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Competition Law Enforcement: Private International Law and Access to Effective Legal Remedies in Cross-Border Cases

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I. Introduction

Competition law is 'one of the most commonly deployed instruments to regulate the operation of markets and is a standard feature of economic policy in developed and developing countries alike'.[1] Its aims include safeguarding consumers' welfare and ensuring that markets function efficiently.[2] In comparison with Private International Law (PIL), competition law might be regarded as a relatively new legal discipline. Some recent comparative datasets show that many countries have now adopted competition laws.[3] Could an appropriate level of international cooperation ensure that various legitimate regulatory objectives and interests are adequately pursued and sufficiently safeguarded in cross-border competition law cases? What should be the role of PIL[4] and the Hague Conference on PIL (HCCH)?

In spite of some recent waves of national protectionism and populism,[5] cross-border trade continues to be actively promoted by the World Trade Organisation (WTO)[6] as well as by multilateral[7] and bilateral[8] trade agreements, including the recent EU–UK Trade and Cooperation Agreement.[9] The legal framework facilitating cross-border trade incentivises companies to adopt a multinational governance structure to efficiently optimise their international economic

[1] A Bradford et al, 'Competition law gone Global: Introducing the comparative competition law and enforcement datasets' (2019) 16 *Journal of Empirical Studies* 411, 411–12.

[2] FH Easterbrook, 'Limits of Antitrust' (1984) 63 *Texas Law Review* 1. See also Communication from the Commission Notice Guidelines on the application of Article 81(3) of the Treaty [2004] OJ C101/97 [33].

[3] Bradford et al (n 1).

[4] M Danov, 'Global Competition Law Framework: A Private International Law Solution Needed' (2016) 12 *Journal of Private International Law* 77.

[5] R Eatwell and M Goodwin, *National Populism: The Revolt Against Liberal Democracy* (Penguin 2018).

[6] Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations, available at: www.wto.org/english/docs_e/legal_e/legal_e.htm.

[7] eg, Canada, Mexico and United States Free Trade Agreement (NAFTA); Brunei, Indonesia, Malaysia, Philippines, Singapore, Thailand. Vietnam, Laos, Myanmar and Cambodia Southeast Asian States Free Trade Area (ASEAN).

[8] eg, EU–Canada Comprehensive Trade and Economic Agreement (CETA); EU–Mexico Trade Agreement.

[9] Trade and Cooperation Agreement between the European Union and The European Atomic Energy Community, of the One Part, and the United Kingdom of Great Britain and Northern Ireland, of the Other Part [2021] OJ L149/10 (EU–UK Trade and Cooperation Agreement).

activities. Transnational supply chains are established by companies to maximise efficiencies and profits.

If some multinational companies decide to engage in anti-competitive business practices, they can use their transnational supply chains to adversely affect the process of competition across the globe.[10] The relationship between the rules facilitating market access and the effectiveness of the relevant competition policies was reflected in the EU–UK Trade and Cooperation Agreement title XI – 'Level Playing Field for Open and Fair Competition and Sustainable Development', with a specific chapter on 'Competition Policy'.[11] These developments signify the importance of the issues in relation to competition law enforcement and cooperation in cross-border cases.[12]

The connection between PIL and competition law needs to be thoroughly considered to facilitate injured parties' access to legal remedies in cross-border cases. In order to safeguard national and regional regulatory interests – whilst facilitating injured parties' access to justice in such cases – it is essential for the international community to attain an adequate level of cooperation with regard to competition law matters. PIL rules may be central to the effective enforcement of national/regional competition laws, not least because very many economic activities are transnational in nature, with the relevant infringements causing harm in different jurisdictions.

States should cooperate with a view to effectively regulating the competition law aspects of cross-border economic activities,[13] but there is a notable lack of an appropriate multilateral mechanism.[14] Even if certain international norms are agreed, they are not compulsory.[15] Whilst it is universally established that anti-competitive practices should be deterred,[16] there is no multilateral mechanism to facilitate international cooperation. Instead, there are some bilateral agreements facilitating cooperation between the national competition authorities[17] and recently one example of some substantive law principles and provisions in place.[18]

More importantly, the definition of 'enforcement activities'[19] provided in bilateral agreements indicates that international cooperation is limited to collaborations between public-administrative competition authorities (ie, regulators) in different jurisdictions. Cooperation is primarily in the area of 'Global Administrative Law',[20] eg, the EU–UK Trade and Cooperation Agreement's cooperation arrangements, involve 'the European Commission or the competition authorities of the Member States, on the one side, and the United Kingdom's competition authority or authorities,

[10] cp: *Motorola Mobility LLC v AU Optronics Corp* 775 F3d 816, 824 (7th Cir, 2015) and *The LCD Appeals* [2018] EWCA Civ 220.

[11] See Chapter two of Title XI of Part Two of the EU–UK Trade and Cooperation Agreement. See specifically Art 359(1) from the EU–UK Trade and Cooperation Agreement.

[12] See Arts 360 and 361 from the EU–UK Trade and Cooperation Agreement.

[13] WTO working group on competition at the Singapore Ministerial Declaration (13 December 1996, WT/MIN(96)/DEC) and OECD Council Recommendation concerning Cooperation between Member Countries on Anticompetitive Practices affecting International Trade (27 July 1995, OECD/LEGAL/0280).

[14] C Otero García-Castrillón, 'Private Parties WTO (Bilateralist) Competition Regime' (2001) 35 *Journal of World Trade Law* 99.

[15] eg, The 1980 United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UN Set).

[16] The UN Set: Section D – Principles and Rules for enterprises, including transnational corporations.

[17] eg, Agreement between the Government of the United States of America and the Commission of the European Communities regarding the application of their competition laws (US/EC Agreement) [1995] OJ L95/47. The relevant agreements within the EU are listed. See the European Commission, 'Bilateral relations on competition issues', available at: ec.europa.eu/competition/international/bilateral/index.html.

[18] See Arts 358 and 359 from the EU–UK Trade and Cooperation Agreement.

[19] eg, Art I(2) C) of the US/EU Agreement.

[20] JP Terhechte, *International Competition Enforcement Law Between Cooperation and Convergence* (Springer 2011) 77.

on the other side'.[21] The Agreement has no appropriate mechanism for judicial cooperation in antitrust matters.[22]

There is a major gap in the existing framework for cross-border judicial cooperation on allocation of jurisdiction, avoiding parallel proceedings and the recognition and enforcement of judgments in relation to competition claims. Devising an appropriate framework for judicial civil cooperation is central to facilitating access to justice.[23] The allocation of adjudicatory and regulatory jurisdiction and coordination of related proceedings would be at the heart of any system for judicial cooperation in relation to competition law matters.

The territorial scope of competition law has been analysed from the perspective of States' jurisdiction to prescribe.[24] Regulatory jurisdiction is associated with the universally accepted territoriality principle. In order to attain certain territorial objectives, the well-known effects doctrine was advanced in line with 'Curries' governmental interest analysis'.[25] The effects test provides the basis for the regulatory jurisdiction of individual legal orders to interplay with the territorial scope of the relevant national/regional competition laws.[26] A major feature of competition law provisions is that they often apply extraterritorially.[27]

The extraterritorial application of competition law may be legitimately justified because the conduct of an undertaking based in one jurisdiction may often adversely affect the trade (and the process of competition as well as consumers' welfare) in another jurisdiction.[28] Extraterritoriality is a common attribute of competition laws in more than 60 jurisdictions.[29] Extraterritorial effect is accepted in public-administrative proceedings before regulators[30] as well as in antitrust damages proceedings before national courts.[31]

In some systems adjudicatory jurisdiction in a cross-border competition law dispute can be retained where the court is *forum conveniens* or declined where it is *forum non conveniens*.[32] Adjudicatory jurisdiction 'is not a separate type of jurisdiction, but merely an emanation of the international jurisdiction to legislate … a state's right of regulation is exercised by legislative jurisdiction which includes adjudication'.[33] A specific feature of competition law is that such

[21] See Art 361(2) from the EU–UK Trade and Cooperation Agreement.

[22] cp: the EU–UK Trade and Cooperation Agreement's Part Three: Law Enforcement and Judicial Cooperation in Criminal Matters. See also, Communication from the Commission to the European Parliament and the Council, Assessment on the application of the United Kingdom of Great Britain and Northern Ireland to accede to the 2007 Lugano Convention, COM(2021) 222 final.

[23] Prel Doc No 2 of December 2018, 'The possible exclusion of anti-trust matters from the Convention as reflected in Article 2(1)(p) of the 2018 draft Convention', 22nd Diplomatic Session of The Hague Conference on Private International Law. cp: Terhechte (n 20) 17.

[24] C Otero García-Castrillón, 'El alcance extraterritorial del derecho de la competencia y su utilización como medida comercial' (2001) *Gaceta Jurídica de la Unión Europea y de la Competencia* 34.

[25] HH Kay, 'A defense of Currie's governmental interest analysis' (1989) 215 *Hague Collected Courses* 9–204.

[26] *LCD Appeals* (n 10) [91]. See also *Timberlane Lumber Co v Bank of America* 549 F2d 597, 610 (9th Cir, 1976); Joined cases 89, 104, 114, 116, 117 and 125 to 129/85 *Ahlström Osakeyhtiö v Commission* EU:C:1988:447; C-413/14 P *Intel v Commission* EU:C:2017:632 [49]; Arts 3(1)(b) and 26 of the Treaty on the Functioning of the European Union (TFEU).

[27] Bradford et al (n 1) 423.

[28] EM Fox, 'Linked-In: Antitrust and the Virtues of a Virtual Network' (2009) *The International Lawyer* 151, 154; FW Papp, 'Competition law and extraterritoriality' in A Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar 2012) 21, 22.

[29] This amounts to over 50% of Bradford's datasets (n 1) 423.

[30] *Intel* (n 26). See also J Basedow, 'Conflicts of Economic Regulation' (1994) 42 *American Journal of Comparative Law* 432.

[31] *LCD Appeals* (n 10).

[32] *F Hoffmann-La Roche Ltd v Empagran* (2004) 542 US 155, 165 (Sup Ct (US)); *Iiyama UK Ltd v Samsung Electronics Co Ltd* [2016] EWHC 1980 (Ch); and *Iiyama UK Ltd v Schott AG* [2016] EWHC 1207 (Ch).

[33] FA Mann, 'The doctrine of international jurisdiction revisited after twenty years' (1984) 186 *Hague Collected Courses* 67.

adjudicatory jurisdiction may be exercised by regulators in public enforcement proceedings (ie, administrative adjudication)[34] as well as by national courts in private antitrust damages proceedings (ie, judicial adjudication). Since the precise determination of whether specific conduct is to be classified as anti-competitive is often to be ascertained by national/regional regulators applying their own competition laws, the distinction between the adjudicatory jurisdiction and the regulatory jurisdiction has been blurred in public enforcement proceedings.

PIL has an important role to play in promoting international cooperation and closing the regulatory gap in relation to judicial cooperation in a global context. PIL offers a suitable method[35] to systematically deal with issues of regulatory and adjudicatory jurisdiction, whilst avoiding parallel proceedings and facilitating private parties' access to legal remedies in cross-border competition law cases. A new model for international cooperation will be advanced by drawing a clear distinction between adjudicatory jurisdiction for a competent forum to determine a cross-border competition law dispute and regulatory jurisdiction for a legal order to regulate the competition law aspects of transnational economic activities.[36] If such a distinction is systematically put forward in a multilateral PIL instrument, the desired level of judicial cooperation could be achieved. Such a convention should enable an adjudicator to assume jurisdiction and apply several sets of competition laws (ie, regulatory regimes) when determining whether there is an infringement as well as when ascertaining the legal remedies (eg, assessing damages).[37]

This chapter sets out a research agenda to identify appropriate PIL solutions to promote access to justice. The focus is on competition law infringements with an international element. Since such infringements may cause harm to consumers and businesses in different jurisdictions, PIL will help to provide legal remedies. Although competition law includes merger control to safeguard the relevant market structure,[38] this chapter only considers rules prohibiting anti-competitive practices (transnational cartel agreements and serious abuses of dominant positions). State aid, subsidies and 'unfair competition'[39] are not discussed as being outside the UN Set of Principles on Competition.[40]

II. Main Limitations of the New Hague Judgments Convention (and the HCCH)[41]

The cross-border judicial cooperation gap is reflected in the multilateral PIL framework in the competition law arena. Appropriate and specific rules, which allocate adjudicatory jurisdiction – whilst considering the aspects of regulatory jurisdiction – in cross-border competition law cases in a global context, are yet to be drafted.

[34] JD González Campos, 'Les liens entre la compétence judiciaire et la competence legislative en droit international privé' (1977) 156 *Hague Collected Courses* 280.

[35] B Currie, 'Notes on Methods and Objectives in the Conflict of Laws' in B Currie, *Selected Essays on the Conflict of Laws* (Duke University Press 1963). See also K Roosevelt, 'Brainerd Currie's Contribution to Choice of Law: Looking Back, Looking Forward' (2015) Faculty Scholarship at Penn Law 1702, available at: scholarship.law.upenn.edu/faculty_scholarship/1702.

[36] Otero García-Castrillón (nn 14 and 24).

[37] M Danov, *Private International Law and Competition Litigation in a Global Context* (Hart Publishing 2023). *Deutsche Bahn AG & Others v MasterCard Incorporated* [2018] EWHC 412 (Ch).

[38] eg, Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (EC Merger Regulation).

[39] Art 10bis(3) of the Paris Convention for the Protection of Industrial Property.

[40] Sections B and D of the UN Set (n 15).

[41] These aspects are further dealt with in Danov (n 37).

Competition law matters are excluded from the substantive scope of the 2005 Choice of Court Convention.[42] Nonetheless, the Service Convention[43] applies 'in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad'.[44] Likewise, the Evidence Convention[45] and the Convention on Access to Justice[46] are applicable in competition law cases.

The Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (Judgments Convention)[47] signals a new approach, with two significant features. First, it shows that PIL multilateral instruments can be used 'to promote effective access to justice for all and to facilitate rule-based multilateral trade and investment … through judicial co-operation'.[48] Second, although the Judgments Convention appears to make an important step in furthering the coverage of competition law cases, its application in cross-border competition law cases may be less than straightforward. Article 2(1)(p) states that:

> This Convention shall not apply to … anti-trust (competition) matters, except where the judgment is based on conduct that constitutes an anti-competitive agreement or concerted practice among actual or potential competitors to fix prices, make rigged bids, establish output restrictions or quotas, or divide markets by allocating customers, suppliers, territories or lines of commerce, and where such conduct and its effect both occurred in the State of origin.

The finalised text, being the only acceptable compromise,[49] is difficult to reconcile with the transnational nature of the instrument because it only applies with regard to judgments in relation to competition law infringements where the 'conduct and its effect both occurred in the State of origin'.[50]

If both the conduct and its effect had materialised in the same jurisdiction, then the defendant would most probably have assets in the State of origin (as long as this was the place where the infringement had occurred as well as the place where the damage had occurred).[51] The fact that the specific type of 'anticompetitive conduct [which is included] within the scope of the Convention is restricted to cases with a *significant link* to the State of origin'[52] indicates that the impact of the Judgments Convention will be somewhat limited. It is a relatively safe prediction that it would be rather unusual for injured parties to seek to recognise and enforce a judgment abroad under the Judgments Convention, not least because the 'significant link'[53] requirement would mean that the defendants would often have assets in the State of origin. Thus, the Judgments Convention has limited ability to facilitate injured parties' access to remedies in cross-border competition law cases.

By excluding many competition law matters from its scope, the drafters of the Judgments Convention left a number of important PIL competition law issues to be addressed in the future as part of another (more specific) instrument. During the negotiations, a specifically designated

[42] Art 2(2)(h) of the Convention on the Choice of Court Agreements of 30 June 2005.
[43] Convention on the Service abroad of Judicial and extrajudicial documents in civil or commercial matters of 15 November 1965.
[44] Ibid, Art 1.
[45] Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970.
[46] Convention on International access to Justice of 25 October 1980.
[47] The full text of the Judgments Convention, which is not in force yet, is available at: www.hcch.net/en/instruments/conventions/full-text/?cid=137.
[48] Ibid, Preamble.
[49] F Garcimartín and G Saumier, *Explanatory Report on the 2019 HCCH Judgments Convention* (HCCH 2020) [69].
[50] Art 2(1)(p). See also, Garcimartín and Saumier (n 49) [72].
[51] cp: *Cooper Tire & Rubber Company* [2009] EWHC 2609 (Comm), [2010] EWCA Civ 864.
[52] Garcimartín and Saumier (n 49) [72] – emphasis added by the authors.
[53] Ibid.

group of experts 'discuss[ed] the possible exclusion of antitrust (competition) matters'[54] and their report[55] discussing 'the different types of anti-trust matters and some of their unique features'[56] may provide a basis for future work with a view to addressing the remaining PIL issues at The Hague.

The types of antitrust matters which need to be considered are correctly identified.[57] However, the report does not sufficiently distinguish between the regulatory aspects of competition laws and the enforcement activities of various regulators and/or adjudicators:

> The *regulation* and *enforcement* of competition laws can then be broken down into three main categories: (i) merger control by a regulator; (ii) public enforcement actions in respect of competition law breaches; and (iii) private enforcement actions in respect of competition law breaches.[58]

It is essential for any future PIL initiative in the area to draw a clear distinction between the regulation of economic activities through competition laws, and the enforcement of the relevant competition laws in public-administrative and/or private proceedings (ie, public and/or private enforcement). In a PIL context, it should not be forgotten that competition regulation has an evidently public (as opposed to private)[59] nature that even leads to the characterisation of competition law as forming part of the national/regional public policy (imperative).[60]

In spite of the public dimension of competition laws, it is well established that 'private enforcement of [such] public rules is a highly efficient strategy of enforcing [them]'.[61] In other words, once national policymakers decide that the competition law aspects of cross-border economic activities are to be regulated, then an 'optimal institutional design'[62] (which strikes an appropriate balance between public and private enforcement strands) is normally advanced. That said, the various national enforcement (public and/or private) modes should make no difference to the regulatory nature of competition law rules.

Effective international cooperation in a multilateral PIL instrument has to successfully accommodate diverse sets of national enforcement regimes. Given the correlation between public and private enforcement, there is an important preliminary question: is a decision adopted by a regulatory authority (as opposed to a judgment rendered by a court) covered by the definition of 'judgment'?[63] The report suggests that this is 'unlikely'.[64] However, its wording seems to indicate that, despite being improbable for regulatory decisions to be covered by the Convention, this possibility cannot be absolutely excluded.

The problem was exacerbated by the *Revised Preliminary Explanatory Report*[65] which was using the concept of 'enforcement orders'.[66] Since there was no definition of enforcement order for those purposes, there was a level of ambiguity whether a decision of a national/regional

[54] Prel Doc No 2 of December 2018 (n 23) [59].
[55] Ibid.
[56] Ibid, [3].
[57] Ibid, [4].
[58] Ibid, [9] – emphases added by the authors.
[59] T Büthe and W Mattli, *The New Global Rulers: The Privatization of Regulation in the World Economy* (Princeton University Press 2013).
[60] Overriding mandatory provisions of the law of the forum within the meaning of the EU Rome I/II Regulations, eg, C-126/97 *Eco Swiss* [1999] ECR I-3055; Case 38/98 *Renault v Maxicar* [2000] ECR I-2973.
[61] A Shleifer, 'Understanding Regulation' (2005) 11 *European Financial Management* 439, 446.
[62] Ibid, 443.
[63] Art 3(1)(b) of the Convention and Prel Doc No 2 of December 2018 (n 23) [15].
[64] Prel Doc No 2 of December 2018 (n 23) [15].
[65] Preliminary Document No 10 of May 2018, 'Judgments Convention: Revised Preliminary Explanatory Report', available at: assets.hcch.net/docs/7cd8bc44-e2e5-46c2-8865-a151ce55e1b2.pdf.
[66] Ibid, para 28.

regulator establishing a cross-border competition law infringement would be classified as a *declaratory* or enforcement order. The Explanatory Report appears to endeavour to clarify the matter by stating:

> Whether a judgment relates to civil or commercial matters is determined by the nature of the claim or action that is the subject of the judgment. The nature of the court of the State of origin or the mere fact that a State was a party to the proceedings are not determinative factors.[67]

This clarification is welcome. The question whether particular conduct 'constitutes an anti-competitive agreement'[68] is an important classification issue. The matter must be classified as either 'civil or commercial' or 'administrative'[69] – irrespective of the nature of the adjudicator (regulator or court) that deals with the dispute.

However, a level of ambiguity remains because the Explanatory Report goes on to state that, '[i]n any event, since the Convention only applies in civil or commercial matters, any judgment resulting from anti-trust (competition) authorities exercising governmental or sovereign powers is excluded'.[70] Would decisions of the EU Commission finding cross-border EU competition law infringements, which are binding on all EU Member States courts,[71] be within the scope of the Judgments Convention? The EU Commission would hardly be exercising any 'governmental or sovereign powers'[72] when it determines whether there is a breach of EU competition law. A more appropriate test would be for the scope of the Convention to be dependent on whether the adjudicator/regulator is exercising judicial functions (or whether it is imposing administrative penalties) when dealing with antitrust matters.

A more nuanced approach is important, not least because, eg, a decision of the EU Commission *finding an infringement* is 'immune from challenge'[73] in follow-on private damages proceedings[74] in EU Member States. A judgment of an EU Member State's court, awarding antitrust damages in a private suit, in reliance on a decision of the EU Commission declaring that there was an anti-competitive agreement, should be recognised and enforced under the Judgments Convention.[75] The 'object'[76] of the relevant private enforcement proceedings would be to compensate the injured parties for the harm caused by the anti-competitive agreement. Such a damages award would be within the scope of the Judgments Convention because the action would principally be concerned with the assessment of the individual[77] or aggregate[78] damage which had resulted from the anti-competitive agreement.

But, if a similar line of reasoning is adopted when interpreting Article 2(2) which sets out an exception to the matters excluded by Article 2(1) of the Judgments Convention (ie, an exception to the exception), then the following questions would be bound to arise: would the

[67] Garcimartín and Saumier (n 49) [28].
[68] Art 2(1)(p).
[69] Art 1(1).
[70] Garcimartín and Saumier (n 49) [73] and also [37].
[71] Art 16 of Council Regulation 1/2003.
[72] Garcimartín and Saumier (n 49) [28].
[73] *The Secretary of State for Health v Servier Laboratories* [2019] EWCA Civ 1096 [74]. See also: C-234/89 *Delimitis* [1991] ECR I-935; C-344/98 *Masterfoods v HB Ice Cream* EU:C:2000:689 [57]; T-474/04 *Pergan Hilfsstoffe für industrielle Prozesse v Commission* EU:T:2007:306 [73]; and *Secretary of State for Health*, ibid [28].
[74] In follow-on actions, the claimants rely on a regulator's decision on the infringement of competition law rules. Such a decision facilitates the task of claimants and courts, not least because the issues concerning the existence of the infringement and the identity of the infringing undertakings are dealt with.
[75] Prel Doc No 2 of December 2018 (n 23) [46].
[76] Art 2(2) Judgments Convention.
[77] *BritNed Development v ABB* [2018] EWHC 2616 (Ch) conf'd [2019] EWCA Civ 1840.
[78] *Merricks v Mastercard Incorporated & Anor* [2020] UKSC 51.

'conduct that constitutes an anti-competitive agreement',[79] which had been established by the regulator, be regarded as a preliminary issue? Or would the 'conduct that constitutes an anti-competitive agreement'[80] be regarded as the 'object'[81] of antitrust damages proceedings? If the answer to the first question is in the affirmative, then the scope of the Judgments Convention could be easily broadened by some national judges to cover judgments awarding antitrust damages regarding conduct that constitutes an abuse of a dominant position as long as the breach had been established by a regulator in a prior set of public-administrative proceedings.

The fact that such important questions were not considered in the report[82] prepared for the Diplomatic Session indicates that the HCCH did not fully reflect how the competition law enforcement model is functioning in the EU.[83] To strengthen the role of the HCCH, a new PIL solution which presupposes a comprehensive in-depth analysis, taking account of how the enforcement regimes are functioning in different jurisdictions, is needed. As part of this process, the following challenges need to be addressed.

III. Challenges Concerning International Cooperation in Cross-Border Cases

The Judgments Convention is an initial attempt to facilitate the recognition and enforcement of certain competition law judgments. This might set the scene for future judicial cooperation in competition law matters. Such cooperation is central to the effective enforcement of competition law in cross-border cases and facilitating injured parties' access to legal remedies in such cases.

There are two major challenges which require PIL solutions in view of the fact that not only are substantive competition laws different, but so too are the enforcement regimes and procedural rules reflecting different national/regional legal traditions and policy choices.[84] In particular, a comparative dataset reiterates that the various national/regional competition laws pursue different objectives.[85] Striking an appropriate balance between the different (but legitimate) regulatory interests is the first major challenge which must be addressed by an appropriately functioning regime for international cooperation.[86]

The second major challenge is to devise a mechanism which enables different national regulators/adjudicators to cooperate in cross-border cases. The fact that competition laws may be enforced in public-administrative proceedings before national/regional regulators as well as in legal proceedings before national courts adds another layer of complexity. It seems obvious that the enforcement proceedings (be they public/administrative or private) should be more coherently coordinated than they are at present. Achieving an appropriate level of cooperation is

[79] Art 2(2) Judgments Convention.
[80] Ibid.
[81] Ibid.
[82] Prel Doc No 2 of December 2018 (n 23).
[83] cp: M Danov, F Becker and P Beaumont (eds), *Cross-border EU Competition Law Actions* (Hart Publishing 2013).
[84] WF Schwartz, 'Overview of the Economics of Antitrust Enforcement' (1980) 68 *Georgetown Law Journal* 1075; S Shavell, 'The Optimal Structure of Law Enforcement' (1993) 36 *Journal of Law and Economics* 255; RP McAfee, HM Mialon and SH Mialon, 'Private v public antitrust enforcement: A strategic analysis' (2008) 92 *Journal of Public Economics* 1863; WPJ Wils, 'The relationship between public antitrust enforcement and private actions for damages' (2009) 32 *World Competition* 3, 18, available at: papers.ssrn.com/sol3/papers.cfm?abstract_id=1296458; K Huschelrath and S Peyer, 'Public and private enforcement of competition law: A differentiated approach' (2013) 36 *World Competition* 585.
[85] Bradford et al (n 1) 418 – '*Figure 3*: Comparative Competition Law Dataset – main variables'.
[86] AT von Mehren, 'Special substantive rules for multistate problems: Their role and significance in contemporary choice of law methodology' [1974] *Harvard Law Review* 347.

complex because, whilst national competition authorities (ie, regulators) impose fines to punish and deter competition law infringers (safeguarding public interests),[87] civil courts (ie, national adjudicators) award legal remedies (eg, compensation for damage caused to injured parties), be it in follow-on or in stand-alone actions.[88]

On the one hand, both public and private enforcement modes respond to the need to protect the public interest in general (administrative action) and the private interests of the directly affected parties (civil jurisdiction).[89] On the other hand, different national/regional enforcement regimes strike a different balance between public and private enforcement modes. How should an appropriate level of international cooperation between the diverse national enforcement regimes be achieved? The response to this question is particularly important in cases where there is a parallel (or subsequent) set of proceedings (involving regulators and courts) concerning the same cross-border competition law infringement taking place in different jurisdictions.[90]

It is desirable for policymakers to coordinate enforcement proceedings before different administrative and judicial authorities in different jurisdictions. Achieving a level of judicial cooperation in antitrust matters is difficult, as The Hague report[91] acknowledged, because competition laws may be publicly and privately enforced. A sufficiently flexible model is needed to ensure that the enforcement of national/regional competition laws in international situations is effective, irrespective of the relevant enforcement modes (ie, publicly or privately initiated proceedings). An enhanced model of international cooperation between different national/regional regulators and national courts should be advanced, particularly to deter anti-competitive conduct and provide redress for multiple injured parties in several jurisdictions.[92]

IV. PIL Mechanisms and International Cooperation in Cross-Border Competition Law Cases

There are two major aspects which need to be dealt with in a new global PIL mechanism. Above all, '*the international jurisdiction to adjudicate*'[93] is central for courts and/or regulators to ascertain whether there is anti-competitive conduct. The rules allocating adjudicatory jurisdiction in cross-border competition law within the EU which have been discussed by courts[94] and commentators,[95] strongly indicate that it is very important for these issues to be dealt with in a

[87] Administrative decisions may be subject to judicial control.

[88] Civil claims that do not rely on a previous (administrative) decision ascertaining a breach of competition law. In these cases, the courts have to decide whether there has been a competition law infringement and, if that is the case, what legal remedies should be awarded.

[89] eg, Reg 1/2003 on the implementation of the rules on competition laid down in Arts 101 and 102 of the TFEU. cp: the US Sherman Act, 26 Stat 209 (1890); the US Clayton Act, 38 Stat 730 (1914); and the US Federal Trade Commission Act, 38 Stat 717 (1914).

[90] R Nazzini, *Competition Enforcement and Procedure*, 2nd edn (Oxford University Press 2016).

[91] Prel Doc No 2 of December 2018 (n 23) [59].

[92] R Mulheron, 'Asserting personal jurisdiction over non-resident class members: comparative insights for the United Kingdom' (2019) 15 *Journal of Private International Law* 445.

[93] Mann (n 33) 67. See also KM Meessen, 'Drafting Rules on Extraterritorial Jurisdiction' in KM Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer 1996) 226; and Otero García-Castrillón (n 24).

[94] eg, C-352/13 *Cartel Damage Claims (CDC)* EU:C:2015:335; *Provimi Limited* [2003] EWHC 961 (Comm); *SanDisk Corporation* [2007] EWHC 332 (Ch); *Cooper Tire & Rubber Company* [2009] EWHC 2609 (Comm), [2010] EWCA Civ 864; *Toshiba Carrier UK Ltd and Other* [2011] EWHC 2665 (Ch), [2012] EWCA Civ 169.

[95] eg, M Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing 2010); J Basedow, S Francq and L Idot (eds), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing 2012); Danov, Becker and Beaumont (n 83).

global context. The case for an appropriate and nuanced approach to issues of jurisdiction was advanced by Justice Scalia:

> It is important to distinguish two distinct questions …: whether the District Court had jurisdiction, and whether the Sherman Act reaches the extraterritorial conduct alleged here. On the first question, I believe that the District Court had subject-matter jurisdiction over the Sherman Act claims against all the defendants (personal jurisdiction is not contested).
>
> …
>
> The second question … has nothing to do with the jurisdiction of the courts. It is a question of substantive law turning on whether, in enacting the Sherman Act, Congress asserted regulatory power over the challenged conduct … If a plaintiff fails to prevail on this issue, the court does not dismiss the claim for want of subject-matter jurisdiction – want of power to adjudicate; rather, it decides the claim, ruling on the merits that the plaintiff has failed to state a cause of action under the relevant statute.[96]

Justice Scalia identifies two separate issues which would need to be addressed in the US proceedings. One might go a step further in a global context and ask: how should regulatory and adjudicatory jurisdiction in cross-border cases be defined in a multilateral PIL instrument? What criteria should be used to ascertain whether a national/regional adjudicator is to be regarded as competent? How can parallel proceedings be avoided? Should the adjudicatory jurisdiction be dependent on the applicable law (*forum legis*)? Should an appropriate adjudicator be expected/entitled to apply foreign 'public' competition law (regulating cross-border economic activities)?

To answer these questions, some analogies could be drawn from the EU PIL rules and their application in cross-border EU competition law cases. However, in a global context there would be an additional issue concerning the question which set of public competition laws, and how, should be used to regulate the competition law aspects of transnational economic activities. Regulatory jurisdiction would normally not be the most contentious issue in cases where a breach of EU competition law has been pleaded. Since the core provisions in this area have public policy character,[97] EU Member State courts would have to apply them as 'overriding mandatory provisions of the law of the forum'.[98]

The question how foreign regulatory interests should be factored into domestic proceedings needs to be addressed by the international community. In this context, States are not constrained by international norms and are free to decide whether to take into consideration the possible foreign contacts of a competition law case. A negative response would imply the direct application of national laws (*Unilateralism*).[99] An affirmative answer would imply that the major interest/contact of a third State should be taken into consideration before applying national law (Balance of interests – *Multilateralism*).[100] Diverse approaches may be advanced

[96] *Hartford Fire Insurance Co v California* 113 SCt 2891, 2917–18 (1993).

[97] *Eco Swiss and Renault* (n 60).

[98] Art 9(2) Rome I; Art 16 Rome II.

[99] *Hartford Fire Insurance* (n 96); WS Dodge, 'Extraterritoriality and Conflict-of-Laws Theory: An Argument for Judicial Unilateralism' (1998) 39 *Harvard International Law Journal* 101; and PR Trimble, 'The Supreme Court and International Law: The Demise of Restatement Section 403' (1995) 89 *American Journal of International Law* 53. US Antitrust Guidelines use a concept of *comity* based in *Hartford* whereby its application will be necessary only when foreign law forces a behaviour not compatible with US norms.

[100] *Timberlane Lumber Co* (n 26) and *Mannington Mills, Inc v Congoleum Corp* 595 F2d 1987 (3rd Cir, 1979) adopt the balance of interests doctrine. A Lowenfeld, 'Conflict, Balancing of Interests and the Exercise of the Jurisdiction to Prescribe: Reflections on the *Insurance Antitrust Case*' (1995) 89 *American Journal of International Law* 42; and A Lowenfeld 'Jurisdictional Issues Before National Courts: The Insurance Antitrust Case' in KM Meessen (ed), *Extraterritorial Jurisdiction in Theory and Practice* (Kluwer 1996) 11, '*conflict is not just about commands, but about interests, values and priorities*'. See more Otero García-Castrillón (nn 14 and 24).

by different policymakers.[101] How should an appropriate balance between different regulatory interests with a view to ascertaining the appropriate and effective legal remedies in cross-border competition law cases be struck?

It is widely recognised that the doctrine of positive comity could have a role to play in public-administrative proceedings by encouraging '[c]ooperation regarding anticompetitive activities in the territory of one Party that adversely affect the interests of the other Party'[102] and some solutions along this line have been advanced as to judicial proceedings.[103] Problems, however, may arise in cross-border competition cases where several (or indeed all) the regulators take action, reaching different conclusions about the anti-competitive nature of the cross-border economic activities.[104] There may be even bigger problems in cases where appropriate adjudicators decline to exercise jurisdiction on the ground that they have no regulatory jurisdiction[105] despite the fact that the countries, which have regulatory jurisdiction, lack sufficient resources and appropriate expertise to deal with cross-border competition law cases.[106]

V. Access to Legal Remedies in Cross-Border Cases: Adjudicatory Jurisdiction and Regulatory Jurisdiction[107]

A major problem in competition law cases is that the global supply chains may be used to spread the antitrust harm across the globe.[108] Establishing adjudicatory jurisdiction before an appropriate forum could be central to effective access to legal remedies, particularly for private parties. The lack (or the existence) of regulatory jurisdiction might impact on the closely related jurisdiction to adjudicate by making the seised courts less appropriate to deal with the dispute.[109] The problems concerning the correlation between the regulatory jurisdiction and the adjudicatory jurisdiction on the one hand, and the injured parties' access to legal remedies, on the other, need to be thoroughly considered at the HCCH.

The weaknesses of the current regime for international cooperation were exposed in the anti-competitive agreement in relation to the Liquid Crystal Displays (LCDs) which was, inter

[101] Dodge (n 99) 147–49; Otero García-Castrillón, ibid.

[102] Art V of the US/EU Agreement. P Demaret, 'L'extraterritorialité des lois et les relations transatlantiques: Une question de Droit ou de diplomatie?' (1985) 21 *Revue Trim Droit Eur* 1, 26–27. See also A-M Slaughter, 'Government networks: the heart of the liberal democratic order' in GH Fox and BR Roth (eds), *Democratic Governance and International Law* (Cambridge University Press 2000) 199, 215.

[103] In order to protect their own interests, States tend to take into consideration the interests of other States. Though comity is not expressly mentioned, it is present when taking decisions so that it has been said that it is implicit in the system. The 'balance of interests' and the 'rule of reason' can be considered as legal principles (not just political). SW Waller, 'The Twilight of Comity' (2000) 38 *Columbia Journal of Transnational Law* 566. See more Otero García-Castrillón (nn 14 and 24).

[104] Statement of the Federal Trade Commission Regarding Google's Search Practices In the Matter of Google Inc FTC File Number 111-0163, 3 January 2013, available at: www.ftc.gov/sites/default/files/documents/public_statements/statement-commission-regarding-googles-search-practices/130103brillgooglesearchstmt.pdf, 2. cp: Case AT.39740, *Google Search (Shopping)*, Antitrust Procedure – Council Reg 1/2003 – Commission Decision of 27.6.2017 relating to proceedings under Art 102 of the TFEU and Art 54 of the Agreement on the European Economic Area, C(2017) 4444 final [341].

[105] eg, *Motorola Mobility* (n 10). See section V below.

[106] Bradford et al (n 1) 423–34; PM Horna, 'David & Goliath: How young competition agencies can succeed in fighting cross-border cartels' (2017) University of Oxford Centre for Competition Law and Policy, Working Paper CCLP (L) 45, available at: www.law.ox.ac.uk/sites/files/oxlaw/david_goliath_-_how_young_competition_agencies_can_succeed_in_fighting_cross-border_cartels_-_cclp_l_45.pdf; Fox (n 28) 154.

[107] These aspects are further dealt with in Danov (n 37). cp: Otero García-Castrillón (nn 14 and 24).

[108] eg, *Motorola Mobility* (n 10).

[109] Ibid, 825–27. See also the US Foreign Trade Anti-trust Improvements Act.

alia, investigated by the EU Commission.[110] In this case, the Commission established that '[t]he infringement had a global character both from the geographic and product point of view, with the parties generally aiming at increasing and/or maintaining the prices for LCD panels for TV and IT application'.[111] The infringers had a 'joint world-wide market share of around [65–80 per cent] in large LCD panels',[112] which was subject to various enforcement proceedings before the EU regulators,[113] EU[114] and UK courts,[115] US courts[116] and the competent adjudicators in Japan, South Korea, Taiwan and Canada.[117]

The parties[118] to the anti-competitive agreement were well-known groups of companies: Samsung, LPL, AUO, CMO, CPT Groups[119] and *HannStar* companies. This meant the global nature of the infringement was beyond doubt. The aggregate damage caused to consumers (who would normally absorb the cartel induced surcharge) was arguably significant. Indeed, the evidence before the EU regulator demonstrated that:

> The participating undertakings, … engaged in a *single, complex and continuous cartel infringement* in respect of LCD panels for IT and TV applications by a series of linked and interacting efforts that lasted from 5 October 2001 until February 2006, with the objective of increasing and maintaining prices of LCD panels for IT and TV applications at world-wide and EEA level. Throughout the period of the infringement those companies were competitors and were aware of the arrangements and the decisions taken which were implemented.[120]

An analysis of this case from a PIL perspective demonstrates that the scope of the regulatory jurisdiction is a difficult issue in both public and private proceedings. The English and Welsh High Court judgments[121] strongly suggest that different views may be taken on the effects, for the jurisdictional purposes, of an anti-competitive agreement in the EU[122] which impacts, in turn, on the scope of the applicable competition laws.[123] It is even more troubling that the issues in relation to adjudicatory and regulatory jurisdiction in this cross-border competition law case remained despite the fact that the court proceedings in England and Wales were preceded by the public enforcement proceedings before the EU Commission.[124]

This is a good example of a case where the claimants' access to legal remedies was dependent on the preliminary issue of the 'territorial scope'[125] of EU competition law (regulatory jurisdiction) and its correlation with adjudicatory jurisdiction.[126] In other words, the regulatory jurisdiction could have an impact on the adjudicatory jurisdiction (ie, the appropriateness of the English courts to hear and determine the dispute in a sort of *forum legis*). A prolonged dispute on

[110] COMP/39.309, *LCD (Liquid Crystal Displays)*, C(2010) 8761 final.
[111] Ibid, [402].
[112] Ibid, [51].
[113] Ibid.
[114] T-91/11 *InnoLux Corp v Commission* EU:T:2014:92; C-231/14 P, *InnoLux Corp v Commission* EU:C:2015:451.
[115] *Schott AG* (n 32); Iiyama UK (n 32); *LCD Appeals* (n 10).
[116] *AT & T Mobility LLC v AU Optronics Corp* 707 F3d 1106 (9th Cir, 2013); *Motorola Mobility* (n 10).
[117] See the Particulars of the Claim [47] quoted in *Nokia Corporation v AU Optronics Corporation & Others* [2012] EWHC 731 (Ch) [39].
[118] Ibid, [13]–[35].
[119] *Samsung Electronics Co Ltd and Samsung Electronics Taiwan Co Ltd*; *LG.Philips LCD Co, Ltd and LG Philips LCD Taiwan Co, Ltd*; *AU Optronics Corporation; Chimei InnoLux Corporation and Chunghwa Picture Tubes.*
[120] COMP/39.309, *LCD (Liquid Crystal Displays)*, C(2010) 8761 final [283] – emphasis added.
[121] *Samsung Electronics* (n 32); *Schott AG* (n 32).
[122] *LCD Appeals* (n 10) [20-25]. See also *Samsung Electronics* (n 32) [51–53]. cp: *Schott AG* (n 32) [140]–[141].
[123] *LCD Appeals* (n 10) [95], [104], [107], [119–21] and [128–32].
[124] *Schott AG* (n 32) [132].
[125] *LCD Appeals* (n 10) [61]–[100].
[126] *Schott AG* (n 32) [171].

such an important pre-trial issue inevitably generates a level of delay, inflating the litigation costs and having significant implications for injured parties' access to (any) legal remedies in cross-border cases. This would be so even when the related proceedings are being dealt with by different judges applying the same PIL regime as well as the same set of competition laws within the same jurisdiction. How is this problem to be addressed globally?

A case for international cooperation is strengthened by the interrelation between the transnational corporate structure (which is necessary to facilitate cross-border economic activities for multinational groups of companies) and the ineffective enforcement of national competition laws in some jurisdictions. The latter aspect might be successfully exploited by strategic defendants to impede the claimants' access to effective remedies. The point can be deduced from *Motorola Mobility*.[127] In this case, the US Court of Appeals held:

> Domestic corporate purchasers are not without remedy when buying component parts from foreign vendors. First, the US parent could buy directly from the foreign vendor and preserve the right to sue as a direct purchaser (while trading off the benefits the company gained from operating through a foreign subsidiary). *Or, if a US parent doesn't think that antitrust laws are sufficiently, or fairly, enforced in a given country, they certainly don't have to set up a subsidiary there* … So, an adverse ruling in Motorola *would not eliminate every* avenue of damage redress for component price-fixing.[128]

Such an approach, which – despite acknowledging the inadequacy of the available remedies and the ineffectiveness of the relevant national enforcement regime – allows the US courts to decline jurisdiction, would inevitably deny some injured parties' access to effective legal remedies. Given the global nature of the economic activities, it does not appear to be a satisfactory solution for a national court to decline jurisdiction on the ground of comity[129] and go on to say that a company should not have set up its subsidiaries in jurisdictions where competition laws are not effectively enforced.[130] National courts should rather consider, before declining to exercise jurisdiction, whether there is a 'real risk … that substantial justice would be unavailable'[131] in the appropriate forum. As part of a new model for cooperation, could foreign regulators be involved with the relevant court proceedings with a view to better balancing comity considerations?

VI. Concluding Remarks

Injured parties' access to effective legal remedies in cross-border competition law cases is a major issue which should be dealt with in a global context. PIL has an important role to play in coordinating regulatory and adjudicatory jurisdiction. International cooperation is much needed with a view to systematically addressing the relevant PIL issues. Coordination of enforcement proceedings between the national courts and the regulators across the globe is as important as ever. Existing mechanisms do not consider how to ensure that cross-border competition cases are centralised before an appropriate forum whilst facilitating injured parties' access to legal remedies.

An appropriate research agenda globally must address how to ensure that multiple injured parties are able to access effective legal remedies in cross-border competition law cases. It is

[127] *Motorola Mobility* (n 10).
[128] Ibid, 827 – emphasis added.
[129] Ibid, 825–27.
[130] Ibid, 827.
[131] *Vedanta Resources PLC and another v Lungowe and others* [2019] UKSC 20 [89]. See also *LCD Appeals* (n 10) [97].

high time for PIL scholars to consider how to answer some important questions.[132] How could the HCCH 'work for the progressive unification of the rules of private international law' in the field of competition law?[133] If different national judges respond to certain key questions inconsistently, then there would potentially be a high level of uncertainty/ambiguity in cross-border competition cases. Since these deficiencies may be exploited by strategic litigants with a view to generating delay (and inflating litigation costs), the Judgments Convention will not, on its own, sufficiently facilitate injured parties' access to remedies in cross-border cases.

The EU model for public-administrative and judicial cooperation in competition cases needs to be thoroughly studied. It should be noted that, beyond advancing a framework for public-administrative cooperation on competition law with third States, the EU has reached a high degree of harmonisation in competition law enforcement. PIL plays a significant role particularly regarding private parties' remedies within the EU. The research should analyse the way in which the current PIL framework is functioning within the EU and how the bilateral relations with the UK will be organised. If the European Commission's position that 'the European Union [should] not … give its consent to the accession of the United Kingdom to the 2007 Lugano Convention' prevails in the EU,[134] a new framework which uses PIL governance techniques should be advanced by the UK/EU policymakers to promote judicial cooperation in cross-border competition law cases. The HCCH should have a significant role in this context.

In the light of the diverse legal orders represented in the HCCH and the search for effective and efficient legal tools, alternatives to international treaties may be considered. Model laws,[135] which set out principles or even guides (addressing predominantly procedural issues concerning parallel and consecutive related proceedings), can be a feasible and successful approach. Such a soft legal instrument could set the scene for a more effective framework for international cooperation which would provide injured parties better access to adequate and effective regulatory and compensatory remedies, generating broader societal impacts. In other words, once such model laws have been successfully advanced, an appropriate regime for judicial cooperation on competition law enforcement may be devised. It would be important to consider issues of regulatory and adjudicatory jurisdiction including the interaction between regulators and courts.

Moreover, given the public interest safeguarding role of competition law, promoting an appropriate level of international cooperation is linked to the question: how could a PIL mechanism be advanced to safeguard the interests of claimants and defendants, as well as the various legitimate regulatory interests, by involving foreign regulators in the proceedings before appropriate national courts?

[132] M Kahler and DA 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. See also RH Graveson, 'Problems of Private International Law in Non-Unified Legal Systems' in RH Graveson, *Comparative Conflict of Laws: Selected Essays* (Vol 1, North-Holland Publishing 1977) 305, 337; M Danov and P Beaumont, 'Measuring the Effectiveness of the EU Civil Justice Framework: Theoretical and Methodological Challenges' (2015/2016) 17 *Yearbook of Private International Law* 151; AA Foer, and JW Cuneo, 'Toward an effective system of private enforcement' in AA Foer, and JW Cuneo (eds), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar 2010) 611.

[133] Art 1 of the HCCH Statute.

[134] Communication from the Commission (n 22) 5.

[135] cp: The UNCTAD Model Law on Competition – TD/RBP/CONF.5/7.