

THE CONFLICT OF LAWS¹ IN CARTEL MATTERS IN A
GLOBALISED WORLD: ALTERNATIVES TO THE EFFECTS
DOCTRINE

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A. INTRODUCTION

The US Supreme Court decided the *Empagran v Hoffmann La Roche* case on 14 June 2004. This case had caused an uproar not only in the USA but also among internationally operating corporations throughout the world because it concerned the application of US cartel law, even though the breach of cartel law occurred outside the USA and neither the plaintiff nor the defendant had any connection with the USA.

In this case, vitamin purchasers filed a class action on behalf of foreign and domestic purchasers of vitamins alleging that vitamin manufacturers and distributors had engaged in a price-fixing conspiracy, raising vitamin prices in the USA and foreign countries, in violation of the Sherman Act.² The defendants (petitioners) moved to dismiss the suit as to the foreign purchasers (respondents), foreign companies located abroad (Ukraine, Australia, Ecuador and Panama), who had purchased vitamins only outside US commerce. Respondents had never asserted that they had purchased any vitamins in the USA or in transactions in USA commerce.

The court at first instance, the District Court of Columbia, had held that US antitrust law did not apply.³ The US Court of Appeals of the District of Colum-

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¹ The expressions differ in various countries. In many continental countries but also in the Hague Conference on Private International Law the term private international law is used. In most EU Member States it covers the rules of jurisdiction (in US law it would be *judicial jurisdiction*) and choice of law rules as well as the recognition of foreign judgments. In German and Portuguese law the term private international law only designates the rules concerning choice of law. Questions of jurisdiction and enforcement of judgments belong to the related category of international procedural law. This article uses "Conflict of Laws" to mean the same as the broad definition of private international law. The term *jurisdiction* refers to the competence of a Court to hear and determine a case. *Choice of law rules* means the rules for selecting the appropriate rules of a system of law. This article focuses on choice of law problems. Questions of jurisdiction are primarily mentioned as background knowledge for the development of a specific choice of law rule for restraint of competition.

² The action was based on s 1 of the Sherman Act, 26 Stat 209, as amended, 15 USC s 1, and ss 4 and 16 of the Clayton Act, 38 Stat 731, 737, as amended, 15 USC ss 15, 26.

³ *Empagran SA v F Hoffmann-LaRoche, Ltd.*, 2001 WL 761360.

bia held that it did.⁴ The US Supreme Court held that US antitrust law did not apply.

The international concern was that the US courts were declaring themselves to be the guardians of global competition. As a consequence, globally operating corporations could have been ordered to pay treble and punitive damages under American antitrust law. This danger seems to have vanished.

As for the background to the case, it concerned a class action by non-American companies from the animal feed branch, suing foreign companies from the chemical and pharmaceuticals industry, including seven European companies. The defendants included BASF plc and Hoffmann-La Roche. For years the animal feed producer Empagran from Ecuador purchased vitamins in South America at an excessive price. The defendant companies had set up a globally operating vitamin cartel and thereby caused an excessive increase in prices globally. The EU Commission had imposed fines of \$900 million and the US Department of Justice had imposed fines of \$855 million. In addition several hundred million dollars have allegedly been paid in private settlements. BASF plc alone was ordered by the EU Commission to pay a penalty of €296.2 million.

Should the US civil courts now also have jurisdiction or apply US cartel law to award compensation for damage caused by a breach of competition committed in non-US markets?

This article will explain the legal background in the USA and compare it with the law in other countries that also have an established cartel law that is enforced. From this it will become apparent that global competition is currently safeguarded only by national and supranational law. As a result, there is an incongruity of the economic area impacted and the law which applies. One must therefore ask whether a solution can be found for safeguarding global competition using the law.

B. THE CONTENT AND THE EXTRATERRITORIAL APPLICATION OF US ANTITRUST LAW

1. The Legal Basis of US Antitrust Law

The law against restraints of competition in the USA is largely federal law and mainly comprises the Sherman Antitrust Act of 1890,⁵ the Clayton Act of 1914⁶ and the Federal Trade Commission Act of 1914.⁷

⁴ *Empagran SA v F Hoffmann-LaRoche, Ltd* (2003) 315 F3d 338, CADC.

⁵ 15 USC s 1.

⁶ 15 USC s 12.

⁷ 15 USC s 41.

Section 1 of the Sherman Act prohibits all contracts, combinations and conspiracies in restraint of trade or commerce. The term trade refers to both interstate and foreign commerce.⁸

2. Using Private Persons as an Instrument to Safeguard Competition

US cartel law is characterised by the coexistence of public and civil powers: the cartel authorities—the Federal Department of Justice and the Federal Trade Commission (FTC)⁹—are responsible for enforcing the regulatory, criminal and administrative provisions.

Breaches of the Sherman Act can be punished with imprisonment of up to three years and fines of up to \$100,000 in the case of natural persons and \$1 million in the case of corporations.¹⁰ Previously the action taken by cartel authorities has usually been to impose cease and desist orders. Now, the possibility of making the criminal sanctions more severe is being discussed: the Senate Judiciary Committee presented a proposal for legislation, whereby imprisonment of up to 10 years is possible and in cases of international cartels resulting fines can be significantly higher due to a new basis of calculation.¹¹

In addition, private persons are used to safeguard competition holistically. Under the Clayton Act they can file a private action based on the breach of *all* antitrust Acts. In so doing they can sue the party in breach for damages and recover threefold the damages actually sustained (treble damages) including the cost of suit and reasonable attorney's fees (Section 4 Clayton Act) as well as punitive damages. In legal practice the right of action granted to market players plays an enormous role in the enforcement and supervision of American cartel legislation.¹²

However, this mixture of public and private (civil) rules and using private persons as an instrument for safeguarding competition is no longer characteristic only of American cartel law, but also of German cartel law and European cartel law (see E.5). Here too, there is a growing consensus that cartel authorities are unable to cope with the task of enforcing competition law on their own as an organ of the state. Consequently, private persons have a right to sue for an

⁸ The Code does not apply to *domestic* conduct. The background is the restricted competence that derives from the Interstate Commerce Clause of the Constitution. P Hay, *Law of the United States: An Overview* (Munich, Beck, 2002), 248.

⁹ Delimitation of competence: see Hay, *ibid*, 255; S Elsing and M van Alstine, *US-amerikanisches Handels und Wirtschaftsrecht* (Heidelberg, Verlag Recht und Wirtschaft, 2nd edn, 1999), Rn 908.

¹⁰ RA Posner and FH Easterbrook, *Antitrust* (St Paul Minnesota, West Publishing, 2nd edn, 1981), 19; Hay, *supra* n 8, 254.

¹¹ Makan Delrahim, Deputy Assistant Attorney General, Antitrust Division US Department of Justice at the American Bar Association, 18 November 2003.

¹² RA Posner, *Antitrust Law* (Chicago University Press, 1976), 23; H Weyer, "Schadensersatz gegen Private Kraft Gemeinschaftsrecht" (2003) *Zeitschrift für Europäisches Privatrecht*, 318, 335.

injunction and damages. In Germany the right derives from Section 33 of the German Act Against Restraints of Competition (GWB).¹³ Up to now civil actions for injunctions and damages have been of little importance in Germany.¹⁴

The EU Commission started work on the drafting of a Green Paper in the second half of 2004. The goal of the Commission is to identify potential ways forward for the encouragement of private enforcement of EU competition law.¹⁵ (See below F.1.)

Using private persons for safeguarding competition is also logical because competition law does not primarily protect competition as an institution, rather it is directly intended to protect individuals.¹⁶ As a consequence it is wrong to automatically assume that an international case involving cartel law falls under conflict rules for public international law, administrative law, or criminal law.¹⁷ People who classify cartel law as being only a public right of intervention fail to appreciate the origins of this legal field which lie in freedom of contract and the necessity to limit the freedom of contract in order to safeguard against self-destruction.¹⁸ Due to its protective purpose and its straightforward statutory form, cartel law falls into the two categories of public law as well as private law (in detail see E.5.c).¹⁹ This distinction will be of importance (see E).

¹³ The German government has recently drafted a cartel law reform to adapt the German Act against Restraint of Competition (GWB) to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81, 82 EC Treaty ("EC Regulation 1/2003"). The 7th GWB-amendment is expected to enter into force on 1 January 2005. According to the current draft published on 28 May 2004 ("Regierungsentwurf"), the 7th GWB-amendment will significantly facilitate claims for damages based on infringements of competition law. See Wach, Epping, Zinsmeister, Bonacker, http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/national_reports/germany_en.pdf; R Hempel, "Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novelle" (2004) *Wirtschaft und Wettbewerb*, 362, 367.

¹⁴ In *British Telecommunications plc and Viag Interkom GmbH/Deutsche Telekom* [1998] CMLR 114 (Landgericht, Düsseldorf) the court held that the defendants had acted in breach of Art 81(1) and that they could be liable in damages pursuant to § 823(2) of the German Civil Code in conjunction with Art 81(1). In this case no damages were awarded because the claimants had only sought before the District Court a declaratory judgment that they were entitled to damages. Subsequently, pending appeal of the proceedings to the Bundesgerichtshof, the claimants withdrew the action following a settlement. D Woods, A Sinclair and D Ashton, "Private Enforcement of Community Competition Law: Modernisation and the Road Ahead" (2004) 2 *Competition Policy Newsletter* 31 (<http://europa.eu.int/comm/competition/publications/cpn/>).

¹⁵ At the end of 2003, the Commission commissioned a study to assist it with this work (Open procedure COMP/2003/A1/22). Based on the results of the study (Study on the conditions of claims for damages in case of infringement of EC competition rules (http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf)) and its own work, the Commission, in the second half of 2004, commenced work on the drafting of a Green Paper with a view to identifying potential ways forward.

¹⁶ U Immenga, EJ Mestmäcker and V Emmerich, *Gesetz gegen Wettbewerbsbeschränkungen (GWB)* (Munich, Beck, 1992), § 33 Rn 8.

¹⁷ As do G Kegel, *Internationales Privatrecht* (München, Beck, 6nd edn, 1987), § 23 V 3.

¹⁸ M Martinek, *Das internationale Kartellprivatrecht* (Heidelberg, 1987), 24–5.

¹⁹ *Ibid.*, 23; J Basedow, *Weltkartellrecht* (Tübingen, Mohr Siebeck, 1988), 8, 10, 38.

3. Extraterritorial Application

Although US antitrust law expressly relates to trade with foreign nations, there was no statutory provision governing whether it applies extraterritorially.

The extraterritorial reach of a country's law is a problem of legislative or prescriptive jurisdiction in US law and a choice of law problem in European terms. Legislative or prescriptive jurisdiction describes the authority of a state to make its substantive law applicable to conduct, relationships or status.²⁰ In other terms this is a choice of law problem (for terminology see below E.2). Prescriptive jurisdiction must first be distinguished from judicial jurisdiction. Judicial jurisdiction (sometimes called adjudicatory jurisdiction) describes the power of a court to subject particular individuals or property to its judicial process.

Prescriptive jurisdiction must further be distinguished from subject matter jurisdiction. Subject matter jurisdiction refers to the power of a court to entertain specified classes of cases without regard to the applicable rules of law and is mainly used to delimit the competences of state and federal courts.

In US law questions of jurisdiction and applicable law are to be distinguished but are more often intertwined than they are in civil law countries. Especially in US cartel law cases, legislative jurisdiction and subject matter jurisdiction are often confused.²¹ In *Hartford Fire Ins Co v California*²² and in the *Empagran* decision of the Court of Appeals²³ the problem of extraterritorial reach of US cartel law was treated as a problem of subject matter jurisdiction.²⁴ In the Supreme Court's decision subject matter jurisdiction and legislative jurisdiction are again confused and not at all distinguished. As Justice *Breyer* refers to "prescriptive comity" in the *Empagran* decision he seems to have regarded the problem as one of prescriptive jurisdiction.

In a first decision concerning the extraterritorial reach of US cartel law in 1909, *American Banana v United Fruit Co*,²⁵ the Supreme Court restricted the application of US cartel law to acts of competition committed on US soil. However, since the *Alcoa* decision of 1945 (*US v Aluminium Co of America*)²⁶ this territorial

²⁰ McKinnon, "Federal Judicial and Legislative Jurisdiction Over Entities Abroad: The Long-arm Statutes of US Antitrust Law and Viable Solutions Beyond the Timberlane/Restatement Comity Approach" (1994) 21 *Pepperdine Law Review* 1219, 1251.

²¹ *Ibid.*; R Michaels and D Zimmer (2004) *Praxis des internationalen Privat- und Verfahrensrechts*, 451, 452, 454.

²² *Hartford Fire Insurance Co v California*, 509 US 764, 796 (1993).

²³ *Empagran SA v F Hoffmann-LaRoche, Ltd* 315 F3d 338, CADC, 2003.

²⁴ See also RW Becker and MH Kirtland, "Extraterritorial Application of US Antitrust Law: What is a 'Direct, Substantial, and Reasonable Foreseeable Effect' Under the Foreign Trade Antitrust Improvement Act?" (2003) 39 *Texas International Law Journal* 11, 21.

²⁵ 213 US 347, 29 S Ct 511, 53 L Ed 826 (1909).

²⁶ *US v Aluminium Co of America (Alcoa)*, 148 F2d 416, 443 (2d Cir 1945); P Hay, "Zur extraterritorialen Anwendung US-amerikanischen Rechts" (1996) 60 *Rebels Zeitschrift* 303, 305; B Grossfeld and CP Rogers, "A Shared Values Approach to Jurisdictional Conflicts in International Economic Law" (1983) 32 *International and Comparative Law Quarterly* 931, 936.

approach no longer applies. Instead US cartel law applies whenever the breach of competition affects the US market. Since then the *effects doctrine* has been considered to be the relevant connecting factor when reviewing international cartel cases.²⁷ Thus, although a breach of competition may be committed outside a state's territory, the law follows and is applied beyond the boundaries of the state. The law applies *extraterritorially*.

However, the case law following this was not always consistent. Matters upon which decisions particularly differed were whether the adverse effect on competition in the USA had to be intentional or whether only the objective effect was relevant and the extent to which there had to be an adverse effect on competition.

In order to remove this uncertainty the Foreign Trade Antitrust Improvement Act (FTAIA) was enacted in 1982 as an amendment to the Sherman Act and was intended to lay down the conditions for the extraterritorial application of cartel law.²⁸ According to this Act, US cartel law does not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless (1) such conduct has a direct, substantial and reasonably foreseeable effect on domestic commerce and (2) such effect gives rise to a claim before US courts.

The second condition was the central issue in the *Empagran* case. Is there a cause of action in the USA if a plaintiff has suffered damage outside the territory of the USA but the anti-competitive conduct by the companies concerned also impairs American competition? *Empagran* did not suffer its damage due to

²⁷ MN Shaw, *International Law* (Cambridge University Press, 5th edn, 2003), 612; Norton, "Extraterritorial Jurisdiction of US Antitrust and Securities Law" (1979) 28 *International and Comparative Law Quarterly* 575; M Sornarajah, "The Extraterritorial Enforcement of US Antitrust Laws: Conflict and Compromise" (1982) 31 *International and Comparative Law Quarterly* 127. Elsing and van Alstine, *US-amerikanisches Handels- und Wirtschaftsrecht*, supra n 9, Rn 916ff; P Hay, *US-amerikanisches Recht*, Rn 551ff.; *idem* (1996) 69 *Rebels Zeitschrift* 303; Basedow, supra n 19, 20; Huber, "Auswirkungstheorie und extraterritoriale Rechtsanwendung im internationalen Kartellrecht" (1981) *Zeitschrift für Gesellschaftsrecht*, 510, 511–12; *idem*, *IX Internationales EG-Kartellrechtsforum* (1982), 11, 12–13; Beck, *Extraterritoriale Anwendung des EG-Kartellrechts, rechtsvergleichende Anmerkungen zum "Zellstoff"-Urteil des Europäischen Gerichtshofs* (RIW, 1990), 91, 92; Martinek, supra n 18, 21–22; *idem*, "Das uneingestandene Auswirkungsprinzip des EuGH zur extraterritorialen Anwendbarkeit der EG-Wettbewerbsregeln" (1989) *Praxis des internationalen Privat- und Verfahrensrechts*, 347, 348. Analysis of American jurisdiction from a continental perspective: Reh binder, *Extraterritoriale Auswirkungen des deutschen Kartellrechts* (1965); I Schwartz, *Deutsches Internationales Kartellrecht* (Köln 1962); K Meessen, *Völkerrechtliche Grundsätze des internationalen Kartellrechts* (Baden-Baden, 1975); Kalfanke, "Jüngste Entwicklungen zur extraterritorialen Anwendung der Wettbewerbsgesetze in den USA" (1987) *Wirtschaft und Wettbewerb*, 277; U Immenga, *EJ Mestmäcker und E Reh binder, Gesetz gegen Wettbewerbsbeschränkungen (GWB)* (Munich, Beck, 2001), s 130 Abs 2 Rn 19; D Voß, *Ansätze zur Behandlung internationaler kartellrechtlich relevanter Sachverhalte* (Frankfurt, Lang, 2000), 20.

²⁸ 15 USC s 6a. The conditions for the extraterritorial enforcement of public cartel law are fixed in the Antitrust Guidelines for the Federal Department of Justice and the Federal Trade Commission (FTC).

the effects of the price cartel on the American market because it bought the vitamins abroad at excessive prices.

The appeal courts had differing opinions on the interpretation of this clause in the FTAIA. In 2001 the Fifth Circuit held that it was necessary that the damage being claimed by the plaintiff was due to an adverse effect on US competition.²⁹ The Second Circuit did not make this a requirement. It held that the plaintiff did not need to have any connection with American competition.³⁰ In January 2003 the District Court of Columbia agreed with this view in the present case.

The Supreme Court now held that where the price-fixing conduct significantly and adversely affects both customers outside and within the United States, but the adverse effect is independent of any adverse domestic effect, the FTAIA exception does not apply, and thus, neither does the Sherman Act, to a claim based solely on the foreign effects. The Supreme Court mentioned two main reasons.

First, the Supreme Court points out that it ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations.³¹ This rule reflected principles of customary international law.³² It would caution courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws. It thereby helps the potentially conflicting laws of different nations to work together in harmony—which is particularly needed in today's highly interdependent commercial world.

America's antitrust laws, when applied to foreign conduct, could interfere with a foreign nation's ability independently to regulate its own commercial affairs. But US courts have long held that application of US antitrust laws to foreign anticompetitive conduct is none the less reasonable, and hence consistent with principles of prescriptive comity, in so far as they reflect a legislative effort to redress domestic antitrust injury that foreign anticompetitive conduct has caused.

Second, the FTAIA's language and history suggests that Congress designed the FTAIA to clarify, perhaps to limit, but not to expand in any significant way, the Sherman Act's scope as applied to foreign commerce.

The Supreme Court has clearly reduced the tendency towards judicial imperialism in US cartel law. But did the threat of global hegemony of the USA in cartel law vanish with the Supreme Court's *Empagran* decision?

²⁹ *Den Norske Stats Oljesellkap As v Heere/Mac Vof*, 241 F3d 420.

³⁰ *Kruman v Christies Int'l PLC*, 284 F3d 384.

³¹ *McCulloch v Sociedad Nacional de Marineros de Honduras*, 372 U. 10, 20–22, 83 S Ct 671, 9 L Ed 2d 547 (1963); *Romero v International Terminal Operating Co*, 358 US 354, 382–83, 79 S Ct 468, 3 L Ed 2d 368 (1959); *Lauritzen v Larsen*, 345 US 571, 578, 73 S Ct 921, 97 L Ed 1254 (1953).

C. THE INADEQUATE SAFEGUARDING OF GLOBAL COMPETITION BY THE EFFECTS DOCTRINE

As a first step some of the considerations, which may have caused the problems prior to the decision of the Supreme Court, will be put into perspective. Then the paper will come to the heart of the problem, which is neither an American problem nor a cartel law problem but a fundamental one.

1. Effects Doctrine is not a Special US Path

First it should be noted that the extraterritorial application of national cartel law has become international practice which, in the course of business globalisation, is intended to protect national and supranational markets.

Both European and German cartel law apply mandatorily if there is a restraint of competition which has an effect on the specific market even if it was caused outside the scope of application of the Act (Art 81, 82 EC Treaty, Sec 130(2) of the German Act Against Restraints of Competition (GWB)).

Internationally, the effects doctrine has set out to win over the world: not only European countries such as Switzerland (Art 2(2) Cartel Law),³³ Austria (para 6(1) Cartel Law), Spain, Greece, Norway, Sweden, Italy and France should be mentioned but so should Australia and countries in Latin America.³⁴

Until 2000 the UK cartel law (Sec 6(1) Restrictive Trade Practices Act 1976, Resale Prices Act 1976, Competition Act 1980 and Fair Trading Act 1980) followed a strict territorial approach. The breach of competition had to be committed by companies carrying on business in the UK and it had to have an effect on the UK market.³⁵ The Competition Act 1998 has repealed the Restrictive Trade Practices Act 1976, the Restrictive Practices Court Act 1976, the Resale Prices Act 1976 and the Restrictive Trade Practices Act 1977. It also replaces Sections 2–10 of the Competition Act 1980 relating to the control of anti-competitive practices.³⁶ It harmonised UK law with European Union legislation

³² See Restatement (Third) of Foreign Relations Law of the United States ss 403(1), 403(2) (1986); *Murray v Schooner Charming Betsy*, 2 Cranch 64, 118, 2 LE2d 208 (1804) *Hartford Fire Insurance Co v California*, 509 US 764.

³³ F Dasser, "Neue Tendenzen im internationalen Kartellprivatrecht der Schweiz" (1996) *AJP/PJA*, 950.

³⁴ For references, see Basedow, *supra* n 19, 25.

³⁵ MA Blythe, "The Extraterritorial Impact of the Anti-trust Laws: Protecting British Trading Interests" (1983) 31 *American Journal of Comparative Law* 99; AV Lowe, "Extraterritorial Jurisdiction—The British Practice" (1988) 52 *Rebels Zeitschrift* 157.

³⁶ For an overview, see D Parker, *Reforming Competition Law in the UK: The Competition Act 1998* (Aston University, Birmingham, 2000). Further reforms have been made by the Enterprise Act 2002. In 2004 the UK government has announced its proposals for the implementation of Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules laid down in Arts 81 and 82 of the EC Treaty ([2003] OJ L001/04/01, 1–25 "EC Competition Law Modernisation Regulation") and for the realignment of the Competition Act 1998 with the modernised EC regime. Office of Fair Trading (www.of.t.gov.uk) Annual Report 2003–2004, 58.

on restrictive practices and abuse of a dominant position. The Act replaces the need for registration with a general prohibition.

The two main prohibitions are the prohibitions in chapter I and in Chapter II. The prohibition in Chapter I is based on Article 81 EC Treaty and prohibits anti-competitive agreements. The prohibition in Chapter II is similar to Article 82 EC Treaty and prohibits abuse of a dominant position.

Chapter I prohibits agreements between undertakings, decisions by associations of undertakings or concerted practices which may affect trade within the UK, and have as their object or effect the prevention, restriction or distortion of competition within the UK, unless they are exempt in accordance with the provisions of the Act.

In contrast to the global triumphal march of the effects doctrine there are still only a few court decisions available.³⁷

In all cartel statutes the term "domestic effect" requires interpretation and does not have an exact legal definition.

To reduce the risk that multiple national legal systems apply to one set of facts it is often said that the domestic effect must be "direct, substantial and foreseeable".³⁸ This expression is also used in the Foreign Trade Antitrust Improvement Act (FTAIA), 15 USC s 6a and in European cartel law. Although Articles 81, 82 EC Treaty include no explicit choice of law rule, their interstate clause was interpreted even prior to the Amsterdam Treaty as requiring a direct or indirect, but substantial, effect on the commerce between Member States.³⁹ German cartel law is, despite the fact that the effect must be substantial,⁴⁰ unequivocal in this question.⁴¹

Thus, neither the fundamental application of the effects doctrine in US law is justified in principle nor is the reproach that the application of one's own law cannot be predicted in relation to the USA.

³⁷ Decisions of the European Court of Justice are not explicit in favour of the effects doctrine, European Court of Justice, 27 September 1988, Case 89/85, *Ahlstrom v Commission* [1988] ECR 5193; J von Staudinger and KH Fezer, *Internationales Wirtschaftsrecht* (Berlin, Sellier, de Gruyter, 2000), Rn 289; Basedow, *Weltkartellrecht*, *supra* n 19, 25.

³⁸ International Law Association, Resolution on Extra-Territorial Application of Anti-Trust Legislation, ILA-Report 55th Conference, New York 1972 XIX, Art 5.

³⁹ [1966] ECR I-281, 304; see Martinek, *supra* n 27, *IPRax*, 347, 349; A Gleiss and M Hirsch, *EWG-Kartellrecht* (Heidelberg, Verlag Recht und Wirtschaft, 1993), Einl Rn 38ff; Huber, *supra* n 27, *ZGR*, 510, 511; *idem*, *supra* n 27, *IX Internationales EG-Kartellrechtsforum*, 11, 12. HG Koppensteiner, *Wettbewerbsrecht*, Bd 1, *Österreichisches und europäisches Kartellrecht* (Vienna, Wirtschaftsverlag Orac, 2nd edn, 1989), Bd 1, 316; U Immenga, "Grundsätze extraterritorialer Anwendung des Kartellrechts nach deutschem Recht und europäischem Gemeinschaftsrecht", in Holl and Klinke (eds), *Internationales Privatrecht—Internationales Wirtschaftsrecht* (Cologne, Munich, 1985), 203, 204; Martinek, *supra* n 27, *IPRax*, 347, 349; Langen and Bunte, *KartR, Einfüg. zum EG-Kartellrecht*, Rn 59; Voß, *supra* n 27, 15; Staudinger and Fezer, *supra* n 37, Rn 283ff.

⁴⁰ R Bechtold, *Gesetz gegen Wettbewerbsbeschränkungen* (GWB) (Munich, Beck, 3rd edn, 2002), s 130 Rn 15.

⁴¹ For an overview, see Staudinger and Fezer, *supra* n 37, Rn 115.

2. Judicial Imperialism

However, what was justified until the Supreme Court's *Empagran* decision was the reproach pertaining to the extensive application of US cartel law. This could lead to unforeseen forum shopping when the acts of globally operating companies were concerned. Legal certainty for these companies was thereby unduly curtailed if, in addition to the state sanctions of various countries, they are also faced with the threat of largely unlimited private actions for treble damages in the USA. The lower instances were rightly accused, not only by the US Department of Justice but also from the OECD countries, of assuming that it is only possible to take action against international cartels with the help of the US courts and US law. The fact that currently approximately 100 countries have enacted their own cartel laws and can therefore—unlike in the past—also prevent restraints of trade effectively was overlooked. Until the Supreme Court's decision, globally operating companies had no possibility of predicting in which courts they may be sued. These kind of imperialistic tendencies hinder the co-operation needed between countries in the field of cartel law.

The Supreme Court's *Empagran* decision directly refers to a foreign nation's ability to regulate its own commercial affairs. The Court expressly wants to avoid unreasonable interference with other nations' sovereign authority.

Even now that the Supreme Court has held that US cartel law did not apply in the *Empagran* case, the problem is not entirely eliminated. The Supreme Court has restricted its decision to the fact that the adverse effect is independent of any adverse domestic effect. The Court of Appeals has to consider now, whether respondents properly preserved their alternative argument that the foreign injury was not in fact independent of the domestic effect. It remains an open question in what circumstances the court will find that the domestic effects of the alleged conduct give rise to the claim of a foreign plaintiff who purchases a product in a purely foreign transaction. There is still no security for the companies involved.

Looking more closely, the problem is not at all the excessive application by US courts of their own law, but rather it is the effects doctrine itself. In its current form it is not suitable for safeguarding global competition. The increasing liberalisation of global trade in a global world has not made regulation superfluous, ie the supervision and control of the conduct of economic subjects. On the contrary, with increasing globalisation comes an increased need for regulations and institutions to avoid private restrictive practices by market players who are compensating for the disappearance of national trade restrictions.

3. Deficits of the Effects Doctrine

The effects doctrine has substantial deficits. The following five are the most important.

(a) Multiple national legal systems apply to one set of facts involving global restrictive practices. In the annual report of BASF plc, one of the companies involved in the vitamin cartel, it is reported that following the revelation of the vitamin cartel the company reached settlements with the US Department of Justice, the Canadian Competition Bureau and the Australian Department of Justice. However, further proceedings were still pending in Brazil and Australia. Private class actions were pending in 28 countries; the cases in 24 of these countries could be settled against voluntary payments of \$340 million.

Although in global commerce there is no international right to a seamless zoning of statutes and the application of the law of just one country, it remains obvious that there is a need to channel jurisdiction. This channelling must, however, be achieved by international consensus not by *judicial imperialism*, as the USA were pursuing.

This necessity has already been recognised for international tax law: It is "in the interests of the states to divide up the taxpayers amongst themselves and to prevent these valuable human cash cows from being either abused or un milked".⁴²

(b) The competition authorities arrive at inconsistent decisions: one authority can order that which another authority prohibits:⁴³

"The Federal Trade Commission (FTC) and the Commission of the European Union had different decisions in the cases *General Electric* and *Honeywell*⁴⁴ and in *Glaxo Wellcome* and *SmithKline Beecham*."⁴⁵

(c) As a result, the effects doctrine enables the economically and politically most powerful nations to impose their own trade and competition policy objectives and value judgements on the rest of the world.

(d) Above all, however, globalisation has brought about an incongruity of state territory and economic area. It is only when looked at superficially that the effects doctrine appears to comply with this by applying national competition law irrespective of where the act was committed or where the companies involved have their seat and in this way tries to protect the national market.

The prevailing opinion in international law is that it is now possible to stipulate a rule that national law applies extraterritorially.⁴⁶ However, it is exceedingly difficult to implement this in practice. Enforcement of the rule requires cartel proceedings to be taken, which require investigation proceedings in order to establish facts abroad and, once the proceedings have been concluded, require

⁴² Siesby, Some Aspects of the Legislative Technique in the Conflict of Laws (Thesis Harvard, 1952), 21.

⁴³ W Kilian, *Europäisches Wirtschaftsrecht* (Munich, Beck, 2004), Rn 453.

⁴⁴ [2004] OJ L048/1, 18/2 (http://europa.eu.int/eur-lex/pri/en/oj/dat/2004/L_048/L_0482004_0218en00010085.pdf).

⁴⁵ Facts in Müller and Wettach, *Wirtschaftswoche* 3/2004, 8.1.2004.

⁴⁶ Permanent Court of International Justice, Series A, No 10, 12th session, 7 September 1927, Judg No 9 (SS "Lotus") (www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus); DJ Gerber (1983) *Yale Journal of International Law*, 901, 906.

coercive measures to be enforced abroad. Due to the sovereignty of other countries, this is only possible on foreign territory if the other country consents. On the whole there are not enough international treaties, at least for acts of state. This results in substantial deficits in implementation and enforcement; even isolated, spectacular cases cannot hide this fact.

Nowadays the problem with the effects doctrine is that a lot of countries lacking the economic or political power do not enforce their competition law. Consequently there have been a few spectacular cases where a country has been of the opinion that it has had to deal with cases which do not have sufficient connection with their own state territory.

(e) A further substantial deficit of the effects doctrine is its one-sided focus.⁴⁷ The fact that commercial relations are increasingly interwoven means that the effects of breaches of competition are ubiquitous. The *Empagran* case shows this very clearly and the Court of Appeals might come to the conclusion that the foreign injury was not independent of the domestic effect and apply US cartel law.

The ubiquity of effects cannot be taken into account by the effects doctrine. Only acts that adversely affect one's own market are combated on the basis of one's own law. Acts that originate in one's own territory and adversely affect competition in a neighbouring country are of no interest so long as there is no adverse effect on one's own market. However, competition often exists in global markets, not national markets, so it would in fact be sensible to take an interest in restrictive practices abroad as well.

Global competition is therefore inadequately protected.

D. INTERIM FINDINGS

1. Despite a liberalisation of state trade policies, global restrictive practices are being combated at a purely national level, though at least in the EU on a supranational level.⁴⁸
2. This results in the application of multiple national laws and decisions by national cartel authorities which are incompatible with each other and consequently leads to a great deal of legal uncertainty for the companies concerned.
3. The effects doctrine as it stands now does not create global order; rather it creates global conflicts.

⁴⁷ Basedow, *supra* n 19, 26–27.

⁴⁸ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules laid down in Arts 81 and 82 of the Treaty ([2003] OJ L001, 04/01, 1–25).

E. POSSIBLE SOLUTIONS

1. Deficits in the Legal Regulation in Cases Involving Global Facts

The *Empagran* case is an example that illustrates the difficulty of legal regulation in a global economic and social order.

The problem after all is not purely a cartel problem; rather the problem concerns the consequences of the basic lack of legal regulation in global (cartel) cases.

2. The Possibilities of Legal Regulation in Transnational Legal Issues

No binding rule has yet emerged for choosing the tools for regulating transnational legal issues. This is particularly so when an area of law does not clearly fall into the category of either civil or public law, as is the case with cartel law.

Irrespective of whether the facts of a case fall into the category of civil law or public law, global cases can be dealt with by applying either a standard uniform law or national law. If regulated by national law, the question of which particular national law applies to a case is decided by the *choice of law rules*.

The efficiency of the conflicts of law solution can be increased by harmonising the choice of law rules, especially if they receive a uniform interpretation from the European Court of Justice (ECJ), and by adding a set of uniform rules of jurisdiction.

An example of the comprehensive solution is in the relation of the Rome Convention on the Law Applicable to Contractual Obligations from 1980, which might be transformed into the Rome I Regulation in the near future,⁴⁹ to the Brussels I Regulation. The Rome Convention of 1980 complements the 1968 Brussels Convention that was replaced by the Brussels I Regulation in 2002. It provides that under certain circumstances the courts of several Member States may have jurisdiction over a case. Having uniform choice of law rules reduces the risk that one party might take his action to the courts of a particular member state because it applies the law most favourable to his case (forum shopping).

The EU Commission stressed in the proposal for a Rome II Regulation,⁵⁰ that harmonisation of the choice of law rules for non-contractual obligations is the necessary adjunct to the harmonisation already achieved by the Brussels I Regulation regarding the rules governing the international jurisdiction of the courts and the mutual recognition of judgments.

⁴⁹ Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation COM(2002) 654 final. Hahn and Tell, "The European Commission's Agenda: The Future 'Rome I and II' Regulations" in J Basedow *et al.* (ed), *Intellectual Property in the Conflict of Laws* (Tübingen, Mohr Siebeck, 2005), 7.

⁵⁰ Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003) 427 final.

The jurisdiction solution and choice of law solution, as well as the uniform law solution, are "instruments from one toolbox" which are supposed to help regulate global cases.⁵¹ All three possibilities of regulation must be considered together. One can only decide which method of regulation is the right way to regulate a particular case if one is aware of the various instruments available for regulating global cases.

3. The Relationship between the Means of Regulation

The relationship between the means of regulation has still not really been settled. Usually the debate fizzles out with the conclusion that the law governing the choice of laws would be superfluous if there was a uniform law. To this very day there is no recognised methodology, deciding in which cases a special instrument is suitable.⁵²

Where harmonisation of the substantive law is more or less embryonic or politically without a chance of consent, a choice of law solution is frequently favoured.

(a) *European Contract Law and the Rome II Instrument*

A current example is the Rome II Instrument, the creation of which seeks to resolve the conflict regarding non-contractual obligations in Europe. On a close reading of the proposal, it seems obvious that the Commission would rather recommend a uniform substantive law, but is reluctant to do so as this would be too optimistic for the present. In the present situation, the creation of a European Law for contractual and non-contractual obligations is considered unrealistic ("the approximation of the substantive law of obligations is no more than embryonic. Despite common principles, there are still major divergences between Member States"⁵³)—the choice of law solution is the preferred approach.

(b) *Global Accounting Standards*

The situation in the field of global accounting is different today due to dramatic changes in recent years. In recent years it became clear that there was no room for national or even supranational solutions, as they brought legal inequality into an area which needed globally identical rules. The EU first tried to solve this problem by creating Accounting Directives.⁵⁴ The results were still divergent

⁵¹ K. Kreuzer, *Vom Internationalen zum Transnationalen Wirtschaftsrecht, Festgabe Zivilrechtslehrer 1934/1935* (Berlin, de Gruyter, 1999), 289, 297.

⁵² But see Kreuzer, *ibid.*, 289.

⁵³ Proposal for a Regulation of the European Parliament and the Council on the Law applicable to non-contractual obligations ("Rome II"), COM (2003) 427 final, 5.

⁵⁴ Fourth Council Directive 78/660/EEC of 25 July 1978 based on Art 54 (3)(g) of the Treaty on

solutions in national law. The Regulation on the application of international accounting standards of 2002 stressed that publicly traded companies *must* be required to apply a single set of international accounting standards for the preparation of their consolidated financial statements. It was considered important that the financial reporting standards applied by Community companies participating in financial markets are internationally accepted and truly global standards. This implied an increasing convergence of internationally applied accounting standards with the ultimate objective of achieving a single set of global accounting standards.

The winners are nowadays uniform (private!) rules like the International Financial Reporting Standards (IFRS)⁵⁵ and the United States Generally Accepted Accounting Principles (US-GAAP), which cover most parts of the world.

Today globally, accounting standards are an area with no apparent room for the choice of law solution. The creation of a uniform law in the private sector, combined with an endorsement mechanism in Europe, is a widely accepted necessity.⁵⁶

The example of accounting standards could show that it might be a political and not a legal decision whether we apply a uniform law or the choice of law rules to a certain situation. The decision for or against a certain solution could therefore be more or less arbitrary and incidental.

(c) *The Principles of Subsidiarity and Reasonableness*

To reduce the element of arbitrariness, two principles could be helpful. One is the principle of subsidiarity, the other the principle of reasonableness. The first answers the question of the right level of legislation and scope of competences. The second helps to find the specific tool for effectively ruling on a certain level.

Before any global law is created, it will have to be demonstrated that there is a need for a global law in a specific area, as was the case in the field of global accounting. Until such time there is a rebuttable presumption that a solution on a lower level is sufficient. The higher level of regulation is called for only when and

the annual accounts of certain types of companies [1978] OJ L222, 14/08, 11–31; Seventh Council Directive 83/349/EEC of 13 June 1983 based on the Art 54 (3)(g) of the Treaty on consolidated accounts [1983] OJ L193, 18/07, 1–17.

⁵⁵ International accounting standards mean International Accounting Standards (IAS), International Financial Reporting Standards (IFRS) and related Interpretations (SIC-IFRIC interpretations) issued or adopted by the International Accounting Standards Board (IASB) (www.iasc.org.uk).

⁵⁶ The implementation of the Regulation is in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission and with due regard to the declaration made by the Commission in the European Parliament on 5 February 2002 concerning the implementation of financial services legislation.

in so far as the objective of proper regulation can only be achieved at a higher level. This is the case if the presumption that the lower level has jurisdiction is rebutted. A principle of subsidiarity similar to Article 5 EC Treaty applies to the creation of a global legal order. Certain problems can only be dealt with by a global rule. This must be demonstrated. Other issues can be addressed on a lower, supranational or national level.

When the right level for a legal solution is found, one has to choose an instrument to solve a legal problem on this specific level. At this stage the principle of reasonableness must be applied. A solution must be *appropriate* and *necessary*. On this particular level of regulation the harmonisation of choice of law rules must be distinguished from the harmonisation of substantive law.

The existence of differing rules of jurisdiction leads to extensive forum shopping, which, if the choice of law rules of all the States that have jurisdiction in one case differ widely, is in fact a choice of law rules shopping which directly leads to substantive law shopping. The harmonisation of choice of law rules allows the parties to confine themselves to studying a single set of choice of law rules, thus reducing the cost of litigation and improving foreseeability of solutions and increasing legal certainty.⁵⁷ Under the regime of a principle of reasonableness, an *appropriate* measure must be taken. This would be the harmonisation of choice of law rules rather than the coexistence of differing choice of law rules.

The harmonisation of choice of law rules will definitely increase foreseeability and certainty but it does not prevent different courts from arriving at differing results. Only harmonisation of the substantive law offers complete legal certainty. If this level of certainty is essential, only the substantive law solution is appropriate under the principle of reasonableness.

4. A Uniform Cartel Law

(a) *The Need for a Uniform Law in Cartel Matters*

An international cartel law code, a global cartel law, would be needed to provide an effective solution to the problem of global restrictive practices. This is the predominant opinion nowadays.⁵⁸ Neither the principle of subsidiarity nor the principle of reasonableness would restrict the implementation of a global law because no lower level is able to reach the same necessary results with any other tool of regulation.

⁵⁷ Proposal for a Regulation of the European Parliament and the Council on the Law applicable to non-contractual obligations ("Rome II"), COM(2003) 427 final, 5.

⁵⁸ See D Fidler, "Competition Law and International Relations" 41 *International and Comparative Law Quarterly* 563 (1992); J Ham, "International Cooperation in the Anti-Trust Field" (1993) 30 *Common Market Law Review* 571; W Fikentscher and A Heinemann, "Der 'Draft International Antitrust Code'—Initiative für ein Weltkartellrecht im Rahmen des GATT" (1994) *Wirtschaft und Wettbewerb*, 97, 107.

Attempts in this direction have been discernible since the end of the Second World War.⁵⁹ In parallel to the political organisation, the United Nations, an economic organisation was to be set up, the International Trade Organisation (ITO). The basic principles were negotiated in 1947/1948 at the Havana Conference. Chapter V of the Havana Charter included an international cartel law but this was never put into force. What remained was the General Agreement on Tariffs and Trade (GATT), which governed world trade and had the aim of eliminating state trade barriers.⁶⁰ In the 1960s and 1970s initiatives within the OECD were put forward but subsequently only led to recommendations.

So far it has not been possible to obtain consensus on a global unified law. Others consider this solution to be completely unrealistic because the competition interests of the various states are so divergent.⁶¹

(b) *The Instruments for Unification*

Even if one thinks that the solution of a uniform law is needed, one has to ask what would be the law-making body and what would be the instrument? Falling back on the traditional means of an international convention is unlikely to succeed because there are too many countries which would have to be involved as negotiating partners (there are currently about 185 sovereign states). The outcome would therefore probably be a patchwork of provisions rather than a uniform law. Furthermore the negotiating resources of the various states are limited.

However, within the World Trade Organization (WTO) there is the possibility of using the plurilateral process pursuant to Annex 4 to the Agreement Establishing the World Trade Organization.⁶² Thus a group of WTO Member States can enter into obligations which go beyond the obligations which generally apply to the member states. Signature of the Agreement Establishing the World Trade Organization created an institutional framework (the WTO has legal personality, it has organs of its own and it provides a dispute resolution procedure) which could offer the conditions for unifying cartel law. The EU has made the subject of competition a "discussion point" for the Doha Development Agenda (since 2001). Politically it would be necessary for at least the EU, Japan and the USA to also take this first step. However, the USA in particular is more concerned about its right to apply its own law than about a global uniform law.

⁵⁹ For an overview, see Basedow, *supra* n 19, 61ff; Meibom and Geiger, "A World Competition Law as an Ultima Ratio" (2002) 23 *ECLR* 445.

⁶⁰ Shaw, *supra* n 27, 1167.

⁶¹ W Fikentscher and J Drexel, "Der 'Draft International Antitrust Code' Initiative für ein Welt Kartellrecht im Rahmen des GATT" (1994) *Recht der internationalen Wirtschaft*, 93, 95; OG Lambsdorff, "Wettbewerbsrecht als Ordnungsfaktor einer globalisierten Marktwirtschaft" (2003) *Wirtschaft und Wettbewerb*, 710.

⁶² Shaw, *supra* n 27, 1168.

Organisations for the creation of soft law, eg UNCITRAL or a non-state setter of standards, such as the International Accounting Standards Board (IASB) in the field of global accounting,⁶³ are a promising basis for the creation of national cartel law, but probably not a basis for creating a binding global cartel law.

(c) *The Draft International Antitrust Code (DIAC)*

This situation has been taken into account by the drafters of the Draft International Antitrust Code (DIAC),⁶⁴ which is the most important start for achieving global unification of cartel law: The unification of law should only be encouraged by the introduction of minimum standards into national laws, application of the law should be left to the national authorities and courts, not to a world cartel authority. The national authorities and courts would only be supervised by international judicial bodies (International Antitrust Authority, International Antitrust Panel) under the umbrella of the WTO.

This attempt has not yet succeeded either. It appears that it will not be possible to create a world cartel law in the near future.⁶⁵ Nevertheless, propagating a uniformly applicable cartel law must remain a long-term goal. Until then, other routes must be taken which may reduce the significance of there being no *loi uniforme* even if it cannot completely compensate for there not being a uniform law.

(d) *Questions of Global Jurisdiction in Cartel Cases*

The Hague Conference on Private International Law had drawn up a Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and

⁶³ J Adolphsen, "Grenzen der internationalen Harmonisierung der Rechnungslegung durch Übernahme internationaler privater Standards" (2004) 68 *Rebels Zeitschrift* 154; *idem*, "Globalisierung der Konzernrechnungslegung als rechtliches Steuerungsproblem" (2004) *Aktienkultur* 26.

⁶⁴ Published in: Antitrust & Trade Regulation Report, Vol 65, No 1628, Special Supplement (19 August 1993); W Fikentscher and U Immenga (eds), *Draft International Antitrust Code, Kommentierter Entwurf eines internationalen Wettbewerbsrechts mit ergänzenden Beiträgen* (1995), 53–110; see also U Immenga, "Internationales Wettbewerbsrecht: Unilateralismus, Bilateralismus, Multilateralismus" in *Beiträge zum Transnationalen Wirtschaftsrecht* (Halle, 2004), 18; W Fikentscher (1994) *Wirtschaft und Wettbewerb*, 97; W Fikentscher and J Drexel, *supra* n 61, 93; Basedow, *supra* n 19, 70; Voß, *supra* n 27, 103ff.

⁶⁵ Same conclusion (different solution) from Michaels and Zimmer, *supra* n 21, 451, 455.

⁶⁶ Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by P Nygh and F Pocar, Preliminary Document No 11 of August 2000, available at www.hcch.net.

⁶⁷ SP Baumgartner, "The Proposed Hague Convention on Jurisdiction and Foreign Judgments" (2002) *European Journal of Law Reform*, 219, 221; P Beaumont, "A United Kingdom Perspective on the Proposed Hague Judgments Convention" (1998) 24 *Brooklyn Journal of International Law*, 1, 75; *idem*, "European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters" (1999) 48 *International and Comparative Law Quarterly*, 251; RA Brand, "Due Process, Jurisdiction and a Hague Judgments Convention" (1999) 60 *University of Pittsburgh Law Review* 3, 661.

Commercial Matters of 1999.⁶⁶ This Draft covered much the same ground as the Brussels and Lugano Conventions.⁶⁷ Work on it was put on hold when it became apparent that there would not be a chance to reach consensus at that time. The Hague Conference later focused on choice of court agreements for business-to-business transactions.⁶⁸ The objective of this project is to make exclusive choice of court agreements an effective solution in the context of international business. The hope is that the future Convention will do for choice of court agreements what the New York Convention of 1958 has done for arbitration agreements.

The problem in the context of a global solution of cartel cases is that the current Draft excludes antitrust (competition) matters (Art 2(2)(g)) although they are recognised as possible subjects of private law proceedings. They "nevertheless affect the public interest, since they discourage anti-competitive behaviour".⁶⁹ Another argument for the exclusion is that an economically weak party, who is forced to accept terms in a contract that infringes antitrust (competition) law, should be able to claim damages from the other party, irrespective of any choice of court agreement. A choice of court agreement might allow the economically strong party to avoid the application of the law of a state that provides for rules for private actions in cartel cases, like the Sherman and Clayton Acts in the USA or Articles 81, 82 EC Treaty.⁷⁰

These arguments are questionable and probably it needs another initiative to again include antitrust (competition) matters in future discussions on a Draft Convention on choice of court agreements for business-to-business transactions. Keeping in mind the situation in the Hague Conference, it seems necessary to keep parallel focus on choice of law rules for the solution of global cartel cases.

5. Refining the Choice of Law Rules in Cartel Matters

A partial solution could be found by refining the choice of law rules as they apply to cartel matters.

(a) *States own Cartel Law and the Application of a Foreign Cartel Law*

In refining the choice of law rules in cartel matters a distinction must be made between one's own cartel law and the application of a foreign cartel law. The effects doctrine only governs the application of one's own law. The distinction between a forum's mandatory rules and mandatory rules of a foreign country is known in many European countries, as the existence of Article 7(1) and (2)

⁶⁸ Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, by Dogauchi and Hartley, Preliminary Document No 25 of March 2004, available at www.hcch.net.

⁶⁹ Preliminary Document No 26 of December 2004, 11 (n 28), available at www.hcch.net.

⁷⁰ Preliminary Document No 26 of December 2004, 11 (n 26), available at www.hcch.net.

Rome Convention and Article 12 Proposal for a Rome II Regulation (overriding mandatory rules) indicates. But this distinction is often of little practical relevance. The expression used by English writers is *overriding rule*, in French its *lois d'application immédiate* or *loi de police*,⁷¹ in Germany *Gesetze streng positiver zwingender Natur*.⁷²

The Rome Convention refers to mandatory provisions in Articles 3 (3), 5 (2), 6, 7 and 9. Mandatory provisions in national law, from which the parties cannot derogate by contract, are numerous.

Mandatory provisions within the meaning of Article 7 (and 12 Proposal for a Rome II Regulation) are a different matter than those in Articles 3 (3), 5 (2), 6 as they are involved only in international cases.⁷³ These rules are of such importance that a state requires them to be applied whenever there is a connection between a legal position and its own territory, whatever law would otherwise be applicable to the legal relationship. This law can be the law of a third country, as the reference in Article 7 is *situation* and not *contract* or *relationship*.

In the *Arblade* decision, the ECJ gave the definition of overriding mandatory rules as "national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State".⁷⁴

According to a continental legal view this is a step back from Savigny's universal theory on determining the seat of a legal relationship, and a step towards the more territorial approach of the old Statute Theory,⁷⁵ which has found little favour in England.

What is special about the mandatory rules within the meaning of Article 7 is that a court would not apply its choice of law rules to determine which law would be applicable and assess whether its content might be repugnant to the values of the forum.⁷⁶

While the application of mandatory rules of the forum must be regarded as an *exclusionary* concept, because its effect is that a foreign rule, which governs under choice of law rules, is not applied, the application of foreign mandatory rules follows a concept of wide application of foreign law. The first concept,

exclusion of foreign law for public policy reasons, is well known in England.⁷⁷ The second concept seems to be of little importance in some Member States, eg England.⁷⁸

(b) Application of Foreign Cartel Legislation

The application of foreign cartel law which requires a right of application of its own could make a significant contribution to the protection of competition on a global level.⁷⁹ When acts restricting foreign competition are committed domestically or are committed by domestically incorporated undertakings it is much easier to enforce the decision than it is to enforce decisions rendered by the state where the effect is felt because the courts involved are the courts which exercise the sovereign rights in the territory concerned.

This is not about, for instance, the English Director-General of Fair Trading⁸⁰ or the German Federal Cartel Office carrying out a decartelization procedure on the basis of the US Merger Guidelines. A State's public laws (in cartel matters administrative or criminal law) apply only territorially.

The application of foreign cartel law does not mean that national cartel authorities are supposed to enforce a foreign state's public laws. It rather means that the court must observe and comply with the *civil law consequences* and *effects* of the foreign state's laws.⁸¹ Within these limits the rule against applying foreign public law has long been superseded.⁸² Thus foreign public law can also be applied on the ground of private international law.

(c) Separation of Public and Private Law in Cartel Matters

The question remains to what extent foreign public law can be applied by domestic courts. In cartel law it is particularly difficult to distinguish between the laws which are so sovereign in nature that they fall into the category of public law, which applies in a strictly territorial manner, from the laws which fall into the category of purely civil law, which is applied by the choice of law rules of private international law.

There is a broad set of rules in which both public law and private law pur-

⁷¹ P Frankescakis, *Revue critique de droit international* (1966), 1ff; R Lehmann, *Zwingendes Recht dritter Staaten im internationalen Vertragsrecht* (Frankfurt am Main, Lang, 1986), 82.

⁷² von Savigny, *System des heutigen Römischen Rechts*, Bd 8 (1849), 33.

⁷³ R Plender and M Wilderspin, *The European Contracts Convention* (London, Sweet & Maxwell, 2nd edn, 2001), 187.

⁷⁴ Cases C-369/96 and C-376/96 [1999] ECR I-8453 (judgment given on 23 November 1999).

⁷⁵ Plender and Wilderspin, *supra* n 73, 184; Adolphsen (2004) 68 *Rebels Zeitschrift* 154, 167; Basedow, "Wirtschaftskollisionsrecht" (1988) 52 *Rebels Zeitschrift* 8, 9.

⁷⁶ 3.2.8.1. Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final.

⁷⁷ JG Collier, *Conflict of Laws* (Cambridge University Press, 3rd edn, 2001), 361; J Cheshire and P North, *International Private Law* (London, 13th edn, 1999), 132.

⁷⁸ Plender and Wilderspin, *supra* n 73, 184; Cheshire and North, *supra* n 77, 132; Ost, *EVÜ und fact doctrine* (1996), 168.

⁷⁹ See H Kronstein, *Das Recht der internationalen Kartelle* (Berlin, 1967), 286ff in 1972(!).

⁸⁰ www.of.gov.uk.

⁸¹ Ch Ungeheuer, *Die Beachtung von Eingriffsnormen in der internationalen Handelschiedsgerichtsbarkeit* (Frankfurt am Main, Lang, 1996), 13; see the private law consequences MüKo and Martiny, *EGBGB*, 3rd edn, Art 34 Rn 54ff; concerning Art 137 IPRG (Switzerland) Vischer, in Heini, IPRG, Art 137 Rn 5.

⁸² The German Federal Court sticks to a strict territorial approach in applying public law BGHZ 31, 367, 371.

poses are inseparably intertwined. The background is the scope of protection of cartel law. Cartel law not only pursues a macro-economic objective by protecting the relevant market, but it also protects the interests of market players. The co-existence of public and civil powers in many cartel laws is indicative of this dual function.

The possibility of claims for damages is acknowledged in many national cartel laws, but to widely different extents.⁸³ While in US cartel law private persons can base an action on the breach of *all* antitrust Acts, private persons are only allowed to base their action on those provisions of German cartel law that are intended to protect their interests (§ 33 GWB) (“Schutzgesetz”).⁸⁴

If the inseparability of public and private law in cartel matters is accepted, one needs another factor to determine the scope of international private law in cartel matters besides the purpose of the law or the extent of protection of private or public interests.

This factor could be the *relevance* of a legal provision to private persons. One can go so far as to classify every substantive legal provision—whether private or public—which is *directly* relevant for shaping relationships under private law, as belonging to private international law.⁸⁵ Direct relevance means that the provision does not merely gain indirect relevance through a decision by an administrative authority.

(d) *The Applicable Choice of Law Rules in Cartel Law*

(i) The Need for a Different Choice of Law Regime

If one assumes to this extent that competition law belongs to private international law, one must also ask whether this is subject to the normal choice of law rules or whether separate choice of law rules have to be created. Since foreign cartel law is often based on trade and competition policies that differ from the domestic trade and competition policies of other states and from the interests laid down in the normal choice of law rules it is only possible to have a special connecting factor for the application of foreign cartel law. The general choice of law rules of international private law cannot apply nor can the unilateral effects doctrine be developed to become a universal conflict rule.⁸⁶ Thus the “Special-link-Theory” (“Sonderanknüpfungstheorie”) established by Wengler⁸⁷ and Zweigert⁸⁸ rightly does not subject foreign (norms) of public law to the choice

⁸³ See also study on the conditions of claims for damages in case of infringement of EC competition rules: http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/comparative_report_clean_en.pdf.

⁸⁴ BGHZ 86, 324, 330; BHG NJW 1999, 190. The 7th amendment of the German Cartel law tries to facilitate private claims for damages.

⁸⁵ Martinek, *supra* n 18, 32; Vischer, in Heini, IPRG, Art 137 Rn 15.

⁸⁶ Mestmäcker (1988) 52 *Zeitschrift für Vergleichende Rechtswissenschaft* 205, 220; different Martinek, *supra* n 18, 94.

⁸⁷ Wengler (1941) 54 *Zeitschrift für Vergleichende Rechtswissenschaft* 168.

⁸⁸ Zweigert (1942) 14 *Rebels Zeitschrift* 283.

of law rules of private international law, but seeks to establish a unique regime of choice of law rules.

By contrast, the *lex causae theory* (“Schuldstatutstheorie”) seeks to apply the ordinary choice of law rules, thus broadly referring to the foreign law including its civil and public norms.⁸⁹ In this respect it is of no consequence that legislators such as those in Germany and the USA compose their cartel law of civil and public law provisions, and whether their conflict norms have public or civil law character. Thus the *lex causae theory* creates an extensive duty to apply foreign law including private and public law provisions and also mandatory rules. However, arguing against the reference to foreign mandatory rules in the *lex causae theory*, it must be said that while the domestic choice of law rules are concerned mainly with the interests of the parties, foreign mandatory norms centre predominantly around the unilateral needs of those nations. It is these diverging interests that preclude too wide a reading of the ordinary choice of law rules. It therefore stands to reason that the vastly differing interests at play give rise to the need for a different choice of law regime.

Recently, the doctrine of a special connecting factor for foreign mandatory law has been further developed into a *rule of reason* by starting to analyse and weigh up the interests with respect to the special connecting factor.⁹⁰

Nowadays the most important criteria are the close connection and its authoritativeness,⁹¹ the intended validity of the foreign law and its legitimacy particularly in relation to the *lex fori (ordre public)*.⁹²

1. The *close connection* is an uncertain expression which includes an element of appraisal in the identification of a connection and its closeness.⁹³ The uncertainty is increased by the reference to *situations* in Article 7(1) Rome Convention, which means that the applicable law for the legal relationship and the overriding rules can be of different national origin. In cartel matters it is the affected market which provides some guidance in finding a close connection. A close connection could also be assumed if the restriction of competition was effected domestically, and its effects were felt exclusively in a foreign market.

⁸⁹ FA Mann (1973) *FS Wahl* 146.

⁹⁰ A Schnyder, *Wirtschaftskollisionsrecht* (Zürich, Schulthess, 1990), 167ff; idem, “Anwendung ausländischer Eingriffsnormen durch Schiedsgerichte” (1995) 59 *Rebels Zeitschrift* 293, 303; U Drobniig, *FS Neumayer* (Baden-Baden, 1985), 159ff; Staudinger and Fezer, *supra* n 37, Rn 64.

⁹¹ Münchener Kommentar/Martiny, *EGBGB* (München, Beck, 3rd edn, 1998), Art 34 Rn 33; Grossfeld and Rogers (1983) 32 *International and Comparative Law Quarterly* 931, 944; P Schlosser, *Recht der internationalen privaten Schiedsgerichtsbarkeit*, Bd 2 (Tübingen, Mohr Siebeck, 2nd edn, 1989), Rn 740.

⁹² KP Berger, *International Economic Arbitration* (Deventer 1993), 690–91; Grossfeld and Rogers (1983) 32 *International and Comparative Law Quarterly* 931ff; M Erne, *Vertragsgültigkeit und drittstaatliche Eingriffsnormen* (Zürich, Schulthess, 1985), 188ff.

⁹³ Plender and Wilderspin, *supra* n 73, 188.

2. With the last criterion, the legitimacy of the overriding rule, the need to protect global competition in global markets must be taken into account. Many breaches of competition take effect across several jurisdictions. In the sense of *comity* it can therefore be in the interest of a state to apply its own law even though the domestic market is not affected.

(ii) Provisions Governing the Application of Foreign Cartel Law

There are no legal provisions governing the application of foreign competition law in Germany and the UK,⁹⁴ because neither country has adopted a rule like Article 7(I) of the Rome Convention or Article 12(I) of the Proposal for a Regulation on the law applicable to non-contractual obligations ("Rome II").

Many European countries, except Germany, Ireland,⁹⁵ Luxembourg, Portugal and UK, that have exercised their Article 22(1) right to refrain from applying Article 7(1) of the Rome Convention, have such a rule.

However, the prevailing opinion is that it is not prohibited to *consider* mandatory foreign law. The Commission stated in its Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation,⁹⁶ that the exclusion does not preclude the courts of the excluding states from taking foreign mandatory rules into account, but they would then be acting outside the Convention and the additional details that it contains.⁹⁷

The House of Lords decision in *Regazzoni v Sethia* [1958] AC 301, decided long before the Rome Convention came into force, can be regarded as an example of applying foreign mandatory rules even though the House of Lords did not use such terminology. In German law it is the prevailing opinion that there is an *intentional* gap in the provisions of German private international law.⁹⁸

(iii) The Swiss Solution as a model for a Rome II Proposal

Switzerland's Federal Code on Private International Law (IPRG)⁹⁹ offers a mod-

⁹⁴ S 2(2) Contracts (Applicable Law) Act 1990; North, *The EEC Convention on the Law Applicable to Contractual Obligations* (1980), 3, 19.

⁹⁵ S 2(2) Contractual Obligations (Applicable Law) Act 1991 (No 8).

⁹⁶ COM(2002) 654 final.

⁹⁷ 3.2.11. Green Paper.

⁹⁸ Martiny, "Der deutsche Vorbehalt gegen Art 7 Abs. 1 des EG-Schuldvertragsübereinkommens vom 19.06.1980—seine Folgen für die Anwendung ausländischen zwingenden Rechts" (1987) *Praxis des internationalen Privat- und Verfahrensrechts*, 277, 278; Münchener Kommentar/Martiny, *EGBGB*, 3rd edn, Art 34 Rn 46; von Bar, (1987) *IPR I*, Rn 263; M Zimmer, "Ausländisches Wirtschaftsrecht vor deutschen Zivilgerichten: Zur Unterscheidung zwischen einer normativen Berücksichtigung fremder zwingender Normen und einer bloßen Beachtung ihrer tatsächlichen Folgen" (1993) *Praxis des internationalen Privat- und Verfahrensrechts*, 65; Staudinger and Fezer, *supra* n 37, Rn 70; J Kropholler, *Internationales Privatrecht* (Tübingen, Mohr Siebeck, 5th edn, 2004), s 52 X 3a.

⁹⁹ Swiss Federal Law, 18.12.1987; SR 292.

ern and unique solution to the problem of considering mandatory rules in general, and applying foreign cartel law in particular. Its Article 19, which was directly influenced by Article 7(1) of the Rome Convention, contains a provision pursuant to which foreign mandatory law can optionally be considered.¹⁰⁰

Article 19 Switzerland's Federal Code on Private International Law

I. If, pursuant to Swiss legal concepts, the legitimate and manifestly preponderant interests of a party so require, a mandatory provision of a law other than that designated by this Code may be taken into account if the circumstances of the case are closely connected with that law.

II. In deciding whether such a provision must be taken into account, its purpose is to be considered as well as whether its application would result in an adequate decision under Swiss concepts of law.

For tortious claims, Article 133 IPRG stipulates a general choice of law rule similar to Article 3(1) Rome II Proposal. According to its basic rule, the applicable law is that of the jurisdiction where the harmful event (tort) occurred, or, if the damage arises in another jurisdiction, the applicable law is deemed to be that of the place where the damage takes effect. Article 133 IPRG and Article 3(1) Rome II Proposal are seeking to strike a reasonable balance between the person allegedly liable, and the person suffering the damage.

For private claims in cartel matters under civil law¹⁰¹ Article 137(1) IPRG, which even constitutes a universal choice of law provision, provides an obligation to *apply* the law of the state in whose market the injured party is directly affected by the restraint of competition.

Article 137(1) Switzerland's Federal Code on Private International Law

Claims founded on restraints of competition shall be governed by the law of the State in whose market the effects of the unfair act are felt.¹⁰²

For the future discussion of a Rome II Proposal, the relationship between Articles 19, 133 and 137(1) IPRG could be of great importance as it could be transposed onto the relationship between Articles 3(1), 5 and 12(1) of the Proposal for a Rome II Regulation.

¹⁰⁰ Vischer, in Heini, IPRG, Art 19 Rn 15. The parallel counterpart to Art 7(2) Rome Convention is Art 18 IPRG.

¹⁰¹ These are the rights to default, removal, compensation, satisfaction and transfer of profits. F Dasser and J Drolshammer, in Honsell, *IPR*, Art 137 Rn 6, Art 136 Rn 5. For the scope of application of Art 137 IPRG in Switzerland, see Dasser and Drolshammer, in Honsell, *IPR*, Art 137 Rn 6, Art 136 Rn 5, 9; Esseiva, (1995) 94 *Zeitschrift für vergleichende Rechtswissenschaft*, 80, 83; Vischer, in Heini, IPRG, Art 18 Rn 12; 137 Rn 6.

¹⁰² See F Dasser and J Drolshammer, in Honsell, *IPR*, Art 137 Rn 5; D Esseiva, "Die Anwendung des EG-Kartellrechts durch den schweizerischen Richter aufgrund des Art 137 IPRG" (1995) 94 *Zeitschrift für vergleichende Rechtswissenschaft*, 80, 82. Vischer, "Zwingendes Recht und Eingriffsgesetze nach dem schweizerischen IPR-Gesetz" (1989) 53 *Rabels Zeitschrift* 438, 455, 457; A Schnyder, *Wirtschaftskollisionsrecht* (Zürich, Schulthess, 1990), Rn 291.

Articles 12(1) Rome II Proposal contains a rule for the optional application of foreign mandatory rules (“effect may be given to the mandatory rules of another country”) in parallel to Article 7(1) Rome Convention, and Article 19 IPRG. It can be characterised as a rule which optionally opens national law to foreign legislation.

Article 5 of the Proposal for a Rome II Regulation includes a special rule for tortious claims in the field of unfair competition.¹⁰³ The general rule in Article 3(1) is not applicable where Article 5 Rome II Proposal applies.

Article 5—Unfair competition

1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are or are likely to be directly and substantially affected.

This provision does not clearly cover restrictions of competition, as the scope and the difference between restraint of competition and unfair competition (*concurrency déloyale*) is not clear and equal in all EU member states. In UK law unfair competition as a separate category of law is recognised as a continental phenomenon.¹⁰⁴ In German law there is a distinction between restraint of competition and unfair competition. While the law of unfair competition focuses on behaviour within a competitive market the law against restraint of competition focuses on the competition itself.¹⁰⁵ Swiss international private law of torts contains a special provision for unfair competition (Art 136 IPRG) and restraint of trade (Art 137 IPRG).

In the Explanatory Memorandum of the Rome II Proposal the Commission refers to acts calculated to influence demand (misleading advertising, forced sales, etc), acts which impede competing supplies (disruption of deliveries by competitors, enticing away a competitor’s staff, boycotts), and acts which exploit a competitor’s reputation (passing off and the like). This excludes tortious claims under cartel law from the scope of application of Article 5 of the Rome II Proposal. This interpretation of Article 5 corresponds to the solution in the Preliminary Draft Convention on jurisdiction and foreign judgments in civil and commercial matters of the Hague Conference on exclusive choice of court agreements. The exclusion of anti-trust (competition) matters (Art 2(2)(g)) does not cover unfair competition (*concurrency déloyale*).¹⁰⁶

¹⁰³ M Leistner, “Unfair Competition Law Protection Against Imitations: A Hybrid under the Future Art 5 Rome II Regulation” in J Basedow (ed), *Intellectual Property in the Conflict of Laws* (Tübingen, Mohr Siebeck, 2005), 129.

¹⁰⁴ See Huntley, “United Kingdom” in D Campbell (ed), *Unfair Trade Practices—The Comparative Yearbook of International Business* (1996), 313, 317; T Bodewig, “Das Recht des unlauteren Wettbewerbs in Großbritannien: Ein Dreiklang von Fallrecht, Gesetzesrecht und Selbstkontrolle” (2004) *Gewerblicher Rechtsschutz und Urheberrecht Internationaler Teil*, 543.

¹⁰⁵ Staudinger and von Hoffmann, *EGBGB* (2001), Art 40 Rn 308; V Emmerich, *Unlauterer Wettbewerb* (Munich, Beck, 7th edn, 2004), 2.

¹⁰⁶ Preliminary Document No 26 of December 2004, p. 11 (Note 26), available at www.hcch.net.

In future discussion, a special choice of law rule should be developed which reflects the two-dimensional function of cartel law (the protection of markets, and the protection of participants therein). This rule would be a particular rule supplementing Article 3(1) Rome II Proposal, which is construed as a general norm covering all obligations which the Rome II Proposal does not specifically regulate. Article 3(1) Rome II Proposal includes this general rule as a modern version of the *lex loci delicti* rule, which has its parallel counterpart in Article 133 IPRG.

The relationship between Articles 3(1), 12(1), and the special rule for torts in cartel matters should be the same as the relationship between Articles 19, 133, and 137 IPRG.

Article 137(1) IPRG is *lex specialis* to Article 19 IPRG, as the application of foreign law is mandatory (Art 137(1) IPRG), not optional (Art 19 IPRG). Furthermore, Article 137(1) IPRG contains special provisions for claims based on restrictions of competition.

It remains to be seen whether there is any need for a special choice of law rule for tortious claims in cartel matters. In discussions about the Rome II Proposal, the need for a special rule for unfair competition has been disputed on the grounds that it would lead to the same outcome as the general rule in Article 3(1) Rome II Proposal. Further it must be mentioned that in most EU Member States the normal *lex loci delicti* rule is applied in cases of unfair competition.¹⁰⁷ The results may be satisfying in some, but certainly not in all, cases.¹⁰⁸ The main argument in favour of a special choice of law rule is that Article 3(1) Rome II Proposal has entirely different interests at heart than any choice of law rule for cartel matters would. Article 3 Rome II Proposal focuses on the interests of the person allegedly liable, and those of the claimant. One of the interests central to the creation of a choice of law rule for cartel law is the need to protect certain markets. As stated above (V.5.d.iii), the applicability of foreign cartel law requires a ‘special connection’ since cartel law protects individuals as market players, as well as the market itself. This is also the justification for the effects doctrine. The general rule (Art 3(I) Rome II Proposal) does not reflect this two-dimensional function of cartel law. This is also the prevailing opinion in the interpretation of the relationship between Articles 133 and 137(I) IPRG.¹⁰⁹

If the Rome II Proposal would include a choice of law rule for tortious claims in cartel matters, this rule would be *lex specialis* to Articles 12(I) and 3(I) Rome II Proposal and therefore would reduce their scope of application.

¹⁰⁷ See Leistner, *supra* n 103, 129, 138.

¹⁰⁸ Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“Rome II”), COM(2003) 427 final, 16.

¹⁰⁹ Vischer, in Heini, IPRG, Art 137 Rn 5, 9.

(iii) The Background of Rules of Jurisdiction in Europe

In creating a choice of law rule, the European rules of jurisdiction must also be taken into account as an action for damages based on tortious liability for infringements of cartel law is a civil and commercial matter within the meaning of Article 1 of the Brussels I Regulation.

There is no general definition of civil and commercial matters in Brussels I. The ECJ has concluded that in order to achieve a uniform application of the Brussels I Convention (the findings of the court are still valid for the Brussels I Regulation) amongst the Contracting (today Member) States, an independent convention definition of civil and commercial matters was necessary.¹¹⁰ The court required reference to be made to the convention scheme and to the national laws of the contracting states. There are no civil and commercial matters in which a public authority acts in the exercise of its public powers.¹¹¹ In cartel matters there may be a mixture of civil and public powers. In this paper, every substantive legal provision *directly* relevant (without a prior decision of an administrative authority) to the shaping of relationships under private law was said to fall under the private choice of law rules. Leaving open the question whether all of these rules must also be characterised as civil and commercial, a claim by a private party seeking damages against another private party, which is based on liability for a restriction or distortion of competition, can be characterised as a civil and commercial matter within the meaning of Article 1 Brussels I. This view is also laid down in the Preliminary Draft Convention on exclusive choice of court agreements of the Hague Conference, Draft report of December 2004.¹¹² The fact that public and civil powers coexist in cartel law does not exclude such claims from the scope of the Brussels I Regulation.

Apart from choice of court agreements under Article 23 Brussels I Regulation, domestic courts have jurisdiction when persons domiciled in a Member State (Art 2 Brussels I Regulation—for companies or other legal persons or associations of natural or legal persons domicile is defined in Art 60 of the Regulation), are sued in the courts of that Member State.

Courts also have jurisdiction if a tort is committed within the Member State irrespective of where the damage occurs. Furthermore courts have jurisdiction where the damage occurs (Art 5(3) Brussels I Regulation).

Particularly in the case of torts that cannot be ascribed to one country, the ECJ jurisprudence on Article 5(3) of the Brussels I Regulation needs to be men-

tioned.¹¹³ This stipulates that a court which claims jurisdiction where (only) the damage occurs may rule only on damages and losses suffered within its national territory (known as "Mosaikbetrachtung" in German law according to the *Shevill* decision). This limitation of judicial authority needs to be considered in determining the applicable law.

(iv) A Choice of Law Rule in Cartel Matters

Considering this background of jurisdiction the choice of law rule for cartel law could be constructed as follows: in contrast to Swiss law, an alternative application of the law of the state in whose market the damage was suffered and the law where the tort was committed could be considered.

If the law of the state is applied whose market is affected and where damages occurred, this law applies only to damages and losses within this state due to the limitation of judicial authority ("Mosaikbetrachtung").

Where damages are sustained in several countries, either a centre of gravity could be fixed or the laws of all the countries concerned will have to be applied on a distributive basis (patchwork-solution). The Rome II Proposal would currently take the second approach within the application of the general rule in Article 3.¹¹⁴ Taking the centre of gravity approach the law of the most affected country would apply. Finding that centre would probably include uncertainty in the identification of the applicable law. In both cases would national civil courts help to protect foreign markets.

The question is whether the (tort) law of the state where the person acting is domiciled or the company has its seat or the wrongful act was committed could be applied irrespective of the effects on the domestic market. It would then be possible to extend national jurisdiction to all losses or damages, as it is done within the scope of Article 5(3) of the Brussels I Regulation. The obvious advantage would be a competence of one single jurisdiction for tort claims of the state, where persons have their domicile or seat or where the act was committed. This would not only protect European markets but also markets worldwide, as the Rome II Proposal has a universal application (Art 2).

Arguing against such a solution one must first state that this would not be in line with the Rome II Proposal's general rule in Article 3: it refers to the law where the damage was sustained as this does "reflect the modern concept of the law of civil liability which is no longer, as it was in the first half of the last century, oriented towards punishing for fault-based conduct: nowadays, it is the compensation function that dominates".

The connection to the law of the place where the damage was sustained has

¹¹⁰ European Court of Justice, 21 April 1993, Case C-172/91, *Sonntag v Waidmann* [1993] ECR I-1963.

¹¹¹ European Court of Justice, 16 December 1980, Case C-814/79, *Netherlands v Ruffer* [1980] ECR-3807.

¹¹² Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, Preliminary Document No 26 of December 2004, 11 (Note 28), available at www.hcch.net.

¹¹³ European Court of Justice, 7 March 1995, Case C-68/93, [1995] ECR I-415.

¹¹⁴ Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003) 427 final, 11.

¹¹⁵ Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003) 427 final, 11.

recently been adopted by some Member States like the Netherlands, the United Kingdom and France, but also in Switzerland. In Germany, Italy and Poland, the victim may opt for this law.¹¹⁵

Although the ECJ has held that the "harmful event" covers both the act itself and the damage, the Commission is of the opinion that an alternative solution would not enable the parties to foresee the law that will be applicable to their situation with reasonable certainty.

To apply national cartel tort law where only foreign competition is restricted without any effect on the domestic market would be a different approach in international cartel law. At first sight domicile, seat or place of commitment of a wrongful act are connecting factors which are outside the scope of protection of cartel law, as it protects markets and market players as individuals. This is why currently the market is the most important connecting factor in cartel law and thus only the effect on the market is considered by the effects doctrine and other factors like domicile, seat or commitment of an act are not relevant at all.

The idea of having a different connecting factor beside the market is not outside the scope of protection of cartel law, the difference only lies in the fact that domestic cartel law would protect *foreign* markets when persons are domiciled or acts are committed in the territory where the state exercises its sovereign rights. It would not at all lead to the application of public, administrative or criminal domestic cartel law where the states own market is not affected.

In the German law of unfair competition (UWG), usually the law of the market where interests are in conflict, is applied.¹¹⁶ This is the same solution as proposed in Article 5 Rome II Proposal. If the competition on the foreign market exists only between domestic (ie German) enterprises the Federal Court does not apply (foreign) market law but domestic (in this case German) law.¹¹⁷ Under these circumstances the seat of the companies is the dominant connecting factor and not the market. This indicates that using the market as connecting factor might be an international tendency but is not at all compulsory in the law of international economic law.

F. CHANCES OF APPLYING FOREIGN CARTEL LAW

The application of foreign cartel tort law can offer a substantial opportunity to effectively prevent adverse effects on competition in interstate legal relations.

¹¹⁵ BGHZ 35, 329; 113, 15. See CP Samson, *Die Marktortregel als allgemeines Prinzip für die kollisionsrechtliche Anknüpfung und die internationale Zuständigkeit in Wettbewerbsachen* (Frankfurt am Main, Lang, 2001), 31.

¹¹⁷ BGHZ 40, 391, 397; see Martiny, "Die Anknüpfung an den Markt" (1998) *FS Drobniq*, 389, 397.

Developing a choice of law rule similar to the proposed rule would be in the line of strengthening private enforcement of cartel law.

1. Private Enforcement of Cartel Law—New Approach in Europe

The Commission expressly wants to improve the role of private claimants as guardians of cartel law.¹¹⁸ When foreign cartel tort law was applied it was necessary that the foreign law contained a provision for compensation under civil law.¹¹⁹ Within the EU Member States this could have changed in 2001: the ECJ held in *Courage Ltd v Bernard Crehan*¹²⁰ that there is a liability in tort for infringements of Community (Cartel) Law. A party to a contract that is liable to restrict or distort competition within the meaning of Article 81 EC Treaty can obtain relief from the other party.¹²¹

Article 82 EC Treaty provides that agreements or decisions prohibited by that article are to be automatically void. That principle of automatic nullity can be relied on by anyone, and the courts are bound by it once the conditions for the application of Article 82(1) are fulfilled. National (civil) courts have the task of applying the provisions of Community law in areas within their jurisdiction.¹²² Actions for damages before the national civil courts can make a significant contribution to the maintenance of effective competition in the Community.

The open question, whether the prohibition in Article 81 EC Treaty is merely the source of the preliminary condition for bringing an action under national law, or the source of the right itself, is of more academic nature in Europe, as most Member States offer effective solutions for the private enforcement of European cartel law.¹²³ The Court has clearly accepted a right to claim

¹¹⁸ Council Regulation (EC) No 1/2003, [2003] OJ L1/1, 4/01; Woods, Sinclair and Ashton, *supra* n 14.

¹¹⁹ Vischer, in Heini, IPRG, Art 137 Rn 13.

¹²⁰ European Court of Justice, 20 September 2001, Case C-453/99, [2001] ECR I-6297.

¹²¹ AA Alvarez, "Individual Tort Liability for Infringements of Community Law" (2002) 29 *Legal Issues of Economic Integration* 177-94; AP Komninos, "New Prospects for Private Enforcement of EC Competition Law (2002) *Common Market Law Review* 447, 466; K Schmidt, "Privatisierung des Europakartellrechts" (2004) 4 *Zeitschrift für Europäisches Privatrecht* 881; Hintersteinger (2001) *Wirtschaft und Wettbewerb*, 554; H Weyer, "Schadensersatzansprüche gegen Private kraft Gemeinschaftsrecht" (2003) *Zeitschrift für Europäisches Privatrecht* 318; T Lettl, "Der Schadensersatzanspruch gemäß § 823 Abs. 2 BGB i.V. mit Art 81 Abs. 1 EG" (2003) *Zeitschrift für das gesamte Handels- und Wirtschaftsrecht* 167, 357.

¹²² Schmidt, *supra* n 121, 881.

¹²³ Woods, Sinclair and Ashton, *supra* n 14; Hintersteinger, *supra* n 121, 554, 556. Belgium (Art 1382 Code civil), France (Art 1382 CC), Italy (Art 2041 Codice Civile, successful actions for damages for breach of national Italian antitrust law: *Telystem/SIP-Telecom* (judgments of the Corte d'Appello of Milan of 18 June 1995 and of 24 December 1996), *Albacom/Telecom Italia* (judgment of the Corte d'Appello of Rome of 20 January 2003) and *Bluocanze Spa/I Viaggi del Ventaglio Spa et al* (judgment of the Corte d'Appello of Milan of 30 April 2003), Netherlands (Art 1401 Burgerlijk Wetboek), Germany s 823(2) BGB (BGH WuW/E BGH 1645). In Great Britain and Ireland a violation of Art 81-82 EC constitutes breach of a statutory duty, which is the basis of tortious liability.

damages as a matter of Community law¹²⁴ but not made clear what happens when national law offers no rule for tort liability for infringements of EU cartel law.

The Court stated that in the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the procedural rules governing actions for safeguarding rights which individuals derive directly from Community law. This indicates that the source of the right to claim damages is still national law.¹²⁵

But the Court has strengthened the instrumental character of civil claims in EU Cartel law.¹²⁶

2. Enforcement of Judgments

The advantage of applying foreign (national or within Europe supranational) cartel law by *observing* its civil law consequences and by *applying* foreign cartel tort law lies in the fact that it is easier to enforce the judgment. An action for damages based on tortious liability for infringements of (Cartel) Law is a civil and commercial matter, which would be within the meaning of Article 1 of the Brussels I Regulation (E.5.d.iii).

In international civil procedure law, documents are served in Europe on the basis of the Regulation on the Service of Documents,¹²⁷ and evidence is taken more simply on the basis of the Regulation on the Taking of Evidence,¹²⁸ while enforcement is based on Brussels I which currently forms the basis for creating a judicial European enforceable instrument.¹²⁹ However, also outside Europe, there are bilateral recognition and enforcement treaties on a completely different scale than in public law.

3. Limits for the Application of Foreign Tort Law

However, the application of foreign cartel tort law to protect global competition cannot go so far that *treble damages* can now be imposed by domestic courts under

¹²⁴ Komninos, *supra* n 121, 466.

¹²⁵ Wurmnest (2003) *Wirtschaft und Wettbewerb*, 896. National reports on private enforcement of cartel law under http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/national_reports; Weyer, *supra* n 12, 318; Lettl, *supra* n 121, 357.

¹²⁶ Komninos, *supra* n 121, 469.

¹²⁷ Council Regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters ([2000] OJ L160, 30/06, 37–52).

¹²⁸ Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters ([2001] OJ L174, 27/06, 1–24).

¹²⁹ Also see the Regulation (EC) No 805/2004 of the European Parliament and of the Council of 21 April 2004 creating a European Enforcement Order for uncontested claims ([2004] OJ L143, 30/04, 15–39).

US antitrust law. Here, the provision in Article 137(2) of Switzerland's Federal Code on Private International Law (IPRG) provides a sensible limit that can serve as a basis for future discussion in formulating a clause in a Rome II instrument or in national law outside the Member States.

Article 137(II) Switzerland's Federal Code on Private International Law

If claims founded on restraints of competition are governed by foreign law, no awards may be made in Switzerland in excess of those which would have been awarded for an unlawful restraint of competition under Swiss law.

According to this, a Swiss award made on the basis of foreign law may not exceed the award that would have been made under Swiss law. Article 137(2) IPRG is a special form of *ordre public* based on the fact that in Switzerland civil law primarily has a compensatory function, not a penal one.

G. CONCLUSION

The threat of US judicial imperialism in international cartel law has been reduced but not totally removed with the Supreme Court's *Empagran* decision.

The effects doctrine is unable to create a global legal order in a global economic and social order.

International cartel law shows an obvious deficit in regulating transnational legal issues which goes far beyond the legal problem of cartel law.

In international cartel law the objective must remain a global unification of cartel law resulting in a channelling of competence into an organisation which would have global jurisdiction or to the state which is mainly affected.

Until then, however, a choice of law solution must be pursued. The application of foreign cartel tort law can make a contribution to effectively prevent adverse effects on competition in global open markets.