ARTICLE 6 UNFAIR COMPETITION AND ACTS RESTRICTING FREE COMPETITION

(1) The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.

(2) Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.

(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.

(b) 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 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.

(4) The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.

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I. Introduction

1. Unfair Competition. The introduction of an independent conflict-of-laws rule for non-contractual obligations arising out of an act of unfair competition was a matter of controversy throughout the legislative procedure, with regard to the actual need for such a clause as well as its specific provisions. The regulation originally proposed by the Commission envisaged an independent conflict-of-law rule for unfair competition. In accordance with 1

Article 5(1) of the Draft Proposal, non-contractual regulations arising from an act of unfair competition were to fall under the law of the country 'where competitive relations or the collective interests of consumers are, or are likely to be, directly and substantially affected.' Article 5(2) of the Draft Proposal stipulated for acts of unfair competition affecting exclusively the interests of a specific competitor that Article 3(2) and (3) of the Draft Proposal (residence in the same country; manifestly closer connection with another country) were to apply as well.

2 Two main objections have been raised against the adoption of an independent conflicts rule for unfair competition.[1] The first argument is that a specific rule is not required in that the general conflicts rule of Article 3 of the Draft Proposal provided for an adequate regulation of competition law. The second point is that the exclusion of specific competition rules was said to be preferable because acts of unfair competition cannot be clearly differentiated from other torts.

3 Despite these objections, a conflicts rule for unfair competition was established in Article 6(1) and (2). The general rule for unfair competition is laid down in paragraph 1, according to which the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected has to be applied. Paragraph 2 contains a specific regulation for acts of unfair competition that exclusively affect the interests of a specific competitor.

4 **2. Acts Restricting Free Competition.** Unlike in the case of unfair competition, the Commission's proposal did not provide for a conflicts rule for acts restricting free competition. The original conflict rule was only to cover unfair competition. Proposals to extend Article 6 to non-contractual obligations arising out of restraints of competition and to use the same connecting factors for unfair competition and acts restricting free competition were not adopted by the Commission.[2]

5 An independent conflict-of-laws rule for acts restricting free competition was finally introduced in the legislative procedure by Article 6(3) when the Common Position was adopted by the Council.[3] The law applicable was to be the law of the country where the market is affected by an act restricting free competition, thereby establishing the effects doctrine, which had already been applied in the Member States. In the course of the legislative procedure the effects doctrine as laid down in paragraph 3 point a was amended by paragraph 3 point b which in specific cases declares the law of the country of the court seized to be applicable.

II. Unfair Competition

6 **1. Scope of Application. a. Unfair Competition.** A general definition of the concept of unfair competition has not been included in the regulation. The concept of unfair competition in Article 6 has to be interpreted autonomously; it is independent of the meanings given to it in national legislations.[4] The term must be understood comprehensively. In the explanatory memorandum of the proposed regulation, the Commission lists the

1. *Committee on Legal Affairs*, Report on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ('Rome II') COM (2003) 0427 – C50338/2003 – 2003/0168(COD), Amendment 29 – Justification (21).
2. See *Hamburg Group for Private International Law*, 'Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-contractual Obligations', RabelsZ 67 (2003), 1, 19.
3. Common Position (EC) No. 22/2006 of 25 Sep. 2006, Art. 6(3).
4. *Dickinson*, Art. 6, in The Rome II Regulation – The Law Applicable to Non-contractual Obligations (Oxford: Oxford University Press, 2008), 17.

following acts of unfair competition as examples: 'acts calculated to influence demand (misleading advertising, forced sales, etc.), acts that impede competing supplies (disruption of deliveries by competitors, enticing away a competitor's staff, boycotts) and acts that exploit a competitor's value (passing off and the like).'[5]

Acts of unfair competition in terms of paragraph 2 as listed by the Commission, which affect exclusively the interests of a specific competitor, are, for example, 'the case of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets or inducing breach of contract'.[6] 7

b. Intellectual Property Rights. In addition to the conflict rules of Article 6 for acts of unfair competition, the Rome II Regulation contains special provisions for intellectual property rights in Article 8. The differentiation between Article 6 and Article 8 poses some problems not only with respect to the complementary protection of copyright and trademarks by unfair competition law but also with respect to the protection of geographical designations of origin. Regarding **geographical designations of origin**, European and international usage indicates that they are covered by the term 'intellectual property' and their protection thus falls under Article 8.[7] The **complementary protection of copyright and trademarks by unfair competition law**, on the other hand, comes under Article 6 as it relates only to standards of conduct that do not establish intellectual property 'rights'.[8] 8

2. Acts Exclusively Affecting a Specific Competitor (paragraph 2). Paragraph 2 provides for an exception for cases in which the act of unfair competition 'affects exclusively the interests of a single competitor'. The European Commission lists the following examples for such acts of unfair competition: 'the case of enticing away a competitor's staff, corruption, industrial espionage, disclosure of business secrets or inducing breach of contract'.[9] The Commission took the view that in all these cases, the defendant's act targets a particular competitor and therefore is to be treated as 'bilateral'. Even though the defendant's conduct might also have an effect on the relevant market, this effect can be argued to be subordinate to the effect on the targeted competitor, so that it seems to be more appropriate to apply the general rules in Article 4 than the market-oriented rule in Article 6(1).[10] 9

The law applicable to such 'bilateral' acts of unfair competition is in principle the law of the country in which the damage occurs (Article 4(1)). The place where the damage occurs is defined as the place where the firm or the part of firm that, according to the claimant, has been affected by an act of unfair competition is situated. However, according to Article 4(2), where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Article 23 states in more concrete terms where this place of habitual 10

5. COM (2003) 427 final, 15.
6. COM (2003) 427 final, 16.
7. Cf. *Paris Convention for the Protection of Industrial Property*, 1883, UNTS, Vol. 828, 305 et seq., Art. 1(2): 'The protection of industrial property has as its object patents, utility models, industrial designs, trademarks, service marks, trade names, indications of source or appellations of origin, and the repression of unfair competition.'; Art. 2(1) lit. c) (iv) Anti-piracy Regulation (Regulation 1383/2003/EC): 'For the purposes of this Regulation, "goods infringing an intellectual property right" means: ... (c) goods which, in the Member State in which the application for customs action is made, infringe: ... (iv) designations of origin or geographical indications under the law of that Member State or Council Regulation (EEC) No. 2081/92 and (EC) No. 1593/1999.'
8. For a detailed overview cf. *Sack*, Internationales Lauterkeitsrecht nach der Rom II-VO, WRP 54 (2008): 845, 858 et seq.
9. COM (2003) 427 final, 16.
10. COM (2003) 427 final, 16.

residence of both parties is to be located. Article 4(3), which refers to the law of the country with a 'manifestly closer connection', will generally not be relevant within the framework of Article 6(2).[11]

11 **3. Market-Related Acts of Unfair Competition (paragraph 1). a. Relationship with Article 4 – General Rule.** According to Article 6(1), the law applicable is the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected. An independent conflict-of-laws rule for acts of unfair competition has been demanded for some time. The main reason is that unlike tort law, international unfair competition law does not focus on a violation of individual rights. Rather, international unfair competition law has to determine which legal order is most suited to decide whether a specific act of competition should be tolerated or prohibited, taking into account the interests of all market participants and the general public.[12]

12 However, international unfair competition law as laid down in Article 6(1) is not actually separated from general international tort law. According to Recital 21, the special rule in Article 6(1) 'is not an exception to the general rule in Article 4(1) but rather a clarification of it.' This is appropriate inasmuch as the particular requirements of unfair competition law may also be considered within the framework of general rules. Even when the principle of *lex loci delicti commissi* is the basis for international unfair competition law, as is the case in German law, this basic rule of tort law still leaves sufficient scope for the particular requirements of unfair competition law. Where market-related acts of unfair competition are concerned, the place where 'the damage occurs' is to be located where the competitive interests of the competitors meet and customers' decision making is to be influenced by competitive practices – that is, the place where the market is affected.[13] Within the framework of the general tort law principle of *lex loci delicti commissi*, the connecting factor is thus the same as provided for by the regulation of Article 6(1).

13 **b. Exceptions.** The Commission has justified the need for a special rule for unfair competition law by explaining that the exceptions to the general conflicts rule are not adapted to international unfair competition law.[14] This issue has been a matter of much controversy up to now; whether and in how far it will be clarified by Article 6 remains to be seen.

14 **aa. Choice of Law.** The Regulation's provisions on the possibility of choice of law are unequivocal. A choice of law is expressly ruled out by paragraph 4.

15 **bb. Closer Connection.** It is debatable whether the exception of Article 4(3) is also excluded. This exception stipulates that, in cases that are **manifestly more closely connected** to another country than the country of the affected market, the law of the former is to apply. In favour of such an exclusion, it can be argued that Article 6(1), unlike Article 6(2), does not generally refer to all provisions of Article 4. Recital 21, according to which Article 6(1) is merely a clarification of the first paragraph of Article 4, also indicates that there are no exceptions to the rule of Article 6(1). However, such strict adherence

11. *Sack*, WRP 54 (2008), 845 (851).
12. *Kropholler*, Internationales Privatrecht (6th ed. Tübingen: Mohr Siebeck, 2006), 543.
13. For German law, see *Bundesgerichtshof*, I ZR 109/85, GRUR 90 (1988), 453 (454) – Ein Champagner unter den Mineralwässern (in German); I ZR 22/89, BGHZ 113, 11 = GRUR 93 (1991), 463 (464) – Kauf im Ausland (in German); I ZR 148/95, GRUR 100 (1998), 419 (420) – Gewinnspiel im Ausland (in German); *Köhler*, Introduction UWG, in Wettbewerbsrecht (Köhler and Bornkamm eds, 25th ed. München: Beck 2007), mn. 5.5; cf. also Explanatory Memorandum to the Rome II Proposal, COM (2003) 427 final, 16 et seq., defining the affected market as where 'competitors are seeking to gain the customer's favour'.
14. COM (2003) 427 final, 16.

to the principle of the affected market does not appear to be appropriate for every case; see mn. 18.

cc. Habitual Residence in the Same Country. The above considerations, opposing an exception in cases with a manifestly closer connection with another country, also militate against a connection to both parties' habitual residence in the same country, as provided by Article 4(2). Acts of unfair competition exclusively and directly affecting a specific competitor are not regulated by paragraph 1 but by paragraph 2, which in turn allows for recourse to Article 4(2). In the case of market-related acts of unfair competition, there is neither any need nor justification for a connection to both parties' habitual residence in the same country. 16

c. The Country Where Competitive Relations or the Collective Interests of Consumers Are Affected. aa. Acts of Advertising. As far as acts of advertising are concerned, the relevant connecting factor is the place where advertisements are to influence potential customers (advertising market).[15] It is debatable whether this also applies when close connections to a country other than that of the advertising market exist. The rule of Article 6(1) seems to be unequivocal: paragraph 1, unlike paragraph 2, does not refer to Article 4(3), but merely clarifies Article 4(1) according to Recital 21 (see mn. 12). 17

However, this does not seem generally convincing, in particular with regard to constellations such as those characterizing the so-called *Gran Canaria* cases.[16] If Article 6(1) is consistently applied, the law applicable in such constellations would be the law of the country where the advertising takes place – in the *Gran Canaria* cases, Spain, since the advertising takes place in a Spanish hotel. However, this does not take into account that all other circumstances do not relate to this country, but exclusively to another country – in the *Gran Canaria* cases, Germany (goods of a German company, contracts in German language, delivery and payment in Germany, guarantee, warranty of quality in Germany). 18

bb. Acts of Sale. The law applicable to acts of sale such as sales outside opening hours or below cost price is the law of the country where the sale takes place (sales market). 19

cc. Impediment Competition. The law applicable to impediment competition such as denigration of a competitor or false allegations about a competitor is the law of the country where the market is affected. However, if the act is *immediately* directed at the competitor, paragraph 2 applies instead of paragraph 1.[17] 20

d. Multistate Acts of Unfair Competition. It is arguable whether the application of the principle of paragraph 1 should be restricted in the case of so-called **multistate acts of unfair competition**. Most commonly in the case of Internet media, but also where transnational broadcast and print media are concerned, an act of unfair competition may affect a multitude of countries at the same time. An advertisement placed on the Internet can be downloaded all over the world. Nevertheless, it seems hardly appropriate to assume that the relevant market is therefore located everywhere and legal orders all over the world are applicable in consequence. 21

aa. The Criterion of Noticeable Influence. International unfair competition law mainly applies the criterion of **noticeable influence** to restrict the relevant market places in the case of multistate acts. Only if an act of unfair competition is directed at a specific country and the competition interests in this country are noticeably affected, the law of this 22

15. *Sack*, WRP 54 (2008): 845, 848.
16. *Bundesgerichtshof*, I ZR 22/89, BGHZ 113, 11 = GRUR 93 (1991), 463 – Kauf im Ausland (in German).
17. For an overview cf. *Sack*, WRP 54 (2008), 845, 850.

country is to be applicable.[18] Whether this is the case may only be decided by considering the individual circumstances: the language of the website, restrictions of the offer to specific countries, prices in a specific currency, use of disclaimers, etc.[19]

23 **bb. Wording.** Such a restriction of relevant markets by the criterion of noticeable influence would serve to avoid the inadequate parallel application of a multitude of different legal orders. On the other hand, it is argued that the wording of Article 6(1) no longer provides for such a restriction. While the original proposals for a conflict rule for unfair competition only provided for the applicability of the law of a country if the competitive relations or the collective interests of consumers in this country were 'directly and substantially' affected (see mn. 1), the final version of Article 6(1) no longer contains such a criterion of direct and substantial influence. This is interpreted as a departure of the Rome II regulation from the criterion of noticeable influence.[20]

24 However, the exclusion of the criterion of direct and substantial influence does not necessarily imply that the number of relevant markets will no longer be restricted by additional criteria. The requirement of 'affected' relations or interests in paragraph 1 still leaves room for a consideration of the criterion of noticeable influence.[21] In general, competitive relations and the interests of consumers in a specific country will not be 'affected' if an act of unfair competition relates to this country only accidentally and incidentally.

25 **cc. Conflict-of-Laws versus Substantive Law.** Furthermore, it is more convincing to discuss the criterion of noticeable influence when determining the applicable law, instead of discussing it as an issue of substantive law. The question of whether a significant domestic connecting factor can be presumed is not a question of substantive law but one of conflict of laws. When deciding a claim for unfair competition, it would hardly be appropriate to first approve the applicability of the law of a specific country, but then to reject the claim arguing that the act of unfair competition had not noticeably affected the competition interests in this country.

26 **4. Relationship with the Country-of-Origin Principle. a. The Country-of-Origin Principle.** The relationship between the principle of Article 6(1) and the country-of-origin principle is controversial. For information society services, the country-of-origin principle is established in Directive 2001/31/EC (**Electronic Commerce Directive**). According to **Article 3(1)** of that Directive, each Member State 'shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.' According to **Article 3(2)**, 'Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.'[22]

Recital 22 states:

> Information society services should be supervised at the source of the activity, in order to ensure an effective protection of public interest objectives; to that end, it is necessary to ensure that the competent authority provides such protection not only for the citizens of its

18. See *Köhler*, Introduction UWG, in Wettbewerbsrecht (Hefermehl, Köhler and Bornkamm eds, 27th ed. (München: Beck, 2009), mn. 5.8.
19. *Ibid.*
20. *Sack*, WRP 54 (2008), 845, 854.
21. The consideration of the criterion of noticeable influence within the framework of Art. 6(1) is also discussed by *Handig*, Neues im Internationalen Wettbewerbsrecht – Auswirkungen der Rom II-Verordnung, GRUR Int. 57 (2008), 24, 28.
22. Likewise, for audiovisual media services, cf. Directive 89/552/EEC (Audiovisual Media Services Directive) as amended by Directive 2007/65/EC of 11 Dec. 2007.

own country but for all Community citizens; in order to improve mutual trust between Member States, it is essential to state clearly this responsibility on the part of the Member State where the services originate; moreover, in order to effectively guarantee freedom to provide services and legal certainty for suppliers and recipients of services, such information society services should in principle be subject to the law of the Member State in which the service provider is established.

b. Consequences of the Country-of-Origin Principle. In fact, the conflicts rule of Article 6 is rendered ineffective by the country-of-origin principle as established in the Electronic Commerce and the Audiovisual Media Services Directive. Even if the country-of-origin principle is not classified as a conflict-of-laws rule but as a rule of substantive law, the law of the country of origin is, at least, applicable in addition to the law of the country of the affected market. This then leads to a kind of 'dual connection', with the law of the country of origin effectively imposing the legal standards.[23] 27

c. No Change under Rome II. It appears that the Rome II Regulation is not intended to end the coexistence of these principles. Although the text of the Regulation does no longer refer to the applicability of the country-of-origin principle as the original proposal did,[24] Recital 35 of the Regulation clearly indicates that the country-of-origin principle is to remain untouched, explicitly stating that: 28

> This Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. The application of provisions of the applicable law designated by the rules of this Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).[25]

d. Critique. It is regrettable that Rome II does not clarify the relationship between country-of-origin and affected-market principle. While the regulation ostensibly provides a general conflict-of-laws rule for acts of unfair competition, it is left open to other Community acts to overrule that rule. Proposals for a conclusive regulation of international unfair competition law within the framework of Rome II, which were put forward during the preliminary stages,[26] have not been taken up. This may well be because the decision between the principle of the affected-market and the country-of-origin principle reflects a legal policy issue that remains a matter of much controversy: Should the law of the affected market be applicable, as would be in the interest of effective consumer protection and equality for all competitors? Or should it be sufficient if the trading party observes the competition rules of its country of origin, even where these only guarantee a comparatively low level of protection, as would be in the interest of free movement of goods and services? 29

23. *Ohly*, Herkunftslandprinzip und Kollisionsrecht, GRUR Int 50 (2001), 899, 902.
24. COM (2003) 427 final, 16.
25. See also the Explanatory Memorandum of the Commission's original proposal, COM (2003) 427 final, 31.
26. Cf., e.g., the proposal of the *Hamburg Group for Private International Law*, RabelsZ 67 (2003), 1, 18 et seq., to establish a special conflict rule for advertising within the Community, besides the principle of the affected market, based on the country of origin.

30 It appears that the European legislature was not prepared to decide this fundamental question – with the result that international unfair competition law is not regulated by Rome II, but by Community acts like the Electronic Commerce Directive, although this Directive explicitly disclaims any conflict-of-laws relevance.[27] The regulation's objective to make the outcome of legal actions more predictable and increase legal certainty by the harmonization of conflict rules is not attained this way.[28]

III. Acts Restricting Free Competition

31 **1. Scope of Application. a. Acts Restricting Free Competition.** The concept of 'restriction of competition' has a comprehensive scope. According to Recital 23 of the Regulation, the concept of restriction of competition should cover

> prohibitions on agreements 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 or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles 81 and 82 of the Treaty or by the law of a Member State.

32 **b. Relationship with Articles 101, 102 FEU Treaty. aa. Agreements, Decisions, Concerted Practices.** Article 6(3) is without significance as European antitrust law takes precedence and national antitrust law thus does not have any independent regulatory force. Whether **agreements, decisions by associations of undertakings** or **concerted practices** that prevent, restrict or distort competition are permissible under antitrust law is, to the extent that they may affect trade between Member States, determined in accordance with Article 101 FEU. The question of which national antitrust law would be applicable is ultimately irrelevant.

33 **bb. Unilateral Acts.** This is different in the case of **unilateral acts** restricting free competition where Article 102 FEU only aims to guarantee a European minimum standard.[29] In accordance with Article 3(2) of Regulation 1/2003,[30] Member States may adopt on their territory stricter provisions that prohibit and sanction unilateral conduct that would be permissible under Article 102 FEU.[31] Since Article 102 FEU thus allows for stricter national antitrust provisions, the national law applicable may be of decisive

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27. See Art. 1(4) of the Electronic Commerce Directive 2000/31/EC: 'This Directive does not establish additional rules on private international law nor does it deal with the jurisdiction of Courts.'
28. Cf. earlier critical comments in *Buchner*, Rom II und das Internationale Immaterialgüter- und Wettbewerbsrecht, *GRUR Int.* 54 (2005), 1004; see also *Handig*, GRUR Int. 57 (2008), 24, 30.
29. *Meessen*, Introduction, in Kartellrecht, Vol. 1 (Loewenheim, Meesen and Riesenkampff eds, München: Beck, 2006), mn. 73.
30. Regulation 1/2003/EC of 16 Dec. 2002 on the Implementation of the Rules on Competition laid down in Arts 81 and 82 of the Treaty.
31. Cf. Art. 3(2) of Regulation 1/2003/EC:
    > The application of national competition law may not lead to the prohibition of agreements, decisions by associations of undertakings or concerted practices which may affect trade between Member States but which do not restrict competition within the meaning of Article 81(1) of the Treaty, or which fulfil the conditions of Article 81(3) of the Treaty or which are covered by a Regulation for the application of Article 81(3) of the Treaty. Member States shall not under this Regulation be precluded from adopting and applying on their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings.

importance for the question whether an act restricting free competition is permissible under antitrust law.

cc. Civil Law Consequences. National antitrust law is also of relevance where the consequences under civil law of restrictions of free competition are concerned. European antitrust law does not contain any provisions that would support civil law claims for injunctive relief, compensation or the like.[32] Whenever such claims are asserted, the applicable national antitrust law must be determined. 34

2. The Law of the Affected Market (paragraph 3 point a). a. Effects Doctrine. Under Article 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. This provision establishes the so-called **effects doctrine**, which is well known from the international antitrust law of most Member States. 35

b. *Lex Loci Delicti Commissi* and the Effects Doctrine. The effects doctrine of Article 6(3) (a) is to be understood as a concretion of the principle of Article 4(1) (*lex loci delicti commissi*).[33] Article 4(1) and Article 6(3)(a) are based on the same principle: The law applicable shall be the law of the place of effect. The place of performance, on the other hand, is of no relevance either under the effects doctrine or under the principle of *lex loci delicti commissi*.[34] 36

c. Direct and Substantial Effect. The question is whether the same is true for the place where the damage occurred – that is, whether, under the effects doctrine, indirect effects are as irrelevant as indirect damages under the principle of *lex loci delicti commissi* of Article 4(1). Under German competition law and under Swiss or American law, for example, only restrictions of competition that have a direct and substantial effect are of relevance.[35] Also, there was agreement in the Council that there should be a recital making clear that the effect on the market has to be direct and substantial. Accordingly, Recital 20 of the Council's common position stipulated that the law applicable should be the law of the country on whose market the restriction has effect, 'provided that the effect is direct and substantial.'[36] 37

However, in the course of the legislative procedure, the requirement of 'direct and substantial' was finally omitted and is now only to be found in paragraph 3 point b. This appears to indicate that the requirement of 'direct and substantial' effects is not to apply within the framework of paragraph 3 point a. However, the arguments stated above within 38

32. *Meessen*, Introduction, in Kartellrecht, mn. 79.
33. *Mankowski*, Das neue Internationale Kartellrecht des Art. 6 Abs. 3 der Rom II-Verordnung, RIW 54 (2008), Supplement: 177, 184.
34. Cf. on European antitrust law ECJ C-89/85 = NJW 41 (1988), 3086 (3087) – *Zellstoffe* (in German).
35. *Hellner*, Unfair Competition and Acts Restricting Free Competition: A Commentary on Article 6 of the Rome II Regulation, Yb. PIL 9 (2007), 49, 61; on German law, cf. *Bundesgerichtshof*, KVR 2/78, BGHZ 74, 322; *Kegel*, Internationales Privatrecht (Kegel and Schurig eds, 9th ed. München: Beck, 2004), 1130; *Rehbinder*, '§ 130 II GWB', in Wettbewerbsrecht, Vol. 2, (Immenga and Mestmäcker eds, 4th ed. München: Beck, 2007), mn. 169 et seq.; on American Law cf. Restatement (Third) of the Foreign Relations Law of the United States § 403 (2):
Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate: (a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; [...].
36. Common Position (EC) No. 22/2006, Recital 20.

the framework of paragraph 1 apply here as well. The omission of the requirement of 'direct and substantial' does not necessarily imply that the number of relevant markets will no longer be restricted by any additional criteria. The requirement of 'affected' still leaves room to consider restrictions of competition with only remote effects on the market as irrelevant.[37] Especially if an act restricting free competition is related to a multitude of countries, the unrestricted application of the effects doctrine would lead to the hardly appropriate parallel application of the legal orders of many countries. Finally, it would not be admissible under public international law to assume prescriptive jurisdiction over anti-competitive acts with only very remote effects on the market of the legislating state.[38]

39 **3. The Claimant's Right to Choose the Law of the Forum (paragraph 3 point b). a. Starting Point: 'Mosaic Principle'.** If several markets are affected by the same restriction of competition, the so-called 'mosaic principle' applies, according to which the effects on individual markets must be judged in accordance with the market law of the respective country. Recital 20 of the Common Position states expressly that: 'Where the damage is sustained in more than one country, the application of the law of any of those countries should be limited to the damage which occurred in that country.' This principle still applies, although the sentence is no longer included in the final version of Rome II.[39]

40 **b. Exception: *Lex Fori*.** As an exception to this mosaic principle, Article 6(3) provides for the applicability of *lex fori* for certain constellations. According to Article 6(3) point b, a plaintiff may, if the markets of several countries are affected by a restriction of competition, choose to base his claim on the law of the forum provided that he brings suit in the defendant's domicile and that the market in that Member State is among those directly and substantially affected by the restriction of competition. Unlike paragraph 3 point a, paragraph 3 point b is based on a connecting factor that has not been established before in international antitrust law.

41 **aa. Domicile of the Defendant.** The defendant's domicile must be located in the forum. The defendant must be sued in the court of a Member State in accordance with Article 2(1) of Council Regulation (EC) No. 44/2001.[40] According to Article 60 of this regulation, a company or other legal person or association of natural or legal persons is domiciled at the place where it has its statutory seat, or central administration, or principal place of business. If these are located in different countries, the case may fall under different laws, depending on the place where the claimant brings suit. The claimant is thus given the opportunity of 'forum shopping'.[41]

42 **bb. Directly and Substantially Affected.** The effect of the restriction of competition on the market in the forum state has to be direct and substantial. This means that the restriction must have a certain impact in the forum; it must be noticeable. It is not required, however, that the market of the forum is the one primarily affected.[42]

37. Cf. also *Mankowski*, RIW 54 (2008), Supplement: 177, 186.
38. *Hellner*, Yb PIL. 9 (2007), 49, 62.
39. *Mankowski*, RIW 54 (2008), Supplement: 177, 188.
40. Regulation 44/2001/EC of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
41. Critically, *Scholz & Rixen*, Die neue europäische Kollisionsnorm für außervertragliche Schuldverhältnisse aus wettbewerbsbeschränkendem Verhalten, EuZW 11 (2008), 327, 331.
42. *Mankowski*, RIW 54 (2008), Supplement: 177, 190.

IV. Choice of Law (paragraph 4)

The admissibility of choice of law with regard to acts of unfair competition has mostly been rejected up to now. International antitrust law should not be at the disposition of individual parties or claimants. Choice of law can neither be reconciled with the interests of the country of the market with respect to the law applicable nor with the principle of equality for all competitors. As a consequence, Article 6(4) precludes choice of law. The application of Article 14 of the regulation is expressly ruled out. **43**