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THE EVOLUTION OF ANTITRUST INSTITUTIONAL FRAMEWORKS AND AMERICAN HEGEMONY:

MERGER REGULATIONS IN THE U.S. AND EUROPE DURING ECONOMIC AND FINANCIAL CRISES

(draft)

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ABSTRACT

This paper aims to analyse the modalities, which Washington has been using in influencing the institutional frameworks of antitrust in Europe, in the context of two crises: the 1970s oil crises and the 2007-2011 credit crisis.

Despite their different origins and consequences, those crises have manifestly questioned the U.S. hegemony over Europe. Moreover, they have also evidenced that the U.S. antitrust approach was no longer efficient and its institutional framework had to be adapted to the new social necessities.

Therefore, this paper intends to investigate the way the U.S. used antitrust to restore its economy and then influence European competition working rules in order to reinforce its economic power and hegemony. Here, even though the literature on varieties of capitalism suggests that each state normally develops a particular form of capitalism conformed to its cultural, social, political and economic necessities; I argue that the U.S. has been trying to influence the frame of antitrust reference in order to make sure that the development of an European continental competition model would not impede its commercial interests and the maintenance of its hegemony.

INTRODUCTION

In the introduction of one of his books, Giuliano Amato maintains that 'antitrust law has not been invented by technicians of commercial law (…) nor by economists themselves. It was instead desired by politicians (…)'[1].

Starting from Amato's assumption this paper hypothesises that antitrust cannot be interpreted as a simple policy adopted by governments to respond to crucial problems of economic freedom in liberal democracy; antitrust is also a tool applied by the U.S in order to rebuild or reframe its hegemony after crises.

In other words, while antitrust emerged in the U.S. as a first attempt to force corporate accountability, stimulate competitiveness and foster free trade, it was then used to encourage the development of an economic system that would suit American economic dominance and create a general wealth in Europe[2]; indeed, the promotion of economic welfare was the necessary condition for the legitimisation of U.S. hegemony.

In this means, the different antitrust policies adopted by the U.S. were not only working rules that responded to the economic necessities of the time but they might be understood also a set of institutional frameworks that, by reflecting particular economic ideas, fostered U.S. knowledge dominance and hegemony.

Hence, the aim of this paper is to analyse the role played by antitrust policy in regulating mergers- the anticompetitive practices mostly used during economic downturn- in order to provide a different interpretation of the rise and the fall of American hegemony during the oil crises and the credit crunch[3].

Although it is probably too early to investigate the effects of antitrust over American hegemony during the current crisis, it is still possible to compare U.S. new antitrust strategies to the one adopted during the 70's and make some previsions. Indeed, like the current downturn, also the oil crises questioned the U.S. economic dominance and

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[1] Amato G., Antitrust and the Bounds of Power, The Dilemma of Liberal Democracy in the History of the Market, (Hart Publishing, Oxford, 1997), pp. 2.
[2] Marc Allen Eisner, 'Antitrust and the Triumph of Economics: Institutions, Expertise and Policy Change', 1991, *University of North Carolina Press*, 1.
[3] B. Lyons 'Competition Policy, Bailouts and the Economic Crisis' , March 2009, *Centre For Competition Policy*, Working Paper, 16.

hegemony over the international arena. In this context, by regulating its internal market through *ad hoc* antitrust approaches, the U.S. has been able to regain its material power over the market. Moreover, since 'economic expansions have gone hand in hand with the global extension of U.S. ideologies[4]'; once resettled its economic strength, the U.S. has been in a position to re-establish its hegemony by imposing a Chicagoans antitrust approach that has fostered the liberalisation of market and has favoured American interests. Here, by implanting a frame of antitrust reference in Europe, the U.S. has not only promoted its commercial interests; it has also fostered its hegemony through the creation of an environment where antitrust values were shared and understood in a similar way.

Following this pattern, this paper is going to be structured as follows. The first part is going to introduce the concepts of hegemony and institutions. The second part will instead analyse the antitrust institutional framework adopted by the U.S. and its influence over Europe during the oil crises and the current credit downturn. In the conclusions, the finding of the historical analysis will then be filtered through the main theoretical concepts in order to understand whether the U.S., during the 80's, has used antitrust to reframe its hegemony and whether Washington is going to apply a similar strategy nowadays.

IDEAS AND INSTITUTIONS: THE ROLE OF ANTITRUST IN DEVELOPING U.S. HEGEMONY

The understanding of the intrinsic meaning of American hegemony has been analysed by many scholars. However, in order to define the evolution of the consensual nature of American hegemony and the role of antitrust regulation in creating a common framework for comprehending competition and educating to competition, I believe it is necessary to adopt a Gramscian perspective.

The analysis of hegemony provided by Gramsci is in fact, a very interesting starting point for researching on the use made by the U.S. of its economic material power and its consensual assets to build a common capitalistic framework within Europe through an

[4] Christopher Layne, *The Peace of Illusions: American Grand Strategy from 1940 to the Present*, 2006 Cornell University Press, 9-10.

institutional antitrust that would support its hegemony[5]. According to Gramsci, hegemony is a power exerted throughout an economic "dominium" of strategic devices and an intellectual and moral 'direction' of ideas[6]. Institutions, interpreted by Gramsci as a set of law and rules, are used by the state to implement its educational mission by shaping the society according to specific ideas and by building a general consensus of the hegemonic power[7].

For this reason, while analysing the development of American hegemony, it is interesting to highlight how antitrust has been used by the U.S. in order to foster its supremacy role during pre and post crises periods[8]. Crises, in fact, occur when the hegemonic power fails to transform its ideas into proper institutions such as regulations and laws, which would create a general consensus.

In this context, global economic and financial crises can be defined as the end of a specific 'historical block' or period where a particular model of capitalism is sustained by a hegemonic country through its preponderance over material and cultural devices[9]. Hence, crises imply a general downturn not only of economic assets that represent the material basis of supremacy but also of the knowledge structure describable as the set of ideologies that support the spread of the hegemonic power. Similarly, from a political economy point of view, crises are the empirical demonstration that a model of capitalism is no longer

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[5] Stephen Gill, *American Hegemony and the Trilateral Commission*, Cambridge Studies in International Relations, 1990, 55. William I. Robinson, 'Gramsci and Globalisation, from National to Transnational Hegemony', December 2006, *8 Critical Review of International Social and Political Philosophy 4*, 1–16. Joseph V. Femia, *Gramsci's Political Thought: Hegemony, Consciousness and the Revolutionary Process*, Oxford: Clarendon Press 1981, 24.

[6] Giorgio Nardone, *Il pensiero di Gramsci*, 1971 De Donato Editore, 127-8. Howard H.Lentner, *Power and Politics in globalization: the indispensable State*, 2004, Routledge, 73. Cox R., 'Gramsci, Hegemony and International Relations: an essay in method (1983)', Cox R. , Sinclair T. edt. *Approaches to World Order*, (Cambridge University Press, 1996), 124-143, 11; Hoare Q., Nowell Smith G., *Selections from the Prison Notebooks of Antonio Gramsci*, 1971, International Publishers,138 and 337; Robert W. Cox 'Gramsci, Hegemony and International Relations: an Essay in Method',1983, 12 *Millennium: Journal of International Studies* 2, 162-175, p.168;

[7] Antonio Gramsci, *Note sul Macchiavelli, sulla Politica e sull'Organizzazione dello stato moderno*, 1955, Einaudi, Torino, 128-30, Antonio Gramsci, *Il Materialismo Storico e la Filosofia di Benedetto Croce*, 1948 Enaudi, 92.

[8] Jacqueline Best, 'Hollowing out Keynesian norms: how the search for a technical fix undermined the Bretton Woods regime', 2004, 30 *Review of International Studies, British International Studies Association*, 383-404, 384; see also Ikenberry G.J., *Liberal Order and Imperial Ambitions: Essay on American Power and World Politics*, Polity Press, 2006, 155; B.J. Cohen, *Organizing the World's Money: The Political Economy of International Monetary Relations*, MacMillan Press, 1977, 221.

[9] Stephen Gill and David Law 'Global Hegemony and Structural Power of Capitalism', Stephen Gill (ed.), *Gramsci, historical materialism and international relations,* 1993, Cambridge University Press, Part 1, 93-126.

efficient, as its institutions, by not responding to social exigencies, do not stimulate economic growth[10].

The role of institutions seems to be fundamental in analysing those economic and political dynamics, however defining institutions themselves is complex because 'the only idea common to all usages of the term (...) is that of some sort of establishment of relative permanence of a distinctly social sort'[11]. From a political point of view, they can be referred to a 'general pattern or categorization of activity or to a particular human constructed arrangement, formally or informally organized'[12]. Differently, from a political economic understanding, institutions can be considered as a framework of behaviours, a set of regularized practices constituted by proper laws or general policies able to influence the asset of a capitalistic system by building a specific social structure of accumulation (SSA) that would possibly lead to economic growth[13]. Particularly, according to Douglass North, institutions are 'humanly devised constraints' that rule a society by shaping human interactions and the way those interactions have to evolve[14]. However, while institutions are the rules of the game constraining individuals' actions, organizations and their actors are the ones who can shape and change the institutional environment according to their necessities.[15] The comprehensive outcome of their actions can create an efficient or inefficient institutional structure that can be comprehended only by understanding the ideologies and the historical specificity of that particular period[16].

In other words institutions and their evolution can be considered as the result of a specific framework of ideas that influence individual in a particular historical moment according to a path dependence process where the future is shaped by both past decisions

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[10] John Groenewegen, Jack Vromen, "Implications of Evolutionary Economics; Theory, Method and Policies", John Greenewegen , Jack Vromon, *Institutions and the Evolution of Capitalism*, (eds.), 1999, Edward Elgar, chapter 1, 1-16;

[11] E.C. Hughes, 'The Ecological Aspect of Institutions', 1936, 1 *American Sociological Review*, 180-89, (180), quoted in Robert O. Keohane, 'International Institutions: Two Approaches', 1988, 32 *International Studies Quarterly*, 379-396 (382)

[12] Robert O. Keohane, *supra*, note 9, 383

[13] D.C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge University Press, 1990, 3. Peter A. Hall and Kathleen Thelen 'Institutional Change in Varieties of Capitalism',(2009) *7 Oxford Journals, Socio-Economic Review 1*, pp. 7-34

[14] D.C. North, 'Economic Performances through time', June 1994, 84 The American Economic Review 3, 359-368, 360.

[15] *Ibid* 361. D.C. North, *supra*, note 14, 362

[16] D.C. North, *supra*, note 14, 362

and contingent necessities. This conceptualisation of institutional framework, as the transposition of ideas into reality that constrains society but also is constrained by society, can be linked to a broader Gramscian interpretation of power and hegemony. Indeed, from a political economy perspective North underlines a similar problematic to the one raise by Gramsci on the necessity of institution for explaining human coordination and cooperation[17]. However, while for North cooperation of individuals inside the organizations is necessary for shaping economic performances through institutions, whether efficient or not, for Gramsci coordination is indispensable to reach hegemony.[18]

This dualism can be translated into the analysis of the antitrust policy applied in the 70's' and today. From a Gramscian perspective, antitrust laws and policies might be considered as an educational tool used by the U.S. to promote its economic dominance, create the essential ideological and material consensus and encourage its hegemony. On the contrary, from a political economic point of view, the formal or informal antitrust policies and laws enforced during and after crises can be considered the institutional framework that had to fix the boundaries of economic actions and coordinate them in order to foster economic transactions. When those institutions became inefficient and caused economic downturn, new ideas and economic thinking modified their nature. The development of theoretical approaches and their influence over institutional framework were not direct but progressive: they shaped human action but they were also shaped by human actions according to a path dependence process.

According to Best, it is possible to integrate those two different approaches, indeed economic theories, by offering solution to crises, are translated into economic reforms or regulations and create the basis for hegemony[19]. Since hegemony is necessarily based on a pedagogic relationship between the dominant state and the international arena, the role of agreements and regulations is central[20]. In fact, institutions, developed in the form of laws, agreements or regulations, are the tool used by the economic dominant State to enforce its

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[17] D.C. North, *supra*, note 11, 26.
[18] Douglass North, *supra*, note 12, 366. Oliver E. Williamson, 'The Institutions and Governance of Economic Development and Reform', September 2000, XXXVIII, *Journal of Economic Literature*, 595-613, 597.
[19] Jacqueline Best, 'Hollowing out Keynesian norms: how the search for a technical fix undermined the Bretton Woods regime', 2004, 30 *Review of International Studies*, *British International Studies Association*, 383-404, 384
[20] Gramsci, *Il Materialismo Storico e la Filosofia di Benedetto dalla Corce*, Einaudi, Torino, 1948, 26, and Giorgio Nardone, *Il pensiero di Gramsci*, 1971 De Donato Editore, 139.

ideologies at an international level in order to universalise its fondant knowledge structure. However, since the educational mission of the state is linked to the maintenance of its hegemony within the historical block, when crises occur, the state has to face those downturns in term of direct economic reforms to foster its economic dominance, but also in term of reshaping ideologies that would inspire the institutional reform.

In this means, the evolution of antitrust institutional framework can be used to explain the development of American hegemony. Thus, the next session will try to demonstrate how antitrust institutions reshaped American economic dominance after the oil crises and the credit crunch and how those were then applied over Europe in order to create the basis for the U.S. knowledge supremacy and hegemony.

THE DEVELOPMENT OF ANTITRUST INSTITUTIONAL FRAMEWORKS DURING THE OIL CRISES AND THE CURRENT CREDIT CRISIS.

In the course of history, ideas have always inspired the institutional antitrust reforms needed to respond 'to the challenge of ever changing economic realities'[21]. For instance, during the oil crises of the 70's the Chicago School of antitrust started to replace little by little the liberal Harvard antitrust vision towards mergers, adopted manly by Nixon, Ford and Carter's presidency. The Chicago School faith in the long-run efficacy of the market mechanism inspired the main reforms applied by President Reagan during its presidency, becoming the theoretical base of the institutions assessing a neo-liberal stage of capitalism[22].

The Chicago oriented institutional enforcement was in fact reflected in the pro-mergers actions undertook by Baxter and Miller in directing the Federal Trade Commission (FTC) and the Antitrust Division. Between 1981 and 1987, although 10,723 mergers came to the attention of the Justice Department, only 26 were suited in Court by the Antitrust

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[21] Sharon E. Foster, 'Fire Sale: The Situational Ethics of Antitrust Law in an Economic Crisis' 2008-2009, *78 Mississippi Law Journal 4*, 777-90.

[22] William K. Carroll, 'Tracking the Transnational capitalist class: the view from on high', Yildiz Atasoy (ed.) *Hegemonic Transitions, the State and Crisis in Neoliberal Capitalism*, 2009, Routledge, 44,43-64; R. J. Peritz, *Competition Policy in America: History, Rhetoric, Law*, (Oxford University Press, 1996) 265-67.

Division.[23] In the same period, by filing only seventeen administrative complaints, the FTC confirmed its unwillingness to be more proactive in fighting the incoming of a new mergers' wave.

In addition, in 1982 Baxter published some guidelines dealing with the 1976 Hart-Scott-Rodino Antitrust Improvements Act (HSR Act) that raise the possibility for mergers to consolidate and to be considered legal[24]. He also replaced the Turner's measure of concentration with another index known as the Herfindahl Index that allowed most vertical and conglomerate mergers to be free from prosecution[25]. According to the Antitrust Division:

> 'The 1982 Guidelines did not simply clarify the Department's merger policy….The 1982 Guidelines recognized that most mergers do not threaten competition and that many are in fact precompetitive and benefit consumers…One of the most important advances of the 1982 Guidelines was the increased freedom they gave to American industries to enhance efficiency through mergers'.[26]

Between 1980 and 1986, thanks to Reagan antitrust policy, the number of mergers passed from 1,565 to 4,323 and their value grew even faster, from $33 billion in 1980 to more than $204 billion in 1986.[27] As Reagan maintained:' *vertical and conglomerate mergers have ceased to be a major enforcement focus of the [Antitrust] division'*.[28] Moreover, the merger wave was also fostered by a major corporate tax cuts that allowed corporations to overcome the shortage of capital that had prevented them from investing.

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[23] R. E. Taylor & S. Crock, 'Reagan Team Believes Antitrust Legislation Hurts Big Business', (July 8, 1981)Wall Street Journal, 1. W. Adams, J.W.Brock, 'Reaganomics and the transmogrification of merger policy' (Summer 1988) 33 *The Antitrust Bulletin*, 309-59.

[24] Kovacic W. E., 'Failed Expectations: The Troubled Past and Uncertain Future of the Sherman Act as a Tool for Deconcentration' (July 1989) *Iowa Law Review* 74, 1126, Freyer T.A., *Antitrust and Global Capitalism:1930-2004*, (2006 Cambridge University Press) 319. J. Davidow, 'The worldwide influence of U.S. antitrust' (1990)35 *The Antitrust Bulletin*, 603-630.

[25] Turner D.F., 'Observations on the New Merger Guidelines and the 1968 Merger Guidelines', Antitrust law journal, 51 (august 1982) 305-315. In T. Freyer, *Regulating Big Business, Antitrust In Great Britain and America, 1880-1990 op.cit.* 322.

[26] W. Adams, J.W.Brock, 'Reaganomics and the transmogrification of merger policy', (Summer 1988) 33 The Antitrust Bulletin, 309-59.

[27] *Ibid*

[28] *Oversight of Government Merger Enforcement Policy: Hearings Before the Senate Comm. on the Judiciary*, 97th Cong., 1st sess. 51 (1982), quoted in W. Adams, J.W.Brock, 'Reaganomics and the transmogrification of merger policy', (Summer 1988) 33 The Antitrust Bulletin, 309-59.

However, since the Chicago antitrust method was oriented towards market efficiency and consumers' welfare, the government, while it formally adopted a neo-liberal approach versus market concentration, used the Hart-Scott-Rodino Act to monitor those mergers considered less efficient or anti-competitive and increased the control over price fixing agreements[29]. In fact, in federal district court, Baxter and his successors initiated 94 cases annually, 80 criminal and 14 civil, while the Carter Justice Department brought 67.5 cases annually, 30 civil and 37.5 criminal. Hence, the Reagan Justice Department not only augmented averagely the number of cases considered, but also it promoted legal actions against criminal cases[30].

Judging the effects of the 'Reaganomics' is very controversial, yet it must be said that from 1982 the recession terminated, the level of employment raised and inflation backed off of 7 percent allowing the development of a positive economic trend. Moreover, by freezing antitrust enforcement and diminishing corporate taxes, Reagan stimulated an unprecedented consolidation of big business and multinational corporations that allowed the U.S. to overcome the crises of the 70's and to re-establish its economic dominance not only by dragging international economics but also by dictating an economic model that became global accepted.

In other word, the Chicago School antitrust theory and its conversion into free-market institutions allowed the U.S. to address specific economic problems in order to foster its economic transactions and so its production structure[31]. Although Clinton's administration slightly challenged it, Baxter and Miller' liberal approach towards mergers 'set the agencies on a durable new path'[32]. Indeed, Chicago oriented antitrust institutions were maintained until Bush's Presidency, when the world economy was shaken by the incoming of the worst financial crisis since the 1930's.

The triggering event of the credit crunch has been linked to the international spreading of a mortgage crisis caused by the U.S. housing construction sector. Even though

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[29] Clifford A. Jones, Mitsuo M., *Competition Policy in the Global Trading System: Perspectives from the EU, Japan and the USA*, 5 International Competition Law Series (2002 Kluwer Law International) 19.

[30] Calvani T., Sibarium M.L., 'Antitrust today: Maturity or decline', (Spring 1990) *35 The Antitrust Bulletin, 125*, 179-183.

[31] Nester W.R., *American Industrial Policy: Free or Managed Markets*, 1997, Palgrave Mac Millans, 76

[32] Daniel A. Crane, 'Chicago, Post-Chicago, and Neo-Chicago' 2009, *University of Chicago Law Review 76*, 1911-33, 1912.

the causes of the credit crunch are more related to a general deregulation of the banking and investment industries, it has to be said that the wide-ranging permissive policy towards mergers allowed big companies to acquire enough share to control the financial sector and overturn governmental policies[33]. In fact, since his election in 2001, President George W. Bush manifestly enforced a non-interventionist approach toward antitrust and after he appointed Tom Barnet as Assistant Attorney General and Deborah Platt Majoras as Chairman at the Federal Trade Commission, the federal merger enforcement became as minimal as during Reagan's presidency[34]. As Majoras underlined in one of her speech, since the scope of antitrust is to protect consumers' interests, competition agency had to carefully limit enforcement to the rare cases when those interests were damaged[35].

According to Professors Jonathan Baker and Carl Saphiro, during Bush's administration, the DOJ and FTC were more permissive than ever in approving mergers and in allowing transactions that could be considered anticompetitive[36]. In January 2007 the Wall Street Journal reported that "the federal government has nearly stepped out of the antitrust enforcement business, leaving companies to mate as they wish"[37]. This lenient antitrust attitude was also underlined in March 2007 by the *New York Times,* which outlined how "Bush administration has been more permissive on antitrust issues than any administration in modern times"[38].

Although the devastating consequences of the crisis, Bush did not change his policy towards antitrust; on the contrary immediately after the crisis companies started to merge in order to augment their profit without any state control. For instance, Bank of America

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[33] Nelson D. Schwartz & Julie Creswell, *What Created this Monster?*, N.Y. TIMES, Mar. 23, 2008.

[34] William E. Kovacic, 'Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement', 2009, *Competition Policy International*, 129-150, 136.

[35] Comment of Deborah Platt Majoras, Chairman of the Federal Trade Commission on Proposed Consumer Trading and Standard Authority, Federal Trade Commission Washington DC 20580. (*www.**ftc**.gov/bc/international/docs/**majoras**responsedti.pdf*)

[36] Jonathan Baker and Carl Shapiro, 'Reinvigorating Horizontal Merger Enforcement', 04-10-2007, *Competition Policy Center*, *Institute of Business and Economic Research, UC Berkeley*, 1-40, 11.

[37] *Wall Street Journal*, Jan. 16, 2007, at C1. Quoted in, Jonathan Baker and Carl Shapiro, 'Reinvigorating Horizontal Merger Enforcement', 04-10-2007, *Competition Policy Center, Institute of Business and Economic Research, UC Berkeley*, 1-40, 11.

[38] Stephen Labaton, Sirius Chief Talks of Ways to Get XM Deal Approved, *New York Times*, March 1, 2007. Quoted in, Jonathan Baker and Carl Shapiro, 'Reinvigorating Horizontal Merger Enforcement', 04-10-2007, *Competition Policy Center, Institute of Business and Economic Research, UC Berkeley*, 1-40, 11.

bought Countrywide and Merrill Lynch; J.P. Morgan bought Bear Stearns and Wells Fargo acquired Wachovia[39].

The credit crunch and the merger waive were more directly faced by President Obama that, elected in 2008, decided to adopt a different antitrust approach. Even though it is too early to analyse the effects of Obama's antitrust policies and the implementation of proper institutions in the control of competition, the newly elected U.S. President has repeatedly manifested a strong interests towards antitrust regulations and antitrust efforts seemed "to be becoming a corner-stone" of his agenda[40].

During the first months of his administration, Obama appointed Christine Varney as the new head of Antitrust Division of the United States Department of Justice (DOJ) and Jon Leibowitz as the Chair of the Federal Trade Commission (FTC); both of them were well known for their strong orientation towards the necessity to foster antitrust control over mergers and anticompetitive practices[41]. In a speech given to the Centre for American Progress, Varney, by rejecting Bush's administration *laissez faire* policies, affirmed that the Justice Department is "committed to aggressively pursuing enforcement of Section 2 of the Sherman Act"[42]. According to him, antitrust has to be enforced in order to fight market concentration and mergers, especially in high-tech, health, pharmaceutical, telecommunications, food, and agriculture firms, which would lead to high prices, lower quality and other negative externalities that would affect consumers[43].

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[39] James R. Hagerty & Valerie Bauerlein, *Credit Crunch: BofA Sets Closing Date for Countrywide Purchase*, WALL ST. J., Jun. 20, 2008, at C2; Matthew Karnitschnig, Carrick Mollenkamp & Dan Fitzpatrick, *Bank of America to Buy Merrill*, WALL ST. J., Sept. 15, 2008, at Al. *J.P. Morgan, Bear Near Completion*, WALL ST. J., Apr. 9, 2008 at C4, Dan Fitzpatrick, *Three Banks Complete Deals*, WALL ST. J., Jan. 2, 2009 at C3. Quoted in Sharon E. Foster, 'Fire Sale: The Situational Ethics of Antitrust Law in an Economic Crisis' 2008-2009, *78 Mississippi Law Journal 4*, 777-90.

[40] Roxane M DeLaurell and Robert W. Rouse, 'Obama's New Antitrust Policy' 2010 Wiley Periodicals, Inc., 29-31, 31.

[41] Stacey Anna Mahoney 'To Day 100 and Beyond: Antitrust Enforcement in the Obama Administration' 2009 American Bar Association, 1.

[42] Daniel A. Crane, 'Can the new administration overcome the Chicago and Harvard schools' reservations? Obama's Antitrust Agenda', 2009, *32 Regulation Magazine 3*, 16-20. Tamara Lytle, 'Obama's New Antitrust Rules Have Big, Powerful Companies Sweating: the Monopoly Policy is a Reversal of a Bush Administration Rule' May 20-2009, *U.S. NEWS & World Rep.*, (http://www.usnews.com/news/national/articles/2009/05/20/obamas-new-antitrust-rules-have-big-powerful-companies-sweating.html.)

[43] Tamara Lytle, 'Obama's New Antitrust Rules Have Big, Powerful Companies Sweating: the Monopoly Policy is a Reversal of a Bush Administration Rule' May 20-2009, *U.S. NEWS & World Rep.*, (http://www.usnews.com/news/national/articles/2009/05/20/obamas-new-antitrust-rules-have-big-powerful-companies-sweating.html.)

The regulatory orientation of Obama's administration can be also underlined by the assertion made by Varney. According to him, the DOJ's actions have to be inspired by Thurman Arnold, the Assistant Attorney General in charge of antitrust during Roosevelt's presidency that, as the first, fostered "a sustained program of antitrust enforcement on a nationwide scale"[44].

However, although it is unlikely that during the current crisis Obama would suspend antitrust enforcement like Roosevelt did in his first administration with the NIRA, a strong Harvard oriented regulation seems to be difficult to realise. The Merger Guidelines adopted in 2010 represent perfectly this dilemma: on the one hand they do not reform the material, on the other they want to introduce a more flexible interpretation of mergers[45]. Indeed, while they deeply rely on the 1982 version, they reflect an ongoing change tendency in merger enforcement practices[46]. It may be said that Obama is trying to enforce Post-Chicago antitrust institutions based on efficiency analysis but not laissez faire; however it is still very hard to judge their effect on the market and on American dominance[47].

EUROPEAN INSTITUTIONAL CHANGES TOWARDS COMPETITION IN TIMES OF CRISES

European competition policy has not only a slightly differentiated structure, if one compares it to the U.S. antitrust regulative body, but also a very different implication. According to Gerber and others, the meaning of European Competition policy lays in the necessity to primarily foster the political and economic integration of Member States in the common market[48]. Above all, European competition law had, in fact, to defend economic

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[44] Cordwin D. E. 'Truman Arnold and the Antitrust Law', Sep., 1943, 48*The Academy of Political Science, Political Science Quarterly* 3, 33. Brinkley A., *The End of Reform, New Deal Liberalism in Recession and War*, New York, Vintage Books Edition, 1996, pp.106-125.

[45] Daniel A. Crane, 'Chicago, Post-Chicago, and Neo-Chicago' 2009, *University of Chicago Law Review 76*, 1911-33.

[46] Carl Shapiro, 'The 2010 Horizontal Merger Guidelines: from Hedgehog to Fox in Forty Years' September 10, 2010, University of California, Berkeley - Economic Analysis & Policy Group (http://ssrn.com/abstract=1675210)

[47] Hovenkamp H., "The reckoning of Post Chicago antitrust", Cucinotta A., Pardolese R., Van Den Bergh R.(eds.), *Post-Chicago developments in antitrust law*, 2002, E.E. publishing, p.3.

[48] Liza Lovdahl Gormsen, 'Article 82 EC: Where are we coming from and where are we going to?'March 2006, 2, *The Competition Law Review 2*, 6-25.

freedom of market players, even though their actions were not economically efficient, in order to avoid the aggregation of big business that would affect the economic performances of smaller competitors and reduce market integration[49].

The history of European competition policy and its theoretical background dates back to the German Freiburg School and the Ordoliberal movement. Developed during the Weimar Republic in the 1920's, the Ordoliberal school proposed a competition model rather innovative, which underlined the necessity of national competition laws to direct the market without limiting individual freedom to invest.

Thus, it is undeniable that European competition policy has a very different background and a dissimilar approach from the American antitrust one; however, the first antitrust law introduced in the European Cool and Steel Community was drafted by Harvard School Professor Richard Bowie and, according to Jean Monnet, this was an adaptation of the Sherman Act principles to an European frame[50]. Indeed, since Roosevelt's Administration considered the creation of the European Coal and Steel Community anything but a bright excuse to conceal and protect a huge European Cartel, the U.S. decided to influence it through a competition policy that, at the same time, reflected an European tradition of thoughts as the Ordoliberal one and was not in contrast within the American necessity to abolish the cartelization of economy in Europe.

The post-war U.S. general liberal institutional influence generated economic welfare in Western Europe; market economy started to regain prosperity and competition reacquired the allegiance it had lost during the Great Depression and the two World Wars[51]. This was the incipit for one of the longest economic boom in Europe, a 'golden age' of capitalism[52].

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[49] Giuliano Amato, *Antitrust and the Bounds of Power*, Hart Publishing, 1997, p 69.

[50] Clifford A. J., ' Foundation of Competition Policy in the EU and USA: Conflict, Convergence and Beyond', Ullrich Hans eds., *The Evolution of European Competition Law: Whose Regulation, Which Competition?*, Ascola (Competition Law Series, 2006), pp24. See also : Acheson D., *Present at the Creation: My years in the State Departement*, (New York Norton, 1969). Dinan D.,*Ever closer union? : an introduction to the European Community*, (Basingstoke, Macmillan Press, 1994).

[51] David J Gerber, 'Constitutionalizing the economy: German Neo-liberalism, Competition Law and the "New" Europe', 1994 *42 Am J Comp L 25*, 25.

[52] Jean Monnet, *Memoirs*, Richard Mayne trans.,(London, Collins, 1978), 352–3. C. Harding, J. Joshua, *Regulating Cartels in Europe: A Study of Legal Control of Corporate Delinquency* (Oxford, 2003) 95. C. A. Jones 'Foundations of competition policy in the EU and USA: conflict, convergence and beyond' in H.Ullrich (ed.) *The Evolution of European Competition Law: Whose Regulation, Which Competition?* (Edward Elgar, 2006) chapter 1, 26.

However, since the beginning of the Oil Crises until the late 1985's the EC experienced negative rate and its share of world trade in manufactured goods fell from 45 to 36 percent.[53] The economic downturn developed disparities among EC economies and the influence of the American liberal model of capitalism in Europe waned considerably. Since tariffs could not be raised within the EC's consumer-free zone, and the GATT and the OECD prohibited the adoption of proper protectionist policies, anticompetitive practices, such as improper state aid and national grants, became the optimal strategy to face the recession[54].

This trend lasted until the early 1980s, when European members states, impressed by the initially positive outcomes of deregulation in the United States, feared of an increasing competition and determined to face the 'to the industrial malaise' that had characterised Europe, finally decided to reinforce the common market by promoting a gradual liberalisation and a deeper integration in competition regulation through the Single Act (SEA) of 1986 [55].

While Reagan's administration apparently welcomed the SEA as a further development of European integration, he generally feared the development of a stronger European market that would combine liberalisation within the protection of smaller enterprises and labour[56]. The European competition policy, in fact, seemed to growth as a sort of alternative to the U.S. system in the region. Following the fall of the Berlin Wall, Europe started to be very dynamic in exporting and influencing 'competition regulation' in Eastern and Central European countries and competition policy became also one of the criteria to the accession to EU membership[57].

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[53]See: Price V. C., *Europe's Last Chance?* (London, Institute of Economic Affairs, 1988)

[54] B. Lyons 'Competition Policy, Bailouts and the Economic Crisis' , March 2009, *Centre For Competition Policy*, Working Paper, 16.T. Judt, *Post-War: a History of Europe since 1945*(The Penguin Press, New York, 2005) 460. M. Cini, F. McGowan, *Competition Policy in the European Union* (Houndmills MacMillan, 1998)31 and 135. H. G. Schroter, *Americanization of the European Economy: A compact survey of American economic influence in Europe since the 1880s.* (Springer, 2005) 127.

[55] T. Buthe', The Politics of Competition and Institutional Change', in S. Meunier, K. Mcnamara (eds) *The State of the European Union. Making History: European Integration and Institutional Change at Fifty* (Oxford University Press volume 8, 2007) chapter 10,175.

[56] Geir Lundestad,*The United States and Western Europe since 1945: From "Empire" by Invitation to Transatlantic Drift*, 2003, Oxford University Press,230.

[57] European Association Agreements were in fact signed with Poland, Hungary and Czech and Slovakian Federal Republic in December 1991 and with Romania and Bulgaria in February and March 1993.

Moreover, because the EC Treaty did not provide any specific juridical tool to control mergers, the Commission persecuted concentrations that involved many American multinational corporations through Article 82's anti-dominant position provisions[58]. However, after the controversial result of the 1973 *Continental Can*[59] and the 1989 *British American Tobacco*[60], a proper EC merger regulation became effective in September 1990[61].

The new regulation introduced a package of reforms that, by modifying the division of jurisdiction over large mergers, empowered the Commission [62]. According to the MCR indeed, any kind of concentration had to be notified to the Commission and in the case of merger or acquisition with a community dimension, only the Commission and not Member States, had the power to verify the compatibility of those activities within the "common market"[63]. A part for the British Clause, under article 21(3), that allowed Member States to use their existing powers to protect certain "legitimate interests" not taken into account by the MCR's competition test, the MCR blocked any national attempts to introduce in merger evaluation considerations related to employment or industrial policy[64]. According to Commissioner Brittan this merger regulation beat back' the supporters of an industrial policy 'and gave 'clear primacy to the competition criterion, with only the smallest nod in the direction of anything else'[65].

C. Rouam, T. Jakob, L. Suni, 'La politique de concurrence de la Communauté à l'echelle mondiale: L'exportation des règles de concurrence communautaires', (1994) 1 *EC Competition Policy Newsletter* 1, 7-11.

[58] Aldcroft D. H., *The European Economy, 1914-1990*, (3rd Edition, London and New York, 1978)240 T.A. Freyer, *Antitrust and Global Capitalism:1930-2004*, *op.cit.*, 245

[59] *Europemballage Corporation and Continental Can Company Inc. v Commission of the European Communities*, Case 6-72, 21 February 1973.

[60] *British American Tobacco Ltd and RJ Reynolds Industries Inc v Commission*, 1987, ECR 4487

[61] Council Regulation (EEC) no 4064/89 of 21 December 1989 on the control of Concentrations between Undertakings, J 1990L257/14. "It introduced an ex ante substantive test that was more suited to the control of concentrations than article 81-81. A notified transaction would be approved provided it did not create or strengthen a dominant position as a result of which effective competition would be significantly impeded in the common market or in a substantial part of it." Ivo Van Bael, Van Bael & Bellis, *Competition Law of the European Community*, 2005, Kluwer Law International, 730-1.

[62] E. J. Morgan, 'Subsidiarity and the division of jurisdiction in EU merger control', Spring 2000, *45 The Antitrust Bulletin*, 153-94.

[63] *Ibid.*

[64] *Ibid*; Hubert Buch-Hanse1 and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy' February 2010 *17 Review of International Political Economy 1*, 20-44, 36.

[65] Brittan, L. 'The Early Days of Merger Control', in International Bar Association, 2000, *EC Merger Control: Ten Years On*, London: International Bar Association, 1–7, 3; quoted in Hubert Buch-Hanse1 and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy' February 2010 *17 Review of International Political Economy 1*, 20-44, 36.

Even though the ordoliberal cause of common market protection remained in the MCR, Hubert Buch-Hanse and Angela Wigger maintain that this was the first step of European competition policy towards neoliberalism because Member States' interests were heavily excluded in the competition evaluation and a sort of efficiency oriented discourse that reflected business interests started to emerge[66].

However, the 1990 MCR did not attenuate Washington's fear of an uncontrolled development of a European welfare oriented competition system, on the contrary, this regulation fostered the idea of a Communitarian policy that would have a deep effect on mergers involving not only European corporations but also American's by not completely following an 'Americanized efficiency-seeking political economy'[67].

Consequently, in 1991 U.S. competition regulators launched discussions with the European Commission on a possible formal competition agreement that would promote cooperation between both competition authorities and allocate jurisdiction in transnational merger cases[68].

It can be argued that the agreement represented a failure of U.S. hegemony because it created a cooperative structure in a policy area that initially had been characterized by its interventionism over other countries regulations, unilateralism and extraterritoriality[69]. However, it is necessary to underline that even though Europe, and especially France, were strongly concerned about the Bilateral Agreement, U.S. competition authorities interpreted it as a very useful tool. Indeed, the agreement would reduce conflicting decisions and facilitate cooperation in a field where the Europeans had increased their attention over cases that involved U.S. companies' interests[70]. In other word, the cooperation agreement can be interpreted as an institutional tool used by the U.S. to indirectly spread a consensual acceptation of its neo-liberal model of capitalism and its Chicago oriented antitrust approach over companies' conducts in order to empower its hegemony. In fact, in the after

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[66] Hubert Buch-Hanse1 and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy' February 2010 *17 Review of International Political Economy 1*, 20-44

[67] Theffry, Patrick, 'The New EC Merger Control Regulation,' 1990, 24, *The International Lawyer*, 543-51.

[68] Joseph P. Griffin, 'EC/U.S. Antitrust Cooperation Agreement: Impact on Transnational Business' (1993-1993), 24 Law & Pol'y Int'l Bus. 1051-65.

[69] C. Damro 'Transatlantic Competition Policy: Domestic and International Sources of EU-US Cooperation' (2006) *12 European Journal of International Relations*, 171-96.

[70] *Ibid* 186.

days of the agreement the Commission began to move the intellectual foundations of European Competition toward a different approach.

The European interpretation of competition was usually not oriented toward economic efficiency as the American one; on the contrary the Commission and Court in interpreting any violation of competition regulations normally focused mainly on which extent a particular economic behaviour was in contrast with European laws and not on how much profitable it was in term of economic performances.

However, after the ratification of the Cooperation Agreement, Europe started to adopt a more efficiency oriented approach in interpreting legal cases and in shaping norms. This decision reflected not only an increasing American influence towards the European system but also a rising European tendency to consider the competition legal analysis that had prevailed in Europe as an obstacle to economic development. Hence, the competition legal framework was strongly reformed in 2004 generating a shift in the mode and in the substance of regulation from the ordoliberal tradition towards a Chicagoan one.

The modernization process introduced neo-liberal practices and consolidated a more efficiency-oriented analysis of business activities and more importance started to be given to short-term consumer welfare considerations[71]. This market based approach was strongly sustained by many DG Competition Commissioners, especially Mario Monti, who interpreted it as 'a silent process of convergence towards US competition law and practices'[72].

The interpretation of this approach can be seen not only in the modernization of merger regulation approved in 2004 by European Ministers that introduce the analysis of 'overall market context and efficiencies' but also in many guidelines[73]. For instance the Horizontal Mergers Guideline outlined the necessity to shift the attention from a simple revelation of an existent dominant position in the market to a more liberal understanding

[71] Wigger, A. and Nolke, A. 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism. The Case of Antitrust Enforcement', 2007, 45 *Journal of Common Market Studies*,2, 487–513, 498.

[72] *Ibid* 499. Monti, M. (2001) 'Competition in a Social Market Economy', Speech at Freiburg, University, 9 November, quoted in Hubert Buch-Hanse1 and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy' February 2010 *17 Review of International Political Economy 1*, 20-44, 37.

[73] Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings, Section 9.

of whether the merger could negatively affect competition[74]. In order to measure concentration levels, the Horizontal Mergers Guidelines formalised the use of the Herfindahl-Hirschman Index (HHI)[75], the same index introduced by Baxter during Reagan's presidency. The adoption of this index reshaped the European test for concentration, the so-called 'Dominance Test', towards a more Chicago oriented approach that allowed efficient mergers to be permitted even though they could generate economic concentration[76].

From 2004 to June 2008, only two out of the 1466 notified mergers were prohibited by the Commission[77]. The enforcement of the reform, which effects were similar to the ones generated by the American 1982 Horizontal Merger Guidelines, not only underlined an European will to achieve the same economic benefits of the U.S., but also the growth of a general consensual acceptance of the same Chicagoans antitrust approach implemented by Washington [78]. According to US Deputy Attorney General for Antitrust, James Rill European merger evaluation became 'as close at it could get to the US-style without copying the whole caboodle'[79].

This consensus, by providing a market where U.S. companies could easily invest, implemented an American knowledge direction necessary to support its hegemony that has been enduring until recently, when the credit crisis has started to affect the European competitiveness.

Currently, while the U.S. is struggling to re-settle its economy, the effect of the recession over Europe has pushed the Commission to regulate once again over the use of state aid and mergers. To face a rising anticompetitive trend and a 'beggar your neighbour

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[74] J. Vickers, 'Merger policy in Europe: retrospect and prospect', 11 February 2004, UK Office of fair trading

[75] European Commission, 'Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings', 05/02/2004,

[76] Davidow, J. 'International Implications of USAntitrust in the George W. Bush Era'. 2002, 25 *World Competition* 4, 493–507, 495.

[77] Hubert Buch-Hanse1 and Angela Wigger, 'Revisiting 50 years of market-making: The neoliberal transformation of European competition policy' February 2010 *17 Review of International Political Economy 1*, 20-44, 37

[78] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, issued 1992, revised 1997, *at* http://www.usdoj.gov/atr/public/guidelines/horiz_book/hmg1.html.
Nicholas Levy 'Mario Monti's Legacy in EC Merger Control', Spring 2005,1 *Competition Policy International* 1.

[79] Rill, J. 'Overhaul Merger Regime May Not Come Up Smelling Roses'2003, 9 *European Voice* 39, quoted in Wigger, A. and Nolke, A. 'Enhanced Roles of Private Actors in EU Business Regulation and the Erosion of Rhenish Capitalism. The Case of Antitrust Enforcement', 2007, 45 *Journal of Common Market Studies*,2, 487–513, 499.

policy' European institutions have promoted in 2008 a 'Temporary framework' in order to regulate the use of state aid and non-horizontal merger guidelines, covering vertical and conglomerate mergers[80].

While the EU is trying to strongly regulate the common market, the U.S. seems not to be able to regain its hegemony. On the one hand, Obama's administration has to maintain its promise to enforce antitrust, while confronting the challenge of the financial crisis; on the other, it has to regain consensus in and over Europe. Even though it is too early to analyse how and whether Obama is going to implement proper antitrust institutions to foster American dominance and hegemony, generally it can be said that this is the most probable trend. Indeed, in his speech during his visit to the UK Parliament on the May 25th 2011 Obama has maintained that: 'the international order has been reshaped in a new centre; countries like China, India and Brazil are growing by leaps and bounds. We should welcome this development which (….) created new markets and opportunities for our nations (….) (however) the time for our leadership is now. It was the United States, the United Kingdom and our democratic allies that shaped a new world ….and even though new nations take on responsibilities for global leadership our alliance would remain indispensable'.

CONCLUSION

The rise and the fall of American hegemony during the above mentioned crises can be linked to the dynamic succession of particular antitrust institutional frameworks adopted by the U.S. and imposed over the rest of the world, especially over Europe. After the oil crisis of the 70's, by reframing antitrust according to the market necessities, the U.S. could resettle its economy and regain economic dominance. Moreover, through antitrust

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[80] C Q. C.Quigley, *European State Aid Law and Policy*, (Oxford Portland Oregon Hart Publishing, II edition, 2009) 352 *See* European Commission, Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on The Control of Concentrations Between Undertakings, 2008 O.J. (C265) *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2008:265:0006:0025:EN:PDF (adopted on Nov. 28, 2007 and published on Oct. 18, 2008) [hereinafter E.C. GUIDELINES].

institutions Washington has been able to spread its knowledge structure on how competition has to be regulated.

The period that elapsed from the oil crises until the recent downturn can be considered as a Gramscian “historical block” where a particular model of capitalism was internationally diffused by the U.S. though antitrust institutions in the form of bilateral agreement or indirect influence over the ideological framework of reference.

According to a path dependency relation, the evolution of European institutional framework has naturally been influenced by its original Ordo-liberal theoretical background; however the power dynamics that characterised the relation between Europe and the U.S. and the fact that European competition policy has been previously influenced by the American one, has pushed Europe to follow a more Chicago oriented approach. Yet, the Chicagoans ideas at the basis of the U.S. antitrust model have to be considered as the dominant knowledge structure that allowed the U.S. to become hegemonic again over Europe. On the one hand, through the Cooperation Agreement, the U.S., having resettled its economic dominance, had the occasion to monitor European competition policy and influence it. On the other, Europe, by registering the success of American neo-liberal competition model, had little by little adopted a more Chicago’s oriented approach towards the regulation of mergers.

The current crisis has underlined once again the necessity to restructure the institutional antitrust in order to face the economic problems. While Europe has adopted some guidelines in order to regulate the use of state aid and mergers, Obama’s administration seems to be not able to react as readily.

As Kovacic maintains, the pendulum that characterises the antitrust changes is slow to implement, consequently it is probably too early to analyse the development of a new antitrust institutional framework in the U.S. and whether the U.S. would be able to formally or informally influence European competition policy again and reframe its hegemonic power[81]. Yet, it is legitimate to say that "history doesn't repeat itself, but it does rhyme”.[82]

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[81] Kovacic W.E. ‘The Modern Evolution of U.S. Competition Policy Enforcement Norms’, 2003, 71 *Antitrust Law Journal*, 377-478.

[82] Quoted in Sharon E. Foster, ‘Fire Sale: The Situational Ethics of Antitrust Law in an Economic Crisis’ 2008-2009, *78 Mississippi Law Journal 4*, 777-90.