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An international multilevel competition policy system

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Abstract

This paper develops a proposal for an international multilevel competition policy system, which draws on the insights of the analysis of multilevel systems of institutions. In doing so, it targets to contribute to bridge a gap in the current world economic order, i.e. the supranational governance of private international restrictions to market competition. Such a governance can effectively be designed against the background of a combination of the well-known nondiscrimination principle and a lead jurisdiction model. Put very briefly, competition policy on the global level restricts itself to the selection and appointment of appropriate lead jurisdictions for concrete cross-border antitrust cases, while the substantive treatment remains within the competence of the existing national and regional-supranational antitrust regimes.

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1. International Competition Policy as a Multilevel System

The current world economic order addresses governmental restrictions to international competition via the trade policy framework of the World Trade Organisation (WTO). However, six decades after the vision of a comprehensive International Trade Organisation (ITO; the so-called Havana Charta), the complementary protection of international competition against restrictions by private enterprises (cartels, market domination, abusive behaviour) is still missing. Through the years of academic and political discussion about international competition policy, two insights have increasingly received support:

- In the face of an ongoing internationalisation of business activities along with a globalisation process of competition and markets, anticompetitive practices like cartels, predatory and exclusionary strategies, and monopolising (or otherwise anticompetitive) mergers have also internationalised. As a consequence, global welfare cannot be maximised without an internationally coordinated competition policy.[1] The reliance on national competition policy regimes does not suffice anymore due to regulatory gaps, for instance, negative externalities from strategic competition policies, effects on markets in smaller and developing countries, business and administration costs of multiple parallel antitrust proceedings, and jurisdictional conflicts over antitrust cases.[2] Thus, on one hand, some sort of an international competition policy regime is necessary.
- On the other hand, the hitherto existing efforts to establish global competition rules and respective enforcement institutions have failed. Along with politico-economic reasons, the resistance to create and implement a powerful global antitrust authority are supported by economic insights, for instance, information asymmetries (closeness of the regulators to the regulated markets and industries), diverging competition policy preferences across countries, and administration costs (international bureaucracy).[3]

Therefore, neither a purely decentralised solution (national competition regimes), nor a strongly centralised solution (domination of global rules and authorities) seems feasible. Instead, the creation of supranational competition policy competences can realistically merely complement the further on existing national and supranational (e.g. common European Union competition policy) regimes. This fits with the theoretical insights that neither extreme decentralism, nor extreme centralism leads to a global optimum.

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[1] See *Barros*/*Cabral* (1994); *Head*/*Ries* (1997); *Kaiser*/*Vosgerau* (2000); *Tay*/*Willmann* (2005); *Haucap*/*Müller*/*Wey* (2006).

[2] See e.g. *Jacquemin* (1995); *Fox* (2000); *Klodt* (2001); *ICN* (2002); *Budzinski* (2003a: 4-10); *Jenny* (2003a, 2003b).

[3] See e.g. *Hauser*/*Schoene* (1994); *Smets*/*Van Cayseele* (1995); *Budzinski* (2003a: 11-18); *Epstein*/*Greve* (2004); *McGinnis* (2004); *Stephan* (2004).

As a consequence, both the academic discourse and the policy practice have increasingly focused on intermediate solutions, encompassing elements of decentralised and centralised solutions. In particular, concepts of network governance have gained increasing popularity within various disciplines, e.g. political, legal, and social sciences as well as in economics. Regarding international competition policy, *Tarullo* (2000) develops a regulatory-convergence approach, in which systematic network cooperation provides "a mechanism for structuring and monitoring the mutual expectations of states" (p. 495) in order to make national regulations more congruent across interacting jurisdictions. He vehemently argues in favour of a participation of the existing antitrust agencies in the process of generating an international regime. In a compatible approach, *Maher* (2002) views competition policy networks to be an important regime-building factor and, in this sense, "a prerequisite to any greater internationalisation" (p. 114). Consequently, the emphasis is predominantly on the way towards international competition governance and to a lesser extent on the sustainable design of the regime. *First* (2003) also focuses on identifying superior avenues towards an international competition policy regime. He develops an interesting and challenging concept of mapping the existing antitrust networks. In doings so, he emphasises the fact that a number of existing antitrust regimes must be characterised as complex institutional arrangements ('networks') themselves. Against the background of the U.S. experience (antitrust federalism), *First* (2003) and *O'Connor* (2002) emphasise benefits of decentralised regime elements.[4] Additionally, the policy sphere has embraced network governance with the introduction of the International Competition Network (ICN) (*Budzinski* 2004), which – despite being rather informal – represents the currently most viable avenue towards international competition policy coordination after the efforts to introduce competition rules in the WTO Doha round have eventually failed (*Bode*/*Budzinski* 2006).

If international competition policy competences are introduced in addition to the prevailing national and regional-supranational regimes, then a multilevel system of competition policy competences (*Budzinski* 2003a: 39-52; *Kerber* 2003) comes into existence. Reconstructing the problem of a coordinated international system of competition policies in terms of a multilevel system can serve as a framework for analysing intermediate institutional arrangements, combining coherence and diversity or balancing centralising with decentralising elements and forces. Within such a multilevel system, the allocation and delimitation of competences represents a crucial issue.

2. Fundamentals of an International Multilevel System of Competition Policies

The concept of multilevel systems represents an analytical framework to describe and model complex regimes, which include of a multitude of interrelated institutions and organisations.

[4] "My overall view is that for a system of antitrust enforcement to remain dynamic, overcentralization must be avoided and some degree of chaos tolerated" *First* (2003, p. 24).

Generally speaking, a *system* consists of elements and interrelations (or, synonymously, interconnections). If the (interrelated) elements are located on more than one level, a *multilevel* system is constituted. Within such a system, interrelations occur regarding two dimensions: *vertical* interrelations between elements on different levels and *horizontal* interrelations between elements of one and the same level. Theoretically, also *diagonal* interrelations between non-vertically interrelated elements of different levels are possible. If they occur comprehensively, a true network result. Thus, networks qualify as an extreme variant of a multilevel system.

Fig. 1 shows a stylised multilevel system with focus on horizontal and vertical interrelations. Though it does not represent a necessary condition, multilevel systems, more often than not, possess only one element on the top level and an increasing number of elements on downward levels.[5]

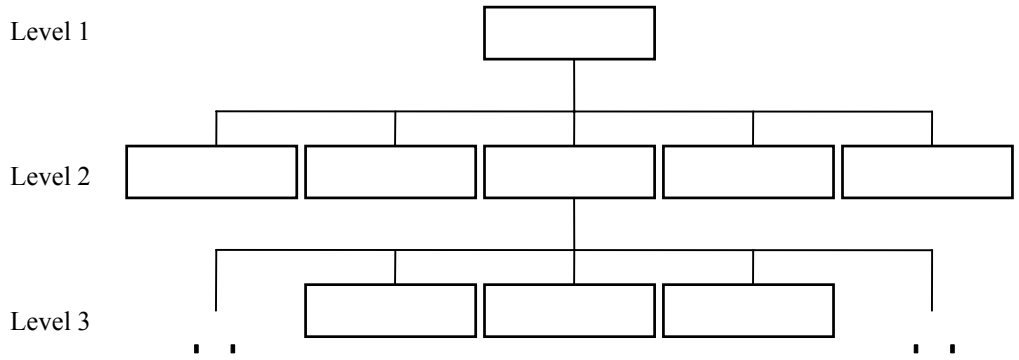

Fig 1: Stylised Multilevel System (Source: *Kerber* 2003: 275)

In respect to complex international competition policy regimes, possible *levels* are global, regional-supranational, national, regional-subnational, and local. The *elements* are competition policy authorities (antitrust agencies, competent ministries, courts, etc.) and antitrust institutions (substantive rules, procedural rules, assessment techniques, enforcement practices, etc.). In order to constitute a system, however, these elements have to be interrelated. These *interrelations* are represented by the allocation and delimitation of competition policy competences.

Drawing on the current structure of antitrust in the world and in the leading jurisdictions, the following vertical structure of an international multilevel system of competition policies is assumed. The top level is global, thus paying tribute to the process of market globalisation.

[5] The characterisations ‘upward’ and ‘downward’ refer to the visualisation of a multilevel system according to fig. 1 and do not imply assessments of importance or superiority versus inferiority. In particular, no prejudice about the competence (neither in a positive nor in a normative sense) of a level to exert jurisdiction over an antitrust case is implied. In the context of this paper, top-down *only* means from centralised to decentralised, e.g. from global to local.

The second level, however, is also supranational. It consists of competition policy regimes that are international, albeit regionally limited. A natural example – and the most comprehensively developed one – is the competition policy of the EU. However, there is a distinct number of additional free trade areas and economic integration projects, which either entail competition policy provisions or are likely to or possess potential to develop some in the future. The third level is the one of nationwide competition policy regimes, like the federal antitrust policy of the U.S., Japan, or Germany. Eventually, a fourth level refers to subnational competition policy regimes, like the antitrust policy efforts of the U.S. states or the State Cartel Offices in Germany. The delimitation of 'subnational', 'national', and 'supranational' follows the historically-originated current structure of nations, their associations and confederations, and their internal institutional designs. As a consequence, competition policy regimes with significantly differing extent, power, or meaning can be located at the same level. However, every alternative vertical structure of levels would be subject to the disadvantage of being illusory.

Competence allocation plays an important role in regard to the performance of the system as a whole. It is sensitive for the sustainable integration of coherence and diversity in order to create a complex but coherent international competition policy regime. The concept of multilevel systems allows for a systematic, theory-based analysis of such regimes. Complexity and diversity are explicitly modelled by the existence of more than one level of jurisdiction and the possibility of having more than one institution/agency at each level (variety of elements). Coherence is represented in the system by the vertical and horizontal interrelations between the elements, i.e. by the design of the interfaces. In other words, the allocation and delimitation of competences decides whether coherence within the system can be achieved without eroding the multilevel character. Thus, the choice of the rules, which determine competence allocation and delimitation, represent a decisive problem in regard to the workability of a multilevel system.

In the framework of multilevel systems, the problem of competence allocation and delimitation possesses a number of dimensions:

- Vertical and horizontal allocation of competences (*dimension I*): competences are allocated vertically between the levels (which is the competent level?) and horizontally among the authorities and institutions of the same level (which is the competent institution/authority on a specific level?). Additionally, problems of diagonal delimitation can occur in the case of allocative effects between a jurisdiction on a downward level and a jurisdiction on an upward level if the two jurisdictions are not vertically interrelated.[6]
- Institutional and enforcement competences (*dimension II*): competition policy regimes can consist of a number of institutional competences. The competence to create,

[6] Imagine, e.g., the question of competence allocation between the EU (supranational but regionally limited level) and Canada (national level but not within the regional scope of the EU).

implement and shape competition rules (*dimension IIa*) can be differently allocated than the competence to apply antitrust institutions (*dimension IIb*) or the competence to enforce the applied rules (*dimension IIc*). Moreover, substantive rules and procedural rules can be distinguished and allocated in a different way. Regarding any specific antitrust case, it must be decided, which institution (set of competition rules) is applied and which agency is responsible. For instance, a downward level agency can be competent in enforcing the institutions of an upward level agency. Or, an upward level agency only consists of procedural rules to enforce downward level substantive institutions. Similarly, on one and the same level agency A (institution Φ) can be competent in moulding substantive rules, whereas agency B (institution Ω) is responsible to apply them (e.g. a domestic institution might be applied by a foreign agency). Consequently, the competence allocation regarding rule-making can differ from the one regarding rule-application and enforcement.

- Exclusive and concurrent allocation of competences (*dimension III*): the competence to exert jurisdiction over a specific antitrust case can be exclusively allocated to one institution and one agency. For instance, a specific case may fall exclusively under the European competition rules and jurisdiction is exclusively allocated to the European Commission. If competence allocation and delimitation is ambiguous, concurrent jurisdiction emerges. For instance, the German Cartel Office might want to challenge a cartel, applying European competition rules. At the same time, the U.S. Federal Trade Commission pursues the same cartel under federal U.S. laws.
- Sustainable and temporary competence allocation (*dimension IV*): Balancing centralising and decentralising forces within the system is a dynamic problem. Multilevel systems evolve along with competence allocation and delimitation. This can lead to two kinds of deficiency: (i) a creeping process of centralisation, incrementally eroding the benefits of having decentralised elements, and (ii) a creeping process of decay, incrementally eroding the benefits of having centralised elements. Therefore, the allocation and delimitation of competences must not only focus on stationary combination of advantages of centralism and decentralism. It must also secure the sustainability of the system by controlling and balancing the centralising and decentralising forces. However, this need not imply that the once-implemented allocation and delimitation of competences must not be changed.

Eventually, the principle structure of competition policy regimes matters in terms of centralism and decentralism. Basic regime types include the court system, the administration system, and the private litigation system.

- In the *court system*, final decisions are made by competition courts. A government attorney or a competent public agency files law suits against anticompetitive business arrangements and practices and is forced to prove its allegations. With respect to the U.S. antitrust system, it is argued that the court system offers superior capabilities in terms of flexibility and innovation (e.g. *Kovacic* 1992, 2004). The reason is that

plaintiffs have incentives to offer contrary evidence and theories against the government advocates with the judge weighing the different positions and, maybe, calling for additional and independent expertise.[7]

- In an *administration system*, the competent competition authority both investigates and decides about anticompetitive business arrangements and practices. Courts become involved only if the respective enterprises file an appeal against the administrative decision. In such a scenario, it becomes important to distinguish between a government authority (like the European Commission) and agency independence[8]. The former is likely to experience difficulty withstanding distortionary influences from non-antitrust policy areas (and lobbyism), whereas the latter can focus exclusively on competition matters. Intraregime diversity may be more limited in administration systems due to the strong position of the competent agency.
- In the *system of private litigation*, no public authority apart of 'ordinary' courts is involved. The private parties themselves enforce competition law through law suits filed by the injured party of an anticompetitive arrangement or practice (e.g. vertically related parties like consumers, resellers, component suppliers, etc., or horizontally related parties like competitors). Although this obviously entails a number of problems if the overall regime is based on private litigation, elements of private litigation are included in many antitrust regimes. Private litigation plays an important role within the U.S. antitrust system and its meaning in the EU is increasing. Additionally, it has some regional importance in the enforcement of rules against unfair competition (e.g. delusive and untrue advertising, defamatory actions against competitors, incorrect price marking, etc.).

These basic regime types rarely occur in their pure variant in real-world antitrust regimes. Instead, real-world regimes usually represent specific mixtures of the described basic elements.

In summary, an international multilevel system of competition policies consists of

- a multitude of competition institutions, among many others global competition provisions, the EU competition rules, U.S. statutes like the Sherman Act, the German Act against Restraints of Competition, Californian antitrust provisions, etc.
- a multitude of antitrust authorities, among many others the U.S. Federal Trade Commission, the Canadian Competition Bureau, State Cartel Offices in Germany, the European Commission, some global instance, etc.

[7] However, the regime is asymmetric. If the government authorities decide not to challenge an arrangement or practice – on whatever grounds – no court supervision occurs.

[8] A comprehensive example represents the European Central Bank. Within the antitrust world, the Federal Cartel Office of Germany possesses somewhat limited independence.

- a multitude of differently designed regimes across the levels, including court systems, government administration systems, independent administration systems, elements of private litigation, and all kinds of mixed types.

3. Nondiscrimination and Mandatory Lead Jurisdictions as Basic Competence Allocation Rules

The workability of such an complex international multilevel system of competition policies demands intelligently-designed competence allocation and delimitation rules. Such rules can have very different designs, corresponding to differing performances. With regard to competition policy, respective comparative analyses highlight in particular two types of competition rules: the nondiscrimination rule and the mandatory lead jurisdiction model (*Budzinski* 2005: 177-244; 2006).

- The *principle of nondiscrimination* belongs to the most important and fundamental principles of the GATT-WTO-framework for international trade. Regarding international antitrust, an extended and modified nondiscrimination rule could incorporate the following elements (*Trebilcock*/*Iacobucci* 2004). Competition policy regimes are not allowed to discriminate between domestic and foreign producers *and* consumers.[9] In particular, they must not favour domestic consumers and/or producers at the expense of foreign ones or disadvantage foreign consumers and/or producers compared to domestic ones. This includes the design of the national and regional competition rules itself as well as the way they are enforced. Both a supervision or complaint and a sanction mechanism to identify and stop discriminating antitrust policies complement the antitrust nondiscrimination principle.

  The nondiscrimination rule limits the competence to claim extraterritorial jurisdiction by the legitimate interest of the foreign jurisdictions to design their domestic laws according to their own preferences (as long as they are non-discriminatory) (*dimension I*). The rule-making competences of each jurisdiction are limited to institutional arrangements that are non-discriminatory (*dimension II*). This excludes a number of popular rule designs, e.g. the exemption of pure export cartels from the general prohibition of cartels and surrogates. Nevertheless, rule-making competences (*dimension IIa*) remain exclusively on the downward (national and regional) levels – the (supranational) level gains no competence to create, design, and implement its own substantial institutions. In cases of discrimination and conflict, the upward level gains application and enforcement competences, however, in a limited sense. Only conflict resolution competences are assigned to the upward level, irrespective of whether they follow complaints by downward jurisdictions or result from supervision. This can mean competences to decide, which institutions of which downward jurisdictions

[9] The inclusion of consumers represents an important extension of the trade-oriented variant of the nondiscrimination concept.

apply to a specific anticompetitive arrangement or practice (*dimension IIb*). It can also cover decisions about enforcement competences (*dimension IIc*). However, the upward level neither directly applies downward institutions, nor directly enforces them. An indirect rule-making competence might occur because the upward level decides whether complained-about competition rules or antitrust practices of downward jurisdictions violate the nondiscrimination principle or not – which can be a controversial matter. However, the upward level can only negatively condemn specific provisions but it cannot prescribe specifically-designed rules.

- The basic principle of the mandatory lead jurisdiction model is that if an anticompetitive arrangement or practice is to be reviewed by more than one competition policy regime (according to their respective standards), a lead jurisdiction reviews and decides the case vicariously for the other ones (*Campbell*/*Trebilcock* 1997). An international panel decides about the appointment of a competent and appropriate lead jurisdiction in regard to a specific anticompetitive arrangement or practice.[10] So, the competence to deal with this case is allocated to the internationally chosen lead jurisdiction (both regarding authority and institution), which is obliged to pay attention to anticompetitive effects in other jurisdictions and entitled to call on other antitrust regimes for assistance.

  The rule-making competences of the national and regional-supranational regimes are left untouched, whereas the supranational level does not get substantive rule-making competence (*dimension IIa*). The enforcement competences are allocated to the lead jurisdiction (*dimension IIc*), which applies its own antitrust institutions. However, the decision concerning which competition rules are applied to a specific anticompetitive arrangement or practice is effectively allocated to the supranational level (*dimension IIb*) because it is competent choose the lead jurisdiction. Consequently, the mandatory lead jurisdiction model leads to an exclusive allocation of competences (*dimension III*). After the supranational level has exerted its exclusive competence to appoint the lead jurisdiction, the latter has exclusive competence to deal with the respective case.

These two competence allocation principles complement each other with regard to the problems of international competition policy outlined in section 1. While the lead jurisdiction model heals the problems from multijurisdictional reviews and proceedings and tends to alleviate information asymmetries, the nondiscrimination rule ensures the respectfulness for different preferences across countries and considerably aggravates strategic behaviour. Both entail potentials to diminish jurisdictional conflicts over antitrust cases as well as limiting administrative costs from international bureaucracy.[11]

Both the nondiscrimination rule and the mandatory lead jurisdiction model imply that the top level neither prescribes concrete substantive provisions against cartels or abusive and

[10] This represents a modified version of the suggestion by *Campbell*/*Trebilcock* (1997: 110-112).

[11] See for an elaborate theoretical analysis *Budzinski* (2005: 122-140, 203-207, 229-244; 2006).

predatory modes of enterprise behaviour, nor consists of a distinctive merger control. Instead, the upward allocation of competences is limited to the selection of competent jurisdictions as well as complaint and supervision competences. Therefore, these competence allocation rules predominantly address competence allocation between the top level and comparably close downward level(s). More distant downward levels, for instance subnational levels, which face substantive competition policy regime on upward levels, require additional competence allocation rules. On these downward levels, risks from overdecentralisation in the face of business internationalisation, causing welfare-decreasing cross-jurisdictional spill-over effects, are more imminent than such from centralising forces. Therefore, simple rules, which safeguard that anticompetitive arrangements and practices with cross-jurisdictional effects (regarding the addressed level) are allocated upwards, are required.

The next section presents an example of how adequate competence allocation rules for a coherent and federalist governance of global competition could look like in a concrete way.

4. The Levels of Competition Policy and their Interrelations

4.1 The Global Level

The preceding analysis leads to the conclusion that a real 'global level' represents a precondition for a sound governance of worldwide competition. However, the differentiated analysis of the multilevel approach allows for and requires a closer look on the competences that a global level inalienably needs in order to cope with its tasks. A combination of the two outlined competence allocation rules implies that an international competition policy regime does not require substantive antitrust laws at the global level.

Nevertheless, the global level should be equipped with considerable competences, namely (i) selection of competent jurisdictions (which incompletely represents a rule-application competence) according to the mandatory lead jurisdiction model and (ii) combat discriminatory rules and practices on other levels according to the nondiscrimination principle. The latter may be called a limited rule-making competence – limited to the ban of discriminatory antitrust. However, there is a difference that is important from an institutional-economic perspective. The global level is only entitled to prohibit discriminatory rules and practices. It cannot and must not prescribe how competition rules and antitrust practices on downward levels should look like. The most important aspect here is that (*Hayek* 1975; *Kerber* 1993; *Wegner* 1997)

- a prohibition excludes only one specific option from the non-determined set of possible options[12], whereas

[12] The set of possible options is ex ante always indetermined because of the creative abilities of human agents to create formerly unknown – because non-existent – modes of behaviour and institutional arrangements (*Wegner* 1997; *Budzinski* 2003c).

- a prescription effectively eliminates any scope of selection and de facto excludes all the other options by prescribing one of them.

In the first case, the downward levels maintain behavioural freedom, including the freedom to create innovative solutions. Each is effectively eroded in the second case.

Consequently, fundamental rule-making competences and the remaining scope of rule-application competences are not allocated to the top level. The same is true for direct enforcement competences. It is the lead jurisdiction, which applies their own or other competition rules to a given anticompetitive arrangement or practice and enforces the outcome of its proceedings. However, referring to the externality issue as the weakest point of both favoured competence allocation rules, the lead jurisdiction is expected to produce positive externalities (i.e. protect competition also in regard to other jurisdictions' markets and consumers), which generates an incentive problem. Therefore, supervision competences must be additionally allocated to the global level.[13] One might call this a kind of indirect enforcement competence, but, again, upward competences only cover the ability to abolish deficient decisions of the lead jurisdiction regarding nondiscrimination and comity. The global level authorities' are not competent to apply and enforce (whichever) competition law themselves.

In order to handle the outlined competences, which are specified below, an agency is needed at the global level. Allow me to call it the *International Competition Panel* (ICP).[14] According to the combination of the mandatory lead jurisdiction model and the nondiscrimination rule, its competences can be specified to include the following three elements.

- Selection of Lead Jurisdiction

  The ICP appoints a lead jurisdiction, preferably from the second or third level. As a lead jurisdiction for a given anticompetitive arrangement or practice qualifies (i) regional gravity of the aggregate turnover of the participating enterprises, (ii) the absence of discriminatory provisions in the potentially competent competition policy regime, and (iii) willingness and experience of the potentially competent antitrust authorities to employ a world welfare standard, i.e. to safeguard comity to other jurisdictions' markets and consumers. The lead jurisdiction receives full competences to deal with the respective anticompetitive arrangement or practice under the obligation of nondiscrimination and pursuance of the common welfare of all affected consumers irrespective of their location.

- Supervision and Sanctions

  The ICP reviews the competition rules and codified practices of the downward levels' antitrust regimes regarding violations of the nondiscrimination principle. In cases of

[13] For instance, the necessity of an external monitoring of activities of downward level jurisdictions in an otherwise federal or decentralised regime is also emphasised by *Figueiredo*/*Weingast* (2005), arguing from a game-theoretic perspective on federalism and constitutional rules.

[14] My intention is not focused on names. Any other denomination of this agency would also be fine as long as it is equipped with the described competences.

discriminatory rules or practices, it demands the modification of the respective provisions (however, without prescribing alternative designs[15]). If the respective competition policy regime refuses to adjust its rules and practices according to the requirements of the nondiscrimination principle, this regime is disqualified and suspended as lead jurisdiction. This procedure also applies safeguarding a minimum necessary nexus of downward competition policy regimes with an anticompetitive arrangement or practice to claim jurisdiction.[16] Additionally, the ICP supervises the review and decision process by the lead jurisdiction, but exclusively concerning violations of nondiscrimination. Potential sanctions are similar to the general nondiscrimination review procedure.

- Complaints and Conflict Resolution

The ICP hears and reviews complaints from jurisdictions or enterprises (i) about decisions of the lead jurisdiction, which disregard foreign consumers and/or nondiscrimination, and (ii) about discriminatory rules or practices of downward level competition policy regimes (including insufficient nexus). Any complaints by parties to the case about wrong assessments by the competent antitrust authority or dissents regarding the facts of a case fall under the competency of the courts and appellation bodies of the lead jurisdiction. In this sense, ICP provides a forum to deal with conflicts between downward level jurisdictions.

While the ICP represents the final instance regarding its supervision and conflict resolution tasks, an appellation body regarding its *jurisdictional* decisions (i.e. appointment of the appropriate lead jurisdiction) is needed. An international court could be one suitable solution, a second chamber of the panel another. The latter may be preferable in order to keep the selection procedure compact. Otherwise, transaction costs and the administrative burden on business would increase, deteriorating institutional efficiency.

Anticompetitive arrangements and practices with more than negligible cross-jurisdictional effects concerning the downward levels fall under the described competences of the ICP. Regarding mergers and other interfirm alliances the following procedure could prove to be compact and efficient. According to the self-assessment of the participating enterprises, these arrangements are pre-notified to the ICP.[17] A standardised notification procedure could minimise filing efforts while providing the necessary information to decide about the

[15] It remains within the competencies of the decentralised competition policy regimes to develop an institutional solution, which heals the discrimination problem.

[16] Claiming jurisdiction without a sufficient nexus to the respective arrangement can be interpreted as representing an indirect kind of discrimination. It is necessary to include the nexus issue in the supervision and sanction mechanism with respect to competition policy competences on national and subnational-regional levels.

[17] The self-assessment by the enterprises should not entail dangers of forum shopping because when assessing the cross-border effects, the respective enterprises are not choosing between different competition laws (since this decision is made by the ICP). Moreover, an ICP pre-notification of an anticompetitive arrangement or practice without considerable cross-border effects does not generate significant harm because the competence to substantially deal with the arrangement is allocated downwards anyhow. If only one downward level jurisdiction is really affected, the selection of a 'lead' jurisdiction is rather simple and indisputable.

appropriate lead jurisdiction. If arrangements with considerable cross-border effects are only notified to a downward level jurisdiction, then the receiving agency must delegate the notification to the ICP.[18] Concerning illegal cartels, which are usually performed secretly, and abusive behaviour, a notification to the ICP occurs according to the assessment of the downward level antitrust authorities, who discover them. In such cases, the ICP's appointment of a lead jurisdiction must sometimes rely on provisional knowledge and hypotheses about the nature of the cartel or abuse. However, since – according to experience in anticartel interagency cooperation – overall cooperation between the affected regimes works considerably well in such cases due to similar interests, the appointment of the second- or third-best appropriate jurisdiction does not represent a serious problem.

This leads towards the organisational design of the ICP. Actually, there are different ways to organise an agency with the above sketched competences. One obvious alternative would be to integrate the ICP within the WTO framework. This would complete the WTO as the primary organisation, which is responsible for the governance of global markets. With both public and private restraints of competition falling under the competence of the WTO, global competition would then be subject to coherent governance out of one single hand. The late completion of the postwar ITO vision clearly comes with considerable sympathy. However, it can be useful to sacrifice this ideal paragon in favour of a more practicable or consensuable solution. The major problem with a WTO competition policy is the significant difference between the prevailing mechanisms of international trade policy and the demands of a decentralised international competition policy system. It represents an important practical difference whether one deals with state action restricting trade or with private business behaviour, which might produce anticompetitive effects – with respect to timeframes, parties' rights, economic analysis, etc. On the other hand, in the framework of an ICP, which is suggested here, the international authority only deals with public agencies – namely competition agencies – and their claims of jurisdiction and handling of assigned competences. Moreover, there are considerable overlaps, for instance, regarding discriminatory competition policy strategies (like selective non-enforcement of competition rules, promotion of outbound restrictions, etc.). Nevertheless, significant differences between the proposal in this paper and the current WTO architecture are obvious and they might prove difficult to overcome.

Alternatively, the ICP could constitute a separate independent international agency. Such an agency must be designed to (i) represent adequately the downward level jurisdictions and (ii) keep procedures compact and efficient. The first requirement facilitates the constitution and implementation of the ICP. In order to avoid an international political bargaining game, the competition authorities of the existing national and supranational jurisdictions could serve as natural constituents and members of the ICP. To some extent, one of the constituting principles of the ICN serves as a paragon – namely aiming for a coordination among

[18] Such cases are likely to occur only infrequently. If an arrangement affects more than one decentralised competition policy regime, the participating agencies are required to notify to more than one agency – and, at the same time, they experience the incentive to make use of the one-stop shop via an ICP pre-notification.

competition authorities instead of among governments. Furthermore, an obvious advantage of this strategy would be the possibility to develop the ICP out of the popular ICN – albeit, it would more likely entail the characteristics of a replacement.

Another organisational paragon for an international panel consisting of experts is represented by the European System of Central Banks or, more precisely, its major decision forum, the Governing Council (*European Central Bank* 2004). Drawing on this, the ICP *Governing Chamber* could consist of a board of appointed ICP directors and the presidents, governors, etc. of downward level antitrust authorities. However, in view of the second demand – compact and efficient procedures – the number of members of Governing Chamber must not be excessive. Therefore, not every jurisdiction can be an acting member of the Governing Chamber at a given point of time. Along with, say, 5 directors, the chamber should consist of a maximum of 10 national or supranational-regional representatives. A rotation system must ensure that none of the participating jurisdiction is disadvantaged concerning its representation in the Governing Chamber. This rotation system could be designed to reflect the differing importance and meaning of the downward level jurisdictions in the world of antitrust. National or supranational-regional competition policy regimes with a large population and/or large economic weight should more often join the chamber than smaller ones. An indicator, which combines measures of population and economic activity, is not too difficult to develop. In fact, this mirrors the upcoming rotation system regarding participation of national central bank governors in the Governing Council of the European Central Bank, which became necessary in the face of the enlargement of the EU and enters into force if the new members qualify for and subsequently join the European Currency Unit (*Baldwin* 2001; *Hefeker* 2002). Roughly, the organisational side mirrors the independent administration system.

An additional precondition for compact and efficient procedures is the absence of veto rights or comprehensive consensus requirements. Instead of unanimity rules, a simple or qualified (e.g. two-thirds of the votes) majority should suffice to generate a definite decision. This is especially true if the independence of both the ICP and the members of its chambers is secured. The independence of the ICP board of directors is served if it consists of antitrust experts, which are appointed by the leaders of the downward level competition agencies. Since comprehensive independence of national and supranational-regional competition authorities may be unrealistic[19], the design of the rotation system promotes the independence of the ICP if membership in the Governing Chamber is rather short (and, thus, rotation frequent) and overlapping (i.e. the chamber does not frequently consist of representatives of the same antitrust authorities because the individual periods are not parallel).

If a second chamber (say *Appellation Chamber*) is employed in order to constitute an appellation body regarding jurisdictional decisions of the Governing Chamber (i.e. selection of the lead jurisdiction according to the defined criteria), then an obvious choice would be to

[19] However, two decades ago the comprehensive independence of Central Banks in each EU member state would also have been deemed to be unrealistic.

let it also consist of representatives of national and supranational-regional competition authorities (second and third level) in a rotating way. Of course, jurisdictions must not fill a seat in both chambers at the same period of time. Again, some majority rule that prevents effective veto rights would be helpful.

The preceding description of how an ICP could be designed is only exemplary for a number of alternative variants. In the context of this study, its main rationale is to demonstrate how a concrete operationalisation of a global level authority with the competences allocated and delimitated by the combination of mandatory lead jurisdiction model and nondiscrimination rule could look like. Therefore (and different from the competence allocation rules), the organisational questions are only sketched and not subject to a rigorous analysis.

4.2 Supranational-Regional Competition Policy Regimes

The second level represents the first one, which disposes of substantive antitrust competences. It consists of joint competition policy regimes of confederations or associations of independent countries. Thus, competition policy competences are allocated to a supranational level, albeit with limited regional scope. The most natural and comprehensive example is represented by the EU Competition Policy System, which contains full-fledged competition rules and an experienced antitrust practice. Additionally, there are antitrust provisions and agencies on a supranational level in the context of several other multicountry associations. For instance, both the Andean Community and the UEMOA (Union Economique et Monétaire Ouest Africaine) have implemented their own competition policy agencies, theoretically competent in enforcing specifically shaped community competition rules. Practically, however, both regimes are currently rather inactive. Comparatively elaborate competition policy competences are located at the EFTA (European Free Trade Association) Surveillance Authority, whereas free trade and economic integration associations, like NAFTA (North American Free Trade Agreement), ASEAN (Association of Southeast Asian Nations), Mercosur (Mercado Común del Conor Sur), CIS (Community of Independent [former soviet] States), CARICOM (Carribean Community and Common Market), FTAA (Free Trade Area of the Americas), SADC (South African Development Community), or CEN-SAD (Community of Sahel-Saharan States), currently only possess at best rudimental antitrust provisions. Meanwhile, COMESA (Common Market for Eastern and Southern Africa) is also reaching for implementing considerable supranational competition policy competences.

Following the paragon of the EU, these associations and confederations might develop effective competition policy regimes with considerable competition policy competences in the course of time. Developed ones represent natural candidates for lead jurisdiction appointments as they jurisdictionally include a number of national markets and address consumers of different countries. Therefore, they automatically internalise parts of the externalities arising from cross-border business activities. Consequently, this level might

become the major antitrust enforcement level in the long run – given that worldwide economic integration is proceeding.

Effective competition policy regimes at the supranational-regional level retain full rule-making, rule-application, and enforcement competences for cross-border anticompetitive arrangements and practices if the upward level appoints them to be lead jurisdiction in the respective case. Each regime autonomously shapes its own substantive competition rules, enforcement institutions, and agencies (including an individual composition of elements of the court system, government and independent administration system, and private litigation) minus discriminatory provisions and practices, which are excluded by the nondiscrimination rule and sanctioned by the global level. Against the background of these non-discriminatory institutions and practices, each regime is obliged to consider competitive effects outside its territory according to the common welfare of all affected consumers. Apart from that, the appointed lead jurisdiction is free to handle the referred case. Of course, it can seek the cooperation with and assistance by other – horizontally- or vertically-interrelated – antitrust regimes as far as it deems this to be necessary and/or helpful.

Regarding the vertical (and diagonal) delimitation of competences between the supranational-regional and the national level, a X-minus rule could provide an efficient and simple competence allocation rule. Its content would be that any anticompetitive arrangement or practice, which is notified to or detected by a supranational-regional competition policy regime, must be allocated downwards if the effects of the respective arrangement or practice occur within X or less national antitrust regimes.

4.3 National Competition Policy Regimes

Since currently only one effective supranational-regional antitrust regime exists, the major level of substantive competition policy is likely to remain at the national level for a considerable time. In particular, national competition policy regimes with large and important internal markets are likely to be frequently appointed as lead jurisdictions. Above all, this refers to the U.S. Antitrust System. However, the competition policy regimes of countries like Canada, Australia, Brazil, Japan, Russia, China, India, and many more also represent frequent candidates if they qualify for a lead jurisdiction appointment.[20]

If national competition policy regimes are selected to serve as lead jurisdictions, their competences are identical with supranational-regional lead jurisdictions. Thus, they handle a referred case according to autonomously shaped, applied, and enforced competition rules, except of nondiscrimination and comity to extraterritorial markets and consumers, supervised

[20] Next to inhabiting the regional gravity of the aggregate turnover of the participating enterprises, a qualification to become appointed lead jurisdiction requires the absence of discriminatory provisions and practices as well as the proven willingness and experience to employ a world welfare standard (see above). This implies that some of the above mentioned countries might face a long way to go until they meet these criteria. Note, however, that the possibility to qualify as lead jurisdiction can entail important incentives to develop national competition policy regimes according to the modern international standards.

by the global regime. Similarly, they are free to develop their individual composition of court system, government and independent administration system, and private litigation elements.

National competition policy regimes can be vertically-interrelated to a supranational-regional level (like within the EU) and/or to a subnational-regional level (like in the U.S.) – or lack any vertical interrelation concerning substantive competition policy. If a vertically-interrelated supranational-regional level exists, an institutional arrangement rule for the upward allocation of competences is required. According to the preceding discussion, an X-plus rule seems adequate, i.e. each anticompetitive arrangement and practice, which would be subject to review by X or more competition policy regimes on a given level, is automatically allocated to the upward level. The more countries a supranational-regional level consists of, the more caution is required regarding the value of X because a very low X can promote (over-) centralising forces.

If a vertically-interrelated subnational-regional level exists, downward allocation can be adequately designed against the background of an X-minus rule. In particular, large countries with big internal markets profit from internal decentralisation and, thus, from the existence of regional competition policy regimes. According to this reasoning, the maintenance of American antitrust federalism is principally beneficial as would be the creation of federalised competition policy structures in comparably-sized countries (e.g. Russia or China).

If no vertically-interrelated subnational-regional level exists, a national competition policy regime needs adequate notification thresholds for mergers and interfirm cooperative arrangements in order to avoid that jurisdiction is claimed even if no sufficient nexus with the (anti-) competitive effects of a business arrangement or practice exists. Concerning per se prohibited cartels and abusive modes of behaviour, such thresholds are also necessary but naturally do not refer to notification. If a national antitrust regime detects such a cartel or mode of behaviour that does not meet the thresholds for a sufficient domestic nexus, it is obliged to notify a horizontally- or vertically-interrelated regime with a sufficient nexus (according to top level standards).

4.4 The Subnational-Regional Level

Subnational-regional competition policy regimes usually do not qualify as lead jurisdictions for cross-border antitrust cases. Their domains are local anticompetitive arrangements and practices because, in this respect, they can exploit their advantages of being very decentralised and very close to the locally-affected markets. In such cases, however, they play an important role within a sound multilevel competition policy system. As discussed in the preceding section, particularly large countries with considerably segmented internal markets profit from downward level competition policy competences. Despite ongoing market globalisation, regional and local markets are unlikely to be completely eroded. Therefore, the scope for subnational competition policy regimes is a sustainable one.

However, it must be secured that only anticompetitive arrangements and practices with purely local effects fall under the jurisdiction of the regimes at this decentralised level. Here, an imbalance of centralising and decentralising forces is more likely to tend towards overdecentralisation. Therefore, upward allocation should be based on a competence allocation rule, which effectively minimises multiple proceedings at this level. According to the preceding economic analysis, an X-plus rule with the value of X close to '2' represents an adequate institutional arrangement. Only if the subnational jurisdictions represent considerable numbers of consumers (because a very large countries subdivided into comparatively large subunits), a larger X might be beneficial.

Obviously, competition policy regimes at this fourth level represent the most downward ones, wherefore the issue of a sufficient nexus between (anti-) competitive impact and the claiming of jurisdiction becomes rather sensitive. Therefore, the competition policy regimes at this level must implement triggering thresholds constituting jurisdiction and notification duties of private parties, which do not violate the safeguards for adequate jurisdiction according to top level standards.

5. Conclusion

This paper develops a proposal for an international multilevel competition policy system, which draws on the insights of the analysis of multilevel systems of institutions. In doing so, it targets to contribute to bridge a gap in the current world economic order, i.e. the supranational governance of private international restrictions to market competition. Such a governance can effectively be designed against the background of a combination of the well-known nondiscrimination principle and a lead jurisdiction model. Put very briefly, competition policy on the global level restricts itself to the selection and appointment of appropriate lead jurisdictions for concrete cross-border antitrust cases, while the substantive treatment remains within the competence of the existing national and regional-supranational antitrust regimes.

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