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Towards Rationalizing Multiple Competition Policy Enforcement Procedures

Oliver Budzinski

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Institute of Economics

Ehrenbergstraße 29
Ernst-Abbe-Zentrum

D-98 684 Ilmenau

Phone 03677/69-4030/-4032
Fax 03677/69-4203

http://www.wirtschaft.tu-ilmenau.de

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Towards Rationalizing Multiple Competition Policy Enforcement Procedures

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Abstract: Lead jurisdiction models represent one option how to extend and enhance contemporary interagency cooperation among competition policy regimes. They constitute a multilateral, case-related form of cooperation that is suited to effectively create a one-stop-shop for the prosecution of international cartels, the handling of cross-border mergers and acquisitions and the governance of international antitrust cases. Thus, lead jurisdiction models offer considerable economic benefits. However, they also entail several caveats. Three possible working problems and downside effects of lead jurisdiction models in international competition policy enforcement are discussed in this paper.

JEL-Codes: F02, F53, F55, K21, L40, D02

Keywords: international competition policy, lead jurisdiction models, international governance, interjurisdictional cooperation, interagency cooperation, competition economics, antitrust

1. Introduction

In a globalized world, the radius of business activities often extends the geography of jurisdictions. As a consequence, pro- and anticompetitive business strategies and arrangements with cross-border effects may face competition policy scrutiny of the very same case in several jurisdictions and by several authorities. Such multiple proceedings of one and the same antitrust case entail considerable disadvantages that have been extensively discussed in the literature:

- increasing transaction costs for companies who are forced to submit materials to and comply with procedures and outcomes of multiple competition policy authorities (*ICN* 2002),

[#] Prof. Dr. Oliver Budzinski, Professor of Economic Theory, Institute of Economics, Ilmenau University of Technology, Germany, Email: oliver.budzinski@tu-ilmenau.de. A former version of this paper was prepared for the OECD Policy Roundtable "Enhanced Enforcement Cooperation" (Hearing) that took place on June 17th, 2014, at the OECD in Paris, France. For further information see http://www.oecd.org/daf/competition/enhanced-enforcement-cooperation.htm (accessed 2014-06-20, 14.49). I thank the other panelists, *Michal Gal*, *Diane P. Wood* and *John Temple Lang*, *Antonio Capobianco* of the OECD as well as all participants for valuable comments and discussion.

- increasing burden on taxpayers due to the parallel investigation of virtually the same case facts by multiple authorities (with comprehensive references *Budzinski* 2014),
- divergent outcomes (with comprehensive references *Budzinski* 2008a: 33-49), and
- power asymmetries between different authorities allowing for beggar-thy-neighbor strategic policies (for instance, non-prosecution of export cartels into small and developing countries with weak authorities) (with comprehensive references *Budzinski* 2008a: 54-64).

So far, cooperation among antitrust authorities focuses strongly on minimizing the risk of divergent outcomes by means of information exchange, mutual notification and consultation, mutual assistance and (at times) negative comity. This is in particular true for bilateral cooperation agreements (*Budzinski* 2008a: 49-53; *Budzinski* 2014: 10-12).[1] Furthermore, the currently most important multilateral forum, the International Competition Network, does not include considerable case-related ambition of cooperation but rather concentrates on (softly and voluntarily) harmonizing competition policy cultures by defining non-binding best practices (*Budzinski* 2004a; *Budzinski* 2008a: 142-148; *Budzinski* 2014: 14-20). In line with the goals of this OECD Hearing[2] and since I have written about these issues extensively elsewhere, I will not go into the questions of deficiencies of uncoordinated national competition policy regimes, insufficiencies of hitherto (bilateral and multilateral) cooperation agreements and practices or welfare effects of international competition policy[3] in this paper. Instead, I will focus on discussing a particular concept aiming to solve the remaining problems of multiple proceedings by enhanced cooperation among (competent) competition authorities. The concept concentrates on rationalizing competition policy enforcement as to economize on transaction costs and taxpayer burden. In doing so, this concept clearly extends the boundaries of the antitrust cooperation frameworks that are currently in place. Whether there is a political will to establish the necessary reforms may be doubtful, at least in the short run. However, this shall not stop academic thinking about possible solutions, their institutional shape, working mechanisms and economic performance.

The concept that I will discuss in this paper, drawing closely on former research of mine (*Budzinski* 2008a, 2009, 2011), is the idea of a multilevel lead jurisdiction model where a lead agency investigates and handles a given case on behalf of the other

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[1] There are some few exceptions, though, like for instance the cooperation between the competition authorities of Australia and New Zealand that include *cross appointments* of senior commissioners to cases that affect both jurisdictions. Thus, a 'common' case is conducted by a team to which a commissioner of the other country is associated. See http://www.parliament.nz/en-nz/pb/business/qoa/49HansQ_20101123_00000007/7-commerce-commissions-new-zealand-and-australia%E2%80%94cross-appointments (accessed 2014-06-20, 16.25).

[2] OECD Hearing on *Enhanced International Cooperation* in Paris, 2014-06-17; see footnote #.

[3] See on these issues with extensive references *Budzinski* 2003, 2004a, 2004b, 2008a, 2014.

affected jurisdictions – and with their support – and decides a case while recognizing the legitimate interests of all affected jurisdictions. This ambitious idea combines the concepts of lead jurisdictions and multilevel governance (section 2) and poses a number of crucial questions as to its institutional design and working properties (section 3):

- what is the lead agency and how should it be selected?
- what competences would be delegated (and by whom) to the lead agency?
- what are the incentives to 'getting the cases right' (vis-à-vis strategic interests)?
- what are the (economic) advantages and disadvantages?

Eventually, I will highlight some limits and open research questions (section 4) before I conclude (section 5). So, what is a lead jurisdiction model and how can it be combined with multilevel governance?

2. Lead Jurisdiction Models as Enhanced Cooperation: Concept and Principles

The economic literature offers, inter alia, two interesting concepts for enhanced international cooperation. The first concept is the idea of a *lead jurisdiction model* (*Campbell* & *Trebilcock* 1993, 1997; *Trebilcock* & *Iacobucci* 2004). It extends the positive comity concept by allocating competence and responsibility for multijurisdictional competition cases to one of the affected regimes that subsequently handles and decides the case with a view to avoiding anticompetitive effects in the overall geographic market (i.e. in all affected jurisdictions) and by relying on the assistance of the other involved regimes. Two variants of lead jurisdiction can be distinguished: the model of a voluntary lead jurisdiction (advanced comity principle) (*Campbell* & *Trebilcock* 1993, 1997) and the mandatory lead jurisdiction concept (*Trebilcock* & *Iacobucci* 2004; *Budzinski* 2008a: 166-168, 203-206).[4]

The *advanced comity principle*, which represents the core element of the *voluntary lead jurisdiction* model, significantly extends the standard comity principles. If an anticompetitive arrangement or practice is to be reviewed by more than one competition policy regime (according to their respective standards), the affected jurisdictions appoint a lead jurisdiction, whose antitrust authority is designated to play the role of a coordinating agency (*Campbell* & *Trebilcock* 1993: 149-150, 1997: 109-110; *Rowley*, *Wakil* & *Campbell* 2000: 27-28). The latter implies that the lead jurisdiction does not suspend the reviews of the other involved jurisdictions. Instead, it coordinates their reviews, i.e. it collects and distributes information from the interacting agencies and, thereby, ensuring mutual comity (i.e. mutual respect for each other's

[4] The U.S. antitrust law system uses an interesting institution in cases of multiple antitrust procedures among U.S. states, namely the Judicial Panel on Multidistrict Litigation, established in 1968. It entails the option of combining parallel proceedings into a single one, unifying the case (see in more detail *Ostolaza* & *Hartmann* 2005; *Heyburn* & *McGovern* 2012).

legitimate interests). Eventually, the coordinating agency compiles a common but non-binding recommendation regarding remedies, which integrates the competition-oriented interests of the participating jurisdictions, in order to generate a coherent treatment of a specific international anticompetitive arrangement or practice. Each regime that claims jurisdiction over the case then decides the case on its own and it remains to its own deliberation whether and how far it considers the recommendation of the lead jurisdiction. Thus, the voluntary lead jurisdiction model includes permanent opt-in and opt-out options: any regime may decide at any stage whether to enter the cooperation and/or follow the recommendations as well as similarly decide to opt-out of the cooperation and proceed with its own stance towards the case in question. Consequently, the voluntary lead jurisdiction model may not considerably enhance the existing cooperation – in particular, in all the cases where the involved jurisdictions are reluctant to share their insights and not willing to adjust their own decisions according to the lead recommendations. In other cases, however, the level of cooperation may be significantly enhanced if the involved agencies engage in cooperation with the lead jurisdiction and adopt the decision recommendation as a guideline for their own decision. In summary, it will be case-dependent if cooperation is enhanced or not.

The *mandatory lead jurisdiction model* extends the concept of cooperation via the appointment of a lead jurisdiction by allocating 'hard' competences and responsibility for multijurisdictional competition cases to one of the affected regimes that subsequently handles and decides the case with a view to avoiding anticompetitive effects in the overall geographic market (i.e. in all affected jurisdictions) and by relying on the assistance of the other involved regimes. The mandatory character of this model lies in the binding character of the lead jurisdiction's decision: the decision of the lead agency binds the other affected jurisdictions. Thus, opt-in and opt-out options are reduced to the decision of joining the model or not. Once a jurisdiction has committed to the mandatory lead jurisdiction model, it cannot opt-out anymore.[5] It is this more advanced and more ambitious version of the lead jurisdiction concept that I will refer to in this paper.

The second concept is the idea of multilevel governance (*Kerber* 2003) in which regimes on different vertical levels (regional, national, supranational) are interconnected with each other. In such a complex multilevel system of institutions, the allocation of competences becomes particularly important (*Budzinski* 2008a). At the same time, different types of competences (for instance, rule-making, rule-applying and enforcement competences or substantive and procedural competences) can be

[5] It would be possible to relate this opt-in option to each single case, i.e. that participating competition policy regimes decide in each single case whether they commit to the lead jurisdiction model or not. For reasons of simplicity, however, I will assume in the following that jurisdictions who commit to the model do so for all upcoming cases.

allocated to different levels, so that a division of labor occurs. The advantage of adding the vertical multilevel dimension to the lead jurisdiction concept lies in the option to introduce a referee authority, monitoring and supervising the impartiality of the assigned lead jurisdiction and providing conflict resolution if necessary. Thus, in this concept, the antitrust institutions on the top level (the supranational or even global level) are not about materially deciding cases. Instead, they allocate lead jurisdiction according to agreed-upon criteria on a case basis[6], monitor and supervise the lead jurisdiction in respect of its impartial treatment of anticompetitive effects in the overall relevant international market (irrespective where – in which jurisdiction – the effects display) and settle conflicts in case of affected jurisdictions allege that their domestic effects (legitimate interests) were disregarded by the lead jurisdiction. Consequently, 'only' procedural competences are assigned to the top level and all material and substantive decision competences remain on the level of the existing competition policy regimes that include national, regional-supranational (e.g. the EU) and regional-subnational regimes (e.g. State antitrust in the U.S.).

From an economic perspective, the charm of this concept is that it

(i) replaces the inbound focus of existing competition policy regimes by a focus embracing all effects in the relevant geographic (international) market,
(ii) provides a one-stop shop for the companies (thus avoiding deficient transaction and administration costs of multiple procedures),
(iii) closes many loopholes due to the lead jurisdiction being powerful and also providing protection of competition abroad, and
(iv) maintains diversity of competition regimes[7] because each assigned lead jurisdiction handles and decides the case according to this regime's antitrust rules and procedures, just with the explicit inclusion of cross-border effects.

On the downside, it requires an international agreement on procedural rules (in particular criteria for allocating case-specific lead jurisdiction as well as for monitoring and conflict resolution mechanisms) and willingness to accept

(i) procedural decisions by the international level and
(ii) material decisions by the lead jurisdiction as long as all effects are treated impartially irrespective of their jurisdictional location.

[6] This only refers to multijurisdictional cases; cases that display effects merely within one of the existing competition policy regimes are solely subject to this regime's jurisdiction. See for more details about possible notification and referral rules in a multilevel competition policy system *Budzinski* (2009: 379)

[7] On the benefits of regime diversity in competition policy see *Kerber* & *Budzinski* (2004); *Budzinski* (2008a: 64-83); *Budzinski* (2008b).

After outlining the basic properties of the concept, the next section explores more deeply into its details.

3. Competence Allocation within a Multilevel Lead-Jurisdiction Model

3.1 Enhanced Cooperation I: Allocating and Supervising Lead Jurisdiction Competence

The notion of assigning a lead jurisdiction with 'hard' competences of handling, investigating and deciding a given case requires a cooperative forum that manages the selection process and safeguards an appropriate case-handling. Such a forum could be either (i) an international organization or agency, consisting of an independent body, or – more in the spirit of enhanced cooperation - (ii) an international forum or panel consisting of representatives of participating competition policy regimes.[8] For reasons of convenience, I call it the *International Competition Panel* (ICP) in the following.[9] The enhanced cooperation in the multilevel lead jurisdiction model requires the implementation of such a forum that is equipped with considerable procedural competences. However, it does not require substantive antitrust laws at this international level of cooperation – and as such the mandatory lead jurisdiction model (as ambitious as it is) remains a modest proposal compared to far-reaching ideas of global competition laws and agencies.[10]

Notwithstanding, it needs to be equipped with considerable procedural competences, namely competences (i) regarding the selection of competent jurisdictions according to the mandatory lead jurisdiction model and (ii) to review, monitor and supervise rules and practices of participating competition policy regimes in order to safeguard that the regimes are able to apply their laws according to a nondiscrimination principle also to effects abroad (*Budzinski* 2008a: 178-182).[11] Consequently, the ICP neither creates its own substantive competition law, nor does it apply or enforce substantive competition law directly. Instead, it is the lead jurisdiction that applies its own competition rules to a given anticompetitive arrangement or practice

[8] For different models how to equip such a forum or panel with representatives from the participating competition policy regimes (including rotation schemes) see *Budzinski* (2009: 379-381).

[9] It may be possible to employ the ICN or some of its structures for this purpose.

[10] Examples for the latter include the Doha Declaration of introducing competition rules into the WTO framework or the academic proposal of the DIAC (*Fikentscher* & *Immenga* 1995; *Fox* 1997, 1998; *Zäch* 1999; *Drexl* 2003, 2004; *Budzinski* 2008a: 134-141).

[11] It is important to emphasize that the ICP cannot prescribe competition policy rules or practices; it is only entitled to combat discriminatory rules and practices. This distinction is important from an institutional-economics perspective (*Hayek* 1975; *Kerber* 1993; *Wegner* 1997) since (a) a prohibition excludes only one specific option from the non-determined set of possible options, whereas (b) a prescription effectively eliminates any scope of selection and de facto excludes all the other options by prescribing one of them. In the first case, the regimes maintain behavioural freedom, including the freedom to create innovative solutions; both is effectively eroded in the second case.

and enforces the outcome of its proceedings. In contrast, the ICP competences can be specified to include the following three elements:

(i) Selection of Lead Jurisdiction

If a case occurs that would lead to multiple procedures among the members of the system (see more detailed section 3.3), the ICP appoints a lead jurisdiction according to a defined set of criteria. As a potential lead jurisdiction for a given anticompetitive arrangement or practice qualifies any competition policy regime (*Budzinski* 2011: 85-86)

(a) whose internal markets represent a regional gravity of the market activities (e.g. aggregate turnover of the participating enterprises),

(b) whose agency enforces a working and nondiscriminatory competition law,

(c) whose agency disposes over sufficient capacities and competences for the case in question, and

(d) that demonstrates (and has demonstrated) the willingness and experience to investigate, handle and decide the case with a view of protecting all affected consumers and markets, i.e. to safeguard comity to other jurisdictions' legitimate interests.

The ICP appoints the competition policy regime to act as the lead jurisdiction that best fulfils these four criteria. In many cases, the choice will be rather obvious, if not, the ICP enjoys a limited but inevitable discretionary scope. The lead jurisdiction receives full competences to deal with the respective anticompetitive arrangement or practice under the obligation of nondiscrimination and pursuance of the common welfare of all affected consumers irrespective of their location. It forms a team with all the other jurisdictions whose internal markets are affected by the anticompetitive arrangement or practice in question. The non-lead jurisdictions provide support and assistance to the lead jurisdiction, injecting their concerns, views and competences into the investigation and decision-finding proceedings.

Criterion (a) reflects the concept of a *primary effects clause* (*Trebilcock* & *Iacobucci* 2004). In order to minimize incentives for strategic competition policies and discriminatory action by the lead jurisdiction, this criterion focuses on market effects, i.e. effects on consumers (*Neven* & *Röller* 2005; *Haucap* et al. 2006). Alternatively, the location of companies and their production facilities could be considered as well, however, entailing the danger of strategic locational interests trumping consumer welfare considerations.

(ii) Supervision and Sanctions

The ICP reviews the competition rules and codified practices of the participating competition policy regimes regarding violations of the nondiscrimination principle. In cases of discriminatory rules or practices, it demands the modification of the respective provisions (however, without prescribing alternative designs). If the respective competition policy regime refuses to adjust its rules and practices accordingly, this regime is disqualified and suspended as a potential lead jurisdiction. This procedure also applies to safeguard a minimum necessary nexus with an anticompetitive arrangement or practice to claim jurisdiction.[12] Additionally, the ICP supervises the review and decision process by the lead jurisdiction, but exclusively concerning violations of nondiscrimination. Potential sanctions, again, refer to the qualification of an acting lead jurisdiction for future cases.

(iii) Complaints and Conflict Resolution

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

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

3.2 Enhanced Cooperation II: Investigating, Handling and Deciding Cases

The second level of enhanced international cooperation represents the one where the cases are actually decided and, consequently, which disposes of substantive antitrust competences. It consists of all participating competition policy regimes, which may be (i) joint competition policy regimes of confederations or associations of independent countries, (ii) national competition policy regimes, or (iii) subnational 'local' competition policy regimes. These competition policy regimes retain their full

[12] Claiming jurisdiction without a sufficient nexus to the respective arrangement can be interpreted as representing an indirect kind of discrimination.

rule-making, rule-application, and enforcement competences for cross-border anti-competitive arrangements and practices if the ICP appoints them to be lead jurisdiction in the respective case. Each regime autonomously shapes its own substantive competition rules, enforcement institutions, and agencies (including an individual composition of elements of the court system, government and independent administration system, and private litigation) – but minus discriminatory provisions and practices, which are excluded and sanctioned by the ICP. Against the background of these non-discriminatory institutions and practices, each regime is obliged to consider competitive effects outside its territory according to the common welfare of all affected consumers. Apart from that, the appointed lead jurisdiction is free to handle the referred case. Eventually, the lead jurisdiction issues a decision on the case that may detail different remedies for different regional effects (in different countries).[13] However, due to the lead jurisdiction treatment, the decision displays overall coherence.

The lead jurisdiction is expected to team up with the other affected antitrust regimes.[14] Insofar, the actual casework of the appointed lead jurisdiction requires enhanced international cooperation as well. The appointed lead jurisdiction acts to the outside as the one-stop-shopping contact for the norm addressees (companies suspected to infringe competition law, their competitors, customers, affected consumers, etc.). It enjoys the power to investigate and decide the case according to its own laws, practices and institutions (but with a view to all effects, domestic and abroad). In doing so, the lead agency leads a cooperative team consisting of all agencies whose internal markets are affected by the case. The non-lead agencies play an important role in this part of the multilevel lead jurisdiction model. On the one hand, they assist the lead agency by providing support in terms of local investigation force and their 'local knowledge advantages' (from being close to their markets). Moreover, they contribute resources and special competences that are needed in the case in question and cannot be provided by the lead agency alone. For instance, an involved non-lead agency may possess specific competences regarding sophisticated economic methods and may, at request, employ them to provide the lead agency with additional evidence. On the other hand, the cooperation within the team of affected jurisdictions also offers the opportunity for non-lead jurisdictions to inject their views, theories of harm and competition-oriented interests into the proceedings, thus increasing the probability that the outcome will satisfy their demands. It can be expected that close cooperation between the lead agency and the other involved agencies during the actual case handling will promote the emergence of a

[13] For instance, in the case of an international hardcore cartel, the lead agency may specify what penalties (amounts) have to be paid to which jurisdictions' authorities, depending on the harm that the cartel caused in these jurisdictions.

[14] Again, violations of this cooperation imperative have a negative impact on the probability of future lead jurisdiction appointments.

common view on the case in question and, thereby, erode the scope for conflicts about the decision and remedies to a significant extent.

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

Following the paragon of the EU, these associations and confederations might develop effective competition policy regimes with considerable competition policy competences in the course of time. Developed ones represent natural candidates for lead jurisdiction appointments as they jurisdictionally include a number of national markets and address consumers of different countries. Therefore, they automatically internalise parts of the externalities arising from cross-border business activities. Furthermore, supranational agencies may be less prone to strategic competition policy because they are experienced of considering effects on different countries.

Since currently only one effective supranational antitrust regime exists, the majority of cases is likely to remain within the second type of regimes at this level of enhanced international cooperation, namely national regimes, in the short- and medium-run. In particular, national competition policy regimes with large and important internal markets are likely to be frequently appointed as lead jurisdictions. Above all, this refers to the U.S. Antitrust System. However, the competition policy regimes of countries like Canada, Australia, Brazil, Japan, Russia, China, India, and many more also represent frequent candidates if they qualify for a lead jurisdiction appointment.[15]

Most likely, local (subnational) competition policy regimes will only infrequently qualify as lead jurisdictions for cross-border antitrust cases. Their domains are local anticompetitive arrangements and practices because, in this respect, they can exploit their advantages of being very close to the locally-affected markets. In such cases, however, they play an important role within a sound multilevel competition policy system. Particularly large countries with considerably segmented internal markets may benefit from local competition policy competences. Despite ongoing market globalisation, regional and local markets are unlikely to be completely eroded. Therefore, the scope for regional and local (including subnational) competition policy regimes is a sustainable one.

3.3 Which Cases Qualify for Being Handled by the Multilevel Lead Jurisdiction Model?

From the outset of the motivating factors for considering a far-reaching cooperation like a multilevel mandatory lead jurisdiction model on it is clear that its competence should be limited to those cases where the multijurisdictional treatment causes costs, burden and harm. In other words, only truly multijurisdictional cases should qualify for being subject to the system. While the notion of truly multijurisdictional may sound simple and straightforward at first sight, the devil may hide in the details.

A basic approach may start with the existing notification rules and picking criteria of the participating national and supranational regimes and simply state an *X-plus rule* (*Budzinski* 2008a: 196-199) for the adoption of a case into the lead jurisdiction system. The idea is that anticompetitive arrangements and practices with cross-border effects should be allocated ‘upwards’ (to treatment in the lead jurisdiction model), whereas other cases should remain within the national competence. As a very simple proxy for market affection serves the number of jurisdictions, in which a specific arrangement or practice would be subject to review. If this number exceeds a defined value of X (for instance, X = 3 or X = 5), it can be assumed that it generates with a sufficient probability significant cross-border spillovers, which justify its inclusion into the lead jurisdiction model. An advantage of using such a simplistic criterion is its simple application that does not create much cost and is rather transparent. As always, this advantage comes along with a disadvantage, notably the different sizes

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

of the national regimes: if X = 3 this may refer to three comparatively small countries (say, Estonia, Latvia, and Lithuania) or to three comparatively big countries (say, the U.S., Mexico, and Brazil). Obviously, it makes a difference for the 'truly multijurisdictional character' whether the first or the second scenario applies. Thus, the X could be complemented by a factor representing the size of a regime's internal market (or population), an addition that would somewhat increase the complexity of delineating the lead jurisdiction cases from the others but may still remain sufficiently simple and transparent enough. Unfortunately, there is no scientific way of determining X or the correcting factor, so that would be up for a political consensus.[16]

In order to avoid strategic behaviour, a multilevel lead jurisdiction model requires rules about notification and picking thresholds on the level of the existing regimes. The participating competition policy regimes need adequate notification thresholds for mergers and interfirm cooperative arrangements and respective rules for picking up cartels and other anticompetitive arrangements or practices in order to avoid that jurisdiction is claimed even if no sufficient nexus with the (anti-) competitive effects of a business arrangement or practice exists. In this field, the already existing ICN best practice recommendations on sufficient nexus for claiming jurisdiction may serve as a focal point. Furthermore, the specifics of the different types of competition cases – cartels, mergers and acquisitions, abuse-of-dominance cases – require different treatments in this regard.[17]

4. Limits and Problems of Lead Jurisdiction Concepts

Even though the concept of a multilevel lead jurisdiction model entails the potential to solve the remaining problems of international competition policy through an enhanced, deeper and more systematic cooperation among the existing competition policy regimes (and without creating new international substantive competition law), it contains a number of inherent problems – like every concept does. In the following, selected problems are discussed with a view to their severity and to possibilities of alleviating them.

4.1 The Incentive Problem

Probably the most crucial problem relates to the incentive of an appointed lead jurisdiction to conduct the given case without privileging its own jurisdiction's interests and without discriminating against the interests of the other affected jurisdictions. For the system to work, the lead jurisdiction must decide the case with consumer welfare in all affected markets in mind and, thus, pursuing international welfare in-

[16] For alternative case allocation rules (that, however, tend to perform worse) see *Budzinski* (2008a: 168-199).

[17] *Gal* (2010) presents an interesting example of a solution for horizontal hardcore cartels that may prove to be very compatible with the ideas outlined in this paper.

stead of national welfare. In economic language, it can be said that the lead jurisdiction is expected to provide a positive externality, i.e. producing a benefit for the other affected jurisdictions without gaining a direct benefit for itself (in addition to its benefits if it would pursue the case with only national welfare in mind). In many cases this may be rather unproblematic though since competition cases often display similar or comparable effects in different jurisdictions. For instance, a hardcore cartel will reduce welfare in all the national markets it sells its products and, similarly, a merger to monopoly will be detrimental to welfare everywhere. Consequently, in such cases, the lead jurisdiction does not run into a serious conflict and mainly needs to consider the rectified foreign effects when deciding the extent of sanctions and remedies. The perspective of reciprocity among the involved jurisdictions may suffice to motivate a fair treatment of all effects by the lead jurisdiction in such cases.

Obviously, the crucial cases are the ones where the interests of the lead jurisdiction stand in (partial) conflict to those of (some of) the other affected jurisdictions. Or, in other words, the cases in which a treatment according to national welfare only would lead to a different assessment than a treatment considering the effects abroad. A reason for such a deviation of interests and/or regional effects may be that producers and consumers are unevenly distributed across the involved jurisdictions (*Barros* & *Cabral* 1994; *Head* & *Ries* 1997). Consider for instance a case where the lead jurisdiction predominantly domiciles the (e.g. cartelizing or merging) producers, whereas the consumers are predominantly located in the other jurisdictions.[18] Then, a national welfare treatment by the lead jurisdiction may imply that (the many) efficiency gains outweigh (the few) consumer disadvantages, whereas an investigation across all the affected markets would reveal the opposite result (because the weight of the producer-side advantages decreases vis-à-vis the demand-side disadvantages). In such cases, the lead jurisdiction could be tempted to privilege its own interests over the legitimate interests of the other affected jurisdictions. However, while the theoretical treatment of this problem in industrial economics shows that cases like this are possible, model theory also demonstrates that cases like this can only surface under rather heroic assumptions. Consequently, they may actually occur, albeit rather infrequently because they are rather special – and by far do not represent the typical case of conflicting interests. The following type of cases represents a much more likely scenario: a purely competition-oriented analysis would yield the same result for national and international welfare (i.e. consumer harm prevails). However, there is strong lobbyism for the domestic producers, be it by industry lobbyism or by political influence (promoting national champions, improving national competitiveness, etc.). Competition policy decisions biased by economic patriotism most typically do not enhance national welfare and this type of competitiveness-promoting policies usually serves to boost the welfare of powerful/influential/well-organized groups

[18] It is questionable, though, whether such a lead jurisdiction selection actually meets the selection criteria outlined n section 3.1.

within the national economy at the expense of domestic consumers, domestic competitors (in particular less influential small-and-medium-sized companies), and foreign jurisdictions (*Budzinski* 2008a: 53-64). Still, the competition agency of an appointed lead jurisdiction may face considerable pressure to bias its decision accordingly when the stakes are sufficiently high.[19]

However, there are a couple of disciplining factors that may reduce the risk of discriminatory treatment. First, the assigned responsibility for all the effects of a competition case may actually strengthen the position of the appointed agency vis-à-vis domestic influence groups and thus increase its ability to withstand pressure from vested interests. Under the conditions of the sketched multilevel lead jurisdiction model, the responsible lead agency itself experiences strong incentives to act as it is expected to be. The ICN-experience shows how effective peer pressure can be in terms of disciplining competition authorities and in terms of strengthening their position within the national policy systems (theoretical treatment: *Budzinski* 2004a; empirical evidence: *Rowley* & *Campbell* 2005; *Evenett* & *Hijzen* 2006). These rather 'soft' disciplining mechanisms should not be underestimated. Moreover, any appointed lead jurisdiction needs to consider that a discriminatory case handling inherently backfires: the probability of being selected as a lead jurisdiction in the future depends, inter alia, on the jurisdiction's behavioural history (see selection criteria in section 3.1). Thus, a rational lead jurisdiction has to weigh the benefits of a strategic decision of the given case against the disadvantages of losing lead jurisdiction appointments in future cases (plus reputation losses, all corrected by discount rates). While there may be cases that may appear to be worth it from the viewpoint of the lead jurisdiction, in most cases the balancing exercise should point towards a non-discriminatory handling and decision (*Budzinski* 2011: 91). The latter is further supported by the danger that more independent revision instances (e.g. law courts) may scrap the discriminating decision anyway – the probability of which may vary considerably across jurisdictions, though.

4.2 Divergent Laws Problem

Another problem originates from divergent competition laws and policies in different jurisdictions. Even with lead jurisdictions that handle cases according to nondiscriminatory treatment and international welfare focus, case decisions may differ depending on the chosen lead jurisdiction due to differences in law and practices. Next to substantive differences in law, like for instance the transatlantic divide on sanctions against cartels (monetary fines against companies only in Europe versus a combination of company fines and criminal prosecution of acting managers in North-America), divergent case decisions may be caused by differences in the applied theories –

[19] The transatlantic antitrust ‚wars' over the Boeing-MDD-merger (*Fox* 1998b) and the eventually aborted GE-Honeywell-proposal (*Gerber* 2003) offer prime examples.

both theories of harm and underlying economic theories. For instance, different outcomes of merger control assessments of the same case in the EU and the U.S. are not so much rooted in the (minor) differences of how the prohibition criterion is phrased (significant lessening of competition vs. significant impediment of effective competition). Instead, they are caused by referring to different economic theories and differences in the – always uncertain – assessment of probabilities of future effects and counterfactual effects. The same can be claimed for differences in the treatment of vertical effects. However, notwithstanding these competition-policy-inherent divergences, empirically the most relevant divergences in the past originated from strategic policies and the inbound focus (disregarding effects that affect markets abroad) – like in virtually all of the famous transatlantic conflict cases (Boeing-MDD, GE-Honeywell, Amadeus, etc.[20]). Since this reason for divergent outcomes should disappear if all effects are considered in a nondiscriminatory way, the remaining scope for divergent case decisions (depending on the assigned lead jurisdiction) may actually not be that significant anymore. This is further reinforced by the success story of the best practice convergence in the course of the ICN work that has reduced differences in competition policy practices to a considerable extent (*Rowley* & *Campbell* 2005; *Evenett* & *Hijzen* 2006).

Still, running a (mandatory) lead jurisdiction concept requires the acceptance of some scope for divergent 'outcomes' – referring to divergences between the actual lead jurisdiction decision and counterfactual decisions by other affected jurisdictions if they had run their own proceedings[21] – that remains despite the safeguarding and alleviating factors. The participating jurisdictions need to live with a limited degree of inconsistency in terms of equal treatment of equal cases with different lead jurisdictions.[22] Notwithstanding, the cooperation among the lead jurisdiction and the other involved jurisdiction on the second level of enhanced cooperation (section 3.2) will contribute to improving acceptance of lead decisions. In addition, on a more psychological or behavioural (economics) note, once a lead jurisdiction system is running, there are no actual divergent outcomes anymore, which is one of the advantages of such a model. Instead, it is just hypothetical (counterfactual) divergent outcomes – what would have been decided if another jurisdiction had been appointed as lead jurisdiction.

From another angle, the remaining scope for applying different theories of harm and different underlying economic theories may actually viewed to be an advantage of

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[20] See with further references *Budzinski* (2008a: 32-64).

[21] Note that within the system there cannot be divergent outcomes of a given case anymore due to the one-stop-shop at the lead jurisdiction. The fact that all divergences will be only hypothetical – in the sense of as-if outcomes in the counterfactual that another agency would have run the case – may actually (psychologically, behaviorally) contribute to a better acceptance of lead agency decisions because divergences are not immediately visible anymore.

[22] However, competition cases are never really equal, further reducing the perceptibility of this problem – once the system is up and running.

the multilevel lead jurisdiction model. Sustaining a limited diversity of regimes, theories and practices allows for beneficial institutional learning (*Kerber* & *Budzinski* 2004). The economics of competition and antitrust are a dynamic field of science that does not rest upon one everlasting and true unifying theory. Instead, the dynamics of theory innovation and development are intense, both due to inner-science factors and due to the dynamics of the object of analysis (*Budzinski* 2008b). Limited diversity of policies, then, offers scope for injecting new knowledge into competition policy practice, testing new theories (parallel experimentation) and thus speeding up the knowledge accumulation process. As such, it may actually be beneficial to live with a limited extent of divergent laws, practices and policies as well as (counterfactual) divergent outcomes.

4.3 Lack-of-Eligible-Lead-Jurisdiction Problem

Eventually, I address a problem that may frustrate the workability of the lead jurisdiction system if it is empirically relevant. There may be a danger that too few regimes fulfil the criteria of becoming a lead jurisdiction so that the same handful of big agencies will lead all the cases. In other words, the market for lead jurisdiction may not be competitive but instead dominated by a narrow oligopoly of regimes – or even a dominant U.S.-EU-duopoly. The reason is that in particular small regimes may struggle to be selected as lead jurisdiction: firstly, they are less likely to accumulate significant shares of the relevant market activities within their domestic markets and, secondly, they may lack capacity and (sophisticated) competence to deal with major multijurisdictional cases. As such, the criteria for lead jurisdiction appointments laid out in section 3.1 entail a tendency to favour experienced and well-equipped agencies as well as such with a large domestic market. This may represent a problem for three reasons:

- if many jurisdictions virtually have no chance of becoming a lead jurisdiction, this may undermine their acceptance of the overall system and of lead decisions due to a lack of (felt) own influence.
- if the ICP faces a narrow and powerful oligopoly of agencies that qualify for lead jurisdiction tasks, it may become difficult to enforce the fundamental principles of nondiscriminatory treatment and international welfare orientation due to a lack of alternatives in case that these agencies do not comply.
- if jurisdictions become disconnected to international cases due to their inability to qualify as lead jurisdictions, then this may also negatively influence their capabilities to deal with domestic cases.

However, some alleviating factors may imply that this problem is not so severe empirically. First, there will be many cases that are sufficiently multijurisdictional to warrant their inclusion in the multilevel lead jurisdiction model but that are sufficiently regional in terms of their impact to qualify other than the big regimes to serve as lead jurisdiction. Note that the phenomenon we usually label as globalisation includes considerable trends of (interjurisdictional) regionalization as well. Second, enhanced international cooperation while 'doing' the case (see section 3.2) may alleviate to some degree a lack of agency size and experience since other affected jurisdictions may assist the lead jurisdiction, also with capacities and specialised competences (like economic expertise). Third, (again) enhanced international cooperation II helps non-lead agencies to remain connected with the international environment and with the development, experience and progress that is associated with it.

Eventually, the real problem may actually stand in sharp contrast to this discussion: (some) regimes with small but open national economies may experience incentives to free ride on the lead jurisdiction system and downgrade their own competition policy regime. Instead of aiming to qualify for lead jurisdiction duties (which always involves to some extent the necessity to provide a positive externality), these regimes may opt for saving resources and rely on the decisions of lead jurisdictions regarding the desired level of protection of competition. Notwithstanding, there may not be so many jurisdictions in reality that find it attractive to revert to this free-riding position. As soon as a jurisdiction experiences a non-negligible number of purely domestic antitrust cases (where it cannot rely on foreign agencies to protect competition and welfare), it is not rational to limit domestic competition policy activities to a free rider position.

5. Conclusion

This contribution discusses a possible avenue towards rationalizing multiple competition policy procedures by an enhanced international cooperation. The concept of a multilevel lead jurisdiction model represents an interesting step to combine the concepts of lead jurisdictions and multilevel governance. The advantage of adding the vertical multilevel dimension to the lead jurisdiction concept lies in the option to introduce a referee authority, monitoring and supervising the impartiality of the assigned lead jurisdictions and providing conflict resolution if necessary. Thus, cooperation among competition agencies on the global level (*enhanced cooperation I*) is not about materially deciding cases. Instead, it allocates lead jurisdiction according to agreed-upon criteria on a case basis, monitor and supervise the lead jurisdiction in respect of its impartial treatment of anticompetitive effects in the overall relevant international market (irrespective where – in which jurisdiction – the effects display) and settle conflicts in case of affected jurisdictions allege that their domestic effects were disregarded by the lead jurisdiction.

Consequently, all material and substantive decision competences remain on the level of the existing national and regional-supranational regimes. Here, each competition case is dealt with by a team of affected jurisdictions. While the lead jurisdiction acts to the outside as the one-stop-shopping contact for the companies (and other involved parties) and enjoys the power to investigate and decide the case according to its own laws, practices and institutions (but with a view to all effects, domestic and abroad), the actual case handling internally consists of interagency cooperation as well (*enhanced cooperation II*). The lead agency leads a cooperative team consisting of all agencies whose internal markets are affected by the case. The non-lead agencies inject their views and (competition-) interests into the case and provide assisting force, resources and competences.

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

At the end of the day, the concept of a multilevel lead jurisdiction model is far from being comprehensively researched and completely developed. Still, it does represent one of the more interesting avenues for thinking about enhanced cooperation.

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