

University of Twente

School of Management and Governance

Master's Thesis:

“The EU Competition Policy since 1990: How Substantial is the Degree of Convergence towards the U.S. Competition Policy?”

Student:

Dzmitry Bartalevich

Supervisors:

Dr. Shawn Donnelly

Prof. Dr. Antoni Brack

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1. Introduction

Competition policy plays a fundamental role in the organization of domestic market economics, thus, it should be designed to ensure and manage competition so that it clearly identifies incentives and opportunities for consumers and producers (Damro, 2006). The objectives which competition policy pursues can be grouped into the following pillars: 1) establishment of a competitive order with the purpose of safeguarding economic freedom; 2) maintenance of a competitive order with the purpose of boosting economic efficiency, technological and economic progress; 3) maintenance of free and fair competition, and prohibition of restrictive, illegal and clandestine practices, as well as unfair advantages through government subsidies; 4) support of small and medium size enterprises, and decentralized structure of supply (Borbely, 2006).

Competition policy had a distinctive place in the foundation of the European Economic Community, the European Community and subsequently the European Union. The central concept behind the European Economic Community was Europe as a single economic unit: a free trade area, which would gradually develop into a Single Market. In order to enhance the ability of the Community to to develop a Single Market, competition policy principles were laid down in the Treaty of Rome in 1958, and later in Articles 81-89 of the Treaty of the European Union and in Articles 101-109 of the Treaty on the Functioning of the European Union. Monopolies, cartels, vertical mergers, other restrictive business practices and kinds of anticompetitive behavior were seen as a potential threat to the fair and free trade and subsequently to the idea of a Single Market (Budzinski, 2007; Wurmnest, 2008).

In 2004, the year, which was marked with the most significant enlargement of the European Union together with the most significant reforms of the European competition policy since the Treaty of Rome, Regulation 1/2003 came to force, succeeding Regulation 17/1962, the first supranational competition policy regulation in the Community. However, adoption of Regulation 1/2003 was not the only important reform that has shaped the European competition policy. Significant competition policy reforms have been started and continued throughout the early 1990s well into the late 2000s: the European Commission 1) revised, reformed and reintroduced some of the early competition rules that prohibited restrictive practices, cartels, and monopolies in the Treaty of Amsterdam (the Treaty of the European Union, TEU) in Articles 81 to 90, and later in the Treaty of the Functioning of the European Union, TFEU, in Articles 101 to 109; 2) decentralized its powers through sharing its responsibilities with the member states' national competition authorities, thus founding the European Union Competition Policy System, a complex two-level jurisdictional entity comprising the European Commission on the European Union level and competent competition authorities in the member states on the national level; 3) modernized the European anticartel regulation by introducing the Leniency Notice in 1996, 2002 and 2006; 4) imposed more substantial fines for breaching the competition rules; 5) introduced initiatives to shift the burden of antitrust enforcement from public to private; 6) revised and reformed Merger Regulation 4064/89 into Merger Regulation 139/2004, and adopted the European Commission's Notice; 7) incorporated a more economic approach (effects-based approach) into the assessment of anticompetitive behavior in order to increase the role of economics in competition law (as opposed to legalistic approach); 8) introduced reforms to shift the mode of regulation from ex ante authorization to ex post control.

The reforms are considered to symbolize transformation in the governance of the markets in the European Union, a shift "from the segmented national markets governed through politicized selective intervention to an integrated pan-European market governed by law" (Wilks, 2005: 449). Moreover, the reforms are considered to signify the radical plan for transformation in the European Union competition policy, to a certain extent through the incorporation of some successful *laissez-faire* competition policy principles and traditions of the United States into the European Union Competition Policy System: the European Union Competition Policy System is assumed to

converge towards the U.S. Competition Policy System (Kovacic, 2008; McGowan, 2009; Montalban et al., 2009). In spite of the evidence of strong influence on the incorporation of policy provisions from the U.S. competition policy model into the recent competition policy reforms in the European Union, few attempts have been made to link the EU competition policy to U.S. antitrust, and to measure the impact of the U.S. antitrust on the EU competition policy (Akman, Kassim, 2010). Moreover, there is a gap in literature in regard to what causal mechanisms activate the convergent policy changes in the EU. This research attempts to address these issues.

2. Research question

The purpose of the research carried out in the framework of the thesis is to fill the gap by attempting to link the EU competition policy with the U.S. antitrust, provide a critical overview of the most important elements of the competition policy reforms in the European Union, trace the evolution of the EU competition policy traditions and central theories underpinning the EU competition rules, and, most importantly, carry out comparative analysis between the EU and U.S. competition policy, detect convergence or divergence, measure the degree of convergence, and account for relevant mechanisms triggering competition policy convergence in the EU. This brings up the main research question of the thesis:

How substantial is the degree of convergence between the competition control models and competition law enforcement systems utilized in the European Union and in the United States?

The goals and purposes of the U.S. competition law is to promote competitive markets that enable consumer prices to drive down, whereas the goals and purposes of the EU competition law incorporate a large variety of goals, most notably strengthening economic and social cohesion, integrating European markets, creating a Single Market, and promoting balanced and sustainable development of economic activities; in short, U.S. competition policy regulators focus on the effects of anticompetitive practices on consumers (consumer harm), while EU competition policy regulators focus on the effects of anticompetitive practices on competitors (competitor harm) (Bagchi, 2005; Budzinski, 2007). Despite the fact that the core difference between competition policy goals in the European Union and the United States is that the European Commission's main concern is market integration, a large number of competition policy objectives in these two political jurisdictions is still very similar, which makes it possible to compare competition policy content and competition policy application, and detect competition policy convergence or divergence (Budzinski, 2007; Lyons, 2004).

The European Union competition policy is centered around four core pillars: *anticartel enforcement*, *antimonopoly enforcement*, and *regulation of mergers, takeovers and acquisitions*, and *state aid*. The focus of the research is on the analysis of the following three core pillars: 1) anticartel enforcement policies, 2) antimonopoly regulation, and 3) regulation of mergers and acquisitions in the European Union, and on the analysis of the respective competition control pillars in the United States of America. State aid, a unique governance structure for the European Union, is not included in the analysis.

3. Theoretical framework and research methodology

3.1 Policy convergence

Policy convergence is the development of similar, sometimes identical, policy objectives, instruments, settings, characteristics, structures, processes, and performances across a given set of

political and economic systems, i.e. political jurisdictions (supranational institutions, states, regions, local authorities) within a given period of time towards a common point, towards an end result, regardless of the causal processes (Knill, 2005). Governments, and to a smaller extent international organizations and institutions, are the primary actors that set regulatory standards and determine the extent of policy convergence (Drezner, 2005).

A. Forms of policy convergence

There are two forms of policy convergence, namely *procedural convergence* and *structural (substantive) convergence*: procedural convergence implies the evolution of similar procedures among different authorities, whereas structural convergence implies incorporation of standards and approaches to policy from other nation states, international organizations and epistemic communities of competition policy experts (Damro, 2006). The state can somewhat encourage procedural convergence through information exchanges, which trigger structural convergence in the long run (Damro, 2011). Hence, structural convergence is a more advanced form of policy convergence succeeding procedural convergence.

B. Related concepts: policy transfer, policy diffusion and isomorphism

Policy convergence is sometimes erroneously equated with related concepts, such as *policy transfer*, *policy diffusion* and *isomorphism*. These three concepts, however, are not to be confused with policy convergence. Research of policy transfer, whereby policies, ideas and institutions in one political or economic system are started to be used in another through common affiliations, negotiations and institutional membership, is centered around processes rather than results; research of policy diffusion, whereby patterns of adoption of policy models are voluntarily or coercive (imposition of policies by legally binding requirements), transferred from one political or economic system to the other through common affiliations, negotiations and institutional membership, is centered around processes rather than results, too; research of isomorphism, whereby characteristics of organizational structures change to become similar to each other, is centered around the mechanisms through which organizations, institutional structures and cultures become similar over time (Knill, 2005). Studies of policy transfer and policy diffusion share the same empirical focus with policy convergence, the focus being *policy characteristics*, but differ in respect to the analytical focus: research of policy convergence focuses on the explanation of *changes in policy similarity over time*, whereas research of policy transfer investigates the content and process of policy transfer, and research of policy diffusion focuses on the explanation of adoption of patterns over time (Knill, 2005). Studies of isomorphism share the same analytical focus with studies of policy convergence, the focus being *changes in policy similarity over time*, but differ in respect to empirical focus: studies of policy convergence concentrate on policy characteristics, while studies of isomorphism concentrate on “increasing similarity of organizational and institutional structures and cultures” (Knill, 2005: 768). The focus of the research of the thesis is on the analysis of competition policy convergence, hence, on the analysis of *policy characteristics* through tracing *changes in policy similarity over time*. Policy transfer, policy diffusion and isomorphism, despite being related concepts, are not classified as convergence in this research, thus, are not analyzed.

C. Policy characteristics, policy outputs and policy outcomes

Policy convergence studies typically face the issue of insufficient level of precision attached to the policy dimension under investigation, which suggests that *policy characteristics*, namely policy goals, policy content, policy application, and policy results need to be distinguished (Heichel et al.,

2005). Policy goals, policy content and policy application can be grouped into one category: *policy outputs*. Policy results belong to the other category: *policy outcomes*.

Depending on interpretation and value added to the concept, it is legitimate to assert that policy convergence within any of the following four *policy characteristics*, or within a combination of such, but not necessarily a complete set of all the four, is policy convergence: 1) *policy goals (policy outputs)*, a constellation of objectives for tackling policy problems; 2) *policy content (policy outputs)*, a set of reactions to policy issues by the government, which includes rules, regulations and laws; 3) *policy application (policy outputs)*, mechanisms and tools available to apply, administer and enforce regulatory, administrative or judicial policy; and 4) *policy results (policy outcomes)*, actual results of policy implementation (Bennett, 1999; Dolowitz, Marsh, 1996).

In modern research, preference is given to comparing *policy outputs* in order to detect convergence, rather than *policy outcomes*, since policy outputs are directly linked to causal mechanisms of convergence in contrast to policy outcomes (Holzinger, Knill, 2005). Moreover, research of policy outcomes cannot be carried out until after several years from the official adoption and full implementation of policy outputs. Full implementation of policy outputs in its turn might take many years after adoption of policy outputs.

Thus, competition policy convergence in this research is measured based on the analysis of *policy outputs* (i.e. *policy goals, policy content and policy application*), rather than *policy outcomes*.

Policy outputs	Policy outcomes
Policy goals (policy objectives)	Policy results (actual results of policy implementation)
Policy content (rules, regulations and laws)	
Policy application (application, administration and enforcement tools and mechanisms)	

Competition policy content and competition policy application are analyzed in each of the following three pillars of competition policy (clusters of variables) in this thesis: 1) anticartel policy, 2) antimonopoly policy, and 3) regulation of mergers and acquisitions; owing to the fact that there are notable differences in policy content and application between these three clusters of variables. Competition policy content and competition policy application in these three clusters of variables are analyzed indirectly, through the prism of variables in a cluster.

Competition policy goals are analyzed collectively, i.e. without differentiating between anticartel enforcement policy goals, antimonopoly policy goals, and merger control goals, owing to the fact that the desirable end result of anticartel, antimonopoly and merger control policy is the same.

Competition policy outcomes are not analyzed in this research for reasons explained previously.

Cluster of variables	Competition policy content (outputs)	Competition policy application (outputs)	Competition policy goals (outputs)	Competition policy results (outcomes)
Anticartel policy	+	+	+	-
Antimonopoly policy	+	+		
Merger control policy	+	+		

D. Degree of policy convergence

In order to get a consistent profile of similarity change and, hence, to measure policy convergence, the indicator of *degree of convergence* needs to be applied. Degree of convergence is typically

measured by comparing policies across the given countries, whereby *policy outputs* (*policy goals, policy content* and *policy application*), the actual policies and programs adopted by the state, and *policy outcomes* (*policy results*), the results of policies and programs adopted by the state, need to be clearly distinguished. However, as mentioned before, in modern research, preference is given to comparing policy outputs, since they are directly linked to causal mechanisms of convergence in contrast to policy outcomes (Holzinger, Knill, 2005). The degree of competition policy convergence in this research is measured based on the analysis of *competition policy outputs* (i.e. *competition policy goals, competition policy content* and *competition policy application*).

3.2 Mechanisms of policy convergence and respective forms of competition policy convergence

Conditions, factors and causes of convergent policy changes are assumed to be rooted in international, economic or ideational factors, whereas the cases for divergence or limited convergence are rooted in national, institutional, factors (Heichel et al., 2005). However, knowledge deficit, inconsistent literature, imprecise interpretation, and lack of empirical findings, complicate the research on conditions, factors and causes of policy convergence and similar concepts across political jurisdictions. One of the most viable and testable means to summarize conditions, factors, and causes of convergence beyond the broader and imprecise international, economic and ideational factors, is through grouping them into two broad categories: first, causal mechanisms (*independent response to problems, policy imposition, international harmonization, regulatory competition* and *transnational communication*), which activate the convergent policy changes, and, second, facilitating factors (cultural, institutional and socioeconomic similarities of the given political systems), which affect these mechanisms (Knill, 2005). Considering the time and word limit, facilitating factors, being less important and less testable than causal mechanisms, have not been included in the analysis of mechanisms of policy convergence.

In regard to forms of policy convergence, there are two, namely *procedural convergence* and *structural (substantive) convergence*: procedural convergence implies the evolution of similar procedures among different competition authorities, whereas structural convergence implies incorporation of standards and approaches to competition policy from other nation states, international organizations and epistemic communities of competition policy experts (Damro, 2006; Damro, 2011).

A. Independent response to problems

The mechanism of *independent responses to problems* is explained as a result of similar but independent responses of political jurisdictions to parallel problems (Holzinger, Knill, 2005). This mechanism triggers merely *procedural convergence*, which implies the evolution of similar procedures among different competition authorities (Damro, 2006).

B. Policy imposition (penetration)

The mechanism of *policy imposition (penetration)* can either take a non-coercive form of voluntary international agreements, which is most often classified as a different causal mechanism, namely transnational communication, or a coercive form of agreements, whereby organizations, institutions and governments exert formal and informal pressures over dependent organizations, institutions and governments, forcing them to adopt policy patterns and programs in exchange for subsidies, loans and other kinds of rewards and privileges (conditionality), or, in case of asymmetry of power, through legally binding agreements (Bennett, 1999; Holzinger, Knill, 2005). Thus, coercive forms of agreements, rather than voluntary international agreements, will be classified as the mechanism

of policy imposition (penetration) in this research, whereas voluntary agreements will be classified as a sub-mechanism of transnational communication (international policy promotion). Policy imposition triggers *structural convergence*, which implies incorporation of standards and approaches to competition policy from other nation states, international organizations and epistemic communities (Damro, 2006).

C. *International harmonization*

The mechanism of *international harmonization* leads to policy convergence if the involved governments, organizations and institutions are legally obliged to comply with international or supranational agreements and codes of conduct imposed by the “international regime” (coalitions of governments, international organizations or institutions) through market power and coercive power (Bennett, 1999: 227; Holzinger, Knill, 2005). When governments, organizations or institutions achieve a concert on the extent to which the involved parties are coerced to converge, effective policy harmonization can occur (Drezner, 2005). When governments, organizations or institutions cannot achieve a concert, convergence occurs through regulatory competition, rather than harmonization, or does not occur to the full extent (Knill, 2005). For the sake of precision, international harmonization is sometimes suggested to be classified as a sub-mechanism of policy imposition, because the core moving force behind it is the imposition of policies through coercive power. International harmonization triggers *structural convergence* (Damro, 2006).

D. *Regulatory competition*

The mechanism of *regulatory competition* triggers compliance as countries facing competitive pressures mutually adjust their policies in order to remove the obstacles to maintaining and improving competitiveness of their markets, and lower their regulatory standards (Drezner, 2005; Holzinger, Knill, 2005). This mechanism triggers *structural convergence* (Damro, 2006).

E. *Transnational communication*

The mechanism of *transnational communication*, in contrast to independent response to problems, imposition of policies, international harmonization, and regulatory competition, is solely based on communication between countries and information exchange, and can be further divided into the following submechanisms: 1) *lesson-drawing* is a sub-mechanism based on the analysis of positive and negative lessons, and can take forms of either mere copying of policies, or other, more sophisticated, forms of policy adoption, including hybrids of transferred components and completely new policy models; 2) *transnational problem-solving* is typically triggered by the epistemic community of policy experts, bound by relatively common knowledge and expertise, driven by the necessity to tackle similar domestic problems by means of sharing expertise and finding effective solutions to policy issues; 3) *policy emulation* is a sub-mechanism, which is triggered when countries utilize evidence about policy programs from other countries, especially the ones which display more institutional compatibilities. Confirmation of the process of policy emulation requires very strong evidence of awareness and utilization of evidence about policy programs from other countries, explicit or implicit similarity of policy goals and instruments; 4) *international policy promotion* is triggered when countries experience pressures from international institutions and organizations to adopt certain policies and policy approaches, backed up by voluntarily international agreements or propositions, peer review and benchmarking (Bennett, 1999; Holzinger, Knill, 2005). The mechanism of transnational communication, including its

submechanisms, triggers *procedural convergence*, which in its turn is likely to trigger *structural convergence*.

F. Summary

The European Union and the United States are equally matched players on the international arena, hence, coercive mechanisms of policy convergence, such as policy imposition, international policy promotion (submechanism of transnational communication) and international harmonization, are unlikely to be triggered in case of the EU. The EU and the U.S. are much more likely to coerce other nations, rather than being forced to, directly, or indirectly through international organizations and epistemic communities, to adopt certain policies. Moreover, as in case with policy imposition, international harmonization and international policy promotion, it is the EU that is more likely to coerce other countries into convergence than vice versa: in order to avoid conflicting decisions and reduce the likelihood of political intervention in competition decisions, the Directorate-General for Competition puts significant effort in promoting its interests, hence, directly or indirectly imposes policies, through agreements in organizations for bilateral cooperation (most notably Mergers Working Group), through bilateral and multilateral agreements within the United Nations Conference of Trade and Development, the Organization for Economic Cooperation and Development, the World Trade Organization, the International Competition Network, and through some other mutual legal assistance agreements (Damro, 2006; First, 2003).¹ Only in the WTO the agreements are coercive, which signifies the fact that a great deal of transnational communication and competition policy convergence between the U.S. and the EU can occur within the WTO. The role of organizations promoting voluntarily adoption of agreements, sharing information and experience, cannot be diminished, and convergence occurs through activities in these organizations as well, especially within the OECD and the ICN (Davison, Johnson, 2002; First, 2003). Moreover, despite the fact that new global initiatives within the UNCTD, the OECD, the WTO and the ICN have seen promising development at the multilateral level since 1990s, implementation of such agreements takes much time, which is the reason why the EU has sought bilateral agreements with the U.S. in the interim (Davison, Johnson, 2002). Thus, evidence of convergence per se is stronger, and is recommended to be searched for in bilateral agreements, both within the UNCTD, the OECD, the WTO and the ICN, and within organizations for bilateral (U.S.-EU) cooperation (for example, the Mergers Working Group).

The most likely mechanisms which could trigger policy convergence in the EU are regulatory competition (structural convergence) and three submechanisms of transnational communication: lesson-drawing, transnational problem-solving, and policy emulation (procedural and later structural convergence).

Despite the strong evidence of consistent transnational communication between the EU and the U.S., it can be assumed that competition policy convergence cannot be wholesome, owing to the fact that legal systems, legal cultures and traditions differ in these two political jurisdictions: rule collisions, contradictions between individual decisions, doctrinal inconsistency, conflicts between legal principles and similar problems significantly jeopardize convergence (Fischer-Lescano, Teubner, 2004). The assumption is that the European Union alters certain competition policy rules after the example from the U.S., but does not alter its legal culture and traditions.

The table below illustrates which mechanisms or submechanisms are generally likely to trigger procedural or structural convergence in theory (general case) and in case of the European Union.

¹ Five legal characteristics determine the preferences for participation in international organizations, namely: international coverage (a broader group of countries represented in a given organization is preferred), bindingness (membership in organizations that presuppose legally binding agreements is generally avoided), primary target of activity (membership in organizations addressing the needs of developing countries as opposed to developed countries is generally avoided), issue mandate and EU representation (membership in organizations where interests of the Directorate-General for Competition are more likely to be overridden by other countries is avoided) (Damro, 2006).

Mechanism of policy convergence	Procedural convergence		Structural convergence	
	General case	EU case	General case	EU case
Independent response to problems	+	–	+	–
Policy imposition (penetration)	–	–	+	–
International harmonization	–	–	+	–
Regulatory competition	–	–	+	+
Transnational communication	+	+	+	+
<i>a) Lesson-drawing</i>	+	+	+	+
<i>b) Transnational problem-solving</i>	+	+	+	+
<i>c) Policy emulation</i>	+	+	+	+
<i>d) International policy promotion</i>	+	–	+	–

Relevant mechanisms triggering procedural or structural competition policy convergence of the three core pillars of competition policy (anticartel enforcement policies, antimonopoly regulation, and regulation of mergers and acquisitions), i.e. three clusters of variables, will be singled out and analyzed in the corresponding clusters.

3.3 Theoretical framework for convergence analysis

The United States and the European Union utilize different competition control models and law enforcement systems, which are considered to be underpinned by different political economic doctrines, the Chicago School doctrine and the Freiburg Ordoliberal School doctrine. Analysis of competition policy convergence in this research is based on the empirical framework, which in its turn has been designed based on the most important pillars of these two doctrines. This section highlights the most significant differences between the competition control model of the United States and the European Union in terms of political economic and legal approach to competition control and competition law enforcement through the prism of either the Chicago School or the Freiburg Ordoliberal School. Moreover, theoretical perspective presented in the section should explain the choice and relevance of variables used in the empirical framework of this research.

A. Chicago School and Freiburg Ordoliberal School

The specificity of the U.S. economy is that market players are generally encouraged to focus on the immediate profit, easily implement new business strategies, quickly acquire new technologies, enable employees bring up ideas to the market, enable quick licensing procedures, and, notoriously, conduct aggressive hire-and-fire policies, search for cheap labor force and reduce wage costs. Few restrictions on firing employees and high workforce mobility stimulate employees to focus on the development of general skills for their own careers rather than being loyal to companies and developing company-specific skills.

Market-incentive economic policies are generally implemented in the U.S., and the government is very much inclined to deregulate (Hall, Soskice, 2009).

The specificity of the U.S. economic policies needed to be addressed by relevant competition rules, most of which were founded on the postulates of the *Chicago School* doctrine.

The Chicago School has been exerting huge influence over the United States antitrust system since the late 1970s (Budzinski, 2007). The School advocates deregulation, liberalization of economies, economic efficiency, bottom-up institutional change, and puts the emphasis on total welfare maximization (Rodríguez-Pose, Storper, 2006). The analysis of economic efficiency and allegedly anticompetitive practices should be based on the total welfare standard through case-by-case analysis, which, however, runs contrary to the common practice of using a hybrid of consumer and total welfare standard as a benchmark of the United States antitrust law (Katsoulacos, Ulph, 2009; Wurmnest, 2008).²

Market performance is considered “more important than market structure”, consequently, “not the concentration of market power as such, but collusive agreements with clear negative effects on welfare, cartels and other restrictive business practices should constitute the focal point of competition control” (Wigger, Noelke, 2007: 492). Monopolies are considered natural and acceptable in the situation where companies are more efficient than their competitors and they legitimately supersede their rivals due to such efficiency. Natural monopolies should not be confused with monopolies, which achieved such a position owing to protection from the state. The latter, and by no means the former, should be subject to antitrust laws, which are to be applied in selected cases (Davies, 2010; Montalban et al., 2009). Collusions and cartels need to be restricted. Mergers, acquisitions and takeovers are considered very unpredictable in terms of whether such operations are favorable for the market, but outlawing all mergers, takeovers and acquisitions is by no means considered efficient (Montalban et al., 2009). State support to enterprises is very undesirable.

The Chicago School advocates the use of a more economic approach in the analysis of whether the behavior of companies is pro or anticompetitive: policies targeting at establishing pure competition are thought to be too general and inefficient, instead, pragmatic rules of reason (rules of reason standard as opposed to the legalistic per se standard) and effects-based approach need to be applied to such analysis by the relevant competition authorities (Katsoulacos, Ulph, 2009). State interventions in regulation of competition contradict the principles of efficient market and free market ideology, hamper economic efficiency, and, hence, should be permitted only in exceptional cases (Ghosal, 2011). Even if there is no pure competition in a political jurisdiction, the market is still efficient: economic efficiency is believed to be dependent on the competitive capacity of the market, and not on the state of pure competition per se. Hence, economic efficiency (market efficiency) rather than competition itself (pure competition) is the goal of competition policy.

Thus, the competitive capacity of the market and subsequently market efficiency are determined by efficiency of competition policies, which is in turn determined by efficient regulatory policies, implementation of a more economic and effects-based approach in the analysis of anticompetitive behavior, absence of barriers for market entry, absence of state interventions, and absence of state aids (Davies, 2010; Montalban et al., 2009).³ Ex post control is advocated to be the optimal mode of regulation.

The postulates of the Chicago School prove that: first, monopolies are not to be banned from the market as long as new companies are not discouraged to enter the market; second, collusions and cartels need to be restricted; third, mergers, acquisitions and takeovers need to be restricted but are not to be outlawed per se; fourth, market efficiency is the end goal of competition policy.

There are very few postulates of the Chicago School in regard to competition policy which run contrary to competition policy principles and traditions in the U.S., the following two being the

² There is, however, a debate among economists and competition policy experts on the definition of welfare in competition law: whether it should refer to consumer welfare, defined as the difference between the amount consumer intend to pay for a commodity and the amount they actually are required to pay, or total welfare, defined as the sum of consumer and producer surplus. The same debate applies to the issue of which market participants need to be protected as consumers: some argue that market participants besides dominant companies and their competitors must be regarded as consumers, while others argue that only those market participants who are at the end of the distribution chain must be regarded as such (Wurmnest, 2008).

³ Market efficiency is measured in terms of Pareto optimality, or in terms of consumer, producer or global surpluses.

most notable ones: first, the analysis of allegedly anticompetitive practices in the U.S. is based on a hybrid of consumer welfare standard and total surplus welfare standard, instead of total welfare standard; second, anticartel regulation in the U.S. prohibits cartels per se (Renckens, 2007).

Market players in the European Union are generally encouraged to provide employees with secure and long employment and autonomy from tight supervision, characterized by much less rigid competition than in the United States, and stimulate them to acquire company-specific skills through training policies. Coordination-oriented economic policies dominate in the European Union (Hall, Soskice, 2009).

Specificity of the EU economic policies needed to be addressed by relevant competition rules, most of which were founded on the postulates of the *Freiburg Ordoliberal School*.

The Freiburg Ordoliberal School has exerted huge influence over the economic regulatory policies and competition policy in the European Union since the 1960s. From the standpoint of the School, the state needs to develop a powerful set of institutions in order to enhance open and free competition and protect market players from unfair practices of other players. Market and competition are artificial notions, and freedom and order for the sake of free and fair competition need to be established and constantly maintained by the state (Davies, 2010; Montalban et al., 2009). Economic policy and regulatory governance must address competition by governing for the market and market players (competitors), not by the market.

Competition needs to be institutionalized through the establishment of sets of rigid rules and regulations, especially the ones targeting against cartels and monopolies, and regulated by relevant regulatory institutions. Accumulation of consumer welfare as opposed to total welfare is considered to be one of the priorities for competition policy, but is secondary to freedom and order. The main goal of competition policy should be consumer protection, and ideally the establishment and maintenance of “a societal rather than an economic policy” through a top-down institutional change, and a situation of “permanent competition”, where each societal element should equally comply with the competition principles (Montalban et al., 2009: 8; Rodríguez-Pose, Storper, 2006). This postulate runs contrary to the EU competition policy goals, which suggest that regulators need to focus on the effects of anticompetitive practices on competitors (competitor harm) rather than consumers (Bagchi, 2005; Budzinski, 2007)

The ideal economy is an economy of small and medium enterprises, without any monopolies or cartels: therefore, the government should support and protect such enterprises through subsidized loans and various financial guarantees (Wigger, Noelke, 2007). Competition is thought to inevitably lead to the emergence of monopolies, hence, dominant companies need to be outlawed and restrained per se (per se legal standard) even if they have achieved the dominant position through fair competition, because they might abuse their dominant position. Mergers need to be restricted but not banned per se.

Policing the market and market interventions are believed to be the most efficient tools that the government should use to safeguard consumers and to balance competition and economic freedom. However, policing the market is restricted to ordering policies, and market interventions are restricted to regulatory policies (Davies, 2010; Montalban et al., 2009).⁴ Ordoliberals acknowledge the fact that market interventions can cause significant distortions to the market.⁵ Although, at the same time, interventions have been widely used by the state various political jurisdictions utilizing the Freiburg School doctrine, including the European Union.

Ex ante authorization is advocated to be the optimal mode of regulation.

B. Adversarial law enforcement system and administrative (inquisitorial) law enforcement system

⁴ Regulatory policies are supposed to be conducted only when ordering policies conformed with the principles of ordoliberalism and when they were structured by rigid legal rules. This structure is designed so that public authorities would not be able to intervene in any way other than that “indicated by the market and the principle of economic freedom” (Montalban et al., 2009: 8).

⁵ According to the principle of conformity of the Freiburg Ordoliberal School.

The United States and the European Union utilize significantly different competition law enforcement systems, too.

Common law model is characteristic of the United States: courts play the main role in interpreting anticompetitive behavior, and legal cases and judicial precedence play the most important role in competition law enforcement. Competition authorities are unable to impose sanctions or inflict penalties. Cases are to be litigated before courts, and final decisions are made by judicial authorities. Competition are solely responsible for carrying out due investigation. The competition law enforcement system is built almost exclusively on the initiative from private litigators, who are encouraged to initiate legal proceedings against companies in order to receive compensation for damage (citizens' initiative, or private litigation).

In regard to antitrust, the United States has actively encouraged private enforcement, which is believed to have considerable advantages over public enforcement, typical of the European Union. First, private parties have stronger motivation and greater financial incentives than public parties. Second, private enforcement benefits the society through additional deterrence (McAfee, Mialon, 2008). Third, private parties detect violation of fair competition more efficiently than public bodies, owing to the fact that public regulators are responsible for a number of industries, lack human resources, budgetary resources and technical capacity, and hence cannot be as effective in continuous monitoring and detecting anticompetitive behavior as private parties, who deal with such practices on a regular basis and are aware of the costs and benefits of their and their competitors' activities. Generally, companies are more likely than the government to be informed about infringements of antitrust laws (Marra, Sarra, 2009). Fourth, the burden of enforcement and substantial financial weight is passed on from the state to private actors.

In addition to high citizens' initiative, criminal penalties and leniency programs make competition policy law enforcement practices very successful in the United States (Wigger, Noelke, 2007). In the United States, it is the private plaintiffs, who bring most of the antitrust cases to courts, which is explained by widespread legal services under no-win-no-fee conditions and the possibility of winning cases with an award up to three times the damage suffered (treble damages).

The legal framework within which the competition law is enforced in the common law model is the *adversarial system*, whereby courts decide on the case since the first instance (Spagnolo, 2008).

Civil law model is characteristic of the European Union: competition authorities, rather than courts, play the main role in interpreting anticompetitive behavior, investigation and decision-making in competition law enforcement. Legal cases, judicial precedence and private litigation do not play as significant role as in the United States. Clause-centric approach prevails in law enforcement, which favors general and somewhat abstract legislation supported by detailed regulatory frameworks (Wigger, Noelke, 2007). The legal framework within which the competition law is being enforced in the civil law model is the *administrative (inquisitorial) system*, whereby public authorities have both prosecutorial and judicial power, which is however subject to appeal in courts (Spagnolo, 2008). Thus, administrative law enforcement is typical of the law enforcement system of the European Union.

C. Summary

The analysis of theories underlying competition control models in the European Union and the United States, as well as different law enforcement systems these two political jurisdictions utilize, suggests the following hypothesis:

Due to fundamental differences in theories underpinning competition control models in the United States and the European Union, as well as different competition law enforcement systems employed

in these two political jurisdictions, the European Commission will most likely continue adopting best practices from the United States Department of Justice rather than utilizing the U.S. competition control model and competition law enforcement system.

The table below illustrates the summary of the core differences between the U.S. and the EU in their approach to competition policy, analyzed through the prism of doctrines they utilize. Five clusters of variables have been singled out: *competition rules* (competition rules, impact on competition, cartels, mergers, and monopolies), *economic policies* (economic policies, central market players, state support), *institutional change* (institutional change), *law enforcement system* (law enforcement system, decision makers, approach to law enforcement), and *mode of regulation* (mode of regulation, regulatory policies).

Variable	Chicago School	Freiburg Ordoliberal School
<i>Competition rules</i>	<i>institutionalized through rules of reason (a more economic and effects-based approach)</i>	<i>institutionalized through rigid competition rules and regulations (legalistic approach)</i>
Assessment of impact on competition	<i>calculations are based on economic effects and economic efficiency, and total welfare standard (competitor harm)</i>	<i>calculations are based on consumer welfare standard (consumer harm)</i>
Cartels	<i>restricted</i>	<i>prohibited per se</i>
Mergers, takeovers and acquisitions	<i>restricted</i>	<i>restricted</i>
Monopolies	<i>prohibited (with the exception of natural monopolies)</i>	<i>prohibited per se</i>
<i>Law enforcement system</i>	<i>adversarial (common law), private enforcement</i>	<i>administrative/inquisitorial (civil law), public enforcement</i>
Decision makers	<i>courts</i>	<i>public authorities</i>
Law enforcement approach	<i>precedence-based (judicial precedence)</i>	<i>clause-centric (general and abstract legislation)</i>
<i>Mode of regulation</i>	<i>ex post control</i>	<i>ex ante authorization</i>
Regulatory policies	<i>laissez-faire (deregulation, market interventions are undesirable and permitted in exceptional cases)</i>	<i>rigid (policing industries and market interventions are acceptable and widespread)</i>

<i>Economic policies</i>	<i>market-incentive</i>	<i>coordination-oriented</i>
Central market players	<i>large enterprises</i>	<i>equally-matched players, small and medium enterprises</i>
State support (subsidized loans, financial guarantees)	<i>undesirable</i>	<i>possible (to small and medium size enterprises)</i>
<i>Institutional change</i>	<i>bottom-up</i>	<i>top-down</i>

There are very few postulates of the Chicago School in regard to competition policy which run contrary to competition policy principles and traditions in the U.S., both in 1990 and in 2008, the following two being the most graphic: first, the analysis of allegedly anticompetitive practices in the U.S. is based on a hybrid of consumer welfare standard and total surplus welfare standard (consumer harm), instead of total welfare standard; second, anticartel regulation in the U.S.

prohibits cartels per se (Renckens, 2007). The postulates of the Chicago School in regard to competition policy, which run contrary to competition policy principles in the U.S., are marked in the table. There are very few postulates of the Freiburg Ordoliberal School, which run contrary to competition policy principles in the EU in 1990: the most notable one pertaining to assessment of impact on competition, which is based on on a hybrid of consumer welfare standard and total welfare standard (competitor harm). Moreover, certain postulates (e.g. in regard to mode of regulation and competition rules) have been rejected by the EU competition policy reformists, most notably through Regulation 1/2003, which is explained in the next sections of the thesis. Such theoretical backup provides solid background for detecting the reference point from which and towards which convergence occurred in the EU.

The following clusters of variables have been completely integrated into the empirical framework for competition policy convergence analysis between the EU and the U.S., and analyzed systematically and explicitly throughout the research: *competition rules*, *(competition) law enforcement system*, and *mode of regulation*.

The following clusters of variables have not been integrated into the framework: *economic policies* (state support), and *institutional change*. The former is not included in the analysis (state aids is a unique governance structure for the European Union), and the latter is unsystematically mentioned in the analysis throughout the research.

The table below illustrates which clusters of variables have been completely integrated into the empirical framework for competition policy convergence analysis between the EU and the U.S.

Variable	United States (1990, 2008)	European Union (1990)
<i>Competition rules</i>	<i>institutionalized through pragmatic rules of reason (a more economic and effects-based approach)</i>	<i>institutionalized through rigid competition rules and regulations (legalistic approach)</i>
Assessment of impact on competition	<i>calculations are based on economic effects and economic efficiency, and a hybrid of consumer welfare standard and total welfare standard (consumer harm)</i>	<i>calculations are based on a hybrid of consumer welfare standard and total welfare standard (competitor harm)</i>
Cartels	<i>prohibited per se</i>	<i>prohibited per se</i>
Mergers, takeovers and acquisitions	<i>restricted</i>	<i>restricted</i>
Monopolies	<i>prohibited (with the exception of natural monopolies)</i>	<i>prohibited per se</i>
<i>Law enforcement system</i>	<i>adversarial (common law), private enforcement</i>	<i>administrative/inquisitorial (civil law), public enforcement</i>
Decision makers	<i>courts</i>	<i>public authorities</i>
Law enforcement approach	<i>precedence-based (judicial precedence)</i>	<i>clause-centric (general and abstract legislation)</i>
<i>Mode of regulation</i>	<i>ex post control</i>	<i>ex ante authorization</i>
Regulatory policies	<i>laissez-faire (deregulation, market interventions are undesirable and permitted in exceptional cases)</i>	<i>rigid (policing industries and market interventions are acceptable and widespread)</i>

3.4 Empirical framework for convergence analysis

The analysis of the degree of competition policy convergence between the U.S. and the EU over a given period of time has been carried out based on comparative analysis of competition policy in the U.S. and the EU in 2008, the reference point towards which convergence towards the U.S. has progressed in the EU since 1990.

The following framework has been proved viable for the analysis of the extent of competition policy similarity, and hence, has been partly integrated into the framework of the thesis to provide a more precise measurement of the degree of competition policy convergence: the comparative analysis of regulatory frameworks between several political jurisdictions has been suggested to be carried out on several clusters of variables (competition policy goals, application of competition policy, scope of competition policy, treatment of horizontal agreements, treatment of vertical agreements, treatment of abuse of dominant position, and merger control) over a given period of time (Van Waarden, Drahos, 2002). This framework, originally designed for comparative analysis between the nation states within the European Union, has been adjusted at once to the framework of the thesis for comparative analysis of the EU and the U.S. competition policy systems in 2008, and of the EU in 1990, and has been expanded based on the theoretical framework explained in the previous sections of the thesis.

Competition policy content and *competition policy application* are analyzed in each of the following three pillars of competition policy (clusters of variables) in this thesis: 1) anticartel policy, 2) antimonopoly policy, and 3) regulation of mergers and acquisitions; owing to the fact that there are notable differences in policy content and application between these three clusters of variables. However, competition policy content and competition policy application are analyzed indirectly and not explicitly, i.e. through the prism of certain variables within a cluster.

Competition policy goals are analyzed collectively, i.e. without differentiating between anticartel enforcement policy goals, antimonopoly policy goals, and merger control goals, owing to the fact that the desirable end result of anticartel, antimonopoly and merger control policy is the same.

Thus, the framework of the thesis includes three clusters of variables: anticartel policy, antimonopoly policy, and merger control policy.

The cluster of *anticartel policy* includes four variables: 1) setup of anticartel policy; 2) system of anticartel law enforcement; 3) mode of regulation; and 4) leniency program.

The cluster of *antimonopoly policy* entails four variables: 1) setup of antimonopoly policy; 2) assessment of abuse of dominant position; 3) system of antimonopoly law enforcement; and 4) mode of regulation.

The cluster of *merger control policy* entails four variables: 1) setup of merger policy; 2) assessment of mergers; 3) system of merger law enforcement; and 4) mode of regulation.

Each cluster of variables contains, besides the analysis of variables, the analysis of the *degree of competition policy convergence*, and the analysis of the corresponding *mechanism(s) of policy convergence* (*independent response to problems, policy imposition, international harmonization, regulatory competition* or *transnational communication*), which triggered *procedural and/or structural competition policy convergence* in a given variable.

The table below illustrates the analysis of competition policy outputs (competition policy content, application and goals) through the prism of the three clusters of variables.

Cluster of Variables	Variable	Competition policy content	Competition policy application	Competition policy goals
<i>Anticartel policy</i>	Setup of anticartel policy	–	+	+
	System of anticartel law enforcement	+	+	

	Mode of regulation	+	+
	Leniency program	+	+
Antimonopoly policy	Setup of antimonopoly policy	–	+
	Assessment of abuse of dominant position	+	–
	System of antimonopoly law enforcement	+	+
	Mode of regulation	+	+
Merger control policy	Setup of merger policy	–	+
	Assessment of mergers	+	–
	System of merger law enforcement	+	+
	Mode of regulation	+	+

The *degree of competition policy convergence* is assessed in each variable based on the following scale: “no convergence”, where convergence has not been detected; “insignificant convergence”, where limited and insignificant convergence has occurred; “significant convergence”, where significant convergence has been discovered; and “very substantial convergence”, where very substantial and significant convergence has been detected.

4. Analysis

4.1 Competition policy goals

The goals and purposes of the U.S. competition law is to promote competitive markets that enable consumer prices to drive down, whereas the goals and purposes of the EU competition law incorporate a large variety of goals, most notably strengthening economic and social cohesion, integrating European markets, creating a Single Market, and promoting balanced and sustainable development of economic activities, in other words, U.S. competition policy regulators focus on the effects of anticompetitive practices on consumers (consumer harm), while EU competition policy regulators focus on the effects of anticompetitive practices on competitors (competitor harm) (Bagchi, 2005; Budzinski, 2007). No convergence towards the U.S. competition policy goals occurred in the EU.

4.2 Anticartel policy

Cartels are a form of illegal activity involving a coordinated effort of several parties with the purpose of restriction of competition by means of price fixing, market shares allocation, creating barriers for entry etc. (Spagnolo, 2008). Collusions increase the equilibrium price at which the market is allocated and give rise to a loss of efficiency and therefore to a loss of welfare (Brisset, Thomas, 2004). Both the European Union and the United States emphasize the importance of vigorous cartel busting for the sake of fair competition.

According to the principal-agent theory, in order to avoid undesirable political intervention, competition authorities in the U.S. and the EU seek convergence in areas under their discretionary authority (Damro, 2011). Political intervention is the result of inactivity and/or ineffectiveness of competition authorities in tackling domestic issues. Undesirability of political intervention motivates regulators to improve their performance by analyzing positive and negative lessons from other competition policy models, sharing expertise, and working on solutions to policy issues with other specialists. One of the most efficient means to attain these goals is through transnational

communication of competition policy experts (epistemic communities). The mechanism of independent response to problems is assumed not to play any role in anticartel policy convergence due to membership and active participation of the European Union in a significant number of international organizations tackling competition policy issues, and hence, constant communication and learning. Therefore, independent response to problems is very unlikely to be a mechanism triggering anticartel policy convergence.

Transnational communication and cooperation between the U.S. and the EU in the framework of anticartel policy (and antimonopoly policy) is less evident than in the framework of merger control policy owing to a number of significant impediments for information exchange pertaining to cartels and monopolies in the EU, and very few bilateral (U.S.-EU) agreements, as opposed to a great number of multilateral agreements within the OECD, the ICN and the WTO (Schaub, 2003). Hence, convergence in field of anticartel policy is hard to detect and connect to a certain mechanism of policy convergence. However, transnational communication (lesson-drawing, transnational problem-solving, and policy emulation) can be singled out as a core mechanism triggering soft procedural convergence between the U.S. and the EU through multilateral agreements.

The 1995 OECD Recommendation on Anticompetitive Practices Affecting Trade (multilateral), the 1998 OECD Recommendation Concerning Effective Action Against Hardcore Cartels (multilateral), and the Agreement 95/145/EC between the European Communities and the Government of the United States of America regarding the application of their competition laws (bilateral), adopted in 1991 and implemented in 1995, are one of the most important guidelines and agreements, which created a platform for competition authorities from the U.S. and the EU for information sharing about cases, policy dialogue concerning best practices, and coordination of investigations in field of anticartel policy (Bhattacharjea, 2006; Davison, Johnson, 2002). However, the assertion that the EU has significantly reformed its competition policy since the 1990s owing to exactly these or other agreements and guidelines, most of which are non-binding, is more than erroneous. As mentioned above, convergence is very hard to trace and attest especially to multilateral agreements: introduction of block exemptions to cartel cases, leniency program, the shift to ex post cartel control and private anticartel litigation in the EU (structural convergence) cannot be traced to these and other guidelines and agreements, but can indeed be traced and ascribed to the mechanism of transnational communication (lesson-drawing, transnational problem-solving, and to a lesser extent policy emulation), through communication and learning in the WTO (for instance, in the Working Group on the Interaction between Trade and Competition Policy), the ICN, the OECD, and other organizations, as well as meetings, forums and conferences. Another mechanism, the mechanism of regulatory competition, is considered to be an unlikely trigger of anticartel policy convergence.

In regard to competition (anticartel) law enforcement system and law enforcement approach, no convergence has occurred.

Another point is that the European Union did not merely attempt to copy the competition model pertaining to anticartel policy from the United States. Rather the EU attempted to incorporate certain best practices after the example of the U.S., without altering the legal culture and traditions in the EU. The next subsections elaborate on anticartel policy convergence in the EU.

A. Setup of anticartel policy

Setup of anticartel policy can be separated into four stages: at the first stage, suspected members to a cartel are taken under examination; at the second stage, suspected members to a cartel are put under investigation; at the third stage, if a cartel is detected, administrative or criminal sanctions are imposed on the members to the collusive agreement; at the fourth stage, members to a cartel can file an appeal to courts.

The setup of the European Union anticartel policy on the Community level under Regulation 17/1962 consisted of three tiers. On the first tier, which encompassed the first two stages, the Directorate-General IV put prospective members to a cartel under investigation on suspicion of breaching Article 81 TEC. On the second tier, if a cartel is revealed, the European Commission imposed administrative fines. On the third tier, members to a cartel could submit an appeal to the Court of First Instance of the European Court of Justice.

On the supranational level, Regulation 1/2003 did not change the setup of the European Union anticartel policy. The Directorate-General for Competition and the General Court of the European Court of Justice replaced their respective predecessors (not due to Regulation 1/2003).

On the national level, Regulation 1/2003 decentralized anticartel enforcement in the European Union sharing the enforcement competence between the European Commission and national competition authorities, which now embodies the system of parallel law enforcement and even case allocation (McGowan, 2009). National competition authorities have become obliged to apply Article 101 TFEU, and to enforce the European Union competition law under the principle of direct effect along with enforcement of their national competition laws. The European Competition Network has been created to support partnership between the Directorate-General for Competition and the national competition authorities, coordinate information exchange and cooperation both vertically and horizontally, between the Directorate-General for Competition and the national competition authorities, and between the national competition authorities in the member states respectively, and distribute cases to relevant competition authorities.⁶

The setup of the U.S. anticartel system on the federal level is very similar to that of the European Union, with the notable exception of roles of main actors in law enforcement and regulation of fines. The system encompasses three tiers. The Department of Justice and the Federal Trade Commission are the main actors on the first tier, which combines the first two stages. State attorneys general are also eligible to start investigations. On the second tier, in case substantial evidence of breaching the Sherman Act has been found, the Department of Justice or the Federal Trade Commission file suits to the Supreme Court. State attorneys general may as well do so to enforce state and federal anticartel laws. On the third tier, members to a cartel may submit an appeal to the Supreme Court.

Despite the noticeable similarities between the two setups, convergence cannot be detected, because it presupposes changes in similarity over a given period of time. The setup of the anticartel policy system in the EU has been initially similar to the U.S. federal anticartel policy setup, and has no experienced any convergence.

B. System of anticartel law enforcement

The system of anticartel law enforcement in the United States exemplifies the adversarial system, whereby courts decide on the case since the first instance, whereas the system of anticartel law enforcement in the European Union exemplifies the administrative, inquisitorial, system, whereby public authorities have both prosecutorial and judicial power, which has not changed since 1990 (Spagnolo, 2008).

⁶ Competition authorities that first receive a complaint generally start an investigation by themselves, but certainly can request assistance from other competition authorities: national competition authorities, competition agencies and the Directorate-General for Competition. In situations where cases affect more than three member states, the Directorate-General for Competition is placed to act, while national competition authorities are relieved from their competence. Moreover, national competition authorities are obliged to inform the Directorate-General for Competition of all details on the cases falling under Article 101 TFEU, which are being processed in their national courts, and to follow the Directorate's decisions when it initiates investigation of these cases, without the right to overrule or contradict its decisions. They are as well obliged to exchange information about cases between themselves and to apply the European Union law if fair trade between member states is affected. National courts and national competition authorities are required to apply the Articles of the Treaty of the European Union TFEU with priority over national competition laws, whereas national competition laws could be applied only if they are stricter than the European Union competition rules (Kassim, Wright, 2009).

An important change occurred in late 1990s, when the Commission, based on the example from the U.S., started to encourage private antitrust enforcement and create incentives for private individuals to turn to the courts to file complaints and start legal proceedings against companies, which are suspected of cartel membership. The motive power behind such actions should be the possibility of obtaining an injunctive relief, which entitles victims to claim a minimum of full compensation of the suffered loss. The European Commission has expressed the intention to foster damage claims for infringements of the anticartel rules in order to better enforce the competition law on the one hand, and, on the other hand, to make the procedure of recovering losses from the infringer easier for consumers and companies (Marra, Sarra, 2009). In reality, however, restrictions on potential compensation of the suffered losses, high fees for legal services, lengthy legal procedures, the requirement to provide very substantial proof of losses, and, most importantly, incompleteness and vagueness of the European Union competition law, create serious disincentives to bring private damage claims to the courts. Moreover, in order to reveal a cartel, thorough economic analysis and extensive investigations to estimate the costs and benefits of such behavior need to be carried out. Thus, the main burden of private litigation has been put on private plaintiffs, but the appropriate conditions have not been created (Peyer, 2011).

A very important aspect has not been addressed by the reforms, too. Cartelization being treated as a civil rather than a criminal offence on the European Union level is in contrast not only to jurisdictions of certain member states' national competition authorities⁷, but also to the United States' jurisdiction. Cartelization is a criminal offence in the United States: huge fines and prison sentences up to ten years can be levied on individuals (Hammond, 2009; Morgan, 2009). The system of anticartel enforcement in the EU has not experienced any convergence towards the U.S.

C. Mode of regulation

Under ex ante mode of regulation introduced by Regulation 17/1962, the approval decision by the European Commission made any commercial agreements falling under Article 81(1) TEU, and exemption decisions⁸ under Article 81(3) TEU immune from legal prosecution. Companies were provided with strong incentives to notify the European Commission of any business agreement falling under Article 81(1) TEU, or under Article 81(3) TEU if they sought for an exemption, in order to secure their ventures from legal prosecution (McGowan, 2007). High numbers of such notifications from companies resulted in immense workload for the Directorate-General IV, which served as one of the most important factors instigating the abolition of the ex ante notification system.⁹ Germany's opposition to the abolition was particularly strong, following from the fact that the competition system in the European Community was to be changed to be no longer based on Germany's oldest established competition regime in Europe, the principles of which has exerted significant influence over the evolution of competition policy in the European Union since the 1960s (Kassim, Wright, 2009). However, disregarding strong opposition from Germany, the European Commission has replaced ex ante authorization by ex post control under Regulation 1/2003, bringing competition control closer to the U.S. regulatory traditions (Budzinski, Christiansen, 2005).

The Directorate-General for Competition has become no longer responsible for processing companies' notifications of commercial agreements, but has retained the power of investigation of

⁷ Currently the European Union antitrust laws limit the punishment for non-compliance to civil penalties on the European Union level; and only Ireland and the UK have adopted policies of seeking incarceration for individual offenders after the example of the Antitrust Division of the United States Department of Justice, on the national level. In Greece, criminal fines can be levied on individuals in addition to non-criminal fines on companies, and in Cyprus, France, Germany, Austria and Slovakia, imprisonment of offenders involved in cartels is as well possible (Morgan, 2009).

⁸ Individual or block exemptions for agreements and contracts falling under the category of "advancing technical or economic progress" or "improving the production or distribution of goods" (McGowan, 2007).

⁹ Member states split into three groups on this matter: enthusiastic supporters (the United Kingdom and Ireland), supporters of the status quo (Germany), and moderates (France and Spain) (Kassim, Wright, 2009).

deals suspected of breaching Article 101(1) TFEU, the power to codify fines and impose them on companies found to be breaching Article 101(1) TFEU, and has been granted the power to interview representatives from companies, the power to investigate a particular sector in the economy, and to search business and domestic premises under Article 105 TFEU (dawn raids) where violation of Article 101 TFEU is suspected. Companies have become obliged to provide the assessment of their business agreements by themselves, both on the matter of infringement of Article 101(1) TFEU and on the matter of exemption under Article 101(3) TFEU, if required. Moreover, companies have become responsible for monitoring other market players' activities, including their suppliers and distributors, and their competitors, and report to the courts on any matters of infringement of the European Union competition law, a requirement adopted from the U.S. regulatory traditions, too. Even though the European Commission has somewhat disregarded the fact that the EU competition laws are incomplete, uncertain and ambiguous, and subsequently the switch from public to private enforcement or to a combination of public and private enforcement cannot happen as quickly and smoothly as planned, the burden of responsibility was put on market players. However, the shift to ex post mode of regulation has indeed occurred, despite inconsistencies in adoption of private litigation. Significant convergence towards the U.S. regulatory traditions in terms of mode of regulation has been detected.

*D. Leniency program*¹⁰

The United States Department of Justice Antitrust Division introduced the first leniency program, the Amnesty Program, in 1978. The program was much less successful than the Corporate Leniency Program, introduced in 1993, much less generous in terms of reductions in sanctions for reporting companies and possibilities of awarding leniency when companies under investigation decided to report (Spagnolo, 2008). Moreover, the legislation had a low level of transparency, which gave the Antitrust Division much discretion in its interpretation and implementation, including the fact that amnesty was not granted automatically to any applicant to come forward first, hence, the program gave much uncertainty to prospective leniency applicants. In 1993, the 1978 Amnesty Program was revised into the Corporate Leniency Program. Section A automatically grants full immunity from legal prosecution to leniency applicants¹¹ if, at the time the company self-reports, the Antitrust Division has not received information about the misconduct from other sources, and if the company is the first one from the cartel to come forward. Moreover, the company should terminate its activities within a collusive agreement upon the reporting of the misconduct, fully cooperate with the Antitrust Division throughout the investigation, provide recovery for damages to the aggrieved parties where possible, prove that it has not coerced the other parties to participate or remain in the collusive agreement, and that it has not been the originator of the cartel, and prove that the leniency application is a corporate act as opposed to individual leniency application.

Hence, it is only the companies to come forward first, as well as its directors, officers and employees who are aware of the illegal collusion, that can be granted immunity from legal prosecution, in the event that they were not the originators of a collusive agreement. The combination of rigid rules for leniency applicants, guaranteed amnesty for the companies to self-

¹⁰ Because of the clandestine nature of cartels, competition authorities generally encounter serious difficulties in detecting and obtaining sufficient hard evidence on them (Brisset, Thomas, 2004). Intrinsicly, all cartels share three fundamental features. First, members to a collusive agreement might undercut other members by offering secret price cuts to their customers. In order to curb opportunism and free riding, cartel members need to develop a governance structure within the cartel, which cannot be done without explicit contracts enforced by the legal system. Second, besides being profitable, a cartel needs to be feasible as well. In order to sustain feasibility, members to a cartel need to police compliance with the internal agreements and deter defections. Third, members to a cartel need to acquire information on the other members' anticompetitive practices in order to be able to coordinate and monitor the cartel (Spagnolo, 2008). Thus, all cartels are unstable by default, which enables competition authorities, normally constrained by a lack of resources and limited investigatory powers, not only to conventionally, to a large extent ineffectively, police industries, but also to complement deterrence by leniency and whistleblower programs, which are especially efficient in inducing cartel members to elicit their (intrinsicly) unstable collusions and to inform on their partners (Friederiszick, Maier-Rigaud, 2008).

¹¹ U.S. Corporate Leniency Program, Section A: <http://www.justice.gov/atr/public/guidelines/0091.htm>

report first, the improved ability of the Antitrust Division to obtain higher sanctions for misconduct from courts, and well-advertised penalties, increased the attractiveness of leniency programs (Spagnolo, 2008). The Corporate Leniency Program together with the Individual Leniency Program, introduced in 1994 to complement the corporate policy by offering individual leniency applicants the possibility of receiving amnesty independently of the company for fear of losing financially or in term of their personal freedom, have yielded considerable success in cartel law enforcement based on the drastic increase in leniency applications, imposed corporate and individual fines, criminal penalties, increased deterrence, and is considered to have been “at the forefront of cartel enforcement efforts” (Stephan, 2008: 538). However, despite the high numbers of self-reporting members to cartels, the prospect of treble-damage lawsuits dissuaded many more potential leniency applicants. Plaintiffs could claim as much as triple compensation of damages incurred under such liability requirements. Moreover, leniency applicants could be liable not only for triple compensation of damages suffered by their customers but also for triple compensation of damages of the other cartel members’ customers under joint liability. In order to tackle the concerns of prospective leniency applicants and further increase the rate of applications, in 2004, the Criminal Penalty Enhancement and Reform Act was passed, which: on the one hand, limited the total private civil liability of leniency applicants who come forward first, including individual applicants, to actual damages incurred, plus the costs of legal services and interest, and removed joint liability for damages; and on the other hand, increased the potential individual liability, including joint liability, for the participants of a collusive agreement that are not the first to come forward to obtain amnesty (Hinlopen, 2003; Spagnolo, 2008). In this wise, the Antitrust Division demonstrated that leniency programs, if properly implemented, could indeed successfully uncover cartels, enhance deterrence, and increase the rate of punishment of infringers.

In 1996, the European Commission, encouraged by the successful implementation of the United States Corporate Leniency Program, adopted the 1996 Commission Notice on the non-imposition or reduction of fines in cartel cases, commonly referred to as “The 1996 Leniency Notice”, to attempt to apply similar leniency policies in order to catch up with the United States. The effectiveness of the 1996 Leniency Notice however, was questionable owing to the following facts: first, legislation had an even lower level of transparency, certainty and predictability than the 1978 Amnesty Program in the United States; second, leniency applicants could be granted amnesty from legal prosecution only if the Commission had not already opened an investigation and, when granted amnesty, leniency applicants were required to immediately cease their participation in the collusion, which could hamper the potential investigation into the cartel¹²; third, by the time the international cartels were disclosed or the leniency application was made, most had already failed or ceased operating; fourth, the fines for breaching the competition rules were rather low; fifth, most important cartel investigations were in regard to international infringements, investigations of which were mostly prompted by or even mirrored the investigations by the Antitrust Division of the U.S. Department of Justice (Brisset, Thomas, 2004; Hinlopen, 2003; Stephan, 2008). The flaws of the 1996 Leniency Notice instigated the European Commission to revise and reform the Leniency Program in 2002, and in 2006. In 2002, the European Commission Notice on immunity from fines and reduction of fines in cartel cases, the 2002 Leniency Notice, introduced:¹³

1) Full, almost automatic exemption from fines for the first company to report the cartel before the investigation, on condition that the company provided sufficient evidence on the cartel enough for a sustainable conviction, fully cooperated with the Directorate-General for Competition, ended its involvement in the infringement upon the time of submission of leniency application, and had not coerced other companies to join the cartel or to remain in it;

¹² Moreover, leniency applications were disregarded unless there was very substantial evidence of existence of the cartel (Stephan, 2008).

¹³ European Commission Notice on immunity from fines and reduction of fines in cartel cases (2002): [http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0219\(02\):EN:NOT](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52002XC0219(02):EN:NOT)

- 2) Full, almost automatic exemption from fines for the first company to elicit the cartel after the investigation and reduced fines for subsequent companies, on condition that they provided sufficient information in order for the Directorate-General for Competition to be able to find an infringement, fully cooperated with the Directorate-General for Competition, ended its involvement in the infringement upon the time of submission of leniency application, and had not coerced other companies to join the cartel or to remain in it;
- 3) More substantial fines for breaching the anticartel law;
- 4) Reduced the European Commission's discretion in the implementation of the new rules (Spagnolo, 2008; Stephan, 2008).

In 2006, the European Commission Notice on immunity from fines and reduction of fines in cartel cases, the 2006 Leniency Notice, amended the 2002 Leniency Notice by dropping the requirement for cartel members to end the involvement in a collusive agreement immediately upon the application. However the Commission reserved the right to require an immediate ceasing of involvement in a cartel if the integrity of the investigation had been proved not to be hampered by ending such involvement (Stephan, 2008).

Despite very substantial convergence of the EU Leniency Program towards the U.S. Corporate and Individual Leniency Programs, there are still notable differences between the programs:

- 1) Under the EU Leniency Policy, the total private civil liability of the company that comes forward first can be waived the fine for actual damages incurred, as well as costs of legal services, whereas under the U.S. Leniency Policy, the leniency applicants to come forward first need to compensate the aggrieved parties for the actual damages incurred, as well as the costs of legal services plus interest. Moreover, the EU Leniency Program offers milder forms of leniency also to the second and third companies to come forward, as opposed to the U.S. Corporate Leniency Program, which offers leniency only to the first company to elicit a collusive agreement (Brisset, Thomas, 2004).
- 2) The U.S. Corporate Leniency Program explicitly grants full, automatic, immunity from legal prosecution if the required conditions are met by a leniency applicant, whereas the EU Leniency Program does so implicitly, thus potentially dissuading European cartel members from applying for amnesty.
- 3) Discounts up to 50 per cent are available under the EU Leniency Policy for subsequent applicants involved in a collusive agreement, provided that they commit to active cooperation with the Directorate-General for Competition and report sufficiently valuable information to prove the case. In the United States, discounts are not available to the second company to come forward, there are only small reductions for those subsequent companies to self-report that commit to active cooperation.
- 4) The U.S. Corporate and Individual Leniency Programs provide anonymity for leniency applicants and their identities, and their role in infringement is not made available to damage claimants. The EU Leniency Program, on the contrary, does not include a general provision of confidentiality (Brenner, 2011). Details on antitrust infringements are made available to public in the U.S. Arguably, however, making leniency applications available to public is a plus, because it allows independent reviewers, policy experts and analysts provide their opinions on the matter, warn the public and disseminate the knowledge.
- 5) The U.S. Corporate Leniency Program has a plea bargaining system for the first member to a cartel to come forward. Under this system leniency applicants negotiate the terms of their liability, the degree of severity of punishment for infringement, the degree of anonymity of the process of cartel busting, and the discounts for revealing the cartel, such as, for instance, protection from treble damages. In 1989, plea bargaining was made no longer available for the second and third leniency applicants (Spagnolo, 2008).

However, these differences appear to be insignificant from a broader perspective. The analysis testifies to the assertion that the EU Leniency Program is very similar to the U.S. Corporate and

Individual Leniency Programs, and proves the instance of a very substantial convergence in the EU towards the U.S. since 1990.

E. Summary

Variable	European Union (1990)	European Union (2008)	United States (2008)	Degree of convergence
Setup of anticartel policy	<i>three tiers</i>	<i>three tiers</i>	<i>three tiers</i>	<i>no convergence</i>
System of anticartel law enforcement	<i>administrative (inquisitorial)</i>	<i>administrative (inquisitorial)</i>	<i>adversarial</i>	<i>no convergence</i>
Mode of regulation	<i>ex ante</i>	<i>ex post</i>	<i>ex post</i>	<i>significant convergence</i>
Leniency program	–	<i>EU Leniency Program</i>	<i>U.S. Corporate and Individual Leniency Programs</i>	<i>very substantial convergence</i>

4.3 Antimonopoly policy

In contrast to the substantial reforms of anticartel enforcement and merger regulation, antimonopoly competition rules have seen less development (Kovacic, 2008). Moreover, transnational communication and cooperation between the U.S. and the EU in the framework of antimonopoly policy, as in case of anticartel policy, is less evident than in the framework of merger control policy owing to a number of significant impediments for information exchange pertaining to cartels and monopolies in the EU, and very few bilateral (U.S.-EU) agreements, as opposed to a great number of multilateral agreements within the OECD, the ICN and the WTO (Schaub, 2003). Hence, convergence of antimonopoly policy is hard to detect and connect to a certain mechanism, or mechanisms, of policy convergence. However, transnational communication (lesson-drawing, transnational problem-solving, and policy emulation) can be indisputably singled out as the main mechanism triggering soft procedural and later structural convergence between the U.S. and the EU in field of antimonopoly policy: not necessarily through binding or voluntarily agreements (there is no direct evidence of this), but through communication and learning in the WTO, the OECD, the ICN and other organizations, as well as forums, rounds tables, conferences, panel meetings, working groups etc. Another point is that the influence of the U.S. competition traditions is evident in the switch to the use of a more economic approach (effects-based approach) in assessment of dominant position, the change in interpretation of abuse and of dominance, the switch to ex post control mode, the attempt to make a wider use of private litigation in the European Union (structural convergence). Convergence of competition (antimonopoly) law enforcement system and law enforcement approach has not experienced any convergence.

In addition to that, the European Union did not merely attempt to copy the competition model pertaining to antimonopoly policy from the United States. Rather the EU attempted to incorporate certain best practices after the example of the U.S., without altering the legal culture and traditions in the EU, and the logic and thinking behind it. The next subsections elaborate on antimonopoly policy convergence in the EU.

A. Setup of antimonopoly policy

Setup of antimonopoly policy can be separated into four stages: at the first stage, a potential monopolistic market player is examined on grounds of abuse of dominant position; at the second stage, the market player is placed under investigation; at the third stage, the market player is either allowed to carry out its economic activities, or, if monopolization of any part of trade has been detected, sanctions are imposed; at the fourth stage, the market player can file an appeal to the courts.

If the European Union antimonopoly policy in 1990 and 2008, under Article 82 TEC and Article 102 TFEU respectively, is analyzed through the prism of the four-stage application of antimonopoly policy, it will encompass three tiers. On the first tier, which encompassed the first two stages, the market player is examined on grounds of market power abuse (including dawn raids granted by Article 105 TFEU) and placed under investigation by the Directorate-General for Competition, in 2008, or the Directorate-General IV, in 1990. On the second tier, if monopolization attempt has been proved, the European Commission imposes administrative fines. On the third tier, the market player can submit an appeal to the General Court of the European Court of Justice, or in 1990, Court of First Instance of the European Court of Justice.

The setup of the antimonopoly policy system in the United States on the federal level is very similar to that of the European Union, with the notable exception of roles of main actors in law enforcement. The system encompasses three tiers. The Department of Justice and the Federal Trade Commission are the main actors on the first tier, which combines the first two stages. On the second tier, in case substantial evidence of breaching Section One (conspiratorial conduct) or Section Two of the Sherman Act has been found, the Department of Justice or the Federal Trade Commission presents the case to the Supreme Court. On the third tier, the market player can submit an appeal to the Supreme Court.

Despite the noticeable similarities between the two setups, convergence cannot be detected, because it presupposes similarity changes over a given period of time. The setup of the antimonopoly policy system in the EU has been initially similar to that of the U.S.

B. Assessment of abuse of dominant position

Competition policy reforms in the European Union targeting modernization of assessment and treatment of cartels and horizontal mergers have evinced more similarities with the U.S. competition policy principles than the reforms targeting modernization of assessment and treatment of abuse of market dominance (Kovacic, 2008). Few significant reforms in field of assessment and treatment of market dominance in the EU have been introduced since 1990.

Section Two of the Sherman Act is applied in cases where there is a definite link from the conduct to market dominance, a concept that has no formal meaning in the U.S., but can be interpreted by estimating effects of a company's behavior. In the European Union, Article 102 TFEU is applicable where there is evidence of pure market dominance, a fuzzy concept based on calculation of market shares.

Dominance, an Ordoliberal concept enshrined in European law, lacked precise boundaries until the Commission clarified the concept, under which companies with market shares as low as forty per cent can be deemed dominant (Gifford, Kudrle, 2011). The European Commission treats market shares at or even below forty per cent as potential monopolization attempts, whereas the Department of Justice treats shares below fifty per cent as being insufficient to establish substantial market power (Kovacic, 2008). Companies tend to get greater scrutiny under the U.S. law as their market shares are larger, but only if market shares are larger than fifty per cent, while most of the companies with forty per cent or even smaller shares are thoroughly scrutinized under suspicion of monopolization attempts under the EU law (Gifford, Kudrle, 2011). Consequently, the

interpretation of dominance in the EU has not converged towards the interpretation of dominance in the U.S.

According to a more economic approach (effects-based approach) to the interpretation of abuse of market dominance enshrined in the U.S. law, the dominant market player must interpret the concept of abuse as objective, which means that even if there is no exclusionary intent of the market player, it still will be treated based on the effects it produced, whereas in accordance with the European Commission's formalistic approach to interpretation of abuse of market dominance, behavior can be interpreted as being abusive per se even if it does not actually maintain or strengthen market dominance, i.e. regardless of whether a form of abuse of market dominance has had actual or likely anticompetitive effects (Vickers, 2005). The formalistic approach has been applied to assessment and treatment of abuse of market dominance up until 2008, when the Guidance Paper on the European Commission's enforcement priorities in applying Article 102 TFEU was adopted. New strategies, factors and tests have been introduced in the Guidance Paper to enable switch from the formalistic dominance-based approach to a more economic approach, the effects-based approach, whereby the Commission can intervene only if there is actual evidence that the effect of exclusionary behavior harms consumers or forecloses competitors from the market (Gravengaard, Kjaersgaard, 2010). Methodology of assessment of abuse of market dominance in the EU has not encountered any substantial changes since 1990, however, the shift to starting to use the effects-based approach in 2008, applied in the U.S. assessment methodology of abuse of dominance and advocated by the Chicago School economists, indicates limited convergence. Altogether, assessment methodology of abuse of dominant position in the EU has insignificantly converged towards the one applied in the U.S.

C. System of antimonopoly law enforcement

The system of law enforcement in the European Union still exemplifies the administrative system, whereby the European Commission has both prosecutorial and judicial power in regard to antimonopoly law enforcement as opposed the adversarial system in the U.S. on the federal level, where the Antitrust Division is able to only initiate and conduct an investigation, submit and defend the case in the Supreme Court, and supply the process with evidence (Spagnolo, 2008).

The Antitrust Division of the Department of Justice is responsible for analyzing the companies' behavior on the matter of infringement of Section Two of the Sherman Act on the federal level (or state attorneys general, who may file suits on the matter of infringement state and federal competition rules), and filing suits if sufficient evidence of abuse of market dominance has been found. The officials from the Antitrust Division do not have any prosecutorial discretion or judicial power, and their functions in are limited to mere filing suits and supplying relevant information to courts. The administrative system of the European Union has not converged towards the adversarial system of the United States since 1990. The European Commission has retained both prosecutorial and judicial power and remained the core actor in enforcing Article 102 TFEU. A minor change occurred in late 1990s, when the Commission proclaimed its expectation to inflict additional deterrence on economic actors in order to be able to achieve a better compliance with European competition law by means of introducing private litigation into the system of antimonopoly enforcement. In addition to this, more burden of responsibility for resolving the uncertainties in respect of antimonopoly laws has been put on the European Court of Justice and national courts, which became obliged to accumulate a substantial case law both on pricing issues (predatory pricing, selective price cuts, margin squeezes, and discounts and rebates), and also on non-pricing issues (tying, bundling, exclusive dealing and refusal to supply). Thus, private enforcement started to resemble a system with parallel application of national competition laws and European

competition laws, whereby Article 102 TFEU is applicable in cases affecting trade between member states (Peyer, 2011).

Following the introduction of Regulation 1/2003, the Commission decided to compensate for the legal uncertainty and deficit, and lack of coherence in antimonopoly enforcement, and to focus on improving the efficiency of damages actions against breaching Article 102 TFEU by introducing the Green Paper in 2005 and the White Paper in 2008 (Boeheim, 2011; Peyer, 2011). However, making conclusions about the progress in this field is yet too early, the implementation of rules and guidelines and the analysis of the results may take up to a decade from the point the documents were adopted.

In contrast to the situation with private antitrust enforcement in the European Union, the United States antitrust law is said to have a “fine-tune combination of public intervention and private litigation which minimizes the overall impact of anticompetitive conduct” (Marra, Sarra, 2009: 132). Hence, the epistemic community of competition policy specialists recommended the European Commission to follow the recommendations on private litigation from the United States and to adopt its best practices.¹⁴ Overall, very limited convergence towards the U.S. can be observed.

D. Mode of regulation

Epistemic community of competition policy experts adhering to the German Ordoliberal School encouraged to incorporate ex ante notification procedure, borrowed from the “German law and thinking”, into Regulation 17/1962 (Wilks, 2005: 433). Under Regulation 17/1962, the Commission enjoyed extensive procedural powers over the right to grant permission or exemptions from the prohibition: companies were obliged to notify the Commission of any agreements, which could potentially affect trade between the member states (dominance and concentration), and obtain official approval for contractual agreements, or exemption from prohibition. The Commission’s ultimate authority to conduct antimonopoly policies independently from the European Council and the member states, made it unique in terms of the amount of power within its range of other competences (Wilks, 2005). The bureaucratic ex ante procedure immediately created a substantial backlog of notifications. Along with uncoordinated prioritization of cases, costly bureaucratic procedures, insufficient manpower of the competition policy executive in the Community on behalf of the European Commission, the Directorate-General IV, diversion of time and resources away from the most serious infringements, the state of limbo the companies had been left in, changing economic circumstances, enlargement of the European Union, and pressure from the epistemic community of competition policy specialists adhering to the Chicago School, instigated the European Commission to reform the system.

Regulation 1/2003 modified the procedure for detecting anticompetitive practices and treating abuse of market dominance in the EU: the old system of mandatory ex ante notification under Regulation

¹⁴ In order to ensure a better functioning of private enforcement and get it closer to the perfect state of equilibrium of pure private and pure public enforcement, different enforcement mechanisms need to be combined, while remembering that pure public or pure private enforcement mechanisms cannot be efficient. Theoretically, when the court is sufficiently accurate, i.e. is likely to rule in favor of the defendant when the defendant is innocent and against the defendant when the defendant is guilty, complementing private enforcement with public enforcement is always efficient and socially beneficial (McAfee, Mialon, 2008). In this situation, companies tend not to use the law in their strategic interests, because the sufficiently accurate court rules only against guilty defendants. When the court is less accurate, the complementation of public enforcement with private enforcement is efficient and socially beneficial only if the state allocates sufficient financial resources to back up the due litigation. When the state does not do so and the court is less accurate, companies tend to use the law in their strategic interest. The criterion of activity/inactivity of the state is no less important than the accuracy/inaccuracy criterion of the court. The combination of private and public enforcement leads to the dominance of private enforcement over public enforcement if the state is inactive (McAfee, Mialon, 2008). The state is aware of the active enforcement by private parties and does not intervene in the processes. If the state is active, the combination of private and public enforcement leads to the dominance of public enforcement over private enforcement, and gradually replaces private enforcement at all, because private parties tend not to bring cases to courts by themselves when they are aware of the fact there exists an institution responsible for litigation. Thus, the combination of private and public enforcement indeed is more efficient and socially beneficial than pure public or pure private enforcement, but the criteria of accuracy/inaccuracy of the court and activity/inactivity of the state need to be necessarily accounted for.

17/1962 was replaced by ex post control, while the powers of national competition authorities and courts were strengthened by decentralizing the enforcement of some competition rules to member states, generally in cases where the rules on the national level were stricter than the rules on the EU level (Loss et al., 2008). Dominant market players have become solely responsible for analyzing the effects of their conduct on the matter of distorting competition. The mode of regulation in the EU started to resemble the ex post mode of regulation applied in the U.S., however, a wider zone of liability for dominant companies in the European Union, which is ascribed to a stricter classification of dominance and ambiguity in interpretation of Article 102 TFEU by the General Court (former Court of First Instance)¹⁵, and excessive interventions by the European Commission, run contrary to the Antitrust Division's laissez-faire regulatory traditions (Kovacic, 2008). In spite of this, the mode of regulation in the EU has experienced somewhat significant convergence towards the U.S.

E. Summary

Variable	European Union (1990)	European Union (2008)	United States (2008)	Degree of convergence
Setup of antimonopoly policy	<i>three tiers</i>	<i>three tiers</i>	<i>three tiers</i>	<i>no convergence</i>
Assessment of abuse of dominant position	<i>formalistic dominance-based approach</i>	<i>effects-based approach</i>	<i>effects-based approach</i>	<i>insignificant convergence</i>
System of antimonopoly law enforcement	<i>administrative (inquisitorial)</i>	<i>administrative (inquisitorial)</i>	<i>adversarial</i>	<i>insignificant convergence</i>
Mode of regulation	<i>ex ante</i>	<i>ex post</i>	<i>ex post</i>	<i>significant convergence</i>

4.4 Merger control policy

According to the principal-agent theory, in order to avoid undesirable political intervention, competition authorities in the U.S. and the EU seek convergence in areas under their discretionary authority (Damro, 2011). Political intervention is the result of inactivity and/or ineffectiveness of competition authorities in tackling domestic issues. Undesirability of political intervention motivates regulators to improve their performance by analyzing positive and negative lessons from other competition policy models, sharing expertise, and working on solutions to policy issues with other specialists. One of the most efficient means to attain these goals is through transnational communication of competition policy experts (epistemic communities), as opposed to seeking independent response to problems.

Merger control policy convergence between the U.S. and the EU has been triggered to a great extent through communication and bilateral non-binding agreements resulting from such communication within the group of competition policy experts from the U.S. and the EU, the Mergers Working Group, established in 1999, and to a lesser extent (and with less evident convergence) within the WTO, the International Competition Network and the OECD (First, 2003; Schaub, 2002). The stage for convergence between the U.S. and the EU in terms of merger control was set by adopting the

¹⁵ Substantial U.S. case law on market dominance contains sets of precise rules to classify behavior as procompetitive or exclusionary, which aids significantly the courts and the Antitrust Division, whereas there is neither substantial case law, nor a set of precise and complete rules on the abuse of market dominance in the European Union (Kovacic, 2008).

Bilateral Competition Agreement and the Administrative Arrangement on Attendance, in 1991 and 1999 respectively: both voluntary agreements, which could not override existing national competition laws (Damro, 2011). The Bilateral Competition Agreement included guidelines on information exchange, consultations, enforcement activities, and merger investigations. The Administrative Agreement on Attendance included explanation of procedures for granting permission for competition authorities in the U.S. and the EU to attend internal hearings and meetings on merger control in these two entities, in case of mutual interest. Both the agreements set the stage for triggering procedural convergence. In early 2000s, the U.S.-EU Mergers Working Group expanded the previous guidelines and principles to include not only procedural, but also structural (substantive) issues, and introduced the guidelines on Best Practices on Cooperation in Merger Investigations (Damro, 2011; Schaub, 2003). The Mergers Working Group provided competition authorities from the U.S. and the EU with a platform for information exchange, policy dialogue and mutual learning. One of the most notable concrete successes of the Group, which led to procedural and afterwards structural convergence in the European Union, was the introduction of the European Commission's Notice in 2000 on behavioral and structural remedies, and replacement of the Dominance Test by the SIEC test (Damro, 2011; Kassim, Wright, 2009; Turk, 2012; Vasconcelos, 2010).

Thus, certain convergence in merger control between the U.S. and the EU was built on a formal framework for information exchanges, which triggered first procedural and later structural convergence, through the mechanism of transnational communication (lesson-drawing, transnational problem-solving, and to a much lesser extent policy emulation). The mechanisms of independent response to problems and regulatory competition apparently have not been implemented in triggering convergence.

Convergence of merger assessment methodology between the U.S. and the EU can be ascribed to transnational communication based on hard evidence, however, convergence of mode of regulation (including the incorporation of private litigation) cannot be traced to the abovementioned agreements and guidelines, despite the proof that it has indeed occurred due to learning from influential international organizations and epistemic communities of competition policy experts, most likely from the United States. Convergence of merger control law enforcement systems between these two entities has not occurred at all. This attests to the fact that the European Union did not merely attempt to copy the competition model pertaining to merger control from the United States. Rather the EU attempted to incorporate certain best practices into its competition control model after the example of the U.S., without altering the EU law enforcement approach and the competition law enforcement system with its specific legal culture and traditions. The next subsections elaborate on merger control policy convergence in the EU.

A. Setup of merger control policy

Setup of merger policy can be separated into four stages: at the first stage, a merger is examined in order to determine if it can potentially create a concern for fair competition; at the second stage, the effect of merging parties' behavior on competition is determined; at the third stage, the decision to approve or prohibit a merger is made; at the fourth stage, parties to a merger can file an appeal to the courts.

If the European Union merger policy after adoption of Merger Regulation 4064/89 is analyzed through the prism of the four-stage application of merger policy, it will consist of only two tiers. On the first tier, which encompassed the first three stages, a merger needed to be reviewed by the Merger Task Force within a month, or within six weeks if a member state or other parties decided to intervene and offer structural or behavioral remedies. The decision needed to be approved by the Directorate-General for Competition and subsequently by the European Commissioners. A merger

was either prohibited, or unconditionally approved, or partially approved and subject to commitments or remedial action plan to diminish anticompetitive effects in rare cases until the introduction of the European Commission's Notice in 2000. On the second tier, after the decision by the Merger Task Force had been made and had been approved by the Commissioners, the parties to a merger could submit an appeal to the Court of First Instance of the European Court of Justice (now the General Court of the European Court of Justice) (Lyons, 2004; Zweifel, 2003).

The setup of the merger policy system in the United States encompasses three tiers. The Department of Justice and the Federal Trade Commission are the main actors on the first tier, which combines the first two stages (decision to investigate a merger, decision to approve/prohibit a merger). They collect the evidence and conclude whether a merger has produced anticompetitive effects according to Section Seven of the Clayton Act (Ghosal, 2011). Most of the cases are settled on the first tier, without addressing the courts. If required, the Department of Justice or the Federal Trade Commission presents the case to the courts on the second tier. On the third tier, the parties to a merger can submit an appeal to the U.S. Supreme Court (Bagchi, 2005; Zweifel, 2003).

The Community merger policy enforcement system differed considerably in its nature from that of the United States, which had a more effective, transparent and flexible system. First, the European Commission combined the first three stages into one tier, and made a single investigation team responsible for scrutinizing mergers, constrained by very tight deadlines. This situation virtually forced the team to provide assumptions and quick conclusions without due scrutiny and rigorous analysis. Second, the appeal procedure designed by the European Commission was much more complex, lengthy and bureaucratic than the appeal procedure in the United States, where the courts actively participated in merger investigations and helped to speed up the process, thus sharing the burden of merger policy enforcement with the Department of Justice and the Federal Trade Commission. In the European Union, if an appeal had been once overturned, the chances of resurrecting a negative merger prohibition were slim (Lyons, 2004).

The changing economic reality, the increase of case load and the planned enlargement of the European Union in 2004 pushed the Commission to instigate reforms. In 2000, the European Commission introduced the European Commission's Notice¹⁶ and later incorporated it into Regulation 139/2004 in 2003 (Vasconcelos, 2010). Despite the fact that the reforms significantly changed the merger assessment methodology and the mode of regulation for mergers, the setup of merger policy has remained the same, and has experienced no convergence whatsoever towards the U.S. The most notable change not related to the application of merger policy was the introduction of solutions to the problem of tight deadlines under the previous *ex ante* notification system: first, extended time schedules for processing applications have been introduced; second, the Merger Task Force has been abolished and the officials have been transferred to sectoral units within the European Commission to cope with applications more efficiently; third, *ad hoc* panels (devil's advocate panels) and the position of Chief Competition Economist have been created in order to review drafts of the Directorate-General for Competition regarding merger investigations, double-check analysis carried out by the sectoral units, and add more technical considerations to the

¹⁶ Before the introduction of the European Commission's Notice in 2000, mergers, takeovers and acquisitions were in most cases either unconditionally approved or prohibited by the Commission, which left little room for partial approvals on condition that parties to a merger commit to a certain action plan or agree to adopt the Commission's remedies. The situation changed, when the European Commission's Notice was adopted in 2000 and incorporated into Regulation 139/2004 in 2003, which outlined its policy in relation to merger remedies and commitments in case of partial approvals (Vasconcelos, 2010). Since then, the use of commitments or (structural) remedies has become widespread in the European Union merger regulation. The Notice allowed the Directorate-General for Competition to determine specific areas of concern in larger mergers and adopt measures (remedial action) to address these (Turk, 2012). Merger remedies could be grouped into two categories: structural remedies and behavioral remedies. Structural remedies modify the allocation of property rights, and can include full or partial disablement of an entire enterprise followed by the deprivation of rights, whereas behavioral remedies only set constraints on the property rights of the newly merged entity or commit the parties to a merger to fulfill certain agreements (Vasconcelos, 2010). Although the Commission appeared to be more inclined to start making use of the option of partial approval by officially adopting the policy in relation to merger remedies and commitments, it preferred to apply structural remedies rather than behavioral remedies, which in most cases equaled to prohibition.

analysis of mergers based on the new assessment methodology (a more economic approach, or effects-based approach), which is analyzed in the next section.¹⁷

B. Assessment of mergers

Merger Regulation 4064/89 (ECMR), adopted in 1989, incorporated the Dominance Test from the German competition law traditions for assessment of mergers, takeovers and acquisitions (Weitbrecht, 2008).¹⁸ The Dominance Test was criticized by the epistemic community of competition policy specialists, most notably by the Chicago School economists and the U.S. competition authorities, for preferring market shares over economic effects in the assessment of mergers (Montalban et al., 2009). On the one hand, the Dominance Test could be excessively strict on merging parties, whereby mergers enhancing efficiency could be wrongly prohibited following the prohibition of dominance per se according to Article 82 TEC (now Article 102 TFEU) (the same rule applies to antimonopoly law). Competition authorities from the United States argued that the use of market dominance approach to block mergers was not economically sane, and that it protected competitors instead of protecting consumer welfare (Akbar, Suder, 2006). On the other hand, it could be too generous on merging parties by allowing anticompetitive mergers, because it stressed market share in the assessment, instead of putting stronger emphasis on measuring economic effects, as advocated by the Chicago School economists (Lyons, 2004). In the United States, the use of effects-based approach in the analysis of mergers, acquisitions and takeovers is secured in Section Four of the Horizontal Merger Guidelines of the Department of Justice (Bagchi, 2005). In the EU, the test used a criterion of market abuse in order to prohibit a merger, but there could be mergers not increasing market dominance but decreasing consumer welfare, which runs counter to competition policy principles of consumer protection according to the U.S. approach, and protects competitors rather than consumers (Fernandez et al., 2008; Roeller, Wey, 2003). This was a notable example where the assessment criterion utilized in the EU ran counter to the one utilized in the U.S., but went accord with the Chicago School principles (competitor harm).

Followed by such criticism, the Dominance Test has been eventually amended by the significant impediment of effective competition test (SIEC) to bring the European Union competition policy closer to the substantial lessening of competition test (SLC) used in the United States merger policy, and closer to using the effects-based approach and consumer welfare standards to analyzing mergers and acquisitions in order to determine economic efficiency and consumer harm (Kassim, Wright, 2009).¹⁹ Even though the focus of the EU competition policy is on market integration and competitor protection, the European Commission proclaimed its new controversial motto after the example of the United States to demonstrate the devotion to bring significant reforms to merger policy: “Merger policy to protect competition, not competitors”.

The Directorate-General for Competition has acquired the power to investigate merger proposals with the new SIEC test, whereby the issue of dominance and market shares does not need to be central anymore, as stated in Article 2(3) of Merger Regulation 139/2004 (EUMR).²⁰

¹⁷ However, devil’s advocate panels face a similar problem that the Merger Task Force did: there are still somewhat strict time schedules to follow (Lyons, 2004).

¹⁸ The substantive test of the creation or strengthening of a dominant position, designed by the Directorate-General for Competition based on market share, and preformed by the Merger Task Force. The Merger Task Force had two options to challenge a merger agreement: by proving that the agreement would either lead to an entity with market share of more than 50 per cent, or would result in the creation of a collective dominant position (Akbar, Suder, 2006).

¹⁹ It must be noted though, that efficiency is interpreted differently by the merger control authorities in the European Union and the United States. Efficiency is closely linked to welfare standards, which is different in these two political economies: consumer welfare standard is used in the European Union, and a hybrid of consumer welfare standard and total surplus welfare standard is used in the United States (Renckens, 2007). Hence, the test itself cannot be used to accurately compare merger efficiency in the United States and in the European Union.

²⁰ Dominance, while being an overriding issue in assessing the anticompetitive impact of mergers, is not the sole criterion for such assessments any longer, whereas it used to be the dominant criterion for assessing anticompetitive impact of mergers in the European Union; to put much less emphasis on the criterion of dominance, Article 2(3) of Merger Regulation 4064/89 (ECMR) was reconceptualized into Article 2(3) of Merger Regulation 139/2004 (EUMR). Compare: Article 2(3) of Merger Regulation 4064/89 (ECMR): “A concentration which would significantly impede

Despite the fact that the new procedural approach of the Directorate-General for Competition in the SIEC test is more interventionist than before, which runs counter to the United States and the Chicago School laissez-faire regulatory traditions, the test itself, hence the assessment of mergers, has seen solid and substantial convergence towards the U.S. assessment methodology (Akbar, Suder, 2006).

C. System of merger law enforcement

The jurisdiction in the United States pertaining to merger control exemplifies the adversarial system, whereby courts decide on the case since the first instance; whereas the jurisdiction in the European Union pertaining to merger control still exemplifies the administrative, inquisitorial, system, whereby public authorities, as represented by the European Commission, have both prosecutorial and judicial power (Spagnolo, 2008). Under Merger Regulation 4064/89, the European Commission enjoyed the power to pass judgment on all mergers occurring in the Community, which made this institution the most important one among the European competition authorities in field of merger control. Under Regulation 1/2003 and Merger Regulation 139/2004, the European Commission has retained its prosecutorial and judicial discretion on all matters concerning mergers, acquisitions and takeovers in the EU (Bagchi, 2005). However, private arbitrations between companies or through third-party mediators have been actively encouraged following the example from the United States. Before Regulation 1/2003 was introduced, the European Court of Justice and the European Commission did not accept arbitration as a fully functional legal technique, and did not approve of arbitrations happening outside courts and other official institutions. This changed, however, and since then the Commission “not only has accepted arbitration but also incorporated private dispute resolution in the decisions on mergers and acquisitions” (Montalban et al., 2009: 36). Private arbitration is typical of the adversarial system of law enforcement, hence of the U.S. jurisdiction. Thus, very insignificant convergence towards the U.S. system of merger law enforcement is claimed to have occurred.

D. Mode of regulation

Under Regulation 1/2003 and Merger Regulation 139/2004, *ex ante* authorization has been replaced by *ex post* control after the example from the U.S. and Chicago School regulatory traditions: the requirement for companies to notify the Directorate-General for Competition or wait for an official approval to be able to make a takeover bids or to merge, have been abolished, instead, they have become obliged to assess the impact of a potential merger or a takeover on the market by themselves and bear responsibility for the assessment. The burden of proof, which the companies had to deal with, on the one hand, stimulated them to shift to the use of the effects-based analysis, which was preferred and encouraged by the Commission since the mid 1990s as a best means to prove whether a merger, an acquisition or a takeover evinced pro or anticompetitive effects, and on the other hand, slightly decreased the number of interventions by the European Commission (Montalban et al., 2009). By doing so, not only has the Commission attempted to shift the burden of proof from the Directorate-General for Competition to market players, but also has encouraged the bottom-up modernization of competition policy in the European Union in merger regulation, as opposed to top-down modernization, typical of the Chicago School logic and thinking. Clear position of the Commission on mergers and less ambiguity in interpretation of merger rules than in interpretation of anticartel and antimonopoly rules, enabled more consistent adaption of *ex post*

effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market”. Article 2(3) of Merger Regulation 4064/89 (ECMR): “A concentration which creates or strengthens 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 shall be declared incompatible with the common market” (Akbar, Suder, 2006: 674).

mode of regulation. Moreover, merger control in the EU started to resemble a laissez-faire approach to mergers in the U.S., especially after the crisis, whereas before the crisis, mergers were closely inspected and indeed often prohibited (Boehem, 2011).

Thus, in regard to mode of regulation, convergence towards the U.S. merger control principles has been somewhat significant.

E. Summary

Variable	European Union (1990)	European Union (2008)	United States (2008)	Degree of convergence
Setup of merger policy	<i>two tiers</i>	<i>two tiers</i>	<i>three tiers</i>	<i>no convergence</i>
Assessment of mergers	<i>dominance-based approach</i>	<i>effects-based approach</i>	<i>effects-based approach</i>	<i>very substantial convergence</i>
System of merger law enforcement	<i>administrative (inquisitorial)</i>	<i>administrative (inquisitorial)</i>	<i>adversarial</i>	<i>insignificant convergence</i>
Mode of regulation	<i>ex ante</i>	<i>ex post</i>	<i>ex post</i>	<i>significant convergence</i>

5. Conclusion

The recent competition policy reforms in the European Union are considered to signify the radical plan for transformation in the European Union competition policy, to a certain extent through the incorporation of some successful laissez-faire competition policy principles and traditions of the United States into the European Union Competition Policy System: the European Union Competition Policy System is assumed to converge towards the U.S. Competition Policy System. In spite of the evidence of strong influence on the incorporation of policy provisions from the U.S. competition policy model into the recent competition policy reforms in the European Union, few attempts have been made to link the EU competition policy to U.S. antitrust, and to measure the impact of the U.S. antitrust on the EU competition policy. Moreover, there is a gap in literature in regard to what causal mechanisms activate the convergent policy changes in the EU. The purpose of the research carried out in the framework of the thesis has been to fill the gaps by attempting to link the EU competition policy with the U.S. antitrust, provide a critical overview of the most important elements of the competition policy reforms in the European Union, trace the evolution of the EU competition policy traditions and central theories underpinning the EU competition rules, the Chicago School and the Freiburg Ordoliberal School, and, most importantly, carry out comparative analysis between the EU and U.S. competition policy, detect convergence or divergence, measure the degree of convergence, and account for relevant mechanisms triggering competition policy convergence in the EU.

Competition policy convergence has been analyzed based on three policy characteristics (policy outputs): policy goals, policy content and policy application.

Competition policy goals have been analyzed collectively, i.e. without differentiating between anticartel enforcement policy goals, antimonopoly policy goals, and merger control goals. No convergence towards the U.S. competition policy goals in the EU has been detected.

Competition policy content and competition policy application have been analyzed in each of the three pillars of competition policy: 1) anticartel policy (setup of anticartel policy, system of anticartel law enforcement, mode of regulation, leniency program), 2) antimonopoly policy (setup of antimonopoly policy, system of antimonopoly law enforcement, mode of regulation), and 3) regulation of mergers and acquisitions (setup of merger policy, assessment of mergers, system of

merger law enforcement, mode of regulation); indirectly and not explicitly, i.e. through the prism of certain variables within a cluster.

Analysis carried out in the framework of the thesis allowed to provide the answer to the main research question: How substantial is the degree of convergence between the competition control models and competition law enforcement systems utilized in the European Union and in the United States? The table below accounts for the results of the analysis.

	Variable	European Union (1990)	European Union (2008)	United States (2008)	Degree of convergence
Anticartel policy	Setup of anticartel policy	<i>three tiers</i>	<i>three tiers</i>	<i>three tiers</i>	<i>no convergence</i>
	System of anticartel law enforcement	<i>administrative (inquisitorial)</i>	<i>administrative (inquisitorial)</i>	<i>adversarial</i>	<i>no convergence</i>
	Mode of regulation	<i>ex ante</i>	<i>ex post</i>	<i>ex post</i>	<i>significant convergence</i>
	Leniency program	–	<i>EU Leniency Program</i>	<i>U.S. Corporate and Individual Leniency Programs</i>	<i>very substantial convergence</i>
Antimonopoly policy	Setup of antimonopoly policy	<i>three tiers</i>	<i>three tiers</i>	<i>three tiers</i>	<i>no convergence</i>
	Assessment of abuse of dominant position	<i>formalistic dominance-based approach</i>	<i>effects-based approach</i>	<i>effects-based approach</i>	<i>insignificant convergence</i>
	System of antimonopoly law enforcement	<i>administrative (inquisitorial)</i>	<i>administrative (inquisitorial)</i>	<i>adversarial</i>	<i>insignificant convergence</i>
	Mode of regulation	<i>ex ante</i>	<i>ex post</i>	<i>ex post</i>	<i>significant convergence</i>
Merger control policy	Setup of merger policy	<i>two tiers</i>	<i>two tiers</i>	<i>three tiers</i>	<i>no convergence</i>
	Assessment of mergers	<i>dominance-based approach</i>	<i>effects-based approach</i>	<i>effects-based approach</i>	<i>very substantial convergence</i>
	System of merger law enforcement	<i>administrative (inquisitorial)</i>	<i>administrative (inquisitorial)</i>	<i>adversarial</i>	<i>insignificant convergence</i>
	Mode of regulation	<i>ex ante</i>	<i>ex post</i>	<i>ex post</i>	<i>significant convergence</i>

Moreover, the hypothesis of the thesis has been confirmed: Due to fundamental differences in theories underpinning competition control models in the United States and the European Union, as well as different competition law enforcement systems employed in these two political jurisdictions, the European Commission will most likely continue adopting best practices from the United States Department of Justice rather than utilizing the U.S. competition control model and competition law enforcement system.

In regard to mechanisms triggering competition policy convergence, the mechanism of transnational communication has been singled out as the main trigger of convergence. Competition policy

reforms (in anticartel policy: introduction of block exemptions to cartel cases, leniency program, the shift to ex post cartel control and private anticartel litigation; in antimonopoly policy: the switch to the use of a more economic approach (effects-based approach) in assessment of dominant position, the change in interpretation of abuse and of dominance, the switch to ex post control mode, the attempt to make a wider use of private litigation in the European Union; in merger control policy: the switch to ex post control mode) cannot be traced to certain guidelines and agreements, but can indeed be traced and ascribed to the mechanism of transnational communication (lesson-drawing, transnational problem-solving, and to a lesser extent policy emulation), through communication and learning in the WTO (for instance, in the Working Group on the Interaction between Trade and Competition Policy), the ICN, the OECD, and other organizations, as well as meetings, forums and conferences. The only notable exception pertains to merger control policy: introduction of the European Commission's Notice in 2000 on behavioral and structural remedies, and replacement of the Dominance Test by the SIEC test can be undoubtedly traced to the work of the Mergers Working Group. In any case, transnational communication has produced impact on policy convergence. The mechanisms of independent response to problems and regulatory competition apparently have not been implemented in triggering convergence.

In regard to competition law enforcement system and law enforcement approach, no convergence in any of the three pillars has occurred. Despite the strong evidence of consistent transnational communication between the EU and the U.S., competition policy convergence has not been wholesome, owing to the fact that legal systems, legal cultures and traditions differ in these two political jurisdictions. The European Union has altered certain competition policy rules after the example from the U.S., but has not altered its legal culture and traditions.

As a minor observation, competition policy reforms in the European Union, despite having introduced important changes, have not had substantial influence from the Chicago School as the table below and the analysis in the previous sections evidences it. The main pillars of the Freiburg Ordoliberal School, underlying the European Union Competition Policy, have remained unaltered, and have experienced very insignificant convergence towards postulates of the Chicago School.

Variable	Chicago School	Freiburg Ordoliberal School	European Union (2008)	Similarity change
Competition rules	<i>institutionalized through pragmatic rules of reason (a more economic and effects-based approach)</i>	<i>institutionalized through rigid competition rules and regulations (legalistic approach)</i>	<i>institutionalized through rigid competition rules and regulations, effects-based approach has started to be used in the analysis</i>	-/+
Assessment of impact on competition	<i>calculations are based on economic effects and economic efficiency, and total welfare standard (based on a hybrid of total and consumer welfare in the U.S.)</i>	<i>calculations are based on consumer welfare standard, through legalistic approach</i>	<i>calculations are based on consumer welfare standard, effects-based approach has started to be used in the analysis</i>	-/+
Cartels	<i>restricted (prohibited in the U.S.)</i>	<i>prohibited per se</i>	<i>prohibited per se</i>	-
Mergers, takeovers and	<i>restricted</i>	<i>restricted</i>	<i>restricted</i>	-

acquisitions				
Monopolies	<i>prohibited (with the exception of natural monopolies)</i>	<i>prohibited per se</i>	<i>prohibited per se</i>	–
State support (subsidized loans, financial guarantees)	<i>undesirable</i>	<i>possible (to small and medium size enterprises)</i>	<i>possible (to small and medium size enterprises)</i>	–
Law enforcement system	<i>adversarial (common law), private enforcement</i>	<i>administrative/inquisitorial (civil law), public enforcement</i>	<i>administrative/inquisitorial (civil law), public enforcement</i>	–
Decision makers	<i>courts</i>	<i>public authorities</i>	<i>role of private litigation has increased, but courts have not become the main decision makers</i>	–/+
Law enforcement approach	<i>precedence-based (judicial precedence)</i>	<i>clause-centric (general and abstract legislation)</i>	<i>clause-centric (general and abstract legislation)</i>	–
Mode of regulation	<i>ex post control</i>	<i>ex ante authorization</i>	<i>ex ante authorization has been replaced by ex post control</i>	+
Regulatory policies	<i>laissez-faire (deregulation, market interventions are undesirable and permitted in exceptional cases)</i>	<i>rigid (policing industries and market interventions are acceptable and widespread)</i>	<i>rigid (policing industries and market interventions are acceptable and widespread)</i>	–

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