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Studies

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Jurisdiction and applicable law to non — contractual obligations arising out of restriction of competition A case of the pharmaceutical sector[1]

Abstract: In this Article the Author has analysed the most important issues arising from the interaction between intellectual property law, competition law and the right to redress, taking into account the cross-border character of the discussed matters. The cases of restraints of competition, having frequently a multinational character raise doubts as to both jurisdiction and applicable law. I believe that the EU's legal act in this area are not well agreed. Perhaps after introducing the Directive no. 2014/104 the provisions of both Brussels I-bis and Rome II should be reconsidered, taking into account the specific character of delicts in the field of competition law. On one hand the wording of art. 6(3) of Rome II somewhat reconciles the interests of both EU-cases and non-EU cases, but the risk of applying the mosaic principle in the discussed cases seems inevitable. Perhaps for these matters the choice of law should be considered. For example the parties could have the possibility to choose the law of one of the affected markets (both of an EU-country or non-EU country, since art. 3 Rome II provides for an universal character of the regulation). When in comes to jurisdiction it is left to the courts to interpret

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the notion of both place of act and place of its consequences, which seems to be a proper solution. In this way we can apply a case-by-case method.

Keywords: restraints of competition, tort law, damages, jurisdiction, applicable law

1. Introduction. Examples of restraints of competition in the pharmaceutical sector

The issues of jurisdiction and applicable law in the pharmaceutical sector are of great importance not only from the substantial law point of view, but also as being sources of cross-border legal relations. Many cases can be placed in a specific "junction" of intellectual property rights, competition law and compensation law. In this article I will focus only on claims for damages in multistate cases.

For several years now, the European Commission has been monitoring patent settlements[2] aimed at delaying the commercialization of generic medicines, which may raise questions not only from the perspective of competition law but also from other areas of law, such as private international law. Such settlements can be one of the forms of patent abuse, but also a dominant position, and at the same raise questions about the consequences in the field of law of damages. It is discussed that such market practices not only distort competition[3] but also affect the position of consumers[4] and others who are interested in the lower price of generic

[2] See M. Siragusa: *The EU Pharmaceutical Sector Inquiry. New forms of Abuse and Article 102 TFEU*. In: *Competition law and intellectual property: A European Perspective*. Eds. G. Caggiano, G. Muscolo, M. Tavassi. Alphen aan den Rijn 2012, p. 177 et seq.; H. Ullrich: *Strategic patenting by the pharmaceutical industry: towards a concept of abusive practices of protection*. In: *Pharmaceutical, Innovation, Competition and Patent law*. Eds. J. Drexl, N. Lee. Cheltenham, Elgar Publishing, 2013, p. 244 et seq.; D. Schnichels, S. Sule: *The Pharmaceutical Sector Inquiry and its Impact on Competition Law Enforcement*. "Journal of European Competition Law & Practice" 2010, vol. 1, no. 2, p. 93 et seq.; See also M.K. Kolasiński: *Odpowiedzialność odszkodowawcza za uszczerbek powstały w Unii Europejskiej w wyniku zawarcia sprzecznych z prawem antymonopolowym ugód patentowych o odwróconej płatności*. "Przegląd Prawa Handlowego" 2016, no. 6, p. 5 et seq.

[3] However if one looks at the agreements which do not contain a remuneration, the anti-competitive effect might be difficult to proof.

[4] However the quantification of damages can be difficult and will be probably only approximate — see L. Prosperetti: *Estimating damages to competitors from exclusionary practices in Europe: a review of the main issues in the light of national courts'* experience. In: *Competition law and intellectual property: A European Perspective*. Eds. G. Caggiano, G. Muscolo, M. Tavassi..., p. 248.

medicines. Moreover practices restraining competition in the pharmaceutical sector may also affect the health policy of the state. In Poland introducing the generic medicines to the market undoubtedly remains in the interest of the National Health Fund (hereinafter "NHF") and the state budget (entities relevant for reimbursement of medicines [in Polish "refundacja"] and financing drugs within the health system financed by the state). Moreover these are insurance companies who might be (economically) interested in placing the generics to the market (if for example the insurer participates in costs of providing medicines within the life insurance coverage).

The reason for the use of various legal instruments to delay the commercialization of generic medicines is primarily an economic consideration related not only to the patent procedure itself, but also to the costs of introducing a new drug to the market. In addition to hundreds of millions of Euros or dollars, the drug's release takes up to 10 to 15 years[5], and therefore, before the cost of the drug is "repaid", patent protection may expire. In the case of market success, it is in the interest of both the original and the generic manufacturer that the product is still commercially viable and profitable (which could serve as a basis for further innovative research). In the meantime, the introduction of generics naturally leads to significant price reductions (by up to several dozen percent[6]) and changes in the market position of the interested parties.

In 2009 the European Commission launched an inquiry on the pharmaceutical sector, monitoring the settlements concluded by manufacturers of original (patented) and generic drugs[7]. In the announcements published also in the subsequent years, it was clearly emphasized that such settlements could have an anticompetitive effect, thus affecting not only the functioning of the market, but also the situation of consumers (and possibly other entities, e.g. national health funds, treasury etc.). Some of the settlements may aim not so much as to achieve an amicable solution to the dispute but for example the delay of commercialization of generic medicines (for a certain remuneration).

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[5] M.A. Carrier: *Competition law and enforcement in the pharmaceutical industry.* In: *Research Handbook on International Competition Law.* Ed. A. Ezrachi. Cheltenham 2012, p. 522.

[6] Ibidem.

[7] Seven reports on this matter (2008 — 2015) are available here: http://ec.europa.eu/competition/sectors/pharmaceuticals/inquiry/index.html [last seen 11th Aug. 2017]. See also L. Kjølbye: *Article 82 EC as Remedy to Patent System Imperfections: Fighting Fire with Fire?* "World Competition Law and Economics Law Review" 2009, vol. 32, issue 2, p. 163 et seq.

These issues coincide simultaneously with the European Union's aspirations to provide private enforcement mechanisms, thus ensuring the injured party the right compensation[8]. Directive of the European Parliament and of the Council No 2014/104/EU on certain provisions governing the compensation claims for infringement of the competition laws of the Member States and the European Union, adopted on 26 XI 2014[9] has just been implemented by the Polish legislator[10].

As I discuss more thoroughly in another papers the substantive law issues involving the restraints of competition in pharmaceutical sector[11], I will only briefly present the possible actions which may have a cross-border character and therefore rise questions as to jurisdiction and applicable law. In the discussed area it is clear that because intellectual property rights, including patent rights to drugs, are exclusive, the way how they are exercised may cause a contradiction between IP rights and competition law[12]. These can be evaluated in the field of national or EU competition law[13] (especially in the context of abuse of a dominant posi-

[8] See D. Ashton, D. Henry: *Competition Damages Actions in the EU. Law and practice*. Cheltenham, Elgar Publishing, 2013, p. 22 et seq.; CJUE ruling in *Manfredi C-295/04*; see also H.W. Micklitz: *Consumers and Competition — access and compensation under EU law*. "European Business Law Review" 2006, p. 3 et seq.; U. Bernitz: *Introduction to the Directive on Competition Damages Actions*. In: *Harmonising EU Competition Litigation. The New Directive and Beyond*. Eds. M. Bergström, M.C. Iacovides, M. Strand. "Swedish Studies in European Law" 2016, vol. 8, Oxford and Portland, Oregon, p. 3 et seq.; J.H.J. Bourgeois, S. Stievi: *EU Competition Remedies in Consumer Cases: Thinking Out of the Shopping Bag*. "World Competition" 2010, no. 2, p. 242 et seq.

[9] "Official Journal" L of 5 XII 2014, p. 1 and seq., hereinafter as "the Directive".

[10] Statute on damages claims for harm caused by infringement of competition law of 6th April 2017. "Official Journal" ("Dziennik Ustaw") of 2017, pos. 1132 (it came into force on 26th June 2017), hereinafter as "the Polish Act".

[11] See *Instrumenty prawne służące opóźnianiu wprowadzenia na rynek leków generycznych — zagadnienia wybrane*. "Gdańskie Studia Prawnicze" 2018, vol. 39, p. 343—356, and *Damages for restraints of competition — a case of private enforcement in the pharmaceutical sector*. "Ius Novum" 2017, vol. 11, no. 4, p. 95—118.

[12] See R. Sikorski: *Wyłączność korzystania z praw własności przemysłowej*. In: "System Prawa Handlowego". T. 3: *Prawo własności przemysłowej*. Eds. E. Nowińska, K. Szczepanowska-Kozłowska. Warszawa 2015, p. 461 and citation of D. Miąsik: *Stosunek prawa ochrony konkurencji do prawa własności intelektualnej*. Warszawa 2012; see also K. Schöller: *Patents and Standards: The Antitrust Objection as a Defense in Patent Infringment Proceedings*. In: *Patents and Technological Progress in a Globalized World. Liber Amicorum Joseph Straus*. Eds. W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack. Berlin—Heidelberg, Springer, 2009, p. 178.

[13] See *Sirena* (C-40/70); *AstraZeneca* (C-457/10); see also I. Ottaviano, in: *Competition law and intellectual property: A European Perspective*. Eds. G. Caggiano, G. Muscolo, M. Tavassi..., p. 200; G. Ghindini: *Patent ambush and reverse pay-*

tion[14]). So if for example a biotechnological invention patent holder demands unreasonably high royalties or even refuses to grant a license, its action may raise questions from the point of view of competition rules and consequently, lead to claim for damages (providing a private enforcement of public competition law). Similarly, the use of other legal instruments may give rise to this anti-competitive effect. As an example we might recall the creation of the so-called "patent thickets"[15] or "overlapping patents"[16]. The other practices are being in fact "artificial" attempts to extend protection through so-called "ever-greening" strategy (which is related to earlier protection: for example, due to the end of patent protection for the substance itself, the patentee applies for protection for the manufacturing method), namely "extending" protection by patenting the second use or substance itself[17]. This type of patent strategy is referred

ments: Comments. In: *More common ground for international competition law?* Eds. J. Drexl, W.S. Grimes, C.A. Jones, R.J.R. Peritz, E.T. Swaine. Cheltenham, Elgar Publishing, 2011, p. 208; J. Drexl: *Intellectual property in competition: How to promote dynamic competition as a goal*. In: *More common ground for international competition law?* Eds. J. Drexl, W.S. Grimes, C.A. Jones, R.J.R. Peritz, E.T. Swaine..., p. 228; M. Kort: *Intellectual Property and Article 82 EC*. In: *Patents and Technological Progress in a Globalized World. Liber Amicorum Joseph Straus*. Eds. W.P. zu Waldeck und Pyrmont, M.J. Adelman, R. Brauneis, J. Drexl, R. Nack..., p. 157.

[14] See K. Szczepanowska-Kozłowska: *Naruszenie praw własności przemysłowej*. In: "System Prawa Handlowego". T. 3: *Prawo własności przemysłowej*. Eds. E. Nowińska, K. Szczepanowska-Kozłowska..., p. 714—715. See also CJEU case *Magill* no. C-242/91 (abuse of IP rights as an abuse of dominant position); see also *Competition Law as a Patent 'Safety Net' in the Biopharmaceutical Industry*. "The Competition Law Review" 2004, vol. 1, issue 2, p. 75; J. Temple Lang: *European competition law and intellectual property rights — a new analysis*. "ERA Forum" 2010, vol. 11, p. 413, 436.

[15] See C. Shapiro: *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*. In: *Innovation Policy and the Economy 1*. Eds. A.B. Jaffe, J. Lerner, S. Stern. Cambridge 2001, p. 120 et seq.

[16] See A. Fuchs: *Patent ambush strategies and Article 102 TFEU*. In: *More common ground for international competition law?* Eds. J. Drexl, W.S. Grimes, C.A. Jones, R.J.R. Peritz, E.T. Swaine..., p. 190; M.W. Haedicke, in: M.W. Haedicke, H. Timmann, D. Bühler: *Patent law. A handbook on European and German patent law*. München 2014, p. 47; K. Schöller: *Patents and Standards: The Antitrust Objection as a Defense in Patent Infringment Proceedings*..., s. 179.

[17] See H. Ullrich: *Strategic patenting by the pharmaceutical industry: towards a concept of abusive practices of protection*..., p. 246; C.M. Correa: *The Current System of Trade and Intellectual Property Rights*. In: *European Yearbook of International Economic Law 2016*. Eds. M. Bungenberg, Ch. Herrmann, M. Krajewski, J.P. Terhechte. Springer Switzerland 2016, p. 190; B. Whitehead, S. Jackson, R. Kempner: *Managing generic competition and patent strategies in the pharmaceutical industry*. "Journal of Intellectual Property Law & Practice" 2008, vol. 3, no. 4, p. 227—229.

to as "defensive patenting"[18], intended to block the development of new products by competitors. The phenomenon of "continuous refreshing" of protection leads to the emergence of patent thickets around the drug (various "parts" are subject to separate protection: for example a cluster of patents on the active substance, molecules, the dosage form of the drug, concentration of preparations, second use). As an example of these activities one may indicate the patent thicket on perindopril[19]. The above strategies are used because the patent system in general allows medicinal products to be protected either as a single chemical compound or a mixture of compounds. In many cases, as performing business activities by patent holders is global, the effects of such antitrust behaviour can be also global, raising questions on applicable law and jurisdiction.

The first case and somewhat a turning point in establishing a right to compensation for damage caused by the infringement of competition law was *Courage Ltd. v. Crehan*[20]. The Court of Justice of the European Union (CJEU) expressly recognized the existence of a right to claim damages in favour of individuals, emphasising the direct effect of the provisions of EU competition law[21]. The reasoning is undoubtedly connected to the doctrine of direct effect of EU law[22]. If an individual's rights provided for in the EU laws are infringed, that person should be allowed to claim compensation for a damage sustained by the unlawful act[23]. This rule was more expressly affirmed in the CJEU's ruling in *Manfredi*[24]. The Court stated that

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[18] See D. Schnichels, S. Sule: *The Pharmaceutical Sector Inquiry and its Impact on Competition Law Enforcement…*, p. 103.

[19] See *Bariery związane z patentami, utrudniające wprowadzenie leków generycznych na rynek Unii Europejskiej*. Ed. K. Roox. Centrala Europejskiego Biura Patentowego, Monachium 2008, p. 32—34.

[20] C-453/99, [2001] ECR I-6297.

[21] See also F. Cengiz: *Antitrust Damages actions: lessons from American indirect purchasers' litigation*. 59 "International & Comparative Law Quarterly" 2010, vol. 45, p. 51.

[22] See also I.B. Nestoruk: *Effects doctrine a la européenne — rozważania na tle art. 6 ust. 3 rozporządzenia Rzym II*. In: *Znad granicy ponad granicami. Księga dedykowana Profesorowi Dieterowi Martiny*. Eds. M. Krzymuski, M. Margoński. Warszawa 2014, p. 216 et seq.; F. Munari: *Issues on Jurisdiction and Applicable law in Private Antitrust Enforcement Cases*. In: *Party Autonomy in Europan Private (And) International Law*. Eds. I. Queirolo, B. Heiderhoff, G. Afferni. T. 1. Arricia 2015, p. 153—154.

[23] See also I. Lianos, P. Davis, P. Nebbia: *Damages for the Infringement of EU Competition Law*. Oxford 2015, p. 19—21; R. Cisotta: *Some considerations on the last development on antitrust damages actions and collective redress in the European Union*. "The Competition Law Review" 2014, vol. 10, issue 1, p. 90.

[24] Joined cases C-295/04 and 298/04 *Manfredi and Others v. Lloyd Adriatico* [2006] ECR I-6619. This rule have been affirmed in later cases: *Pfeiderer* C-360/09 and *Donau Chemie* C-536/11.

"any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited by art. 81 EC [now article 101 TFEU]". According to the ruling, in the absence of EU laws on this matter, it is was at that time for the Member States to designate the courts having the jurisdiction and rules to establish the liability for infringements of EU competition law causing harm. In addition the national laws were to provide rules for compensation of not only the actual damage, but also loss of profits[25] and interest. Both the Commission's Green Paper (2005) and White Paper (2008) on damages actions for breach of the EU antitrust rules, and consequently the Directive 2014/14 followed the full compensation rule[26]. In Poland, before implementing the Directive, these were the Civil Code rules which could have been applied in the discussed matter (art. 361, 415)[27]. *De lege lata* the Directive does not alter the national rules governing the actions of damages, neither it aims at changing the standard of proof. Moreover the Directive does not make any position regarding punitive damages and so again these are the Member States to decide whether in cases of private enforcement of competition law such claims will be available and on what grounds[28]. This could be a subject to criticism — of course on one hand one could argue that this is a subject of minimal harmonisation (so the Directive had to take account that only in fact a minority of national laws allow punitive damages in general), but this may lead to the whole system of private enforcement ineffective. Consequently even if a national court grants punitive damages to the plaintiff in one jurisdiction and according to applicable law (if it is a cross — border situation, which in case of phar-

[25] For example loss of profits by the generic drugs manufacturers who — caused by a created patent — thicket — cannot put their products to the market. In this case the loss can be sustained even already at the moment of the expected patent (or supplementary protection certificate) expiry. The practice will show how the notion of manifestation of damage will be understood in these cases.

[26] See also (on the aim pointed out in the Green Paper) Ch. Hodges: *Competition enforcement, regulation and civil justice: what is the case?* "Common Market Law Review" 2006, vol. 43, p. 1383.

[27] See also D. Hansberry, Ch. Hummer, M. Le Berre, M. Leclerc: *Umbrella effect: damages claimed by customers on non-cartelist competitors.* "Journal of European Competition Law & Practice" 2014, vol. 5, no. 4, p. 202—203; P. Podrecki: *Civil Law Actions in the Context of Competition Restricting Practices Under Polish Law.* "Yearbook of Antitrust and Regulatory Studies" 2009, no. 2(2), p. 80, 88 et seq.

[28] This follows a ruling of the CJEU in the *Manfredi* case (C-295/04 to 298/04), however in this case the CJEU did not support the view that punitive damages should be always allowed in such cases (according to the Court it should be left to the national laws, having in mind the principles of equivalence and effectiveness. The argument was connected with the assumption that the plaintiff could not be overcompensated (*de lege lata* — see art. 3(3) of the Directive)).

maceutical sector may happen quite often), the recognition of that judgment and its enforcement in another Member State might be considered as contrary to public order.

The infringement of the competition rules should be eligible for tort, and therefore not as an event being the source of contractual liability[29]. The purpose of the parties, including for instance the reversed payment settlements, appears to be a breach of the competition rules (therefore the element of unlawfulness is met).

2. Jurisdiction

To begin with the issues of jurisdiction one should bear in mind that the Directive 2014/104 does not refer to this question, it harmonises only certain rules of substantive law. Therefore for the claims brought after 10th January 2015 the Regulation no. 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[30] (hereinafter as "Brussels I-bis") applies, substituting Regulation 44/2001 (hereinafter "Brussels I"). Undoubtedly the claims for damages caused by restraints of competition are of a very specific nature, especially when one looks at cartels. In general most of the claims covered by the Directive can be understood as arising out of non — contractual liability, being also a basis of a joint and several liability (see art. 11 of the Directive and art. 5 of the Polish Act).

The cross-border nature of the acts restraining competition stem from two main factors: first, the agreement (for example the reverse-payment settlement) can be implemented in several countries. For example if we look at the reverse-payment agreement concluded between an original drugs manufacturer and producers of generic drugs when the parties have the habitual residence in different countries (being also often the

[29] See D. Ashton, D. Henry: *Competition Damages Actions in the EU. Law and practice*. Cheltenham, Elgar Publishing, 2013, p. 33. Moreover, there is no need of creating a special regime for antitrust torts — see T. Eilmansberger: *The Green Paper on damages actions for breach of the EC antitrust rules and beyond: reflections of the utility and feasibility of stimulating private enforcement trough legislative action*. "Common Market Law Review" 2007, vol. 44, p. 442. See also A. Jurkowska-Gomułka: *Private Enforcement and Competition law in Polish Courts: The Story of an (Almost) Lost Hope for Development*. YARS ("Yearbook of Antitrust and Regulatory Studies") 2013, vol. 6 (8), p. 122.

[30] "Official Journal" of 20 XII 2012, L-351/1.

market in the meaning of art. 6 of Rome II Regulation[31], which I will discuss later), it is obvious that the cartel-like settlement can affect several different legal systems and in the effect provide grounds for both deciding on jurisdiction and applicable law. What is also important, those agreements may cause damages to many victims (being both direct and indirect victims, natural or legal persons — see art. 3 of the Directive and art. 3 of the Polish Act), having their habitual residence in different countries (be it an EU or non — EU country), making the discussed cases even more complicated for both jurisdiction and applicable law matters. From the point of jurisdiction the practical solution could be to group the claims in one proceedings[32].

Since there is no special legal framework dealing with the issues of jurisdiction in antitrust litigation, general rules on jurisdiction apply, both in EU-related only and multinational (also involving non-EU countries) cases. Similarly as Brussels I (see art. 2), Brussels I-bis (art. 4) provides as a main principle the *actor sequitur forum rei* rule[33]. Therefore the defendant can be sued in the country of his domicile. What is however important is that in cases concerning damages for infringements of competition law, the defendant might exercise his activities also outside the country of his domicile. For example the original drugs producer (being also the patent holder or a licensee for a certain pharmaceutical product) may sell drugs to many countries and by his actions described in part I of this article, he may cause damage in several jurisdictions. According however to the general rule, he may be sued only in the country of his domicile.

On the other hand there are exceptions to the general rule on jurisdiction. Similarly as in art. 5(3) of Brussels I, art. 7(2) of the Brussels I-bis sets rules on jurisdiction in matters relating to tort, delict or quasi-delict. The claimant may sue in the courts of a country of the place where the harmful event occurred or may occur (however the defendant must be domiciled in a Member State[34]). For the purpose of applying this rule

[31] Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11.07.2007 on the law applicable to non — contractualn obligations (Rome II), O.J. L 199/40.

[32] In the *CDC case* (C-352/13) the legal entity acquired claims of 32 victims who suffered damage in 13 countries as a result of cartel created by 7 enterprises. In any case these acts can form either multistate or multi party torts (or both at the same time), causing the risk of many courts having jurisdiction applying several national laws (mosaic-principle).

[33] These Regulations deal only with intra-EU cases.

[34] The domicile is determined according to art. 62—63 of the 1215/2010 Regulation. The same rule applies if the parties want to choice the court of a Member State — see art. 25; see also J. Basedow: *Jurisdiction and choice of law in the private enforcement*

in cases of infringements of antitrust laws one must interpret precisely the meaning of "the place where the harmful event occurred" (I will not deal with the place where it may occur as I shall focus only on damages claims). According to the well established case law of the CJEU[35] that notion can be understood as both the place of acting as well as the place of the effect of such a behaviour. It has to be stressed that the place of damage has been understood as a place of a direct damage for the purposes of establishing jurisdiction[36]. This view, taking into account the wording of the Directive, needs to be changed in the discussed matters. If the EU legislator provided a right to claim for antitrust damages also for the indirect purchasers, the place of their loss should be taken into account (e.g. no price-drop), being often an indirect or consequential loss. The previous CJEU case law treating only the direct damage as connecting factor should be abandoned for the purposes of antitrust cases, as contrary to the principle of effectiveness of EU law[37]. Since purposes of Brussels I-bis and Rome II are not identical, some of their provisions can be interpreted independently[38]).

When it comes to the "place of the event" it can be understood very widely in antitrust cases. When we discuss the reverse-payment settlements we may either try to establish jurisdiction in a country where the agreement was actually made or in a country when it was in fact exercised or implemented[39] (for example in countries where the drugs are sold. Therefore is it the place where the agreement was exercised, being at the same time the affected market). The first interpretation may however be problematic — it would not be surprising in my understanding if we discovered that the meetings took place in several jurisdictions, following correspondence, emails etc. And as in general in the competition law regulation the effects — doctrine is often a basis of setting rules (see also art. 6(3) of Rome II Regulation), perhaps the place of exercising the agreement would be proper. If therefore the reverse-payment agreement was settled in Germany but the effects of it are in France, I would say

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of EC competition law. In: *Private enforcement of EC Competition Law*. Ed. J. Basedow. Alphen aan den Rijn, Kluwer Law International, 2007, p. 235 et seq.

[35] See *Shevill* C/68/93; *eDate* C-509/09.

[36] See for example *Dumez*, C-220/88; *Marinari*, C-364/93.

[37] See also J. Fitchen: *Allocating Jurisdiction in Private Competition Law Claims within the EU*. 13 "Maastricht Journal of European and Competition Law" (2006), p. 398 et seq.; J. von Hein: *Protecting victims of cross-border torts under Article 7 no. 2 Brussels I-bis: towards a more differentiated and balanced approach*. "Yearbook of Private International Law" 2014/2015, 2016, vol. 16, p. 244 et seq.

[38] J. von Hein: *Protecting victims of cross-border torts*..., p. 250.

[39] See I. Lianos, P. Davis, P. Nebbia: *Damages for the Infringement of EU Competition Law*..., p. 316—317.

that the French court should have the jurisdiction. If of course the agreement has effects on more markets (e.g. in France, Germany, Poland, Belgium) all of the national courts could have jurisdiction in the discussed sort of cases. It stems from the fact that all the cartel — members may exercise the agreed rules on different markets. However in the *CDC-case* the CJEU actually ruled that it is the place where the cartel was concluded, causing the higher prices to be paid (although sometimes it might be difficult to discover). This reasoning is however doubtful — the place of concluding of an antitrust agreement might be quite random, and it should not matter where such an agreement was discussed upon or finally concluded, but the effects of it should determine jurisdiction. And these can be only established when discovering where the terms of for example a price — cartel were actually implemented (it is usually the country in which the member of a cartel is acting[40] [usually that is also his place of residence]). The latter interpretation is in consistence with purpose of art. 6(3) of Rome II Regulation.

Apart from that the restraint of competition law in the pharmaceutical sector may be the effect of patent-abuse such as creating patent-thickets (or clusters). Again the notion of "the place of the event" might be understood in different ways. If for example the exclusionary rights stemming from patent are only registered in one country (which is probably unlikely in the pharma-sector), that country when the patent-holder abuses his rights is the country of the harmful event (the damage being for example no price — drop caused by delaying the generic drugs enter the market). On the other hand however the patent-exclusivity usually encompasses several countries (in which the single patent or a thicket of patents are registered). As a result the restraint of competition may in fact result in damages in several countries. Therefore the jurisdiction of each of these countries could be established. What is the main difficulty in such cases is the fact that it might be impossible to establish "one" place of the harmful event (and it is not even a case when several events cause damage).

As the CJEU established, the notion of "place of harmful event" can be also understood as the place where the effects of such for example tortious behaviour occurred. Damage in cartel cases or other cases of restraints of competition may have different forms, I will only focus on the actual damage and loss of profits, as being defined by the Directive.

[40] See M. Szpunar: *Private enforcement a prawo prywatne międzynarodowe*. In: *Prawo konkurencji. 25 lat. Pierwszy Polski Kongres Prawa Konkurencji*. Ed. T. Skoczny. Warszawa 2016, p. 40.

It is possible that the claimant's place of habitual residence is different than the market affected by the acts breaching competition law. For example a claimant might have bought the drugs by a higher price in a country of his vacation or temporary workplace. Of course in most of the cases we may assume that the loss will be born in the country of the victim's residence. Another example to support this assumption can be a situation in which a non — individual is harmed (it can be a state or national health authority who reimburses the drugs; it may be also the wholesaler buying drugs on the higher prices (if of course it does not pass the difference in price onto the end-buyers, such as patients or hospitals or even insurance companies, covering for examples expenses within the life-insurance contract)). The complexity of the discussed forms of restraints of competition in the pharmaceutical sector leads to conclusion that each case should be discussed separately. The same was ruled by CJUE in the *CDC* case (the place of damage should be established separately to each of the claimants). In most of cases it is the victim's habitual residence being the place of damage (for example the patient usually buys drugs in his country of residence), especially when we also talk about the damage of the wholesalers (one can have only one place of residence although of course may well perform his business activities also outside this country, via for example the online-pharmacy services), the national health authorities or other business entities such as insurers etc.

As the CJEU established in both *Shevill*[41] and *eDate*[42] cases, the court of the place of the event can hear the whole case (so the whole damages claims based on the national law implementing the Directive or any other national law, applicable according to Rome II Regulation, discussed later), however if the loss is sustained in several countries, the courts of each of these countries have jurisdiction over the damages claims encompassing only loss accrued in each country. Inevitably therefore not only when it comes to establishing the applicable law (see further remarks), we might actually face the application of the mosaic principle when es-

[41] C-68/93.

[42] C-509-09 (in this case however the CJEU ruled that for the purposes of establishing jurisdiction in cases of infringements of personality rights on the Internet, the claimant may sue either before the courts of the Member State in which the publisher of that content is established or before the courts of the Member State in which the centre of his interests is based. That person may also, instead of an action for liability in respect of all the damage caused, bring his action before the courts of each Member State in the territory of which content placed online is or has been accessible. Those courts have jurisdiction only in respect of the damage caused in the territory of the Member State of the court seized).

tablishing jurisdiction (different courts might have the jurisdiction and different national laws may be applicable to the "parts" of the case).

Therefore, for practical reasons both the Brussels I-bis and the Rome II provide some rules allowing the avoidance of the mosaic-principle. In cases when the defendants are jointly liable it is possible to establish the jurisdiction of a court of domicile of one of the defendants, provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings (art. 8(1) Brussels I-bis; *the anchor defendant rule*)[43].

Of course the parties of a case may well choose the court to decide on claim for damages (*prorogatio fori*). If they decide to do so, the general (and special) rules on jurisdiction are excluded. According to art. 25(1) Brussels I-bis if the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction[44]. The difficulty in applying this provision is however quite visible — if the claim for damages is not in connection with a particular legal relationship (so when for example a patient brings a claim for damages) then one may doubt whether such an agreement is valid. If on the other hand the claim arises between the members of an anti-competitive settlement, then this provision could be applied. When it comes however to the claims of victims outside the cartel or any other forms of antitrust behaviour, this provision is unlikely applicable in the discussed area. It is difficult to imagine a court agreement between a patent-holder creating a patent-thicket and a patient who had to pay a higher price for the drugs. As there is no existing legal relationship between the parties, no choice of jurisdiction is allowed. On the other hand however, when one takes into account the special rules on reimbursement of drugs (pol. refundacja), where the price is fixed by the national health authority or ministry or health, following the earlier negotiations, it can be said that if the parties agree on a jurisdiction for future disputes, this agreement could encompass the claims for damages as well (having a tortious source of action).

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[43] This rule should be applied to both follow-on and stand-alone actions — see I. Lianos, P. Davis, P. Nebbia: *Damages for the Infringement of EU Competition Law*..., p. 321.

[44] Jurisdiction agreements between EU and non-EU domiciled parties designating the courts outside EU remain outside the scope of the Brussels I-bis and shall be interpreted under their national law.

3. Applicable law

It is understandable that many anti-competitive actions in the pharmaceutical sector may have a cross-border character. Not only the biggest producers of drugs exercise their business activities globally or internationally, but also the effects of antitrust behaviours (even if taken only in one country) may have transnational range. That provokes questions not only in the field of jurisdiction but also applicable law. It is not my goal to analyse thoroughly the competition law rules, especially that in most EU countries they seem similar (it is caused by the fact that the EU rules in this area are binding directly), (see art. 101 — TFEU, Regulation 1/2003). Moreover these rules should be treated as mandatory, so they will be applied no matter which national law is applicable in a certain case[45].

It is also stressed in the literature that most of the claims for damages caused by anti-competitive behaviour are *follow-on* actions, so brought after a competition authority (European or national) had established an infringement. If it is so, the requirement of illegality is met for the purposes of civil claims case[46]. Before the Directive was implemented one could have argued that the *stand-alone* actions would happen rarely. Nowadays however that might not be the case in all circumstances, especially as the Directive provides that "anyone" can claim damages. Of course when the competition authority establishes the illegality of certain acts it is easier — for the illegality prerequisite — to bring a private (or class — if possible) action for damages. For these reasons probably the majority of future claims for damages, being a new tool of private enforcement of competition law, will also be of the *follow-on* type of claims.

As for the applicable law the discussed claims should be understood as non — contractual [I will not discuss the contractual obligations as these seem to be very rare in the pharma-sector]. The Directive itself harmonises only certain aspects of claims for damages in cases of restraints of competition (e.g. the meaning of damage, joint and several

[45] See also F. Munari: *Issues on Jurisdiction and Applicable law in Private Antitrust Enforcement Cases*..., p. 144; I. Lianos, P. Davis, P. Nebbia: *Damages for the Infringement of EU Competition Law*..., p. 354—355; T. Rosenkranz, E. Rohde: *The law applicable to non-contractual obligations arising out of acts of unfair competition and acts restraining free competition under Article 6 Rome II Regulation*. "Nederlands International Privaatrecht" 2008, vol. 4, p. 436; M. Danov: *Jurisdiction and Judgment in Relation to EU Competition Claims*. Hart Publishing 2011, p. 15.

[46] See M. Szpunar: *Private enforcement a prawo prywatne międzynarodowe*..., p. 41.

liability, limitation periods). This act does not harmonise either the regime of liability or specific rules of compensation such as the assessment of damages, the causal link etc. It only provides for the definition of losses, some presumptions and the minimum periods of limitation. Therefore other specific issues are governed by national laws (see also art. 15 Rome II). Consequently on one hand we can state that within the EU countries' law some issues will be ruled out in the same manner, so in general if the applicable law is of a EU-country, the outcome as to the compensation seems quite predictable. On the other hand however, since the application of the Rome II is universal (see art. 3)[47], we may easily imagine a case when the applicable law is of a non-EU country. As a consequence the assessment of loss, the limitation periods etc. might be ruled differently.

Assuming that the court seized is an EU-member court, the Rome II applies to determine the applicable substantive law. According to art. 6(3)a the law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected. However when the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seized, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises; where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction

[47] However a closer look at the wording of art. 6(3) leads to a conclusion that only art. 6(3)a is universal, and art. 6(3)b is not. See also M. Danov: *Jurisdiction and Judgment in Relation to EU Competition Claims*…, p. 168; T. Holzmuller, Ch.V. Koeckritz: *Private enforcement of competition law under the Rome II Regulation*. "Global Competition Litigation Review" 2010, p. 91; S. Francq, W. Wurmnest, in: *International Antitrust Litigation. Conflict of Laws and Coordination*. Eds. J. Basedow, S. Francq, L. Idot. Oxford and Portland, Oregon 2012, p. 100—101 (the Authors stress that art. 6(3)b was created to promote private enforcement of competition law within the EU); R. Plender, M. Wilderspin: *The European Private International Law of Obligations*. 4th ed. by M. Wilderspin, 2015, p. 646; M. Ilmer: *Rome II. Pocket Commentary*. Ed. P. Huber. Munich 2011, p. 184; M. Wilderspin: *The Rome II Regulation; Some policy observations*. "Nederlands International Privaatrecht" 2008, no. 4, p. 410—411; E. Rodriguez Pineau: *Conflicts of Laws comes to the rescue of competition law: the new Rome II Regulation*. 5 "Journal of Private International Law" August 2009, p. 320 (the Author rightly argues that art. 6(3)b is limited to Member States' however territorial limitation makes perfect sense when enforcing EU competition laws, but there are no reasons in art. 6 to limit the application of art. 6 only to EU-related cases).

of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court (art. 6(3)b).

The general rule follows the "effects doctrine", taking into account the result of acts restricting competition[48]. What is important is that this rule is not an exception to art. 4 (*lex loci damni*) but a clarification of it (see recital 21 of Rome II which is also emphasizing that such rule aims also at ensuring that the market economy functions properly[49]). The connecting factor (the affection of the market) rightly encompasses the impact rule and not the source-of-obligation rule. These are the effects to the market that connect the tort with a national law, and not for example the place where the agreement of reverse-payment was concluded. However for the purposes of interpreting art. 6 of the Rome II Regulation, under the "effects doctrine" mentioned earlier, the place where the effects are produced does not necessarily always correspond to the place where the damage has occurred[50].

Since art. 6(3) is a "clarification" of art. 4 of Rome II, which differentiates between three elements of a distance-delict (act giving rise to the liability, the injury, the consequential loss), the connecting factors must be interpreted thoroughly in the discussed here matters. In many delicts both the place of action and the place of damage should not cause many problems with interpretation. However in the antitrust cases it does not always seem so clear. For example if we look at a cartel in a form of reverse — payment settlement in the pharmaceutical sector, it may not be easy to establish the place of act giving rise to the liability (I believe it is not the place where the agreement was concluded, but where it is exercised). The same difficulties may arise when applying the factor of place of damage, especially when it is a consequential (indirect)

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[48] See also S. Augenhofer, in: *Rome Regulations. Commentary.* Ed. G.P. Callies. Second edtition. Alphen aan den Rijn, Kluwer Law International 2015, p. 598—599. Undoubtedly the wording of art. 137 of Swiss Private International Law statute of 18 Dec. 1987 can serve as a good example of the effects doctrine. According to section 1 of that article *claims based on a restraint of competition are governed by the law of the state in whose market the restraint has direct effects on the injured party.* Swiss act uses the notion of "direct effects" of the act restraining competition, excluding the indirect consequences of e.g. a cartel agreement of other forms on antitrust behaviour.

[49] The wording of art. 6(3) takes into account the specific character of the non — contractual obligations being a consequence of restraints of competition. These actions might be condemned by the public law instruments as well as give rights to damages (private enforcement of competition law). Article 6(3) applies only to private consequences of breaches of antitrust law.

[50] F. Munari: *Issues on Jurisdiction and Applicable law in Private Antitrust Enforcement Cases*..., p. 154.

loss. If we applied art. 4 this could not be a connecting factor relevant for deciding on which law should be applied (only the direct damage is of importance in this matter[51]), but if we apply art. 6(3) in connection with the goals of the Directive, also the indirect losses should be taken into account when establishing the law applicable (for example for the claims of indirect purchasers of drugs). This leads to a conclusion that art. 6(3) is not only a simple clarification of art. 4 but a separate rule[52]. Moreover there is no requirement in art. 6(3)a of directness of damage (contrary to art. 6(3)b). In the end the mosaic principle will occur when establishing the applicable law based on art. 6(3)a, especially for claims of indirect purchasers (even a small group of patients for whom the drugs were imported on a higher price).

And when we talk about the abuse of dominant position by for example creating a patent-thicket, clearly in many cases affecting more than one market, the outcome seems to be similar, what is connected with the territoriality of intellectual property rights. Since the exclusivity of the IP rights is connected with the country of for example registration, the effects can be only understood in the discussed matters as emerging in countries when the exclusivity stemming from patents is maintained[53]. Therefore if because of a patent-cluster the prices of drugs remain high, the market affected is the market of a country (for the purposes of choosing the applicable law we must turn to the geographical market criterion[54] being at the same time the system of some national law — see also below) where the loss is sustained (understood as a difference in price). If therefore patients are affected by higher costs (or more simply — no

[51] See also CJEU case *Marinari*, C-364/93 in which — for the purposes of art. 5(3) Brussels I — the court decided that the meaning of the "place of damage" does not include the place where the victim suffered financial damage arising from the initial damage and suffered by his in another contracting state; see also *Bier* case, C-21/76.

[52] See also M. Hellner: *Unfair competition and acts retricting free competition. A commentary on Article 6 of the Rome II Regulation*. "Yearbook of Private International Law" 2007, vol. 9, p. 54.

[53] It is of course necessary to determine whether the claim for damages is based on restriction of competition or infringement of IP right. See also T. Rosenkranz, E. Rohde: *The law applicable to non-contractual obligations arising out of acts*…, p. 437.

[54] Some Authors point out that the definition of the market in the stand — alone cases must be construed by the domestic court, being a preliminary matter to be resolved — see J. Fitchen: *Choice of law in international claims based on restrictions of competition: article 6(3) of the Rome II Regulation*. 5 "Journal of Private International Law", August 2009, p. 362. Moreover in some cases the notion of "market" is different from the "relevant market" for the purposes of competition law infringement — see I. Lianos, P. Davis, P. Nebbia: *Damages for the Infringement of EU Competition Law*…, p. 367—368.

price-drop), this market onto which the original drugs were offered is the affected market when applying art. 6(3)a Rome II. The same outcome is reached when the victim is an insurance company covering costs of treatment by a life — insurance contract terms or a national health fund reimbursing fully or partially the costs of drugs, as well as for example hospitals buying drugs on higher prices (the same goes to the wholesalers). The effects should be understood as taking place in the country of residence of the victim or where the victim exercises its business activities (wholesalers) or acts within its public authority.

The transnational character of many restraints of competition[55] in the pharmaceutical sector inevitably leads — by the wording of art. 6(3)a — to the necessity of applying multiple laws in one case[56]. If the antitrust behavior causes damages on several markets (which also according to the Directive is of no surprise), many national laws can be applicable, deciding on the losses sustained in those markets (so in the geographical sense).

As applying multiple laws to the "parts" of damages sustained on the affected markets at stake can lead to difficulties and different outcomes, the European legislator provides for a rule aiming at "concentrating" the case through applying one of the possibly applicable laws. According to the wording of art. 6(3)b of Rome II, when the market is, or is likely to be, affected in more that one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seized, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises. Where the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court[57].

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[55] Recital 23 of the Rome II Regulation defines the concept of "restriction of competition" as agreement between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State of within the internal market, as well as the abuse of dominant position within a Member State of within the internal market (if these practices or abuses are prohibited by art. 81—82 of the TFEU or the law of the Member State). In other words both infringements of EU or domestic competition laws fall within the scope of art. 6.

[56] See also J. Fitchen: *Choice of law in international claims based on restrictions of competition: article 6(3) of the Rome II Regulation…*, p. 357.

[57] The court seized based on art. 8 Brussels I-bis.

On one hand this provision allows the claimant to choose the law applicable (*lex fori*), on the other however its application is limited only to EU-members' national laws. According to this rule the same claim may be adjudicated according to the same applicable law, irrespective of how many national markets (within the EU) have been affected[58]. If therefore one of the markets affected is outside the EU, this rule cannot be used[59] (so art. 6(3)a applies respectively). Moreover art. 6(4) denies any relevance to party autonomy, so the determination of law applicable by art. 6(3) cannot be derogated by the parties. This stems from the fact that both unfair competition and restraints to competition to which art. 6 applies, touch upon also public interests and the interests of third parties. In spite of that lack of *lex voluntatis* has been criticised in the doctrine[60].

It is not clear how the notion of "direct and substantial effect" should be interpreted for the purposes of art. 6(3)b. Only some guidance can be derived from the *de minimis principle* applied in EU antitrust law, meaning that EU law is not applicable to agreements of minor importance[61]. For the purposes of art. 6(3)b [remembering that it is an exception to the general rule] that could also mean that the market of the court seised is so strongly affected by the act restricting the competition, that its law should be applied (also serving as a practical solution to "concentrate" the case in one court applying only one national law). What can be important is the market-position of the defendant in the market of a product — for example it can be established that the original drug is the most often bought drug or the most effective one (therefore a patent-thicket aims at delaying introduction the generic drug onto the market). Moreover art. 6(3)b is silent as to the case where there are multiple claimants. It is to be decided by *lex fori* who of them and how should decide on the application of *lex fori*[62].

So if the prerequisites of avoiding the mosaic rule cannot be met, the courts will have to apply several different national laws (both EU and non-EU countries). This issue might however cause another problem connected with the wording of art. 11 of the Directive (art. 5 of the Polish

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[58] See F. Munari: *Issues on Jurisdiction and Applicable law in Private Antitrust Enforcement Cases…*, p. 154.

[59] See also E. Rodriguez Pineau: *Conflicts of Laws comes to the rescue of competition law: the new Rome II Regulation…*, p. 324—325.

[60] See A. Dickinson: *The Rome II Regulation: the law applicable to non-contractual obligations*. Oxford 2008, p. 426; R. Plender, M. Wilderspin: *The European Private International Law of Obligations*. 4th ed. by M. Wilderspin, 2015, p. 618—619.

[61] See CJEU cases C-5/69, joined cases C-215/96 — C-216/96.

[62] See J. Fitchen: *The Applicable Law in Cross-Border Competition Law Actions and Article 6(3) of Regulation 864/2007*. In: *Cross-border EU Competition Law Actions*. Eds. M. Danov, F. Becker, P. Beaumont. Oxford, Portland, Oregon 2013, p. 324.

Act respectively), providing for joint and several liability of the defendants, be it for example the parties of the reverse-payment settlement. If amongst the laws applicable are laws of the Member States, the rules of especially recourse will be similar. However if one or more of the applicable national laws are of non-EU countries, the national courts or even the CJEU will have to decide on how to apply these laws when they differ as to the recourse or basis of the joint and several liability. Perhaps the answer lies in the concept of adaptation of the laws to be applied.

The mosaic-principle may also rise questions as to the scope of compensation. When we read the Directive (art. 3) it clearly states that the victim can claim both for the actual loss (*damnum emergens*) and the lost profits (*lucrum cessans*), as well as the interest (from the day when harm occurred until the time when compensation is paid — see recital 12), leaving however open the question of permissibility of punitive or exemplary damages, known in some legal systems. On one hand the CJEU left this to national laws (see *Manfredi*) [however the case was decided before the Directive was enacted], on the other — the Rome II ambiguously states that — depending on the circumstances of the case and the legal order of the Member State of the court seized (*lex fori*) — non — compensatory exemplary or punitive damages of an excessive nature to be awarded, may be regarded as being contrary to the public policy (*ordre public*) of the forum (recital 32). It is clear that these two pieces of EU legislation are not well agreed. The Directive puts an impact on compensatory law, deciding at the same time that for example the assessment of damages, the influence of the level of fault on the circumstances will be decided by national laws (the harmonization is of a minimum character). The Rome II Regulation on one hand does not exclude to possibility of granting non — compensatory damages, however it limits the level of such damages as possibly contrary to the public policy of the forum (see art. 26). In other words, according to Rome II, only the "excessive" punitive damages could be interpreted as contrary to the public policy. Moreover art. 2 of the Directive states clearly that full compensation under the Directive shall not lead to "overcompensation", whether by means of punitive multiple or other types of damages. These issues will be therefore decided on case — by — case basis in the future[63], especially when we recall multinational cases, falling also outside the EU (prohibition of overcompensation does not influence directly in these occasions, so applying art. 15 in connection with recital 32 of Rome II may lead to a conclusion that *lex fori* may

[63] See also M. Danov: *Awarding exemplary (or punitive) antitrust damages in EC competition cases with an international element — the Rome II Regulation and the Commission's White Paper on Damages*. "European Competition Law Review" 2008, p. 433 et seq.

also play an important role when assessing damages in antitrust cases in general). National courts, taking these into account, may also refuse to recognize or enforce the part of the judgment awarding exemplary (or punitive) damages, as long as they are contrary to their public policy (see art. 45—46 Brussels I-bis)[64].

[64] See also I. Lianos, P. Davis, P. Nebbia: *Damages for the Infringement of EU Competition Law*..., p. 372—373. That is the case in Switzerland: according to art. 137(2) of Swiss Private International law if claims based on a restraint of competition are governed by foreign law, no compensation may be awarded other than that which would be awarded for a restraint of competition pursuant to Swiss law. English wording in B. Dutoit: *Droit international privé suisse. Commentaire de la loi fédérale du 18 décembre 1987*. 4ème édition. Bâle, Genève, Munich 2005, p. 489. This provision contains a specific clause of public policy, treating the Swiss law of damages as having mandatory character.