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Title	The possible exclusion of anti-trust matters from the Convention as reflected in Article 2(1)(p) of the 2018 draft Convention	
Author	Cara North, Consultant to the Hague Conference on Private International Law, with the assistance of the Permanent Bureau	
Objective	- To provide an overview of the different types of anti-trust matters and some of their unique features and considering whether, and to what extent, the matters identified will fall within the scope of the draft Convention under Article 1(1); - To describe the circumstances in which an anti-trust judgment will circulate under the Convention if such matters were included and describe the possible consequences of a complete exclusion of anti-trust matters under Article 2(1).	
Annexes	n.a.	
Related documents	n.a.	

I. Introduction[1]

1. During the Special Commission on the Judgments Project in May 2018, a proposal was made to exclude anti-trust (competition) matters from the scope of the future Convention by adding the words "anti-trust (competition) matters" to Article 2(1)(p) of the draft Convention.[2]

2. Following discussion of the proposed exclusion, delegations noted the need for further reflection and consideration of this issue. It was decided that the Special Commission would proceed on the basis that the possible exclusion be included, but in square brackets, and that an informal working group would be established to further consider this issue in preparation for the Diplomatic Session in June 2019.[3]

3. The purpose of this note is to facilitate and inform the discussion of that informal working group as well as other discussions prior to the Diplomatic Session by:

(i) providing an overview of the different types of anti-trust matters and some of their unique features and considering whether, and to what extent, the matters identified will fall within the scope of the draft Convention under Article 1(1); and

(ii) describing the circumstances in which an anti-trust judgment will circulate under the Convention if such matters were included and describing the possible consequences of a complete exclusion of anti-trust matters under Article 2(1).

4. This note does not list or consider the various options for the possible exclusion of anti-trust matters as it is envisaged that the informal working group will consider and discuss the possible exclusion of anti-trust (competition) matters and provide a report to the Diplomatic Session.

5. Before moving on, it is important to set out the parameters of this topic. As noted in the Revised Draft Explanatory Report to the draft Convention, the possible exclusion refers to 'anti-trust (competition) matters'.[4] This is because different terminology has been adopted in different jurisdictions for rules of similar (although not identical) substantive content on this topic. For example, in the United States of America ("**US**"), the standard term used is 'anti-trust'; while in Europe the standard term used is 'competition law'. Consequently, both terms were adopted in the exclusion from scope under the *Convention of 30 June 2005 on Choice of Court Agreements*[5] ("**the 2005 Choice of Court Convention**") and both have been used for the possible exclusion under the draft Convention.

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1 This Note was kindly prepared by Ms Cara North, Consultant to the Hague Conference on Private International Law, with the assistance of the Permanent Bureau. The author and the Permanent Bureau are grateful to the United States of America, the European Union and Prof. Tanja Domej, chair of the Informal Working Group 5 on the Possible Exclusion of anti-trust (competition) matters, for their assistance in the preparation of this Note.

2 This proposal was made by the delegation from the Republic of Korea and can be found in Work. Doc. No 198. The proposal records various reasons for the proposed exclusion.

3 *Aide memoire* of the Chair of the Special Commission of May 2018, paras 25 and 32; See also Minutes of the Fourth Meeting of the Special Commission on the Recognition and Enforcement of Foreign Judgments (24-29 Mays 2018), Minutes Nos 6 and 7, paras 67-70 and paras 2-13 respectively (these documents are available on the Secure Portal of the HCCH website at < www.hcch.net > under "22nd Diplomatic Session".

4 See "Judgments Convention: Revised Draft Explanatory Report", Prel. Doc. No 1 of November 2018 for the attention of the Twenty-Second Session on the Recognition and Enforcement of Foreign Judgments (18 June-2 July 2019) ("**Revised Draft Explanatory Report**"), paras 61-62 (see path indicated in note 3). As was concluded at the 2018 Special Commission meeting, the Revised Draft Explanatory Report would include, in square brackets, text based on T. Hartley & M. Dogauchi, "Explanatory Report on the 2005 Hague Choice of Court Convention", in *Proceedings of the Twentieth Session* (2005), Tome III, *Choice of Court Agreements*, Antwerp – Oxford – Portland, Intersentia, 2010, paras 60-63 (hereinafter, "Hartley/Dogauchi Report").

5 See Art. 2(1)(h) of the 2005 Choice of Court Convention.

Further, the exclusion is not intended to cover "unfair competition" (in French, *concurrence déloyale*) – for example, misleading advertising or passing one's goods off as those of a competitor."[6]

6. For ease of reference, this paper refers to both anti-trust matters and competition law interchangeably; unless otherwise stated, the use of either term is intended to cover both anti-trust and competition law.

II. Types of anti-trust (competition) matters

7. Historically anti-trust (competition) law existed in few jurisdictions[7] and was largely an unfamiliar area of law for many jurisdictions. Today, however, competition law regimes exist in almost all jurisdictions around the world.[8] While different jurisdictions use different terminology and anti-trust (competition) laws have some distinguishing features globally, for the most part they all share the same objective and largely common characteristics.

8. The primary objective of competition law has been recorded as to "maintain and encourage the process of competition in order to promote efficient use of resources while protecting the freedom of economic action of various market participants."[9] This is achieved in most jurisdictions by:

(i) a number of prohibitions on certain types of anti-competitive market arrangements between competitors and associated conduct (*e.g.,* collusion between market operators by way of price-fixing, market-sharing, bid-rigging or agreements to limit production or sales *etc.*);

(ii) prohibitions or restrictions on the unilateral conduct of market operators (*e.g.,* abuse of dominance, such as predatory pricing, use of market power to hinder the competitive process *etc.*);

(iii) prohibitions on mergers and acquisitions that harm competition; and

(iv) a number of jurisdictions also provide for the regulation of proposed mergers.[10]

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

A. Merger control by regulators

10. In many legal systems, competition law provides for the regulation of proposed mergers and acquisitions by enabling competition law authorities to investigate mergers between market operators

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[6] Hartley/Dogauchi Report, para. 60.

[7] Robust anti-trust litigation has existed in the US since the passing of the *Sherman Act* in 1890, longer than any other jurisdictions. For an overview of the history of anti-trust litigation in the US, see D.J. Gerber, *Global Competition: Law, Markets, and Globalization*, Oxford, Oxford University Press, 2010, pp. 122-124.

[8] For a concise overview of the different types of competition law regimes see Baker McKenzie, *Global Guide to Competition Litigation*, 2018 available at < https://f.datasrvr.com/fr1/818/58870/DSC34493_Global_Guide_to_Competition_Litigation_April_11.pdf > (last consulted on 13 December 2018).

[9] OECD, Centre for co-operation with non-members – Directorate for financial, fiscal and entreprise affairs, Global Forum on Competition, "The Objectives of Competition Law and Policy - Note by the Secretariat", 29 January 2003, p. 2 available at < http://www.oecd.org/daf/competition/2486329.pdf > (last consulted on 13 December 2018).

[10] M. Dabbah, *International and Comparative Competition Law*, Cambridge, Cambridge University Press, 2010, p. 13. For a description of the different types of anti-competitive behaviours, see R.S. Khemani and D.M. Shapiro, *Glossary of Industrial Organisation Economics and Competition Law*, Paris, OECD Editions, 1995, in particular see para. 10 available at < http://www.oecd.org/dataoecd/8/61/2376087.pdf > (last consulted on 13 December 2018).

that could be harmful to competition[11] or requires prior approval from a regulatory authority (usually a competition authority) before a merger can complete. A typical example of merger control is a competition authority investigating circumstances where one company proposes to acquire its main competitor with the result that the market will become less competitive, and consumers may be required to pay a higher price. In these types of competition law matters the focus is on the public interest and the maintenance of a competitive market. [12]

11. Such matters are regulatory in nature; they will therefore fall outside the scope of the Convention as they are not "civil or commercial matters" as provided in Article 1(1) of the draft Convention. They will also likely fall outside the scope of the draft Convention by virtue of the definition of judgment in Article 3(1)(b) of the draft Convention (*i.e.,* "any decision on the merits given by a court").

B. Public enforcement

12. The public enforcement of anti-trust matters involves the investigation and enforcement by State authorities of anti-competitive conduct such as the types of conduct listed at paragraph 8(i), (ii) and (iii) above. Public enforcement of competition law violations can be brought as either administrative, criminal or civil law actions by the regulatory authority.

13. Key distinguishing features of the public enforcement of anti-trust matters, as compared to private enforcement, (other than the fact that it is undertaken by a public regulatory authority such as a financial or competition law authority) are:

(i) the broad investigatory powers of the regulatory authorities. Such powers include, for example, the power to compel the giving of information and documentation relating to any potential breach of anti-trust laws, entering a premise with or without a warrant and compulsory interview powers.[13]

(ii) the numerous powers of the regulatory authority, or of a court on the application of a regulatory authority, in terms of sanctions which can take the form of one or more of the following: substantial civil penalties and fines (*e.g.,* imprisonment, monetary fines or the disqualification of directors from serving as a company director for a period), compensation, injunctive relief, divestment orders and/or declarations (*e.g.,* a declaration that an agreement is void and unenforceable).[14]

14. Again, as a consequence of their public regulatory nature, such matters will also be excluded from the scope of the draft Convention as they will not fall within the definition of "civil or commercial matters" in Article 1(1) of the draft Convention. This point is made in the Revised Draft Explanatory Report which provides:[15]

> "The key element distinguishing public law matters from "civil or commercial" matters is whether one of the parties is exercising governmental or sovereign powers that are not enjoyed by ordinary persons. It is therefore necessary to identify the legal relationship between the parties to the dispute and to examine the legal basis of the action brought before the court of origin to establish whether the judgment relates to civil or commercial matters. If the action derives from the exercise of public powers (or duties), the draft Convention does not apply. A

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[11] R. Whish and D. Bailey, *Competition Law* (Chapter: '*Overview and Practices Controlled by Competition law*'), Oxford, Oxford University Press, 8th ed, 2015, p. 3.

[12] *Ibid.* p. 3.

[13] There can also be severe penalties for non-compliance with an investigation by a competition law authority.

[14] See K. Hüschelrath and S. Peyer, "Public and Private Enforcement of Competition Law: A Differentiated Approach", *ZEW Discussion Papers*, Vol. 13-029, pp. 3-4.

[15] Revised Draft Explanatory Report, para. 29.

> typical example of public power is the capacity to enforce a claim by way of administrative enforcement proceedings with no need for any court action. Thus, for example, the draft Convention does not apply to enforcement orders brought by governments or governmental agencies such as anti-trust/competition authorities or financial supervisors, which seek to ensure compliance or to prevent non-compliance with regulatory requirements.[16] Nor does it apply to judgments on judicial actions brought either to enforce or appeal such orders […]."

15. It is also unlikely that a decision of the regulatory authority (as opposed to a decision by a court) will fall within the definition of "judgment" in Article 3(1)(b) of the draft Convention.

16. In some jurisdictions, it is possible for a public regulatory authority to award compensation to a private party following a decision that there has been a competition law violation. These matters would also be excluded from the scope of the Convention irrespective of whether anti-trust law matters are completely excluded from scope under Article 2(1) because, again, the decision would not be a decision "given by a court" under Article 3(1)(b) of the draft Convention. While the definition of "court" is not provided in the draft Convention, the Revised Draft Explanatory Report provides that it "must be interpreted autonomously and refers to authorities or bodies that are part of the judicial branch of a State and which exercise judicial functions."[17] The Revised Draft Explanatory Report also specifies that administrative authorities are not courts and provides examples of those administrative bodies whose decisions would not fall within the scope of the Convention due to the definition of "court" (*e.g.*, patent or trademark offices[18] or public notaries or registries).

C. Private enforcement

1. Types of private enforcement claims

17. Private enforcement, on the other hand, generally refers to litigation between private parties. These claims are normally brought either in a contractual context, or as a tort claim. As noted in the Hartley/Dogauchi Report, examples of such claims in a contractual law context would be "when a plaintiff who is a party to an anti-competitive agreement invokes the nullity of the agreement, or when a buyer seeks repayment of excessively high prices paid to his seller as a result of the latter having engaged in a price-fixing arrangement or abused a dominant position."[19] An example of a claim in a tort law context would be a claim for relief (*e.g.*, compensation) as a result of price fixing or exclusionary conduct.

18. Private enforcement matters can either be brought in what is known in many jurisdictions as standalone actions[20] or follow-on actions.

19. A standalone action is a private law claim for liability and damages and/or some other form of injunctive and/or declaratory relief in the absence of a finding by a regulatory authority or by a court on the application of a regulatory authority. In a standalone action the claimant must prove breach of the relevant competition law, causation and loss.

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[16] "Note on Article 1(1) of the Preliminary Draft Convention and the Term 'Civil or Commercial Matters'", Prel. Doc. No 4 of December 2016 for the attention of the Special Commission of February 2017 on the Recognition and Enforcement of Foreign Judgments (16-24 February 2017), para. 41 (see path indicated in note 3).

[17] Revised Draft Explanatory Report, para. 89.

[18] Although this is subject to the outcome of the informal Working Group on Intellectual Property.

[19] Hartley/Dogauchi Report, para. 62.

[20] Available for example in the Russian Federation, the US, Mexico, Australia and Egypt. However, standalone claims are not in available in other jurisdictions, such as Turkey. For more information, see Baker McKenzie (*op. cit.* note 8).

20. A follow-on action is a claim for private damages based on a prior decision on a violation of competition laws by a public regulatory body or by a court on the application of the regulator. In follow-on actions claimants are typically not required to establish an infringement; they are only required to demonstrate causation and loss.

21. In some jurisdictions, such as under European Union law for example, a finding of an infringement in a final decision by a national competition authority, or by a court on appeal from an authority, will be binding on national courts of that Member State.[21] Some competition laws also provide for the possibility to stay of proceedings where a claim is pending before a regulatory authority in its jurisdiction; the court may stay the proceedings to await the outcome of the regulatory authority's decision.[22]

22. Thus, it is not uncommon for the one company that has breached competition law to have received a fine imposed or sought by a competition law authority in one or multiple countries as well as being required to pay damages as a consequence of a private enforcement action. However, as stated above, it is only the judgments resulting from private enforcement actions that will fall within the scope of the draft Convention.

2. Who can bring private enforcement proceedings?

23. Private enforcement proceedings are generally litigated between private parties. However, there is a growing trend[23] toward, and in some jurisdictions a long-established tradition[24] of, private enforcement actions being brought by way of class action (also known as group proceedings or collective redress). The purpose of these proceedings is to enable individuals who have suffered damage because of anti-competitive behaviour, and who are otherwise unable to bring proceedings on their own, to gain access to meaningful relief.

24. Class action proceedings can generally be brought either on behalf of individuals by, for example, a consumer organisation, or by simply grouping individual claims. There are some jurisdictions in which the regulator is also able to bring a representative claim seeking compensation for affected persons.[25] There are differences globally in approaches taken to class action claims, in particular whether the specific regime provides for the convening of a class on an opt-in or opt-out basis. For

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[21] Art. 9(1) of the Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union Text with EEA relevance ("**Antitrust Damages Directive**").

[22] See for example Art. 16 of European Union Council Regulation No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Arts 81 and 82 of the Treaty provides that Member States should avoid giving decision which would conflict with a decision contemplated by the Commission in proceedings it has initiated and that national courts may assess whether it is necessary to stay its proceedings pending the outcome of the decision of the EC, available at < https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32003R0001 > (last consulted on 13 December 2018).

[23] In 2013 the European Commission encouraged every Member State to adopt collective and representative actions: See "Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law", *Official Journal of the European Union*, No L201/60, 2013. Following this in January 2018, the Commission published a report: "Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the implementation of the Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union law (2013/396/EU)", COM(2018) 40 final. See also the Baker McKenzie (*op. cit.* note 8) which provides that class actions are available in competition law matters in Australia, Belgium, Canada, England and Wales, France, Italy, Japan, Mexico, the Netherlands, Poland, Sweden and the US.

[24] This is common and has been prevalent in the US for example pursuant to Rule 23 of the *United States Federal Rules of Civil Procedure*.

[25] For example, in Australia private enforcement proceedings can be brought on behalf of individuals by the Australian Competition and Consumer Commission in certain limited circumstances: see section 87(1B) of the *Competition and Consumer Act 2010 (Cth).*

competition law matters, such claims are often brought as a follow-on action, but in some jurisdictions they can be brought as either a follow-on or standalone action.

25. While class actions are a growing feature of the private enforcement of competition law disputes, they are of course not limited to competition law matters and are common in other types of matters that fall within the scope of the draft Convention.[26] There do not appear to be any features of class actions in the competition context that raise distinct issues requiring separate consideration.

3. Forms of relief

26. Common forms of relief for private enforcement matters are damages, declaratory relief and injunctive relief (both interim and final). In some jurisdictions, relief in the form of an order for disgorgement of profits from the breach is also available.[27]

27. In most jurisdictions, damages are limited to loss suffered by a plaintiff as a result of the breach of competition laws, which may include loss of profits.[28] The plaintiff can be required to prove the actual loss or damage suffered and may not be entitled to recover any loss or damage that they passed on to a downstream purchaser (this is dealt with in greater detail below). Thus, the common approach is for the courts to consider the position that the claimant would have been in had the competition law violation not occurred.

28. However, in other jurisdictions such as the US, an award of multiple (*i.e.,* punitive) damages is also available. In the US, damages actions are available under section 4 of the *Clayton Act 1914.* This section gives private parties who suffered loss due to an anti-trust infringement the ability to bring an action in the federal courts against the offending firm(s) and obtain what is known as treble damages (*i.e.,* damages which are three times the actual damage suffered). Treble damages are automatic under section 4 of the *Clayton Act 1914*. In addition to treble damages, claimants may also seek recovery of their court fees.[29]

29. The awarding of multiple or punitive damages was a point of contention in earlier negotiations of the judgments project[30] and the 2005 Choice of Court Convention.[31] This is not, however, a matter unique to judgments ruling on anti-trust matters as is dealt with further below in relation to Article 10 of the draft Convention.

30. Injunctive relief can either take the form of interim or final injunctions. Other forms of relief may include cease-and-desist orders, declaring a contract void in whole or in part, varying a contract prospectively and retrospectively and an order for restitution.[32]

4. Defence of passing-on

31. The defence of passing-on in competition law matters refers to circumstances where damages suffered by a purchaser of a product which have been tainted by a cartel are reduced because the

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[26] For example, consumer law matters, product liability claims *etc*.

[27] See for example Article 34a of the German *Gesetz gegen Wettbewerbsbeschränkungen*.

[28] This is the case in Australia, Argentina and China (under SPC Provisions, Art. 14 and Anti-Monopoly Law, Art. 50).

[29] M. Dabbah *op. cit.* Note 10), p. 258.

[30] See C. Kessedjian, "International Jurisdiction and Foreign Judgments in Civil and Commercial Matters", in *Proceedings of the Twentieth Session (2005)*, Tome II, *Judgments*, Cambridge/Antwerp/Portland, Intersentia, 2013, p. 65, para 194. See also C. Kessedjian, "Recognition and Enforcement of Foreign Judgments" in J. Basedow, S. Franzq and L. Idot, *International Antitrust Litigation: Conflict of Laws and Coordination*, Hart Publishing, 2012, pp. 253-254.

[31] See L. Radicati di Brozolo, "Antitrust Claims: Why exclude them from the Hague Jurisdiction and Judgments Convention", *European Competition Law Review*, 2004, Vol. 25, No 12, p. 780, at 783-784 concluding that the provision of treble damages in the US is not a reason to exclude anti-trust matters from the scope of either the 2005 Choice of Court Convention or the original Judgments Project.

[32] A. Foer and J. Cuneo, *The International Handbook on Private Enforcement of Competition Law*, Edward Elgar Publishing Ltd, 2010, p. 495.

purchaser has passed-on those overcharges to its customer. The defence seeks to ensure that the plaintiff is compensated, but not over-compensated, for the damage suffered by not forcing the defendant to potentially pay twice for the same wrong.[33]

32. In some jurisdictions, such as under EU law for example, the passing-on defence is available, and both indirect and direct purchasers are entitled to sue for damages. There is a rebuttable presumption that passing-on has occurred in favour of the indirect purchaser if (i) the defendant has violated anti-competition laws; (ii) the violation has resulted in an overcharge to the direct purchaser of the defendant; and (iii) the indirect purchaser purchased the goods or services that were the object of the infringement.[34] EU law further provides that national courts should be able to estimate the pass-on.[35]

33. By contrast, in other jurisdictions such as the US (at the federal level), the defence of passing-on is not available.[36] Moreover, US federal law provides that damages in certain actions are only available to direct purchasers; it does not allow for damages to be recovered by indirect purchasers (*i.e.,* those who did not purchase directly from the defendant). The leading US decision on this issue is the 1977 US Supreme Court decision in *Illinois Brick Co. v Illinois.*[37] In that case the Supreme Court observed that (i) attempting to determine how much of an overcharge was passed on to the plaintiff's customer is difficult and can be affected by other market forces not related to a defendant's antitrust violation, and (ii) that allowing claims by indirect purchasers could result in defendants being faced with duplicative damages awards for both direct and indirect purchasers. The defence of passing-on is currently available under some state laws[38] and indirect purchasers may be awarded general damages.[39]

34. Where a private party obtains an award of damages in a jurisdiction that does not permit the defendant to raise a passing-on defence, an issue may arise in the requested State as to whether that judgment is treated as awarding non-compensatory damages. This issue is dealt with further below in the context of Article 10.

5. Extraterritorial application of competition laws

35. A somewhat unique feature of competition law is that anti-competitive conduct is often global in scope and undertaken by multinational market operators. Anti-competitive behaviour occurring in one jurisdiction can harm competition in markets in one or more other jurisdictions. For that reason, competition laws in a number of jurisdictions provide for extraterritorial reach of their competition laws, with the result that those laws extend to certain conduct outside the jurisdiction that harms competition in markets in that jurisdiction (an effects-based approach).[40] Antitrust laws in many countries can be applied to extraterritorial conduct. Two examples of jurisdictions with antitrust laws that can apply to extraterritorial conduct are the US and EU.

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[33] See *Sainsbury's Supermarkets v Mastercard Incorporated and others* [2016] CAT 11 for an English decision providing detailed consideration of the defence of passing-on; see also, European Commission Study on the Passing-on of Overcharges, prepared by RBB Economics and Cuatrecasas, Gonçalves Pereira, 2016, available at < http://ec.europa.eu/competition/publications/reports/KD0216916ENN.pdf > (last consulted on 13 December 2018).

[34] See Art. 14 of the EU Antitrust Damages Directive.

[35] *Ibid.*, Art. 12; See also the European Commission Study prepared by RBB Economics and Cuatrecasas, Gonçalves Pereira (*op. cit.* note 33).

[36] See the US Supreme Court decision in *Hanover Shoe v United Shoe Machinery* 392 US 481 (1968) in which the Supreme Court held that a defendant in a price fixing case could not claim in defence that the direct purchaser was not damaged because the alleged overcharge was passed on to another.

[37] 431 US 720 (1977).

[38] This is the case now in most States, including New York and California: see Dabbah (*op. cit.* note 10), p. 26o. See also Baker McKenzie (*op. cit.* note 8), pp. 3 and 204.

[39] See G.J. Benson, "Indirect Purchasers' Standing to Claim Damages in Price Fixing Antitrust Action: A Benefit/Cost Analysis of Proposals to Change the Illinois Brick Rule", 55 Antitrust L. J. 213, 214 (1986).

[40] Dabbah (*op. cit.* note 10), p. 264.

36. In the US, this issue is governed by the *Foreign Trade Antitrust Improvements Act 1982* ("**FTAIA**") which provides that US anti-trust laws will not apply to anti-competitive conduct involving non-import trade or commerce with foreign nations unless that conduct has a "direct, substantial and reasonably foreseeable effect"[41] on US trade or commerce.[42] Thus, for example, US anti-trust can apply to anti-competitive conduct that occurs outside of the US, such as world-wide cartels, where there is a "direct, substantial and reasonably foreseeable effect" on US commerce and a causal link between the conduct and the claimant. However, the US courts have held that in applying this legislation consideration should be given to the interests of other States that might be affronted by the US courts assertion of jurisdiction in a particular case.[43]

37. US case law has tended to apply this legislation narrowly. For example, a controversial issue that has arisen in the context of the extraterritorial nature of US anti-trust law is whether a claimant who has suffered damage outside the US is entitled to seek damages in the US. This question was considered by the US Supreme Court in *Hoffmann-La Roche v Empagran SA.*[44] In that case, mindful of the impact that an overexposure to treble damages claims could have on the regulation of anti-competitive conduct in other parts of the world, the Supreme Court held that as the claimants in that case had suffered harm elsewhere they could not seek damages in the US. However, the US Supreme Court did leave open the question of whether foreign plaintiffs are entitled to seek damages in US courts in circumstances where the injury suffered abroad by the plaintiff is considered to be inseparable from the domestic harm caused by the cartel to US customers.[45]

38. In the EU the issue of the extraterritorial application of EU competition law has also been raised before the European courts. There are two main tests that have developed to limit the extraterritorial reach of EU competition law: the "implementation test"[46] and the "qualified effects test".[47] The implementation test requires that for the extraterritorial application of EU competition law the anti-competitive conduct must be implemented in the EU (*e.g.,* by direct sales into the EU).[48] The implementation can be by agents, sub-agents, subsidiaries, or branches operating within the EU. The "qualified effects test" requires that anti-competitive practices have an "immediate, substantial and foreseeable effects in the EU".[49] In a 2017 ruling, the Court of Justice of the European Union clarified the relationship between the two tests and observed that EU competition law can have extraterritorial application when either test applies.[50] This is still a developing area of EU law.

39. There are other jurisdictions that provide for their competition law to apply to conduct outside their territory if the conduct affects domestic markets.[51]

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[41] Section 6a of FTAIA.

[42] See M. Huffman, "A Retrospective on Twenty-five Years of the Foreign Trade Antitrust Improvements Act", 44 Hous. L. Rev. 285, 294-98 (2007). This is also known as the "effects doctrine".

[43] See *Timberlane Lumber Co v Bank of America* 549 F2d 597 (9th Cir 1976); *Mannington Mills v Congoleum Corpn* 595 F2d 1287 (3rd Cir 1979); E. Fox "Extraterritoriality and Antitrust – Is Reasonableness the Answer?", Fordhman Corporate Law Institute (ed Hawk), 1986, p. 49 as referred to in R. Whish and D. Bailey (*op. cit.* note 11), p. 524. However, the governing law in this matter is statutory (i.e., FTAIA) which courts have held to supersede *Timberlane* and its progeny: see, e.g., *McGlinchy v. Shell Chemical Co.,* 845 F.2d 81 n. 8 (9th Cir. 1988).

[44] 542 US 155 (2004).

[45] R. Whish, D. Bailey(*op. cit.* note 11), p. 524.

[46] See Judgment of 31 March 1993, *A Ahlström Osakeyhtiö and Others v. Commission of the European Communities* (commonly known as Woodpulp I), C-89/85, EU:C:1993:120, para. 16.

[47] Judgment of 25 March 1999,, *Gencor v Commission*, T-102/96, EU:T:1999:65, para. 92.

[48] R. Whish and D. Bailey (*op. cit.* note 11), p. 528.

[49] *Gencor v Commission,* (*op. cit.* note 47)*,* para. 92.

[50] See Judgment of 6 September 2017, *Intel Corp. Inc. v. European Commission*, C-413/14 P, EU:C:2017:632, paras. 40 *et al*; See also E. Turtle and C. Sandger, "EU Overview", in Llene Knable Gotts *The Private Competition Enforcement Review*, 11th ed, Law Business Research Ltd, 2018, 4.

[51] See, for example, section 4 of the *New Zealand Commerce Act 1986* and section 5 of the *Australian Consumer and Competition Act 2010*. Each of these provisions sets out in some detail the circumstances in which conduct outside the jurisdiction is regulated by the provisions of that jurisdiction's competition law.

40. Another cross-border issue that can arise in the competition/antitrust context is that it may be possible for a private claimant to bring a claim for damages in one State (State A) in respect of conduct in another State (State B) that breaches the competition law of State B. No issue arises in relation to the extraterritorial application of competition law in such a case. This is a scenario that can and does arise in relation to many types of cross-border claim: it does not appear to give rise to any issues specific to competition law that require consideration in this paper.

III. Anti-trust judgments and the draft Convention

41. Against this background, it is helpful to consider (i) the circulation of judgments under the draft Convention if anti-trust matters are included with the scope of the Convention; and (ii) the circulation of judgments under the Convention if anti-trust matters are completely excluded from the scope of the Convention under Article 2(1).

A. Inclusion of anti-trust matters

42. As stated above, should anti-trust matters be included within the scope of the draft Convention, the draft Convention would only extend to private enforcement claims. This would include both follow-on and standalone claims brought both by or on behalf of individuals, including claims on behalf of individuals brought by a competition agency.

1. Jurisdictional filters

43. If anti-trust matters are included within the scope of the draft Convention, a judgment ruling on an anti-trust matter would potentially fall within the scope of the following jurisdictional filters: Article 5(1)(a) on habitual residence; Article 5(1)(b) on principal place of business; Article 5(1)(c) on recognition and enforcement against the person who brought the claim; Article 5(1)(d) on branch, agency or other establishment; Article 5(1)(e) and 5(1)(m) dealing with express consent; Article 5(1)(f) on tacit submission; Article 5(1)(l) on counterclaims; and Article 5(1)(g) on contractual obligations, if the judgment was given in the State in which performance of that obligation took place or should have taken place.

44. An anti-trust judgment would not circulate under the Convention under Article 5(1)(j) relating to non-contractual obligations. This is because that jurisdictional filter is limited to judgments ruling on non-contractual obligations arising out of death, physical injury, damage to or loss of tangible property. Nor would any of the other jurisdictional filters in Article 5 apply to a judgment ruling on an anti-trust matter.

45. The application of these filters would thus limit the recognition and enforcement of judgments ruling on the application of anti-trust laws. There would need to be a close connection between the defendant and the State of origin, or the defendant would need to have consented (expressly or implicitly) to the matter being litigated in that forum. In either of these scenarios, the force of a complaint by the defendant that the judgment is based on the application of the forum's competition law to the defendant's conduct invites careful scrutiny, whether that conduct occurred in the State of origin or outside it.[52]

46. Some examples of judgments that would circulate under the draft Convention include:

(i) a judgment awarding damages against a company based in the requested State arising out of cartel arrangements entered into on behalf of the company by a branch of that company in the State of origin, which breached the competition law of the State of origin; or

[52] In some limited circumstances public policy concerns may arise in the State addressed: see para. 47 below.

(ii) a judgment dismissing a claim for breach of a contractual provision on the grounds that the provision was unenforceable under the competition law of the State of origin (or under the competition law of another State that was applied by the court of origin when determining the issue of validity/enforceability, in accordance with the State of origin's choice of law rules).

2. Public policy

47. For anti-trust matters, the Article 7(1)(c) public policy ground for refusal under the draft Convention may be invoked to deal with judgments that are aimed more at regulating the market concerned as opposed to (or in addition to) compensating the claimant for loss suffered. An example of such a case may be the enforcement of a judgment applying extraterritorial anti-trust laws to award compensation for conduct in the State addressed that was lawful in that State.

48. However, it should be noted that consistent with the wording of the provision (*i.e.,* "manifestly incompatible with public policy"), the public policy exception is of course only intended to be used in a very limited number of exceptional cases.[53]

3. Relief

49. The question of treble damages in private enforcement matters would be dealt with under Article 10(1) of the draft Convention. Article 10(1) provides for refusal of recognition and enforcement in circumstances where the judgment awards damages that go beyond compensating the plaintiff for the actual loss or harm suffered (*i.e.,* in circumstances where the judgment awards punitive or exemplary damages). The issue of awarding punitive damages is of course not unique to anti-trust law matters, it also arises in the context of many other matters which fall within the scope of the draft Convention.[54]

50. Moreover, final injunctive relief – but not interim injunctive relief[55] – would be capable of being recognised and enforced under the draft Convention pursuant to the definition of "judgment" in Article 3(1)(b) of the draft Convention.

4. Declarations with respect to specific matters

51. It should also be noted that if the draft Convention includes anti-trust (competition) matters within scope, States may make a declaration under Article 19 of the draft Convention excluding such matters. Article 19 provides that "[w]here a State has a strong interest in not applying the Convention to a specific matter, it may declare that it will not apply the Convention to that matter". A declaration under Article 19 will mean that anti-trust matters would be excluded from the scope of the draft Convention for the Contracting State that made the declaration; and any other Contracting States in which recognition or enforcement of a judgment given in the Contracting State that made the declaration is sought.

52. Therefore, even if anti-trust matters are not excluded from the scope of the draft Convention under Article 2(1), anti-trust matters (or some subset of anti-trust matters) could be excluded from the scope of the draft Convention for certain States by means of an Article 19 declaration.

B. Exclusion of anti-trust matters

53. Should anti-trust matters be excluded entirely from the scope of the draft Convention, this would mean that a judgment ruling on a claim in the contractual context where a defence is raised

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[53] See discussion in the Revised Draft Explanatory Report, paras 289-290.
[54] *Ibid.*, paras 333-336.
[55] *Ibid.*, para. 87.

based on competition law, or tort claims which have competition law breaches as the object of the proceedings, would not circulate under the Convention. In other words, the victim of an anti-trust law violation who successfully obtained damages or injunctive relief could not have its judgment recognised and enforced under the Convention. Similarly, a defendant who successfully defended a claim for an anti-trust law violation could not have a judgment in its favour recognised (or an associated costs order enforced) in any other Contracting State under the Convention.

54. Where a competition law matter is not the object of the proceedings (*e.g.,* where an anti-trust matter is raised by way of defence to a breach of contract claim), Article 2(2) of the draft Convention provides that such a judgment will not be excluded from the scope of the Convention merely because the competition law issue arose as a preliminary question in the proceedings in which the judgment was given. However, this provision needs to be read in conjunction with Article 8 of the draft Convention which provides that:

(i) a ruling on a matter outside the scope of the Convention (*e.g.,* a competition law matter) shall not circulate under the draft Convention pursuant to Article 8(1); and

(ii) recognition and enforcement of a judgment on, for example, a contract claim may be refused, if and to the extent that, the judgment was based on a ruling on a matter excluded from scope (*e.g.,* a competition law matter) pursuant to Article 8(2).

55. This means that if a contract claim were to succeed because the court of origin dismissed an argument based on a competition law matter, recognition or enforcement may be refused. Similarly, if a contract claim fails because the court of origin accepted an argument based on competition law, recognition or enforcement of that decision may also be refused.

IV. Conclusion

56. It is apparent from the above analysis that, irrespective of the decision made on whether to exclude anti-trust matters entirely, many decisions in this field – in particular, decisions by regulators and court decisions resulting from public enforcement actions initiated by regulators – will be excluded from the scope of the instrument because they will fall outside the scope of the instrument under Article 1(1) of the draft Convention.

57. For those that remain, should anti-trust law matters remain within the scope of the draft Convention, a relatively limited number of judgments ruling on such matters would circulate under the jurisdictional filters found in Article 5(1) of the draft Convention and would be subject to the usual safeguards applicable to judgments ruling on either types of claims that fall within the scope of the Convention.

58. Finally, should the decision be made to exclude anti-trust matters from the scope of the Convention, again, a relatively limited number of judgments would be excluded from the scope of the Convention.

59. It is hoped that this paper will facilitate the discussion of the informal working group and other discussions prior to the Diplomatic Session on the policy question of whether to exclude anti-trust matters from the scope of the Convention.