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**Global Governance of Antitrust and the
Need for a BRICS Joint Research Platform in
Competition Law and Policy**

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ABSTRACT

In May 2016 the BRICS competition authorities signed a Memorandum of Understanding (MoU), which puts in place an Institutional Partnership between BRICS jurisdictions in the area of competition law through a general framework for multilateral cooperation. The paper takes stock of these recent developments and suggests the establishment of a BRICS Joint Research Platform which, in addition to its task to improve the quality of decision-making within BRICS' competition authorities, will also serve as an alternative forum in the constitution of a global deliberative space in the area of competition law.

The paper offers a critical analysis of the call for policy convergence in competition law, which merely emanates from the global business community and enables established competition law regimes, such as that of the US and Europe, to influence the convergence point and more generally to take ownership of the process of global convergence of competition law.

The paper criticizes this state of affairs for not taking into account the different patterns of diffusion of competition law and consequently the variety of competition law systems emerging out of the original US antitrust law model and its EU competition law "spin-off". In particular, it castigates the lack of participation in this global deliberative space of emergent and developing economies and the inability of various affected interests, beyond global businesses and, to a limited extent, consumers, to be considered. The study takes a broader perspective and puts forward a "participation-centred" approach that would seek to avoid both majority and minority biases, the ultimate objective being not policy convergence as such, but increasing levels of total trust between competition authorities and between competition authorities and their stakeholders. The BRICS Joint Research Platform may play an important role in contributing to the establishment of this new architecture of global governance of competition law.

Keywords: global competition law, policy convergence, trust, BRICS, global governance

JEL: F02, F15, F42, F60, K21, L40, G34, O19, O55, Z18

Global Governance of Antitrust and the need for a BRICS Joint Research Platform in Competition Law and Policy

Ioannis Lianos¹

I. Introduction

While at the end of the 1970s only nine jurisdictions had a competition law, and only six of them had a competition authority in place, in 2016 more than 120 jurisdictions around the world have adopted and effectively implemented competition law². During the same time we witnessed an increase in the activity of new competition authorities, in the area of merger control but also beyond³. The more authorities are involved in reviewing global merger transactions or are investigating global cartels, the more the complexity of bilateral co-operation increases. It is frequent that the same transaction will be reviewed by more than a dozen competition authorities around the world. As a recent OECD report indicates:

“(t)he Co-operation Complexity Index for merger deals has increased by about 23 times from 1995 to 2011 [...] The index can also be calculated for cartel enforcement, as a function of the number of authorities involved and the number of investigations with an international element. For international cartel investigations, the Co-operation Complexity Index has increased by about 53 times between 1990-1994 and 2007-2011”⁴.

This proliferation of national competition laws sets important challenges for the global governance of antitrust, by which concept I refer to the management of the risks generated by the increased interconnectedness of cross-border enforcement of competition law. An important risk involves the costs of “cross-jurisdictional disagreement,” which, it is alleged, may create particularly complex situations for international businesses⁵. These disagreements may also affect the effectiveness of competition law enforcement, as it is increasingly more difficult for competition law regimes to impose remedies that take into account the negative externalities imposed by the specific anticompetitive conduct, not only to their own consumers, but also to the consumers of other jurisdictions. For instance, a global merger may affect the market of a handful of jurisdictions, each having the possibility to block it, in case of course it has a sufficient size to affect the incentives of the merging firms. As no

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² OECD, Challenges of International Co-operation in Competition Law Enforcement (2014), available at <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> .

³ Ibid.

⁴ Ibid., p. 28.

⁵ Ibid., p. 39.

jurisdiction controls more than 20% of the global GDP, it looks likely that if one jurisdiction takes a decision on the basis of its domestic concerns, this may potentially produce important externalities to the consumers of the other jurisdictions. It is also clear that decisions to block or clear a merger are not “symmetrical”: for a global merger to go through it needs the agreement of more than 4 or 5 jurisdictions, while for a global merger to be blocked, the opposition of a significant jurisdiction in terms of global GDP may be sufficient, the stricter substantive standard usually prevailing⁶.

A recent OECD report explains that while “(f)rom 1990 to 2011, [...] the complexity of co-operation has increased 20 times or more, the legal mechanisms for co-operation have hardly evolved”⁷. This gap in the global governance of competition law has led many to argue for a strategy of incremental policy convergence, augmented by the elaboration of a number of global institutional mechanisms to enhance cooperation among various jurisdictions in the area of competition law⁸. It is clear that further international cooperation should be promoted, but one needs to understand the practical limits of cooperation in the context of an increasingly more complex institutional environment and conflicting approaches in matters of economic policy, including competition law. It is also important to assess more critically the “policy convergence” claim, as it might not be practically achievable and theoretically appealing to strive for greater policy convergence in the area of competition law. A critical analysis of the factors pushing for a greater diversification of competition law regimes is therefore needed, before exploring the possibilities for global governance of antitrust to tame the negative effects of such diversification and complexity.

The first part of the paper critically explores the claim for “policy convergence” in this area and concludes that this is practically unachievable and normatively contestable. The paper argues that the concept and mechanisms of “policy convergence” should be replaced by a different conceptual framework for the global governance of competition law that emphasises the establishment of higher levels of trust between the different competition authorities, but also between the authorities and the people (or stakeholders).

The second part of the paper explores the role of BRICS in the establishment of an architecture of global governance in this area so that it corresponds better to the dynamics of systemic transformation of the competition law enterprise and the challenges posed by expanding global interdependence in this area. I argue for a more intensive cooperation between BRICS jurisdictions in the area of competition law and policy, the first step of that process being the recent establishment of a BRICS Joint

⁶ Ibid., p. 43.

⁷ Ibid., p. 53.

⁸ See, for instance, PEREZ MOTTA, Eduardo (2016), *Competition Policy and Trade in the Global Economy: Towards an Integrated Approach*, The E15 Initiative, World Economic Forum, available at <http://e15initiative.org/publications/competition-policy-trade-global-economy-towards-integrated-approach/> ; OECD, *Challenges of International Co-operation in Competition Law Enforcement* (2014), available at <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> .

Research Platform. I consider that such cooperation may not only serve the interests of the BRICS jurisdictions by enhancing the quality of their competition law enforcement, but that it will also constitute a significant contribution to a more inclusive and participation-centered model for the global governance of competition law and policy.

II. Global Governance of Competition Law does not mean Global Policy Convergence of Competition Law

Recent discussions over the need for an architecture of global governance in competition law and policy have turned around the need to achieve policy convergence and the various mechanisms that may be put in place so as to promote international cooperation between competition authorities with the aim to reduce the occurrence of conflicting outcomes when more than one competition law authority are investigating the same competition law case. The “heterogeneity” of competition laws is seen as a source of large costs for companies active in multiple foreign markets as well as for the competition law authorities which are obliged to run multiple parallel investigations. Although the narrative of policy convergence has been a factor driving international cooperation in the area of competition law, the assumptions on which it relies upon and its normative implications have not been examined in depth. It is usually assumed that globalization of economic activity provides the legal irritant for the development of competition law regimes worldwide with the aim to regulate the negative externalities of global capitalism, in particular the exercise of market power in transnational markets. From this perspective, the adoption of competition laws in various jurisdictions is subject to similar principles of development, thus implying that once the various competition law regimes reach a similar level of maturity they will tend to converge as they will have to respond to a similar set of external stimuli (the so called “absolutist view”)⁹.

I consider that such proposition is neither descriptively accurate nor normatively appealing. First, although the various competition law regimes around the world emanate from similar sources and represent to a certain extent a modified version of the original model developed in the United States (US) during the late 19th century and early 20th century, a closer look to the global diffusion of competition law in particular the last three decades indicates that the different trajectories pursued by each competition law regime establish complex relations of path dependence that cannot be accounted for by the “absolutist view”. I explore an alternative theoretical

⁹ For such claim see, PRIEST, George, *Competition Law in Developing Nations: The Absolutist View*, in (D. Sokol, T. Cheng & I. Lianos eds.) *COMPETITION LAW AND DEVELOPMENT* (Stanford University press, 2013), p. 79 (advancing the view that there is an optimal competition law based on a set of competition law principles for which there is widespread agreement and that despite the different economic and cultural settings, the competition laws of all nations should in principle be identical. Any deviation from this optimal competition law model should be adequately explained and accounted for).

framework, policy diffusion, which challenges the simple assumptions of the “policy convergence” model and enables us to set the conceptual foundations of the global governance of competition law on firmer theoretical and empirical ground. Second, I explore the conceptual fuzziness of “policy convergence” and the implicit normative assumptions made as to the desirable “convergence point”. This leads me to underscore the profound incompatibility between the claims for “policy convergence” and the multi-polar foundations of the global economy, as well as the legal pluralism of the international legal order. I conclude this part by arguing for a different conception of global governance in this area, which would aim to enhance trust between competition authorities, but also between competition authorities and the people (their stakeholders) at a transnational level.

A. The global diffusion of competition law

Policy diffusion has been defined as “the process whereby policy choices in one unit are influenced by policy choices in other units”¹⁰. Policy transfer consists in a form of policy diffusion and sometimes it is considered as a related concept¹¹. “Diffusion” has been described as “any process where prior adoption of a trait or practice in a population alters the probability of adoption for remaining non-adopters”¹². By emphasizing the interdependence of the policy choices effectuated by States, diffusion theory assumes that the outcome for each actor (here a State) depends on the choices of all other actors with which they share some form of interdependence (e.g. trade related, spatial interdependence, cultural, communicational). Although a product of interdependence, diffusion does not lead to similar outcomes across jurisdictions. The diffusion of competition law in different political settings and legal traditions illustrates its great malleability and the operation of various background factors.

One should therefore distinguish diffusion from convergence, as the former concept pre-supposes the existence of interdependence, while convergence may be caused by interdependence but also by different common factors, such as the fact that the specific units may react to similar, independent pressures (e.g. globalization)¹³.

¹⁰ GRAHAM, Erin, SHIPAN, Charles R., VOLDEN, Craig, (2013) The Diffusion of Policy Diffusion Research, *British Journal of Political Science*, 43(3), pp. 673-701.

¹¹ MAGGETTI, Martino & GILARDI, Fabrizio, (2016) Problems (and solutions) in the measurement of policy diffusion mechanisms, *Journal of Public Policy*, 36(1), pp. 87-107, 90 (noting that there is “significant overlap” between policy transfer and policy diffusion).

¹² STRANG, David (1991), Adding Social Structure to Diffusion Models – An Event History Framework, *Sociological Methods and Research*, 19(3), pp. 324-353; HEINZ, Torben (2011), Mechanism-Based Thinking on Policy Diffusion, No. 34 KFG Working Paper, Freie Universität Berlin; DOBBIN, Frank, SIMMONS, Beth, GARRETT, Geoffrey (2007), The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?, *Annual Review of Sociology*, 33, pp. 449-472.

¹³ MAGGETTI, Martino & GILARDI, Fabrizio, (2016) Problems (and solutions) in the measurement of policy diffusion mechanisms, *Journal of Public Policy*, 36(1), pp. 87-107.

The diffusion of competition law, from the United States, where it was first framed as a distinct legal field at the end of the 19th century, in different political settings and legal traditions illustrates its great normative appeal and its conceptual flexibility, as pretty much the same conceptual framework has been used in the various jurisdictions adopting competition law. Despite this common core, the adoption and effective implementation of competition law has been nevertheless characterized by a great degree of variability among jurisdictions, notwithstanding the considerable role played by international actors aiming to generate different mechanisms of policy convergence (substantive and/or procedural): the ICN, UNCTAD, OECD, the EU and other regional integration models and, the influence of common background factors, such as the globalization of markets, the professionalization of economic advice, the development of technocratic competition law enforcement.

This diversity is not only reflected in the adoption of different models of competition law across various jurisdictions, but also in the way this area of law has been effectively implemented. The implementation of competition law varies of course within each jurisdiction through time and often depends on the specific institutions in place, their capabilities, but also the policy area in which it is intervening (e.g. energy, telecommunications, healthcare services, etc.). There might also be some dissonance between the intended enforcement of competition law, as this is proclaimed in the foundational texts, guidelines, legislation, constitutional (or other) provisions that have been put in place in each jurisdiction, and its day-to-day operation in the specific jurisdiction.

Among the factors explaining the diversity of competition law systems in various jurisdictions, the most important ones consist in the *patterns of diffusion* (that is, the mechanisms of interdependence that lead to the adoption and implementation of a specific policy by another State), and in more general *background factors* affecting the interdependence among jurisdictions, such as the interaction of politics with transnational expert communities, the relations between government and global or transnational business, the important role of state capitalism and State Owned Enterprises (SOEs) in global trade, the role of other societal groups (e.g. consumers, labor unions) that are trans-nationally organized, and the role of domestic struggles of power and influence when these reproduce relatively common (from a cultural perspective) political/ideological or expertise-related struggles (“the internationalization of palace wars”¹⁴).

Policy diffusion should be understood broadly as consisting of: (1) *adoption*, and (2) *implementation*. Adoption refers to the formal introduction of the competition law regime into the legal system. Implementation may be conceptualized as referring to the stages after the decisional point of adoption and must be understood as referring

¹⁴ DEZALAY, Yves & GARTH, Brian (2002), *The Internationalization of Palace Wars* (The University of Chicago Press, 2002).

to the “depth of adoption”. This includes the direct practical experience with competition law indicated, among others, by the frequency of its use, its scope, the quality of competition assessment, its role in the specific polity, its institutionalization and permanence within a specific organizational structure, enduring through elections and changes in government. The process of implementation of the competition law regime into a specific organizational and institutional context is prolonged and has several phases. It should not be excluded that the transplantation of competition law in political and legal systems that do not present functional equivalents to the system where the transplant originated may produce completely different outcomes, leading to situations of diffusion without convergence.

Diffusion may be vertical, horizontal, or both. Vertical diffusion operates through higher levels of governance, for example through the influence of international organizations or the federal level, when exploring intra-state processes of diffusion. The most important of the former are international organizations (OECD, UNCTAD, EU), international networks (ICN), or regional economic integration organizations (e.g. EU). Horizontal diffusion involves interconnectedness of governments when elites communicate and interact, exchanging ideas, solutions, and experiences.

Focusing on diffusion as a product of interdependence, rather than on the process of policy convergence as such, enables us to explore the reasons competition law has been diffused across many jurisdictions and assess the influence of the process of diffusion to its substantive and procedural framework, in comparison to the original model of the Sherman Act and US antitrust law in general. One should understand that there are different *patterns of diffusion*, indicating the existence of various trajectories of this original “model” and the operation of various forms of interdependence between the various units of analysis (in our case competition law systems).

Diffusion literature has put forward the following typology of mechanisms (*patterns*) of diffusion¹⁵:

- *learning* resulting from internal (e.g. the characteristics of public administration, legal and constitutional frameworks, administrative culture) or external (e.g. transnational institutional linkages, government decisional interdependence, epistemic communities) sources;
- *externalities*, providing incentives altering the cost-benefit ratios of domestic actors, such as *competition* among governments for resources (leading them to adopt and implement similar “successful” policy innovations)¹⁶; *coercion*

¹⁵ HEINZ, Torben (2011), Mechanism-Based Thinking on Policy Diffusion, No. 34 KFG Working Paper, Freie Universität Berlin. DE FRANCESCO, Fabrizio (2013), *Transnational Policy Innovation: The OECD and the Diffusion of Regulatory Impact Analysis*, Colchester: ECPR Press; DOBBIN, Frank, SIMMONS, Beth, GARRETT, Geoffrey (2007), The Global Diffusion of Public Policies: Social Construction, Coercion, Competition, or Learning?, *Annual Review of Sociology*, 33, pp. 449-472.

¹⁶ MAGGETTI, Martino & GILARDI, Fabrizio, (2016) Problems (and solutions) in the measurement of policy diffusion mechanisms, *Journal of Public Policy*, 36(1), pp. 87-107, 90 (noting that “success can

(when the diffusion of the specific policy innovation results from the use of material or economic power, including asymmetric bargaining imposing conditionality for these reforms, or binding legal norms adopted by supranational institutions), and *contractualization* (when diffusion results from some form of symmetric bargaining between states, or “soft” international organization influence);

- *socialisation* among networks of experts and/or administrative elites that develop shared understandings and beliefs due to their continuous interaction;
- *emulation* indicating the “desire (or need) of domestic actors to conform to internationally widespread norms” in order to “increase the legitimacy of policy choices”¹⁷;

Some recent studies have focused on the micro-foundations of trans-border policy diffusion, advancing the importance of the electorate in pushing for the adoption of “successful” policy innovations developed elsewhere (the voter information model or the democratic foundations of diffusion)¹⁸. These various patterns of diffusion alter the incentives of domestic actors and may lead to different policy outcomes, even if the “original” policy design diffused is the same. Various diffusion mechanisms may work in parallel and lead to a complex trajectory, eventually establishing path-dependences that affect the evolution of the policy transferred in the specific jurisdiction. The role of domestic actors and their participation in the emergence of competition law norms and the diffusion, more generally, of competition law should not be ignored.

Focusing on diffusion, rather than on the existence, or not, of convergence, presents several advantages. First, it avoids the conceptual narrowness of convergence, which views the specific policy, in this case competition law, from the perspective of the actors affected, focusing on the outcomes of the policy process, and largely ignoring the policy *process* itself. Diffusion theory enables the researcher to move beyond the analysis of the outcomes of the policy process. It provides important clues as to why policies spread in some jurisdictions, and not in others, and as to the extent to which the pattern of diffusion may impact on the content of the policies diffused. Second, diffusion may be “operationalized” with the help of indicators linked to specific patterns of diffusion, thus offering to the researcher the opportunity to measure policy diffusion. Finally, it highlights the various forms of interdependence

be related to (a) the goals that the policy is designed to achieve, (b) the challenges of its implementation and/or (c) its political support”.

¹⁷ HEINZ, Torben (2011), Mechanism-Based Thinking on Policy Diffusion, No. 34 KFG Working Paper, Freie Universität Berlin. To the difference of learning, which is related to the “objective consequences” of a policy, emulation puts emphasis on the “symbolic and socially constructed characteristics of policies”, regardless of whether or not the policies “work” in the specific jurisdiction. In other words, the material consequences of adopting and implementing a specific policy “carry less weight than the pressure to conform to a norm within a given peer group”: MAGGETTI, Martino & GILARDI, Fabrizio, (2016) Problems (and solutions) in the measurement of policy diffusion mechanisms, *Journal of Public Policy*, 36(1), pp. 87-107, 91.

¹⁸ LINOS, Katerina (2013), *The Democratic Foundations of Policy Diffusion* (Oxford Univ. Press, 2013).

linking the various policy actors, rather than insisting on their common or divergent reaction to common factors affecting them. This narrows down the scope of analysis to an element that is intrinsically linked to the governance of the interactions between actors, rather than the more esoteric study of the way these different actors experience the impact of the common background factors affecting them. It also explains why expecting policy convergence once the various competition law regimes have attained a level of maturity may be profoundly misguided.

B. The futile call for global policy convergence

Although “policy convergence” is the talk of the day among antitrust enforcers at a global level, the concept is still in search of a definition. David Gerber explains that “(t)he term convergence necessarily refers to a process of movement towards a center”, the so called “convergence point”¹⁹. The discussion over competition law convergence at a global scale seems to indicate the process by which the characteristics of individual competition law systems increasingly resemble some set of “characteristics” representing the convergence point or “model”. For Gerber, this convergence point in global antitrust is currently the “economics-based model” of competition law, as this has developed in the US. This model relying on the proposition that “economics should be the basis for competition law norms”²⁰. I would even further claim that this model should not be characterised as “economics-based”, but as “Neoclassical Price Theory economics based” or “NPT-based” model, as the economic knowledge inspiring this model emanates from the Neoclassical Price Theory approach and ignores to a great extent other intellectual traditions in economics.

The choice of the specific “convergence point”, an idealized, and for that reason largely partial, view of the US model, may be explained by historical reasons, as US antitrust law grandfathered competition law statutes in other nations, by economic ones, in view of the importance of the US in the global economy, as well as by politico-ideological ones as the current version of neo-liberalism characterizing the design and structures of the global economy has been very much a product of the US hegemony in the world. The idea that the US system is more “advanced” and “sophisticated” than that of other nations, relies on various distinguishing elements of the US model: the significant experience collected through a more than a century old, mostly private, competition law enforcement; the presence in the US of a significant community of competition law scholars, economists and lawyers, which is highly influential at a global scale, partly because of the greater internationalisation of higher education in the US, the prevalence of US-based law firms in global antitrust enforcement, the

¹⁹ GERBER, David J. (2016), Global competition law convergence: Potential roles for economics, in Theodore Eisenberg and Giovanni B. Ramello (eds.), *Comparative Law and Economics*, pp. 206-235, 207-209..

²⁰ *Ibid.*, 213.

important role of global economic consultancies, most of which are based or constitute spin-offs of US-based firms; the presence in the US of multinational enterprises that frame their contractual or other arrangements and business practices so as to comply to US antitrust standards and which are less keen in accepting additional compliance costs resulting from other competition law regimes.

During the last two decades EU competition law has also gained considerable influence in framing the global competition law “model”, or “convergence point”. Because of the administrative nature of EU competition law enforcement, which has influenced the way most nations have organized their competition law enforcement systems, legal culture (as civil law systems are prevalent) but also more generally in view of their enforcement capabilities (as their court system remains relatively under-developed in areas of economic regulation), most countries seem to follow with some degree of differentiation the institutional design of the EU model. EU law doctrines have also exercised a considerable influence in framing the substantive law standards in various areas, as EU competition law has itself entered into a process of “modernization” according to the precepts of the US inspired “NPT-based model”, generating a considerable number of normative texts and guidelines, inspired by the most recent economic analysis and setting clear principles for competition law enforcement in various areas. These have proven a considerable source of inspiration for many competition law authorities around the world. Although they manifestly are products “made in the EU”, their intellectual underpinnings originate for the most part in the other side of the Atlantic and emanate from the US model of neoliberalism, and not that developed in Freiburg by the so called ordo-liberal version of neo-liberalism. This becomes clear if one looks to the areas of EU law that are usually put forward as exportable products. These do not usually include areas of EU law where the ordo-liberal model has exercised some influence and which seem less compatible with the “NPT-based model” of competition law serving as the point of convergence.

As its name indicates, the “NPT-based model” of competition law largely relies on economic concepts, methods and overall narratives. Perceived as forming a “naturalist order”, pre-existing any intervention by the State²¹, global markets are supposed to be free and stay so, state intervention being limited only in the confined, by neoclassical price theory, situations of market failure²². In these cases, the

²¹ See, however, HARCOURT, Bernard, *The Illusion of Free Markets – Punishment and the need of Natural Order* (Harvard University press, 2012) criticizing “the ‘illusion’ of ‘free markets’ perceived as a natural order that pre-exists regulation”.

²² A market failure is a general term describing situations in which market outcomes are not Pareto efficient. Pareto efficiency, also referred to as allocative efficiency, occurs when resources are so allocated that it is not possible to make anyone better off without making someone else worse off, or stated otherwise, where (scarce) resources are used to produce the mix of good and services which is most valued by society. This is a very abstract concept, which is grounded on the theoretical construct of general equilibrium, which looks at the economy in its entirety, that is, where all markets are considered together. In practice, though, the case against monopoly (as the archetypal example of market failure due to market power) is based on partial equilibrium analysis, which looks at only one market at a time, characterised by its demand and supply curves. To focus on a single market rests on

“technology” of economic efficiency analysis, developed by economists, will provide the necessary direction and, if performed well, will produce similar results to those expected by free markets²³. These two principles, free markets and economic efficiency, are interchangeable, the core of economic theory being based on the idea that free markets are efficient²⁴. To the extent that competition law adheres to the goal of economic efficiency, its intervention will be considered adequate when artificial barriers, either public or private, impede free markets to produce their full potential. Cartels constitute the quintessential example of a private barrier to the free operation of a market, a free market being considered as one in which each economic operator determines independently his conduct. State restrictions may also restrict efficiency, in particular if they originate from rent-seeking and regulatory capture.

The call for “policy convergence” in competition law may thus be understood as seeking to develop competition law regimes that promote free markets and economic efficiency, while at the same time striving to develop a (global) regime that reduces regulatory barriers emanating from regulatory divergence. Regulatory divergence has implications for businesses interested in foreign markets expansion. It may create obstacles to international trade due to cultural differences (e.g. prior beliefs over the costs of type I or type II errors, market-based and individualist values as opposed to more collective values), but also because of different regulatory methods, procedures and traditions. Hence the claim for policy convergence in this context may be considered as a functional equivalent to greater economic integration, whose aim is also to erode barriers to trade with the removal of regulatory impediments and the convergence towards unified or, at least, compatible regulatory standards.

This is of course a desirable objective from the point of view of the economic actors subject to regulation, as the cost of complying with one (similar) set of legal norms is evidently lower than that of having to comply with different (or stricter) legal norms. Removing regulatory differences and converging to a “NPT-based model” of competition law may promote the process of “international economic integration”²⁵, an

the assumption that the levels of income and the prices of both substitute and complement products are fixed (*ceteris paribus*).

²³ Indeed, according to the neoliberal view of the State, markets constitute a site of “veridiction-falsification” for governmental practice, based on the assumption that “[...] inasmuch as prices are determined in accordance with the natural mechanisms of the market they constitute a standard of truth which enables us to discern which governmental practices are correct and which are erroneous”: FOUCAULT, Michel, *The Birth of Biopolitics – Lectures at the Collège de France 1978-1979*, (Picador, reprint ed. 2010), 32. State intervention should therefore be evaluated from the viewpoint of market principles.

²⁴ Economics relies on free markets, real or fictitious, in order to develop evaluation criteria: see the seminal works of COURNOT, Augustin, *Recherches sur les principes mathématiques de la théorie des richesses* (1838) translated in English as A. Cournot, *Researches on the Mathematical Principles of the Theory of Wealth* (1897, Macmilland & Co.) & MARSHALL, Alfred, *Principles of Economics* (8th ed., 1890, Macmillan & Co.).

²⁵ On the emergence of the theory of international economic integration see, MACHLUP, Fritz, *A History of Thought on Economic Integration*, (Macmillan Press, 1977), noting that economists in the inter-war era employed the negative noun of “disintegration” of the world economy, probably as a consequence of the national protectionist legislation (including national cartels) that followed the economic crisis of

ideal to which the concept of “policy convergence” alludes to. “Policy convergence” aims to reproduce the results of “economic integration”, regulatory sameness or similarity with the consequent limitation of barriers to trade, without however imitating the institutional mechanisms of “economic integration”, which are thought of as being relatively heavy, in the sense that they require some intense transnational institution-building (e.g. putting in place institutions ensuring negative integration and/or positive integration), and politically risky, as these institutions may escape the authority of the sovereign State.

One may understand this strategy as a follow up of functionalist theories, which were the first to break away “from the traditional link between authority and a definite territory by ascribing authority to activities based in areas of agreement”²⁶. States exercise several functions (activities), some of which require action at the international level. This transfer initiates the process of integration, which is driven by the continuous pursuit of these functions, in the context of an international institution (or informal network) created to that effect. According to functionalism, “(e)very function is left to generate others gradually; in every case the appropriate authority is left to grow and develop out of actual performance”²⁷. The functionalist approach and the concept of integration are profoundly interlinked: without the functionalist emphasis on the existence of separate functions, where authority can be transferred, there can be no integration, in the sense political scientists give to this term.

Neo-functionalism’s starting point is social differentiation: society is carved in various specialized and autonomous sectors, operating independently but gradually in more intensive cooperation with each other, as a consequence of the spill-over effect. Technocratic economic issues are perceived separately from contentious political or social ones. At the same time, they are profoundly interlinked within the same *continuum*. According to Haas, the initiator of the theory, “the supranational style stresses the indirect penetration of the political by way of economic[s] because the ‘purely’ economic decisions always acquire political significance in the minds of the participants”²⁸. At the same time, “the measure of political success inherent in economic integration lies in the demands, expectations and loyalties of the political actors affected by the process, which do not logically and necessarily follow from statistical indices of economic success”²⁹. It is clear in neo-functionalist theory that a

1929. The positive noun of “integration” was first employed after the Second World War in order to provide a conceptual vehicle for the efforts of “integration of the Western European economy”, the substance of which “would be the formation of a single large market within which quantitative restrictions on the movements of goods, monetary barriers to the flow of payments and, eventually, all tariffs are permanently swept away”: *Ibid.*, p. 11, referring to Paul Hoffmann’s official pronouncement to the Council of the Organisation of European Economic Co-operation on October 31, 1949

²⁶ MATTLI, Walter, *The Logic Of Regional Integration – Europe and Beyond* (Cambridge University Press, 1999), p. 21.

²⁷ MITRANY, David, *A Working Peace System* (Quadrangle Books: Chicago, 1966).

²⁸ HAAS, Ernst B., *Technocracy, Pluralism and the New Europe*, in in. Joseph S. Nye, ed., *International Regionalism: A Reader* (Boston: Little, Brown, 1968), 149-166, p. 152.

²⁹ HAAS, Ernst B., *The Uniting of Europe* (Stanford University Press, 1958), p. 13.

“purely” economic scheme “does not by itself answer the basic political question whether the unified economy meets with the satisfaction of people active within it”³⁰. The political and the economic dimension of integration are profoundly interlinked. However, the social actors influencing the decision-making at these supranational settings may be different than those participating in domestic political processes. The main actors in the process of integration are experts operating independently from their national political constituents although they are at the same time checked by “equally prescient national actors”³¹. Their aim is to promote, first, sectoral economic integration and, following “spill-over”, other forms of integration. The process of decision-making is incremental³².

The concept of integration relies on “authority-legitimacy transfer or sharing” in different areas³³. As “institutionalization” constitute(s) an indicator for authority and legitimacy³⁴, the formation of common institutions reveals that a higher degree of integration has been achieved. Building global institutions, such as a global competition authority, may however be an impossible task, although one may expect that a higher intensity of business transactions producing multi-jurisdictional effects could over time make this option a more realistic possibility.

In contrast, “policy convergence” does not require any “authority-legitimacy transfer or sharing”, but simply relies on the *independent* and *voluntary* decision of a number of States to converge towards the same regulatory model/convergence point³⁵. This is usually managed by members of national bureaucracies working together in the context of formal and informal “government networks”³⁶. Although the process is different, the sought effect is the same as that sought by “integration”, which

³⁰ Ibid., p. 284.

³¹ HAAS, Ernst B., The Study of Regional Integration – Reflections on the joy and Anguish of Pretheorizing, *International Organization*, 24(4) (1970), 607-646, p. 627.

³² Ibid.

³³ Ibid., p. 633.

³⁴ Ibid.

³⁵ GERBER, David J., Global competition law convergence: Potential roles for economics, in Theodore Eisenberg and Giovanni B. Ramello (eds.), *Comparative Law and Economics*, pp. 206-235, 208 considers that such decisions should be “neither the subject of an obligation (created by agreement or otherwise) nor subject to coercive pressures from external sources”. By doing so, he only takes into account emulation as the main mechanism of diffusion if one is to focus on “policy convergence”. We do not agree with this narrow definition of convergence for the simple reason that the incentives driving policy convergence may be broader than the emulation process of policy diffusion. It may certainly cover socialisation, externalities and learning. In our view even externalities flowing from coercion should be included, as it is quite difficult to distinguish situations in which the presumed coerced acquiesces after her/his incentives have been altered, in some way, by the coercer. NOZICK, Robert, ‘Coercion’, in P. Suppes, and M. White (eds.), *Philosophy, Science, and Method: Essays in Honor of Ernest Nagel*, (Sidney Morgenbesser, New York: St. Martin's Press, 1969), 440–472, 441-445 offers a broad definition of coercion that includes any alteration of the coerced's costs and benefits to acting, coercion finally operating through the will of the coerced. If one takes such definition of coercion, how would this be distinguishable from the situation in which the State found “coerced” has merely made the choice of adopting and implementing competition law as a result of the pattern of diffusion of other externalities or socialisation?

³⁶ SLAUGHTER, Anne-Marie, *A New World Order: Government Networks and the Disaggregated State* (Princeton University Press, 2004).

is perceived as a process, encompassing “measures designed to abolish discrimination between economic units belonging to different national states”, as well as a state of affairs, represented by “the absence of various forms of discrimination between national economies”³⁷. The concept of “policy convergence” as it has been conceived in the debate over the global governance of competition law, seems to adhere to the same aim, albeit using different means: the voluntary decision to move to the desired end-point without this being done through cooperation, integration or more generally “authority-legitimacy transfer or sharing” in the area of competition law.

The concept of “policy convergence” is put forward as an essential aim for the global governance of antitrust, a number of strategies and mechanisms being suggested in order to achieve this objective and going from the impossible dream of elaborating a global supranational authority applying one competition law, to the collective cross-fertilization among various competition authorities through specific networks of informal interactions, or the elaboration of bilateral or regional dispute resolution and appeal mechanisms³⁸. The claim for policy convergence relies on the conceptual linkage made between competition law and international trade and the idea that “there is a risk that competition law enforcement can itself be employed as a tool of discrimination or market exclusion, contrary to the values it is intended to promote”³⁹.

Policy convergence in the area of competition law is thus promoted as a way to erode inter-jurisdictional trade barriers, a reason that looks at first sight extraneous to considerations of effective competition law enforcement. Policy convergence is often an aim explicitly pursued by trade agreements, in particular the deeper forms of international economic integration. One may note the importance of “regulatory convergence” and “regulatory compatibility” in the negotiations for the Trans-Pacific Partnership and the ongoing Trans-Atlantic Trade and Investment Partnership (TTIP) negotiations between the European Commission and the US⁴⁰. Each of these mega-

³⁷ BALASSA, Béla, *The Theory of Economic Integration* (George Allen & Unwin Ltd, 1961), p. 1. For a more ‘outcome-oriented’ definition see, TINBERGEN, Jan, *International Economic Integration* (Elsevier, 1954), p. 95, defining integration as ‘the creation of the most desirable structure of international economy, removing artificial hindrances to the optimal operation and introducing deliberately all desirable elements of co-ordination or unification’.

³⁸ For an overview of the various proposals, see PEREZ MOTTA, Eduardo (2016), *Competition Policy and Trade in the Global Economy: Towards an Integrated Approach*, The E15 Initiative, World Economic Forum, available at <http://e15initiative.org/publications/competition-policy-trade-global-economy-towards-integrated-approach/>.

³⁹ *Ibid.*, p. 6.

⁴⁰ Further examples of these “deep” mega-trade agreements, include the EU Korea FTA, the US Korea FTA, the EU Singapore FTA. One may also cite the Australia-New Zealand regulatory cooperation and the US-Canada Regulatory Cooperation Council. The US-Canada have also put in place the US-Canada Regulatory Cooperation Council which was created in 2011 by the US President and the Canadian Prime Minister, thus not resulting from an international trade agreement. It aims at better alignment in regulation, enhancing mutual recognition of regulatory practices and establishing new effective regulations in specific sectors. It is composed of high-level representatives of regulatory oversight bodies as well as senior representatives from the international trade departments, but other regulatory agencies are also involved.

trade agreements include in addition to the traditional for trade agreements market access rules, regulatory “behind the border” issues involving foreign direct investment, intellectual property rights, labour standards, as well as competition rules. These are usually accompanied by horizontal provisions on “regulatory compatibility” and “regulatory convergence”⁴¹. For instance, the EU/Canada Comprehensive Trade and Economic Agreement will include “horizontal” regulatory cooperation provisions in order to “prevent and eliminate unnecessary barriers to trade and investment”, “regulatory compatibility, recognition of equivalence, and convergence”, including “(b)uilding trust, deepening mutual understanding of regulatory governance” and “reducing unnecessary differences in regulation”, among other similar objectives⁴². Similar provisions may be included in the TTIP. The EU Negotiators Mandate calls for “enhanced cooperation between regulators” and “regulatory compatibility”⁴³. A Section on Regulatory Policy Instruments provides for some harmonization of “analytical tools” such as Impact Assessments. It is envisaged that a bilateral cooperation mechanism will support regulatory cooperation with the aim to “seek increased compatibility between their respective regulatory frameworks”. This will include information and regulatory exchanges “led by the regulators and competent authorities at central level responsible for the regulatory acts concerned”. A specific provision on the promotion of “International Regulatory Cooperation” stipulates that “the Parties agree to cooperate between themselves, and with third countries, with a view to strengthening, developing and promoting the implementation of international instruments *inter alia* by presenting joint initiatives, proposals and approaches in international bodies or fora, especially in areas where regulatory exchanges have been initiated or concluded pursuant to this Chapter and in areas covered by [specific or sectoral provisions –to be identified] of this Agreement,”⁴⁴.

The competition law provisions of the draft TTIP agreement do not include any talk of convergence as such. However, one of the purposes of 1991 EU/US cooperation agreement in this area was to “lessen the possibility or impact of differences between the Parties in the application of their competition laws”⁴⁵. What is relatively new in TTIP is the addition of consultation provisions and the possibility of

⁴¹ KRSTIC, Stanko S. (2012), Regulatory cooperation to remove non-tariff barriers to trade in products: key challenges and opportunities for the Canada-EU comprehensive Trade Agreement (CETA), *Legal issues of Economic Integration*, 39(1), pp. 3-28; HOEKMAN, Bernard (2015), Fostering Transatlantic Regulatory Cooperation and Gradual Multilateralization, *Journal of International Economic Law*, 18, pp. 609-624

⁴² EU Canada Comprehensive Economic and Trade Agreement (CETA) formally proposed by the European Commission for adoption by the Council of the EU in July 2016, Chapter 26 on Regulatory Cooperation, available at <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/ceta-aecg/text-texte/26.aspx?lang=eng> .

⁴³ See the current EU proposals on Regulatory Cooperation, available at http://trade.ec.europa.eu/doclib/docs/2016/march/tradoc_154377.pdf .

⁴⁴ See, <https://wikileaks.org/ttip/Regulatory-Cooperation/Regulatory-Cooperation.pdf> .

⁴⁵ Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws, [1995] OJ L 95/47, Art. 1(1).

adopting best practices. It is reminded that the EU-US cooperation in competition law is quite advanced, the Administrative Arrangements on Attendance (AAA)⁴⁶ enabling reciprocal attendance at certain stages of the procedures in individual cases and the 2011 EU/US Best Practices on Cooperation in Merger Investigations providing rules on the coordination on timing issues, exchange of information/collection and evaluation of evidence, joint EU/US interviews of the companies concerned, the establishment of key points for direct contacts between enforcers, and cooperation in the remedial process⁴⁷.

The idea is that once regulatory systems develop some form of “convergence”, based, for instance, on a common reliance on similar sources of scientific expertise and similar regulatory processes, international cooperation in order to promote a common interpretation and understanding of that expert body of knowledge, the reasons for regulatory diversity erode. Whatever one may think of the view that similar inputs of expert knowledge, with some degree of regulatory cooperation and regulatory process convergence, will lead to similar regulatory outputs, it is clear that such an approach aims to kick-start the process of inter-state regulatory cooperation in order to reduce “unnecessary differences” in regulation and achieve “regulatory compatibility”.

However, as with the narrow view of economic integration, the main difficulty with this conceptualization of “policy convergence” is that it does not accommodate the need for regulatory pluralism and diversity, which might better represent the preferences of the various political communities connected through the nexus of global markets (and global supply chains). By focusing on the demands of specific stakeholders, businesses eager to expand their activities in global markets, the narrow definition of “policy convergence” as the process through which the convergence point of the “NPT-based model” of competition law will be achieved, may face a similar legitimacy crisis than that suffered in recent years by the neo-functional integration model, at least in the EU.

One may not necessarily view institutional choices from a welfare perspective, in the sense that a particular institution produces superior welfare effects than another one, but also from a participatory perspective, regarding the quality and extent of participation in the decision-making processes at issue⁴⁸. One needs to take into account the interests of all parties affected.

Despite the frequent pleas of competition policy makers around the world and global business for convergence, the process of convergence remains highly

⁴⁶ See, <http://ec.europa.eu/competition/international/bilateral/usa.html> .

⁴⁷ See, http://ec.europa.eu/competition/mergers/legislation/best_practices_2011_en.pdf

⁴⁸ KOMESAR, Neil, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy*, (University of Chicago Press, 1997).

contentious⁴⁹. From a descriptive perspective, convergence appears like an unrealizable dream. The recourse to economic analysis and the role of economics in enhancing policy convergence in this area has been duly highlighted⁵⁰, and certainly many competition law regimes make use of economic methodologies and policy frameworks put in place by the “global profession” of economics⁵¹. Various soft law texts, guidelines and best practices published by competition authorities aim to elevate economics’ driven evidence-based decision-making at the rank of best practice at the global scale⁵². However, expecting the same economic inputs to produce similar legal outputs would be ignoring the importance of legal process in the assessment and reliance on evidence, as well as the complex interaction between economic and legal concepts.

An interesting feature of economic transplants is that their interpretation is not always a function of the exact meaning of the concept in economics. In that sense, they share a common characteristic with the concept of “legal transplants”⁵³. The economic transplant takes a different form as soon as it is translated into the legal context: its content evolves separately than in its original setting, economics, as it evolves in congruence with the context of its host language, the specific legal system, and some would also claim, is heavily influenced by the politics and the culture of the specific jurisdiction to which it is introduced. Indeed, as some authors put it, “the law today not only interprets the social impacts of science” but also “constructs” the very environment in which scientific discourse comes to have “meaning, utility, and force”⁵⁴. For this reason, even if EU competition law has moved towards the integration of economic analysis in the development of its standards of adjudication, in particular for horizontal and vertical contractual restraints, and largely relies on the same economics than those relied upon by the US antitrust agencies and courts, there are still significant differences with regard to some types of practices, such as vertical resale price maintenance for instance, which is unequivocally condemned in EU competition law, but assessed under the more lenient rule of reason in US antitrust law, probably

⁴⁹ See, inter alia, CHENG, Thomas K. (2012), *Convergence and Its Discontents: A Reconsideration of the Merits of Convergence of Global Competition Law*, *Chicago Journal of International Law*, 12(2), pp. 433-490.

⁵⁰ GERBER, David J., *Global competition law convergence: Potential roles for economics*, in Theodore Eisenberg and Giovanni B. Ramello (eds.), *Comparative Law and Economics*, pp. 206-235, 226-234.

⁵¹ FOURCADE, Marion (2006), *The Construction of a Global Profession: The Transnationalization of Economics*, *American Journal of Sociology*, 112(1), pp. 145-194.

⁵² See, DG Comp, *Best practices, submission of economic evidence* (2010) http://ec.europa.eu/competition/consultations/2010_best_practices/best_practice_submissions.pdf; Bundeskartellamt, *Best practices for expert economic opinion* http://www.bundeskartellamt.de/wEnglisch/download/pdf/Merkblaetter/Bekanntmachung_Standards_Englisch_final.pdf; European Commission, *Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union* (2013), available at http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_guide_en.pdf.

⁵³ On the concept of “economic transplant” see, LIANOS, Ioannis (2009), *Lost in Translation? Towards a Theory of Economic Transplants*, *Current Legal Problems*, pp. 346-404.

⁵⁴ JASANOFF, Sheila, *Science at the Bar* (Harvard Univ. Press, 1997), 16.

representing deep-rooted differences with regard to the assumptions made as to the operation of markets, thus affecting the choice of economic models attempting to explain the competitive interactions occurring in this context⁵⁵.

There has been a considerable effort the last two decades to build international institutions that would not only carry the message of policy convergence, but will also put in place policy convergence building tools, such as training and capacity building programmes, a set of best practices for competition authorities, an intense production of expert consensus reports, conferences and global symposia bringing together competition officials and a selected group of academics and representatives of the “stakeholders”, including global corporations, global law firms and economic consultancies. This effort followed the failure of the Doha round to establish a global institutional architecture for competition policy in the context of the WTO, a project mainly supported by the EU⁵⁶. The US has opposed the WTO option⁵⁷ and suggested instead a light institutional option, confined in the area of competition law and not linked with the broader trade issues covered by the WTO, with the establishment of a global network of competition authorities, what later became the ICN⁵⁸. There are of course other important players that pre-existed the resurgence of the global competition policy discussion in the mid-1990s with the Doha Development Agenda. This includes the OECD, a club of developed economies that has recently moved in integrating emergent economies (in particular in South America with the inclusion of Chile in 2010) and has adopted a strategy of “inclusive growth” that has the potential to bring within the competition law remit issues, such as inequality, that were until then considered as not directly related to the considerations normally driving the work of competition authorities⁵⁹. Initially the champion of a New International Economic Order in the 1970s and 1980s⁶⁰, and for this reason relatively marginalized in the discussion,

⁵⁵ Compare *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 US 877, 877 (2007) with Article 4(a) of Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] L 102/1 and Commission Notice - Guidelines Vertical Restraints [2010] OJ C-130/1, paras 48 & 223.

⁵⁶ Competition policy formed part of the so called Doha Development Agenda launched in 2001, and initiated by the WTO Ministerial Meeting in Singapore in 1996. For a discussion of this initiative and the need to re-launch the WTO option, see ANDERSON Robert D. & MULLER Anna Caroline, *Competition Law/Policy and the Multilateral Trading System: A Possible Agenda for the Future*, E15 Expert Group on Competition Policy and the Trade System (September 2015), available at <http://e15initiative.org/wp-content/uploads/2015/07/E15-Competition-Anderson-and-Muller-FINAL.pdf> ; see also EVENETT, Simon J. (2007). *Five Hypotheses Concerning the Fate of the Singapore Issues in the Doha Round*. *Oxford Review of Economic Policy*, 23(3), pp. 392–414.

⁵⁷ See, KLEIN, Joel I. (1996), *A Note of Caution with Respect to a WTO Agenda on Competition Policy.* Remarks to the Royal Institute of International Affairs, 18 Nov., <http://www.justice.gov/atr/public/speeches/0998.htm>

⁵⁸ For a discussion, see GERBER, David, *Global Competition: Law, Markets and Globalization* (OUP, 2010), p. 105.

⁵⁹ See, OECD Strategy on Development, available at <https://www.oecd.org/pcd/OECD%20Development%20Strategy.pdf> ;

⁶⁰ For a discussion, see LIANOS, Ioannis (2007), *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, *Tulane Journal of International & Comparative Law*, 15(2), 415.

UNCTAD has recently re-calibrated its action to more “mainstream” competition law positions, albeit always geared towards the defense of the interests of developing countries, and tasks of capacity building and technical assistance⁶¹. Its new function in this emerging global competition law institutional framework is apparently to serve as an “efficient middleman between technical assistance donors and the youngest competition agencies that are most in need of improving their technical staff, investigation methodologies, and procedures”, to the direction of course of the NPT-based model of competition law⁶².

Despite the wide intervention and high visibility of these international platforms and undeniably the excellent work they have accomplished so far in terms of knowledge dissemination, the facilitation of the conversation with the development of a common language among competition authorities, as well as the establishment of various links between competition authorities globally, their potential to generate “policy convergence” is limited by various factors.

First, it is clear that there are still important differences between competition law systems on the way the various common concepts, frameworks and tools generated by these international institutions and networks will be implemented in practice. As it was noted by Frederic Jenny, who has played a significant role in the global discussion on competition law since the mid-1990s in his capacity as the Chair of the WTO Competition and Trade Working group and as the head of the Competition Policy Committee at the OECD, with regard to substantive convergence in merger control, notwithstanding the important progress made in the generation of substantive convergence, “the convergence of national merger control regimes across the world, if desirable, is unlikely to lead to the complete homogeneity of merger control regimes,” with Jenny continuing that “the convergence of merger control regimes cannot guarantee that there will be no conflicts or divergence of results”⁶³.

Second, we have witnessed the last two decades the emergence of new competition law regimes of global significance, in view of the importance of the economy of these States for global trade, such as China, India, Brazil, Russia, South Africa, Mexico and Turkey. Some of these regimes have been, and to a certain degree still are, closely related to the EU mainly, but also the US competition law models, but as they mature, these “new” competition law systems tend to develop independently from their “parent” jurisdictions. Following adoption most competition law regimes pass by a process of soul-searching, which integrates the specificities of their economies,

⁶¹ See, UNCTAD Perspective on Competition Law and Policy 2013, available at http://unctad.org/en/PublicationsLibrary/ditoclpmisc2013d2_en.pdf (arguing that competition policy should be suited to their development needs and economic situation).

⁶² PEREZ MOTTA, Eduardo (2016), Competition Policy and Trade in the Global Economy: Towards an Integrated Approach, The E15 Initiative, World Economic Forum, available at <http://e15initiative.org/publications/competition-policy-trade-global-economy-towards-integrated-approach/>.

⁶³ JENNY, Frederic (2015), Substantive convergence in merger control: An assessment, 2015-1, pp 25-41.

institutional capabilities and cultural baggage in the development of the law. It is inevitable that, once the initial steps of implementing the model have passed, the emerging competition law communities of these jurisdictions will aim to produce knowledge that will represent the interests of their constituents, or stakeholders, and to project that globally, in their effort to shape globalization according to their national interests and the demands of their political economy. Hence, the phase of initial convergence to the original “model” may be followed by a phase of divergence, once the economic, legal and political cultural specificities start kicking in.

Third, the global economy has substantially changed, with the global share of the US and EU, shrinking from 60% in 2003 to approximately 45% in 2013 at the same time as the BRICS witnessed their share tripling during this period. Despite the recent drop in the growth rates of the BRICS economies, some economists predict that growth in emergent economies, in particular BRICS, will considerably increase their share of the global economy⁶⁴. A recent OECD report explains that

“(i)n 1995, the US, EU and Japan accounted for about two thirds of world GDP – and about 95% of the GDP of countries with competition law. Consequently, co-operation among just these three jurisdictions would have covered almost all significant international antitrust matters. In 2014 that same trilateral co-operation would cover less than half of world GDP. By 2030 on reasonable projections, those three economies will account for only 35% of world GDP. Beyond 2030, at least five jurisdictions would have to co-operate to reach the proportion of world GDP which could be achieved with just trilateral co-operation in 1995. Of course to reach 95% of those covered by competition law, one would need to include probably a hundred jurisdictions”⁶⁵.

This renders compliance to competition law a much trickier exercise, as an undertaking entering into transnational activities, for instance a M&A, will need even more now to pro-actively take into account the competition law regimes of the most important economies globally. This enhances the leverage of the competition authorities of the BRICS in the global governance of competition law and policy, in comparison to their position ten years ago.

Fourth, one of the most important in terms of political and economic significance jurisdictions in the world, China, is conspicuously absent from the main fora advancing the global discussion in competition law and policy, namely the ICN and the OECD. This has obviously an impact on the legitimacy in terms of representativeness and the clout of the work accomplished in these fora at a global scale, as it is increasingly clear that ICN and the OECD represent mainly the views of an important, but not dominant any more, part of the global competition law community.

⁶⁴ SPENCE, Michael, *The Next Convergence: The Future of Economic Growth in a Multispeed World* (Picador, 2012).

⁶⁵ OECD, *Challenges of International Co-operation in Competition Law Enforcement* (2014), available at <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf> , pp. 50-51.

Fifth, it becomes clear that the ideological consensus emerging out of the roaring mid-1990s and early 2000s that formed the basis for the emergence of the global order for competition law and policy during this period is increasingly under intense scrutiny and eventually contestation. In many of the core/model jurisdictions there is an increasing concern over the lack of competition that the sole focus of antitrust laws on economic efficiency has led to and its impact on the rise of inequalities⁶⁶.

It becomes clear that the soft international architecture put in place in the area of competition law and policy has trouble to cope with this multi-polar reality. While one may regret the absence of a “view from the top”⁶⁷, policy convergence being an important and legitimate demand from business, it is clear that the array of interests participating in the discussion over the governance of global antitrust is fairly limited and that little effort has been made to re-think the adequacy of the “NPT-based model” of antitrust put forward by these global institutions and networks in view of the lessons of the global economic crisis and the important changes brought in by the technological developments of the “fourth industrial revolution” and the rising significance of new centers of power globally. It is important that the quest for “policy convergence” does not lead to the impoverishment of the debate over global competition law by excluding different points of view, which challenge the dominant “NPT-based model” and by artificially narrowing down the debate (for instance by excluding from the discussion themes that may generate disagreements, such as the role of inclusive growth or inequality considerations in competition law enforcement), as these are perceived as putting obstacles to policy convergence. It is also crucial that the current architecture of global governance in this area represents the role and weight of all significant global players, in particular the BRICS economies. One cannot dis-embed policy convergence in the area of competition law from the political and social structure underpinning the global economy, and the ability of various sociological categories (e.g. small and medium undertakings, consumers, employees, governments), whose interests are affected, to participate in the decision-making process⁶⁸. Hence, there is need to re-embed the discussion on the global governance

⁶⁶ See, for instance, the Council of Economic Advisors’ Brief to the US President, April 2016, available at https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf followed by the launch of a new initiative of the US president to promote competition, see <https://www.whitehouse.gov/the-press-office/2016/04/15/executive-order-steps-increase-competition-and-better-inform-consumers> .

⁶⁷ See the suggestions of FOX, Eleanor (2015) Antitrust Without Borders: From Roots to Codes to Networks, November 2015, available at <http://e15initiative.org/wp-content/uploads/2015/09/E15-Competition-Fox-FINAL.pdf> .

⁶⁸ On the importance of the concept of embeddedness in understanding the (global) economy, and in particular the starting point that economic actions are “embedded in concrete, ongoing systems of social relations”, see M. Granovetter (1985), Economic Action and Social Structure: The Problem of Embeddedness, *American Journal of Sociology*, 91, pp. 481-510, 482-483.

of competition law to the multi-polar dimension of the global marketplace and the pluralistic nature of global governance as well as the international legal order.

C. Re-Embedding the discussion on the global governance of competition law to the multi-polar global economy and global legal pluralism

The original Havana Charter, establishing the WTO and including a chapter on competition law⁶⁹, the United Nations Economic and Social Council (ECOSOC) ad hoc committee on the drafting of an international code for restrictive business practices in the early 1950s (which again failed because of lack of support from the US)⁷⁰, the proposal of a Draft International Antitrust Code (DIAC), prepared by an “International Antitrust Working Group”, a unique initiative of a group of antitrust scholars to pave the way towards international enforcement of free and open markets⁷¹, that has inspired the European Commission’s proposals leading to the inclusion of competition as one of the Singapore matters to be negotiated in Doha, which also failed, provide some glimpses of an international law approach to the governance of global competition law. Some proposals made to integrate “cosmopolitan” principles in national competition law enforcement may also be considered as animated by similar principles⁷².

Despite its great theoretical appeal, it is unclear how an international law framework may be achievable at this stage of the development of the global antitrust law enterprise. It becomes however important to recognize that the development of global markets is intrinsically linked to the existence of a set of international or transnational legal norms that support them. These either emanate from traditional international law norms, resulting from International treaties or international customary law, negotiated or accepted by the States, or by a body of transnational commercial law which in a significant part constitutes an archetype of global law without a State and has moved from the state of “an amorphous and flexible soft law to an established

⁶⁹ Chapter V of the Havana Charter of 1948 expressed a concern for the restrictive effect of some business practices, without however adopting the more active approach proposed by the United States and the United Kingdom in their 1945 Proposals for Expansion of World Trade and Employment. However, the proposals never took effect, the United States Department of State publicly withdrew its request for ratification by the United States Congress.

⁷⁰ U.N. Econ. & Soc. Council [ECOSOC], Off. Rec., 16th Sess., Supp. No. II, U.N. Doc. No.E/2380 (1953). For a detailed analysis, see TIMBERG, Sigmund (1953), *Restrictive Business Practices: Comparative Legislation and the Problems That Lie Ahead*, 2 *American Journal of Comparative Law*, 445, 463-64; FURNISH, Dale B. (1970), *A Transnational Approach to Restrictive Business Practices*, 4 *International Lawyer*. 317, 327.

⁷¹ Draft International Antitrust Code as a GATT-MTO-Plurilateral Trade Agreement (International Antitrust Code Working Group Proposed Draft 1993), *published and released July 10, 1993*, 64 *Antitrust & Trade Reg. Rep. (BNA) No. 1628 (Aug. 19, 1993) (Special Supp.)*.

⁷² FOX, Eleanor M (2000), *Antitrust and Regulatory Federalism: Races Up, Down, and Sideways*, 75 *N.Y.U. L. REV.* 1781, 1801.

system of law with codified legal rules”⁷³. Various linkages are in operation, between States and State-sponsored global institutions, between private actors operating across national borders, and between State actors and private actors. Although ordered by well accepted legal principles and methodologies this global legal “field”⁷⁴ is of course characterized by a significant degree of diversification and a pluralistic legal order⁷⁵.

As the diversity of linkages and legal pluralism characterize the current status of the governance of global markets, it should not be a surprise that the global governance of antitrust should also be theorized through similar lenses. The multi-polar nature of the global economy calls for a multi-polar setting in the global governance of competition law. The emergence of various centers of competition law decision-making globally should not be perceived as a curse, a mere nuisance in the necessary drive towards policy convergence, but as an expression of the pluralism of the global legal order regulating global markets and of the changing constellation of power in the global economy. Legal pluralism and multi-polarity will inevitably constitute the essential features of the global governance of antitrust.

The legal pluralism and multi-polarity characterizing global markets calls for a framework that seeks to engage the various interests affected by the emergence of global antitrust in the emerging global field of competition law. Prioritizing the demands of global business for policy convergence, without any analysis of the way other interests may be affected by the process, is a recipe for a legitimacy disaster that the nascent framework of global governance in the antitrust field may not afford, in view of the recent rise of populism and mistrust to the elites. Competition officials promoting global policy convergence as a way to promote a global competition law culture should be cautious in the support they receive in this effort by the global business community, whose interests in a world of more than 120 competition law regimes, seem naturally aligned with their own, with regard to the outcome sought, greater convergence, although the reasons each of these groups aims to achieve such convergence essentially differ. Accepting legal pluralism and multi-polarity does not however mean that one needs to sacrifice efficiency concerns. It is important to acknowledge that the quality and extent of participation may be a proxy for the efficiency of the specific institutional process.

Neil Komesar notably advanced a “participation-centered” approach seeking to avoid the fallacy of one-sided interest group analysis. This aims to account for all affected groups in various dimensions and to examine how the distribution of benefits

⁷³ MICHAELS, Ralf (2007), *The True Lex Mercatoria: Law beyond the State*, *Indiana Journal of Global Legal Studies*, 14 (2), pp. 447-468

⁷⁴ As explained earlier, the concept of “field” used here has a sociological connotation and does not refer to a specific area of law or discipline.

⁷⁵ On “transnational legal pluralism”, see ZUMBANSEN, Peer (2012), *Defining the Space of Transnational Law: Legal Theory, Global Governance, and Legal Pluralism*. *Transnational Law and Contemporary Problems* 21(2): 305-336.

and costs of action would affect the ability of different groups to get what they want via the different institutions⁷⁶. From this perspective, both the over-representation of minority interests but also of majority interests might lead to unsatisfactory results. According to this theory, it is important to focus on the factors determining a group's marginal cost of participation. An affected group or interest participates on a given issue when its benefits (the group's average per capita stakes) exceed their costs. In Komesar's "participation-centered" model, "information costs" and "organization costs" determine a group's participation costs. The first refer to the costs of learning the law and procedures applicable as well as the costs for the specific institution to gather information. The organization costs facing a group are the costs to be incurred by the members who want to take action, and want other members to contribute. Organization costs increase with group size. The size of each member's individual stake — how much she stands to gain from winning — also affects her inclination to organize her fellow members. It follows that organization costs rise as individual stakes decrease.

Institutional processes can be biased in two ways: a "minority bias" when a small group with high individual stakes (e.g. multi-nationals) convinces an institution to enact its preferred policy and by doing so inflicts a greater cost on a large group with lower individual stakes (e.g. consumers) than the benefit it obtains⁷⁷, or a "majoritarian bias" when a large group with low individual stakes prevails and thereby inflicts a greater cost on a small, high-stakes group than the benefit it obtains⁷⁸. Once a dispute has been identified, the goal of comparative institutional analysis would thus be to find the institution least likely to develop a minority or majoritarian bias, that is, the institution where the group with the highest total stake is most likely to win.

If we follow this theoretical framework, the choice of an adequate institutional arrangement for the global governance of antitrust may require a fine balancing exercise between minority interests, such as global corporations that have high stakes in view of the existence of more than one hundred competition laws to which they are expected to comply, and majority interests, such as consumers, that may benefit from multilateral competition law enforcement (in the form of additional deterrence). It is however also true that the marginal benefit provided by the enforcement of an additional competition law may be minimal and in any case decline at some deterrence point, or even lead to consumer harm, in case this additional competition law enforcement stifles innovation and thus affects long term consumer benefits (over-enforcement risks).

Because of its design and the prevalent role it provides to the US and EU competition law models, the institutional setting of "policy convergence" may suffer from a minority bias, as it may not accommodate the interests of large groups, such

⁷⁶ *Ibid.*, p. 8.

⁷⁷ *Ibid.*, p. 55.

⁷⁸ *Ibid.*, p. 77.

as small and medium undertakings in the Global South that seek access to global markets and global value chains in order to upgrade their economic potential; farmers that may see their profits squeezed by powerful buyers established in the Global North; or consumers of the emergent and developing economies that may suffer from export cartels, increasing global concentration in various product markets and powerful global monopolies. At the same time, subjecting multinational corporations to the scrutiny of an extensive network of competition authorities that apply different standards and principles in assessing their practices may be a source of majoritarian bias and lead to inefficiency. As none of these solutions preserves us from majoritarian and minoritarian biases, it becomes important to think of alternative institutional settings, which will lead to a balanced and vigorous engagement by a broad spectrum of affected interests in the decision-making process. This participation-centered process may provide the exploratory tool needed in order to allow for cross-institutional comparisons by enabling us to understand the capabilities of an institution to bring out the diversity of interests affected by global competition law enforcement and engage the various stakeholders in a balanced way. Each affected group should have access to the decision-making process and a voice, for the process to be judged legitimate. At the same time, the representation of various interests will provide the chosen institution with a more complete base of information from which to make decisions, thus enhancing its accountability.

Turning to the architecture of the global governance of competition law, it is clear that individual countries, in particular jurisdictions with a “low externalities” competition law enforcement potential, because of the small size of their market, will incur difficulties to have their voice heard, certainly in the current context where only a few jurisdictions may take decisions and impose remedies to global corporations, but also in the event of a regime of policy convergence engineered by the existing international institutions involved in this area that mostly represent the interests and views about economic development of the US, the EU and a few other industrialised economies. Some affected interests/groups seem also excluded from consideration by the existing institutional setting (e.g. employees, farmers, small and medium undertakings), the latter being essentially consumers-focused.

While it may not be possible to design international institutions that may achieve the representation and participation of all interests, a second best would be to constitute a *global deliberative space* to which the interests of the emergent and developing countries, which form now the majority of the States disposing competition law systems, as well as those of all affected interests from global competition law enforcement, will be adequately represented. This global deliberative space will aim to be more inclusive and transparent than the current one, to which global corporations, transnational law firms and economic consultancies seem to be over-represented, and to guarantee the access of a diversity of affected interests to

information and expertise that would enable them to assess their positioning with regard to the various proposals made.

As the BRICS “club” is becoming one of the most important platforms for establishing a multi-polar, and inclusive, global governance, along with other inter-governmental settings, such as G20, it seems natural that it should play an important role in the effort to constitute this global deliberative space in competition law and policy. This “participation-centered” approach breaks with the realist perspective of global policy convergence engineered by powerful coalitions of the willing and their followers. It also differs from the cosmopolitan view, in the sense that it recognizes the difficulties of a larger community to preserve individual autonomy, as significant increases in the number of jurisdictions of competition law and the increasing complexity of the area (in view of the rise of the economics-based NPT-model of competition law) alter the dynamics of participation and reduce the likelihood of adequate representation of the various affected interests. It remains also different from an “internationalist” approach that would engage only with States and would ignore various other affected interests that may not have gained influence in the domestic political arena to make their concerns adequately represented.

From a participation-centered perspective, global governance will not seek policy convergence for its own sake but will aim to promote greater levels of trust among the various States but also other actors involved in this “field”: competition authorities and national bureaucracies, businesses, consumers and other interests.

D. Global governance as promoting total trust

Contrary to those calling for policy convergence as such, which is, as we previously highlighted, linked to the view that regulatory diversity constitutes a problem that needs to be tackled by global governance, in view of its effects on global markets, I consider that this approach may negate any space to legal pluralism and regulatory diversity. If the objective is regulatory convergence or compatibility, the different governance arrangements that may emerge are provisional steps towards the ineluctable end-game of the convergence point of the “NPT-based” competition law model. I do not consider that global governance means engineering policy convergence, but argue, to the contrary, that this concept should be carefully distinguished from that of policy convergence.

Our starting point is that the usual rationale for organizing a global governance regime is to manage tensions between *different* legal systems, not necessarily to unify legal systems into one indistinguishable one, although this might also be considered an option among others. The frictions between the various systems of competition law that interact with each other when dealing with conduct producing effects in a foreign jurisdiction generate negative policy externalities. These externalities may take different forms as the following stylized examples show. First, the consumers of the

host State (where the products are sold) may be affected by an agreement or a merger between two undertakings in the home State (where the undertakings are situated). By implementing its competition law extraterritorially, and prohibiting the agreement or merger, the host State may protect its consumers, but it may also affect the objectives pursued by the home State, which may find that this agreement or merger produces efficiency gains for its economy, or promotes another policy objective that is not taken into account by the competition law of the host State and is on balance positive from a public policy perspective. Secondly, the home State may not implement its competition law against anticompetitive conduct that exclusively aims at a foreign market (e.g. export cartel), that of the host State, which may not be able to get hold of the evidence and may not dispose of adequate competition assessment or remedial capabilities to tackle this anticompetitive practice. Thirdly, one may imagine that competition law enforcement by a variety of jurisdictions may lead to overlaps and unnecessary duplication, thus raising the costs of compliance for business and limiting the occurrence of beneficial to the global economy transactions. Fourthly, certain economically powerful States may finish by establishing global standards for the enforcement of competition law, as because of the sheer size and significance of their market, it will be impossible for businesses to ignore them, without taking in due consideration the policy preferences of other less powerful States.

It is theoretically possible for each State to adopt unilaterally measures in order to mitigate the negative policy externalities by either actively implementing negative and positive comity principles, that is by refraining to use its competition enforcement authority when this may be more important for the foreign nation than the exercise of authority would be for the specific State,⁷⁹ or by adopting a cosmopolitan standard that internalises policy preferences and interests foreign to its domestic policy calculus⁸⁰. Despite the appeal these option may exercise, their implementation in the current political and economic context seems impractical, in view of the clear accountability and legitimacy lines of competition authorities which report to national governments and national Parliaments, and not to supranational constituencies, in particular as it is not clear what interests these represent, and because of the important costs of integrating concerns and policy choices which lie outside the clear boundaries of the domestic legal system (information gathering and processing costs, risks of misinterpretation due to the lack of expertise about the foreign legal system). In these instances, cooperation with the foreign jurisdiction would be a more effective option in order to deal with these negative policy externalities.

The presence of negative policy externalities between different jurisdictions may lead to the need of some form of governance mechanism in order to mitigate the risk

⁷⁹ See, in the US *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 614 (9th Cir. 1976).

⁸⁰ Testimony of Eleanor M. Fox before the Antitrust Modernization Commission Hearing on International Issues, Washington DC, February 15, 2006, available at <http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/spring/06/012.pdf> .

of these externalities occurring⁸¹. The risk of negative externalities becomes even more significant, the more transnational organization of production through global supply chains takes hold in the global economy. This governance mechanism may take different forms: from a centralising harmonization option to a regime of complete inter-jurisdictional competition enabling forum shopping. Contrary to what is advanced by those focusing on the unidimensional objective of policy convergence, I take the view that the establishment of a global governance architecture should not seek to enhance regulatory sameness or convergence, but to enhance the building of increased levels of “institutional-based” trust (or “system trust”) between “actors” interacting across national boundaries.

One could identify two categories of trust relationships of relevance to our framework. First, one should enhance trust between different national regulators that interact as they try to resolve the conflicts arising out of the extraterritorial application of their national regulatory standards in cases of transnational dimension (“trust between governments”). Second, there should be trust between private actors (business, consumers, citizens) and the institutions that regulate their interactions (“trust in government”). This is a particularly important factor if one pays attention to the necessary legitimacy that national regulators (e.g. competition authorities) should enjoy in the performance of their tasks. Achieving policy convergence may harm the legitimacy of competition authorities if their constituents are critically disposed to the “economics-base model” of antitrust that serves as the convergence point. One should therefore aim to achieve increased levels of both trust between governments and trust in government (“total trust”).

Actors are not only States, but also entities operating inside the black-box of the State: the various sociological groups, consumers, the general public, small and medium undertakings, shareholders of multi-national companies whose interests are usually taken into account by competition law. These actors operate within a specific (social) environment, which can be characterized by relations of competition, cooperation and co-opetition. Actors do not behave or decide as atoms outside the social context: their action is instead, embedded in concrete, ongoing systems of social relations, in some instances, transnational ones. They dispose of the power to interact with other public or private actors across jurisdictions. This theory does not neglect the concept of the State, which is still present, as the interference of national boundaries defines the interactions between actors that are of interest for the existence of transnational negative externalities and therefore the need for a global

⁸¹ The existence of positive policy externalities, that is when a State implements its competition law statute and by doing so produces positive effects to the economy or the market of a foreign jurisdiction, does not necessarily call for the establishment of a governance mechanism. Policies that confer benefits on foreign groups in order to promote domestic policies, are often of little interest for international agreements, regimes or transnational cooperation.

governance architecture. Interactions between actors within the boundaries of a State are excluded from consideration.

We turn now to the concept of “trust”. The term is employed in economics, organization theory and sociological literature in different ways.⁸² One could define trust as “an attitude involving a willingness to place the fate of one’s interests under the control of others”⁸³. Repeated interaction forms the primary basis for trust. Andrew Kydd explains that

“trust is a belief that the other side prefers mutual cooperation to exploiting one’s own cooperation, while mistrust is a belief that the other side prefers exploiting one’s cooperation to returning it. In other words, to be trustworthy, with respect to a certain person in a certain context, is to prefer to return their cooperation rather than exploit them. [...] Cooperation between two actors will be possible if the *level of trust* each has for the other exceeds some threshold specific to the situation and the actors”⁸⁴.

Increasing the intensity (level) of trust refers “to the amount of discretion trustors grant trustees over their interests”⁸⁵. Indeed, “cooperation is possible when the level of trust for the other exceeds a minimum trust threshold for each party”, which “will depend on the party’s own tolerance for the risk of exploitation by the other side”⁸⁶. Consequently, “to trust someone [...] is to believe it relatively likely that they would prefer to reciprocate cooperation. To mistrust someone is to think it is relatively likely that they prefer to defect even if they think one will cooperate”⁸⁷. The function of trust is to reduce uncertainty and complexity in social communication systems as “it allows for specific (rather than arbitrary) assumptions about other social actors’ future behaviour”⁸⁸. It could thus be seen as a communicative medium reducing complexity⁸⁹.

Trust can take different forms: Luhmann distinguishes between “personal trust”, which is likely to develop when individual actors have frequent interactions and

⁸² See, LUHMANN, Niklas, *Trust and Power* (New York: John Wiley, 1979) for a discussion of trust from the point of view of systems theory; COLEMAN, Jules, *Foundations of Social Theory* (Harvard Univ. Press, 1990) for a discussion of trust from a rational theory perspective; WILLIAMSON, Oliver (1993), Calculativeness, trust, and economic organization, *Journal of Law and Economics* 453 for an economic perspective on trust. For sociological accounts of trust see, HARDIN, Russel, *Trust* (Russel Sage, 1998) ; KRAMER, Roderick M. & TYLER, Tom R. (eds.) *Trust in Organizations* (Sage, 1996) ; BARBER, Bernard, *The Logic and Limits of Trust* (Rutgers Univ. Press, 1983); For the role of trust in international relations theory see, KYDD, Andrew, *Trust and Mistrust in International Relations* (Princeton University Press, 2005).

⁸³ HOFFMANN, Aaron (2002), A Conceptualization of Trust in International Relations, *European Journal of International Relations*, 8(3), pp. 376-377.

⁸⁴ KYDD, Andrew, *Trust and Mistrust in International Relations* (Princeton University Press, 2005), p. 6.

⁸⁵ *Ibid.*, p. 377.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ BACHMANN, Reinhard (2001), Trust, Power and Control in Trans-Organizational Relations, *Organization Studies*, 22 pp. 337, also available at http://www.sase.org/oldsite/conf1999/papers/reinhard_bachmann.pdf , p. 8.

⁸⁹ LUHMANN, Niklas, *Trust and Power*, above, pp. 42-43.

become thus familiar with each other's personal preferences and interests and thus indifferent to the institutional arrangements, and "system trust", which relies on institutions to generate trust, rather than on personal interaction. Institutional-based trust constitutes a more "advanced stage of trust production"⁹⁰ as its function is to generate trust in a massive scale. But trust produces also risk, in particular if there is limited available information about the future behaviour of the trustee. Risk is an unavoidable feature of trust because trust can be disappointed. For example, an offer of cooperation may be exploited by free riding, or not be reciprocated. There are thus two inter-related conditions for trust: risk and interdependence between the actors. In order to minimize the risk of defect, actors may develop various strategies.

An alternative way than trust, to reduce complexity and uncertainty is the exercise of interaction power. Power influences "the selection of actions in the face of other possibilities"⁹¹. Power may not exclude risk but it may reduce it considerably: "a social actor who considers using power usually can refer to 'authoritative' and 'allocative' resources, which can be deemed likely to find recognition by the subordinate actor"⁹² and thus affect its incentives to act. Hegemonic power by one State, or the fight for hegemony, has been a feature of many historical periods in human history⁹³. If powerful actors have few constraints on the exercise of their power, our capacity for trust in them is limited. Power is treated here as a relational construct, which connotes the degree of dependence of the actors on one another.

Actors are frequently found in situations where they have to decide if they would base their interaction/communication mostly on trust or on power and the proportions of trust and power which should govern their relationship. Trust and power should not be exclusively viewed, however, as alternatives. It is possible that power appears in a "de-personalised" form as "system power". System power can take the form of law, organization or a hierarchy which can develop shared meanings among the social actors and can thus "mass-produce" trust. Standards of expertise are the main sources of "system trust": they are integrated in organizational routines that may take the form of institutions (formal or informal). Institutions are thus the central precondition rather than an alternative to "system trust". The constitution of trust ultimately relies on the existence of strong institutions. As institutional-based or system trust is a condition for the efficient production of a high level of trust, the "trans-organizational relations can be reconstructed as being controlled by the patterns of trust and/or power mechanisms"⁹⁴.

⁹⁰ BACHMANN, Reinhard (2001), Trust, Power and Control in Trans-Organizational Relations, above, p. 12.

⁹¹ LUHMANN, Niklas, *Trust and Power*, above, p. 112.

⁹² BACHMANN, Reinhard (2001), Trust, Power and Control in Trans-Organizational Relations, above, p. 16.

⁹³ See, the analysis of different models of international relations and trust in A KYDD, Andrew, *Trust and Mistrust in International Relations* (Princeton University Press, 2005).

⁹⁴ BACHMANN, Reinhard (2001), Trust, Power and Control in Trans-Organizational Relations, above, p. 24.

It follows from this analysis that trust is a concept that takes significance in situations of uncertainty over the preferences or behaviour of interdependent actors in a specific social system. Its function is to reduce uncertainty and thus to induce welfare-enhancing cooperation between them. However, trust produces also risks when cooperation will be exploited or not returned. This will provoke mistrust, which could potentially dodge welfare-enhancing activity from happening. Power or hegemonic control would be the other side of the coin: it is alternative to trust and contributes to maintain control and avoid the slippery-slope to a Hobbesian state of anarchy. The establishment of informal or formal institutions constitutes another available option in order to mitigate the risk of distrust by creating “system trust”. Institutions will generate trust, as long as their constituents believe that they are effective in preventing situations of distrust. Institutions may also require the invention of a common grammar that will facilitate communication between the actors, the existence of a regime of sanctions for instances of mistrust or of a hierarchy that will exercise control over the action of the actors and will ensure that they are trustworthy (“system power”).

In the sphere of international and transnational economy regulation, trust can be considered as an objective concept describing a relationship between regulatory systems underpinned by a relationship between public and private actors. The starting point is that when States interact, they have incomplete information about the preferences and objectives of their counterparts, as well as their payoffs and domestic pressures that are not evident to a counter-party. As it is also the case for individual relations, relations between states are shaped by social networks. Actions are embedded in concrete, ongoing systems of social relations. Consequently, the behaviour of the actors is not only driven by a pure interest calculation (calculative trust) but also by social norms and formal and informal institutions that support the specific relationship.

An important source of trust in this context would be the long history of interaction between these actors and their collective memory. Geographic proximity, common language, shared values and preferences facilitate interaction and thus build a certain level of “personal trust” between the different actors. The social network provides a source of information but at the same time it constitutes a mechanism that grants importance to “reputational sanctions”⁹⁵. Reputation helps to determine whether an actor would risk cooperating with another one⁹⁶. To the extent that all actors are connected in a web of relations, even if there is no personal interaction, there is some assurance that the victim of a trust violation can take action to rectify the situation. The development of mutual dependence between exchange partners may, however, have

⁹⁵ GUZMAN, Andrew, *How International Law Works – A Rational Choice Theory*, (OUP, 2008), p. 33.

⁹⁶ On the value of reputation in international law see, GUZMAN, Andrew, *How International Law Works – A Rational Choice Theory*, (OUP, 2008), 71-117.

ambivalent results as it may promote trust but also foster opportunistic behaviour (mistrust).

The network of social relations to which all actors belong provides not only a source of information about trustworthiness but also the opportunity for each actor to contribute to the reputation of another one, should other actors choose to provide information about a possible lack of trustworthiness. This reputational cost is particularly effective in closed social systems with membership, as is the case for instance of the European Union, or of the BRICS.

There is, however, a point where “personal trust” is not sufficient to promote welfare-enhancing cooperation. The reason is that the more complex the relationship and its environment becomes, the more uncertainty is generated over the future actions of the actors. As actors attempt to deal with uncertainty and the risk of mistrust, they may find it necessary either to exercise hegemonic power, if they have the capacity to do so (interaction power), or to elaborate institutions that will control occurrences of distrust. Institutions will have as their function to generate “system trust”. They build on an existing level of trust, which is a necessary pre-condition for their existence. The reputation mechanism is one dimension of the story. Institutions will act as social networks implementing informal or formal mechanisms to address mistrust. These trust-building tools could take different forms: extensive communication and information exchange, joint work, monitoring, norms of exclusion in the case of closed groups, or credible commitments, such as the delegation of important tasks, for instance the investigation of anticompetitive conduct producing transnational effects, to the competition authority of the partner State(s).

This brief sketch of a new theoretical framework based on the concept of trust may serve as a blueprint for a new model of global governance in the area of antitrust, based on multi-polarity and legal pluralism. We believe that because of their economic and political significance, the BRICS jurisdictions are able to take a leading role in moving the discussion away from the sterile and counter-productive insistence on policy convergence and towards the generation of total trust.

III. The role of BRICS in the Global Governance of Competition Law

The globalization of economic activity, in particular with the advent of the digital economy and the internationalisation of IP rights enabling global players to maintain the competitive advantage conferred by IP rights in their commercial activities across the globe, has increased the likelihood of competition law regimes colliding, as various competition authorities grapple with transnational anticompetitive conduct involving these global platforms. The role of BRICS competition authorities in the new geopolitics of competition law enforcement is particularly significant and will continue to grow, once their relatively more recent competition law regimes mature. From laggards and mainly followers of the trends set by the US and EU competition law

“models”, BRICS competition law regimes are increasingly finding a voice of their own and may eventually become trend setters in global antitrust. From this perspective, the recent investigations against Google’s alleged anticompetitive activities in mobile and search markets provide an illustration of the increasingly important role of BRICS in global competition law enforcement. This practical significance of their enforcement action notwithstanding, the BRICS have so far stayed mute with regard to the direction the global governance of competition law should move to. The main proposals on this crucial issue, of interest to the global economy, are indeed prepared in the established formal fora of ICN and OECD, with contributions from UNCTAD and the World Bank⁹⁷, all of which are dominated to a certain extent by the US and the EU, as well as in more informal fora put in place by some global economic players, for instance the E15 Initiative supported by the World Economic Forum⁹⁸.

It is clear that this constellation of established players in the global governance of antitrust game cannot be representative of the interests of the BRICS countries, in particular in view of the way these fora operate in practice, and more so of the emergent and developing jurisdictions that have now come to form the majority of competition law enforcers worldwide. Once this fact is accepted, it becomes essential to rethink the role of BRICS, not just as a “club” of significant, from the point of view of competition law enforcement, jurisdictions, but also as a major participant in the efforts to imagine a global architecture for competition law enforcement, but also as a trend-setter in the area of competition law and policy. The existence of a BRICS “club” does not assume that these jurisdictions have common interests or present common characteristics that set them apart the US and the EU. It is clear that BRICS’ economies, societies and political systems are markedly different from each other and that the group is quite heterogeneous. However, these differences may be considered as a source of comparative advantage in the context of the present discussion: the global governance of competition law and the establishment of a global deliberative space. They enable the representation of a variety of interests, and “models” of competition law enforcement, the common thread here being legal pluralism. Hence, I do not consider that the heterogeneity of the BRICS’ club may constitute an obstacle to them gaining, as a group and/or individually, a more prominent role in the global governance of competition law.

I propose the constitution of a BRICS Joint Research Platform that will be entrusted with the following tasks: (i) establish a common knowledge-base for competition law enforcement in these jurisdictions reflecting the specificities of their economies, social and institutional structures, culture, and vision for the role of

⁹⁷ See, for instance, the recent event organised by the World bank in June 2015 on Promoting Effective Competition Policies for Shared Prosperity and Inclusive Growth, <http://www.worldbank.org/en/events/2015/06/23/promoting-effective-competition-policies-for-shared-prosperity-and-inclusive-growth> .

⁹⁸ See, <http://e15initiative.org/themes/competition-policy/> .

competition law, in the form of a global competition authorities/academia partnership; (ii) increase trust between the various BRICS competition authorities, by providing them a platform to exchange information, cooperate in investigation economic sectors of global importance, eventually initiating joint competition law enforcement action; (iii) represent the interests and vision of the BRICS jurisdictions with regard to the global architecture of competition law enforcement, but also enabling the construction of alternative narratives to the current mainstream NPT-based model, that we think may not, in many cases, fit well the particular challenges to which BRICS jurisdictions, but also emergent and developing countries, are subject to.

A. The Google cases as a moment in the emergence of a truly global antitrust: BRICS as a protagonist?

Alphabet's Google's contractual (and other) practices with regard to its search engine and Android, an off-the-shelf Operating system (OS) that Original Equipment Manufacturers can freely install on a cell phone or other computing devices, have been at the centre of the enforcement attention of various competition authorities around the world, including BRICS authorities.

In 2012, the Ministry of Commerce of the People's Republic of China (Mofcom) announced its conditional approval of the \$12,5 billion buy-out of Motorola by Google⁹⁹, a merger also approved by the European Commission¹⁰⁰ and the US antitrust authorities¹⁰¹. It is of interest however that MOFCOM's decision addressed a number of issues relating to the interaction between Google and the Original Equipment Manufacturers of smartphones regarding the licensing of the Android system. The Chinese merger regulator insisted that Android should be licensed on free-of-charge terms and being kept as open-source software, that all OEMs should be treated in fair and non-discriminatory manner (although this obligation only applied to the original equipment manufacturers who have agreed not to differentiate or derive from the Android platform and did not apply to Google providing, licensing or distributing of any products or services relating to the Android platform), and that Google should continue to fulfil the FRAND commitment it had taken in licensing the patents obtained from Motorola Mobility.

It is clear that some of these conditions did not reflect the core business reason of the merger transaction. The aim of the transaction was for Google to acquire Motorola's valuable patent portfolio for its ongoing competitive struggles (defensive

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See <http://english.mofcom.gov.cn/article/policyrelease/domesticpolicy/201206/20120608199125.shtml> .

¹⁰⁰ Case No COMP/M.6381 GOOGLE/ MOTOROLA MOBILITY (February 13, 2012), available at http://ec.europa.eu/competition/mergers/cases/decisions/m6381_20120213_20310_2277480_EN.pdf .

¹⁰¹ See, <https://www.justice.gov/opa/pr/statement-department-justice-s-antitrust-division-its-decision-close-its-investigations> .

patenting) against Apple, a vertically integrated company in the smartphones market, and against Microsoft that had just acquired Nokia, an original equipment manufacturer and had for this reason access to Nokia's patents. Google's business model does not also rely on royalty payments, as its main revenues come from advertising from its search engine and its strategy is to promote the use of Android by as many OEMs as possible¹⁰². However, the concerns expressed by the Chinese merger regulator with regard to the openness of the Android platform and the FRAND commitment may be understood by its will to protect the position of smartphone/hardware manufacturers (some of the most important ones globally being based in China) from a possible exercise by Google of its bargaining power, with respect either to exploitation of its FRAND commitment or to charging excessive licensing rates in case they decide to change their business model¹⁰³.

Google also faced competition law investigations by the Competition Commission of India. One investigation focused on Google's termination of two companies' AdWords accounts. Audney and Albion were two "remote tech support" (RTS) companies that advertised on Google's search results page through Google AdWords. RTS firms offer tech support from a remote location (often by ghosting into the customer's computer to fix problems). Audney and Albion offered these services outside India. Google terminated both companies' AdWords accounts because it allegedly found they were violating Google's user safety policies. Audney and Albion counter-attacked alleging an abuse of dominance. The CCI issued *prima facie* findings against Google, asking the DG to investigate. The DG Report is yet to be issued.

The other investigation is much broader. Based on two complaints (by a consumer organization and a matrimonial services website), the CCI issued *prima facie* findings against Google and referred the matter to the DG. The DG investigated for more than 3 years and issued its Report in August 2015. The Report was leaked to the press and there has been wide publicly available coverage of the DG's claims and the case in general. The Report alleges various infringements, regarding (i) Google Search, because of the prominent display of Google's in-built services (e.g., news, images, maps, etc.) on the search results page; (ii) advertising (AdWords), as Google does not provide advertisers sufficient information, allows bidding on competitors' trademarks, provides preferential treatment of Google ads, includes restrictions in the AdWords API on moving data between different advertising platforms; (iii) Google has entered into exclusivity agreements with browsers for

¹⁰² This is a very different business model from that of Apple, BlackBerry, and Microsoft, which are all integrated hardware-software businesses. Indeed, Google sold Motorola's mobile phone operations to Lenovo in 2014 thus taking again its role as the neutral broker of operating systems to OEMs.

¹⁰³ For an analysis of this decision, see QIANG YU, *forth.* (2007) Computer Law and Security Review.

search services, and with websites for search and ad services; and (v) Google is “scraping” “snippets” and images from websites on the search results page¹⁰⁴.

Google has also faced antitrust action in Brazil. Buscapé, a price comparison website brought a private action against Google alleging that Google (1) manipulates its search service, controlling 95 percent of the market, by allowing only Google Shopping to display images of the searched merchandise, which is not permitted to Buscapé and other competitors, (2) embezzles and usurps the database of reviews — clients’ evaluations of the purchases gathered along more than 10 years by Buscapé and other competing price comparison websites, and (3) artificially includes Google Shopping in the first ranks of the organic search results, whenever a consumer conducts a query for the purchase of products in Google Search, thus harming the other competing websites.

Google was granted summary judgment against the company. The court found that “there are several search services at the disposal of the consumers who are looking for products, and at the disposal of the merchants intending to attract consumers [i.e., Bing, Yahoo, Ask]. Google’s leadership in the internet search segment in Brazil cannot be mistaken with a monopoly of that activity”. The Brazilian court concluded that Buscapé “does not need and is not dependent on Google Search to [be found by consumers]” as the users may access its website, and those of other competing price comparison websites, without passing through Google. The Court also held that Google Shopping is not a shopping comparison site like Buscapé “but just a thematic search option within the generic search made available by Google Search”, thus refusing to consider vertical search as a separate product. The court also noted that “nothing prevents [Google], in the conduction of its profit corporate business, from developing and using a tool (algorithmic formula) that returns results to a user query in Google search in a display order dictated by Google’s quality and relevance criteria”¹⁰⁵.

Although this summary judgment ended the private action against Google, Brazil’s competition prosecutor CADE opened in October 2013 a series of investigations into Google after receiving complaints from Microsoft and other companies. Although as a result of a global agreement with Google, in April 2016 Microsoft agreed to stop pursuing antitrust complaints against Google Inc. in Europe and other parts of the world¹⁰⁶, CADE continues its probe against Google¹⁰⁷, exploring

¹⁰⁴ Presentation by Karan Singh Chandhiok, April 22, 2016, HSE Skolkovo Institute for Law and Development conference on “The hidden side of the moon: Google’s BRICS competition law cases and the role of BRICS in the emergence of global competition law norms regarding unilateral conduct”.

¹⁰⁵ See, <http://searchengineland.com/google-wins-major-antitrust-victory-in-brazil-does-it-foreshadow-broader-eu-us-wins-132729> .

¹⁰⁶ See, <https://www.law360.com/articles/787900/microsoft-drops-antitrust-regulatory-fights-with-google> .

¹⁰⁷ See, <http://www.law360.com/articles/792935/brazil-continues-google-antitrust-probe-without-microsoft>

whether Google unfairly scrapes the content from rival websites, discourages their advertisers and favours its own product listings in search results¹⁰⁸.

In 2015, the Russian Federal Antimonopoly Service adopted a decision finding Google “guilty of abusing its dominant position” and requesting Google to make changes in the requirements it puts on its hardware partners¹⁰⁹. This decision has been recently confirmed on appeal¹¹⁰. The FAS found that Google was dominant in view of the ubiquity of Google Play in Android-operating system mobile phones. Google did not enjoy a dominant position in general Search in view of the strong position of the local incumbent Yandex in PC search. Yet, its power in the rapidly expanding and strategic mobile search market was quite pre-eminent, the main concern in the FAS decision being the leveraging of Google’s dominant position in mobile search to PC search, and the marginalization of the local incumbent.

The Russian FAS found that Google had abused this dominant position by imposing the mandatory acquisition of the entire Google Mobile Services (GMS) suite (which includes Google Search, and Chrome) as a condition for obtaining Google Play, thus bundling apps from GMS with the Google Play store. Furthermore, by requiring the mandatory setting/pre-installation of Google Search as a default search engine in all search entry points in respect of the general web search. and thirdly, by requiring the advantageous placement of Google app icons on the first screen of a Mobile device, thus offering them preferential treatment and by prohibiting the pre-installation of competing to GMS applications and services (such as third-party “store” and third party “search”) on any other of its devices running other versions of Android (Android forks). This prohibition was also secured by a remuneration payable by Google.

The decision of the FAS is based on some empirical evidence indicating that the majority of users of Mobile Devices consider availability of an app store a mandatory condition for the purchase of such device. Furthermore, the decision was based on the finding that there are no devices in the Russian market without pre-installed Google Play, except for a number of devices the market share of which is negligible. Thus, availability of Google Play was actually considered a necessary requirement for the production and sale of a competitive Mobile Device. The FAS concluded that Google’s practice of bundling the Google Play app store, in relation to which Google enjoys a dominant market position, with the other GMS applications which usually face competition, without any technological reasons for it, restricts access of undertakings competing with Google to several markets where the GMS applications and services are circulating, and subsequently may result in squeezing such undertakings out from such markets. The FAS also considered that pre-installation was the most effective promotion channel for mobile applications and

¹⁰⁸ See, <http://www.reuters.com/article/us-google-brazil-idUSBRE99A0JM20131011>

¹⁰⁹ Translated decision of FAS (on file with the author).

¹¹⁰ Translated judgment of the Court of appeal (on file with the author).

provides for the widest coverage and frequency of use of applications on Mobile Devices, in view of the passive behaviour of users (as it was found that end users usually do not change pre-installed applications and services and do not download similar applications independently). The FAS adopted a cease and desist order and imposed a fine calculated on the basis of Google's turnover in the Russian Federation.

Table: Google investigations by BRICS Competition Authorities

Countries	Vertical search	OS Devices	Mobile search	AdWords/AdSense
Brazil	X (price comparison)			
China		X		
India	X			X
Russia			X	

What is quite interesting with these Google investigations is that the BRICS competition authorities have acted as trend setters, rather than as followers piggybacking on the enforcement activity of the US and/or EU competition authorities. Indeed, while the US FTC did not touch upon Android in its 2013 settlement with Google¹¹¹, in April 2016 it has expressed concerns that Google unfairly used Android's strength in the mobile computing market to prioritize its own services over those of competitors¹¹².

In April 2016, the European Commission announced that it sent a statement of objections to Google, in which it takes the preliminary view that the company has, in breach of EU antitrust rules, "abused its dominant position" by imposing restrictions on Android device manufacturers and mobile network operators. In contrast with the situation of the Russian market, Google disposes of a significant market share in PC search. The Commission's statement of objections indicates that Google is dominant in view of the quasi-monopoly position of Google Play in Android OS, Google Search

¹¹¹ See, <https://www.ftc.gov/news-events/press-releases/2013/01/google-agrees-change-its-business-practices-resolve-ftc> .

¹¹² See, <http://www.wsj.com/articles/ftc-extends-probe-into-googles-android-1461699217> .

dominance in Android OS and the fact that GMS is dominant in Android OS. With this difference aside, the Commission finds problematic the contractual tying of the Google Play with other apps in GMS, as well as the anti-fragmentation clause which essentially means that an OEM cannot produce some devices with GMS on the “standardized Google version of Android” and some without it on another version of Android, thus limiting competition from Android forks (a maintenance of monopoly, rather than a pre leveraging narrative as in the Russian case).

Although the South Korea’s Fair Trade Commission (“KFTC”) dropped a two-year investigation into Android in 2013 confirming that Google’s Android business model did not infringe competition law, it has recently been reported that it re-opened its investigation on the matter¹¹³. In July 2016, the European Commission also filed a third antitrust charge against Google with regard to its AdSense advertising business, which with AdWords forms the bulk of Google’s \$75 billion revenue in 2015.

One couldn’t help but notice that many of the cases brought by the EU, US and South Korean competition authorities are on similar grounds than the ones investigated by the BRICS authorities, which in this case took the initiative and played an active role in re-framing the anti-competitive effects narrative. The future will show if the positions adopted in BRICS jurisdictions will be compatible with those of the EU, US and South Korean competition watchdogs.

B. Promoting pluralism in Global Antitrust Discourses: the need for a BRICS Joint Research Platform

The area of competition law has increasingly been a theme for BRICS cooperation, in particular since the joint declaration of the heads of BRICS governments in Ufa in 2015. In 2014, the HSE-Skolkovo Institute for Law and Development in collaboration with FAS Russia and with the support of the Centre for Law, Economics and Society (CLES) at UCL Faculty of Laws, established an annual forum in St. Petersburg with the aim to promote an academic-competition authority knowledge platform between BRICS authorities and a number of BRICS and foreign academics in competition law and policy. The two first competition law fora held in June 2015 and May 2016 were supported by the Centre for Law, Economics and Society at UCL Faculty of Laws. In May 2016, the BRICS competition authorities signed a memorandum of cooperation which puts in place an Institutional Partnership between BRICS jurisdictions through a general framework for multilateral cooperation.

The Memorandum of Understanding (MoU), signed the 19th of May 2016 and remaining in effect for a period of four years, aims at promoting and strengthening the cooperation in competition law and policy of the Parties through exchanges of

¹¹³ See, <https://www.theguardian.com/technology/2016/jul/21/google-south-korean-offices-inspected-android-antitrust-probe> .

information and best practices, as well as through capacity-building activities. This would, for instance, take the form of exchanging policies, laws, rules and information on legislative changes and enforcement activities, the organization of joint studies for the purpose of providing common knowledge on competition issues, the organization of international conferences, seminars and other relevant events on competition issues, including the BRICS International Competition Conference held once every two years, the cooperation and coordination between BRICS jurisdictions of investigations and enforcement proceedings regarding competition law enforcement. A Liaison Committee, consisting of one representative of each BRICS jurisdiction, will ensure adequate communications and consultations among the Parties. A quite interesting provision in the MoU is the establishment of working groups to conduct joint studies on matters of common interest, such working groups being proposed by a Party through the Liaison Committee. Each party is free to make its own decision whether or not to participate in a working group, in view of its needs, available resources and other considerations. A provision guarantees the confidentiality of information exchanges between the BRICS competition authorities, although competition authorities are not required to communicate such information, if this is prohibited by their domestic law, or if such communications would be incompatible with the interests of that Party. The MoU also includes a clause on the settlement of disputes arising out of the interpretation, application or implementation of the MoU, which should be settled amicably through consultation or negotiation between the Parties.

These new developments indicate that BRICS jurisdictions are increasingly taking a more pro-active approach in collaborating in the area of global antitrust, for matters that concern their own jurisdiction and may affect their economy. Within the context of a group of BRICS academic institutions, we have been thinking on the elaboration of a proper competition authorities-academia partnership, which may cover more areas than the global food value chain, which has been the first project initiated having from its inception a BRICS dimension. For instance, a lot of work may be undertaken with regard to the regulation of competition in digital markets, the pharmaceutical industry, the interaction between competition law and intellectual property, the competition policy implications of big data. We envision the establishment of inter-disciplinary cross-BRICS teams which may provide high value independent academic comment geared towards the situation of the BRICS economies, and societies. These teams will be open to academics from other jurisdictions, from different fields (law, economics, finance), with the aim to enhance the global visibility of the research produced and to attain the highest quality in terms of research methodologies and content. Such public-academic partnership may provide the first step in a more systematic long-term research cooperation between BRICS in the area of competition law and policy.

I suggest that the work of these inter-disciplinary teams, operating as autonomous academic networks, may be structured within a BRICS Joint Research Platform in

Competition Law and Policy that will carry out research in order to provide independent scientific advice and support to policy adopted by BRICS jurisdictions from world leading researchers, and will also channel the research work accomplished by the various inter-disciplinary groups to the BRICS competition authorities, and the global community of scholars in competition law. This independent, evidence-based scientific and technical support could be provided throughout the whole policy cycle, while flexibly responding to new policy demands. It could also constitute one of the few, BRICS-created, institutions within the BRICS international system, in addition to the Contingency Reserve Arrangement and the New Development Bank. The BRICS Joint Research Platform will contribute to the overall objectives of the BRICS competition law authorities with its long-standing scientific expertise, modelling capacity, foresight studies, knowledge management, training activities, work on best practices, infrastructure and e-infrastructures. With a number of BRICS partners we envision to develop a web-based interactive platform for the different research projects undertaken in the context of the Joint Research platform. Common BRICS research seminars and training sessions open to the staff of BRICS competition authorities and other officials with BRICS-based and international experts may also be organized.

Eventually, the benefits of the development of this BRICS competition law and policy forum may be quite important for the BRICS competition authorities and more generally the BRICS countries' societies. The Joint Research Platform will constitute a source of independent and ground-breaking empirically driven research providing the necessary analysis and market intelligence so as to enable BRICS competition authorities to develop a bird's eye long term view on important competition law questions and issues that may arise in the future, which is essential for the development of evidence-based policy. It may economize on the resources of the BRICS competition authorities by enabling them to receive academic advice from a pool of leading BRICS researchers and selected international experts. Such research capabilities may not currently exist for all areas of competition law enforcement. The BRICS Joint Research Platform in competition law and policy may also provide an invaluable resource for independent academic comment. In case research capabilities already exist, the existence of the BRICS competition law and policy forum will free some in-house research teams of the BRICS competition authorities from these tasks, thus enabling them to focus on immediate priorities and pending case work.

The ambition of the BRICS Joint Research Platform is to produce knowledge on competition law enforcement that would be useful for both the academic community and the world of practice. It should seek to actively involve these communities in our various research projects and to promote the interaction and the dialogue between them through the organization of conferences and other events, as well as the promotion of specific research projects and the organization of joint training and knowledge sharing activities by BRICS and international experts for the benefit of competition law officials, representatives of business, consumer associations and

other stakeholders. Indeed, the interaction of competition authorities with academia is a prevalent practice among many competition law authorities around the world and international organizations involved in competition policy. For instance, UNCTAD has put in place a few years now a Research Partnership Platform with a number of academic institutions around the world participating in it. The ICN relies on non-governmental advisors coming from academia in the work undertaken in its various working groups. However, these efforts to involve academia are not systematic and do not proceed with a clear strategic perspective, as the one we are suggesting the BRICS authorities to adopt with the establishment of the BRICS Joint Research Platform in Competition Law and Policy. We consider that the specific situation of the BRICS supports a more pro-active approach than that followed by the other international players in global competition law and policy, so as to weighing in the discussion over the governance of global competition law. We consider that for this reason, the BRICS Joint Research Platform should be perceived as a truly global institution, involving BRICS and non-BRICS experts who would be working on a specific research agenda promoted by the BRICS authorities. More than just gaining valuable expertise, the Joint Research Platform will aim to provide an academic voice for the concerns expressed by the BRICS societies.

The current debate in global competition law and policy is inevitably influenced by the agenda of the two main jurisdictions in terms of competition law enforcement experience, academic research capabilities, economic development and market size, the European Union and the United States. It is true that in recent years the competition law regimes of the BRICS jurisdictions attracted a lot of attention from academia and other stakeholders. However, this effort is still nascent and as sketched above has not yet been systematic. The aim of the Joint BRICS Competition Law and Policy Platform will be to provide the first systematic effort to establish a genuine BRICS-oriented agenda and provide information on the BRICS countries' models in competition law and policy. It might also provide an opportunity for our research community to explore the possibility of the emergence of a BRICS competition law and policy model, in view of the importance the various BRICS countries put on the objectives of development and growth. Starting from concrete economic sectors and developing an academic dialogue among many various academic teams from BRICS, the BRICS Joint Research Platform for Competition Law and Policy will enable BRICS to develop incrementally a more general approach and strategy with regard to global competition law and policy issues. It goes also without saying that such initiative will enhance the quality of research in competition policy and law performed in BRICS and will generate fruitful academic cooperation between researchers coming from different disciplines and BRICS countries.

In parallel to the BRICS Joint Research Platform in Competition Law and Policy, we consider that collaborative initiatives focusing on the exchange of information may develop between the various BRICS competition authorities. We consider that

initiatives such as the BRICS Joint Research Platform may enhance trust among BRICS competition law authorities so that they can envision the development of a closer cooperation in the future, in particular by promoting common positions on the emerging global governance of competition law and policy or conduct transnational sector enquiries. But more than just represent the voice and interests of BRICS jurisdictions, the BRICS Joint Research Platform should be perceived as a tool to promote alternative models for competition law, inspired by the experience of the BRICS jurisdictions and other emerging economies or developing countries, thus promoting the ambition of a global deliberative space in competition law. Put simply, the BRICS Joint Research Platform could serve as a gateway for under-represented interests to contribute to the discussion on the future architecture of the global governance of antitrust. It may also provide the opportunity to engage in a critical discussion over the concepts, methodologies and tools of competition law, away from the “policy convergence” fetishism that has so far impeded new jurisdictions adopting competition law from exploring the potential offered by their own legal culture, but also the variety of sources of wisdom, and not just NPT, that may eventually contribute to framing a competition law and policy that benefits from a high degree of legitimacy as it reflects the concerns of their societies. Global governance in the antitrust field can only but gain from legal pluralism and additional spaces of experimentation.

C. A Roadmap for the BRICS Joint Research Platform: the missing discussions

As it was explained in the previous part, the dual aim followed by the BRICS Joint Research Platform in Competition Law and Policy will be (i) to enhance trust between different BRICS competition authorities by promoting their cooperation and assisting them in developing a common knowledge base, methodologies and tools that fit their specific needs and aspirations, and (ii) to offer a global voice for the BRICS in the current discussion over the global governance of competition law and policy. In order to gain the support of the global community, in particular the great majority of emergent and developing economies that form the bulk of jurisdictions implementing competition law, the voice of the BRICS in the antitrust field has to be distinctive and true to the concerns of the citizens of these countries.

The quest of “policy convergence” has often led to the exclusion of a number of issues/topics which the BRICS and other emerging economies may consider important. These have been often relegated to other fields of law (where no such effort of policy convergence has taken place), or, in the worst case scenario, they have been ignored altogether. In the world of “policy convergence”, legal pluralism remains suspect and should eventually be banned. I take a different perspective and consider that for competition law regimes to become effective and endure through time, it is crucial that they should enjoy a high degree of legitimacy, including acceptance by

their citizenry. This process of internal (rather than external through peer-acceptance by other competition authorities and international organisations) legitimacy-building may set limits to procedural or substantive policy convergence. The work undertaken in the context of the proposed BRICS Joint Research Platform will of course be a matter for open discussion between the BRICS competition authorities and their stakeholders, but I suggest tentatively the following roadmap as the starting point for such discussion.

1. Broadening the vision of competition law: Global Value Chains and transnational production

The dominance of NPT theory in modern antitrust has led to the exclusion of other sources of wisdom such as political economy or economic sociology from the work of competition authorities. The rigor of NPT and its relatively narrow perspective, which is based on methodological individualism, is considered as a better basis in order to ensure policy convergence, assisted by the use of a common vocabulary and calibrated research methods. Social action and the ensuing order are perceived as generated by objective economic interests of the individual actor, the latter behaving in an instrumental (rational) way in order to maximize some welfare function. This is also how the activity of social organisations is perceived, as a result of coordinated individual action. What is absent from such analysis is the role that social relations and social institutions play in the economy, the latter being considered as distinct configurations of interests and social relations. Work in political economy and economic sociology may provide the bigger picture we need in order to understand the full dimension of competitive interactions. To give an example, we consider that competition authorities should engage with the concept of global value chains and the important work in this are.

The last two decades we have witnessed the emergence of a “new economy” driven by the important technological changes and the emergence of a new kind of infrastructure technology, the Internet. As sociologist Manuel Castells noted, this economy is global in nature, not just international:

“A global economy is a historically new reality, distinct from a world economy. A world economy, that is an economy in which capital accumulation proceeds throughout the world, has existed in the West at least since the sixteenth century [...] A global economy is something different: it is an economy with the capacity to work as a unit in real time on a planetary scale”¹¹⁴.

As it is noted by Kevin Sobel-Read,

¹¹⁴ CASTELLS, Manuel, *The Information Age: Economy, Society and Culture – The Rise of the Network Society* (Wiley, 1996) , p. 92

“The paradigm of the world political economy has shifted dramatically over the past twenty years. Legal scholarship, however, lags significantly behind. Existing legal scholarship is calibrated to an outdated model that suggests that multinational corporations — either individually or through one-to-one supplier relationships — create, manufacture, and sell a given product. But in today’s world, in what have been termed “global value chains,” the research, design, production, and retail of most products take place through coordinated chain components that stretch systemically across multiple — from a few to a few thousand — firms”¹¹⁵.

These global value chains (GVCs) are characterised by their “systemic, coordination-driven nature”, as they rely on various systems of transnational governance and different sorts of linkages, some traditional such as contract law, others novel and relying on corporate law, property law or some more informal mechanisms¹¹⁶. For instance, “global value chains are becoming a primary conduit for the transfer of intellectual property globally”, as “(t)he creators of intellectual products are relying less on traditional intellectual property regimes to enable them to limit access to their material, and more on a combination of contractual rights and technological protections”¹¹⁷.

GVCs are prevalent in the global economy. As a recent joint OECD, WTO and World bank report indicates, “(b)etween 30% and 60% of G20 countries’ exports consist of intermediate inputs traded within GVCs”¹¹⁸. Kevin Sobel-Read goes as far as arguing that “(t)he most important paradigm for understanding the global economy, and the political and social relationships that both guide it and stem from it, is no longer the template of the market but rather the role of global value chains”, corporate action, in the form of global value chains not only driving but also defining, and therefore creating, the market¹¹⁹. Indeed, economic production is increasingly structured around GVCs, which permit the simultaneous and coordinated transnational production and distribution of a very large array of products that each stage of the supply chain has to manage effectively, without this involving vertical integration by ownership.¹²⁰

The development of technology has made supply chain management more effective and less expensive, enabling companies to achieve higher quality at a lower production cost. One may also trace the development of value chains in the expansion

¹¹⁵ SOBEL-READ, Kevin B. (2014), Global value Chains: A Framework for Analysis, *Transnational Legal Theory*, 5(3), pp. 364-407, 364.

¹¹⁶ Id., at 365.

¹¹⁷ Id., at 392.

¹¹⁸ OECD, WTO and World Bank group, Global Value Chains; Challenges, Opportunities and Implications for Policy (2014), available at https://www.oecd.org/tad/gvc_report_g20_july_2014.pdf , p. 13. See also UNCTAD, World Investment Report 2013, available at http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf .

¹¹⁹ SOBEL-READ, Kevin B. (2014), Global value Chains: A Framework for Analysis, *Transnational Legal Theory*, 5(3), pp. 364-407, 367.

¹²⁰ DE BACKER, Koen & S. MIROUDOT, Sébastien (2014), Mapping Global Value Chains, European Central Bank, *Working Paper Series*, No. 1677.

of national and international regulations regarding consumer protection, food safety and quality, and technical standardisation. These supply chains start from the factors of production and other inputs needed for the production of a good and end up with distribution of the end product to the final consumer. Firms find it crucial to enter into long-term agreements with partners in other segments of a value chain, in order to create the necessary relation of trust that is required by the importance of relation-specific investments that need to be undertaken in setting the supply chain management. This may lead to disintermediation and vertical integration but also to de-concentration through the constitution of networks or supply alliances that are managed by supply chain councils. These various forms of supply chain management share the common characteristic that they are all ultimately consumer orientated, as any segment of the chain directs its efforts towards meeting the needs of the next member of the chain, the perception being that all segments of the chain do not constitute separate islands of activity but essential ingredients for the formation of the total value of the chain. For instance, brand-building takes the wider perspective, that of the whole value chain, leading to the elaboration of labels and standards to which the various segments of the chain abide.

With some exceptions GVCs have not been explored systematically by competition law scholars¹²¹. The concept offers an important analytical potential. The most obvious one relates to the transnational dimension it brings forward, calling for a “transnational coordination” between “destination states” and “producer states”, this coordination being pursued at global, regional or bilateral levels¹²². A deeper impact could be the re-conceptualization of the way competition law deals with vertical integration or quasi-integration. Traditionally, the relation between the different levels of a vertical supply chain has been thought as complementary, competition authorities rarely seeing any reason to intervene, unless one of the segments disposes of considerable market power and engages in acts of exclusion by, for instance, raising the costs of its rivals upstream or downstream. This approach tends to ignore the allocation of the revenues engendered by the supply chain between the various partners (what some have called “vertical competition”)¹²³, as an issue external to the

¹²¹ See, LIANOS, Ioannis & LOMBARDI, Claudio (2016), Superior Bargaining Power and the Global Food Value Chain: The Wuthering Heights of Holistic Competition Law? *Concurrences* 1-2016, pp. 22-35; GERBER, David (2016), Competition Law and Global Supply Chains (June 16, 2016). Available at SSRN: <http://ssrn.com/abstract=2807154>; LIANOS, Ioannis, Global Value Chains and Competition Law (forth. 2016), CLES Research paper series 7/2016; DAVIS, Dennis, KALPINSKY, Raphael & MORRIS, Mike, Rents, Power and Governance in Global Value Chains, Chapter in I. Lianos, A. Ivanov & D. Davis (eds.), *Global Food Value Chains and Competition Law* (forth. 2017).

¹²² GERBER, David (2016), Competition Law and Global Supply Chains (June 16, 2016). Available at SSRN: <http://ssrn.com/abstract=2807154>, pp. 24-26.

¹²³ STEINER, Robert L (1991), Intra-brand Competition-Stepchild of Antitrust, *The Antitrust Bulletin*, 36, pp. 155-200. See also SOBEL-READ, Kevin B. (2014), Global value Chains: A Framework for Analysis, *Transnational Legal Theory*, 5(3), pp. 364-407, 384, noting that “(o)ne consequence of these evolving strategies is that competition in the global marketplace is becoming increasingly vertical rather than horizontal. In other words, the most effective path for a clothing supplier in Reebok’s value chain is often

exclusive focus of competition law on economic efficiency. In contrast, the GVC approach recognizes that issues relating to the distribution of the total surplus value of the chain also take a prominent role in the relation between the various economic actors participating to the supply chain, in particular as supply chain management, even if it is flexible, crystallizes more easily their position (and share). By dissecting the chain-wide coordination of various economic activities, the GVC approach also better describes the systemic nature of GVCs, each part of the chain impacting on the others.

The GVC approach provides a theoretical framework enabling us to understand how the global division and integration of labour in the world economy has evolved over time and, more importantly, how the distribution of awards, from the total surplus value, is allocated between the various segments of the chain.¹²⁴ The starting point for the development of this framework was the growing importance of new global corporations, such as buyers (e.g. big retail) constituting “buyer-driven global commodity chains”. These powerful lead firms are usually located in the industrialized countries and interact with economically less powerful suppliers present in the developing countries. Contrary to traditional NPT analysis, and more in vogue with transaction cost economics (TCE) and economics of organization, the GVC approach enables competition authorities to focus not only on issues of horizontal market power and concentration at each segment of the chain, but also to engage with the vertical links between the various actors with the aim to understand how and whether “lead” actors can capture value. Their focus is on the distribution of the value generated by the chain, rather than only on the maximization of the surplus (efficiency) as such.

GVC’s “holistic view” of global industries centres on the governance of the value chain, that is, how some actors can shape the distribution of profits and risks in the chain. Taking a political economy perspective, the GVC approach explores the way economic actors may maintain or improve (“upgrade”) their position in the global value chain, “economic upgrading” being defined as “the process by which economic actors — firms and workers — move from low-value to relatively high-value activities in GVC.”¹²⁵ Concerns over global competitiveness, employment, investment in quality competition and long-term consumer interest may weigh in the decision of competition

not to switch to a slightly better contract with a competing brand such as Adidas but instead to advance to higher value-added work within its existing value chain for Reebok. Such work can include the performance of additional activities (e.g. assembly in addition to cutting) or the performance of current activities for a more profitable market (e.g. cutting high-performance cotton rather than standard cotton)”.

¹²⁴ On the GVC framework and its predecessor Global Commodity Chains, see GEREFFI, Gary & M. KORZIENIEWICZ, Miguel (eds.), *Commodity Chains and Global Capitalism* (Westport: Praeger, 1994); KAPLISNKY, Raphael & MORRIS, Mike, *A Handbook for Value Chain Research*, available at <https://www.ids.ac.uk/ids/global/pdfs/VchNov01.pdf> .

¹²⁵ GEREFFI, Gary (2014), Global value chains in a post-Washington Consensus world, (*Review of International Political Economy* 21(1), pp. 9-37, 18.

authorities to explore the dynamics of global value chains and the way issues of distribution may be included in competition law assessment.

A typology of GVC governance structures was elaborated with the aim to describe and explain the driving forces for the constitution of global value chains. According to Gereffi et al., there are “three key determinants of value chain governance patterns: complexity of transactions, codifiability of information; and capability of suppliers.”¹²⁶ His framework is broader than the framework often employed by TCE in order to explain the prevalence of certain forms of organization (hierarchy versus the market system), as the latter focuses only on the determinants of asset specificity and the frequency of the transactions as the driving forces for organizational choice.¹²⁷

The GVC framework draws inspiration from the resource-based or competences-based view of the firm, according to which firms are path-dependent entities characterised by heterogeneous competence bases and operating under conditions of genuine uncertainty, their existence being justified by the development of productive competencies and learning for a specific cognitive community that forms the firm’s core¹²⁸. Contrary to what TCE predicts, firms will not necessarily develop specific capabilities and learning in order to engage in certain value activities, because for instance of economies of scale and the frequency of transactions, as they may be unable to develop the capabilities which are necessary for them to participate in certain value chain activities; they will be thus obliged to appeal to external resources.¹²⁹ Contrary to the contract theory of the firm, pioneered by TCE, the competence-base view of the firm enquires into the sources of the competitive advantage and the path-dependent process of accumulation of such capabilities.

The various forms of organization of global value chains highlight the importance of conducting a careful analysis of the power relations along the supply chain, the aim being to unveil value extraction bottlenecks affecting the distribution of the total surplus value and affecting, inter alia, the incentives of the various actors in the chain to innovate. This analysis cannot be undertaken by the traditional NPT framework which mainly focuses on horizontal competition and its effects on consumers or total welfare and assesses the competitive interactions between firms within a specific relevant market. In contrast, the GVC perspective has a distributive focus and may be particularly helpful if one aims to understand real business strategies and how the design of the value chain may determine who profits from the collective innovation and

¹²⁶ GEREFFI, Gary, HUMPHREY, John & STURGEON, Timothy (2005), The governance of global value chains, (2005) *Review of International Political Economy*, 12(1), pp. 78-104, 84.

¹²⁷ In a nutshell, the more there is asset specificity and the interaction is long-term, the more it is justifiable to invest resources in order to build a hierarchy form of organization.

¹²⁸ GEREFFI, Gary, HUMPHREY, John & STURGEON, Timothy (2005), The governance of global value chains, (2005) *Review of International Political Economy*, 12(1), pp. 78-104, 81.

¹²⁹ The competence or resource-bases view of the firm draws on work by PENROSE, Edith, *The Theory of the Growth of the Firm* (Oxford University Press: Oxford, 1959). See, more generally, HODGSON, Geoffrey (1998), Evolutionary and competence-based theories of the firm, (*Journal of Economic Studies*, 25(1), pp. 25-56.

other surplus value generated, the inter-country distribution of the total surplus value, in the case of transnational networks, if one takes a political economy perspective, and more broadly the impact of value extraction bottlenecks on the competitive process, the latter concept being intrinsically related to an evolutionary perspective on economic change.

We consider that such an approach is particularly helpful for understanding the challenges transnational production raises to competition law enforcement. This is particularly the case in the context of global value chains affecting developing or emergent economies¹³⁰, which is a topic that has attracted some attention, in view of the necessity to promote a political economy framework that will enable local firms to participate in global value chains and thus to capture value, or to “upgrade” existing capabilities and to create “domestic” added value.

2. Responding to New Challenges: A Competition Law for the Fourth Industrial Revolution

We live during a period of important technological changes, whose impact on economic production, employment, but also society at large is not fully comprehended. As many areas of law, competition law disposes of a conceptual toolkit that needs constant updating in order to be implemented in increasingly complex areas of economic activity. In view of the rapid pace of technological advances, law is usually lagging behind, which increases the risk that it may be ineffectual in fulfilling its aims. As many other public authorities, competition law enforcers may be ill-prepared to deal with the challenges of the so called “fourth industrial revolution”¹³¹. In a period of convergence of physical, biological and digital worlds, as a result of the recent transformations of industrial production, and the dislocation of boundaries between markets, one may find that, for instance, the traditional relevant market concept based on the principle of cross-price elasticity between products, from the point of view of the consumer, may fail to describe the complex competitive interactions of firms constituting a “strategic group”¹³², disposing of similar resources, and serving the

¹³⁰ See, for instance, KAPLINSKY, Raphael, Competitions Policy and the Global Coffee and Cocoa Value Chains, Paper prepared for the United Nations Conference for Trade and Development (Institute of Development Studies, Sussex, Brighton, 2004), available at <https://www.ids.ac.uk/files/RKaplinskycocoacoffee05.pdf>.

¹³¹ SCHWAB, Klaus, The Fourth Industrial Revolution (World Economic Forum, 2016).

¹³² According to PORTER, Michael, Competitive strategy. Techniques for analysing industries and competitors (Free Press, 1980), 129, “strategic groups” constitute a “group of firms in an industry following the same or similar strategy along the strategic dimensions”, the firms within a “strategic group” competing more intensely with each other than with firms outside this core group. See also, REGER, Rhonda & HUFF, Anne-Sigismund (1993), Strategic groups: A cognitive perspective, (Strategic Management Journal, 14(2), 103-123 (emphasising the need to take into account psycho-sociological factors influencing manager’s cognitive perception about their competitors).

same customers' needs¹³³, thus constraining the action of each other, even if their products do not overlap in the same relevant market. Some may go as far as defining markets as "tangible cliques of producers watching each other [...] (p)ressure from the buyer side creates a mirror in which the producers see themselves, not consumers"¹³⁴. How could one proceed to market delineation in a world in which personalisation of production means that consumers become the designers of the individually customised products they will consume, the products being produced by 3-D printing and robots, firms competing mainly on the market for personal information, which will serve as the raw material on which personalised production will take place? Which of the various approaches is chosen very much depends on the type of competition/tournament taking place in the specific "field"¹³⁵. Competition can be for the market, as well as take place in the market¹³⁶. Platform or system competition characterises a lot of competitive interactions in the network economy.

Looking to the IT sector, in particular, it is undeniable that the development of the World Wide Web has profoundly transformed the global economy, accentuating transnational commercial activity, first with the dazzling growth of e- and m-commerce, and the rapid development of global digital platforms, which now constitute the largest in terms of capitalization corporations in the world. The expansion of the more rapid broadband connections, until then merely used by business, to consumers, which were until then connected to the Internet using much slower dial-up modems, has contributed to this development. The increased use of the Internet, the more intensive use of e-mail technologies, the growth of online advertising activity and subsequently the development of Web 2.0 technologies, allowing users to participate in the creation, editing and distribution of content online, were among the factors explaining the phenomenal increase of the economic significance of electronic commerce and digital platforms globally. The widespread use of smartphones or the development of tablet computers have led to the transition from browsers to apps, thus further increasing the opportunities for growth of e-commerce and of the various digital platforms that emerged. Worldwide mobile broadband subscriptions have even quadrupled in the past five years, to over 3.5 billion in 2015. Social networking technologies enable social platforms, such as Facebook, or microblogging platforms, such as Twitter, to emerge as additional e-and m-commerce sites and platforms, taking advantage of

¹³³ BERGEN, Mark & PETERAF, Margaret (2002), Competitor identification and competitor analysis: A broad-based managerial approach, *Managerial and Decision Economics*, 23 (4/5), 157-169.

¹³⁴ WHITE, Harrison (1981), Where do markets Come From? *American Journal of Sociology*, 87, 517-547, 543.

¹³⁵ On the concept of "field" and its possible contribution to address complex competitive interactions, see P. Bourdieu, *Principles of an Economic Anthropology*, in BOURDIEU, Pierre, *The Social Structures of the Economy*, (Cambridge, Polity press, 2005), 193; FLIGSTEIN, Neil & McADAM, Doug (2001), Toward a General Theory of Strategic Action Fields, *Sociological Theory*, 29, 1-26.

¹³⁶ GEROSKI, Paul A. (2003), Competition in Markets and Competition for Markets, *Journal of Industry*, 3(3), Competition and Trade 151-166.

interpersonal connections to provide targeted advertising or promotion of products (social commerce).

Big Data analytics and the massive collection of personal data may further help in tracking with detail the behaviour of consumers (their digital identity), when navigating the Internet, and help companies predict the kinds of products and services consumers may be interested in. These tracking technologies, such as barcodes, bokodes, smart cards and Radio Frequency Identification devices are embedded in the various objects, collecting data about them without any human intervention and feeding this information into computer systems, thus enabling supply chains to monitor where their products are at all times. Major global companies, including distributors such as Wal-Mart and branded goods suppliers, such as Gillette, Procter & Gamble, Coca-Cola, Unilever, Johnson & Johnson are supporting the Auto-ID Labs, research entities working on the integration of tracking and communication technologies into B2B exchanges and on the architecture of the Internet of Things, which will significantly affect the way supply chains operate by, for instance, enabling higher in-transit visibility and significantly cutting down logistics. Physical devices will get direct Internet connectivity including thermostats, refrigerators, and cars.

One cannot help but notice the strategic position of digital platforms, which often act as gatekeepers for the Internet, as they enable direct interactions between groups of users. The significant amount of IP rights they hold over technology enable lead companies to control global digital value chains, extracting an important share of the total surplus value generated. These companies benefit from 'network effects', the value of their services increasing with the number of users and contribute significantly in digital value creation, notably through data accumulation. These multi-sided platforms rely on a great variety of business models fee-for-content revenue model, advertising-supported revenue models, fee for transaction or fee-for service revenue models, sometimes combining many of the above).

Firms operating in each of the layers of a digital value chain face an important dilemma: they want to maximise their market power but they are also hurt if firms operating in other parts of the chain do so as well¹³⁷. Their strategy is to increase competition in other parts of the chain by promoting entry and fragmenting supply, while maintaining their monopoly position in their segment of the chain and cooperate with monopolised segments, thus sharing between them the profits arising out of the activities of the chain, Competition authorities should realize that intervention at one segment of the vertical value chain may lead to adverse unintended consequences at other parts of the chain, thus making it necessary to internalize the complexity of the digital value chain as an integral part of the overall business model and its organizational structure, and avoid any localized silo-based competition assessment of a particular segment. As we explained in the previous section, interfering with the

¹³⁷ Presentation by Jorge Padilla, June 10th 2016, AECLJ Conference.

distribution of value across the various segments of the chain may be justified by the fact that firms enjoying network effects may discourage innovation, eventually affect consumers, as most value brought in is extracted by the lead firms, and affect the value of the entire value chain. Competition law enforcement may thus aim to limit the rents extracted so as to promote innovation across the value chain for the benefit of consumers or more broadly of the economy.

The economic geography of these digital platforms indicates that many of them are present outside the US and the EU and in BRICS countries. This renders particularly important for BRICS competition authorities to study more thoroughly digital value chains and the interactions between software and hardware companies in this context, including issues relating to the allocation of the total surplus value of the digital chain. Similar studies should be performed in other economic areas affected by the fourth industrial revolution, such as the pharma-industry, biotechnology, artificial intelligence, robotics, agritech, etc.

Advances in communication technologies may also change the dynamics of collusion. Information on prices, but also future pricing trends may be posted on web sites, making price signalling easier. Firm representatives may communicate through “facially anonymous” blogs and chat-rooms or web-casts, enabling instant and less traceable communication, than “old-fashioned” press conferences, conference meetings in “smoke-filled rooms,” etc.¹³⁸ Price fixing through algorithms may replace more classic forms of collusion. This may render detection more difficult for competition authorities which are, at the same time, subject to more extensive due process requirements, as a result of the extension of human/fundamental rights protection for corporate defendants.

Additionally, one needs to take into account the variety of industrialization strategies chosen and the important role of the State in the emergence of new technologies and innovation in general. Indeed, many important technological advances in various areas of the economy have relied on State funding of research and development and State investment in the further development and commercialisation of technologies.

3. Balancing Economic Development and Fair Competition: Addressing Inequality and the Role of Competition Law

The rise of inequality and relative, as well as absolute, poverty in Western societies the last three decades has been well documented. Yet, the post-World War II consensus among growth theorists was that income inequality is a driving force behind income growth, both within and between nations. This led to the perception that there

¹³⁸ KAPLOW, Louis, *Competition Policy and Price Fixing* (Harvard University press, 2013), 437-438.

is an efficiency-equality trade-off. This consensus has been more recently subject to increased criticism. There is empirical evidence from several cross-country studies that shows how inequality has slowed down national growth rates and may be an impediment to growth¹³⁹. More importantly, sharp inequalities of income or wealth may produce negative consequences by establishing some form of path dependence affecting growth, but also personal development, starting with the “unequal prenatal development of the foetus”, “unequal early childhood development” and investments by parents, including educational opportunities, but also “unequal returns to human capital because of discrimination at one end and use of parental connections in the job market at the other end”¹⁴⁰. This “inter-generational transmission of inequality” may lead to “genetic inequalities”¹⁴¹.

More importantly, the growing levels of inequality leads to political capture, thus creating a vicious cycle where elites influence policy making and regulations to the benefit of their interests, often resulting in policies that are detrimental to the interests of the many, which in turn makes inequality worse and reinforces the power of elites still further. This may be cause for major distrust in government and a surge in populism.

There are many causes that explain this rise in poverty and inequality. One may consider that this is due to globalization of production, the erosion of collective bargaining systems, the continued drop in real wage values, tax evasion or unfair tax systems. But more importantly for our purposes, has been the recent focus on market power as a source of inefficiency *and* inequality. According to Joseph Stiglitz, “today’s markets are characterised by the persistence of high monopoly profits”¹⁴². Stiglitz does not accept Joseph Schumpeter’s view that monopolists would only be temporary and argues that today’s markets are characterized by the persistence of high monopoly profits. A recent report of the Council of Economic Advisers to the White House published in April 2016, tracks the rise of the concentration of various industries in the

¹³⁹ See, for instance, BERG, Andrew & OSTRY, Jonathan D. (2011), *Inequality and Unsustainable Growth: Two Sides of the Same Coin?*, IMF Staff Discussion Note, available at <https://www.imf.org/external/pubs/ft/sdn/2011/sdn1108.pdf> (finding that countries with high inequality experience shortened growth spells); DABLA-NORRIS, Era, KOCHHAR, Kalpana, SUPHAPHIPHAT, Nujin, RICKA, Frantisek, TSOUNTA, Evridiki (2015), *Causes and Consequences of Income Inequality: A Global Perspective*, IMF Staff Discussion paper, available at <https://www.imf.org/external/pubs/cat/longres.aspx?sk=42986.0> (finding that income distribution matters for growth).

¹⁴⁰ KANBUR, Ravi & Stiglitz, Joseph (2015), *Wealth and income distribution: New theories needed for a new era*, available at <http://www.voxeu.org/article/wealth-and-income-distribution-new-theories-needed-new-era>.

¹⁴¹ See, MENCHIK, Paul L. (1979), *Inter-generational Transmission of Inequality: An Empirical Study of Wealth Mobility*, *Economica* New Series, 46(184), Special Issue on the Economics of Inheritance, pp. 349-362

¹⁴² STIGLITZ, Joseph (2016), *Monopoly’s New Era*, available at <https://www.project-syndicate.org/commentary/high-monopoly-profits-persist-in-markets-by-joseph-e--stiglitz-2016-05>.

US, noting that the “majority of industries have seen increases in the revenue share enjoyed by the 50 largest firms between 1997 and 2012”¹⁴³.

Important developments in the global economy have shifted the structure of various industries towards rising levels of concentration. One may cite the large waves of mergers, acquisitions and take-overs, following the liberalisation of markets and the retreat of State monopolies in various economic sectors, the growing importance of financial capital with the recent “rise of distorporation”, major industrial empires being controlled by master limited partnerships (MLP) managed by a few global equity companies and institutional investors¹⁴⁴, the global expansion of intellectual property rights and the need for extensive levels of cooperation between global competitors through cross-licensing arrangements or patent pools, the development of the Internet and consequently the importance of network effects and platform competition. These have led to unprecedented levels of corporate consolidation at a global scale. Increasing levels of market concentration have become the rule, rather than the exception in various sectors of the American and European industry, in crucial, from a social welfare perspective, sectors such as agriculture, retailing, automobiles, banking and a number of manufacturing industries.¹⁴⁵ The upstream agriculture supply industries provide an interesting example of this concentration trend¹⁴⁶. These high concentration levels may affect consumers and industries in BRICS and other emergent economies, thus building the case for a more active approach from BRICS towards these industries and a concern over global concentration and stealth consolidation through distorporation.

It is important here to note that, in phase with the “new economics of inequality”, the approach here is not only to focus on inequality in the sense of more “equal” or “fair” distribution of the revenues generated by economic activity according to some principle of distributive justice, which is an aim that may be better pursued by other areas of law, such as tax law (although in each case this conclusion should be subject to comparative institutional analysis), but to ensure that there is “productivity-enhancing asset redistribution”¹⁴⁷, in the sense, for instance, that small and medium undertakings in the developing world have equal opportunities of access to global

¹⁴³ White House CEA, Benefits of Competition and Indicators of Market Power (April 2016), available at https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf

¹⁴⁴ The Economist, Rise of the distorporation (Oct 26th, 2013). A recent study has also raised the related issue of horizontal shareholdings, a small group of institutions having acquired large shareholdings in horizontal competitors throughout various economic sectors, causing them to compete less vigorously with each other: See, ELHAUGE, Einer (2016), Horizontal Shareholding, 109 Harvard Law Review 1267.

¹⁴⁵ For a number of examples drawing on the U.S. markets, see LINN, Barry C., *Cornered - The New Monopoly Capitalism and the Economics of Destruction* (Wiley, 2010).

¹⁴⁶ LIANOS, Ioannis, KATALEVSKY, Dmitry & IVANOV, Alexey (2016), *The Global Seed Market, Competition Law and Intellectual Property Rights: Untying the Gordian Knot*, CLES Research Paper Series, available at SSRN: <http://ssrn.com/abstract=2773422>

¹⁴⁷ BOWLES, Samuel, *The New Economics of Inequality and Re-distribution* (Federico Caffè Lectures, CUP, 2012).

value chains, where, as we indicated above, most of the global economic activity takes place. This is clearly a competition law task, as it is beyond doubt that no other area of law disposes of the instruments to achieve this aim in an effective way.

Traditionally, the analysis of market power, and the corresponding trade-offs outlined above, does not explicitly deal with distributional issues. The case against monopoly is motivated by the desire to correct for the inefficiency caused by lost (marginal) transactions — the deadweight loss — rather than the implicit wealth transfer from consumers to producers over (infra-marginal) transactions. Moreover, reliance on firms' profitability as a guide for enforcement is problematic in light of the difficulty to tell whether high profits are the results of superior efficiency/quality, or the outcome of anticompetitive entry and expansion barriers.

Nevertheless, tackling market power in order to improve consumer surplus is good for inequality, given that lower prices (or, better still, higher quality/price ratios) improve the purchasing power of disposable income. Moreover, where high profits are siphoned off by corporate elites (i.e., rather than returned to dispersed shareholders), the concern might be that the resulting concentration of income (and, over time, accumulated wealth) is deployed to lobby against redistributive fiscal policies aimed at addressing economic inequality. From a macro-economic perspective, the concern may be that high profits induced by anticompetitive entry and expansion barriers are not re-invested in high productivity industries but in low productivity ones as these assets are relatively easier to pledge as collaterals¹⁴⁸. The resulting low levels of corporate investments would not only reduce aggregate demand, but also suppress productivity growth, which would ultimately constrain wage growth.¹⁴⁹ Hence, under these circumstances, tough antitrust enforcement ought to be welcome from a distributional perspective as well.

A recent paper of the OECD on Market Power and Wealth Distribution has attracted attention, as it shows a substantial impact of market power on wealth inequality¹⁵⁰. According to the study which relies in terms of methodology on some work previously completed by Comanor and Smiley in 1975,¹⁵¹ market power may account for a substantial amount of wealth inequality. The report found that the increased margins charged to customers as a result of market power will disproportionately harm the poor who will pay more for goods without receiving a

¹⁴⁸ CECCHETTI, Stephen and KHARROUBI Enisse (2015), Why does financial sector growth crowd out real economic growth?, CEPR Discussion Paper 10642, BIS WP 490 available at <http://www.bis.org/publ/work490.htm> .

¹⁴⁹ The Economist, Too much of a good thing - Profits are too high. America needs a giant dose of competition, May 26, 2016, available at <http://www.economist.com/news/briefing/21695385-profits-are-too-high-america-needs-giant-dose-competition-too-much-good-thing> .

¹⁵⁰ OECD, Market Power and Wealth Distribution, DAF/COMP(2015)10, available at [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP\(2015\)10&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP(2015)10&docLanguage=En)

¹⁵¹ COMANOR, William S. & SMILEY, Robert H. (1975), Monopoly and the Distribution of Wealth, The Quarterly Journal of Economics, 89(2), pp. 177-194.

counter-balancing share of increased profits as they are not usually shareholders, while the wealthy benefit more from higher profits, due to their generally higher ownership of the stream of corporate profits and capital gains. This study only explored eight developed jurisdictions, thus showcasing the need for equivalent studies do be performed in the context of BRICS and emergent/developing countries.

But is there a case for equality beyond a possible negative effect of inequality on growth and efficiency? Can competition law integrate “equality” concerns, without necessarily these being related to economic efficiency? And if this is done, how could this be integrated in competition law assessment and what would be its limiting principles, as competition law may not have the means, or it may not be desirable, to go after any form of inequality, in particular if this results from “business acumen” and “competition on the merits”. Michael Walzer’s concept of “complex equality” may provide a useful limiting principle¹⁵²: it is important to intervene in situations of *pervasive* inequality, which does not only affect wealth, income and social status, but more generally the equality of “moral status” and mutual respect, as well as the equal participation in global politics, as citizens of the world having an equal say for decisions affecting the future of mankind¹⁵³.

In his recent book on *Inequality: What can be done?* Tony Atkinson suggests that “(p)ublic policy should aim at a proper balance of power among stakeholders, and to this end should a) introduce an explicitly distributional dimension into competition policy; [...]”¹⁵⁴. This proposal raises a number of questions with regard to the way competition law may square with inequality concerns.

First, is the distributional dimension already taken into account in competition law? And if yes, is a “proper” balance of power among stakeholders achieved? Who should define this “proper” balance of power?

Second, are the concepts and instruments of competition law ready for a more pronounced distributional dimension? What would be the concepts and instruments one needs to develop and the reforms one needs to bring to modern competition law enforcement so as to make it more distributive justice compatible?

Third, how a more proactive distributive justice agenda in competition law may square with the global governance of antitrust and the fact that consumers are mostly found in developed countries (rather than developing ones) and that many of the actions taken by competition authorities may be thought of as focusing only on certain parts of the population with higher than average income?

Fourth, is the lack of competition one of the causes of the inequality currently observed in developed countries, such as the Unites States and the European Union?

¹⁵² WALZER, Michael, *Spheres of Justice: In Defense of Pluralism and Equality* (Basic Books, 1984).

¹⁵³ HAUSMAN, Daniel M. (2016), *Equality versus Priority: A Badly Misleading Distinction*, available at <http://philosophy.wisc.edu/hausman/papers/Hausman-Equality-vs-Priority-revised.htm> . This is a topic further examined by LIANOS, Ioannis, *The Poverty of Competition Law* (CLES Research Paper series, 6/2016, forth. 2016).

¹⁵⁴ ATKINSON, Tony, *Inequality: What can be done?* (Harvard University Press, 2015).

Fifth, it seems that the growing financialisation of the economy has played some role in exacerbating inequalities. As a CEPR blog report recently noted “(t)he financial sector has seen a moderate increase in its share of the workforce and a dramatic increase in pay per worker (between 1978 and 2000, wages rose 73.7 percent in the financial sector but rose just 12.0 percent in the private sector more generally). These two factors have allowed finance to capture a growing share of wages and made it so most Americans are unable to share in the economy’s gains”¹⁵⁵. If this is true, has the lack of an active competition law enforcement with regard to the financial sector for decades played a role? Are the existing competition law tools sufficient, or not, to take into account the growing importance of overlapping financial investor ownership? What can be done to remedy this problem, in case of course this is something one considers to be a priority?

The BRICS countries may play a significant role in pushing for the integration of the inequality dimension in the agenda of competition authorities and in engaging in a reflection on competition law’s eventual contribution in this highly contentious area, which has been ignored by the mainstream NPT approach.¹⁵⁶

4. Enhancing the participation of forgotten stakeholders in the global discussion

The NPT-based model for competition law has developed alongside the focus put on consumer welfare, which became the totemic goal allegedly pursued by most competition law regimes around the world¹⁵⁷.

Consumer welfare may take different dimensions and meanings, but it remains an essential concept in competition law analysis, allegedly enabling a rigorous assessment of the competitive effects of a specific conduct on an important class of protected interests by legislation. Yet, despite its central position in competition law assessment, the concept of consumer welfare may not provide an adequate protection to the interests of other important stakeholders that may also be affected by alleged restrictions of competition. For instance, countries exporting agricultural commodities may not find in their interest to implement consumer welfare focused competition law statutes, but would find it preferable, from the viewpoint of their interests, to offer a

¹⁵⁵ Available at <http://cepr.net/blogs/cepr-blog/the-growth-of-finance-in-graphs>

¹⁵⁶ The Second Fundamental Theorem of Welfare economics implies that if a particular state of the economy is judged to be desirable, it may be achieved through lump-sum transfers, hence separating efficiency from distributive justice. Following the Kaldor-Hicks criterion of efficiency, economic policy recommendations should be determined by efficiency, distribution remaining a problem for the political realm (the separability thesis).

¹⁵⁷ For a critical discussion of this concept, see LIANOS, Ioannis (2013), Some Reflections on the Questions of the Goals of EU Competition Law, in Ioannis Lianos & Damien Geradin (eds.), Handbook on European Competition Law: Substantive Aspects 9Edward Elgar, 2013), pp. 1-84; See also, ORBACH, Barak (2011), The Antitrust Consumer Welfare paradox, Journal of Competition Law & Economics, 7, 133-164 who “chronicles how academic confusion and thoughtless judicial borrowing led to the rise of a label that 30 years later has no clear meaning”:

sufficient high level of protection of their producers against abuses of dominant positions by global buyers and processor companies.

Moving beyond consumers should not nevertheless lead to the inclusion of any sort of consideration in competition assessment. But it may however open the door to a different form of economics that would look at all the costs to the economy, and not only those relating to higher prices or the effect on innovation. All material and symbolic costs relating to the specific economic activity should be analysed, depending of course on the availability of adequate tools to take them into account (for instance, unemployment, consumption of medicines, sustainable development, etc.). Bringing in additional stakeholders may provide a missing dimension of great political importance to the discussion. For example, it is clear that farmers' interests are affected by the high pace of concentration of the factors of production, processing and retail markets. Faced with a reality of decreasing revenues, small farmers are pressed to produce even more agricultural commodities in order to earn short-term income in an attempt to meet daily expenses, which leads to oversupply and the vicious circle of further depression of prices, sometimes even below the average cost of production. This has particularly devastating consequences in the developing world and emerging economies, as most of their active population is employed in farming, these effects not being alleviated through a high level of state subsidies, as it is the case in Europe, for instance. In view of the inability of major developed countries' competition authorities to control excessive buyer power, because of the remoteness of the effects of such power on their consumers, according to the effects doctrine, developing jurisdictions, in which the majority of impoverished farmers are located, should be able to tackle the anticompetitive effect of these practices, in collaboration with the jurisdictions in which the dominant agribusiness buyers are domiciled.¹⁵⁸

This may also alter the decision procedure and decision criteria employed in order to assess anticompetitive practices. For instance, some competition authorities take into account sustainability benefits when assessing an otherwise anticompetitive agreement.¹⁵⁹ Some authorities have even gone as far (actually quite far!) in this direction as including in the cost benefit analysis "animal welfare", leading the authority to accept that an agreement that may raise consumer prices but at the same time

¹⁵⁸ See the suggestions by DE SCHUTTER, Olivier, Addressing Concentration in Food Supply Chains, (December 2010) Briefing Note 03, available at <http://www.srfood.org/en/briefing-note-addressing-concentration-in-food-supply-chains>, p. 6.

¹⁵⁹ On 23 December 2015 the Dutch Minister of Economic Affairs published a Draft Policy Rule on competition and sustainability for consultation. This Draft Policy Rule provides guidelines on the assessment of whether agreements relating to sustainability are exempted from the prohibition of cartels. The Rules replace the previous rules on competition and sustainability adopted in 2014. See, Vision Document of the ACM on Competition and Sustainability, available at <https://www.acm.nl/en/publications/publication/13077/Vision-document-on-Competition-and-Sustainability/>

enhances animal welfare can be justified if the gains in sustainability offset the price-increase resulting from the agreement.¹⁶⁰

Some claim that such a trade-off is impossible in view of the incommensurability problem, the benefits and costs being of different kind, or in other words, qualitatively different. Commensuration is indeed “the expression or measurement of characteristics normally represented by different units according to a common metric,”¹⁶¹ that being utility, price, efficiency, competition. However, the trade-offs involved between static and dynamic efficiency (actual and future consumers), or those between price and quality, or even between the different individual consumers of the group of consumers affected by the specific restrictive conduct in the “relevant market,” may equally be described as conducive to the incommensurability problem.¹⁶² Balancing various social values is also an exercise routinely undertaken by constitutional and administrative courts, sometimes involving issues of greater complexity than the more confined type of economic balancing needed in the context of a competition law dispute.¹⁶³ The alleged incommensurability problem also ignores that commensuration is a social process, by essence deeply political.¹⁶⁴ Comparison is excluded between the values thought as incommensurables. However, the choice of finding that values are incommensurable might also indicate that each of these values relies on justifications characterized by different logics, or different “orders of worth”.¹⁶⁵ In this case, other decision procedures than balancing may be more

¹⁶⁰ The Dutch competition authority (ACM) took into consideration sustainability concerns in agreements involving supermarkets, poultry farmers and broiler meat processors concerning the selling of chicken meat produced under animal welfare friendly conditions in a decision adopted in 2015. In particular, the agreement looked to replace the regular chicken with the Chicken of Tomorrow, a chicken raised in a more animal-friendly manner. In examining the benefits of these agreements, the ACM explored if the measures concerned were valued by consumers and found that the improvements came at a cost higher than the consumers were willing to pay. The ACM concluded that the potential advantages did not outweigh the reduction in consumer choice and potential price increases. See, <https://www.acm.nl/en/publications/publication/13789/ACMs-analysis-of-the-sustainability-arrangements-concerning-the-Chicken-of-Tomorrow/> . Similar sustainability concerns were taken into account with regard to agreements between energy producers to close down coal-fired plants. See, <https://www.acm.nl/en/publications/publication/12194/Private-arrangement-in-Energy-Agreement-to-withdraw-production-capacity-from-the-market-restricts-competition/> . One may make similar arguments with regard to an agreement between undertakings to limit the alcohol content of their drinks so as to reduce binge-drinking. For a discussion of the theoretical framework for such an approach, inspired by the capabilities approach of Amartya Sen and Martha Nussbaum, see CLAASSEN Rutger & GERBRANDY Anna (2016), Rethinking European Competition Law: From a Consumer Welfare to a Capability Approach, 12(1) Utrecht Law Review 1.

¹⁶¹ W. Nelso n Espeland & M.L. Stevens, Commensuration as a Social process, (1998) 24 Annual Review of Sociology 313, 315.

¹⁶² See the excellent analysis of ALLENSWORTH, Haw R.(2016), The Commensurability Myth in Antitrust, 69(1) Vanderbilt Law Review 1.

¹⁶³ Ibid.

¹⁶⁴ ESPELAND Nelson W. & STEVENS M.L. (1998), Commensuration as a Social process, 24 Annual Review of Sociology 313.

¹⁶⁵ BOLTANSKI, Luc & THÉVENOT, Laurent, On Justification: Economies of Worth (Princeton University press, 2006) arguing that justifications fall into six main logics: civic (Rousseau), market (Adam Smith), industrial (Saint-Simon), domestic (Bossuet), inspiration (Augustine), and fame

appropriate, such as lexicographic (or lexical) ordering (so that certain values may take priority with respect to other values without however this leading to the suppression of the second ordered value), trumping (some values trumping others), combinations of trumping with balancing, etc. The administrability of these various decision procedures and their proper design so as to limit substantive errors and procedural costs provides fertile ground for research that may be undertaken by the BRICS competition authorities in the context of the BRICS Joint Research Platform, on the basis, for instance of empirical research relating to the integration of public interest objectives and requirements in the competition assessment of mergers¹⁶⁶.

5. Reconnecting Antitrust with “Real” Markets, Competition, Politics and Culture

The BRICS Joint Research Platform will aim to expand the knowledge base of competition law by integrating the insights of different disciplines shedding light on the way markets really function and their interaction with politics and culture in general. This would require for instance more work done on behavioural economics, economic sociology and political economy.

Taking forward the example of behavioural economics, in a seminal contribution published in 1955, Herbert Simon noted that an individual may not choose his most preferred alternative, but one that is sufficiently satisficing according to his preferences.¹⁶⁷ Simon advanced the bounded rationality theory as a challenge to both the descriptive accounts of how individuals (and firms) behave, but also to the normative account of how individuals (and firms) ought to behave. His objective was to “replace the global rationality of economic man with a kind of rational behaviour that is compatible with the access to information and the computational capacities that are actually possessed by organisms, including man, in the kinds of environments in which such organisms exist.”¹⁶⁸ Simon indicated that the work done by psychologists on choice and learning could be a valuable source of wisdom for economics, although he did not have high hopes about this either. In the absence of usable psychological work, he advanced the view that common experience may be a valuable source in order to understand the “gross characteristics of human choice”. Simon suggested some modifications to the rationality principle so that it corresponds better to observed

(Hobbes). Of particular interest for our purposes is the distinction made between the civic, market and industrial logics.

¹⁶⁶ See, for instance, on public interest objectives and merger control, RASLAN, Azza, Public Policy Considerations in Competition Enforcement: Merger Control in South Africa (CLES Research papers series, 3/2016), available at <https://www.ucl.ac.uk/cles/research-paper-series/index/edit/research-papers/cles-3-2016> .

¹⁶⁷ SIMON, Herbert (1955), A Behavioral Model of Rational Choice, *The Quarterly Journal of Economics*, 69 (1). pp. 99-118.

¹⁶⁸ Id.

behaviour processes in humans. This would, for instance, take into account, the cost of gathering information for an individual to make a choice, the process being iterative, or the fact that individuals often make a partial ordering of pay-offs, instead of making a complete ordering by constructing a scale of pay-offs. The more context dependent view of rationality put forward by Simon broke with the conceptualisation of individuals by rational choice theory as well-programmed automatons. It also offered an explanation for the discrepancies observed between the Rational Choice theory model and reality.

Following the footprints of Simon, a new shift took place in the late 1970s with the work of psychologists Daniel Kahneman and Amos Tversky, who attracted greater attention to psychology in contemporary economic theory.¹⁶⁹ The psychological trend that transpires in many recent economic movements, such as behavioral law and economics, experimental economics and neuro-economics, transforms economics to a sort of cognitive science, where economic behaviour is reconceived on the basis of “psychological facts” discovered with the method of experimental introspection. The psychological experiments showed that individuals discount hyperbolically, as some consequences of choice (rewards) are delayed and individuals prefer rewards that arrive sooner rather than later, thus discounting the value of later rewards. They also demonstrated that the same individual may have inconsistent inter-temporal choices, as an individual may express a preference for option A instead of B, but after a lapse of time prefer B instead of A.

More importantly, Kahneman’s and Tversky’s research showed that human behaviour may be described as the outcome of two different cognitive systems/processes of choice, which inhabit every individual.¹⁷⁰ In what was called System 1, the individual operates automatically and quickly, with little or no effort and no sense of voluntary control. Decisions are reached through intuition, emotional and affective elements playing an important role in decision-making, which relies on heuristics. In System 2, the individual allocates attention to effortful mental activities, including complex computations. System 2 is mobilised when a question arises for which System 1 does not offer an answer, or when an event is detected that violates the model of the world that System 1 maintains. The division of labour between System 1 and System 2 is highly efficient as it minimizes effort and optimizes performance. Processing power biases of individuals may push them to a choice overload, where the multiplication of the options offered to consumers may lead to sub-optimal choice, in the sense that consumers may follow rules of thumbs, for instance imitating what other consumers do rather than make their own decisions, in order to satisfy their preferences.

¹⁶⁹ For an overview see, KAHNEMAN, Daniel (2003), A Psychological Perspective on Economics, *American Economic Review* 93, pp. 162-168 .

¹⁷⁰ KAHNEMAN, Daniel, *Thinking, fast and slow* (Allen Lane, 2011).

Tversky and Kahneman also advanced a theory explaining decision-making under conditions of risk. They argued that most people violate all the axioms of expected utility theory. Their prospect theory is based on psychophysical models and presents a different account, and a more accurate prediction, of how people really behave.¹⁷¹ Kahneman and Tversky were however careful not to challenge the normative foundations of Rational Choice Theory and its axiomatic view of individual behaviour.

In summary, Kahneman and Tversky found that people's attitudes toward risks concerning gains may be quite different from their attitudes toward risks concerning losses. Loss aversion and endowment effect imply that selling prices should be higher than buying prices, since the minimal compensation people demand to give up a good is often several times larger than the maximum amount they are willing to pay for a commensurate entitlement.¹⁷² They also distinguished between different phases of decision-making. During the *editing/framing phase of decision making*, they observed the influence of framing effects, as choosing an option may be affected by the order or manner in which it is presented to a decision maker and choice can be affected by trivial manipulations in the construction of available options. During the *evaluation phase* in decision-making, the *status quo* serves as an operative reference point and hence has a value function, while a different function, the *weighing* function, measures the impact of the probability of an event on the desirability of a prospect. They advanced the idea that this psycho-scientific framework should be adopted as a basis for investigating individual (economic) behaviour.

Initially, work accomplished by behavioural scientists with anthropologists attempted to explore how preferences were formed through the interaction of an individual with the environment in which its action was set. Research on the foundations of human sociality found that preferences were not exogenous but that they are shaped by the economic and social interactions of everyday life, thus questioning the foundations of marginal and ordinal utility theory, which take preferences as a given and a fixed norm that influences decision-making¹⁷³. Adopting

¹⁷¹ KAHNEMAN, Daniel & TVERSKY, Amos (1979), Prospect Theory: An Analysis of Decision under Risk, *Econometrica*, 47(2), pp. 263-292.

¹⁷² The loss aversion biases include endowment biases (consumers value something more once they have owned it more than before they own it).

¹⁷³ HENRICH, Joseph, BOYD, Robert, BOWLES, Samuel, CAMERER, Colin, FEHR, Ernst & GINTIS, Herbert Foundations of Human Sociality: Economic Experiments and Ethnographic Evidence from Fifteen Small-Scale Societies (OUP, 2014), p. 46, noting that "the institutions that define feasible actions may also alter beliefs about consequences of actions and the evaluation of these consequences. For example, a market-oriented society may develop distinct cognitive capacities and habits. The fact that almost everything has a price in market-oriented societies provides a cognitive simplification not available to people in societies where money plays a lesser role: namely, allowing the aggregation of disparate objects using a monetary standard as in '\$50 of groceries'. To take another example, extensive market interactions may accustom individuals to the idea that interactions with strangers may be mutually beneficial. By contrast, those who do not customarily deal with strangers in mutually advantageous ways may be more likely to treat anonymous interactions as hostile or threatening, or as occasions for the opportunistic pursuit of self-interest".

an approach that would have analysed preferences as an exogenous factor could have tarnished the pretention of economics to make accurate predictions as to the effects of economic behaviour. The mainstream behavioural economics programme thus took care of not challenging the fundamental assumption of a fixed universal benchmark of full rationality as a normative criterion for making decisions, although it improved the empirical realism of economic models by describing instances in which individuals' behaviour violates the principles of full rationality. In essence, behavioural economics attempted to draw a map of bounded rationality, by exploring the systematic biases that people show in their day-to-day behaviour in relation to choices a fully rational agent would have made in similar circumstances. For instance, people may make choices that could satisfy their immediate (hot) preferences (e.g. smoking a cigarette), which they would have changed had they behaved as if they were fully rational agents (e.g. the "cold" preference of staying healthy for a longer period of time). A possible avenue for research will be to abandon the rational choice perspective as a normative criterion and explore the role of culture and social norms in influencing preferences, thus accounting more accurately for the "real" behaviour of consumers in various settings.

Limits in the cognitive capacities of consumers lead them to boundedly rational choices, or as economist Dan Ariely puts it, they act as "predictably irrational".¹⁷⁴ People tend to make judgments about the likelihood of an event, on the basis of how easily this event comes to mind (the availability heuristic), hence, indicating that prior exposure to a number of events may influence an individual's subsequent judgments.¹⁷⁵ Similarity of an event/product may also serve as a cognitive shortcut in decision-making, which explains, for instance, why the package of a generic (store) brand (private label) looks similar to that of an established national brand in order to influence consumers' choice (the representativeness heuristic)¹⁷⁶. Ariely and his colleagues advance the concept of "zero-price effect," which suggests that the usual cost-benefit analysis cannot account for the psychological effect of a free good, consumers perceiving it as intrinsically more valuable than a reduction of the price of the same product from £0,15 to £ 0,01, because of the "affect heuristic" associating free goods with a good feeling, which surfaces automatically when someone makes decisions under System 1.¹⁷⁷

Decisions in risky or uncertain situations are often influenced by anticipatory feelings and emotions experienced in the moment of decision-making.¹⁷⁸ Humans are

¹⁷⁴ ARIELY, Dan, *Predictably Rational* (Harper Collins, 2008).

¹⁷⁵ TVERSKY, Amos & KAHNEMAN, Daniel (1974), Judgment under uncertainty: Heuristics and biases. *Science (New Series)*, 185, 1124-1131.

¹⁷⁶ KAHNEMAN, Daniel & TVERSKY, Amos (1972), Subjective probability: A judgment of representativeness. *Cognitive Psychology*, 3, 430-454.

¹⁷⁷ SHAMPANIER, Kristina, MAZAR, Nina & ARIELY, Dan, Zero as a special price: The true value of free products, (2007) 26 *Marketing Science*, 742-757

¹⁷⁸ The risk as feelings model of decision-making: LOEWENSTEIN, George (2000), Emotions in economic theory and economic behaviour, *The American Economic Review*, 90(2) 426-432.

also averse to change and exhibit a status quo bias, the formation of a habit making it difficult to dis-engage, unless the incentive to do so is strong. However, this may indicate that higher prices may not be enough for consumers to switch their existing suppliers, procrastination and inertia eventually limiting their ability to exercise an active choice.¹⁷⁹ Of particular interest is also the fact that humans often attach more importance to present events than future events, discounting future benefits for actual benefits. Thus discounting is non-linear and its rate may vary over time. Time inconsistency bias may also manifest itself by the impossibility to predict accurately our preferences in the future.¹⁸⁰ Preferences are also context-dependent, the framing of the choice exercising an important influence over the decision of consumers.¹⁸¹

Consumers do not make decisions in isolation, in order to satisfy their given preferences. They are also embedded in social environments, which inevitably influence, one might even say construct their preferences.¹⁸² Because of these broader social preferences that often frame individual ones, people show that they prefer fairness and reciprocity over inequality and pursuing one's own self-interest.¹⁸³ It is not only monetary incentives that count, but also people's perception of self, in other words, their social identity.¹⁸⁴ Preferences are influenced by social roles, and more broadly social norms, which vary across cultures and contexts. Preferences may even follow choice, instead of guiding it, the order of preferences aiming mainly to rationalize/justify actions after the fact.

The behavioural economics approach challenges the theory of revealed preferences, as it cannot be assumed that consumers' choice on the marketplace represents their "true preferences," the latter being defined as the preferences that a fully rational individual would have developed, had he all the relevant factual information and the unlimited cognitive abilities to evaluate it through a careful cost benefit analysis. The welfare analysis in competition law works within a revealed preferences paradigm, when relevant and reliable data on actual purchases are available. The use of quantitative methods (econometrics) enables in this case competition authorities to estimate the elasticities of demand, in particular the cross-price elasticity of demand, which measures the sensitivity of demand for one category

¹⁷⁹ KAHNEMAN, Daniel & TVERSKY, Amos (1982), The psychology of preference, *Scientific American*, 246(1), pp. 160-173.

¹⁸⁰ OFT1228, What does Behavioural Economics Mean for Competition Policy?, (March 2010), 6, "The time inconsistency biases include: projection bias (consumers expect that they will feel the same tomorrow as they do today); over optimism (consumers over estimate how much they will use a good, or underestimate how much it will cost them); and hyperbolic discount biases (consumers value today disproportionately greater than tomorrow".

¹⁸¹ KAHNEMAN, Daniel & TVERSKY, Amos (1984), Choices, Values and Frames, *American Psychologist*, 39(4), 341.

¹⁸² LICHTENSTEIN, Sarah & SLOVIC, Paul (eds.), *The Construction of Preference* (CUP, 2006).

¹⁸³ FEHR, Ernst & GÄCHTER, Simon (2000), Fairness and Retaliation: The economics of reciprocity, *Journal of Economic Perspectives*, 14, 159.

¹⁸⁴ AKERLOF, George A. & KRANTON, Rachel E., *Identity Economics* (Princeton University Press, 2010).

of products to the price of another category. However, such data is not often available or not specific enough to estimate the cross-price elasticities of demand for the product(s) in question, in which case properly designed survey methods will measure preferences over hypothetical products and alternatives. In this case, the preferences will be *stated*, as opposed to revealed preferences. Discrete choice survey methods attempt to mimic the situation of choice faced by the consumer in the real-world, but it is a proxy really for revealed preferences, assuming that the survey is well designed, the process was conducted so as to assure objectivity, and that a representative sample of consumers to be surveyed has been selected. However, behavioural economics may question the link between preferences (revealed or stated) and welfare, which forms the basis for the welfare analysis performed in competition law. One may not go as far as to challenge the assumptions of methodological individualism altogether, assuming that this is the dominant approach in economics¹⁸⁵ but it certainly becomes important to acknowledge the crucial role of social structures in framing preferences. This calls for a more extensive analysis of culture and social norms of the BRICS societies.

This also raises interesting questions as to the existence of “authentic,” extant preferences, which competition law should be deemed to protect, but which can also be considered as previously-constructed preferences that may have “stabilized over time, with repeated exposure to sufficiently similar stimuli, so that now they are retrieved from memory rather than constructed ad-hoc when consumers face a similar (even if not identical) choice”.¹⁸⁶ The choice construction may partly depend on consumer’s more abstract values, but also partly on the context of the specific choice and the options to be evaluated.¹⁸⁷ The rise of behavioural economics does not only impact on the demand side through the analysis of consumer biases but may also influence how the supply side of the market is analysed, firms often acting to exacerbate and exploit consumer biases, at every stage in the decision-making process.¹⁸⁸

The role of political institutions in the emergence of markets needs also to be highlighted, market building constituting an important task ensured by the State, in

¹⁸⁵ For a discussion, see HODGSON, Geoffrey M. (2007), Meanings of Methodological Individualism, *Journal of Economic Methodology*, 14(2), pp. 211-226.

¹⁸⁶ TOR, Avishalom (2016), Justifying Antitrust: Prediction, Efficiency, and Welfare, available at the SSRN <http://ssrn.com/abstract=2730670> , 70.

¹⁸⁷ The arguments criticizing reliance on preferences as indicators of welfare have been older than the behavioural economics challenge. See, for instance, LERNER, Abba (1972), The Economics and Politics of Consumer Sovereignty, *American Economic Review*, 62(1), 258, “(I) confess I still find a similar rising of my hackles when I hear people’s preferences dismissed as not genuine, because influenced or even created by advertising, and somebody else telling them what they ‘really want’. In a rich society like ours, only a very tiny part of what people want is determined by their physical and chemical makeup. Almost all needs and desires are built on observation and imitation”.

¹⁸⁸ See, OFT1224, What does Behavioural Economics Mean for Competition Policy?, (March 2010).

particular in emerging economies.¹⁸⁹ The State plays an important role in stabilizing markets, often called by incumbent companies eager to enjoy stability and limit disruptive competition. One needs to move beyond simplistic opposition between State capitalism and private enterprise capitalism that ignore the permeable role of the State in the making and development of markets, and its contribution to the innovative effort of private corporations,¹⁹⁰ and engage with the various development paths chosen by the various States and the role of competition law in each specific context. Competition law should take into account this complex environment, even more so as the division of functions between politics and the economy is not as clear cut in emergent and developing countries as it is in the US and the EU. Social institutions, including the State, play an important role in shaping the economic sphere.

The role of culture and of the different varieties of capitalism in competition law is also a rapidly expanding area of research.¹⁹¹ But more generally, we should be able to critically engage with new work in economics challenging the NPT framework and suggesting different theoretical frameworks in order to understand the way “real competition” works in the global marketplace¹⁹², and the impact of path-dependent lack of “real competition” on the development and growth trajectories of emerging and developing countries¹⁹³.

6. Re-negotiating the boundaries of the “regulatory” sciences of competition law

The integration of scientific knowledge, in particular economics, in the decision-making process in the area of competition law, since the 1970s, has been a major step in the transformation of modern competition law to some form of technocratic enterprise.¹⁹⁴ This is not of course a unique development as many other areas of social regulation, starting with environmental regulation, have seen a similar pattern. In her seminal work on science advisors, Sheilla Jasanoff has noted how the expansion of the role of technical experts led to an isolation of the scientific and political decision-making and the positivistic value-fact separation.¹⁹⁵ It has also led to the emergence of a “regulatory science (science used in policy making),” or “mandated science,” which presents distinct characteristics from “science in a research setting”

¹⁸⁹ See, FLIGSTEIN, Neil (1996), Markets as politics: A political-Cultural Approach to Market Institutions, *American Sociological Review*, 61, pp. 656-673.

¹⁹⁰ See, MAZZUCATO, Marianna, *The Entrepreneurial State* (Anthem, 2013).

¹⁹¹ See, for instance, LIANOS, Ioannis & SOKOL, Daniel (eds.), *The Global Limits of Competition Law* (Stanford Univ. Press, 2012), Part V; DOWDLE, Michael, GILLEPSIE, John, MAHER, Imelda (eds.), *Asian Capitalism and the Regulation of Competition* (Cambridge Univ. Press, 2013).

¹⁹² SHAIKH, Anwar, *Capitalism: Competition, Conflict, Crises* (OUP, 2016).

¹⁹³ FILHO, Calixto Salomão, *Monopolies and Underdevelopment: From Colonial Past to Global Reality* (Edward Elgar, 2015).

¹⁹⁴ CRANE, Daniel (2008), *Technocracy and Antitrust*, *Texas Law Review*, 86, 1159.

¹⁹⁵ JASANOFF, Sheila, *The Fifth Brand – Science Advisers as Policy Makers* (Harvard University Press, 1990), p. 17.

(or ordinary science).¹⁹⁶ Regulatory science includes “a component of knowledge production,” as does ordinary science, but also a “substantial component of knowledge synthesis,” which includes “secondary activities, such as evaluation, screening, and meta-analysis”.¹⁹⁷ “Regulatory science” is largely “predictive,” as it feeds decision-making, the latter being constrained by time and resources, in contrast to an ordinary science-setting where a long process of peer reviewing assures a gate-keeping function.¹⁹⁸ Regulatory science also obeys different standards of validity than ordinary science, as these are the products of “uneasy bargains”¹⁹⁹ between the scientific experts, in our case economists, and the other actors in the competition law process (judges, lawyers, interest groups).²⁰⁰

Because of the volume of cases more mature competition law systems, such as the US and the EU, exercise an important influence on the type of economic expertise usually presented in competition cases and the methods of assessing such expertise. More recent competition law systems attempt to emulate these processes and often transplant institutional and evidence law innovations developed in the US and the EU, such as the position of chief economist, specialised courts in the area of competition law, the hot tub procedure for examining party experts, etc. However, despite these common trends, the way economics is integrated in each system of competition law depends on the specific evidence eco-system and more generally legal culture.

While not focusing on the competition economics field, Marion Fourcade’s excellent comparative cultural sociology analysis of the dialectic relationship between culture and economics in the United States, France and the UK provides a useful account of the linkages between institutions and economic analysis, and in particular the impact of national constellations and various institutional logics on the development of economic theory and methodology.²⁰¹ One needs to take into account the institutional specificities, but also more generally the availability of sufficient economic expertise in these jurisdictions in order to re-work the boundaries between regulatory science (for instance, economics) and the legal system. For instance, more work needs to be done on the way competition authorities and the judiciary in emergent and developing economies deal with economic (and other technical) experts

¹⁹⁶ SALTER, Liora, *Mandated Science* (Dordrecht, Netherlands, Kluwer, 1988).

¹⁹⁷ JASANOFF, Sheila, *The Fifth Brand – Science Advisers as Policy Makers* (Harvard University Press, 1990), p. 77.

¹⁹⁸ *Ibid.*, p. 78.

¹⁹⁹ DAVIES, William (2011), Economic advice as a vocation: symbioses of scientific and political authority, *The British Journal of Sociology*, 62(2), pp. 304-323.

²⁰⁰ On the analysis of the social construction of the standards of validity of econometrics used in the context of competition law enforcement, see LIANOS, Ioannis & GENAKOS, Christos (2013), Econometric Evidence in EU Competition Law: An Empirical and Theoretical Analysis, in I. Lianos & D. Geradin (eds.), *Handbook of European Competition Law: Enforcement and Procedure* (Edward Elgar, 2013), pp. 1-137.

²⁰¹ FOURCADE, Marion, *Economists and Societies* (Princeton University Press, 2009).

and the impact of the use of economic evidence on the margin of discretion of competition authorities and the standards of judicial review.²⁰²

It is also possible that the local market for economic expertise has been foreclosed by the litigation tactics of (global) corporations which proceed by hiring the best experts in order to limit their availability for the competition authorities or private litigants. One may also note more complex entanglements between economic expertise and the corporate world, some global corporations integrating in their litigation strategy the systematic commissioning of articles to academics, thus further reducing the available options for getting unbiased scientific advice. Such foreclosure may prove to be a profitable strategy in emergent and developing jurisdictions where specialised economic expertise in the area of competition law is not often in sufficient supply.

The establishment of the BRICS Joint Research Platform will provide BRICS competition authorities but also other emergent and developing jurisdictions a pool of unbiased academic experts from around the world from which they would be able to draw on resources for their industry studies, investigations, but also horizontal topics of interest. The Platform will also engage with empirical work on the use of economics and other sources of evidence by competition authorities and courts in the BRICS jurisdictions and will aim to suggest institutional reforms and innovations that will enhance the quality of decision-making in these jurisdictions. The Platform should also facilitate the use of big data analytics, socio-metric techniques and advanced social network analysis, which will enable BRICS competition authorities to widen their perspective and respond to a broader array of tasks.

IV. Conclusion

More than a decade after the failure of the most recent efforts to establish a global governance of competition law in the context of the WTO, and following the elaboration of the current flexible network-form of governance at the centre of which sits the International Competition Network, there is a clear understanding that the current institutional setting cannot tackle the externalities generated by more than 120 competition law regimes that may potentially regulate parts of the global economy. This raises important concerns to global businesses that need to comply with multiple, and often incompatible, standards. The call for policy convergence aims to mitigate

²⁰² See, for instance, AVDASHEVA, Svetlana , KATSOULACOS, Yannis, GOLOVANOVA, Svetlana & TSYTSULINA, Dina (2016), *Economic Analysis in Competition Law Enforcement in Russia: Empirical Evidence Based on Data of Judicial Reviews*, in JENNY, Frederic & KATSOULACOS, Yannis (eds.), *Competition Law Enforcement in the BRICS and in Developing Countries*, (Springer, 2016), pp. 263-287; BONAKELE, Tembinkosi, *The Nature and Use of Economic Evidence in Competition Enforcement (with Special Emphasis to the Case of South Africa)*, JENNY, Frederic & KATSOULACOS, Yannis (eds.), *Competition Law Enforcement in the BRICS and in Developing Countries*, (Springer, 2016), pp. 187-205.

these concerns, while enabling established competition law regimes, such as that of the US and Europe, to influence the convergence point and more generally to take ownership of the process.

This state of affairs can first be criticized for not taking into account the different patterns of diffusion of competition law and consequently the variety of competition law systems emerging out of the original US antitrust law model and its EU competition law “spin-off”. Expecting convergence towards the US model, as it is now implemented, or towards an idealized economics NPT-based model, seems naïve at best and normatively contestable. Indeed, the call for convergence mainly emanates from global business which, understandably, is not keen to incur the costs of overlapping jurisdictions by different competition law systems.

One needs, however, to take a broader perspective and engage with other affected interests, which are often not represented in the debate on the global governance of competition law. I put forward a “participation-centred” approach that would seek to avoid both majority and minority biases, the ultimate objective being not policy convergence as such, but increasing levels of total trust between competition authorities and between competition authorities and their stakeholders. The lack of participation in this global deliberative space of emergent and developing economies, the inability of various affected interests to be considered and the disproportional weight in the decision-making process of the two most mature competition law regimes, the US and the EU, favour a greater involvement of the BRICS and other emergent competition law jurisdictions in the discussion over the architecture of the global governance of competition law.

I suggest the establishment of a BRICS Joint Research Platform which, in addition to its task to improve the quality of decision-making within BRICS, will also serve as an alternative forum in the global deliberative space in the area of competition law. Its distinctive role will be to represent the views of the BRICS jurisdictions, but also to serve as a knowledge platform, contributing innovative ideas, elaborated with the requisite academic robustness, to the global deliberative space in competition law. The paper provides some initial thoughts on the themes/directions that the BRICS Joint Research Platform may choose to follow.