

# TOWARD AN INTERNATIONAL GOVERNANCE OF TRANSBORDER MERGERS? COMPETITION NETWORKS AND INSTITUTIONS BETWEEN CENTRALISM AND DECENTRALISM

OLIVER BUDZINSKI\*

## I. INTRODUCTION: CROSS-BORDER MERGERS AND INTERNATIONAL COMPETITION POLICY

### A. *The Globalization of Merger Activity*

Present economic trends are strongly characterized by the process of market globalization. Relevant markets increasingly tend to cover world markets, inducing the emergence of global business structures. This has driven a massive wave of international and transcontinental mergers, starting in the mid-1990s and including megamergers of new dimensions.<sup>1</sup> The worldwide volume of mergers increased from about \$ 0.5

---

\* Senior researcher, Department of Economics, Philipps University of Marburg; former Visiting Scholar, New York University School of Law. This contribution is part of the refereed research project *International Competition Policy—A Decentralized System of International Merger Control*, funded by the Volkswagen Foundation, priority area *Global Structures and Governance*.

1. On this merger wave, see BUNDESKARTELLAMT [GERMAN FEDERAL ANTI-TRUST OFFICE], MEGAFUSIONEN—EINE NEUE HERAUSFORDERUNG FÜR DAS KARTELLRECHT?: DOKUMENTATION EINER VERANSTALTUNG DES BUNDESKARTELLAMTES AM 10. UND 11. MAI 1999 [MEGAMERGERS—A NEW CHALLENGE FOR ANTITRUST LAWS?: PROCEEDINGS OF A CONFERENCE HELD BY THE *Bundeskartellamt* on May 10-11, 1999] (Knud Hansen ed., 2000); JÖRN KLEINERT & HENNING KLODT, CAUSES AND CONSEQUENCES OF MERGER WAVES, 1-2, 5, 26 (Kiel Institute of World Economics, Working Paper No. 1092, 2002), available at <http://www.uni-kiel.de/IFW/pub/kap/2002/kap1092.pdf>. See also generally Gregor Andrade et al., *New Evidence and Perspectives on Mergers*, J. ECON. PERSP., Spring 2001, at 103 (discussing empirical trends in merger activity); Frederic L. Pryor, *Dimensions of the Worldwide Merger Boom*, 35 J. ECON. ISSUES 825 (2001) (presenting data related to various dimensions of mergers and acquisitions during this period); OLIVER BUDZINSKI & WOLFGANG KERBER, MEGAFUSIONEN, WETTBEWERB UND GLOBALISIERUNG [MEGAMERGERS, COMPETITION AND GLOBALIZATION] 14 (Zukunft der Sozialen Marktwirtschaft, Bd. 5 [Future of the Social Market Economy, vol. 5], Hans D. Barbier et al. eds., 2003); Jonathan M. Karpoff & David Wessels, *Large Mergers During the 1990s*, in MEGAMERGERS IN A GLOBAL ECONOMY 45 (Benton E. Gup ed., 2002) (discussing the latest merger wave).

trillion in 1990 to \$ 3.5 trillion in 2000.<sup>2</sup> The \$ 4.0 trillion volume predicted for 2001 was not realized, however, due to the beginning of a worldwide economic recession.<sup>3</sup> Nevertheless, there is a strong probability that merger dynamics will speed up again after the recessive period ends, since international business structures have yet to complete the process of restructuring and adjusting to globalizing markets. This conjecture is supported by the fact that the international megamerger wave has encompassed virtually every industry, from traditional ones like metal mining, financial services, and insurance to so-called future industries like communications, media, and biotechnology.<sup>4</sup>

Special features of this merger wave, which is the fifth in the history of modern market economies,<sup>5</sup> include the international and transcontinental character of the mergers (in terms of both their origins and their effects), the phenomenon of equal mergers, and the increasing size of the average merger.<sup>6</sup> Increasing international dimensions manifest themselves in huge transcontinental mergers like *Daimler-Benz/Chrysler* (Germany/U.S.A.),<sup>7</sup> *Seagram/Vivendi* (Canada/France),<sup>8</sup> and *YPF/Repsol* (Argentina/Spain).<sup>9</sup> Recent mergers of enterprises with the same jurisdiction of origin, like *Exxon/Mobil* (U.S.A.),<sup>10</sup>

---

2. KLEINERT & KLODT, *supra* note 1, at 2.

3. *See id.* (noting that the merger wave reached its peak in 2000 and has drained away today).

4. *See, e.g.,* A. Edward Safarian, *Trends in the Forms of International Business Organization*, in *COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION* 40, 47, 55 (Leonard Waverman et al. eds., 1997); Andrade et al., *supra* note 1, at 107.

5. On the other four merger waves—which occurred approximately during 1897-1904, 1920-1929, 1965-1973, and 1984-1989—see KLEINERT & KLODT, *supra* note 1, at 3-4; Carolyn A. Carroll, *A Century of Mergers and Acquisitions*, in *MEGAMERGERS IN A GLOBAL ECONOMY*, *supra* note 1, at 19, 19-34.

6. *See* Carroll, *supra* note 5, at 1-2, 5, 26.

7. *See* Steven Lipin, *Auto Bond: Chrysler Approves Deal with Daimler-Benz; Big Questions Remain*, WALL ST. J., May 7, 1998, at A1.

8. *See* Bruce Orwall, *Universal Script: Vivendi-Seagram Deal Has the Former MCA Playing Familiar Role*, WALL ST. J., June 20, 2000, at A1.

9. *See* Craig Torres, *YPF's Board Accepts Offer of \$13.4 Billion from Repsol*, WALL ST. J., May 11, 1999, at A12.

10. *See* Christopher Cooper & Steve Liesman, *Exxon Agrees to Buy Mobil for \$75.3 Billion*, WALL ST. J., Dec. 2, 1998, at A3.

*Hoechst/Rhone-Poulenc* (E.U.),<sup>11</sup> or *Chevron/Texaco* (U.S.A.),<sup>12</sup> also must be termed international since they affect markets all over the world, often are inspired by the globalization of markets, and usually are motivated by the will to perform successfully as global players. The examples listed above clearly demonstrate the tendency toward so-called equal mergers. While past merger waves were dominated by the acquisition of smaller companies by larger ones, megamergers of companies with similar sizes are rapidly gaining importance today. This change has led to an explosion in the average size of the mergers: The transaction values of *Vodafone Airtouch/Mannesmann*<sup>13</sup> and *AOL/Time Warner*<sup>14</sup> more than doubled the size of the previous largest merger<sup>15</sup> and matched the GDP of middle-sized industrial countries like Portugal.<sup>16</sup>

With the rise of the core-competences approach,<sup>17</sup> the direction of mergers changed from conglomerate ones (a diversification strategy) in the 1980s to horizontal and vertical ones (a strategy concentrating on core competences).<sup>18</sup> This increases the anticompetitive impact of the merger wave, although most international megamergers have been followed by some degree of deconcentration due to the sale of subsidiaries that do not serve the core competences (the process of business restructuring).<sup>19</sup> However, the deconcentration pro-

---

11. See Stephen D. Moore & Thomas Kamm, *Hoechst and Rhone Unveil Aventis Unit*, WALL ST. J., Dec. 2, 1998, at A17.

12. See Nikhil Deogun et al., *Chevron to Buy Texaco for \$35.1 Billion*, WALL ST. J., Oct. 16, 2000, at A3.

13. U.S.\$ 183 billion. See Andrew Ross Sorkin, *Phone Giant in Britain Sets Plan to Lift Price of Stock*, N.Y. TIMES, Apr. 14, 2000, at C4; Frederic L. Pryor, *Dimensions of the Worldwide Merger Boom*, 35 J. ECON. ISSUES 825, 825 (2001).

14. U.S.\$ 165 billion (2000). See Pryor, *supra* note 13, at 825.

15. *Exxon/Mobil* (U.S.\$ 80 billion). See *Oil Industry Ending a Year to Remember: Big Companies Expect Results to Fall 32% to 90% in 4th Quarter*, N.Y. TIMES, Dec. 26, 1998, at C2. At the beginning of the 5th merger wave, the *Time/Warner* merger was the all-time leader with a transaction volume of U.S.\$ 14 billion. See Geraldine Fabrikant, *A Delaware Court Refuses to Block Time-Warner Link*, N.Y. TIMES, Apr. 14, 2000, at 1.

16. An estimated U.S.\$ 182 billion in 2002. UNITED STATES CENTRAL INTELLIGENCE AGENCY, WORLD FACTBOOK, available at <http://www.cia.gov/publications/factbook/geos/po.html> (last modified Aug. 1, 2003).

17. See generally C.K. Prahalad & Gary Hamel, *The Core Competence of the Corporation*, HARV. BUS. REV., May-June 1990, at 79.

18. BUDZINSKI & KERBER, *supra* note 1, at 47.

19. *Id.*

cess focuses mainly on conglomerate arrangements, whereas the concentration process predominantly consists of horizontal arrangements, which are more critical from a competition policy point of view.<sup>20</sup>

### B. *The Case for an International Merger Control Regime*

Although the international megamerger wave generates procompetitive effects in both globalizing markets with growing market sizes and environments of liberalization and deregulation of trade, competition policy has to keep an eye on the evolution of concentration. Dominant market positions and monopolization are not impossible in world markets (especially in the long term), as is demonstrated by the *Boeing-Airbus* duopoly on large jet aircraft production (which was eventually created by the Boeing/McDonnell Douglas merger, following decades of merger activity in that industry around the world).<sup>21</sup> Additionally, the disciplining threat of potential competition decreases in fully developed global markets because there are no remaining foreign horizontal competitors that can easily enter the market. This is especially true in markets with high industry-specific sunk costs.<sup>22</sup> Coherent and effective control of international megamerger demands some kind of international merger control arrangement that regulates the allocation of jurisdiction. Otherwise, every individual jurisdiction that believes its domestic market to be affected by the merger will claim the right to review the proposed merger under the effects doctrine.<sup>23</sup> This leads to considerable fric-

---

20. See *id.* at 48.

21. See generally Thomas L. Boeder & Gary J. Dorman, *The Boeing/McDonnell Douglas Merger: The Economics, Antitrust Law and Politics of the Aerospace Industry*, 45 ANTITRUST BULL. 119 (2000) (addressing the Boeing/McDonnell Douglas merger in relation to the aerospace industry).

22. Companies that produce similar products in different geographical markets and/or use similar resources and modes of production compared to the ones within the relevant industry have a significantly higher likelihood of entering the relevant market than other companies. See Constance E. Helfat & Marvin B. Lieberman, *The Birth of Capabilities: Market Entry and the Importance of Pre-History*, 11 INDUS. & CORP. CHANGE 725, 736-38 (2002).

23. For a definition of the effects doctrine, see Henning Klodt, *Conflicts and Conflict Resolution in International Anti-Trust: Do We Need International Competition Rules?*, 24 WORLD ECON. 877, 878 (2001); Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 916 (2003) [hereinafter Fox, *International Antitrust*].

tions, negative externalities, and inefficiencies like jurisdictional conflicts,<sup>24</sup> increasing transaction costs,<sup>25</sup> and power asymmetries between countries.<sup>26</sup> Without an international arrangement, the success of trade liberalization is endangered by strategic competition policy designed to create “national champions” for global markets, to promote so-called key industries and technologies, and to defend domestic producers against competitors from abroad (e.g., by selective non-enforcement of merger control rules or other discretionary and discriminating merger control practices).<sup>27</sup> Even though such

---

24. See Klodt, *supra* note 23, at 879 (documenting an impressive listing of jurisdictional conflicts on merger control decisions); see also Eleanor M. Fox, *Antitrust Regulation Across National Borders*, BROOKINGS REV., Winter 1998, at 30, 31 [hereinafter Fox, *Antitrust Regulation*] (discussing the famous Boeing-McDonnell Douglas merger, which almost caused a U.S.-E.U. trade war).

25. Merging companies often have to comply with more than a dozen merger control procedures and requirements. Thereby, significant costs and burdens are generated both for merging enterprises and the involved jurisdictions. See NOTIFICATION & PROCEDURES SUBGROUP, INT’L COMPETITION NETWORK [ICN], REPORT ON THE COSTS AND BURDENS OF MULTIJURISDICTIONAL MERGER REVIEW 10-12 (2002), available at <http://www.internationalcompetitionnetwork.org/costburd.pdf>.

26. The U.S. and the E.U. are probably able to protect competition in their domestic markets against multinational companies because free access to these markets is indispensable for most multinational enterprises. But smaller countries, and especially developing countries, often do not possess sufficient power to enforce their antitrust policies against multinational enterprises. See Alexis Jacquemin, *Towards an Internationalisation of Competition Policy*, 18 WORLD ECON. 781, 786 (1995); see also Fox, *Antitrust Regulation*, *supra* note 24, at 1794-95 (noting that some countries choose not to have antitrust law because enforcement is too expensive). Furthermore, the effects doctrine itself can be applied in a discriminatory way by powerful countries with large and important domestic markets against enterprises of smaller countries that attempt to enter a powerful nation’s market to threaten the market positions of domestic enterprises.

27. See Andrew T. Guzman, *Is International Antitrust Possible?*, 73 N.Y.U. L. REV. 1501, 1510-24 (1998) (discussing the economic incentives individual countries face in determining antitrust policy in the absence of international agreements); Fox, *Antitrust Regulation*, *supra* note 24, at 30-31 (discussing the Boeing-McDonnell Douglas merger, in which the U.S. and E.U. each championed national aircraft manufacturers); Eleanor M. Fox, *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 N.Y.U. L. REV. 1781, 1803-04 (2000) [hereinafter Fox, *Antitrust and Regulatory Federalism*] (illuminating the problem of nationalism); Wolfgang Kerber & Oliver Budzinski, *Competition of Competition Laws: Mission Impossible?*, in COMPETITION LAWS IN CONFLICT: ANTITRUST JURISDICTION IN THE GLOBAL ECONOMY (Richard Epstein & Michael S. Greve eds.) (forthcoming 2004) (manuscript at 28, available at

strategic competition policies may reduce world welfare by causing allocative inefficiencies in the international division of labor, following such policies can be rational for governments, since it either may increase national welfare at the expense of other countries (a beggar-thy-neighbor policy) or may increase the welfare of particular lobby groups within the domestic jurisdiction,<sup>28</sup> promoting the probability of the re-election of the government. In economic game theory, the first case is de-

---

[http://aei.org/docLib/20030421\\_Kerber.pdf](http://aei.org/docLib/20030421_Kerber.pdf)) (noting that “competition of competition laws” can lead to serious problems without appropriate international arrangements). A recent example may be presented by the merger of E.ON and Ruhrgas, which created a near-monopolistic position in the German gas market and, therefore, was initially prohibited by the Bundeskartellamt (German Federal Cartel Office). The German Ministry of Economics overruled the Bundeskartellamt—against the most explicit advice of the German Monopolies Commission, *see* MONOPOLKOMMISSION [MONOPOLY COMMISSION], SONDERGUTACHTEN [SPECIAL REPORT] 34, ZUSAMMENSCHLUSSVORHABEN DER E.ON AG MIT DER GELSENBERG AG UND DER E.ON AG MIT DER BERGEMANN GMBH [MERGER PLAN OF E.ON AG AND GELSENBERG AG AND OF E.ON AG AND BERGEMANN GMBH] 130 (2002), *available at* [http://www.monopolkommission.de/sg\\_34/text\\_s34.pdf](http://www.monopolkommission.de/sg_34/text_s34.pdf); MONOPOLKOMMISSION [MONOPOLY COMMISSION], SONDERGUTACHTEN [SPECIAL REPORT] 35, ZUSAMMENSCHLUSSVORHABEN DER E.ON AG MIT DER GELSENBERG AG UND DER E.ON AG MIT DER BERGEMANN GMBH [MERGER PLAN OF E.ON AG AND GELSENBERG AG AND OF E.ON AG AND BERGEMANN GMBH] 4, 36 (2002), *available at* [http://www.monopolkommission.de/sg\\_35/text\\_s35.pdf](http://www.monopolkommission.de/sg_35/text_s35.pdf)—and allowed the merger, probably with the strategic intention of having a domestic global player in the emerging international (European) energy markets. *See* Audio recording: Wirtschafts-Staatssekretär Alfred Tacke zur Eon-Ruhrgas-Fusion [Administrative State Economic Secretary Alfred Tacke, on the Eon/Ruhrgas Merger], FIN. TIMES DEUTSCHLAND, *at* <http://www.ftd.de/ub/di/1032245712795.html?nv=S> (Sept.19, 2002). Alfred Tacke, Administrative State Secretary in the German Federal Ministry of Economics (and responsible for the E.ON decision, since then-Minister Müller was a former leading director of the E.ON predecessor VEBA—a conflict that caused a multitude of speculations), states that the merger was allowed because it “strengthens the international competitiveness of Ruhrgas on international gas markets . . .” *Id.*

28. In this case, in addition to foreign companies, domestic consumer groups and other members of the general public may also have to face welfare losses. However, their poor degree of organization and small ability to organize, relative to special interest groups, renders them less able to lobby successfully for policies that are more beneficial to the public at large. *See* MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* 141-48 (photo. reprint 1971) (1965); *cf.* Susanne Lohmann, *An Information Rationale for the Power of Special Interests*, 92 AM. POL. SCI. REV. 809, 809 (1998) (explaining the power of special interest groups in terms of information asymmetries and the free-rider problem).

scribed as a prisoners' dilemma (PD) situation, since the optimal situation is not achievable by isolated rational individual behavior but only through an arrangement between the "players."<sup>29</sup> Non-coordinated jurisdictional competition policy may, thus, lead to an inferior equilibrium on the world level. The following figure explains the incentives in a rather simple PD for international competition policy:<sup>30</sup>

Country A \ Country B	Strategic Competition Policy (non-cooperative strategy)	International Competition Policy (cooperative strategy)
Strategic Competition Policy (non-cooperative strategy)	A = 5, B = 5 (W = 10)	A = 15, B = 0 (W = 15)
International Competition Policy (cooperative strategy)	A = 0, B = 15 (W = 15)	A = 10, B = 10 (W = 20)

As can be seen here, the highest world-welfare (W) results if both countries A and B engage in a competition policy that disclaims national-strategic elements and focuses instead on the maximization of international welfare (i.e., a cooperative strategy). Following this line of thought does not prescribe whether this "international competition policy" is a national competition law enforced by a national authority that targets world welfare or whether it involves the enforcement of international agreements and/or international law. The decisive insight that can be derived from the PD game points to the possibility of rational national behavior leading to an inferior equilibrium in the absence of an international arrangement. If country A decides upon its competition policy strategy with-

29. See Robert Axelrod, *The Emergence of Cooperation Among Egoists*, 75 AM. POL. SCI. REV. 306, 317 (1981).

30. To keep the analysis short and simple, more elaborated and dynamic PDs are not discussed here. Also, the game theoretic insights into the evolution of conventions, norms, and arrangements in PD games are ignored. My intention is only to demonstrate that (world) welfare-reducing strategic competition policies can take place without an international arrangement. It is important to remark, however, that in dynamic and evolutionary PD games, international rules need not always be implemented "top down" by political negotiations and agreements but can also emerge "bottom up" if specific conditions (like repeated interaction of the "players") are sufficiently met. As a consequence, the rationality of an inferior equilibrium does not prescribe which kind of solution to the underlying problem is the best one.

out knowing which competition policy strategy country B engages in, then it is perfectly individual-rational for A to choose the non-cooperative strategy (i.e., to engage in strategic competition policy). If B chooses the cooperative strategy, A gains a welfare pay-off of 15, the corresponding pay-off to B is 0, and world-welfare ( $W$ ) is 15.<sup>31</sup> If A engages in the cooperative strategy, its pay-off is 10 (a loss of 5 from its current position). Furthermore, if B also chooses the non-cooperative strategy, A is better off as well. A gains “only” 5 but, given the non-cooperative performance of B, choosing the cooperative strategy would have reduced A’s pay-off to zero.

Therefore, irrespective of the strategy B chooses, A is always better off engaging in strategic competition policy—as long as the two countries act without international coordination and thus, they do not know in advance (or with sufficient security) what strategy the other one will choose. Since B’s situation is exactly the same, without international coordination rational jurisdictional behavior will lead to the inferior equilibrium ( $W = 10$ ), which is suboptimal (inefficient) from a world-welfare point of view. The superior equilibrium of cooperative strategies ( $W = 20$ ) can, in this very simple model, only be achieved by some kind of international coordination.<sup>32</sup>

The insight that some kind of international competition policy coordination is necessary to avoid—or, at least, to reduce—jurisdictional conflicts has led to a number of bilateral arrangements.<sup>33</sup> These mainly focus on the prosecution of hardcore cartels, however, whereas merger control issues only play a minor role and generally only include notification and

---

31. If individual rational behavior is assumed, the welfare pay-offs of B and  $W$  do not influence A’s decision.

32. It should be emphasized that “international coordination” must be interpreted in a very broad sense. The model tells nothing about the *kind* of international coordination (substantive international law, minimum standards, international procedural rules, cooperation agreements, etc.) sufficient to escape from the inefficient PD situation.

33. See Larry Fullerton & Camelia C. Mazard, *International Antitrust Cooperation Agreements*, 24 *WORLD COMPETITION: L. & ECON. REV.* 405, 406 (2001); Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective* 7, 12 (Sept. 20-21, 2002) (paper presented at the University of Minnesota Law School Conference on Global Antitrust Law and Policy, on file with author).

consultation duties.<sup>34</sup> Other shortcomings of the bilateral agreements include that they are drafted predominantly by industrialized countries and that the different agreements are not congruent, creating conflicting demands on a competition authority in a three-or-more-country case. Moreover, power asymmetries play an important role. Especially in bilateral negotiations, powerful jurisdictions like the U.S. and the E.U. are better able to assert their interests while smaller countries (and especially developing countries) may have to bear disproportionate burdens.<sup>35</sup> Altogether, “[i]t seems over-optimistic to imagine that a world-wide framework for competition policy could be built up piecemeal from a network of bilateral agreements . . . . [I]t would be virtually impossible to ensure that all the agreements were compatible with each other.”<sup>36</sup>

The European Union initiated a multilateral approach to international competition policy in 1995.<sup>37</sup> This suggested complementing the existing WTO framework, which deals exclusively with the restriction of international competition through state action, by introducing a world competition code (preferably minimum standards)<sup>38</sup> that would be enforced by WTO mechanisms.<sup>39</sup> The governance of cross-border mergers was one of the main issues in this context. Although a “WTO Working Group on the Interaction of Trade and Competition” has been established, substantive WTO rules against the restriction of international competition through private anticompetitive market behavior cannot be expected for the foreseeable future.<sup>40</sup> Both the U.S.<sup>41</sup> and a large number of

---

34. For example, the cooperation agreement between the U.S. and the E.U. includes the far-reaching positive comity principle, but merger control is excluded from that part of the agreement. See Fullerton & Mazard, *supra* note 33, at 413-14.

35. *C.f. Report (1999) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WT/WGTCP/3, ¶ 24 (Oct. 11, 1999).

36. Roderick Meiklejohn, *An International Competition Policy: Do We Need It? Is It Feasible?*, 22 *WORLD ECON.* 1233, 1247 (1999).

37. See David J. Gerber, *The U.S.-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 *NEW ENG. L. REV.* 123, 129 (1999).

38. See *id.*

39. See *id.*

40. See *id.*; *Singapore Ministerial Declaration*, WT/MIN(96)/DEC, ¶ 20 (Dec. 18, 1996). Nonetheless, the work of the Working Group has been

developing countries are not willing to transfer competition policy competences—especially in the field of merger control—to the WTO.<sup>42</sup> With this realization, the E.U. and Japan suggested a more modest proposal at the Doha Ministerial Conference in 2001, which no longer entails any substantive harmonization, except for a rather vague commitment to fight hardcore cartels.<sup>43</sup> Instead, voluntary cooperation, capacity building in developing countries, and procedural core principles (like transparency, fairness, and non-discrimination) are proposed.<sup>44</sup> The Conference agreed on a similar agenda and planned to start negotiations on these subjects after the next Ministerial Conference—provided that a consensus on the modalities can be achieved.<sup>45</sup> However, the failure of the Cancún Conference causes a barely calculable delay of this process.<sup>46</sup>

---

fruitful in the sense that its advocacy has led many countries to establish effective national competition rules in the last decade. See *Report (2003) of the Working Group on the Interaction Between Trade and Competition Policy to the General Council*, WT/WGTCP/7, ¶ 18 (July 17, 2003); Working Group on the Interaction Between Trade and Competition Policy, WTO, *Report on the Meeting of 26-27 May 2003*, WT/WGTCP/M/22, ¶ 14 (July 9, 2003).

41. On the divergent views of the U.S. and E.U. on the internationalization of competition policy, see generally Gerber, *supra* note 37.

42. See INT'L COMPETITION POLICY ADVISORY COMMITTEE, U.S. DEP'T OF JUSTICE, FINAL REPORT 264, 267 (2003) [hereinafter ICPAC REPORT], available at <http://www.doj.gov/atr/icpac/finalreport.htm> (explaining the objections raised by the U.S. and developing countries to the WTO as an adequate forum for negotiating rules or resolving disputes in relation to competition policy).

43. See *Ministerial Declaration*, WT/MIN(01)/DEC/1, ¶ 25 (Nov. 14, 2001).

44. *Id.*

45. See Fox, *International Antitrust*, *supra* note 23, at 913 n.3 (quoting the Ministerial Declaration on competition policy), 913-15 (outlining the modality debate between “horizontalists” and “internationalists”); Frederic Jenny, *Competition Law and Policy: Global Governance Issues 12* (Mar. 24, 2003) (paper presented at the New York University School of Law Colloquium on Globalization and its Discontents, on file with author) (noting that Doha participants agreed to develop “modalities for cooperation between Member states on competition policy issues”).

46. See WORLD TRADE ORGANIZATION, SUMMARY OF 14 SEPTEMBER 2003: THE MINISTERIAL STATEMENT (2003), available at [http://www.wto.org/english/thewto\\_e/minist\\_e/min03\\_e/min03\\_14sept\\_e.htm#statement](http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm#statement) (last visited Apr. 27, 2003).

C. *Objections to a Uniform and Centralized International Merger Control Regime*

Currently existing systems of competition laws differ substantially among different jurisdictions. On one hand, this complicates the task of negotiating international rules. On the other hand, however, an analysis of the reasons for the diversity in competition rules and policies provides a theoretical argument in favor of such diversity.<sup>47</sup>

Perhaps more than other fields of economic policy, competition policy was and continues to be influenced by economic theory.<sup>48</sup> Therefore, the diversity and (at least partly) incompatibility of actual competition policy regimes reflect pluralism in the economic theories of competition (industrial economics, theory of industrial organization, competition theory) in general, and of mergers especially. The famous dis-

---

47. There are many other reasons against a uniform world merger control regime, for instance administrative costs and bureaucratic burdens, loss of democratic control, operational problems, erosion of a beneficial institutional competition (allowing for efficiency-enhancing division of labor according to the comparative advantages of different antitrust agencies), low error tolerance, problems of adequacy if the same rules and enforcers address countries with significantly different economic structures, etc. These are discussed extensively in the literature. See, e.g., Karl M. Meessen, *Competition of Competition Laws*, 10 NW. J. INT'L L. & BUS. 17 (1989); Heinz Hauser & Rainer E. Schoene, *Is There a Need for International Competition Rules?*, 49 AUSSEN-WIRTSCHAFT 205, 217-19 (1994); Hanns Ullrich, *International Harmonisation of Competition Law: Making Diversity a Workable Concept*, in *COMPARATIVE COMPETITION LAW: APPROACHING AN INTERNATIONAL SYSTEM OF ANTITRUST LAW* 43, 52-53, 74 (Hanns Ullrich ed., 1998); Paul B. Stephan, *Regulatory Cooperation and Competition: The Search for Virtue*, in *TRANSATLANTIC REGULATORY COOPERATION: LEGAL PROBLEMS AND POLITICAL PROSPECTS* 167 (George A. Germann et al. eds., 2000); Harry First, *Evolving Toward What? The Development of International Antitrust*, in *THE FUTURE OF TRANSNATIONAL ANTITRUST—FROM COMPARATIVE TO COMMON COMPETITION LAW* 23, 50-51 (Josef Drexel ed., 2003); Paul B. Stephan, *Competitive Competition Law? An Essay against International Cooperation*, in *COMPETITION LAWS IN CONFLICT*, *supra* note 27; John O. McGinnis, *The Political Economy of International Antitrust Harmonization*, in *COMPETITION LAWS IN CONFLICT*, *supra* note 27 (manuscript at 3-13, on file with author). For a differentiated analysis of the prospects and limits of a competition of competition laws, see generally Kerber & Budzinski, *supra* note 27. In this paper, I want to focus on a theoretical reason for diversity, and not primarily against uniformity or against specific ways toward harmonization.

48. See William E. Kovacic, *The Influence of Economics on Antitrust Law*, 30 ECON. INQUIRY 294, 294-96 (1992).

pute between the Harvard School,<sup>49</sup> dominating American antitrust policy in the 1960s and 1970s, and the Chicago School,<sup>50</sup> gaining increasing influence on American antitrust policy throughout the 1980s, provides a striking example for (widely) incompatible theoretical approaches to competition policy.<sup>51</sup> Whereas the Harvard School emphasizes the market power effect of mergers (market power doctrine)<sup>52</sup> and, therefore, predominantly focuses on anticompetitive effects of increasing concentration due to merger activity (decreasing allocative efficiency),<sup>53</sup> the Chicago School emphasizes efficiency-enhancing effects of mergers due to synergies, economies of scale and scope, and network effects (efficiency doctrine and increasing business efficiency).<sup>54</sup> In truth, both effects exist in economic reality and point to counteracting competition consequences of mergers as, for example, the well-known trade-off model<sup>55</sup> shows. From a non-ideological point of view, this con-

---

49. See generally J.M. Clark, *Toward a Concept of Workable Competition*, 30 AM. ECON. REV. 241 (1940); F.M. SCHERER & DAVID ROSS, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* (3d ed. 1990).

50. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 925-33 (1979). See generally ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984) (discussing the limits of antitrust from a Chicago School perspective).

51. For comparative overviews of the two schools, see generally Eleanor M. Fox & Lawrence A. Sullivan, *Antitrust—Retrospective and Prospective: Where Are We Coming From? Where Are We Going?*, 62 N.Y.U. L. REV. 936 (1987) (tracing the development of antitrust law in the U.S. and the emergence of the Chicago School ideological challenges); David B. Audretsch, *Divergent Views in Antitrust Economics*, 33 ANTITRUST BULL. 135 (1988) (presenting the two distinct views of antitrust—mainstream and neo-Chicago School). Empirical evidence on (partly) differing economic foundations of competition policy in America and in Europe is provided by Karl Aiginger et al., *Objectives, Topics and Methods in Industrial Organization During the Nineties: Results from a Survey*, 16 INT'L J. INDUS. ORG. 799, 800-06 (1998); Karl Aiginger et al., *Do American and European Industrial Organization Economists Differ?*, 19 REV. INDUS. ORG. 383, 385-95 (2001).

52. See SCHERER & ROSS, *supra* note 49, at 153-62 (describing the history of U.S. merger activity and arguing that one motive for merger, among many, is the desire for monopoly power).

53. *Id.* at 21-29 (explaining the inefficiency of monopoly pricing).

54. See Audretsch, *supra* note 51, at 150-55 (describing the neo-Chicagoans' emphasis on the efficiency of mergers).

55. See Oliver E. Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18, 18-23 (1968).

stitutes a permanent trade-off (or even dilemma) between allocative and business efficiency, since neither of the two effects generally is dominated by the other. Consequently, modern industrial economics approaches include prospects and limits concerning both effects. Whereas the famous merger model by Farrell and Shapiro highlights the efficiency doctrine,<sup>56</sup> the modern theory of strategic market barriers allows for purely private market barriers (and, thus, considerable anticompetitive market power) in free—but concentrated—markets.<sup>57</sup> Recent theoretical reasoning demonstrates the anticompetitive (i.e., consumer welfare-reducing) effects of mergers, even in the face of cost efficiencies and free entry, as well as the increase of dominance without efficiency promotion.<sup>58</sup> The empirical evidence shows that the majority of mergers, especially of megamergers and equal mergers, tend to produce business inefficiencies instead of increasing market efficiency.<sup>59</sup> Rea-

---

56. See Joseph Farrell & Carl Shapiro, *Horizontal Mergers: An Equilibrium Analysis*, 80 AM. ECON. REV. 107, 108, 111 (1990).

57. Strategic market barriers include, for example, the excess capacity strategy, Avinash K. Dixit, *The Role of Investment in Entry-Deterrence*, 90 ECON. J. 95, 106 (1980); limit pricing, Paul Milgrom & John Roberts, *Limit Pricing and Entry Under Incomplete Information: An Equilibrium Analysis*, 50 ECONOMETRICA 443, 457-58 (1982); strategic product differentiation, Avinash K. Dixit & Joseph E. Stiglitz, *Monopolistic Competition and Optimum Product Diversity*, 67 AM. ECON. REV. 297, 301 (1977); contract and network strategies, Philippe Aghion & Patrick Bolton, *Contracts as a Barrier to Entry*, 77 AM. ECON. REV. 388, 398-99 (1987); and the strategies of raising rivals' costs and switching costs, STEPHEN MARTIN, *ADVANCED INDUSTRIAL ECONOMICS* 64-71 (1993); LUÍS M.B. CABRAL, *INTRODUCTION TO INDUSTRIAL ORGANIZATION* 217-219 (2000). Additionally, the Chicago doctrine of the impossibility of predatory pricing in free markets becomes shaken by solutions of the famous "chain store paradox." See Reinhard Selten, *The Chain Store Paradox*, 9 THEORY AND DECISION 127 (1978); Paul Milgrom & John Roberts, *Predation, Reputation, and Entry Deterrence*, 27 J. ECON. THEORY 280, 281 (1982); Drew Fudenberg & Jean Tirole, *A "Signal-Jamming" Theory of Predation*, 17 RAND J. ECON. 366, 366-67 (1986); Patrick Bolton & David S. Scharfstein, *A Theory of Predation Based on Agency Problems in Financial Contracting*, 80 AM. ECON. REV. 93, 93-94, 104 (1990).

58. See Susan Athey & Armin Schmutzler, *Investment and Market Dominance*, 32 RAND J. ECON. 1, 21 (2001); see also LUÍS M.B. Cabral, *Increasing Dominance with No Efficiency Effect*, 102 J. ECON. THEORY 471, 472, 477-479 (2002); LUÍS M.B. Cabral, *Horizontal Mergers with Free-Entry: Why Cost Efficiencies May be a Weak Defense and Asset Sales a Poor Remedy*, 21 INT'L J. INDUS. ORG. 607, 609 (2003).

59. See SCHERER & ROSS, *supra* note 49, at 167, 174; see also Klaus Gugler et al., *The Effects of Mergers: An International Comparison*, 21 INT'L J. INDUS. ORG.

sons lie in the problem of X-inefficiencies that prevent the realization of theoretical synergy potentials and in doubts concerning the economic rationality of merger decisions (information asymmetries, bounded rationality, psychological effects, maximization of private interests by managers and consultants, etc.).<sup>60</sup>

Additional economic theories that are at least potentially significant for merger control include (without any claim of overall inclusiveness):<sup>61</sup>

- the theory of contestable markets,<sup>62</sup> which emphasizes the disciplinary force of potential competition for market-dominating enterprises but also clarifies the rather restrictive conditions for the effectiveness of potential competition.
- the innovation-market analysis, which discusses the effect of market concentration on innovation.<sup>63</sup> Big enterprises in highly concentrated markets can realize economies of scale and scope in R&D and can more easily finance elaborate innovation due to higher profits, especially in high-technology industries (so-called Neo-Schumpeter-Hypotheses). This points to a possible additional trade-off between static efficiency and dynamic efficiency (or innovation efficiency). However, the incentive to

---

625, 649-51 (2003). *But see* LARS-HENDRIK RÖLLER ET AL., EFFICIENCY GAINS FROM MERGERS 50-51, 53 (Aug. 2000), available at <http://skylla.wz-berlin.de/pdf/2000/iv00-09.pdf> (demonstrating mixed results in empirical studies); Paul A. Pautler, *Evidence on Mergers and Acquisitions*, 48 ANTITRUST BULL. 119, 145-66 (2003).

60. BUDZINSKI & KERBER, *supra* note 1, at 46-47, 78.

61. For a more elaborated and detailed discussion of incompatible competition theories within economics, see Oliver Budzinski, *Pluralism of Competition Policy Paradigms and the Call for Regulatory Diversity* (June 23, 2003), available at <http://ssrn.com/abstract=452900>.

62. See William J. Baumol, *Contestable Markets: An Uprising in the Theory of Industry Structure*, 72 AM. ECON. REV. 1, 2 (1982).

63. See Thomas M. Jorde & David J. Teece, *Innovation and Cooperation: Implications for Competition and Antitrust*, J. ECON. PERSP., Summer 1990, at 75, 85-89; DAVID B. AUDRETSCH, INNOVATION AND INDUSTRY EVOLUTION 1-4 (1995); Richard J. Gilbert & Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 63 ANTITRUST L. J. 569, 574-81, 595 (1995); David B. Audretsch et al., *Competition Policy in Dynamic Markets*, 19 INT'L J. INDUS. ORG. 613, 630.

innovate often ceases with increasing market dominance.

- evolutionary theories of competition, following the Austrian market process theory (competition as a discovery procedure)<sup>64</sup> or Schumpeterian approaches,<sup>65</sup> which emphasize the meaning of diversity for the preservation of sustainable innovation-generating competition processes. Although they are not elaborately reflected in current merger control regimes,<sup>66</sup> these approaches allow for the important insight that diversity may well be a value for itself in real-world complex market processes, which are neither deterministic nor reducible to linear algebra.
- German traditions of ordoliberalism (Freiburg School) and dynamic competition theory,<sup>67</sup> which have been very influential on German competition policy and, more indirectly, on the E.U. competition policy and merger control system. Although arguing from a free market perspective, these ap-

---

64. For an illustration of Austrian market process theory's characterization of competition as discovery procedure, see FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 96-106 (1948); FRIEDRICH A. HAYEK, *Competition as Discovery Procedure*, in NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 179, 179-189 (Univ. Chicago Press 1978) (1968).

65. See J. Stanley Metcalf, EVOLUTIONARY ECONOMICS AND CREATIVE DESTRUCTION 17, 24-25 (1998) (discussing Schumpeter as one inspiration for contemporary evolutionary theories of competition).

66. But see the claim for their future importance by Audretsch et al., *supra* note 63, at 614.

67. For the Freiburg School, see WALTER EUCKEN, GRUNDSÄTZE DER WIRTSCHAFTSPOLITIK 294, 370-71 (1960); Viktor Vanberg, "Ordnungstheorie" as Constitutional Economics—*The German Conception of a "Social Market Economy"*, 39 ORDO: JAHRBUCH FÜR DIE ORDNUNG VON WIRTSCHAFT UND GESELLSCHAFT [hereinafter ORDO] 17 (1988); Viktor Vanberg, *Markets and Regulation: On the Contrast Between Free-Market Liberalism and Constitutional Liberalism*, 10 CONST. POL. ECON. 219 (1999); Manfred E. Streit, *Economic Order, Private Law and Public Policy: The Freiburg School of Law and Economics in Perspective*, 148 J. INSTITUTIONAL & THEORETICAL ECON. 675 (1992); WOLFGANG KASPER & MANFRED E. STREIT, INSTITUTIONAL ECONOMICS: SOCIAL ORDER AND PUBLIC POLICY 311-17, 471-72 (1998) (describing ordo-liberal economic policies and their influence on post-war economic policy in West Germany). For an overview of German dynamic competition theory, see Wolfgang Kerber, *German Market Process Theory*, in THE ELGAR COMPANION TO AUSTRIAN ECONOMICS 500, 500-04 (Peter J. Boettke ed., 1994).

proaches are suspicious about the misuse of market dominance and support an active—but non-discretionary—merger control regime.

The crucial point of theory pluralism is that, from a non-ideological point of view, there can be no certainty about the “right” competition theory and, consequently, it is impossible to derive the “right” competition rules and policies. Furthermore, taking a dynamic perspective into account makes clear that a change in this situation is improbable. Competition theories will keep evolving through scientific progress (both piecemeal within current paradigms and discontinuously by the creation of new paradigms), and private agents will most probably keep developing innovative modes of anticompetitive behavior,<sup>68</sup> leading to the necessity of corresponding competition policy innovations.

The impossibility of having the “right” and “ultimate” theory or policy leads to the necessity of capabilities for institutional evolution. Any system of competition rules must be able to adjust to new developments in competition theory and new challenges from innovative anticompetitive market behavior. This requires a minimum degree of diversity of competition policies (and, thus, a minimum of decentralization within any international competition law or policy system) to offer permeability for the creation and diffusion of theory innovations. U.S. antitrust policy’s turn from the Harvard competition policy regime, which aims to protect small business and the diversity of independent agents (in that way characterized by a preference for pluralism), to the Chicago competition policy regime, which aims to produce efficient markets, was made possible by the diversity of antitrust enforcement agencies and courts, which offered a multitude of channels through which the new economic ideas could penetrate the antitrust system.<sup>69</sup> An efficiency-orientated reversal of the extremely restrictive

---

68. In competition, agents have incentives to create totally new modes of behavior which are not ex ante predictable. Thus, the environment in which antitrust policy takes place is subject to evolution, and future challenges will emerge that cannot be anticipated today. On the foundations of creative behavior and its connection to market competition and institutional arrangements, see generally Oliver Budzinski, *Cognitive Rules, Institutions, and Competition*, 14 CONST. POL. ECON. 215 (2003).

69. See Fox, *Antitrust and Regulatory Federalism*, *supra* note 27, at 1797-98 (discussing the shift in U.S. antitrust policy in the 1980s); Kovacic, *supra* note

U.S. merger guidelines of the 1960s, for example, would have been much more difficult if the guidelines had been codified in an international arrangement.<sup>70</sup>

Generally, ignorance of the “right” competition policy demands arrangements that allow for institutional learning about (i) the workability of different institutional arrangements representing different competition theories, (ii) the workability of competition policy techniques<sup>71</sup> that are widely independent of the prevailing theoretical paradigm, and (iii) institutional innovation. A process of institutional learning requires parallel experiments with different institutional solutions and, therefore, diversity of rules and agencies. Each competition institution, policy technique, or institutional innovation can be viewed as a hypothesis about better control of anticompetitive behavior. Due to theory pluralism and the dynamics of competition, these hypotheses are, as a matter of principle, fallible (i.e., they can contain situational improvements of competition policy but can also fail). The adequacy of institutional hypotheses is tested on reality through a process of experimentation. For example, one competition authority implements and enforces a new and different institutional arrangement, believing it to be superior, and the following evolution of the governed markets serves as a feedback. If more than one authority joins this process of experimentation, mutual learning occurs via one’s own experiments and the observable experiments of other “interacting”<sup>72</sup> agencies. The more institutional hypotheses are tested simultaneously on the markets, the faster and more efficient the process of institutional learning becomes. Thus, diversity of rules and agencies optimizes institutional learning and speeds up the process of institutional innovation. Since no institutional improvement achieves an all-time optimum (due to the evolutionary dynamics of both competitive markets and the creation of innovative theories), the process of institutional learning is never-end-

---

48, at 295 (discussing the “relative ease with which new economic concepts can enter the courtroom”).

70. See Daniel K. Tarullo, *Norms and Institutions in Global Competition Policy*, 94 AM. J. INT’L L. 478, 490 (2000).

71. These include techniques for market definition, concentration ratios, identification of essential facilities and other market barriers, etc.

72. As in the concept of yardstick competition, no real interaction is necessary. Instead, mutual observation serves as “quasi-interaction.”

ing.<sup>73</sup> The implications of this theoretical framework demand diversity among institutions and agencies in international competition policy arrangements.

D. *The Governance of International Mergers: Between Coherence and Diversity*

The governance of cross-border mergers has to face two demands: the demand of coherence and the demand of diversity. Thereby, the task of designing an international competition policy institution is defined. Any real-world international merger control system will have to combine internationality with nationality or, in other words, will have to achieve coherence by preserving diversity. Since simple institutional solutions—like bilateral cooperation agreements on the one extreme and an uniform world competition code on the other—do not fit this task,<sup>74</sup> the analysis of complex institutional ar-

---

73. This concept of competition as a process of experimentation, for institutional competition, is provided by Viktor Vanberg & Wolfgang Kerber, *Institutional Competition Among Jurisdictions: An Evolutionary Approach*, 10 CONST. POL. ECON. 193, 195-201 (1994); Wolfgang Kerber, *Interjurisdictional Competition Within the European Union*, 23 FORDHAM INT'L L.J. S217, S224-26 (2000) (discussing interjurisdictional competition and experimentation in the context of the European Union); Kerber & Budzinski, *supra* note 27, at 12. For competition in ordinary markets, see Wolfgang Kerber, *Wettbewerb als Hypothesentest: Eine evolutorische Konzeption wissenschaftlichen Wettbewerbs* [*Competition as Testing Hypotheses: An Evolutionary Conception of Economic Competition*], in DIMENSIONEN DES WETTBEWERBS: SEINE ROLLE IN DER ENTSTEHUNG UND AUSGESTALTUNG VON WIRTSCHAFTSORDNUNGEN [DIMENSIONS OF COMPETITION: THEIR ROLE IN THE EMERGENCE AND SHAPING OF ECONOMIC REGULATIONS] 29, 49-56 (Karl von Delhaes & Ulrich Fehl eds., 1997); Wolfgang Kerber & Nicole J. Saam, *Competition as a Test of Hypotheses: Simulation of Knowledge-Generating Market Processes*, J. ARTIFICIAL SOC'IES & SOC. SIMULATION, June 2001, ¶ 1.2, available at <http://jasss.soc.surrey.ac.uk/4/3/2.html> (describing free market processes as competitive experimentation). Additionally, see the analysis by OLIVER BUDZINSKI, WIRTSCHAFTSPOLITISCHE IMPLIKATIONEN EVOLUTORISCHER ORDNUNGSÖKONOMIK [POLITICAL ECONOMIC IMPLICATIONS OF EVOLUTIONARY INSTITUTIONAL ECONOMICS] 165-74 (Institutionelle und Evolutorische Ökonomik, Band 11 [Institutional and Evolutionary Economics, Vol. 11], Birger P. Priddat et al. eds., 2000); Oliver Budzinski, *Cognitive Rules, Institutions, and Competition*, 14 CONST. POL. ECON. 215, 227-28 (2003), available at [www.kluweronline.com/issn/1043-4062/contents](http://www.kluweronline.com/issn/1043-4062/contents).

74. "The simplistic postulated choice—regulatory competition or a world code—is frequently used as a straw man to discredit, and not to deal with, nuanced internationalism." Fox, *Antitrust and Regulatory Federalism*, *supra* note 27, at 1800 n.69. Only within the framework of the sole analysis of

rangements becomes important, and new institutional economics thus becomes the discipline offering the most promising theory for an adequate analysis. In the following Part the currently most promising multilateral approach to an international merger control arrangement, the International Competition Network (ICN), is presented. In Part III, the tools of new institutional economics and governance theory are utilized to analyze the adequacy of the ICN in combining and integrating the two demands sketched above.

## II. THE INTERNATIONAL COMPETITION NETWORK AND ITS MERGER-CONTROL INSTITUTIONS

### A. *The General Framework*

On October 25, 2001, the International Competition Network (ICN) was established,<sup>75</sup> largely following the recommendations of the final report of the U.S. International Competition Policy Advisory Committee (ICPAC), which was established by the U.S. Department of Justice, Antitrust Division. ICPAC promoted the abandonment of the WTO solution<sup>76</sup> and, instead, suggested a more informal Global Competition Initiative (GCI) without binding international competition rules.<sup>77</sup> This led to a slight change in the U.S. position toward international competition policy: Instead of insisting on bilateral cooperation, the U.S. launched an international initiative to put the ICPAC recommendations into action.<sup>78</sup> Although

---

uniform internationality versus more or less isolated nationality do the demands of coherence and diversity seem contradictory.

75. See Yves Devellennes & Georgios Kiriazis, *The Creation of an International Competition Network*, COMPETITION POL'Y NEWSLETTER (European Comm'n, Brussels, Belgium), Feb. 2002, at 25, 25-26; Konrad von Finckenstein, International Antitrust Policy and the International Competition Network, Address at the Fordham Corporate Law Institute 29th Annual Conference on International Antitrust Law & Policy (Oct. 31, 2002) (transcript available at [http://strategis.ic.gc.ca/pics/ct/fordham\\_oct312002.pdf](http://strategis.ic.gc.ca/pics/ct/fordham_oct312002.pdf)); First, *supra* note 47, at 36-38; see also ICN, HISTORY, at <http://www.internationalcompetitionnetwork.org/history.html> (last visited Sep. 20, 2003).

76. See ICPAC REPORT, *supra* note 42, at 274. There were, however, divergent views within the committee concerning this point. See *id.* Annex I-A (statement of Advisory Committee Member Eleanor M. Fox) (advocating "strengthening and constitutionalizing the WTO").

77. See *id.* at 284.

78. See Merit E. Janow & Cynthia R. Lewis, *International Antitrust and the Global Economy*, 24 WORLD COMPETITION: L. & ECON. REV. 3, 16 (2001).

the European Union had been the strongest advocate for binding WTO minimum standards (and its officials still claim to be), it promptly supported the U.S. initiative and participated in its implementation.<sup>79</sup>

The ICN creates a forum for national and multinational competition authorities. As of December 2003, more than 80 agencies from over 70 jurisdictions had joined the ICN,<sup>80</sup> among them the competition authorities of almost all industrial countries and many transition and developing countries as well as the multinational agencies of the E.U., the European Free Trade Association, and the Andean Community.<sup>81</sup> The purpose of the ICN is to facilitate international cooperation on competition issues, to promote procedural and substantive convergence among competition jurisdictions concerning cross-border cases, and to advance knowledge about best practices on competition matters of common interest.<sup>82</sup> Since the network has no legal status and is not based on an international treaty, the ICN characterizes itself as a virtual organization.<sup>83</sup> All of its proposals are therefore non-binding; both participation in its work and compliance with its outcomes are completely voluntary. Consequently, the ICN neither consists of its own organizational body and staff nor has any funding

---

79. See Janet L. McDavid & Lynda K. Marshall, *Antitrust: Global Review Regimes*, NAT'L L.J., Sept. 24, 2001, at A23; see also ICN, HISTORY, *supra* note 75.

80. See generally ICN, ICN MEMBERSHIP CONTACT LIST, available at [http://www.internationalcompetitionnetwork.org/icn\\_membership\\_list.pdf](http://www.internationalcompetitionnetwork.org/icn_membership_list.pdf) (last visited Apr. 26, 2004).

81. Additionally, non-governmental advisors like international organizations (e.g., WTO, OECD, World Bank, etc.), associations of legal and economic antitrust scholars and practitioners, and individual antitrust experts can join a special limited membership that (only) allows them to inject their expertise. See ICN, MEMORANDUM ON THE ESTABLISHMENT AND OPERATION OF THE INTERNATIONAL COMPETITION NETWORK 2 [hereinafter ICN ESTABLISHMENT MEMORANDUM], available at <http://www.internationalcompetitionnetwork.org/mou.pdf> (last visited Sept. 23, 2003).

82. ICN, WORLD ANTITRUST AUTHORITIES CALL FOR IMPROVED MERGER REVIEW, ADVOCACY AND CAPACITY BUILDING AT 2D ANNUAL INTERNATIONAL COMPETITION NETWORK CONFERENCE (June 26, 2003), at <http://www.internationalcompetitionnetwork.org/news/june262003.html>.

83. See Commissioner Konrad von Finckenstein, Fiesole Speech at the Sixth Annual International Bar Association Competition Conference (Sept. 20, 2002) (transcript available at <http://www.internationalcompetitionnetwork.org/news/sept202002.html>).

obligations. It is guided by a Steering Group, currently chaired by Dr. Fernando Sánchez Ugarte, Chairman of the Mexican Federal Competition Commission, that consists of leading representatives of member agencies who rotate every two years.<sup>84</sup> All related expenses are borne by the members actually in charge.<sup>85</sup>

The working program of the ICN is project-oriented and the outcomes are always consensus-based. ICN Working Groups (WG), which represent the commonly defined projects, do the actual work.<sup>86</sup> As of December 2002, three substantive WGs had been launched: (i) the merger control process in the multi-jurisdictional context,<sup>87</sup> (ii) the competition advocacy role of antitrust agencies, and (iii) capacity building and competition policy implementation.<sup>88</sup> At the Mexico conference in June 2003, a fourth substantive WG, on the role of competition enforcement in regulated sectors, was established.<sup>89</sup>

The Advocacy WG (led by the Mexican Competition Commission) aims to strengthen the role of competition authorities as advocates for market competition.<sup>90</sup> To this end, it reviews advocacy practices in member countries to derive and develop best practices in this field for voluntary adoption by the member agencies.<sup>91</sup> The Advocacy WG intensely collabo-

---

84. See ICN, HEAD OF MEXICAN COMPETITION AGENCY TO LEAD THE INTERNATIONAL COMPETITION NETWORK (Sept. 2, 2003), at <http://www.internationalcompetitionnetwork.org/news/sept022003.html>.

85. See ICN ESTABLISHMENT MEMORANDUM, *supra* note 81, at 4.

86. See, e.g., Chairman Chul-kyu Kang, Introductory Remarks at the International Competition Network Merida Conference: ICN Future Workplan Session (June 25, 2003) (transcript available at [http://www.internationalcompetitionnetwork.org/merida\\_speech9.pdf](http://www.internationalcompetitionnetwork.org/merida_speech9.pdf)).

87. See *infra* Part II.B.

88. See Commissioner Konrad von Finckenstein, Address to the 2003 Forum on International Competition Law (Feb. 6, 2003), available at <http://www.internationalcompetitionnetwork.org/news/feb62003.html>.

89. See ICN, WORLD ANTITRUST AUTHORITIES CALL FOR IMPROVED MERGER REVIEW, ADVOCACY AND CAPACITY BUILDING AT 2D ANNUAL INTERNATIONAL COMPETITION NETWORK CONFERENCE (June 26, 2003), available at <http://www.internationalcompetitionnetwork.org/news/june262003.html>.

90. See ADVOCACY WORKING GROUP, ICN, ADVOCACY AND COMPETITION POLICY 21 (2002), available at <http://www.internationalcompetitionnetwork.org/advocacyfinal.pdf>.

91. See *id.*; Fernando Sánchez Ugarte, Vice Chair of the International Competition Network, Address at the Cape Town Competition Law and Pol-

rates with the Organization for Economic Co-operation and Development (OECD) and the United Nations Conference on Trade and Development (UNCTAD).<sup>92</sup> Altogether, this WG should enhance the ability of competition authorities to promote procompetitive reforms within governments, especially if competition apparently or actually stands in conflict with other political or public goals (e.g., in the case of industrial policy). It has prepared an Advocacy & Competition Policy Report which addresses (i) political influences on competition agencies, (ii) the role of advocacy in developing countries, and (iii) the suitability of different institutional settings to promote pro-competition advocacy.<sup>93</sup>

The Implementation WG (jointly chaired by the European Commission and the South African Competition Tribunal) aims to promote the establishment of competition cultures and agencies in developing countries, to advocate the independence of competition authorities, and to analyze whether regional institutions should be encouraged.<sup>94</sup>

#### B. *The Working Group on the Merger Control Process in the Multi-Jurisdictional Context*

The Merger WG is led by the U.S. Department of Justice and aims to promote the adoption of best practices in designing merger review governance.<sup>95</sup> In doing so, the effectiveness

---

icy Conference 13 (Mar. 18, 2002), available at <http://www.internationalcompetitionnetwork.org/news/march182002.pdf>.

92. See ELEANOR M. FOX, A REPORT ON THE FIRST ANNUAL CONFERENCE OF THE INTERNATIONAL COMPETITION NETWORK 11 (2002), available at [http://www.internationalcompetitionnetwork.org/icn\\_naples\\_report.pdf](http://www.internationalcompetitionnetwork.org/icn_naples_report.pdf).

93. ADVOCACY WORKING GROUP, *supra* note 90.

94. See WORKING GROUP ON CAPACITY BUILDING & COMPETITION POLICY IMPLEMENTATION, ICN, CAPACITY BUILDING AND TECHNICAL ASSISTANCE: BUILDING CREDIBLE COMPETITION AUTHORITIES IN DEVELOPING AND TRANSITION ECONOMIES 9, 23 (June 2003), available at [http://www.internationalcompetitionnetwork.org/Final%20Report\\_16June2003.pdf](http://www.internationalcompetitionnetwork.org/Final%20Report_16June2003.pdf). Additionally, there are three administrative WGs: the WG on Membership (chaired by the Competition Policy Bureau of Korea), the WG on Funding (chaired by the U.S. Federal Trade Commission), and the WG on the Operational Framework (co-chaired by the Italian Antitrust Authority and the Canadian Competition Bureau). See ICN, WORKING GROUPS, at <http://www.internationalcompetitionnetwork.org/workinggroups.html> (last visited Oct. 1, 2003).

95. See MERGER REVIEW WORKING GROUP, ICN, PRELIMINARY WORK PLAN 1 (2001), available at [http://www.internationalcompetitionnetwork.org/mgrs\\_prelim.pdf](http://www.internationalcompetitionnetwork.org/mgrs_prelim.pdf).

of the jurisdictional merger reviews will be enhanced, procedural and substantive convergence facilitated, jurisdictional conflicts reduced, and transaction costs decreased. Three subgroups (SGs) constitute the network's governance system and specify the planned work:

- (i) The SG for merger notification and review procedures is chaired by the U.S. Federal Trade Commission.<sup>96</sup> In close cooperation with the private sector, it has developed eight general guiding principles for merger review regimes: (1) sovereignty; (2) transparency; (3) non-discrimination (on the basis of nationality); (4) procedural fairness; (5) efficient, timely, and effective review; (6) coordination; (7) convergence; and (8) protection of confidential information.<sup>97</sup> Application of these principles should reduce significantly costs and inefficiencies resulting from differing notification and review procedures. In this subgroup, no substantive convergence is attempted; instead, best practices on (1) notification thresholds, (2) the timing of notification and review periods, (3) requirements for initial notification, (4) the appropriate nexus between a transaction's effects and the reviewing jurisdiction, and (5) continual review of merger control procedures with periodical considerations of convergence towards ICN best practices are developed and recommended.<sup>98</sup> A first blueprint, which focuses

---

96. See MERGER REVIEW WORKING GROUP, ICN, 2003-2004 WORK PLANS 1 (2003), *available at* [http://www.internationalcompetitionnetwork.org/2003\\_2004\\_mergerswg.pdf](http://www.internationalcompetitionnetwork.org/2003_2004_mergerswg.pdf) (listing Mr. Randolph Tritell, Assistant Director for International Antitrust, U.S. Federal Trade Commission, as Chair of the Merger Notification and Procedures Subgroup).

97. NOTIFICATION & PROCEDURES SUBGROUP, ICN, GUIDING PRINCIPLES FOR MERGER NOTIFICATION AND REVIEW 1 (2002), *available at* [http://www.internationalcompetitionnetwork.org/mergers\\_guiding.pdf](http://www.internationalcompetitionnetwork.org/mergers_guiding.pdf).

98. See NOTIFICATION & PROCEDURES SUBGROUP, ICN, RECOMMENDED PRACTICES FOR MERGER NOTIFICATION PROCEDURES (2003), *available at* [http://www.internationalcompetitionnetwork.org/2003\\_practices.pdf](http://www.internationalcompetitionnetwork.org/2003_practices.pdf).

- on rather general and less controversial practices, was discussed at the Mexico conference.<sup>99</sup>
- (ii) The SG for the analytical review framework is chaired by the U.K. Office of Fair Trading.<sup>100</sup> It attempts to collect and compile information on the substantive standards for prohibiting anticompetitive mergers.<sup>101</sup> The pros and cons of standards like “substantial lessening of competition,” “creation or strengthening of dominant market positions,” and “public interest” are analyzed in close cooperation with leading scholars from all over the world. In order to compile model merger guidelines, this SG presented an interim report in Mexico, which reviewed existing merger guidelines of member countries, cataloguing their common features and main differences concerning: (1) market definition, (2) unilateral effects, (3) coordinated effects, (4) barriers to entry, and (5) the consideration of efficiencies.<sup>102</sup>
- (iii) The SG for investigative techniques is chaired by the Israel Antitrust Authority.<sup>103</sup> In order to develop best practices for investigating mergers, including methods for gathering reliable information, protecting confidential business data, and coordinating interagency information shar-

---

99. *See id.*

100. *See* MERGER REVIEW WORKING GROUP, ICN, ANALYTICAL FRAMEWORK SUBGROUP: 2003-2004 DRAFT WORK PLAN 2 (2003), available at [http://www.internationalcompetitionnetwork.org/2003\\_2004\\_mergersafsg.pdf](http://www.internationalcompetitionnetwork.org/2003_2004_mergersafsg.pdf) (listing Mr. Steve Lisseter, OFT, U.K., as Secretary of the Analytical Framework Subgroup).

101. *See* ANALYTICAL FRAMEWORK SUBGROUP, ICN, WORKING GROUPS: MERGERS: ANALYTICAL FRAMEWORK SUBGROUP, at <http://www.internationalcompetitionnetwork.org/analytical.html> (last visited Oct. 10, 2003).

102. *See* ANALYTICAL FRAMEWORK SUBGROUP, ICN, PROJECT ON MERGER GUIDELINES: INTERIM REPORT FOR THE SECOND ICN ANNUAL CONFERENCE IN MERIDA 4-15 (2003), available at [http://www.internationalcompetitionnetwork.org/overview\(final\).pdf](http://www.internationalcompetitionnetwork.org/overview(final).pdf).

103. *See* INVESTIGATIVE TECHNIQUES SUBGROUP, ICN, 2003-2004 WORK PLAN 2 (2003), available at [http://www.internationalcompetitionnetwork.org/2003\\_2004\\_mergersitsg.pdf](http://www.internationalcompetitionnetwork.org/2003_2004_mergersitsg.pdf) (listing Mr. Dror Strum, Israel Antitrust Authority, as General Director of the Investigative Techniques Subgroup).

ing, a comprehensive compendium of current practices and experiences has been published.<sup>104</sup> Additionally, the SG will analyze the role of economic evidence and the involvement of economists in merger control procedures.<sup>105</sup>

The governance of cross-border mergers (in origin and effects) relies on voluntary interagency coordination. First, knowledge of best practices will lead to procedural convergence—and maybe even to substantive convergence in the long run—by awakening self-interest in adopting more efficient methods of merger control. This incremental process of convergence will reduce inefficiencies caused by excessive bureaucratic burdens on cross-border mergers. Second, the personal interaction of the officials of jurisdictional competition authorities should give rise to cognitive convergence (i.e., the views on specific merger cases become harmonized due to the exchange of arguments and the cooperative review process). Possessing identical facts about a potentially conflicting merger case and sharing similar convictions on merger control may reduce jurisdictional conflict.

### III. INTERNATIONAL MERGER GOVERNANCE FROM THE PERSPECTIVE OF NEW INSTITUTIONAL ECONOMICS

#### A. *New Institutional Economics, Diversity, and Governance*

In the last decades, an increasing interest in the study of institutions has developed in economics. Since this movement has not been connected to “old” institutionalism, indicating work that is dedicated to Thorstein B. Veblen,<sup>106</sup> the term “new institutional economics” has been used to characterize institutional analysis that is based on methodological individu-

---

104. See INVESTIGATIVE TECHNIQUES SUBGROUP, ICN, REPORT ON INVESTIGATIVE TECHNIQUES EMPLOYED BY MEMBER AGENCIES IN THE AREA OF MERGER REVIEW 3, 19-20 (2003), available at <http://www.internationalcompetitionnetwork.org/ReportIT.pdf>.

105. See generally ICN, THE ROLE OF ECONOMISTS AND ECONOMIC EVIDENCE IN MERGER ANALYSIS, available at <http://www.internationalcompetitionnetwork.org/Role%20of%20Economists.pdf> (last visited Oct. 10, 2003) (concentrating on the role of economists in merger analysis).

106. Thorstein Veblen, *Why Is Economics Not an Evolutionary Science?*, 12 Q.J. OF ECON. 373 (1898).

alism and focuses on market economies.<sup>107</sup> However, individual behavior is viewed as shaped—though not determined—by the institutional environment and context of an action.<sup>108</sup> The economic interpretation of the term “institution” distinguishes it from “organization.” Institutions are defined as generally known systems of interpersonal rules, which order repetitive interactions of individual actors and are followed by a majority of them.<sup>109</sup> Organizations, as “groups of individuals bound by some common purpose to achieve objectives,”<sup>110</sup> are agents in the competitive market process and not institutions. Under this economic interpretation, the Federal Trade Commission or the International Monetary Fund are organizations, and thus agents, while competition laws like the Sherman Act or the standing facilities of the ECB are examples of institutions.

There are several possible ways to differentiate different types of institutions:

- External versus internal institutions:<sup>111</sup> The former constitute a framework of laws and traditional or moral rules—external to the market sphere—in which individual economic action takes place, while the latter are implemented within the market sphere, like standardized contracts or organizational rules.

---

107. See, e.g., INT'L SOC'Y FOR NEW INSTITUTIONAL ECON., ISNIE MISSION STATEMENT 1, available at <http://www.isnie.org/ISNIE%20Mission%20Statement.pdf> (last visited Oct. 10, 2003).

108. For surveys on New Institutional Economics see generally Ronald H. Coase, *The New Institutional Economics*, 140 J. INSTITUTIONAL & THEORETICAL ECON. 229 (1984); Richard N. Langlois, *The New Institutional Economics: An Introductory Essay*, in *ECONOMICS AS A PROCESS: ESSAYS IN THE NEW INSTITUTIONAL ECONOMICS* 5-21 (Richard Langlois ed., 1986); EIRIK G. FURUBOTN & RUDOLF RICHTER, *INSTITUTIONS AND ECONOMIC THEORY: THE CONTRIBUTION OF THE NEW INSTITUTIONAL ECONOMICS* (1997); Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595 (2000); KASPER & STREIT, *supra* note 67. On the interrelation of individual behavior and institutions see generally Budzinski, *supra* note 68.

109. See Budzinski, *supra* note 68, at 214-15.

110. DOUGLASS C. NORTH, *INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE* 5 (1990).

111. See Ludwig M. Lachmann, *Wirtschaftsordnung und Wirtschaftliche Institutionen* [*Economic Order and Economic Institutions*], 14 ORDO 63, 66-67 (1963).

- Formal versus informal institutions:<sup>112</sup> The first addresses codified institutions (such as constitutions of states and companies, written law, etc.), which are connected to explicit public enforcement, whereas the second addresses non-codified institutions (such as moral codes of behavior, tradition, manners and customs, rules of *zeitgeist*, etc.), which are enforced through social sanctions.
- Designed versus undesigned institutions:<sup>113</sup> The first are created purposefully and implemented intentionally by authorized human agents (governments, parliaments, religious leaders, etc.), whereas the second emerge spontaneously (as a result of human action but not of human design) and evolve self-organizationally over time.
- Functional, afunctional and dysfunctional institutions:<sup>114</sup> This differentiation corresponds to the adequacy of institutions to solve the problems for which they are created. Contrary to the preceding types of institutions, which contain positive categories, this is a normative differentiation.

According to this theoretical framework, the problem of international merger governance is one of the design of an international institutional arrangement. As Part I of this Article shows, international merger governance has to rely on a rather complex system of institutions, including existing ones and newly created ones. Competition policy predominantly focuses on external and designed institutions, as it is its explicit purpose to prevent market-internal institutions (like cartels, price-fixing arrangements, etc.) which harm competi-

---

112. NORTH, *supra* note 110, at 36-53.

113. See FRIEDRICH A. HAYEK, *STUDIES IN PHILOSOPHY, POLITICS AND ECONOMICS* 161-64 (1967) (contrasting designed and undesigned institutions within the contexts of political liberalism and market capitalism); Steven Horwitz, *Spontaneity and Design in the Evolution of Institutions: The Similarities of Money and Law*, 4 *JOURNAL DES ECONOMISTES ET DES ETUDES HUMAINES* 571, 571 (1993) (viewing the origin and functions of money and law as the results of human action, not human design).

114. See Dennis C. Mueller, *Capitalism, Democracy, and Rational Individual Behavior*, 10 *J. EVOLUTIONARY ECON.* 67, 73 (2000).

tion.<sup>115</sup> Most competition rules are codified institutions, although merger control systems also encompass some informal institutions.<sup>116</sup> Their emergence and further evolution include designed and undesigned institutions. The (normative) functionality or adequacy of an international merger control institution depends on the specific design of its arrangements. Relevant institutional economic categories include transaction costs, externalities, principal-agent and inter-agent relations (including problems like trust and fairness, moral hazard, free riders, adverse selection, signaling, rent-seeking, etc.), and institutional evolution (the process of learning, innovation, order and experimentation, institutional competition, etc.).<sup>117</sup>

### B. *The Network Approach—Prospects and Limits*

Participatory governance through voluntary cooperation in rather informal network structures is gaining increasing popularity in different fields of economic policy. For example, in environmental policy a number of countries have substituted traditional regulatory policy interventions with policies inducing voluntary arrangements within the polluting industries to reduce their harmful ecological impact.<sup>118</sup> In Ger-

---

115. *C.f.* P.J. LLOYD & KERRIN M. VAUTIER, PROMOTING COMPETITION IN GLOBAL MARKETS: A MULTI-NATIONAL APPROACH 11 (1999).

116. Informal institutions in the E.U. merger control system include, for example, conventions within the notification and review procedure such as the briefing paper, the process and organization of pre-notification meetings, information waivers, statements of objections, oral hearings, and consultation procedures. *See* JOSE RIVAS, THE EU MERGER REGULATION AND THE ANATOMY OF THE MERGER TASK FORCE 17-51 (1999). Many of these developed undesigned out of the process of interaction between the parties involved through the accumulation of experience. *See id.* at 17 (explaining the impact of informal contacts on developing these informal institutions).

117. For introductory analyses of these issues (without specification on international merger control) see FURUBOTN & RICHTER, *supra* note 108, at 39-67, 89-97, 186-227 (1997). *See also generally* KASPER & STREIT, *supra* note 67 (detailing, in its introduction to institutional economics, various analytic categories such as externalities, transaction costs, agentive behaviors, and institutional evolution).

118. *See, e.g.*, VOLUNTARY APPROACHES IN ENVIRONMENTAL POLICY (Carlo Carraro & François Lévêque eds., 1999) (presenting a number of articles on the move toward voluntary arrangements in environmental policy); Kathryn Harrison, *Talking with the Donkey: Cooperative Approaches to Environmental Protection*, J. OF INDUS. ECOLOGY, Summer 1998, at 51, 57-69 (1999) (addressing the benefits of voluntary approaches).

many, a cooperative network of governments, unions, and employers has been favored to solve labor market problems in recent years (“Bündnis für Arbeit”).<sup>119</sup> Recently, voluntary approaches have gained attention in competition policy.<sup>120</sup> When the liberalization of energy and telecommunication markets raised the problem of how to regulate access to essential facilities, the establishment of external regulatory agencies was not the only institutional arrangement considered as a solution. Governance through voluntary arrangements between the market participants to guarantee procompetitive access to an essential facility (“Negotiated-Third-Party-Access”—as opposed to the “Regulated-Third-Party-Access” governed by a public regulatory agency) also has been discussed seriously and, in some cases, has been implemented.<sup>121</sup> For example, in the German gas market, the “Verbändevereinbarung”<sup>122</sup> is the dominating institutional arrangement and constitutes an important element of the current competition order.<sup>123</sup>

Paradigms for the concept of governance in informal networks come from new trends in business organization in the context of the internet-based innovation in communication. The emergence of business network structures like strategic alliances, virtual organizations, and other innovative, complex forms of interfirm collaborative arrangements<sup>124</sup> have con-

---

119. Bündnis für Arbeit (Alliance for Jobs) “was supposed to be the most important decision-making forum for labour market and social policies.” *Review of Alliance for Jobs Unlikely at Present*, EUR. INDUS. REL. OBSERVATORY ONLINE, at <http://www.eiro.eurofound.ie/2003/02/InBrief/DE0302104N.html> (last visited Sept. 30, 2003). In early 2003, however, growing differences between trade unions and employers had “buried” the Alliance for Jobs. *Id.*

120. See, e.g., Anu Piilola, *Assessing Theories of Global Governance: A Case Study of International Antitrust Regulation*, 39 STAN. J. INT’L L. 207, 236 (2003).

121. See, e.g., Carlos Lapuerta & Boaz Moselle, *Network Industries, Third Party Access and Competition Law in the European Union*, 19 NW. J. INT’L L. & BUS. 454, 454-55, 456 (1998-1999).

122. The “Verbändevereinbarung” is a voluntary arrangement of the leading industry associations that regulates the access to the gas net, the price of its use, and the conditions that are imposed on consumers who intend to change their gas supplier. See *id.* at 477. Since there is no explicit enforcement mechanism in case of deviation, the arrangement has to be called purely voluntary.

123. See *id.*

124. See, e.g., WILLIAM H. DAVIDOW & MICHAEL S. MALONE, *THE VIRTUAL CORPORATION* 5-7 (1992); J.C. JARILLO, *STRATEGIC NETWORKS: CREATING THE BORDERLESS ORGANIZATION* 16-18 (1993); Safarian, *supra* note 4, at 50-57; Es-

fronted governance theorists and business practitioners with a partial loss of the possibility of implementing binding governance structures due to the sovereignty of the network participants. The renunciation of challenges to the sovereignty and formal independence of network members is both a matter of principle and a profitable strategy for conquering the challenges of the globalization of markets.

When addressing the issue of international merger control, the subject slightly changes. Instead of private parties within markets—and, thus, governance through internal and informal institutions—the network members are competition authorities that are either (partly) independent administrative bodies or integral parts of government. Concerning the elements of the competition order for international markets, governance keeps relying on market-external institutions. Contrary to the traditional jurisdictional merger control model,<sup>125</sup> suprajurisdictional governance by the network approach means complementing existing formal institutions (the laws of the participating jurisdictions) with informal ones (aiming to coordinate the interfaces between formal institutions).<sup>126</sup> As the markets to be controlled exceed jurisdictional territories, network governance models may offer advantages similar to those achieved by enterprises competing in internationalizing markets. Consequently, the issue of global governance without formal institutions and international supra-authorities has come onto the agenda, influencing almost all fields of international relations (e.g., labor standards, social security, environmental protection, intellectual property, etc.).<sup>127</sup> Explicit at-

---

teban García-Canal et al., *Accelerating International Expansion Through Global Alliances: A Typology of Cooperative Strategies*, 37 J. WORLD BUS. 91, 94-96 (2002).

125. I use the term jurisdiction to mark the current competition policy regimes, which are predominantly national but sometimes also international (e.g., the E.U. competition policy framework or that of the Andean Community). The institutionalization of an international merger control regime (perhaps with an international competition policy agency) would, of course, constitute its own jurisdiction, but from today's perspective such merger governance can be called suprajurisdictional.

126. See Karl-Heinz Ladeur, *Towards a Legal Theory of Supranationality—The Viability of the Network Concept*, 3 EUR. L.J. 33, 46 (1997).

127. See ORAN R. YOUNG, INTERNATIONAL GOVERNANCE: PROTECTING THE ENVIRONMENT IN A STATELESS SOCIETY 14-19 (1994) (addressing the possibility of “governance without government”); Imelda Maher, *Competition Law in*

tempts at network governance concerning international competition policy are provided by Tarullo (the regulatory-convergence approach),<sup>128</sup> Maher (regime-building competition policy networks),<sup>129</sup> O'Connor (convergence through enforcement networks and case law evolution),<sup>130</sup> and First (mapping national and international antitrust networks).<sup>131</sup> They provide competition-policy oriented operationalizations of network governance and systematically integrate most of the arguments in favor of cooperative arrangements.

The network governance approach aims to make jurisdictional regulatory regimes more congruent<sup>132</sup> and, thus, serves to coordinate internationally the enforcement of similar institutional arrangements. Consequently, one important goal of the regulatory-convergence approach is to achieve more consistency concerning overlapping jurisdictional regulatory competences.<sup>133</sup> Still, this consistency is not primarily striven for by the implementation of formal (codified) institutions with corresponding enforcement systems.<sup>134</sup> Instead, governance of international activities relies on contact and cooperation between jurisdictional regulatory agencies and, thus, on the development of informal (non-codified) institutions, or "soft law," which are non-binding as a matter of principle.<sup>135</sup> These informal institutional arrangements serve as points of reference for the actual cooperation in transborder merger control cases instead of prescribing codes of conduct. They emerge

---

*the International Domain: Networks as a New Form of Governance*, 29 J. L. & Soc'y 111, 114-17, 121-24 (2002) (discussing the centrality of policy and epistemic networks to contemporary governance in international competition law); Ladeur, *supra* note 126, at 46-54 (presenting the "network-concept" to conceptualize both European supranationality and the disaggregated political and legal structures of the nation-state). See generally POLICY NETWORKS: EMPIRICAL EVIDENCE AND THEORETICAL CONSIDERATIONS (Bernd Marin & Renate Mayntz eds., 1991) (discussing policy coordination efforts across different industries and actors).

128. See Tarullo, *supra* note 70, at 495-99.

129. See Maher, *supra* note 127, at 121-29.

130. See Kevin J. O'Connor, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413, 414-15 (2002).

131. See First, *supra* note 47, at 25-33.

132. See, e.g., *id.* at 48-49 (discussing possible solutions in evolving the framework of international jurisdictional congruence).

133. See *id.* at 42-43.

134. See *id.* at 25.

135. See *id.*

and evolve as undesigned, spontaneous institutions out of the ongoing cooperative interaction between the competition agencies involved. Altogether, a higher degree of interjurisdictional coordination is striven for without reducing the formal autonomy of the jurisdictional agencies and their rule-making and decision competences.

Governance of cross-border mergers through informal and undesigned institutions can produce a functional institutional framework if it constitutes a network of voluntary cooperative arrangements that preserves diversity and achieves coherence. How can the latter be reached? The network of participatory institution- and decision-making provides a mechanism for structuring, monitoring, and thereby stabilizing the mutual expectations of jurisdictional competition authorities that are reviewing the same transborder merger. The coordinated and systematic interaction of the relevant competition policy agents offers opportunities for cognitive convergence (i.e., the differing views on the facts of a specific case converge and a consensual knowledge about the assessment and control of anticompetitive mergers is promoted). This could lead to the emergence of substantial trust among the agencies and their agents, thereby contributing to the reduction of interjurisdictional conflicts on merger control issues.<sup>136</sup>

The emergence and meaning of substantial trust, reputation, and cognitive convergence—as well as their pro-cooperative effects—are phenomena that are well-described in modern institutional economics and supported by experimental evidence.<sup>137</sup> In workable networks, trust is maintained and reinforced by the extremely repetitive character of the intra-

---

136. See Tarullo, *supra* note 70, at 495-96; Maher, *supra* note 127, at 117.

137. See Werner Güth & Hartmut Kliemt, *Competition or Co-Operation: On the Evolutionary Economics of Trust, Exploitation and Moral Attitudes*, 45 METROECONOMICA 155, 180-186 (1994); Werner Güth et al., *Cooperation Based on Trust: An Experimental Investigation*, 18 J. ECON. PSYCHOL. 15, 28-30 (1997); Simon Gächter et al., *Does Social Change Increase Voluntary Cooperation?*, 49 KYKLOS 541, 544-45, 548-51 (1996). See generally Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity*, J. ECON. PERSP., Summer 2000, at 159 (presenting evidence that in many cases economic agents make decisions based on reciprocity, responding to friendly or hostile actions in repeated interactions); Luís M.B. Cabral, *International Merger Policy Coordination*, 15 JAPAN & WORLD ECON. 21 (2003) (describing a non-experimental game-theoretic approach to the self-enforcement of international merger control rules through repeated interaction).

network interaction. This increases the hurdle for defecting behavior, in both an economic-rational and a human-cognitive sense.<sup>138</sup> An economic-rational hurdle means that defection is not rational in the sense of emotionless, objective calculation of its cost and utility in the face of (i) a high probability of detection and (ii) probable future dependence on the voluntary cooperation of other network members. A human-cognitive hurdle means that the disappointment of trust-based expectations leads to personal injury, and the cognitive structures of human beings as social beings include a preference for intersubjective reciprocal treatment (preference for fairness).

An international forum facilitates the (non-binding and voluntary) coordinated analysis, consultation, and cooperative action of competition authorities in merger control cases involving multiple markets. Thereby, the transaction costs of governance through voluntary arrangements are reduced. Moreover, this represents an incremental evolution of existing antitrust enforcement practices, which—together with the voluntariness of the forum—increases the acceptability of this type of cross-border merger governance. Since institutional evolution within the network approach is predominantly spontaneous (instead of designed),<sup>139</sup> institutional learning and the generation and diffusion of institutional innovation will be facilitated and improved. Institutional diversity is explicitly accepted and the multitude of agents that participate in the network offer various channels to inject innovation and adjust to both new scientific knowledge and new modes of anticompetitive behavior created by private companies. Altogether, the network offers a high degree of permeability in the evolution of the network's environment.

Although the intensive but voluntary cooperative interaction of jurisdictional competition authorities offers considerable prospects of an integration of coherence and diversity, some limitations must be considered. The competition forum sets incentives for the disregard of the two demands in favor of strategic negotiations (rent-seeking) and phenomena of intra-group empathy:

---

138. It is important to emphasize that—to maintain the metaphor—the hurdle to defecting behavior does not, however, reach a prohibitive height.

139. See Ladeur, *supra* note 126, at 47-48.

- The targeted avoidance of conflict (creating a culture of consensus) through personal cooperative interaction and trust may promote bargaining between the agencies at the expense of market competition—distorting the demand for coherence.<sup>140</sup>
- The voluntariness of the institutional arrangement allows for doubts regarding whether consensual and coherent solutions that are guided by the goal to maintain and strengthen the forces of competition are possible in cases where massive national (political and lobbyist rent-seeking) interests influence jurisdictional competition authorities.<sup>141</sup> Trust and cognitive convergence do not prevent conflict and inconsistency when the competition agencies involved are not completely independent from governments and rent-seeking groups (extra-network agents). If only non-conflicting cases were solvable, the functionality of the network's institutional arrangements would seem doubtful.<sup>142</sup> This is another instance of the distortion of the demand for coherence.
- If national competition institutions remain untouched (and, thus, do not converge), no consensus and conflict avoidance is theoretically possible in cases where the jurisdictional rules are incompatible with each other and the discretionary scope of the competition agencies involved is not suffi-

---

140. See G uth & Kliemt, *supra* note 137, at 15-56. Generally, agreements at the expense of non-participating third parties are quite typical in voluntary cooperative arrangements and alliances and represent a well-known problem in institutional economics.

141. As it was in the well-known case of the *Boeing-McDonnell Douglas* merger. See Amy Ann Karpel, Comment, *The European Commission's Decision on the Boeing-McDonnell Douglas Merger and the Need for Greater U.S.-EU Cooperation in the Merger Field*, 47 AM. U. L. REV. 1029, 1045-46 (1998).

142. Stephan, *supra* note 47, at 187-90 (noting that international regulatory cooperation is particularly vulnerable to rent-seeking and can only be justified where the costs of government failure produced by cooperation do not exceed the costs of market failure); ROGER J. VAN DEN BERGH & PETER D. CAMESASCA, *EUROPEAN COMPETITION LAW AND ECONOMICS: A COMPARATIVE PERSPECTIVE* 159-165 (2001) (noting that the effectiveness of European Commission centralized competition authorities may be hampered by regulatory capture).

cient to overcome the incompatibility.<sup>143</sup> This is a third instance of a distortion of the demand for coherence.

- The emergence of a spirit of cooperation and a culture of consensus among the agencies and their agents may impose limits on the willingness of the forum to accept institutional innovation.<sup>144</sup> Instead, a resistance to external suggestions and developments, both in economic theory and in business, could be reinforced incrementally through intra-group interaction and, with time, lead to institutional conservatism that distorts the demand for diversity.<sup>145</sup>
- Institutional diversity is not seen as a generally favorable situation but “only” accepted for reasons of real-world actuality. In the (extreme) long-run, a convergence of both merger control practice and material rules, and, thus, a reduction of diversity, is—explicitly or implicitly—striven for.<sup>146</sup> It remains unclear if national and regional agencies and institutions could play a sustainable role in the

---

143. See KEVIN C. KENNEDY, *COMPETITION LAW AND THE WORLD TRADE ORGANISATION: THE LIMITS OF MULTILATERALISM* 201-03, 254-55 (2001) (noting points of divergence in domestic competition policies that are difficult for WTO members to overcome); A. Neil Campbell & Michael J. Trebilcock, *Interjurisdictional Conflict in Merger Review*, in *COMPETITION POLICY IN THE GLOBAL ECONOMY: MODALITIES FOR COOPERATION*, *supra* note 4, at 89-90 (introducing the risks of divergent determinations in domestic jurisdictions). *But see* Tarullo, *supra* note 70, at 481-82 (explaining that although disagreement between jurisdictions may be inevitable, “the inevitability of disagreement does not necessarily define a problem in need of solution”).

144. The crucial character of this aspect stems from the fact that this culture of consensus is indispensable in order to realize the proposed advantages of the regulatory-convergence approach. As Maher puts it: “Behaviour becomes routinized, path dependencies are created for problem solving that simplify processes but also reduce the number of acceptable alternatives.” Maher, *supra* note 127, at 117-18.

145. *See id.*; *see also* David Marsh & Martin Smith, *Understanding Policy Networks: Towards a Dialectical Approach*, 48 *POL. STUD.* 4, 19 (2000).

146. Note the label “regulatory-convergence approach” in Tarullo, *supra* note 70, at 495. While Maher, *supra* note 127, at 134, and O’Connor, *supra* note 130, at 414-15, also highlight network governance as a way towards convergence, First, *supra* note 47, at 24, more strongly emphasizes the risks of too much convergence through networking.

network approach and what this role could look like.<sup>147</sup> This creates a strong opportunity for another distortion of the demand for diversity.

C. *The ICN and the Network Approach—Similarities, Differences, and Shortcomings*

It is natural that the ICN is largely congruent with the idea of network governance according to the regulatory-convergence approach. Its basic principles are voluntariness—both concerning participation and compliance with the outcomes—and consensus-based, non-binding recommendations of best practices.<sup>148</sup> The latter can be characterized as external informal institutions, and they evolve spontaneously<sup>149</sup> out of the ongoing process of voluntary cooperation.

The effectiveness of the governance of transborder mergers by the relevant ICN WG relies on the enlargement and diffusion of knowledge about best practices and peer pressure to adopt them. If best practices for notification and review procedures (SG I), substantive standards for prohibiting anticompetitive mergers (SG II), and investigative techniques (SG III) are—reliably and consistently—determined and published, then a competition agency and the corresponding legislative and judicial authorities will probably have difficulties in explaining a refusal to adopt these benchmarks. However informal, this might represent an effective enforcement mechanism if the non-adoption of recommended best practices reduces the credibility of the authority with respect to either the ongoing cooperation within the forum or the views of the domestic agents (enterprises, citizens, etc.). In institutional economics, it is common knowledge that the sanction and enforcement mechanisms of informal institutions can be rather effective as, for example, the enforcement of informal moral rules, conventions, manners, etc. demonstrates.<sup>150</sup>

---

147. See Jens Ladefoged Mortensen, *The Institutional Requirements of the WTO in an Era of Globalisation: Imperfections in the Global Economic Polity*, 6 EUR. L.J. 176, 192 (2000).

148. See ICN ESTABLISHMENT MEMORANDUM, *supra* note 81, at 1.

149. Instead of being designed by multijurisdictional negotiations.

150. See, e.g., FURUBOTN & RICHTER, *supra* note 108, at 20-21 (underlining the “instrumental role of morality, the overlap of economics and practical ethics”).

The process of cognitive convergence induced by the systematic and permanent cooperative interaction of merger control agencies will probably facilitate procedural convergence. This does not only contribute to the reduction of interagency conflict but also reduces the transaction costs for merging companies. Even if no substantial convergence were to occur and, thus, no transaction-cost-minimum were achieved, the efficiency of cross-border merger control nevertheless would be significantly increased compared to the status quo. Moreover, if it is true that divergent assessments of specific mergers by different competition authorities are often not rooted in substantive rule conflicts, but rather in differing interpretations of the facts of the relevant cases, conflict reduction will also cover such cases of apparently substantive divergence. Altogether, one has to admit that transborder merger governance by the ICN offers significant potential for an improvement of coherence in the international merger control regime.

Concerning the increased acceptability of the network approach, as compared to international binding (minimum) standards or the implementation of an international merger control agency with considerable rule-making and/or enforcement power, one first must state that the foundation and implementation of the ICN, as well as the large number of participating agencies, support this assumption. This is especially important if one compares the implementation process of the ICN with the endeavors to install a merger control system within the framework of the WTO. However, since the ICN still is a very young network, no ultimate assessment is possible here.

The structure of the ICN also highlights the role of diversity. The existing national and supranational merger control agencies maintain their full autonomy, and no jurisdiction formally is forced to let its merger control institutions and practices converge to the ICN proposals.<sup>151</sup> Furthermore, the actual diversity of competition rules plays an important role in the process of identifying best practices. Together with schol-

---

151. See ICN, *About the ICN*, at <http://www.internationalcompetitionnetwork.org/aboutus.html> (last visited Sept. 24, 2003); William J. Kolasky, Address at the Sixth Annual International Bar Association Competition Conference, at 7 (Sept. 20, 2002), available at <http://www.usdoj.gov/atr/public/speeches/220234.pdf>.

arly advice, the review of the experience with different practices in different jurisdictions is the most important source for rule evaluation. Altogether, the demand of diversity ostensibly is not challenged by the ICN, since no common formal institutional arrangement is targeted.

However, the shortcomings of the regulatory-convergence approach also largely apply to the ICN merger governance. Distortions, especially of the coherence of network governance, can be expected through influence by governments and rent-seeking. Most of the participating agencies are not independent from their home governments, which can thus introduce non-competition interests. These interests can be injected into cross-border merger governance through two channels: (i) ignoring ICN outcomes (both because they are non-binding and through defection) and (ii) influencing the cooperative process to achieve “consensual” outcomes that favor their own interests (public rent-seeking).<sup>152</sup> It is not difficult to imagine that the latter can occur via bargaining processes and will probably discriminate against smaller network members. As defection is costly, a rational use of the first channel will require serious jurisdictional interests.<sup>153</sup> Although problems of inconsistency and conflict might be reduced significantly by the ICN, this, perhaps, only covers non- or low-conflict cases. This does represent an improvement over the pre-ICN governance of cross-border mergers, but it remains doubtful whether cases with severe national interests involved will be solvable under the ICN framework. Moreover, cases in which the national laws themselves compel incompatible decisions by different competition agencies are, as a matter of principle, not solvable through voluntary cooperation.

---

152. Private rent-seeking is also possible, since the ICN intends to let private agents participate. See ICN ESTABLISHMENT MEMORANDUM, *supra* note 81, at 2. As long as this participation is limited to the best practices discussion and does not cover concrete merger cases, no severe problems should arise.

153. If one looks at the Boeing/MDD case, Commission Decision IV/M.877, Boeing/McDonnell Douglas, 1997 O.J. (L 336) 16, it seems doubtful whether the ICN could have prevented the massive jurisdictional conflict, given the severe industrial interests both of the U.S. government (reorganization of the U.S. armaments industry) and the E.U. member states (competitiveness of the highly subsidized Airbus company).

Concerning the demand for institutional diversity and permeability to innovation, the problem of resistance to external suggestions and institutional conservatism due to an extensive culture of consensus and intra-group empathy seems rather unlikely to occur in the ICN. With its explicit openness to academic experts, antitrust practitioners, and non-governmental interest groups, the ICN framework includes several channels for the injection of innovative (or simply different) external ideas. The low degree of codification of the ICN's institutional arrangements also may facilitate and promote institutional evolution.

More critical seems the long-term attitude of the ICN toward institutional diversity. The targeted development of best practices does not correspond to the sustainable pluralism of competition theory and the evolutionary character of the market process. Due to differing, incompatible, and evolving theories on competition, no best practice derived from theory or experience will ever be incontestable or unassailable by different points of view. It at least remains doubtful whether best practices for markets in (predominantly) industrialized countries are simultaneously best practices for markets in (predominantly) developing countries. Moreover, since the market agents will keep creating new modes of anticompetitive behavior in the future, thus forcing competition policy to respond, today's best practices may be inadequate and obsolete tomorrow. Looking at the current ICN process, one does not get the impression that the theoretical and sustainable merits of diversity are reflected adequately. Instead, the ICN may well emerge as a road to harmonization of merger control regimes and end up with uniformity of merger control institutions on a global scale. This is speculative, but as long as institutional diversity does not play an explicit sustainable role in the ICN framework it cannot be excluded that diversity is only seen as a temporary second-best solution to the problem of cross-border merger governance.

#### D. *An Extended Framework for Analysis: Multilevel Systems of Institutions*

Merger control systems that are not based on one single competition law and do not consist of one sole enforcement agency generally can be regarded and modeled as multilevel

systems of institutions and agencies.<sup>154</sup> Federal jurisdictional structures and confederations of states typically produce such multilevel systems.<sup>155</sup> This extends to a multitude of institutional settings, including tax systems, jurisprudence, political institutions, and—the focus of this paper—merger control systems. Consequently, each instance of realistic and consistent international governance of (anticompetitive) cross-border mergers will take place within or constitute a multilevel system since the existing jurisdictional levels will not be removed but rather complemented by a new (international) one. Thus, a theory of such multilevel systems of institutions provides a suitable framework for the analysis of international merger governance, including both theoretical and political approaches. However, until now, theoretical analyses of multilevel systems of institutions in economics in general, and in institutional economics specifically, are rather rare.<sup>156</sup> Since no fully developed theory is available, this Part attempts to outline elements that contribute to the formation of an adequate theory of multilevel systems of institutions (here, with the focus on international merger control). The network approach, upon which the ICN is theoretically based, proves to be a specific case of a multilevel system.

Actually, the two most important merger control systems in the world represent multilevel systems of institutions—the U.S. antitrust system and the E.U. competition policy system:

- The U.S. merger control system consists of three interrelated levels:<sup>157</sup> On the top level are the fed-

---

154. See, e.g., O'Connor, *supra* note 130, at 419-21.

155. See *id.* at 413.

156. For approaches concerning contract laws, see Stefan Grundmann & Wolfgang Kerber, *European System of Contract Laws—A Map for Combining the Advantages of Centralised and Decentralised Rule-Making*, in AN ACADEMIC GREEN PAPER ON EUROPEAN CONTRACT LAW 295, 298-99 (Stefan Grundmann & Jules Stuyck eds., 2002); Wolfgang Kerber & Klaus Heine, *Zur Gestaltung von Mehr-Ebenen-Rechtssystemen aus ökonomischer Sicht [Design of Multi-Level Legal Systems from an Economic Perspective]*, in VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN [STANDARDIZATION AND DIVERSITY OF CIVIL LAW IN TRANSNATIONAL ECONOMIC REALMS] 167 (Claus Ott & Hans-Bernd Schäfer eds., 2002).

157. See Kovacic, *supra* note 48, at 295; William E. Kovacic, *Downsizing Antitrust: Is It Time to End Dual Federal Enforcement?*, 41 ANTITRUST BULL. 505, 508 & n.7 (1996); Douglas H. Ginsburg & Scott H. Angstreich, *Multinational Merger Review: Lessons from Our Federalism*, 68 ANTITRUST L. J. 219, 227 (2000);

eral merger laws (Sherman Act, Clayton Act, etc.) and the federal agencies, namely the U.S. Department of Justice, Antitrust Division, and the Federal Trade Commission (FTC) as general competition authorities, as well as several industry-specific regulatory agencies (e.g., the Securities and Exchange Commission (SEC), the Federal Energy Regulatory Commission, and the Federal Communication Commission (FCC)<sup>158</sup>). The general and specific authorities possess largely overlapping competences concerning merger control.<sup>159</sup> The second level is represented by the states, namely the state attorneys general, and their merger control institutions.<sup>160</sup> The third level is constituted by private litigation, meaning that both consumers and competitors of merging companies have standing to pursue antitrust cases.<sup>161</sup>

- In the E.U., the top level is represented by the common merger control institutions (Council Regulation (EEC) No. 4064/89 “Merger Regula-

---

O'Connor, *supra* note 130, at 413; Warren S. Grimes, *The Microsoft Litigation and Federalism in U.S. Antitrust Enforcement: Implications for International Competition Law*, in *THE FUTURE OF TRANSNATIONAL ANTITRUST—FROM COMPARATIVE TO COMMON COMPETITION LAW*, *supra* note 47, at 237, 250; HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* 721-45 (2d ed. 1999) (describing the basic structure and interplay of antitrust law in the United States at the federal, state, and local level); LAWRENCE A. SULLIVAN & WARREN S. GRIMES, *THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* 536-556, 887-967 (2000).

158. For example, the FCC generally has to prohibit mergers in telecommunications if the buying company comes from abroad and is state-owned (more than 25% of the shares), unless the foreign corporate interest is consistent with the public interest. See 47 U.S.C. § 310(a),(b)(4) (2004); see also *In re VoiceStream Wireless Corp.*, FCC 01-142, IB Docket No. 00-187, ¶¶ 33-48 (Apr. 2001). For overviews of the interrelation of antitrust and regulatory institutions, agencies, and policies in the U.S., see DAVID L. KASERMAN & JOHN W. MAYO, *GOVERNMENT AND BUSINESS: THE ECONOMICS OF ANTITRUST AND REGULATION* 441-48 (1995); HOVENKAMP, *supra* note 157, 698-720; SULLIVAN & GRIMES, *supra* note 157, at 697-798.

159. See O'Connor, *supra* note 130, at 413 & n.2.

160. See *id.*; Grimes, *supra* note 157, at 250-51.

161. See Kovacic, *supra* note 48, at 295 (taking note of the “number and diversity of parties who can file antitrust suits”).

tion<sup>162</sup>) enforced by the European Commission, Directorate General Competition.<sup>163</sup> The second level consists of the national competition laws of member countries with their own merger controls, such as the Bundeskartellamt (Federal Cartel Office of Germany).<sup>164</sup> On this level, there are also numerous industry-specific regulatory agencies with direct or, more often, indirect competences in merger control (e.g., in media, telecommunications, banking, energy services, etc.).<sup>165</sup> In some states, there are also competition policy competences on regional levels, but these usually focus on unfair practices rather than merger control issues.<sup>166</sup> Thus there are at least two interrelated

---

162. This regulation will be replaced by Council Regulation (E.C.) No. 139/2004, which came into force on May 1, 2004.

163. On the E.U. system, see, e.g., CHRISTOPHER BELLAMY & GRAHAM D. CHILD, *EUROPEAN COMMUNITY LAW OF COMPETITION* 313-32 (5th ed. 2001) (reprinting of Regulation No. 4064/89); VAN DEN BERGH & CAMESASCA, *supra* note 142, at 136-65 (using a comparative approach to describe the allocation of functions in the E.U. system); C.J. COOK & C.S. KERSE, *E.C. MERGER CONTROL* 3-9 (3d ed. 2000) (focusing on merger control). Unlike the U.S. system, there is currently a single agency at the federal level. However, there are efforts underway to implement industry-specific regulatory agencies at the E.U. level. On the relationship between competition and regulatory authorities, see Gary Hewitt, *Background Note* in Organisation for Economic Co-Operation and Development, *The Relationship Between Competition and Regulatory Authorities*, OECD J. OF COMPETITION L. & POL'Y, Sept. 1999, at 169, 177-202 (1999). See also generally Wernhard Möschel, *Das Verhältnis von Kartellbehörde und Sonderaufsichtsbehörden* [*The Relationship Between Antitrust and Regulatory Authorities*], 52 *WIRTSCHAFT UND WETTBEWERB* 683 (2002) (outlining, in general, the relationship between antitrust and regulatory authorities).

164. See VAN DEN BERGH & CAMESASCA, *supra* note 142, at 142-43.

165. See generally *COMPETITION LAW IN THE EU, ITS MEMBER STATES AND SWITZERLAND* 205, 262-65 (Floris O.W. Vogelaar et al. eds., 2002) (a collection of articles discussing examples of these industry-specific regulatory agencies).

166. For example, in Germany there are also State Cartel Offices ("Landeskartellämter"). See *id.* at 213. Furthermore, the federal law against unfair competition ("Gesetz gegen den unlauteren Wettbewerb"), see *id.* at 211, is enforced by regional Competition Centers ("Wettbewerbszentralen"—non-governmental organizations) that take violations of this law to the courts. See Joachim Rudo, *Introduction to German Business Law*, at <http://www.germanbusinesslaw.de/introinhalt.htm> (last visited Mar. 23, 2004).

levels of merger control institutions and agencies in the E.U.

These two examples of real-world multilevel systems of merger control illustrate the main characteristics of multilevel systems in general: Several vertically-related jurisdictional levels (international, federal, national, regional, etc.) are complemented by a variety of horizontally-related competition institutions and agencies on most of these levels (sometimes with an exception of the top level). As these levels do not stand independent from each other, the vertical and horizontal interrelations and, thus, the institutional interfaces, become a crucial aspect for the workability of the system. Regarding the allocation of competences within the system, three dimensions of interrelation can be identified: horizontal versus vertical relations, rule-making versus enforcement competences, and substantial versus procedural rules. Rule-making and enforcement competences can be located at the same or different levels. Both competences can include substantial and/or procedural rules. Therefore, the horizontal institutional interfaces have to cope with the allocation of rule-making and enforcement competences concerning material and procedural rules. However, in multilevel systems the horizontal institutional interfaces can become dominated by a higher level agency that has rule-making and/or enforcement competence to design the horizontal institutional interfaces on the lower level and solve jurisdictional conflicts there.

Nonetheless, the vertical institutional interfaces also have to cope with the allocation and demarcation of rule-making and enforcement competences concerning material and procedural rules. The questions are on which level to locate a specific competence and whether that location should be an exclusive or concurrent allocation of the relevant power.

Regarding international merger control, the problem of the horizontal allocation of competences is well-known in academic discussion: The effects doctrine (dominating the pre-ICN international merger control “system”<sup>167</sup>), systematic interagency cooperation arrangements (e.g., guided by one of

---

167. To be precise, one cannot talk of a “system” if each jurisdiction within an autarkic global market applies the effects doctrine since its elements are not systematically interrelated and, therefore, do not constitute a system.

the comity principles), and the origins concept<sup>168</sup> all represent possible designs of horizontal institutional interfaces in international merger control.<sup>169</sup> Yet the problem of the design of the vertical institutional interfaces in an international merger control system has not been addressed systematically so far, and this will be the decisive problem concerning the ability of a multilevel system of international cross-border merger governance to integrate coherence and diversity.

In the existing multilevel systems of merger control, the vertical allocation and assignment of competences is designed in different ways. In the E.U. system, the implementation of

---

168. Under the origins concept, a national competition authority would govern every anticompetitive merger that has domestic origins, independent of where the anticompetitive effects may occur. See, e.g., Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 14-15, 17-19 (1997) (explaining a national approach to competition law); Wolfgang Kerber, *Wettbewerbspolitik als nationale und internationale Aufgabe* [*Competition Policy as a National and International Task*], in STANDORTWETTBEWERB, WIRTSCHAFTLICHE RATIONALITÄT UND INTERNATIONALE ORDNUNGSPOLITIK [LOCAL COMPETITION, ECONOMIC RATIONALITY AND INTERNATIONAL REGULATORY POLICY] 241, 259-60 (Thomas Apolte et al. eds., 1999). This alternative to the effects doctrine reduces the jurisdictions involved and facilitates investigation and enforcement. Even in the case of cross-border mergers, the countries of origin will most probably be fewer than the countries affected. However, the origins concept would require a voluntary abandonment of strategic competition policy, and there remains the crucial question of which competition law should be applied—the one of the country of origin (leading to a discriminatory competition framework in the affected countries, under which domestic agents face different rules than foreign agents) or the ones of the affected countries?

169. For extended overviews, see generally JÜRGEN BASEDOW, *WELTKARTELLRECHT* [WORLD ANTITRUST LAW] (Beiträge zum ausländischen und internationalen Privatrecht [Contributions to Foreign and International Civil Law], Vol. 63, 1998) (providing overviews of three possible designs for horizontal interfaces); LLOYD & VAUTIER, *supra* note 115 (discussing the advantages and limitations of various types of cooperation agreements); Alexandre S. Grewlich, *Globalisation and Conflict in Competition Law*, 24 WORLD COMPETITION: L. & ECON. REV. 367 (2001). Additionally, see the industrial organization models presented by Pedro P. Barros & Luís Cabral, *Merger Policy in Open Economies*, 38 EUR. ECON. REV. 1041, 1043-46 (1994); Keith Head & John Ries, *International Mergers and Welfare Under Decentralized Competition Policy*, 30 CAN. J. OF ECON. 1104, 1121-22 (1997) (addressing the welfare consequences of cross-border horizontal mergers under different circumstances); Damien J. Neven & Lars-Hendrik Röller, *The Allocation of Jurisdiction in International Antitrust*, 44 EUR. ECON. REV. 845, 850-54 (2000) (addressing the horizontal allocation of competences); Cabral, *supra* note 137, at 22-29 (also addressing the horizontal allocation of competences).

the “one-stop-control” principle leads to a rather clear delimitation of competences: Turnover thresholds decide whether a merger has “community dimension” and is controlled exclusively by the European Commission<sup>170</sup> or whether it is subject to the national merger control agencies (Article 1: Merger Regulation).<sup>171</sup> However, since turnover thresholds and affected geographic markets are not always congruent, several mergers with non-community dimension have to notify and be reviewed by more than two member state agencies. Therefore, a reform of the delimitation of vertical competences lay at the heart of the reform discussion regarding E.U. merger control.<sup>172</sup> Also discussed was whether member state agencies should apply E.U. rules in their merger control procedures, and if such application was mandatory or discretionary. This would have implied a stricter differentiation between rule-making and enforcement competence, leading to a centralization of rule-making competence and a decentralization of enforcement competence.<sup>173</sup> In the U.S. merger control system, no formal delimitation between the competences of the federal agencies, the state attorneys general, and the private parties exists.<sup>174</sup> The first two levels have at least implemented a

---

170. See Council Regulation 4064/89, art. 1(2), art. 21 (1),(2), 1990 O.J. (L 257) 13.

171. See *id.* at art. 21(3).

172. See Claus Dieter Ehlermann, *The Modernization of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 COMMON MKT. L. REV. 537, 537-38, 588-89 (2000) (noting the existence of a major debate over vertical delimitation of competences). See generally Götz Drauz & Michael Reynolds, *EC MERGER CONTROL: A MAJOR REFORM IN PROGRESS* (2003) (providing a comprehensive overview of the debate).

173. Due to the resistance of the member states and their competition agencies, the reform was eventually limited to an enhancement of the possibilities and facilitation of the procedure for referrals of cases between the European and national level. For instance, merging enterprises are now entitled to demand pre-notification referral to the E.U. if they otherwise would be forced to notify more than two member state agencies. The member state agencies retain veto rights, however. Additionally, cooperation between E.U. competition authorities shall be improved by implementing a Network of European Competition Authorities. See Council Regulation (EC) No. 139/2004.

174. See Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or Harmony?*, 9 CONN. J. INT'L L. 501, 504-13 (1994) (describing the different, but often overlapping, authority of the federal government and the state governments).

procedural agreement.<sup>175</sup> Altogether, the vertical allocation of competences in the U.S. system encompasses predominantly, but not exclusively, enforcement competences (concurrent application of the federal laws),<sup>176</sup> whereas in the E.U. system the vertical allocation of rule-making competences also plays a vital role.

Analytically, the problem of the vertical allocation of competences can be reformulated as a subsidiarity issue. According to this model, the lowest level that can control a potentially anticompetitive merger efficiently should be the level with the respective competence. An implementation of this idea may be derived from the economic theory of federalism,<sup>177</sup> which develops criteria for the centralization (higher levels) and decentralization (lower levels) of competences concerning the tax system and public goods.<sup>178</sup> Combining this with the categories that are relevant for an institutional analysis<sup>179</sup> may offer fruitful insights for the design options of the vertical institutional interfaces.<sup>180</sup>

---

175. See Antitrust Div., U.S. Dep't of Justice, *Protocol for Coordination in Merger Investigations Between the Federal Enforcement Agencies and State Attorneys General* (Mar. 11, 1998), available at <http://www.usdoj.gov/atr/public/guidelines/1773.htm>.

176. During the last fifteen to twenty years there has been a vital discussion on whether the competences of the states should be reduced to increase the consistency of the U.S. antitrust system. See, e.g., Flexner & Racanelli, *supra* note 174, at 531-34; Grimes, *supra* note 157, at 250; see generally Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004 (2001) (discussing the "proper role of state antitrust enforcement" in the U.S. antitrust system).

177. See Wallace E. Oates, *An Essay on Fiscal Federalism*, 37 J. ECON. LITERATURE 1120, 1121-24 (1999).

178. See *id.* at 1121-22, 1125. This theory, however, does not deal with competition policy.

179. See *supra* Part III.A.

180. Regarding several parts of the following discussion, see Roger Van den Bergh, *Economic Criteria for Applying the Subsidiary Principle in the European Community: The Case of Competition Policy*, 16 INT'L REV. L. & ECON. 363 (1996); Roger Van den Bergh, *Towards an Institutional Legal Framework for Regulatory Competition in Europe*, 53 KYKLOS 435 (2000). For a general introduction to the concepts used in the following discussion, see VAN DEN BERGH & CAMESASCA, *supra* note 142, at 127-36 (using an efficiency model to describe the benefits and disadvantages of decentralization of policy control, including competition policy); Wolfgang Kerber, *An International Multi-Level System of Competition Laws: Federalism in Antitrust*, in THE FUTURE OF TRANSNATIONAL ANTITRUST—FROM COMPARATIVE TO COMMON COMPETITION LAW,

- *Transaction Costs*: A centralization of rule-making and enforcement competences on the top level can reduce transaction costs that otherwise result from (i) having to give notice of cross-border mergers to authorities in a multitude of jurisdictions,<sup>181</sup> (ii) being subject to parallel review procedures by these jurisdictions (costs of the competition authorities), and (iii) needing information about the different rules in various jurisdictions as a precondition for competing internationally (information costs). Furthermore, economies of scale reveal advantages of the centralization of law (meaning allocating competences to a higher level). Whereas the fixed costs of merger control—such as the drafting and implementing of laws, the decision processes of the legislators, the building up of specific human capital (legal scholars, lawyers, judges, etc.), and the staff of competition authorities and courts—are rather high, the marginal costs of applying the merger control are comparatively small. Thus, a centralization of merger control competences would economize these fixed costs. Moreover, in a dynamic perspective, the quality of a legal institution improves with the number of cases that have been decided on its basis (through the cumulation of experience and knowledge, higher predictability, stabilization of expectations, etc.).<sup>182</sup>
- *Principal-Agent-Relations*: The goals of competition policy, as well as competition culture and traditions, differ among jurisdictions. This can be traced back to different citizen preferences about the role of competition and competition policy. If

---

*supra* note 47, at 269. In the context of this paper the following considerations can only be sketched briefly. A different application of the economics of federalism to competition policy is provided by Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23 (1983).

181. See also *supra* Part I.

182. However, an ambivalence may result if one takes into account that path-dependencies can lead to lock-ins in inefficient paths. See Klaus Heine & Wolfgang Kerber, *European Corporate Laws, Regulatory Competition and Path Dependence*, 13 EUR. J.L. & ECON. 47, 54 (2002); Kerber, *supra* note 180, at 293-94.

there are such differing preferences, then a decentralization of competences (allocating competences to lower, decentralized levels) is favorable concerning the ability of the principal to govern his agents in congruence with his preferences. Obviously, this would be more difficult with uniform merger control on the global level, which simply cannot cope with the differing competition policy preferences of the lower-level jurisdictions (or their citizens). However, the question of how much rent-seeking activities disturb the principal-agent-relations yields rather ambivalent answers. On one hand, decentralized competences may increase the ability of the citizens to control rent-seeking influences on their agents. On the other hand, a supranational agency with centralized competences may be more difficult for interest groups to capture.<sup>183</sup>

- *Externalities and Spillovers*: Most generally, jurisdiction over a policy problem should be allocated to the jurisdictional level which has the highest degree of congruency with the territorial or geographical scope of the problem. Otherwise, negative externalities lead to a suboptimally high frequency of related policies (as in the case of strategic competition policies), while positive externalities reduce the incentive to provide related policies. This points towards an upward allocation of competences if mergers affect several markets in different jurisdictions or interjurisdictional mar-

---

183. Two other features of an international competition policy system are crucially important here: (i) the degree of independence of the competition authorities, allowing for an escape from both strategic political influences and lobbying (in analogy to the insights of Central Bank Independence theory and practice), and (ii) the choice between administrative governance (by the competition agency—the “European model”) and judicial governance (by the courts—the “U.S. model”). The two features are interrelated, since the merits of the judicial governance in terms of independence and absence of public choice problems crucially depend on the degree of independence of the competition agencies.

kets. It also encompasses a downward allocation if mergers affect regional markets.<sup>184</sup>

- *Institutional Evolution*: The capability of the multilevel system of institutions to evolve is an important aspect because of the sustainable pluralism in competition theories and the inherent evolutionary character of the market process. Permeability to creative injections of innovative institutional arrangements and enforcement practices is promoted by a plurality of competences, implying both horizontal diversity (avoiding centralization within a jurisdictional level) and vertical diversity (allocating competences both to high/centralized and low/decentralized levels). This aspect thus points to the merits of decentralization because processes of institutional learning advance more rapidly if they rely on parallel (knowledge-creating) experimentation with different institutional solutions instead of sequential experimentation.<sup>185</sup>

The design of the vertical institutional interfaces is an important feature concerning the degree to which the demands for coherence and diversity become integrated in a multilevel system of merger control institutions. The difficult task is balancing centralizing forces with decentralizing forces.<sup>186</sup> If centralism on the top level dominates, then the internal dynamics of the system will lead to uniformity and the erosion of diversity. A dominance of decentralizing forces on lower levels, however, will drive the system to decay, thereby eroding coherence.

---

184. This is a very general assessment. For a more differentiated discussion including non-centralization solutions of the externality problem, see Kerber, *supra* note 180, at 287-90.

185. A uniform merger control "system" can only test different institutional arrangements sequentially, and such experimentation likely will be limited further by the "system" becoming dominated by institutional conservatism. On the concept of institutional learning through parallel experimentation, see Vanberg & Kerber, *supra* note 73, at 210-12; Kerber, *supra* note 180, at 293-94; Kerber & Budzinski, *supra* note 27, at 9-11.

186. Agents on the top level may have incentives to vote for more centralization, whereas agents on regional levels may strive for an enlargement of their autonomy—at the expense of the federal levels.

If the ICN is to govern cross-border mergers effectively, an additional level must be introduced into the international merger control system. The establishment of the network is justified by the problems arising from a missing top level in the pre-ICN "system." Jurisdictional conflicts, increasing transaction costs, and regulatory loopholes can be interpreted as failures of horizontal institutional interfaces due to a missing higher level. Thus, the design of the vertical institutional interfaces between the ICN-level and the level of the sovereign nations reveals sensitivity for an increase in coherence but also for the preservation of diversity. Until now, the design of these vertical institutional interfaces has been all but clear. The network-oriented reliance on informal pressure to adopt identified best practices without any binding enforcement mechanism is especially sensible in the starting period of the ICN. The effectiveness of this informal enforcement system increases with its duration because the involvement of the member agencies increases with the number of successful cooperation arrangements—and the frequency of their use—by raising the hurdles for defection.

The network approach presents itself as a special case of a multilevel system because the top level is a nearly virtual one. Networks like the ICN must therefore cope with the danger of decay. The problem of an institutional evolution eroding the demand for coherence is especially relevant in the early periods of the life-cycle of the network. In later periods, if the network has developed considerable enforcement power and coherence has improved over time, tendencies toward centralization may become the crucial problem. The ICN may well prove to be a road to harmonization or even unification in the course of time. It is necessary, therefore, to design the vertical interfaces so that the variety of levels plays a sustainable role in the governance of cross-border mergers.

#### IV. CONCLUSION—INTERNATIONAL MERGER CONTROL BETWEEN CENTRALISM AND DECENTRALISM?

Cross-border merger activity represents a problem with which purely jurisdictional competition policy cannot deal adequately. Therefore, cross-border merger governance requires an international institutional arrangement to coordinate jurisdictional control efforts. However, neither central-

ism (uniform world competition rules and enforcement) nor decentralism (disclaimer of any systematic international governance) alone can cope adequately with this problem. Pure centralism erodes institutional diversity, which frustrates institutional learning and innovation, leading to dynamic inefficiencies. Pure decentralism, on the other hand, erodes institutional coherence and generates regulatory conflicts and loopholes, leading to static inefficiencies. To survive these challenges, an adequate international merger control arrangement must balance and integrate centralism and decentralism.

The concept of multilevel systems of institutions offers an appropriate framework for the analysis of arrangements including both coherence and diversity. With the allocation of (material and procedural rule-making versus enforcement) competences among both the different vertical levels and the different jurisdictions on each level, the space for design options is described. In particular, the design of the vertical and horizontal institutional interfaces plays a vital role for the sustainability of coherence and diversity within the multilevel system. This sustainability is endangered by the internal dynamics of the system, which incorporate both centralizing forces (leading to uniformity) and decentralizing forces (leading to decay).

The real-world multilevel systems of merger control institutions include—without any claim of completeness—the U.S. antitrust system, the E.U. system, and the ICN. Concerning international merger governance, the ICN is especially interesting. Designed according to the network approach, the ICN constitutes a multilevel system with strong competences on the national levels (including the E.U.) and very few competences on an almost-virtual international level. Taking a static perspective, this hints at a strong fulfillment of the demand for diversity but creates remarkable doubts concerning the demand for coherence. Currently, decentralism seems to dominate the ICN. This decentralism does not, however, seem to be rooted in insight into the merits of institutional diversity. Instead, it could simply be due to the fact that more centralizing solutions—such as a WTO merger control—would not generate consent in the current political environment. If this assumption were true, the ICN could—due to its internal dynamics—evolve to become an avenue to more ambitious integration and therefore could produce a powerful international

merger control institution and a similar authority in the long run. This would probably enhance coherence, but the crucial question would be whether this would happen at the expense of, or with the preservation of, diversity.

The characteristics and internal dynamics of multilevel systems of institutions are not understood well enough in institutional economics. Further research is necessary to learn about vertical and horizontal institutional interfaces and their impact on the evolution of the system. This knowledge is crucial for the design and sustainable workability of such multilevel systems, which will become increasingly important if federalism and subsidiarity play a significant role within the institutional framework of a globalized world economy. This represents a general problem which is highly relevant for all kinds of international institutions, irrespective of whether the evolution of existing, or the design and implementation of new, international institutions is the object of analysis.