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VOLUME III

PRIVATE INTERNATIONAL LAW

Chapter 35

Restrictions on Competition

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KURT LIPSTEIN · *CHIEF EDITOR*

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Survey of Contents

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Chapter 35

RESTRICTIONS ON COMPETITION

Ivo E. Schwartz and Jürgen Basedow

I. ANTI-COMPETITIVE PRACTICES IN THE CONFLICT OF LAWS*

1. – In the context of this chapter anti-competitive practices refer to practices adopted by private undertakings, rather than by the state. Restriction on competition through public law measures (*e.g.* customs duties, quantitative restrictions on production, imports and exports, state monopolies of production and trade) will therefore not be considered; discussion will be limited to private restrictions on competition.

Several types of restriction fall into this category. First, horizontal relationships or cartels, *i.e.* contracts or agreements between undertakings at the same stage in the chain of supply concerning production, prices, distribution areas, *etc.* Secondly, vertical restrictive business practices, *i.e.* agreements between undertakings at different stages in the chain of supply concerning resale prices (described as resale price maintenance), exclusivity of distribution, export bans, *etc.* Licensing agreements are the third restrictive practice to fall into this category: contracts concerning intellectual property rights which are restrictive of competition, *e.g.* patent pools, non-competition clauses, purchasing obligations, obligations concerning the surrender or exploitation of improvements to an invention or parallel inventions, resale price maintenance, export bans, and clauses prohibiting manufacture and use. A fourth matter to fall into this category is the emergence of dominant undertakings, in particular monopolies and oligopolies, and the conduct of such undertakings; measures which strengthen the power of the organization often prove to be abusive, as do discriminatory practices such as boycotting or engaging in price discrimination. A growing number of countries also recognizes as a fifth problem area the anti-competitive nature of concentrations of undertakings, in particular mergers and capital participation, which change the structure of the market in a way that reduces competition.

The survey displays a great variety of anti-competitive agreements and practices which extend far beyond the traditional boundaries of antitrust law. It is therefore more appropriate to talk of the law against restrictions on competition or, in short, of competition law, and the references made in this chapter to antitrust law are to be understood in that sense.

The law on restrictive business practices has three dimensions: First, it is concerned with the internal organization of cartels and other anti-competitive forms of organization, as well as their effects on private individuals; the legal issues arising from this are issues of private law and form part of the law of contract, company law and the law of tort. Secondly, it is concerned with the efforts of many states to regulate particular markets with the help of cartels. A policy of obligatory cartelization was followed by many countries between the world wars and is reflected in many compulsory cartel laws.[1] In contrast, since the Second World War the general trend of market regulatory legislation has been towards renewed opposition to cartels. The aspect of the law on restrictive business practices with whose territorial scope we are presently concerned, deals solely with the third set of problems, *i.e.* limitations on freedom of contract where they are used to restrict competition. The focus is on *anti*trust laws and laws *prohibiting anti*-competitive practices.

International competition law is concerned with the implementation of these laws against anti-competitive practices in the international sphere. Thus it deals with several related problems: the scope of application of the forum's law against anti-competitive practices; conflicts rules that require the application of a foreign law against anti-competitive practices; specific substantive rules introduced to deal with transnational situations, *e.g.* rules that establish the geographical extent of the relevant market or that determine the relevance of foreign legislative or executive acts to the enforcement of domestic competition law; issues of international civil and administrative procedure, such

* This chapter originates from the approach developed by *Ivo Schwartz* at the end of the 1960's and was given its basic form by him in two drafts of 1970 and 1978. Recent developments worldwide made a complete overhaul of the manuscript necessary; *Jürgen Basedow* undertook this task and rewrote the text while still maintaining the basic form of the original. Many people have contributed to the successful completion of this chapter; the authors owe particular thanks to *Matthias Otto* and *Andreas Schmidt*, research assistants at Augsburg University.

[1] See the collection and translation of these laws in *Reichert*, Die Kartellgesetze der Welt (Berlin 1935); for a comparative account of the cartel law of that time *Strauß and Wolff*, Kartellrecht: Rvgl. HWB IV (1933) 614–707.

as effecting service on foreign undertakings, or conducting investigations abroad; international harmonization and approximation of laws against anti-competitive practices; the constraints placed on national legislators by international law. International competition law is thus not a pure branch of private international law, but instead cuts across the classical divisions of the law and extends into many other areas such as international criminal, administrative and procedural law, substantive competition law and international law. On the other hand it is appropriate to the structure of the Encyclopedia, the internal organization of this volume and the ideas behind this chapter that in the following pages the most significant problems concerning choice of law are considered in terms of the scope of the law of the forum and the extent to which foreign laws against anti-competitive practices are taken into account.

A restrictive business practice, and in particular a cartel, will generally be considered to have an international dimension when undertakings or cartels in two or more states are participants. A (national or international) restrictive business practice, and in particular a cartel, will be characterized as foreign when no domestic undertaking is involved in it. Both concepts are thus based on the persons involved, rather than on objective factors, such as the relevant market or the effects of the cartel in different states.

Export cartels are described as "pure", if they exclusively cover competition on foreign markets, and as "mixed", if they concern competition both on foreign and domestic markets. International export cartels are cartels of exporters from several countries, whereas national export cartels are cartels of exporters from one country only.[2]

A. GENERAL RULES OF PRIVATE INTERNATIONAL LAW

2. *Private law aspects of restrictions on competition.* – As mentioned above, this chapter will deal only with those restrictive business activities that are permitted and regulated by legal provisions having a direct impact on *private* law, *i.e.* with legal transactions between persons of equal standing in law and actions affecting such persons. If there are no special legal provisions or principles established by the courts concerning restrictive business practices, the general provisions of substantive private law in individual states will continue to apply, and in particular the rules of contract, tort and company law.

If a contract or an act or omission that restricts competition has connections with several countries, then the principles of private international law of the forum state determine which law is to be applied, in accordance with the private law character of the legal relationship. In particular the general conflicts rules concerning contract, tort and company law are applicable.

In relation to contracts it is thus primarily the parties themselves who determine which law is to be applied to their restrictive agreement. The form of the agreement is a matter for the law that governs the formal validity of legal transactions, notably the rule *locus regit actum*. As far as tortious restrictive practices are concerned, a widely applied conflicts rule in international tort law refers the issue to the law of the place of acting. The internal organization of the cartel and the question of its legal personality is a matter for the law governing the status of corporations and thus either the law of the place of incorporation or the law of the place where the cartel has its seat. If foreign law is found to be applicable, it will be applied in so far as it is not in conflict with the public policy of the forum state.

3. *Scope of private international law.* – The legal position in a number of states in which competition law is still regarded as a matter of private law is characterized by the strong influence exerted by private international law. These legal systems emphasize the protection of the legal rights of members of the cartel (whether as contracting parties or shareholders) and of third parties; the market regulating economic policy function of competition law remains in the background, or is not yet or not fully developed.

Four groups of states conform to this model. Firstly those which have not enacted any special provisions prohibiting restrictions on competi-

[2] These definitions are adopted from *OECD*, Report 7 n. 3 and 4.

tion,[3] or whose provisions have little importance in practice.[4]

Secondly, some states have special provisions on competition law, but these provisions have no impact on substantive private law (such as *e.g.* rules prohibiting contracts or requiring them to obtain approval and rules relating to the supervision of cartels, dominant undertakings and mergers). Instead they are content with the establishment of an office to undertake investigations and make recommendations[5] or with the registration of restrictive business practices and other measures.

Thirdly, the legal position is the same in states which have competition laws that only deal with particular types of restrictive business practices. In such states any other restrictive practices remain unaffected and are thus still a matter for the general rules of private law. For example, in the UNITED KINGDOM the old common law contract rules concerning agreements in restraint of trade have not lost their importance as a result of the introduction of special legislation prohibiting restrictive business practices.[6] In transnational cases the contract rules of private international law determine in principle whether or not those old rules apply. Nevertheless there are indications here that the market-regulating character of competition law is also inherent in traditional private law rules concerning competition, especially in the prohibition of monopolies. For this reason the ENGLISH courts have concluded that the rules against restraints of trade have an overriding character and must be enforced even if the proper law of the contract is foreign if the restrictive business practices in question affect the English market.[7]

Fourthly, the general rules of private international law continue to be applied where the competition law of a given state does not extend to transnational situations. This is true *e.g.* for states that apply their domestic competition law solely to the domestic effects of export cartels, and otherwise deal with the relevant agreements in accordance with general rules of law. This is the attitude adopted by *e.g.* GERMAN law towards mergers of foreign companies. Such mergers will only be investigated for compliance with the GERMAN Law against restraints of competition to the extent that they produce effects in Germany, and especially if they lead to a merger of German subsidiaries.[8] Otherwise (*i.e.* in relation to the effects produced on foreign markets and in foreign states) such mergers are a matter for the general rules of private international law.

In these four groups of cases private international law still determines which law regulates transnational restrictive business practices, even in the antitrust law era. However, the law selected is less concerned with the restrictive aspects of the agreements in question than with the private rights and duties flowing from them. The legal position if a competition law

[3] This group includes most AFRICAN, ASIAN and LATIN AMERICAN states, but only a few EUROPEAN countries, such as ICELAND, TURKEY and a few of the former SOCIALIST states. For an overview see *v. Kalinowski; Klaue.* A Handbook on Restrictive Practices Legislation, based on reports by national governments, has been in preparation by the UNCTAD Secretariat in Geneva since 1985, see UNCTAD Doc. TD/B/RBP/33 of 22 July 1986 p. 1–2; documentation on the laws of OECD member states, published since the 1960's, has now been discontinued, see *OECD*, Guide I–VI.

[4] This group includes LATIN AMERICAN countries, *e.g.* COLOMBIA or MEXICO; for these states see *UNCTAD Secretariat (Eduardo White)*, Control of Restrictive Business Practices in Latin America: 21 Antitrust Bull. 137–152, 139–141 (1976); *Cira*, Observations 31–33. The same also applies to PORTUGAL, PAKISTAN, the PHILIPPINES, LIBERIA, former YUGOSLAVIA, former CZECHOSLOVAKIA and a number of CENTRAL AMERICAN states, that even go so far as to include principles of free competition in their constitutions, but do not enforce them.

[5] Such was the case *e.g.* in IRELAND, where intervention in private law relationships, before 1 Oct. 1991, was only possible by means of an Order which required the prior approval of the legislature: Restrictive Practices Act 1972, as amended by Restrictive Practices (Amendment) Act 1987 s. 8. For further detail see *Walsh* 803, 807, 839–842; *Grehan* 42 ss. The IRISH Competition Act 1991 has repealed the control of abuse system and essentially follows the model of EEC-Treaty art. 85, 86, *cf., Rijnsbergen.*

[6] *Cf., Prentice* no. 1092 ss.

[7] In *Warner Brothers, Inc. v. Nelson,* [1937] 1 K.B. 209, 222, the American actress *Bette Davis* had concluded an exclusive contract for eight years with the plaintiff US-American film company, but had then worked in England for another producer. Although the contract was subject to a foreign law, the court granted an injunction in accordance with ENGLISH law. A similar conclusion had previously also been reached in *Rousillon v. Rousillon* (1880), 14 Ch.D. 351, 369 through reliance on ENGLISH public policy. In favour of a special connection (*Sonderanknüpfung*) for rules prohibiting restraints of trade see also *Cheshire and North,* Private International Law (ed. 9 London 1974) 150 ss.; *Dicey and Morris(-Collins)* 22.

[8] KG 1 July 1983, WuW/E OLG 3051, 3058, 3061 ss., IPRspr. 1985 no. 124 b (*Morris v. Rothmans*).

sounding in public law replaces, changes, or supplements the ordinary substantive law remains to be considered. In transnational cases, does such a statute replace, change or supplement the ordinary rules of private international law as well? The answer to this question depends primarily on the terms of the individual competition law.

B. GENERAL RULES OF PUBLIC INTERNATIONAL LAW

4. *The hybrid nature of competition laws.* – In 1990 about 40 states, as well as the EUROPEAN COAL AND STEEL COMMUNITY and the EUROPEAN ECONOMIC COMMUNITY, had special provisions dealing with restrictive business practices. Although the principle of competition is inherently incompatible with the concept of a centrally planned economy,[9] even some SOCIALIST states had provisions of this kind. This has been true for the former YUGOSLAVIA[10] and former CZECHOSLOVAKIA[11] for a long time, while POLAND,[12] HUNGARY,[13] the RUSSIAN FEDERATION,[14] UKRAINE,[15] and other EASTERN EUROPEAN countries[16] have enacted such statutes only in the course of the recent period of liberalization.

It is true that these statutes regulate private law matters. But they make use of techniques from administrative law, the law of business crimes and private law (either individually or cumulatively) to achieve their objectives:

- they establish statutory prohibitions and obligations and also provide for official intervention in private law relationships;
- they threaten penalties or fines;
- they declare contracts to be invalid, and also introduce claims for damages or an injunction as well as the right to terminate or rescind the agreement.

Because of the possible administrative law, criminal law or private law nature of the rules of competition law, the following question has been a matter of discussion for decades in the legal systems of CONTINENTAL EUROPE: Is the international scope of such rules determined partly by the ordinary rules of international administrative law, partly by the rules of international criminal law and partly by the rules of private international law? Or is it determined in a uniform manner? If the ordinary rules relating to conflicts of administrative law were applied, then the criminal and private law conflicts rules would be overridden. If on the other hand the applicable law was determined uniformly in accordance with the ordinary rules of private international law, the criminal and administrative conflict-of-laws rules would no longer be ap-

[9] *Hopt*, Restrictive Trade Practices and Juridification. A Comparative Law Study: *Teubner* (ed.), Juridification of Social Spheres (Berlin 1987) 291–331, 294; contrast the emphasis on the "law of adequate value" in the Chinese economy, outlined in *Münzel*, Kartellrecht 270–271 at n. 74.

[10] Law on the suppression of unfair competition and monopolistic agreements of 26 April 1974; on the earlier Law of 1962 see also *Jovanović*; for the new Law see *infra* s. 36 and esp. n. 134.

[11] *Cf.*, *Knap* 10ss., 19ss. The relevant provisions were Economic Code § 119 and 119a that have frequently been amended. After the breakdown of the old system, a new statute has been enacted: Act for the protection of economic competition of 30 Jan. 1991; *cf.* also the introduction by *Schulze, U. W.*, Tschechoslowakei; *Verny; Pittman*, Some Critical Provisions in the Antimonopoly Laws of Central and Eastern Europe: 26 Int.Lawy. 485–503 (1992); *cf. infra* s. 73.

[12] Law on the suppression of monopolistic practices of 24 Feb. 1990; commented on in *Schulze, U. W.*, Der rechtliche Rahmen der Wettbewerbspolitik und Privatisierung in Polen: WuW 1991, 23–27; *Sievers and Spark*, Competition Law and Policy in Poland: Eur.Comp.L.Rev. 14 (1993) 77–82. See previously the Law on the suppression of monopolistic practices in the national economy of 28 Jan. 1987, commented on in *Schulze, U. W.*, Polen; *idem*, Zwei Jahre polnisches Antimonopolrecht: WuW 1990, 399–402; *Piontek; Wiszniewska; Sołtysinski; Pittman*, preceding note; for a more detailed account, see *infra* s. 73.

[13] Law no. 86/1990 on the prohibition of unfair market practices of 20 Nov. 1990; *cf.*, *Vörös*, Ungarn; see also the earlier Law no. 4/1984 on the prohibition of unfair competitive practices of 31 Oct. 1984, commented on in *Vörös*, Gesetz; *Vida*.

[14] See Russische Föderation (Rußland) – Regelung des Wettbewerbs- und Kartellrechts: GRUR Int. 1992, 317, referring to an Act on competition and restriction of monopolistic activity on goods markets of 22 March 1991; see also *Pittman, supra* n. 11; *Capelik*, Antimonopoly Policy in the USSR: Antitrust Bull. 37 (1992) 163–270. *Hyden*, Russian Competition Law – A Brief Analysis: Eur.Comp.L.Rev. 14 (1993) 83–86.

[15] Act on restriction of monopolism and prohibition of unfair competition in business activity of 19 Feb. 1992; see the summary given by *Batyuk*, Ukraine – Legislation: Eur.Comp.L.Rev. 13 (1992) R-149ss.

[16] See the general surveys given by *Pfeffer*, *Pittman* (*supra* n. 11) 485 and by *Black*, Competition Law in Central and Eastern Europe: Eur.Comp.L.Rev. 14 (1993) 129–134.

plicable. In either case the rules would receive an application extending beyond their intended scope. Where competition laws themselves contain conflict-of-laws rules, which determine the scope of all three types of legal rules, the question can be answered relatively easily. Conflict-of-laws rules forming part of competition law displace the ordinary administrative law, criminal law and private law conflicts rules. But what is the position when the competition statute itself does not include any conflicts rule? This is the case in many states, such as *e.g.* FRANCE or SWITZERLAND. The following pages contain a discussion of whether in such cases the differing conflict-of-laws rules of administrative law, criminal law or private law are to be applied in accordance with the nature of the substantive rule, or whether instead use of a single connecting factor is required.

5. *Competition law and international criminal law.* – Many competition law provisions have the characteristics of criminal law rules, and many of them, such as the traditional rule prohibiting conspiracy in restraint of trade in CANADIAN law, even find a place in national criminal codes.[17]

In this situation, in the absence of any special conflicts rules, it becomes necessary to consider the application of the ordinary rules of international criminal law. Under these rules the applicable criminal law is determined on the basis of the place of commission. In most states this is understood to include both the place of acting and also the place in which the consequence of the criminal act occurred.

The application of these general rules of international criminal law to infringements of competition law sounding in criminal law has been accepted in the literature for decades;[18] although admittedly there are few cases.[19] There is still uncertainty about the definition of the "consequence" of an anti-competitive criminal act, and thus where it occurred. Reference back to the ordinary conflicts rules is of only limited assistance here. They can only be given a specific meaning in the individual case through the interpretation of the relevant competition rule.

If competition laws which lack conflict-of-laws rules contain administrative as well as criminal law rules, two different possibilities must be distinguished: dependent and independent crimes. Rules of criminal law that merely provide sanctions for failure to comply with administrative law prohibitions or obligations are only internationally and substantively applicable if the administrative law rules to which they relate are internationally and substantively applicable. If, under international and substantive administrative law, that is the case, then international criminal law determines whether the criminal law rule is also applicable.[20] Although the administrative and criminal rules of competition law have the same objectives, their spheres of application do not necessarily coincide; but the scope of the dependent criminal law rule can only be more limited than that of the administrative law rule, it cannot be broader.

In the case of independent criminal law rules, the criminal penalty is not dependent on the infringement of an administrative law rule; then the traditional view is that the scope of the criminal law rule is determined by the ordinary rules of international criminal law, while the scope of the administrative law rule is deter-

[17] CANADIAN Criminal Code (R.S.C. 1985, c. C-46, as amended) s. 466.

[18] For references see *Schwartz, I. E.,* Kartellrecht 253 n. 30–34; similarly for a tortious failure to act arising from competition law rules, *Mezger,* Le commerçant étranger établi à l'étranger est-il soumis à la prohibition du refus de vente en France?: Rev.crit. d.i.p. 1963, 43–50; for BRAZIL, *Franceschini* 331.

[19] In a case of refusal to sell, the *Cour d'appel de Paris* has used the place of acting as connecting factor: "On the applicability of the ordinance no. 45-1423 of 30 June 1945: ... held that the offence of refusal to sell which the execution of the exclusive franchise agreement might result in, could only be committed at the seat of the franchisor situated in Germany; that the offence therefore cannot be committed in France (*Sur l'applicabilité de l'ordonnance numéro 45-1423 du 30 juin 1945: ... considérant que le délit de refus de vente, qui serait susceptible d'être commis en exécution du contrat de concession exclusive, ne pourrait être perpétré qu'au siège de la société concédante, situé en Allemagne; que cette infraction pénale ne peut donc être constituée en France*)": Cour Paris 22 Feb. 1967, Rev.crit.d.i.p. 1968, 78 at 82, WuW/E EWG/MUV 179, 180 (*La Technique Minière v. Maschinenbau Ulm*). For critical comment see note *Mezger,* Rev.crit.d.i.p. 1968, 83–86: the connecting factor ought to be the place where the consequence occurred (the place of sale, or the place where the harm was incurred). The decision was somewhat surprising given that according to CProc.Pén. art. 693 "every offence is held to be committed on the territory of the republic if an act which forms one of its constitutive elements has been perpetrated in France (*est réputée commise sur le territoire de la République toute infraction dont un acte caractérisant un de ses éléments constitutifs a été accompli en France*)". For criticism because of this, see *de Roux, Voillemot and Vassogne,* Le droit français de la concurrence (Paris 1975) 165–167.

[20] *Neumeyer* IV 489; *Rehbinder* 254.

mined in accordance with international administrative law. Thus here too each rule may have a different scope.

6. *Competition law and international administrative law.* – If a competition statute consists of administrative law rules, its scope must, in the absence of express conflict-of-laws rules, be determined in accordance with the ordinary rules of international administrative law. However, such ordinary rules will be sought in vain, for they do not exist,[21] or at any rate do not exist yet.[22] The principle of territoriality is not in itself a conflict-of-laws rule, nor is it possible to derive a conflicts rule from the principle.[23] The area in which a rule is *in force* is limited to the territory of a state, and thus the area in which courts and officials must comply with it and enforce it; this formal territoriality is however true of all the legal rules of a given state, whether they are characterized as administrative, criminal or private law rules.

Substantive territoriality as to the *scope* of rules of administrative law is however not proven. Quite frequently situations covered by an administrative rule have links with several states. This is true in international social law as well as in international tax law or international economic law. It is not possible to have one general connecting factor for all administrative law rules. Theorists and practitioners are more concerned to develop conflict-of-laws rules for the individual aspects of administrative law. The same is true for competition law, in so far as there are no expressly indicated conflict-of-laws rules (*infra* s. 8–30); moreover where such conflicts rules exist, they use very varying connecting factors (*infra* s. 32 ss.).

Since there is no general conflict-of-laws rule for international administrative law, there can be no overspill effect by such a rule on the private law competition rules. An argument for an overspill effect of this kind by administrative law rules permitting interference with private law relationships on private law sanctions is to be found in the literature on international administrative law, but needs no further elaboration in this context.[24]

7. *Competition law and private international law.* – Likewise there can be no overspill effect of private international law on administrative law competition rules. This follows from the different functions of general private international law rules and competition conflict-of-laws rules within the structure of the legal system as a whole. Private international law method is characterized by a distinction between substantive law and the conflict of laws, between substantive rules and rules of reference; the system is based on the principle that a foreign legal system is of equal value with the law of the forum, and an effort is made to refer every situation to the legal system with which it is most closely connected. The "nationalization" of international situations enables the parties to enjoy the consistency of judicial interpretation that prevails within national legal systems; and this in turn affords them legal certainty and reduces the possibility of conflicting obligations. The fact that private international law has these aims shows that its primary purpose is the legal regulation of international situations from the perspective of the individual; and to that extent it is a part of private law.

In contrast, modern laws prohibiting restrictive business practices have been enacted essentially in the public interest of a specific state exercising a market regulatory function. Competition law – just like other aspects of modern economic law, such as labour law or consumer law – seeks to strike a balance between the needs of the market and of the community as a whole in the forum state. As far as competition law is concerned the public interest in fact assists the operation of the private law system. Its objective is not, however, as in other parts of private law, to give effect to the intentions of individuals expressed in a legally enforceable way, but rather the protection of the private law system as a whole against the dangers arising from individual freedom of action and thus ultimately

[21] On this subject in relation to the laws of certain EUROPEAN states *Hug* 622 ss.; in general *Vogel* 185 ss.; *Vischer*, Vertragsrecht 195; *Wiethölter*, Zur Frage des internationalen ordre public: BerGesVR 7 (1967) 133–177, 155 ss., 162 ss.

[22] For opposition to the idea of an independent international administrative law, corresponding to private international law, and support of the integration into substantive administrative law of rules concerned with the scope of application of administrative law in relation to situations with foreign connections, *Vogel, passim*, esp. 287 ss., 298 ss.

[23] Standard works include *Vogel* 11 ss., 142 ss., 148 ss., 185 ss.; *Rehbinder* 247 ss.; *Schwartz, I. E.*, Kartellrecht 185 ss.; *Van Hecke*, Droit 305–306; *Zweigert* 130–131; *Sandrock* 5 ss.; *Rigaux* 111 ss. Contrast *Eeckman* 500 ss., 506 ss.

[24] *Cf.* on this point *Neumeyer* IV 487–488, 245–248 and 113; *Schwartz, I. E.*, Kartellrecht 182 ss.

from the system itself. Two consequences flow from the fact that the purpose of competition law is essentially a regulatory one: Firstly, the territorial scope of competition rules has to be determined by the aims and objectives of the competition statute itself, so that substantive rules and conflict-of-laws rules are combined. Secondly, the international competition law of a given state does not act as a neutral arbitrator between the substantive competition law of a foreign state and the law of the forum; unlike private international law, in international competition law foreign law and forum law cannot be considered as having equal value in principle. The general principles of private international law thus do not extend to competition law.[25]

The same is true for the private law rules of competition law. To determine their application in accordance with the ordinary rules of private international law would be to disregard their intended scope. By choosing a law that has no analogous competition provisions it would be possible to avoid rules on the invalidity, termination and rescission of contracts which restrict competition, or which permit claims for an injunction or for compensation arising out of such contracts, or arising out of a restraint of trade which constitutes a tort. If this was permitted it would not just deprive those concerned of their rights and legal protection; regulation of the market, which it was the objective of the competition rules to achieve, would also be less effective if there were no appropriate legal remedies to encourage private enforcement actions. Relief from this situation could only be afforded by reference to the public policy of the forum, if it was the *lex fori* whose competition provisions were being evaded. A further result would be that the administrative, criminal and private law rules of the competition statute would each have a different scope in relation to transnational situations. This would however run counter to their common purpose (*infra* s. 9).

[25] For a detailed consideration of the historical background to this distinction see *Basedow*, Wirtschaftskollisionsrecht – Theoretischer Versuch über die ordnungspolitischen Normen des Forumstaates: RabelsZ 52 (1988) 8–40, 13–20.

II. THE SCOPE OF APPLICATION OF COMPETITION STATUTES

A. COMPETITION STATUTES WITHOUT CONFLICTS RULES – THE EFFECTS DOCTRINE

8. – The consequences of applying the ordinary rules of private international law or international administrative or criminal law speak for themselves. They are either not adapted to the special, anti-competitive character of the contracts, acts or omissions in question (*i.e.* they do not meet the requirements of competition law in its private law function); or they do not (yet) exist; or they exist but require further elaboration. And finally, general conflicts rules of this kind contradict each other since they may claim application of the *lex fori* in administrative or criminal proceedings whereas a private case concerning the same fact situation might be referred to the laws of a foreign country. It follows that the technical characterization of the respective rules as criminal, administrative or private law is unsatisfactory as a way of determining the scope of competition law.

In the absence of a specific conflict-of-laws rule, the question whether a rule ought to be applied to a transnational situation, and if so how, can only be resolved through interpretation of the rule itself, and thus primarily by considering its purpose. In cases of doubt an economic law should only be applied to the extent that its purpose requires this. Determination of the scope of a rule is simply an aspect of interpreting it. In the process of interpretation the generally recognized methods of statutory interpretation must be observed, one of which is of course a consideration of the purpose of the rule.[26]

Thus courts and academic writers have frequently determined the international scope of public law and private law rules in accordance with their purpose. This is principally true of currency and foreign exchange laws,[27] but also of other areas of economic law, *e.g.* competition law. But this mainly applies to competition statutes that include a conflicts rule whose interpretation is a matter of debate.[28]

i. *The Purpose of Competition Law*

9. – The purpose of national or supranational competition law is the protection of the national or supranational economic order from the detrimental effects of a restriction of competition. In doing this the protection of effective competition is not an end in itself. In part competition is protected because of its consequences for the national economy. As an institution of the market economy, the function of competition is to ensure a correlation between supply and demand, and achieve the fullest possible satisfaction of the requirements of all market participants in relation to price, quality, quantity, innovation, service, *etc.* Moreover competition can optimize the deployment of economic resources through rationalization, research and technical progress.

At the same time competition is protected because of its social and commercial consequences. In particular it limits the exercise of market power and increases freedom of choice. It is the function of competition as an institution of private law to ensure freedom of contract for all market participants, *i.e.* to guarantee suppliers, manufacturers, purchasers and consumers freedom of choice as to their contracting partners, as to whether to enter into a contract, and as to the content of the contract. In this way it can achieve an optimal degree of freedom of economic activity and limitation of economic power.

As explained above, competition law serves both public and private ends and thereby contributes to substantive justice between individuals, even when it forms a branch of public law. This interpretation is not without its detractors. However a comparison of the different national

[26] The relevance of the purpose of a rule in the process of interpretation is recognized in relation to international treaties in Vienna Convention on the Law of Treaties of 1969 art. 31 par. 2; on the importance of this principle for the determination of the scope of a rule see *e.g.*, *Vogel* 357 ss., 416.

[27] See *Ernst*, Die Bedeutung des Gesetzeszweckes im internationalen Währungs- und Devisenrecht (Berlin 1963) 87, 2–3; *Vogel* 378 ss., 402 ss., 417; for earlier studies see *Rabel*, The Conflict of Laws. A Comparative Study II (Chicago 1947) 560; *Wengler*, Die Anknüpfung des zwingenden Schuldrechts im internationalen Privatrecht: ZvglRW 54 (1941) 168–212, 178.

[28] See *e.g.*, *Neumayer, K. H.*, Die Notgesetzgebung des Wirtschaftsrechts im internationalen Privatrecht: BerGesVR 2 (1958) 35–57, 56; *Hug* 615, 617; *Van Hecke*, Droit 304; *Mezger* (*supra* n. 18) 46 ss., 49; *Rehbinder* 113 ss., 247; *Vogel* 408 ss. and n. 20, 421 ss.; *Sandrock* 24 ss.; *Basedow* (*supra* n. 25) 24.

competition laws reveals three elements that are constantly present:

(1) The concepts of freedom and competition are inextricably bound together, although both are occasionally set aside to accommodate more specific social or economic policy goals.

(2) There is a strong desire for a market economy and for freedom of business activity.

(3) Both these legally protected goals[29] are accorded equal importance.

This does not exclude the possibility that individual legal systems may differ in the emphasis they place on the structural as compared with the freedom-enhancing objectives of competition law. Thus in SWITZERLAND the balance is tipped in favour of the private law protection of freedom of choice. The same is also true of the UNITED STATES OF AMERICA, where from an early date many judgments adverted to the conflict between the two different objectives of the relevant legislation;[30] moreover by introducing a claim for treble damages the AMERICAN legislature has utilized the private interest in free competition to further the public interest in market regulation.[31] In contrast, the fact that in FRENCH competition law the state has for many years combined antitrust law with price control indicates that the protection of competition in FRANCE mainly served economic policy ends, such as regulating prices to maintain price stability.[32] Such countries sometimes have no special competition law rules sounding in private law, but the general rules of private law may then be invoked, particularly those on prohibitory injunctions and compensation for tortious harm.

ii. *Unwritten Conflicts Rules in Competition Law*

a. Theory and Content

10. *The effects doctrine.* – Private property rights are not usually designed to suit economic operators of any particular nationality. Rather they ensure that interest groups, such as *e.g.* vendors and purchasers, suppliers, lessors and lessees, or mortgagors and mortgagees, have an equal opportunity to assert their interests. However, where economic law in general, and competition law in particular, is concerned, matters are different. As explained above (*supra* s. 7), competition law always determines the constitution of the market and the wider community in a specific country. The political judgment of the legislator that an economy based on effective competition will guarantee a more efficient use of economic resources than a monopolistic structure depends on *e.g.* economic conditions within the national market and on the extent to which the country in question is integrated into the international economy. For example, the desire to promote major national undertakings as a counterbalance to multinational corporations plays a much greater role in small states and developing countries than it does in large, developed Western economies.

The result of this is that the competition law of a given country does not provide universal protection of competition and freedom of competition, but only protects its own economic and social order. It is not concerned about preserving competition in foreign economies. It is the restriction of competition within the domestic economy that is geographically relevant to the application of national competition law. Two consequences flow from this:

Firstly, it is the impact and effects of economic activity rather than the individual acts themselves that are relevant. Thus, to ensure that competition laws are effective, legislators tend to use the propensity of practices and agreements to restrict competition as the criterion for applying competition law sanctions, rather than the fulfilment of specific conditions. Competition law rules are structured in a way that indicates an intention to achieve particular

[29] *Bär*, Kartellrecht 275 ss., 280, 281 with particular reference to SWITZERLAND but also more generally on a comparative law basis, including comprehensive references; *Merz*, Kartellrecht – Instrument der Wirtschaftspolitik oder Schutz der persönlichen Freiheit: Wirtschaftsordnung und Rechtsordnung. Festschrift Franz Böhm (Karlsruhe 1965) 227–259, esp. 255 ss.; see also *Rehbinder* 115 ss.; *Schwartz, I. E.*, Kartellrecht 33 ss., 95 ss. with further references; *cf.*, *Kegel* 748 ss., 750, for a more sceptical approach.

[30] *Cf.*, *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962), in which Chief Justice *Warren* was prepared to take economic disadvantages in the shape of increased costs into account in order to allow the undertakings greater freedom of action in a market dominated by small and medium companies.

[31] *Zenith Radio Corp. v. Hazeltine Research Inc.*, 395 U.S. 100, 130–131 (1969).

[32] *Cf.*, *Burst and Kovar* 210; see also *Savatier*, La théorie des obligations. Vision juridique et économique (ed. 3 Paris 1974) 170 ss., 176 ss. who considers competition law solely from the point of view of "economic policy". On the other hand, according to *Goldman* 667, 668–669, 671, the *Commission technique des ententes et des positions dominantes* sought to achieve both these goals, particularly in cases with an international element.

substantive goals rather than impose formal requirements.[33]

This approach, with its emphasis on results, produces the second consequence for choice-of-law purposes: the place in which the activity that caused the restriction of competition was undertaken is not decisive in the determination of the applicable law; instead the relevant place is the place where the outcome is felt, which is the market on which competition is restricted. That market must be in the forum state before domestic competition law will be applied. This connection is certainly present if the product or service is sold in the forum state. If the market for the product or service is elsewhere, then the main effect on competition is in that foreign economy. At this point the question arises whether the competition law of that foreign country should be applied; domestic competition law may anyway always prove to be relevant, if the restriction of competition on the foreign market has repercussions on the domestic market (*infra* s. 11).

As seen above, the purpose of competition law makes it advisable to provide complete protection for the domestic economy, in other words to protect it from interference with competition both at home and abroad. Supply and demand on the domestic market is not solely the concern of domestic undertakings, but involves foreign undertakings as well, so they must also be dealt with. Otherwise the protection afforded to competition on the domestic market would be inadequate and ineffective.

Conversely, if domestic undertakings sell or purchase goods or services on foreign markets it is only in those foreign countries that they mean to interfere with competition directly through these anti-competitive agreements or practices. Repercussions on the domestic market are however possible, and indeed up to a point unavoidable. It is both possible and probable that competitors who have coordinated their behaviour on foreign markets will be less willing to compete and will engage in less intense competition on the domestic market. Inevitable domestic repercussions arise from restrictive business practices on foreign markets to the extent that cartel profits reduce the pressure on the members of the cartel to compete and to rationalize their operations, and even provide an incentive to increase costs – in the form of *e.g.* agreements on higher wages – which can in turn be used to justify price increases on the domestic market. If foreign undertakings participate in restrictive business practices on a foreign market, it is possible that those of them that are not yet active on the domestic market, will no longer even be potential competitors.[34]

The fact that the objectives of competition law meet the needs of the domestic market means that a restriction of competition on foreign markets cannot in itself justify the application of domestic competition law. In these circumstances it may be appropriate to have regard to the competition law of the foreign state concerned (*infra* s. 103–110); but there is no reason to enforce the competition law of the forum.

11. *Domestic markets.* – The conflict-of-laws rules outlined here and the numerous conflict-of-laws rules inherent in substantive law make use of the concept of the "domestic market". What does this signify? The term market is generally understood to connote a coincidence of supply and demand for a particular product (and its substitutes) and in a particular geographic area. Thus the market is affected (effects are produced on it) if within the relevant geographic area there is a restriction of competition between suppliers or purchasers of the product. To be more precise: the market for a product in the geographic area concerned is affected if the freedom of competition of suppliers and thus also the freedom of purchasers to make business decisions (freedom of choice, freedom to devise business strategies and freedom to conclude contracts) is interfered with.

The decisive factor is not where the purchasers and suppliers are located, but the geo-

[33] This distinction has been developed in the context of socio-legal studies by *Luhmann*, Rechtssoziologie II (Reinbek 1972) 227–234; on its importance for economic law see *Joerges*, Vorüberlegungen zu einer Theorie des Internationalen Wirtschaftsrechts: RabelsZ 43 (1979) 6–79, 48–51. In countries like GREAT BRITAIN where antitrust law still consists mainly of legal rules that set out formal conditions to be fulfilled, there have been calls for the law to take more account of the effects of restrictive business practices, *cf., United Kingdom Department of Trade and Industry*, Review of Restrictive Trade Practices Policy – A Consultative Document: W.Comp. 33 (1988) 97–116, 101, 103–104.

[34] See the thorough economic critique of the exemption of export cartels by *Hoppmann: Eichler, Hoppmann and Schäfer* 75–162, 90, 99–101; see also the outline and critique of past US-AMERICAN discussion of the topic in note *Collins*, Webb-Pomerene vs. Foreign Economic Policy: 99 U.Pa.L.Rev. 1195–1217 and esp. 1212–1215 (1950/51).

graphic area in which the supply and demand arises – in the forum state or abroad. All that matters is the geographic location in which supply and demand coincide. The market cannot be divided between a foreign "supply market" and a domestic "demand market" or *vice versa.* Instead it includes both supply (whatever its source) and demand (wherever from) in a defined geographic area, and can therefore be defined as the coincidence of supply and demand in one and the same geographic area. The decisive factor is always whether coincidence of supply and demand occurs in the forum state or in a foreign country; in other words, whether performance by suppliers of their obligations, and counter-performance by purchasers, takes place in a geographic area within the forum state or in a foreign country.

On this basis the domestic market is the geographic area into which a product is carried to be consumed or made use of (*e.g.* processed or resold). It is the territory in which a product is sold, the place of sale, the place where the product is delivered to customers. For services the domestic market is the geographic area in which the service will be performed. In relation to *e.g.* construction work this is the place in which the building is erected, and in relation to a patent licence it is the territory for which it is granted.

12. *Domestic effects.* – Laws prohibiting restrictive business practices deal only with behaviour that restricts competition in the state concerned, *i.e.* at a point of sale within that state. The straightforward measure of this is whether individual freedom of action is restricted such that it interferes with the conduct of business in that state. This may apply to the parties to the restrictive business practice, but the effect on their competitors or other third parties is also relevant.

The effects doctrine leads to problems when the restrictive business practices designed to have an effect on a foreign market also produce effects on the domestic market. Two different situations need to be distinguished. (1) If the restrictive business practices affect the domestic market directly, as in the case of "mixed" export cartels, they do not differ in principle from the restrictions on domestic competition considered above (s. 10); for the same reasons it is appropriate to apply the competition law of the forum where domestic effects of this kind are produced. (2) If, however, the domestic effects only arise indirectly, as a repercussion of restrictive practices on foreign markets, it is less obvious that domestic competition law should be applied.

Two lines of argument can be envisaged: one view is that competition law is only intended to prevent a direct restriction of competition on the domestic market. Faced with the potentially global territorial connections of major international cooperations, it would be virtually impossible to find a connecting factor straightforward enough to enable the undertakings involved to calculate the impact of national law and the officials and courts involved to apply it and yet retain conflicts with foreign laws within reasonable bounds if secondary and tertiary effects, or ripple effects and repercussions, also constituted relevant connections. Moreover in relation to competitors on the domestic market, the restriction of freedom of competition that results indirectly from restrictive business practices directed at foreign markets, although it exists as a matter of fact, does not give rise to a legal cause of action. In reality, there is widespread international acceptance of an approach which limits the effects doctrine to direct, perceptible and foreseeable domestic effects.[35] Not least because grave doubts exist as to the conformity with international law of an exorbitant exercise of national jurisdiction.

On the other hand, if these limiting international law considerations are excluded and the only relevant consideration is the function of competition law, it is also possible to justify the view that a distinction between direct and indirect restrictions of domestic competition is irrelevant and the only issue is how severely competition is restricted. Exclusive dealing agreements may be used as an illustration. Suppose that undertakings X and Y in state A trade in competing products; company X succeeds in winning the custom of the dealers in those products in surrounding states B, C and D; they contract to purchase the products concerned exclusively

[35] This limitation has already been expressed in *International Law Association,* Resolution on Extra-Territorial Application of Anti-Trust Legislation: ILA Rep. of the 55th Conf. (New York 1972) XIX art. 5; UNITED STATES: Restatement 2d. Foreign Relations Law of the United States (St. Paul, Minn. 1965) § 18 with comment f and antitrust ill. 8 and 9; see *infra* s. 76 at n. 399 and also *Atwood and Brewster* I 152, 155, 167. GERMANY: *Immenga and Mestmäcker (-Rehbinder)* § 98 Abs. 2 no. 89 ss.; *Schwartz, I. E.,* Kartellrecht 40. SWITZERLAND: *Bär,* Kartellrecht 377 ss. For a similar approach in the EUROPEAN ECONOMIC COMMUNITY, see Advocate General *Darmon, infra* s. 58 n. 298.

from X. This network of agreements makes it more difficult for Y to obtain access to markets B, C and D; company Y can thus not extend its own business activity in the same way as company X and achieve economies of scale that might arise out of trade in the products concerned. The disadvantages that company Y suffers in terms of costs because of this also hamper the performance of company Y on the domestic market of state A, so that, all other things being equal, its prices there will be higher than those of company X. Since it is the objective of competition law to improve the effectiveness of all aspects of competition, including competition in costs, there are many who would consider domestic effects of this kind sufficient to justify the application of the domestic competition statute. Their sole requirement is that the indirect domestic effects were perceptible and intended, or at least foreseeable.[36]

13. *Summary.* – Drawing these strands together one may conclude that where competition statutes do not expressly regulate their scope in transnational situations, the objective of such laws permits the following unwritten conflicts rules to be derived from them: the competition law of a given state is applicable to agreements and acts that restrict competition in that state; the place of acting is irrelevant.

If competition in a foreign country is also restricted by the same act or agreement, the objective of domestic competition law does not in principle require its application to that further restriction of competition. Thus it only applies to the domestic aspects of the situation. In principle the foreign aspects of the situation are governed by the competition law of the foreign state, provided there is such legislation. If that is not the case or if the domestic court cannot apply the foreign law (*infra* s. 89 ss.), then the general rules of private international law governing contracts, torts, and companies are applicable. It is true that many states define the scope of their own competition law either more broadly or more narrowly than this; the rule outlined here however only concerns those states whose competition law does not contain any conflict-of-laws rules of its own. It is an approach inspired by the conflict-of-laws concept of international comity, which includes sensitivity to the wishes of the foreign states concerned in relation to their domestic organization and regulation.[37]

In the absence of any express rule to the contrary, restriction of domestic competition is used as a connecting factor for all competition law rules. It applies regardless of the legal nature of the rule, though admittedly in each individual case the term "relevant domestic effects" must be given substance by reference to the aims and objectives of the particular rule in question. As a mandatory *lex specialis* the effects doctrine takes precedence over the general rules of international administrative law and private international law. It thus requires direct and immediate application, *i.e.* without falling back on public policy considerations. Where it is possible to rely on this unwritten competition conflict-of-laws rule, derived from the purpose of the relevant substantive provisions, no question of applying general conflict-of-laws rules arises. For the purposes of classification, the nature of the substantive rule to be applied determines whether the competition conflict of laws rule is one of administrative, criminal or private international law. There is therefore no need to accept any overlap as between public and private international law.

b. The Effects Doctrine in Particular Legal Systems

aa. Eastern Europe, Semi-Industrialized States and Developing Countries

14. – The approach to conflict-of-laws issues outlined above is accepted in certain countries whose competition law has no special rules governing its scope. In fact there are a great many competition statutes that make little or no reference to their own scope, or even to the existence of restrictive business practices with an international dimension. In many countries the reason for this is that competition law is of only symbolic importance; it is more an expression of the

[36] See *e.g.* in a similar situation, OLG Düsseldorf 27 July 1982, WuW/E OLG 2765, IPRspr. 1982 no. 125 – the battery charging unit case: a German manufacturer had granted a Swedish dealer the exclusive right to import his products into Sweden; the court took the view that this agreement directly excluded German purchasers of the product from exporting to Sweden and therefore produced effects on the domestic market; this view is shared by *Basedow* 629. See also *U.S. v. Aluminium Company of America*, 148 F. 2d 416, 444 (2 Cir. 1945), where Judge *Learned Hand* only required "some effect" in addition to the intention to restrict competition.

[37] *Vogel* 421–423, *cf.* also 409; *Steindorff*, Internationales Verwaltungsrecht: *Strupp and Schlochauer*, Wörterbuch des Völkerrechts III (ed. 2 Berlin 1962) 581–586, 583; see further *infra* s. 95 ss.