



The University of Oxford
Centre for Competition Law and Policy

Working Paper CCLP (L) 26

International Competition Enforcement Law
Between Cooperation and Convergence -
Mapping a New Field for Global Administrative Law

By

Jörg Philipp Terhechte

The international dimensions of competition law and policy are mostly perceived at the level of substantive law. In this legal area intended as well as spontaneous assimilation and harmonization trends can be recognized, which for instance manifest themselves in comparable approaches at combating particularly harmful restraints (so called hardcore cartels). However, the complex terrain of enforcement law has been mainly ignored up to date. Are there common approaches in this field as well? How are the various competition laws linked with each other in respect to procedural norms? The following paper will conceptualise “International Competition Enforcement Law” against the backdrop of these issues on the level of comparative law. The ciphers „cooperation” and „convergence” will serve as the two principle ideas for this paper. Furthermore, the then-explored area of law can act as field of reference of a “Global Administrative Law” (or “International Administrative Law”), an emerging field not yet explored in depth.

Jörg Philipp Terhechte

Dr. Jörg Philipp Terhechte is an Assistant Professor at the Institute for European Law, University of Hamburg and was in 2008 a Visiting Fellow at the Institute for European and Comparative Law, University of Oxford. Contact: <joerg.terhechte@jura.uni-hamburg.de>

This paper has resulted from a research project funded by the Fritz Thyssen Stiftung für Wissenschaftsförderung which has been conducted at the Universities of Hamburg and Bielefeld as well as at the George Washington University Law School and the U.S. Federal Trade Commission, Washington D. C. This project also resulted in the handbook *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Jörg Philipp Terhechte, Ed.), Gieseking Publisher, Bielefeld. Special thanks to *Dr. Ariel Ezrachi*, University of Oxford, *Prof. Dr. Armin Hatje*, University of Hamburg, Hon. Commissioner *William E. Kovacic*, Commissioner U.S. Federal Trade Commission, Washington, D. C. and *John J. Parisi*, Counsel for European Affairs, U.S. Federal Trade Commission, Washington, D. C., for their invaluable advice.

To Nicole and Jakob

© Jörg Philipp Terhechte, October 2009

A German version of this paper was published in
68 Heidelberg Journal of International Law (2008), 689-762

A Mongolian version of this paper was published as
GTZ Working Paper in 2008 (translation by Teemulen Baata), 45 pp.

Parts of the paper were published in
Jörg Philipp Terhechte (ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht*, Gieseking
Publisher (Bielefeld) 2008 (§§ 1, 2 and 90)

Contents

<i>A. Introduction</i>	7
I. Overview	7
II. The Term “International Competition Enforcement Law”	10
1. <i>General remarks on the term “enforcement”</i>	10
2. <i>International Competition Enforcement Law – a Definition</i>	11
<i>B. “Cooperation” as Guiding Principle of International Competition Enforcement Law</i>	13
I. Fundamentals of Cooperation.....	14
1. <i>Globalization of Competition Restraints</i>	15
2. <i>Globalization of Competition Policy?</i>	17
II. Forms of Cooperation.....	17
1. <i>Networks</i>	18
a) <i>Administrative Networks</i>	18
b) <i>Judicial Networks</i>	20
2. <i>“Classical” Administrative Cooperation</i>	20
3. <i>Cooperation beyond the Limits of Authority</i>	21
4. <i>Cooperation with Privates</i>	21
III. The Limits of Cooperation.....	22
1. <i>The Differences of Procedures</i>	22
2. <i>Fundamental and Human Rights</i>	22
3. <i>Transparency Requirements</i>	24
4. <i>Legal Protection</i>	24
5. <i>Lacking Binding Nature</i>	25
<i>C. Convergence of International Competition Enforcement Law</i>	25

I. Convergence of Substantive Standards.....	25
II. Convergence on the Level of Enforcement?	25
1. <i>Criminal Enforcement</i>	26
2. <i>Effective Enforcement by Use of Leniency Programs</i>	26
3. <i>Antitrust Law Execution by Privates</i>	27
4. <i>Expansion of Governmental Cooperation</i>	28
5. <i>Convergence and Divergence of Norms Securing Fundamental Rights</i>	28
6. <i>The Effects Doctrine as a Global Criterion for Jurisdiction</i>	28
7. <i>Reduction of Areas of Exception</i>	29
8. <i>The Role of State-owned Companies</i>	29
9. <i>International Free Trade Agreements and Regional Economic Integration</i> ..	29
III. Sources of Law of Converging Procedural Law.....	31
1. <i>The Level of Public International Law</i>	32
2. <i>The Level of Regional Economic Integration Treaties</i>	33
3. <i>The Level of European Law</i>	34
4. <i>The Role of the ECHR</i>	36
5. <i>The Level of National Law</i>	37
a) <i>Constitutional Law</i>	37
b) <i>Competition Legislation</i>	38
c) <i>Sectoral Legislation</i>	38
d) <i>Interlocking with Different Laws</i>	39
e) <i>Guidelines and Notices as Atypical Legal Acts</i>	40
IV. Scope of Application of National Rules	41
1. <i>Possible Links for the Scope of Application</i>	42
2. <i>Current Dominance of the Effects Doctrine</i>	43

International Competition Enforcement Law

3. Personal Scope of Application of National Laws	44
4. Exemptions	45
a) Areas of Exemption	45
b) Role of State-owned Companies.....	46
c) Immunities	47
V. Actors.....	48
1. Variety of Authorities as Initial Perspective	48
a) Single Agency Approach	48
b) Horizontal Multiagency Approach.....	49
c) Vertical Multiagency Approach.....	49
d) Competition Authorities and Sectoral Regulatory Authorities.....	50
2. Differences between Authorities.....	50
a) Financial and Personal Resources	50
b) Composition at the Decisional Level.....	53
c) Independence	54
c) Accountability.....	55
3. A World Antitrust Authority as Platform of Coordination?	57
4. Role of the Courts.....	58
5. Privates	58
VI. Variety and Uniformity of Proceedings	59
1. Administrative Proceeding.....	59
a) Opening/Filing.....	59
b) Investigational Powers	60
c) The Time Factor.....	60
d) Conclusion of procedure	61

e) <i>Sanctions</i>	62
2. <i>Court Proceedings</i>	62
a) <i>The correlation of Court Proceedings and Administrative Proceedings</i>	63
b) <i>Indefinite Legal Concepts and Concretization</i>	63
c) <i>Competences</i>	64
<i>D. Procedural Convergence through Cooperation?</i>	64
I. <i>Contents of Cooperation</i>	65
II. <i>Emerging Global Enforcement Standards?</i>	66
1. <i>Role of the International Competition Network</i>	66
2. <i>Role of the OECD</i>	67
3. <i>Role of UNCTAD</i>	67
4. <i>Claim to Self-Determination by National Law as an Obstacle</i>	67
III. <i>World Competition Enforcement Law in the Making?</i>	68
1. <i>DIAC as a Paragon?</i>	68
2. <i>The Role of Politics</i>	70
<i>E. Summary</i>	70

A. Introduction

I. Overview

“International Competition Enforcement Law” is not yet a separate discipline of jurisprudence. Even its substantive origins – International Competition Law – is not clearly defined but instead composed of regulations taken from national competition and antitrust laws, relevant and pertinent regulations of the European Community law (Art. 81-86 EC), from a number of international cooperation agreements as well as from international “soft law”. Therefore, the question arises if on this basis a standard model can be identified, which can provide a new legal area such as the “International Competition Enforcement Law” with clear outlines and systematics. To find the answer to this question common procedural principles and organizational structures must be found by way of a comparative approach that allows for the description of the International Competition Enforcement Law's traits in general, especially with regard to German, European and US-American law.¹

If one searches for the fixed points of an International Competition Enforcement Law, two main concepts can be identified: On the one hand an improved cooperation of competition authorities and courts (see B.) and on the other hand – with regard to substantive law – the gradual convergence of procedural regimes (see C.).² Both concepts find their basis in current legal reality:

¹ On the role of comparative jurisprudence and its modes of application see Zweigert and Kötz, *Einführung in die Rechtsvergleichung auf dem Gebiet des Privatrechts*, 3rd ed. (Mohr Siebeck, 1996), p. 12 et seq; Kötz, “Alte und neue Aufgaben der Rechtsvergleichung“, *Juristenzeitung* (2002), 257; see also Wieser, *Vergleichendes Verfassungsrecht* (Springer, 2005), p. 19 et seq: „Nach hier vertretener Auffassung ist Rechtsvergleichung aber zugleich ein eigenes Fach; [...]. Der Sprung von einer bloßen Anhäufung von Wissen zu einer eigenen Wissenschaft wird erst dadurch vollzogen, dass die durch die vergleichende Methode gewonnenen Erkenntnisse geordnet, gruppiert, klassifiziert und in den Gesamtzusammenhang eingefügt werden. Darin ist die Aufgabe der vergleichenden Rechtswissenschaft zu sehen. Sie versucht derart, aus der Summe der Teile zu einem Verständnis des Ganzen zu gelangen.“ For a take on Cartel Law specifically see Gerber, “Comparative Antitrust Law” in Reimann and Zimmermann (Eds.), *Oxford Handbook of Comparative Law* (Oxford University Press, 2006), § 37; Drexl, *The Future of Transnational Antitrust – From Comparative Competition Law to Common Competition Law* (Staempfli, 2003); Ullrich (Ed.), *Comparative Competition Law: Approaching an International System of Antitrust Law* (Nomos, 1998).

² Wood, “Cooperation and Convergence in International Antitrust: Why the Light is Still Yellow” in Epstein and Greve (Eds.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (AEI Press, 2004), 177; Calvani, “Conflict, Cooperation, and Convergence in International Competition”, 72 *Antitrust L. J.* (2005), 1127; James, “International Antitrust in the 21st Century: Cooperation and Convergence”, to be found at <http://www.usdoj.gov/atr/public/speeches/9330.htm>; Terhechte, “Das internationale Kartellrecht zwischen Konvergenz und Extraterritorialität” in Bungenberg and Meessen (Eds.), *Das internationale Wirtschaftsrecht im Schatten des 11. September 2001* (Boorberg, 2004), 87; id., “Die Reform des europäischen Kartellrechts – am Ende eines langen Weges?“, 15 *Europäische Zeitschrift für Wirtschaftsrecht* (2004), 353; Noonan, *The Emerging Principles of International Competition Law* (Oxford University Press, 2008).

1. Cooperation – in the sense of institutionalized collaboration – in competition and antitrust law has for the longest time exclusively taken place at the intergovernmental level. Today however, different forms of cooperation can be witnessed on the national, European and international level. On all of these three levels can both vertical and horizontal cooperation be observed (see B. II.).³ In addition to that the actors participating can take different forms: The International Competition Network (ICN)⁴, for instance, is a platform of cooperation between national and supranational Competition Authorities. Different again is the situation regarding the Organisation for Economic Co-operation and Development (OECD) and their Competition Committee, as well as the Global Forum on Competition. Herein, there is activity by competition authorities as well as private experts to be found, though at the core OECD is a platform for member states. The competition authorities thus do not act out of their own interest within this framework but do so initially as representatives of their respective states.⁵ Next to that, new forms of cooperative relations outside of governmental and state cooperation can be observed, for example those between courts as well as those between authorities and private entities.

2. The term Convergence of the International Competition Enforcement Law – defined as the gradual approximation of different procedural regimes⁶ – entails a condition and a process at the same time.⁷ This term has more or less established itself in the academic discussion of recent years, especially in light of the fact that “harmonisation” may sound somewhat hierarchical.⁸ Though the idea of convergence originally referred only to substantive law, there is also a certain amount of worldwide competition law concepts to be found in procedural law – so goes the assumption.⁹ Its definition and the con-

³ On the term “cooperation” cf. *supra* note 2; For an examination of the administrative cooperation on EC level see Schmidt-Aßmann, “Verwaltungskooperation und Verwaltungskooperationsrecht in der Europäischen Gemeinschaft”, 31 *Europarecht* (1996), 270; Sommer, *Verwaltungskooperation am Beispiel administrativer Informationsverfahren im Europäischen Umweltrecht* (Springer, 2003), p. 74 et seq. (especially on the term “cooperation”); see also Sydow, *Verwaltungskooperation in der Europäischen Union. Zur horizontalen und vertikalen Zusammenarbeit der europäischen Verwaltungen am Beispiel des Produktzulassungsrechts* (Mohr Siebeck, 2004), p. 4 et seq.

⁴ Available at <http://www.internationalcompetitionnetwork.org>; see also section B. II. 1. a) *infra* as well as section D. II. 1. *infra* with further references.

⁵ Cf. http://www.oecd.org/about/0,3347,en_2649_37463_1_1_1_1_37463,00.html; see also Göransson and Reindl in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Gieseking, 2008), § 75 para 2.

⁶ On the term “convergence” see Terhechte, *Das internationale Kartellrecht zwischen Konvergenz und Extraterritorialität* (*supra* note 2), p. 87 et seq.

⁷ For a comprehensive overview see Böge, “Konvergenz kartellrechtlicher Normen und deren Anwendung auf globale Sachverhalte“, *Wirtschaft und Wettbewerb* (2001), 922; Scherer, “Competition Policy Convergence – Where Next?“, *International Business Lawyer* (1996), 485; Calvani, “Conflict, Cooperation, and Convergence in International Competition“, 72 *Antitrust L. J.* (2005), 1127; *id.*, “Devolution and Convergence in Competition Enforcement“, *ECLR* (2003), 415.

⁸ Tritell, “International Antitrust Convergence: A Positive View“, 26 *Antitrust* (Summer 2005), 25.

⁹ On the convergence of substantive law Kennedy, *Competition Law and the World Trade Organization: The Limits of Multilateralism* (Sweet & Maxwell, 2001), p. 200 et seq.; Tritell (*supra* note 8), 25

sequential systematization allows for first statements to be made - in the context of globalization – about which structures currently affect the International Competition Enforcement Law and which future developments can be expected in this field.¹⁰

3. Within this approach new soil can be broken on the developing field of research that is “Global Administrative Law” (or “International Administrative Law”). The present debate surrounding that field is mostly occupied with the administrative structures of international organizations, such as the United Nations (UN) or the World Bank. The question raised therein is how instruments that originate in national administrative law can be used in “areas of global governance”.¹¹ However, much is still in a state of flux and the field can be characterized as open to development.¹² The following work is an attempt at developing essential features of a concept of Global Administrative Law with which to identify – on the basis of a comparative approach – common administrative structures in a specific field of reference.¹³ The field of reference should feature a multi-level build.

An approach that focuses on broad fields of reference also offers the advantage that legal areas which are traditionally attributed to International Administrative Law (such as the “Administrative Collision Law”) can be included in the equation along with the respective roles of international and European law. Furthermore, this approach allows us to understand the interaction of state, supranational and private actors and is not limited to international organizations, although these do play a significant role. Finally, it becomes obvious that in many legal areas a common ground can be identified, so global standards in substantive and in procedural respect can be distinguished. The rules and principles drawn on this basis can then – in perpetual comparison to other fields of reference – be joined together to form a frame-

et seq; Beatge, “Competition Law and Perspectives for Harmonisation”, *Uniform Law Review* (2004), 501; Basedow, “International Antitrust: From Extraterritorial Application to Harmonization”, 60 *Louisiana Law Review* (2000), 1037; see also Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge University Press, 2003); Fox, “Toward World Antitrust and Market Access”, 91 *AJIL* (1997), 1; id., “Harmonization of Law and Procedures in a Globalized World – Why, What, and How”, 60 *Antitrust L. J.* (1992), 593.

¹⁰ See section E *infra*.

¹¹ See for example Classen, “Die Entwicklung eines Internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft”, 67 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (2007), 365 et seq; Biaggini, “Die Entwicklung eines Internationalen Verwaltungsrechts als Aufgabe der Rechtswissenschaft”, 67 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (2007), 413 et seq; Kingsbury, Krisch and Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* (2005), 15; Esty, “Good Governance at the Supranational Scale: Globalizing Administrative Law”, 115 *Yale L. J.* (2006); 1490; Harlow, “Global Administrative Law: The Quest for Principles and Values”, 17 *EJIL* (2006), 187; Krisch, “The Pluralism of Global Administrative Law”, 17 *EJIL* (2006), 247 with further references.

¹² Ladeur, “Die Internationalisierung des Verwaltungsrechts: Versuch einer Synthese“ in Möllers, Voßkuhle and Walter (Eds.), *Internationales Verwaltungsrecht. Eine Analyse anhand von Referenzgebieten* (Mohr Siebeck, 2007), 375.

¹³ A similar approach is being taken in Möllers, Voßkuhle and Walter (Eds.), *Internationales Verwaltungsrecht. Eine Analyse anhand von Referenzgebieten* (Mohr Siebeck, 2007).

work. Insofar one can speak of an International Competition Enforcement Law in the same way as of an international customs law and an international postal law. The sum of the commonalities of these fields would then constitute the general structures of a “*Global Administrative Law*”.

II. The Term “International Competition Enforcement Law”

1. General remarks on the term “enforcement”

a) If one tries to define the term “enforcement” or “procedure” or it has to be noticed that currently no general procedural theory exists. Even so it can be stipulated that the concept in question has, after a period of being more or less disregarded in jurisprudence, presently gained popularity again. This could, among other things, be attributed to the fact that legislative power to dictate the result of legal application is ever shrinking and consequently the concept of procedure (seen as the path to result) becomes of larger importance in many cases.¹⁴

Procedure (or enforcement) – to use the words of the German *Bundesverfassungsgericht* (the German Federal Constitutional Court) – “serves to bring about lawful and from this point of view correct and fitting, fair decisions.”¹⁵ Owing to the rules which it is based on a procedure is hence capable of supporting the legitimacy of governmental and legal decisions and furthermore exercises considerable influence on the final verdict regarding a specific issue.¹⁶

In Competition Enforcement Law, “the procedure as a mode of realisation of the law”¹⁷ possesses an especially important function. This area incorporates a large number of undefined legal terms and latitudes of evaluation that give the executive a wide margin of discretion without extensive judicial review by courts.¹⁸ Against this background, procedural law ultimately supports the important role of securing the rule of law and equal treatment.

b) Due to this rudimentary composition of the substantive standards of this field of law, Competition enforcement law it can also serve as an “international field of reference”, in which the intensively – especially in Germany

¹⁴ Cf. Hoffmann-Riem, “Wir stehen am Beginn eines europäischen Verwaltungsrechts“, *Zeitschrift für Rechtspolitik* (2007), 101 et seq.

¹⁵ *Entscheidungen des Bundesverfassungsrechts* 42, 72.

¹⁶ Luhmann, *Legitimation durch Verfahren*, 2nd ed. (Suhrkamp, 1997), p. 11.

¹⁷ See Wahl, “Verwaltungsverfahren zwischen Verwaltungseffizienz und Rechtsschutzauftrag“, 41 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (1983), 151 et seq; Hatje in Terhechte (*supra* note 5), § 5 para 4.

¹⁸ Terhechte, “Administrative Discretion and Judicial Review in Germany – New Tendencies in the Field of Economic Regulation”, in: Lavrijssen, Essens and Gerbrandy (Eds.), *Judicial Review in Economic Regulation and Competition Law* (European Law Publishing, 2009), p. 79; id., *Die ungeschriebenen Tatbestandsmerkmale des europäischen Wettbewerbsrechts* (Nomos, 2004), p. 42 et seq.; Hatje in Terhechte (*supra* note 5), § 5 para 4.

– discussed transition from an “application-oriented interpretative approach to a law-making-oriented action and decision approach” to administrative law can be observed vividly.¹⁹ Within the scope of competition law, it is rarely sufficient to undertake a “pure” interpretation or systematization of the rules or legal acts if one seeks to understand the system in its entirety. This area is strongly dependent on economic and political assessment. The question of how “*prevention, restriction or distortion of competition*” (see Art. 81 [1] EC) or the term “*restraints of trade*” (Sec. 1 U.S. Sherman Act) are to be interpreted can for example only be decided after consideration of economical and political aspects. Procedural law also significantly affects the question of how insights from associated areas of science can be adopted into the legal discourse and can hence be of enormous importance.

2. International Competition Enforcement Law – a Definition

a) In this paper, “International Competition Enforcement Law” is to be understood as the sum of legal norms and those established by development of law by courts that concern – at a national, supranational or international level – the execution of rules which relate to:

- Horizontal and vertical restraints of competition,
- Abuse of dominant positions and/or
- Merger control

as their subject matter. Because many jurisdictions will be analyzed this paper will use the terms “competition” and “antitrust” simultaneously as well as the terms “enforcement” and “procedure”. Preference should be given to this wide focus, as the practical application of antitrust rules seldomly differentiates between cases of foreign nature and those of purely domestic nature. This is basically caused by the “effects doctrine” (see for this C. II. 6. and C. IV. 2.). Solely this fact allows to speak about an International Competition Enforcement Law, although the subject of this scientific field first and foremost is national law, at least in many areas.²⁰ Against this backdrop the pic-

¹⁹ Cf. Voßkuhle, “Neue Verwaltungsrechtswissenschaft“ in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, Vol. 1 (C. H. Beck, 2006), § 1 paras 15 et seq; see also Eifert, “Das Verwaltungsrecht zwischen klassischem dogmatischen Verständnis und steuerungswissenschaftlichem Anspruch“, 67 *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer* (2007), 286 et seq; Spiecker gen. Döhmman, “Das Verwaltungsrecht zwischen klassischem dogmatischen Verständnis und steuerungswissenschaftlichem Anspruch“, *Deutsches Verwaltungsblatt* (2007), 1074.

²⁰ In common understanding “International Competition Law“ or „International Administrative Law“ first and foremost encompasses the rules that decide if the respective state’s jurisdiction is appli-

ture can only be painted if one attempts to establish an overview over the entirety of the procedural rules on all relevant levels of regulation.

b) Additionally such an examination must not be limited to “pure” procedural law, but should include the role of executive authorities and other actors as well. This paper – in heeding the functional unity of these regulations – not only seeks to examine the actual procedural law, (i.e. the rules about the opening, execution and completion of a procedure) but also the composition of executive authorities and courts.²¹ Just by considering the entirety of procedure, institutions and other actors is it possible to make reliable statements about the current state of procedural law.²² These interactions have in recent years been coined as “institution building” and have been lively discussed.²³

c) Procedure, however, can naturally not be separated from substantive law. While in the past it was frequently stated that procedure was a mere follow-up to substantive law, just as thirst follows the consumption of something salty (*ubi ius ibi remedium*), it is becoming more and more commonly accepted that the relationship between procedural and substantive law is far more complex. Especially with regard to Competition Enforcement Law with its extremely complicated and drawn-out processes, it can be observed that the (adjective and substantive) law not only shows its existence in the procedure, but in many cases comes into existence because of it.²⁴ On top of that, courts do not always subject this “creation of law through procedure” to judicial review.²⁵ Therefore, it can at several points not be avoided to elucidate substantive aspects of International Competition Enforcement Law, as these are closely linked to procedural law.

d) Finally, the so-defined approach deliberately leaves out of consideration a debate that is especially frequent in current German jurisprudence, which relates to the nature of antitrust. Therein antitrust is by some classified as a classical matter of civil law²⁶, by others as commercial or economic administrative law.²⁷ At the level of sanctioning, both concepts are intertwined with

able; it therefore is a law of collision, see Biaggini (*supra* note 19), 417; Linke, *Europäisches Internationales Verwaltungsrecht* (Peter Lang, 2001), p. 23 et seq.

²¹ See section C. V *infra*.

²² Schmidt and Binder, *Wettbewerbspolitik im internationalen Vergleich* (Verlag Recht und Wirtschaft, 1996), p. 26 et seq; Schmidt, *Wettbewerbspolitik und Kartellrecht*, 8th ed (UTB-Verlag, 2005), p. 165 et seq.

²³ See Trebilcock and Iacobucci, “Designing Competition Law Institutions”, 25 *World Competition* (2002), 349.

²⁴ On the relationship between substantive and procedural law Hufen, *Fehler im Verwaltungsverfahren*, 4th ed. (Nomos, 2002), para 8 with further references.; see also Schwarze, *Der funktionale Zusammenhang von Verwaltungsverfahrensrecht und verwaltungsgerichtlichem Rechtsschutz* (Duncker & Humblot, 1974).

²⁵ Terhechte (*supra* note 18), p. 42 et seq.

²⁶ Cf. Schmidt, „Wirtschaftsrecht: Nagelprobe des Zivilrechts – Das Kartellrecht als Beispiel“, 206 *Archiv für die civilistische Praxis* (2006), 167 (172 et seq); id., *Kartellverfahrensrecht – Kartellverwaltungsrecht – Bürgerliches Recht* (Carl Heymanns, 1977), p. 88 et seq.

²⁷ Forsthoff, *Allgemeines Verwaltungsrecht*, 10th ed. (C. H. Beck, 1973), p. 66 et seq; von Köhler, “Das Kartellverfahrensrecht ist öffentliches Recht!“, 54 *Verwaltungsarchiv* (1963), 262; Ullrich,

aspects of penal law. A clear classification is thus futile, due to the Janus-faced approach of German law²⁸ (and competition law in general) – and in view of the postulate for the unity of the legal system – also unnecessary. Furthermore, not only the substantive antitrust law but the procedural law as well shows that a “look at the whole” is the only possibility to draw a complete picture of this hybrid legal subject.²⁹ This finding can ultimately be transferred to all national competition and antitrust laws as well as to supranational European law.

B. “Cooperation” as Guiding Principle of International Competition Enforcement Law

From the perspective of International Competition Enforcement Law the cooperation of the competition authorities constitutes a main leitmotif.³⁰ Decisions with international dimensions are often increasingly not longer determined “autonomously” by the responsible authority or court but are made in cooperation or on the basis of cooperations with all actors at a governmental or private level that are potentially affected by a said national or foreign decision. At the international level, this enhanced cooperation is at least partly a result of globalization of competition restrictions (see B. I. 1.) and the therefore necessary globalization of competition policy (B. I. 2.).

In the end, quite different forms of cooperation can be discerned (see B. II.): International Competition Enforcement Law is rather progressive with regard to cooperation within networks. Issues which could be discussed under the cipher of “networks” over the next years in general jurisprudence, have already become solid reality in antitrust law.³¹ One only has to take a

Das Recht der Wettbewerbsbeschränkungen des Gemeinsamen Marktes und die einzelstaatliche Zivilgerichtsbarkeit (Duncker & Humblot, 1972), p. 322.

²⁸ Mestmäcker in Immenga and Mestmäcker (Ed.), *GWB Kommentar*, 3rd ed. (C. H. Beck, 2001), “Einleitung” paras 59 et seq.

²⁹ Therefore it cannot be verified for the European level that cartel law has been ultimately assigned to the area of civil law (contra Schmidt, 206 *Archiv für die civilistische Praxis* [2006], 167), because the interference of national and supranational law leads to supranational aims winning out that do not have too much in common with categories of civil law, cf. Terhechte (*supra* note 18), p. 366 et seq; id., “Die Wettbewerbspolitik und der Umweltschutz in der Europäischen Gemeinschaft”, *Zeitschrift für Umweltrecht* (2002), 274.

³⁰ See Buchmann, *Positive Comity im internationalen Kartellrecht* (Sellier, 2004); Lampert, “International Cooperation Among Competition Authorities”, *ECLR* (1999), 214; Mozet, *Internationale Zusammenarbeit der Kartellbehörden* (C. F. Müller, 1991); Parisi, “Enforcement Cooperation Among Antitrust Authorities”, *ECLR* (1993), 133; Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* (LIT Verlag, 2005); Zanettin, *Cooperation between Antitrust Agencies at the International Level* (Hart Publishing, 2002).

³¹ Extensive information on the term “network” and the associated problems in Slaughter and Zaring, “Networking Goes International”, 2 *Annual Review of Law and Social Science* (2006), 211; Slaughter, “Global Government Networks, Global Information Agencies, and Disaggregated Democracy”, 24 *Michigan Journal of International Law* (2003), 1041; Fischer-Lescano and Teubner, *Regimekollisionen. Zur Fragmentierung des globalen Rechts* (Suhrkamp, 2006), p. 57 et seq; Ladeur, “Towards

look at the ICN and the European Competition Network (ECN). Both networks embody forms of no or at least diminished hierarchical coordination on behalf of the participating authorities (s. B. II. 1.). By contrast judiciary networks will be less heavily focused on (for example the Association of European Competition Judges [AECJ]).³² Admittedly, the cooperation of the involved actors is nevertheless limited, especially based on differences in procedure, the consideration of different fundamental and human right standards, as well as requirements of transparency (B. III.).

I. Fundamentals of Cooperation

Cooperation among competition authorities and courts is not a new phenomenon. In fact, there have been first attempts between states – by way of bilateral agreements – to ensure a common line of action against international cartels and improved coordination regarding mergers across the border quite early. An example for this development is the cooperation agreement between the United States and Germany from the year 1976.³³ However, the practical relevance of this covenant remained marginal. Nevertheless, this example reflects the fundamental insight that a global competition politics must come into existence against the background of an accelerating globalization of competition restrictions if the national and supranational Competition Enforcement Law is to be effectively implemented.

Directly connected to this is the knowledge that the procedural cooperation of the various actors and the accompanying combination of the respective procedural regimes is the only form of coordination that is currently feasible. Although the “dream” of a unitary worldwide antitrust law often is the subject of discussion all such attempts to date, from the Havana Charta in year 1948³⁴ to the development of the Draft International Antitrust Code (DIAC) in the years 1991-1993³⁵, have failed. The idea of uniform international law³⁶ – in the form of an international multilateral agreement on com-

a Legal Theory of Supranationality – The Viability of the Network Concept“, 3 European Law Journal (1997), 33; Möllers, “Netzwerk als Kategorie des Organisationsrechts. Zur juristischen Beschreibung dezentraler Steuerung“ in Oebbecke (Ed.), *Nicht-normative Steuerung in dezentralen Systemen* (Stuttgart, 2005), 285; Teubner, “Das Recht hybrider Netzwerke“, 165 Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht (2001), 550; contra Schwarze, *Europäisches Verwaltungsrecht*, 2nd ed. (Nomos, 2005), p. CIX: “Schon jetzt zeichnet sich allerdings ab, dass sich mit dem Zauberwort des „Netzwerks“ nicht alle Probleme des arbeitsteiligen Zusammenwirkens zwischen europäischen und nationalen Wettbewerbsbehörden lösen lassen.“

³² The “network-approach” was transferred to judicial co-operation by Slaughter, *A New World Order*, (Princeton University Press, 2004), p. 65 et seq.

³³ Federal Law Gazette II (1976), p. 1711; see generally Buchmann (*supra* note 30), p. 121 et seq.

³⁴ Stödter, “Völkerrecht und Weltwirtschaft“, 13 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1950/1951), 67 et seq.; Mozet (*supra* note 30), p. 16 et seq.

³⁵ See section D. III. 1. *infra*; see also Basedow, *Weltkartellrecht*, (Mohr Siebeck, 1998), p. 70 et seq.

³⁶ Detailed information on the area of procedural law in Oeter, “Vielfalt der Gerichte – Einheit des Prozessrechts?”, *Berichte der deutschen Gesellschaft für Völkerrecht* (2007), 149.

petition – does not appear to not be viable at the moment. The implementation of such an agreement would be difficult anyway, especially in the light of the ever growing number of new actors in the field of International Competition Enforcement Law and constant reservations on the part of the U.S.³⁷ Perhaps – this is only to be taken as speculation – it was a fundamental mistake to mainly work with concepts that attempted to integrate a competition agreement into the body of rules of GATT or the WTO respectively.³⁸ Thus, not only the concepts that were hardly matching from a legal viewpoint clashed hard but also persons and institutions that previously had never had anything to do with each other.³⁹

Yet, to avoid the risks of a completely uncoordinated application of different national laws, the U.S. launched an initiative - that was later followed by the EU - to form independent coordination structures (be it networks or bilateral agreements).

1. Globalization of Competition Restraints

Competition restraints increasingly take on a global dimension: a perfect case in point being Microsoft. This case has been pursued – with a different outcome – in both the U.S. and Europe.⁴⁰ Additionally investigations were initi-

³⁷ U.S. concerns regarding this issue were included in the 2002 Final Report of the International Competition Policy Advisory Committee, to be found at <http://www.usdoj.gov/atr/icpac/finalreport.htm>; on the position of the U.S. also cf. Tarullo, “Norms and Institutions in Global Competition Policy”, 94 AJIL (2000), 478; Stockmann, “Die neuen globalen Initiativen (Global Competition Network)“ in FIW (Ed.), *Konvergenz der Wettbewerbsrechte – Eine Welt, ein Kartellrecht* (Carl Heymanns, 2002), 57 et seq.

³⁸ See Jackson, “Alternative Approaches for Implementing Competition Rules in International Economic Relations“, 49 *Aussenwirtschaft* (1994), 177 (191); Petersmann, “Proposals for Negotiating International Competition Rules in the GATT/WTO World Trade and Legal System“, 49 *Aussenwirtschaft* (1994), 231 et seq; Meessen, “Das Für und Wider eines Weltkartellrechts“, *Wirtschaft und Wettbewerb* (2000), 5 et seq; Fox, “Toward World Antitrust and Market Access“, 91 AJIL (1997), 1; Drexler, “WTO und Kartellrecht – Zum Warum und Wie dieser Verbindung in Zeiten der Globalisierung“, *Zeitschrift für Wettbewerbsrecht* (2004), 191; id., *Perspektiven eines Weltkartellrechts* (Rheinische Friedrich-Wilhelms-Universität Bonn, 1998); Anderson and Jenny, “Current Developments on Competition Policy in the World Trade Organization“, *Antitrust* (Spring 2001), 40; Lenski, “Die WTO auf dem Weg zur Weltwirtschaftsorganisation?“ in Bungenberg and Meessen (*supra* note 2), 115.

³⁹ Cf. Tarullo, “Norms and Institutions in Global Competition Policy“, 94 AJIL (2000), 478. These circumstances have – among other things – led to the U.S. not accepting the DIAC.

⁴⁰ On the Microsoft saga see Case T-201/04, *Microsoft Corporation v Commission*, [2007],II-3601; see also the Decision of the European Commission of 24 March 2004, COM(2004)900 final; see also the Decision 2007/53/EC of 24 May 2004, O.J. 2007, L 32/23; Pardolesi and Renda, “The European Commission’s Case Against Microsoft: Kill Bill?“, 27 *World Competition* (2004), 513; detailed information on the case in Gavil and First, *Microsoft and the Globalization of Competition Policy: A Study in Antitrust Institutions* (MIT Press, 2006); Korah, *An Introductory Guide to EC Competition Law and Practice*, 8th ed. (Hart Publishing, 2004), p. 175 et seq; Lange and Pries, “Möglichkeiten und Grenzen der Missbrauchskontrolle von Kopplungsgeschäften: Der Fall Microsoft“, *Europäisches Wirtschafts- und Steuerrecht* (2008), 1; Körber, “Machtmissbrauch durch Multimedia? – Der Fall Microsoft zwischen Produktinnovation und Behinderungsmisbrauch“, *Recht der internationalen Wirtschaft* (2004), 568; Motta, *Competition Policy* (Cambridge University Press, 2004), p. 511 et seq; Takigawa, “A Compar-

ated in South Korea and Japan.⁴¹ A similar development can also be witnessed in the area of merger enforcement as shown by the cases GE/Honeywell⁴² and Boeing/McDonnell-Douglas.⁴³ Lastly, the “international cartels” such as the vitamin cartels⁴⁴ also serve to underline the increasing globalization of competition restraints.⁴⁵

Nevertheless the phenomenon of “international competition restraints” has not merely existed for only a few years, but was discussed intensively even as far back as 50 years ago.⁴⁶ Starting point of this development was the extensive liberalization of international business relationships in the course of GATT.⁴⁷ Since the collapse of former state-controlled economies in Eastern Europe, Asia and Africa and the creation of a common body of rules for the international trade with goods and services in the broader context of the WTO, governmental trade restraints have steadily been reduced, i.e. tariffs, quota and other restraints of trade.⁴⁸ Thus, the possible range of agreements restraining competition between companies has grown as well.

The starting situation therefore can be described like this:

- with the increase in international trade and the worldwide use of the effects doctrine as it is becoming more and more likely that competition restraints affect more than one state.
- Mergers in particular are of transnational character nowadays, hence the probability for accumulation of excessive market power and undue influence on the competition process increases.

tive Analysis of U.S., EU, and Japanese Microsoft Cases: How to Regulate Exclusionary Conduct by a Dominant Firm in a Network Industry”, 50 Antitrust Bulletin (2005), 237.

⁴¹ See the press releases on the decision of the Korean Cartel Authority KFTC on the Microsoft case from 7 March 2005 and the then-following appeal by Microsoft, both to be found at <http://ftc.go.kr/eng/> (category “News“, keyword „Microsoft“) as well as the press release on the recommendation of the Japanese Competition Authority JFTC to Microsoft Corporation from 13 July 2004, available at <http://www.jftc.go.jp/e-page/pressreleases/2004/july/040713.pdf>.

⁴² Decision of the European Commission of 3 July 2001, O.J. 2004, L 48/1.

⁴³ Decision of the European Commission of 30 July 1997, O.J. 1997, L 336/16; Kovacic, “Transatlantic Turbulence – The Boeing-McDonnell Douglas Merger and International Competition Policy”, 68 Antitrust L. J. (2001), 805.

⁴⁴ Decision of the European Commission of 22 November 2001, O.J. 2003, L 6/1.

⁴⁵ See also Akbar, “Grabbing Victory from the Jaws of Defeat: Can the GE/Honeywell Merger Facilitate International Antitrust Policy Co-operation?“, 25 World Competition (2002), 403; Böge, “Die Herausforderungen einer internationalen Wettbewerbspolitik in Zeiten globalisierter Märkte“, Wirtschaft und Wettbewerb 2005, 590; Conrad, *Die Notwendigkeit, die Möglichkeit und die Grenzen einer internationalen Wettbewerbsordnung* (Duncker & Humblot, 2005); Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge University Press, 2003).

⁴⁶ See Wolany, “Internationale Kartellpolitik“ in Jahn and Junckerstorff (Eds.), *Internationales Handbuch der Kartellpolitik* (Duncker & Humblot, 1958), 515 with further references.

⁴⁷ Ibid.

⁴⁸ Cf. Herrmann, Weiß and Ohler, *Welthandelsrecht*, 2nd ed. (C. H. Beck, 2007), paras 97 et seq, using the tariff reduction rounds of GATT as an example.

- Overall multiple branches of the industry have become strongly concentrated. The world market for crude oil for example lies in the hands of a small number of private corporations and OPEC.⁴⁹ The same applies to related energy markets.

2. Globalization of Competition Policy?

Competition politics have not been able to keep pace with the globalization of competition restraints. With historical hindsight, it has been a tale of failure and set-backs although the need for international structures had been recognised early.⁵⁰ Only just today forums of cooperation are being developed by competition authorities. Nevertheless – and this is also shown by a closer look at the daily cooperation of competition authorities – this reveals the fundamental conflict between state sovereignty on the one hand and the challenges of a global economy with open markets on the other hand.⁵¹ Until now the community of states has not opposed the phenomenon of “globalization” with a common body of rules; unitary ideas collide with reservations on behalf of state sovereignty. Additionally it is doubtful whether “one” body of rules will ever exist at all or if it will come down to a network of several such bodies.⁵² The development of antitrust and competition law in particular indicates that the latter will be the case.⁵³ Insofar the future development will depend to a considerable degree on instruments of coordination between the various actors.

II. Forms of Cooperation

As far as the development of International Competition Enforcement Law can be described with the ciphers “Cooperation” and “Convergence”, it necessitates in a second step the examination of the various forms of cooperation between competition authorities. It is important to note that cooperation in this sense is not limited to executive authorities and agencies cooperating

⁴⁹ Terhechte, *OPEC und europäisches Wettbewerbsrecht. Zugleich ein Beitrag zum Phänomen der Fragmentierung des internationalen Wirtschaftsrechts* (Nomos, 2008), p. 38 et seq; id., *Applying European Competition Law to International Organisations – The Case of OPEC*, 1 *European Yearbook of International Economic Law* (2010), 179.

⁵⁰ Cf. Dörinkel, *Internationales Kartellrecht* (Carls Heymanns, 1932); Wolff, *Die Rechtsgrundlagen der internationalen Kartelle*, (Carl Heymanns, 1929); Wolany, “Internationale Kartellpolitik“ in Jahn and Junckerstorff (Eds.), *Internationales Handbuch der Kartellpolitik* (Duncker & Humblot, 1958), 515 with further references.

⁵¹ Basedow (*supra* note 35), p. 111; Mestmäcker, “Staatliche Souveränität und offene Märkte“, 52 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1988), 205.

⁵² Fischer-Lescano and Teubner, *Regimekollisionen. Zur Fragmentierung des globalen Rechts* (Suhrkamp, 2006).

⁵³ This topic is often being discussed under aspects of competition; on the „competition of competition systems“ see Möschel, „Wettbewerb der Wettbewerbsordnungen“, *Wirtschaft und Wettbewerb* 2005, 599; Bätge, *Wettbewerb der Wettbewerbsordnungen?* (Nomos, 2009).

with each other. On the contrary, there is also the cooperation of authorities with private entities (e.g. companies) as well the cooperation within the judiciary. In this respect “cooperation” includes networks, various forms of administrative cooperation, cooperation in the European *administrative compound* (see B. II. 1 a) and diverse cooperation forms with private entities.⁵⁴

1. Networks

A peculiar characteristic of International Competition Enforcement Law lies in the fact that it does not only operate through or inside “networks” but that there is also explicit use of this term.⁵⁵ Here one may refer to the ICN, the ECN. The *East Asia Competition Policy Forum* embodies an important platform, too.⁵⁶ Likewise the OECD is often labelled a network. The term network describes at first non-hierarchical or hardly-hierarchical cooperation forms that are located outside of usual forms of administrative cooperation. Ultimately this means dealing with a new form of “compressed and long-lasting cooperation”.⁵⁷ However the term does create certain problems for jurisprudence, not at least because the term “network” is currently en vogue and sometimes overused.⁵⁸ Nevertheless the development in the Competition Enforcement Law verifies that the term can indeed be helpful from time to time, not least because it is able to cover and describe a wide range of phenomena.

a) Administrative Networks

ICN and ECN constitute networks of competition authorities. Admittedly there are differences regarding their preferred fields of activity. The aim of the ICN is to create a worldwide informational platform for all competition authorities. To this purpose, annual conferences are held and common view-

⁵⁴ See generally Möllers, “Transnationale Behördenkooperation. Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung“, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005), 351; Schmidt-Aßmann, “Verfassungsprinzipien für den Europäischen Verwaltungsverbund“ in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (*supra* note 19), § 5 paras 41 et seq.

⁵⁵ Other examples on the European level are the *Subsidiarity Monitoring Network of the Committee of the Regions*, to be found at <http://www.cor.europa.eu/subsidinet/en/sublibrary.htm>, and the *European Union Network for the Implementation and Enforcement of Environmental Law* (IMPEL), to be found at <http://ec.europa.eu/environment/impel/index.htm>; see generally Martínez Soria, “Administrative Netzwerke im Lichte europäischer Verwaltungsrechtstraditionen“, *Göttinger Online-Beiträge zum Europarecht* Nr. 47 (2006), available at <http://www.europarecht.uni-goettingen.de>; on the problematic nature of the term „network“ Frenzel, “Vom Verbund zum Netzwerk. Die Musik des Zufalls als Erkenntnisquelle“ in Boysen et al. (Eds.), *Netzwerke* (Baden-Baden, 2007), 247.

⁵⁶ Terhechte in id. (*supra* note 5), § 77 para 3.

⁵⁷ Schmidt-Aßmann, “Verfassungsprinzipien für den Europäischen Verwaltungsverbund“ in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (*supra* note 19), § 5 para 26.

⁵⁸ Schwarze (*supra* note 31), p. CIX.

points as well as discussion papers are developed in study groups. An exchange of information with respect to specific cases etc. does however not take place.⁵⁹

In contrast to this the ECN serves as coordination agent for the enforcement of the European competition procedure regulation No 1/2003⁶⁰ and is supposed to be instrumental in harmonizing the mutual activities of the European Commission and the national competition authorities.⁶¹ The ECN therefore is a good example for the ongoing stabilization of administrative structures in the EC and is therefore also frequently characterized as one cornerstone of the European *administrative compound*⁶²: “It [the administrative compound] manifests itself in a growing number of administrative entities in the Union, in decentralized and centralized networks, in a multi faceted European committee system and in the practical *cooperation* of national and unional administration authorities. The enforcement of the administration of the Union takes place in an *information, decision and control compound* between member state and the Union's own executive.”⁶³ In contrast to rather loosely organized networks at the international level (i.e. ICN, OECD, UNCTAD) ECN is embedded in rigidly defined legal structures. This also exemplified by the multi-dimensional nature of its tasks: Besides the exchange of information, it is also concerned with questions about fundamental ranges of authority, the execution of investigations for other competition authorities within the compound and the control of these processes through the Commission.⁶⁴

Common to both networks however, is that national or supranational authorities operate here primarily, not the states to which they belong. Admittedly though the ICN in particular does not confine itself completely to a governmental perspective but regularly invites scholars and law firms to partake in its activities.⁶⁵ Moreover a non-hierarchical structure is established in ECN only to a certain degree, which has a lot to do with the role of the European Commission as a proverbial “spider in the web”. These cases alone demonstrate that the term “network” within the context of the Competition Enforcement Law can embody utterly different phenomena.

⁵⁹ See Rasek in Terhechte (*supra* note 5), § 83 paras 10 et seq.

⁶⁰ Regulation (EC) 1/2003, O.J. 2003, L 1/1.

⁶¹ Hossenfelder in Terhechte (*supra* note 5), § 84 paras 3 et seq

⁶² Schmidt-Aßmann and Schöndorf-Haubold (Eds.), *Der Europäische Verwaltungsverbund* (Mohr Siebeck, 2005).

⁶³ Schmidt-Aßmann, „Verfassungsprinzipien für den Europäischen Verwaltungsverbund“ in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (*supra* note 19), § 5 para 17.

⁶⁴ See extensively Hossenfelder in Terhechte (*supra* note 5), § 84 paras 7 et seq.

⁶⁵ Cf. Rasek in Terhechte (*supra* note 5), § 83 para 9.

b) Judicial Networks

The “network idea” is not restricted to the administrative realm but can also be applied to judiciary settings as “court networks”.⁶⁶ Indeed, it is possible in the field of the judiciary to discern certain network formations, as affirmed by the foundation of the *Association of European Competition Law Judges* (AECLJ). It constitutes an attempt at creating a constant foundation for the exchange of experiences and organizing Europe-wide opportunities for advanced judicial education. The funding of court networks is, however, an evident and perennial problem. The AECLJ for example is dependent on European Commission funds or donations from other sources in order to carry out its activities. However, this form of association embodies no completely new development that is limited to antitrust law. In other legal areas court networks have been established as well.⁶⁷ At the international level the *International Association of Judges* (IAJ)⁶⁸ is worth to mention here as is the U.S. *American American Judges Association*.⁶⁹

Besides common organizations and advanced education projects, cooperation also increasingly takes place between the courts at international level. In this regard the different agreements on legal assistance may acquire an important function as the legal basis of judicial cooperation. Germany has made such agreements with various states around the globe which refer to legal assistance in criminal and civil cases but which can also have antitrust problems as their subject matter. Practical relevancy has so far only been achieved by matters of penal procedure, though.⁷⁰

2. “Classical” Administrative Cooperation

Today cooperation between the responsible administrative bodies at international level mainly takes place in the classical forms, i.e. the administrative

⁶⁶ Slaughter, “A Global Community of Courts”, 44 *Harvard International Law Journal* (2003), 191; id., *A New World Order*, (Princeton University Press, 2004), p. 65; id., “Judicial Globalization”, 40 *Virginia Journal of International Law* (2000), 1103 et seq.; Terhechte, “Judicial Ethics for a Global Justice – How Judicial Networks Create their own Codes of Conduct”, 10 *German Law Journal* (2009), 501.

⁶⁷ A rundown of the european organizations of judges is available at <http://www.richtervereinigung.at/links6a.htm>.

⁶⁸ http://www.iaj-uim.org/ENG/frameset_ENG.html.

⁶⁹ <http://aja.ncsc.dni.us>.

⁷⁰ See Podszun in Terhechte (*supra* note 5), § 85 paras 13 et seq; see generally on international legal assistance Siehr, “Grundfragen der internationalen Rechtshilfe in Zivilsachen“, *Recht der Internationalen Wirtschaft* (2007), 321; Schomburg, “Internationale vertragliche Rechtshilfe in Strafsachen“, *Neue Juristische Wochenschrift* (2005), 3262; Danwitz, “Verfassungsfragen des deutsch-amerikanischen Rechtshilfeverkehrs“, *Die Öffentliche Verwaltung* (2004), 501; Knöfel, “Judicial Assistance in the Taking of Evidence Abroad in Aid of Arbitration – A German Perspective”, 5 *Journal of Private International Law* (2009), 281.

assistance that is partly laid down in individual international agreements.⁷¹ From a “dogmatic” point of view one frequently deals with questions concerning “classical” international administrative law, which acts to some extent as the counterpart of private international law in solving traditional questions of collision.⁷² This perception of international administrative law as a law of administrative collision only is in flux today, as can be clearly illustrated by using the International Competition Enforcement Law as an example. Here the concern lies less in solving the problems of conflicting laws and more in developing common standards and fundamental rules as well as the cross-linking of the responsible administrative bodies. Thus, “International Administrative Law” or “Global Administrative Law” is nowadays clearly based rather on international than on national law. Younger studies that refer explicitly to the competition law also try to establish the Global Administrative Law on this assumption.⁷³

3. Cooperation beyond the Limits of Authority

Cooperation takes place not only within the core, but also beyond the limits of authority. This is partly due to the fact that the judiciary often does not command the necessary funds to cooperate in networks. Financial resources are then made available by the European Community, private foundations and the OECD. The cooperation becomes more formal however, when courts with regard to pending cases request evidence and other information through the official channel of obligatory information exchange.

4. Cooperation with Privates

To date research on the role of cooperation between competition authorities (or courts) and privates has been poor.⁷⁴ In Europe the role of privates has largely been ignored and so far been mainly limited to suits for damages which are rarely pursued in light of often insurmountable obstacles. Not until the last important Amendment of the German *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition – ARC) did this partly change in Germany (cf. § 33 ARC). Despite that private enforcement of anti-

⁷¹ Cf. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Mohr Siebeck, 2005); Kastner in Fehling, Kastner and Wahrendorf (Eds.), *Handkommentar Verwaltungsrecht* (Nomos, 2006), § 4 VwVfG para 11 with further references.

⁷² Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts* (Mohr Siebeck, 2005), p. 2 et seq.

⁷³ See section A. I. 3. *supra*; for the concept of GAL see also Kingsbury, Krisch and Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* (2005), 15; Krisch, “The Pluralism of Global Administrative Law”, 17 *EJIL* (2006), 247 as well as *supra* note 2 with further references.

⁷⁴ Kovacic, “Private Participation in the Enforcement of Public Competition Law”, available at <http://www.ftc.gov/speeches/other/030514biicl.shtm>.

trust law continues to play a secondary role in Europe.⁷⁵ In contrast to that about 90 % of all U.S. proceedings can be attributed to private initiative. In the field of international cooperation private entities are involved in international networks such as the ICN to ensure the availability of external expertise.⁷⁶ In part their contributions have given rise to fundamental reform processes and new initiatives. In regard to this the *Whish/Wood* report⁷⁷ from within the OECD is very much worth a look, because it evoked strong impulses for the reform of merger enforcement law worldwide.⁷⁸

III. The Limits of Cooperation

It would be fallacious to assume that the cooperation of the actors in International Competition Enforcement Law can resolve all the problems of this legal field. Cooperation can only affect certain parts of it. It is naturally limited by differences in the implementation of various procedures (B. III. 1.). In addition, the standards of protection (i.e. through fundamental rights) are in quite different stages of development so that the problem is always present, if national competition authorities have the authority to forward any information at all. (Cf. on this Art. 12, 28 regulation No 1/2003⁷⁹, also cf. B. III. 2.). Furthermore the cooperation in question often lacks transparency with regard to outside actors.

1. The Differences of Procedures

Until recently many observers have characterized the procedural law as a jungle.⁸⁰ Indeed the thicket here is most difficult to break through. Procedures as such are often not homogenous or uniform and thereby reflect the divergent structures of executive authorities. Even if certain common points and principles can be detected, the differences in procedure must in many cases be identified as a considerable hindrance of cross-border cooperation.

2. Fundamental and Human Rights

The differences between national standards regarding fundamental and human rights can constitute a not-to-be-underestimated hindrance to the cooperation of authorities or courts. One for example has to consider the conse-

⁷⁵ See Gebauer and Staudinger in Terhechte (*supra* note 5), § 7 para 6; Mäsch, “Private Ansprüche bei Verstößen gegen das europäische Kartellverbot“, *Europarecht* (2003), 825.

⁷⁶ Cf. *supra* note 59.

⁷⁷ Whish and Wood, *Merger Cases in the Real World – A Study of Merger Control Procedures*, (OECD, 1994).

⁷⁸ Göranson and Reindl in Terhechte (*supra* note 5), § 75 para 26.

⁷⁹ See *supra* note 60.

⁸⁰ Stockmann in Terhechte (*supra* note 5), VII.

quences of information exchange in the ECN or between authorities at the international level. Is evidence that has been obtained through ways which fail to abide by German standards (i.e. violating a prohibition on the taking of evidence) nevertheless admissible, providing foreign authorities supplied it? Problematic are also cases in which confidential information is passed on, i.e. business secrets, internal documents or personal data on witnesses. The disclosure of such information is explicitly forbidden by the majority of legal systems, at least if happening in an international context - showcasing its role as materialization of individual fundamental right positions.⁸¹ Admittedly, the parties of a procedure usually have the chance to lift the protection upon their data by relinquishing their corresponding rights. However in the absence of such a waiver, a fundamental prohibition exists that prevents the disclosure of business secrets. The situation is different though when the forwarding of general data is concerned, such as i.e. the information that a procedure has been initiated or the general characterization of a market. This information can usually be disclosed without the assent of the parties involved.

Based on the effects doctrine which takes as basis for the application of a respective jurisdiction the effects of the behaviour in question alone, can reveal a fundamental rights dimension.⁸² Here – among other things – exists a danger of double or multiple punishments, owing to the fact that in a globalized world competition-restraining behavior can have effects in many places, not to say everywhere.⁸³ In extreme cases it is even possible that opposing sanctions will be imposed, in the way that a company is obliged by law to behave in a certain way in state A, while the same behaviour is forbidden in state B.⁸⁴ This issue could be resolved if one gives preference to the state within whose jurisdiction the main impact of the suspect behaviour took place.⁸⁵

Another basic question that affects the fundamental rights, are the on a global scale quite different effective ranges of the so-called *Legal Professional Privilege*, which is to protect the legal correspondence between lawyers.⁸⁶ The discussion essentially revolves around the question if a staff lawyer can

⁸¹ Cf. § 50 b (2) GWB, see also Becker in Loewenheim, Meessen and Riesenkampff (Eds.), *Kartellrecht, Band 2 (GWB)* (München, 2006), § 50 b para 2; for a view on the European level see Art. 12 (2), (3), Art. 28 of Regulation (EC) No 1/2003, see also Frieß in Loewenheim, Meessen and Riesenkampff (Eds.), *Kartellrecht, Vol 1 (Europäisches Recht)* (C. H. Beck, 2005), “Einführung VerfVO” para 18, Art. 28 paras 11 et seq.; Art. 17 of Regulation (EC) 139/2004, see also Hecker, *ibid.*, “FKVO” Art. 17 paras 1.; for a view on U.S. law see FTC Act 15 U.S.C. § 46 (f), cf. Buchmann (*supra* note 30), p. 71 with further references.

⁸² See extensively section C. II. 6. *infra* and section C. IV. *infra*.

⁸³ On the prohibition of double jeopardy Schild and Terhechte in Terhechte (*supra* note 5), § 8 paras 28 et seq.

⁸⁴ Cf. Kebel, “Die Extraterritorialität des europäischen Kartellrechts“, *Europäische Zeitschrift für Wirtschaftsrecht* (1991), 265.

⁸⁵ Parisi and Podszun in Terhechte (*supra* note 5), § 87 paras 30 et seq.

⁸⁶ See extensively Weiß in Terhechte (*supra* note 5), § 6 para 53.

refer to this *Legal Privilege* as well. The discussion on this question in community law has recently been encouraged again by the CFI.⁸⁷

Overall questions regarding fundamental rights – in particular the divergence of the standards that are to secure fundamental rights – constitute an important limitation to the cooperation of the competition authorities. This basically also applies to cooperation within the judiciary that is normally bound by fundamental and human rights as well.

3. *Transparency Requirements*

Occasionally international administrative cooperation can be difficult for outsiders to overview because a large number of processes take place at an informal level.⁸⁸ An example for this is a purely informal exchange of information (i.e. by telephone) which in practice constitutes a quite important part of governmental cooperation. For the affected company it is often impossible to find out what kind of data has been exchanged. This must invoke skepticism as high transparency standards play an increasingly important role in the Competition enforcement law.⁸⁹ Admittedly it has to be noted that companies in the field of merger enforcement often renounce the secrecy of information in order to speed up the procedure in many cases.

4. *Legal Protection*

Another important question is how companies and private entities can obtain effective legal protection in the case that information which is classified as confidential is passed on or disclosed. The division of the cases in ECN can illustrate additional problems which until recently have not been the subject of much discussion.⁹⁰ All in all it is certain that the more informal governmental cooperation is, the more difficult it is for the affected companies and private entities to implement their rights in the courts. As far as they are successful in this regard, they may have the potential to limit the cooperation between the authorities by delineating clear boundaries.

⁸⁷ Joined cases T-125/03 and T-253/03, *Akzo et al. v. Commission*, [2007] ECR II-3523, *Europarecht* (2008), 514; see also Weiß, “Neues zum Legal Professional Privilege – Eine Anmerkung zum Akzo Urteil des EuG“, *Europarecht* (2008), 546.

⁸⁸ Mozet, *Internationale Zusammenarbeit der Kartellbehörden* (C. F. Müller, 1998), p. 88 et seq. with further references.

⁸⁹ See generally Bjurulf and Elgröm, “Negotiating Transparency: The Role of Institutions“, *JCMS* (2004), 249 et seq; Prechal and de Leeuw, “Dimensions of Transparency: The Building Blocks for a New Legal Principle?“, *Review of European Administrative Law* (2007), 51; Schwarze (*supra* note 31), p. CXV; id., “Formen, Standards und Zukunftsperspektiven des europäischen Verwaltungsrechts“ in id. (Ed.), *Bestand und Perspektiven des europäischen Verwaltungsrechts* (Nomos, 2008), 11 et seq.

⁹⁰ But see Schwarze, “Anfechtung der Fallverteilung im europäischen Netzwerk der Wettbewerbsbehörden“ in Brinker, Scheuing and Stockmann (Eds.), *Festschrift für Rainer Bechtold* (C. H. Beck, 2006), 483.

5. Lacking Binding Nature

Finally, it is important to point out the lack of binding nature of most cooperation agreements. The parties to the agreement *are able to* but not necessarily *must* work together. This construction is significantly connected to the Comity-Principle on which the cooperation agreements are based.⁹¹ Insofar there are limits to cooperation from the very beginning which may at least then play a role if certain processes affect the national interests of a state. In practice though, this has not often been the case.

C. Convergence of International Competition Enforcement Law

I. Convergence of Substantive Standards

The convergence of substantive Competition Enforcement Law is the basis from which the idea of an ever-increasing convergence of the procedural law (see C. II.) can be developed. As has already put forth a global common approach can be recognized in cases of severe forms of *horizontal competition restraints*. These so called hardcore cartels (i.e. alliances between competitors which divide up markets or fix prices) are outlawed almost everywhere in jurisdictions across the globe.⁹² However there are also certain “convergence trends” in the area of *vertical restraints*, i.e. restraints between companies at various levels in the business chain, although there are considerable differences to be noted in regard to certain question. Not least the field of merger enforcement has become a point of interest. In this field a step in the direction of U.S. law has been made by changing the substantive test criteria of the European merger enforcement regulation No 139/2004.⁹³

II. Convergence on the Level of Enforcement?

To date no work of research – in contrast to substantive law – has analyzed a possible convergence of procedural law. A closer look into this area reveals however that there are to some extent tendencies of convergence. Thus certain procedural instruments are applied in almost all antitrust systems worldwide, the application of a domestic jurisdiction is most often based upon the effects doctrine and national bodies of law are often superimposed

⁹¹ Extensively Buchmann (*supra* note 30), p. 104 et seq.

⁹² See Kennedy (*supra* note 9), p. 204 et seq.

⁹³ Regulation (EC) 139/2004, O.J. 2004, L 24/1; see also Hoffmann and Terhechte in Terhechte (*supra* note 5), § 4 para 12.

by regional law that in turn exerts a pressure in the direction of adjustment. These developments shall be examined in the following part.

1. Criminal Enforcement

The Competition Enforcement Law is clearly developing towards penalization, i.e. the states want to develop a prevention effect reinforced by prison and high fines in case of the violation of antitrust rules. The EU and Germany are an exception to this. As EU has no legislative competence with regard to criminal law, European developments on this level are met with a natural boundary. Germany for its part classifies violations of ARC respectively Art. 81 and Art. 82 EC as a mere administrative offence⁹⁴, and is likely to continue to adhere to this policy in future. A change in German law would in the end create considerable problems for the execution of Competition Enforcement Law, in that the ongoing proceedings would have to be passed on to the prosecution authorities, the holder of sole right of the state to institute criminal proceedings.

In other states a more effective execution of the antitrust law is aimed for in particularly heavy violations of antitrust law, as prison sentences can be imposed. In this respect many states have created so-called *cartel offences* in recent years, and Singapore⁹⁵, Indonesia⁹⁶, United Kingdom⁹⁷ as well as Ireland⁹⁸ are cases in point. The U.S. has moreover throughout the years extended the range of punishments in antitrust law (cf. Sec. 1 and Sec. 2 Sherman Act).⁹⁹

2. Effective Enforcement by Use of Leniency Programs

Another trend that is recognizable across the globe is the idea of using *Leniency* programs or principal-witness-rules to improve investigations and discovery of cartels.¹⁰⁰ These programs which promise members of a cartel complete immunity from criminal prosecution, if certain conditions are met, have made an impressive progress worldwide and become firmly embedded in the daily practice of competition authorities. Quite problematic appears to be

⁹⁴ Schild and Terhechte in Terhechte (*supra* note 5), § 8 para 14 et seq.

⁹⁵ Terhechte in id. (*supra* note 5), § 63 para 46.

⁹⁶ Ibid., § 8 paras 14 et seq.

⁹⁷ Ziegler in Terhechte (*supra* note 5), § 13 para 71.

⁹⁸ Kelly in Terhechte (*supra* note 5), § 14 para 32.

⁹⁹ See *infra* note 282; see also Kovacic, Calkins, Ludwin and Bär-Bouyssière in Terhechte (*supra* note 5), § 46 para 94; Schild and Terhechte in Terhechte (*supra* note 5), § 8 para 12.

¹⁰⁰ Cf. Motta and Polo, "Leniency Programs and Cartel Prosecution", 21 Int. J. Indust. Org. (2003), 347; Hetzel, *Kronzeugenregelungen im Kartellrecht – Anwendung und Auslegung von Vorschriften über den Erlass von Geldbußen im Lichte elementarer Rechtsgrundsätze* (Nomos, 2004); Klusmann, "Internationale Kartelle und das Europäische Leniency-Programm aus der Sicht der Verteidigung", *Wirtschaft und Wettbewerb* (2001), 820.

though that in many cases these antitrust programs are introduced by the competition authorities before corresponding laws provided the required authorization.¹⁰¹ Such was for example the case in Germany for a long time. Some states however have made provisions in their antitrust laws allowing for the possibility of reduction or remission of a penalty, as far as the companies make information available that leads to the detection of cartels, such as South Korea.¹⁰²

3. Antitrust Law Execution by Privates

Another important development in International Competition Enforcement Law lies in the bolstering of private persecution of antitrust violations by competitors, consumers and consumer associations (so-called *private enforcement*).¹⁰³ In particular within the framework of the EC a much more effective execution of the antitrust law is hoped for with the help of this instrument,¹⁰⁴ keeping in view the example of the US, where approximately 90% of all antitrust proceedings are brought about by private initiative. However a prerequisite for the execution of this idea is a well-functioning legal system, which is why this model has no chance of coming into effect in many emerging and developing countries, if only at the present time. In these

¹⁰¹ In Germany a proper legal basis for the FCO's bonus arrangement did not exist until the 7th ARC amendment which created § 81(7) ARC, cf. Bechtold, *GWB Kommentar*, 4th ed. (C. H. Beck, 2006), § 81 para 41; Cramer and Pananis in Loewenheim, Meessen and Riesenkampff (*supra* note 81), Vol 2 (GWB), § 81 para 84 et seq; Engelsing, "Die neue Bonusregelung des Bundeskartellamtes", *Zeitschrift für Wettbewerbsrecht* (2006), 179.

¹⁰² Terhechte in id. (*supra* note 5), § 60 para 18.

¹⁰³ Möschel, "Behördliche oder privatrechtliche Durchsetzung des Kartellrechts?", *Wirtschaft und Wettbewerb* (2007), 483; Basedow, "Perspektiven des Kartellrechts", *Zeitschrift für Wettbewerbsrecht* (2006), 294; Ginsburg, "Comparing Antitrust Enforcement in the United States and Europe", 1 *Journal of Competition Law and Economics* (2005), 427; Jones, "Private Antitrust Enforcement in Europe: A Policy Analysis and Reality Check", 27 *World Competition* (2004), 13; id., *Private Enforcement of Antitrust Law in the EU, UK and USA* (Oxford University Press, 1999); Keßler, "Private Enforcement – Zur deliktsrechtlichen Aktualisierung des deutschen und europäischen Kartellrechts im Lichte des Verbraucherschutzes", *Wettbewerb in Recht und Praxis* (2006), 1061; Lübbig and LeBell, "Die Reform des Zivilprozesses in Kartellsachen", *Wettbewerb in Recht und Praxis* (2006), 1209; Rüggeberg and Schinkel, "Consolidating Antitrust Damages in Europe: A Proposal for Standing in Line with Efficient Private Enforcement", 29 *World Competition* (2006), 395; Schmidt, "'Privatisierung' des Europakartellrechts – Aufgaben, Verantwortung und Chancen der Privatrechtspraxis nach der VO Nr. 1/2003", *Zeitschrift für europäisches Privatrecht* (2004), 881; Debroux and Tricot, "Competition – EU Competition Law Enforcement: Towards a US Style Private Antitrust Action?", 27 *Business Law Review* (2006), 256; Gebauer and Staudinger in Terhechte (*supra* note 5), § 7 para 5; Basedow, Terhechte and Tichy (Eds.), *Private Enforcement of Competition Law* (Nomos, 2010 – forthcoming).

¹⁰⁴ Green Paper on Damages Actions for Breach of the EC Antitrust Rules of 19 December 2005, COM(2005)672; see also Eilmansberger, "The Green Paper on Damages Actions for Breach of the EC Antitrust Rules and Beyond: Reflections on the Utility and Feasibility of Stimulating Private Enforcement Through Legislative Action", 44 *CMLRev.* (2007), 431.

states effective antitrust law execution rather depends on the executive authorities.¹⁰⁵

4. Expansion of Governmental Cooperation

The cooperation of authorities and other institutions which are responsible for the execution of the Competition Enforcement Law is another characteristic which promotes the convergence at the procedural level. In doing so cooperation is the cause and at the same time the result of an increasing convergence (see above B.)

5. Convergence and Divergence of Norms Securing Fundamental Rights

Furthermore, a tendency of standardization of defensive rights and standards of protection for companies can be recognized in the enforcement of competition laws, especially regarding the sphere of fundamental rights.¹⁰⁶ This depends not least on the fact that fundamental rights are constantly being given more and more weight in the supranational and international context. Here one can for example refer to the future role of the Charter of Fundamental Rights of the EU and the ECHR. The complex surrounding fundamental rights is closely connected to and dependent on the steady expansion of power wielded by the competition authorities.¹⁰⁷

6. The Effects Doctrine as a Global Criterion for Jurisdiction

With reference to the extraterritorial application of national antitrust laws (and also within the bounds of regional regimes, such as the EU and MERCOSUR) the effects doctrine has indisputably made enormous progress (see C. IV.). This development is consequent, simply because a global “system of moderation” is lacking. It remains to be seen if newer informal rules which lead to national competition authorities postponing their investigations because the “gravitational center” of a competition-restraining measure is located in another state and there is a corresponding proceeding going on (such cases currently exist between Canada and the U.S.) will spread and become

¹⁰⁵ Kovacic, “Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement”, 77 *Chicago-Kent Law Review* (2001), 265.

¹⁰⁶ Weiß in Terhechte (*supra* note 5), § 6 para 7.

¹⁰⁷ In regard to this complex see Montag, “The Case for Radical Reform of the Infringement Procedure and Regulation”, *ECLR* (1996), 428; Sotész, Steinele and Bielez, “Rekordgeldbußen versus Bestimmtheitsgebot – Die Kartellverordnung auf dem Prüfstand höherrangigen Gemeinschaftsrechts“, *Europäische Zeitschrift für Wirtschaftsrecht* (2003), 202.

more popular.¹⁰⁸ Here considerable modifications of the effects doctrine could take place in the future.

7. Reduction of Areas of Exception

Significant progress in the development of a many national and regional anti-trust regimes is shown in the reduction of the sectorized areas of exception, which at the same time evidences a comprehensive liberalization process. Exemplary is the removal of the areas of exception from the German ARC.¹⁰⁹ Despite this tendency the fact that whole sectors are suspended from the application continues to be a fundamental problem for the execution of Competition Enforcement Law.

8. The Role of State-owned Companies

In many states the role of state-owned companies appears to be problematic as they are often bestowed with privileges and frequently occupy market positions that they would not enjoy if not for their public law character and connections. Admittedly the general desire of most regimes is the equal treatment of both public and private owned companies (cf. § 130 (1) ARC respectively Art. 86 (1) EC) but this ideal has hardly been consequently put into practice anywhere. On the contrary, proceedings in which publicly owned companies take part are often even more complicated than “normal” proceedings.

9. International Free Trade Agreements and Regional Economic Integration

A discovery that certainly invites to dwell on substantive as well as procedural convergence in national, supranational and international law is the unmistakable increase in free trade agreements¹¹⁰ and regional regimes that in many cases also include Competition enforcement stipulations.

a) In this respect it must be referred to the multitude of bilateral free trade agreements that the U.S. have signed with Asian states (such as Singapore and China) in recent years and some of which contain rules on competition. The

¹⁰⁸ Cf. Eilmansberger, “‘Ne bis in idem’ und kartellrechtliche Drittstaatssanktionen“, *Europäisches Wirtschafts- und Steuerrecht* (2004), 49; Schwarze and Weitbrecht, *Grundzüge des europäischen Kartellverfahrensrechts* (Nomos, 2004), § 7 paras 24 et seq

¹⁰⁹ Bechtold (*supra* note 101), Vor § 28 para 1 et seq; Emmerich, *Kartellrecht*, 10th ed. (C. H. Beck, 2006), p. 470 et seq.

¹¹⁰ Cf. Herrmann, Weiß and Ohler (*supra* note 48), paras 601 et seq; *Herdegen*, *Internationales Wirtschaftsrecht*, 5th ed. (C. H. Beck, 2005), § 11 paras 1 et seq.

free trade agreement signed between the U.S. and Singapore from 2003 for example stipulates that Singapore will issue a competition law.¹¹¹

b) Regional developments are of some interest as well: For example a quite detailed draft for a common antitrust regime on the basis of Art. 55 COMESA-Treaty – the first one of its kind – was presented in 2003 within the framework of the *Common Market for Eastern and Southern Africa* (COMESA).¹¹² The draft is based on a cooperation with UNCTAD and the Zambian Competition Commission (ZCC) and contains essentially all the necessary parts of a regional competition regime.¹¹³ The idea of the draft lies in establishing an antitrust environment which is similar to the EU, through setting up a common competition authority (*COMESA Competition Commission*). This notion is made especially clear from the tenor of the rules which occasionally is very similar to the terminology of the TEC. However only a few COMESA states possess any experience with regard to the application of antitrust rules – only four of its member states currently have issued their own competition law (Egypt since 2005¹¹⁴, Zambia since 1995¹¹⁵, Kenya since 1989¹¹⁶ and Zimbabwe since 1996), while other member states still are in the process of legislature (i.e. Malawi) or do not have antitrust laws at all (Mauritius, Uganda and Swaziland). It is doubtful whether against this backdrop competition rules can be successful at all within the framework of COMESA.

However COMESA is not the only regional commercial organization in Africa that emits impulses of this kind. Within the framework of the *Southern African Development Community* (SADC)¹¹⁷ or the *Economic Community of West African States* (ECOWAS)¹¹⁸ similar attempts can be recognized which suggest that regional competition regimes could eventually come into existence. In this respect it is of highest importance that fully operative institutions are set up and that they are given sufficient authority, are institutionally independent and stocked on staff and resources.

This trend to “regionalization” of antitrust law can be observed in all corners of the world: In Asia the developments within the *Asia-Pacific Economic Cooperation* (APEC)¹¹⁹ and the *Association of Southeast Asian Nations*

¹¹¹ Agreements of the U.S. can be found at http://www.ustr.gov/Trade_Agreements/Section_Index.html; on the agreement between Singapore and the U.S. see Terhechte in id. (*supra* note 5), § 63 para 1 (see especially loc. cit. note 2).

¹¹² Available at <http://www.comesa.org>.

¹¹³ For example a ban on restrictive business practices (Art. 16), a ban on the abuse of a dominant market position, (Art. 17 et seq), rules on merger control (Art. 23 et seq) as well as rules on protection from unfair competition (Art. 27-39).

¹¹⁴ Pautke in Terhechte (*supra* note 5), § 69 paras 1 et seq.

¹¹⁵ Pautke in Terhechte (*supra* note 5), § 71 paras 1 et seq.

¹¹⁶ Pautke in Terhechte (*supra* note 5), § 70 paras 1 et seq.

¹¹⁷ Cf. <http://www.sadc.int>; see also Vogt, *Die regionale Integration des südlichen Afrikas. Unter besonderer Berücksichtigung der Southern African Development Community (SADC)*, (Nomos, 2007).

¹¹⁸ Cf. <http://www.ecowas.int>.

¹¹⁹ Terhechte in id. (*supra* note 5), § 77 para 7.

(ASEAN)¹²⁰ are particularly worth mention. The Korean and Japanese competition authorities especially have taken pioneer roles in many aspects in regard to coordination and build-up of networks. However the very close cooperation between Australia and New Zealand within the framework of the *Australia-New Zealand Closer Economic Relations Trade Agreement* (ANCERTA)¹²¹, which can be seen as an inspiring example in certain points, plays a large part as well. In America the cooperation within the frameworks of the *North American Free Trade Agreement* (NAFTA)¹²², the Andean Community (CAN)¹²³ and the Mercado Común del Sur (MERCOSUR)¹²⁴ is to be mentioned. These developments could even be surmounted by the founding of the *Free Trade Area of the Americas* (FTAA)¹²⁵, which is to contain antitrust rules and which is mainly pursued by the U.S. Especially within Europe it must be referred to the effects of the *association agreements of the EC* and the role of the *European Economic Area (EEA)*.¹²⁶ Particularly the association agreements with the central and eastern European countries (CEE, the so-called Europe Agreements) have in the past led to a very precise implementation of the unional stipulations by the country in question. This also included procedural rules (this was i.e. the case in Poland, Hungary and the Czech Republic).¹²⁷

III. Sources of Law of Converging Procedural Law

International Competition Enforcement Law is derived from a multitude of different sources of law. This can initially be attributed to the “multi-level construction” of this legal area. Thus for the closer examination of a “cross border” case usually a large number of different legal regimes and sources of law are to be elucidated. At a vertical level this leads to a differentiation between international, European and national rules and at a horizontal level to a distinction between laws of different nature, for example the relation between “general” competition laws and sectorial rules and regulations.

¹²⁰ Terhechte in id. (*supra* note 5), § 77 para 5.

¹²¹ See Podszun in Terhechte (*supra* note 5), § 88 para 2.

¹²² Damtoft in Terhechte (*supra* note 5), § 81 para 21.

¹²³ Bischoff-Everding and Schreiber in Terhechte (*supra* note 5), § 79 paras 1 et seq.

¹²⁴ Bischoff-Everding in Terhechte (*supra* note 5), § 78 para 27.

¹²⁵ ABA Section of Antitrust Law, *Competition Laws Outside the United States - First Supplement*, (American Bar Association, 2005), Overview, p. 36 et seq; Tritell and Damtoft, “The Role of Antitrust in the Free Trade of Americas”, 16 *Antitrust* (Fall 2001), 37.

¹²⁶ Bungenberg in Terhechte (*supra* note 5), § 82 para 1.

¹²⁷ Terhechte, “Die Ausstrahlung des Europäischen Gemeinschaftsrechts auf die Rechtsordnungen der Beitrittskandidaten am Beispiel des Wettbewerbsrechts“, *Europäisches Wirtschafts- und Steuerrecht* (2002), 560.

1. The Level of Public International Law

Although there is no public international agreement to date which contains antitrust or merger enforcement rules on a global level, a set of public international law related regimes with points of reference to International Competition Enforcement Law nevertheless give a firm basis to the assumption that this legal area can be regarded as the reference system for the creation of a *Global Administrative Law*.¹²⁸

In this regard, bilateral or multilateral agreements in Public International Law can be of primary importance, for instance if competition and antitrust rules are part of said agreements. This is the case, as has already been stated, in numerous bilateral free trade agreements, in which the signing states bind each other to issue antitrust rules. Furthermore there are competition and antitrust rules to be found in numerous regional free trade zones and common markets that have their roots in public international law, such as for example NAFTA or MERCOSUR. Moreover, one may refer to numerous cooperation agreements of various states in the field of Competition Enforcement Law. Lastly the agreements in Public International law – especially the agreements under WTO (WTOA, GATT, GATS and TRIPS) – form the background for considerations to establish a “world competition law” as multi- or plurilateral agreement.¹²⁹

Additionally, individual rules of customary international law can play a certain role for the International Competition Enforcement Law as well, as a statutory source of law in the sense of Art. 38 Statute of the ICJ.¹³⁰ Here the rules of state immunity are to be named as examples which to date have only partly been transferred into international agreements (admittedly these rules stand on the threshold to complete transferal into international agreements, by way of the United Nations Convention on Jurisdictional Immunities of States).¹³¹ State immunity is able to limit the application of Competition Enforcement Law in particular. Even insofar as sovereign acts (*acta iure imperii*) are detrimental to competition, an application of state law must not be considered because sovereign acts in general are exempt from antitrust law. Only for commercial acts (*acta iure gestionis*) can an extension of the jurisdiction of one state onto another one be considered. Further reference must be made to the general ban on intervention¹³² which is ultimately based on customary in-

¹²⁸ On the relationship between Global Administrative Law and Public International Law cf. Schmidt-Aßmann, “Verfassungsprinzipien für den Europäischen Verwaltungsverbund“ in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (*supra* note 19), § 5 para 48; Biaggini (*supra* note 19), 439.

¹²⁹ Fox, “Toward World Antitrust and Market Access”, 91 AJIL (1997), 1; Herrmann in Terhechte (*supra* note 5), § 74 paras 24 et seq.

¹³⁰ Cf. Waller, “An International Common Law of Antitrust”, 34 New Eng. L. Review (1999), 163 et seq.

¹³¹ See section C. IV. 4. c) *infra*.

¹³² Cf. Hobe and Kimminich, *Völkerrecht*, 8th ed. (UTB-Verlag, 2004), p. 343.

ternational law and which is directly linked to the question of extraterritorial application of competition laws.¹³³

A notable position as source of insight on law can also be held by judicial decisions.¹³⁴ Usually international courts are not able to create generally binding public international law (as “public international judiciary law”) because their verdicts in the majority of cases are *inter partes* and therefore are incapable of being generalized. In the light of a steady increase of international courts though it could be asked if a “global antitrust judiciary” would have the power to intervene if conflicting decisions have been made by two states. Such a mechanism could constitute an option for the future. Another role can be attributed to national courts such as the U.S. Supreme Court and supranational courts such as ECJ and CFI whose decisions, coming from the highest “World Antitrust Courts”, frequently set examples for many other states.

Of great importance for International Competition Enforcement Law is ultimately so-called “soft law”¹³⁵ of public international law. Although the term is heavily disputed, this phenomenon has had on Competition Enforcement Law. The term *soft law* describes a difficult to grasp category that lies on the threshold between non-law and law.¹³⁶ For this reason *soft law* is partly denied the character of law.¹³⁷ Beyond this discussion however it cannot be denied that numerous recommendations, model laws and comparative accounts from international organizations, such as for example the OECD or UNCTAD, have an enormous influence in countries whose competition legislature is still in development.¹³⁸

2. The Level of Regional Economic Integration Treaties

An unbroken trend to regional economic integration has led to a huge gain in importance on the part of regional competition regimes.¹³⁹ This applies to MERCOSUR, which has its own competition regime, the North American Free Trade Zone (NAFTA) as well as potentially to a number of regional integration projects in Africa (COMESA/SADC/ECOWAS) and Asia (ASEAN/APEC).¹⁴⁰ The applicable law admittedly must be classed as part of public international law.¹⁴¹ Because of the coordination of the member states, which within the scope of regional antitrust regimes becomes regularly neces-

¹³³ See Section C. IV. 2 *infra*.

¹³⁴ Similar Graf Vitzthum in id. (Ed.), *Völkerrecht*, 4th ed. (De Gruyter, 2007), part. 1 para 147 with further references.

¹³⁵ Basedow (*supra* note 35), p. 67 et seq.

¹³⁶ Doering, *Völkerrecht*, 2nd ed., (C. F. Müller, 2004), para 744.

¹³⁷ Similar Graf Vitzthum in id. (*supra* note 134), part 1 para 152 with further references.

¹³⁸ See section D. II. 1.-3 *infra*.

¹³⁹ See section C. II. 9 *supra*.

¹⁴⁰ See *supra* notes 119 and 120.

¹⁴¹ See generally Hilpold, “International Competition Law and Regional Trade Agreements”, 2 *Manchester Journal of International Economic Law* (3/2005), 78.

sary, they constitute an important element of International Competition Enforcement Law and ensure a stronger linking of procedures than it would be possible at ICN (or similar) level. How successful such regional concepts can become in the end is clearly visible in the example of European Community Law.

3. *The Level of European Law*

In the European Community a globally unique supranational competition enforcement regime has developed that is equal to national rules and regulations in every respect in its sophisticated and differentiated construction¹⁴², application relevance and practical effectiveness. It embodies an archetype of supranational antitrust rules and in many respects even paves the way into the future, so for example with regard to the stabilization of coordination structures. In addition the European Convention on Human Rights (ECHR) may serve – from the perspective of fundamental rights protection – as an important module of the legal subject “European Law”.

A special trait of European Community Law is the anchorage of the major competition rules on the constitutional level, if one by all means qualifies the European primary legislation as constitutional law (see Art. 3 lit. g, Art. 81-89 EC).¹⁴³ This expresses the central role of European Competition Law for the whole process of European integration. The setting in primary law also results in peculiarities with regard to the application of European Competition Law: competition law must be interpreted in the light of the general integration aims and - especially - also in the light of the not primarily commercially oriented integration aims, such as environmental protection for example (Art. 6 EC).¹⁴⁴ Herein lies a major difference between U.S. antitrust law and European competition law: during its creation in 1890 U.S. law did not stand in an integration context but was created to uniformly combat concentrations in a specific economic region with a single currency.¹⁴⁵ These features also play a significant role in the area of procedural law such is the general arrangement

¹⁴² On the term of differentiation in European Community Law see Terhechte (Ed.), *Verwaltungsrecht in der Europäischen Union – Zur Ausdifferenzierung und Globalisierung der europäischen Verwaltungsrechtsordnung*, § 1 para 7 et seq. (Nomos, 2010 - forthcoming).

¹⁴³ Cf. Drexl in von Bogdandy (Ed.), *Europäisches Verfassungsrecht* (Springer, 2003), 747; Terhechte, “Die Rolle des Wettbewerbsrechts in der europäischen Verfassung“ in Hatje/Terhechte (Eds.), *Das Binnenmarktziel in der europäischen Verfassung*, *Europarecht Supplement* (3/2004), 137; id., “Wandlungen der europäischen Wettbewerbsverfassung durch den Vertrag von Lissabon“, in Fastenrath and Nowak (Eds.), *Die Europäische Union nach dem Vertrag von Lissabon* (Duncker & Humblot 2009), 187 on the possibly constitutional character of European primary law see id., “Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag“, *Europarecht* (2008), 143.

¹⁴⁴ See Terhechte, “Der Umweltschutz und die Wettbewerbspolitik in der Europäischen Gemeinschaft“, *Zeitschrift für Umweltrecht* (2002), 274.

¹⁴⁵ See Korah and O’Sullivan, *Distribution Agreements under EC Competition Rules*, (Hart Publishing 2003), p. 21.

of antitrust procedure roughly stipulated in Art. 83 et seq. EC and with that predefined at a constitutional level: this also applies – this be mentioned in passing – for the procedure in regard to state aids (cf. Art. 88 et seq. EC).

However *secondary community law* has pre-eminence for European competition law - and especially for procedural law. With the merger enforcement regulation (regulation No 139/2004)¹⁴⁶ which was based on Art. 83 EC and Art. 308 EC as well as the competition procedure regulation (regulation No 1/2003)¹⁴⁷ which was based on Art. 83 EC the main procedural law components of community law have been combined to a finely tuned procedural regime that through further regulations and atypical acts is more clearly defined. The regulations on the exemption of certain categories are based on Art. 81 (3) EC which exempts types of agreements that fall under Art. 81 (1) EC from the application of this rule, play a special role.¹⁴⁸ On the other hand the importance of *atypical acts* for European competition law and here especially in the field of procedural law was neglected for a long time.¹⁴⁹ The enumeration of legal acts in Art. 249 EC is not complete. For this reason it soon became evident that besides the classic quintet of legal acts mentioned in Art. 249 EC a need still existed for other abstract general types of acts, which were formed primarily through the practice of the Commission. Noteworthy are for example notifications, guidelines and announcements. In addition, European state aid law (Art. 87-89 EC) uses other atypical acts like the *vademecum* or the *framework*.¹⁵⁰ In the practical application of law these atypical acts are of great importance, for example in the form of the *de-minimis*-announcement of the Commission which evaluates the application of Art. 81 EC to a certain behavior.¹⁵¹ With regard to the respectively pursued aims one can differentiate between 1. Atypical acts that demonstrate how the Commission will exercise the discretion given to it by the Treaty (mostly called *guideline*) and 2. Atypical acts with which the commission explains its interpretation of a rule of community law (mostly called “*notice*”).

Until now the question of the legal binding effect of these acts has not been clarified completely. While they obviously can lead to a self-binding of the Commission to a certain degree, the existence of more extensive legal ef-

¹⁴⁶ See *supra* note 93.

¹⁴⁷ See *supra* note 60.

¹⁴⁸ In-depth Terhechte in id. (*supra* note 5), § 3 para 82.

¹⁴⁹ But see Schwarze, *Die Befugnis zur Abstraktion im europäischen Gemeinschaftsrecht* (Nomos, 1976), p. 64 et seq.

¹⁵⁰ In-depth Schweda, *Administrative Normsetzung und Verwaltungsverfahren in der europäischen Beihilfenaufsicht* (Universitätsverlag Rasch, 2000); Senden, *Soft Law in European Community Law*, (Hart Publishing, 2004).

¹⁵¹ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*), O.J. 2001 C 368/13; see also Terhechte in id. (*supra* note 5), § 3 paras 63 et seq; id., “Die Revision der Bagatellbekanntmachung der europäischen Kommission“, *Europäisches Wirtschafts- und Steuerrecht* (2002), 66; id. (*supra* note 18), 166 et seq.

fects has been uncertain till today.¹⁵² The importance of the atypical acts for the field of procedural law is nevertheless immense. The functioning of the ECN is more closely explained in the so-called network notice,¹⁵³ the European *Leniency*-Program is likewise based on a notice.¹⁵⁴ This also applies to guidelines on the assessment of fines on the basis of regulation No 1/2003.¹⁵⁵ By means of atypical acts it is possible for the European Commission to guarantee a control of the enforcement of European Competition Law that is not based on acts of law derived directly from the Treaty and is considerably more flexible as a result. Admittedly this form of procedural rationalization raises a lot of questions: Under which conditions can the Commission change its practice in the light of atypical acts? How can this form of abstract application of law improve its democratic legitimation? Final answers to these questions are not visible which evokes certainly problems regarding the perspective of the certainty of law.

4. *The Role of the ECHR*

Also the standards of the ECHR can be of importance to Competition Enforcement Law, for instance with respect to the protection of home and business rooms (Art. 8 paragraph 1 ECHR) against house searches.¹⁵⁶ Especially the national and supranational competition enforcement law behaves from time to time as an “intervention intensive law”.¹⁵⁷ It can be observed that the status of the ECHR in the convention states is not entirely uniform, in Austria for example it ranks as constitutional law, in other convention states it is inferior to constitutional law but superior to parliament law (e.g. in France) and in Germany it merely ranks as parliament law.¹⁵⁸ The EU has not yet joined the ECHR, thus it is not bound by the standards of the ECHR. Inside the Community the ECHR therefore “only” has a status as a source of insight on law, which however would be dramatically changed by the Union joining the ECHR.

¹⁵² Extensively Senden (*supra* note 150), p. 235 et seq; Cronos, *Selbstbindungen der Verwaltung im Europäischen Verwaltungsrecht* (Nomos, 1997); Terhechte (*supra* note 18), 130 et seq.

¹⁵³ Commission Notice on cooperation within the Network of Competition Authorities, O.J. 2004, C 101/43.

¹⁵⁴ Commission Notice on Immunity from fines and reduction of fines in cartel cases, O.J. 2006, C 298/17.

¹⁵⁵ Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003, O.J. 2006, C 210/2.

¹⁵⁶ Weiß in Terhechte (*supra* note 5), § 6 para 11.

¹⁵⁷ Von Bogdandy, “Rechtsgleichheit, Rechtssicherheit und Subsidiarität im transnationalen Wirtschaftsrecht“, *Europäische Zeitschrift für Wirtschaftsrecht* (2001), 357 et seq; Schwarze, “Rechtsstaatliche Grenzen der gesetzlichen Qualifikation von Verwaltungssanktionen im europäischen Gemeinschaftsrecht“, *Europäische Zeitschrift für Wirtschaftsrecht* (2003), 261 et seq; id., *Europäisches Verwaltungsrecht* (*supra* note 31), p. 811.

¹⁵⁸ Ehlers in id. (Ed.), *Europäische Grundrechte und Grundfreiheiten*, 2nd ed. (De Gruyter, 2005), § 2 para 6.

5. *The Level of National Law*

The Competition Enforcement Law still has its origins predominantly in national law. Primarily at this level there has been a phenomenal increase in competition legislation since the collapse of the former socialist states. Similar to the level of Public International Law or European Law the national level also exhibits a “mixture of sources of law” which does not show at first glance which level of norms is the “decisive” one. This phenomenon is fittingly described with the term “hybridization”.¹⁵⁹ It is however remarkable that – in contrast to EC Law – Competition Enforcement Law hardly ever plays any role on the constitutional level in the majority of states.

a) Constitutional Law

At the constitutional level of national law competition rules usually take a secondary role; accordingly most states lack constitutional guidelines in regard to the enactment of competition legislation and especially with regard to the procedures that are to be implemented. An exception is the Mexican Constitution from 1917 which contains a comprehensive regulation on monopoly power.¹⁶⁰ Meanwhile some constitutions contain a general acknowledgement towards “market economy” and with that indirectly also an acknowledgement towards competition structures which should be established and maintained through antitrust and competition legislation.¹⁶¹ Besides these rather general regulations fundamental and human rights being guaranteed in most constitutions play a considerable role for the competition enforcement procedure.¹⁶² From the perspective of legislative authority, the German Basic Law (Art. 74 (1) Nr. 16) and the U.S. Constitution (on the basis of the commerce clause of Art. 1 Sec. 8 [3]¹⁶³) provide the basis for legislative competence to enact competition legislation. In Germany for example the federal level has the authority over competing legislation in order to “prohibit the abuse of positions of economic power”. It is generally acknowledged that this authority encompasses not only the power to issue the elements of the offense that is to be prohibited on the federal level, but also the corresponding procedural law.¹⁶⁴

¹⁵⁹ On the term „hybrid law“ and its methodical consequences see Willke, *Global Governance* (transcript Verlag, 2006), p. 56 et seq; Teubner, “Hybrid Laws: Constitutionalizing Private Governance Networks“ in Robert Kagan und Kenneth Winston (Eds.), *Legality and Community: On the Intellectual Legacy of Philip Selznick* (Berkeley, 2002), 311.

¹⁶⁰ Cf. Art. 28 of the Mexican Constitution.

¹⁶¹ See Hatje, “Wirtschaftsverfassung“ in von Bogdandy (Ed.), *Europäisches Verfassungsrecht* (Springer, 2003), 683 et seq.

¹⁶² Cf. Weiß in Terhechte (*supra* note 5), § 6 para 1.

¹⁶³ In-depth Nowak and Rotunda, *Constitutional Law*, 7th ed. (West Group, 2004), 157 et seq

¹⁶⁴ Oeter in von Mangoldt, Klein and Starck (Eds.), *Grundgesetz Kommentar, Band 2 (Art. 20-82)*, 5th ed. (Fanz Vahlen Verlag, 2005), Art. 74 para 128.

Considerable potentials regarding the imposition and enforcement of compliance with the law can evoke possibly conflicting aims at the level of constitutional law. Here there is for example to consider the relationship of the services of general interest on the one hand and competitive market structures on the other hand, or the relationship of environment protection as a “state aim” (Art. 20a of the German Basic Law, Art. 6 EC) to competition law.¹⁶⁵ Weighing the individual state aims it can be very difficult and requires good instinct on the part of the competition authorities within the scope of their procedural conduct and in regard to the justification for decisions.

b) Competition Legislation

The promulgation of national competition enforcement legislation is obviously a trait of our time. At the moment more than 100 of such laws exist worldwide, in which first of all a whole set of differences can be observed: many countries follow a rather wide approach and aspects of unfair competition are included as well as rules governing public procurement (cf. § 97 et seqq. of the German ARC) or the control of state aids (such as in Estonia¹⁶⁶). Additionally in some states there is a tendency to overlapping rules, i.e. competition law relevant behavior is the subject matter of several laws simultaneously. For example it is possible in U.S. law that not only Sec. 1 Sherman Act but also Sec. 5 FTC Act can be applied on the same behavior. Here the differentiation often depends on which authority managed to lead the procedure (thus the FTC is not authorized to use the Sherman Act). The development of competition legislation has immediate influence on the appropriate procedure. Rather small competition authorities are most likely going to be completely overtaxed because of extensive task allocations; overlapping responsibilities are especially a problem for entities notifying a behavior because for outsiders it is not always easy to assess which authority is responsible.

c) Sectoral Legislation

Besides competition laws in strict sense there are existing sectorial rules in regard to cartels, abusive conduct, and mergers in many states, for instance in the form of laws pertaining to telecommunications, energy and the press. These laws do not constitute rules of general exception but independent sector-specific cartel prohibitions. Examples of this kind are found in Singapore,¹⁶⁷ which has something to do with the fact that the sector-specific rules,

¹⁶⁵ Extensively Terhechte, “Der Umweltschutz und die Wettbewerbspolitik in der Europäischen Gemeinschaft“, *Zeitschrift für Umweltrecht* (2002), 274 et seq.

¹⁶⁶ Cf. Sec. 30 et seq. of the Estonian Cartel and Competition Law, see generally Rapp, “State Aid in the Accession Countries – Sorting through the Confusion“, *ECLR* (2005), 410 et seq.

¹⁶⁷ Terhechte in id. (*supra* note 5), § 63 para 6.

which were laid down here, are in parts considerably older than the general rules of the respective competition law. Ultimately specially situated interests in some sectors demand independent rules and regulatory authorities in many cases which for example is expressed by the German Energy Law (EnWG) that also contains specific elements of an offense (cf. § 30 [1] EnWG).¹⁶⁸ In the end these developments can lead to the emergence of various antitrust procedural laws, because in many sectors rather specific procedural rules can emerge. The individual sectoral rules are accompanied in many cases by the competence of the responsible antitrust authority to prohibit a cartel or an abuse of market power, or to decide over the lawfulness of a company merger. Nevertheless frequently problematic is the relationship of sectoral regulations to general antitrust laws as well as the relationship between different authorities. Because of the multitude of various authorities that are entrusted with the enforcement of competition rules, in daily practice it can be difficult to recognize which authority is responsible in a specific case.¹⁶⁹ In some states – such as in the U.S. – voices have already been raised in favor of a *Domestic Competition Network* that would allow a better coordination of the different competition and regulatory authorities.¹⁷⁰

However there is – despite the ever increasing codification of competition laws worldwide – also a whole tier of states that to date do not command a generally applicable competition law. Notwithstanding that it is often still possible to discern a body of antitrust rules in sectoral regulatory codifications. In this manner Malaysia for example has – despite first efforts being made – no own competition and antitrust law. Nevertheless there is a set of regulations which at their core resemble competition laws, such as Sec. 133 of the Communications and Multimedia Act from 1998.¹⁷¹ In turn procedural regulations can be observed which are primarily oriented towards the specific structure of sectoral regulatory laws.

d) Interlocking with Different Laws

Competition Enforcement Law is in many areas closely interlocked with other laws; this is an expression of its hybrid character as well. The procedural law is mostly intertwined with general administrative and administrative procedure laws or complements them. Thus for example the German general Administrative Law (VwVfG) is applied during procedures of the German *Federal Cartel Office* (FCO), if ARC provides no specific regula-

¹⁶⁸ In-depth Emmerich (*supra* note 109), § 39 paras 30 et seq.

¹⁶⁹ Rosch, “The Three Cs: Convergence, Comity, and Coordination”, Speech held on May 10th 2007, available at <http://www.ftc.gov/speeches/rosch/070510stgallen.pdf>.

¹⁷⁰ Kovacic, “Towards a Domestic Competition Network” in Epstein and Greve (Eds.), *Competition Law in Conflict – Antitrust Jurisdiction in the Global Economy* (AEI Press, 2004), 316 et seq.

¹⁷¹ Act No. 588; available at the homepage of the Malaysian Communications and Multimedia Commission, http://mcmc.gov.my/the_law/ViewAct.asp?cc=31478525&lg=e&arid=900722; see also Terhechte in id. (*supra* note 5), § 77 para 11.

tions.¹⁷² However interaction with the penal procedural code (StPO) and the civil procedural code (ZPO), the civil code (BGB) and finally the Basic Law as well (Art. 12, 9, 2 as well as Art. 74 (1) Nr. 16 Basic Law¹⁷³) is of vital importance as well. Same goes for the relationship of German law to EC law (Art. 81 and 82 EC) as well as to the merger enforcement regulation as a part of secondary law. This – incomplete – list already verifies the potential complexity and confusing structure of competition procedures. Such interplay of several laws can be observed in almost all competition enforcement regimes that have been mentioned in this paper. Especially in the area of procedural law, in which questions of reliable information exchange, authorization and the limits of international cooperation as well as questions of advancing conformity with European and international standards are becoming more and more important, there is a notable influence of other legal rules and limits posed through them to be observed (for instance with regard to the role of fundamental rights and maxims of procedure).

e) Guidelines and Notices as Atypical Legal Acts

Similar to the domain of the EC (see above, C. III. 2.) the importance of “atypical legal acts” grows steadily for the execution of national Competition Enforcement Law. This phenomenon has worldwide prevalence, which is obviously connected to the fact that executive authorities require flexible instruments which can nonetheless supply abstract general guidelines for law enforcement. An example for this are the guidelines drawn up by the *U.S. Federal Trade Commission* (FTC) and the *Antitrust Division of the Department of Justice* (DOJ) for many areas and which in regard to their practical importance are equal in every right to real statute law.¹⁷⁴

The German FCO makes use of such flexible instruments as well, for example in the form of “announcements” and “explanatory leaflets”. Such has the German leniency program regarding the discovery of hardcore cartels been published in an “announcement”.¹⁷⁵ The internet-based “explanatory leaflets” of the FCO refer to allowed cooperation between small and middle-sized companies.¹⁷⁶ Here we can see that the handling of procedure at almost all levels transcends formal legal acts to a high degree which on the one hand

¹⁷² Schneider in Terhechte (*supra* note 5), § 12 paras 52 et seq.

¹⁷³ On the significance of criteria from constitutional law for Competition enforcement law see Selmer, *Verfassungsrechtliche Probleme einer Kriminalisierung des Kartellrechts*, (Carl Heymanns, 1977); Möschel, *Recht der Wettbewerbsbeschränkungen*, (Carl Heymanns, 1983), § 1 paras 6 et seq; Meessen, “Die 7. GWB-Novelle verfassungsrechtlich gesehen“, *Wirtschaft und Wettbewerb* (2004), 733.

¹⁷⁴ Presentation with many examples in Terhechte (*supra* note 18), 123 et seq

¹⁷⁵ Announcement of the Bundeskartellamt No 9/2006 of 7 March 2006 on Immunity from fines and reduction of fines in cartel cases (bonus arrangement), available in German at http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/06_Bonusregelung.pdf.

¹⁷⁶See http://www.bundeskartellamt.de/wDeutsch/download/pdf/Merkblaetter/Merkblaetter_deutsch/07KM_U-Merkblatt.pdf.

makes a more flexible approach at procedure possible but at the same time is a critical development from the perspective of democratic legitimation and predictability.

IV. Scope of Application of National Rules

National competition laws as well as the supranational European law define their scope of application mostly according to the so-called *effects doctrine* (see C.IV. 2.), which by now has reached an almost global spread. According to this doctrine it has to be asked whether a dubious behavior in regard to competition has an effect at domestic level. Therefore the application basically does not depend on the scene of the offense or the residence of the criminal, which usually results in many cases in extra-territorial application of national law on persons and companies. This principle therefore plays an important role for the competition enforcement procedure because it tends to increase the number of initiated procedures. In addition to this an unilateral extra-territorial extension of an area of application of national law embodies to a certain degree the complete opposite to concepts of coordination and has therefore been the reason for great commotion in the past.¹⁷⁷ By now the questions surrounding the effects doctrine have been thoroughly examined many times, without a consensus to be found in every regard.¹⁷⁸

¹⁷⁷ See Terhechte in: id (*supra* note 5), § 1 para 12.

¹⁷⁸ The number of works discussing the extraterritorial application of national and supranational Competition Enforcement Law is immense, cf. Alford, "The Extraterritorial Application of Antitrust Laws: The United States and European Community Approaches", 33 Va. J. Int. L. (1992), 1; Basedow, "Entwicklungslinien des internationalen Kartellrechts", Neue Juristische Wochenschrift (1989), 627; Beck, *Die extraterritoriale Anwendung nationalen Wettbewerbsrechts unter besonderer Berücksichtigung länderübergreifender Fusionen* (Nomos, 1986); Buchmann, *Positive Comity im internationalen Kartellrecht* (Sellier, 2004); Dlouhy, *Extraterritoriale Anwendung des Kartellrechts im europäischen und US-amerikanischen Recht* (Nomos, 2003); Griffin, "Extraterritoriality in U.S. and EU Antitrust Enforcement", 67 Antitrust Law Journal (1999), 159; Huber, "Auswirkungstheorie und extraterritoriale Rechtsanwendung im internationalen Kartellrecht", Zeitschrift für Unternehmens- und Gesellschaftsrecht (1981), 511; Mc Neill, "Extraterritorial Antitrust Jurisdiction: Continuing the Confusion in Policy, Law, and Jurisdiction", 28 California Western International Law Journal (1998), 425; Meessen, *Kollisionsrecht der Zusammenschlusskontrolle* (Nomos Verlag, 1984); id., "Antitrust Jurisdiction Under Customary International Law", 78 AJIL (1984), 783; Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (Springer Verlag, 1994); id., "Neuere Entwicklungen im Streit um die Jurisdiktionshoheit der Staaten im Bereich der Wettbewerbsbeschränkungen", 41 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (1981), 469; Olmstead (Ed.), *Extraterritorial Application of Laws and Responses Thereto* (Oxford University Press, 1984); Pavic, *Extraterritoriality in the Matters of Antitrust* (European Press Academic Publishing, 2001); Schwarze, *Die Jurisdiktionsabgrenzung im Völkerrecht* (Nomos, 1994); id. (Ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung* (Nomos, 2002); Taylor, "The Extraterritoriality of the Australian Antitrust Law", 13 Journal of International Law and Economics (1979), 273; Veelken, *Interessenabwägung im Wirtschaftskollisionsrecht* (Nomos, 1988).

1. Possible Links for the Scope of Application

In the past there were basically three principles to be differentiated, the territoriality principle, the personality principle and the effects doctrine, although all these principles spawned several variants. The territoriality principle supposes that a state can subject to its authority all persons and actions within its own territory.¹⁷⁹ A difference must be made between subjective and objective territoriality: Whereas subjective territoriality is linked to the acting subject carrying out the actions relevant to competition law within a state, the principle of object territoriality relates to target and object of the actions in question. As far as these actions can be attributed to that territory, the state has judiciary sovereignty over them.¹⁸⁰ Hence the principle of objective territoriality depends on either the location where the elements of the offense are performed or where the effect is obtained.¹⁸¹ Comparative jurisprudence however shows that a merely a combination of objective and subjective territoriality principle within the scope of the competition enforcement procedure used to play a certain role, such as in the United Kingdom up to 2002 and in other states that keep up the tradition of Common Law.¹⁸² Today certain links in Australia¹⁸³ and Pakistan¹⁸⁴ are attestable.¹⁸⁵ In the end a combination of subjective and objective elements serves to ensure that the relevant action is performed in the state and has a relationship to a market within this state (*carry on business-criterion*).¹⁸⁶

Besides the territoriality principle further links are imaginable for the application of a specific state's jurisdiction: The personality principle is especially worth mention here which makes the application dependent on the nationality of the actors. Theoretically the link can also be drawn to the actor's residence, the center of the business activity in question or the law which it was founded upon.¹⁸⁷ However this principle apparently has no longer any practical significance in the field of Competition Enforcement Law¹⁸⁸, which

¹⁷⁹ Dlouhy, *Extraterritoriale Anwendung des Kartellrechts im europäischen und US-amerikanischen Recht* (Nomos, 2003), p. 34; Schwarze, *Die Jurisdiktionsabgrenzung im Völkerrecht* (Nomos, 1994), 21; Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (Springer, 1994), p. 500 et seq

¹⁸⁰ Basedow (*supra* note 35), 12.

¹⁸¹ Buchmann (*supra* note 30), p. 12 with further references.

¹⁸² Since the enactment of Competition Act 2002 the effects doctrine has also come into use in the United Kingdom, cf. Ziegler in Terhechte (*supra* note 5), § 13 para 24 with further references.

¹⁸³ Hellmann in Terhechte (*supra* note 5), § 55 paras 8 et seq

¹⁸⁴ Terhechte in id. (*supra* note 5), § 66 para 4.

¹⁸⁵ See also Basedow (*supra* note 35), 13 et seq.

¹⁸⁶ Basedow (*supra* note 35), 13.

¹⁸⁷ Schwarze, "Die extraterritoriale Anwendbarkeit des EG-Wettbewerbsrechts – Vom Durchführungsprinzip zum Prinzip der qualifizierten Auswirkung" in id. (Ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung* (Nomos, 2002), 37 (40); Buchmann (*supra* note 30), p. 8 e seq.

¹⁸⁸ Schröter in von der Groeben and Schwarze (Eds.), *EUV/EGV-Kommentar*, 6th ed. (Nomos, 2004), Vorbem. Zu den Art. 81-85 EG para 80.

also applies for the so-called protective principle as well as the universality principle.¹⁸⁹

2. Current Dominance of the Effects Doctrine

a) Owing to the globalization of competition restraints it has today become undeniable that only the effects doctrine can capture all behavior that is capable of violating national competition and antitrust laws. According to the effects doctrine the application depends, as already mentioned, on the fact that a competition restraining action has an effect in the territory of the state that seeks to extend its jurisdiction to this action. At least initially it is insignificant from where or from whom this action originated. The effects doctrine is foundation for almost all competition and antitrust laws worldwide. This applies to the German ARC (§ 130 [2]), the U.S. Antitrust Law¹⁹⁰, the EC Law¹⁹¹, the national laws of all EU Member States, but also to Asia (Indonesia, Singapore, South Korea and probably also Japan¹⁹²) as well as South Africa.¹⁹³

b) Traditionally the limitations of the effects doctrine are fervently discussed.¹⁹⁴ In the end every imaginable economic behavior has an effect somehow and somewhere in a globalized world economy with open markets so that a link for one's own jurisdiction can be recognized. While for instance § 130 (2) of the German ARC contains a broad formulation in this respect ("all restraints on competition") and for the moment merely a judiciary-made criterion of appreciability serves to narrow down the area of application,¹⁹⁵ Sec. 7 of the Sherman Act provides that only such actions fall into the area of application of the Sherman Act that have a direct, substantial, and reasonably foreseeable effect.¹⁹⁶ Which of these requirements could begin to play a role

¹⁸⁹ Buchmann (*supra* note 30), p. 9.

¹⁹⁰ Kovacic, Calkins, Ludwin and Bär-Bouyssière in Terhechte (*supra* note 5), § 46 para 64.

¹⁹¹ Admittedly, the legal situation under EC law is not quite clear. While the Commission and the CFI follow the effects doctrine with regard to the relevant actions, the ECJ deems that the decisive factor is the implementation of an action, cf. Case C-89/85, *Ahlström v. Commission*, [1988] ECR 5193 para 12. The practical implications of this approach, however, are very limited if not irrelevant. See generally Emmerich (*supra* note 109), § 3 paras 14 et seq; Mestmäcker and Schweitzer, *Europäisches Wettbewerbsrecht*, 2nd ed. (C. H. Beck, 2004), § 6 paras 34 et seq; Weiß in Callies and Ruffert (Eds.), *EUV/EGV*, 3rd ed. (C. H. Beck, 2007), Art. 81 EGV paras 8 et seq. with further references.

¹⁹² See Heath in Terhechte (*supra* note 5), § 59 para 12; see also Ohara, "International Application of the Japanese Antimonopoly Law", *Swiss Review of International Competition Law* (1986), 5.

¹⁹³ Pautke in Terhechte (*supra* note 5), § 67 para 12.

¹⁹⁴ Extensively Meng, *Extraterritoriale Jurisdiktion im öffentlichen Wirtschaftsrecht* (Springer, 1994), p. 556 et seq; Schwarze, *Jurisdiktionsabgrenzung im Völkerrecht* (Nomos, 1994), p. 43 et seq.

¹⁹⁵ Cf. Entscheidungen des Bundesgerichtshofes für Zivilsachen 74, 322 (325) – *Organische Pigmente*; Bechtold (*supra* note 101), § 130 para 18; Stockmann in Loewenheim, Meessen and Riesenkampff (*supra* note 81), Band 2 (GWB), § 130 paras 41 et seq.

¹⁹⁶ This stipulation has been introduced into the Sherman Act in 1982 by the Foreign Trade Antitrust Improvements Act, cf. Kovacic, Calkins, Ludwin and Bär-Bouyssière in Terhechte (*supra* note 5), § 46 para 65.

in German law is as contested as the question concerning the possible nature of international standards.

c) Limitations to a state exercising its own jurisdiction can arise not only from national law but also from public international law. Here one must especially focus on the ban on intervention as well as the ban on abuse of law and the related principle of *comity*.¹⁹⁷ Partially the use of a rule of consideration is proposed, by which the state that wants to apply its jurisdiction prior to this has to weigh its interests with those of another affected state.¹⁹⁸ This rule is based on the public international ban on intervention. It is however doubtful who should be responsible for the involved consideration, how “foreign” interests can be included in a proper way and what the specific legal scale of such a consideration should be.¹⁹⁹ That the concept derives from customary international law can be doubted rightfully as well.²⁰⁰ From all this can be concluded that the limitations of the effects doctrine have up to now – despite all academic efforts – not been given clear outlines. Potentially resulting conflicts can in most cases nonetheless be adequately solved by well-functioning cooperation mechanisms between the competition authorities.

3. Personal Scope of Application of National Laws

With regard to the personal scope of application of national competition laws as well as the supranational European competition law it can be retained that almost all laws seeks to an extensive area of application by aiming at a wide group of addressees. In this way many laws address “business actors” (such as in Israel and India)²⁰¹ or “enterprises” (Art. 81 [1] EC, Art 82 TEC or § 1 ARC)²⁰² in general as well as “economic entities” (as in Russia).²⁰³ In the end this approach serves to take individuals as well as legal entities into the fold of application. In this respect, a functional approach is often used to determine the personal area of application.²⁰⁴ In many cases, however, the treatment of public companies is still problematic in this regard. Here competition en-

¹⁹⁷ In-depth Terhechte (*supra* note 49), p. 72 et seq.

¹⁹⁸ Meessen, “Antitrust Jurisdiction under Customary International Law, 78 AJIL (1984), 783 et seq; id., *Völkerrechtliche Grundsätze des internationalen Kartellrechts* (Nomos, 1975), p. 231 et seq.

¹⁹⁹ Similarly Reh binder in Immenga and Mestmäcker (Eds.), *Kommentar zum europäischen Kartellrecht*, Vol 1/1, 4th ed. (C. H. Beck, 2007), “IntWbR” para 20.

²⁰⁰ Mestmäcker and Schweitzer (*supra* note 189), § 6 paras 55 et seq.; Basedow (*supra* note 35), 25 et seq; Schwarze, *Jurisdiktionsabgrenzung im Völkerrecht* (Nomos, 1994), p. 52 et seq.

²⁰¹ See Art. 2 of the Israeli Competition Law (“persons conducting business”) or Art. 1 No. 5 of the Indonesian Cartel Law (“business actors”).

²⁰² Mestmäcker and Schweitzer (*supra* note 189), § 8 paras 1 et seq; Louri, “‘Undertaking’ as a Jurisdictional Element in EC Competition Rules”, 29 *Legal Issues of European Integration* (2002), 143; Terhechte (*supra* note 49), p. 54 et seq. with further references.

²⁰³ See for example Art. 4 of the Russian Competition Law.

²⁰⁴ On the functional definition of the term „enterprise“ in European competition law see Gippini-Fournier in Loewenheim, Meessen and Riesenkampff (*supra* note 81), Vol 1 (Europäisches Recht), Art. 81 EG, paras 35 et seq; see also Case C-41/90, *Höfner and Elser v. Macroton GmbH*, [1991] ECR I-1979, para 21.

forcement procedure hits a barrier that is not least an expression of political influence.

4. Exemptions

Exemption rules of all kind play a large role for the application of antitrust law and the enforcement of relevant procedure. First of all there is to think of the sectorial exemptions of whole industries and production branches, letting them evade antitrust law. In addition to this regulations frequently exist that allow for special treatment of state-owned companies. In some instances this goes so far as to completely exempt public companies from the application of antitrust law. Finally, certain procedural immunity rules are to be observed, according to which certain actors can be exempted from initiating procedures.

a) Areas of Exemption

A significant problem for the efficient application of Competition Enforcement Law is still constituted by the fact that many laws exclude whole sectors from competition control. This “perforation” of many laws has in the past led to problems in several states. A good example for such a finding is Japan,²⁰⁵ where the competition law that originally was designed to be rather extensive in its application, has been hollowed out by a multitude of exemption rules that are often part of other laws. Such hidden laws make access to the antitrust law difficult in practice. By contrast, similar exemptions in German law have become quite rare. § 130 (1) 2 of the German ARC stipulates that the law is not to be applied to the German Federal Bank and the Credit Institute for Reconstruction. Besides that the ARC contains special arrangements for the area of agriculture (§ 28 ARC) and for resale price maintenance among publishers (§ 30 ARC). All other exemptions were withdrawn in the course of the 7th ARC amendment, especially because EU law hardly uses branch exemptions at all.²⁰⁶ Herein at least for European law a trend to only allow a limited degree of exemptions is demonstrated. This already results from Art. 3 lit. g EC, which establishes a system of undistorted competition as a cornerstone of the European economic constitution. However, the EC-Treaty provides certain exceptions from this fundamental principle, for example with regard to agriculture in accordance with Art. 32 (2) EC and Art. 36 EC and regulation No 1184/2006²⁰⁷ (as in the so-called producer’s privi-

²⁰⁵ Heath in Terhechte (*supra* note 5), § 59 para 5.

²⁰⁶ In-depth Bechtold (*supra* note 101), Vor. § 28 paras 1 et seq.

²⁰⁷ O.J. 2006, L 214/7; cf. Thiele in Calliess and Ruffert (*supra* note 191), Art. 36 EGV para 3.

lege). At the same time the European law is generally based on the principle of universal application.²⁰⁸

In the U.S. exemptions do exist in particular for the insurance branch²⁰⁹ and for the area of organized labor;²¹⁰ they have partly been created by the jurisdiction of the U.S. Supreme Court and partly by special rules, such as the Sports Broadcasting Act²¹¹ and the McCarran-Ferguson Act.²¹² On the whole special rules can be detected for a whole batch of branches, such as the transport, agriculture and energy sectors.

b) Role of State-owned Companies

It is particularly difficult to define the relationship between Competition Enforcement Law and state-owned companies. A worldwide analysis of competition laws brings completely different approaches forward. While some jurisdictions make every effort to protect state-owned companies from the application of the antitrust law, other countries make no such exceptions. Moreover, the existing doctrine in this area is obviously in a state of flux in several states. An example is the fundamental rule of Crown Immunity in Australia which was applied up to 1996 and which excluded the state and all state-owned companies from the application of the Trade Practices Act (TPA). This fundamental rule was in a sense “reversed”²¹³ by Australian legislation through an amendment of the TPA. As far as the state itself or state-owned companies pursue business activities they can no longer invoke the principle of immunity, thus they have to allow their activities to be judged by the standards of antitrust law.²¹⁴

Such examples, however, cannot hide the fact that an inherent potential for conflict lies in the relationship between competition and antitrust laws and state-owned companies or companies that are entrusted with special public tasks.²¹⁵ In this context Art. 86 EC is sometimes referred to, as its wording is

²⁰⁸ Brinker in Schwarze (Ed.), *EU-Kommentar* 2. nd ed. (Nomos, 2009), Art. 81 EGV para 10.

²⁰⁹ *SEC v. Variable Annuity Life Ins. Co.*, 359 U.S. 65 (1959); *St. Paul Fire & Marine Ins. v. Barry*, 438 U.S. 531 (1978); see also Sullivan and Grimes, *The Law of Antitrust: An Integrated Handbook*, 2nd ed. (West Group, 2006), p. 727 et seq.

²¹⁰ *United States v. Hutcheson*, 312 U.S. 219 (1941); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965); *Brown v. Pro Football Inc.*, 518 U.S. 231 (1996); see also Gifford, „Redefining the Antitrust Labor Exemption, 72 *Minnesota Law Review* (1988), 1379; Gellhorn, Kovacic and Calkins, *Antitrust Law and Economics*, 5th ed. (West Law, 2004), p. 572 et seq.

²¹¹ 15 U.S.C. §§ 1291-1295; Kovacic, Calkins, Ludwin and Bär-Bouyssièrè in Terhechte (*supra* note 5), § 46 para 70.

²¹² 15 U. S. C. A. §§ 1011-1015. The use of exceptions in state antitrust laws is the result of a 1944 U.S. Supreme Court Ruling, according to which the insurance industry falls under the *commerce clause* of the U.S. Constitution, see *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944).

²¹³ Hellmann in Terhechte (*supra* note 5), § 55 para 12.

²¹⁴ *Ibid.* with further examples from the jurisdiction of Australian courts.

²¹⁵ For an examination of the conflicts on the level of TEC see Mestmäcker and Schweitzer (*supra* note 189), §§ 33 et seq; Schwarze (Ed.), *Daseinsvorsorge im Lichte des Wettbewerbsrechts* (Nomos,

most markedly that of a compromise formula and its execution by the European Commission occasionally meets considerable opposition from the Member States.²¹⁶

c) Immunities

Of crucial importance for the effectiveness of the application of antitrust law is the manner in which states are to be treated when they act as the origin of competition restraints.²¹⁷ The answers from the various regimes are thoroughly different.²¹⁸ However, the willingness to grant state immunity for the area of Competition Enforcement Law insofar as the state itself is taking part in the commercial process (the so-called commercial exception) is visibly decreasing.²¹⁹ This either depends on the nature of the activity or on its purpose.

At the level of public international law the rules governing state immunity have up to now been attributed to customary international law. This development has been cut short by the “*United Nations Convention on Jurisdictional Immunities of States and Their Property*” from 2007.²²⁰ Many states – especially those from the realm of common law – have passed own laws regarding third-state-immunity to ensure the substantiation of those tenets of public international law, such as the USA (*Foreign Sovereign Immunities Act*), the United Kingdom (*State Immunity Act*), Canada (*State Immunity Act*), Australia (*State Immunity Act*) as well as Argentina (*Immunidad Jurisdiccional de los Estados Extranjeros ante los Tribunales Argentinos*).²²¹ The EC is also bound by these principles, in accordance with the jurisdiction of

2001); Burgi, “Die öffentlichen Unternehmen im Gefüge des primären Gemeinschaftsrechts“, *Europarecht* (1998), 261; Weiß, “Öffentliche Unternehmen und EG“, *Europarecht* (2003), 166.

²¹⁶ In-depth Terhechte (*supra* note 18), p. 312 et seq.

²¹⁷ Bach, *Wettbewerbsrechtliche Schranken für nationales Handeln nach europäischem Gemeinschaftsrecht* (Mohr Siebeck, 1992); Ehrlicke, *Staatliche Eingriffe in den Wettbewerb* (Nomos, 1994); Gyselen, “State Action and the Effectiveness of the EEC Treaty’s Competition Provisions“, 26 *CMLRev.* (1989), 33 et seq.; Hassel, *Hoheitliches Handeln als Verstoß gegen EU-Kartellrecht* (Kovac Verlag, 2006); Klasse, *Gemeinschaftsrechtliche Grenzen für staatlich veranlasste Wettbewerbsbeschränkungen* (Nomos, 2006); Lange, “Die Anwendung des europäischen Kartellverbots auf staatliche Eingriffe in das Marktgeschehen“, *Europarecht* (2008), 3.

²¹⁸ For a detailed description cf. Terhechte (*supra* note 49), p. 75 et seq.

²¹⁹ Cf. Fox, *The Law of State Immunity* (Oxford University Press, 2002), p. 273 et seq.

²²⁰ United Nations Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004, General Assembly resolution 59/38, Official Records of the General Assembly, 59. Session, Supplement No. 49, (A/59/49), The Convention can be viewed at http://www.untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf; see also Gardiner, “UN Convention on State Immunity: Form and Function“, 55 *International and Comparative Law Quarterly* (2/2006), 407; Foakes and Wilmhurst, “State Immunity: the United Nations Convention and its effect“, *Chatham House International Law Programme*, May 2005 (ILP BP 05/01), available at <http://www.chathamhouse.uk>; Hafner, “Das Übereinkommen der Vereinten Nationen über die Immunität der Staaten und ihres Vermögens von der Gerichtsbarkeit“, 61 *Zeitschrift für öffentliches Recht* (2006), 381.

²²¹ English versions of these laws are available in Dickinson, Lindsay and Loonam, *State Immunity, Selected Materials and Commentary* (Oxford University Press, 2004).

the ECJ²²² and the practice of the European Commission;²²³ this also applies to the Federal Republic of Germany (see Art. 25 of the Basic Law). For procedural law the rules of immunity constitute sharply-defined limitations that simply must not be transgressed. In international comparison it must be ascertained that the willingness to grant *absolute immunity* has strongly decreased in recent years. Accordingly the application of antitrust laws to public authority could become an important topic in the future.

V. Actors

The contents of the “International Competition Enforcement Law” and the modes of its daily application are decisively influenced by the competition authorities (see C. V. 1.). Furthermore the practice by the courts as well as private enforcement, particularly in the U.S., plays a prominent role. A closer look shows that on the whole the procedural law could be standing on what is only the verge of a big change. In the future a focus must be placed on a better coordination of the different actors both at the national as at the international level and towards further investigation of the possibilities, which lie within the private pursuit of offences against competition law (on this see below, C. V. 5.).

1. Variety of Authorities as Initial Perspective

The differences between the respective competition authorities can be seen as an important cause of different procedural systems. As far as in a given state several authorities are responsible for the enforcement of antitrust laws, a continuous problem results from the necessary demarcation of responsibilities – on the horizontal as well on at the vertical level. This includes the little-researched relationship of general competition authorities to sectoral regulatory authorities (for example in the area of postal services, telecommunications and energy). Owing to this variety of authorities it clearly makes sense to conduct a systematization based on the levels on which the authorities are operating.

a) Single Agency Approach

Only a few states have put the execution of the Competition Enforcement Law in the hands of a single authority. This may be caused by the fact that it is nearly impossible for any single institution to adequately handle the many-faceted tasks that are part of competition control. A juxtaposition of different authorities often also has historical reasons. An example of “*Single Agency*

²²² Cf. Case C-364/92, *SAT Fluggesellschaft mbH v. Eurocontrol*, [1994] ECR I-43 et seq.

²²³ Decision of the European Commission of 19 December 1984, O.J. 1985 L 92/1.

Approach” is Indonesia where the Indonesian competition authority KPPU is solely entrusted with the application of Indonesian competition and antitrust laws.²²⁴ This concept requires a certain differentiation in the organisational structure of the authority. Especially in states with a large territory it is hardly possible to fulfill all arising tasks from a single place. In this regard usually regional and local branches are established (for example in Indonesia²²⁵ and Russia²²⁶).

b) Horizontal Multiagency Approach

By contrast, a “*Horizontal Multiagency Approach*” can be found much more frequently. This concept puts the supervision of competition into the hands of several authorities, which work equally side by side on the basis of certain criteria to separate their tasks. An example for this is the juxtaposition of DOJ and FTC in the US. Whilst the FTC is primarily authorised to apply the FTC-Act as well the Clayton-Act, the DOJ also applies the Sherman Act and is responsible in particular for the criminal prosecution of violation of the antitrust laws.

Nevertheless, where there are intersections between the tasks of both authorities, this causes a situation in which it is not always obvious from the onset who will lead the proceedings. This problem has been recognized but has evaded a clear solution till now.²²⁷

c) Vertical Multiagency Approach

Concerning the institutional structure of enforcement of Art. 81 et seq. EC within the European Administrative Compound, one may speak of a “*Vertical Multiagency Approach*” which fittingly characterises the relationship between the European Commission and the 27 national competition authorities (NCAs). However, national law occasionally resorts to this organisational concept as well. Here for instance one may refer to the relationship of the state competition authorities (*Landeskartellbehörden*) to the Federal Cartel Office (FCO) in Germany, which is in part also vertically organised (cf. § 49 ARC).

Within the framework of the *vertical multiagency approach* problems often emerge in form of the exact demarcation of the involved responsibilities. At the European level this problem has been resolved within the scope of

²²⁴ Terhechte in id. (*supra* note 5), § 64 paras 13 et seq; id., “Das indonesische Kartellrecht am Wendepunkt“, *Recht der Internationalen Wirtschaft* (2003), 532.

²²⁵ Ibid.

²²⁶ Gritsenko and Ritz in Terhechte (*supra* note 5), § 45 para 24.

²²⁷ Gellhorn, “Two's a Crowd: The FTC's Redundant Antitrust Powers“, 5 *Regulation* (1981), 32; on the respective competences see also Kovacic, Calkins, Ludwin and Bär-Bouyssière in Terhechte (*supra* note 5), § 46 paras 75 et seq.

regulation No 1/2003 by constituting a fundamental precedence of Commission enforcement (Art. 11 (6) regulation No 1/2003). Admittedly though this solution cannot be transferred to all vertically organised authority structures, for it arises from the special character of supranational European law that enjoys primacy in application towards national law.²²⁸ Such a mechanism would for instance not be possible in the U.S. legal context.

d) Competition Authorities and Sectoral Regulatory Authorities

In specific cases the situation can turn out to be especially problematic, if besides the “actual” competition authorities sectoral regulatory authorities have to implement their “own” Competition Enforcement Law. In the course of the liberalization of many former state monopolies it became necessary to keep regulating the markets in question (such as in the areas of transport, telecommunications and postal services), so a whole set of regulatory authorities was set up. The resulting interplay of various authorities can be observed almost everywhere in Europe, in the U.S., but also in Asia (for example in Singapore²²⁹). This juxtaposition – as is getting revealed more and more – presents a danger to the uniform enforcement of competition laws, as regulatory authorities do not always apply the same standards as competition authorities.

2. Differences between Authorities

In many cases the structure and composition of a competition authority bears large influence on the procedure. Aspects of this kind have rarely been investigated up to now. However the personal and material resources of a competition authority (see following (a)) are in the same way important for the execution of the procedure as for matters of its composition (b), independence (c) and accountability (d).

a) Financial and Personal Resources

From the point of view of the executive authorities financial resources present an important factor for the effective implementation of Competition Enforcement Law. It is important to note that sufficient staff and in-kind resources are not to be taken for granted in a global perspective.²³⁰ This applies

²²⁸ See Case 6/64, *Costa v. E.N.E.L.*, [1964] ECR 1251; Terhechte, “Der Vorrang des Unionsrechts“, *Juristische Schulung* (2008), 403.

²²⁹ See Terhechte in id. (*supra* note 5), § 63 paras 6 et seq

²³⁰ In-depth Ewing, *Competition Rules for the 21st Century: Principles from America's Experience* (Kluwer, 2003).

not only to countries which can be described as a part of competition law “periphery”, but also to countries in Europe.²³¹

This basic relationship between resources and effectiveness was recognised early on by the FTC and not without reason an Office for Congressional Relations was set up.²³² The budget of the FTC in 2007 amounted to approximately 223 million U.S.-\$. This sum refers to two areas of action, namely the Bureau of Competition (approx. 96 million U.S.-\$) and the Bureau of Consumer Protection (approx. 126 million U.S.-\$). This sum will increase to 240 million U.S.-\$ in the year 2008. In addition, one needs to further mention the costs for the Antitrust Division of the DOJ as well as the federal antitrust authorities and sectoral regulatory authorities. In the end the total financial need is considerable. According to statements made by the FTC the commission has so far been “contented” with their financial resources.

In contrast to this the annual budget of the German FCO is very modest. It has approximately 17 million Euros per year available as resources in-kind and the personnel resources. Nevertheless the resources are still sufficient to fulfill the tasks established through the ARC and Art. 81 et seq. EC. In the future the question, if the tendency towards financing by the users will be continued for the area of German Competition Enforcement Law, will get interesting for the FCO. The model of user financing has spread worldwide and shown a considerable potential for possible abuse. In Brazil for example, the notification of a company merger has to be accompanied by paying an administration fee of 45.000 BRL (about 17.000 Euro).²³³ Similar mechanisms exist in South Africa (here the administration fee ranges from 10.000 to 30.000 Euro)²³⁴ as well as in Mexico (approx. 10.000 Euro).²³⁵ Admittedly a complete switch and the introduction of PAYGO financing, as is possible in German law, is hardly imaginable for the area of Competition Enforcement Law, given that the set of actors is too heterogeneous and in addition to that the interests are situated differently to many sectoral areas.²³⁶ The German FCO nevertheless raises fees for official acts in accordance with § 80 ARC.²³⁷

Looking at the fines imposed by the FCO which accrue to a considerable sum annually (in 2003 for instance amounting to 717 million Euro as well as to 58 million Euro in 2004), one could say that the FCO works most profita-

²³¹ See generally Gal, “Reality Bites (or Bits): The Political Economy of Antitrust Enforcement“, 2001 Fordham Corp. L. Inst., 605 et seq.

²³² Available at <http://www.ftc.gov/ocr/about.shtm>.

²³³ Schreiber in Terhechte (*supra* note 5), § 48 para 43.

²³⁴ Pautke in Terhechte (*supra* note 5), § 67 para 57.

²³⁵ Cf. Heckenberger, “Probleme der globalisierten Fusionskontrolle aus der Sicht eines Unternehmensjuristen“ in Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung* (Nomos, 2002), 89 et seq.

²³⁶ General outlook on this in Stober, *Allgemeines Wirtschaftsverwaltungsrecht*, 15th ed. (Kohlhammer Verlag, 2006), p. 293 et seq.

²³⁷ Bechtold (*supra* note 101), § 80 paras 1 ff; Mees in Loewenheim, Meessen and Riesenkampff (*supra* note. 81), Band 2 (GWB), § 80 paras 2 et seq.

bly. The earnings from fines and money amounts, whose forfeiture has been ordered, go into the federal account, in accordance with § 82a (2) ARC.²³⁸

In the course of the management plan for the year 2007²³⁹, devised by the Directorate General for Competition of the European Commission, the DG has funds to the amount of 8.29 million Euros at its disposal. Far greater however, are the expenses of the in-total 782 employees of the DG for Competition. The funds are used mainly for external employees (3.8 million Euro), studies (1.75 million Euro), IT-systems (635.000 Euro), meetings and representation (1.85 million Euro) as well as internal education and training events (232.000 Euro). Considering the enormous sum that the Commission earns by way of fines, it can be assumed that the activity is a profitable one, even though EU law offers the Commission no authority to raise fees for its official acts or demand reimbursement of expenses and sundry costs. Plans to issue rules concerning fees in connection with the merger regulation have not been put into action until now.²⁴⁰

A negative example in regard to the question of personal and material resources is the Argentinean Competition Authority, the *Comisión Nacional de Defensa de la Competencia* (CNDC).²⁴¹ Owing to its strict integration into the Argentinean Ministry of Commerce and the resulting lack of autonomy with respect to the use and amount of its own budget, the CNDC itself describes its work as being hindered severely.²⁴² Underfinancing is a fundamental problem for the construction of global networks, which in the end are dependent upon the participation of all competition authorities. This problem has become known within the ICN and the competition authorities of the industrial nations seek to cover – within the scope of the ICN-Support Cooperation – the costs for travel etc. for the competition authority representatives from emerging and developing countries.²⁴³

bb) With regard to personnel resources it can be stated that especially those countries which have little or no experience with the implementation of complex competition rules are in many cases dependent on support from global networks. In this respect however, the FCO, the U.S.-American FTC and DOJ, the European DG Competition, the Japanese Fair Trade Commission, all of which take pioneer roles, do not always act in concert. Nevertheless, the additional local training measures and support with IT systems etc.

²³⁸ For the time being this does not apply to cases in which the Federal Cartel Office issues a decision relating to a fine or forfeiture that has been confirmed by the High Court of Duesseldorf. In these cases the amount in question is booked to the account of the Land Northrhine-Westfalia in a transitional rule that is valid until the 30th of June 2009. (cf. § 131(5) S. 2 i.V.n. § 82a(2) GWB). Both the old rule as well as the transitional rule are problematic, see also Bechtold (*supra* note 101), § 131 para 10: “materially completely unjustified”.

²³⁹ The Management Plan 2007 of the DG Competition can be viewed at http://ec.europa.eu/comm/competition/publications/annual_management_plan/amp_2007_en.pdf.

²⁴⁰ Bechtold (*supra* note 101), § 80 para 14.

²⁴¹ Schreiber in Terhechte (*supra* note 5), § 49 para 13.

²⁴² Cf. OECD Policy Brief October 2006, Competition Law and Policy in Argentina, 6.

²⁴³ Rasek in Terhechte (*supra* note 5), § 83 para 9.

(“Technical Assistance”) or invitations to visit Europe or the U.S. do bear an important function.²⁴⁴

The decisive factor is finally, especially in countries which are gathering new or initial experience on the enforcement of competition law, the allocation of tasks through the national competition laws. In this way complex merger enforcement procedures can present an insuperable obstacle for an inexperienced competition authority, so that the advice to completely avoid such stipulations is often given (Indonesia for example followed this advice; Singapore postponed the application of the merger enforcement stipulations by three years after the introduction of the *Competition Act* in 2004).²⁴⁵

b) Composition at the Decisional Level

The composition and personnel stability of the competition authorities and also that of the responsible courts is another carrying pillar for the effective implementation of International Competition Enforcement Law. Within the framework of the governmental enforcement of antitrust law, worldwide there exist two different organizational systems: In those authorities that are assigned to the relevant ministerial level or that are part of a ministry (FCO, DOJ, DG Comp, CNDC in Argentina), instructions and directives from outside cannot be ruled out, thus there is a certain danger of political exertion of influence. In contrast to this other states place their trust into a “commission model“, in which decisions are made by several independent commissioners. Both models often however, can only then be successful, if the degree of independence on the part of decision makers sufficient (to this see following c).

Besides that, an effective implementation heavily depends on the staffing of the authorities. Competition enforcement procedures are proceedings that are characterized by considerable complexity in regard to the legal rules guiding them.²⁴⁶ They can only then be successfully carried out if the responsible institutions possess adequate “manpower”. Work at the decisional level is predominantly carried out by economists and lawyers. Many antitrust laws provide corresponding requirements in regard to the qualifications necessary to become an employee (cf. § 5 [4] of the German ARC, Art. 213 [1] EC).

²⁴⁴ Rasek in Terhechte (*supra* note 5), § 83 para 23; see also Tritell, Testimony before the Antitrust Modernization Commission from 15 January 2006, according to which the FTC cooperated with 18 countries worldwide in 2005 (this pertained to training measures etc.), available at http://www.amc.gov/commission_hearings/pdf/Statement_Tritell.pdf.

²⁴⁵ See generally on this aspect Kovacic, “Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement“, 77 *Chicago-Kent Law Review* (2001), 265 et seq

²⁴⁶ Cf. Shelton, “Competition Policy: What Chance for International Rules”, 4 et seq. (available at <http://www.oecd.org/dataoecd/34/39/1919969.pdf>); especially states with a large territory require sufficient (and decentralized) staffing, on the situation in Russia (75 provincial departments with circa 1.400 employees) see Gritsenko/Ritz in Terhechte (*supra* note 5), § 45 para 24.

Considering the rather small manpower of some authorities, it can be doubted whether they are in fact in a position to fulfill their often broad tasks. This particularly applies to smaller competition authorities they often have difficulties to be represented in European and international networks – due to the lack of human resources – with the multitude of international meetings and occasions in mind this problem is most likely to get worse.

The situation in Sri Lanka, for example, has been characterised by *Pubudini Wickramaratne Rupesinghe* as follows:

“Although wide investigative powers are given to the FTC, it has failed to actively perform its functions and exercise its powers. This dormancy on the part of the FTC could be attributed to the lack of staff and financial resources. Statistics show that FTC has been equipped with its full cadre of 27 persons only in its year of inception, with vacant positions gradually increasing and only about 13 positions being filled over the past four years. The high number of vacancies is a result of the low priority the FTC is given by the Ministry and the difficulties in recruitment due to the poor salaries and other benefits paid to the FTC staff compared to that of the private sector. The lack of adequate financial resources has hampered the investigations of the FTC, as it is one of the key factors considered before a decision is made to investigate into a complaint.”²⁴⁷

c) Independence

The effectiveness of the implementation of competition law is to a considerable degree related to the independence of the executive authorities.²⁴⁸ While private enforcement within the framework of court procedure depends on the independence of judges in particular, which as a constitutionally guaranteed principle (cf. for example Art. 97 of the German Basic Law, § 64 of the Danish Constitution, Art. 87 of the Greek Constitution, Art. 35 [2] of the Irish Constitution, Art. 17 [1] of the Spanish Constitution) is constantly gaining in importance all over the world,²⁴⁹ quite different models can be observed within the framework of administrative procedure. While some states have put the enforcement of competition law into the hands of ministerial administration (and with that have pre-programmed considerable political influence on the authorities) other states have decided to constitute rather far-reaching independence for the decision-making authorities.

Exemplary with regard to independence is the position of the decision-making departments (*Beschlussabteilungen*) of the German FCO: According to § 51 ARC it is autonomous, i.e. the president of the FCO must not issue instructions with regard to its decisions or influence it in another way.²⁵⁰ The

²⁴⁷ Wickramaratne Rupesinghe, “Competition Law in Sri Lanka”, available at http://www.lawnet.lk/docs/articles/sri_lankan/HTML/CV39.html.

²⁴⁸ See generally van de Gronden and de Vries, “Independent Competition Authorities in the EU”, 2 *Utrecht Law Review* (2006), 32 et seq; Duijm, “Die Unabhängigkeit von Kartellbehörden”, *The Ordo Yearbook of Economic and Social Order* (1999), 323 et seq.

²⁴⁹ See Wieser (*supra* note 1), p. 132 et seq.

²⁵⁰ Becker in Loewenheim, Meessen and Riesenkampff (*supra* note 81), Band 2 (GWB), § 51 para 6.

personal independence of the members of the decision-making departments and the entire FCO is moreover secured by the incompatibility rules in § 51 ARC. Nevertheless, the president can still influence the composition of the decision-making department. Just recently there has been a case which has led to heated discussions: The head of the task force responsible for combating cartels was transferred during an ongoing investigation. Afterwards FCO staff council exercised particularly strong – and public – criticism.

At the European level all members of the European Commission and with that also the respective commissioner for the DG Competition are independent (cf. Art. 213 [1] EC). The independence of the commissioners of the U.S. FTC on the other hand results indirectly from Sec. 1 FTC Act²⁵¹ which states that only the president of the United States can dismiss the commissioners in the case of certain offences. Also Sec. 1 FTC Act contains rules about personal incompatibilities as well as rules about affiliations to political parties.

The independence of competition authorities must however, not be taken for granted. Especially in the case of a direct ministerial or presidential authority to issue directives, the possibility of dismissing decision makers without reason and an appointment by proportional representation in regard to political parties, jeopardizes the independence of the competition authorities.²⁵² These correlations should be accorded more attention, since many states are still gathering experience in the build-up of competition authorities. Misguided developments in the area of independence can at times prevent the authorities to take any action at all.

c) Accountability

The current heated debate on accountability which relates to the sum of all the control and supervisory instruments, to which the exertion of public power is subjected, might be able to give impulses for the control and responsibility of the competition authorities with regard to the enforcement of competition law.²⁵³

aa) An investigation of different responsibility structures in the context of EC law brings a rather odd result to light. Here it is obviously attempted to compensate the lacking democratic legitimacy of legislation (especially on the

²⁵¹ 15 U.S.C. § 41.

²⁵² Yuzhanov, "Competition Law and Policy – The Role of Political Influence" in Hawk (Ed.), *International Antitrust Law and Policy* (Juris Publishing, 2002), 623 et seq; Gal, "The Ecology of Antitrust – Preconditions for Competition Law Enforcement in Developing Countries" in UNCTAD, *Competition, Competitiveness and Development* (New York, 2004), 20 et seq.

²⁵³ For an explanation on the term „accountability“ see Harlow, *Accountability in the European Union* (Oxford University Press, 2002), 6 et seq; Dann, "Accountability in International Development Aid Law", 44 *Archiv des Völkerrechts* (2006), 381 et seq.

level of formal European secondary law and atypical legal acts)²⁵⁴ with very intensive judicial control by the European Court of Justice. This aspect of a lack of democratic legitimation in European legislation in the area of competition law is characterised by the limited powers of the European Parliament to act against Council and Commission (involving only statements, proposals on the annual reports concerning competition politics as well as informal consultations).²⁵⁵ Only the Parliament's power to pass a no-confidence motion against the Commission (cf. Art. 201 EC) might embody an aspect of control of the latter's activities. Because of the general structure of this instrument though (unanimous resignation of the entire Commission in accordance with Art. 201 [2] EC) it is practically impossible that the Parliament will make use of it in respect to competition politics.²⁵⁶

With this background in mind the judicial review by the ECJ and the CFI does hold a hugely important role, which it comprehensively exercises.²⁵⁷ It is estimated that alone between the years 1958 and 1998 more than 500 judgments of the ECJ were issued on competition rules.²⁵⁸ Nowadays, it has become common practice that companies take legal action against decisions of the Commission. This has been rewarded in many cases, as in that the Commission has had to suffer several heavy defeats in the field of merger enforcement law.²⁵⁹ In addition to that, the fines imposed by the Commission regularly get reduced by CFI and ECJ. By these measures alone Community courts make provision for being included in many proceedings and being able to fulfil its function of supervision and concretization of European competition law.²⁶⁰

Judicial review of decisions by competition authorities does not only play an outstanding role in European law, but is also of immense importance worldwide. In this respect past events have shown that particularly countries with little knowledge in the implementation of competition and antitrust laws

²⁵⁴ Cf. Bast, „Einheit und Differenzierung der europäischen Verfassung – der Verfassungsvertrag als reflexive Verfassung“ in Terhechte et al. (Eds.), *Die europäische Verfassung – Verfassungen in Europa* (Nomos, 2005), 34 et seq.

²⁵⁵ Jakob in von der Groeben and Schwarze (*supra* note 188), Vorbem. zu den Art. 81-89 para 85.

²⁵⁶ See also Schoo in Schwarze (*supra* note 208), Art. 201 EGV paras 1 et seq.

²⁵⁷ Schwarze (Ed.), *Die rechtsstaatliche Einbindung der Wirtschaftsverwaltung*, Europarecht Supplement (2/2002); id., “Die gerichtliche Kontrolle der europäischen Wirtschaftsverwaltung“ in Schwarze and Schmidt-Aßmann (Eds.), *Das Ausmaß der gerichtlichen Kontrolle im Wirtschaftsverwaltungs- und Umweltrecht* (Nomos, 1992), 302 et seq.

²⁵⁸ Jakob in von der Groeben/Schwarze (*supra* note 188), Vorbem. zu den Art. 81-89 para 83, loc. cit. fn. 273.

²⁵⁹ Case T-342/99, *Airtours v. Commission*, [2002] ECR II-2585; Case T-05/02, *Tetra Laval v. Commission*, [2002] ECR II-4389; Case T-310/01, *Schneider Electric SA v. Commission*, [2002] ECR II-4075; see also Hoffmann and Terhechte in Terhechte (*supra* note 5), § 4 para 32; id., “Der Vorschlag der Europäischen Kommission für eine neue Fusionskontrollverordnung“, *Die Aktiengesellschaft* (2003), 415; Schohe, “Aufhebung einer Untersagungsverfügung der Kommission durch das Gericht erster Instanz“, *Wirtschaft und Wettbewerb* (2002), 841.

²⁶⁰ On legal supervision in European Competition Law see Pechstein, *EU-/EG-Prozessrecht*, 3rd ed. (Mohr Siebeck, 2007), paras 492 et seq; Lenaerts, Arts and Maselis, *Procedural Law of the European Union*, 2nd ed. (Sweet & Maxwell, 2006), p. 216 et seq.

experienced difficulties, especially because the relationship of the judiciary to executive authorities was unclear. In this area as well the idea of cooperation can be helpful in solving conflicts. In Indonesia for instance there has been a long lasting conflict between the Supreme Court and the competition authority (KPPU) concerning the question if the KPPU had the capacity to act in person.²⁶¹

bb) Beyond judicial review there are also transparency requirements in many states which ought to make the activities of competition authorities more transparent to the outside. A good example for this is the U.S. *Sunshine Act* that forces to publicize meetings of the commissioners of the FTC to a large extent and formulates strict transparency requirements.²⁶² A similar situation applies to the EC level, where Art. 253-255 EC stipulates obligations to justification, the citizens' entitlement to information as well as transparency requirements. Another important element is self-checking of the authority (for instance through evaluations) which will likely attract more attention in the future.²⁶³

Finally, one must refer to the problem complex of corruption. Here Competition Enforcement Law stands at the threshold of an important debate. Competition law and anti-corruption law are in a way similar in their material field of application, i.e. in regard to tendering offences.²⁶⁴ Nevertheless, the corruption problem meanwhile also directly affects the competition authorities. Particularly in some developing and emerging countries rethinking in this regard should transpire so as to enable an effective enforcement of the corresponding legal rules. Through clear incompatibility rules, reasonable payment, clear responsibility structures as well as functioning sanctioning mechanisms, elements of corruption will perhaps be kept in-check better than they have been up to now.²⁶⁵

3. A World Antitrust Authority as Platform of Coordination?

The heterogeneous foundation revealed by a look at the “landscape of authorities” in International Competition Enforcement Law has in the past given rise to a call for a “world competition authority” or a “world antitrust

²⁶¹ Terhechte in id. (*supra* note 5), § 64 para 27.

²⁶² 5 U.S.C. 552 b (*Government in the Sunshine Act*).

²⁶³ Kovacic, “Using Evaluation to Promote the Performance of Competition Policy Authorities” in OECD (Ed.), *Evaluation of the Actions and Resources of Competition Authorities*, DAF/COMP(2005)30, 19 et seq; id., “Evaluating Antitrust Experiments: Using Ex Post Assessments of Government Enforcement Decisions to Inform Competition Policy”, 9 *George Mason Law Review* (2001), 843.

²⁶⁴ Terhechte in id. (*supra* note 5), § 3 paras 24 et seq.

²⁶⁵ See Lederman, Loayza and Soares, “Accountability and Corruption: Political Institutions”, 17 *Economics & Politics* (2005), 1; Gal, “The Ecology of Antitrust – Preconditions for Competition Law Enforcement in Developing Countries” in UNCTAD, *Competition, Competitiveness and Development* (New York, 2004), 20 et seq.

agency”.²⁶⁶ Certainly, such an institution could improve the coordination of the numerous regimes and especially facilitate merger enforcement procedure. Still, no tangible proposal has yet been made towards the establishment of such a “mammoth institution”.²⁶⁷ Admittedly, the viability of such an institution appears to be arguable. Indeed, the development of cooperation networks seems to have undermined the idea of a world antitrust authority.

4. Role of the Courts

In Europe the private enforcement of antitrust law before the courts is still struggling with its rather short tradition, whereas in international comparison it often plays an outstanding role. It is not only the mere role of courts to examine the legality of measures but moreover to ensure – within the framework of criminal and tort proceedings – the implementation of antitrust guidelines in practice. This however raises a whole new set of problems and questions. Should the case be referred to an ordinary court? Does the judge’s degree of specialization suffice?

5. Privates

A pillar in the application of Competition Enforcement Law that is growing in importance – even in Europe – is the engagement of private parties.²⁶⁸ Those do not only play a big role as addressees of competition law, but also for the execution of competition rules. The development in that regard has come quite far: Companies report mergers, give assistance within the framework of the leniency program which can lead to the initiation of proceedings and try to defend their rights by means of raising legal action against their competitors. In addition to that private lawsuits, the option of appealing to authorities etc. are to mention.²⁶⁹ On the whole it can be resolved that the enforcement of competition law does not lie exclusively in the hands of the state, but has become object of a web of public and private rights to initiate and supervise that is increasingly difficult to systematize.

²⁶⁶ First stated by Kartte, “Internationale Instrumente zur Kontrolle von Wettbewerbsbeschränkungen nach 1992”, *Wirtschaft und Wettbewerb* (1990), 748, at 752; Mozet, *Internationale Zusammenarbeit der Kartellbehörden*, p. 116 et seq; Basedow (fn. 35), 102 et seq; Buchmann (fn. 30), 132 et seq; Sedemund, “Zur Notwendigkeit einer einheitlichen Aufsichtsbehörde für globale Fusionen“ in Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung* (Nomos, 2002), 107 et seq.

²⁶⁷ Skeptical Freytag/Zimmermann, “Muss die internationale Handelsordnung um eine Wettbewerbsordnung erweitert werden?“, 62 *Rabels Zeitschrift für internationales Privatrecht* (1998), 38 (50).

²⁶⁸ Debroux/Tricot, “Competition – EU Competition Law Enforcement: Towards a US Style Private Antitrust Action?“, 27 *Business Law Review* (2006), 256; Kovacic, Private Participation in the Enforcement of Public Competition Law, available at <<http://www.ftc.gov/speeches/other/030514biicl.shtm>>.

²⁶⁹ In-depth Kovacic, Private Participation in the Enforcement of Public Competition Law, abrufbar unter <<http://www.ftc.gov/speeches/other/030514biicl.shtm>>.

VI. Variety and Uniformity of Proceedings

Even if a closer look at competition enforcement proceedings often reveals considerable differences in terms of details, there are nevertheless similarities to be highlighted. Firstly, one must differentiate between two main types of procedures, *executive authority proceedings* on the one hand and *judicial proceedings* on the other. Taking into account the different subjects involved, there is appreciable difference in many aspects, among them the rules applicable to the burden of proof, the institution of proceedings, the general principles on which the proceedings are based, the binding force of the final decision and (occasionally) the status of the institution carrying out the proceedings (with regard to its independence and supervision).²⁷⁰

1. Administrative Proceeding

For the most part, the enforcement of competition laws worldwide is entrusted to the responsible administrative authorities. Notwithstanding the numerous distinctions in view of their structure, the administrative procedure and its conclusion, it is possible though to draw up the course of their proceedings in a simplistic manner.

a) Opening/Filing

A multitude of events can lead to the initiation of administrative proceedings. In the main focus is the initiation *ex officio*, meaning that the authority's attention is drawn towards certain events on the basis of certain information (for instance delivered by the press) and it decides to open proceedings. In addition to this, affected competitors and consumers can file a complaint. A consolidated view of this situation indicates that the initiation depends mainly on the level of information available. In this respect, networks as well as cooperation between the authorities can contribute to providing a high level of information. In the light of the numerous notification requirements (namely in the field of merger enforcement) this development, on the other hand, has increased the authorities' workload worldwide. Eliminating this deplorable state of affairs was thus one of the key objectives of the reform of European competition law through regulation No 1/2003: By decentralizing

²⁷⁰ See generally ABA Section of Antitrust, *Competition Law Outside the United States - First Supplement*, (American Bar Association, 2005); Kuhmann, *Das Ermittlungsverfahren im Internationalen Kartellrecht der USA* (Nomos, 1988); Rowley and Baker, *International Mergers. The Antitrust Process* (Sweet & Maxwell, looseleaf); Slot and McDonnell (Eds.), *Procedure and Enforcement in E.C. and U.S. Competition Law, Proceedings of the Leiden Europa Instituut Seminar on User-friendly Competition Law* (Sweet & Maxwell, 1993); Whish/Wood, *Merger Cases in the Real World - A Study of Merger Control Procedures* (OECD, 1994).

the implementation of Art. 81 and 82 EC in addition to a shift in favour of the *ex post* notification system it was possible to contain the workload and relieve the European Commission.²⁷¹

b) Investigational Powers

The powers of investigation of the respective authorities in competition enforcement have provided a source of vivacious discussion in the past. A worldwide comparison of existing models displays the discrepancy between the different legal systems: for example in Europe there is a broad consensus that competition authorities (including the European Commission) must be provided with far-reaching powers in order to ensure the effective enforcement of competition laws. Subsequently, the reform in the context of regulation No 1/2003 has strengthened the Commission's position by extending its powers of investigation.²⁷² In contrast to this, the DOJ – within the framework of criminal proceedings – depends on the cooperation of the *Grand Jury* for the purpose of obtaining summonses and orders to submit documents. In Civil Law proceedings, the FTC as far as it is involved clarifies the facts of the case by means of so-called *Civil Investigative Demands* whereby it should be outlined that in practice these instruments regularly suffice. Regardless of the above mentioned differences, the powers of investigation nevertheless can be reduced to a common denominator concerning the right to be heard, the right to question, the confiscation and copying of documents as well as investigational rights (or “inspections“, cf. Art. 21 et seq. regulation No 1/2003).²⁷³

c) The Time Factor

As in other fields of law, the time factor is of overriding importance in competition enforcement. Nearly all competition laws include narrow settings of time standards with detailed schedules and deadlines.²⁷⁴ Due to the participants' notable dependence on legal certainty, this factor especially plays a prominent role in merger enforcement procedure where short registration

²⁷¹ See Terhechte, “Die Reform des europäischen Kartellrechts - am Ende eines langen Weges?“, *Europäische Zeitschrift für Wirtschaftsrecht* (2004), 353; id. (*supra* note 18), p. 387 et seq

²⁷² Terhechte, “Die Rolle des Wettbewerbsrechts in der europäischen Verfassung“ in Hatje and Terhechte, *Das Binnenmarktziel in der europäischen Verfassung*, *Europarecht Supplement* (3/2004), 107 with further references.

²⁷³ For a take on the European law see Weiß in Terhechte (*supra* note 5), § 72 paras 89 et seq; Schriefer, “Die Ermittlungsbefugnisse der EG-Kommission in Kartellverfahren“, *Wirtschaft und Wettbewerb* (1993), 98; Gillmeister, *Ermittlungsrechte im deutschen und europäischen Kartellordnungswidrigkeitenverfahren* (Berliner Wissenschafts-Verlag, 1985); Tissot-Favre, “The Investigative Powers of the European Commission“, *ICCLR* (2003), 319; for the perspective of U.S. law see also Kovacic, Calkins, Ludwin and Bär-Bouyssiére in Terhechte (*supra* note 5), § 46 paras 86 et seq; Kuhmann, *Das Ermittlungsverfahren im Internationalen Kartellrecht der USA* (Nomos, 1988).

²⁷⁴ Terhechte (*supra* note 5), 387 et seq.

deadlines have been met with legitimate criticism for years.²⁷⁵ The detailed setting of time standards in numerous competition laws (cf. for example § 40 ARC for the German merger enforcement procedure or Art. 10 of regulation No 139/2004 for the European merger procedure) could definitely serve as a role model for other types of proceedings, when becoming aware of the fact that the excessive duration of proceedings consistently builds a grand obstacle for complex proceedings. Yet occasionally, these detailed settings of time standards have the potential to obstruct international cooperation for – given the short deadlines – it becomes hardly possible for many authorities to conduct drawn-out and complicated administrative assistance proceedings.

d) Conclusion of procedure

There are multiple ways of concluding administrative proceedings: In practice the formal (cf. for instance § 61 [2] of the German ARC) or informal closing of the proceedings represents an important option. Previous to the reform of European competition procedural law the European Commission closed about 90 % of the instituted proceedings by means of so-called *comfort letters*, which – although legally non-binding – certified the compatibility of the alleged measure with competition rules.²⁷⁶ As a consequence of the new distribution of responsibilities through regulation (EC) No 1/2003, the Commission no longer disposes of this instrument today. In the case that proceedings are not closed by the responsible authority the procedural concepts vary: In European law the Commission in accordance with Art. 7 regulation No 1/2003 can assess an infringement against Art. 81 or Art. 82 EC and can oblige the involved company to discontinue the action. Furthermore, Art. 8 regulation No 1/2003 entitles the Commission to take interim measures. Besides this, in the run up a company has the option of avoiding the above-mentioned decision by way of a voluntary commitment which the Commission can declare binding for the company. Finally, the Commission can also, in accordance with Art. 10 Council regulation No 1/2003, declare the non-applicability of Art. 81 and 82 EC. This possibility shall however be confined to reasons of public interest²⁷⁷.

Under German law the proceedings come to an end by means of a terminating injunction (as far as no discontinuance of proceedings has taken place). This is usually achieved by a so-called interdiction in accordance with § 32 ARC. Furthermore the FCO is authorized to enact provisional measures (§ 32a ARC). In accordance with § 40 ARC merger enforcement proceedings close with a release injunction or a disallowance injunction.²⁷⁸

²⁷⁵ Montag, “Konvergenz bei internationalen Fusionen“ in FIW (Ed.), *Konvergenz der Wettbewerbsrechte – Eine Welt, ein Kartellrecht* (Carl Heymanns, 2002), 39.

²⁷⁶ Schwarze and Weitbrecht (*supra* note 108), § 6 para 4.

²⁷⁷ See generally Schwarze and Weitbrecht (*supra* note 108), § 6.

²⁷⁸ In-depth Emmerich (*supra* note 109), § 13 Rn 1 et seq, § 36 para 22 et seq.

In contrast to this the scope of many authorities is limited to filing an action: The U.S. FTC is for example not empowered to issue an interdiction on its own authority but is, should the need arise, reliant on the participation of, an Administrative Judge. The involved parties on their part can lodge an appeal against his decision before the responsible court.²⁷⁹ The latent uncertainty about the result of the proceedings explains why U.S. law provides for the option of closing proceedings through *settlements*.

e) Sanctions

To conclude competition enforcement proceedings different sanctions can take place. In this respect, usually two types of sanctions can be differentiated, namely those leading to administration procedure and those aimed at punishing the infringement against the substantive rules of the respective law. The first category (cf. for instance Art. 23 [1], 24 regulation No 1/2003) shall maintain the administrative investigations' ability to function, while sanctions at the end of proceedings appear rather as administrative penalty carrying elements of prevention.²⁸⁰ Moreover, it has to be noted that the legal assessment of contravention differs significantly among national laws. Whereas German law classifies violations of ARC as "ethically neutral" and does not condemn them, the majority of competition and antitrust laws worldwide shows a tendency towards imposing high fines or imprisonment if the infringement trespasses a certain degree of severity.²⁸¹ The penalization of Competition Enforcement Law has become an essential characteristic of this legal field accompanied by a latent increase in the range of punishment. In the U.S. the *Antitrust Improvement Act of 2004* considerably widened the range of punishment in terms of fines as well as imprisonment.²⁸²

2. Court Proceedings

Apart from administrative proceedings, court proceedings also play an increasingly large role in the field of International Competition Enforcement Law. Given the fact that competition law in Europe nowadays strives for strengthening the significance of private enforcement and the existing immense importance attached to it in the U.S., it suggests itself that in the future the focus in procedural law will shift from administrative proceedings at least partly to court proceedings (this will likely apply rather to antitrust law than

²⁷⁹ Kovacic, Calkins, Ludwin and Bär-Bouyssière in Terhechte (*supra* note 5), § 46 para 90.

²⁸⁰ In-depth Schwarze and Weitbrecht (*supra* note 108), § 7.

²⁸¹ Extensively Schild and Terhechte in Terhechte (*supra* note 5), § 8 paras 1 et seq.

²⁸² Sec. 1 of the *Sherman Act* stipulates that violations of the cartel ban may entail prison sentences of up to 10 years or fines of up to \$ 1 Million for natural persons or \$ 100 Million for legal persons. For the range of possible penalties, see also Kovacic, Calkins, Ludwin and Bär-Bouyssière in Terhechte (*supra* note 5), § 46 para 94.

to merger enforcement law). Admittedly though, it is primarily due to the judiciary infrastructure and the specific expertise of courts that it remains uncertain if these developments will indeed lead to a more effective implementation of legal standards. Additionally, the private prosecution of cartel offences requires a functioning judicial system that is surely more difficult to establish than a narrowly oriented administrative apparatus. Insofar the concept of private enforcement appears rather to be a prototype in a certain legal framework than a universal concept.

a) The correlation of Court Proceedings and Administrative Proceedings

Court proceedings and administrative proceedings do not have a relationship of mutual exclusion but rather share numerous contact points. Notwithstanding the lack of experience in many fields, in Europe, the risk of private damage suits is still notably high. In fact in most cases administrative proceedings are followed by damage suits against the involved cartels. It is to await further action if a new era of private enforcement, independent from administrative proceedings, can prevail.²⁸³ The problems which arise from the coexistence of these two procedural types are rendered clear when looking at the relationship of the *Leniency* program to private suits: As long as companies in Europe have to fear the risk of damage suits despite the benefits of a bonus scheme after their self-reporting, they will be very reluctant participants in the leniency program. Meanwhile, the U.S.²⁸⁴ as well as the EU has become aware of this nuisance. Therefore, the green book of the European Commission concerning private damage suits also deals thoroughly with this complex.²⁸⁵

b) Indefinite Legal Concepts and Concretization

As already mentioned, courts not only play an important role in dispute settlement but also with regard to the concretization of indefinite legal concepts and therewith for the standards upon which the application of competition law is based.²⁸⁶ Competition laws worldwide are replete with indefinite legal concepts, which over the decades have been subject to interpretation by the responsible courts. It can be observed that in some jurisdictions there is a definite tendency towards concretizing these abstract terms through guide-

²⁸³ Möschel, "Behördliche oder privatrechtliche Durchsetzung des Kartellrechts?", *Wirtschaft und Wettbewerb* (2007), 483.

²⁸⁴ Kovacic, Calkins, Ludwin and Bär-Bouyssière in *Terhechte* (*supra* note 5), § 46 para 98 with further references.

²⁸⁵ Cf. Green Paper on Damages Actions for Breach of the EC Antitrust Rules of 19 December 2005, COM(2005)672.

²⁸⁶ For the significance of jurisprudence in the area of U.S. merger control see Kovacic, Calkins, Ludwin and Bär-Bouyssière in *Terhechte* (*supra* note 5), § 46 Paras 181 et seq.

lines etc. and thus challenging the courts' presumed exclusive sovereignty in interpreting.²⁸⁷ Even higher courts have restrained themselves in this respect, a development which is best reflected in the fact that the U.S. Supreme Court's latest decision on merger enforcement law, for example, dates back to the seventies of the last century.²⁸⁸ Nevertheless, some higher courts play undoubtedly a crucial role in the international context. The U.S. Supreme Court and the ECJ (respectively the CFI) are, on the basis of their decision-making power, capable of issuing decisions conclusive and binding upon all parties in U.S. antitrust law²⁸⁹ or European competition law²⁹⁰ allowing them to exercise enormous influence and to fundamentally shape antitrust law doctrines in the past decades.

c) Competences

With regard to the competence of courts, large differences exist globally. Several competition and antitrust laws stipulate the establishment of jurisdictions assigned the exclusive competence in matters pertaining to the said laws. The *Competition Appeal Tribunal* (CAT) in the United Kingdom or the *Competition Tribunal* in South Africa serve as suitable examples. Besides, a great number of jurisdictions work with special referrals to lower courts. In Germany the regional higher court of Düsseldorf is trial court for complaints against FCO injunctions, in accordance with § 63 (4) ARC and, contrary to other regional higher courts, is provided with three cartel senates. In France all disputes related to a decision of the Competition Council (*Conseil de la Concurrence*) are exclusively assigned to the appeal court (*Cour d'appel*) in Paris.²⁹¹ Such assignments facilitate bundling competences and take into account that the handling of complex antitrust proceedings requires experience, which is not always available to every possible court.²⁹²

D. Procedural Convergence through Cooperation?

When envisaging the above highlighted convergence developments perceptible in the world with regard to the procedural structure of competition and antitrust laws one must subsequently pursue the question whether the appar-

²⁸⁷ See section C. III. 2. *supra*.

²⁸⁸ Kovacic, "Antitrust in the O'Connor-Rehnquist Era: A View from Inside the Supreme Court", 30/3 *Antitrust* (2006), 21 et seq.

²⁸⁹ Kovacic, "Antitrust Decision Making and the Supreme Court: Perspectives from the Thurgood Marshall Papers", 42 *Antitrust Bulletin* (1997), 93 et seq; id., "Antitrust in the O'Connor – Rehnquist Era: A View from Inside the Supreme Court", 30/3 *Antitrust* (2006), 21 et seq.

²⁹⁰ Terhechte (*supra* note 18), p. 67 et seq.

²⁹¹ See Vogel in Terhechte (*supra* note 5), § 17 para 28.

²⁹² See on this aspect Wood, "Generalist Judges in a Specialized World", 50 *SMU L. Rev.* (1997), 1755; id., "The Role of the Judge in Competition Enforcement", (1997) *Robert Schuman Centre Annual on European Competition Law*, 359.

ent effort to cooperate can contribute to establishing a greater conformity or convergence of proceedings as well. This initially depends on the contents of cooperation in precise (on this D. I.), the shape of “global *Enforcement standards*“ and the international actors and networks making contribution to the concretization of these standards (D. II.). Finally, these considerations aim at delivering an answer to the question whether there is a “World Competition Law in the making” (D. III.). Also, one has to explore if the rules presently available permit to narrow them down to a legal field, further, on which predecessor rules it can be based and which desiderata of legal policy encourage its implementation.

I. Contents of Cooperation

Cooperation between competition authorities primarily concerns the exchange of information.²⁹³ Due to the fact that competition enforcement proceedings are mostly “fact-intensive” (looking at market demarcations and company structures for example), authorities are dependent on these forms of cooperation. Consequently, for example § 50b of the German ARC provides for the authorization of the FCO to liaise with foreign authorities.²⁹⁴

Apart from administrative cooperation in a strict sense, which refers first and foremost to the exchange of specific information on cases, a variety of benchmarks for administrative cooperation and court cooperation in general have developed. In this context one has to refer to the *Technical Assistance* of the competition authorities and the *Outreach*-programs of OECD which are in particular entrusted with training and educating administrative authority employees.²⁹⁵ These measures also harmonize the legal views, economic principles and investigative techniques, on which the system is based, having direct influence on the convergence process of the national antitrust laws. Not only the U.S. with the assistance from U.S.-Aid, but also the European Commission, the FCO and finally the Japanese FTC, are active supporters of these forms of advanced training. Moreover, the financial cooperation – within the framework of the enlargement of the EU – between competition authorities of EU member states and those of the accession states also exemplifies this development enabling the administrative staff of accession countries to participate in further training and conferences in Europe and North America.

²⁹³ See for example. §§ 50a-c of the German ARC; for a take on the area of European Competition Law see Hossenfelder in Loewenheim, Meessen and Riesenkampff (*supra* note 81), Vol 1 (Europäisches Recht), Art. 11 VerfVO paras 1 et seq; in regard to the bilateral cooperation between the competition authorities of EU and U.S. see Mestmäcker and Schweitzer (*see* note 189), § 6 paras 96 et seq.

²⁹⁴ See Becker in Loewenheim, Meessen and Riesenkampff (*supra* note 81), Band 2 (GWB), § 50b GWB paras 1 et seq.

²⁹⁵ Göranson and Reindl in Terhechte (*supra* note 5), § 75 paras 18 and 23; on the problems of „young“ competition authorities see generally Serebrisky, “What Do We Know about Competition Agencies in Emerging and Transition Countries? Evidence on Workload, Personnel, Priority Sectors and Training Needs”, 27 *World Competition* (2004), 651.

The internet influences the means of cooperation and exchange between the authorities tremendously, paving the path for previously unimagined capabilities of research and resource detection. Different *blogs* on economic law have built a platform for a global discourse on measures and cases on the issue of competition politics.²⁹⁶ Besides that special *Research Tools* and databases²⁹⁷ play a large role, i.e. those of the World Bank²⁹⁸, the OECD²⁹⁹ or numerous universities.³⁰⁰

II. Emerging Global Enforcement Standards?

Finally one has to pose the question whether the field of procedure in particular is still accessible to standardization or whether the progress initiated by the achieved systemization of the legal principles has reached a finite state. In other words: Can “Global Enforcement Standards” be envisaged in the foreseeable future? Initially, it must be noted that this heavily depends on the perspective taken. If the view is confined to questions of conflict of laws or questions of public international or supranational law, the picture would surely be incomplete. Rather, one should prefer an “overall view” that can only be achieved *in* and *by* networks. Global networks and their correlation have the potential to lead to a minimum amount of convergence including procedural law rules – and have already partly succeeded in it. In this respect, ICN, OECD and UNCTAD play a large role when speaking of Global Enforcement Standards.

1. Role of the International Competition Network

Since its founding, the *International Competition Network* (ICN) has concerned itself intensively with questions related to Competition Enforcement Law.³⁰¹ Especially through cooperation with the emerging and developing countries it succeeded in elaborating a number of *guidelines* and *manuals* the application of which might lead to a converging application of law. Meanwhile, one should not overestimate the capabilities of this informal network. Given its informality, it will be difficult to reach consensus in the future.³⁰²

²⁹⁶ See <http://www.antitrustreview.com>.

²⁹⁷ <http://www.abanet.org/antitrust/at-source/at-source.html>.

²⁹⁸ <http://www-wds.worldbank.org>.

²⁹⁹ <http://www.oecd.org/publications>.

³⁰⁰ For example the database on competition law of Oxford University, available at <http://www.competition-law.ox.ac.uk/competition/portal.php>, the database of the Miami University Law Library, available at <http://library.law.miami.edu/databas.html>, and the links provided by Princeton University Library (International and Foreign Legal Research), available at <http://firestone.princeton.edu/law/intlforrg.php>.

³⁰¹ Regarding results of the ICN see Rasek in Terhechte (*supra* note 5), § 83 para 10.

³⁰² Regarding convergence based on implementation of the working results of the ICN cf. Rasek in Terhechte (*supra* note 5), § 83 para 24.

2. Role of the OECD

Next to the ICN, the OECD also represents a network with the objective to evaluate the fundamental standards on which its member states base the application of their competition laws, and to identify new tendencies. Moreover, the advanced training and support of “young” competition authorities within the framework of the *Outreach Programs* have attained great importance.³⁰³

3. Role of UNCTAD

The *United Nations Conference on Trade and Development* (UNCTAD) offers – next to ICN – a forum in which the developing countries can negotiate with the industrial nations on an equal basis.³⁰⁴ Accordingly the model laws suggested by UNCTAD, among them the UN-RBP Code (*UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Business Practices*) in 1980,³⁰⁵ mirror in many areas conflicting interests. However, they also demonstrate compromise solutions.³⁰⁶

4. Claim to Self-Determination by National Law as an Obstacle

The internationalization of competition procedure is hampered in many cases by a claim to self-determination by national legal systems. Especially in Europe and in the U.S. the pronounced awareness for one's legal system forms an obstacle for convergence and harmonization ideas. *J. Basedow* speaks of an “anachronistic clock-tower-perspective of national law”.³⁰⁷ Practice illustrates that it is in particular this perspective of national law which impedes the definition of uniform standards and the coordination of actions within global networks.³⁰⁸

³⁰³ Göranson and Reindl in Terhechte (supra note 5), § 75 para 18.

³⁰⁴ Weisweiler in Terhechte (supra note 5), § 76 para 1.

³⁰⁵ Resolution 35/62 of 5 December 1980, available at www.unctad.org/en/docs/tdrbpconf10r2.en.pdf; Weisweiler in Terhechte (supra note 5), § 76 paras 19 et seq; Basedow (supra note 35), p. 65 et seq; Fikentscher and Straub, “Der RBP-Kodex der Vereinten Nationen: Weltkartellrichtlinien“, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (1982), 637 et seq.

³⁰⁶ Terhechte, “Das Internationale Kartellrecht zwischen Extraterritorialität und Konvergenz“ in Bungenberg and Meessen (supra note 2), 87 et seq. with further references.

³⁰⁷ Basedow (supra note 35), p. 111.

³⁰⁸ From the perspective of the U.S. Waller, “Comparative Competition Law as a Form of Empiricism”, 23 *Brook. J. Int'l L.* (1997), 455; Fox, “Toward World Antitrust and Market Access”, 91 *AJIL* (1997), 1 et seq

III. World Competition Enforcement Law in the Making?

When talking about the establishment of an International Competition Enforcement Law one cannot ignore the question on the future structure of this legal field. Is, for instance, a “unified law” in the sense of a coherent multilateral treaty imaginable? Or will the future depend on the observance of different regimes in this field and their interaction?

1. DIAC as a Paragon?

The *Draft International Antitrust Code* (DIAC), a model law worked out by a group of well-known, predominantly European competition specialists between 1991 and 1993, is a prominent example for attempts to establish a “world competition law” (including procedural rules).³⁰⁹ The fundamental idea behind it was to expand the system of rules and regulations within the WTO (back then still called MTO) by adding a world competition treaty. The draft was although handed in to the first director general of the WTO, was never agreed upon. Although the field of competition and commerce law played a certain role in WTO, the draft has fallen into oblivion since the failure of the WTO Minister Conference of Cancún.³¹⁰

On the basis of its past history the DIAC merely can no longer claim exemplary character mostly because the setting has fundamentally changed since then. The starting point of the DIAC is the establishment of substantive legal standards of binding nature for all parties, containing not only a general ban on cartels (Art. 4 and 5) and rules about merger enforcement (Art. 8-13) but also a ban on abuse of market power (Art. 14). From the viewpoint of procedural law one can differentiate between an institutional perspective and the procedure itself. The DIAC provides in Art. 17 Sec. 1 *lit. a* the obligation of all member states to establish competition authorities. At the time of its inception this aspect was revolutionary. In a farsighted way emphasis was put not only on the independence of the authorities (Art. 17 Sec. 1 *lit. b*) but also on sufficient financial means (Art. 17 Sec. 1 *lit. c*). Additionally the investigative powers etc. are depicted in detail (Art. 18 f.). The DIAC however takes into account that international law lies exclusively in the hands of national authorities and is thus rarely applied efficiently. For this reason, the draft

³⁰⁹ To be found in *Wirtschaft und Wettbewerb* (1994), 128, in Fikentscher and Immenga (Eds.), *Der Draft International Antitrust Code* (Nomos, 1995), p. 53 et seq. as well as in *supra* note 35, p. 142 et seq; cf. Fikentscher and Drexler, “Der Draft International Antitrust Code“, *Recht der Internationalen Wirtschaft* (1994), 93 et seq; Fikentscher, “Der Draft International Antitrust Code in der Diskussion“, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (1996), 543 et seq; Fikentscher, Heinemann and Kunz-Hallstein, “Das Kartellrecht des Immaterialgüterschutzes im Draft International Antitrust Code“, *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil* (1995), 757 et seq.

³¹⁰ See generally Herrmann in Terhechte (*supra* note 5), § 74 para 45 with further references.

stipulated the setup of an *International Antitrust Authority*³¹¹, which was to be supported by an *International Antitrust Council*. In accordance with the draft this authority was to have its own participatory rights within the national procedure, especially the power to initiate proceedings at the responsible courts, insofar as the state's authorities refuse to open proceedings (Art. 19 sec. 2 *lit.* b). This kind of participation is completely new.³¹² An *international antitrust panel* was to be established, which would, according to Art. 20 DIAC, be responsible for disputes with regard to DIAC between the states of the agreement.

DIAC met some response, especially in Europe, and may be seen as inspiration for a row of publications pertaining to international competition law.³¹³ Nevertheless, it has been sharply criticized in part. The setup of a “super authority” has been assaulted, in that it was thought to create more bureaucracy than benefit.³¹⁴ Moreover the inclusion of merger enforcement law rules and the DIAC's discussion concerning state-owned companies was criticized.³¹⁵ A central problem of these concepts obviously lies in the combination of WTO law and competition law with their completely different approaches, institutions and bureaucratic structures.³¹⁶ Out of DIAC's rejection one may extrapolate that a new global initiative should avoid these highly controversial areas.

³¹¹ Regarding the concept of the DIAC and its fundamental principles, which also include the establishment of a special international cartel monitoring body, Fikentscher and Heinemann, “Der Draft International Antitrust Code – Initiative für ein Weltkartellrecht im Rahmen des GATT“, *Wirtschaft und Wettbewerb* (1994), 97; specifically with regard to institutional questions of a possible global cartel law see also Kerber, „An International Multi-Level System of Competition Laws: Federalism and Antitrust“ in Drexel (Ed.), *The Future of Transnational Antitrust* (Staempfli, 2003), 269 et seq.

³¹² Likewise Basedow (*supra* note 35), p. 77 et seq.

³¹³ See for example Basedow (Ed.), *Limits and Control of Competition with a View to International Harmonization* (Kluwer, 2002); Bingaman, “Internationales Antitrustrecht und gegenwärtige Rechtsanwendung“, *Wirtschaft und Wettbewerb* (1995), 304; Conrad, *Die Notwendigkeit, die Möglichkeiten und die Grenzen einer internationalen Wettbewerbsordnung*, (Duncker & Humblot Verlag, 2005); Drexel (Ed.), *The Future of Transnational Antitrust. From Comparative to Common Competition Law* (Staempfli, 2003); id., *Perspektiven eines Weltkartellrechts*, (Rheinische Friedrich-Wilhelms-Universität Bonn, 1998); Karl, “Auf dem Weg zu einer globalen Kartellrechtsordnung“, *Recht der Internationalen Wirtschaft* (1996), 633; Kennedy, *Competition Law and the World Trade Organisation: The Limits of Multilateralism* (Sweet & Maxwell, 2001); Meessen, “Das Für und Wider eines Weltkartellrechts“, *Wirtschaft und Wettbewerb* (2000), 5; Podszun, *Internationales Kartellverfahrensrecht* (Staempfli, 2003); Weintraub, “Globalization's EffEC on Antitrust Law“, 34 *New Eng. L. Rev.* (1999), 27.

³¹⁴ Freytag and Zimmermann, “Muss die internationale Handelsordnung um eine Wettbewerbsordnung erweitert werden?“, 62 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1998), 38 et seq; see also Fikentscher, “Entwürfe auf dem Wege zu einem transnationalen Wirtschaftsrecht“ in Beuthien et al. (Eds.), *Festschrift für Dieter Medicus* (Carl Heymanns, 1999), 109 et seq.

³¹⁵ See generally Meessen, “Das Für und Wider eines Weltkartellrechts“, *Wirtschaft und Wettbewerb* (2000), 5 et seq; Phillips, “Comments on the Draft International Antitrust Code“, 49 *Aussenwirtschaft* (1994), 327.

³¹⁶ In-depth Tarullo, “Norms and Institutions in Global Competition Policy“, 94 *AJIL* (2000), 478; Ehlermann, “WTO-Wettbewerbsregeln: Lehren aus den bestehenden Streitbeilegungsverfahren“ in FIW (Ed.), *Konvergenz der Wettbewerbsrechte – Eine Welt, ein Kartellrecht* (Carl Heymanns, 2002), 93 et seq.

2. *The Role of Politics*

Admittedly, no initiative can be perceived currently which has the power to initiate a global procedural standard set of rules. In this respect one depends on identifying the existing imperfections of the international system to draw up suggestions for a solution on this foundation.

In the area of *Competition Procedural Law*, the main problems still lie in the coordination of different authorities with each other as well as in forming a consensus with regard to the criteria upon which the procedure is to be based. Uncertainty is caused by a lack of norm clarity and by the fact that there are no global definitions about what purpose competition laws are to serve at all.³¹⁷ From the authorities' side the development will concern a more effective organization in exposing cartels and the consolidating of existing cooperation. In the context of cooperation heavy dependence will lie on instruments, which in view of the proliferation of regimes and responsible authorities are to secure the uniform application of law.

In the area of *Merger Procedural Law* many items are problematic and heavily disputed as well: In practice one is often involved with numerous jurisdictions, some of which work with completely different standards. This begins with the fact that especially within complex proceedings many months are needed to clarify the status of a merger. Additionally, in many states it is uncertain if and when a merger must be registered at all. Moreover many regimes work with extremely extensive informational obligations. The authorities' practice in regard to positive answers is not always clear so the applicant frequently does not know how to proceed.³¹⁸ This entire state of affairs inflates the already rather high transaction costs.³¹⁹ In all regards cooperation between authorities and law amendments can lead to more transparency and conformity. These problems have been identified and solutions are being worked on within the framework of various networks.³²⁰

E. Summary

This inventory has shown clearly that in the near future the idea of a unified law (in the sense of a "World Competition Law" or "World Competition Procedural Law" on the basis of an international agreement) at least for the

³¹⁷ Terhechte in id. (*supra* note 5), § 3 para 6.

³¹⁸ Cf. Montag, "Konvergenz bei internationalen Fusionen" in FIW (Ed.), *Konvergenz der Wettbewerbsrechte – Eine Welt, ein Kartellrecht* (Carls Heymanns, 2002), 39 et seq; Heckenberger, "Probleme der globalisierten Fusionskontrolle aus der Sicht eines Unternehmensjuristen" in Schwarze (Ed.), *Europäisches Wettbewerbsrecht im Zeichen der Globalisierung* (Nomos, 2002), 89 et seq.

³¹⁹ Terhechte in id. (*supra* note 5), § 1 para 14.

³²⁰ Cf. for example the report on the Costs and Burdens of Multijurisdictional Merger Review (2004) by the Mergers Working Group (Notification and Procedures Subgroup) of ICN, available at <http://www.internationalcompetitionnetwork.org>.

moment has little chance of being implemented. International Competition Enforcement Law, similarly to other areas of international law, has clearly dissociated itself from the conformity postulate – if it has ever been committed to it – and tries now to overcome through various concepts the disadvantages of its fragmentary character. In the area of procedure this development is mainly carried by the pillars of “cooperation” and “convergence”.

On this basis the entire construction of this new legal field can be rather clearly outlined: Starting point for this development has been the globalization of competition restraints. This phenomenon has made it necessary to come up with instruments that enable prosecution beyond national borders. Many regimes have given a first answer through extensive application of their own law (especially by applying the effects doctrine). Nevertheless this concept faces multiple limiting factors. This has made the establishment of new structures necessary: Through bilateral and multilateral agreements, cooperation structures have been created that increasingly allow competition authorities to exchange information and from the standpoint of the companies can shorten proceedings and make them less confusing.³²¹

Beyond the “classical administrative cooperation” especially cooperation in networks is an essential characteristic of International Competition Enforcement Law. Here the mutual processing of specific cases is less important than the creation of a common foundation at global level – for instance within the framework of the ICN or OECD. In contrast to this ECN serves the specific coordination of activities and assignment of cases respectively the guarantee of common standards. The network idea is not confined to administrative cooperation – the judiciary is also clearly trying to establish networks which make international exchange possible. In addition, the role of the professional communities, blogs and other internet forums will increase to secure the omnipresence of important information. Certainly this entire process of “cooperation in and through networks” still is at an early stage of its development. On top of that it is limited, for example by the fundamental differences between many procedures, varying standards regarding fundamental and human rights as well as differently-pronounced transparency requirements.

Sources of law of the International Competition Enforcement Law are to be found at all levels (international, European and national law) and reflect its differentiated construction. In this regard, stronger systemization of these legal fields will become increasingly important. One will also have to ask which public international norms originally refer to Competition Enforcement Law. Are these norms and atypical legal acts binding in European Community law and national law? Especially the procedural law is derived from different (national) sources of law and for this reason in many cases is a

³²¹ In many cases this ultimately depends on the cooperation of the involved companies, which must consent to the exchange of confidential information.

good example for hybrid structures which are difficult to grasp if not for a look at the whole. Despite this the traditional doctrine of the sources of law can indeed capture and systemize most manifestations. From time to time atypical forms of actions and atypical legal acts (notices, announcements and guidelines) which play an important role for the authorities' control over procedure. Procedural law transcends the classical sources of law, thus not always is an authorization available for the issuing of these atypical "legal" acts. In this way they neither possess flawless democratic authorization nor is it always clear how legal protection is to be granted.

International Competition Enforcement Law is characterized by a multitude of different actors. Next to the national competition authorities, whether they are vertically or horizontally arranged, the sectoral regulatory authorities also are tasked with enforcing competition law norms, as are courts, consumer associations and private entities. Here cooperation is needed as well. *W. E. Kovacic* for example characterized the relationship of the U.S. authorities to each other as follows: "We have an archipelago of policy makers with very inadequate ferry service between the islands".³²² An effective implementation of Competition Enforcement Law will depend on a coordination of various users and a detailed evaluation of the instruments, which are available for the application. A question of paramount importance here is in which kind of relationship the independence of the executing institutions, their financial means and advanced training possibilities stand towards the effective enforcement of the corresponding normative material. This aspect plays a large role especially for newly established competition authorities in developing and emerging countries.³²³

International Competition Enforcement Law is made of a multitude of national regimes, the law governing their cooperation as well as supreme legal principles, which appear at the level of public international law (i.e. the ban on intervention and the principle of state immunity), European law (e.g. from the principle of *effet utile* and the principle of the harmonized implementation of community law and other regional legal systems (MERCOSUR, NAFTA, ASEAN, APEC, COMESA)). On this foundation convergence processes have also to a considerable degree taken place in the area of procedural law, which is apparent from the increasing penalization of competition law, the introduction of *Leniency*-programs or a reinforced application by private entities.

The principles on which enforcement is based are not only for Competition Enforcement Law of utmost significance but also provide elements for new concepts of systematization beyond this legal area. This applies to ad-

³²² Dow Jones Newswires from 29 Januar 2007; for problems resulting from parallel competencies of the FTC and DOJ in U.S. law and the resulting legal uncertainty cf. Gellhorn (*supra* note 227), 32.

³²³ Cf. Gal, "The Ecology of Antitrust – Preconditions for Competition Law Enforcement in Developing Countries" in UNCTAD, *Competition, Competitiveness and Development* (New York, 2004), 20 et seq.

ministration in and by networks as well as to approaches to a “global administrative law” or “international administrative law”. A crucial future task of jurisprudence lies in proving the existence of common global structures,³²⁴ while constantly drawing comparisons to other legal fields (i.e. the area of customs and tax law, banking law or environmental law), and to thus put together elements for a new, global field of research.

* * * * *

³²⁴ See Esty and Geradin (Eds.), *Regulatory Competition and Economic Integration – Comparative Perspectives*, (Oxford University Press, 2001); Ohler, “Die Zukunft des Wirtschaftsverwaltungsrechts unter den Bedingungen globaler Märkte“ in Bungenberg et al. (Eds.), *Recht und Ökonomik* (C. H. Beck, 2004), 309 et seq; Junge, “Die Macht des Marktes – Globalisierung und Wirtschaftsrecht“ in Schwenzer and Hager, (Eds.), *Festschrift für Peter Schlechtriem* (Mohr Siebeck, 2003), 817 et seq.