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e aplicação do Direito da Concorrência

MATEUSZ BŁACHUCKI

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THE ROLE OF THE OECD IN DEVELOPMENT AND ENFORCEMENT OF COMPETITION LAW

O PAPEL DA OCDE NO DESENVOLVIMENTO E APLICAÇÃO DO DIREITO DA CONCORRÊNCIA

MATEUSZ BŁACHUCKI¹
Polish Academy of Sciences
Institute of Law Studies
Nowy Świat St. 72 (Pałac Staszica)
00-330 Warsaw
Poland
mateusz.blachucki@inp.pan.pl

Abstract: The paper presents the role of the Organization for Economic Cooperation and Development (OECD) in elaboration and proliferation of competition law across jurisdictions. Furthermore it discusses how the OECD enhances international cooperation in competition cases. The paper explains what distinguishes the OECD from the other international organizations (IOs) and international networks active in the field of competition law and policy. Taking the OECD example the paper proves that even if states are willing to harmonize their competition laws, at the same time they are not willing to transfer decision making powers in the given area outside their jurisdictions. Therefore the efforts of the OECD and other networks concentrate on removing legal and the other barriers between jurisdictions and invigorating real cooperation between agencies by providing them analytical and to lesser extent administrative assistance. The article concludes that the OECD used to play a leading role in the development of competition law worldwide but this preponderant role has been taken over by regional and global networks devoted solely to competition law. Nonetheless, the OCED continues to be an important intergovernmental think tank and respected reviewer of national public policies, including competition one.

Resumo: O presente artigo incide sobre o papel da Organização de Cooperação e Desenvolvimento Econômico (OCDE) na elaboração e proliferação de leis de concorrência entre jurisdições nacionais. Além disso, discute como a OCDE reforça a cooperação internacional em casos de Direito da Concorrência. O artigo explica o que distingue a OCDE das outras organizações internacionais (OI) e das redes internacionais que atuam no campo da legislação e da política de concorrência. Tomando o exemplo da OCDE, o artigo comprova que, embora os Estados estejam dispostos a harmonizar os seus regimes de concorrência, tal não ocorre quanto à transferência de poderes de decisão nesta área para fora de suas jurisdições. Por conseguinte, os esforços da OCDE e de outras

1. Assistant Professor at the Department of Administrative Law (Institute of Law Studies, Polish Academy of Sciences).

redes concentram-se na remoção das barreiras jurídicas e de outro tipo entre as jurisdições e na revitalização da cooperação efectiva entre as autoridades nacionais de concorrência, fornecendo-lhes assistência em áreas de competência analítica e, em menor medida, administrativa. O artigo conclui que a OCDE costumava desempenhar um papel de liderança no desenvolvimento do Direito da Concorrência em todo o mundo, mas este lugar preponderante foi assumido por redes regionais e globais dedicadas exclusivamente ao Direito da Concorrência. No entanto, a OCED continua a ser um importante grupo de reflexão intergovernamental e um respeitado avaliador das políticas públicas nacionais, incluindo a da concorrência.

Keywords: OECD, competition law, competition policy, public enforcement, international cooperation, Global Administrative Law

Palavras-chave: OCDE, Direito da Concorrência, Política de Concorrência, poderes públicos de execução, cooperação internacional, Direito Administrativo Global

Summary: Introduction; The goals and legal instruments of the OECD; The OECD bodies responsible for competition law and policy; Achievements of the OECD in the area of competition law and policy; The OECD in the patchwork of networks and IO's engaged in the competition law; Quo vadis OECD?; Conclusions.

Sumário: Introdução; Objectivos e instrumentos jurídicos da OCDE; Os órgãos da OCDE responsáveis pelo direito e política de concorrência; Resultados da OCDE no campo do direito e política da concorrência; A OCDE na mistura de redes e organizações internacionais (?) que prosseguem o direito da concorrência [não fica bem, deixo à vossa consideração porque eu alteraria]; Quo vadis OCDE? Conclusões.

Introduction

The Organization for Economic Cooperation and Development (OECD) remains one of the oldest international organizations (IOs), yet it has never attracted too much attention from the scholars or the public². As a result it is described as “the forgotten institution of global governance”³. Seen by some as the rich man’s club⁴ and Cold War relic or a highly technical research organization with little significance for world politics⁵ it strives to adapt to challenges of XXI century. Undoubtedly, the OECD has been established in different political and economic conditions. However, the OECD has been transforming itself together with the revolution of the world affairs from the bi-polar system of world politics to a globalised economy with no global hegemon but with plurality of strong world leaders.

The OECD is the archetypical example of an international organization that governs through deliberation, persuasion, surveillance and self-regulation⁶. Even though the OECD lacks of formal administrative powers it is perceived as *the quintessential host of transgovernmental regulatory networks*⁷. The organization is a subject of interest of Global Administrative Law studies⁸. GAL researchers point that the *OECD provides a wonderful example for the study of global administrative law for the simple reason that it is a hybrid organization. Through its many diverse activities, the OECD shares characteristics with primarily lawmaking international bodies, such as the European Union, primarily standardsetting bodies, such as the World Health Organization, and primarily data gathering and research organizations, such as the U.N. Conference on Trade and Development*⁹. Furthermore, GAL researchers have analyzed the OECD in the context of development of global competition law¹⁰ from a procedural

2. The scholarship on the OECD is relatively small. For the literature overview please refer to R. Woodward, *Global Governance and the Organization for Economic Cooperation and Development*, in: G.D. Hook & H. Dobson (eds.) *Global Governance and Japan: The institutional architecture*, Routledge, London 2007.

3. Ibidem.

4. Two thirds of the world income is produced by the OECD members.

5. T. Porter, M. Webb, *Role of the OECD in the Orchestration of Global Knowledge Networks*, Paper prepared for presentation at Canadian Political Science Association annual meetings, Saskatoon, Saskatchewan, Canada, 2007, p. 1.

6. M. Marcussen, *OECD Governance through Soft Law*, in: U. Mörth (ed.), *Soft Law in Governance and Regulation*, Edward Elgar, Cheltenham 2005, p. 103.

7. A.-M. Slaughter, *A New World Order*, Princeton University Press, Princeton 2004, p. 46.

8. GAL – Global Administrative Law is a research project and/or a concept of emerging new branch of law. GAL is described as *encompassing the legal mechanisms, principles, and practices, along with supporting social understandings, that promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring these bodies meet adequate standards of transparency, consultation, participation, rationality, and legality, and by providing effective review of the rules and decisions these bodies make*. See B. Kingsbury, N. Krisch, & R.B. Stewart, *The Emergence of Global Administrative Law*, 68:3-4 *Law & Contemporary Problems* (2005), p. 17.

9. J. Salzman, *Decentralized administrative law in the Organization for Economic Cooperation and Development*, *Law and Contemporary Problems* 68 (2005), pp. 189-190.

10. Competition law has been one of the areas that attracted attention of GAL researches from the very beginning. One of the first projects of the Global Administrative Law Network

perspective¹¹. Taking up on those studies the article aims at presenting a full picture of past and present activities the OECD in the area of competition law and the role of the OECD in proliferation of competition law and policy.

The OECD is a universal organisation which means that its jurisdiction is not limited to any particular subject matter¹². Given the diversity of the topics covered by OECD activities one may witness some differences regarding the outcome of the organisation's work. Some areas seemed to be especially successful for the OECD, namely taxation¹³, anti-bribery¹⁴ or even labour rights¹⁵. Failures of the international cooperation within the OECD are also eminent, like in the case of Multilateral Agreement on Investment¹⁶. Given limitations resulting from the OECD's specific character its achievements in the area of competition law and policy should be assessed as a moderate success. The role of the OECD as an IO active in promoting competition policy culture should be seen in terms of changing awareness of participating countries¹⁷. From today's perspective we may take protection of competition for granted as one of the core principles of a free market economy. However, changing perception of governments and the need of overcoming protectionist measures or desire to achieve short term industrial or social policy goals over long term economy goals remain challenging. The OECD played an important role in changing this attitude of governments by using persuasive common standards and other soft law instruments allowing governments to adjust their laws at the right pace. The OECD has contributed immensely to proliferation of competition laws – in the 50's there were only few countries with competition laws, but together with establishment and enlargement of the OECD each newly adopted national competition law put a pressure on those jurisdictions who did not yet have one. As a result competition law gradually became fashionable¹⁸.

The competition law is especially well placed to be studied in the context of activities of the IOs. As one of the researchers put it – “if networking is the new

founded by the Institute for International Law and Justice (IILJ) at NYU School of Law has been Comparative Competition Law Institutions Project. For more information please refer to <http://www.iilj.org/GAL/GALNetwork.asp>.

11. E.M. Fox, A. Arena, *The International Institutions of Competition Law: The Systems' Norms*, in: E.M. Fox, M.J. Trebilcock (eds.) *The Design of Competition Law Institutions. Global Norms, Local Choices*, OUP, Oxford 2012, pp. 476 – 480.

12. There are only few exemptions like sport or culture.

13. OECD is even called 'Informal World Tax Organization' - A.J. Cockfield, *The Rise of the OECD as Informal 'World Tax Organization' through National Responses to E-Commerce Tax Challenges*, Yale Journal of Law and Technology, Vol. 8, Spring 2006.

14. C. Pacini, J.A. Swingen, H. Rogers, *The role of the OECD Convention in combating bribery of foreign public officials*, Journal of Business Ethics 37 (4):385 - 405 (2002).

15. J. Salzman, *Labor Rights Globalization and Institutions - The Role and Influence OECD*, Michigan Journal of International Law 21, no. 4 (Summer 2000).

16. J. Salzman, *Decentralized administrative law in the Organization for Economic Cooperation and Development*, Law and Contemporary Problems 68 (2005), pp. 196-201.

17. W. Moschel, *International Restraints of Competition: A Regulatory Outline*, 10 Nw. J. Int'l L. & Bus. 76 (1989-1990), p. 77.

18. D.J. Gerber, *Global Competition: Law, Markets, and Globalization*, OUP, Oxford 2010, p. 167.

world order – the antitrust is the provocative example¹⁹. In the last decades one can witness significant propagation of fora devoted to development of competition law cooperation on international level like International Competition Network (ICN) or UNCTAD, regional level like European Competition Network (ECN), European Competition Authorities (ECA), COMESA or Nordic Co-operation. Furthermore bilateral cooperation in this area flourishes, as well. In this patchwork of networks the role of the OECD seemed to have been diminishing. It is surprising, considering the fact that the OECD served as a pioneer among International Organizations who contributed heavily to development and spreading of competition laws among jurisdictions. At the moment, when plurality of competition enforcement cooperation networks and organizations exists, the role of the OECD is important yet limited. The OECD serves primarily as a forum for adoption of common standards and best practices and harmonization of competition laws and enforcement thereof, as well as the transnational problem solving arena where substantive and jurisdictional problems occurring in applying competition laws may be discussed. The OECD offers in-depth analysis and comparative studies in relation to competition law and enforcement.

The paper seeks to analyze the role of the OECD in development of competition laws and cooperation between competition agencies, as well as to explore what distinguishes the OECD from other IOs and networks active in the field. First, it provides a description of goals and legal instruments of the OECD. It is followed by a presentation of bodies and instruments devoted to study and development of competition law and policy. The next sections of the paper offer critical examination of historical and current achievements of the OECD concerning competition law. The last sections present an analysis of the OECD against other fora devoted to cooperation in the area of competition law. Upon this basis the article tries to show how the OECD may further distinguish itself from other transnational networks and what are prospects for the Organisation in the area of competition law and policy.

The goals and legal instruments of the OECD

The OECD describes its mission as a promotion of policies that will improve the economic and social well-being of people around the world by providing forum for governments to discuss their experiences and develop solution to common problems, analyzing roots of economic, social and environmental changes, gathering and comparing data to predict future trends and last but not least setting international standards on a wide range of things, from agriculture and tax to the safety of chemicals²⁰. The formal goals of the OECD are declared

19. E.M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, in: P. Lugard (ed.), *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, Intersentia, Cambridge – Antwerp – Portland 2011, p. 105.

20. <http://www.oecd.org/about/> .

in the Art. 1 of the OECD Convention²¹. According to this provision the OECD promotes policies designed: *(a) to achieve the highest sustainable economic growth and employment and a rising standard of living in Member countries, while maintaining financial stability, and thus to contribute to the development of the world economy; (b) to contribute to sound economic expansion in Member as well as non-member countries in the process of economic development; and (c) to contribute to the expansion of world trade on a multilateral, non-discriminatory basis in accordance with international obligations.*

Surprisingly, the OECD Convention is silent about competition protection. Nonetheless, many soft law documents adopted by the OECD emphasize the role of competition law and policy. The most recent Recommendation of the Council adopted in the competition law area states *that anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries and that anticompetitive practices and mergers with anticompetitive effects may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals of Adherents to this Recommendation*²². Therefore the other Recommendation of the Council has recognized that *effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports*²³.

The powers of the OECD are defined in the Art. 5 of the OECD Convention. Based on this provision the OECD may *(a) take decisions which, except as otherwise provided, shall be binding on all the Members; (b) make recommendations to Members; and (c) enter into agreements with Members, non-member States and international organisations.* The binding decisions are very rare in the practice of the OECD. As indicated in the introduction, the OECD is a primarily soft law organization. This notion has gained value during the years. Especially since the mid of 70's the OECD produces mainly non-binding soft law acts instead of hard law. Recommendations are non – binding in two senses. First, as the name suggests they are simply recommendations and provide only for good practices. Second, even non-binding recommendations provide for provisions highlighting that the state may refuse to cooperate if it is contrary to his interests²⁴. One of the OECD top rank officials emphasized that *apart from nearly thirty decisions and a few international agreements, most OECD legal instruments are “soft law,” or non-binding. However, soft law is taken seriously within the OECD and entails a strong political commitment by members, to the point that some*

21. Convention on the Organisation for Economic Co-operation and Development of 14th December 1960, available at <http://www.oecd.org/general/conventionontheorganisationforeconomicco-operationanddevelopment.htm> (17/09/2015).

22. Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings of 16 September 2014 [C(2014)108].

23. Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies of 23 October 1986 [C(86)65/FINAL].

24. T. Winslow, *OECD competition law recommendations, developing countries, and possible WTO competition rules*, [2001] OECD Journal of Competition Law and Policy, Volume 3, No. 1, p. 118.

*of the most influential OECD standards are not legally binding*²⁵. Therefore it is not surprising that the OECD describes itself as a *market leader in developing standards and guidelines*²⁶. This suggests that the OECD is playing an ideas game, which concerns the collection, manipulation and diffusion of information and knowledge²⁷.

The OECD bodies responsible for competition law and policy

The leading role in adopting recommendations rests within the OECD Council. However, adoption of best practices, papers and conducting other activities is delegated to specialized committees. Competition law and policy is the responsibility of a dedicated Competition Committee. The Committee is supported by the Directorate for Financial and Enterprise Affairs. The Competition Committee is one of the oldest committees and it has been established on 5th December 1961²⁸ and it was successor of the committee which was active during the OEEC since 1953. At present, apart from the member states of the OECD, fifteen observers are involved in the works of the Committee²⁹. During the meetings of Competition Committee officials from different countries share their experiences, seek advice, and receive feedback through an informal system of peer review³⁰. As indicated in the Resolution of the OECD Council³¹ the *main objective of the Competition Committee is to protect and promote competition as an organising principle of modern economies, based on the knowledge that vigorous market competition boosts growth and employment and makes economies more flexible and innovative*. In achieving that goal the Competition Committee may undertake various activities, such as: i) reviewing developments in competition laws and policies both in individual countries and in international organisations; ii) examining particular competition law and policy issues taking into account the interaction between competition and

25. N. Bonnuci, *The OECD at fifty: some observations on the evolving nature of an international organization*, 2011 *The Geo. Wash. Int'l L. Rev.*, Vol. 43, p. 247.

26. Focus on Africa – OECD, <http://www.oecd.org/ctp/40998413.pdf> (accessed 05/04/2016).

27. M. Marcussen, *OECD Governance through Soft Law*, in: U. Mörtz (ed.), *Soft Law in Governance and Regulation*, Edward Elgar, Cheltenham 2005, p. 112.

28. At the beginning the official name of the committee was the Committee of Experts on Restrictive Business Practices (Resolution of the Council OECD/C(61)47(Final)). It was changed in 1987 for the Committee on Competition Law and Policy (Resolution of the Council concerning the Committee of Experts on Restrictive Business Practices and amending its name and terms of reference [C(87)138(Final)]). The present name of the committee was established in 2001 (Change of name from 'Committee on Competition Law and Policy' to 'Competition Committee' agreed by Council at its 1017th session [C/M(2001)23, item 402] and document [C(2001)261]).

29. Brazil, Latvia, India, Lithuania, Indonesia, Malta, South Africa, Peru, Bulgaria, Romania, Chinese Taipei, Ukraine, Colombia, Russian Federation, Egypt.

30. T. Winslow, *OECD competition law recommendations, developing Countries, and possible WTO competition rules*, [2001] *OECD Journal of Competition Law and Policy*, Volume 3, No. 1, p. 117.

31. C(2008)134 & CORR1 and C/M(2008)17, item 219.

other government policies; iii) enhancing the effectiveness of competition law enforcement, through measures that include the development of best practices and the promotion of cooperation among competition authorities of Member countries. Moreover the Committee should cooperate with other competition related organisations, notably the International Competition Network³². The Competition Committee is characterized as a major vehicle for exchange of views between members and observers to the OECD regarding competition law policy issues, exchanges of experience, definition of best practices, peer reviews or preparing recommendations³³. Essentially, the Competition Committee is a transgovernmental network of antitrust enforcers³⁴.

Under the auspices of the Competition Committee two working groups have been established:

1. Working party no. 2 on competition and regulation (est. on 1st October 1994) which is responsible for enhancing the effectiveness of procompetitive economic reform, including by reviewing competition issues in jurisdictions and particular sectors and identifying options for addressing these issues and developing best practices³⁵;
2. Working party no. 3 on co-operation and enforcement (est. in October 1964) which is responsible for enhancing the effectiveness of competition law enforcement, through measures that include the development of best practices and the promotion of cooperation among competition authorities of member countries³⁶.

The Competition Committee has undertaken activities in order to influence non-members states of the OECD regarding competition law and policy issues. As noted earlier the OECD is an exclusive and relatively small club of well developed countries. In order to overcome this limitation the Committee has decided to create Global Forum on Competition (GFC) on 1st January 2001. The Forum is open to all interested jurisdictions. It holds annual conferences. The last - 14th OECD Global Forum on Competition took place on 29-30 October 2015 with participation of high-level competition officials from more than 100 delegations worldwide. The main objectives of GFC are dissemination of the OECD experience and best practices, exchanging views with non-members and creating larger networks of government officials that are familiar with the OECD work³⁷.

Apart from the GFC, the Competition Committee of OECD has been engaged in

32. Directory of Bodies of the OECD, OECD Publishing 2012, p. 237 – 239.

33. F. Jenny, *International cooperation on competition: myth, reality and perspective*, Antitrust Bulletin; Winter 2003, Vol. 48, Issue 4, p. 981.

34. D. Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 37 (2007), p. 97.

35. Directory of Bodies of the OECD, OECD Publishing 2012, p. 242.

36. *Ibidem*, p. 243.

37. <http://www.oecd.org/competition/globalforum/abouttheglobalforumoncompetition.htm> (accessed 05/04/2016).

creation of two regional centres and one regional forum for competition:

1. OECD-GVH Regional Centre for Competition in Budapest is a joint venture between the Hungarian Competition Authority (GVH) and the OECD. It was created in February 2005 and the role of the Centre is to expand the OECD's work on competition in the Central, East and South-East European regions³⁸;
2. OECD/Korea Policy Centre is a joint venture between the Korean government and the OECD. Opened in May 2004, the Centre works with competition authorities in the Asia-Pacific region to develop and implement effective competition law and policy. The Centre provides a hub for competition officials from Asia-Pacific countries to meet regularly to exchange experiences and deepen their capacities in competition law and policy through workshops, seminars and other events³⁹;
3. Latin American Competition Forum has been established in April 2003 by the Inter-American Development Bank and the OECD as a joint effort to foster effective competition law and policy in Latin America and the Caribbean. After years of work in the region, the Forum came as a concrete means for the two organisations to promote dialogue, consensus building and networking among policy makers and enforcers⁴⁰.

Historical developments in the area of competition law and policy driven by the OECD

The role of the OECD has been changing considerably during almost six decades of Organisation's history. Undoubtedly, the OECD may be described as the pioneer of developing international cooperation and standard setting in the area of competition law and policy. The Organisation has never been involved in administrative cooperation not to mention decision making process. The OECD played its leading role in 70's and especially in 80's. The last two decades may have been marked as the decline of the influential role of the Organisation. The OECD became one of many international networks active in competition protection with its distinctive role as a place for sophisticated deliberations between top rank officials from national competition authorities (NCA's) and highly respected reports.

Competition protection is not expressly mentioned in the OECD Convention of 1960. However, since the very beginning, the lack of protection of competition has been recognized as one of the principal obstacles in international trade

38. <http://www.oecd.org/daf/competition/oecd-gvhregionalcentreforcompetitioninbudapest.htm> (accessed 05/04/2016).

39. <http://www.oecd.org/daf/competition/oecdkoreapolicycentrecompetitionprogramme.htm>.

40. <http://www.oecd.org/competition/latinamerica/aboutthelatinamericancompetitionforum.htm>.

and one of the most frequent delicts committed by multinational undertakings. Therefore, the OECD has begun to take a leading role in setting international standards in competition law and policy. Competition protection has often been part of wider projects undertaken by the OECD. Such a pattern shows the desire of the Organization to take a comprehensive approach to identified problems. Moreover, from the very beginning the OECD put an emphasis on cooperation in competition law matters which is visible in its recommendations. Additionally the period of 70's and 80's may be seen as a time of "rivalry" between the OECD and the UNCTAD on the primacy in relation to adoption and proliferation of commonly agreeable rules on competition law. The pioneer role of the OECD in developing international competition rules may be seen both in relation to mergers and cartel enforcement.

In 1967 the OECD adopted recommendation⁴¹ which was the first document adopted on international level that served as a basis for cooperation in merger control and cartel cases between states⁴². This recommendation advised member states to notify each other whenever important interest of the other country may be affected by the result of the investigation. The envisaged cooperation tools involved as well consultation on competition enforcement, consideration of other members' significant national interests, cooperation in enforcement, or consideration of other members' requests to investigate anticompetitive practices taking place in the requested parties' jurisdiction. The Recommendation of 1967 (together with its following revisions) was the first to introduce the principle of negative comity into international competition rules⁴³. Under this principle states should avoid conflict in applying their domestic laws in a way that may adversely affect the other jurisdiction. The 1967 Recommendation had another important benefit for member states and other countries. It served as the model for bilateral or multilateral international agreements on cooperation in competition cases⁴⁴. This was important because the Recommendation may have served as a basis for cooperation for the OECD members and by the fact that it was taken as a model, the scope of influence of the Recommendation was widened.

Second important recommendation in the area of competition cooperation was the Recommendation Concerning Consultation and Conciliation Procedure on Restrictive Business Practices Affecting International Trade which was adopted in 1973⁴⁵. Together with the previous Recommendation they both constitute historical achievement of the OECD because those Recommendations

41. Recommendation of the Council of 5th October 1967 Concerning Co-Operation Between Member Countries On Anticompetitive Practices Affecting International Trade [C(67)53(Final)].

42. F. Jenny, *International cooperation on competition: myth, reality and perspective*, Antitrust Bulletin; Winter 2003, Vol. 48, Issue 4, p. 995.

43. H. Buch-Hansen, A. Wigger, *The Politics of European Competition Regulation. A critical political economy perspective*, Routledge, London – New York 2014, p. 120.

44. T. Winslow, *OECD competition law recommendations, developing Countries, and possible WTO competition rules*, [2001] OECD Journal of Competition Law and Policy, Volume 3, No. 1, p. 119.

45. C(73)99(Final).

provided framework for cooperation between countries in competition cases⁴⁶. Both Recommendations are described as the first generation of the OECD recommendations⁴⁷. To some extent they constituted a response to a 1960 Report of a General Agreement on Tariffs and Trade of group of experts expressing growing concern over United States extraterritorial application of antitrust laws. Recommendations of 1967 and 1973 were based upon the principle of traditional comity, notification of investigations which may affect interests of other state, calls for coordination in procedures against the same anticompetitive business practices, and information sharing⁴⁸.

Apart from efforts to boost cooperation, the OECD made efforts to adopt standards as regards substantive rules. Good example in this respect is OECD Guidelines for multinational enterprises, first adopted in 1976 (and subsequently amended in 1979, 1982, 1984, 1991, 2000 and 2011). Competition rules form one out of nine sets of rules of business ethics that should be followed by multinational corporations. The guidelines of 1976 for multinational enterprises were adopted by the OECD in a desire to stay ahead of the UNCTAD. They reflected the position of developed western economies on the conduct of multinational corporations including the antitrust rules. They were intended as a mean of persuasion before negotiating the UN rules on foreign investments⁴⁹. This political agenda should not diminish the achievement of the OECD. The Guidelines of 1976 were the first document establishing common rules for antitrust law adopted by any international body⁵⁰. Even though the guidelines were not a perfect document, they had important persuasive and educational value and resulted in increased cooperation between competition officials from the OECD countries⁵¹.

In the beginning of 70's the United Nations put competition policy on the agenda. This was an attempt to give a new direction to international economic relations and to find a compromise between interests of developing countries with competition law. Consequently, UNCTAD adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices. However, the document proved to have been ineffective. As a result major industrial countries turned to the OECD to take the lead in internationalization of competition policy in line with the interests of developed countries⁵². In consequence, the OECD has dominated debates on competition policy at the international level since the 1980s. Unfortunately, this domination

46. B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level*, Hart Publishing, Oxford – Portland 2002, p. 53.

47. Ch.W. Smitherman III, *The Future of Global Competition Governance: Lessons From the Transatlantic*, American University International Law Review 19, no. 4 (2003), p. 839.

48. Ibidem.

49. J. Davidow, *International Antitrust Codes and Multinational Enterprises*, 2 Loy. L.A. Int'l & Comp. L. Rev. 17 (1979), p. 19.

50. B.E. Hawk, *The OECD Guidelines for Multinational Enterprises: Competition*, 46 Fordham L. Rev. 241 (1977), pp. 244-245.

51. Ibidem, p. 275-276.

52. I. Maher, *Competition Law in the International Domain: Networks as a New Form of Governance*, Journal of Law And Society, Volume 29, Number 1, March 2002, p. 122.

brought only two set of guidelines adopted on hard core cartels⁵³ and MNE's (Multinational Enterprises)⁵⁴ which may be seen as a very moderate success⁵⁵.

The OECD was also the first IO who fully grasped incoming problem of proliferating merger control systems with increasing number of transnational concentrations which resulted in multiple mergers filings around the world. In the beginning of 90's, the Organisation prepared a report⁵⁶ which became the basis for future activities in this field. The Whish/Wood report has evoked strong impulses for the reform of merger enforcement laws worldwide⁵⁷. However, activities taken by the OECD proved to have been a very moderate success and it took many years for the OECD to develop common position on merger control. Moreover, despite a positive initial reception, most of these recommendations have been ignored in the OECD works⁵⁸. As a result of discussions influenced by the report, next report was adopted in 1999⁵⁹ but it contained only small part of proposals formulated in the Wish/Wood report. The report of 1999 contained the proposal for a universal notification form. Despite efforts of the OECD there is no proof that any jurisdiction used this form in practice. Somehow disappointing may be the fact that, the OECD recommendation on merger review has been adopted 11 years after the Wish/Wood report.

The evaluation of practical impact of recommendations is not straightforward. There are voices that the OECD recommendations have not created significant compliance among OECD members and that nonbinding nature of the recommendations based on the OECD's institutional capacity did not create an incentive for countries to undertake their implementation⁶⁰. However, such a strong criticism is only partially justified as it ignores the fact that recommendations prepared by the OECD set only minimum standards as regards substantive competition rules. Those substantive standards are not so difficult to reach even in different domestic regulatory settings (like US and EU). Furthermore, the available data suggests that notification system introduced by the OECD Recommendation on cooperation proved to have been quite effective⁶¹. Nonetheless, the relevance of mentioned act and following recommendations on cooperation decreased together with increasing cooperation based on bilateral cooperation agreement (notably 1991 EU/US Competition Cooperation

53. C(86)65(Final).

54. Adopted on 18 May 1984 - <http://www.oecd.org/daf/inv/mne/50024913.pdf>.

55. I. Maher, *Competition Law in the International Domain: Networks as a New Form of Governance*, Journal of Law And Society, Volume 29, Number 1, March 2002, p. 122.

56. D. Wood, R. Whish, *Merger cases in the real world: A study of merger control procedures*, OECD Publishing, Paris 1994.

57. J.Ph. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Springer-Verlag, Berlin Heidelberg 2011, p. 18.

58. Merger Streamlining Group, "Best Practices for the Review of International Mergers," prepared in Sept. 2001, in Global Comp. Rev., Oct./Nov. 2001, available at <http://www.mcmillanbinch.com/mergerstreamlininggroup.html> (accessed 06/04.16), p. 10.

59. Report on Notification of Transnational Mergers, DAFFE/CLP(99)2/FINAL.

60. D. Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 37 (2007), p. 47.

61. B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level*, Hart Publishing, Oxford – Portland 2002, pp. 78 - 79.

Agreement).

It is interesting to note the evolution of goals and means of activity of the Competition Committee. It shows that the OECD is capable of changing and replacing ineffective instruments with better ones. In 70's and 80's the OECD's Committee devoted to competition law had ambitious goals which were hardly feasible to achieved or the execution proved to have been ineffective. First, the Committee was obliged to undertake periodical examinations of national laws. However, those examinations were found to large extent inaccurate. They were conducted by each member itself and served on many occasions nor for evaluation but for justification⁶². Second, working together within the Committee members states aimed at preparing common reports on substantive issues of competition law. However, it turned out to be time consuming and hardly possible to agree on common understanding and approach towards various substantive issues. It resulted in a situation where number of reports was relatively small and covered limited issues. To address those issues the Competition Committee ceased to publish yearly reports on competition law and policy in the OECD countries and replaced it with in depth peer reviews of selected jurisdictions. Those reviews are not limited to competition issues but put in a wider agenda of regulatory change. The evaluation of particular jurisdiction is made by an independent OECD civil servant or consultant. At later stage the member state may discuss findings and recommendations during open proceedings in the Committee. This change has increased value of reports which allow them to be much more influential tool⁶³. During 1990's some NCAs deliberately used the peer review system of the OECD to advocate for domestic reforms (or avoid implementing reforms which may underline effectiveness of NSA's activities)⁶⁴. Furthermore, the OECD moved from adopting collective reports to producing roundtable documents combining background papers prepared by the OECD Secretariat with national contributions. Such a change increased efficiency of Competition Committee works. Instead of agreeing on common position the Committee simply presented the issue and different national approaches. The change has increased productivity of the OECD Committee immensely allowing it to organize several roundtables per year and later publish results⁶⁵.

In the 90's the OECD adapted institutionally to analyse the subject of intersection of competition and trade policies. In 1996 the Competition Committee established Joint Group on Trade and Competition (JGTC)⁶⁶. The goal of the group was to strengthen coherence between trade and competition policies. The relevance of the topic is highlighted by the fact that at the same time the WTO established the Singapore Group with similar agenda. JGTC worked until 2006 when its mandate was not renewed. The achievements of the JGTC were moderate even though it was regarded as an important forum in 1990's in studying possible

62. F. Jenny, *International cooperation on competition: myth, reality and perspective*, Antitrust Bulletin; Winter 2003, Vol. 48, Issue 4, p. 987.

63. *Ibidem*, pp. 987-988.

64. *Ibidem*, p. 983.

65. *Ibidem*, p. 987.

66. Directory of Bodies of the OECD, OECD Publishing 2006, p. 203 – 204.

directions in internationalization of antitrust⁶⁷. It organised numerous meetings and produced several background papers and reports. However, no official recommendations were agreed since the Group could not come to any consensus on many important issues of market access⁶⁸.

Described efforts of the OECD show that the Competition Committee had its inherent limitations. It is argued that it has worked efficiently as a forum for promoting soft convergence of competition policies among its members and for providing technical assistance to certain OECD observers and non-members. On the other side however, the Committee has not achieved much success in rulemaking or dispute settlement. Achieved convergence was also more in terms of understandings and principles than in terms of rules, processes, and practices⁶⁹. JGTC is not the only project of the Competition Committee that did not lead to any conclusive results. The same is true for the Convergence Steering Group. The Group was formed in December 1992 and it aimed at reaching consensus among the OECD countries where convergence in laws and practice had been reached, where it was likely to be achieved and where convergence was very unlikely to be reached⁷⁰. Despite achievements in bringing competition laws of the OECD countries in line, there is no evidence that this particular institutional convergence endeavour brought any formal results. However, the reasons for these failures may lie outside the OECD itself.

When analysing historical developments in shaping competition laws and the role of the OECD in this process one should be aware of the fact that the OECD did not exist in political vacuum and that the member countries had their own agendas which had significant impact on the Organisation itself. As it was already indicated, in 70's the OECD was used by developed countries to counterbalance the efforts of the UNCTAD to prepare agreement on international antitrust rules. The same was true in 90's where the OECD was used by the US as an alternative for WTO efforts to achieve agreement on international antitrust rules. Commentators point that in 1990's the US and Japan preferred the OECD to the WTO as a place where major discussions about international antitrust should take place. In that view the OECD with a moderate, consensus based approach would slow down the process of adopting international competition rules⁷¹. Additionally, mid of 90's was a time of political struggles within the OECD between the US and the EU⁷². However, at some point the US switched

67. M.H. Dabbah, *International and Comparative Competition Law*, CUP, Cambridge 2010, p. 135.

68. D. Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 37 (2007), p. 80.

69. M.-L. Djelic, Th. Kleiner, *The International Competition Network – Moving Towards Transnational Governance*, in: M.-L. Djelic and K. Sahlin-Andersson (eds.), *Transnational Governance. Institutional Dynamics of Regulation*, CUP, Cambridge 2006, p. 297.

70. G.B. Doern, *Internationalisation of Competition Policy*, in: G.B. Doern, S. Wilks (eds.), *Comparative Competition Policy. National Institutions in a Global Market*, Clarendon Press, Oxford 1996, p. 315.

71. S.W. Weller, *The Internalization of Antitrust Enforcement*, Boston Univ. Law Review 1997, Vol. 77, p. 391.

72. G.B. Doern, S. Wilks, *Conclusions*, in: G.B. Doern, S. Wilks (eds.), *Comparative Com-*

its preference and it opted for creation of new competition forum which turned out to be International Competition Network⁷³. The establishment of the ICN in 2001 came as a surprise⁷⁴ for the OECD since in the same year the OECD Global Competition Forum has been erected which initially had similar goals as the ICN. These short historical observations point to some limits which are inherent to any IO and which should be kept in mind when evaluating such organisations.

When pursuing an assessment of historical achievements of the OECD in the area of competition law and policy one should agree that the OECD established excellent forum for regular meetings between NCA's officials, publication of high quality legal, economic and political studies, preparation of voluntary guidelines for multinational enterprises, as well as adopting recommendations on international cooperation in competition matters⁷⁵. Thanks to facilitation of contacts and cooperation between national regulatory officials the Committee promoted voluntary convergence⁷⁶. The OECD continues those activities, though they receive much less appeal nowadays than they used to in the past.

Current activities of the OECD in the area of competition law and policy

The OECD is active in various areas of competition law and policy. The most important field is adoption of soft law instruments. It is a standard setting exercise resulting in emphasis on convergence and cooperation. Even though soft law instruments do not have binding effect, they put some pressure on member states and are persuasive for the public. In a similar way, the OECD influences member states and other jurisdiction by publishing papers and reports⁷⁷. High quality and broad scope of papers issued by the Organisation make the OECD a unique source of such analysis. Each report presents contributions from various states together with a background analysis prepared by the OECD experts. Apart from a general influence, the OECD may individually encourage particular jurisdiction when conducting a peer review. Such review is conducted through the prism of a particular theme or has a general character. To overcome the basic barrier for the OECD's activities resulting from limited membership, the Organisation initiates various outreach programmes and offers technical assistance to non-member states. It is an important task even if limited in scope given budgetary restraints

petition Policy. National Institutions in a Global Market, Clarendon Press, Oxford 1996, p. 338.

73. H. First, *Evolving toward What? The Development of International Antitrust*, in: J. Drexler (ed.), *The Future of Transnational Antitrust – From Comparative to Common Competition Law*, Kluwer Law International, The Hague – London – New York 2003, pp. 33 – 41.

74. T. Winslow, *The OECD's Global forum on Competition and Other Activities*, 16 *Antitrust* 38 (2001), p. 39.

75. S.W. Weller, *The Internalization of Antitrust Enforcement*, Boston Univ. Law Review 1997, Vol. 77, p. 361.

76. D.K. Tarullo, *Norms and Institutions in Global Competition Policy*, AM. J. INT'L L. 479 (2000), p. 495.

77. For example: *Trade and Competition Policies. Options for a Greater Coherence*, OECD Publishing, Paris 2001, [DOI:10.1787/9789264192492-en](https://doi.org/10.1787/9789264192492-en) or *Issues for Trade and Competition in the Global Context*, OECD Journal of Competition Law and Policy, 2003, Volume 5 Issue 3, [DOI:10.1787/clp-v5-art10-en](https://doi.org/10.1787/clp-v5-art10-en).

of the OECD. Finally, an administrative assistance and jurisdictional disputes settling should be mentioned. At some point, the OECD offered member states conciliation procedure to settle any disputes arising from cooperation. However, there is no evidence that it has ever been used in practice.

Recommendations and other soft law instruments

The OECD has adopted many recommendations and other soft law documents in the area of competition law. The Competition Committee points at nine such documents that are of special relevance⁷⁸:

1. 1979 - Recommendation on Competition Policy and Exempted or Regulated Sectors. The oldest recommendation that is still applicable. It was adopted under different political and economic conditions when only few jurisdictions had relevant competition laws. The main goal of this Recommendation is to limit number of sectors exempted from competition law scrutiny. It calls upon governments to empower NCAs to effectively present their opinions and take part in the legislative process whenever legislative proposals regarding such exemptions are debated.
2. 1998 - Recommendation concerning Effective Action Against Hard Core Cartels. The Recommendation sets minimum standards in relation to fighting hard core cartels by the international community. It focuses on effectiveness of laws prohibiting hard core cartels and international co-operation and comity in enforcing those laws. Despite the wording of section A of the Recommendation it actually does not touch the problem of convergence among member states regarding anti hard core cartel legislation.
3. 2005 - Recommendation on Merger Review. The Recommendation offers a set of general principles on design of merger control regime. It covers four substantive sections on notification and review procedures, co-ordination and co-operation, resources and powers of competition authorities and periodic review of merger control legislation.
4. 2005 - Best practices on Information Exchange. Best practices are non-binding document adopted in attempt to provide detailed guidelines on procedure of exchanging information between NCAs during investigations against hard core cartels. They are based on two Council Recommendations (Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade and Concerning Effective Action Against Hard Core Cartels). Contrary to OECD recommendations which are general, best practices are very specific.
5. 2005 - Guiding principles for Regulatory Quality and Performance. This

78. All documents are listed and available at <http://www.oecd.org/daf/competition/recommendations.htm>.

document is part of wider OECD agenda concerning regulatory reform and it is not competition specific. It invokes ideas developed in OECD recommendations and reports on regulatory reforms⁷⁹. The document presents principles with short commentaries on how regulatory reform should be performed.

6. 2009 - Recommendation on Competition Assessment. The Recommendation continues the OECD's effort to restrict or even eliminate legislation which unduly and adversely affects competition and is a part of the OECD agenda on the regulatory reform. It *calls for governments to identify existing or proposed public policies that unduly restrict competition and to revise them by adopting more pro-competitive alternatives*. The Recommendation is assisted by the Competition Assessment Toolkit⁸⁰ which provides for very detailed guidelines on assessment of existing and proposed national legislation through the prism of its effect on competition.
7. 2012 - Recommendation on Fighting Bid Rigging in Public Procurement. The Recommendation calls for improvement of procurement laws and their enforcement in member states. The document deals with assessment of various features of national public procurement laws and practices and their impact on the likelihood of collusion between bidders. It recommends member states to raise awareness of possible dangers to bidding process and educate officials engaged in public procurement. The Recommendation highlights issues elaborated in more details in the OECD Guidelines for Fighting Bid Rigging in Public Procurement⁸¹.
8. 2014 - Recommendation concerning International Co-operation on Competition Investigations and Proceedings. The latest Recommendation touches upon the issue of cooperation in competition investigation. It replaces and develops the previous 1995 Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices affecting International Trade. This is probably a recommendation of the most practical value for competition agencies.
9. 2016 - Recommendation concerning Structural Separation in Regulated Industries. The Recommendation asks member states to consider structural separation in regulated industries. Furthermore it calls for a careful evaluation of pros and cons of separating the structure of a regulated firm's activities. The Recommendation is a part of the OECD agenda on the regulatory reform.

79. See Recommendation on Improving the Quality of Government Regulation of 1995 [C(95)21/FINAL] and Report on Regulatory Reform of 1997 [C/MIN(97)10 (summary) and C/MIN(97)10/ADD].

80. Available at <http://www.oecd.org/daf/competition/assessment-toolkit.htm>. To show how much value is put on this tool the OECD offers the Toolkit in 17 languages.

81. Guidelines are more detailed and they are available in 24 languages - <http://www.oecd.org/daf/competition/guidelinesforfightingbidrigginginpublicprocurement.htm>.

Apart from those documents there are five other recommendations in the area of competition policy which are somehow forgotten and yet they remain in force. Those are as follows: 1) 1971 Recommendation of the Council concerning Action against Inflation in the Field of Competitive Policy; 2) 1978 Recommendation of the Council concerning Action against Restrictive Business Practices relating to the Use of Trademarks and Trademark Licences; 3) 1978 Recommendation of the Council concerning Action against Restrictive Business Practices Affecting International Trade Including those Involving Multinational Enterprises; 4) 1986 Recommendation of the Council for Co-operation between Member Countries in Areas of Potential Conflict between Competition and Trade Policies; 5) 1989 Recommendation of the Council concerning the Application of Competition Laws and Policy to Patent and Know-How Licensing Agreements. It is fair to say that it is not surprising that the Competition Committee does not really advertise those documents. They constitute a set of examples of a living history of hot topics in competition policy like: inflation, trademarks or crossroads of competition and trade policies. Some of those issues remain relevant but they gained a completely new dimension over the years – the best example is patents and competition policy. At the same time they emphasize that the OECD fails to deliver new recommendations that would address current relevant issues like online restrictions to trade or new wave of protectionism versus competition policy. Some may claim that it was easier to adopt recommendations in 70s or 80s but it still id does not fully explain why the OECD does not even try and simply resigns from taking more active role in shaping the global antitrust.

When analysing recommendations some further general conclusions may be reached. Most of recommendations focus on procedural aspects of cooperation or active involvement of NCAs in legislative process. To some extent the scope of application of several recommendations partially overlaps. The same is true for overlapping with best practices issued by the ICN - in many cases the ICN recommendations touch similar issues to those raised in the OECD recommendations. This may diminish an appeal and influence of the OECD recommendations especially because it is argued that the ICN best practices have wider implementation than OECD relevant recommendations⁸². Furthermore, some of the OECD recommendations were clearly inspired by the ICN. For example, the OECD responded to the ICN's Recommended Practices by issuing its own Recommendation Concerning Merger Review. What is interesting is that the OECD Recommendation duplicates many of ICN's proposals. It is explained by the occurrence of mutually reinforcing recommendations. It may also result from the OECD's desire to continue to be seen as relevant in this area where the ICN has taken the lead in policy implementation and where previously the OECD monopolized policy initiatives⁸³. Similar observations may be, at least partially true, for the OECD Recommendation on cooperation of 2014.

Not surprisingly, the OECD recommendations focus on procedures and there is

82. D. Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 37 (2007), p. 114.

83. *Ibidem*.

not so much about the substance – in the latter area it is more difficult to reach consensus than with regard to cooperation. Recommendations generally concern issues where the compromise is relatively easy to reach – for example the OECD Council adopted recommendations on hard core cartels but there are no specific recommendations on other types of anticompetitive practices. Recommendations are quite general and use very broad language. Such desistance from proposing more specific rules opens them to different interpretations⁸⁴. As a result only less formalized OECD documents like best practices or reports offer more concrete proposals.

Finally, many recommendations cover topics which are only indirectly related to antimonopoly law, like for example regulatory reform or public procurement rules. This surely offers broader perspective even though factual application of such recommendations usually lies outside NCAs' competences. Nonetheless, the OECD's effort to encourage NCAs' to measure their performance is as important for the competition agencies as for the national governments⁸⁵. The same applies to another important OECD project i.e. application of competition assessment toolkit⁸⁶. This suggests that those recommendations should be reflected upon by ministries of economies and not only by the NCAs.

To remedy some of observed deficits of the OECD recommendations the Competition Committee scheduled a review of existing legal documents for 2017. There is a chance to abrogate some of older recommendations and update the remaining rest. This review will also show how members of the Committee view usefulness and applicability of existing recommendations and which are a really value added for the work of competition agencies and governments. There is also a chance that following the review, some new recommendations will be discussed. It will be good indicators to see what are the priorities of the OECD and where the Organisation sees its role as a facilitator of developments of competition laws and cooperation between agencies.

Papers and reports

Apart from formal soft law documents the OECD is highly regarded for its papers. The OECD Competition Committee periodically holds meetings where member states together with observers and invited guests are present. Such meetings serve as fora for discussions, exchanges of views and analysis on competition policy issues. Every such meeting is prepared in advance by the Secretariat. There is a background paper and short list of points that should be addressed by participants to the meetings. All participants are invited to send their submissions which are further discussed during the meeting. The OECD

84. It is especially visible when comparing recommendations prepared by the OECD with those adopted by the ICN.

85. More details on evaluation of competition interventions see <http://www.oecd.org/daf/competition/evaluationofcompetitioninterventions.htm> (accessed 08/04/16).

86. <http://www.oecd.org/daf/competition/assessment-toolkit.htm> (accessed 08/04/16).

does not take a position during discussions and stays with the role of facilitator inviting members of the Competition Committee as well as external experts to discuss current issues in competition law and policy⁸⁷. All papers and submissions are published within the Best Practice Roundtables on Competition Policy series. They constitute most valuable source of comparative analysis and review of the national practice in the various topics related to competition laws. There are around 200 papers published since 1995 that are available to public⁸⁸.

Peer reviews

Another important mechanism for development of national competition laws with the influence of the OECD are periodical peer reviews. Peer review is the systematic and reciprocal assessment of the performance of a member by other members, with the goal of helping the reviewed member to improve its policy-making and comply with OECD standards⁸⁹. The OECD conducts periodical in-depth country reviews with the focus on national competition laws and policies. These reviews assess how each country deals with competition and regulatory issues, from the soundness of its competition law to the structure and effectiveness of its competition institutions. All reviews are discussed in advance before the publication. They serve as an important tool for the alteration of domestic laws as they usually incorporate recommendations for changes in government policy⁹⁰. They give agencies a mandate to push for domestic change. A reviewed agency can return to its legislature with an OECD mandate to revise the structure of domestic antitrust system⁹¹. Peer reviews are considered to be a significant element of the OECD mechanisms that facilitate convergence among member states and observers upon superior substantive concepts and procedures⁹².

The success of peer review rests on its acceptance by the countries concerned⁹³. There are countries (like Finland or Canada) where recommendations made by the OECD are highly evaluated and present a strong voice in national debates⁹⁴.

87. M.H. Dabbah, *International and Comparative Competition Law*, CUP, Cambridge 2010, p. 140.

88. All documents are available at <http://www.oecd.org/daf/competition/roundtables.htm>.

89. N. Bonucci, G. Kothari, *Organization for Economic Cooperation and Development*, Max Planck Encyclopedia of Pub. Int'l L.

90. All country reports since 1998 are available at <http://www.oecd.org/competition/countryreviewsofcompetitionpolicyframeworks.htm>.

91. D. Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 37 (2007), p. 99.

92. H.M. Hollman, W.E. Kovacic, *The International Competition Network: Its Past, Current and Future Role*, in: P. Lugard (ed.), *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, Intersentia, Cambridge – Antwerp – Portland 2011, p. 67.

93. N. Bonucci, *The OECD at fifty: some observations on the evolving nature of an international organization*, 2011 The Geo. Wash. Int'l L. Rev., Vol. 43, p. 245.

94. P. Alasuutari, L.A. Pal, *The OECD as an International Referent in National Policy Debates: Comparing Canada and Finland*, Paper to 18th NISPAcee Annual Conference, available at www.nispa.org (accessed 05/04/2016)

Unfortunately, Poland may serve as an example of a country which almost completely ignores the OECD recommendations in the area of competition law. For example, the OECD economic survey of 2014 formulated four recommendations in relation to the Polish competition policy: 1) strengthening of independence of Polish competition authority; 2) empowering of the Polish competition authority to enforce structural remedies in relation to dominant companies operating in network industries; 3) accelerating competition litigation and improving functioning of competition courts; 5) abolishing barriers for class action cases of competition breaches⁹⁵. The current OECD study suggests the second recommendation has been implemented and no action has been taken in relation to the remaining recommendations⁹⁶. However, the OECD evaluation is only partially true. The amendment of the Polish competition act which entered into force on 18 January 2015 introduced possibility to implement structural remedies. Nonetheless, the scope of application of this possibility is much narrower than suggested by the OECD. Despite the recommendation the Polish competition authority is precluded from enforcing structural remedies after conducting market studies. Structural remedies may be offered only after conducting full antimonopoly proceedings as a part of the decision concluding the abuse of dominant cases. Furthermore, not only the OECD recommendations have not been implemented but Poland has repeatedly undertaken practices which were openly criticized by the OECD⁹⁷. Therefore it should not come as a surprise that Poland has never acknowledged any influence from the OECD in relation to changes of legislation in the area of antimonopoly law. The analysis of narrative memorandums which provide justifications for legislative changes in Poland proved that none of the amendments or drafts of competition acts pointed at the OECD as any of the sources inspiring legislative changes⁹⁸.

When analysing treatment of the OECD conclusions from peer reviews in the area of competition law by particular countries, internal domestic politics seem to play important role. On the one hand, agencies are eager to use recommendations to gain more powers, independence or budget (recent case of Denmark⁹⁹). On the other hand, governments use recommendations to gain credibility for the proposed legislative or structural changes in competition policy on national and international levels (recent case of Russia¹⁰⁰). However, the effectiveness of recommendations is measured by the perception of the OECD and willingness of

95. OECD. (2014), *OECD Economic Surveys: Poland 2014*, OECD Publishing, Paris, http://dx.doi.org/10.1787/eco_surveys-pol-2014-en, pp. 131 -132.

96. OECD. (2016), *OECD Economic Surveys: Poland 2016*, OECD Publishing, Paris, http://dx.doi.org/10.1787/eco_surveys-pol-2016-en, p. 56.

97. For example: removing the heads of the Polish competition authority unexpectedly and with no justification given twice in a row in 2014 and 2016.

98. It is especially surprising as many changes introduced to the Polish competition law after 1997 (date of accession of Poland to the OECD) have been in line with OECD guidelines. Instead of OECD guidelines, best practices or recommendations narrative memoranda usually point at the EU and US law and own experiences of Polish competition authority.

99. *Danish antitrust sanction powers should increase, OECD recommends*, <http://www.parr-global.com> (accessed 08/04/16).

100. *The President of Russia approved the forth antimonopoly package*, http://en.fas.gov.ru/news/news_34706.html (accessed 08/04/16).

the government to follow them. Should particular government decide to ignore recommendations, they become a futile effort of the OECD (case of Poland).

Technical assistance and outreach programmes

In the beginning of 90's, together with the collapse of communism in Europe, the OECD initiated outreach programme in competition law which has at its core a capacity building programme. The programme was addressed to non-member states of the OECD. Initially it focused on Poland, Hungary, and then Czechoslovakia. Later it rapidly expanded to include the former Soviet Union and other Eastern European economies. On the basis of the programme, regular co-operation with Latin American economies began in 1994, with Korea in 1997 and with Republic of China (Taiwan) in 1999¹⁰¹. The programme consisted of workshops for competition law enforcement officials, government officials involved in regulating natural monopoly sectors, and other officials involved in competition policy issues. In addition, the OECD has provided comments on draft laws, regulations and guidelines¹⁰². At present, the OECD outreach activities concentrate on Southeast Asia and Latin America. Special enhanced cooperation is provided to Key Partners of the OECD. The continuations of the outreach programme are regional OECD centres for competition law in Hungary and Korea and the forum for Latin America. Analysis of undertaken outreach efforts by the OECD in the area of competition law through the prism of geography shows that the OECD is an important source of inspiration and possible reforms for regions with less developed competition culture like post Soviet countries, South America or Southeast Asia.

Administrative assistance and jurisdictional disputes settling

The OECD does not provide its members with direct administrative assistance in handling competition cases. However, the organisation adopted several recommendations in 1967, 1973, 1979, 1986, 1995 and 2014 which created legal framework for cooperation among competition agencies in providing administrative assistance. Such assistance varies in form depending on the stage of proceedings. At the first stage when proceedings are initiated OECD recommends to inform other jurisdictions who may be affected by the proceedings. At the later stage, countries should inform each other if they conduct evidence proceedings in other jurisdictions. It is common in competition cases that agencies send requests for information to undertakings established in other jurisdictions. When the evidence gathering is completed, the OECD recommends exchanging evidence when needed (however, there remain a difficulty in exchanging of confidential information). None of the OECD recommendations allows for such transfer. Best practices issued by the OECD

101. T. Winslow (2002), Latest Developments in International Competition Law/Policy, www.jftc.go.jp/eacpf/WinslowOECD.pdf (accessed 04/04/2016).

102. Ibidem.

in this area¹⁰³ discuss this issue in detail and refer member states to their own evidence rules and usually require the consent from the undertakings for such exchange (waivers of confidentiality). The OECD Best Practices provide for the procedural safeguards for formal exchange of information, in particular they contain detailed provisions concerning confidentiality, use, and disclosure of the information in the requesting jurisdiction¹⁰⁴. It is worth noting that, the system of mutual notification established by the OECD's recommendation proved to have been quite efficient during the last four decades but its role and significance evolved and decreased¹⁰⁵. At present, it is especially relevant for notification of request for information sent by an NCA to an undertaking in a foreign jurisdiction.

Last but not least, the OECD used to provide a forum for dispute resolution ('conciliation') which was foreseen by the Recommendation of 1995 on Cooperation between Member Countries on Anticompetitive Practices and preceding recommendations. However it has never been used in practice. Therefore the new Recommendation on cooperation of 2014 put emphasis on providing a common legal playground for cooperation and coordination of competition law enforcement without any mechanism for conciliation.

The OECD in the patchwork of networks and IOs engaged in the competition law

The OECD remains the oldest and the most developed (in the terms of staff and work product) of IOs and networks active in the field of competition law. After establishment of the OECD, several other entities have been erected. The institutional landscape has substantially evolved and the OECD has become one of many international bodies active in the field of competition law and policy. Therefore, it is necessary to briefly introduce other IOs and networks and present their achievements in the said field. It will give a complete picture of the patchwork of emerging worldwide organizations active in the field of competition law and enforcement and will make it possible to show distinctive features and the role of the OECD in this institutional landscape. The order of presentation will be chronological.

First IO which should be mentioned is United Nations Conference on Trade and Development (UNCTAD). It was created in Geneva in 1964 as an intergovernmental forum for North-South dialogue and negotiations on issues of interest to developing countries for providing analytical research and policy advice on development problems. UNCTAD is a horizontal IO and competition law is only one of many areas of its interest. What is most distinctive for

103. Best practices on Information Exchange of 2005.

104. M. Błachucki, S. Józwiak, *Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights*, Yearbook of Antitrust and Regulatory Studies, Vol. 2012, 5(6), p. 153.

105. B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level*, Hart Publishing, Oxford – Portland 2002, p. 78.

UNCTAD, is its ultimate goal, i.e. assistance to developing countries. However, UNCTAD has undertaken initiatives aimed at development or even establishing universal competition rules. The efforts of UNCTAD led to adoption of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (the Set)¹⁰⁶. The Set is not legally binding and it constitutes only a recommendation. The adoption of the Set and its further interpretation led to disagreement between developed and developing countries. Even though, there are suggestions that the Set may serve as an inspiration for the spontaneous (through customary international law) or organized (through an international antitrust agreement) emergence of a global antitrust regime¹⁰⁷, most of the researchers agree that its practical influence has been very limited¹⁰⁸.

Second important IO active in the field of competition law is the WTO - World Trade Organization. It is an international organization whose primary purpose is to eliminate barriers to international trade which should be beneficial to all countries. WTO's main objective is the free, fair and uninterrupted international trade based on the equality of its members and their sincere cooperation in settling their disputes. It is the forum for governments to negotiate trade agreements like GATT. Soon after the creation of WTO the Working Group on the Interaction between Trade and Competition (so called Singapore Group) was formed. The group delivered several reports and prepared the ministerial declaration on inclusion of competition law into WTO's agenda. Some commentators believed that the WTO is an objective decision making organisation staffed with professionals and representing greater array of interest is better placed forum to adopt common rules on competition law than the OECD¹⁰⁹. However, the failure of Cancun round of negotiations within WTO in 2003 has eliminated the competition law from the WTO works. WTO failure in achieving any progress in establishing worldwide rules for competition law is explained by several factors¹¹⁰. First, specific nature of WTO constitute major obstacle to deal with this issue. The centralized mechanism of WTO governance leads to limitation of sovereignty of its members. Many jurisdictions were not prepared to do so in relation to competition law. Second, the WTO's dispute resolution mechanism is not designed to settle disputes in relation to competition law. Such disputes always involve private parties which does not fit into WTO mechanism¹¹¹. Furthermore it is argued that the WTO simply lacks the capacity to police purely private behaviour. Many international cartels operate without any government

106. UN Doc. TD/RPB/CONF 10/Rev.1., available at <http://unctad.org/en/docs/tdrbpconf10r2.en.pdf>.

107. I. Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, Tulane Journal of International & Comparative Law, Vol. 15, No. 2, 2007, p. 48.

108. O. Budzinski, *The Governance of Global Competition. Competence Allocation in international Competition Policy*, Edward Elgar, Cheltenham 2008, p. 142, A.S. Papadopoulos, *The International Dimension of EU Competition Law and Policy*, CUP, Cambridge 2010, p. 208.

109. A. Fiebig, *A Role for the WTO in International Merger Control*, 20 Nw. J. Int'l L. & Bus. 233 (1999-2000), p. 247.

110. M.H. Dabbah, *International and Comparative Competition Law*, CUP, Cambridge 2010, p. 128.

111. *Ibidem*, pp. 129 – 130.

restraints upon them, whereas the WTO can only be effective in those cases in which the government is somehow facilitating a private cartel through regulation or purposeful non-enforcement of anti-cartel laws¹¹².

Third international body that should be mentioned is the ICN – International Competition Network. It has been established on October 25, 2001 by top antitrust officials from 14 jurisdictions. The ICN is an informal virtual network consisting of competition agencies and non-governmental advisors (namely lawyers specializing in competition law, academics, and representatives from undertakings or other IOs). The ICN has no permanent structure and is a results-based, project-oriented organization. At the moment, the ICN comprises of 132 competition agencies from 119 jurisdictions¹¹³. ICN is solely devoted to competition law and has no other agenda. The network does not seek to establish any physical presence. Its works take place through internet, telephone, teleseminars and webinars. Members of the ICN meet at the workshops and annual conferences. The tasks within the ICN are divided between working groups (Advocacy, Agency Effectiveness, Cartel, Merger and Unilateral Conduct). The main outcome of the ICN constitutes recommendations, best practices, handbooks, practical guides, manuals, reports and official positions. The characteristic feature is that all the work products aim at having practical applications as are developed by competition agencies and for competition agencies. The ICN refrains from leading to any formally binding hard law documents like multilateral treaties. All its output has character of soft law or practical advice how to handle cases. The ICN offers assistance for younger agencies. Such assistance is always based on cooperation between two or more agencies as the ICN does not have its own staff. The establishment and functioning of the ICN is regarded as a success that has far surpassed the expectations and it fills the need for the global antitrust¹¹⁴.

To complete the picture of institutional landscape of cooperation in competition law enforcement regional and bilateral initiatives should be mentioned. Regional cooperation in competition law and policy takes various forms including formation of competition networks. The most advanced is probably the European Union with a set of common competition rules directly applicable in all member states. Additionally, in 2001 the European Competition Network has been established as a part of decentralization of European competition law with the intention of further convergence between member states and increasing cooperation between national competition agencies of the EU. Other regional networks active in the field of competition law include for instance COMESA¹¹⁵

112. D. Sokol, *Monopolists without Borders: The Institutional Challenge of International Antitrust in a Global Gilded Age*, 4 Berkeley Bus. L.J. 37 (2007), p. 92.

113. <http://www.internationalcompetitionnetwork.org/about.aspx> (accessed 24/04/16).

114. E.M. Fox, *Linked-In: Antitrust and the Virtues of a Virtual Network*, in: P. Lugard (ed.), *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, Intersentia, Cambridge – Antwerp – Portland 2011, p. 134.

115. COMESA – the Common Market for Eastern and Southern Africa is a free trade area with twenty member states from Africa. The Organization established COMESA Competition Commission which is a regional competition network. For more information see <http://www.comesacompetition.org/> (accessed 24/04/16).

or Nordic Co-operation¹¹⁶. Bilateral agreements are also common instrument of cooperation in the field of competition law¹¹⁷. The specific feature of the regional and bilateral agreements is that they provide the most far reaching instruments for administrative assistance such as possibility to exchange (even confidential) information, mutual assistance during administrative actions (like inspections) or mutual recognition of decisions (still very rare). It is easily understood because the countries entering in such agreements are usually confident about the legal standards of the other side and they are driven by their own national interest in following these agreements. However, bilateral agreements have their important and inherent limits. It is argued that bilateral agreements do not prevent different outcome of competition proceedings provided that there exist different legal systems, different procedures, different analyses of the same facts, and possibly different political perspectives¹¹⁸.

Quo vadis OECD?

To answer the question raised in the title of this section it is important to learn what are shared and distinctive features of the OECD vis a vis other IOs and networks active in the field of competition enforcement. Such comparison will point on those features of the OECD which are similar to other organisations and those where the Organisation is most regarded and unique. This may serve as a starting point to present possible development of the activities of the OECD in the field of competition law and policy.

When comparing the OECD to other IOs and networks some common and distinctive features may be observed. Neither UNCTAD, WTO, ICN nor the OECD provide for any decision making powers in relation to competition law. All those entities proved to be soft law organizations in relation to competition law. However, in comparison to OECD the output of UNCTAD or WTO is very limited in terms of number and quality of soft law and information documents that are produced. UNCTAD and WTO are driven by their overcoming objectives whereas the OECD remains the most horizontally oriented IO. The OECD is specific as it connects competition policy with other policy creating comprehensive regulatory framework for modern states. It distinguishes it from the ICN which is solely concentrated on competition law issues. Practitioners underline that the OECD provides the best forum for in-depth exploration and debate concerning substantive policy issues in comparison to other IOs or ICN¹¹⁹.

116. Nordic Co-operation is a regional network with seven Nordic members. For more information see http://en.samkeppni.is/competition_authority/international-co-operation/nordic-co-operation/ (accessed 24/04/16).

117. The most comprehensive list of such agreements is prepared by the OECD – see the OECD inventory of international co-operation agreements on competition <http://www.oecd.org/competition/inventory-competition-agreements.htm> (accessed 24/04/16).

118. M.-L. Djelic, Th. Kleiner, *The International Competition Network – Moving Towards Transnational Governance*, in: M.-L. Djelic and K. Sahlin-Andersson (eds.), *Transnational Governance. Institutional Dynamics of Regulation*, CUP, Cambridge 2006, p. 295.

119. H.M. Hollman, W.E. Kovacic, *The International Competition Network: Its Past, Cur-*

There are other important differences between other IOs and the OECD. WTO, UNCTAD and the OECD are intergovernmental organization whereas ICN is a forum of cooperation between the agencies. This formal distinction is somehow blurred by the practice of the OECD. The Steering Committee of the ICN which is the managing body of this network usually consists of members who are at the same time members or observers in the OECD Competition Committee. It is not uncommon that the meetings of the ICN Steering committee take place around the meeting of the OECD Competition Committee. This may suggest that activities of the ICN and the OECD may be *de facto* coordinated. The careful analysis of activities of both entities shows that they are in many areas complimentary. The ICN recommended practices for merger review of 2001 inspired the following recommendation for merger control of 2005 adopted by the OECD. Similarly, the 1998 OECD recommendation on the hard core cartels inspired directly the following works of the ICN¹²⁰. Furthermore in 2013 the OECD and the ICN conducted the common project on the international cooperation in competition cases. The results inspired the new OECD guidelines of 2014 on the international cooperation among competition agencies. Those examples show that the OECD and the ICN may be complimentary bodies.

The ICN presents a new approach in a development of competition law and establishment of general competition rules and enforcement on the worldwide basis. It focuses primarily on the needs of the agencies and aims at streamlining the actual cooperation between them. The concept of the ICN shows the need to overcome limitations in membership - both in terms of number and quality of members. The paradox is that the ICN has been established by all the OECD members. It shows that the OECD proved to have been insufficient for fostering cooperation and promoting more convergence between NCA's from all over the world. The development of the ICN shows that it replicates and even takes over some functions of the OECD. First step was adoption of soft law documents. The ICN went even further – it created manuals, handbooks. It served not only convergence of statutory rules but also administrative practice (sometimes the order was reversed). Second, ICN offers variety of meetings (annual conference, group workshops) and virtual contacts like webinars and teleconferences. The ICN organises different meetings addressing various issues and designed for different needs of officials and heads of NCA's. The OECD meets only two times a year and the Global Competition Forum takes place once per year. Meetings at the OECD usually involve senior officials or heads of NCA's. Third, the ICN through the working groups is trying to offer peer reviews which used to be of great importance for the OECD.

Nonetheless, the ICN has its important limits which preclude this network from

rent and Future Role, in: P. Lugard (ed.), *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, Intersentia, Cambridge – Antwerp – Portland 2011, p. 67.

120. F. Jenny, *The International Competition Network and the OECD Competition Committee: Differences, Similarities and Complementarities*, in: P. Lugard (ed.), *The International Competition Network At Ten. Origins, Accomplishments and Aspirations*, Intersentia, Cambridge – Antwerp – Portland 2011, pp. 103-104.

becoming a single driving forum of global antitrust. Contrary to the OECD it lacks legitimization – the ICN is established by agencies, not governments. The ICN has limited resources what may preclude it from providing in depth analysis of relevant issues – which is the case of the OECD. Furthermore, the OECD has necessary experience and position to adopt soft law instruments which may have broader effects. Therefore, the OECD and the ICN are to large extent complimentary. It is interesting to note that that the OECD recommendations and the ICN soft law documents refer to each other. If read and applied in connection those documents may fully achieve their objectives. That is why cooperation of these two bodies is crucial for the future of global antitrust.

It is argued that the OECD, WTO and ICN represent three paths of development of transnational governance in antitrust matters. In that view, the OECD represents “an expert path”. The Organisation is described as *a public transnational forum with the legitimacy of an expert body on general economic issues but with no direct power of constraint or coercion upon its members – and even less so on non-members – published recommendations and guidelines*¹²¹. The idea was that national agencies would spontaneously and voluntarily seize upon those guidelines and frames developed by an external, “neutral” and scientific public body to work towards a coordination of their practices in antitrust matters. The legitimization of the expert stems from the belief in the superiority and legitimacy of expertise based on scientific claims. The reach of the OECD route would initially have been limited to member countries. The WTO represents “a statist” scenario with the idea of adoption of a set of binding rules that would apply to all members of the WTO. The ICN represents “a community scenario” with the idea of establishing a transnational space where NCA’s could come together to negotiate and reach consensus on full or partial convergence of regimes and practices as well as enhanced coordination to deal with the incoming challenges¹²². Due to its inherent limitations the OECD as an expert body may not play a leading role in international competition governance. Nonetheless, even if the “community path” prevails there is a place for an expert organisation which can and should be taken by the OECD.

The OECD has limits which prevent it from gaining a leading role in development of competition law and cooperation between NCAs. First, the limited membership of the OECD precludes it from fully engaging and at the same time influencing more countries. Second, the membership is not only limited in numbers but also in characteristics of its members. Those are all developed countries devoted to free market economy mainly from Europe with a few representatives from Americas and south Asia. Third, the OECD is a well-established IO with formal procedures and elaborated process for deliberation and adoption of acts. Fourth, the OECD is a universal organization. It suggests the need to divide its resources across different agendas. The competition law is only one of many topics that

121. M.-L. Djelic, Th. Kleiner, *The International Competition Network – Moving Towards Transnational Governance*, in: M.-L. Djelic and K. Sahlin-Andersson (eds.), *Transnational Governance. Institutional Dynamics of Regulation*, CUP, Cambridge 2006, pp. 303 - 305.

122. Ibidem.

the OECD is dealing with. Fifth, the OECD is influenced heavily by the Chicago School of antitrust¹²³. Some even suggest that the OECD has been a part what was described as a “neoliberal crusade for bilateral and multilateral competition rules”¹²⁴. Irrespective of the label, the OECD clearly represents interests of developed countries and their preference for liberal solutions in international trade. This may not be warmly welcomed by developing countries. In recent years, together with establishment of Global Competition Forum, the OECD is trying to change this perception and encourage more discussions on different national views on competition law and policy.

As the paper showed, none of the existing IOs was able to successfully lead to adoption of a general, commonly applied set of rules of antitrust law. The Set prepared by UNCTAD has been ineffective from the very beginning and its practical value is very limited. Scepticism towards possibility of adoption of any general and multilateral agreement in the competition law area based on a universality principle (like in criminal law in relation to genocide) has been raised in the past¹²⁵ and despite the changes that took place in the last decades such agreement is still unlikely to be signed. The failure of the WTO negotiations proves that point well. Therefore, the mode of soft convergence and persuasion taken by the OECD may remain valid for a long time. This argument is supported by the creation of the recent phenomena of rather informal global competition law network, i.e. the ICN. Additionally, regional organizations like EU will undoubtedly push for even more convergence and cooperation in competition policy on the continental scale. However, the other regional organization will not be able to effectively endeavour similar efforts.

The OECD should and will remain an elite and limited club. It has both advantages and weakness. The most important weakness is that the OECD lacks wider legitimization. As a result, the influence of the OECD recommendations and other activities on developing countries will never be similar to UNCTAD or ICN. On the other hand, thanks to its coherent and limited membership, the OECD may influence the most developed economies through standard setting. Consequently, they may serve as attractive models for other jurisdictions. Furthermore, the OECD should pursue in what it does best – being place for deliberations and highly respected intergovernmental think tank. The OECD offers a unique comprehensive perspective on development of a modern state. It should work on this perspective and does not limit itself to one standpoint (like the ICN or even WTO). Therefore, the OECD should engage its committees focus more on governments than on agencies. The Competition Committee should include in its work ministries and not only NCAs since many of undertaken projects touch upon issues lying outside agencies’ competences. Sometimes projects

123. G.B. Doern, *Internationalisation of Competition Policy*, in: G.B. Doern, S. Wilks (eds.), *Comparative Competition Policy. National Institutions in a Global Market*, Clarendon Press, Oxford 1996, p. 314.

124. H. Buch-Hansen, A. Wigger, *The Politics of European Competition Regulation. A critical political economy perspective*, Routledge, London – New York 2014, p. 119.

125. W. Moschel, *International Restraints of Competition: A Regulatory Outline*, 10 Nw. J. Int’l L. & Bus. 76 (1989-1990), p. 79.

undertaken by the Committee may not necessarily serve agency's interest. For example, evaluation of competition interventions may bring various results and some agencies would prefer to avoid that. The Competition Committee should also develop on activities of regional centres and Latin America forum since those initiatives prove to be valuable tool for regional dissemination of the OECD work and are useful especially for non-OECD states.

It is justified to point that the OECD and competition law enforcement are a good match. Competition law is the area where the states are not willing to give up their jurisdictions (as the recent case of WTO efforts proved) but at the same time the needs for common standards, area for problem solving and discussion and cooperation in the field of competition law are evident. The OECD serves all these purposes well. The character of the organization do not affect jurisdictions of the states and at the same time it guarantees that voluntary harmonization and following cooperation is developing. Even though, the recent developments showed that the OECD can no longer have monopoly or even leading role over the development of competition law on the international level, the Organisation remains an important element of emerging international competition law system.

Conclusions

The OECD has undeniable achievements for development and proliferation of competition laws. It used to serve as the main international arena of exchange on competition policy matters¹²⁶. Furthermore, it is argued that, the OECD process in particular has been critical for the emergence of transgovernmental cooperation among competition regulators¹²⁷. The Organisation remains relatively small IO (in terms of members) with a homogenous membership. Such limited membership allows the OECD to elaborate excellent analysis and develop well-balanced and thought-through recommendations and background (policy) papers or reports. However, the leading role worldwide in the area of development of competition law that the OECD used to enjoy is no longer the case. The role of the OECD in the area of competition law is still viable but it has ceased in recent years leaving the space for the ICN and regional networks¹²⁸. The Organization needs to fit into the existing patchwork of networks active in the field of competition law. Overview of the activities taken by the Competition Committee of the OECD in recent years shows that the Organization effectively fulfils its new expert role in the analysed area. With a strong analytical background and expertise in promoting convergence and cooperation through soft law, the OECD stays one

126. G.B. Doern, *Internationalisation of Competition Policy*, in: G.B. Doern, S. Wilks (eds.), *Comparative Competition Policy. National Institutions in a Global Market*, Clarendon Press, Oxford 1996, p. 313.

127. K. Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 2002 *Virginia Journal of International Law*, Vol. 43, pp. 39 – 40.

128. O. Budzinski, *The Governance of Global Competition. Competence Allocation in international Competition Policy*, Edward Elgar, Cheltenham 2008, p. 148.

of many elements of common global competition law and enforcement system.

The analysis of the OECD efforts in developing and spreading competition law proves the accuracy of important GAL findings that global regulatory regimes do not follow a common pattern and each has individual pattern of growth¹²⁹. Global competition law, forming a part of GAL, emerges from a cooperation and coexistence of multiple global and regional networks of competition agencies. This observation supports the claim invoked in the introduction that the global antitrust law is a network originated law. In case of global competition law, there is no one omnipotent organization which leads the process and it is rather unlikely that any international antitrust agreement would be reached in a near future. Instead of this, global competition law is expanding through cooperation and convergence. It is emphasised that the cooperation of the competition authorities constitutes a main leitmotif of global antitrust¹³⁰. Cooperation requires effective procedural rules and mutual trust to enforce them. Cooperation is supported by all IOs and networks active in competition protection. Despite plurality of fora many rules on cooperation are similar and shared what is evidenced by soft law documents issued by those bodies. At present, rules on cooperation stemming from recommendations, best practices and other soft law documents prepared by those transgovernmental bodies form a significant part of global antitrust. Such emphasis on a procedure is also characteristic for emerging GAL. The growing international cooperation of NCAs will surely contribute to development of global antitrust. As the paper proved, the OECD has stimulated this course of actions and still remains important facilitator of this process.

129. S. Cassese, *What is Global Administrative Law and why study it?*, in: *Global Administrative Law: an Italian Perspective*, RSCAS Policy Papers 2012/04, p.2.

130. J.Ph. Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence*, Springer-Verlag, Berlin Heidelberg 2011, p. 9.