; hence, high consumption started to be sustained through debts. At the same time, only a small portion of the American society, i.e. those with an annual income of more than 200,000 dollars, enjoyed the benefits of the kind of capital

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<sup>554</sup>Sander Levin ‘Should All the Bush-Era Tax Cuts Be Extended?’ 9/10/2010, 2 *U.S. News Digital Weekly*, 36, Jan Nederveen Pieterse, ‘Political and Economic Brinkmanship’, Aug.2007, 14 *Review of International Political Economy*, 3, 467-486, 477.

<sup>555</sup>Jan Nederveen Pieterse, ‘Political and Economic Brinkmanship’, Aug.2007, 14 *Review of International Political Economy*, 3, 467-486, 477.

<sup>556</sup>Allen Schick ‘Bush’s Budget Problem’ in Fred I. Greenstein (ed.) *The George W. Bush Presidency: An Early Assessment*, 2003, The Johns Hopkins University Press, Baltimore and London, chapter 4, 78-99.

<sup>557</sup>Will Hutton, *The World We’re In*, 2002, London: Little, Brown.

<sup>558</sup>Jan Nederveen Pieterse, ‘Political and Economic Brinkmanship’, Aug.2007, 14 *Review of International Political Economy*, 3, 467-486, 477

investments encouraged by Bush's neo-liberal reforms.<sup>559</sup>

Following this trend, a Ponzi economy based on 'a giant pyramid selling scheme' began to grow in a cycle; trade deficits helped to finance the US budget deficit and to make up for its low savings rates.<sup>560</sup> During the Bush era, the US needed roughly 2 billion dollars every day to fund the current account deficit, sustain its overconsumption, and avoid the fall of the dollar. As Gill notes, the American debt was mostly covered by Asian central banks. In 2008, Japan held 12% of the total US debt, China 11%, while Singapore, South Korea, Hong Kong and Taiwan more than 6%.<sup>561</sup>

Table 2. Foreign holdings of US securities, by country and type of security, for the major investing countries into the US, as of June 30, 2008 (billions of dollars)			
Country	Total	%	Equities
Japan	1,250	12	199
China (Mainland)	1,205	11.67	100
Singapore	210	2	52
Korea, South	150	1.4	11
Hong Kong	147	1.4	29
Taiwan	137	1.3	81
Total	10,324		2,969

Source: U.S. Treasury Department Office of Public Affairs

<sup>559</sup> See: Gerard Dumeil and Dominique Levy, 'The Profit Rate: Where and How Much did it fall? Did it recover? (USA 1948-2000)', 2002, 34 *Review of Radical Political Economics* 4, 437-461. Gérard Dumeil and Dominique Levy, 'Technology and distribution: historical trajectories à la Marx' October 2003, 52 *Journal of Economic Behavior & Organization* 2, 201-233.

<sup>560</sup> Warde, I. 'High Price of the Cheap Dollar', 2005, *Le Monde Diplomatique*.

<sup>561</sup> See: U.S. Treasury Department Office of Public Affairs, *Preliminary Report on Foreign Holdings of US Securities at the end June 2008*, February 27, 2009.

<http://www.treasury.gov/Pages/Search.aspx?k=MAJOR%20FOREIGN%20HOLDERS%20OF%20TREASURY%20SECURITIES&s=allsites&start1=11>

This was a paradoxical situation in which poorer nations were sustaining the most powerful country in the world. Central banks did not easily reveal ‘the proportion of their reserves held in US dollar assets, but the Bank for International Settlements [...] estimated that just over two-thirds of total central bank foreign exchange reserves were held in dollars at the end of 2003’. Additionally, according to the US Bond Market Association, in 2004 foreigners possessed ‘46.8% of US treasuries, versus the 20% they controlled in 1990’.<sup>562</sup> At the same time, while the level of state and corporate debts was already high, the manufacturing capacity started to erode. Corporations, which enjoyed a very liberal antitrust policy, found more profitable to invest their gains not in new productions, but in merger operations that reduced the level of competition in the market. Indeed, following in Reagan’s footsteps and true to its Chicago School roots, Bush adopted a *laissez-faire* approach also in antitrust policy.

#### *Bush’s Antitrust Policy*

The credit crunch has been linked to the international spreading of a mortgage crisis caused by the US housing construction sector. Even though the causes of the credit crunch are more related to the general deregulation of the banking and investment industries, it has to be said that the wide-ranging permissive policies towards mergers allowed big companies to acquire enough shares to control the financial sector and overturn governmental policies.<sup>563</sup> As a matter of fact, since his election in 2001, President George W. Bush manifestly enforced a non-interventionist approach towards antitrust along Chicago neoliberal lines. The FTC Chairman Timothy Muris and the Former Assistant Attorney General of DOJ Charles A. James institutionalised the Chicago antitrust vision advocated by Bush. After their appointment, they started to

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<sup>562</sup> Chris Gill, ‘Why George Bush should heed Asia’s central bankers’, 26 February 2005, *Financial Times*.

<sup>563</sup> Nelson D. Schwartz & Julie Creswell, *What Created this Monster?*, Mar. 23, 2008, *N.Y. TIMES*.

enforce a variety of federal antitrust and consumer protection laws and to eliminate anti-competitive practices in order to ensure that the nation's markets functioned competitively.

For instance, in 2001 the administration, through the Premerger Notification Rules, enforced an amendment of the Hart-Scott-Rodino reporting convention that allowed the rise of a new wave of mergers.<sup>564</sup> From a value of 1.2 trillion dollars in 2002, the rate of merger activity increased rapidly and, by the end of 2006, it reached 3.4 trillion dollars.<sup>565</sup> Those are also the years of the ten largest mergers in history, such as American Online and Time Warner (2000) and the AT&T and BellSouth Corporation (2006).<sup>566</sup>

The number of mergers challenged by DOJ became equal to the merger enforcement level experienced during the second term of the Reagan presidency, which was the lowest registered in the US. This trend was intensified during Bush's second mandate, when, while the DOJ enforcement rate remained constant, the FTC enforcement rate dropped. This resulted in a general decline of the total federal merger enforcement rate, which beat the lowest level previously recorded.<sup>567</sup>

Bush's antitrust policy in his second mandate considered the strengthening of

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<sup>564</sup> Premerger Notification, 66 Fed. Reg. 8680 (Feb. 1, 2001). John B. Kirkwood and Robert H. Lande, 'The Chicago School's Foundation Is Flawed: Antitrust Protects Consumers, Not Efficiency' in Robert Pitofsky (ed.), *How The Chicago School Overshot the Market: The Effect of Conservative Economic Analysis on U.S. Antitrust*, 2008, Oxford University Press, Chapter 2, 89-106.

<sup>565</sup> Timothy Kiessling, Michael Harvey, Miriam Moeller, 'Supply-chain corporate venturing through acquisition: Key management team retention', January 2012, 47 *Journal of World Business* 1, 81-92, Caterina Moshieri, Jose' Campa, 'The European M&A industry: A market in the process of construction', 2009, *Academy of Management Perspectives*, 71-86. *Wall Street Journal*, 'How to cash in on the M&A boom', 2006, February 3.

<sup>566</sup> Jeannette Gorzala, *The Art of Hostile Takeover Defence: The Roadmap to fighting corporate riders*, 2010, Igel Verlag Hamburg, 6-7. Gary A. Dymksi, 'The Global Bank Merger Wave: Implications for developing countries', December 2002, 40 *The Developing Economies* 4, 435-466.

<sup>567</sup> Thomas O. Barnett, 'Merger Review: A Quest for Efficiency', Jan. 25, 2007, available at <http://www.usdoj.gov/atr/public/speeches/221173.htm>. Deborah Platt Majoras, "Reforms to the Merger Review Process," Feb. 16, 2006, available at <http://www.ftc.gov/os/2006/02/mergerreviewprocess.pdf>. Jonathan B. Baker and Carl Shapiro, 'Reinvigorating Horizontal Merger Enforcement', in Robert Pitofsky (ed.), *How The Chicago School Overshot the Market: The Effect of Conservative Economic Analysis on U.S. Antitrust*, 2008, Oxford University Press, chapter 6.1, 235-288.

antitrust control more harmful than good.<sup>568</sup> Yet, after President Bush appointed Tom Barnett as Assistant Attorney General and Deborah Platt Majoras as Chairman at the Federal Trade Commission, the federal merger enforcement rate reached the lows recorded during the Reagan presidency.<sup>569</sup> As Majoras underlined in one of her speeches, since the scope of antitrust was to protect the interests of consumers, competition agency had to carefully limit enforcement to the rare cases when those interests were actually damaged.<sup>570</sup>

Professors Jonathan Baker and Carl Shapiro argued that the DOJ and FTC had never been as permissive of seemingly anticompetitive mergers and transactions as they were during the Bush administration.<sup>571</sup> As reported by the Wall Street Journal in January 2007, ‘the federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish’.<sup>572</sup> This lenient antitrust attitude was also picked up by the *New York Times* in March 2007. According to the newspaper, the ‘Bush administration has been more permissive on antitrust issues than any administration in modern times’.<sup>573</sup>

Notwithstanding the devastating consequences of the crisis, Bush did not change his Chicago approach towards antitrust; on the contrary, excessive *laissez faire* and

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<sup>568</sup> Robert Pitofsky ‘Introduction: Setting the Stage’, in Robert Pitofsky (ed.) *How The Chicago School Overshot the Market: The Effect of Conservative Economic Analysis on U.S. Antitrust*, 2008, Oxford University Press, 3-7, 5.

<sup>569</sup> William E. Kovacic, ‘Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement’, 2009, *Competition Policy International*, 129-150, 136. Frederic M. Scherer, ‘Conservative Economics and Antitrust: A Variety of Influences’ in Robert Pitofsky (ed.), *How The Chicago School Overshot the Market: The Effect of Conservative Economic Analysis on U.S. Antitrust*, 2008, Oxford University Press, chapter 1.3, 30-39, 37.

<sup>570</sup> Comment of Deborah Platt Majoras, Chairman of the Federal Trade Commission on Proposed Consumer Trading and Standard Authority, Federal Trade Commission Washington DC 20580. ([www.ftc.gov/bc/international/docs/majorasrespondeti.pdf](http://www.ftc.gov/bc/international/docs/majorasrespondeti.pdf))

<sup>571</sup> Jonathan Baker and Carl Shapiro, ‘Reinvigorating Horizontal Merger Enforcement’, 04-10-2007, *Competition Policy Center, Institute of Business and Economic Research, UC Berkeley*, 1-40, 11.

<sup>572</sup> *Wall Street Journal*, Jan. 16, 2007. Quoted in, Jonathan Baker and Carl Shapiro, ‘Reinvigorating Horizontal Merger Enforcement’, 04-10-2007, *Competition Policy Center, Institute of Business and Economic Research, UC Berkeley*, 1-40, 11.

<sup>573</sup> Stephen Labaton, Sirius Chief Talks of Ways to Get XM Deal Approved, *New York Times*, March 1, 2007. Quoted in, Jonathan Baker and Carl Shapiro, ‘Reinvigorating Horizontal Merger Enforcement’, 04-10-2007, *Competition Policy Center, Institute of Business and Economic Research, UC Berkeley*, 1-40, 11.

extreme faith in market efficiency resulted in big acquisitions in the financial sector.<sup>574</sup> In fact, immediately after the crisis, companies took advantage of this and started to merge in order to increase their profits far from the eye of state. For instance, Bank of America bought Countrywide and Merrill Lynch, J.P. Morgan bought Bear Stearns, and Wells Fargo acquired Wachovia.<sup>575</sup> According to Kovacic, Bush's competition programme 'had swung too far in the direction of non-intervention.'<sup>576</sup>

At the end of 2008, the US was facing the worst economic crisis since the 1930s. While references to Keynesian theory and policy became the order of the day, Chicago economists remained committed to free markets.<sup>577</sup> The difficult relationship between those contrasting ideas and the pressing economic needs of the time did not result in the promotion of coherent institutions to regulate the market. On the contrary, while antitrust policy remained essentially neo-liberal, the US started to adopt a schizophrenic trade policy to protect the market from what was considered unfair competition.

According to Simon Everett, head of the Global Trade Alert research group of the Centre of Economic Policy Research (CEPR), 'the overwhelming picture is one of planned and implemented state initiatives that reduce foreign commercial opportunities and reverse the 25-year trend towards open borders'.<sup>578</sup> According to Everett, the

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<sup>574</sup> See: Gary A. Dymski, *The Bank Merger Wave: The Economic Causes and Social Consequences of Financial Consolidation*, 1999, M.E. Sharpe. Inc. Gary A. Dymski 'The Global Crisis and the Governance of Power in Finance' in Philip Arestis, Rogério Sobreira and José Luis Oreiro (eds.), *An Assessment of the Global Impact of the Financial Crisis*, 2008, Palgrave.

<sup>575</sup> James R. Hagerty & Valerie Bauerlein, 'Credit Crunch: BofA Sets Closing Date for Countrywide Purchase', Jun. 20, 2008, *Wall Street Journal*; Matthew Karnitschnig, Carrick Mollenkamp & Dan Fitzpatrick, 'Bank of America to Buy Merrill', Sept. 15, 2008, *Wall Street Journal*. *Wall Street Journal* 'J.P. Morgan, Bear Near Completion', Apr. 9, 2008. Dan Fitzpatrick, 'Three Banks Complete Deals', *Wall Street Journal*, Jan. 2, 2009. Quoted in Sharon E. Foster, 'Fire Sale: The Situational Ethics of Antitrust Law in an Economic Crisis' 2008-2009, *78 Mississippi Law Journal* 4, 777-90.

<sup>576</sup> Jonathan B. Baker & Carl Shapiro, *Reinvigorating Horizontal Merger Enforcement*, in Robert Pitofsky (ed.), *How The Chicago School Overshot the Market: The Effect of Conservative Economic Analysis on U.S. Antitrust*, 2008, Oxford University Press. William E. Kovacic, 'Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement', 2009, *Competition Policy International*, 129-150.

<sup>577</sup> L. Randall Wray 'Money manager capitalism and the global financial crisis' 2009, *51 Real-World Economics Review* 1, 55-70.

<sup>578</sup> Everett, Simon, 'Broken Promises: A G-20 Summit Report by Global Trade Alert', 2009, *London, Center of Economic and Policy Research*, 3.

decision to raise new ‘tariffs on Chinese tires, cancel a program allowing Mexican trucks to carry cargo on American roads, and enact a stimulus package that included explicit “buy-America” requirements’ could be defined as protectionist policies.<sup>579</sup> However, such protectionist strategies were short-lived as the Bush presidency was coming to an end and it was now Obama’s turn to face the recession and try to rebalance the American economy.

In the aftermath of the crisis, the most pressing question was concerned with the sort of criteria that competition agencies would need to adopt if they were to enforce the institutional framework of a new model of competition policy that would carry the US out of the crisis.<sup>580</sup>

#### *Obama and the Crisis: A new Institutional Response?*

The credit crunch and the merger wave were tackled head-on by President Obama who, elected in 2008, decided to adopt a different antitrust approach. President Obama represented a *homo novus* in the American political panorama; he was portrayed as the embodiment of the change the US desperately needed.<sup>581</sup>

It is too early to analyse the effects of Obama’s antitrust policies and the implementation of appropriate institutions responsible for the control of competition. It is safe to note, however, that the newly elected U.S. President has clearly exhibited a strong interest in antitrust regulations and antitrust efforts seemed to have ‘becom[e] a corner-stone’ of his policy agenda.<sup>582</sup>

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[http://www.globaltradealert.org/sites/default/files/Broken\\_promises\\_GTA\\_second\\_report.pdf](http://www.globaltradealert.org/sites/default/files/Broken_promises_GTA_second_report.pdf)

<sup>579</sup> Evan E. Hillebrand, Joshua J. Lewery, Janice Turtora Zagardo, ‘Backtracking from Globalization’, 2010, 10 *Global Economy Journal* 4, Article 6, 1.

<sup>580</sup> William E. Kovacic ‘Rating the Competition Agencies: What Constitutes a Good Performance?’ 2008-2009, 16 *Geo. Mason L. Rev.* 903.

<sup>581</sup> Nigel Hamilton, *American Caesars: Lives of the Presidents from Franklin D. Roosevelt to George W. Bush*, 2010, New Haven & London, Yale University Press, 518.

<sup>582</sup> Roxane M. DeLaurell and Robert W. Rouse, ‘Obama’s New Antitrust Policy’, 2010, *Wiley Periodicals, Inc.*, 29-31, 31.

During the first months of his administration, Obama appointed Christine Varney as the new head of the DOJ Antitrust Division and Jon Leibowitz as the Chair of the FTC; both of them were well known for their strong stance against mergers and anticompetitive practices.<sup>583</sup> In a speech given to the Centre for American Progress, Varney publicly rejected the *laissez-faire* policies of the Bush administration and affirmed that the DOJ was ‘committed to aggressively pursuing the enforcement of Section 2 of the Sherman Act’.<sup>584</sup> Varney stressed that strong antitrust policies were necessary to fight market concentrations and mergers (especially in high-tech, health, pharmaceutical, telecommunications, food, and agriculture firms), as they would lead to higher prices, low-quality products, and other negative externalities for consumers.<sup>585</sup> Moreover, the DOJ made now explicit reference to its debt to Thurman Arnold, the Assistant Attorney General in charge of antitrust under Roosevelt, who was the first to enforce a substantial antitrust program on a nationwide scale’.<sup>586</sup>

However, while President Obama was not planning to suspend antitrust enforcement (as Roosevelt did with the NIRA during his first administration), a strong Harvard-oriented approach seemed to be difficult to put into action. In this sense, the Merger Guidelines adopted in 2010 perfectly represented this dilemma: on the one hand, they did not reform the material, but on the other hand they aimed to introduce a more

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<sup>583</sup> Stacey Anna Mahoney ‘To Day 100 and Beyond: Antitrust Enforcement in the Obama Administration’, 2009, *American Bar Association*, 1.

<sup>584</sup> Daniel A. Crane, ‘Can the new administration overcome the Chicago and Harvard schools’ reservations? Obama’s Antitrust Agenda’, 2009, 32 *Regulation Magazine* 3, 16-20. Tamara Lytle, ‘Obama’s New Antitrust Rules Have Big, Powerful Companies Sweating: the Monopoly Policy is a Reversal of a Bush Administration Rule’, May 20-2009, *U.S. NEWS & World Rep.*, (<http://www.usnews.com/news/national/articles/2009/05/20/obamas-new-antitrust-rules-have-big-powerful-companies-sweating.html>.)

<sup>585</sup> Tamara Lytle, ‘Obama’s New Antitrust Rules Have Big, Powerful Companies Sweating: the Monopoly Policy is a Reversal of a Bush Administration Rule’, May 20-2009, *U.S. NEWS & World Rep.* (<http://www.usnews.com/news/national/articles/2009/05/20/obamas-new-antitrust-rules-have-big-powerful-companies-sweating.html>.)

<sup>586</sup> Cordwin D. Edwards, ‘Truman Arnold and the Antitrust Law’, Sep. 1943, 48 *The Academy of Political Science, Political Science Quarterly* 3, 33. Alan Brinkley, *The End of Reform, New Deal Liberalism in Recession and War*, 1996, New York, Vintage Books Edition, 106-125.

flexible interpretation of mergers.<sup>587</sup> Indeed, while heavily relying on the 1982 version, the new guidelines reflected the ever-increasing tide of change that invested the US antitrust enforcement practices.<sup>588</sup> For instance, they revised the Herfindahl-Hirschman Index (HHI) of market concentration; this Index, originally introduced during the Reagan presidency, established a scale of the level of market concentration reaching up to 10,000, with 10,000 representing a perfect case of market monopoly. Obama's Merger Guidelines modified the reading of the Index so that any merger agreement that registers an increase of 200 HHI points, or otherwise recording an overall HHI score greater than or equal to 2,500, will be *de facto* considered anticompetitive.

Generally speaking, the approach introduced by the new Merger Guidelines to the legality of mergers is based on the evaluation of 'direct' evidence of the real impact of mergers on competition. Indeed, one of the tools suggested for better assessing the anticompetitive effects of an agreement is based on the 'upward pricing pressure' model. This model allows the comparison of the premerger profit margins of the firms with the diversion ratio of customer demand. According to Crane, 'because profit margins are often high in differentiated goods markets, this upward pricing pressure model could be used to predict that many more mergers than previously expected will result in the unilateral exercise of market power.'<sup>589</sup>

The result of these policies is plain to see. According to Baker and Shapiro's benchmarking scale of merger actions, the Obama administration increased the control of mergers. Indeed, in a scale where the value of 0.75% corresponds to the lowest level of merger control applied during the second term of the Reagan Administration and the

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<sup>587</sup> Daniel A. Crane, 'Chicago, Post-Chicago, and Neo-Chicago' 2009, *University of Chicago Law Review* 76, 1911-33.

<sup>588</sup> Carl Shapiro, 'The 2010 Horizontal Merger Guidelines: from Hedgehog to Fox in Forty Years' September 10, 2010, *University of California, Berkeley - Economic Analysis & Policy Group* (<http://ssrn.com/abstract=1675210>)

<sup>589</sup> Daniel A. Crane, 'Has Obama Justice Department Reinvigorated Antitrust Enforcement', July 18, 2012, 65 *Stan Law Review Online* 13.

first term of Bush Administration, Obama reached – only in 2010 – a merger control level of 1.5%.<sup>590</sup>

Looking at Obama policies, it can be argued that the President is trying to enforce Post-Chicago antitrust institutions based on efficiency analysis, but not on pure *laissez faire* ideas;<sup>591</sup> this is in line with what sustained by Von Apeldoorn and the idea that this crisis does not constitute the end of neo-liberalism but only a reinterpretation of its principles.<sup>592</sup> However, in the aftermath of the crisis, it is still too early to properly interpret the criteria that US antitrust agencies are currently adopting in order to promote a new model of competition policy.<sup>593</sup>

## CONCLUSION

North and historical institutionalists were right to point out the existence of a path-dependent process, in which specific market conceptions are passed down from one generation to another. Although the evolution of antitrust institutions has been characterised by vibrant trends and its different roots have followed different ideas and material interests, its core meaning has always remained anchored to the need to foster effectiveness and social profits.

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<sup>590</sup> Maurice E. Stucke, 'Crony Capitalism and Antitrust', October 10, 2011, *University of Tennessee Legal Studies*, Research Paper No. 164, Jonathan B. Baker and Carl Shapiro, 'Response. Evaluating Merger Enforcement during the Obama Administration', August 21, 2012, 65 *Stan. Law Review Online* 28.

<sup>591</sup> Oliver Budzinsky, 'Monoculture versus diversity in competition economics', 2008, *Cambridge Journal of Economics* 32, 295-324, 301, quoted also in Stephen Wilks, 'Competition Policy', in David Coen, Wyn Grant, Graham Wilson (eds.), *The Oxford Handbook of Business and Government*, 2010, Oxford University Press, chapter 32, 731-757, 733. Massimo Motta, *Competition Policy, Theory of Practice*, 2004, Cambridge University Press, 30. J. Gregory Sidak and David J. Teece, 'Rewriting the Horizontal Merger Guidelines in the Name of Dynamic Competition', 2009, 16 *Geo. Mason L. Rev* 4, 855-95, 895.

<sup>592</sup> Hervert Hovenkamp, 'The Reckoning of Post-Chicago Antitrust: the Long History of Economics in Antitrust' in Antonio Cucinotta, Roberto Pardolesi, Roger van den Bergh (eds.), *Post-Chicago developments in antitrust law*, 2002, *Edward Elgar Publishing Limited*, chapter 1, 1-33, 3.

<sup>593</sup> Baker J. and Shapiro C., 'Reinvigorating Horizontal Merger Enforcement', 2007, *Competition Policy Center, Institute of Business and Economic Research, UC Berkeley*, 1-40. William E. Kovacic, 'Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement', 2009, *Competition Policy International*, 129-150.

In this interpretation, the three above-mentioned schools of thought and the ideas encapsulated in their theories have been modifying the perception of antitrust while reflecting, at the same time, specific interests. At the same time, concepts such as welfare and efficiency have always been relevant in the institutionalisation of new policies.

The Great Depression, by challenging the economic and political dynamics of the time, spelled the end of the classical conceptualisations of antitrust. Those were embodied in the theories of Adam Smith and Ricardo and maintained by many other illustrious scholars such as Schumpeter. At the beginning of the 1930s, there was not a strong antitrust tradition, as the previous theories stressed the non-necessity of any analysis of competition *per se*, since the market would adjust its rivalry dynamics by itself.

However, the emergence of the Marginalist School bucked this theoretical trend and paved the way for a different understanding of market competition. Its ideas influenced the development of the first antitrust rules, such as the Sherman Act, the Clayton Act, and also the NRA. The US found marginalism a valuable framework of reference, because, by criticising the vision of perfect competition, it formally legitimised the intervention of the state in the market. Their alternative understanding of competition was more compatible with the new US economic needs. Those were concerned more with containing the power of the *robber barons* than with limiting the negative externalities produced by cartels.

Although marginalist scholars were the first to focus on the mechanisms of imperfect competition, they did not define any precise course of actions for the state. This may explain why the NRA resembled more a protectionist plan than a pro-competition set of regulations.

Nonetheless, proceeding from those assumptions, the Harvard School began to influence the development of antitrust policy more directly. The first actor involved in the ‘Harvardisation’ of antitrust institutions was Thurman Arnold. At the head of the

DOJ, Arnold contributed to revolutionise the understanding of antitrust and to prosecute unprecedented numbers of national and international cartels. This was the first implementation of informal Harvard-oriented antitrust institutions, which were later formalised through the enforcement of the amendments of section 7 of the Clayton Act's merger provision in 1950 and of the Merger guidelines of 1968.<sup>594</sup>

The influence of ideas in the modernisation process of US antitrust policy was crucial. Mergers previously interpreted as normal outcomes of perfectly competitive market agreements started to be questioned not in term of efficiency but in term of general welfare, whereby the latter began to be considered as an efficiency generator. Similarly, as soon as the causes of Great Depression began to be clearly perceived as the negative externalities created by cartels and mergers, and World War II started to wreak economic havoc, the range of interests pursued by the US started to change and so did its institutions.

Harvard ideas began to be perceived as the only lenses through which reality could be understood. These ideas were part of a general trend, reflected also in Keynesianism and Fordism, in which the revitalisation of general economic welfare became economically efficient. In fact, the Great Depression and the War World I outlined the necessity to create free markets where to sell products. Therefore, American regulators used Harvard ideas to enforce institutions that would limit and control the rise of mergers and cartels and create more favourable conditions for the emergence of new competitors. This would allow a major diffusion of positive economic outcomes and would create the possibility for a higher number of people to gain access to market products, thereby reinvigorating the economy.

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<sup>594</sup> Nicola Giocoli, 'Competition vs. property rights: American antitrust law, the Freiburg School and the early years of European competition policy', 2009, 5 *Journal of Competition Law & Economics*, 4, 747-786, 758.

Harvard institutions were held in place until the Carter Presidency, when another school of thought took over antitrust policymaking. The interaction of the ideas advocated by the Chicago School and the necessity to overcome not only the Oil Crises but also the de-legitimisation of the US as an international political actor pushed President Reagan to resettle antitrust regulations according to what he defined as a *Reagonomic* revolution. The neo-liberal principles inspired by the Chicago School, and which formed the basis of his policies, radically modified the way of fair and unfair competition were understood, and created room for a new interpretation of how economic growth should be promoted. The power of those ideas was so strong that it changed the perception of reality. From a welfare-oriented perspective, antitrust institutions were to shift towards a completely efficiency-oriented logic in order to better serve the interests of corporations.

Once again, ideas and interests determined the institutionalisation of a specific antitrust approach. The members of the FTC and DOJ formed the network involved in the process, although a number of lobbies and interest groups also contributed to the push for change. Chicago ideas were *de facto* institutionalised by Baxter and Miller through the enforcement of the 1982 guidelines. These guidelines substantially modified the interpretation of the 1976 Hart-Scott Rodino Act, the historical act that had formalised the control over merger practices.

As pointed out above, the institutionalisation of Chicago School ideas and, generally speaking, of a neo-liberal approach, has been long-lasting – and it is probably going to survive the current crisis. However, it is also possible that the downturn will allow the emergence of new ideas. President Obama’s nomination of Varney and Leibowitz at the head of the FTC and the DOJ could be considered an attempt to restore a Harvard-oriented approach. From an historical institutional point of view, this would correspond to what Polanyi defined as the ‘cyclical change’ or what Kovacic called

the ‘antitrust pendulum’.<sup>595</sup> In other words, the choice of non-regulation and non-intervention will consistently be followed by the opposite regulatory trend. However, by analysing the current situation, it is rather difficult to imagine a re-institutionalisation of the same antitrust approach enforced by Thurman Arnold in the 1940s. Interests are still dictated by economic efficiency and it is evident that states are still in the on-going process of economic liberalisation.

Although the possible institutionalisation of a Post-Chicago approach would represent another shift in the antitrust pendulum, this would still be very much in line with the previous antitrust mechanism. On the one hand, it would probably allow the development of more flexible market conditions, but on the other hand it would also allow the implementation of regulations halfway between rigid state control – hardly practicable at present – and a complete *laissez-faire* approach. In other words, the Post-Chicago School could represent a compromise between a pure efficiency-seeking approach and a radical welfare-oriented policy.

In conclusion, this chapter aimed at describing the role of state actors in shaping the institutional changing process. By mediating the *diktat* of ideas with practical economic interests, the US government played a fundamental role in the evolution of antitrust. As previously pointed out, most changes in American antitrust policy resulted from the emergence of economic thoughts that were able to offer different ways of interpreting reality in each historical period and to allow individuals to pursue their specific economic interests. Apart from the role exerted by US presidents, antitrust experts, and economic actors, this evolution trajectory has also been determined by the outbreak of economic crises. Indeed, crises had the merit of highlighting new market

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<sup>595</sup> See Karl Polanyi, *The great transformation: the political and economic origins of our time*, 1944, Boston: Beacon, 1957. William E. Kovacic and Carl Shapiro, ‘Antitrust Policy: A Century of Economic and Legal Thinking’, 2009, Competition Policy Centre Working Paper CPC99-09, UC Berkeley, available at <http://escholarship.org/uc/item/5zb4g387>. William E. Kovacic, ‘Modern Evolution of U.S. Competition Policy Enforcement Norms’, 2003, 2 *Antitrust Law Journal* 71, 377–478.

exigencies, thereby making it easier for governmental bodies to set up institutions specifically designed to respond to the new economic needs. This process favoured the enforcement of various regulations, according to the way interests and economic opportunities were perceived in each historical period. Nevertheless, a path-dependent process allowed antitrust to evolve along time-tested routes. This is particularly apparent in the primacy that has been constantly ascribed to the principles of efficiency and welfare by every US antitrust policy. In conclusion, the evolution of US antitrust policy can be interpreted as the outcome of specific interests as well as of theoretical interpretations of reality and market needs.

## CHAPTER 5

# INTERNALISING ANTITRUST: THE EVOLUTION OF COMPETITION POLICY IN EUROPE AND JAPAN

### THE FATE OF THE HARVARD SCHOOL

The purpose of this chapter is to illustrate and explain the process through which American antitrust ideas have been influencing the development of competition policies in Europe and in Japan in the aftermath of the Great Depression and World War II. In order to do this, this chapter is organised in two parts. The first part offers a brief historical overview to help to contextualise the general outlines of the period. The second part describes the emulation processes that took place in each of the three countries under analysis.

In addition, because the political and economic structure of the European Union has been subject to several changes over the past 80 years, the first part will also take into consideration the development of competition policy in Germany. This country has been specifically chosen because it represents the most interesting example of traditional European competition theoretical frameworks and juridical administrations. The German case is also of particular interest because the country was historically forced to accept the introduction of policy reforms and to adjust its traditional economic system to the new practices. In this sense, the history of German antitrust policy is a clear illustration of how American antitrust ideas came to be incorporated into Europe.

The evolution of competition regulation in Japan is a fascinating case study all on its own. Formally, antitrust was introduced in the country by direct American intervention after the end of World War II. Still, the way Japanese Confucian ideological frameworks adapted to liberal and neo-liberal economic ideas is uniquely remarkable.

In conclusion, this chapter will outline the different types of isomorphic mechanisms that have enabled the institutionalisation of a Harvard antitrust approach in those countries. In doing so, it will see to explain how US ideas could have such a dramatic – and concrete – impact on local perceptions of market competition.

*The Great Depression, Competitiveness and Trade Performance in Europe and Japan*

If the Great Depression had already damaged free trade and competition in the international markets, the outbreak of World War II effectively killed them.

Already in 1931, the US Congress' approval of Hoover's Smoot-Hawley Tariff Act compelled most nations to raise protective barriers. For instance, European countries and Japan started to reinforce protectionist provisions by imposing stringent nationalistic tariffs and currency controls. At the same time, every country strengthened their protection of so-called strategic industries, particularly after 1930, when the belligerent intentions of Germany and Japan came to light.

Those market restrictions reinforced cartelisation practices among leading US, German, and Japanese big firms; exporters from different countries began to join together in order to overcome the contraction of the market. At the time, world governments refused to negotiate a common program to re-establish competition and revive the international economy because of a lack of resources and leadership. This, coupled with the absence of systematic antitrust legislations, allowed firms to enter into explicit contractual agreements.<sup>596</sup>

The United Kingdom, which had historically directed the efforts to keep the international trade system stable, was weakened by the war while the US was reluctant to take its place.<sup>597</sup> Ironically, despite declaring cartels *per se* illegal within the domestic

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<sup>596</sup> Valerie Suslow, 'Cartel contract duration: empirical evidence from inter-war international cartels', Oct. 2005, 14 *Industrial & Corporate Change* 5, 705-744.

<sup>597</sup> Wells Wyatt, *Antitrust and the Formation of the Post-war World*, 2002, New York, Columbia

market, the US waited a long time to intervene against the anticompetitive practices of American giant corporations operating in the international market. Consequently, economists from both Europe and Japan rejected the idea of US antitrust leadership. Protectionism and state interventionism became the only tools for Europe and Japan to preserve their internal market from foreign competitors and to overcome the crisis.

The vacuum left by the general reluctance to agree on a compromise was filled by international cartels, which were still considered by many as a 'higher form of economic organisation that replaced the brutal ethos of competition with a system of cooperation' supported by governments.<sup>598</sup> By the beginning of the 1940s, cartels controlled 40% of the global markets. Indeed, many countries considered them vital for their domestic economic security.<sup>599</sup>

For instance, in Germany, the Weimar government approved an ordinance in 1923 that imposed more direct control over cartels in order to avoid abuses of market power. However, the ordinance only served to judge the legality or illegality of cartels.<sup>600</sup> At the time, many pressure groups and political action committees started to lobby the central administration to adopt several different antitrust reforms. On one side of the spectrum, the liberals were in favour of policies restricting cartels, although they disapproved of direct government intervention. On the other side, the socialist and communist parties advocated heavy-handed state control and interventionism against all forms of cartels. By contrast, the Federation of German Industries supported the self-regulation of cartels by business operators.<sup>601</sup> The dire consequences of the Great

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University Press, 7-8-9.

<sup>598</sup> J. George Frederick 'General Summing Up by the Editor', in Gerard Swope, J. George Frederick (eds.), *The Swope Plan: Details, Criticisms, Analysis*, 1931, New York, Business Bourse, 212-13.

<sup>599</sup> Jeffrey Fear, 'Cartels and Competition: Neither Markets nor Hierarchies', 2006, *Working Paper Harvard Business School*.

<sup>600</sup> Fritz Voight, 'German Experience with Cartels and Their Control During Pre-War and Post-War Periods' in John P. Miller (ed.), *Competition, Cartels and their Regulation*, 1961, NorthHolland Amsterdam, 176.

<sup>601</sup> Gustav Stolper, *German Economy, 1870-1940 Issues and Trends*, 1940, New York, Weidenfeld & Nicolson, 209-25.

Depression, in terms of high unemployment and low market transactions, seemed to vindicate the interventionist ideas recommended by most German economists, with the notable exception of the Freiburg School. Consequently, in order to overcome the depression and maintain social stability, the government established a new series of provisions to empower the Ministry of National Economy to apply stronger controls over price reductions and cartel agreements.

However, the ascent to power of the Nazis caused a new reorganisation of the system. With the approval of the Compulsory Cartels Law, the Economy Minister was authorised to set up and dissolve cartels as well as to force firms to enter into existing cooperative agreements. In Edward Mason's words, "The cartels made Hitler and Hitler made war".<sup>602</sup>

In the name of national and racial superiority, the National Socialists restricted the operation of foreign corporations. Indeed, a provision of a 1933 law allowed cartel members to boycott other businesses, if the persons in charge of them were not deemed reliable enough. The meaning of 'reliability' was strictly related to nationality and the whole reform was meant to favour Germans over foreigners and to delineate market relations in racial terms. Moreover, the cartelised economy made it possible for the Nazi government to easily supervise society, control prices, and limit the introduction of technology in order to maintain high employment. It was through cartels that Hitler planned to establish a new economic order in Europe. By imposing an extensive rationalisation of industries on an international scale and by negotiating trade agreements with other continents, he also planned to put an end to the balkanisation of the global trade system.<sup>603</sup> Since several European countries, such as Belgium, France, Spain, Italy

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<sup>602</sup> Edward S. Mason, *Controlling World Trade: Cartels and Commodity Agreements*. 1946, New York, McGraw-Hill, 280. Quoted in Jeffrey Fear, 'Cartels and Competition: Neither Markets nor Hierarchies', 2006, *Working Paper Harvard Business School*, 15.

<sup>603</sup> Robert Skidelsky, *John Maynard Keynes, Fighting for Freedom, 1937-1946*, 2000, Vol. 3, New York, Viking, 179-232. Paul Einzing, *Hitler's "New Order" in Europe*, 1941, London, Macmillan, 23-

and the Netherlands had no special provisions against cartels, cartel policies became the preferred way to negotiate agreements with Germany and to adjust the level of exchange rate and exports.<sup>604</sup> For instance, according to Freyer, ‘in 1939, representatives from each nation's coal industries agreed on quotas regulating coal exports throughout Europe.’<sup>605</sup> In 1930, Britain passed a resolution requiring compulsory notification, registration, and publication of cartels agreements.<sup>606</sup> Additionally, in March 1939, in Dusseldorf, the UK Federation of British Industries (FBI) and its German equivalent, the Reichsgruppe Industrie, signed an agreement to put an end to ‘destructive competition’ and to achieve a ‘more ordered system of world trade’ by negotiating fixed prices.<sup>607</sup> As a result, at the beginning of the war, the UK and Germany had signed more than 130 agreements and controlled a large share of global trade through international cartels.

In the same period, in the other side of the world, Japan was experiencing a similar trend. Since 1853, when the U.S. started to force the country to open to foreign trade, the strong relationship between the Tokyo government and Japanese business firms had safeguarded the internal market more than protectionism itself. Indeed, according to the Japanese Confucian tradition, the exertion of power had to be centralised and free competition was not considered the best strategy for economic development.<sup>608</sup>

For these reasons, the Japanese strategy consisted of a partial adoption of European and American technology, education, and institutions, which were to coexist with its own traditions. Accordingly, Japan developed a unique capitalistic system,

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<sup>604</sup> Valerie Suslow, ‘Cartel contract duration: empirical evidence from inter-war international cartels’, Oct. 2005, 14 *Industrial & Corporate Change* 5, 705-744.

<sup>605</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 69.

<sup>606</sup> William Boserup and Uffe Schlichkrull, ‘Alternative approaches to the control of competition: an outline of European cartel legislation and its administration’ in J. P. Miller (ed.), *Competition, Cartels, and their regulation*, 1962, North-Holland, Amsterdam.

<sup>607</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 70.

<sup>608</sup> Eleanor M. Hadley, *Antitrust in Japan*, 1970, Princeton University Press, Princeton, New Jersey, 13-14.

characterised by the coexistence of property rights and extensive government interventions in the economy. Although private business welcomed state interventionism and the government encouraged some forms of cartelising practices in order to limit excessive competition, until 1920s Japan had only a very small number of cartels. The first two cartels appeared in 1880 and in 1882 with the foundation of the Japan Paper Manufacturers Federation and the Japanese Cotton Spinning Federation.<sup>609</sup>

Yet, Japan developed other forms of cooperation. In fact, the Japanese internal market was mostly controlled by the *Zaibatsu*, a group of holding companies structured in an oligopolistic organisational system that was owned by members of a small number of single families, such as the Mitsui, Mitsubishi, Sumitomo, Yasuda, Furukawa, and Okura. In fact, the term 'Zaibatsu' literally meant financial combine. From the beginning of the nineteenth century, these families started to leading banking, insurance, mining, manufacture and construction industries and their influence over the Japanese market was so strong that in 1937 they controlled 10% of Japan's paid-in capital.<sup>610</sup>

During the 1930s, the economic depression pushed the government to substantially promote the *Zaibatsu*, along with cartels and other anticompetitive business practices.<sup>611</sup> For instance, in 1931, Tokyo approved the Significant Industries Control Law. This law authorised the Ministry not only to enforce price-fixing agreements, output restrictions, joint-sale practices, and other market restraints, but also to act as a promoter of cartel agreements.<sup>612</sup> In so doing, the Japanese bureaucracy began to closely control, but not impede, cartels. On the contrary, cartel participation and market access were sold

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<sup>609</sup> Jeffrey Fear, 'Cartels and Competition: Neither Markets nor Hierarchies', 2006, *Working Paper Harvard Business School*, 11.

<sup>610</sup> Jennifer L. Frank, 'An Analysis of Japanese Corporate Structure, 1915-1937', Dec. 1999, 59 *The Journal of Economic History* 4, 997-1015. First Harry, 'Antitrust in Japan: The Original Intent', 2000, 9 *Pac. Rim L. & Pol'y Journal* 1, 1-72, 10.

<sup>611</sup> See Mark Tilton, *Restrained Trade: Cartels in Japan's Basic Materials Industries*, 1996, Ithaca, Cornell University Press. Eleanor M. Hadley, *Antitrust in Japan*, 1970, Princeton University Press, Princeton, New Jersey, 363-370.

<sup>612</sup> Alex Y. Seita, 'The Historical Background of Japan's Antimonopoly Law', 1994, 1994 *University of Illinois Law Review* 115, 115-85.

to other countries for technological know-how or for the protection for domestic industries.<sup>613</sup> Additionally, in 1941 Japan enforced the Major Industries Association Ordinance, which was designed to suppress competition by fostering the on-going cartelisation process. This was designed to create a new economic structure that, according to the Japan Economic Federation and the Japan Chamber of Commerce and Industry, was essential to allow the country to sustain the economic pressure of the war.<sup>614</sup>

Therefore, by the end of the 1930s, both the German and Japanese governments, following global trends, pursued a strictly controlled economic policy and favoured the creation and the protection of cartels. Cartels shaped economic and business structures and became generally accepted practices to develop and protect the domestic market. Although this general trend had detrimental effects on the development of competitive trade practices, substantial political economic reforms were not introduced until the end of the war.

*The US Interests in Promoting New Antitrust Systems: The Causes of a Coercive Internalisation Process*

As described in detail above, the US overcame the Great Depression by institutionalising a new antitrust approach that abolished both political isolationism and economic protectionism. At the same time, the US also realised that in order to boost its production, it was necessary to create a free market in Europe and Japan where its surplus products could be sold. Thus, at the end of the war, the need to increase trade drove the US to look at the rest of the world in its promotion of free markets.

American efforts were motivated by the need to influence antitrust regulations

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<sup>613</sup> See: Dominique Barjot (ed.), *International Cartels Revisited 1880-1980*, 1994, Caen, Editions-Diffusion du Lys.

<sup>614</sup> First Harry, 'Antitrust in Japan: The Original Intent', 2000, 9 *Pac. Rim L. & Pol'y Journal* 1, 1-72, 10.

and to introduce strict provisions against cartels, especially in occupied Germany and Japan.<sup>615</sup> Indeed, it was evident that the Great Depression caused widespread cartelisation of large international corporations especially in those two countries.

By influencing competition laws, the US would not only ensure the promotion of free market, but also the complete abolition of national protectionisms and cartels, which were held to be largely responsible for the long duration of the war. Indeed, during the conflict, international cartels provided strategic resources to the totalitarian regimes. For instance, the cartel agreement between the Aluminium Industrie AG (Swiss-German) and Alcoa (US) provided Germany with enough strategic material to support the war against Europe.<sup>616</sup> Similarly, in Japan, it was only thanks to the nepotistic business system of the *Zaibatsu* that the government could sustain the war effort.

Furthermore, the fight against cartels became a way to pursue more radical policies both in Western countries and Japan. Indeed, the fear of economic recession and the allure of market freedom became a way to keep countries out of the Soviet sphere of influence and into the American one. Indeed, the US needed stability in order to provide American firms with free access to European and Asian market. For this reason, it promoted democratisation programmes to also encourage the adoption of antitrust policies in both Europe and Japan. Antitrust policies were thus coercively implemented and internalised because of the economic, financial and military clout the US exerted on them at the time. This power came from different sources. Firstly, after World War II, the US was the only country able to counterbalance the Soviet Union and the expansion of the planned-economic system. By providing security to Western countries through the Atlantic Pact and through its monopoly of atomic weapons, it could easily create a safe

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<sup>615</sup> James T. Patterson, *Grand Expectations, The United States, 1945-1974*, 1997, New York, Oxford University Press, 343-74, See also Alan Brinkley, *The End of Reform, New Deal Liberalism in Recession and War*, 1996, New York, Vintage Books Edition.

<sup>616</sup> George W. Stocking and Myron W. Watkins, *Cartels in Action: Case Studies in International Business Diplomacy*, 1946, New York: Twentieth Century Fund.

space where institutionalise antitrust policies and promote trade growth.<sup>617</sup>

Secondly, the US wielded maximum financial power, as the dollar dominated both Western and Japanese economies. At the time, most currencies were not convertible and the US, through the gold standard, made the dollar the only currency that could be used in the international transactions. Under this system, many countries pegged their exchange rates to the US dollar and were compelled to buy or sell their products to the US in order to supply cash.<sup>618</sup> Thirdly, since European and Japanese enterprises had to be rebuilt or reconverted, American corporations had a *de facto*, if not *de jure*, monopoly in the supply of merchandise.

In conclusion, the mechanism of antitrust emulation after World War II can easily be explained as a form of coercive isomorphism. Indeed, both Europe and Japan were militarily, financially and economically unable to confront or challenge the US involvement in their national market regulations and general economic policies.

#### *Coercive Isomorphism: The Case of Europe*

The first example of coercive isomorphism was found in Europe. Indeed, through the Marshal plan, the US acquired not only the right to lead the recovery process, but also to exert its influence over both the development and the direction of the European integration process. Economic aid began to be used by the US to push European countries to adopt the American prescriptions on monetary and fiscal policies and to

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<sup>617</sup> Susan Strange, 'The Persistent Myth of Lost Hegemony', Autumn 1987, 41 *International Organization* 4, 551-574. Max Belof, *The United States and the Unity of Europe*, 1963, Washington DC: Brookings Institutions, Desmond Dinan, *Ever closer union? : An introduction to the European Community*, 1994, Basingstoke, Macmillan Press. Paul Kennedy, *The Rise and Fall of the Great Powers- Economic change and Military conflict from 1500 to 2000*, 1989, London, Fontana Press 357-358.

<sup>618</sup> Benjamin Cohen, 'Phoenix Risen: the resurrection of global finance', 1996, 48 *World Politics* 2, 268-96. Eric Helleir, *States and the Re-emergence of Global Finance*, 1994, Ithaca, NY, Cornell University Press, 25-80. Susan Strange, *State and Markets an Introduction to International Political Economy*, 1998, London, Pinter Publishers. Susan Strange, 'Cave! Hic Dragones: A Critique of Regime Analysis', 1982, 36 *International Organization* 2, 479-496. Susan Strange 'The Persistent Myth of Lost Hegemony', autumn 1987, 41 *International Organization* 4, 551-574.

foster the liberalisation and opening of national markets. In other words, by providing economic aid to Europe, the Marshall Plan allowed the US to spread specific ideas on how capitalism should be regulated. In fact, once its European partners recovered their economies and became effective competitors, the US claimed the right to demand the adoption of specific domestic reforms in order to ‘level’ the ‘playing fields’ and promote international competition.<sup>619</sup> Sure enough, those reforms would turn out to be a strong challenge to the maintenance of certain national interventionist practices or some of the state aid provisions that were used during the war to avoid competition.

Apart from the Marshall Plan, the US also influenced the drafting process of the competition law of the European Coal and Steel Community (ECSC). Indeed, the US Secretary of State of the time, Dean Acheson, was convinced that the Schuman Plan for the creation of the European Coal and Steel Community was an excuse to conceal a huge European cartel.<sup>620</sup> Consequently, the antitrust principles introduced in the ECSC Treaty resulted to be an accommodation of US Harvard antitrust ideas to the European market, made by Professor Robert Bowie and supported by Jean Monnet.

Indeed, according to Jean Monnet, the antitrust provisions of the ECSC Treaty ‘were fundamental innovations’ for Europe and they were based on the ‘few lines in the Schuman Treaty’ written by Robert Bowie on the basis of the Sherman Act and reworked into ‘European idiom’ by Maurice Lagrange.<sup>621</sup> Professor Bowie, an antitrust specialist from the Harvard Law School, was a member of the German High Committee

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<sup>619</sup> Howard H. Lentner H.H., *Power and Politics in globalization: the indispensable State*, 2004, Routledge, 81. Demetrious Dinan, *Ever closer union? : An introduction to the European Community*, 1994, Basingstoke, Macmillan Press.

<sup>620</sup> Clifford A. Jones, ‘Foundation of Competition Policy in the EU and USA: Conflict, Convergence and Beyond’, in Ullrich Hans (eds.), *The Evolution of European Competition Law: Whose Regulation, Which Competition?*, 2006, Ascola, Competition Law Series, 24. See also Dean Acheson, *Present at the Creation: My years in the State Department*, 1969, New York, Norton.

<sup>621</sup> Jean Monnet, *Memoirs*, Richard Mayne trans., 1978, London, Collins, 352–3. Christopher. Harding, Julian Joshua, *Regulating Cartels in Europe*, 2003, Oxford, 95. Clifford A. Jones, ‘Foundation of Competition Policy in the EU and USA: Conflict, Convergence and Beyond’, in Ullrich Hans (eds.), *The Evolution of European Competition Law: Whose Regulation, Which Competition?*, 2006, Ascola, Competition Law Series, 26.

and he was involved in the drafting process of the German Anti-Cartel Act of 1947. In June 1950, he also drafted the preliminary version of the ECSC antitrust provisions that would become articles 60 and 61 of the final ECSC Treaty, which complied with ‘the substantive imprint of the Sherman Act derived from their American ancestry’. Article 60 prohibited cartels and loose agreements that could be authorised by the High Authority only in case of crisis. Article 61 dealt with concentrations and the abuse of market power, prohibiting, as per the American tradition, only unreasonable concentrations thereof. Finally, with the creation of European Economic Community (EEC) in 1957, these articles were changed to become article 85 and 86 of the Treaty of Rome.<sup>622</sup>

Those antitrust provisions can be considered as the foundation of competition regulation in Western Europe.<sup>623</sup> Where the European Economic Community provisions were applicable, they took precedence over national rules.<sup>624</sup> Consequently, by influencing EEC law, the US could partially control the application of competition laws in all the member countries of the European Community (EC). However, according to Giandomenico Majone, ‘the commitment to competition policy has never been as strong in Europe as it is in the United States. Indeed, cartels and restrictive practices were traditionally accepted either as an expression of freedom of contract, as in Britain, or as instruments of rationalisation and industrial policy as in Germany’.<sup>625</sup>

Nonetheless, the American will to support the European economy and to influence its antitrust policy was translated into a process of coercive isomorphism

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<sup>622</sup> Clifford A. Jones, ‘Competition Dimensions of NAFTA and the European Union: Semi Common Competition Policy, Uncommon Rules and No Common Institutions’, October 2006, 6 *Jean Monnet/Robert Schuman Paper Series* 18, 4.

<sup>623</sup> Marie-Laure Djelic M.L., Bensedrine J., ‘Globalization and its Limits, the Making of International Regulation’, in Glenn Morgan, Peer Hull Kristensen, and Richard Whitley (eds.), *The multinational firm : organizing across institutional and national divides*, 2001, Oxford University Press, 263.

<sup>624</sup> David M. Raybould and Alison Firth, *Law and Monopolies, Competition Law and Practices in the USA, EEC, Germany and the UK*, 1991, Graham Totman, 382-382.

<sup>625</sup> Giandomenico Majone, *Regulating Europe*, 1996, Routledge, 50.

whereby Europe could not confront the US spread of Harvard anti-cartels and mergers principles. However, although it is hard to deny that the US acted out of its economic and military supremacy, the acceptance of the US involvement in European antitrust policy was probably also determined by mimetic reasons. In other words, the EC acknowledged the effectiveness of American antitrust practices because its member States were actively looking for new economic models and the US was the only alternative to the Soviet planned-economic system. Hence, Europe's response to the nationalistic ideologies that caused World War II resulted in their yielding to American pressures 'to ensure primacy of economics over politics, and thus to de-ideologise issues of political economy into questions of output and efficiency'.<sup>626</sup>

Finally, this process also paved the way for future normative isomorphism. Indeed, by creating the general framework of antitrust laws, the US shaped not only the basis of European competition policies, but also its future perception of antitrust and competitiveness. Similarly to the Coal and Steel Community, the process of post-war reconstruction and institutional building in Germany was widely influenced by the US through coercive procedures. As in the case of the ECSC, the isomorphism process was largely coercive because the US was the main economic power of the time and its intervention in the war had been of fundamental importance for the Allies' victory. In this context, Germany was forced to adopt antitrust regulations because the demolition of those business concentrations that were believed to undermine economic growth became the US principle objective during the occupation.

A law against unfair competition, known as the *Gesetz gegen den unlauteren Wettbewerb* or *UWB*, had already been approved in 1909. However, the Nazi regime had subsequently promoted the development of large cartels to assure total economic

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<sup>626</sup> Giandomenico Majone, *Regulating Europe*, 1996, Routledge, 50. Tony A. Freyer, 'Antitrust and Bilateralism, The US, Japanese and EU Comparative and Historical relationship' in C. A. Jones, M. Matsushita, *Competition policy in the global trading system*, 2002, Kluwer Law International, chapter 1, 3-53.

control. Consequently, in 1947 the Allies, aware that the economic power of the Nazi regime was based on the structure of German industries, pushed the West Germany government to adopt antitrust provisions specifically targeted against cartel agreements.<sup>627</sup> The introduction of such competition policies, modelled after the American tradition, was hoped to prevent the rise of any future totalitarian power and to turn Germany into a viable economy.<sup>628</sup> For this reason, the adoption of an antitrust system became one of the preconditions for the withdrawal of the allied military forces.

The industrial sector that most suffered from the provisional antitrust regulations was that of the coal and steel monopolies in the Ruhr. During the war, all the German steel production was controlled by 6 main cartels, and between them, the *Vereinigte Stahlwerke* produced more steel than France alone.<sup>629</sup> From 1947 to 1948, the Allied High Commission (AHC), composed of the US, UK and France, imposed a decartelisation and a de-concentration law drafted by Professor Bowie. The law aimed at dismantling the 6 steel cartels and at creating 25 private enterprises. Its rationale was to introduce Harvard principles into the country in order to re-establish competition by converting Germany to an American-oriented antitrust model where cartels and restrictive practices had to be prosecuted and blocked. The fact that the abolition of cartels decimated the productivity levels of some of the most strategic and efficient German industries was seemingly irrelevant.

The 1947 law was later replaced by a new one, which had to be approved by both German and Allied authorities. This was finally passed in 1957, when the West German

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<sup>627</sup> David M. Raybould and Alison Firth, *Law and Monopolies, Competition Law and Practices in the USA, EEC, Germany and the UK*, 1991, Graham Totman, 382.

<sup>628</sup> Ulf Boge, 'Competition Law in Germany', in Vinod Dhall (ed.), *Competition Law Today*, 2007, Oxford University Press, 299, see also Volker R. Berghahn, *The Americanisation of West Germany Industry, 1946-1973*, 1986, Cambridge University Press, and Marie-Laure Djelic, *Exporting the American Model: The Post-war Transformation of European Business*, 1998, Oxford, Oxford University Press.

<sup>629</sup> Isabel Warner, *Steel and sovereignty: the deconcentration of the West German Steel Industry 1949-1954*, 1996, Mainz: Verlag Philipp von Zabern.

government enforced the Restraint of Competition Act (*Gesetz gegen Wettbewerbsbeschränkungen*), a final draft of antitrust law in full compliance with the American antitrust tradition. According to the Act, cartels and loose agreements had to be declared illicit and combinations that restrained trade had to be considered illegal *per se*.

Although Berlin included a number exceptions, and even if the Act after various amendments, was only finally consolidated in 1980, this episode counts as the first coercive attempt by the US to convert Germany to the American Harvard antitrust tradition and to consolidate a free market subservient to US interests.

#### *Coercive Isomorphism: The Case of Japan*

In the immediate aftermath of the war, the Japanese government had to provide jobs for seven million soldiers, four million military-factory workers, and one-and-a-half million individuals returning from abroad. Moreover, the poor results of the 1945 rice harvest and the general war costs put Japan in a very fragile economic condition. In this general framework, another big challenge for Japan was the need to adopt antitrust policies. Indeed, just as in Germany, the US forced Japan towards a liberalisation process through one of the most ambitious antitrust campaigns in history.<sup>630</sup>

On January 6, 1946, Corwin Edwards' Mission on Japanese Combines, otherwise known as the '*Zaibatsu* Mission', arrived in Tokyo. Quoting Eleanor Fox, First Harry claimed that 'the Edwards Mission's mandate was to consider the ways and means that would effectively destroy the power of the *Zaibatsu*'.<sup>631</sup> Making Tokyo adopt competition regulations was part of a wider market-opening plan to promote a general Japanese

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<sup>630</sup> John D. Montgomery, *Forced to be Free: The Artificial Revolution in Germany and Japan*, 1957, University of Chicago Press. Eleanor M. Hadley, *Antitrust in Japan*, 1970, Princeton University Press, Princeton, New Jersey, 205.

<sup>631</sup> Eleanor M. Fox, 'Toward World Antitrust and Market Access', 1997, 91 *American Journal of International Law*, 13-25. First Harry, 'Antitrust in Japan: The Original Intent', 2000, 9 *Pac. Rim L. & Pol'y Journal* 1, 1-72, 10.

economic restructuring, in accordance to Harvard and Keynesian principles.<sup>632</sup> Hence, in the aftermath of the Allied military occupation, the Japanese authorities had to enforce market regulations that would satisfy the Allies' requests. Indeed, the withdrawal of the occupying forces was conditional upon the full democratisation of Japan.

Japan bureaucrats had very little knowledge of US antitrust and, at the time, very few Japanese scholars had studied the discipline of competition and antitrust. Nonetheless, among those influenced by the Anglo-American competition models, academics like Wakimura and Takayanagi tried to persuade the government to abolish the *Zaibatsu* holding company, to provide new market opportunities for other firms, and to increase investment possibilities.<sup>633</sup> Unfortunately, those ideas had very little influence on Japanese policymakers' traditional Confucian understanding of the social-economic order. Hence, in January 1946, in response to the Allies' request to liberalise the market, the Japanese authorities presented the Industrial Order Bill. This was to regulate the level of government intervention in the market in a similar way to the political economic strategies adopted by Japan with the 1931 Important Industries Control Act and it did not offer any provision for stimulating market competitiveness in an American liberal way. Since 'the measure clearly did not represent a realistic grasp of American antitrust', in 1947 the Allies forced Tokyo to enforce an Antimonopoly Law, namely the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade. The major aim of the law was to lay the economic foundation for democracy by prohibiting private monopolization (Article 3), cartels (Article 3), and unfair trade practices or any other act that impeded competition (Article 19). On the one hand, the Act would pass judgement on all those practices that were considered harmful for the development of national

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<sup>632</sup> Mitsuo Matsushita, 'The Antimonopoly Law of Japan', in Edward Montgomery Graham, J. David Richardson (eds.), *Global Competition Policy*, 1997, Institute for International Economics, chapter 5, 151-190.

<sup>633</sup> Tony Alan Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 164-65.

economy and social welfare. On the other hand, it would allow the opening of a new rich market for US corporations.<sup>634</sup>

In other words, the Allied Occupation Force's economic democratisation policies were nothing short of a pure attempt to break up the *Zaibatsu* system of combinations and to avoid the rise of new monopolies and concentrations that would adversely affect their investments in Japan. Moreover, similarly to the Ruhr industries, the *Zaibatsu* was considered an undemocratic concentration of economic power and a possible danger to international security, being as it was easily exploitable by a militarist regime. For these reasons, the *Zaibatsu* was completely dissolved under the intervention of the General Headquarters of the Allied powers in Japan (the GHQ), and, as in Germany, the previous system was replaced with a more dispersed industrial structure through the redistribution of ownership.<sup>635</sup>

In conclusion, it can be argued that the US used its military and economic power to influence Japan antitrust policy. The process can be understood as coercive isomorphism and it was aimed at guarantying the maintenance of free markets and at preventing the rise of protectionism. This was part of a wider plan aimed at reconstructing and developing the major economies at the time in the interest of international peace and stability. On the one hand, stability would allow American firms to invest freely in those economies, and on the other hand, economic reforms would assure the capacity of local markets to absorb American goods.

Despite its best efforts to shape Japanese competition law, shortly after the US military left the country, Tokyo started to adopt a broader interpretation of antitrust policy compared to the Harvard-oriented one inherited from the US. The Ministry of

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<sup>634</sup> Mitsuo Matsushita, 'The Antimonopoly Law of Japan', in Edward Montgomery Graham, J. David Richardson (eds.), *Global Competition Policy*, 1997, Institute for International Economics, chapter 5, 151-190.

<sup>635</sup> Hideaki Miyajima, 'The impact of Deregulation on Corporate Governance and Finance', in Lonny E. Carlile, Mark Tilton (eds.), *Is Japan really changing its ways? Regulatory reform and the Japanese economy*, 1998, The Brooking Institution, 36.

International Trade and Industry (MITI) began to strictly control the activities of the Fair Trade Commission (FTC) in order to prevent any form of ‘ruinous competition’ that would reduce Japan’s industrial profits. The rise of the Japanese economy would risk threatening the competitiveness of American companies and, sure enough, this eventually became one of the main problems for the US during the oil crisis of the 1970s.

*Coercive, Mimetic, Normative and Competitive Isomorphism: General Trends*

The US intervened in the economic reconstruction of Europe and Japan in order to spread its liberal market approach and Harvard antitrust ideas with a view to ultimately promote world peace and so prosperity. US involvement took place in the form of a coercive isomorphism process, whereby Europe, Germany and Japan were directly coerced to adopt antitrust regulations in order to abolish national forms of protectionism and government-backed cartels. This is an example of what I understand as institutionalisation process whereby ideas were internalised by countries to allow the achievement of specific interests.

In this context, Harvard antitrust ideas were strongly supported by the US because they were believed to promote free markets. Access to international free markets was vital for American firms to freely invest in Europe and Asia and thereby solve their over-production problem. Furthermore, Europe and Japan had no other choice other than buying American merchandise because, before restoring their own production capacities, they first needed to dismantle their military industries.

Hence, the imposition of competition regulations modelled after those of the US resulted in a liberal environment heavily influenced by a Harvard perspective of the world economy. This aspect is perfectly explained by coercive isomorphism. However, while the US coercively enforced antitrust regulations in Europe and Japan, those

countries started to integrate these practices with their traditional models. This set in motion other types of isomorphic mechanisms, namely a mimetic, a normative and a competitive one. Indeed, after World War II, the need for economic reconstruction pushed Europe and Japan to find and apply the best model that would allow them to regain international competitiveness. This facilitated the construction of a world where similar economic ideas could be easily shared; these ideas, in turn, favoured a constant normative isomorphic process that preserved international stability and, along with it, the US economic supremacy.<sup>636</sup> By the end of the 1950s, the US promoted an international political and economic post-war order based on a coalition of states tied together through markets, international agreements, and security partnerships. On the one hand, the US provided its European and Asian partners with economic and financial aid; on the other, however, it encouraged an open world economy by forcing the adoption on the part of Europe and Japan of antitrust regulations that allowed American corporations to establish and expand their investments.<sup>637</sup>

The form of embedded liberalism inherent in the Keynesian and Harvard ideas that were internationally promoted by the US allowed states to increase social welfare without obstructing free trade. This combination resulted in what came to be known as the Golden Age of capitalism. For this reason, the adoption of specific antitrust institutions, in the form of laws and regulations, while at first coercive, became in time an international normative trend, particularly strong in Europe.

Moreover, the exigencies of international competition and the need for international leadership pushed European countries, and later Japan, to integrate their traditional models with a more Harvard-oriented perception of antitrust or, at least, to

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<sup>636</sup> Susan Strange, *State and Markets an Introduction to International Political Economy*, 1998, London, Pinter Publishers, 25.

<sup>637</sup> John G. Ikenberry, 'America's Imperial Ambition', 2002, 81 *Foreign Affairs* 5, 44-60. Joseph Duffey, 'U.S. Competitiveness: Looking Back and Looking Ahead' in Martin K. Starr (ed.), *Global Competitiveness: Getting the U.S. Back on Track*, 1988, W.W. Norton & Company, chapter 3, 78.

maintain the provisions previously established by the US.

Europe was more accommodating to a Harvard-oriented antitrust approach, not only because it was forced to do so, but also because it looked at the US as a successful economic model. West Germany, for instance, was obliged to adopt an antimonopoly law that was reframed as soon as the occupation ended. However, the need to respect European competition criteria, to preserve international competitiveness, and to avoid the rise of another fascist regime pushed the country to reconsider the merits of the Harvard School and to integrate it with its own Ordoliberal tradition. In this sense, the influence of American antitrust ideas in Europe was caused not only by coercive isomorphism but also by mimetic, normative and competitive ones. Japan, by contrast, adopted its Anti-Monopoly Law only because it was coerced to do so. However, as soon as the occupation ended, the MITI amended the AML exempt cartels. This trend demonstrates that coercive isomorphism *per se* is not enough to promote full institutional change, as ideas are normally deeply rooted in the local culture. Indeed, even though Japan started to adopt a more liberal approach towards cartels, those liberal ideas were always integrated with local business customs.

In conclusion, the international adoption of Harvard-oriented antitrust policies was first set in motion by a mechanism of coercive isomorphism and later sustained by mimetic, competitive and normative motivations. American ideas became so influential as to permanently change the way Europe and Japan understood competition. The liberal trend turned out to be extremely favourable to the Europeans and the Japanese, so much so that, at the beginning of the 1970s, the US started to confront stiff economic competition from the same countries it had helped recover twenty years before. Nonetheless, prior to the oil crises, Harvard antitrust ideas together with the Keynesian policies and Fordism production system were responsible for creating an international Golden Age of capitalism.

## THE FATE OF THE CHICAGO SCHOOL

After the Great Depression and World War II, the US engaged in the construction of a post-war international order congenial to its interests. The United States were able to influence antitrust regulations in Europe and Japan because of its military, economic and financial dominance. In other words, through coercive isomorphic processes, the US could drive Europe and Japan to institutionalise Harvard oriented antitrust ideas into their models of capitalism and influence their way of perceiving competition. The general result of the US international involvement was the construction of a stable international arena, which favoured the development of independent centres of economic power. Indeed, as soon as European countries and Japan started to recover from the crisis and the war, they became very strong competitors.<sup>638</sup>

By the 1960s, while production in Europe and Japan reached or exceeded pre-war levels, the US share of world manufacturer exports began to decline. On the contrary, Western Europe's share rose from 48.6% in 1953 to 52.3% in 1959 and 55.1% in 1971, whereas Japan's share increased, in the same years, from 3.9% to 6.8% and 10.7%.

However, the economic trauma generated by the two oil crises of the 1970s stimulated government interventionism in much of the 'free world', as it was known at the time. Europe and Japan followed their traditional way of tackling economic downturns and, by radicalising Keynesian and Harvard formulas of central antitrust controls, ended up favouring the adoption of subsidies. Forms of protectionism and other interventionist measures began to be perceived as the only recipe for stimulating the recovery and for protecting the national economies from outside competition.<sup>639</sup>

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<sup>638</sup> John G. Ikenberry, 'Manufacturing Consensus: The Institutionalization of American Private Interests in the Tokyo Trade Round', 1989, 21 *Comparative Politics* 3, 289-305.

<sup>639</sup> Harald B. Malmgren, 'Trade Policy and Trade Negotiations in the 1980s', in J. N. Yochelson (ed.),

These measures are not comparable to those implemented during the Great Depression. Indeed, the institutionalisation of international competition practices, through the anti-trade barriers campaign promoted by the GATT, deterred governments from adopting economic policies that would directly exclude foreign investors. However, the use of national subsidies – or the creation of companies groups in the case of Japan – encouraged governments to indirectly apply anticompetitive policies in order to overcome the crises. At the same time, the US lacked the same economic strength to coerce other countries to implement different policies.<sup>640</sup>

At the beginning of the 1980s, trade and non-trade barriers adopted by European and Japanese governments were still damaging the US economy. In response to this, the Reagan administration resorted to a more aggressive bilateral strategy based on the threat that the US would restrict access to its market unless other countries adopted fair trade policies and opened their borders to US corporations. At the same time, economic exigencies pushed Europe and Japan closer to the US in their attempt to meet the new needs that had just arisen from the downturn.

#### *European State Aid and the Re-launch of the European Union*

Even though the competition policies adopted by the ECSC, and based on American ideologies, were in contrast to the Western European tradition of economic *dirigisme*, they came to be adopted by the EC much more readily than by Japan.<sup>641</sup> In fact, they became part of the set of common rules necessary to integrate the European market.<sup>642</sup>

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*The United States and The World Economy: Policy, Alternatives for New Realities*, 1985, Westview Press, Chapter 1, 1.

<sup>640</sup> Robert E. Baldwin, 'U.S. Trade Policy: Recent Changes and Future U.S. Interests', May 1989, 79 *The American Economic Review* 2, 128-33.

<sup>641</sup> Giuliano Amato, *Antitrust and the Bounds of Power: The dilemma of liberal democracy in the history of the market*, 1997, Hart Publishing, 39.

<sup>642</sup> See: Derek W. Urwin, *The Community of Europe: A History of European Integration since 1945*, 1991, Harlow, Longman. Giandomenico Majone, *Regulating Europe*, 1996, Routledge, 50. Daniel Yergin and Joseph Stanislaw, *The Commanding Heights: The Battle Between Government and the Marketplace that is Remarking the Modern World*, 1999, Simon & Schuster.

However, European competition policy was also strongly influenced by the German Ordoliberal School. According to Gerber, the ordoliberals maintained that ‘the inability of the legal system to prevent the creation and misuse of private economic power’ had ‘led to economic and political disintegration of Germany and elsewhere’.<sup>643</sup> Hence, it was necessary to develop a social market economy where the role of the state was not undermined by economic power.<sup>644</sup> According to Walter Hallstein, the German law professor of ordoliberal principles that led the first presidency of the European Commission, what the Community was all about integrating ‘the role of the state in establishing the framework within which economic activities takes place’.<sup>645</sup>

The ratification of the Treaty of Rome, along with its liberal economic provisions required by the US and mediated by the German Ordoliberal School, was the point of departure for one of the longest economic booms in Europe, a ‘European Golden Age.’ Between 1950 and 1970, the European GDP grew by about 5.5% a year, while the world average stood at 5.0%. The level of unemployment was very low and industrial production rates rose by 7.1% a year against a world average of 5.9%.<sup>646</sup>

However, if the economic expansion that followed World War II allowed Europe to recover and reconvert its industries, the first oil crisis of 1974 precipitated an economic downturn that sent both the European and the world economy into depression. Between 1973 and 1985, the EC experienced negative rates of growth and its share of world trade in manufactured goods fell from 45% to 36%. The crisis had also a

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<sup>643</sup> David J. Gerber, ‘Competition Law and International Trade: The European Union and the Neo-Liberal Factor’, in John O. Haley and Hiroshi Iyori (eds.), *Antitrust: A new International Trade Remedy?*, 1996, Pacific Rim Law & Policy association, 37-58.

<sup>644</sup> Pio Baake, Oliver Perschau, ‘The Law and Policy of Competition in Germany’ in Giandomenico Majone (ed.) *Regulating Europe*, 1996, London Routledge, 131-156.

<sup>645</sup> Baake P., Perschau O., ‘The Law and Policy of Competition in Germany’ in Giandomenico Majone (ed.) *Regulating Europe*, 1996, London, Routledge, 131-156. Andrew Moravcsik, *The choice for Europe Social Purpose and State Policy, from Messina to Maastricht*, 1999, Ithaca, NY.

<sup>646</sup> Derek H. Aldcroft, *The European Economy: 1914–1990*, 1993, Routledge, 3rd Edition, 132. Loukas Tsoukalis, *The New European Economy*, 1993, Oxford, Oxford University Press, 22- 34.

negative impact on the European integration process.<sup>647</sup>

The economic downturn developed disparities among EC economies and the influence of the American economic model in Europe waned considerably. Since tariffs could not be raised within the EC free zone and the GATT prohibited the adoption of aggressive protectionist policies, European governments used public subsidies in order to promote national firms and to raise the level of employment.<sup>648</sup> This policy direction, which was driven by a misinterpretation of Keynesian and Harvard principles, had already been taken up by many EC countries even before the economic boom; however, the economic downturn reinforced the trend.

Although the Treaty of Rome gave the EC Commission the competence to discipline national subsidies, at the time Directorate General of Competition, (DG IV) lacked the legitimacy necessary to effectively coordinate states' aid to industries.<sup>649</sup> Unable to agree on any common policy, the European governments tried to find valid responses to the economic downturn through a vigorous, if not coordinated, promotion of national economies. In Germany and Britain, the biggest European economies, large firms operating in industrial sectors such as shipbuilding, steel production, cars, and electronics, received national industrial subsidies. Moreover, in the textile sector, while British governments paid employers to keep on any redundant workforce, West

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<sup>647</sup> See: Victoria C. Price, *Europe's Last Chance?*, 1988, London, Institute of Economic Affairs.

<sup>648</sup> Michael Blauburger, 'From Negative to Positive Integration? European State Aid Control Through Soft and Hard Law', April 2008, *Max Planck Institute for the Study of Societies, Cologne MPIfG Discussion Paper 08/4*, 1. Michelle Cini, Lee McGowan, *Competition Policy in the European Union*, 1998, Houndmills MacMillan, 135. Margaret Sharp, 'Industrial Policy and European Integration: lessons from experience in Western Europe over the last 25 years', 2003, *Centre for the Study of Economic & Social Change in Europe, School of Slavonic and East European Studies, UCL*, Working Paper n.30, 9; George Ross, *Jacques Delors and European Integration*, 1995, Polity Press, 14. Emmanuelle Maincent, Lluís Navarro, 'A Policy for Industrial Champions: From picking winners to fostering excellence and the growth of firms', April 2006, *Industrial Policy and Economic Reforms Papers 2, Enterprise and Industry Directorate-General European Commission*, 21. Clifford A. Jones, Mitsuo Matsushita, *Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA*, 2002, Kluwer Law International. Andrew Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht*, 1998, Ithaca, NY, 90, 136. Harm G. Schroter, *Americanization of the European Economy: A Compact Survey of American Economic Influence in Europe since the 1880s*, 2005, Springer, 127.

<sup>649</sup> E. Damsgaard Hansen, *European Economic History: From Mercantilism to Maastricht and Beyond*, 2001, Copenhagen Business School Press, 405.

Germany covered 80% of part-time workers' wages.<sup>650</sup> According to Margaret Sharp, in the telecommunication sector, British government awarded large public sector contracts to companies like ICL or the GEC-Marconi, while British Telecom procured materials only from the three British suppliers of telecom equipment and eschewed all foreign suppliers. Similarly, the German Deutsches Bundespost shared contracts only with the German Siemens and Nixdorf.<sup>651</sup>

These policies affected economic integration and threatened competition, and thus the efficiency of the European internal market.<sup>652</sup> Moreover, the economic downturn was exacerbated by the second oil-price shocks in 1979/80. At that point, stagflation pushed political leaders in Europe and the US to abandon the Keynesian scheme and to reconsider the policies of the post-war boom.<sup>653</sup> Indeed, compared to the 1960s, the level of growth had dropped to at least one-half, while intra-EC trade expansions had effectively stopped and international trade transactions had slowed down.<sup>654</sup>

This trend lasted until the mid-1980s, when the European Union, inspired by the *Reagonomics*, started to change tack and member states started to agree on a common policy at a European level with a view to developing a Single European Market.<sup>655</sup> The increasing willingness of the US to regulate the European market is also apparent in the Cooperation Agreement signed in 1979 with West Germany. Here, the Ordoliberal

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<sup>650</sup> Tony Judt, *Post-War: a History of Europe since 1945*, 2005, The Penguin Press, New York, 460.

<sup>651</sup> Margaret Sharp, 'Industrial Policy and European Integration: lessons from experience in Western Europe over the last 25 years', 2003, *Centre for the Study of Economic & Social Change in Europe, School of Slavonic and East European Studies*, UCL, Working Paper n.30, 9; 6.

<sup>652</sup> Dorothee Bohle, 'Race to the Bottom? Transnational Companies and Reinforced Competition in the Enlarged European Union', in Bastian van Apeldoorn, Jan Drahekoupil and Laura Horn (eds.), *Contradictions and limits of Neo-liberal European Governance, from Lisbon to Lisbon*, 2009, Palgrave Macmillan, chapter 8, 163. Fiona G. Wishlade, 'Competition and Cohesion - Coherence or Conflict? European Union Regional State Aid Reform Post 2006', 2008, 42 *Routledge Regional Studies* 5, 753-765.

<sup>653</sup> Harm G. Schroter, *Americanization of the European Economy: A Compact Survey of American Economic Influence in Europe since the 1880s*, 2005, Springer, 127.127-128.

<sup>654</sup> George Ross, *Jacques Delors and European Integration*, 1995, Polity Press, 24.

<sup>655</sup> Tim Buthe, 'The Politics of Competition and Institutional Change', in Sophie Meunier, Kathleen Mcnamara (eds.), *The State of the European Union. Making History: European Integration and Institutional Change at Fifty*, 2007, Oxford University Press, volume 8, chapter 10, 175.

School had proposed models that slightly differed from those supported by the Chicago School; by maintaining both trade unions and high social protections, the German economy had thus managed to stay competitive.<sup>656</sup> Even though neo-liberal reforms were hardly applicable in West Germany, in 1979 the US promoted an Antitrust Cooperation Agreement in an attempt to regulate cooperation between the two countries and avoid the rise of ‘restrictive business practices’ that could be ‘prejudicial to the economic and commercial interests’ of both countries.<sup>657</sup>

At the same time, German Ordoliberal scholars, influenced by Chicago theories, developed the ‘neo-liberal Euro-sclerosis idea’ and linked the causes of the European economic stagflation to states’ interventionism.<sup>658</sup> In contrast, the Ordoliberal economists’ recipe for a successful industrial policy comprised privatisations and the reduction of state aid. This was likely the result of first a mimetic, and then a competitive, isomorphic process. At the time, the US did not wield enough influence to force Germany to adopt a different antitrust policy. It was rather Germany itself that, looking at the US neo-liberal model as a possible way out of the crisis, turned to a more Chicago-oriented competition approach.

Similarly, the UK Prime Minister, Margaret Thatcher, inspired by Reagan, inaugurated a neo-liberal policy with a drastic containment of public expenditure. The reduced role of the state was translated into market self-regulation and a major

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<sup>656</sup> Indeed while both Ordoliberal and Chicago economists condemned any form of state dirigisme and bureaucratic control over economy, however the ordo-liberals maintained that free competition has to be combined with a guarantee welfare system, a social market economy. Precisely, while Ordo-liberals sustained that the state had to lead society in the name of the economy, the US Chicago economists interpreted the social sphere as a form of the economic domain. Viktor J. Vanberg, ‘The Freiburg School: Walter Eucken and Ordoliberalism’, April 2011, *Freiburg Discussion Papers Albert-Ludwigs Universität Freiburg i. Br.*, 2. Tony A. Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990*, 1992, Cambridge University Press, 330, Thomas Lemke, ‘The birth of biopolitics’: Michel Foucault’s lecture at the Collège de France on neo-liberal governmentality’, 2 May 2001, 30 *Economy and Society* 2, 190–207. David Harvey, *A Brief History of Neoliberalism*, 2005, Oxford University Press, 89.

<sup>657</sup> U. S. - GERMANY ANTITRUST ACCORD, June 23, 1976

<sup>658</sup> The term ‘Eurosclerosis’ was developed by the German neo-liberal economist Herbert Giersch in 1980. At the time Giersch was president of the Mont Pelerin Society, a think tank founded by Friederich von Hayek and considered the core of the European neo-liberal propaganda.

privatisation wave.<sup>659</sup>

*Mimetic, Normative and Competitive Isomorphism: the case of Europe*

Although Germany and the UK inaugurated a largely neo-liberal economic policy, in the early 1980s other European countries were still promoting national champions and strategic trade policies. For instance, in Italy and France there was a form of ‘symbiosis’ between public and private sectors.<sup>660</sup> However, impressed by the initially positive outcomes of deregulation in the United States, and fearing greater competition, the EU leadership finally decided to overhaul its antitrust policy. On the one hand, Europe agreed to promote gradual deregulation; on the other hand, it granted the promotion of the common market through the enforcement of the Single European Act (SEA) in 1986. These policies helped to overcome national economic egoisms and to achieve an ‘improved competitive advantage of private companies and industries within the Member States and the Community as a whole’.<sup>661</sup>

The aim of the SEA was in fact to give new *impetus* to the creation of a single market, by promoting, for instance, a deeper integration in competition regulations under the aegis of the European Commission. Indeed, the development of a strong European common market was linked to the stricter regulation of mergers and state aid and to the prohibition of cartels and monopoly conducts.<sup>662</sup>

Although the general trend in the 1980s was for governments to favour greater liberalisation in the market, ‘the European Commission’s policies protected smaller enterprise and labour while imposing accountability upon US multinational

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<sup>659</sup> Barry Eichengreen, *The European economy since 1945: coordinated capitalism and beyond*, 2007, Princeton University Press, 281.

<sup>660</sup> Bastian Von Apeldoorn, *Transnational Capitalism and the Struggle of European Integration*, 2002, Routledge, 72-77. Vivien A. Schmidt, ‘Loosening the Ties that Bind: The Impact of European Integration on French Government and Its Relationship to Business’, 1996, 34 *Journal of Common Market* 2, 223-52.

<sup>661</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 245.

<sup>662</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 245.

corporations'.<sup>663</sup> In this sense, European competition policy, by following both a European welfare oriented policy and an 'Americanized efficiency-seeking political economy', developed a sort of alternative to the US system in the region.<sup>664</sup> Furthermore, following the fall of the Berlin Wall, Europe started to be very dynamic in exporting and influencing 'competition regulation' in Eastern and Central European countries and competition policy became also one of the EU membership criteria. European Association Agreements were signed with Poland, Hungary, and the Czech and Slovak Federal Republic in December 1991, and with Romania and Bulgaria in February and March 1993.<sup>665</sup>

Yet, because the EC Treaty did not provide any specific juridical tool to control mergers, the Commission prosecuted concentrations that involved many American multinational corporations under the anti-dominant position provisions of Article 82.<sup>666</sup> Hence, after the controversial result of the 1973 Continental Can and the 1989 British American Tobacco, an appropriate EC merger regulation became effective in September 1990.<sup>667</sup>

The new regulation attempted to neo-liberalise European competition policy by preventing forms of state interventionism. It introduced a package of reforms that modified the division of jurisdiction in the case of large mergers and empowered the

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<sup>663</sup> Derek Aldcroft, *The European Economy, 1914-1990*, 1978, 3rd Edition, London and New York, Routledge, 240.

<sup>664</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006 Cambridge University Press, 245

<sup>665</sup> Claude Rouam, Thomas Jakob, Lisbe Suni, 'La politique de concurrence de la Communauté à l'échelle mondiale: L'exportation des règles de concurrence communautaires', 1994, 1 *EC Competition Policy Newsletter* 1, 7-11.

<sup>666</sup> Derek Aldcroft, *The European Economy, 1914-1990*, 1978, 3rd Edition, London and New York, Routledge, 240. Tony A. Freyer, *Antitrust and Global Capitalism*, 2006 Cambridge University Press, 245.

<sup>667</sup> *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Case 6-72, 21 February 1973. *British American Tobacco Ltd and RJ Reynolds Industries Inc v Commission*, 1987, ECR 4487

Council Regulation (EEC) no 4064/89 of 21 December 1989 on the control of Concentrations between Undertakings, J 1990L257/14. "It introduced an ex ante substantive test that was more suited to the control of concentrations than article 81-81. A notified transaction would be approved provided it did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it." Van Bael & Bellis, (eds.), *Competition Law of the European Community*, 2005, Kluwer Law International, 730-1.

Commission.<sup>668</sup> The MCR made mandatory the notification to the Commission of any kind of concentration and it clarified that, in the case of mergers or acquisitions with a community dimension, only the Commission had the power to verify the compatibility of those activities within the ‘common market’.<sup>669</sup> Apart from the British Clause under article 21(3), which allowed member states to use their existing powers to protect certain ‘legitimate interests’ not taken into account by the MCR competition test, the MCR blocked any national attempts to introduce, in merger evaluations, any consideration related to employment or industrial policy.<sup>670</sup> According to Commissioner Brittan this merger regulation ‘beat back’ the supporters of an industrial policy’ and gave ‘clear primacy to the competition criterion, with only the smallest nod in the direction of anything else’<sup>671</sup>.

Even though the ordoliberal clause of common market protection remained in the MCR, Hubert Buch-Hanse and Angela Wigger maintained that this was the first step made by the European Competition General Directorate towards neoliberalism. This was fostered by a mimetic isomorphic process, through which the European competition policy was directly inspired by the same Chicago ideas that shaped antitrust in the US. Indeed, for the first time, the interests of Member States were heavily excluded in the competition evaluation and a sort of efficiency-oriented discourse that reflected business interests started to emerge.<sup>672</sup> This process resulted from competition mechanisms too.

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<sup>668</sup> Eleanor J. Morgan, ‘Subsidiarity and the division of jurisdiction in EU merger control’, Spring 2000, 45 *The Antitrust Bulletin*, 153-94.

<sup>669</sup> Eleanor J. Morgan, ‘Subsidiarity and the division of jurisdiction in EU merger control’, Spring 2000, 45 *The Antitrust Bulletin*, 153-94.

<sup>670</sup> Hubert Buch-Hanse and Angela Wigger, ‘Revisiting 50 years of market-making: The neoliberal transformation of European competition policy’, February 2010, 17 *Review of International Political Economy* 1, 20-44, 36.

<sup>671</sup> Lyoid Brittan, ‘The Early Days of Merger Control’, in International Bar Association (eds.), 2000, *EC Merger Control: Ten Years On*, London: International Bar Association, 1–7, 3; quoted in Hubert Buch-Hanse and Angela Wigger, ‘Revisiting 50 years of market-making: The neoliberal transformation of European competition policy’, February 2010, 17 *Review of International Political Economy* 1, 20-44, 36.

<sup>672</sup> Hubert Buch-Hanse and Angela Wigger, ‘Revisiting 50 years of market-making: The neoliberal transformation of European competition policy’, February 2010, 17 *Review of International Political*

Indeed, Europe began to move its policy towards a more efficiency-oriented approach because of a rising tendency among the EU Member States to consider the neo-liberal system applied in the US as the best model for the development of efficiency and welfare.

However, traditional European interpretations of competition were usually not as much oriented toward economic efficiency as the American one. On the contrary, the Commission and the Court, in interpreting any violation of competition regulations, normally focused on the extent to which a particular economic behaviour in contrast with European laws was affecting the common market, rather than how profitable it was in terms of economic performance. Hence, the 1990 MCR did not alleviate American fears of an uncontrolled development of the European welfare oriented competition system; on the contrary, this regulation fostered the idea of a Communitarian policy that would have a deep effect on mergers involving not only European but also American corporations by not completely following an 'Americanised efficiency-seeking political economy'.<sup>673</sup>

Consequently, in 1991 the US began to adopt a normative isomorphic strategy by launching discussions with the European Commission. Those discussions were designed to promote a formal competition agreement, which could in turn foster cooperation among competition authorities and allocate jurisdiction in transnational merger cases.<sup>674</sup> In other words, the agreement was a normative instrument to reduce conflicting decisions and facilitate collaboration in a field where the Europeans had increasingly enforced their decisions over cases that involved US companies' interests. Hence, the final ratification of the Cooperation Agreement was the means through which Europe

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*Economy* 1, 20-44.

<sup>673</sup> Patrick Theffry, 'The New EC Merger Control Regulation,' 1990, 24, *The International Lawyer*, 543-51.

<sup>674</sup> Joseph P. Griffin, 'EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business', 1993-1993, 24 *Law & Pol'y Int'l Bus.*, 1051-65.

started to institutionalise American-oriented antitrust ideas.

Through the cooperation agreement, the US found the right institutional tool to indirectly promote the consensual adoption of its neo-liberal model of capitalism and its Chicago-oriented antitrust approach over business conducts. In fact, in the days after the agreement, the Commission began to move the intellectual foundations of European Competition toward a different approach: a Chicago one.

*The Japanese Post–World-War Economic Success and the Oil Crises*

Prior to 1945, the Japanese juridical system did not provide any antitrust supervision and the national market was entirely controlled by the *Zaibatsu*, a family group that owned the main national firms. However, after World War II, the US, by pushing Japan to adopt the Antimonopoly Law of 1947, rebalanced the Japanese economic system in order to integrate it with the new international order embodied in the Bretton Woods and the GATT agreements.<sup>675</sup> From 1950 to 1973, the country experienced extraordinarily fast economic growth: manufacturing production grew by 13% a year and GDP growth reached 10% a year. Moreover, the ‘asymmetric cooperation’ with the United States allowed Japan to raise its exports by 10%.<sup>676</sup>

However, as soon as Japan regained full sovereignty in 1952, the Ministry of International Trade and Industry (MITI) allowed the development of a strong cooperation between public and private sectors. On the one hand, under the administration of the Ministry of Finance, restrictions on market entry and international competition were applied. On the other hand, the Bank of Japan supplied money to the

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<sup>675</sup> Bai Gao, *Japan’s Economic Dilemma: The Institutional Origins of Prosperity and Stagnation*, 2001, Cambridge University Press, 2001, 68. William W. Grimes, *Unmaking the Japanese Miracle: Macroeconomic Politics, 1985-2000*, 2002, Cornell University. Richard Katz, *Japanese Phoenix: The Long Road to Economic Revival*, 2003, M.E. Sharp Inc. T. J. Pempel, *Regime Shift: Comparative Dynamics of the Japanese Political Economy*, 1998, Cornell University.

<sup>676</sup> Bai Gao, *Japan’s Economic Dilemma: The Institutional Origins of Prosperity and Stagnation*, 2001, Cambridge University Press, 2001, 68.

national banks in order to allow them to provide credit to the main local industries. In addition, MITI considered weaker antitrust enforcement measures to be more beneficial to economic development and accordingly sponsored a wide range of cartels and an economic model based on high market concentrations. Indeed, the general belief was that firms had to be protected, especially in their infant stage.<sup>677</sup>

Consequently, through the 1953 Antimonopoly Law Amendment, the formation of the *keiretsu* (*keigyo shudan*) was legalised.<sup>678</sup> Essentially, the *keiretsu* was an unusual inter-corporate shareholding system that reintegrated and reassembled the corporations of the dismantled *Zaibatsu*.<sup>679</sup> This new type of business agglomeration was based on a reciprocal cross-ownership system that guaranteed corporations market power by allowing them to share the use of common resources, such as technology and information.<sup>680</sup> With the increasing importance of the *keiretsu*, by the beginning of 1970 cartels were playing a central part in government industrial policy and Japan was becoming a ‘cartel archipelago’.<sup>681</sup>

The aim of the industrial policy implemented by the MITI was to foster competition between oligopolistic firms by granting different kind of rewards, such as access to credit or protection from international competition. Those rewards were assigned according to the economic performances registered in export markets, technological development, or new products. This combined system of cooperation and competition was the key to the Japanese economic success; indeed, it enhanced rivalry between firms and promoted a dynamic and efficient system where industries were

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<sup>677</sup> Takotoshi Ito, *The Japanese Economy*, 1992, Massachusetts Institute of Technology. Mikio Sumiya, *A History of Japanese Trade and Industry Policy*, 2004, Oxford University Press.

<sup>678</sup> John O. Haley, *Antitrust in Germany and Japan: The First Fifty Years, 1947-1998*, 2001, University of Washington Press, Seattle London, 53-55.

<sup>679</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 161.

<sup>680</sup> Ghemawat Pankaj and Tarun Khanna, ‘The Nature of Diversified Business Groups: A Research Design and Two Case Studies’, March 1998, 46 *Journal of Industrial Economics*. 1, 35–61.

<sup>681</sup> Michael L. Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973-1995*, 2000, Routledge, 40.

extremely competitive.<sup>682</sup> For instance, at the beginning of the 1950s, the MITI allowed companies in the textile, paper and pulp, chemical fertilizer, and steel sectors to develop cartels to stimulate their growth and development. Moreover, after World War II, Tokyo began to limit imports and foreign direct investments (FDI) to protect domestic companies. Indeed, FDI were partially liberalised in 1967 and they were eventually freed in 1973.<sup>683</sup>

However, the economic miracle that characterised the Japanese ‘high-speed’ growth of the 1960s was followed by a severe economic downturn, and eventually a recession, over the 1970s. Indeed, as the Bretton Woods declined in 1971 and the world economy was beaten by the oil shock of 1974, demands for more protectionist measures multiplied. Moreover, the end of the dollar convertibility negatively affected the trade balance surpluses, which had buoyed the Japanese economy in the period from the late 1960s to 1972, while the excess of liquidity created by the shock caused the rise of inflation.<sup>684</sup>

At first, in order to foster the recovery of some of the most rapidly declining sectors, such as those of textiles and shipbuilding, the Japanese government, under the aegis of Prime Minister Tanaka Kakuei, promoted a series of ‘rationalisation’ cartels.<sup>685</sup> In addition, following the radicalisation of the effect of the oil crisis, the MITI and the Economic Planning Agency (EPA) recommended two bills. The first one allowed the government to fix quotas for petroleum product shipments directed to industries or consumers. The second bill, the Law on Emergency Measures to Stabilise the National

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<sup>682</sup> Ajit Singh, ‘Competition and Competition policy in Emerging Markets: International and Developmental Dimensions’, September 2002, *United Nations Conference on Trade and Development, Harvard University. Center for International Development, G24 Discussion Paper No. 18.*

<sup>683</sup> Michael E. Porter, Mariko Sakakibara, ‘Competition in Japan’, Winter 2004, 18 *Journal of Economic Perspectives* 1, 27–50.

<sup>684</sup> Michael L. Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973-1995*, 2000, Routledge, 41.

<sup>685</sup> Wells Wyatt, *Antitrust and the Formation of the Post-war World*, 2002, New York, Columbia University Press, 215-216.

Lifestyle, allowed the central government to set 'criterion prices' for basic products. However, both the Liberal Democratic Party (LDP) members and industry leaders declared to be against this bill; indeed they did not want Japan to return to the situation of price controls that characterised the wartime market. Moreover, while the FTC did not completely oppose the bill, on the understanding that price competition would only be suppressed for the time necessary to promote the economic recovery, the head of the Fair Trade Commission, Takahashi Toshihide, was opposed to the government proposal to include manufacturers, wholesalers, and retailers in a system of price stabilisation cartels.

Since by May 1973 the level of prices had doubled and by February 1974 inflation had reached 26%, the issue of price controls became increasingly important. Inflation had a destabilising effect over the political arena, too. Local media spoke of a 'Liberal Democratic Party in crisis' and during Tanaka's first year of administration (July 1972-July 1973) cabinet support rate dropped from 62 to 25%.<sup>686</sup> When the political scenario started to be affected also by a number of major corporate scandals, the government began to direct its effort to strengthening an antimonopoly policy, and cartels became a primary FTC target.

Consequently, from the beginning of 1973, the FTC, under the direction of Takahashi Toshihide, rolled in stricter controls over cartels of all kinds.<sup>687</sup> During the mid-1970s, the FTC sued sixty-seven cartel actors, accused 12 oil wholesalers and five of their directors of price-fixing, and sued the Japanese Petroleum Federation and its four

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<sup>686</sup> Michael L. Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973-1995*, 2000, Routledge, 41.

<sup>687</sup> Richard Schwindt, Devin McDaniels, 'Competition Policy, Capacity Building, and Selective Adaptation: Lessons from Japan's Experience', 2008, 7 *Washington University Global Studies Law Review*, 1 35-86. Toshiaki Takigawa, 'The Prospect of Antitrust Law and Policy in the Twenty-First Century: In Reference to the Japanese Antimonopoly Law and Japan Fair Trade Commission', 2002, *Washington University Global Studies Law Review* 1, 27-300. Michael L. Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973-1995*, 2000, Routledge, 40.

representatives for restricting production.<sup>688</sup> Even if the FTC activism pushed three consumer groups to lodge a private action, its authority was not a reason of concern for corporations. The majority of them, having received recommendations from the FTC during the past years, received no sanctions at all. Therefore, although the Fair Trade Commission became more active, recording 69 formal actions against big corporations only in 1973, the level of prices did not decrease, as corporations were not really affected by any of the FTC actions.

As the Japanese economy was still deteriorating in 1973 and in 1974/5 registered the first negative growth rate from the 1950s, Takahashi proposed to review the Antimonopoly Law in order to enforce the power of FTC against cartels and price controls. The process of revision of the law was very long and had to face one rejection in 1975 and another in 1976. Indeed, while Takahashi's proposals were generally supported by small business and consumer groups, who were mainly concerned about losing the protection of the state, big businesses were obviously against any reforms that would undermine their privileges.<sup>689</sup> Moreover, the MITI was against any kind of FTC reinforcement that would affect the promotion of its industrial policy. However, since the reform was supported by the political opposition as well as by Prime Minister Miki, the LDP was forced into compromise and the reform was finally passed in 1977.

In the period between 1977 and 1983 the Japanese economy remained in crisis. Indeed energy costs were high and the country had to face a much stronger competition in the international market because the yen had been overvalued. In this context, the MITI decided to promote the formation of cartels to reduce production in some of the

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<sup>688</sup> Hiroshi Iyori and Akinori Uesugi, *Antimonopoly Laws and Policies of Japan*, 1983, Federal Legal Publications, 51.

<sup>689</sup> Michael L. Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973-1995*, 2000, Routledge, 77-83. Michael E. Porter and Mariko Sakakibara, 'Competition in Japan', Winter 2004, 18 *The Journal of Economic Perspectives* 1, 27-50. Michael E. Porter and Mariko Sakakibara 'Competing at Home to Win Abroad: Evidence from Japanese Industry', May 2001, 83 *The Review of Economics and Statistics* 2, 310-322.

sectors badly affected by the economic downturn. In 1977, the Diet passed the Depressed Industries Stabilisation Law, which allowed, for a period of five years, the formation of cartels among eight of the fourteen production areas belonging to the eight industry sectors most affected by the economic crisis. However, the fact that not all industries were covered by the Stabilisation Law pushed industrialists to ask the MITI to revise the law so as to include new sectors. The MITI formulated their requests in the 'six Yamanaka principles' where it was maintained that even if the MITI agreed on the system of cartel established by law and on the power accorded to the FTC, their cooperation was dependent on the Fair Trade Commission being more flexible in evaluating the condition of each industry. The FTC agreed on keeping a controlled cartel system; however, it denied any alteration in the cartel agreement criteria settled. Hence, MITI could not 'issue a warning against designated cartel outsiders over new investment', control the production by issuing guidelines, or approve exemptions for mergers and business tie-up agreements.<sup>690</sup>

#### *The Case of Japan: Competition under Constraints*

Even though Nixon tried several times to open Tokyo's markets, it was under the Reagan administration that effective political actions started to be taken. Indeed, since the mid-1980s, the US began to push Japan to strengthen its antitrust regime and to avoid on the one hand, any limitation of market access and, on the other, excessive exports to the US.<sup>691</sup> For the first time, in October 1982, a US Trade Representative report to Congress identified Japan's industrial policies and the *keiretsu* system as trade barriers. Later, in

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<sup>690</sup> Michael L. Beeman, *Public Policy and Economic Competition in Japan: Change and Continuity in Antimonopoly Policy, 1973-1995*, 2000, Routledge, 40.

<sup>691</sup> Clifford A. Jones, Mitsuo Matsushita, *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, 22. Rill J.F., Metallo V. R. 'The Next Step: Convergence of Procedure and Enforcement' in Barry Hawk (ed.), *Fordham Corporate Law Institute 19<sup>th</sup> Annual Conference International Antitrust Law & Policy*, New York, 22-23 October 1992, 15-39. Leonard J. Schoppa, *Bargaining with Japan: What American Pressure can or cannot do*, 1997, Ithaca.

December 1982, Lionel Olmer, the Undersecretary of Commerce for Industrial Trade, made a formal statement to President Reagan and the Cabinet, stating that the US had to change its policy towards Japan in order to restrain the country's growing position in the technological, manufacturing and financial sectors.

Following the displacement of American domestic production by Japanese exports in areas such as steel, textiles, and consumer electronics, the US started to consider Japanese antimonopoly policy as inefficient and to maintain that the Japanese rapid expansion was due to lax antitrust policies that favoured local companies.<sup>692</sup> During the 1980s, as US global competitiveness was declining, business groups began to push the government to limit trade policies on a selective basis. Mounting US criticism of Japanese unfair treatment of cartels and similar anticompetitive policies, made it more difficult for the MITI to justify policies that compromised antimonopoly policy principles. The US wanted Japan to reduce the Anti-Monopoly Law (AML) exemption cartels that damaged American business and consumers; moreover, it asked the FTC to fight against exclusionary practices in the distribution system. In the end, the FTC and the MITI arrived at a compromise embodied in the 1983 Industry Structure Law. This act established that, since economic depression had negatively affected 26 production areas in 10 industry sectors, designated cartels would be allowed in seven production areas. However, in 1987, US pressure on Japanese anticompetitive policies pushed the MITI to draft the Law of Temporary Measures to Facilitate Industrial Structural Adjustment. The bill replaced the previous act by denying any form of cartels or AML exemptions. However, it allowed a financial assistance scheme based on the concept of voluntary reductions in production facilities.

In 1984, US and Japanese delegations and Tokyo started the Market Oriented

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<sup>692</sup> See: United States International Trade Commission, 'Foreign Industrial Targeting and its Effects on US Industries- Phase I: Japan, Report to the Subcommittee on Trade', Committee on Ways and Means, US House of Representatives on Investigation no. 332-162 under Section 332(b) of the Tariff Act of 1930, October 1983.

Specific (MOSS) negotiations in order to diminish or prevent trade barriers in the industries dealing with the telecommunication, electronic, forest production, medical, and pharmaceutical sectors.<sup>693</sup> After the expiration of the Industry Structure Law in 1988, while MITI tried to informally control production, the Office of the United States Trade Representative began to complain that the Japanese cartelised system represented a substantial barrier to US exports to Japan and it was causing a massive bilateral trade imbalance.

Hence, in 1989, the US launched a bilateral negotiation process, called the Structural Impediments Initiative (SII) in order to pressure Japan to adopt a more coherent antimonopoly antitrust policy in accordance with US interests and to foster a different trend in the bilateral trade and investment imbalance. The US was not only concerned about Japan's tariff and quantitative restrictions on imports, but also the oligopolistic industrial sector that, by linking all the main local corporations, excluded any outsider firm from transactions.<sup>694</sup>

The SII represented the US intention to harmonise the Japanese system to the international standards of an open market; it was a bilateral negotiations directed to rectify the structural impediments between the Japan and US trade relationship. Its recommendations were mainly concerned with Japanese domestic policy regulations, such as public expenditure, land use policy, restrictive business behaviour, close inter-corporate relationship and the system by which goods were distributed.

The SII was the result of coercive isomorphism; indeed, the recommendations directed to the US were general and abstract. By contrast, the advice to the Japanese government was very concrete and aimed at pushing the government to make structural

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<sup>693</sup> William R. Nester, *American Industrial Policy: Free or Managed Markets*, 1997 Palgrave Mac Millans, 7.

<sup>694</sup> Mitsuo Matsushita 'The Structural Impediments Initiative: an example of Bilateral Trade Negotiations', 1991, 12 *Michigan Journal of International Law*, 436-49.

changes in the antimonopoly practices.<sup>695</sup> Yet, while the reasons at the basis of the adoption of the SII by Tokyo were coercive, they soon became competitive. As the implementation of SII took place, a profound crisis invested Japan.

The collapse of a speculative boom caused Japan's worst recession in fifty years. Moreover, the fragmentation of the Liberal Democratic Party (LDP) that had ruled the country since 1955, caused severe political instability.<sup>696</sup> The final agreement reached in June 1990 was also the result of the Japanese need to overcome the political and economic downturn. By enacting a stronger antimonopoly policy, Tokyo managed to avert any stronger repercussions from the US and allowed the Japanese economy to grow. The measure reflected a close cooperation between American antitrust officials and their counterparts in the Japan Fair Trade Commission (JFTC), and permitted Japan to integrate its economy into a transnational antitrust culture. Although they were integrated with local Confucians traditions, neo-liberal ideas began to be institutionalised into common practices. According to Mitsuo Matsushita and Douglas Rosenthal, for the second time since the approbation of the Japan Antimonopoly Law (AML), Japan antitrust law was 'increasingly [...] enforced in ways comparable to Western antitrust law'.<sup>697</sup>

#### *The Oil Crises and Antitrust Isomorphism Procedures*

Compared to the history of Harvard ideas, the institutionalisation process of Chicago ideas followed a different course. At the end of 1980s, it was clear that the US had lost its privileged position at the international level to become just another actor among the many other important political and economic national entities. The US had to face not

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<sup>695</sup> Mitsuo Matsushita 'The Structural Impediments Initiative: an example of Bilateral Trade Negotiations', 1991, 12 *Michigan Journal of International Law*, 436-49.

<sup>696</sup> T.J. Pempel, 'Japan's Search for a New Path', December 1998, 97 *Current History*, 431-436.

<sup>697</sup> Mitsuo Matsushita and Douglass Rosenthal, 'Competition in Japan and in the West: Can the Approaches be reconciled?' in Graham, Edward M., and J. David Richardson (eds.), *Global Competition Policy*, 1997, Washington DC: Institute for International Economics, chapter 9, 313-317.

only an economic downturn, but also a crisis of international stature; indeed, it could not directly enforce antitrust regulation as it had done in Japan and Germany after World War II.

However, in Japan, the adoption of a cooperation agreement was forced by the US. This process was forcedly accepted by Japan under the threat of being excluded from the US market. Europe, which had been influenced by the US ideas after the Great Depression, integrated Chicago principles mainly through a normative process. Indeed the American antitrust culture was more readily accepted by European countries and this had created a sort of common understanding of business practices. Hence, it was easier for Europe to accept US antitrust ideas, as they were already partially shared by the European governmental bodies. Nonetheless, the institutionalisation of neo-liberal ideas was also led by competitive dynamics. Both Europe and Japan soon realised that in order to rescue their market and increase competitiveness, it was more convenient to follow the U.S. neo-liberal route because it easily proved to be the most successful one. Yet, on the one hand, the US and Japanese bilateral negotiation process, the Structural Impediments Initiative, adapted the Japanese system to the necessities of an open market.<sup>698</sup> On the other hand, the process of coordination enforced by the competition agreement of 1991 saw Europe orienting even more towards neo-liberalism.

By the end of the 1990s, the whole international economic order was sharing the same neo-liberal ideas and institutions that reflected, or at least did not challenge, US economic principles.<sup>699</sup> While the US seemed to have lost its dominant position, by becoming just one actor among the many important political actors in the international

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<sup>698</sup> Mitsuo Matsushita and Douglass Rosenthal, 'Competition in Japan and in the West: Can the Approaches be reconciled?' in Graham, Edward M., and J. David Richardson (eds.), *Global Competition Policy*, 1997, Washington DC: Institute for International Economics, chapter 9, 313-317.

<sup>699</sup> John G. Ikenberry, 'America's Imperial Ambition' in David Skidmore (ed.), *Paradoxes of power: US foreign policy in a changing world*, Paradigm Publishers, 2007, chapter 23, pp. 247-8. Stephen G. Brooks and William C. Wohlforth, 'American Primacy in Perspective' in David Skidmore (ed.), *Paradoxes of power: US foreign policy in a changing world*, 2007, Paradigm Publishers, chapter 1, 17.

arena, its economic ideas were once again leading the world. At the same time, the international spread of neo-liberalism and Chicago antitrust theories helped the US to re-establish a new role in the global markets by leading a multilateral system that had internalised the same antitrust principles.

#### NEO-LIBERAL ERA AND POST-CHICAGO IDEAS

Since the 1990s, the US has started to collaborate more closely with European and Japanese bureaucracies in order to foster cooperation in antitrust matters. Bilateral negotiations have allowed the institutional sharing of antitrust enforcement measures.<sup>700</sup>

However, a common institutional culture and greater cooperation have not resulted in a complete transformation of the European and Japanese competition systems towards an American-centric approach. On the contrary, there are many examples of these countries arriving at different juridical decisions of the same dispute. For instance, in the case of Microsoft or Boeing/McDonnell Douglas mergers, the US Federal Trade Commission and the EU DG IV arrived at different deliberations regarding the presence – or the absence of anticompetitive practices. As outlined by many antitrust experts, there are various peculiarities in each national antitrust procedures and their complete elimination is not feasible.<sup>701</sup>

Nevertheless, the substantial enforcement of bilateral agreements, and the increasing antitrust cooperation, allowed for an international diffusion of neo-liberal or Chicago-oriented antitrust values, which transformed both the European and Japanese competition systems.<sup>702</sup> To stress to point further, the practices and the juridical

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<sup>700</sup>Clifford A. Jones, Mitsuo Matsushita, *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, 4.

<sup>701</sup> John O. Haley, 'Competition and Trade Policy: Antitrust Enforcement: Do differences matter', 1995, 4 *Pacific Rim Law & Policy Journal*, 303-26.

<sup>702</sup> Clifford A. Jones, Mitsuo Matsushita, *Competition Policy in the Global Trading System*.

procedures of those countries, on comparison, are completely different because of the divergences in the legal system and in the traditional perceptions of the meaning of antitrust. While the rationale of European competition policy lies in the need to foster the common market and to avoid any beggar-your-neighbour practices, in Japan competition policy has always been understood as a practice used by the state to defend national enterprises, rather than to condemn local cartels.

However, since the US began to directly (after World War II) or indirectly (after the oil crises) influence European and Japanese competition policy, the way the discipline developed in those countries has been inspired by American ideas. This is evidenced by the fact that, since the 1990s, both competition regimes have started to become more efficiency-oriented.

It is too early to see how the 2008 crises and the 2009 environmental catastrophe in Japan have affected the evolution of antitrust development. However, it can safely be argued that the neo-liberal model of the Chicago School has largely failed, and that both Europe and Japan are trying to establish a sort of interventionist policy with stricter business controls. At present, Europe and Japan are experimenting with alternative strategies to overcome the recession. It is still not clear if this crisis will push for a radical change of institutions or it will just re-adjust the neo-liberal framework to the new social-economic necessities. Although some scholars, such as Stiglitz, have enthusiastically welcomed the crisis as the end of the neo-liberal hegemony, three years after the credit crunch the neo-liberal system is still largely intact. Indeed, as Van Apeldoorn and Overbeek claim, this crisis appears to be not a crisis *of* neo-liberalism, but a crisis *in* neo-liberalism. In other words, while the downturn questioned the validity of the neo-liberal system, it did not cause its end; on the contrary, there is still place for a new dominant

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*Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, 5.

neo-liberal era.<sup>703</sup>

### *Europe*

The European competition policy does not only possess a slightly differentiated structure compared to the US antitrust regulatory body, but also very different goals. According to Gerber and others, the meaning of European competition policy lies in the necessity to primarily foster the political and economic integration of Member States into the common market.<sup>704</sup> Above all, European competition law had to defend the economic freedom of market players, even though their actions were not economically efficient, in order to avoid the aggregation of big business that would affect the economic performances of smaller competitors and thus reduce market integration.<sup>705</sup>

However, in the twenty years after the enforcement of the 1990 Merger Regulation, European competition policy grew in prestige and effectiveness to become a sort of ‘economic constitution’.<sup>706</sup> In other words, from being a symbolic endorsement of the market economy, it developed into a cornerstone of European competitiveness in the global markets.<sup>707</sup>

The increasing importance of competition policy has been in line with the rise of a neo-liberal wave. Since the end of the oil crises, the European Commission has started to judge competition matters by adopting an approach increasingly more similar to the

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<sup>703</sup> Bastian Van Apeldoorn, Henk Overbeek, ‘Introduction: The Life Course of the Neoliberal project and the Global Crises’ in Henk Overbeek and Bastiaan van Apeldoorn (eds.), *Neoliberalism in Crisis*, 2012, Palgrave Macmillan International Political Economy Series, Chapter 1, 1-22.

<sup>704</sup> David J. Gerber, *Law and Competition in the Twentieth Century Europe: Protecting Prometheus*, 1998, Clarendon Press, Oxford. Liza Lovdahl Gormsen, ‘Article 82 EC: Where are we coming from and where are we going to?’, March 2006, 2 *The Competition Law Review* 2, 6-25. Oliver Budzinski, ‘Monoculture versus diversity in competition economics’, 2008, 32 *Cambridge Journal of Economics*, 295–324.

<sup>705</sup> Giuliano Amato, *Antitrust and the Bounds of Power*, 1997, Hart Publishing, 69.

<sup>706</sup> Stephen Wilks, ‘The Impact of the Recession on Competition Policy: Amending the Economic Constitution?’ November 2009, 16, *Int. J. of the Economics of Business* 3, 269–288, 271.

<sup>707</sup> Stephen Wilks, ‘Competition policy’, in Wyn Grant and David Coen (eds.), *The Oxford Handbook of Business and Government*, 2009 Oxford University Press, chapter 32, 730-57.

US one.<sup>708</sup> Normative and competitive isomorphism have in fact favoured the diffusion in Europe of the idea that free competition with minimal government intervention, short-term economic efficiency, and faith in the market was the most effective way to develop the economy.<sup>709</sup> This does not mean that Europe has started to judge antitrust matters in the same way as the US. However, since the end of the 1990s, the Commission has begun to enforce a more efficiency-oriented approach, which differed from the previous one because of the introduction of the first supranational system of merger controls that was embodied in the MCR.<sup>710</sup> From the end of the crises to 2001, the European Commission blocked 18 mergers, out of 1,700 cases judged. In only two cases did the EU blocked mergers that involved US firms: the WorldComMCI/Sprint, which was also challenged by the DOJ, and the GE/Honeywell.<sup>711</sup> Additionally, in October 2002, the EU and the US jointly published their 'Best Practices' for coordinating the review of mergers.<sup>712</sup>

The legal framework regulating competition was again deeply reformed through the Modernisation Regulation in 2003. This generated a shift from an ordoliberal to a Chicago approach both in the *modus operandi* and in the substance of regulations. The above-mentioned modernisation process has, in fact, consolidated a more efficiency-oriented analysis of business activities by attributing more importance to short-term

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<sup>708</sup> Stephen Wilks, 'The Impact of the Recession on Competition Policy: Amending the Economic Constitution?', November 2009, 16, *Int. J. of the Economics of Business*, 3, 269–288, 271.

<sup>709</sup> Stephen Wilks, 'The Impact of the Recession on Competition Policy: Amending the Economic Constitution?', November 2009, 16, *Int. J. of the Economics of Business*, 3, 269–288, 272.

<sup>710</sup> Lee McGowan and Michelle Cini, 'Discretion and Politicization in EU Competition Policy: The Case of Merger Control', April 1999, 12 *Governance: An International Journal of Policy and Administration* 2, 175–200. Michelle Cini, 'European Merger Regime: Accounting for the Distinctiveness of the Eu Model', 2002, 30 *Policy Study Journal* 2, 240-251. Stephen Wilks and Lee McGowan, 'Disarming the Commission: The Debate over a European Cartel Office', June 1995, 32 *Journal of Common Market Studies* 2, 259-37.

<sup>711</sup> Timothy J. Muris, Chairman of the US Federal Trade Commission, *Prepared Remarks 'Merger Enforcement in a World of Multiple Arbiters'*, December 21, 2001, Brookings Institution Roundtable on Trade and Investment Policy, Washington, DC.  
<http://www.ftc.gov/speeches/muris/brookings.pdf>

<sup>712</sup> US-EU Merger Working Group, 'Best Practices on Cooperation in Merger Investigations'  
[ec.europa.eu/competition/mergers/legislation/eu\\_us.pdf](http://ec.europa.eu/competition/mergers/legislation/eu_us.pdf)

consumer welfare considerations.<sup>713</sup> Such a market-based approach was strongly sustained by many DG Competition Commissioners, especially Mario Monti, who regarded it as ‘a silent process of convergence towards US competition law and practices’.<sup>714</sup> Moreover the Modernisation Regulation applied also a decentralisation of the implementation of the Competition rules, which gave more space of action to the Member States National Competition Authorities (NCAs). Indeed, the enlargement towards Eastern European Countries experienced by the EU in 2004 and in 2007, together with the previous established centralised corporate notification system had rapidly increased the Commission workload. Hence, the EU Council Regulation 1/2003 allowed National Competition Authorities and Member State national courts to directly enforce of Articles 101 and 102. At the same time, the Commission had to lead the development of the European Competition Network. Indeed, the European Competition Network (ECN), a central element of the modernisation process of 2003, had to promote cooperation as well as a ‘common competition culture’ in antitrust matters among national authorities and the DG IV.<sup>715</sup> Hence, the modernisation regulation caused strong changes in the European competition policy. On the one hand, the central authority of the DG Competition was increased since the regulation established the precedence of European law over national regulations. On the other hand, national competition authorities obtained more competences in enforcing Articles 101 and 102.<sup>716</sup> Overall, the ECN favoured a normative or institutional isomorphism that

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<sup>713</sup> Angela Wigger and Andreas Nolke 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: the Case of Antitrust Enforcement' 2007, 45 *Journal of Common Market Studies* 2, 487–513, 498.

<sup>714</sup> Mario Monti, ‘Competition in a Social Market Economy’, 2001, Speech at Freiburg, University, 9 November.

<sup>715</sup> Stephen Wilks, ‘The European Competition Network: what has changed?’, 2007, European Union Studies Association (EUSA), Biennial Conference .

<sup>716</sup> Stephen Wilks, ‘Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?’, July 2005, 18 *Governance: An International Journal of Policy, Administration, and Institutions* 3, 431-53. Stephen Wilks, ‘Agencies, Networks Discourses and Trajectory of European Competition Enforcement’, December 2007, *European Competition Journal*, 437- 464.

has allowed national authorities to adopt a similar vision on antitrust matters to the one of the DG Competition.<sup>717</sup> Through the ECN, the Commission has been seeking to expand the commitment to a neoliberal European economy by privileging competition *per se* instead of employment or social welfare.<sup>718</sup> Indeed, differently from Vallindos – who argues that the European Union has been maintaining a sort of Harvard approach, with a strong state control over mergers – Wigger argues that the European competition policy has adopted a more permissive, efficiency-oriented, and ‘Americanised’ neo-liberalism.<sup>719</sup>

This trend is apparent not only in the above mentioned modernisation of merger regulation approved in 2003 by European Ministers, but also in the many guidelines introduced by the modernisation process of 2004.<sup>720</sup> For instance, the Horizontal Mergers Guideline stressed the need to divert attention from the simple revelation of an existent dominant position in the market to a more liberal understanding of whether the merger can negatively affect competition.<sup>721</sup>

In order to measure concentration levels, the Horizontal Mergers Guidelines formalised the use of the Herfindahl-Hirschman Index (HHI), the same index introduced by Baxter during Reagan’s presidency.<sup>722</sup> The adoption of this index reshaped the European measure of concentrations, the so-called ‘Dominance Test’, towards a

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<sup>717</sup>Frans van Waarden and Michaela Drahos, ‘Courts and (Epistemic) Communities in the Convergence of Competition Policies’, 6 December 2002, 9 *Journal of European Public Policy*, 913–934.

<sup>718</sup>Stephen Wilks, ‘Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?’, July 2005, 18 *Governance: An International Journal of Policy, Administration, and Institutions* 3, 431–53, 438.

<sup>719</sup>Georges Vallindos, ‘New Directions in EC Competition Policy: The Case of Merger Control’, September 2006, 12 *European Law Journal*, 636–660, 642–43. Stephen Wilks, ‘Agencies, Networks Discourses and Trajectory of European Competition Enforcement’ December 2007, *European Competition Journal*, 437–464, 459.

<sup>720</sup>Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, Section 9.

Angela Wigger and Andreas Nolke ‘Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: the Case of Antitrust Enforcement’ 2007, 45 *Journal of Common Market Studies* 2, 487–513.

<sup>721</sup>John Vickers, ‘Merger policy in Europe: retrospect and prospect’, 11 February 2004, UK Office of Fair Trading.

<sup>722</sup>European Commission, ‘Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings’, 05/02/2004,

more Chicago-oriented approach that authorised the most efficient mergers even when they were likely to generate economic concentration.<sup>723</sup>

From 2004 to June 2008, only two notified mergers, out of a total of 1466, were prohibited by the Commission.<sup>724</sup> The enforcement of the reform, whose effects were similar to the ones generated by the American 1982 Horizontal Merger Guidelines, not only emphasised a European will to achieve the same economic benefits of the US, but also exhibited a growing consensual European acceptance of the Chicago-oriented antitrust approach implemented by the United States two decades before.<sup>725</sup> According to the US Deputy Attorney General for Antitrust, James Rill, European merger evaluation became ‘as close as it could get to the US-style without copying the whole caboodle’.<sup>726</sup>

This modernisation process can be understood as a result of mimetic normative and competitive isomorphism. On the one hand, Europe wished to confront the competition generated by Japan and the US but, on the other, since the US was the most powerful economy of the time, it was easier to copy its approach and reconvert it into a European framework. Moreover, the creation of a cooperative agreement favoured a normative isomorphism and provided room for a constant exchange of opinion and information between US and EU antitrust practitioners.

Over the past years, the financial crisis has strongly tested the EU economic and financial stability. With the financial collapse of Ireland and Greece, and the fragile

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<sup>723</sup> Joel Davidow, ‘International Implications of US Antitrust in the George W. Bush Era’, 2002, 25 *World Competition* 4, 493–507, 495.

<sup>724</sup> Hubert Buch-Hanse1 and Angela Wigger, ‘Revisiting 50 years of market-making: The neoliberal transformation of European competition policy’, February 2010, 17 *Review of International Political Economy* 1, 20–44, 37.

<sup>725</sup> See U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, issued 1992, revised 1997.  
[http://www.usdoj.gov/atr/public/guidelines/horiz\\_book/hmg1.html](http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html).

Nicholas Levy ‘Mario Monti’s Legacy in EC Merger Control’, spring 2005, 1 *Competition Policy International* 1.

<sup>726</sup> James Rill, ‘Overhaul Merger Regime May Not Come Up Smelling Roses’, 2003, 9 *European Voice* 39. Angela Wigger and Andreas Nolke, ‘Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism. The Case of Antitrust Enforcement’, 2007, 45 *Journal of Common Market Studies* 2, 487–513, 499.

economic conditions of Italy, Spain and Portugal, the European Union is struggling to find a way to recover stability.

Clearly, it will be necessary to enforce a radical change in economic and financial regulations and to redefine competition regimes at the national and European levels.<sup>727</sup> Indeed, while the recession has started in the financial sector, it has also quickly spread over the real economy. The negative growth caused by this downturn has created the worst recession since the post-war era. However, it is still too early to predict whether the crisis is going to cause any policy changes.<sup>728</sup> The term ‘crisis’, as employed by the Commission, can be thought to refer to a ‘deterioration in competitive conditions and an attendant shift in political priorities which has impacted on competition policy. Some of the impacts are already obvious or easy to predict, others are more speculative and potentially profound.’<sup>729</sup>

The effect of the recession on Europe has driven the Commission to regulate once again the use of state aid and mergers, since many financially vulnerable companies necessitated a major relaxation of competition regulations.<sup>730</sup> To avoid a rising anticompetitive trend and a ‘beggar your neighbour policy’ European institutions have promoted a Temporary Framework in 2008 in order to regulate the use of state aid and non-horizontal merger guidelines, which also covers vertical and conglomerate mergers.<sup>731</sup>

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<sup>727</sup> Stephen Wilks, ‘The Impact of the Recession on Competition Policy: Amending the Economic Constitution?’, November 2009, 16, *Int. J. of the Economics of Business* 3, 269–288, 269.

<sup>728</sup> Arjen Boin, Paul ‘t Hart and Allan McConnell, ‘Crisis exploitation: political and policy impacts of framing contests’, 2009, 16 *Journal of European Public Policy* 1, 81–106.

<sup>729</sup> Stephen Wilks ‘Competition Policy in the Recession: industrial crisis and implications for the economic constitution’ April 2009, Paper for EUSA, Los Angeles, [www.unc.edu/euce/eusa2009/papers/wilks\\_02H.pdf](http://www.unc.edu/euce/eusa2009/papers/wilks_02H.pdf)

<sup>730</sup> Abel M. Mateus, ‘The Current Financial Crisis and State Aid in the EU’, 2009, 5 *European Competition Journal* 1, 1-18

<sup>731</sup> Conoe C. Q. Quigley, *European State Aid Law and Policy*, 2009, Oxford Portland Oregon Hart Publishing, II edition, 352. See European Commission, Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on The Control of Concentrations Between Undertakings, 2008 O.J. (C265). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF> (adopted

This framework, being part of the measures launched by the Commission in its 26<sup>th</sup> November European Economic Recovery Plan authorises Member States to provide up to 200,000 dollars of capital to Small and Medium Enterprises (SMEs) without previous notification. Moreover, Member States are thus able to finance companies in exceptionally difficult circumstances to the tune of 500,000 dollars upon notification to, and approval from, the Commission. The framework has also reduced the level of interest rates and has facilitated industrial loans by reducing the amount of annual premium to be paid for a settled guarantee by 25% for SMEs and 15% for other companies. The Commission has also established that companies investing in new 'green' products have the right to ask for national aid; indeed, despite the economic crisis, the EU is still far from fulfilling its environmental commitments. Moreover, the framework also raised the safe-harbour threshold for risk-capital investments in order to reduce the increasing number of investments in safe assets and to promote risk-capital investment in SMEs.

It looks like the EU is trying to find a third way in the regulation of competition by taking inspiration from the old Ordoliberal literature. Wigger has indeed strongly criticised the ideological perspective previously followed by Europe that has minimised antitrust enforcement by using US-style analysis based on efficiency evaluation, neoclassical principles, and econometrics.<sup>732</sup> Although many European academics, especially from Germany, are starting to stress the need to resettle the system towards a more social welfare approach, their orthodoxy risks being challenged by the rise of a the Post-Chicago competition approach, which, according to Budzinski, provides 'an

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on Nov. 28, 2007 and published on Oct. 18, 2008) [hereinafter E.C. GUIDELINES].

<sup>732</sup> Angela Wigger, 'Towards a market-based approach: the privatization and microeconomization of EU antitrust law enforcement', in Henk Overbeek et al (eds.), *The Transnational Politics of Corporate Governance Regulation*, 2007, London, Routledge. 106.

Angela Wigger 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism: the Case of Antitrust Enforcement' 2007, 45 *Journal of Common Market Studies* 2007, 2, 487–513

unambiguous manual to the “right” competition policy’.<sup>733</sup>

In conclusion, it is still difficult to understand if the Anglo-Saxon competition model is going to be replaced and, if so, what model is going to replace it. Indeed, while the EU is opting for a stricter regulation of the common market, the US seems still unable to define a new antitrust approach. On the one hand, the Obama administration has to keep the promise of stronger antitrust measures, while confronting the challenge of the financial crisis; on the other hand, however, the neo-liberal tradition is still very hard to challenge.

### *Japan*

From the mid-1980s, since the Japan’s economic performance and its increasingly closed markets were having a negative impact on the American economy, the US promoted a set of institutional arrangements, in the form of bilateral negotiations, that aimed to foster Japanese antitrust provisions against cartels and to open up its market to American economic interests.<sup>734</sup> At the beginning of 1985, the US and Japan started the negotiation of the Structural Impediment Initiative (SII), a bilateral treaty that had to promote both cooperation in antitrust enforcement and open markets. The agreement had strategic importance in fostering both normative and coercive isomorphic processes; indeed, the term cooperation itself covered a wide range of conducts and potential obligations.

The aims of the SII were twofold: on the one hand, it intended to promote a fair antitrust regulation against the anticompetitive and cartelised business practices of the

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<sup>733</sup> Oliver Budzinski, 'Monoculture versus diversity in competition economics', 2008, 32 *Cambridge Journal of Economics* .295–324,304-318. Oliver Budzinski, 'A Note on Competing Merger Simulation Models in Antitrust Cases: Can the Best Be Identified?', 2008, *Joint Discussion Paper Series in Economics by the Universities of Aachen,Gießen, Göttingen Kassel, Marburg, Siegen, ISSN 18673678*.

[http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/index\\_html%28magks%29](http://www.uni-marburg.de/fb02/makro/forschung/magkspapers/index_html%28magks%29)

<sup>734</sup> Clifford A. Jones, Mitsuo Matsushita, *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, 22.

*keiretsu*. Indeed, the scope of the SII was not to completely challenge the structure of *keiretsu* system per se, but to simply expose and detect the anticompetitive behaviour of those Japanese business organisations that affected American business activities.<sup>735</sup> In this sense, this new regulatory process did not have to abolish the traditional Japanese bureaucratic system; on the contrary, it simply had to orient it towards competition and away from protectionism. According to a US Congressional Research Report quoted by Freyer, the Japanese FTC had to ‘monitor the transactions among *keiretsu* firms to determine whether or not they are being conducted in a manner that impedes fair competition’.<sup>736</sup>

On the other hand, the SII envisioned the promotion of a deregulation process that would allow the demolition of all bureaucratic and normative impediments and the complete openness of the Japanese market to American corporations.

The cooperation agreement, therefore, allowed the establishment of a normative and mimetic isomorphism. Japan reformed its own system and accepted a more neo-liberal antitrust institutional culture; at the same time, the neo-liberal culture gradually became a common language between the two countries. This isomorphic process was also a coercive and competitive one, considering that the US had repeatedly threatened to close its borders to Japanese products and that Tokyo needed to rebuild its market structure in order to remain globally competitive.

Hence, the enforcement of the SII resulted in a neo-liberal antitrust enforcement, which gave the JFTC a new legitimacy in subjecting the *keiretsu* to greater transparency. Indeed, according to the SII, the Japanese Federal Trade Commission had to enforce the Antimonopoly Act in order ‘to address anti-competitive and exclusionary practices uncovered’.<sup>737</sup> It also had to provide guidelines and recommendations against

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<sup>735</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 227.

<sup>736</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 227.

<sup>737</sup> Dick K. Nanto, ‘Japan’s Industrial Groups: The Keiretsu’, November 5, 1990, *CRS Report for*

any business actions that could violate the Antimonopoly Law to ensure that *keiretsu* transactions would not restrict the market opportunities of foreign firms. The effect of the SII on Japanese competition policy was so strong that the gap between the US and the Japanese levels of antitrust enforcement narrowed by a wide margin. Moreover, despite the number of antitrust criminal cases was greater in the US than in Japan, the FTC imposed a larger number of fines against cartels.<sup>738</sup>

Additionally, the neo-liberal effects of the SII can be seen in the fact that while competition regulations were indeed implemented, the JFTC simultaneously enforced a deregulation process over many industries. Deregulation plans were proposed for the transportation industry, including airlines, trucking, and taxi services, the non-life insurance industry, the telecommunications industry, and the electric power industry. Strong importance was attached to the need to ensure that the new companies would have access to essential market facilities.<sup>739</sup> According to Osamu Moriya, a member of MITI, 'Now, deregulation is under way in every sector and discretionary powers of the bureaucracy are phased out where possible.'<sup>740</sup>

Since the enforcement of the SII, the US has kept monitoring the evolution of Japan's competition policy and, following a more general international trend, a cooperation process has developed between the two countries. The isomorphism process introduced by the SII continued through the negotiation, on October 7, 1999, of an 'Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anti-Competitive Activities'. The aim

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*Congress, Congressional Research Service, Library of Congress, Washington, DC*, quotes at 18 and 19. Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 227.

<sup>738</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press.

<sup>739</sup> Shogo Itoda, 'Competition Policy of Japan and its Global Implementation' in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 3, 66.

<sup>740</sup> Osamu Moriya 'Creating a New Competitive Business Environment in Japan' in Mitsuo Matsushita, Clifford A. Jones (eds.), *Competition policy in the global trading system*, 2002, Kluwer Law International, chapter 9, 161-174, 163. Quoted also in Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 263.

of the agreement was 'to contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party. The Competition authorities of the parties shall cooperate with and provide assistance to each other in their enforcement activities (Article 1)'.<sup>741</sup>

According to the agreement, since the two economies were becoming more and more connected, it became increasingly necessary to strengthen antitrust cooperation. Hence, since the 1990s, Japan began to gradually open up to competition. For instance, 'entry restrictions were reduced in telecommunications, financial services, taxis, electricity generation and petroleum. Price controls were abolished in industries such as trucking, airlines and brokerage'.<sup>742</sup>

Following this trend, in 2001, Prime Minister Junichiro Koizumi emphasised the need to enhance and revitalise competition. In his inaugural speech, he underlined that enforcing a stronger and effective competition policy played a fundamental part in the general government programme to restructure the economy of the country. This economic 'revitalisation' process was set off in 2005 with the amendments of the Antimonopoly Law (JAML) and again in 2009 with further modifications to the Act.

Despite the opposition of the powerful business groups, the 2005 amendments, in an attempt to make competitiveness more effective, increased the administrative surcharge for the turnover of a company participating in a cartel from 2% to 10%. Apart from the surcharge system, which was designed as a deterrent system against the development of cartels and anti-competitive activities, the reform established also a leniency program in order to incentivise cartel participants to step forward and inform

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<sup>741</sup> Jiro Tamura 'Market Access Issues in Japan's Antimonopoly Law' in Clifford A. Jones, Mitsuo Matsushita (eds.), *Competition Policy in the Global Trading System. Perspectives from the EU, Japan and the USA*, 2002, International Competition Law Series, Kluwer Law International, chapter 8, 156-9.

<sup>742</sup> Michael E. Porter and Mariko Sakakibara, 'Competition in Japan' 2004, 18 *The Journal of Economic Perspectives*, 1, 27-50, 46.

the JTFC of the unlawful activity they were involved in.<sup>743</sup>

The 2005 reform was most strongly criticised by the *Keidanren* group. According to this business organisation, the procedure introduced by the amendment was biased because the JTFC was in charge not only of investigating and issuing the administrative order, but also of reviewing it in the hearing procedure. They argued that it was very unlikely that the examiners would dispute an order issued by themselves. Academics, in contrast, welcomed the reform, arguing that the JTFC was the most appropriate organ to judge competition matters.<sup>744</sup> The Japan Federation of Bar Association, for its part, called for a dual system in which a 'party subjected to a JTFC order would have a choice of petitioning in court or requesting that the JTFC initiate a formal administrative hearing'.<sup>745</sup>

For this reason, the Diet decided that the amendment would be reviewed two years later. However, the 2009 amendment, which took effect in 2010, did not change the hearing procedure and it raised the administrative surcharge to 15%.

Despite the government attempt to promote a fair competition system, the strategy applied by the majority of Japanese enterprises was to turn into mergers or cartels in order to face market difficulties. According to Freyer, this can be explained in terms of cultural influence. Indeed, in a seminal article, he argued that, when asked about antitrust enforcement, the Japanese Ministry of Finance answered him that 'cartels were surely bad', but the phenomenon involving 'Japanese business people meeting over dinner to talk about prices' was quite simply part of their culture.<sup>746</sup>

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<sup>743</sup> Mark R. Joelson, *An International Antitrust Primer I: A guide to the Operations of United States, European Union and Other Key Competition Laws in the Global Economy*, 2006, Kluwer Law International, International Competition Law Series, Volume II, 522-3.

<sup>744</sup> Masaaki Kotabe, Kent W. Wheeler, *Anticompetitive Practices in Japan: Their Impact on the Performance of Foreign Firms*, 1996, Praeger Publisher.

<sup>745</sup> Mitsuo Matsushita, 'Reforming the Enforcement of the Japanese Antimonopoly Law', 2010, *Loyola University Chicago Law Journal*, 521-34, 527.

<sup>746</sup> Tony Alan Freyer, 'Comparative and Historical Perspective on Business Risks and Antitrust in 20<sup>th</sup> Century Central America, Japan, Europe and Australia', December 2003, ESRC, *Centre for Analysis of Risk and Regulation*, Discussion Paper No. 12, London School of Economics and Political Science.

Before the crises, this trend was highly criticised. It was claimed that Japan needed ‘a more flexible economy in which competition is truly open will increase productivity and create new business opportunities’.<sup>747</sup> However, since the beginning of the current financial turmoil, Japan has realised that the *laissez-faire* approach adopted globally has allowed enterprises to abuse their market power. Therefore, ‘a level playing field’ is required ‘since abuse of market power, has become more pronounced with economic globalisation’.<sup>748</sup> In this context, Japan has decided to introduce reforms against unilateral conducts in order to monitor and eventually sanction any attempt of private monopolisation and unfair trade practices. However, the natural disaster caused by Fukushima has added pressure to the already serious *economic* fallout *caused* by the crisis. Nowadays, it is accepted that, in the case of Japan, the reconstruction of the economy and the re-establishment of equilibrium in the system is still a long way off.

## CONCLUSION

As demonstrated above, the institutionalisation of specific antitrust approaches in Europe and Japan can be explained by the phenomenon of isomorphism.

At first, the institutionalisation of the liberal antitrust approach – identified with the Harvard school of thought – in Europe, West Germany, and Japan, was achieved through the combination of different isomorphic processes. Despite the fact that Germany had originally its own school of antitrust thought, namely the Ordoliberal School or Freiburg School, the enforcement of the first antitrust law was coercive. Germany had in fact lost the war and the 1959 Anti-monopoly Law was approved

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<sup>747</sup> Michael E. Porter and Mariko Sakakibara, ‘Competition in Japan’, 2004, 18 *The Journal of Economic Perspectives*, 1, 27-50, 47.

<sup>748</sup> Kiyoshi Hosokawa’s speech, JFTC Commissioner, The 2nd BRICS International Competition Conference, Beijing, China, 21 September 2011, “Regulation against Unilateral Conduct in Japan”. [http://www.jftc.go.jp/en/policy\\_enforcement/speeches/index.html](http://www.jftc.go.jp/en/policy_enforcement/speeches/index.html)

because of the pressure exerted by the Allies to start the decartelisation of its industries. The same happened in Japan, where the antimonopoly law introduced by the US, destroyed the *Zaibatsu*, the industrial groups at the basis of the Japanese economic model.

In Europe, the process of antitrust institutionalisation was different. Indeed, the antitrust regulations introduced in the European Coal and Steel Community Treaty in the 1950, were inspired by Professors Bowie and maintained American roots as well as Ordoliberal ones. In practice, the prescriptions introduced by the law reflected international liberal trends. In this context, the institutionalisation of Harvard-oriented ideas was first of all mimetic; European countries had to reconstruct their economies and needed a model of reference. Secondly, the antitrust institutionalisation trend was, however, also coercive. As the US was providing financial help to the majority of European countries, Europe had to abide by any suggestions coming from American government in terms of market liberalisation and competition regulations.

Yet, the process of antitrust institutionalisation tends to be a path-dependent trend. Building on the liberal principles institutionalised by the first competition regulations, the European member states subsequently developed their own systems by integrating Harvard liberal values in their model of capitalism. This explains why most scholars strongly denied any process of antitrust harmonisation or convergence. In so doing, the liberal roots of the original US antitrust positions were adapted to the local necessities as well as to the local, and already established, model of capitalism.

The onset of the oil crises created the need for Europe and Japan to change their system once again. As both started to apply protectionist reforms, the US decided that something had to be changed. For instance, in Japan, the US coercively introduced the SSII agreement through which Japan agreed to modify its antitrust institutions according to a more efficiency-oriented path. This isomorphism process, however, was also implemented because of competitive motivations. Indeed, Japan wanted to overcome the

crisis and believed that neo-liberal ideas could provide a new roadmap for reaching a sufficient level of development. In Europe, too, the process of isomorphism happened through a cooperative treaty that fostered mimetic and competitive processes. This made Europe more neo-liberal. The EU needed a model of reference to reframe the inefficiencies of its competition system and to stimulate economic growth; moreover, the normative processes established years before encouraged European governments to keep following the US way as Member States were already sharing US-based antitrust discourses.

At present, the neo-liberal model appears moribund. However, there is as yet no process of isomorphism in sight, since neither the US nor Europe nor Japan has rebalanced its economy and a clear plan of reconstruction is still out of reach.

## CHAPTER 6

### THE EVOLUTION OF IDEAS IN THE GLOBAL(ISING)

#### ECONOMY

Having defined the antitrust internalisation process occurred in Europe and Japan, in what follows this thesis analyses how the US spread antitrust ideas or theories at a global level through the creation of international regimes. Here, differently from Keohane and Nye, regimes are not interpreted as ‘networks of rules, norms and procedures that regularise behaviour and control its effects’.<sup>749</sup> Rather, they are explained in terms of shared and accepted ways of understanding specific conducts as right or wrong.

Following Meyer and Rowan, it is possible to posit that international organisations have been used by the US to institutionalise specific patterns of market behaviour and thus acquire legitimacy at a global level.<sup>750</sup> To be sure, based on its role in the creation of international institutions in the form of agreements or treaties, it can be argued that the United States have attempted to spread and promote specific views of antitrust at the global level – and to have done so in furtherance of its own economic interests. In this view, the US used international organisations as the ‘physical entities’

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<sup>749</sup> Robert O. Keohane and Joseph S. Nye, Jr., *Power and Interdependence: World Politics in Transition*, 1989, Little-Brown, 17; quoted in Susan Strange ‘Cave!Hic Dragones: A Critique of Regime Analysis’, 1982, 36 *International Organization*, 2, 479-496, 485 and in Hugo Stokke, ‘Institutional Approaches to the Study of International Organization’, 1996, Working Paper, *Chr. Michelsen Institute, Development Studies and Human Rights Bergen Norway*.

<sup>750</sup> Meyer, John W. and Brian Rowan, ‘Institutionalized Organizations: Formal Structure as Myth and Ceremony’, 1977, 83 *American Journal of Sociology* 2, 340-363. Fabrizio Girardi, ‘Transnational diffusion: Norms, ideas, and policies’, in Walter Carlsnaes, Thomas Risse and Beth Simmons (eds.), *Handbook of International Relations*, 2002, SAGE Publications, chapter 18, 456.

through which rules and conventions functional to American economic needs could be diffused.<sup>751</sup>

This process allowed the development of an international regime, based on ‘principled and shared understandings of desirable and acceptable forms of behaviour’ or shared worldwide models able to construct and propagate institutions in order to influence national policies.<sup>752</sup> Indeed, as Goldstein and Keohane pointed out, those worldviews, or common principles, which were acknowledged and accepted by recognised world elites, were able to exert the greatest impact on the social realm.<sup>753</sup>

The promotion of a common international understanding of antitrust has taken different forms over time. This is because the United States have employed a number of different instruments to internationalise its competition ideas. For instance, after World War II, the US leveraged its economic and military supremacy to create the first functioning group of international organisations. While the material power exerted by the US allowed the construction of an international framework to serve specific ideas and particular interests, the maintenance of the system was not as dependent on sheer power. On the contrary, it was linked to a sort of normative institutionalisation of the American antitrust approach, which, at the same time, provided the US both with international legitimacy in its governance of competition and with the possibility to enforce daring antitrust policies with international reach.

Against this background, this chapter will provide an historical overview of US attempts to internationalise its antitrust ideas by means of international organisations. It

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<sup>751</sup> Oran R. Young, ‘International Regimes: Toward a New Theory of Institutions’, 1986, 29, *World Politics* 1, 104-122, 108.

<sup>752</sup> John W. Meyer, John Boli, George M. Thomas and Francisco O. Ramirez, ‘World Society and the Nation-State’, 1997, 103 *American Journal of Sociology* 1, 144-181. Friedrich Kratochwil and John Gerard Ruggie, ‘International Organization: a State of the Art on an Art of the State’, 1986, 40 *International Organization* 4, 753-775, 764.

<sup>753</sup> Judith Goldstein & Robert O. Keohane, ‘Ideas & Foreign Policy: an Analytical Framework’ in Judith Goldstein & Robert O. Keohane (eds.), *Ideas & Foreign Policy: beliefs, Institutions and Political Change*, 1993, Cornell University, 3-31, 8-11.

is worth noting that organisations are here interpreted, in Hodgson's words, as 'special' kinds of institutions, whose physical framework allows the implementation of institutionalised practices<sup>754</sup> In this sense, they can be considered the supporting structures of international regimes and globalisation. Indeed, globalisation is here conceived as the result of institutional isomorphic processes, which has allowed the spread and the internalisation of ideas and the institutionalisation of the same theoretical framework into different countries. This has allowed the creation of a global arena where countries maintained the peculiarities of their model of capitalism but at the same time, they began to conceive market issues according to similar path.

With that in mind, the chapter will provide a conclusive analysis of the evolution of antitrust paradigms in the globalising economy. Indeed, as evidenced in my historical analysis, these schools of thought had a profound impact on the way antitrust was perceived, understood, and institutionalised during the Great Depression, the oil shocks, and the current financial crisis at both the national and international level. The central aim of this chapter, therefore, is to explain the process of antitrust institutionalisation that took place during these crises as the outcome of the influence exerted by antitrust ideas on the way the US, Europe, Japan and the international arena came to understand competition and to identify their interests.

#### ANTITRUST AND INSTITUTIONAL CHANGE IN THE INTERNATIONAL CONTEXT

##### *The Three Pillars of the Golden Age of Capitalism and the Internationalisation of Antitrust Ideas*

The first attempt by the US to internationalise a specific antitrust approach dates back to the final years of the Great Depression. As soon as the New Deal and the institutionalisation of the corresponding antitrust method managed to kick-start the US economy, Roosevelt realised that only by re-establishing positive trends in international

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<sup>754</sup> Geoffrey M. Hodgson 'Economics and Institutions', 1988, *Journal of Economic Issues*.

trade could the crisis be truly overcome.<sup>755</sup> Since the expansion of global trade was vital for US prosperity, President Roosevelt decided to intervene in support of the Reciprocal Trade Agreement Act (RTAA). In June 1934, the President's secretary of state, Cordell Hull, advocated to the Congress the adoption of the RTAA, which, as an amendment to the 1930 Smoot-Hawley Tariff Act, marked the end of the historical era of American protectionism.

The aim of the Act was to stimulate the US economic recovery by introducing the principles of non-discrimination and reciprocity in trade policy. Indeed, as much as the US government sought to increase exports, it could not afford to reduce imports because other countries would simply respond in kind. Moreover, a policy of reciprocal trade liberalisation would effectively balance the economic benefits of increasing exports with the negative externalities of imports in the domestic competing sector.<sup>756</sup>

The principle of non-discrimination contributed to the liberalisation programme that, together with Keynes' October 1940 proposal for the implementation of an international monetary system, constituted the basis for the institutionalisation of an international liberal economic order. Moreover the 1941 Atlantic Chart and the

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<sup>755</sup> Annie-Marie Burely, 'Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State', in John Gerard Ruggie (eds.), *Multilateralism Matters*, 1993, Columbia University Press, New York, 131-132.

<sup>756</sup> The effects of the RTAA were twofold: on the one hand, by shifting authority over trade policy from Congress to the President, the Act basically modified the nature of the US policymaking process. On the other hand, the law allowed the President to negotiate only trade agreements that did not need senate ratification. Indeed, the Act was intended to allow the President to negotiate commercial agreements on tariff reductions with other countries in order to stimulate US exports and diminish production surplus. The President had the power to negotiate trade agreements for three years; after that period he could request the Congress to renew his authority.

Each agreement, incorporating the principle of 'unconditional most-favoured-nation treatment', could permit a reduction of import duties of up to 50% of Smoot-Hawley levels. The tariff reduction process was a driving element of the wider and more radical transformation of the international trade dynamics that would later result in economic globalisation. The RTTA introduced the principles of non-discrimination and reciprocity in the American trade policy. During the negotiation process under the RTAA, the US generally obtained a complete opening of foreign countries' markets to American exports by making some strategic concessions. Between 1934 and 1947, by reducing tariffs from an average of 48% to an average of 25%, the US signed 29 different trade agreements with foreign countries. Moreover, by exploiting its condition of non-interventionism in the on-going conflict, the US also solved the problems of over-production and unemployment by selling its surplus to Europe. In this view, the war helped the US to stimulate its economic recovery. Indeed, only once it obtained world leadership in the manufacture of tradable goods did the US decide to enter the war and to work towards the resolution of world conflicts in order to further the global liberalisation of trade.

consequent 1942 framework agreement signed by Roosevelt and Churchill gave the US the authority to influence the normative development in the after-war period. Indeed, article 7 defined the compensation for the US military and economic engagement in terms of US normative intervention over the Allies post-war economic and trade policies.<sup>757</sup>

Indeed, no sooner did commercial negotiations begin that countries started in earnest to replace their previously protectionist systems with new liberal ones. However, the stability of this new liberal order at a global level needed to be preserved and guaranteed by a system of *ad hoc* international organisations. To this end, the creation of an international organisation with the scope of promoting antitrust provisions became of vital importance by governments all over the world. This laid the foundations of the International Trade Organisation (ITO).<sup>758</sup>

Starting from the early 1943, the US government promoted the creation of a Committee on Post-War Foreign Economic Policy. This agency was made up of 12 'special' working groups engaged in the post-war planning process. Among them, the Special Committee on Private Monopolies and Cartels was of strategic importance to the US and was heavily influenced by its interests and economic plans.<sup>759</sup>

Indeed, the first internal reports on international cartels produced by the working group painted a dramatic picture. The international market was characterised by the presence of a strong and complex interrelationship between governments and the investments and technology transfers of multinational corporations. This intricate interdependency, which connected private and public ventures and speculations,

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<sup>757</sup> Jean-Christophe Graz, *Aux Sources de l'OMC, la Charte de la Havane, 1941-1950*, 1999, International Economic and Social History Publication, Droz, 76-80.

<sup>758</sup> See: Jean-Christophe Graz, *Aux Sources de l'OMC: La Charte de la Havane, 1941-1950*, 1999, International Economics and Social History Publications, Droz, 17-38, 75-102.

<sup>759</sup> Anne-Marie Burly, 'Regulating the World: Multilateralism, International Law, and the Projection of the New Deal Regulatory State', in John Gerard Ruggie (eds.), *Multilateralism Matters*, 1993, Columbia University Press, New York, 133.

indicated the need for a comprehensive international agreement to enforce antitrust patents against international cartels and other anticompetitive practices. In fact, in accordance with the liberal Keynesian trend, the dominant antitrust ideas of the time, based on Harvard-oriented principles, identified the need to foster general welfare by enhancing competition and strictly controlling the creation of cartels, mergers and monopolies in the international and national markets.

Following this trend, in 1944, shortly before the end of the war, Roosevelt organised an international conference at Bretton Woods, New Hampshire, to work out a strategy to ensure a post-war economic recovery based on free competition and the promotion of welfare.<sup>760</sup> The aim of the conference was to prevent the sort of economic and political turmoil that resulted from the outcome of the Versailles Treaty. Moreover, the US, in view of its new global leadership role, wished to spread the same system of embedded liberalism of the New Deal to the rest of the world and to combine free international trade with state guarantees of social welfare.<sup>761</sup>

The economic arrangements established in Bretton Woods revolved around the institution of a gold standard that pegged the dollar to gold. In addition, the Allies, in accordance with Keynes's proposal to support policy directed as much at economic growth as at full employment, called for the establishment of the ITO to complement the work of the International Monetary Fund and the World Bank.

The latter institutions were considered the two pillars of the economic and financial global order. In contrast, the ITO, as an autonomous supranational body, had to fulfil the function of a third pillar. The ITO was meant to be in charge of international trade policies, specifically by promoting competition and by avoiding the creation of

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<sup>760</sup> Robert Kuttner, *The End of Laissez-Faire: National Purpose and The Global Economy After The Cold War*, 1991, New York, Knopf: Distributed by Random House, 25-54.

<sup>761</sup> John G. Ruggie, 'International Regimes, Transactions, and Change: Embedded Liberalism in the Post War Economic Order', 2000, *International Organization* 36, 379-415. In Howard H. Lentner, *Power and Politics in Globalization: The Indispensable State*, 2000, Routledge New York, London, 81.

international cartels beyond the reach of national policies. The organisation was given the duty to safeguard the system against any of the restrictive trade practices that characterised the world economy during the 1930s. Furthermore, it had the authority to investigate and make recommendations.<sup>762</sup>

The United Nations Economic and Social Council approved, in 1964, the first resolution on the creation of the ITO. The organisation charter was then discussed in New York and in Geneva in 1947 and in Havana in 1948. However, during the Geneva meetings, besides the drafting of an ITO charter, government representatives agreed to prepare a multilateral treaty containing general principles of trade and tariff reductions, namely, the General Agreement on Tariffs and Trade (GATT). As soon as the GATT treaty was completed in 1947, governments decided to adopt a Protocol of Provisional Application of GATT after January 1, 1948, in order to allow the treaty and its tariff schedules to immediately enter into force.<sup>763</sup> Although the ITO charter was later completed during the Havana Conference of 1948, it never actually entered into force. Those countries that pressed for its adoption waited in vain for the US to approve the charter.<sup>764</sup> The US government, however, refused to ratify a binding treaty in international trade. By 1947, it was clear that Europe and Japan were slowly recovering and that the US was the only industrialised nation that was left unscathed by the war. Only the US disposed of the economic and financial resources necessary to help the other industrialised countries to overcome the economic havoc wrought by the crisis and the war. In this context, the United States had no reason to accept the authority of an international organisation in matters of global trade competition. Open borders and free trade would allow American manufactures to enter new markets and “domestic

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<sup>762</sup> Wells Wyatt, *Antitrust and the Formation of the Post-war World*, 2002, Columbia University Press, New York, 120-121.

<sup>763</sup> Protocol of Provisional Application to the General Agreement on Tariffs and Trade, 30, October 1947, 55 U.N.T.S. 308.

<sup>764</sup> Mitsuo Matsushita, Thomas J. Schoenbaum, Petros C. Mavroidis, *The World Trade Organization, Law, Practice, and Policy*, 2006, Oxford University Press, 1-2.

competition policy would treat the rest of the world as if it did not exist”.<sup>765</sup> In fact, in virtue of the extraterritorial reach of its rules, American antitrust law would even be able to prosecute anticompetitive practices in both the internal and the international market, thus bypassing the need of an international organisation. The US was especially reluctant to create an international antitrust organisation because this would end up exerting the same authority as the central government and, as such, would be allowed to judge and legislate over the practices of private businesses.

As a result, the International Trade Organisation never came to fruition. In 1948, after President Truman submitted the ITO charter, the Republicans gained control of Congress and finally rejected the charter.<sup>766</sup> Consequently, in 1950, the Truman administration announced that it would no longer seek congressional approval for the ITO.

In the absence of an international organisation that dealt with trade and antitrust, which was to be the ‘third pillar’ of the Bretton Woods system, the US supported a narrower multilateral agreement for trade: The General Agreement on Tariffs and Trade (GATT).<sup>767</sup> The GATT had to simply promote liberal trade agreements through multilateral cooperation by encouraging the lifting of national barriers and protectionist tariffs.<sup>768</sup> In this sense, the GATT was perfect for spreading a shared perception of antitrust at an international level in such a way as to fulfil the American interests of free market without directly intervening in any antitrust litigation. This allowed American firms to easily expand their commercial activities worldwide, while only few foreign firms

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<sup>765</sup> Rudolph J. Peritz, *Competition Policy in America. 1818-1992, History, Rhetoric, Law*, 1996, Oxford University Press, 178-180.

<sup>766</sup> Joel Davidow, ‘The Seeking of a World Competition Code: Quixotic Quest?’, in Oscar Schachter and Robert Hellawell, (eds.), *Competition in International Business Law and Policy on Restrictive Practices*, 1981, New York, Columbia University Press, 361-365.

<sup>767</sup> The other two “pillars” that were created as agreed at the Bretton Woods Conference were the International Monetary Fund and the World Bank.

<sup>768</sup> Frederic M. Scherer, ‘Efficiency, fairness, and the early contributions of economists to the antitrust debate’, 1990, *Washburn Law Journal*, 29, 12.

were able to directly invest in the US domestic market.<sup>769</sup>

This is a classic example of how the US managed to create an *ad hoc* organisation to formally and informally institutionalise specific antitrust approaches according to its own market interests. The General Agreement on Tariff and Trade, together with the International Monetary Fund and the World Bank, represents the liberal institution that internationalised Keynesian and Harvard ideas, promoted liberal trade programmes, and stabilised the international market by creating a common arena where a normative isomorphism could develop. This liberal international regime was based on shared liberal ideas and was sustained by the principled belief that competition without control was detrimental and the causal belief that every attempt to constrain the market had to be regarded as economically inefficient.

Later often identified as the Golden Age of capitalism, this historical period lasted until the beginning of the 1970s. At that time, the US realised that the international economic trends called for a radically new approach. In conclusion, this is a perfect illustration of the way interests shaped the promotions of specific ideas, which, in turn, reflected and institutionalised particular economic needs, such as the necessity to liberalise and open national markets according to causal and principled beliefs. Furthermore, it also shows how ideas themselves contributed to the creation of international organisations and how the latter shaped in its turn the perceptions on the feasibility of economic practices. In this sense, ideas and interests, at an international level, combined with the strategic economic and military power exerted by the US at the time, created a legitimate international regime that defined how business practices were to be universally perceived and understood.

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<sup>769</sup> Raymond Vernon, Debora Spar, 'Beyond Globalism Remaking American Foreign Economic Policy', 1989, New York, *Foreign Affairs*, 109-139.

*US Antitrust and International Trade Policy during the 1970's: from Harvard to Chicago*

In the decades after World War II, the American commitment to multilateral regimes and international organisations became conditional. The US, while limiting other states' room for action through multilateral rules and institutions, strove to maintain special privileges for preserving its freedom and achieving its interests.<sup>770</sup> Although the economic dominance of the United States started to erode at the beginning of the 1970s, its legitimacy over the GATT and other international organisations was still solid enough to allow American government to use multilateral negotiations to try to influence antitrust policies. Unlike in the post-war period, this legitimacy was not based on coercive power, but on an international normative and mimetic isomorphic process that created shared perceptions of anti-competitive practices in line with those expressed by the US.<sup>771</sup>

Indeed, the unstable political and economic climate of the 1970s, together with increased European and Japanese competition, significantly challenged the US international status quo and created new economic needs. Just as in the 1940s, the United States hastened to promote a new order in the international trade system through the implementation of new institutions. These were designed to create a competitive advantage for American corporations and would thus allow the US to weather the recessionary squalls.

At the outset, the process of institutional change was inspired by a reinterpretation of the same principles of the 1950s according to the needs of the time. By translating Harvard ideas into the Kennedy Round, Nixon aimed to re-launch US competitiveness not by merely applying antitrust provisions, but by blocking the

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<sup>770</sup> David Skidmore, 'Strategic choice, Unilateralism or Multilateralism?', in David Skidmore (ed.), *Paradoxes of power*, chapter 3, 101.

<sup>771</sup> James A. Baker III, 'Renewing America's Competitiveness', in Claude E. Barfield and John H. Makin, *Trade Policy and U.S. Competitiveness*, 1987, American Enterprise Institute for Public Policy Research, chapter 1, 5. Robert Z. Lawrence, 'The Challenge of Deeper International Integration: U.S. Trade Policy Options' in Geza Feketekuty and Bruce Stokes (eds.), *Trade Strategies for a new era: Ensuring U.S. Leadership in a Global Economy*, 1998, Council on Foreign Relations Book, chapter 17, 324-359.

apparently anticompetitive foreign practices that were damaging the US trade balance. The Kennedy round consisted in the sixth session of General Agreement on Tariffs and Trade (GATT) trade negotiations held in 1964-1967 in Geneva. Its rationale was to formally institutionalise regulations against anticompetitive practices, to fight trade barriers settled by European and Japanese governments, and to allow American companies to regain or retain their dominant international position.<sup>772</sup> Accordingly, ‘as trade barriers [were] reduced around the world, American exports [would] increase substantially, enhancing the health of our entire economy’.<sup>773</sup>

With this in mind, the resolution of the Kennedy Round was institutionalised in the 1974 Trade Act. To be precise, section 201 of the Act provided American business interests with an official representation, by requiring the International Trade Commission (ITR) to consider the petitions presented by domestic industries or workers that had been negatively affected by growing imports. In those cases, the ITR had to investigate for a period of 6 months and if any illegal behaviour or injury was discovered, the US could resort to restrictive measures.<sup>774</sup> Hence, the Kennedy Round and the consequent

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<sup>772</sup> Robert E. Baldwin, ‘U.S. Trade Policy: Recent Changes and Future U.S. Interests’, May 1989, 79 *The American Economic Review* 2, Papers and Proceedings of the Hundred and First Annual Meeting of the American Economic Association, 128-133. Robert Z. Lawrence, ‘The Challenge of Deeper International Integration: U.S. Trade Policy Options’ in Geza Feketekuty and Bruce Stokes (eds.), *Trade Strategies for a new era: Ensuring U.S. Leadership in a Global Economy*, 1998, Council on Foreign Relations Book, chapter 17, 324-359.

<sup>773</sup> Richard Nixon, ‘Special Message to the Congress Proposing Trade Reform Legislation’, April 10, 1973, available at <http://www.presidency.ucsb.edu/ws/?pid=2661>.

<sup>774</sup> Additionally, section 301 could be used by domestic industries to push the US government to unilaterally bring a matter to international dispute settlement. Moreover, where market-opening activities ultimately were unsuccessful, the act empowered the president and the United States Trade Representatives (USTR) to address against unfair practices tolerated by local governments. This provision, being used to limit the access to the market to those foreign companies that created an unjustifiable burden on US commerce, was a clear example of the different use of antitrust and trade policy. Indeed, according to the US antitrust regulation, in order to start a legal action against a company and to challenge foreign market access, it was necessary to demonstrate the existence of an effective attempt to restrain trade that affected the possibility for American companies to compete. On the contrary, this section allowed the President to establish whether the trade practices were unjustifiable, unreasonable, or discriminatory, and if burdened or restricted US commerce.

The President was also given the power to negotiate with foreign countries reciprocal tariff concessions during the five-year period beginning on the date of enactment.

The Congress later broadened Section 301 in 1979, 1984, 1988 and 1994. The statute now covers foreign barriers to investments, intellectual property, protection, and trade in all good and services. The amendments also restricted the President’s discretion to avoid taking action. In particular, the 1988

Trade Act effectively boosted US international trade. Emboldened by the ‘protection’ of the government, various American industries, in the semiconductor, pharmaceutical, automobile, photography, and entertainment sectors, among others, started to use the Act to fight off foreign companies, primarily Japanese ones.<sup>775</sup>

Consequently, after the tortuous four years of the Kennedy Round trade negotiations that concluded in 1967, the US called for another large round of talks to discuss international competition problems. Many economists of the time maintained that one of the causes of the US deteriorated balance of payments was the presence of many non-tariff trade barriers (NTBs), such as the EC Common Agricultural Policy, that restricted US exports around the world.

For this reason, in December 1970, Nixon, while promoting the Smithsonian Agreement to provide the international arena with a provisional monetary settlement, asserted that the temporary 10% surcharge established by the agreement would be cancelled only when another round of negotiations on NTBs would be established. Therefore, the Smithsonian Agreement became the first step toward the launch of the Tokyo Round in 1973. The negotiations did not arrive at any agreement until the US started to lead its meetings in January 1975. At this point, the level of trade barriers was reduced from 27 % to an average of 5%. Furthermore, the Round promoted a series of

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amendment gave the authority to take decisions concerning section 301 directly to URST, without any Presidential involvement. The scope of the Act and its amendments was to broaden the areas of competence, covering sectors of trade that were not yet regulated by international trade rules, such the intellectual property protection and trade services.

Chung Wan Jae, *the Political Economy of International Trade: U.S. Trade Law, Policy and Social Cost*, 2006, Lexington Books, 24. Miles Kahler, *Regional Futures and Transatlantic Economic Relations*, 1995, New York, Council on Foreign Relations Press, 45-48. Gregory C. Shaffer, ‘The Blurring of Intergovernmental: Public and Private partnerships behind US and EC trade claims’ in Mark A. Pollack, and Gregory C. Shaffer (eds.), *Transatlantic Governance in the Global Economy*, 2001, Boulder CO and Oxford, Rowman and Littlefield, Part II, chapter 4, 98. Thomas R. Howell, ‘The Trade Remedies: A US Perspective’, in Geza Feketekuty and Bruce Stkes (eds.), *Trade Strategies for a new era: Ensuring U.S. Leadership in a Global Economy*, 1998, Council on Foreign Relations Book, chapter 1, 299-323. Harvey M. Applebaum, ‘The Interface of the Trade Laws and the Antitrust Laws’, 1998, 6 *George Mason Law Review*, 479-492.

<sup>775</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 154-55

codes as the ‘Tokyo Round Codes’ or ‘MTN codes’ to reduce NTBs.<sup>776</sup> However, the US failed to negotiate a new agricultural policy for Europe and to establish stronger discipline over domestic and export subsidies.<sup>777</sup>

For these reasons, as soon as the Tokyo Round was concluded, US companies’ growing concern with unfair trade practices made clear that the newly negotiated GATT codes were not sufficient.<sup>778</sup> It was evident that the Harvard principles were not responding effectively to the economic needs of the time. Moreover, during the 1980s, the US registered a trade downturn that confirmed the ideas that unfair trade practices were eroding US competitiveness. In reality, other different causes contributed to the US deficit as the high government spending, the tight monetary policy applied by the Federal Reserve and an abnormal increase in the value of the dollar that created a disadvantage for American local enterprises, facilitating the rise of imports.<sup>779</sup> Additionally, from 1980 to 1982 the world economy suffered a period of economic stagnation that caused a sharp decline in international trade. As in the 1970s, the increasing competition that American firms had to face, resulted in the demand for institutional changes that began to be inspired by the Chicago School.<sup>780</sup>

#### *A New Trend: Reagonomics and the Antitrust Neo-liberal Revolution*

The second attempt to institutionalise a new antitrust approach took place during the Reagan presidency. In those years, as the economic crisis challenged the international

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<sup>776</sup> G. John Ikenberry, ‘Manufacturing Consensus: The Institutionalization of American Private Interests in the Tokyo Trade Round’, Apr. 1989, 21 *Comparative Politics* 3, 289-305.

<sup>777</sup> Robert E. Hudec, *Enforcing International Trade Law: The Evolution of GATT Legal System*, 1991, Butterworth Legal Publishers, 19-28.

<sup>778</sup> Robert E. Baldwin, ‘U.S. Trade Policy: Recent Changes and Future U.S. Interests’, May 1989, 79 *The American Economic Review* 2, Papers and Proceedings of the Hundred and First Annual Meeting of the American Economic Association, 128-133.

<sup>779</sup> Robert E. Baldwin, ‘U.S. Trade Policy: Recent Changes and Future U.S. Interests’, May 1989, 79 *The American Economic Review* 2, Papers and Proceedings of the Hundred and First Annual Meeting of the American Economic Association, 128-133.

<sup>780</sup> John Peterson and Mark A. Pollack, *Europe, America, Bush Transatlantic relations in the twenty-first century*, 2003, Routledge, 33.

economic order and foreign anticompetitive private conducts started to damage the American economy, the Reaganomics doctrine pointed the way to a new antitrust approach.<sup>781</sup>

From the beginning of the 1980s, under the aegis of the Chicago Boys, Reagan used the legitimacy of the GATT negotiations to promote the same principle at an international level and to justify his daringly far-reaching antitrust policy ambitions. In essence, President Reagan's idea was to re-launch the American economy in the international arena by liberalising the markets, even at the cost of mitigating antitrust provisions.<sup>782</sup>

For instance, in 1982, as a result of the conclusion of the Tokyo Round trade negotiations to reduce non-tariff barriers, the Reagan Administration supported the Foreign Trade Antitrust Improvements Act (FTAIA) in order to minimise the effects of the extraterritorial antitrust jurisdiction.<sup>783</sup> Indeed, by amending the Sherman Act and the Federal Commission Act, the FTAIA limited the application of antitrust controls over the conducts of those multilateral corporations, operating at an international level whose operations could have a direct and negative effect on US commerce or would otherwise exclude US companies.<sup>784</sup> The Act also removed from section 7 of the Clayton Act jurisdiction all joint ventures engaged exclusively in export trade.<sup>785</sup> Also as a result of the Uruguay Round, President Reagan signed into law the Export Trading Company Act (ETCA) in October 1982. The aim of the ETCA was primarily to reduce US balance-of-

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<sup>781</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 154.

<sup>782</sup> Tony A. Freyer, *Antitrust and Global Capitalism*, 2006, Cambridge University Press, 149.

<sup>783</sup> See: G. John Ikenberry, 'Manufacturing Consensus: The Institutionalization of American Private Interests in the Tokyo Trade Round', Apr. 1989, 21 *Comparative Politics* 3, 289-05. Note 3: 'The results of the Tokyo Round are remarkable in several aspects. First the agreements pushed forward efforts at trade liberalization. Tariffs were reduced to a post-war low, weighted average tariffs on industrial goods declined from 7.0 percent to 4.7 percent. The total value of trade affected by tariff concessions has been estimated in GATT documents to be in the range of \$ 155 billion.'

<sup>784</sup> Yuri Devuyt, 'Transatlantic Competition Relations' in Mark A. Pollack, M. A. and Gregory C. Shaffer (eds.), *Transatlantic Governance in the Global Economy*, 2001, Boulder CO and Oxford: Rowman and Littlefield, Part III, chapter 5, 131.

<sup>785</sup> George E. Garvey, 'The Foreign Trade Antitrust Improvements Act of 1981', 1982-1983, 14 *Law and Policy in International Business Review* 1, 1-46.

payment deficits by allowing the formation of new export ventures.<sup>786</sup> Indeed, at the beginning of the 1980s, Western economies, including the United States, were still plagued by massive and growing trade deficits.

Despite repeated efforts to boost their exports, many governments resorted to discouraging their competitors through tariff and non-tariff barriers. Foreign producers, particularly in Japan, were perceived as excessively and unfairly intrusive into US markets (they sold items ranging from automobiles to high-technology goods). Moreover, US companies were experiencing strong competition in overseas trade especially because many governments were granting aid to local enterprises and multinational trading companies. Hence, with the passing of the ETCA, Congress was attempting to foster American competitiveness abroad by allowing US companies to combine their resources.

The ETCA represented an alternative solution to a protectionist approach characterised by import restrictions, quotas, and other similar measures.<sup>787</sup> Indeed, it established procedures that allowed the Department of Commerce and the Department of Justice to certify export agreements under which qualified export activities could receive antitrust immunity.<sup>788</sup> Moreover, under Title IV, the Sherman Act could only be applied against those conducts that had a 'direct, substantial and reasonably foreseeable affect' in domestic US markets, import trade, or the export trade of another US person.<sup>789</sup>

Consequently, by promoting a more liberal approach, Reagan allowed the frenetic

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<sup>786</sup> Cornelius J. Golden, Charles E. M. Kolb, 'The Export Trading Company Act of 1982: An American Response to Foreign Competition', April 1983, 58 *Notre Dame Law Review*, 743-92.

<sup>787</sup> Cornelius J. Golden, Charles E. M. Kolb, 'The Export Trading Company Act of 1982: An American Response to Foreign Competition', April 1983, 58 *Notre Dame Law Review*, 744.

<sup>788</sup> George E. Garvey, 'The Foreign Trade Antitrust Improvements Act of 1981', 1982-1983, 14 *Law and Policy in International Business Review* 1, 1-46.

<sup>789</sup> In addition, the National Cooperative Research Act of 1984 allowed the formation of transnational Research and Development joint ventures to help U.S. companies to compete with foreign rivals, especially with Japan and Western Europe. David L. Foster, Gregory L. Curtner, Elizabeth C. Dell, 'The National Cooperative Research Act of 1984 as a Shield from the Antitrust Laws', 1985, 5 *J.L. & Comm.* 347-71. Cornelius J. Golden, Charles E. M. Kolb, 'The Export Trading Company Act of 1982: An American Response to Foreign Competition', April 1983, 58 *Notre Dame Law Review*, 743-92, 744.

development of business transactions in the international market in order to accelerate the phenomenon known as ‘economic globalisation’. Accordingly, the Uruguay round, formally launched in September 1986, aimed at revising the general policies of the GATT according to a more liberal perspective. Among the many important issues discussed during the round were the elimination of tariff and nontariff barriers to trade and the development of clear international trading rules. GATT member countries agreed to cut their import tariffs by an average of 36% and to limit state aid practices of domestic subsidies.

However, the Uruguay Round negotiations concluded in 1994, in Marrakesh, without agreeing on any specific international antitrust regulation. On the one hand, Reagan started to support an increasingly liberal antitrust approach and, on the other, the GATT and the WTO (created during the Uruguay Round) were far from obtaining direct jurisdiction over private anticompetitive conducts.<sup>790</sup> Therefore, while the European Union made pressure to empower the WTO to create a global agency to control antitrust, to prohibit hard-core cartels, and to promote transparency and non-discriminatory practices, the US remained sceptical.<sup>791</sup>

Instead, it had rather support the development of the International Competition Network (ICN), an *ad hoc* international network where normative isomorphism processes could eventually allow the international diffusion of Chicago Boys competition ideas.<sup>792</sup>

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<sup>790</sup> Harvey M. Applebaum, ‘Are U.S. International Trade and Commerce Conduct Laws in Harmony with Traditional Antitrust Law and Policy?’, 1980, 49 *Antitrust Law Journal*, 1207-15.

<sup>791</sup> Yuri Devuyt, ‘Transatlantic Competition Relations’ in Mark A. Pollack, M. A. and Gregory C. Shaffer (eds.), *Transatlantic Governance in the Global Economy*, 2001, Boulder CO and Oxford: Rowman and Littlefield, Part III, chapter 5, 133. John Peterson and Mark A. Pollack, *Europe, America, Bush, Transatlantic relations in the twenty-first century*, 2003, Routledge, 33.

<sup>792</sup> The ICN, launched in 1993, was an international agency with no executive or juridical powers; it was constituted by national antitrust representatives from different countries and aimed at tackling global antitrust problems by promoting policy coordination. Furthermore, during the 1990s, both the initiative of the Organization for Economic Cooperation and Development (OECD) to create a forum of discussion on competition policy and the promotion by the United Nations Conference on Trade and Development (UNCTAD) of a ‘Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices’ failed to gain enough traction. Mariana Bode, Oliver Budzinski, ‘Competing Ways Towards International Antitrust: the WTO versus the ICN’, 2005, 3

The ICN would promote the global adoption of the causal beliefs of efficiency and *laissez faire* to justify the lack of state intervention. Here, globally shared ideas were strictly of the neo-liberal kind.

Hence, the end of the Uruguay Round can be seen as the formal reestablishment of a post-crisis international order based on a form of multilateral institutionalism led by the American government and designed to allow neo-liberalism and Chicago ideas to spread globally. Indeed, the same neo-liberal ideas promoted by Reagan at home and at a European and Japanese level, were now meant to go global without being subjected to any binding international antitrust organisation with the authority to block or check American companies.<sup>793</sup>

#### *The Doha Round and the Chicago Ideas*

Since the beginning of the 1990s, a global process of national reforms of local institutions began to take place. While the US redesigned its antitrust policy under the influence of Chicago School ideas, it also demanded Western and Eastern Europe, Asia, Africa, and Latin America to conform to such neo-liberal principles.<sup>794</sup> Europe, Japan and many other countries welcomed such changes and increasingly engaged in debates around the necessity to internationalise their competition policy in response to market globalisation.

In this context, great importance has been given to the process of coordination, convergence and harmonisation of competition laws. For instance, the WTO, initially promoted to generate institutional isomorphism at the international level, has switched its focus to antitrust issues *per se* and competition policy entered the agenda of the third

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*Marburg Papers on Economics*, 9. Mario Todino, 'International Competition Network : The State of Play After Naples', 2003, 26 *World Competition* 2, *Kluwer Law International*, 283-302.

<sup>793</sup> Andrew Walter and Gautam Sen, *Analyzing the Global Political Economy*, 2009, Princeton University Press, 37.

<sup>794</sup> David Kotz, 'Neoliberalism and the US Economic Expansion of the 1990s', 2003, *Economics Department and Political Economy Research Institute Thompson Hall, University of Massachusetts*.

WTO Ministerial Conference, held in Seattle from November 30 to December 3, 1999. Institutional convergence has also been fostered through the creation of the International Competition Network in 2001, which aimed at identifying and sharing the best practices in competition matters among its members.<sup>795</sup> The ICN is today considered the most influential organisation in promoting real convergence through informal interaction among antitrust agencies and practitioners.<sup>796</sup> Indeed, the members of every antitrust authority meet every year, in one of the hosting member countries, to discuss antitrust policy implementation and practical competition cases; this promotes a soft convergence in competition policies, improves cooperation, and establishes non-binding best practices.<sup>797</sup>

The latest wave of interest in antitrust coordination was sparked by the need to regulate international markets and reflected the ideas maintained by many academics that while competition is hard to harmonise, there is still a possibility to create a common theoretical or ideological ground for enforcing similar policy paradigms.<sup>798</sup>

In the same vein, since the beginning of his presidency, Bush has actively worked with

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<sup>795</sup>Wolfgang Kerber and Oliver Budzinski 'Competition of Competition Laws: Mission Impossible?', in Richard Allen Epstein and Michael S. Greve (eds.), *Competition laws in conflict: antitrust jurisdiction in the global economy*, 2004, National research Initiative, The American Enterprise Institute for Public Policy Research, Washington D.C., chapter 2, 31.

<sup>796</sup>Andreas Weitbrecht, 'Exporting Competition Policy: From Soft Pressures to Shared Values' in Karl M. Meessen (eds), *Economic Law as an Economic Good: Its Rule Function and its Tool Function in the Competition of Systems*, 2009, Sellier, European Law Publisher, Part II, Chapter 5, 279-88, 271. The US initially promoted it in order to block the European intention of empowering the WTO in matters of international antitrust regulation; however, the influence of European competition policy on the institution has been growing exponentially. This demonstrates a possible inversion of tendency in the international isomorphism process, where Europe, from being an actor whose antitrust institutions were influenced by the US, is becoming a source for normative, mimetic and maybe competitive inspiration for other countries.

<sup>797</sup>Roland Weinrauch, *Competition Law in the WTO: The Rational for a Framework Agreement*, 2004, Vienna: Neuer, 160.

<sup>798</sup>Andrew Guzman, 'International Antitrust and the WTO: The Lesson from Intellectual Property', 2000, Berkeley Program in Law and Economics, Working Paper Series, Berkeley Program in Law and Economics, UC Berkeley. <http://escholarship.org/uc/item/80r0k642>.

Eleanor Fox, 'International Antitrust: Cosmopolitan Principles for an Open World', 1998, Chapter 16 - *International Antitrust Law & Policy: Fordham Corporate Law*. Eleanor Fox, 'Toward World Antitrust and Market Access', 1997, 91 *American Journal of International Law* 1. Wolfgang Kerber and Oliver Budzinski, 'Competition of Competition Laws: Mission Impossible?' in Richard Allen Epstein and Michael S. Greve (eds.), *Competition laws in conflict: antitrust jurisdiction in the global economy*, 2004, National research Initiative, The American Enterprise Institute for Public Policy Research, Washington D.C., chapter 2, 31.

the WTO to promote neo-liberal ideas and free trade on behalf of US economic interests. Since the beginning of his presidential mandate in 2001, George W. Bush promoted radical economic policies at international and national level. However, after the end of the Cold War, the US had to face a multipolar world that required increasing cooperation with various small powers.<sup>799</sup> In order to both sustain and preserve global economic interdependence and to institutionalise its preferences, the US had no other choice other than to engage in bilateral and multilateral cooperation agreements.<sup>800</sup> This pushed the US government to gradually build institutional structures that could allow the rapid accumulation of capital through free competition and the elimination of trade barriers.

However, the terrorist attacks on the World Trade Centre and the Pentagon on September 11, 2001, galvanised this policymaking.<sup>801</sup> The heightened sense of instability pushed Bush to impose constraints to both allies and international institutions in the name of American security. In the aftermath of the terrorist attacks, the US waged wars against Saddam Hussein in Iraq and against the Taliban in Afghanistan. Even though these countries did not directly affect American security, they were still considered a security threat and the wars were justified on the grounds of pre-emptive self-defence. The messianic rhetoric used by Bush to justify those military actions was constructed upon the need to protect the motherland and to rescue the world from tyrannical regimes. At the same time, the need to find and destroy weapons of mass destruction in those countries was on a par with the duty to enforce democracy and free-market

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<sup>799</sup> Geza Feketekuty, 'An American Trade Strategy for the 21st Century' Geza Feketekuty and Bruce Stkes (eds.), *An American Trade Strategy for the 21th Century*, 1998, Council on Foreign Relations Book, chapter 1, 13.

<sup>800</sup> David Skidmore, 'Strategic choice, Unilateralism or Multilateralism?', David Skidmore (ed.), *Paradoxes of power*, 2007, Paradigm Publishers, chapter 3, 103.

<sup>801</sup> Daniel M. Ogilvie, Alison Cook, Mark J. Landau, Sheldon Solomon, Jeff Greenberg, Florette Cohen, Tom Pyszczynski, Jamie Arndt, Claude H. Miller, 'George W. Bush Deliver us from Evil: The Effects of Mortality Salience and Reminders of 9/11 on Support for President', 2004, 30 *Pers Soc Psychol Bull*, 1136.

principles.

The general *leitmotif* of the Bush administration can be summarised in the concept of freedom. 'Freedom', he stated, 'is the almighty gift to every man and woman in this world', it was to be given to the oppressed people in Iraq and Afghanistan and it was to be applied in policy matters as well as in economics.<sup>802</sup> For instance, on September 19, 2003, Paul Bremer, the head of the Coalition Provisional Authority in Iraq, declared 'the full privatization of public enterprises, full ownership rights by foreign firms of Iraqi businesses, full repatriation of foreign profits [...] the opening of Iraq's banks to foreign control, national treatment for foreign companies and [...] the elimination of nearly all trade barriers'.<sup>803</sup> This level of liberalisation had to be applied across all industries, including public services, the media, manufacturing, transportation, finance, and construction. Oil was the only exception to this on account of its geopolitical strategic importance.

While the world focused on the implementation of the new American security system, a new economic order slowly emerged.<sup>804</sup> Indeed, the insecurity wave created by the terrorist attack of 2001 allowed Bush to reinforce his legitimacy as a national leader and to enforce his neo-liberal vision internationally.<sup>805</sup>

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<sup>802</sup>George W. Bush, 'President Addresses the Nation in Prime Time Press Conference', April 13th, 2004; <http://www.whitehouse.gov/news/releases/2004/04/20040413-20.html>.

<sup>803</sup>Antonia Juhasz, 'Ambitions of Empire: the Bush Administration economic plan for Iraq (and Beyond)', No.12 Feb/March 2004, *LeftTurn Magazine*. Quoted in David Harvey, 'Neo-Liberalism and The Restoration of Class Power' in David Harvey (ed.), *Neo-Liberalism and The Restoration of Class Power*, 2004, Hettner-Lecture, Franz Steiner Verlag, chapter 2, 7-54, 7.

<sup>804</sup>Daniel W. Drezner, 'The New New World Order', March/April 2007, *Foreign Affairs*. Robert Kagan 'America's Crisis of Legitimacy', Mar. - Apr., 2004, 83 *Foreign Affairs* 2, 65-87. Robert W. Tucker and David C. Hendrickson, 'The Sources of American Legitimacy', Nov. - Dec., 2004, 83 *Foreign Affairs* 6, 18-32. Andrew Hurrell, 'There are No Rules (George W. Bush): International Order After September 11', August 2002, 16 *International Relations* 2, 185-204.

<sup>805</sup>Mueller has defined this phenomenon as a 'rally-round-the-flag'. In his view, in times of crises the American citizens tend to identify their president as an 'anthropomorphic symbol of national unity'. Accordingly, Jong Lee has maintained that the 'president becomes the focus of national attention in times of crisis [...] symbolizing national unity and power [...] The average man's reaction will include a feeling of patriotism in supporting presidential actions.' Marc J. Hetherington, Michael Nelson 'Anatomy of a Rally Effect: George W. Bush and the War on Terrorism', Jan. 2003, *Political Science & Politics*, 37-46. Jong R. Lee, 'Rally Around the Flag: Foreign Policy Events and Presidential Popularity', 1977, *Presidential Studies Quarterly* 7, 252-256. Quoted in Marc J. Hetherington, Michael

The political economy plan envisioned by President Bush had to be based, on the one hand, on economic and financial *laissez faire* and, on the other, on the military and political exportation of democracy in order to create a stable international environment for trade relationships.<sup>806</sup>

Therefore, economic *laissez faire* became the principled and casual belief promoted by international organisations. Its principled nature stood in the obligation of safeguarding freedom in every social relation, while its causal essence lay in the need to foster economic relations only in the context of a completely free and open market. The US tried to uphold the global acceptance of these beliefs by presenting them as the central contents of the WTO Doha Round, heralded in November 2001 in Qatar. The Round aimed at addressing and sanctioning any restriction of economic flows that could possibly generate market inefficiencies. In their dealing with the regulation of market issues, such as competition and trade barriers, the Doha negotiations were again used by the US to another international normative isomorphism mechanism to spread and promote a neo-liberal worldview. Indeed, the aim of the Doha was the promotion of multilateral standards in order to open national markets and to integrate them at an international level.<sup>807</sup>

Despite the support paid by the US, the Round has been faltering. Currently, it risks becoming the first major multilateral trade negotiation to fail since the 1930s.<sup>808</sup> In an attempt to ease the negotiations, two critical topics, namely investment and competition policy, were removed from the agenda in 2003; however, there are still too many

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Nelson 'Anatomy of a Rally Effect: George W. Bush and the War on Terrorism', Jan. 2003, *Political Science & Politics*, 37-46.

<sup>806</sup> Thomas P. M. Barnett, *The Pentagon's New Map: War and Peace in the Twenty first Century*, 2004 New York: Putnam's. Bruce K. Gagnon, 'New Pentagon Vision Transforms War Agenda, February 2005, <http://globalresearch.ca/articles/GAG501A.html>. Quoted in Jan Nederveen Pieterse, 'Political and Economic Brinkmanship', Aug.2007, 14 *Review of International Political Economy* 3, 467-486, 471.

<sup>807</sup> Werner Raza, 'WTO: Conflictive Norm Setting between Multilateral Agreements and Bilateralism - The Case of Services', June 2008, *Economy and Society Trust and Institute for Studies in Political Economy*, Brno, 7-11.

<sup>808</sup> C. Fred Bergsten, 'Rescuing the Doha Round', December 2005, *Foreign Affairs*, WTO Special Edition.

divergences concerning issues dealing with the possibility of applying trade barriers in certain economic situations.<sup>809</sup>

The possible failure of Doha would be a very serious risk because it will be tantamount to an informally authorisation for governments to stop cooperating and to start pursuing protectionist policies.<sup>810</sup> Despite its uncertain outlook, the Doha Round has seen Europe, the US and Japan negotiating over the same lines – with the exception of the issue of European agricultural subsidies. As explained in the following sections, this means that the isomorphic processes implemented over the years have allowed those three countries to gain a common vision of economic regulations through the normative or institutional adoption of a similar neo-liberal culture. Indeed, the emerging of alternative centres of power such as China, India and Brazil, is showing that new countries might take the material leadership over the world. However, the fact that countries such as Europe and Japan are still accepting and sharing neoliberal economic principles and Chicago-oriented antitrust ideas is proof that the role of those ideological frameworks in the context of globalising economy is extremely important.

#### IDEAS AND THE GLOBAL ARENA

Traditionally, the role of ideas in the process of economic structural change has been marginal and ideas themselves have rarely been considered independent variables. However, as outlined above, many political economic studies have recently attempted to diverge from traditional approaches and integrate the discipline with the analysis of

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<sup>809</sup> David Loyn, 'Trade talks' failure ends Doha dreams', Tuesday, 29 July 2008, *International development correspondent*, BBC News, <http://news.bbc.co.uk/2/hi/7532168.stm>. Frank Ackerman, 'The Shrinking Gains from Trade: A Critical Assessment of Doha Round Projections', October 2005, Global Development and Environment Institute Working Paper No. 05-01.

<sup>810</sup> Antoine Bou't and David Laborde, 'The Potential Cost of a Failed Doha Round', December 2008, *International Food policy research Institute*, IFPRI Issue Brief 56.

institutions.<sup>811</sup> This experiment has brought to light a new set of theories that seek to explain institutional transformation from a more ontological point of view, i.e. in terms of ideological constructs and their influence on the social realm.

Theories about the role of ideas in policymaking have been widely criticised. Classical institutional scholars tend to regard them as an attempt to overcome the failure of rationalist and quantitative methods to predict economic crises and possible post-crisis scenarios – the well-known ‘analytical myopia of the behavioural revolution’.<sup>812</sup> Although many rationalist scholars believe that Goldstein, Keohane, and Hall used the concept of ideas as a way to buttress their political economic analysis, the analytical value of ideas may in fact go deeper. Qua mental models, ideas are essential to understand and categorise the evolution of institutions and of the social realm. It follows that these are in turn determined – or in fact constructed – as much by material interests as by ideas themselves. In this view, the power of ideas is consistent, and indeed concomitant, with the existence of social actors and particular interests. In the case of competition, for instance, the development of antitrust policy was made possible by different social and political actors fostering the institutionalisation and internationalisation of specific ideas in the pursuit of particular interests.<sup>813</sup>

The success of antitrust institutions is normally associated to the degree to which the economic conditions they create are conducive to the achievement of interests such as profits or welfare. The role of interests in determining social constructions and influencing the social realm has long been considered prominent. For instance, rational-choice institutionalists interpret institutions as structured apparatuses created for the purpose of reducing uncertainty and providing a stable environment for the negotiation

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<sup>811</sup> Mark M. Blyth, “Any More Bright Ideas?” *The Ideational Turn of Comparative Political Economy*, Jan. 1997, 29 *Comparative Politics* 2, 229-250.

<sup>812</sup> John Kurt Jacobsen, ‘Much Ado About Ideas: The Cognitive Factor in Economic Policy Ideas’, Jan. 1995, 47 *World Politics*, 2, 283-310.

<sup>813</sup> Ngaire Woods ‘Economic Ideas and International Relations: Beyond Rational Neglect’ June 1995, 39 *International Studies Quarterly* 2, 161-180.

of agreements. Their chief function is to maximise economic gains, overcome downturns, or foster welfare. In this perspective, ideas are largely irrelevant; theoretical conceptualisations, beliefs, and cultures constitute the environmental sources of habitual customs that provide a steady framework of conduct for individuals to efficiently pursue and preserve their economic interests. Essentially, rational-choice theories postulate that individuals are rational actors and behave according to precise cost-benefit calculations in order to maximise their interests and optimise their conditions.

In this view, all social structures and institutions have only evolved and developed in furtherance of the needs of social actors.<sup>814</sup> Everything happens for a specific reason; particular social dynamics occur as a result of an individual's deliberate intention to create them, and their effects are never fortuitous. The majority of rationalist scholars maintain that 'ideas are unimportant or epiphenomena either because agents correctly anticipate the results of their actions or because some selective process ensures that only agents who behave as if they were rational succeed'.<sup>815</sup> Interests are the main drivers of social action, because they represent the ends to be achieved; the means to pursue them are only a reflection of their existence. In other words: social action is necessarily contingent upon the existence of a purpose to be reached; interests are the sole priorities of social actors; and ideas and social beliefs are unexplained variables.

However, the historical frequency of economic crises, such as the ones discussed in this thesis, shows that the institutional rational approach and game theories have been less helpful in providing 'a priori specific Nash equilibria without resorting to dubious *post hoc* logics'.<sup>816</sup> In other words, rationalist scholars are only able to explain social

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<sup>814</sup> John Hall, 'Ideas and the Social Science' in Judith Goldstein and Robert O. Keohane, *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, 1993, Cornell University, Part 1, chapter 2, 31-54, 39.

<sup>815</sup> Judith Goldstein and Robert O. Keohane, 'Ideas and Foreign Policy' in Judith Goldstein and Robert O. Keohane, *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*, 1993, Cornell University, Part 1, chapter 1, 3-30, 4.

<sup>816</sup> Mark M. Blyth, "'Any More Bright Ideas?'" The Ideational Turn of Comparative Political Economy,

actions *ex post*, by outlining the rational basis of social behaviour, but they struggle to offer a similar level of understanding of present dynamics. For instance, although it is proven that the institutions responsible for unsettling the financial markets were among the underlying causes of the current credit crunch, governments have as yet failed to distance themselves from those types of destabilizing regulations and policies.<sup>817</sup>

This can be explained with an historical perspective. Indeed, historical institutionalists consider institutions as tools to steer, but not limit, social actions. Normally, they are deeply embedded in society and only exogenous factors can alter or break their structures. These factors, such as wars or economic and financial crises, play the role of a *deus ex machina*, in that they challenge the system and pave the way for transformation. In this context, the role of ideas is fundamental to understanding the process of change; however, beliefs themselves are not directly responsible for the evolution of institutions. On the contrary, every alteration is linked to a path-dependent process, where theories and culture cause 'ideational turns' and are conceptualised by agents in response to new interests or problems.

By contrast, scholars like Hall, Goldstein, Keohane and others challenged the classical axioms that actors are perfectly rational or that institutions are necessarily oriented towards specific interests, thereby drawing special attention to the role of ideas. Ideas are interpreted not as useless and static variables, but as fundamental determiners of social behaviour. For instance, Goldstein and Keohane, in their seminal contributions to the debate, did not radically deny the role of interests in shaping human actions, but they strongly contested the belief that needs are the sole engines that motivate actors'

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Jan. 1997, 29 *Comparative Politics* 2, 229-250, 230.

<sup>817</sup> Bastian Van Apeldoorn, Henk Overbeek, 'Introduction: The Life Course of the Neoliberal project and the Global Crises' in Henk Overbeek and Bastiaan van Apeldoorn (eds.), *Neoliberalism in Crisis*, 2012, Palgrave Macmillan International Political Economy Series, Chapter 1, 1-22. Hyman P. Minsky 'The Financial Instability Hypothesis', May 1992, *The Jerome Levy Economics Institute Working Paper*, 74.

behaviour.<sup>818</sup> Rather, the role of ideas is pivotal because they generate the basic building blocks of the mental models that individuals use to judge reality, make predictions, and plan goal-oriented strategies. In contrast to reflectivists like Wendt, they argue that interests are neither endogenous elements of ideas nor abstract mental constructions: they are both fully exogenous and very much real. Beliefs, on the other hand, allow actors the leeway to freely change direction in the daily pursuit of their interests.

In this sense, those scholars found a sort of middle ground between rational, historical, and reflectivist interpretations of reality. Ideas, here, as seen as playing a central role in the interest-seeking game, as actors use their mental models to analyse interests and the social environment as well as to build a strategy to pursue specific needs. Thus, culture and theoretical thoughts come to determine not only the way social actors are going to achieve their objectives, but also the way society understands and interprets its own interests. According to Gourevitch,

Ideas or ideology, for example, can make a great difference to political development: Catholic vs. Protestant; Napoleon and the French Revolution vs. the Ancient Regime; fascism, communism and bourgeois democracy against each other. These lines of ideological tension shaped not only the international system but internal politics as well. This should be no surprise. Ideas, along with war and trade, relate intimately to the critical functions any regime must perform: defence against invaders, satisfaction of material want, gratification of ideal needs.<sup>819</sup>

In addition to the political dynamics described by Gourevitch, it is worth noting that ideas has been equally crucial in the field of competition, especially for their role in

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<sup>818</sup> Judith Goldstein & Robert O. Keohane (eds.), *Ideas & Foreign Policy: beliefs, Institutions and Political Change*, 1993, Cornell University.

<sup>819</sup> Peter Gourevitch, 'The Second Image Reversed: The International Sources of Domestic Politics', Autumn 1978, 32 *International Organization* 4, 881-912,883.

defining the fluctuating relationship between efficiency and welfare as well as in steering the geopolitical and historical evolution of antitrust policies. As perfectly illustrated by the theories on varieties of capitalism, each country develops its own institutions in accordance to its own culture and beliefs. For this reason, states end up either developing entirely different institutions or applying similar regulations in different ways. This hypothesis is amply evidenced by the original implementation of antitrust rules in West Germany and Japan in the aftermath of World War II. The two processes evolved along noticeably different paths: while West Germany reacted more readily to the imposition of anti-monopoly rules, Japan barely accepted to enforce a strict control of the business activities of its local industrial groups. In Germany, the anti-monopoly law was adapted to the Ordoliberal ideological framework, in such a way that the American antitrust principles contained in it were integrated with a more welfare-oriented approach. Still, the law was fully enforced, and it represented one of major turning points for the achievement of economic development in West Germany.

By contrast, the anti-monopoly law in Japan was only maintained until the end of the Allied occupation. Soon after the US withdrawal, the Japanese government interfered with the anti-monopoly principles embedded in the law and reapplied its traditional political principles based on state intervention and on barriers to external investors. In fact, a few years after the dismantling of the *Zaibatsu*, Tokyo amended the Anti-Monopoly Act and legalised the formation of the *Keiretsu*, another big industrial group that essentially replaced the previous model. In this sense, even though the US used antitrust institutions to coercively impose antitrust ideas on Japan and to direct its economic affairs, the power of local culture and local beliefs proved more influential to the development of their interest-maximising strategies than the one exerted by Washington. A similar but opposite trend happened in the 1970s, when, in spite of the invisible constraints dictated by local customs and worldviews, both Germany and Japan,

among others, adopted US neo-liberal antitrust norms and institutions much more voluntarily because in explicit pursuit of economic efficiency.

Therefore, as Haas and Adler note, this epistemic approach provides ‘the necessary prerequisites for rational choice analysis’ but, at the same time, it helps to uncover ‘where alternatives and payoffs come from’.<sup>820</sup>

#### *Ideas Institutions and Interests*

As highlighted above, the structural essence of ideas encompasses three aspects: principled beliefs, causal beliefs, and worldviews. While principled beliefs provide actors with criteria to define what is right and what is wrong or with justifications of particular decisions, causal beliefs supply individuals with tools to understand the consequences of each action and the strategies for achieving goals. Worldviews, in contrast, provide common principles for all the recognised elites and, in this sense, they have the greatest impact on the social realm.<sup>821</sup>

Even though economic ideas and theories usually comprise all those three elements, this thesis has assumed as ‘worldview’ the idea that antitrust, or competition, aims at maximising efficiency and welfare. In this sense, only changes in principled and the causal beliefs have played a role in producing or preserving institutional change.

For instance, throughout the history of antitrust policy, the Harvard, Chicago, and Post-Chicago schools have all struck a different balance between economic efficiency and welfare and have accordingly produced different interpretations of economic interests and causality, not only in the US, but internationally. This process has been implemented through the institutionalisation of their vision into corresponding

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<sup>820</sup> Emanuel Adler and Peter Haas, ‘Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program’, 1992, 46 *International Organization* 1, 367–90, 369; quoted in John Kurt Jacobsen, ‘Much Ado About Ideas: The Cognitive Factor in Economic Policy Ideas’, Jan. 1995, 47 *World Politics*, 2, 283-310, 290.

<sup>821</sup> Judith Goldstein & Robert O. Keohane, ‘Ideas & Foreign Policy: an Analytical Framework’ in Judith Goldstein & Robert O. Keohane (eds.), *Ideas & Foreign Policy: beliefs, Institutions and Political Change*, 1993, Cornell University, 3-31, 8-11.

policies and regulations. Therefore, the worldview shared by the two main antitrust schools of thought was that the maintenance of competition was good for fostering efficient economic performance and welfare. However, the principled beliefs of the Harvard school emphasised that it was necessary for the state to intervene in the market in order to find a balance between the efficient gains of the few and the welfare of the many. By contrast, according to the Chicago School, the state did not have to play a strong role in directing competition because market-based rivalry mechanisms were efficient *per se*.

Accordingly, the causal beliefs supported by Harvard underlined that competition was not perfect; hence, the state had to control the market more strictly. On the contrary, Chicago believed that free market was perfectly autonomous and that, in the case of inefficiencies, competition would readjust by itself.

As in the case of the Harvard and Chicago schools, these ideas have influenced the real world not just in virtue of their existence, but because they have inspired regulators into promoting institutions that would overcome specific problems or otherwise help society to reach specific interests. In this sense, Goldstein and Keohane distanced their analysis from rationalist and reflectivist positions. On the one hand, even though interests exist *per se*, their interpretation and understanding are performed through what the authors define as ‘social psychological models’. Here, ideas play a central role because they determine the mechanism of such models. On the other hand, in contrast to the reflectivists, these scholars argue that interests are not an outcome of psychological models and they are not determined by their language, culture or history, but they are perceived and acknowledged through them. Therefore, even though the interests at the basis of antitrust were still efficiency and welfare, the way states interpreted those interests varied with each country and with each historical period. In the words of Garret and Weingast:

More generally, the force of ideas is neither random nor independent. Only certain ideas have properties that may lead to their selection by political actors and to their institutionalisation and perpetuation. It is not something intrinsic to ideas that give them their power, but their utility in helping actors achieve their desired ends under prevailing constraints. Given the complexity and uncertainty of most political economic interactions, appropriate ideas may serve as pivotal mechanisms for coordinating expectations and behaviour.<sup>822</sup>

In this sense, without the presence of specific actors, not only would the institutionalisation of Harvard and Chicago simply not take place, but the interests at the basis of their institutionalisation would be immaterial. Douglas North defines those who make decisions as the ‘relevant actors’ of organisations. In my research, these are identified as the members of the FTC and the DOJ as well as the American presidents in the case of the US, the European Commission in the case of Europe, and the executive governments in the case of Japan and West Germany.

As Goldstein and Keohane argue, once institutionalised, the principled and casual beliefs behind an idea provide a sort of ‘map’ that allows individuals to solve problems and pursue interests. However, they also provide a pair of lenses through which actors increase their understanding of the goals they want to achieve in reality. Indeed, ‘how a problem is defined, determine the nature of the solution’.<sup>823</sup>

Thus, while the worldview embodied in the antitrust ideas presented above reflected economic efficiency and welfare, the institutions inspired by those ideas were

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<sup>822</sup> Geoffrey Garrett and Barry R. Weingast, ‘Ideas, Interests and Institutions: Constructing the European Community’s Internal Market’ in Judith Goldstein & Robert O. Keohane (eds.), *Ideas & Foreign Policy: beliefs, Institutions and Political Change*, 1993, Cornell University, 173-207, 178.

<sup>823</sup> John Kurt Jacobsen, ‘Much Ado About Ideas: The Cognitive Factor in Economic Policy Ideas’, Jan. 1995, 47 *World Politics* 2, 283-310.

different because the theorisation of the principled and casual beliefs of those principles was different. For instance, the 1950 amendment of section 7 of the Clayton Act's merger provision, which extended the application of merger controls over cases of market dominance, was a transposition of Harvard ideas into a formal institution, which was made to reach a specific national interest, i.e. the control of mergers and the achievement of greater welfare. However, the Merger Modernisation Act of 1986, which amended section 7 of the Clayton Act, was an expression of Chicago-oriented principled and casual beliefs and was made to foster free markets and efficiency by liberalising mergers. Hence, it is possible to argue that ideas not only provide different paths through which specific interests are acquired, but also contribute to generate several understandings of social needs.

*Why were US Antitrust Ideas Stronger? Challenging Hegemonic Conceptions*

While path-dependency can explain why antitrust takes on different characteristics according to the country and the period taken into consideration, it does not explain its international diffusion. In other words, neither does it highlight the way antitrust policies in Europe and Japan have been shaped by prior political choices made in the US, nor does it explain why it was the US to influence Europe and Japan rather than the other way around.<sup>824</sup> Indeed, even though some European theories had a moderate impact on the development of US antitrust policy – for instance, both Hayek and the Chicago School were demonstrably inspired by many German Ordoliberal principles – the US antitrust tradition was too deep-rooted to countenance any European or Japanese influence.

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<sup>824</sup> Beth A. Simmons, Frank Dobbin and Geoffrey Garret, 'Introduction: The International Diffusion of Liberalism', autumn 2006, 4 *International Organization* 60, 781-810, 787.

Therefore, the success of US antitrust ideas, and of its general capitalistic model, in the international arena, and specifically across Europe and Japan, can be interpreted as a manifestation of the greater power exerted by the US through its material resources. Through the international economic institutions created after World War II, American government 'has used a combination of carrots (political and military support, as well as preferential access to US markets) and sticks (from strings attached to financial assistance to threats of military coercion) to impose its vision for political and economic liberalism on the rest of the world'.<sup>825</sup> In other words, coercion may be considered the most effective explanation for the spread of antitrust. This is because stronger countries can directly influence other nations' policy-making process through a mix of grants and constraints or by mediating their intervention with the use of the international organisations created or led by themselves. Whether direct or mediated, coercion implicates that a stronger country may threaten to use force or directly intervene in another nation in order to obtain the enforcement of specific policies.<sup>826</sup>

This type of coerced policy diffusion can also be conducted through a softer form of power. Following a Gramscian theoretical line, it is possible to maintain that dominant actors can influence other countries 'through ideational channels without exerting physical power or materially altering costs or benefits'.<sup>827</sup> In this vein, scholars, such as Gill and Cox, in their review of Gramsci's *Prison Notebooks*, have created a separate 'island' of IPE theories by interpreting market and economic dynamics as a reflection of hegemonic power. According to this approach, global politics and decision-

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<sup>825</sup> Beth A. Simmons, Frank Dobbin and Geoffrey Garret, 'Introduction: The International Diffusion of Liberalism', autumn 2006, 4 *International Organization*, 60, 781-810, 782.

<sup>826</sup> Beth A. Simmons, Frank Dobbin and Geoffrey Garret, 'Introduction: The International Diffusion of Liberalism', autumn 2006, 4 *International Organization*, 60, 781-810, 792.

<sup>827</sup> Beth A. Simmons, Frank Dobbin and Geoffrey Garret, 'Introduction: The International Diffusion of Liberalism', autumn 2006, 4 *International Organization*, 60, 781-810, 792.

making processes take place in the context of a world order, which is built upon a strong production system and oriented by precise ideologies.<sup>828</sup>

Cox argues that the world order is supported by a hegemonic liberal economic discourse that allows the free movement of goods, money, and investments across borders. After the oil crises of the 1970s, this order was based upon neo-liberal reforms that, by promoting open markets, free trade, and deregulation policies, disproportionately favoured the US because of the predominance of American multinationals and banks in the global economy.<sup>829</sup> Following Cox and Gill, it may be possible to apply a Neo-Gramscian interpretation to the study of the international institutionalisation of antitrust ideas. Indeed, it may be possible to demonstrate that the imposition of specific understandings of antitrust on Europe and Japan on the part of the US was a result of the hegemonic power of the latter. In other words, US ideas proved stronger than others because American governments used its superior material resources to build a hegemonic regime that helped to spread its ideology to the rest of the world.<sup>830</sup>

However, the limits of Neo-Gramscian IPE lie in the difficulties of unravelling the dynamics behind policy-making decision processes. While this approach helps to better comprehend how the mechanisms of specific social relations of production reflect distinct perspectives on the world, it does not allow for a cultural interpretation of power. Indeed, power, even if dependent on the material economic structure, as it is in

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<sup>828</sup> Barbara Jenkins, 'Creating global Hegemony: Culture and the Market', in Mary Ann Tetreault, Robert A. Denemark, Kenneth P. Thomas, Kurt Burch (eds.), *Rethinking Global Political Economy: Emerging Issues, Unfolding Odysseys*, 2003, Routledge London and New York, Part II, Chapter 4, 65-87, 65.

<sup>829</sup> Stephen R. Gill, 'Neo-liberalism and the shift towards a US-Centred Transnational Hegemony', Henk Overbeek (ed.), *Restructuring Hegemony in the Global Political Economy: The rise of Transnational neo-liberalism in the 1980s*, Routledge, 1993, chapter 10, 246-280. Stephen Gill, *American Hegemony and the Trilateral Commission*, Cambridge Studies in International Relations, 1990, 58. Cox, R. W. 'Social forces, states and world orders: Beyond international relations theory', 1981, 10 *Millennium: Journal of International Studies* 2, 126-55, 139, quoted in Adam David Morton 'Social Forces in the Struggle over Hegemony: Neo-Gramscian Perspectives in International Political Economy', April 2003, 15 *Rethinking Marxism*, 2, 153-179, 155-156.

<sup>830</sup> Barbara Jenkins, 'Creating Global Hegemony: Culture and the Market' in Mary Ann Tetreault, Robert A. Denemark, Kenneth P. Thomas, Kurt Burch (eds.), *Rethinking Global Political Economy*, 2003, Routledge, London and New York, Chapter 4, 65-85, 65.

every capitalist society, is also determined by cultural and social beliefs.<sup>831</sup> In other words, the concept of hegemony is useful to understand the relation between ideas and material power, but it is not relevant for the purposes of this analysis. That is because it does not provide any helpful instruments for appreciating the influence exerted by ideas and culture *per se* in promoting the institutionalisation of specific antitrust conceptualisations in relation to precise interests.

As pointed out in the historical analysis of the crises, the material power exerted by the US was not the only cause of the international process of antitrust institutionalisation. Economic, financial, and military power was also relevant in explaining part of the institutionalisation process, but whether Europe and Japan followed the US model depended also on other reasons.

In this sense, the triumph of US ideas cannot be linked only to material conditions or power dynamics. Antitrust institutions were invented in the US and only then exported abroad. Hence, the seeds of antitrust implanted in Europe and Japan had *de facto* US origins. This has generated a path-dependent process whereby the consequent institutionalisation of antitrust followed US-based discourses because of normative and mimetic reasons. The US was able to maintain primacy over the regulation of competition because, being the first to institute a specific antitrust discourse, it made sure that the international development of antitrust institutions would be in line with general American market conceptions.

In conclusion, my study has shown that this process is better understood as an example of institutional policy diffusion explained by the sociological school of institutions, especially by the studies of DiMaggio and Powell. The isomorphism model they developed, in particular, is especially helpful to explain the link between the role of

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<sup>831</sup> Barbara Jenkins, 'Creating Global Hegemony: Culture and the Market' in Mary Ann Tetreault, Robert A. Denemark, Kenneth P. Thomas, Kurt Burch (eds.), *Rethinking Global Political Economy*, 2003, Routledge, London and New York, Chapter 4, 65-85,66.

ideas and the economic interests and contingent necessities of each country, as well as to explain the institutionalisation of specific US-based approaches in terms of to a double genesis: a formal international one and a national one.

RIVALRY, EMULATION AND LEARNING IN THE DIFFUSION OF IDEAS AND THE  
INSTITUTIONALISATION OF COMPETITION POLICIES

As underlined above, the international antitrust liberalisation process started in the 1930s can be defined in terms of a combination of institutional changes at a national and international level. In fact, the role of policy diffusion and institutional evolution have been crucial in determining the objectives of antitrust regulations and the way some governments have directly or indirectly influenced the choices of others. As previously mentioned, power and coercion cannot be considered the sole causes of the isomorphism process that has shaped the institutional change trends in Europe, Japan and the rest of the world. Among the different mechanisms that have contributed to a sort of institutional convergence of antitrust policy, economic rivalry rates as one of the most significant.

Unlike coercion, competition does not require vertical hierarchical relations for policy diffusion to occur; on the contrary, at the basis of this specific isomorphic phenomenon are horizontal relationships. Indeed, in a competitive environment, actors tend to modify their institutional framework not because their economic rivals force them to, but because the latter are acting in what is perceived to be a more efficient manner. Moreover, in stark contrast to the coercive mechanism of policy diffusion, competition-based isomorphism can be considered a more de-centralised mechanism, in that it is based on the allure of certain policies and on the efforts on the part of the state to develop revenue-raising strategies. Indeed, it is self-evident that actors wishing to

invest in the global market place tend to prefer a political system where their interests can be maximised. This favourable environment is often created, for instance, by enforcing less binding regulatory requirements or lower tax burdens. Hence, in order to receive the best investments, governments compete with each other by elaborating strategic plans to make their markets more attractive. This form of competitive isomorphism can partially explain, for instance, the diffusion of neo-liberalism in the early 1990s in Europe.

Competitive isomorphism was undoubtedly a positive force for the promotion of efficient policy tools. Yet, at the same time, it also produced radical negative effects over the general welfare by favouring a sort of ‘race to the bottom’ of social spending as well as environmental and labour regulations. Apart for the disputable negative consequences of neo-liberal antitrust reforms, what it is relevant here is the understanding of why and how competitive isomorphism has pushed the European Union to accept specific interpretations of antitrust or, more generally, why certain conceptions of efficiency have driven the Commission to adopt particular neo-liberal antitrust policies and to modify its traditional institutional assets. Indeed, during the 1950s, the EC economic policy was based both on extensive market regulations and on large public economies. This was extremely useful for achieving economic stability, pursuing social objectives, such as the redistribution of wealth and risk, and reconstructing the European economies.

Competitive isomorphism, then, might have pushed Europe to change its policy as the US, under the Reagan Administration, began to heavily liberalise market transactions in order to face the negative consequences of the oil crises and the extremely high productivity rates of Europe and Japan.

In this case, competitive isomorphism worked because, in the short-to-medium term, European countries believed that neo-liberal institutions could foster the flow of international production and capital. Moreover, policy diffusion is also normally expected

to grow when two economic competitors are under the persuasion that one of them has applied the right policy instrument to satisfactorily influence market trends in its favour. This can explain the radical European turn towards neo-liberalism. In other words, the adoption of neo-liberal antitrust provisions by Europe was led by the fact that its major competitor, the US, was perceived as able of providing its companies with better institutional instruments to be competitive in the international market. Thus, the need to be a competitive actor in international trade transactions, and thus to attract foreign investors, was translated into the institutionalisation of efficiency-oriented antitrust ideas, as those articulated by the Chicago School.

However, as governments lack complete market information, the idea of efficiency cannot be adjusted to the precise calculations that states are expected to provide. To be sure, it is impossible for states to accurately predict the effects that particular policy changes in other countries will have on the global market and, consequently, on their own national economies. Moreover, while seeking to penetrate foreign markets, countries have to adopt entry modes, such as joint ventures or acquisitions, that require political and cultural knowledge of their competitors.<sup>832</sup>

Hence, what drives states, and in this case Europe, to change their policy is the idea that an institutional reform will improve their economic outlook the way it did to their competitors. In other words, since the assumption of a perfectly rational system, as described by Hannan and Freeman, is not applicable to reality, the competitive process can only partially explain the process of institutional change.<sup>833</sup>

A full picture can only be obtained by widening the spectrum of interpretation of reality to other approaches as well as by considering other isomorphic processes, such as

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<sup>832</sup> Daniele Dalli, 'The organization of exporting activities: Relationships between internal external arrangements', 1995, 34 *Journal of Business Research*, 107-115.

<sup>833</sup> Peter A. Hall and Rosemary C. A. Taylor, 'Political Science and Three new Institutionalism', 1996, *Political Studies*, XLIV, 936-957. Michael T. Hannan and John Freeman, 'The Population Ecology of Organizations', Mar. 1977, 82 *American Journal of Sociology* 5, 929-964.

the mimetic one. The desire of mimesis pushes states or organisations that face similar issues to imitate each other. Proceeding from this assumption, since the late 1970s, many scholars have studied the process of emulation among organisations from different perspectives and this has eventually become ‘an established paradigm in international relations research in the late 1990s’.<sup>834</sup>

Accordingly, social changes can be understood only by analysing the social context of reference. Indeed, the significance of every social fact or action is nothing more than the empirically traceable result of a social context of reference.<sup>835</sup> In this sense, human interactions are not simply built upon material factors. Rather, they are shaped by widely accepted inter-subjective beliefs, which determine the desired and necessary interests of ‘purposive actors’.<sup>836</sup> Following this approach, the historical pursuit of efficient or welfare-oriented competition policies by Europe and Japan can be understood also through the analysis of their local ideas and culture. In this respect, changing traditional or local ideological frameworks is tantamount to changing the social meaning attributed to efficiency and welfare; this, in turn, causes specific political choices.

Indeed, sociological research suggest that these modifications can occur through a mimetic process and that countries tend to adopt certain programmes not only because they believe these are going to ameliorate their conditions but also because they simply emulate the conduct of their ‘self-identified peers, even when they cannot ascertain that

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<sup>834</sup> Beth A. Simmons, Frank Dobbin and Geoffrey Garret, ‘Introduction: The International Diffusion of Liberalism’, autumn 2006, 4 *International Organization* 60, 781-810, 800.

<sup>835</sup> Beth A. Simmons, Frank Dobbin and Geoffrey Garret, ‘Introduction: The International Diffusion of Liberalism’, autumn 2006, 4 *International Organization* 60, 781-810, 790-796. Max Weber, *Economy and Society*, 1978, Two Volumes, Edited by Guenther Roth and Claus Wittich. Berkeley: University of California Press, 4. See: John W. Meyer and Michael T. Hannan, *National Development and the World System: Educational, Economic, and Political Change, 1950–1970*, 1979, Chicago: University of Chicago Press.

<sup>836</sup> Martha Finnemore and Kathryn Sikkink, ‘Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics’, 2001, 4 *Annual Review of Political Science* 1, 391–416, 391.

doing so will in fact be in their best interests'.<sup>837</sup> In other words, the process of emulation implicates a converge of perceptions and the creation of patterns of behaviour that are considered acceptable because modelled upon the examples provided by peer-based reference groups or, as Halligan defined them, 'elite networks'.<sup>838</sup>

While these arguments were originally used to investigate mimesis among social communities, they can be applied also to the state as a particular type of organisation. In this respect, countries are seen as influencing others not only through the use of power, but also by sharing ideas through, for instance, diplomatic interactions or international events.

This may help to explain why North American antitrust ideas had a great impact on European competition policies while, at the same time, being filtered through the preferences of national leaders. In the case of Europe, for instance, commissioners were sent to train in the United States in order to understand American antitrust policy. Therefore, while Europe was indeed at the receiving end of Harvard, and then Chicago, ideas, their influence was always filtered through the local, European understanding of efficiency and welfare.

However, while analysing this process of mimesis it is necessary to consider that states also learn from one another. Here, the process of learning 'refers to a change in beliefs or change in one's confidence in existing beliefs, which can result from exposure to new evidence, theories, or behavioural repertoires'.<sup>839</sup>

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<sup>837</sup> Beth A. Simmons, Frank Dobbin and Geoffrey Garret, 'Introduction: The International Diffusion of Liberalism', autumn 2006, 4 *International Organization* 60, 781-810,801

<sup>838</sup> See Everett M. Rogers, *Diffusion of Innovations*, 1995, 4th ed. New York: Free Press. John Halligan, 'The Diffusion of Civil Service Reform', in Hans Bekke, James L. Perry, and Theo Toonen (eds.), *Civil Service Systems in Comparative Perspective*, 1996, Bloomington: Indiana University Press, 288-317. Quoted in Chang Kil Lee and David Strang, 'The International Diffusion of Public-Sector Downsizing: Network Emulation and Theory-Driven Learning, 2006, 60, *International Organizations*, 883-910, 889.

<sup>839</sup> Jack S. Levy, 'Learning and Foreign Policy: Sweeping a Conceptual Minefield', 1994, 2 *International Organization* 48, 279-312. Yaacov Vertzberger, *The World in Their Minds: Information, Processing, Cognition, and Perception in Foreign Decision Policy Making*, 1990, Stanford University Press, 120.

Some researchers distinguish a simple learning process, whereby new strategic information prompts a change in the means, but not the ends, of behaviour, from a more complex learning process, which modifies not only the general beliefs but also the perception of the ends.<sup>840</sup> In other words, political actors can learn either to better understand the same target or to change target altogether. For instance, the emergence of Harvard School theories and their influence on European and Japanese competition policies changed their perception of welfare and efficiency and offered new means to achieve them.

By contrast, the normative isomorphism process works neither through coercion or rivalry nor through an emulative mechanism. It exists because the spreading of new information, generated by a social group or a state, allows an alteration of the general beliefs held by actors in the international arena.<sup>841</sup> At first, changes are caused by the diffusion of some specific knowledge among political elites, epistemic communities, or issue networks, which, at bottom, share a similar understanding of reality.<sup>842</sup> This process can be defined as ‘the sum of technical information and of theories about that information, which commands sufficient consensus at a given time among interested actors to serve as a guide to public policy designed to achieve some social goal.’<sup>843</sup>

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<sup>840</sup> Jack S. Levy, ‘Learning and Foreign Policy: Sweeping a Conceptual Minefield’, 1994, 2 *International Organization* 48, 279–312, 286. See also, Robert Jervis, *Perception or Misperception in International Politics*, 1976, Princeton University Press.

<sup>841</sup> Zachary Elkins and Beth Simmons, ‘On Waves, Clusters, and Diffusion: A Conceptual Framework’, 2005, 598 *Annals of the American Academy of Political and Social Science*, 33-51. Beth A. Simmons and Zachary Elkins, ‘The Globalization of Liberalization: Policy Diffusion in the International Political Economy’, 2004, 98 *Annals of the American Academy of Political and Social Science*, 171-189, Covadonga Meseguer, ‘Policy Learning, Policy Diffusion, and the Making of a New Order’, 2005, 598 *Annals of the American Academy of Political and Social Science*, 67-82. Beth A. Simmons, Frank Dobbin and Geoffrey Garrett, ‘Introduction: The International Diffusion of Liberalism’, 2006, 60 *International Organization* 4, 781-810.

<sup>842</sup> Peter Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, 1992, 46 *International Organization* 1, 1–35. James K. Sebenius ‘Challenging Conventional Explanations of International Cooperation: Negotiation Analysis and the Case of Epistemic Communities’, 1992, 46 *International Organization* 1, 323-365. Emanuel Adler and Peter M. Haas ‘Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program’, 1992, 46 *International Organization* 1, 367-390.

<sup>843</sup> Ernst B. Haas, ‘Why Collaborate? Issue-Linkage and International Regimes’, 1980, 32 *World Politics* 3, 357– 405, 367-368. Beth A. Simmons, Frank Dobbin and Geoffrey Garret, ‘Introduction:

Subsequently, this sharing process is also pushed by a dynamics of path-dependency, which allows change to proceed along a similar path.<sup>844</sup> However, the fact that this social learning process is real does not mean that its effects are always efficient.<sup>845</sup> This was true during the crises of the 1980s, but it is also manifest nowadays, in the aftermath of the credit crunch, when the US, Europe and Japan are paying the costs of hazardous neo-liberal policies. This, again, is due to the fact that actors lack complete information and political decisions are taken for very different reasons. These reasons include coercion, as in Japan and Germany after World War II, competition, as in Europe after the oil crises, or the desire to emulate or learn.

I believe that none of the above-mentioned isomorphic mechanisms can be singled out as the only explanation for the process of antitrust institutional modification that occurred in Europe and Japan and in the international arena. The process was caused by a combination of all those isomorphic mechanisms. Moreover, since the US was the first country to enforce antitrust, and then promote it as a ‘worldview’, Europe, Japan and the international arena, by default, looked to the United States for inspiration every time an antitrust institution failed to perform. This happened more frequently during economic and financial crises, as the new market necessities were more visible in times of downturns.

In conclusion, the process of international antitrust institutionalisation was primarily vertical, in that it was imposed by the US with the use of its military, economic, and financial power. It was also horizontal, as corporations pushed for antitrust institutional changes that would help their investment opportunities. At the same time,

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The International Diffusion of Liberalism’, autumn 2006, 4 *International Organization*, 60, 781-810, 795-796. See also, Ernst B. Haas, *When Knowledge is Power, Three Models of Change in International Organizations*, 1990 Studies in International Political Economy, University of California Press.

<sup>844</sup> Peter Haas, ‘Introduction: Epistemic Communities and International Policy Coordination’, 1992, 46 *International Organization* 1, 1–35.

<sup>845</sup> Beth A. Simmons, Frank Dobbin and Geoffrey Garrett, ‘Introduction: The International Diffusion of Liberalism’, 2006, 60 *International Organization* 4, 781-810.

though, the process was also ontological and epistemological. Indeed, on the one hand, it was linked to the perception of legitimacy acquired by the US, which allowed it to lead the international arena antitrust changes. On the other hand, it was also based on the superior expertise of the US, which was sought out by other countries in order to overcome their own economic issues.

It is easy to see how those four phenomena are part of a unique process whereby ideas influence reality and interests push for the codifications of ideas. These forces are mutually reinforcing.

## CONCLUSION

The power of ideas seems to be stronger than any other. Ideas are a flexible tool able to influence the social realm by shaping the perception of social interests. At a national level, ideas are the lenses through which reality is understood while their corresponding institutions are formed in response to specific necessities.

The power of US antitrust ideas was so strong that, so far, American antitrust schools and institutions have been the only ones to ever be exported or adopted abroad. While the majority of IR and IP scholar would define this process as a hegemonic one, this thesis, because it starts its analysis from a different perspective, does not deny that material power has been fundamental in contributing to the diffusion of specific ideas but it also emphasises that, ideas and interests can exert power *per se*. Indeed, apart from the institutions that were coercively imposed on Europe, Japan and at a global level, it needs to be recognised that other elements have equally contributed to the internationalisation process of American antitrust theories. Competitive motivations, mimetic interests, and normative reasons also supported those specific antitrust

discourses, which contributed to the creation of globalised antitrust models in a globalising economy.

## CONCLUSIONS

The major premise of this thesis has been that antitrust, both in national and international contexts can only be fully understood as an element in the institutional evolution of competition policies and regulations. A pan-institutional approach adopted here has shown that antitrust policies are not only the result of practical political-judicial or economic answers to specific issues, but embody the institutionalisation of ideological framework into reality.

In this context, pan-institutionalism appears to be a fundamental tool of analysis. Indeed, political institutionalism normally applies a normative understanding of reality and it uses universal rules to explain social events. For instance, political rational institutionalists define reality as a process of interests' achievement by rational actors and they refuse the possibility that human rationality might lead to inefficient outcomes. Historical institutionalists instead, by applying the concept of path dependency, understand social realm as a chain in which every event is caused by previous one. While it is undeniable that reality is conditioned by path dependency - since historical facts influence human understanding of the realm itself- still the historical approach deprives social actors of any possibility to change the environment according to their interests. Hence, while the merit of political institutionalism is to appreciate the role of path dependency in constructing reality, it provides a universalistic approach that can hardly explain the complexity characterising social and economic trends.

On the contrary, the limit of the different sociological institutional studies lays in their cognitive interpretation of reality. In this vein, the realm becomes a social construction, a product of human intellect, whereby contingent and material interests do not play any role. Scholars of such sociological acquaintance conceive any human need as

a product of human mind. At different levels, this approach appears to be too much ontological and very hardly demonstrable. Nevertheless, the sociological understanding of the role of ideas in shaping and influencing reality is very much important to explain the process of both internalisation and internationalisation of institutions through the concept of isomorphic policy diffusion.

Differently from the previous approaches, economic institutionalists and in particular Douglass North, generally apply a much more regulatory approach. Economic institutionalism does not try to fix universal rule to understand reality, but it firstly analyses events and then extracts workable rules to comprehend human behaviours. According to Douglass North, institutions are a set of formal or informal constraints that are created by individuals and adapted to their interests. Indeed, even if human beings act rationally, their actions cannot always be efficient as reality is much more complex than economic models. Hence, the lack of perfect conditions and full information favour the evolution of institutions.

Starting from Douglass North's theoretical constructions, pan-institutionalism takes into account the contributions developed by the socio-political institutional approaches and it provides a much more complete understanding of institutional evolution. Indeed, while individuals act rationally to pursue their objectives, their rationality is shaped by the social context and by the ideas, culture and traditions that through different isomorphic process influence it. In this vein, the necessity to pursue specific needs pushes actors to think the best way to achieve them. However, the process of thinking and understanding reality is influenced or shaped by the shared ideological framework of each society.

Therefore, a pan-institutional approach has the merit to allow the understanding of reality through a much more flexible approach that is neither too ontological, neither too rational. It takes into consideration the role of ideas and interests in influencing

social realm and it harmonises the dichotomies developed by the three different institutional approaches.

In this vein, a pan-institutional understanding of institutionalisation allows to better analyse the evolution of competition policies and regulations. This is particularly relevant because there are no such studies of antitrust from an international political economic approach. Normally antitrust is analysed according to economic and juridical points or view as the set of regulations and policies enforced by governments to foster market competitiveness. Indeed, the desirability of competitiveness lies in its capacity to efficiently increase profit and the general wellbeing, as long as its market conditions are respected.

Since the implementation of the Sherman Act in 1890, there has been much academic interest in the study of competition and of alternative ways of regulating the market. If, on the one hand, pure *laissez faire* can result in the development of monopolies and cartels that may negatively affect the market, on the other hand, strict state control can stifle meritocracy and personal initiative by reducing profits and, along with it, general welfare.

In this respect, the need to foster, but also to control, market competition has long been considered a fundamental condition for economic growth and welfare and it has always inspired scholars in their study of antitrust. However, while it was generally accepted that the significance of competition was the maximisation of economic efficiency and/or the promotion of general welfare, the principled and causal beliefs embedded in the various theoretical schools developed over the course of history changed the perception on how those two goals were to be pursued. For instance, the Harvard School promoted institutions to block the rise of mergers and thereby control competition and support a fairer distribution of welfare. The Chicago School, in contrast, favoured personal initiative and economic freedom over state interventionism,

and it indirectly fostered practices to that effect.

The evolution of different theoretical frameworks sharing the same values and worldviews proceeded in line with the development of the general economic principles underpinning each country's model of capitalism. Thus, when antitrust policies were led by Harvard principles, and general economic policies were inspired by Keynesian and Fordist ideas, the common idea was that the state should intervene in the market. Similarly, after the oil crises, the Chicago School and the Mont Pelerin Society respectively shaped antitrust policies and economic regulations in support of the same neo-liberal principles.

At the same time, US antitrust ideas, acquired and applied by Europe and Japan, were filtered through local European and Japanese perception of competition. Thus, in Europe, American antitrust conceptualisations were understood from an Ordoliberal angle, while, in Japan, the Confucian tradition provided yet another set of interpretative lenses through which Western antitrust principles came to be perceived and enforced. In this sense, it is not possible to speak of a process of complete antitrust harmonisation, because each country has interpreted market competition through unique ideological and cultural lenses. However, this does not mean that antitrust influence did not occur.

Up until the beginning of the latest financial crisis, in 2007, international cooperation in antitrust policy had progressively increased. Governments had to face the challenge of adapting their national regulations to the exigencies of the international arena and of the global markets. This fostered the implementation of isomorphic processes in the form of bilateral and multilateral negotiations.

Since the 1930s, the US has been the leading model in this process of convergence. The negative consequences of the Great Depression and World War II were partly overcome by applying Harvard-oriented antitrust policies, which allowed Arnold to take on international cartels and harmonise the antitrust policy with the

general Keynesian political economy adopted by President Roosevelt. Harvard School antitrust ideas were based on the realisation that competition is not perfect *per se* and that oligopolistic or monopolistic dynamics are the most common market conditions. Because of the impossibility of perfect competition, these scholars called for states to intervene in the economy through appropriate regulations in order to promote a workable competition. This was deemed the only way to simultaneously allow firms to efficiently compete against each other and society to enjoy a better distribution of welfare.

After the end of World War II, those antitrust ideas, alongside the Keynesian and Fordist economic models, started to be applied internationally with the help of international organisations. At the time, the US was the only country to have the economic, military, financial, and knowledge resources to re-stabilise the international arena, create a valuable international market for its corporations, and overcome the negative fallout of the Great Depression.<sup>846</sup> In order to promote economic reconstruction in Europe and Japan and to create a strong barrier to the Soviet sphere of influence, the US was driven to coercively influence antitrust regulations in both Europe and Japan. While this process was encouraged by the economic and military power the US could still exert at the time, it was also partially fostered, especially in the case of Europe, by the need to find an alternative economic model and win back international competitiveness. In this sense, although the isomorphic mechanism was mainly coercive, it was also characterised by elements of mimesis and competition. This is apparent in the adoption of the first European competition regulation, inspired by Professor Bowie as a mediation of Ordoliberal principles. At the same time, however, the Allies also coerced Germany and Japan to adopt Anti-monopoly laws that would strongly control the use

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<sup>846</sup> Susan Strange, *The Retreat of the State: The Diffusion of Power in the World Economy*, 1996, Cambridge University Press. Susan Strange, *State and Markets*, 1988, Continuum.

and abuse of cartels.

Harvard-oriented doctrines were at their zenith under Nixon, Ford, and Carter, but they were then replaced by Chicago School ideas when the outbreak of the two oil crises of the 1970s called for new solutions for new economic necessities. Indeed, during the 1970s, the US had to face not only the oil crises, but also the military costs caused by the conflict in Vietnam and the increasing political instability in Iran. Harvard-oriented policies against mergers and business freedoms started to lose ground, since the crises and the economic competition exerted by the rest of the world were considered a sort of wake-up call to liberalise the market in order to guarantee better conditions to American corporations and to improve their investment opportunities. As a result, Harvard School policies were gradually abandoned over the course of the Carter Administration. President Reagan was the first one to openly adopt a pure Chicago School antitrust policy, in line with the economic neo-liberal prescriptions enforced in the US internal market. Under his administration, the general process of economic liberalisation and deregulation began to be converted into competition policy reforms and antitrust institutional changes.

This competition approach was inspired by the ideas of economists who strongly believed in the positive effects and long-term efficiency of the free market. Chicago ideas rejected the need to intervene in competition regulations. Rather, they looked at any form of antitrust regulation as a restriction of market possibilities.<sup>847</sup> The Chicago antitrust revolution took place without significantly challenging the body of competition regulation itself but, by suggesting an alternative interpretation of previous regulations and practices, it completely modified the orientation of US antitrust policy.<sup>848</sup>

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<sup>847</sup> Oliver Budzinsky, 'Monoculture versus Diversity in Competition Economics', February 2007, *Diskussionsbeitrag aus dem Fachbereich Wirtschaftswissenschaften Universität Duisburg-Essen Campus Essen*, Nr. 158 (<http://www.econstor.eu/bitstream/10419/32122/1/541747029.pdf>)

<sup>848</sup> Eleanor M. Fox and Lawrence A. Sullivan, 'Antitrust – Retrospective and Prospective', 1987, 62 *New York University Law Review*, 936-968. William E. Kovacic and Carl Shapiro, 'Antitrust Policy: A

As soon as Europe and Japan felt the negative economic repercussions of the crisis, they began to look for new alternatives to the already ineffective American liberal model. Although the strategies implemented by Japan and many European countries were not fully protectionist, they still provided support for local enterprises through state aid and national grants. For this reason, after re-stabilising the US domestic economy through the institutionalisation of the Chicago approach, Reagan sought to develop strategies to fight the international rise of unfair and anticompetitive practices and to recreate an international environment that would once again favour American business interests. At the same time, Europe and Japan were still on the lookout for new models to overcome the crisis.

The implementation of neo-liberal institutions occurred through coercive mimetic normative and competitive isomorphism processes. Internationally, the neo-liberal vision was sponsored through the WTO rounds, specifically through the fight against non-trade barriers. Also, the creation of an international environment where it was possible to share ideas on market regulation facilitated the adoption of the same policy language and precipitated an international process of conversion towards neo-liberalism.

In Europe, a softer version of the US neo-liberal model was applied through mimetic, normative and competitive isomorphic mechanisms. The search for new solutions to the crisis pushed the Commission, which was already familiar with the language of the US antitrust discourse, directly towards Reagan. Additionally, the need to face competition from both sides of the world resulted in the promotion of competitive isomorphism: Europe did not wish to remain the backwater of the international

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Century of Economic and Legal Thinking', 2000, 14 *Journal of Economic Perspectives* 1, 43-60. Quoted in Oliver Budzinsky, ' Monoculture versus Diversity in Competition Economics', February 2007, *Diskussionsbeitrag aus dem Fachbereich Wirtschaftswissenschaften Universität Duisburg-Essen Campus Essen*, Nr. 158 (<http://www.econstor.eu/bitstream/10419/32122/1/541747029.pdf>)

economy and the US model seemed the only feasible way to win back competitiveness.

This time the process of conversion was not coerced by the US, as it did not have enough legitimacy or power to directly intervene in Europe. However, it was still in the interests of the US to push Europe further into neo-liberalism, as the collapse of the Soviet Bloc created the geo-political conditions for a European enlargement towards the East. This part of the world was now left wide open to Western investment opportunities and political influence. It is in this context that Europe, under Commissioner Mario Monti, started its long journey towards a neo-liberal market economy and neo-liberal antitrust regulations.

In the case of Japan, the SII was initially demanded by the US, but later implemented through a process of mimetic and normative isomorphism. Indeed, on creating the first antitrust law in Japan, the Anti-Monopoly Act, the US had also established its own antitrust discourse within the country. This allowed Tokyo to understand more easily the antitrust ideas implemented by the US. Moreover, in its pursuit of international competitiveness, Japan started to look at the US as a positive antitrust model. In other words, a version of neo-liberalism was implemented in Japan through a coercive bilateral cooperation agreement, whereby Tokyo was compelled to shift to a more neo-liberal interpretation of antitrust policy in order to remain internationally competitive.

Since the neo-liberal path established during the Regan presidency were hard to challenge, the Chicago approach lasted through to the Bush Administration. The Bush presidential doctrine was characterised by the creation of a new international order based on democracy and free market and the key to the interpretation of all of his political actions and decisions centred on the notion of economic freedom. However, this bold *laissez-faire* system resulted in the credit crunch of 2007 and the beginning of a new recession.

Currently, the approach adopted by Obama is a sort of mixture between a Harvard and a Chicago approach, which most scholars identify as a Post-Chicago School. This refers to a liberal system that introduces more freedom in business activities together with more central control by judges and the state. Excessive Chicago optimism in the free market might have motivated the reintroduction of more Harvard-oriented policies, which, on their own, would however risk producing anticompetitive effects on the market. By contrast, a Post-Chicago approach has the advantage of preserving the goal of allocative efficiency while implementing some control over the distribution of general social welfare. In this sense, it appears to be a middle ground between the two contrasting approaches in that it links ‘the antipodes by a common methodological framework: the game-theoretic oligopoly theory’.<sup>849</sup> This will possibly and hopefully allow the US to overcome the downturn alongside the rest of the world.

In the end, it can be argued that the worldviews, the principled beliefs and the casual beliefs embodied in the different conceptualisations of antitrust have been essential tools to progressively adjust the international perception of competition to best suit American interests over time. By sharing the principles embedded in the above-mentioned different schools of thought, the US has been able to project internationally its own ideological frameworks in the form of worldviews, which have been reshaped and adapted by the rest of the world in accordance to their own model of capitalism. Thus, while the global perception of competition was one of fostering efficiency and welfare, the principled and casual beliefs that went with it varied with the economic interests and the antitrust theoretical framework of the time.

This process allowed the US to create a structure that would support its economic interests while simultaneously allowing Europe and Japan to develop their own

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<sup>849</sup> Oliver Budzinsky, ‘Monoculture versus Diversity in Competition Economics’, February 2007, *Diskussionsbeitrag aus dem Fachbereich Wirtschaftswissenschaften Universität Duisburg-Essen Campus Essen*, Nr. 158, 8 (<http://www.econstor.eu/bitstream/10419/32122/1/541747029.pdf>)

markets. The fact that the US was the only country able to influence the European and Japanese antitrust culture, and thereby serving its own interests while doing so, has been fully explained. The US was the first country to develop a coherent antitrust tradition, whereas Europe and Japan only implemented one after World War II. Again, this process of institutionalisation was not the result of a simple act of coercion as both Europe and Japan actively participated in the making of their liberal and neo-liberal antitrust institutionalisation. Moreover, they had already developed forms of domestic US-oriented discourses through a path-dependent process of mimetic and normative isomorphism that derived from the sort of authority the US had long enjoyed on the conceptualisation of antitrust policy.

At present, it looks very unlikely that we will revert to a system where the state exerts more influence over the market, as corporations seem to have reached such an economic power to be able to overturn political decisions. It is also unclear whether the US can continue to be a model of reference for the rest of the world, since countries like China, India and Brazil are growing very fast and seem to hold different ideas about competition and capitalism. However, although the US has lost its economic, military and financial predominance, Europe and Japan are still likely to follow the American model because of mimetic, normative and competitive reasons.

In conclusion, the thesis aimed at demonstrating the power of antitrust conceptualisations in influencing policy-making from a pan-institutional point of view. Specifically, it attempted to analyse how particular ideas, in the form of beliefs and academic theories, have been transformed into institutions that reflected specific purposes. In the wake of each one of the economic crises discussed, the US was consistently found in need of a new policy model to overcome the economic recession. By revealing new economic needs, the crises proved to spell more than just economic disaster; they also served as bellwethers of the failure of knowledge models to fulfil new

social and economic interests. Each economic decline produced national institutions in the form of laws and general policies that reflected particular economic ideas, principles and necessities. Those ideas were then projected at an international level, assimilated and institutionalised by other countries into appropriate agreements and rules through processes of isomorphism.

In this sense, it can be concluded that the power of ideas has enabled the US not only to overcome its own economic downturns, but also to create and export ideological frameworks that, once adopted abroad, fostered a common international understanding of antitrust in accordance with US interests.

In summary, this thesis made two claims. First, institutional analysis, by allowing a balanced investigation of the role of both ideas and interests, is especially helpful to better understand the evolution of antitrust institutions in the context of the varieties of capitalism. Secondly, while material resources are important to explain some of the isomorphic dynamics, it is not possible to single out coercion, or the US use of power, as the only explanatory criterion. Indeed, since individuals seek their self-interests, the implementation of specific antitrust ideas has been caused by the need to reach specific objectives. At the same time, by applying particular theoretical conceptions, actors have modified their way of perceiving reality and material needs. This is what I define 'the power of ideas'.

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