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Coordination in multijurisdictional competition cases
Developing a "main impact principle" in international law

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Europa-Kolleg Hamburg
Institute for European Integration

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Coordination in multijurisdictional competition cases
Developing a "main impact principle" in international law

Thea Freese*

Abstract

This paper introduces a "main impact principle" for the international allocation of competition cases to address welfare losses arising under increasingly multijurisdictional competition investigations. The principle is derived from rules on case allocation in the European Competition Network ("ECN") and in bilateral treaties on positive comity, like the agreement between the European Union and the United States of America signed in 1998. Despite some drawbacks, its application might lead to a workable international competition regime. In the light of sovereignty of states it seems more likely that it will find acceptance as a non-binding mechanism of coordination rather than a strict rule enforced by an international agency.

key words: extraterritorial jurisdiction, competence allocation, advanced comity, cooperation agreements, conflict of laws, effects doctrine

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I. List of abbreviations

CFR	Charter of Fundamental Rights of the European Union
Commission	European Commission
EC	European Community
ECtHR	European Court of Human Rights
ECJ	European Court of Justice
ECN	European Competition Network
EU	European Union
FTC	Federal Trade Commission
GATT	General Agreement on Tariffs and Trade
GE	General Electric
ICN	International Competition Network
M&A	Mergers and Acquisitions
NCA	National Competition Authority
OECD	Organization for Economic Cooperation and Development
TFEU	Treaty on the Functioning of the European Union
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
US	United States of America
WTO	World Trade Organization

II. Table of cases

Alcoa/Reynolds	O.J. 2002, L 58/25
AOL/Time Warner	O.J. 2000, L 268/28
Boehringer Mannheim v. Commission	ECR 769, 1970
Boeing/McDonnell-Douglas	O.J. 1997, L 336/16
Consorzio del Prosciutto di Parma	Boll. N. 25/1996
DuPont/ICI	O.J. 1993, L 7/13
Dyestuffs	3 CMLR 557, 1972
Franz Fischer v. Austria	ECtHR, Application no 37959/97, 2001
GE/Honeywell	O.J. 2004, L 48/1
Hartford Fire Insurance	509 U.S. 764, 1993
Hilton v. Guyot	U.S. LEXIS 2294, 1895
Hunt v. T&N	4 S.C.R. 289, 1993
IRI/AC Nielsen	26th Report on Competition Policy, 144-148, 1996
Lysine	O.J. 2000, L 152/14
MCI Worldcom/Sprint	O.J. 2003, L 300/1
Microsoft v. Commission	O.J. 2007, C-269
Öztürk v. Germany	NJW 1985, 1273
Provimi v. Aventis	EWHC 961, 460, 2003
PVC II	ECR I-8375, 2002
Santa Cruz/Microsoft	27th Report on Competition Policy, para 79, 1997
SABRE/Amadeus	IP/91/784, 1991
Shell/Montecatini	O.J. 1994, L 332
Sotralentz v. Commission	ECR II-1127, 1995
Tréfileurope v. Commission	ECR II-797, 1995
Vitamin Cartels	O.J. 2003, L 6/1
Walt Wilhelm v. Bundeskartellamt	ECR 1, 1969
Wood pulp	4 CMLR 901, 1988

1. Introduction

> *The only way most states can realize and express their sovereignty is through participation in the regimes that make up the substance of international life*[1].

Increasingly aware of their impotence to protect domestic markets from international competitive constraints, national authorities show a growing interest in the development of an international competition regime. Two strands of argument lead the discussions among legal scholars: Shall the new system evolve around rules of coordination with the ultimate aim of forming an international competition authority or shall one favour the development of a uniform global competition law and thus advance on the path of convergence? Meanwhile economists are unsure whether the convergence of rules will not incur welfare losses linked to a lack in competition of competition rules. The need for an international administrative competition law due to a significant increase in multijurisdictional competition cases and the hitherto existing failed attempts of global coordination will be discussed in Chapter 2.

Currently the cost that multijurisdictional competition control carries for companies is likely to outweigh the benefits of effective surveillance. The urgent development of a solution that does neither impose unbearable burdens on multinational corporations (hereinafter "MNCs") nor neutralizes its purpose by being slow-moving and inefficient is thus of utmost importance. This paper introduces the concept of a worldwide delimitation of competences based on a "main impact principle". The principle is derived from ongoing endeavours of successful cooperation among national competition authorities and best practice results from the European Competition Network [2] (hereinafter "ECN") (see Chapter 3) and the EU-US Positive Comity Agreement[3] (see Chapter 4). The concepts used to deal with jurisdictional conflicts, exchanges of confidential information, multiple procedures, double punishment and the naming of a lead authority will be discussed in detail.

The thesis will be guided by the following research question:

Can international jurisdictional conflicts in competition cases be solved by the effective global allocation of competences and how should such a coordination mechanism look like?

The "main impact principle" itself will be advanced in Chapter 5. The currently observed doctrines for the global delimitation of competences are outlined to grasp the environment the new concept will be moving in, a brief presentation of solutions suggested by other academics will follow and finally the characteristics of the "main impact principle" and the limitations thereto will be developed. Lastly a summary of the findings and an outlook for future developments will be given.

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1 *Chayes*, The new sovereignty: Compliance with international regulatory agreements (1998), 27.

2 Detailed information available online at http://ec.europa.eu/competition/ecn/ index_en.html.

3 Find the EU-US Positive Comity Agreement 1998 online at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21998A0618%2801%29:EN:HTML.

2. Research problem

2.1 The need for international administrative competition law

The desirability of an international competition regime has been identified by European scholars already in the 1930s.[4] Since then, globalization has gained momentum and the capacity of states to respond to anticompetitive conduct by multinational corporations has decreased substantially.[5] The main antagonism lies in the fact that business activities become increasingly borderless[6] while sovereign states retain in principle exclusive jurisdiction over their territories and national companies.

Efforts of harmonization and coordination have taken place at the level of substantive law[7], but little research has been conducted in the field of international administrative competition law.[8] This development is detrimental to enhance effective coordination at the international level, as administrative rules have a number of benefits over substantive law. Most importantly, they are much more flexible than formal enforcement law and by nature better able to cope with changing situations.[9] Furthermore, although not yet counted as an independent judicial discipline, the field of competition law may serve as a laboratory to further assist the development of an evolving global administrative law.[10] Next to legal considerations, the exercise of competition law is significantly built upon economic and political disciplines to reach a just and lawful verdict. Thus, national competition authorities (hereinafter "NCAs") enjoy broad judicial discretion in their work and their decisions are not easy to review by courts. In consequence underlying procedural law is of high importance in merger and cartel investigations as to legitimate the final judgement and ensure non-discrimination before the law.[11] This again enforces the need for international administrative competition law.

Despite the great value of administrative competition legislation, some important obstacles have to be kept in mind. Firstly, it is only effective if supported by national competition rules. The effect of administrative law depends on the might of the authority exercising it. In times where MNCs hold more economic power than many governments the significance of administrative rules is endangered to decline.[12] More

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4 *Oualid,* Les ententes industrielles internationales et leurs consequences sociales. La défense des travailleurs et des consommateurs (1926); *MacGregor,* Les cartels internationaux (1927); *Wolff,* Die Rechtsgrundlagen der internationalen Kartelle (1929); *Király,* International cartels and their effects on the progress of international law (1929).

5 See *Gerber,* Global competition: law, markets and globalization (2009), 116 et sqq.; *Terhechte,* International competition enforcement law between cooperation and convergence (2011), 13.

6 The number of multinational corporation reached 82.000 in 2009 (see UNCTAD World Investment Report (2009), xxi), while the number is constantly increasing, the average size of multinationals is decreasing.

7 See for example the initiatives to fight hardcore cartels, e.g. *OECD,* Hard core cartels: recent progress and challenges ahead (2003b).

8 For research in the field of procedural law see *Terhechte,* Das internationale Kartell- und Fusionsverfahrensrecht zwischen Kooperation und Konvergenz (2008a).

9 See *Matsushita,* International trade and competition law in Japan (1993), 69.

10 See *Hatje,* Öffentlich-rechtliche und verwaltungsprozessuale Prinzipien, in: *Terhechte,* Internationales Kartell- und Fusionskontrollverfahrensrecht (2008), 178.

11 See *Terhechte,* Die ungeschriebenen Tatbestandsmerkmale des europäischen Wettbewerbsrechts (2004), 42 et sqq.

12 On the argument that „the golden age of administrative guidance has passed" see *Matsushita,* International trade and competition law in Japan (1993), 69.

than before, coordination in the field of administrative rules is thus necessary to ensure a flexible and efficient approach to reach legitimate and just verdicts in times of globalization.

2.2 Increase in multijurisdictional competition cases

Some scientists argue that there is no need for a multilateral competition framework, as free trade automatically guarantees competitive behaviour.[13] However, as every enforcement agency has effective leverage against multi-national companies and more than 100 countries have competition laws in place today[14], the costs for companies caused by unnecessary bureaucratic barriers, multiple penalization[15] and differences in notice periods increased substantially in recent years.[16] The development can be described by the term "race to the strictest" as in multijurisdictional competition reviews the most rigid ruling will prevail.[17] Increased spending for administrative personnel and adverse effects on the functioning of legal systems[18] further enhance the welfare losses caused by an increase in multinational competition proceedings. The wide application of the effects doctrine[19] can lead to serious jurisdictional conflicts among national competition authorities. When Boeing and McDonnell Douglas, two U.S. aircraft manufacturing giants, merged in 1997, the fact that the European Commission reviewed the merger led to heated controversy and almost ended in a trade war, as the parallel investigations came to contradicting conclusions.[20] Cases like *GE-*

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[13] On the "threat of imports argument" see *Williams*, The effectiveness of proposed antitrust programs for developing countries (1994), 209.

[14] See *Whish*, Competition law (2009), 801; *Papadopoulos*, International dimension of EU competition law and policy (2010), 15 and 43 et sqq; Illuminating examples are the 1989 Gillette/Wilkinson merger, that had to be notified in 14 jurisdictions and the Alcan merger, where the company had to hire lawyers from 35 different firms and file 16 notifications in 8 different languages, all having different information requirements and deadlines.

[15] See *Schild, Terhechte*, Strafrechtliche und strafprozessuale Prinzipien, in: *Terhechte*, Internationales Kartell- und Fusionskontrollverfahrensrecht (2008), 258 et sqq.

[16] According to a study conducted by PricewaterhouseCoopers in 2003, the average costs for an international merger amount to around € 3,3 million of which 65% are expenses for legal council. A multijurisdictional merger takes about 7 months to be cleared in all jurisdictions, see *PricewaterhouseCoopers*, A tax on mergers? Surveying the time and costs to business of multi-jurisdictional merger reviews (2003); On the same topic see *Heckenberger, W.*, Probleme der globalisierten Fusionskontrolle aus der Sicht eines Unternehmensjuristen, in: *Schwarze*, Europäisches Wettbewerbsrecht im Zeichen der Globalisierung (2002), 89 et sqq.; *ICN Mergers Working Group*, Report on the costs and burdens of multijurisdictional merger review (2004); *Mitschke*, The influence of national competition policy on the international competitiveness of nations (2008), 48 et sqq.

[17] Should one authority for example decide to prohibit a merger, this prohibition will prevail, see *Epstein*, Competition laws in conflict: antitrust jurisdiction in the global economy (2004), 165.

[18] Fears are related especially to the functioning of leniency systems as well as the imposition of counterproductive remedies by other jurisdictions, see *Bush*, Coming to America: a group of claimants are currently trying to enforce claims under European competition rules in a U.S. court (2008); *Geradin, Reysen, Henry*, Extraterritoriality, comity, and cooperation in EU competition law, in: *Guzman*, Cooperation, comity and competition policy (2011), 30.

[19] See infra 139.

[20] On the *Boeing/McDonnell-Douglas* dispute see *Kovacic*, Transatlantic turbulence: The Boeing-McDonnell Douglas merger and international competition policy (2001); *Fox*, Antitrust regulation across national borders: The United States Boeing versus the European Union of Airbus (1998); *Luz*, The Boeing-McDonnell Douglas merger: Competition law, parochialism and the need for a globalized antitrust system (1999); *Karpel*, The European Commission's decision on the Boeing-McDonnell Douglas merger and the need for greater US-EU cooperation in the merger field (1998); *Peck*, Extraterritorial application of antitrust laws and the US-EU dispute over the Boeing and McDonnell Douglas merger: From comity to conflict? An argument for a binding international agreement on antitrust enforcement and dispute resolution (1998). The threat of a trade war became evident in a war

Honeywell (2001)[21], *AOL/Time Warner* (2001)[22], *Microsoft*[23] and the review of the *vitamin cartels*[24] were similarly prone to jurisdictional conflicts. Extraterritorial competition investigations are politically highly sensitive and can lead to expensive disputes. All these costs have to be taken into account when calculating the welfare effects of cooperation in multijurisdictional competition cases. In recent years non-state actors have been furthermore prone to use anticompetitive practices as a substitute to official trade barriers no longer allowed under WTO rules.[25] Criticism has arisen that some states even play on an alternative kind of trade policy by influencing the competitive situation of so-called "national champions".[26] Unlike trade law, competition law is lacking an international regime and dispute resolution system to counteract such practices. Problems arising in the course of investigations thus currently find no appropriate platform to be resolved. If a multinational company has to face over 100 parallel merger reviews and can be held liable for anticompetitive behaviour in just as many jurisdictions the costs may outweigh the positive effects from effective cartel and merger control.

2.3 Failed attempts of global coordination

To overcome the problems outlined above, nation states have been working towards the implementation of a global system of coordination in competition issues since 1967. A non-binding *Catalogue of Recommendations on Co-operation in Competition Matters*[27] as well as *Recommendations on effective Action against Hard-core Cartels*[28] were developed by the OECD as a stimulus for greater cooperation among national competition authorities. These first approaches to develop common grounds on

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of words as a spokesman to the EU Commissioner expressed: „If any deal has an effect on the European marketplace, then the jurisdiction is within our territory. We don't give a damn about extraterritoriality." U.S. Vice President Al Gore's response: „We will be watching [the European Commission's] deliberations extremely carefully, and we will take whatever action is appropriate to ensure justice and fairness", see *Andrews,* Minister of objection nettles Washington (1997), D1.

21 See *Schmitz,* How dare they? European Merger Control and the European Commission's blocking of the General Electric/Honeywell merger (2002), 325 et sqq.; *Akbar,* Grabbing victory from the jaws of defeat: can the GE/Honeywell merger force international competition policy cooperation? (2002); *Franker,* Restoration: International merger review in the wake of General Electric/Honeywell and the triumphant return of negative comity (2004), 877 et sqq.

22 In the case of the *AOL/Time Warner* merger (O.J. 2000, L 268/28) cooperation between the EU and US authorities was successful: *Petersmann, Pollack,* Transatlantic economic disputes: the EU, the US and the WTO, 289 et sqq.; Invoking the Administrative Arrangement on Attendance ("AAA") officials of the U.S. antitrust authorities attended oral hearings at the Commission in the cases *AOL/Time Warner* as well as *Worldcom MCI/Sprint*, *GE/Honeywell* and *Alcoa/Reynolds*, see *Bael,* Due process in EU competition proceedings (2011), 63; *Dabbah,* Future directions in bilateral cooperation, in: *Guzman,* Cooperation, comity and competition policy (2011), 290 et sqq.

23 In *Microsoft v. Commission* (O.J. 2007, C-269) the Commission imposed a fine of 500 million EUR on Microsoft, while the company had already reached settlement in proceedings before the US authorities.

24 See on the *Vitamin Cartels* cases in detail *Connor,* Global price fixing: our customers are the enemy (2001), 305 et sqq.

25 On the danger that liberalized barriers to trade might be erected again by means of competition restraints see *Hope, Maeleng,* Competition and trade policies: coherence or conflict (1998), 47 et sqq.

26 See *Moreira Mateus, Coelho Moreira,* Competion law and economics: advances in competion policy enforcement in the EU and North America (2010), 303 et sqq., see for the argument that the national champions argument has no influence on the de facto decision-making of the Commission: *Oinonen,* Does EU merger control discriminate against small market companies? (2010), 137.

27 For the most recent version: http://www.oecd.org/dataoecd/60/42/21570317.pdf (1995).

28 Available under http://acts.oecd.org/Instruments/ShowInstrumentView.aspx?InstrumentID=193& InstrumentPID =189&Lang=en&Book=False (1998).

competition legislation and to overcome concerns over the exchange of confidential information are however only careful steps in the direction of reliable global coordination structures.[29]

The approach of the United Nations Conference on Trade and Development (hereinafter "UNCTAD") has similar shortcomings. The publication of a *UN Set of Principles and Rules on Competition*[30] and a *Model Law on Competition*[31] based on two resolutions on competition law adopted by the UN General Assembly in 1980 provide developing countries with a support forum on competition law and policy issues, including a peer review mechanism and technical cooperation.[32] The consultations that can be held under UN auspices are however of purely suggestive character and the effort of the UNCTAD rather increases the number of jurisdictions exercising extraterritorial competition reviews thereby augmenting the costs for MNCs even further.[33]

Founded in 2001 by the presidents for 14 national competition authorities, the International Competition Network[34] (hereinafter "ICN") serves as a framework for soft harmonization and convergence of national competition laws. The international organization has been very successful in recent years in achieving its tasks, but the voluntary character of recommendations does not provide for a reliable instrument in cases were hard national interests clash over jurisdictional issues.[35] The convergence of rules is however an important prerequisite for an effective network of joint reviews of competition cases.

The World Trade Organization (hereinafter "WTO") began its engagement in competition coordination in 1996 with the coming to life of the Singapore Group.[36] Setting up a forum for discussion to explore the relations between competition and trade policy the prospects of introducing a framework for competition law into the WTO were discussed; an endeavour that failed at the fatal Cancun round in 2003.[37] It is unlikely

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[29] See for the limits to the role of the OECD *Göranson, Reindl,* Organisation für wirtschaftliche Zusammenarbeit und Entwicklung (OECD), in: *Terhechte,* Internationales Kartell- und Fusionskontrollverfahrensrecht (2008), 1944 et sqq.; *Piilola,* Assessing theories of global governance: a case study of international antitrust regulation (2003), 207; *ICN Cartels Working Group*: Cooperation between competition agencies in cartel investigations (2007), 7 et sqq.

[30] Available online: http://www.unctad.org/en/docs/tdrbpconf10r2.en.pdf (2001).

[31] Available online: http://www.unctad.org/en/docs/tdrbpconf5d7.en.pdf (2000), the latest version was published in 2007.

[32] See in detail on the work of UNCTAD: *Dabbah,* International and comparative competition law (2010), 141 et sqq.

[33] See critically on the role of UNCTAD: *Mitschke,* The influence of national competition policy on the international competitiveness of nations: a contribution to the debate on international competition rules (2008), 40 et sqq; *Baetge,* Globalisierung des Wettbewerbsrechts: eine internationale Weltkartellordnung zwischen Kartell- und Welthandelsrecht (2009), 486 et sqq.

[34] For more information see http://www.internationalcompetitionnetwork.org/.

[35] See *Budzinski*, The International Competition Network: Prospects and limits on the road towards international competition governance (2004), 233; *Terhechte,* Das internationale Kartell- und Fusionskontrollverfahrensrecht zwischen Kooperation und Konvergenz, in: *ibid.,* Internationales Kartell- und Fusionskontrollverfahrensrecht (2008b), 2206; *Kerber,* The theory of regulatory competition and competition law (2009), 41.

[36] On the suggestions of the Singapore Groups find a comprehensive overview on the WTO website (http://www.wto.org/english/thewto_e/minist_e/min96_e/min 96_e.htm), see further *Baetge,* Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht (2009), 436 et sqq.; *Dabbah,* International and comparative competition law (2010), 123 et sqq.

[37] See *Kennedy,* Competition law and the World Trade Organization: the limits of multilateralism (2001); *Davidow, Shapiro,* The feasibility and worth of a World Trade Organization Competition Agreement

that the WTO will go anywhere in the coming years, least of all towards becoming a major player in solving multijurisdictional conflicts of competition law.

Another failed endeavour was the development of an international antitrust law laid down in the so-called Draft International Antitrust Code (hereinafter "DIAC") or Munich Code.[38] The document included not only the obligation for all signatories to set up a national competition authority, but also contained minimum enforcement standards as well as the inauguration of an international antitrust authority and an international antitrust panel for dispute settlement. This well-developed but far too ambitious project was politically not viable as the drafters held no official mandate by any of the leading organizations dealing with international antitrust legislation.[39] The authors were probably aware of the likely failure of their venture, but their pragmatic approach still included a number of groundbreaking approaches that served as a blueprint for further convergence in international competition laws.[40]

One reason for all these failed attempts of global coordination is the widespread fear of losing national sovereignty.[41] Furthermore, cooperation often fails due to a lack in common standards of protection and insufficient transparency of proceedings.[42] In addition, withholding information from other partners is often made legally necessary by national legislation on data protection.[43] A significant amount of trust-building, communication and convergence of rules is thus necessary to advance further towards a coordinated global competition regime.

The last question that remains to be answered in this respect is the adequacy of centralized global competition governance.[44] The Hayekian argument of limited

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(2003); *Budzinski, Bode,* Competing ways towards international antitrust: the WTO versus the ICN (2005).

38 Developed by experts of the Max Planck Institute in Munich and handed over to the General Director of the GATT in 1993 the text can be found in *Fikentscher, Immenga,* Draft International Antitrust Code (1995), 53 et sqq., for an assessment see *Fikentscher, Heinemann,* Der Draft International Antitrust Code – Initiative für ein Weltkartellrecht im Rahmen des GATT (1994), 97 et sqq.; *Fox,* Toward world antitrust and market access (1997); *Immenga,* An International Antitrust Code in perspective (1997), 8 et sqq.; *Drexl,* Perspektiven eines Weltkartellrechts (1998); *Baetge,* Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welt-handelsrecht (2009), 445 et sqq.

39 See for critical assessments by representatives of the leading international organizations *Phillips,* Comments on the Draft International Trust Code (1994), 327 et sqq. compared to his assessment of the work of the OECD on pages 332 et sqq.; also thematised in *N.N.,* OECD Committee lacks enthusiasm for Draft International Antitrust Code (1993), 771 et sqq.

40 A number of authors have picked up on the basic ideas of the DIAC, e.g. *Drexl, Behrens,* The future of transnational antitrust: from comparative to common competition law (2003); *Podszun,* Internationales Kartellverfahrensrecht (2003); *Conrad,* Die Notwendigkeit, die Möglichkeiten und die Grenzen einer internationalen Wettbewerbsordnung (2005); *Taylor,* International competition law: a new dimension for the WTO? (2006).

41 See *Scherer,* Competition policies for an integrated world economy (1994), xviii et sqq.; *Basedow,* Weltkartellrecht (1998), 111; *Love,* Beyond sovereignty: issues for a global agenda (2011), 34 et sqq.

42 See *Terhechte,* International competition enforcement law between cooperation and convergence (2011), 18 et sqq.

43 See for example on Austrian concerns of data protection *Cahill, Cooke,* The modernization of EU competition law enforcement in the European Union (2004), 52 et sqq.

44 For critical views on the idea of an international competition policy regime see *Freytag, Zimmermann,* Muss die internationale Handelsordnung um eine Weltwettbewerbsordnung erweitert werden? (1998), 50 et sqq.; *Wins,* Eine internationale Wettbewerbsordnung als Ergänzung zum GATT (2000); *Wilson,* Globalization and the limits of national merger control laws (2003); *Epstein,* Competition laws in conflict: Antitrust jurisdiction in the global economy (2004), 53; *Kerber,* The theory of regulatory

knowledge about the best solution and an inherent lack of flexibility of international systems is brought forward by a number of academics.[45] The opportunity for mutual learning exists only where a competition of competition regimes is in operation.[46] In the light of these arguments it remains unclear whether a centralized global competition regime is a desirable outcome.

Global network structures are free from some of these drawbacks.[47] While they have some potential to work towards a certain level of convergence of laws and coordination among competition authorities, their purely suggestive nature allows for flexible development and learning. Still, voluntary cooperation in networks is unable to address the fundamental problem of jurisdictional conflicts in cases of diverging strong national interests.[48]

The current global endeavours successfully work towards the convergence of competition rules around the globe, support developing countries in refining their legislation and aim at enhancing cooperation among NCAs. Still, they fail to provide a reliable mechanism to decrease the number of jurisdictions investigating a certain case. Neither the OECD, nor the UN, the WTO or the ICN have been able to provide both reliable and flexible instruments of global competition review.

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competition and competition law, in: *Bungenberg, Meessen, Puttler,* Economic law as an economic good: its role function and its tool function in the competition of systems (2009), 27 et sqq.

45 On the argument that multiple enforcement likely leads to more innovation than enforcement by a monopolistic competition authority see *Fox,* Modernization: efficiency, dynamic efficiency and the diffusion of competition law, in: *Ehlermann, Atanasiu,* European Competition Law Annual 2000 (2001), 123; *Wils,* Regulation 1/2003: a reminder on the main issues, in: *Geradin,* Modernisation and enlargement: two major challenges for EC competition law (2004a), para 57.

46 *Epstein,* Competition laws in conflict: Antitrust jurisdiction in the global economy (2004), 54.

47 See on networks in competition policy in detail *Terhechte,* Das internationale Kartell- und Fusionskontrollverfahrensrecht zwischen Kooperation und Konvergenz (2008a), 703 et sqq.

48 See *Terhechte,* Das internationale Kartell- und Fusionskontrollverfahrensrecht zwischen Kooperation und Konvergenz, in: *ibid.,* Internationales Kartell- und Fusionskontrollverfahrensrecht (2008b), 2206.

3. The European approach

One example of effective case allocation and conflict prevention is the delimitation of competences within the European Union.[49] This paper will focus on the horizontal delimitation of competences between competition authorities at the national level (Chapter 3.2), but will also briefly touch the vertical allocation of cases between national authorities and the European Commission (see Chapter 3.1).

3.1 Supranational competition authority

The allocation of cases within the European Union follows first of all the interstate trade criterion[50] (for cartels) and the community dimension (for mergers) as expressions of the *principle of subsidiarity*.[51] Anticompetitive behaviour affecting interjurisdictional trade is dealt with by the European Commission (hereinafter "Commission") while the remaining competition control is conducted by NCAs.[52] The Commission may always initiate proceedings and is particularly well placed to do so if the anticompetitive behaviour has substantial effects in more than three member states, the interests of the Community are at stake or new competition policy is bound to be developed.[53] This practice works toward the *ne bis in idem*[54] principle as according to Article 11 (6) Regulation 1/2003 NCAs might not conduct investigations if the Commission opened a procedure according to Article 7 Regulation 1/2003.[55] The phrasing of the Regulation provides the Commission with a wide scope of discretion on which cases to take on and which cases to leave to the national authorities. Should NCAs for example fail to agree on a lead authority among them the Commission can assume power[56]. The same holds true if a national authority plans to reach a decision that would stand in conflict with EU provisions. The decision of the Commission is binding upon national authorities (see Article 16(2) Regulation 1/2003) and the coherent application of EU competition law is thus ensured.

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49 Such a multi-level system of competence allocation is taken by some scholars as a blueprint for the global level, see *Kerber,* An international multi-level system of competition laws: federalism in antitrust (2003).

50 See critically on the subjective nature of the interstate trade criterion *Stuyck, Gilliams, Ballon,* Modernisation of European competition law: the Commission's proposal for a new regulation implementing Articles 81 and 82 EC (2002), 46.

51 See *Budzinski,* The governance of global competition: Competence allocation in international competition policy (2008), 154 et sqq.

52 Case allocation rules are laid down in the Council regulation (EC) No 1/2003 of December 16, 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (O.J. L1/1, 2003), hereinafter named „Regulation 1/2003".

53 See Article 11(6) of Regulation 1/2003. Community interests are at stake if the case is linked to exclusive competences of the EU or legal provisions can be applied more effectively by the Commission, further *Geradin, Reysen, Henry,* Extraterritoriality, comity, and cooperation in EU competition law, in: *Guzman,* Cooperation, comity and competition policy (2011), 36.

54 Latin, literally translated "not twice for the same".

55 See *Schild, Terhechte,* Strafrechtliche und strafprozessuale Prinzipien, in: *Terhechte,* Internationales Kartell- und Fusionskontrollverfahrensrecht (2008), 259.

56 See *Wils,* Regulation 1/2003: a reminder of the main issues, in: *Geradin,* Modernisation and enlargement: two major challenges for EC competition law (2004a), 115; *Ritter, Braun,* European competition law: a practitioner's guide (2005), 1037 et sqq.

3.2 Coordination within the European Competition Network (ECN)

Established in 2002 the European Competition Network (hereinafter "ECN") provides a platform to coordinate the allocation of cases and the coherent application of Articles 101 and 102 TFEU among NCAs in proceedings where the Commission does not conduct a centralized investigation. This is generally the case when the abovementioned criteria are not fulfilled, e.g. when the markets of three or less member states are affected or when the economic effects of a conduct are comparatively small. The ECN facilitates the exchange of relevant information[57] as well as effective assistance in investigations[58] among NCAs. Article 22 allows for example for an NCA to carry out a fact-finding mission or inspection on behalf of another NCA[59]. Of significant importance in cartel investigations are Articles 11(3), 12 and 22 of Regulation 1/2003 as they provide legal grounds for simultaneously carried out inspections by several NCAs and for a subsequent exchange of the acquired information[60].

In order to make proceedings even more "efficient and flexible"[61], Regulation 1/2003 specifies that wherever possible cases should be dealt with by one single authority. In general, case allocation rules are based on the principle of parallel competences of NCAs and the Commission. Vertical and horizontal allocations shall take place as soon as possible after the initiation of proceedings through effective communication.[62] If the proceedings are conducted at the national level a "single well placed authority" is named to take the lead in multijurisdictional cases. According to para 8 of the Commission Notice[63], three cumulative conditions characterize such an authority: (a) the agreement or practice has substantial, direct, actual or foreseeable effects on competition within its territory, is implemented within or originates from its territory; (b) the authority is able to effectively bring to an end the infringement [...] and it can, where appropriate, sanction the infringement adequately; (c) it can gather, possibly with the assistance of other authorities, the evidence required to prove the infringement. The Commission has no saying in the case allocation or possible multiple procedures by national authorities as it is *primus inter pares* among the other authorities in the ECN.

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57 Article 12(1) of Regulation 1/2003 NCAs provides for the possibility to share and make use of evidence among the ECN, also including confidential information. Confidential information can however not be exchanged in the context of merger control coordination, if not either provided for by national law or explicitly waived by the parties.

58 See for example the recently launced Model Leniency Programme to ease parallel leniency applications in the ECN (http://ec.europa.eu/competition/ ecn/model_leniency_en.pdf).

59 Article 22 of Regulation 1/2003 has recently been made use of by the *OHG Österreich* (15.07.2009) and the *Cour d'appel de Paris* (24.11.2009); although it seems that NCAs have discretion in this respect, even though they are bound by the duty of cooperation, see *Hofmann, Türk,* EU administrative governance (2006), 223.

60 The use of confidential information obtained from other NCAs as documentary evidence is however limited to the same object of investigation, the same case in question and only if an equal level of protection for natural persons is guaranteed.

61 These main aims where stipulated by *Philip Lowe,* Director of DG Competition during a speech held on 23 January 2004 at the University of London.

62 A time limit of three months to definitely allocate a case is given within the network. Should the facts of the case however change substantially during the proceedings, a case might be reallocated after that indicative deadline, see *Van Bael,* Competition law of the European Community (2005), 1026.

63 See Commission Notice on cooperation within the Network of Competition Authorities "Commission Notice" (O.J. C 101/03, 2004), para 7.

The current coordination mechanism within the ECN does not necessarily preclude national authorities from conducting parallel or consecutive investigations[64] although the legality of this practice is questioned by a number of academics[65] as well as the European Court of Human Rights[66] (hereinafter "ECtHR"). The critics argue that Article 50 Charter of Fundamental Rights of the European Union ("CFR"), clearly stating that "no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union" clearly prohibits proceedings by a second authority for the same anticompetitive behaviour.[67] This reasoning is also reflected in Article 13 of Regulation 1/2003 stating that "[w]here competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article 81 or Article 82 of the Treaty against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them". This line of argument is also supported by the *lis pendens* principle[68] according to which a court must decline its jurisdiction if another court is already investigating the same cause of action.

The Court of Justice however decided that multiple procedures are not inconsistent with the principle of *ne bis in idem* as they derive from the "special system of the sharing of jurisdiction between the Community and the Member States".[69] The Commission Notice also explicitly provides for parallel proceedings "where an agreement or practice has substantial effects on competition mainly in [the member states'] respective territories and the action of only one NCA would not be sufficient to bring the entire infringement to an end and/or to sanction it adequately"[70]. According to Ehlermann and Atanasiu parallel proceedings are possible, but only temporarily. As soon as one national authority closes its proceedings by acquittal or conviction all other NCAs must immediately discontinue their investigations.[71] The Commission Notice is not that straightforward. It leaves some scope of consideration to the national authorities.[72]

Linked to the question of multiple proceedings is the discussion whether multiple punishments are possible within the ECN framework. Regulation 1/2003 leaves open to dispute whether the EU Commission might impose sanctions after a member state has

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64 See *Wils,* Working paper IX, in: *Ehlermann, Atanasiu,* European Competition Law Annual 2002: Constructing the EU network of competition authorities (2004), 449 et sqq.

65 See *Soltész, Marquier,* Hält "doppelt bestraft" wirklich besser? Der ne bis in idem-Grundsatz im Europäischen Netzwerk der Kartellbehörden (2006), 2.

66 See for example *Öztürk v. Germany* (21.02.1984, A/73, para 50 et sqq. NJW 1985, 1273) or more recently *Franz Fischer v. Austria* (29.05.2001, ECtHR, application no. 37959/97).

67 See supra 64, 451.

68 On *lis pendens* in EU law see *Bellis, Van Hove,* Multiple enforcement and forum shopping after 1 May 2004: Fear for fear's sake? (2004),10; *Raitio,* The principle of legal certainty in EC law (2003), 157 et sqq.

69 See *Walt Wilhelm v. Bundeskartellamt* (1969, ECR 1), para 11, also confirmed by *PVC II* (2002, ECR I-8375); *Lysine (O.J. 2000, L 152/14)*; *Tréfileurope v. Commission* (1995, ECR II-791) and *Sotralentz v. Commission* (1995, ECR II-1137).

70 See Commission Notice (supra 63), para 12.

71 See *Wils,* Working paper IX, in: *Ehlermann, Atanasiu,* European Competition Law Annual 2002: Constructing the EU network of competition authorities (2004), 449.

72 See Commission Notice (supra 63), para 22: "An NCA may suspend or close its proceedings but it has no obligation to do so. Article 13 of the Council Regulation leaves scope for appreciation of the peculiarities of each individual case." The Commission argues that this is essential to provide for flexibility in proceedings and that "such flexibility also facilitates consistent application of the rules".

already done so or whether NCAs might impose multiple sanctions.[73] The *ne bis in idem* principle generally excludes multiple prosecution as well as double punishment for the same criminal act.[74] This view is supported by the majority of academics who argue that several NCAs may investigate an infringement, but only one authority may impose a penalty. [75] All member states of the European Union have according criminal jurisdiction in place.[76] Still some scholars claim that the double jeopardy argument does not hold when sanctions are only enforced upon anticompetitive behaviour on the domestic market.[77] Some argue that sanctions are *de facto* usually limited to the effects in the own jurisdiction.[78] The essential question is whether the same practice according to Article 13 of Regulation 1/2003 [79] is punished or in other words whether the prerequisite *"idem"* is met. According to the ECJ a conduct might have entirely different effects in different member states and thus individual aims of protection apply, but due to reasons of equity a sanction imposed by one NCA should still be deducted from penalties levied by other authorities [80]. The risks of double punishment and multiple procedures are thus largely overcome within the ECN.

Following current case law, an agreement that breaches both EU and national law can be fined twice.[81] An example is the *Dyestuffs* case[82], where both the German authorities and the EC imposed fines on the companies in question. Still, sanctions imposed by the Member States must be taken into account when determining the sanctions at Community level. The *ne bis in idem* principle is however not applied in relations to third countries. In the case *Boehringer Mannheim v. Commission*[83] the court ruled that a prior penalty imposed by a court in the United States must not be taken into account as "the application has put forward nothing capable of confirming the argument that the conviction in the United States was directed against the application or effects of the cartel other than those occurring in that territory". A protection from double punishment is thus only ensured within the limits of the ECN.

A fear voiced often in relation to the appointment of a single well-placed jurisdiction is the notion of forum shopping. If significant differences in the interpretation of competition rules or the system of applicable sanctions[84] become evident parties might

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73 See *Soltész, Marquier,* Hält "doppelt bestraft" wirklich besser? Der ne bis in idem-Grundsatz im Europäischen Netzwerk der Kartellbehörden (2006), 5 et sqq.

74 See Article 50 CFR.

75 See *Wils,* The principle of "ne bis in idem" in EC antitrust enforcement: a legal and economic analysis (2003), 131.

76 For the *ne bis in idem* principle in national legislation see *Eilmansberger,* „Ne bis in idem" und kartellrechtliche Drittstaatssanktionen (2004); *Mansdörfer,* Das Prinzip des ne bis in idem im europäischen Strafrecht (2004), 57 et sqq.

77 See *Bellis, Van Hove,* Multiple enforcement and forum shopping after 1 May 2004: fear for fear's sake? (2004), 6, supported by the Commission Notice, para 12 (supra 70).

78 See *Gussone,* Zusammenarbeit der Kartellbehörden im Rahmen des ECN (2010).

79 See also Commission Notice, para 21: "Article 13 of the Council Regulation can be invoked when the agreement or practice involves the same infringement(s) on the same relevant geographic and product markets".

80 See on the "Anrechnungsprinzip": *Van Bockel,* The *ne bis in idem* principle in EU law stating that the deduction of a prior penalty is an articulation of the principle of proportionality.

81 See on double jeopardy *Kent,* Law of the European Union (2001), 273; *Bellis, Van Hove,* Multiple enforcement and forum shopping after 1 May 2004: Fear for fear's sake? (2004).

82 See *Imperial Chemical Industries Ltd. v. Commission, Case 48/69* (3 CMLR 557, 1972).

83 See *Boehringer Mannheim GmbH v. Commission* (ECR 769, 1970).

84 A wide array of applicable penalties is available in the different member states, e.g. under UK law cartel conduct might be punished with custodial sentences (U.K. Enterprise Act 2002), while in Spain no criminal sanctions are available in such a case (Law 16/1989 on the Defence of Competition).

decide to pursue claims either in front of the strictest or the most lenient national authority.[85] According to a Commission study from 1994 two thirds of all cases have economic impacts in more than one member state.[86] Furthermore, the relevant *Provimi v. Aventis*[87] case sets out that a customer can bring his claim for all accumulated damages in front of the jurisdiction with the most favourable conditions for prosecution, thus widely opening the door for forum shopping.[88] This problem will only be overcome if national competition rules are widely harmonized and the interpretation of the legal texts is conducted in a congruent way.[89] As the Commission investigates all major cases and EU competition laws are largely consonant with each other the real danger of forum shopping is however deemed to be negligible by many scholars.[90]

Another inherent risk to the lead jurisdiction approach is the danger of under-enforcement.[91] Due to national interests or a lack of resources a "well placed authority" might decide not to take action or to approve the conduct in question. This will however regularly lead to the Commission assuming power or another NCA starting parallel proceedings. The danger of under-enforcement is thus marginal in the EU.

Some academics furthermore criticize the strict framework in which NCAs move and the strong control exercised by the Commission that goes not in conformity with the claim that a "culture of competition" including "abundant case law, clearly established basic principles and well-defined details" is already a reality in the ECN.[92] Scholars are concerned with the lack of trust among NCAs and of the Commission towards the NCAs, as the Commission retains a veto right and the national authorities may conduct their own investigations in cases of disagreement.[93] Although these rigid legal structures might seem unnecessary, they are of utmost importance for providing a reliably legal framework that allows at the same time for a flexible development of competition rules at the national level.

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85 See *Jacobs, Deisenhofer,* Working Paper I, in: *Ehlermann, Atanasiu,* European Competition Law Annual 2001 (2003), 204; *Jones, Sufrin,* EC competition law: Text, cases and materials (2007), 1348; *Dabbah,* International and comparative competition law (2010), 114.

86 *Bourgeois,* Panel discussion, in: *Ehlermann, Atanasiu,* European Competition Law Annual 2000 (2001), 274.

87 EWHC 961 (2003), see also *SanDisk Corporation v. Koninklijki Philips Electronics N.V.,* EWHC 332 (2007).

88 See *Jones, Sufrin,* EC competition law: Text, cases and materials (2007), 1348.

89 See *Holmes,* A practical guide to national competition rules across Europe (2004), 20.

90 On complainants „shopping" for the most favourable conditions of prosecution or defence see *Siragusa,* The modernization of EC competition law: Risks of inconsistency and forum shopping (2000); *Bellis, Van Hove,* Multiple enforcement and forum shopping after 1 May 2004: Fear for fear's sake? (2004); *Geradin, Reysen, Henry,* Extraterritoriality, comity, and cooperation in EU competition law, in: *Guzman,* Cooperation, comity and competition policy (2011), 29, see also the speech by *Philip Lowe,* Director of DG Competition held on 23 January 2004 at the University of London.

91 See *Monti,* EC competition law (2007), 417 et sqq.

92 See *White paper on modernization* (O.J. 1999, C132), criticism by *Monti,* EC competition law (2007), 418.

93 See *Monti,* EC competition law (2007), 418.

4. The transatlantic approach

"[We] cannot avoid the possibility of conflicts of jurisdiction, with both the United States and the Community claiming jurisdiction in the same areas. If the case is a sufficiently important one, the consequence could be an unseemingly and damaging dispute. I therefore think that we now need to give serious considerations to the desirability of a Treaty or less formal agreement between the Community and the United States, to deal with such problems."[94]

Under the U.S. Sherman Act antitrust law can be applied when a merger between two foreign companies has a "direct, substantial and reasonably foreseeable impact on U.S. commerce".[95] This understanding of extraterritorial jurisdiction is very similar to the EU and the likelihood of disputes has prompted the competition authorities to cooperate by sharing information and coordinating their policies. Since 1991 the governments of the EU and the US signed a number of agreements[96], brought to life a Merger Working Group and engaged in the exchange of employees and informal contacts between their competition authorities.[97] In its annual report of 2009 the European Commission calls the cooperation with the United States "intense, both as regards individual cases and more general matters related to competition policy".[98] The relevant provisions on transatlantic case allocation as agreed upon in the 1998 Positive Comity Agreement and the lessons drawn for the development of a "main impact principle" in international law will be discussed below.

4.1 EU-US Positive Comity Agreement

"The old common rules relating to recognition and enforcement were rooted in an outmoded conception of the world that emphasized sovereignty and independence, often at the cost of unfairness. Greater comity is required in our modern era when international transactions involve a constant flow of products, wealth and people across the globe".[99]

"We should not expect the principle of positive comity [...] to impact dramatically on the proposition that laws are written and enforced to protect national interests."[100]

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94 *Brittan*, Competition policy in the European Community: the new merger regulation (1990), 15.

95 See U.S. Sherman Act (http://www.justice.gov/atr/public/divisionmanual/chapter 2. pdf), although the definition is unclear as described by *Beckler, Kirtland*, Extraterritorial application of U.S. antitrust law: what is a „direct, substantial, and reasonably foreseeable effect" under the foreign trade antitrust improvements act? (2003), 15 et sqq. Some guidelines in this respect are given by the American Bar Association in *Pearlstein*, Antitrust law developments (2002), 1119 et sqq.

96 Cooperation agreements include the 1991 agreement (infra 105), the agreement on positive comity (infra 106), which supplements the first, as well as the Administrative Arrangement on Attendance in Proceedings (1999), providing for the presence of officials at proceedings of the other authority and the Best Practices on Cooperation in Merger Cases (2002) which can be found under http://ec.europa.eu/competition/international/bilateral/eu_us.pdf.

97 See *Parisi, Podzun*, Verwaltungskooperationsabkommen zwischen der Europäischen Union und den Vereinigten Staaten von Amerika, in: *Terhechte*, Internationales Kartell- und Fusionskontrollverfahrensrecht (2008), 2086 et sqq.

98 See *European Commission*, Report on Competition Policy 2009 (2010), 51; supra 97, 2102 et sqq.

99 Taken from the *Hunt v. T&N* (4 S.C.R. 289, 1993) ruling by the Canadian Supreme Court, a landmark decision on the conflict of laws.

100 *Atwood*, Positive comity: is it a positive step?, in: *Hawk*, Annual proceedings of the Fordham Corporate Law Institute (1993), 86.

Comity agreements form a frequent part of interagency cooperation initiatives to overcome the uncoordinated employment of the effects doctrine by a number of jurisdictions simultaneously.[101] The legal concept of comity is however not clearly specified. Taking the words of Joel R. Paul "comity has been defined variously as the basis of international law, a rule of international law, a rule of choice of law, courtesy, politeness, convenience or goodwill between sovereigns, a moral necessity, expedience, reciprocity or considerations of high international politics concerned with maintaining amicable and workable relationships between nations".[102] For the purpose of this paper a distinction is made between traditional or negative comity and positive comity rules. Traditional comity can be defined as "the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation."[103] In other words it describes how a national authority tries to apply its competition rules without harming another country's important interests. The concept of positive comity equally serves to regulate the international delimitation of competences, but instead of the passive weighting of interests in traditional comity, it is characterized by sympathetically giving active assistance to other nation's critical concerns.[104] According to the EU-US 1991[105] and 1998[106] positive comity regulations the competition authority of one jurisdiction can ask the other authority to investigate anticompetitive behaviour based on foreign rules.[107] One important prerequisite for the functioning of positive comity is thus that the conduct in question is unlawful under the national competition laws of the requested country.[108] Positive comity counts as an instrument of hard cooperation, as the investigation is conducted by the requested country. Investigatory assistance, i.e. information sharing on the other hand is based on competition proceedings in the requesting country.[109] The review of notified mergers is excluded from the 1998 agreement, but as this has no effect for the operation of the 1991 agreement, most transatlantic cooperation today involves merger cases.[110]

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[101] See *Budzinski*, The governance of global competition: Competence allocation in international competition policy (2008), 165; on the worldwide application of the effects doctrine see infra 139.

[102] *Paul*, Comity in international law (1991), 3; see also *Aust*, Handbook of international law (2010), 11.

[103] See *Henry Hilton v. Gustave Bertin Guyot, et al.* (1895 U.S. LEXIS 2294), on negative comity see also *OECD*, Report on positive comity (1999), para 5; *Zanettin*, Cooperation between antitrust agencies at the international level (2002), 184; *Slaughter*, A new world order (2005), 251.

[104] On the concept of positive comity see *Atwood*, Positive comity: is it a positive step?, in: *Hawk*, Annual proceedings of the Fordham Corporate Law Institute (1993), 79; *OECD*, Report on positive comity (1999); *Baetge*, Globalisierung des Wettbewerbsrechts: eine internationale Wettbewerbsordnung zwischen Kartell- und Welthandelsrecht (2009), 368 et sqq.; *Papadopoulos*, The international dimension of EU competition law and policy (2010), 73 et sqq.

[105] On the first bilateral agreement to include a positive comity provision: Agreement between the government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (23.09.1991), OJ 1995 L 95/45, see in detail *Buchmann*, Positive Comity im internationalen Kartellrecht (2004), 65 et sqq.

[106] Agreement between the European Communities and the government of the United States of America on the application of positive comity principles in the enforcement of their competition laws (18.06.1998), O.J. L 173.

[107] See *Völcker*, Wettbewerbsrecht und seine internationale Durchsetzung: Kartellbehörden in Drittstaaten und ihre Beziehungen zur EG-Kommission am Beispiel des EG-US-Kartellrechtsabkommens, in: *Immenga, Mestmäcker*, Wettbewerbsrecht: EG (2007).

[108] See *Zanettin*, Cooperation between antitrust agencies at the international level (2002), 183.

[109] Ibid., 183.

[110] See *Papadopoulos*, The international dimension of EU competition law and policy (2010), 75; *Van Bael*, Due process in EU competition proceedings (2011), 61. The exclusion of mergers in the 1998 agreement can be explained by reasons of different decision deadlines in the EU and the US as well as the restriction upon the EU to only review mergers that have a Community Dimension. The EU would

There has been very limited practical experience with positive comity regulations until to date. The only case formally referred to the European authorities by the US Department of Justice was *SABRE/Amadeus* in 1997.[111] The informal application of positive comity principles has however frequently taken place. It first was observed in *IRI/AC Nielsen*[112] in the mid-90s, where the US authority left the investigation to the European Commission due to the fact that the anticompetitive behaviour mainly took place in Europe and affected mainly European consumers.[113] Furthermore informal cooperation has taken place in the merger case *DuPont/ICI*[114], in *Microsoft*[115], in the joint venture case *Shell/Montecatini*[116] and in *Consorzio del Prosciutto di Parma*[117]. Moreover, the number of notifications to the other authority has been steadily increasing[118], which indicates strengthened transatlantic cooperation among authorities in everyday matters. In the relations between the EU and the US the principle of positive comity thus *de facto* seems to have gained significant momentum.

Still, officials on both sides of the Atlantic Ocean do not seem to see the developments overtly positive. Director-General Schaub commented on the cooperation agreements with the US "[p]rocedures of notification and consultation and the principles of traditional and positive comity allow us to bring our respective approaches closer in cases of common interest but there exists no mechanism for resolving conflicts in cases of substantial divergence of analysis."[119] The question whether positive comity rules will apply in cases were important national interests are concerned has been denied by a number of legal academics.[120] Atwood comments on the limited practicability of

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be unable to follow a request under positive comity by the US authorities, if no Community Dimension is given.

111 In *SABRE/Amadeus* (IP/91/784, 1991) the US authority requested the Commission to investigate under EU competition rules anticompetitive conduct by four EU carriers failing to provide the US computer reservations system SABRE with the same flight information they provided to the European system Amadeus, see *Armani,* Sabre contre Amadeus e.a.: un dossier riche en enseignements (2000), 27 et sqq.; *Pearlstein*, Antitrust law developments (2002), 1193; *Geradin, Reysen, Henry*, Extraterritoriality, comity, and cooperation in EU competition law, in: *Guzman,* Cooperation, comity and competition policy (2011), 32.

112 See *European Communities*, 26th report on competition policy (1996), 144-148; further *Zanettin,* Cooperation between antitrust agencies at the international level (2002), 223.

113 See *Völcker*, Wettbewerbsrecht und seine internationale Durchsetzung: Kartellbehörden in Drittstaaten und ihre Beziehungen zur EG-Kommission am Beispiel des EG-US-Kartellrechtsabkommens, in: *Immenga, Mestmäcker*, Wettbewerbsrecht: EG (2007) also describing another example, where the FTC informally followed positive comity principles by not taking action against Italian Parma ham producers agreeing on export quotas and left the investigation to the Italian antitrust authority.

114 See O.J. L 7/13 (1993).

115 See O.J. C-269 (2007).

116 See O.J. L332 (1994), on the joint use of information in the *Shell/Montecatini* case see *Pitofsky*, International antitrust: an FTC perspective (1995), 6.

117 See *Consorzio del Prosciutto di San Daniele – Consorzio del Prosciutto di Parma* (Boll.N. 25/1996), further on the decision of the FTC to discontinue their investigations following a decision of the Italian competition authorities see *Pitofsky*, Merger and competition policy – the way ahead, Speech delivered at the American Bar Association Annual Meeting (1998); *Parisi, Podzun*, Verwaltungskooperationsabkommen zwischen der Europäischen Union und den Vereinigten Staaten von Amerika, in: *Terhechte*, Internationales Kartell- und Fusionskontrollverfahrensrecht (2008), 2100 et sqq.

118 See *Voigt, Albert, Schmidtchen*, International conflict resolution (2006), 316.

119 *Schaub*, International cooperation in antitrust matters: making the point in the wake of the Boeing/MDD proceedings, Speech delivered in February 1998.

120 Questioning the willingness of competition authorities to prosecute under comity in cases were national interests are concerned: *Papadopoulos*, The international dimension of EU competition law

positive comity agreements as one authority cannot be expected to prosecute its own nationals for the welfare of others.[121] Enhancing this effect, anticompetitive conduct will usually not even violate domestic laws if own national interests are concerned.[122] A further minefield opens up where a certain conduct is explicitly permitted by one authority. The competition authorities of the US denied that in such a case positive comity rules would find application.[123] Furthermore the argument is brought forward that the system is very unbalanced as requests under positive comity are more likely to succeed in the EU than in the US.[124] A further deficiency is the fact that the Positive Comity Agreement is of purely voluntary character.[125] As an instrument of soft law the relevant provisions are not laid down in a treaty, but in a so-called "Administrative" or "Executive Arrangement".[126] Even though it seems to be proven that actual cooperation does not depend on the signing of an agreement, but on continued informal cooperation and trust-building among the authorities[127] this is a strong sign for the limited importance of the agreement to both sides. A case in point for all the critical voices is that the 1998 agreement has not actually been invoked until today.[128] The practice shows that cases are generally dealt with through informal cooperation, making a formal request unnecessary. Furthermore, MNCs today are aware of international cooperation and generally chose to address the most affected jurisdiction directly to save costs and efforts.[129]

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and policy (2010), 81 et sqq.; *Geradin, Reysen, Henry,* Extraterritoriality, comity, and cooperation in EU competition law, in: *Guzman,* Cooperation, comity and competition policy (2011), 22; *Dabbah,* Future directions in bilateral cooperation, in: *Guzman,* Cooperation, comity and competition policy (2011), 293 et sqq.

121 See *Atwood,* Positive comity: is it a positive step?, in: *Hawk,* Annual proceedings of the Fordham Corporate Law Institute (1993), 84.

122 *Ham,* International cooperation in the antitrust field and in particular the agreement between the United States of America and the Commission of the European Communities (1993), 594 et sqq.

123 According to the opinion of the US authorities voiced in *Hartford Fire Insurance Co. V. California* (509 U.S. 764, 1993), no conflict of jurisdictions arises if one jurisdiction permits a conduct, as comity considerations are only applicable where a foreign sovereign compels a certain practice. This line of thinking might not be in the interest of other states, see *Waller,* The twilight of comity (2000), 563 et sqq.; *Geradin, Reysen, Henry,* Extraterritoriality, comity, and cooperation in EU competition law, in: *Guzman,* Cooperation, comity and competition policy (2011), 32 et sqq.

124 See *Zanettin,* Cooperation between antitrust agencies at the international level (2002), 223 et sqq. He argues that the Commission applies stricter rules towards the definition of market power, leading to situations like in the *Boeing/McDonnell Douglas* case (see supra 20) where the FTC could not follow the Commission's request to remedy Boeing as market share's where below the threshould required by US law; see also *Geradin, Reysen, Henry,* Extraterritoriality, comity and cooperation in EU competition law, in: *Guzman,* Cooperation, comity and competition policy (2011), 30 et sqq. arguing that the US asserts far more extensive extraterritorial jurisdiction than the EU.

125 On the non-binding character of the agreement see *Papadopoulos,* The international dimension of EU competition law and policy (2010), 77 et sqq.

126 The Commission lacks the competence to sign treaties altogether while in the US an approval by the Senate would be mandatory to call it a treaty.

127 See for example the Ukraine, that has entered into formal agreement with the Russian Federation, Georgia, Azerbaijan, Lithuania, Poland, Hungary, Bulgaria and the Czech Republic without actual cooperation taking place, while the competition authorities in Chile and the United States effectively and fully cooperate while a formal understanding is lacking, see *Dabbah,* Future directions in bilateral cooperation, in: *Guzman,* Cooperation, comity and competition policy (2011), 296.

128 See *Zanettin,* Cooperation between antitrust agencies at the international level (2002), 185; *Van Bael,* Due process in EU competition proceedings (2011), 61.

129 See *Van Bael,* Due process in EU competition proceedings (2011), 62.

A further shortcoming is the possibility of forum shopping enhanced by the Agreement on Positive Comity. As illustrated by the *Santa Cruz/Microsoft* case[130], US competition authorities or private actors can bring cases before the European Commission that would not come within the scope of sections 1 and 2 of the Sherman Act and thereby "shop" for stricter conditions of prosecution.[131] The problem of forum shopping can only be overcome by a convergence of rules, a development that seems to be under way between the EU and US authorities in recent years.[132]

4.2 Positive comity and the "main impact principle"

The most important regulations on positive comity can be found under Article IV (2) in the 1998 agreement laying out a catalogue of requirements under which one party to the agreement normally waives its right to investigate a certain case affecting its jurisdiction. This presumption applies when, inter alia, anticompetitive conduct (a) does not have a direct, substantial, and foreseeable impact on consumers in the requesting party's territory and where the anticompetitive activities do have such an impact on the requesting party's consumers, they **occur principally in and are principally directed towards** the other party's territory and (b) the adverse effects on the interests of the requesting party can be and are likely to be fully and adequately investigated and, as appropriate, eliminated or adequately remedied pursuant to the laws, procedures, and available remedies of the requested party.[133]

Sidelined by a relevant supporting provision on effective enforcement, the EU-US Comity Agreement is based on a "main impact principle" working towards a similar case allocation than within the ECN. Early communication among NCAs serves to determine which authority is better placed, e.g. more affected, to investigate the conduct in question. The lead authority will than examine and remedy the effects in both jurisdictions, assisted by the other NCA through enforcement cooperation and information gathering. Should both markets be directly and substantially affected parallel investigations will be possible. The agreement even provides for double punishment where "anti-competitive activities affecting both territories justify the imposition of penalties within both jurisdictions"[134]. Again the *ne bis in idem* test is based on the consideration whether the "*idem"* prerequisite is met. As similar mechanisms are at work in the bilateral context (although no supranational authority can step in should conflicts arise), similar problems are to be expected. The danger of forum shopping is more prominent in the transatlantic context, as competition rules diverge on a number of significant issues[135]. Furthermore, greater differences in national interests

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[130] See *European Communities,* 27th report on competition policy, para 79 (Santa Cruz was forced to use outdated Microsoft software due to an abusive contract and its innovative capacity was this hindered), also find a brief description of the case in *Ritter, Braun,* European competition law: a practitioner's guide (2005), 442.

[131] See *Zanettin,* Cooperation between antitrust agencies at the international level (2002), 224 et sqq.

[132] See *Dabbah,* Future directions in bilateral cooperation, in: *Guzman,* Cooperation, comity and competition policy (2011), 290, on the improved comprehension among the two competition authorities and their increased efforts to avoid unnecessary divergence in decisional practices.

[133] See Article IV (2) of the EU-US Positive Comity Agreement (1998); for a full discussion see *OECD,* Report on positive comity (1999); *Parisi, Podzun,* Verwaltungskooperationsabkommen zwischen der Europäischen Union und den Vereinigten Staaten von Amerika, in: *Terhechte,* Internationales Kartell- und Fusionskontrollverfahrensrecht (2008), 2098 et sqq.

[134] See Article IV (2) b) EU-US Positive Comity Agreement.

[135] See *Van Bael,* Due process in EU competition proceedings (2011), 54 et sqq. on the argument that US competition law is based on pure economic theory, while EU rules mirror economic as well as political considerations. Furthermore, US law provides for treble damages and sanctions under

can be observed and the feeling of a shared identity as witnessed among European authorities plays little role for the alleviation of potential bilateral conflicts[136]. Under-enforcement of competition rules as part of a strategic trade policy to support national champions may also happen in certain cases[137].

To conclude, the "main impact principle" as found in the EU-US Positive Comity Agreement serves towards an efficient bilateral allocation of cases, while at the same time allowing for a flexible adjustment of rules to a quickly changing environment. Its main handicap however is the non-binding nature of the agreement. Where national affections clash, the provisions will be of little value.

criminal law, while the EU authorities exclude these types of punishment (unlike some individual EU member states), see in detail on similarities and differences *Sullivan, Grimes*, The law of antitrust: an integrated handbook (2006), 1040 et sqq.

[136] On the dynamics of a shared identity within the European Union see *Koops*, The European Union as an integrative power (2011), 130 et sqq. Some academics even argue that the identity of the EU is formed by explicit separation from the US, see *Fehl*, Europäische Identitätsbildung in Abgrenzung von den USA: Eine Untersuchung des deutschen und britischen Mediendiskurses über das transatlantische Verhältnis (2005), 26 et sqq.

[137] European officials have accused the US authorities repeatedly of having agreed to the *Boeing/McDonnell-Douglas* merger (supra 20) despite obvious anticompetitive effects in order to support a national champion, see *Zanettin*, Cooperation between antitrust agencies at the international level (2002), 38.

5. Developing the "main impact principle" in international law

5.1 Established principles guiding the international division of competition cases

The currently ever-expanding dominant competition regime is characterized by the uncoordinated extraterritorial application of domestic legislation.[138] In almost all jurisdictions worldwide, the allocation of competences is determined by the *effects doctrine* whereby national competition authorities investigate all anticompetitive conduct that negative affects their domestic market.[139] The United States take this approach even further by applying national competition rules also to foreign behaviour that has a negative effect on foreign sales of American corporations.[140] Economic scholars agree that the powerful *effects doctrine* is highly detrimental to global welfare[141], but nonetheless it has become an established concept of international law. This development is not even halted by the fact that the doctrine interferes with the substantial principle of the sovereignty of nations.[142]

The greatest fear comes from the theoretic idea that in today's globalized world every economic action will have an impact on a large number of jurisdictions.[143] As competition laws are far from being harmonized a certain conduct might be deemed

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[138] See *Budzinski*, The governance of global competition: Competence allocation in international competition policy (2008), 153.

[139] On the prevalence of the effects doctrine worldwide see *Terhechte*, Das internationale Kartell- und Fusionskontrollverfahrensrecht zwischen Kooperation und Konvergenz, in: *ibid.*, Internationales Kartell- und Fusionskontroll-verfahrensrecht (2008b), 2182; *Guzmán*, Cooperation, Comity and competition policy (2010), 3 et sqq. The legal situation within the EU is ambigious. While the Commission *de facto* applies the *effects doctrine*, the ECJ asserts jurisdiction on the basis of the principle of *objective territoriality*, see cases *Dyestuffs* (*Imperial Chemical Indus. Ltd. v. Commission*, Case 48/69 (1972), 3 CMLR 557) and *Wood pulp (Ahlstrom v. Commission* (1988), CMLR 901). On the European ambivalent approach in detail see *Feeney*, The European Commission's extraterritorial jurisdiction over corporate mergers (2002), *Van Bael*, Competition law of the European Community (2005), 152 et sqq.; *Broberg*, The European Commission's jurisdiction to scrutinize mergers (2006), 228 et sqq.; *Bertrand, Ivaldi*, European competition policy in international markets (2006), 8 et sqq; *Geradin, Reysen, Henry*, Extraterritoriality, comity and cooperation in EU competition law, in: *Guzman*, Cooperation, comity and competition policy (2011), 20.

[140] See *Fullerton; Mazard*, International antitrust co-operation agreements (2001), 409; the US apply national legislation for example in cases where foreign market access for national companies is limited.

[141] See *Budzinski*, The governance of global competition: Competence allocation in international competition policy (2008), 151 et sqq.; *Kerber*, The theory of regulatory competition and competition law, in: *Bungenberg, Meessen, Puttler*, Economic law as an economic good: its rule function and its tool function in the competition of systems (2009), 38. The effects doctrine encourages jurisdictional conflicts (see supra 20 et sqq.), while being characterized by the limited enforceability of judgments.

[142] On the conflict between extraterritorial jurisdiction and sovereignty see *Gerber*, Prescriptive authority: global markets as a challenge to national regulatory systems (2004); *Raustiala*, Does the constitution follow the flag? The evolution of territoriality in American law (2009); *Menzel*, Internationales öffentliches Recht: Verfassungs- und Verwaltungsgrenzrecht in Zeiten offener Staatlichkeit (2010), 106 et sqq.

[143] See *Terhechte*, Das internationale Kartell- und Fusionskontrollverfahrensrecht zwischen Kooperation und Konvergenz, in: *ibid.*, Internationales Kartell- und Fusionskontrollverfahrensrecht (2008b), 2182 et sqq., the limitations to the *effects doctrine* are discussed in detail by *Meng*, Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht (1994), 556 et sqq. and *Schwarze*, Jurisdiktionsabgrenzung im Völkerrecht (1994), 43 et sqq.

lawful in some jurisdiction while being prosecuted by other authorities.[144] Conflicts are likely to arise. The general anxiety is however not entirely reasonable, as the unconfined application of the *effects doctrine* is limited by a number of principles of international law as specified below.

Firstly, the *effects doctrine* is limited by the principle of *prohibition of interference*, meaning that forcible interference in the sphere of interest of other state is only permitted as a reaction to a violation of international law.[145] This doctrine under general international law sets out that one state might not threaten or use force against another to implement domestic competition rules. The threat of wars over competition law is thus diminished. Secondly, the doctrine of *abuse of rights*, meaning that the exercise of a right is unlawful if its sole purpose is to cause damage to others, further limits the exercise of extraterritorial jurisdiction of nations.[146] States can thus only enforce their competition rules abroad if they have a legitimate national interest to do so.

The principle of *courtoisie* or *comity of nations* also greatly helps to further limit the scope of the effects doctrine. While rules of positive and negative comity may be included in bilateral agreements (see Chapter 4.1), rules of negative comity are also to some extent considered to be principles of international law.[147] Nation states are bound to reach their aims of national legislation under the smallest potential for conflicts with other nations. Still, this principle might *de facto* be difficult to adhere to as governments are generally reluctant to expose their interests and domestic authorities are not competent to judge on foreign political and economic implications of national actions.[148] However, initiating a trade war over national competition law is not only politically unwise but also restrained by the *courtoisie principle* of international law.

A further constraint on the exercise of extraterritoriality can be found in the principle *in dubio mitius*, meaning that if in doubt, legal texts should be interpreted in a way which involves "the minimum of obligations" for the parties and least interferes with territorial supremacy.[149] This principle is closely linked to *comity of nations* and imposes similar constraints on the application of the effects doctrine.

Of significant practical importance is the principle of *proportionality*, whereby anticompetitive effects shall generally only be investigated if factors of immediacy and pertinence are fulfilled. Legal discretion has to be applied during the initiation and implementation of the proceedings, for information and documentation requests, for the adoption of measures and the imposition of sanctions.[150] The European Commission[151]

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144 See *Mitschke*, The influence of national competition policy on the international competitiveness of nations (2008), 23, this might lead to a "race to the strictest", see supra 17.

145 See *Kelsen*, Principles of international law (2003), 63 et sqq.

146 See *Byers*, Abuse of rights: an old principle, a new age (2002), 397 et sqq.

147 See *Oppenheim*, International law: a treatise (2006), 24.

148 See *Rehbinder*, Internationaler Anwendungsbereich, in: *Immenga*, *Mestmäcker*, Wettbewerbsrecht: EG (2007), Rn 19; *Terhechte*, Das internationale Kartell- und Fusionskontrollverfahrensrecht zwischen Kooperation und Konvergenz, in: *ibid.*, Internationales Kartell- und Fusionskontrollverfahrensrecht (2008b), 2183.

149 See *Cameron/Gray*, Principles of international law in the WTO dispute settlement body (2001), 258.

150 See *Immenga*, *Mestmäcker*, Wettbewerbsrecht: EG (2007), 24.

151 See on the *de minimis* regulations in the EU: Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (O.J. 2001, C368), online available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri= CELEX:52001XC1222%2803%29:EN:NOT.

as well as the EU member states[152] work successfully with *de minimis* regulations to adhere to the principle of *proportionality*. Jurisdictional conflicts may however still arise in matters not falling under *de minimis* clauses in several jurisdictions.

Other important limitations to the application of the *effects doctrine* are informal ways of competence allocation like best-practice recommendations and peer pressure[153]. Soft governance in this sphere reaches from persuasion by knowledge transfer to allocation rules based on political power.[154] Some academics believe that these mechanisms work best to limit the potential of jurisdictional conflicts[155] and while that might be true they lead to severe asymmetries in favour of strong industrialized nations. A system based on informal exchanges will always neglect the legitimate interests of small and weak economies.

Lastly, the full enforcement of the *effects doctrine* is confined by administrative barriers. The *de facto* limitations to thorough information gathering, cross-border competition reviews and enforcement of judgements are significant and competition authorities will regularly abstain from applying extraterritorial jurisdiction if their chances of conducting a thorough investigation are negligible.

In summary, the widely applied *effects doctrine* is a suboptimal tool to engage in the international delimitation of jurisdiction in competition cases. Although its employment is limited by a number of principles of international law, namely the concepts of prohibition of interference, abuse of rights, in dubio mitius, comity and the principle of *proportionality* and is furthermore restricted by informal power politics and administrative barriers, it still leads to unbearable costs and efforts for MNCs and potential conflicts among nations. A timely limitation by a new concept in international law that is able to address the core problems of the doctrine is necessary.

5.2 Principles for the allocation of competences in literature

Unlike in the European Union, no horizontal case allocation among NCAs and a higher authority exists at the international level. The predominant *effects doctrine* is solely aimed at the vertical delimitation of competences among national authorities.[156] Addressing the shortcoming of the doctrine, a number of authors have advanced new ideas of horizontal or vertical delimitations of multijurisdictional cases in recent years and have come up with a variety of more or less workable concepts. Some of their main characteristics and shortcomings will be discussed in this chapter.

The simplest form of a global allocation of cases is the *principle of origin* or *location doctrine*. Hereby, each anticompetitive conduct is investigated in the territory in which it occurs; independent of the effects it unfolds in other jurisdictions.[157] Although this

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[152] See *Boos, Christian, Pries,* The application of the German and UK de minimis regimes in theory and in practice – a comparative analysis (2010).

[153] See *Budzinski,* The governance of global competition: Competence allocation in international competition policy (2008), 158 et sqq.

[154] Ibid., 158.

[155] See *OECD,* L'examen par les pairs: un instrument de l'OCDE pour la coopération et le changement (2003a), 10 et sqq. as well as *OECD Joint Group on Trade and Competition*, Peer review: merits and approaches in a trade and competition context (2002).

[156] See *Budzinski,* The governance of global competition: competence allocation in international competition policy (2008), 153 et sqq.

[157] See on the *location doctrine*: *Budzinski*, The governance of global competition: competence allocation in international competition policy (2008), 187 et sqq.

principle is easy to grasp and entirely eliminates jurisdictional conflicts, it has a number of relevant drawbacks that exclude it from gaining practical importance. First of all, NCAs would no longer orient their actions on measures of national welfare, but would have to protect foreign markets. This does not only surmount to a costly and unnecessary system of extensive information sharing, but would probably need the support of a powerful supranational competition authority. Furthermore some anticompetitive conduct like cross-national cartels will not be detected under a *principle of origin* approach and national differences in competition legislation might lead to severe distortions on other markets for which the respective laws were not made.[158] The *location doctrine* belongs to the same family as the *nationality principle*, whereby a competition authority exercises jurisdiction over its national subjects, independent of their current location.[159] The effects of applying a *nationality principle* are similarly fallacious as the effects of applying the *location doctrine*.

A second theoretical concept for the global allocation of competences is the *relevant markets rule*, whereby certain behaviour is always scrutinized by the competition authority with jurisdiction over the relevant geographic market.[160] As soon as a conduct is affecting two jurisdictions, a higher level authority would take on the investigations. This might in principle be a regional authority, but for cases affecting countries on several continents a global competition authority would have to conduct a centralized investigation. Although the inherent pluralism of competition authorities encourages innovation, the necessary inauguration of both an international and a number of regional agencies might prove expensive. Furthermore the immediate transfer of a case to a higher level yields inefficiencies. As very few products are traded on global markets, this solution might be workable to some extent, but in the light of all the past failed attempts of forming a global competition authority a solution more likely to be implemented should be looked out for.

The *x-plus rule* is currently in use at the level of the European Union[161] and could equally serve towards the horizontal delimitation of competences at the international level. Its basic idea is very simple: Should an anticompetitive conduct find itself under scrutiny by more than x national jurisdictions it is automatically allocated to an international authority.[162] The effectiveness of such a regime depends largely on the value of the term x, as well as on the size and economic importance of the jurisdictions in question. One of the main drawbacks is the fact, that it requires the inauguration of a powerful and reliable international competition institution. Furthermore, the pure number of affected jurisdictions might not be linked to the economic importance of the conduct and the likelihood of jurisdictional conflicts. In times of ever closer links between markets an increasing number of anticompetitive practices will fall under the *x-plus rule* and lead to an ever growing importance of the supranational authority.[163] Nation states are unlikely to support such a development.

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158 Ibid., 7.

159 See *Dabbah*, International and comparative competition law (2010).

160 See on the *relevant markets rule Budzinski*, The governance of global competition: competence allocation in international competition policy (2008), 192 et sqq.

161 See supra 53.

162 See *Budzinski*, The governance of global competition: competence allocation in international competition policy (2008), 153 et sqq.

163 See *Slaughter*, A new world worder (2005), 253 et sqq.; *Budzinski*, The governance of global competition: competence allocation in international competition policy (2008), 164.

A very promising idea is the concept of a *voluntary lead jurisdiction* that expands the idea of positive comity to a multijurisdictional agreement. It involves the naming of a coordinating agency if more than one authority is affected by the anticompetitive behaviour.[164] Also named *advanced comity principle*, it requires the lead jurisdiction to coordinate national reviews, ensure information sharing and work towards mutual comity.[165] In how far the lead jurisdiction shall dispose of powers over other affected jurisdictions remains open for dispute. Campbell and Trebilcock suggest that the lead jurisdiction prepares a recommendation including a preliminary assessment of the competitive effects that will most likely unfold a *de facto* presumption on other NCAs.[166] Significant advantages of the concept are that NCAs do not lose their sovereign power of rule making and rule application, as the only function principally allocated at the level of the lead jurisdiction is the enforcement of sanctions. The concept minimizes the duplication of efforts, but requires a significant amount of trust and regular contacts among NCAs, prerequisites that are currently not in effect between very many authorities.[167] Also, without real powers the lead jurisdiction is not able to rule out conflicting decisions entirely.

Going even one step further, the effective international vertical delimitation of competences could be achieved by an international agency adopting a binding decision on a *mandatory lead jurisdiction*.[168] Again, the rule-making competences of NCAs remain unconcerned while the enforcement competence is allocated at the level of the lead jurisdiction. The sole purpose of the supranational jurisdiction is to decide upon the lead jurisdiction. The lead authority should be "the country that represents the largest share of consumption".[169] One drawback of this allocation is the likelihood that the majority of cases will be ruled upon by large jurisdictions, e.g. the EU and the US, as they will generally consume a large share of most traded products.[170] Still, the concept of a voluntary or mandatory lead jurisdiction proves helpful for developing the institutional design of case allocation under the "main impact principle".

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[164] See on the concept of a voluntary lead jurisdiction *Campbell, Trebilcock,* Interjurisdictional conflict in merger review, in: *Waverman, Comanor, Goto,* Competition policy in the global economy: modalities for cooperation (1997), 109 et sqq.; *Rowley et al.,* Streamlining international merger control (2000), 27 et sqq.; *Epstein,* Competition laws in conflict: antitrust jurisdiction in the global economy (2004), 166; *Budzinski,* The governance of global competition: competence allocation in international competition policy (2008), 165 et sqq.

[165] See *Budzinski,* The governance of global competition: Competence allocation in international competition policy (2008), 165.

[166] See *Campbell, Trebilcock,* Interjurisdictional conflict in merger review, in: *Waverman, Comanor, Goto,* Competition policy in the global economy: modalities for cooperation (1997), 95 et sqq.

[167] See *Campbell, Trebilcock,* Interjurisdictional conflict in merger review, in: *Waverman, Comanor, Goto,* Competition policy in the global economy: modalities for cooperation (1997), 95 et sqq.; *Budzinski*, The governance of global competition: Competence allocation in international competition policy (2008), 165.

[168] On this concept see *Epstein,* Competition laws in conflict: antitrust jurisdiction in the global economy (2004), 166; *Budzinski,* The governance of global competition: competence allocation in international competition policy (2008), 166 et sqq.

[169] See *Trebilcock, Jacobucci,* (2004), 166.

[170] See *Budzinski,* The governance of global competition: competence allocation in international competition policy (2008), 166 et sqq., together the EU and the US make more than half of the world's GDP.

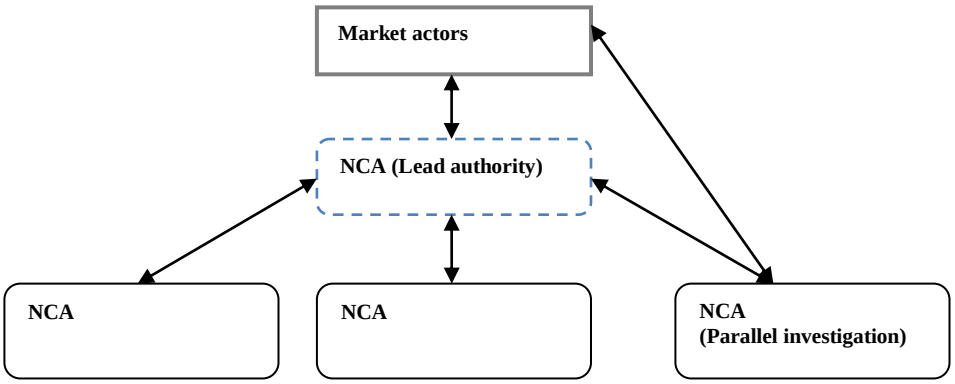
5.3 Introducing the "main impact principle"

Drawing on positive experiences of coordination within the ECN and among the EU and the US, the "main impact principle" is based on the concept that the jurisdiction where the main impact of anticompetitive conduct is felt shall investigate and remedy the demeanour in question. In line with the EU-US Positive Comity Agreement this shall be the territory where the conduct principally occurs or to where it is principally directed. The authorities on other affected markets shall waive their right to conduct own investigations and shall instead provide the lead authority with relevant information and support the enforcement of the final judgement[171]. Employing the voluntary lead jurisdiction concept, no supranational authority is necessary to ensure the effective allocation of cases within the network. The investigation will be based on national laws of the most affected market and will take into account all competitive effects, may they be positive or negative, in all substantially impacted jurisdiction worldwide.

Under normal conditions MNCs will only have to communicate with the lead authority. They will be asked to provide in-depth information according to the requirements and deadlines of national competition laws and will face punishment according to the legislation of the most affected jurisdiction. This means a significant decrease in the number of procedures and will considerably lower the costs for MNCs linked to competition investigations. By saving unnecessary expenses while still providing for an effective review, an increase in global welfare can be expected.

Drawing on the example of the ECN, national authorities may conduct parallel investigations if a conduct unfolds effects that are essentially limited to the national market and will only prove to be prosecutable by the national authority.

Information flows under the global application of the main impact principle; own research.



Notwithstanding the possibility to conduct parallel investigations, the *ne bis in idem* principle has to be adhered to. The relevant test as already seen in the context of the ECN is whether effects of the very same conduct unfold in all jurisdictions. If that is the case, multiple penalizations are not possible and sanctions will be imposed only by the

[171] This concept is characterized by a limited amount of harmonization of laws, while its success is based on the mutual recognition of judgements of other authorities. See on the advantages of such a concept *Möllers, Heinemann,* The enforcement of competition law in Europe (2007), 371 et sqq.

lead authority[172]. If however different national market rules can be distinguished that significantly influence the expected national welfare effects, parallel investigations must take place[173].

In order to make the "main impact principle" work, many aspects of the EU-US Positive Comity Agreement will have to find application among all competition authorities worldwide. The most important provision concerns the exchange of confidential information. The "main impact principle" will have to be accompanied by hard law agreements that make it possible for parties to exchange confidential information within a compulsory system of cooperation.[174]

Furthermore, in order for the "main impact" concept to develop into a principle of international law it will have to form part of a number of bi- and multilateral agreements for many years to come. Preferably, an agreement under UN auspices will be signed at least by all jurisdictions currently claiming extraterritorial reach of their competition laws.

5.4 Limits to the approach

Although the "main impact" approach manages to provide a reliable and flexible international competition regime, it is nonetheless characterized by a number of drawbacks.

If a large number of jurisdictions feel affected by certain behaviour, the procedures to determine a lead authority are likely to be long and complicated. If cooperation does not work properly and national authorities are led more by national political opinions than by considerations for global welfare, under- or over-enforcement[175] of competition rules is possible. Especially in the case of developing countries, conduct might go mistakenly unnoticed or anticompetitive conduct is not enforced on purpose.[176] Similar problems arise in developed nations when national champions are concerned.[177] A legitimate anxiety of NCAs in abstaining from conducting own investigations is that foreign authorities might be prone to privilege national business or consumer interests and might bias their findings.[178] According to a study by Aktas, Bodt and Roll the European Commission is more likely to challenge a merger if the interests of European companies are affected.[179] It can be assumed that other competition authorities show similar

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[172] This should generally be the case if a cartel among MNCs increases the price level on all affected markets.

[173] In strongly regulated markets like pharmaceuticals or telecommunications, a merger might have entirely different effects, depending on the national legislation in each jurisdiction. Parallel investigations should thus take place.

[174] See further on the advantages of hard law agreements and possible developments into this direction *Papadopoulos*, The international dimension of EU competition law and policy (2010), 83 et sqq.

[175] See *Guzman*, Competition law and cooperation: possible strategies, in: *ibid.*, Cooperation, comity and competition policy (2011), 248 et sqq.

[176] See *Guzman*, Competition law and cooperation: possible strategies, in: *ibid.*, Cooperation, comity and competition policy (2011), 249.

[177] See *Epstein*, Competition laws in conflict: Antitrust jurisdiction in the global economy (2004), 52, on strategic competition policy and the global prisoner's dilemma.

[178] On the political pressure on NCAs to increase national income at the expense of world income see *Campbell, Trebilcock*, Interjurisdictional conflict in merger review, in: *Waverman, Comanor, Goto*, Competition policy in the global economy: modalities for cooperation (1997), 96.

[179] *Aktas, Bodt, Roll*, Is European M&A regulation protectionist? (2007), on the arbitrary exercise of *de facto* power see also *Matsushita*, International trade and competition law in Japan (1993), 69 et sqq.

behaviour. A system of peer reviews and political pressure might help to ensure non-discriminatory treatment.

Further barriers to the adoption of the "main impact principle" are issues of confidentiality. In a significant number of countries domestic laws preclude the exchange of confidential information with foreign authorities [180]. A number of legislative amendments will be necessary to overcome these restrictions. Sharing confidential information is not only essential to make cooperation successful, but also requires a significant amount of trust between national authorities. The fear that Russian or Chinese authorities might use insider knowledge gained from competitors to push the performance of state-owned enterprises on the international market cannot easily be disregarded.

An issue of high significance for developing countries are power asymmetries between strong and weak economies.[181] The European Union is well placed to enforce its rulings in other jurisdictions notwithstanding domestic resistance, while a developing economy will struggle to conduct an investigation against European corporations confronted with political pressure from Brussels. Furthermore MNCs may exercise critical control over NCAs through effective lobbying, blackmailing and the menace to relocate business activities to locations where authorities either weakly enforce competition rules or abstain from investigations altogether.[182] Power asymmetries may lead to protectionist misuse of the "main impact principle"[183]. Weaker authorities will thus need additional support by international organizations when acting as a lead authority.

Introducing the "main impact principle" at the international level additionally carries the immanent risk of forum shopping. As long as national competition rules including the level of sanctions to be imposed for anticompetitive conduct are not fully harmonized at the global level, market actors will be drawn towards filing at either very strict or very lax authorities. Minimum enforcement standards, but no full harmonization, could prove to be a successful pathway.

Lastly, it is questionable whether the jurisdiction feeling the "main impact" of anticompetitive behaviour is able to investigate and remedy the impacts felt on all affected markets. Some scholars remark that there is no supranational market for most products, much less a global market.[184] It is thus not only logical but also desirable that NCAs reach different conclusions regarding the impact of anticompetitive behaviour in their national sphere. A centralized response by a well-placed authority will only ever be appropriate if the relevant market is supranational. Consensus on the scope of the geographic market is thus necessary, again leaving room for disagreement among NCAs.

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[180] See supra 43.

[181] See *Kerber*, The theory of regulatory competition and competition law, in: *Bungenberg, Meessen, Puttler*, Economic law as an economic good: its rule function and its tool function in the competition of systems (2009), 38, on the capability of the EU and the US to extraterritorially enforce their competition laws, while smaller countries are not able to do so.

[182] See *Dabbah*, International and comparative competition law (2010), 114.

[183] See *Epstein*, Competition laws in conflict: Antitrust jurisdiction in the global economy (2004), 45; *Mitschke*, The influence of national competition policy on the international competitiveness of nations (2008), 23 et sqq.

[184] See *Campbell, Trebilcock*, Interjurisdictional conflict in merger review, in: *Waverman, Comanor, Goto*, Competition policy in the global economy: modalities for cooperation (1997), 97 et sqq.; *Parisi, Podzun*, Verwaltungs-kooperationsabkommen zwischen der Europäischen Union und den Vereinigten Staaten von Amerika, in: *Terhechte*, Internationales Kartell- und Fusionskontrollverfahrensrecht (2008), 2104 et sqq.

In other cases, the principal impact may be felt in one jurisdiction while the responsible company is based in another, making it difficult for the one jurisdiction to investigate and for the other jurisdiction to remedy anticompetitive behaviour.[185] Furthermore it might happen that many jurisdictions experience a loss in consumer welfare while an efficiency gain is realized mainly in one jurisdiction. A mechanism must be in place to ensure that the lead jurisdiction balances all these tradeoffs honestly.

[185] See on difficult enforcement procedures in cases where impact and origin of a conduct do not fall within the same territory *Campbell, Trebilcock,* Interjurisdictional conflict in merger review, in: *Waverman, Comanor, Goto,* Competition policy in the global economy: modalities for cooperation (1997), 96.

6. Conclusion and outlook

More than 100 jurisdictions exercise extraterritorial competition reviews today and with the number of multinational companies constantly growing the welfare lost is increasing year by year. International organizations have tried to resolve the problem by investing in endeavours of global convergence of rules and coordination among national authorities. These efforts have however not served towards a limitation in the number of jurisdictions dealing with a certain conduct.

This paper researches the effective allocation of competences among national authorities within the European Competition Network as well as the *de facto* functioning transatlantic case allocation according to the EU-US Positive Comity Agreement. Both practices are arranged around a "main impact principle", where a "well-placed" or "principally impacted" authority serves as a lead jurisdiction to investigate anticompetitive behaviour in the name and with the support of all other affected authorities. Parallel reviews and sanctions are provided for if different conduct or different markets are being investigated.

The "main impact principle" could develop into a principle of international law, if it finds its way into international treaties and could thus serve to overcome the detrimental effects of uncoordinated application of the *effects doctrine*. Based on a network structure and independent from an overarching supranational authority the principle could ensure both reliability and flexibility in the sphere of international competition. Formerly developed institutional concepts on the formation of a *voluntary lead jurisdiction* can be employed in this context.

Even if the "main impact" doctrine does not need *ad hoc* political decisions but can develop slowly through a number of bilateral and multilateral agreements, its application as a reliable principle of international law has a long way to come. Most jurisdictions are unlikely to waive their rights of investigation in cases where national interests are concerned and the danger of forum shopping is very real as long as national competition laws remain inharmonious. Furthermore, without a significant level of trust national authorities will oppose the exchange of confidential information among each other.

A feasible way to move forward could be found in a step-by-step introduction of the principle into a growing number of regional or multilateral agreements, similar to the EU-US Positive Comity Agreement. Such a development would continuously build up trust among the authorities and slowly limit the number of agencies exercising jurisdiction in a certain case. One might even think about the creation of a panel dealing with conflict resolution over jurisdictional issues or the naming of a mandatory lead jurisdiction in the long run. A further convergence of rules to avoid forum shopping could improve the regime while a full convergence should not be advised as it limits flexibility and learning of the system.

As a number of endeavours aimed at centralized regimes failed, it is likely that the global competition system will find its path in cooperation agreements. Over the years a "main impact principle" might evolve in international law to guide the allocation of cases within a global network of competition authorities.

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Annex 1: Exemplary multijurisdictional competition cases[186]

Case	Year	Type	Conflicting jurisdictions
Alcoa (CH)	1945	Quota cartel	US/CH
Ciba (CH)/Geigy (CH)	1970	Merger	US/CH
Dyestuffs (US)	1972	Export price fixing	US/EU
Organic pigments (US)	1979	Merger	US/D
Bayer (D)/Firestone (US)	1980	Merger of French subsidiaries	F/D
Uranium cartel	1981	Price fixing	US/CDN/SA/F/UK
Philip Morris (US)/Rothmans (SA/UK)	1983	Merger	D/UK/SA/US
IBM (US)	1985	Abuse of dominant position	US/EU
Laker Airways (GB)	1985	Predatory pricing	UK/US
Wood pulp	1988	Export price fixing	US/EU/CDN
Gillette (US)/Wilkinson (GB)	1989	Merger	EU/D/F/IR/ES/US/CDN/NZ/AU/BR/CH/SA/SW
Mérieux (F)/Connaught (CDN)	1990	Merger	US/CDN/F
De Havilland (CDN)/Alenia-Aerospatiale (F/I)	1991	Merger	EU/F/CDN/US
Hartfort Fire Insurance (UK)	1993	Market behaviour	US/UK
Japanese automakers/United States Trade Representative	1995	Exclusive dealing, vertical foreclosure	US/JPN
British Airways (UK)/American Airways (US)	1996	Strategic alliance	US/UK
Union Pacific (US)/Southern Pacific (US)	1996	Merger	US/MEX
Boeing (US)/McDonnell-Douglas (US)	1997	Merger	US/EU
Fuji (JPN)/Kodak (US)	1997	Market entry deterrence	US/JPN
Air Liquide (F)/BOC (UK)	1999	Merger	US/EU
AOL (US)/Time Warner (US)	2000	Merger	US/EU
Time Warner (US)/EMI (GB)	2000	Merger	US/EU
MCI WorldCom (US)/Sprint (US)	2000	Merger	US/EU
Alcoa (US)/Reynolds (GB)	2000	Merger	US/EU/CDN/AUS
British Airways (UK)	2001	Predatory pricing	US/EU
General Electric (US)/Honeywell (US)	2001	Merger	US/EU
Metso (FI)/Svedala (SW)	2001	Merger	US/EU
Nestlé (CH)/Ralston Purina (US)	2001	Merger	US/EU
Microsoft (US)	2004	Predatory strategies	US/EU
Siemens (D)/InterRos Silovyje Maschiny (RUS)	2005	Merger	RUS/D
United Airlines (US)/Continental (US)	2010	Merger	US/EU

[186] *Van Bael*, Competition law of the European Community (2005), 879; *Budzinski*, The governance of global competition: competence allocation in international competition policy (2008), 46 et sqq.; own research.

Annex 2: Bilateral enforcement cooperation agreements[187]

Agreement	Notification	Exchange of information	Enforcement cooperation	Coordination	Consultations	Meetings between officials	Technical assistance	Comity	Positive comity	Predominance of existing laws of the parties	Right to share confidential information
US – Germany (1976)	√	√	√		√			√		√	
US – Australia (1982)	√	√	√		√			√		√	
EU – US (1991)	√	√	√	√	√	√		√	√	√	
US – Canada (1995)	√	√	√	√	√	√		√	√	√	
Australia – Taipei (1996)	√	√	√	√			√	√		√	
New Zealand – Taipei (1996)	√	√	√	√			√			√	
EU – US on positive comity (1998)			√						√	√	
US – Australia (1999)		√	√							√	√
EU – Canada (1999)	√	√	√	√	√	√		√	√	√	
US – Japan (1999)	√	√	√	√	√	√		√		√	
US – Brazil (1999)	√		√	√		√	√	√	√	√	
Australia – Papua New Guinea (1999)	√	√	√	√	√		√	√		√	
US – Israel (1999)	√	√	√	√	√	√		√	√	√	
US – Mexico (2000)	√	√	√	√	√	√	√	√	√	√	
Canada – Chile (2001)	√	√	√	√		√		√		√	
Russia – Brazil (2001)			√		√	√				√	
Canada – Mexico (2001)	√	√	√	√	√	√	√	√	√	√	
Australia – Fiji (2002)		√	√	√		√	√	√		√	
Australia – Korea (2002)	√	√	√	√	√	√	√	√		√	
Canada – UK (2003)	√	√	√	√		√		√		√	
EU – Japan (2003)	√	√	√	√	√	√		√	√	√	
US – Canada on positive comity (2004)			√						√	√	
Canada – Japan (2005)	√	√	√	√	√	√		√	√	√	
Canada – Korea (2006)	√	√	√	√		√		√		√	
Australia – New Zealand (2007)		√	√	√	√	√		√			√
Canada – Brazil (2008)	√	√	√	√		√		√		√	
EU – Korea (2009)	√	√	√	√	√			√	√	√	√

[187] *Papadopoulos*, The international dimension of EU competition law and policy (2010), 56 et sqq.; own research.