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Unruling Markets: How the Fight Against Monopolies Derailed Globally

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Abstract

This dissertation examines the following puzzle: Why have antitrust (competition) laws and policies failed in their mission to prevent concentrations of economic power globally? Corporate monopolization has grown more acute in the last three decades and created serious problems in consumer and worker protection, economic stability, and democratic representation worldwide. Departing from the previous research in economics and management, which emphasizes recent technological and organizational changes to explain monopolies, my study incorporates economic sociology and international political economy perspectives to consider how the monopoly problem is embedded in formal government actions (laws and policies).

I unpack this question with three interconnected layers of research while offering a transnational perspective. The first empirical layer examines the historical changes in the US antitrust policy through extensive archival research in the Congressional Records. I show that the US antitrust law reforms responding to the 1970's economic and intellectual crises unintentionally created a new competition "policy paradigm" more forgiving of corporate monopolization. The second layer analyzes how these formal and enforcement changes in the US national antitrust law regime have shaped the construction of antitrust laws as a global norm that every country with an open, free-market economy must adopt in the 1990s. I argue that non-Western developing economies did not adopt competition laws by themselves in response to domestic economic pressures to organize markets more efficiently. Instead, the free-trade agreements with competition law articles and the growing number of international organizations promoting competition laws led them to adopt these laws. By diffusing competition laws through

these mechanisms, the US policymakers sought to “level the playing field” for American corporations.

The third and last layer evaluates the adoption and implementation of new competition laws in two important developing countries: Turkey and Mexico. By comparing the Turkish and Mexican competition laws, I found that these laws were designed as “hybrids” of the US and EU competition law models. Even under intense external pressures to conform to these models, the local interest groups and expert professionals in these countries could decide which competition law rules were more relevant to their local contexts. In addition, by compiling and analyzing detailed competition law enforcement data in Turkey and Mexico, I reveal that their competition law implementations were also very different in practice. Relying on 95 interviews with competition law experts and reports of competition authorities, I suggest that these enforcement differences developed due to the match/mismatch between the organizational features of their competition authorities and their juridical court systems. Therefore, policy diffusion cannot ensure that the competition laws adopted by developing countries are implemented similarly in different developing economy contexts.

These three layers of research suggest that not only have antitrust rules failed, but they have also actively contributed to the global rise in monopolization in the last four decades. I argue that antitrust laws can take on various interpretations and enforcement styles, thus leading to very different antitrust policies in practice. Some of these policies prevent monopolization, and some contribute to it. More broadly, this research contributes to understanding how legal institutions that assume similar formal goals and written rules change and diffuse.

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Frequently Used Abbreviations

AAG: Assistant Attorney General

CCE: Entrepreneurial Coordinating Centre (*Consejo Coordinador Empresarial)*

CUA: Customs Union Agreement

DOJ: Department of Justice

FTC: Federal Trade Commission

HSR: Hart-Scott-Rodino Amendment

ICN: International Competition Network

ISI: Import-Substitution-Industrialization

M&A: Mergers and Acquisitions

MCA: Mexican Competition Authority

NAFTA: North American Free Trade Agreement

OECD: Organization for Economic Co-operation and Development

PRI: Institutional Revolutionary Party (*Partido Revolucionario Institucional*)

RPM: Resale Price Maintenance

RP: Robinson-Patman Act

SCP: Structure-Conduct-Performance

SOE: State-Owned Enterprises

TCA: Turkish Competition Authority

TUSIAD: Turkish Industry and Business Association (*Türk Sanayicileri ve Is Insanlari Dernegi*)

UNCTAD: United Nations Conference on Trade and Development

WTO: World Trade Organization

To the memory of our fathers

Fahrettin and Aldo

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1. INTRODUCTION

There has been much discussion in recent socio-economic scholarship on the rising wealth inequality around the world (discussion around Piketty 2017 being exemplary). One important dimension of this phenomenon has recently attracted more attention: the rise of monopolization, especially in the US (Philippon 2019; De Loecker and Eeckhout 2017). Domination by two or three companies has become more common across many sectors of the economy directly affecting consumers, including airlines, phone services, medicines, hospitals, supermarkets, and even movie theaters (Lynn 2009; Stoller 2019). But particular attention has been given to monopolization in the digital economy. A handful of "platform firms" (Culpepper and Thelen 2020), mainly Google, Facebook, Amazon, and Apple, have harnessed tremendous market power by dominating the online marketplaces where buyers and sellers meet and exchange goods and services.

Monopolies have the ability to dictate the prices and terms of sale for specific products, thanks to ineffective competition from other producers. This gives them the ability to extract wealth from their consumers, laborers, and smaller competitors, more so than the average producers in competitive markets. Take the example of the platform monopolies in online and tech industries today. Consumers in this industry do not pay for accessing these digital services with their wallets, but they pay with their data. Consequently, most harmful effects of monopolization are felt in how consumer data is harnessed and monetized. For example, when previously there were multiple social media services, Facebook offered better quality services, data security, and respect for users' privacy. However, since it has become a monopoly,

Facebook rolled back on quality by increasing the number of advertisements and requiring users to grant more access to their private and commercially valuable information (Srinivasan 2019).

Monopolies also hold substantial political power and can protect their wealth and economic advantages by affecting the regulations and laws in their environment. The lack of accountability in how digital platforms collect consumer data became a hotly debated issue when Facebook gave a political consultancy access to its users' data to be used for political campaigns during the 2016 US presidential elections.[1] In addition, monopolistic firms also seem to shape the public distribution of corporate subsidies and tax incentives. Scholars estimate that state and city governments in the US spend between $45B to $90B each year on investment incentives, including direct and indirect subsidies, tax breaks and other financial benefits (Bartik 2017; Mattera et al. 2014; Thomas 2012). The most common beneficiaries of these subsidies are not small and medium-sized businesses but the largest and most profitable corporations, many of which possess substantial market power (Bartik 2005: 141; LeRoy et al. 2015; Mattera 2014). For example, Amazon's announcement to open a second headquarters in 2018 led to fierce competition among a dozen US cities and states to outbid each other. The winning proposals offered the company $4.6 billion in public subsidies and benefits or $92,000 per job.[2]

Although there are some natural, economic reasons why concentrations in market power can emerge, the business decisions and strategies that lead to monopolization are not made in isolation, rather they are shaped by their institutional and legal environments (Fligstein 2002;

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[1] https://www.wired.com/story/cambridge-analytica-facebook-privacyawakening/

[2] "Taxpayer Costs Far Understated, Exceed $4.6 Billion," Good Jobs First Press Release. Nov. 14, 2018. Accessible at <tinyurl.com/hft7cvcj>.

Edelman and Suchman 1997). Some economists suggest that monopolization in platform economies is a natural consequence of economic "network effects" (D. S. Evans and Schmalensee 2013), which means that an increase in users also increases the value of a good or service. However, a closer look at the history of this sector reveals that human design and social institutions also contributed strongly to the emergence and growth of these monopolies. Most directly, the "coding" of digital technologies as capital through intellectual property (IP) rights (Pistor 2020) gives these firms monopoly rights over their products. IP rights have been strengthened in the last three decades through trade agreements – like the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of 1994 – with the argument that they are necessary for incentivizing innovations (Sell 2003). At the same time, the US antitrust policies since the 1980s have allowed these companies to pursue monopolistic strategies (Christophers 2016). For example, from 2004 to 2014, Google spent almost $23 billion to buy 145 smaller tech firms, while Facebook acquired over 80 competing social media and texting service providers, and none of these transactions faced substantial antitrust scrutiny.[3]

This dissertation seeks to explain the global rise in corporate monopolization through a comparative and transnational analysis of antitrust (competition) laws and policies. It investigates the important changes in the antitrust laws and policy, considering why and how they have come about and how they contribute to or challenge the growing monopolization. By focusing on how the monopoly problem is embedded in these formal government decisions, my sociological perspective on this topic departs from the previous research in economics and

[3] https://www.economicliberties.us/our-work/addressing-facebook-andgoogles-harms-through-a-regulated-competition-approach/

management that emphasized recent technological and organizational changes to explain monopolies. Furthermore, even though policymakers in the US and the EU have turned their attention to these issues with increasing public scrutiny over the practices of digital platform monopolies, less attention has been given to the growing monopolization in other regions of the world. My study also extends beyond this exclusive focus on advanced Western economies and surveys the competition policies of developing countries in light of the global interconnectedness of markets and governance institutions.

1. Research Questions

Antitrust laws and policies are designed to protect competitive markets from concentrations of economic power. Once an American idiosyncrasy, these laws can now be found in over 160 countries (Kovacic and Lopez-Galdos 2016). Yet, corporate monopolization has grown more acute in the last three decades and created serious problems in consumer and worker protection, economic stability, and democratic representation all over the world (Jarsulic et al. 2016; Eggertsson, Robbins, and Wold 2018; De Loecker and Eeckhout 2017). These contradictory developments beg the following questions: Why has the global diffusion of competition laws not translated into more control over corporate monopolization? Why have competition laws failed in their mission to prevent concentrations of economic power?

This project offers three interconnected layers of research to unpack this large puzzle. First, I examine the historical changes in the US antitrust policy through extensive archival research in the Congressional Records. Historically, antitrust regulations emerged and expanded

with some redistributive, social, and political goals in the US. The legislators, judges and antitrust agencies argued that market competition should incorporate "greater fairness" for the market actors (Waller 1997) and should disperse economic power to smaller companies and ease the market access of lower-income consumers by reducing the product prices (Fox 1980, 1142). However, a new interpretation of competition laws based solely on "economic efficiency" considerations emerged in the late 1970s (R. H. Bork 1967). In this new antitrust policy, the enforcement of antitrust laws is non-redistributive, neutral and economic-growth oriented. The only aim of antitrust law enforcement is preventing the competition-restricting corporate practices that reduce the aggregate economic output, regardless of their distributive effects (Fox 2016). How did this new interpretation of antitrust policy capture the US antitrust law enforcement? And how did it shape the US antitrust enforcement practices?

Second, I analyze the international diffusion of competition law institutions and policy ideas by looking at Congressional Records, reports of the US antitrust agencies, and reports of the international organizations that promote antitrust laws. The countries with competition laws now include post-communist countries of East Europe (Brzezinski 1993), China and Russia (Kovacic and Lopez-Galdos 2016), South-Asian countries with strong collaboration between the state and large businesses (Brooks and Evenett 2005), and Latin American countries with a strong history of state-led economic development model (Coate, Bustamante, and Rodriguez 1992). Most of these competition laws outside European countries were legislated in the 1990s, which roughly coincides with the global ascendance and diffusion of neoliberal policies- i.e., economic policies that prioritize market exchange over state control. The neoliberal economic development model entails the deregulation of particular sectors of the economy, the

privatization of the SOEs and the opening of the national markets to foreign investors and traders by the liberalization of the state controls over finance and trade (Buch-Hansen and Wigger 2011). The international organizations promoting this model, like International Monetary Fund (IMF) or the Organization for Economic Co-operation and Development (OECD), have argued that the implementation of such neoliberal reforms raised the importance of the laws that establish "the rules of the game by which market actors play" (T. C. Halliday and Osinsky 2006), including competition laws. However, this global promotion of competition laws still remains in tension with the neoliberal policy ideas and the Chicago School critique of antitrust enforcement that approach the state interventions on markets with suspicion. In addition, antitrust laws' global diffusion also restricts the international growth and corporate strategies of multinational corporations and finance capital. Then, how did the acceptance of the Chicago School antitrust approach in the US and the business interests of the time shape the global promotion and diffusion of competition laws and policies?

Third, I look at the adoption and implementation of new competition laws in two important developing countries: Turkey and Mexico. Turkey and Mexico are "upper-middle-income" countries with open economies and trade relations since the late 1980s and have an important place in the world economy as members of the OECD and the G20. They offer ideal sites for studying the diffusion of the EU and US antitrust policies since they have close historical and political ties with the EU and the US. The European and American antitrust law systems have evolved differently on the restrictions they place on monopolies (Djelic 2002; Wigger and Nölke 2007; Kovacic 2008; Geradin 2012; Gifford and Kudrle 2015; Sokol 2016; Ergen and Kohl 2019; Philippon 2019). Although the EU competition laws were influenced by

the Chicago School ideas as well, they have not entirely adhered to its prescriptions and continue to impose more restrictive limits on dominant companies. Differences in the local traditions of legal thought and political-economic relationships between companies and states sustain these law and policy differences (Philippon 2019; Wigger and Nölke 2007). How did these differences between the US and EU competition law regimes impact the Turkish and Mexican national competition laws? Besides these exogenous influences, what other local factors shape the enactment and implementation of competition laws in developing countries? To provide the micro-foundations of this comparative analysis, my research employs a "mixed-method" strategy integrating detailed quantitative antitrust law enforcement data with qualitative content analysis of law and policy documents in their original languages and face-to-face interviews with competition law and policy experts.

These three layers of research suggest that not only have antitrust rules failed, but they have also actively contributed to the global rise in monopolization in the last four decades. I argue that antitrust laws can take on various interpretations and enforcement styles, thus leading to very different antitrust policies in practice. Some of these policies prevent monopolization and contribute to it. I also identify the key policy actors in the US that have played a major role in introducing new standards of interpretation into antitrust laws in the 1970s, then turned these standards into a global norm in the 1980s and 1990s. Lastly, I reveal how two major developing economies have created their own interpretations of competition law and policy under the influence of their domestic economic and political interests, technocratic expertise traditions, and the organizational configurations of their law enforcement authorities. This research, above all,

contributes to our understanding of how formal institutions that assume similar formal goals and written rules change and diffuse.

2. Institutional Change and Diffusion

Institutions can be defined as "the rules of the game" (Pierson and Skocpol 2002) or "procedures, routines, norms and conventions embedded in the organizational structure of the polity or political economy" (P. A. Hall and Taylor 1996). There are mainly two schools of thought in institutional studies: the rational-choice perspective and the historical perspective (Mahoney and Thelen 2009, 6–7). According to the rational-choice perspective, institutions exist because they allow individuals to predict and calculate the consequences of their actions and play important functional roles. From this perspective, institutions change when the needs of society change, and new institutions are created to take on new roles. According to the historical perspective, institutions indicate the political configurations of power. In this perspective, institutions change when the relationships between different power groups are renegotiated or reorganized (Zysman 1984; J. Knight 1992; March and Olsen 2010). Despite their differences, both of these perspectives consider institutions through their official (formal) characteristics and see institutional change as a rare event.

This common perception overlooks the institutional changes that appear in institutions' interpretations and daily practices more frequently. For example, Streeck and Thelen (2005) argue that "gradual transformation" in institutions happens when the institutional actors fail to close the "gaps" between the formal rules and their "implementation or enactment" in practice

(13-14). These gaps emerge because the subjects of the institutional rules look for ways to manipulate or circumvent them to protect their own interests, and there are always some issues with compliance (Streeck and Thelen 2005, 14–15). Similarly, Hacker (2004) suggests that the "shifts in the social context of policies, such as the rise of new or intensified social risks" lead the existing institutions to change their operations without any significant changes to their formal structures. Such gradual institutional changes use the channels of implementation and enforcement, rather than formal law and policy reforms, either due to the existence of some "veto" actors that block these formal changes (Mahoney and Thelen 2009) or because these major policy reforms are more politically taxing and difficult than slowly transforming the orientation and purposes of the existing institutions in practice.

Studies on globalization investigate how institutions diffuse and spread globally but offer limited insights into globally diffused institutions' actual practices. These studies argue that national law and policymakers cannot avoid global influences in the current era of economic and political globalization while creating new institutions. The *competition* between countries to attract increasingly mobile capital investments leads them to adopt laws and regulations more conducive to businesses and investors (Carruthers and Lamoreaux 2016). Some powerful nations (such as the US and the EU) and international organizations (such as the International Monetary Fund (IMF) or the World Bank (WB)) can use the *coercion* of economic threats or benefits to impose their own preferred institutions and laws to other nations (Dobbin, Simmons, and Garrett 2007). This process is complemented by the *learning* and diffusion of institutional ideas (Meseguer 2004), facilitated by the cross-national networks of "epistemic communities" (Haas

1992) composed of intellectuals, experts and professionals.[4] As a result of these forces, similar institutional designs have spread around the world and the legal infrastructure of global markets has been "harmonized" across nations.

However, by focusing on the adoptions of formal institutions, these studies also miss many cross-national variations in institutional implementation. Even the most globally diffused and harmonized institutions, such as national corporate laws (Pistor et al. 2002) and bankruptcy laws (Halliday and Carruthers 2009), demonstrate significant implementation differences. Some researchers have argued that there is a systematic gap between the "law in the books" and "law in practice" in countries that adopt laws under the pressure of global hegemons or international organizations (Berkowitz, Pistor, and Richard 2003, also see Pistor et al. 2002; Halliday and Carruthers 2009). These gaps emerge because, in many cases, there is a lack of local demand and political interest in putting these laws into actual practice. Therefore, the formal adoption of these laws remains as "symbolic adoptions" or "window dressing" (Dobbin, Simmons, and Garrett 2007) to appease international investors or financial institutions without making any real institutional commitments.

Building on these core debates in institutional and globalization studies, this dissertation investigates the interactions between the formal characteristics of antitrust laws and their actual implementations and how these interactions have shaped antitrust law changes and diffusion. Departing from the classic institutional analyses that solely focus on formal institutional design, I highlight the institutional changes that took place in the actual practices and implementations of

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[4] These "constructivist" theories take different names; most importantly the theory of "normative isomorphism" by DiMaggio & Powell (1983) and the "world society" by Meyers and his collaborators (1997).

antitrust laws through the interpretations and enforcement policies of the institutional actors putting these laws into practice. However, unlike the gradual institutional change theories, I suggest that the conversion in antitrust policy practices did not exclude the changes in the formal structures and design of antitrust laws. These different forms of institutional change are not mutually exclusive; but instead, they complement each other. Similarly, while I underline the antitrust law enforcement differences across nations, I also connect these differences to the diffusion of the formal structures of antitrust laws and the minor differences in their formal design that occurred during their legislation in different nations. In other words, these two kinds of institutional variations work together in causing institutional changes and diffusion because they have causally interconnected histories. Sometimes formal variations have to occur first for the implementation differences to emerge, and sometimes variations in implementation lead to variations in formal design. These interconnections suggest the multiplicity of institutional actors involved in the changes or diffusion of institutions.

3. Chapters Outline and Summary of Arguments

The antitrust (competition) concepts are notoriously ambiguous and amenable to different interpretations (Sagner 2006). Even the definition of "market competition" is not stable across countries (Dabbah 2003). Competition can mean both personal rivalry between different producers and structural diffusion of price-making power to multiple producers; choosing one definition over the other has serious implications over the implementation of the competition laws. Competition as personal rivalry can accommodate large oligopolistic companies in the

economy, while competition as anonymous price setting cannot (J. B. Foster et al. 2011). Other essential competition law concepts, such as "market concentration" or "monopoly", are also interpreted differently, even in ways opposite of commonsense. For example, Lee and McKenzi argue that "even companies that have no existing competitor in their markets" do not always act like "standard monopolies" (Lee and McKenzie 2000, 37). There is also no agreement on the proper goals of competition laws. Competition laws can carry different and sometimes opposite institutional goals, such as the redistribution of economic power, protection of consumers, creation of economic efficiency and technological innovation (Aydin and Buthe 2016).

Consequently, the preferences of different institutional actors or in different social contexts can lead to different interpretations of antitrust laws and policy. Strong interpretation differences exist between legal professionals and economists employed in the competition law enforcement. While the former has traditionally defended the close and cross reading of the legal texts and the investigation of "legislative intent" to find the proper interpretations of competition law concepts, the latter has advocated inferring the meaning of these from the competition laws' "goals" and the "effects" in relation to the economy. Similarly, countries with developing economies can interpret competition laws differently than the ones with advanced economies. While most nations with advanced economies chose to guide antitrust policy through economic efficiency and output considerations, some developing countries emphasize "economic and human development" goals in competition law implementation (Aydin and Buthe 2016). The former focuses on the severity of anticompetitive practices in terms of their economic effects. In contrast, the latter concentrates explicitly on creating competition in the "sectors that directly

impinge on the well-being of the poor, in particular essential consumer goods, agriculture [and its inputs] and health care" (Bhattacharjea 2013, 54).

The second chapter of this dissertation connects these different possible interpretations and enforcement practices of antitrust policy with the formal characteristics of antitrust laws. As Hacker argued, "Instead of single-use tools, institutions are usually versatile multitaskers, and this versatility is itself a crucial variable shaping the strategies of actors who wish to change them" (2004, 246). Similarly, antitrust laws have three main tasks or rule areas. They have *egalitarian rules* that limit the *hierarchical coordination* of economic resources between market actors through mergers and acquisitions (M&As), restrictive vertical agreements between producers and their contractors, and the abuses of monopolistic companies. They also have *individualist rules* limiting the *horizontal coordination* through the agreements to share, for instance, production output, information, resources, and clients between economic actors of similar economic power. Lastly, they have *libertarian rules* that try to reduce the *public coordination* by public authorities that distribute the economic resources or organize economic activity based on their political power. I suggest that, while almost all antitrust laws have these three main kinds of rules or functions, the antitrust enforcement actors can pick and choose which areas they would like to prioritize and enforce more strongly depending on their interpretations of the goals or meanings of antitrust. This creates different *antitrust (enforcement) policies,* which signify the differences in the way antitrust institutions shape economic activity. Lastly, in this chapter, I demonstrate the utility of this theorization of antitrust laws and policy with a short analysis applying them to the macro-level, historical changes in the US antitrust law and policies.

In the third chapter of this dissertation, I focus more specifically on one recent episode of antitrust policy change in the US in the 1970s and analyze the institutional actors and forces that created this change. In this period, the US Antitrust policy's emphasis shifted on protecting "consumer welfare", defined as preserving market efficiency and lower prices. The most common explanation of this US antitrust policy change suggests that there was a "paradigm shift" (Kuhn 2012; P. A. Hall 1993) in antitrust under the growing influence of the Chicago School of Law and Economics (Davies 2010; L. M. Khan 2017; Vaheesan 2017; Wu 2018). Chicago scholars proposed that consumer welfare should be the only goal of antitrust policy and promoted reliance on economic expertise (see Bork 1978; Posner 1976), which changed the enforcement policies of the antitrust agencies and the courts (Ergen and Kohl 2019). This explanation fits the broader sociological theories of "policy paradigms" (Hall 1993) and the importance of ideational influences over policy changes (Weir and Skocpol 1985; Blyth and Mark 2002; Campbell 2002; Béland and Cox 2013).

Contrary to the prevailing assumptions in the US legal scholarship, I show that the Chicago School of Law and Economics approach did not gain prominence in the US antitrust policy without formal, institutional changes in antitrust laws. Instead, in responding to economic and intellectual crises with a new wave of "anti-trustism," the US Congress increased the institutional powers of antitrust authorities with several antitrust law reforms, which unintentionally facilitated the rise of this new paradigm. The US Congress can control the agenda of regulatory agencies through oversight hearings, investigations and policy pronouncements, including new legislation (Weingast 1984; Weingast and Moran 1983; McCubbins and Schwartz 1984). It passed two important legislations in the 1970s: The Tunney

Act of 1974 led to a 20-fold increase in fees and a 3-fold increase in prison sentences for criminal antitrust cases. The Hart-Scott-Rodino (HSR) Amendment of 1976 created a notification requirement for companies before completing their mergers and acquisitions (M&As). I show that these legal changes resulted from the reconciliation of two different perspectives on antitrust, one held by Congress and one by antitrust agencies. This finding suggests a "double-paradigm fallacy", a significantly different pathway of policy change than suggested by Peter Hall's classic paradigm shift theory (1993) (also see Blyth 2013). It also corrects the existing social science theories on "gradual institutional change" (Hacker 2004; Streeck and Thelen 2005; Mahoney and Thelen 2009) by showing that gradual and swift forms of change are not mutually exclusive and in some cases can be complementary.

In the fourth chapter of this dissertation, I analyze how these formal and enforcement changes in the US national antitrust law regime have shaped the construction of antitrust laws as a global norm that every country with an open, free-market economy must adopt in the 1990s. Once peculiar to the US and the advanced European economies, competition laws now can be found in every economy (Evenett 2003; GCL 2015). The common explanation for the global acceptance of antitrust laws offered by the international antitrust scholarship and policy circles is the growing international consensus on the benefits of free and competitive markets in the 1980s – also called the "Washington Consensus" or "neoliberalism" (Campbell and Pedersen 2011; Dezelay and Garth 2002; Fourcade-Gourinchas and Babb 2002; Babb 2013). This consensus has led national lawmakers around the world to adopt new competition laws or strengthen their existing laws to protect competition (Gray and Davis 1993; Kovacic 1997; 2001; Gal 2004; D. P. Wood 2005; Kronthaler and Stephan 2007; Buch-Hansen and Wigger 2011; Hazel 2015).

Diverging from this explanation, I argue that non-Western developing economies did not adopt competition laws by themselves in response to domestic economic pressures to organize markets more efficiently. Instead, the exogenous forces of free-trade agreements with competition law articles and the growing number of international organizations promoting competition laws led them to adopt these laws. By diffusing competition laws, the business groups and policymakers in the US sought to alleviate the American companies' growing foreign competitiveness problem in the 1980s and 1990s by "levelling the playing field".

This chapter shows that the Chicago School influence shaped the US promotion of antitrust laws and policy in the 1990s and 2000s in two significant ways. First, as the Chicago School influence reduced the enforcement of antitrust laws on restrictive vertical contracts in the US, these changes led to complaints by the American manufacturers that sought to use antitrust laws to protect themselves from anticompetitive practices of their foreign competitors. These economic interest groups successfully lobbied the US government to change its foreign trade policy from "free trade" to "fair trade" and require the trading partners of the US to adopt antitrust laws that can limit the anticompetitive practices of the competitors of US firms. Secondly, the US did not just promote the adoption of antitrust laws but also tried to diffuse its own *kind* of antitrust (enforcement) policy influenced by the Chicago School of antitrust to the rest of the world, as scientific and technical knowledge through the international network of antitrust authorities created by the US. This kind of antitrust policy places strong restrictions over the horizontal coordination of competitors, even when they are small, but allows the hierarchical coordination strategies of multinational firms and international financial interests; therefore, it is amenable to the growth of multinational corporations and international movement

of capital. These findings suggest that the global expansion of antitrust regulations happened almost concurrently with their contraction under the influence of the Chicago School interpretation, both inside the US and outside in the new antitrust law jurisdictions.

In the fifth chapter of this dissertation, I analyze how Mexico and Turkey have legislated their first competition laws in the mid-1990s. Globalization scholarship expects to find the Mexican competition laws mimicking the US and the Turkish competition laws mimicking the EU competition laws closely. They both signed comprehensive free-trade agreements with their neighbors around the same time, Turkey under the Customs Union Agreement (CUA) of 1995 and Mexico under the North American Free Trade Agreement (NAFTA) of 1994, which have led them to pass a series of legal reforms, including their first competition laws. However, by comparing the Turkish and Mexican competition laws, I found that these laws were designed as "hybrids" of the US and EU competition law models. Although they closely follow the competition law models of their closest trade partners in terms of the strength of the restrictions over monopolies, they do not follow the same models on limiting state actions and instead borrow from the other available model. While the Turkish competition laws address monopolization by private corporations but give permission to the Turkish state in yielding and politically distributing market power, the Mexican competition laws strongly limit the actions of the federal and state governments in shaping market competition, but they are lenient towards market monopolization by large private companies. In other words, despite their similarities to these two models, Turkey and Mexico's competition laws are, in their overall composition, hybrids that play different overall roles in their economies.

This chapter also argues that the businesses and governments' ability to influence policy decisions and the reliance on different expert groups have shaped the Turkish and Mexican competition laws' borrowing from the US and EU models. Even under intense external pressures to conform, the local interest groups and expert professional inside borrowing countries can decide which characteristics of these systems are more relevant to their local contexts. This allows them to select and combine different parts of the globalized institutional models rather than following a single model. As the existing literature suggests, globally-connected professionals often do not act alone in institutional transmission, but they have to form "reform coalitions" (Thacker 1999) or "power blocks" (Guillén 2001b) with the local entrenched political and economic interests. These interest structures were fundamentally different in Turkey and Mexico due to long-term historical developments, which led them to exert different influences over their competition law designs. In addition, the globally connected national expert groups are essential allies to foreign pressures and global norms (Fairbrother 2007; Bockman and Eyal 2002; Fourcade 2009; Miguel A. Centeno and Silva 2016). Therefore, the Turkish government's reliance on lawyers and legal scholars trained in the EU competition laws and the Mexican government's assignment of economists with PhDs in American universities with this duty also shaped how competition law ideas and design features from the EU and US shaped the competition laws in Turkey and Mexico.

In the sixth and last empirical chapter of this dissertation, I evaluate Turkey and Mexico's actual enforcement of competition laws since their legislation in the mid-1990s. The traditional distinction in legal studies between "law in the books" and "law in practice" suggests that there are important "gaps" between the formal requirements of laws and their actual practices

(Edelman and Stryker 2005; T. C. Halliday and Osinsky 2006; G. C. Shaffer 2009). The existing research on the global diffusion of laws have found that such gaps may be even wider in non-Western, developing countries that adopt foreign laws not created by their own economic and political systems (Berkowitz, Pistor, and Richard 2003; Pistor 2002). By compiling and analyzing detailed competition law enforcement data in Turkey and Mexico, I reveal that their implementation of competition laws is indeed very different. In Turkey, the competition authority has pursued a more active enforcement policy against monopolies than the competition authority in Mexico, as suggested by the number of cases sanctioned, the average administrative fines issued, and the sectors of the economy covered. I show that these significant differences in enforcement cannot be explained by the differences in legal statutes, underlying economic conditions, and their enforcement authorities' resources and political autonomy. Instead, I suggest that the differences in the enforcement of competition laws have developed due to the *match/mismatch* between the organizational features of their competition authorities and their juridical court systems. Although both Turkey and Mexico use the international diffused "administrative model" of enforcement for their new competition laws –with the competition authorities sharing responsibility with the courts–, their enforcement systems have produced different outcomes because their competition authorities were set up very differently.

Using 95 interviews with competition law experts in Turkey and Mexico and the annual reports of the Turkish and Mexican competition authorities, this chapter details the main organizational differences between these countries' competition authorities. I show that, in organizing their decision-making process, the Turkish competition authority chose a bottom-up organization, giving vital prosecutorial responsibilities to the authority and substantial autonomy

to case-handlers in their investigation of cases. In contrast, the Mexican authority uses a top-down approach, with authority having considerable room for discretion in pursuing cases and the commissioners, particularly the chairman of the authority, intimately involved in investigating cases. These competition authorities also accumulate expertise through different methods of recruitment and training. In the Turkish competition authority, the recruitment is centralized, open and transparent for the case-handlers, which also receive generous support for pursuing post-graduate training abroad. Conversely, the Mexican competition authority recruits its top-level officials (chairmen, commissioners and administrators leading divisions) from the experienced bureaucrats and technocrats in other parts of the Mexican state, who already hold post-graduate degrees from foreign universities. Lastly, the Turkish and Mexican authorities have relied on economists and economic analyses to a different extent: in Mexico, economists with PhDs have taken the high level of positions (in the commission and as the chairmen) and have their specialized economic analysis division, while in Turkey, there are very few economists with PhDs in high-level positions and also at the level of case-handlers, and the few economists that the Turkish authority had have failed to create for themselves a formalized (institutionalized) role inside investigations.

These different organizational features of the Turkish and Mexican competition authorities have significant consequences for how competition laws are put into practice because they shape the authorities' ability to work with the local courts and juridical traditions. In Mexico, the top-down management of decisions has led to significant procedural errors, which led the courts to repeal the Mexican authority's decisions. The heavy reliance on economists and economic analyses also diminished the Mexican authority's attention to following the procedural

rules of enforcement and further increased the dissonance and distrust between legal practitioners and judges. Conversely, in Turkey, the ability of the case-handlers to shape the decisions of the authority created a strongly formalistic and almost formulaic competition law enforcement style, which minimized the potential frictions with the courts. The absence of economists inside the Turkish authority also allowed it to successfully create close ties with legal practitioners and judges, who at times came to the aid of the authority and supported its active enforcement policies.

In the concluding chapter, I reflect on my research's theoretical and practical implications for understanding the antitrust laws' effects on markets, economic globalization, and institutional diffusion. I also discuss how each empirical chapter contributes to understanding the factors shaping institutional reforms, diffusion, enactment, and implementation. I conclude with a discussion over the future of antitrust policy and what questions remain for future research.

2. HOW DO ANTITRUST LAWS AND POLICY SHAPE MARKETS?

1. Introduction

What are antitrust (competition) laws and regulations? What are their main goals and functions in a free-market economy? How do they shape markets, and how are they, in return, shaped by market and non-market forces? This section tries to answer these questions through a theoretical evaluation, using the conceptual tools of economic sociology for three main reasons. First, as I will demonstrate, the dominant approaches in legal and economic scholarships have failed to create stable definitions of antitrust. On the one hand, the US legal scholarship has sowed more confusion than clarity over antitrust policy's *raison d'être*. The goal of antitrust laws has been exposed to political and ideological disputes that are revived in each generation. The legal definition has also failed to acknowledge antitrust policies' broader and universal appeal. On the other hand, although the economic scholarship on antitrust laws has clearer definitions, these definitions either put too much responsibility on antitrust laws, or too little, which has led antitrust policies to seem constantly behind their idealized versions in practice. Consequently, antitrust laws and policy are perceived as a "paradox" (R. H. Bork 1978) by economic approaches, i.e., they can never and could have never fulfilled their economic promises fully in real life.

A second reason for this theoretical exercise is the inaccuracy of the conventional wisdom, which suggests that the effects of antitrust laws over monopolization should be expressed in degrees. The expectation is that the *more* antitrust laws are enforced, with *stronger*

sanctions, the *more* antitrust laws can help prevent monopolization. However, this conventional account, regularly used in newspaper or tv reports, fails to acknowledge the multiple and qualitatively distinctive effects of antitrust policies over markets. The relationship between antitrust and monopolization is more complicated than a relationship of degrees. More antitrust enforcement does not always translate to more control over monopolization. In fact, as I will discuss shortly, it may even have the opposite of the expected effects.

Third and lastly, the existing definitions do not lend themselves to comparative-historical research on antitrust policy, which is the purpose of this dissertation. Expressing antitrust law and policy differences in terms of degrees does not allow an investigation on the qualitative differences between antitrust policy regimes in different periods of time or in different national jurisdictions. Based on an analysis of the multiple and distinct functions of antitrust, I theorize a typology of antitrust laws and policy that can be used to capture some of these differences. This typology is composed of generalizable ideal types, therefore, and does not presume to represent the messy reality of day-to-day antitrust policy decisions. It cannot explain, for example, the decision-making process that went into each, individual antitrust policy decisions. What it does, instead, is allow us to discuss some of the more "macro-level" causes of significant changes or variations in antitrust policy, such as expert norms and understandings and the power dynamics between economic and political interest groups.

I suggest that the job of antitrust policy is not to protect or create market competition *per se*, because competition has changing meanings and is perceived differently by different policy actors. Its job instead is to limit and regulate economic coordination inside a market economy in the name of protecting competition. This simple inversion of the reference point from

competition to coordination, which are often conceived as opposites but are in fact complements, resolves the problem of lack of stable definition for antitrust policy, and defines it with a universally applicable purpose. It also allows us to reconceptualize the changing and shifting meanings of competition as variations in antitrust policy.

I show that the existing social science studies on economic coordination shows that there are three distinct forms of economic coordination in a market economy that make markets stable and sustainable: hierarchical, horizontal, and public. However, if they are taken to the extreme, these coordination mechanisms eliminate all uncertainty and risk-taking that makes competition between economic agents possible. Therefore, antitrust laws have –what I will call– egalitarian, individualist and libertarian rules that seek to prevent each one of these types of coordination. Because these rules leave substantial degree of discretion and room for interpretation, the antitrust (enforcement) policy based on these rules can vary substantially in each context. These variations in antitrust policy can be expressed in how the egalitarian, individualist and libertarian antitrust rules are enforced.

This analysis takes strong inspiration from the work of a young legal scholar, Sanjukta Paul, who argues that antitrust regulations distribute "coordination rights" across different economic actors (Paul 2020). However, I depart from her account by integrating the social science literature on different forms of economic coordination and systematically analyzing the potential variations in antitrust policy. She also does not discuss the antitrust regulations on public coordination, since this is not a major role of antitrust laws in the US but is necessary to offer a more universally and comparatively applicable definition of antitrust. I also conceive antitrust laws to be more amenable to differences in interpretation and do not suggest that the

original or true meaning of antitrust laws can be found. In doing so, I offer a more sociological definition and categorization that are more suitable for the future social science analyses on antitrust laws and policy.

2. The Limits of the Legal and Economic Definitions of Antitrust

According to American jurisprudence and legal scholarship, antitrust laws exist to prevent monopolization. In this definition, antitrust laws are concerned with the power of economic entities (i.e., corporations, but also association of corporations or even a public entities) to control the prices in a market independent of the actions of other economic entities in the same market. In this conception, markets should have their own autonomous mechanisms that set prices (i.e., "the invisible hand" of Adam Smith). Prices can refer to both output and input prices. For instance, monopsonies are monopolies in the input markets that can control the prices of raw materials or laborers. A market in antitrust law refers to a collection of goods, products or services that can be considered in the same subset of the economy by the consumers' ability to switch between them or substitute one with the other responding to price or quality changes. For example, if consumers regularly switch between laptop and desktop computers depending on prices, laptop and desktop computers are considered in the same market, which means the producers of both kinds of computers are in competition with each other to offer better products and prices.

This legal definition of antitrust casts a wide net on corporate strategies and behaviors, but also limits this net to certain corporations and corporate actions. Monopolization is defined

broadly to not limit antitrust laws to the regulation of pure monopolies, i.e., one economic actor producing the total supply in a market, which exist only under limited circumstance. Antitrust laws are rather broadly interested in regulating "de facto monopolies" (Hovenkamp 2011, 16–17), i.e., economic entities that are not the sole producer in a market, but still can have substantial power to set prices. However, since the landmark decision of the US Supreme Court on Standard Oil Trust in 1911, only "unreasonable" monopolization is accepted within the jurisdiction of antitrust. Scholars interpret unreasonableness as a recognition by courts that some degrees of monopolization always exist in markets allowing some economic entities a degree of control over prices, which is not necessarily harmful. In other words, from a legal standpoint, harm from monopolization is a precondition for its illegality under antitrust laws.

Much of the disagreement in legal scholarship on the nature of antitrust stems from this legal requirement of harm. Harm on whom? To competitors, consumers, workers, or the public in general? And what counts as harm? For example, should antitrust actions be taken when some economic entities struggle to stay in the market due to the exclusionary strategies of their competitors, or should they only intervene when the consumers receive higher prices or low quality of goods? The main approaches in legal scholarship, the *realist* and *originalist* approaches, have offered competing methods of answering these questions. The realist tradition argues that the meanings of laws change according to the necessities and political configurations of time (Tamanaha 2008). However, the legal realists' approach to antitrust is deeply unsatisfying, especially for practitioners. The treatment of antitrust as a shapeshifting law that takes it purpose and functions solely from the political and ideological trends of the day does not give any substantial guidance to courts on how to interpret them. Therefore, instead of the realist

approach, the originalist method has more commonly been used in antitrust legal scholarship. This method tries to find the "true" measure of antitrust harm in the original intentions and motivations of the legislators that created the antitrust laws (Scalia 1988).

However, the originalist method faces some important challenges in interpreting the complex history of the US antitrust legislation. The original antitrust legislation, the Sherman Act, was intentionally written with a degree of "generality and adaptability comparable to that found to be desirable in constitutional provisions" in order to make it a living document that adapts to changing economic and political realities.[5] This also reflects the bi-partisan success of the Sherman Act, which brought together a broad coalition of economic conservatives and progressives that did not share a single point of view on markets and monopolization (see: Peritz 2000; Horton 2017; Berk 2009). Furthermore, the US antitrust law is not a single text, but multiple texts that were prepared and layered on top of one another in different periods of time and by different political actors carrying out different purposes. For example, while most of the legislators in Sherman Act were motivated by the political goals of protecting democracy and consumers from concentrations of private power (Peritz 2000), the legislators of the later acts, such as the Robinson-Patman Act in 1936 and the Celler-Kefauver Act Amendments in 1950, were noticeably more motivated by protecting small businesses (Hovenkamp 2011, 50). As a result, the originalist accounts are deeply divided over the meanings and purposes of antitrust laws, therefore, do not offer stable definitions.

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[5] This is the Supreme Court definition of antitrust laws in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359-360 (1933).

Into this disarray and confusion in legal scholarship, economic theories have injected some degree of certainty and practical guidance. The main contribution of economists to the debate was their introduction of the concept of competition. There is a high degree of consensus among economists that competition in a market economy is natural and desirable (Ergen and Kohl 2020, 2). Most economic theories start with the assumption that markets are naturally characterized by the competitive process (Hayek 1973) through instinctive drives of greed, which, like in the Darwinian theory of evolution, ensures that the best and the fittest economic actors have access to limited economic resources (Ahrne, Aspers, and Brunsson 2015). Competition provides a "constant forward momentum", leading consumers to compete with each for more unique and new products, producers for more innovative and efficient ways of production, and laborers for acquiring better skills (Beckert 2016). Through competition, markets can find the optimum use and distribution of resources among every economic actor, maximizing their utility in the process (Beckert 2009b). Therefore, introducing competition as the main or only goal of antitrust laws made sense to economists.

Although it has now become the commonsense definition of antitrust, largely thanks to the claims of some Chicago School originalist legal scholars (mainly Bork 1967; 1978), the statement "antitrust laws are for the protection of competition" is not supported by the historical facts on antitrust laws' legislation and interpretation. The Sherman Act does not mention "competition" but only talks about protecting "trade". In fact, the Congress debated whether to add "full and free competition" into the language of the Sherman Act, but dropped it after 15 months of discussion and disagreements over what competition is (Peritz 2000, 12). The term competition entered antitrust legislations in the 1910s but mostly in the form of "fair

competition", which suggests a very different understanding of competition than the one assumed in economic theories (Peritz 2000). Later, as the influence of economists and economic theories over antitrust policy increased, in 1958 the Supreme Court defined antitrust law as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade", but still acknowledged the non-economic and political goals of antitrust laws.[6] Only after the dominance of the Chicago School approach to antitrust (which is discussed more extensively in Chapter 3), did the economic definition of antitrust as protection of competition gain prominence.

Another difficulty in defining antitrust laws as "laws that protect competition" is that it leaves much undefined and unspecified. Economists have large disagreements over the conditions that lead markets to become competitive, which also affect what duties they attribute to antitrust laws. Initially, there was the *structuralist* interpretation of competition in economics. This perspective saw competition is a "structural condition", where there are many small buyers, many small sellers and homogeneous products (Scherer 1980; Schmalensee et al. 1989). This idea was formulated and popularized by the Structure-Conduct-Performance (SCP) paradigm and articulated by the highly influential group of Harvard University economists in the 50s and 60s (e.g., Joe Bain, Carl Kaysen and Edward Mason). Under this theory, the structure of the industry determines the competitive conduct of the constituent firms, which then determines their economic performance. They argued that companies in concentrated industries are inefficient, place limits on innovation, create inflationary bias and harm the consumers through

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[6] *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4 (1958).

maldistribution of resources (Waller 2001). From this perspective, antitrust law rules should try to create or maintain the multiplicity of market actors by using merger controls, issuing divestment orders and limiting corporate strategies that create structural barriers on market entry, such as fixing the resale prices with retailer.

The structuralist definition, however, was unrealistically ambitious. The US antitrust system relies on contentious litigation in courts and imposing hard sanctions, like divestments, is difficult through this system. Besides these practical challenges, the structuralist view also proposes a very broad target for antitrust. Market concentrations can happen for various reasons that are not always signs of inefficiency. For example, product heterogeneity (also called "product differentiation") allows producers to find unique niches for their products where they can shield from market competition and raise prices, or some products have the characteristics of creating "efficiencies of scale" in the production process, like oil drilling or railroads, where concentrated markets produce things with higher efficiency due to high initial costs. Consequently, even during the peak of the structuralist influence in the 1950s and 60s, the structuralist economists were unsatisfied with the results of antitrust law enforcement. For example, well-known Keynesian, Harvard economist John K. Galbraith (2007) argued in the late 1960s that the market was "dead" due to high degrees of market concentration and antitrust was a "charade" for failing to prevent it.

Over time, the structuralist view was replaced by a more *behavioral* definition of competition with the revival of classical economic theories in economics. Instead of how many competitors there are in the market, this definition argues that the determinant factor for the competitiveness of a market is the existence or absence of rivalry between economic entities.

"Rivalry" refers to striving for more buyers and vying for more opportunities of exchange (Baker, Faulkner, and Fisher 1998). According to the so-called "contestable markets" theory, rivalry can exist even under highly concentrated, oligopolistic markets, where two or three large corporations control the whole market, in the absence of any regulatory (public) barriers over market entry (Niels, Jenkins, and Kavanagh 2011, 59–60). In this perspective, the role of antitrust policy is not deconcentrating markets, but targeting and disciplining those anti-competitive behaviors that do not conform to the logic of rivalry, mainly the collective agreements to not compete, such as cartel agreements.

While the structural definition of antitrust leads to a wide range of responsibilities for antitrust policy, this behavioral definition, by contrast, attributes to it a very narrow area of responsibility. If market competition is rivalry between competitors, most corporate strategies can be interpreted as rivalrous strategies and removed from the list of anticompetitive behaviors that are regulated by antitrust. Using this conception of competition, the Chicago School of law and economics had criticized what they saw as the "excessive" enforcement of antirust rules under the influence of structuralist paradigm in the 1950s and 1960s and proposed a much more narrowly applied antitrust policy. This is also why, Robert Bork, the most prominent proponent of the Chicago School approach, defined the US antitrust policy as a "paradox" (1978). He suggested that the active pursuit of antitrust policy in the name of protecting competition was attacking the rivalrous strategies of firms and consequently "chilling" the efficient and productive competition between firms.

Neither the representation of antitrust as a "charade", nor as a "paradox" is helpful in creating a stable, realistic, and potentially universally applicable definition of what antitrust laws

are. Economic definitions have not resolved the problems of uncertainty in legal interpretation, and political ideologies continue to shape how antitrust laws are interpreted, not through the definitions of harm, but through the definitions of competition. The debate between the Harvard School and the Chicago School economists over antitrust policy at the end of the 1960s was clearly motivated by their political ideologies and beliefs on the appropriate limits of state actions shape how competition is defined (L. M. Khan and Vaheesan 2017). Furthermore, there is an additional, fundamental problem with these economic accounts of competition, which either disregard social connections and interactions in markets or see them as anticompetitive strategies. As economic sociologists suggest, economic theories conceive market exchange as a "spontaneous" process that takes place among "atomistic" agents (Uzzi 1996). However, various forms of social connections are necessary to bring order and cohesion into markets. Any definition of competition that ignores this fact cannot offer a realistic account of antitrust laws and policies.

3. Antitrust Laws as Regulations Over Economic Coordination

I suggest that a better social science definition of antitrust laws should be based on the recognition that markets only exist when economic agents utilize some social forms of economic coordination to reduce the uncertainty in economic activity. Coordination can broadly be defined as "acting together in a smooth concerted way" (Klein 1997, 326). In any market economy some level of coordination is necessary in order for market actors to "form stable expectations with regard to the actions of other market actors and future events relevant for their decisions"

(Beckert 2009b, 247; also see Fligstein 2002). These stable expectations do not need to be correct, instead, it is necessary that economic actors feel they can form "reasonable expectations" (Guseva and Rona-Tas 2014, 9). Coordination in markets necessitates some intermediation of economic exchange by social connections and organizations. Otherwise, the contingencies in market exchange not only create occasional market failures, but even deter economic agents from participating in it in the first place: buyers may not find the appropriate sellers to sell their products at a profitable price, buyers and sellers may not fulfill the requirements of their contracts and defraud their exchange partners, the product may not have the promised qualities, buyers may not have enough information on alternative offers, and so on (Baker 1984; Geertz 1978; Beckert 2009b).

It is also important to recognize the negative effects of unmediated competition. Competition is a "destabilizing force" for market organization (Fligstein 1996), and markets can only exist and stay stable under "disequilibrium" (Chamberlin 1949; F. H. Knight 1921; Robinson 1934). In the markets under perfect competition, the aggregate demand and supply are in equilibrium and the profits from sales are dangerously close to zero for the producers. In very competitive markets, producers are susceptible to periodic shocks to production and have higher risk of failure. There is also a risk that products can be priced below a profitable rate, which disincentivizes producers from bringing their products to the market in the first place. A typical example of perfectly competitive markets is a wheat market, where the product is almost homogenous and there are numerous small sellers. In real world, social instruments like insurance and government subsidy programs are necessary to ensure that wheat producers are incentivized to produce wheat for the market. As this example shows, some degree of social,

extra-economic organization is necessary to coordinate market exchanges and to bring stability to markets.

However, capitalistic markets cannot allocate resources efficiently solely based on economic coordination and intermediation either. They also need a degree of disconnection and distrust between economic agents, which leads to competitive behavior and all the benefits attributed to competition by the economists. As Frank Knight argues (1921) “zones of unpredictability” are essential to the dynamics of exchange. Social scientists are correct to claim that even free markets require a degree of social (or institutionalized) coordination and certainty to work well, but these markets also require a degree of noncooperation and uncertainty to function through the competition between economic agents. If there is no uncertainty on whether products will find consumers or whether consumers will find products that they desire, there is no risk-taking and there is no competition. Capitalistic markets require that there is a degree of uncertainty, which entrepreneurs can leverage to better each other, and a degree of risk, which clears out some firms, projects and products that do not satisfy consumers. This can happen, for example, in a communist economy where each person is allocated a certain amount and quality of toothbrushes per year, and it is already predetermined which producers will supply how many toothbrushes to the population. If there is no drive to survive, or if survival chances are already pre-determined, then there is also no drive for innovation.

Social network theorists have tried to capture this idea with the theory of “structural holes” (Burt 2009). This theory predicts that economic actors can get ahead of others, not through their existing social connections that coordinate actions regularly, but by leveraging the gaps and uncertainties between different coordinating groups. Those that solely rely on their

networks fall behind, because everyone shares the same information and imitate each other's strategies. In other words, the coordination of economic exchange is only helpful to some degree, and if taken to an extreme, it can suffocate the creative drive and rivalry in the markets. This is why there is a need for antitrust laws and policy.

I argue that the main function of antitrust law is finding the balance between the certainty of social forms of economic coordination and the uncertainty of unmediated economic exchange. Therefore, I define antitrust law as *an institution that limits different forms of coordination in order to create a degree of uncertainty and risk taking in markets.* In the following subsections, I will discuss three social mechanisms for economic coordination –*hierarchical*, *horizontal,* and *public* coordination– by reviewing the previous social science literature on economic coordination. I will also suggest that there are three set of antitrust rules limiting each form of economic coordination: *egalitarian*, *individualist,* and *libertarian* rules.

Figure 1 below graphically represents a market economy with these antitrust rules and summarized my argument. In this economy, all three kinds of coordination coexist and interact with each other in order to create areas of stability and safety for economic agent participating in markets. These forms of coordination are nevertheless surrounded by unmediated market exchange. In this system three kinds of antitrust rules try to shape the structure of markets: The *egalitarian* antitrust rules try to prevent the expansion of the hierarchical coordination inside this economy and the emergence of a monopolistic market. The *individualist* antitrust rules try to limit the expansion of the horizontal coordination mechanisms that could lead to a cartelistic market. Lastly, the *libertarian* antitrust rules try to restrain the public coordination of economic

activity that can lead to the state's coordination of economic resources replacing private enterprise.

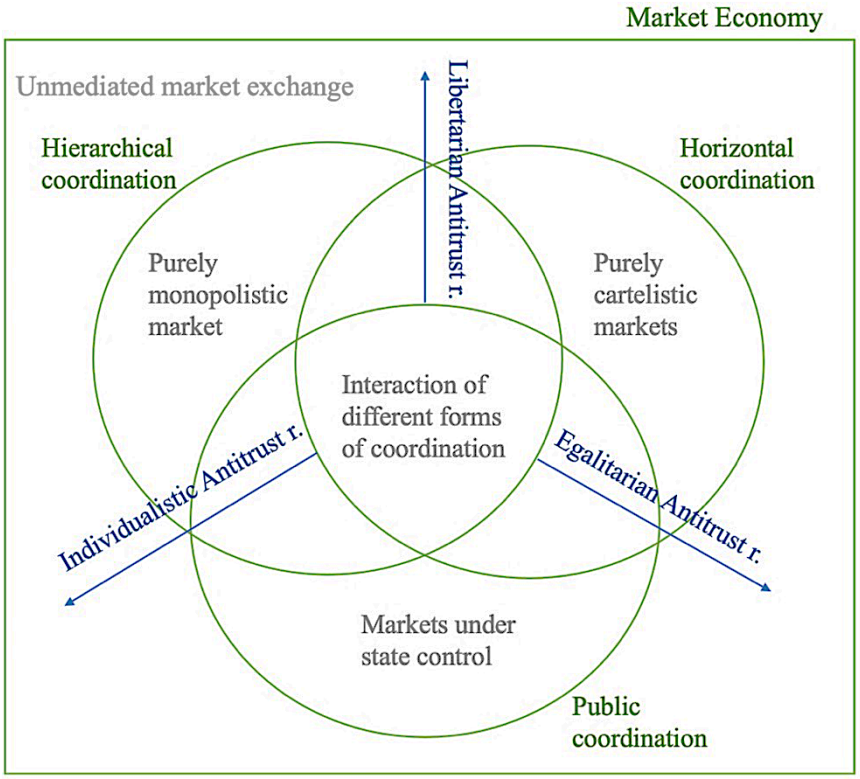

Figure 1: A graphic representation of a market economy and the role of antitrust rules

Antitrust Regulations over Hierarchical Economic Coordination (Egalitarian Antitrust Rules)

Some scholars have argued that antitrust laws were conceived in reaction to the emergence of the first multi-unit, hierarchically organized and centrally controlled corporations in the US in late 19th century, which were legally structured as "trusts" in the absence of modern

and uniform incorporation laws (Chandler Jr 1993; Fligstein 1996; Neuman 1998).[7] By using the legal instrument of trusts, "a number of companies turned their stock over to a board of trustees, receiving in return trust certificates of equivalent value… The board of trustees was then specifically authorized to act as a board of managers with the power to make operating and investment decisions for the constituent companies that had entered the consolidation" (Chandler Jr 1993, 313). The "trust problem", which occupied the center of public discourse in the US from the late 1880s through World War I was generally used to refer to all large, hierarchically organized corporations (Thorelli 1955). The main characteristics of hierarchical coordination of economic activity were laid out by the works of institutional economists such as Ronald Coase (1960; 2012) and Oliver Williamson (1971; 1996), and economic historian Alfred Chandler (1993; Chandler, Hikino, and Chandler 2009) (others in this tradition include Arrow 1974; Alchian and Demsetz 1972; Fama 1980; Jensen and Meckling 1976). These scholars have addressed the central gap in classical economic theories and explained why corporate firms coordinate economic activity through hierarchical and centralized bureaucracies, rather than unmediated exchange in markets.

Coase's transaction costs theory suggests that unmediated market exchange is costly for economic agents, since it involves substantial tasks of planning, adapting, and monitoring. Market participants have to find suitable partners of exchange, inform potential buyers and

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[7] To be clear, there were already state incorporation laws in the US, but these were not very suitable for the creation of large, national corporations. Chandler writes: "The trust was, however, only a temporary expedient. It quickly carne under attack in state and federal courts and in state legislatures. What was needed was a general incorporation law that permitted the formation of holding companies simply by filing a few outline forms and paying a standard fee" (1993; 319).

sellers, spend time negotiating prices and draw up contracts to secure deals, and so on (Coase 2012). Williamson expanded this theory by incorporating potential "hazards" in exchange, such as measurement and inter-temporal errors and weak property rights and institutional protections, which can increase the costs of market exchange even further (1996). To avoid these costs, producers coordinate the economic processes of production and distribution through hierarchical coordination within the firm. This form of coordination eliminates the use of transactions and price mechanisms for the organization of economic activity and replaces them with restrictive and binding contracts that limit the decisions of each economic agent inside the firm (Coase 2012). For example, labor contracts to work for certain amounts of labor replaces purchasing agreements for the products of labor (Fligstein and Dauber 1989). Firms emerge, grow and expand to the extent that these benefits of hierarchical coordination exceed the costs of unmediated transactions in the market (Coase 2012).

Chandler's study on the managerial organization of large modern corporations advanced institutionalist economists' ideas further. He suggests that the multiple operating units that make up large corporations could theoretically function as independent firms, making their own pricing, production and hiring decisions (Chandler Jr 1993). However, inside the same corporate entity, they are bound by law with the pricing and supply decisions made by the central bureaucracy of the firm. As Williamson explains, "The courts will refuse to hear disputes between one internal division and another… [so] the parties must resolve their differences internally" (Williamson 1996, 98). In addition, the internal and ongoing supervision by a salaried managerial class with specialized skills and training make the hierarchical coordination of

economic activity more proficient in solving the problems of coordination than market exchange (Chandler Jr 1993).

The hierarchical coordination of economic activity can also be used to refer to certain kinds of inter-firm relationships (Stinchcombe 1990). The central idea of "resource dependence" in the sociology of markets suggest that, the power of each party in an exchange is proportional to the dependence of the other on that exchange (Pfeffer and Salancik 2003). In other words, in some economic exchanges, one party can depend on the exchange more than the other for survival (Emerson 1962). For instance, if there are few distributors who are willing to buy, producers may be dependent on their distributors to get their product into the market. In these situations, those parties that have less resource dependency can impose hard terms of trade over others, not just by setting the prices, but also deciding how their exchange partners can conduct their business in general. For example, they can impose exclusivity agreements that force their partners to not to sell or buy from others for certain periods. According to agency theory, this creates a "principle-agent" dynamic (Miller 2005; Weingast 1984). Although economic agents retain their legal independence, they lose some of their *de facto* independence through the restrictive agreements they are forced to sign, and the stronger economic agent controls the behavior of the other as its "principle".

The best example for hierarchical coordination between legally separate firms is franchising. In a standard franchise contract, a franchisor licenses out the rights to sell its branded products and services to a franchisee. The franchisee in return agrees to some strong restrictions to use the rights without diminishing its brand value, to provide good quality services, finance the visibility and recognition to the brand etc. These requirements go much

beyond the usual requirements of a transaction contract and establishes an ongoing hierarchical relationship where one party establishes for the other its business practices, such as its accounting rules, training of personnel, information, and reporting responsibilities etc. The literature considers these forms of hierarchical coordination as "hybrid forms" that remain between market exchange and corporate integration into a single firm and shows that they have become more popular since the 1980s (Williamson 1996; Langlois 2003).

However, the complete hierarchical coordination in a market, either through the expansion of a corporation or creation of restrictive ties, would eliminate economic exchange, business uncertainties and risk taking. Although the institutionalist economists suggest that there is a natural efficiency limit to the hierarchical coordination (Coase 2012; Chandler Jr 1993), from a more sociological perspective, hierarchical coordination is not necessarily about economic efficiency. Instead, the organizational models available in their environment (DiMaggio and Powell 1983; Fligstein 1991; Meyer and Rowan 1977), and the competition for power between different corporate actors and levels of management inside the firm (Fligstein 1990; 2002) influence the decisions on coordination. In other words, hierarchical coordination can expand as the dominant form of coordination and eliminate unmediated exchange if it is left uncontrolled. Therefore, antitrust laws have a set of *egalitarian rules* that restrain and limit the hierarchical coordination of economic activity; these are: the rules for mergers and acquisitions (M&As), the rules for vertical restrictive contracts, and the monopolization (also called "abuse of dominance") rules.

Corporate M&As can lead to the expansion of hierarchical coordination in an economy by consolidating economic assets. There are three categories of M&As based on which assets are

consolidated. Horizontal M&As consolidate assets in the same market by the merging of two competitors, e.g., the purchase of one shoe manufacturer by another shoe manufacturer. Vertical M&As cover the consolidation of companies that operate in different but connected markets, e.g., a shoe manufacturer buying a shoe store. Lastly, conglomerate M&As are consolidation of companies in somewhat disconnected markets of economy, e.g., a shoe manufacturer buying a clothing manufacturer. All three types of M&As can lead to the expansion of hierarchical coordination inside the aggregate economy, but horizontal and vertical M&As are especially of concern for antitrust regulations since they expand hierarchical coordination inside the same or connected markets.

In the US, the main antitrust act that restricts M&As is the Section 7 of the Clayton Act of 1914 and it prohibits M&As where the effect "may be substantially to lessen competition, or to tend to create a monopoly." In the EU competition law regime, M&A controls are set through the European Economic Community Regulation 4064/89 of 1989, which prohibits mergers and acquisitions that "create or strengthen a dominant position as a result of which effective competition would significantly be impeded." In both jurisdictions, while the legislators have acknowledged the dangers of the expansion of hierarchical controls over the whole economy through M&As, they have left it to the policy makers and enforcement authorities to decide when competition is severely restricted for the economic agents. The M&A filing and clearance requirements allow the enforcement authorities to make discretionary and regulatory decisions on these transactions on a case-by-case basis, following some internal "guidelines" they periodically publish to announce enforcement priorities and perspectives. These enforcement authorities are the Department of Justice's Antitrust Division (DOJ) and Federal Trade

Commission (FTC) in the US, and the European Commission's Directorate-General for Competition (DG-COMP).

Similar to M&As, vertical restrictive contracts can also expand the hierarchical coordination of economic assets inside a market by restricting the options of economic agents at different levels of the production and distribution process. Previously I described franchising contracts an example of such vertical restrictive contract. Another example would be the "resale-price maintenance" (RPM) agreements. RPM is the "practice by which manufacturers try to set not only their own wholesale prices but also the prices at which their products are offered for sale by dealers and distributors" (Marvel and McCafferty 1986, 1074). RPM agreements eliminate intra-brand price competition between different stores selling the goods of the same manufacturer and allow the manufacturers to control the prices in their market. There are also non-price restrictive vertical restraints, such as trying and exclusivity agreements. Tying contracts force a dealer or distributor to purchase a second product as a condition of obtaining the main product they are interested in purchasing from a manufacturer. Exclusivity agreements require that a dealer or distributor do not buy products from the competitors of a manufacturer. All of these agreements create a dynamic of principle-agent between the manufacturer and its downstream business partners and expand the hierarchical coordination of business activity inside a market.

Such vertical restrictive contracts are regulated by the Section 1 of the Sherman Act, which prohibits "every contract… in restraint of trade". Also, the Section 3 of Clayton Act more specifically prohibits exclusivity and tying agreements. In the EU, Article 101 of the Treaty on the Functioning of the European Union (hereby "Treaty") prohibits agreements between two or

more independent market operators which restrict competition, and various regulations issues by the European Commission and Council specify the limits of these prohibitions. Like the restrictions over M&As, in these legal texts the legislators largely leave it to the discretion of the enforcement authorities to determine which vertical restrictive agreements are eliminating competition. In the US, the federal courts together with the FTC and DOJ can determine which vertical restrictions are prohibited on the basis of complaints and public investigations. In the EU, similar to its regulation of M&As, companies are required to report and ask for clearance from the DG-COMP for their vertical restrictive contracts that are considered threatening to competition categorically. The DG-COMP similarly issues internal guidelines on these categorical prohibitions to inform companies.

Lastly, antitrust rules not only regulate how hierarchical coordination can expand, but also how they can be used. They limit, what antitrust scholars call, the "exclusionary" and "exploitative" uses of hierarchical coordination. The main example of an exclusionary practice is predatory pricing, i.e., a strategy to price one's products from below-cost prices in order to force the competitors to leave the market. This strategy is often combined with discriminatory pricing, i.e., the sale of the same unit of products from different prices, which does not correspond to a difference in production costs (Hovenkamp 2011, 364). Refusal to supply is another common exclusionary strategy. For these exclusionary strategies to succeed in eliminating competition, companies using them must already have some high degree of market power having expanded their hierarchical coordination within a market. There are also exploitative practices that take full advantage of the expansion of hierarchical coordination by increasing corporate markups. The typical example of an exploitative conduct is excessive pricing. If the hierarchical foreclosure of

the market is effective enough, and there are important barriers to entry for potential competitors, corporations can raise prices to a much higher level than the competitive levels. Tying or product bundling can also increase the markups if consumers are effectively forced to buy products that they are not interested in buying.

Section 2 of Sherman Act, which prohibits "monopolization and attempts to monopolize", regulates these exclusionary and exploitative uses of hierarchical coordination. In addition, some sections of Clayton Act and the Robinson-Patman Act of 1936 explicitly prohibit predatory and discretionary pricing. In the EU, the Article 102 of the Treaty defines and prohibits these exclusionary and exploitative practices as "abuses of dominant position". More explicitly than the US laws, the EU laws attribute dominant companies with "a special responsibility" to exercise self-control and make sure that their hierarchical coordination inside a market is not harmful to competition. That is why they restrict excessive pricing, which is not considered an anticompetitive monopolistic practice in the US. Similar to the regulations over M&A and vertical restrictions, the restrictions over these monopolistic or abusive conduct of dominant companies are mostly left to the discretion and interpretation of the enforcement authorities.

Antitrust Regulations over Horizontal Economic Coordination (Individualist Antitrust Rules)

While most historians and legal scholars have described trusts as the pre-modern form of hierarchically organized corporations, most economists commonly share the view that they were only a thinly veiled versions of illegal cartels, i.e., coordination between direct competitors

operating in the same market to fix prices above a competitive level. For example, a popular economics textbook on industrial organizations (Tremblay and Tremblay 2012) states, "A trust is another word for a cartel, which consists of a group of firms in a single industry that come together to increase profits through collusion" (596). Some historians suggest that both arguments are accurate, since a trust in the late 19th century US could be organized both as a single company with the majority shareholders making the controlling managerial decisions, or an association of separate companies with multiple owners coordinating their decisions (Sawyer 2019, 2). Therefore, antitrust laws not only tried to limit and control the hierarchical coordination of economic activity, but also its horizontal coordination.

Economic sociologists have shown the importance of the "horizontal" connections and network ties for the stability and success of market institutions (White 1981; Burt 2009; Baker 1984). Although cartels are commonly described as agreements made by greedy and selfish businessmen, as sociologist Fligstein (1990) argues, their historical purpose has mostly been to curtail some of the most harmful consequences of "cutthroat competition" and unmediated market exchange, such as driving prices to below-cost levels (22). While these sociologists did not use this term "horizontal", what they essentially described was a form of economic coordination that collectivizes economic resources and facilitates economic exchange, not by establishing hierarchical bureaucracies or a principle-agent dynamic, but by establishing horizontal reciprocity and mutual trust between economic agents of equal or similar levels of economic power.[8] While hierarchical coordination is based on the centralization of economic

[8] I define horizontal coordination not in the way it is defined in antitrust policy as coordination between firms operating in the same sector of the economy. Horizontal coordination can take place between actors that take part in

decision making by a managerial class through restrictive contracts, horizontal coordination as described by economic sociologists is based on the collectivization of decision making through loose, flexible and often non-binding agreements.

Going beyond institutional economists and economic historians, economic sociologists emphasize the essential difficulty in creating stable and reliable exchange relationships when each economic agent is acting in self-interested and noncooperative ways (M. S. Granovetter 1973; Uzzi 1996; Powell, Staw, and Cummings 1990). They argue that, only when buyers are confident that they will not be exploited or deceived by their exchange partners will they ever participate in a market economy (Arrow 1974). This confidence and trust cannot be necessarily achieved by the restrictive contracts that create hierarchical coordination and dependencies. Even restrictive contracts can be broken and are costly to repair. Rather, the collective pooling of resource, forgoing of self-interests, and establishment of reciprocity –or as they call it, "interdependency"–between economic agents of equal power can achieve mutual confidence and trust (Powell, Staw, and Cummings 1990). These scholars argue that the collective exercise of "voice" is more effective in resolving problems that affect every partner, than the threat of "exit" (Hirschman 1970; Larson 1992). Also, because people tend to believe in the information that comes from someone they know, horizontal network ties are more effective in transmitting information among exchange partners (Powell, Staw, and Cummings 1990).

These forms of horizontal coordination may seem unstable and fragile due to high risk of free riding and opportunistic behavior by individual members (Kogut 1988). However, they can

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different production processes (e.g. cotton spinning and weaving), so long as the parties to contracts have equal footing in their decisions and trade reciprocally.

still remain strong and resistant to outside pressures. Game theory in economics explains the resilience of horizontal coordination ties by theorizing market exchange as a repetitive activity that is recognized by economic agents and taken into consideration when they make momentary decisions (Giocoli 2008). When economic agents are in horizontal coordination, they know that they cannot cheat or "free ride" on the same group twice; therefore, they have a strong economic incentive to collectivize resources and risk taking, even when that comes at an individual cost – this is also called the "prisoner's dilemma" (Beckert 2009b). Economic sociologists also suggest that economic motivations cannot fully explain why people "suspend" the suspicion of getting exploited in these relationships (M. Granovetter 2000, 40). Instead, the existence of "informal codes of honor" and the normative and cognitive commitment to these codes are essential to the success of horizontal ties (Knorr Cetina and Bruegger 2002).

Besides cartels, other traditional organizations of horizontal economic coordination are trade associations and labor unions (Ahrne, Aspers, and Brunsson 2015), which were the central pieces of the post-Depression Fordist economies. Business associations in the US were instrumental to building close ties and information sharing between businesses that stabilized prices and catalyzed high levels of growth even during the difficulties of the wartime economy (Sawyer 2016). They also continue to help with setting industry standards among their members, which can protect consumers, and represent industry-wide interests in political discussions. Labor associations similarly coordinate worker salaries through collective negotiations with employers and represent laborer interests in democratic politics.

While these traditional economic coordination forms have lost their importance since the 1980s, new forms of horizontal coordination organizations have been created to replace them.

Especially due to the intensification in international competition and increasing pace of technological change, horizontal forms of coordination became more efficient in coordinating economic activity (Adams and Brock 1990). For example, strategic alliances (Gulati and Gargiulo 1999) and partnerships (Powell, Staw, and Cummings 1990) are crucial to the functioning of modern airlines companies today. Mutual assistance programs between small producers, mainly textile firms, continue to give them important cost advantage over their hierarchically organized, large business competitors (Dore 1983). Joint ventures for marketing and research and development (R&D) are commonly used to pool resources for the benefit of multiple companies in an industry (Powell, Staw, and Cummings 1990). In addition, linked ownership structures and common membership among corporate boards continue to create mutual trust and reciprocity between firms (Lincoln, Gerlach, and Ahmadjian 1996).

However, economic sociologists' emphasis on trust and reciprocity in facilitating economic exchange and business success may distract from the fact that, distrust, risks and uncertainty are also important aspects of market exchange (Beckert 2009a). If all economic actions were determined by strong and friendship-like ties between market actors, there would not be competition. As sociologists of social networks have shown, actors need "gaps" in knowledge and their social networks in order to assume strategic positions that allow them to get ahead of others (Burt 2009; M. S. Granovetter 1973). Profit opportunities can only realize when there are important disconnections in networks that the entrepreneurs can "breach" for their own advantage. Therefore, the *individualist* antitrust rules try to create a degree of disconnection and distrust between economic agents, which they can strategically use to get ahead of each other.

These individualist antitrust rules are mainly the anti-cartel rules and rules that restrict similar, but softer forms of horizontal collaborations.

Section 1 of Sherman Act in the US and the Article 101 of the European Treaty, which apply to vertical restrictive agreements, also apply to horizontal agreements that restrict the competitors' actions, including cartels. These are "agreements among competitors to fix prices or output, rig bids, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce" (FTC and DOJ 2000, 3). In both the US and EU competition law regimes, such "hard-core" cartelistic agreements are considered illegal *per se*; that is, they are categorically found against competition, therefore, where cartelistic agreements are detected, they must be prosecuted and sanctioned by the law enforcement authorities. The only difference in the US and EU in this respect is in the sanctions that can be imposed on corporations. In the US, cartelistic agreements are often prosecuted as criminal antitrust cases, therefore, the executives responsible in the creation of these agreements can face prison sentences in courts, while the only sanctions that the EU Commission can impose are administrative and onto corporate entities.

However, antitrust laws also put restrictions over "softer" forms of horizontal economic coordination between competitors, which are left more to the discretion and interpretation of antitrust enforcement authorities. For example, the DOJ and FTC's "Antitrust Guidelines for Collaborations Among Competitors" (2000) states that antitrust laws also apply to joint ventures, trade or professional associations, licensing arrangements, or strategic alliances (p.6). It suggests that these kinds of horizontal collaborations "might harm competition by eliminating independent decision making or combining control or financial interests" (p.13). For example, if trade associations facilitate the exchange of information on prices between their members or

suggest prices to their members, even though they do not directly fix prices, their actions can be considered harmful to competition. Similarly, if professional organizations impose some "ethical codes" on their members that restrict their competition in offering services to clients, they may be considered anticompetitive. Therefore, it is incorrect to say antitrust laws completely ban horizontal coordination of economic activity. There are more common types of horizontal coordination like joint-ventures and strategic alliances that antitrust rules apply depending on how these coordination forms are conceived. This again underscores the discretion given to antitrust authorities in regulating economic coordination.

Antitrust Regulations over Public Economic Coordination (Libertarian Antitrust Rules)

Although the US antitrust laws were originally solely interested in regulating private monopolies and actions of private economic agents, the limitations over the public coordination of economic resources and activity are central to the European Competition Laws. As opposed to the US economy in the late 19th century, the presence of the state inside the market, through for example, state-owned enterprises, public assistance programs, or subsidized credit and tax breaks, was a prominent feature of the European Economic Community (EEC) at the beginning of its unification project in the 1950s. For example, until the early 1980s, the industrial subsidies distributed by each member of the EEC was around 3% of their GDP.[9] There were substantial worries that such strong presence of the state could give some firms (state-owned or private)

[9] http://aei.pitt.edu/3100/

unfair advantages over their competitors, even *de facto* monopoly status (Ronald H. Coase 2012) in the European market.

The "Varieties of Capitalism" (VoC) approach in political science and sociology has theorized some of the important economic coordination roles that public authorities can play in market economies. States can coordinate economic activity by attempting to "improve the competencies of firms, such as their skill levels or technological capabilities, by addressing firm needs with relative precision" (P. A. Hall and Soskice 2001, 47). This kind of public coordination can help in resolving some of the uncertainties and risks created by unmediated market exchange. They can protect market actors from failure or incentivize them to invest in certain parts of the economy that would otherwise stay underinvested through state subsidies, aid programs and tax-breaks. For example, as I have discussed earlier, in almost perfectly competitive markets like wheat, where the profit margins are thin and seasonal droughts increase the risks, public subsidies and grant programs play a fundamental role in bringing producers into the market. Such subsidies alleviate resource dependencies, for not just the receivers of subsidies themselves but also the other producers that purchase the subsidized goods. Public authorities can also provide the necessary research and information inputs, directly or through special grants, into some sectors of the economy, like medicines and healthcare, that require high levels of investment in research to offer competitive products.

In addition, states can also coordinate markets more directly by privatizing and distributing the rights to use publicly owned assets. Without public coordination some markets would either completely fail in reaching consumers or become monopolistic. For example, in most countries private broadcasting is regulated by the states' sale of rights to use publicly

owned radio and television waves. The licensing out through a centralized public authority resolves the problems with overlapping use of waves or consumers not knowing which waves belong to which broadcasters. Another example would be the long-term licensing of the use of ports and terminals to private enterprises. These licenses give *de facto* monopoly rights to the licensees to use the natural economic advantages of owning a transportation hub, and the states' ability to impose contractual obligations on these monopolies is important to restricting their potential abuses. Also, more broadly, states are the "lenders of last resort", not just for financial markets, but increasingly for all markets that face systemic risks of collapse. We observed this most starkly in the large public aids the airlines and hotel businesses received during the Covid-19 pandemic. These kinds of public coordination of markets come with certain contractual responsibilities and restrictions for private businesses, and states continue to play monitoring roles even after licenses or aids are handed out.

The increasing business risks during the great wars had led many countries to turn to public coordination to stabilize their markets in the 1920s and 30s– the rise of communism in the East, fascist governments in Europe and the New Deal in the US are examples of this phenomenon. Even in the US private businesses received substantial public investments and subsidies that sought to stabilize markets local markets. Furthermore, as the literature on "developmental states" suggests (P. B. Evans 2012; Chibber 2002), in emerging market economies where private capital and business experience were in limited supply, the public coordination of economic economy by the bureaucratic apparatuses of states was thought to be a better alternative to market coordination to achieve rapid industrialization and economic growth. The successful examples in East Asia showed that the strategic and selective use of protections,

government subsidies and incentives for investment was able to produce levels of economic growth that were higher than in economies with purely privately organized markets (C. Johnson 1982; Wade 1990; Waldner 1999). Despite successive rounds of market liberalization and the rolling back the state controls, public authorities around the world continue to have enormous coordinating powers for markets.

However, similar to the excesses of hierarchical and horizontal coordination, the immoderate use of public coordination too leads to the elimination of competition. In "state capitalism", i.e., economies where the states control economic enterprise through ownership of productive activity (Musacchio, Farias, and Lazzarini 2014), there is clearly no room for the disconnection or risk-taking that defines competitive behavior. But even lesser forms of state coordination in mostly privately controlled economies can be threatening to competition. According to the public choice theory (see Stigler 1971; Priest 1993) the limited economic resources of states constrain their policy making options and increase their dependency on the economic support of some corporate groups. These groups can then shape states' economic policy decisions through campaign donations, public-private partnership agreements or lobbying on lawmakers. According to this view, the distribution of state licenses, subsidies and tax breaks etc., can all be the channels of giving some economic groups unfair advantages within a market economy. In other words, when companies cannot control markets through horizontal or hierarchical coordination, they can resort to using public coordination to their benefit. This is why antitrust laws have certain rules to restrict the public coordination of economic activity in private market economies.

A significant characteristic of the EU competition law system is the limitations it imposes over the public coordination of markets under its "state aid" rules (see Collie 2000; Ehlermann 1994; Ganoulis and Martin 2001).[10] The Article 87 of the EU Treaty broadly defines illegal "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States." While subject to the interpretation of the EU commission, state aid can encompass all kinds of direct or indirect government assistance, such as non-repayable subsidies, loans on favorable terms, tax and duty exemptions and loan guaranties (Ganoulis and Martin 2001). State aid that goes to research and development, environmental protection and energy, training aid, and aid for disadvantaged and disabled workers, are exempted from this article, since they are thought to promote the common interests of the member states.

The EU Commission and the European Court of Justice enforce state aid rules at the supranational level, and prepare "guidelines, frameworks, communications, codes, and even at times letters" to guide state aid policy (Cini 2001). The treaty requires member states to notify and get a clearance for their national state aids (exceeding €200,000 and not in one of the exempted categories) before they come into effect (Smith 1998; Wolf 2005). The competitors of subsidized firms or nationally subsidized industries can also file complaints at the Commission (Büthe 2007). If the commission finds an aid scheme anticompetitive or distorting the common market, it can require the member states to "abolish or alter" them before they come into effect

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[10] For an overview, see "State aid procedures", European Commission. Accessible at http://ec.europa.eu/competition/state_aid/overview/state_aid_procedures_en.html.

(Büthe 2007). The Commission can even issue "state aid recovery orders", which compels a member state to collect money that has already been dispensed. Each member state is also required to have national state aid rules, that are enforced by their own national competition authorities, which prohibit aid that significantly distorts competition inside their national market following with the enforcement criteria established by the Commission.

Besides the EU, other countries have extended their competition laws to public coordination of economic activity as well. While there are no similar rules that limit the anticompetitive actions of the state or federal governments in the US, and state actions are exempted from antitrust regulations (Fox 1995a; Kovacic 2008), in its place, "competition advocacy" roles of the antitrust agencies (DOJ and the FTC) are used to challenge the political legitimacy of some forms of public coordination in markets (Cooper and Kovacic 2010). In formal submissions, testimonies and reports, the antitrust agencies can argue that the presence of antitrust laws in the US suggest a national policy in favor of competition, therefore, the states have a burden to justify their policy decisions with pro-competitive goals and use them when they are only necessary to target market failures (Cooper and Kovacic 2010, 1581). However, the states' compliance with these suggestions is only voluntary.

As I will discuss in this dissertation (in Chapter 5), Mexico's competition laws, similar to the EU, have expansive rules that restrict state's coordination of economic activity. The Mexican Competition Authority can start investigations on its own or review private party complaints on state actions and can declare them null and void if they distort inter-state trade competition. The Mexican Authority is also responsible with the compliance of the federal and state procurement of licenses. It can check compliance both in the bidding procedure design and the companies

allowed to participate in bidding. Without the competition authority's clearance, governments cannot initiate public bids, and private parties cannot participate in them. In addition, the Mexican competition laws put important limitations on the regulatory decisions of the federal government. In order to impose any asymmetric regulations, such as price caps or access limitations on particular firms and industries, the federal government needs a resolution from the Mexican Competition Authority that justifies these regulations by finding the relevant markets uncompetitive (J. C. Shaffer 2004). Similarly, the federal government has to suspend all asymmetric regulations when the Authority finds that the competitive conditions have been restored (J. C. Shaffer 2004).

4. The Variations in Antitrust (Enforcement) Policy

To sum up, I argue that antitrust laws are institutions that regulate three main kinds of social coordination in order to carve out areas of uncertainty and high risk that generate competitive behavior in a market economy. However, while every national antitrust law, almost universally, has some components of these egalitarian, individualist and libertarian antitrust rules and regulations, as I explained, most of these rules leave substantial room for interpretive differences and enforcement discretion by antitrust authorities. Therefore, I argue that there are wide variations in how antitrust laws are put into practice, which means also great differences how antitrust laws and rules shape markets. This section will discuss different possible forms of antitrust (competition) law enforcement, or what I will call *antitrust (enforcement) policies.*

Policies have different features than laws. They emerge from explicit authorizations in legal texts that allow public decision makers to exercise their discretion in regulating economic activities. They are also broader in application, and they derive their force from multiple areas of law. For example, competition policy is broader than competition laws, and encompasses and shapes other areas of regulations, such as business incorporation and licensing laws that restrain market entry. However, in this section I will use "competition policy" to refer only to the ways that antitrust authorities interpret and enforce antitrust (competition) laws. Policies are also more flexible and prone to changing circumstances and political interests than legal texts. Laws often stay stable for longer periods of time, while the policies they create are subject to periodical changes in administrations. Similarly, while different nations often share the same set of laws due to globalization, their policies of enforcement vary widely. As I will discuss in this dissertation (Chapter 3 and 6), antitrust policies incorporate more local, on the ground influences and local configurations of politics than the texts of antitrust laws, which causes these policy variations.

Based on my conceptualization of antitrust laws, I offer a typology of antitrust policy as an alternative to the conventional account on antitrust policy expressed in *degrees* – i.e., more or less, or weaker or stronger. This account fails to acknowledge the multiple and qualitatively distinctive effects of antitrust that I have discussed above. Instead, I argue that antitrust policy variations can be observed by looking at how extensively (or restrictively) the egalitarian, individualist, and libertarian rules of antitrust are enforced in practice. The restrictiveness of enforcement in these rule areas can be discerned from the established case-law precedence, the enforcement policy declarations of antitrust authorities, as well as the statistics on cases filed,

concluded, and sanctioned based on these antitrust rules. While there are potentially infinite number of antitrust policy variations defined in this way, Figure 2 below represents three potential antitrust policies that are useful in demonstrating how these variations take place. This typology also serves to dispel the illusion that the *more* antitrust laws are enforced (or with *stronger* sanctions) the *more* antitrust laws can help prevent monopolization. My typology instead suggests that more antitrust enforcement does not always translate to more control over monopolization. In fact, it may even have the opposite effect depending on which variety of antitrust policy is implemented.

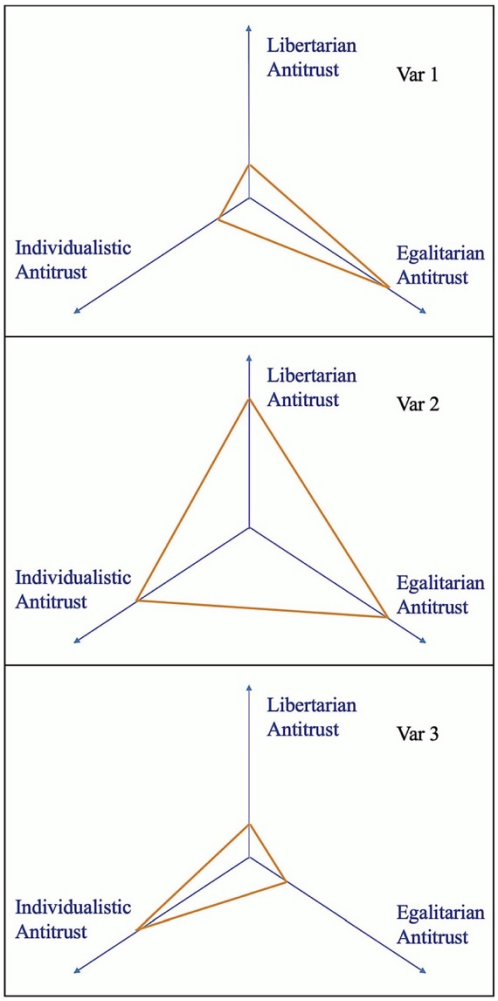

Figure 2: Some examples of antitrust policy variations

The first thing to pay attention in these variations of antitrust policy is that the combination of two or more policy directions expands the regulation of social coordination by antitrust laws but reduces the overall specificity of antitrust policy. For example, a strongly egalitarian antitrust policy (Var 1) focuses on preventing the expansion of hierarchical coordination inside a market economy by targeting the increases in corporations' market shares through M&As or restrictive agreements. This form of antitrust policy applies the other kinds of antitrust rules only in a limited sense when they complement the egalitarian goals. In other words, they only focus on the horizontal coordination among large corporations, and the public coordination that contributes to the growth of large corporations and are not concerned much with the coordination agreements between small producers and the public coordination that helps small businesses. If antitrust policies try to enforce all antitrust law rules equally strongly (Var 2), the policy becomes broader, but also less specific and potentially self-contradictory. For example, this kind of antitrust policy would try to eliminate concentrations of private power by large corporations, but also punish small corporations for coordinating their activities horizontally.

Secondly it is important to underline how removing the egalitarian concern from antitrust policy transforms its potential effects on markets dramatically. A strongly individualistic antitrust with weak egalitarian rules (Var 3) focuses mainly on preventing the horizontal coordination between producers without making any distinctions based on their size and market shares, and targets horizontal or public coordination when they help in the creation of horizontal

ties between corporations of similar size. For example, this form of antitrust enforces the rules against resale-price maintenance (RPM) only when these rules help prevent the coordination of prices between multiple distributors but ignores the same restrictive practices if they are deployed to increase the control of a monopolistic producer over its distributors. It also ignores the public coordination that helps the increasing concentration of private power in large corporations but targets the public coordination that aids in the sharing of information or resources between small companies.

How do changes from one kind of antirust policy to another shape corporate behaviors? Institutional theories in economic sociology suggest that new policies create constraints and incentives for corporate organizations to adopt new business strategies (Fligstein 1990; Dobbin and Dowd 1997). As businesses observe and imitate each other's new strategies (Strang and Meyer 1993), in time they converge on similar organization responses, which are the main effects of policy changes. Therefore, these scholars have suggested that the changes in antitrust policy encourage the adoption of one form of coordination over another, or the creation of a new coordination strategy that can evade the new antitrust restrictions. For example, Dobbin and Down (1997) have suggested that the strong prohibition of cartelistic agreements by the US antitrust policy in the late 19th century had led railroad companies to resort to hierarchical coordination through M&As, leading to a concentration in markets. Similarly, Fligstein (1990) has argued that the antitrust policy against vertical and horizontal M&As during the 1960s had contributed to the creation of the conglomerate business form that expands hierarchical coordination through M&As in distinct sectors of the economy.

However, these accounts understate the consequences of antitrust policy changes over market structures. Economic actors cannot easily switch between different available coordination strategies or invent new forms of coordination to evade the harmful effects of unmediated competition. Their size, as well as the sectors they operate in impose strong restrictions over how they can coordinate their economic activity to create stable and functional markets. Strongly egalitarian antitrust policies make it difficult for large firms operating in the sectors of the economy where size bring economic efficiencies to survive with limitations on hierarchical coordination mechanisms. Similarly, strongly individualist antitrust policies encumber small companies operating in sectors of the economy where small size is more efficient to survive with limitations over horizontal coordination mechanisms. Therefore, when antitrust policies change to reconfigure the legal legitimacy of different forms of economic coordination, these changes not only impact organizational strategies, but also the capabilities of firms of different size and in different sectors of the economy to survive.

Variations in the History of US Antitrust Policy

To illustrate the usefulness of these categorizations for the comparative-historical study of antitrust policy, I will briefly discuss the historical changes in the US antitrust policies in three broadly defined periods. First, between 1915 and 1935, under the influence of the Brandeisian theory of antitrust, the US antitrust policies were solely egalitarian and allowed the horizontal coordination agreements between small companies and the state's coordination of economic activity that protected small corporations go unchecked. Second, as antitrust policy became more

technocratic and came under the influence of economics between 1940 and 1975, it assumed both egalitarian and individualist roles and tried to limit hierarchical coordination and horizontal coordination equally. Third and lastly, with the growing popularity of Chicago School ideas, the US antitrust policy abandoned its egalitarian goals and became solely individualist in the 1980s. This form of antitrust strongly punishes horizontal coordination, especially among small economic agents, and mostly disregards the expansion of hierarchical coordination by large firms, which is also aided by the state aid policies.

I should note that, this account of the US antitrust policy's history diverges substantially from the existing legal and economic accounts. First of all, many legal scholars regard the period between 1915 and 1935 as a period of "repose" in the enforcement of antitrust laws (Fox 1980; Kovacic and Shapiro 2000). However, unlike these scholars, I do not assume antitrust laws' core responsibility or original goal is to prohibit cartelistic agreements categorically; rather, such enforcement focus is determined by the policy discretion of authorities. Secondly, many scholars in economics and law and economics scholarships have suggested that antitrust policy has become technocratic and more influenced by economics in the 1980s, and before then, it was more influenced by political calculations (Davies 2010). However, this account ignores the substantial technocratization and disengagement from politics that took place as early as 1940s (Eisner 1991). Unlike this account, I do not make a distinction between the economic theories of the 1950s and 1960s as "politically-tainted theories", and the economic theories of the 1970s and 1980s as "objective theories" in a positivist sense (see Bork 1977). Instead, I conceive them as different, but equally restricted perspectives on what economic competition is.

In the early years of the Sherman Act (1890-1914) the federal courts interpreted the law in a very limited sense and applied it only to the cartelistic agreements between large companies, especially in the railroads sector.[11] This incentivized the expansion of hierarchical coordination through mergers (Sawyer 2019; Neuman 1998; Dobbin and Dowd 1997). The main test for the Supreme Court's application of the Sherman Act was in the Standard Oil case.[12] In 1911, the Court ruled that the various strategies used by Standard Oil to consolidate its hierarchical control (e.g. use of preferential contracts with railroads, control over the pipelines and predatory pricing for competitors) were illegal, it also established "rule of reason" as the basic method of antitrust analysis (Kovacic and Shapiro 2000). With this decision, although the Sherman Act explicitly prohibited "every" contract in restraint of trade, the Court argued that only "unreasonable" restrictions were sanctionable. This decision infuriated the populist Democrats and the progressive Republicans in the Congress, which saw it against the original legislative intentions behind Sherman Act (Kovacic and Shapiro 2000). In addition, the growing number of trusts in the country made antitrust policy a central issue in the 1912 presidential election where each candidate pitched a different form of antitrust policy for America (Sawyer 2019). Ultimately, Woodrow Wilson, who teamed up with a lawyer from Boston, Louis D. Brandeis to redesign the US antitrust laws and policy, won the elections.

Louis Brandeis had a particular image in mind for the US Antitrust policy. He agreed with the Supreme Court that a literal reading of the Sherman Act to eliminate "every" restriction

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[11] See *United States v. Trans-Missouri Freight Association,* 166 U.S. 290 (1897) and *Addyston Pipe and Steel Co. v. U.S.,* 175 U.S. 211 (1897).
[12] *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

over trade would be useless and self-defeating (Berk 2009, 51).[13] But unlike the Court, he proposed to formulate an explicitly political and egalitarian standard of differentiating between unreasonable and reasonable restrictions. He argued that the main purpose of antitrust laws should be to protect the democratic system and the "industrial liberty" of individuals from the private power of large corporations (Berk 2009, 44).[14] He idealized a decentralized market with independent proprietors and small businesses as the backbone the American society (Wu 2018, 38; Sawyer 2016). With this purpose in mind, he supported the strong enforcement of antitrust rule on hierarchical coordination, while also pleading for the allowance of horizontal coordination between small producers. He argued that the *per se* (categorical) prohibition of price-fixing agreements would defeat the purpose of antitrust policy, since these agreements, if made between small producers, are helpful in limiting "ruinous competition" and counteract large corporations' power (Berk 2009, 57). He insisted that the horizontal coordination between small businesses, especially through trade associations that pool information and educational resources, should be exempt from antitrust (Berk 2009, 60). He also argued that the horizontal coordination between large businesses, often created through interlocking directorates, i.e. the members of one company's board sitting in on another's, should be banned strongly and categorically (Fischer 2015, 315).

Wilson and Brandeis redesigned the US antitrust policy on the basis of these egalitarian-individualistic ideals. The Clayton Act of 1915 explicitly banned corporate strategies that expand

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[13] Brandeis wrote, "Combinations in unreasonable restraint of trade are a grave evil", but there are also many combinations "which do not stifle competition and… greatly advance the common wealth" (Brandeis quoted in Berk 2009, 64).

[14] According to Lena Khan, Brandeis's conception of "industrial liberty" meant the "the ability of citizens to control and check private concentrations of economic power" (L. Khan 2018, 131).

or abuse hierarchical coordination, like the M&As that increase concentration in market shares, tying contracts and predatory pricing, and the horizontal coordination strategies like interlocking directorates dominantly used by large corporations (Berk 2009, 107). At the same time, Brandeis hoped that the creation of the FTC with the FTC Act of 1915 would help in the horizontal coordination of small businesses through uniform cost accounting and benchmarking standards and trade associations (Berk 2009, 148). Indeed, by the 1920s, the FTC was organizing "trade practice conferences" to coordinate business association activities and explicitly supported the sharing of price information between small competitors (Sawyer 2016).[15] At the same time, individual states passed "fair trade laws" that allowed small retailers to coordinate their prices to compete with the large, chain retailers in the 1930s, and the Congress legalized these state laws through the Miller-Tydings Amendments to Sherman Act in 1937. Supreme Court's own decisions also supported the new egalitarian-individualist direction. Until the mid-1930s the Supreme Court decisions mostly reflected a tolerant treatment of horizontal coordination between small companies, which was supported by the governments that preferred to coordinate economic activity through business associations under the wartime and the Great Depression (Kovacic and Shapiro 2000; Sawyer 2019).[16] The Court also allowed the states to coordinate prices and impose price controls on producers within their territory.[17]

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[15] From 1920 and 1932, FTC held 143 such conferences with different industries (Berk 2009, 144). These conferences brought together businesses within a single industry and asked them to voluntarily coordinate information on production, orders and bids, distribution costs and services, and prices (Sawyer 2016).

[16] The Supreme Court decided that *rule of reason* should be applied to horizontal coordination involving cooperative standard setting by trade associations or small proprietors (*Chicago Board of Trade v. U.S.*, 246 U.S. 231 (1918)). The Court also held that sharing information on average costs of production was not necessarily against antitrust laws (*Maple Flooring Manufacturers' Association v. U.S.* 268 U.S. 563 (1925)).

[17] In *Nebbia v. New York* (1934), the Supreme Court affirmed New York State's power to regulate the prices of milk and other necessary items for dairy farmers, dealers and retailers.

By the 1940s, the Wilsonian-Brandeisian antitrust policy had started to wane. A strong anti-cartel political rhetoric emerged during the Second World War and its immediate aftermath, and politicians adopted a more negative view on horizontal coordination and trade associations (Majone 1991). At the same time, the Supreme Court decisions that limited the FTC's antitrust enforcement authority in the 1930s led the DOJ's Antitrust Division to take the leading role in setting federal government's antitrust policy. The new Assistant Attorney in General (AAG) Thurman Arnold (1938-1942) transformed the Division into a technocratic and non-political agency by introducing economic goals, concepts, and analyses into its practices (Eisner 1991, 80; Waller 1998, 1393). This forced an alignment between the antitrust policies of the DOJ and the prevailing industrial organization theories of the time. The so-called "structure-conduct-performance (SCP)" paradigm led by Harvard economists (Mason 1937; Bain 1956; Kaysen 1956) became dominant and strongly shaped antitrust policies in the 1950s and 1960s. This paradigm, as I summarized earlier, conceived market competition structurally and had a negative view of concentrated markets. In addition, the appointment of new Supreme Court judges by Roosevelt in 1941 gave a strong majority to progressive judges that supposed the expansive use of antitrust laws.

The result of these changes was a new antitrust policy that was both egalitarian and individualist, which led to some contradictory results. On the one hand, antitrust policy was strongly against the expansion and abuse of hierarchical coordination through M&As and restrictive agreements. The legislation of the Celler-Kefauver Act in 1950 expanded the restrictions over M&As and even companies with small market shares could face restrictions

over their transactions (Ornstein 1989, 95).[18] In addition, antitrust authorities and courts enforced hierarchical coordination almost as *per se* violations. For example, the Supreme Court issued categorical prohibitions over tying arrangements that conditioned the sale of one product upon the buyer's agreement to purchase a second product[19] and nonprice vertical restraints by which a manufacturer limited its retailers to specific geographic areas[20]. On the other hand, under the influence of economic theories, the individualistic antitrust policy goals were no longer tempered by the protection of the egalitarian goals, and they were also restricted as *per se* violations. With the *United States v. Socony-Vacuum Oil Co* decision in 1940, the Supreme Court went back to using a *per se* definition of horizontal cartelistic agreements.

By the 1970s, the lack of a clear direction in the US antitrust policy had led to a search for a new direction in antitrust policy. As the Chapter 3 in this dissertation will demonstrate, two different perspectives on antitrust policy emerged in this period. Some scholars supported the expansion of the structuralist enforcement criteria to target the expansion of hierarchical coordination more strongly, while the scholars in the Chicago School of Law and Economics tradition promoted a redefinition of antitrust policy that would eliminate the egalitarian direction and the enforcement of rules on hierarchical coordination. These Chicago School antitrust scholars argued that the mixing of social and political goals was preventing a robust antitrust policy and the sole purpose of antitrust policy should be economic. They conceptualized

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[18] E.g., in the 1962 Brown Shoe decision the Supreme Court condemned the acquisition of the eighth-largest seller of shoes by the third-largest shoe seller. The combined firm would only control a mere 7.2% of the retail shoe market nationwide (*Brown Shoe Co. v. United States* 370 U.S. 294 (1962)). Similarly in 1963 Philadelphia National Bank case the merger was blocked by the Supreme Court because the combination of two banks would reach 59% of the banking sector only in the Philadelphia area.

[19] *Northern Pacific Ry. Co. v. U. S.* 356 U.S. 1 (1958) and *International Salt Co. v. U.S.* 332 U.S. 392 (1947).

[20] *U.S. v. Arnold, Schwinn & Co*. 388 U.S. 365 (1967).

"consumer welfare", i.e. the "maximization of wealth and consumer want satisfaction" as the only, true goal of antitrust laws. Following the insights of transaction-cost theory by Coase and Williamson, they argued that to the extent that hierarchical coordination exists, it is efficiency-inducing, and markets can resolve the problems of monopolization naturally by increasing the costs of hierarchical coordination.

For the reasons that I will explain in Chapter 3, the Chicago School of Law and Economics gained popularity in courts and antitrust enforcement authorities and changed the outlook of antitrust policy in the US towards away from egalitarian goals. In *Continental T.V., Inc. v. GTE Sylvania, Inc.* (1977) case, the Supreme Court upheld the efficiency criteria for the first time, citing Chicago School scholars explicitly (Kovacic 2007; Davies 2010). Over the course of 1980s and 90s, the Supreme Court rolled back the strong restrictions over the hierarchical coordination of markets that was created by the case precedence in the 1950s and 1960s. The new Merger Guidelines created by the DOJ and the FTC in 1982 also introduced very softer standards for the M&As that increase market concentration.

However, these changes did not lead to a clear decline in antitrust law enforcement. Rather, the absolute number of antitrust law cases went up in the 1980s and 1990s (Holliday 1998, 82). This was because the declining egalitarian orientation of antitrust policy was replaced by a strongly individualist precept. Consequently, the decline in antitrust cases restricting hierarchical coordination coincided with the large increase in the enforcement of antitrust rules on horizontal coordination (Kovacic 2003, 403). Reagan's Assistant Attorney General William Baxter popularized the idea that cartelistic price-fixing agreements had to be criminally prosecuted, which was the main purpose of antitrust laws. Under his term "from 1981 through

1988, the DOJ initiated more criminal prosecutions than the total of government criminal antitrust cases from 1890 to 1980" (Kovacic 2003, 420). The success rate for the criminal filings of antitrust increased from 71% on average between 1938-1952 to 91% between 1977-1990 (Holliday 1998, 76). Similarly, while jail sentences for antitrust cases were extremely rare until the late 1970s, they multiplied by nearly 10-fold in the 80s (Holliday 1998, 79–80).

The Gallo et. al. (2000) study, summarized below in Figure 1, offers the most comprehensive picture on antitrust law enforcement in the US from data on the DOJ's filing of antitrust cases between 1955 and 1997[21], and clearly shows the differences between the two last periods of antitrust policy. The "restrictions on hierarchical coordination" is a sum of all the cases filed with a charge of "monopolization and the act of acquiring monopoly", "exclusionary practices", including predatory pricing, price discrimination, boycott, reciprocity, tying, misuse of patents and exclusive agreements, and "vertical restraints", including RPM and other restrictions imposed on the distributers, dealers, and franchisees. The "restrictions on hierarchical coordination" includes price-fixing, bid-rigging, fixed terms of sale, base point pricing and market, territory, and consumer allocation schemes.

[21] Gallo et. al. (2000) calculations were based on the method used in Posner (1970), which uses the "CCH Trade Regulation Reporter", commonly referred to as the "CCH Bluebook", as the main data source. To avoid double counting, the authors combine the cases reported at different stages in the proceedings and the cases that were initiated as a result of the same investigation (Gallo et. al. 2000, 76-77).

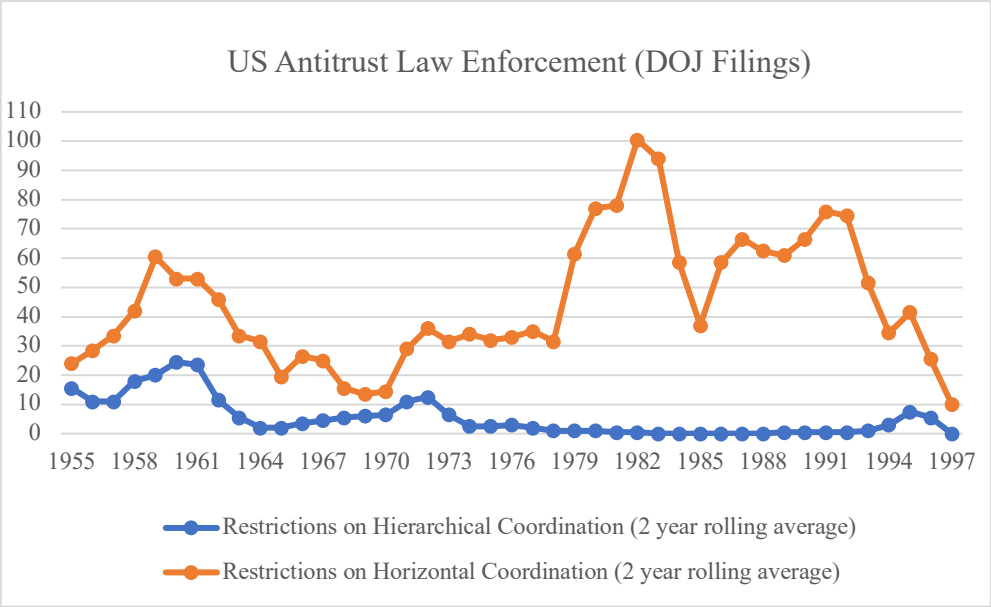

Figure 3: US Antitrust cases filed by the DOJ for different types of antitrust rules (1955-1997), source: Gallo et. al. (2000)

The Figure shows that in the first period between 1955 and 1970 the DOJ filed both complaints on horizontal and hierarchical coordination. While the cases it filed against horizontal coordination were more than the cases on hierarchical coordination, these filing numbers were mostly synchronous (when one increased, the other one also increased). However, starting in the 1970s, and more clearly in the 1980s and 1990s, the enforcement of egalitarian rules that restrict hierarchical coordination has almost virtually disappeared. Instead, the enforcement of individualist rules that restrict horizontal coordination exploded to take over most of enforcement activity by the DOJ.

As Sanjukta Paul (2020) argues, this expansion of the antitrust restrictions over horizontal coordination is largely due to the targeting of small economic agents, even individuals who offer services contractually, by the new US antitrust policy. With the disappearance of labor unions and even deprived of traditional labor contracts, many part-time and gig-economy workers are deprived of any ability to economically coordinate their activities horizontally. For example, when the non-union truck drivers tried to coordinate to negotiate their salaried, they were prosecuted by the FTC in 1999 (p.13), the FTC has also targeted associations of piano teachers, ice skating instructors, and church organists with antitrust cases (p. 15), and more recently, when the drivers sought to coordinate through local municipal ordinances in their negotiations with Lyft and Uber, they were challenged by private lawsuits based on the Sherman Act in 2016 and were forced to compromise (p. 14). These kinds of cases against small economic agents now constitute the majority of cases prosecuted by the antitrust agencies.

5. Conclusion

This chapter tried to provide some answers to some essential questions for the rest of this dissertation: What are antitrust (competition) laws? How are they enforced in practice? How do they shape markets? In trying to find some answers by using the sociological theories on markets, I also disputed some of the main assumptions about antitrust laws and policy in commonsense and legal and economic scholarships. First, I have challenged the notion that antitrust laws and policies are by definition and universally against monopolies and monopolization. I have shown that when the egalitarian rules of antitrust laws are not enforced

strongly and instead the individualist rules are prioritized, the overall role of antitrust policy is not to reduce the power of monopolies or counteract against monopolization by large corporations. In practice, it works towards the opposite goal, by diminishing the coordination abilities and survival capability of smaller economic actors and allowing most hierarchical coordination strategies of large firms to shield themselves from competition. Therefore, *more* antitrust law enforcement does not necessarily mean *more* control over monopolization. Instead, the way antitrust laws shape markets should be observed by looking at the variations in their (enforcement) policies.

Secondly, I have discussed the definition that antitrust laws and policy are for the protection of competition and demonstrated the limitations of this definition. One important limitation is that the understanding of market competition is contextual and varies by time and location. Therefore, this definition hides away the multiple roles that antitrust laws play in the economy and hides away the variations that antitrust policies can have. Instead, I suggest defining antitrust laws as an institution that limits different forms of coordination in order to create a degree of uncertainty and risk taking in markets. This definition is more in line with the essential insight in sociological theories of markets that suggest economic coordination –in its hierarchical, horizontal and public forms– is necessary for the stability and functionality of markets, and purely competitive markets cannot (or should not) exist. My definition also resolves the problems with the economic definitions of antitrust that assign either a too expansive or too restrictive role to antitrust laws, which lead them to always fall behind of their idealized definitions.

I have also tried to suggest the usefulness of my definition and categorization of antitrust laws and policy for comparative-historical research with a brief overview of the US antitrust history from this perspective. I have argued that the US antitrust policy started at a strongly egalitarian direction (1915-1935), moved to a generalist view with both egalitarian and individualist goals (1940-1970), and lastly, adopted a strongly individualist goal without much concern for the enforcement of egalitarian antitrust rules (1980-ongoing). These categorizations are ideal types that do not try to represent the day-to-day decision making in antitrust policy. Rather, these categories serve to analyze the broad changes or variations in antitrust policies across space and time. This way, we can start to ask questions on what historical, political, economic and societal factors lead to long-term changes or variations in antitrust policies. The following chapters of this dissertation will each try to analyze the causes of these broad differences.

3. THE SHIFT IN US ANTITRUST POLICY

"Reform of substantive antitrust policy cannot be achieved without an understanding of critical pressure points. Expansion or alteration of the role of any of the participants in the process may have consequences not readily perceived." (Thomas Kauper, 1978)

"I really prefer living in California. I would not be here unless I intended to enforce the antitrust laws very, very vigorously" (William Baxter, 1981)

1. Introduction

On July 30th, 2020, the House Judiciary Antitrust Subcommittee invited the CEOs of four flagships of the US digital economy, Google, Facebook, Amazon and Apple, to testify in relation to their alleged monopolization of their markets. The Congressmen tried to corner the CEOs with their questions, armed with the documents collected by the public antitrust agencies. Besides a few potentially trial-worthy revelations, the main takeaway from these hearings was the undeniable role the US Congress in guiding the US Antitrust policy. The Congress used to hold investigations on previous corporate giants, like the GE, IBM, and Du Pont regularly in the 1950s and 1960s, but such hearings have been rare in the last three decades. Those were the times the antitrust agencies, the Department of Justice (DOJ)'s Antitrust Division, and the Federal Trade Commission (FTC), and the federal courts pursued a strict interpretation of

antitrust laws, focusing on preventing the concentration of economic power in the hands of a few corporations.

Since the late 1970s, however, the US Antitrust policy has been in decline, with the courts and the antitrust agencies having shifted their attention to protecting the "consumer welfare", defined as the preservation of market efficiency and lower prices. This shift in focus allowed many of the monopolizing strategies of corporations, such as merging with or acquiring other competitors in the same market, signing restrictive contracts with the distributors, or selling below-cost to push the competitors off the market, to go on. Some research suggests as a result of this, monopolization has risen in the US to unprecedented levels, not just in a few high-tech industries, but in almost all sectors of the US economy (Furman and Orszag 2015; De Loecker and Eeckhout 2017; 2018; Eggertsson, Robbins, and Wold 2018; Jarsulic et al. 2016). Once the only country in the world with a strong antitrust system, the US has now fallen behind newer jurisdictions in controlling monopolization (T. Clark 2016; Fox 2006).

While monopolization in the US has created serious problems in consumer and worker protection, economic stability, and inequality, and even in democratic representation narrowed by the influence of money in politics, sociologists have completely ignored the recent monopolization and antitrust issues. But scholars in other disciplines have advanced three main explanations for the changes in the US Antitrust policy. The most common explanation suggests that there was a "paradigm shift" (Kuhn 2012; P. A. Hall 1993) in antitrust under the growing influence of the Chicago School of Law and Economics (Davies 2010; L. M. Khan 2017; Vaheesan 2017; Wu 2018). Chicago scholars proposed that consumer welfare should be the only goal of antitrust policy and promoted reliance on economic expertise (see Bork 1978; Posner

1976), which changed the enforcement policies of the antitrust agencies and the courts (Ergen and Kohl 2019). This explanation fits the broader sociological theories of "policy paradigms" (Hall 1993) and the importance of ideational influences over policy changes (Weir and Skocpol 1985; Blyth and Mark 2002; Campbell 2002; Béland and Cox 2013). Other scholars have emphasized either corporate lobbying (Philippon 2019) or conservative political ideology (Hovenkamp 2018, 600; Fox 1980, 1152) to explain the antitrust policy change.

However, these explanations all focus on the judicial or the executive (through the FTC and the DOJ) control over antitrust policy, ignoring the third branch of government, the US Congress. As we saw in the recent tech hearings, Congress can control the agenda of regulatory agencies through oversight hearings, investigations and policy pronouncements, including new legislation (Weingast 1984; Weingast and Moran 1983; McCubbins and Schwartz 1984). Historically, Congress has typically supported a more interventionist antitrust, which would undoubtedly be a problem for antitrust agencies and the courts if they decided to undermine it. In fact, the assumption in the literature that antitrust policy changed "without a single revision of antitrust laws" (Ergen and Kohl 2019) is not correct. Congress passed two important legislations in the 1970s, which interestingly expanded the scope and punitiveness of antitrust policy going contrary to the changes made by enforcement authorities. The Tunney Act of 1974 led to a 20-fold increase in fees and a 3-fold increase in prison sentences for criminal antitrust cases. The Hart-Scott-Rodino (HSR) Amendment of 1976 created a notification requirement for companies before completing their mergers and acquisitions (M&As). Therefore, rather than simply asking how the Chicago School or business and ideological influences have shaped the US antitrust policy, we should ask how these influences could overcome the potential resistance from the

Congress, and what did these seemingly contradictory legislative changes mean for the long term change in the US antitrust policy.

Using original archival data from Congressional debates and with an in-case comparison of the antitrust legislative proposals in the 1970s, this chapter shows that the Congress' policy position was not a reflection of its representation of electoral constituents, but its commitment to a more radical implementation of the old "structuralist" antitrust paradigm under the pressure of rising crises of conglomerate mergers and increasing inflation in the 1970s. This was in sharp contrast to the rising importance of the Chicago School paradigm inside the antitrust agencies, which is revealed by their dramatically different perceptions of policy related economic crises and solutions. Nevertheless, the Tunney Act and the HSR Amendment could successfully reconcile these paradigms and were supported both by Congress and the antitrust agencies, although for different reasons and expectations. Business pressures and conservative presidents played only limited roles. However, these legislations also significantly increased the control of the antitrust agencies over antitrust policy *vis a vis* the Congress, allowing them to reduce antitrust enforcement later on, which was not the original intention of these legislations.

These findings suggest a "dual-paradigm fallacy", a significantly different pathway of policy change than suggested by Peter Hall's classic paradigm shift theory (1993). His theory predicts that the competition between the old and new paradigms is resolved by the failures of the old paradigm in devising policy solutions and the success of the new paradigm's recommendations (Blyth 2013). I instead argue that both the old paradigm and new paradigm can declare success over the same policy reform proposals, which they interpret from different perspectives. However, one major caveat of such paradigm reconciling reforms is they rearrange

the balance of power between different policy actors by giving the actors who propagate new paradigms new institutional capacity, which they can then use as leverage that to establish the dominance of their own paradigm. In other words, policies can change through realignment between the old and new paradigms for a brief transitional moment. This theory also corrects the existing social science theories on "gradual institutional change" (Hacker 2004; Streeck and Thelen 2005; Mahoney and Thelen 2009), by showing that gradual and swift forms of change are not mutually exclusive and in some cases can be complementary.

This chapter will first summarize the existing explanations for the US Antitrust policy shift and examine what they are missing by ignoring the role of Congress and its legislative decisions. Second, I will outline three possible models of antitrust policy change that would incorporate Congress as an antitrust policy actor, based on different configurations of power and policy positions in the 1970s. Third, I will discuss my data and methods, elaborating the benefits of using an in-case comparison of successful and failed antitrust legislative proposals to test my hypotheses. Fourth, I will examine antitrust policy's intellectual and economic crises in the late 1960s and early 1970s and demonstrate the deep paradigmatic divide in the antitrust policy field. The fifth section will investigate why four main legislative proposals to overcome these crises succeeded or failed. Lastly, I will briefly discuss the aftermath of these legislations and conclude with a summary of empirical and theoretical contributions.

2. Explanations of US Antitrust Policy Change

Once politically salient, powerful and regularly used, the US antitrust laws have lost their relevance to managing the economy and controlling market power concentration since the late 1970s (Fligstein 1990; Davies 2010; L. M. Khan 2016; Wu 2018; Ergen and Kohl 2019). Because Sherman Act was written almost like a "constitution", having broad and abstract articles, its interpretation and meaning could change over time (Waller 1998). Some Supreme Court antitrust decisions in 1977 first signalled the adoption of more demanding enforcement criteria.[22] However, the shift in antitrust enforcement was most clear under Reagan's Assistant Attorney General (AAG) in charge of Antitrust William Baxter (Mueller 1984; Pitofsky 2008; L. M. Khan and Vaheesan 2017). In the early 1980s, The DOJ and the FTC dropped major monopolization cases against AT&T and IBM and allowed megamergers and highly leveraged buyouts in oil, airlines and banking sectors to go through (Eisner and Meier 1990). The new "Merger Guidelines" in 1982 reduced the restrictiveness of merger controls (Davies 2010). Agencies even began to actively advocate for lenient enforcement or nonenforcement in antitrust cases by filing *amicus curiae* briefs in private plaintiff initiated cases (Mueller 1984).[23]

As a result, dominant firms' strategies excluding smaller competitors and preventing new entries are not as frequently punished or prosecuted by the US antitrust system.[24] For example, predatory pricing, a strategy of using aggressive price cuts to eliminate economic rivals, is commonly ignored by the US antitrust authorities, although it has been rampant in industries like

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[22]For example, in the GTE Sylvania (1977) the Supreme Court cited Chicago Scholars for the first time and looked for "demonstrable economic effects" of the conduct as evidence (Kovacic 2003, 398).

[23]Although private plaintiffs can also file antitrust cases, their likelihood of winning is already decided by the enforcement policies set by these public authorities (Kovacic 2003).

[24]I use "dominant firm" or a "monopoly" interchangeably, by which I mean corporations that have substantial control over the price, output, and investment in an industry.

the airlines and pharmaceuticals (Elzinga and Mills 2009). Other potentially competition-restricting conduct, including exclusive dealing agreements, refusal to supply (boycott), tying of products, price discrimination, and vertical restrictions, such as resale price maintenance agreements (RPM) are also rarely penalized. These were not temporary policy changes. Long-term antitrust enforcement data indicate that there was a "structural break" or "dramatic shift" in antitrust enforcement policy (Holliday 1998; Gallo et al. 2000; Ghosal 2011; Kades 2019). Figure 1 below shows the civil antitrust lawsuits filed by the DOJ's Antitrust Division- these cases are the main component of antitrust law enforcement dealing with monopolies and their abuses. Despite some temporary comebacks in the 1990s, the antitrust law and policy never had a proper return to limiting monopolization.

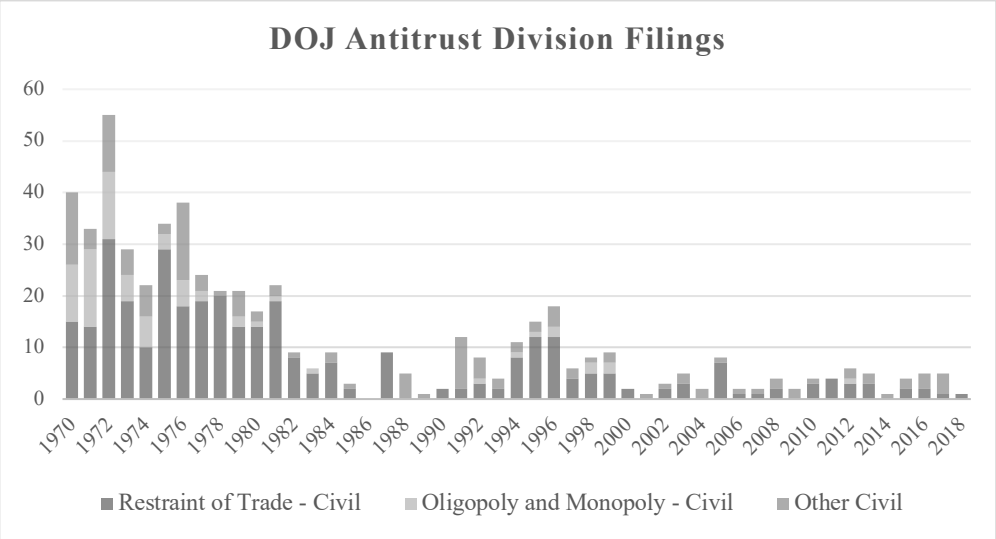

Figure 1: DOJ Antitrust Division's Civil Lawsuits dealing with monopolization, estimated based on the DOJ's "Workload Statistics"[25]

[25] Available at https://www.justice.gov/atr/division-operations [last accessed on August 1st, 2019].

There are three main theories explaining the shift in the US Antitrust policy. The most common is the change in antitrust goals under the influence of the Chicago School of Law and Economics scholarship (Davies 2010; L. M. Khan 2016; L. M. Khan and Vaheesan 2017; Wu 2018; Sawyer 2019). A number of prominent scholars in the University of Chicago Law School (mainly Robert Bork and Richard Posner) targeted what they saw as "extensive confusion" in antitrust enforcement (Teles 2008; Posner 1987). They argued that the use of numerous and often contradictory social and political goals in enforcement was intervening in the making of a robust antitrust policy. This idea was most powerfully expressed in Robert Bork's influential book *Antitrust Paradox* (1978), which depicted antitrust as a "policy in war with itself". Instead, the only and true goal for antitrust was "consumer welfare", i.e. the "maximization of wealth and consumer want satisfaction" (Bork 1967; 1978; Posner 1976).

The Chicago Scholars argued that the existing enforcement of antitrust was erroneous because it relied on faulty and outdated economic theories (Posner 1979). They insisted on using neoclassical economic theory to examine the anticompetitive effects of corporate practices and to guide antitrust decisions (Hovenkamp 2018). They suggested that many business conducts previously assumed to be anticompetitive were, in essence, efficiency-inducing and competitive (R. H. Bork and Bowman 1965). For example, exclusionary practices like exclusive dealing and tying were, in fact, "either competitive tactics equally available to all firms or means of maximizing the returns from a market position already held" (R. H. Bork and Bowman 1965, 366). There was a strong assumption on the inherent efficiency-maximizing mechanisms of the

market and that the monopoly problem can be naturally resolved by the market in these suggestions (L. M. Khan 2017, 974).[26]

The Chicago School ideas created a "revolution" in Antitrust academia. The "structure-conduct-performance" (SCP) model of market competition formulated by Harvard economists and turned into popular legal theories by Harvard law scholars like Carl Kaysen and Donald Turner (also leading the DOJ Antitrust Division in the 60s) suggested that market concentration (i.e. low number of competitors in a product-market) creates anticompetitive business behaviors that harm competition (Kovacic 1989, 1413). This was recognized as the "structuralist paradigm" in antitrust and dominated the field until the 1970s. However, the early 1970s, these scholars silently changed their position and adopted the Chicago School-like efficiency criteria and cost-benefit analyses in their writings, signaling the dawn of a new paradigm (Hovenkamp 2018).

The influence of the Chicago School approach was especially strong over the DOJ Antitrust Division and the FTC. Eisner (1991) shows that the presence and the power of economists inside the FTC and the DOJ increased since mid-1960s, which made these agencies more receptive to Chicago School ideas (also see (Davies 2010; B. D. Wood and Anderson 1993). At the same time, the profile of the antitrust attorney also changed. It became essential that they "think a bit like an economist and develop an economic intuition" (Niels, Jenkins, and Kavanagh 2011, 6). As Robert Bork himself stated, the changes inside the antirust agencies created by the Chicago School influence allowed AAG William Baxter to implement enforcement policy changes that already had widespread support (R. H. Bork 1985, 25).

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[26] This is related to the "contestable market" assumption commonly used in industrial organizations (IO) economics (Niels, Jenkins, and Kavanagh 2011, 108).

This explanation resonates well with general social science theories that connect ideas and policies (P. A. Hall 1993; Weir and Skocpol 1985; Blyth and Mark 2002; Campbell 2002; Béland and Cox 2013). Hall's theory of "policy paradigm" (1993) is one of the most prominent models of policy change, suggesting that ideas transform policies by affecting the dominant frameworks and standards used by policymakers when analyzing and conceiving solutions to problems. Some scholars have specifically identified the influence of the Chicago School of Economics as an important force in policy changes around the world (Babb 2013; Dezelay and Garth 2002). An extension of this theory has emphasized the importance of economists in bridging intellectual and policy trends (Bockman and Eyal 2002; Fourcade 2006; Babb 2004). For example, the domination of the efficient markets hypothesis in finance and real business cycle theories in macroeconomic policy exerted important influences over policymaking (Reay 2012).

The second and potentially complementary approach attributes the shift in the US antitrust policy to proactive lobbying and campaigning by business, especially big business groups. For example, Philippon's recent book argues that weaker antitrust policy towards monopolies was a result of corporate lobbying at the antitrust authorities, which have been increasing in the US since the 1980s (2019, 9 & 151). Using the European competition law system as the unobserved counterfactual, he estimates "a doubling of lobbying expenditures to the DOJ and FTC reduces the number of cases in a given industry by 9 percent. This is a sizable effect, considering that such lobbying nearly tripled from 1998 to 2008. If [these] estimates are correct, increases in lobbying can thus account for most of the decrease in enforcement in the US." (Philippon 2019, 173).

Another potentially complementary perspective points at the election of conservative Presidents. This account typically assumes that "pro-consumer" Democratic presidents pursue stronger enforcement policies while "pro-business" Republican presidents would be less stringent in enforcing antitrust (see a recent news article Tankersley 2020). However, most studies found no correlation between the political party affiliations of the US Presidents and antitrust enforcement patterns (Posner 1970; Gallo et al. 2000; Holliday 1998). Nevertheless, some suggest that antitrust became a partisan issue only since the 1970s. They point out that the changes in Supreme Court's approach coincided with the shift from the liberal-leaning "Warren court" to the conservative-leaning "Burger court" after four appointments by President Nixon (Hovenkamp 2018; Fox 1980). The judges appointed by the Republican presidents used Chicago School ideas more commonly than their more liberal-leaning peers, which shows that ideational diffusion was mediated by political identities (Hovenkamp 2018, 600; Fox 1980, 1152).

Despite these differences, all of the existing explanations of the US antitrust policy change focus on the position of the courts and the antitrust agencies and underline that the antitrust policy change happened "without making a single change to antitrust laws" (Ergen and Kohl 2019, 259; Kovacic 2003). This enforcement-based change narrative was recently theoretically formulated in the institutional studies in social sciences as a "gradual" form of change (Streeck and Thelen 2005). These "silent" changes can take the form of "drift" or "conversion", and result from the blocking of more swift forms of institutional changes by the "veto" actors like the Congress (Hacker 2004; Mahoney and Thelen 2009). However, the omission of Congress and its legislative powers contradicts the literature that describes Congress' significant power to oversee and overrule enforcement authorities (McCubbins and

Schwartz 1984; Ferejohn and Shipan 1990). Congress can make legislative amendments, block the Supreme Court nominees selected by the President, and influence the enforcement policies of antitrust agencies through oversight and appropriation hearings, congressional investigations and confirmation hearings of agency heads (Weingast and Moran 1983).

By the 1970s, two subcommittees in each chamber of Congress had emerged as strong proponents of antitrust policy: the "Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary in Senate" and "Antitrust Subcommittee (Subcommittee No.5) of the Committee on the Judiciary in the House of Representatives."[27] They were composed of senior and high-ranking members of both political parties. For example, the chair of the House Antitrust Subcommittee also chaired the House Committee of Judiciary. In the 50s, 60s and 70s, these subcommittees regularly held oversight and investigation hearings to advocate for more enforcement of antitrust on large corporations and sponsored the main antitrust law amendments. The Celler-Kefauver Act (also called the "Anti-Merger Act") of 1950, which created a more robust M&A control system, was prepared and sponsored by the two chairmen of these subcommittees.

Through these subcommittees, Congress was an effective "veto actor" (Mahoney and Thelen 2009) over antitrust agencies' attempts to reduce enforcement. For example, it rejected various different legislative proposals that would have instituted the Chicago School recommendations in the 1970s and 1980s, and President Regan's nomination of Robert Bork, the most prominent representative of the Chicago School of antitrust, to the Supreme Court in 1987.

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[27] Renamed "Subcommittee on Monopolies and Commercial Law of the Committee on the Judiciary" in 1973.

Congress also picked fights with the DOJ and the FTC. In 1983, the DOJ and FTC's attempts to soften the enforcement of RPM cases through *amicus* briefs infuriated the Congress and led it to pass a joint resolution in the emergency spending bill in 1983 that stated "no funds appropriated for the Department of Justice or the FTC shall be used to overturn or alter the per se prohibition against resale price maintenance in effect under the federal antitrust laws." (cited in Seiberling 1984). The agencies had to stop filing these amicus briefs as a result.

Congress did not just oppose weakening antitrust but even took new steps towards strengthening it. The argument that antitrust enforcement policy changed without a single reform to antitrust laws is not entirely true. Congress did make two important changes to antitrust laws during the 1970s, which expanded the scope and restrictiveness of this policy. First, the Antitrust Procedures and Penalties Act (also called Tunney Act) of 1974 strengthened the rules and penalties of criminal price-fixing cases. Such cartelistic agreements typically involved competitors in the same market agreeing to fix prices, reduce output or allocate geographical markets to increase prices collectively. This legislation increased the maximum fine for such criminal cases from $50,000 to $100,000 for individuals and from $50,000 to $1 million for corporations -the first fine increase since 1950- and also increased the maximum prison sentence for individuals from one year to three, thus raising the status of a Sherman Act criminal offense from misdemeanor to felony. Second, the Hart-Scott-Rodino (HSR) Amendment of 1976 created the regulatory pre-merger notification and clearance system that is being used today. It requires mergers and acquisitions above a certain size threshold to report their mergers to antitrust agencies, the DOJ and the FTC before they are consummated. Once the proper pre-merger

notification papers are filed, the agencies have 30 days to decide whether to ask for more information or allow the deal to go through.

These legal changes seem to be contradicting the description of a gradual decline in antitrust policy starting in the late 1970s. Then if we take Congress' actions into account, we are facing a slightly different set of research questions: How did the influence of the Chicago School, business lobbying or conservative presidents circumvent the opposition from the Congress? Also, what explains strengthening legislations passed by Congress when these other forces were working towards undermining antitrust policy in the same period? In the next section, I offer a theory on the "dual-paradigm fallacy" to answer these questions.

3. Incorporating the Congress and the Dual-Paradigm Fallacy

There are three possible explanations to the Congress' legislation of the Tunney Act and the HSR Amendment, each representing a different model of policy change when also taking the Congress into account (see Figure 2 below). The first possible explanation is that Congress enacted the Tunney and the HSR Acts according to its own paradigm or interests, overpowering the antitrust agencies in the legislative domain. But these changes had no impact on the resulting policy changes in the long run, which were solely influenced by the Chicago School paradigm organized inside the antitrust agencies. In this story, the enforcement actors overcome Congress through "silent" strategies of change, and the legislative changes and the Congress' paradigm are not important. I will call narrative the "single-paradigm-drift" pathway of policy change.

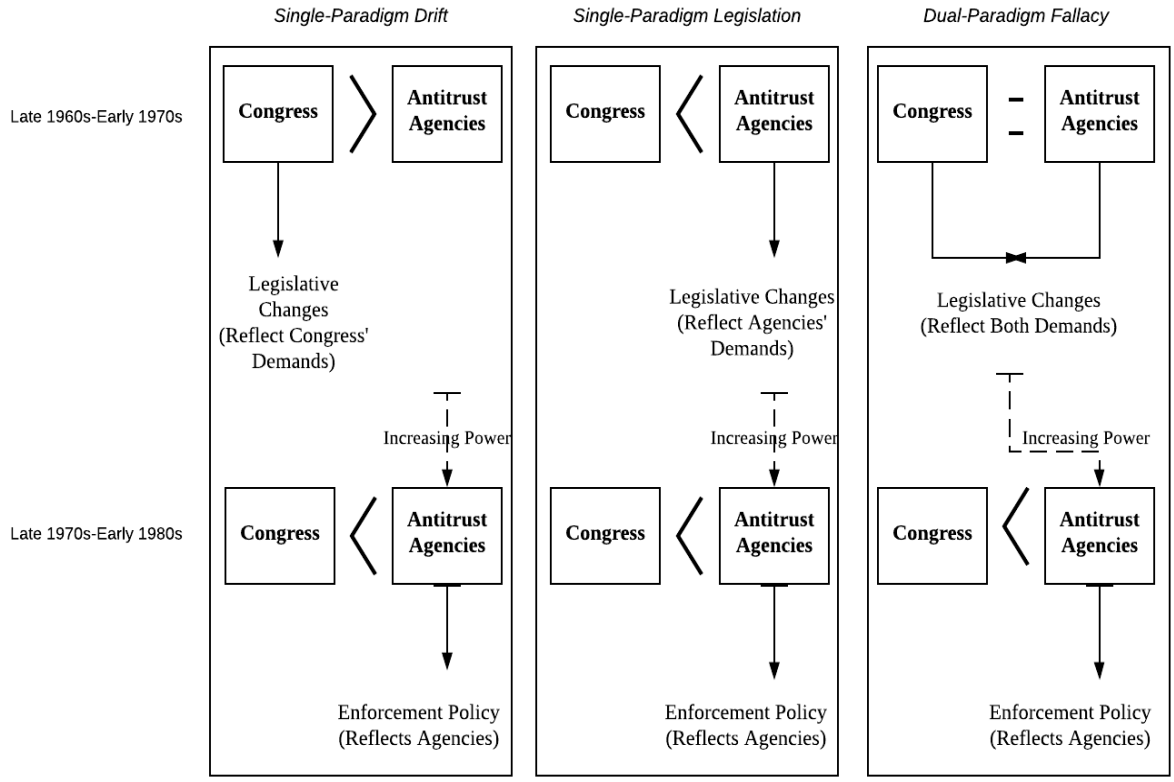

Figure 2: Three alternative ways to connect the Congress to antitrust policy changes (“>” symbolizes “stronger than, “<” symbolizes “weaker than”, and “=” symbolizes “in equal power to”)

Second, the antitrust agencies requested these legislative changes according to their own paradigm to increase the institutional power of the antitrust agencies. Either because their paradigm was more accepted than the Congress’ or they had more control over the legislative agenda, they could get these legislations to pass. This narrative would keep the antitrust enforcement authorities as the designers of the policy change but would add legislative reforms as another mechanism through which they changed the policy. I will call this narrative the “single-paradigm-legislative” pathway of policy change.

Third and lastly, a reconciliation between the Congress and antitrust agencies' paradigms took place. These legislations did not simply represent either the Congress' or antitrust agencies' paradigms but could fit into both. Nevertheless, unintentionally these legislative changes increased the power of the antitrust agencies *vis a vis* the Congress, thus, in the long run, allowing them to overcome the Congressional resistance. This suggests an entirely different pathway of policy change, in which the Congress' policy position contributed to the causal sequence. I will call this "dual-paradigm fallacy" pathway.

I argue that the last model represents the history of the US Antitrust Policy change better. This form of change occurs when two different and opposite policy paradigms, representing a different set of interests and using different frameworks to perceive problems and their solutions, are equally powerful and represented by different policy actors inside a policy field. Such dual-paradigm fields can emerge during transitional periods when the existing paradigm is challenged by its own crises in managing society's problems and facing an already-organized alternative. Peter Hall himself talks about this transitional period in the British monetary policy field in his original account of paradigm shift (1993). He shows that for a time in the mid-1970s, the old Keynesian paradigm upheld by the Treasury coexisted with the new Monetarist paradigm organized inside the Bank of England. This duality was resolved when the Treasury facing its own failure in managing economic crises, created new policies that "adjusted traditional Keynesian practices" but "stretched its intellectual coherence… to the point of breaking" (P. A. Hall 1993, 285). These reactionary policies' failure escalated the fall of the old paradigm and led to the Prime Minister's preference of the Bank over the Treasury in deciding monetary policy, which completed the paradigm shift. However, there was not an equivalent superior actor that

could change the balance between Congress and the antitrust agencies. Instead, the only way the antitrust agencies could increase their power was by convincing Congress to make legislative changes. This forced a reconciliation between the two paradigms and concessions on both sides.

Paradigm reconciliations can occur because policies have various different component rules, often doing different things. In fact, a good way to define a policy is *a set of institutionalized rules that complement each other towards achieving a specific set of goals*. While Hall and others have assumed that different goals require different rules, it is the arrangement between these rules that make up the overall direction of the policy, not the rules themselves individually. Consequently, different paradigms can have opposite demands on one set of the rules, but they can also have reconcilable demands in another set of rules, although they seek to implement different policy goals overall. In antitrust, the old paradigm and the new paradigm could not agree on how to enforce the set of antitrust rules that govern monopolies' conduct that restrict competition; one side wanted non-enforcement, the other wanted strong enforcement. In another area, however, such as how much the price-fixing cartels should be punished or how the merger control should be conducted, they could agree on the future direction of policy. This does not mean they shared the same views or interests in supporting the same policy changes. The same reform can mean different things to each perspective, but both sides can still agree on the reform.

I call this a fallacy because much like the reactive policy changes initiated by the Treasury in Hall's research, the US Congress' attempts to correct its own failures led to its own undermining, which was neither planned, nor expected by the Congress. As I will explain in the last chapter, the Tunney Act and the HSR Act increased the power of the antitrust agencies

inside the policy field and allowed them to shape antitrust enforcement more independently from Congress and the courts. Baxter used Tunney Act's mandate to "foil" the slow decline in other areas of antitrust- while he was fighting over the control of other areas of antitrust, the increasing criminal prosecutions increased DOJ's political and institutional legitimacy. The premerger notification system was similarly essential in allowing the DOJ and FTC to take control over mergers and to replace the court-made law with their regulations. It is also important to note that criminal antitrust cases and notified mergers' clearance constitute the main activity of antitrust authorities, which allow them to increase their resources despite the decline in antitrust in other areas.

I do not want to dismiss the potential influence of non-ideational factors, like big business lobbying and conservative politics. Both big businesses and conservative Presidents played important roles in the late 1960s and early 1970s when Congress was preparing its legislative proposals. However, as I will show, although these influences often worked together with the Chicago School towards achieving similar policy goals, they were less influential on their own without the support from this paradigm. This is mainly because Congress' was more hostile towards the open demands of big businesses or conservative politicians. In fact, the reconciliation between these two paradigms could happen precisely when the Chicago School prescriptions diverged with the big business groups or the conservative presidents.

The dual-paradigm fallacy framework also adds more broadly to social science theories on institutional change. The "gradual institutional change" theory created by the historical-institutionalists argues that when actors seeking substantial policy changes face "veto actors", like the Congress regarding antitrust, they can use the ambiguities in rules to slowly transform

the actual working and effects of the policy on the ground (Hacker 2004; Streeck and Thelen 2005, 9, 16; Mahoney and Thelen 2009, 11, 21). However, this assumes that the gradual and swift forms of change are mutually exclusive, and gradual change only happens when swift changes are blocked. The dual-paradigm fallacy theory shows that these forms of change can also be complementary: swift changes can allow or contribute to gradual changes that undermine them. Furthermore, social scientists often interpret political actors as solely the representatives of some business interests or carrier of some political ideologies. However, political actors with long-term appointments in specialized policy branches can also develop policy expertise and hold onto paradigm frameworks that they use to perceive policy problems and solutions. In a sense, they can be intellectuals or technocrats in their own right. In the Antitrust field, as I will show, the Congressional Subcommittees of Antitrust held such policy expertise in the political field.

4. Data and Methods

To test these arguments, I collected original data on antitrust policy discussions from the late 1960s until 1980. In addition, I used "Legislative History of the Federal Antitrust Laws and Related Statutes" (Kintner 1978) to give these debates historical context. I also collected policy documents and public statements of the heads of the antitrust agencies, the declarations of the Presidents and policy-relevant intellectual works by well-known antitrust intellectuals to understand their perspectives. Secondary resources from legal scholarship covering this period supplemented this original data.

With this data, I built an in-case comparison between four antitrust legislative proposals discussed by Congress in this period to test the three models of policy change outlined above. In addition to the two successful legislations, the Tunney Act and the HSR Amendment, I selected two failed reform proposals, the "Deconcentation Act" and the "Robinson-Patman Repeal Act", both appearing persistently on the Congressional record over the course of the period under analysis, strongly indicating that they were feasible counterfactuals to the other policy reforms that succeeded. Importantly, these failed proposals were either prepared by the Congressional or the antitrust agency experts.

There are distinct advantages to using legislative proposals that never turned into law to understand the proposals that did. First of all, looking at what could have had happened reveals the important components of uncertainty and unpredictability during the period of policy change that would have been missed in a more deterministic approach. The examination of the Deconcentation Act and the Robinson-Patman Repeal Act reveals that antitrust in the US could have been much more different. Second, incorporating failed and successful proposals together allows tracing which legislative proposals the different policy actors felt most strongly about and why they supported these changes. This is crucial to demonstrate the opposite points of view between Congress and the antitrust authorities in this period. Lastly, the comparison between the successful and the failed antitrust change proposals can help reveal the power dynamics and interactions between the proponents of these proposals, with that it allows an examination of the necessary conditions for a successful legislative proposal.

5. The Crises and Divided Field of Antitrust

As the chief economist of the FTC wrote in 1969, “Today, antitrust is under attack from both left and right... Although the critics start on common ground, they soon part company” (FTC 1970, 7). What she was describing was the undermining of antitrust policy by the strain of economic crises, which were interpreted in radically different ways under two existing policy paradigms.

The first economic crisis was the boom in conglomerate mergers, which was the “most explosive issue” in the antitrust policy field in the late 1960s (Austin 1969). Merger activity was doubling almost every year between 1965 and 1969 and consisted of more than 80% of conglomerate mergers (Congress 1964). These mergers escaped antitrust enforcement because they typically merged companies operating in unrelated markets (Fligstein 1990), and therefore, they did not increase market concentration. Thus, the enforcement authorities hesitated in expanding the existing jurisprudence on mergers to conglomerations. For example, when ruling on the Procter & Gamble merger case in 1967, Supreme Court Justice Harlan stated, “It is clear enough that Congress desired that conglomerate and product-extension mergers be brought under Section 7 [Clayton Act] scrutiny, but well-versed economists have argued that such scrutiny can never lead to a valid finding of illegality”.[28] Similarly, Assistant Attorney General Donald Turner argued that conglomerate mergers did not constitute an antitrust problem and refused to prosecute such cases until the end of his term in 1968 (Turner 1964; Reid 1969).

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[28] FTC v. Procter & Gamble Co., 386 U.S. 568, 587

The second and related concern was the increase in inflation. Consumer good prices started to increase in the late-1960s, pressuring President Johnson's administration into action. In 1968, the Cabinet Committee on Price Stability studied the industries that were the persistent source of inflation and submitted four papers to the President. One paper titled "Industrial Structure and Competition Policy" contained an analysis of existing aggregate concentration trends and market concentration statistics and concluded that increasing market concentration was the leading cause of inflation and called for "more vigorous" antitrust enforcement (Cabinet 1969).

The failure of the structuralist school of antitrust in targeting the conglomerate merger and inflation crises was aggravated by the sharp division on perspectives inside the antitrust intellectual field. The Chicago School did not recognize conglomerate mergers or inflation as antitrust problems. Robert Bork had argued that conglomerate mergers were efficient mergers that should never be intervened by antitrust (R. H. Bork and Bowman 1965).[29] The Chicago School economist George Stigler had stated in no uncertain terms that "oligopoly and monopoly prices have no special relevance to inflation" (Stigler 1962). Other Chicago scholars argued that "absent government controls, administered pricing is not a phenomenon observed in concentrated industries." (Congress 1974a). Instead, market concentration can signify "economies of scale" and "productive efficiency", which can help lower the price.

However, there was also a second group of intellectuals ignored by the previous research. I will call this second intellectual group, for lack of a better term, "radical structuralists". The

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[29] This argument since then has been discredited, and most economists today agree that there were no significant efficiency gains from conglomerate mergers (see Kaplan and Weisbach 1992).

views of these groups were epitomized in John K. Galbraith's "The New Industrial State" (2007). Galbraith, an influential Keynesian economist from Harvard University and previously an economic advisor to President Kennedy, argued that the market was already "dead" due to the increasing concentration of market power, and antitrust was a "charade" for failing to prevent this. This strong criticism was taken as an admission of failure by the proponents of the old paradigm, which began demanding improvements to the antitrust laws to better achieve deconcentration in the market (see Davidow 1968; Reilly 1968; Rill 1966; W. F. Mueller 1970; Adams 1968). The radical structuralists criticized orthodox structuralists like Turner, calling him a "passive theorist" (Reid 1969) and argued that antitrust should be strongly used against conglomerate mergers and price increasing concentrated markets.

The differences between two different expert panels ordered by Presidents Johnson and Nixon to study antitrust policy is most revealing of the paradigmatic chams dividing the antitrust field in this period. The first report prepared by Phil C. Neal from Chicago University (Neal et al. 1968) was written from a radical structuralist perspective[30]. The most significant aspect of the report was the recommendation of a new "Concentrated Industries Act", which would aim at deconcentrating industries where the four largest firms hold 70% or more of the market through divestitures.[31] The Neal report also recommended a new "Merger Law" that can more clearly apply to conglomerate mergers that involved the acquisition of one of the four leading firms in a concentrated economy. The second report prepared by George Stigler (Stigler et al. 1968) fully

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[30] It is a mystery why Bork agreed to sign this report. He would later explain in 1977 that he dissented to the report in preparation, but "the Task Force majority went ahead over [his] dead body, which they seemed to think was the scenic route" (R. H. Bork 1977, 874).

[31] This act would be in place for only 4 years, target industries with sales over $500 million or more and attempt to reduce the market share of companies below a share of 12%.

embraced the Chicago School perspective. It opposed the Neal report's deconcentration act arguing "present economic knowledge" does not indicate any negative consequences of concentration *per se*. It also opposed antitrust control over conglomerate mergers. It stated, "We seriously doubt that the Antitrust Division should embark upon an active program challenging conglomerate enterprises on the basis of nebulous fears about size and economic power". Both reports looked at the same economic problems but offered completely different interpretations and recommendations, representing two distinct paradigms. It was the view of the Neal report and the radical structuralists that the Congressional subcommittees allied with.

The Congressional antitrust subcommittees held extensive hearings on conglomerate mergers between 1965 and 1971, emphasizing them as "one of the most important and pressing economic, social and political problems of America's recent history" (Representative McCulloch in Congress 1970). According to the Congressmen, the main problem with these mergers was the increase in "aggregate concentration", defined as the increasing control of the overall economy by a few corporations, which differed from "market concentration", specific to product sectors. The Congressmen identified aggregate concentration, rather than product-sector specific market concentration, the main historical occupation of antitrust. The Congressmen identified aggregate concentration, rather than product-sector specific market concentration is the main historical occupation of antitrust. The report on these hearings recommended "new remedies" to target "increasing concentration of economic power, in both the aggregate and in particular markets" (Congress 1971).

Interestingly, originally President Nixon's administration pursued a tough antitrust policy and announced a number of investigations on conglomerates.[32] However, this position came to an abrupt end when the DOJ settled one of its most significant conglomerate merger cases against International Telephone and Telegraph Company (ITT) with a few concessions. Journalists quickly found out that the ITT promised a large donation to the Republican National Convention in 1972, and the possibility that Nixon made a *quid pro quo* alarmed Congress. Independent of its effects on Nixon's impeachment trial, this scandal also deepened the crisis of antitrust and convinced Congress that enforcement policy commitments of the agencies were unreliable and legislative changes were needed.

The antitrust subcommittees were also concerned by the inflation problem, especially in the early 1970s. The failure of Keynesian monetary and fiscal policies (derisively called "the old religion" in these debates) in dealing with the combination of inflation and unemployment had forced Congress to open up the policy toolbox and try new solutions. In 1970, Congress passed the Economic Stabilization Act, which gave President Nixon the authority to institute price and wage controls (freezes). This dramatic measure worked briefly until some of the price restrictions were lifted in the second half of 1972, which led to severe price hikes in 1973 and 1974. In the same period, the antitrust subcommittees began to consider antitrust as an alternative to price controls. In 1971 the Senate Subcommittee held a four-day symposium with a suggestive title "Controls or Competition?" (Congress 1972). In 1973, the House Subcommittee held

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[32] Nixon's antitrust policy deserves separate research. Publicly, he advocated for strong antitrust policies, but the Nixon tapes revealed that privately he saw antitrust as an impediment and wanted his attorney general out of office (Naughton 1974).

extensive hearings on the food industry in order to "determine whether there may be some antitrust violations or anticompetitive practices sanctioned by law in part responsible for price increases" (Congress 1973a). This hearing was concluded with a suggestion "Vigorous enforcement of the antitrust laws is one way to obtain at least some relief from high food prices". When Congress created a special Joint Economic Committee to provide specific legislative solutions to inflation in 1974, the first scheduled hearing was on the "concentrated industries" (Congress 1974a). These hearings were focused on figuring out if concentrated industries contributed more to the inflation problem by "administering" prices, which referred to the ability of companies with substantial market power to set the prices in their market. The radical structuralists again supplied supporting testimony (Scherer and Mueller in Congress 1974a). This theory suggested that inflation resulted "not of impersonal market forces but of conscious decisions by the firms involved".

Combined with the obvious example of the Organization of Petroleum Exporting Countries (OPEC) cartel fixing the world oil prices in 1973, the antitrust subcommittees' suggestion to perceive inflation as an antitrust problem suddenly gained traction in Congress. As Representative Hart stated, a week didn't go by without a Congressman "gracing the Congressional Record with admiring words for antitrust as a weapon to fight inflation" (in Congress 1975). President Ford's administration was also on board. Ford stated in 1974, "heightened antitrust enforcement is a significant weapon in the current fight against double-digit inflation" and included "vigorous antitrust enforcement" as a part of his inflation program (cited in Handler 1975). This pushed legislative agendas of antitrust forward.

On the side of antitrust agencies, however, other convictions were increasingly dominant, which has been extensively investigated in previous research (Eisner 1991; Davies 2010). Briefly, under the leadership of Thomas Kauper from 1972 to 1976, the DOJ Antitrust Division started to seek "a greater capacity for economic analysis… both in terms of the development of specific cases… and in the development of an overall program that made economic sense" (Kauper quoted in Eisner 1991). Similar changes were occurring inside the FTC as well. In 1974, an FTC commissioner was testifying in Congress, "Our staff is now required to advise the Commission of the estimated costs and consumer benefits expected from proposed enforcement activity" (Bradley Thompson in Congress 1974). The FTC chairman Engman also testified, "I think that the [FTC] Commission recently had had a renaissance, one might say, with respect to a reevaluation of what the competition is attempting to do. I don't view our job of the antitrust enforcement as being designed to protect competitors, but to protect competition" (Lewis Engman in Congress 1974). Such statements strongly signalled the increasing adoption of the new Chicago School paradigm by the antitrust agencies by the mid-1970s. This was important for the faith of the legislative proposals that were discussed in Congress.

6. The Antitrust Legislation Proposals

The four main legislative proposals brought to Congress in the late 1960s, and early 1970s all shared a connection to the conglomerate merger or inflation crises, which were the main motivations for Congress to take up any proposal to legislate new antitrust laws. However, as I will show in this section, not all proposals were accepted. Only those proposals that

reconciled these seemingly irreconcilable perspectives were legislated at the end of the day. I will also show that big business lobbying and conservative ideologies upheld by presidents played only limited roles in in these decisions and do not seem to have an independent causal effect.

	FAILURE		SUCCESS	
Legislative Proposals	**Robinson Patman Act Repeal**	**Deconcentration Act**	**Tunney Act (1974)**	**HSR Amendment (1976)**
Years of Discussion	1969 & 1974-76	1972 &1973-1975	1969 & 1973-74	1975-76
Fits the Structural Paradigm	**(-)**	**(+)**	**(+)**	**(+)**
Fits the Chicago School Paradigm	**(+)**	**(-)**	**(+)**	**(+)**
Big Business Support	**(+)**	**(-)**	**(+)**	**(-)**
Conservative President Support	**(-)**	**(n/a)**	**(+)**	**(-)**

Table 1: Comparison of different antitrust legislation proposals in the late 1960s and early 1970s

Robinson-Patman Act Repeal

Robinson-Patman Act (RP Act) was legislated in 1938 to prohibit price discrimination, and by extension, predatory pricing by monopolists. Economists have always criticized it, but the Chicago scholars increased the attack on this legislation, arguing price discrimination is always efficient, and predatory pricing is nothing but more efficient competitors competing on prices. For example, Posner argued, “A supplier might offer a discount or allowance to one distributor, but not to others because the distributor did a better job of advertising. To object to such

"discrimination" would be tantamount to disapproving the payment of an extra bonus to a salesman who turns in an outstanding performance." (Posner 1969, 56). Big business groups, especially in the retail sector, also regularly lobbied Congress to repeal this Act but could not succeed without the support of the antitrust agencies. Congressional records show that the economists and commissioners inside the FTC were increasingly complaining about this legislation (Congress 1969) by 1969, but the agencies still upheld the law.

By 1974, however, antitrust agencies had turned against the RP Act. The FTC published a report in 1973 stating the prohibition of price discrimination diminished competitive pricing (Congress 1974c). The DOJ Antitrust Division also called the Act "deleterious impact upon competition" (Congress 1976). Kauper announced, "I firmly believe that the time has come for substantial modification of the Robinson-Patman Act" (Kauper 1975, 154). The Division circulated two draft statutes, "The Predatory Practices Act" and "The Price Discrimination Act," to amend or repeal the Act in 1975.[33] The antitrust agencies not only adopted the proposal of the Chicago School but also its theory of price setting in the market. They argued that the inefficiencies created by the RP were causing inflation, not market concentration. For example, one FTC commissioner argued, "If the FTC forces every chain grocery store and drug store in the land to pay the same price that is paid by the "mom and pop" grocer and the neighborhood pharmacist, the effect will inevitably be to eliminate a vast array of price discounts and thus raise the overall price in those important sectors of the economy" (Thompson in Congress 1974b).

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[33] The former had the explicit purpose to overturn the case precedence set by the Utah Pie decision and limit how the courts should interpret "below-cost pricing" by looking at marginal cost. The latter had the more direct goal to limit the price discrimination prohibition to those cases where there is a "systematic scheme" that "clearly threatens" to eliminate competitors, and to allow for the defendants to use a number of arguments in their defense.

The agencies' campaign to repeal the RP Act faced strong resistance in Congress, where Congressmen often called the RP Act the "Magna Carta of small business*".* Congressmen perceived the objections to the RP Act as purely "theoretical" and had little basis in "the realities of business" (Congress 1969). They argued that the RP Act had the purpose of preventing manufacturers from giving discriminatory discounts to large chain stores, which deprives the small purchasers and retailers of the same discounts for not placing similarly large orders (Congress 1969). If RP Act is repealed, these small businesses will disappear. Against the argument that the RP's price discrimination prohibition harms consumers by creating price rigidity, they argued that "the interests of the consumers are best served by the preservation of small business", because small businesses are innovators, price cutters and providers of consumer-choice. (Congress 1969). The RP Act contributed to lowering inflation by forcing large businesses to give discounts indiscriminately.

Small business groups heavily lobbied Congress and the President to prevent the repeal of the Act. They met with President Ford on August 17, 1975 (Congress 1975c)[34] and warned that, if the amendments are passed, "there is no question that thousands would be driven from the marketplace with a disastrous impact on our economy, tax revenue and jobs" (Congress 1975b). As a consequence, Ford did not side with the antitrust agencies in this legislative proposal.

The RP repeal proposal reveals the growing influence of the Chicago School over antitrust agencies in the 1970s and how this paradigm diverged so sharply from the structuralist

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[34] Including National Small Business Association, the National Federation of Independent Business, Council of Smaller Enterprises of Cleveland, Independent Business Association of Wisconsin, National Association of Small Business Investment Companies, Smaller Business Association of New England, and Smaller Manufacturers Council of Pittsburgh

paradigm still dominating Congress. The failure of this proposal also suggests the limitations of big business lobbies, the Chicago School and conservative presidents in forcing legislative changes that fit their new paradigm, and the continuing power of small business lobbies. Therefore, it weakens the single-paradigm legislation model, which argued the agencies could impose their reform proposals at this moment and weakens the hypotheses that big business lobbying and conservative ideology played a significant role in antitrust policy change. The RP proposal failed because it was not presented from the perspective of the old paradigm assumed by Congress.

Deconcentration Act

Today it is completely forgotten that the US Congress came closest to legislating the most structuralist interpretation of antitrust policy into law, not in the 1950s or 1960s when this paradigm was unchallenged, but in the early 1970s when this paradigm was already dying. The main force behind this proposal was the new radical structuralists that also found expression in the Neal report and a senior, influential senator chairing the Senate Subcommittee on Antitrust and Monopoly, Senator Philip Hart.

Senator Hart first introduced the "Industrial Reorganization Act" (S. 3832) to the 92nd Congress in 1972, then to the 93rd Congress in 1973 (S.1167) and to the 94th Congress in 1975 (S. 1959). Hart's proposal was even more radical than the Neal Report's-it would break up companies with a 4-firm market share of 50% (instead of 70%). The Act proposed the creation of new administrative and judicial agencies that would oversee this process (for more details, see

Jones 1973). [35] Surprisingly, this radical proposal was not marginalized in Congress. The Senate antitrust subcommittee organized a 9-part hearing series from 1973 to 1975 to discuss and plan how the deconcentration would work in different sectors of the economy (Congress 1973b). The joint committee on inflation in 1974 and several congressional reports emphasized the proposal as a feasible solution to inflation caused by market concentration (Congress 1974a; 1976).

This positive political reception was thanks to Hart's ability to connect his proposal to the accepted paradigm. Hart argued that his Act was not a radical departure from the existing laws, but their "upgrading". He stated the Act "merely restates the philosophy which has been the bedrock of the antitrust laws for 82 years" and "seeks to bring closer to reality what this country has pretended to have for years, a competitive economy" (Hart 1971). Hart also connected his proposal to the discussions that had been taking place around the issues of conglomerate mergers and inflation at the congressional antitrust subcommittees (Congress 1973b). He stated that his Act "bears the seeds of a reform program that could produce an economy in which inflation and high unemployment would no longer be a way of life" (Hart 1971). He argued that market deconcentration is a "free-market" alternative to the government's growing dependence on regulations and price control to deal with the problems of inflation, unemployment, and stagnation (Hart 1971).

Big businesses groups like the National Association of Manufacturers (NAM) opposed the proposed legislation and argued it had "potential for destroying the efficiency which has

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[35] It proposed an 'Industrial Reorganization Commission', an administrative body to determine which corporations are in violation of the statute's prohibition against monopoly power. Then the cases would be brought to a new 15-member judicial body, the 'Industrial Reorganization Court'.

occurred as a result of good management and economies of scale" (Congress 1973b). They brought in Chicago School experts to testify in Congress that "a comprehensive deconcentration policy could do great harm by decreasing efficient performance and removing part of the incentive toward improving performance in a behaviorally competitive industry" (Congress 1973b).

The antitrust agencies' resistance to Congress was more measured given that they receive their institutional mandate from Congress' legislation and institutional capacity from Congress' budget allocation decisions. Nevertheless, when asked his opinion at a Bar Association meeting, Assistant Attorney General Kauper said: *"*My own feeling…is one of some skepticism... We are dealing with a very generalized economic theory, which says and predicts that concentrated industries behave in a certain way… I don't think that as of now the data in many industries is enough to tell us what these results are*"* (American Bar Association 1973). The FTC was similarly resistant to the structuralist theory behind the act that concentration is categorically harmful. The Director of Policy Planning at the FTC stated, "For if concentration results from productive efficiency, deconcentration will cause productive inefficiency. And production inefficiency will likely cause higher prices to consumers" (Wesley Liebeler in Congress 1973). However, the antitrust agencies did not produce an official stance against the deconcentration act, which they might have if the act reached the vote. Ultimately, Hart's Act died when he passed away in 1976, but his name lived on with the Hart-Scott-Rodino Act, which he also supported.

The proposal of the Deconcentration Act is revealing not only the solid structuralist tradition in the Congressional subcommittees and Congress in general but also the new radical

turn this paradigm had taken during the crisis of Antitrust. It also weakens the single-paradigm drift model by showing that Congress alone could not dominate the antitrust policy field. I argue that this proposal failed because it was not reconciliatory with the rising new paradigm of the Chicago School and did not try to appease the antitrust agencies by proposing to replace them with new administrative bodies to oversee the deconcentrating work. As Robert Bork put most elegantly, "It is one of the ironies with which public policy abounds that so frequently ideas which have been around for decades begin to be translated into politics and then into law just at the time when they are coming to be recognized in the intellectual world as false" (R. H. Bork 1977, 873). The Deconcentration Act was facing a dawning new paradigm that would not let such legislation pass.

Tunney Act

When the Antitrust Penalties and Procedures, or Tunney Act, was signed into law by President Ford, he praised it as "the first major reform of the Nation's antitrust laws in nearly 20 years" (Presidential Documents 1974). The Act had multiple parts, but as it was argued when the Act reached the debate at the House floor in 1974, its "most significant provision" was the increase in criminal penalties (Congress 1974d). Since Sherman Act, the maximum fines for antitrust violations had only increased once in 1955.

The proposal originally came from Nixon's Council of Economic Advisers, which argued that due to inflation and increasing size of corporations, the maximum antitrust fines had become useless. The proposal to increase the maximum fine from $50,000 to $500,000 reached Congress

in 1970 and immediately received strong support from Subcommittees. Senator Philip Hart commended the administration for offering this bill and supported for "it should increase the effectiveness of our antitrust laws as a deterrent to harmful economic concentration, and as such, should help decrease the burden on the Department of Justice and the courts created by antitrust prosecutions" (Congress 1970a).

The proposal generated little controversy and "no real opposition" (Kintner 1978). Even big business lobbyists seemed non-resistant. The Ford administration continued to advocate for this agenda. Before the Tunney Act reached a vote, in October 1974, Ford delivered a message to Congress calling for an increase in the fine to $1 million (Congress 1974d). Assistant Attorney General Kauper also announced that he intended to propose legislation making antitrust violations punishable as felonies and increasing the maximum imprisonment to five years (which were not originally in the Tunney Act). The antitrust subcommittees immediately stood behind these proposals and pledged support (Congress 1974d). The law passed with these last-minute increases in penalties.

The seemingly conflictless legislation of the increase in criminal antitrust penalties reflects the alignment between the old structuralist paradigm and the new Chicago School paradigm over this legislation. In fact, the Stigler Report, which was ignored both by the Nixon administration and Congress, had also advocated for an increase in criminal penalties of antitrust (Stigler et al. 1968). For the Chicago School, price-fixing constituted the most significant harm to the economy by causing efficiency losses; therefore, it deserved the biggest punishment. Richard Posner also testified in Congress, "There should be no maximum penalty, and the

amount of the penalty should be determined in each case primarily, although not exclusively, by the economic harm caused by the illegal act" (Congress 1969).

However, departing from the Chicago School, Congress interpreted this act based on the structuralist theory of "administered prices". As one historian of this law stated, the Act "in large part, … reflected a frequently expressed belief that anticompetitive activities by business were in part responsible for the national economic difficulties existing at the time of enactment" (Kintner 1984). The DOJ played an essential role in creating this understanding in the Congressional debates by representing vigorous enforcement on price-fixing to solve inflation. For example, when asked to comment on how his agency can play a role in battling inflation, Kauper testified in Congress: "It is the responsibility of the Antitrust Division to identify price rises which have not been compelled by increases in labor or material costs and to then investigate whether those unexplainable price rises are a product of collusion." (Congress 1974a), adding "Antitrust actions with the greatest short run promise [to battle inflation] include a redoubling of efforts to detect and prosecute price-fixing conspiracies" (Congress 1974a).

The Tunney Act was successful in the absence of resistance from either the proponents of the Chicago School or the structural paradigm. This finding supports the dual-paradigm fallacy model, but it does not refute the role of big business support or the conservative ideology of presidents. The examination of the HSR Act in the next section will provide a clearer example.

HSR Amendment

Creating a pre-merger notification system had been in discussions since the Clayton Act. Proposals were introduced to Congress in 1938, 1943, 1946, 1956, 1961 and most recently in 1967, but failed due to the strong business lobbying against them (Horton 2017, 199). Without this system, antitrust agencies were not alerted to planned mergers and had to rely on the publicly available information when investigating not yet consummated mergers. In other words, as Senator Hart explained, "if the Wall Street Journal missed one [merger], so well may the Federal Trade Commission and the Antitrust Division." (Congress 1975d). The FTC had created a pre-merger notification system in 1969 in response to the rise in conglomerate mergers, but compliance was low because it was a regulatory provision. Also, only very sizable mergers were subject to this requirement and information was not shared across agencies, leaving the DOJ behind. Correcting DOJ's weakness in merger control, as Kauper stated, was the "top legislative priority item" for the DOJ Antitrust Division in 1975 (Congress 1975d).

However, the DOJ's original proposal to Congress did not involve a clearance system but the expansion of the DOJ's Civil Investigative Demand (CID) powers. The Antitrust Division could use CIDs for non-criminal antitrust cases to collect information without first going through the courts, thanks to the Antitrust Civil Process Act of 1962. But these powers were limited to documentary information (not testimonies from persons), could only involve the corporations that allegedly broke the law (not third parties), and most importantly, could not be based on actions not already committed, i.e. unconsummated mergers. Information had become especially important with the growing reliance on economic analyses in merger control. As Kauper stated: "Sound analysis of a pending merger requires the assembly of reliable market data. We must

formulate relevant product markets, taking into consideration cross elasticity of demand among functionally related products" (Congress 1975d).

Nevertheless, the DOJ's CIDs suggestion reignited the Congressional antitrust subcommittees' interest to institute a pre-merger notification system. Congressmen argued that, without complementing the new CID powers with a waiting period, the DOJ would not have enough time to collect the information it would need (Congress 1975d). They prepared legislation requiring all merging parties (without a size threshold) to report to the agencies 30 days in advance. The proposal gave "giant corporations with assets or sales more than $100 million" an additional 30 days of investigation. This extra precaution for large M&As was reminiscent of the Congressional subcommittees' perception of "aggregate concentration" as the real antitrust threat. The most important part of the proposal was the automatic halt requirement for M&A transactions if the agencies filed a complaint in court, which could stop the mergers indefinitely. An additional "escrow provision" also separated and fixed the value of the acquired stock and assets during this pause. With this proposal, Congress sought to create a system that could divest harmful mergers easily. As Senator Hart explained, "Anyone who has looked at the problems in undoing a merger knows that, if the merger is not to be allowed, all the country and the companies would be much better off if it is never born" (Congress 1975d).

To the big business groups, the pre-merger notification system was as radical as Hart's Deconcentration Act. Business representatives from the Chamber of Commerce and the Business Roundtable strongly lobbied Congress against it. For example, the Attorney representing the Chamber of Commerce stated: "I do not think that it is a good idea to put somebody in a position where they are in effect a regulator of acquisitions… You would have to then apply, in effect, to

the Department of Justice for permission to merge, or to acquire substantial assets" (Rogers in Congress 1975c). This was successful in getting President Ford and the Republicans in Congress to fight against the Act. As a result, "perhaps only the tax reform bill has been the subject of such extensive committee and floor considerations as this legislation" (Senator Kennedy cited in Horton 2017, 199).

Unlike the Ford administration, both antitrust agencies sided with Congress, at least "in principle" (Congress 1975d), but requested several essential revisions. The most objected section was the automatic halt requirement. Kauper argued that it goes "too far", adding "It does not seem to me appropriate to give such unreviewable and irrevocable discretion to any government agency, even my own, in this manner" (Congress 1975d). The FTC Chairman Engman similarly demanded "rather than mandating a court, upon application of the enforcement agency, to enter an order prohibiting consummation of a merger pending final judgment, the law should permit a court to require a showing by the government of probable illegality" (Congress 1975d). The cause of their objection was the fear of a possible "chilling effect" over mergers. They argued that when companies know their merger can be halted indefinitely without a trial, they would be less inclined to commit to M&As to begin with. This reflected the Chicago School concern with maintaining market efficiency. In objecting to the automatic halt, agencies often reminded Congress that "many mergers are pro-competitive, or promote efficiencies…Generally, unless there is a recognizable harm, businessmen should be permitted to make and implement business decisions without the sort of disincentives this provision would create" (Kauper in Congress 1975). The agencies also objected to the 'escrow provision' by saying that it is "surely severe

disincentive to merge, and goes well beyond what may be necessary to ensure competition" (Congress 1975d).

Nevertheless, the Chicago School perspective could still align with Congress' proposal. Chicago Scholars also strongly criticized the existing merger control system for relying on the inefficient method of divestment. They did not seek to stop mergers potentially harmful from happening but negotiate appropriate "remedies" before the merger is consummated. This was the approach in the Stigler Report as well. The report argued that merger control should "not tell companies which mergers are forbidden, but which mergers are permitted" (Stigler et al. 1968). This regulatory approach to merger control required a pre-merger notification system where antitrust agencies could negotiate with the merging parties before the merger is finalized.

The pressures from the agencies eventually led to the replacement of the automatic stay requirement with a possibility to obtain preliminary injunction delaying consummation if the agencies can bear the burden of proof of showing that the merger might be harmful. Furthermore, the Act passed with a notification requirement for only companies with assets or sales over $100 million when acquiring or merging with companies with assets or sales over $10 million 30-days in advance. The 'escrow' provision was eliminated. These amendments to the last bill basically reduced the HSR Act's ability to keep merging parties separate and order divestments.

Much like the Taylor Act, the success of the HSR Amendment reflects the alignment between the dawning Chicago School and old structuralist paradigms of antitrust, supporting the dual-paradigm fallacy model. While both sides agreed that divesting completed mergers defeats the purpose of merger control, they envisioned that a pre-merger notification system would

resolve this problem in different ways. Congress wanted (or hoped) the antitrust authorities would use this authority to block more mergers and stop them from increasing market concentration. In contrast, the Chicago School proponents had hoped it would be used to tell the merging parties how they can improve the efficiency of their mergers. It also demonstrates the shortcomings of the explanations relying on big business lobbying and conservative ideologies. The corporate lobbyists' objections found no supporters among antitrust authorities, which conversely sought to increase their own institutional power. President Ford was forced to concede to this legislation once it became clear he would face the "populist" Jimmy Carter in the elections, and he could not lose political points by vetoing an antitrust legislation that sought to broaden antitrust enforcement (Horton 2017).

7. Agencies' Increasing Powers to Reduce Enforcement

The previous explanations of the US antitrust policy also miss the fact that the Tunney and the HSR Amendment were fundamental for the antitrust agencies to preserve, or even increase their institutional and political legitimacy while pursuing enforcement policies that undermined antitrust enforcement beginning in the mid-1970s.

When asked how he intends to enforce antitrust, William Baxter responded, "I would not be here unless I intended to enforce the antitrust laws very, very vigorously" (Baxter et al. 1981). By vigorous, he specifically meant the criminal prosecution of price-fixing and related charges. Following this promise, by some estimates, "from 1981 through 1988, the DOJ initiated more criminal prosecutions than the total of government criminal antitrust cases from 1890 to 1980"

(Kovacic 2003, 420). Furthermore, the number of criminal antitrust cases that resulted in a jail sentence for some executives increased by 10-fold (Holliday 1998, 79–80), and the average real fine per firm through criminal cases increased by more than 144% (Gallo et al. 2000, 122–23). The table below summarizes some of these changes.[36]

	Criminal price-fixing cases filed by DOJ	Number of firms fined	Average real fine per firm
1961-1970	153	653	$ 51,893,100.00
1971-1980	292	890	$ 94,124,300.00
1981-1990	649	628	$ 229,723,700.00

Table 2: Criminal price-fixing enforcement by the DOJ (source Gallo et al. 2000)

Baxter used the increasing criminal prosecution of horizontal price-fixing to offset and legitimize the disappearance of other types of antitrust prosecutions by DOJ's Antitrust Division in the 1980s. In fact, the reduction in the prosecution of civil monopolization cases and the increase in the criminal prosecution of cases by the DOJ had already started under Kauper. The latter he used to increase the budget and resources of the DOJ tremendously in the 1970s, offsetting the potential losses from the former.

The antitrust agencies need the Congressional support for their budget allocations, and the increasing criminal prosecution of price-fixing was (and still is) a perfect cover to keep growing the agencies. Therefore, when Kauper lobbied Congress for substantial increases to its budget in

[36] This trend of focusing on criminal antitrust cases would continue on in the 1990s. In 1990, Congress raised the maximum Sherman Act fine for individuals to $350,000 from $100,000 and for corporations to $10 million from $1 million.

1974, he argued, “Our emphasis on price fixing means more criminal work, and thus more use of grand juries, also requiring additional resources” (Congress 1975b). Kauper asked for a $1.5 million increase to his $13 million budget and a total of 83 new positions (a 14% increase). In 1975 various bills were submitted to Congress, some of which would increase the $17 million annual budget of the Division to $50 million in the span of 2-3 years. For example, “the Antitrust Enforcement Authorization Act of 1975” (S.1136) aimed to increase the funding for both the Division and the FTC by 200%. The fact that this act collected 45 signatures in the Senate shows that even the conservative Congressmen normally opposed to increasing public spending supported the DOJ Antitrust Division’s budget. Although this proposal did not pass, antitrust agencies could still secure a 94% increase (2.5% per year) to their combined budget between 1970 and 1997 (Kwoka 1999). This demonstrates how important it was that antitrust agencies preserved and even increased the enforcement of criminal antitrust cases in order to keep its institutional and political legitimacy intact while undermining enforcement in other areas.

Secondly, the premerger notification system of the HSR Amendment increased the control of the DOJ and FTC over mergers agencies (Rogers III 2012). Before the HSR Amendment, merger cases were regularly reaching and decided at the Supreme Court, but since this amendment, there hasn’t been a single merger case decided by the Supreme Court. This is mainly because very few cases are decided by the courts to begin with. For example, between 1977 and 1997, only about 22% of the mergers challenged by the agencies were eventually litigated, compared to about 50% in the previous decades (Sims and Herman 1996). This means most enforcement decisions over merger control are made by the FTC and the DOJ during the notification period, allowing them to control the accepted norms on mergers through their own administrative regulations or

"merger guidelines". Most mergers are settled during the notification period by using structural and behavioral remedies (the so-called "fix-it-first" approach) (Eisner 1991, 144). These are highly confidential negotiations conducted without judicial overview or public record, allowing the agencies' to pursue policy positions without scrutiny (Rogers III 2012, 27).

This more regulatory merger-control system allows the agencies to control the enforcement of merger rules through their administrative regulations or "merger guidelines", which have replaced the text of the law and the courts' interpretation as the main source of law enforcement. It was thanks to this increased control that agencies could change the merger control policy dramatically through their "Merger Guidelines" in 1982 (Waller 1998). It is possible to say that, without the passing of the HSR Act in 1976, it would be very hard for William Baxter to decide and change how the government deals with the mergers, excluding the Courts and Congress from the equation.

The Tunney Act and HSR Amendments were not unequivocal victories for the Chicago School paradigm proponents either. As discussed earlier, Chicago School intellectuals had strong objections to some parts of the original bill to create the pre-merger notification system, and big businesses and the President were against the law in more certain terms. On the Tunney Act, Chicago scholars were also originally on the fence. For example, Stigler also argued that cartel agreements would break down easily on their own, even without strong legal sanctions (Ghosal and Sokol 2020, 476). Robert Bork only dedicated less than a paragraph on price-fixing in his "Antitrust Paradox", the bible for the Chicago School (Ghosal and Sokol 2020, 476). Richard Posner vocally argued against fail time for cartel organizers and also suggested increased fines are not useful in deterring this behavior (Ghosal and Sokol 2020, 476). Therefore, both the HSR

Amendment and the Tunney Act did not contribute to advancing the goals of the new Chicago School paradigm directly, but they contributed indirectly to the rise of this new paradigm by enabling and increasing the institutional power of the antitrust agencies, which became the active supporters of the Chicago School perspective beginning in the late 1970s.

8. Conclusion

The recent attention on the social and economic problems created by companies like Facebook, Google and Amazon almost monopolizing the digital economy has generated a new interest on the changes in the US antitrust policy. While sociologists have been missing in this inquiry, their conceptual tools and theories from the sociology of knowledge and expertise can still offer new perspectives on the ongoing debates in legal and economic scholarship.

This chapter argued that it was not solely the federal courts and antitrust agencies that gave a new direction to the US antitrust policy more accepting of monopolization as suggested by previous research, but the US Congress also played a distinct role with its own expertise and paradigmatic ideas. The Congressional policy actors responded to the economic problems and proposed policy reform solutions through their radicalized version of the old structuralist antitrust policy paradigm, which was in stark contrast with the new Chicago School paradigm increasingly dominating the enforcement authorities. This dual-paradigm moment led to a deadlock in policy reform proposals and could only be resolved by the realignment of the new and old paradigms under the Tunney Act and the HSR Amendment. This paper showed that each paradigm saw proposals from its own perspective and the resulting legislative changes reflected both sides' point

of view. This form of policy change, however, led to an important fallacy. While satisfying to Congress at the beginning, the Tunney Act and HSR Amendments also increased the institutional powers and enforcement capacity of the antitrust agencies, allowing them to insert their own paradigmatic preferences on policy enforcement later on. The Congressional debates in the early 1970s suggest that this was an unexpected and unforeseen consequence of the legislations for the congressmen that supported them.

The policy change pathway of "dual-paradigm fallacy" has important theoretical implications for social science studies on policy changes in general. It suggests that when examining the influence of ideas and expert knowledge over policy changes, sociologists should not dismiss the roles of other institutionalized policy actors like Congress, which can be policy experts and paradigm holders in their own right. It also suggests that Peter Hall's original model of policy paradigm shift was missing the paradigm realignment mechanism as another way for new policy paradigms to rise into power. The domination of an old paradigm with a new one is not always due to the failures of the old paradigm and the successes of the new paradigm, but sometimes the successes are enjoyed both by the new and the old paradigms in the same policy changes. Lastly, it reveals the complementarity between swift and dramatic forms of change like legislation and slow-moving gradual changes like policy drift. These two forms of policy change are imagined negatively correlated in the literature, while legislative changes can help in propelling the slow-moving enforcement changes by shielding them from the influence of the potential veto actors. Future research should investigate further the possibility of multiple paradigms in a single policy field. The dual-paradigm fallacy in this paper suggests that multiple paradigms can coexist when different policy actors have equal or similar powers to control the policy. In the case of the

US antitrust field, this was a transitional moment that was eventually resolved with realignment, but in other policy fields such dualities can break or restructure the power of policy actors in different ways.

4. THE GLOBALIZATION OF ANTITRUST

1. Introduction

Once an American idiosyncrasy, antitrust (competition) laws can now be found in all corners of the world. Even countries with ongoing state control over their economies, such as China and Russia, have national competition laws that have the official purpose of creating competitive markets. These laws share the basic rules of antitrust laws formulated by the US case law over a decade of enforcement since the Sherman Act was passed in 1890: They prohibit monopolization, i.e. the excessive forms of private market power; they limit the exclusionary contracts and agreements between producers, suppliers and distributors that foreclose markets to entry; they prohibit cartelistic (horizontal) agreements between competitors that fix prices and share costumers or territory; and they regulate the mergers and acquisitions (M&As) that increase market concentration, often through an administrative, pre-merger clearance system. In most of these cases, there are also public antitrust agencies similar to the US Federal Trade Commission (FTC) or the Department of Justice (DOJ)'s Antitrust Division that bring antitrust complaints or resolve cases in an administrative procedure. Consequently, as one chairman of the FTC proclaimed, antitrust laws are among the "most successful exports" of the United States to the rest of the world (Janet Steiger in *Economist* 1991).

This chapter investigates how and why the US policymakers have promoted antitrust laws as a *global norm* –i.e., institutions accepted in (and expected from) every member of the international community of nation-states. The common account offered by the international antitrust scholarship and policy circles is that the growing international consensus on the benefits

of free and competitive markets in the 1980s – also called the "Washington Consensus" or "neoliberalism" (Campbell and Pedersen 2011; Dezelay and Garth 2002; Fourcade-Gourinchas and Babb 2002; Babb 2013)– has led national lawmakers around the world to adopt new competition laws or strengthen their existing laws to protect competition (Gray and Davis 1993; Kovacic 1997; 2001; Gal 2004; D. P. Wood 2005; Kronthaler and Stephan 2007; Buch-Hansen and Wigger 2011; Hazel 2015). That is why there was an exponential increase in the number of national antitrust laws in the 1990s following the restructuring of markets according to liberal principles (see Figure 1 below). In addition to the US, various international organizations, like the World Bank (WB), United Nations Conference on Trade and Development (UNCTAD), and the Organization for Economic Co-operation and Development (OECD) have encouraged and supported this diffusion by using conditionalities on credit or trade agreements and creating international competition law best-practices (Connor 1997; C. Lee 2005b; Shenefield 2004).

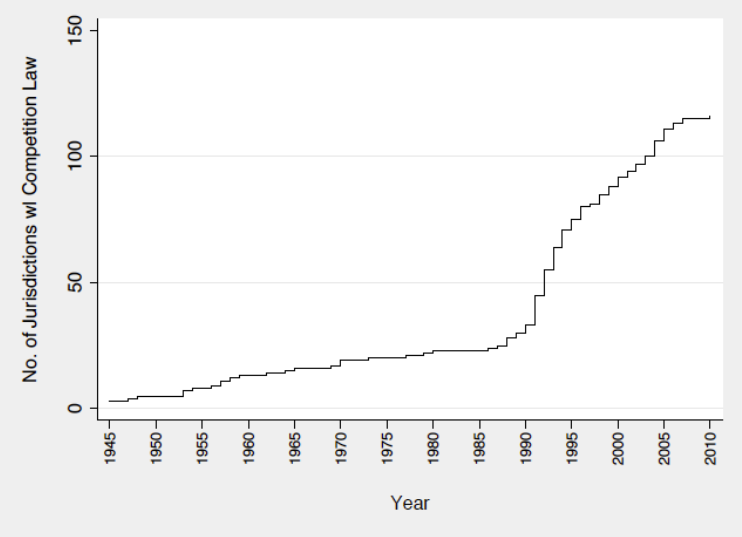

Figure 1: Number of national jurisdictions with competition laws (source: Büthe 2015)

However, it is still unclear in these accounts how the tensions between neoliberal policy ideas, international business and financial interests, and antitrust laws were resolved by the international promoters of antitrust laws, especially since the Chicago School of Law and Economics critique of antitrust had already revealed these tensions in the 1970s. As I discussed in the previous chapter, this critique dispelled the intellectual consensus over the economic benefits of antitrust and instead emphasized its "chilling" effects on economic growth and prosperity. What impact, if any, did the acceptance of the Chicago School antitrust approach in the US make on the global diffusion of antitrust laws and policy? Furthermore, the existing narrative also does not explain how the diffusion of antitrust laws could coexist with the growth of international mobility of capital and multinational corporations in this period. Antitrust laws are not like the other Washington Consensus institutions, such as the intellectual property, contract, business, and bankruptcy laws that benefit big, international companies. On the contrary, their diffusion can, in theory, restrict the growth and corporate strategies of multinational corporations and the free movement of capital through international M&As and hierarchical coordination mechanisms. Then how did the business interests of the time influence the global promotion and diffusion of competition laws and policies in the 1990s?

In this chapter, I argue that the Chicago School influence shaped the global diffusion of antitrust laws and policy in the 1990s and 2000s in two significant ways. First, as I have discussed in the previous chapter, the Chicago School influence reduced the enforcement of antitrust laws on restrictive vertical contracts used to create hierarchical coordination. These changes may have benefited some monopolistic US firms at home, but they have also caused complaints from some weaker, local manufacturers losing market shares to foreign competitors

under trade liberalization policies. In particular, the US cars, electronics, and home appliance manufacturers complained that they were at a disadvantage against the Japanese "keiretsu" corporate groups, which relied on the hierarchical coordination of economic activity between its members. The antitrust complaints against these Japanese firms failed in the US courts in the 1980s due to the new, limited understanding of antitrust rules introduced by the Chicago School approach and the difficulty of applying antitrust laws extraterritorially. In response, the US manufacturers successfully lobbied the Congress and the Bush government to pressure the trading partners of the US, particularly Japan, to adopt new or stronger competition laws at their home jurisdictions, thus, "leveling the playing field." In other words, the US promotion and pressure for other countries to adopt antitrust laws was a direct consequence of the changes antitrust law enforcement of home went through under the Chicago School influence in the 1980s.

Secondly, the US did not just promote the adoption of antitrust laws but also tried to diffuse its own *kind* of antitrust (enforcement) policy influenced by the Chicago School of antitrust to the rest of the world, which helped in aligning this diffusion with international business and financial interests. The global network of antitrust authorities created by the US antitrust agencies in the late 1990s transmitted the Chicago School's narrow interpretation of antitrust laws as scientific and technical knowledge. This kind of antitrust policy places substantial restrictions over the horizontal coordination of competitors, even when they are small, but allows the hierarchical coordination strategies of multinational firms and international financial interests; therefore, it is amenable to the multinational corporations' growth, and the international movement of capital. However, this suggests that the gains from the global

diffusion of antitrust laws for the US businesses depend on the ongoing supervision and attention on the new antitrust law jurisdictions by the international competition authorities' networks, and within it, the maintenance of the influence of the US antitrust policymakers and experts.

Sociologists have long been interested in understanding how norms emerge and institutionalize at the international level (Meyer et al. 1997; T. C. Halliday and Carruthers 2007; T. Halliday and Carruthers 2009b; Schofer et al. 2012; Chorev 2012; Babb 2013). The dominant view in this literature is that global norm-making involves the interactions and competition between the international actors, such as intergovernmental organizations and networks of professionals, and national actors, such as local political parties and economic interest groups, to create a policy or institution as the global norm (T. C. Halliday and Carruthers 2007; T. Halliday and Carruthers 2009b). However, as Kentikelenis & Seabrooke (2017) emphasized, less is known about how actors involved in this iterative process decide their own preferred policy designs – or as they call it, "policy scripts"– before they interact and compete with other actors to make their proposal the dominant one. By showing how American businesses, legislators, and policymakers have produced their preferred policy script on antitrust laws, then competed with the European policymakers for the international diffusion of their scripts, this chapter opens this black box of scriptwriting. I show how national ideational frames and material interests interacted to shape the preferred script of this global hegemon.

My findings also dispute the dichotomy that the existing literature on the global diffusion of institutions and policies offers between the "races to the bottom" – i.e., a global convergence on reduced regulatory standards–, and "races to the top"– i.e., a global convergence on increased regulations–, under the international competition between nation-states for investments (see

Carruthers and Lamoreaux 2016 for a review). What happened with the diffusion of antitrust laws in the 1990s was a mixture of these two trends: a regulatory system expanded and became a global institution, while it also contracted and was limited in its enforcement application under the influence of a particular interpretation of its rules. This finding underlines the importance of taking into account the varying interests of different investors, their contradictory demands from regulators, and the role of ideas and perception.

The analysis in this chapter mainly relies on the US Congressional Records and the DOJ's official reports and press releases on international antitrust activities from the early-1980s to the late-1990s to understand how the US corporations and policymakers conceived the changes in the US antitrust policy in relation to trade policy, and how they came to support the diffusion of antitrust laws to foreign countries. I have also relied on various secondary resources, scholarly and newspaper accounts from this period to give a rich account of the political, intellectual, and business perspectives over the US promotion of antitrust laws. The reports from international organizations, particularly from the OECD in the 2000s, were helpful in analyzing the components of antitrust policy as a policy script inside the Washington Consensus.

As previous scholars have argued, the EU also played a significant role in diffusing competition laws to developing nations, particularly to the Central and East European countries (Bradford et al. 2019; Aydin and Buthe 2016; Waked 2016). However, the American antitrust institutions and actors still had the most substantial influence over the global diffusion of competition laws, since the US has an older competition law regime and more substantial political power in international organizations that promote antitrust law diffusion, like the

OECD. As this chapter will show, the US policymakers were even able to veto the competition law diffusion proposals of the EU authorities when these proposals did not fit the US interests.

2. How Did Competition Laws Become a Global Norm?

The first wave of antitrust law diffusions was to a handful of American-occupied countries after World War II. By the end of the war, American politicians were convinced that the cartelistic groups of industrialists in Germany and Japan played a crucial role in the rise of fascist governments (Freyer 2006, 56).[37] Therefore, at the Yalta Conference, Americans insisted on creating a "radical decartelization" program and sent staff directly from the US Justice Department's Antitrust Division to oversee the drafting and institutionalization of the new German and Japanese antitrust laws (Freyer 2006, 248). In the following years, Germany became the biggest supporter of the diffusion of competition laws in Europe. It was also the leading force behind the competition law articles in the founding treaty of the European Economic Community (EEC) (later the European Union (EU)), the Treaty of Rome, in 1957. As new European countries adopted competition laws, some previous European colonies, like South Africa (1955), India (1969), and Pakistan (1970), also legislated similar competition laws (C. Lee 2005a). However, the diffusion of antitrust laws outside Europe was still limited. By the end of this first wave in 1989, there were only 37 nations with competition laws in the books (Büthe 2015).

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[37] For example, Senator Celler, one of the sponsors of the Celler-Kefauver Act of 1950, said "I want to point out the danger of this trend toward more and better combines. I read from a report filed with [the former Secretary of War] as to the history of the cartelization and concentration of industry in Germany… I do not want to see my country go the way of Japan or the way of Italy or the way of Germany or even the way of England" (Celler cited in Fox 1980, 1150–51).

As figure 1 above has showed, the second wave of competition law diffusion between 1990 and 2010 was much bigger and more expeditious than the first wave after the War. In this period, the countries with competition laws grew from 37 to 130, a 270% increase in two decades (Büthe 2015; Bradford and Chilton 2018; Bradford et al. 2019). Numerous non-Western, emerging market economies in the Global South that never had competition laws adopted them in this period. Table 1 below shows a small sample of these countries and the dates of their first competition laws:

Latin America	
Peru	1990
Brazil	1991
Colombia	1991
Venezuela	1991
Mexico	1992
Central/East Europe	
Poland	1990
Russia	1991
Bulgaria	1991
Czech Republic	1991
Slovenia	1991
Turkey	1994
Croatia	1995
Hungry	1995
Asia	
Taiwan	1992
China	1993

Table 1: Some countries that adopted new competition laws in the second wave of diffusion (source: Lee 2005a).

The existing cross-national surveys on competition law regimes suggest that they mostly have similar formal rules and procedures. For example, Bradford and Chilton (2018) have found that a majority of competition law regimes in their dataset had general provisions on abuse of dominance (118), price-fixing (114), market sharing (108), output limitations (108), tying of products (98), mandatory merger notification (96), discriminatory pricing (88) and unfair pricing (87) (p.402). In another study, Bradford and her coauthors (2019) found that a significant majority of these competition law jurisdictions allow sanctions in the form of administrative fees (almost 100%) and divestiture of corporate assets (75%) (p.33). This nearly universal acceptance of competition laws in the books suggests that competition laws have become a *global norm*. I define a global norm as an institution seen as a requirement of membership in the international community of modern nation-states, such as basic human rights or legal protections for private property.

Many existing accounts of the global diffusion of competition laws argue that countries adopted competition laws as a part of their adoption of "neoliberal policies" or the "Washington Consensus" in the 1980s and 1990s (Gray and Davis 1993; Kovacic 1997; 2001; Gal 2004; D. P. Wood 2005; Kronthaler and Stephan 2007; Buch-Hansen and Wigger 2011; Hazel 2015). In this new consensus, most countries turned to the free competitive markets over the state-based controlled economies, and adopted of a set of policy reforms, such as privatizations, dismantling of the welfare state, deregulation of many sectors of the economy, tax cuts and trade liberalization, to make their economies more competitive (Babb 2013; Fourcade-Gourinchas and Babb 2002). The legislation of competition laws was a part of this effort. The following passage

from the introduction of a book titled "The Internationalisation of Antitrust Policy" summarizes this argument in its simplest form:

> "As the end of the century approached, however, the scene began to change dramatically with a move on the part of many countries from monopolisation to demonopolisation and from state control and planning to liberalisation and privatisation. This important development has enormously contributed to the growing recognition that, on the whole, competition can be regarded as an effective tool for enhancing innovation, furthering economic growth and safeguarding the welfare and social development of countries. […] It has also been accompanied by a considerable increase in the number of countries, which – particularly over the last two decades – have come to recognise not only the desirability of competition but also the need to protect it [by competition laws]." (Dabbah 2003, 1).[38]

While some version of this account suggests that the diffusion of antitrust laws was based on countries' own voluntary and calculated decisions or beliefs on their economic interests, in reality, the countries without a previous competition law system most of the time lacked the necessary local knowledge or support for these laws. Indeed, numerous international reports on new competition law jurisdictions suggest that lack of awareness or explicit support was a

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[38] The OECD peer-review on Mexico similarly states: "Mexico's competition policy was introduced as part of a decade-long reform initiative, begun in the mid-1980s, to end central government control and protection of domestic economic activity and to develop instead a market-based economy […] A key element in the government's economic reform was the adoption of a general competition law. Removing trade barriers could not assure competition if private barriers sprang up instead and import liberalization could not ensure rivalry in non-traded sectors." (Shaffer p. 10-11).

challenge for the new laws. For example, the OECD report on Turkey stated that its new competition law "faces problems that often confront competition agencies in economies with a long tradition of strong government control, including deficiencies in public understanding of and appreciation for competition policy" (J. C. Shaffer 2006, 63). Similarly, the OECD report on Mexico suggested "The development of a constituency for competition policy in Mexico must contend with the fact that concepts of market competition are novel in the Mexican business and government culture" (J. C. Shaffer 2004, 12). Therefore, the endogenous, political and economic demands for protecting competition through competition laws do not seem to be the main force behind the diffusion of competition laws.

Instead, similar to some other neoliberal policies, like trade liberalization or deregulations (see e.g., Henisz, Zelner, and Guillén 2005; Campbell 2004), a major contributor to the diffusion of competition laws was the pressures and promotion of the global hegemons (mainly the US and EU) and several influential international organizations. These international actors framed and propagated competition laws as a part of the neoliberal policy package. The World Trade Organization (WTO), UNCTAD, and OECD supported the adoption of competition laws as a requirement of trade liberalization (Anderson and Jenny 2001; Marquis 2014; Winslow 2001; C. Lee 2005b; Blachucki 2016). They argued that trade liberalization through the elimination of "public barriers over trade", such as tariff and quotas, and trade and investment regulations, do not sufficiently ensure the free flow of goods and services, since the "private barriers over trade" erected by private monopolistic businesses can continue to "close off" markets to the entry of foreign companies (Hazel 2015). Consequently, one major force behind diffusions was the competition law clauses of free trade agreements (like in Turkey and Mexico, which I will

discuss in the next chapter). Bradford & Büthe (Bradford and Buthe 2015) find that of a randomly selected sample of 182 post–World War II preferential free-trade agreements, 128 (just over 70%) had at least one article devoted to competition laws, and the increase in such agreements since the 1990s coincides with the growing number of new competition law jurisdictions.

Furthermore, the World Bank (WB) and International Monetary Fund (IMF) also pressed countries for the adoption of competition laws by framing them as complements to privatization and deregulation reforms (Khemani 2007; Laffont 1998). They argued that, without the checks on monopolization by competition laws, privatizations and deregulations could create new private monopolies in sectors like telecommunications and transportation; therefore, competition law reforms should complement privatization and deregulation reforms (Hazel 2015; Laffont 1998). With this conviction, the IMF and WB imposed conditionalities on some borrowing countries to adopt competition laws (Gray and Davis 1993). For example, the Indonesian and Thai competition laws were passed due to IMF agreements after the Asian financial crisis (Hazel 2015; C. Lee 2005b). Similarly, the Argentinian competition law in 1991 was conditioned by a WB industrial sector adjustment loan (Waked 2016). However, for most countries, the influence of international organizations over their competition laws was through their "soft power," through research papers, guidelines, and performance measurements (Khemani 2007).[39]

[39] Notable examples: UNCTAD's "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices" ("RBP Code") (1980) and OECD's "Guidelines for Multinational Enterprises" (1976).

The promotion of antitrust laws by these international proponents of the Washington Consensus is contradicting the scholarship on neoliberal policy diffusion. Unlike the other Washington Consensus institutions and policy recommendations, antitrust laws have strong tensions with mainstream neoliberal ideas and big business interests, which were already revealed by the strong critique of antitrust laws by the Chicago School of Law and Economics in the US (discussed previously in Chapter 2). This School has argued that rather than contributing to the emergence of competitive dynamics and market efficiency, the antitrust restrictions on many areas of economic activity (such as vertical restrictive agreements between suppliers and distributors) have a "chilling" effect on competition and efficiencies (see: R. H. Bork and Bowman 1965; R. Bork 1993; Posner 2009). It has urged policymakers to err on the side of caution and make the minimum antitrust interventions as possible. It has also suggested that the competitiveness of markets could be in danger mostly when there are public impediments over market entry; therefore, in the absence of these impediments under trade liberalization and deregulations, there were few reasons to worry about the competitiveness of markets. Indeed, some legal scholars adhering to a version of these Chicago School ideas have openly opposed the diffusion of antitrust laws warning that they can be "abused" or misapplied by foreign governments and prevent economic development (see: Rodriguez and Coate 1995; Rodriguez and Williams 1993 for strongest versions of this critique). They suggested that developing countries often have weaker or more corrupt political systems that allow local economic interest groups to manipulate economic policies, including antitrust, to protect their own interests (Baumol and Ordover 1985; McChesney, Shughart, and Shughart II 1995). Consequently, the diffusion of antitrust laws, despite these strong objections from intellectuals, contradicts the

expectations of the scholarship that connects the Washington Consensus prescriptions to market-fundamentalist ideas in academia and various expertise fields (P. A. Hall 1993; Blyth and Mark 2002; Fourcade 2009; Babb 2013).

In addition, the diffusion of antitrust laws also contradicts the global business and financial interests of the 1980s and 1990s, as described by the existing scholarship on economic globalization (Guillén 2001a; Alderson 2004; Brady, Beckfield, and Zhao 2007; Gereffi 2010). One major characteristic of economic globalization in this period was the growth in foreign direct investments (FDIs), which outpaced the trade flows by one to three between 1983 and 1990 (Gereffi 2010, 163). As a result, the value of cross-border merger and acquisition transactions doubled between 1988 and 1995 (Lloyd 1998, 169). The new antitrust regulations over M&As, in theory, could prevent this lucrative business or slow it down by increasing the bureaucratic red tape. The growth of multinational corporations also increased their restrictive contracts with their producers for outsourcing or licensing of the rights to their services and products (Buckley and Casson 2016; Buckley and Enderwick 1985). These contracts were essential for the multinational corporations' control of their local upstream and downstream markets to reduce unpredictability and offer services and products at a lower price. The new competition laws would regulate and limit these restrictive contracts.

Then, why did the global hegemons like the US and the international organizations support the antitrust laws as a part of the Washington Consensus? How did the global diffusion of antitrust laws interact with the dominant intellectual ideas and economic interest groups of the time? As I summarized above, the existing literature ignores these questions by either solely focusing on the endogenous factors that have led countries to adopt new competition laws in the

1990s or by taking the promotion of antitrust laws by these countries and international organizations at their face value, accepting that antitrust laws complement rather than contradict the main policies of the Washington Consensus. I instead argue that, despite clear contradictions, the association of antitrust laws with neoliberal policies was a result of the deliberate effort on the part of the US business interest groups, lawmakers, and antitrust agencies to diffuse antitrust laws to the rest of the world as a way to "level the playing field" between the US and its foreign competitors in international trade. This effort, ironically, was in direct response to the weakening of the US antitrust law enforcement at home under the influence of the Chicago School ideas in the 1980s.

In the following pages, I will show that, by the late 1980s, owing to the political resentment for the antitrust losses in courts against foreign companies and the US's growing trade imbalance, US business interest groups –particularly car, electronics, and machinery manufacturers–, the lawmakers in the congress and the policymakers in the antitrust agencies started to build a policy script suggesting that antitrust laws are a requirement for trade liberalization, and even more broadly, for the liberal arrangement of markets. They first put this new policy script into use during the Structural Impediments Initiative (SII) negotiations with Japan. Then, the US antitrust agencies expanded it in their "technical assistance" mission to the post-Soviet countries after the fall of the Soviet Union, and later, incorporated it into international organizations, particularly the OECD, and later to the International Competition Network (ICN).

3. The US Antitrust Exceptionalism Problem and Its Solutions

Since the beginning of antitrust law enforcement, many American corporations have argued that the US antitrust laws hurt their international competitiveness because only the US companies had to comply with strict antitrust rules that banned abusive and anticompetitive conduct, while their competitors based in other countries were allowed, or even encouraged, to use anticompetitive strategies to defeat their competitors in international trade. As a result, the US companies were competing internationally "with one hand tied behind" (Statement of Jacob Javitz in Congress 1981, 14). What I will call the "US antitrust exceptionalism argument" was brought to Congress many times to request reforms to the US antitrust policy or object to the proposed expansions of antitrust enforcement in the 1960s and 1970s.[40] But as Senator Hart, the Chairman of the Senate Subcommittee on Antitrust and Monopoly, explained, it was never taken very seriously until the American companies' competitiveness both at home and abroad came to face a severe crisis by the mid-1970s under increasing trade liberalization:

> "Over the years American businessmen have complained that, the American antitrust laws were hampering their ability to compete in other countries. Further, there have been complaints that because of laxness of antitrust laws of other countries –especially in their treatment of their exporting companies– American businessmen were having problems competing at home. Over the 10 years during which I have chaired this subcommittee the level of these complaints has been a low murmur. Every once in a while, the volume level peaked, but generally it has

[40]There were extensive hearings on the subject before the Senate Judiciary and Monopoly Subcommittee from 1964 and 1967, and then again in 1974. This argument was also used to oppose the increasing criminal penalties for cartels (see Congress 1970).

> been more on the order of muttering. But, as our balance of payments problems have worsened and operations of American companies overseas have expanded, the complaints are louder and more frequent." (Senator Hart in Congress 1974, 2).

By the mid-1970s, the American manufacturing industries in steel, electronics, cars, and machinery, which were the backbone of the American economic exports after the Second World War, started to lose market shares both at home and abroad to competitors from Europe and Japan. In 1972, the import penetration ratio for manufactured products (the ratio of imports to total shipments plus imports) was 6.1 percent. That figure rose to 7 percent in 1977, 8.5 percent in 1982, and 12.9 percent in 1987 (U.S. Department of Commerce 1989). Exports were also faltering. By 1980, only 8% of the US production was exported overseas, way behind the 25% of the European countries (Congress 1981, 15). The result was a mounting trade deficit that had grown from $2.5 billion in 1971 to $128.1 billion in 1988 (U.S. Department of Commerce 1989). The private sector's efforts to catch up by making more capital investments were insufficient. For example, the $7 billion investment in new machinery by the US steel producers in the early 1980s could not prevent their continuing loss of global market shares (Congress 1987, 35).

In the 1980s, the American business complaints on the US antitrust exceptionalism primarily focused on the Japanese "keiretsu" groups.[41] Keiretsu groups are comprised of a system of companies cooperating through shared (interlocking) shareholders and directors, exchange of personnel, and close line of communication in management. They were often

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[41] An opinion piece in the New York Times in 1989 stated: "Frustration with Japan in the United States and resentment of America in Japan are near the flash point. Many Americans are upset about recent shifts in the global balance of economic power, shifts that seem to threaten American jobs and international influence." (The New York Times 1989).

created under the support of the Japanese government officials (Lincoln, Gerlach, and Ahmadjian 1996). They had a pyramid-like structure, which had a controlling "parent" manufacturer (like Toyota Co.) at the top supervising the activities of suppliers and distributors at the lower levels. Some observers at the time argued that the keiretsu system was an efficient business organization bringing a steady supply of components at stable prices to the manufacturer parent company, thus allowing it to produce at lower cost and offer cheaper products (Lincoln, Gerlach, and Ahmadjian 1996). However, many American manufacturers at the time complained that keiretsu groups used anti-competitive strategies that they were not allowed to use under the existing US antitrust laws. This sentiment was also shared by some politicians and trade experts worrying about the growing trade deficit of the US with Japan. For example, Robert Prestowitz, a leading trade negotiator under the Reagan administration, published a popular book *Trading places: How we allowed Japan to take the lead* (Prestowitz 1989; also see Lipsky 1991; Myerson 1991).

There were two main antitrust-related allegations against the Japanese keiretsu groups: First, inside the Japanese market, the keiretsu groups had formed exclusivity agreements and cartelistic groups to block the entry of American competitors into the Japanese market. The US manufacturers argued that these cartelistic agreements were the main reason why the US exporters were not successful in Japan – for example, the share of American cars in Japan remained below 1% (Congress 1990, 67). Secondly, by closing the Japanese market off to foreign competitors, the keiretsu firms could collect higher markups from Japanese consumers. They then used these markups to subsidize the below-cost sales inside the US market,

committing price discrimination and predatory pricing antitrust violations (Congress 1992, 66).[42] In other words, as one corporate representative aptly put, by consuming products at a higher price inside Japan, the Japanese middle class was forced to "buying market shares" in the US (Boone Pickens in Congress 1990, 65). This way, the US producers could shift the blame for their inability to offer similar quality products at competitive prices both at the home market and abroad.

The US antitrust policymakers discussed three leading solutions to this problem and had already tried some out. The first proposal was to soften the US national antitrust laws, if not universally, only partially by giving *exemptions* to the export companies, either by amendments to the antitrust laws or by changes to the antitrust authorities' enforcement policies. The second proposal was to apply the US national antitrust laws *extraterritorially* to foreign companies' anti-competitive practices abroad when these practices affect the US market and producers. The third proposal was to "level the playing field" by *exporting* the US antitrust rules abroad or by harmonizing other countries' existing antitrust laws with the US antitrust law standards so that companies competing abroad can face similar restrictions over anti-competitive practices. I argue that the third option started to gain prominence in the 1980s as the influence of the Chicago School over the US antitrust policy blocked the first and second solutions.

Antitrust Exemptions to Exporting Companies

[42] They argued that, this is why the seven major Japanese auto makers lost $3 billion a year in the United States and $1 billion per year in Europe, but earned overall earned $10 billion a year globally between 1987 and 1990 (Congress 1992, 66–67).

As I explained in Chapter 2, the US Congress historically resisted reducing antitrust law sanctions by repealing or amending parts of the US antitrust laws. However, Congress was still receptive to the idea of carving out antitrust exemptions for companies demanding less antitrust oversight. Such exemptions were provided to a wide range of economic sectors, such as agriculture, sports activities, and media. Since the legislation of the Sherman Act, export companies also pressured Congress to receive antitrust exemptions. They argued that the European competitors of the US firms at the time were free of antitrust regulations and were even encouraged by their governments to combine and form cartelistic agreements to conduct international trade, which created "unfair" market conditions for the US exporters.[43] In response, Congress passed the Webb-Pomerene Act of 1918. This Act allows companies that only export to foreign markets to commit antitrust violations, such as price-fixing or information sharing if they register as "export trade associations" with the FTC, and their actions do not affect the US consumers.

However, in the 1970s and 1980s, the American companies argued that the broad and abstract language of the Webb-Pomerene Act did not provide sufficient protection to exporting companies when they tried to coordinate their activities. There were only a few companies that were willing to organize as export trade associations. By the mid-1970s, their numbers had dwindled to 35, accounting for only 3% of the country's exports (James Nicholson testimony in

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[43] Senator Atlee Pomerene argued in support for this legislation with these words: "In foreign countries today the merchants and manufacturers and businessmen generally are allowed to combine to go out and seek foreign trade, and they do combine for that purpose. If we are to meet them on a fair basis of competition, we must place in the bands of our businessmen the same methods which the businessmen of other nations use in seeking foreign trade" (Pomerene quoted in Congress 1974, 162).

Congress 1974, 162). They argued that, compared to their competitors in Japan or the Soviet Union, US companies wanting to coordinate their actions and pool their resources faced too much antitrust liability. Therefore, they demanded an explicit exemption for "joint ventures," i.e., an integration of productive capacity or collaboration between two legally independent firms for a common purpose (Pitofsky 1986). By the late 1970s, joint ventures had become a popular business strategy for US export manufacturers as a solution to their reduced international competitiveness, especially R&D joint ventures. Although the antitrust agencies were already allowing almost all joint ventures (for example, between 1970 and 1985, there were only three challenges on R&D joint ventures (Congress 1987, 124)) the US firms still asked for more legal guarantees that they would not face antitrust restrictions.

In response to these demands, the DOJ issued a new antitrust guideline for "research joint ventures" in 1980. These guidelines differentiated efficient joint ventures from inefficient cartelistic agreements that the DOJ would continue to prosecute. Congress went a step further and passed the Export Trading Company Act in 1982. This Act explicitly granted partial antitrust immunity and single damage treatment to export ventures if they are first reported to the DOJ and the FTC. One of the early beneficiaries of this Act was the GM-Toyota joint venture (New United Motor Manufacturing, Inc. or NUMMI), which the FTC cleared in 1983. In 1984, Congress again expanded the antitrust exemptions for exporting companies with the National Cooperative Research Act by exempting the R&D joint ventures from antitrust laws without any clearance requirements. These exemptions successfully increased the number of joint ventures among US exporters (Congress 1987).

However, the hardened stance against cartelistic (horizontal) agreements under the Chicago School approach and the Reagan administration made it more difficult for companies to expand these antitrust exemptions even further. Indeed, the Chicago School intellectuals had always recommended against giving antitrust exemptions to exporting companies. The Antitrust Taskforce led by the Chicago School economist George Stigler strongly recommended in 1969 the repeal of the Webb-Pomerene, arguing "The creation of cartels in foreign commerce is antithetical to the underlying theory of the Sherman Act. The danger that exempted cooperation between competitors in the export field will lead to illegal cooperation at home is too great to be viewed as merely a potential abuse" (Stigler et al. 1968, 35). Similarly, when the Congress considered softening the antitrust laws to give blanket immunity to failing businesses, especially those in the suffering manufacturing industries, the Assistant Attorney in General (AAG) in charge of antitrust in Reagan administration, William Baxter, told the Senate Judiciary Committee that instead of granting antitrust immunity to distressed industries to cartelize, he would rather "grant them a license to import heroin" (Congress 1990, 22). In other words, as the business complaints about the "US exceptionalism" grew and became more politically salient, the growing Chicago School influence over the US antitrust policy emerged as a critical impediment over the business demands to expand their exemptions.

Furthermore, the argument for increasing the antitrust exemptions for exporters had also lost most of its strength since the successful export of antitrust laws to European countries in the 1950s. When facing complaints by businesses about their "unfair" restrictions by the US antitrust rules, legislators and antitrust agencies resisting these complaints could point at the availability of antitrust laws in major European countries and Japan by the 1970s and argue that their foreign

competitors faced the same restrictions.[44] In addition, they warned against a race to the bottom in antitrust laws if the US would expand its antitrust exemptions. The trading partners of the US in Europe could easily reciprocate by expanding their own exemptions, which would defeat the purpose of the changes in the US (Congress 1981).

Extraterritorial Application of the US Antitrust Laws

The second solution debated and tried was the use of the US national antitrust laws "extraterritorially," i.e., beyond the national boundaries of the US, on foreign companies and conduct affecting the US producers and markets. The extraterritorial application of the US antitrust laws was already allowed by the broad language of the Sherman Act. The landmark Supreme Court decision in *United States v. Aluminum Co. of America* ("Alcoa") in 1945 had established the US antitrust law jurisdiction over conduct committed outside the US, if that conduct intended to or did produce anti-competitive effects over the US markets (Waller 1996). This so-called "effects doctrine" was actively used in the post-war period by courts to sanction foreign companies (Waller 1996). The antitrust agencies also pursued the extraterritorial enforcement of antitrust. The DOJ published its first "Guide for International Operations", which

[44] For example, against this business argument, Senator Hart wrote in 1972: "Much of the business argument in this area appears to stem from a mistaken belief that the United States is the only country in the world with strong antitrust policies. This might have been true prior to World War II when most other nations not only permitted but actually encouraged cartels and restrictive business practices. But today 24 nations, including most of Europe, Japan, and most of the other developed countries of the world, have their own antitrust laws and what is unlawful for U.S. firms may also be unlawful for their foreign competitors." (Hart 1971, 47). Similarly, the AAG Kauper testified in the Congress "One also has to recognize that increasingly our companies doing business abroad and subject to the antitrust laws of the authorities under which they operate abroad are undoubtedly subject to virtually these same investigative authorities by any number of foreign government agencies" in 1975 (Congress 1975a).

clearly “allowed for actions against export-restraining conduct, even in the absence of direct harm to U.S. consumers” (AAG Rill in Congress 1992, 18–19). Congress transferred these guidelines into written law with the Foreign Trade Antitrust Improvements Act in 1982 (Congress 1990, 11).

However, besides the practical, administrative problems in filing subpoenas and collecting evidence from foreign businesses, the extraterritorial enforcement of the US antitrust laws also faced active resistance from foreign authorities and governments in the 1980s that saw it as an intervention in their legal sovereignty. Foreign countries, including the close allies of the US, passed new legislation in the 1980s to prevent the US law enforcement efforts. For example, the United Kingdom's Protection of Trading Interest Act of 1980 and Australia's Foreign Proceedings (Excess of Jurisdiction) Act 1984 barred its citizens from helping US antitrust cases. [45] A French law enacted in 1980 imposes criminal liability on any foreign nationals seeking discovery of economic, commercial, or technical information in connection to a foreign judicial or administrative proceeding (Congress 1981). In 1981, the US Department of State complained they were receiving dozens of complaints every week about the extraterritorial application of US laws (Congress 1981).

For the administration of President Reagan (1981-1989), these jurisdictional conflicts were a source of diplomatic embarrassment and harmed the US interests in pursuing free trade

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[45] The UK government even said it has postponed the privatization of the British Airlines because of the effort to inability to estimate the cost of its liability in the American courts (Congress 1986, 35). The ambassador to UK Kingman Brewster complained, “The ease with which private plaintiffs can threaten foreign companies, not only with the heavy costs of litigation but the possibility of three times the recovery of actual damages, outrages even those of our foreign friends and allies who understand us best” (Congress 1981, 58).

agreements with other nations.[46] The Reagan trade negotiators committed to rolling back the extraterritorial enforcement of antitrust laws based on a new principle called "negative comity." This principle dictated that the US would drop antitrust cases to "accommodate the vital interests of other states whenever accommodation is not inconsistent with its own essential national interests" (Congress 1986, 69). To force the courts to adhere to this standard, the Senate Republicans introduced a bill called "Foreign Trade Antitrust Improvements Act" in 1985, which would have forced the courts to also adhere to the negative comity principle if it had passed (Congress 1986).[47] Failing in this effort, the administration instead revised the DOJ "Antitrust Enforcement Guidelines for International Operations" in 1988, which committed the DOJ to adhere to the negative comity principle in its prosecution of antitrust cases (Congress 1989, 122).

Even more importantly, similar to the antitrust exemptions for exporting companies, the solution to enforce the US antitrust laws extraterritorially on foreign companies also faced a significant impediment from the Chicago School's influence over antitrust policy in the 1980s. Even if the courts and authorities supported the extraterritorial enforcement antitrust laws, many of the allegations brought against foreign companies, such as exclusionary practices and abusive practices – most importantly predatory and discriminatory pricing– were already very hard to pursue in the US courts (see Davidow 1992). Under the new Chicago School consumer welfare

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[46] The AAG Rule testified in the Congress: "the Department are aware of the harm that blind application of the antitrust laws, insensitive to the interests of foreign nations, can do to our relationships with our trading partners" (Congress 1986, 8).

[47] Sen. Mitch McConnel summarized the purpose of this bill with these words: "As I understand it, the bill would require that both the interests of the United States and of the foreign nation or nations involved in any given case must be taken into account in adjudicating private treble damage actions. By doing so, it seeks to lessen tensions that result from the extraterritorial application of the domestic antitrust laws, without sacrificing the legitimate interests of the United States. To the extent that the bill manages to accomplish that, it is certainly deserving of support" (Congress 1986, 50).

and efficiency standards, these conducts were considered almost categorically competitive and legal.

The clearest example of how the Chicago School influence emerged as a significant impediment over the extraterritorial antitrust enforcement was the antitrust case against Japanese TV manufacturer Matsushita, which reached the Supreme Court in 1985.[48] In this case, the plaintiff US company (Zenith Electronics Corp.) argued that Matsushita conspired with others to fix prices and collected high markups in the Japanese market, which it then used to undercut the prices of its American competitors in the US market, i.e., a combination of cartelistic coordination with predatory (below-cost) pricing to monopolize a market. Because a part of the alleged antitrust violation was committed abroad, the case required the extraterritorial enforcement of the US antitrust laws. However, the main issue here was interpreting the predatory pricing rule, which the Chicago School scholars had strongly criticized. They had argued that courts often confuse competitive (low markup) pricing with predatory pricing, and if companies really attempt predatory pricing to exclude their competitors, they are behaving irrationally and at their own loss; therefore, the courts should rarely enforce the antitrust predatory pricing rule (R. Bork 1993; McGee 1958).

While reviewing the Matsushita case, the Supreme Court asked the DOJ to file an *amicus curiae* brief – the DOJ's expert opinion on the alleged conduct. In addition to urging the Court to follow the negative comity principle in its extraterritorial enforcement, the DOJ also characterized Matsushita's conduct as "vigorous price competition and lawful competition" and

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[48] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.* - 475 U.S. 574, 106 S. Ct. 1348 (1986).

argued that there was no predatory pricing behavior and no evidence that Matsushita had gained anything from it below-cost pricing in the US (Congress 1989, 10). The Court agreed with the amicus and with the Chicago School skepticism on predatory pricing in general by saying "a predatory pricing conspiracy is by its nature speculative" and vindicated Matsushita. In the aftermath of this case, the DOJ's decision to file an amicus brief in support of the Japanese defendant company was strongly criticized for giving in to the pressures of the Japanese government.[49] But when asked to defend his decision, the AAG Charles Rule explained that the DOJ simply sought to guide the Court in the proper enforcement of the predatory pricing rules under the new Chicago School interpretation, and its opinion did not discriminate between foreign and American corporations:

> "We were simply saying that the American companies can be victimized just as much as any other country's companies, by standards of antitrust that allow plaintiffs' attorneys to spend years and years and impose hundreds of thousands and millions of dollars in costs on the companies who get sued. What we wanted to do was try to develop rules that are efficient, that the courts can use, to make sure they handle their docket in the antitrust area efficiently." (Rule testimony Congress 1989, 110).

The Matsushita case was the first time that the Chicago School influence substantially weakened the predatory pricing rules, and this decision had its first direct impact on the US companies trying to use the antitrust laws extraterritorially to protect

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[49] Indeed, the Japanese embassy officials visited the DOJ Antitrust Division before the filing of the brief, and in a diplomatic note in 1984, the Japanese government urged the filing of the amicus (Congress 1989).

themselves from the strategies of their foreign competitors. Although the negative comity principle was abandoned later on with the change in the administration from Reagan to Bush, and the DOJ again revised its guidelines in 1992, which allowed extraterritorial enforcement, nevertheless, the weakening of the antitrust laws on monopolistic conduct at home had already reduced the American corporations' ability to use the US antitrust laws extraterritorially. If the US companies cannot create their own cartels under antitrust exemptions or prevent the monopolistic practices of the foreign companies by the enforcement of the US antitrust laws, the only remaining solution to US exceptionalism in antitrust was to make the US not the exception and require other governments to check and control their own cartels and monopolies.

Exporting Antitrust Abroad

As I explained above, the US efforts to export antitrust laws to other countries go back to the aftermath of the Second World War, with the installment of the new antitrust laws to Germany and Japan under US occupation, and the US also supported the installation of the European competition law system through the Treaty of Rome. However, these promotions remained isolated and did not turn into a universal promotion of antitrust laws under a global policy script. For example, the proposal to create an International Trade Organization (ITO), which would not only regulate the public barriers over trade but also enforce some basic competition law rules to prevent international cartelistic agreements, failed when the US Congress refused to ratify the Havana-Charter in 1948. As the AAG Diane Wood reflected later

on this missed opportunity, “it seemed peculiar for them to abandon an instrument that promised international coordination of competition rules” (D. P. Wood 1992, 284).[50] Similarly, in the 1950s and 1960s, the US antitrust policy largely turned inwards and did not engage much with foreign governments or international organizations to promote itself internationally.

In the 1970s, there was a revived interest to discuss competition law and policy at the international level. Still, this interest was mostly through the developing countries’ demand to control the power of multinational corporations. A group of developing countries in the UN (the so-called “Group 77”) started working on a multilateral code on “restrictive business practices” under the UNCTAD in 1974, which was accepted in 1980.[51] This code is important because it acknowledged that anti-competitive business practices could impede or negate the benefits of trade liberalization, therefore, framed competition laws as a complement to trade liberalization policies (Dhanjee 2001; Fox 1988). However, written from the perspective of developing economies, the UNCTAD codes assigned the primary responsibility of keeping multinational corporations in check to advanced Western economies already with competition laws (Fox 1988), and explicitly absolved developing countries from enforcing competition laws onto their own corporations by stating that these countries may "orchestrate production and distribution of their resources and manufacturers (i.e., cartelise) to promote their development interests and to protect themselves from exploitation by multinationals." (Fox and Sullivan 1989, 142). The

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[50] Diane Wood explains that there were two reasons related to antirust fort the Congress’ rejection: “Congress was not ready to cede any antitrust jurisdiction to the international mechanisms established by the Charter, and furthermore, it found the language on restrictive business practices to be too weak, as compared with the prevailing U.S. standards on these matters.” (D. P. Wood 1992, 284).

[51] The UNCTAD codes are called “The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”, or the “RBP Code”. These were only voluntary codes for the signatory countries.

industrialized countries in the OECD also responded to these developing county demands by issuing the "Guidelines for Multinational Enterprises", which similarly sought to limit the anticompetitive practices that multinational corporations can use in developing economies (Fox 1995b), rather than diffusing the competition laws to them.

However, by the end of the 1980s, there was a significant change in the US' interest to export antitrust laws to other countries, particularly developing economies, to protect its own corporations. The Democratic takeover of Congress with the 1987 elections also contributed to this change. Democrats strongly criticized the previous Reagan administration and the Conservative party for the uncontrolled expansion of free-trade relations with other countries without considering the growing trade dependency and gradual disappearance of the US manufacturing industries.[52] Since Congress can approve or reject free trade agreements negotiated by the government, this critique successfully forced the new Bush administration (1988-1992) to revise the US trade policies. Granting American corporations "fair access" to international markets, rather than just "free access" (Senator Bryan Congress 1990, 2), became the primary goal of the US trade policy in this period. As Senator Reid expressed, Congress recommended that the US government should force the countries that seek free trade with the US to acquire the same antitrust laws and rules:

> "If a nation really has free trade laws, then it will receive the benefit of America's open market. If it places restrictions on foreign investment on its own economy,

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[52] The shift in the US trade policy under Bush administration was summarized with these words: "The Administration, like its predecessor, uses open investment and free trade as the two policy components to cure our foreign trade ills. But unfortunately, and I think this Administration is beginning to realize it, the pursuit of these policies has done nothing to improve our staggering trade deficit." (Senator Reid in Congress 1990, 5).

then America will place the same restrictions on investments here" (Senator Reid in Congress 1990, 5).

Congress also identified Japan as the primary target of this new "tit for tat" US trade policy. It issued a series of warnings to Japan by sanctioning it for violating a bilateral semiconductor agreement in 1987 and selling sensitive technology to the Soviet Union by a subsidiary of Toshiba in 1988 (Mastanduno 1992). It passed the 1988 Trade Act that gave the US government the authority to negotiate the elimination of "objectionable trade practices" with "priority trade partners," defined to refer to Japan, under the threat of reciprocation (the so-called "Super 301" article) (Mastanduno 1992). Furthermore, in the 1989 DOJ oversight hearings, the Democrats in Congress strongly reprimanded the DOJ's amicus brief in the Matsushita case and demanded that the new government protect the US industries against anti-competitive practices of the keiretsu firms (Congress 1989).[53]

Under this congressional pressure, the Bush administration initiated the Structural Impediments Initiative (SII) negotiations with the Japanese government in 1989 (Mastanduno 1992). The SII represents a significant shift in the US trade liberalization policy and free trade talks. Going beyond the previous free trade agreements and the framework of the GATT negotiations, in SII, the US government scrutinized the domestic policies and practices of a foreign government as a "structural impediment" over free trade and sought to alter its behavior (Japan already had some of the lowest tariffs in the world and was compliant with the regulatory

[53] Democratic senators often expressed "shock" about the outcome of the case. For example, Senator Bryan said "the Matsushita decision was truly an extraordinary case. As shocking as the decision was to many of us was the fact that the American government filed an amicus brief in support of the Japanese electronics firm involved, and hopefully that policy will not continue" (Congress 1990, 7).

trade requirements under GATT) (Mastanduno 1992). The US had a long list of practices that wanted to be addressed, as every government department participating in the negotiations brought their own policy solutions to the trade imbalance problem with Japan. For example, the State Department sought to reform Japan's "Large Retail Store Law," and the Treasury Department suggested a significant increase in Japanese government spending on infrastructure and housing. The Office of the United States Trade Representative even wanted to focus on encouraging more leisure and shorter working hours for Japanese workers (Mastanduno 1992). Into this list of demands, the DOJ Antitrust Division added the demands for the reformation of the Japanese Antimonopoly Laws and changes in the enforcement policies of the Japanese antitrust authority, the Japan Fair Trade Commission (JFTC). The SII was the first instance the US explicitly demanded the acquiring or strengthening antitrust laws from a foreign government to grant free access to its market.

When the SII negotiations were concluded, and a final agreement was signed in 1990, Japan's commitment to reform its antitrust laws and policies was perceived as one of the most significant accomplishments in SII. The Final Report of SII stated that the JFTC committed to "rigorously deal with such conduct as price cartels, supply restraint cartels, market allocations, bid-rigging, and group boycotts, and will take more formal actions against them when they are found in violation of the Antimonopoly Act" (Congress 1990, 56–60). In two years following the agreement, the Japanese government increased the investigative staff of the JFTC by 38%, reformed the Japanese antimonopoly law to increase administrative fines and criminal violation penalties substantially, and took 30 formal actions against violators, including one high-profile

criminal cartel case and 8 bid-rigging cases and imposed a record high level of fines ($97 million) (Congress 1992, 23–25).

The US antitrust agencies and Congress used the SII as a model for other trade negotiations (Matsushita 1990). Following this agreement, the number of bilateral preferential trade agreements the US signed with other governments that included competition law articles increased dramatically (Bradford and Buthe 2015). SII also seemed to have inspired the competition policy article of the North American Free Trade Agreement (NAFTA) signed with Mexico and Canada in 1992, which required the signatory states to "adopt or maintain measures to proscribe anticompetitive business conduct and take appropriate action with respect thereto." In addition to reforming or legislating new antitrust laws, these agreements emphasized the signatory countries to ensure "non-discrimination, transparency and due process", and "coordination" with the US authorities in their antitrust enforcement actions (Solano and Sennekamp 2006, 18), thus starting to set up the institutional mechanisms for the global harmonization in antitrust policy.

4. The Global Harmonization of Antitrust Policy Through Antitrust Agency Networks

Besides dictating that its trade partners have antitrust law regimes, the shift inside the US antitrust policy towards the Chicago School interpretation also impacted the *kind* of antirust policy that the US promoted to the rest of the world. The main state actor in the US that could determine which kind of antitrust policy was promoted was the US antitrust agencies and their

policy experts, which suddenly became much more involved in international affairs, rather than regulating the local markets. As the Economist wrote, “The Bush administration's trustbusters are far more interested in what is happening abroad than at home.” (Economist 1991b). This was particularly the case for the DOJ’s Antitrust Division, which took political credit for committing Japan to antitrust changes in SII[54]. Under the Bush administration’s AAG James Rill (1989-1992), this division assumed a new responsibility to guide the global “harmonization” (increasing the shared standards of enforcement and interpretation) of antitrust policies among the new competition law jurisdictions. As Rill himself explained, this was a historical shift in the mission of the DOJ Antitrust Division:

> “To the extent that the years 1989 to 1992 can be in some way distinctive, I think, probably the unique defining factor is the Division's leadership together with that of Janet Steiger and her colleagues on the FTC on the global reach of competition policy… Although international antitrust has for a long time been the focus of the Division … , the events of the recent period were more qualitatively than even quantitatively different, more than incremental.” (Rill 1994, 904).

To explain the success of SII, the DOJ had placed much emphasis on the strength of the informal close relationship between the DOJ Antitrust Division and the JFTC, as they exchanged staff for training and participated in common working groups in the OECD together, and also on

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[54] The New York Times wrote that the AAG Rill played an important role in involving the DOJ Antitrust Division into these talks “Mr. Rill has also elbowed his way into trade talks, helping to prod the Japanese into promising to enforce their own antitrust laws against Japanese companies that work to keep American goods out of Japan.” (Johnston 1990). Also, after the talks, Rill proudly himself wrote: “One of the Division's most visible activities during the past year was as the Department of Justice's representative in the U.S.-Japan Structural Impediment Initiative (SII) talks” (Rill 1991, 28).

a personal level, between AAG Rill and the JFTC Chairman Umezawa[55]. This experience led DOJ to advocate for increasingly closes relationships and coordination with the competition authorities of emerging or existing competition law regimes to facilitate the harmonization of antitrust policies.

The method of establishing cross-national antitrust agency ties for antitrust policy harmonization was first tried with the Soviet Union after Japan. As Russia and Eastern European countries were undergoing an economic revolution in 1990 and 1991, the US and various international organizations, like the WB and the IMF, sent some "legal development" advisors to guide theme on how to redesign their state institutions and laws for their new market economies (Trubek 2003; Dam 2007). There were also antitrust lawyers and economists from the US antitrust agencies within this envoy. In April and July 1990, the US DOJ and the FTC participated in discussions with officials of the Soviet government, and also hosted a week-long competition seminar in Washington for the Soviet officials (Rill 1992, 275). The antitrust agency representatives also travelled to Eastern European countries in May 1990 to give consultations to local governments and new antitrust agencies (Rill 1991). The AAG Rill personally visited the newly competition agencies in Czechoslovakia, Hungary, and Poland, and officials from the DOJ and the FTC stayed on long-term missions in Bulgaria, Poland and Czechoslovak to train the members of their agencies (Rill 1991). [56]

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[55] Rill testified in the Congress that Uwezawa personally promised to "rigorously eliminate all unlawful conduct" and added "I believe that Chairman Umezawa intended that commitment to be taken seriously" (Congress 1990, 11).
[56] The US was also very active in Latin American countries to promote the legislation of antitrust laws and gave training to their new antitrust authorities. According to a Washington Post article in 1993: "To learn how to attack the monopolies, people like Patricia Mayorga, an attorney for the Superintendency for the Promotion and Protection of Free Competition in Venezuela, have come to Washington to study how the Department of Justice and Federal Trade Commission enforce competition laws. Venezuela is one of more than 10 countries that have set up new

The US antitrust agencies also increased their efforts to create new bilateral and multilateral coordination agreements with other competition agencies. The US had already signed some cooperation agencies with then existing competition law authorities; however, these agreements had only focused on allowing the US courts and agencies to gain evidentiary information for the extraterritorial enforcement of the US antitrust laws. For example, the US had brokered a multilateral agreement among OECD members in 1986[57], which instituted the principle of "negative comity" by setting the requirements of prior notification and consultation of foreign countries, thus helped in avoiding the conflicts over the information requests of the US antitrust authorities (Congress 1990, 16). Similar agreements were also signed individually with Canada, Australia and Germany. Going beyond these agreements, the US signed a new cooperation agreement with the EU Commission in 1991 introducing a new principle of "positive comity". This new principle allowed the US antitrust agencies to "request action under EC antitrust laws against conduct in Europe" that harms both the consumers in Europe and the US exporters, and vice versa (Congress 1992, 10–11).[58] In other words, the agencies agreed to delegate the authority to each other's competition law regimes in resolving the issues they find problematic, rather than pursuing extraterritorial enforcement. The US also brought the positive comity principle into the OECD in 1995. These changes demonstrate a newly found confidence

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antitrust laws or strengthened old ones over the past two years and is one of many that have sent attorneys and economists to this country to learn from U.S. experts." (Glater 1993).

[57] This agreement was called "Recommendation of the Council Concerning Cooperation Between Member Countries on Anticompetitive Practices Affecting International Trade".

[58] The Congress passed the International Antitrust Enforcement Assistance Act in 1994, allowing the antitrust authorities to sign similar agreements with other authorities without a formal agreement between governments.

in the ability of American antitrust agencies to guide the antitrust policies of their peers through the new institutional ties between competition agencies.

However, the US antitrust agencies' method of harmonizing antitrust policies through institutional ties between competition authorities was not the only proposed methods. The EU policy maker proposed an alternative: creating an international system of competition law under the WTO (Waller 1996; Marquis 2014). This international competition law would be a multilaterally agreed minimum set of competition rules and would have a binding effect by creating dispute settlement procedures. It especially found intellectual support from Germany-legal experts at the Max-Planck Institute began drafting a draft proposal in 1993 (Gerber 1999). The project gained momentum when the "Working Group on Trade and Competition Policy" was formed in WTO to work on the proposal and published several reports in December 1996 (Anderson and Jenny 2001). However, the proposal eventually died in 2003 largely due to the rejection of the US (Gerber 1999). The US policy makers expressed various concerns with the EU-WTO competition law proposal, including the fear that the supranational competition law rules would be too weak and the WTO was not the right forum to decide and enforce these laws (Gerber 2007), and mainly argued that it was simply not necessary (Gerber 1999). According to the US antitrust agencies, the international coordination and cooperation between authorities, either bilaterally between individual regimes or multilaterally through the work of international organizations was sufficient to create competition policy convergence. For example, the AAG Dianne Wood argued in 1995 "The type of controlled and modest inter-agency sharing arrangement we are now able to create seems greatly preferable to some kind of supranational World Competition Authority." (Wood quoted in Steiner 1996, 587).

To counter the EU proposal, the US antitrust agencies began creating new international venues for coordination and cooperation among competition agencies. In 1997, the DOJ enlisted an expert advisory committee- the International Competition Policy Advisory Committee (ICPAC)- to “study and recommend ways of developing desirable forms of global antitrust governance” (Marquis 2014). The former AAG James Rill was also selected to this committee. In its final report in 2000, ICPAC stated: "While recognizing that certain core WTO nondiscrimination principles of national treatment and transparency would also apply to the enforcement of domestic competition laws, the ICPAC Report specifically endorsed a more modest role for the WTO than the establishment of new competition rules subject to WTO dispute settlement." It instead proposed, among other things, the creation of a new "Global Competition Initiative" consisting of a voluntary network of competition authorities and experts (Marquis 2014). The same year, the US helped launch two new organizations, where competition authorities and experts can come together to discuss competition issues and make recommendations of a nonbinding nature, one inside the OECD and one outside the existing international organizations, called the International Competition Network (ICN).

There were already some efforts to organize competition agency networks inside the OECD in the early 1990s. In the 1991 and 1992 Ministerial meetings, the Competition Committee of the OECD was ordered to increase its efforts to facilitate competition policy convergence (Steiner 1996). In its 1994 report, the Committee restated its goals as “providing a foundation for convergence of substantive rules and enforcement practices in competition policy” (OECD 1994, 3), which led to the creation of the “Working party no. 2 on competition and regulation” (Blachucki 2016). The same year, the OECD held its first competition policy

workshop open to non-member countries.[59] The workshop focused on a discussion over "what should be the objectives and scope of competition laws" and "how the laws should be enforced" (OECD 1996). Finally, in 2001, the OECD formalized these efforts in the Global Forum on Competition. This Forum holds yearly conferences on competition law and policy with all interested national jurisdictions and continues to be one of the most influential meetings for antitrust agencies. The OECD also runs regional competition centers in Eastern Europe and Asia and a Latin American Competition Forum (G. C. Shaffer, Nesbitt, and Waller 2015).

Unlike the OECD, ICN is "an informal virtual network" consisting only of competition agency officials and "non-governmental advisors", i.e. academics, private sector lawyers, economists and other consultants (Blachucki 2016; G. C. Shaffer, Nesbitt, and Waller 2015). In other words, it does not require any diplomatic or economic commitment from governments and all the work is done "by the competition agencies, for the competition agencies" (Blachucki 2016). This allows competition agencies to work on competition policy norm creation and convergence in isolation from other governmental bodies solely focusing on the technical aspects of competition laws and policy. At the same time, the inclusion of non-government actors helps create a sense of common interests in global norm convergence, while also facilitating cordial relationships and "revolving door" between competition authorities and consulting firms in practice. Thus, as a US-based Antitrust lawyer and scholar Elanor Fox, one of the most well-known participants of these international competition law networks, expressed:

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[59] These were "Dynamic Non-Member Economies (DNMEs)": Argentina, Brazil, Chile, Hong Kong, Korea, Malaysia, Chinese Taipei and Thailand.

> "[The ICN provides] guidance and moral support to newer and more vulnerable agencies pursuing the lonely and often resisted task within their nation of creating a competition culture. It provides a blueprint or reference for agencies in drafting or revising their rules or regulations. And it gives anchor to the officials of the newer agencies appearing before legislators or jurists. "This is the way it is done in the world" or "This is the international standard of good practice" is powerful testimony" (Fox 2009, 166).

Instead of a "hard convergence" on antitrust policy through a formal international agreement under the WTO, the competition agency networks organized in the OECD and ICN encourage "soft convergence" on the basis of "deliberation, persuasion, surveillance and self-regulation" (Blachucki 2016). This process builds convergence towards a common set of antitrust (enforcement) policy principles gradually through ongoing discussions, rather than imposing a uniform competition code that needs to be immediately agreed upon. The OECD and the ICN use various methods of soft convergence, for example, they collect regular self-evaluations from members on enforcement actions and projects (Kovacic and Lopez-Galdos 2016), create non-binding "best practices", guidelines and benchmarks (Sokol 2009), publish yearly reports and research articles, and organize annual conferences and workshops. The OECD's "peer-review" reports, which offer "systematic and reciprocal assessment of the performance of a member by other members, with the goal of helping the reviewed member to improve its policymaking" (Blachucki 2016), have been particularly successful in encouraging convergence. For example, the peer-review report of Brazil in 2005 led to extensive reforms in

the following years (Sokol 2008). ICN has also been particularly successful with its training manuals and templates for competition authority staff (Sokol 2008).

Besides these more tangible products, a lot of the activity in these networks is just "talk". Most meetings do not create any policy recommendations, guidelines or reports, but just create conversation over practical matters of competition law enforcement. As one commentator remarks "in international antitrust, talk is actually more valuable than treaty" (Marsden 2012, 110). The informality and flexibility in these networks make them more useful in facilitating convergence than any formal and fixed agreement between governments. Convergence is ensured, not through real, binding commitments to a single set of laws, but through commitments to a common sense of purpose and understandings shared among competition law authority officials and mid-level bureaucrats (Marsden 2012).

On paper, the competition policy networks create horizontal structures of interaction, encourage inclusivity and seek to find the consensus among participants to guide policy convergence (Maher 2015). However, in practice only powerful nations with longer histories of antitrust enforcement play the leadership roles in deciding the competition policy standards and get them accepted across different nations (Sokol 2008). One main reason for this is the disparity in the institutional legitimacy needs of the establish antitrust agencies and new agencies. While the established competition authorities have already created their local political constituents and established a presence in state bureaucracies, the new competition law authorities often face hostile political environments in their own country, trying to find themselves a place in a crowded political field with more established bureaucratic authorities in trade and industrial policy and sectoral regulations. Therefore, they need the support of the international community

of antitrust experts to gain legitimacy and recognition in their home countries. Another reason is these competition networks' representation of their work as a "scientific enterprise", removed from political negotiations and government interests, but only concerned with the "technical" aspects of antitrust policy. This practical and technical focus gives overrepresentation to experienced jurisdictions. For example, when the networks discuss matters on how to perform leniency programs, experts from the US agencies get longer representation just because they have invented these programs. Similarly, when legal academics are invited to discuss details of legal interpretation, most academics are supplied from the US, where antitrust laws have a bigger presence in law schools and scholarship than any other country. As a result, the convergence in these networks favor the interests and the perceptions of the US and the EU policy makers, while the new adopters of competition laws are largely norm takers.

The US prominence in these competition law and policy networks is particularly easy to detect in two areas: the prominence of the Chicago School perspective in the definition of the main goals and purposes of competition policy, and emphasis on "hard core" cartels as the main targets of competition laws. Many of the guidelines and recommendations of the OECD and the ICN recognize the efficiency and consumer welfare standards as the only goals of competition policy, although many of the participants have multiple different purposes and goals cited in their laws. The diversity in the way the member competition authorities can enforce competition laws is hardly recognized. The earliest example is the 1994 Interim Report of the OECD Competition Committee, which states:

> "[T] here is a general consensus that the basic objective of competition policy is to protect and preserve competition as the most appropriate means of ensuring

> efficient allocation of resources -and thus efficient market outcomes- in free market economies… There is a general agreement that [efficient market outcomes are] manifested by lower consumer prices, higher quality products and better product choice" (OECD 1994, 8).

Both the OECD and the ICN also strongly emphasize cartel enforcement, explicitly borrowing from the decisions and practices in the US. For example, one the earliest OECD competition policy guidelines focused on "hard core cartels" ("Recommendation concerning Effective Action Against Hard Core Cartels" of 1998) and condemned cartels "as the most egregious violations of competition law." The following OECD reports on cartels similarly stated, "cartels are unambiguously bad" and cited with approval a 2004 US Supreme Court opinion that cartels are the "supreme evil of antitrust" (G. C. Shaffer, Nesbitt, and Waller 2015). Under its anti-cartel program, the OECD encourages authorities to adopt a number of "best practices" that borrow from the US antitrust regime. For example, in a subsection called 'A Trend Towards Criminalisation', a 2005 OECD report encourages states to adopt "'sanctions against natural persons, placing them at risk individually for their conduct" (G. C. Shaffer, Nesbitt, and Waller 2015). The report also encourages the adoption of "leniency programs" as a best practice, which was first created in the US (G. C. Shaffer, Nesbitt, and Waller 2015). Similarly, the ICN's Cartel Working Group states "At the heart of antitrust enforcement is the battle against hardcore cartels directed at price fixing, bid rigging, market sharing and market allocations" in its founding document (G. C. Shaffer, Nesbitt, and Waller 2015). The manuals published by this group emphasizes "effective leniency programs" and "the effectiveness of criminal sanctions as a deterrent".

5. Conclusion

With the widespread adoption of new competition (antitrust) laws by developing economies in the 1990s, competition law and policy emerged as a global norm that every country adhering to the principles of free-market capitalism should adopt. More than a century ago when the legislators of the Sherman Act created the first modern antitrust law system, they perhaps imagined that antitrust laws would someday become a cornerstone of any modern capitalist society. But what they meant by anti-trust policy and what they intended to do with antitrust rules were much different than what the interpretation of antitrust laws under the Washington Consensus suggests. In the late 19th century, antitrust laws were created to become a treaty of freedom, a source of liberation from the whims of large corporations and their control over the economic enterprise of individuals. In the late 20th century, they had turned into an instrument of economic efficiency and performance. It was this latter interpretation of antitrust laws that was promoted and diffused to the world by the US trade negotiators and antitrust policy actors.

In this chapter, I have tried to show why the diffusion of antitrust laws emerged as a solution to American businesses' complaints over US exceptionalism in antitrust regulations while the US trade deficit became a political problem and after the influence of the Chicago School begun to be felt on the US national antitrust policy in the 1980s. I have argued that the first solution to this perceived problem, that is, the granting of statutory or policy exemptions to exporting companies from the US antitrust laws was tried and failed. Under the new Chicago School-based antitrust law interpretation, the courts and the antitrust agencies scrutinized the horizontal coordination attempts between exporting companies with increasing hostility as

cartelistic agreements and criminal offenses and resisted the attempts to carve out exemptions to exporting companies from cartelization rules. The second solution to this perceived problem, namely, the expansion of the extraterritorial enforcement of the US antitrust laws to the conduct of foreign companies in other markers also failed. Foreign countries refused to comply with this extension of the US laws over their sovereign territory, and the Reagan administration found the antitrust extraterritorial enforcement against the US interests to persuade other countries to liberalize their trade in the 1980s. Besides diplomatic reasons, as the outcome in the Matsushita case strongly indicates, the weakening of the US antitrust regulations on corporate monopolistic conduct under the Chicago School influence, like discriminatory and predatory pricing, also made the extraterritorial enforcement of antitrust laws useless for the American manufacturers seeking protections against the business practices of their foreign competitors.

Only after these two solutions were cast into doubt and closed off by the Chicago School interpretation of antitrust in the 1980s that the US efforts to export antitrust laws abroad was truly revived under the increasing business pressures on politicians. The Congressional Democrats' pressure over the Bush administration to prioritize "fair trade" over "free trade" in trade negotiations with other governments also contributed to this revival. These pressures culminated in the SII negotiations with Japan, where for the first time the US explicitly required a trade partner to adopt antitrust law regulations compliant with its own standards. This symbolized the emergence of the policy script on antitrust as a requirement of trade liberalization policies under the Washington Consensus. This requirement in SII was later reproduced in many free-trade agreements that the US signed with foreign governments, including in NAFTA. The

US also expanded this script by associating antitrust law and policy adoption with the transition to a market economy in its relations with the post-Soviet countries.

Lastly, I have shortly discussed the US' preferred method of promoting policy harmonization with new antitrust law jurisdictions through institutional networks between antitrust agencies, and how this contributes to the global diffusion of the Chicago School ideas, mainly its prioritization of economic efficiency as the main goal of antitrust policy and the strong enforcement of cartel prohibitions. This method emerged through the US antitrust agencies' experiences in Japan and post-Soviet countries, but also a reactionary alternative to the EU proposal to draft a new international competition law under the WTO. I have argued that, instead, the US antitrust agencies became very active in promoting antitrust laws and policy in this period, circumventing inter-governmental negotiations and framing antitrust as a technical and even scientific matter that needs to be discussed between the agents of competition agencies. This method is particularly amenable to diffusing the Chicago School influence over antitrust policy by depoliticizing it.

The following chapters will expand this discussion by looking at the diffusion of antitrust laws to developing economies in practice. Besides the international pressures and influences over this diffusion, I will investigate how the endogenous (local) political, economic and institutional factors in these developing economies have shaped the kinds of antitrust law and policy systems they have installed.

5. THE TURKISH AND MEXICAN COMPETITION LAW HYBRIDS

1. Introduction

The previous chapter analyzed how the antitrust (competition) laws have emerged as a global norm, i.e., an institution that every country must adopt under free-market principles and integration to global trade. Diverging from previous studies and the rhetoric of international organizations, I argued that non-Western developing economies did not adopt competition laws by themselves in response to domestic economic pressures to organize markets more efficiently, but rather, the exogenous forces of free-trade agreements with competition law articles and the growing number of international organizations promoting competition laws led them to adopt these laws. These forces were primarily organized by the US trade policymakers, antitrust experts, and business groups, which sought to ameliorate the American companies' growing foreign competitiveness problem in the 1980s and 1990s by "leveling the playing fields" and exporting antitrust rules to other countries. One significant implication of these findings was that all national jurisdictions gradually converged on similar competition law rules and policies thanks to these globalizing external pressures.

However, there is competing literature on the "Atlantic-divide" that emphasizes the "stickiness" of national differences as a result of endogenous factors shaping national competition laws and policy (Djelic 2002; Wigger and Nölke 2007; Kovacic 2008; Geradin 2012; Gifford and Kudrle 2015; Sokol 2016; Ergen and Kohl 2019; Philippon 2019). This literature points at the differences between the European competition and the American antitrust

law systems that continue to resist convergence. Their main argument is that, although the EU and US competition laws largely share similar enforcement priorities in strongly punishing and preventing cartelization and regulating horizontal mergers and acquisitions between companies in the same industries, they substantially diverge on their restrictions on "abuses of dominance" or unilateral monopolization. As I previously discussed in Chapter 3, the US antitrust regime acquired the "consumer welfare" and "economic efficiency" standards under the influence of the Chicago School of law and economics in the 1970s, which led to a decline in the US antitrust restrictions over monopolization. Although the EU competition laws were influenced by the Chicago School as well, they did not adopt its prescriptions over the competition laws' purposes. They continued a more restrictive and "formalistic" approach to limiting abuses of dominance by monopolists. Differences in the local traditions of legal thought and political-economic relationships between companies and states sustain these law and policy differences (Philippon 2019; Wigger and Nölke 2007).

This second literature conforms to the expectations of the "varieties of capitalism" (VoC) literature, which predicts continuous cross-country economic policy divergence- either with two (P. A. Hall and Soskice 2001) or more kinds of capitalisms (Esping-Andersen 1990; Amable 2003; Boyer 2004). Because there are high switching costs to economic policies -different institutional configurations create comparative advantages for countries that are hard to give up, institutional complementarities prevent switching, and powerful economic and state actors continue to invest in institutional continuity to sustain their gains, etc.- international convergence on similar institutions of capitalist development is unlikely.

This chapter attempts to bridge these two pieces of literature -globalization and international diffusion of competition law norms with the varieties of capitalism and Atlantic divide in competition laws -, by suggesting that global influences and national histories combined to create "hybrid" forms of competition laws while these laws have diffused and became a part of the international economic order in the 1990s and 2000s. This argument has two main components. First, I suggest that the stickiness of the differences between the US and EU competition law regimes have important impact in the diffusion of competition laws to other countries, because these jurisdictions have the longest history of competition case-law development, highest spending on the public investigation of cases, and more direct jurisdictional reach over multinational companies that impact multiple markets (Kovacic 2008). Furthermore, they compete inside the international competition policy networks to promote their own design preferences (Raustiala 2002; Blauberger and Krämer 2013). Therefore, newer jurisdictions of competition law borrow from either the US or the EU competition law model, which leads to a "bi-polar isomorphism" in competition law and policy. Both endogenous and exogenous factors determine which model is chosen; for example, the new adopters of competition laws might select the model closest to their domestic legal systems, i.e., those in the "civil law tradition" select the EU model, while the others in the "common law tradition" opt into the US model. Or the more decisive influence of the US or the EU over some countries, through, for example, closer trade relations or giving "technical assistance" can also result in bi-polar isomorphism.

Second, I argue that substantial "hybridization" exists in these adoptions from the US and the EU models. Even under intense external pressures to conform, the local interest groups and

expert professionals inside borrowing countries can decide which characteristics of these systems are more relevant to their local contexts. Therefore, developing countries select and combine different aspects of the globalized institutional models rather than following a single model loyally. This second argument builds on the existing literature on the "hybrid" forms of institutional development (Zeitlin and Herrigel 2000; Aguilera and Jackson 2002; Djelic 2002; Rose 2014; Boyer et al. 1998). Hybridization refers to "the ways in which forms become separated from existing practices and recombine with new forms in new practices" (Nederveen Pieterse 1993, 165). This literature suggests, for example, that the commonly used "common law" and "civil law" distinction does not accurately represent the historical and empirical variations among the non-Western legal systems. Instead of adopting wholesale a single legal system, countries borrow different aspects of Western legal systems and rearrange them according to their own needs, perspectives, and interests (McEldowny 2009). Selective adoption of the recommendations of international organizations and global hegemons is a common strategy used by developing economies because they are likely to be in a weaker negotiating position (Carruthers and Halliday 2000, 343). My analysis improves this literature by highlighting the importance of the borrowing countries' historical differences in which economic interest and expert groups influence policymaking inside the state.

This chapter also makes a more direct contribution to the "Atlantic divide" debate. While researching the differences between the US and the EU competition law systems, I found that these systems also significantly vary in a second way currently ignored by most scholars in this debate: limiting state decisions. The US antitrust laws do not have any role in checking state decisions' compliance with competition rules. Developed after the US system, the EU

competition law regime "invented" this role for competition laws and policy. The so-called European "state aid control" rules (see Collie 2000; Ehlermann 1994; Ganoulis and Martin 2001) prohibit the granting of economic benefits by the member states that "distorts" the competition within the European market. The EU and the international organizations have promoted these rules (see WB report Goodwin and Martinez Licetti 2016; and UNCTAD report Qaqaya and Lipimile 2008), leading to their diffusion to countries outside the EU jurisdiction. I argue that, from a political-economic perspective, this second difference between the US and the EU competition law regimes is just as important as the often-discussed difference in the restriction of monopolies, because they shape the overall functions competition laws play in the economy.

This chapter advances these arguments using the cases of Turkey and Mexico. Turkey and Mexico are "upper-middle-income" countries with liberal-economic systems and open trade relations since the early 1980s. They have an important place in the world economy as members of the OECD and the G20. They are also geographically located right at the border of the US and the EU and have historically stronger economic and political ties with one than the other- i.e., Mexico has closer relations with the US, and Turkey has more intimate connections with the EU. They both signed comprehensive free-trade agreements with their neighbors around the same time, Turkey under the Customs Union Agreement (CUA) of 1995 and Mexico under the North American Free Trade Agreement (NAFTA) of 1994, which have led them to pass a series of legal reforms, including their first competition laws. As a result, their competition laws have been influenced by both the global diffusion of competition law norms and the more direct influence by the US and the EU jurisdictions. In this chapter, I use the paired-comparison method (Tarrow 2010) with these two cases to theorize how global exogenous forces of imitation

and endogenous forces of divergence combine to shape competition law legislation in developing economies.

Comparing the Turkish and Mexican competition laws as they were originally legislated in the mid-1990s, I found that these laws were designed as hybrids of the US and EU competition law models (See Table 1 below). Although they closely follow the competition law models of their closest trade partners in terms of the strength of the restrictions over monopolies, they do not follow the same models on limiting state actions and instead borrow from the other available model. Consequently, despite their similarities to these two models, Turkey and Mexico's competition laws are, in their overall composition, hybrids that play different overall roles in their economies. While the Turkish competition laws address monopolization by private corporations but give permission to the Turkish state in yielding and politically distributing market power, the Mexican competition laws strongly limit the actions of the federal and state governments in shaping market competition, but they are lenient towards market monopolization by large private companies.

		RESTRICTIONS OVER MONOPOLIZATION (ABUSE OF DOMINANCE)	
		LOW	HIGH
RESTRICTIONS OVER STATE ACTIONS	NO	US	Turkey
	YES	Mexico	EU

Table 1: The US and EU competition law models and the Mexican and Turkish competition law hybrids.

In the rest of this chapter, I will first discuss why the Turkish and Mexican competition laws should be considered hybrids of the EU and the US models of competition law. Second, I will analyze the control of market and policymaking power by big business groups and governments in Turkey and Mexico from a historical-comparative perspective, starting with the substitution industrialization (ISI) policies in the 1960s and 70s, leading up to the swift turn to market liberation policies in the 1980s and 1990s, with a particular focus on the privatization of state-owned enterprises (SOEs). Third, I will analyze the historical differences between Turkey and Mexico in relying on technocratic expert groups in designing their economic policies and laws, suggesting that lawyers have been the traditional technocratic group in Turkey, while Mexico came to rely heavily on economists since the 1970s. The third and last section will analyze the drafting of the Turkish Competition Law (*4054 Sayılı Rekabetin Korunması Hakkında Kanun*) of 1994 and the Mexican Competition Law (*Ley Federal de Competencia Económica*) of 1992 during the NAFTA and CUA negotiations. I will show how the businesses' and governments' ability to influence policy decisions in these negotiations and the reliance of different expert groups have shaped the borrowing of competition law characteristics from the US and EU. I will conclude with a summary and discussion of findings.

2. Mexican and Turkish Competition Law Hybrids

Restrictions over Monopolization (Abuses of Dominance)

While both the US and the EU competition law regimes are aiming to protect the competitive process in the market, they have some important differences in enforcement practices and priorities that have led scholars to suggest an "Atlantic divide" in the regulation of markets (for a lengthier discussion see Ergen and Kohl 2019; Sokol 2016; Kovacic 2008). Leaving aside the procedural differences created by legal tradition (the civil law EU system has explicit rules written into the law, while the common law US system has broad, abstract rules detailed by judge-made case law) and the bureaucratic organization of enforcement (the EU system is enforced through autonomous administrative authorities, while the US system is enforced by courts), there is one specific difference between the US antitrust and the EU competition laws that the scholars have primarily focused on: the criteria used in the restriction of unilateral (single company) "monopolization" or "abuse of dominance."

As I discussed in Chapter 3, the US antitrust regime adopted a Chicago School-based understanding of antitrust policy by the late 1970s, which led the enforcement authorities and courts to produce a case law that prioritizes the protection of economic efficiency in the market, and moved the restrictions over monopolistic practices, such as like predatory pricing, price discrimination, tying and exclusive sales, to a more permissible direction. In the common law tradition of the US, this shift was expressed as a move of these rules from *per se* enforcement, i.e. restrictions that apply to actions, transactions and agreements categorically and universally, to *rule of reason* enforcement, i.e. restrictions that only apply to actions, transactions and agreements under certain conditions when certain effects can be shown. For example, in the well-known 1977 *Continental TV, Inc. v. GTE Sylvania Inc* case, the US Supreme Court ruled

that the antitrust rules against non-price vertical restraints, such as exclusivity and tying agreements, should not be enforced categorically when they increase market concentration, but should only be enforced when they are shown to decrease economic efficiency in addition to increasing concentration. By requiring the courts to evaluate monopolization strategies through *rule of reason,* such case law creates higher legal thresholds for such agreements to count as illegal monopolization conduct.

The EU competition law system, on the other hand, was established under the Treaty of Rome- the founding treaty of the European Economic Community (EEC). The Director General of Competition (DG-Comp) of the EU Commission and the European Court of Justice are in charge of enforcing the Treaty's articles at the supranational level on the corporate conduct and transactions that affect multiple member states. While each member state has its own national competition laws and enforcement authorities, they must conform to the legal standards and principles established at the EU level. As the EU competition law regime took off in its enforcement activity by the late 1970s, it started to develop a case-law that went in the opposite direction of the US in strongly prohibiting monopolization strategies, or as they are called in the EU system, the "abuses of dominance" (Ergen and Kohl 2019; C. Foster 2021).[60]

This important "reversal" (Philippon 2019) between the US and EU competition policies was caused by the differences in these two regimes' local political and intellectual histories. Rather than the Chicago School of thought, the EU competition laws were influenced by the

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[60] The differences in the evaluation of monopolies or dominant position are said to have affected the US and EU jurisdiction's control over mergers and acquisitions as well (Fox 2006; Gerber 2003). However, in light of the amendments to the European merger guidelines in the 2000s, which introduced very similar enforcement criteria to the US merger guidelines, there is currently less emphasis on this aspect of the so-called "Atlantic divide".

German “ordoliberal school” (Gerber 1998; Ergen and Kohl 2019; Behrens 2018; Wigger and Nölke 2007). Although both schools are against heavy state interventions, the former sees competition as a natural and resilient state of markets, while the latter sees competition as a fragile condition that requires the constant protection and supervision of the state. Unlike the Chicago Scholars, ordoliberals thought of accumulating private market power as a severe threat to economic liberties and consumer choice. They conceived “dominant position,” i.e., having a large market share in a market, with a special responsibility to not engage in exclusionary and exploitative conducts that can result in harm to smaller competitors and consumers. As a result of this influence, the European competition law regime employs a broader and more “form-based” (Ergen and Kohl 2019) criteria for abuse of dominance, similar to the *per se* enforcement in the US. Although the EU Commission and the courts still consider efficiency-effects, these considerations are secondary to the formalistic evaluation of dominance, for example, the market concentration rates, the evidence on the exclusion of smaller competitors, or the managers' intentions to achieve this exclusion.

Looking at the rules that apply to abuse of dominance or monopolization cases in Turkey and Mexico, it is easy to recognize the similarities to the EU and US models, respectively. The Turkish competition laws are almost copies of the EU laws in this respect. Article 6 of the Turkish competition law prohibits abuse of dominance and closely resembles the EU Article 82 in stating, “The abuse, by one or more undertakings, of their dominant position in a market for goods or services within the whole or a part of the country on their own or through agreements with others or concerted practices, is illegal and prohibited.” The article offers a non-exclusive list of practices that mostly match those listed in the EU Article 82, such as discrimination, tying,

and restrictions over production.[61] While the Turkish law does not mention "unfair pricing" recognized by the EU law, it even expands the list of dominance abuses by listing "the exclusion of competitors", "the exploitation of market power to distort competition in a different market" and "resale price maintenance" more specifically (J. C. Shaffer 2006, 192). Again, similar to the EU competition articles, the Turkish abuse of dominance rules make no mention of considering the effects of conduct or efficiency losses.

The similarity between the Mexican and American restrictions over monopolization is also striking. The Mexican competition laws have a unique distinction between "absolute" and "relative" monopolistic practices, which closely resembles the "per se" and "rule of reason" distinction in the US (Slottje and Prowse 2001; Van Fleet 1995). While the absolute monopolistic practices are categorically prohibited, similar to per se enforcement in the US, the relative monopolistic practices can only be found illegal under certain circumstances when a company fails to prove there are efficiency benefits to the monopolistic conduct, similar to the rule of reason enforcement in the US (J. C. Shaffer 2004, 18). By placing unilateral monopolistic practices in the "relative" category (in addition to vertical restrictions), Article 10 of the Mexican competition law adopts the weak US monopolization enforcement criteria influenced by the Chicago School critique. More importantly, while the categorization of these practices under the rule of reason is judge-made in the US, they can change over time with new case law

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[61] "Preventing, directly or indirectly, another undertaking from entering into the area of commercial activity", "Making direct or indirect discrimination by offering different terms to purchasers with equal status for the same and equal rights", "tying a good or service or imposing limitations with regard to the terms of purchase", "Actions which aim at distorting competitive conditions in another market for goods or services by means of exploiting financial, technological and commercial advantages created by dominance in a particular market", and "Restricting production, marketing or technical development to the prejudice of consumers".

precedence. In contrast, the Mexican competition laws permanently commit to weak enforcement by fixing these rules into statutes (Truskett 2007, 785). In addition, the Mexican competition laws avoid spelling out some of the abuse of dominance violations explicitly prohibited by the EU and Turkish laws, namely discriminatory and predatory pricing (Gallardo 1996). This characteristic of Mexican competition again follows the US example since these violations are rarely enforced in the US since the late 1970s.

Restrictions over State Actions

As William Kovacic, one of the most respected experts on the US antitrust laws, notes, "Although EU and US enforcement officials have a shared suspicion of government restraints on competition, the EU system provides a more powerful platform to address such restrictions. The US has no counterpart to the state aids portfolio of the EU" (2008, 10). Nevertheless, curiously, he omits this difference in his lengthier discussion on the "Atlantic divide" in the same article, which is echoed by the silence of other antitrust experts. A notable exception is an entry on competition laws in "Elgar Encyclopedia of Comparative Law," where the author underlines the absence of the state aid rules as "arguably one of the weaknesses of the US antitrust regime" (Geradin 2006, 179). This statement suggests that such rules shape the overall purposes and effects of competition laws in an economy.

A significant characteristic of the EU competition law system is its prohibition of state actions that may harm competition under its "state aid" rules (see Collie 2000; Ehlermann 1994; Ganoulis and Martin 2001). The expressed reason for these rules is to prevent firms from

receiving government support that can give them unfair advantages (Cini and McGowan 2008, 178), even *de facto* legal monopoly status. Article 87 of the EU Treaty broadly defines illegal "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favoring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States." While subject to the interpretation of the EU commission, state aid can encompass all kinds of direct or indirect government assistance, such as non-repayable subsidies, loans on favorable terms, tax and duty exemptions, and loan guarantees (Ganoulis and Martin 2001). Although some scholars question their enforceability and weakening by the "exemption" clauses in the law (Büthe 2007; Weber and Schmitz 2011)[62], most scholars agree that state aid rules put necessary restrictions over the EU member states (Cini and McGowan 2008; Blauberger and Krämer 2013; Ehlermann 1994). The EU Commission and the European Court of Justice enforce state aid rules at the supranational level and require member states to notify and get a clearance for their national state aids before they come into effect (Smith 1998; Wolf 2005). The competitors of subsidized firms or nationally subsidized industries can also file complaints at the Commission (Büthe 2007). The Commission can require a member state to "abolish or alter" their aid if they violate Article 87 (Büthe 2007). Each member state is also required to have national state aid rules enforced by their own national competition authorities, which prohibit aid that significantly distorts

[62] The Treaty exempts aid to individual consumers based on social criteria (from housing subsidies for the poor to progressive taxation) and disaster relief aid (87(2)); it also allows the Commission to consider as 'compatible with the common market', aid to underdeveloped regions within the EU, aid to facilitate economic adjustment, and aid to promote culture (87(3)) (Büthe 2007). Also see Weber & Schmitz (2011) for a discussion on how these rules were bent during the 2009 crisis.

competition inside their national market following the enforcement criteria established by the Commission.

Conversely, there are no similar rules that limit the anticompetitive actions of the state or federal governments in the US, and state actions are exempted from antitrust regulations (Fox 1995a; Kovacic 2008). The omission of these rules is curious because the US has a federal system and should share the EU's concerns about economic disunity and public barriers over market competition. Very few explanations exist on this omission, and they all point at the uniqueness of the political-economic and legal history of the US antitrust laws. One explanation is that the US has a more liberal economy than the EU countries; therefore, fewer reasons to be concerned about the economic benefits directly distributed by public authorities (Ganoulis and Martin 2001). However, this argument is weakened by the substantial evidence on the states' "bidding wars" and competition to distribute economic benefits discriminately to attract investments within their borders (see Hanson 1993). Another explanation suggests that the US Constitution's Commerce Clause, legislated a decade before the Sherman Act, already protects interstate commerce against the anticompetitive actions of states (J. W. Clark 1993). However, the US Supreme Court has consistently interpreted this Clause incomparably narrower than the scope of the EU state aid rules. For example, the Court has found that a state subsidy system "ordinarily imposes no burden on interstate commerce, but merely assists local business"[63] (Burstein and Rolnick 1995).

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[63] *West Lynn Creamery, Inc. v. Healy, 114 S. Ct. 2205, 2214* (1994).

When assessing the reflection of these differences over the Turkish and Mexican competition law regimes, a surprising and reversed pattern of bi-polar isomorphism emerges. Unlike in the EU, the Turkish competition laws do not have any state aid rules, nor any explicit provisions giving the Turkish Competition Authority any powers to check public authorities, regulators, and other government officials with competition laws. Instead, the law's jurisdiction ends where the jurisdiction of public authorities, like ministries, local administrations, and sectoral regulators, begins. Suppose a government ministry or regulatory agency exercises statutory authority to place price caps on goods or impose asymmetric regulations that displace competition. In that case, the Turkish Competition Authority has no power to act (J. C. Shaffer 2006, 219). Companies and private citizens also cannot file complaints again public decisions. These omissions limit the Turkish Authority's "competition advocacy" functions severely.

Conversely, the Mexican competition laws have extensive powers to oversee, limit or directly shape the decisions of public authorities at both the state and federal levels. The Mexican Competition Authority can start investigations on its own or review private party complaints on state actions and can declare them null and void if they distort inter-state trade competition. The Mexican Authority is also responsible for the compliance of the federal and state procurement of licenses. It can check compliance both in the bidding procedure design and the companies allowed to participate in bidding. Without the competition authority's clearance, governments cannot initiate public bids, and private parties cannot participate in them. In addition, the Mexican competition laws put limitations on the regulatory decisions of the federal government. To impose any asymmetric regulations, such as price caps or access limitations on particular firms and industries, the federal government needs a resolution from the Mexican Competition

Authority that justifies these regulations by finding the relevant markets uncompetitive (J. C. Shaffer 2004). Similarly, the federal government has to suspend all asymmetric regulations when the Authority finds that the competitive conditions have been restored (J. C. Shaffer 2004).

Potential Explanations

These characteristics of Turkish and Mexican competition law systems support bi-polar isomorphism with hybridization. The Turkish competition laws are vigilant in watching the monopolization strategies of large private businesses like the EU laws, but they are inattentive to the state actions that can shape market power like the US laws. While the Mexican competition laws show substantial tolerance towards monopolization like the US laws, they are strongly suspicious of state actions that can harm competition like the EU laws. Although I have not discussed the other competition law areas here, the shared characteristics of the US and EU models, i.e., the strong restrictions over cartelistic agreements and control over horizontal mergers and acquisitions, are also shared by the Turkish and Mexican competition laws. Mexico and Turkey diverge only in the areas of the competition laws that the US and the EU diverge.

External pressures on Turkey and Mexico to conform to the US and EU practices cannot sufficiently explain all of these characteristics. On the one hand, Mexico was not bound by NAFTA to follow the US model of antitrust. Therefore, why it was voluntarily following the US model requires further explanation. NAFTA did not explicitly require Mexico to follow the US model in its competition law design; it only stated, "each party shall adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto."

(Article 1501(1)). NAFTA did not limit the Mexican government's ability to give subsidies, both to exporting and domestic firms either (R. Johnson 2017). On the other hand, Turkey was bound by the CUA statements to follow the EU model, including the state aid rules. The CUA stated that "Turkey must adapt all of its existing aid schemes to EU standards and generally comply with the notification and guidelines procedures established by the EU to control aid by the Member States." (Article 39(2)) and gave Turkey two to pass the "necessary rules" for the implementation of both antitrust and state aid provisions of the Treaty (J. C. Shaffer 2006, 199). In addition, after the legislation of the Turkish competition law, the EU's annual accession reports on Turkey routinely complained about Turkey's failure to pass these rules (J. C. Shaffer 2006, 200). In other words, the articles of the NAFTA and CUA agreements provide only limited explanations for the competition laws Mexico and Turkey ended up adopting.

The weakness of these exogenous factors should alert us to the importance of endogenous factors in shaping institutional diffusion, even when the initial momentum for diffusion came from exogenous forces and the adopters were encouraged to follow foreign models. One possible endogenous explanation often considered in the literature is the "legal origin" (e.g., in La Porta, Lopez-de-Silanes, and Shleifer 2008) of the adopting country. This argument suggests that the "origin" of one's legal system- whether it falls into the Anglo-American "common law" or Continental European "civil law" systems- determines how they design and enforce particular laws. However, legal origin does not explain the characteristics of Turkish and Mexican competition laws. While both countries have civil law traditions, they have imitated some aspects of the US common law, reaching another tradition. Another potential endogenous explanation is a unitary or federal system of government, especially to explain the limitations

over state actions. Yet, as explained earlier, if this were the only determining factor, both the US and the EU would have competition law regimes that address state actions. Furthermore, each member of the EU, many of which have centralized states, also has national state aid rules, which is why the EU pressured Turkey to adopt them.

Lastly, the "legal transplants" literature suggests that the differences in legal systems can result from the adaptation of the universal legal models to the "local needs" of the adopters (Berkowitz, Pistor, and Richard 2003; Arvind 2010). However, it is hard to differentiate Turkey and Mexico's economic needs for competition law regulations when they legislated their new laws. Both countries had a history of strong state interventionism for economic development before the 1980s. By the time they were negotiating their free-trade agreements in the mid-1990s, they had completed a long list of market transformations to adopt a more liberal economy (Özel 2014; Aydin 2019). They both had highly concentrated markets, with some large conglomerates dominating multiple sectors of the economy. Therefore, it is reasonable to argue that, solely based on local socio-economic "needs," Turkey and Mexico would have adopted very similar competition laws.

This chapter will instead consider the effects of two other endogenous factors: economic interest representation and technocratic experts. Political economists have long considered the legislation of new economic laws and regulations from the perspective of powerful economic interests. The public choice theory in economics rejects the claim that economic regulations are designed to solve economic problems or market failures and suggests that they are instead designed to limit market competition and increase the market power of specific companies (for the origins of regulatory capture theory, see Posner 1974; Stigler 1974). Scholars in other

traditions have also argued that economic interest groups can shape their institutional environment through "meta-bargaining" on institutional rules (Carruthers and Halliday 1998) and strategic litigation in courts to shape the enforcement of these rules (Galanter 1974). These insights have also been applied to the analysis of historical changes in the US antitrust policies. The legislation of the Sherman Act in 1890 is largely attributed to the reaction of farmers and small business owners to the growth of large "trusts" in the Progressive era (Galambos 1988; Dobbin 1994; Neuman 1998). Similarly, Thomas Philippon argues that the later weakening of the US antitrust laws in the late 1970s was due to corporate lobbying to limit the enforcement by public authorities (Philippon 2019).

Economic interest groups shape the adoption of globally promoted laws and policies as well. Studies on the global diffusion of market-oriented reforms often consider the creation of "reform coalitions" between domestic interest groups and the international actors as a fundamental cause for policy transmissions (Campbell 2004; Simmons and Elkins 2004; Levi-Faur 2005). For example, the literature on IMF lending suggests that the ability of the IMF to impose conditionalities and institutional reforms onto its borrowers largely depends on the existence of local interest groups who support their implementation (Dixit 1998; Putnam et al. 1983; Vreeland 2003). Without any domestic interest group support, the externally imposed reforms are likely to turn out "window-dressing" (Dobbin, Simmons, and Garrett 2007) or "ceremonial" (Lim and Tsutsui 2012) adoptions without actual implementation.

However, Turkey and Mexico's competition laws do not entire fit into the predictions of these accounts. As established by the OECD reports (J. C. Shaffer 2004; 2006), ICN rankings (both Turkish and Mexican authorities have consistently received three stars (Good)), and other

scholarly accounts (Aydin 2019), Turkey and Mexico's competition laws are reasonably compliant with international best practices, and they sustain substantial levels of enforcement to eliminate any suspicion of "window dressing." Yet, as I will show when Turkey and Mexico were legislating their new laws, there was substantial resistance from powerful, local interest groups. In its dichotomous conception of "successful" or "failed" diffusions, what this literature often misses is how the local interest groups shape the global diffusion of policies and laws by shaping their design during the moment of adoption. As the recent historical-institutionalist accounts suggest, interest groups always "try to achieve an advantage by interpreting or redirecting institutions in pursuit of their goals, or by subverting or circumventing rules that clash with their interests" (Streeck and Thelen 2005, 19). This "subversion" by interest groups means the reforms are neither entirely successful nor entirely unsuccessful, but they are partial successes resulting from hybrid imitation.

I suggest that there were mainly two interest groups that were relevant to the design of competition laws when developing countries adopted them in the 1990s. First, the local big business groups, which had profited in the previous decades from state protections and subsidies under the import substitution industrialization (ISI) policies and gained *de facto* monopolization over many sectors of the economy, had important vested interests to protect their market power against any interventions by new competition laws. Second, the political elites and government actors, who had used the ISI policies and SOEs to distribute economic benefits to businesses discriminately to create politically important clientelist ties to gain the control and ability to distribute market power in the economy, also had important vested interests to limit competition laws' application onto their decisions. Since powerful external pressures dictated competition

laws, these interest groups could not altogether refuse to adopt competition laws. Still, they could exert direct or indirect influence over the process of legislation to make sure that the new competition laws are created in a way that protects their interests. Therefore, the relative ability of each of these interest groups to influence policy and law-making could have shaped Turkey and Mexico's competition laws.

Secondly, a parallel set of literature has focused on the role of "technocratic experts" in shaping policy adoptions. Technocrats are professionals whose knowledge is used to develop public policies by elected government officials (Miguel Angel Centeno 1993; Chwieroth 2007; J. A. Teichman 2001). They are differentiated from non-technocratic experts by their knowledge in specific public policy areas and "capacity to network" with other state actors (Seabrooke and Wigan 2016), which lead to their employment, either temporarily or permanently, inside the state. Often holding academic credentials, these expert technocrats play an important role in translating intellectual ideas into policy design decisions (P. A. Hall 1993; Campbell 2002; Blyth and Mark 2002). In addition, their degrees in foreign universities and ability to network across national borders with other experts serve as important transmission mechanisms for institutions and policies (Haas 1992; Levi-Faur 2005; Babb 2004). While previous studies have identified how such expert groups have played crucial roles in the diffusion of pro-market, so-called "neoliberal" policies to developing economies (Fairbrother 2007; Miguel A. Centeno and Silva 2016), for example, in their monetary policies and welfare state reforms (Fourcade-Gourinchas and Babb 2002), none of these studies have considered their role in the diffusion of competition laws.

Two expert groups are particularly relevant for competition law reforms: lawyers and economists. As identified by previous studies on competition laws (and almost universally recognized by the participants of this expertise field), these are part law, part policy systems, and their practice requires expertise in both legal and economic knowledge (Davies 2010; Niels, Jenkins, and Kavanagh 2011; Eisner 1991). While some convergence between the legal and economic knowledge fields has occurred in the last four decades, lawyers and economists continue to have different education tracks and professional careers, especially in developing economies where access to higher degrees and foreign education is limited (Dezelay and Garth 2002). This divergence also emerges in their professional perspectives and biases (Eisner 1991) and the competition between lawyers and economists to expand their "professional jurisdiction" (Abbott 1986) over competition laws and policies. In general, economists tend to be more intellectually committed to the free market and pro-globalization policies (Fairbrother 2014, 1331; Chwieroth 2007) than lawyers, while lawyers nurture more statist ideologies, especially in countries with the French-civil law systems (Bourdieu 1986; Dezelay and Garth 2002; Dezalay and Madsen 2012).

	MEXICO	**TURKEY**
Interest group representation	Big business groups	Political elites and parties
Technocratic experts	Economists	Lawyers

Table 2: Two endogenous factors shaping competition law design in Turkey and Mexico

Table 2 above summarizes the differences between Turkey and Mexico in terms of these two endogenous factors when they legislated their competition laws. In the next two sections, I will demonstrate through historical-comparative analysis how these particular configurations have emerged.

3. Interest Group Representation

The Turkish political and bureaucratic elites could attain substantial power to make economic policy decisions independent of economic interest groups from earlier on (Bugra 1994).[64] The literature typically depicts the Turkish state as having high capacity and strength, facing a relatively weaker civil society and business groups (Bianchi 1984; Mardin 1980). This has its roots in the founding of the Turkish Republic after the collapse of the Ottoman Empire during World War I (1914-1918) and the subsequent war of independence (1919-1923). While the young Republic benefited from the continuity of its political elite, bureaucracy, and army with the Ottomans (Heper 1985), it faced a diminished industrial and trade capital as a result of the exodus of the non-Muslim populations during the wars (Güran 2011; Colpan and Jones 2016). [65] Foreign investments remained very low until the 1950s (Bugra 1994), which the state had to make up for using its own capital. The new Republic had already inherited several important state-owned monopolies from the Ottomans, including *TEKEL,* the state monopoly in

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[64] Therefore, as Buğra argues, the disconnection between the public actions of the state and the interests of the business groups became a source of "indeterminacy" and a major "impediment to the development of a self-confident bourgeoisie which could be regarded as enjoying a hegemonic position" (Bugra 1998, 523).
[65] For example, compared to 6 major industrial companies of today first establishing in the 1920s-1930s, there were 18 established in the 1940s and 1950s (Bugra 1994).

tobacco, alcohol, and salt production, and *Ziraat Bankası*, a big development bank specializing in agricultural credits (Kepenek and Yentürk 2000), and it continued to expand its economic ownership in the early years. As a result, by the 1960s, the private sector was lagging behind the public sector, generating 53.2% of total output in light industrial sectors and 55% of total production in heavy industries (Ugur 2000). A military coup in 1960 against a political party that the industrialists backed also reinforced the power of the political elites.

Conversely, in Mexico, business organizations have been very influential over Mexican economic policy with stronger historical roots (Özel 2014). Many of Mexico's business families had emerged under dictator Porfirio Diaz (1890-1910) (Hoshino 2010) [66], in part thanks to the high levels of US direct investments in the northern parts of Mexico in the late 19th century (Hogenboom 2004).[67] Unlike the new Turkish state, Mexico initially lacked a strong state apparatus and bureaucracy to retain political control after gaining independence, which was evident from the periodical revolts in the country until the 1940s. The Mexican business elites decided the winners during the Mexican Civil War (1910-1920) (Razo and Haber 1998). Consequently, they formed close relationships with the left-wing Institutional Revolutionary Party (*Partido Revolucionario Institucional* (PRI)) that assumed power. The institutionalization of these state-business relationships turned Mexico into a famous case of a "corporatist state" (Schmitter Philippe and Gerhard 1992; Collier and Collier 2002). Big business groups received

[66] Such as Alfa, Femsa, Liverpool, Cemex, Modelo and Ball.
[67] Most industry was concentrated at the region of Monterrey close to the northern border with the US. Here, the biggest industrial businesses were formed without extensive government support and before the Mexican state began promoting industrialization. During the ISI period, these businesses sought government support, while also feeling threatened by its decisions at times (Schneider 2002).

regularized access to the PRI policymakers in this period.[68] For example, by the 1970s, it had become an informal rule for the PRI cabinet officials to have lunch once a month with an exclusive business association (Schneider 2002).

Despite these early differences, the import substitution industrialization (ISI) policies implemented in the 60s and 70s led to the growth of large family-owned conglomerate groups in size and numbers in Turkey and Mexico (Hoshino 2010; Hogenboom 2004; Colpan and Jones 2016). In this period, big businesses benefited from high import tariffs and import bans, cheap input goods from state-owned enterprises (SOEs), generous subsidies, cheap credits, tax, and investment incentives and favorable exchange rate regimes until the 1980s. Especially the restrictions over trade and investments shielded the domestic industries from competition from abroad. Turkish government directly encouraged conglomerate concentration by eliminating double corporate taxation on the income that a parent holding company earned from its affiliated companies in the early 1960s (Bugra 1994). Similarly, in Mexico, holding companies owned by Mexicans were given financial benefits for consolidating account settlement of majority-owned subsidiaries (Hoshino 2010).

As the "economic miracles" created by the ISI policies began to dwindle by the 1970s, big businesses in both countries began to demand more share of the local consumer market from the public sector, access to export markets, and most importantly, reduced public spending to ensure macroeconomic stability to lure foreign investments. In Turkey, by the late 1970s,

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[68] Some of the most important organizations were Confederacion de Camaras Nacionales de Comercio (CONCANACO), the Confederacion de Camaras Industriales (CONCAMIN), and the Camara Nacional de la Industria de Transformacion (CANACINTRA) (Schneider 2002).

persistent balance of payment and budget deficit problems (Onis and Riedel 1993) and armed conflicts between right- and left-wing groups (Bianchi 1984) led the big business groups to mobilize politically. To voice their demands, they formed the Turkish Industry and Business Association (*Türk Sanayicileri ve Is Insanlari Dernegi* (TUSIAD)) in 1971. Similarly, in Mexico, the uncontrollable expansion of budget spending and high inflation rates and the ending of the consultations with big businesses under President Echeverría infuriated big business groups. They formed Entrepreneurial Coordinating Centre (*Consejo Coordinador Empresarial*, (CCE)) in 1974 to express their opposition for the first time outside of the established corporatist channels (Otero 2013, 8).

However, in Turkey, the military takeover of 1980 suppressed the increasing big business influence over policy decisions. While the military was supportive of market-liberalization policies, it refused to share power with the business elites, which created important precedence for the democratic government formed by Turgut Özal (1983-1993), who continued the market liberalization reforms after the army left the control of government to the elected officials. He could make policy decisions without big business participation thanks to three legacies of the 1980 coup: First, there was little risk of capital flight, as the national and international investors were calmed down by the military's guarantee of private property rights during the transition moment, and foreign investments were still low going into the 1980s. Second, the changes with the 1982 constitution allowed the executive to exercise high discretion in economic decision-making. The Prime Minister (PM) could issue executive orders to institute economic reforms

bypassing bureaucratic hurdles and discussions in the Parliament (Öniş 2004).[69] Third and lastly, by the late 1980s, the small and medium-sized enterprises (SMEs) located in various Anatolian cities had grown in size and numbers by incorporating into the global supply chains and using access to newly deregulated finance sector (Bugra 1994) and emerged as rivals to established conglomerate groups by creating their own holding companies (Özcan and Turunç 2011; Bekmen 2014). Özal and the subsequent right-wing-led coalition governments in the 1990s used the political potential of these groups and incorporated them into the economic policy decisions. This led to a "decentralization" of state-business relationships away from the Istanbul-based conglomerates and TUSIAD.

As a result, during the neoliberal reforms in Turkey in the 1980s and early 1990s, the big business groups constantly complained about the lack of transparency, consistency, and certainty in the government's economic decisions and the sporadic and inconsistent policy changes (Bugra 1994). Their criticisms on the lack of macroeconomic stability, particularly the sustained high levels of inflation, were mostly ignored by Özal as he continued to use budget spending for his political goals.[70] The government did not include businesses in the trade liberalization decisions either. When the government decided to decrease custom tariffs by 50% in 1990, big industrialists, who were not informed or consulted, suffered economically and considered it an "economic coup" (Özel 2014). By the late 1980s, TUSIAD's chairman was openly criticizing Özal for not knowing economics and creating complete chaos in economic management.

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[69] For example, some extra-budget funds, such as Mass Housing and Public Transportation Funds, came under the discretion of the PM and became channels of economic rent distribution (Eder 1999, 75).
[70] Inflation rate increased from 25% in 1982 to 70% in 1986-1987.

Fighting TUSIAD back, Özal took on more anti-big business rhetoric in this period, claiming to fight against the 'hegemony of the Istanbul dukedom' (referring to big businesses).[71]

In Mexico, by contrast, the end of the ISI period led to a dramatic increase in the power of big business groups, while the power of the PRI governments diminished politically. Facing a deep budget crisis as a result of the dip in oil prices in 1981, PRI took a radical step by defaulting on the government debt and nationalizing the Mexican banks owned by conglomerate groups, which led business groups to mobilize to take down the PRI government. Under the "Mexico in Liberty" campaign organized by the CCE, millions of laborers and protectors impacted by the high inflation rates filled the streets of Mexico City to call for democratic elections (Marois 2011; Gates 2009).[72] Realizing the dramatic deterioration in PRI's legitimacy, the following PRI presidents sought to rebuild the relationships with big business groups, which led to their more intimate incorporation into the policy-making decisions during the neoliberal reforms (Gates 2009; Schneider 2002; Thacker 1999; Luna 2004). First, the new PRI President tried to improve the relations by giving a formal apology and generous compensations to the previous owners of the banks (Gates 2009) and purging the supporters of the bank nationalization from the state bureaucracy (Van Gunten 2015b). Then the government announced a debt restructuring program

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[71] By the 1990s, the prominent businesses in TUSIAD began to support the new political alternative of the center-right, DYP (The True Path Party) (Bekmen 2014). After the 1991 elections, DYP formed a coalition with a center-left wing political party, the Social Democratic Populist Party (SHP). However, this government and the following coalition governments in the 1990s continued to ignore the big business policy demands.

[72] The recession was so deep that it had affected every part of the society. In 1982, inflation had reached 100%, the peso had devalued by 466%, and the debt service reached 90 percent of the GDP (Aspe and Armella 1993).

for large businesses (Hoshino 2010)[73], which not only helped them recover but even grow through mergers and acquisitions (Hogenboom 2004).

The incorporation of Mexican businesses into economic policy decisions reached a new level with the "Pact of Economic Solidarity" in 1987, which created a business-state collaboration program to establish macroeconomic stability (Thacker 1999; Ozel 2012). Under this program, the government kept the wages low and cut budget spending, while big businesses kept consumer products cheap and accessible.[74] As Thacker (1999) argues, the pact "reinforced a growing trend toward the inclusion of the largest segments of the private sector elite and the exclusion of smaller and medium-sized firms" (61). This measure finally won back the big business support in elections, and the highly unpopular PRI candidate, Salinas de Gortari, could win the elections in 1988 under highly suspicious circumstances (Fairbrother 2007).[75] Later, the method of creating broad "pacts" between businesses and the government became a stable feature of the Mexican system.[76]

A brief discussion on privatization reforms in Turkey and Mexico should further demonstrate the crucial differences in interest representation between these two countries. From a political-economic perspective, privatizations are the neoliberal reforms that arguably create

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[73] The government established a fiduciary named FICORCA, which assumed the exchange risk on private sector debt brought on by the devaluation of the Mexican currency (Hoshino 2010). Through FICORCA a sum of US$11.6 billion of public funding was transferred to the private sector (Hogenboom 2004).

[74] These measures very successful. Inflation fell from 159% in 1987 to 51.7% in 1988 in the first year of the Pact (Guillén 2001b). All business organizations supported the Pact, not just CCN (Thacker 1999). In 1988, almost 70 percent of businesspeople expressed increasing support for the government, reaching 99.6 percent of trust in economic policies at the beginning of 1990 (Özel 2014).

[75] Arguably this was the most controversial election in Mexican history. There is serious historical evidence that Salinas actually lost the election.

[76] More pacts were announced later: the Pact for Stability and Economic Growth (PECE, January 1989–October 1992); the Pact for Stability, Competitiveness and Employment (October 1992–September 1994); and the Pact for Welfare, Stability and Growth (September 1994–December 1994).

the most friction between state and big business interests. At a basic level, states lose from privatizing their own business assets in forfeiting some of their income. Even more importantly, governments and political parties lose their channels of rent distribution in privatizing. The SOEs can serve as necessary instruments of political patronage, allowing politicians to manipulate prices, wages, and employment to remain in power. Although the privatization process itself can be a form of political patronage, it is a one-time boost to political popularity and cannot be reversed.

Furthermore, especially in countries like Turkey and Mexico with a strong history of nationalist movements, privatization decisions are highly unpopular and politically costly for political parties. This is why privatizations often occur only under intense budget crises and the threat from international financial institutions (IFIs), like the IMF and the WB, and international investors. But states can also be encouraged to privatize by their big business allies. Under the right circumstances, big businesses are the beneficiaries of privatizations. After benefiting from the subsidized inputs of the SOEs during the ISI period, they have reached a significant size and industrial capacity, that they no longer need these inputs. Moreover, they hold enough liquid assets and access to capital markets after financial liberalization to raise the large sums of money necessary to purchase the SOEs wholesale. For these reasons, privatization reforms can lead to an increase in private monopolization. Therefore, the different experiences with privatization reforms are indicative of the differences in business-state relations and reinforce these differences into the future.

The primary evidence for the Mexican big corporations' ability to shape economic policies during the country's neoliberal transformations is their ability to push the Mexican

government to privatize almost all of its assets in a few years through private wholesale auctions to already large conglomerate groups without putting in place any regulatory framework (Walton and Levy 2009). The 18 banks nationalized in 1981 were privatized between 1991 and 1992 to the richest families and investment groups in the country for a total of $12.27 billion (Marois 2012)[77]. Investors were lured by the promise of high profits in the absence of the banking regulations and continuing protections by laws that barred foreign banks from owning more than 30 percent of national banks' shares.[78] Another big sale was the Mexican Telephone Company (TELMEX), the state monopoly in fixed-line telephony, to a consortium controlled by Grupo Carso of Carlos Slim in 1990 (Hoshino 2010). Almost as a gift, it was sold for a mere $443 million, less than two-thirds of its estimated real value (Hogenboom 2004). Similar to the banking sector, there was no regulatory framework in telecommunications, and TELMEX enjoyed an absolute market monopoly until 1997 (Haber et al. 2008). Mexican privatizations contributed to increasing corporate sizes in other sectors as well, such as sugar (Group Xabre by 14 acquisitions), glass (Grupo Vitro by 18 acquisitions), wood and paper products (Grupo Durango by 6 acquisitions), and copper (Jorge Larrea by 3 acquisitions) (Tanski and French 2001). By April 1991, the government sold the ninety-six companies privatized in these sectors to only seventeen individuals and enterprises (Tanski and French 2001).

Conversely, although Turkey had agreed to the IMF's conditionality to privatize and drafted a privatization plan as early as 1986 (Güran 2011), only a few minor privatizations took

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[77] The bidders were allowed to perform leveraged buyouts (LBOs), often borrowing from the same banks that they are purchasing in order to complete their transactions. This became a major source of liability for the Mexican banking sector, paving the way for the 1994 "tequila" crisis (Marois 2011).

[78] The government argued that the bank privatizations were necessary, not because they were unprofitable or inefficient, but the state holding banking assets was not appropriate in the neoliberal era (Santin Quiroz 2000).

place in the 1990s. Unlike in Mexico, the Turkish governments did not commit to the privatization of state-owned banks and only privatized the least profitable banks (Marois 2012).[79] Indeed, by 1999, the state still had the full control and ownership of 4 major banks (*Ziraat Bank, Halk Bank, Emlak Bank,* and *Vakıf Bank*), which collectively controlled the 40% of the banking assets in the country (Marois 2012, 112).[80] In other sectors, only minority shares of the SOEs were offered through public offerings; for example, the SOEs in the steel (Erdemir in 1990), petrochemicals (Petkim in 1990), refinery (Tüpraş in 1991), and retail gasoline (Petrol Ofisi in 1991) sectors were only partially privatized (İ. Atiyas 2009). The public offerings dispersed the ownership of these giant SOEs. Furthermore, unlike in Mexico, Turkey's state-owned fixed-line telecom company, Türk Telekom, was only privatized in 2005, after new telecom regulations and a new regulatory authority were put in place and the monopoly rights of Türk Telekom was already abolished.[81] As a result, while in Mexico privatizations generated a total of $25 billion in revenue between 1988 to 1993, corresponding to 1/4 of privatization revenues in all developing countries during those years (MacLeod 2005, 37), in Turkey, privatization revenue remained below $3 billion between 1987-97 in total, which led the WB to put Turkey among the worse three performers in privatizations by the mid-1990s (Eder 1999, 76).

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[79] Rather than privatization, the Turkish governments rationalized the state banks' management and turned them into larger, more powerful and profitable operations (Marois 2012, 112).
[80] Even after the 2000-2001 crisis, some of these banks retained their power. For example, Ziraat Bank had a net profit of almost $1.5 billion and was the ninth most profitable bank in Europe in 2005 (Marois 2012)
[81] Türk Telekom was truly a giant, with an estimated value of $25-30 billion, whose sale would be a great help to the Turkish state's budget deficit problem which continued into the 1990s. This delay occurred despite the fact that Turkey had committed to this privatization again in 1994 under a new IMF agreement (I. Atiyas 2009).

The generous privatizations helped increase the share of national companies in the Mexican economy when the economy was opening up to foreign competition (Hoshino 2010). While in 1987, 73% of the top 500 firms in Mexico were Mexican private companies, in 1992, their share had increased to 84% (Hogenboom 2004). President Salinas himself defended the increasing the corporate size of local corporations as an intentional industrial policy designed to offset the effects of globalization:

> "If, in Mexico, we had not had large business groups, we would not have been able to deal with the challenges of globalization and competitiveness. This would have meant that our entry into world markets would have been much less efficient, which in tum would have meant fewer exports, and fewer jobs in industry, in export-oriented services, and in the small and mid-sized companies that provided inputs. In our domestic market, we had to face growing competition from the major foreign companies, and this required the existence of large Mexican groups." (De Gortari 2002, 477).

As a result, the big business groups in Mexico were more supportive and more involved in the trade liberalization process when NAFTA negotiations started in 1990. Whereas in Turkey, the state's resistance to privatizing early and extensively was a cause for big business complaints[82] and contributed to their resistance to and absence from the CUA negotiations.

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[82] The Turkish Confederation of Employers' Union (*Türkiye İşveren Sendikaları Konfederasyonu* (TISK)), for example, denounced the state for using the public enterprises for populist ends, wasting domestic savings, discouraging foreign investments and deterring entrepreneurial development (Yılmaz 1999).

4. Technocratic Experts

In Turkey, lawyers and especially law professors have been the traditional technocratic professions that have a claim to scientific authority over public policy decisions and an ability to network with political elites and parties (Erozan 2005; Parslow 2015). The close connection between the state and lawyers was forged in the early years of the Turkish Republic. Influenced by French legal theories since the late-modernization period of the Ottoman Empire (*Tazminat*, ca. 1839-1876), the political elites of the new Republic saw the discipline of law, particularly administrative law, as the "science of the state" (Parslow 2015). As they adopted secular and positivist principles to organize the new state, they believed the involvement of academic lawyers was necessary to give the new regime's public policy decisions some "scientific rationality" (Erozan 2005, 84). Lawyers were asked to adopt the new Republic's official ideology and support it by creating legal theories that legitimated the new regime (Özman 2010). These Republican ideals included the principle of "statism" (*devletçilik),* i.e., the state ownership and control over economic resources to provide economic opportunities to the general public (Parslow 2015). The state relied heavily on law professors, some of which had degrees from European universities, to prepare its new national laws based on Western legal systems- such as the Swiss Civil Law, the German Law of Obligations, the Italian Civil Code, to name a few.

One of the earliest decisions of the Turkish Republic was to create a new School of Law in Ankara in 1925, which was chaired by the Minister of Justice (Erozan 2005, 73 & 82; Parslow 2015, 67). The close alliance between law schools and the state was secured by the purging of an older School of Law in Istanbul, which followed a more liberal tradition (Parslow 2015, 69), and

instituting tight control over the appointments of professors and the teaching curricula in law schools (Özman 2010). The formation of private universities, which could have disrupted this special relationship, was not allowed until the mid-1980s. This control over legal education was extended to bar associations and professional practices of private attorneys as well. Under the Code of Attorneys (*Avukatlık kanunu)*, the lawyering profession attained a "quasi-public status" subject to the direct regulations and control of the state (Özman 2010, 79).

As a result, the Turkish academic lawyers constructed their professional identity as one of "public service," which gave them substantial power to shape public policy decisions (Parslow 2015). Even the most authoritarian decisions of the central government could be justified if it was first negotiated and framed by legal professionals and law professors. During the great depression and the second world war, law professors played essential roles in legitimating the substantial violation of constitutional and universal human rights rules by the government (Parslow 2015, 56). In the 1950s, they challenged a new democratically elected government by delegitimizing its decisions and calling the liberal economic policies they introduced unconstitutional. Even the Turkish army had to negotiate and ask for the approval of the legal scholars when it took over the government in the 1960 coup. The military relied on a group of law professors to prepare a new constitution, giving them substantial freedom to design it. The resulting 1961 Constitution was one of the most politically liberal constitutions in Turkish history, with expansive civil rights for individuals, but it secured the statist management of the economy by constitutional principles. For example, they gave constitutional roles to the state's economic planning institutes and allowed the nationalization of private property. Similarly, in the

1960s and 1970s, the legal scholars and legal practitioners in large part supported the ISI policies and state interventionism (Parslow 2015).

While the role of legal professionals as technocrats was somewhat challenged with the 1980 coup and transition to neoliberal policies, lawyers continued their importance as technocratic professions for the Turkish state. Although Özal government (1983-1993) introduced other professional groups, mainly engineers and economists, into the state, these appointees remained political, connected to political actors inside the government, and did not become career bureaucrats with their own professional power inside the state (Özel 2014). Until the 2000s, the access to foreign economic degrees remained very limited in Turkey, which curtailed any potential economist challenges to legal scholars' technocratic jurisdiction over policy decisions.

At the beginning, similar to Turkey, Mexico relied on "self-taught lawyers (or occasionally engineers) with little or no formal training in economics" in policy-making (Fourcade-Gourinchas and Babb 2002, 559). However, this started to change by the late 1950s, as economists began to climb to more important policy positions (Babb 2004). Like the Turkish state's connection to legal professionals, economists and the Mexican state developed close institutional ties. The Mexican state created the first economics department in Autonomous National University of Mexico (*Universidad Nacional Autónoma de Méxic*o (UNAM)) in the mid-1930s with the explicit purpose of generating graduates that could populate the economic bureaucracies of the state (Babb 2004, 29). Adopting the ideological position of the Mexican revolution and the PRI governments, the economists graduating from UNAM held strong sympathies for Marxist and socialist ideologies and a self-prescribed mission to protect the

"general interests" of the Mexican public, rather than the private interest of businesses (Babb 2004, 67). However, earlier on in the 1940s, big business groups founded an alternative economics department in the Mexican Technological Institute (ITM- later ITAM) to counter the ideological influence of the UNAM economists (Babb 2004, 74). Both schools argued that economics offered a "scientific" and "objective" vision to public policymaking and offered their services to the state.

The primary employer of economists inside the state was the Mexican Central Bank and the Finance Ministry, two essential economic bureaucracies during the implementation of ISI policies in the 60s and 70s. In this period, foreign degrees became a highly valued asset for economist technocrats due to the growing need to have good relations with the US and the international financial organizations that provided debt relief to the highly indebted Mexican government (Babb 2004, 82–83). Economist technocrats received state scholarships for post-graduate degrees in the US and UK universities. These foreign-educated economists played an essential role in the "deepening" of Mexico's ISI policies, particularly in the 1970s, by advocating for Keynesian monetary policies at the cost of inflation (Babb 2004, 118; Van Gunten 2015a). However, during the same period, the ITAM economists began to challenge the ISI policies and advocating for more liberal policies; they began gaining influence over the Mexican Central Bank (Fourcade-Gourinchas and Babb 2002).

After the failure of the ISI policies with the debt crisis of 1981, this liberal group of economists gained prominence over economic policy decisions in Mexico. Under pressure from business groups, the government purged the older generation of left-leaning economists the ministries and the Central Bank, which were blamed for the highly unpopular bank

nationalization and debt defaulting decisions and replaced with a younger generation of economists with foreign degrees and pro-market, liberal ideologies (Gates 2009; J. A. Teichman 2001; Van Gunten 2015a). The IMF, the US, and international banks that provided debt relief to the Mexican government also supported the advancement of liberal economists within the Mexican state (J. Teichman 2004). The dominance of these economists inside the state peaked under President Salinas (1988-1994); almost all his cabinet members were economists with PhDs from prestigious US economics departments, such as MIT, Yale, and Chicago (Fairbrother 2014, 1357). These economists were deeply committed to neoliberal market reforms and spearheaded Mexico's market restructuring reforms, and they shaped economic policy areas beyond monetary and financial policies, including deregulations and privatizations.

5. Free-Trade Agreements and the Preparation of Competition Laws

Both in Turkey and Mexico, the decisions to sign free-trade agreements with the EU and US did not stem from business pressures. Instead, they originated in the state bureaucracy as a continuation of neoliberal reforms. In both countries, big business groups initially resisted trade liberalization (Fairbrother 2007; Bugra 1994). They had benefited from the protectionist measures of the state to accumulate market shares for decades and were likely not efficient enough to survive direct competition with business groups based in Western, advanced economies. However, going into the 1990s, these countries' neoliberal restructuring reforms, especially depressing labor wages and export incentives, had reached their limits in sustaining economic growth without trade liberalization (Yeldan 2006, 196–99; Fairbrother 2007). By

already liberalizing capital accounts and floating their currencies, both countries had become increasingly dependent on foreign investors, who were still hesitant to invest in these countries for their history of state-protectionism (Yeldan 2006). Turkey and Mexico needed to differentiate themselves from other developing countries and convince foreign investors of the "endurance" of their commitment to free markets. The CUA and NAFTA would serve as commitment devices to reduce the threat of protectionism to attract foreign direct investments while also increasing access to emerging regional trade blocks in North America and Europe.

The CUA and NAFTA free-trade agreements share some significant similarities. In both cases, the agreements went over and beyond simply requiring tariff reductions and harmonizing trade regulations between the signatory countries, but they also required Turkey and Mexico to pass some institutional reforms. Some of these requirements were to remove the "public barriers" over trade, such as lifting the legal restrictions over investments and eliminating discriminatory regulations against foreign businesses. Others were to create new institutions, such as new regulations on product standards and accreditation, new laws protecting intellectual property rights, and new competition laws. Like many other developing economies, Turkey and Mexico did not have a competition law system prior to the 1990s, which became an issue in the CUA and NAFTA negotiations. In Mexico, the 1857 Constitution, the 1917 Constitution, and the 1934 Organic Law of Monopolies prohibited monopolization. In Turkey, the 1982 Constitution assigned the state the role to "prevent the monopolization and cartelization in the markets," and the Commercial Code of 1952 also defined a criminal offense called "unfair competition." However, none of these previous legal codes were specific and detailed enough to create a competition law system, and they were very rarely enforced.

Despite the similarities of CUA and NAFTA in requiring Turkey and Mexico to legislate new competition laws, the legislation processes for these laws looked completely different. They took place under very different configurations of economic interest representation and technocratic professionals' employment for the historical reasons I have explained above. In Turkey, the government excluded big business groups from the CUA negotiations with the EU, and the new competition law was prepared by a small group of law professors from public universities commissioned by the Ministry of Industry and Commerce (*Sanayi ve Ticaret Bakanlığı (STB)*). In Mexico, the new competition law was designed by the Ministry of Trade and Industrial Development (*Secretaría de Comercio y Fomento Industrial (SECOFI)*), which worked closely with the big business groups in NAFTA negotiations and was dominated by liberal-minded economists with PhDs from American universities.

The CUA and the Preparation of the Turkish Competition Laws

In Turkey, state bureaucrats and politicians could exclude big business groups from the CUA negotiations by framing the CUA as a political agreement that will change the political outlook of Turkey, rather than an economic agreement that could reshape the Turkish economy and require business participation. Turkey had a special "association relationship" with the European Economic Community (EEC) since the Ankara Agreement in 1963, which had laid out a three-step process for Turkey's full membership, including the signing of a "Customs Union."[83]

[83] The Additional Protocol in 1971 had set out the details of the implementation of a "Customs Union" between Turkey and Mexico, giving Turkey a 22-years span transition period (Voigt 2008). However, the negotiations for the

Big business groups in Turkey, including TUSIAD, persistently opposed Turkey's joining of the EU Customs Union without membership, arguing (rightly) that this would amount to surrendering the Turkish national industrial policies and regulatory decisions to the EU in the absence of any political representation and say in EU-level decisions.[84] They demanded that the government "bargain proficiently" during the Customs Union negotiations and look out for the local business interests.[85] They founded the Economic Development Foundation (*Iktisadi Kalkınma Vakfı* (IKV)) to represent the big business groups' interests in the negotiations.

In response to the business opposition and demands, the government started a political campaign to frame the signing of the CUA as Turkey's "entry into Western civilization."[86] The government pressed businesses to accept the agreement it reached with the EU without objections, suggesting that the EU could back out from the deal if Turkish companies made demands. This campaign successfully silenced big business opposition without giving them any say in the CUA (Eder 1999; Bozdaglioglu 2004). By the start of the official negotiations in 1992, the IKV had turned into a supporter of the CUA without getting any invitation to the negotiations (Milliyet 1995). As the president of TUSIAD later stated, many businessmen conceded to the

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union were put "on hold" under Turkey's ISI policies in the 1970s, and little progress was made on realizing the CUA by the late 1980s (Ugur 2000) The revival of the CUA negotiations in 1987 is largely attributed to Turkey's transition to free-market policies in the 1980s and the expansion of the EEC to incorporate Greece, Spain and Portugal in the same period, which left Turkey with a feeling of "missing out" (Eder 1999).

[84] For example, the representatives of all major business organizations published a joint notice on mainstream newspapers in 1989 stating that Turkey should not sign a customs union until it becomes a full member (Milliyet 1989). During a meeting with the government representatives in June 1993, many TUSIAD members argued that the Turkish economy would pay a high price by joining the Customs Union without asserting its rights to protect its industries (Milliyet 1993b).

[85] "We did not say we should not enter the CEU, but we said we should bargain proficiently and know what we give and take in the process" (Milliyet 1997).

[86] By the 1990s, the rise of so-called "Islamist" political movements had begun to challenge the secular political elites entrenched in the bureaucracy. The government coalition argued that the CUA might be the last line of defense protecting modern Turkey (Eder 1999; Bozdaglioglu 2004).

Customs Union "as a sacrifice on the way to the full membership." (Cumhuriyet 1995). Consequently, the negotiations that led to Turkey's signing of the CUA in 1995 were conducted with little participation from big business groups.

Turkey had agreed to pass several reforms before negotiating the CUA with the EU, including the legislation of new competition law.[87] At the time, the government was composed of a coalition between the right-wing political party of Turgut Özal -who had by then became the President of the Republic but continued his influence over economic policy decisions through his successor PM Tansu Çiller- and a left-wing political party (the Social Democratic People 's Party (*Sosyal Demokrat Halkçı Parti* (SHP)) -which was led by Erdal İnönü, the son of one of the founding fathers and the second President of the Republic. According to the protocol agreement between these government parties, the right-wing political party would lead the negotiations with the EU on trade liberalization, while the left-wing political party would prepare most of the reforms required for this agreement through the Ministry of Industry and Commerce (*Sanayi ve Ticaret Bakanlığı (STB))*. Besides the new competition law, the necessary legal reforms included the Consumer Protection Law (1994), decree-law on the protection of patents (1995), decree-law on the protection of trademarks (1995), and decree-law on the protection of industrial design (1995). This reform package was presented to the public as "economic democratization" (*"ekonomide demokratikleşme"*). They were explained not in relation to market liberalization and economic integration with Europe but in relation to achieving social-democratic

[87] "If the customs union process had not existed, if it had not been for the signing process of that council decision, it would not have come out so quickly, and maybe not even. In other words, it both enabled it to come out and, more importantly, it accelerated the processes in the parliament. At that time, the wind to enter the European Union was blowing very hard" (Interview 18).

redistributive goals under the new liberal economic model. For example, one of the economic advisors of İnönü at the time explained the reforms as, "The main starting point was to control within the framework of law the historical and structural 'injustices' and 'inequalities' in [Turkey's] industrial society, and to help to change a system in which the 'strong' is always dominating the 'weak'" (Katırcıoğlu 2004).

To start preparing the new competition laws in 1992, the economic advisors of Erdal İnönü convened an *ad hoc* commission mainly composed of law professors. These professors had introduced the Turkish legal academia to competition laws before there was even a Turkish competition law. The commission was chaired by Professor Nurkut İnan, a senior law professor at the Ankara University School of Law and one of the pioneers of the "economic analysis of law" in Turkey. In his memoirs, he explains that his interest in law and economics dates back to his research visits to UC-Berkeley and Yale University in the early 1970s, which was followed by a more specific focus on European economic laws through his participation in a month-long seminar in Salzburg in 1980 (İnan 2016). He organized Turkey's first post-graduate law degree program on "European Economic Community Laws" at Ankara University with funding support from the European Commission and taught the first European competition law class at this program (İnan 2016).

In addition to İnan, there were two younger law professors in the commission.[88] First, Associate Professor Yılmaz Aslan was a direct intellectual descendent of İnan and one of the

[88] According to the memoirs of Mehmet Akif Ersin, the Ministry first got in touch with İnan upon learning that he teaches European competition law classes in Ankara, and İnan then recommended the inclusion of the two younger legal scholars into the commission (Ersin 2012).

earliest graduates of the EEC program in 1982. During our interview, Aslan explained to me that after taking İnan's competition law class, he was convinced that competition laws would eventually be legislated in Turkey since they existed in almost every country.[89] With this conviction, he wrote his doctoral dissertation on "The Abuse of Dominant Position in European Community Law" in 1989. Second, Associate Professor Ateş Akıncı, who was not a student of İnan, was also specialized in competition laws through his education abroad. He received an LLM at Harvard University in 1983, where he got to take an antitrust class from legendary antitrust scholar Phillip E. Areeda (Akıncı 2001). Similar to Aslan, he wrote his doctoral dissertation on competition laws in other countries under the title "The Horizontal Restriction of Competition Law in the United States and European Community Law from a Comparative Perspective" in 1988. In addition to these three law professors, the commission also had Mehmet Akif Ersin, who was a lawyer-inspector (*müfettiş*) at the Ministry of Industry and Commerce and had a masters in "European Studies" at Reading University in England, and Erol Katircioglu, who received his Ph.D. in economics from Marmara University in Turkey and was one of the economic advisors of Erdal İnönü.

While some of these commissioned scholars were influenced by the American system of antitrust and "law and economics" ideas, they were more closely familiar with the competition law rules in the European system. For example, in our interview, Nurkut İnan explained that his main resources while teaching himself and his students competition law rules were the decisions of the European Court of Justice and the works of European competition law scholars like

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[89] Interview with Yılmaz Aslan (September 2019)

Richard Whish and Valentine Korah.[90] Yılmaz Aslan and Ateş Akıncı similarly stated the importance of references to the EU competition case law while learning competition law jurisprudence (Akıncı 2001).[91] These influences help explain why their draft law carried strong similarities to the European competition laws rather than the US antitrust laws. However, as Nurkut İnan also explained in our interview, the decision to base the new Turkish competition law strongly on the European competition law system was made during the meeting with the economic advisors of Erdal İnönü even before the drafting committee had convened; therefore, there was also political support for following the EU model.[92]

Although the commissioned scholars were strong supporters of competition laws and their protection of market competition, their endorsement of these laws was based on the legal and normative notions of protecting consumer rights, the competition rights of smaller businesses, and the equality between market participants, rather than the economic notions of establishing and protecting economic efficiency under free-market conditions. These legal and normative reasonings for competition law rules, which were once dominant in the US antitrust laws, but then largely became outdated and discarded by Chicago School influence, are more commonly embraced in the European competition law jurisprudence under Ordoliberal influence. For example, in his doctoral dissertation, Ateş Akıncı explained:

> "Due to the fact that competition is an economic matter, Competition Law primarily aims at obtaining the regular economic results of competition. However,

[90] Interview with Nurkut İnan (May 2019)
[91] Interview with Yılmaz Aslan (September 2019)
[92] Interview with Nurkut İnan (May 2019)

> the benefit desired to be obtained by Competition Law is not limited to the economic consequences of competition. Although the economic consequences of competition began to be understood in the 20th century, Competition Law has a longer history. The natural consequence of this is that besides economic facts, social and moral values are important in the acceptance of Competition Law, and in fact, for the acceptance of Competition Law these are even more important than economic reasons. The rules of Competition Law, which were adopted to meet moral and social needs, gained only a new dimension with the developments in economics in the 20th century" (Akıncı 2001, 6–7).

Similarly, Yılmaz Aslan suggested, "Economists propose to govern competition law solely with the 'laws' of the economy and want to purge it of social thoughts ... A dehumanized (ignoring social relations) law is not possible. For this reason, the idea of 'consumer protection' will always be one of the main ideas underlying competition laws.", adding "consumer protection" is different from the protection of "consumer welfare", the main goal of antitrust suggested by Chicago Scholars. (Aslan 2001, 4–5).

These convictions of the law professors also echoed in the preamble of the Turkish competition law, which states, "Laws should determine the areas of competitive freedom in order to give enterprises an opportunity to compete freely and equally." While the preamble of the Turkish competition law listed the achievement of economic efficiency as the main goal of competition laws, it also included the protection of small businesses and fair competition as important additional goals: "the competitive order helps to protect small businesses by removing

the barriers to entering the market… on the other hand, the competitive order also contributes to the spreading of accuracy and honesty in the market".

Furthermore, while some commission members proposed making some adjustments to the competition laws borrowed from the EU, these adjustments were intended to make Turkish competition law's restrictions on monopolies even more restrictive. Economist Erol Katircioglu was the only member who proposed to borrow some aspects of the US antitrust laws but proposed to borrow specifically the strongest sanction in this system, the divestment of corporate assets, which does not exist under the European regime (According to Hurşit Güneş in Tutanak Dergisi 2014). However, this proposal was rejected by the votes of the other members of the commission. Ateş Akıncı instead recommended adopting the "concerted action presumption," which also goes beyond the EU competition law rules in allowing the competition authority to sanction companies if the defendants cannot prove they are not in concerted action.[93] This recommendation was adopted by the votes of the other lawyers in the commission and eventually legislated into the law.[94]

Despite the drafting commissioners' and the Turkish government's expressed commitment to following the EU model in competition law design, state aid rules were missing in both the draft law prepared by the commission in 1992, and the law that eventually passed in the Parliament in 1994. After the law passed, some commentators speculated that the State

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[93] Interview with Nurkut İnan (May 2019)

[94] In the European and American models, the burden of proof is on the claimants or the investigative authority to show that there is concerted action between companies operating in the same sector of the economy to find the defendants guilty. In the Turkish law, which has remained unchanged since 1994, the burden of proof is on the defendants to show they are not engaging in concerted practices. Later, there was substantial debate in Turkish legal academia that this part of the law might be unconstitutional (Gürkaynak et al. 2011). In fact, Nurkut İnan later wrote that he regrets conceding to this proposal of Ateş Akıncı (İnan 2016).

Planning Institution vetoed state aid rules in order to protect the state aid distribution as a mechanism of state-led economic development. There was also speculation that the PM at the time did not want the new Competition Law Authority to restrict her government's actions (Eser Karakaş interview at Ahval 2020).[95] Indeed, the draft law created by the expert committee was subjected to various subsequent interventions by ministries (Ersin 2012)[96], which may have led the commissioners to omit that part of the law as a concession to the political actors that were involved.

I have questioned the absence of state aid rules in the draft law in my correspondence with Mehmet Akif Ersin. He told me that the commissioned scholars were focused more on adopting the "antitrust" part of the European competition laws, that is the restrictions over abuses of dominance, coordination agreements and merger and acquisitions. They thought, given that Turkey was not becoming a member immediately, there was no need to adopt the state aid rules immediately. But he also added "On the other hand, the commission that prepared the law was aware that Turkey gave importance to the state aids issue, and the draft bill would not be legislated solely for this reason"[97]. His explanation suggests, besides the unwillingness of the law professors to restrict state actions with law, that there was also no political support for including state aid rules in the legislation and the inclusion of state aid rules could have killed the draft bill. Ersin also explained that, when the EU representatives were presented with the draft law during

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[95] Professor Eser Karakaş says "The Competition Law we passed when we were entering the Customs Union in 1994 (under Tansu Çiller) did not incorporate the issue of state aids. In a sense, we received a delegation from the EU. In that period, Ms. Çiller did not want the law to get into state aids. Now the Justice and Development Party does not want it at all. This was skipped during the Kemal Derviş period as well" (Ahval 2020).

[96] Not only the Ministry of Trade was involved. Before presenting the law to the Parliament, the draft law also had to be cleared by the Ministry of Finance, State Planning Institution and Ministry of Justice.

[97] Interview with Nurkut İnan (May 2019).

the negotiations for CUA in 1993, they did not object to the absence of the state aid rules, but they only made this an issue after the law was legislated in 1994. Later, the commissioners who drafted the law, as well as the new Turkish Competition Authority lobbied the government to pass amendments to incorporate state aid rules and give the competition authority the ability to check the compliance of state actions with competition laws. However, the successive governments rejected these requests, finding the Turkish Competition Authority "too autonomous" to enforce state aid restrictions[98].

Indeed, the issue of the autonomy of the new Turkish Competition Authority created substantial tension between different government actors after the draft legislation was presented to various Ministries after the drafting commission finished its work in 1992. The expert commission's draft envisioned the creation of a new Competition Authority with substantial financial, administrative and decision-making autonomy from the Ministry of Industry and Commerce it would be "related" (*ilişkili*) to. [99] However, the first draft did not detail the administrative features and powers of this new Authority, which allowed the other ministries to redesign the financial and administrative autonomy of the new Authority (Ersin 2012) (This issue is discussed in more detailed in the next chapter- Chapter 6).

As a result of the exclusion of big business groups from CUA negotiations, the business participation in the making of the new Turkish Competition Law remained also very limited, even though the draft law prepared by the expert commission was later shared with the public to

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[98] His full statement was "The decision makers found the Competition Authority too (!) autonomous" ("*Karar vericiler Rekabet Kurumunu fazla özerk(!) buldular*" (Interview 44).

[99] By the 1982 Turkish Constitution, every organ of the state has to be centrally connected to some executive, legislative or judicial power. Therefore, the drafted invented the "related" category, which implies more political autonomy than the other state institutions at the time.

receive comments and feedback before it was presented to the Parliament. While the economic advisors of İnönü expected strong resistance from big business groups (Hurşit Güneş at Tutanak Dergisi 2014), according to Mehmet Akif Ersin, TUSIAD did not formally submit any objections or requests to the draft legislation (Ersin 2012).[100] The Ministry and the government were not very willing to accommodate big business groups' interests later either.[101] Close to the date that the Parliament was scheduled to discuss the proposed competition law, in a private meeting held at the Minister of Trade, the Koç Group, the largest conglomerate and the leader of TUSIAD, expressed its strong objections and demanded radical changes to the proposal from government representatives (Ersin 2012). They requested, among other things, eliminating from the law the restrictions over exclusivity agreements, reducing the scope of abuse of dominance and merger regulations, significant cuts to the maximum fines, and replacing the new competition law authority with a commission organized inside the Ministry of Trade, thus gutting the authority's autonomy completely (Ersin 2012). The government representatives found most of these demands unreasonable and only agreed to respond somewhat to the demands on exclusivity agreement restrictions. However, according to Ersin, who designed the government's response to these demands, the changes made to the law in response to Koç Group's demands were only symbolic and in practice did not have any consequence for the scope of the law (Ersin 2012).

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[100] In his memoirs, Mehmet Akif Ersin recounts that the Ministry received comments and feedback from some other public institutions, economics departments, academics and local chambers of commerce (Ersin 2012).

[101] Although another major business organization representing big business interests, the Confederation of Employer Associations of Turkey (*Türkiye İşveren Sendikaları Konfederasyonu* (TİSK), submitted its strong objections to the draft law, arguing that it would diminish the international competitiveness of Turkish businesses under trade liberalization, the Ministry did not take these objections into consideration (Ersin 2012).

Its perhaps important to note that, while the drafters of the Turkish Competition Law were mostly unresponsive to the interests of big business groups and could effectively exclude them from the process, this does not mean no business interests were represented. The Union of Chambers and Commerce (*Türkiye Odalar ve Borsalar Birliği* (TOBB)), which is the traditional representative of small and medium size business interests and has much broader membership (Bugra 1994; Özel 2014), was an ardent supporter of the legislation of competition laws. TOBB's support for competition laws seem to stem from its belief that these laws would protect smaller businesses from big businesses encroachment. TOBB had even prepared its own competition law proposal, which had a long section on abuse of dominance and even went further than the Ministry's draft by incorporating prison sentences for infringements.[102] Later, it also supported the government's competition law proposal by stating "the important matter in the law is preventing the abuse by dominant companies. In this respect, the latest draft law prepared by the Ministry of Industry is in line with our views" (TOBB Chairman Yalım Erez interview at Milliyet 1993). While supportive, the TOBB representatives asked the government to grant them representation in the decision-making body of the new Competition Authority (the Turkish Competition Commission), and managed to get 1 seat (out of 11) at this body (Ersin 2012). However, the other demand of TOBB, which was to see the State-Owned Enterprises (SOEs) and the public monopolies explicitly regulated by the new competition law, was ultimately rejected (Milliyet 1994). This suggests that, although the Turkish small-medium size businesses could get

[102] There were some other important differences between TOBB's proposal, and the law prepared by the Ministry of Industry. TOBB wanted to see a more relaxed enforcement on mergers, and wanted to give more role to the courts in deciding cases, rather than an autonomous competition authority (Ersin 2012).

some concessions for themselves, they could not push back against the public sector with the legislation of the new competition law.

NAFTA and the Preparation of the Mexican Competition Laws

Like in Turkey, Mexican big businesses too had their doubts about trade liberalization with the US (Fairbrother 2007). However, unlike in Turkey, "Mexico was one of the few major countries where well-organized business associations participated in negotiating a major trade agreement" (Schneider 2002, 78). Immediately after announcing the decision to negotiate for NAFTA, the Mexican government asked the CCE to create a "private sector trade policy advisor structure" (Thacker 1999; Fairbrother 2007). This led to the creation of the Coordination Council of Foreign Trade Business Organizations (*Coordinadora de Organismos Empresariales de Comercio Exterior* (*COECE*)) in 1990. While officially representing all business groups, the COECE overwhelmingly favored the largest conglomerations in the country (Gates 2009).[103] President Salinas had ordered the government negotiators in NAFTA to "go to great lengths to respect the business community's wishes" and make ever decision after consultation with the private sector representatives (Thacker 1999).

As a result, COECE's involvement in NAFTA negotiations almost created a "parallel structure" of negotiations. The government and COECE representatives would meet in small steering groups in Mexico before each round of negotiations on NAFTA in Washington (Thacker

[103] Business representatives needed to volunteer time and resources to participate in the negotiations, which only the largest conglomerations could supply (Fairbrother 2007; Thacker 1999).

1999). Mexican business representatives would also be invited to the negotiations, which would typically be stationed in the "room next door" during the official negotiations between government representations and prepared to give their opinion during session breaks (Fairbrother 2007). According to Thacker (1999), the COECE representatives were asked to respond to the full draft of the agreement towards the end of the negotiations and 90% of their demands in their 50-pages response were accepted by the Mexican government. As a result, the Mexican businesses were able to get some important exceptions and periodical delays in the elimination tariffs, duties, and quotas from NAFTA that the Turkey businesses could not get from CUA[104]. This also allowed them to shape the new Mexican Competition Law more indirectly as well.

Similar to Turkey, Mexico had agreed to making a number of reforms to its national institutional and legal infrastructure before liberalizing its trade under NAFTA agreement, including the legislation of new competition laws.[105] However, unlike in Turkey, these reforms did not have any social-democratic, redistributive goals (at least on the surface), but they had explicit purposes of creating free competition. The reforms were prepared under the "economic deregulation program" ("*Programa de Desregulación Economica")* announced in 1989. It was promoted as a program to review and revise the existing economic regulations with the intentions of increasing economic efficiency, expanding the participation of the private and social sectors, avoiding regulatory obstacles to free competition, and increasing Mexican industries'

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[104] Mexico received a long period to eliminate tariffs on many imports (some lasting 15 years). Furthermore, the owners of the newly privatized banks received important concessions on the liberalization of finance, and clauses protecting the newly privatized giant telecommunications company from foreign competitors were buried inside NAFTA (Gates 2009).

[105] "An implicit obligation under NAFTA was the necessity to create an effective competition regime in Mexico. It wasn't anything statutory. It wasn't included as an obligation in the NAFTA, and actually with the law, and the institution were created in 1992, but that was clearly a product of the negotiations" (Interview 83).

competitiveness (OECD report). Business groups had expressed their support for this program for helping them expand their business activity and keeping the state regulations at check (IFC report). However, rather than eliminating or cutting down the existing regulations, much like in Turkey, the program expanded the legal infrastructure of the state through new legislation, including the Federal Law on Metrology and Standardization (1992), the Foreign Trade Law (1993), the Ports Act (1993) and the Federal Telecommunications Law (1995).

A special unit called "Economic Deregulation Unit (UDE)" inside SECOFI was authorized by President Salinas to prepare the new Mexican Competition Law as a part of the deregulation program, which began its work on the law in the Spring of 1992 (Palma Rangel 2007). The director of UDE Santiago Levy was a well-known economist, who won the Mexican National Bank's National Research Prize in Economics for his article on poverty alleviation programs (titled "*La Pobreza en México*"). He had a PhD from Boston University with a dissertation on international trade and worked at the same university as an associate professor until 1993. Besides his appointment in SECOFI, he gave consultations to various governments, including Indonesia, Bolivia, Peru and Ecuador, on trade policies during his appointment at Boston. The second important economist in this team was Gabriel Martínez González, who had just received his PhD from University of Chicago in 1990, with a dissertation on fertility rates in Mexico.[106] The third important person in this team was a lawyer, Gabriel Castañeda Gallardo, who was the Legal Director of the Deregulation Program since 1989 and had worked on almost all of the Program's legal proposals. He had received his undergraduate degree in Law from

[106] Gabriel Martínez González became the director of the Deregulation Program after Levy left to become the first chairman of the Mexican Competition Authority.

Escuela Libre de Derecho and had a master's degree in political science from the LSE. Prior to working for the Program, he was working for a state bank (Banobras) managing their legal contracts with clients.

As it should be clear from these biographies, unlike the law professors in Turkey, none of these experts who were put in charge of preparing the Mexican Competition Law were specialized in competition law and policy, had any apparent training in this field or studied them in their academic research. Therefore, it is possible to assume that they were open to the influence of foreign competition law models and international "best-practices" promoted by other jurisdictions because of their lack of knowledge. Indeed, according to Palma Ranger (2007), one of the first actions of the UDE was to ask and receive recommendations on how to draft the new competition law from various foreign competition law authorities, including the American Federal Trade Commission (FTC) and Department of Justice (DOJ), the Spanish Competition Court (*Tribunal de Defensa de la Competencia*) and the German Cartel Office (*Bundeskartellamt*). In addition, Santiago Levy had meetings with OECD representatives to learn about the "best-practices" they promoted.[107] It is also reasonable to assume that due to the influence of the NAFTA negotiations and the majority of the UDE experts' background in American universities, American antitrust authorities and experts might have had stronger influence over the Mexican drafting process than the other actors.

Although the experts of the UDE were all strong supporters of competition laws -like the law professors in Turkey-, the reasons they provided for their support was different. Their job at

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[107] Interview 82.

the UDE as a part of the "deregulation project" was to shape economic policies with a "pro-competition bias" (K. G. Hall 1994). They believed that competition laws would complement Mexico's market transformations and adoption neoliberal policies in recent years, and they supported competition laws through economic arguments on the efficiency of free competitive markets and the consumer welfare they generate. As the document the UDE experts published to explain the motivations of the draft law stated:

> "The change in orientation in economic policy made in Mexico during the past few years implies that the economic development of the country will increasingly rely on the markets. A renewed competition policy is the natural and necessary complement to these changes, to ensure that the operation of the markets translates into greater efficiency. To the extent that there is equality of economic opportunities, greater efficiency and the barriers to social mobility are removed, we will have a more equal and richer country" (Gallardo et al. 1993, 230).

In this document, the drafters of the Mexican Competition Law also seemed to be in agreement with the Chicago School premise that the sole purpose of competition laws is the protection of the competitive process, which excludes the consideration of other social and political goals of competition laws:

> "The law proposes a policy focused exclusively on promoting economic efficiency and the competitive process. In itself, the law will not have distributive objectives. While the reduction of monopoly power can, and generally does, have a positive redistributive effect, the latter should be thought of as an effect of the law and not as an objective. Thus, it is explicitly recognized that distributive

> objectives are pursued with other policy instruments, such as educational ones, progressive elements of fiscal policy and those of social policy, among others, and not through competition law" (Gallardo et al. 1993, 230)

Castañeda similarly wrote "The original idea behind the FLEC was not (and could not be) to eliminate structural pre-existing monopolies, but rather to combat anti-competitive conduct… Structural problems are the responsibility of Congress and political decisions beyond the reach of competition law." (Gallardo 2010, 38). It is not a surprise then that the Chairman of the FTC remarked when he visited the newly created Mexican Competition Authority in 1993 stated that the purpose of the Mexican Competition Law "sounds familiar; boy, does that ever sound familiar! We may already be "harmonized" enough for our annual report writers to be sharing computer discs" (Steiger 1994).

My interviewees, who were high-level bureaucrats at SECOFI at the time and could observe the preparation of the Mexican Competition Law, told me that this Chicago School influence on the UDE experts shaped the "substance" of the new law. One interviewee explained "All the substantial matters were evaluated by, at that time, the Chicago School of Law and Economics and the procedural issue was influenced by the European models".[108] This was especially the case for the design of the restrictions over monopolies or abuse of dominance cases:

> "Interviewee: When they were creating this law in 1992, they had to wonder, 'what would be an abusive dominance? We have to make a catalogue of

[108] Interview 82. By procedural issue he means the administrative enforcement of the law by competition authorities, as in the European system, not the judicial enforcement by courts like in the US.

companies that could become an abuse of dominance if they are practiced by a dominant player and the effects are worse than the benefits.' You don't have here a description that you have to apply a rule of law, rule of reason for these cases. It says that you have to take into account the efficiency gains. If somebody can prove that the efficiency gains are higher than the bad effects of the company, then you shouldn't fine the dominant player. So all of that is influenced by the--

Interviewer: The US system?

Interviewee: Yes."[109]

The drafters based the Mexican Competition Law's restrictions over monopolies purposefully to conform to the American legal norms of the time. Castañeda himself explained that the praise the new Mexican Competition Law received from American commentators was thanks to its "cautious position by not expressly recognizing predatory pricing and discrimination" as competition law offenses and consideration of resale price maintenance not a per se (absolute) offense (Gallardo 1996, 23).

However, departing from the American antitrust norms, the drafters of the Mexican Competition Law also sought to incorporate public authorities and their actions as targets of the new law. They were convinced that the public controls over free enterprise, rather than the private impediments over competition created by monopolization, remained the most important source of economic inefficiencies in the Mexican economy. As Castañeda explained, "the main challenge faced by the drafters of the FLEC was designing a law to enforce competition

[109] Interview 82.

principles amidst huge, designated state monopolies, suffocating regulations, old and deep barriers to entry and a wide variety of de facto foreclosed economic activities" (Gallardo 2010, 37). Therefore, the motivation statement they wrote also stated:

> "the focus of the law recognizes that an important part of anti-competitive practices has its origin in the behavior of the public sector (as a buyer, as a seller, as a concessionaire and as a price fixer). That is why, as part of the new competition policy, policies are proposed that make the effect of public sector actions more competitive, repealing old laws that promoted collusive behavior, and at the same time creating mechanisms to assess the impact on competition of new provisions" (Gallardo et al. 1993, 231).

Because they placed substantial limitations over the state and federal government's actions, new Mexican Competition Law's drafters feared the opposition from other ministries and government members. Castañeda recounts, "Initially, the team of drafters thought that the main source of opposition to the bill and its subsequent application would come from the public sector itself, as such legislation would disrupt very deep-rooted arrangements, threatening old favorites and vested interests" (Gallardo 2004, 353). Indeed, one of the main oppositions to the draft law came from the Ministry of Finance (*Secretaría de Hacienda y Crédito Público* (SHCP)) (Gallardo 2004). This can be connected to the competition between SHCP and SECOFI in this period to shape Mexican economic policies. As previous studies have shown, unlike SECOFI, SHCP had retained more of the state-planning technocrats and the old conservative members of the PRI (Morton 2003) and resisted the fast opening of the economy under NAFTA (Luna 2004). SHCP's opposition to the draft law prepared in SECOFI was based on its limitations on SHCP's

decisions over the mergers and acquisitions in the finance sector (Gallardo 2004). However, Castañeda recounts that the drafters were able to surpass the SHCP objections with the help of President Salinas, who supported the SECOFI draft (Gallardo 2004).

Nonetheless, the resistance of SECOFI to incorporate other interests and viewpoints into the legislation of the new competition law was not extended to the big business groups, who vocally expressed their concerns on the law to the government. The Minister of SECOFI, Jaime Serra Puche, made sure that, similar to NAFTA, the big business groups felt represented and their interests protected in the making of the new Mexican Competition Law. Minister Puche personally introduced the draft law to the representatives of CCE before bringing it to the cabinet (Gallardo 2004, 346). He reassured them that the purpose of the law was "not to punish companies because they are large or small… It is not to fight size by size but to combat and avoid monopolistic practices that attempt against productivity, competitiveness, and, therefore, the general welfare of society… There are companies that can have a high degree of concentration and, however, not have a monopolistic behavior" (proceso 1992). He defended the legislation by arguing that Mexican national industries needed it to build a defense against the potential monopolistic practices of new foreign competitors coming to Mexico after NAFTA (Gallardo 2004, 346).

Still, the CCE's lawyers examined SECOFI's draft law and presented some strong objections (Gallardo 2004, 346). The lawyers mainly argued that the new competition law would give too much discretionary power to the government in intervening the economy and would eliminate free enterprise. In response, the PDE drafters presented a detailed document reassuring the CCE that "the draft had a markedly pro-efficiency rather than interventionist bias", and

contrary to CCE's claims, it had the intention of limiting the central planning and "leadership" functions of the public authorities (Gallardo 2004, 347). The document further argued that the creation of an autonomous competition law authority would further ensure that the political interventions on the market would be limited (Gallardo 2004). Castañeda (2004) recounts that these reassurances satisfied the CCE.[110] The reassurances given to CCE in the process suggest that the government and the UDE drafters left the Mexican Competition Law's restrictions over monopolies intentionally weak also not to spook the national big business groups, whose support they needed to negotiate NAFTA.

6. Conclusion

This chapter questioned how globalized the competition laws and policies of the developing economies are, given the international pressures to conform to global legal standards and best practices. An alternative point of view suggests that competition laws and policies are largely shaped by national, political and economic ideologies, but this has only been argued in the case of the "Atlantic divide" between the US and the EU competition law regimes. Previous studies have failed to examine the impact of the divide between the US and the EU competition laws onto the design of developing country competition laws. I argued that this divide creates a pattern of "bi-polar isomorphism" with a touch of hybridization. Developing countries feel

[110] Besides the objections from the CCE, the drafters received a number of demands from smaller businesses in the agriculture and industrial sectors to create exceptions for certain businesses to allow them to collectively compete against foreign competitors through cartelistic agreements, which they outright rejected (Gallardo 2004). This is another sign that small-business groups were excluded from the neoliberal transformation and trade liberalization process in Mexico.

restricted by the design choices of the US and the EU competition law jurisdictions, but at the same time, can pick and choose between the traits of these jurisdictions based on their local political and economic interests and perceptions.

My historical-comparative analysis suggested that, in addition to foreign pressures, two endogenous factors shaped the Turkish and Mexican competition law hybrids: which technocratic experts were entrusted with the role of drafting the new competition laws, and whether big businesses or governments had the upper hand while negotiating for the adoption of competition laws. As previous research suggests, globally connected national expert groups are important allies to foreign pressures and global norms (Fairbrother 2007; Bockman and Eyal 2002; Fourcade 2009; Miguel A. Centeno and Silva 2016). Therefore, while the exogenous pressure of free-trade agreements were the primary reasons for Turkey and Mexico's legislation of competition laws, these agreements themselves did not shape how the EU and US models were transmitted. Instead, the Turkish government's reliance on lawyers and legal scholars who were trained in the EU competition laws, and the Mexican government's assignment of economists with PhDs in American universities with this duty, were fundamental to the transmission of competition law ideas and design features from the EU and US.

In addition, I found that the hybridization in competition laws occurred mainly through the influence of governments and big business groups over the free-trade agreements. As the existing literature suggests, globally connected professionals often do not act alone in institutional transmission, but they have to form "reform coalitions" (Thacker 1999) or "power blocks" (Guillén 2001b) with the local entrenched political and economic interests. These interest structures were fundamentally different in Turkey and Mexico as a result of long-term

historical developments, which led them to exert different influences over their competition law designs. In Turkey, the central government and political parties controlled economic policies and particularly the CUA negotiations with the EU. This allowed them to prevent the adoption of the state aid rules into the Turkish competition laws, although the EU was persistent in demanding their adoption. While in Mexico, big business groups had strong influence over economic policies and exercised strong voice in the NAFTA negations with the US. Through this influence they could limit the monopolization rules' reach in the Mexican competition laws.

These findings dispute the theorization of the global diffusion of laws as unchanging objects and cautions against the thesis that the diffusion of models of laws lead to homogenization. It is unreasonable to expect that non-Western, developing economies' laws become completely "Americanized" or "Europeanized" through such diffusion. Instead, I suggest that global legal diffusion is likely to lead to heterogenization through hybridization, point at the concrete ways that laws can take on different functions when removed from one body and placed in another, and explain why these differences occur.

6. TURKEY AND MEXICO'S ENFORCEMENT OF COMPETITION LAWS (IN PRACTICE)

1. Introduction

In the previous chapter (Chapter 5), I explained how the differences in the legislation of competition laws in Turkey and Mexico created hybrid legal texts imitating and combining the features of the EU and US competition law regimes. However, this analysis did not offer any insights on how Turkey and Mexico have enforced their competition laws in practice after their legislation. In socio-legal scholarship, the classic distinction between "law in action" and "law in the books" suggests that there may be substantial differences in how statutory rights and obligations are written into the law and how they are actually enforced and put into practice through the decisions of public authorities (Edelman and Stryker 2005; T. C. Halliday and Osinsky 2006; G. C. Shaffer 2009). In globalization studies, the "legal transplants" literature suggests that this "gap" between the law in the books and law in action may be even wider in non-Western developing countries that were forced to legislate some laws through external pressures from stronger nations or international organizations (Berkowitz, Pistor, and Richard 2003; Pistor 2002). Therefore, this chapter gives more substantive consideration to how Turkey and Mexico have enforced their national competition laws since they legislated them in the mid-1990s as a requirement of their CUA and NAFTA agreements.

The previous sociological studies on antitrust laws in the US offered important insights on how these laws shape the markets, but they paid scant attention to the actual enforcement

practices of these laws, and instead, focused largely on their formal features (Fligstein 1990; Dobbin and Dowd 1997). More recently, studies on the differences in the competition law regimes of the US and the EU have identified the importance of legal interpretation and implementation in creating significant cross-national variations in how competition laws shape markets (e.g. Ergen and Kohl 2019; Philippon 2019). Specifically, they have found that the influence of the German, Ordo-liberal School of thought over the interpretation of competition laws in the EU and the influence of the Chicago School of Law and Economics perspective over the US antitrust law regime have created substantial differences between these two jurisdictions in the enforcement of the competition rules on "abuse of dominance" or "monopolization" in practice (Ergen and Kohl 2019; C. Foster 2021).

While I follow the example of this later group of studies in emphasizing the significance of cross-national competition law enforcement differences, I move beyond them by looking at two non-Western, developing economies. To my knowledge, there are no previous studies that have analyzed the competition law enforcement differences in these economies with comprehensive law enforcement data and inquired on the causes of these variations. Most existing accounts on these countries are produced by international organizations, such as the OECD and the ICN. These studies offer only subjective and limited insights on enforcement differences by employing surveys and interviews with local practitioners or case studies on select cases (see J. C. Shaffer 2006; 2004; GCR 2015). Furthermore, these studies commonly employ normative standards to evaluate enforcement practices, by measuring developing country enforcement practices' distance from some accepted international "best practices". This study departs from these normative accounts and is rather perceives the changes and cross-national

variations in competition law enforcement in non-Western developing countries as the "neutral" consequences of some local forces inside these nations.

Using detailed competition law enforcement data collected from the local competition authorities in Turkey and Mexico, I have found that Mexico's enforcement of competition law rules on dominant companies is weaker than in Turkey, with fewer cases, lower sanctions and less enforcement attention on these charges recorded in the 20-years of implementation between 1999 and 2018. I have also found that there is a temporal dimension to these differences: Turkey and Mexico's competition law enforcement was similar in the first 10 years of implementation, but later diverged substantially in the last 10 years. More specifically, in both jurisdictions, the competition law authorities started with high levels of enforcement activity in the first 5 years, then experienced a decline in the next 5 years. However, only in Turkey the enforcement activity recovered from this slump and reached its peak in later years, while in Mexico, the enforcement activity continued to shrink. Furthermore, laws were not only more infrequently and weakly enforced in Mexico, but also more narrowly applied in a few sectors of the economy. In Mexico, most antitrust sanctions on monopolization were issued to telecommunications companies, while in Turkey monopolies in different sectors of the economy were more evenly sanctioned.

What causes these differences in competition law enforcement in Turkey and Mexico? Unlike the EU and US enforcement differences, different intellectual influences, or "paradigms" (P. A. Hall 1993), were not the main factor shaping competition law enforcement differences in these developing countries. There are no local schools of thought on competition laws, and as I argued in Chapter 4, both countries are under the influence of Chicago School conceptions through their participation in the international network of competition agencies that propagate

them as "objective" and "scientific" knowledge.[111] My findings also dispute the international organizations' reports on competition law enforcement in non-Western developing economies. These reports often suggest that the problems of institutional capacity (i.e., enforcement resources, technical knowledge etc.) is the leading cause of enforcement differences in developing economies (e.g. GCR 2015). However, I show that Turkey and Mexico had similar institutional capacity to enforce competition laws. I also discuss and eliminate the differences in statutes, the underlying economic differences, and the political autonomy of competition law enforcement authorities as potential explanations.

Instead, I argue that the "organizational matching" between competition authorities and second-order courts (courts of appeal) is the primary factor shaping competition law enforcement in these two countries. I define organizational matching as the features of the competition authorities and courts that allow them to work together in agreement over the collection and processing of information, the legal and analytical justification of decisions, and the formal requirements of sentencing. Organizational matching is essential to the successful enforcement of any new law, but it is especially difficult to achieve for competition laws. In civil law countries like Turkey and Mexico, competition law enforcement is coordinated between administrative competition authorities and courts. In other words, the competition law enforcement activity combines the traditional law enforcement characteristics set by the judicial branch with the policymaking characteristics determined by the executive branch or semi-

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[111] I have run some preliminary tests on the influence of the Chicago School ideas over Turkish and Mexican case law using simple word frequency counts (inspired by the work of Ergen & Kohl 2019) and reading the main arguments in case files. The results were ambiguous, and this method is not very reliable; therefore, I did not include them in this chapter's main discussion. However, you can find a summary and results of that small exercise at the end of the Appendix (Tables 10 and 11).

autonomous regulatory authorities. Therefore, for a successful implementation of competition laws these two branches of government must be able to work together.

Relying on over 95 in-depth interviews with competition law experts working in Turkey and Mexico, and the annual reports of the Turkish and Mexican competition authorities, I offer a detailed comparative-historical analysis of the organizational design features of the Turkish and Mexican competition authorities across three main criteria: the order of decision-making, the recruitment and accumulation of expertise, and the influence of economists. I show that, on the one hand, the Turkish Competition Authority ("*Türk Rekabet Kurumu"* (henceforth "TCA")) has a bottom-up decision-making process, meritocratic recruitment and foreign training for lower-level bureaucrats, and weak economist influence. These organizational characteristics have allowed the TCA to produce decisions that fit the formal expectations of the Turkish administrative appeal courts. This "organizational matching" is the main reason why Turkey was able to overcome the enforcement problems that emerged in the first years of the implementation as both the TCA and the courts were trying out this new system of law. On the other hand, the Mexican Competition Authority ("*Comisión Federal de Competencia Económica"* (henceforth "MCA") has a top-down decision-making process, network-based recruitment and foreign training for higher-level bureaucrats, and strong economist influence. As a result of these characteristics, the MCA produces competition law enforcement decisions that do not fit the formal expectations of the Mexican federal courts. This "mismatch" has prevented Mexico from overcoming the enforcement problems that emerged in the earlier years.

In the rest of this chapter, I will first analyze the competition law enforcement differences in Turkey and Mexico through detailed data on the monopolistic practices sanctioned by the

TCA and the MCA. Then I will discuss and refute some major alternative explanations for these differences –the statutory differences in competition laws, the underlying differences in the economy in market concentration and monopolization, the enforcement resources of the antitrust agencies, and lastly, the institutional autonomy of the antitrust agencies– before I summarize my own argument on the organizational matching/mismatching of competition authorities. In section four, using the information collected from interviews with informed experts and the annual reports of competition authorities, I will outline the main organizational differences between the TCA and MCA across three dimensions: how the competition authorities organize their internal decision-making processes, how they recruit and accumulate expertise, and whether or not they institutionalize economists and economic knowledge. The fifth and sixth sections of this chapter will explain how these organizational characteristics have shaped the competition law enforcement coordination between the competition authorities and the courts in Mexico and Turkey. I will conclude this chapter with the evaluation of my findings.

2. Comparing Competition Law Enforcement in Turkey and Mexico

Enforcement Data

To study competition law enforcement comparatively in Turkey and Mexico, I have collected data on TCA and MCA's decisions from the official publications, statistics and online databases of these authorities. In addition, a statistical book prepared by a member of the TCA was very useful in selecting cases and analyzing information (Gündüz 2018). There are a number

of important studies that have already used such data to analyze antitrust law enforcement, which suggests the usefulness of this approach to offer a comprehensive view of enforcement traits (Posner 1970; Eisner 1991; Holliday 1998; Gallo et al. 2000; Kovacic 2003; Ghosal 2011; C. Foster 2021). However, one of the important problems with this approach is finding the right enforcement data that is comparable across different legal systems (Ergen and Kohl 2019). For this reason, I have narrowed down the data collection to certain type of competition law infringements and certain type of decisions of the antitrust authorities.

I have particularly focused on the enforcement of competition law rules that apply to monopolistic (dominant) companies with substantial market power- i.e., the ability to determine the prices in a part of the economy. Besides the abuse of dominance rules, which were examined in the previous chapter (Chapter 5), this chapter also incorporates the rules on restrictive agreements, which are used by dominant companies to exclude their competitors. For example, the antitrust rules over the resale-price maintenance or RPM agreements between manufacturers and distributors are such restrictive agreements often used by monopolistic firms. These rules are considered under the "relative monopolistic practices" section in the Mexican competition laws and the "agreements that restrict competition" section of the Turkish competition laws.

As an enforcement action, I only counted the resolutions by competition authorities that found some economic agents guilty of breaking the law and sanctioned them with some administrative fees. This is a more manageable data, with little noise created by the variations in enforcement and data reporting styles in both countries. For example, I found that the initiation of official investigations does not carry the same weight and implications for Turkey and Mexico, because of the different investigative steps in these jurisdictions. Therefore, the numbers

on investigations would not be an equivalent measure of enforcement activity. Also, the numbers on the sanctioned cases are more theoretically reliable. The numbers on investigations initiated or finalized without any sanctions and financial penalties for the defendants could be considered bad indicators of enforcement activity, since they may not be deterrent enough for monopolistic companies with a lot of resources.

The time span I examine is 20 years between 1999 and 2018, which comprises almost the full duration of competition law enforcement activity in Mexico and Turkey (Mexico started enforcement activity in 1994, while Turkey started in 1997). The full list of cases that were counted as competition law enforcement activity (Table 4), as well as a short note on the methodology used to select these cases, can be found in the Appendix section at the end of this chapter.

Overview of Enforcement Differences

	MEXICO	**TURKEY**
Total number of cases sanctioned with fees	35	57
Average number of cases sanctioned with fees each year	1.75	2.85
Average amount of fees sanctioned	$10,030,848.70	$26,674,951.69
Percent share in all competition law cases that found infringement	24.5	31

Table 1: The Main metrics on competition law enforcement on monopolies between 1999-2018; sources: Turkish Competition Authority, Mexican Competition Authority, Gündüz 2018.

Table 1 above summarizes the main metrics on competition law enforcement in Turkey and Mexico. I report the total number of cases in this 20-years period, the average number of cases per year, the average fees for each case, and the share of these cases as a percentage of all enforcement actions that found some infringements to competition laws.

In Mexico, the MCA found defendants guilty and sanctioned them with some administrative fees in 35 cases, corresponding to 1.75 cases per year on average. The average size of the administrative fines issued by the MCA was little over 10 million USD per case.[112] This enforcement activity was 24.5% of all enforcement decisions of MCA, including the illegal cartelistic agreements between competitors, unreported mergers, and other restrictions over competition that the authority sanctioned in the same period.

In Turkey, the TCA found a greater number of cases in violation of competition laws: in total 57 cases, 2.85 cases on average per year. The average amount of fees issued per case was also significantly higher and more than double the amount of fees issued by the MCA (almost 27 million USD). Lastly, this enforcement activity corresponded to a higher share of the TCA's overall enforcement activity by 31%. This suggests that the TCA allocated more of its resources to this kind of competition law enforcement activity than the MCA.

There is also a temporal dimension to these differences in Turkey and Mexico's enforcement activity, as they increased and solidified over time. Figure 1 below shows the distribution of competition law enforcement activity on monopolistic companies over time in both jurisdictions, with polynomial trendlines signifying the overall trends. Table 2 complements

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[112] This does not necessarily correspond to the average fines per company, because there were sometimes multiple companies sanctioned per case.

this figure by separating the 20-year period into four quarters (5-years periods) and comparing them with the main metrics used in Table 1.

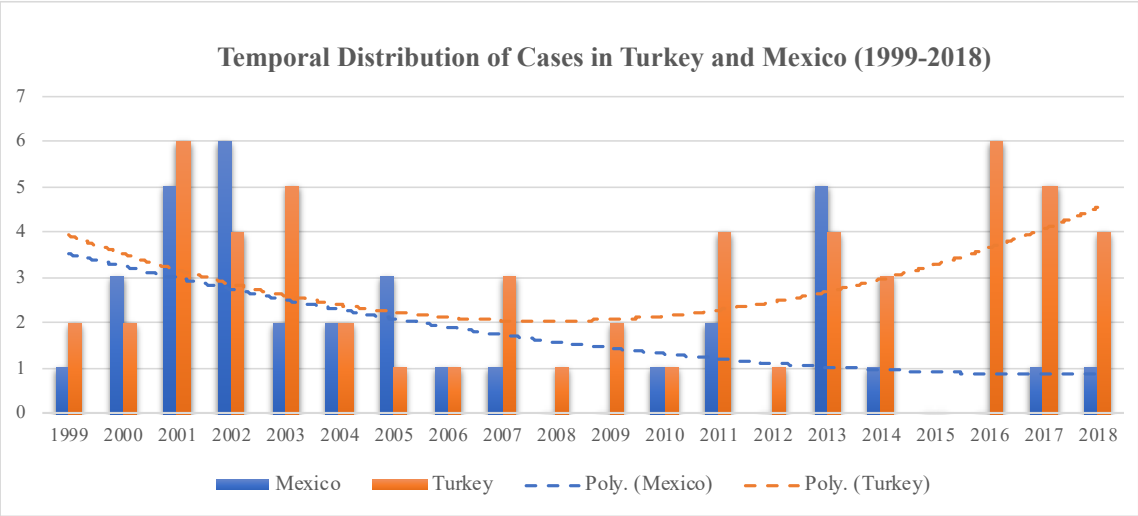

Figure 1: Temporal distribution of competition law enforcement on monopolistic companies in the period under analysis (1999-2018), sources: Turkish Competition Authority, Mexican Competition Authority, Gündüz 2018 (Polynomial trendlines have an order of 2).

	1st Quarter 1999-2003	**2nd Quarter 2004-2008**	**3rd Quarter 2009-2013**	**4th Quarter 2014-2018**
MEXICO				
Number of Cases	17	7	8	3
Average per year	3.4	1.4	1.6	0.6
Average fees	$3,154,651	$3,559,463	$21,821,042	$11,588,237
Percent proportion	27.4	26.9	22.9	15
TURKEY				
Number of Cases	19	8	12	18
Average per year	3.8	1.6	2.4	3.6
Average fees	$8,676,892	$3,511,049	$24,452,019	$70,059,846
Percent proportion	41.3	13.3	26.1	56.2

Table 2: The comparison of competition law enforcement activity in into four 5-year periods (quarters); sources: Turkish Competition Authority, Mexican Competition Authority, Gündüz 2018.

In Mexico the enforcement of cases on dominant companies is largely concentrated in the first quarter of the period under investigation- almost half of all cases recorded in Mexico in these 20 years. The cases reduced in the second quarter. This high-to-low pattern remarkably similar to Turkey's enforcement activity in these first two quarters. However, while the Mexican enforcement activity decreases over time, the Turkish enforcement activity recuperated and increased to higher levels in the last two quarters. In addition, although Mexico's average fines increased over time, this increase still fell behind the improvements in the Turkish fees over the same period. Turkey in fact recorded its highest average fines for monopolistic companies in its last quarter of implementation. Lastly, the percent share of these enforcement decisions on monopolies inside all the competition law decisions gradually decreased in Mexico, suggesting a decline in the focus of the MCA on monopolization strategies, while the TCA's focus on these infringements increased even further in the last 5 years.

Finally, to give a sense of the scope and economic reach of these enforcement activities, Figure 2 below reports the distribution of enforcement activity into different sectors of the Turkish and Mexican economies. This sectoral categorization is loosely based on the classification used by the European Community (commonly known as "NACE").

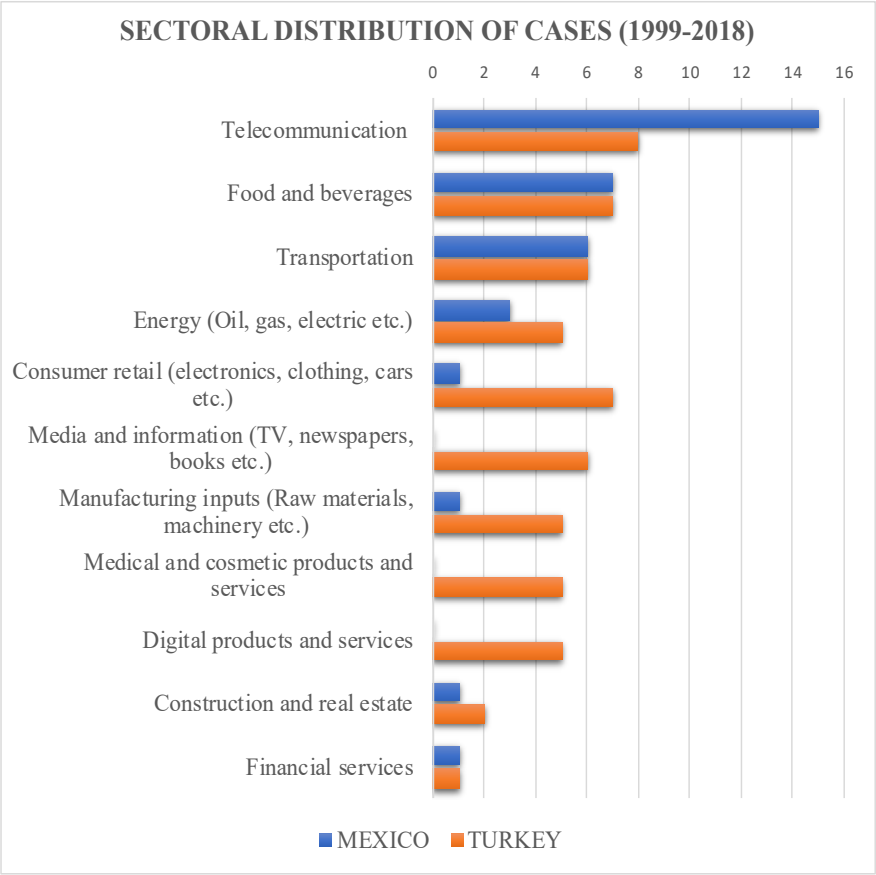

Figure 2: The sectoral distribution of enforcement activity on monopolistic companies (1999-2018); sources: Turkish Competition Authority, Mexican Competition Authority, Gündüz 2018.

In Mexico, many of the sanctioned dominant companies were operating in the telecommunications sector of the economy (in 15 out of 35 cases). Although Turkey also sanctioned many dominant companies in this sector as well, its enforcement activity was overall more evenly distributed across different sectors of the economy. The TCA found illegal monopolization in some sectors of the economy in Turkey that the MCA found no

monopolization in Mexico, mainly the media and information, medical and cosmetic products and services and digital products and services sectors.

3. Explaining Competition Law Enforcement Differences

What explains these significant differences between Turkey and Mexico's enforcement of competition laws over the monopolistic strategies of dominant companies? Before developing my own theory, I will discuss and dispute four common explanations for competition law enforcement variations: the statutory differences in competition laws, the underlying differences in the economy in market concentration and monopolization, the enforcement resources of the antitrust agencies, and lastly, the institutional autonomy of the antitrust agencies.

Statutes

First of all, since my analysis in the previous chapter of this dissertation (Chapter 5) has established that Mexico originally legislated weaker competition laws in terms of restrictions over monopolistic corporations than Turkey, it is reasonable to suggest that the enforcement differences we observe are due to the differences in the legal statutes. However, there are two main reasons to suspect the absence of a direct relationship between law in the books and law in practice in the Turkish and Mexican competition laws. First, despite the statutory differences, in the first 5 years of enforcement between 1999 and 2003, the enforcement activities in Turkey and Mexico were remarkably similar; therefore, these differences did not translate into enforcement

differences. Secondly, the Mexican competition laws went through a number of statutory reforms, most importantly in 2006 and 2011. Each of these amendments increased the formal sanctions and restrictions on monopolistic practices and made the law's prohibitions more explicit (see the Table 5 in the Appendix for the timeline of competition law amendments in Turkey and Mexico). However, despite these substantial improvements to the statutes, the enforcement activity in Mexico continued to decline after each amendment. These two pieces of anecdotal evidence suggests that statutory strength or weaknesses were not the main drivers of the overall differences in enforcement activity.

Economy

The second potential explanation for Turkey and Mexico's competition law enforcement differences is the differences in their economy. It can be argued that the Turkish and Mexican competition authorities enforce competition laws on monopolistic companies differently, because they face different economies with divergent pervasiveness of monopolistic structures and behaviors. Although market concentration levels do not by themselves justify antitrust activity, nevertheless, everything else being equal, firms in concentrated markets can exert more market power and resort to anticompetitive practices than the firms in less concentrated markets. In other words, this argument would hypothesize that the enforcement activity in Turkey is higher because there are more monopolies in the Turkish economy, while the enforcement activity is lower in Mexico because there are fewer monopolies in the Mexican economy.

However, there is substantial economic evidence that suggests the Mexican economy is overall more concentrated and monopolistic than the Turkish economy, and this disparity is not disappearing. This was demonstrated by the landmark study of De Loecker and Eeckhout (2018), which used estimations on corporate markups, i.e., the ratio of the price to the marginal cost of production, to estimate the nationwide presence of companies with substantial market power (p.2). Figure 3 drawn from the data of this study shows the average markups in Turkey, Mexico and the World in the period between 1980 and 2016. While the markups in Turkey mostly stayed below the World average in this period, Mexico's markups were consistently higher than the World average. In addition, the markups increased in Mexico by 0.17 markup points, while they have decreased in Turkey 0.32 over this period.

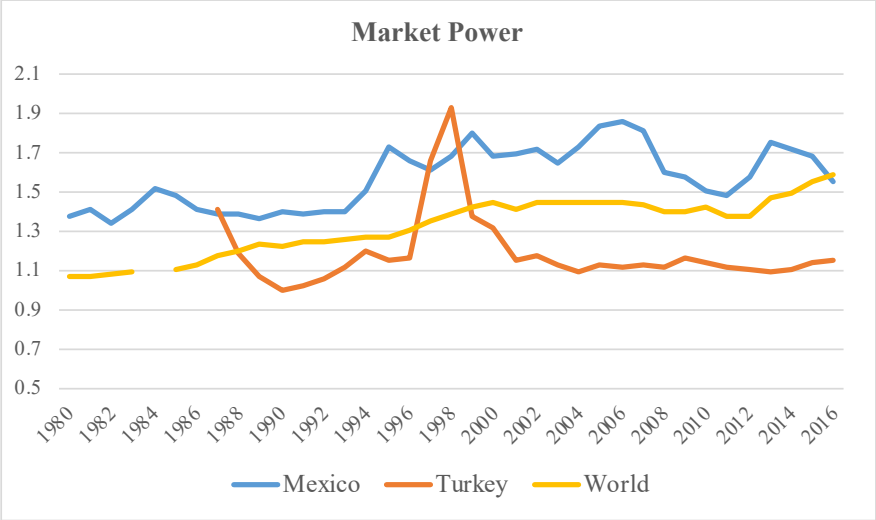

Figure 3: Market power estimated by average economy-wide markups (Turkey, Mexico and the World); source: Loecker and Eeckhout 2018

Various national studies on market concentration in Turkey and Mexico support the findings of the Loecker and Eeckhout study. A recent WB report on Turkey (World Bank 2019) suggests "While the concerns in the US market are that markets are increasingly concentrating, in Turkey an opposite trend is emerging in the concentration in manufacturing and in construction… Both manufacturing and services show notable declines in concentration between 2006 and 2016" (p.118).[113] Özhan (2015) similarly estimates "a falling tendency in the dominant role of large firms in the Turkish economy" (p.183). While for Mexico, a recent WB research paper detected significant increases in market concentration in 11 of the 20-total manufacturing sectors (Rodríguez-Castelán, López-Calva, and Barriga Cabanillas 2020).

However, I do not suggest only Mexico has a monopolization problem. In fact, there are plenty evidence for high levels of concentration and monopolization in some sectors of the Turkish economy (e.g. see Pehlivanoğlu and Tiftikçigil 2013 for manufacturing inputs; Repková and Stavárek 2014 for banking; Yaşar et al. 2017 for airlines). The problem rather is, while the TCA seems to be addressing these underlying economic problems in multiple sectors of the economy, the MCA seem to be only focused on a few sectors. For example, it is not surprising that both in Turkey and Mexico, the competition law authorities took strong actions against the dominant companies in the telecom sector.[114] The telecommunications sector is highly concentrated in both Turkey and Mexico (Durukan and Hamurcu 2009; Casanueva-Reguart and

[113] In fact, the share of top-20 manufacturing firms declined by 8% between 2006 to 2016 (World Bank 2019, 118).
[114] For example, the Turkish Competition Authority fined Türk Telekom, the dominant company in landlines, $10.2 million USD in 2015. Similarly, the Mexican Competition Authority fined Telmex, a similar monopolistic company in landlines, with $51.6 million dollar USD in 2013.

Cantú-Díaz de León 2016) and these countries have some of the highest telecommunication prices in the world (OECD 2012; Atiyas, Izak, Levy, Brian D., and Walton, Michael 2017).

However, it should come as a surprise that the MCA seems to be largely inactive in enforcing the laws on the media and information sector (newspapers, tv, books, advertising etc.). This sector is highly concentrated both in Turkey and Mexico. In 2013, Turkey and Mexico were in the top-5 countries with highest level of media industry concentration (Noam 2014). 4 big media companies control the 70% of the media content in Turkey (Kalça and Arı 2013, 890), while they control the 86% of the media content in Mexico (Noam 2014, 9). Yet my data shows that there were no competition law enforcement actions on the dominant media companies in Mexico, while there were some actions in Turkey. Similar disparities exist in consumer retail and digital products as well. Such variation in the sectoral enforcement of competition laws strongly undermines the argument that the economic differences are the driving force for the competition law enforcement differences in these two countries.

Enforcement Resources

Third, numerous reports by international organizations on antitrust law enforcement in developing economies suggest that the differences in competition authorities' resources and human and financial capital are a primary concern for enforcement activity. Based on this argument, it is still possible to hypothesize that Mexico might have lower levels of enforcement resources than in Turkey, creating the enforcement activity differences we have observed. However, as Figure 4 below shows, the number of staff members the TCA and MCA employed

in competition law enforcement were quite similar, especially from 2000 to 2014.[115] Furthermore, after 2014, the growth in the staff members of the MCA outpaces the numbers of the TCA, although the enforcement activity in Mexico continued to decline after 2014. These two pieces of evidence dispute the hypothesis that institutions resources, defined in a simple way, can explain the competition law enforcement differences in these countries.

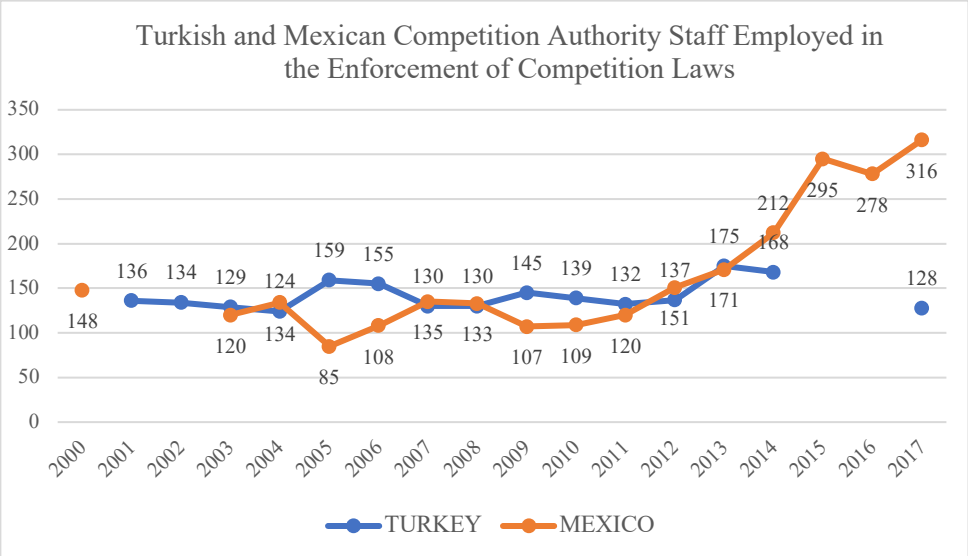

Figure 4: Turkish and Mexican Competition Authority staff employed in the enforcement of Competition Laws (2000-2017); source: annual reports of the Turkish and Mexican competition authorities.

[115] Here, I measure enforcement resources by looking at the number of competition authority staff dedicated to competition law enforcement. Later in this chapter I will give more detailed information on the education and professional background information on these employees. While I also have data on the financial resources, budget and spending of Turkish and Mexican authorities, I have come to realize that this data is not necessarily directly relevant to the questions on enforcement, since the way these authorities spend and manage their money differed widely by their institutional set up- for example, the Turkish authority pays a large sum to capital investments from its budget every year, which does not have any direct or immediate expected effects on enforcement activity.

Autonomy

Lastly, perhaps it is not the differences in the resources of the Turkish and Mexican Authorities that impact their enforcement activity, but rather the autonomy they have while using these resources. The enforcement of competition laws over monopolies requires substantial degree of institutional autonomy from economic and political interest groups that may try to prevent them (see the main argument in Philippon 2019). Therefore, it is possible to hypothesize that while the MCA had more limited institutional autonomy, the TCA had more expansive autonomy to use their resources to sanction monopolization. I suggest that while this was true at the beginning, these authorities' degree of institutional autonomy was reversed over time, which is contrary to the enforcement change trends we observe in these countries.

In both Turkey and Mexico, the local legal traditions did not permit full autonomy for the competition authorities, therefore, the drafters of the competition laws had to come up with some new definitions of administrative organization to situate them *vis a vis* the central government. Under the Turkish Constitution of 1981, any bureaucratic organ of the state should be connected to the central government, typically through a ministry. Therefore, the Turkish Competition Law decreed that the new TCA was "related" to the Ministry of Customs and Trade ("*Gümrük ve Ticaret Bakanlığı"*), but would have substantial decision-making autonomy.[116] Similarly, the

[116] The TCA was one of the earliest economic and regulatory authorities that gained political independence from the central government- it was only the second after the Capital Markets Board created in 1982, and came before the autonomous authorities that were created under the guidance of the IMF and the WB later, such as the Banking Regulation and Inspection Agency (1999), and the Telecommunications Board (2001), Energy Market Regulatory Authority (2001) (Türem 2010). The Turkish Competition Law decreed that the new competition authority has "administrative and financial autonomy" and "independent while performing its duty". It says, "No organ, authority, institution or person can give orders or instructions to influence the final decision of the Authority." (Article 20).

MCA was created as a "deconcentrated" agency connected to, but partially separated from the Ministry of Commerce and Industrial Development ("*Secretario de Comercio y Fomento Industrial"* (SECOFI)).[117]

The TCA and MCA were set-up with different degrees of fiscal and administrative autonomy. The TCA had substantial fiscal autonomy from the ministry it was connected to, since a certain percentage of the administrative fees it collected for processing competition law cases was directed into its own operational budget. The legal amendment in 2004 eliminated this autonomous source of income but replaced it with another source from the incorporation fees collected from companies. In addition, the TCA also had autonomy in its hiring decisions.[118] Conversely, the MCA did not have any autonomous source of income and the fines it collected were transferred to the Treasury. The MCA had to negotiate its budget yearly with the Ministry of Economy, which then requested it from the Congress (J. C. Shaffer 2004). The Mexican authority's staff hiring decisions were also controlled by the Ministry.

Furthermore, the election rules and procedures for the highest decision-making organ of these antitrust authorities, often called "competition commissions" or "boards", were also substantially different. In the first version of the Turkish competition law, the "Turkish Competition Commission" ("*Rekabet Kurulu"*) was composed of 11 members and each member was selected by a different public and private stakeholder in competition law enforcement. 4 members were selected by the TCA itself, 2 members by the Ministry of Industry and Trade, and

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[117] The Mexican Competition Law decreed that the MCA "will have technical and operational autonomy" and "will enjoy autonomy to dictate its resolutions in relation to this law" (Article 23).
[118] This provision of the law stated "The Board is free to regulate the appropriate institutional and staff statuses. Cancellation and creation of cadres is made by the Board" (Article 34).

1 member each by the State Planning Institute, the Court of Cassation, the Council of State, the Higher Education Board and the Chambers of Commerce. This system limited the representation of the political authority by allowing the central government to appoint only 3 out of 11 commissioners. By contrast in Mexico, to "Mexican Competition Board" ("*Plenum"*) had in total 5 members and ever member was appointed directly by the President of Mexico without any overview from other branches of government.

However, the political changes in Turkey and Mexico after the legislation of the competition laws have reversed these differences in the autonomy of their competition authorities. In Turkey, the Justice and Development Party ("*Adalet ve Kalkınma Partisi"* (AKP)), which came to dominate the Turkish political scene after its victory in the 2002 parliamentarian elections, increasingly became authoritarian after the financial crisis of 2009. An amendment to the Turkish competition law in 2005 reduced the number of commissioners from 11 to 7, but did not increase the representation of the government appointees.[119] However later, an executive decree in 2011 substantially increased the government's representation to 4 commissioners out of the 7.[120] The same year, another executive decree brought all independent administrative authorities, including the TCA, under the financial and administrative supervision of their related ministers (Aydin 2012). A year later in 2012, another decree "leveled" the salaries of public servants, eliminating the TCA's autonomy in setting its own employees'

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[119] With the amendment in 2005, 2 commissioners were appointed by the TCA and 1 commissioner each by the Ministry of Industry and Trade, the State Planning Institute, the Chambers of Commerce, the Court of Cassation and the Council of State.

[120] With this amendment in 2011, 3 commissioners were appointed by the Ministry of Customs and Trade and 1 commissioner by the Ministry of Development. The rest were appointed by the Chambers of Commerce, the Court of Cassation, the Council of State.

salaries. In 2013, the Turkish Supreme Court, nearly 20 years after the competition law was legislated, declared that the article of the law that gave the TCA autonomy in its hiring decisions was unconstitutional. Finally, after the elimination of the parliamentary democracy, the President of Turkey assumed the power to appoint all 7 commissioners of the TCA with another executive decree in 2018.

Conversely in Mexico, the Institutional Revolutionary Party ("*Partido Revolucionario Institucional"* (PRI)) controlling the Mexican government since the 1930s for the first time lost the presidential elections in 2000. As the Mexican political scene became more crowded and changes in government became more common, the political desire to increase the autonomy of administrative authorities from the central government also increased. An amendment to the competition law in 2006 allowed the Senate to challenge the appointees of the President to the commission of the MCA. However, the Mexican Supreme Court found this amendment unconstitutional (Mena Labarthe 2017). In response, a political coalition between all major parties amended the Mexican Constitution in 2013 to create a new, fully autonomous MCA. This authority assumed the status of a "constitutionally autonomous organ" ("*Órgano Constitucional Autónomo"*) of the state, separate from all three branches of government. This amendment also changed the election procedure for the commissioners (board members). The President now has to select the commissioners from a number of applicants who get the highest scores from a written test on competition laws administered by an autonomous scientific commission, and the Senate has to approve the President's appointments.

While these institutional changes are significant in themselves, they cannot by themselves explain the law enforcement differences we observe. The MCA had the highest number of cases

during the period when it was the least autonomous from the central government and had the lowest number of cases during the period when it had the most formal autonomy, which contradicts the hypothesis that the increase in autonomy increased the enforcement activity. The TCA's continuously declining autonomy in this period also does not fit neatly into its V shaped law enforcement activity.

Organizational Matching and Mismatching in Enforcement

I suggest a different explanation for competition law enforcement differences in Turkey and Mexico that emphasizes the complementary role between competition authorities and the courts in setting up the law enforcement characteristics of a country. Once competition laws are written and legislated, the designers of the law must also choose how to organize their enforcement. There are two main internationally accepted and diffused models for the organization of competition law enforcement: the "adversarial prosecution model" used in the US antitrust system, and the "administrative enforcement model" used in the EU competition law system (Kovacic 2008). Due to the compatibility between the EU administrative model and the civil law legal systems, most developing countries with civil law tradition, including Turkey and Mexico, have chosen the administrative enforcement model (Bradford et al. 2019). In this model, competition authorities (also called "agencies") have expansive powers; they receive complaints, collect information, build investigations and resolve cases inside a single organization. While the courts only review the decisions of competition authorities if they are appealed and cannot

evaluate complaints and decide cases independently and directly, they still play some important roles in checking the legality of the competition authorities' decisions.

The court review process is an essential component of the long-term competition law enforcement patterns in civil law countries. Figure 5 below shows a simplified model of case-law development in these systems through the interactions between a competition authority and the courts. After the competition authority finalizes a decision vindicating or sanctioning an economic agent for some anticompetitive practices, this decision is sometimes appealed at the courts. The courts (sometimes multiple courts are involved) review the evidence, procedures and reasoning used in the authority's decision and decide to uphold (accept) or repeal (reject) it. When a decision is accepted, it sends a positive feedback to the competition authority about the legal validity of the procedures and interpretations it used in this case. Over time, the authority responds to this positive feedback by producing similar kinds of decisions. When a decision is instead rejected by the courts, it sends a negative feedback, suggesting which procedures or interpretations the competition authority should avoid. The cost of resources allocated to these decisions and the reputation costs of losing cases in court deter competition authority from issuing similar decisions that could be rejected by the courts again and again in the future. If this trial-and-error case-law making method is successful, the competition authority will create a stable system of law enforcement activity by aligning its decisions with the expectations of the courts. However, if all or almost all decisions of the competition authority are persistently overturned by the courts, the enforcement activity will continue to decline and remain at very low levels.

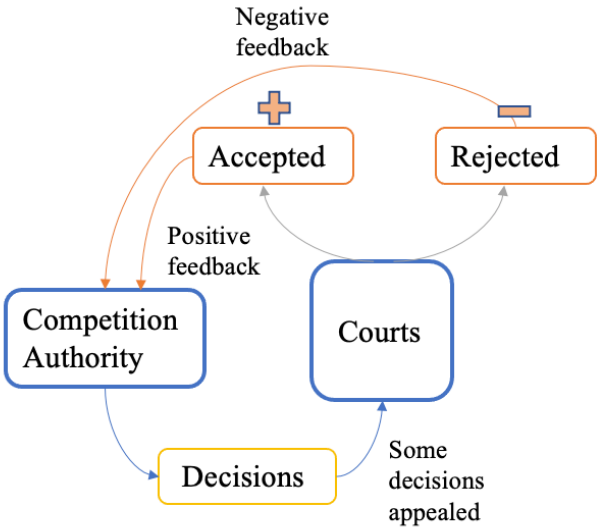

Figure 5: A simple model of competition law case-law development through interactions between an administrative competition authority and the courts

This situation can arise when competition authorities and courts disagree on the standards for competition law enforcement, i.e., the standards for the collection and processing of information, the legal and analytical justification of decisions, or the formal requirements of sentencing etc. The division of enforcement authority between courts and competition authorities already provides the suitable conditions for such disagreements: Although competition laws give the courts the last say in determining the interpretation of competition laws and how they are enforced, they also give the specialized competition authorities the technical capacity and policy-making discretion to find these interpretations and methods of enforcement by incorporating economic analyses. While they lack in expertise and specialization, courts also have older and broader jurisdiction, therefore, their law enforcement standards are more durable and resistant to

change. For example, courts employ the same standards for evidentiary information collection in the review of cases on different kinds of economic laws, which they would also expect competition authorities to conform to. In other words, it is largely up to the competition authorities to find an agreement with the courts on competition law enforcement standards to create at least some level of enforcement activity.

I argue that the organizational design characteristics of a competition authority constrain or enable competition authorities to find an agreement with the courts to overcome the impediments over competition law enforcement that may come about during the court review process. Legal scholars who have surveyed international examples of competition law enforcement suggest that there are a myriad of different ways that administrative antitrust authorities can be internally constructed (Kovacic and Hyman 2012; Trebilcock and Iacobucci 2009; Sokol 2009). In my analysis, I specifically focus on three organizational characteristics: how the competition authorities organize their internal decision-making processes, how they recruit and accumulate expertise, and whether or not they institutionalize economists and economic knowledge.

First, the decision-making process inside competition authorities can be organized in a "bottom-up" or "top-down" fashion. In some authorities, the decision-making order follows a bottom-up direction, when the prosecutorial and adjudicative functions of the authority are separated through some organizational firewalls, and "case-handlers", who collect information and build the prosecutorial argument of cases, have strong influence over the final sanctioning decisions. Conversely, in some other authorities, the decision-making process follows a top-down direction, when the prosecutorial and adjudicative functions of the authority are collapsed,

and the commissioners and administrators, who make the final sanctioning decisions of the authority, can also give orders to case-handlers and get involved in the building of cases from earlier on.

Second, how competition authorities create and accumulate specialized expertise in competition laws depends on which recruitment and training strategies they employ. Recruitments can be made through open, transparent applications and on a meritocratic basis, or through closed, non-transparent applications and social network connections, which affects who is recruited to the authorities. Training can be provided by local universities through certificate and post-graduate programs, the specialized programs organized inside the competition authorities or scholarships for post-graduate degrees and training in foreign universities. These recruitment and training strategies also differ for the different cadres of the authority, i.e., case-handlers or commissioners, depending on the bottom-up or top-down organization of decisions.

Third and lastly, some competition authorities rely more on economists and economics knowledge. Economists have always been an important professional group inside competition law enforcement, but they have become especially important under the influence of the Chicago School of Law and Economics (Eisner 1991; Davies 2010). Some competition authorities employ more economists, place them at higher and more senior positions, and give them more roles in the processing of cases than other authorities (Eisner 1991). Specifically, the creation of separate organizational units for economists (or "economist bureaus") give them more voice and more direct influence than simply playing a supportive role to the legal arguments of lawyers (Kovacic and Hyman 2012).

In the following sections of this chapter, I will show that the local law and jurisprudence traditions in Turkey were well matched by the organizational design of the TCA, while in Mexico, these traditions came into a clash with the organizational design features of the MCA. In Turkey, the administrative court system expected the TCA to adhere to its formalistic law enforcement standards, with clear rules for the collection, processing and sentencing of cases. At first, the TCA had difficulty following these expectations, which led the authority's decisions being challenged and overturned in courts, and the decline in enforcement activity in the second quarter. However, by the third quarter of implementation, the TCA's enforcement activity recuperated, thanks to new formalistic bylaws and guidelines prepared by its case-handlers, and their ability to present cases with high level of technical capacity. These case-handlers were given substantial power to shape the enforcement decisions of the TCA, because of its bottom-up processing of cases, and the meritocratic selection and foreign training of case-handlers. In this period, the failure of the economists to gain influence inside the TCA was a blessing in disguise preventing a potential rift with the courts. By the last quarter of implementation, the alignment between the competition authority and the courts had reached its pinnacle; the Turkish courts became willing participants of high levels of competition enforcement activity, even pushing the TCA to sanction more cases than its willing.

Conversely, in Mexico, there was a substantial organizational mismatch between the courts and MCA. In Mexico, the federal constitutional courts, which are in charge of reviewing the decisions of the MCA, have a broad authority to protect constitutional rights of individuals against administrative authorities and require an even higher degree of legal formality and certainty from the competition authority than in Turkey. The MCA failed to ground its decisions

in established legal reasoning and due process standards earlier on, and the enforcement activity dropped while the MCA was losing most of its cases in court and unable to collect any of the sanctioned fines. Unlike in Turkey, in the third quarter, the MCA could not fix its strained relationship with the courts and adopt their formalistic standards, due to the continuing top-down influence of the commissioners and the chairmen over the investigation of cases and the lack of expertise and technical capacity at the level of case-handlers. The strong influence of the economists in MCA also constituted to the persistence in MCA's use of undetermined and abstract economic analyses and concept, which did not fit the expectations of the courts. By the last quarter of implementation (and the end of my research period in Mexico), an agreement between the courts and the MCA was still not reached.

There are some similarities between my argument and some of the explanations developed by the "law and development" scholarship on law enforcement deficits in developing countries (see Messick 1999; Garth 2002; Krever 2011). The scholars in this literature suggested that developing countries with new economic laws should train their judges in in "law and economics" methods and create specialized courts that employ only knowledgeable judges in order to create sufficient enforcement activity. However, I do not suggest that the conflicts between competition authorities and the judiciary arise from the courts' lack of knowledge or specialization. As my analysis will show, the judiciary lacked knowledge and specialization both in Turkey and Mexico, but only in Mexico the disagreements between the competition authority and courts were perpetuated, even though Mexico invested more resources and passed more legal reforms than Turkey to increase the training and specialization of its courts.

4. The Organizational Design of Turkish and Mexican Competition Authorities

Organizational Design Characteristics	**TURKEY**	**MEXICO**
Decision-Making Order	Bottom-up direction	Top-down direction
Recruitment and Accumulation of Expertise	Meritocratic recruitment and foreign training for lower-level bureaucrats	Network-based recruitment and foreign training for higher-level bureaucrats
Influence of Economists	Weak economist influence	Strong economist influence

Table 3: Main organizational features of TCA and MCA

Annual Reports and Interview Data

To understand the organizational features of the TCA and MCA and their role in the enforcement of competition laws in Turkey and Mexico, I conducted document analysis on the annual activity reports published by the TCA and MCA, and 95 semi-structured interviews with the key competition law expert groups in both Turkey and Mexico. Both the TCA and MCA publish detailed yearly activity reports on their websites[121] in their native languages (Turkish and Spanish) complying with the international standards of transparency. These reports typically give some statistical overview of the enforcement actions taken each year and describe briefly some

[121] https://www.rekabet.gov.tr/en/Sayfa/About-us/turkish-competition-authority and https://www.cofece.mx/?lang=en.

of the most significant decisions made by the authorities. They also give some important insights into their internal organization, by indicating their staff numbers and budget, the organization of departments, the appointments to top positions, training and educational events for the staff, and the international participation and connections of the authorities.

The interviews in Turkey and Mexico were conducted over the course of a year and a half between 2018 and 2019, mostly in-person, during my fieldwork in these countries. The semi-structured interviews, which lasted a minimum of 40 minutes and a maximum of 3 hours, focused on the participants' experiences with competition law enforcement in their county, for example, which cases or which institutional reforms they have participated in. They were also asked to share their views on which decisions of the competition authorities they find most important, how the competition law enforcement has evolved and improved in their jurisdictions, and what remains to be improved in the future.

The interviews were conducted with the employees of the competition authorities at different levels and positions (i.e., the Chairmen, commissioners, administrators, case-handlers, chief-economists etc.), the previous employees of the competition authorities now working in private practice or in other regulatory authorities, some academics with knowledge into the local competition laws, and the leading lawyers and economic consultants focusing on representing clients in competition law cases. The administrators at the TCA and MCA gave permissions to the interviews at these locations. I have used the international rankings of the Global

Competition Review 100[122], Who's Who Legal[123] and Legal 500[124] for competition lawyers to identify and try to recruit the leading lawyers and economic consultants in each jurisdiction. In addition, I have used snowball sampling method and asked each interviewee to use their professional networks to put me in touch with other important lawyers and consultants.

The Table 6 in the Appendix lists all the interviews conducted for this research, their dates and locations. Table 7 in the Appendix also summarizes the distribution of current occupation and past work experiences of the participants. As this table suggests, the representation of perspectives from inside or outside the competition authorities was fairly balanced and similar across Turkey and Mexico.

Decision-Making Order

The formal and informal organizational characteristics of the Mexican and Turkish competition authorities suggest that they organize their decision making over competition law enforcement very differently. The TCA has a clear prosecutorial duty and has a better organizational separation between its prosecuting and adjudicating functions, which gives case-handlers an influence over decisions in a "bottom-up" way. Whereas the MCA has a less clear prosecutorial role and a weaker organizational separation between its prosecuting and adjudicating functions, which allows its commissioners to affect cases in a "top-down" fashion.

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[122] Specifically, this issue: https://globalcompetitionreview.com/survey/gcr-100/19th-edition.
[123] https://whoswholegal.com.
[124] https://www.legal500.com

The strong prosecutorial responsibility of the TCA stems from the articles of the Turkish Competition Law that compel the authority to initiate a "pre-investigation" ("*ön araştırma*") upon receiving a complaint.[125] This first stage of an investigation is controlled almost fully by case-handlers. The complaints are first distributed to the main investigative divisions of the Authority.[126] Three case-handlers (called "*meslek personeli*"- literally means "professional staff") are appointed to them by the directors of these divisions based on their knowledge and experience in similar cases.[127] They collect information and check the substance of the complaints. At this stage they can even perform "dawn-raids", i.e., sudden, unannounced visits to the headquarters of defendants to collect documentary evidence. It is only when case-handlers finish their report at the end of the 58-days statutory period that commissioner can make a decision over whether a lengthier investigation on the allegations ("*soruşturma*") (typically between 6 to 24 months) is needed. If there is a lengthier investigation, the same case-handlers continue collecting more information and prepare a more detailed and full investigation report

In addition, the established informal norms (i.e., established practices) of the TCA also give substantial decision-making autonomy to case-handlers from the commissioners and their administrative chiefs. When the TCA was created in 1997, about 15 administrators were sent from the Ministry of Customs and Trade to oversee the setting up of the new authority.[128] In the

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[125] In the early days of the TCA, the authority had a non-transparent, first-level evaluation process to reject complaints that it deemed without any substance, called "initial investigation", before starting the "pre-investigation" (Gündüz 2018). However, the Turkish administrative courts in 2007 required the authority to eliminate this informal process that was not defined by the Turkish competition law and initiate a "pre-investigation" directly (Decision: E.2006/2052, K.2007/7582 (20.11.2007))

[126] For example, the 4th investigative division handles cases related to banking, insurance, finance, tourism, education and health service industries. This sectoral organization of investigative divisions mimics the German anticartel authority Bundeskartellamt (Interview 7)

[127] Interview 9, 17 and 19.

[128] Interviews 7, 17 and 18.

first 10-15 years of the TCA, these administrators took roles as directors and vice-presidents, but, because they lacked specialized expertise, they did not get involved in the investigation of cases. Instead, they nurtured a norm of giving substantial autonomy to case-handlers.

> "First of all, there is a principle called the "independence of the professional staff" [case-handlers]. That independence is meaningful. Meaning, the competition experts looking at the file are independent, the heads of departments do not influence them, the most they do is express their opinion. Of course, they want to direct them, but at the end of the day, if that [case-handler] team is convinced of something, they give their opinion according to their own convictions. That report reaches the Commission, and if the heads of the departments have any dissenting opinions, they can write it to the annex of the report. The Commission evaluates them all […] So there is a free environment in this sense. It is kept in principle." (a previous case-handler of the TCA)[129]

> "I have always been in the inspection, administrative side of the authority. I am able to speak to how comfortable this position is. There are other bureaucracies where they [case-handlers] are told "write it this way, that way" or called back to the Authority while conducting field inspections. None of these things have happened in this Authority, and they cannot happen! The most important thing that keeps us in this right path is the internal norms." (a current administrator of the TCA)[130]

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[129] Interview 31
[130] Interview 17.

As a result, case-handlers could gain a bottom-up influence over the investigation decisions of the TCA. The commissioners almost always defer to the judgement of the case-handlers when deciding on opening an investigation after the pre-investigation stage.[131] That is, if the pre-investigation report the case-handlers wrote recommends the initiation of an investigation, the Commission opens the investigation, and if the report recommends the termination of the case, the Commission terminates the case. If the commissioners' decision diverges from the recommendations of the case-handlers, the claimants could use this discord and the information already collected in the pre-investigation report to file a court appeal. Furthermore, the Commission even defers to the judgement of case-handlers at the sentencing stage. The Commission's final decisions to sanction or not sanction a defendant matched closely the recommendations of the final report of the case-handlers- by 95.4% to vindicate or by 86% to sanction (Gündüz 2018, 84).

By Mexican laws, the MCA also has to evaluate every complaint it receives, but it has much weaker prosecutorial duties than the TCA. Unlike in the TCA, there is no clear, transparent and formal initial procedure in the MCA.[132] In the absence of this procedure, the MCA cannot collect any extra information on the complaints and has to rely on the information submitted by the complainants.[133] Therefore, the MCA dismisses many cases if the complainants take their claims back ("*desistidas*") or do not provide further information when requested ("*no presentadas*"). Even when substantial information is provided by the complainants, the

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[131] Interview 8, 9 and 37.
[132] The Mexican Competition Law requires that the MCA evaluates the "objective cause" or some reason to believe the complaints before opening a formal investigation, but there is no clear procedure defined.
[133] Interview 74.

Commission can dismiss them without releasing to the public much information or explanation ("*desechada*"). The MCA finds approximately 80% of all the complaints without "the proper elements to initiate an investigation."[134] This reduced prosecutorial responsibility gives the MCA, and within it the top-cadres of the authority, more discretion in which investigations they initiate and does not allow case-handlers' to make an impact on decisions like in the TCA.

Also, unlike the TCA, the MCA has very little separation between its prosecutorial and adjudicative functions. The directors of the investigative divisions and the commissioners are more directly involved in investigation decisions than the case-handlers. For example, the division director makes all the decisions over which information to collect and prosecutorial arguments to make, rather than the case-handlers themselves.[135] In addition, while the companies investigated in Turkey have more direct communication with the case-handlers, in Mexico they get into contact and meet with the directors.[136]

Instead, the established organizational norms in the MCA give the chairmen substantial top-down influence over the investigation decisions. Initially, the MCA's Commission was initially much smaller than in Turkey (5 vs. 11 commissioners); therefore, the chairman of the commission held more influence over decision making.[137] The chairman of the MCA also has control over investigations though its "executive secretary" ("*Secretario Ejecutivo*"), who was

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[134] Interview 51.
[135] Interview 54 and 55.
[136] Interview 83.
[137] The Mexican chairman only needed 2 other commissioners' vote, and in cases on the absence of any commissioner, only 1 other commissioner's vote to pass a resolution confirming his point of view and policy objectives.

both the right hand of the chairman and the main investigator in the authority.[138] It was an intentional organization design to give the chairman this power:

> "It was a way of putting together the cases. […] Once the president of the commission was behind a case, and because the prosecutor [the technical secretary] was his employee, if they have already set their minds in getting that company criminalized or sanctioned, they could do so easily […] That may be good or bad, but if you're thinking about competition policy, and if we're going to go against this particular monopolistic market, it's not that bad that the chief of the agency has some control over the prosecution, so that by the time that the case is called before the board, they are better aligned and better- It is a matter of design. (a senior competition lawyer and previous commissioner at the MCA)[139]

After the constitutional reforms in 2013, there were some important reforms to the organization of the MCA. Responding to corporations' and private attorney's complaints about impartiality[140] in investigation decisions, the reforms reduced the power of the chairman inside the Commission and the MCA. In addition, a separate investigative authority ("*Autoridad Investigadora*") was created inside the MCA to oversee investigation decisions separately from the commission. However, the commission continues to influence the investigative authority by creating a "strategic plan" every four years, which determines which areas of the economy and what kinds of investigations the investigative authority must prioritize.[141] Most of my

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[138] Interview 83.
[139] Interview 79.
[140] Interview 51 and 71.
[141] Interview 51.

interviewees also scrutinized this new internal division inside the MCA, including the previous head of the investigative authority:

> "Interviewee: For me, being in that position was complicated, because you were independent, but they called you and they want to know what you are doing, and they have your money. It's very complicated.
> Interviewer: Is it difficult to maintain your independence from the Commission?
> Interviewee: It's very difficult! Very, very difficult!" (a senior lawyer and the previous head of the investigative authority)[142]

Recruitment and Accumulation of Expertise

The TCA and MCA also acquire and accumulate specialized expertise in competition laws in different ways. These differences have some historical and broader reasons: The Turkish state bureaucracy has a long history of public service since the late-Ottoman period, whereas the public service institutions and culture have never been fully established in the Mexican state bureaucracy. In addition, the Mexican labor market is more flexible than the Turkish labor market, with more common short-term, easy to terminate contracts. Consequently, many university graduates move in and out of public sector jobs regularly in Mexico[143], while the

[142] Interview 68.
[143] Interview 48, 49 and 57.

university graduates in Turkey generally chose and stay on the same employment track, either inside the public or private sector, for most of their lives.[144]

The TCA is required by administrative laws to publicize its open positions, announce hiring criteria and require the applicants to pass through a series of centralized written and oral exams. The first written exam is nationally administered, which gives every potential applicant a national score and ranking. The TCA requires applicants to have high scores, in addition to a certain level of proficiency in the English language part of this exam.[145] After passing this first evaluation, the applicants are then required to take an internal exam organized by the TCA, which measures their general competence on topics related to competition laws, such as market demand and supply, different business models and administrative law.[146] The applicants are lastly asked to take an oral exam at the TCA.[147] This three-level recruitment process provides high degree of transparency and favors meritocratic appointments and the selection of the graduates from top public and private universities in Turkey.

The high salaries and other employment benefits provided by the TCA made it particularly attractive for the graduates of top universities especially in the earlier years.[148] The Figure 7 in the Appendix shows the distribution of the TCA's case-handlers' university education in years 2007 and 2017. In its first decade, the TCA was able to recruit 49% of its case

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[144] Interview 42.
[145] Interview 22 and 23.
[146] Interview 22 and 23.
[147] Interview 18.
[148] In 2002, the salaries in the Turkish competition authority ranged between 4.503.640.000 TL. and 852.370.000 TL, which were higher than the salaries in Capital Markets Board of Turkey (Sermaye Piyasası Kurulu (SPK)) (ranging between 3.410.000.000 TL. and 280.000.000 TL), Banking Regulation and Supervision Agency (BDDK)) (ranging between 2.891.330.000 TL. and 552.380.000 TL) (Haber Vitrini 2002) (Also discussed in interview 36 and 18).

handlers from top-tier and another 48% from middle-tier national universities, which is a remarkable achievement considering the authority was new and not well-known by the public. While the share of the top-tier graduates dropped to 38% by 2017, the sum of top and middle-tier graduates still remained at 87% percent.

By contrast, the MCA does not have a fixed, transparent or centralized recruitment method. Rather, the employment information and opportunities are available to those who have personal connections with the existing employees of the MCA, particularly the chairman and the directors.[149] Almost all my interviewees at the MCA told me that they were hired through a direct offer from a chairman, commissioner or the executive secretary of the MCA.[150] Rather than an examination, the employment decisions are made based on the assessment of the reputation and previous work experiences of the candidates.[151] This method of hiring favors applicants who are in their mid-careers, rather than new graduates of universities, and does not provide enough transparency and equal opportunity for potential applicants. Most of my interviewees were working either in private sector jobs, like in private banks or law firms[152] or at other public authorities, like the energy regulator or the Ministry of Finance[153] before they were employed at the MCA.

The TCA and MCA train new employees differently as well. Since most of its new recruits were new graduates, and most universities in Turkey did not have competition law classes until the late 2000s, the TCA created an internal training system for its employees. When

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[149] Interview 75, 79 and 57.
[150] Interview 68, 75 and 57.
[151] Interview 75, 69 and 68.
[152] Interview 68, 76 and 77.
[153] Interview 53 and 52.

the new recruits enter the TCA as case-handlers, they take the status of an "assistant expert" for the first three years ("*uzman yardımcısı*"). They are required to complete a 5 or 6 months-long internal training with seminars and classes provided by law professors and economists invited to the authority on competition law topics.[154] In addition, they "learn-by-doing", by participating in the preparation of investigations with more senior case-handlers. At the end of these three years, they have to prepare and defend an academic "thesis of expertise" ("*uzmanlık tezi*").[155] This thesis has to survey and evaluate the competition law enforcement practices in the US and the EU, and demonstrate an ability to research foreign cases law written in English.[156] The case-handlers can advance to the "expert" ("*uzman*") status only when these theses are approved by a committee composed of an academic, an administrator and the chairman (or one of his assistants).[157]

In addition to this internal training, the TCA also provides substantial number of scholarships to its employees to attain post-graduate degrees and training abroad. In the early years when the TCA had more autonomy over its budget, it could provide up to 15 employees each year scholarships for foreign post-graduate decrees (Rekabet Kurumu 2002), which reduced to 5 employees per year in the later years (Rekabet Kurumu 2014). These are substantial numbers in proportion to the small number of total people (around 100) employed in the enforcement of competition laws in the TCA and were sufficient to create a highly trained and

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[154] Interview 20.
[155] There are mainly two kinds of expertise theses that these employees can prepare: those that cover a specific conduct and rule area in competition law, such as resale price-maintenance (RPM), or a specific sector of the economy with special business characteristics, like the energy or automotive sector (interview 9).
[156] Interview 17.
[157] Interview 17, 19 and 20.

specialized human resource in just a few years. Most employees are also sent to short-term internships, trainings and seminars organized by the EU Commission and European national authorities.[158] Importantly, the TCA has also managed to retain a substantial portion of these employees it trained by conditioning its scholarships on continued employment inside the authority.[159]

Whereas in Mexico, the employment of recruits in mid-career seems to have discouraged the MCA from creating a stable and lengthy internal training system. The training provided inside the MCA has been much more limited. For example, the annual reports of the MCA reported that each employee participated an average of 25 and 14 hours of training in years 2002 (Rekabet Kurumu 2003, 31) and 2003 (Rekabet Kurumu 2004), which is measly compared to the months-long training received by the TCA employees each year. By 2007, this was increased to 40 hours using mostly online training programs (Rekabet Kurumu 2008, 32). Only in recent years, the MCA increased its connections to local universities and academics and started organizing more substantial training seminars and workshops for the new recruits.[160] Still, there is no equivalent in the MCA to the "expertise theses" requirement of the TCA.

The MCA also for a long time provided a few opportunities for its employees to receive post-graduate degrees or training abroad. The MCA employees did not receive any financial help to cover tuition and stipend, and the applications to take a leave for training abroad were

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[158] Interview 11, 36, 7, and 19.
[159] In return for scholarships, the employees of the TCA were required to work twice the length of their stay abroad at the TCA before they could be released from their contract. While many indeed left especially after 2012-2013 changes in the administratives autonomy of the TCA to find more lucrative jobs in the private sector, the employee retention rate is still very high compared to the MCA (Interview 20 and 30).
[160] Interview 71.

evaluated on a case-by-case basis.[161] Only since 2017, the MCA has an agreement with the National Council of Science and Technology ("*Consejo Nacional de Ciencia y Tecnología"* (CONACYT)) [162] to provide scholarships to its employees to receive post-graduate education abroad. However, this agreement still does not cover full tuition and the authority can only nominate 3 employees each year.[163]

Furthermore, the MCA has faced a persistent problem of high employee turnover. Most of the educated workforce has left the authority after a few years of employment, especially at the level of case-handlers. The average turnover rate for the MCA's staff was 14.5 per cent for the five years from 1998 to 2002 (J. C. Shaffer 2004, 53). More recently, with the reorganization of the authority in 2013, the Authority lost almost 40% of its previous work force (Aydin 2016, 177). Here is how a high-ranking member of the MCA explained the situation:

> "That's a huge problem! Because I would say only 20% of the people who come here make a commitment to the Authority. The rest are here for a few years, they think they can go to practice another type of law […] What I see here is we have a lot of talent, a lot of committed persons in antitrust issues, but sometimes it's not enough because you sometimes only get new and younger people. These younger people come here, they learn and then they go to the legal firms- for us it's a problem."[164]

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[161] Interview 54.
[162] Mexico's National Science Foundation.
[163] Interview 54.
[164] Interview 51.

These differences in recruitment and employment practices had substantial impact in shaping the human resources in the competition authorities. Most importantly, while in Turkey these practices led to an accumulation of expertise at the bottom of the authority, namely at the level of case-handlers, in Mexico, they led to an accumulation of expertise at the top levels of administrators and commissioners.

Table 8 in the Appendix shows the most common foreign universities the Turkish case-handlers received their post-graduate degrees from. When I was conducting this study in 2019, the TCA had employed a total of 160 people at "expert" case-handler level in its 22 years of existence. Of the 119 that I could find public information on, 94 of them had received some post-graduate degrees at a foreign university, most likely during their employment at the Authority. Most of these degrees were from US and UK universities.[165] By contrast, the ordinary case-handlers in the MCA do not have such education backgrounds.

However, the MCA's *ad hoc* and non-transparent appointment system has important advantages in accumulating high-level expertise at the top cadres of the authority. Many of the commissioners and division heads have been highly trained professionals with post-graduate degrees in foreign universities, who had reputable careers before being employed at the MCA. Table 9 in the Appendix shows basic information on all MCA commissions (24) divided by the constitutional changes in 2013. In the first period when the commissioners were appointed by the President of Mexico, about half of the commissioners had economics PhDs from American

[165] My interviewees explained that this is because the employees' command in English and also the reputation of some of these US and UK universities in training competition law experts from around the world (Interview 19 and 30).

universities, and 4 had post-graduate law degrees from foreign universities. Most commissioners worked at some ministries or at the office of the President before their appointment to the MCA. After the 2013 reforms, which changed the selection criteria for the commissioners, the professional background of the commissioners changed; now the commissioners are mostly selected from high-level administrators within the MCA. However, similar to before, almost all of these commissioners have post-graduate degrees, mostly PhDs in economics, from foreign universities. The Commissioners of the TCA do not have such education backgrounds.

Influence of Economists

As explained in Chapter 5, the Mexican competition law was largely a product of the economist-technocrats employed by the Salinas government, while the Turkish competition law was drafted by a group of law professors, who have always been more central to law-making in Turkey. These differences in the preparation of laws impacted the TCA and MCA's employment of different professional groups. In the MCA, economists took on important, high-level positions for law enforcement and policymaking, and direct roles in the processing of competition law investigations. Whereas in the TCA, economists have never been employed in high numbers, could occupy important positions or have special divisions.

As Table 9 in the Appendix shows, most of the commissioners of the MCA were economists with PhDs from American universities. Also, all of the previous chairmen of the MCA were also economists with PhDs from American universities. Besides the economists' influence over the MCA's commission, they have also been influential through their own

investigation units over the decision-making process. Economic Studies division ("*Director General de Estudios Económicos*") led by a Chief Economist[166] plays significant roles in determining the economic policy priorities and investigation focus of the MCA, by surveying different sectors of the economy for market distortions and barriers over trade in "market studies".[167] It is also responsible with checking and responding to the economic analyses presented by both the case-handlers and defendants.[168] In addition, MCA's investigations over mergers and "unilateral conduct" (i.e., monopolistic practices) are also dominated by economists and strongly rely on economic analyses.[169]

Conversely, there is very little economist influence over the TCA. Out of the 39 commissioners in TCA's history, only four of them had PhDs in economics, and among these only one had a degree from a foreign university. The largest represented professional group among commissioners has been instead lawyers (by 19 out of 39), followed by business administrators (by 8 out of 39). The TCA never had an economist as the chairman. As explained in the previous section, the TCA made more investments in increasing its expertise at the lower levels among the case-handlers. However, economists were few and far between among the case-handlers as well. Of the 94 case-handlers that have received post-graduate foreign degrees in total, only 19 had received them in economics. The limited presence of economist in TCA

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[166] The Chief Economist is typically someone who has a PhD from an American university. For example, the Director General of Economic Studies from 2006-2012 (Ernesto Estrada González) had a PhD in economics from University of Chicago.
[167] "A fundamental aspect to promote competition is to analyze the conditions in which markets operate, in order to identify opportunities for improvement in competition policy. In this sense, the evidence provided by studies and research regarding the distortions generated by public policies and the regulatory framework allows the criteria that guide the work of the CFC related to competition advocacy to be nurtured." (CFC 2013, 86)
[168] Interview 76 and 51.
[169] Interview 62 and 61.

suggests a much more limited role of economics and economic perspectives inside the Turkish competition law enforcement.

Furthermore, economists did not have separate investigative units inside the TCA either. Although the TCA formally has an "Economic Studies Department" ("*İktisadi Araştırmalar Müdürlüğü*"), this department has mostly been non-functional and employs only a few people. When I was conducting this research, there were only 5 people employed in this department and none of them had a PhD in economics. I was also told that until mid-2000s, there was no investigative activity in this division.[170] The absence of any formal and clearly defined roles assigned to this division contributes to its idleness. The internal organization of the TCA makes considers it optional for the main case-handlers of investigations and the commissioners to ask for the participation of the economic studies department through its economic analyses. While some of the interviewees that I have talked to in Turkey emphasized the difficulty of finding economists and market data in Turkey as the main reason for why economic studies do not play a bigger role in Turkish competition law enforcement[171], the main reason for their absence seems to the organizational resistance of the TCA to incorporate economists. The short-history of activism in the economic studies department reveals the resistance from the administrators and the case-handlers of the TCA to incorporate economists into the decision-making processes as an important influence.

In late 2000s, a small group of case-handlers at the expert level decided to reactivate this department and invited some academic economists to the TCA to give some seminars and

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[170] Interview 42.
[171] Interview 36 and 22.

discuss how to use more economic techniques in investigations.[172] Gradually, the number of economists in the department, almost all from good universities and some with PhDs, increased. Later, they started to get more involved in investigations and conducted some economic analyses for investigations between 2011 and 2014.[173] However, they still faced strong resistance to formalizing and institutionalizing this department's role inside investigations from the chairman, administrators and especially the case-handlers.[174] The case-handlers assigned to investigations refused to share their authority with the economists of the economic studies department. As a senior economist who was in the division at the period explained to me, the case-handlers felt threatened by the economic techniques and analyses used by this division:

> "He was asking me 'what are we going to do if your analysis conflicts with mine?'. He was saying 'I have been working on this case for 6 months, you just sat down and produced an analysis in a few days.' You know, our [economic] analysis has some "magic". You know, like in Harry Potter where wizards compete with their magic? Ours was more powerful. I calculate two lines of estimates, and because there are numbers and symbols [involved], mine is more effective, clearer. Even my closest friends [other case-handlers] objected. And that is how the negotiations came to a deadlock" (a senior economist at the economic studies division of the TCA at the time)[175]

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[172] Interview 42.
[173] Interview 42.
[174] Interview 42.
[175] Interview 42.

The administrators and commissioners were also reluctant to intermediate between the conflicting interests of the economists and the case-handlers and to find an official role for the economic studies department. As a consequence, eventually, most economists in this department left the TCA[176] and the department continues to play largely a ceremonial role.

5. The Organizational Mismatch in Mexico

In Mexico, the decisions of the MCA are mainly reviewed by a uniquely Mexican procedure called *amparo*-, specifically *amparo administrativo*[177]. Originally developed as the Mexican version of the common law *habeas corpus* writ, the amparo procedure is an appeal for the acts performed by a public authority with a claim that they infringe on the constitutionally protected individual liberties (Castagnola and Noriega 2016). The broad definition of "individual liberties" by the Mexican Supreme Court has allowed corporate entities to file amparos since the early 1900s (Zamora and Cossío 2006). Amparos are first filed at any of the hundreds of Mexican federal district courts, then reviewed in the collegiate circuit courts ("*Tribunales Colegiados de Circuito"*), and lastly, decided at the Mexican Supreme Court[178]. As explained in the previous chapter, one of the main consequences of Mexico's economic and political

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[176] Interview 22 and 23.

[177] In addition to amparos, the Mexican Competition Authority's decisions to issue a fine can also be challenged in the Federal Court of Fiscal and Administrative Justice ("*Tribunal Federal de Justicia Fiscal y Administrativa"*). However, as the OECD peer-review report (J. C. Shaffer 2004) suggests and my interviewees argued, the main process for appealing has been amparo.

[178] As the Mexican Supreme Court was flooded by amparo reviews, collegiate circuit courts ("*Tribunales Colegiados de Circuito*") were set up in 1951 to act as second-degree courts to handle basic amparo cases. These courts are composed of a three-judge panel, inspired by the United States Courts of Appeals. Initially 6 in the country, the number of collegiate circuit courts reached 250 by 2014, underscoring the demand for the amparo procedure and its significance for the Mexican legal system (Sieder, Schjolden, and Angell 2016).

transformations in the 1980s was increasing political democratization. These democratization reforms also increased the resources and political independence of the Mexican judiciary and made them an even more important institutional actor than before (Ríos-Figueroa 2007).[179]

The Mexican Constitution allows amparo to cover a "broad sweep of issues" and do not limit it to the control of solely procedural mistakes (J. C. Shaffer 2004). Nevertheless, in practice, amparo cases almost always focus on the procedural mistakes.[180] Amparos can be filed against any kind of actions or decisions of the MCA. Consequently, its requests for information, decisions to admit or reject evidentiary submissions, or issuing of fines for failure to comply with orders, etc. can all be subject to amparo review (J. C. Shaffer 2004). Companies can also file multiple amparos for, therefore, each competition investigation can involve dozens of amparo filings (J. C. Shaffer 2004).[181] In the first 10 years of the MCA, the authority recorded over 600 amparos filed against its orders, with filings almost doubling every year (CFC 2004b, 319). A large majority of these were filed before the MCA could finalize its investigation (J. C. Shaffer 2004, 45). As a result, the amparo reviews dragged MCA's cases on for years.

These delays prevented many of the MCA decisions to take effects. As I showed earlier, especially in its early years, MCA was focused on investigations in the telecommunications sector. In 1997, a landmark decision of the MCA established that *Teléfonos de México, S.A. de*

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[179] As PRI was losing its hold over the central government, it made juridical reforms to protect itself from the unchecked the power of opposition parties now in the ascendancy (Zamora and Cossío 2006). The 1994 constitutional reform increased independence by creating a new appointment system to the Supreme Court, which now required the two-thirds majority support of the Senate on a candidate from a list of three candidates proposed by the President, who previously proposed only a single candidate and needed a majority vote in the Senate. The 1994 and 1996 reforms also expanded the jurisdiction of the Supreme Court to check the constitutionality of the laws and election. In addition, the budget of the judiciary quadrupled between 1995 and 2002 (Sieder, Schjolden, and Angell 2016, 30–31).

[180] Interview 59, 72, 78 and 83.

[181] Interview 59 and 72.

C.V. (*Telmex*) had substantial market power in five basic telecommunications markets. By the Article 63 of the Mexican Competition Law, this decision would have compelled the Mexican telecommunications regulator to issue irregular obligations on Telmex to curtail its market power. However, the MCA's decision was overturned by courts, then reaffirmed by the MCA and overturned again, and so on, for three times, preventing the telecom regulator to take any action on the company while the court cases are ongoing (Solano, del Villar, and Garcia-Verdu 2005, 529).

Moreover, the MCA was not only delayed by slow moving appeals, but it was also struggling to win its cases and defend its decisions in courts. As one interviewee explained "So from the mid 1990s to 2004 you had a deluge of litigation, the MCA used to lose pretty much 2/3 or 3/4 of all the cases brought to courts".[182] As a result, between 1993 and 2004 the MCA could collect only a small portion of the fees it had sanctioned (19%) (CFC 2004a; 2005). The losses were especially numerous in monopolization (i.e., relative monopolistic practices) cases. As my data showed, the MCA issued many sanctions on monopolies in its first period, suggesting that that MCA itself was willing to pursue these cases. However, most of these sanction decisions were overturned by the courts, preventing these decisions from creating a case law precedence for strong enforcement on monopolization.

For example, one of the earliest sanctions of the MCA was on Warner Lambert, a producer of chewing gums and sweets for predatory pricing, a kind of monopolistic conduct that is very difficult to pursue for authorities around the world, especially difficult under a Chicago

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[182] Interview 69.

School inspired interpretation. The investigation which began *ex officio* in 1996 was concluded in 1998 with the decision that Warner Lambert was a dominant company with a market share between 65 and 73 percent, had substantial control over prices in this market and persistently priced its products below cost to expand its market share against its competitors (J. C. Shaffer 2004, 22). However, the resolution was quickly overturned by the courts on the basis of procedural errors. In 2002, the MCA reissued its decision, presumably after correcting the procedural errors in the first case. The case reached the Supreme Court in 2003 and was overturned again.

These early losses could be explained as natural outcomes of both the courts and the MCA learning the ropes of enforcement. However, the losses were perpetuated in the later years as well, suggesting a more structural problem. These losses cannot be explained by the corruption of the judges either. As my interviewees explained, the judges in Mexico are shielded from corruption by high wages and rules over how and when they can be fired or replaced in their positions. [183] Even though there are surely corrupt judges, they are not so common to explain the deep rift between the MCA and the courts. I instead suggest that an organizational mismatch between the MCA and its legal environment, which was not present in Turkey, was the main cause of these losses in the courts.

The MCA's reliance on a top-down decision-making process was not conducive to responding to the expectations of the courts on the protection of the due process rights of individuals and companies. This organizational feature rather opened the MCA to the defense

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[183] Interview 93.

lawyers' claims of wrongful processing and biased prosecution of cases. As the current head of the investigative authority inside the MCA explained to me:

> "Since the same person who investigated you also handles the due process, it might carry over some bias that it conceived about you, so it wasn't real defense… In Spanish we say we are "*juaciparte*"- we are the judge and the party- you are the one who investigates and one that analyzes the process, so this isn't so impartial. So that was a huge argument that everybody told, when they challenged us in Amparo, in due process."[184]

In addition, the weakness of the offices of case-handler at the bottom of the authority prevented the regular checking and control of the MCA's decisions' compliance with the procedural expectations of the courts. Instead, the chairmen controlling these decisions were willing to diverge greatly from the text of the laws and regulations to pursue their own law enforcement policy goals. As a lawyer in private practice explained to me, the significant delay between the MCA's decisions and the finalization of cases in courts also incentivized the chairmen to be careless with their decisions' compliance with the expectations of the courts:

> "The heads now will not suffer the setbacks of the cases they are resolving. It's delayed gratification. They really don't worry too much… If they have to choose between having gratification today, and worrying about a setback in amparo tomorrow, they will probably choose taking the hit today."[185]

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[184] Interview 51.
[185] Interview 89.

A striking example of the damage sustained due to the top-down organization of the MCA is the outcome in the 2011 case on *Radiomóvil Dipsa, S.A de C.V. (Telcel).* In this case, the MCA issued its strongest sanction by that time with a record fine of 11.9 billion pesos (about $1 billion). The defendant was found to have used price-squeezing, i.e., increasing its competitors' costs by fixing an interconnection fee that was higher than the fee charged on calls in its own network.[186] However, the decision was rife with procedural errors, which were ignored by the chairman of the Authority, Perez Motta, who sought to pursue a strong antitrust policy against the telecom monopolies during his tenure from 2004 to 2013.

The first problem in this case was an error in the calculation of the fine. The MCA had calculated the sanctioned fine from a higher percentage, arguing that this was the second offence of Telcel. However, the second sanction was for an offence that had happened before the first sanctioned offence, therefore, by the Mexican Competition Law, it could not be considered a second offense. According to a senior lawyer who was working inside the MCA at the time, the lawyers of the MCA warned Perez Motta of this calculation error, but he chose to ignore them. [187] Furthermore, after the decision of the MCA was announced, Motta gave a press conference and said (something to the effect of) "I know that the company will challenge our decision, but our decision has been made."[188] This was the second procedural error: the chairman of the MCA should not express his personal opinion on a case still in appeal. As a result, the lawyers of Telcel successfully argued their due-process rights were violated and pressured the MCA into

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[186] Source: https://www.jonesday.com/en/insights/2012/05/antitrust-alert--mexican-competition-commission-accepts-commitments-and-revokes-monopolization-fine-imposed-on-telcel (accessed: May 26th, 2021).
[187] Interview 79.
[188] Interview 79.

dropping the record level fine all together and accept some behavioral commitments from Telcel instead to settle the case. According to the legal practitioners who followed this case, these two procedural errors made by the MCA were the main reason for this loss, as the infringements in this case were very clear-cut and substantiated with sufficient evidence.[189]

The MCA's recruitment and training practices also contributed to its losses in courts. One of the main issues that the MCA had to face in amparos was legally justifying its information requests from defendants and other parties involved. Any simple error in the information requesting process made by the case-handlers could cost the MCA its whole case. As a lawyer in private practice explained to me, the case-handlers, often not sufficiently trained and experienced, made many such procedural errors:

> "When the authority acts, it has to *fundar y motivar* everything they do. *Fundar* means, what is the legal provision that you are using, and *motivar* means, explain how that article applies in this case […] When you issue a request for information with 200 questions about parts of my business that are not involved in your investigation, you're violating due process. Even if you have a general provision that allows you to ask what you need for your investigation, it's not anything you want to ask […] This is something that I say very regretfully, but no one at the COFECE [MCA] is getting enough training to be a public servant to follow the constitution."[190]

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[189] Interview 85.
[190] Interview 79.

Lastly, the MCA's reliance on economists and economic analyses also created problems with the courts. Not only the lawyers in private practice[191], but also numerous lawyers who were previously employed inside the MCA emphasized the strong influence of economists as the main reason for its losses in courts:

> "I think the problem is, who had some agency. Again, going to personalities, we only had economists heading the agency. And for me that's a problem […] So that, a lot of weight was given to economics, and I think this is the case in many jurisdictions, a lot of weight is given to economics but not to the legal procedure, in the terms of due process and all that. So, they were losing many cases in the judiciary." (the previous head of the investigative authority)[192]
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> "I think there was definitely a problem. I think the economist just thought that they didn't need the lawyers. I'm exaggerating, right? It wasn't like, 'Oh, we don't need a lawyer.' But they certainly didn't attribute sufficient importance to that part." (a previous technical secretary of the MCA)[193]
>
> "Throughout the years, the Competition Commission was handled with a more economic view and the procedural, legal issues were not that important to economists. […] I'm a lawyer and they were economists, and we told them, 'Look, this is not good. We are going to lose this,' but the economists said, 'Well, look, let the judicial branch decide that. Economically, this makes sense, and so

[191] Interview 71 and 78.
[192] Interview 68.
[193] Interview 83.

we're going to decide this way.' That happened a lot. It still happens a lot." (a lawyer who was previously a commissioner at the MCA)[194]

The lawyers in the Mexican judiciary and the economists inside the MCA disagreed strongly on the bases of validity and legitimacy for the decisions of the MCA. The economists employed in the authority believed that MCA's decisions were valid and admissible when they are based on the scientific authority of economics. They also perceived the judiciary and lawyers as opportunistic actors using the gaps in the law to prevent enforcement actions. They also blamed the professional training and experience of Mexican judges for their inability to accept and understand the decisions of the MCA.[195] While the lawyers argued that the MCA's decisions should get their legitimacy and authority from compliance with the letter of the law. They argued that the scientific authority that the economists get their authority from is not reliable for making enforcement decisions.[196]

By 2009, the MCA was looking to find a solution to this organizational mismatch with the judiciary.[197] The idea was that, since the judiciary refused to work with the MCA and its economists, they had to learn how to enforce competition laws "properly" from judges. Between 2009 and 2011, with funding from USAID and collaboration with the Judiciary Council

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[194] Interview 82.
[195] One senior case-handler in the MCA explained: "This protection of liberties is important in criminal law of course. But the judges sometimes don't understand the competition analysis, they only do human rights analysis. The judges are not specialized in antitrust. They don't understand. They prefer to study the procedural problems. So, we lose cases" (Interview 48).
[196] As a lawyer in private practice said, "Then you have to go to economic experts, and economic experts will go to, basically, books of microeconomics, those books of microeconomics, the real ones, or the most recognized ones, were written by foreigners and they're used for saying, "oh, right, this is what this means." I mean, the law isn't going to be defined at the end by some scholar abroad! But also depending on the scholar that you are reading, the concepts vary a lot." (Interview 66).
[197] Interview 66, 67 and 68.

("*Consejo de la Judicatura"*), the MCA organized a training program for Mexican judges and magistrates and brought them together with their peers from the US and European countries in seminars over competition laws.[198] In addition, with the constitutional changes in 2013, specialized courts were created for the review of the MCA's decisions (Mena Labarthe 2017). The constitutional amendment also limited the defendants' ability to file amparos. These changes lowered the number of amparos filed against the MCA and also made the courts more competent.[199]

However, these measures still had a limited success. The gains that were made in creating sympathetic judges were lost with the reappointments inside the judiciary, which led to a return to strongly unfavorable decisions in recent years. The lawyers I have talked to told me that the constitutional limitations placed over amparo was a blessing in disguise for their clients, since the MCA became more reckless with its interim decisions and is making even more procedural errors, which they can use in court at the end of the procedure:

> "During these proceedings, maybe I cannot have access to Amparo, but I can create most of the evidence that I will use during this second proceeding, to show that all the mistakes that they have here, as well as all the evidence, that maybe, one time, I will use at the Amparo proceedings."[200]

Furthermore, the MCA also tried to correct some of its organizational problems. It has hired more lawyers to check cases before they reach the courts[201], and since 2014, the

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[198] Interview 67.
[199] Interview 60, 67 and 82.
[200] Interview 71, also 79.
[201] Interview 75.

chairwoman of the MCA is not an economist, and the institutionalized power of the economists seems to have reduced. However, this only made the MCA more cautious and self-restricting on its own investigative actions and the fees it imposes. [202]

> "Interviewee: Now I don't see that they are using an economic investigative point of view. I think they have very limited resources in that. They have a lot of resources in forensics, and maybe price screening, but I mean its contradictory, that they have been screening the market a lot in some markets, but they haven't initiated any investigation in some markets. I don't know what's missing there.
>
> Interviewer: Could it be the economists they employ?
>
> Interviewee: Or it may be the cautious lawyers that they have that say, 'how can we use this in court?'"[203]

As a result, the organizational mismatch between the MCA and the judiciary continues to create major roadblocks over enforcement actions. For example, when I was conducting my research in Mexico, the Mexican courts had recently annulled a decision of the MCA, based on the argument that during its dawn-raid the Authority had collected some hard drives that contained some documents that should have been protected under attorney-client privilege, even though the MCA did not use these documents to build its case. This was a major blow to the MCA's ability to collect information through dawn-raids.[204] Instead of monopolistic cases, the

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[202] Interview 54 and 75.
[203] Interview 78.
[204] Interview 54 and 74.

MCA now focuses more on cartel enforcement through leniency applications[205] and merger review, which is, because of the time-constraints over merger transactions, rarely appealed.[206]

6. Organizational Matching in Turkey

In Turkey TCA's decisions are reviewed by the administrative courts. Closely imitating the French-continental civil law systems, the Turkish law separates between administrative law and private law and designates a separate system of administrative courts to the resolution of disputes between public authorities and private persons. According to the "Law on Administrative Trial Procedure" ("*2577 Sayılı Idari Yargılama Usulü Kanunu"*), administrative appeal process is "the supervision of the legality of administrative acts and transactions", and this process has clear limits: "Administrative courts cannot audit the appropriateness, restrict the execution of the executive duty in accordance with the form and principles set forth in the laws, cannot make judicial decisions in the nature of an administrative action and transaction or in a manner that removes the discretionary power of the administration". The judges in administrative courts are generalists with broad knowledge in all kinds of administrative procedures and decisions, such as in taxation, public service employment disputes and zoning changes.[207] The Turkish administrative courts typically focus on only the procedural and due-process mistakes when reviewing the decisions of administrative authorities, and they cannot

[205] Interview 61, 54 and 48.
[206] Interview 89 and 90.
[207] Interview 5, 6 and 8.

pass judgement on the merits of those decisions beyond "obvious discretion or proportionality errors" (Aslan 2017, 1301).[208]

The Turkish Competition Law also limits the ability of economic actors to appeal the decisions of the TCA. Only the "final" decisions, meaning those that determine legal violations, assess fines, issue or withdraw individual exemptions, block exemptions and negative clearances, and reject complaints can be subject to the courts' review (J. C. Shaffer 2006). Therefore, unlike the Mexican courts, the administrative courts in Turkey cannot review the "interim" decisions made by the TCA and the economic actors have to wait until the finalization of the TCA's decision before they can file a complaint in courts. However, unlike the amparo cases in Mexico, the decisions made in the Turkish administrative courts create precedence and apply to multiple cases with similar characteristics. In other words, if the Turkish courts find a procedural error in the TCA's decisions and if there are other cases with the same procedural error, they will all be repealed by the same court decision. This feature of the Turkish court reviews gives them potentially more power in shaping case law than the Mexican amparo courts, whose decision only apply to a single case.

Similar to Mexico, Turkish competition laws' first decade of enforcement was rife with conflicts between the TCA and the court. Many of TCA's decisions were appealed in courts and each case took on average 4-5 years to resolve (Gündüz 2018, 37). Also much like the MCA, the

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[208] Initially the Turkish Competition Law designated the Council of State (which have a smaller number of judges) as the first instance court for appeals for the Turkish Authority's decisions, and the Council designated its 13th Chamber to the handle these appeals, in practice the judges in this chamber could achieve some degree of familiarity and competence in this law over time as more and more decisions arrived (Interview 9). However, an amendment to the law in 2012 designated the local administrative courts in Ankara as the first instance courts, which curtailed this gradual specialization in the juridical review of competition law decisions.

TCA lost many of its cases in the early years of enforcement. Figure 6 below shows the proportion of TCA's decisions[209] that were appealed in courts and the outcomes of these appeals (approval or repeal). As this figure suggests, until roughly 2006, the TCA had great difficulty getting its decisions approved by the administrative courts.

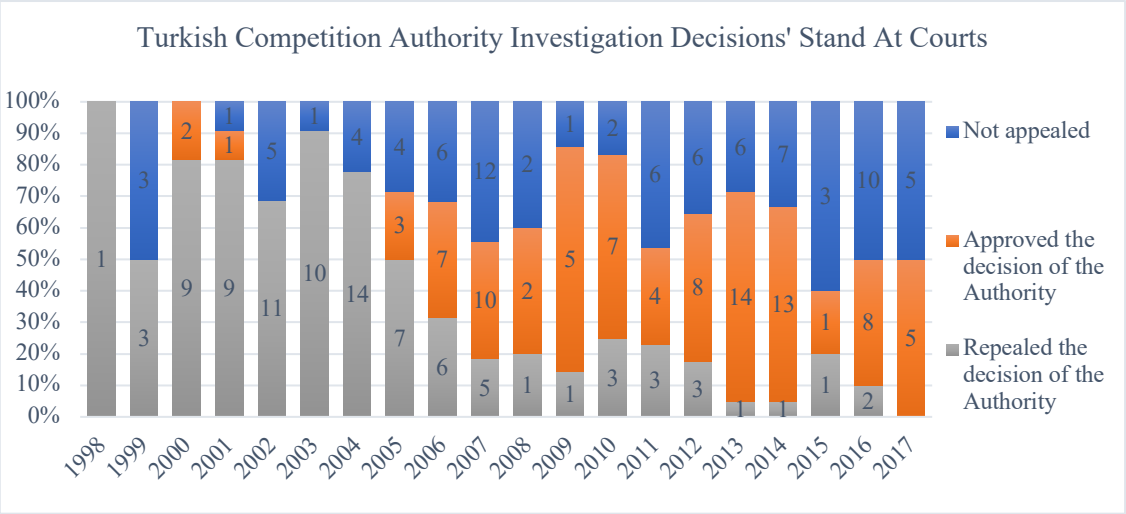

Figure 6: All enforcement decisions of the TCA and their stand in court (1998-2017) (source: Gündüz 2018, 94).

Similar to Mexico, the losses in this early period were due to some major procedural errors made of the TCA, which the courts found in violation of the due process rights of defendants. One major problem was the assignment of a commissioner to an ongoing investigation. Although this practice was based on the articles of the Turkish Competition Law, the administrative courts found it in violation of the principles of due process by biasing the

[209] This composite figure shows all the final decisions of the TCA in its investigations in this period, including in mergers and cartel cases.

commissioners' decisions. This decision of the administrative courts effectively overturned almost all the sanctioning decisions that the TCA made between 1998 and 2005.[210]Another significant procedural error that the TCA made in this early period was in 2006, when the meeting quorum of the commission did not comply with the requirements of the law, which led to a series of decisions overturned that year.[211]

However, unlike in Mexico –as Figure 6 suggests– the TCA was able to overcome these procedural problems and maintain much better relationship with the courts in the long run. The TCA began to win more cases that were appealed in courts after 2005. Moreover, the proportion of the TCA's decisions appealed in administrative courts also significantly decreased since 2006. This strongly indicates the private competition law practitioners' recognition that the courts began to overwhelmingly support the TCA's decisions after 2006 and challenging them in courts is largely futile. The lawyers I have talked to recognized that their chances of winning in courts against the TCA were slim, but attributed this to the Turkish administrative courts' lack of knowledge in competition laws:

> "The courts approve the Authority's [TCA] decision 99% of the time. I have only seen 3-4 cases that have been repealed. This is because the judges do not know the competition law. There is no specialization. The judges cannot even speak English" (an experienced lawyer who was previously a case-handler in the TCA).[212]

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[210] Interview 8 and 18.
[211] Interview 8 and 18.
[212] Interview 8.

However, the problem with the courts' lack of knowledge and specialization in competition laws was common between Turkey and Mexico, but these problems led to different consequences in their enforcement outcomes. Therefore, the real question is, why did the unknowledgeable and generalist courts in Turkey side with the TCA's decisions, while the unknowledgeable and generalist courts in Mexico oppose the decisions of the MCA? I suggest that unlike the MCA, the TCA's organizational features were conducive to responding to the expectations of the courts on the protection of the due process rights of individuals and companies. As a consequence, after the initial experience with procedural errors and overturning of its decisions, the TCA was able to form a better relationship with the courts than the MCA and made sure that its enforcement decisions could stand in the courts.

The bottom-up organization of decision-making in the TCA was an important component of TCA's decisions' compliance with the courts' standards of due process in competition law enforcement. Thanks to the bottom-up influence of case-handlers over the decision-making process inside the authority, the TCA developed a very technically detailed and formalistic law enforcement method that lacked in Mexico. By formalistic (it could also be called "legalistic") enforcement of competition law, I specifically mean the enforcement style according to definitive legal criteria based on harder legal evidence and broad categorization of what is legal and what is not legal. This form of enforcement does not take into consideration the economic effects on consumers and does not give much discretion to the enforcement authority in interpreting the law. This formalism in the TCA's competition law decisions was recognized by the lawyers:

> "The established legal practice here is like "Is there a resale-price maintenance, did you tell the retailer the resale-price? Oh, if you did, then that's an infringement. Here is your sanction!". In the US they say "We call this an infringement, but why is that? What does this affect? Does this really affect competition? Should this be an infringement?". Even the most commonly accepted rule can be challenged at some point […] Here, our style of enforcement is more formalistic."[213]

The existing comparative-international literature on competition laws suggests that the formalistic enforcement of competition law is a mistake that developing economies' competition authorities make due to limited resources or lack of experience in enforcing competition laws. (Dabbah 2003, 32). However, the difference between the TCA and MCA's enforcement of competition laws suggest that this is not an outcome due to resource or experience differences. Formalistic enforcement is not a planned-out decision that competition authorities make either. Rather, their organizational features lead them to this outcome.

In the TCA's case, the bottom-up control of the case-handlers over the decision-making process, combined with the absence of the economists' influence inside the TCA, created a very formalistic enforcement style. As one previous case-handler in the TCA explained, it is the case-handlers' job to pay attention to the technical details of competition law infringements and prepare their investigation through formalistic criteria. Formal enforcement criteria can be relaxed by the commissioners later on while they are making the final decision, but it is the case-

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[213] Interview 13.

handlers' job to simply consider what is allowed and what is now allowed while preparing their investigation reports. Because the commissioners of the TCA lack the expertise in competition laws and they are strongly influenced by the reports prepared by the case-handlers, the decisions made by the TCA reflect only the formalistic investigation methods of the case-handlers. This was explained to me by a private consultant who was once a case-handler in the TCA:

> "There is a saying in state bureaucracy about experts: the expert throws a bone in front of a chicken, and the chicken eats it or not, it doesn't concern the expert! There is an issue about the distribution of risks here, meaning, did they cross a line or not. The expert can say, "they have crossed the line, I will destroy them, who cares!" In other words, writing a stricter report, especially if he is more 'risk averse', makes the expert feel better. After all, no one can tell him his report is missing something or is biased. Therefore, the head of the expert works more rigidly, more negatively. [While] it is the responsibility of the commission to make decisions and carry their responsibility. […] A commissioner can ask "okay, fine, they are in dominant position, but is this good or bad?", but the expert cannot ask that. Because if the company is in dominant position, it doesn't matter to him whether this is good or bad."[214]

Another significant effect of the bottom-up organization of the TCA is its reliance on a significant number of by-laws, guidelines and memorandums prepared by its case-handlers in resolving case (By contrast, the MCA has used only a few such by-laws and they are not

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[214] Interview 7.

considered as important by the practitioners). These by-laws outline an explicit law enforcement methodology, create clear parameters for sanctions and specify the definitions of competition law concepts. Therefore, they serve to commit the commissioners to making its decisions under certain formalistic parameters. This is a practice that the TCA adopted from the EU Commission but extended further and harmonized with local practices. The professors who drafted the Turkish competition law (as explained in Chapter 5) also translated the by-laws and guidelines published by the EU Commission almost verbatim.[215] However, the TCA abandoned these translated guidelines shortly after, finding them too difficult to use, and instead drafted its own guidelines and by-laws.[216]

These formalistic legal texts were prepared by the case-handlers inside TCA. For example, one of the most significant by-laws of the TCA is it internal "penal code" ("*Ceza Yönetmeliği"*) that outlines a clear calculation formula for administrative fines considering certain factors, such as the nature of the infringement, the economic damage from the offence, the consideration of repeat offenses or compliance with the orders of the TCA during the investigation (Sanlı 2009, 6). This by-law was created by a small group of case-handlers, then approved by the commissioners. It places significant limits on how commissioners can decide cases, which has in fact led to some protestations from some commissioners, who did not want to be bounded by an internally created by-law.[217] Nevertheless, they were very useful in preventing the kind of arbitrary, top-down decision-making with less attention to procedural and formal

[215] Interview 42 and 36.
[216] Interview 17 and 18.
[217] Interview 37.

requirements of law enforcement that we saw in Mexico. This form of formal and prior commitment to some enforcement standards also helps the TCA in justifying the number of administrative fines it issues for each case in administrative appeals (Sanlı 2009, 11).

The absence of economists in the TCA also contributes to better relationships with the courts and the defense lawyers more directly. Without the economists, the TCA is better able to communicate its institutional goals and methods to the legal practitioners. Therefore, unlike the lawyers in Mexico, the lawyers in Turkey told me that they were willing to work with the case-handlers of the TCA in providing them with information and helping them by getting the compliance of their clients. While the lawyers in Mexico repeatedly told me that they fight against the information requests and the fines their clients get for noncompliance, in Turkey defense lawyers told me that they advise compliance with the requests, warning their clients that working with the TCA is the best strategy:

> "When there is a dawn raid to our clients, we go there. We provide the documents, we speak the same language, this can prevent any misunderstandings with the investigators […] Having good relationships with the authority is important. I can say it's very useful to be able to ask for a meeting for your clients and get an appointment easily, to able to talk about the file in a friendly way."[218]

Similar to the private attorneys, the judges in administrative courts also perceived the TCA in a favorable light in the absence of economists' complicating their relationship. Instead of perceiving the TCA's investigative decisions as policy making in the interest of some economic-

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[218] Interview 10.

political goals, which was the constitutional courts' perception of the decisions of the MCA, the Turkish courts perceived the TCA as a law-making institution, resolving its cases through the technical capacity and expertise of its impartial case-handlers. As one interviewee explained, due to the trust and good relationship between the TCA and the courts, the courts' ignorance on competition laws was translated into a blind trust in the decisions of the TCA:

> "The courts think that this institution [TCA] has all the expertise; therefore, whatever it says must be true […] They say, 'The institution must have investigated this', then they approve the decision".[219]

Without the courts' supervision, the TCA has almost unlimited power in enforcing competition laws. As more decisions of the TCA are accepted in courts, more the TCA is incentivized to expand its jurisdiction, investigate more cases and sanction more companies. For this reason, the sanctioning decisions of the TCA has increased in more recent years. This increasing patter is decided more directly by the organizational features of the TCA. The TCA's statutory duty to launch pre-investigations in response to complaints has substantial influence in broadening the sectoral scope of the TCA's investigations, getting it involved in many sectors of the economy that the TCA receives complaints from. This also increases the share of the sanctions on monopolization practices among all the sanctions that the TCA has issued, since businesses complain more often about monopolistic practices of their competitors than other kinds of antitrust infringements. The strong influence of the case-handlers' investigative reports over the decisions of the commissioners ensures that formalistic evaluations impact sanctioning

[219] Interview 9.

decisions, and the absence of economists also allows more monopolization cases to be sanctioned.

7. Conclusion

When we study the global diffusion of institutions, particularly legal codes, it is tempting to consider the appearance of the same lines of legal rules in the legal texts of multiple countries as a sign of success. However, the real intentions behind the global diffusion of institutions are to set up the same "rules of the game" also in practice, not just the formal rules in the books. This classic distinction between "laws in practice" and "laws in the books" suggests that there can be an important "gap" between the formal features of laws and their actual implementations.

Similarly, in competition laws, the efforts to diffuse competition laws internationally and coordinate enforcement activity may have been futile. In Chapter 4, I have explained that the reason for the global promotion of antitrust (competition) laws was the perceptions of the industrialists and policymakers in advanced economies, particularly in the US, that the existence of these laws in emerging market economies could protect them from the monopolists and cartels organized in these newly economically connected parts of the world. The intention of these diffusers was to lead developing countries to enforce their new competition laws strongly on the cartelistic and monopolistic conduct of their own industrialists when they exclude foreign companies and investors from their local markets. The instruments for this global promotion were the competition chapters of free-trade agreements and the diffusion of competition

enforcement policy ideas through the international connections between competition authorities and expert professionals.

However, these instruments of policy diffusion cannot ensure that the competition laws adopted by developing countries are implemented similarly in different developing economy contexts in the ways that the promoters desire. Even when free-trade agreements succeed in getting countries to legislate similar competition laws with similar rules around the world, these countries can enforce these laws significantly differently, because enforcement is essentially decided by the local legal authorities and policy actors. Even when the international competition authority and expertise networks teach the ideas of the Chicago School and internationally accepted "best-practices" to these authorities and actors, their relationships to each other and to their juridical political environment still plays a more important role in shaping their enforcement practices.

Therefore, this chapter has investigated Turkey and Mexico's enforcement of competition laws since their legislation under free-trade agreements in the mid-1990s. I have specifically focused on their restrictions over monopolistic (dominant) companies to prevent abusive, exploitative or exclusionary conducts, because there is more controversy and discussion over the enforcement of this part of the law. The scholarship comparing the US and EU policies on the restriction of monopolistic companies mostly suggest that different intellectual influences shape have led to different enforcement policies: while the US has softened its approach under the influence of the Chicago School since the late 1970s, the EU has continued to strongly restrict monopolies under the Ordoliberal School's influence. In this chapter, I show that, similar to the US and the EU, Mexico and Turkey have pursued different competition law enforcement policies

on these companies. Turkey's enforcement of restrictions over monopolies is stricter than Mexico's enforcement of the same rules, with more sanctions, higher administrative fees and more parts of the economy covered. However, I argue that these differences did not stem from intellectual influences; instead, the competition authorities' ability to coordinate their enforcement decisions with the local courts have determined how they have enforced their competition laws in practice.

As I have showed in this chapter, there are important organizational differences between the Turkish and Mexican competition authorities. First, in terms of the organization of the decision-making process, the Turkish competition authority has relied on a bottom-up organization, giving strong prosecutorial responsibilities to the authority and substantial autonomy to case-handlers in their investigation of cases, while the Mexican competition authority uses a top-down organization, with the authority having considerable room for discretion in the cases it pursues and the commissioners, and in particular, the chairman of the authority intimately involved in the investigation of cases.

Secondly, these competition authorities also chose accumulating expertise through different methods of recruitment and training. In the Turkish competition authority, the recruitment is centralized, open and transparent for the case-handlers, which also receive generous support for pursuing post-graduate training abroad. Conversely, the Mexican competition authority recruits its top-level officials (chairmen, commissioners and administrators leading divisions) from the experienced bureaucrats and technocrats in other parts of the Mexican state, who already hold post-graduate degrees from foreign universities.

Lastly, the Turkish and Mexican authorities have relied on economists and economic analyses to different extent. On the one hand, in the Mexican competition authority economists with PhDs has taken the high level of positions (in the commission and as the chairmen) and have their own specialized economic analysis divisions. On the other hand, the Turkish competition authority has had very few economists with PhDs in high level positions and also at the level of case-handlers, and the few economists that the Turkish authority had have failed to create for themselves a formalized (institutionalized) role inside investigations.

These different organizational features of the Turkish and Mexican competition authorities have important consequences for how competition laws are put into practice in these countries, because they shape their ability to work with the local courts and traditions of due-process evaluation. The successful creation of competition law case-law with substantial levels of law enforcement depends in large part on whether competition authorities can produce law enforcement decisions that can stand in courts during the appeal process. Court appeals is an important component of the "administrative model" of competition law enforcement common among countries with the civil law tradition, like Turkey and Mexico.

I show that the organizational feature of the Mexican competition authority made it more difficult for it to comply with the due-process expectations and standards of the courts. In Mexico, the power of commissioners, particularly the chairmen, combined with the expertise of the case-handlers, has led to significant procedural errors, which were regularly detected and led to the repeal of its decisions by the courts. The heavy reliance on economists and economic analyses also diminished the Mexican authority's attention to following the procedural rules of enforcement and further increased the dissonance and distrust with the legal practitioners and

judges. Conversely in Turkey, the ability of the case-handlers to shape the decisions of the authority created a strongly formalistic and almost formulaic competition law enforcement style, which minimized the potential frictions with the courts. The absence of economists inside the Turkish authority also allowed it to successfully create close ties with legal practitioners and judges, who at times came to the aid of the authority and supported its active enforcement policies.

My research suggests that the Turkish competition authority has been able to pursue a more aggressive and active enforcement policy than the competition authority in Mexico because of its organizational matching with its juridical environment. However, this does not mean Turkey has a better competition law enforcement than Mexico. The Turkish competition authority's more aggressive and numerous enforcement actions may have their own problems. As the Chicago School suggests, this active enforcement policy in Turkey may be a result of "false positives", i.e., the punishment of competitive practices as if they are anticompetitive practices, which have the danger of "chilling" competition. Only a case-by-case examination of the Turkish authority's decisions and their economic effects can give more insights on these issues, which is beyond the limits of this study. My findings instead serve to dispute the point of view that insulates the enforcement decisions of competition authorities from their institutional environments. The studies on the global diffusion of competition laws should pay further attention to the variations in the organizational features of these authorities, since they shape the authorities' ability to create case-law in coordination with the courts.

8. Appendix

Year of decision	Case Name	Case File Number	Fine Amount (in Local Currency)	Related Economic Sector
TURKEY				
1999	IGTOG	99-53/575-365	819,803.00	Food and beverages
1999	Cine-5	99-46/500-316	49,387.58	Media
2000	Gazete Dağıtımı-2	00-49/529-291	1,133,760.69	Media
2000	Mais	00-42/453-247	258,765.40	Consumer retail
2001	Turkcell-1	01-35/347-95	6,973,129.00	Telecommunication
2001	Teleon	01-07/62-19	1,599,400.52	Media
2001	Doğuş Otomotiv	01-47/483-120	445,175.26	Consumer retail
2001	Istanbul Otobus	01-31/313-91	158,801.54	Transportation
2001	Belko	01-17/150-39	41,023.00	Energy
2001	Izmir Otobus	01-26/256-72	39,359.84	Transportation
2002	TTAS-1 (Turk Telecom)	02-60/755-305	1,136,376.79	Telecommunication
2002	Digiturk-1 (Atlas)	02-50/636-258	769,487.23	Media
2002	Karboğaz	02-49/634-257	320,804.53	Inputs
2002	Çukurova Limanı	02-29/339-139	15,703.49	Transportation
2003	Ulusal Dolaşım (Turkcell+Telsim)	03-40/432-186	30,402,958.00	Telecommunication
2003	ÇEAŞ (Çukurova Elektrik)	03-72/874-373	9,557,363.02	Energy
2003	Benkar (HSBC)	03-57/671-304	5,003,930.23	Finance
2003	Maya-2	03-49/556-241	190,028.45	Food and beverages
2003	Meyve Suyu-2	03-10/114-52	12,484.30	Food and beverages

2004	Peugeot	04-82/1168-294	7,122,296.77	Consumer retail
2004	Anadolu Cam-1	04-76/1086-271	2,482,665.76	Inputs
2005	Warner Bros	05-18/224-66	158,048.16	Media
2006	Marmara Çimento (Bursa)	06-68/926-265	1,123,134.45	Construction and real estate
2007	Bilsa Yazılım	07-26/238-77	246,457.67	Digital
2007	Alarko	07-15/142-45	225,274.43	Consumer retail
2007	3M-1	07-22/207-66	13,051.70	Medical and Cosmetics
2008	TTAS-3 (Turk Telecom)	08-65/1055-411	12,394,781.16	Telecommunication
2009	Turkcell-2	09-60/1490-379	36,072,230.98	Telecommunication
2009	Senofi Aventis	09-16/374-88	3,648,045.58	Medical and Cosmetics
2010	Izocam	10-14/175-66	1,317,714.37	Inputs
2011	Turkcell-3	11-34/742-230	91,942,343.31	Telecommunication
2011	Efes-2	11-42/911-281	8,085,929.62	Food and beverages
2011	Doğan Medya	11-18/341-103	6,563,811.04	Media
2011	Anadolu Elektronik	11-39/838-262	1,066,669.72	Consumer retail
2012	Un Ro Ro	12-47/1413-474	841,199.70	Transportation
2013	Turkcell-4 (Araç Takip Sistemi)	13-71/988-414	39,727,308.20	Telecommunication
2013	Frito-Lay 2	13-49/711-300	17,908,674.19	Food and beverages
2013	Linde	13-49/710-297	594,641.26	Inputs
2013	Edirne Otogarı	13-67/928-390	488,375.14	Transportation
2014	Tüpraş	14-03/60-24	412,015,081.24	Energy
2014	Mey Içki-1	14-21/410-178	41,512,531.90	Food and beverages
2014	Tekhnelogos-2	14-33/666-292	44,222.35	Digital

2016	Tüketici Elektroniği-Konsol Oyun	16-37/628-279	54,326,630.74	Consumer retail
2016	TTAS-9 (Tesis Paylaşımı)	16-20/326-146	33,983,792.76	Telecommunication
2016	TEB-5 (ithal ilaç)	16-42/699-313	18,062,307.32	Medical and Cosmetics
2016	3M-2	16-20/340-155	2,115,839.95	Medical and Cosmetics
2016	Yemek Sepeti	16-20/347-156	427,977.70	Digital
2016	Congresium Fuar	16-35/604-269	268,042.77	Construction and real estate
2017	Mey Içki-2	17-07/84-34	155,782,969.05	Food and beverages
2017	Trakya Cam	17-41/641-280	17,497,141.63	Inputs
2017	Booking.com	17-01/12-4	2,543,992.85	Digital
2017	Luxottica Gözlük	17-08/99-42	1,672,647.11	Consumer retail
2017	Edirne Otogari-2	17-23/384-167	765,233.83	Transportation
2018	Enerjisa	18-27/461-224	143,061,738.12	Energy
2018	Google-1 (Android)	18-33/555-273	93,083,422.30	Digital
2018	Ck Elektrik	18-06/101-52	38,155,517.93	Energy
2018	Henkel	18-33/556-274	6,944,931.02	Medical and Cosmetics
MEXICO				
1999	Contratos De Exclusividad En La Introducción Distribución Y Comercialización De Cerveza En Santiago Ixcuintla, Nayarit:	IO-046-1997	679,500.00	Food and beverages
2000	Avantel, SA De CV Vs Teléfonos De México, SA De CV	DE-007-1998	7,647,750.00	Telecommunication
2000	Harinera Seis Hermanos, SA Vs Cargill De México, SA Y Empresas Miembros De La Asociación De Proveedores De Productos Agropecuarios (México), AC	DE-052-1998	400,000.00	Food and beverages
2000	Tortillerías San Antonio Vs. Delegación De La Cámara Nacional De Comercio, Servicio Y Turismo De La Ciudad Angostura Y El H. Ayuntamiento Del Municipio De Angostura, Sinaloa	DE-046-1999	10,000.00	Food and beverages

2001	SOS Telecomunicaciones, SA De CV; Telecomunicaciones Del Golfo, SA De CV; Sistemas Telefónicos Portátiles Celulares, SA De CV; Comunicaciones Celulares De Occidente, SA De CV Y Grupo Iusacell Vs Teléfonos De México, SA De CV Y Radiomóvil Dipsa SA De CV	DE-016-1995	25,000,000.00	Telecommunication
2001	Avantel SA Vs Teléfonos De México, SA De CV	DE-021-1999	12,105,000.00	Telecommunication
2001	Pemex Refinación Por “La Franquicia PEMEX En El Autoconsumo”	IO-14-99	8,527,500.00	Energy
2001	Asociación Nacional De Tiendas De Autoservicio Y Departamentales, AC (Antad)	IO-19-2000	5,043,750.00	Finance
2001	Pemex Refinación	IO-024-2000	366,444.40	Energy
2002	Avantel, S.A. Vs. Teléfonos De México, S.A. De C.V.	DE-003-1999	36,881,250.00	Telecommunication
2002	Pegaso, Comunicaciones Y Sistemas, S.A. De C.V. Y Pegaso PCS, S.A. De C.V. Vs. Centro De Telefonía Celular, S.A. De C.V., Avancel, S.A. De C.V. Y Radiomóvil Dipsa, S.A. De C.V.	DE-060-2000	6,406,800.00	Telecommunication
2002	Avantel, S.A. De C.V. Y Marca Tel, S.A. De C.V. Vs. Teléfonos De México, S.A. De C.V.	DE-025-2000	6,322,500.00	Telecommunication
2002	Alestra, S. De R.L. Vs. Telmex, S.A.	IO-001-2000	4,215,000.00	Telecommunication
2002	Warner Lambert México, S.A. De C.V.	IO-016-1996	2,107,500.00	Food and beverages
2002	Avantel, S.A. Vs. Teléfonos De México, S.A. De C.V.	DE-045-2000	2,107,500.00	Telecommunication
2003	Videotam, SA De CV Y Pegaso Comunicaciones Y Sistemas, SA De CV Vs Servicio Celular Reynosa, SA De CV Y Radiomóvil Dipsa, SA De CV	DE-028-2001	5,901,000.00	Telecommunication
2003	Aerocarga Mexicana, SA De CV Vs Grupo De Desarrollo Del Sureste, SA De CV	DE-017-2001	210,750.00	Transportation
2004	Sistema Computarizado De Emergencia, SA De CV Vs Teléfonos De México, SA De CV	DE-22-2003	4,524,000.00	Telecommunication
2004	Compañía Fletera Nacional Chiapaneca, SA De CV Vs Unión De Transportistas De Carga Cuxtepeques Y Anexas, SA De CV	DE-041-2002	50,216.00	Transportation
2005	Persona Física Vs Propimex, SA De CV	DE-021-2003	168,480,000.00	Food and beverages
2005	Pepsi Cola Mexicana, SA De CV Y Otros Vs the Coca-Cola Company Y Otras	DE-06-2000	10,530,000.00	Food and beverages
2005	Administración Portuaria Integral De Tampico, SA De CV; Gremio Unido De Alijadores, SC De RL; Servicios Marítimos Portuarios, SA; Sindicato Nacional De Pilotos De Puerto Delegación Tampico-Altamira	IO-004-2004	2,340,000.00	Transportation

2006	Unión De Trabajadores No Asalariados Taxistas Misión Los Cabos, Gremio Frente Único De Choferes Propietarios De San José, Sitio Rosarito, AC, Sitio San José, AC, Sindicato Único De Choferes Propietarios De Automóviles Y Camiones De Alquiler De Cabo San Lucas, Sitio San Lucas, AC, Y Sitio Nuevo Atardecer, AC	IO-001-2005	2,447,986.70	Transportation
2007	Confederación De Asociaciones De Agentes Aduanales De La República Mexicana, A.C.	IO-001-2006	5,689,125.00	Transportation
2010	Distribución Y Comercialización De Señales Mediante El Sistema De Televisión Restringida	DE-001-2006	6,399,188.20	Telecommunication
2011	Bebidas Carbonatadas, Conocidas Comúnmente Como Refrescos	DE-006-2000	610,740,000.00	Food and beverages
2011	Servicios De Interconexión En Redes Fijas	DE-039-2007	82,340,140.13	Telecommunication
2013	Servicios Mayoristas De Arrendamiento De Enlaces Dedicados Locales Y De Larga Distancia Nacional	DE-008-2010	657,391,350.00	Telecommunication
2013	Producción, Distribución Y Comercialización De Materiales Para La Construcción	DE-017-2006	10,179,000.00	Input
2013	Telefonia Movil	DE-060-2000	6,406,800.00	Telecommunication
2013	Comercialización De Canales De Televisión Para Concesionarios De Televisión Restringida	DE-022-2007	254.87	Telecommunication
2013	Proveeduria O Comercialización De Muebles Para El Hogar En La Región Del Estado De Jalisco.	DE-015-2010	54.80	Consumer retail
2014	Producción, Distribución Y Comercialización De Compresores Herméticos	IO-002-2009	223,273,399.11	industrial machinery
2017	El Suministro De Productos Petroliferos A La Estaciones De Servicios Pertenecientes A La Franquicia Pemex	DE-024-2010	653,214,932.66	Energy
2018	Mercado Del Acceso A Zona Federal Y Estacionamiento Para La Prestación Del Servicio Público De Autotransporte Federal De Pasajeros Con Origen O Destino En El Aeropuerto Internacional De La Ciudad De México	DE-015-2013	126,180,000.00	Transportation

Table 4: List of cases considered to measure law enforcement activity.*

*Methodology: I have selected cases sanctioned with an administrative fee between 1999 and 2018 in the area of abuse of dominance and vertical restriction practices (called “relative monopolistic practices” in Mexico). I have not included the cases that were appealed and repealed by the MCA through its internal appeal process. As fees, I took the fines reported after the internal appeal and before the appeal in courts. For Mexico, I have relied on yearly reports and the online database of the MCA to find the cases. For Turkey I have used Gündüz 2018 and the online database of the TCA.

MEXICO		TURKEY	
1992	- The Mexican Competition Law (la Ley Federal de Competencia Económica) legislated	**1994**	- The Turkish Competition Law (4054 Sayılı Rekabetin Korunması Hakkında Kanun) legislated
1993	- The Mexican Competition Authority (la Comisión Federal de Competencia (CFC)) became functional - First chairman of the authority: Santiago Levi	**1997**	- The Turkish Competition Authority (Rekabet Kurumu (RK)) became functional - First chairman of the authority: Aydın Ayaydın - First guidelines published by translating the EU commission's guidelines
1994	- The second chairman of the authority appointed: Fernando Sánchez Ugarte		
1998	- Internal regulations specify the "catch-all" article on the relative monopolistic practices	**1999**	- The second chairman of the authority appointed: Tamer Müftüoğlu
2003	- The Mexican Supreme Court finds Fraction VII of Article 10 (the "catch-all" provision on relative monopolistic practices) of the Mexican Competition Law unconstitutional	**2003**	- First amendment to the Turkish Competition Law: • Strengthened the dawn-raid provisions • Increased the ability to collect sanctioned fines - Third chairman of the RK: Mustafa Parlak
2004	- The third chairman of the authority appointed: Eduardo Pérez Motta - The Mexican Supreme Court finds Articles 14 and 15 (about "state barriers over trade") of the Mexican Competition Law unconstitutional	**2004**	- Second amendment to the Turkish Competition Law: • Changed the autonomous budget of the RK: new corporations or corporations that increase their capital will pay 0.04% of capital payments to RK's budget
2005	- The OECD peer-review report on Mexican competition law system	**2005**	- Third amendment to the Turkish Competition Law: • Ending the reporting requirement for agreements; the RK can declare exemptions ex officio • Commissioners cannot participate in the investigations • The number of commissioners reduced from 11 to 7. - Vertical Agreements Guidelines
2006	- First amendment to the Mexican Competition Law: • Unconstitutional articles eliminated from the law • Leniency program introduced • Relative monopolistic practices detailed with 5 more practices • Defining the concept of "economic agent" • CFC can perform dawn-raids (only after informing) • Higher fines for anticompetitive practices; fines aggravated at the	**2006**	- The OECD peer-review report on Turkish competition law system

	second infringement; ability to divest at the third infringement • Merger thresholds increased • Senate can challenge the commissioners appointed by the President CFC can issue binding opinions on the secondary laws on the regulated industries prepared by the government	**2007**	- Fourth chairman of the RK: Nurettin Kaldırımcı - The appeal court finds the "initial investigation" unlawful
2007	- Amendment to regulations and organizational changes in the CFC: • separation of the relative practices, absolute practices, and regulated industries divisions, • separation of the division to handle cases at the appeal courts	**2008**	- Fourth amendment to the Turkish Competition Law: • Leniency program introduced • Allowed the RK to determine the fine amounts by its guidelines • Allowed fining individuals
		2009	- Leniency Regulations - Fine Regulations
2011	- Second amendment to the Mexican Competition Law: • Higher fines • Criminal sanctions can be imposed • Dawn-raids can be performed without prior notification • CFC can introduce preliminary measures that suspend action before case is finalized • CFC can settle in investigations • "Collective dominance" concept introduced • The creation of specialized courts • Damage claims can be filed in courts	**2011**	- New executive orders: • Eliminated the budgetary and administrative autonomy of the RK • Changes in the election of commissioners: the government appoints 4/7 of the members (it used to be 2/7) - New Merger Guidelines: regulates the commitments
2012	- New regulation and internal organizational changes in the CFC: • The commission can conduct oral hearings before making a decision • The executive secretary is appointed by the commission, not the chairman; does not need to report to the chairman	**2012**	- New law levels public employees' salaries (reduction for the RK employees)
2013	- Constitutional amendment: • The creation of a new competition authority (Comisión Federal de	**2013**	- Constitutional Court decision finds the Article 24 (allowing the RK to create and

	Competencia Económica (COFECE)) • Separation of the telecommunications sector from the jurisdiction of the COFECE and its assignment to the federal telecommunications regulator (Instituto Federal de Telecomunicaciones (IFT)) • COFECE can conduct "market investigations to detect structural barriers to market entry and can order divestitures or recommend new regulations to the sectoral regulators. • COFECE's internal organization changed: investigative unit separate from the due-process unit and both separate from the commission • Commissioners' appointment changed: Self-nominated candidates have to take an exam administered by a committee composed of autonomous public authorities. The President selects from those that receive the highest scores and the Senate ratifies the candidates. • The creation of a specialized court for COFECO's decisions • COFECO's actions can only be challenged in federal courts after investigations are concluded		cancel its own cadres) of the Turkish Competition Law found unconstitutional. - New Group Exemption Guidelines - Leniency Guidelines
2014	- Latest amendment to the Mexican Competition Law: • Absolute monopolistic practice (cartel) rules expanded • Criminal penalties increased for cartels and can also be imposed for obstructing dawn-raids COFECE can conduct market studies and issue non-binding opinions		
2015-2018	- Substantial increases to COFECE's budget by the Parliament - Various new guidelines on investigation procedures, leniency, sanctions and exchange information between competitors	**2018**	- New executive order connects all the independent authorities and agencies, including the RK, to the President of the Republic. All the commissioners are appointed by the President.

Table 5: The timeline of major statutory changes and institutional amendments to the competition law systems in Turkey and Mexico

NO	Interviewee Occupation (at the time of the interview)	Interview Method	Interview Date	Current or past experience in the competition authority or the drafting of the competition law
TURKEY				
1	Lawyer at a law firm	Interview in person in IST	September 6th, 2018	yes
2	Lawyer at a law firm	Conversations in IST	September 6th, 2018	no
3	Lawyer at a law firm	Conversations in IST	September 6th, 2018	no
4	Lawyer at a law firm	Interview in person in IST	September 10th, 2018	no
5	Lawyer at a law firm	Group interview in person in IST	September 10th, 2018	no
6	Consultant at a law firm	Group interview in person in IST	September 10th, 2018	no
7	Consultant at a law firm	Interview in person in IST	September 18th, 2018	yes
8	Lawyer at a law firm	Interview in person in IST	September 19th, 2018	yes
9	Lawyer at a law firm	Interview in person in IST	September 21st, 2018	yes
10	Lawyer at a law firm	Interview in person in IST	September 26th, 2018	no
11	Consultant at a law firm	Interview in person in IST	September 26th, 2018	yes
12	In-house compliance officer	Interview in person in IST	October 1st, 2018	no
13	In-house compliance officer	Interview in person in IST	October 1st, 2018	yes
14	Lawyer at a law firm	Interview in person in IST l	October 5th, 2018	no
15	Lawyer at a law firm	Group interview in person in IST	October 5th, 2018	no
16	Consultant at a law firm	Group interview in person in IST	October 5th, 2018	no
17	Administrator at TCA	Interview in person in Ankara	October 8th, 2018	yes
18	Administrator at TCA	Interview in person in Ankara	October 8th, 2018 + December 27th, 2018	yes
19	Chief case-handler at TCA	Interview in person in Ankara	October 8th, 2018	yes
20	Chief case-handler at TCA	Interview in person in Ankara	October 9th, 2018	yes

21	Chief case-handler at TCA	Interview in person in Ankara	October 9th, 2018	yes
22	Case-handler at TCA	Interview in person in Ankara	October 10th, 2018	yes
23	Case-handler at TCA	Interview in person in Ankara	October 10th, 2018	yes
24	Academic/independent consultant	Interview in person in IST	October 15th, 2018	no
25	In-house compliance officer	Interview in person in IST	October 15th, 2018	yes
26	Lawyer at a law firm	Interview in person in IST	October 16th, 2018	no
27	Academic/independent consultant	Interview in person in IST	October 16th, 2018	no
28	In-house compliance officer	Interview in person in IST	October 17th, 2018	yes
29	In-house compliance officer	Interview in person in IST	October 17th, 2018	yes
30	Consultant at a law firm	Interview in person in IST	October 18th, 2018	yes
31	In-house compliance officer	Interview in person in IST	October 18th, 2018	yes
32	Independent consultant	Interview in person in IST	December 12th, 2018	yes
33	Lawyer at a law firm	Interview in person in IST	December 13th, 2018	no
34	Lawyer at a law firm	Interview in person in IST	December 13th, 2018	no
35	Lawyer at a law firm	Interview in person in IST	December 14th, 2018	yes
36	Independent consultant	Interview in person in IST	December 17th, 2018	yes
37	Lawyer at a law firm	Interview in person in IST	December 18th, 2018	yes
38	Lawyer at a law firm	Interview in person in IST	December 18th, 2018	no
39	Independent consultant	Interview in person in Ankara	December 24th, 2018	yes
40	Chairman of the TCA	Interview in person in Ankara	December 25th, 2018	yes
41	Vice-Chairman of the TCA	Interview in person in Ankara	December 25th, 2018	yes
42	Consultant at a law firm	Interview in person in Ankara	December 26th, 2018	yes
43	Independent consultant	Interview in person in Ankara	December 27th, 2018	yes
44	Academic/independent consultant	E-mail correspondence and phone conversations	May 30th, 2019	yes
45	Lawyer at a law firm	E-mail correspondence	June 27th, 2019 + July 9th, 2020	yes
46	Academic independent consultant	E-mail correspondence and phone conversations	August 6th, 2019	no
47	Consultant at a law firm	Phone conversations	August 16th, 2019	yes

MEXICO				
48	Chief case-handler at MCA	Group interview in person in MC	January 22nd, 2019	yes
49	Case-handler at MCA	Group interview in person in MC	January 22nd, 2019	yes
50	Academic/independent consultant	Interview in person in MC	January 23rd, 2019	no
51	Vice-Chairman of MCA	Interview in person in MC	January 28th, 2019	yes
52	Chief case-handler at MCA	Interview in person in MC	January 28th, 2019	yes
53	Chief case-handler at MCA	Interview in person in MC	January 29th, 2019	yes
54	Case-handler at MCA	Interview in person in MC	January 29th, 2019	yes
55	Case-handler at MCA	Interview in person in MC	January 29th, 2019	yes
56	Academic	Conversations in MC	January 30th, 2019	no
57	Administrator at the Mexican Energy Regulator	Group interview in person in MC	January 31st, 2019	yes
58	Administrator at the Mexican Energy Regulator	Group interview in person in MC	January 31st, 2019	yes
59	Lawyer at a law firm	Interview in person in MC	February 5th, 2019	no
60	Commissioner at MCA	Interview in person in MC	February 6th, 2019	yes
61	Case-handler at MCA	Interview in person in MC	February 6th, 2019	yes
62	Case-handler at MCA	Interview in person in MC	February 6th, 2019	yes
63	Academic/independent consultant	Conversations in MC	February 6th, 2019	yes
64	Academic	Interview in person in MC	February 7th, 2019	no
65	Lawyer at a law firm	Interview in person in MC	February 8th, 2019	no
66	Lawyer at a law firm	Interview in person in MC	February 8th, 2019	no
67	Judge	Group interview in person in MC	February 11th, 2019	no
68	Lawyer at a law firm	Interview in person in MC	February 11th, 2019	yes
69	Consultant at a law firm	Interview in person in MC	February 12th, 2019	yes
70	Administrator at MCA	Interview in person in MC	February 12th, 2019	yes
71	Lawyer at a law firm	Interview in person in MC	February 14th, 2019	no
72	Lawyer at a law firm	Interview in person in MC	February 19th, 2019	no
73	Chairwoman of MCA	Interview in person in MC	February 19th, 2019	yes
74	Lawyer at a law firm	Interview in person in MC	February 20th, 2019	yes
75	Lawyer at a law firm	Interview in person in MC	February 26th, 2019	yes
76	Chief case-handler at MCA	Interview in person in MC	February 26th, 2019	yes

77	Chief case-handler at MCA	Interview in person in MC	February 27th, 2019	yes
78	Lawyer at a law firm	Interview in person in MC	February 27th, 2019	yes
79	Lawyer at a law firm	Interview in person in MC	March 4th, 2019	yes
80	Lawyer at a law firm	Interview in person in MC	March 5th, 2019	no
81	Lawyer at a law firm	Interview in person in MC	March 5th, 2019	no
82	Lawyer at a law firm	Interview in person in MC	March 5th, 2019	yes
83	Lawyer at a law firm	Interview in person in MC	March 6th, 2019	yes
84	Chief case-handler at MCA	Interview in person in MC	March 6th, 2019	yes
85	Lawyer at a law firm	Interview in person in MC	March 7th, 2019	yes
86	Chief case-handler in the Mexican Telecommunications Regulator	Group interview in person in MC	March 8th, 2019	yes
87	Case-handler in the Mexican Telecommunications Regulator	Group interview in person in MC	March 8th, 2019	yes
88	Case-handler in the Mexican Telecommunications Regulator	Group interview in person in MC	March 8th, 2019	yes
89	Lawyer at a law firm	Interview in person in MC	March 11th, 2019	no
90	Lawyer at a law firm	Interview in person in MC	March 11th, 2019	no
91	Consultant at a law firm	Interview in person in MC	March 12th, 2019	yes
92	Reporter of OECD	Interview in person in MC	March 13th, 2019	no
93	Lawyer at a law firm	Interview in person in MC	March 13th, 2019	no
94	Academic/independent consultant	Interview in person in MC	March 14th, 2019	yes
95	Academic/independent consultant	Interview in person in MC	March 15th, 2019	yes

Table 6: List of all interviews*

*Note on acronyms: TCA: Turkish Competition Authority, MCA: Mexican Competition Authority, IST: Istanbul, MC: Mexico City

	Interviewees in Mexico	Interviewees in Turkey	SUM
Occupation (at the time of the interview)			
Lawyer at a law firm	18	17	35
Chief case-handler in Competition Authority	6	3	9
Case-handler in Competition Authority	5	2	7
Academic independent consultant	4	4	8
Academic	2	0	2
Employee of the Energy Regulator	2	0	2
Employee of the Telecommunications Regulator	3	0	3
Consultant at a law firm	2	7	9
Administrator at the Competition Authority	1	2	3
Chairman/woman of the Competition Authority	1	1	2
Commissioner in Competition Authority	1	0	1
Judge	1	0	1
Reporter for the OECD	1	0	1
Vice-Chairman of the Competition Authority	1	1	2
Independent consultant	0	4	4
In-house compliance officer	0	6	6
Current or past experience in the Competition Authority or the drafting of the competition law			
YES	33	30	63
NO	15	17	32
TOTAL	**48**	**47**	**95**

Table 7: Basic information about the interviewees

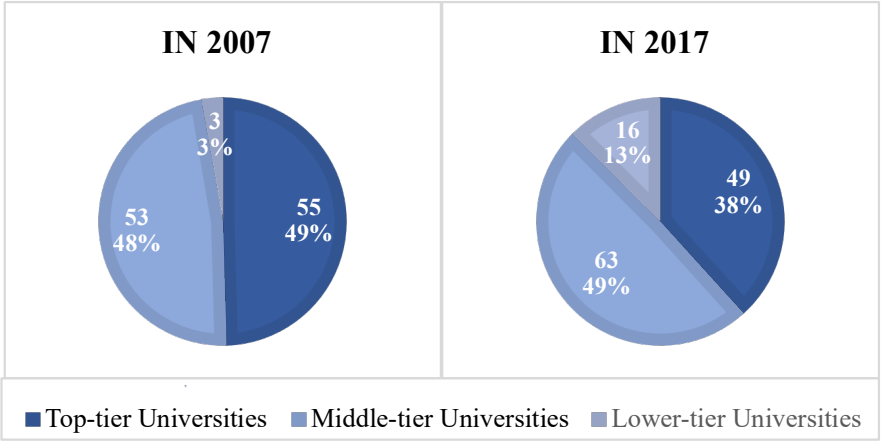

Figure 7: The education of case-handlers at the Turkish Competition Authority when they were employed (source: the Turkish Competition Authority Annual Reports)

University	Country	Number
University of Essex	UK	9
University of Michigan	USA	9
Queen Mary College	UK	7
LSE	UK	6
University of Illinois	USA	5
Columbia University	USA	5
University of East Anglia	UK	4
Harvard University	USA	4
KU Leuven	Belgium	2
Dundee University	UK	2
Vanderbilt University	USA	2
Tilburg University	Netherlands	2
Carnegie Mellon University	USA	2
Penn State	USA	2
Freie Universität Berlin	Germany	2
Georgetown	USA	2
Duke University	USA	2
Kings College	UK	2

Table 8: The most common universities the case-handlers of the Turkish Competition Authority (past and present) received their foreign post-graduate degrees by 2019.

Commissioner	Post-graduate degrees	Country	Previous Appointment
Before the 2013 reforms			
Levy	PhD in Economics at Boston Uni	USA	Ministry of Economy
García	.	.	.
Alba	.	.	.
Castro	PhD in Law at Sorbonne	France	University Professor
Etienne	LLM at Harvard	USA	Ministry of Finance
Ugarte	PhD in Economics at UChicago	USA	Ministry of Economy
Iduñate	PhD in Economics at Yale	USA	Ministry of Education
Rocha	PhD in Economics at Stanford	USA	University Professor
Gergely	.	.	Ministry of Economy
Motta	PhD in Economics at UCLA	USA	Ministry of Economy
Elcoro	PhD in Economics at UT-Austin	USA	Office of the President
Bernés	LLM at Warwick	UK	Office of the President
Pardo	PhD in Economics at UCLA	USA	Office of the President
Sánchez	LLM at Harvard	USA	Office of the President
After the 2013 reforms			
Prieto	MBA at ITAM	Mexico	NGO
Sabido	PhD in Economics at Stanford	USA	Consultant at MCA
Astiazarán	PhD in Economics at UT-Austin	USA	General director at MCA
Chombo	PhD in Economics at Rice Uni	USA	General director at MCA
Gloria	LLM at Warwick	UK	General director at MCA
Zermeño	PhD in Economics at UChicago	USA	Ministry of Economics
Melgoza	MA in Economics at El Colegio de México	Mexico	General director at MCA
Rodríguez	LLM at Cambridge	UK	Director at MCA
Ramírez	LLM at Università di Bologna	IT	General director at MCA
Contreras	PhD in Economics at Uni of Surrey	UK	General director at MCA

Table 9: The commissioners of the Mexican Competition Authority (1993-2020)

		MEXICO (N:22)	TURKEY (N:27)
CHICAGO	"consumer"* (yes/no) [*more than 5]	15 (68%)	16 (59%)
	"consumer welfare" (yes/no)	6 (27%)	6 (22%)
	"price"* (yes/no) [*more than 10]	11 (50%)	22 (81.4%)
	"price increase" (yes/no)	10 (45%)	15 (55.5%)
	"efficiency" (yes/no)	9* (40%)	15 (55%)
ORDOLIBERAL	"essential facilities/inputs" (yes/no)	11 (50%)	6 (22%)
	"prevent access" OR "foreclose" (yes/no)	21 (95%)	18 (67%)
	"displace (competitors)" (yes/no)	21 (95%)	12 (44%)
	"(market) structure" (yes/no)	2 (9%)	12 (44%)
	"right to sell/buy" OR "right/freedom to compete" (yes/no)	22 (100%)	22 (81%)

Table 10: Frequency of dictionary terms associated with Chicago School and Ordoliberal School (on the cases reported between 1999 and 2008)*

*Note on methodology: The keywords for the Chicago School and Ordoliberal School were selected based on the existing literature on these schools of thought and also the work of Ergen & Kohl (this work uses some of the words selected here). I have downloaded the main "resolution" documents of the MCA and TCA, which explain the main findings and arguments of the case and used OCR scanning and searched for these key words. Given the universal mention of some words (like price and consumers) in these sample of cases, I have decided to use the frequency of these words as an indicator of assumption of a particular school of thought. I have coded them when they were used more than 5 or more than 10 times. I found the differences between Turkey and Mexico very limited and unclear through this approach, therefore, I did not advance this type of research further.

	MEXICO			TURKEY		
	Chi	Ordo	N/A	Chi	Ordo	N/A
What is seen as a barrier to entry? CHI: laws and regulations; ORDO: inability to invest	13	17		11	8	9*
How is the relevant market defined? CHI: expansively, considering substitutions; ORDO: narrowly, considering the difficulty to switch production/consumption	9	12	1 (not clear)	9	18	
How the market power/dominant position defined? CHI: ability to increase prices; ORDO: market share; or absence of competitors	1	21		0	19	8**
How the harm to competition is defined? CHI: reduction in consumer welfare (increase in prices); ORDO: competitors exit the market (displacement) or cannot enter the market	2	16	4	3	16	8**
Are intentions important/aggravating factor? CHI: no, ORDO: yes	0	21	1 (not clear)	3	13	11***

*Irrelevant
**Not defined
***Both factors not considered

Table 11: Factors cited as causes for the Authority decisions†

†Note on methodology: Based on the existing literature on the differences between the Chicago School and Ordoliberal School of antitrust policy, I have selected these five main questions as differentiating questions for these schools. I have read all the cases in the sample (n:49) and looked for the answers given to these questions in each case. The frequency of cases in Turkey in which these questions were not answered clearly in the case files have led me to drop this research approach.

7. CONCLUSION

In this conclusion, I reflect on my research's theoretical and practical implications for understanding the antitrust laws' effects on markets, economic globalization and institutional diffusion, and the new questions that this research has brought up for future research. Three main findings have emerged from my study. First, antitrust laws and policy have changed significantly since the 1980s regarding corporate monopolization. Both in their national form inside the US and their international form as a global norm, antitrust policies have assumed a new role that aids (not prevents) the increasing concentration of economic power in a few corporations. Second, despite this global convergence on a new role, the global diffusion of antitrust laws in the books have allowed nation-states to create their own legal hybrids and interpretations of antitrust. These local variations are not simply "gaps" or less-than-ideal implementations; they can even go beyond and assume different roles than those globally ascribed to them. Third and lastly, the causes of variations in antitrust policy across nations and time have less to do with who controls these policy debates but more to do with how the conflicting interests and perspectives are coordinated and reconciled inside legal reform, enactment, and implementation processes. It is the politics of negotiation, rather than domination, that decides how antitrust laws and policies shape markets.

By focusing on antitrust laws and policy, this research also tries to offer a solution to one of the central debates in current capitalism: Why did the increasing liberalization of markets from public controls, and the expansion of financial opportunities and the international movement of capital in the last four decades coincide with the growing presence of monopolies, i.e., large corporations that control single or multiple markets of the economy? After all, it was

one of the central goals of the so-called "neoliberal" or "Washington Consensus" economic policies to create more competitive, efficient, and productive markets that can increase economic welfare for all. Yet, there is now abundant evidence that suggests corporate markups have risen tremendously in the last four decades at the expense of the consumers' access to products and workers' wages and workplace safety (Philippon 2019; De Loecker and Eeckhout 2017). Thus, while a degree of market concentration can be necessary to create stable and productive markets, the current levels of monopolization have gone far beyond and have become detrimental to most participants of markets.

It is ironic the growth of monopolization in the last four decades coincided with the most active decade in antitrust law enforcement. Before the 1990s, antitrust laws were only present in the books in a few Western advanced economies and arguably only enforced strongly in the US (for example, the European Union did not have an active merger control system until the 1990s). Currently, almost every country in the world has some basic antitrust law rules and some degree of antitrust enforcement in practice. Although it is impossible to measure the total amount of antitrust law enforcement worldwide, significant signs suggest this activity is very high. Today, a major multinational company closing a merger or acquisition transaction with another multinational company must declare and attain clearance from dozens of national competition law authorities.[220] These regulatory compliance requirements have fueled the sector of competition law consultancy, creating multinational firms like Compass Lexicon that continue to grow and branch out in different competition law jurisdictions.[221] In addition, the international

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[220] See the Google and Motorola merger clearance filings in multiple jurisdictions: https://www.infoworld.com/article/2619911/google--motorola-file-for-merger-clearance-in-many-countries.html.
[221] See the recent Global Competition Review report: https://media.thinkbrg.com/wp-content/uploads/2020/06/19094619/288_GCR_Econ20_2013.pdf (accessed on June 20th, 2021).

conferences on competition laws organized by private bars or national antitrust authorities have also increased in numbers and attendance.[222] Such global interest in competition law and policy was absent before competition laws diffused around the world in the 1990s.

We must acknowledge the contradictions inside the globalization of antitrust regulations to understand why this globalization coincided with the global increase in monopolization. Powerful nations like the US and international organizations continue to encourage the geographical expansion of competition laws into new countries. To exert this influence, they use the political and economic weaknesses of the states in the Global South, as well as their own technical experience and "expertise" in this area of policy. However, these global actors also control the competition law enforcement activity in these nations by shaping the antitrust conceptualizations and interpretations of law they work with. As a result, they discourage, rather than encourage, the vigorous enforcement of competition laws over monopolies and direct antitrust policies to limit only the horizontal agreements between competitors. Consequently, the globalization of antitrust laws and policy may have created a new patchwork of national regulations over global markets. Still, it has also "domesticated" antitrust policy by acclimating it to neoliberal ideas and organization of markets. The result is an institution radically different from its original form that helps create and expand monopolization.

However, since the globalization of antitrust laws relied on each nation legislating their own competition laws and implementing them with their own enforcement authorities, it can never create a complete harmonization among national antitrust policies of nation-states. There

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[222] Organizing international conferences on competition law and policy is recommended to national competition authorities by UNCTAD as a best-practice (see https://unctad.org/system/files/non-official-document/ccpb_SCF_AdvocacyGuidelines_en.pdf)

remains ample room for the influence of local interests, professional expertise groups and organizational facets of enforcement authorities to shape the actual practices of competition laws. These factors can create international antitrust policy variations, with some nations pursuing a more active enforcement policy over monopolies. Such variations alarm multinational corporations and global financial interests and develop new tensions between countries in international trade relations. This happened, for example, when the EU Commission blocked the GE/Honeywell merger after the US authorities cleared it in 2001, or more recently with the sanctions the EU Commission issued on Google for monopolization (Gerber 2003). While this economic and political backlash can force nations to fall back in line, these international and periodical variations with more aggressive antitrust enforcement can inspire the collapse of the current system of antitrust laws in the future. The moment antitrust policy assumes a new role in different nations in more aggressively addressing monopolization, the globalization of antitrust will have completely different consequences for the global economy.

1. The Historical Transformations in Antitrust Laws and Policy

This dissertation has shown that antitrust laws and policy have passed through three main transformations in the last four decades. First, the country with the oldest and strongest antitrust law regime, the United States, made essential revisions to how it interprets and implements antitrust laws that had stood unchanged for decades. From the early-1940s until the end of 1960s, the US antitrust policy tried to achieve multiple social and political goals by expansively regulating both the horizontal coordination agreements between small economic agents and the hierarchical integration and coordination by large monopolistic agents. By the end of the 1960s,

the existing contradictions within this antitrust policy and the growing economic problems with conglomerate mergers and inflation in consumer goods prices had led antitrust policy actors to seek substantial reforms.

Since the mid-1970s, the US antitrust laws and policy assumed a more permissive position towards monopolistic mergers and hierarchical coordination agreements. At the same time, they increased their restrictions over horizontal coordination agreements between competitors, including small economic agents. The Chicago School of law and economics emerged as the dominant paradigm inside the US antitrust policy, directing enforcement goals towards attaining "consumer welfare" or increasing the aggregate output in the economy. The other social and political purposes attributed to the antitrust policy that did not serve these economic interests were discarded. This paradigm found significant support from the antitrust agencies, namely the DOJ's Antitrust Division and the FTC, the federal courts, and the Supreme Court. On a case-by-case basis, these authorities changed the previous case law in antitrust law enforcement and created a new interpretation of antitrust rules that became the law of the land.

Domestic considerations shaped these national reforms in the US antitrust policy. While the US corporations have always complained that the US antitrust regulations put them at a disadvantage in international trade, little attention was given to these complaints during these domestic policy reforms. However, as the US trade deficit reached unprecedented levels under the trade liberalization reforms of Presidential Reagan, the complaints about the "US exceptionalism in antitrust" started to gain political salience. By this point, the US antitrust laws had already weakened their regulations over monopolies under the influence of the Chicago School paradigm substantially. Therefore, the business complaints about antitrust laws and policy were not focused on their excessiveness at home in the US but their absence abroad.

The second major transformation in antitrust policy was its establishment as a global norm, i.e., an institution that every member of the international community of nation-states with capitalistic markets must have. The US had already promoted the diffusion of antitrust laws to other countries in the aftermath of the Second World War– mainly to German and Japan. Still, these were politically motivated diffusion efforts that remained limited to a few geographies. By the late 1980s, the European supranational competition law regime, enforced by the European Commission and supervised by the European Court of Justice, had caught up with the US antitrust regime in terms of its activity, resources, and proficiency. However, most non-Western countries in the world's developing regions did not have any competition laws or enforced them in minimal cases.

In the 1990s, the US antitrust policy field turned its full attention to diffusing antitrust laws and policy norms abroad. This new policy goal was stimulated by the competitiveness crisis of American manufacturers under strong pressures from foreign manufacturers, mainly from Japan. The American producers had lost significant domestic and international market shares to foreign competitors as trade liberalized worldwide, which created an unprecedented level of US trade deficit in the mid-1980s. These corporate failures stimulated various private and public efforts to promote antitrust laws as a complement to trade and economic liberalization reforms of the Washington Consensus (or neoliberalism). American manufacturers succeeded in convincing Congress and the Bush administration that the trade partners of the US must have similar antitrust laws.

However, despite the influence of the US on the creation of global antitrust norms, there remains substantial room for cross-national variations. After the “transplantation” of antitrust laws in Germany at the end of the Second World War, the EU competition law regime has

evolved in its own internal dynamics and local intellectual influences (namely, the influence of the Ordoliberal School), which led to its divergence from the US antitrust regime. The EU competition regime uses stricter and more "formalistic" criteria to measure companies' market power and perceives corporate monopolization more negatively than the US antitrust regime under the Chicago School influence. The EU and US competition laws also vary in terms of their approaches to the decisions of public authorities that could restrict or bias market competition. The EU's powerful state-aid rules impose substantial limitations over the decisions of public authorities that distribute economic benefits to market agents and shape competition. At the same time, the US antitrust laws have an explicit exemption for public authorities' decisions. Besides creating significant tensions between the US and the EU authorities, these legal and policy differences have also multiplied the options for developing countries, which were pressured to adopt competition laws in the 1990s.

The third central transformation in antitrust laws and policy was their further institutional diversification under globalization. As antitrust laws and policy diffused to the developing regions of the world in the 1990s, the possibilities for design and interpretation variability increased. Turkey and Mexico, which were pressured to adopt competition laws through their free-trade agreements with the EU and the US respectively, created different competition laws, both from each other and from the global hegemons that they were pressured by. As Carruthers and Halliday observed concerning bankruptcy laws, "legal variation among advanced countries created the possibility for variation among developing countries" (T. Halliday and Carruthers 2009a, 406). Similarly, the so-called "Atlantic divide" in competition policy between the US and the EU has allowed Turkey and Mexico to adopt different approaches to antitrust regulations over monopolies and state actors.

Developing countries diversify competition laws and policy by borrowing selectively from and rearranging the characteristics of Western advanced economies' competition law regimes. Turkey's competition laws followed the example of EU competition laws by imposing restrictive and formalistic limits on dominant corporations. Mexico's competition laws imitated US antitrust laws by creating a more flexible and relaxed system of rules for monopolistic corporations. However, diverging from EU competition laws, Turkey's competition laws exclude public authorities from surveillance. Unlike the US antitrust regime, Mexico's competition laws impose substantial restrictions over public authorities' decisions affecting competition. In other words, while restricted by the institutional design preferences of their closest powerful nation neighbors, Turkey and Mexico could also borrow from the other internationally available institutional models to create their own "institutional bricolage".

The cross-national variations in antitrust laws and policy also emerged in their implementations. The new competition laws must create new institutions and institutional connections between different parts of the state to be put into practice. In most cases, in legal systems with the civil law tradition, new administrative authorities are created to enforce these new competition laws. However, these new authorities are born into an institutional environment that they cannot control or shape. They must work with the existing courts and judicial system to put competition law into practice, in one way or another. The new authorities and the courts must agree on some enforcement principles for competition laws to bring about a stable and reliable flow of enforcement outputs. Without sufficient levels of enforcement, the existence of come competition laws in the books ceases to have any practical implications for market actors. Therefore, national variations emerged in not only how competition laws are designed, but also how they act on the existing economic structural conditions in different countries.

While documenting these three transformations in antitrust laws and policy at the global level, I have also analyzed the causes of institutional change at four levels: institutional reforms, diffusion, enactment, and implementation. In the following pages, I will elaborate further on these causes, going beyond the analyses offered in each chapter.

2. Institutional Reform

The second chapter of this dissertation evaluated the reforms in the US antitrust policy in the 1970s. The existing scholarship suggests that these reforms resulted from the Chicago School of law and economics' growing influence over antitrust laws' interpretation and enforcement by the courts and antitrust agencies (Davies 2010; L. M. Khan 2017; Vaheesan 2017; Wu 2018). This explanation highlights the gradual, informal changes in antitrust practice without the need for swift, formal changes. However, although the role of the Chicago School in transforming the US antitrust laws and policy is undeniable, this common explanation offers incomplete and misleading accounts of how this school came to dominance. It underplays the importance of breaking down the previous antitrust policy system, the formal changes in antitrust laws, and the debates in Congress over the future direction of antitrust policy in the 1970s.

Some of the existing accounts have suggested that the sponsorship of big business groups and conservative politicians have carried the Chicago School ideas to the center of US policymaking (Davies 2010; Philippon 2019). Still, I have found little evidence for the power of big business groups and conservative governments in shaping the antitrust policy agenda in the 1970s. Instead, I have found a Congress strongly motivated in strengthening and upgrading antitrust laws to resist the attacks from big business groups, the Chicago School, and the

conservative governments in the 1970s. In the congressional committees and subcommittees of antitrust policy, the Congressmen believed that the US antitrust laws and policy needed significant reforms. Still, they diverged sharply from these groups on the kinds of reforms they intended to make. How did these variations in perspectives emerge in antitrust policy, and how did the Chicago School manage to rise to prominence despite these rival perspectives and the opposition from Congress?

The findings in this chapter suggest that there are three levels of interpretation and narrative framing that shape institutional reforms. First, some economic changes and events need to be interpreted as societal problems or "crises" by policy actors to create momentum for institutional change. It is not sufficient that these changes take place in objective reality; they also need to be framed and perceived as societal problems by these actors. Here, the economic actors whose interests are harmed by these economic changes are the main sponsors of this reframing. In the case of the US antitrust laws, there were two main economic events in the late 1960s that were increasingly discussed by policymakers. The mergers and acquisitions that combined corporations working in different sectors of the economy had increased throughout the 1960s. They had created very large businesses (conglomerates) that controlled multiple sectors of the economy. Also, the prices of consumer goods increased to unprecedented levels in the early 1970s. These significant changes were presented as societal problems that alarmed both the Democrats and the Republicans in Congress by the consumer advocacy groups (for example, the influential group organized by Ralph Nader).

However, bringing economic crises to the attention of political actors is not sufficient. The second step of stimulating institutional reforms is to frame these societal problems in connection to particular policy decisions or "mistakes". At this step, the economic groups that

have raised the issues need to form alliances with some intellectual groups whose theories and concepts on a particular policy could inform their framing. In the early 1970s, two leading schools of intellectual thought competed inside the academic antitrust field: On the one hand, the "old school" in antitrust law and policy scholarship, based on the 1950s' "structuralist" thought, supported by the Harvard Law School; on the other hand, the "new school" integrated the neoclassical economic thought with legal studies at the University of Chicago. While the former saw conglomerate mergers and consumer goods inflation as consequences of incorrect antitrust policies, the latter suggested that these economic events were unrelated to antitrust policies. Therefore, the consumer groups and their political allies used the old school to stimulate institutional reforms in antitrust policy. This revived and reenergized this old school inside Congressional debates.

This new, more radical version of the old school in antitrust thought was different from the accepted orthodoxy by antitrust enforcement authorities. The accepted orthodoxy in antitrust policy was shaped in the 1950s and 1960s and had argued that conglomerate mergers did not create antitrust concerns because they did not increase concentration in a single market. However, the radical old school argued that antitrust should prosecute and prevent conglomerate expansion because it expands the "aggregate concentration" in an economy. Similarly, the existing antitrust orthodoxy had supported the Keynesian school by perceiving economy-wide inflation solely as a problem of monetary policy, not concerning antitrust regulations. According to the radical old school proponents, the antitrust orthodoxy overlooks the companies with monopoly power administratively controlling prices and increasing them above competitive levels. The example of the OPEC cartel increasing global oil prices in early 1970s was used to illustrate this point.

This second stage of framing societal problems in relation to particular policy decisions is followed by the third and last step towards institutional reforms: generating policy solutions. Suppose some economic events are identified as joint problems related to some mistakes in a particular policy; what reforms should be made to this policy to fix those problems? My research reveals a significant possibility at this stage for the original groups of economic actors and their intellectual and political allies to be sidetracked by other economic actors and intellectual and political groups that offer their own policy solutions. Sometimes the actors that determine what needs to be changed are not the ones that decide what changes are made at the end of the day. In the US antitrust policy, the consumer groups, and the old school of antitrust that stimulated antitrust policy actors to change the US antitrust policy were not the only ones that decided which changes were made to the US antitrust policy in the 1970s.

This divergence can occur when policy areas like antitrust become disassociated from politics and dominated by non-elected bureaucratic experts. For example, in monetary policy, the growing independence of central banks and the reliance on central bank economists have placed significant limits over how politicians and political forces can shape monetary policies (Polillo and Guillén 2005). Similarly, the US antitrust policy field had already become highly technocratic since the 1940s, increasingly expanding the autonomy of antitrust agencies from political administrations and the Congress and relying on the technocratic knowledge of economists and legal experts in interpreting antitrust laws. These agencies had identified different problems with antitrust enforcement. Following the Chicago School critique, they believed that the real problem with the existing antitrust orthodoxy of the late 1960s was being distracted by too many social and political goals and not prioritizing economic efficiency. This

created a different problem of "chilling" market competition and the efficient and cheaper production of goods in the market.

These two different perspectives and set of actors came head-to-head in the third stage of antitrust policy reforms and proposed radically different reforms to antitrust laws in the early 1970s. On the one hand, the Neal Report of 1969 presented the perspective of the "old school". It recommended a series of amendments to antitrust laws to expand their reach onto conglomerate mergers and the calcified structures of market concentration. The consumer advocates supported these proposals. Senator Philip Hart, the chairman of the antitrust subcommittee in the Senate, sponsored multiple acts to legislate these changes in Congress. On the other hand, the Stigler Report of 1969 presented the "new school" perspective and recommended that some parts of antitrust laws are eliminated or severely curtailed. Big business groups supported these recommendations. The antitrust agencies– the DOJ and the FTC– lobbied Congress to introduced multiple bills to repeal parts of antitrust laws.

However, both the reforms proposed by the old school and the new school failed in legislation. These perspectives had to be reconciled because Congress was forced to share its authority with the DOJ and FTC. The results of this reconciliation were two legislations: the 1974 Tunney Act, which increased the criminal sanction on antitrust law violations, and the 1976 Hart-Scott-Rodino (HSR) Amendment, which required companies to clear their merger and acquisition transactions with the antitrust agencies before they close them. These two amendments satisfied both the Congress (and the old school) and the antitrust agencies (and the new school). The former could claim that they have expanded antitrust regulations to make them more active in pursuing conglomerate-type concentrations in power and the administrative

management of prices; the latter could claim that they could expand the power of the antitrust agencies and narrow down the enforcement of antitrust laws to a few areas.

In other words, although the initiative for antitrust reforms came from the political actors in Congress, these actors were forced to give significant concessions to the experts of enforcement in the DOJ and FTC while passing their legal amendments. For this reason, the consequences of these reforms were not predictable for both sides. While Congress intended these reforms to resolve the problems they perceived with concentration, they were utilized to achieve different ends in practice after they came into effect. Under Assistant Attorney General (AAG) Baxter, the increasing criminal prosecution of horizontal price-fixing through the Tunney Act was used to offset and legitimize the disappearance of other types of antitrust prosecutions by the DOJ in the 1980s, putting into action the recommendations of the Chicago School. Similarly, the Hart-Scott-Rodino (HSR) Amendment gave the sole authority to decide the antitrust regulations on merger and acquisitions to the DOJ and the FTC, eliminating the judicial review of mergers. This way, the AAG Baxter's "1982 Merger Guidelines" could institutionalize the Chicago School interpretation in merger control policies.

There are important insights in this story on how new intellectual perspectives gain prominence in policy fields. "Policy paradigms", i.e., dominant, binding, and shared perspectives guiding policy decisions of the actors in a policy field (P. A. Hall 1993; Blyth 2013), erode when they have significant in-fighting over the future of a policy under economic crises. The actors seeking reforms to resolve these crises tend to align with the new perspectives that have emerged from within the existing paradigm (in this case, the extreme version of the old school). However, other institutional actors can be opportunists and use the movement for institutional change to advance a new perspective outside the old paradigm. By participating in Congress' reform

efforts, the antitrust agencies could promote the Chicago School perspective into prominence and their own institutional role inside the antitrust policy.

These findings also reveal essential connections between rapid institutional changes, like legislations, and gradual institutional changes, like rule interpretation changes. The existing perspective on gradual institutional change suggests that this form of change occurs when some "veto" actors block the road to swift, formal changes. In antitrust laws, Congress was such a veto actor blocking the advancement of the Chicago School perspective by not allowing any legal amendments to antitrust laws that would repeal some of its parts or curtail their effectiveness. However, this theorization overlooks the possibility of a complementary relationship between legislative changes and gradual policy changes. Although some institutional reforms may be blocked, other reform proposals that reconcile the opposing institutional actors' interests and perspectives can go through. These changes to the laws in the books can precipitate and pave the way for the enforcement and interpretation changes to the laws in practice later.

3. Sponsoring Diffusion

The third chapter of this dissertation investigated the transformation of antitrust laws and policy into a global norm in the 1990s, i.e., an institution expected from every member of the international system of nation-states with capitalist economies. The existing scholarship largely attributes this transformation to the growing international consensus over the benefits of the (neo)liberal organization of markets and the elimination of state-dependencies in the management of the economy, or the so-called "Washington Consensus" (Gray and Davis 1993; Kovacic 1997; 2001; Gal 2004; D. P. Wood 2005; Kronthaler and Stephan 2007; Buch-Hansen

and Wigger 2011; Hazel 2015). However, this shared account overemphasizes the willingness of developing economies to adopt antitrust laws and overlooks the potential conflicts of interest and ideological beliefs between antitrust regulations and other neoliberal policies.

There are two sources of conflict between antitrust policies and the Washington Consensus that the literature does not discuss. The first is ideological: Neoliberal ideas contain a strong suspicion over state regulations and an equally strong belief in the ability of markets to self-regulate. Conversely, antitrust rules have skepticism over markets' ability to self-regulate and give mighty institutional weapons to states to intervene in the markets. This ideological contradiction was already discussed and resolved by the Chicago School by its proposal to limit antitrust regulations and eliminate most of its activity. The second contradiction is more material: Antitrust rules can seriously impede the international mobility of capital and the growth of multinational corporations, which the neoliberals tried to protect and foster. Competition laws made the global merger and acquisition activity more difficult and imposed significant restrictions over the use of hierarchical coordination mechanisms (like exclusivity or franchising agreements) by multinational corporations. The existing explanation on the globalization of antitrust does not explain why the global promoters of the Washington Consensus, like the US or the OECD, have also sponsored the diffusion of competition laws in the 1990s despite these ideological and material conflicts.

I instead argue that the motivations to sponsor the diffusion of antitrust were not based on neoliberal ideas or interests per se. Instead, they were rooted in state protectionism's ideas and material interests that emerged in reaction to the uncontrolled expansion of neoliberal policies, particularly trade liberalization. In the 1990s, the US efforts to diffuse antitrust rules to developing countries were motivated by the goal of protecting its own corporations in an

increasingly connected global market economy. The main target of this effort was Japan and its keiretsu firms, which dominated the production of manufacturing goods. Later, the target shifted to the post-Soviet economies and then every developing country that wished to enter into a free-trade agreement with the US.

This finding offers essential insights into what motivates global hegemons to sponsor global institutional harmonization. Global hegemons are not always the clear beneficiaries of the institutions that they endeavor to diffuse. Sometimes they support institutional diffusion even though it inflicts pain onto themselves, as long as they also inflict pain onto their international adversaries. As more countries adopted new competition laws or strengthened their existing competition laws in the books or in practice, the companies operating in those jurisdictions, including the US firms, were forced to abide by new antitrust rules. In other words, the diffusion of competition laws was a double-edged sword for the US.

In addition, the blocking of possible domestic policy remedies to domestic economic problems of global hegemons also instigates institutional globalization. The US motivations to campaign for the worldwide diffusion of antitrust were based on its local economic problems and the inability of domestic policy changes to resolve these problems. In the 1980s, the US manufacturing firms lobbied policymakers to address the growing trade deficit problem of the US. They argued that the US "antitrust exceptionalism" was partly responsible for this deficit by putting the US corporations at a disadvantage while competing with foreign firms both at home and abroad. The domestic ways of dealing with this exceptionalism, namely, by creating antitrust exceptions for exporting firms and extending the US courts' authority to enforce the US antitrust laws extraterritorially, were closed off the Chicago School influence grew inside the US antitrust

policy in the 1980s. Therefore, the only option left for the US policymakers was to make the US not the exception by diffusing the antitrust laws and policy.

This chapter also demonstrates that the globally accepted methods of institutional diffusion are tested and tried out in bilateral relations between nation-states before they are generalized. The Structural Impediments Initiative (SII) negotiations in 1990 were the first time that the US tried out requiring a foreign nation to adopt or strengthen competition laws in exchange for deregulating trade. These negotiations became a blueprint for the successive free-trade agreements where the US requested its partners to adopt similar competition law standards–including the North American Free Trade Agreement (NAFTA) with Mexico in 1993. The SII also set a precedence for using one-on-one relationships between competition law enforcement authorities to diffuse competition law enforcement norms. It led to the belief, especially in DOJ's Antitrust Division, that the direct and informal ties between competition law authorities circumventing the negotiations between governments were more effective in creating the global harmonization in competition law enforcement. This method was later used in post-Soviet nations and also led to the creation of the international competition authority networks within the OECD and the creation of the ICN.

There are important complementarities between "hard" and "soft" forms of pressures the global powers exert onto weaker nations to diffuse their chosen institutions. The international networks of competition authorities not only supported the diffusion of competition laws in the books – that task was mostly completed in the 1990s– but have shaped how competition laws are put into practice around the world. It was not enough that developing countries created new competition laws in the 1990s; the enforcement practices in these new jurisdictions also needed to be guided and limited to benefit the international diffusers of competition laws. The global

networks of competition authorities were very influential in harmonizing enforcement practices by building relationships of collaboration and learning between national competition authorities and in circumventing the political negotiations between governments and politicians that could impede this harmonization. They have determined and then surveyed the national competition authorities' compliance with the international standards and "best-practices" in competition law enforcement.

Although formally horizontally organized, these international communities of competition law experts and authorities have prioritized the input from Western countries with advanced economies, particularly the US, when setting the international standards. The US antitrust authorities, particularly the DOJ's Antitrust Division and the FTC, invest more human and financial resources into these networks than other national authorities. They also assume more central roles inside these networks by sponsoring the main committees and panels. Even the speakers invited to these meetings are mainly recruited from American universities or private bar since the US antitrust academia and practice is the oldest and most respected in the world. Consequently, it is hard to find a voice inside these networks that offer a completely alternative perspective on antitrust policy. Instead, the US antitrust authorities and experts can define the main rules, goals, and practices of antitrust laws, particularly under the Chicago School influence.

Nevertheless, the widespread diffusion of antitrust laws has generated sufficient room for reinterpretation. Challenges to the hegemonic influence of the US antitrust policymakers could be launched from the new peripheries of the global antitrust regime in developing economies. These economies could pursue more aggressive antitrust policies against monopolies and monopolization than the policies pursued in the US, depending on their domestic economic

policies, business structures and legal institutions. The international networks of antitrust agencies can criticize and try to correct these divergent national policies, but since they do not have any retaliation power, their influence would be limited. This potential reveals the contradictions in the politics of institutional diffusion.

4. Law Enactment Under Globalization

The fourth chapter of this dissertation analyzed how developing countries legislated new competition laws in the 1990s under pressure from global hegemons and international organizations. It questioned, in particular, how closely the new competition laws legislated by developing countries matched the competition laws in the two leading competition law jurisdictions in the US and the EU. The existing comparative legal scholarship on antitrust laws has demonstrated marked differences between the US and the EU competition laws, especially in the regulation of monopolistic companies and their abuses of market power (Djelic 2002; Wigger and Nölke 2007; Kovacic 2008; Geradin 2012; Gifford and Kudrle 2015; Sokol 2016). Therefore, contrasting with the hegemonic power of the US to shape antitrust policies around the world, the EU could present itself as a counter-hegemonic alternative to developing economies.

There are four alternative ways that developing economies could legislate new competition laws in the 1990s under the influence of global pressures. First, due to the hegemonic force of the US antitrust laws, developing countries could imitate the US example while designing their national laws. Secondly, and alternatively, due to the counter-hegemonic availability of the EU model of competition policy, developing countries could imitate the EU competition laws. Third, rather than converging on a single model of antitrust, the divergence

between the US and the EU competition law regimes may have led variations among developing economies– some economies closer to the US picked the US-type of antitrust, while some others closer to the EU opted for the EU-type of competition laws. Fourth and lastly, developing countries could free themselves from these global influences and design their own competition laws without any clear signs of imitation.

Turkey and Mexico offered ideal cases to test these hypotheses. Turkey and Mexico are "upper-middle-income" countries with liberal-economic systems and open trade relations since the early 1980s. They have an essential place in the world economy as members of the OECD and the G20. They are also geographically located right at the US and the EU border and have historically stronger economic and political ties with one than the other- i.e., Mexico has closer relations with the US, and Turkey has more intimate connections with the EU. They both signed comprehensive free-trade agreements with their neighbors around the same time, Turkey under the Customs Union Agreement (CUA) of 1995 and Mexico under the North American Free Trade Agreement (NAFTA) of 1994, which have led them to pass a series of legal reforms, including their first competition laws. As a result, their competition laws have been influenced by both the global diffusion of competition law norms and the more direct influence of the US and the EU, respectively.

Instead of these four scenarios, I found that Turkey and Mexico mixed and matched different characteristics of the US and EU models while enacting their national antitrust laws. There were two kinds of characteristics that differed in these models: the regulation of monopolistic abuses of market power and the limitations over state actions. Turkey and Mexico imitated the EU and US competition laws respectively in the regulation of monopolistic abuses but diverged from them over the limitations over states. Unlike the US antitrust laws, Mexico's

competition laws impose significant restrictions over the actions of states and public authorities that could affect market structures. Unlike the EU competition laws, Turkey's competition laws exclude state actions and public authorities' decisions from competition laws' jurisdiction. This was a combination of mimicry and reinterpretation that has not been studied in the literature.

While the previous studies on institutional globalization have underlined the importance of the regulation variations among advanced Western economies in justifying the variations among non-Western, developing economies, they have not clarified how developing countries choose between these alternatives. I found that two main domestic influences shaped Turkey and Mexico's picking and choosing of different competition law design features from the EU and US: the powerful economic and political interests and expert professionals. First, the relationship between political parties and economic interest groups during developing countries' market transformations in the 1980s and early 1990s shaped which economic and political interests were incorporated into competition law statutes. When political interests were incorporated, the designers of competition laws adopted competition law features that would protect the interests of political parties and elites in government. When economic interests were incorporated, they borrowed elements that would protect the interests of big businesses and local industrialists.

Second, the professional groups regarded as "experts" in competition laws and policy also shaped which policy ideas and assumptions were incorporated into the enactment of competition laws. When these developing economies were legislating their first competition laws, the expertise in competition laws was in short supply. Only a few internationally connected professionals with access to state bureaucracies could influence the design of the new competition laws. These professionals' background in law or economics led to different design preferences. When lawyers or legal scholars were put in charge of designing the law, the

competition laws carried their professional biases in seeing the state as the guarantor of a fair, well-organized and stable market economy while approaching the decisions of private economic agents with more suspicion. By contrast, when economists were involved (especially those who received their degrees from the US), competition laws carried their professional biases in seeing the state with more skepticism and the private economic agents with more trust. These two influences worked together; the representation of different professional expert groups in the legislation process complemented the effects of interest group representation.

This finding suggests that, much like in the US, competition laws in developing economies are shaped by both political and economic interest disputes and intellectual and professional ideas at the stage of enactment. They are institutions where powerful interest and professional groups with conflicting interests and visions compete for influence. Having an impact on the enactment of competition law statutes affects the prospects of these groups under a new legal regime. When big business groups can shape competition laws, they can also limit the ability of competition authorities to go after their monopolization practices. When political elites shape these laws, they can prevent competition authorities from regulating their use of public resources. Different professional groups institutionalize their roles inside the new competition law systems by writing into the law how the new competition authorities should recruit their experts and what law enforcement methods (through legal or economic analyses) should be dominant in making decisions. The main difference between the enactment of competition laws in advanced economies like the US and developing economies like Turkey and Mexico is that the domestic influences over the design of rules are bounded by the internationally available models for antitrust laws and policy. Despite being influenced by domestic factors, Turkey and Mexico still followed the main formal features of the EU and US competition law models.

5. The Organization of Implementation

The fifth and last empirical chapter examined how Turkey and Mexico implement their competition laws and the factors that have shaped their implementation. Besides the formal law design preferences, these economies could also enforce competition laws differently in practice due to the abstract language of competition laws and their openness to different interpretations. Looking at the actual implementation of competition laws is essential to assess whether the global diffusion of competition laws has given developing economies effective institutional tools to target and limit the growth of monopolization and monopolistic abusive conduct in their economies.

I have found out that, in practice, the Turkish competition authority enforced its new competition laws more strongly on the conduct of monopolistic companies than the Mexican competition authority. This was indicated by the difference in the number of cases that they sanctioned, the size of administrative fees they issued, and the share of this enforcement activity inside all competition law enforcement decisions they made. Turkey also enforced these antitrust restrictions more widely across different sectors of the economy than Mexico. Importantly, these differences had a temporal dimension: Mexico and Turkey's competition law enforcement differences were small initially after the legislation of these laws but increased and became more noticeable in the later years of enforcement. As the experience of the new competition authorities increased, the gap between Turkey and Mexico's enforcement of competition laws also increased.

While the differences in the formal competition laws explored in chapter four could have contributed to these enforcement differences, they cannot explain their temporal trajectory. If

Mexico's laws were designed weaker than Turkey's laws, the differences in enforcement would have appeared in the early years. Furthermore, Mexico's competition laws went through several important amendments to increase their restrictiveness over monopolies, which did not translate into more enforcement later. The differences in enforcement cannot be explained by the underlying economic differences either; all economic research suggests that the Mexican economy is more concentrated and has more signs of monopolization than the Turkish economy. Competition authorities' resources and political independence also do not explain these enforcement differences; these authorities had roughly similar economic and human resources and Mexico's competition authority over time gained more autonomy than the Turkish authority.

I instead found that the competition law enforcement by competition authorities is shaped by their interactions with the domestic and long-established judicial systems, which were determined by these authorities' own organizational characteristics. Competition authorities in Turkey and Mexico were created in the image of the European competition authority as administrative bodies with the power to both prosecute and decide cases, but they had some significant organizational differences. I suggest that the different design of these new regulatory bodies have shaped how well their decisions were received by the courts, whose responsibility is to oversee the resolutions of these administrative bodies.

The necessity of matching the decision "output" of competition authorities to courts' expectations stems from the superimposition of a new system of competition laws onto the existing and long-established judicial systems in developing countries. Most of these economies, including Turkey and Mexico, are not experienced in using semi-autonomous expert administrative authorities to enforce a body of law outside of the judicial system. By contrast, they have local traditions of jurisprudence that have already formulated specific standards on due

process, formalization of procedures and clarity of evidence for decision-making. As a result, the courts can react negatively to the decisions of new competition authorities if their decisions do not conform to their expectations.

The problem here is not that these courts do not have any prior experience or knowledge in competition laws, which can be ameliorated over time with more experience. Instead, the potential mismatches between courts and competition authorities occur as the courts learn more about competition laws and how to oversee competition authorities' decisions over time by incorporating their pre-established law enforcement standards. The age of these judicial standards, the autonomy of the judiciary, and the seniority of judges that review competition law decisions contribute to this potential source of mismatch with competition authorities' administrative decisions.

Since it's the responsibility of new competition authorities to produce decision outputs that match the expectation of their judicial systems, their own internal organization gains significant importance. My findings suggest that how semi-autonomous administrative authorities make regulatory decisions is primarily determined by how they are organized internally. Certain organizational characteristics that the Mexican competition authority had were not amenable to producing decisions that matched the formalistic expectations of the courts, mainly the top-down organization of decision-making, the recruitment and accumulation of expertise at the top cadres and the strong influence of economists. Some of these characteristics complied with the standards of the international promoters of competition laws, like the OECD and the ICN, but failed to generate significant enforcement due to their mismatch with the courts. The bottom-up organization of decision-making, the recruitment and accumulation of expertise at the bottom cadres and the weak influence of economists, which may be regarded as inferior

characteristics by the international organizations, served the Turkish competition authority well in producing decisions that matched the expectations of the courts.

When mismatches between the decisions of competition authorities and the courts' review occur, this creates a negative feedback loop that diminishes the authorities' enforcement activity. Every decision of a competition authority overturned by courts is a waste of its resources and time and lead to reputation costs. Therefore, competition authorities are discouraged from producing decisions that they know would face significant challenges in the courts. The Mexican competition authority tried to pursue a more aggressive enforcement policy in its early years; however, most of its sanctioning decisions were overturned by the courts. This discouraged the Mexican authority from issuing more sanctions and even pursuing similar monopolization cases. Conversely, the Turkish competition authority managed to get its active enforcement of competition laws accepted by the courts. After the early years of learning to adjust to each other, the courts became the biggest supporter of the authority, giving it almost full discretion over the interpretation of competition laws.

This analysis on how globally diffused institutions are implemented in practice in developing economies defies the traditional "gap studies" in legal studies and globalization research (Berkowitz, Pistor, and Richard 2003, also see Pistor et al. 2002; Halliday and Carruthers 2009). These studies assume the global norms expect developing countries to enforce the newly "transplanted" laws strongly and actively. In contrast, in competition laws, the international norms favored more restrained and restricted enforcement practices. Therefore, the more vigorous and more active enforcement of competition on monopolistic conduct laws, such as Turkey, deviates from these norms. Such deviations cannot be considered "gaps" since they achieve more than (not less than) what is globally prescribed for these institutions. Therefore,

rather than “implementation gaps”, it's more meaningful to talk about “implementation variations” among developing economies.

The gap studies also suggest that the lack of political will or the local professionals’ support for the enforcement of these institutions creates implementation gaps. However, I show that the variations in implementation are not necessarily created by a lack of political will or lack of professional support. The Mexican competition authority and its experts sought to pursue an active enforcement policy on monopolies in the early years; therefore, it is hard to say the political will was absent. It also had sufficient professional expertise and resources to enforce the laws effectively. Instead, the decisions of the Mexican competition authority were blocked by the courts. In other words, the organizational features and institutional complementarities determine how well the newly transplanted institutions are implemented in these countries.

My theory of “organizational match/mismatch” improves on the existing studies on the implementation problems in developing economies. While these studies underline the direct impact of the inner organizational features of public authorities over regulatory decisions, I analyze the impact of these features’ interactions with the other institutional actors in their environment. In the context of the newly “implanted” institutions, like antitrust laws, I show that the impact of authorities’ design on policy decisions is intermediated by broader and older features of these other institutional actors. Such features and complementarities are resistant to change; therefore, even when the professionals and political actors try to increase implementation by reforming the laws or the enforcement authorities, they can continue to face structural impediments.

The policy implication of this theory is that the design of competition authorities in isolation from their institutional environment can create weak institutions. Suppose the purpose

of adopting new competition laws in developing economies is to enforce regulations over monopolies effectively. In that case, the authorities in charge of enforcement should also be able to work with the established systems of courts and jurisprudence in these nations. Some of the key organizational features to focus on in order to avoid mismatching are the organization of decision-making, the recruitment and training of personnel, and economists' use in enforcement decisions.

6. Open Questions and the Future of Antitrust

While trying to answer a broad set of questions and cover the long-term trajectory and global changes in antitrust laws and policy, this research has left some important questions unanswered. In order to understand more fully antitrust laws' impact on markets and how they have become more amenable to monopolization over the last four decades, I suggest that future research should inquire into the following questions.

The first set of questions concern the global expansion of the antitrust law services sector. During my research, I have observed the explosive growth of this sector in the last four decades. At the international level, several multinational competition law consultancy firms (such as Compass Lexicon) have emerged and expanded their reach into new national competition law jurisdictions. These consultancies offer legal advice and advanced economic analyses to support defendant or plaintiff corporations' arguments in competition law legal disputes. They provide compliance services (comprising training for employees and internal audits) to corporations that aim to control their antitrust liabilities. They also help to prepare the M&A filings of multinational corporations in different national jurisdictions by coordinating with local

competition law consultancies across the globe. This activity has also boosted the growth of the local competition law "boutique" law firms and economic consultancies in developing economies.

At present, there is no research on the global expansion of competition law consultancies and their effects on the implementation of antitrust laws. These consultancies function as essential intermediaries between the competition laws' intended effects and actual effects. Do these consultancies aid the public competition law enforcement authorities' enforcement activity, or have they introduced novel ways of subverting competition law regulations? Inquiring these questions can bring further insights on the impact of law's globalization over corporate decisions and market structures. It could also be possible to observe the variations in the services provided by different competition law consultancies, such as between national and international or economic and legal consultancies, and to inquire how these variations shape corporate compliance with competition laws.

The second set of questions are concerned with the global variations in antitrust policies. While Turkish and Mexican cases gave essential insights on developing economies' competition law regimes, these insights do not give sufficient knowledge on the global scope of antitrust variations. Some international reports have suggested that the enforcement of competition laws in countries like Russia and China are more outside the international norms than the Turkish and Mexican cases. For example, the Russian competition authority holds a clear record in issuing the highest number of sanctions to monopolistic companies for market power abuse (see GCR 2015). How do these more incongruous regimes of competition law shape their markets? What local forces and influences have led them to diverge so dramatically from the global norms? We

should also study the international competition authority networks' reactions to such clear outliers and how they try to pressure them to comply with the global norms.

In addition, there are few studies that pay attention to the libertarian varieties of antitrust with rules that limit the decisions of public authorities (see notable exceptions: Blauberger and Krämer 2013; Ganoulis and Martin 2001). By inquiring how the European competition law regime birthed and evolved its "state aid rules", diverging sharply from the US antitrust model, future research could try to understand further what political and economic conditions lead to this variation. In addition, it is also important to search for other examples of national antitrust laws with libertarian rules besides the EU and Mexico and investigate how these rules have diffused to these countries.

To offer a more comprehensive perspective on the global variations in antitrust policy, besides adding new case studies, future researchers should also create new methodologies to measure antitrust variations in large-N studies. The conceptualization in the second chapter of this dissertation offers one possible method. Competition policies vary in their effects over markets by combining different law enforcement degrees for three types of competition law rules, i.e., individualistic, egalitarian, and libertarian rules. When countries enforce individualistic rules strongly, i.e., horizontal coordination between economic agents, they affect small businesses more directly by limiting their defense strategies against large business monopolies. When they enforce egalitarian rules more strongly, i.e., the hierarchical coordination within a single firm, they affect large businesses more severely by limiting their strategies to concentrate their market power. Lastly, when they enforce libertarian rules more strongly, i.e., the public coordination by public authorities, they restrict the ability of states and political actors

to control and direct market power for their own benefit. National competition policies can be compared by assigning different values on each of these three axes.

Third and lastly, recently, there are significant signs that the global antitrust law and policy regime is changing. In particular, the concerns about the antitrust violations of the digital platform monopolies (e.g., Google, Facebook, Amazon, and Apple) have reached a new political salience in the US. This has led to recent calls to amend the antitrust statutes inside Congress and appoint some vocal critiques of the Chicago School paradigm, like Lina Khan, into the antitrust agencies, the DOJ, and the FTC.[223] In the last couple of years, these antitrust agencies, together with the state district attorneys, filed new complaints against monopolistic firms.[224] How did this new "anti-trustism" emerge and gain momentum inside political, expert, and public institutions in the US? Will it bring about a return to the multi-dimensional and overly ambitious antitrust policy of the 1950s and 60s, or produce an entirely different variety of antitrust? Furthermore, how will this new movement affect the antitrust law and policy norms at the international level?

Considering the current moment of policy change, we could reinvestigate the impact of intellectual ideas over antitrust policy changes. In recent years, scholars in antitrust academic fields have created new alternatives to the Chicago School paradigm that propose new methods and conceptualizations to enforce anti-monopoly rules more actively. In legal scholarship, the "neo-Brandeisians" (e.g. Lina Khan, Tim Wu, and Sandeep Vaheesan) have launched the strongest critique of the Chicago School and proposed embracing and reviving the populist and politically motivated roots of antitrust laws in the US (see Khan 2016; Wu 2018; Khan and

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[223] https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html
[224] The Google complaint: https://www.wsj.com/articles/california-seeks-to-join-justice-department-antitrust-case-against-google-11607719192?mod=e2tw. The Facebook complaint: https://www.nytimes.com/2020/12/10/technology/facebook-antitrust-suits-hurdles.html.

Vaheesan 2017). In economics, the game theoretical approaches in industrial organizations field have advanced new economic findings that contradict Chicago School's arguments on the markets' ability to correct monopolization and the stability of cartelistic arrangements (see Berman 2017). These new perspectives may be candidates for new paradigms in antitrust policy; therefore, important to observe how they have challenged the Chicago School paradigm and gained supporters inside antitrust authorities and policymakers.

Regardless of these new intellectual influences, the current moment of "anti-trustism" seems to be receiving its momentum from real, "material" grievances. Monopolistic tech companies are often also "monopsonies", which means they can control the price and terms of purchase of their inputs, including labor. Consequently, the mistreatment and underpayment of contract workers (also called gig workers) have become chronic problems in the tech industry.[225] These problems have provoked substantial public mobilization in recent years from progressive journals and investigative journalists, civil society organizations, grassroots organizations, think-tanks, and research institutes. For example, the "Freedom from Facebook" campaign (which later expanded to include Google), consists of a coalition of twelve think-tanks and organizations that lobby in Washington and publish ads to highlight Big Tech's abuses in social media.[226] A coalition of restaurant owners across the US is pressuring cities and states to enact regulations on the practices of food delivery apps, which is a sector that has increased in concentration in recent years through mergers and is currently dominated by four companies.[227]

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[225] For Amazon's treatment of its workers, see: https://www.theguardian.com/technology/2020/feb/05/amazon-workersprotest-unsafe-grueling-conditions-warehouse. For Uber and Lyft drivers see: https://www.npr.org/2019/05/08/721333408/uber-and-lyft-drivers-are-striking-and-call-on-passengers-to-boycott.
[226] https://www.wired.com/story/freedom-from-facebook-open-marketsinstitute/
[227] https://forgeorganizing.org/article/organizing-strategies-fightcorporate-power

These efforts may seem small compared to the Big Tech's political donations, lobbying, and investment in friendly think-tanks to protect their interests[228], but they have succeeded in creating cracks in what seemed like an impregnable barrier just a few years ago, partly thanks to the growing displeasure of politicians with the abuses of these monopolies. For example, the lack of accountability in how platforms collect consumer data became a hotly debated issue when Facebook gave a political consultancy access to its users' data to be used for political campaigns during the 2016 US presidential elections.[229]

Currently, policymakers are evaluating their policy options to deal with these platform monopolies. Among the numerous solutions being discussed is a new set of regulations on the third-party content published on online platforms, regulations regarding how consumer data can be collected and used, and an expansion of the rights of gig workers. Another potential solution is to treat digital platforms as "essential facilities", like transportation networks or energy utilities, and impose special requirements on dominant firms in these sectors to give indiscriminate access to their services to other providers, even competitors. Among all the possible solutions, most policy attention has been focused on "breaking up" the Big Tech through antitrust.[230] The growing bipartisan support in the US Congress to divide up the four largest platform monopolies point out to the unique potential of the antimonopoly agenda in uniting right- and left-wing political ideologies even under growing political polarization. If these efforts succeed, they can overturn the existing US antitrust law precedence that narrowly

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[228] For an example of how Big Tech exert influence over think tanks through donations see: https://www.nytimes.com/2017/08/30/us/politics/ericschmidt-google-new-america.html
[229] https://www.wired.com/story/cambridge-analytica-facebookprivacy-awakening/
[230] See the House Antitrust Subcommittee's recent investigation's report: https://prospect.org/power/triumphant-return-of-congress-big-techantitrust-hearing/

interprets antitrust rules under the Chicago School influence. These changes at the center of the global antitrust regime can have global repercussions.

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