

1. Introduction

The governance of global competition represents a highly topical issue. It is connected to the more general debate about globalisation although, in times like these, an ubiquitous meaning is ascribed to this term. Depending on one's perspective, globalisation either fuels a beneficial process towards more world welfare or destroys local welfare and social relations. Concerning economic policy, however, globalisation is often discussed in terms of the loss of national and regional governance capacity. This book addresses the effects of globalisation on the governance of a particular field of economic policy: competition policy. The globalisation of markets and competition belongs to the major trends within the more general phenomenon of overall globalisation. According to consensual economic insight, competitive markets generally represent the best available coordination mechanism for economic activities. More precisely, workable competitive markets contribute to optimal allocation, innovation dynamics, consumer sovereignty, economic freedom, and flexibility and responsiveness of the economy. In doing so, material welfare becomes maximised compared to other available coordination mechanisms. In this context, the international spread of competitive markets implies a higher welfare potential for the world economy. Or, in other words, the advantages of market economy and the division of labour do not cease at historically and politically defined borders.

However, competitive markets need an accompanying governance in order to prevent the self-destruction of competition. Competition puts pressure on the participating actors, in particular on enterprises, and it is this pressure which is predominantly responsible for the efficiency and welfare gains due to competitive markets. The market participants are forced to search continuously for and create superior solutions to economic problems. However, there exists an alternative strategy to respond to competitive pressure. Instead of improving one's own performance in competition, the market participants can attempt to protect themselves against the forces of competition, for example, by building coalitions between competitors, by monopolisation or by other anticompetitive arrangements and practices. If market participants engage in such anticompetitive strategies, overall welfare losses result, with consumers and non-participating competitors particularly suffering. Moreover, companies, which are protected from the disciplining forces of competition, become powerful in economic and non-economic terms – to the disadvantage of society. Therefore,

any market economy requires a competition policy, which prevents market competition from self-destruction.¹

Historically, this competition policy was – and to a significant extent still is – located at the nation-state level. For a considerable time in modern history, this coincided with public protective instruments, which artificially (and incompletely/imperfectly) separated markets according to national borders. However, due to the lowering of trade barriers and technological developments, markets and competition have become more and more internationalised in the last few decades and this development is likely to continue. This creates the core problem with which this book deals: what are the adequate governance structures to protect competition in international and global markets?

Imaginable solutions for the problem of the governance of global competition embrace a broad field and a lively academic discussion, covering, at one extreme ‘national competition policies suffice to provide an effective governance of global competition’ (radical decentralism), to the other extreme of ‘a centralised global authority, enforcing original global laws is necessary to govern global competition’ (radical centralism). In between, a large number of – more or less complex – intermediate solutions can be constructed and discussed. I argue in this book that these intermediate solutions between decentralism and centralism are particularly worth analysing. The pivotal goal of this study is twofold:

- I provide a theoretical framework, based on economic theory, for analysing complex institutional governance arrangements between centralism and decentralism. It consists of a theory of competence allocation in multilevel systems of institutions. This analytical framework serves to derive the conclusions of this study in regard to the international competition policy system. However, it furthermore represents a general economic framework, which can be applied to any field in which complex institutional arrangements between centralism and decentralism are necessary for adequate governance structures.
- I suggest a design of an international multilevel competition policy system, which represents an example of an adequate governance of global competition from a broad economic point of view, that is, the integrative consideration of different approaches of economics, basic legal implications, and related political insights.²

¹ However, in the economic literature, a number of different opinions on the adequate design of competition policy exist. See, for example, Budzinski (2007) and Kerber and Schwalbe (2007).

² Competition policy represents an inherently interdisciplinary task including (at the least) economics, legal sciences and politics.

Each of the two interrelated aspects departs from the existing literature, which lacks a systematic and analytical approach towards complex institutional arrangements for international competition policy (although examples of such arrangements are frequently designed and discussed). Consequently, my design suggestion is different from the existing concepts with regard to several elements. The following paragraphs present the structure of the study and report the respective basic results.

CHAPTER 2: GLOBALISATION OF COMPETITION AND BUSINESS STRUCTURES

The analysis begins with a description of the environment in which international competition policy takes place. In doing so, section 1 of Chapter 2, 'The internationalisation of business activity and competitive markets' describes how business has expanded into the international sphere and, thus, both driven and responded to the globalisation of markets. As the driving forces of this development: (1) the market-enhancing and competition-intensifying role of liberalisation of foreign trade and deregulation of services and network industries, as well as (2) innovations in communication and transportation technologies are identified.

As a consequence, business patterns have, accordingly, evolved towards new forms of interfirm arrangements (often informal in character) and international corporate structures (for example, through M&A strategies). More often than not, they represent (pro-)competitive responses to the evolution of the business environment. However, with the globalisation of business behaviour, the occurrence of anticompetitive strategies has also expanded to the global level. Section 2 of Chapter 2, 'The corresponding globalisation of anticompetitive practices and structures', describes in terms of aggregate numbers, anecdotal evidence, and outstanding examples, how international cartels (section 2.1), abuse of global market power including unfair and predatory strategies (section 2.2), and cross-border mergers (section 2.3) are playing an increasing role in international competition.

CHAPTER 3: INTERNATIONAL COMPETITION POLICY BETWEEN DECENTRALISM AND CENTRALISM

After Chapter 2 has demonstrated that cross-border anticompetitive practices empirically do represent a virulent problem, Chapter 3 analyses why neither purely national competition policy (radical decentralism), nor monolithic global competition policy (radical centralism) represents a sufficient solution.

Section 1 of Chapter 3, 'The limits of national competition policy regimes in globalised markets', addresses the first part of the problem – the limits of radical decentralism. National competition policy regimes cannot provide sufficient protection for competition in internationalising markets and, moreover, generate frictions themselves. This assessment rests on a number of aspects:

- The procompetitive forces of trade liberalisation do not represent a complete substitute for an international competition policy (section 1.1). Instead, an internationally effective competition policy regime is necessary to permanently secure the advantages of trade liberalisation. Otherwise, public restrictions of competition (trade barriers) become substituted by private restrictions of competition (cartels, incontestable monopolies, and so on). This insight advocates the necessity of an international regime.
- National competition policy regimes must rely on extraterritorial antitrust enforcement in order to cope with inbound anticompetitive arrangements and practices from abroad (or with participants from abroad). Although regimes with important domestic markets can exercise non-negligible power on foreign enterprises, extraterritorial competition policy enforcement entails considerable loopholes, generates jurisdictional conflicts, and produces significant inefficiencies due to multiple procedures (section 1.2). An important reason for these deficiencies is the inability of national regimes to tackle competition concerns in international markets directly and with a view to world welfare. Instead, these regimes are forced to take an inbound view of domestic competitive impact only. Competitive concerns of global markets enter the national jurisdictional sphere only if they also affect the national sub-segments of the affected markets. Consequently, only the inbound-related features of comprehensive international anticompetitive arrangements and practices are addressed, ignoring outside and outbound effects.
- Moreover, national competition policy regimes may develop an interest in profitably restricting international competition at the expense of foreign countries. With such strategic competition policies (section 1.3), national regimes actively distort and deter global competition instead of protecting it.

However, as section 2 of Chapter 3, 'The limits of a uniform worldwide competition policy regime', argues, the complete transfer of competition policy competences to supranational authorities, enforcing supranational laws, is also insufficient. The main problems are:

- national sovereignty (section 2.1);
- public choice problems of centralised governance (section 2.2); and
- the overall adequacy of centralised supranational governance as a replacement for national competition policies in the face of the onward co-existence of regional/local and international markets (section 2.3).

Section 3 of Chapter 3 discusses the prospects of having a ‘competition of competition policy regimes’. However, a second-order competitive solution – detecting rules for competitive markets by institutional competition – experiences severe limitations if one undertakes an innovative, differentiated analysis. Although ‘competitive antitrust’ does not represent an overall solution, it entails elements that can play useful roles in an international competition policy system – namely, a variant of yardstick or benchmark competition.

Thus, neither radical decentralism nor radical centralism provides sufficient or adequate solutions to the governance problem of global competition. Consequently, section 4 of Chapter 3, ‘Concluding remarks: competence allocation as a problem’, calls for a differentiated analysis and promotes more complex ‘intermediate’ institutional arrangements, which combine the advantages of decentralism and centralism.

CHAPTER 4: TOWARDS AN INTERNATIONAL MULTILEVEL SYSTEM OF COMPETITION POLICIES

Chapter 4 develops the theoretical framework for the analysis of complex institutional arrangements, creating and shaping an international competition policy system between centralism and decentralism. In doing so, section 1 of Chapter 4, ‘The concept of multilevel systems of institutions – general idea and working properties’, presents a theory of competence allocation in multilevel systems of institutions. It consists of ingredients from modern governance theories (section 1.1), the general theory of institutional multilevel systems (interrelated governance on global, national, local, and so on, levels), and the economics of federalism (section 1.2). In multilevel systems of institutions, the allocation and delimitation of competences both within a governance level (horizontal allocation) and between governance levels (vertical allocation) become decisive for the overall performance of the system. The economics of federalism plays an important role because it provides criteria for the centralisation or decentralisation of government competences. Reformulating and re-interpreting these criteria in the specific context of competition policy allow for an economic analysis of competence allocation and its effects in a multilevel system of competition policies (section 1.3). The relevant categories are:

- externalities and spillovers;
- efficiencies in terms of production, transaction, and administrative costs;
- preference orientation;
- agency problems and lobbyism; and
- institutional evolution and adaptability.

This theory-driven analysis subsequently allows for the derivation of a number of evaluation criteria with which different competence allocations can be comparatively assessed regarding the resulting economic performance of the overall system (section 1.4).

Having made this claim, the capacity of the presented analytical framework is outlined by analysing existing multilevel systems of competition policies from that perspective (section 2 of Chapter 4; ‘Existing multilevel competition policy regimes – an analytical overview’). The relevant examples include ‘The US antitrust system: ongoing discussion about federalism?’ (section 2.1), ‘The EU competition policy system and its reform dynamics’ (section 2.2), ‘The WTO competition regime: creating an additional level of antitrust jurisdiction?’ (section 2.3), ‘The international competition network: a virtual global level?’ (section 2.4). All of these regimes are analysed along similar lines. First, the respective regimes are described in the language of multilevel systems. Secondly, the state of competence allocation and delimitation is identified. Thirdly, the previous evolution, current problems, and future challenges of competence allocation within those systems are analysed. The common result, explored in ‘Concluding Remarks’ (section 3 of Chapter 4), is that competence allocation problems are at the heart of these acting and emerging multilevel competition policy systems. An analytical approach towards these problems, therefore, benefits the related discussions and reform debates.

CHAPTER 5: A COMPARATIVE ANALYSIS OF DIFFERENT RULES FOR THE ALLOCATION AND DELIMITATION OF COMPETENCES

Real-world competition policy regimes always consist of a more or less complex mixture of institutions. In order to identify which concrete institutions are responsible for the success or failure of an antitrust regime, a disaggregated approach is necessary. Thereby, a systematic analysis of the responsible system elements, which determine competence allocation and delimitation, becomes possible and subsequently enables a more differentiated

line of argument about an adequate design of an international competition policy system. Chapter 5 contributes to this task by identifying 'stylised competence allocation rules' and comparatively analysing them according to the theoretical framework developed in Chapter 4.

Section 1 of Chapter 5, 'Design options for rules for the allocation of competences', presents and defines a selection of stylised competence allocation rules. This section is split into institutional solutions stemming from existing antitrust regimes (section 1.1) and those that are additionally suggested by the academic literature (section 1.2). Since the options available for constructed competence allocation rules are infinite, this selection cannot be complete. However, it includes both the most important practical solutions and their prominent academic alternatives. In particular, the following stylised rules for the allocation and delimitation of competences are analysed:

- effects doctrine;
- turnover thresholds;
- nondiscrimination rule;
- best practice recommendations and peer pressure;
- location doctrine;
- relevant markets rule;
- X-plus rule;
- voluntary lead jurisdiction (advanced comity principle); and
- mandatory lead jurisdiction.

In section 2 of Chapter 5, 'An institutional-economic analysis of competence-allocating rules', the actual analysis of these institutional solutions according to the derived criteria is exercised. The results are comparatively concluded in section 3 of Chapter 5 ('A comparative conclusion'). Comparatively superior performances can be expected from the mandatory lead jurisdiction model, which performs particularly well regarding efficiency and adaptability, and the nondiscrimination rule, which shows specific advantages regarding lobbyism control as well as preference conformity and adaptability. A combination of these two rules is particularly promising because, on the one hand, they complement each other well (apart from room for improvement regarding externalities) and, on the other hand, all the other analysed rules perform significantly worse. For instance, the X-plus rule has a significant weak point regarding preference conformity, the relevant markets rule regarding efficiency, and both the location doctrine and the effects doctrine regarding externalities, efficiency and lobbyism.

CHAPTER 6: ON THE APPROPRIATE DESIGN OF AN INTERNATIONAL MULTILEVEL SYSTEM OF COMPETITION POLICIES

Chapter 6, the final chapter, presents the policy conclusions. After reintroducing ‘Elementary features of an international multilevel system of competition policies’ (section 1 of Chapter 6), the relatively superior competence allocation rules from the preceding analysis, mandatory lead jurisdiction model and nondiscrimination rule are scrutinised regarding their combination potentials as well as concerning amendments to the stylised variants that further improve their performance (section 2 of Chapter 6, ‘The fundamental principles of competence allocation’). Against this background, section 3 of Chapter 6, ‘The levels and their interrelations’, presents a design example of an international multilevel system of competition policies that, as expected, fulfils the economic requirements outlined in the submitted study. The following is a very brief overview of the main results.

In this concept, the global level (section 3.1) is responsible for appointing a lead jurisdiction for a given cross-border competition case. It selects lead jurisdictions according to the following criteria: (1) regional gravity of the aggregate turnover of the participating enterprises; (2) the absence of discriminatory provisions in the potentially competent competition policy regime; and (3) willingness and experience of the potentially competent antitrust authorities to employ a world welfare standard. Furthermore, the global level is competent to supervise the competition rules of the potentially competent jurisdictions in regard to discriminating provisions and practices. Thirdly, the global level deals with complaints from other jurisdictions about the appointed lead jurisdiction. However, the global level does not possess substantive competition rules and does not decide antitrust cases itself. It ‘merely’ has jurisdictional and supervision competences.

The national level as well as existing regionally limited supranational regimes, like the European Union (EU), is the place where concrete antitrust cases with cross-border effects are decided (sections 3.2 and 3.3). The competition policy regimes at these levels can qualify for lead jurisdiction and, then, are responsible for reviewing and deciding a given case in view of the interests of all affected countries. Additionally, these regimes stay autonomous regarding purely domestic cases. There remains scope for subnational competition policy (section 3.4) since specific markets will remain localised.

The suggested concept combines the advantages of decentralism and centralism. It presents a regime in which decentralised substantive competences are complemented by centralised jurisdictional competences – supplemented by supervision and revision elements. Thereby, the advantages of

decentralised governance (flexibility, preference orientation, marketability, and so on) can be realised without suffering from its major disadvantage regarding international antitrust: the incoherence of the overall system and the resulting negative efficiency implications, as well as loopholes in the protection of competition.

Finally, section 4 of Chapter 6, 'Concluding remarks', presents the overall conclusion of the book. It summarises the main goals and the respective results. After this introductory overview, Chapter 2 starts with the actual analysis.