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**International Antitrust Institutions**

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# International Antitrust Institutions

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**Abstract:** The paper discussed the economic theory of international antitrust institutions. Economic theory shows that non-coordinated competition policies of regimes that are territorially smaller than the international markets on which business companies compete violate cross-border allocative efficiency and are deficient with respect to global welfare. At the same time, some diversity of antitrust institutions and policies promotes dynamic and evolutionary efficiency so that globally binding, worldwide homogenous competition rules do not represent a first-best solution either. After reviewing the existing international antitrust institutions and their prospects and limits from an economic perspective (with a focus on the International Competition Network, ICN), the paper discusses reform proposals from economic literature.

**Keywords:** international competition policy, international antitrust, International Competition Network, global governance, WTO, institutions, international organizations

**JEL:** F02, F53, F55, K21, L40, D02

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# 1. Introduction

The fundamental problem addressed in this chapter is simple in its structure: business companies compete increasingly on international or even worldwide markets whereas the regulation and governance of this business behavior remain bound to territorially-defined jurisdiction. In other words, the geographical area of competition often exceeds the geographical scope of competition rules and policy. In even other words, while competition among enterprises is globalizing, competition policy remains national<sup>1</sup>. This basic problem entails three more specific research questions: (i) Do we need international antitrust institutions in correspondence to internationalizing competition among enterprises? And if the answer is in the affirmative, then (ii) what is the design of effective and efficient international antitrust institutions? Eventually if we know about (ii), then (iii) how can effective and efficient international antitrust institutions be implemented?

This chapter deals with question (i) in its second section and addresses question (ii) and partly (iii) in its third and fourth section along with presenting the state of development of actual international antitrust institutions. Furthermore, section four brings together the two preceding sections by contrasting the current state of international competition policy with the needs of effective and efficient international antitrust institutions that are developed in the second section. In doing so, it derives an agenda of open problems that put up a challenge for the existing international antitrust institutions regarding their future development. Moreover, it discusses a proposal from the economic literature that may serve to solve these open problems. Section five concludes.

Analyzing international antitrust institutions represents a multi-disciplinary task, comprising economics, legal sciences and political sciences. Accordingly, contributors to this research come from all three disciplines, working with very differing methods and theories. Written by an economist, this chapter naturally takes an economic perspective, however, arguments, reasoning and references from the other two disciplines are included and – hopefully – appropriately valued. Some of the central vocabulary in this chapter may receive different definitions and usage in different disciplinary contexts. Therefore, let me make explicitly clear that *antitrust* and *competition* are used interchangeably regarding rules, policies, economics or regimes. Furthermore, the term *institution* is used in an economics understanding, implying that institutions are understood to be an interrelated set of rules and can be distinguished from *organizations*: while organizations belong to the ‘players of

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<sup>1</sup> Strictly speaking, this is incorrect since the European Competition Policy System represents an effective supranational competition policy regime. However, as other competition policy systems of big territories (like the U.S. one), it remains bound to a territorial jurisdiction that in many cases is geographically smaller than the extent of the markets in which companies compete. Therefore, and even though it is legally and politically incorrect, I will treat European competition policy as a ‘national’ one throughout this chapter.

the game', institutions represent the 'rules of the game' (North 1990; Vanberg 1994).

## 2. The Economics of International Antitrust

The economics of competition represent a vital, comprehensive and also diversified research area encompassing several 'schools' of thought and widespread conflicting opinions about various details of pro- and anticompetitive arrangements and business strategies. However, even in the absence of any unifying economic theory of competition<sup>2</sup>, the vast majority of competition economics schools, scholars and researchers agree on the necessity of having competition rules (prohibiting anticompetitive arrangements and business strategies<sup>3</sup>) and an effective enforcement of these rules (competition policy combating anticompetitive arrangements and business strategies). Joining this mainstream position, naturally, represents a precondition for engaging in an economic analysis of the pros and cons of international antitrust institutions. However, accepting and advocating the existence of competition rules and policy on a national level of jurisdiction does not automatically imply advocating international antitrust institutions. The question whether national competition regimes can effectively and efficiently govern cross-border anticompetitive arrangements and business strategies is not a trivial one and, consequently, has attracted the attention of economic research. As a result, the problems of (i) cross-border externalities of national competition policies, (ii) deficiencies of multiple procedures, (iii) loopholes in the protection of competition, and (iv) the diversity of competition philosophies and regimes around the world are discussed.

### 2.1. *International Externalities of National Competition Policies*

If companies compete on relevant markets that are geographically larger than the jurisdiction of competition policy regimes, incongruence between governance and governed actors occurs which is likely to produce cross-border externalities. If the

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<sup>2</sup> For the fundamental improbability of any unifying competition theory see *Budzinski (2008b)* who also presents an updated overview on the most popular schools of economic thought about competition and their main differences.

<sup>3</sup> Much more than the question whether competition rules and policies are necessary at all, the different economic theories of and approaches to competition disagree on the exact borderline between procompetitive and anticompetitive arrangements and conduct. However and notwithstanding, anticompetitive arrangements and conduct usually encompass anticompetitive inter-business cooperation (*cartels*), anticompetitive market concentration through *mergers and acquisitions* as well as business strategies abusing market power with predatory, squeezing, deterrence, handicap or foreclosure effects (*unilateral anticompetitive strategies*). Accordingly, anti-cartel policy, merger control and abuse control are the three typical categories of competition policy. The term anticompetitive arrangements and conduct will be used in this article to encompass these three types of anticompetitive business phenomena. Furthermore, and sometimes somewhat neglected in economics, competition rules to combat grossly unfair behavior (espionage, sabotage, false and misleading advertising, consumer protection, etc.) exist in most jurisdictions.

relevant market – delineated according to the state-of-the-art methods in antitrust economics – includes several competition policy regimes, then each regime will deal with cases that (i) may be caused within and/or outside the jurisdiction and (ii) may display anticompetitive effects within and/or outside the jurisdiction. While the first issue points at the problem of extraterritorial enforcement power (see section 3.1), the effects of the second issue are closely related to the goals of the competition policy regimes in question. The typical and predominant situation is that each regime pursues inbound-focused policy goals, like the protection of competition in domestic markets or the ‘national’ (consumer) welfare. As a consequence, each jurisdiction focuses only on domestic effects, ignoring possible effects abroad.

Given inbound-focused welfare goals, *Barros & Cabral* (1994) as well as *Head & Ries* (1997) demonstrate that already an asymmetric allocation of producers and consumers among the jurisdictions of the relevant international market suffices to cause negative externalities: the uncoordinated, rational decisions of the affected regimes are divergent and incompatible with each other. Due to the inbound focus of the decisions, negative effects on competition and/or welfare abroad are not taken into consideration. Even without any anticompetitive intentions on the side of the involved competition authorities, these negative externalities imply a reduction of welfare compared to a rational decision by a(n international) regime that fully encloses the geographical market in question (see also: *Sykes* 1999; *Kaiser & Vosgerau* 2000; *Tay & Willmann* 2005; *Haucap et al.* 2006; *Mehra* 2008, 2011).

Competition policy goals focusing on domestic welfare goals, furthermore, offer scope for strategic competition policies (*Fox* 2000; *Guzman* 2004; *Budzinski* 2008a: 53-64; *Motta & Ruta* 2011), which represent a variation to strategic trade policy and, thus, an element of so-called beggar-my-neighbor policies. The underlying idea is to increase domestic welfare by redirecting rents of foreigners into the jurisdiction, so that domestic welfare is increased at the expense of foreign welfare. Competition policy can be used in order to create so-called ‘national champions’, i.e. domestic companies with market power on international markets. Those companies enjoy the ability to exploit consumers in other countries with the profits ending up ‘at home’. Instruments of a strategic competition policy may include a more permissive merger control towards domestic mergers than towards mergers between foreign companies, selective non-enforcement of anti-cartel rules towards home companies, antitrust exceptions for domestic key industries or the allowance of pure export cartels (creating damages only abroad but securing supracompetitive profits for domestic companies). Strategic competition policies actively distort competition on international markets, thus, intentionally producing

negative externalities, reducing world welfare at the attempted benefit of single jurisdictions<sup>4</sup>.

Not only but particularly in the case of strategic competition policies (see the economic modeling of *Motta & Ruta* 2012), jurisdictional conflicts may result from diverging and mutually incompatible decisions of several national competition authorities on the same antitrust case in an international market. Famous examples include the European challenges of the U.S. mergers Boeing-McDonnell Douglas (*Fox* 1998; *Kovacic* 2001) and GE-Honeywell (*Reynolds & Ordover* 2002; *Gerber* 2003). In both cases, negative externalities on trade relations and diplomatic relations between the two jurisdictions followed or were on the brink of happening. Furthermore, these two famous cases only represent the tip of the iceberg: *Klodt* (2005: 45-65) and *Budzinski* (2008a: 40-49) list an impressive number of jurisdictional conflicts on competition policy issues, involving a multitude of different countries (more recently also China and Russia).

## 2.2. *Deficiencies of Multiple Procedures*

Having markets with a geographical scope encompassing multiple non-coordinated competition policy regimes inevitably leads to multiple procedures. International mergers as well as companies with global strategies (à la Microsoft) often face competition policy procedures from (sometimes by far) more than twenty jurisdictions. Next to conflicting outcomes these multiple procedures exert costs on business companies (transaction costs) and taxpayers (administrative costs). Being subject to x competition policy procedures implies the necessity to submit large-scale information in x different languages, acquire knowledge about x different legal systems, pay notification and other fees to x authorities, pay x times for legal assistance and so on and so forth (overview: *ICN* 2002). These transaction costs easily amount to significant sums of millions of US\$, making cross-border mergers and acquisitions, cooperation agreements and alliances as well as unilateral strategies considerably more expensive – including the eventually procompetitive ones. To some extent, this discourages beneficial strategies, arrangements and combinations of assets and, thus, harms global welfare (*Evenett* 2002; *De Loecker et al.* 2008).

Moreover, a system of non-coordinated domestic competition policies puts a considerable burden on taxpayers. In the end, it is vastly the same facts that all these competition authorities are trying to investigate in an international case involving multiple procedures. Most of the doubling, tripling and multiplying of investigation costs merely increases the 'production costs' of competition policy without yielding additional 'output', insights or benefits.

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<sup>4</sup> From an economic point of view, most real-world strategic competition policies are unlikely to achieve their goal (increase of domestic welfare). The rent-shifting reasoning often serves to conceal political-economic motives based upon vested interests and lobbyism influence on imperfect political decision processes (*Kerber & Budzinski* 2003, 2004).

### 2.3. *Loopholes in the Protection of Competition*

A system of non-coordinated national competition policies with inbound-focused policy goals cannot provide any global welfare-optimal worldwide protection of competition if not all jurisdiction dispose over an effective competition policy regime. Although the number of countries without any competition regime has significantly decreased during the last two decades, this does not necessarily imply that all the new regimes are also effective. As a consequence, loopholes arise and they appear to be especially relevant where companies from jurisdictions with strong (but inbound-focused) competition regimes (often comparatively wealthy industrialized countries) restrict competition in jurisdictions with weak or without competition regimes (often comparatively poorer developing countries).<sup>5</sup>

### 2.4. *Diversity of Competition Regimes*

The existing competition regimes in the world differ, inter alia, regarding two dimensions. Firstly, the goals of competition policy diverge in focusing on different welfare standards (consumer welfare vs. total welfare; allocative welfare vs. dynamic welfare; etc.), on different intermediate goals (different efficiency concepts, protection of the competitive process, liberty of competition, structure-conduct-performance concepts, etc.) and on the inclusion of 'non-welfare' goals (market integration, economic development, fairness, high employment, international competitiveness, etc.). Apart from the fact that the academic controversy about the 'right' goal is not solved at all (inter alia, *Fox 2003b; Foer 2005; Farrell & Katz 2006; Haucap et al. 2006; Heyer 2006; Kerber 2009; Vanberg 2011; Werden 2011*), democratic societies may want to substitute some welfare in favor of other values, like fairness. As long as the principal explicitly takes the welfare trade off into consideration, this choice is legitimate, although economists may remain skeptical towards the underlying value arguments. As a consequence, even in a world without political imperfections and deficiencies, national competition regimes cannot be expected to produce mutually homogenous goals. And if 'one size does not fit all' (*Evans 2009; Gal 2009; Fox 2012*), then a diversity of competition regimes is beneficial in the sense of being conformal with the people's preferences. Secondly, the absence of a unifying theory of competition (*Budzinski 2008b*) implies that different regimes will legitimately base their theories of competitive harm on diverging economic approaches. Consequently, the dividing line between procompetitive and anticompetitive arrangements and conduct will not be the same in each jurisdiction. Similarly, they will use different investigational and analytical methods.

The resulting competition among competition regimes has been subject to several economic analyses (*Easterbrook 1983; Hauser & Schoene 1994; Smets & Van Cayseele 1995; Sinn 1999; Fox 2000; Guzman 2001; Kerber & Budzinski 2003,*

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<sup>5</sup> *Jenny (2003a, 2003b)* as well as *Levenstein & Suslow (2004)* offer an impressive set of examples.



2004; *Stephan* 2004). While one should keep in mind that institutional competition is a difficult concept that next to similarities also bears important differences to goods market competition (*Sinn* 1990; *Tirole* 1994), there is an area where competition among competition regimes yields benefits. If many competition regime experiment with different theories and methods (or even with differing goals), then this offers scope for dynamic institutional learning (dynamic and evolutionary efficiency). In case of diversity, competition regimes learn from their own successes and failures and, additionally, they learn from other regimes' successes and failures. This mutual learning speeds up the learning process and offers potential to dynamically improve competition policy (*Kerber & Budzinski* 2003, 2004). Mutual learning through decentralized experimentation is particularly fruitful if there is no safe academic consensus on the 'right' solution – like it is the case with competition economics (*Budzinski* 2008b). However, the benefits of a system with decentralized elements do not imply that any type of coordination is necessarily eroding these learning effects.

## 2.5. Summary

In summary, the economic analysis of international antitrust demonstrates that a system of non-coordinated national competition policies with inbound-focused policy goals will not be optimal in terms of global welfare. Thus, there is scope for beneficial international antitrust institutions. At the same time, the economic analysis highlights that in the absence of perfect competition economic knowledge decentralized elements do possess merits. Altogether, the issues (i) cross-border externalities of national competition policies, (ii) deficiencies of multiple procedures, (iii) loopholes in the protection of competition, and (iv) learning potential from the diversity of competition philosophies and regimes represent criteria against which types of international antitrust institutions can be assessed. While (i) – (iii) are motivated by stationary efficiency considerations, (iv) focuses on dynamic and evolutionary efficiency considerations.

## 3. Strategies towards International Antitrust Institutions

### 3.1. *The Unilateral Strategy: Extraterritorial Enforcement through the Effects Doctrine*

This scenario stays very close to the system of non-coordinated and territorially-bound competition policies that was underlying the economic analysis in section 2. However, the effects doctrine<sup>6</sup> represents an extraterritorial enlargement of domestic competition policy competences by offering a possibility for countries to unilat-

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<sup>6</sup> The Effects Doctrine was first applied by the U.S. in the so-called Alcoa-Case in 1945 and has subsequently been implemented by most other countries. See also on the following and with comprehensive references *Budzinski* (2008a: 33-49, 168-173).

erally react to anticompetitive arrangements and conduct caused abroad (inward competition restraints). According to this doctrine, a competition regime claims jurisdiction over any business arrangement or conduct that affects its domestic markets, irrespective of the location or the nationality of its participants (*Griffin 1999; Fox 2003a*).

Even though the effects doctrine has been applied successfully in many cases, it cannot heal the shortcomings of non-coordinated national competition policies as outlined in sections 2.1-2.3. On the contrary, the effects doctrine reinforces the inbound focus of competition policy and, due to the larger (now also extraterritorial) scope of regime jurisdiction, it tends to further increase the problem of multiple procedures. Obviously, the effects doctrine also does not help to close down loopholes originating from non-existent or ineffective competition regimes. It actually further amplifies power asymmetries even among the 'really working' regimes. While regimes with big internal markets like the U.S. or the EU have sufficient power to enforce their competition rules against foreign and multinational companies (by threatening to tax or block their domestic turnovers), regimes with smaller domestic markets or such from poorer countries (less important domestic markets) may face a powerless situation against foreign and multinational companies. The attempt of extraterritorial competition law enforcement may in such cases be countered by threats from the respective companies to stop supplying the markets of the country in question.

The case with the externalities is a bit more complex. If every regime effectively applied the effects doctrine, then the ignorance of purely outbound anticompetitive arrangements and conduct (e.g. export cartels) would not matter anymore. Negative externalities would in so far be internalized as every jurisdiction would protect their domestic markets and, thus, effectively prevent inbound restrictions of competition. However, along with this effect, the scope for jurisdictional conflicts increases since the probability of incompatible decisions on cross-border cases increases. In a perfect enforcement world, conflicting decisions within an effects doctrine regime imply that the most restrictive decision prevails (*Geradin 2009*). Consequently, a complete internalization of negative externalities cannot be expected even with perfect effects doctrine enforcement. As the preceding paragraph already pointed out, however, the effects doctrine can only be effectively enforced by sufficiently powerful regimes in reality. Therefore, the theoretical potential for internalization is rather unlikely to materialize under real-world conditions. Quite contrary, power asymmetries between regimes may actually contribute to increase negative externalities when the effects doctrine is used as an instrument of strategic competition policy.

In summary, the unilateral strategy via the effects doctrine is not appropriate to improve global welfare.

### 3.2. *The Cooperative Strategy: Bilateral Agreements and Comity Principles*

Starting to become widespread in the mid-1970s, bilateral cooperation agreements between competition policy regimes became very popular with a heyday in the late 1990s (overview: *Budzinski 2008a: 51*). In the absence of more ambitious international antitrust institutions, these bilateral agreements – sometimes initiated to supplement and complement bilateral trade agreements – usually focused merely on cartel prosecution and were predominantly concluded between established competition policy regimes of comparatively industrialized countries (see for more comprehensive analyses, inter alia, *Fullerton & Mazard 2001; Zanettin 2002; Jenny 2003b*). The contents of bilateral cooperation agreements can be categorized in the following way:

- *Notification*: competition authorities inform each other about ongoing antitrust procedures and exchange very general information, but their investigations, proceedings and decisions remain completely autonomous.
- *Consultation*: competition authorities exchange more detailed information, particularly regarding technical issues (market definition, case facts, etc.) on a completely voluntary and discretionary basis. It remains within the discretion of the national agencies whether they pay respect to the interests of other countries in their independent decision.
- *Mutual Assistance*: the cooperating regimes mutually assist each other regarding information gathering and/or sanctioning in order to overcome the problems of extraterritorial investigation and enforcement. However, mutual assistance only includes cases in which the laws of the cooperating jurisdictions produce mutually compatible assessments, investigational procedures and sanctions.
- *Negative Comity*: following this traditional comity principle implies abstaining from extraterritorial enforcement of the domestic competition rules if there is explicit resistance by the foreign regime (i.e. no hostile extraterritorial enforcement). Thus, with negative comity each competition regime agrees to respect serious interests and the sovereignty of the other jurisdictions.

Almost all the bilateral cooperation agreements focused on these less ambitious types of cooperation, many included merely mutual notification and consultation. For several reasons, these types of bilateral cooperation represent an insufficient supplement to non-coordinated extraterritorial competition policy. Although they do alleviate the shortcomings of non-coordination, significant limitations remain. Firstly, jurisdictional conflicts may be reduced by avoiding misunderstandings. However, genuine conflicts of decisions as well as serious conflicts of interests cannot be solved 'just' by mutual notification and consultation. Secondly, the prob-

lems of multiple procedures are not tackled. Thirdly, the asymmetry of power is not resolved. Developing countries were severely underrepresented in existing bilateral cooperation agreements and the bargaining power of big industrialized jurisdictions may allow for discriminating agreements or the discriminating use of it (Fox 2000, 2003a; Jenny 2003a, 2003b). Fourthly, and for the same reasons, loopholes are not effectively closed.

Notwithstanding, the potential of cooperation should not be overlooked. For instance, the prosecution of hardcore cartels seems to represent a comparatively beneficial field for bilateral cooperation.<sup>7</sup> With a view to leniency programs for whistleblowers in hardcore cartels, preliminary modeling hints that, under some special circumstances, limited information exchange between competition agencies may be optimal to destabilize cartels and deter their formation (Choi & Gerlach 2010). However, even if there was an overall kaleidoscope of bilateral cooperation agreements, involving every antitrust jurisdiction in the world, this network would most probably be characterized by significant incoherence. In multijurisdictional cases, each jurisdiction would have to handle a multitude of bilateral duties, probably not consistent with each other since the inbound-focus of competition policy remains unchanged.

- *Positive Comity*: if a domestic market is negatively affected by an anticompetitive arrangement or conduct originating from the partner's jurisdiction, its antitrust authority can request its partner authority to take enforcement actions on behalf of the affected country. The cooperating authority applies its own antitrust laws, however, with a view to combat the outbound restrictions on competition, which affect the partner jurisdiction, while the affected jurisdiction relinquishes an own procedure and relies on its cooperation partner to protect its interests.

This advanced and far-reaching comity principle is the only one within bilateral agreements that actually modifies the inbound-focused policy and adds a responsibility to protect competition abroad and, consequently, also on international markets as a whole. In doing so, it provides the potential to internalize most negative externalities. However, it does so by relying on one competition regime to provide a positive externality for the cooperating regime (by targeting to increase its welfare, too), which may cause an incentive problem.<sup>8</sup> Indeed, the positive comity principle

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<sup>7</sup> The prosecution of the international vitamins cartels may represent an outstanding success story (First 2001a). However, the absence of industrial policy interests plays an important role. "Where no industrial policy at the source is concerned, cartel enforcement at the national level with deep cooperation of sister agencies is the success story (in progress) of international antitrust. Where industrial policy intervenes, however, the gap is great, as in the case of OPEC, marketing boards and commodity cartels" Fox (2003a: 373).

<sup>8</sup> See for an economic analysis of advanced comity principles Budzinski (2008a: 165-166, 199-203).

in the U.S.-EU agreement did not succeed very well in the so-called Amadeus case.<sup>9</sup> Furthermore, the fundamental problems of bilaterism still apply.

Altogether, a cacophony of bilateral agreements cannot realistically be expected to work under real-world conditions. "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). The popularity of bilateral agreements ceased with the implementation of the International Competition Network in 2001 (see section 3.4.).

### **3.3. The Multilateral Strategy: International Antitrust Institutions in Trade Agreements**

The basic idea to fight international anticompetitive arrangements and conduct on an international level has been so straightforward to the political sphere that as far back as in 1927, the League of Nations' World Economic Conference in Geneva put the problem of international cartels on its agenda, discussing options for a coordinated international anti-cartel policy effort (Wells 2002: 10-11). This early initiative did not have any chance of success, however, since in the 1920s a consensus that hardcore cartels are detrimental to welfare and should be combated by antitrust policy was just about to form.<sup>10</sup> Still, less than two decades later, the next attempt to establish multilateral antitrust institutions appeared on the agenda. This time, it was driven by the desire to create a coherent and comprehensive post-war world economic order, consisting of international institutions and organizations for the governance of (i) the monetary system and international currency relations (International Monetary Fund; The World Bank Group), (ii) public cross-border restrictions to competition, i.e. trade barriers (Havana Charter and International Trade Organization; in advance established in 1947 as the General Agreement on Tariffs and Trade, GATT), and (iii) private cross-border restraints of competition (the 1948 Havana Charter; International Trade Organization). While the first two institutions

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<sup>9</sup> In 1997 the U.S. Department of Justice formally requested the European Commission to investigate allegedly anticompetitive practices by European airlines, discriminating U.S. enterprises. More detailed, the EU computer reservation system Amadeus was said to be acting in an exclusionary way, thus deterring the concurrent U.S. system SABRE. However, the procedure seemed to proceed rather sluggish and hampered by deviating investigation techniques and evidentiary standards between the U.S. and the EU. The case was eventually settled in 2000 by private agreements between the airlines and their reservation system companies. See also Zanettin (2002: 188-189).

<sup>10</sup> In many European countries of the late 19<sup>th</sup> and early 20<sup>th</sup> century, cartels (including even horizontal price-fixing arrangements) were viewed as (i) a legitimate part of the freedom of business and (ii) an effective instrument against the permanent thread of deflation (because of their price-'stabilizing' effects), which was inherent to the contemporary gold standard currency system as soon as domestic economic growth met with deficits in the balance of trade. On the origins and development of competition law and policy in Europe see Gerber (1998).

were set into force while the window of opportunity due to the global catastrophe of World War II was open, the international antitrust institution-part missed out and was subsequently abandoned in 1953 due to a lack of ratification by leading members states (*Wells* 2002: 116-125).

However, the idea of international antitrust institutions being a complement to trade liberalization rules remained virulent. The benefits of trade liberalization can only be reaped in a sustainable way if the competition-intensifying effects of opening up national markets for international competition (*Budzinski* 2008a: 27-32) are not counteracted by the emergence of cross-border anticompetitive arrangements and conduct, re-establishing the pre-liberalization non-competitive equilibrium. Therefore, effective means against international cartels and against international market dominance need to accompany trade liberalization. This is in line with theoretical economic thinking (inter alia, *Ross* 1988; *Feinberg* 1991; *Jacquemin* 1995; *Cadot et al.* 2000; *Hamilton & Stiegert* 2000; *Gaudet & Kanouni* 2004; *Mehra* 2011; rather contrasting: *Hauser & Schoene* 1994).

Consequently, competition provisions somewhat survived on the agenda of the World Trading System and in some instances found their way into regional trade agreements, albeit predominantly in rather rudimentary shape (*Alvarez et al.* 2005; *Cernat* 2005; *Evenett* 2005). After the establishment of the World Trade Organization (1995, comprising GATT, the General Agreement on Trade in Services GATS and the agreement on Trade-Related Intellectual Property Rights, TRIPS), international competition resurfaced on the agenda, leading to the adoption of WTO anti-trust institutions in the Doha Declaration (2001). However, in the aftermath of the Cancún conflicts, centering predominantly on agricultural markets issues, the anti-trust provisions were provisionally abandoned in 2004 – and since then a reappearance does not look likely.

While the recurring attempts to establish multilateral competition rules can easily be motivated both by the shortcomings and limits of unilateral and bilateral approaches (see sections 4.1. and 4.2.) as well as by the complementary nature of trade liberalization and protection of competition on international markets, the likewise recurring failures to actually establish international antitrust institutions have motivated additional economic research. From a game-theoretic perspective, negotiations on international antitrust institutions among sovereign nations resemble the characteristics of a prisoners' dilemma game. Even if adopting international antitrust institutions would represent the world welfare optimum, the players may end up in an inferior equilibrium because it is individually rational to choose strategic competition policies (beggar-my-neighbor policies) in the absence of an effective institution. Due to the incentive structure, such an institution is notoriously difficult to establish outside specific 'windows of opportunity' – at least in rather simplistic game-theoretical models (à la *Budzinski* 2003). More advanced

models (building upon so-called supergames) allow for much more differentiated analyses that also display self-enforcing cooperation patterns (Cabral 2003, 2005). However, also dynamic prisoners' dilemma games show that cooperation is possible but not necessary and may take long to be successfully established.

### 3.4. *The Network Strategy: The ICN after 10 Years*

During the years where the hitherto last attempt to establish WTO competition rules failed, a new avenue towards international antitrust institutions surfaced. On its route a multilateral perspective was combined with a focus on voluntary cooperation among competition agencies and within one decade the resulting network developed to become the most important international antitrust player in the world.

There have been attempts to establish voluntary multilateral cooperation before. In 1967, the Organization for Economic Cooperation and Development (OECD) created a forum for their members in order to debate international competition issues and issue consensus-based recommendations on competition policy – with the latter goal being abandoned in the 1990s (Zanettin 2002: 53-57). Furthermore, in 1980, the United Nations Conference on Trade and Development (UNCTAD) adopted a so-called *Restrictive Business Practices Code* with the particular aim of protecting developing countries against inbound anticompetitive arrangements and conduct by powerful multinational enterprises. It attempted to ban, inter alia, price-fixing arrangements and other hardcore cartels as well as boycotts. However, the comparatively ambitious code lacked enforceability (First 2003). At the end of the day, both initiatives failed to produce considerable effects regarding a satisfying level of protection of international competition (Wells 2002; First 2003).

Based on the concept of a Global Competition Initiative developed by the International Competition Policy Advisory Committee to the U.S. Department of Justice (ICPAC 2000), 15 national competition agencies (including the European Commission) established the International Competition Network (ICN) in October 2001 (Finckenstein 2003; Janow & Rill 2011). Until today, membership of the ICN has risen to 121 competition agencies from more than 100 jurisdictions all around the world.<sup>11</sup> Being a network of competition agencies and calling itself a virtual organization, the ICN neither is based on an international contract, nor has its own administrative staff or budget. The ICN is led by a steering group consisting of leading officials from member agencies with the board positions rotating among the mem-

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<sup>11</sup> This includes several regional-but-international competition agencies like the European Commission or the CARICOM Competition Commission. The number of member agencies is higher than the number of participating countries because some jurisdictions have more than one competition agency. Figures according to <http://www.internationalcompetitionnetwork.org/members/member-directory.aspx> (accessed 12th of June, 2012). Motta (2012: 1) even mentions 123 member agencies.

bers.<sup>12</sup> Annual conferences of all member agencies with participation of different stakeholder groups represent the major 'decision body'. The actual work is done in so-called working groups (WGs), which typically start out by reviewing and comparatively evaluating the current practices of the member agencies. They constitute themselves project-oriented and expire if the respective agenda has been finished. The general goal of the WGs is to develop best practice recommendations that are subsequently consensually adopted by the annual conference. In addition to the substantive WGs, administrative working groups address problems of internal governance. Currently, the ICN consists of five substantive and two administrative WGs, which are overviewed in figures 1-6. The voluntariness of cooperation and the non-binding character of all best practice recommendations represent a fundamental principle and an important characteristic of the ICN. Still, the eventual goal of the ICN is about improving international competition governance. By promoting multilateral cooperation among competition agencies and by creating a *common competition culture*, convergence of national and regional competition policies, starting with procedural issues but aiming at substantive issues as well, is on the long-run agenda (ICN 2011; Mitchell 2011: 5).<sup>13</sup>

During its first decade, the ICN has produced an impressive output of more than 10,000 pages of 'virtual' paper. While the dozens of comparative analyses of worldwide existing practices and institutions regarding specific competition policy fields represent a valuable stock of knowledge, inter alia, also for competition economics, law and policy researchers, the main institutional contribution of the ICN is represented by the consensually adopted best practice recommendations as well as by enforcement manuals on various topics (ICN 2011). They include, for instance, the *Recommended Practices for Merger Notification and Review Procedures*, the *Anti-Cartel Enforcement Manual* or the *Market Studies Good Practices Handbook* (see also fig. 1-5).

The question whether purely voluntary cooperation, resting on the publication of consensual best practice recommendations, can actually be successful triggered theoretical and empirical economic research. *Budzinski* (2004a, 2004b) analyzed the economics of combining consensual best practice recommendations with peer pressure. Even though it remains completely voluntary whether individual competition policy regimes bring their practices and institutions in line with the published ICN best practice recommendations or not, the consensual character of the recommendations and their public availability creates peer pressure. Agencies that have agreed that a certain practice is the best one will face a loss of reputation if they

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<sup>12</sup> Currently (June 2012), Eduardo Pérez-Motta (Mexican Federal Competition Commission) represents the chair of the ICN. From the establishment of the ICN on, the Canadian Competition Bureau has taken a leading responsibility for the administration.

<sup>13</sup> See for recent academic analyses of the ICN, inter alia, *Fox* (2009), *Coppola* (2011), *Hollman & Kovacic* (2011), *Lugard* (2011) and *Sokol* (2011).



stick to an inferior practice – even according to their own evaluation expressed in the consensually adopted ICN recommendation. Thus, the combination of published best practice recommendations and peer pressure sets strong incentives to actually comply with the ICN recommendations on the regime level. Furthermore, it is in line with behavioral economic thinking that a systematic and cooperative discussion of competition policy matters among the competition agencies has the potential to harmonize views on competition and antitrust issues, thus, promoting the targeted common competition culture (*Budzinski 2004a*). Once this ‘cognitive’ harmonization process has taken off, it can develop strong force. However, particularly in the early period considerable obstacles may impede this process altogether. Nonetheless, peer pressure through publication and transparency of superior antitrust practices, which have been consensually acknowledged as superior, should promote a widespread adoption of the ICN best practice recommendations by the member authorities. This economic theory reasoning is supported by early empirical analyses, suggesting that ICN best practice recommendations actually influence competition regime reforms and implementation processes in member jurisdictions (*Rowley & Campbell 2005; Evenett & Hijzen 2006*).

## **4. Challenges and Unsolved Problems: The Way Forward**

### **4.1. *The Success Story ICN***

Without any doubt, the ICN has managed many impressive achievements in its first decade – and more so than many experts were expecting. First of all, the combination of consensual best practice recommendations and peer pressure through the publication of the recommendations has been effective in the sense that many countries cited the ICN recommendations as motivation and guideline for domestic reforms of antitrust institutions. Moreover, both scientific analysis (*Rowley & Campbell 2005; Evenett & Hijzen 2006*) and internal assessment (*ICN 2011*) confirm that many member jurisdictions indeed reformed their competition rules to be more in line with the ICN recommendations. Thus, there is a harmonization effect on national competition policy regimes through the ICN membership that has potentials to reduce jurisdictional conflicts over antitrust issues as well as to decrease the volume and severity of negative externalities, albeit not to zero.

Secondly, the ICN has been very successful in promoting the implementation of competition regimes in developing and transitory countries. The impressive rise in membership is partly due to the establishment of new competition policy regimes in previously antitrust-free jurisdictions and the ICN played a considerable role in this process. Furthermore, the ICN comprehensively engaged in capacity building for agencies in newly-established and also in previously defunct or ineffective competition policy regimes. This has contributed to reduce loopholes in the worldwide

protection of competition, which were due to a lack of effective competition policy regimes in particular in many developing and transitory countries (Sokol 2009). And the newly-established regimes have to a large extent particularly used the ICN best practice recommendations as a role-model for their antitrust institutions.

Thirdly, the ICN has published compilations of current practices in member jurisdictions (inter alia, merger review including substantive assessment and prohibition standards, anti-cartel enforcement techniques, unilateral conduct, competition advocacy, etc.). In many cases, for instance in the case of the unilateral conduct compilation, the main function of the compilations is to highlight the differences among member jurisdictions. While not directly promoting harmonization, the resulting transparency serves to improve the mutual understanding of differing and potentially incompatible case decisions and, thus, may contribute to reducing conflicts over such decisions ('informed divergence'; Mitchell 2011: 6).

Fourthly, the ICN has produced handbooks, manuals and toolkits on many down-to-earth competition policy practices. They represent an important practical help for competition agency officials regarding the everyday handling of cases. Together with the curriculum project (see figure 1), they serve as materials for the training of agency staff and proved particularly useful to young agencies that lack long-standing experiences how to deal with antitrust cases.

Fifthly, it is certainly a success story that the ICN managed to actually issue an impressive number of *consensually adopted* best practice recommendations (see figures 1-5). This achievement alone exceeds the output of former multilateral cooperation attempts. It proved to be considerably supportive for the success of cooperation that competition agencies have been driving the process and negotiated the agreements – instead of governments and government officials. Even across jurisdictions, the interests of competition agencies are significantly more homogeneous and consensus-suited than the interests of governments.

Eventually, a rather informal effect is often cited by participants as representing the main benefit from the ICN: mutual experience-sharing and getting-to-know each other (ICN 2011; Mitchell 2011: 3). The strong working relationship developed through the face-to-face contact on ICN seminars, workshops and conferences facilitates informal cooperation also outside the direct ICN scope.

#### **4.2. Limits of the ICN Approach?**

Notwithstanding the achievements, the fifth aspect, however, already hints at some inherent limits of the ICN approach to international antitrust institutions from an economic perspective. A closer look on the best practice recommendations reveals that there are barely any recommendations on substantive issues. The recommendations that were possible in consensus among all the members are predominantly

referring to procedural issues like transparency of notification requirements, fees, timetables, etc. One must not underestimate that this type of best practice recommendations represents an important progress in international antitrust both for interacting agencies and norm addressees (the companies). However, along with the lack of substantial convergence (substantive rules and standards, delineation between pro- and anticompetitive effects, theories of harm, assessment practices and policies, etc.), the potential of the ICN to internalize negative externalities from diverging and incompatible case decisions appear to be rather limited and this limited scope has effectively been reaped in the first decade. Without consensus on more ambitious best practice recommendations, diminishing returns on further 'low controversial' recommendations must be expected for the second decade.

With respect to the problem of negative externalities, the economic analysis identifies the inbound focus of competition policy, i.e. the absence of an international welfare goal for national competition policy regimes, as a sufficient condition to create negative cross-border externalities (see section 2.1). This problem is not addressed by the ICN so far. Furthermore, it appears to be rather unlikely that an institutional arrangement like the ICN can be capable of introducing a world welfare goal for national competition policy regimes. Since it is the very nature of the ICN to rely on consensus and voluntary participation and implementation, it cannot provide any binding, contractual agreement which in case of defection may be enforced in member jurisdictions. Thus, the only way would be to issue a best practice recommendation on antitrust goals (world welfare) and hope for (i) a consensual adoption on an annual conference and (ii) voluntary compliance to the recommendation by the member jurisdictions. Since this typically refers to 'hard' law, the members of the ICN – competition agencies – would not be able to implement that recommendation without support from the legislative chambers (e.g. parliaments) and executive institutions (e.g. government) in their jurisdictions. This might well represent a limit to the 'soft' law approach of the ICN.

Another problem of international competition governance – the deficiencies of multiple procedures (see section 2.2) – has been alleviated by the ICN only to a negligible extent. Due to the imperfect convergence of procedures through the adopted best practice recommendations, the costs of multijurisdictional antitrust case handling have been decreased marginally. However, since there has been no reduction of the number of antitrust procedures in conjunction with, for instance, a multijurisdictional merger, the vast majority of transaction and administration cost burdens remain unchanged. In the end, there is still nothing remotely close to a one-stop shop. Ironically, the impressive increase in active competition policy regimes around the world has actually increased the number of jurisdiction that declares themselves competent for international and particularly intercontinental competition cases. This in turn increases the deficiencies of multiple procedures and

most probably more than compensates for the cost improvement due to soft and imperfect procedural harmonization. With the ICN as it is now, it is difficult to see how the second decade can bring significant improvements. The ICN does not entail direct case-related cooperation but exactly this would be necessary if considerable efficiency gains from international antitrust institutions are to be realized. Even though the ICN indirectly facilitates case-related cooperation because the member agencies and their staff know each other and know whom to call for informal exchange and cooperation over a given case (ICN 2011; Mitchell 2011), this grassroots effect – which without any doubt is highly important and helpful for everyday work – remains rather limited in the absence of an institutionalized case-related cooperation.

The loopholes in the worldwide landscape of competition regimes (see section 2.3) have been substantially reduced by the ICN's activities. Next to the impressive increase in newly-established competition regimes, the ICN has also been very active in arming previously rather ineffective competition regimes. However, there has been virtually no change in a particularly problematic area, which is the power asymmetry when it comes to enforcing domestic competition rules against multinational companies by means of the effects doctrine (see section 3.1). If domestic markets are not sufficiently important for the business of the multinational, then the multinational remains in a position to avoid compliance by boycotting the respective country. The threat of this alone influences the decisions of smaller and less powerful regimes. Again, the regime of the uncoordinated effects doctrine can only be overcome by (i) replacing inbound competition policy goals with international welfare standards and (ii) a case-related cooperation approach. As has been argued in the preceding paragraphs, both seem to be difficult to achieve with an ICN of the current nature and structure.

The fourth criterion to assess international antitrust institutions from an economic perspective (as derived in section 2) is the diversity of regimes reflecting the diversity and the provisional nature of economic thinking on competition. It refers to the dynamic and evolutionary efficiency of international antitrust institutions. The ICN highlights this by systematically reviewing the different practices in the member jurisdictions and its compilations of the differences create transparency that serves to speed up mutual learning processes. Actually, the ICN best practice recommendations represent the result of such a learning process. However, this is exactly where problems kick in: with a best practice *result* that leads to all member jurisdiction harmonizing their regimes according to this result the dynamic learning process comes to an end. This implies no more future learning due to a lack of experiments with new insights and new methods, theories, etc. Thus, the provisional economic knowledge of the time of the best practice recommendation becomes a persistent standard and scientific progress of the future will find it much more dif-

difficult to enter the stage.<sup>14</sup> If learning from diversity is useful for finding today's best practices, then learning from diversity will also be useful to detect future's best practices. Consequently, three hazards are incorporated to the ICN's harmonization approach. Firstly, the identification of best practices to some extent relies on and promotes academically controversial practices (like the case-by-case effects approach in merger control). Secondly, the injection of new scientific knowledge is deterred. Both hazards together may lead to a *deficient harmonization*. Thirdly, the ICN best practice approach implicitly assumes that there actually are *one-size-fits-all benchmarks*. However, best practices for old-industrialized countries' competition regimes may differ from such for newly-industrialized or developing or transitory countries' ones. Of course, the reasoning in this paragraph must be qualified to the extent that it becomes only relevant when the ICN is unexpectedly successful in achieving also substantive harmonization.

In summary, the first decade of the ICN must be hailed for bringing the most significant progress to global competition governance of all times so far. However, from the viewpoint of global economic welfare, there are still a lot of challenges and unsolved problems, covering all the four criteria (international externalities, deficiencies from multiple procedures, loopholes, and regime diversity) that can be formulated from an economic perspective. Moreover, and even more seriously, it appears to be rather doubtful whether in its current form (purely voluntary cooperation, reliance on consensus and peer pressure), the ICN is well-suited and well-equipped to address the remaining issues. Ironically, the (unexpected) success of the ICN's first decade may imply bad news for its second decade since the potentials have already been exploited so that from now on diminishing returns of the network strategy must be expected.<sup>15</sup>

#### **4.3. A Way Forward? Towards a Multilevel Lead Jurisdiction Model**

So, how can international antitrust institutions be designed to embrace all four criteria with their conflicting incentives toward more centralization (internalizing ex-

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<sup>14</sup> It should be emphasized here that the process of scientific knowledge accumulation and progress is a permanent one and all social science knowledge must be provisional by the nature of the (creative, innovative and intentional) object of research (*Budzinski* 2008b: 313-317).

<sup>15</sup> When the ICN envisions enforcement cooperation to be an important topic for its second decade, for instance, it refers to "facilitating and promoting informal cooperation and exchange of nonconfidential materials, which may help to foster better inter-agency relations and indirectly promote future formal cooperation; developing tools to facilitate identification of agencies reviewing or investigating matters and contacts in those agencies; promoting the exchange of experience and identifying and disseminating practical tips relevant to cooperation through the ICN blog<sup>17</sup> and webinar programs; developing advocacy materials on the value of cooperation; and creating ICN guidance, such as investigational checklists and/or model cooperation agreements or confidentiality provisions, for use by ICN members" (*Mitchell* 2011: 6). This ICN-typical list – while without doubt representing valuable topics – demonstrates the type of consensual output that the ICN is capable of and thus entails prospects and limits at the same time. Replacing national welfare goals by international welfare goals or introducing one-stop shops for multinational cases go far beyond the ambition level expressed here.

ternalities and reducing multiple procedures; stationary efficiency) on the one hand and preservation of regime diversity (dynamic and evolutionary efficiency through decentralization) on the other hand? The economic literature offers two interesting concepts to approach this balancing act. The first concept is the idea of a *lead jurisdiction model* (Campbell & Trebilcock 1993, 1997; Trebilcock & Iacobucci 2004). It extends the positive comity concept (see section 3.2) by allocating competence and responsibility for multijurisdictional competition cases to one of the affected regimes that subsequently handles and decides the case with a view to avoiding anticompetitive effects in the overall geographic market (i.e. in all affected jurisdictions) and by relying on the assistance of the other involved regimes.<sup>16</sup> The second concept is the idea of multilevel governance (Kerber 2003) in which regimes on different vertical levels (regional, national, supranational) are interconnected with each other. In such a complex multilevel system of institutions, the design of competence allocation rules, managing the interfaces of the participating regimes, becomes particularly important. Economic analysis reveals that different competence allocation rules (such as the effects doctrine, interjurisdictional commerce clauses, turnover thresholds, nondiscrimination, principle of origin doctrine, relevant markets rule or x-pus rule) are more or less appropriate when it comes to specified horizontal or vertical regime interfaces (Budzinski 2008a: 151-217).

With a view to the four economic problems of international antitrust (as derived in section 2), it represents an interesting step to combine these two concepts towards a multilevel lead jurisdiction model (Budzinski 2009, 2011). The advantage of adding the vertical multilevel dimension to the lead jurisdiction concept lies in the option to introduce a referee authority, monitoring and supervising the impartiality of the assigned lead jurisdictions and providing conflict resolution if necessary. Thus, the antitrust institutions on the global level are not about materially deciding cases. Instead, they allocate lead jurisdiction according to agreed-upon criteria on a case basis<sup>17</sup>, monitor and supervise the lead jurisdiction in respect of its impartial treatment of anticompetitive effects in the overall relevant international market (irrespective where – in which jurisdiction – the effects display) and settle conflicts in case of affected jurisdictions allege that their domestic effects were disregarded by

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<sup>16</sup> Two sub-concepts can be distinguished: in the voluntary lead jurisdiction model (Campbell & Trebilcock 1993, 1997), the lead jurisdiction just proposes a decision and the each of the affected regimes decides on its own whether to adopt this paragon decision or not, whereas in the mandatory lead jurisdiction model (Trebilcock & Iacobucci 2004; Budzinski 2008a: 166-168, 203-206) the decision of the lead jurisdiction binds the other affected jurisdictions. Note an important difference between the ICN-style network approach and the lead jurisdiction concept: while the ICN works on the level of guidelines and principles, the lead jurisdiction model works on the case level, assigning lead jurisdiction to one of the involved regimes on a case-by-case nature (according to pre-defined allocation criteria).

<sup>17</sup> This only refers to multijurisdictional cases; cases that display effects merely within one of the existing competition policy regimes are solely subject to this regime's jurisdiction. For possible delineation criteria as well as for possible criteria for selecting lead jurisdictions see Budzinski (2009: 377-381, 2011: 81-87), also for more details on the following discussion.

the lead jurisdiction. Consequently, 'only' procedural competences are assigned to the global level and all material and substantive decision competences remain on the level of the existing national and regional-supranational regimes.

From an economic perspective, the charm of this concept is that it (i) replaces the inbound focus of existing competition policy regimes by a focus embracing all effects in the relevant geographic (international) market, (ii) provides a one-stop shop for the norm addressees (thus avoiding deficient transaction and administration costs of multiple procedures), (iii) closes many loopholes due to the lead jurisdiction being powerful and also providing protection of competition abroad, and (iv) maintains diversity of competition regimes because each assigned lead jurisdiction handles and decides the case according to this regime's antitrust rules and procedures, just with the explicit inclusion of cross-border effects. On the downside, it requires an international agreement on procedural rules (in particular criteria for allocating case-specific lead jurisdiction as well as for monitoring and conflict resolution mechanisms) and willingness to accept (i) procedural decisions by the international level and (ii) material decisions by the lead jurisdiction as long as all effects are treated impartially irrespective of their jurisdictional location. This certainly represents a higher hurdle for consensus than the ICN-style network cooperation, but certainly a lower hurdle than consensus on binding global competition rules within the WTO framework. And from an economic perspective, such a multilevel lead jurisdiction model appears to be welfare-superior to these alternatives. However, the concept of a multilevel lead jurisdiction model is far from being comprehensively researched. Furthermore, an interesting exploration would be whether such a model could develop from the contemporary ICN when it seriously strives to solve the economic problems of international antitrust in its second or third decade.

## 5. Conclusion

The global governance of competition represents an important economic problem. Economic theory clearly shows that non-coordinated competition policies of regimes that are territorially smaller than the international markets on which business companies compete violate cross-border allocative efficiency and are deficient with respect to global welfare. At the same time, some diversity of antitrust institutions and policies promotes dynamic and evolutionary efficiency so that globally binding, worldwide homogenous competition rules do not represent a first-best solution – even when neglecting obvious agreement and implementation difficulties.

Since 2001, the world of international antitrust institutions has been significantly influenced by the then-established International Competition Network. This multilateral forum for voluntary cooperation among competition agencies has been a success story in its first decade – by far exceeding most experts' expectation. The

ICN has considerably contributed to alleviate the negative economic effects from the previous, virtually non-coordinated world of international antitrust. However and notwithstanding, from an economic welfare point of view, considerable challenges and problems remain on the agenda.

Whether the ICN in its current structure and nature has the potential to solve the remaining problems represents a decisive question for the future of international antitrust institutions. Despite the success story of its first decade, however, economic analysis justifies skepticism whether the contemporary ICN is up to the remaining challenges. In particular, a change from inbound-, national-welfare-focused competition policies to such pursuing supranational and suprajurisdictional welfare goals as well as cooperation on concrete, specified cases are necessary from an economic perspective. However, both topics are hardly compatible with the contemporary governance principles of the ICN. A way forward can be expected from the economic concept of a multilevel lead jurisdiction model that possesses the potential to balance allocative and dynamic efficiency. It remains an open question, though, whether such a model could evolve out of the ICN during the next decade(s).



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## Figures

Agency Effectiveness	Mission	Output	Ongoing Work
	Identifying key elements of a well-function competition agency and good practices for strategy and planning, operations, and enforcement tools and procedures. Sharing of experience among ICN members and NGAs and to develop and disseminate good practices for agency effectiveness	<ul style="list-style-type: none"> <li>• Competition Agency Practice Manual (Strategic Planning and Prioritization &amp; Effective Project Delivery)</li> <li>• Workshops and Teleseminars</li> <li>• Curriculum Project               <ul style="list-style-type: none"> <li>• Series I. Competition Policy Fundamentals (5 Modules)</li> <li>• Series II. Horizontal Restraints (1 Module)</li> <li>• Series III. Dominant Firm Conduct (1 Module)</li> <li>• Series IV. Mergers (1 Module)</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Continue to develop the Agency Practice Handbook (Effective Knowledge Management &amp; Human Resources Management &amp; proposals for ex-post evaluation as well as communication and accountability)</li> <li>• New work on Effectiveness of different types of Investigative Processes</li> <li>• Curriculum Project               <ul style="list-style-type: none"> <li>• Agency Effectiveness</li> <li>• Developing Agencies</li> <li>• Competition Advocacy</li> <li>• Unilateral Conduct, Horizontal Agreements</li> </ul> </li> </ul>

**Figure 1: Agency Effectiveness Working Group**

Cartel	Mission	Output	Ongoing Work
	Addressing the challenges of anti-cartel enforcement across the entire range of ICN members and amongst the agencies with different levels of experiences. At the heart of antitrust enforcement is the battle against hardcore cartels directed at price fixing, bid rigging, market sharing and market allocations.	<ul style="list-style-type: none"> <li>• Compilation of "Good Practices" from the Anti-Cartel Enforcement Manual of the ICN Cartel Working Group</li> <li>• Anti-Cartel Templates</li> <li>• Compilation of the world's largest collection of cartel awareness and outreach materials.</li> <li>• Cartel Workshops and annual conferences</li> </ul>	<ul style="list-style-type: none"> <li>• Enforcer roundtable telephone discussions on cartel awareness &amp; outreach efforts</li> <li>• New Anti-Cartel Enforcement Manual Chapter on Case Resolution</li> <li>• Coordinating the completion of the Anti-Cartel Enforcement Templates by additional ICN Members, update of old templates</li> </ul>

**Figure 2: Cartel Working Group**

<b>Merger</b>	<b>Mission</b>	<b>Output</b>	<b>Ongoing Work</b>
	Promoting the adoption of best practices in the design and operation of merger review regimes in order to enhance the effectiveness of each jurisdiction's merger review mechanisms; to facilitate procedural and substantive convergence; and to reduce the public and private time and cost of multijurisdictional merger reviews.	<ul style="list-style-type: none"> <li>• Merger Guidelines Workbook</li> <li>• Recommended Practice for Merger Notification Procedures</li> <li>• Merger Remedies Report</li> <li>• Investigative Techniques Handbook</li> <li>• Model Confidentiality Waiver</li> <li>• Practical Guidance Materials</li> <li>• Workshops and Teleseminars</li> </ul>	<ul style="list-style-type: none"> <li>• Project on Economic Analysis in Merger Review</li> <li>• Work to promote familiarity, use, and implementation of the MWG's work product</li> <li>• ICN Framework for merger review cooperation</li> <li>• International Merger Enforcement Cooperation</li> <li>• Potential ICN Merger Workshop</li> </ul>

**Figure 3: Merger Working Group**

<b>Unilateral Conduct</b>	<b>Mission</b>	<b>Output</b>	<b>Ongoing Work</b>
	Examining challenges involved in analyzing unilateral conduct of dominant firms and firms with substantial market power, facilitate greater understanding of the issues involved in analyzing unilateral conduct, and to promote greater convergence and sound enforcement of laws governing unilateral conduct	<ul style="list-style-type: none"> <li>• Recommended Practices on the assessment of dominance/substantial market power</li> <li>• Recommended Practice on the application of unilateral conduct rules to state-created monopolies</li> <li>• Workshop and Teleseminars</li> </ul>	<ul style="list-style-type: none"> <li>• Continue to Develop a Unilateral Conduct Workbook</li> <li>• Discuss Recommended Practices or Other Guidance for the analysis of unilateral conduct</li> <li>• Consider Further Work Identified in the Group's Long Term Plan</li> </ul>

**Figure 4: Unilateral Conduct Working Group**



Advocacy	Mission	Output	Ongoing Work
	Developing practical tools and guidance, and to facilitate experience sharing among ICN member agencies, in order to improve the effectiveness of ICN members' advocacy activities in advocating the adoption of competition principles in government and promote the development of a competition culture within society.	<ul style="list-style-type: none"> <li>• Best Practice Recommendations               <ul style="list-style-type: none"> <li>• Recommendation on International Cooperation</li> <li>• Recommendation on Cooperating in combating Hard Core Cartels</li> <li>• Recommendation on Competition Assessment of Governmental Market Regulation</li> <li>• Best practices for the sharing of confidential information in cartel investigations</li> <li>• Best practices to help governments advocate pro-competitive reform</li> </ul> </li> <li>• Advocacy Toolkit Part 1 (Advocacy process and tools)</li> <li>• Teleseminars</li> </ul>	<ul style="list-style-type: none"> <li>• Raising Awareness of the Benefits of Competition (the Benefits Project).</li> <li>• Competition Advocacy Toolkit Part 2 (communications and public relations)</li> <li>• Market Studies Information Store and Market Studies Good Practice Handbook.</li> <li>• Competition Advocacy Experience Sharing Teleseminars.</li> </ul>

Figure 5: Advocacy Working Group

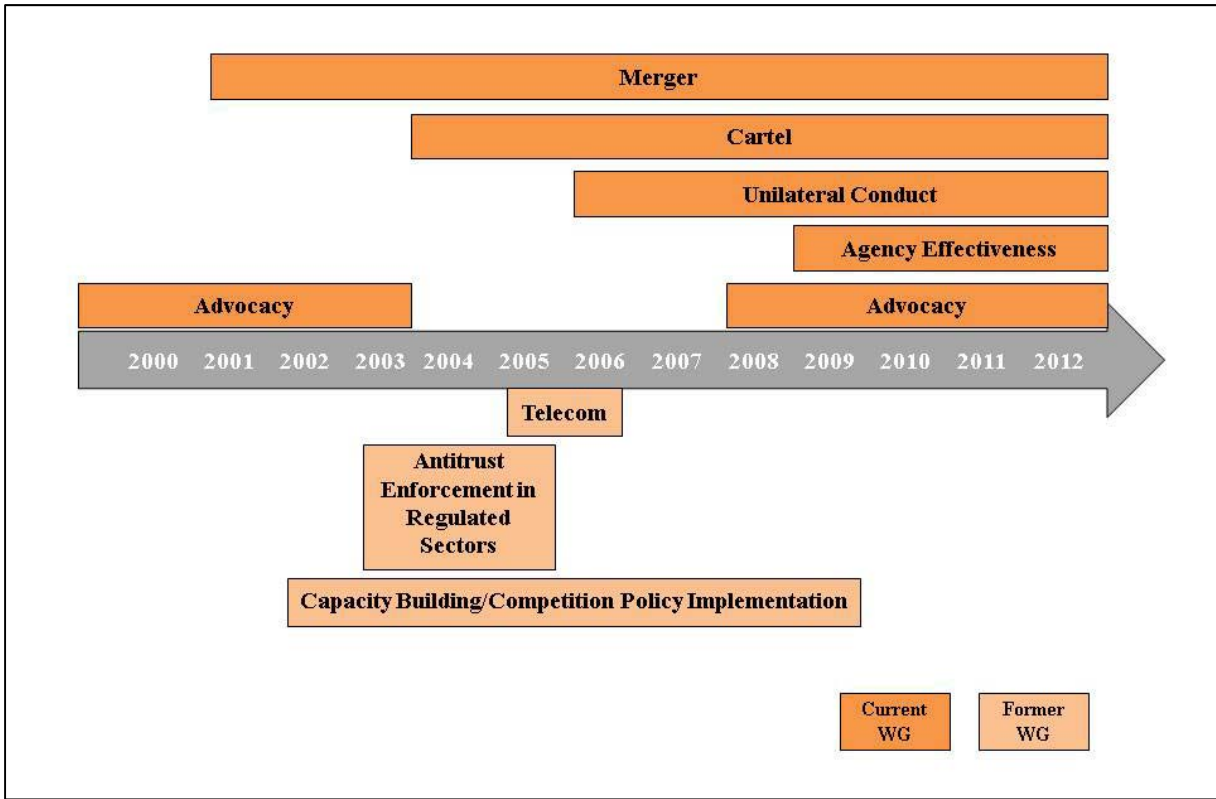
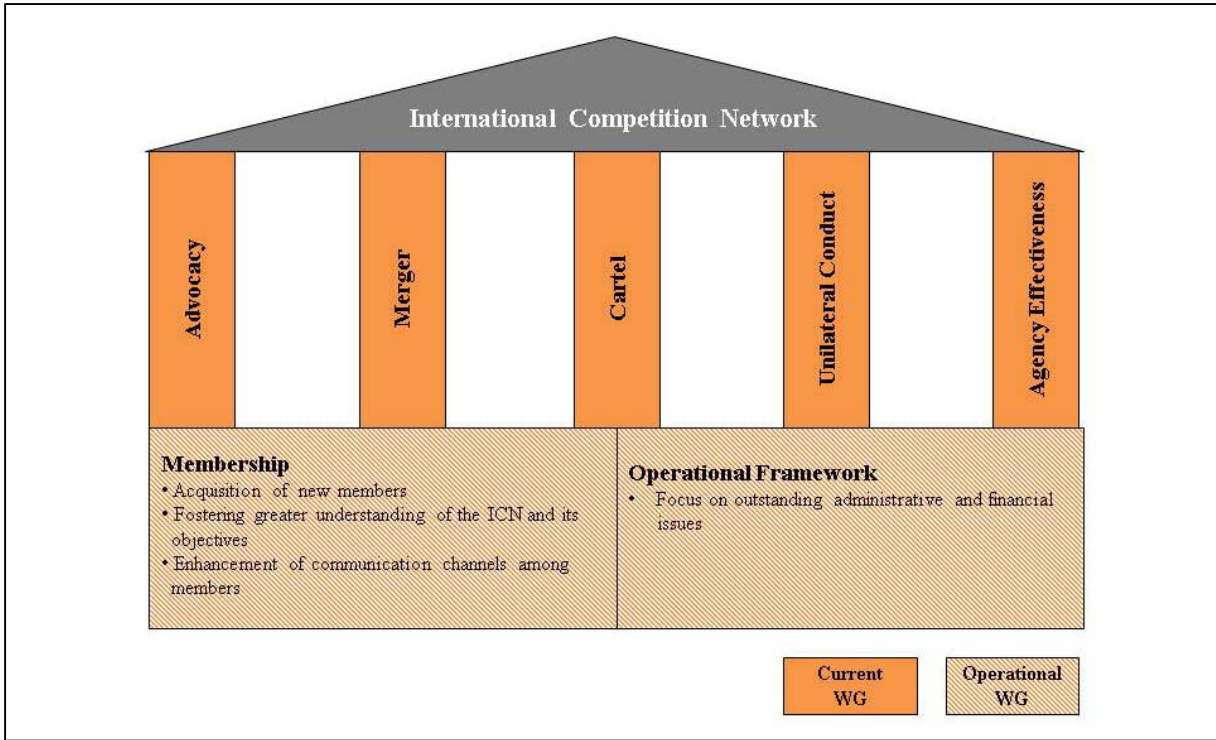


Figure 6: Timeline of Current and Former Working Groups



**Figure 7: Working Groups of the International Competition Network**

**Diskussionspapiere aus dem Institut für Volkswirtschaftslehre  
der Technischen Universität Ilmenau**

- Nr. 15 *Kallfass, Hermann H.:* Vertikale Verträge und die europäische Wettbewerbspolitik, Oktober 1998. In veränderter Fassung erschienen als: „Vertikale Verträge in der Wettbewerbspolitik der EU“, in: *Wirtschaft und Wettbewerb*, 49. Jg., 1999, S. 225-244.
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- Nr. 17 *Kallfass, Hermann H.:* Strukturwandel im staatlichen Einfluss, April 1999.
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- Nr. 19 *Kuchinke, Björn:* Sind vor- und vollstationäre Krankenhausleistungen Vertrauensgüter? Eine Analyse von Informationsasymmetrien und deren Bewältigung, September 2000.
- Nr. 20 *Steinrücken, Torsten:* Der Markt für „politische Zitronen“, Februar 2001.
- Nr. 21 *Kuchinke, Björn A.:* Fallpauschalen als zentrales Finanzierungselement für deutsche Krankenhäuser: Eine Beurteilung aus gesundheitsökonomischer Sicht, Februar 2001.
- Nr. 22 *Kallfass, Hermann H.:* Zahlungsunfähige Unternehmen mit irreversiblen Kosten, ihre Fortführungs- und Liquidationswerte, März 2001.
- Nr. 23 *Kallfass, Hermann H.:* Beihilfenkontrolle bei Restrukturierungen und Privatisierungen, April 2001.
- Nr. 24 *Bielig, Andreas:* Property Rights und juristischer Eigentumsbegriff. Leben Ökonomen und Juristen in unterschiedlichen Welten?, Juni 2001.
- Nr. 25 *Sichelstiel, Gerhard:* Theoretische Ansätze zur Erklärung von Ähnlichkeit und Unähnlichkeit in Partnerschaften, Juni 2001.
- Nr. 26 *Bielig, Andreas:* Der „Markt für Naturschutzdienstleistungen“. Vertragsnaturschutz auf dem Prüfstand, Juli 2001.
- Nr. 27 *Bielig, Andreas:* Netzeffekte und soziale Gruppenbildung, Januar 2002.
- Nr. 28 *Kuchinke, Björn A.; Schubert, Jens M.:* Europarechtswidrige Beihilfen für öffentliche Krankenhäuser in Deutschland, April 2002.

- Nr. 29 *Bielig, Andreas*: Messung von Nachhaltigkeit durch Nachhaltigkeitsindikatoren, Februar 2003.
- Nr. 30 *Steinrücken, Torsten*: Die Legitimation staatlicher Aktivität durch vertragstheoretische Argumente: Anmerkungen zur Kritik an der Theorie des Gesellschaftsvertrages, März 2003.
- Nr. 31 *Steinrücken, Torsten; Jaenichen, Sebastian*: Heterogene Standortqualitäten und Signalstrategien: Ansiedlungsprämien, Werbung und kommunale Leuchtturmpolitik, April 2003.
- Nr. 32 *Steinrücken, Torsten*: Funktioniert ‚fairer‘ Handel? Ökonomische Überlegungen zum alternativen Handel mit Kaffee, Juli 2003.
- Nr. 33 *Steinrücken, Torsten; Jaenichen, Sebastian*: Die Wiederentdeckung der Zweitwohnsitzsteuer durch die Kommunen - zu Wirkungen und Legitimation aus ökonomischer Sicht, September 2003.
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- Nr. 40 *Engelmann, Sabine*: Internationale Transfers und wohlfahrtsminderndes Wachstum, September 2004.
- Nr. 41 *Steinrücken, Torsten; Jaenichen, Sebastian*: Zum Einfluss von Ausländern auf die Wirtschaftsleistung von Standorten - Ist Zuwanderung ein Weg aus der ostdeutschen Lethargie?, Oktober 2004.

- Nr. 42 *Steinrücken, Torsten; Jaenichen, Sebastian: Wer ist wirklich reich? - Zu Problemen der Wohlfahrtsmessung durch das Bruttoinlandsprodukt, April 2005.*
- Nr. 43 *Steinrücken, Torsten; Jaenichen, Sebastian: Wo bleiben die Subventionssteuern? - Probleme des Beihilfenrechts und ein alternatives Regulierungskonzept, Mai 2005.*
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- Nr. 52 *Kallfaß, Hermann H.; Kuchinke, Björn A.: Die räumliche Marktabgrenzung bei Zusammenschlüssen von Krankenhäusern in den USA und in Deutschland: Eine wettbewerbsökonomische Analyse, April 2006.*
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- Nr. 59 *Lehnert, Ninja M.*: Externe Kosten des Luftverkehrs - Ein Überblick über den aktuellen Stand der Diskussion, April 2008.
- Nr. 60 *Walterscheid, Heike*: Reformbedarf etablierter Demokratien im Kontext dezentralisierter Gesellschaftssysteme - Grundlegende Hindernisse bei Steuersystemreformen“, April 2010.
- Nr. 61 *Walterscheid, Heike; Wegehenkel, Lothar*: Kostenstruktur, Zahlungsbereitschaft und das Angebot von Mediengütern auf Medienmärkten, Juni 2008.
- Nr. 62 *Walterscheid, Heike; Wegehenkel, Lothar*: Wohlstand der Nationen und handlungsrechtliche Struktur eines Gesellschaftssystems, September 2008.
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- Nr. 68 *Kallfaß, Hermann H.:* Die Aufmerksamkeit für, die Nutzung der und die Werbung in Medien in Deutschland, November 2010.
- Nr. 69 *Budzinski, Oliver:* Empirische Ex-Post Evaluation von wettbewerbspolitischen Entscheidungen: Methodische Anmerkungen, Januar 2012.
- Nr. 70 *Budzinski, Oliver:* The Institutional Framework for Doing Sports Business: Principles of EU Competition Policy in Sports Markets, January 2012.
- Nr. 71 *Budzinski, Oliver; Monostori, Katalin:* Intellectual Property Rights and the WTO, April 2012.