

Chapter 2

“Cooperation” as Guiding Principle of International Competition Enforcement Law

From the perspective of International Competition Enforcement Law the cooperation of the competition authorities constitutes a main leitmotif.¹ Decisions with international dimensions are increasingly no longer determined “autonomously” by the responsible authority or court but are being made in cooperation or on the basis of cooperation with all actors at a governmental or private level who may be potentially affected by a said national or foreign decision. At the international level, this enhanced cooperation is at least partly a result of the globalization of competition restrictions (see Sect. 2.1.1) and the therefore necessary globalization of competition policy (see Sect. 2.1.2).

In the end, quite different forms of cooperation can be discerned (see Sect. 2.2): International Competition Enforcement Law is rather progressive with regard to cooperation within networks. Issues which could be discussed under the cipher of “networks” over the next years in general jurisprudence, have already become solid reality in antitrust law.² One has only to take a look at the ICN and the European

¹See Mozet, *Internationale Zusammenarbeit der Kartellbehörden* (C. F. Müller, 1991); Parisi, “Enforcement Cooperation Among Antitrust Authorities”, ECLR (1993), 133; Lampert, “International Cooperation Among Competition Authorities”, *Europäische Zeitschrift für Wirtschaftsrecht* (1999), 107 et seq; Zanettin, *Cooperation between Antitrust Agencies at the International Level* (Hart Publishing, 2002); Buchmann, *Positive Comity im internationalen Kartellrecht* (Sellier, 2004); Petersen, *Die Internationale Zusammenarbeit der Wettbewerbsbehörden* (LIT Verlag, 2005).

²Extensive information on the term “network” and the associated problems in Ladeur, “Towards a Legal Theory of Supranationality – The Viability of the Network Concept”, 3 *European Law Journal* (1997), 33; Teubner, “Das Recht hybrider Netzwerke”, 165 *Zeitschrift für das gesamte Handelsrecht und Wirtschaftsrecht* (2001), 550; Slaughter, “Global Government Networks, Global Information Agencies, and Disaggregated Democracy”, 24 *Michigan Journal of International Law* (2003), 1041; Möllers, “Netzwerk als Kategorie des Organisationsrechts. Zur juristischen Beschreibung dezentraler Steuerung” in Oebbecke (Ed.), *Nicht-normative Steuerung in dezentralen Systemen* (Steiner, 2005), 285; Slaughter and Zaring, “Networking Goes International”, 2 *Annual Review of Law and Social Science* (2006), 211; Fischer-Lescano and Teubner, *Regimekollisionen. Zur Fragmentierung des globalen Rechts* (Suhrkamp, 2006), p. 57 et seq; sceptical Schwarze, *Europäisches Verwaltungsrecht*, 2nd ed. (Nomos, 2005), p. CIX: “Schon jetzt zeichnet sich allerdings ab, dass sich mit dem Zauberwort des ‘Netzwerks’ nicht alle Probleme des arbeitsteiligen Zusammenwirkens zwischen europäischen und nationalen Wettbewerbsbehörden lösen lassen”.

Competition Network (ECN). Both networks embody forms of no or at least diminished hierarchical coordination on behalf of the participating authorities (see Sect. 2.2.1). In contrast to this, judiciary networks will be less heavily focused on (for example the Association of European Competition Law Judges).³ Nevertheless the cooperation of the involved actors is admittedly limited, based on differences in procedure, the consideration of different fundamental and human rights standards, and requirements of transparency (see Sect. 2.3).

2.1 Fundamentals of Cooperation

Cooperation among competition authorities and courts is not a new phenomenon. In fact, there have been early attempts between states – by way of bilateral agreements – to ensure a common line of action against international cartels and improved coordination regarding mergers across the border. An example of this development is the cooperation agreement between the USA and Germany from the year 1976,⁴ though the practical relevance of this covenant remained marginal. Nevertheless, this example reflects the fundamental insight that global competition politics must come into existence against the background of an accelerating globalization of competition restrictions if the national and supranational Competition Enforcement Law is to be effectively implemented.

Directly connected to this is the knowledge that the procedural cooperation of the various actors, with the accompanying combination of the respective procedural regimes, is the only form of coordination that is currently feasible. Although the “dream” of a unitary worldwide competition regime (in the sense of a binding international treaty) is often the subject of discussion, all such attempts to date, from the Havana Charter in the year 1948⁵ to the development of the Draft International Antitrust Code (DIAC) in the years 1991–1993,⁶ have failed. The idea of a uniform international law⁷ – in the form of an international multilateral agreement on competition – does not appear to be viable at the moment. The implementation of such an agreement would be difficult anyway, especially in the light of the ever-growing number of new actors in the field of International

³The “network-approach” was transferred to judicial co-operation by Slaughter, *A New World Order* (Princeton University Press, 2004), p. 65 et seq.

⁴German Federal Law Gazette II (1976), p. 1711; see generally Buchmann, *Positive Comity im internationalen Kartellrecht* (Sellier, 2004), p. 121 et seq.

⁵Stödter, “Völkerrecht und Weltwirtschaft”, 13 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (1950/1951), 67 et seq; Mozet, *Internationale Zusammenarbeit der Kartellbehörden* (C. F. Müller, 1991), p. 16 et seq.

⁶See Sect. 4.3.1 *infra*; see also Basedow, *Weltkartellrecht* (Mohr Siebeck, 1998), p. 70 et seq.

⁷Detailed information on the area of procedural law in Oeter, “Vielfalt der Gerichte – Einheit des Prozessrechts?” *Berichte der deutschen Gesellschaft für Völkerrecht* (2007), 149.

Competition Enforcement Law and constant reservations on the part of the USA.⁸ Perhaps – this is only to be taken as speculation – it was a fundamental mistake to work mainly with concepts that attempted to integrate a competition agreement into the body of rules of GATT or the WTO respectively.⁹ Thus, not only did the concepts that were hardly matching from a legal viewpoint clash hard, but also persons and institutions that previously had never had anything to do with each other.¹⁰

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

2.1.1 Globalization of Competition Restraints

Competition restraints increasingly take on a global dimension: A perfect case in point being Microsoft. This case has been pursued – with a different outcome – in both the USA and Europe.¹¹ Investigations were also initiated in South Korea and

⁸US concerns regarding this issue were included in the 2002 Final Report of the International Competition Policy Advisory Committee (<<http://www.justice.gov/atr/icpac/finalreport.htm>>); on the position of the USA also cf. Tarullo, “Norms and Institutions in Global Competition Policy”, 94 *American Journal of International Law* (2000), 478; Stockmann, “Die neuen globalen Initiativen (Global Competition Network)” in FIW (Ed.), *Konvergenz der Wettbewerbsrechte – Eine Welt, ein Kartellrecht* (Carl Heymanns, 2002), 57 et seq.

⁹See Jackson, “Alternative Approaches for Implementing Competition Rules in International Economic Relations”, 49 *Aussenwirtschaft* (1994), 177 (191); Petersmann, “Proposals for Negotiating International Competition Rules in the GATT/WTO World Trade and Legal System”, 49 *Aussenwirtschaft* (1994), 231 et seq; Meessen, “Das Für und Wider eines Weltkartellrechts”, *Wirtschaft und Wettbewerb* (2000), 5 et seq; Fox, “Toward World Antitrust and Market Access”, 91 *American Journal of International Law* (1997), 1; Drexl, “WTO und Kartellrecht – Zum Warum und Wie dieser Verbindung in Zeiten der Globalisierung”, *Zeitschrift für Wettbewerbsrecht* (2004), 191; id., *Perspektiven eines Weltkartellrechts* (Rheinische Friedrich-Wilhelms-Universität Bonn, 1998); Anderson and Jenny, “Current Developments on Competition Policy in the World Trade Organization”, *Antitrust* (Spring 2001), 40; Lenski, “Die WTO auf dem Weg zur Weltwirtschaftsorganisation?” in Bungenberg and Meessen (Eds.), *Das internationale Wirtschaftsrecht im Schatten des 11. September 2001* (Boorberg, 2004), 115; Terhechte, “WTO und Wettbewerb”, in Hilf and Oeter (Eds.), *WTO-Recht* (Nomos, 2010), 641 et seq.

¹⁰Cf. Tarullo, “Norms and Institutions in Global Competition Policy”, 94 *American Journal of International Law* (2000), 478. These circumstances have – among other things – led to the USA not accepting the DIAC.

¹¹On the Microsoft saga see Case T-201/04, *Microsoft Corporation v Commission* [2007], II-3601; see also the Decision of the European Commission of 24 March 2004, COM(2004)900 final; see also the Decision 2007/53/EC of 24 May 2004, O.J. 2007, L 32/23; Pardolesi and Renda, “The European Commission’s Case Against Microsoft: Kill Bill?” 27 *World Competition* (2004), 513; detailed information on the case in Korah, *An Introductory Guide to EC Competition Law and Practice*, 8th ed. (Hart Publishing, 2004), p. 175 et seq; Lange and Pries, “Möglichkeiten und Grenzen der Missbrauchskontrolle von Kopplungsgeschäften: Der Fall Microsoft”, *Europäisches Wirtschafts- und Steuerrecht* (2008), 1; Körber, “Machtmissbrauch durch Multimedia? – Der Fall Microsoft zwischen

Japan.¹² A similar development can also be witnessed in the area of merger enforcement as shown by the cases GE/Honeywell¹³ and Boeing/McDonnell-Douglas.¹⁴ Lastly, the “international cartels” such as the vitamin cartels¹⁵ also serve to underline the increasing globalization of competition restraints.¹⁶

Nevertheless the phenomenon of “international competition restraints” has not existed only for a few years, but was discussed intensively even as far back as 50 years ago.¹⁷ The starting point for this development was the extensive liberalization of international business relationships in the course of GATT.¹⁸ Since the collapse of the former state-controlled economies in Eastern Europe, Asia and Africa and the creation of a common body of rules for the international trade of goods and services in the broader context of the WTO, governmental trade restraints, i.e., tariffs, quota and other restraints of trade, have steadily been reduced.¹⁹ Thus, the possible range of agreements restraining competition between companies has grown as well.

The situation therefore can be described as follows:

- With the increase in international trade and the worldwide use of the effects doctrine, it is becoming more and more likely that competition restraints affect more than one state.

Produktinnovation und Behinderungsmissbrauch”, *Recht der internationalen Wirtschaft* (2004), 568; Motta, *Competition Policy* (Cambridge University Press, 2004), p. 511 et seq; Takigawa, “A Comparative Analysis of U.S., EU, and Japanese Microsoft Cases: How to Regulate Exclusionary Conduct by a Dominant Firm in a Network Industry”, 50 *Antitrust Bulletin* (2005), 237.

¹²See the press releases on the decision of the Korean Cartel Authority KFTC on the Microsoft case from 7 March 2005 and the appeal by Microsoft that followed, both to be found at <<http://eng.ftc.go.kr>> (category “News”, keyword “Microsoft”) as well as the press release on the recommendation of the Japanese Competition Authority JFTC to Microsoft Corporation from 13 July 2004, available at <<http://www.jftc.go.jp/e-page/pressreleases/2004/july/040713.pdf>>.

¹³Decision of the European Commission of 3 July 2001, O.J. 2004, L 48/1.

¹⁴Decision of the European Commission of 30 July 1997, O.J. 1997, L 336/16; Kovacic, “Transatlantic Turbulence – The Boeing-McDonnell Douglas Merger and International Competition Policy”, 68 *Antitrust Law Journal* (2001), 805.

¹⁵Decision of the European Commission of 22 November 2001, O.J. 2003, L 6/1.

¹⁶See also Akbar, “Grabbing Victory from the Jaws of Defeat: Can the GE/Honeywell Merger Facilitate International Antitrust Policy Co-operation?” 25 *World Competition* (2002), 403; Böge, “Die Herausforderungen einer internationalen Wettbewerbspolitik in Zeiten globalisierter Märkte”, *Wirtschaft und Wettbewerb* 2005, 590; Conrad, *Die Notwendigkeit, die Möglichkeit und die Grenzen einer internationalen Wettbewerbsordnung* (Duncker & Humblot, 2005); Dabbah, *The Internationalisation of Antitrust Policy* (Cambridge University Press, 2003).

¹⁷See for a German perspective Wolany, “Internationale Kartellpolitik” in Jahn and Junckerstorff (Eds.), *Internationales Handbuch der Kartellpolitik* (Duncker & Humblot, 1958), 515 with further references.

¹⁸See for a German perspective Wolany, “Internationale Kartellpolitik” in Jahn and Junckerstorff (Eds.), *Internationales Handbuch der Kartellpolitik* (Duncker & Humblot, 1958), 515 with further references.

¹⁹Cf. Herrmann, Weiß and Ohler, *Welthandelsrecht*, 2nd ed. (C. H. Beck, 2007), paras. 97 et seq, using the tariff reduction rounds of GATT as an example.

- Mergers in particular are of transnational character nowadays, hence the probability of accumulation of excessive market power and increase of undue influence on the competition process.
- Overall, multiple branches of the industry have become strongly concentrated. The world market for crude oil, for example, lies in the hands of a small number of private corporations and OPEC.²⁰ The same applies to related energy markets.

2.1.2 Globalization of Competition Policy?

Competition politics have not been able to keep pace with the globalization of competition restraints. With historical hindsight, it can be seen as a tale of failure and set-backs although the need for international structures had been recognized early.²¹ Only now forums of cooperation are being developed by competition authorities. Nevertheless – and this is also shown by a closer look at the daily cooperation of competition authorities – this reveals the fundamental conflict between state sovereignty on the one hand and the challenges of a global economy with open markets on the other hand.²² Until now the community of states has not opposed the phenomenon of “globalization” with a common body of rules; unitary ideas collide with reservations on behalf of state sovereignty. Also, it is doubtful whether “one” body of rules will ever exist at all or if it will come down to a network of several such bodies.²³ The development of antitrust and competition law in particular indicates that the latter will be the case.²⁴ Therefore, future developments will depend to a considerable degree on instruments of coordination between the various actors.

²⁰Terhechte, *OPEC und europäisches Wettbewerbsrecht. Zugleich ein Beitrag zum Phänomen der Fragmentierung des internationalen Wirtschaftsrechts* (Nomos, 2008), p. 38 et seq; id., *Applying European Competition Law to International Organisations – The Case of OPEC*, 1 *European Yearbook of International Economic Law* (2010), 179.

²¹Cf. Dörinkel, *Internationales Kartellrecht* (Carl Heymanns, 1932); Wolff, *Die Rechtsgrundlagen der internationalen Kartelle* (Carl Heymanns, 1929); Wolany, “Internationale Kartellpolitik” in Jahn and Junckerstorff (Eds.), *Internationales Handbuch der Kartellpolitik* (Duncker & Humblot, 1958), 515 with further references.

²²Basedow, *Weltkartellrecht* (Mohr Siebeck, 1998), p. 111; Mestmäcker, “Staatliche Souveränität und offene Märkte”, 52 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* (1988), 205.

²³Fischer-Lescano and Teubner, *Regimekollisionen. Zur Fragmentierung des globalen Rechts* (Suhrkamp, 2006).

²⁴This topic is often being discussed under aspects of competition; on the “competition of competition systems” see Möschel, “Wettbewerb der Wettbewerbsordnungen”, *Wirtschaft und Wettbewerb* 2005, 599; Bätge, *Wettbewerb der Wettbewerbsordnungen?* (Nomos, 2009).

2.2 Forms of Cooperation

As long as the development of International Competition Enforcement Law can be described with the ciphers “Cooperation” and “Convergence”, it necessitates, as a second step, the examination of the various forms of cooperation between competition authorities. It is important to note that cooperation in this sense is not limited to executive authorities and agencies cooperating with each other; there is also the cooperation of authorities with private entities (e.g., companies) as well as the cooperation within the judiciary. In this respect “cooperation” includes networks, various forms of administrative cooperation, cooperation in the European *administrative compound* (see Sect. 2.2.1.1)²⁵ and diverse cooperation forms with private entities.

2.2.1 Networks

A peculiar characteristic of International Competition Enforcement Law lies in the fact that it does not only operate through or inside “networks” but that there is also explicit use of this term.²⁶ Here one may refer to the International Competition Network or the European Competition Network. The *East Asia Competition Policy Forum* also embodies an important platform.²⁷ Likewise the OECD is often labelled a network.

The term network describes non-hierarchical or hardly-hierarchical cooperation forms that are located outside usual forms of administrative cooperation. Ultimately this means dealing with a new form of “compressed and long-lasting cooperation”.²⁸ However the term does create certain problems for jurisprudence, not least because the term “network” is currently en vogue and sometimes overused.²⁹ Nevertheless the development in the Competition Enforcement Law proves that

²⁵On administrative cooperation see Möllers, “Transnationale Behördenkooperation. Verfassungs- und völkerrechtliche Probleme transnationaler administrativer Standardsetzung”, 65 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2005), 351; Schmidt-Aßmann, “Verfassungsprinzipien für den Europäischen Verwaltungsverbund” in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, Vol. 1 (C. H. Beck, 2006), § 5 paras. 41 et seq.

²⁶See Damtoft and Flanagan, “The Development of International Networks in Antitrust”, 43 *International Law* (2009), 137; Fox, “Linked-in: Antitrust and the Virtues of a Virtual Network”, 43 *International Law* (2009), 151; Sweeny, “International Competition Law and Policy: A Work in Progress”, 10 *Melbourne Journal of International Law* (2009), 58.

²⁷Terhechte in id. (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 77 para. 3.

²⁸Schmidt-Aßmann, “Verfassungsprinzipien für den Europäischen Verwaltungsverbund” in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, Vol. 1 (C. H. Beck, 2006), § 5 para. 26.

²⁹Schwarze, *Europäisches Verwaltungsrecht*, 2nd ed. (Nomos, 2005), p. CIX.

the term can indeed be helpful from time to time, not least because it is able to cover and describe a wide range of phenomena.³⁰

2.2.1.1 Administrative Networks

ICN and ECN constitute networks of competition authorities. Admittedly there are differences regarding their preferred fields of activity. The aim of the ICN is to create a worldwide information platform for all competition authorities. To this purpose, annual conferences are held and common viewpoints as well as discussion papers are developed in study groups. However, an exchange of information with respect to specific cases etc. does not take place.

In contrast to this the ECN serves as coordination agent for the enforcement of the European competition procedure Reg. (EC) No 1/2003³¹ and is supposed to be instrumental in harmonizing the mutual activities of the European Commission and the national competition authorities.³² The ECN therefore is a good example of the ongoing stabilization of administrative structures in the EU and is therefore also frequently characterized as one cornerstone of the European *administrative compound*³³: “It [the administrative compound] manifests itself in a growing number of administrative entities in the Union, in decentralized and centralized networks, in a multi faceted European committee system and in the practical *cooperation* of national and unional administration authorities. The enforcement of the administration of the Union takes place in an *information, decision and control compound* between member states and the Union’s own executive”.³⁴ In contrast to rather loosely organized networks at the international level (i.e., ICN, OECD, UNCTAD) ECN is embedded in rigidly defined legal structures. This is also exemplified by the multi-dimensional nature of its tasks: Besides the exchange of information, it is also concerned with questions about fundamental ranges of authority, the execution of investigations for other competition authorities within the compound and the control of these processes through the Commission.³⁵

³⁰Damtoft and Flanagan, “The Development of International Networks in Antitrust”, 43 Int’l Law. (2009), p. 137 et seq; see also Verdier, Transnational Regulatory Networks and their Limits, 34 *Yale Journal of International Law* (2009), 113.

³¹Regulation (EC) 1/2003, O.J. 2003, L 1/1.

³²Hossenfelder in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 84 paras. 3 et seq.

³³Schmidt-Aßmann and Schöndorf-Haubold (Eds.), *Der Europäische Verwaltungsverbund* (Mohr Siebeck, 2005).

³⁴Schmidt-Aßmann, “Verfassungsprinzipien für den Europäischen Verwaltungsverbund” in Hoffmann-Riem, Schmidt-Aßmann and Voßkuhle (Eds.), *Grundlagen des Verwaltungsrechts*, Vol. 1 (C. H. Beck, 2006), § 5 para. 17.

³⁵See extensively Hossenfelder in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 84 paras. 7 et seq.

Common to both networks however, is that national or supranational authorities operate here primarily, not the states to which they belong. Admittedly though, the ICN in particular does not confine itself completely to a governmental perspective but regularly invites scholars and law firms to partake in its activities.³⁶ Moreover a non-hierarchical structure has been established in ECN only to a certain degree, which has a lot to do with the role of the European Commission as a proverbial “spider in the web”. These cases alone demonstrate that the term “network” within the context of Competition Enforcement Law can embody totally different phenomena.

2.2.1.2 Judicial Networks

The “network idea” is not restricted to the administrative realm but can also be applied to judiciary settings, as in “court networks”.³⁷ Indeed, it is possible in the field of the judiciary to discern certain network formations, as affirmed by the foundation of the *Association of European Competition Law Judges* (AECLJ). It constitutes an attempt at creating a constant foundation for the exchange of experiences and organizing Europe-wide opportunities for advanced judicial education. The funding of court networks is, however, an evident and perennial problem. The AECLJ, for example, is dependent on European Commission funds or donations from other sources to carry out its activities. However, this form of association embodies no completely new development that is limited to antitrust law. Court networks have been established in other legal areas as well.³⁸ At the international level it is worth mentioning the *International Association of Judges* (IAJ)³⁹ as also the *American Judges Association*.⁴⁰

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

³⁶Cf. Rasek in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Gieseck, 2008), § 83 para. 9.

³⁷Slaughter, “A Global Community of Courts”, 44 *Harvard International Law Journal* (2003), 191; id., *A New World Order* (Princeton University Press, 2004), p. 65; id., “Judicial Globalization”, 40 *Virginia Journal of International Law* (2000), 1103 et seq; Terhechte, “Judicial Ethics for a Global Justice – How Judicial Networks Create their own Codes of Conduct”, 10 *German Law Journal* (2009), 501.

³⁸A rundown of the European organizations of judges is available at <<http://www.richtervereiningung.at/links6a.htm>>.

³⁹<http://www.iaj-uim.org/old/ENG/frameset_ENG.html>.

⁴⁰<<http://aja.ncsc.dni.us>>.

matter. Practical relevance, however, has so far been achieved only on matters of penal procedure.⁴¹

2.2.2 “Classical” Administrative Cooperation

Today cooperation between the responsible administrative bodies at the international level mainly takes place in the classical forms, i.e., the administrative assistance that is partly laid down in individual international agreements.⁴² From a “dogmatic” point of view one frequently deals with questions concerning “classical” international administrative law, which acts to some extent as the counterpart of private international law in solving traditional questions of collision.⁴³ This perception of international administrative law as a law of administrative collision only is in a flux today, as can be clearly illustrated by using the International Competition Enforcement Law as an example. Here the concern lies less in solving the problems of conflicting laws and more in developing common standards and fundamental rules as well as the cross-linking of the responsible administrative bodies. Thus, “International Administrative Law” or “Global Administrative Law” is nowadays clearly based rather on international than on national law. Later studies that refer explicitly to the competition law also try to establish the Global Administrative Law on this assumption.⁴⁴

2.2.3 Cooperation Beyond the Limits of Authority

Cooperation takes place not only within the core, but also beyond the limits of authority. This is partly due to the fact that the judiciary often does not have the

⁴¹See Podszun in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 85 paras. 13 et seq; see generally on international legal assistance Siehr, “Grundfragen der internationalen Rechtshilfe in Zivilsachen”, *Recht der Internationalen Wirtschaft* (2007), 321; Schomburg, “Internationale vertragliche Rechtshilfe in Strafsachen”, *Neue Juristische Wochenschrift* (2005), 3262; von Danwitz, “Verfassungsfragen des deutsch-amerikanischen Rechtshilfeverkehrs”, *Die Öffentliche Verwaltung* (2004), 501; Knöfel, “Judicial Assistance in the Taking of Evidence Abroad in Aid of Arbitration – A German Perspective”, 5 *Journal of Private International Law* (2009), 281.

⁴²Cf. Wettner, *Die Amtshilfe im Europäischen Verwaltungsrecht* (Mohr Siebeck, 2005); Kastner in Fehling and Kastner (Eds.), *Handkommentar Verwaltungsrecht*, 2nd ed. (Nomos, 2009), § 4 VwVfG para. 11 with further references.

⁴³Ohler, *Die Kollisionsordnung des Allgemeinen Verwaltungsrechts* (Mohr Siebeck, 2005), p. 2 et seq.

⁴⁴See Sect. 1.1.3 *supra*; for the concept of Global Administrative Law see also Kingsbury, Krisch and Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* (2005), 15; Krisch, “The Pluralism of Global Administrative Law”, 17 *European Journal of International Law* (2006), 247 as well as *supra* note 2 with further references.

necessary funds to cooperate in networks. Financial resources are then made available by the European Community, private foundations and the OECD. The cooperation becomes more formal however, when courts request evidence and other information with regard to pending cases through the official channel of obligatory information exchange.

2.2.4 Cooperation with Private Entities

To date research on the role of cooperation between competition authorities (or courts) and private entities has been poor.⁴⁵ In Europe the role of private entities has largely been ignored and so far has been mainly limited to suits for damages, which are rarely pursued in the light of often insurmountable obstacles. Not until the last important Amendment of the German *Gesetz gegen Wettbewerbsbeschränkungen* (Act against Restraints of Competition – ARC) did this partly change in Germany (cf. § 33 ARC). Despite that, private enforcement of antitrust law continues to play a secondary role in Europe.⁴⁶ In contrast to that about 90 % of all US proceedings can be attributed to private initiative. In the field of international cooperation, private entities are involved in international networks such as the ICN to ensure the availability of external expertise.⁴⁷ In part their contributions have given rise to fundamental reform processes and new initiatives. In this regard the *Whish/Wood* report⁴⁸ from within the OECD is well worth a look, because it has evoked strong impulses for the reform of merger enforcement laws worldwide.⁴⁹

2.3 The Limits of Cooperation

It would be fallacious to assume that the cooperation of the actors in International Competition Enforcement Law can resolve all the problems of this legal field. Cooperation can only affect certain parts of it. It is naturally limited by differences in the implementation of various procedures (see Sect. 2.3.1). In addition, the standards of protection (i.e., through fundamental rights) are in quite different stages of

⁴⁵Kovacic, “Private Participation in the Enforcement of Public Competition Laws”, available at <<http://www.ftc.gov/speeches/other/030514biicl.shtml>>.

⁴⁶See Gebauer and Staudinger in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 7 para. 6; Mäsch, “Private Ansprüche bei Verstößen gegen das europäische Kartellverbot”, *Europarecht* (2003), 825.

⁴⁷Cf. Damtoft and Flanagan, “The Development of International Networks in Antitrust”, 43 *International Law* (2009), p. 137 et seq; see also Verdier, *Transnational Regulatory Networks and their Limits*, 34 *Yale Journal of International Law* (2009), 113.

⁴⁸Whish and Wood, *Merger Cases in the Real World – A Study of Merger Control Procedures* (OECD, 1994).

⁴⁹Göranson and Reindl in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 75 para. 26.

development so that the problem is always present, if national competition authorities have the authority to forward any information at all. (Cf. on this Art. 12, 28 Reg. (EC) No 1/2003,⁵⁰ also cf. Sect. 2.3.2). Furthermore the cooperation in question often lacks transparency with regard to outside actors.

2.3.1 *Differences in Procedures*

Until recently many observers have characterized procedural law as a jungle.⁵¹ Indeed the thicket here is most difficult to break through. Procedures as such are often not homogenous or uniform and thereby reflect the divergent structures of executive authorities. Even if certain common points and principles can be detected, the differences in procedure must in many cases be identified as considerable hindrances to cross-border cooperation.

2.3.2 *Fundamental and Human Rights*

The differences in national standards regarding fundamental and human rights can constitute a not-to-be-underestimated hindrance to the cooperation of authorities or courts. One, for example, has to consider the consequences of information exchange in the ECN or between authorities at the international level. Is evidence that has been obtained through ways which fail to abide by German standards (i.e., violating a prohibition on the taking of evidence) nevertheless admissible, provided foreign authorities supplied it? Cases in which confidential information is passed on, i.e., business secrets, internal documents or personal data on witnesses, are also problematic. The disclosure of such information is explicitly forbidden by the majority of legal systems, at least in the international context – showcasing its role as a manifestation of individual fundamental rights positions.⁵² Admittedly, the parties of a procedure usually have the chance to lift the protection upon their data by relinquishing their rights. However in the absence of such a waiver, a fundamental prohibition that prevents the disclosure of business secrets exists. The situation is

⁵⁰Regulation (EC) 1/2003, O.J. 2003, L 1/1.

⁵¹Stockmann in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), VII.

⁵²Cf. § 50 b (2) GWB, see also Becker in Loewenheim, Meessen and Riesenkampff (Eds.), *Kartellrecht, Band 2 (GWB)* (C. H. Beck, 2006), § 50 b para. 2; for a view on the European level see Art. 12 (2), (3), Art. 28 of Regulation (EC) No 1/2003, see also Frieß in Loewenheim, Meessen and Riesenkampff (Eds.), *Kartellrecht, Band 1 (Europäisches Recht)* (C. H. Beck, 2005), “Einführung VerfVO” para. 18, Art. 28 paras. 11 et seq; Art. 17 of Regulation (EC) 139/2004, see also Hecker, *ibid.*, “FKVO” Art. 17 paras. 1; for a view on U.S. law see FTC Act 15 U.S.C. § 46 (f), cf. Buchmann, *Positive Comity im internationalen Kartellrecht* (Sellier, 2004), p. 71 with further references.

different though when the forwarding of general data is concerned, such as the information that a procedure has been initiated or the general characterization of a market. Such information can usually be disclosed without the assent of the parties involved.

The effects doctrine, which takes as a basis for the application of a respective jurisdiction the effects of the behaviour in question alone, can reveal a fundamental rights dimension.⁵³ Here – among other things – exists a danger of double or multiple punishments, owing to the fact that in a globalized world, competition-restraining behaviour can have effects in many places, not to say everywhere.⁵⁴ In extreme cases it is even possible that opposing sanctions will be imposed, in the way that a company is obliged by law to behave in a certain way in state A, while the same behaviour is forbidden in state B.⁵⁵ This issue could be resolved if one gives preference to the state within whose jurisdiction the main impact of the suspicious behaviour took place.⁵⁶

Another basic question that affects fundamental rights is the role of the so-called *Legal Professional Privilege*, which shall protect legal correspondence between lawyers and their clients.⁵⁷ The discussion essentially revolves around the question of whether a staff lawyer can refer to this *Legal Privilege* in the relationship to his employer as well. The discussion on this question in European Union law has recently been encouraged again by the General Court (GC), formerly known as Court of First Instance (CFI).⁵⁸

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

2.3.3 Transparency Requirements

Occasionally international administrative cooperation can be difficult for outsiders to overview because a large number of processes take place at an informal

⁵³See extensively Chap. 3.2.6 *infra* and Chap. 3.4 *infra*.

⁵⁴On the prohibition of double jeopardy Schild and Terhechte in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 8 paras. 28 et seq.

⁵⁵Cf. Knebel, “Die Extraterritorialität des europäischen Kartellrechts”, *Europäische Zeitschrift für Wirtschaftsrecht* (1991), 265.

⁵⁶Parisi and Podszun in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 87 paras. 30 et seq.

⁵⁷See extensively Weiß in Terhechte (Ed.), *Internationales Kartell- und Fusionskontrollverfahrensrecht* (Giesecking, 2008), § 6 para. 53.

⁵⁸Joined cases T-125/03 and T-253/03, *Akzo et al. v. Commission*, [2007] ECR II-3523, *Euro-parecht* (2008), 514; see also Weiß, “Neues zum Legal Professional Privilege – Eine Anmerkung zum Akzo Urteil des EuG”, *Europarecht* (2008), 546.

level.⁵⁹ An example of this is a purely informal exchange of information (i.e., by telephone) which in practice constitutes a quite important part of governmental cooperation. For the affected company it is often impossible to find out what kind of data has been exchanged. This must invoke skepticism as high transparency standards play an increasingly important role in the Competition enforcement law.⁶⁰ Admittedly it has to be noted that in many cases, companies in the field of merger enforcement often renounce the secrecy of information to speed up the procedure.

2.3.4 *Legal Protection*

Another important question is how companies and private entities can obtain effective legal protection if information which is classified as confidential is passed on or disclosed. The division of the cases in ECN can illustrate additional problems which until recently have not been the subject of much discussion.⁶¹ It is certain that the more informal governmental cooperation is, the more difficult it is for the affected companies and private entities to implement their rights in the courts. If they are successful in this regard, they may have the potential to limit the cooperation between the authorities by delineating clear boundaries.

2.3.5 *Lack of Binding Nature*

Finally, it is important to point out the lack of binding nature of most cooperation agreements. The parties to the agreement *can*, but not necessarily *must*, work together. This clause is significantly connected to the *Comity-Principle* on which the cooperation agreements are based.⁶² There are thus basic limits to cooperation, which can play a role if certain processes affect the national interests of a state. In practice though, this has not often been the case.

⁵⁹Mozet, *Internationale Zusammenarbeit der Kartellbehörden* (C. F. Müller, 1991), p. 88 et seq with further references.

⁶⁰See generally Bjurulf and Elgström, "Negotiating Transparency: The Role of Institutions", 42 *Journal of Common Market Studies* (2004), 249 et seq; Prechal and de Leeuw, "Dimensions of Transparency: The Building Blocks for a New Legal Principle?" *Review of European Administrative Law* (2007), 51; Schwarze *Europäisches Verwaltungsrecht*, 2nd ed. (Nomos, 2005), p. CXV; id., "Formen, Standards und Zukunftsperspektiven des europäischen Verwaltungsrechts" in id (Ed.), *Bestand und Perspektiven des europäischen Verwaltungsrechts* (Nomos, 2008), 11 et seq.

⁶¹But see Schwarze, "Anfechtung der Fallverteilung im europäischen Netzwerk der Wettbewerbsbehörden" in Brinker, Scheuing and Stockmann (Eds.), *Festschrift für Rainer Bechtold* (C.H. Beck, 2006), 483.

⁶²Extensively Buchmann, *Positive Comity im internationalen Kartellrecht* (Sellier, 2004), p. 104 et seq.



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