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Towards a Differentiated Analysis of Competition of Competition Laws

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Abstract

Can "competition of competition laws" be a feasible concept that should play an important role in an international order for the worldwide protection of competition? We introduce four different types of regulatory competition that allow for a more differentiated analysis of beneficial and deficient effects of competition of competition laws. Our analysis shows that most types of regulatory competition have a rather limited scope for application to competition laws. However, yardstick competition can be very promising and represents a powerful argument against centralisation. An important result of our analysis is that the institutional framework of any competition of competition laws plays a crucial role for its workability.

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JEL-Classification: F 020, K 210, L 400

I. Introduction

During recent years, an intensive discussion about the internationalisation of competition policy as a response to market globalisation has risen. One controversial issue is the question of coordination, convergence and harmonisation of competition laws both on a global level (WTO, ICN) and within the supranational competition law regime of the European Union (modernisation debate). Although many scholars put forward arguments in favour of a greater convergence or even (minimum) harmonisation of competition laws, there is also vigorous opposition. One line of thought prefers, instead, a beneficial competition of competition laws as the adequate answer to the challenges of market globalisation. This is a very specific argument that refers to the concept of institutional or regulatory competition, drawing particularly on the famous example of competition of U.S. corporate laws. Other authors reject this argument, pointing to loopholes,

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inefficiencies and conflicts in the current system of national competition laws and emphasising negative effects of a failing competition of competition laws.

Thus, there is a vital discussion whether "competition of competition laws" is a feasible concept and whether it represents an important argument in the discussion about an international order for the worldwide protection of competition. However, even a brief analysis of this issue already reveals that it seems to be very unclear what exactly the meaning of "competition of competition laws" is. Therefore, our first concern is to clarify possible meanings and mechanisms of this specific kind of regulatory competition. Drawing on the general theory of regulatory competition, we suggest to differentiate between four types of regulatory competition in order to distinguish four meanings of "competition of competition laws": (I) regulatory competition via mutual learning (yardstick competition), (II) regulatory competition via international trade, (III) regulatory competition via locational (interjurisdictional) competition, and (IV) regulatory competition via free choice of law. Having introduced these four different meaning of competition of competition laws, we can analyse each type concerning its role in the literature, its implications and its feasibility in regard to an international competition policy regime.

Our main result is that an elaborated and detailed analysis leads to very differentiated assessments about the feasibility of regulatory competition of competition laws. It depends crucially on both the specific type of competition of competition laws and specific institutional preconditions whether these competition processes lead to an improvement or a deterioration of competition laws. We show that competition of competition laws is beneficial in the sense that a decentralised system of competition law regimes allows for experimentation and mutual learning about the best ways to protect competition. However, competition of competition laws via international trade, locational competition or choice of law includes the danger of considerable failures and, therefore, needs an adequate institutional framework that impedes defective processes of regulatory competition. Altogether, our results support a sceptical position to regulatory competition in regard to competition laws while simultaneously emphasising the benefits of a decentralised multi-level system of competition laws with an appropriate institutional framework that ensures its proper working.

This paper is organised as follows: in section 2, four types of regulatory competition in regard to competition law are differentiated. Section 3 represents the main part of the paper and provides a detailed analysis of the mechanisms, implications and problems of each type of competition of competition laws. Based on a short overall assessment of the feasibility and desirability of different types of competition of competition laws, section 4 discusses briefly the perspective of a decentralised multi-level system of competition laws (antitrust federalism) as a promising avenue for international competition policy.

II. Possible Meanings of "Competition of Competition Laws": Four Types of Regulatory Competition

"Competition of competition laws" represents a special case of the general concept of regulatory competition. The theoretical analyses of regulatory competition is closely linked to the discussions about interjurisdictional (and locational) competition, systems competition,

centralisation versus decentralisation, and competitive federalism.[1] Concerning policy applications, the discussions about the merits and problems of competition among U.S. corporate laws[2] and about centralisation / harmonisation vs. decentralisation of legal rules and regulations within the EU (Cassis de Dijon-Judgment of the European Court of Justice)[3] are particular important. Our analysis of regulatory competition in regard to competition law regimes draws on the insights of these discussions.

So far, it cannot be claimed that a thorough, well-elaborated general theory of regulatory competition exists. The main issues of these discussions refer to the question whether regulatory competition can work satisfactorily, i.e. that these competition processes lead to an improvement of legal rules ("race to the top"), or whether, vice versa, processes of regulatory competition will fail, implying a deterioration of the quality of legal rules ("race to the bottom"). Although much research still has to be done, theoretical and empirical research shows that no general answer can be given. The working properties of regulatory competition seem to depend crucially on specific preconditions, the institutional framework for regulatory competition, and the kind of legal rules and regulations itself.[4]

This general debate, however, is also characterised by the problem that the term "regulatory competition" is used either in very different ways or rather vaguely. Often, it is not clear whether regulatory competition is meant as a direct competition of legal rules by choice of law, or as a more or less indirect one through "voting by feet" (interjurisdictional competition), by the application of the principle of origin (like within the EU), or simply as a kind of competition of regulatory concepts and theories. As it will be demonstrated in section 3, the difference matters: each type of regulatory competition has its own properties and implications and they differ considerably among those types. Therefore, in the following, four basic types of regulatory competition are distinguished according to the extent of mobility between different jurisdictions (regulatory regimes) which, consequently, imply different transmission mechanisms for competition among legal rules or regulations (see Table 1).[5]

[1] See e.g. Tiebout (1956), Siebert/Koop (1990), Kenyon/Kincaid (1991), Vanberg/Kerber (1994), Frey/Eichenberger (1995), Breton (1996), Sinn (1997, 2003), Bratton/McCahery (1997), Kerber (1998), and Oates (1999).

[2] See e.g. Bebchuk (1992), Romano (1985, 1993), and Easterbrook/Fischel (1996).

[3] See Woolcock (1994), Sun/Pelkmans (1995), and Kerber (2000b).

[4] See Siebert/Koop (1990), Hauser/Hösli (1991), Sun/Pelkmans (1995), Sinn (1997), Gatsios/Holmes (1998), Van den Bergh (2000), Stephan (2000), and Heine (2003).

[5] For this distinction of different types of regulatory competition, see also Kerber (2000a), Heine (2003), and briefly in respect to competition laws Kerber (2003). Since it is not realistic to assume mobility of goods/services without mobility of information, the extent of mobility is step-by-step cumulating from type (I) to (IV). However, this might not be appropriate in all cases. Furthermore, these types are only basic types, which can be further differentiated.

Table 1: Types of Regulatory Competition

Mobility of Type of Regulatory Competition	Information/Theories	Goods/Services	Factors of Production	Legal Rules
(I)	X	-	-	-
(II)	X	X	-	-
(III)	X	X	X	-
(IV)	X	X	X	X

Type (I)-Regulatory Competition via Mutual Learning (Yardstick Competition): In type (I)-regulatory competition, the jurisdictions are assumed to be isolated with the exception of information flows, which allow for mutual learning about the advantages and disadvantages of different legal rules. Regarding competition laws, this implies that the jurisdictions can learn from the experiences of the competition policies in other countries. Thus, they can imitate superior competition law rules or enforcement techniques. In its pure form, this type of regulatory competition as a process of parallel experimentation and mutual learning can already work without presupposing that the competition policy of one jurisdiction affects the welfare of other jurisdictions, i.e. no international markets or an international mobility of individuals, firms, and factors of production are necessary. The transmission mechanism for the imitation of successful policies from other jurisdictions is intrajurisdictional political competition, in which voters assess the performance of their government by comparing it with the performance in other countries (yardstick competition).

Type (II)-Regulatory Competition via International Trade: This type represents the assumptions of the traditional theory of international trade: mobility of goods/services and immobility of factors of production. Since the design of the institutional and legal framework influences the competitiveness of domestic firms on international markets, there is a kind of indirect competition between the legal rules of different countries. Since competition laws can influence the international competitiveness of domestic firms as well, success or failure in international trade can be an important additional feedback mechanism for competition laws. Therefore, governments may have incentives to take into account the international competitiveness of domestic industries in their decisions upon competition policy. This can lead to additional incentives to improve competition laws, e.g. by learning from superior competition policies of other countries, but also widens the perspective for strategic competition policies, e.g. lenient

merger policies, which deliberately avoid fighting the emergence of "national champions" in order to reap rents from market power on international markets.

Type (III)-Regulatory Competition via Interjurisdictional Competition: If we extend type (II)-regulatory competition to include the mobility of individuals, firms, and factors of production (particularly capital), direct competition for mobile factors among different jurisdictions emerges (interjurisdictional competition). This type (III)-regulatory competition implies, in contrast to type (II), that legal rules and regulations can be chosen by moving between jurisdictions. Consequently, jurisdictions can shape their competition laws to attract investments of firms and, then, competition of competition laws becomes part of interjurisdictional competition. This is a much more direct form of regulatory competition than in the case of type (II), providing additional incentives for the improvement of competition laws or strategic competition policies.

Type (IV)-Regulatory Competition via Free Choice of Law: An additional type can be distinguished, if individuals and firms can directly choose between legal rules of different jurisdictions without having to move (physically) their location (direct choice of law). The already mentioned competition of corporate laws in the U.S. serves as an example of this type (IV)-regulatory competition. The advantage in comparison to type (III) is that particular regulations can be chosen without having to accept the whole bundle of public goods, taxes, and regulations of the respective jurisdiction. This can lead to a much more intensive regulatory competition, as it could be observed in the case of U.S. corporate laws. In regard to competition laws, this type would imply that firms can choose directly between different competition law regimes independent from their location or the markets in which they do business.

The mobility determining the type of competition of competition laws depends on (1) real mobility conditions (like costs of transportation, communication and moving costs, etc.) and (2) legal rules that determine to what extent mobility of goods / services, individuals, firms, factors of production, or legal rules (by choice of law) is allowed or restricted.[6] Considering competition law, the most important of these rules is the wide-spread "effects doctrine", i.e. that each jurisdiction claims to apply its competition law to all restraints of competition that have restricting effects on competition within its own territory, wherever those restraints of competition take place.[7] If this extra-territorial application of competition laws was enforced perfectly, it would have serious consequences for the possibility of some types of competition of competition laws, because it would imply that firms wanting to do business in a particular jurisdiction would not have the actual freedom to choose between different competition laws, neither through direct choice of competition laws nor through moving their location to another jurisdiction. However, due to the limited enforceability of domestic competition laws in foreign countries, the effects doctrine, in reality, does not exclude necessarily the possibility of these types of competition of competition laws. It becomes clear, in any case, that the rules defining the extent of the competencies of competition law regimes are crucial for our analysis of the possibility and working properties of different types of regulatory competition.

[6] Various kinds of barriers to international trade, barriers to migration or establishment of firms, or restrictions of free choice of law influence the type and extent of regulatory competition.
[7] See Basedow (1998).

Another important dimension is the multi-level structure of existing competition laws. Within the EU, there are competition laws and competition authorities on two different jurisdictional levels: both on the national level of the EU Member States and on the EU level. Also in the U.S., a two-level structure (federal and state level) is effective, particularly in regard to the enforcement of antitrust laws.[8] The establishment of (additional) international competition rules would lead to a three-level structure of competition law regimes. Consequently, competition of competition laws can take place *horizontally* between competition laws of the same jurisdictional level (as between German and French competition policy) and *vertically*, e.g. between competition law regimes of the EU and its member states. Discussing competition of competition laws from this perspective of a multi-level system of competition laws shows that this debate is closely linked to the discussion on centralisation versus decentralisation of competition law regimes, and, therefore, to the possibility to apply the concept of federalism to competition laws (federalism in antitrust).[9]

III. Analysis of Different Types of Competition of Competition Laws

1. Type (I)-Competition of Competition Laws: via Mutual Learning (Yardstick Competition)

1.1 Introduction

Many proponents of the idea of competition of competition laws emphasise that the parallel existence of different competition laws allows jurisdictions to learn from each other how to carry out competition policy successfully.[10] Some of them stress beneficial effects of decentralisation and diversity of competition laws on principle.[11] Others argue that mutual learning processes alleviate the convergence of competition laws, e.g. by identifying best practices and spreading them.[12] Whereas the first position remains sceptical to convergence and harmonisation and promotes decentralisation and diversity to be a permanent feature of the international protection of competition, the latter understands the process of mutual learning as an instrument for achieving convergence. This approach is also called ex-post or market-based harmonisation in contrast to ex-ante harmonisation via political agreements on harmonised rules. In the following, these – at first sight – rather vague arguments are analysed in more detail within the framework

[8] For the two-level structure of competition laws in Europe, see Mavroidis/Neven (2000), Van den Bergh/Camesasca (2001, pp.136-165), and Bergeron (2001); for analyses on U.S. federalism in antitrust, see Easterbrook (1983), Kovacic (1992, 1996), Hovenkamp (1999, pp. 721-745), Sullivan/Grimes (2000, pp. 536-556, 887-967), and Posner (2001, 2003). The U.S. system is additionally characterised by an unique importance of private litigation.

[9] For first approaches to apply federalism to competition policy see Easterbrook (1983), Hawk/Laudati (1996), Fox (2000), Guzman (2001), and Kerber (2003).

[10] See Meessen (1989), Nicolaides (1992, 1994), Van den Bergh (1996), First (1998), and Freytag/Zimmermann (1998).

[11] See Ullrich (1998), Budzinski (2002a), and Kerber (2003).

[12] See Nicolaides (1994) and Freytag/Zimmermann (1998) as well as the cautious approach of First (1998) towards a "best-rule-harmonization" through regulatory competition. The best practice approach is also one important goal of the International Competition Network (ICN). See Budzinski (2003) and First (2003).

of the conditions of type (I)-regulatory competition, i.e. that only information flows are relevant between different countries, in which competition laws protect competition in domestic markets independently from each other.

1.2 Knowledge Problems and the Quality of Competition Laws

The theoretical background of this line of argument about experimentation and mutual learning can be traced back to basic epistemological reasoning of Hayek and Popper about the fundamental limitations of our knowledge, particularly in regard to the appropriate rules for human societies. Popper (1972) emphasised the fallibility of human knowledge and, therefore, characterised the growth of knowledge as the outcome of processes of trial and error.[13] Hayek (1970) elaborated extensively on the fundamental knowledge problems that policy makers have to face, leading him to a profound scepticism regarding the capability of governments to influence successfully the outcome of market processes. If we take Hayeks “knowledge problem” seriously, a crucial consequence arises. We must not assume that governments (or even academic scholars) already know the best legal rules in advance. Therefore, existing legal rules might not only be deficient because of rent-seeking problems but also due to fundamental knowledge problems. Consequently, particularly in the long run, a legal system should have a high endogenous capability for improving the knowledge about the quality of its legal rules by innovation and adaptation. From this Popperian and Hayekian perspective, the establishment of processes of parallel experimentation with legal rules in different jurisdictions (and mutual learning from these experiences) are a crucial device for dealing with these knowledge problems.[14]

In order to understand the importance of the knowledge-generating effects of parallel experimentation and learning concerning the protection of competition, we should take into account that each competition law regime consists of a complex set of many rules, institutions, theories, and practices that determine its overall quality:[15]

(1) Different substantial competition rules can be expected to lead to different qualities of competition law. This refers both to the legal texts itself (like the Sherman Act, the German "GWB", or Art. 81 and 82 EC Treaty), but also to the official guidelines and communications for the application of these laws. Additionally, the appropriateness of general legal terms can be different, like, e.g., the U.S. concept of "substantially lessening of competition" in comparison with the "market dominance test" in the EU.

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[13] Popper (1972, p. 255) claimed an universal Darwinian concept of the growth of knowledge, based upon the principle of trial and error elimination. This eventually leads to the approach of evolutionary epistemology. See also Campbell (1987) and Vanberg (1994).

[14] From the evolutionary perspective of Popper, parallel processes of experimentation with mutual learning can be understood as evolutionary processes of variation, retention and selection, leading to the sifting of superior solutions and, therefore, to a growth of knowledge (Popper 1972). For a very similar notion see Hayek's theory of cultural evolution (Hayek 1973; Vanberg 1994). In legal discussions about the advantages and disadvantages of uniformity versus diversity of law, variety and experimentation with new legal rules and mutual learning have also been seen as an important advantage of diversity of law. See e.g. Behrens (1986, pp. 238), Parisi/Ribstein (1998), Ogus (1999), and Van den Bergh (2000).

[15] The following four categories should not be viewed as strictly separable.

(2) Each competition law regime has a set of procedural rules, like filing requirements, deadlines and time schedules for merger procedures, investigation rights, rules for the dealing with confidential business information, sanction mechanisms in the case of non-compliance, etc.. Other aspects of the quality of enforcement include the organisation of competition authorities for public enforcement and courts as well as rules that determine the extent and the incentives for private enforcement of competition rules. The degree of independence from political and private influence, which competition agencies possess plays an important role.

(3) The application of substantial competition rules also depends on the specific theories of competition (industrial economics) that are used by competition authorities (including courts), because they provide the set of criteria for assessing particular cases. Using different theories, e.g. about entry barriers or predatory pricing, can lead to a different quality of competition laws.

(4) Beyond that, there is a set of (more technical) practices, e.g. methods to define relevant markets or to determine turnovers (for market shares or turnover thresholds).

Each one of these many elements of a competition law regime can be more or less appropriate. Although theoretical and empirical studies can provide valuable information from which we learn extensively, we have to accept that the above-mentioned knowledge problems exist in relation to nearly all of these elements of competition law regimes. Although there is a wide-spread consensus on some basic elements, like the positive assessment of the existence of merger reviews or the prohibition of hardcore cartels, our knowledge about the best set of criteria for reviewing mergers or exempting cartels or about the most appropriate procedural rules is a rather limited. Therefore, experiences with already implemented rules, established competition authorities, and applied theories and practices are an important source of valuable information.[16]

1.3 Experimentation, Mutual Learning, and Competition

If there are different competition law regimes in different countries, and mutual observation of these competition policies and their relative success (or failure) is possible (as assumed in type (I)-regulatory competition), governments, competition authorities staff, and citizens (as voters) can use the experiences of other countries to reassess their own competition law regimes. This allows for correcting errors, imitating superior legal rules, enforcement mechanisms, theories and practices, or simply avoiding mistakes others have made.[17]

What examples can be given for mutual learning concerning competition policy? Most important is the innovation of modern competition policy by the establishment of U.S. antitrust policy at the end of the 19th century itself, which spread in the second half of the 20th century into many industrialised countries, and its increasing diffusion into developing countries since the 1990s. Such innovation-imitation-processes can also be observed when considering particular instruments of competition policy, e.g. merger control, in regard to specific practices, e.g.

[16] Competition law regimes have in many respects the characteristics of an experience good, i.e., information about their quality can only be generated through the use of the competition law.

[17] Even if one competition law regime might seem in general superior to another, it cannot be expected that it is superior in regard to all substantial and procedural rules, theories and practices. This ensures the mutuality of learning from others in respect to at least some traits of the competition law regime.

methods for defining relevant markets, or in regard to specific theories, e.g. the spreading of arguments of Chicago economics for the evaluation of vertical restraints or the theory of Contestable Markets concerning the assessment of entry conditions. Additionally, the current discussions in European competition policy whether the "efficiency defence" should be introduced in European merger control or whether the concept of "substantially lessening of competition" might be superior to the "market dominance test" are examples for the possibility of learning from each other. Particularly interesting would be a detailed analysis about mutual learning processes between the German and the European competition law regime. As a general outline, one can suppose that until the 1980s the European competition policy learned much from the more developed German competition policy, whereas since the 1990s the main direction of learning (and imitation) has been reversed.[18] This demonstrates that in a multi-level system of competition law regimes processes of experimentation and mutual learning are also possible between competition law regimes on different jurisdictional levels (vertical dimension).

Can we, however, label these processes of parallel experimentation and mutual learning as "competition processes"? In our opinion, the term can be used if we do not narrow down "competition" to the model of perfect competition but, instead, use it in a theoretically broader way. Both the Schumpeterian concept of competition as innovation-imitation-processes and the Hayekian concept of "competition as a discovery procedure" can be interpreted as encompassing the notion of parallel experimentation with new problem solutions and the imitation of the successful solutions by others through learning. In these evolutionary concepts of competition, which can be analysed as variation-selection-processes, new knowledge about the solving of problems (here: the protection of competition) is endogenously generated and spread.[19] Closely linked to this concept of competition is the concept of yardstick competition, which is well known in the discussion on interjurisdictional and regulatory competition. The basic idea of yardstick competition is that information about the quality of the performance of governments or policies (and legal rules) is revealed by comparing it with the performance of others. In this respect, the concept of yardstick competition comprises implicitly the notion of parallel experimentation and ex-post revelation of superior solutions.[20]

Nevertheless, the positive knowledge-generating effects of parallel experimentation presuppose that there is some diversity in regard to the competition policies of different jurisdictions. Therefore, a crucial conclusion is that type (I)-competition of competition laws implies (1) the right of the jurisdictions to decide freely on the details of their competition policies and (2) the acceptance of a certain diversity of the competition policies of all jurisdictions. From this perspective, the endeavours to achieve convergence (or even harmonisation and centralisation) of

[18] The last revision of the German Law Against Restraints of Competition (GWB) comprised several imitations of European competition rules, e.g. the imitation of the EU rule on cartel exemptions (Art. 81(3) EC Treaty as "Sonderkartelle" (§ 7 GWB) or procedural rules for merger control.

[19] See for evolutionary concepts of competition Schumpeter (1934), Hayek (1978), Kerber (1997), Kirzner (1997), and Budzinski (2000); for applications of evolutionary concepts of competition to interjurisdictional and regulatory competition see Vihanto (1992), Vanberg/Kerber (1994), and Streit/Wohlgemuth (1999).

[20] The concept of yardstick competition can be traced back to Shleifer (1985). In the theory of interjurisdictional and regulatory competition it was introduced by Salmon (1987). For modelling the search for new policy solutions in decentralized federal systems with learning from others, see Kollman/Miller/Page (2000).

competition law regimes (particularly on the global level) hampers or even eliminates the beneficial knowledge-generating (error-correcting) effects of experimentation and mutual learning.

From a Hayekian evolutionary point of view, the concept of competition of competition laws as a device for ex-post harmonisation is also misleading. The benefits of endogenous knowledge creation are not a temporary phenomenon, leading to an optimal solution, which makes further learning unnecessary. Instead, processes of mutual learning have to take place permanently in order to secure error tolerance and allow for continuing improvements as well as adaptations to changing environments. The fundamental knowledge problem is never finally solved. Therefore, the advantages of experimentation and mutual learning should be maintained in an international system of competition laws, which requires a certain degree of diversity which is not only tolerated but even seen as a fundamental precondition for the future workability and adaptive flexibility of the system, despite other problems that may result from these differences.

1.4 Problems and Relevance

Several groups of problems and obstacles to a satisfactory workability of type (I)-competition of competition laws require discussion:[21]

(1) If the aims of competition policy (or other important conditions) differ to a considerable extent between jurisdictions, different competition law regimes might be best for different countries. In this case, the potential for mutual learning may be limited. Similar problems will arise, if transplanting of particular rules or policy instruments from one competition law regime to another is difficult, because compatibility problems with other parts of the legal system emerge or the same rules have different effects in combination with another legal environment (like e.g. another court system).[22]

(2) From the Hayekian perspective, it cannot be expected that comparative assessments of the experiences with legal rules, theories, and practices are without errors. Therefore, one cannot rule out that in some cases the relatively best solutions are not identified, leading to the danger of the imitation of “wrong” competition policies. A more important problem is that incentives within the jurisdictions, particularly through politically influential rent seeking-coalitions, may lead governments to deliberately imitate welfare-reducing competition policies, for instance, by protecting special interests through cartel exemptions or selective non-enforcement. Processes of experimentation and mutual learning alone cannot ensure that superior competition policies are selected and spread. If the intrajurisdictional political processes that ultimately decide on the competition law regime are systematically deficient, type (I)-regulatory competition can also lead to the learning of inferior policies and, therefore, to a deterioration of competition law regimes. These problems, however, can be solved effectively only by addressing the cause of the deficiencies: the institutional framework of intrajurisdictional political markets.

[21] The majority of these problems are well known in the economic literature on innovation and diffusion of new products and technologies.

[22] For those compatibility problems see, for example, Heine/Kerber (2002) in regard to the introduction of regulatory competition of corporate laws within the EU after the "Centros"-decision of the European Court of Justice.

(3) This leads to the general incentive problem in regard to innovation and imitation of substantive and procedural legal rules, theories, and practices in the case of competition policy.[23] There can be doubts whether the already mentioned yardstick competition, which is driven by intrajurisdictional political competition,[24] is strong enough for providing sufficient incentives for politicians. Nevertheless, within competition law regimes, there are also other agents who can influence innovation and imitation. Economists and legal scholars, who influence the academic discussion on competition policy, might have large incentives for the innovation of new theories and arguments, and/or for importing them into domestic academic discussions. Officials in competition authorities and high judges in courts, who are responsible for drawing up guidelines and/or deciding on specific cases (including precedence), as well as lawyers might have specific incentives for picking up new theories and developing new arguments. Therefore, complex incentive and transmission mechanisms are at work in this type (I)-competition of competition laws, which need to be analysed in detail.[25]

1.5 Conclusions

We have seen that one important interpretation of "competition of competition laws" is that the parallel existence of different competition policies in different countries can be viewed as a process of parallel experimentation, which allows for innovation and mutual learning from the experiences of other countries. This effect was isolated in the analysis of type (I)-competition of competition laws. Its rationale lies in the fundamental knowledge problem that we cannot assume that the best way to protect competition is already found, and that from an Hayekian (and also Schumpeterian) perspective competition of competition laws can be understood as a "discovery procedure" (or "innovation-imitation"-process) which might lead to a process of improving the quality of competition laws. Learning can take place both horizontally between the competition law regimes on the same jurisdictional level and vertically between different jurisdictional levels. Although type (I)-competition of competition laws does not work without institutional preconditions that have to be analysed in more depth, it is important that no mechanisms can be described that lead to systematic processes of deterioration, in contrast to the following types of competition of competition laws. We contend rather that, in the long run, considerable beneficial effects of experimentation and learning on the quality of competition law regimes can be expected. The most important precondition, however, is the maintenance of a certain degree of decentralisation and diversity, leading to a powerful argument against centralisation and harmonisation of competition laws in the international setting.

[23] Please note that this type (I)-regulatory competition does not comprise any direct incentives in regard to the jurisdictions, since effects of competition laws concerning international trade or migration of firms and production factors are excluded from the analysis.

[24] However, yardstick competition requires that voters have incentives to get familiar with foreign policies and their performance in other countries.

[25] See Kovacic (1992, 1996) on the different channels through which innovations spread into and within the U.S. antitrust system.

2. Type (II)-Competition of Competition Laws: International Trade

2.1 Introduction

We now want to extend the analysis by additionally allowing for the mobility of goods. Factors of production are still assumed to be immobile and there is also no direct choice of law. These mobility assumptions imply that type (II)-competition of competition laws embraces type (I) (yardstick competition), i.e., that processes of experimentation and mutual learning are effective here as well. However, international trade between jurisdictions offers an additional transmission mechanism through which competition of competition laws can become effective. It primarily works through the effects of domestic competition policies on the competitiveness of domestic firms on international markets (in relation to foreign firms), influencing the relationship of exports and imports. The enhancement of the international competitiveness of domestic firms by an appropriate competition policy has always been a popular argument in competition policy discussions, e.g. regarding merger policy or cartel exemptions.[26]

2.2 Improving the Protection of Competition

2.2.1 Increasing the International Competitiveness of Domestic Firms by Strict Competition Laws

One strategy to increase the international competitiveness of domestic firms can consist of a consequent policy against every kind of market power. It is the goal of such competition policies to increase the intensity of competition on domestic markets and to prevent firms from getting powerful market positions, which allow them to rest on their past successes. The rationale for this strategy is that highly competitive domestic markets increase the competitiveness of domestic firms and render them fitter for international competition than foreign firms who are used to less competitive market conditions. Therefore, competition laws leading to a high level of protection of competition can increase the international competitiveness of domestic firms.[27] Moreover, such policies may lead to cost reductions on the markets for intermediate goods, leading to competitive advantages for domestic firms compared to foreign ones with non-competitive (and, therefore, more inefficient) suppliers of intermediate goods.[28]

2.2.2 Protection of Consumers on International Markets

Another incentive from international trade for competition-increasing policies has to be considered concerning jurisdictions in which there are only few producers and which, therefore, focus predominantly on consumers' benefits. Since such a jurisdiction would have to bear the costs of monopolisation in international markets (many consumers) without participating much in

[26] See among many others Neumann (1990), Kantzenbach/Kinne (1997), European Commission (2002, pp. 100-119), and especially regarding innovative industries Fuchs (1989) and Jorde/Teece (1992).

[27] This line of thought has always been emphasized in the ordoliberal tradition of competition theory and policy in Germany (and its rejection of industrial policy). See e.g. Immenga (1999). This argument is also stressed by Porter's (1990) "competitive advantage of nations".

[28] The same argumentation may be applied to factor markets. For instance, competitive capital markets and banking systems allow for lower interests rates, whereas highly-regulated labor markets with many rigidities can increase labor costs.

the profits (only few producers), this jurisdiction has incentives to run a high level of protection of competition as well as to try to impose it also on international markets.[29]

2.2.3 Rationale for Improving the Protection of Competition

If jurisdictions with a high level of protection of competition systematically (a) increase the competitiveness of their domestic firms in international markets or (b) protect their domestic consumers from market power, these policies will probably be reinforced through intrajurisdictional political competition, since (a) both export-oriented and import-substituting firms (including their employees) or (b) the dominating group of consumers benefits. Citizens in jurisdictions with less consequent competition policies will experience negative feedback from international trade, because their export-oriented firms suffer from low international competitiveness and their import-substituting industries are strongly challenged by foreign competitors (a), or their consumers finance foreign monopoly rents by bearing higher prices (b). This can provide political-economic incentives for politicians to adjust their competition policy regime towards more competition. In this case, it can be presumed that type (II)-competition of competition laws leads to an improvement of competition laws. The parallel existence of type (I)-competition of competition laws further supports this mechanism. Since legal innovations (or imitations) in regard to substantial or procedural competition rules, theories, or practices improve the protection of competition and / or imply lower enforcement costs both for competition authorities and firms, the international trade mechanism reinforces the incentives for type (I)-competition of competition laws.[30]

2.3 Strategic Competition Policy: Deliberate Toleration of Market Power and Anticompetitive Behaviour

However, there also exist theories implying that the deliberate toleration of market power and the lessening of (domestic) competition can increase the international competitiveness of domestic firms and, thereby, contribute to domestic welfare. In analogy to the well-known strategic trade policies, which use tariffs, subsidies, and other protectionist trade policy instruments to increase domestic welfare, we can call such approaches "strategic competition policies".[31]

2.3.1 Strategic Competition Policy I: Domestic Market Power and Efficiencies on International Markets

A jurisdiction can strategically allow their enterprises to obtain market power in domestic markets, if there are efficiency gains concerning their activities in related international markets

[29] See similarly Guzman (1998).

[30] The same level of protection of competition can be carried out more efficiently by one jurisdiction than by others (e.g. through transparency in filing requirements, tighter time schedules, or more effective leniency programs). Therefore, firms in jurisdictions with more efficient procedural rules will have to bear lower costs, implying a competitive advantage on international markets.

[31] See on strategic trade theory e.g. Helpman/Krugman (1985) and Kemp (2001), and concerning the relation to competition policies Klodt (1993), Greaney (1999), and Markl/Meissner (2000).

due to synergies and economies of scale and scope.[32] Since international markets usually are larger than national ones, the efficient size of firms on international markets may be larger. Thus, cooperation between domestic enterprises and a higher domestic concentration may be efficient. This can be called an 'international competitiveness defence', referring to a trade-off between market power effects (allocative inefficiencies) on domestic markets and efficiency effects on international markets. A recent example can be seen in the merger of E.ON and Ruhrgas that tends to create a near-monopolistic position on the German gas market and, therefore, has initially been prohibited by the Bundeskartellamt (German Federal Cartel Office). However, the German Federal Ministry of Economics overruled the Bundeskartellamt and allowed the merger because it "strengthens the international competitiveness of Ruhrgas on international gas markets (…)."[33] The Ministry did not deny the emergence of market power on the domestic market but since it assumed that the gas markets are on their way to internationalise, it concluded efficiency advantages for the merged company concerning these emerging larger international markets.[34]

2.3.2 Strategic Competition Policy II: Market Power on International Markets

The deliberate toleration of market power by domestic competition policies can also serve to support the attainment of market power on international markets by domestic firms. In this case, profits do not result from efficiency gains, but from monopoly or oligopoly rents on international markets. Therefore, the benefits for the domestic firms (and their employees) are based on higher prices, predominantly for foreign consumers, and the deterrence of (actual and potential) foreign competitors. Thus, this represents some kind of a beggar-my-neighbour-strategy because it implies a rent-shifting process from foreign to domestic agents. Well-known competition policy strategies in this area include the exemption of export cartels, selective non-enforcement of competition laws, the strategic use of merger control to support the creation of 'national champions' and 'domestic global players' as well as the promotion of R&D-cooperations (e.g. strategic alliances) directed to international markets (promotion of 'key industries' and 'future trend-setting technologies'). For instance, in the well-known US-EU dispute on the Boeing-McDonnell Douglas merger (1996/97), both sides have been accused to abuse competition law for strategic industrial goals: the US was said to support the creation of an US monopoly on the world market for large civil jet aircrafts with more than 100 passengers by allowing the merger without considerable modifications, whereas the European Commission was said to protect Airbus against a more efficient competitor by challenging the merger.[35]

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[32] This applies predominantly to markets that are internationalising, i.e. that they used to be national but are in the process of becoming international ones. Not included in this case is cross-subsidizing (see infra case c).

[33] Alfred Tacke, Administrative State Secretary in the German Federal Ministry of Economics , in the Financial Times Deutschland Online, (Sept 19, 2002), http://www.ftd.de/ub/di/1032245712795.html?nv=s (our translation).

[34] It has to be remarked, however, that the German Monopolies Commission (2002a, 2002b) explicitly rejected this line of argument and, instead, supported the decision of the Bundeskartellamt. Thus, this might turn out to be an example for the infra case b).

[35] See Fox (1998b) and Budzinski/Kerber (2003, pp. 17-19, 93-96). Market shares before the merger were: Boeing more than 60%, Airbus 30%, MDD less than 10%. Eventually, the merger was approved, nevertheless with modifications concerning exclusive long-term contracts of Boeing and MDD with several US-airlines.

This latter example shows that deliberately allowing for market power can also be directed against foreign firms that intend to export their goods into the domestic markets. For example, a jurisdiction can protect import-substituting industries against their foreign competitors by enabling them to erect barriers to entry. Instruments include the permission of a defence concentration or of vertical integration that might exclude imports from domestic distribution channels.[36]

2.3.3 Strategic Competition Policy III: Domestic Market Power and Predatory Behaviour on International Markets

Domestic competition policy can allow some firms to reap profits from domestic market power and use them to cross-subsidize foreign market activities. A strategy to promote a "national global player" may be to grant monopoly privileges on purely national or regional markets allowing the privileged firm to use the monopoly rents to finance predatory strategies on international markets and harm its foreign competitors.

The recent controversy about the behaviour of the Deutsche Post AG might serve as an example. Deutsche Post has a monopoly privilege for postal services in Germany concerning standard letters. This remnant from the former governmental organised German mail market is under pressure from liberalisation claims by the European Commission, but the German Government so far refused to withdraw the monopoly privilege. During the last years, the Deutsche Post has started an expansive strategy on the international logistic markets, including takeovers of Global Mail (U.S., 1998), Danzas (CH, 1999), Air Express International (U.S., 1999), and DHL (step-by-step 1998-2002). Since the postage for standard letters remained significantly higher than in other European countries and, at the same time, the prices of Deutsche Post and its subsidiaries in the international logistic markets were reduced considerably, complaints about cross-subsidization were raised by competitors and the European Court of First Instance leading to several investigations by the European competition authorities.[37]

Export promotion through dumping strategies represents an interface between trade and competition policy. On the international level, an anti-dumping policy regime, implemented within the framework of the World Trade Organization (WTO), addresses all kinds of dumping strategies that are made possible and supported by public authorities.[38] However, controversial opinions exist, whether the WTO rules include dumping strategies of private firms that are based on loose competition policies in their home countries.[39] Altogether, the role of the WTO remains rather limited concerning such cases.

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[36] Several cases in which the U.S., the EU or Japan have acted along these lines are discussed in Fox (2003) and Stephan (2003).

[37] Cases IP/00/562 abuse of dominant position: disturbance of international mail traffic, IP/00/919 abuse of dominant position: predatory pricing in mail-order parcel delivery service, and IP/99/530 state aid. Only the state aid investigation led to a fine, so far, but Deutsche Post has filed an appeal.

[38] Currently, there is a vital discussion on dumping through low labour and environmental standards, especially in developing countries. This issue is not discussed here.

[39] See Hoekman/Mavroidis (1994), Iacobucci (1997), Hoekman (1997), Fox (1999), and Janow (2000). The standard example is the Kodak/Fuji-Film-case in which the US tried in vain to stop (indirectly) government-supported anticompetitive private practices in Japan.

2.3.4 Purely Domestic Case: Market Power without Effects on International Trade

Competition policy can also tolerate market power on domestic markets without directly affecting international trade. If competition policy "only" results in rent-shifting between domestic agents, e.g. from domestic consumers to domestic firms, negative welfare effects for the domestic economy might ensue. However, as long as these effects do not affect other jurisdictions, this case is irrelevant for type (II)-competition of competition policies.

2.3.5 Rationale for Strategic Competition Policy

In the first case (a), the favoured firms and their employees benefit and will lobby for a reinforcement of this kind of competition policy through the process of intrajurisdictional political competition. Since there are efficiency gains in international markets, consumers might benefit from decreasing prices (at least in the long run). Disadvantages, however, may result for remaining domestic competitors of the new global player and also for consumers in the monopolised domestic market. From a traditional welfare perspective, this strategy (a), nonetheless, might be Kaldor-Hicks-superior, if the losers were compensated by the winners.[40] However, this is only true, if the efficiency gains (scale- and scope-effects) become in fact realised, which often is not the case. Moreover, from a political-economic perspective, the losers (most likely small firms and domestic consumers) would probably not possess enough lobby power to prevent this strategy.

In contrast to the first case (a), the strategic competition policies (b) and (c) do not produce an efficiency-based gain for the world economy. Instead, international competition is harmed by the national competition policies and international allocation becomes inefficient. As analysed, for example, by the Virginia School of Antitrust Analysis[41], antitrust policy as well as any other policy field can become captured by lobbyism and interest groups. Strategic competition policies (b) and (c) become political-economically rational, if the agents that benefit are better organised to lobby than the losers.[42] Both export-oriented and import-substituting industries, which have incentives to lobby for a strategic abuse of competition policy, have relatively low organisational costs and are represented by well-organised industry associations. Just as well, the "national champions" and their stakeholders (e.g. unions of their employees) should be big enough themselves to participate successfully in the lobbyism game. On the other side, the losers predominantly consist of groups with high organisational costs (consumers) or will live abroad and have no voice in the domestic political competition. Thus, it can be political-economically rational to perform strategies (b) and (c), even if they lead to a net welfare decrease within the domestic jurisdiction.

Moreover, modern trade theory shows that under certain assumptions the national welfare gains from strategic restrictions / distortions of international competition may be high enough to compensate the domestic losers – at least as long as the foreign jurisdictions do not engage in

[40] Originally, the Kaldor-Hicks-criterion requires that (at least theoretically) all losers, domestic and foreign ones, can be compensated.
[41] See Shughart/Tollison (1985) and McChesney/Shughart (1995).
[42] See Olson (1965).

such strategies themselves.[43] Thus, politicians may have incentives from intrajurisdictional political competition to direct domestic competition policy to alleged "national" (but in fact partial) interests.[44] Internationally discriminating competition policy strategies can, eventually, become a profit-maximizing strategy for one country, but not for the world economy: if all jurisdictions carry out these types of discriminating strategies all countries have to cope with a reduced welfare compared to the free-trade-and-no-discrimination equilibrium. Nevertheless, jurisdictions might choose such "beggar-my-neighbour" competition policy strategies although they reduce the level of world welfare. The rationale of this process is provided by economic game theory. In game-theoretic terms, a prisoners' dilemma emerges. For each jurisdiction, it remains individually rational to choose the beggar-my-neighbour strategy as long as it designs its competition policy autonomously, i.e. without suprajurisdictional arrangements. In the absence of international coordination, the overall performance of strategic competition policies represents a stable Nash-equilibrium and the superior equilibrium[45] is not attained. From this perspective, a jurisdiction that chooses a procompetitive strategy while all other jurisdictions use strategic competition policies (b) and (c), will bear the costs of these beggar-my-neighbour strategies, and, thus, would receive incentives through this type (II)-competition of competition laws to adapt their competition policy.[46] This could lead to a defection race implying a deterioration of protection of competition. An analogous argument, the tendency towards subsidy races, is well-known and largely accepted in the literature on strategic trade policy.[47]

The cases discussed in this section show that if strategic competition policies dominate type (II)-competition of competition laws, a systematic deterioration of competition laws and policies with a declining protection of competition can result. This process might be reinforced by type (I)-regulatory competition because, under these conditions, mutual learning can also include learning about more effective beggar-my-neighbour-strategies.

2.4 Problems and Relevance

As type (II)-competition of competition laws relies on an indirect transmission mechanism, an analysis how relevant the effects of international trade are for the evolution of competition laws is required:

(1) The role of the effects doctrine: The effects doctrine is of crucial importance for the ability of jurisdictions to perform those strategic competition policies. A complete application of the effects

[43] However, there remains a net welfare loss, but this loss is completely imposed on the foreign jurisdiction. See for overviews Helpman/Krugman (1985), Krugman (1987), Guzman (1998), Kemp (2001), and Kemp/Shimomura (2002).

[44] See on the connection of protectionist interests, intrajurisdictional competition and international trade Vanberg (2000), who concludes that without factor mobility and without choice of law protectionist and rent-seeking interests have a good chance to influence national policy strategies.

[45] All jurisdictions fight market power and make exemptions only on the grounds of efficiencies for the world economy.

[46] Please note that this also depends on the theories that dominate competition policy. If it is true that intensive domestic competition enhances the competitiveness of domestic firms, as it was assumed in section III.2.2, a procompetitive strategy need not lead to negative effects on international trade despite strategic competition policies of other jurisdictions.

[47] See among many others Klodt (1993) and Markl/Meissner (2000).

doctrine would render any strategic competition policy impossible. Whenever national competition authorities would allow a foreign-market-oriented cartel or merger, the negatively affected jurisdiction would intervene to prevent the anticompetitive effects. Therefore, a perfectly enforced effects doctrine would exclude those strategic competition policies with beggar-my-neighbour-effects from competition of competition laws.[48] Consequently, the effects doctrine represents an institutional arrangement that reduces the range of strategies that can be chosen by jurisdictions in type (II)-competition of competition laws. In reality, however, the effects doctrine cannot be applied in a perfect and complete way. Shortcomings like problems of investigation, information-gathering and rule-enforcement abroad as well as its potential to generate jurisdictional conflicts[49] clearly demonstrate this. Therefore, despite the existence of the effects doctrine, strategic competition policies may be impeded but not eliminated in a real-world setting.[50]

(2) Relevance: It is difficult to estimate the importance of type (II)-competition of competition laws. One has to consider that the importance of international trade and export-import-relations differ considerably among jurisdictions (from small open countries with a high significance of international trade to large countries dominated by domestic markets). Often, the international competitiveness of domestic firms has only a small importance for intrajurisdictional political competition which is dominated by other issues.

(3) Trade policy versus competition policy: If a jurisdiction's performance in international trade is important enough for its citizens to set incentives via domestic political competition, political influence on export-import-relations might be more efficiently directed to the use of trade policy instruments than to competition policy instruments. However, due to the development of an international free trade framework under the governance of the WTO, trade policy competencies have been delegated (although incompletely) to an international level and the national authorities have become restricted in the application of trade policy instruments – and this process probably will continue. This might create a 'vacuum' that can be filled by replacing strategic trade policy by strategic competition policy as a second-best-solution.[51]

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[48] Of course, the procompetitive strategy remains possible as well as an efficiency-oriented competition policy tolerating purely domestic market power.

[49] Examples include the US-EU-conflicts on Boeing/MDD and GE/Honeywell. See additionally the impressive listing by Klodt (2001) of jurisdictional conflicts caused by the effects doctrine. Another important disadvantage of the effects doctrine is the increase in transaction costs of international mergers that must comply with a number of national and supranational merger controls with different and sometimes contradictory requirements.

[50] Moreover, the effects doctrine itself can be used as an instrument of strategic competition policy. It can be strategically applied to handicap foreign competitors of domestic firms. There are considerable asymmetries concerning the jurisdictional power to enforce the domestic competition laws against the resistance of another jurisdiction. Whereas big jurisdictions with important markets (like the U.S. and the EU) can easily protect domestic competition against restrictions from abroad, small and developing countries often have difficulties in doing so. Therefore, the power asymmetries between the jurisdictions offer the possibility for powerful jurisdictions to abuse the effects doctrine to serve protectionist interests. See Jacquemin (1995) and Fox (1998a, 1998b, 2000).

[51] See Cadot/Grether/De Melo (2000) and Budzinski (2002a). An example provides the Kodak/Fuji-Film case, in which Japan was accused of maintaining its protection of domestic markets against foreign firms by tolerating an import cartel after the original, trade policy based protection had to be reduced (due to

2.5 Conclusions

Type (II)-competition of competition laws is an indirect competition with limited importance but not without considerable effectiveness. However, theoretically, it remains unclear whether type (II)-regulatory competition improves competition laws (like in the competitive-advantage-through-domestic-competition case) or leads into prisoners' dilemmas with sub-optimal competition laws due to the dominance of strategic competition policies (implying a deterioration of the protection of competition). The institutional arrangements that restrict the capability of jurisdictions to pursue market power tolerating strategic competition policies have an important influence on the outcome of the respective regulatory competition process. The effects doctrine, for instance, reduces the scope for those strategic competition policies, but leads simultaneously also to a limitation of type (II)-competition of competition laws in general. The application of other rules than the effects doctrine would lead to different effects. Designing them properly might allow to benefit from the advantages of these competition processes without having to suffer from their potential defects. Type (II)-competition of competition laws can only work horizontally between competition laws on the same jurisdictional level, whereas vertical regulatory competition is not possible.[52]

3. Type (III)-Competition of Competition Laws: via Interjurisdictional Competition

3.1 Introduction

In this section, in addition to the mobility of information and goods, the mobility of factors of production, namely capital and labour, is assumed. Thus, enterprises and individuals may choose indirectly between different institutional arrangements via the choice of their location. However, direct choice of law independent from the (physical) location is still excluded from the analysis. The specific transmission mechanism of type (III)-competition of competition laws is the inflow and outflow of production factors due to different competition laws and policies. The idea is that an inflow of production factors contributes to increasing national welfare whereas a significant exit of factors decreases the domestic welfare. Therefore, politicians have incentives to adjust their regulations in order to attract instead of driving away mobile factors: jurisdictions compete for mobile factors, especially for firms.

Most of the existing literature on competition of competition laws draws exclusively or predominantly on interjurisdictional competition (type (III)-competition).[53] The focus is on the effects of different competition laws on the locational choice of enterprises and the strategic use of competition laws to attract business. In contrast to type (II), type (III)-regulatory competition is focused on the international competitiveness of jurisdictions instead of firms.

WTO requirements). Thus, Japan simply "privatized protection" by selective non-enforcement of competition laws to compensate the loss of trade policy instruments. See Fox (2003, p. 23).

[52] Vertical regulatory competition is not effective, because exports and imports of goods are based on territories and vertically-related jurisdictions share the same territory (with higher-level jurisdictions usually having a larger one that includes the lower-level territory).

[53] See e.g. Easterbrook (1983), Nicolaides (1992, 1994), Freytag/Zimmermann (1998), Fox (2000), Meessen (2000), and Sinn (2003). Since none of the existing literature distinguishes between the different types of competition of competition laws, the focus on type (III)-regulatory competition is implicit.

3.2 Improving the Protection of Competition

Domestic competition laws that foster competitive markets can serve as an attractor for firms and investments. In analogy to the strategy for improving the protection of competition in type (II)-regulatory competition, it can be argued that if highly competitive domestic markets improve the competitiveness of the firms located within this jurisdiction[54]; it is a rational strategy for these firms to choose this location. The deliberate choice of a location within a jurisdiction with strict competition laws can also be interpreted as some kind of self-commitment to remain competitive, which might generate positive signals to investors, shareholders, competitors, and consumers. Additionally, lower prices for intermediate goods, which can be expected if strict competition laws secure intensive competition on these markets, can be an argument for choosing this jurisdiction.

Some authors conclude that if improved competition policies attract more factors, then interjurisdictional competition will lead to an improvement of competition laws (race to the top).[55] Since mobile factors will locate themselves within the jurisdiction that supplies the best competition laws, jurisdictions with inferior institutions will experience actual exits and threats to exit by mobile factors. This provides incentives for politicians to adjust their competition laws according to the superior solutions. In this case, again, the parallel existence of type (I)-competition of competition laws supports this mechanism. Reciprocally, interjurisdictional competition provides additional incentives for the innovation and imitation of substantial and procedural competition rules, theories, or practices in order to improve the competition law regimes.

3.3 Deliberate Toleration of Market Power and Anticompetitive Behaviour

On the other hand, competition laws that deliberately allow for domestic market power and anticompetitive business behaviour may also be attractive for firms. If firms value the freedom to cartelise and monopolise higher than the protection against those modes of behaviour if performed by their competitors, the strategy to lower the level of protection of competition can improve the competitiveness of jurisdictions in the international market for locations.[56] In that respect, strategic competition policies can also be relevant in interjurisdictional competition. Generally, the same cases can be differentiated like in section III.2.

Domestic market power and efficiencies on international markets (strategic competition policy I): Jurisdictions can attempt to attract firms by offering competition policies, which allow the reaping of efficiency gains, e.g. by introducing an efficiency defence in merger control, although market power on (related) domestic markets might ensue. Since economies of scale-effects can increase the international competitiveness, firms might prefer this kind of competition policy, leading to an inflow of firms and capital into this jurisdiction.

Market power on international markets (strategic competition policy II): A lower level of protection of competition, either by less strict competition laws or a policy of (selective) non-

[54] See again Porter (1990).
[55] See e.g. Meessen (1989, 2000), Hauser/Schöne (1994), De Léon (1997), Freytag/Zimmermann (1998), and First (1998).
[56] For example by running a cartel haven, granting monopoly privileges or selective non-enforcement of domestic competition rules; see Fox (2000), pp. 1795-1797.

enforcement, can be an important argument for locational decisions, if firms want to restrict competition by cartels, build up market power by mergers, or perform anticompetitive behaviour on international markets. If the negative effects of market power and anticompetitive behaviour primarily affect markets in other jurisdictions, the positive welfare effects of the inflow of resources can overcompensate possible negative effects on domestic markets due to a lower level of protection of competition.

Domestic market power and predatory behaviour on international markets (strategic competition policy III): Also the strategy to allow firms to build up market power on domestic markets in order to use these profits to cross-subsidize business activities on foreign markets (maybe to finance predatory strategies), can be attractive for firms in regard to their locational decision.

Purely domestic case: market power without effects on international trade: A jurisdiction can allow for market power that can only be used to reap profits from domestic markets. It may be attractive for firms to move their location into that jurisdiction, even if they produce exclusively for its domestic market. Under certain conditions, it might be an attractive strategy for jurisdictions, particularly if otherwise domestic suppliers are unable to produce these goods, e.g. due to lacking technology and knowledge.

By emphasising the success of deliberately allowing market power as a strategy in interjurisdictional competition, some contributors to the literature on competition of competition laws fear a race-to-the-bottom of antitrust standards.[57] This includes also the purely domestic case.[58] If firms prefer jurisdictions with a low level of protection of competition, which allow for anticompetitive behaviour and the building up of market power, jurisdictions with a high level of protection of competition might suffer from an exit of factors and a subsequent decrease in welfare. Consequently, agents in those jurisdictions have incentives to vote in favour of a policy imitating the successful jurisdictions in order to re-attract mobile factors. Thus, stiff interjurisdictional competition can lead to a deterioration of competition laws. Similar to type (II)-competition of competition laws, prisoners' dilemma situations can appear. Although all jurisdictions could be better off with appropriate competition laws, there can be a sub-optimal equilibrium with an insufficient level of protection of competition.

3.4 Relevance and Problems

Although locational competition represents a more direct type of competition of competition laws there are also some obstacles for the workability of this type of regulatory competition. Therefore, the effectiveness of type (III)-competition of competition laws has to be scrutinized:

(1) It is a specific characteristic of type (III)-competition of competition laws that firms cannot choose only a more attractive competition law by moving to another jurisdiction but have to accept the entire bundle of public goods, regulations and taxes of this jurisdiction. It is doubtful

[57] See Sinn (1990), Ackermann (1998), and, with a more critical attitude, Van den Bergh/Camesasca (2001, pp. 133, 149-154). Sinn (2003) derives a race-to-the-bottom (with, however, conflicting welfare effects) in a game-theoretic general equilibrium model of competition of competition policies.

[58] Although "the purely domestic case" does not affect competition on international markets, it might nonetheless lead to a deterioration of competition laws because jurisdictions can try to attract firms by lowering their antitrust standards. Thus, in contrast to type (II)-purely domestic case, its type (III) analogue may lead to a defective competition of competition laws.

whether competition laws will dominate locational decisions in the face of the importance of other jurisdictional characteristics (e.g. taxes, labour market regulations, etc.).

(2) There might be considerable costs of mobility, which have to be overcompensated by the benefits of the locational change.

(3) Another limiting factor to type (III)-competition of competition laws is represented by the effects doctrine. Under a perfect effects doctrine-regime, moving the location of a firm to another jurisdiction with a lower protection of competition does not help because the jurisdictions of the affected markets will nevertheless enforce their (stricter) competition laws against anticompetitive behaviour of the firm.[59] Again, no scope for type (III)-competition of competition laws would remain.[60] However, since the effects doctrine cannot be applied perfectly, some scope probably remains for type (III)-competition of competition laws.

3.5 Conclusions

Type (III)-competition of competition laws opens up the possibility for firms to choose between different competition law regimes by physically moving between jurisdictions. Thereby, it might enhance the effectiveness of regulatory competition and improve competition laws. Such beneficial effects are to be expected if firms prefer a more competitive domestic market because of its beneficial effects on their competitiveness and on downstream markets (race-to-the-top). Nevertheless, race-to-the-bottom processes can emerge if jurisdictions engage in strategic competition policies that allow for restrictive practices and the building up of market power in domestic and international markets. In these cases, type (III)-competition of competition laws can run into prisoners' dilemma problems on the international level, which cannot be solved without international coordination. Whether prisoners' dilemma problems result or type (III)-competition of competition laws proves to be beneficial, largely depends on the institutional framework of that regulatory competition, i.e. on the rules that shape the jurisdictions' behaviour in interjurisdictional competition. Again, the effects doctrine can play an important limiting role but also other rules such as comity-principles could be an important part of an institutional framework that allows for productive interjurisdictional competition and rules out race-to-the-bottom phenomena. Similar to type (II), type (III)-competition of competition laws can only be applied to horizontal competition between jurisdictions on the same jurisdictional level, whereas vertical competition is excluded.

4. Type (IV)-Competition of Competition Laws: via Choice of Law

Type (IV)-regulatory competition implies that firms have the right to choose directly between regulations of different jurisdictions without having to move their location to that jurisdiction. The well-known case of competition among U.S. corporate laws represents a striking example for this type of regulatory competition, but can it also be applied to competition law?

[59] As Eleanor Fox (2000, p. 1795) puts it: "There is no escape from antitrust." See also Meessen (2000, p. 11), who emphasises that antitrust laws do not depend on the location of business but on the affected markets.

[60] The effects doctrine represents no problem for the "purely domestic case" because the lower level of protection of competition affects only the domestic markets.

The application would imply that firms are allowed to choose between the competition laws of different jurisdictions without changing their location or the geographically relevant markets of their business. Of course, firms would be interested in choosing between different competition law regimes. Examples exist, which highlight that firms might have this choice to a limited extent. In Europe, for example, firms can influence by the specific design of their mergers or cooperative agreements, which competition rules are relevant for their cases. Since e.g. European merger control was viewed as less restrictive as German merger control, there was an incentive to specify mergers in a way (via turnover thresholds) that they fall under the jurisdiction of European merger control. Such kinds of "forum shopping" between national and European competition rules also existed in regard to cartel exemptions but only in a limited way.[61] However, forum shopping is also viewed as one of the potential problems of the decentralisation approach of the European Commission concerning the reform of the application of Art. 81 and 82 EC Treaty.[62] On the international level, the situation is completely different. The "effects doctrine" largely excludes forum shopping and, instead, leads to the contrary effect, namely the cumulating of competition law proceedings that deal with one and the same case. Yet, the practical limits to the enforcement of the "effects doctrine" might give scope for forum shopping in specific cases. However, all of these examples of forum shopping are not intended from the perspective of competition policy and nearly always assessed negatively in the literature.[63]

How should one assess a type (IV)-competition of competition laws? The aim of competition law is the protection of competition on markets, i.e. the regulation refers to a particular market and not to a particular firm. If we let the firms on a market choose under which competition rules they want to do business, a prisoners' dilemma emerges. Individually, each firm is interested in being not restricted in its business practices on the market, leading to the choice of less restrictive or poorly enforced competition laws. Although the firms might be interested in being protected from anticompetitive behaviour of others and, therefore, might prefer a stricter competition law, the prisoners' dilemma situation can lead to a process, in which jurisdictions (in order to induce firms to choose their competition law[64]) change their laws to less stricter ones. Consequently, a race to the bottom-process might ensue, leading to a defective competition of competition laws. From this perspective, the idea that choice of law can be applied to competition law seems to be entirely mistaken and even absurd from the beginning.[65]

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[61] See for example Van den Bergh/Camesasca (2001, pp. 151-152). Consequently, the German competition policy felt the pressure to adapt their standards to the less restrictive ones of the European competition policy.

[62] See e.g. German Monopolies Commission (1999, 2001), Mavroidis/Neven (2000), and Bourgeois/Humpe (2002). However, in this case, the choice is not between laws but between different enforcement agencies.

[63] This is even true for some ardent proponents of regulatory competition in antitrust, e.g. Stephan (2000, pp. 186-187, problem of "jurisdiction-shopping").

[64] However, in this case, an incentive must exist for the jurisdictions, e.g. a kind of franchise tax like in U.S. corporate laws.

[65] Another argumentation with the same result would begin by interpreting competition on a particular market as a public good, which only can be produced, if all firms on this market contribute to the production of this public good by subjecting themselves to the same restrictive rules. Stephan (2000, pp. 186-187, 199) argues that antitrust law concerns itself with injuries to third parties that are not involved in the competition-violating arrangement (e.g. consumers harmed by a cartel). No contractual link between

Is it possible to find any cases at all, in which a type (IV)-competition of competition laws might lead to improvements of competition law regimes? Two cases can be distinguished:

(1) Efficiency of procedures: Choosing between different competition law regimes by firms can help to improve competition laws, if this choice does not depend on the strictness of protection of competition but on the efficiency of competition law procedures. For example, merger reviews of different competition law regimes might cause different costs and require different time for the merging firms - independent from the strictness of the review. If the same level of protection of competition would be ensured by other means (e.g. international arrangements), a free choice of the competition law regime in case of a merger review might lead to a productive competition between the competition authorities in regard to the costs of merger reviews, both for the firms and the jurisdictions.

(2) Rent-seeking problems and over-regulation: The basic problem of type (IV)-competition of competition laws can also be described in the way that choice of competition laws enables firms to circumvent strict competition laws by choosing more lenient ones. Nevertheless, circumvention of inefficient laws can also enhance the welfare of a society. If, for example, competition laws are discriminating between different industries due to rent-seeking-activities or are generally too restrictive and, therefore, stifling competition and impeding efficiency (over-regulation), type (IV)-competition of competition laws might lead to an improvement of competition laws because the circumvention might induce the jurisdictions to enact more appropriate competition laws.[66] However, type (IV)-competition of competition laws misses a device which stops the deregulation race at the optimal level and, thus, prevents the process from turning into a deficient race-to-the-bottom.

In general, type (IV)-regulatory competition is not applicable to competition law because competition law refers to the protection of competition on a particular market. Allowing competing firms on a market to choose individually between different competition laws will lead to a break down of the protection of competition. Only in very particular cases, like in the case of over-regulation and in regard to the efficiency of procedures, type (IV)-competition of competition laws might offer limited scope for an improvement of competition laws. Altogether, the example of competition of U.S. corporate laws cannot serve as a model for competition of competition laws.[67] Instead, the wide-spread suspicion against forum shopping concerning competition rules is justified.

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anticompetitive firms and harmed consumers/competitors exists. Instead, significant externalities occur because of the resulting jurisdiction-shopping and there is no workable mechanism that would force the law-choosing firms to internalise these costs.

[66] This could also be relevant for type (III)-competition of competition laws, if firms (by migration) chose lenient competition laws to escape from over-regulation. In the general theories of interjurisdictional and regulatory competition, it has been emphasised that these competition processes can limit the scope of welfare losses due to rent seeking activities, see Sinn (1992).

[67] Stephan (2000) and Fox (2000) also stress this.

5. A Brief Overall Assessment

Four basic types of "competition of competition laws" have been distinguished. They differ considerably in regard to their preconditions, incentive structures, transmission mechanisms, and overall results. Although we could not analyse all relevant cases in detail (and additional differentiations are possible within these basic types), in this section, we attempt to give a brief general assessment considering the feasibility of these types of "competition of competition laws".

An important conclusion is that competition of competition laws constitutes a very different case than the well-known example of competition of U.S. corporate laws. Firms should not be allowed to choose their competition law for particular markets themselves. This is true both for direct choice of law and for choosing their competition law by moving their location to another jurisdiction. Competition laws cannot be separated from the markets on which they should protect competition. Since competition laws necessarily have to restrict the behaviour of firms in order to exclude anticompetitive practices, choosing between competition laws implies the possibility of circumventing competition rules. Therefore, it can be expected that type (III)- and type (IV)-competition of competition laws will generally lead to serious problems, namely a deterioration of the protection of competition. However, there may be some exceptions from this general assessment. Type (III)-competition of competition laws can also lead to improvements of competition laws, if firms prefer strict competition laws.[68] Circumvention and the following process of deregulation can be beneficial, if the current competition laws represent an over-regulation (type (III) and type (IV)). If the level of protection of competition would be safeguarded by other means, e.g. by the application of the effects doctrine, choosing between different competition laws might improve the efficiency of procedures of competition law regimes (type (III) and type (IV)). However, especially the last two cases probably represent rather special cases with very limited practical significance.

Changing the perspective from the firms to the jurisdictions as the providers of competition laws leads to the issue of strategic competition policies, which jurisdictions can use to enhance their welfare or at least the welfare of powerful interest groups. Strategic competition policies are particularly relevant concerning type (II)- and type (III)-competition of competition laws, in which jurisdictions have incentives to instrumentalise competition policy in order to reap advantages from international trade or interjurisdictional competition. Two main cases can be distinguished:

(1) Both types of competition of competition laws can lead to an improvement of competition laws, if theories dominate in intrajurisdictional political competition that a high level of protection of competition enhances the international competitiveness of domestic firms (type (II)) or of jurisdictions as locations (type (III)).

(2) Jurisdictions can also engage in competition policy strategies, which reduce the protection of competition in order to promote domestic firms on international markets (or protect them against foreign competitors) or to attract firms in interjurisdictional competition. Generally, strategic

[68] As it was shown in section III.3, the reasons are the positive effects of highly competitive markets either on the competitiveness of the firms itself and / or on intermediate goods and factors. Both effects do not exist in type (IV)-competition of competition laws because firms can only choose strict competition rules for themselves but not for other firms on their own or related markets.

competition policies have negative (external) effects on other jurisdictions and lead to prisoners' dilemma-situations in regard to global welfare. Therefore, in most cases, competition of these strategic competition policies must be assessed negatively because it tends to reduce the protection of competition both on domestic and international markets.

Consequently, type (II) and (III)-competition of competition laws can improve competition laws only if the negative effects of strategic competition policies are avoided by appropriate institutional arrangements, like e.g. the effects doctrine or international rules. However, both will limit considerably the extent of competition of competition policies. Altogether, the applicability and extent of type (II), (III), and (IV)-competition of competition laws remains limited. They can only be used in particular cases and have to be severely restricted, if a deterioration of the protection of competition should be avoided.

The general assessment is different in regard to type (I)-competition of competition policies. If the knowledge problem is taken seriously, i.e. that (a) the best competition laws are not known yet and (b) permanently new adaptations are necessary due to economic and technological change, processes of parallel experimentation become very important, leading to different experiences and the possibility of mutual learning in regard to the effectiveness of substantial and procedural rules, theories, and practices. Type (I)-competition processes can take place between competition law regimes on the same jurisdictional level (horizontal dimension) and on different jurisdictional levels (vertical dimension). Although it can suffer from imitation and incentive problems, no systematic "race to the bottom"-problems emerge, as it is the case with the other types of competition of competition laws. Consequently, this type (I) offers the opportunity for a long-term process of improving the knowledge about effective competition laws.[69]

IV. Towards a Decentralised International Multi-Level System of Competition Laws

What can we learn from our analysis for the discussion of an international competition policy regime? What is the perspective that we would see as the most promising for further elaboration? In the extensive debate on international competition policy in the last decade, three main avenues to cope with international competition and globalizing markets have emerged:[70]

(1) No systematic international competition policy: Despite a wide spread consensus about the existence of problems in regard to the protection of competition on international markets, the proponents of this view believe that the costs of an international competition policy regime are higher than its benefits. Instead, the application of the effects doctrine combined with discretionary bilateral cooperation between antitrust agencies is usually favoured.

[69] As far as other types of competition of competition laws are working beneficially, they are supported by type (I), as well as other types also support the working of type (I) through their additional incentives. However, if other types lead to negative effects, as in the case of strategic competition policies, type (I)-competition of competition policies can aggravate the problems (due to mutual learning about more effective strategic competition policies).

[70] We only give a very brief overview without a detailed discussion of features and divergent positions. For more elaborated discussions of the fundamental possibilities to organise an international competition policy regime see e.g. Jacquemin (1995), Guzman (1998), Kerber (1999), Grewlich (2001), Budzinski (2002b, 2003), First (2003), and Fox (2003).

(2) Convergence and harmonisation of national competition laws towards centralised international regulation: Proponents of this view eventually strive for a uniform international competition policy ("level playing field") in the long run. The (realistic) way towards this first-best solutions includes a step-by-step process of convergence of national competition policies in a multilateral framework. Consequently, the focus lies on the harmonisation of substantial competition law.

(3) *Regulation of the allocation of jurisdiction within an (international) decentralised system of competition laws:* Proponents of this perspective believe that an international convergence and harmonisation of substantial competition law is either not feasible or not desirable, except to a very limited extent. A workable solution is viewed rather in an international consensus on procedural rules for policy problems in multi-jurisdictional antitrust cases. These rules particularly address the delimitation of jurisdictional competencies, conflict resolution, and enforcement assistance.

Following our analyses, we would not agree to the first line of thought. The problems and deficiencies of purely national competition policies in international markets, like loopholes in the protection of competition (due to deficient extra-territorial enforcement), negative externalities (due to beggar-my-neighbour-strategies), and cumulating competition law proceedings (due to overlapping jurisdictions with resulting jurisdictional conflicts), will increase with the ongoing globalisation of markets and firm behaviour. Competition of competition laws that is not guarded by an appropriate international arrangement cannot be reliably expected to yield welfare-enhancing results. The risk of deficient outcomes should not be neglected.

We are also reluctant in regard to the second perspective of substantial convergence and harmonisation of national competition policies, which would eventually also imply a centralisation of international competition policy. There are considerable costs of establishing a substantial international competition policy regime and pessimism in respect to the possibility of agreeing on harmonisation of substantial competition laws might be justified. However, this is not our main concern. Instead, we are sceptical whether harmonisation (and centralisation) of competition laws is the most appropriate (first-best) solution at all. Already the existence of different goals of competition policy and varying economic and cultural conditions across different countries call for severe doubts whether an uniform competition policy would be the best one for all countries (irrespective of their state of development, their cultural background, their size, their openness to international markets, and their institutions). Decentralised competition policies might be more appropriate to cope with the enormous divergences in the world economy.

However, the most important objection comes from our Hayekian perspective: our limited knowledge about the most appropriate competition law regime and the necessity to secure its flexibility and openness for improvements due to the ongoing technical and economic change. This is a powerful argument against the establishment of an inflexible centralised or harmonised solution. A decentralised system of competition laws would allow for parallel experimentation with different solutions and mutual learning from their performance. In section III.1, this process was analysed under the heading "type (I)-competition of competition laws". This Hayekian "discovery procedure", however, requires a system of competition laws that is characterised by a certain minimum extent of decentralisation and sustainable diversity.

To some extent, the International Competition Network (ICN) embraces the advantages of parallel experimentation and mutual learning. Its main features are the systematic exchange of information and the evaluation of current competition laws and policies of the member jurisdictions. Thereby, best practices concerning antitrust procedures[71], institutional arrangements[72], and substantial rules[73] shall be identified and published. In doing so, the ICN (implicitly) promotes type-(I) competition of competition laws through two channels: (1) the creation of transparency concerning different solutions to competition policy problems enhances the possibilities for interjurisdictional comparisons, and (2) the public identification of superior solutions (best practices) alleviates their diffusion by putting "peer pressure" on the member jurisdictions to imitate the best practices. However, it is not clear whether the ICN will develop to be a road to ex-post harmonisation, because processes of imitation are strongly emphasised, while the role of future innovations remains rather vague.[74] Taking the notion of a beneficial type (I)-competition of competition laws seriously does not imply to once identify best practices and then harmonise competition policies according to this standard. On the contrary, the knowledge problem leads to the necessity to ensure that an international system of competition laws produces variety and generates new knowledge.

Nevertheless, how can a decentralised approach to competition policy be made compatible with the necessity to solve the many problems that result from the current situation of multiple, independent national competition laws? In our view, the most promising perspective is the development of a consistent international multi-level system of competition laws. Within this system, substantial competition rules and enforcement agencies might exist on two or three different jurisdictional levels (like, for example: international level, European level, national level (within the EU)). Although the competition policies on these different levels should remain (to a considerable extent) independent from each other (decentralisation), a coherent institutional framework should exist for the whole multi-level system that helps to reduce gaps in the protection of competition, to resolve conflicts between different competition policies (by internalisation of externalities), and to save transaction costs by limiting parallel proceedings. It is crucial that this multi-level system of competition laws works as an integrated system. Although it cannot be denied that a minimum consensus about the basic principles of competition policies is also a precondition for such an international system, the main focus is on the development of the institutional framework for making this decentralised system work in a satisfactory way. In that respect, this approach fits into the above-mentioned third perspective for international competition policy, namely searching for an international consensus in regard to the regulation of the allocation of jurisdiction in trans-border antitrust cases.

[71] See, for example, the activities of the working group on the merger control process in the multi-jurisdictional context, subgroup on merger notification and review procedures.

[72] For example, concerning the independence of competition authorities, the meaning of regional institutions, and institutional settings for advocacy (working groups on *capacity building and competition policy implementation* and *competition advocacy role of antitrust agencies*).

[73] For example, concerning standards for merger prohibition like "substantial lessening of competition", "creation or strengthening of dominant market positions", and "public interest" (working group on *the merger control process in the multi-jurisdictional context*, subgroup on *the analytical review framework*).

[74] For a more elaborated analysis, see Budzinski (2002a, 2003).

One cannot deny that so far there is no elaborated concept for a multi-level system of competition laws that would allow detailed policy conclusions to be derived. However, if we accept that a sustainable two- or three-level system of competition laws should be attained, the economic theory of federalism can be applied for addressing the problem of the appropriate mixture of centralisation and decentralisation within such an international multi-level system of jurisdictions.[75] The primary questions are: what kinds of competition problems should be dealt with on what jurisdictional level, e.g. the international level, the European or the national level? What extent of centralisation and decentralisation should be chosen in regard to substantial competition rules, on the one hand, and in regard to the enforcement of competition rules (competition authorities, courts), on the other hand?[76] Particularly the geographic scope of competition problems (externality problems), but also (static and dynamic) economies of scale, transaction costs, the extent of local knowledge, and the homogeneity / heterogeneity of the aims of competition policies are some of the criteria that can be used for determining the optimal balance between centralisation and decentralisation.

Since also the positive and negative effects of regulatory competition can influence the workability of a decentralised multi-level system, our analyses of the different types of competition of competition laws are also an important contribution to this question. We have seen that type (I)-competition of competition laws, allowing for parallel experimentation and mutual learning, can be used as a powerful argument for a more decentralised system. One may ask what kind of institutional arrangements could help to channel the learning processes into a beneficial direction. Although type (II)- and (III)-competition of competition laws can lead to processes of improving competition laws, they can also suffer from severe deficiencies (strategic competition policies, prisoners' dilemmas), leading to the danger of a deterioration of competition laws. While the application of the effects-doctrine could impede those negative effects (if it were fully enforceable), it also considerably limits the potential positive effects of these types of competition of competition laws. Perhaps it is possible to develop more sophisticated rules, which are better able to differentiate between the positive and the negative effects of these types of competition of competition laws. Since it is expected that type (IV)-competition of competition laws has predominantly negative effects, a rule that would allow a free choice between competition laws cannot be recommended. On the whole, "competition of competition laws" can play its most important role in the discussion on international competition policy as a powerful argument in favour of a decentralised system of competition laws.

However, the development of a concept for an appropriate institutional framework for an international multi-level system of competition laws will require much further research work.[77] Particularly necessary is the development of rules for the horizontal and vertical delimitation of

[75] See in more detail Kerber (2003) and for other first approaches Van den Bergh (1996) and Van den Bergh/Camesasca (2001, pp.125). For a general attempt to apply the criteria of federalism theory to legal rules (legal federalism), see Kerber/Heine (2002); for a first attempt to apply the concept of a multi-level system of legal rules to European contract law, see Grundmann/Kerber (2002).

[76] For example, in the EU there are simultaneously processes of centralisation and harmonisation of substantial competition rules and processes of decentralisation regarding their enforcement.

[77] Nevertheless, first steps have already been done. Both the attempts to establish a decentralised system of enforcement of European competition law within the EU and the efforts to agree on procedural rules for national merger reviews on a global level can be viewed as treating particular aspects of this task.

competencies of the competition policies within this international multi-level system of competition laws. The effects doctrine and its modifications by applying principles of positive and negative comity as well as other explicit rules for the horizontal and vertical delimitation of competencies can be viewed as starting-points for the development of a consistent set of rules for an international multi-level system of competition laws.

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Abstract

We analyse whether "competition of competition laws" can be a feasible concept that might play an important role in the discussion about an international order for the worldwide protection of competition. Drawing on the general theory of regulatory competition, we distinguish between four different types of "competition of competition laws": (I) competition of competition laws via mutual learning (yardstick competition), (II) competition of competition laws via international trade, (III) competition of competition laws via interjurisdictional competition, (IV) competition of competition laws via free choice of law. Our main result is that the working of competition of competition laws depends crucially on the type of competition and on the institutional framework. Whereas type IV can be expected to lead to a deterioration of competition laws (race to the bottom), the analyses in regard to types II and III render mixed results: jurisdictions have incentives either to improve the protection of competition or to carry out different kinds of strategic competition policies that weaken goods competition and can lead to prisoners' dilemma problems on the global level. These deficient forms of competition of competition laws can only be avoided by appropriate institutional safeguards. Our contention is that especially type I-competition of competition laws is very important, because it can be seen as a process of parallel experimentation with different competition policies that allows for mutually learning (yardstick competition) and, therefore, for a process of improving competition law regimes in the long run. These beneficial effects of type I represent a powerful argument against centralisation and harmonisation. Therefore, in respect to the design of future international competition policy, we would recommend the striving for a decentralised international multi-level system of competition laws (federalism in antitrust).