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Global Competition Law Framework: A Private International

Law Solution Needed

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Abstract: There are a significant number of national competition law systems which prohibit anti-competitive behaviour. The cross-border nature of many antitrust/competition law infringements leaves no doubt that parallel and related competition law proceedings will arise. Competition laws enjoy public policy character, and as a result are regarded as mandatory provisions of the forum. The extra-territorial application of mandatory antitrust law provisions does suggest that different sets of competition laws may be applicable depending on where the competition law proceedings are taking place. Since there may often be a conflict of competition laws, there are complex issues which must be addressed in a global context. This article demonstrates that a private international law tool, which aims to preserve the diverse national competition law cultures, may be used as a new mode of governance in a global context. Such an instrument could/should take account of the competition laws of the countries that have legitimate interests to regulate the relevant business activities. Given the high costs for achieving harmonised competition laws in a global context, agreeing upon a private international law instrument with a view to coordinating cross-border competition law proceedings may be a more realistic objective to be pursued by the international community.

Key words: *Global governance, Competition law, Conflict of competition laws, Cross-border proceedings, Private international law*

A. INTRODUCTION

Competition laws regulate the business activities of private undertakings¹ with a view to deterring anti-competitive behaviour/practices.² Recent research shows that “[t]here are now more than 120 national competition law systems.”³ It is not only that competition laws are different, but also the competition culture across the globe is diverse. In 2013/14, the International Competition Network (ICN) conducted amongst its members a Competition Culture Survey. As a part of this project, the ICN Advocacy Working Group provided a definition of competition culture, and noted that:

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¹ A Albors-Llorens, “Consumer Law, Competition Law and the Europeanization of Private Law” in F Cafaggi (ed.) *The Institutional Framework of European Private Law* (Oxford University Press, 2006) 244, 260.

² See E M Fox, “Antitrust and Regulatory Federalism: Races Up, Down, and Sideways” (2000) 75 *New York University Law Review* 1781, 1782-4.; W P J Wils, *Principles of European Antitrust Enforcement* (Hart Publishing, 2005) pp 116-118; A P Komninos, *EC Private Antitrust Enforcement: Decentralised Application of EC Competition Law by National Courts* (Hart Publishing, 2008) 7-8.

³ E M Fox and A Arena, “The international institutions of competition law” in E M Fox and M J Trebilcock (eds.), *The Design of Competition Law Institutions: Global Norms, Local Choices* (Oxford University Press, 2012) 444.

“each jurisdiction is situated differently with respect to public policies that promote market competition or cooperation. For example, transition economies and small island economies may be characterised by a more regulatory approach, in which there is greater state involvement in the running of markets and where markets are highly concentrated. It is also important to recognise that the objectives of promoting competition principles of efficiency and consumer welfare can be superseded by other public policy considerations, including social policy, public interest and national security. What may be considered a ‘strong competition culture’ in one jurisdiction may not be feasible or appropriate in another.”⁴

It is well established that competition law provisions are intended to protect important public interests, and, as a result, for choice of law purposes, competition law rules are regarded as mandatory provisions which express the public policy of the forum.⁵ There is a real risk of conflict of competition laws.⁶ An effective global competition law framework which takes account of the diverse competition law cultures across the globe would be important with a view to providing for effective remedies with regard to competition law infringements that occur in a global context. Given the number of national competition law systems, which may apply to the same cross-border business activities, a choice of governance design would be central to setting up an effective global competition law framework.

Setting out the rules, which provide for a level of co-ordination between different national regimes, is important because the national authorities might be biased in applying their own competition laws, reflecting their national/regional public policy. The issue of applying national (or regional) competition laws in a global context has been discussed by policy-makers⁷ and commentators for some time.⁸ Devising an effective institutional framework⁹ appears to be a complex task for national/regional policy-makers. Since the markets are not necessarily national (or even regional for that matter), but, on many occasions global, most competition

⁴ ICN Advocacy Working Group, *Competition Culture Project*, 14th ICN Annual Conference, Sydney, 29 April–1 May 2015 < <http://www.internationalcompetitionnetwork.org/uploads/library/doc1035.pdf> > (accessed 26 January 2016) p 9.

⁵ E.g. Case C-126/97, *Eco Swiss China Time v Benetton International* (‘Eco Swiss’), [1999] ECR I-3055; Case 38/98, *Renault v Maxicar*, [2000] ECR I-2973.

⁶ H Klodt, “Conflicts and conflict resolution in international anti-trust: Do we need international competition rules?” (2005) *The World Economy* 877, 883.

⁷ Communication From the Commission to the Council, *Towards an International Framework of Competition Rules*, COM(96) 284 final. See also: European Commission, *XXVIth Report on Competition Policy 1996* (Published in conjunction with the ‘General Report on the Activities of the European Union – 1996’); The US Department of Justice - International Competition Policy Advisory Committee, *The Final Report to the Attorney General and Assistant Attorney General* < <http://www.justice.gov/atr/icpac/finalreport.html> > (accessed 26 January 2016).

⁸ D K Tarullo, “Norms and institutions in global competition policy” (2000) *The American Journal of International Law* 478; Fox, *supra* n 2; O Budzinski, *The Governance of Global Competition: Competence Allocation in International Competition Policy* (Edward Elgar, 2008); E M Fox, ‘Linked-In: Antitrust and the Virtues of a Virtual Network’ (2009) *The International Lawyer* 151, 154.

⁹ E M Fox, “Antitrust and Institutions: Design and Change” (2010) 41 *Loyola University Chicago Law Journal* 473, 486. See also: D A Crane, *The Institutional Structure of Antitrust Enforcement* (Oxford University Press, 2011); D Sokol, ‘International Antitrust Institutions’ in A T Guzman (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011) 187.

law infringements have cross-border implications.¹⁰ It has been very recently submitted that “transnational networks occupy centre stage in competition law, which is attentive to (and suspicious of) informal alliances or spontaneous congruence of market behaviour.”¹¹ There is a strong case that the policy-makers should carefully consider what mode of “governance”¹² should be used with a view to setting up an effective global competition law enforcement regime. The literature on regulation suggests that a global system, which is not characterised by the availability of a supranational regulatory authority, may need to rely on other modes of governance.¹³ One such mode of governance is “hierarchy, in which states transfer regulatory authority to dominant states for certain limited purposes.”¹⁴ Another mode of international governance is “networks, in which states, private actors, or both share regulatory authority through coordinated and repeated interactions.”¹⁵ Most recently, Muir-Watt and Arroyo have considered how private international law may have a governance function in a cross-border context.¹⁶

This article demonstrates that private international law should be used as a new mode of governance¹⁷ which allocates jurisdiction and identifies applicable laws in disputes involving

¹⁰ E.g. Case COMP/E-1/37.512 — *Vitamins*, Commission Decision of 21 November 2001 relating to a proceeding pursuant to Art 81 of the EC Treaty and Art 53 of the EEA Agreement [2003] OJ L6/1; Case COMP/38.899 — *Gas Insulated Switchgear*, Commission Decision of 24 January 2007 relating to a proceeding under Art 81 of the Treaty establishing the European Community and Art 53 of the EEA Agreement, C(2006) 6762 final; COMP/39.309 – *LCD - Liquid Crystal Displays*, Commission Decision of 8 December 2010 relating to a proceeding under Art 101 Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area, C(2010) 8761 final.

¹¹ H Muir-Watt, ‘Governing Networks: A Global Challenge for Private International Law’ (2015) *Maastricht Journal of European and Comparative Law* 352, 357.

¹² It has been submitted that “The term ‘governance’ is used in relation to national, European and international orders, and it crosses the public-private divide. [...] Governance [...] encompasses all stages of the policy chain, from drafting to enacting to implementing to enforcing rules.” M de Visser, *Network-Based Governance in EC Law* (Hart Publishing, 2009) 4. See also: The New Modes of Governance Project – T L Brunell, C Harlow and A S Sweet, *Litigating the Treaty of Rome: The European Court of Justice and Articles 226, 230, and 234* < http://www.eu-newgov.org/datalists/deliverables_detail.asp?Project_ID=26 > (accessed 26 January 2016); K A Armstrong, “The character of EU law and governance: From “Community method” to new modes of governance” (2011) *Current Legal Problems* 179.

¹³ M Kahler and D A Lake, “Economic integration and global governance: Why so little supranationalism?” in W Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press 2009) 242.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ H Muir-Watt and D P F Arroyo, *Private International Law and Global Governance* (Oxford University Press, 2014). See also: Blog “Private International Law as Global Governance” < <http://blogs.sciences-po.fr/pilagg/> > (accessed 26 January 2016). H Muir-Watt, ‘Private International Law beyond the Schism’ (2011) 2 *Transnational legal theory* 347; H Muir-Watt, ‘Integration and diversity: The conflict of laws as a regulatory tool’ in F Cafaggi (ed), *The Institutional Framework of European Private Law* (Oxford University Press, 2006) p. 107; H Muir-Watt, “European integration, legal diversity and the conflict of laws” (2005) *Edinburgh Law Review* 6; A Mills, *The Confluence of Public and Private International Law: Justice, Pluralism and Subsidiarity in the International Constitutional Ordering of Private Law* (Cambridge University Press, 2009); A Mills, “Federalism in the European Union and the United States: Subsidiarity, Private Law, and the Conflict of Laws” (2010-1) *University of Pennsylvania Journal of International Law* 369-455.

¹⁷ A-M Slaughter, *A New World Order* (Princeton University Press 2004) 16.

private undertakings that engage in anti-competitive practices in a global context. Indeed, many private undertakings whose business activities are regulated by competition laws are multinational groups of companies doing business in several jurisdictions.¹⁸ A contemporary world, in which multi-national companies employ business strategies that are global in nature,¹⁹ calls for an appropriately drafted private international law instrument preserving the diverse national competition law cultures. Employing a private international tool as a new mode of governance could/should be used to co-ordinate cross-border antitrust law enforcement activities.²⁰ Coordinating enforcement activities and avoiding duplication of work would be important for the creation of a “global legal system”²¹ which provides for effective remedies in cross-border competition law cases. With this in mind, an analysis of the jurisdictional issues and substantive law issues, in the light of the relevant case law, will be used to indicate how cross-border competition law enforcement activities could be co-ordinated in a global context.

To this end, the article will open with a brief explanation as to why an effective private international law regime would be necessary as a part of a well-functioning global competition law framework. Then, the importance of jurisdictional issues arising in the context of cross-border competition law infringements will be outlined by engaging with relevant cases. Thirdly, complex issues of jurisdiction arising in cases where there is a conflict of competition laws, as well as a level of divergence, will be duly analysed. Finally, some conclusions will be drawn with a view to co-ordinating cross-border competition law enforcement activities in a global context.

B. DEVISING A GLOBAL COMPETITION LAW REGIME: A CASE FOR A PRIVATE INTERNATIONAL LAW INSTRUMENT

A level of harmonisation of substantive competition laws and principles has proved difficult in a global context. This appears to be the case despite the need for a global competition law regime being identified by influential bodies such as the European Commission,²² which noted:

¹⁸ e.g. *Vitamins*, *supra* n 10; *Gas Insulated Switchgear*, *supra* n 10; *LCD - Liquid Crystal Displays*, *supra* n 10.

¹⁹ Report on the functioning of Regulation 1/2003, COM(2009) 206 final [22].

²⁰ The paper is timely in view of the decision of the General Affairs and Policy Council (Hague Conference) to continue with the “Judgments Project”. See < http://www.hcch.net/upload/wop/gap2012concl_en.pdf > [16-19] (accessed 26 January 2016).

²¹ Slaughter, *supra* n 17, 85.

²² Communication From the Commission to the Council, *Towards an International Framework of Competition Rules*, COM(96) 284 final, 18 June 1996. See also: European Commission, *XXVIth Report on Competition Policy 1996* (Published in conjunction with the ‘General Report on the Activities of the European Union – 1996) p. 95.

“The number and size of transnational firms has increased. There are more commercial practices that have international dimensions than ever before. These can lead to an increase in cross-border anti-competitive practices: cartels with international effects, agreements whose effect is to exclude (foreign) competitors in an unfair way, international abuses of a dominant position, or international mergers with anti-competitive effects. Such practices can limit competition and undermine the benefits of liberalisation.

These developments call into question the domestic nature of competition rules and the absence of binding rules at the international level. Many countries or regions have implemented comprehensive competition policies, but lack appropriate instruments to apply domestic competition rules to anti-competitive practices with an international dimension, as well as to obtain relevant information outside their jurisdiction. A framework is then necessary to enhance effective enforcement of competition rules.”²³

The Commission proposed negotiations at WTO with a view to adopting a WTO instrument binding upon the states, but without direct effect. The European Commission justified its proposal for a global competition law regime by outlining four main reasons, which need to be addressed by policy-makers. First, in the absence of a legal instrument to deal with cross-border competition law infringements, it was felt that private restraints and anti-competitive practices may deny access of European companies to third country markets.²⁴ Secondly, the Commission felt that a legal framework was needed in order “to avoid conflicts of law[s] and jurisdiction and to promote a gradual convergence of competition laws.”²⁵ Thirdly, given the important role of competition law for the functioning of the European economy, a global competition law regime may be necessary with a view to “tak[ing] account of the effects of globalisation”.²⁶ Fourthly, an enhanced commitment and co-operation with regard to enforcement would have positive effects on the trading system as a whole.²⁷

In line with the Commission initiative, the WTO set up a Working Group on the Interaction between Trade and Competition Policy.²⁸ The 1998 Report²⁹ of the working group did recommend to the General Council to continue the educative work in the area.³⁰ The Doha 2001 Ministerial Declaration went on to recognise the need for a multilateral framework and

²³ Communication From the Commission to the Council, *Towards an International Framework of Competition Rules*, COM(96) 284 final, 18 June 1996, p 3.

²⁴ *Ibid.*

²⁵ *Ibid.*

²⁶ *Ibid.*, p 4.

²⁷ *Ibid.*

²⁸ See *Singapore First WTO Ministerial Conference - Adopted 13 December 1996*, WT/MIN(96)/DEC, 18 December 1996 [20]. See also: WTO web site <<

http://www.wto.org/english/tratop_e/comp_e/history_e.htm#singapore >> (accessed 26 January 2016).

²⁹ Report (1998) of the Working Group on the Interaction between Trade and Competition Policy to the General Council, WT/WGTCP/2, 8 December 1998.

³⁰ See also: Working Group on the Interaction between Trade and Competition Policy, *Communication From the United States*, WT/WGTCP/W/35, 1 October 1997; Working Group on the Interaction between Trade and Competition Policy, *Submission by the European Community and its Member States*, WT/WGTCP/W/45, 24 November 1997.

closer cooperation in the area.³¹ However, the WTO General Council stated that these issues “will not form part of the Work Programme set out in that Declaration and therefore no work towards negotiations on any of these issues will take place within the WTO during the Doha Round.”³² This strongly suggests that, in practice, it may be difficult to devise a global competition law regime.³³

According to the global governance theory, the failure of the WTO negotiations may be regarded as another “[example] of insufficient political will to regulate transnational problems collectively.”³⁴ One could strongly argue that the issues, which were identified by the Commission as requiring to set up a global competition law regime, remain relevant and may still need to be addressed by a private international law tool in a global context. The number and size of business activities with regional and global dimensions have substantially increased since 1996. The need to devise a framework which is necessary to govern cross-border competition law enforcement activities in a global context is as important as ever.

The governance aspects of cross-border EU competition law actions and the role of private international law have been recently discussed in the European Union context where a level of harmonisation has already been achieved.³⁵ It has been argued that the current enforcement regime in the EU calls for a specifically designated private international law mechanism which promotes inter-jurisdictional regulatory competition dispute resolution, and provides effective remedies for injured parties in cross-border cases. Since it is very difficult for the international community to set up “an international competition authority with its own enforcement jurisdiction,”³⁶ the policy-makers in a global context could “set the terms of their

³¹ Doha WTO Ministerial 2001: Ministerial Declaration – Adopted on 14 November 2001, WT/MIN(01)/DEC/1, 20 November 2001, [23-25].

³² Doha Work Programme, *Decision Adopted by the General Council on 1 August 2004*, WT/L/579, 2 August 2004, p 3.

³³ D K Tarullo, ‘Competition policy for global markets’ (1999) *Journal of International Economic Law* 445; E M Fox, ‘Competition Law and the Millennium Round’ (1999) *Journal of International Economic Law* 665; J Basedow, ‘International Antitrust: From Extraterritorial Application to Harmonization’ (2000) *Louisiana Law Review* 1037; A T Guzman, ‘International Antitrust and the WTO: The Lesson from Intellectual property’ (2003) 43 *Virginia Journal of International Law* 933; P B Stephan, ‘Against International Cooperation’ in R A Epstein and M S Greve (eds.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (AEI Press, 2004) 66; F. Becker, ‘International Competition Law between Unilateralism, Horizontalism and Globalism’ in S. Shao (ed.), *Special Issues on International Law* (Renmin University Press, 2009) pp 296 – 341; J Malinauskaite, ‘International competition law harmonisation and the WTO: past, present and future’ in M. Andenas and C. B. Andersen (eds.) *Theory and Practice of Harmonisation* (Edward Elgar, 2011) 323, 338-351.

³⁴ H Muir-Watt, ‘Governing Networks: A Global Challenge for Private International Law’ (2015) *Maastricht Journal of European and Comparative Law* 352, 369.

³⁵ M Danov and F Becker, ‘Governance Aspects of Cross-Border EU Competition Law Actions: Theoretical and Practical Challenges’ (2014) *Journal of Private International Law* 359. See more generally: Armstrong, *supra* n 12, 182.

³⁶ Compare: Basedow, *supra* n 33, 1051.

interaction through [private international law] rules that assign jurisdiction (based on some criteria) to one or more states.”³⁷

Nonetheless, it should be noted that a level of harmonisation of competition laws may be justified by the fact that markets are global and as a result there may be a need to avoid irreconcilable national views on the anti-competitive nature of the very same global business activities/strategies. If there was no harmonisation, then there would be legal uncertainty which may increase the transaction costs for the businesses in a global context. The harm to consumers may be significant in so far as the businesses would pass the higher transaction costs on to the consumers across the globe.³⁸ Moreover, it has been submitted that “in a world with extraterritorial application of antitrust laws, the most restrictive antitrust laws will govern business behaviour.”³⁹ A number of aspects justifying setting up a global competition law framework have been discussed by commentators.⁴⁰ Basedow⁴¹ has argued that “[t]he international harmonisation of competition laws appears desirable for various reasons. Among the foremost objectives is the need to cure deficits in the enforcement of national competition laws.”⁴²

That said, Basedow himself notes that “[harmonisation] cannot be expected to be achieved in one go, but only step by step.”⁴³ The point has been clearly made by Guzman⁴⁴ who reinforces the argument that, due to the high costs, a global optimal competition policy would be difficult to agree upon.⁴⁵ In other words, a harmonised regime may be hard to achieve in so far as “states engaged in significant international trade have incentives to adopt competition laws that fail to maximize global welfare,”⁴⁶ whilst import-oriented countries may have incentives to adopt stricter competition laws which are applied/enforced globally.⁴⁷ As a result, there are low harmonisation prospects in the area of antitrust law on a global scale.⁴⁸ Indeed,

³⁷ A T Guzman, “The case for international antitrust” in R A Epstein and M S Greve (eds.) *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (AEI Press, 2004) 99, 116.

³⁸ Compare: Case C-12/11, *Denise McDonagh v Ryanair*, ECLI:EU:C:2012:161 – AG Bot Opinion [58] 22 March 2012.

³⁹ J O McGinnis, “The political economy of international antitrust harmonization” in R A Epstein and M. S. Greve (eds.) *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (AEI Press, 2004) 126, 127.

⁴⁰ Tarullo, *supra* n 8; Fox, *supra* n 2; Budzinski, *supra* n 8; Fox, *supra* n 8, 151; Malinauskaite, *supra* n 33, 344-346; A Ezrachi, “Setting the scene: the scope and limits of ‘international competition law’” in A. Ezrachi (ed.), *Research Handbook on International Competition Law* (Edward Elgar, 2012) 3, 4-13.

⁴¹ E.g. Basedow, *supra* n 33.

⁴² *Ibid*, 1048.

⁴³ *Ibid* 1050. See also: Malinauskaite, *supra* n 33, 344, 346-351.

⁴⁴ Guzman, *supra* n 37.

⁴⁵ Guzman, *supra* n 37, 110.

⁴⁶ Stephan, *supra* n 33, 75.

⁴⁷ Guzman, *supra* n 33, 946. See also: Malinauskaite, *supra* n 33, 350-351

⁴⁸ Crane, *supra* n 9, 239-40. See also: Malinauskaite, *supra* n 33, 350-351

devising an effective institutional framework could be difficult to achieve in a global context.⁴⁹ It has been submitted that any global competition law framework should “be built upon national regulatory systems, certainly for foreseeable future.”⁵⁰ That said, on the one hand, a case against greater international cooperation has been made by Stephan who has stated:

“Three reasons occur to me why, in a contemporary world, international implementation of competition law is limited and weak: The present international system lacks the institutional capacity to implement real cooperation; cooperation requires difficult political choices, not merely technical competences; and there is no consensus about the object of cooperation across a broad range of economic sectors.”⁵¹

On the other hand, it has been argued that a level of cooperation should be promoted.⁵² It has been noted that “[t]here are three forms of cooperation that could be implemented with regard to competition policy – information sharing, agreement on choice of law, and cooperation in terms of substantive rules.”⁵³ Given that competition law provisions express important and legitimate public policy interests of diverse national legal regimes, a private international law tool may need to be used to coordinate cross-border competition law proceedings. The “conflict of laws provides a potentially useful framework for viewing disputes among multiple normative orders.”⁵⁴ The point may be strengthened further by making reference to the recent literature on global law⁵⁵ which indicates that private international law could be used as a mode of governance in respect of “increasingly dense and intricate relations between different regulatory regimes.”⁵⁶ Therefore, a private international law instrument should be used to govern competition law proceedings in a global context.

Some may argue that an alternative to private international law would be to further promote a level of co-operation through the International Competition Network (ICN), which was founded in 2001.⁵⁷ In a recent analysis of the ICN work, Fox and Arena have made the following observations:

“The ICN, now more than ten years old, is normally regarded as a success in moving law and process towards convergence. Its success is in large part attributed to the fact that it is comprised of the competition law community, not the trade community, and that, since it has no formal powers, little seems to be at stake in agreeing to (for example) recommended practices or

⁴⁹ Crane, *supra* n 9, 237.

⁵⁰ Tarullo, *supra* n 30, 455.

⁵¹ P B Stephan, “The problem with cooperation” in A T Guzman (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011) 217, 218.

⁵² A Guzman, ‘Competition law and cooperation: possible strategies’ in A T Guzman (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011) 345.

⁵³ *Ibid* 356.

⁵⁴ P S Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012) 192.

⁵⁵ N Walker, *Intimations of Global Law* (Cambridge University Press 2014) 107 – 114.

⁵⁶ *Ibid* pp 108-109. See also: Muir-Watt, *supra* n 16; J Bonhoff and A Meuwese, ‘The Meta-regulation of Transnational Private Regulation’ (2011) *Journal of Law and Society* 138.

⁵⁷ See more: Fox and Arena, *supra* n 3, 481-4.

principles. Moreover, because the agencies' agreements in ICN do not bind their governments, no higher governmental organization is needed, thus facilitating agreement."⁵⁸

That said, there is a view that "[t]his form of soft cooperation furthers the enforcement goals of regulators but does virtually nothing to address the over- and underregulation of antitrust law at international level."⁵⁹ Indeed, national competition authorities, which would exclusively apply their national (or regional) competition laws, may be less than adequate competition law enforcers in a global context in so far as another country's laws may need to be applied if the country in question has legitimate interests to have its laws applicable.⁶⁰ A case for using a new mode of global governance can be strengthened by noting that "all institutions contain some policy bias."⁶¹ *The greater the policy bias of a national institution, the more biased will be any new form of global governance created by that institution.*⁶²

Moreover, the global nature of the trade nowadays strongly suggests that more of the competition law infringements would cause harm to consumers and businesses in several jurisdictions.⁶³ There would be specific problems in the "developing countries, which almost by definition do not have the resources to catch and deter violations that originate below their borders."⁶⁴ In other words, the inability of some national institutions to adequately enforce their competition laws would leave an enforcement gap which may be seen as another indication that there is a need for "an alternative form of governance"⁶⁵ to be considered in the area.

Furthermore, in 2013, the ICN and the Organisation for Economic Co-operation and Development (OECD) conducted a survey among national competition authorities.⁶⁶ The survey results reiterated the benefits of the co-operation among national competition authorities,⁶⁷ but the overall conclusion appears to be that the "[i]ncentives to co-operation depend on the effectiveness of the international enforcement system. Reforms of the legal and institutional setting for international co-operation can increase incentives for agencies to engage

⁵⁸ Fox and Arena, *supra* n 3, 482-3.

⁵⁹ Guzman, *supra* n 34, 116.

⁶⁰ A T von Mehren, 'Special substantive rules for multistate problems: Their role and significance in contemporary choice of law methodology' (1974) *Harvard Law Review* 347, 351.

⁶¹ R Rogowsky, 'Institutions as constraints on strategic choice' in D A Lake and R Powell (eds), *Strategic Choice and International Relations* (Princeton University Press, Princeton 1999).

⁶² M Kahler and D A Lake, 'Economic integration and global governance: Why so little supranationalism?' in Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, Princeton 2009) 242, 255 – emphasis in the original,

⁶³ Tarullo, *supra* n 8, 481-2; E M Fox, 'International Antitrust and the Doha Dome' (2003) *Virginia Journal of International Law* 911.

⁶⁴ Fox, *supra* n 8, 154.

⁶⁵ K W Abbott and D Snidal, 'The governance triangle: Regulatory standards institutions and the shadow of the state' in W. Mattli and N Woods (eds), *The Politics of Global Regulation* (Princeton University Press, 2009) 44.

⁶⁶ OECD/ICN Survey on International Competition Enforcement Co-operation, 2013 < <http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf> > (accessed 26 January 2016).

⁶⁷ *Ibid*, p 10.

more effectively in case cooperation.”⁶⁸ The need for new forms of co-operation among the States has been identified by the 2014 OECD Report on the Challenges of international co-operation in competition law enforcement.⁶⁹ Its conclusion states that:

“Continuing and deepening the existing system of bilateral co-operation is important. However, making it work going forward will be increasingly complex, as business becomes more globalised, spanning more jurisdictions enforcing competition law. Governments may want to consider whether new approaches to international co-operation in enforcing competition law are required, in the face of this challenge. These might include, for instance, developing general standards designed to promote both convergence in substance and procedure as well as greater co-operation and co-ordination that could be applied in the context of differing national legal systems around the world.”⁷⁰

The author’s view is that, given the diverse legal traditions and competition law cultures across the globe, the effectiveness of international enforcement system would presuppose an effectively functioning judicial system (or rather effective functioning national judicial systems) which could provide effective remedies in a global context.⁷¹ Indeed, it is difficult to see how the ICN could be used to avoid parallel competition law proceedings, resulting in duplication of work, (public and private spending) costs, ineffectiveness and inefficiencies. For example, national competition authorities (which are administrative bodies combining the function of a party to competition law proceedings and a judge in Europe⁷²) and national courts (located in a non-EU country) may both have the powers to apply competition law provisions in individual cases⁷³ related to the same infringement. However, a national competition authority’s decision may have no binding effect outside the territory on which the authority in question operates.⁷⁴ Indeed, the cross-border nature of the business activities appears to suggest that there is a strong case that a new mode of governance based on private international law,⁷⁵ which provides for co-operation between the various competition law systems, should be used to address issues of competence allocation and applicable competition laws in a global context. Indeed, private international law instruments are often seen as appropriate legislative tools, which may be used to preserve the inherent characteristics of the diverse competition law

⁶⁸ *Ibid.* 22

⁶⁹ OECD Report on the Challenges of international co-operation in competition law enforcement (2014). <<http://www.oecd.org/daf/competition/challenges-international-coop-competition-2014.htm>> (accessed 26 January 2016).

⁷⁰ *Ibid.*, 54.

⁷¹ A M Mateus, “Competition and Development: Towards an Institutional Foundation for Competition Enforcement” (2010) *World Competition* 275, 296. See also: S Djankov, R La Porta, F Lopez-de-Silanes and A Shleifer, ‘Courts’ (2003) 118 *Quarterly Journal of Economics* 453.

⁷² Wils, *supra* n 2, 88; Komninos, *supra* n 2, 119.

⁷³ Compare: Arts 5 and 6 – Regulation 1/2003.

⁷⁴ White Paper on Modernisation of the Rules implementing Articles 85 and 86 of the EC Treaty, Commission Programme 99/027 [60]. See Wils, *supra* n 2, 116-18; Komninos, *supra* n 2, 77; S Brammer, *Co-operation between National Competition Agencies in the Enforcement of EC Competition Law* (Hart Publishing, 2009) 426–436.

⁷⁵ Guzman, *supra* n 34, 116.

cultures.⁷⁶ However, the use of a private international law solution in a global context has been questioned by Guzman⁷⁷ who notes that:

“choice-of-law rules cannot, without more, address the problems of over- and underregulation. A choice-of-law system that allows for overlapping jurisdiction leaves the problem of overregulation unresolved. A system that assigns jurisdiction to a single state can reduce the problem of overregulation but may exacerbate the problem of underregulation. Nor can a choice-of-law strategy prevent local favouritism and trade-induced distortions of national substantive policies.”⁷⁸

With this in mind, the author argues that jurisdictional issues would be central in a global context. The issues of jurisdiction and applicable competition laws are best to be addressed through a private international law instrument. This argument will be substantiated by examining some of the cases which have arisen in a global context.

C. JURISDICTION AND CROSS-BORDER CASES

The concept of jurisdiction, when used in the context of cross-border competition law infringements, may have public international law connotations (i.e. “jurisdiction to prescribe”⁷⁹) and private international law nuances (i.e. jurisdiction to adjudicate⁸⁰). The former concept which is “also called legislative or regulatory jurisdiction, is designed to explore the extent and limits of the reach of a nation’s laws.”⁸¹ In a private international law context, it has been noted that “[j]urisdiction involves the decision of a community to assert legal dominion over an act or actor.”⁸² The academic literature goes further to highlight the political dimension of jurisdiction⁸³ which may need to be factored in when competition law enforcement is co-ordinated (or governed) globally. It has been very recently submitted that:

“Jurisdiction has always been more than the infrastructure of the judicial order or part of the configuration of legal authority. It is the very extension of the state power in the form of legal authority; it is how legal authority gets done – how it is extended, reconceived and abbreviated.

⁷⁶ Muir-Watt, “European integration *supra* n16, 7. See also: Muir-Watt, “Integration and diversity” *supra* n 16; . Tichy, ‘A new role for private international law and procedural law in European Integration? A critical comment’ in R Brownsword, H.-W Micklitz, L Niglia and S Weatherill (eds.), *The Foundations of European Private Law* (Hart Publishing, 2011) 393 – 412; Mills, *supra* n 16; D Lasok and P A Stone, *Conflict of Laws in the European Community* (Professional Books Limited, 1987) 144 – 145.

⁷⁷ Guzman, *supra* n 37.

⁷⁸ *Ibid* 116-7.

⁷⁹ A F Lowenfeld, *International Litigation and Arbitration* (2nd edn, West Group, 2002) 39. J Adolphsen, ‘The conflict of laws in cartel matters in a globalised world: Alternatives to the effects doctrine’ (2005) *Journal of Private International Law* 151, 155.

⁸⁰ A T von Mehren and D T Trautman, “A Jurisdiction to Adjudicate: A Suggested Analysis” (1966) *Harvard Law Review* 1121.

⁸¹ Lowenfeld, *supra* n 79, 39. See also: Adolphsen, *supra* n 79, 155.

⁸² Berman, *supra* n 54, 191.

⁸³ A Kaushal, “The Politics of Jurisdiction” (2015) 78 *Modern Law Review* 759-792.

This makes jurisdiction a conceptual powerhouse with the capacity to remake legal categories. Conceived properly, jurisdiction is the political heart of the judicial order.”⁸⁴

There is a strong case that the concept of adjudicatory jurisdiction may be very important with a view to co-ordinating enforcement activities in competition cases in a global context. Its relevance may be illustrated by reference to *Nokia v AU Optronics Corporation*.⁸⁵ In this case, Nokia brought a competition claim against 25 defendants in England. It was alleged that manufacturers of LCDs had agreed to “fix the prices and limit the supply of LCDs sold in the global market [...]”⁸⁶ The behaviour of the defendants has been subject to investigation not only by the European Commission and the US Department of Justice, but also by national competition authorities in Japan, South Korea, Taiwan and Canada.⁸⁷ Moreover, a private antitrust claimant may have a level of freedom in choosing where to bring a claim.⁸⁸ Therefore, the issue of parallel proceedings, which may lead to irreconcilable findings/decisions, is bound to arise. Furthermore, there could be numerous differences in the laws of the available forums, which could lead to advantages for sophisticated claimants that are in a position to make an informed decision where to conduct a trial with a view to benefitting from the relevant rules (eg pre-trial discovery; costs (eg the availability of contingency fees); and opt-out collective redress proceedings; the availability of multiple damages (or punitive) damages which could often depend on the *lex fori*).⁸⁹

The following questions are bound to arise: What are the difficulties when allocating jurisdiction in a global context?⁹⁰ Is there room for the notion of territoriality when regulating global business activities? Should it be possible for competition laws of one legal system to prescribe the behaviour of companies based in another country? May another country’s laws be applied if the latter has legitimate interests to have its laws applicable in so far as the business activities in question may affect the process of competition and consumer welfare there?

⁸⁴ *Ibid* 788.

⁸⁵ *Nokia Corporation v AU Optronics Corporation & Others* [2012] EWHC 731 (Ch).

⁸⁶ See the Particulars of the Claim [45] quoted in *Nokia*, *supra* n 85, [39].

⁸⁷ See the Particulars of the Claim [47] quoted in *Nokia*, *supra* n 85, [39].

⁸⁸ See *Cooper Tire & Rubber Company v Shell Chemicals UK Limited* [2009] EWHC 2609 (Comm); *Cooper Tire & Rubber Company Europe Limited & Others* [2010] EWCA Civ 864.

⁸⁹ M Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Oxford: Hart Publishing, 2010) Ch 5; and M Danov, F Becker and P Beaumont (eds.), *Cross-Border EU Competition Law Actions* (Hart Publishing, 2013).

⁹⁰ The issues have been discussed in the European context. See Danov, *supra* n 89. See also: J Basedow, S Francq and L Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing, 2012).

1. Jurisdiction to Prescribe

The concept of jurisdiction to prescribe/regulate does suggest which set of competition laws should be used to determine whether there is a competition law infringement. In practice, this may be far from a straightforward process because several states may have legitimate interests for their laws to regulate cross-border business activities. On the one hand, the question as to which set of laws would apply to the merits of a competition law dispute denotes a choice-of-law problem in so far as such a dispute may essentially be regarded as a commercial dispute.⁹¹ On the other hand, national competition authorities, which have the status of public administrative bodies, may be involved in such disputes, so that they may often impose administrative penalties (i.e. fines) on undertakings (e.g. multinational groups of companies) that have infringed competition laws.

The problems, which arise in this context, can be demonstrated by making reference to *Imperial Chemical Industries*.⁹² In this case, the parties to a dispute before the English court were two English companies. The questions were: Should the English court enforce a contract without taking account of the US antitrust laws? Are the legitimate interests of applying the US laws to be taken account of in this context? The English court performed a private international law analysis when addressing the issues by holding that:

“[this is] an English contract made between English nationals and to be performed in England, to have it performed and, if necessary, to have an order made by the courts of this country for its specific performance. That is a right - it might be said, a species of property, seeing particularly that it is related to patents - which is English in character and is subject to the jurisdiction of the English courts; and it seems to me that the plaintiffs have at least established a prima facie case for saying that it is not competent for the courts of the United States or of any other country to interfere with those rights or to make orders, observance of which by our courts would require that our courts should not exercise the jurisdiction which they have and which it is their duty to exercise in regard to those rights.”⁹³

That said, adopting a more sophisticated private international law solution may be needed in a global context. There should be a possibility for a national court to consider the compatibility of business activities with the laws of another country which may have legitimate interests to have its laws applicable in cases where the infringers’ conduct affects the process of competition and consumer welfare there.

⁹¹ Eg Art 6 of Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [2007] OJ L199/40.

⁹² *United States v Imperial Chemical Industries* 100 F. Supp. 504 (S.D.N.Y. 1951); *United States v Imperial Chemical Industries* 105 F. Supp. 215 (S.D.N.Y. 1952); *British Nylon Spinners v Imperial Chemical Industries* [1953] Ch 19 (CA); *British Nylon Spinners v Imperial Chemical Industries* [1955] 1 Ch 37. See also: Lowenfeld, *supra* n 79, 39-59.

⁹³ *British Nylon Spinners v Imperial Chemical Industries* [1953] Ch 19, 26.

2. Extra-territoriality and Comity

It is now well established that “there is no room for the notion of territoriality in the conflict of laws which, on the contrary, permits and requires the application of whatever foreign law, statutory or common, public or private, its constituent rules refer to.”⁹⁴ Collins has noted that “[c]omity may be a discredited concept in the eyes of the textwriters, but it thrives in the judicial decisions”⁹⁵ which indicates that the issue should be carefully considered along with the concept of extra-territorial application of competition law provisions.

The extra-territorial application of competition laws has been widely discussed by the courts⁹⁶ and commentators.⁹⁷ Articles 101 and 102 TFEU may be applied extra-territorially. This was clearly established by the Court of Justice in *Wood Pulp*.⁹⁸ The extra-territorial application of EU competition laws can be further deduced from the decisions in the *Gencor/Lonrho*⁹⁹ and *GE/Honeywell*¹⁰⁰ cases.¹⁰¹ Similarly, the US Sherman Act has been applied to extra-territorial conduct.¹⁰² The extra-territorial application of competition law provisions may be legitimately justified in so far as behaviour of undertakings based in one jurisdiction may often adversely affect the trade (and the process of competition as well as consumers’ welfare) in another jurisdiction.¹⁰³

⁹⁴ F A Mann, *Conflict of Laws and Public Law, Recueil Des Cours: Collected Courses of the Hague Academy of International Law* (A. W. Sijtoff, 1971) 107, 190.

⁹⁵ L Collins, ‘Comity in modern private international law’ in J J Fawcett (ed.) *Reform and Development of Private International Law* (Oxford University Press, 2002) 89, 95.

⁹⁶ The EU approach: Joined Cases 89/85, 104/85, 114/85, 116–17/85, and 125–29/85 *Ahlstrom v Commission* [1988] ECR 5193 (Wood Pulp Cartel Case). Compare the US approach: (a) territorial approach: *America Banana v United Fruit* 213 US 347 (1909); (b) the ‘effects’ approach: *United States v Aluminum Co of America (Alcoa)* 148 F 2d 416 (2d Cir 1945); (c) the ‘balancing’ approach: *Timberline Lumber v Bank of America* 549 F 2d 597 (9th Cir 1976). See also Restatement of the Law (Third), The Foreign Relations Law of the United States (1987) [403].

⁹⁷ M Waelbroeck, ‘The European Community Approach’ in C J Omstead (ed) *Extra-territorial Application of Laws and Responses Thereto* (International Law Association in association with ESC Publishing Limited, 1984) 74; V Pavic, *Extra-territoriality in the Matters of Antitrust* (European Press Academic Publishing, 2001); W S Dodge, ‘Extraterritoriality and Conflict-of-Laws Theory: An argument for judicial unilateralism’ (1998) *Harvard International Law Journal* 101; Adolphsen, *supra* n 79; A Jones and B Sufrin, *EU Competition Law: Text, Cases and Materials* (5th ed., Oxford University Press, 2014) 1271–86.

⁹⁸ *Wood Pulp*, *supra* n 96.

⁹⁹ Case T-102/96 *Gencor Ltd v Commission* [1999] ECR II-753. See also Case No IV/M.619 *Gencor/Lonrho* [1997] OJ L11/30.

¹⁰⁰ Case T-210/01 *General Electric v Commission* [2005] ECR II-5575.

¹⁰¹ Jones and Sufrin, *supra* n 97, 1279–86. See also: E M Fox, ‘The Merger Regulation and its territorial reach’ (1999) *European Competition Law Review* 334.

¹⁰² E.g. *Timberline Lumber Co v Bank of America, NT & SA* 549 F2d 597 at 609 (9th Cir 1976).

¹⁰³ Fox, *supra* n 8, 154; F W Papp, ‘Competition law and extraterritoriality’ in A Ezrachi (ed.), *Research Handbook on International Competition Law* (Edward Elgar, 2012) 21, 22.

However, competition laws do enjoy public policy character,¹⁰⁴ and as a result they are often regarded as mandatory rules for private international law purposes.¹⁰⁵ The law of the forum may have an important role to play in this context. Extra-territorial application of mandatory rules of the forum may be problematic as different regulations may be applicable to a given legal relationship in different countries.¹⁰⁶ The extra-territorial application of mandatory antitrust law provisions would fly in the face of the “so-called categorical imperative of [private international law which] implies that legal systems of all States are of equal value and deserve the same appreciation.”¹⁰⁷ This poses an interesting question about the conflict of mandatory competition laws.

As noted elsewhere,¹⁰⁸ if the applicable set of competition laws does not guarantee that the dispute is sufficiently closely connected with the forum, then an English court, for example, would always need to apply Articles 101 and 102 TFEU as being mandatory rules of the forum. In other words, if an agreement were ‘implemented’ within the EU and the competition law infringement had appreciable effect on competition or inter-state trade within the EU, then an English court could not refuse to apply EU competition law, even if the competition law infringement was manifestly more closely connected with the US (or the US antitrust law had a stronger claim to be applied).¹⁰⁹ It would have been more appropriate if the policy-makers had provided for a private international law solution in a global context, which would have guaranteed that a set of competition laws would not be applicable unless the dispute is sufficiently closely connected with the forum.¹¹⁰

The problems might be exacerbated by the adoption of legislative instruments which may limit the application of foreign antitrust laws affecting domestic trading interests.¹¹¹ This point is illustrated by the *Laker Airways* litigation, which suggests that various national public policies may be at stake before English¹¹² and American¹¹³ judges in such cases. In this case, an important issue was whether it is “appropriate in the interests of avoiding injustice to enjoin

¹⁰⁴ *Eco Swiss*, *supra* n 5. *Renault*, *supra* n 5.

¹⁰⁵ See Danov, *supra* n 89, Ch 5.

¹⁰⁶ See C M Schmitthoff, *The English Conflict of Laws* (3rd edn, Steven & Sons, 1954) 11.

¹⁰⁷ T Pfeiffer, *Private International Law* in R Wofrum (ed), *The Max Planck Encyclopedia of Public International Law* (Volume VIII, Oxford University Press, 2012) 459, 464.

¹⁰⁸ Danov, *supra* n 89.

¹⁰⁹ Compare: Art 16 of Rome II; Art 9(2) of Rome I. See O. Lando, ‘The EEC Convention on the law applicable to contractual obligations’ (1987) *Common Market Law Review* 159, 207. See also C Withers, ‘Jurisdiction and Applicable Law in Antitrust Tort Claims’ (2002) *Journal of Business Law* 250, 270

¹¹⁰ A Mills, *The Confluence of Public and Private International Law* (Cambridge University Press, 2009) 290.

¹¹¹ See The Protection of Trading Interests Act 1980.

¹¹² *British Airways Board v Laker Airways* [1984] 1 QB 142.

¹¹³ *Laker Airways Limited v Sabena* 731 F.2d 909 (1984), US Court of Appeals DC.

Lakers from pursuing their claims against B.A. and B.C. in the United States courts.”¹¹⁴ The English Court of Appeal answered this question in affirmative and granted an anti-suit injunction. The effect of the Protection of Trading Interests (U.S. Antitrust Measures) Order 1983 was decisive.¹¹⁵ In this context, it was stated that the latter measure “prevents B.A. and B.C. complying with any judgment of the district court, in so far as it is given pursuant to the Sherman and Clayton Acts”.¹¹⁶ However, the US Court of Appeals for the District of Columbia Circuit held the view that the injunction was “purely offensive”¹¹⁷ in so far as it “seeks to quash the practical power of the United States courts to adjudicate claims under United States law against defendants admittedly subject to the courts’ adjudicatory jurisdiction.”¹¹⁸ The US court held that:

“At the root of the conflict are the fundamentally opposed policies of the United States and Great Britain regarding the desirability, scope, and implementation of legislation controlling anticompetitive and restrictive business practices.”¹¹⁹

The difficult issues which relate to the extra-territorial application of competition laws may be further illustrated by making reference to *Hartford Fire Insurance*.¹²⁰ In this case, the US Supreme Court held there was not a true conflict between the US and UK law since the latter did not require the London-based insurers to perform activities which were prohibited by the law of the United States, so that it was still possible for them to comply with the Sherman Act.¹²¹ The foregoing examples strongly suggest that, due to the conflicting public policies at stake, the issue of jurisdiction to adjudicate may be very important in competition law cases in a global context. One should pose the question: Is there a case for linking the assumption of jurisdiction with the applicable substantive competition law/s¹²² which are to be applied in global competition law cases?

The importance of allocating jurisdiction to an appropriate court could be demonstrated by making reference to the *Vitamin* case where “each cartel was global in nature, the object of each was, inter alia, to allocate markets on a worldwide level, and thus to withhold competitive reserves from the EEA market.”¹²³ In follow-on proceedings before the US District Court for

¹¹⁴ *British Airways Board v Laker Airways* [1984] 1 QB 142, 199.

¹¹⁵ *Ibid.*, 202.

¹¹⁶ *Ibid.*

¹¹⁷ *Laker Airways Limited v Sabena* 731 F.2d 909 (1984), US Court of Appeals DC, 938.

¹¹⁸ *Ibid.*

¹¹⁹ *Laker Airways Limited v Sabena* 731 F.2d 909 (1984), US Court of Appeals DC, 955.

¹²⁰ *Hartford Fire Insurance v California* (1993) 509 US 764.

¹²¹ *Ibid.*, 798-9.

¹²² von Mehren and Trautman, *supra* n 80, 1128.

¹²³ *Vitamins*, *supra* n 10, [681].

the District of Columbia,¹²⁴ foreign purchasers¹²⁵ of vitamins brought a damages action in connection with vitamins purchased for delivery outside of the United States against members of Vitamin cartels. Although the action was dismissed due to lack of subject matter jurisdiction,¹²⁶ the court went on to consider the claimants' argument that the US courts should exercise supplemental jurisdiction over foreign claims with a view to avoiding parallel and related proceedings with respect to the same cartel agreement pending before numerous courts.¹²⁷ In this context, Hogan J held that:

“there are comity and efficiency reasons for declining to exercise supplemental jurisdiction over the foreign law claims in this case, the Court will decline to exercise supplemental jurisdiction over plaintiffs' foreign law claims.”¹²⁸

However, an appeal was made before the Court of Appeals which reversed the first instance court's ruling on the subject matter jurisdiction, and went on to hold that the District Court must consider anew whether to accept supplemental jurisdiction.¹²⁹ The case reached the US Supreme Court which adopted a different approach which links the court's jurisdiction with the effects on competition within a country's territory.¹³⁰ Therefore, the US court held it has no subject matter jurisdiction in a case where the anti-competitive price-fixing activity was in significant part foreign. In this case, the court went further and held: ‘why should American law supplant, for example, Canada's or Great Britain's or Japan's own determination about how best to protect Canadian or British or Japanese customers from anticompetitive conduct engaged in significant part by Canadian or British or Japanese or other foreign companies?’¹³¹ The judgment has been interpreted as an indication that the U.S. “Supreme Court is receptive to comity when presented as a tool for statutory construction.”¹³² However, more importantly for the purposes of this paper, it may be argued that there is a strong case that a regime on jurisdiction may be used as an appropriate PIL mode of governance which allocates jurisdiction in competition law cases in a global context. This would be particularly important because such cross-border competition law infringements will be affecting the process of competition and

¹²⁴ *Empagran SA v F. Hoffman-La Roche* 2001 WL 761360. See also: H L Buxbaum and R Michaels, ‘Jurisdiction and Choice of Law in International Antitrust Law – A US Perspective’ in Basedow, Francq and Idot, *supra* n 90, 225.

¹²⁵ Foreign claimants represented companies domiciled in Ecuador, Panama, Australia, Mexico, Belgium, the United Kingdom, Indonesia and the Ukraine.

¹²⁶ *Empagran SA v F. Hoffman-La Roche* 2001 WL 761360, p. 4.

¹²⁷ *Ibid*, p. 8.

¹²⁸ *Ibid*.

¹²⁹ *Empagran SA v F. Hoffman-La Roche* (2003) 315 F.3d 338, 357.

¹³⁰ See *F Hoffmann-La Roche Ltd v Empagran* (2004) 542 US 155, 167; 124 SCt 2359 (Sup Ct (US)).

¹³¹ *Ibid* 165; See also E Wind, “Remedies and Sanctions in Article 82 of the EC Treaty” (2005) *European Competition Law Review* 659, 667. See also Danov, *supra* n 89, Ch 5 - on the issue of applicable law.

¹³² E T Swaine, “Cooperation, Comity, and Competition Policy: United States” in A T Guzman (ed), *Cooperation, Comity, and Competition Policy* (Oxford University Press, 2011) 3, 13.

consumer welfare in a number of jurisdictions. The *Vitamins* case may indeed be regarded as an example which indicates that the dispute may be allocated to an appropriate court in some cases where the allocation of jurisdiction is linked to the applicable substantive competition law/s.

The deduction that it is vitally important to initiate/consolidate proceeding before an appropriate forum can be further strengthened by the *Transportation Surcharge Antitrust Litigation*¹³³ case in which claims of both US and UK victims arising from a global price-fixing conspiracy were settled before the US District Court for the Northern District of California.

D. A CONFLICT OF COMPETITION LAWS: ISSUES TO BE CONSIDERED IN A GLOBAL CONTEXT

Even more complex jurisdictional issues may arise in cases where there is a conflict of mandatory competition laws. In theory, “[c]hoice-of-law analysis considers which community’s legal norms should apply to a dispute involving members of multiple communities”.¹³⁴ That said, the various national competition law systems may pursue different interests in so far as there could be a difference between promoting national welfare, on the one hand, and enhancing global welfare, on the other hand.¹³⁵ If substantive competition law provisions differ, then the outcome of a competition law dispute would depend on where the proceedings are initiated. For example, in *Wood Pulp*, the US Webb-Pomerene Act did exempt the export cartel agreements from the prohibitions laid down in the US antitrust laws.¹³⁶ As a result, it was essential for the Commission to establish that EU competition laws applied and regulated the private undertakings’ behaviour. Similarly, it was crucial for the litigants in *Laker Airways*¹³⁷ and *Hartford Fire Insurance*¹³⁸ to establish jurisdiction in the US with a view to having US antitrust laws applied to the merits of their competition law dispute.

¹³³ Case No. M:06-cv-01793-CRB, *In re: International Air Transportation Surcharge Antitrust Litigation* MDL No 1793 (United States District Court for the Northern District of California, San Francisco Division). See also: R Mulheron, “The Recognition, and *Res Judicata* Effect, of a United States Class Actions Judgment in England: A Rebuttal of Vivendi” (2012) *Modern Law Review* 180.

¹³⁴ Berman, *supra* n 54, 191.

¹³⁵ Budzinski, *supra* n 8, 32.

¹³⁶ *Wood Pulp*, *supra* n 96, [20].

¹³⁷ *British Airways Board v Laker Airways* [1984] 1 QB 142; *Laker Airways Limited v Sabena* 731 F.2d 909 (1984), US Court of Appeals DC.

¹³⁸ *Hartford Fire Insurance v California* (1993) 509 US 764.

The point could be further illustrated by making reference to two sets of competition law proceedings, involving Virgin Airways (Virgin) and British Airways (BA) in the US¹³⁹ and the EU.¹⁴⁰ In July 1993, Virgin lodged a complaint with the European Commission, directed in particular against the marketing agreements which enabled certain agents to receive payments in addition to the basic commission.¹⁴¹ Another complaint was filed by Virgin in the Southern District of New York.¹⁴² In the first set of proceedings, the Commission decided to take the complaint up, and initiate proceedings. In July 1999, the Commission rendered a decision finding an infringement of EU competition law.¹⁴³ However, a different view was held by the courts in the US. In October 1999, the District Court granted a summary judgment to British Airways on the ground that there was not sufficient evidence that BA engaged in anti-competitive practices.¹⁴⁴ The Virgin/BA competition law disputes not only show that there may be irreconcilable views with regard to the same type of business activities, but also that the proceedings may be time consuming and costly due to the level of uncertainty in a global context.

Therefore, there is a strong case that establishing jurisdiction in one country rather than another may be very important in cases where there is a conflict of competition laws. The issues are indeed important because, as already noted, there may often be a conflict of competition laws in a global context in so far as the regional/national competition law policy objectives may vary¹⁴⁵ and competition law rules themselves may differ.¹⁴⁶ Elhauge and Geradin¹⁴⁷ have recently made the following observation:

“Although [...] U.S. and EU doctrine [i.e. sets of competition law rules] are closer than they might appear and probably converging over time, there remain important differences. Those differences include divergent rules on: (1) excessive unilateral pricing; (2) above-cost predatory pricing; (3) a recoupment requirement for below-cost predatory pricing; (4) unilateral duties to deal; ([5]) loyalty and volume-based discounts; ([6]) vertical territorial restraints; and ([7]) vertical and conglomerate mergers. Moreover, even when the doctrines do not differ, their application can lead to conflicting conclusions if the courts or agencies in the U.S. and EU differ in their assessment of the facts of particular cases or how the law applies to those facts. And even when the U.S. and EU agree, other affected nations may not.”¹⁴⁸

¹³⁹ *Virgin Atlantic Airways v British Airways* 257 F.3d 256 (2001), United States Court of Appeals, Second Circuit.

¹⁴⁰ Case T-219/99, *British Airways v Commission of the European Communities* [2003] ECR II-5925.

¹⁴¹ *Ibid* [6-13].

¹⁴² *Virgin Atlantic Airways*, *supra* n 139.

¹⁴³ IV/D-2/34.780 – *Virgin/British Airways* – 2000/74/EC: *Commission Decision of 14 July 1999 relating to a proceeding under Article 82 of the EC Treaty* [2000] OJ L30/1.

¹⁴⁴ *Virgin Atlantic Airways Ltd v British Airways Plc* 69 F.Supp.2d 571 – US District Court, S.D. New York.

¹⁴⁵ Klodt, *supra* n 6, 882.

¹⁴⁶ *Ibid*.

¹⁴⁷ E Elhauge and D Geradin, *Global Competition Law and Economics* (2nd edn., Hart Publishing, 2011).

¹⁴⁸ *Ibid* 1137.

In addition, a level of divergence exists with regard to such important issues as the appropriate remedies,¹⁴⁹ standing to sue,¹⁵⁰ passing-on defence,¹⁵¹ and collective redress mechanisms¹⁵² which are important for adequately pursuing enforcement objectives in a global context. Therefore, there is a strong case that different views on the anti-competitive nature of the conduct may be shared by the applicable competition law systems. In this context, Elhauge and Geradin¹⁵³ have noted that there is a “global problem that the most aggressive antitrust regime always wins. [...] To the extent that EU law is generally more restrictive than US law, it means largely ceding to the EU the antitrust regulation of global markets.”¹⁵⁴ However, it is difficult to see how EU competition law may regulate the global markets in so far as public enforcers across Europe are unlikely to have the resources to investigate all the complaints they receive.¹⁵⁵ In other words, there may not be overregulation, but on the contrary there may be a strong case that there is an enforcement gap at present.¹⁵⁶

1. Remedies for breach of Competition Laws: a level of divergence

It is necessary to consider whether the various remedies for breach of competition law provide for an effective enforcement regime in a global context.¹⁵⁷ *Microsoft*¹⁵⁸ does suggest that even when the competition authorities in the various countries agree as to the anti-competitive character of the behaviour, there may be a level of divergence when it comes to the appropriate

¹⁴⁹ See Section D *infra*. See also: Budzinski, *supra* n 8, 45.

¹⁵⁰ Section D *infra*.

¹⁵¹ Section D *infra*.

¹⁵² Section D *infra*.

¹⁵³ Elhauge and Geradin, *supra* n 147.

¹⁵⁴ *Ibid* 1137-8.

¹⁵⁵ See more: E Burrows and T Gilbert, “OFT Competition Act enforcement: Key developments over the first decade” (2010) 9 *Competition Law Journal* 178, 182.

¹⁵⁶ See M Danov, F Becker and P Beaumont (eds), *Cross-Border EU Competition Law Actions* (Hart Publishing 2013) Part I. See also: D Waelbroeck, D Slater and G Even-Shoshan, *Study on the conditions of claims for damages in case of infringement of EC competition rules (Ashurst Report)* < http://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf > ((accessed 27 January 2016)); P Buccirossi, M Carpagnano, L Ciari and others, *Collective Redress in Antitrust* < <http://www.europarl.europa.eu/document/activities/cont/201206/20120613ATT46782/20120613ATT46782EN.pdf> > ((accessed 27 January 2016)) p 25; See the UK Department for Business Innovation & Skills, *Private Actions in Competition Law: A Consultation on Options for Reform – Government Response* < https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf > ((accessed 27 January 2016).

¹⁵⁷ Compare some of the issues discussed in the EU context. See M Danov and S Dnes, “Cross-Border EU Litigation: New Evidence from England and Wales” in M Danov, F Becker and P Beaumont (eds.), *Cross-Border EU Competition Law Actions* (Hart Publishing 2013) 33, 45-48.

¹⁵⁸ Case COMP/C-3/37.792 *Microsoft* - Commission Decision of 24.03.2004 relating to a proceeding under Article 82 of the EC Treaty C(2004) 900 final; Case T-201/04, *Microsoft Corp v Commission of the European Communities* [2007] ECR II-3619.

remedies which should be deployed.¹⁵⁹ In this case, Microsoft was found to infringe Article 102 TFEU by refusing to supply the complete and accurate specifications to some of its competitors as well as by making the availability of the Microsoft Windows operating system on the simultaneous acquisition of *Windows Media Player*.¹⁶⁰ However, the European Union approach and the remedies imposed were criticised by the US authorities¹⁶¹ and commentators.¹⁶²

Similarly, the EU policy makers have expressed a disapproving attitude towards some of the remedies deployed by the US legislator. For example, it is well established that a US award of multiple damages would infringe the UK Protection of Trading Interests Act 1980, which may therefore affect the availability of such damages in England.¹⁶³ As noted elsewhere,¹⁶⁴ the prevailing opinion¹⁶⁵ is that an English court should refuse to multiply the sum assessed as compensation on the ground that multiple damages would be contrary to its public policy. But why should an English court not consider the legitimate interests of a foreign competition law system awarding treble damages, if the relevant anti-competitive conduct is significantly foreign?¹⁶⁶

There are good reasons suggesting that a new mode of governance, incorporating a private international law solution, which provides for co-ordination of the various competition law systems, would be needed. Such a global instrument could allow a court to factor in the fact that a foreign competition law system, which has legitimate interests in regulating the business activities in question, had decided that multiple damages are an appropriate and effective remedy for breach of its competition laws. In particular, if the US legislature had decided that the probability of detection of an illegal cartel is 33 per cent and as a result any compensatory award should be tripled to provide an effective remedy for certain competition law infringements,¹⁶⁷ then this very remedy should be awarded in an appropriate case, for example, by an English court.¹⁶⁸ In other words, such a new global PIL mechanism would take account

¹⁵⁹ Budzinski, *supra* n 8, 45.

¹⁶⁰ Art 2 of the Commission Decision.

¹⁶¹ Press Release, US Department of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on the EC's Decision in its Microsoft Investigation < http://www.justice.gov/opa/pr/2004/March/04_at_184.htm > (accessed 27 January 2016).

¹⁶² K Heyer, "A world of uncertainty: Economics and the globalization of antitrust" (2005) *Antitrust Law Journal* 375.

¹⁶³ C G J Morse, "Torts in private international law: a new statutory framework" (1996) *International and Comparative Law Quarterly* 888, 895; A. Dickinson, *The Rome II Regulation: The Law Applicable to Non-contractual Obligations* (Oxford University Press, 2008) 408.

¹⁶⁴ Danov, *supra* n 89, 177-178.

¹⁶⁵ Morse, *supra* n 163, 895; Dickinson, *supra* n 163, 408.

¹⁶⁶ Compare *Empagran*, *supra* n 130, at 166.

¹⁶⁷ L T Visscher, 'Economic analysis of punitive damages' in H Koziol and V Wilcox (eds.) *Punitive Damages: Common Law and Civil Law Perspectives* (Springer, 2009) 220, 223-5.

¹⁶⁸ Compare: Recital 32 of the Rome II Regulation; The Protection of Trading Interests Act 1980,

of fact that the foreign competition law system has legitimate interest to decide how best to enforce its own antitrust laws in a case, in which the anti-competitive conduct took place in its territory, causing anti-competitive harm there.¹⁶⁹ A more flexible PIL solution would undoubtedly reflect the fact that exemplary damages may be seen as an appropriate and effective remedy in some competition cases.¹⁷⁰ This was acknowledged by the Competition Appeal Tribunal in *Cardiff City Transport*¹⁷¹ where it was held that “exemplary damages can in theory be awarded where there is an intentional breach of the law i.e. the defendant acts knowing that what he does constitutes an infringement of competition law and intending that infringement”.¹⁷² These examples may be regarded as a strong indication that an appropriate private international law mode of governance, which allows for another country’s competition laws to be applied in cases where the country in question has legitimate interests to have its competition laws applicable, might need to be considered by the policy-makers in a global context.

2. Conditions for bringing competition law actions: a level of divergence

The case for a global regime may be strengthened if one considers the level of divergence between conditions for bringing competition law actions. A recent study¹⁷³ shows the conditions for bringing antitrust claims do influence litigants’ tactics even in Europe where EU competition law forms part of each Member State’s legal order. A case for harmonisation was made by a recently adopted Directive on antitrust damages actions.¹⁷⁴

But, how to address the problems in a global context? Is there even more variation globally? The passing-on defence and standing are addressed by the European Commission in its proposed Directive as well as by the Supreme Court of Canada in *Pro-Sys Consultants v Microsoft Corporation*.¹⁷⁵ EU Directive 2014/104 states that “Member States shall ensure that

¹⁶⁹ Compare *Empagan*, *supra* n 130, at 165.

¹⁷⁰ Office of Fair Trading, *Response to the European Commission's Green Paper, Damages actions for breach of the EC antitrust rules* (2006) OFT 844.

¹⁷¹ Case Number: 1178/5/7/11, *2 Travel Group Plc (In Liquidation) v Cardiff City Transport Services Ltd* [2012] CAT 19.

¹⁷² *Ibid* [485]. Compare: *Devenish Nutrition Ltd v Sanofi-Aventis SA* [2007] EWHC 2394; [2008] 2 WLR 637 (Ch) [18]; Case Number: 1166/5/7/10, *Albion Water Ltd v DWR Cymru Cyfyngedig* [2013] CAT 6.

¹⁷³ M Danov, F Becker and P Beaumont (eds.), *Cross-Border EU Competition Law Actions* (Hart Publishing 2013).

¹⁷⁴ Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union [2014] OJ L349/1.

¹⁷⁵ *Pro-Sys Consultants v Microsoft Corporation* [2013] SCC 57 (CanLII).

the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law.”¹⁷⁶ As a matter of EU law, anyone who has suffered harm caused by a competition law infringement has the right to be “able to claim and obtain full compensation for that harm.”¹⁷⁷ Thus, an indirect purchaser¹⁷⁸ may seek compensation for losses suffered from the anti-competitive conduct¹⁷⁹ or to enjoin future anti-competitive conduct.¹⁸⁰

On the contrary, the passing-on defence cannot be invoked by defendants in the US.¹⁸¹ Moreover, the US Supreme Court in *Illinois Brick v Illinois*¹⁸² held that:

“[...] following an automatic recovery of the full overcharge by the direct purchaser, the indirect purchaser could sue to recover the same amount. The risk of duplicative recoveries created by unequal application of the *Hanover Shoe* rule is much more substantial than in the more usual situation where the defendant is sued in two different lawsuits by plaintiffs asserting conflicting claims to the same fund. A one-sided application of *Hanover Shoe* substantially increases the possibility of inconsistent adjudications -- and therefore of unwarranted multiple liability for the defendant -- by *presuming* that one plaintiff (the direct purchaser) is entitled to full recovery while preventing the defendant from using that presumption against the other plaintiff; overlapping recoveries are certain to result from the two lawsuits unless the indirect purchaser is unable to establish any pass-on whatsoever. As in *Hawaii v. Standard Oil Co. of Cal.*, 405 U. S. 251, 405 U. S. 264 (1972), we are unwilling to ‘open the door to duplicative recoveries’ [...]”¹⁸³

Recently the Canadian Supreme Court had a chance to opine on this, and went on to hold that the rejection of the passing on defence does not preclude the indirect purchasers’ actions.¹⁸⁴ This example clearly suggests that, despite the similarities/distinctions between the various competition law systems, the questions of double and multiple recoveries may well be addressed in a global context through a private international law tool used as a new mode of governance.

Collective redress mechanisms may be seen as yet another area which suggests that, despite the remaining differences, the trend is for the regimes to become more similar than they used to be in the past. It should be noted that class actions on an opt-out basis¹⁸⁵ have been

¹⁷⁶ See Art 13 of the Directive on antitrust damages actions.

¹⁷⁷ See Art 3 of the Directive on antitrust damages actions. But, “overcompensation” is not part of the “full compensation” under the Directive. (See Article 3(3).) Commission Staff Working Paper, Annex to the Green Paper on damages actions for breach of the EC antitrust rules SEC(2005) 1732 paras. 1-3.

¹⁷⁸ See Arts 12 and 14 of the Directive on antitrust damages actions.

¹⁷⁹ Case C-453/99, *Courage Ltd v Crehan* [2001] ECR I-6297; Joined Cases C-295/04–C-298/04, *Manfredi v Lloyd Adriatico*, [2006] 5 CMLR 17.

¹⁸⁰ *Purple Parking Ltd and Meteor Parking Ltd v Heathrow Airport Ltd* [2011] EWHC 987 (Ch).

¹⁸¹ *Hanover Shoe v United Shoe Machinery*, 392 U.S. 481 (1968).

¹⁸² *Illinois Brick v Illinois*, 431 U.S. 720 (1977).

¹⁸³ *Ibid* 730-1.

¹⁸⁴ *Pro-Sys Consultants v Microsoft Corporation* [2013] SCC 57 (CanLII) [60].

¹⁸⁵ C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart Publishing, 2008) 118-130.

known for some time in the United States.¹⁸⁶ Although, the recent Commission Recommendation states that the ‘opt-in’ principle would dominate in Europe, it goes on to indicate that there may be exceptions which may be justified by reasons of sound administration of justice.¹⁸⁷ In competition law cases, the need for making such an exception appears to be regarded as justifiable by the UK government in the recently adopted Consumer Right Act 2015. In particular, the UK government “decided to introduce **a limited opt-out collective actions regime, with safeguards, for competition law, with cases to be heard only in the Competition Appeal Tribunal.**”¹⁸⁸ Although there appear to be differences between the US regime and the EU proposed model, Justice Kagan,¹⁸⁹ sitting at the US Supreme Court, appears to present an interesting trend from the US by stating: “The Court today mistakes what this case is about. To a hammer, everything looks like a nail. And to a Court bent on diminishing the usefulness of Rule 23, everything looks like a class action, ready to be dismantled.”¹⁹⁰

In view of the foregoing, one may say that the time is ripe for the international community to set out rules which co-ordinate cross-border competition law proceedings initiated in a global context. *Transportation Surcharge Antitrust Litigation*¹⁹¹ may be regarded as a good example as to how a non-EU court could award compensatory damages to UK consumers for damages they have suffered as a result of a cross-border competition infringement. This case re-iterates the important role which the private international law rules could play for claimants (and their representatives) who wish to obtain redress in a global context.

¹⁸⁶ Rule 23 of the Federal Rules of Civil Procedure. See also: G J Benston, ‘A comprehensive analysis of the determinants of private antitrust litigation, with particular emphasis on class action suits and the rule of joint and several damages’ in L J White (ed.) *Private Antitrust Litigation, New Evidence, New Learning* (MIT Press, 1988) 271, 310-311.

¹⁸⁷ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law [2013] OJ L201/60 [21].

¹⁸⁸ *A Consultation on Options for Reform – Government Response*, *supra* n 156, [5.13] (bold font used in the original).

¹⁸⁹ *American Express Company v Italian Colors Restaurant*, No. 12-133, (U.S. June, 20, 2013) 570 U.S. ___ (2013).

¹⁹⁰ *Ibid.*

¹⁹¹ *In re: International Air Transportation Surcharge Antitrust Litigation*, *supra* n 133. Mulheron *supra* n 133.

E. THE WAY FORWARD: A PRIVATE INTERNATIONAL LAW TOOL AS A NEW MODE OF GOVERNANCE

The foregoing examples suggest that there is a strong case for the issues of competence allocation and applicable competition laws (which may apply with respect to the same cross-border business activities performed in a global context) to be addressed head-on by policy-makers in a global context. A private international law mechanism may be particularly important to this end.

According to private international law theory, “[i]t is possible to seek a ‘harmony of laws’, ‘unison of decisions’, or a ‘minimum of conflicting decisions’ [...] either through limitations upon the assumption of adjudicatory jurisdiction or through choice of law.”¹⁹² Parallel proceedings may be avoided if there is a special basis for jurisdiction which requires a substantial connection with the forum in antitrust law claims.¹⁹³ The problem with this solution is that competition law claims often involve multiple injured parties as harm may be caused in a number of countries. The analysis of Mr Justice Teare in *Cooper Tire* appears to suggest that in many competition law cases, the place where the event giving rise to the damage occurred may be very difficult indeed to determine.¹⁹⁴

The issues could be even more complex with regard to anti-competitive activities which are global in nature. A need for taking evidence in one country in support of proceedings in another country may often arise in competition cases. Von Mehren and Trautman¹⁹⁵ have noted that “adjudicatory action of one jurisdiction, if it is to be fully effective, will often require the cooperation of other jurisdictions.”¹⁹⁶ The rules designed to deal with the parallel proceedings would be particularly important in this context. The European Union regime is based on the assumption that the court first seised is always more appropriate.¹⁹⁷ However, it may often be the case that the court first seised is not well placed to hear and determine a competition law dispute because, for example, an anti-competitive agreement, which has been implemented in a number of countries, does not affect the market in the jurisdiction where the action is brought. As noted elsewhere,¹⁹⁸ a more satisfactory result could be reached if the courts were entitled to

¹⁹² von Mehren, *supra* n 60, 350.

¹⁹³ Guzman, *supra* n 37.

¹⁹⁴ *Cooper Tire & Rubber Company Europe Limited & Others* [2010] EWCA Civ 864 [65].

¹⁹⁵ von Mehren and Trautman, *supra* n 80.

¹⁹⁶ *Ibid* 1127.

¹⁹⁷ Danov, *supra* n 89, Ch 4.

¹⁹⁸ Danov, *supra* n 89.

decline jurisdiction (or transfer the proceedings¹⁹⁹) in cases where agreement or practice has no substantial direct (actual or foreseeable) effects on competition within the jurisdiction.²⁰⁰ The advantages of an approach which links the court's jurisdiction with the effects on competition within a country's territory as well as with the applicable competition laws could be demonstrated by the US Supreme Court ruling in the *Empagran* case.²⁰¹

Another important issue, which is to be considered when devising a global competition law regime based on co-operation between the various competition law systems relates to the question "whether and how choice-of-law practices should be taken into account in the formulation of rules governing the assumption of adjudicatory jurisdiction."²⁰² Given the public policy character of most competition law provisions (and their mandatory nature in particular), the traditional private international theories which presuppose "the selection of a single governing law for resolution of multistate disputes"²⁰³ may not produce satisfactory results in cases where there are competition law infringements which are often global in nature. In such cases, the problems may be dealt with by "recourse to special substantive rules which would seek to adjust, on a basis of equality, the views of all legitimately concerned jurisdictions."²⁰⁴ As von Mehren notes "The multi-state rule proposed, unlike a domestic-rule solution, thus recognizes that [several] states have legitimate interests in the situation."²⁰⁵ Could this theoretical model be developed and used in global competition law cases?

The advantages of adopting such an approach with regard to global business activities can be demonstrated by the following example (which is modelled on von Mehren's analysis of choice of law theories²⁰⁶). Suppose that a loyalty discount is permissible in State A, but prohibited in State B.²⁰⁷ On the one hand, if the laws of State A are applied, then the prohibitive effect of the laws of State B would be defeated. On the other hand, if the laws of State B are applied, then the business practice would be regarded as prohibited. However, it may be problematic for a national court to apply the laws of State A and prohibit a conduct, which State B regards as legitimate in so far as "its procompetitive consequences likely outweigh its

¹⁹⁹ Compare: Article 15 of the Brussels IIa Regulation.

²⁰⁰ Compare the European approach in respect of allocation of cases between the NCAs. See Commission (EC), 'Cooperation within the Network of Competition Authorities' (Notice) OJ [2004] C101/43 [8].

²⁰¹ See *Empagran*, *supra* n 130, at 167.

²⁰² von Mehren and Trautman, *supra* n 80, 1128.

²⁰³ von Mehren, *supra* n 60, 353.

²⁰⁴ *Ibid* 366.

²⁰⁵ *Ibid* 366.

²⁰⁶ *Ibid* 353 and 366.

²⁰⁷ *Virgin Atlantic Airways v British Airways* 257 F.3d 256 (2001), United States Court of Appeals, Second Circuit; Case T-219/99, *British Airways v Commission of the European Communities* [2003] ECR II-5925. See also: Elhauge and Geradin, *supra* n 147, 1137-8.

anticompetitive effects.”²⁰⁸ Since different outcomes may be reached depending on what is the applicable substantive law, a more appropriate solution would be to “apply both states’ rules, compromising differences on the basis of the relative strength of each legal order’s claim to regulate.”²⁰⁹ Another example may relate to export cartels. Such cartels, which may not be regarded as illegal in State A (i.e. the exporting nation), may adversely affect the trade in State B (i.e. the importing nation). Given the legitimate interests of the importing nation, the laws of State B may well have a stronger claim to regulate and apply in this context, and as a result they should be applied irrespective of whether the dispute is litigated. Therefore, there is a very strong case for discussion in a global context with a view to setting out the specific detail of a private international law tool which may be used to co-ordinate the cross-border enforcement activities in a global context.

On the one hand, a less ambitious private international law solution may be adopted under the auspices of the Hague Conference on Private International Law. Following the failure of the Hague Conference Draft Convention on jurisdiction and foreign judgments in civil and commercial matters,²¹⁰ the Global Judgments project was restarted.²¹¹ Although the interim text of the Judgments Convention²¹² (and recently adopted Choice of Court Agreement Convention²¹³) excluded competition claims from the scope of the Convention, there is a strong case for the inclusion of the antitrust/competition claims into a newly proposed Judgments Convention.²¹⁴ It seems that, given the previous experience with a Global Jurisdiction and Judgments Convention, the Hague Conference project will proceed as a “single”²¹⁵ convention which will include some “jurisdictional filters”.²¹⁶ This may be seen as an opportunity for the

²⁰⁸ Elhauge and Geradin, *supra* n 147, 1138.

²⁰⁹ von Mehren, *supra* n 60, 366.

²¹⁰ Preliminary draft Convention on jurisdiction and foreign judgments in civil and commercial matters, adopted by the Special Commission and Report by P. Nygh & F. Pocar” < <http://www.hcch.net/upload/wop/jdgm11.pdf> > (accessed 27 January 2016). Compare: Convention of 30 June 2005 on Choice of Court Agreements < http://www.hcch.net/index_en.php?act=conventions.text&cid=98 >.

²¹¹ Hague Conference Permanent Bureau, *Process Paper on the Continuation of the Judgments Project* < http://www.hcch.net/upload/wop/jdgm2013processpaper_e.pdf > (accessed 27 January 2016).

²¹² Hague Conference Permanent Bureau, *Interim Text* < http://www.hcch.net/upload/wop/jdgm2001draft_e.pdf > (accessed 27 January 2016).

²¹³ See Article 2(2)(h) of the Convention of 30 June on Choice of Court Agreement.

²¹⁴ R di Brozolo, ‘Antitrust claims: Why exclude them from the Hague Jurisdiction and Judgments Convention?’ (2004) 4 *Global Jurist Advances*, Article 2.

²¹⁵ A T von Mehren, “Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgments Acceptable World-wide: Can the Hague Conference project succeed?” (2001) *The American Journal of Comparative Law* 191; W E O’Brian, ‘The Hague Convention on Jurisdiction and Judgments: The Way Forward’ (2003) *Modern Law Review* 491; P. Beaumont, “Hague Choice of Court Agreements Convention 2005: Background, Negotiations, Analysis and Current Status” (2009) *Journal of Private International Law* 125.

²¹⁶ Hague Conference Permanent Bureau, *Report of the Fifth Meeting of the Working Group on the Judgments Project (26-31 October 2015) and the Proposed Draft Text Resulting From the Meeting* <

international community to ensure the recognition and enforcement of judgments in relation to competition law claims, indirectly dealing with issues of jurisdiction and parallel proceedings as well as with the issue of a conflict of competition laws while taking their public policy character into account.

On the other hand, the prevailing view appears to be that it would be very difficult (if not impossible) to agree (directly or indirectly) at The Hague Conference on a global rule on jurisdiction for competition law cases. Due to political dimension of jurisdiction,²¹⁷ the States around the globe may be very careful when negotiating jurisdictional rules which are to allocate jurisdiction in antitrust cases. In view of that, one may argue that a “multilevel ‘judicial governance’”²¹⁸ of competition law enforcement activities in a global context may be best discussed and achieved under the auspices of the OECD which is well aware of the “complexity of cross-border competition law enforcement co-operation”.²¹⁹

The OECD may take a lead in proposing and negotiating a multi-lateral agreement which may be used as a new form of cooperation with a view to co-ordinating cross-border antitrust enforcement activities in a global context. To this end, a private international law tool may be used to allocate jurisdiction in competition law cases as well as to promote the recognition and enforcement of judgments, whilst encouraging a closer co-operation of the competition authorities in the ICN framework.²²⁰

<https://assets.hcch.net/docs/06811e9c-dddf-4619-81af-71e8836c8d3e.pdf> > (accessed 27 January 2016) > (accessed 27 January 2016) 1.

²¹⁷ Kaushal, *supra* n 83, 759-792.

²¹⁸ E-U Petersmann, ‘How to Evaluate the European Union as a Normative Power in Multilevel Governance of Public Goods Methodological Pluralism and its Constitutional Limits in European Governance’ in C Kaddous, *The European Union in International Organisations and Global Governance* (Hart Publishing 2015) 254.

²¹⁹ OECD International Co-operation and Competition < <http://www.oecd.org/daf/competition/internationalco-operationandcompetition.htm> > (accessed 27 January 2016). See also: Section B, *supra*.

²²⁰ See the Recommendation of the OECD Council concerning International Co-operation on Competition Investigations and Proceedings, as approved by Council on 16 September 2014 [C(2014)108] < <http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf> > (accessed 27 January 2016).