An International Multilevel Competition Policy System

Oliver Budzinski

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Department of Environmental and Business Economics
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Oliver Budzinski
Department of Environmental and Business Economics
University of Southern Denmark
Niels Bohrs Vej 9-10
DK-6700 Esbjerg
Tel.: +45 6550 4159
Fax: +45 6550 1091
E-mail: obu@sam.sdu.dk

Abstract

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

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1. International Competition Policy as a Multilevel System

The problem of the appropriate design of the world economic order and sufficient global governance has been brought up on the agenda again in a dramatic way by the recent financial crisis. One of the issues in the focus of global economic policy – though perhaps not at the heart of the financial crisis[1] – is the emergence of competitive markets that are easily larger in geographic extent than jurisdictional borders. Along with the benefits of breaking up sclerotic structures on national markets and intensifying efficiency-enhancing and innovation-driving competition forces comes the problem how to deal with the anti-competitive, welfare-reducing implications of global business behaviour. It is well-known that competition exerts incentives on firms to improve their performance in order to be successful (competition on the merits) – and it does so better than any other known coordination mechanism. However, 'striving to perform better' is not the only way for firms to be successful in competition. Alternatively, they can turn the incentives into restricting competition (anti-competitive behaviour), like joining cartels, merging towards dominating positions or even monopolies, and playing predatory strategies in order to oust and deter competitors. This, it is a widespread insight that competition needs to be protected both against *governmental* and *private* restrictions (*Budzinski* 2008b). Those private restrictions of competition are traditionally dealt with by competition rules and the enforcement activities of competition (or antitrust) authorities.

While the current world economic order addresses *governmental* restrictions to international competition via the trade policy framework of the World Trade Organisation (WTO), *private* restrictions to international competition have re-

1 Although it must be emphasised that the problem of an ostensibly unregulated competition among banks and on financial markets is part of the discussion.

mained an exclusive domain of nation states.[2] More than six decades after the vision of a comprehensive International Trade Organisation (ITO; the so-called Havana Charta) that was to cover both public and private restrictions to competition, the protection of international competition against restrictions by private enterprises is still done by jurisdictions and their agencies that often are much smaller in geographical terms than the markets in which the anticompetitive actions take place. Such a 'system' of uncoordinated national policies towards international business practices was able to survive for such a long time partly because the application of the effects doctrine allowed for some degree of protection of national markets against international restrictions to competition.

However, through the years of academic and political discussion about the necessity of an international competition policy, two insights have increasingly received support:[3]

- In the face of an ongoing internationalisation of business activities along with a globalisation process of competition and markets, anticompetitive practices like cartels, predatory and exclusionary strategies, as well as monopolising (or otherwise anticompetitive) mergers have also internationalised. As a consequence, global welfare cannot be maximised without an internationally coordinated competition policy.[4] The reliance on national competition policy regimes does not suffice anymore due to regulatory gaps, for instance, negative externalities from strategic competition policies, effects on markets in smaller and developing countries, business and administration costs of multiple parallel antitrust proceed-

2 Or, in some exceptional instances, the domain of confederations of nation states (like the European Union).

3 This elaborate discussion cannot be reported here in detail, see instead *Budzinski* (2008a: 10-150) and the literature quoted therein.

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

ings, and jurisdictional conflicts over antitrust cases.[5] Thus, on one hand, some sort of an international competition policy regime is necessary.

- On the other hand, the hitherto existing efforts to establish global competition rules and respective enforcement institutions have failed. Along with politico-economic reasons, the resistance to create and implement a powerful global antitrust authority are supported by economic insights, for instance, information asymmetries (closeness of the regulators to the regulated markets and industries), diverging competition policy preferences across countries, and administration costs (international bureaucracy).[6]

Therefore, neither a purely decentralised solution (national competition regimes), nor a strongly centralised solution (domination of global rules and authorities) seems feasible. Instead, the creation of supranational competition policy competences must realistically build upon and complement the further on existing national and supranational (e.g. common European Union competition policy) regimes. As a consequence, both the academic discourse and the policy practice have increasingly focused on intermediate solutions, encompassing elements of decentralised and centralised solutions. In particular, concepts of network governance have gained increasing popularity within various disciplines, e.g. political, legal, and social sciences as well as in economics. Regarding international competition policy, *Tarullo* (2000) develops a regulatory-convergence approach, in which systematic network cooperation provides "a mechanism for structuring and monitoring the mutual expectations of states" (p. 495) in order to make national regulations more congruent across interacting jurisdictions. He vehemently argues in favour of a participation of the existing antitrust agencies in the process of generating an international regime. In a com-

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

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

patible approach, *Maher* (2002) views competition policy networks to be an important regime-building factor and, in this sense, "a prerequisite to any greater internationalisation" (p. 114). Consequently, the emphasis is predominantly on the way towards international competition governance and to a lesser extent on the sustainable design of the regime. *First* (2003) also focuses on identifying superior avenues towards an international competition policy regime. He develops an interesting and challenging concept of mapping the existing antitrust networks. In doing so, he emphasises the fact that a number of existing antitrust regimes must be characterised as complex institutional arrangements ('networks') themselves. Against the background of the U.S. experience (antitrust federalism), *First* (2003) and *O'Connor* (2002) emphasise benefits of decentralised regime elements.[7]

Actually, the policy sphere has embraced network governance with the introduction of the International Competition Network (ICN), which – despite being rather informal – represents the currently most viable avenue towards international competition policy coordination after the efforts to introduce competition rules in the WTO Doha round have eventually failed (*Bode*/*Budzinski* 2006). However, the ICN is a forum for purely voluntary cooperation only and, while providing valuable work in terms of building a common spirit of competition among the members, falls short of an effective governance of international competition (*Budzinski* 2004).

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

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

elements and forces. Within such a multilevel system, the allocation and delimitation of competences represents a crucial issue. This paper attempts to utilize the framework of multilevel systems in order to develop a proposal for an international competition policy system that can improve the current world economic order by mitigating the problems of cross-border private restrictions to competition. This proposal somewhat represents the least centralised design that can be expected to provide an effective protection of international competition.

2. Fundamentals of an International Multilevel System of Competition Policies

The concept of multilevel systems represents an analytical framework to describe and model complex regimes, which include of a multitude of interrelated institutions and organisations. Generally speaking, a *system* consists of elements and interrelations (or, synonymously, interconnections). If the (interrelated) elements are located on more than one level, a *multilevel* system is constituted. Within such a system, interrelations occur regarding two dimensions: *vertical* interrelations between elements on different levels and *horizontal* interrelations between elements of one and the same level. Theoretically, also *diagonal* interrelations between non-vertically interrelated elements of different levels are possible. If they occur comprehensively, a true network results. Thus, networks qualify as an extreme variant of a multilevel system.

Though it does not represent a necessary condition, multilevel systems, more often than not, possess only one element on the top level and an increasing number of elements on downward levels.[8] In respect to complex international competition policy regimes, possible *levels* include global, regional-supranational, national, and local. The *elements* include competition policy au-

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

thorities (antitrust agencies, competent ministries, courts, etc.) and antitrust institutions (substantive rules, procedural rules, assessment techniques, enforcement practices, etc.). In order to constitute a system, however, these elements have to be interrelated. These *interrelations* are represented by the allocation and delimitation of competition policy competences.

Drawing on the current structure of antitrust in the world and in the leading jurisdictions, the following vertical structure of an international multilevel system of competition policies is assumed. The top level is global, thus paying tribute to the process of market globalisation. The second level, however, can also be supranational when it consists of competition policy regimes that are international, albeit regionally limited. A natural example – and the most comprehensively developed one – is the competition policy of the EU. However, there is a distinct number of additional free trade areas and economic integration projects, which either entail competition policy provisions or are likely to develop some in the future. However, the second level is currently dominated by nationwide competition policy regimes, like the federal antitrust policy of the U.S., Japan, or Germany. Eventually, a third level refers to subnational (local) competition policy regimes, like the antitrust policy efforts of the U.S. states or the State Cartel Offices in Germany. The delimitation of 'subnational', 'national', and 'supranational' follows the historically-originated current structure of nations, their associations and confederations, and their internal institutional designs. As a consequence, competition policy regimes with significantly differing extent, power, or meaning can be located at the same level. However, every alternative vertical structure of levels would be subject to the disadvantage of being illusory.

Competence allocation plays an important role in regard to the performance of the system as a whole. It is sensitive for the sustainable integration of coherence and diversity in order to create a complex but coherent international competition policy regime. The concept of multilevel systems allows for a systematic, theory-based analysis of such regimes. Complexity and diversity are explicitly

modelled by the existence of more than one level of jurisdiction and the possibility of having more than one institution/agency at each level (variety of elements). Coherence is represented in the system by the vertical and horizontal interrelations between the elements, i.e. by the design of the interfaces. In other words, the allocation and delimitation of competences decides whether coherence within the system can be achieved without eroding the multilevel character. Thus, the choice of the rules, which determine competence allocation and delimitation, represent a decisive problem in regard to the workability of a multilevel system.

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

- Vertical and horizontal allocation of competences (*dimension D_I*): competences are allocated vertically between the levels (which is the competent level?) and horizontally among the authorities and institutions of the same level (which is the competent institution/authority on a specific level?). Additionally, problems of diagonal delimitation can occur in the case of allocative effects between a jurisdiction on a downward level and a jurisdiction on an upward level if the two jurisdictions are not vertically interrelated.[9]

- Institutional competences (D_{II}): competition policy regimes can consist of a number of institutional competences. The competence to create, implement and shape competition rules (D_{IIa}) can be differently allocated than the competence to apply antitrust rules (D_{IIb}) or the competence to enforce the applied rules (D_{IIc}). Moreover, substantive rules and procedural rules can be distinguished and allocated in a different way. Regarding any specific antitrust case, it must be decided, which set of competition rules is

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

applied and which agency is responsible. For instance, a downward level agency can be competent in enforcing the rules of an upward level agency. Or, an upward level agency only consists of procedural rules to enforce downward level substantive rules. Similarly, on one and the same level agency A (set of rules Φ) can be competent in moulding substantive rules, whereas agency B (set of rules Ω) is responsible to apply them (e.g. domestic rules might be applied by a foreign agency). Consequently, the competence allocation regarding rule-making can differ from the one regarding rule-application and enforcement.

- Exclusive and concurrent allocation of competences (D_{III}): the competence to exert jurisdiction over a specific antitrust case can be exclusively allocated to one institution and one agency. For instance, a specific case may fall exclusively under the European competition rules and jurisdiction is exclusively allocated to the European Commission. If competence allocation and delimitation is ambiguous, concurrent jurisdiction emerges. For instance, the German Cartel Office might want to challenge a cartel, applying European competition rules. At the same time, the U.S. Federal Trade Commission pursues the same cartel under federal U.S. laws.

- Sustainable and temporary competence allocation (D_{IV}): balancing centralising and decentralising forces within the system is a dynamic problem. Multilevel systems evolve along with competence allocation and delimitation. This can lead to two kinds of deficiencies: (i) a creeping process of centralisation, incrementally eroding the benefits of having decentralised elements, and (ii) a creeping process of decay, incrementally eroding the benefits of having centralised elements. Therefore, the allocation and delimitation of competences must not only focus on stationary combination of advantages of centralism and decentralism. It must also secure the sustainability of the system by controlling and balancing the centralising and decentralising forces. However, this need not imply that

the once-implemented allocation and delimitation of competences must not be changed.

Dimension		Competence Type	
D_I		jurisdictional scope of competences	vertical and horizontal
D_{II}		institutional competences	
	D_{IIa}		rule-making
	D_{IIb}		rule-application
	D_{IIc}		enforcement
D_{III}		exclusivity of competences	exclusive vs. concurrent
D_{IV}		sustainability of competences	sustainable vs. temporary

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

- In the *court system*, final decisions are made by competition courts. A government attorney or a competent public agency files law suits against anticompetitive business arrangements and practices and is forced to prove its allegations. With respect to the U.S. antitrust system, it is argued that the court system offers superior capabilities in terms of flexibility and innovation (e.g. *Kovacic* 1992, 2004). The reason is that plaintiffs have incentives to offer contrary evidence and theories against the government advocates with the judge weighing the different positions and, maybe, calling for additional and independent expertise.[10]

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

- In an *administration system*, the competent competition authority both investigates and decides about anticompetitive business arrangements and practices. Courts become involved only if the respective enterprises file an appeal against the administrative decision. In such a scenario, it becomes important to distinguish between a government authority (like the European Commission) and agency independence.[11] The former is likely to experience difficulty withstanding distortionary influences from non-antitrust policy areas (and lobbyism), whereas the latter can focus exclusively on competition matters. Intraregime diversity may be more limited in administration systems due to the strong position of the competent agency.

- In the *system of private litigation*, no public authority apart of 'ordinary' courts is involved. The private parties themselves enforce competition law through law suits filed by the injured party of an anticompetitive arrangement or practice (e.g. vertically related parties like consumers, resellers, component suppliers, etc., or horizontally related parties like competitors). Although this obviously entails a number of problems if the overall regime is based on private litigation, elements of private litigation are included in many antitrust regimes. Private litigation plays an important role within the U.S. antitrust system and its meaning in the EU is increasing. Additionally, it has some regional importance in the enforcement of rules against unfair competition (e.g. delusive and untrue advertising, defamatory actions against competitors, incorrect price marking, etc.).

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

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

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

- a multitude of competition rules, among many others global competition provisions, the EU competition rules, U.S. statutes like the Sherman Act, the German Act against Restraints of Competition, Californian antitrust provisions, etc.

- a multitude of antitrust authorities, among many others the U.S. Federal Trade Commission, the Canadian Competition Bureau, State Cartel Offices in Germany, the European Commission, some global instance, etc.

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

3. A Proposal for an International Multilevel Competition Policy System

3.1. The Problem of Competence Allocation and Delimitation

The workability of such a complex international multilevel system of competition policies demands intelligently-designed competence allocation and delimitation rules. Such rules can have very different designs, corresponding to differing performances. *Budzinski* (2008a: 151-217) identifies nine stylised competence allocation rules. Due to restrictions in space and the focus of this paper, this analysis cannot be mirrored here in detail. Instead, this paper draws on respective comparative analyses that highlight in particular two types of competition rules - the nondiscrimination rule and the mandatory lead jurisdiction

model - and employs these principles as the backbone of an international multi-level competition policy system.

The Nondiscrimination Rule

The principle of nondiscrimination belongs to the most important and fundamental principles of the GATT-WTO-framework for international trade. Regarding international antitrust, *Trebilcock* and *Iacobucci* (2004) developed an extended and modified nondiscrimination rule that incorporates the following elements. Competition policy regimes are not allowed to discriminate between domestic and foreign producers *and* consumers.[12] In particular, they must not favour domestic consumers and/or producers at the expense of foreign ones or disadvantage foreign consumers and/or producers compared to domestic ones. This includes the design of the national and regional competition rules itself as well as the way they are enforced. Both a supervision (or complaint) and a sanction mechanism to identify and stop discriminating antitrust policies complement the antitrust nondiscrimination principle.

What does this imply for the dimensions of competence allocation identified in section 2? With respect to D_I (jurisdictional scope of competences), the nondiscrimination rule limits the competence to claim extraterritorial jurisdiction by the legitimate interest of the foreign jurisdictions to design their domestic laws according to their own preferences (as long as they are non-discriminatory). Horizontally, this means that extraterritorial jurisdiction must not interfere with domestic policies as long as they treat domestic and foreign producers and consumers in the same way (implying a priority of intrajurisdictional competition policy as long as the nondiscrimination principle is not violated). Vertically, an upward allocation of competences to a supranational level is implied in regard to (alleged) discriminations and anticompetitive arrangements or practices that generate conflicting competition policies on the downward level.

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

The institutional competences (D_{II}) of each jurisdiction are limited to institutional arrangements that are non-discriminatory. This excludes a number of popular rule designs, e.g. the exemption of pure export cartels from the general prohibition of cartels and surrogates. Notwithstanding this, rule-making competences (D_{IIa}) remain exclusively on the downward (national and local) levels – the supranational level gains no competence to create, design, and implement its own substantive competition rules. In cases of discrimination and conflict, the upward level gains application and enforcement competences, however, in a limited and indirect way. Only conflict resolution competences are assigned to the upward level, irrespective of whether they follow complaints by downward jurisdictions or result from supervision. This can mean competences to decide, which rules of which downward jurisdictions apply to a specific anticompetitive arrangement or practice (D_{IIb}). It can also cover decisions about enforcement competences (D_{IIc}). However, the upward level neither directly applies downward institutions, nor directly enforces them. An indirect rule-making competence might occur because the upward level decides whether complained-about competition rules or antitrust practices of downward jurisdictions violate the nondiscrimination principle or not – which can be a controversial matter. This indirect competence remains very limited, though, since the upward level can only negatively condemn specific provisions but it cannot prescribe specifically-designed rules.

With respect to D_{III}, unchallenged exclusive competence only occurs in regard to purely domestic business arrangements without participation of foreign producers and without effects on foreign consumers. Otherwise, discrimination claims and inbound effects from the perspective of other jurisdictions might generate concurrent competences. On the supranational level, exclusive conflict resolution competences exist. The sustainability of competence allocation (D_{IV}) is subject to two countervailing forces. On the one hand, the number of discriminatory provisions and practices in the national and regional competition policy regimes should cease in the course of time because of the complaint, supervision, and sanction mechanism. On the other hand, an ongoing globalisa-

tion of business activities might lead to an increasing number of interjurisdictional antitrust conflicts about the (non-) discriminatory character of institutions and decisions.

The Mandatory Lead Jurisdiction Model

The basic principle of the mandatory lead jurisdiction model is that if an anticompetitive arrangement or practice is to be reviewed by more than one competition policy regime (according to their respective standards), a lead jurisdiction reviews and decides the case vicariously for the other ones (*Campbell*/*Trebilcock* 1997). An international panel decides about the appointment of a competent and appropriate lead jurisdiction in regard to a specific anticompetitive arrangement or practice.[13] So, the competence to deal with this case is allocated to the internationally chosen lead jurisdiction (both regarding authority and institution), which is obliged to pay attention to anticompetitive effects in other jurisdictions and entitled to call on other antitrust regimes for assistance.

What does this imply for the dimensions of competence allocation identified in section 2? Firstly, the jurisdictional scope of competition policy competences (D_I) is horizontally affected since the appointed lead jurisdiction becomes competent for the overall case while other affected jurisdictions eventually loose competence to deal with the case autonomously.[14] The vertical allocation of competences, in contrast, is not involved in a substantive sense. However, a new type of competence, the appointment competence (selecting the lead jurisdiction), is created at the top level.

With respect to the institutional competences (D_{II}), the rule-making competences (D_{IIa}) of the national and local regimes are left untouched because the

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

14 Note that they remain involved in the course of their consultation and cooperation with the appointed lead jurisdiction.

supranational level does not acquire any substantive rule-making competence. As each jurisdiction theoretically qualifies to be the lead jurisdiction for some cases, no restriction to the regime sovereignty in terms of rule-making occurs. However, the enforcement competences for a given case are allocated to the respective lead jurisdiction (D_{IIc}). Although an appointed lead jurisdiction applies its own antitrust institutions, the decision concerning which competition rules are applied to a specific anticompetitive arrangement or practice is effectively allocated to the supranational level (D_{IIb}) because it is competent to select and appoint the lead jurisdiction. Consequently, the mandatory lead jurisdiction model leads to an exclusive allocation of competences (D_{III}). After the supranational level has exerted its exclusive competence to appoint the lead jurisdiction, the latter has exclusive competence to deal with the respective case.

Combining the Principles

These two competence allocation principles complement each other with regard to the problems of international competition policy outlined in section 1. The lead jurisdiction model heals the problems from multijurisdictional reviews and proceedings by providing a coherent review of any case through the coordinating hands of the appointed lead jurisdiction. Furthermore, it tends to alleviate information asymmetries if the lead jurisdiction is chosen so that it is comparatively close to the markets in which the anticompetitive conduct or agreements take place. However, the lead jurisdiction model alone would not provide sufficient protection against strategic or otherwise biased competition policies. This is where the nondiscrimination rule steps in by ensuring the respectfulness for outbound effects as well as for diverging preferences across countries. In addition, the interplay of both principles entails potentials for diminishing jurisdictional conflicts over antitrust cases as well as limiting administrative costs from international bureaucracy.[15]

15 See for an elaborate theoretical analysis *Budzinski* (2008a: 156-160, 178-217).

A regime built upon the combination of the nondiscrimination rule and the mandatory lead jurisdiction model does not require that the top level prescribes concrete substantive provisions against cartels or abusive and predatory modes of enterprise behaviour or consists of a distinctive merger control. Instead, the upward allocation of competences can be limited to the selection of competent jurisdictions as well as complaint and supervision competences. The latter becomes especially important since it answers the question how a sanction mechanism might look like that promotes compliance with the outlined principles. The next section presents a proposal of how adequate competence allocation rules for a coherent and federalist governance of global competition that are built upon the principles nondiscrimination and lead jurisdiction could look like in a concrete way.

3.2. The Global Level: Allocating Competences and Providing Supervision and Monitoring

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

Nevertheless, the global level should be equipped with considerable competences, namely (i) selection of competent jurisdictions (which incompletely represents a rule-application competence) according to the mandatory lead jurisdiction model and (ii) combat discriminatory rules and practices on other levels according to the nondiscrimination principle. The latter may be called a limited rule-making competence – limited to the ban of discriminatory antitrust. However, there is a difference that is important from an institutional-economic perspective. The global level is only entitled to prohibit discriminatory rules

and practices. It cannot and must not prescribe how competition rules and antitrust practices on downward levels should look like. The most important aspect here is that (*Hayek* 1975; *Kerber* 1993; *Wegner* 1997)

- a prohibition excludes only one specific option from the non-determined set of possible options,[16] whereas

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

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

Consequently, fundamental rule-making competences and the remaining scope of rule-application competences are not allocated to the top level. The same is true for direct enforcement competences. It is the lead jurisdiction, which applies their own or other competition rules to a given anticompetitive arrangement or practice and enforces the outcome of its proceedings. However, referring to the externality issue as the weakest point of both favoured competence allocation rules, the lead jurisdiction is expected to produce positive externalities (i.e. protect competition also in regard to other jurisdictions' markets and consumers), which generates an incentive problem. Therefore, supervision competences must be additionally allocated to the global level.[17] One might call this a kind of indirect enforcement competence, but, again, upward competences only cover the ability to abolish deficient decisions of the lead jurisdic-

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

17 For instance, the general necessity of an external monitoring of activities of downward level jurisdictions in an otherwise federal or decentralised regime is also emphasised by *Figueiredo*/*Weingast* (2005).

tion regarding nondiscrimination and comity. The global level authorities' are not competent to apply and enforce (whichever) competition law themselves.

In order to handle the outlined competences, which are specified below, an agency is needed at the global level. Allow me to call it the *International Competition Panel* (ICP).[18] According to the combination of the mandatory lead jurisdiction model and the nondiscrimination rule, its competences can be specified to include the following three elements.

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

- Supervision and Sanctions
The ICP reviews the competition rules and codified practices of the downward levels' antitrust regimes regarding violations of the nondiscrimination principle. In cases of discriminatory rules or practices, it demands the modification of the respective provisions (however, without prescribing alternative designs).[19] If the respective competition policy regime refuses to adjust

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

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

its rules and practices according to the requirements of the nondiscrimination principle, this regime is disqualified and suspended as lead jurisdiction. This procedure also applies safeguarding a minimum necessary nexus of downward competition policy regimes with an anticompetitive arrangement or practice to claim jurisdiction.[20] Additionally, the ICP supervises the review and decision process by the lead jurisdiction, but exclusively concerning violations of nondiscrimination. Potential sanctions are similar to the general nondiscrimination review procedure.

- Complaints and Conflict Resolution

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

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

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

Anticompetitive arrangements and practices with more than negligible cross-jurisdictional effects concerning the downward levels fall under the described competences of the ICP. Regarding mergers and other interfirm alliances the following procedure could prove to be compact and efficient. According to the self-assessment of the participating enterprises, these arrangements are pre-notified to the ICP.[21] A standardised notification procedure could minimise filing efforts while providing the necessary information to decide about the appropriate lead jurisdiction. If arrangements with considerable cross-border effects are only notified to a downward level jurisdiction, then the receiving agency must delegate the notification to the ICP.[22] Concerning illegal cartels, which are usually performed secretly, and abusive behaviour, a notification to the ICP occurs according to the assessment of the downward level antitrust authorities, who discover them. In such cases, the ICP's appointment of a lead jurisdiction must sometimes rely on provisional knowledge and hypotheses about the nature of the cartel or abuse. However, since – according to experience in anticartel interagency cooperation – overall cooperation between the affected regimes works considerably well in such cases due to similar interests, the appointment of the second- or third-best appropriate jurisdiction does not represent a serious problem.[23]

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

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

23 In cases of cartel participants 'voluntarily' confessing due to the incentives set by leniency programs, the procedure mirrors that of merger notifications. If someone confesses to the 'wrong', this agency must redirect her to the appropriate level/authority.

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

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

tuting principles of the ICN serves as a paragon – namely aiming for a coordination among competition authorities instead of among governments. Furthermore, an obvious advantage of this strategy would be the possibility to develop the ICP out of the popular ICN – albeit, it would more likely entail the characteristics of a replacement.

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

An additional precondition for compact and efficient procedures is the absence of veto rights or comprehensive consensus requirements. Instead of unanimity rules, a simple or qualified (e.g. two-thirds of the votes) majority should suffice to generate a definite decision. This is especially true if the independence of both the ICP and the members of its chambers is secured. The independence of the ICP board of directors is served if it consists of antitrust experts, which are appointed by the leaders of the downward level competition agencies. Since comprehensive independence of national and supranational-regional competition authorities may be unrealistic,[24] the design of the rotation system promotes the independence of the ICP if membership in the Governing Chamber is rather short (and, thus, rotation frequent) and overlapping (i.e. the chamber does not frequently consist of representatives of the same antitrust authorities because the individual periods are not parallel).

If a second chamber (say *Appellation Chamber*) is employed in order to constitute an appellation body regarding jurisdictional decisions of the Governing Chamber (i.e. selection of the lead jurisdiction according to the defined criteria), then an obvious choice would be to let it also consist of representatives of national and supranational-regional competition authorities (second and third level) in a rotating way. Of course, jurisdictions must not fill a seat in both chambers at the same period of time. Again, some majority rule that prevents effective veto rights would be helpful.

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

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

3.3. Supranational-Regional and National Competition Policy Regimes: Where Cases Are Decided

The second level represents the first one, which disposes of substantive antitrust competences. It consists of (i) joint competition policy regimes of confederations or associations of independent countries as well as of (ii) national competition policy regimes.

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

Following the paragon of the EU, these associations and confederations might develop effective competition policy regimes with considerable competition

policy competences in the course of time. Developed ones represent natural candidates for lead jurisdiction appointments as they jurisdictionally include a number of national markets and address consumers of different countries. Therefore, they automatically internalise parts of the externalities arising from cross-border business activities.

Since currently only one effective supranational-regional antitrust regime exists, the major level of substantive competition policy is likely to remain at the second type of regimes at this level, namely national regimes, for a considerable time. In particular, national competition policy regimes with large and important internal markets are likely to be frequently appointed as lead jurisdictions. Above all, this refers to the U.S. Antitrust System. However, the competition policy regimes of countries like Canada, Australia, Brazil, Japan, Russia, China, India, and many more also represent frequent candidates if they qualify for a lead jurisdiction appointment.[25]

Effective competition policy regimes at this level retain full rule-making, rule-application, and enforcement competences for cross-border anticompetitive arrangements and practices if the upward level appoints them to be lead jurisdiction in the respective case. Each regime autonomously shapes its own substantive competition rules, enforcement institutions, and agencies (including an individual composition of elements of the court system, government and independent administration system, and private litigation) minus discriminatory provisions and practices, which are excluded by the nondiscrimination rule and sanctioned by the global level. Against the background of these non-discriminatory institutions and practices, each regime is obliged to consider

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

competitive effects outside its territory according to the common welfare of all affected consumers. Apart from that, the appointed lead jurisdiction is free to handle the referred case. Of course, it can seek the cooperation with and assistance by other – horizontally- or vertically-interrelated – antitrust regimes as far as it deems this to be necessary and/or helpful.

If a vertically-interrelated local level exists, an X-minus rule could provide an efficient and simple competence allocation rule. Its content would be that any anticompetitive arrangement or practice, which is notified to or detected by a supranational-regional or national competition policy regime, must be allocated downwards if the effects of the respective arrangement or practice occur within X or less national antitrust regimes.[26] Next to confederations or associations of independent states, large countries with big internal markets particularly benefit from internal decentralisation and, thus, from the existence of local competition policy regimes. According to this reasoning, the maintenance of American antitrust federalism is principally beneficial as would be the creation of federalised competition policy structures in comparably-sized countries (e.g. Russia or China).

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

26 The same delimitation of competences could be applied if a vertical (and diagonal) interrelation between a supranational-regional and national regimes exists, like for instance in the EU (common EU competition policy and Member State competition policies).

3.4. Is There Still Scope for Local Competition Policies?

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

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

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

4. Some Comparisons to Other Proposals

Contrary to many other proposals and contrary to the meanwhile aborted WTO Doha declaration (*Fox* 2003), this proposal abstains from allocating substantive rule-making competences to the global level. This particularly includes the definition of mandatory minimum standards in regard to substantive cartel and merger policy. For instance, proposals somewhat related to the initial DIAC initiative[27] generally prescribe comparatively ambitious minimum standards at the global level to which national competition rules must be adjusted. Examples are the prohibition of horizontal hardcore cartels, rule-of-reason provisions for all other cartels and cartel surrogates, a full-fledged merger control including mandatory regulation of anticompetitive mergers and acquisitions, and provisions regarding abusive and predatory business practices. Since this initiative significantly framed the WTO discourse on competition matters, the content of the Doha declaration as well as other WTO related proposals show considerable similarities and argue along comparable lines (*Scherer* 1994; *Dabbah* 2003; *Wilson* 2003; *Klodt* 2005). Different from these proposals, my proposal assigns no rule-making (D_{IIa}) and – at best – only indirect rule-application competences (D_{IIb}) to the global level. However, regarding enforcement competences (D_{IIc}), the WTO-related proposals usually also refer to national competition authorities.[28] More in line with the proposal presented here, *Wilson* (2003) explicitly introduces jurisdictional competences at the global level, although he limits his proposal to merger control. According to his proposal, the main task of the so-called WTO Competition Office is to facilitate the consensual and cooperative selection of a lead jurisdiction by the affected member jurisdictions (*Wilson* 2003: 312). However, the binding decision of the lead jurisdiction must follow

27 The Draft International Antitrust Code (DIAC) was presented by the so-called Munich Group in 1995 as a full-fledged proposal for a comprehensive international competition order in the context of the WTO. See for the original proposal *Fikentscher*/*Immenga* (1995) as well as for applications inter alia *Drexl* (1999, 2003) and *Podszun* (2003: 247-312).

28 Maybe with the exception of *Scherer* (1994), whose proposal contains considerable enforcement competences of his International Competition Policy Office (ICPO) in the long run.

ambitious supranational minimum standards, which are moulded as a copy of U.S. antitrust laws (*Wilson* 2003: 309, 314).

In contrast to these proposals, the one presented in this paper entails the benefit of being less centralistic by abstaining from substantive provisions on the global level. Instead, it develops a system of multilevel governance that has the potential to heal the most serious problems of the non-existence of a coherent international governance of competition despite relying on a permanently decentralised system. Therefore, there is no underlying vision of ultimate harmonisation towards a one-dimensional global competition bureaucracy. In contrast, virtually all of the aforementioned proposals at least entail a perspective of harmonisation at the end of the road, i.e. harmonised competition rules, practices, and policies are targeted in the long run (e.g. *Scherer* 1994; *Dabbah* 2003; *Wilson* 2003; *Klodt* 2005). Waiving the vision of ultimate harmonisation entails two benefits. Firstly, the amount of sovereignty that must be sacrificed as a price for international governance is reduced, albeit not to zero. Past attempts to implement an international competition order often stranded because of the lack of willingness to transfer substantive competition policy competences to a supranational body. This hurdle still exists in my proposal but it is certainly lower than in the WTO-related ('ultimate harmonisation') proposals since no substantive competences must be ceded.[29] Secondly, the advantages of decentralised governance are maintained, in particular less sclerotic bureaucracy, alleviation of information asymmetries, respect for diverging preferences about competition policy across countries, higher flexibility and improved openness for innovation and adaptation to new circumstances (in detail: *Budzinski* 2008a: 64-83). The benefits of a decentralised system of competition policies are highlighted by proposals that focus more on cooperation among existing competition policy

29 Obviously, there is no guarantee that the hurdle does not remain at a prohibitive size and probably some will remain pessimistic about the realisability of the proposal. However, it is less ambitious than other proposals in this regard. Like in the past, significant steps forward in international governance probably need the right 'window of opportunity'.

regimes and a re reluctant to create a global level of governance.[30] Concepts of network governance (inter alia *Tarullo* 2000; *Maher* 2002; *First* 2003) attempt to alleviate the shortcomings of purely bilateral or case-by-case cooperation by seeking for a systematic multilateral cooperation. More often than not, the voluntary character of cooperation is emphasized. The ICN represents the attempt to operationalise the network idea. Competition agencies from all around the world meet on a voluntary basis in order to agree upon best practice recommendations (benchmarking process) that then are hoped to be voluntarily implemented by the participating agencies (*Budzinski* 2004).

In comparison to these approaches, the proposal presented in this paper entails the benefit that it provides a more effective governance of international competition. Due to the supervision and conflict resolution competences on the global level (including sanction mechanisms that set considerable compliance incentives), loopholes resulting from the fragmented enforcement and strategic competition policies as well as jurisdictional conflicts can be remedied more effectively and to a larger extent as reliance on purely voluntary compliance could.[31] Moreover, the costs of multiple proceeding for business and taxpayers become significantly reduced. On the downside, the more effective protection of international competition comes at the price of a higher hurdle for consensus about such a multilevel system as compared with purely voluntary coordination. Therefore, this proposal does not suggest abandoning voluntary cooperation forums in the absence of a more effective solution. However, it somewhat represents a possible next step forward and the mildest regime (in terms of competence transfer to a global level) that can effectively solve the problems of a missing international competition order. As outlined in section 1, the multilevel

30 Instead of truly highlighting the benefits, these proposals sometimes are rather motivated by the expectation that nothing more than cooperation can be realised.

31 Case-by-case (bilateral) cooperation is unlikely to remedy these effects: "It seems over-optimistic to imagine that a world-wide framework for competition policy could be built up piecemeal from a network of bilateral agreements. (…) [I]t would be virtually impossible to ensure that all the agreements were compatible with each other" (*Meiklejohn* 1999: 1247).

approach is closely related to the network ideas but provides a more systematic and more concrete perspective with its focus on competence allocation and delimitation rules – an issue that is usually neglected.

Obviously, the proposal presented here cannot bring forward a perfect international competition policy. Next to the problems of acceptance and consensus on implementing such a multilevel regime, three other phenomena might complicate its working.[32] Firstly, the really big and controversial cases, like the infamous Microsoft case for instance, will occur somewhat infrequent or might even be unique. Since many elements of the proposed international multilevel competition policy system depend on repeated (inter-) action, for instance the sanction mechanism, they might not work smoothly in the face of such a discontinuity. An appointed lead jurisdiction for a case like Microsoft would have to weigh the incentive to reap benefits from a biased decision (looking at domestic welfare alone and dismissing justified interests of other impacted jurisdictions) against the countervailing incentives from the consequent loss of reputation and further appointments as a lead jurisdiction. Perhaps the gains of a biased decision of Microsoft would have been big enough for the U.S. antitrust authorities (or the EU ones) to abuse an eventual appointment as the lead jurisdiction in this case. This must remain speculative. If it was that way, however, then both the current system of uncoordinated extraterritorial competition policies and even more so a world authority with substantive competences might be superiour for this single case (but not necessarily for the overall welfare record).

Secondly, cases might involve novel issues so that it is hard to distinguish discriminatory from non-discriminatory policies. However, this is a problem that all types of regimes struggle with. A powerful world authority with substantive competences can make mistakes and deice such a case in a discriminatory way and the absence of a any kind of lead jurisdiction will not alleviate the knowledge problem, either. In contrast to more centralised systems, however, the

32 I owe the inspiration for the following discussion to two anonymous referees.

multilevel character of the proposed regime allows for a more rapid influx of new knowledge, generating an advantage of decentralised systems to deal with novelties in the longer run if not in regard to the first case.

Thirdly, if the lead jurisdiction is appointed after a conduct or agreement has taken place, then what about the predictability of regulatory decisions (legal certainty)? Obviously, legal certainty would be higher in a more centralised regime, ideally with one world competition authority responsible for all cases. On the other hand, the proposal presented here improves the predictability of competition policy outcomes compared to the current 'system'. Currently, norm addressees face reviews and procedures by multiple national competition policy regimes. This makes it (i) difficult to anticipate all the different outcomes and (ii) almost impossible to predict the effects from the interaction of the kaleidoscope of mutually incoherent outcomes. With the proposed multilevel system, the predictability of the competition policy decision largely depends on the predictability of the lead jurisdiction selection process. After a while, norm addressees will most likely develop competences in anticipating what lead jurisdiction will be appointed for their case – or at least, which 1-2 competition policy regimes can be seen as serious contenders. As the selection and appointment process is not random but follows predictable patterns, legal certainty should be quite high and probably not much deviating from the minimum standard proposals at the beginning of this section. Note that these considerations include leniency programs for cartel defectors. They might not be able to perfectly predict the competent jurisdiction but, after a transitory period, anticipation capabilities will be considerable. This represents an improvement in terms of legal certainty in comparison to the current situation of uncoordinated multijurisdictional enforcement where a cartel breaker might get leniency in one jurisdiction, the evidence made available during that public (court) procedure, however, might enable another jurisdiction to penalize him for the very same deed.

5. Conclusion

This paper develops a proposal for an international multilevel competition policy system, which draws on the insights of the analysis of multilevel systems of institutions. In doing so, it targets to contribute to bridge a gap in the current world economic order, i.e. an effective supranational governance of private international restrictions to market competition. The proposal builds upon a combination of the well-known nondiscrimination principle and the concept of a lead jurisdiction model. In order to maintain decentralised elements, competition policy on the global level restricts itself to the selection and appointment of appropriate lead jurisdictions for concrete cross-border antitrust cases, while the substantive treatment remains within the competence of the existing national and regional antitrust regimes. The competition policy agency at the global level – tentatively labelled ICP – appoints (on a case-by-case basis) a lead jurisdiction from downward levels, which deals with a concrete antitrust case. Furthermore, it supervises the acting lead jurisdiction and ensures the nondiscriminatory character of its provisions, institutions, practices, and decisions. Apart from the nondiscrimination issue, downward jurisdictions are free to shape their competition policy regimes individually. However, for which cases they are competent or can claim to be competent is governed in a clearcut way, thus minimising both loopholes and conflicts in the protection of international competition. Such an international multilevel system of competition policies could combine the benefits of decentralised and centralised elements and somewhat represent the minimum of necessary competences on a global level in order to ensure an effective protection of international competition.

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