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An International Multi-Level System of Competition Laws: Federalism in Antitrust

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Abstract

Since the 1990s, an intensive discussion on the necessity and the potential design of international competition policy has developed. As a preliminary result, some general tendencies can be observed: Many states (including the U.S. and the EU) and most antitrust experts hold the opinion that the traditional system of national competition laws (including their extra-territorial application) is not sufficient for the protection of competition in the new millennium. Therefore, some kind of international arrangement in regard to competition rules seems to be necessary. The introduction of substantive international competition rules with an international competition authority and a corresponding court (in analogy to the supranational European competition law) is not seen as feasible and/or desirable. Thus the solution should not be sought in centralised global competition rules but be based primarily upon national competition laws and authorities. Consequently, the main thrust of the discussion has shifted from the idea of a larger harmonisation and convergence of national competition laws to the problem of better international enforcement of these laws. Although bilateral cooperation between national competition authorities have become an increasingly important issue, bilateral cooperation agreements are considered only a first step to a more preferable multilateral (or plurilateral) solution (e.g. within the WTO). Generally, the path to international competition rules is seen as a pragmatic, step-by-step approach, which can achieve its aim only in the long run. The currently favoured informal network approach, which remains without commitment and emphasizes primarily the gathering, discussion and exchange of information between national competition authorities, is in line with such a pragmatic approach to the incremental evolution of international competition rules. How can we describe the present situation from a global perspective? We have a multitude of national competition laws and enforcement agencies (competition authorities, courts) with more or less different substantive and procedural rules. Different competition laws and enforcement agencies can also exist within a (kind of) federal system, as to some degree within the U.S. and to a larger extent within the EU, where European competition rules and national competition laws coexist on two different levels. Since the competencies of these competition laws and enforcement agencies overlap, many external effects and conflicts can emerge. Up to now we cannot reasonably argue that this complex structure of competition laws forms an integrated system for protecting competition in international markets. The establishment of international competition rules (as well as the less ambitious international network approach), which on one side should help to solve the problems of the current situation, can, on the other side, increase the complexity of the system, because an additional vertical regulatory level in regard to competition rules would be introduced – including new potential conflicts of competencies. But what are

the long-term perspectives of this situation? What can an international system for protecting competition look like in the long run? Two basic perspectives can be outlined: One perspective is that such a pragmatic approach, which fosters the discussion between different countries and their competition authorities, eventually will lead to a uniform global competition law or – at least – to a quasi-harmonisation of national competition laws. If the differences between the competition laws disappeared, many of the current problems would vanish. From this perspective, the current situation with many different competition laws on two or three different levels does constitute only an intermediate phase, which in the long run would be replaced by one quasiuniform set of global competition rules. Another perspective proceeds from the more sceptical assumption that it will not be possible for all countries to agree on one uniform set of competition rules, even in the long run. There will always be different objectives of competition laws and different theories about what competition is and what rules are necessary for the protection of competition. Therefore, the coexistence of different competition laws should be seen as a permanent feature of an international system of competition laws, implying that substantial decentralisation and variety will remain a major characteristic of such an international system, also in the long run. This paper will focus on the second perspective, which can be characterised as an evolutionary one: The objectives of competition policy in different countries might change and remain different; competition theories mightevolve through academic progress; the rules for the protection of competition might have to change due to new anticompetitive business practices or new technology (such as the Internet). From this evolutionary perspective, it is crucial that an international system for the protection of competition should also include the long-term capability of adapting quickly to new competition problems, particularly by fostering legal innovations for improving the protection of competition. One important argument for a more decentralised international system of competition laws will be that decentralisation will increase the capability of the system for innovation and learning in regard to the development of effective legal rules for the protection of competition. But what can a workable international system with different competition laws and enforcement agencies on different levels, i.e., a decentralised international system of competition laws, look like? This paper can only present some considerations about this problem. But its goal is to outline an analytical framework, which can be used for designing a workable multi-level system of competition laws. The main idea is that we should apply economic theories about federalism and the advantages and disadvantages of centralisation and decentralisation to develop arguments about the appropriate institutional structure of an international multi-level system of competition laws. The theories that are used in this paper are the economic theory of federalism, the attempts to apply the concept of federalism to legal rules as well (legal federalism), and the theories of interjurisdictional and regulatory competition. The paper is structured as follows. In section II it is shown that the present situation can be interpreted as being already rather close to a kind of threelevel system of competition laws and that many current issues in European and international competition policy can be interpreted as

discussions about problems of the horizontal and vertical delimitation of competencies within such a three-level system. In the main section III an analytical framework concerning the potential advantages and disadvantages of centralisation and decentralisation of competition policy will be developed on the basis of economic theories of federalism and regulatory competition. This will include a (still incomplete) set of criteria for regulatory federalism in competition law. Some conclusions for reconstructing international competition policy as a multi-level system of competition laws are presented in section IV.

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An International Multi-Level System of Competition Laws: Federalism in Antitrust

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Contents

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I. Introduction

Since the 1990s, an intensive discussion on the necessity and the potential design of international competition policy has developed. As a preliminary result, some general tendencies can be observed:[1]

[1] For overviews of the discussion on the introduction of international competition rules see *Petersmann*, International Competition Rules for the GATT-MTO World Trade and Legal System, 27/6 J. World Trade L. 35 (1993); *Scherer*, Competition Policies for an Integrated World, 1994; *Fikentscher & Immenga* (eds.), Draft International Antitrust Code, 1995; *Fox & Ordover*, The Harmonization of Competition and Trade Law, 19/2 World Competition 5 (1995); *European Commission*, Competition Policy in the New Trade Order: Strengthening International Cooperation and Rules, Report of the Group of Experts, 12 July 1995, Doc. COM(95)359 final; *Brittan & van Miert*, Towards an International Framework of Competition Rules, 24 Int'l Bus. Law. 454 (1996); *Basedow*, Weltkartellrecht – Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen, 1998; *Fox*, International Antitrust: Against Minimum Rules, for Cosmopolitan Principles, 43/1 Antitrust Bulletin 5 (1998); *Janow*, Unilateral and Bilateral Approaches to Competition Policy – Drawing on the Trade Experience, in: 1 Brooking Trade Forum 1998; *Monopolkommission*, Marktöffnung umfassend verwirklichen, Hauptgutachten XII. 1996/97, 1998, p. 351-367; *Drexl*, Trade-Related Restraints of Competition – The Competition Policy Approach, in: *Zäch* (ed.), Towards WTO Competition Rules, 1999, p. 225; *First*, Towards an International Common Law of Competition, in: *Zäch* (ed.), Towards WTO Competition Rules, 1999, p. 95; *Petersmann*, Legal, Economic and Political Objectives of National and Intenational Competition Policies: Constitutional Functions of WTO "Linking Principles" for Trade and Competition, 34/1 New England L. Rev. 145 (1999); *Kerber*, Wettbewerbspolitik als nationale und internationale Aufgabe, in: *Apolte & Caspers & Welfens* (eds.), Standortwettbewerb – Wirtschaftspolitische Rationalität und internationale Ordnungspolitik, 1999, p. 242; *International Competition Policy Advisory Committee (ICPAC)*, Final Report, 2000; *Tarullo*, Norms and Institutions in Global Competition Policy, 94/3 Am. J. Int'l. L. 478 (2000); *Wins*, Eine internationale Wettbewerbsordnung als Ergänzung zum GATT, 2000; *Amato*, International

- Many states (including the U.S. and the EU) and most antitrust experts hold the opinion that the traditional system of national competition laws (including their extra-territorial application) is not sufficient for the protection of competition in the new millennium. Therefore, some kind of international arrangement in regard to competition rules seems to be necessary.
- The introduction of substantive international competition rules with an international competition authority and a corresponding court (in analogy to the supranational European competition law) is not seen as feasible and/or desirable. Thus the solution should not be sought in centralised global competition rules but be based primarily upon national competition laws and authorities.
- Consequently, the main thrust of the discussion has shifted from the idea of a larger harmonisation and convergence of national competition laws to the problem of better international enforcement of these laws. Although bilateral cooperation between national competition authorities have become an increasingly important issue, bilateral cooperation agreements are considered only a first step to a more preferable multilateral (or plurilateral) solution (e.g. within the WTO).
- Generally, the path to international competition rules is seen as a pragmatic, step-by-step approach, which can achieve its aim only in the long run. The currently favoured informal network approach, which remains without commitment and emphasizes primarily the gathering, discussion and exchange of information between national competition authorities, is in line with such a pragmatic approach to the incremental evolution of international competition rules.[2]

Antitrust: What Future?, 24/4 World Competition 451 (2001); *Grewlich*, Globalization and Conflict in Competition Law – Elements of Possible Solutions, 24/3 World Competition 367 (2001); *Fullerton & Mazard*, International Antitrust Co-operation Agreements, 24/3 World Competition 405 (2001); *Janow & Lewis*, International Antitrust and the Global Economy, 24/1 World Competition 3 (2001); *Drexl*, Do We Need "Courage" for International Antitrust Law? – Choosing Between Supranational and International Law Principles of Enforcement, (in this volume); *Budzinski*, Perspektiven einer internationalen Politik gegen Wettbewerbsbeschränkungen, in: List Forum für Wirtschafts- und Finanzpolitik 28, 2002, p. 233-252.

[2] For an overview and analysis of the International Competition Network and other antitrust networks see *Budzinski*, Institutional Aspects of Complex International Competition Policy Arrangements, in: *Esser & Stierle & Maurin* (eds.), Current Issues in Competition Theory and Policy, (forthcoming); *First*, Evolving Toward What? The Development of International Antitrust, (in this volume).

How can we describe the present situation from a global perspective? We have a multitude of national competition laws and enforcement agencies (competition authorities, courts) with more or less different substantive and procedural rules. Different competition laws and enforcement agencies can also exist within a (kind of) federal system, as to some degree within the U.S. and to a larger extent within the EU, where European competition rules and national competition laws coexist on two different levels. Since the competencies of these competition laws and enforcement agencies overlap, many external effects and conflicts can emerge. Up to now we cannot reasonably argue that this complex structure of competition laws forms an integrated system for protecting competition in international markets. The establishment of international competition rules (as well as the less ambitious international network approach), which on one side should help to solve the problems of the current situation, can, on the other side, increase the complexity of the system, because an additional vertical regulatory level in regard to competition rules would be introduced – including new potential conflicts of competencies.

But what are the long-term perspectives of this situation? What can an international system for protecting competition look like in the long run? Two basic perspectives can be outlined:

One perspective is that such a pragmatic approach, which fosters the discussion between different countries and their competition authorities, eventually will lead to a uniform global competition law or – at least – to a quasi-harmonisation of national competition laws. If the differences between the competition laws disappeared, many of the current problems would vanish. From this perspective, the current situation with many different competition laws on two or three different levels does constitute only an intermediate phase, which in the long run would be replaced by one quasi-uniform set of global competition rules.

Another perspective proceeds from the more sceptical assumption that it will not be possible for all countries to agree on one uniform set of competition rules, even in the long run. There will always be different objectives of competition laws and different theories about what competition is and what rules are necessary for the protection of competition. Therefore, the coexistence of different competition laws should be seen as a permanent feature of an international system of competition laws, implying that substantial decentralisation and variety will remain a major characteristic of such an international system, also in the long run.

This paper will focus on the second perspective, which can be characterised as an evolutionary one: The objectives of competition policy in different countries might change and remain different; competition theories might

evolve through academic progress; the rules for the protection of competition might have to change due to new anticompetitive business practices or new technology (such as the Internet). From this evolutionary perspective, it is crucial that an international system for the protection of competition should also include the long-term capability of adapting quickly to new competition problems, particularly by fostering legal innovations for improving the protection of competition. One important argument for a more decentralised international system of competition laws will be that decentralisation will increase the capability of the system for innovation and learning in regard to the development of effective legal rules for the protection of competition.

But what can a workable international system with different competition laws and enforcement agencies on different levels, i.e., a decentralised international system of competition laws, look like? This paper can only present some considerations about this problem. But its goal is to outline an analytical framework, which can be used for designing a workable multi-level system of competition laws. The main idea is that we should apply economic theories about federalism and the advantages and disadvantages of centralisation and decentralisation to develop arguments about the appropriate institutional structure of an international multi-level system of competition laws. The theories that are used in this paper are the economic theory of federalism, the attempts to apply the concept of federalism to legal rules as well (legal federalism),[3] and the theories of interjurisdictional and regulatory competition.[4]

The paper is structured as follows. In section II it is shown that the present situation can be interpreted as being already rather close to a kind of three-

[3] The application of the concept of federalism to competition policy is a rather new approach. First attempts can be found in *Fox*, Antitrust and Regulatory Federalism: Races Up, Down and Sideways, 75 N.Y.U.L. Rev. 1781 (2000); *Guzman*, Antitrust and International Regulatory Federalism, 76 N.Y.U.L. Rev. 1142 (2001); and particularly *Van den Bergh & Camesasca*, European Competition Law and Economics – A Comparative Perspective, 2001, p. 125-165.

[4] This paper is part of a larger research project which generally explores the possibility and preconditions of decentralised multi-level legal systems (see *Kerber & Heine*, Zur Gestaltung von Mehr-Ebenen-Rechtssystemen aus ökonomischer Sicht, in: *Schäfer & Ott* (eds.), Vereinheitlichung des Zivilrechts in transnationalen Wirtschaftsräumen, Ergebnisse des 8. Travemünder Symposiums zur ökonomischen Analyse des Rechts (forthcoming). Other research projects inquire into centralisation and decentralisation in European contract law (see *Grundmann & Kerber*, European System of Contract Laws – A Map for Combining the Advantages of Centralised and Decentralised Rule-making, in: *Grundmann & Stuyck* (eds.), An Academic Green Paper on European Contract Law, 2002, p. 291), and regulatory competition between European corporate laws (see *Heine & Kerber*, European Corporate Laws, Regulatory Competition and Path Dependency, 13 European Journal of Law and Economics 47 (2002)).

level system of competition laws and that many current issues in European and international competition policy can be interpreted as discussions about problems of the horizontal and vertical delimitation of competencies within such a three-level system. In the main section III an analytical framework concerning the potential advantages and disadvantages of centralisation and decentralisation of competition policy will be developed on the basis of economic theories of federalism and regulatory competition. This will include a (still incomplete) set of criteria for regulatory federalism in competition law. Some conclusions for reconstructing international competition policy as a multi-level system of competition laws are presented in section IV.

II. Towards an International Multi-Level System of Competition Laws

A. Competition Law Regimes on Different Levels

A competition law regime can be seen as consisting of substantive legal rules for protecting competition on one hand and an enforcement system on the other hand. The latter includes procedural rules, the competition authorities (such as the Antitrust Division of the Department of Justice in the U.S.), the courts (such as the European Court of Justice for European competition law), and also private parties, if they have the right to sue firms for breaking competition laws (private litigation). In that respect competition laws can be enforced both by public and private agencies. So if we consider a multi-level system of competition law regimes for solving international competition problems, we have to take into account the basic elements: substantive competition rules, enforcement agencies and the courts.

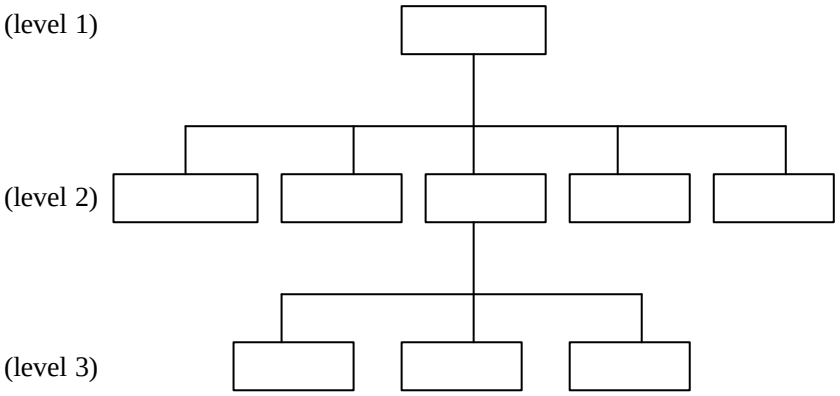

Figure 1: A three-level system of competition law regimes

If we include the current discussion about the establishment of an international level of competition policy, we are already very close to a kind of three-level system of competition law regimes. Within the EU, competition laws, competition authorities and the corresponding courts already exist on two levels: (1) the national competition laws of the Member States of the EU, e.g. the German Law against Restraints of Competition (GWB), enforced by the national competition authorities (e.g. the Bundeskartellamt in Germany) and national courts, and (2) the European competition rules (Art. 81, 82 EC Treaty, Merger Regulation), the European Commission as competition authority and the European courts. Also in the U.S., competition laws and enforcement agencies exist on two different levels: On the federal level, there are the federal antitrust laws, the U.S. Department of Justice and the Federal Trade Commission (FTC) as federal enforcement agencies, and the federal courts. But there are also state antitrust statutes, and state attorneys can act as independent enforcement agencies of the states.[5] The establishment of competition rules on an international level would imply the emergence of a three-level system of competition laws (of course, for most states outside the EU and the U.S., it would be a two-level system). And on each of these three

[5] See *Ginsburg & Angstreich*, Multinational Merger Review: Lessons from Our Federalism, 68 Antitrust L.J. 219 (2000); *First*, Delivering Remedies: The Role of the States in Antitrust Enforcement, George Washington L. Rev. 1701 (2001); *Grimes*, Microsoft Litigation and Federalism in U.S. Antitrust Enforcement: Implications for International Competition Law (in this volume).

levels, substantive competition rules, competition authorities and courts can exist. Figure 1 illustrates such a structure.

Within a multi-level system the three elements of competition law regimes (substantive rules, competition authorities and courts) can be combined between the levels in very different ways. European competition rules, for example, can be applied directly in the Member States by national competition authorities and the national courts (also e.g. in private litigation). So enforcement agencies on a lower level might have the right to apply also substantive competition rules of a higher level. Therefore, the introduction of an international level of protecting competition does not imply the necessity to introduce simultaneously international competition rules, an international competition authority and an international court. Instead, the problem of protecting competition on international markets might also be solved by international procedural rules on the first level, which ensure the enforcement of second-level competition laws by second-level enforcement agencies.[6] The decisive point is that there is a wide range of options for the design of a multi-level system of competition law regimes.

B. Horizontal and Vertical Delimitation of Competencies

1. Competence Problems in a Multiple Competition Law Regime

A crucial problem in a world of multiple competition law regimes is that usually the geographical scope of the effects of anticompetitive behaviour is not identical with the geographical scope of the jurisdictions, each with its own competition law regime. One competition case, e.g. a merger or a price-fixing cartel, can have anticompetitive effects in several relevant markets, which might extend over a number of different jurisdictions. Which of the several jurisdictions that are negatively affected by a competition case should deal with the problem? In a multi-level system the question arises how the competencies of competition laws and enforcement agencies should be delineated. In a first step we deal with the horizontal delimitation of competencies, that is, between the competition law regimes of the same level, before we turn, in a second step, to the vertical delimitation of competencies – between the competition law regimes of different levels.

[6] See e.g. the Draft International Antitrust Code (*Fikentscher & Immenga*, supra n. 1, p. 53-110), that can be interpreted in this way.

2. Horizontal Delimitation of Competencies

The relationship between different competition law regimes of the same jurisdictional level, such as nation states, is characterised by two main problems:

(1) Nearly all competition laws combat only those restraints of competition which have negative effects on competition within the territory of their jurisdictions. For example, in European merger control the Commission analyses whether a merger leads to the emergence or strengthening of a dominant position within the common market of the European Union. Whether this merger leads to market dominance in Brazil is irrelevant for EC merger control. A more extreme, well-known case are export cartels, which were allowed under most competition laws. As a consequence of this neglect of domestic restraints of competition which have their negative effects abroad, nearly all countries apply the "effects doctrine", i.e. they claim that their national competition law regimes have the right also to combat restraints of competition which take place in other countries but have negative effects on competition in domestic markets. But since the extra-territorial enforcement of competition laws is difficult and often impossible, the national competition authorities are often not able to deal effectively with those restraints of competition.[7]

Thus, the first main problem is that competition might not be protected enough if there are negative effects of restraints of competition on other jurisdictions. The "effects doctrine" – as a kind of rule for the definition of competencies within competition law regimes – can only be a very imperfect solution. But bilateral cooperation agreements between national competition authorities concerning mutual assistance in the extra-territorial enforcement of national competition laws might help to solve those problems of under-enforcement of competition laws in the case of international competition problems.[8]

(2) In the last two decades more and more countries have enacted competition laws (including merger controls) and, thus, the number of competition cases affecting several countries has increased. The overlapping of competencies – as a logical consequence of the effects doctrine – can become a difficult problem. This is particularly true for merger cases. Often international mergers have to pass through several national merger reviews at the same

7 See *Basedow*, supra n. 1, p. 11-37, for an overview of the extra-territorial application of national competition laws and its problems.

8 For an overview of bilateral cooperation agreements in regard to competition policy see *Fullerton & Mazard*, supra n. 1.

time.[9] This leads (a) to considerable transaction costs, both for the competition authorities and for the merging firms, and (b) to a range of potential conflicts, because the national competition authorities can come to different evaluations of the same merger case (including perhaps different requirements for the modification of the merger). One of the most prominent cases which was assessed with different results was the Boeing/McDonnell Douglas merger. Potential solutions for these problems consist of proper horizontal delimitation of competencies, which would reduce or avoid the overlapping of competencies. This can be carried out by establishing bilateral or multilateral rules – like negative or positive comity – channelling international cases to only one of the involved competition authorities, which would take the lead in treating the case in question (lead jurisdiction).[10]

3. Vertical Delimitation of Competencies

Another solution for these horizontal problems is the introduction of a higher-level competition law. Specifically, the European competition law can be understood in that way. It is based upon the conviction that the national competition laws of the Member States are not able to protect competition within the EU sufficiently. The European competition law regime is a fully developed competition law with its own enforcement agency and its own court system.[11] The main advantage of the introduction of a higher-level competition law within the EU is that competition problems which affect several Member States can be dealt with on the higher level, thus avoiding both the problems of insufficient enforcement and the costs of multiple procedures and conflicts. Therefore, within a two-level system of competition laws the problems of delimiting horizontal competencies are reduced. However, the new problem of vertical delimitation arises: which competition

9 For the problems of multi-jurisdictional merger reviews and potential solutions see *Halverson*, Harmonization and Coordination of International Merger Procedures, 60 Antitrust L.J. 531 (1992); *Campbell & Trebilcock*, International Merger Review – Problems of Multi-Jurisdictional Conflict, in: *Kantzenbach & Scharrer & Wavermann* (eds.), Competition Policy in an Interdependent World Economy, 1993, p. 129; *Janow & Lewis*, supra n. 1, 5-12; *Davidow*, United States Antitrust Developments in the New Millennium, 24/3 World Competition 425, 439 et seq. (2002).

10 See *Trebilcock & Howse*, Trade Liberalization and Regulatory Diversity: Reconciling Competitive Markets with Competitive Politics, 6 European Journal of Law and Economics 5 (1993).

11 The introduction of an entirely independent system on the EU level was necessary, because in the past many Member States did not have effective national competition law regimes.

problems should be solved by the higher-level competition law regime and which by the lower-level ones?[12]

How, for example, are the competencies delineated between the two different levels of competition laws within the EU?

Mergers: In regard to merger cases there is a clear-cut delimitation of competencies between the European merger control and the national merger controls. "One-stop control" was one of the basic principles of the introduction of the European Merger Regulation in 1989: a merger case should be either a European case ("Community dimension") or a national case. The criteria for allocating merger cases to the European level are turnover thresholds (Art. 1 Merger Regulation). If these are fulfilled, the merger has a "Community dimension" and is subject to European merger control. Particularly all large mergers with a minimum turnover in the EU are controlled by the Commission. An exception was made for those large mergers which have at least two-thirds of their turnover within one Member State. They are seen as national mergers and regulated by national authorities.

From the beginning of European merger control there was an intensive discussion about whether this vertical delimitation is adequate. The Commission always wanted to reduce the turnover thresholds, implying that more merger cases would be shifted from the national to the European level. Already in the first reform of the Merger Regulation in 1998, the thresholds were modified to a certain extent to alleviate the problems of multiple notification of mergers that simultaneously affect several Member States but have no Community dimension. The recently published Green Paper on the reform of merger control hints in the same direction.[13] Clearly, the problem of the vertical delimitation between the European and the national merger control regulations is a permanent issue.[14]

Cartels and Abuse of Dominant Positions: The situation is entirely different in regard to cartels and the abuse of dominant positions. Art. 81 and 82 EC Treaty can be applied if the restraints of competition "may affect trade between member states". Since this criterion is interpreted very widely, many restraints of competition and abuses of dominant positions are subject to these

[12] Additionally, we have to distinguish between the competencies of the competition laws and the competencies of the competition authorities on both levels.

[13] See *Baron*, Die neuen Bestimmungen der europäischen Fusionskontrolle, 1997 Wirtschaft und Wettbewerb (WuW) 579; *European Commission*, Green Paper of 11 December 2001 on the Review of Council Regulation (EEC) No. 4064/89, COM(2001) 745 final; *European Commission*, XXXI. Report on Competition Policy 2001, 2002, p. 61 et seq.

[14] But it is primarily a problem of the vertical delimitation of substantive rules, and not one of the vertical delimitation of the competencies of competition authorities.

European competition rules, even if the relevant market does not extend beyond one Member State.[15] Consequently, in both cases the competencies of the European and national competition law regimes overlap, both in regard to the substantive competition rules and the enforcement agencies. Additionally, the national competition authorities and courts can also apply the European competition rules. Although the application of the European rules does not preclude the parallel application of the national rules, in the case of conflicts the European rules prevail. Therefore, regarding cartels and the abuse of dominant positions there is no clear vertical demarcation of competencies between the two levels. The long-term effect of this overlap in combination with the power of the national competition authorities and courts to apply Art. 81 and 82 is the decrease in importance of the national substantive competition rules.

The vertical delimitation of competencies is also one of the core issues in the modernisation debate concerning Regulation 17 of European competition law. The proposals and their discussion cannot be considered in detail here. But it is important to note that the Commission would give up its monopoly on exemptions according to Art. 81 (3) EC Treaty. The proposals end up in complicated rules concerning the competencies of the Commission, the national competition authorities and the national courts to enforce Art. 81 and, particularly, the exemptions of Art. 81 (3). One suggestion is that there should be intensive vertical cooperation between the national and the European competition authorities. Despite provisions that the Commission should have special rights to control the exemption policy and monitor the exemptions, there can be no doubt that the enforcement would be much more decentralised than in the present system of prior notification.[16] But this discussion of the vertical delimitation of competencies treats only the

15 See *Korah*, EC Competition Law and Practice, 2000, p. 51-58.

16 See *European Commission*, White Paper of 28 April 1999 on modernisation of the rules implementing articles 85 and 86 of the EC Treaty, Working Programm of the Commission No. 99/027; *Temple Lang*, Decentralised Application of Community Competition Law, 22/4 World Competition 3 (1999); *Mestmäcker*, Versuch einer kartellpolitischen Wende in der EU, 1999 Europäische Zeitschrift für Wirtschaftsrecht (EZW) 523; *Ehlermann*, The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution, 37 C.M.L. Rev. 537 (2000); *Monopolkommission*, Kartellpolitische Wende in der Europäischen Union? Zum Weißbuch der Kommission vom 28. April 1999, Sondergutachten 28 gemäß Art. 44 Abs. 1 Satz 4 GWB, 1999; *Fox*, The Elusive Promise of Modernisation: Europe and the World, Leg. Iss. Eur. Integr. 141 (2001); and *Van den Bergh & Camesasca*, supra n. 3, p. 140 et seq. The central point of the discussion is whether such a more decentralised system for the enforcement of Art. 81 EC Treaty can be as effective in protecting competition as the present one, because the system of prior notification exemptions of Art. 81 (3) shall be given up.

competencies of second- and third-level enforcement agencies (see Figure 1) to apply the substantive competition rules on the second level, and not the vertical delimitation of competencies between the substantive competition rules on both levels. Consequently, the Commission's strategy of decentralisation refers only to the application of European competition rules.

C. Conclusions

In this section it was shown that the present structure of competition law regimes is not far away from a kind of three-level system of competition law regimes, if we take into account the proposals for introducing international competition rules as an additional level of competition law regimes. But up to now, it cannot be argued that this kind of multi-level structure of competition law regimes forms an integrated, consistent system of competition laws and enforcement agencies which satisfactorily protects competition on international markets. Even within the EU there are so many inconsistencies in regard to the horizontal and, particularly, the vertical delimitation of competencies that the structure of competition laws within the EU cannot be regarded as an integrated two-level system of competition laws. We have seen that many recent discussions in competition policy, both in regard to the reforms within the EU and in regard to international competition rules, can be interpreted as discussions about the proper horizontal and vertical delimitation of competencies in a three-level system of competition laws. An important result of our analysis is that the horizontal and vertical delimitation of competencies of the substantial competition rules, the competition authorities and the courts is the crucial problem that has to be solved in such a complex multi-level structure of competition law regimes.

It is the main thesis of this paper that this emerging three-tier structure should not be seen as a transitory phenomenon that eventually will be replaced by a new global one-level competition law regime. Instead, we must accept the fact that, even in the long run, we will have a multi-level system of competition law regimes – with more or less different substantive rules and a number of different enforcement agencies on different jurisdictional levels. Therefore, we must ask how such an international multi-level system of competition laws should be designed, and which institutional framework is necessary for the proper working of such an integrated system. For solving this problem, I want to suggest in the second half of this paper that the economic theory of federalism might provide a theoretical framework for the development of an international multi-level system of competition law regimes. Particularly, we will see that the economic theory of federalism can provide arguments for the case that a multi-level system of competition laws

might even be a superior solution to a uniform one-level competition law regime.

III. Regulatory Federalism in Competition Law: Arguments for and against Centralisation and Decentralisation

A. Economic Theories of Federalism and Regulatory Competition: An Introduction

In the well-established economic theory of fiscal federalism a number of criteria have been developed on the appropriate extent of centralisation and decentralisation of the provision of public goods, redistribution, and taxation within a federal multi-level system of jurisdictions. The most important criteria are the geographical scope of public goods (the problem of spill over-effects), geographical heterogeneity of preferences, economies of scale effects, transaction costs (within the federal system), rent-seeking arguments, the extent of decentralised information and the advantages of decentralised experimentation.[17] Since the 1990s the theory of fiscal federalism has been complemented by the theory of interjurisdictional competition (or: systems competition, institutional competition, locational competition), which analyses the competition of different states, regions or cities for mobile resources (primarily investors).[18] This was necessary because in a federal state

[17] See e.g. *Oates*, Fiscal Federalism, 1972; *Oates*, An Essay on Fiscal Federalism, 37 Journal of Economic Literature 1120 (1999); *Breton*, Competitive Goverments – An Economic Theory of Politics and Public Finance, 1996.

[18] See e.g. *Tiebout*, A Pure Theory of Local Expenditures, 64 Journal of Political Economy 416 (1956); *Siebert & Koop*, Institutional Competition. A Concept for Europe? 45 Aussenwirtschaft 439 (1990); *Kenyon & Kincaid* (eds.), Competition Among States and Local Goverments – Efficiency and Equity in American Federalism, 1991; *Vanberg & Kerber*, Institutional Competition Among Jurisdictions: An Evolutionary Approach, 5 Constitutional Political Economy 193 (1994); *Bratton & McCahery*, The New Economics of Jurisdictional Competition: Devolutionary Federalism in a Second-Best World, 86 Georgetown L.J. 201 (1997); *Sinn*, The Selection Principle and Market Failure in Systems Competition, 88 J. Publ. Econ. 247 (1997); *Kerber*, Zum Problem einer Wettbewerbsordnung für den Systemwettbewerb, in: 17 Jahrbuch für Neue Politische Ökonomie 199 (1998); *Oates*, supra n. 17, 37 Journal of Economic Literature 1120 (1999).

with substantial decentralisation the increasing competition among lower-level jurisdictions is a logical consequence of the rising mobility of individuals, firms and production factors. This led to the concept of competitive federalism.

A particularly important issue in the discussion of the appropriate degree of centralisation or decentralisation in federal multi-level systems of jurisdictions is whether competitive federalism leads primarily to positive or negative effects. Whereas the proponents of competitive federalism emphasize the positive effects in terms of greater efficiency and more innovation, other scholars believe that interjurisdictional competition might lead to an under-provision of public goods and redistribution due to a cut-throat tax competition. The preliminary result of this discussion in economics about the pros and cons of centralisation or decentralisation is that (1) federal multi-level systems of jurisdictions with a substantial degree of decentralisation can be recommended, (2) the specific vertical allocation of competencies within such multi-level systems depends on a number of criteria, and (3) also interjurisdictional competition can be workable within an appropriate institutional framework, but a differentiated analysis is necessary. It is important for our discussion that the theories of fiscal federalism and interjurisdictional competition have developed a number of criteria which can help to solve the problem of how a federal multi-level system of jurisdictions should be conceived.

However, the conclusions we can draw from these theories for our problem of a multi-level system of competition laws still remain limited, because the economic theories of federalism and interjurisdictional competition have been primarily developed for the provision of public goods, redistribution, and taxation, and not for the provision of legal rules and regulations. The question of how to allocate competencies for regulations within a multi-level system of jurisdictions has not been treated in a systematic way. This means that an economic theory of legal federalism, i.e., an economic theory of the design of a multi-level system of law, is still in its infancy. But in the context of European integration problems, this topic was dealt with by asking whether legal rules and regulations should be harmonised on a European level or remain decentralised. The discussion on the consequences of the *Cassis de Dijon* Judgment of the European Court of Justice (principle of mutual recognition) triggered a controversy over the merits and dangers of regulatory competition. In combination with the well-known debate on competition among corporate laws in the U.S., a theory of regulatory competition began to

emerge, which has been dominated by the problem of whether regulatory competition would lead to a "race to the bottom" or to a "race to the top".[19]

But combining the insights of the economic theory of federalism on one hand and the discussions on harmonisation vs. decentralisation of regulations and on regulatory competition on the other hand can provide a number of well-founded arguments dealing with the issue of whether to allocate regulations to the top level of a federal system of jurisdictions or to lower levels. Therefore it is conceivable to develop an elaborated concept of legal federalism, i.e., a concept of multi-level legal systems, in which competencies for the making of legal rules exist on different levels of jurisdictions. Similar to the above-mentioned set of criteria for the allocation of public goods to different levels of jurisdictions, it might also be possible to develop criteria for allocating legal rules and regulations to different levels of jurisdictions. Up to now, there have only been initial approaches attempting to develop such sets of criteria.[20] The first results of the application of these criteria to real-world regulations show that the extreme options of total centralisation or decentralisation do not seem to be the best solutions. Presumably, skilfully conceived intermediate options between centralisation and decentralisation within a multi-level system of jurisdictions will be more appropriate solutions.

In this section, several criteria for the vertical allocation of regulatory competencies in a multi-level system of jurisdictions will be presented and applied to our problem, to which jurisdictional level the solution of competition problems should be allocated. It should be clear that in this paper we cannot solve the problem of how a multi-level system of competition law regimes should look. So only some of these criteria can be analysed in regard

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19 For the theory of regulatory competition see *Romano*, Law as a Product: Some Pieces of the Incorporation Puzzle, 1 Journal of Law, Economics and Organization 225 (1985); *Bebchuk*, Federalism and the Corporation: The Desirable Limits on State Competition in Corporate Law, 105 Harvard L. Rev. 1435 (1992); *Sun & Pelkmans*, Regulatory Competition in the Single Market, 33 Journal of Common Market Studies 67 (1995); *Streit & Mussler*, Wettbewerb der Systeme und das Binnenmarktprogramm der Europäischen Union, in: *Gerken* (ed.), Europa zwischen Ordnungswettbewerb und Harmonisierung, 1995, p. 75; *Sinn*, supra n. 18; *Kerber*, Interjurisdictional Competition within the European Union, 23 Fordham Int'l L. J. 217 (2000); *Van den Bergh*, Towards an Institutional Legal Framework for Regulatory Competition in Europe, 53 Kyklos 435 (2000); *Heine*, Regulierungswettbewerb im Gesellschaftsrecht. Zur Funktionsfähigkeit eines Wettbewerbs der Rechtsordnungen im europäischen Gesellschaftsrecht (forthcoming).

20 See e.g. *Grundmann & Kerber*, supra n. 3; *Kerber & Heine*, supra n. 3; *Van den Bergh*, Forced Harmonisation of Contract Law in Europe – Not to Be Continued, in: *Grundmann & Stuyck*, supra n. 3, where preliminary sets of criteria can be found.

to competition law.[21] But I want to give an impression of how the problem can be addressed from the perspective of a theory of legal federalism. The question can be posed both for substantive competition rules (section III.B) and for the corresponding enforcement system (section III.C). The specific problem of regulatory competition, which might emerge in a decentralised system of competition law regimes, can only be discussed briefly. So in the following, the specific advantages and disadvantages of centralisation and decentralisation of competition law regimes will be discussed.

B. Centralisation or Decentralisation of Competition Laws: Some Criteria

1. Economies of Scale and Transaction Costs

Static economies of scale: The drafting of laws, the decision processes of the legislators and the implementation of laws can cause considerable costs, which can be interpreted as fixed costs (setup costs). Also, the building up of specific human capital for competition law and its application by legal scholars, lawyers, judges, and the staff of competition authorities has the character of fixed costs. In contrast to these fixed costs, the marginal costs of applying the competition rules are small. Thus, from an economic point of view, the production and application of competition laws can imply economies of scale effects, i.e., the average cost of protecting competition by a competition law regime declines with an increasing number of cases. As a consequence, a global competition law regime – with uniform legal rules and one system of enforcement (including the judicial system) – would economize on these fixed costs. In contrast to that, a multi-level system of competition law regimes would lead to considerably higher fixed costs for setting up many different competition law regimes. So a uniform (and therefore centralised) competition law can save costs due to economies of scale.

Dynamic economies of scale: In regard to the utility and the costs of legal rules, dynamic economies of scale also have to be taken into account. It is well known that the quality of a law depends on the number of cases that have been decided on the basis of this law, because a large set of decisions in the

[21] For the criteria see *Kerber & Heine*, supra n. 3. For the application of some of these criteria to competition policy see also *Van den Bergh & Camesasca*, supra n. 3, p. 125 et seq.

past can be taken as cumulating experience and knowledge for solving legal problems. This increases the quality of the law for the solving of transaction problems and the users of the law can more easily predict what kind of behaviour is legal or illegal. This stabilizes the expectations of firms. So a long established competition law regime might have a higher quality than a new one. For our problem of centralised and decentralised competition laws those dynamic economies of scale seem to be an argument for one uniform competition law, because the fewer competition laws exist, the greater is the body of decisions of the courts which are based upon those laws, and the quicker the quality of the competition law regimes increases.

But we also have to take into account that the legal development can be characterised by path dependencies, which might lead to the problem of inefficient legal rules prevailing for a long time (lock-in effects).[22] If such path dependencies with a lock-in of inefficient competition rules emerge in the case of a centralised, uniform competition law, this might imply a much greater danger to competition than in a more decentralised system of competition laws, in which different competition laws co-exist. Additionally, we have to take into account that a process of centralisation by introducing new competition rules on a higher level implies that much of the experience and knowledge which has been accumulated in the previously existing lower-level competition law regimes will become useless and eventually be lost. At the same time, the new competition rules on the higher level will suffer from their lack of experience for a certain amount of time. Therefore, the argument of dynamic economies of scale is ambivalent in regard to the question of centralisation or decentralisation.

Transaction costs: The existence of different competition laws can also increase the costs of doing business in international markets, because firms need information about the specific legal rules that have to be respected in particular countries. The problem of the costs of having to notify international mergers in several countries and having to pass several merger control reviews in different countries according to different criteria and procedural requirements has been recognized as one of the particular problems of the existing system of national competition laws. From an economic point of view, these costs can be interpreted as transaction costs in the merger's market. Also, the costs to the competition authorities for the assessment of mergers can be interpreted as transaction costs, which have to be borne several times if parallel merger procedures take place. But information costs concerning different competition laws are also important in regard to other

[22] For the problem of path dependencies in institutional or legal evolution see *North*, Institution, Institutional Change and Economic Performance, 1990; *Kerber & Heine*, supra n. 3.

parts of competition law regimes, as e.g. in the question of what kinds of business behaviour are assessed as unfair competition or abuse of a dominant position, or what kinds of horizontal or vertical agreements are allowed in certain jurisdictions, can be pre-empted under certain conditions or are deemed prohibited *per se.* In a world with different legal rules for protecting competition, those information costs will be considerably higher than in a world with one uniform competition law regime, implying higher transaction costs for the firms on international markets.

2. Geographic Scope of Competition Problems

In the economic theory of federalism, one important argument is that a problem should be allocated to that jurisdictional level on which the geographical scope of the problem is identical with the territorial scope of the jurisdictions. With respect to public goods, this implies that there should be no spill-over to other jurisdictions, because otherwise the incentive for the provision of these (usually tax-funded) public goods is too low – due to the free-rider effects in other jurisdictions. If a spill-over has the form of negative external effects (as in environmental problems, public bads), there is a tendency towards over-provision of those activities, because not all of these costs have to be borne by the jurisdictions in which these activities with negative externalities are carried out. So the criterion of the geographical scope of a problem can be interpreted as helping to avoid inefficiencies due to positive and negative externalities. But economic theory also shows that the existence of positive and negative spill-over effects need not necessarily imply that the problem has to be solved by a higher-level jurisdiction. Different kinds of bargaining solutions between jurisdictions are also feasible.

To what extent can such externalities (or spill over-effects) between different jurisdictions emerge in regard to restraints of competition and competition policy? This problem has already been addressed briefly in section II.B.1 by showing that the geographical scope of the negative effects of restraints of competition often transcend the territorial scope of jurisdictions, leading to problems of the horizontal delimitation of competencies between different competition law regimes. In the following, different trans-border cases are distinguished.

Since the protection of competition in a relevant market is an indivisible public good, an externality problem emerges if the size of the geographically relevant market[23] is larger than the territorial size of the jurisdictions, e.g. if in

[23] One unresolved issue is the problem of potential competition from outside the geographically relevant market.

regard to a merger in Germany the geographically relevant market is the EU, but it is not an European case because the turnover thresholds are not fulfilled. In that case, German merger control has to provide a public good, which can be used within the whole European Union. In such cases, economic theory would predict that there is a danger of under-provision of protection of competition due to free-rider effects, although the negative effects for Germany might constitute a sufficient incentive for the German authorities to provide this public good.

A more important problem is that often one case of competition – a merger, for example – might have anticompetitive effects on several markets which lie in a number of different jurisdictions. So if one competition authority deals with this particular competition case, but only takes into account the potential anticompetitive effects on its own domestic territory, it will make a decision which does not include the effects of that restraint of competition on markets in other jurisdictions. In that respect, it is very probable that the decision will not be optimal from the perspective of all the jurisdictions affected by this competition case.[24] But the problem is not only the neglect of anticompetitive effects in other jurisdictions, but the possibility that competition authorities decide competition cases deliberately in such a way that the advantages of e.g. a merger remain in the domestic jurisdiction, whereas the burden of anticompetitive effects is placed on other jurisdictions (strategic competition policy). In all of these cases, the decisions of the competition authority of one jurisdiction can have negative external effects on other jurisdictions.

What options for solving these problems exist from the perspective of the economic theory of federalism?

The present solution of the application of the "effects doctrine" is very unsatisfactory. It cannot dispel the above-mentioned danger of under-provision of the public good of protection of competition. In the case of negative external effects of the activities (or lack of activities) of the competition authorities of particular jurisdictions, the "effects doctrine" allows other competition authorities to combat these anticompetitive effects, but the problems of the extra-territorial enforcement of competition laws are

[24] For economic models, which try to show such problems, see *Falvey & Lloyd*, An Economic Analysis of Extraterritoriality, Center for Research on Globalization and Labour Markets, University of Nottingham, Research Paper 99/3, 1999; *Neven & Röller*, The Allocation of Jurisdiction in International Antitrust, 44 Europ. Econ. Rev. 845 (2000); *Kaiser & Vosgerau*, Global Harmonisation of National Competition Policies, in: *Vosgerau* (ed.), Institutional Arrangements for Global Economic Integration, 2000, p. 35. See also *Fox & Ordover*, supra n. 1; *Guzman*, Is International Antitrust Possible?, 73 N.Y.U.L. Rev. 1142 (1998); *Van den Bergh & Camesasca*, supra n. 3, p. 145 et seq.

well-known as well as the costs and conflicts that can arise from parallel antitrust proceedings concerning one competition case.

The most obvious solution from the economic theory of federalism is to establish an identity between the geographical scope of the competition problem and the territorial scope of the jurisdiction that has to deal with this problem. Therefore, within a multi-level system of competition law regimes competition cases should be regulated on that jurisdictional level which encompasses all jurisdictions that are affected by this restraint of competition. Then this jurisdiction can take into account all effects of these competition cases and is also able to enforce its decision. Thus, the solution of the problems of trans-border cases would be the allocation of the case to a higher-level competition law regime.[25] But it is clear that this solution leads to a considerable centralisation of competition policy, as we can observe in the case of European competition policy, which serves as a good example for this strategy. From this perspective, the introduction of a full-fledged global competition law regime (including substantial competition rules, a competition authority and a court) seems to be the logical solution for all those competition cases, as e.g. mergers, which can have anticompetitive effects in many countries.

But in the economic theory of federalism additional options for dealing with positive and negative externalities (spill-over effects) between different jurisdictions have been developed. *Coase* showed that, under certain conditions, externalities can be internalised by bargaining between the affected parties.[26] The already existing bilateral agreements on the cooperation of national competition authorities can be seen as such an instrument for helping to provide the public good of protection of competition in trans-border cases and for solving externality problems in regard to the decision of competition authorities. These bilateral agreements can refer to mutual assistance regarding pure information, cooperation in particular cases, and the enforcement of the decisions of the competition authorities. Particularly, bilateral cooperation of the competition authorities allows for bringing in and taking into account all positive and negative competitive effects in both countries, which might reduce negative externalities of decisions of competition cases considerably.

A generalisation of those bilateral bargaining solutions for externalities is represented by multilateral solutions, in which a number of countries agree on common rules for mutual assistance in regard to the exchange of information,

[25] In section II.B.3) we already interpreted the introduction of a higher-level competition law regime as the solution for horizontal conflicts between different competition law regimes.

[26] See *Coase*, The Problem of Social Cost, 2 Journal of Law and Economics 1 (1960).

cooperation and enforcement. This can be called a club solution. One possibility currently being discussed involves proposals that the most important competition law regimes agree on common rules regarding the procedures and formal requirements for merger reviews. More important for the internalisation of external effects would be an agreement of a number of jurisdictions on procedural rules determining that only one competition authority should investigate a particular competition case, but in regard to potential anticompetitive effects in all jurisdictions. Why should the EU merger control authority only investigate whether a particular international merger may lead to a dominant position within the EU? It can also assess the effects of the merger on Australia, South Africa or Brazil. What is necessary in that regard are international rules determining which competition authority in which country should review a particular merger, and which countries should be included in regard to the assessment of the effects of these mergers. But note that club solutions with common rules can be interpreted as the introduction of an additional level of competition law regimes, and therefore constitute a vertical solution for horizontal problems between jurisdictions. But the decisive difference from the solution by higher-level allocation discussed above is that on this higher level only procedural rules exist on how to deal with problems of externalities.[27]

In this section we dealt with the problem that one competition authority does not take fully into account all effects of a particular competition case due to its geographical limitation. In the following two sections, additional problems are discussed which render the problems of internalising externalities much more difficult, namely, when the countries differ both as regards the objectives of their competition policies and as regards their theories about the competitive assessment of the market position and the behaviour of firms.

3. Heterogeneity of Preferences and the Objectives of Competition Policy

One important criterion in the economic theory of federalism is the extent of the heterogeneity of preferences between different jurisdictions. Since the legal rules should correspond to the preferences of the citizens of the jurisdictions, the existence of large differences between the preferences of different jurisdictions would be an argument in favour of greater

[27] What institutional arrangement is comparatively the best, depends – according to Coase – also on the transaction costs for these different kinds of bargaining solutions. The International Competition Network can itself be interpreted as one type of institutional arrangement to solve these problems.

decentralisation. For in that case the various preferences can be satisfied better than in the case of a centralised solution, which might result in an unsatisfactory average solution for the citizens of all jurisdictions. The greater the heterogeneity between populations in this respect, the higher the cost of centralisation, again an argument for decentralisation.

In regard to competition policy the question is whether different preferences in different jurisdictions might lead to different objectives of competition policy and thus to different normative criteria and different legal rules for assessing mergers and business behaviour. If we compare the competition policies of the European Union and the U.S., there is no doubt that the normative objectives of both competition laws are not identical. Whereas in the U.S. the efficiency approach prevails, the European concept of competition, which also includes the aim of integration, protection of small and medium firms and the protection against the abuse of dominant market positions, has more the characteristic of a multi-goal approach.[28] Beyond that, in many countries, industrial policies with their aim of fostering the international competitiveness of domestic industries can also play an important role in competition policies. There can be no doubt that the objectives of competition laws are different to some extent between countries. This heterogeneity of the objectives of competition law, then, would favour a more decentralised approach.[29]

But the question arises whether these observable differences should be accepted as an argument in an economic discussion about the advantages and disadvantages of decentralisation. Two kinds of arguments are important:

First, many economists think that competition is a clear theoretical concept (as e.g. in the neoclassical model of perfect competition) with a definite normative meaning (to achieve efficient allocation). In that case, competition policy should only pursue economic efficiency, implying that no other normative criteria should be taken into account at all. Therefore, different objectives of competition policies between different countries can only be a consequence of wrong concepts of competition and cannot be a sound argument for decentralisation. This view of the problem, however, is too simple. For one thing, within economics we have different concepts of competition, including different normative concepts, from which different objectives of competition law can be derived. Furthermore, other objectives

[28] For a thorough analysis of the historical background of the differences between the EU and the U.S., see particularly *Gerber*, The U.S.-European Conflict over the Globalization of Antitrust Law: A Legal Experience Perspective, 34/1 New England L. Rev. 123 (1999); for a more general view of potential conflicts among competition cultures see *Grewlich*, supra n. 1, at 376-378.

[29] See also *Van den Bergh & Camesasca*, supra n. 3, p. 136 et seq.

of competition policy beyond economic efficiency are also legitimate, if they correspond to the preferences of the citizens. In that respect, we can also discuss to what extent cultural differences influence the general attitude of a society towards market competition or what kind of competition is seen as preferable.

The second, and more important, objection is that the objectives of competition policy in a country might not reflect entirely the preferences of the constituency, but might be influenced and therefore distorted by rent-seeking activities of interest groups. That is the problem of the political economy of competition policy. From an economic point of view, differences in the objectives of competition policy which do not reflect differences of the preferences of the constituency, but have their cause in differences of rent-seeking activities, are no legitimate argument in favour of decentralisation.[30]

4. Heterogeneity of Theories, Experimentation, and Learning

In modern approaches to the economic theory of federalism, information and knowledge problems play an important role. In the traditional economic theory of federalism it has been implicitly assumed that the policy-makers on the central level have perfect information about all relevant data for their policy decisions. If we assume that on the central level there is an "omniscient" (and benevolent) planner, then it is hard to argue for any form of decentralisation from an economic point of view, because this planner knows the best solution for all. But in reality we have serious information and knowledge problems. The economic theory of federalism claims that the solution of these knowledge problems is a crucial criterion for the decision on the vertical allocation of competencies. Two kinds of information and knowledge problems can be differentiated.

Local knowledge: If the relevant knowledge for solving problems does not exist on the central level, but only in lower-level jurisdictions, a powerful argument for decentralisation emerges, because tasks should be allocated to that jurisdictional level where the most relevant knowledge is available. This can be called the problem of local knowledge.[31] This can be relevant (a) for

[30] Public choice and rent-seeking arguments in regard to centralisation and decentralisation will also be discussed in sections III.B.5 and III.C.

[31] Theoretically it can be traced back to Hayek's claim that the economically relevant knowledge in a society cannot be entirely centralised, leading to his argument of the impossibility of central planning and the superiority of the market economy, which can use the dispersed knowledge in a society; see *Hayek*, The Use of Knowledge in

the competition rules themselves, because the different circumstances in the jurisdictions might mean that different substantive competition rules are appropriate, and (b) for the application of competition rules. The decentralisation of the application of a higher-level competition law can be defended by the argument that lower-level enforcement agencies can have superior local knowledge than those on higher levels.

Uncertainty about the best theories and legal rules: More important than the problem of local knowledge is that we cannot assume that the best rules for protecting competition have already been found. It would be a "pretence of knowledge" (*Hayek*), if we (as legal and economic scholars) were to think that we already know the best legal rules for competition law, and that no improvements are possible. Our limited knowledge about the best set of competition rules is reflected in the existence of different theories of competition, of different recommendations as to what kind of competition rules should be used to protect competition, and in the controversial discussions on what set of criteria should be applied for the diagnosis of anticompetitive behaviour or dominant positions. In that respect, we can explain the simultaneous existence of different competition rules in different countries also by a variety of theories about competition which are applied in these countries.[32]

Since we cannot be sure that we already know the best legal rules for protecting competition, it has to be seen as a permanent task to improve and adapt the rules and criteria for the assessment of business behaviour or market structures. This can be supported by two arguments: (a) Just as we have technical progress in regard to products and production processes (product and process innovations), we can also have innovations in regard to legal rules for the protection of competition, which might improve how we fight restraints of competition. (b) Since firms can create new forms of anticompetitive business behaviours or new technical innovations can lead to new kinds of markets, new challenges for the protection of competition can emerge, which require an evolution of competition laws – or at least an evolution of the substantive criteria in the application of competition laws.

In the modern economic theory of federalism, decentralisation is seen as an important solution for tackling problems with this knowledge and ensuring a high degree of innovativeness and adaptability. The fundamental argument is

Society, 35 Am. Econ. Rev. 519 (1945). *Van den Bergh & Camesasca*, supra n. 3, p. 131, use the argument of information asymmetries.

[32] Whereas in the U.S. an efficiency approach on the theoretical basis of Chicago economics prevails, other competition policies can use different theories of competition leading to different criteria for the assessment of potential restraints of competition.

that in multi-level systems of jurisdictions with decentralised competencies, the lower-level jurisdictions can experiment with different solutions for public goods and policies. This diversity leads to different experiences and to the identification of the relatively best policy solution, which can be learned by other jurisdictions. One of the most prominent experts in the economic theory of federalism, *Oates*, characterizes a federal system as a "laboratory" in which policy innovations are generated and spread.[33] This can be compared both to the Schumpeterian notion of the innovation and imitation of new products and production processes in markets and to *Hayek*'s concept of "competition as a discovery procedure," in which parallel processes of experimentation take place, leading to the identification of superior knowledge and to the spreading of this knowledge by imitation.[34] In legal contributions to the problem of "uniformity of law" versus "diversity of law" the advantages of decentralised experimentation processes for the evolution of legal rules have been emphasized as well.[35]

Thus, in the long run, decentralisation in competition policy might help to improve competition rules by enabling jurisdictions to learn from each other's experiences. This also entails a greater capability to correct errors that might have emerged in the evolution of competition law regimes. This advantage of

[33] See *Oates*, supra n. 17, 37 Journal of Economic Literature 1120, 1133 (1999). Whereas in a centralised system of competition law, only sequential experimentation with different rules and criteria are possible, a decentralised system of competiton laws allows for parallel processes of experimentation. The latter will lead to more experience and therefore to a more rapid process of learning about the best competition rules. In this respect, it would be an interesting research project to analyse the mutual learning processes between different systems of competition law, both horizontally, as between U.S. antitrust law and German competition law, and vertically, as between German competition law and European competition law. For such learning processes see also *Van den Bergh & Camesasca*, supra n. 3, p. 138 et seq. and *Budzinski*, supra n. 2.

[34] See *Hayek*, Der Wettbewerb als Entdeckungsverfahren, 1968.

[35] See e.g., *Behrens*, Vorausetzungen und Grenzen der Rechtsfortbildung durch Rechtsvereinheitlichung, 50 Rabels Zeitschrift für ausländisches und internationales Privatrecht (1986) 19; *Kirchner*, The Principle of Subsidiarity in the Treaty on European Union: A Critique from the Perspective of Constitutional Economics, 6 Tulane J. Int'l & Comp. L. 291 (1998); *Trebilcock & Howse*, supra n. 10; *Van den Bergh*, Subsidiarity as an Economic Demarcation Principle and the Emergence of European Private Law, 5 Maastricht J. Europ. & Comp. L. 129 (1998); *Van den Bergh*, supra n. 19; *Van den Bergh*, supra n. 20. For a general analysis of the advantages of legal diversity from the perspective of innovation economics, see *Kerber*, Rechtseinheitlichkeit und Rechtsvielfalt aus ökonomischer Sicht, in: *Grundmann* (ed.), Systembildung und Systemlücken in Kerngebieten des Europäischen Privatrechts, 2000, p. 67.

a decentralised international system of competition laws has already been emphasized by a number of scholars in the discussion on international competition policy.[36]

5. Other Criteria

Beyond the criteria already mentioned, there are a number of additional criteria that can be used from the perspective of the economic theory of federalism for the vertical allocation of competencies in a multi-level system of competition law regimes. One of these criteria is the consistency of a legal system. In a decentralised system of competition law regimes there might be problems of compatibility between legal rules from different jurisdictional levels. In a centralised competition law regime, problems of lacking compatibility of legal rules, and thus inconsistencies, are less probable than in decentralised systems. A particularly important issue in the economic theory of federalism is whether centralisation or decentralisation leads to a larger amount of wealth-reducing, rent-seeking activities. Usually it is argued that a greater decentralisation of the power of the state would help the citizens to monitor the activities of the state and therefore would reduce the negative effects of rent seeking. Since competition policies can also be influenced by special interest groups, the rent seeking problem can also be an issue for competition law, both on the level of legislation and the level of application to specific competition cases. Although there are well-established arguments for the position that a decentralised approach to competition policy might reduce rent seeking, other arguments that speak in favour of centralisation have also to be considered.

6. Regulatory Competition in Competition Law: A Special Problem

All of the above-mentioned criteria can be used to decide on the optimal degree of centralisation and decentralisation of competition policy in a multi-level system of competition laws. But within a federal system, in which decentralisation exists to a certain degree, the additional question arises whether decentralisation is accompanied by processes of competition between

[36] See, e.g., *Meessen*, Competition of Competition Laws, 10 Northwestern J. Int'l L. & Bus. 17 (1989); *Kerber*, supra n. 1; *Van den Bergh & Camesasca*, supra n. 3, p. 138 et seq.; *Budzinski* , supra n. 2; *Grimes*, supra n. 5; *First*, supra n. 2 in respect to the decentrality of antitrust networks.

the legal rules of the lower-level jurisdictions. Are there processes of regulatory competition in our envisaged multi-level system of competition laws? Does competition among competition laws exist? Would regulatory competition in regard to competition laws lead to negative "race to the bottom" effects or – on the contrary – to a "race to the top"? And: what are the preconditions for a workable regulatory competition among competition laws?[37] Regulatory competition is a complex issue. In this article it is not possible to analyse this problem thoroughly. But some preliminary considerations are presented.

The general discussion about regulatory competition has shown that neither of the two extreme positions, one of which generally condemns regulatory competition due to problems of "race to the bottom" and other arguments of market failure, and the other argues that the positive effects of regulatory competition always prevail, stands up to a critical assessment. Whether the advantages or problems of regulatory competition predominate, depend both on the specific regulations and on the institutional framework for regulatory competition. Whereas regulatory competition might work satisfactorily in regard to the corporate laws of the federal states within the specific institutional context of the U.S., competition among corporate laws might have different effects within the present institutional setting of the European Union. In the same way, regulatory competition in competition law might work very differently from regulatory competition in consumer law or labour law. Consequently, processes of competition among competition laws have to be analysed very carefully.

The crucial problem is that there often is no clear concept of the meaning of regulatory competition: what do we mean by competition among competition laws? From a theoretical perspective we have to distinguish at least three different types of regulatory competition:[38]

(I) *Yardstick competition*: If only information can cross the borders of jurisdictions, then yardstick competition is the sole type of regulatory competition that is possible. For example, citizens in Germany might observe that the U.S. antitrust policy leads to a better protection of competition than the German competition policy, urging the German government to imitate the U.S. competition rules. Thus yardstick competition allows for reaping the advantages of mutual learning through the observation of experimentation processes in different jurisdictions.

(II) *Indirect regulatory competition through international trade*: If, in addition to that, firms of different countries compete with their goods and

[37] See e.g. *Meessen*, supra n. 36; *Petersmann*, supra n. 1, New England L. Rev. 145, 155-157 (1999); *Fox*, supra n. 4; *Guzman*, supra n. 4.

[38] See *Kerber & Heine*, supra n. 3.

services on international markets (mobility of goods and services), an indirect form of competition among the regulations of different countries can emerge. Jurisdictions with superior regulations, such as e.g. more efficient competition laws, might have a cost advantage in comparison to their foreign competitors.

(III) *Regulatory competition as part of interjurisdictional competition*: If firms and production factors are mobile between the jurisdictions, competition among jurisdictions for mobile resources emerges. In that case, the jurisdictions try to attract investments and firms by offering attractive regulations as part of the entire bundle of public goods, legal rules and taxes in this jurisdiction. Since particular laws like competition laws represent only a small fraction of the entire bundle the jurisdictions offer, regulatory competition in regard to one particular law (like the competition law) might be rather limited.

(IV) *Regulatory competition in the case of free choice of law*: Competition among regulations can be much stronger if the firms have the right to choose between regulations of different jurisdictions without having to change their location. For example, competition among corporate laws within the U.S. is characterised by the right of the firms to choose freely between the corporate laws of the states irrespective of the location of their business activities in the U.S. In the case of competition law this would imply that the firms can choose, e.g. in a merger case, between different competition laws.

It is clear that these are very different types of regulatory competition. We will not analyse here the possibilities and the advantages and disadvantages of these types of regulatory competition in regard to competition laws. But it is necessary to emphasize that the rules for the horizontal and vertical delimitation of competencies within a multi-level structure of competition law regimes are decisive for the question of which type of regulatory competition is possible in regard to competition laws. For example, if all countries apply the "effects doctrine" consistently, it is unclear to what extent regulatory competition of type (III) and (IV) is possible, because the firms can choose neither directly, by choice of law, nor indirectly, by moving their location to another jurisdiction, the competition law under which they do their business. On the contrary, the "effects doctrine" leads to the problem that e.g. a merger case is reviewed simultaneously by several competition law regimes, implying an accumulation of requirements for the clearing of one merger.[39] But the situation might become different if – through bilateral or multilateral agreements about negative or positive comity or the introduction of the model of lead jurisdictions for merger cases – the "effects doctrine" is restricted.

[39] In the case of an ineffective extra-territorial application of domestic competition laws, some kind of regulatory competition of type (III) might be possible.

Then it will be necessary to analyse carefully whether processes of regulatory competition can emerge, and how it can be ensured that these forms of competition among competition law regimes have more positive than negative effects.[40]

C. Centralisation or Decentralisation of the Enforcement of Competition Laws

In section II.A we argued that competition law regimes consist of the substantive rules for protecting competition on one hand and of the enforcement agencies (competition authorities, courts) on the other hand. In the last section some criteria for the centralisation and decentralisation of substantive competition rules have been discussed. In the same way, we can also ask whether the enforcement of competition laws should be carried out by a centralised competition authority or by a system of decentralised competition authorities. Additionally, we can ask whether the enforcement should be based exclusively on the state through tax-funded competition authorities (as is common in Europe), or whether the activities of the competition authorities should also be accompanied by private litigation (as is the case in U.S. antitrust law). The private enforcement of competition laws by suing firms that violate competition laws for damages in civil courts can be understood as an additional form of decentralisation of the enforcement of competition laws. The example of the U.S. system of enforcement of antitrust laws makes it clear that very complex systems with a multitude of public and private enforcers on different jurisdictional levels are possible.[41]

Since the quality of the enforcement of legal rules is crucial, the question of the optimal degree of centralisation or decentralisation of the competition law enforcement system is as important as for the substantial rules. This is particularly true for a possible international level of competition law regime, because here decentralised enforcement agencies will have to play a

[40] One important problem is "forum shopping", which, for example, is possible in regard to merger control in Europe, because merging firms can influence through the specific design of a merger whether it exceeds the turnover thresholds for EU merger control or remains within the competence of national merger control. For other examples see also *Van den Bergh & Camesasca*, supra n. 3, p. 151 et seq.

[41] The example of the EU shows that the problem of centralisation and decentralisation can be seen differently in regard to substantive competition rules and the enforcement of these rules. Whereas a clear tendency towards the harmonisation and centralisation of substantive competition rules can be observed, a decentralising approach is pursued in regard to the enforcement of the European competition rules.

prominent role. Generally, it is also possible to use a similar set of criteria as in section III.B for assessing whether substantial competition rules should be enforced in a more centralised or decentralised way: For example, economies of scale arguments might speak for a centralised competition authority instead of several different ones with the multiplication of fixed costs. The criterion of the extent of local knowledge, however, can be a powerful argument for a more decentralised approach. The same is true for the capacity of the competition law regime for innovation, experimentation and learning. A decentralised system of enforcement agencies can be superior in developing new arguments and introducing them into the economic and legal discussion about the appropriate way to fight restraints of competition. Another argument is that a decentralised enforcement system with a multitude of enforcement agencies – as in the U.S. – might provide better protection against the capture of enforcement agencies by rent-seeking interests. However, such a decentralised system can bring with it high enforcement and transaction costs, particularly through parallel and long-lasting legal proceedings.[42]

IV. International Competition Policy as a Multi-Level System of Competition Laws: Some Conclusions

There is wide-spread agreement among governments as well as among experts on competition policy that some kind of international arrangement is necessary for better protection of competition on international markets. The current quasi-anarchistic situation of the parallel existence of many different national competition law regimes (including the "effects doctrine") does not fulfil the requirements for a workable system of protection of competition on international markets. One long-term perspective is to strive for the convergence of national competition laws with the implicit ultimate end of replacing the national one-level competition law regimes with a global one-level competition law regime with uniform substantive competition rules, a global competition authority and a corresponding court. In this article we hold the opinion that this perspective is not only unrealistic but also not the theoretically optimal solution. Instead, it is claimed that a global system for the protection of competition should be characterised by a considerable

[42] See for arguments concerning these problems e.g. *Posner*, Antitrust in the New Economy, 68 Antitrust L.J. 925 (2001); *First*, supra n. 5; *Grimes*, supra n. 5; *Van den Bergh & Camesasca*, supra n. 3, p. 140 et seq.

degree of decentralisation. Therefore, the perspective of an international multi-level system of competition law regimes is developed.

The application of the economic theories of federalism and regulatory competition shows that there are many advantages for a decentralised approach to competition policy. The most important advantages are that a decentralised system is much more flexible and innovative in reacting to new kinds of restraints of competition, because experimentation with new competition rules are possible, from whose success or failure other competition law regimes can learn, and that also the different preferences can be met in a better way. But these theories can also show the disadvantages of decentralisation in terms of increasing conflicts and transaction costs, etc. The contention is that an integrated multi-level system of competition law regimes that combines the advantages of centralisation and the advantages of decentralisation might be the optimal institutional solution. The basic idea of federalism has always been that the skilful combination of elements of centralisation and elements of decentralisation can lead to superior solutions. The concept of a multi-level system of competition laws and enforcement agencies allows for much flexibility in finding the optimal allocation of competencies to the different jurisdictional levels.

It was not the task of this article to elaborate in detail how an international multi-level system of competition law regimes might look, but to show that the economic theory of federalism can also be applied to antitrust. This analysis has still to be done thoroughly. But it can be presumed that an international system of competition law regimes will be a two- or (as within the EU) three-level system. In section II it was shown that the current structure is not far away from the notion of a three-level system. It can also be suggested that this system will be primarily based on the national competition law regimes (within the EU: European competition law). Crucial for the workability of an international multi-level system of competition laws is an integrated set of procedural rules (or institutional framework) which determines the competencies of competition laws and enforcement agencies (competition authorities, courts, private parties). This especially includes the horizontal and vertical delimitation of competencies.