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Capturing the Transplant: U.S. Antitrust Law in the European Union

Silvia Beltrametti

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Capturing the Transplant: U.S. Antitrust Law in the European Union

*Silvia Beltrametti**

ABSTRACT

The scholarly literature on the movement of legal norms focuses almost exclusively on transfers from one jurisdiction to another. It largely ignores transfers into new regulatory regimes. Drawing on a case study of the transplantation of U.S. antitrust law into the nascent entity that was to become the European Community, and analyzing its evolution from a public choice perspective, this Article suggests that transfers into new regulatory regimes are more likely to be effective when the lack of established institutions creates opportunities for stakeholders. The endorsement of a new law will enable stakeholders to influence its application and to capture positions of the regulatory agency in charge of its administration. An enhanced understanding of this transplant and the impact of a German stakeholder on the development of EU competition law explains why, if today the European Union and the United States investigate the same transaction, the competition law standards set by the European Union will prevail.

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I. INTRODUCTION

The wave of regional and global economic integration that started in the 1950s with the formation of the European Community (EC) called for the definition of supranational rules and policies to regulate trade in newly integrated markets.¹ Key among these policies was the promotion of a competitive market, which promised to attract capital inflows and spur economic growth. Familiarity with competition law was, however, not widespread when the integration movement started, and the negotiators of the newly formed EC had to refer to the U.S. example, the only country that had a comprehensive system of competition law in place at the time.² The U.S. Sherman Act thus became a model for the competition laws of the European Coal and Steel Community (ECSC), the entity that laid the foundations for the EC.³ The definition of new rules through transfers or imitation is by no means a new phenomenon in the scholarship on integration, convergence, and, more generally, the movement of legal norms, but this Article explores a different and underestimated angle of this literature: the transfer of rules into new regulatory systems.⁴ Drawing on the transfer of U.S. antitrust law to the EC, this Article asks—how are transfers to new regulatory regimes different? How is this difference relevant to the globalization of competition? To what extent did U.S. antitrust law influence the formation of competition policies in the European Union?

1. See WALTER MATTLI, *THE LOGIC OF REGIONAL INTEGRATION: EUROPE AND BEYOND* 190 (1999).

2. See ALAN D. NEALE & D. G. GOYDER, *THE ANTITRUST LAWS OF THE UNITED STATES OF AMERICA* 488 (1980).

3. ECSC, European Coal and Steel Community. See discussion *infra* Section II.

4. See generally ALAN WATSON, *THE EVOLUTION OF LAW* (1985); KONRAD ZWEIGERT & HEIN KÖTZ, *AN INTRODUCTION TO COMPARATIVE LAW* (3d ed. 1998); Daniel Berkowitz et al., *The Transplant Effect*, 51 AM. J. COMP. L. 163 (2003) (exploring the relationship between the way in which country receives its formal law and the effectiveness of its legal institutions); Frank Dobbin et al., *The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?*, 33 ANN. REV. SOC. 449 (2007); Nuno Garoupa & Anthony Ogus, *A Strategic Interpretation of Legal Transplants*, 35 J. LEGAL STUD. 339 (2006); Ugo Mattei, *Efficiency in Legal Transplants, An Essay in Comparative Law and Economics*, INT'L REV. L. & ECON., March 1994; Alex Y. Seitza, *Globalization and the Convergence of Values*, 30 CORNELL INT'L L.J. 429 (1997).

These questions have become more and more relevant since European antitrust authorities began making it increasingly difficult for U.S. firms to operate in Europe. Over the past decade, the European Commission has fined Microsoft more than \$3 billion and ordered the company to change the products it sold in Europe in response to its antitrust abuses, even though U.S. authorities had previously cleared such behavior.⁵ Similarly, the European Commission accused Google of abusing its dominance in the online search market.⁶ Whereas the U.S. Federal Trade Commission (FTC) dropped its charges against Google in 2013, the Commission's investigation is ongoing, and it is causing much agitation in Congress, since a recent resolution by the European Parliament called for the "unbundling [of] search engines from other commercial practices."⁷ This would require Google to split its operations, which would fundamentally alter the way Google operates in Europe as well as worldwide.⁸ The regulatory leverage that European competition law is exerting on the companies that come under its jurisdiction, including U.S. firms, is perplexing insofar as EU competition laws were originally modeled on U.S. antitrust provisions in an attempt to integrate international competition.⁹

This Article introduces a framework for the evaluation of legal transfers to new regulatory regimes that explains how the transfer of U.S. antitrust to Europe led to the current situation, as well as the general implications underlying the development of laws in forming legal systems. The framework shows that transfers into forming legal systems are more likely to be effective when the lack of established institutions creates opportunities for stakeholders to assert

5. See generally *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001); Commission Decision of Mar. 21, 2004, Relating to a Proceeding Pursuant to Article 82 of the EC Treaty, Case COMP/C-3/37.792 Microsoft, http://ec.europa.eu/competition/antitrust/cases/dec_docs/37792/37792_4177_1.pdf [<http://perma.cc/KYP9-KW8Q>] (archived Oct. 5, 2015).

6. See European Commission 15/4785, Press Release, Statement by Commissioner Vestager on Antitrust Decisions Concerning Google (April 15, 2015) [hereinafter Vestager Statement].

7. Resolution on Supporting Consumer Rights in the Digital Single Market, EUR. PARL. DOC. 2014/2973(RSP) (2014) [hereinafter Eur. Parl. Resolution]; see also Alex Barker et al, *Washington Weighs In on EU Google Probe*, FINANCIAL TIMES (November 25, 2014), <http://www.ft.com/intl/cms/s/0/3d903290-74c9-11e4-a418-00144feabdc0.html> [<http://perma.cc/P7RM-KM9M>] (archived Oct. 5, 2015); Press Release, Federal Trade Commission, Statement of the Federal Trade Commission in the Matter of Google Inc. (Jan. 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> [<https://perma.cc/WJCS-DKW8>] (archived Oct. 5, 2015).

8. Cf. Consolidated Version of the Treaty on the Functioning of the European Union art. 3, 32, 101–05, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; European Commission Press Release MEMO/08/132, Antitrust: Commission Welcomes E.ON Proposals for Structural Remedies to Increase Competition in German Electricity Market (Feb. 28, 2008).

9. See Anu Bradford, *The Brussels Effect*, 107 NW. U.L. REV. 1, 19–22 (2012).

themselves within a new regulatory regime. No such opportunities emerge if the institutional setting of an importing body is tightly entrenched and has already determined the role the transplanted measure would have. The discussion makes specific reference to the transfer of U.S. antitrust to Japan, which occurred at the same time and under similar circumstances as the transfer to the EC, but where existing bureaucracies refused to integrate the law.¹⁰ The focus of the existing literature on the role of institutions in integrating new laws fails to explain transfers into nascent entities, where the introduction of a law occurs just as the institutional and normative settings of the receiving system are forming.¹¹ As institutional constraints diminish, the bargaining power of stakeholders becomes predictive of the effectiveness of the transfer—the two parameters are inversely proportional.

By applying public choice theory to the context of the formation of laws, the analytical core of the framework explores the role of stakeholders when the transfers into new regulatory regimes occur. At present, public choice explanations in this context are limited to stating that transferred laws are likely to reflect the normative preferences of local advocates, but such an argument has never been fully explored.¹² This Article claims that interest group theory is fundamental to understanding and evaluating the development of laws in new legal orders, and that it carries significant implications for regional integration and regulatory globalization in general.¹³ The

10. See ELEANOR M. HADLEY, ANTITRUST IN JAPAN 357–89 (1970); ETSUKO KAMEOKA, COMPETITION LAW AND POLICY IN JAPAN AND THE EU 5–6 (2014); see also Iwakazu Takahashi, *The Development of Competition Law for the Last 15 Years in Japan: Progress or Setback?*, in THE DEVELOPMENT OF COMPETITION LAWS: GLOBAL PERSPECTIVES 87–107 (Roger Zach et al. eds., 2010).

11. See discussion *infra* Section I.A. See generally DAVID NELKEN & JOHANNES FEEST, ADAPTING LEGAL CULTURES (2001); Berkowitz et al., *supra* note 4; Michele Graziadei, *Comparative Law as the Study of Transplants and Receptions*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 441 (Mathias Reimann & Reinhard Zimmermann eds., 2006); Stephen Knack & Philip Keefer, *Institutions and Economic Performance: Cross-Country Tests Using Alternative Institutional Measures*, 7 ECON. & POL. 207 (1995).

12. See Karen Alter et al., *Transplanting the European Court of Justice: The Experience of the Andean Tribunal of Justice*, 60 AM. J. COMP. L. 629, 635 (2012); Enrico Colombatto & Jonathan R. Macey, *A Public Choice Model of International Economic Cooperation and the Decline of the Nation State*, 18 CARDOZO L. REV. 925, 928–32 (1996); Garoupa & Ogus, *supra* note 4, at 353; Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 265 (1982) (“[L]egislation is a good demanded and supplied much as other goods, so that legislative protection flows to those groups that derive the greatest value from it . . .”); *Cf.* Saul Levmore, *Interstate Exploitation and Judicial Intervention*, 69 VA. L. REV. 563, 566–67 (1983).

13. See TIM BÜTHE & WALTER MATTLI, THE NEW GLOBAL RULERS: THE PRIVATIZATION OF REGULATION IN THE WORLD ECONOMY 18–40 (2011) (discussing the creation of regulatory regimes in a vacuum and the issue of control); Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, in DOUBLE-EDGED DIPLOMACY: INTERNATIONAL BARGAINING AND DOMESTIC POLITICS 431, 431–68 (Peter

metric that determines the effective development of a law in a newborn system is connected to the bargaining power of stakeholders that can benefit from the introduction of a new law—elements such as confidence in the law's attainments, familiarity with its theoretical basis, articulated strategies to implement it, and alignment with the exporter's interpretative preferences (especially if there is outside pressure to introduce the law) will increase the bargaining power of a given stakeholder vis-à-vis its opposition.¹⁴ The payoffs are significant. The winning stakeholder will play a direct role in shaping the policies used to apply the new law and capture positions within the regulatory agency in charge of its administration.¹⁵ This will help the group secure stable outcomes, durable benefits, and long-lasting power.

The argument is supported by a case study that shows that a self-interested stakeholder used the introduction of U.S. antitrust laws to its favor during the formation of the EC. The analysis directly engages with the intellectual disciplines governing competition policy in the United States and in Europe at the time of transfer and uncovers the importance of a German liberal movement that emerged as the winning stakeholder because it could define the transplanted provisions in a way that would benefit its own constituency as well as the United States. The United States had a keen interest that the laws in Europe be used to break up concentrations and prohibit anticompetitive behavior, and the approach to competition of the German Ordoliberal movement could accommodate these goals.¹⁶ This is the first analysis that compares and connects the approach to antitrust of the Harvard School, also known as Structuralism, with the discipline of the Ordoliberal School. It shows that the vision of the Ordoliberals was not just the key to integrate the U.S. approach to antitrust in Europe, but also to explain how competition policies are applied by the European Commission today.¹⁷

Finally, the dominance of the U.S. approach to antitrust ties the present case study to the literature on state power and

B. Evans et al. eds., 1993). See generally MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* (1965); ERIC A. POSNER & ALAN O. SYKES, *ECONOMIC FOUNDATIONS OF INTERNATIONAL LAW* (2013).

14. See discussion *infra* Section I.B.

15. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* 9–21 (3d ed. 1951); JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY* 41–50 (1962); OLSON, *supra* note 13, at 53.

16. See discussion *infra* Section II.C.

17. See DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* (1998) (acknowledging the importance of the Ordoliberal School on the formation of European competition policy, but not connecting it to the U.S. experience); DANIEL J. GIFFORD & ROBERT T. KUDRLE, *THE ATLANTIC DIVIDE IN ANTITRUST: AN EXAMINATION OF US AND EU COMPETITION POLICY* 18–21 (2015); Nicola Giocoli, *Competition Versus Property Rights: American Antitrust Law, the Freiburg School, and the Early Years of European Competition Policy*, 5 J. COMP. L. & ECON. 747, 767–80 (2009).

“Americanization” to the extent that the influence of hegemonic U.S. ideas provoked a shift in the European system.¹⁸ This Article argues that the transplant of antitrust into the ECSC was accepted because it created an opportunity for certain constituencies that were sophisticated and organized enough to use it to their advantage. This interpretation differs from the conventional narrative that defends the transplant as an assertion of American power.¹⁹ Once the Ordoliberal School had affirmed itself as a major influence on the development of European competition law, the importance of the American antitrust model diminished—and when the approach to antitrust in the United States changed from rigorous enforcement to the more laissez-faire attitude endorsed by the Chicago School, this change was not reflected in Europe, where rigorous enforcement remained the norm.²⁰ These diverging paths have led to a reversal of the conventional story: in recent case law, European antitrust regulations have come to define the standards under which large corporations operate, causing great concern for U.S. companies. The divergent opinions of the FTC and the European Commission on Google’s case merely illustrate this trend.

This work has broader implications for the globalization of competition policy. The present discussion draws attention to the antagonism between current approaches to antitrust in the United States and the European Union, two major players in the global economy. The approach other key participants decide to adopt will have fundamental consequences for the evolution of transnational competition law and the operation of international corporations. By highlighting the role of stakeholders when the formation of

18. See JEFF FRIEDEN, FROM ECONOMIC NATIONALISM TO HEGEMONY: SOCIAL FORCES AND THE EMERGENCY OF MODERN U.S. FOREIGN ECONOMIC POLICY 1914–1940 (1986); R. Daniel Keleman & Eric C. Sibbitt, *The Americanization of Japanese Law*, 23 U. PA. J. INT’L ECON. L. 269, 269–74 (2002); Jacques de Lisle, *Lex Americana?: United States Legal Assistance, American Legal Models, and Legal Change in the Post-Communist World and Beyond*, 20 U. PA. J. INT’L ECON. L. 179, 182–84 (1999); Ugo Mattei, *A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance*, 10 IND. J. GLOBAL LEGAL STUD. 383, 384–86 (2003); Loukas A. Mistelis, *Regulatory Aspects: Globalization, Harmonization, Legal Transplants, and Law Reform—Some Fundamental Observations*, 34 INT’L L. 1055, 1059–60 (2000); Keith B. Norman, *Our Greatest Export: The Rule of Law*, ALA. LAWYER (May 1999); Barry Posen, *Command of the Commons: The Military Foundation of U.S. Hegemony*, 28 INT’L SECURITY 5, 8–10 (2003); Elizabeth A. Summers, *Recent Secured Transactions Law Reform in the Newly Independent States and Central and Eastern Europe*, 23 REV. CENT. EUR. L. 177, 180–83 (1997); Elizabeth A. Summers, *Why the Wind Changed: Intellectual Leadership in Western Law*, 42 AM. J. COMP. L. 195, 205–17 (1994); Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 246–48 (1991).

19. See Giocoli, *supra* note 17, at 748–50.

20. See RICHARD A. POSNER, ANTITRUST LAW (2001); Ronald H. Coase, *Industrial Organization: A Proposal for Research*, in 3 POLICY ISSUES AND RESEARCH OPPORTUNITIES IN INDUSTRIAL ORGANIZATION 59, 69 (Victor R. Fuchs ed., 1972); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 4–9 (1984); see also discussion *infra* Section II.C.

regulatory regimes is at stake, this study provides guidance for regional entities in Latin America, Africa and the Caribbean that are currently in the process of developing supranational competition policies to integrate their markets.²¹ Lessons on stakeholders' bargaining power may also have significant relevance for China, whose new antitrust laws have been influenced by the United States and Europe, but also specifically followed German patterns.²² If China and other key players in today's global economy follow the European Commission's aggressive lead in pursuing antitrust abuses, as evidence suggests that they are, global companies will be inhibited from operating globally.²³

The Article proceeds as follows. Part II discusses transfers into new regulatory regimes and shows how the present scholarship has failed at explaining when such transfers are effective. In order to bridge this gap, it develops a framework that relies on the presence of a stakeholder within the importing entity that endorses the transplant because it can benefit from it. Part III applies the framework to the transfer of the U.S. antitrust provisions to Europe. This section includes the comparative analysis of Structuralism and Ordoliberalism. Part IV ties the influence of the Ordoliberal tradition to modern-day antitrust developments.

II. CAPTURING LEGAL TRANSPLANTS

A. *Transplants into New Regulatory Regimes*

Transfers into new regulatory regimes present a little-explored scenario. The scholarly literature on the movement of legal rules has almost exclusively focused on the transfer of norms from one jurisdiction to another.²⁴ This Part explains how a transplant into a

21. See generally UNITED NATIONS, COMPETITION PROVISIONS IN REGIONAL TRADE AGREEMENTS: HOW TO ASSURE DEVELOPMENT GAINS (Philippe Brusick et al., 2005) [hereinafter Brusick et al.].

22. DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 228–33 (2010).

23. Michael Han & David Boyle, *Antitrust Enforcement: China Ups the Ante*, COMPETITION POL'Y INT'L, Dec. 2014, <https://www.competitionpolicyinternational.com/antitrust-enforcement-china-ups-the-ante> [<https://perma.cc/TH94-A5UR>] (archived Oct. 5, 2014); see also Aaron Mamiit, *\$1 Billion: Fines Qualcomm Might Pay to Settle China Antitrust Probe*, TECH TIMES (Dec. 26, 2015, 9:44 AM), <https://www.competitionpolicyinternational.com/assets/Uploads/AsiaDecember14.pdf> [<http://perma.cc/B6F6-XCM2>] (archived Oct. 5, 2015).

24. See generally NELKEN & FEEST, *supra* note 11; Graziadei, *supra* note 11; Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839 (2003). Examples of case studies are contained in edited collections, e.g., TRANSFRONTIER MOBILITY OF LAW (R. Jagtenberg et al. eds., 1995); COMPARING LEGAL CULTURES (David Nelken, 1995); COMPARATIVE LAW IN THE 21ST CENTURY (Andrew

new legal order differs from other transplants, and it also shows that existing models that inspect what determinants make a transfer effective cannot account for transplants into forming systems.

The broad debate in the literature on legal transfers focuses on whether and when laws can be successfully transferred from one system to another.²⁵ Some scholars—notably Alan Watson—are convinced that transplantations prove the autonomy of law, while others argue that the law is embedded in society, and that transfers can only survive if they can fit the social and economic conditions of the society into which they are being transplanted.²⁶ Since the debate was introduced, transfers have been examined from a variety of perspectives, ranging from the causes of legal changes, to the identification of elements that make a transplant effective.²⁷ The present discussion focuses on this latter point and relies on a study by Katharina Pistor (and others) that argues that the key to a successful transfer is localization.²⁸ She claims that in order to succeed, a legal

Harding & E. Örcü eds., 2002); THE MIGRATION OF CONSTITUTIONAL IDEAS (Sujit Choudhry ed., 2006); and journal special issues, e.g. *Histories of Legal Transplantations*, 10 THEORETICAL INQ. L. 299 (2009).

25. See generally ALAN WATSON, LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW 107 (2nd ed. 1993) (“The picture that emerge[s] [i]s of continual massive borrowing . . . of rules.”); Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 MOD. L. REV. 1 (1974) (arguing that the viability of a transplant is related to the social and political environment of both the donor and receiving state); Pierre LeGrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 118 (1997) (arguing that legal transplants are never possible because during the process of transplantation every reform becomes localized: the product of moving a rule elsewhere is always something else, “not the same rule”).

26. See WATSON, LEGAL TRANSPLANTS, *supra* note 25, at 91–109.

27. See Eric Agostini, *La Circulation des Modeles Juridiques*, 42 Revue Internationale de Droit Comparé [R.I.D.C.] 461 (1990) (distinguishing between importers and exporters and between assimilation and adaptation in the latter category); Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment I)*, 39 AM. J. COMP. L. 1, 34 (1991) [hereinafter Sacco, *Installment I*] (developing a theory of legal change based on “legal formants,” which shifts away from the static approach of outlining the differences between legal families and instead examines changes within the major legal systems as a process of constant evolution). In any case, “history provides no evidence that uniformity is achieved through comparative legal study. In the Middle Ages, Roman law spread throughout Continental Europe because the other systems of rules with which it had to compete lacked its quality and prestige. The jurists who turned to Roman law instead of to local rules did not do so because they had compared the two. In most cases, the Roman rules were the only ones they really knew, and their choice was more the result of ignorance than of comparative study.” Sacco, *Installment I*, *supra* at 2; Graziadei, *supra* note 11, at 443 (claiming that theories that propose unified theories fail to provide accurate descriptions of the complexity and multidimensionality of the world of legal transplants). In Germany, see the work of Reinhard Zimmermann, Reiner Schulze and Elmar Wadle. In the United States see Edward Wise, James Gordley. In Italy, besides Rodolfo Sacco, see Gino Gorla. In Great Britain see A. W. Brian Simpson and Basil Markesinis.

28. See Berkowitz et al., *supra* note 4, at 167–69 (developing an empirical exercise showing that the way in which a law is transplanted is a more important determinant of effective transfer than the belonging to a compatible legal family). Compare *id.* with La Porta & Al., *Legal determinants of external finance*, 52 J. OF

transfer must be acceptable to the regulatory culture in which it is inserted, and it must be made suitable for use so that it can be developed by existing or newly formed institutions in a way that is responsive to the local demand for that law.²⁹

The central claim in Pistor's model states that ultimately it is upon the institutional system in the receiving state to integrate the new law.³⁰ Institutional receptiveness is measured by inspecting two factors: (1) the familiarity of the importer with the legal system of the exporter (i.e., legal tradition, common history, the legal concepts being introduced), and (2) the importer's voluntary adaptation of the foreign law to the local conditions during the importation process (i.e., this happens when there is demand for the law).³¹ Both concepts are closely connected to the institutional setup of the receiving country: familiarity refers to the compatibility of the regulatory cultures present in both countries, and the voluntary adaptation is a response to the internal demand for legal innovation in a certain area of law.³² If there is an institutional setting in the receiving country, assessing familiarity and voluntary adaptation revolves around testing the regulatory culture of such institutions or predicting the development of new institutions based on the shape of the existing ones. This assessment will suggest whether the importing body can accommodate the transplanted law.

Often transplants fail because it is difficult to uproot established institutions. The transfer of U.S. antitrust law to Japan, which provides a valuable example because it occurred at approximately the same time and under similar circumstances as the transfer to the ECSC, is illustrative of the force of such institutional barriers in preventing an effective transplant.³³ Before the transfer, in Japan,

FINANCE 1131-50 (1997) (arguing that legal families are important determinants of financial market development).

29. Berkowitz et al., *supra* note 4, at 167 ("[F]or the law to be effective, it must be meaningful in the context in which it is applied so citizens have an incentive to use the law and to demand institutions that work to enforce and develop the law.")

30. *See id.* at 167-68.

31. *See id.* at 182.

32. *See id.* at 177 ("But even for professionals to apply a special rule, they must not only grasp the wording of that rule, but also the concept behind it, the value judgments on which it rests, and its position within the overall legal order. Even a seemingly clear law—do not steal!—raises a host of interpretative problems when applied to real world cases . . . An identical rule like this one, will be interpreted differently by those charged with applying it and will be influenced by their understanding of the underlying values on which this norm rests."); *see also* Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 897-901 (2003); Curtis J. Milhaupt, *In the Shadow of Delaware? The Rise of Hostile Takeovers in Japan*, 105 COLUM. L. REV. 2171, 2220 (2005).

33. *See* HADLEY, *supra* note 10, at 357-89; Takahashi, *supra* note 10, at 87-96; Harry First, *Antitrust Enforcement in Japan*, 64 ANTITRUST L. J. 137, 173-82 (1995) [hereinafter First, *Antitrust Enforcement*]; Harry First, *Antitrust in Japan: The Original Intent*, 9 PAC. RIM L. & POL'Y J. 1, 21-22 (2000) [hereinafter First, *Original Intent*].

antitrust was one of many instruments used by bureaucrats to guide and foster the national economy, at times through the active promotion of cartels.³⁴ The role that the Japanese government had assigned to antitrust policies stood in opposition to the focus of U.S. antitrust law on the advancement of competition and individual freedom. Such tensions affected the negotiations over the content of the Japanese Antimonopoly Act, when it was adopted in 1947 under the pressure of the U.S. occupation.³⁵ Even though the substantive legal provisions of the Act were very similar to the Sherman Act, and an independent enforcement agency similar to the FTC was introduced to apply them, the U.S. provisions were not developed into effective law.³⁶ The Japanese regulatory culture was not used to having independent agencies that were not subject to established economic policies and the direct control of an existing ministry.³⁷

The institutional structure of existing bureaucracies ultimately constrained the integration of the U.S. antitrust model in Japan. The agency created by the Americans was unable to assert its power within an existing bureaucracy that was accustomed to controlling every angle of the economy. The other ministries, especially the MITI (Ministry of Internal Trade and Industry), did not let the agency operate freely by reserving the power to be involved in matters of industrial policy, and by exerting pressure to keep the level of antitrust enforcement low.³⁸ Its functionality was also limited by the

34. See CHALMERS JOHNSON, *MITI AND THE JAPANESE MIRACLE: THE GROWTH OF INDUSTRIAL POLICY 1925–1975* 108–09 (1982) (explaining that an official of the MITI spent seven months in Berlin reporting on industrial rationalization, emphasizing the usefulness of government-sponsored cartels); Shuya Hayashi, *The Goal of Japanese Competition Law*, in *ECONOMIC THEORY AND COMPETITION LAW* 57 (2009) (stating that, before the transfer, Japan had no experience with competition law); Mitsuo Matsushita, *The Antimonopoly Law in Japan*, in *GLOBAL COMPETITION POLICY* 151, 181 (1997) (explaining that before the transfer the Japanese economy was protective of the so-called “zaibatsu” conglomerates and arguing that the Japanese developed competition policies to appease the Allied occupation forces); Takahashi, *supra* note 10, at 93–96; First, *Antitrust Enforcement*, *supra* note 33, at 144; J. Mark Ramseyer, *The Costs of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 *YALE L.J.* 604, 643–45 (1985).

35. See Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 1947 (Japan), http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.files/The_Antimonopoly_Act.pdf [<http://perma.cc/V25Q-5EQW>] (archived Oct. 5, 2015); KAMEOKA, *supra* note 10, at 10–20 (arguing that industrial policies prioritizing the needs of the national economy overshadowed the vision of competitive markets that the United States had in mind); First, *Antitrust Enforcement*, *supra* note 33, at 144; Takahashi, *supra* note 10, at 93–96.

36. See Takahashi, *supra* note 10, at 87–88; First, *Antitrust Enforcement*, *supra* note 33, at 173–82.

37. See Takahashi, *supra* note 10, at 94–95.

38. See KAMEOKA, *supra* note 10, at 28–30 (arguing that Japanese focus on industrial policy as administered by the MITI, which included the regulatory control of industrial conglomerates, preempted the application and enforcement of competition rules); First, *Antitrust Enforcement*, *supra* note 33, at 154–157.

allocation of meager funds for its operations.³⁹ The few cases brought to the agency were disposed of bureaucratically, almost exclusively through private settlements, and only rarely litigated in courts.⁴⁰ This strategy to keep the courts uninvolved and to restrain the doctrinal development of the Act was purposeful: it left the bureaucracy with the power to control antitrust decisions by not having to abide to preexisting legal requirements.⁴¹ The result was a system of weak enforcement where the laws remained ambiguous and executive bodies maintained full discretion over what concerned the administrative guidance of antitrust.⁴² In short, Japan accepted the law into its system, but used its institutions to limit its usefulness.

The above discussion suggests that the effectiveness of a legal transplant has less to do with the substantive provisions than with the internal logic of existing institutions. The antitrust transplant from the United States to Japan was largely ineffective because there was no familiarity with the American regulatory culture, and at the time of the transfer, the Japanese made no effort to accommodate the American legalistic tradition within its bureaucratic structure. Familiarity and voluntary adaptation are useful concepts to think about transplants, but they seem to be more easily applicable to a situation that involves a transfer from one jurisdiction to another, where both the exporting and the receiving country have an institutionalized legal system in place. In a situation where the importing body does not yet have established institutions, the localization model becomes insufficient, and the evaluation of criteria such as familiarity and voluntary adaptation loses importance because, even if there is neither familiarity with the imported law nor a sign of voluntary reception, a transplant can still be effective. When inspecting a transplant in a new regulatory regime, the lack of an institutional structure itself becomes the predictor of legal development.

The localization model is not immediately applicable to the transplant of U.S. antitrust to the EC because it cannot account for the fact that at the time of the transplant the EC was a nascent

39. First, *Antitrust Enforcement*, *supra* note 33, at 155.

40. See KAMEOKA, *supra* note 10, at 30–32 (explaining that competition law enforcement through “administrative guidance” was insufficient at preventing or stopping anticompetitive practices); First, *Antitrust Enforcement*, *supra* note 33, at 154.

41. See First, *Antitrust Enforcement*, *supra* note 33, at 176–77 (“[I]n the area of joint conduct it is not clear what, beyond the most overt behavior, constitutes an “agreement,” nor is it clear under what circumstances competitor agreements on price might be justified.”).

42. See KAMEOKA, *supra* note 10, at 14 (arguing that the Antimonopoly Act was weakened by a 1953 amendment); see also Takako Ishihara, *Industrial Policy and Competition Policy*, JAPAN FAIR TRADE COMM’N, <http://www.jftc.go.jp/eacpf/05/jicatext/aug27.pdf> [<http://perma.cc/5252-8K9Z>] (archived Oct. 5, 2015) (arguing that the 1953 amendment and the purposively weak implementation of competition law in Japan reflected its inability to find a place in the national social and economic context).

entity without an institutionalized setup. The dynamics of the EC transplant will be examined in detail below, but for present purposes may it suffice to say that the main way in which the European antitrust transplant case differed from the Japanese one, was that it involved a transplant to a supranational entity, at the point in time when its laws and institutions had yet to be decided upon. In the Japan case, the U.S. antitrust laws were transferred into an established context accustomed to a different set of rules, in the EC the same rules were transplanted into a not-yet-formed context that was in the course of framing its rules and institutions. There was no preexisting institutional system to adapt the foreign law to. Instead, the U.S. provisions were to regulate the internal market of a newly born supranational community of states that was in the process of being formed.

Testing for familiarity and voluntary adaptation in the EC transfer case would have predicted a negative outcome. There was no familiarity with the U.S. system, nor with antitrust and its attainments in general, as only very few countries in Europe had antitrust laws in place, and they were largely ineffective and scarcely enforced.⁴³ There was also a lack of voluntary adaptation, as the occupation forces initially forced the provisions into the ECSC treaty.⁴⁴ The relevant debate in the social sciences, which inspects the processes and mechanisms through which policies, institutions, and norms spread around the world—also known as “diffusion”—would categorize this as a coerced transfer and would also predict a negative outcome.⁴⁵ There was however on the European end, a strong demand to lay the foundations of a new economic order—and such demand integrated the laws as part of a reform process instigated by a native stakeholder.⁴⁶

43. GERBER, *supra* note 17, at 166–67.

44. See Graziadei, *supra* note 11, at 456–57; Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law (Installment II)*, 39 AM. J. COMP. L. 343, 359 (1991) [hereinafter Sacco, *Installment II*]. On coercion in this context, see Julie Mertus, Book Review, 21 HOUS. J. INT'L L. 581, 582 (1999) (reviewing THOMAS DAVID JONES, HUMAN RIGHTS: GROUP DEFAMATION, FREEDOM OF EXPRESSION AND THE LAW OF NATIONS (1998)), who argues that superpower hegemony imposes legal rules on less powerful nations, because the superpower cannot be denied: “the legal transplant process is generally marked by some form of coercion, . . . states that adapt their laws to conform with the laws of politically powerful states are rewarded . . . while those that do not are penalized.” See also Steven R. Ratner & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, 93 AM. J. INT'L L. 291, 291–301 (1999).

45. See Dobbin et al., *supra* note 4, at 449; Zachary Elkins & Beth Simmons, *On Waves, Clusters, and Diffusion: A Conceptual Framework*, 598 ANNALS AM. ACAD. POL. & SOC. SCI. 33 (2005) (elaborating on a theoretical and conceptual framework that distinguishes between adaptation and learning).

46. See Wolfgang Wiegand, *Americanization of Law: Reception or Convergence?*, in LEGAL CULTURE AND THE LEGAL PROFESSION 137, 138 (1996); Wiegand, *supra* note 18, at 230–31. See generally CONSTITUTIONALISM AND RIGHTS:

B. *The Role of Stakeholders*

A transplant into a new regulatory regime calls for the examination of new elements that can account for its effectiveness. This section develops a framework that explains legal transplants using interest group theory. The framework is premised on the argument that if a legal transplant is made effective by inducing an internal process of legislating, there must be a group of stakeholders in the receiving entity that supports the reception of the transplanted law, because such group will gain benefits through its use and application.

The transfer of a law into a new context sets into motion different dynamics depending on whether the law is transferred to an existing order or to a new order. If the introduction of a law occurs at the moment in time when the institutional and normative settings of the receiving body are forming, several groups will compete over how to implement the given law, because this will enable them to influence the formation of the institutional structure of the new system and gain power. This is not expected to happen when the institutional setting of an importing body is tightly entrenched because such rooted setup will emerge as the strongest stakeholder and dictate the role the transplanted measure will have. That is what happened with the antitrust transplant to Japan, where the government—the leading and unrivaled stakeholder—rendered the new law ineffective by isolating it in a system that could not assimilate it.⁴⁷ In a situation where institutions are in the process of being conceived, there is space for competing meanings of a given legal measure, and such different meanings will benefit different groups. Groups with high stakes in the outcome of the policy are expected to spend substantial effort fighting for the implementation of a new law, so that their preferred policy outcomes are implemented, and so they can assert themselves within the new regulatory framework created for the law's administration.⁴⁸ This will help the group secure stable outcomes, durable benefits, and long-lasting power.

Supranational capture in this sense differs from regulatory capture in traditional public choice analysis. Public choice theory assumes that local politicians and bureaucrats are rationally self-

THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990); Joan Davison, *America's Impact on Constitutional Change in Eastern Europe*, 55 ALB. L. REV. 793 (1992); Miller, *supra* note 24, at 847 (arguing that externally-dictated transplants are implemented to satisfy the demands of foreign states or entities in order to obtain benefits or avoid penalties for the nation or national interest).

47. See First, *Antitrust Enforcement*, *supra* note 33, at 178 ("In Japan, legalistic antitrust was placed in the context of a bureaucratic regulatory culture.")

48. See MARVER H. BERNSTEIN, *REGULATING BUSINESS BY INDEPENDENT COMMISSION* 74–95 (1955).

interested individuals who will attempt to influence policy to maximize their personal power.⁴⁹ The dynamics of regulatory capture within existing jurisdictions have been studied and explained mostly in connection with rent-seeking and other benefits that can be obtained by influencing regulation, but not in connection with the development of rules in the absence of established institutions.⁵⁰ The presence of established institutions does not inhibit stakeholders or interest groups from lobbying for the introduction of rules that would advance their interest, but it does limit their scope. Such rules would only be recognized to the extent that they can further the general economic policies advocated by the establishment. The rivalry would take place among constituencies that endorse laws that further previously chosen policy goals. If the constituencies' preferences do not further those goals, legal change would be limited to isolated innovations disconnected from key policymaking areas.

This type of supranational capture also differs from capture in the context of harmonization, and the creation of international law or global rules, which has been studied in many settings and describes multiparty negotiations that take into account the complex power structure of each country's government and the interests of other constituencies.⁵¹ The difference lies in the way of legislating. Most of these negotiations do primarily concern standards, as opposed to laws, and the power to administer such standards is usually

49. See generally MAXWELL STEARNS & TODD ZYWICKI, *PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW* (2009).

50. See, e.g., George Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3–21 (1971); Jean-Jacques Laffont & Jean Tirole, *The Politics of Government Decision-Making: A Theory of Regulatory Capture*, 106 *Q.J. ECON.* 1089, 1089–127 (1991); Micheal Levine & Jennifer Forrence, *Regulatory Capture, Public Interest and the Public Agenda: Toward a Synthesis*, 6 *J.L. ECON. & ORG.* 167, 185 (1990).

51. See BÜTE & MATTLI, *supra* note 13, at 18–40; Putnam, *supra* note 13, at 431–68; Colombatto & Macey, *supra* note 12, at 955. On regime theory, see generally STEPHEN D. KRASNER, *INTERNATIONAL REGIMES* (1983); ROBERT O. KEOHANE, *AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD OF POLITICAL ECONOMY* (1984). On harmonization, see Li Wen Lin, *Legal Transplants Through Private Contracting: Codes of Vendor Conduct in Global Supply Chains as an Example*, 57 *AM. J. COMP. L.* 711, 712 (2009) (explaining that harmonization is seen as an approximation of national laws by virtue of legal and administrative action taken by international governmental or non-governmental organizations and that there are hard and soft approaches to harmonization). Examples of the hard approach are the legal interactions between the WTO and its members, or between the European Union and its Member States, whereas examples of the soft approach include the OECD Corporate Governance Principles and the UNIDROIT Principles of International Commercial Contracts. See Lin, *supra*, at 712; see also Gianmaria Ajani, *By Chance and Prestige: Legal Transplants in Russia and Eastern Europe*, 43 *AM. J. COMP. L.* 93, 115–17 (1995); Louis F. Del Duca, *Developing Global Transnational Harmonization Procedures for the Twenty-First Century: The Accelerating Pace of Common and Civil Law Convergence*, 42 *TEX. INT'L. L.J.* 625, 626 (2007); Wei Shi, *Globalization and Indigenization: Legal Transplant of a Universal TRIPS Regime in a Multicultural World*, 47 *AM. BUS. L.J.* 455, 455 (2010).

delegated to supranational institutions that have limited enforcement powers.⁵² Effective supranational organizations are rare, as states are typically reluctant to devolve their legislating power to supranational institutions, and resort to charging standard-setting bodies with the task to regulate through soft measures.⁵³ This study is different. It inspects the horizontal introduction of a foreign law into a supranational entity at its inception, and not a vertical standard it had to comply with. In the present case, the stakeholder was successful because it had expertise in a field that was introduced as a full legal measure, and the system in charge of enforcing it agreed to comply with the respective commitments.

The next step involves teasing out what factors make a stakeholder successful in its pursuit to influence a newly transplanted law. Public choice theory maintains that successful interest groups are coherent, well organized, and that they have charismatic leaders and articulate strategies and plans.⁵⁴ It also suggests that the likelihood of their success is a function of how (poorly) organized the opposition is.⁵⁵ If the opposition is diffused and not motivated to educate itself on the matter at issue, a stakeholder with an elaborate plan is likely emerge as the winner.⁵⁶ The amount of effort dedicated by a given group to lobby for a specific interpretation of a law is anticipated to be proportional to the profits that can be obtained through its applicability.⁵⁷ In a situation where institutions are being created and power is being allocated among them, substantial extra returns can be gained by capturing positions in agencies charged with the administration of that law because it

52. See BÜTE & MATTLI, *supra* note 13, at 18–40; JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* 91–100 (2005); ROBERT E. SCOTT & PAUL B. STEPHAN, *THE LIMITS OF LEVIATHAN: CONTRACT THEORY AND THE ENFORCEMENT OF INTERNATIONAL LAW* 112–20 (2006); Dinah Shelton, *Introduction, in COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM* 1, 1–18 (Dinah Shelton ed., 2000); Kenneth Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 *INT'L. ORG.* 421, 422 (2000) (stating that soft measures reflect commitments that are less strong than legal commitments); Jacob Gersen & Eric Posner, *Soft Law: Lessons from Congressional Practice*, 61 *STANFORD L. REV.* 573, 575 (2008); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 *DUKE L.J.* 568, 579, 621 (1992); Charles Lipson, *Why Are Some International Agreements Informal?*, 45 *INT'L. ORG.* 495, 500–02 (1991) (arguing that soft laws are useful because they are flexible and can be negotiated quickly, in a way that legal agreements are not).

53. Gersen & Posner, *supra* note 52, at 575. For specific examples, see BÜTE & MATTLI, *supra* note 13, at 18–40.

54. OLSON, *supra* note 13, at 63–75.

55. See MICHAEL HAYES, *LOBBYISTS AND LEGISLATORS: A THEORY OF POLITICAL MARKETS* 59 (1981); OLSON, *supra* note 13, at 63–75; STEARNS & ZYWICKI, *supra* note 49, at 69–72; JAMES WILSON, *POLITICAL ORGANIZATIONS* 332–37 (1973).

56. OLSON, *supra* note 13, at 63–75; STEARNS & ZYWICKI, *supra* note 49, at 376–78.

57. OLSON, *supra* note 13, at 63–75.

will enable the group to “feed itself” and stay powerful.⁵⁸ Furthermore, a transplant in a new regulatory body is likely to be captured when an unconstrained constituency within the importing entity is educated and informed enough to interpret a certain transplanted law in a way that endorses, to some extent, the intellectual approach used to apply the same rule in the exporting entity.

The latter argument focuses on the intellectual alignment of the parties to the transfer in what concerns the meaning of a legal rule.⁵⁹ If the exporter maintains some power over the importer, in view of the allocation of such powerful positions, the importer’s constituencies will seek to influence a new law in a way that pleases the exporting body. In turn, the exporter is most likely to cooperate with constituencies that support an interpretation of the law that is in line with its goals. In this sense, once a transfer has been identified, an important consideration becomes the assessment of the rational principles used to apply the law in the exporting country.⁶⁰ This requires the examination of intellectual connections and political mechanisms that the exporting institution utilizes to shape its policies.⁶¹ If such intellectual determinants and mechanisms find a counterpart in the receiving entity, then such counterpart will invest resources and effort in order to capture the interpretation and administration of the transferred law, because it will then be able to utilize them to further its own goals and purposes. Agreement on the way a legal rule is to be understood and interpreted presents advantages for both parties: the stakeholder benefits because it can defeat its opposition and gain power, and the exporter for the reasons it induced the transfer of law in the first place—which in the case of antitrust usually involves obtaining market access.

At its core, the framework of the captured transplant aims at identifying the unifying elements in the regimes of the exporter and the importer at the time of the transplant in order to predict its

58. *Id.*

59. *Id.*; see also LeGrand, *supra* note 25, at 116; Wendy Wagner, *Administrative Law, Filter Failure, and Information Capture*, 59 DUKE L.J. 1321, 1325 (2010).

60. See LeGrand, *supra* note 25, at 114 (arguing that rules and meaning are separate concepts, that “[t]he meaning of a rule, however, is not entirely supplied by the rule itself,” and that “meaning is also—and perhaps mostly—a function of the application of the rule by its interpreter, of the concretization or instantiation in the events the rule is meant to govern”).

61. See WATSON, *supra* note 25; Kahn-Freud, *supra* note 25, at 27; Sacco, *Installment I*, *supra* note 27, at 21 (“If, then, we are to compare the rules of the Italian legal system with those of the English system, which rule are we to compare? The constitutional rule, the statutory rule or the judicial rule?”).

significance.⁶² The more articulated the instruments used, the easier it is to compare them and make this prediction. The preferences of interpretative communities in exporting countries are usually more easily discerned than the ones in the receiving entity, especially if the receiving entity is in the process of being formed and several groups with differing preferences are negotiating.⁶³ In the latter case, the way of thinking about the law will come from the elements that form the individual legal orders of many negotiating member states, and reflect their bargaining power. Each of the bargaining states will be conditioned by a series of factors, and by a framework of intangible values within which its interpretive communities operate, and which have normative force for these communities but not necessarily for the supranational entity. Ultimately, however, one legal tradition will prevail, and if the social and intellectual contexts of this tradition can lend themselves to the transposition of the intellectual preferences of the exporting country, the transplanted law is likely to be endorsed.⁶⁴ The key issue then becomes inspecting what factors are relevant proxies when measuring the compatibility of the interpretative context, because this is what will ultimately make the transfer effective.

The case study of the transfer of U.S. antitrust law to the EC finds evidence to support several of the propositions outlined above. The aim of the Americans with the transfer of their antitrust law to Europe was to enable American businesses to access the European market, and, in order to do so, existing cartels had to be fragmented. The Americans therefore had a keen interest that antitrust laws in Europe would be used in the same way they were used in the United States, where, more than at any point in time before, antitrust measures were aggressively enforced to punish anticompetitive practices and excessive market power; and this was in line with the intellectual discipline of the Harvard School, the dominant school on competition policy at the time. A positive outcome would have

62. See David Nelken, *Comparatists and Transferability*, in *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITION* 437, 456–59 (Pierre LeGrand & Roderick Munday eds., 2003).

63. See Sacco, *Installment II*, *supra* note 44, at 348 (“To defend their views, the scholars elaborate systematic criteria for the legal method around which ‘schools’ form such as the current law and economics movement. The importance of scholarly activity is perhaps the feature, which most distinguishes American from English law.”).

64. See *id.* at 389 (“For example, one of the strongest anti-formalist methodological trends relates legal phenomena to economic reality. Most of the representatives of this tendency analyze economic reality in terms of conflicting class interests. We have nothing to say against this way of investigating. However, to reach any sound conclusions one must be able to establish connections between class interest and legal superstructure, legal rules and institutions. To do so one must show that certain legal solutions actually accompany any instance of a given class structure, and that a certain class structure actually correlates with the emergence of a given legal solution. It is incredible that this methodological principle is hardly ever put into practice.”).

ultimately depended on the ability of a stakeholder in the EC to give a meaning to the transplanted provisions that would benefit its own constituency as well as the United States.

The stakeholders in Europe included several groups of representatives of the member states involved in the negotiation of the nascent EC, and they all understood the need to lay the foundations of a new integrated economic system, but their knowledge of antitrust was mostly limited.⁶⁵ The case study that follows explains that the German Ordoliberal School emerged as the winning stakeholder that was successful in appropriating the transplanted law because it had a deeper knowledge about antitrust than its opposition, and its vision of a competitive system was compatible with the American perspective. Furthermore, the moment of formation of a new regulatory regime and the absence of institutional constraints helped its members achieve significant power and important positions within the new administration.

III. THE CASE STUDY: U.S. ANTITRUST IN EUROPE

This Part will unpack the facts in order to contextualize the transfer. In light of these facts, which narrate the story of the transfer of U.S. antitrust provisions to the entity that was going to become the EC, the present discussion illustrates the approaches underlying competition policy on both sides of the Atlantic in order to show that the transplant was made effective by the presence of a stakeholder that believed in concepts that were similar to those of the American school.

In the 1950s, the United States was provided with the occasion to directly influence the competition policies of the ECSC, an institution with a cross-national dimension that was later going to develop into the European Community.⁶⁶ The ECSC treaty established a supranational infrastructure designed to regulate the integration of European coal, steel, and related sectors, and it presented the very start of a European history of supranational competition policy. Six European countries founded the ECSC in 1951: Germany, France, Italy, and the three Benelux states.⁶⁷ The

65. See discussion *infra* Part II.C.

66. JEAN MONNET, MÉMOIRS 349–360 (1976). The ECSC Treaty expired in July 2002 and the coal and steel sectors of the EC Member States became subject to the market rules of the EC market.

67. See *id.* at 342–343 (using a pragmatic internationalist approach emphasizing the common interests of participating states); see also FRANÇOIS DUCHENE, JEAN MONNET: THE FIRST STATESMAN FOR INDEPENDENCE 209–23 (1994); ROBERT SCHUMAN, ORIGINES ET ELABORATIONS DU ‘PLAN SCHUMAN’ 272 (1953) (“But through these perspectives of an economic kind . . . we have in particular focused on the advantages immediately achieved in the political domain. To conclude a durable

United States was able to directly influence the negotiations leading to the framing of the competition policy provisions of the ECSC treaty by making reconstruction resources conditional on the deconcentration of major cartelized industries.⁶⁸

While Americans were accustomed to thinking in terms of competition policy, Europeans did not have much direct experience with competition law and its attainments. Only a few countries in Europe had competition laws in place at that time, and they were mostly of minor relevance.⁶⁹ The founders of the EC, however, understood the thought behind competition policy well enough to see it as a tool to further their ends, namely to facilitate the creation of an integrated market. In an effort to leverage the allocation of political powers within the new union and to overcome this lack of expertise in the field of competition, Jeanne Monnet, the Planning Commissioner of France after the liberation, assigned the task of designing the antitrust provisions of the newborn treaty to a group of antitrust experts from the American Delegation.⁷⁰ Robert Bowie, the

and controlled union regarding coal and steel would be to prevent each country involved not only from waging but even from preparing for war against the other countries involved.”).

68. See Marie Laure Djelic, *Does Europe Mean Americanization? The Case of Competition*, 6 COMPETITION & CHANGE 223, 245 (2002) (quoting Walter Hallstein saying to the German government on October 19, 1950, “Monnet’s ideas are probably also influenced by the American desire that all cartel-like institutions be rejected—a desire that gains special weight due to the fact that it is supported by the funds that Americans are to provide at a later stage.”); see also WILLIAM DIEBOLD, *THE SCHUMAN PLAN: A STUDY IN ECONOMIC COOPERATION 1950–1959*, at 49–78 (1959); MARIE LAURE DJELIC, *EXPORTING THE AMERICAN MODEL: THE POST WAR TRANSFORMATION OF EUROPEAN BUSINESS* 81 (1988); ERNST B. HAAS, *THE UNITING OF EUROPE: POLITICAL, ECONOMIC AND SOCIAL FORCES 1950–1957*, at 242 (1958); WALTER HALLSTEIN, *EUROPE IN THE MAKING* 110 (1972); MONNET, *supra* note 66, at 356; Heinrich Karl Bock & Hans Korsch, *Decartelization and Deconcentration in the West German Economy Since 1945*, in *ANTI-TRUST LAWS: A COMPARATIVE SYMPOSIUM* 138–75 (1956); Gerhard Bebr, *Labor and the Schuman Plan*, 52 MICH. L. REV. 1007, 1022 (1954). Note that Spain did not receive any aid under the Marshall plan. See J. Bradford De Long & Barry J. Eichengreen, *The Marshall Plan: History’s Most Successful Structural Adjustment Program* 14 (Nat’l Bureau of Econ. Research, Working Paper No. 3899, 1991).

69. See GERBER, *supra* note 17, at 43–114, 171 (explaining that, although the general thinking about competition law in Europe started in the 1890s in Vienna, it never translated into applicable provisions until 1923, when the first European competition law was enacted in Germany, where it was, however, eliminated in the 30s, and that Norway and Sweden enacted competition laws in 1925 and 1926 respectively but such laws were of minor relevance, and that most competition legislation was enacted after the World War II).

70. See MONNET, *supra* note 66; see also GERBER, *supra* note 17, at 338 (explaining the role of George Ball, a U.S. lawyer based in Paris who was asked to comment on the drafts, and reporting that “George Ball notes how during the negotiations he left through the backdoor of the building where Monnet was masterminding the drafting and negotiating of the treaty—in case Europeans arrived”); GEORGE W. BALL, *MEMOIRS* 88–89 (1st ed. 1982); Yannis Karagiannis, *The Causes and Consequences of the Collegial Implementation of European Competition Law*, 19 EUR. L.J. 682, 700–704 (2013) (analyzing the countervailing French and German interests when negotiating with the American counterpart); Yannis Karagiannis, *The Origins of European Competition Policy: Redistributive Versus*

legal counsel of the U.S. High Commission to Germany, drafted Articles 65 and 66 of the treaty, the main competition law provisions of the nascent community.⁷¹ When Bowie wrote the drafts he drew heavily on the American experience and, not surprisingly, the articles resembled Sections I and II of the Sherman Act quite closely.⁷²

Bowie's knowledge and background in antitrust heavily influenced his drafting and are therefore instrumental to the understanding of the new competition law provisions. Before coming to Europe, Bowie had been a professor at Harvard Law School specializing in antitrust.⁷³ At Harvard, he supported notions of antitrust that strongly condemned excessive market power and anticompetitive practices, such as the excess profits resulting from monopolistic behavior.⁷⁴ The idea that deconcentrated markets are more efficient than concentrated ones had been rooted in his mindset since his days as a student. As a result, Bowie thought that the right role of the American establishment in Europe was to introduce policies based on democratic capitalism, liberal political values and free trade, which had proved enormously successful in the United States. However, in order to do this, aggregations of power had to be broken up first.⁷⁵

The competition policy provisions set out in the ECSC Treaty, in Monnet's words "Europe's first major antitrust law," resembled the American prohibition-based approach very closely.

Article 65(1) prohibited anticompetitive agreements among enterprises or associations of enterprises, and cartels in the form of concerted practices that tended, directly or indirectly, to "prevent, restrict or distort the normal operation of competition within the

Ideational Explanations, 20 J. EUR. PUB. POL'Y 777-94 (stressing the importance of the French negotiating power in connection with the aims and functions of the new laws); Raymond Vernon, *The Schuman Plan*, 47 AM. J. INT'L L. 183, 183-97 (1953) ("The reasons for [competition law] provisions are to be found only partly in the drafters' adherence to competition as an economic way of life. More important, perhaps, was the concern of the drafters that cartels, if permitted to develop, might become the real political power of the Community and might constitute a challenge to the Community's sovereignty.").

71. MONNET, *supra* note 66; ROBERT R. BOWIE, RÉFLEXIONS SUR JEAN MONNET IN TÉMOIGNAGES À LA MÉMOIRE DE JEAN MONNET 81 (1989).

72. See generally TFEU, *supra* note 8; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, arts. 80, 81, 1997 O.J. (C 340); Treaty of Rome, art. 85-86, Mar. 25, 1957, 298 U.N.T.S. 3.

73. Julia D. Maxwell, *Robert Bowie, Founder of Harvard's Weatherhead Center, Dies at 104*, HARVARD CRIMSON (December 3, 2013), <http://www.thecrimson.com/article/2013/12/3/robert-bowie-dies-at-104/> [<http://perma.cc/T56Y-U433>] (archived Oct. 14, 2015).

74. See Carl Kaysen, *Collusion Under the Sherman Act*, 65 Q.J. ECON. 263, 263 (1951) (acknowledging the helpful comments of Professor Bowie).

75. Robert Bowie, Section Seven of the Clayton Act (1934) (unpublished third year paper) (on file with the Harvard University Library System). As a 3L, Bowie wrote this paper on merger policies.

common market.”⁷⁶ Some examples given are actions tending to fix prices, the restriction or control of production, technical development and investments, and the allocation of consumers, markets, products or sources of supply.⁷⁷ This provision was widely drafted: it not only encompassed cartels, which are agreements between separate companies in the same line of business that are designed to limit or eliminate competition, but also included a wider spectrum of horizontal as well as vertical agreements between two or more enterprises operating at different levels of the same production-distribution-consumption process.⁷⁸

Article 65(2) authorized the enforcement body, the High Authority, to permit certain types of agreements prohibited by subsection (1) if specific exceptional circumstances were met.⁷⁹ For instance, agreements that furthered product specialization and agreements for joint buying and selling of such products were exempted from the application of subsection (1), provided that they would substantially improve the production and distribution of the products in question and that the agreement was the only way to achieve the same result.⁸⁰ Improved market performance was paramount, as long as the agreements were not capable of giving the interested firms power to fix prices, to control output, to stifle competition, or simply to abuse their dominant position.

The other competition law article of the treaty, Article 66, contained detailed provisions dealing with concentrations, which could be effected by “merger, acquisition of shares or assets, loan, contract, or any other means of control.”⁸¹ According to 66(1), concentrations that had the potential to harm competition were proscribed, whereas mergers that could be shown to result in efficiencies and enhanced productivity could be authorized.⁸² The provision states that harm to competition would result when a concentration gained enough power to influence prices, control production, or gain an unfair advantage in accessing supplies or markets.⁸³ The executive power to enforce all the above provisions was vested in the High Authority, a body composed of nine members, eight of whom were appointed and the ninth elected by the governments of member states.⁸⁴ In connection with Article 66(1), a merger would require prior authorization by the High Authority,

76. Treaty Constituting the European Coal and Steel Community, art. 65, April 18, 1951, 261 U.N.T.S. 140.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* art. 66.

82. *Id.*

83. *Id.*

84. *Id.* arts. 8-19.

whose powers in merger control proceedings were, at the time, without precedent.⁸⁵

The new supranational competition law provisions were not only drafted to resemble the competition law provisions of the Sherman Act, but also reflected a prohibition approach to competition that was in line with the Harvard School tradition, at least as far as restrictive practices and cartels were concerned. These provisions were at first only designed to apply to the coal and steel industry, but their scope was widened to include other sectors when the same articles became the relevant antitrust sections of the Treaty of Rome, which paved the way for the creation of the EC.⁸⁶ The Americans had succeeded in transplanting their antitrust laws into Europe at a time when its supranational institutional structure was being negotiated, and the lack of existing power structures facilitated their introduction and assimilation.

A. *The Harvard School and Structuralism*

The narrative above suggests that there was an almost direct transplant of U.S. antitrust law to Europe and that it was significantly facilitated by the fact that the ECSC was at its inception. Yet the provisions themselves leave much unsaid, as they could be interpreted in many ways. The present section examines the approach of the Harvard School to antitrust policy. The section that follows inspects whether the intellectual discipline that was steering the way the provisions were implemented in the United States had a counterpart in Europe, as this would have increased the chances of making the transplant effective.

Since its enactment in 1890, the Sherman Act has been interpreted in a multitude of ways, ranging from the application of the rule of reason to the neglect of antitrust enforcement, from imperfect competition to the strict condemnation of market power, but for most of the twentieth century the U.S. antitrust tradition treated most monopolies with distrust.⁸⁷ In 1911 for instance, a

85. *Id.* art. 66.

86. Treaty Establishing the European Economic Community Signed at Rome, March 25, 1957, 298 U.N.T.S. 11. The Treaty did not include specific merger provisions, they were introduced later through legislation and the case law. See European Commission, Problem of Concentration of Enterprises in the Common Market, Competition Series, Study No. 3 (1966); Joint Cases 142/84 & 156/84, British Am. Tobacco Co. & RJ Reynolds v. Commission, 1987 E.C.R. 4487; Council Regulation 139/2004 of Jan. 20, 2004, On the Control of Concentrations Between Undertakings (the EC Merger Regulation), 2004 O.J. (L 24); Council Regulation 4064/89 of Dec. 21, 1989, On the Control of Concentrations Between Undertakings, 1989 O.J. (L 395).

87. Sherman Act of 1890, 15 U.S.C. §§ 1-7 (1890); see also JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 81-106 (1942); Kenneth Arrow, *Economic Welfare and the Allocation of Resources for Invention*, in THE RATE AND

landmark decision by the U.S. Supreme Court broke petroleum giant Standard Oil into thirty-four sub-entities after holding that it was abusing its monopoly position.⁸⁸ The fear of monopolies reached its peak at the time of the transplant, a point in time when the American antitrust tradition was characterized by Structuralism, an approach to antitrust associated with the Harvard School, which endorsed the aggressive pursuit of antitrust practices, and which was heavily concerned about the structural manifestations of monopolistic power.⁸⁹ The power of big corporations was perceived as a threat to democratic government policies, and antitrust laws were seen as the tools to combat such a threat and enhance economic prosperity.⁹⁰

This call for the vigorous enforcement of antitrust laws resulted in a number of Supreme Court decisions that manipulated the Sherman Act to introduce new per se prohibitions concerning restraints of trade and monopolization matters.⁹¹ In *Interstate Circuit* and *Socony Vacuum Oil*, conscious parallelism and price fixing

DIRECTION OF INVENTIVE ACTIVITY: ECONOMIC AND SOCIAL FACTORS 609, 619 (1962); Giocoli, *supra* note 17, at 758–63.

88. Standard Oil Co. v. United States, 221 U.S. 1, 71–82 (1911).

89. *Id.* at 9; see also Herbert Hovenkamp, *Antitrust and the Costs of Movement*, 78 ANTITRUST L.J. 67, 74 (2012).

90. See Frank A. Fetter, *The Economist's Committee on Anti-Trust Law Policy*, 22 AM. ECON. REV. 465, 465–69 (1932) (stating that 127 economists signed a petition attacking cartels and the undaunted economic power yielded by many big corporations); Franklin D. Roosevelt, *Letter to the Secretary of State Relating to Elimination of Cartels, September 6, 1944*, in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: F.D. ROOSEVELT 1944–1945, Kilgore Committee, *Mobilization Hearings*, Part 16, 2038 (“[C]artel practices which restrict the free flow of goods in foreign commerce would have to be curbed.”); see also RICHARD J. HOFSTADTER, *THE PARANOID STYLE IN AMERICAN POLITICS AND OTHER ESSAYS* 212–13 (1952) (explaining that the acceptance of large corporations accustomed people to bureaucratic careers and this getting accustomed to living in the corporate framework possibly explains a decline in interest in antitrust’s grandiose theories, it was becoming more and more a topic for specialists and technocrats); Elmo Roper, *The Public Looks at Business*, 27 HARV. BUS. REV. 165, 165–174 (1949) (explaining that this sharp revival of antitrust enforcement activities took place at a time when the public had come to view big corporations in predominantly favorable terms, one reason for this being that the economy had performed well since the beginning of the Second World War and big corporations had created jobs and kept prices down, and recognizing that there was some apprehension over possible abuses of power inherent in big businesses).

91. See Henry C. Simons, *A Positive Program for Laissez-Faire: Some Proposals for a Liberal Economic Policy*, in ECONOMIC POLICY FOR A FREE SOCIETY 4–77 (1948); see also Henry C. Simons, *The Requisites of Free Competition*, 26 AM. ECON. REV. 68, 70 (1936) (calling it “an obvious responsibility of the state . . . to maintain the kind of legal and institutional framework with which competition can function effectively,” and asserting that active control over the size of companies and structure of the market was the most effective way to achieve this: “[T]here must be vigorous and vigilant prosecution of conspiracy in restraint of trade and, above all, through going reform in corporation law. The right to charter large corporations must be vested exclusively in the federal government; and the powers conferred on these legal creatures must be carefully and narrowly limited.”); JOHN BATES CLARK & JOHN MAURICE CLARK, *THE CONTROL OF TRUSTS* 187–88 (1912).

strategies of monopolies were harshly punished.⁹² The case of *Alcoa* further demonstrated how the mere size of a company could constitute a violation of the Sherman Act: Judge Learned Hand argued that even if *Alcoa* did not misuse its monopoly power, the fact that it was building capacity ahead of demand, put the company in a position where it *could* engage in anticompetitive behavior, and this was enough to constitute an antitrust infringement.⁹³ The focus of competition law had shifted from the inspection of conduct towards structural issues, and the core of judicial evaluations lay in the consideration of concentration rates and market shares.

From a theoretical perspective, the central tenet of Structuralist thinking lay in the Structure-Conduct-Performance (SCP) paradigm, a method of analyzing competition first introduced by Edward Mason that looked at the market structure of an industry in order to predict conduct and performance in terms of pro- or anticompetitive outcomes.⁹⁴ Mason's theory was advanced by Carl Kaysen and Donald Turner, who argued that the goal of antitrust law was the protection of the competitive process through the limitation of market power, and explained that antitrust laws correcting conduct could not be enough, because they were unable to deal with undue market power that could not be related to distinct anticompetitive practices.⁹⁵ Their concern for preventing market concentration was grounded in economic analysis arguments that inspected the breadth of the market, the character of demand, the number and distribution of sellers and buyers, entry barriers, and product differentiation.⁹⁶

92. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 221 (1939); *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150, 254 (1940).

93. *United States v. Aluminum Co. of America*, 148 F.2d 416, 448 (2nd Cir. 1945) (ruling on what Herbert Hovenkamp defines as "arguably the most important monopolization decision of the twentieth century, and the one that brought modern economic analysis to postwar antitrust"); Herbert Hovenkamp, Book Review, 28 J. INTERDISCIPLINARY HISTORY 158, 159 (1997) (reviewing RUDOLPH J. R. PERITZ, *COMPETITION POLICY IN AMERICA* (1996)).

94. Edward S. Mason, *Price and Production Policies of Large-Scale Enterprises*, 29 AM. ECON. REV. 61, 61 (1949); see also JOE S. BAIN, *BARRIERS TO NEW COMPETITION* 182-204 (4th ed. 1967); JOE S. BAIN, *INDUSTRIAL ORGANIZATION* 430-68 (2d ed. 1959).

95. See CARL KAYSEN & DONALD F. TURNER, *ANTITRUST POLICY: AN ECONOMIC AND LEGAL ANALYSIS* 5 (1959) ("In our democratic, egalitarian society, large areas of uncontrolled private power are not tolerated."). Kaysen and Turner do concede that some situations make regulated monopolies necessary; for example, when the efficiency of scale economies is at stake they look at economies of scale comparatively, in the sense that the scale needed in order to be efficient can be created by many firms together. *Id.* at 44-45. Note that Edward Mason wrote the preface.

96. See *id.* at 60, 110 (conceding that a broad definition of market structure could include the characteristic conduct of firms in a market and the presence of practices that affect the creation or the maintenance of market power, showing that, to a certain extent, reflections about conduct infiltrated their definition of structure); see also Almarin Phillips, *Competition, Confusion, and Commercial Banking*, 19 J. FIN. 32, 32 (1964) (explaining how the application of the Structuralist tools impacted even the

Kaysen and Turner argued for divestiture as a remedy for excess market power and expressed skepticism of any type of concentration that was not accompanied by an explicit efficiency justification.⁹⁷

The work of Joe Bain substantiated their empirical claim by showing that structural situations characterized by high seller concentrations and high barriers to entry were more conducive to a worse performance.⁹⁸ Bain demonstrated that both these factors, whether assessed independently or in combination, tended to be connected with substantially higher rates of excess profits and had therefore an adverse effect on market performance.⁹⁹ On the basis of some rudimentary data, Bain developed a dichotomy that predicted a worse market performance when at least 70 percent of the market is controlled by the eight largest firms.¹⁰⁰ He showed that firms with large market shares have the ability to impose higher prices.¹⁰¹ Overall Bain developed a model that demonstrated that good performance was positively correlated with unconcentrated markets and that avoided the transaction costs associated with the inspection of conduct.¹⁰²

The scholarly debate was able to affect legislation in a direct way. New merger policies were implemented with the 1950 Celler-Kefauver Act.¹⁰³ Celler-Kefauver extended the reach of merger

banking industry). Kaysen and Turner themselves classed the banking industry among those industries for which conventional antitrust policy was inapplicable. See KAYSSEN & TURNER, *supra* note 95, at 42–43; see also *United States v. Phila. Nat'l Bank*, 374 U.S. 322, 363 (1963) (concluding that performance improves as the number of banks increases: "Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects . . . 'competition is likely to be the greatest when there are many sellers, none of which has any significant market share.'").

97. KAYSSEN & TURNER, *supra* note 95, at 44–45.

98. See BAIN, *INDUSTRIAL ORGANIZATIONS*, *supra* note 94, at 204–06 (arguing that both factors, whether assessed independently or in combination, tend to be connected with substantially higher rates of excess profits and therefore have an adverse effect on market performance).

99. See *id.* at 372–429.

100. *Id.* at 464; see also George J. Stigler, *Mergers and Preventive Antitrust Policy*, 104 U. PA. L. REV. 182, 183 (1947) (suggesting that mergers creating market shares of 10–20 percent are big enough to create a threat and should be closely scrutinized by enforcement agencies).

101. See BAIN, *INDUSTRIAL ORGANIZATIONS*, *supra* note 94, at 464–68.

102. See *id.*; see also Edward Mason, *Market Power and Business Conduct: Some Comments*, 46 AM. ECON. REV. 471, 471–80 (1956) ("That market power is an elusive quantity requires no demonstration before this audience. It is not possible nor will it ever be possible, by calculating market shares, dividing price–minus–marginal–cost by price, or other hocus pocus, to present an unambiguous measure of the degree of monopoly. Market power has many dimensions . . . it is probably desirable that these judgments be economically sophisticated.")

103. Giocoli, *supra* note 17, at 756; see also TEMP. NAT'L ECON. COMM., 77TH CONG., INVESTIGATION OF CONCENTRATION OF ECONOMIC POWER 1 (1941).

controls policies considerably: whereas the old law, Section 7 of the Clayton Act, only covered acquisitions of control by the purchase of shares of stock, Celler-Kefauver also tackled mergers that proceeded via the purchase of assets—thereby covering asset consolidations that fell short of full market dominance.¹⁰⁴ Furthermore, the old legal test required that the anticompetitive effect be between the acquiring and the acquired company, and courts could interpret it as not covering vertical mergers since the effect of the vertical merger is not on the merging parties.¹⁰⁵ The new legal test inspected the likely impact of a merger on competition “in any line of commerce in any section of the country” and not only the potential impact of the merger on competition between the two merging companies.¹⁰⁶ The first important Supreme Court interpretation of the amended Section came with the *Brown Shoe* decision where the Supreme Court evaluated the merger in terms of market shares and applied economic analysis to analyze the concentration.¹⁰⁷ Furthermore, the Court banned a merger that would occupy 7.5 percent of the relevant market in *Von’s Grocery*, and a merger with an even smaller concentration percentage in the *Pabst* decision.¹⁰⁸

The changes effected by Celler-Kefauver were fundamental: they expressed a shift in the philosophy of antitrust law from setting rules of conduct to the proactive control of changes in the market structure.¹⁰⁹ The main concerns behind this shift in attitude did, however, go beyond market performance and the concentration of economic power affected by the rise of monopolies: there was an acute fear among government administrators that large corporations would exploit their power politically and take over the executive role of the state.¹¹⁰ The concern for the political implications of these

104. Celler-Kefauver Act of 1950, Pub. L. No. 899, 38 Stat. 731, 734 (codified at 15 U.S.C. §§ 18, 21 (1950)).

105. See Clayton Act, Pub. L. No. 212 §7, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 12 (2012)).

106. See *id.*

107. See generally *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

108. See generally *United States v. Von’s Grocery Co.*, 384 U.S. 270 (1966); *United States v. Pabst Brewing Co.*, 384 U.S. 546 (1966).

109. See, e.g., The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18(a) (2012) (amending the Clayton Act by providing that before certain mergers, tender offers or other acquisition transactions can close, both parties must file a “Notification and Report Form” with the FTC and notify the Antitrust Division of the Department of Justice); ALFRED R. OXENFELDT, *INDUSTRIAL PRICING AND MARKET PRACTICES* 406–07 (1951); see also Joe Sims & Deborah P. Herman, *The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation*, 65 ANTITRUST L.J. 865, 878–80 (1997).

110. See GEORGE J. STIGLER, *FIVE LECTURES ON ECONOMIC PROBLEMS* 46–59 (1949); M.A. Adelman, *The Measurement of Industrial Concentration*, 33 REV. OF ECON. & STAT. 269, 296 (1951) (“The extent of concentration shows no tendency to grow, and it may possibly be declining. Any tendency either way, if it does exist, must be the pace of

agglomerates of economic power was voiced by Senator Kefauver himself:

[T]he history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state.¹¹¹

Senator Kefauver was concerned with the legitimacy of the system and the need to maintain public faith and to prevent the failure of a democratically elected government. When expressing his concerns he certainly had in mind the outcome of dictatorial policies in Europe.

B. *Europe and the Ordoliberal School*

It is difficult to imagine the application of American-style competition laws to the European scenario, which had long been dominated by a tradition of cartelization. In Europe, the application of competition laws was marginal, because it was thought that government-driven industry coordination was a more efficient process—a resolution of the Inter Parliamentary Union defined cartels as “natural phenomena of economic life.”¹¹² To the very limited extent that there were competition laws in place, rules were vague, the use of administrative power discretionary, and the enforcement soft.¹¹³ Most European states had been following abuse-based policies, which gave enforcement agencies wide discretion in defining abuse of market power, a concept mainly understood in terms of conduct causing harmful effects.¹¹⁴ However, the provisions of the ECSC treaty now incorporated the prohibition of cartels, trusts, and the restrictive practices of a system that envisaged the aggressive enforcement of antitrust laws—a drastic innovation to the European antitrust setting.

This section explains that the effectiveness of the transplant depended on the presence of a stakeholder, the Ordoliberal School, which was able to integrate the U.S. approach. The Ordoliberals believed in rational principles that were compatible with the American antitrust model. They endorsed liberal political values and the creation of a social market economy, and had full confidence in

a glacial drift.”); John Lintner & J. Keith Butters, *Effect of Mergers on Industrial Concentration, 1940–1947*, 32 REV. OF ECON. & STAT. 30, 30–31 (1950).

111. 96 Cong. Rec. 16452 (daily ed. Dec. 12, 1950) (statement of Sen. Kefauver).

112. Giocoli, *supra* note 17, at 764 n.53; *see also* GIFFORD & KUDRLE, *supra* note 17, at 8.

113. *See generally* David J. Gerber, *Law and the Abuse of Economic Power in Europe*, 62 TUL. L. REV. 58 (1987).

114. *See generally id.*

the advantages of a competitive system.¹¹⁵ These principles could be used to give a meaning to the new laws contained in the ECSC treaty that was in line with the way Americans applied and understood antitrust policy. When the Ordoliberalists sought to influence the transplanted law, the timing worked in their favor, the institutions in charge of administering the competition policies of the EC were in the process of being conceived, and that was helpful on two fronts. First, they did not encounter resistance from existing power structures, and second, it enabled them to capture positions within the developing bodies in charge of applying the new law. U.S. officials backed their efforts, because they understood that by supporting Ordoliberal methods and actors they could succeed in their goal of importing a free market system to Europe and open new avenues for American companies.

Born during the interwar period at the University of Freiburg in Germany, the Ordoliberal School developed into one of the principal schools of thought on competition policy in Europe.¹¹⁶ The ideas expressed in the Ordoliberal Manifesto of 1936 were intellectually opposed to the centralization of economic power and the way this led to social division and market disintegration that was typical of the Nazi regime. During the war, the Ordoliberal public intellectuals who refused to join Hitler's political party had their work censored and were forced to leave their positions.¹¹⁷ With the fall of the Nazi regime, there was a widespread need for fundamental changes, and the Ordoliberalists that returned to their offices were now in the

115. See DARIO VELO & FRANCESCO VELO, A SOCIAL MARKET ECONOMY AND EUROPEAN ECONOMIC MONETARY UNION 57–59 (2013) (explaining Walter Rathenau's influence on the foundation development of the social market economy); Rainer Klump & Manuel Wörsdörfer, *An Ordoliberal Interpretation of Adam Smith*, 61 ORDO: JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT 29–51 (2010) (examining works spanning from EUCKEN, DIE GRUNDLAGEN DER NATIONALÖKONOMIE, (1950) and GRUNDSÄTZE DER WIRTSCHAFTSPOLITIK, (1952), to ADAM SMITH, WEALTH OF NATIONS (1776); JOHN STUART MILL, ON LIBERTY (1869)); see also JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT (F.C. Montague ed., 1891) (1776).

116. See generally Doris Hildebrand, *The European School in Competition Law*, 25 WORLD COMPETITION 3 (2002); David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25 (1994).

117. FRANZ BÖHM, WALTER EUCKEN & HANS GROSSMAN-DOERTH, THE ORDO MANIFESTO OF 1936 (1936). Starting in 1948 Boehm and Eucken founded the journal ORDO: JAHRBUCH FÜR DIE ORDNUNG UND WIRTSCHAFT UND GESELLSCHAFT which is still available today. The preface of the first volume (1948) at 11 said, "All we are asking for is the creation of an economic and social order which equally guarantees economic activity and humane living conditions. We call for competition because it can be utilized to reach this goal—in fact the goal cannot be reached without it. It is a means, not an end in itself." See also Constantin von Dietze, *Die Universität Freiburg im Dritten Reich*, 3 MITTEILUNGEN DER LIST- GESELLSCHAFT (1961); NILS GOLDSCHMIDT, WALTER EUCKEN INSTITUT, ALFRED MUELLER-ALMACK AND LUDWIG ERHARD: SOCIAL MARKET LIBERALISM 13 (2012).

position to provide a coherent plan for reconstruction.¹¹⁸ They had regained the political and intellectual liberty to influence policy, and their plans to decentralize economic power in Europe were in alignment with those of the Americans. As was their belief that only once aggregations are broken could a system supportive of liberal political values be put into place.¹¹⁹

The Ordoliberalists envisioned the introduction of a fundamentally new model for economic growth in Europe aimed at restoring the public's faith in the market and promoting social integration through economic freedom and the belief in competition.¹²⁰ In agreement with the American perspective, Ordoliberalism sharply rejected monopolistic structures and cartel-dominated economies and drew instead on the basic values of classical liberalism that supported the introduction of a competitive economic system in an effort to enhance prosperity and equity within society.¹²¹ Their goal was to give competition policies a constitutional dimension, so that citizens would be constitutionally protected from distortions and abuses and could gain the maximum benefits stemming from a free market.¹²² Erhard, a committed Ordoliberal, envisaged a system in which the state was responsible for setting up and constitutionally guaranteeing an economic order, but not for controlling the economic process: "What I am aiming at with a market economy policy is . . . to lay down the order and the rules of the game."¹²³ This way, competition policy was transformed into a constitutionally endorsed democratic principle that protected individuals' freedom to do business.¹²⁴

The methodological approach of the Ordoliberalists was broader in scope than the Structuralist SCP paradigm in the sense that it went beyond the inspection of market structure and the control over size, but similarly it supported the use of interventionist practices to suppress cartels and anticompetitive behavior. Its foundations can be traced back to the work of Walter Eucken, an economist at the University of Freiburg, who was convinced that economic systems

118. A. J. NICHOLLS, *FREEDOM WITH RESPONSIBILITY: THE SOCIAL MARKET ECONOMY IN GERMANY, 1918-1963*, at 151 (1994) (noting that Ludwig Erhard had to leave the "Institute for the Economic Research" in 1942).

119. Friedrich von Hayek, *Die Überlieferung der Ideale der Wirtschaftsfreiheit*, 31 SCHWEIZER MONATSHEFTE: ZEITSCHRIFT FÜR POLITIK, WIRTSCHAFT, KULTUR 337 (1951).

120. *Id.*

121. *Id.*

122. LEONHARD MIKSCH, *WETTBEWERB ALS AUFGABE* (1947); see also GERBER *supra* note 17, at 256 (stating that "economic knowledge had to be translated into the language of the law"); Giocoli, *supra* note 17, at 769-78.

123. LUDWIG ERHARD, *PROSPERITY THROUGH COMPETITION* 102 (1958).

124. See Friedrich A. Hayek, *Wahrer un Falscher Individualismus*, *ORDO* 19-55 (1948) (explaining how competition policy transformed into an individual freedom).

must be guided by competition-enhancing principles.¹²⁵ Eucken developed a doctrine named *Ordnungspolitik*, often translated as “thinking in orders,” in which he distinguished two main types of fundamental economic orders. The “centrally administered” economic order ensured that competition policy framed market processes at the institutional level, and the “transaction economy” enabled individuals to deal according to their own incentives.¹²⁶ Even though individual elements of their respective theories differed, the notions reflecting the classical liberal ideal that competition is necessary for democracy, and the wellbeing of society were in direct alignment with the procompetition belief of the Structuralists.

The main intellectual innovation of the Ordoliberal School lay in the idea of an economic constitution. The Ordoliberals thought that a society’s constitution had to establish the characteristics of its economic order. A useful definition of economic constitution can be found in the Manifesto itself: “[A] general political decision as to how the economic life of the nation is to be structured.”¹²⁷ In a free market economy where competition policy decisions constituted a major pillar, the economic constitution was formed by the political and legal decisions that characterized the market structure of a nation.¹²⁸ These constitutional choices were not meant to survive in a vacuum, but after being translated into normative guidelines they had to be implemented and made effective by a functional legal system.¹²⁹ As one commentator put it, “the principles enshrined in the economic constitution should represent at the same time the source and the constraint for the specific decisions made by governments and legislators.”¹³⁰ In short, economic theory was encapsulated in a constitutional framework that was subsequently transformed into enforceable legal norms.

How do constitutionally bounded economic principles regulate economic conduct? Eucken distinguished between constitutive and regulative principles.¹³¹ Constitutive principles were fundamental and had a constitutional dimension; examples are the freedom of contract, the recognition of private property, and the protection of

125. See WALTER EUCKEN, *THE FOUNDATIONS OF ECONOMICS: HISTORY AND THEORY IN THE ANALYSIS OF ECONOMIC REALITY* 313–15 (T.W. Hutchison trans., 1950).

126. See *id.* To better tie the influence of this intellectual thought to what was happening on the European political stage, see generally NICHOLLS, *supra* note 118, who explains that Ludwig Erhard was a student of Walter Eucken in Freiburg. Eucken died in 1950 and never personally managed to bring his Ordoliberal ideas to bear in the political scene, this was done by Erhard who pushed through the Ordoliberal thought first from his position as Minister of Economic Affairs and later as Chancellor.

127. FRANZ BÖHM, WALTER EUCKEN & HANS GROSSMAN-DOERTH, *supra* note 117, at 24.

128. *Id.*

129. *Id.*

130. Giocoli, *supra* note 17, at 771.

131. WALTER EUCKEN, *GRUNDSÄTZE DER WIRTSCHAFTSPOLITIK* 254–291 (1952).

open markets and competition.¹³² More specific regulation follows therefrom in the form of workable legal norms, such as the condemnation of abuses and monopolistic power.¹³³ Through their invention of the economic concept of constitution, the Ordoliberals had found a coherent way to give a legal foundation to competition policy that minimized governmental discretion. From that moment onwards competition policies would institutionally frame market processes. Legislators had little discretion in writing the law because constitutive principles translated almost directly into legal measures, and government's role was to enforce them.

Ordoliberal theory limited government's role to that of maintaining conditions under which market prices, freely arrived at, would allocate resources. Heavy-handed regulation and the control of prices were abhorred, and competition was perceived as an "instrument for disempowerment."¹³⁴ The Ordoliberals reasoned that if governmental discretion was not limited by constitutive principles, its intrusive involvement in controlling private contracts would lead to rent-seeking: "Competition would not take place in the market, but in the antechambers of government departments, and attempts at monopoly are also made partly via these antechambers and partly through the concentration of enterprises."¹³⁵ Specific reference was made to the dangerous status of cartels that result from the collusion of private and public power.¹³⁶ According to the Ordoliberals, government's role was to enforce contracts wherever they reflected individual freedom to trade and to refuse to enforce those inconsistent with free decisions and allocative efficiency. The overriding goal of

132. *Id.*

133. *Id.*

134. See Franz Böhm, *Kartelle und Monopole im Modernen Recht, in DEMOKRATIE UND ÖKONOMISCHE MACHT* 22 (1961); see also *Monopoly and Competition in Western Germany, in MONOPOLY AND COMPETITION AND THEIR REGULATION* 143 (1954) ("This mixture of free and controlled prices has great economic disadvantages, particularly as officially controlled prices are at present, in Western Germany, consistently lower than they would be in a free market. As a result, economic planning in factories or in private households is vitiated. The demand for goods with officially controlled prices is artificially inflated, with the result that they are squandered. The profitability of the works producing these goods is artificially lowered, and their equipment neither improved nor renewed. A scarcity of these goods then results, bottleneck appear, and the government sees itself forced to ration such goods. On the other hand, profits are high in the industries where prices are uncontrolled, profits are reinvested in these industries—chiefly those producing consumption goods—whereas the basic industries suffer from a notable lack of capital. Intervention is therefore needed to divert the flow of capital from the consumption industries to the basic ones.").

135. See *Monopoly and Competition in Western Germany, supra* note 134, at 150.

136. See, e.g., Franz Böhm, *Das Problem der Privaten Macht: Ein Beitrag zur Monopofrage*, 3 *DIE JUSTIZ* 324 (1928); Franz Böhm, *Eine Untersuchung zur Frage des wirtschaftlichen Kampfrechts und zur Frage der rechtlichen Struktur der geltenden Wirtschaftsordnung, in XI WETTBEWERB UND MONOPOLKAMPF* (1933).

competition policy was to maintain a constitutionally protected individual freedom, so that efficiency would follow from agreements of individual parties bargaining in their best interest.¹³⁷

To sum up, the new system envisioned by the Ordoliberals was characterized by the maximization of individual freedom, confidence in competitive markets and concern for state power, and these principles could accommodate the American experience by reflecting the rational principles and intellectual preferences applied in the interpretation of antitrust laws by the Structuralist movement.

C. Capturing the U.S. Antitrust Transplant

This section explains that the German Ordoliberals emerged as the winning stakeholders in capturing the transplant of U.S. antitrust laws because they could define the transplanted provisions in a way that would benefit its own constituency as well as the United States. In addition, the moment of formation of the EC and the flexibility of its institutional structure enabled the Ordoliberal to assert themselves within a new regulatory framework thereby securing long-term power and durable returns.

The present version of capture differs from modern capture theory, which postulates that groups capture governmental positions in order to maximize their wealth.¹³⁸ Ordoliberal actors were eager to use their power for ideological, rather than wealth-transferring, purposes. The benefits in the present case were not associated with pecuniary gains or private benefits, but rather with the power associated with holding office and bringing ideas to bear in public practice.¹³⁹ The thirst for power was deeper than self-gratification; the Ordoliberals had an ideological agenda that was silenced by the advent to power of Hitler's party and throughout the war, and now that they had gained back their positions their main goal was to increase their ability to influence public policy in a direct way.

The Ordoliberal School was very influential in postwar Europe in its efforts to put a new and workable system of competition into place. One of the keys to the success of the Ordoliberal thought was its sharpness and depth: all policy recommendations were given intellectual strength and appeal by a novel and solid theoretical

137. ERNST-WOLFRAM DÜRR, *WESEN UND ZIELE DES ORDO-LIBERALISMUS* (1954).

138. See, e.g., ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 137-41 (1957); OLSON, *supra* note 13; Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 371-98 (1983); Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211-40 (1976); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335-58 (1974); Stigler, *supra* note 50, at 3-21.

139. Joseph P. Kalt & Mark A. Zupan, *Capture and Ideology in the Economic Theory of Politics*, 74 AM. ECON. REV. 279, 279-300 (1984).

basis. Another reason for their achievements had to do with a structural advantage in the political process; the transplant of U.S. antitrust law occurred at the point in time when the institutions of the EC were being conceived by a number of participants who were not familiar with antitrust theory, and who therefore tried to secure power by other means. This enabled the Ordoliberal School to seize the opportunity to translate its principles into the new law and to capture positions within the developing institutions to apply and guide its application.

An additional factor that explains the influence of the Ordoliberals was their deviation from other approaches to antitrust present in Europe. The Ordoliberal thought on competition was very different from the other mainstream approach to competition policy in Europe, which placed more importance on the control of abuses of big corporations.¹⁴⁰ The “abuse control” approach, which was dominant in most European countries and which allowed for the existence of cartels so long as no abusive practice could be discerned, was not compatible with the Structuralist model.¹⁴¹ It lost to the Ordoliberal counterpart mostly because its reliance on the discretion of authorities to find and regulate abuse was unsatisfactory in view of systematically breaking up existing concentrations. The interventionist approach of the Ordoliberals, on the other hand, could meet those goals. Given the symmetry between the Ordoliberal approach and the American model, the Ordoliberals had higher stakes in transposing their principles into the new law than its opposition. And it is not surprising that the Americans chose to cooperate with the constituency that supported an interpretation of antitrust that was in line with their goals.

Further, the Ordoliberal School was the one stakeholder within the importing body that was able to understand and interpret the transplanted law in a way that endorsed, to a significant extent, the intellectual approach to antitrust applied in the United States. The Ordoliberal view that competition laws were to be used to prevent the creation of monopolistic power did fit well with the prohibition-based approach of the ECSC articles, and so did their keenness to prohibit cartels and other power creating agreements. Overall, the Structuralist and the Ordoliberal model had much in common: both believed in no-fault standards and in the legal prohibition of aggregations that wielded economic power. Both approaches supported interventions towards dangerous concentrations, and both

140. See generally Gerber, *supra* note 113.

141. See generally *id.*; Sigfrido M. Ramírez Pérez & Sebastian van de Scheur, *The Evolution of the Law on Articles 85 and 86 EEC [Articles 101 and 102 TFEU]: Ordoliberalism and its Keynesian Challenge*, in *THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW 19* (Kiran Klaus Patel & Heike Schweitzer eds., 2013).

stood against the abuse approach in that the keystone of their analysis lay in the mere presence of aggregations, not their behavior.

Such intellectual alignment made it possible for Americans as well as the Ordoliberalists to directly benefit from the transfer. Both movements could sustain similar goals—namely dismantling the steel cartels in the German *Ruhrgebiet*, which was in line with the goals that the U.S. administration had in mind for postwar Europe and also with the Ordoliberal philosophy of breaking up monopolies. The Americans aimed to import their free market system to Europe to facilitate the entry of U.S. business in the European market. Conveniently, Ordoliberal values and principles could be easily used and adapted to that end.¹⁴² The promotion of a market-driven economy was in the interest of both Europe and the United States, and it was endorsed by the liberal principles enshrined in the Ordoliberal economic constitution. In many ways, the deal worked on a quid pro quo basis; U.S. officials were in a position to use the Ordoliberal ideas in order to further their ends. Similarly, the ability to influence the transplanted law gave the Ordoliberalists the opportunity to achieve their own goals and purposes.

Even if the intended outcomes of a working competition law model were similar, Ordoliberal principles were intellectually closer to the European situation than the American ones. The American understanding of competition law could not fully account for one of the major features of the European situation, the integration of a European common market.¹⁴³ The U.S. model could provide a satisfactory intellectual tool in that direction only partially, and this was through its faith in a free market economy—and that was important with respect to the unified Europe that Schuman and Monnet had in mind, but not sufficient. The goal of the nascent European competition laws was the elimination of restraints of trade across national borders, and although the idea of European integration did not come from the Ordoliberalists, but from the group of negotiators of the ECSC, their model provided a comprehensive and well-grounded framework that could be applied to give form to legal principles and institutions of the new union according to the general political goals envisioned by its founders. Integration could further be met by the constitutional dimension to competition law endorsed by the Ordoliberalists, as it would be conducive to an economic system designed to prevent the creation of monopolistic power.

142. GERBER, *supra* note 17, at 258 (arguing that besides of an outlet for business, the United States also sought stability in view of the Cold war “The rupture of co-operation between the Soviet Union and the other occupation authorities that led to the ‘Cold War’ further intensified United States support for Ordoliberal proposals, as economic structure and policy quickly became part of the East-West conflict”).

143. See generally Stephen Martin, *The Goals of Antitrust and Competition Policy*, in *ISSUES IN COMPETITION LAW AND ECONOMICS* 19 (2008); GIFFORD & KUDRLE, *supra* note 17.

The other claim that this case study makes is that the absence of institutional power structures in Europe enabled the Ordoliberal stakeholders to capture positions created for the law's administration and influence policy. The intellectual background of the key actors of the integration process initiated by the ECSC proves the point.¹⁴⁴ German Chancellor Ludwig Erhard, a committed Ordoliberal, was one of the architects of postwar economic policy as well as one of the driving forces behind the reform of competition law.¹⁴⁵ He was particularly important because the Americans liked him, and this facilitated their interactions.¹⁴⁶ Furthermore, the negotiations that led the way to the Treaty of Rome, and which later established the EC, were also guided by strong supporters of the Ordoliberal intellectual force: Walter Hallstein, who was appointed first president of the European Commission, and Hans Von der Groben, who became EC Competition Commissioner in 1963.¹⁴⁷ From his position as EC Competition Commissioner, Von der Groben highlighted three purposes of competition law: (1) the prevention to create barriers of trade within the common market; (2) the creation of an economic and social order based on the individual freedom of workers, businesses, and consumers; and (3) the promotion of market integration as a result of business decisions as opposed to government directives.¹⁴⁸ The interaction of these three goals was intended to stimulate economic activity and create a system of free competition in which supply and demand would adjust automatically to technological development within an integrated market place.¹⁴⁹ The strong emphasis on individual freedom of action in a competitive environment reflected the impact of the Ordoliberal thought on EC competition law.

Overall, the new version of liberalism articulated in the Ordoliberal model was instrumental to the successful formation of competition policy in a new economic order. By placing economic doctrine at the center of its intellectual framework, Ordoliberalism succeeded in enhancing the value of competition rules, which up to that moment in history had played a very minimal role in Europe,

144. See generally Brigitte Leucht & Mel Marquis, *American Influences on EEC Competition Law*, in *THE HISTORICAL FOUNDATIONS OF EU COMPETITION LAW* 125, *supra* note 141.

145. See NICHOLLS, *supra* note 118, at 151.

146. *Id.*

147. HALLSTEIN, *supra* note 68, at 28; see also INTERGOVERNMENTAL COMM. ON EUR. INTEGRATION, *THE BRUSSELS REPORT ON THE GENERAL COMMON MARKET* (June 1956).

148. HANS VON DER GROBEN, *AUFBAUJAHRE DER EUROPÄISCHEN GEMEINSCHAFT* (1982); Hans Von der Groben, *The Role of Competition in the Common Market*, A.B.A. PROCEEDINGS CONFERENCE ON ANTITRUST AND THE EUROPEAN COMMUNITIES 14, 18–19 (1963).

149. HANS VON DER GROBEN, *supra* note 148; see also Eur. Coal & Steel Comm'n et al., *First Report on Competition Policy*, at 11 (1972).

and put them at center stage of European integration. The European competition policy provisions were successful for two reasons: first it was clear that the adherence of the major European countries to policies committed to the creation of a common market would bring about greater efficiency and more rapid growth, and second, these laws reached a constitutional level by setting out general overarching principles that could be absorbed gradually on two levels: by the Commission and the European Court of Justice on one level, and by the individual competition laws of member states that were progressively converging toward Community competition law.¹⁵⁰ Both processes played a central role in the advent of European integration.

IV. TODAY'S DIVERGENCE AND PROTECTIONISM IN THE EUROPEAN UNION

At present, U.S. antitrust and EC competition law operate quite differently.¹⁵¹ U.S. antitrust policies influenced the development of its European counterpart at its origin, but once the law was transplanted, the Ordoliberalism arose to turn the law in their favor and guide its application and development.¹⁵² This last Part will emphasize the importance that the Ordoliberal movement still has in connection with the application of present-day competition policy in the EC. The recent decisions in Microsoft and Google have shown that when it comes to antitrust policy the European Commission can be very harsh towards the anticompetitive practices of American companies—there is a certain irony in this, given that the very purpose of the introduction of U.S. antitrust laws in Europe was to open up market platforms to facilitate the business of U.S. companies.

150. Case 26/62, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E.C.R. 1 9 (where the ECJ established the conditions for the direct applicability of EC law); Case 6/64, *Costa v. ENEL*, 1964 E.C.R. 585 (establishing the conditions of primacy of EC law in case of conflict with national law); Case 6/72 *Europemballage Corp and Continental Can Co Inc v. EC Commission*, 1973 E.C.R. 215 (examining exclusionary abuses of power affecting the structure of a market); Joint Cases 142/84 & 156/84 *BAT & Reynolds v. Commission*, 1987 E.C.R. 4487 (examining concentrations); see also Council Regulation 1/2003, 2003 OJ (L 1) (confirming that Arts 101, 102 TFEU are directly applicable in member states by virtue of the above and other case-law as long as the agreements restricting competition affect the trade between member states and mergers have a EU dimension).

151. See generally GIFFORD & KUDRLE, *supra* note 17.

152. See Peter Behrens, *The Ordoliberal Concept of 'Abuse' of a Dominant Position and Its Impact on Article 102 TFEU*, in ABUSE REGULATION IN COMPETITION LAW, PROCEEDINGS OF THE 10TH ASCOLA CONFERENCE TOKYO (2015) (arguing that the Ordoliberal approach was not monolithic but could instead adapt to social changes to remain relevant after the transplant).

In the past decade, U.S. antitrust authorities have been relatively lenient in connection with antitrust enforcement. The change in attitude came as the consequence of the so called "antitrust revolution" of the 1970s, when vigorous enforcement was replaced by a more laissez-faire disposition to antitrust disputes, when the Chicago approach to competition policy substituted Structuralism, and when the distrust towards monopolies was replaced by economic efficiency arguments.¹⁵³ The Chicago approach rested on the fact that markets exhibit a spontaneous tendency to reach Pareto efficient results, provided they are not interfered with by exogenous factors, like antitrust actions.¹⁵⁴ Today the U.S. approach to antitrust relies on a more nuanced form of the Chicago approach, introduced by the so-called post Chicago scholars, who not only continue to base their arguments on efficiency, but also take into account game theory, innovation, consumer choice, and the ability of regulators to intervene in the presence of market failure.¹⁵⁵ However, since Nobel Laureate Ronald Coase articulated the damage that can be caused by courts' erroneous conclusions that given practices are anticompetitive (when in fact they are not), authorities became more deferential towards antitrust issues, especially in connection with novel business practices or products whose scope is not yet evident.¹⁵⁶

On the other hand, the approach to competition policy in the EC never abandoned the inclination to control competition practices through the regulatory process, and by doing so it maintained a strong belief in the principles inherited from the Ordoliberal tradition. When the United States started to place greater faith in markets and refrained from regulating the so-called "false positive" practices, the EC continued to show greater confidence towards interventionist procedures.¹⁵⁷ At times it exposed itself to the costs of erroneously regulating behavior that may have led to positive results, the so-called "false negatives."¹⁵⁸ The continued commitment to shape competition through intervention confirms that Ordoliberal principles

153. Richard Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925–28 (1979).

154. *Id.*; see also Melvin Reder, *Chicago Economics: Permanence and Change*, 20 J. ECON. LIT 1, 11 (1982).

155. See Daniel Crane, *Chicago, Post-Chicago, and Neo-Chicago*, 76 U. CHI. L. REV. 1911, 1923–29, 1933 (2009).

156. Ronald H. Coase, *supra* note 20, at 67 ("One important result of this preoccupation with the monopoly problem is that if an economist finds something – a business practice of one sort or other – that he does not understand, he looks for a monopoly explanation. And as in this field we are very ignorant, the number of understandable practices tends to be rather large, and the reliance on a monopoly explanation, frequent.")

157. Bradford, *supra* note 9, at 20; see also Easterbrook, *supra* note 20, at 4–9 (articulating the limits of antitrust and the damage that can be caused by courts' erroneous conclusions that a given practice is anticompetitive when in fact it is not).

158. Bradford, *supra* note 9, at 20.

were not just instrumental in shaping the policies of the nascent European Union, but that they account for much of the way European competition policy is still understood and applied to this day. This in turn explains why, when the European Commission and the FTC investigate the same transaction, most times the application of EC competition standards will result in stricter sentences and penalties, regardless of whether the transaction deals with mergers or abuse issues.

In terms of mergers, on several occasions EC authorities intervened to stop mergers that had previously been approved by U.S. authorities. Boeing and McDonnell Douglas was one such case.¹⁵⁹ Even though the Department of Justice had already cleared the merger, the European Commission expressed serious concerns about the strengthening of Boeing's existing position and imposed a considerable number of conditions before granting its approval.¹⁶⁰ In other cases, the Commission blocked mergers between U.S. companies altogether. This happened, for instance, when it denied General Electric's request to merge with Honeywell International, holding that the short-term efficiencies that the merger would create would drive out European competitors and enable the merged entity to extract higher prices from consumers in the longer term.¹⁶¹ The transaction in this case had also previously been cleared by U.S. authorities.¹⁶² This particular decision was held to be legally non-divisible because General Electric saw no benefit in merging with Honeywell and restricting its operations to the U.S. market.¹⁶³ Currently another merger involving General Electric is under investigation, and although a final decision has not yet been taken, the Commission explicitly voiced its concerns on how the transaction will raise prices, diminish customer choice, and reduce overall research and development investments.¹⁶⁴ Other recent merger cases involving U.S. companies, including Cisco/Tandberg, UTC/Goodrich,

159. Case No: IV/M. 877-Boeing/ McDonnell Douglas, Commission Decision of July 30, 1997, 1997 O.J. (L336/16).

160. *Id.* (discussing that in order for the merger to proceed the Commission ordered that Boeing give up the exclusive supply contracts that it had with major U.S. airline carriers).

161. Case No: COMP/M.2220-General Electric/Honeywell, Commission Decision of March 7th, 2001, 2004 O.J. (L048) (declaring a concentration to be incompatible with the common market because in the long term GE would have been able to bundle its products and charge lower prices than its competitors through the avoidance of double marginalization in supplier-purchaser transactions).

162. Deborah Platt Majoras, Deputy Assistant Attorney General, Remarks Before Antitrust Law Section of the State Bar of Georgia (November 29, 2001), <http://www.justice.gov/atr/public/speeches/9893.htm> [<http://perma.cc/UZ23-5Y58>] (archived Oct. 5, 2015).

163. Bradford, *supra* note 9, at 20.

164. European Commission Press Release IP/15/4478, Mergers: Commission Opens In-depth Investigation into General Electric's Proposed Acquisition of Alstom's European Businesses (February 23, 2015).

and Google/Motorola Mobility, were approved by the Commission in an attempt to cooperate with U.S. authorities—but ultimately the approval of those mergers was made conditional on the implementation of extensive conditions that materially affected the operations of U.S. companies in Europe as well as globally.¹⁶⁵

Also in connection with abuse of dominance cases, the Commission's rulings have had a significant impact on the way U.S. companies conduct their business.¹⁶⁶ The most significant decisions in this ambit involve innovation-intensive industries and platform economies where the network effects are strong, facilitating the formation of monopolies and raising entry barriers for competitors. These industries are characterized by high fixed costs to produce a new technology, such as investment in intellectual property and skilled labor and low marginal production costs.¹⁶⁷ The landmark case where the Commission forced a U.S. company to adjust its conduct to European competition law standards is the Microsoft decision.¹⁶⁸ Holding that Microsoft was abusing its dominant position by not sharing its programming interface with third party companies, the Commission ordered Microsoft to pay fines amounting to more than \$2.3 billion, in addition to changing key elements of its operating software to enable interoperability with other systems.¹⁶⁹ The Commission hit the company again in 2009, this time claiming that by tying Internet Explorer to the Windows platform Microsoft failed to give Europeans a browser choice, and fined the company an additional \$751 million.¹⁷⁰ The tying of Internet Explorer to Windows was at the core of the Microsoft case when it was first brought in the

165. See, e.g., CISCO/Tandberg COMP/M.5669 (2010); UTC/Goodrich COMP/M.6410 (2012); Google/Motorola COMP/M.6381 (2012); see also U.S.–EU MERGER WORKING GRP., BEST PRACTICES ON COOPERATION IN MERGER INVESTIGATIONS 2–3 (2011), http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf [<http://perma.cc/88LZ-H2Y4>] (archived Oct. 5, 2015).

166. Microsoft COMP/C-3/37.792; see also Intel COMP/C-3/37.990 (finding that Intel was abusing its dominant position in the computer chip market by giving rebates to manufacturers on the condition that they exclusively bought their processing unit, imposing a fine of \$1.45 billion and obliging Intel to cease the identified illegal practices). Intel reached a separate settlement with the FTC in 2010 where they agreed not to give computer makers discounts or other inducements in exchange for promises they will buy chips exclusively from Intel. See Intel COMP/C-3/37.990.

167. See David S. Evans & Richard Schmalensee, Some Economic Aspects of Antitrust Analysis in Dynamically Competitive Industries 7–15 (Nat'l Bureau of Econ. Research, Working Paper No. 8268, 2001).

168. *Id.*; Microsoft, *supra* note 166.

169. See Evans & Schmalensee, *supra* note 167, at 7–15; see also European Commission Press Release IP/04/382, Commission Concludes on Microsoft Investigation, Imposes Conduct Remedies and a Fine (Mar. 24, 2004) (discussing how Microsoft had to pay an initial fine of \$794 million in 2004); European Commission Press Release IP/08/318, Antitrust: Commission Imposes €899 Million Penalty on Microsoft for Non-compliance with March 2004 Decision (Feb. 27, 2008).

170. European Commission Press Release IP/13/196, Antitrust: Commission Fines Microsoft for Non-compliance with Browser Choice Commitment (March 6, 2013).

United States, where an appellate decision, overturning the order of a district court, released Microsoft from antitrust violation charges once the company made a commitment to share its programming interface with third party browsers.¹⁷¹ It has often been argued that the U.S. court protected Microsoft's attempt to incentivize innovation.¹⁷²

The Microsoft case suggests that the European Commission is likely to intervene when it fears that the extension of monopolies from one platform to another will foreclose the entry of potential competitors, especially when the first platform benefits from a so-called "network advantage." In particular, the Commission seemed worried that Microsoft was going to leverage its power in the software market into other platforms such as the browsers market, as well as the market for media players, thereby foreclosing competition in the latter ones. Such leveraging practices are dangerous for competition because they enable dominant players to use their market power in one market to break into other distinct markets, thereby restricting competition and raising prices in secondary markets. In making determinations in the platform economy, the European Commission had sometimes distinguished between cases where the creation of a new product was at issue, as opposed to the enhancement of competition in an existing market.¹⁷³ In the Microsoft scenario, opening its operating system to rivals' browsers implies the latter, whereas enabling interoperability with alternative ways to consume digital media implies the former. The Commission failed to articulate this distinction; it forced Microsoft to do both—provide a version of Windows that enabled the choice of alternative browsers and that was not tied to its Media Player—hoping that by doing so it would stimulate competition in these secondary platforms.¹⁷⁴ By doing so, the Commission implied that the innovation that would flow from opening new platforms to competition compensated for disincentivizing original platform carrier's innovation efforts. Overall its decision, as well as the heavy fines, had a forceful impact on Microsoft's worldwide operations.¹⁷⁵

171. See generally *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

172. See GIFFORD & KUDRLE, *supra* note 17, at 170–95.

173. See Case C-418/01, *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co.* 2004 ECR I-5039; Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs- und Zeitschriftenverlag GmbH & Co. KG*, 1998 ECR I-07791; Joined Cases C-241/91 & C-242/91, *Radio Telefis Eireann (RTE) v. Comm'n of the Eur. Comms.*, 1995 ECR I-743; GIFFORD & KUDRLE, *supra* note 17, at 170–95. See generally Amedeo Arena et al., *Two Bodies of Law Separated by a Common Mission: Unilateral Conduct by Dominant Firms at the IP/Antitrust Intersection in the EU and the US*, 9 EUR. COMPETITION J. 623 (2013).

174. Ian Ayres & Barry Nalebuf, *Going Soft on Microsoft? The EU's Antitrust Case and Remedy*, 2 ECONOMISTS' VOICE 4 (2005).

175. *Id.* (discussing how Microsoft's Media Player lost customer appeal when Apple technologies became the preferred way to consume media); see also Nigam Arora,

Another tech giant, Google, is likely to be the next victim of the Commission's strict policing efforts. Since 2010, Google has been the subject of active investigations in both the United States and the EC, and their respective reasons for concern match quite closely. The centerpiece of both complaints related to the way Google displays its search results: Google was accused of abusing its dominant position in the online search market by reserving unfavorable treatment to vertical search service providers compared to Google's own sponsored vertical search results.¹⁷⁶ Google was said to be giving undue preference to its products by highlighting them through biased listings and displaying its own reviews of restaurants and other services more prominently than the ones of other providers like Yelp, OpenTable, etc.¹⁷⁷ Additionally, there were concerns related to the way Google was "scraping" content from those competing providers, using content without permission in its own offerings, and delivering advertisements.¹⁷⁸ On January 3, 2013, the FTC held that Google's practices were not anticompetitive.¹⁷⁹ The FTC essentially supported Google's argument that its system benefitted consumers and that "any negative impact on actual or perceived competitors was incidental to that purpose."¹⁸⁰ Once Google had made a voluntary commitment to refrain from using content of other websites and agreed to remove some restrictions related to advertising, the five-member U.S. Commission unanimously voted to close the investigation without bringing charges.¹⁸¹

In Europe, after five years, Google's antitrust investigation is still open. Since 2010 Google proposed three settlements, all of which were rejected.¹⁸² In April 2015, the Commission issued a set of formal

Seeds of Apple's New Growth in Mobile Payments, 800 Million iTunes Accounts, FORBES (April 24, 2014), <http://www.forbes.com/sites/nigamarora/2014/04/24/seeds-of-apples-new-growth-in-mobile-payments-800-million-itune-accounts/> [<http://perma.cc/KEN4-C5NN>] (archived Oct. 5, 2015).

176. See Vestager Statement, *supra* note 6. But see Aaron Edlin & Robert Harris, *The Role of Switching Costs in Antitrust Analysis: A Comparison of Microsoft and Google*, 15 YALE J.L. & TECH. 169, 171-74 (2013).

177. But see Edlin & Harris, *supra* note 176, at 171-74; Benjamin Edelman & Lai Zhenyu, *Design of Search Engine Services: Channel Interdependence in Search Engine Results* 28-30 (Harv. Bus. Sch., Working Paper No. 13-087, 2014).

178. But see Edelman & Lai, *supra* note 177, at 171-74.

179. Press Release, Fed. Trade Comm'n, Google Agrees to Change Its Business Practices to Resolve FTC Competition Concerns in the Markets for Devices Like Smart Phones, Games and Tablets, and in Online Search (January 3, 2013), <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> [<https://perma.cc/D5PX-MCZE>] (Oct. 5, 2015).

180. *Id.*

181. *Id.*

182. Alex Barker & Richard Waters, *EU Rejects Google's Antitrust Deal Again*, FIN. TIMES (Sept. 8, 2014), <http://www.ft.com/cms/s/0/4af20576-3757-11e4-8472-00144feabdc0.html> [<http://perma.cc/PH4A-RR6Z>] (archived Oct. 5, 2015); see also European Commission Press Release IP/14/116, Antitrust: Commission Obtains from Google Comparable Display of Specialized Search Rivals (Feb. 5, 2014),

charges, known as a statement of objections, outlining its concerns that Google's monopoly power in general online searching will carry over to vertical searching and that this will foreclose competition in the latter market.¹⁸³ To support the Commission's position, the European Parliament recently passed a resolution calling for the "unbundling [of] search engines from other commercial services."¹⁸⁴ What is going to happen next is uncertain; if Google fails to rebut the charges it is likely to face a break-up order as well as a fine of up to 10 percent of its global annual revenue.¹⁸⁵ Alternatively, Google can submit another settlement hoping that the Commission will accept it. Given the previous rejections, any new settlement would need to quite radically change the way the company operates in Europe.¹⁸⁶ The Commission and Google's adversaries will try to extract as many concessions as they can. If a settlement is finally endorsed, Google will have escaped heavy fines and the finding of abuse of its dominant position. Google will, however, still be stuck with the costs of maintaining a different face in Europe, and such costs will have a deep impact on Google's future operations.¹⁸⁷

So far it is unclear whether the actions of the Commission have enhanced competition as they purported to, or whether they have tried to protect the operations of local businesses. Balancing efficiency against monopoly when applying antitrust laws is an inherently difficult task, especially when technology companies relying on network effects are at issue. History, as well as the theoretical literature relating to competition and innovation, remains insufficient at determining which antitrust practices will ultimately encourage innovation.¹⁸⁸ In many ways, antitrust action has shaped the

http://europa.eu/rapid/press-release_IP-14-116_en.htm [<http://perma.cc/FU7B-NLU6>] (archived Oct. 5, 2016).

183. James Kanter & Mark Scott, *Europe Challenges Google, Seeing Violations of Its Antitrust Law*, N.Y. TIMES (April 15, 2015), <http://www.nytimes.com/2015/04/16/business/international/european-union-google-antitrust-case.html> [<http://perma.cc/6RUK-RPYS>] (archived Oct. 5, 2015).

184. EUR. PARL. RESOLUTION, *supra* note 7, ¶ 15.

185. See generally Commission Regulation 1/2003 of Dec. 16, 2002, Application of Articles 101 and 102 TFEU, O.J. (L1).

186. See European Commission Memorandum MEMO/14/87, Antitrust: Commission Obtains from Google Comparable Display of Specialised Search Rivals—Frequently Asked Questions (February 5, 2014).

187. *Google, the EU and Antitrust: Search Over*, ECONOMIST (February 8, 2014), <http://www.economist.com/news/business/21595966-third-attempt-settlement-likely-belast-search-over> [<http://perma.cc/ED26-LN56>] (archived Oct. 5, 2015).

188. See generally Michael R. Baye & Joshua D. Wright, *Is Antitrust Too Complicated for Generalist Judges? The Impact of Economic Complexity & Judicial Training on Appeals*, 54 J.L. & ECON. 1 (2011); Richard J. Gilbert, *Competition and Innovation*, in ISSUES IN COMPETITION LAW & POLICY 583 (2008); Geoffrey A. Manne & Joshua D. Wright, *Google and the Limits of Antitrust: The Case Against the Case Against Google*, 34 HARV. J.L. & PUB. POL'Y 1 (2011) (arguing that Google's practices should not qualify as anti-competitive because in the online search market alternative engines are "just a click away"); *Should Digital Monopolies Be Broken Up? European Moves Against Google Are About Protecting Companies, Not Consumers*, ECONOMIST

technology that characterizes the dynamic economy of the twenty-first century, but it is unclear whether innovation could have found a way to express itself without the help of competition laws.¹⁸⁹ It is also unclear whether monopolies in network effects economies should be treated as entry barriers, and therefore fragmented, or treated as major means to achieve technological advance, and therefore tolerated. What is clear is that major global players in the world's economy had to incur significant costs in order to adjust their standards to the ones set out by European competition law. By requesting differentiated products, it looks as if the Commission is trying to protect the European market from competitive outside forces rather than making European companies competitive at a global level.

V. CONCLUSION

This Article has shown that legal transfers almost never head in a direction the transplanting institution can foresee and that the fate of a new legal measure in foreign territory remains an uncertain one. Constructions of different legal realities place rules in different settings that do affect their interpretation. This Article has argued that similar legal provisions will hardly ever develop in the same rule, because interest groups within the importing body will inevitably influence them, and that the role of such groups is fundamental to the evaluation of a transfer into a new regulatory system. The transfer discussed in the Article was ultimately effective because it involved a transfer into a new regulatory system at its inception and was supported by a stakeholder that could utilize it in a way that induced an internal process of legal development that was welcome and needed.

The present discussion has also uncovered a protectionist attitude of the European Commission towards the European common market. Sixty-five years ago the United States transferred their antitrust laws to Europe in order to open up market platforms that would facilitate the business of U.S. companies, but eventually their objectives did not succeed, as modern day EC competition policy is mainly inhibiting the way U.S. companies operate, and U.S. companies are increasingly uncomfortable about it. Whether and when antitrust laws are used as trade barriers—especially in the

(November 29, 2014), <http://www.economist.com/news/leaders/21635000-european-moves-against-google-are-about-protecting-companies-not-consumers-should-digital> [<http://perma.cc/GP4X-AX3V>] (archived Oct. 5, 2015).

189. See Anthony Lewis, *A.T.&T. Settles Antitrust Case; Shares Patents*, N.Y. TIMES (January 25, 1956). But see FRANKLIN M. FISHER ET AL., FOLDED, SPINDLED, AND MUTILATED: ECONOMIC ANALYSIS AND *U.S. vs. IBM* 163 (1983) (analyzing the 1969 case brought by the U.S. government against IBM alleging that it was violating Sec. 2 of the Sherman Act through its monopoly in the market for general purposes computers).

context of platform economies—will be the topic of further research, especially since the EC's protectionist attitude may also be followed by forming regional entities in Latin America, South and East Africa, and the Caribbean, where several states are the process of negotiating trade policies and the regulation of competition¹⁹⁰—and by China, which has recently passed its own antitrust laws.¹⁹¹ A closer look at local stakeholders will help articulate which direction those developing policies are headed and determine if the threat to the operation of global companies is a real one.

190. GERBER, *supra* note 17, at 236; *see also* Brusick et al., *supra* note 21, at 301–23.

191. GERBER, *supra* note 17, at 223–36.