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Competition Agency Design in Globalised Markets

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ABSTRACT

In this paper, the authors look at institutional design of competition authorities. They describe and assess trade-offs entailed by different options, such as different leadership structures or different degrees of autonomy from political power. The design choices are also analysed in a multi-jurisdictional context where different competition authorities can take decisions on the same or similar international cases.

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LIST OF ABBREVIATIONS AND ACRONYMS

CADE	Conselho Administrativo de Defesa Econômica
DOJ	Department of Justice
EC	European Commission
EU	European Union
FRAND	Fair, reasonable, and non-discriminatory
FTA	Free-trade agreement
FTC	Federal Trade Commission
ICN	International Competition Network
LCD	Liquid-crystal display
MofCom	Ministry of Commerce
NDRC	National Development and Reform Commission
OECD	Organization for Economic Co-operation and Development
SAIC	State Administration for Industry & Commerce
SEAE	Secretariat for Economic Monitoring
TFEU	Treaty on the Functioning of the European Union
UNCTAD	United Nations Conference on Trade and Development
UK	United Kingdom
US	United States

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INTRODUCTION

The global reach of competition law continues to expand. As of 2015, more than 125 jurisdictions have adopted competition laws.[1] More than 100 of these systems are less than 25 years old. By 2020, the number of competition regimes will exceed 130.[2]

These developments have major consequences for international trade flows and investment. Ideally, a convergence in the design and application of laws would help achieve consistent outcomes, favouring the flow of international trade. For example, companies willing to invest abroad through mergers and acquisitions could face lower transaction costs if individual jurisdictions would adopt broadly similar notification procedures and filing requirements. The very same companies would find it easier to predict what they would need to do to get regulatory clearance. A greater degree of standardisation internationally would reduce the risk of delays or inconsistent outcomes that could affect the viability of proposed mergers. Beyond merger control, multinational firms could engage in similar market strategies across multiple jurisdictions without being (too) worried that conduct considered legal in one jurisdiction could be deemed to breach antitrust laws in another. Thus, an exporter selling domestic products in bundles would be happy to know that the scale of its bundled supply can be efficiently increased to supply other markets without fearing antitrust consequences abroad. Investors considering deploying new green-field outlays could be reassured that antitrust enforcement in the host economy will not allow for a lower level of protection to the one received at home. A retailer entering foreign downstream markets would have the same tools to complain and oppose upstream cartels as it would do at home.

International cooperation and convergence in the application of antitrust laws may also affect the quality of decisions. For example, if authorities dealing with the same multi-jurisdictional merger are seeking the same kind of information, a strong international information-sharing system would enable these authorities to gather relevant data more quickly if that information already had been provided to other authorities. Likewise, broad acceptance and application of analytical norms would enable authorities to rely more heavily on the action of other agencies to deter illegal behaviour, to the extent that the different systems pursue similar objectives. An upstream monopolist would be wary to engage in similar exclusionary conducts in different jurisdictions if the starting of the investigation in one market would prompt the attention of the authority in the other.

Such benefits become more compelling with the globalisation of markets, and so do calls for increased cooperation between antitrust authorities. Yet, antitrust agencies and competition law systems are not identical. There is considerable variation in how antitrust authorities are designed to pursue their institutional mandates. Some agencies are solely competition agencies; others have mandates with two or more functions. In some jurisdictions, the competition authority is a stand-alone body with substantial independence from the legislature or from government ministers. In some countries, the functions of prosecution and the determination of guilt are allocated to different public bodies. In many others, these functions are integrated within a single institution. The power of competition agencies to impose sanctions (e.g., injunctions or structural remedies) upon companies in breach of antitrust law varies significantly. The ties of agency leaders to the political process also differ across jurisdictions. An agency's leadership may be more or less involved in the policy process; it might be headed by a politically appointed chief or governed by a board of bipartisan experts.

It is fair to say that an optimal set of institutional characteristics does not exist. Rather, each institutional setting entails a trade-off to be assessed against the objectives that are meant to be achieved through the application of a country's competition policy framework. However, the outcome of antitrust action in any jurisdiction and the level of international cooperation between authorities may well depend on the institutional setting. It could be argued that similar institutional designs are more likely to lead to similar outcomes, although this is not necessarily true, if one accepts that what works better in a certain jurisdiction does not necessarily work well in others.[3] Broad generalisations about the impact of formal design choices must be tempered by the awareness that various informal customs and norms can be crucial to how a system performs in practice.

In this paper, we describe the different options available for institutional design of antitrust authorities – a "menu" of institutional choices – and assess their costs and benefits. We also discuss how different settings may affect authorities'

1 The results of the George Washington University Competition Law Center 2015 survey of competition systems are available at http://www.gwclc.com. Data compiled by the Organisation for Economic Co-operation and Development in 2014 on competition systems are available at http://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf.

2 For example, the ASEAN treaty requires its members to adopt competition laws by the end of 2015. Myanmar adopted its first competition law in 2015, and its system will become operational in February 2017.

3 For example, a major consideration in choosing among alternative design possibilities is the pool of human capital available in the jurisdiction to implement the competition law and related regulatory regimes. A nation with a small population and few experts in regulatory economics might be well advised to combine a larger number of regulatory functions within a single agency – to make the best possible use of individuals who are skilled in microeconomic policy analysis. The case for integrating more decision-making functions within a single agency is greater if the nation's courts are dysfunctional. On the importance of national context in making design choices for competition systems and other forms of economic regulation, see Hyman, D.A. and W.E. Kovacic (2014), "Why Who Does What Matters: Governmental Design and Agency Performance," *George Washington Law Review* 82:1336.

abilities to cooperate or converge on consistent outcomes, particularly in cases with an international dimension. We conclude with a number of considerations from a policy perspective.

Our emphasis on institutional characteristics seeks to help correct a tendency on the part of researchers to overlook the importance of institutional structures as determinants of substantive policy outcomes. Commentators – especially academics – often find it interesting and professionally rewarding to focus on the theories and analytical frameworks that should guide policy analysis. In doing so, they tend to overlook the practical problems of organisation and management that public administrators must solve to implement programmes effectively. One legal scholar has described the imbalance in scholarly effort in the following terms:

> It is the substantive merits and politics of policy proposals that almost always dominates public debates, not the often invisible, mundane processes of public administration. Even political scientists, who should know better, tend to relegate public administration to a relatively obscure corner of their profession. Whereas the substance of policy design is considered sexy, the process of policy administration is usually seen as, well, boring.[4]

To put it another way, the pursuit of the elegant theoretical model or the creative analytical framework is the physics of regulatory policy, while the formation of mechanisms to see that the good idea is realised in practice is dismissed or treated as a pedestrian task in engineering – something that can be left for sorting out later. The sum of brilliant physics and inferior engineering is a policy scheme in which actual policy results lag distressingly behind expectations.

AGENCY DESIGN: WHAT'S ON THE MENU

In this section, we describe nine major design choices a jurisdiction confronts in deciding how to organise its competition law system. As we describe below, variations in the approach that nations have taken to addressing these choices affect the consistency, predictability, and coherence of global competition law systems as a whole and influence investment and trade patterns. In setting out these choices, we draw on work that each of us has done with other co-authors in exploring how organisational structure affects policy content and outcomes.[5]

AUTONOMY V. ACCOUNTABILITY

The establishment of a competition agency requires decisions about its relationship to elected officials in the executive and legislative branches of government. Ideally, the agency will be simultaneously autonomous from political pressure in exercising its authority to investigate infringements and prosecute violations, but accountable for the exercise of its powers and expenditure of public resources. Institutional design choices influence the degree to which these two (admittedly somewhat inconsistent) goals are met.

One common approach to achieving autonomy is to establish the competition authority as an "independent" agency.[6] A variety of measures can help increase the agency's ability to resist efforts by the political branches of government to decide which cases get brought and how they are resolved. A standard method is to give the agency's leaders fixed-term appointments and to forbid their removal from office except for good cause.[7]

Funding may also be a source of autonomy if the agency can obtain resources without recourse to ministerial approval or legislative appropriations. One way to increase protection from political interference in the form of budgetary pressure that would distort its selection of cases is to allow the agency to collect and retain user fees as part of the merger review process. We note immediately that user fee collection and other independent funding mechanisms (e.g., allowing the competition agency to retain part of the fines it collects for infringements) create their own distortions and incentives for perverse agency behaviour.[8]

4 Schuck, P.H. (2009). "Is a Competent Federal Government Becoming Oxymoronic?" *George Washington Law Review* 77: 973, 975.

5 Kovacic, W.E. and D.A. Hyman (2012). "Competition Agency Design: What's on the Menu?" *European Competition Journal* 8:1; Kovacic, W.E., P. Mavroidis, and D. Neven, D. (2014)." Merger Control Procedures and Institutions: A Comparison of E.U. and U.S. Practice." *Antitrust Bulletin* 59:55; M. Mariniello, D. Neven, and J. Padilla, J. (June 2015) Antitrust, regulatory capture, and economic integration.

6 The possible meanings of "independence" and the tensions between autonomy and accountability are discussed in Kovacic, W.E. and M. Winerman. (2015) "The Federal Trade Commission as an Independent Agency: Autonomy, Legitimacy, and Effectiveness." *Iowa Law Review* 100: 2085.

7 We do not mean to suggest that the formal protection of fixed tenure is always necessary for an agency to attain a requisite degree of autonomy. In some systems, by reason of customs developed over time, heads of agencies in some jurisdictions enjoy considerable autonomy even though they are subject to immediate removal for any reason by the head of state. Also, we do not conclude that a fixed-term appointment always suffices to ensure that agency leaders act autonomously in using their law enforcement powers. To some extent, agency leaders are only as independent as they wish to be. An agency head with a tenured appointment also may desire to remain on good terms with powerful political leaders who can dispense favours, such as a future appointment to another position in government.

8 For example, relying on merger filing fees to finance agency operations creates temptations to set filing thresholds artificially low in order to increase the number of mandatory notifications and, consequently, filing fees.

Accountability can be achieved in various ways, some of which involve design features that reduce autonomy. The agency might be constituted as an executive branch ministry or a subunit of another ministry, and its leaders would serve at the pleasure of the head of state or the legislature. Accountability is usually established by giving the executive branch and/or the legislature direct control of the agency's budget.

Judicial review of agency decisions can provide a further means to achieve accountability. In principle, the courts scrutinise agency decisions to ensure that the agency is faithful to commands set out in the competition law and in other legal instruments, such as a national constitution or statute governing administrative process. In one sense, buy creating judicial review, the legislature delegates to the courts the task of seeing that the agency operates properly within the bounds of its authority. In practice, the contribution of judicial review to the sound operation of the competition agency depends on the role and powers of the courts. If the courts are substantially subject to political control, because judges lack fixed terms or are directly subordinate to political officials, their ability to serve as dispassionate referees in reviewing agency decisions may be limited. Moreover, the protection of needed levels of competition agency autonomy will not be achieved if politically subordinate courts use judicial review to achieve outcomes in individual cases that please legislators or ministers.

Another accountability strategy is to mandate fuller disclosure about the agency's activities. For example, an agency might be required to publish regular reports about its activities and operations. A jurisdiction can compel the agency to disclose certain information in response to requests by the public. The agency also can take voluntary steps to increase accountability, including the revelation of data not required by law, frequent public appearances by agency leaders to explain and defend policy choices, and public consultations in which the agency seeks views about what it should do. As its powers increase, an agency may find that expanded voluntary disclosure is necessary to boost its perceived legitimacy.

Autonomy and accountability are not goals to be sought in their own right. An agency that is completely autonomous (e.g., with tenured appointments and a separate income stream) can become isolated from the policy decisions that shape the competitive process. For example, the agency might find itself on the outside looking in as executive branch ministries and legislatures hammer out legislative packages that will affect the competition more deeply than any 10 cases the antitrust agency might file. Similarly, an agency that is "too accountable" may spend so much time responding to legislative demands/oversight, and public inquiries that it is hamstrung.

LEADERSHIP STRUCTURE: MULTI-MEMBER BOARD OR UNITARY EXECUTIVE

Competition agencies typically adopt one of two dominant models for their leadership structure: either a multi-member board or a unitary executive. More than 60 percent of the world's competition agencies are governed by multi-member boards. The multi-member board is believed to offer the advantages of diversified expertise, greater resistance to capture, and heightened legitimacy. Multi-member boards are also less subject to abrupt shifts in policy in the wake of an election that results in a change in power.

A unitary hierarchy offers its own advantages. Compared with a board whose members may communicate disparate views about what their agency should do, a single executive is better able to create a clear "brand" and define a coherent programme for her agency.[9] A single executive is more likely than a multi-member board to reach a decision and implement it quickly. Finally, because decision-making is in the hands of a single individual, it less likely (though not impossible) that the slot will go to an unqualified political supporter.[10]

STAND-ALONE AGENCY OR SUBSIDIARY COMPONENT OF A LARGER DEPARTMENT

Most jurisdictions have established the competition agency as a distinct, stand-alone body. A self-contained body has greater ability to establish a distinct identify and brand. The separate agency also can respond to changing circumstances without the need to coordinate with other units of the organisation in which it resides.

Alternatively, the competition agency can be situated within a larger entity. This is the model used by the European Union (where the Directorate General for Competition is but 1 of 27 directorates of the European Commission (EC)), and by the United States (US) — where Antitrust is 1 of 8 divisions, 5 bureaus, 27 offices, 4 programmes, 2 commissions, and 2 institutes of the Department of Justice (DOJ). The competition agency benefits from the reputation and political power of

9 On the importance of branding as a determinant of an agency's success, see Kovacic, W.E. (2015) "Creating a Respected Brand: How Regulatory Agencies Signal Quality." *George Mason Law Review* 22:237.

10 On the barriers to making good appointments to multi-member boards, see Kovacic, W.E. (1997). "The Quality of Appointments and the Capability of the Federal Trade Commission." *Administrative Law Review* 49: 915. With a multi-member board, heads of state or legislators may feel less urgency to make every appointment count. Those responsible for appointments may believe that if a majority of the board members are well qualified, or at least if the chair has the relevant expertise, the other slots on the board can be dispensed as patronage. When a single individual heads the competition agency, it is not possible to hide a weaker appointee.

the larger entity, but it must compete with other units for budgetary resources and administrative support. It is also more difficult to create a distinct, respected identify amid a sea of sister subsidiaries.

ONE OR MANY ENFORCEMENT AGENCIES/ AGENTS

The simplest model is to give a single public institution exclusive enforcement authority. More pluralised models are possible. In the US, for example, there are two national antitrust agencies — the Federal Trade Commission (FTC) and the DOJ Antitrust Division — with overlapping mandates; member states enforce the national competition laws and their own antitrust statutes; sectoral regulators (e.g., the Federal Communications Commission) have concurrent competition powers to review mergers; and there are powerful private rights of action.

Reliance on multiple enforcement agencies serves several distinct purposes. It provides insurance against the possibility that any single agent will fail to execute its responsibilities by reason of sloth, resource constraints, corruption, capture, or political influence. Multiplicity also creates the basis for rivalry that can lead to improvements in system-wide performance. Multiple agents allow testing of alternative approaches to implementation.

Multiplicity also has costs. Placing two or more public agencies in the same policy domain is almost certain to create tension. Interagency rivalry can degenerate into competition on margins that do not increase society's well-being, but instead focus on the parochial interests of the institutions. Multiplicity can also detract from the coherence of a nation's competition policy. As the number of enforcement agents increases, no single agent may have the ability to determine the selection and timing of important litigation matters. Ill-advised prosecutorial choices by one agent may yield doctrines that adversely restrict the capacity of other agents. Multiplicity will also impede the ability of a jurisdiction to speak with one voice in international forums.

There are various strategies to address the problems created by multiplicity, ranging from hard constraints that establish a strict hierarchy of authority (such as the power of the EC to displace the authority of national competition authorities on matters with broad community-wide significance) to the use of "soft law" approaches (such as the operation of the European Competition Network).

SINGLE-PURPOSE OR MULTIPURPOSE MANDATE

Some nations have created single-purpose competition authorities, whose sole remit is the enforcement of antitrust commands while a majority of other nations have formed multipurpose institutions that also enforce other bodies of law. The most common combination is antitrust plus consumer protection statutes and/or public procurement laws, but more exotic combinations exist.

Single-purpose agencies have greater capacity to establish a clear institutional "brand" and coherent priorities, but multipurpose agencies can realise synergies and lower the costs associated with coordinating policy between separate institutions with related functions. The combination of two or more regulatory functions also can enable an agency to achieve minimum efficient scale in the creation of its professional staff in jurisdictions where the talent pool available precludes establishing a larger number of regulatory bodies.[11] This may be especially true in countries with small populations and particularly severe resource constraints.

The ability to realise policy synergies depends on whether the functions to be combined are true policy complements and do not consist of a rubbish bin of dissimilar (or, worse, conflicting) duties. The greater the diversity of functions, the lower the synergies – and harder time a multipurpose agency may have in persuading a reviewing court that it is genuinely expert and entitled to deference in all the policy domains for which it is responsible.[12]

A multiplicity of functions can provide a safeguard against capture. Generally speaking, competition agencies are less prone to capture, owing to the diversity of commercial interests they oversee. Most competition agencies have regulatory authority over a broad array of industries and firms with cross-cutting commercial interests. This provides a built-in buffer against capture. By contrast, a sectoral regulator with responsibility for overseeing a single field of commerce may be more susceptible to efforts by the sector to persuade officials that the well-being of incumbents is the agency's first priority.[13]

The breadth and diversity of a mandate can make a multipurpose agency a more elusive target for any single industry group. Joining network access oversight with a competition mandate may make it less likely that the

11 We thank John Davies for bringing this point to our attention.

12 We do not suggest that it is impossible to tell a capture story involving competition agencies. Who might have some success in capturing competition regulators? One hypothesis is that professional societies, such as bar associations, might influence competition agency officials by promoting acceptance of norms that encourage greater agency activity in the form of cases or investigations. These agency activities generate opportunities for lawyers and economists to represent affected parties. If agency officials aspire to future positions in law firms or economic consultancies, they may feel some inclination to embrace norms favoured by their future employers. Such a disposition could imbue the agency, at the margin, with a bias to take action rather than to stand down.

13 Even for a single-sector regulator, capture becomes more difficult as the interests within the sector splinter. For example, technological change within the telecommunications sector has created strongly divergent interests among various classes of industry participants, including many in service segments (e.g., mobile telephony) that did not exist 20 years ago.

regulated network participants can capture the diversified competition regulator. More generally, as the range of regulator duties and affected commercial interests expands (e.g., by combining consumer protection advertising oversight with competition law), the possibilities for capture by any single industry interest would tend to diminish.

LAW ENFORCEMENT OR COMPETITION POLICY

Countries differ in terms of whether the competition agency is accorded a narrow or more expansive ambit. A narrow conception of the agency's role emphasises its law enforcement functions (e.g., conducting investigations and prosecuting infringements of the law). A broader conception of the agency's role allows it to function as an advocate for competition (e.g., by performing studies and appearing before other government bodies to urge them to consider the importance of promoting competition when adopting policies). This advocacy role makes it possible for the agency to protect the marketplace from public restraints on competition, which are likely to be more durable than private restraints.

"Advocacy" authority expands the competition agency's field of play and has important political consequences. When an agency is seen to perform only law enforcement functions, elected officials will pay a political cost for interfering. Conversely, when an agency engages in advocacy, it will be seen as fair game by the ministers and legislators being lobbied – and they will reasonably respond by attempting to influence the agency's priorities, preferences, and funding. Advocacy entails forays into matters that elected officials regard as their policy domain. Agencies that enter more political realms face greater buffeting than they encounter when they prosecute cases in the courts.

DEFINING THE REMEDIES TOOLKIT

Should the violation of a nation's competition laws constitute civil offenses, crimes, or both? The enhancement of sanctions can increase the competition agency's credibility and its ability to deter violations. Boosting sanctions has institutional side effects. Most nations reserve the authority to prosecute crimes to executive departments, such as a justice ministry or the public prosecutor's office. If competition enforcement is vested in an independent administrative agency, bringing a criminal case requires collaboration between the agency (which often conducts the investigation) and the prosecutor (who decides whether to file the criminal case). Close cooperation is necessary if promises of leniency made by the competition agency are to be credible and effective.

Internal design

How should the competition agency be organised?[14] There are many variations. The obvious possibilities are by professional training (e.g., lawyers in one bureau, and economists in another); by substantive body of law being enforced (e.g., separate bureaus for antitrust and for consumer protection); or by line of business (e.g., separate units for health care, transportation, and media). Hybrid arrangements are possible, as well. There is also variation in the design of the veto-gates through which information, recommendations, and decisions must flow. Other factors (e.g., national and agency culture, the personalities of those involved) will mediate the impact of these design dynamics on the quality and quantity of outputs generated by the competition agency.

Sometimes the competition law dictates the internal organisation of the agency or the allocation of tasks within the body. In other cases, these choices reside within the discretion of the competition agency.[15] In some countries, a mix of legal commands, norms of public administration, and the exercise of agency discretion account for internal organisation and the specific delegation of authority to subunits within the agency. The decision-making chambers of Germany's Bundeskartellamt provide an example. By reason of constitutional principles and norms of public administration, these chambers enjoy considerable autonomy. The President of the Bundeskartellamt selects the heads of the chambers, but the chambers alone decide which matters to investigate and how to resolve individual cases.

We identify internal organisation as a matter of importance, because choices related to internal organisation and the delegation of power can affect an agency's behaviour. In particular, these choices often bear upon what often is referred to as "procedural fairness" (discussed more fully below) in that the internal decision-making configuration affects the rigour with which theories and evidence are evaluated. We can envision internal design as an exercise in quality control, where one decides how many "inspectors" to deploy and when to engage them in agency decision-making. For example, one quality control technique is to create internal processes through which separate units of an agency (e.g., legal services, the chief economist's team, and case handling departments) give top agency decision-makers their recommendations about proposed law enforcement matters. Alternatively, one might establish a deliberately adversarial process by which a designated unit of the agency, in the run-up to the decision to prosecute, plays the role of the prospective commercial defendants and confronts case handlers with the best arguments and evidence they will offer in a contested proceeding.

14 For a recent treatment of the significance of these choices, see, Nou, J. (2015 Forthcoming) "Intra-Agency Coordination," 129 *Harvard L.Rev.*

15 One focal point of attention in discussions about competition agency design is the location of economists within the agency. One trend observable over the past 20 years has been the establishment in some agencies of the position of the chief economist, who reports directly to the head of the agency or its director general. In other cases, agencies have placed their economists within an office under the supervision of the chief economist. In this configuration, the economists participate in case handling teams, but their organisational home is a distinct unit within the agency.

Procedural fairness and institutional legitimacy

Procedural fairness is an important way to create and enhance legitimacy. Competition law enforcement entails several discrete tasks: the investigation of possible wrongdoing, the decision to prosecute, the determination of culpability, and the imposition of sanctions. A jurisdiction can unbundle these functions, or combine them within a single entity. Some countries unbundle decision-making tasks, using a "prosecutorial model." Under this approach, the competition agency makes the decision to investigate and to prosecute cases, but disputes are presented for decision to a separate entity/tribunal – sometimes courts of general jurisdiction, sometimes specialist competition law tribunals. The external tribunal also controls the decision to impose sanctions. The unbundling of the functions of prosecution and adjudication of guilt or innocence is the rule when criminal sanctions are sought.

Among all of the world's competition systems, the prosecutorial model is the exception rather than the norm. A substantial majority of the world's regimes feature greater integration of powers within a single entity. Consider two examples. In the US Federal Trade Commission (FTC), a five-member board (a) decides to use a compulsory process to facilitate investigations; (b) decides to issue complaints; and (c) determines (following an administrative trial before a hearing officer) whether defendants have infringed the law. Parties may appeal adverse decisions to the federal appellate courts, whose judges are required to give deference to certain factual findings of the Commission. Notable in the FTC system, the same body that decides whether to prosecute ultimately decides whether the firms in question are guilty of the charges the Commission has pressed against them. This feature of the FTC system has attracted intense debate throughout the agency's century-long history.

A notable aspect of the FTC regime, however, consists of limits on its remedial powers. The agency does not have authority to block a proposed merger of its own accord or impose sanctions. The agency must bring all of its actions to enjoin proposed mergers in the federal courts, and its remedial orders in administrative cases ordinarily are suspended pending appeal. Thus, as a rough proposition, the FTC cannot do anything by way of remedies that "hurt" without the approval of a federal judge.

The EC presents a more complete and powerful model of decision-making integration. For example, the EC has authority to block mergers without recourse to an external judicial process. The merging parties can appeal an EC prohibition decision to the General Court, but the proposed transaction is suspended pending the appeal. The EC's internal hearing process does not include features found in the FTC's internal administrative trials, such as the cross-examination of witnesses by opposing counsel.

The decision to unbundle or integrate involves, at least in concept, trade-offs between decision-making speed and expertise versus quality control and legitimacy. One argument made for integration is that it increases speed in the treatment of possible infringements of the competition law. In theory, integration does so by reducing transaction costs that otherwise would arise by bringing related functions within the same institution. We are not aware of studies that have sought to measure the relative speed of disposition attained by prosecutorial and integrated administrative systems, respectively. We also note that institutions relying on a prosecutorial model can accelerate the resolution of matters through settlements and plea agreements that avoid recourse to formal adjudication.

Speed, of course, is not the only aim of a competition policy decision-making process. The quality of analysis is a vital consideration. Going faster is not a virtue if one is traveling in the wrong direction. A second claimed attribute for tighter integration is that it can improve substantive outcomes by placing the key decision-making tasks in the hands of a body with specialised expertise gained through repeated exposure to specific problems. Compared to a generalist court, the competition agency may be more proficient in diagnosing commercial behaviour, making wise decisions about whether to intervene, and selecting appropriate remedies.

The claim for superior expertise in an integrated decision model arguably is greatest in jurisdictions where the nation's courts are dysfunctional owing to corruption, incompetence, or severe under-resourcing. In such a context, it is sensible to place additional functions in an expert competition agency, which is designed to set higher standards for substantive analysis and public administration. At the same time, the jurisdiction can seek to overcome the infirmities of existing courts by creating new judicial tribunals or specialist chambers of existing courts.

For all of its possible benefits, integration can create quality control problems and undermine the fact, and perception of, procedural fairness. The overall objective of any system is to generate substantively sound outcomes. When all decisions are integrated within the same institution, it is more difficult for earlier decisions (including the decision to prosecute the case in the first instance) to be revisited with an open mind. Various bureaucratic pathologies increase the chances the case will simply run on autopilot, even if the original assessment was flawed, or circumstances have changed in the interim. Agencies can create internal safeguards to minimise such problems, including walling off the "case team" from the personnel that will ultimately decide issues of culpability, and requiring periodic "hard looks" at the evidence by those who are not already involved in the case.[16] Agencies with integrated models also can strive to provide other safeguards – for example, enhancing pre-complaint access to file, expanding third-party rights to challenge agency decisions to act or

16 Froeb, L.M., P.A. Pautler, and L.H, Roller. (2009). "The Economics of Organizing the Economists." *Antitrust Law Journal* 76: 569 (discussing effect on agency decisions of placing economists in separate organisation unit).

not act, giving informative justifications for the decision to prosecute or not prosecute, and conducting ex post reviews of past decisions – that can enhance the quality of decision-making.

Those who doubt the merits of any given case will not be comforted by such safeguards; they will emphasise the unfairness of having the same entity act as "judge, jury, and executioner" and deride the proceedings as a "kangaroo court." Notwithstanding the effectiveness benefits that integration can yield, a nation that bundles prosecutorial and adjudicatory powers in one body is likely to incur real costs in the form of diminished perceptions of procedural fairness and legitimacy.

INSTITUTIONAL CHOICES IN A MULTI-JURISDICTIONAL CONTEXT

We set out the menu of design choices in Section 2 to set a foundation for what we hope will be a fuller examination of how specific design characteristics affect the treatment within individual jurisdictions of conduct that implicates multiple competition regimes. Discussions of convergence and divergence in global competition policy tend to explain patterns in national decision-making mainly in terms of goals, economic philosophy, and political ideology.

Our intuition is that the similarity and dissimilarity we see across competition agency decisions also have roots in institutional design choices that tend, by themselves, to shape outcomes. Sometimes these design choices are purposeful and seek consciously to give effect to the same goals, economic philosophy, and political ideology that inform the development and application of substantive competition law rules. We suspect that, in a significant number of other instances, the choice among design alternatives does not reflect so conscious a policy choice. Other forces – historical accident, path dependency, and mechanical adoption of a framework used by more experienced authorities – may explain an existing institutional configuration.

Whatever factors may have caused individual jurisdictions to make design choices, the institutional arrangements chosen can have major substantive implications. We are not aware of studies that systematically have traced international policy similarities or dissimilarities to specific design characteristics. The work we are aware of (including our own) generally has approached the question in a qualitative manner and has relied on case studies. Considerable work remains to be done simply to map out the relevant characteristics of the world's competition systems to set a foundation for the kind of fuller inquiry that would test the link between outcomes and specific design features. In the section below we describe some notable trends in institutional design and draw some tentative links between design choices and substantive results at the national level.

Table 1 below provides a summary overview of institutional choices described in Section 2 in selected jurisdictions around the world: Australia (AUS); Brazil (BRA); China (CHN); the European Union (EU); France (FRA); Germany (DEU); Italy (ITA); Japan (JAP); South Africa (ZAF); Republic of Korea (KOR); Spain (ESP); United Kingdom (GBR); and the US. Most authorities included in our sample have multi-member boards; US (DOJ), the EU, and South Africa have a unitary executive. Few countries require a parliamentary approval following the appointment of the chair of the authority (e.g. the Congress in the US or both chambers of the Diet in Japan). In most jurisdictions, the head of state or the minister in charge of economic affairs makes the appointment. Most countries have one agency in charge of competition enforcement. Notable exceptions are the US (where the DOJ Antitrust Division and the FTC have very similar functions and overlapping jurisdiction); China — where three authorities, the National Development and Reform Commission (NDRC), State Administration for Industry & Commerce (SAIC) and Ministry of Commerce (MofCom) investigate different types of infringements — and Brazil —where the Conselho Administrativo de Defesa Econômica (CADE) prosecutes antitrust infringements while the Secretariat for Economic Monitoring (SEAE) is in charge of competition policy. Most agencies are stand-alone organisations, although they might fall under a ministerial portfolio, as in Brazil (Ministry of Justice) or Japan (the Prime Minister's cabinet). Notable exceptions are the EU's Directorate-General for Competition, which is part of the EC, the German Bundeskartellamt, agency of the Ministry of Economics, the DOJ's Antitrust Division; and in China, where each antitrust unit is part of a large, diversified department. Many agencies have mandates that go beyond the protection of competition: Australia, Italy, the United Kingdom (UK), and the FTC in the US deal both with competition and consumer protection, the EU Directorate-General for Competition enforces state aid control; the Spanish authority also acts as a regulator in the energy, telecoms, and transport sector. Most agencies, apart from prosecuting competition infringements, have larger competition policy responsibilities, such as advocacy. Finally, most authorities in our sample integrate the power to conduct investigations and decide cases. South Africa places two different independent authorities, the Competition Commission and the Competition Tribunal, in charge of the investigation and adjudication functions, respectively.

In a multi-jurisdictional context, differences in institutional design of the authorities dealing with the same case may help explain the degree of consistency in decisions' outcomes, or even the authorities' ability to cooperate during their investigations. Table 2 below provides examples of recent multi-jurisdictional cases, and Table 3 lists examples of cooperation agreements between various competition authorities across the world.

In speaking of consistency in analysis, we do not mean that all authorities should reach the same conclusions in every case. For our purposes, consistency means that agencies perform their own assessments through the application of similar analytical principles. In this sense, decisions may be consistent even if a merger is cleared in one jurisdiction while blocked in another, for example, because affected markets are different (see Deutsche Börse AG / NYSE Euronext – cleared by US DOJ and blocked by EU Directorate-General for Competition –Table 2 below[17]).

Consider two countries of different sizes: a big one (say the US) and a small one (say Costa Rica). Assume that the respective antitrust authorities have the mandate to maximise consumer welfare. Two airlines operating overlapping routes between the two countries are planning to merge. The merger may make US customers better off overall, for example, because a vast majority of users would connect on the overlapping route with an indirect flight, and the merger would eliminate a "double-marginalisation" effect that could be presumed to push ticket prices up. Costa Rican customers, instead, would be on average worse off, as most would just take a direct flight on the overlapping routes, and the merger would have the negative effect of reducing the number of air carriers in direct competition on the route. In this case, the Costa Rican antitrust authority should oppose the merger; and if remedies suitable to mitigate the competition concern were not available, it would need to block the deal, de-facto vetoing a potentially pro-competitive merger from the perspective of US antitrust authorities.

Another interesting example concerns the application of antitrust laws in the context of disputes on the definition of fair, reasonable, and non-discriminatory (FRAND) access rates to standard-essential patents. Antitrust authorities must be wary that the adoption of a standard technology and, therefore, the elimination of competition in the technology market do not imply that licensees are overcharged to access the only technology available. However, they must also be attentive to preserving patent holders' right to being rewarded for their innovations: the reward provides an important incentive to develop future new technologies that may translate in higher welfare levels for consumers. Striking the right balance between the two interests (that of licensees and that of licensors) is an extremely complex task, often requiring accepting a degree of subjective assessment. However, even if the objective pursued (e.g., the ultimate interest of consumers) and the assessment methodologies by antitrust authorities from different countries were the same, a

17 *See also* http://www.justice.gov/atr/public/speeches/281609.pdf

TABLE 1:

Institutional characteristics of various competition authorities

Source: authors' analysis of information collected from authorities' website

Structure of Governing Body	Multi-Member Board	US(FTC), GBR, ITA, FRA, EPS, DEU, KOR, BRA, AUS
	Unitary executive	EU, US(DoJ), ZAF
Appointment of the head of the authority	Appointment subject to parliamentary approval	US, JAP, BRA, AUS
	Presidential / Ministerial appointment	EU, GBR, ITA, DEU, ESP, FRA, ZAF, KOR
Status of the agency	Stand-alone agency	US(FTC), GBR, ITA, ESP, FRA, BRA, ZAF, AUS, JAP
	Subsidiary	EU, US(DoJ), DEU, CHN
Number of competition agencies	One enforcement agecy	EU, UK, ITA, DEU, ESP, FRA, JAP, AUS, KOR
	Mary	US, BRA, CHN, ZAF
Objectives (competition, consumer protection, state aid...)	Single-purpose	US(DoJ), DEU, FRA, JAF, BRA, ZAC, KOR
	Multi-purpose	EU, US(FTC), GBR, ITA, ESP, CHN, AUS
Scope of the agency	Law Enforcement	US(DoJ), BRA
	Competition Policy	EU, US(FTC), GBR, ITA, ESP, CHN, AUS, DEU, FRA, JAP, BRA, ZAF, KOR
Civil or Criminal competition law	Administrative remedies only	EU, ITA, DEU, FRA, ESP, CHN, ZAF
	Criminal sanction available	US, GBR, JAP, BRA, AUS, KOR
Integration of functions	Prosecutorial model	US, ZAF, AUS
	Integration of functions in one entity	EU, ITA, DEU, FRA, ESP, CHN, GBR, JAP, BRA, KOR

multi-jurisdictional case for FRAND infringement may lead to different outcomes. For example, because affected countries differ in their economic structure, a small country with a strong industrial base of implementers and little intention to develop its own innovations in the future may tend to attach a higher value to lower access tariff, especially if the country can "free-ride" on other more pro-patent holders' countries to provide the incentives for future innovation. Even if frustrating from the point of view of multinational companies facing different charges in different jurisdictions for engaging in similar behaviours, such an assessment may be legitimate and largely independent of the degree of international cooperation between authorities or the convergence in the design of competition policy framework. The interests of domestic consumers from different countries may be conflicting; authorities taking account of those interests may take contrasting decisions.

TABLE 2:

Multi-jurisdictional cases

Multi – Jurisdictional Cases
Intel: Intel's conditional rebates and direct payments to PC manufacturers, aimed at impeding the use of rival AMD's CPUs, were fined in the EU [2007-2009] and South Korea [2007-2008], where the competition authorities deemed that the behaviour made it difficult (if not impossible) for AMD to compete on merits; the company settled with the American FTC [2008-2010] and a "cease and desist" order was issued by the JFTC in Japan [2004-2005], the latter authorities being more concerned with the prompt termination of the anti-competitive behaviour.
LCD cartel: global price-fixing agreement among the major LCD panel producers, with multiple meetings in South Korea and Taiwan between 2001 and 2006. Fined in the EU [2006-2010], Korea [2011] and by the Chinese NRDC [2013]; in the US, the DOJ investigation led to criminal fines and convictions of companies' executives [2006-2012], while Brazil reached a settlement [2014]. In the US, component manufacturers were prosecuted on the basis that the foreign cartelised products had a "direct, substantial, and reasonably foreseeable effect" on prices in the US. The EC adopted sanctioned companies selling inputs that were embedded in foreign manufacturing and arrived in Europe several steps down the production chain. There is a continuing debate within the US courts about whether US antitrust law can impose damages upon firms that operate outside the US and fix the price of components that are included in products manufactured outside the US and then exported for sale into the US
Qualcomm standard-essential patents: abusive patent licensing practices and charge of non-FRAND royalties for mobile telephony technology (CDMA, WCDMA, LTE) fined by the Korean FTC [2009] and by the Chinese NRDC [2013-2015]; cease and desist order in Japan [2006-2009]; the case was dropped after the withdrawal of the complaints in the EU [2007-2009]. All jurisdictions where Qualcomm was sanctioned concluded that the alleged practices created barriers to entry and reduced the ability to innovate of existing competitors.
Deutsche Börse /NYSE – Euronext: merger between securities exchange operators leading to the world's largest combined market for trading stocks and derivatives. In the US, the DOJ cleared the deal conditional on the divestiture of Direct Edge, the fourth largest stock exchange operator in the US, ultimately controlled by DB, considered an innovator in the exchange space and a competitive constraint on NYSE. In the EU, a more specific market was considered and the Directorate-General for Competition rejected the deal [2012]; it deemed the proposed divestitures insufficient considering that the tie-up would have created a quasi-monopoly for the European financial derivatives traded on exchanges, harming derivative users and the European economy as a whole.
Eurotunnel: Channel Tunnel operator Eurotunnel acquired 3 ships along with their related assets from the bankrupt ferry company SeaFrance, with the authorisation of the French Commercial Court overseeing the liquidation process. The deal was cleared with remedies by French Autorité de la Concurrence [2012] and blocked by the UK Competition Commission [2012-2013]. The main difference lies in the approach to the counterfactual, the UK court concluding that the attribution of the bid to another company would have produced a better outcome for competition, while the French authority did not contemplate such a scenario.
Google search engine: cleared by a Brazilian court in a private lawsuit [2011-2012] and investigated by CADE [2013-]; closed by FTC (US) after Google issued a letter (but did not sign an enforceable order) promising to adjust certain practices [2011-2013]; ongoing investigation by the European Commission [2010-]. The authorities mostly differ in assessing whether Google's alleged search bias (promoting its own services in general search results) is harmful for the consumers, and whether direct intervention on Google's product design is desirable.
Holchim/Lafarge: the merger between two cement companies with a combined market value exceeding $50 billion raised regulatory concerns in several jurisdictions worldwide. It was cleared with conditions in the EU, South Africa and Brazil [2014] and by the FTC (US) [2015]. In all the jurisdictions, the conditions involved the divestiture of assets, although with different justifications: the US and South African authority stressing the risk of future collusion in the cement market, the EU focused on the insufficient competitive pressure from remaining players in the market.

The outcome of antitrust intervention also may differ even if the authorities pursue the same mandate and no significant differences between the affected markets or economies exist.

Antitrust enforcement agendas may differ, owing to asymmetries in the balance between accountability and independence within competition authorities. More accountable agencies may tend to attach a higher priority ranking to issues that are easier to "resell" as a political success to the country's electorate. Independent agencies can focus on issues that are of greater relevance from a judicial or economic standpoint but with effects that are more visible in the long term. For example, an independent agency may opt to invest a higher amount of resources to pursue a case in an "unsexy" economic sector of little relevance for the national economy to set a precedent that could increase deterrence of antitrust action or provide guidance on behaviour complying with the law to market players active in other economic sectors.

Conversely, a high-profile multi-jurisdictional case with a lower potential precedent value (for example, because the case involves big multinational corporations but is based on a traditional theory of harm) is likely to receive disproportionate attention by an accountable agency.[18] In terms of cooperation, independent agencies may find it more difficult to collaborate with more accountable ones if this entails an increase in their exposure to external conditioning or criticism, for example, because they could be affected by transparency measures binding the more accountable agencies. Imagine an accountable agency revealing that it collaborated with an independent authority on a number of international alleged cartel cases that ultimately were not pursued, while the independent agency would want to keep that information secret. In addition, more accountable agencies may find it difficult to collaborate with agencies from countries that are not in a good diplomatic relationship with their home states, depending on how strongly they are bound with their national governments. Since more accountable agencies tend to be more involved in the policy process, they are more likely to be able to affect the competition policy framework in which their counterparts operate. An agency very well involved in the home policymaking process could influence the government to negotiate the inclusion of specific competition policy clauses in a free-trade agreement, for example, or to lay the ground for more cooperation on competition policy issues. Similar considerations can be made with agencies that are subsidiaries of the government, rather than stand-alone bodies.

The actions of multi-board agencies tend to be more consistent over time; it may, therefore, be easier for international investors to form expectations concerning the impact of future antitrust enforcement on potential long-term investment. Conversely, unitary executive agencies tend to be less predictable in the long term, as a political shift leading to a change in the agency's leadership may entail radical changes in approach. But, thanks to the "branding" effect, unitary executive agencies may provide for a more clear-cut framework in the short term whereby multinational companies can more easily identify conduct potentially in breach of antitrust laws and react accordingly. During his mandate (2010-15), EU Commissioner for Competition Joaquin Almunia settled antitrust allegations in approximately 70 percent of the cases, a significantly higher proportion than during previous administrations.[19] It could be argued that the Directorate-General for Competition's brand during Mr Almunia's mandate was his leader's preference for negotiation. A settlement with Google in the context of the Google search engine case (see Table 2) was indeed largely expected. However, when the new Commissioner, Margrethe Vestager, succeeded in the EU antitrust leadership, the Directorate-General for Competition appeared to have suddenly changed approach in the investigation: the authority sent Google a formal sheet (a "Statement of Objections") with its preliminary considerations on Google's alleged breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU); commentators have interpreted that as a signal that the Commission intends to abandon the talks on a potential settlement and move toward the adoption of an infringing decision.

International cooperation between antitrust authorities is arguably easier if only one agency enforces competition laws in each of the concerned jurisdictions. Multiplicity limits the ability of a jurisdiction to speak with one voice in international forums; when working on a common case, it makes it harder for the counterpart to coordinate efforts and timing and share information. It also makes it more difficult to ensure continuity in a history of cooperation if there is a risk that the counterpart will be represented by a different office when cooperation occasions (for example: international cartels) materialise.

Agencies with multiple policy mandates are less likely to reach consistent conclusions, even if, strictly speaking, when enforcing competition laws they adopt the same methodologies, pursue the same welfare standard, and identify similar effects on comparable markets. Inconsistencies may occur if the authorities face a trade-off between conflicting objectives: for example, an authority with the mandate to enforce "consumer protection" may tend to attach a heavier weight to short-term negative effects as compared to dynamic effects when dealing with a merger case; consumers may be believed to lack the tools to adjust their behaviour anticipating that higher current prices will be followed by stronger competition in the future, for example.[20]

18 In saying this, we do not dispute the benefit to a competition system, especially in the early phase of its life cycle, in pursuing cases that establish foundational doctrinal principles, regardless of the identity of the defendant. We can envision bringing the Nth case against a prominent multinational company if the case serves to set in place an important doctrinal foundation that is lacking or is only weakly established.

19 Excluding cartels. *See* Mariniello, M. (2014). Commitments or prohibition? The EU antitrust dilemma. Bruegel Policy Brief 2014/01, 31 January 2014.

20 For a discussion on the interaction between antitrust and consumer protection and in particular on consumer rationality see Wright, J. D. (2012). "The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other." *Yale Law Journal*.

Moreover, particularly when competition agencies are assigned multiple policy duties beyond antitrust enforcement, these authorities may feel compelled to correct for weaknesses of other regulatory authorities if the border of their mandate is not sufficiently well defined. In the EU, the Directorate-General for Competition possesses inquiry and sanctioning powers that are unknown to the other regulatory branches of the EC; it enforces competition law also with the object to contributing to European integration within the Single Market. And it is not uncommon for the Directorate-General for Competition to take decisions that would fall outside the boundaries of antitrust action. For example, the Directorate-General for Competition has sometimes imposed "proactive" remedies that would envisage the opening of markets to favour entry of new competitors when that was not strictly necessary to terminate the harm due to an ongoing antitrust infringement. In some past exclusionary conduct cases in the energy sector, the Commission required the dominant company to divest significant assets for capacity generation and favour competitors' new investment.[21]

Another interesting example of how the object of contributing to the Single Market project may lead the EC to take different decisions from other national antitrust authorities concerns the treatment of efficiencies when they do not relate to customers that are directly affected by the antitrust infringement. Article 43 of the guidelines on the application of Article 101(3) of the TFEU[22] dictates that "negative effects on consumers in one geographic market or product market cannot normally be balanced against and compensated by positive effects for consumers in another unrelated geographic market or product market." Traditionally, this article has been interpreted as a limitation on the extent to which negative effects in one EU member state could be compensated by positive effects elsewhere in the Union. Other authorities may not be constrained by similar geographic limitations. For example, a joint venture between two airlines with transatlantic routes may be cleared in the US on the basis of cross-compensations between customers from different geographic areas while it could be blocked in Europe if only customers from one region would be worse off, even if the vast majority of EU customers would be better off.

International cooperation between authorities is particularly important when there exist significant asymmetries in the power to impose sanctions or remedies. Leniency schemes can be effective in destabilizing international cartels, but require that authorities in the affected jurisdictions coordinate the timing and implement similar methodologies for the assessment of the rights granted to leniency applicants; lack of coordination between authorities may dissuade whistle-blowing. A member of an international cartel may fear that disclosing information to one authority may entail significant costs in other jurisdictions, for example because immunity would not be granted on the same grounds or because fining methodologies are significantly different. The imposition of fines and, in particular, the adoption of behavioural or structural remedies in antitrust or merger cases involving multinational companies should aim to avoid duplications that do not increase deterrence or mitigate the risk of harm to competition. Antitrust authorities, however, may be compelled to impose sanctions that are necessary to pursue their objectives but that de facto compensate for lack of enforcement by other authorities.

An interesting example in that respect is the liquid-crystal display (LCD) international cartel case (see Table 2 above). When calculating the fine for cartel members, the EU Directorate-General for Competition considered also intragroup sales of LCD panels to cartelists' factories in China and Taiwan. A recent judgement of the EU Court of Justice confirmed the legitimacy of such an approach. The Directorate-General for Competition's fining policy is aimed at dissuading infringement by establishing a link between potential profits due to the illegal behaviour and the size of the fine. In the LCD case, it was considered that cartelised sales outside the EU borders had an ultimate indirect effect on EU markets and that failing to include those sales in the computation of the fine would have led to under-deterrence. It could be argued that similar deterrent effects could have been achieved, however, if the Taiwanese and Chinese authorities had imposed fines that would have been considered adequate by the EU authority.

Multi-jurisdictional cases may offer an opportunity to complement antitrust authorities' institutional designs aimed at enhancing their legitimacy and procedural fairness. The outcome of antitrust action in a certain jurisdiction may be used as a benchmark to assess the action of other authorities as regards the same case with effects in other jurisdictions. In that sense, other authorities may play a sort of "checks-and-balance" role, limiting the risk that an authority would end up captured in its own investigation, as discussed above in Section 2. For example, an authority running an antitrust case that has been struggling for years on how to pin down the infringement with sufficiently strong evidence to stand before courts may find it increasingly difficult to drop the case and go back to its constituency with "empty hands."[23] If, meanwhile, another authority adopted a decision concerning the same defendant and similar allegations, that could help a reframing of the assessment in the jurisdiction where the case was still under investigation.

As a final point, we see value in a deeper examination of bilateral cooperation arrangements that have featured high levels of institutional and policymaking integration. Such an inquiry might begin by examining the extensive integration of the regulatory regimes of Australia and New Zealand,

21 The E.ON case, for example: http://europa.eu/rapid/press-release_IP-10-494_en.htm.

22 http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52004XC0427%2807%29

23 Mariniello, M. (2014). Commitments or prohibition? The EU antitrust dilemma. Bruegel Policy Brief 2014/01, 31 January 2014.

including in the field of competition policy.[24] Coordination of competition policymaking between the two jurisdictions is the most extensive cross-border integration in any setting outside the EU. The Australia-New Zealand collaboration has taken place through a large collection of formal arrangements (e.g., bilateral trade agreements) and less formal measures (e.g., extensive regular consultations between the Australia Competition and Consumer Commission and New Zealand's Commerce Commission). Activities of collateral institutions, such as legal societies and universities, have reinforced and helped inspire these arrangements. The policy portfolios of the two agencies are strongly similar (competition law, consumer protection, and access regulation for utilities), and several individuals have served on the boards of both bodies.

24 We thank Tim Lear for this point. The arrangements that join the Australian and New Zealand competition regimes are summarised on the OECD website at http://www.slideshare.net/ORCD-DAF/oecd-enhanced-enforcementcooperationaustralianewzealand17june2014.

Examples of Bilateral Agreements on Competition Policy	
Australia	China (2014)
	Japan (2015)
	US (1992, 1999)
Brazil	China (2012)
	EU (2009)
	France (2011)
	Japan (2013)
	South Korea (2013)
	US (1999)
China	Australia (2014)
	Brazil (2012)
	EU (2004, 2012)
	South Korea (2012)
	US (2011)
EU (DG Comp)	Brazil (2009)
	China (2004, 2012)
	Japan (2003)
	South Korea (2009)
	US (1995, 1998, 2011)
Japan	Australia (2015)
	Brazil (2013)
	EU (2003)
	South Korea (2014)
	US (1999)
South Korea	Brazil (2013)
	China (2012)
	EU (2009)
	Japan (2014)
US	Australia (1992, 1999)
	Brazil (1999)
	China (2011)
	EU (1995, 1998, 2011)
	Germany (1976)
	Japan (1999)

TABLE 3:

Examples of bilateral agreements on competition policy

Source: cooperation agreements. NCA websites and authors' analysis. The bilateral agreements reported can concern coordination and cooperation on broad competition policy matters and/or specific subjects of international relevance (e.g. mergers). The European NCAs and the Directorate-General for Competition cooperate with each other through the European Competition Network (ECN). All the considered competition authorities (except the Chinese ones) are members of the International Competition Network.

CONCLUSIONS - POLICY IMPLICATIONS

In this paper, we have identified important choices that jurisdictions must make in deciding how to design their competition law systems. By studying design alternatives and trade-offs, we can develop a better understanding of the sources of substantive differences we observe across jurisdictions in the application of competition law. Appreciation for the substantive policy implications of individual design characteristics adds a valuable tool – in addition to divergence involving economic philosophy, analytical methodologies, and political conditions – that often serve to inform judgements about why individual jurisdictions achieve different outcomes when dealing with largely similar commercial phenomena or even in evaluating the same practice undertaken by a firm or collection of companies.

We also have identified how variations in institutional arrangements across competition agencies may affect international cooperation or convergence toward consistent outcomes of antitrust action. Where possible, individual jurisdictions should continue and expand efforts – undertaken bilaterally, regionally, and in the context of large multinational bodies, such as the International Competition Network (ICN), the Organisation for Economic Co-operation and Development (OECD), and the United Nations Conference on Trade and Development (UNCTAD) – to promote the adoption of standards that incorporate superior analytical methods and operating procedures based on past enforcement experience and new learning in economics, law, and public administration. Reducing the cost of achieving sound regulatory outcomes within and across jurisdictions could have powerful, beneficial effects for business investment and international trade.

Our analysis does not suggest that authorities should adopt a certain set of institutional choices in order to foster international convergence. We recognise that what could be optimal for an authority in one jurisdiction might not be optimal in other jurisdictions. Culture, legal, economic, political, and historic background matters. At the same time, we suggest tools to assess the outcomes of cases in a multi-jurisdictional context. Decisions by different authorities on the same international case (be that an international agreement or unilateral conduct in breach of domestic antitrust laws or a cross-border merger) cannot be compared as such but require understanding the underlying institutional settings of the respective jurisdictions. Efforts to promote international convergence should duly account for institutional differences between authorities. Cooperation agreements and competition clauses in free-trade agreements (FTAs) should be designed accordingly.

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