DECENTRALIZED GLOBALIZATION: POSSIBLE SOLUTIONS FOR MULTIPLE MERGER CONTROL REGIMES IN CROSS-BORDER TRANSACTIONS

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Abstract: The worldwide development of antitrust laws has led to the spread of merger control regimes. The impossibility to create a cohesive global antitrust system has led to a process of "decentralized globalization" of antitrust. Extraterritoriality and different procedural and material standards have created a high-cost scenario for cross-border transactions. Proposed solutions involve the creation of a supranational global antitrust authority, a multi-level system, the harmonization of national antitrust laws through soft law and bilateral agreements. In this paper, I propose a new solution: the establishment of non-binding case-by-case commissions for the joint assessment of cross-border transactions.

Keywords: *Antitrust; Competition Law; Merger Control; Globalization; Cross-Border; Harmonization.*

Palavras-Chave: *Antitruste; Direito Concorrencial; Controle de Concentrações; Globalização; Multijurisdicional; Harmonização.*

1. INTRODUCTION

More than 120 years after the enactment of the Sherman Act (1890) in the United States, one can affirm that there is a worldwide antitrust system. In 1990, 38 jurisdictions adopted antitrust regimes and nowadays there are more than 120 different jurisdictions all over the world[1]. Furthermore, there are also several international organizations that actively support and promote the development of antitrust systems, such as the Organization for Economic Co-operation and Development ("OECD"), the World Trade Organization ("WTO") and the International Competition Network ("ICN").

[1] *See* http://www.law.columbia.edu/media_inquiries/news_events/2014/march2014/bradford-antitrust-project

The dissemination of this Antitrust (or Competition[2]) "Culture" promotes the adoption of antitrust laws under the arguments of the benefits of the free market and the consumers' welfare. In fact, the origin of this spread of competition rules stems from the trade liberalization process and the need of countries to ensure a well-established free-market[3].

Statistics on the economic growth and the increase of the per capita GDP because of antitrust laws enforcement[4] are very captivating for this movement. And, in fact, this dissemination was also very effective. For instance, in the last decades, many important economies adopted new antitrust regimes, "such as Japan in 1947, Australia in 1974, Korea in 1981 and Canada in 1985". More recently, many emerging and developing countries also adopted antitrust laws, such as "Mexico in 1992, South Africa in 1998, Russia in 2006, and China in 2008" and "Kenya in 1988, Jamaica in 1993, Zambia 1996 and Indonesia in 1999[5]. Currently, the ICN's website lists 67 jurisdictions with merger control regimes[6].

The most significant cases of recent developments are the Chinese, Indian and Brazilian ones. In August 2008, China adopted the

[2] Even though there may be some nuances between the expressions "Antitrust" and "Competition", they will be herein considered synonyms.

[3] *See* HORN, Henrik; LEVINSOHN, James. Merger Policies and Trade Liberalization. In: NBER Working Paper No. 6077. National Bureau of Economic Research. 1997.

[4] *See* PETERSEN, Niels, *Antitrust Law and the Promotion of Democracy and Economic Growth*. MPI Collective Goods Preprint, No. 2011/3. 2011. p.46

[5] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. Chicago Journal of International Law, Chicago. 2009. p.6

[6] They are: Austria, Latvia, Russia, Albania, Argentina, Armenia, Australia, Barbados, Belgium, Bosnia & Herzegovina, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, Croatia, Cyprus, Czech Republic, Denmark, EFTA Surveillance Authority, Estonia, European Union, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jersey, Jordan, Kenya, Korea, Lithuania, Macedonia, Malta, Mexico, Netherlands, New Zealand, Norway, Pakistan, Panama, Papua New Guinea, Poland, Portugal, Romania, Serbia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Taiwan, Turkey, Ukraine, United Kingdom, United States, Uzbekistan, and Zambia. Available at: http://www.internationalcompetitionnetwork.org/working-groups/current/merger/templates.aspx

"Anti-Monopoly Law" [7], after a 13-year-long approval process. Furthermore, in 2007 India reformed its antitrust system, which created the new competition authority, the "Competition Commission of India"[8]. In Brazil, the enactment of the Law no. 12,529/2011, which restructured the Brazilian antitrust system and created the pre-merger control, was also part of this recent development[9].

When analyzing this global development of antitrust laws all over the world, the absence of cohesion[10] among the different regimes is clear and, thus, "merging undertakings encounter enormous difficulties with multiple compliance methods" [11]. Many of the difficulties rely on "[d]iffering thresholds, notification deadlines, substantive assessments test, amount and form of the required documents, significant filing fees and associated expenses"[12]. Furthermore, "[b]esides heavy burden of

[7] The English version of the Antimonopoly Law is available at: http://www.china.org.cn/government/laws/2009-02/10/content_17254169.htm).

[8] In India, the Amendment Act of 2007 reformed the Indian Competition Act. The text of the Competition Act is available at: http://www.cci.gov.in/images/media/competition_act/act2002.pdf?phpMyAdmin=QuqXb-8V2yTtoq617iR6-k2VA8d

[9] The English version of the Brazilian Competition Law (Law no. 12,529/2011) is available at: http://cade.gov.br/upload/LAW%20N%C2%BA%2012529%202011%20%28English%20version%20from%2018%2005%202012%29.pdf. For an in-depth analysis of the Brazilian Competition Policy in the field of extraterritoriality and the country's participation in the international fori, *see*: TIMM, Luciano Benetti. Jurisdiction, Cooperation, Comity and Competition Policy in Brazilian International Antitrust Law. In: GUZMAN, Andrew T. (Ed.) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011.

[10] As item 3.5 below will describe, this paper does not advocate for the absolute cohesion and harmonization of competition laws in the merger review field. There are substantial political interests that must be taken into account, especially regarding developed and developing countries. For the peculiar relation between developing and antitrust laws, see FOX, Eleanor M., GAL, Michal. *Drafting competition law for developing jurisdictions: learning from experience*, in *New York University Law and Economics Working Papers*, Paper 374, 2014.

[11] *See* SVETLICINII, Alexandr, *Competitiveness and Competition*: International Merger Control from the Business Prospective. Economic Integration, Competition and Cooperation, 6th International Conference, Opatija, April 19-20, 2007. p. 2

[12] *Id*, p.2

multiple compliance, merging undertaking always face the risk of a holdup or outright prohibition of a merger in one of the notified jurisdictions"[13].

This development promoted by the most important international institutions and scholars has led to a disconnected system, in the words of Professor Damen Geradin, it created a "decentralized globalization", which can be described as the "result of the concomitant failure of nations or international organizations to develop a global antitrust law regime and the decision of many nations to adopt their own antitrust laws"[14].

Inspired by the work of Professor Geradin, this paper proposes to discuss the "Perils of Antitrust Proliferation", specifically, the effects of the so-called decentralized globalization in the field of the merger control[15]. Therefore, the central objective is to deepen his analysis in order to answer the following questions: (*i*) which are the problems related to the existence of several merger control regimes over the world and which are the most relevant procedural and material differences among them and (*ii*) what are the possible solutions for this problem?

The argument this paper presents is that even if it is possible to argue that such decentralization of antitrust laws may produce positive outcomes for investigations of anticompetitive conducts – as in the case of cartels and abuse of dominant position – in cases of merger control review the ultimate results are not positive: they increase "costs of doing business" to the involved parties and also the "risk of contradictory decisions"[16]-[17]. Thus, after presenting the already proposed solutions to

[13] *Id*, p.2

[14] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. Chicago Journal of International Law, Chicago. 2009. p.3

[15] Despite of stressing the outcomes regarding different decisions, as demonstrated in the next sections, Damien Geradin does not focus its work on merger control issues. Therefore, its conclusions may differ from the hereby presented.

[16] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. Chicago Journal of International Law, Chicago. 2009. p. 3

[17] "The procedure-related concerns that affect the international system can increase transaction costs. There are over seventy antitrust regimes with merger control. Lack of transparency, significant (sometimes contradictory) variation, and unnecessary delay can create substantial problems." (SOKOL, D. Daniel. International Antitrust Institutions. *In*: GUZMAN, Andrew T. (Ed.) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011. p. 190)

the problem of cross-border merger analysis (*i.e.*, the creation of a supranational global antitrust authority, a multi-level system, the harmonization of national antitrust laws and authorities and even the abolition of extraterritorial mergers control), this paper proposes a new alternative, which focuses on a case-by-case multilateral coordination among antitrust authorities.

It is important to highlight that this paper focuses solely on merger review issues arising from the spread of antitrust systems owing to the two main reasons as follows. The first, as previously mentioned the issue of international anticompetitive issues, as pointed out by Professor Geradin, is already addressed by competition authorities to some extent whenever they do not investigate export cartels[18]. The second, because collusive and unilateral conducts do have a higher harm potential (since these are considered crimes in some jurisdictions) and, therefore, any proposal to coordinate anything in this field would require a higher level of sovereignty loss.

The paper is divided in two parts. The first part focuses on the description of the problem, which is the relationship between economic globalization and the development of domestic merger review systems, which results in the so-called "decentralized globalization" and the outcomes of the identified problem, which are the multi-jurisdictional merger filings costs and the risks of different outcomes by the different authorities' assessments. The second part analyzes the proposed solutions to the problem, focusing solely on merger control issues, and presents the contribution of this paper, which is a new form of cooperation among antitrust authorities.

2. GLOBALIZATION AND MERGER CONTROL: ORIGIN AND OUTCOMES

2.1 Attempts for establishing an International Antitrust System

The idea of establishing a centralized worldwide antitrust system is not recent. According to Anestis Papadopoulos, "[t]he history of the attempts to adopt a multilateral agreement on competition law goes back to

[18] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. Chicago Journal of International Law, Chicago. 2009.

1925 when the first international competition code was proposed in a study conducted under the aegis of the League of Nations"[19]. In 1947, the Havana Charter of the International Trade Organization was the first attempt for a unified and coherent system. However, it failed mostly because of objections from the USA[20]. Furthermore, the General Agreement on Tariffs and Trade (GATT) did not originally contemplate antitrust rules. In 1950, the Economic and Social Council (ECOSOC) of the UN also tried to create international antitrust rules. In 1980, developing countries adopted a "Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices"[21]. In 1996 a Working Group at the Singapore WTO Ministerial Meeting was created to discuss the interaction between trade and competition law. Those efforts resulted in several discussions and recommendations at an infra-legal level[22]. So far, none of the mentioned efforts resulted in a cohesive worldwide merger control system.

Other worldwide relevant matters, however, were successfully ruled. This is the case of Uruguay's round negotiations which led to the adoption of regulations on Intellectual Property rights (TRIPs) and international investments (TRIMs).

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[19] *See* PAPADOPOULOS. Anestis S. *The International Dimension of EU Competition Law and Policy*. Cambridge University Press, 2010. p. 205

[20] "The US State Department viewed the Havana Charter as a threat to stricter US competition laws, while the US Congress viewed it as an unwarranted threat to US economic hegemony and domestic political sovereignty in the post-war era" (TAYLOR, Martyn D. International Competition Law: A New Dimension for the WTO? Cambridige University Press, 2006. p. 153). On this issue, see also HOLMES, Peter. *Trade, Competition and the WTO*. *In:* HOEKMAN, Bernard, MATTOO, Aaditya, ENGLISH, Philip. Development, Trade, and the WTO. The World Bank. 2002.

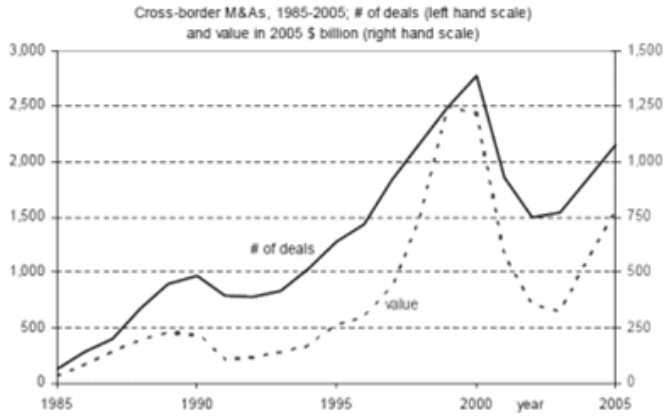
[21] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. Chicago Journal of International Law, Chicago. 2009. p. 5

[22] David Gerber identified two main obstacles for the inclusion of competition law in the WTO: "(i) a perceived lack of 'community' in the norms and operations of the WTO and (ii) uncertainty about the form and potential consequences of the competition law that might be introduced". According to this author, "[t]he inclusion of competition law as an effective part of the WTO is likely to require that substantial progress be mate in eliminating both obstacles" (GERBER, David J.*Competition Law and the WTO: Rethinking the Relationship* Journal of International Economic Law 10.3. 2007).

2.2. Growth of M&A Transactions as a result of economic Globalization

The expansion of entrepreneurial activities around the globe as a result of globalization has imposed the diversification of activities to companies. Bearing this in mind, there are two main possibilities whereby companies may set a foothold in foreign market: by Greenfield projects (*i.e.*, projects developed from scratch) or the acquisition of already-established enterprises in the target country. Considering the uncertainty and inexperience in the target country, Merger & Acquisitions ("M&A") transactions have been a more suitable strategy to transnational companies.

As a natural consequence of the globalization process, there has been a significant increase in the number of cross-border M&A transactions over the last decades. M&A transactions at the end of 20th Century data evidences this transformation:



Source: BRAKMAN, Steven, GARRETSEN, Harry, VAN MARREWIJK, Charles. Cross-Border Mergers and Acquisitions: The Facts as a Guide for International Economics (October 2006).

For instance, whereas all M&A transactions represented only 0.3% of the worldwide GPB in 1980, in 1999, this amount jumped to 8%. From 1985 to 2005, cross-border M&A transactions represented a substantial amount of transactions: 10.6% in USA, 29.9% in the UK, 33.5% in continental Europe, 52.6% in Japan, 30% in Australia, New

Zealand and Canada, and 28.5% in the rest of the world[23]. From 1988 to 2008, there was an 8.9% yearly average growth of cross-border transactions[24].

Because of the increasing number of cross-border M&A transactions, competition law has also felt the consequences. According to Ana Maria de Oliveira Nusdeo, the globalization process imposes the adoption of liberalizing measures by the countries willing to be part of this worldwide market and, as a consequence, competition law has gained terrain[25].

2.3. High costs involved in Cross-border Merger Cases

Since 1945, after the adoption of the "effects doctrine" in the Alcoa case by the US couts[26], antitrust laws developed the so-called extraterritorial application of competition rules. According to William Kovacic, this extraterritorial concept was also included in most of the merger control regimes[27], resulting in a substantial increase of complying costs[28].

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[23] *See* BRAKMAN, Steven, GARRETSEN, Harry, VAN MARREWIJK, Charles. *Cross-Border Mergers and Acquisitions*: The Facts as a Guide for International Economics (October 2006). CESifo Working Paper Series No. 1823. P. 7-8

[24] *See* MAKAEW, Tanakorn. *The Dynamics of International Mergers and Acquisitions.* January 15, 2010. p. 39.

[25] *See* NUSDEO, Ana Maria de Oliveira. *Defesa da Concorrência e Globalização Econômica: o controle da concentração de empresas*. Malheiros Editores: 2002, São Paulo. p. 139-140

[26] *See* PAPADOPOULOS. Anestis S. *The International Dimension of EU Competition Law and Policy*. Cambridge University Press, 2010. p. 67

[27] For instance, the Brazilian Competition Law rules the extraterritorial application of the Law in its Article 2: "Art. 2. This Law applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed, in full or in part, on the national territory, or that produce or may produce effects thereon. "

[28] "The growth in the number of competition laws and the broad acceptance of EU and U.S. concepts of extraterritoriality have major implications for cross-border commerce. One consequence is an increase in the cost of complying with requirements for report mergers. Firms active in global commerce may be required to notify dozens of jurisdictions. This phenomenon has raised the question of whether valid competition policy goals might be achieved at lower cost through acceptance of common notification procedures." (KOVACIC, William E. *Extraterritoriality, Institutions, and Convergence in International Competition Policy*. p. 3. Available at:

As pointed out by Professor Geradin, there are two main concerns related to the decentralized globalization of antitrust: the costs of several notifications and the risks of different outcomes. The main problems faced by this internationalization of antitrust are: (*i*) different methods and procedures, (*ii*) increase in the cost of litigation, (*iii*) contradictory decisions, and (*iv*) protectionist motives [29]. Especially regarding merger control, the main issues are the different methods and procedures – which result in higher costs, and contradictory decisions.

Firstly, regarding the costs, according to research conducted by PriceWaterhouseCoopers ("PWC"), transnational companies incur in high expenses for the submission of multi-jurisdictional merger cases. In a survey encompassing 62 cross-border transactions, 382 merger filings were submitted, which means an average of six filings per transaction. The majority of notifications were filed in the US (40 filings), EU (32), Brazil (31), Germany (29), Canada (20), UK (16), Poland (16) and Austria (15).[30].

For this analysis of the costs, the survey took into account three variables: duration, external and internal costs[31] and third-party costs. The average duration of the analyzed transactions were seven months, being the longest average in Brazil[32] (11.9 months) and the shortest Germany and Mexico (3 months). Regarding the external costs (*i.e.*, costs with legal

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https://www.ftc.gov/system/files/documents/public_statements/303671/031210kovacic.pdf)

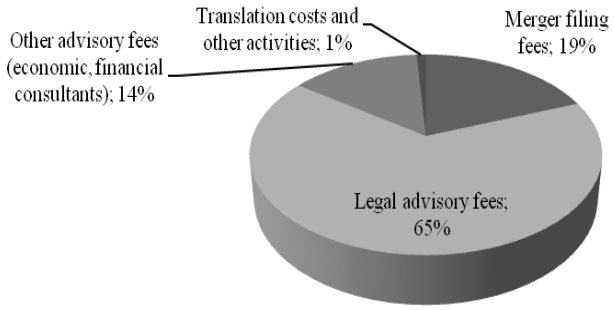
[29] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. Chicago Journal of International Law, Chicago. 2009. p. 11.

[30] *See* PRICEWATERHOUSECOOPERTS LLP. *Tax on mergers? Surveying the time and costs to business off multi-jurisdictional merger reviews.* 2003. p. 15

[31] External an internal costs were defined as "External costs are defined as costs for work done by advisors (legal advisors, PR advisors, economic advisors), as well as merger filing fees and translation costs. Internal costs include management time, travel expenses and sundry overhead charges, although the majority of respondents were only able to provide this information by number of person weeks. As we were only able to collect internal costs (in terms of person weeks), it was not possible to calculate total costs for the transactions in our sample." (PRICEWATERHOUSECOOPERTS LLP. *Tax on mergers? Surveying the time and costs to business off multi-jurisdictional merger reviews.* 2003. p. 20)

[32] One must consider, however, the recent reform of the Brazilian merger control regime, which reduced drastically the duration of the review process.

and economic advisors, as well as filing fees[33]), in spite of the great variation – ranging from EUR 100 thousand to more than EUR 10 million – the EUR 3.28 million per transaction average shows how relevant those costs were. They can be divided as follows:



Source: Author's elaboration based on PWC research figures.

Internal costs were also very representative: the respondents indicated an average number of 81 person weeks per transaction[34].

As a result from both external and internal costs, the survey estimated an average cost of EUR 2.18 million per transaction, and EUR 584 thousand per filing[35], as the chart below demonstrates[36]:

	Average costs per transaction		Average costs per filing	
	Cost *(EUR thousand)*	%	Cost *(EUR thousand)*	%
External Costs	1,861	85%	492	84%
Internal Costs	326	15%	92	16%
Estimated total costs	2,187	100%	584	100%

Source: PRICEWATERHOUSECOOPERTS LLP. *Tax on mergers? Surveying the time and costs to business off multi-jurisdictional merger reviews.* 2003p.24

[33] Especially regarding filing fees, in 2005 the ICN published a thorough report. See: INTERNATIONAL COMPETITION NETWORK. *Merger Notification Filing Fees.* 2005.

[34] *See* PRICEWATERHOUSECOOPERTS LLP. *Tax on mergers? Surveying the time and costs to business off multi-jurisdictional merger reviews.* 2003. p. 21

[35] These numbers represent the average of the responding transactions, which reduced substantially after the consultation regarding internal costs.

36 *Id.* p. 22

It is important to highlight, however, that those numbers may have substantially changed after 2003, since many new jurisdictions adopted merger review systems. China and India are important examples of this recent development as mentioned above. The extremely high costs described above are the result of several discrepancies in procedures and methods among merger review systems.

2.4. Different outcomes in Cross-border Merger Cases

The second major problem is the possibility of different outcomes from a single transaction. In the words of professor Geradin, the issue is related to the problem of the "strictest regime wins"[37].

There are two especially critical situations in which different decisions may affect a specific cross-border transaction. First, when one authority approves and other authority rejects a transaction. This occurred in the e GE/Honeywell merger case, in which the US authorities cleared the transaction, while the EU Competition Commission blocked it[38]. The second situation is when more than one authority imposes remedies for the clearance of transactions, but those remedies conflict among themselves.

In this regard, it is important to point out that many antitrust authorities do not allow the companies to "carve-out" those countries where the authority has not approved the transaction or has imposed remedies, as it is in the case of the Brazilian antitrust authority.

3. POSSIBLE SOLUTIONS: FROM SUPRANATIONALITY TO A NEW SOLUTION

In the last years, there has been increasing cooperation among competition authorities. This has been recently identified by OECD[39].

[37] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. Chicago Journal of International Law, Chicago. 2009. p. 12

[38] *See* PATTERSON, Donna; SHAPIRO, Carl. Transatlantic Divergence in GE/Honeywell: Causes and Lessons. ANTITRUST, Fall 2001,

[39] OECD. *Policy Roundtables – Remedies in Cross-Border Merger Cases* (2013);

Saskia Sassen identifies this cooperation as a trend among specialized government agencies over the world[40].

Over the last decade, several scholars have proposed different solutions for the problem of the decentralized globalization. However, none of the efforts resulted in a cohesive merger control system[41]. One of the main reasons is that merger policy is strongly related to industrial policy and, therefore, countries have rejected the possible loss of sovereignty[42] that is part of the main proposals so far. Furthermore, as pointed out by Jörg Terhechte, there are many differences between authorities that must be taken into account for the designing of a possible solution, like financial and personal resources, composition at the decisional level, independence, accountability[43]

Following, the four most important proposals to solve this problem and reasons why they have not been adopted yet are presented.

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[40] *See* SASSEN, Saskia. *Territory, authority, rights: from medieval to global assemblages*, Princeton, Priceton University Press, 200. p. 105-106

[41] "For transactions that are cross-border and especially global, there is a case to be made for a single rule of law or framework for the law — adopted multilaterally — all other things being equal. There is a credible argument that one substantive standard should govern global mergers. The United States has strongly opposed this idea when proposed in the context of multilateral agreement. Its officials have argued that nations have different standards and that there is not one standard fi t for or accepted by all. If there is not an appropriate single standard achievable through a multilateral regime, then can there be an appropriate single standard to be achieved through cajoled convergence?" (FOX, Eleanor M. *Antitrust Without Borders: From Roots to Codes to Networks. In*: GUZMAN, Andrew T. (Ed.) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011. p. 268)

[42] "Because merger policy is usually closely linked to industrial policy, nowadays most countries are not ready to relinquish part of their sovereign rights in this area in order to support some sort of international merger policy, negotiated and implemented at a multilateral level. Therefore, absolutely no agreement on substantive rules to tackle mergers, not even in the form of «rule of reason» guidelines, seems to be foreseeable at international level in the near future". (MONTINI, Massimiliano. *Globalization and International Antitrust Cooperation*. International Conference Trade and Competition in the WTO and Beyond. 1999. p. 18 Available at: http://www.feem.it/userfiles/attach/Publication/NDL1999/NDL1999-069.pdf)

[43] *See* TERHECHTE. Jörg Philipp. *International Competition Enforcement Law: Between Cooperation and Convergence – Mapping a New Field for Global Administrative Law*. The University of Oxford Centre for Competition Law and Policy. Working Paper CCLP (L) 26.

Finally, a new solution which would address most of the concerns hereby described is proposed.

3.1. Supranational Agency

One of the most controversial and complex solutions is the creation of an international supranational agency that would be responsible for the assessment of cross-border transactions[44]. This agency would be probably organized by an international organization like WTO[45-46]. However, this proposal has suffered much criticism. Professor Geradin suggests that a unified global regime regulating antitrust matters would neither be politically feasible nor desirable. As an alternative, he suggests that the EU and the US – as "the most widely respected and influential regulators in the world", which are also the host countries of the most exposed corporations – should take the lead on the possible solutions[47].

Furthermore, the most respected jurisdictions are also totally against this solution. As Alexandr Svetlicinii mentions, the US representatives already expressed their disagreement regarding an international supranational agency.[48] Besides, professor Geradin points

[44] *See* SINGH, Poonam, *Supranational Agency*: A Solution for Conflict in International Mergers? (January 2, 2008). p. 23

[45] *See* SVETLICINII, Alexandr, *EU-US Merger Control Cooperation: A Model for the International Antitrust?* Legal Life: Journal for Legal Theory and Practice of the Jurists Association of Serbia, 2006, Vol. 11, No. III, pp. 113-126, 2006. p. 2.

[46] According to Poonam Singh, "despite of the imperfections in WTO, it still remains the best available platform to ensure compliance in international merger policy as it has universal representation" (SINGH, Poonam, *Supranational Agency*: A Solution for Conflict in International Mergers? January 2, 2008. p. 25)

[47] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behaviour. Chicago Journal of International Law, Chicago. 2009. p. 16

[48] According to the US DOJ Assistant Attorney General: "almost no one in the US, and very few people elsewhere, believe that this is the time for a global antitrust authority within the WTO or elsewhere. When half of the world's antitrust agencies are only ten years young or less, and there is still much discrepancy between agencies on antitrust enforcement principles, we believe that a forced path to uniformity would result in enforcement at the level of the lowest common denominator." Facing the Challenge of globalization: Coordination and Cooperation between Antitrust Enforcement Agencies of the U.S. and E.U., Remarks by Makan Delraim, Deputy Assistant Attorney General , Antitrust Division, U.S. Department of Justice *apud* SVETLICINII, Alexandr, *EU-US Merger Control Cooperation: A Model for the*

out two main reasons why a global competition law regime has not been established yet. His first argument addresses the absence of negative externalities in the multiple enforcement of antitrust laws, mentioning the example of export cartels and the exemptions that many jurisdictions have. His second argument relates to the "race to the bottom", which would lead to a competitive deregulation, and the fact that antitrust laws do not focus on the domestic presence of companies, but rather the effects of companies' activities in the domestic market. According to him, the absence of negative externalities and a race to the bottom are absent in the antitrust field[49].

This difficulty of creating a "hard law system", was described by Claire Cutler well, who stated that "[…]'hard law' reduces transaction costs and strengthens the credibility of commitments, it restricts sovereignty and autonomy and is thus harder to achieve, and initially, very costly to negotiate"[50].

As a result, this solution raises concerns related to the loss of sovereignty and the refusal from the most relevant jurisdictions make this an impossible alternative.

3.2. Harmonization through "*Soft Law*"

The harmonization through "soft law" seems to be the most acceptable way to promote an at least coherent worldwide merger system[51]. Responding to this issue, Claire Cuttler states that "soft law, in

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International Antitrust? Legal Life: Journal for Legal Theory and Practice of the Jurists Association of Serbia, 2006, Vol. 11, No. III, pp. 113-126, 2006

[49] *See* GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behavior. Chicago Journal of International Law, Chicago. 2009. p. 7-8

[50] *See* CUTLER, A. Claire. *Private power and global authority - transational merchant law in the global political economy*, Cambridge, Cambridge, 2003. p. 23

[51] According to Daniel Sokol, "Soft law is an institutional choice for domestic-level agency implementation over hard law's international adjudication. This choice may involve information costs and decisions about which institutions are more likely to have better information. Soft law uses benchmarking of general practices". The author also describes each of the main international antitrust institutions that promote soft law solutions. (SOKOL, D. Daniel. *International Antitrust Institutions*. In: GUZMAN, Andrew T. (Ed.) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011. p. 194).

contrast, is cheaper and easier to achieve, but is easier to breach with impunity"[52].

Considering the international aspect of antitrust laws, there are several organizations that promote convergence[53] and harmonization among domestic antitrust regulations. Most relevant examples are the ICN and the OECD. There are also private organizations that foster the development of antitrust rules, as the American Bar Association ("ABA"), the Fordham Corporate Law Institute,[54] the American Antitrust Institute, the CUTS Center for Competition, Investment & Economic Regulation, and the Institute for Consumer Antitrust Studies.

According to Alexandr Svetlicinii, the proposed recommendations from ICN are commonly adopted by the participating authorities (the participating member are the authorities, not the countries' governments)[55]. The author indicates that a 2004 ICN Report indicated that the recommendations of ICN's working groups were adopted by 90% of the involved jurisdictions. Simon Evenett and Alexander Hijzen identified several characteristics of countries and authorities that may shape the susceptibility of conformity of national merger control regimes with ICN recommendations[56]

However, even though such a harmonization could be a good alternative to the problem of different outcomes from the different authorities' assessment, it does not address the criticism regarding different procedural issues and the costs involved in multi-jurisdictional transactions[57]. This is so because, even if the authorities adopted same

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[52] *See* CUTLER, A. Claire. *Private power and global authority - transational merchant law in the global political economy*, Cambridge, Cambridge, 2003. p. 23

[53] Thomas Cheng provides a systematic analysis of the convergence of competition laws through various levels and mechanisms. See CHENG, Thomas K. *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*. Chicago Journal of International Law 12.2 (2012): 433-490.

[54] *See* SVETLICINII, Alexandr, *EU-US Merger Control Cooperation: A Model for the International Antitrust?* Legal Life: Journal for Legal Theory and Practice of the Jurists Association of Serbia, 2006, Vol. 11, No. III, pp. 113-126, 2006. p. 5

[55] *Id.*, p. 3.

[56] *See* EVENETT, Simon J.; HIJZEN, Alexander. *Conformity with International Recommendations on Merger Reviews: An Economic Perspective on "Soft Law"*.

[57] For instance, Julie Clarke proposes six practices that would "alleviate the cost of multi-jurisdictional merger review for parties and regulators and other parties to whom the cost is passed on." They are: (1) Common form for initial (stage 1)

criteria, methodology and standards of analysis, the involved parties would still need to file the transaction in each of the applicable jurisdictions. Therefore, costs related to filing fees, external expenses with lawyers and economists in each country and the amount of information needed to each authority would probably not be reduced.

3.3. Bilateral Agreements

Considering the already mentioned international aspect of antitrust laws, besides several organizations that promote convergence and harmonization among domestic antitrust regulations, the bilateral relation among competition authorities also plays a fundamental role in this process. According to Alexandr Svetlicinii, despite the customization for the relation between two countries, bilateral agreements foster international acceptance of basic antitrust policies, as it is the case of the 1991 EU-US Agreement[58-59]. As a result, the author understands that "bilateral interagency cooperation arrangements remain the only

notification; (2) Binding agreement on thresholds for notification (a) Initial thresholds, (b) Additional nexus requirements for foreign-to-foreign mergers; (3)A binding agreement on timeframe for filing mergers; (4) Best practices agreement on timeframe for reviewing mergers; (5) Best practices agreement on transparency in merger review; (6) Best practices agreement on the facilitation of co-operation between Member States where notified multi-jurisdictional mergers raise competition concerns. (See CLARKE, Julie. Multi-Jurisdictional Merger Review Procedures – A Better Way. In: 14 (2) Trade Practices Law Journal. 2006. p. 22)

[58] *See* SVETLICINII, Alexandr, *EU-US Merger Control Cooperation: A Model for the International Antitrust?* Legal Life: Journal for Legal Theory and Practice of the Jurists Association of Serbia, 2006, Vol. 11, No. III, pp. 113-126, 2006. p. 2.

[59] According to Geradin, Reysen and Henry, "[i]n the field of merger review in particular, the EU and United States have set up a Merger Working Group, the principal objective of which is to enhance transatlantic cooperation in the control of global mergers. Within the framework of that working group, a set of best practices on cooperation in reviewing mergers that require approval in both the EU and United States was agreed upon. The best practices address issues pertaining to, inter alia, coordination on timing and consistency in the imposition of remedies" (GERADIN, Damien, REYSEN, Marc, HENRYM David. Extraterritoriality, Comity and Cooperation in the EU Competition Law. In: GUZMAN, Andrew T. (ed) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011. p. 39).

functioning option that has proven its efficiency to a certain degree"[60]. Since this kind of relation would be convenient and less binding, it ends up being not so authoritative.

Finally, the author also mentions that the EU-US cooperation has also developed procedural mechanisms in order to partially jointly review cross-border transactions. According to him, EU and US officials are working together and communicating through joint meetings[61].

This solution addresses both concerns related to costs and outcomes. However, it is limited to a two-country (or region) relation, as the EU-US arrangement demonstrates. As previously mentioned, however, cross-border transactions are commonly submitted to several jurisdictions at the same time – an average of six filings. In this case, the proposed bilateral solution would not completely address the core of the problem.

3.4. Multilevel System

According to Oliver Budzinski, the best suitable solution to the presented problem would be a multilevel system, "neither a purely decentralized solution (national competition regimes), nor a strongly centralized solution (domination of global rules and authorities)"[62]. This solution would involve "the creation of supranational competition policy competences can realistically merely complement the further on existing national and supranational (e.g. common European Union competition policy) regimes"[63].

In other words, Oliver Budzinski proposed a multilevel system, which may be described as the correlation among several systems, including "a multitude of interrelated institutions and organizations"[64]. This would have as basic principles the nondiscrimination rule and the mandatory lead jurisdiction model.

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[60] *See* SVETLICINII, Alexandr, *EU-US Merger Control Cooperation: A Model for the International Antitrust?* Legal Life: Journal for Legal Theory and Practice of the Jurists Association of Serbia, 2006, Vol. 11, No. III, pp. 113-126, 2006. p. 9

[61] *Id.*, p. 10

[62] *See* BUDZINSKI, Oliver, *An International Multilevel Competition Policy System*. p.1

[63] *Id.*, p. 1

[64] *Id.*, p. 2

Therefore, the model would consist of (*i*) a global level, (*ii*) a supranational level (*i.e.*, international competition policy regimes, like the EU), and (*iii*) the nationwide level, which means the authorities themselves. There are some cases where a fourth level would be applicable, in subnational regimes (*e.g.*, German and US subnational competition policies regimes)[65]. This system could be summarized as the coexistence of competition institutions and policies, which would be interrelated by regimes designed to work across the levels, "including court systems, government administration systems, independent administration systems, elements of private litigation, and all kinds of mixed types"[66].

Despite of being creative, this model seems to have similar problems of the supranational agency, which are the coordination among all jurisdictions and the refusal of the sovereignty loss at the last level. Furthermore, the author does not clarify how costs and procedural issues – maybe the most important issues to be addressed – that would be defined in this model.

3.5. The proposed solution: A case-by-case cooperation among Authorities

As seen above, none of the proposed solutions is able to thoroughly address both costs, procedural issues and different outcome problems described in this paper. On the one hand, the difficulties to establish a unified supranational authority faces the problem of loss of sovereignty, and on the other hand, the partiality of bilateral agreements and soft law make the proposed solutions insufficient in the current antitrust development scenario. Therefore, a more suitable solution for the "decentralized globalization" should involve the maintenance of the countries' sovereignty and the freedom for the authorities to participate in this process: a case-by-case cooperation among authorities.

In this model, there would be no need for an ex-ante multilateral agreement among the authorities, since it would be defined on a case-by-case basis. The involved authorities (*i.e.*, authorities of the countries affected by the transaction according to the effects doctrine) would jointly analyze cross-border transactions but without strict

[65] *Id.*, p.4-5

[66] *Id.*, p.6-7

bindingness, and thus, leaving it possible an individual (traditional) assessment.

In this case, the involved authorities would sign a commitment whereby they would delegate case handlers in order to form an international group ("Comission") – similar to an arbitral tribunal[67] - which would be comprised of members of all authorities of the countries affected by the transaction. Applying the notion of "*enhanced comity"*, "the state whose competition regime is best equipped to enforce any sanctions or remedies" would lead this commission[68]. Taking into account different internal procedures among the authorities, each one would determine the selection procedural for the case-handler in charge of the transaction. This person would be responsible for the thorough assessment of the transaction and the negotiation of remedies inside their institutions.

Once established, the Commission would also jointly define procedural issues (*i.e.*, forms, deadlines, fees) and information required for the case assessment. Finally, the Commission would be in charge of discussing the assessment (*i.e.*, definition of relevant markets, methodology and eventual remedies). Eventual disagreements would be discussed by the Commission and the divergent authority is able to issue a dissent decision, applying or not its own restrictions.

On the authorities' perspective, and taking into account the already mentioned solutions (*i.e.*, supranational agency, harmonization through soft law, bilateral agreements and multilevel system), this new alternative would possibly be more acceptable, since it would not require loss of sovereignty or impose substantial transaction costs to the authorities, like bilateral agreements or other costly adjustments. It would

[67] Indeed, arbitration is not completely new for competition authorities. The European and the Brazilian authorities have been adopting for the review of remedies imposed to transactions.

[68] "For this reason, a number of commentators have suggested that the concept of enhanced comity may provide a useful basis for allocating jurisdiction. According to the principle of enhanced comity, jurisdiction should be allocated to the state whose competition regime is best equipped to enforce any sanctions or remedies. To date, however, the notion of enhanced comity has not been built into any international competition law institutions. The ICN has largely avoided this issue and it is doubtful that competence allocation is an appropriate topic for the ICN." (SWEENEY, Brendan. I*nternational Competition Law and Policy: A Work in Progress*. 10 Melbourne J. Int'l L, 58, 68. 2009.)

work as a sort of regulatory dualism in this international antitrust field[69], leaving it open to each authority (and every case) its adoption, depending on strategic and internal policy issues.

Naturally, this proposed solution may be subject of criticism and further development. For instance, there are some concerns that would need to be addressed even before the signing of such commitment (*e.g.*, the timeline for the signing of the commitment and for the analysis, as well as filing fees). Furthermore, this solution would not exempt the parties from the costs related to the filings, but it would drastically reduce internal and external costs, since there would be a centralization of information. Besides, even if one or two authorities do not engage in the Commission, the simple unification of two analysis into one would be already positive for both the involved parties, as well as the authorities.

4. CONCLUSIONS

This paper has tried to demonstrate the recent development of antitrust merger review systems around the globe and the difficulties related to the coexistence of several regimes applicable to a single transaction. Besides the high costs companies must bear, there is also the risk of divergent outcomes from the authorities' assessment. Mostly of the risks related to different outcomes are being addressed by "soft law" initiatives, however, most of the problems of the majority of cross-border transactions are procedural issues that imply significant costs. Those problems have not been covered yet.

Legal literature has proposed several possible solutions to this problem, however most of them are either impossible to be applied or the outcomes are not the most desirable. Main reasons rely on the possible loss of sovereignty and the impossibility to solve procedural issues.

The proposed solution , *i.e.*, a case-by-case cooperation among authorities, tackles both the presented problems of, on one hand, the loss of sovereignty, and on the other hand, high costs and different outcomes. This solution seems to be more feasible, since it does not depend on a strict binding agreement among authorities through a specific international agreement. It is only in a case-by-case situation. Naturally, the proposed

[69] *See* GILSON, Ronald J., HANSMANN, Henry, PARGENDLER, Mariana, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the U.S., and the EU*. 2010.

system would need to be tested according to each jurisdiction's regulation, but recent adoptions of arbitration in merger cases in the EU and Brazil seem to be relevant evidence of the possible success of the proposal.

5. BIBLIOGRAPHY

BRAKMAN, Steven, GARRETSEN, Harry, VAN MARREWIJK, Charles. *Cross-Border Mergers and Acquisitions*: The Facts as a Guide for International Economics (October 2006). CESifo Working Paper Series No. 1823. Available at: <http://ssrn.com/abstract=940348>.

BUDZINSKI, Oliver, *An International Multilevel Competition Policy System*. Available at: http://ssrn.com/abstract=927710 or http://dx.doi.org/10.2139/ssrn.927710

CHENG, Thomas K.. *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*. Chicago Journal of International Law 12.2 (2012): 433-490. Available at: http://works.bepress.com/thomas_cheng1/7

CLARKE, Julie. *Multi-Jurisdictional Merger Review Procedures – A Better Way*. In: 14 (2) Trade Practices Law Journal. p. 90 – 109. 2006. Available at: http://ssrn.com/abstract=1445267

CUTLER, A. Claire. *Private power and global authority - transational merchant law in the global political economy*, Cambridge, Cambridge, 2003.

EVENETT, Simon J.; HIJZEN, Alexander. *Conformity with International Recommendations on Merger Reviews: An Economic Perspective on "Soft Law"*. Available at: http://ssrn.com/abstract=893034.

FOX, Eleanor M. *Antitrust Without Borders: From Roots to Codes to Networks. In*: GUZMAN, Andrew T. (Ed.) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011.\

FOX, Eleanor M., GAL, Michal. *Drafting competition law for developing jurisdictions: learning from experience*, in *New York University Law and Economics Working Papers*, Paper 374, 2014.

GERADIN, Damien, REYSEN, Marc, HENRYM David.

Extraterritoriality, Comity and Cooperation in the EU Competition Law. *In*: GUZMAN, Andrew T. (Ed.) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011.

GERADIN, Damien, *The Perils of Antitrust Proliferation*: The Process of 'Decentralized Globalization' and the Risks of Over-Regulation of Competitive Behaviour. Chicago Journal of International Law, Chicago. 2009. Available at: http://ssrn.com/abstract=1327688.

GERBER, David J. *Competition Law and the WTO: Rethinking the Relationship*. Journal of International Economic Law 10.3 (2007). Available at: http://works.bepress.com/david_gerber/76

GILSON, Ronald J., HANSMANN, Henry, PARGENDLER, Mariana, *Regulatory Dualism as a Development Strategy: Corporate Reform in Brazil, the U.S., and the EU* (March 1, 2010). Stanford Law and Economics Olin Working Paper No. 390; Columbia Law and Economics Working Paper No. 368; Yale Law & Economics Research Paper No. 399; ECGI - Law Working Paper No. 149/2010; Rock Center for Corporate Governance at Stanford University Working Paper No. 80. Available: http://ssrn.com/abstract=1541226 or http://dx.doi.org/10.2139/ssrn.1541226

HOLMES, Peter. *Trade, Competition and the WTO*. *In*: HOEKMAN, Bernard, MATTOO, Aaditya, ENGLISH, Philip. Development, Trade, and the WTO. The World Bank. 2002. Available at: http://www-wds.worldbank.org/servlet/WDSContentServer/WDSP/IB/2004/08/19/000160016_20040819140633/Rendered/PDF/297990018213149971x.pdf

HORN, Henrik; LEVINSOHN, James. *Merger Policies and Trade Liberalization*. In: NBER Working Paper No. 6077. National Bureau of Economic Research. 1997. Available at: http://ssrn.com/abstract=226484

INTERNATIONAL COMPETITION NETWORK. *Merger Notification Filing Fees*. 2005. Available at: http://www.internationalcompetitionnetwork.org/uploads/library/doc331.pdf

KOVACIC, William E. *Extraterritoriality, Institutions, and Convergence in International Competition Policy*. Available at: https://www.ftc.gov/system/files/documents/public_statements/303671/031210kovacic.pdf.

MAKAEW, Tanakorn. *The Dynamics of International Mergers and Acquisitions.* January 15, 2010. Available at: http://ssrn.com/abstract=1572005.

MONTINI, Massimiliano. *Globalization and International Antitrust Cooperation*. International Conference Trade and Competition in the WTO and Beyond. 1999. Available at: http://www.feem.it/userfiles/attach/Publication/NDL1999/NDL1999-069.pdf

NUSDEO, Ana Maria de Oliveira. *Defesa da Concorrência e Globalização Econômica: o controle da concentração de empresas*. Malheiros Editores: 2002, São Paulo.

OECD. *Policy Roundtables:* Remedies in Cross-Border Merger Cases, 2013. Available at: http://www.oecd.org/daf/competition/Remedies_Merger_Cases_2013.pdf

PAPADOPOULOS. Anestis S. T*he International Dimension of EU Competition Law and Policy*. Cambridge University Press, 2010.

PATTERSON, Donna; SHAPIRO, Carl. Transatlantic Divergence in GE/Honeywell: Causes and Lessons. ANTITRUST, Fall 2001, Available at: http://faculty.haas.berkeley.edu/shapiro/divergence.pdf

PETERSEN, Niels, *Antitrust Law and the Promotion of Democracy and Economic Growth*. MPI Collective Goods Preprint, No. 2011/3. 2011. Available at: http://ssrn.com/abstract=1750144.

PRICEWATERHOUSECOOPERTS LLP. *Tax on mergers? Surveying the time and costs to business off multi-jurisdictional merger reviews.* 2003. Available at: http://www.globalcompetitionforum.org/PWC_Merger_Cost_Study_Report_Final_2003_Jun.pdf

SASSEN, Saskia. *Territory, authority, rights: from medieval to global assemblages*, Princeton, Priceton University Press, 2006

SINGH, Poonam, *Supranational Agency*: A Solution for Conflict in International Mergers? January 2, 2008. Available at: http://ssrn.com/abstract=1094568

SOKOL, D. Daniel. *International Antitrust Institutions*. *In*: GUZMAN, Andrew T. (Ed.) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011.

SVETLICINII, Alexandr, *Competitiveness and Competition*: International Merger Control from the Business Prospective. Economic Integration, Competition and Cooperation, 6th International Conference, Opatija, April 19-20, 2007. Available at SSRN: http://ssrn.com/abstract=1311069 or http://dx.doi.org/10.2139/ssrn.1311069

SVETLICINII, Alexandr, *EU-US Merger Control Cooperation: A Model for the International Antitrust?* Legal Life: Journal for Legal Theory and Practice of the Jurists Association of Serbia, 2006, Vol. 11, No. III, pp. 113-126, 2006. Available at: http://ssrn.com/abstract=1325695

SWEENEY, Brendan. *International Competition Law and Policy: A Work in Progress*. 10 Melbourne J. Int'l L, 58, 68. 2009. Available at: https://www.law.unimelb.edu.au/files/dmfile/download192d1.pdf

TAYLOR, Martyn D. *International Competition Law: A New Dimension for the WTO?* Cambridige University Press, 2006.

TERHECHTE. Jörg Philipp. *International Competition Enforcement Law: Between Cooperation and Convergence – Mapping a New Field for Global Administrative Law*. The University of Oxford Centre for Competition Law and Policy. Working Paper CCLP (L) 26. Available at: https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_l._26.pdf

TIMM, Luciano Benetti. *Jurisdiction, Cooperation, Comity and Competition Policy in Brazilian International Antitrust Law*. *In*: GUZMAN, Andrew T. (Ed.) Cooperation, Comity, and Competition Policy. Oxford University Press, 2011.