Competition Law in EU Free Trade and Cooperation Agreements (and What the UK Can Expect After Brexit)

Florian Wagner-von Papp*

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Abstract

Free trade and competition law, for the most part, mutually reinforce each other by breaking up entrenched positions of market power and creating competitive constraints on any entities with market power. Competition law enforcement still adheres mostly to the 19th century paradigm of enforcement by sovereign nation states, albeit with extended extraterritorial prescriptive jurisdiction. At the same time national competition law enforcers face an increasingly transnational economy. The increase in free trade and competition advocacy has

* F. Wagner-von Papp
UCL Faculty of Laws, Bidborough House, 38-50 Bidborough Street, London WC1H 9BT, United Kingdom
e-mail: f.wagner-von-papp@ucl.ac.uk

resulted in a proliferation of national competition law regimes. The patchwork of multiple national enforcement leads to enforcement gaps and enforcement overlaps (*Guzman*). While some call for global solutions to global problems and advocate a global competition agency (or appointing a lead jurisdiction), it is questionable if such centralisatn would be desirable and at any rate it does not seem politically feasible. The intermediate path between pure unilateral enforcement and a centralised global enforcer consists in unilateral enforcement tempered by cooperation and coordination of enforcement activities. Regional cooperation leads to internally relatively homogeneous clusters, and reduces complexity on the global scale. The extremely close cooperation in such regional cooperation agreements is supplemented by a second layer of reciprocal cooperation links, which are characterised by a slightly lower but still high degree of internal homogeneity, and accordingly cooperation that does not go quite as far as the one in the central region. As we move in concentric circles further away from the centre, heterogeneity of competitive conditions or interests increases and the depth of cooperation decreases. This results in regional clusters. Within each cluster, issues of gaps and overlaps can be reduced to the greatest possible extent. Some of the clusters are interconnected among each other by bilateral links (such as CETA between the EU and Canada). Between clusters, the weaker cooperation and coordination may not resolve all gaps and overlaps, but as global heterogeneity of views on competition policy decreases through the work of international organisations (such as the OECD, the ICN or APEC), gradual progress is made here as well.

This contribution exemplifies the concentric circles of cooperation around the EU by examining the intergovernmental and inter-agency agreements concluded by the EU to face the complexities of the transnational economy of the 21st century. It then turns to a development that does not fit this neat picture of ever-increasing cooperation at all: Brexit and its implications.

1 Introduction

This is, for two reasons, a curious time for an academic in the United Kingdom (UK) to write about free trade and competition law.

First, the global enchantment with free trade, and especially multi- and pluri-lateral Free Trade Agreements (FTAs), seems to be coming to an end.[1] There had been a surge of FTAs in recent years, both of the bilateral and of the pluri-lateral variety.[2] However, the backlash against FTAs – in particular the Trans-Pacific Partnership (TPP),[3] the Comprehensive Economic and Trade Agreement (CETA),[4] the Trans-Atlantic Trade and Investment

[1] See Evenett and Fritz (2015); see also European Commission, Reflection paper on harnessing globalisation, COM(2017) 240 of 10 May 2017, https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-globalisation_en.pdf (last accessed 16 July 2017).

[2] Bi- and pluri-lateral FTAs proliferated especially after it had become clear in the Doha Round that substantial progress in multilateral agreements on the World Trade Organisation (WTO) level would be difficult. The same trend was observable for antitrust cooperation agreements. See Gerber (2010), p. 108 et seq.

[3] US President-Elect Trump has vowed to withdraw from the TPP "from day one". Woolf N, McCurry J, Haas B, Trump to Withdraw from Trans-Pacific Partnership on Day One in Office, The Guardian, 22 November 2016, and ordered withdrawal by executive order on 23 January 2017: https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific (last accessed 16 July 2017).

[4] CETA was narrowly saved after being pulled back from the brink of extinction in Wallonia – cf. Donnan S, Canada and EU reach finishing line over trade deal, Financial Times, 29 September 2016. The Council decided to sign CETA on 28 October 2016, see Council Decision(EU) 2017/37 of 28 October 2016 on the signing on

Partnership (TTIP), and, in the wake of the criticism against all these, the EU-Ukraine Deep and Comprehensive Free Trade Agreement (DCFTA) — have cast doubt on the future of trade deals.[5] The 2016 presidential race and the outcome of the elections in the United States signal a retreat from the free trade paradigm.[6]

Secondly, and closer to home, an uneasy alliance of free traders and protectionists has won the EU Referendum on "Brexit" in the UK.[7] More than a year after the referendum, and four months after the referendum, it is still not clear in which direction the UK is headed. Options range, at least in theory, from trading under WTO rules (with schedules yet to be teased out from the schedules negotiated for the EU), to tailored bilateral agreements with the EU – which in themselves could range from a mere traditional FTA to modern versions à la EU-South Korea or CETA to a near-replication of the rights and obligations in the European Economic Area (EEA) à la Switzerland – or even full membership in the EEA.[8] The UK government has set out its position in a White Paper, according to which the UK will not seek to stay within the Single Market or the Customs Union, but will instead seek to negotiate a custom-made "ambitious and comprehensive FTA".[9] Once the UK has made up its mind what precisely it wants to ask for, it remains to be seen how its advances are received by the EU (and possibly all EEA) Member States. Whatever form Brexit will take, one of the issues that will have to be dealt with is what UK competition law will look like and to what extent there will be cooperation between the UK authorities and courts with their counterparts in the EU, EEA, Switzerland, and the rest of the world.

This essay gives a short overview of the relationship between free trade and competition law (part 2) and the extent to which the expansion of unilateral extraterritorial competition law enforcement may render international cooperation less necessary, and conversely the extent to

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behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ 2017 L 11/1. CETA was signed on the EU-Canada summit on 30 October 2016 and the European Parliament approved CETA by a vote of 408 to 254, with 33 abstentions on 15 February 2017. As a mixed agreement, it will have to be approved by the (national and in some cases regional) parliaments of the Member States.

[5] See, e.g., Goodman PS, More jobs, but not for everyone, The New York Times, 29 September 2016, p. A1; Barber T, Free trade sceptics on the rise in European Parliament, Financial Times, 21 September 2016, reporting on the voting pattern analysis conducted by VoteWatch Europe, see Frantescu DP, Who is for and against free trade in the European Parliament?, 19 September 2016, http://www.votewatch.eu/blog/who-is-for-and-against-free-trade-in-the-european-parliament/ (last accessed 16 July 2017); Donnan S, Free trade v populism: The fight for America's economy, Financial Times, 22 September 2016.

[6] For an analysis of the US presidential candidates' positions on free trade, see Noland et al. (2016). Since President Trump's inauguration, he has withdrawn from the Trans-Pacific Partnership by executive order on 23 January 2017 (https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific, last accessed 16 July 2017) and is reportedly investigating the possibility to bypass the WTO in order to impose unilateral trade sanctions, Donnan S, Trump's trade shake-up: why has the US taken aim at the WTO, Financial Times, 2 March 2017, linking to an internal draft paper that had considered this option in a passage omitted from the final paper (for the draft, see http://im.ft-static.com/content/images/1dd70b12-fe25-11e6-96f8-3700c5664d30.pdf, last accessed 16 July 2017).

[7] Nixon S, Britain's Post-Brexit Trade Ambitions Run Up Against Protectionist Forces, Wall Street Journal, 14 September 2016; see also Thomas N, May: Britain Wants to be Free Trade "Leader", Financial Times, Fast FT Comment, 5 September 2016, on the Prime Minister's assurances to the G20 that there would not be any "retreat to protectionism"; Pickard J, Parker G, Plimmer G, Hinkley Point Deal Prompts Tougher Line on Infrastructure Sales, Financial Times, 15 September 2016, on considerations by the British Government to introduce a "tougher approach to the rules governing mergers and acquisitions by examining whether the sale of 'critical infrastructure' should be overseen by ministers".

[8] For an overview of the options and some of the arising issues see Lehmann and Zetzsche (2016).

[9] HM Government, The United Kingdom's exit from and new partnership with the European Union, February 2017, Cm 9417, Section 8, pp. 35-49, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf (last accessed 16 July 2017).

which gaps and overlaps due to the unilateral enforcement regime requires international cooperation (part 3). Uncoordinated unilateral enforcement by the approximately 130 competition law regimes in the world[10] would result in enforcement gaps and overlaps in enforcement.[11] The EU has reduced the complexity on the global level by staggering the intensity of cooperation in concentric circles according to the degree of homogeneity of competitive conditions and interests: extremely intensive regional cooperation between the competition authorities within the EU at the core, very intensive cooperation with the EFTA Surveillance Authority in the EEA, intensive bilateral cooperation with Switzerland, close cooperation with various potential candidates and candidates for accession and certain Euro-Mediterranean and other neighbouring states, and generally less detailed cooperation with states further away, albeit with selectively deeper cooperation with important trading partners such as Canada, Japan, Singapore and South Korea. Part 4 examines how the EU has integrated competition law into FTAs, Association Agreements and intergovernmental and inter-agency cooperation agreements. If other regions followed this example of concentric circles with intense cooperation at the centre that eliminates internal gaps and overlaps to the greatest possible degree, and gradually decreasing cooperation with other areas in which the competitive conditions and interests are not as homogeneous, then this global network of nodes and links would, while not eliminating gaps and overlaps, arguably reduce them to a manageable level. Part 5 turns to a development that does not fit this view of the world, namely Brexit and its implications for the relationship in competition law enforcement between the UK and the EU as well as between the UK and the rest of the world. Part 6 concludes.

2 Free Trade and Competition Law

Free trade interacts with competition law on many levels.[12] In many ways, free trade and competition law have common objectives and mutually reinforce each other (below 2.1 and 2.2). Nevertheless, the goals of trade law and competition law are, at least in the prevailing views in the respective disciplines, not identical, and the diverging goals mean that trade and competition law may come into conflict with each other (below 2.3).

2.1 Mutual Reinforcement Part 1: Free Trade Invigorates Competition

The added competition from foreign competitors that comes with free trade undermines domestic market power. Where free trade results in a substantial reduction of entry barriers, the geographic scope of relevant markets may expand. Even if foreign undertakings should not quite be included in the relevant market, they may at least become a competitive constraint on the fringes. This increased competition from foreign competitors may be even more invigorating than mere market shares would indicate: a different mind-set of foreign

[10] Cf. Capobianco and Nagy (2016), p. 2, figure 1.
[11] For the costs of gaps and overlaps see in particular Guzman (2010) and Guzman (2004).
[12] For more detail, see in particular Bradford and Chilton (2017), a statistical analysis based on a new extensive data set, whose (for the time being: provisional) finding is a positive correlation between "trade openness and the specificity and stringency of countries' law antitrust regimes" (p. 4 of the manuscript). Bradford and Chilton's paper would have deserved much greater attention here, but their draft could only be worked into the proofs of this contribution. Their paper is strongly recommended to anyone interested in the relationship between trade and competition law. My account that follows in the text below is only a rough sketch, and the B radford and Chilton paper provides much more detail on the empirics and the relevant literature. I am glad to say, however, that my intuitive account that follows in the text below is not contradicted by their empirical findings. See also Bradford and Büthe (2015); Trebilcock and Iacobucci (2004); Trebilcock (1996).

mavericks may undermine collusive practices that were established, explicitly or tacitly, among domestic competitors, and disrupt their complacency. The self-correcting mechanisms of markets are therefore boosted by the entry of foreign competitors made possible through free trade. Ceteris paribus, this would seem to indicate that competition law has a lesser role to play where there is free trade.

2.2 Mutual Reinforcement Part 2: Competition Law to Address Blowback against Free Trade

However, if one changes one variable in a dynamic and homeostatic system such as a market, things will not remain "*ceteris paribus*". Domestic market participants may, individually or collectively, respond to the increased competitive pressure by resorting to exclusionary practices against foreign competitors. Private barriers to entry may be erected and replace the state barriers to entry that existed before free trade agreements removed them. Trade is impaired by these private barriers, unless competition law intervenes. Alternatively, or cumulatively, domestic and foreign competitors may agree to reduce the mutual competitive pressures by allocating markets or by fixing prices amongst themselves – following the motto "if you can't beat 'em, join 'em". At the same time, free trade allows supply chains to become truly international.[13] This combination of longer (and more international) supply chains and the greater incentive to enter into cartels to escape competitive pressure means that more cartels acquire an international dimension, with collusion often occurring higher up in the supply chain, far removed from the eventual end consumers.[14] The need for effective competition law and the difficulties for its enforcement are increased.

It was these interactions that motivated the founders of the Rome Treaties in Europe to include competition rules to complement the fundamental free movement rights when the European Communities were established. This interaction between the integration of markets and competition law still shapes the EU's approach to substantive competition law. Exclusionary measures will often consist in (a network of) vertical agreements by domestic companies or exclusionary practices by dominant undertakings. The more aggressive approach in the EU to vertical agreements and abuses of dominant positions may be explicable, at least in part, with this market integration objective of the EU competition rules. Within the European Union, the supranational character of EU competition law allows the EU to address such private practices that impede trade by prohibiting them, in much the same way as a federal state, such as the US, would address such issues internally.

When it comes to external relations, however, the situation becomes more complicated. Assume a third country has foreclosed its market by a comprehensive network of vertical and conglomerate relationships (similar to the accusation which the US levelled against Japan's *keireitsu* system in the Structural Impediments Initiative[15]). Similar to the reasoning in intra-EU cases, such anti-competitive conduct can impair market access and so – as the CETA puts

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[13] See, e.g., the 2014 OECD-WTO-World Bank Report to the G20, Global Value Chains: Challenges, Opportunities, and Implications for Policy, Sydney, Australia, 19 July 2014, https://www.oecd.org/tad/gvc_report_g20_july_2014.pdf (last accessed 16 July 2017).

[14] See the discussion below 3.1 on the "component cases", such as *Minn-Chem v Agrium*, 683 F.3d 845, 856–858 (7th Cir. 2012), *cert. den.*, 134 S.Ct. 23 (2013); *Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816 (7th Cir. 26 November 2014, amended 12 January 2015), *cert. den*. docket number 14-1122, 15 June 2015; *United States v Hsiung*, 758 F.3d 1074 (9th Cir. 2014), amended by 778 F.3d 738 (9th Cir. 2015), *cert den.* docket number 14-1121, 15 June 2015; *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 409–413 (2d Cir. 2014).

[15] Cf. the description in Morita (1991).

it – "undermine the benefits of trade liberalisation".[16] Where the anticompetitive practices in the third country have a direct, foreseeable and substantial effect on competition within the EU, and if this affects, directly or indirectly, actually or potentially, trade between Member States, EU competition law may apply to these practices. In other words, the unilateral extraterritorial application of EU competition law may address some of the issues in this scenario. However, even where the substantive EU competition prohibitions apply extraterritorially, there remains a need for international cooperation because *enforcement jurisdiction* remains strictly territorial. This need is partly addressed by measures that incentivise the foreign state to establish its own domestic competition law (such as requirements to introduce competition laws and authorities contained in FTAs[17] and Association Agreements), and to enforce these laws (such as requirements in FTAs[18] and positive comity agreements), and partly by entering into mutual legal assistance treaties (MLATs) and extradition treaties.[19]

Where such qualified effects cannot be shown to exist in this scenario, public international law prevents the application of EU competition law.[20] In these instances, there may well be an EU *trade* interest in opening up the foreign market for exporters, which is foreclosed due to private anticompetitive practices, an interest that cannot be addressed by the unilateral application of EU competition law. Accordingly, trade agreements and bilateral intergovernmental or inter-agency agreements may be, and are, used to urge the foreign state to adopt and enforce its own domestic competition law provisions against the anticompetitive practices on its territory.[21] As will be explained below, the US purports to be more aggressive in this latter group of cases, both as a matter of the unilateral extraterritorial application of its antitrust laws and as a matter of international trade law. However, even these more aggressive US instruments are primarily used as a bargaining tool to open up markets by way of trade agreements.[22]

2.3 The Relationship between Trade and Competition Law: Frictions

Despite these mutually reinforcing effects that free trade and competition law often have, they can come into conflict as well. On an abstract level, the goals pursued by (and mind-sets of) trade lawyers and competition lawyers are different. Trade lawyers are generally primarily

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[16] Article 17.2(1) of the Comprehensive Economic and Trade Agreement (CETA): Council Decision(EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ 2017 L 11/1; similarly Article 12.1.1. of the EU-Singapore FTA. See also Article 11.1.1. of the EU-South Korea FTA: Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ 2011 L 127/1 ("to prevent the benefits of the trade liberalisation process in goods, services and establishment from being removed or eliminated by anti-competitive business conduct or anti-competitive transactions").

[17] See, e.g., Article 16.1(1) and (3) of the TPP. For similar requirements in EU agreements see below part 4.

[18] See, e.g., Article 16.1(2) of the TPP.

[19] See below part 3 for the scope of unilateral extraterritorial application of EU competition law (and US antitrust law), and the remaining need for international cooperation when it comes to enforcement.

[20] See, e.g., opinion by Advocate General *Wahl* in CJEU, case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2016:788, paras. 294–305. Where there are qualified effects on competition in one of the Member States, but no sufficient effect on trade between Member States can be shown, public international law would permit the application of EU competition law, but the conflicts and substantive law clauses on effects on trade contained in Articles 101 and 102 TFEU prevent the application of EU competition law (although the Member States' national competition laws may still apply extraterritorially).

[21] Below part 4.

[22] Below part 3.2.2.

focussed on protecting the interests and welfare of their home jurisdiction's domestic industry, that is, its producers and exporters. For public choice and collective action reasons, they are generally less focussed on their home jurisdiction's consumers, and consumers abroad do not figure in their calculation at all. The focus of competition lawyers tends to be total welfare and the process of competition, at least in their home jurisdictions, but potentially also, though to a lesser extent, abroad. On the margin, competition lawyers therefore give greater weight to consumer and total welfare than trade lawyers, who have a greater focus on domestic producer welfare.

This difference on the abstract level becomes clearer when comparing the trade concept of dumping and the competition law concept of predatory pricing.[23] From a trade perspective, dumping exists where an exporter charges prices that are lower than those normally charged on the exporter's home market, causing injury to the domestic industry in the export market.[24] From a competition perspective, the relationship between prices in the exporter's home market and the export market is irrelevant. Indeed, unless the competitor in question has a dominant position (or unless competitors collude), competition lawyers would not worry about low prices at all. Competition lawyers would be concerned only where there is collusion, or where the cumulative criteria of the undertaking being in a dominant position *and* prices being below an appropriate cost measure (and, depending on the jurisdiction, a dangerous probability or reasonable likelihood of recoupment) are fulfilled.

The different mind-sets of trade and competition lawyers also came to the fore in the Structural Impediment Initiative (SII): while Chicago-inspired competition lawyers argued (rightly or wrongly) that the largely vertical and conglomerate relationships making up the *keiretsu* system in Japan were unproblematic from a competition perspective,[25] the US Trade Representative focussed alone on the interests of the US exporters who felt that market entry was made more difficult.[26] This is sending mixed signals.

Yet another emanation of the different focus of trade law and competition law is crystallised in legislation exempting exporters from antitrust scrutiny. While the empirical magnitude of the effect of such (explicit or implicit[27]) exemptions for export cartels is controversial,[28] conceptually there is little question that they are an attempt to implement beggar-thy-

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[23] See, e.g., Hoekman and Mavroidis (1996).

[24] See Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in particular Article 2, which defines dumping; Article 3, which sets out how "injury" is determined; Article 4, which defines "domestic industry"; and Article 9 on the imposition and collection of dumping duties. In the EU, see Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union, OJ 2016 L 176/21 (the "Anti-Dumping Regulation"); see in particular Articles 1, 2, which set out the principles and what constitutes dumping; Article 3, which defines injury; Article 4, which defines who must be injured, namely the "Union industry" consisting of Union *producers*; and Article 9 on the imposition of definitive duties. It should, however, be mentioned that in the EU a final prong, which is *not* required by WTO law, is added, namely the requirement that anti-dumping measures are not against the Union's interest (Article 21 of the Anti-Dumping Regulation). This test takes the welfare not only of the industry, but also of consumers into account (Article 21(1) of the Anti-Dumping Regulation). However, first, the test shall be "based on an appreciation" of all the interests; this is less than saying that the measures should not be taken where the net welfare effect would be negative. Secondly, this prong is formulated as an exception to the rule: measures may not be applied only where "the authorities can clearly conclude that it is not in the Union's interest". Thirdly, as a matter of practice and public choice, one may expect producers' interests to be much more coordinated and better represented in the procedure than consumers' interests.

[25] Melamed (1998), p. 441 et seq. See also Trebilcock (1996), p. 99; Marsden (2010), p. 306; Wagner-von Papp (2012), p. 37 et seq.

[26] Supporting the arguments made in the SII by the USTR e.g. Morita (1991).

[27] Levenstein and Suslow (2005).

[28] Sokol (2008), p. 970 et seq.; Sweeney (2007), pp. 91–96.

neighbour strategies.[29] One could object that the preferential treatment of export cartels actually follows from the consumer welfare orientation of competition law: it lies in the effects test's nature, with its focus on domestic effects, to exempt pure[30] export cartels from scrutiny implicitly. Pure export cartels by definition do not have any substantial effects in their home jurisdiction. Unless the law additionally provides for enforcement based on the territoriality or nationality principle, pure export cartels are automatically (implicitly) exempt, even without explicit legislative exemptions.[31] From a competition policy point, however, export cartels are nearly universally condemned, and it is possible to prohibit export cartels: There are examples of legislation that subject cartel activity of pure export cartels to the home jurisdiction's scrutiny. From a public international law perspective, such legislation can be justified on the basis of the territoriality (or possibly the active nationality) principle: it is not, after all, the exercise of *extra*-territorial jurisdiction where an export cartel is established on domestic territory. Nevertheless, one could raise the question what the home jurisdiction's legitimate interest is in prohibiting activity that will not have any substantial effects on its own territory. In other words, one may ask whether it does not follow from the logic of the effects test that it *limits territorial jurisdiction as well as expands extraterritorial jurisdiction*. While such an interest-based genuine-link requirement has its attractions, it certainly departs from the orthodoxy in public international law that a sovereign state can prohibit conduct on its own territory and conduct by its own citizens. Even those who would reject territorial enforcement against conduct without foreseeable substantial domestic effects may be willing to let it suffice that collusive practices in the export sector may have spill-over effects on domestic competition, or that non-enforcement may result in negative reputational effects on the international level for the enforcing jurisdiction.

This leads to a further possible conflict between the trade lawyer's focus on domestic industry and the competition lawyer's focus on total welfare in the context of export cartels. Competition lawyers in the target state, where the negative welfare effects of the cartels on consumers are felt, will be in favour of enforcing the target state's competition laws against the export cartel. However, there have been cases where the target state's trade lawyers have tolerated or even actively encouraged foreign export cartels that raised prices, because this attenuated the competitive pressure on the target state's domestic industry (even where this came at the expense of domestic consumers), occasionally resulting in formalised voluntary export restraint agreements.[32] This is just another emanation of the trade lawyer's aversion to low prices by foreign competitors that we already encountered in relation to dumping. In essence, the target state in voluntary export restraint agreements delegates the task of imposing an anti-dumping tariff to the cartel, without regard to whether or not even the

[29] Wagner-von Papp (2012), pp. 49–51; Martyniszyn (2012b); Becker (2007); Guzman (2004), p. 373; Immenga (1995); Hoekman and Mavroidis (2003), p. 11; Scherer (1994), p. 93; Jenny (2012).

[30] As opposed to "mixed" export cartels, that is, export cartels where it is reasonably foreseeable that there will be substantial domestic effects, for example because of a realistic possibility of reimports, cf. CJEU, case C-306/96, *Javico v YSLP*, ECLI:EU:C:1998:173. A difficult question, but one that is beyond the scope of this overview, is to what extent the indirect effects resulting from the distortions in the pattern of trade caused by *any* cartel are to be taken into account when determining domestic effects (e.g., where an export cartel raises export prices, some of the domestic supply may shift to the export markets, thereby reducing domestic supply and raising domestic prices; or the raised export prices may lead to reduced demand in the export market, reducing production by domestic producers, which may result in reduced economies of scale, raising domestic prices).

[31] Wagner-von Papp (2012), pp. 49–51.

[32] Immenga (1995). These Voluntary Export Restraints (VERs) have been phased out under the WTO agreement on safeguards, but as the *In re Vitamins Antitrust Litigation* case shows (discussed in 3.2.1 below), they continue to have restrictive effects under a different name. For other continuing effects of VERs see Kagitani and Harimaya (2015).

relaxed preconditions for dumping would have been fulfilled, never mind the strict conditions of predatory pricing.

These different goals and mind-sets between trade and competition lawyers have arguably contributed to the relative neglect with which competition law has been treated in FTAs. Another factor why FTAs and other international agreements have not featured competition concerns more prominently is that many of these concerns can be addressed by unilateral extraterritorial enforcement. The scope and limits of this extraterritorial enforcement will be summarised in Section 3, before turning to competition law in international agreements in Section 4.

3 Unilateral Extraterritorial Enforcement

This is not the place to elaborate on the development and exact scope of unilateral extraterritorial enforcement.[33] Nevertheless, a brief overview is necessary to identify which competition issues can be addressed by unilateral extraterritorial enforcement (below 3.1) and the gaps that a pure unilateral extraterritorial enforcement scheme cannot fill (below 3.2, 3.3, and 3.4), and the overlaps that are created (below 3.5). For these gaps and overlaps international cooperation is required.

3.1 Qualified Effects Doctrine (in particular: "Component Cases")

The qualified effects doctrine has won the day in the US and the EU. For the US, this is an old hat.[34] The EU has famously taken its time, and the Court of Justice of the European Union (CJEU) has yet to adopt the qualified effects test explicitly. However, for all intents and purposes, EU institutions have always applied EU competition law extraterritorially *as if* a qualified effects test were the law of the land, either by explicitly applying the effects test, as the Commission, the General Court and various Advocates General at the CJEU have done,[35] or by using crutches, as the CJEU has done so far, like finding domestic conduct by employing the single economic entity principle[36] and an expansive implementation test,[37]

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[33] See e.g. Geradin et al. (2010); Wagner-von Papp (2012).

[34] *United States v Aluminum Co of America*, 148 F.2d 416 (2d Cir. 1945) ("Alcoa"); *Hartford Fire v California*, 509 U.S. 764, 795-796 (1993); *Hoffmann-La Roche v Empagran*, 542 U.S. 155, 165 (2004); US Department of Justice & Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation, 13 January 2017, Section 3, https://www.ftc.gov/public-statements/2017/01/antitrust-guidelines-international-enforcement-cooperation-issued-us (last accessed 16 July 2017). More precisely, the qualifications under *Alcoa* and *Hartford Fire* are that US law is applicable as soon as there are "intended and substantial effects". For foreign commerce other than import commerce, the more stringent criteria of the FTAIA of "direct, substantial and foreseeable effects" have to be fulfilled.

[35] GC, case T-286/09, *Intel v Commission*, ECLI:EU:T:2014:547, paras. 231–258; on appeal: opinion by Advocate General Wahl in CJEU, case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2016:788, paras. 294–305; see previously already Commission Decision 69/243/EEC, OJ 1969 L 195/11 (*Dyestuffs*); AG Mayras's opinion in CJEU, case 48/69, *ICI v Commission*, ECLI:EU:C:1972:32, paras. 688–691; Commission Decision 85/202/EC OJ 1985 L 85/1, para. 79 (*Woodpulp*); AG Darmon's opinion in CJEU, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström v Commission*, ECLI:EU:C:1988:258, para. 7 et seq.; obiter in GC, case T-91/11, *InnoLux v Commission*, ECLI:EU:T:2014:92, para. 62, finding that the implementation test was satisfied in the case at bar; see also opinion of Advocate General Wathelet in CJEU, case C-231/14 P, *InnoLux v Commission*, ECLI:EU:C:2015:292, who, however, considered the effects not sufficiently direct in the component case in question; the Court eventually did not consider the question to be relevant.

[36] CJEU, case 48/69, *Imperial Chemical Industries Ltd. v Commission*, ECLI:EU:C:1972:70.

[37] CJEU, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström v Commission*, ECLI:EU:C:1988:447, paras. 16–18 ("Wood Pulp I").

which, while notionally based on the territoriality principle and theoretically narrower than the effects doctrine, has never in its practical application been more restrictive than the effects doctrine would have been.

The qualifications of the effects test – effects must be "direct, substantial and foreseeable" – have so far not usually proved to be a high hurdle, either.[38] "Substantiality" is generally interpreted as a de minimis standard, and would more accurately be described as "appreciability"; even potential effects are sufficient.[39] "Foreseeability" is the normative filter by which conduct is excluded from scrutiny in which the actors could not reasonably have been aware that there would be anticompetitive effects in the jurisdiction in question. Where it is clear from the supply or distribution chains that semi-final or end products will reach a particular jurisdiction, it is unlikely that the foreseeability test would not be met.

The qualification creating the greatest difficulties is arguably the "directness" criterion. On a literal reading, it would seem to exclude any "indirect" effect, that is, any effect that is caused by way of some intermediate causal step. Taken literally, practically all economic effects are indirect, because markets are complex phenomena. Neither excluding all indirect effects nor including remote indirect ripple effects can be the correct interpretation of the "directness" criterion. The latter would subject all anticompetitive conduct to universal jurisdiction; the former would eliminate extraterritoriality entirely. Directness is therefore not a black-or-white question, but rather a question of which of the 50 shades of grey still deserve antitrust scrutiny. This has led to the problem how to treat the so-called "component cases". In these cases, which are getting more frequent because of global supply chains enabled by free trade,[40] the cartel is between producers of components that are sold and delivered to (innocent) assemblers in a foreign jurisdiction, who may or may not be subsidiaries of the cartelist or the eventual victim, where they are assembled into a final product, before this finished product is exported to the end consumers' jurisdiction. Some argue that here the end consumer market is only *indirectly* affected by the upstream cartel. Despite some prevarication,[41] US courts have decided that the US antitrust laws extend to these cases and the directness criterion is satisfied as long as there is a "reasonably proximate causal nexus".[42] This is also the position taken in the 2017 Antitrust Guidelines for International Enforcement

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[38] Wagner-von Papp (2012), pp. 28–32, for the qualifiers in the FTAIA.

[39] However, see opinion by Advocate General Wahl in CJEU, case C-413/14 P, *Intel v Commission*, ECLI:EU:C:2016:788, paras. 318–327, considering that the General Court's assessment that the effects were substantial is vitiated by error, that the relevant facts were not assessed by the General Court, and that the case should be referred back to the General Court.

[40] See the 2014 OECD-WTO-World Bank Report to the G20, Global Value Chains: Challenges, Opportunities, and Implications for Policy, Sydney, Australia, 19 July 2014, https://www.oecd.org/tad/gvc_report_g20_july_2014.pdf (last accessed 16 July 2017).

[41] See the decision *Motorola Mobility LLC v AU Optronics Corp*, 746 F.3d 842 (7th Cir. 27 March 2014) – Judge Posner arguing that the sale from the defendants to the plaintiff's foreign subsidiaries who then imported finished products into the US did not create a "direct" effect in the US, and additionally did not give rise to a claim in the US because these were indirect purchases (vacated and rehearing granted 1 July 2014); see also *Minn-Chem v Agrium*, 657 F.3d 650, 661–662 (7th Cir. 2011) (vacated and rehearing en banc granted). For the decisions after rehearing, see the references in the next footnote.

[42] *Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816 (7th Cir. 26 November 2014, amended 12 January 2015) – Judge Posner, now conceding that the effects may have been "direct" and assuming this for the appeal; however, rejecting that this gave rise to a claim in the US, because these were indirect purchases, *cert. den.* 15 June 2015; *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 409–413 (2d Cir. 2014); *Minn-Chem v Agrium*, 683 F.3d 845, 856–858 (7th Cir. 2012) – Chief Justice Diane Wood, considering that the "directness" criterion only requires a "reasonably proximate causal nexus", *cert. den.*, 134 S.Ct. 23 (2013). The three-judge panel in *United States v. Hui Hsiung*, 778 F.3d 738 (9th Cir. 2014, amended 30 January 2015) did not have to decide whether the majority opinion in *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004) should be reversed; that majority opinion had given a stricter interpretation to the directness criterion than the 2nd and 7th Circuit in the aforementioned cases. See also Wagner-von Papp (2012), pp. 29–31.

and Cooperation.[43] However, *private* enforcement in these cases is constrained because of the lack of standing for indirect purchasers under federal antitrust law.[44] This normative and nuanced understanding of the "directness" criterion is by far the preferable approach.

In EU law, the issues arising from component cases are not yet settled. They had first been raised in a case concerning the very same LCD cartel underlying the US case *Motorola v. AU Optronics*: the *InnoLux* case.[45] In this case, Advocate General *Wathelet* argued that the Court of Justice of the European Union should consider sales of the cartelised good (LCD screens) to the vertically integrated appellants' subsidiaries, who then integrated the screens into the end product, as extra-territorial sales that did not have a direct effect in the EU.[46] In making his argument he pointed to the "similar" decision in *Motorola v. AU Optronics*, apparently referring to the decision which the Seventh Circuit had later vacated[47] and not the revised November 2014 decision[48] which had eventually assumed the effects to be sufficiently direct.[49] The Advocate General accordingly recommended that the Court set aside the General Court's judgment and annul the Commission decision on the fine to the extent it was based on the sale of imported finished end products that merely incorporated the cartelised goods. The CJEU in *InnoLux* did *not* follow the Advocate General's recommendation and dismissed the appeal.[50] This, however, was not based on an acceptance of the Commission's and General Court's argument that the effects of the sales of finished end products containing the cartelised goods were sufficiently direct, substantial and foreseeable, but based on the argument that the question simply did not arise in the case: the cartel agreement undoubtedly had qualified effects and was implemented in the EU, and the only question raised by the case was the question whether the sales of the end products incorporating the cartelised goods could be used in determining the fine.[51] In the *Intel* case, Advocate General *Wahl* indicated that he, in contrast to Advocate General *Wathelet*, would not exclude the possibility that indirect sales could be considered an implementation of the infringement in the EU.[52] For

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[43] US Department of Justice & Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation, 13 January 2017, Section 3.2, https://www.ftc.gov/public-statements/2017/01/antitrust-guidelines-international-enforcement-cooperation-issued-us (last accessed 16 July 2017).

[44] See the *Empagran* and *Motorola Mobility* cases, as well as US Department of Justice & Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation, 13 January 2017, 3.2, 25-26, https://www.ftc.gov/public-statements/2017/01/antitrust-guidelines-international-enforcement-cooperation-issued-us (last accessed 16 July 2017).

[45] For an analysis of *InnoLux* see, e.g., Martyniszyn (2016).

[46] Opinion of Advocate General Wathelet in CJEU, case C-231/14 P, *InnoLux v Commission*, ECLI:EU:C:2015:292, paras. 23–62.

[47] *Motorola Mobility LLC v AU Optronics Corp*, 746 F.3d 842 (7th Cir. 27 March 2014) (vacated 1 July 2014).

[48] *Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816 (7th Cir. 26 November 2014, amended 12 January 2015), *cert. den.* 15 June 2015.

[49] Opinion of Advocate General Wathelet in CJEU, case C-231/14 P, *InnoLux v Commission*, ECLI:EU:C:2015:292, paras. 39–41.

[50] CJEU, case C-231/14 P, *InnoLux v Commission*, ECLI:EU:C:2015:451.

[51] CJEU, case C-231/14 P, *InnoLux v Commission*, ECLI:EU:C:2015:451, paras. 71–76.

[52] Opinion by Advocate General Wahl in CJEU, case C-413/14 P, *Intel v Commission,* ECLI:EU:C:2016:788, para. 292 with fn. 180, giving as an example the situation in which the two foreign companies are part of a single economic entity, as had been the case in *InnoLux*. As I have explained elsewhere (Wagner-von Papp (2012), p. 46), I agree that the implementation test can reach cases where the foreign cartelist sell to foreign subsidiaries which then export into the EU when cartelist and the subsidiary form a single economic entity; where this is not the case (as, for example, in the US case *Motorola Mobility v AU Optronics*), the qualified effects test would apply. Whether the effects are sufficiently direct in that case depends, in my view, on whether there is a "reasonably proximate causal nexus" (as the Second and Seventh Circuits put it in *Motorola Mobility LLC v AU Optronics Corp*, 775 F.3d 816 (7th Cir. 26 November 2014, amended 12 January 2015); *Lotes Co. v. Hon Hai Precision Industry Co.*, 753 F.3d 395, 409–413 (2d Cir. 2014); *Minn-Chem v Agrium*, 683 F.3d 845, 856–858 (7th Cir. 2012)); and whether this nexus is reasonably proximate is, in my view, synonymous with the question whether the effects in the jurisdiction in question were reasonably foreseeable (Wagner-von Papp (2012), p. 31).

reasons I have explained elsewhere, I would hope that the CJEU will follow the Second and Seventh Circuits in the US in determining whether or not the effects in the component cases are sufficiently "direct" by applying a purposive interpretation to this qualifier of the qualified effects test.[53]

There is no question that the long arm of unilateral extraterritorial competition law enforcement reaches far. Nevertheless, some gaps remain. In terms of prescriptive jurisdiction or substantive reach of the competition laws, gaps remain in so far as there is state involvement and in "outbound" cases (below 3.2). Arguably even more frequent are problems that result from limits to the enforcement jurisdiction, which, in contrast to prescriptive jurisdiction, is strictly territorial (below 3.3).

3.2 Gaps in the Prescriptive Jurisdiction or Substantive Reach

In terms of prescriptive jurisdiction, there are relatively few constraints on extraterritoriality. Remaining gaps in the extraterritorial coverage regarding prescriptive jurisdiction or the substantive requirements of competition law mostly concern the involvement of state action in one form or another (below 3.2.1). Also, access-restricting exclusionary measures implemented exclusively in a foreign jurisdiction are outside the reach of an effects test in combination with the territoriality principle; justifying exercising prescriptive jurisdiction in these cases hinges on the more doubtful combination of the effects principle with a passive personality principle (below 3.2.2).

3.2.1 An Example of State Involvement: In re Vitamin C Antitrust Litigation

With regard to prescriptive jurisdiction and substantive reach of the competition laws, nearly all gaps are due to state involvement in the infringement. Unproblematic are those cases in which one jurisdiction allows what the other prohibits – for example: export cartels from one jurisdiction, which are prohibited as import cartels by the other. In these cases, there is a way to conform with all legal obligations by refraining from the conduct, and courts both in the US and the EU have made clear that they will not accept the mere legality of conduct in one jurisdiction, or even encouragement by that state, as an excuse if the conduct infringes the law of the other jurisdiction.[54]

More problematic are cases in which one jurisdiction prescribes what the other proscribes (true conflict cases). Traditionally, cases in this category mostly had a procedural flavour: they often concerned cases in which one jurisdiction (most often the US) sought to compel the production of evidence in the discovery procedure, while the foreign jurisdiction had a blocking statute.[55] In cases concerning substantive competition law, defendants often plead true conflicts, but it is rare that courts find sufficient state compulsion to accept that there is a true conflict.

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[53] Wagner-von Papp (2012), pp. 29–31, 46.

[54] *Hartford Fire Insurance v. California*, 509 U.S. 764, 798–799 (1993); *Continental Ore v. Union Carbide*, 370 U.S. 690, 706–707 (1962); CJEU, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström v Commission*, ECLI:EU:C:1988:447, para. 19 et seq.; GC, case T-102/96, *Gencor v Commission*, ECLI:EU:T:1999:65, para. 103.

[55] See, e.g., *Société Nationale Industrielle Aérospatiale v US District Court*, 482 U.S. 522, 544 fn 29 (1987); *Richmark Corp. v Timber Falling Consultants*, 959 F.2d 1468, 1474-1475 (9th Cir. 1992); *In re Honda American Motor Dealership Relations Lit.*, 168 FRD 535 (D. Md. 1996). For a case in the EU see, e.g., Commission Decision 76/593/EEC, OJ 1976 L 192/27 – *CSV* (duty to comply with a request for information despite assumed applicability of Article 273 of the Swiss Criminal Code).

Recently, however, there has been an interesting case in the US in which a substantive competition law infringement was considered to be subject to a true conflict, and which demonstrates the interaction between competition and trade law. In *In re Vitamins Antitrust Litigation*, the defendants had not denied their participation in a price-fixing cartel, but instead argued that they had been compelled by Chinese law to enter into the cartel. Defendants argued that a "Chamber" determined prices, and that only exports based on these "industry-wide negotiated" Chamber-coordinated prices would receive the Ministry's seal of approval (so-called "price-verification-chop", or PVC system). In contrast to previous cases in which a true conflict had been claimed, the Chinese government filed an *amicus curiae* brief supporting the defendants' interpretation of Chinese law. Interestingly for our purposes, the Ministry had introduced this PVC system in 2002 in lieu of the previous system of export quote licences "in order to accommodate the new situations since China's entry into [the World Trade Organization], maintain the order of market competition, *make active efforts to avoid anti-dumping sanctions imposed by foreign countries on China's exports*, promote industry self-discipline and facilitate the healthy development of exports".[56] The cartel was, in other words, a reaction to the phasing out of VERs under the WTO agreement on safeguards.

The District Court had denied defendants' motions to dismiss and for summary judgment, because it considered the Ministry's submission that Chinese law compelled the cartel to be contradicted by other evidence, showing, among other things, that the defendants had occasionally undercut the PVC prices without any repercussions. Essentially, the District Court treated the Chamber merely as a cartel that was encouraged and facilitated, but not compelled, by the Chinese government. After the jury had returned its verdict, the District Court entered judgment for plaintiffs and awarded $147 million in damages. On 20 September 2016, the Court of Appeals for the Second Circuit vacated the judgment for plaintiffs, reversed the District Court's decision to reject defendants' motion to dismiss and remanded with the instruction to dismiss the complaint with prejudice. The Court of Appeals applied principles of international comity and found that it was an abuse of discretion for the District Court not to defer to the Chinese government's interpretation of its domestic laws, and that, pursuant to the *Timberlane Lumber* and *Mannington Mills* comity balancing test,[57] subject matter jurisdiction over the extraterritorial conduct should not be exercised. The Second Circuit interpreted the *Hartford Fire* decision narrowly: in that decision, the Supreme Court had held that because there was no true conflict, there was "no need in this litigation to consider other considerations that might inform the decision to refrain from the exercise of jurisdiction on the ground of international comity".[58] This left unclear whether the "other considerations" would have to be considered where there was a true conflict. The Second Circuit was of the view that these other comity balancing factors would have to be considered where there was a true conflict.[59] In applying these other factors, and finding comity to

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[56] *In re Vitamin C Antitrust Litigation, Animal Science Products Inc. et al. v. Hebei Welcome Pharmaceutical Co. et al.*, Docket No. 13–4791–cv (2nd Cir., 20 September 2016), slip opinion, p. 10 (emphasis added).

[57] *Timberlane Lumber v Bank of America*, 549 F.2d 597, 610 et seq. (9th Cir. 1976); *Mannington Mills v Congoleum Corp*, 595 F2d 1287, 1297-1298 (3d Cir. 1979). Also cf. § 403 Restatement (Third) of Foreign Relations Law and Justice Scalia's dissenting opinion in *Hartford Fire Insurance v. California*, 509 U.S. 764, 800 et seq. (1993).

[58] *Hartford Fire Insurance v. California*, 509 U.S. 764, 798 (1993).

[59] *In re Vitamin C Antitrust Litigation, Animal Science Products Inc. et al. v. Hebei Welcome Pharmaceutical Co. et al.*, Docket No. 13–4791–cv (2nd Cir., 20 September 2016), slip opinion, p. 21 et seq. The Second Circuit left open whether, as some lower courts had held even after *Hartford Fire*, a comity balancing test might even apply in the absence of a true conflict.

require refraining from exercising jurisdiction, the Second Circuit noted, among other things,[60] that

> "complaints as to China's export policies can adequately be addressed through diplomatic channels and the World Trade Organization's processes. Both the U.S. and China are members of the World Trade Organization and are subject to the same rules on export restrictions"[61]

and that

> "the Plaintiffs are not without recourse to the executive branch, which is best suited to deal with foreign policy, sanctions, treaties, and bi-lateral negotiations."[62]

The Second Circuit did not reach the act of state, foreign sovereign compulsion and political question issues because it considered that the District Court's judgment should be reversed on comity grounds. The US Supreme Court is currently considering the certiorari petition (sub nomine Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd., Docket No. 16-1220), and on 26 June 2017, the Court requested the Acting Solicitor General to file a brief for the United States, indicating that the Court is minded to consider granting certiorari.

In the EU, anticompetitive conduct *compelled* by foreign law would arguably not be subject to competition law, although it is less clear that European Courts would have found this to be the case on the facts of *In re Vitamin C Litigation*. The Chinese scheme in *In re Vitamins C Litigation* does not seem to amount to state compulsion that would prevent the undertakings from engaging in autonomous economic activity "on their own initiative" in the meaning of the EU state action cases.[63] While the legislative requirement of ministerial approval (the "chop") could be seen to remove the "possibility of competitive conduct", the Chinese legislative scheme seems merely to delegate price-setting authority to the market participants without obliging them to consider the public interest, and the ministerial procedure does not seem to give the minister room for independent control over the "industry-wide negotiated" prices.

Wood Pulp and *Gencor* at least indicate that the public international law principles of non-interference or proportionality could prevent exercise of international jurisdiction in the case of a true conflict, although these cases stopped short of endorsing such a principle.[64] It seems

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[60] Other factors mentioned were that the conduct took place between Chinese defendants on Chinese soil, that the case had led to strained relations to the Chinese Government, that the conduct was not targeted specifically at the US, that the defendants would otherwise be subject to contradicting obligations under US and Chinese law, and that injunctive relief would almost certainly not be obtainable in China.

[61] *In re Vitamin C Antitrust Litigation, Animal Science Products Inc. et al. v. Hebei Welcome Pharmaceutical Co. et al.*, Docket No. 13–4791–cv (2nd Cir., 20 September 2016), slip opinion, p. 41.

[62] *In re Vitamin C Antitrust Litigation, Animal Science Products Inc. et al. v. Hebei Welcome Pharmaceutical Co. et al.*, Docket No. 13–4791–cv (2nd Cir., 20 September 2016), slip opinion, p. 44.

[63] This assumes that the intra-EU state action jurisprudence would be applied by analogy to non-Member States as well. For a discussion whether the standards of the US state action docrine (that is, the *Midcal* test of clear articulation and active supervision, rather than strict compulsion) should be applied to foreign nations, see Baker and Rushkoff (1990), p. 425 et seq. For a comparison of the US Foreign Sovereign Compulsion Doctrine (which is separate from both the state action doctrine and the comity test applied in *In re Vitamins C Antitrust Litigation*) and the EU case law on state action see Martyniszyn (2012a), correctly pointing to the unclear status of state compulsion in EU law as either exempting from the substantive provisions in Articles 101, 102 TFEU (as is usually argued in cases involving compulsion) or as providing the undertakings (but not the compelling state) with a defence based on legal certainty while leaving the infringement of Articles 101 or 102 TFEU untouched, CJEU, case C-198/01, *Consorzio Industrie Fiammiferi (CIF) v Autorità Garante della Concorrenza e del Mercato*, ECLI:EU:C:2003:430, para. 53 et seq.

[64] CJEU, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström v Commission*, ECLI:EU:C:1988:447, para. 19 et seq.; GC, case T-102/96, *Gencor v Commission*, ECLI:EU:T:1999:65, para. 103.

likely that in cases of true conflict, the EU Court would not apply EU competition law, although there are policy reasons both for and against the application. On the one hand, the only way in which the undertakings could conform to both legal orders where the foreign state genuinely *requires* exports at a cartelised price, would be to refrain entirely from importing into the EU. This would dampen instead of invigorate competition in the EU. On the other hand, of course, refraining from applying competition law in true conflict cases provides an incentive to foreign undertakings and foreign governments to enact requirements compelling anti-competitive conduct.

It appears unlikely, however, that European courts would have accorded the Chinese Government's intervention the absolute deference that the Second Circuit required, and the findings of the District Court in the case arguably indicate that the system of voluntary self-restraint did not in practice amount to an irresolvable conflict between compliance with Chinese law and foreign competition law. In the past, claims of state compulsion have been treated with deep scepticism in the EU when raised outside a clear regulatory framework, and there is little reason to suspect that this will change.

Nevertheless, to the extent prescriptive jurisdiction or the legality of its exercise is denied in true conflict cases, this produces some gaps in the unilateral enforcement of competition law.

3.2.2 "Outbound" Cases: Effects on Exporters

The extraterritorial reach of EU competition law may also exclude cases in which private conduct on foreign soil prevents competition in that jurisdiction. In particular, where a foreign market forecloses access by exclusionary private agreements which have no substantial, direct and reasonably foreseeable effect on competition in the EU, not even the qualified effects doctrine in combination with the territoriality principle (much less the implementation test) can justify international jurisdiction. Why should the EU be permitted to export its competition law along with its goods?[65] From a European perspective, such issues of market access would have to be resolved by domestic competition law of the importing foreign state, possibly incentivised by FTAs or enforcement cooperation agreements.

The US is, or at least purports to be, more aggressive in these cases. The Foreign Trade Antitrust Improvement Act 1982 (FTAIA) provides that the Sherman and FTC Acts are applicable not only when import commerce is restrained (in which case the FTAIA does not limit the extraterritorial application at all[66]), or when there are direct, substantial and reasonably foreseeable effects on trade and commerce "which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations" (that is, when there are effects on any trade and commerce that is not purely foreign or pure export),[67] but also where there are direct, substantial and reasonably foreseeable effects "*on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States*".[68] Until 1992, the Department of Justice's (DOJ) 1988 International Guidelines made clear that the DOJ did not intend to make use of this provision. Footnote 159 of these 1988 Guidelines provided:

> "Although the [FTAIA] extends jurisdiction under the Sherman Act to conduct that has a direct, substantial, and reasonably foreseeable effect on the export trade or export commerce of a person engaged

[65] Trebilcock (1996).
[66] 15 U.S.C. § 6a *principium*. In these cases, where import commerce or trade is restrained directly, the *Hartford Fire* standard (intended and actual effects) applies.
[67] 15 U.S.C. § 6a(1)(A).
[68] 15 U.S.C. § 6a(1)(B).

> in such commerce in the United States, *the Division is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices*."[69]

In 1992, the DOJ famously withdrew this footnote 159, and declared that it would

> "in appropriate cases, take antitrust enforcement action against conduct occurring overseas that restrains United States exports, whether or not there is direct harm to US consumers, where it is clear that: (1) the conduct has a direct, substantial, and reasonably foreseeable effect on exports of goods or services from the United States; (2) the conduct involves anticompetitive activities which violate the US antitrust laws – in most cases, group boycotts, collusive pricing, and other exclusionary activities; and (3) US courts have jurisdiction over foreign persons or corporations engaged in such conduct."[70]

The subsequent 1995 DOJ/FTC International Guidelines included examples of market foreclosure to the detriment of US exporters in which the DOJ and FTC would consider application of US law justified.[71] The new 2017 DOJ/FTC International Guidelines do not mention this "outbound" category any longer.[72]

In theory, this extension of the unilateral extraterritorial reach of competition laws would seem to reduce the need for international cooperation. In practice, however, the US appears to use the *threat* of exercising this kind of "outbound" jurisdiction as leverage for negotiating a solution instead of actually enforcing their antitrust laws in this category of cases. The 1992 statement that superseded footnote 159 already hinted at this use. It stated that "[i]f the conduct is also unlawful under the importing country's antitrust laws, the [DOJ] is prepared to work with that country if that country is better situated to remedy the conduct and is prepared to take action against such conduct pursuant to its antitrust laws",[73] a statement that was included nearly verbatim in the 1995 DOJ/FTC International Guidelines.[74] An alternative way for the US to address these cases, and one which is arguably more consistent with the delimitation between antitrust and trade law than the application of antitrust law,[75] would be directly by trade remedies under section 301 of the 1974 Trade Act.[76]

3.3 Enforcement Jurisdiction

While prescriptive jurisdiction is far-reaching and subject to relatively few constraints (above 3.1 and 3.2), the same cannot be said about enforcement jurisdiction. Enforcement jurisdiction

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[69] 1988 U.S. Department of Justice Antitrust Enforcement Guidelines for International Operations, reprinted in: Department of Justice, World Competition 12 (1988), pp. 105–207, note 159 (emphasis added).
[70] Department of Justice, Press Release, Justice Department will challenge foreign restraints on US exports under antitrust laws, 3 April 1992, https://www.justice.gov/archive/atr/public/press_releases/1992/211137.htm (last accessed 16 July 2017).
[71] US Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations, April 1995, Section 3.122, Illustrative Examples D and E, https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations (last accessed 16 July 2017).
[72] US Department of Justice & Federal Trade Commission Antitrust Guidelines for International Enforcement and Cooperation, 13 January 2017, https://www.ftc.gov/public-statements/2017/01/antitrust-guidelines-international-enforcement-cooperation-issued-us (last accessed 16 July 2017).
[73] Department of Justice, Press Release, Justice Department will challenge foreign restraints on US exports under antitrust laws, 3 April 1992, https://www.justice.gov/archive/atr/public/press_releases/1992/211137.htm (last accessed 16 July 2017).
[74] US Department of Justice and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations, April 1995, Section 3.122, https://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations (last accessed 16 July 2017). The differences were minuscule ("as well" instead of "also", "Agencies" instead of "DOJ" to include the FTC as well; "country's authorities" instead of "country"). The 2017 Guidelines no longer refer to the category of "outbound" cases.
[75] Trebilcock and Iacobucci (2004), pp. 158–161.
[76] 19 U.S.C. § 2411.

has always been and remains strictly territorial. The EU and US can prohibit import cartels as much as they want, but this does not allow them to take investigatory (or sanctioning) measures on foreign soil.

In some cases, domestic enforcement may be used to overcome this gap. For example, requests for information from, or inspections of, a domestic subsidiary may yield the required evidence; and where the infringers directly import into the EU or US, imposing and enforcing pecuniary sanctions (and, by way of periodic penalty orders, injunctive relief) is usually unproblematic.

In many cases, however, it will be difficult to uncover evidence of competition law infringements committed entirely abroad, in particular where the infringers do not have any direct sales into the enforcing jurisdiction, as is the case in the "component cases" with upstream cartels in global value chains. In these cases, it may also be difficult to impose sanctions on the infringers. Even where infringers import directly into the EU or US, sanctions other than pecuniary sanctions on the undertakings, such as criminal sanctions against individuals, are difficult to enforce due to the territorial limits of enforcement jurisdiction.

To fill these gaps in jurisdiction for investigations and sanctioning, the cooperation of the foreign state is required. The cooperation may take the form of the foreign state enforcing its own domestic competition laws, or of assisting the state in which the anticompetitive effects materialise with extraterritorial enforcement. Part 4 will discuss ways to achieve such cooperation.

3.4 De Facto Gaps

The previous sections have argued that unilateral extraterritorial enforcement cannot reach all competition law infringements for *legal* reasons. It should not be forgotten, however, that there is also a critical de facto reasons for the emergence of gaps in a pure unilateral enforcement system.

First, there is the obvious problem that not all antitrust jurisdictions and authorities have the capacity to apply their laws extraterritorially. For example, even though *theoretically* export cartels should not lead to gaps, because every export cartel is an import cartel in another jurisdiction, it seems clear that despite the fact that some 130 jurisdictions have antitrust laws, and most are able to reach extraterritorial conduct *de iure*, not all of them will be able to enforce them effectively extraterritorially. In some cases, competition law infringements of multinationals may not be prosecuted for fear of deterring foreign investment.

Second, there is a difference in perception by market participants between extraterritorial enforcement by a foreign state and domestic competition law enforcement. Consider an export cartel, initiated in Europe or Asia, into the United States. Theoretically, the criminal sanctions under US law should deter such cartels. The goal of competition law enforcement is not primarily to uncover and sanction competition law infringements; the primary goal is to deter from infringements in the first place. The effectiveness of deterrence is mediated by the market participants' understanding of the content of the law. Market participants tend to be more familiar with the laws of their own jurisdiction than with foreign laws. This means that even where there are no legal obstacles to unilateral extraterritorial enforcement, it may still be preferable to bolster domestic competition law regimes and their enforcement.

To illustrate the point and that it does not only affect unsophisticated actors, one may look at the debate about criminalisation of competition law in European jurisdictions. Opponents of criminalisation in jurisdictions that have not yet criminalised (any or all) horizontal hardcore

cartels often argue that the introduction of criminal sanctions could lead to chilling effects for permissible horizontal cooperation. While this is in principle a legitimate argument, I have yet to see an acknowledgement that if there were such a chilling effect, we should already observe it for all undertakings that export to the United States (or to other jurisdictions enforcing criminal sanctions). Cartels with qualified effects in the United States are already criminalised, even though actors in other jurisdictions may not be aware of this fact.[77]

3.5 Overlaps

In addition to the enforcement gaps (above 3.2, 3.3 and 3.4), a system of uncoordinated unilateral extraterritorial enforcement would also lead to overlaps.[78] While the gaps are perhaps more exciting from a theoretical perspective, in practice the overlaps are arguably the greater problem. Many mergers require multijurisdictional merger filings, whether or not they pose a serious competition problem. These have to be adapted to the legal and factual differences of the various jurisdictions. The timeline may present problems for securing financing. In some cases, mergers have reportedly not been notified to all jurisdiction whose notification thresholds were exceeded to prevent one jurisdiction from derailing the deal, in the hope that the gun jumping would not be noticed in that jurisdiction. More often, the costs are in the form of a Type I error from one of several jurisdictions. Since the clearing of a merger in all affected jurisdictions is usually a sine qua non for proceeding with the transaction, the most restrictive jurisdiction will set the tone.[79]

Cartels are prosecuted and sanctioned in several jurisdictions,[80] and leniency applicants have to comply with multiple leniency regimes, which are broadly similar to each other but differ ever so slightly with regard to details such as the rules on markers, finalising the marker, the information required etc. Conflicting leniency conditions may mean that the overall expected sanctions have to be considered before a decision on the leniency application can be made – should a leniency application be submitted where the applicant would be the first in all affected jurisdictions and would receive full immunity from fines, but where the directors involved would still be criminally liable in one or two jurisdictions?

Both in the merger context and the leniency context "one-stop shop" solutions are regularly requested.[81] With regard to mergers, only very integrated systems such as the EU have been able to provide such a one-stop shop (Article 21 EU Merger Regulation 139/2004). With regard to leniency, so far not even the EU has been able to find a one-stop shop solution, even though the European Competition Network (ECN) recognises that

> "[m]aking multiple parallel applications across the ECN is a complex exercise given the existing discrepancies between the different leniency regimes. Certain discrepancies may have adverse effects on the effectiveness of individual programmes."[82]

Without greater cooperation and possibly a one-stop shop, costly mistakes can and do happen.[83] While the costs in individual cases where these mistakes happen are regrettable

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[77] Wagner-von Papp (2016), pp. 179–181.
[78] Guzman (2004) and Guzman (2010).
[79] See, e.g., Guzman (2004; 2010); Wagner-von Papp (2015b) 620–621.
[80] See, e.g., the *Marine Hose Cartel* – Capobianco and Nagy (2016), p. 7 et seq. with fn. 52–57.
[81] See, e.g., Taladay (2012), global one-stop shop for markers; Pereira (2016), for a European solution modifying the current ECN Model Leniency Programme approach and making it binding; see also Capobianco and Nagy (2016), pp. 12–14.
[82] ECN, ECN Model Leniency Programme, explanatory notes, as revised November 2012, http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf (last accessed 16 July 2017), p. 10, para. 6.
[83] Cf. CJEU, case C-428/14, *DHL Express (Italy) v AGCM*, ECLI:EU:C:2016:27.

enough, the greater cost is arguably the social cost associated with the loss of attractiveness of leniency programmes more generally.

4 Competition Law in Trade and Cooperation Agreements

The legal and de facto limits to the exercise of extraterritorial prescriptive and enforcement jurisdiction and the overlaps created by the proliferation of regimes that are enforced unilaterally result in a need for international cooperation. This cooperation could theoretically result in a multilateral competition law regime in which the current externalities between jurisdictions are internalised by agreeing on international standards and/or enforcement institutions – similar to the internalisation of such externalities between the Member States by applying EU law. Yet such moves towards a global competition law have, with the exception of some isolated and mostly sector-specific provisions, largely failed, from the Havana Charter to the Draft International Antitrust Code and the WTO Doha Round. Nor is it clear that a more centralised approach would be desirable. Among other things, a centralised regime could lead to an ossification of the law, which would be problematic in particular in an area of law as dynamic as competition law, and it could take less account of local circumstances or preferences. Some have suggested a lead jurisdiction approach.[84] This would eliminate overlaps and would avoid many of the drawbacks of centralisation. However, at least on the global level the political feasibility of this approach seems minuscule. Sovereign nations are not going to defer to the assessment by another nation's authority, especially given that both the legal and the factual conditions may differ starkly from jurisdiction to jurisdiction even where the same conduct or concentration is in question.

Realistically, then, international cooperation is largely based on bilateral and plurilateral agreements, either between states or between competition authorities. Agreements of this sort have two aims: first, the enactment and enforcement of domestic competition law in the jurisdiction in which the conduct occurs, and, second, the provision of assistance with the extraterritorial enforcement of the laws of the jurisdiction in which there are substantial, direct and reasonably foreseeable effects.

While the proliferation of bilateral and plurilateral agreements may at first glance look like a messy second-best solution, it can nevertheless result in a system of international cooperation that combines the advantages of a decentralised approach with the benefits of reducing overall complexity and gaps as well as overlaps. This part will describe from an EU-centric perspective how this is achieved. According to the prevailing gravity model of trade, the intensity of trade between two economies depends on the geographic distance and the size of the economies. The closer other states are geographically to the EU, the more intensive is the cooperation, and the closer their "orbit" is to the centre. This system of concentric circles, in which cooperation gets weaker as one moves away from the centre, establishes one node (or centre of gravity) of the international network. Other centres of gravity may develop similar systems of concentric circles of regional trade and cooperation agreements to make up other nodes in the network (for example, the US and NAFTA). The network is completed by establishing links between different nodes, such as the links between the EU and geographically distant but larger economies, such as the United States, Canada, Japan, Singapore and South Korea. This network of regional nodes and links between the nodes, combined with soft cooperation in organisations such as the International Competition Network or the OECD, may lead to a system of international coordination that reduces complexity, gaps and overlaps while avoiding the pitfalls of a centralised system.

[84] Budzinski (2008); see also Capobianco and Nagy (2016), p. 14 et seq.

4.1 Competition Law in Trade Agreements

FTAs concluded by the US and EU typically include a requirement to enact or maintain competition laws and specify some of the modalities of their enforcement and of cooperation between the parties. Famously, the US and the EU take a slightly different approach to the formulation of such requirements in FTAs.[85]

4.1.1 US Free Trade Agreements

FTAs concluded between the US and other states tend to establish a general requirement that the parties introduce or maintain competition laws (usually without further definition of the content of these laws) and enforcement authorities,[86] and relatively detailed provisions on due process rights,[87] cooperation,[88] and the principles of transparency[89] and non-discrimination.[90] The TPP, though now abandoned by the current US government,[91] even includes a provision that parties "should adopt or maintain […] measures that provide an independent right of action", or, failing that, at least the right for individuals to request that a competition authority investigate, and, where a violation is found, a right to a follow-on action.[92]

4.1.2 EU Trade Agreements

In contrast to the FTAs between the US and third countries, the EU's agreements tend to have a greater focus on requiring substantive competition law provisions that are similar to the competition rules in the TFEU. International agreements concluded between the EU and other states tend to fall into different categories, depending on the closeness of the association between the EU and the other state.[93]

The following sections will outline the system of concentric circles that determines the depth of the cooperation in competition matters, starting from the centre – cooperation within the EU itself – moving to the inner orbit of close cooperation between the EU Commission and the EFTA Surveillance Authority and via Stabilisation and Accession Agreements (SAAs) to Euro-Mediterranean Agreements (EMAs) and Partnership and Cooperation Agreements (PCAs). These agreements describe the various "orbits" around the EU that together with the EU make up one of several clusters on the global scale. The last section in this part will look

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[85] See Solano and Sennekamp (2006); see also the typology in Laprévote FC et al., Competition policy within the context of Free Trade Agreements, E15 Initiative, September 2015, http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-FINAL.pdf (last accessed 16 July 2017), pp. 2–14; Papadopoulos (2013), p. 99; Tschaeni and Engammare (2013) p. 44 et seq.

[86] See, for example, Article 16.1 of the Trans-Pacific Partnership (TPP), https://ustr.gov/sites/default/files/TPP-Final-Text-Competition.pdf (last accessed 16 July 2017). This provision does, however, specify that the objective of the laws is to be the promotion of "economic efficiency and consumer welfare".

[87] See, e.g., Article 16.2 of the TPP.

[88] See, e.g., Articles 16.4 and 16.5 of the TPP.

[89] See, e.g., Article 16.7 of the TPP.

[90] See the reference in Article 16.1 of the TPP to the APEC Principles to Enhance Competition and Regulatory Reform, done at Auckland, 13 September 1999, http://www.apec.org/Meeting-Papers/Leaders-Declarations/1999/1999_aelm/attachment_apec.aspx (last accessed 16 July 2017), which contain non-discrimination as the first principle.

[91] Executive Order of 23 January 2017, https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific (last accessed 16 July 2017).

[92] Article 16.3 of the TPP.

[93] For greater analytical depth than the overview in this section can provide, see Papadopoulos (2010), pp. 93–144.

at several links interconnecting the cluster around the EU with other clusters – such as CETA, the EU-South Korea FTA, the EU-Singapore FTA and TTIP.

European Union

The centre of this system of concentric circles is made up of the supranational law of the European Union, which consists of a substantive harmonisation of national competition laws as well as close cooperation of the national competition authorities (NCAs) among themselves and between the NCAs and the Commission as *primus inter pares* in the ECN.

The control of illegal state aid is largely centralised. Outside the state aid procedure, the substantive and procedural cooperation is closest with regard to merger control. EU law provides for a one-stop shop for concentrations with a Union dimension (Article 21(3) EU Merger Regulation 139/2004), thus avoiding overlaps altogether which could result from the applicability of several national competition laws of different Member States and ultimately in divergent outcomes. This desire to avoid overlaps is also apparent in the possibility to refer a concentration without a Union dimension to the Commission if it would otherwise be controlled under the laws of at least three Member States, Article 4(5) EU Merger Regulation 139/2004. The close cooperation in merger cases between the Commission and the NCAs, which aim at allocating jurisdiction to the appropriate level in the multilevel governance structure and at avoiding gaps and overlaps, can further be seen in the other possibilities for referral (Articles 4(4), 9 and 22 EU Merger Regulation 139/2004). This does not completely exclude the possibility of overlaps, for example, where a merger is controlled under the laws of several Members States' laws and not referred. Nevertheless, it reduces the danger of gaps and overlaps to the greatest possible extent. If concerns arise from concentrations in third countries, Article 24 with recital 44 of the EU Merger Regulation 139/2004 provide for a feedback mechanism to enable the EU to address such concerns by negotiating for non-discriminatory treatment.

With regard to the competition rules on conduct ("antitrust"), the supranational competition rules in the Treaty have to be applied by the national competition authorities (Article 3(1) Regulation 1/2003[94]) where trade between Member States may be affected. In the area of restrictive agreements, the convergence rule in Article 3(2) Regulation 1/2003 provides that national law may not lead to diverging results. Only in the area of unilateral conduct is there a significant danger of overlaps with diverging substantive standards.

The information flow within the European Competition Network (ECN) is governed in antitrust cases by Regulation 1/2003 – in particular Articles 11 to 16 –, the Network Notice,[95] and the Notice on cooperation between the Commission and the courts of the Member States.[96] Crucially, these provisions allow the exchange of confidential information within the ECN. In merger cases, the Commission liaises with the NCAs and consults the Advisory Committee under Article 19 of the EU Merger Regulation 139/2004.

[94] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.
[95] Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/43.
[96] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101/54.

European Economic Area

The closest cooperation with non-EU Member States exists between the Surveillance Authorities within the European Economic Area (EEA). The EEA Agreement's substantive competition law provisions are practically identical to those of the EU anyway. Protocol 23 concerning the Cooperation between the Surveillance Authorities (Article 58) provides for the closest possible cooperation between the EFTA Surveillance Authority and the European Commission, including administrative assistance (Article 8) and the exchange of confidential information (Article 9). Protocol 24 provides for similarly close cooperation in the area of merger control.

Stabilisation and Accession Agreements and Turkey Customs Union

Moving from the centre via the "first orbit" made up of EEA states (and disregarding, for the time being, the special status of Switzerland), the next closest cooperation is afforded to candidate countries for accession and potential candidate countries for accession. The EU has entered into "Stabilisation and Accession Agreements" (SAAs) with the Western Balkan candidate countries for accession to the European Union (Albania, the former Yugoslav Republic of Macedonia [fYRoM], Montenegro, and Serbia) and potential candidate countries (Bosnia and Herzegovina, Kosovo). These agreements contain prohibitions that mirror (in greater or lesser detail) the competition provisions in the Treaty on the Functioning of the European Union (TFEU), in particular on state monopolies,[97] horizontal and vertical anticompetitive agreements,[98] abuses of dominant positions,[99] public undertakings and undertakings with special and exclusive rights,[100] as well as state aid.[101] With the candidate country Turkey, the Turkey Customs Union Decision 1/95, based on the Ankara Agreement, provides for a nearly verbatim rendering of Articles 101, 102 and 107 TFEU as far as trade between the EU and Turkey may be affected,[102] includes the content of Article 106 TFEU by reference,[103] and provides for an approximation of Turkey's competition laws to the EU's competition rules.[104] Of course, even identical "law in the books" does not necessarily result in similar "law in action", especially where the provisions are as abstract as competition provisions. The SAAs and the Turkey Customs Union Decision 1/95 seek to address this

[97] Compare Article 37 TFEU with Article 40 in the Albania SAA, Article 39 in the fYRoM SAA, Article 43 in the Montenegro and Serbia SAAs, Article 41 in the Bosnia and Herzegovina SAA, Article 45 in the Kosovo SAA.

[98] Compare Article 101 TFEU with Article 71(1)(i) in the Albania SAA, Article 69(1)(i) in the fYRoM SAA, Article 73(1)(i) in the Montenegro and Serbia SAAs, Article 71(1)(a) in the Bosnia and Herzegovina SAA, Article 75(1)(a) in the Kosovo SAA.

[99] Compare Article 102 TFEU with Article 71(1)(ii) in the Albania SAA, Article 69(1)(ii) in the fYRoM SAA, Article 73(1)(ii) in the Montenegro and Serbia SAAs, Article 71(1)(b) in the Bosnia and Herzegovina SAA, Article 75(1)(b) in the Kosovo SAA.

[100] Compare Article 106 TFEU with Article 72 in the Albania SAA; see also Article 70 in the fYRoM SAA, Article 74 in the Montenegro and Serbia SAAs, and Article 76 in the Kosovo SAA which directly reference Article 86 TEC or Article 106 TFEU.

[101] Compare Article 107 TFEU with Article 71(1)(iii) in the Albania SAA, Article 69(1)(iii) in the fYRoM SAA, Article 73(1)(iii) in the Montenegro and Serbia SAAs; Article 71(1)(c) in the Bosnia and Herzegovina SAA, Article 75(1)(c) in the Kosovo SAA.

[102] Compare Article 32 of Decision No 1/95 of the EC-Turkey Association Council of 22 December 1995 on implementing the final phase of the Customs Union, OJ 1996 L 35/1, with Article 101 TFEU; Article 33 of Decision 1/95 with Article 102 TFEU; Article 34 of Decision 1/95 with Article 107 TFEU. See also Article 42 of Decision 1/95 and compare it to Article 37(1) TFEU.

[103] Article 41 Decision 1/95 directly references Article 90 TEC (now Article 106 TFEU).

[104] Article 39 of the Turkey Customs Union Decision 1/95.

point by requiring interpretation of the competition rules in accordance with the EU's practice.[105]

In comparison to US FTAs, the institutional, procedural and cooperation issues seem at first glance to be treated superficially in the SAAs and the Turkey Customs Union Decision 1/95.[106] However, it should be borne in mind that there are separate communication channels for notifications available in the form of the Stabilisation and Association Council and the EU-Turkey Association Council.[107]

Euro-Mediterranean Agreements

Similarly, but in a slightly less detailed fashion, agreements between the EU and various Mediterranean countries provide for the adoption of rules similar to the substantive EU competition rules in so-called "Euro-Mediterranean Agreements" (EMAs). These form the next "orbit" of the system of concentric circles of cooperation. The scope varies slightly from EMA to EMA. Provisions similar to Articles 101 and 102 TFEU are always included,[108] as are rules on state monopolies similar to Article 37 TFEU[109] and public undertakings and undertakings with special and exclusive rights similar to Article 106 TFEU.[110] Not all, but some, EMAs contain rules on public (state/official) aid similar to Article 107 TFEU,[111] and/or public procurement.[112] A few of the EMAs provide, similar to the SAAs, for the application

[105] For example, the Albania SAA provides in Article 71(3): "Any practices contrary to this Article shall be assessed on the basis of criteria arising from the application of the competition rules applicable in the Community, in particular from Articles 81, 82, 86 and 87 of the Treaty establishing the European Community [that is, Articles 101, 102, 106 and 107 TFEU] and interpretative instruments adopted by the Community institutions." See, identically, Article 73(2) in the Montenegro and Serbia SAAs, Article 71(2) in the Bosnia and Herzegovina SAA, and (using the TFEU numbering) Article 75(2) in the Kosovo SAA. See, similarly (but leaving out Article 86 TEC/Article 106 TFEU, which is directly referenced elsewhere in those agreements), Article 69(2) in the fYRoM SAA, Article 35 of the Turkey Customs Union Decision 1/95.

[106] The SAAs require the establishment of an operationally independent competition authority (see SAA Article 71(3), (4) in the Albania SAA; Article 73(3), (4) in the Montenegro and Serbia SAAs; Article 71(3), (4) in the Bosnia and Herzegovina SAA; Article 75(3), (4) in the Kosovo SAA) and some provide for information exchange in a rather desultory fashion (see Article 69(6) in the fYRoM SAA; see also Article 36 of the Turkey Customs Union Decision 1/95). More detailed transparency requirements apply to state aids (see Article 71(5) of the Albania SAA, Article 69(3)(b) in the fYRoM SAA, Article 73(5), (6) in the Montenegro and Serbia SAAs, Article 71(5), (6) in the Bosnia and Herzegovina SAA, Article 75(5), (6) in the Kosovo SAA). The Turkey Customs Union Decision 1/95 provides for notifications (Articles 39(3) and 40) and positive comity (Article 43); where one of the parties objects to the state aid granted by the other, conflicts not settled consensually will be resolved by arbitration or litigation before the CJEU (Article 39(4), (5)).

[107] See Article 71(9) in the Albania SAA, Article 69(5) in the fYRoM SAA, Article 73(10) in the Montenegro SAA, Article 73(8), (9) Serbia SAA, Article 71(10) in the Bosnia and Herzegovina SAA, Article 75(9) in the Kosovo SAA.

[108] See Article 41(1) Algeria EMA; Article 34(1)(i), (ii) Egypt EMA; Article 36(1)(i), (ii) Israel EMA; Article 53(1)(a), (b) Jordan EMA; Article 35(1)(a), (b) Lebanon EMA; Article 36(1)(a), (b) Morocco EMA; Article 36(1)(a), (b) Tunisia EMA; Article 30(1)(i), (ii) West Bank and Gaza Strip EMA.

[109] Article 42 Algeria EMA; Article 35 Egypt EMA; Article 37 of the Israel EMA; Article 54 Jordan EMA; Article 36 Lebanon EMA; Article 37 of the Morocco EMA; Article 37 of the Tunisia EMA; Article 31 West Bank and Gaza Strip EMA.

[110] Article 43 of the Algeria EMA; Article 36 Egypt EMA; Article 38 of the Israel EMA; Article 55 Jordan EMA; Article 37 Lebanon EMA; Article 38 Morocco EMA; Article 38 Tunisia EMA; Article 32 West Bank and Gaza Strip EMA.

[111] Article 34(1)(iii) Egypt EMA, Article 36(1)(iii) Israel EMA, Article 53(1)(c) Jordan EMA; Article 36(1)(iii) Morocco EMA; Article 36(1)(iii) Tunisia EMA; Article 30(1)(iii) West Bank and Gaza Strip EMA (each supplemented by transparency requirements).

[112] Article 38 Egypt EMA; Article 58 Jordan EMA; Article 34 West Bank and Gaza Strip EMA.

of these rules in accordance with the criteria applied to the EU rules.[113] Some of these agreements are supplemented by detailed cooperation agreements similar to (and affected by the same weaknesses as) the dedicated intergovernmental cooperation agreements between the EU and the US,[114] providing for notification, exchange of information, and negative and positive comity.[115] Others only contain a cursory rule on information exchange.[116] The EMAs also provide that appropriate measures may be taken, after giving an opportunity for consultation between the parties, where anticompetitive agreements or abuses of a dominant position "cause or threaten to cause serious prejudice" to the other party.[117]

Partnership and Cooperation Agreements and subsequent Association Agreements

The next orbital ring is formed of Partnership and Cooperation Agreements (PCAs) between the EU and a number of East European and Asian countries. In contrast to the SAAs and EMAs described above, some PCAs merely provide on an abstract level that the parties endeavour to approximate their competition laws gradually, and that the parties "examine ways" to coordinate the application of their competition laws in cases where trade between them is affected.[118] Some of the PCAs, however, go further and approach the level of detail contained in EMAs.[119] Action plans adopted under the European Neighbourhood Policy have added a few more specific obligations, for example with regard to transparency in state aids.[120] The cooperation with these states is further strengthened, for example, by the contacts in the Cooperation Council and the Twinning Instrument, which allows for secondments of civil servants between the parties. Nevertheless, the obligations in the PCAs by themselves remain relatively open textured.

Some of the parties to PCAs have since entered into more detailed Association Agreements. These provide for an obligation to maintain a competition authority,[121] and maintain comprehensive competition laws "which effectively address anti-competitive agreements, concerted practices and anti-competitive unilateral conduct of enterprises with dominant market power and which provide effective control of concentrations to avoid significant

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[113] Article 53(2) Jordan EMA: Article 36(2) Morocco EMA; Article 36(2) Tunisia EMA; Article 30(2) West Bank and Gaza Strip EMA.

[114] Below part 4.2.2.

[115] Article 41(2) of the Algeria EMA, with Annex 5 to that agreement; Decision No. 1/2004 of the EU-Morocco Association Council of 19 April 2004 adopting the necessary rules for the implementation of the competition rules, OJ 2005 L 165/10, with the Annex Mechanism of cooperation between the Parties' competition authorities responsible for the implementation of competition rules.

[116] Article 34(6) of the Egypt EMA; Article 53(7) Jordan EMA; Article 36(7) Morocco EMA; Article 36(7) Tunisia EMA; Article 30(8) West Bank and Gaza Strip EMA (all subject to the possibility of more detailed implementing rules).

[117] Article 41(3) of the Algeria EMA; Article 34(5) Egypt EMA; Article 36(5) Israel EMA; Article 53(6) Jordan EMA; Article 36(6) Morocco EMA; Article 36(6) Tunisia EMA; Article 30(7) West Bank and Gaza Strip EMA.

[118] Article 43 Armenia PCA; Article 43 Azerbaijan PCA; Article 43, 44(2) Georgia PCA.

[119] Cf. Article 48(2) Moldova PCA; Article 49(2) Ukraine PCA; more tentatively Articles 53, 55 Russian Federation PCA.

[120] See, e.g., section 4.5.5. of the Proposal for a Council Decision on the position to be adopted by the Communities and its Member States within the Cooperation Council established by the Partnership and Cooperation Agreement establishing a partnership between the European Communities and its Member States, of the one part, and the Republic of Azerbaijan, of the other part, with regard to the adoption of a Recommendation on the implementation of the EU-Azerbaijan Action Plan, COM (2006) 637 final, adopted by the Council for submission to the EU-Azerbaijan Cooperation Council, 8 November 2006, CS/2006/14416, and which was adopted in the same year by that Cooperation Council.

[121] Article 204(2) of the 2014 EU-Georgia Association Agreement; Article 335(2) of the 2014 EU-Moldova Association Agreement; Article 255(2) of the 2014 EU-Ukraine Association Agreement.

impediment to effective competition and abuse of dominant position."[122] Noteworthy is in particular the inclusion of a requirement to maintain a merger control regime, which is not usually included even in the more elaborate (but older) SAAs and EMAs. Similar to these agreements, the Association Agreements also provide for rules on state monopolies and undertakings with exclusive and special rights[123] and state aids[124]. The 2014 Ukraine Association Agreement goes further by obliging the Ukraine to approximate its laws to very specific instruments, including Regulation 1/2003, the EU Merger Regulation 139/2004, and the vertical Block Exemption Regulation 330/2010.[125]

The EU-Moldova and EU-Ukraine Agreements additionally contain rudimentary cooperation provisions that do not, however, approach the level of detail seen in the cooperation agreements discussed below.[126]

Similar to the US-style FTAs, but in less detail, the Association Agreements also state that the parties "recognise the importance of applying their respective competition laws in a transparent and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence of the enterprises concerned."[127]

However, in a feature that is common to practically all FTAs with competition provisions, the competition rules (with the exception of the state aids provisions) are excluded from the dispute settlement mechanism of the Association Agreements.[128]

Links between Nodes: CETA, Singapore and South Korea (and TTIP, Japan...?)

The sections above deal with trade agreements on different orbitals with the EU at their centre. The international network is completed by links between the nodes, namely by trade agreements between the EU and geographically distant states that are on a similar level of economic development. Recent examples of such trade agreements are the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada,[129] the (nearly certainly stillborn) Transatlantic Trade and Investment Partnership (TTIP),[130] and the FTAs with

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[122] Article 204(1) of the 2014 EU-Georgia Association Agreement; similarly Article 335(1) of the 2014 EU-Moldova Association Agreement; Article 254 of the 2014 EU-Ukraine Association Agreement.

[123] Article 205 of the 2014 EU-Georgia Association Agreement; Article 336 of the 2014 EU-Moldova Association Agreement; Articles 257 and 258 of the 2014 EU-Ukraine Association Agreement.

[124] Article 206 of the 2014 EU-Georgia Association Agreement; in more detail Articles 339–342 of the 2014 EU-Moldova Association Agreement; in even more detail, and subject to the dispute settlement mechanism, Articles 262–267 of the 2014 EU-Ukraine Association Agreement, which even requires interpretation in accordance to the EU rules (Article 264).

[125] Article 256 of the 2014 EU-Ukraine Association Agreement.

[126] Articles 337 and 343 of the 2014 EU-Moldova Association Agreement; Articles 259 and 260 of the 2014 EU-Ukraine Association Agreement.

[127] Article 204(3) of the 2014 EU-Georgia Association Agreement; Article 335(1) of the 2014 EU-Moldova Association Agreement; going into a little more detail Article 255(3) of the 2014 EU-Ukraine Association Agreement.

[128] Article 207 of the 2014 EU-Georgia Association Agreement; Article 338 of the 2014 EU-Moldova Association Agreement; see also Article 261 of the 2014 EU-Ukraine Association Agreement, which, however, excludes the duty to approximate to the various competition Regulations in Article 256.

[129] Council Decision(EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ 2017 L 11/1. CETA was approved by the European Parliament on 15 February 2017.

[130] For the EU negotiating position, see EU negotiating texts in TTIP, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#regulatory-cooperation (last accessed 16 July 2017). Specifically for the EU negotiating position with regard to competition matters see below.

Singapore and South Korea.[131] A number of further FTAs are in the pipeline: the negotiations of the EU-Japan FTA are at an advanced stage,[132] the EU-India FTA[133] has been held up primarily because of reservations on part of the UK, and negotiations with a number of Mercosur nations are planned.[134]

For the most part, these agreements do not contain great detail on competition law. At first glance, this may seem surprising, because at least Canada, the United States and South Korea have been especially vigorous enforcers of competition law in recent years, so that the elimination of overlaps and gaps with these jurisdictions would seem to be a particularly pressing concern. The explanation lies arguably not so much in the uneasy relationship between trade law and competition law described above in part 2.3. Instead, the very importance of cooperation with these active enforcers of competition law has led to competition-law specific cooperation agreements that predate the trade agreements, and which will be described below in part 4.2.1.

CETA refers to competition law primarily in Chapter 17. Article 17.2.1 provides that the parties "recognise the importance of free and undistorted competition" and the potential of anti-competitive business conduct to "distort the proper functioning of markets and undermine the benefits of trade liberalisation." The parties "shall take appropriate measures to proscribe anti-competitive business conduct" (Article 17.2.2). These measures "shall be consistent with the principles of transparency, non-discrimination, and procedural fairness", and in particular exclusions from the application of competition law are to be transparent (Article 17.2.4). The measures are to be applied to public entities according to Canadian and EU law respectively (Article 17.3). In terms of cooperation, Article 17.3 refers to and incorporates into the CETA by reference the terms of the 1999 Agreement between the European Communities and the Government of Canada Regarding the Application of their Competition Laws. In keeping with other trade and association agreements,[135] the provisions on competition policy in Chapter 17 are not subject to the dispute settlement mechanism (Article 17.4).

Chapter 18 of the CETA deals specifically with state enterprises, monopolies, and enterprises granted special rights or privileges ("covered entities" as defined in Article 18.1). While the parties are not prevented "from designing or maintaining state enterprises or monopolies or from granting special rights or privileges", they are under a duty not to "require or encourage such a covered entity to act in a manner inconsistent with [the CETA]" (Article 18.3), and to ensure that such covered entities accord non-discriminatory treatment to covered investments, goods and service suppliers (Article 18.4). Covered entities generally have to "act in accordance with commercial considerations" when purchasing or selling goods or purchasing or supplying services, unless non-commercial considerations are required to fulfil the purpose

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[131] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ 2011 L 127/1.

[132] On 6 July 2017, the EU and Japan announced the agreement in principle of the Economic Partnership Agreement and the Strategic Partnership Agreement at political level (EU Commission, 24th EU-Japan Summit Joint Statement, Statement/17/1920, http://europa.eu/rapid/press-release_STATEMENT-17-1920_en.htm (last accessed 16 July 2017)).

[133] See http://ec.europa.eu/trade/policy/countries-and-regions/countries/india/index_en.htm (last accessed 16 July 2017).

[134] See Mercosur-EU joint communiqué 28th negotiating round, Brussels, 7 July 2017, http://trade.ec.europa.eu/doclib/press/index.cfm?id=1688 (last accessed 16 July 2017); Barber T, Brexit and Trump push world trade deals up EU priority list, Financial Times, 28 February 2017.

[135] Article 207 of the 2014 EU-Georgia Association Agreement; Article 338 of the 2014 EU-Moldova Association Agreement; Article 261 of the 2014 EU-Ukraine Association Agreement.

of the monopoly, special right, privilege or public mandate (Article 18.5). Chapter 19 goes into much more detail with regard to public procurement. In other sections of CETA, competition law is mentioned in order to ensure that CETA provisions do not prevent the application of competition law. For example, obligations to separate ownership or to prevent a concentration of market power under competition law are not inconsistent with the obligation to guarantee unimpeded market access through establishment (Article 8.4.2), and the forced transfer of technology or proprietary knowledge is permissible where it is imposed as a remedy of a competition law infringement (Article 8.5.4).

The EU-South Korea FTA addresses competition law specifically in Chapter 11.[136] Prior to the FTA, the EU had already entered into an agreement with South Korea on cooperation on anti-competitive activities (although one would hope that what is meant is cooperation on *fighting* anti-competitive activities).[137] The FTA refers to this agreement in Article 11.6.2. and adds a general obligation to enter into consultations regarding the other Party's representations and to provide relevant non-confidential information (Article 11.7). Most of the other competition provisions in the EU-South Korea FTA are similar to the ones described for CETA. An interesting aspect is that the EU-South Korea FTA does not only oblige the parties to maintain their own competition rules against restrictive agreements, concerted practices and abuse of dominance by one or more enterprises as well as effective merger control (11.1.2.) and to maintain appropriately equipped competition authorities that apply the law in a transparent, timely and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence (Article 11.3.). In addition, Article 11.1.3 essentially replicates the operative text of Articles 101 and 102 TFEU and the substantive merger control test (SIEC test) from Article 2 of the EU Merger Regulation 139/2004, substituting "trade between [the Parties]" for "trade between Member States" to define activities that are "incompatible with the proper functioning of" the FTA. These rules are supplemented by rules on public enterprises, enterprises with special or exclusive rights, and state monopolies (11.4 and 11.5). The dispute settlement mechanism in the EU-South Korea FTA does not apply to disputes arising under any of the aforementioned rules (Article 11.8). This is a difference to the CETA, in which the application of the dispute settlement mechanism is excluded only for the general competition rules in Chapter 17, but not for disputes arising under Chapter 18 on state enterprises, monopolies, and enterprises granted special rights or privileges. In the competition chapter, only the rules on specific subsidies in the EU-South Korea FTA (Articles 11.9 to 11.15) are subject to the dispute settlement mechanism.

The EU-Singapore FTA, negotiations for which were concluded on 17 October 2014, considers competition and related matters in Chapter 12 similarly to the EU-South Korea FTA.[138] What is separated in the EU-South Korea FTA into two separate provisions (the maintenance of effective competition rules on their own territory on the one hand, and the practices prohibited to the extent they affect trade between the parties), is conflated in the EU-Singapore agreement: the parties agree to maintain specified competition rules, which are here essentially an adapted replication of Articles 101, 102 and the substantive SIEC/SLC

[136] Council Decision of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ 2011 L 127/1.

[137] Council Decision 2009/586/EC of 16 February 2009 relating to the conclusion of the Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, OJ 2009 L 202/35. This agreement covers the "usual" content of such cooperation agreements as outlined below in section 4.2, such as notifications and consultation, positive and negative comity, and assistance in and coordination of enforcement activities.

[138] See the authentic text as of May 2015 under http://trade.ec.europa.eu/doclib/press/index.cfm?id=961 (last accessed 16 July 2017).

merger test, only to the extent they affect trade between the parties (Article 12.1). Similar to the EU-South Korea FTA, the EU-Singapore Agreement obliges the parties to maintain appropriately equipped competition authorities that apply the rules in a "transparent and non-discriminatory manner, respecting the principles of procedural fairness and rights of defence"; in the EU-Singapore FTA, the right of the parties to be heard is specifically mentioned. Again the general competition rules are supplemented by rules on public undertakings, undertakings entrusted with special or exclusive rights and state monopolies (Articles 12.3 and 12.4); Article 12.3.4. imposes an obligation on Singapore to ensure that its public undertakings and undertakings entrusted with special or exclusive rights act in accordance with commercial principles. Articles 12.5 to 12.10 cover specific subsidies similar to the equivalent rules in the EU-South Korea FTA. Articles 12.11 to 12.13 outline generic cooperation and confidentiality obligations. Only Article 12.7 on Prohibited Subsidies is subject to the dispute and mediation mechanisms under the EU-Singapore FTA.

As mentioned above, the EU has a number of other free trade agreements in the pipeline, including those with Japan, India and South American states. With regard to the US-EU Trans-Atlantic Trade and Investment Partnership, only the EU's negotiating position is known.[139] The negotiating position covers, first, general competition rules – which do not go beyond the existing competition rules on the two sides of the Atlantic or the 1995/98 Cooperation Agreements described below 4.2.1. Secondly, they cover rules on state enterprises, monopolies and enterprises with special or exclusive rights, which includes the principle of non-discrimination, mutual obligations to act in accordance to commercial considerations unless the fulfilment of the purpose requires otherwise (clarifying that differential pricing in different markets is not precluded by these obligations), and imposes on the parties an obligation to ensure that such enterprises conform to high standards of transparency and corporate governance, and to enable the parties to request from the other party information on such enterprises, although confidential information is excluded from such disclosures. Finally, a chapter on subsidies was also envisaged. While the EU negotiating position in this regard is not very detailed and largely refers to the obligations under the WTO Agreement on Subsidies and Countervailing Measures, adding obligations of transparency and consultations on request, this chapter would likely have been one where the negotiations would have been interesting to watch. However, the TTIP negotiations appear to have stalled due to resistance both in the US and in Europe, and it seems politically unlikely that this Agreement is going to progress much in 2017.[140]

4.2 Cooperation Agreements

The common denominator of the SAAs, EMAs, and PCAs described above is that they are primarily (but, as noted above, not exclusively) aimed at incentivising the counterparties to adopt and maintain their own domestic competition laws.

A complementary way to address the gaps in the international enforcement scheme is to strengthen the unilateral extraterritorial enforcement mechanisms. This is the primary aim of various competition cooperation agreements (4.2.1), mutual legal assistance treaties (4.2.2), and extradition treaties (4.2.3).

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[139] See the EU negotiating texts at http://trade.ec.europa.eu/doclib/press/index.cfm?id=1230#regulatory-cooperation (last accessed 16 July 2017).

[140] But see the U.S.-EU Joint Report on TTIP Progress to Date, 17 January 2017, http://trade.ec.europa.eu/doclib/docs/2017/january/tradoc_155242.pdf (last accessed 16 July 2017).

4.2.1 Competition Cooperation Agreements

Following an OECD 1967 Recommendation,[141] and its latest revision in 2014,[142] states (in inter-governmental agreements) and their competition authorities (in inter-agency agreements) started to enter into cooperation agreements.[143]

US-EU Comity Agreements

In 1991, the European Commission entered into an agreement with the US.[144] This agreement provides for duties of notification (Article II) and encourages the exchange of information (Article III) as well as cooperation and coordination between the authorities (Article IV). The so-called "positive comity" Article V allows a party that believes that conduct in the second party's territory affects the first party's interests to request the second party to take enforcement action. The "negative comity" Article VI tells the parties to consider the other party's important interests when enforcing their laws.

The conclusion of this agreement was celebrated as a milestone in transatlantic cooperation. The actual legal content, however, is rather disappointing. Most "duties" are not duties at all, because they are contingent on "potestative conditions", that is, conditions that depend solely on the will of the "obligated" party. If they were contained in a private agreement, they would arguably be considered illusory promises. In the article on cooperation and coordination, it is said that the parties "*may agree that it is in their mutual interest to coordinate their enforcement activities*". The negative comity article "requires" the parties, when enforcing their respective laws, to "*seek* [...] *to take into account*"(!) the other party's interests. The positive comity article disclaims any binding or even discretion-limiting effects on either of the parties in its final paragraph. The exchange-of-information article, which looks at first glance as if it contained substantive duties, is rendered largely ineffective by Article VIII, which excludes information that is either confidential under the laws of the requested party or whose exchange would be incompatible with that party's important interests.[145] The only duties that are relatively unqualified are those providing for notification.

In 1998, the "Positive Comity" Agreement between the US and the EU supplemented the 1991/95 agreement. The Positive Comity Agreement clarifies that a party may request the other party to look into practices in the requested party's territory even if the practice does not infringe the requesting party's laws. Article IV of the Positive Comity Agreement establishes something coming close to a real duty by specifying circumstances in which the requesting party "*will normally defer or suspend*" its own investigations. But even if the numerous criteria of Article IV are fulfilled, the requesting party may still continue its parallel enforcement, provided it informs the requested party of this decision and its reasons; and in

[141] OECD C(67)53 Final.
[142] OECD C(2014)108 Final.
[143] For an early example, see the 1976 US-Germany Antitrust Accord.
[144] International Legal Materials 30 (1991), p. 1491. Although the CJEU later declared this Treaty a nullity, because only the European *Community*, and not the *Commission* could be party to such an agreement – CJEU, case C-327/91, *France/Commission*, ECLI:EU:C:1994:305 –, the 1991 Treaty was ratified ex post in 1995 by the competent bodies with *ex tunc* effect, OJ 1995 L 95/45, corrigendum OJ 1995 L 131/38. Despite this complication, the 20th birthday was celebrated in 2011.
[145] See additionally the Exchange of Interpretative Letters between the EEC/ECSC and Government of the United States of America in the Corrigendum, OJ 1995 L 131/38.

any case the requesting party may "later" initiate or resume its enforcement. Although introduced with much fanfare, the positive comity provision was virtually never used.[146]

Even though the legal content of the two US-EU cooperation agreements is negligible, they were certainly a symbolic success, and have probably contributed to the enhanced spirit of cooperation between US and EU authorities, as reflected in the Administrative Arrangement on Attendance and the (updated) "Best Practices on Cooperation in Merger Investigations".[147] However, this is probably at least as much a result of the interaction at the International Competition Network and the OECD as of the bilateral cooperation agreements. A more direct consequence is that they have also served as a template for numerous other cooperation agreements (4.2.1 below).

Other EU Intergovernmental Cooperation Agreements and Inter-Agency Memoranda of Understanding

Agreements similar to the cooperation agreements between the EU and the US have been concluded with several other countries. Some of these have taken the form of inter-governmental agreements, such as the agreements with Canada,[148] Japan,[149] the Republic of Korea,[150] and Switzerland.[151] In other cases, the Directorate-General Competition of the EU Commission (DG Competition) has entered into Memoranda of Understanding (MOU) directly with the competition authorities of other countries, for example Brazil,[152] China,[153] India,[154] the Russian Federation,[155] and South Africa.[156]

While these cooperation agreements differ from each other, nearly all of them provide for a common core of the elements contained in the US-EU Comity Agreements, that is, notification requirements, exchange of information, and negative and positive comity provisions. Confidential information may be exchanged if and to the extent the persons concerned consent to the exchange (the notable exception being the Agreement with

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[146] *Amadeus/SABRE* being the notable exception, see Commission press releases IP/99/171 and IP/00/835. In other cases, such as *AC Nielsen*, requests to look into anticompetitive practices were made informally. For the reasons why the positive comity provisions largely remained a dead letter see Marsden (2010).

[147] Dabbah (2010), p. 289 et seq. Attributing the use of the word "*dominance*" in US merger decisions such as the *Staples* decision to the transatlantic cooperation (as does Dabbah (2010), p. 290) is falling prey to a *faux ami*, however. Proving a "dominant position" to show a substantial lessening of competition preceded the comity agreements, and indeed the EUMR, by several decades, see, e.g., *United States v Continental Can*, 378 U.S. 441, 458, 459 (1964).

[148] Agreement between the European Communities and the Government of Canada regarding the application of their competition laws, OJ 1999 L 175/49.

[149] Agreement between the European Community and the Government of Japan concerning cooperation on anti-competitive activities, OJ 2003 L 183/12.

[150] See Council Decision 2009/586/EC of 16 February 2009 relating to the conclusion of the Agreement between the European Community and the Government of the Republic of Korea concerning cooperation on anti-competitive activities, OJ 2009 L 202/35.

[151] See Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, OJ 2014 L 347/3.

[152] See the Memorandum of Understanding on cooperation between DG Competition and CADE and SEAE of the Government of the Federative Republic of Brazil, signed 8 October 2009.

[153] Memorandum of Understanding on cooperation in the area of anti-monopoly law between DG Competition and NDRC and SAIC, signed 20 September 2012.

[154] Memorandum of Understanding between DG Competition and the Competition Commission of India on cooperation in the field of competition laws, signed 21 November 2013.

[155] Memorandum of Understanding on cooperation between the DG Competition and the Federal Antimonopoly Service (FAS Russia), signed 10 March 2011.

[156] Memorandum of Understanding between DG Competition and the Competition Commission of South Africa, signed 22 June 2016.

Switzerland, which allows the exchange of confidential information even without consent under certain conditions).[157] Some agreements provide for a framework of meetings.

The inter-agency MOU differ from the agreements between the EU and other countries in that they are generally less detailed and formal,[158] and in that they do not provide for notification duties. On the other hand, they often provide for additional cooperation, in particular technical assistance.

While most of the agreements and MOU differ only in the details with respect to their coverage, there are "outliers" in both directions. At one end of the spectrum is the MOU with the Chinese authorities. The MOU with the Chinese authorities is markedly less specific than the other cooperation agreements and MOU, and only provides for an exchange of views, experiences and non-confidential information; it does not deal with notifications, negative or positive comity. However, the EU-China Competition Policy Dialogue provides for an institutional forum for the exchange of views and experiences, and also for technical assistance and capacity building;[159] in the area of merger control, the Practical Guidance for Cooperation on Reviewing Merger Cases provides for closer cooperation in individual merger cases, including an exchange on the "definition of relevant markets, theory of harm, competitive impact assessment and the design of remedies" and coordination of information requests to the merging and third parties.[160]

The outlier at the other end of the spectrum is the 2014 EU-Switzerland Agreement. While this agreement mirrors for the most part the other cooperation agreements, with its provisions on notification, exchange of information, and positive as well as negative comity, the crucial difference is that Article 7(4) of the 2014 EU-Switzerland Agreement allows the parties' competition authorities under certain conditions to exchange *confidential* information even where the undertakings concerned have not consented to such an exchange. Such an exchange of confidential information without consent of the persons concerned is not completely unprecedented, as it can be found in a few other "second-generation" cooperation agreements, but is still exceedingly rare.[161]

4.2.2 Mutual Legal Assistance Treaties

Apart from these competition-law specific agreements, general mutual legal assistance treaties, such as the ones entered by EU Member States and the US on the basis of the EU-US

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[157] Article 7(4) of the Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, OJ 2014 L 347/3.

[158] While the agreements often allow notifications and exchanges between the competition authorities directly, these have to be followed by communications through diplomatic channels.

[159] See Agreement between the Ministry of Commerce of China and the Directorate-General for Competition of European Commission on a structured dialogue on competition, 6 May 2004, and the terms of reference of the EU-China competition policy dialogue.

[160] Practical guidance for cooperation on reviewing merger cases between DG Competition and Ministry of Commerce of PR China, signed 15 October 2015.

[161] See the Agreement on Mutual Antitrust Enforcement Assistance between the US and Australia, in force since 5 November 1999, based on the authorisation in the 1994 International Antitrust Enforcement Assistance Act (IAEAA, or informally the "vowel Act"), 15 U.S.C. §§ 6201–6212. Table 3 of OECD, Inventory of Co-Operation Agreements, 2015, https://www.oecd.org/daf/competition/competition-inventory-list-of-cooperation-agreements.pdf (last accessed 16 July 2017), lists the following second-generation agreements in addition to the EU-Switzerland and US-Australia agreements: Australia-Japan (2015); New Zealand-Australia on compulsorily-acquired information and investigative assistance (2013); and the Nordic Co-Operation Agreement between Denmark, Iceland, Norway and Sweden (2001). To these one could add the cooperation agreements between the EFTA Surveillance Authority and the EU Commission in Protocols 23, 24 to the EEA Agreement.

Mutual Legal Assistance Agreement[162] and extradition treaties can become relevant for antitrust investigations, and frequently these more general agreements have more "bite". While they also include clauses according to which legal assistance may be denied, such a denial is usually possible only in narrowly defined exceptions, e.g. where "*execution of the request would prejudice the sovereignty, security, or other essential interests of the Requested State.*" Mutual legal assistance treaties frequently require dual criminality at least for some forms of legal assistance. Their significance for competition cases therefore often depends on the extent to which competition law is criminalized in the jurisdictions in question. A notable exception is the Mutual Legal Assistance Treaty between the US and Germany,[163] according to which "[*c*]*riminal investigations or proceedings for the purpose of this Treaty include investigations or proceedings relating to regulatory offenses (Ordnungswidrigkeiten) under German antitrust law*."

4.2.3 Extradition Treaties

One of the limitations of criminal antitrust enforcement has traditionally been the difficulty to get hold of individuals located abroad. The only jurisdiction that has a sufficiently robust system of criminal enforcement to care about extraterritorial criminal enforcement is, so far, the United States. For a long time, the United States relied on a carrot-and-stick policy to incentivise defendants located abroad to submit voluntarily to prosecution in the United States: as a carrot, the Department of Justice promised plea agreements with "no jail time" to foreign defendants (and often facilitated future entry to the United States for "cooperating aliens"[164]), and, as a stick, it impeded international travel by placing non-cooperating foreign infringers on border watches and, since 2001, on the Interpol Red Notice list. The days of "no jail time" agreements are gone. The conclusion of extradition treaties has made them unnecessary. Of course, extradition treaties require dual criminality, and there are few countries in the world in which there is active criminal antitrust enforcement. However, many jurisdictions have adopted criminal antitrust statutes at least as law in the books over the past two decades, and while law in the books may not be a good deterrent as such, it is sufficient to meet the dual criminality requirement. This means that a participant in a criminal antitrust infringement with effects in the United States may not be able to travel to any jurisdiction which has criminal statutes applicable to the conduct and an extradition treaty with the United States.

The *Ian Norris* case concerned conduct that preceded the introduction of the cartel offence in the United Kingdom, so that the extradition was effectuated only after a lengthy court battle and not on the basis of the actual cartel conduct.[165] In contrast, the extradition in the *Pisciotti* case went relatively smoothly: Mr *Pisciotti*, an Italian allegedly participating in the *Marine Hose* cartel, was arrested during a stop-over at the Frankfurt International Airport and extradited to the United States. Given that the Marine Hose cartel was a bid-rigging cartel and

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[162] Signed at Washington on 25 June 2003, entered into force 1 February 2010, https://www.state.gov/documents/organization/180815.pdf (last accessed 16 July 2017).
[163] In force since 18 October 2009.
[164] See the Memorandum of Understanding between the Antitrust Division, United States Department of Justice, and the Immigration and Naturalization Service, United States Department Of Justice, 15 March 1996, https://www.justice.gov/atr/memorandum-understanding-between-antitrust-division-united-states-department-justice-and (last accessed 16 July 2017).
[165] *Ian Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 A.C. 920.

bid rigging is a criminal offence in Germany, the dual criminality requirement was fulfilled without question.[166]

5 EU and UK Relations after Brexit

The story in this contribution so far has been one of increasing cooperation to decrease complexity and overcome the gaps and overlaps created by uncoordinated unilateral enforcement. The EU is a paragon in this regard. Regional supranational integration in the EU enables, for example, the approximation of substantive competition law under Article 3 Regulation 1/2003, the close cooperation within the ECN under Regulation 1/2003 and the Network Notice, and the one-stop shop for concentrations with an EU dimension under Article 21(3) of the EU Merger Regulation 139/2004.[167] Outside of this core of integration of the Member States in the supranational organisation itself, which in the area of competition law comes close to the integration in a federal state, the EU has established external links of varying intensity to neighbouring jurisdictions and jurisdictions with active competition law enforcement (part 4).

The Brexit Referendum, which ended with a majority for leaving the European Union (51.9 % to 48.1 %), and the decision by Her Majesty's Government to act on the result of this advisory referendum[168] will have various and as yet unknown implications for competition law in the United Kingdom.

What is clear, however, is that Brexit turns the development towards greater cooperation described above on its head. The UK will exit the integrated EU, a geographically proximate and large economy, and lose the benefits of the information exchange and close cooperation within the ECN. Undertakings will lose the benefit of a one-stop shop for concentrations. The UK will lose the indirect benefits of the close cooperation that the European Union has with Switzerland through the 2014 Agreement[169] and the European Commission has with the EFTA Surveillance Authority through the EEA-Agreement. It will also lose the indirect benefits from all the other intergovernmental cooperation agreements and the inter-agency MOUs which the EU and the Commission have entered into and which have been described in part 4 above. It is a return to a largely unshared sovereignty in the sense of the 19th century

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[166] The litigation in the *Pisciotti* case concerned the question whether Mr Pisciotti, as an EU citizen, could rely on Article 16 of the German Constitution which prohibits the extradition of German citizens from Germany. The Higher Regional Court in Frankfurt denied this, as did the German Federal Constitutional Court (BVerfG of 17 February 2014, case 2 BvQ 4/14). Mr Pisciotti sought help from the EU Commission, which decided not to intervene, and Mr Pisciotti's attempts to force the European Commission to intervene by applying to the General Court and the CJEU were unsuccessful – GC, case T-403/14, *Romano Pisciotti v Commission*, ECLI:EU:T:2014:692; CJEU, case C-411/14 P, *Romano Pisciotti v Commission*, ECLI:EU:C:2015:48. Mr Pisciotti was extradited in 2014. He has since initiated an action against the Federal Republic of Germany for compensation, and the civil court in Berlin has made a preliminary reference to the CJEU, case C-191/16, pending.

[167] See above Part 4.1.2 (EU).

[168] See Uberoi, E, European Union Referendum Bill 2015-16, House of Commons Library Briefing Paper Number 07212, 3 June 2015, p 25, http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7212#fullreport (last accessed 16 July 2017) ("It does not contain any requirement f or the UK Government to implement the results of the referendum") ; see also *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) and Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review, and Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review*, [2017] UKSC 5 [124], stating that the referendum result was politically but not legally binding.

[169] Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, OJ 2014 L 347/3.

nation state. Time will tell if this is a sustainable model in the integrated world economy in the 21st century.

5.1 A Brief Overview of the State of Brexit

As indicated in the introduction, it is still unclear what form Brexit will eventually take. The only firm announcement that has been made by the UK Government is that "Brexit means Brexit". The UK government submitted the notification under Article 50 Treaty on European Union (TEU) on 29 March 2017. Given that the negotiating position of the UK Government is still not yet determined, that the Government's majority in Parliament after the recent general election is thin and depends on support from the DUP, and that the policy statements that have been published by the Government so far seem rather flimsy, it is likely that the 2-year period provided for in Article 50(3) TEU will expire and the United Kingdom will cease to be a member of the European Union without any negotiated trade agreement with the EU, unless an extension of the negotiation period can be arranged.

Article 50(1) TEU requires the decision to leave the EU to be made in accordance with the Member State's constitutional requirements. Initially, Her Majesty's Government believed and argued that it could decide to leave the EU and notify the EU Council of its intention based on the Crown's Prerogative powers without Parliament's involvement. The High Court, sitting in a panel including the Lord Chief Justice of England and Wales, the Master of the Rolls, and Lord Justice Sales, rejected this view and held that UK constitutional law, in particular the principle of parliamentary sovereignty, does not allow the Government to notify the Council under Article 50 TEU under the Crown's Prerogative powers but instead requires an Act of Parliament.[170] The Government appealed to the Supreme Court of the United Kingdom. The Supreme Court, sitting in a panel consisting of all eleven Justices, dismissed the appeal in a decision of eight to three and upheld the High Court's decision that an Act of Parliament was required.[171]

The case before the Supreme Court concerned only the procedural path to notification. Subsequent to the UK Supreme Court's decision, the Government submitted a very brief bill (the European Union (Notification of Withdrawal) Bill 2016-17) which provided only that the Prime Minister had the power to notify the United Kingdom's intention to withdraw from the EU under Article 50 TEU.[172] This bill was passed by the House of Commons without amendments, and amendments adopted in the House of Lords were voted down in the Commons.[173] The UK Government submitted its notification of the UK's withdrawal from the EU on 29 March 2017, and unexpectedly called for a snap election on 18 April 2017, scheduled for 8 June 2017; in this election, the Conservative party lost its majority, but

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[170] *The Queen on the application of Gina Miller & Deir Tozetti Dos Santos v The Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin).

[171] *R (on the application of Miller and another) (Respondents) v Secretary of State for Exiting the European Union (Appellant) and Reference by the Attorney General for Northern Ireland - In the matter of an application by Agnew and others for Judicial Review, and Reference by the Court of Appeal (Northern Ireland) – In the matter of an application by Raymond McCord for Judicial Review*, [2017] UKSC 5 [101], [123] (holding that the mere resolution in the House of Commons of 7 December 2016 was insufficient because an Act of Parliament was required), [152].

[172] For the text of the original bill, see https://www.publications.parliament.uk/pa/bills/cbill/2016-2017/0132/17132.pdf (last accessed 16 July 2017).

[173] For the progress of the bill see http://services.parliament.uk/bills/2016-17/europeanunionnotificationofwithdrawal.html (last accessed 16 July 2017).

negotiated an agreement (falling short of a coalition agreement) with the ten Members of Parliament belonging to the DUP.[174]

The argument "du jour" by those who seek to limit the consequences of Brexit is that notification under Article 50 TEU and the following exit from the EU would not automatically end membership in the EEA, because Article 127 of the EEA Agreement provides that ending membership in the EEA requires giving notice to the other Contracting Parties. The issue arises because the United Kingdom is a Contracting Party of the EEA Agreement, but is so by virtue of its EU membership. While EU membership was clearly the *motivation* for accessing the EEA, it would seem that the UK is an EEA Contracting Party in its own right. There is no explicit provision that would automatically end EEA membership where an EEA Contracting Party leaves the EU. If one followed this argument, this would allow the UK Government to trigger Article 50 TEU and leave the EU without leaving the EEA. Against this line of argument, one could point to numerous provisions in the EEA Agreement that indicate that EEA members are either EU Member States or EFTA Member States. Even assuming, arguendo, that the argument from Article 127 EEA Agreement is correct, it would merely *allow* the UK to stay within the EEA. It is unclear at best whether the UK Government has the intention of doing so, and the "White Paper on the United Kingdom's exit from and new partnership with the European Union" (the "Brexit White Paper") indicates that the UK does not seek EEA membership and the Government has since repeated multiple times that the UK seeks to leave both the Single Market and the Customs Union (while somehow retaining seamless trade).[175] The members of the Cabinet had appeared divided on whether to prioritise staying within the Single Market, a position which the Chancellor *Philip Hammond* initially appeared to favour, or whether to prioritise "taking back control" with regard to immigration, an option the so-called "Three Brexiteers", the Foreign Secretary *Boris Johnson*, the Secretary for Exiting the European Union *David Davis* and the Secretary for International Trade *Liam Fox*, appeared to prefer. The latter approach was set on ending freedom of movement of workers, and this would be incompatible with Articles 28 et seq. of the EEA Agreement.[176]

In the Brexit White Paper, Her Majesty's Government outlined its plans, albeit in highly simplistic and less than clear terms. It seems that the limitation of freedom of movement takes priority over membership in the Single Market, and that the UK also seeks to leave the Customs Union.[177] This means that the Government would, even if the notification under Article 50 TEU and the subsequent leaving of the EU did not automatically end the UK's

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[174] For the notification, see EU Commission, Taskforce on Article 50 negotiations with the United Kingdom, Notification of Article 50 TEU by the United Kingdom, 29 March 2017, https://ec.europa.eu/info/news/notification-article-50-teu- united-kingdom-2017-mar-29_en (last accessed 16 July 2017). For the results of the general election see http://www.bbc.co.uk/news/election/2017/results (last accessed 16 July 2017).

[175] White Paper on the United Kingdom's exit from and new partnership with the European Union, February 2017, CM 9417, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf (last accessed 16 July 2017).

[176] While the Government's preferred policy seems to be to "have their cake and eat it", in other words to keep access to the Single Market without free movement (sometimes pointing to the restrictions on taking residence in Liechtenstein provided for in Annex VIII to the EEA Agreement), it seems exceedingly unlikely that the other EEA Contracting Parties would be willing to grant the UK an exemption from the free movement provisions, given that the provisions for Liechtenstein are based on its "specific geographic situation".

[177] Section 8 of the White Paper on the United Kingdom's exit from and new partnership with the European Union, February 2017, CM 9417, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf (last accessed 16 July 2017).

membership in the EEA, give the required notice under Article 127 EEA Agreement as well. In other words, even if the argument from Article 127 EEA Agreement should be considered persuasive, this may give the UK Government a unilateral option to leave the EU and stay within the EEA even without positive consent from the other EEA Member States, but at the moment it seems highly unlikely that the current Government would exercise any such option.

Thus, while continued membership in the EEA may still be a remote possibility, it appears much more likely that the United Kingdom will leave the EU in a so-called "hard Brexit" in 2019, unless all Member States agree to an extension of the two-year period.

5.2 Implications of Brexit for Competition Law

If the UK stayed within the EEA, UK competition law would not change dramatically. For the reasons outlined above (5.1), this section considers the implications of a "hard" Brexit, that is, of leaving both the EU and the EEA (and likely the customs union).

5.2.1 Substantive Competition Law in the UK Post Brexit

UK Competition Law

The substantive provisions of UK Competition Law would continue to apply even after a hard Brexit. Nor does it seem likely that the main prohibitions (the chapter I and chapter II prohibitions of the Competition Act 1998) would necessarily be changed.

Unless the Competition Act 1998 is modified, even section 60 of the Competition Act 1998 would continue to apply, a provision which requires courts and the Competition and Markets Authority (CMA) to avoid inconsistency between, on the one hand, the principles they apply and the decisions they reach, and, on the other hand, the principles laid down by the TFEU and the Court of Justice, and by the decisions reached by the Court of Justice, as well as decisions reached and statements made by the Commission. In principle, this provision could continue to apply after Brexit, and especially considering the dearth of decision practice in the UK,[178] it may even make sense to continue to aspire to continued harmony between the more active decision-making practice on the EU level and in the UK. Not being a Member State of the EU would not preclude this aspiration. In Switzerland, for example, there is an active debate to what extent Swiss courts should and already do follow precedent of the Court of Justice and interpret laws in accordance with the interpretation of equivalent laws in the EU.[179] Nevertheless, as *Richard Whish* has pointed out, it appears unlikely that section 60 of the Competition Act 1998 would survive the UK's striving for "taking back control", given that one of the reasons often cited for leaving the EU was being subject to the Court of

[178] National Audit Office, The UK competition regime, HC 737, Session 2015–16, 5 February 2016, https://www.nao.org.uk/wp-content/uploads/2016/02/The-UK-Competition-regime.pdf (last accessed 16 July 2017), noting that "the low caseflow we identified in 2010 has continued, with the Office of Fair Trading and the CMA making 24 decisions and the regulators just eight since 2010. The UK competition authorities issued only £65 million of competition enforcement fines between 2012 and 2014 (in 2015 prices), compared to almost £1.4 billion of fines imposed by their German counterparts. The CMA faces significant barriers in increasing its flow of competition cases, although recent activity means it now has 12 ongoing cases." Wils (2013).

[179] Baudenbacher (2012), pp. 626–645; Lehmann and Zetzsche (2016); see also Zeiler H, Auswirkungen des EU-Rechts auf Nicht-EU-Mitglieder ("de facto Mitgliedschaft" der Schweiz und Liechtensteins?), XVI. Meeting of the Highest Administrative Courts of Austria, Germany, Liechtenstein and Switzerland, 18/19 September 2008, http://www.bger.ch/landesbericht_schweiz_auswirkungen_eu-recht.pdf (last accessed 16 July 2017).

Justice's jurisdiction.[180] On 13 July 2017, the UK Government introduced the "European Union (Withdrawal) Bill" (informally known as the "Great Repeal Bill").[181] This Bill provides that a court or tribunal "is not bound by any principles laid down, or any decisions made, on or after exit day by the European Court" and "need not have regard to anything done on or after exit day by the European Court, another EU entity or the EU but may do so if it considers it appropriate to do so".[182] Accordingly, if these provisions become law, they will replace the slightly stricter obligations of section 60 of the Competition Act 1998 with a mere possibility to have regard to the practice of the European institutions.[183] The same provisions in clause 6 will also immediately destroy, as of exit day, the binding effect of EU Commission decisions under Article 16 of Regulation (EC) No. 1/2003 for follow-on actions, and the corresponding prima facie effect of infringement decisions of foreign NCAs required by Article 9 of the Damages Directive 2014/104/EU, which was implemented into UK law only in March 2017, and will so render British courts and tribunal a much less attractive venue for damages actions.[184]

Clause 2 of the European Union (Withdrawal) Bill would ensure that the various European Block Exemption Regulations continue to apply, in the version in force on the day before exit day, under UK law (even though it is unclear, for example, who would have the competence to withdraw the benefit of the Block Exemption Regulations until provision for this deficiency is made under the "Henry VIII" power provided for in clause 7 of the Bill).

There are, of course, many other implications for substantive competition law post Brexit: How should the independent UK deal with merger control, given that the one-stop shop will not apply anymore and that referrals from and to the Commission will no longer be available?[185] Will it be feasible to continue to rely on a voluntary notification system?

More fundamentally, the UK would be free to abolish or fundamentally reshape its conceptions of competition law. Despite the theoretical possibility, there seems little danger that the UK would go back to the times when cartels were seen as a mere modality of business – although these days are not that long gone, as the House of Lord recalled in the *Norris* decision.[186] Today, the UK competition law and policy debate is too firmly rooted in

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[180] Whish (2016), p. 297. See now section 2 of the White Paper on the United Kingdom's exit from and new partnership with the European Union, February 2017, CM 9417, https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/589191/The_United_Kingdoms_exit_from_and_partnership_with_the_EU_Web.pdf (last accessed 16 July 2017), which has the title "Taking control of our laws" and stating in the abstract: "We will take control of our own affairs, as those who voted in their millions to leave the EU demanded we must, and bring an end to the jurisdiction in the UK of the Court of Justice of the European Union (CJEU)."

[181] For the progress of this bill see http://services.parliament.uk/bills/2017-19/europeanunionwithdrawal/documents.html (last accessed 16 July 2017).

[182] Clause 6(1)(a) and 6(2) of the Bill, respectively.

[183] Clause 6 of the Bill applies to section 60 of the Competition Act 1998 because this section falls under the definition of "retained EU law" in clause 6(7) of the Bill; section 60 of the Competition Act 1998 is "EU-derived domestic legislation" as defined in clause 2(2)(d) of the Bill, because it is an "enactment [...] relating otherwise to the EU or EEA".

[184] For the binding effect of infringement decisions see sections 47A and 58A of the Competition Act 1998; for the prima facie effect of foreign NCA decisions see paragraph 35 of Schedule 8A to the Competition Act 1998, inserted by The Claims in respect of Loss or Damage arising from Competition Infringements (Compeitition Act 1998 and Other Enactments (Amendment)) Regulations 2017, Statutory Instrument 2017 No. 385, made on 8 March 2017. For the implementation of the Damages Directive in various Member States, see e.g., Bien et al. (2017).

[185] See already Whish (2016).

[186] See the overview in *Ian Norris v Government of the United States of America* [2008] UKHL 16, [2008] 1 A.C. 920, and in particular 934–935, para. 18 referring to *British Airways Board v Laker Airways Ltd* [1985] AC 58.

the modern competition law discourse to revert to the state of (or before) the 1980s. If anything, competition lawyers in the UK today are more influenced by the US American and in particular Chicago school discourse and the more economic approach than their continental counterparts, generally preferring an effects-based approach over form-based approaches. Also, the UK is too involved in international cooperation efforts such as the OECD and ICN, and too proud of its "special relationship" with (or dependence on) the United States, to discard the modern competition law regime they have built over the past two decades. While it is difficult to predict whether a UK "freed from the shackles of Brussels" would become more statist and protectionist, or on the contrary more libertarian, the paradigm of effective competition law seems here to stay. If and to the extent the UK changes its competition laws, instead of choosing to mirror EU competition law in the future on a voluntary basis, I would expect that it would shift in the direction of US federal antitrust law, that is, taking a more lenient stance on vertical restrictions than the EU does and more generally erring on the side of false negatives instead of false positives.

Any such developments in UK competition law, however, depend on the choices that would be made post-Brexit by Parliament (or, if the European Union (Withdr awal) Bill is enacted, by a Minister of the Crown under the Henry VIII powers envisaged in clause 7). Even the immediate consequences of Brexit seem nebulous, and such potential future changes to competition law are so completely unpredictable that speculation is useless. What is predicable, however, is that EU competition law would no longer be the "law of the land", and the next section discusses some of the consequences of this effect.

EU Competition Law in the UK post Brexit

An immediate consequence of Brexit would be that competition law infringements committed in the UK would become extraterritorial from the EU's perspective. Of course, we have been there before, *ICI Dyestuffs* being the EU's paradigm case for extraterritorial jurisdiction.[187] Since then the EU's position to extraterritorial enforcement has evolved. The implementation test in its broad interpretation by the CJEU in *Wood Pulp I* would facilitate finding prescriptive jurisdiction of the EU institutions in most cases, especially given that the UK economy and the EU economy are much more intertwined than used to be the case before UK accession to the (then) European Communities. Should the CJEU follow Advocate General Wahl's Opinion in the *Intel* case that the qualified effects test applies, it seems likely that in most cases in which UK undertakings are involved and the restriction may affect trade between Member States, EU law would still apply (extraterritorially) to infringements committed in the UK after Brexit.

Of course, there will be some cases in which the restriction merely affects trade between the UK and *one* Member State of the EU, in which today EU competition law is applicable, while it would not be applicable after Brexit. Nevertheless, for most economically important cases this is unlikely to be a serious problem, given the close relationship between the economies within the EU. Even in these cases, the affected Member States' competition law, whose content will be largely shaped by EU competition law, may well be applicable extraterritorially.

Prescriptive jurisdiction is therefore unlikely to be a serious limitation to the applicability of substantive EU competition law to competition law infringements committed in the UK post

[187] Commission Decision 69/243/EEC, OJ 1969 L 195/11 (*Dyestuffs*); AG Mayras's opinion in CJEU, case 48/69, *ICI v Commission*, ECLI:EU:C:1972:32; CJEU, case 48/69, *Imperial Chemical Industries Ltd. v Commission,* ECLI:EU:C:1972:70.

Brexit. This is just a specific application of the recognition above that the modern law and practice on extraterritorial enforcement has largely moved to a qualified effects test, making prescriptive jurisdiction in many cases unproblematic. As was pointed out above, the same cannot be said about enforcement jurisdiction, to which we now turn.

5.2.2 Enforcement Cooperation post Brexit

One of the most pressing issues for the practical workings of competition authorities following a hard Brexit would be ensuring the continued cooperation between the UK competition authorities on the one hand and the EU Commission and EFTA Surveillance Authority as well as the National Competition Authorities (NCAs) of the other Member States on the other, as well as between the UK and EU courts, and between the respective courts and authorities. Currently, the information flow is governed in antitrust cases by Regulation 1/2003 – in particular Articles 11 to 16 –,[188] the Network Notice,[189] and the Notice on cooperation between the Commission and the courts of the Member States,[190] and in merger cases by Regulation 139/2004, in particular its Article 19.

Brexit would deprive the UK authorities and the EU Commission (and National Competition Authorities) of practically all of the benefits of these rules on cooperation. The UK competition authorities would of course cease to be part of the European Competition Network (ECN).[191] Notifications, the ability of the UK competition authorities to consult the Commission, the close information exchange between the Commission and the NCAs on the one hand and the UK competition authorities, including confidential information,[192] and the UK participation in the Advisory Committee would all come to an end. UK courts will no longer have the right to ask the Commission to transmit information to them under Regulation 1/2003. From the EU's perspective, and the perspective of the remaining Member States, the ability to conduct inspections in the UK or to request the UK authorities to conduct such inspections under Articles 20 to 22 of Regulation 1/2003, will be a major disadvantage.

With regard to private enforcement, a number of changes would result, which may have an impact on the UK as a preferred forum of choice for damages actions.[193] In particular, as described above, clause 6 of the European Union (Withdrawal) Bill would make it impossible to rely on the binding effect of Commission decisions as a basis for follow-on actions. If one wanted to find a silver lining, the UK would no longer be bound by the provisions in the Damages Directive.[194] While the Damages Directive may facilitate private damages actions in many continental jurisdictions, its provisions for the most part either reflect or fall behind the standards already used in English private and civil procedure law.[195] It is true that the

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[188] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1.
[189] Commission Notice on cooperation within the Network of Competition Authorities, OJ 2004 C 101/43.
[190] Commission Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ 2004 C 101/54.
[191] Whish (2016).
[192] Article 12(1) Regulation No 1/2003.
[193] Until now, the UK was one of the most frequently chosen venues for damages actions – alongside Germany and the Netherlands, see the references in Wagner-von Papp (2015a), p. 29 in fn. 62. The Consumer Rights Act 2015 with its section 81 and schedule 8 strengthening the Competition Appeal Tribunal and allowing various forms of collective redress was expected to consolidate this position.
[194] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014 L 349/1. For the implementation in various Member States, see, e.g., Bien et al (2017).
[195] Cf. Wagner-von Papp (2015a).

Damages Directive seeks, for the most part, only minimum harmonisation, so that it is for the most part merely *not facilitating* damages actions. In some respects, however, the Damages Directive makes private enforcement *more difficult*, for example with regard to the prohibition of over-compensatory damages (Article 3(3) of the Directive) and the absolute limits of disclosure with regard to leniency statements and settlement submissions (Articles 6(6), 7(1) of the Directive). English law may, after Brexit, use over-compensatory damages, in particular exemplary damages, in exceptional cases again, a practice that is prohibited by Article 3(3) of the Damages Directive.[196] With regard to disclosure rules, the provisions in Article 5 of the Damages Directive did not extend the scope of available disclosure in English law, but those in Article 6 and 7 of the Damages Directive restricted the available disclosure;[197] after Brexit, disclosure can be extended to leniency statements and settlement submissions, if this were to be considered desirable. Nor would the English legislator be constrained by the Directive's framework regarding leniency applicants: it could choose a completely different approach, such as following the suggestion in the literature to give full immunity from damages obligations to the immunity recipient and oblige the immunity recipient to disclose all its information to the claimants.[198] All these changes, however, fall into the category of speculative, merely possible changes post-Brexit.

More immediately, a number of Regulations in the field of private international law would cease to be applicable: in our context in particular Brussels I (Recast), the Taking of Evidence Regulation, and the Rome I and Rome II Regulations.[199] The subject matter covered by these Regulations was in some cases dealt with by Conventions before the Regulations started to apply, such as the Brussels Convention, the Lugano Conventions, and the Rome Convention. In these cases the question arises whether the Conventions are revived once the Regulations cease to apply.[200] With regard to jurisdiction, recognition and enforcement, the Brussels I (Recast) Regulation[201] would cease to apply and the UK would have to rely on the 1968 Brussels Convention[202] instead. It has been pointed out that the Brussels Convention has a more limited geographical scope and does not contain the improvements that the Brussels I and Brussels I (Recast) Regulations made, such as addressing (at least partially) the *Italian Torpedo* issue and doing away with the *exequatur* requirement.[203] It has also been pointed out[204] that with regard to jurisdiction, recognition and enforcement in relation to Denmark,

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[196] See Wagner-von Papp (2015a), p. 30 et seq. for the question in which exceptional cases exemplary damages may be awarded under the cases *Devenish Nutrition* (*Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394 para. 48, an issue that was not appealed), *Cardiff Bus* (*2 Travel Group plc (in liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19 paras. 448–598) and *Albion Water* (*Albion Water Ltd v Dŵr Cymru Cyfyngedig* [2010] CAT 30). See now paragraph 36 of Schedule 8A to the Competition Act 1998, implementing the Damages Directive ("A court or the Tribunal may not award exemplary damages in competit ion proceedings").

[197] For details see Wagner-von Papp F, Access to Evidence and Leniency Materials, 18 February 2016, https://ssrn.com/abstract=2733973 (last accessed 16 July 2017); for an overview Wagner-von Papp (2015a), p. 31 et seq.

[198] Buccirossi P, Marvão C, Spagnolo G, Leniency and Damages, CEPR Discussion Paper No DP10682, June 2015, http://ssrn.com/abstract=2624637 (last accessed 16 July 2017).

[199] For an excellent discussion see in particular Dickinson (2016); see also Lehmann and Zetsche (2016).

[200] Dickinson (2016), pp. 203–207.

[201] Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ 2012 L 351/1.

[202] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ 1972 L 299/32.

[203] Lehmann and Zetzsche (2016), pp. 29–31, *inter alia*, with a discussion why the Brussels Convention "survived" the Brussels I and II (Recast) Regulations, and the advantages of the Regulations over the Convention; Dickinson (2016), p. 201 et seq.

[204] By Dickinson (2016), p. 206 et seq.; Lehmann and Zetsche (2016), p. 31.

Iceland, Norway and Switzerland, the situation is even more difficult: while the UK was a Contracting Party to the original 1988 Lugano Convention, this Convention was replaced by the 2007 Lugano Convention – and the 2007 Lugano Convention was negotiated, concluded and ratified by the European Community (EC) and only mentions the EC and its Member States, Denmark, Iceland, Norway and Switzerland.[205] The 2007 Lugano Convention has thus arguably terminated the applicability of the 1988 Lugano Convention to the UK by virtue of its Article 69(6), but will itself no longer apply to the UK once it ceases to be an EU Member State.[206] In our context, the Hague Convention on Choice of Court Agreements[207] could *not* act as a complement to the Brussels and Lugano Conventions in any event because it excludes competition matters from its scope.[208]

In contrast to the Lugano Convention, it is clearer that the Rome Convention[209] on the applicable law will revive,[210] but in our context it is notable that the Rome Convention only covers contractual obligations and therefore can at best be a replacement for the *Rome I* Regulation,[211] and not for the Rome II Regulation,[212] which covers non-contractual obligations.

The Taking of Evidence Regulation[213] would also cease to apply, although the experience with this Regulation in the competition law case *National Grid* was not necessarily an unmitigated success anyway.[214] Vis-à-vis several jurisdictions, the UK courts could at least continue to rely on the Hague Convention on Taking Evidence.[215]

It should be noted that the "European Union (Withdrawal) Bill" (informally called the "Great Repeal Bill") introduced in Parliament on 13 July 2017 would be of very limited use with regard to most of these aspects. The Great Repeal Bill could not ensure the continued access to information and cooperation that is available under Regulation 1/2003 in the ECN, in the Advisory Committee and through judicial cooperation. Nor would it allow the continuation of the benefits of the Brussels I (Recast) Regulation (although, as noted above, the Brussels Convention would revive and provide limited relief). Nor would the Great Repeal Bill allow courts in the UK to make use of the Taking of Evidence Regulation (although again there is a partial substitute in the Hague Convention on Taking Evidence). The only aspect the Great Repeal Bill addresses in clause 2 is the unilateral replication of the provisions in the various Regulations (in the version in force on the day before exit day) in domestic law; this would mean, for example, that UK courts and tribunals continue to be bound (until further legislative action) by the jurisdictional provisions etc in the Brussels I (Recast) Regulation, and by the provisions on the applicable law in the Rome I and Rome II Regulations.[216]

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[205] Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2007 Lugano Convention), OJ 2007 L 339/3.
[206] Dickinson (2016), p. 207; Lehmann and Zetsche (2016), p. 31.
[207] Hague Convention on choice of court agreements of 30 June 2005.
[208] Article 2(2)(h) of the Hague Convention on choice of court agreements.
[209] Convention 80/934/EEC on the law applicable to contractual obligations, OJ 1980 L 266/1.
[210] Dickinson (2016), p. 203.
[211] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ 2008 L 177/6.
[212] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ 2007 L 199/40.
[213] Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters, OJ 2001 L 174/1.
[214] Cf. Wagner-von Papp F, Access to Evidence and Leniency Materials, 18 February 2016, https://ssrn.com/abstract=2733973 (last accessed 16 July 2017), p. 71.
[215] Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, concluded on 18 March 1970.
[216] See already Dickinson (2016), p. 210.

5.2.3 Enforcement Cooperation Models for the post-Brexit UK

Time has to show how acrimonious or amicable the divorce of the UK from the EU will be more generally. With regard to competition law enforcement, however, there is little doubt that a very close, and if possible uninterrupted, cooperation especially between the UK authorities and the ECN should be in the mutual interest of both sides. The EU has no interest in going back to the times of *Dyestuffs*, and the CMA is likely keen to cooperate as closely as possible with the EU Commission and the ECN as well, given that its enforcement resources are limited.

In some respects, the circumstances are particularly conducive to agreeing on enforcement cooperation between the UK and the EU. Capobianco and Nagy have recently summarised factors that may impede enforcement cooperation: differences in the enforcement scheme (civil/criminal); differences in the substantive law; differences in procedural rules; and differences in size and economic development.[217] The CMA itself, while young in its current emanation, is the successor of the OFT and so a well-developed competition authority, and the UK economy is as advanced as the economies of the remaining EU Member States. On exit day, the substantive and procedural provisions in UK law will be in full compliance with EU law (or so one would hope), so that substantive or procedural divergences should not prevent cooperation at that time. No further "approximation" of the laws would be required. Whether this state of affairs will continue into the future depends largely on the question to what extent UK competition law will be allowed by the legislator to use EU competition law as a guiding star. A sensible approach would be to aim at the greatest possible harmonisation with EU developments, but such an approach may be questioned by those whose main aim is to "take back control", and the European Union (Withdrawal) Bill does not give great hope in this regard.

There is a certain danger that this emphasis on taking back control and sovereignty in the Brexit campaign may even lead to a revival of the UK's resistance against extraterritorial enforcement of EU (and other foreign) competition law that led to conflicts in the 1970s and 1980s,[218] with a potential application of the Protection of Trading Interests Act 1980. While it is unlikely that *the CMA* would support such actions impeding the European Commission's antitrust enforcement, it is not unthinkable that *the UK Government* will choose to protect UK undertakings against EU competition law enforcement to advance their industrial policy or protect national champions.[219]

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[217] Capobianco and Nagy (2016), pp. 3–6.

[218] In *Dyestuffs*, the United Kingdom submitted an *aide-mémoire* of 20 October 1969, which is reprinted in Lowe (1983), pp. 144–147. In *Wood Pulp I*, the UK again objected to the effects test: CJEU, joined cases 89/85, 104/85, 114/85, 116/85, 117/85 and 125/85 to 129/85, *Ahlström v Commission*, ECLI:EU:C:1988:447. Also, see Note No 196 of the British Embassy at Washington, DC, which was presented to the US Department of State on July 27, reprinted in Marston (1978), p. 390 et seq. It states that "in the present state of international law there is no basis for the extension of one country's antitrust jurisdiction to activities outside that country by foreign nationals". See also Sweeney (2010), p. 245 et seq.; Lowe (1988), p. 179; but see Whish and Bailey (2015), p. 533, indicating a move towards a more favourable attitude to extraterritorial application in the Enterprise and Regulatory Reform Act 2013.

[219] One of the more prominent business leaders donating to the Leave Campaign and speaking out in favour of Brexit before the Referendum was Lord Bamford, the chairman of JCB. It has been speculated that the fine of some €40m for antitrust infringements imposed by the Commission in 2000 and eventually largely upheld by the CJEU in 2006 (although with a reduced fine of approximately €31m), "which he [scil: Lord Bamford] called 'disappointing and wrong'" is "likely to have exacerbated" his pre-existing eurosceptic views (Mance H, Brexit donors guided by bitter experience with EU, Financial Times, 15 June 2016). See Commission Decision of 21 December 2000 relating to a proceeding under Article 81 of the EC Treaty Case COMP.F.1/35.918, *JCB*,

With these caveats, it would seem that both the EU and the UK have a substantial mutual interest to cooperate as closely as possible in competition matters. Even if both parties are willing, however, and despite the current substantive and procedural harmony between the UK and EU competition regimes, the UK will not get the same access to information and cooperation that it currently has by virtue of Regulation 1/2003. The best that could be hoped for after Brexit even by incorrigible optimists would be a cooperation agreement along the lines of Protocol 23 to the EEA Agreement concerning the cooperation between the Surveillance Authorities (Article 58) and Protocol 24 on cooperation in the field of control of concentrations; a close second would be a second-generation intergovernmental agreement along the lines of the Agreement between Switzerland and the EU of 17 May 2013. It would be desirable to start immediate negotiations for an intergovernmental cooperation agreement along these lines. Given the enormity of the task of negotiating Brexit, the limited available time, and the very limited resources for negotiations that the UK Government has at its disposal, it appears unlikely that competition law cooperation will be high on the list of priorities. Under these conditions it does not seem feasible to get to a full-blown intergovernmental agreement between the EU and the UK on competition enforcement cooperation in time to ensure a smooth transition – at least assuming that the two-year period is not extended. It would be desirable, therefore, that the UK competition authority and the EU Commission immediately start negotiations aiming at an interim inter-agency cooperation agreement.

Re-establishing cooperation with the EU itself is only part of the task. Part 4 above outlined the network of cooperation agreements on which the EU can rely. Many of these agreements, such as most SAAs, EMAs and PCAs are essentially institution-building tools that are meant to induce the partners in these agreements to introduce and maintain competition rules at least broadly similar to the EU competition rules. To this extent, there is no need to replicate these agreements on the UK side. However, other intergovernmental cooperation agreements with increasingly active antitrust jurisdictions, such as the ones with the US, Switzerland, Turkey, Japan, and Korea, as well as the Memoranda of Understanding with the competition authorities of Brazil, Russia, China, India, and South Africa, are of increasing strategic importance for a competition authority. In establishing links to other third countries, the UK will have to begin largely, save existing general mutual legal assistance treaties and extradition treaties, from scratch.

Even greater difficulties may be expected in the negotiations with the EU with regard to cooperation when it comes to private enforcement. The difficulties will be greater for two reasons. First, jurisdictions within the EU have been competing with each other to attract private enforcement cases, and the disadvantages that the UK will face from not being able to rely on, for example, the Brussel I (Recast) Regulation's provisions on jurisdiction, recognition and enforcement may be considered as a boon by continental jurisdictions. The second reason is that these issues transcend competition law. While it seems likely that in the competition law sector there will be a mutual interest in cooperation to the greatest possible extent, the private international law instruments mentioned above are cross-sectoral, and this means that negotiations will be multipolar. Continental jurisdictions have sought for some time to cannibalise London's dominance in the provision of commercial legal services.[220] It

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OJ 2002 L 69/1; GC, case T-67/01, *JCB Service v Commission*, ECLI:EU:T:2004:3; CJEU, case C-167/04 P, *JCB Services v Commission,* ECLI:EU:C:2006:594.

[220] See Bundesnotarkammer (BNotK), Bundesrechtsanwaltskammer (BRAK), Deutscher Anwaltverein (DAV), Deutscher Industrie- und Handelskammertag e.V. (DIHK), Deutscher Notarverein (DNotV), Deutscher Richterbund (DRB), Law made in Germany, 3rd ed. 2014, http://www.lawmadeingermany.de/Law-Made_in_Germany_EN.pdf (last accessed 16 July 2017). This is a brochure published by an initiative that was

cannot be excluded that the continental jurisdictions will see the difficulties which English law faces in the area of private international law post Brexit with a certain degree of glee.

6 Conclusion

Free trade and competition law, for the most part, mutually reinforce each other by breaking up entrenched positions of market power and creating competitive pressures. Competition law enforcement (as does most public international law) still adheres mostly to the 19th century paradigm of sovereign nation states. National competition law enforcers face an increasingly transnational economy, and for the reasons outlined in Part 2 globalisation makes unilateral competition law enforcement based on territorial enforcement jurisdiction difficult. The increase in free trade, the increasing sophistication of the economies of many developing nations, and competition advocacy have resulted in a proliferation of national competition law regimes and national competition enforcement agencies. The patchwork of multiple national unilateral enforcement leads to enforcement gaps and enforcement overlaps. Some commentators are of the view that such global problems have to be addressed by global solutions, and advocate a global competition agency, or at least acceptance of the decision of a lead agency. Apart from the question whether such centralised enforcement would be desirable, such proposals face an insurmountable (political) feasibility constraint. If neither a global solution nor independent unilateral enforcement is the answer, then there must be an intermediate path.

This path consists in increasing cooperation and coordination of enforcement activities. Arguably the closest integration of sovereign nation states for more than 50 years has been what is today the EU and the extended EEA. Regional cooperation along similar lines, albeit not (yet) in the same depth, is developing all over the world. Ideally, joining forces at a regional level leads to internally (relatively) homogeneous clusters, and reduces complexity – instead of considering all 130 individual competition regimes, regionalisation allows us to treat the (today) 28 Member States of the EU as one cluster, and Australia-New Zealand as another one. To be sure, as always in comparative law the *praesumptio similitudinis* only holds at a high degree of abstraction: of course the competition regimes of the 28 Member States are far from identical.

Around the extremely close cooperation in such regional cooperation agreements, there can be a penumbra of gradually decreasing cooperation, such as the area covering the EU and the states affiliated by the various bilateral agreements described in part 4 of this paper, in particular the second-generation intergovernmental cooperation agreement with Switzerland, the Comity agreements between the EU and the US, and the various SAAs, PCAs and EMAs, as well as the Customs Union with Turkey.

This regional cooperation with an extended penumbra is complemented by cooperation with antitrust regimes that are geographically further apart but are larger economies. Together, we find a network of nodes consisting of regional cooperation with strengthening bonds to neighbouring areas, which are interconnected amongst each other by bilateral or biregional agreements.

Extrapolating this development into the future, the result would eventually be a network of clusters around the nodes. Within each cluster, issues of gaps and overlaps can be reduced to the greatest possible extent – externalities between Member States can be dealt with on the

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founded in reaction to the Law Society's promotion of English law as the best in the world. I have spent several years each in Germany, the UK and the US. Interestingly, all three have the best legal system in the world, at least according to their own assessment.

EU level so that gaps are avoided, and one-stop shops, as in Article 21(3) of the European Merger Control Regulation 139/2004, or at least case allocation rules, such as the ones in the Network Notice, help to avoid overlaps. Between clusters, cooperation and coordination may not resolve all gaps and overlaps, but as global heterogeneity in views on competition policy decreases, gradual progress is made here as well.

Until June 2016, this description of the development of cooperation seemed an accurate representation of reality. Then the UK chose to break with the pattern. The attempt to "take back control" and insist on unfettered sovereignty in the tradition of the 19th century by going it alone will face steep hurdles in the transnational economy of the 21st century. For all the insistence that Brexit will make the UK more and not less open to the world, this fails to understand the complexity of the global economy in the 21st century (quite apart from failing to understand the perception the vote for Brexit has created, rightly or wrongly, that it is a signal of isolationism). The presidential election in the US in November 2016 has raised further questions going to the very existence of the transnational economy in its current form.[221] Time will tell whether the events of June 2016 and November 2016 will remain isolated bumps in the road towards greater global cooperation that allows us to face the challenges and reap the fruits of an international economy based on free trade and competitive markets, or whether the world will regress into a collection of protectionist nation states of the 19th century. Of course, the retrenchment of the United States, and even the leaving of the United Kingdom, could give the European Union a chance to fill the void by pushing forward with its trade agenda.

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