A CALL TO ARMS: PROPOSING THE USE OF SOCIAL SCIENCE METHODS IN TRANSNATIONAL COMPETITION LAW

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Competition law enforcement is one of the cornerstones of sound business regulation; yet it faces a problem in the transnational context. Whereas transnational commerce seamlessly transcends borders, competition law has jurisdictional roots, lacking a true transnational response. Global frictions due to the enforcement of divergent domestic laws and policies seem inevitable yet are surprisingly rare. We argue this phenomenon cannot be fully explained by a doctrinal analysis of the global efforts towards policy or legal convergence. Instead, the focus should be on the competition law officials who operationalise the law in a transnational context. This 'human element' of the inquiry must embrace qualitative research methods, such as ethnographic studies commonly used in legal anthropology, to develop a comprehensive legal analysis in this context.

I INTRODUCTION

Business is global. Competition law is not. Conflict seems inevitable. Or maybe not?

On the business side, transnational corporate lawyers facilitating the global transactions of multinational companies have developed a privatised legal order that is not completely bound by domestic jurisdictions.[1] These arrangements weave their way between local customs, and domestic, international, and privatised supranational laws and rules.[2] This fabric of transnational governance

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1 The evolution of transnational law has led legal scholars, such as Gunther Teubner, to consider the application of the notion of 'hybrid sovereignty' in which the private sector contributes to the development of legal order, like the Dubai International Financial Centre ('DIFC'), as opposed to the state being the sole legal regulator: see Gunther Teubner, 'Global Bukowina: Legal Plurism in the World Society' in Gunther Teubner (ed), *Global Law without a State* (Dartmouth, 1997) 3. The discrete extra-territorial jurisdiction of the DIFC creates an independent sovereign domain within the United Arab Emirates that is arguably a truly global legal platform: see Jeremy J Kingsley and Melinda Heap, 'Dubai: Creating a Global Legal Platform?' (2019) 20(1) *Melbourne Journal of International Law* 277.

2 Jeremy J Kingsley, 'Drafting Inter-Asian Legalities: Jakarta's Transnational Corporate Lawyers' (2021) 42(1) *Adelaide Law Review* 197, 198.

has arguably recreated a body of law, *lex mercatoria*, or the law of merchants.[3] The fabric is bound together through the terms of contracts that seek to privatise dispute resolution, avoiding domestic courts, through international commercial arbitration.[4] The aim of transnational law is, therefore, to allow business activities to cross borders as necessary.

Competition law, on the other side, is different. It has developed domestically, despite being deeply interrelated and a vital component in relation to trade, for investment, and the movement of goods, services, capital, and workers. With business having gone global, one would have expected a similar response from the competition law community. After all, one of the key roles of competition laws and their enforcement is the regulation of business conduct with an aim to address anticompetitive behaviour such as cartelisation and abuse of market power, as well as the scrutiny of mergers that would significantly change the competitive environment in a given market. However, competition law has gone global without becoming international. Over 130 nations nowadays enforce competition law on a domestic, or sometimes regional level, but an international competition law regime has not yet emerged and may never do so. This proliferation of domestic competition law regimes undoubtedly has an impact on transnational commerce. Apart from increasing the transaction costs of transnational business deals,[5] one would also expect significant tension between the priorities of large-scale global transactions/business activities and the array of domestic competition laws and policy orientations.

Surprisingly, tension between national competition authorities in relation to the scrutiny of transnational business transactions that raise competition issues, such as global mergers, is rare. This is striking, as significant differences between national approaches to competition policy and the application of competition law prevail across the globe. Efforts by multilateral and international organisations to develop an 'international' competition law regime have not been successful.[6] At the same time, harmonisation efforts by these organisations as well as governments, and competition authorities, from around the world aiming to converge on mutually accepted core principles of competition policy is a slow-moving process and the outcome of these activities is uncertain.

While acknowledging cleavages within competition law and policy is a concession to reality,[7] the tangible concerns for competition authorities and the

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3 Ibid 199.

4 The parameters of transnational law and their privatising effects are considered in: Philip C Jessup, *Transnational Law* (Yale University Press, 1956); Peer Zumbansen and Gralf-Peter Calliess, *Rough Consensus and Running Code: A Theory of Transnational Private Law* (Hart Publishing, 2010).

5 For example, transnational mergers can require multiple law firms to file merger notifications in different languages, with different deadlines, information requirements and approval processes: see Janet L McDavid and Lynda K Marshall, 'Antitrust Law: Global Review Regimes' (25 September 2001) *National Law Journal*.

6 See Part II.

7 Eleanor M Fox, 'Antitrust without Borders: From Roots to Codes to Networks' in Andrew T Guzman (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011) 265, 267–8 <https://doi.org/10.1093/acprof:oso/9780195387704.003.0013>. Most recently, Julián Peña highlighted these variances between competition law regimes in Latin America, attributing these flexibilisations in the countries' competition law enforcement to differences in social values and beliefs, as well as their economic, political, institutional, and legal cultures: see Julián Peña, 'Cultural Challenges to Competition

private sector that flow from these differences in relation to competition law enforcement in transnational commerce have been further emphasised by John Pecman,[8] a former Commissioner of Competition at the Canadian Competition Commission and more recently Abbott B Lipsky,[9] former longstanding partner at Latham & Watkins, who have provided legal counsel on international and transnational competition matters for decades. They have explained how the regulatory patchwork that companies face in applying competition law to global transactions impacts regulators, private practice, and the business sector alike. Consequently, it is timely and vital to investigate how it is possible that a patchwork of domestic competition law regimes that pursue different policy goals and national priorities, are nonetheless able to work in unison and often arrive at the same or very similar outcomes.

Instead of adding further commentary to the different harmonisation and convergence initiatives, we are looking to contribute to this discussion by offering a novel perspective for competition law and policy. We argue that the answer to the posed question lies beyond competition law itself and the harmonisation of substantive provisions and procedures that have taken place over the last decades. We believe the focus should be on the competition law administrators and case managers that apply the law on a daily basis and engage in informal cooperation with their counterparts at other agencies as part of epistemic communities,[10] navigating the transnational competition law space which relies on a '*diverse set of norms and transnational practices to regulate the increasingly globalized*

Law Enforcement in Latin America' (2023) *Journal of Antitrust Enforcement* (advance) <https://doi.org/10.1093/jaenfo/jnad041>.

8 John Pecman and Duy D Pham, 'The Next Frontier of International Cooperation in Competition Enforcement' in Paul Lugard and Dave Anderson (eds), *The International Competition Network at Twenty: Origins, Accomplishments and Aspirations* (Concurrences, 2022) 291.

9 Abbott B Lipsky Jr, 'Overdeterrence, Non-competition Policy Goals, and Inadequate Defense Rights: Identifying (and Fixing) Antitrust Constraints on International Trade' (2021) 84(1) *Antitrust Law Journal* 185 <https://doi.org/10.2139/ssrn.3981919>.

10 Peter Hass highlights the importance of focusing on members of epistemic communities and determining the community members' principled and causal beliefs, and tracing their activities to demonstrate their influence on the policy making process: see Peter M Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46(1) *International Organization* 1, 34 <https://doi.org/10.1017/s0020818300001442>. Imelda Maher discusses the impact of policy networks and epistemic communities on the governance of competition policy: see Imelda Maher, 'Competition Law in the International Domain: Networks as a New Form of Governance' (2002) 29(1) *Journal of Law and Society* 111 <https://doi.org/10.1111/1467-6478.00213>. Van Waarden and Drahos highlight the importance of competition lawyers as an epistemic community in the convergence of competition laws in Germany, Austria and the Netherlands: see Frans van Waarden and Michaela Drahos, 'Courts and (Epistemic) Communities in the Convergence of Competition Policies' (2002) 9(6) *Journal of European Public Policy* 913 <https://doi.org/10.1080/1350176022000046427>. For a discussion on the impact of epistemic communities on the development of European competition law: see Hussein Kassim and Kathryn Wright, 'Bringing Regulatory Processes Back In: The Reform of EU Antitrust and Merger Control' (2009) 32(4) *West European Politics* 738 <https://doi.org/10.1080/01402380902945391>; and more broadly, Pinar Akman and Hussein Kassin, 'Myths and Myth-Making in the European Union: The Institutionalization and Interpretation of EU Competition Policy' (2010) 48(1) *Journal of Common Market Studies* 111 <https://doi.org/10.1111/j.1468-5965.2009.02044.x>.

economy'.[11] These administrators are the facilitators who make the deals work despite the legal divergence.[12]

In fact, competition agency officials regularly acknowledge that informal cooperation takes place daily.[13] While the Australian Competition and Consumer Commission ('ACCC') notes that this kind of informal information sharing is especially important for effective enforcement of business conduct that transcends national borders, it also contends that it requires agency staff to have developed personal relationships that are built on trust and mutual understanding.[14] This seems to be a universally accepted truth. It is therefore not surprising that the ACCC has already made significant investments in this area over the years with its Competition Law Implementation Program ('CLIP').[15] This program allows ACCC staff to visit Association of South-East Asian Nations ('ASEAN') Member States on short-term placements, and reciprocally, ASEAN officials can be seconded to the ACCC. Interestingly, the relationships themselves, the ways in which they have been formed and developed and, importantly, the factors that determine their success have not yet attracted any meaningful academic attention.

It therefore seems pertinent to address the legal conundrum of mediating the diverse domestic jurisdictions in a global legal environment by proposing an enriched legal analysis that goes beyond black-letter law and instead focuses on the 'human element' and the lived realities of competition law, using social science methods,[16] such as ethnographic accounts of work of public servants.[17] To understand the operation of competition law, we need to understand how competition law

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11 Hannah L Buxbaum, 'Transnational Antitrust Law' in Peer Zumbansen (ed), *Oxford Handbook of Transnational Law* (Oxford University Press, 2021) 315, 316 (emphasis added) <https://doi.org/10.1111/j.1468-5965.2009.02044.x>. This article uses transnational competition law and transnational competition law enforcement as shorthands for competition law, and its enforcement, that transcends borders and jurisdictions while being scrutinised by a diverse set of domestic competition law norms.

12 The role of intermediaries, and their importance to understanding and implementing competition law in the ASEAN region focuses on the roles of intermediaries, such as those who provide technical legal assistance, has been described by Wendy Ng, 'From Divergence to Convergence: The Role of Intermediaries in Developing Competition Laws in ASEAN' (2021) *Journal of Antitrust Enforcement* 1 <https://doi.org/10.1093/jaenfo/jnab014>. This article sees the merit in focusing on the role of those actors who implement competition law, giving it meaning, substance and practical application.

13 Russell W Damtoft, 'Mechanisms for Cooperation: Informal Cooperation' (Speech, Intergovernmental Group of Experts on Competition Law and Policy, 8 July 2014).

14 'Building Regional Relationships', *International Competition Network* (Training Module, 2020) <https://www.internationalcompetitionnetwork.org/training/building-regional-relationships>. The transcript can be found at International Competition Network, 'Training on Demand Module VII-5: Building Regional Relationships' (Transcript) <https://internationalcompetitionnetwork.org/wp-content/uploads/2018/04/ITODtranscriptVII-5RegionRelations-1.pdf> ('Training Module Transcript').

15 'Competition Law Implementation Program (CLIP)', *Australian Competition and Consumer Commission* (Web Page) <https://www.accc.gov.au/about-us/international-relations/competition-law-implementation-program-clip> ('CLIP').

16 Jeremy J Kingsley and Kari Telle, 'Does Anthropology Matter to Law?' (2018) 2(2) *Journal of Legal Anthropology* 61, 61–2 <https://doi.org/10.3167/jla.2018.020205>.

17 Annelise Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011) 11–12.

authorities, such as the ACCC, and their officers tackle the challenges and give life to competition law and policy.[18]

To showcase the importance of the proposed approach to investigating the realities of competition law enforcement in a transnational world, the article first sets the scene by discussing the past and present efforts of harmonisation and policy convergence in competition law and policy. The next section highlights the need to reach a global consensus on international competition policy goals in order to engage in effective competition law enforcement in the transnational legal space, while acknowledging that success in this endeavour is unrealistic. This can be seen by the failed attempts to agree on a multilateral competition law agreement under the auspices of the World Trade Organisation ('WTO'). In the sections that follow, the discussion then turns to the convergence efforts by international organisations such as the Organisation for Economic Co-operation and Development ('OECD'), United Nations Conference on Trade and Development ('UNCTAD') and the International Competition Network ('ICN'), as well as individual governments and competition agencies by means of formal cooperation agreements and more flexible Memorandums of Understanding. This leads us to the importance of informal cooperation between competition agencies that are embedded in these agreements, facilitated by a variety of different measures and frequently emphasised by competition agency officials on the international stage.[19]

Despite these difficult and protracted efforts to bridge the gaps between contesting competition law regimes and associated policy inclinations, competition law authorities somehow manage to facilitate transnational business relationships. These contradictory demands lead us to the conclusion that our legal analysis needs to be enriched by considering the administrators of competition law and the social structures and cultural practices that guide their activities. Consequently, in the final section of this article we will consider the techniques and approaches to utilising a social science approach, primarily the anthropology of law, in an attempt to understand the domestic practices of competition law authorities that facilitate transnational business interactions.

The richness added to the legal analysis though social sciences will make it practical and give it a tangible effect. The social sciences allow us to understand the complex regulatory and interpersonal relationships that give meaning

18 Our approach to ethnographically considering competition law agencies has been considered in: Gustavo Onto, 'The Market as Lived Experience: On the Knowledge of Markets in Antitrust Analysis' (2014) 11(1) *Vibrant: Virtual Brazilian Anthropology* 161, 175–87 <https://doi.org/10.1590/S1809-43412014000100006>. It provides insights into the lived experience of regulators and the utility of this goes to understanding their preferences, priorities, and cultural orientations.

19 For example, the European Commission's Executive Vice-President Margrethe Vestager recently emphasised in multiple speeches the need for competition agencies to listen, talk, and understand one another to establish a common approach to these principles they are working to defend, despite the differences in legal systems, traditions and priorities: Margrethe Vestager, 'A New Age of International Cooperation in Competition Policy' (Speech, ICN Annual Conference, 5 May 2022); Margrethe Vestager, 'Recent Developments in EU Merger Control' (Speech, International Forum of the Studienvereinigung Kartellrecht, 25 May 2023).

to competition law when applied to transnational business relationships.[20] Understanding how interpersonal interactions develop and are fostered between these competition law authorities allows us to effectively interpret competition law, and to understand the mechanisms for informal international cooperation amongst competition law authorities, in response to the contemporary sociopolitical and business environment. Understanding these professional entanglements is essential to comprehending how and why law and policy is implemented, and the way it is prioritised in a synchronised manner, when the law on the books and the policies of governments across the globe are so diverse.

Social sciences, such as ethnographic methods that are prioritised later in this article, provide us with the tools to understand and effectively interpret these modes of professional problem-solving. For instance, Bruno Latour's scholarship provided insights into professional networks and their utility, or otherwise, through his actor network theory.[21] It will help to make sense of international cooperation described later in the article when his work is recognised for giving us insights into the manner that people communicate and interact within and between workplaces. Latour took workplace relationships seriously as they indicated the choices and priorities that drove professional outcomes. These approaches allow us to bring to our legal analysis a thickness of description.[22] Detailed accounts of the mundane operation of office life explain how these daily modes of behaviour shape and give meaning to their circumstances.

This use of detailed observational and empirical research is neither strange nor new,[23] as it can be seen, for instance, with the work of Annelise Riles that gave meaning to financial services regulation, not through looking at Japan's laws, but rather through investigating how regulators applied these laws and the pressures that they faced.[24] Riles provides an intricate understanding of the way that these regulators operate, allowing observations into the way that law is given practical and realistic application.[25]

It is our proposition that this focus on the operational practices and social interactions of regulators will enhance the analysis of competition law and policy. Despite its application in other areas of legal research, the use of social science

20 The importance of social relationships to facilitate legal interactions through facilitating activity and providing authority for those participating in these legal activities has been discussed in: Yves Dezalay and Bryant G Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of Transnational Legal Order* (University of Chicago Press, 1996) 290.

21 Bruno Latour, *The Making of Law: An Ethnography of the Conseil D'etat*, tr Marina Brilman and Alain Pottage (Polity Press, 2010).

22 Thick description is a technique used in ethnography that provides comprehensive and detailed analysis of field work experiences. The idea is to identify social, cultural and political relationships and connect them to their context. This allows the research to have a nuanced empirical platform to work from: see Clifford Geertz, *The Interpretation of Culture: Selected Essays* (Basic Books, 1973) ch 1.

23 Sally Engle Merry, 'Does Anthropology Matter to Law? A Comment' (2018) 2(2) *Journal of Legal Anthropology* 86, 88–9 <https://doi.org/10.3167/jla.2018.020208>.

24 Riles (n 17).

25 Ibid.

research methods in competition law and policy remains limited and sporadic.[26] Gustavo Onto's analysis of Brazilian competition law regulators provides a rare example of the adoption of social science methods into competition law.[27] This article highlights the benefit of expanding, and mainstreaming, the use of social sciences in this area of law. In fact, we argue that adding this new methodology and theoretical orientation is essential in the transnational context. It will allow for an analysis that scrutinises the diverse and patchwork legal landscape of domestic laws and policy, while also orienting our gaze to the practices, relationships, and priorities of those regulators whose actions create this legal arena and the cooperation necessary to facilitate it.

Ultimately, this article is a 'call to arms' arguing in favour of the use of fine-grained ethnographic accounts of personal interactions and transnational networks of professionals and experts to better understand processes in the competition law domain. It sets the stage for such an analysis by discussing subjects of relevance to competition law such as informal cooperation between competition law agencies and the public servants who lead the compliance and enforcement activities. While we have *not yet* proceeded to apply the advocated ethnographic approach to a particular case study, in the manner of the studies that are highlighted by Riles, Gupta and Kingsley, we put forward a convincing argument for such an approach.

II REASONS FOR THE ABSENCE OF INTERNATIONAL COMPETITION LAW

The significance of competition policy for international trade has been known for decades and has been subject to long-standing international discussions. In the late 1990s and early 2000s, discussions took place for a multilateral set of competition law rules under the auspices of the WTO. Following an initiative of the European Community ('EC'), the Singapore Ministerial Conference agreed to enter into negotiations about a multilateral competition law agreement in 1996.[28] The interactions between international trade and competition policy became known as part of the 'Singapore issues' and were considered within the Working Group on the Interaction between Trade and Competition Policy.[29] Their scope was clarified during the Doha Round in 2001 and the WTO Members decided to

26 See Andrew I Gavil, 'Competition and Cooperation on Sherman Island: An Antitrust Ethnography' (1995) 44(4) *DePaul Law Review* 1225. This invites us to focus our attention on the 'cultural conceptions of competition'. Borrowing from the literature and methodology of ethnographic studies, he investigates the historic development and evolution of competition law in the United States throughout the 19th and 20th centuries. While he does not undertake an ethnographic study as such, the article highlights the merit in broadening the analysis of competition to a more focussed assessment of cultural attitudes about human relationships.

27 Onto (n 18).

28 Maher (n 10) 127.

29 Ibid 128.

include competition policy in the official agenda for the following WTO Round in Cancun in 2003.[30]

As a part of this process, the EC amended its initial proposal of a binding multilateral competition law code – down to an agreement on the core principles of competition with a focus on the anticompetitive practices that are most likely to affect international trade and investment, as well as the modes of international cooperation.[31] In the lead-up to, and during, the Ministerial Conference in Cancun, the WTO Members nonetheless failed to reach a consensus even in relation to this minimum agreement. Subsequently, work in the WTO Working Group on the Interaction between Trade and Competition was suspended.[32] Since then, no further attempts to create a substantive international competition law have been made.

The reasons behind the failure to reach a consensus on the international stage for harmonised competition law are plentiful, and caused by the very nature of competition law. Competition law is a social construct that is influenced by societal, political and economic values deeply rooted in domestic jurisdictions[33] and its goals are shaped by parameters that are subject to change and evolve over time. A plethora of different policy goals across the globe is inevitable. The discussion on appropriate competition policy goals is even still in flux amongst the two dominant competition law regimes, namely the United States ('US') and the European Union ('EU'). Whereas from a US perspective, the seemingly sole driver for competition policy has been the protection of consumer welfare in a pure economic sense,[34] the EC and later the EU has pursued a wider range of policy goals including the integration of the European Single Market.[35] This single market

30 See *Doha Ministerial Conference Fourth Session*, WTO Doc WT/MIN(01)/DEC/1 (20 November 2001, adopted 14 November 2001) (Ministerial Declaration) para 25:

> In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.

31 For a detailed account of these developments at the WTO, see Anestis S Papadopoulos, *The International Dimension of EU Competition Law and Policy* (Cambridge University Press, 2010) <https://doi.org/10.1017/CBO9780511762147>.

32 See *Doha Work Programme*, WTO Doc WT/L/579 (2 August 2004, adopted 1 August 2004).

33 Ariel Ezrachi, 'Sponge' (2017) 5(1) *Journal of Antitrust Enforcement* 49, 51 <https://doi.org/10.1093/jaenfo/jnw011>.

34 Richard Posner, one of the most prominent members and supporters of the Chicago School, argued in 1976 that 'the only goal of antitrust law should be to promote efficiency in the economic sense' in his seminal book *Antitrust Law* (Chicago Press, 1976) 3. Over the last few decades this 'single goal' approach of the Chicago School has been heavily challenged. A detailed discussion of the criticism and the recent shift in thinking about the appropriate nature of relevant competition goals in the United States is beyond the scope of this article. For an overview of the development, see Deborah Healey, 'The Ambit of Competition Law: Comments on its Goals' in Deborah Healey, Michael Jacobs and Rhonda L Smith (eds), *Research Handbook on Models and Methods of Competition Law* (Edward Elgar, 2020) 12, 18–21.

35 It is argued that EU competition policy has pursued a variety of competition policy goals rather than taking a 'monothematic' approach: Konstantinos Stylianou and Marios Iacovides, 'The Goals of EU Competition Law: A Comprehensive Empirical Investigation' (2022) 42(4) *Legal Studies* 620, 623 <https://doi.org/10.1017/lst.2022.8>.

imperative led, at times in the past, to enforcement efforts that were more likely to protect competitors to boost the competitive process and to restrict single-firm conduct, if it harmed competitors.[36]

Although the US and the EU competition policies have seemingly converged on the consumer welfare standard over the years,[37] the definition of the standard[38] as well as the standard itself, has faced increasing challenges as the appropriate base premise of US antitrust policy by the so-called 'New Brandeis Movement'.[39] Looking at competition policy more globally, the situation has become more complicated over the years following the proliferation of competition policy regimes. Over the last few decades, the number of nations with a competition law regime has increased to over 130, including significant emerging economies such as the BRICS countries, namely Brazil, Russia, India, China, and South Africa. This expansion triggered a discussion about a broader approach to competition policy.[40] In fact, it has been argued that

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36 For a brief summary of the different enforcement approaches, and consequently, their divergent outcomes, see William J Kolasky, 'What is Competition? A Comparison of US and Europe Perspectives' (2004) 49(1–2) *Antitrust Bulletin* 29 <https://doi.org/10.1177/0003603X0404900102>.

37 See William E Kovacic, 'Competition Policy in the European Union and the United States: Convergence or Divergence?' (Conference Paper, Bates White Antitrust Conference, 2 June 2008) 8 (emphasis omitted) <https://www.ftc.gov/news-events/news/speeches/competition-policy-european-union-united-states-convergence-or-divergence>:

> EU and US antitrust officials routinely disavow any purpose of applying competition laws to safeguard individual competitors as an end in itself. EU officials also have grown accustomed to hearing, by direct quotation or paraphrase, the U.S. Supreme Court's admonition that the proper aim of antitrust law is 'the protection of competition, not competitors'.

38 Ezrachi notes that a common understanding as to the definition of the consumer welfare standard is still missing: Ezrachi (n 33) 61. See also American Bar Association, *Report of the Task Force on the Future of Competition Law Standards* (Report, 3 August 2020) <https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/vault-01/aba-antitrust-standards-task-force-report.pdf>. The study surveyed the opinions, commentaries and proposals by 25 thought leaders including competition authority officials, legal practitioners and economists, as well as academic scholars from the United States and Europe. Some commentators consider that the consumer welfare standard should also take into consideration producer surplus, while others see the standard to be applied too narrowly and advocate for the inclusion of product quality consumer choice, innovation, the protection of the competitive process and privacy considerations.

39 For example, Barak Orbach argues for the recalibration of the consumer welfare standard in the United States, describing it not only as a misnomer, capturing total surplus which not necessarily benefits consumers, but rather 'as a trojan horse to conceal crude hostility to any constraints on profit-seeking activity': Barak Orbach, 'The Consumer Welfare Controversy' [2019] (November) *Antitrust Chronicle* 22, 29. Lina Khan has argued that the United States has a 'monopoly problem' and it is the antitrust policy shaped by the Chicago School which is the root cause of the problem: Lina Khan, 'The New Brandeis Movement: America's Antimonopoly Debate' (2018) 9(3) *Journal of European Competition Law and Practice* 131, 132 <https://doi.org/10.1093/jeclap/lpy020>. Instead of being suspicious of market concentration and the associated accumulation of corporate power, current antitrust policy views monopoly power not only as non-threatening but as beneficial: Lina M Khan, 'The Ideological Roots of America's Market Power Problem' (2018) 127 *Yale Law Journal Forum* 960, 969–70. According to Michelle Meagher, this development has led a disempowered policy framework that has failed to hold corporate entities accountable for their conduct: see Michelle Meagher, 'Powerless Antitrust' [2019] (November) *Antitrust Chronicle* 1.

40 For example, the promotion of employment, regional development, national champions (sometimes couched in terms such as promoting an 'export-led economy' or 'external competitiveness'), national ownership, economic stability, anti-inflation policies, social progress or welfare, poverty alleviation programs, increasing ownership stakes of historically disadvantaged persons, security interests and

> most other competition law systems pursue several objectives, not only in the language of their statutes, but also in the decision making of competition authorities and courts. Often economic development is a central goal, but political goals such as dispersion of power and social goals such as increased access to markets are also common.[41]

Developing nations may also reject EU or US-style market liberalisation as an economic policy.[42] Even if market liberalisation and the introduction of competition might be beneficial in the long run, law makers may not be willing to risk adverse impacts on local economies, emerging markets, and employment in the short term.[43] Developing and emerging economies are especially likely to engage in forms of economic nationalism, putting local interests first.[44] The competition authorities of developing countries have also been required to take direct account of their country's major national economic problems and aspirations to gain credibility and legitimacy in their countries.[45] Thus, even more so than 30 years ago, it seems unlikely that an expanding and diverse international community – applying competition law domestically – would agree on any set of substantive international competition law rules.

III TRANSNATIONAL CONSEQUENCES OF POLICY DIFFUSION

This diffuse nature of competition policy goals and the resulting divergence in domestic enforcement actions has led to significant transatlantic disagreements, potentially causing consumer harm and increased the burden on businesses engaging in transnational commerce.[46]

An often cited example of these transnational frictions, in late 1990s and early 2000s, was when the European Commission decided to initially oppose the US

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the 'national' interest. See *The Objectives of Competition Law and Policy*, OECD Doc CCNM/GF/COMP(2003)3 (29 January 2003) 3. See also Joseph E Stiglitz, 'Towards a Broader View of Competition Policy' in Tembinkosi Bonakele, Eleanor Fox and Liberty Mncube (eds), *Competition Policy for the New Era: Insights from the BRICS Countries* (Oxford University Press, 2017) 4 <https://doi.org/10.1093/oso/9780198810674.001.0001>.

41 David Gerber, *Global Competition: Law, Markets and Globalization* (Oxford University Press, 2010) 265 <https://doi.org/10.1093/acprof:oso/9780199228225.001.0001>. This argument about the diffusion of competition policy goals finds empirical support: see Anu Bradford et al, 'Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets' (2019) 16(2) *Journal of Empirical Legal Studies* 411, 420–1 <https://doi.org/10.1111/jels.12215>.

42 Gal and Fox, for example, contend that the implementation or application of competition law can in fact compete with other industrial policy considerations such as the protection of weak industries from being taken over by foreign firms: Michal S Gal and Eleanor M Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning from Experience' in Michal S Gal et al (eds), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law* (Edward Elgar, 2015) 296, 306–7.

43 Buxbaum (n 11) 326.

44 Chris Noonan, *The Emerging Principles of International Competition Law* (Oxford University Press, 2008) 22–5 <https://doi.org/10.1093/acprof:oso/9780199207527.001.0001>.

45 David Lewis, 'The Role of Public Interest in Merger Evaluation' (Speech, International Competition Network Merger Working Group, 28–29 September 2002) 2.

46 See Robert D Anderson et al, 'Competition Policy and the Global Economy: Current Developments and Issues for Reflection' (2020) 88(6) *George Washington Law Review* 1422, 1429–30.

merger between Boeing/McDonell Douglas,[47] and prohibit the GE/Honeywell merger,[48] as well as the European infringement decision against Microsoft,[49] which also led to strident academic criticism in the US.[50] Yet, it is the potentially lesser-known examples of more recent competition enforcement actions in regions such as South-East Asia and Africa which highlight the impact that divergent policy approaches to competition law have on local economies and the welfare of consumers. For example, the SEEK/Jobstreet merger in the South-East Asia region was only notified to the Competition & Consumer Commission of Singapore ('CCCS') in 2014, despite its potential impact on the state of competition in the Philippines, Vietnam, Malaysia, and Indonesia.[51]

A similar lack of informal cooperation was also noted by South Africa's competition law authority regarding merger investigations in Africa.[52] More effective cooperation between authorities in Africa may have assisted with the discovery and prosecution of cross-border cartels.[53] The lack of transnational competition law enforcement in relation to cartels has caused an estimated global overcharge[54] of at least US$24 trillion between 1990–2019, which has had a significant detrimental impact on the global economy.[55]

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47 *Commission Decision of 30 July 1997 Declaring a Concentration Compatible with the Common Market and the Functioning of the EEA Agreement* [1997] OJ L 336/16. The merger was ultimately cleared subject to considerable conditions imposed on Boeing, after the EU's initial consideration to block the merger triggered a political uproar with the US government threatening to retaliate against European companies: see William E Kovacic, 'Transatlantic Turbulence: The Boeing-McDonnell Douglas Merger and International Competition Policy' (2001) 68(3) *Antitrust Law Journal* 805, 826.

48 *Commission Decision of 3 July 2001 Declaring a Concentration to Be Incompatible with the Common Market and the EEA Agreement* [2004] OJ L 48/1 which was upheld by the Court of First Instance in 2005: *Honeywell International Inc v Commission of the European Communities* (T-209/01) [2005] ECR II-5532; *General Electric Company v Commission of the European Communities* (T-210/01) [2005] ECR II-5575.

49 *Commission Decision of 24 March 2004 Relating to a Proceeding under Article 82 of the EC Treaty* [2004] OJ L 32/23. For a comparative discussion of the Microsoft investigation in the US and Europe, see John Jennings, 'Comparing the US and EU Microsoft Antitrust Prosecutions: How Level Is the Playing Field?' (2006) 2(1) *Erasmus Law and Economics Review* 71.

50 See, eg, Eleanor M Fox 'We Protect Competition, You Protect Competitors' (2003) 26(2) *World Competition* 149 <https://doi.org/10.54648/woco2003002>.

51 Toh Han Li, 'Actual Cases and Challenges of Cross-Border Enforcement and Cooperation: Singapore's Experience' (Speech, East Asia Top Level Officials' Meeting on Competition Policy, 9 September 2016).

52 'Many member states across the [region] have dealt with significant cross-border mergers but have done so independently and different (or no) conditions have been attached to the mergers in different jurisdictions. A regional assessment and a more aligned approach may have resulted in the imposition of conditions advantageous to other member states.': see *Regional Competition Agreements: Benefits and Challenges*, OECD Doc DAF/COMP/GF/WD(2018)13 (29 November 2018) 7 <https://one.oecd.org/document/DAF/COMP/GF/WD(2018)13/en/pdf>.

53 Ibid 6.

54 Overcharges are the additional cost imposed on consumer by the cartel. They are calculated by comparing the prices charged by the cartel with the estimated prices 'but for' the cartel conduct. 'Overcharges are the result of effective collusion that raises prices … generating supranormal, monopoly profits for the members of the cartel.': John M Connor, 'The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990–July 2016' (Paper, 9 August 2016) 15 <https://dx.doi.org/10.2139/ssrn.2821254>.

55 John M Connor and Robert H Lande, 'The Prevalence and Injuriousness of Cartels Worldwide' in Peter Whelan (ed), *Research Handbook on Cartels* (Edward Elgar, 2023) 22, 33–4.

The business community is also impacted by the patchwork of competition law regimes across the globe. In 2001, the transnational merger of Alcan Inc and one of its competitors required the company to hire competition lawyers from 35 law firms and file 16 merger notifications in eight different languages, all with different deadlines, information requirements, and approval processes.[56] With the global expansion of competition law, the transaction costs for transnational mergers have only increased. The acquisition of SABMiller by AB InBev in 2016 saw two of the biggest multinational brewery companies merge. The transaction required a team of lawyers and leading practitioners from 80 national law firms to facilitate the merger and seek clearance from more than 30 national competition authorities with more than half of them requiring remedies to address competition concerns in their given jurisdiction.[57] As a final example, Bayer's acquisition of Monsanto was also initially filed in over 30 jurisdictions and was finally cleared in 2019, two years after the acquisition was agreed between the parties and subject to several asset divestitures.[58]

Ultimately, these examples highlight that it would be in the interests of all parties involved as well as the consumers of affected jurisdictions if competition authorities find ways to effectively build bridges between these domestic competition law islands. Anderson et al succinctly note, 'these issues are important ones with significant implications for trade, prosperity, and development at both the national and global levels. There is, moreover, a risk of coordination failures, if not outright policy conflicts, in this area if action is not taken'.[59] The question is if harmonisation of laws or policy seem unattainable how can a competition law, and the authorities applying it, provide some form of global cohesion?

IV FIXING THE PATCHWORK THROUGH POLICY CONVERGENCE

Over the last few decades, governments across the globe have sought ways to manage and mitigate this patchwork of domestic laws and procedural requirements in the competition law domain. The vacuum left behind by the failed WTO negotiations in relation to transnational competition law enforcement has subsequently been filled by a variety of regional, bilateral measures as well as

56 See McDavid and Marshall (n 5).

57 See Freshfields Bruckhaus Deringer, 'AB InBev Case Study' *International Consumer M&A* (Web Page) <https://www.freshfields.com/en-gb/what-we-do/case-studies/ab-inbev-case-study/>. The ACCC did not oppose this merger, nor seek any remedies, as the merger was not considered to raise any significant anticompetitive concerns in the Australian beer market: see Australian Competition and Consumer Commission, 'ACCC Will Not Oppose AB InBev's Acquisition of SABMiller' (Media Release MR72/16, 5 May 2016) <https://www.accc.gov.au/media-release/accc-will-not-oppose-ab-inbev-acquisition-of-sabmiller>.

58 Anderson et al (n 46) 1432.

59 Ibid 1476.

plurilateral convergence efforts[60] that aim to collectively gain 'broad acceptance of standards concerning the substantive doctrine and analytical methods of competition law, the procedures for applying substantive commands, and the methods for administering a competition agency'.[61] Whereas governments and competition law authorities have made considerable efforts to establish formal cooperation agreements at a bilateral and multilateral level, significant progress towards policy convergence has been made by epistemic communities[62] such as the OECD, UNCTAD and the ICN.

A Formal Cooperation on a Bilateral and Multilateral Level

Formal cooperation arrangements include bilateral and multilateral enforcement cooperation agreements, in contrast to more flexible inter-agency Memorandums of Understanding ('MoU') and informal cooperation. These mechanisms are essentially building bridges between the domestic antitrust islands.[63]

These government-driven cooperation agreements can generally be categorised as first and second-generation cooperation agreements. First generation agreements often cover case-specific cooperation as well as general policy dialogue. Based on the notion of 'positive comity'[64] these agreements avoid conflict by allowing for the notification of enforcement actions that might be of interest or importance to the other party, the exchange of non-confidential information, and importantly urge parties to avoid conflicts of interest in relation to enforcement activities.[65] Second-generation agreements extend cooperation by facilitating the exchange of confidential information that has been uncovered during competition law investigations.[66]

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60 Stephen Woolcock, 'The Singapore Issues in Cancún: A Failed Negotiation Ploy or a Litmus Test for Global Governance?' (2003) 38(5) *Intereconomics* 249, 255 <https://doi.org/10.1007/BF03031726>.

61 Hugh M Hollman and William E Kovacic, 'The International Competition Network: Its Past, Current and Future Role' (2011) 20(2) *Minnesota Journal of International Law* 274, 290.

62 Haas defined an episteme as 'a network of professionals with recognized expertise and competence in a particular policy domain and the authoritative claim to policy-relevant knowledge within that domain': Haas (n 10) 3, 26–7.

63 This discussion purposefully excludes bilateral, as well as multilateral, trade agreements that include competition provisions. These agreements do not cover the cooperation between existing enforcement regimes but rather the establishment of competition laws as part of the development of trade relations or regional integration. For a detailed discussion of these agreements, see Papadopoulos (n 31) chs 4–5.

64 The term itself has seemingly been created during the negotiations for the 1991 cooperation agreement between the US and the EU but is based on an OECD recommendation that states:

> a country should give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding in competition cases in order to remedy conduct in its territory that is substantially and adversely affecting another country's interests. In addition, the requested country is urged to take whatever remedial action it deems appropriate on a voluntary basis and in consideration of its own legitimate interests.

CLP Report on Positive Comity, OECD Doc DAFFE/CLP(99)19 (14 June 1999) 2 <https://www.oecd.org/daf/competition/prosecutionandlawenforcement/2752161.pdf>.

65 Valerie Demedts, 'International Competition Law Enforcement: Different Means, One Goal?' (2012) 8(3) *Competition Law Review* 223, 238.

66 Ibid 239.

At the regulator level, competition authorities are also cooperating with each other on a more flexible and discretionary basis.[67] These practical agency-specific approaches have the advantage of not requiring government approval, thereby avoiding entanglements in wider policy considerations fuelled by potentially competing interests and policy orientations.[68] While these arrangements are generally non-binding on the authorities and do not involve any rule-making, they nonetheless enable authorities to expand their discretionary powers in order to engage in inter-agency cooperation. The exchange of information and informal discussions about enforcement approaches and competition law analysis reduces the likelihood of divergent decisions – and political intervention – in cases with a transnational dimension.[69]

A recent example of such inter-agency agreements is the MoU on the *Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities* signed by the ACCC and its fellow competition agencies in New Zealand, Canada, the United Kingdom, and the US.[70] The memorandum provides the participating agencies with a model agreement that allows for the request of inter-agency cooperation including a framework in relation to the disclosure of privileged information. These disclosures relate to enforcement proceedings that safeguard the private parties' rights and ensure that information is not disclosed or used in any other situation. More generally, the MoU recognises the need for cooperation due to the increasing cross-border competition law enforcement issues that go beyond individual jurisdictions.

The cooperation further includes the exchange of information and expertise in relation to competition advocacy, capacity building training, best practice sharing in relation to topics of mutual interest (including enforcement methods), as well as the collaboration on projects of mutual interest.[71] According to the ACCC, the MoU will allow proactive informal cooperation between the parties involved.[72] In fact, these kinds of non-binding inter-agency agreements alongside the formal and binding bilateral agreements, which were mentioned earlier, are often the

67 Chad Damro, *Cooperating on Competition in Transatlantic Economic Relations: The Politics of Dispute Prevention* (Palgrave MacMillan, 2006) 12–13.

68 Ibid.

69 Ibid 132; see also at 137 quoting US–EU Merger Working Group, *Best Practices on Cooperation in Merger Investigations* (Report, 2002) 1:

> In today's global economy, many sizeable transactions involving international businesses are likely to be subject to review by the EU and by the US. Where the US and EU are reviewing the same transaction, both jurisdictions have an interest in reaching, insofar as possible, consistent, or at least non-conflicting, outcomes. Divergent approaches to assessment of the likely impact on competition of the same transaction undermine public [and, thus, political] confidence in the merger review process, risk imposing inconsistent requirements on the firms involved, and may frustrate the agencies' respective remedial objectives.

70 *Multilateral Mutual Assistance and Cooperation Framework for Competition Authorities*, signed 2 September 2020 (Memorandum of Understanding) <https://www.ftc.gov/system/files/documents/cooperation_agreements/multilateralcompetitionmou.pdf>.

71 Ibid [3.1].

72 Australian Competition and Consumer Commission, 'Competition Agencies to Coordinate on Cross-Border Investigations' (Press Release 185/20, 3 September 2020) <https://www.accc.gov.au/media-release/competition-agencies-to-coordinate-on-cross-border-investigations-0>.

framework that facilitate interpersonal cooperation between agency staff thereby expanding institutional cooperation at a bilateral as well as a multilateral level.[73]

B Epistemic Competition Communities

The lack of substantive international competition law and the increased globalisation of trade has amplified the importance of epistemic communities in the competition law and policy space as a means to overcome the bounded territoriality of domestic competition law regimes and failure to address business behaviour that affects the state and its citizens while occurring outside the relevant jurisdiction.[74] The interactions and meetings amongst these epistemic groups of technocrats and experts allow those participating to gain institutional and cultural knowledge about each other that in turn facilitates cooperation aimed at bringing policies and law together.[75] Examples for epistemic competition communities in a global context are the OECD, UNCTAD and ICN. Despite their differing organisational structures, all three entities have a common denominator. They provide a forum for international groups of experts in the field of competition law and policy.

The OECD and UNCTAD, for example, aim to facilitate predominantly policy and normative convergence at the state level. The OECD issues constructive policy recommendations based on in-depth policy research papers that often form the basis of detailed discussions amongst its members. Given that its members are governments and not just competition agencies, their recommendations carry notable force.[76]

When looking at cooperation, formal and informal, a useful starting point is UNCTAD, which provides a broader forum for intergovernmental deliberations, policy analysis and technical assistance for all nations that have a competition law regime or are intending to create such a regime, catering especially for developing countries and least-developed countries.[77] The framework for capacity building and policy development at UNCTAD is the *Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices* ('UN Set') which was adopted in 1980. This framework allows for the development of points of discussion and policy interaction for competition law regulators.

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73 Damro (n 67) 13.

74 Maher (n 10) 116.

75 Imelda Maher and Oana Stefan, 'Competition Law in Europe: The Challenge of a Network Constitution' in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (Oxford University Press, 2010) 185 <https://doi.org/10.1093/acprof:oso/9780199593170.003.0009>. See also Brigitte Leucht and Mel Marquis, 'American Influences on EEC Competition Law: Two Paths, How Much Dependence?' in Kiran Klaus Patel and Heike Schweitzer, *The Historical Foundations of EU Competition Law* (Oxford University Press, 2013) 125 <https://doi.org/10.1093/acprof:oso/9780199665358.003.0005>, discussing the impact of epistemic transatlantic communities on the development and evolution of European competition law.

76 Hollman and Kovacic (n 61) 289–90.

77 UNCTAD, 'Mandate and Key Functions', *Competition and Consumer Protection* (Web Page) <https://unctad.org/Topic/Competition-and-Consumer-Protection>. For a detailed discussion of the technical assistance in developing competition law knowledge and skills in Latin American countries, see Ana Maria Alvarez and Pierre Horna, 'Implementing Competition Law and Policy in Latin America: The Role of Technical Assistance' (2008) 83(1) *Chicago-Kent Law Review* 91.

A mechanism to facilitate the development of policy cooperation, and integration, which was originally initiated by the OECD and later also adopted by UNCTAD are 'peer reviews' of competition law systems, which are aimed at building a common base of experience to encourage best-practice sharing.[78] Peer review can be described as the systematic examination and assessment of the performance of a state by other states with the ultimate goal of helping the reviewed state improve its policy making, adopt best practices and comply with established standards and principles. The examination is conducted on a non-adversarial basis, and it relies heavily on mutual trust among the states involved in the review, as well as on their shared objectives to improve their operations. Notwithstanding these concerted efforts and their achievements towards policy convergence, a drawback of most of these measures is their voluntary nature and the fact that they are often government-driven, which can lead to trade-offs with other government policy objectives.

A more practical approach is taken by the ICN, which is a virtual network of competition authorities instead of governments.[79] It can be described as transnational rather than transgovernmental, as it actively involves academics, private sector solicitors, economic consultancies, and civil society groups, which provide a different level of input and experience.[80] The network, therefore, avoids the potential interference of other policy objectives and 'allows for a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community'.[81] The consensus-driven 'best practice' recommendations have made a significant contribution to global competition policy coordination with an estimated 25 per cent of its members having undertaken major changes to their competition law regimes that are in line with the 'best practice' recommendations.[82] The ICN also fosters collaboration on enforcement actions including cross-border cases.[83] Yet, despite this success there are limitations, with the recommendations being non-binding.

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78 Hollman and Kovacic (n 61) 274, 293.

79 The ICN was initiated by the United States with the assistance of EU and Canada amongst others, following the collapse of the World Trade Organisation initiative to reach a consensus about a multilateral competition regime: Gerber (n 41) 11. Originally launched by 15 competition authorities the membership has grown to over 120 authorities: see 'About', *International Competition Network* (Web Page) <https://www.internationalcompetitionnetwork.org/about/> ('About the ICN').

80 Daniel D Sokol, 'International Antitrust Institutions' in Andrew T Guzman (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011) 187, 201.

81 'About the ICN' (n 79).

82 Eduardo Pérez Motta, 'Competition Policy and Trade in the Global Economy: Towards An Integrated Approach' (Policy Options Paper, E15 Expert Group on Competition Policy and the Trade System, January 2016) 27 <https://www3.weforum.org/docs/E15/WEF_Competitition_Policy_Trade_Global_Economy_Towards_Integrated_Approach_report_2015_1401.pdf>.

83 A recent survey study including 18 national competition agencies has shown that '[a]lmost half of the study community indicated that they collaborated with other ICN members in investigating, prosecuting or following up on competition cases, including the exchange of ideas, information or investigation methods': see Hetham Abu Karky, 'The Impact of the International Competition Network on Competition Advocacy and Global Competition Collaboration' (2019) 40(10) *European Competition Law Review* 490, 499. While the sample is arguably rather small, it nonetheless alludes to the importance of epistemic communities.

The non-binding nature of these activities and the vagueness of convergence efforts make the three organisations an attractive option for government and agency officials as it allows them to participate in multilateral discussions and point to the gains of such efforts, without being exposed or bound to any specific legal or policy changes.[84] Although such activities seem to be a rather slow-moving process these epistemic communities provide a forum facilitating vital cooperation that fosters learning, imitation, and explicit transfer of legal concepts between individual members of the community.[85]

V INFORMAL COOPERATION IN TRANSNATIONAL COMPETITION LAW ENFORCEMENT

While epistemic communities play an important role in policy convergence as discussed in the previous section, the networks established by these communities are also vital for transnational competition law enforcement, providing avenues to engage in informal cooperation as part of competition agency officials' day-to-day business. As such informal cooperation on an interpersonal level between staff members of different competition law authorities should not be regarded as a by-product of more formal convergence efforts. Instead, it seems to be the life blood of competition law enforcement in a transnational context; or as Marsden succinctly puts it: 'in international antitrust, talk is actually *more* valuable than treaty'.[86] In fact, the reliance on informal cooperation has been attributed to the proliferation of competition law regimes globally. The rapid growth required new competition authorities, in particular, to find practical solutions to swiftly engage in competition law enforcement actions.[87] Competition authority officials not only regularly acknowledge that informal cooperation takes place daily,[88] but anecdotal evidence also showcases its effectiveness.[89] For instance, the ACCC believes that informal information sharing is pivotal for effective enforcement of transnational

84 Gerber (n 41) 111.

85 The importance of networking between European competition authorities as part of the convergence efforts in the European Union has been highlighted in: van Waarden and Drahos (n 10).

86 Philip Marsden, '"Jaw-Jaw" Not "Law-Law" – From Treaties to Meetings: The Increasing Informality and Effectiveness of International Cooperation' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar, 2012) 110 (emphasis in original).

87 Sean Heather and Guido Lobrano, '"I'd Like to Propose a Toast": Marking the 20th Anniversary of US-EU Antitrust Cooperation' [2011] (October) *Antitrust Chronicle* 3.

88 Damtoft (n 13) 18.

89 For example, John Fingleton, the then Chief Executive of the UK Office of Fair Trading (now the Competition and Markets Authority) noted during the ICN's annual conference in Turkey that after meeting with an ACCC chairman, each had learned

> that cartel officials from the ACCC and OFT had been in touch with one another to share technical know-how in relation to a type of horizontal behaviour in the context of ongoing investigations being conducted by both authorities. This contact happened naturally as a result of officials having met at an ICN cartel workshop, and neither of us was aware of it.

John Fingleton, 'The International Competition Network: Planning for the Second Decade' (Speech, International Competition Network Annual Conference, 27 April 2010) <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/01/SpeechChairFingleton2010.pdf>.

business activities. The ACCC also expects its employees to foster productive relationships with counterpart agencies.[90] Agency officials from across the globe agree with this position, noting that 'trust is the lubricant of cooperation'. It is vital to bring agencies together so that officials can get to know their counterparts and start 'putting a face to the name'. One agency official noted that 'trust and relationships are to a certain degree more important than MoUs'.[91]

It is therefore not surprising that competition authorities, multilateral organisations and networks make a concerted effort to facilitate and increase informal cooperation and information sharing. The ACCC plays a leading role in this sphere with its CLIP in Southeast Asia. Since 2014, the program has aimed to work with ASEAN countries 'to build capacity to draft, introduce and/or reform the legal and institutional mechanisms necessary for effective competition law implementation'.[92] This work is facilitated by capacity-building workshops, regional placements and secondments of agency staff, as well as eLearning modules and technical assistance;[93] all of which foster informal sharing of experiences and relationship building.[94] The US Federal Trade Commission undertakes similar activities to facilitate the creation of trust and mutual understanding through knowledge exchange by the establishment of visitor exchange programs such as the International Fellows Program.[95] These programs allow short-term secondments which enable agency staff on both sides to gain knowledge about the cultural and legal variations across jurisdictions. It has been noted that these programs help with the formulation of enforcement policy, the development of a common understanding of norms and an informed appreciation of divergent enforcement approaches.

To support the work of these domestic competition law agencies at an international level, the OECD, UNCTAD and ICN have also implemented initiatives to foster and enhance this kind of informal cooperation. The OECD and ICN, for example, have encouraged the establishment of so-called 'pick up the phone relationships'.[96] This effort is spear-headed by the Japan Fair Trade Commission ('JFTC') that proposed the establishment of the *Framework for the Promotion of the Sharing of Non-confidential Information for Cartel Enforcement*

90 'Training Module Transcript' (n 14) 11.

91 One of the authors witnessed these statements while attending ICN workshop meetings, UNCTAD International Group of Expert (IGE) meetings in Geneva and webinars on the topic of international cooperation.

92 'CLIP' (n 15).

93 Ibid.

94 Commenting on the usefulness of workshops within CLIP, agency staff have noted that '[t]hese workshops not only help develop skills and knowledge in the area of competition law enforcement, but strengthen relationships among ASEAN and Australian counterparts': ACCC, 'Welcome to Phase III of CLIP' (August 2018) *Clippings* 3 <https://www.accc.gov.au/system/files/Clippings-Edition-7.pdf>. The importance of networking and relationship building during the secondment to the ACCC was also noted by a number of secondees from different countries: see ibid.

95 'International Fellows Program', *Federal Trade Commission* (Web Page) <https://www.ftc.gov/policy/international/international-fellows-program>.

96 Organisation for Economic Co-operation and Development, *Executive Summary of the Hearing on Enhanced Enforcement Co-operation*, Doc No DAF/COMP/WP3/M(2014)2/ANN3/FINAL, 119th mtg, 17 June 2014, 6.

in 2016.[97] More recently, it has also been proposed to 'weave the UN mechanisms into the ICN' at UNCTAD.[98] In October 2020, UNCTAD member states have adopted the *Guiding Policies and Procedures under Section F of the UN Set on Competition*[99] during the 8th UN Conference on Competition and Consumer Protection. This adoption was an effort to reinforce the ICN framework to foster case-specific cooperation in relation to transnational investigations and promote consistent outcomes.[100] The *Guiding Policies and Procedures under Section F of the UN Set* makes direct reference to the ICN's 'pick up the phone relationships' initiative stating that mutual trust is the key driver for meaningful cooperation.[101] It is further recognised that such cooperation requires relationships of trust and understanding that are supported through informal cooperation, highlighting the concerted effort by these international organisations to boost the kind of practice between competition authorities.[102]

A further UNCTAD initiative is the UNCTAD Working Group on Cross-Border Cartels which was established in October 2020.[103] The group is comprised of representatives of competition authorities, interested international organisations and relevant stakeholders from the private sector, civil society and academia. The purpose of this working group is to highlight best practices and to facilitate information exchange. During these regular meetings of antitrust authorities, the group share case studies about joint cross-border enforcement efforts particularly focussed on difficult situations and lessons learned. The *Guiding Policies and Procedures under Section F of the UN Set on Competition* as well as the cooperation

97 'International Competition Network (ICN)', *Japan Free Trade Commission* (Web Page) <https://www.jftc.go.jp/en/int_relations/icn.html>.

98 Pierre Horna, 'David and Goliath: How Young Competition Agencies can Succeed in Fighting Cross-Border Cartels' (Working Paper No 45, Centre for Competition Law and Policy, University of Oxford, 2017) 14–18.

99 Trade and Development Board, *Report of the Intergovernmental Group of Experts on Competition Law and Policy on its Eighteenth Session*, 18th sess, UN Doc No TD/B/C.I/CLP/55/Add.1 (28 July 2020).

100 The agreed principles under section F of the UN Set recognise that cooperation can
(a) help to promote consistent outcomes;
(b) increase investigative efficiency by reducing unnecessary duplication of work, delays and burdens for parties, third parties and authorities;
(c) reduce gaps in information available to authorities and lead to a more informed decision-making process;
(d) help to promote convergence, both in the analysis of specific cases as well as more generally, in relation to principles applicable to the review of mergers and suspected anticompetitive conduct; and
(e) increase familiarity between authorities and mutual understanding of their processes, which in turn may help foster trust and facilitate future cooperation.
For a detailed discussion of the importance of the *Guiding Policies and Procedures under Section F of the United Nations Set on Competition*: see Rajan Dhanjee, 'International Co-operation on Competition Law Enforcement: A Breakthrough?' (2021) 44(4) *World Competition* 455 <https://doi.org/10.54648/woco2021025>.

101 United Nations Conference on Trade and Development, *Guiding Policies and Procedures Under Section F of the United Nations Set on Competition*, Doc No UNCTAD/DITC/CPLP/MISC/2021/2 (18 February 2021) 10.

102 Ibid 1.

103 'Working Group on Cross-Border Cartels', *UNCTAD* (Web Page) <https://unctad.org/Topic/Competition-and-Consumer-Protection/working-group-on-cross-border-cartels>.

efforts of the UNCTAD Working Group on Cross-Border Cartels are again top of the agenda during the 21st UNCTAD Intergovernmental Group of Experts on Competition Law and Policy that took place in Geneva in July 2023.

The origin of informal cooperation between agency officials can thus be firmly located within meetings and events undertaken within these epistemic communities. The regular contact between staff members of different competition agencies during workshops, meetings, drinks, receptions and coffee breaks establishes a good working relationship that allows the individuals to gain confidence in each other's capabilities.[104]

However, the all-important question of *how* these relationships are established and what makes them successful has not yet systematically been addressed by the literature. In effect, we are saying that in order to understand how competition law authorities are managing transnational business that jumps jurisdictional boundaries, more research is needed on these informal modes of cooperation. Why are they successful when the legal structures and requirements are explicitly divergent? The next two sections not only advocate for placing the focus on the human element of competition law enforcement but also offer tools that will allow us to gain a deeper and complementary insight into the effectiveness of informal cooperation between competition authorities. While being novel in competition law and policy, the proposed methodologies are tried and tested and by no means radical. As the case studies below will show, social science has enabled researchers to gain a deeper understanding of the everyday application of commercial law, the operation of government public servants and courts that goes beyond any doctrinal or comparative analysis of the law. This is an essential element of our proposed legal analysis below.

VI PLACING THE FOCUS ON THE 'HUMAN ELEMENT' OF COMPETITION LAW ENFORCEMENT

Determining the factors that contribute to strong relationships, and facilitate inter-agency cooperation, which are based on mutual trust require us to carefully evaluate informal cooperation. We believe that these relationships have created or are formed within epistemic communities.[105] Investigating these epistemic communities allows us, as Caro de Sousa succinctly puts it, to identify '*a substratum to discussions regarding the various factors governing the application of competition law to cross-border business conduct*'.[106] While successful informal cooperation, as well as the lack of it, play an important role in the cross-border

104 Holger Dieckmann, 'The Benefits of Cooperation between Competition Authorities' (Speech, Inaugural Symposium of the Competition Policy Research Center, 20 November 2003) 5 <https://dl.ndl.go.jp/info:ndljp/pid/1255100>.

105 Hass (n 10).

106 Pedro Caro de Sousa, 'The Three Body Problem: Extraterritoriality, Comity and Cooperation in Competition Law' in Nuno Cunha Rodrigues (ed), *Extraterritoriality of EU Economic Law: European Union and Its Neighbours in a Globalized World* (Springer, 2021) 119, 146 (emphasis altered).

coordination and enforcement of competition law, it is acknowledged that these informal arrangements make it '*extremely difficult fully to explain how the international competition system operates in every instance, even if one were to agree on general principles that broadly govern it*'.[107] As such, we argue that the factors that determine the success of cooperation cannot be found by engaging in a comparative analysis of substantive competition laws or policies or by discussing the substantive convergence efforts being undertaken. Instead, the focus needs to be placed on the individual members of these epistemic communities, the activities and the forms of sociality, in which they operate. Our approach is inspired by the methodology put forward by Hass who noted:

> The research techniques for demonstrating the impact of epistemic communities on the policymaking process are straightforward but painstaking. With respect to a specific community, they involve identifying community membership, determining the community members' principled and causal beliefs, tracing their activities and demonstrating their influence on decision makers at various points in time.[108]

The appropriateness of our focus can be highlighted by the success of the EU Merger Working Group,[109] as well as the European Competition Network ('ECN').[110] Cooperation between competition authorities seems to work best when the relevant counterparts understand each other on a social and personal level. The success of these epistemic communities can be explained by its members' shared normative and cognitive principles under EU law. The broad shared policy goals, and a common legal training assist with the socialisation within the group and community coherence.[111] Further to this, European inter-agency cooperation is based on long-term political projects (such as the EU), cultural similarities, and shared histories, which mean that there is a significant natural convergence of competition law and policy.[112] The need to look beyond the law is supported by Thomas Cheng, who finds that *culture* as an institutional and social construct is an important factor for understanding policy and legal convergence, and its limitations, and agrees that it has only received scant attention in antitrust circles.[113] He rightly advocates for a broadening of the generally economics-focused analytical framework of

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107 Ibid 146 (emphasis added).

108 Haas (n 10) 34.

109 See Andreas Bardong, 'The EU Merger Working Group: Looking through the Rear View Mirror' in Matteusz Błachucki (ed), *International Cooperation of Competition Authorities in Europe: From Bilateral Agreements to Transgovernmental Networks* (Publishing House of ILS PAS, 2nd ed, 2020) 35.

110 See Stephen Wilks, 'Agencies, Networks, Discourses and the Trajectory of European Competition Enforcement' (2007) 3(2) *European Competition Journal* 437, 453–5 <https://doi.org/10.5235/ecj.v3n2.437>.

111 van Waarden and Drahos (n 10) 929.

112 See Ki Jong Lee, 'Promoting Convergence of Competition Policies in Northeast Asia: Culture-Competition Correlation and Its Implications' in Ioannis Lianos and D Daniel Sokol (eds), *The Global Limits of Competition Law* (Stanford University Press, 2012) 221 <https://doi.org/10.1515/9780804782678-017>. This found that similarities in culture facilitated convergence in competition policies within Northeast Asia.

113 Thomas Cheng, 'How Culture May Change Assumptions in Antitrust Policy' in Ioannis Lianos and D Daniel Sokol (eds), *The Global Limits of Competition Law* (Stanford University Press, 2012) 205 <https://doi.org/10.1515/9780804782678-016>. A notable exception is Peña (n 7) who investigates the influence of different social values, legal, economic, and political cultures on competition law enforcement in Latin American countries.

competition law and policy to embrace the cultural similarities and differences that affect economic and competitive behaviour.[114] The value of embracing a broader analytical framework of competition law is further highlighted by Ma and Marquis, who investigate the impact of Confucian culture on competition law compliance and its enforcement in East Asia by using culture as an interpretative tool to understand the differences in the application of competition law in China, Japan and Korea.[115]

In essence, when investigating the workings of regulators, we need to consider the legal culture and practices that regulators emerge from/operate within. The key to bridging the gaps between divergent competition law regimes and ensuring their smooth coexistence are the personal relationships formed within these epistemic communities.[116]

VII INVESTIGATING THE ADMINISTRATORS OF COMPETITION LAW

To afford legal analysis the 'thickness' that comes with considering history, politics and commerce we need to embrace social science as an integral part of our interpretative tool kit. Therefore, when seeking to add new dimensions to our analysis of competition law, such as an analysis of the activities of regulators and their efforts to cooperate with fellow agencies, in a world in which commerce seems to cross borders easily, we need to apply qualitative research methods carefully.[117] For instance, ethnography allows us to focus our investigations on the actions of regulators and their agencies, and then carefully place these actors and institutions into the legal architecture that makes competition law function. This makes our legal analysis contextualised and practical.

Later in this section we will identify examples of the way that ethnography has illuminated the operation of law and consider how this effects our legal analysis. Using examples of legal anthropology studies in commercial law, contract law and financial services in a variety of jurisdictions, this section highlights how to engage these tools to advance our legal analysis of competition law and ground it more closely with the realities of this regulatory operation. If we can incorporate into our analysis the lived experience of competition law regulators, such as the difficulties involved in completing certain sorts of paperwork, the limitations of the research materials to which they have access, the political pressures they manage and the networks they create, then we will find ourselves in a better position to understand their application of law and policy. 'At a time of "interdisciplinary" scholarly debate

114 Ibid 219.

115 Jingyuan Ma and Mel Marquis, *Confucian Culture and Competition Law in East Asia* (Cambridge University Press, 2022) <https://doi.org/10.1017/9781108762342>.

116 de Sousa (n 106) 145.

117 Quantitative research methods could also be employed to broaden the analysis such as undertaking a survey across a larger number of stakeholders to assess their perceptions of issues to be considered.

and "transdisciplinary" pedagogy, some disciplines appear more siloed and tone deaf to each other than ever before.'[118] Black-letter doctrinal research, or that which adheres to legalism, involves a strict adherence to the ideas and terms of statute and/or court decisions.[119] Historically, this is the law's domain. As anthropologist Insa Koch has noted: 'To think like a lawyer means to learn the art of abstraction and rationalisation, something that requires students to become well versed in legal jargon.'[120] However, in recent years, legal scholars have often tried to incorporate *context*, bedded into social structures and cultural norms, into their understandings and interpretation of the law (and its application). Unfortunately, as noted in the quote above, this contextualisation is often limited to cursory references to politics or social considerations. Essentially, our academic silo remains strong within legal research. However, it is only through the analysis of these actors' behaviours and actions that the conundrum faced by the conflicting demands of competition law and policy and transnational business arrangements can be properly understood.

If we want to understand the operation of competition authorities, such as the ACCC, we need to broaden our approach to legal analysis. One of the tools for developing a granular account of the administrators of competition law is through ethnography which allows us to 'change the way we think about law, its parameters and interpretations. One of the most important ways to incorporate ethnography is grounding legal analysis through recognising the nuanced finely grained accounts of everyday life'.[121] When we bring into our legal analysis the thick description developed through observational research, we can gain insights from the mundane, the everyday, through elaborate and detailed descriptions.[122] The benefits of this kind of approach and the invaluable insights that can be gained from venturing beyond doctrinal research in law have been highlighted by a number of research projects in public as well as private legal environments.

Annelise Riles developed a finely gained understanding of Japanese legal culture(s) through analysing the operation of those who work in the financial services sector. Looking at derivatives trading and its regulation, Riles has undertaken observational research that considered the modes of regulation for a market-based financial payments system and the response of Japanese regulators to it. For example, Riles considered the Bank of Japan's failed attempt to implement an instantaneous financial payment system, or a real-time gross settlement ('RTGS') system, which allowed the market to have immediate settlements but with simultaneous regulatory oversight. The proposed system was not able to be effectively introduced. The institutional failure to implement the proposed system, and why this arose, highlighted the gaps between regulatory interventions and a

118 Kingsley and Telle (n 16) 61.

119 See Lawrence M Friedman, 'On Legalistic Reasoning: A Footnote to Weber' [1966] (Winter) *Wisconsin Law Review* 148.

120 Insa Koch, '"Turning Human Beings into Lawyers": Why Anthropology Matters So Little to the Legal Curriculum' (2018) 2(2) *Journal of Legal Anthropology* 99, 100 <https://doi.org/10.3167/jla.2018.020210>.

121 Kingsley and Telle (n 16) 66.

122 The term 'thick description' was developed in Geertz (n 22) 6–10.

state's institutional abilities. This research not only gave meaning to the possibility, or limitations, of the law[123] but also allowed Riles to understand the operation of the financial services sector, and legal issues that arise from it, with a clarity that a strict doctrinal approach to law would not provide.[124] Through her work the law is not as merely a 'law on the page' but a 'lived law'. In other words, her research approach sheds light on the workings of the law not as we imagine it, but rather as it is given everyday meaning.

Another example of an investigation of the practice of statecraft and the everyday application of law comes from anthropologist Akhil Gupta, who considered the Indian bureaucracies' attempts to implement anti-poverty programs.[125] His ethnography emerged from the operation of a small provincial government office and it was through his observations that we are able to interrogate the real implications of the operation of the public service in its implementation of a state program.[126] Through looking at the way that public servants use processes, or paper trails, to clog the arteries of these programs, he illuminated the challenging governance environment being studied. The documents used, and the jargon that they are drafted in, resulted in an inaccessibility to the anti-poverty programs for those who were meant to be its beneficiary. Doctrinal research on the enabling legislation and the underlying legal processes would not have allowed Gupta to capture the impact of the processes and mechanisms that were created through the everyday application of the law.

Finally, Jeremy Kingsley in a recent article about transnational corporate lawyers in Jakarta examined the application of transnational business relationships and their documentation through a case study of the negotiations for access to an online database between a travel business in Indonesia and a European software/digital services company.[127] This case study examined the way that the Indonesian lawyers provided contract advice to their Indonesian client and illuminated their client's reluctance to accept legal advice in the way that their lawyers had anticipated. The Indonesian client seemed to ignore any unfavourable contractual terms being pointed out to them, not appearing to see the risks that they were being made subject to under the terms of the contract. What emerged was that the protection of their contractual rights was not the client's priority. Rather they were concerned with their relationship with their European business partner – a clear example of relational contracting. This case study was not just a pleasant anecdote but rather allowed the reader to understand the manner that lawyers in Indonesia aided a particular element of the business community who prioritised relationships over legal strictures.[128] This information contextualises one's understanding of

123 Ibid 160–2.
124 Riles (n 17) 130–7,147–8, 160–2.
125 Akhil Gupta, *Red Tape: Bureaucracy, Structural Violence, and Poverty in India* (Duke University Press, 2012) ch 2.
126 Ibid ch 5.
127 Kingsley (n 2) 211–19.
128 Ibid.

Indonesian contract law. It became evident that the drafting of the contract terms was not of particular importance to the Indonesian business executives, but rather the document itself was symbolic of a relationship.[129] In many ways, the role of the lawyers was to 'sanctify' the contract as an embodiment of a (hopefully) long-term business relationship.[130] This helps to understand law, not as lawyers romanticise it, but representative of the needs and expectations of their clients.

Employing these kinds of rich ethnographic approaches to competition law would allow us to understand the pressures and priorities that affect the regulator's enforcement activities, such as multi-jurisdictional mergers. Observational research will shed light on actual mechanisms of informal cooperation and determine its parameters, and their limitations on the application of competition laws in a transnational context. Who is designated to prepare documents and briefings for the decision-makers? Who are the decision-makers? What processes are followed to internally review and decide upon mergers? Who liaises with regional and international counterparts? Thick descriptions of these processes, like Riles, Gupta and Kingsley examined, enables the outsider to understand the law as a complicated and intricate process in which institutional actors and their operations are as important as black-letter law.[131]

Importantly, observational research not only allows us to understand how lawyers, and other legal intermediaries, such as public servants, balance competing demands and interpretations of business, politics and law in transnational environments but also navigate and reconcile domestic laws and policy with these larger circumstances.[132] By preparing this thick description, we can investigate how decisions are imbued with a sense of authority and legitimacy. After all, a competition law regulator's standing is not simply determined by the way a statute is articulated but rather its enforcement and importantly the key stakeholder's perceptions of their activities. Cooperating competition agencies must be able to trust the processes of their counterparts, and businesses, consumers and general stakeholders must be willing to accept an authority's decision-making outcomes and consider their activities legitimate. This legitimacy allows for the law to have efficacy.

The importance of legitimacy can be highlighted by the public perception of tax authorities in Greece. The lack of public trust and respect for the authorities led people to seek ways to avoid their tax obligations, such as occurred in Greece preceding and subsequently after its financial crisis in the early 2000s.[133] Therefore, it would be our contention that the legitimacy and authority of public servants are at the heart of international cooperation between competition law authorities. Cooperation cannot work if people do not believe they are dealing with actors of

129 Ibid.

130 John Flood, 'Lawyers as Sanctifiers: The Role of Elite Law Firms in International Business Transactions' (2007) 14(1) *Indiana Journal of Global Legal Studies* 35.

131 The importance of court processes in the outcome of cases was discussed in Latour (n 21).

132 Nafay Choudhury, 'Order in the Bazaar: The Transformation of Non-state Law in Afghanistan's Premier Money Exchange Market' (2022) 47(1) *Law and Social Inquiry* 292, 324–6.

133 Adéa Guillot, 'Greece Struggles to Address Its Tax Evasion Problem', *The Guardian* (online, 24 February 2015) <https://www.theguardian.com/world/2015/feb/24/greece-collecting-revenue-tax-evasion>.

good faith and high institutional standing. The challenge we are posing here is that observational research does not just illuminate the processes and practices of the law. But rather the importance of recognising, and measuring, accrued institutional and personal legitimacy of those working in competition law agencies is essential to understanding competition law.

VIII CONCLUSION

Informal cooperation between competition authorities is at the centre of competition law enforcement in the transnational space and its success is not dependent on the law itself, but the interpersonal relationship between agency staff and the resulting understanding, trust and appreciation of their respective abilities. Understanding the 'human element' and the mechanics of informal cooperation is of vital importance to understanding the outcomes of competition law to transnational business. The impact of competition law can be seen in the SEEK/Jobstreet merger and the takeover of SABMiller by ABInbev, as well as the significant anticompetitive harm that can come from the operation of transnational cartels on a global scale.

We believe that this proposal to focus on competition law actors more directly, and the authorities that they work for, is far from being radical and that the competition law community will see its benefit and be receptive to its findings. After all, competition law is an enforcement regime as well as a field of academic research that has long embraced interdisciplinarity. Law and economics have been at the core of competition policy for over a century in the US, as the application of competition law directly impacts economic concepts. 'What emerged is a convergence of economics and law without parallel in public oversight of business.'[134] The vast body of literature of law and economics in competition law and policy is further complemented by research in the field of political science, such as the work of Kassim.[135]

Further broadening this interdisciplinarity makes sense, as competition law has already been described at the start of this article as a social construct that is influenced by societal, political and economic values. Many substantive areas of competition law scholarship have already benefited from an interdisciplinary approach. With two of the three values of this social construct already being covered, it thus seems only logical to add the third perspective, the social, to our legal analysis, by drawing rich insight from adopting an interdisciplinary approach to evaluating the 'lived experience' within competition authorities and their interactions with other authorities. Ethnographic accounts will render visible,

134 William E Kovacic and Carl Shapiro, 'Antitrust Policy: A Century of Economic and Legal Thinking' (2000) 14(1) *Journal of Economic Perspectives* 43, 43.

135 See, eg, Francesca Pia Vantaggiato, Hussein Kassim and Kathryn Wright, 'Internal Network Structures as Opportunity Structures: Control and Effectiveness in the European Competition Network' (2021) 28(4) *Journal of European Public Policy* 571.

and comprehendible, the underpinnings of legal cultures, their decision-making processes and mechanisms to establish sociopolitical and legal legitimacy.[136] The challenge we face is 'how to use our ethnographic imagination to change and reinterpret legal fictions' and reconstruct our understandings of competition law.[137] This nuanced contextualisation requires us to adopt a truly interdisciplinary toolkit. The task we face is to show lawyers and legal scholars that considering these everyday activities of the administrators of a legal/regulatory process is significant. This article has showcased the utility of legal analysis that carefully incorporates the everyday implementation of competition law as essential for examining the *realpolitik* application of law.

136 Lawrence Rosen, *Law as Culture: An Invitation* (Princeton University Press, 2008).
137 Kingsley and Telle (n 16) 67.