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Chapter 10

ADAPTATION, RECOMBINATION AND REINFORCEMENT: THE STORY OF ANTITRUST AND COMPETITION LAW IN GERMANY AND EUROPE*

Sigrid Quack and Marie-Laure Djelic

We consider, in this paper, national business system change in relation to transnational institution building. Our field of exploration is antitrust regulation and competition law, its emergence and development both in Germany and at the European level. It is increasingly acknowledged that legal frameworks structure market economies and constrain economic behavior (Laporta et al. 1998, De Soto 2000, Fligstein 2001, Berglöf et al. 2001). We see the legal treatment of competition issues as important in that respect (Dobbin and Dowd 2000, Djelic 2002).

Until 1945, antitrust regulation was an American legal tradition with no impact beyond American borders. Sixty years later, this has changed to a remarkable extent and antitrust is "going global" (Evenett et al. 2000). Today, close to a hundred countries have adopted a competition law and a transnational space such as the European Union is also structured by antitrust principles (Djelic 2002).

We use the terms antitrust and competition law interchangeably to refer to legal regimes that have as their objective the protection of competition. Modern competition law encompasses two broad categories of provisions. The first category aims at preventing restraints of competition through agreements or concerted practices such as trusts or cartels. The second category deals with undue acquisition of economic power through monopolization, abuse of dominant position or mergers (Goyder 1998, Pittman 1998). Antitrust and competition laws, however, are not just a

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matter of substantive provisions but also of legal interpretation, implementation and enforcement (Rheinstein 1974, Haley 2001). In this chapter, we focus on formal legal changes and how they have been interpreted, implemented and enforced by legal and administrative actors. Changes in formal rules do not necessarily lead to immediate behavioral change. There may be considerable resistance and actors may find ways to circumvent certain legal prescriptions. In a longer term perspective, however, the introduction of new legal standards – with an impact for example on what is allowed and not allowed in terms of competitive behaviour – opens a window on new cognitive and normative frames that actors may gradually start to use to approach reality. This progressive habitualization is likely to be reinforced when a professional community gets structured around those new legal rules – in charge of reading, implementing and enforcing them (Heinz et al. 2001; Stryker 2003).

Antitrust first came to Germany in 1947, while the building of an antitrust framework was constitutive of the forming of the European Coal and Steel Community (ECSC) in 1951 – the first step towards the creation of a European Community. However, during the first ten years, these two developments remained only loosely coupled. After 1957, a year marked both by the passing of the first German antitrust act and the signing of the Treaty of Rome, the German and European antitrust stories became much more closely interconnected. We look at the interplay between rule change in Germany and rule building in Europe and at the evolving logics of that interplay up until today. We argue that, over time, the two processes reinforced and stabilized each other.

From our analysis of the development of the German competition regime, we draw some conclusions about the conditions for national institutional change and its mechanisms. This case provides an interesting illustration of how new templates or institutional logics diffuse and call in question old ones – institutional change by "displacement" (see introduction to this volume). In particular, this chapter highlights the salience of coalitions between "foreign invaders" and "local outsiders" in this process of displacement and institutional change.

Building upon earlier work (Djelic and Quack 2003a, b) we point to the need to think about national system change as resulting from a succession and combination of phases with different logics of change. The process may start with radical reorientations that come at moments when national systems face some degree of crisis. Initially, radical reorientations may be more formal than real, with a significant degree of resistance and decoupling. They will not

stabilize nor be long-lasting if this early period is not followed by others where radical changes are appropriated, institutionalized, reinforced or even partially reoriented through a succession of slow, incremental but significant and consequential steps (see also the introduction to this volume).

Crossing the Atlantic – Antitrust Comes to Europe

In 1890, the United States passed the Sherman Antitrust Act. Initially, the intent had been to curb the multiplication of cartels and informal agreements and to re-establish conditions for free and fair competition. The unique context in which the Sherman Act was enacted, however, limited its domain of applicability and had unintended consequences of significance (Peritz 1996). Early court cases showed that cartels and other restraints of trade across the States of the Union would be prohibited *per se.* As a piece of Federal legislation, however, the Sherman Act did not apply within individual States, and tight combinations and mergers within the legal frame of one particular State hence seemed to lie outside its reach (Djelic 1998). Soon, corporate lawyers were identifying mergers as an alternative to cartelization, that was legal under the Sherman Act (Thorelli 1954; Sklar 1988; Fligstein 1990).

The passing of the Sherman Act was thus indirectly a triggering force for the first wave of mergers in the United States (1895-1904). In an irony of history, the fight for competition in the United States led to the emergence of large, integrated firms and contributed to the oligopolistic reorganization of American industries. The Sherman Act was read as generally and in principle outlawing cartels and loose forms of agreements. With respect to size, however, and hence to mergers, the interpretation that ultimately came to dominate in the Supreme Court was that illegality stemmed not from size in and of itself but from unreasonableness as revealed by a proven intent and purpose to exclude others and stifle competition. In 1914, the Clayton Act confirmed and institutionalized this so-called rule of reason argument for size and mergers, prohibiting mergers and acquisitions only when their effect was to "unreasonably" lessen competition or to create a monopoly (Peritz 1996). By the 1920s, both the *per se* prohibition of

cartels and the use, for mergers, of the rule of reason had become trademarks and defining features of the American antitrust tradition.[1]

Germany discovers antitrust

Until the First World War, the perception prevailed in Germany that organized markets, cartels and agreements were natural and progressive developments, leading economies and societies away from the chaos and disruption associated with competition and price wars. In the German intellectual tradition of historicism then dominant amongst economists, lawyers and politicians, policy making and legislation should not attempt to mould business conditions or restrict freedom of economic activity. This meant that cartels and agreements were essentially left to multiply and extend their reach.

After the First World War, however, public concern about cartel abuses increased significantly in Germany. It reached a high point in 1923, during the dark period of hyperinflation, when inter-firm agreements were used by member firms to pass on the costs of inflation to retailers and customers (Michels 1928). Yielding to public pressure, the Weimar government issued in November 1923 a regulation against abuses of economic power (Gerber 1998). The impact of this regulation proved limited, leading mostly to a systematic notification of cartel agreements to public authorities (Michels 1928, Liefmann 1938). In 1933, it was replaced by National Socialist legislation that rendered cartels mandatory and gave the Ministry of Economic Affairs a free hand in organizing and monitoring them (Levy 1966:159).

The Freiburg school – a minority and dissonant voice

That same year, 1933, one economist (Walter Eucken) and two lawyers (Franz Böhm and Hanns Grossmann-Doerth) met at the University of Freiburg. They shared a common conviction: that the inability of the German legal and political system to prevent the creation and misuse of private economic power had contributed to the disintegration of the Weimar Republic. Their academic collaboration gave birth to the Freiburg or ordo-liberal school (Gerber 1994a). In stark

[1] Needless to say that American antitrust has been throughout its history a "moving target" and that our summary here is schematic (see Thorelli 1954 and Peritz 1996 for detailed analyses of its historical evolution). For our purposes – and for reasons of space – we only point here to the broad characteristics of that tradition as crystallized by the 1920s.

contrast to the German *zeitgeist*, members of the ordo-liberal school were in favor of competition, both on economic and political grounds. Competition was a necessary condition, they believed, for political democracy. The competitive economy they envisaged – a multitude of productive units, each one more or less corresponding to a private household – had neoclassical features.

At the same time, they did not believe in competition as self-maintaining equilibrium. A *laissez-faire* policy in Germany, after all, had only brought about collusion and a curtailment of competition. Markets and competitive conditions had to be created by enlightened political authorities and protected by legal frameworks (Peacock and Willgerodt 1989: cha.2). They argued for a legislation prohibiting cartels and agreements. They believed that monopoly power should also be prevented, for example by requiring firms to divest certainoperations. However, situations in which this would be necessary were then quite rare. The cartel issue appeared much more problematic (Gerber 1994a: 51).

When World War II came to an end, the Freiburg school was neither well known in Germany nor well connected (Wallich 1955, Nicholls 1984). Its programs and the convictions of its members, however, happened to fit in reasonably well with the emerging American project for Germany. American occupation authorities in Germany were therefore instrumental in propelling the ordo-liberal school to the forefront of the political and economic scene (Nicholls 1984, Djelic 1998). In January 1948, the Americans appointed Ludwig Erhard as chairman of the newly constituted German Economic Council (*Deutscher Wirtschaftsrat*). Erhard had been in contact with the ordo-liberal school for a number of years and many members of his close advisory council were connected to that school.

The direct impact of American occupation

A widely shared conviction that cartels had played an important role in the build up of Nazi power led Western allied forces to introduce decartelization laws in 1947. These laws grew out of the long standing American antitrust tradition and prohibited cartels, combines, syndicates or trusts (Damm 1958). In the treaty allowing Germany to return progressively to sovereignty, the American government demanded that German agencies prepare their own competition law. Once accepted by German and Allied authorities, this law, it was agreed, would replace the 1947 legislation.

While targeting cartels, American occupation authorities had also aimed at "deconcentration" (Berghahn 1986: 84) of German industry by splitting up large undertakings. However, well into 1947 there was considerable controversy within the American administration as to how far deconcentration should go (Martin 1950). The onset of the Cold War settled the issue. After that, West Germany became a key bulwark in the fight against communism and was turned into the "cockpit" of American policy (McCloy, quoted in Schwartz 1991: 29). In consequence, the deconcentration program lost in significance and American occupation authorities came to advocate an oligopolistic structure for the German economy. The model was American and the idea was that "oligopolies, when policed by the vigorous enforcement of antitrust laws as in the United States, yield pretty good results" (OMGUS 1947: Vol. 18). American policy makers were aware that radical transformations of the sort they were fostering would survive only if Germans actively appropriated them. They had identified the ordo-liberal school as a local relay, but appropriation of the American antitrust tradition was not easy. To smooth the process, the United States sponsored training and "indoctrination" missions (OMGUS 1950: Vol.42). In June 1950, a German delegation led by Franz Böhm visited the US for several weeks, meeting representatives of the Federal Trade Council (FTC), the Antitrust Division and the Securities and Exchange Commission (SEC), antitrust experts and lawyers, industrialists and trade union members. Upon its return, the delegation published a detailed report (Bundesanzeiger 1950) that became an important source of knowledge on American antitrust in Germany, and some of its members became closely involved in the drafting of the German anticartel act. Back in Germany, they could also use other American resources. Robert Bowie, an antitrust lawyer who was General Counsel to the US High Commissioner in Germany, helped throughout the drafting. The US Department of Justice prepared an enforcement manual, using American antitrust cases. Finally, Americans did not hesitate to adopt a tougher strategy – threatening to impose their own version of anti-cartel legislation when the drafting process stalled or slowed down (Damm 1958: 212ff).

Running into obstacles

In 1949, a team of ordo-liberal experts proposed a first draft. The Josten draft, as it was known, called for a total ban on cartels and for legal and political intervention to prevent concentrations of economic power. This draft was quickly filed away, though, for at least three reasons

(Berghahn 1986: 160). First, the resistance of business communities was strong, both to the ban on cartels and to the tough deconcentration clause. Then, Erhard's close advisors – including Eberhardt Günther – would rather endorse a philosophy of abuse control than one of strict prohibition. Erhard himself, finally, was not fully convinced, and his opposition to the draft paralleled the opposition of American authorities (Robert 1976). Erhard's own position combined a strict opposition to cartels with a more lenient approach to concentrations of economic power, which placed him close to the position at the time of American occupation authorities. The vision of a social market economy (*soziale Marktwirtschaft*) relied on a combination of large-scale enterprises and efficient competition that together would drive the German economy towards US type consumer capitalism (Erhard 1958: 169-71, Berghahn 1984: 185).

In March 1949, the Allied High Commission prepared a directive asking German authorities to build upon chapter 5 of the Havana Charter for the drafting of a German anticartel legislation. This Charter, drawn up in the context of the United Nations Conferences on Trade and Employment in 1947, was part of the American attempt to establish a multilateral trading system. It recommended the liberalization of world trade and urged the signatories to introduce national anticartel legislation, but said nothing about the curbing of concentration (Berghahn 1986: 157). Erhard used this directive to reject the Josten draft and to initiate a new drafting process. By October, Günther had prepared a new draft, but since it upheld the principle of abuse control rather than prohibition it was rejected by American authorities.

By 1952, a new version was ready that provided for a prohibition of cartels, with a number of exceptions. It also included provisions on mergers and combinations; a Federal Cartel Office would be entitled to prohibit mergers that led to market dominance. The draft included a definition of market dominance that brought it closer to the Josten draft (Robert 1976:165). However, by the time of legislative elections in 1953, discussions of the bill in Parliament were still pending.

Industry pressure was a key factor behind the deadlock. Traditional German heavy industries that dominated the Federal Association of German Industries (*Bundesverband Deutscher Industrien*, BDI) were vehemently against any ban on cartels or serious deconcentration. As their capacity to organize was gradually re-established in the early 1950s, they lobbied strongly (Damm 1958, Braunthal 1965, Djelic 1998). For example, they threatened to reduce their campaign contributions for the 1953 elections and launched a virulent media

campaign against Erhard, whom they accused of acting on American orders (Erhard 1963: cha.16).

Overcoming the deadlock

In October 1953, following elections, a new attempt was made to reach an agreement. Erhard created an adhoc commission that brought together officials from the Ministry of Economic Affairs and a few members of the BDI. At the same time, he put pressure on the BDI by deploying a Trojan Horse strategy, attempting to work through minority groups within the business community with more to lose than to gain from cartels. The Community of Entrepreneurs (*Arbeitsgemeinschaft Selbständiger Unternehmer*, AsU), an association of small independent businessmen, joined somewhat later by representatives of the consumer goods industries at the BDI, became his main institutional relays within the business community. These groups became increasingly vocal from 1954, challenging the dominant position of the BDI and its leader Fritz Berg (Braunthal 1965, Berghahn 1986).

The ad-hoc commission finally agreed on a revised draft in 1955. Erhard had insisted on the prohibition principle – the bill included a prohibition of cartels largely similar to the provisions of the Sherman Act – but had accepted a number of exceptions. The bill was put to the Bundestag in 1955. Hostilities were immediately reopened and the confrontation lasted until 1957 when the Law against Restraints on Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) was finally passed. In the meantime, some last-minute changes had been made. The 1955 draft, for example, contained provisions on merger control that had received agreement from the Bundestag at first reading but were then changed at the end of the legislative process (Schmidt and Binder 1996). The same happened to a provision that prohibited oligopolies, the scope of which was reduced (Robert 1976: 312ff). These last-minute changes revealed once again the strength of opposition coming from parts of German industry, which was represented mostly, but not only, by the Conservative party (the *Christdemokratische Union* or CDU). The *zeitgeist* amongst German political decision makers was that concentration was a necessary precondition for German reconstruction (Müller-Henneberg and Schwartz 1963: 615).

The Law Against Restraints on Competition took effect on January 1st 1958. Section 1 declared agreements with restrictive effects on competition as null and void (§1). Section 2 extended the prohibition to vertical agreements that had a negative effect on competition. In their

basic principles, German provisions on cartels and agreements thus became congruent with American antitrust tradition. The prohibition principle, however, was qualified in German law by two types of exemptions. First, certain types of agreements were altogether excluded from the general ban. Among these were term-fixing, rebate and specialisation agreements that merely had to be reported to the Federal Cartel Office. The continued toleration of specialisation cartels, in particular, allowed small and medium-sized firms in postwar Germany to establish collaborative networks that enabled them to compete successfully with large industrial firms (Herrigel 1996: 172). Second, certain sectors such as agriculture, sea and air transport, banking and credit institutions, insurance or public utilities were entirely exempted. It would take more than 20 years before these sector exemptions came under serious attack, from national and European actors. Section 3 dealt with market power and prescribed control of its abusive exploitation (§22). The newly created Federal Cartel Office (*Bundeskartellamt*, BKA) was entitled to impose measures and fines against undertakings and groups of undertakings with a view to terminating abusive conduct. From a certain size onwards, mergers had to be reported to the BKA (§23). If the BKA found that the behavior of merged firms represented an abuse of dominant position, it could require the termination of this behavior. The BKA, however, had no authority to prevent the merger itself. The German control of abuse approach with regard to dominant market position paralleled the American rule of reason doctrine and arguably went further in its leniency towards concentration.

The enforcement framework of the German law differed in important ways from its American counterpart. First of all, the legislative traditions in which both laws were embedded differed. The German act was drafted in the tradition of statutory law and its provisions were therefore more detailed, specific and comprehensive than those of the American Acts. The German law created a relatively autonomous Federal Cartel Office in charge of enforcing the law. This office became the motor of the competition law system because it was virtually the only actor that could initiate, investigate and decide upon cases in which firms were suspected to violate provisions of the Law Against Restraints on Competition. In stark contrast to American practice, the German law did not allow private antitrust suits except in very specific conditions. In practice, the procedure was developed very much along judicial principles under the influence of Eberhardt Günther, who became the first President of the BKA. Decisions have been subject to

judicial review by ordinary courts in the first instance and by the Federal Court of Justice (*Bundesgesetzhof*, BGH) in second instance.

Planting the seeds transnationally – the European Coal and Steel Community

In May 1950, France proposed a plan for pooling French and German coal and steel industries, with the possible participation of other European countries. The idea was to create the conditions for peace between a core of European countries by institutionalizing mutual economic dependence. Jean Monnet and the French Planning Council were behind the proposal and by the end of June negotiations had begun between six countries – France, West Germany, Italy, Belgium, the Netherlands and Luxemburg.

A European cartel or the United States of Europe?

In an immediate reaction to the French proposal, the American Secretary of State Dean Acheson praised the initiative but held back from giving it full support. This initial American hesitation was mostly due to wariness that the project could turn into a European cartel. Two days later, the French team sent a memorandum to the American State Department, documenting differences between the French proposal and an international cartel. The memorandum emphasized that the main objective was to create a competitive space to stimulate production and productivity and not to "maintain stable profits and acquired positions" (FRUS 1950).

What really made a difference, however, and got the better of American hesitation, was the fact that Monnet was behind the project. Members of the American administration knew that Monnet believed in the model of expanded production and competitive markets and entertained the vision of a peaceful and united, mass-producing and mass-consuming Europe, with the United States as a model. They were also aware of the close collaboration between the French planning council and American experts, lawyers and consultants (Djelic 1998: 151). A key figure again was Robert Bowie, who traveled from Germany to Paris in June 1950 and wrote the competition provisions of the European Coal and Steel Community Treaty (Monnet 1976).

Antitrust legislation as a key bone of contention

Monnet had anticipated difficulties and the probable opposition of business communities. To pre-empt conflicts, industry representatives were excluded from negotiation proceedings. The French team had insisted that official country delegates should not be members of national industries but "independent personalities who [had], besides technical capacity, a concern for general interest" (FRUS 1950). As expected, French, Belgian and German business communities vehemently denounced the project from the start, in particular its anticartel orientations. The impact of these lobbies on country delegates was real, albeit indirect; as a consequence, early drafts of the ECSC Treaty reflected and to some extent incorporated those pressures.

This soon aroused concern within the American administration and prompted intervention. In the autumn, the Americans imposed a redrafting to bring the future treaty into line with initial objectives. As Walter Hallstein, head of the German delegation, described it:

> Monnet's ideas are probably also influenced by the American desire that all cartel-like institutions be rejected… The French side will examine the cartel question once more from this perspective. The [German] Ministry of Economic Affairs is likewise asked to submit an appropriate proposal… (quoted in Berghahn 1986:140).

At the end of October, the French came back with a draft that essentially rekindled the spirit of the early proposal. Two articles, 60 and 61, written in large part by Robert Bowie, dealt explicitly with the cartel issue. Article 60 prohibited cartels and agreements although it made partial exception for crisis cartels. Article 61 dealt with abuse of market power due to excessive concentration, without prohibiting concentration as such. Mergers were allowed if they created conditions for increased efficiency and productivity without threatening competition. The German draft was much less restrictive on the cartel issue, only preventing abuse. All national delegations except the French backed this second draft, which was also more acceptable to industry representatives. The French draft, however, received full American support.

Reaching a compromise

Negotiations stalled for three months, although Monnet continued to hold intensive behind-the-scene talks with both Ludwig Erhard and Konrad Adenauer, the West German Chancellor. Eventually the American High Commissioner, John McCloy – a personal friend of Monnet's –

was instrumental in bringing parties back to the negotiating table. In the end, the version of the ECSC Treaty finally adopted was a compromise.

Article 60 had become Article 65 and declared "all agreements, decisions and concerted practices as void which tend to prevent, restrict or distort 'normal competition' within the Common Market for coal and steel" – a *per se* prohibition of cartels congruent with American antitrust tradition. As part of the compromise, subsection 2 of the same paragraph gave the High Authority the right to authorize specialization agreements, joint buying or joint selling agreements of particular products if they would "make for substantial improvements in the production or distribution of those products", were "not more restrictive than necessary for this purpose" and "not liable to give the undertakings concerned the power to determine the prices, or to control or restrict production or marketing of a substantial part of the products in question within the Common Market, or to shield them against effective competition from other undertakings within the Common Market". [2]

Article 61 had become Article 66 but was essentially unchanged. It subjected mergers to the prior approval of a "High Authority" (§1). The latter would agree upon a merger if the transaction did not create an entity with the power to fix prices, to control or restrict production or distribution to the detriment of competition (§2). Under §3, the High Authority could "exempt from the requirement of prior authorization" concentrations between smaller undertakings. Thus, in line with American antitrust tradition, Article 66 was designed to prevent the emergence of monopolies but not to combat concentration as such. As a complement to merger control, §7 dealt with firms that already had achieved market dominance when the Treaty came into effect or that could get there afterwards through internal growth. This paragraph and the "abuse of dominant market position" concept would be re-used five years later in the Rome Treaty in a somewhat different form (Joliet 1970: 218ff).

Whereas Articles 65 and 66 ECSC by and large reflected the influence of American antitrust tradition, a new Article (67) was added that included provisions more in line with European practices. The High Authority in charge of applying the Treaty could allow national States to accept certain agreements under particular conditions, such as during economic or social crises. The introduction of Article 67 left open the possibility for coal and steel producers and

[2] All citations from the ECSC Treaty are taken from http://www.europa.eu.int/abc/obj/treaties/en/entoc29.htm (Download from 18.09.2003).

their national governments to reestablish certain prewar practices of collaborative market control when economic downswings and increasing global competition brought the European coal and steel industry under increasing pressure in the following decades. In fact, it was Article 67 that rendered ECSC competition law provisions so ineffective in later periods (Schmidt and Binder 1996).

European Antitrust Becomes a Force of its own

As it turned out, the Coal and Steel Community was relayed in 1958 by the European Economic Community (EEC). In the following years, competition policy became an important dimension of European integration, particularly once the EEC became the European Union (EU) in 1992. Today, the European competition authority has grown into a global player – forty years ago this would have seemed unthinkable. Throughout those forty years, American antitrust legislation and practice have exerted influence on the European competition framework, but that impact has varied in character and intensity. At the same time, influences coming from member states or Community institutions gradually contributed to building up European antitrust as a force with dynamics of its own.

Laying the groundwork

The Rome Treaty laid the groundwork for the operation of a European competition law system. Formal provisions were subsequently turned into living law through regulations issued by the Commission as well as through European Court of Justice case law. Many characteristics of the contemporary competition regime and of recent attempts at reform can be seen as going back to decisions made during the early foundation period.

From the ECSC to the EEC

In May 1955, Foreign Ministers of the ECSC met at Messina, Sicily, to discuss the possibility of an extended Common Market. The context was different then to that four years before. Germany was reimposing itself in Europe, economically and politically, and this worried France. At the

same time, attempts at setting up a European defense system had failed in 1952, dealing a blow to political integration projects. These changes in the European balance of power impacted upon the Messina discussions. The French were wary and championing as a consequence a free trade area with limited supranational power. The German government was more ready to envision a European confederation of national states (El-Agraa 1980).

All delegations agreed that the creation of a Common Market required a joint competition policy. Opinions differed considerably, however, as to the nature and scope of such a policy. Germans were in favor of a strict prohibition of restrictive agreements and of a preventive control system run by a strong competition authority. From the start this position was influential, not least because Germany was the only country about to pass and implement a national competition law. Following the Messina meeting, a group of experts worked under the leadership of the Belgian Foreign Minister Paul Henri Spaak to consider the necessary preconditions for a Common Market. A German, Hans von der Groeben, and the Frenchman Pierre Uri drafted the final report, outlining in particular a common competition policy.

Published in April 1956, the Spaak Report prepared the ground for further negotiations. The preamble called for the creation of a Common Market as a way to raise European productivity and efficiency and bring them closer to American levels. The section on competition policy suggested a prohibition of cartels and restrictive agreements with a merger control system similar to that of the ECSC Treaty (Schwarz 1956,1980: 277-335). The French delegation strongly opposed those propositions, favoring instead a weak system of abuse control. The Dutch perspective combined compulsory notification of cartels with provisional validity (Goyder 1998, Forrester 2000). During negotiations, participants explored concepts unfamiliar to most of them or at least (as in the German case) untried. Paragraphs were changed until the last minute. Ultimately, the German delegation got its way, with a rigorous ban on restrictive agreements as *quid pro quo* to French demands on Euratom and the association of overseas territories (Bayliss 1980: 118). Initial reluctance left some trace, however, in the form of exemptions that were integrated in the final text of Article 85 of the Rome Treaty.[3]

[3] Following the Treaty on the European Union of 1992 (TEU hereafter) Articles 85 and 86 were renumbered respectively to 81 and 82 (cf. Official Journal C 191 of 29 July 1992). We use the pre-1992 numbering throughout unless otherwise stated.

The treatment of concentrations and market power was less controversial. With American firms as benchmark, European politicians believed that further concentration in the integrated market would be both inevitable and desirable – a view also influential amongst officials of the European Commission (Joliet 1970: 3). Therefore, the proposition of the Spaak Report to establish a merger control system similar to that of the ECSC Treaty did not find its way into the Rome Treaty.

Competition Provisions in the Rome Treaty

Article 85 (1) prohibits "agreements between undertakings, decisions by associations of undertakings and concerted practices which may effect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the Common Market."[4] This formulation is similar to that of Article 65 in the ECSC Treaty, and in all likelihood derives from the latter (Goyder 1998: 98). The American legacy of a *per se* prohibition of cartels had entered, via the ECSC path and under German pressure, the competition law of the European Community. However, Article 85 (3) stated that cartels and concerted practices may be accepted when they "contribute to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit". Here, we see parallels to the exemptions under Article 65 (2) of the ECSC Treaty or those in the German Act of 1958. Given the complex and lengthy negotiations described above, the wording of Article 85 is surprisingly close to that of Article 65 ECSC except for somewhat broader exemption provisions in the Rome Treaty (Joliet 1970: 225).

Article 86 stated, on the other hand, that "any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States". The focus of Article 86 on abuse of dominant position was inspired by §7 of Article 66 ECSC. But unlike competition law provisions of the ECSC, the Rome Treaty did not deal with mergers (Joliet 1970: 225). Article 86 is directed only at the misuse of dominant power; it cannot deal with the attempt to monopolize, in contrast to Article 66 ECSC. The "abuse of dominant position" – a concept that originally had constituted a supplementary provision in the ECSC

[4] Citations from the Rome Treaty are taken from http://europa.eu.int/abc/obj/treaties/en/entoc05.htm (Download from 29.09.2003).

Treaty – became of key importance in the Rome Treaty. This approach comes very close in fact to the concept of "abuse of dominant power" that the German Act of 1958 introduced to deal with concentrations.

Altogether, the influence of American antitrust tradition on European competition law is unmistakable, at least in its fundamental principles. However, the introduction of exemptions and the granting of considerable discretion to the Commission created a situation where in practice, and through procedural judgment, the European antitrust act could develop a dynamic of its own.

Regulation 17/62: German midwifery for a strong DG IV

In contrast to its ECSC predecessor, the Rome Treaty did not define enforcement mechanisms. The Council of Ministers had four years to adopt an implementation legislation. Hence, debates started again, showing that there were different national interpretations of the law. Germans argued that restraints of trade should be generally forbidden until exempted by the Commission. The French proposed that Article 85 (3) should be interpreted as directly applicable exemption – which would give national authorities greater leeway.

Under the leadership of two Germans – Walter Hallstein, first president of the Commission, and Hans von der Groeben, first Commissioner for competition policy – the European Commission resisted the French position. Member states, national courts and business communities should be prevented from watering down competition provisions (Forrester and Norall 1984). In parallel, members of the Commission balked at the scope of jurisdictions involved; this was bound to exceed the limited resources of the Commission. DG IV, the newly founded Directorate-General for competition policy, then had about 20 officials, far fewer than its new German counterpart (Goyder 1998).

Initially, DG IV focused on preparing a procedural regulation and hence consulted broadly with member states and experts. German lawyers, academics and competition officials played an influential role there since they could refer to the German experience (Goyder 1998, Gerber 1998). A first version of Regulation 17/62 confirmed the direct applicability of Articles 85 and 86, imposed notification, reasserted the principle of prohibition, gave the Commission sole jurisdiction for approval of exemptions and imposition of penalties and provided that decisions of the Commission could be appealed in the European Court of Justice. Tense discussions followed, in the European Parliament and in the European Council. The French

delegation disagreed strongly with the obligation to notify agreements and proposed that decisions under Articles 85 and 86 should be taken jointly by the Commission and member states concerned. The French finally relented on their opposition to Regulation 17/62 when offered an agreement on agricultural policy (Bayliss 1980: 118; Von Groeben 1987).

Regulation 17/62 came into force in March 1962 and has shaped since then, without major amendments, the European approach to competition policy.[5] The Regulation gave the Commission exclusive powers in defining exemptions under Article 85 (3). Altogether, it strongly empowered the Commission relative to national competition authorities and laid the foundation for a far-reaching delegation of decision-making powers from the Commission to DG IV (Gerber 1998). Few other DGs had such widely delegated powers. This enabled DG IV to continue enforcement including when political deadlocks made it difficult for the Council to decide on other matters (Goyder 1998).

Implementing Antitrust

The 'German' approach that prevailed in Regulation 17/62 reflected the belief that a literal reading of the Treaty and strong enforcement authority were necessary to overcome the resistance of national business and political communities. There was, however, an obvious risk in this approach. Critics had pointed out that the "mesh of the net for catching notifications was so fine that the anticipated number of agreements likely to be registered […] would be extremely high" (Goyder 1998: 47). And this was the case. By 1963, the Commission had received 920 notifications for multilateral agreements and 34,500 for bilateral ones. DG IV was confronted with a mass problem. The European Parliament and the Council understood that quickly and adopted regulations allowing the Commission to grant block exemptions (Regulations 19/65 and 67/67)[6].

As a consequence of this mass problem, DG IV concentrated its efforts during the 1960s on vertical agreements, often of a bilateral nature. It focused particularly on agreements dealing

[5] EEC Council: Regulation No. 17: First Regulation implementing Articles 85 and 86 of the Treaty. Official Journal P 013, 21/02/1962, p. 0204-0211

[6] Regulation No 19/65/EEC on application of Article 85(3) of the Treaty to certain categories of agreements and concerted practices. Official Journal P 036, 06/03/1965, p. 0533-0535. Regulation No. 67/67/EEC on the application of Article 85(3) of the Treaty to certain categories of exclusive dealing agreements. Official Journal 057, 25/03/1967, p. 0849.

with distribution, the licensing of industrial property rights or cooperation for example in research and development. Preoccupation with these kinds of agreements, some have argued, absorbed resources which DG IV might have better employed investigating multilateral agreements. Most multilateral agreements were horizontal with a dimension of market sharing at least at the national level. They were generally threatening competition more than bilateral agreements on distribution or patent licensing (Goyder 1998: 70). The tendency for DG IV (and the Commission as a whole) to avoid cases likely to generate political resistance amongst national members explains in part that strategy (Gerber 1998).

The Commission also gave scant attention to abuse of dominant position during this period. In 1963, thinking about implementation of Article 86 , the Commission created a working group, again with strong German representation. This group concluded that mergers should be seen more positively than cartels; the former were efficiency-enhancing while the latter were perceived as preserving inefficient structures. These conclusions shaped the Commission's Memorandum on Concentration, where effective competition between oligopolistic enterprises was claimed to be in conformity with Treaty objectives (Joliet 1970: 261).

Altogether, the first years of DG IV were characterized by a steady development of the legislative base for competition policy in the European Community. This development went faster than many European industrialists (and governments) had expected. By the mid-1960s, however, it faced two major challenges: the limited resources of DG IV and the political deadlock created by De Gaulle's "empty chair" politics.

The European Court of Justice: stimulating supranational dynamics

In that context, the European Court of Justice took over leadership on competition issues. Timing was a critical factor. The first competition cases reached the Court in the mid-1960s, just as De Gaulle's request for unanimous decision making threatened to destroy the European Community (Gerber 1994b). In a situation where the Council was all but paralyzed, the Court had increasing importance for maintaining the momentum of integration (Mattli and Slaughter 1998; Stone Sweet and Caporaso 1998). Rather than limiting itself to particulars of individual cases, the Court enunciated broad principles. It looked to the future, guiding the Commission in its development of competition policy. As Goyder (1998: 578) suggested, the Court provided the

Commission with "windows of opportunity", indicating willingness to support certain developments in competition doctrine.

In its 1964 *Grundig Case* decision [Cases 56 and 58/64 ECJ], the Court gave, for example, a wide interpretation to the 'trade' clause of Article 85 ["which may affect trade between Member States"], thereby increasing the reach of competition policy (Goyder 1998: 52ff.). Similarly, after the mid-1970s, the European Court of Justice developed an interpretation of "concerted practices" – signaling that it would support a more rigorous enforcement of Article 85. Decision on *Continental Can* in 1972 is another example [6/72 ECJ]. For the first time, the Commission had sought to use Article 86 to prevent an acquisition that would lead to an abuse of dominant position. The Court agreed, thus opening up the possibility to deal with anti-competitive mergers using Article 86 (Gerber 1994b: 117). Finally, the Court's decision in the *United Brands Case* [27/76 ECJ] set the stage for enhanced enforcement activities on the part of the Commission against abuse of dominant position (Goyder 1998: 320ff).

As in constitutional law (cf. Alter 1998), the Court interpreted competition provisions in light of its conception of what was needed to foster integration. Believing that a strong Commission was necessary, it developed a competition law doctrine that empowered the latter relative to national authorities. Hence, the Court confirmed the partial autonomy that Regulation 17/62 had granted the Commission. It also fostered the development of legal doctrines and practices that were (relatively) beyond the reach of intergovernmental negotiations or direct national pressure.

New challenges for the enforcement activities of DG IV

The economic crisis of the early 1970s confronted the Commission with a dilemma. On one side, the Commission was intent on securing compliance with established norms and the European Parliament insisted on competition law enforcement, with a view to maintaining the faltering process of integration. On the other, economic difficulties increased incentives for firms to engage in anti-competitive conduct and enforcement became more complex. The integration, in 1973, of the UK, Ireland and Denmark, only compounded difficulties. Educational and advocacy efforts were necessary to disseminate European competition norms in these countries. And still, DG IV's resources remained extremely limited (Gerber 1994b).

DG IV reacted to the challenge of bridging multiple tasks and limited resources by adopting a "low economic cost, minimum political risk" strategy (Gerber 1994b: 121). From the 1970s onwards, it imposed significant fines in a limited number of cases, focusing increasingly on multilateral horizontal agreements – cartels using concerted practices (Lilja and Moen 2003) or on cases where firms abused a dominant market position (Gerber 1994b).

Moving further

Until the mid-1980s, the European competition law system was organized around a clearly delineated division of labor between the Commission and the European Court of Justice. The Commission aimed at improving compliance with competition rules while the Court was developing a European competition law doctrine and expanding its reach. The interplay between national courts and competition officials and the European competition law system remained limited.

Beyond apparent stability, however, considerable change was under way. Basic legal doctrines and institutions remained the same, but from the mid-1980s onwards the respective roles of the Commission, the Court and member states would change (Gerber 1994b). In the following, we briefly outline the context of this transformation.

The Single European Act and merger control

The Single European Act (SEA) of 1986 changed the scene in two ways. First, it increased the range of issues for which qualified majority voting applied. In the process, it gave the Commission back some of the room for manoeuvre that the latter had lost in the 1960s. Second, it engendered confidence that economic integration was progressing, hence fostering a wave of mergers and acquisitions. Together, those two developments led to the passing of a Merger Regulation in 1989.[7] The Commission had been asking for such legislation since the 1970s but members states had resisted it (Bulmer 1994).

The Merger Regulation provided that "concentrations" (mergers and certain joint ventures) with a "community dimension" were subject to Community regulation and removed

[7] Council Regulation (EEC) No 4064/89 on the control of concentrations between undertakings (Corrigenda – whole text republished in OJ L 257/90, p. 13). Official Journal L 395, 30/12/1989, p. 0001-0012.

from the jurisdiction of national competition authorities. The Commission should get advanced notification and it could prohibit the merger where it would "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".

The introduction of the Merger Regulation fundamentally altered the European competitionregime. It enhanced the influence of the Commission, putting it back – rather than the Court – at the center of the system. The Merger Regulation has itself become a key focus of DG IV, shifting attention away from other activities. The establishment of a merger control system has also brought political issues back, while they had been pushed aside in the 1960s in favor of a judicial approach. Even more importantly, the building of a merger control system on the foundations of the existing system strengthened elements of American case law in European competition law. From this perspective, the introduction of the Merger Control system is a case of "institutional layering" (Thelen 2003: 226). New coalitions designed new institutional arrangements that were built on top of existing ones, circumventing a basic reform of the old system. The parallel operation of the different layers, however, changed the direction in which the overall system evolved, arguably bringing it back closer to the American competition law system, which in the meantime, of course, had itself been evolving.

Towards decentralization of enforcement

Paralleling these developments, members of the European Court of Justice suggested from the mid-1980s that the Court did not need to play as aggressive a role as in the past, now that other institutions were in a position to carry more of the integration burden.

The Commission has since become more pro-active in legislation, issuing both formal and binding regulations (e.g. block exemptions) as well as informal, non-binding general notices, letters of comfort and other forms of soft law. During the 1990s, DG IV has increasingly turned its attention to public sectors and government intervention in the economy. The Commission report in 1990 stated, for example, that "at the present stage of economic integration in the Community the barriers are greatest in markets currently subject to state regulation" (Gerber 1994b: 138). This public turn found expression in the activation of Article 90 of the Rome Treaty[8], which applies competition law provisions to public enterprises. It also translated into

[8] Article 86 in the Treaty of the European Union of 1992.

increased enforcement of provisions relating to state aid (for sectoral analyses of these trends see Plehwe with Vescovi 2003; Midttun et al. 2003). Sections of the Rome Treaty that had not been invoked for thirty years now were activated by the Commission and other actors aiming at a liberalisation of public sectors. This shows how societal and political actors can invoke "dormant" institutional fragments not only at the national but also at the supranational level to mobilize for institutional change (see also introduction to this volume).

Finally, the introduction of the concept of *subsidiarity* during the Maastricht Treaty negotiations has also had a significant impact. Recent Commission proposals envisage a far-reaching re-delegation of enforcement activity to national competition authorities, in order to free DG IV resources in particular for merger control. This only makes sense, however, in the context of an evolution – over the last twenty years – where European competition law has had a significant impact at the level of member states, shaping, structuring or transforming national competition systems (Djelic 2002, ENA 2002).

Discussion – Towards National System Change

When the Rome Treaty was signed, Germany was the only member state with a competition law – and even there it was only emerging. Today, all member states have competition regimes, shaped and inspired, in one way or another, by the European Community competition regime. When entering the EEC in 1981, Greece adopted a legislative framework fully modeled on the Community blueprint. France significantly reformed its set of loose competition-related norms and institutions in 1986, with European standards in mind. Spain and Italy introduced competition law systems in 1989 and 1990 respectively (Gerber 1994b: 142,ENA 2002).

The Commission has never attempted to put direct pressure on member states (i.e. through regulations and directives) to align national competition laws to European law. Neither have case decisions by the Commission or the European Court of Justice attempted to influence national competition law directly (Van Waarden and Drahos 2002). In fact, the European Court of Justice ruled in 1969 that national competition law could be applied in parallel to EU law, but that EU law had precedence in those areas where it applied. Nevertheless, all member countries have created national competition law regimes, and those regimes, furthermore, have gained in congruence through time if not fully converged (ENA 2002). This increasing congruence

provides an interesting case of harmonization occurring without significant direct coercion. Indirect pressures, however, played an important role.

Indirect pressures for harmonization

Growing congruence between European and national competition regimes does not mean full convergence. Differences in substance and procedure persist, and, for reasons identified below, some of these differences will probably not disappear. Nevertheless, we observe a progressive alignment, on general principles, enforcement mechanisms and administrative practice (ENA 2002). This growing congruence has emerged from the combination of at least three mechanisms.

The first mechanism consisted of subtle 'top-down' pressures exerted by the Commission and the European Court of Justice. Decisions of the Commission and ECJ created pressure on member states by banning practices at the European level (e.g. cartels) hitherto accepted at the national level (Drahos 2001, Van Waarden and Drahos 2002: 925). This placed national authorities in the difficult position of having to develop arguments justifying differences between national and European norms and practices. It alsot provided previously marginal groups of actors, nationally, with windows of opportunity to question the dominant approach. In many instances, such subtle top-down pressures set in motion a process of gradual de-institutionalization (Djelic and Quack 2003a). The reaction of national authorities to a succession of indirect European attacks potentially relayed nationally was in general to adapt national to European law.

A second mechanism, operating in close interaction with the first, was the emergence of an "epistemic community" of legally trained officials (Van Waarden and Drahos 2002: 914). This community channeled information, ideas and solutions between the European and national systems of competition law. EU case law provided an important model and source of norms for this community. Part of this development was the gradual delegation of European competition cases from the European Court of Justice to national courts. Already in 1973, the ECJ had ruled that Treaty provisions on competition were directly applicable in national courts. It took more than a decade for national courts to become really involved. Once they did, though, it meant that justices and lawyers became increasingly familiar with European competition law standards and drew comparisons between those standards and national practice. Progressively, those national

members of a budding European "epistemic community" would put pressure on their national systems, fostering change (Quack 2003).

Finally, the "public turn" in the enforcement activities of DG IV in the 1990s put quite direct pressures on national governments to bring their policies on public sectors in line with the European competition regime. These pressures often led in practice to a general overhaul of existing national competition rules.

Taken together, these three mechanisms suggest a process of "hollowing out". The creation, gradual expansion and subsequently successful operation of a European competition regime gradually undermined the operation of differently patterned national competition regimes and pushed actors within these systems to contemplate, and finally accept, at least partial adaptation to the European model.

The German case: Reluctant adaptation

This process can be illustrated with the German case. As described above, German lawyers and competition officials significantly influenced European competition law during the foundation period of the EEC. German ordo-liberal thinking left its mark on the Rome Treaty and on procedural regulations implementing the Treaty during the early years. At the same time, the parallel existence of a European competition regime, structured along similar principles, probably contributed more to the stabilization of the German competition regime than it was realized then. In fact, by the late 1960s, German competition officials referred explicitly to the European competition regime in order to mobilize support against re-emerging pro-cartel attitudes at the national level[9] Interactions between the two systems continued over time, although they changed in nature. While at the beginning of the period influence went predominantly from Germany to Europe, this changed progressively and since the late 1980s the direction of influence has overall been reversed.

[9] In 1967, for example, the German Federal Cartel Office charged major German and European chemical producers of aniline dyes with price-fixing, imposing high fines on these companies. German courts rejected this decision, arguing that no written agreement had been found, and created in the process considerable public debate. The president of the Federal Cartel Office, Eberhard Günther, argued in that context that German regulation should be adapted to the more comprehensive rules of the EC competition regime. It took several years before this proposal would be finally endorsed politically, leading to the reform in 1973 of the GWB. In the meantime, the European Commission had initiated investigations and imposed high fines on the same chemical companies, the ECJ confirming this decision (Nawrocki 1973: 87).

As in other member states, German courts have eventually come to borrow concepts and definitions from European case law. German competition authorities have also come to apply EU law in areas that benefited from exemption under national law. German competition officials meet Commission inspectors regularly in the context of investigations or in advisory Committees. Given the close starting base of German and European systems, and reinforcing interactions between the two systems over time, it is surprising that the "former best pupil" has turned today into a rather reluctant adapter (Van Waarden and Drahos 2002: 915). In fact, German competition officials continue to oppose full adaptation to European competition norms.

Interestingly, and somewhat ironically considering the history recounted above, it was the Federation of German Industry (BDI) that suggested, in 1995, harmonization of national and European competition law in order to enhance the competitiveness of German business. The Federal government responded with a proposal aiming at full harmonization. The advisory Academic Council of the German Minister for Economic Affairs, however, mirroring the views of the Federal Cartel Office and Monopoly Commission (both bastions of ordo-liberal thought) rejected the initiative and the idea of 'Europeanisation'. Criticism was mostly directed at the inclusion of a general exemption clause along the lines of Article 85 (3). This was condemned, together with the introduction of the notion of "decisive influence" in merger provisions, for importing industrial policy goals into competition law (Lodge 2000: 95). In 1999, after four years of controversy, the German law was finally reformed – meaning a far-reaching but not full adaptation to European legislation. There were less sector exemptions, for example, but there were still some. The German merger regime continues to differ from the European, particularly on the concept of dominance (Stadler 1998).

This shows that cross-border model transfer, even when a model has, in earlier periods, been influenced by one's own heritage, always amounts to more than mere copying. The European system, starting as a recombinant of national elements, has evolved over the years its own characteristics and dynamics, as have competition regimes in member states. Despite subtle top-down pressures and an emerging community of episteme and practice, beyond borrowing, modeling and recombination, there are still some differences between the European and German competition regimes.

Conclusions

The above narratives document two interwoven processes. On the one hand, we have a case of transnational institution building, where rules for the competitive game are progressively structured and stabilized at the European level. On the other hand, in partial interconnection, we document a case of progressive, incremental but consequential institutional change in one country, Germany.

Transnational institution building – recombination and layering

The story of European antitrust recounted above is an illustration of transnational institution building. New rules were progressively institutionalized in a space that was itself being structured. The process of institutional emergence did not start from scratch. It was closer to *bricolage* – recombining institutional fragments – than to ex-nihilo creation (Djelic and Quack 2003).

At the beginning, the impact of American antitrust tradition and experience was undeniable. The German postwar antitrust experience also had some impact on the construction of a European competition regime. This German development itself reflected an encounter between strong American influence, national ordo-liberal thinking, national institutional legacies and local resistance.

Altogether, this early period of recombination was characterized by a dominant mode or logic (Djelic and Quack 2003b: 324f). One particular set of institutional fragments – here associated with American antitrust tradition – became the dominant element in the recombination process. In the ECSC story, this influence combined a direct and an indirect effect. The direct effect was the impact of American tradition and experience on the ECSC competition regime. The indirect effect was the impact of American antitrust on the German competition regime that in turn played a role in the recombination process at the European level.

Yet, once it started to be interpreted and implemented, European antitrust legislation became a force of its own. By the early 1960s the mode of recombination had ceased to be of a clear dominant kind. The interplay between European texts, new European institutions, national

interlocutors and an emergent epistemic community made institution building a complex process. Evidence points to a combination of what we call negotiated and emergent modes. A negotiated mode expresses the friction between multiple national fragments with approximately equal weight. An emergent mode implies presence, in the friction, of actors and institutional fragments not directly associated with a national identity (Djelic and Quack 2003b: 325f). During the 1990s, institution building around antitrust involved actors and institutions (eg. the epistemic community, the European Court of Justice or DG IV) with an identity that went beyond a combination of national identities and was, in a sense, transnational. Multiple actors with no clear identity, functioning themselves at the interface of multiple rule systems, collide with each other. What takes place then, we label an emergent process. The resulting construction is decoupled somewhat from national roots and develops a dynamic of its own as a truly transnational space (Barnett and Finnemore 1999).

While modes and logics of recombination changed during the period, we also document institutional layering and sedimentation (see introduction to this volume). Until the mid 1980s, the European competition regime dealt mostly with cartels and/or abuse of dominant position. With the Merger Regulation, a new layer of institution building was superimposed in 1989, this time with a focus on merger issues. European institution building around the merger issue was strongly influenced by the American experience. On that layer, a dominant mode was again at work, albeit with quite different characteristics from the dominant mode of the 1950s.

The United States could not attempt to impose their model as they had done then. The impact was more subtle and indirect. As the Chairman of the American Federal Trade Commission said in 2002, “no treaty forced foreign nations to borrow ideas from the US Merger guidelines” (Muris 2002). Nevertheless, they did, seizing upon, in the words of Muris, “best practices”. An institutionalist perspective would point to a successful process of socialization, to cultural diffusion and to legitimacy-seeking mechanisms (Strang and Meyer 1993). By the 1990s, Europe and other countries had been “converted to the value of antitrust” that Americans had early on “been preaching” (Melamed 2000). Even though Europe was itself a missionary by then (Rouam et al. 1994), with respect to antitrust the United States remained the referent well into the 1990s.

National institutional change – trickle-down and trickle-up trajectories

In parallel to a story of transnational institution building, we have also documented in this chapter a case of incremental but nevertheless consequential institutional change (see introduction to this volume). In 1945, Germany was closely associated with cartels and cartelization. Then, a political window of opportunity opened in that country, allowing a radical and consequential reformulation of economic policy. The institutional entrepreneurs who seized this opportunity were a coalition of outsiders – Americans with an experience of antitrust – and a small group of (then marginal) insiders with a compatible project. In the long run, the reformulation indeed proved consequential. It was not, however, radical in the sense of rapid rupture and clean break with the past – Germany the cartel country one day turned bastion of antitrust the next. Instead, we observe a succession and combination, over a long period of time, of partial steps and incremental transformations that ultimately amounted to consequential and significant change.

In previous work we have used the metaphor of stalactite change to characterize a process where a succession of incremental steps is nevertheless consequential, in order to overcome the classic dichotomy between rare and radical change on the one hand, incremental and inconsequential change on the other (Djelic and Quack 2003b: 308, see also introduction to this volume). The image is that of a minuscule drop of water falling from the vault of a cave. In itself, it seems insignificant, with no impact on the cave as a whole. However, under given conditions of temperature, the succession and combination of large numbers of droplets may lead to an aggregation of the calcite contained in those drops. After a long while, the result is a thick landscape of inovatively shaped stalactites and stalagmites and a consequential transformation, one could say, of the cave as a whole.

In the German antitrust story told here, each single step was fragile, particularly at the beginning. The multiplication of steps, their accretion and aggregation, reinforced each individual step and in time stabilized the process. As is the case with stalactite formation, the overall direction was set by the first steps (drops). Thereafter, however, the process became, as in our imaginary cave, quite open-ended. The result was a German antitrust tradition with features that could not have been fully anticipated. At the same time, we argue that the concomitant and partly interconnected development of European antitrust was a further stabilizing factor, over the long term, for the German transformation. A comparison with the Japanese antitrust story would tend to confirm this (Haley 2001). The Japanese story shared many features with the German (Yamamura and Streeck 2003) but lacked the interconnection with a reinforcing transnational

process of institution building such as took place in Europe. This comparison suggests the importance of including the effect of transnational institutions – through both trickle-down and trickle-up pressures – in future analysis of national institutional change.

The nature and extent of interconnection between European institution building and German institutional change have varied across time. We identify three main periods. From the mid-1950s to the mid-1970s, influence went predominantly from Germany towards Europe – the German antitrust experience having an impact on the budding European attempt at institution building. For the following ten years, we essentially have a lull, where interplays were weaker than at any other moment. Since the mid-1980s, interconnections have increased again in density and influence is going mostly from Europe towards Germany.

These interconnections are mostly in the form of indirect pressures for harmonization, of essentially two types (Djelic and Quack 2003b: 315-320). On the one hand, we identify trickle-down pressures. Those are exerted by European institutions – the Commission, DG IV, the European Court of Justice – on the German competition regime. As we have shown, those pressures tend to be subtle, discreet, implicit and of a normative kind, with little legal or institutional coercion. This trajectory of indirect, subtle but top-down pressures was to some extent institutionalized from 2000, when the European Commission launched a reform to transfer progressively some of its responsibilities and prerogatives to national authorities, in line with the subsidiarity principle. This delegation of powers comes with a systematic effort at structuring and stabilizing cooperation between national competition authorities. A European network of competition authorities was thus created with a view to building the foundations of more solid cooperation. The Commission hopes that these developments will deepen the common antitrust culture and further in time homogenization (ENA 2002).

On the other hand we also find trickle-up pressures. The structuring of a European epistemic community, around antitrust lawyers and competition officials, has created a situation where national members of that epistemic community are putting pressure nationally for competition regimes to adapt to European blueprints. This has been operative in Germany, increasingly so since the late 1980s. The German story points to another example of trickle-up pressure; this time stemming from German business communities. We have noted the irony, there, given the early history of German antitrust. The BDI in particular has since 1995 been

urging a reform to bring the German competition regime closer to the European one. This, they claim, is necessary to increase the competitiveness of German business.

Although resistance has not been insignificant, the combination of trickle-down and trickle-up pressures was enough to bring about, in 1999, a reform of the German competition regime. Further research, by comparing the German to other cases could make it possible to specify the conditions under which the interplay of trickle-down and trickle-up pressures brings about gradual but consequential institutional change and the conditions under which it does not.

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