

GCLC Annual Conference, Nov 2013 Antitrust Damages in EU Law and Policy

Jurisdiction Issues and Applicable Law: Brussels I, Rome I and II

Prof. Stéphanie Francq
UCL

Prof. Patrick Wautelet
ULg

I. Introduction

- Relevance of conflict of laws in private antitrust litigation?
Various issues:
 - where to bring proceedings
 - how to obtain evidence in other MS
 - enforcement of damages decision in other MS etc.Not : who is right and who is wrong

I. Introduction: sources

Content of conflict of laws in private antitrust litigation? Full scale of EU private international law rules:

- Where to bring proceedings : Brussels I/Ibis
- How to determine applicable law : Rome I / II
- How to obtain evidence : Evidence Regulation
- How to enforce decision : various civil cooperation Regulations

I. Introduction: focus of this intervention

- **Where to bring proceedings?**
- **Difficulties in determining applicable rules**
- **Difficulties in obtaining evidence**

I. Introduction: Let's start with facts...

- Decision by EU Commission re cartel formed by companies involved in designing and manufacturing contact strips for pantographs used in power supply for high speed trains
- Manufacturers of contract strips agreed to maintain prices at an artificially high level – found to be in violation of Article 101 of the TFEU

I. Introduction: Let's start with facts...

- Commission decision addressed to a number of companies : G, established in Germany; I, established in Italy and U established in the US
- Companies were subject to a fine – except I, which benefited from the leniency program

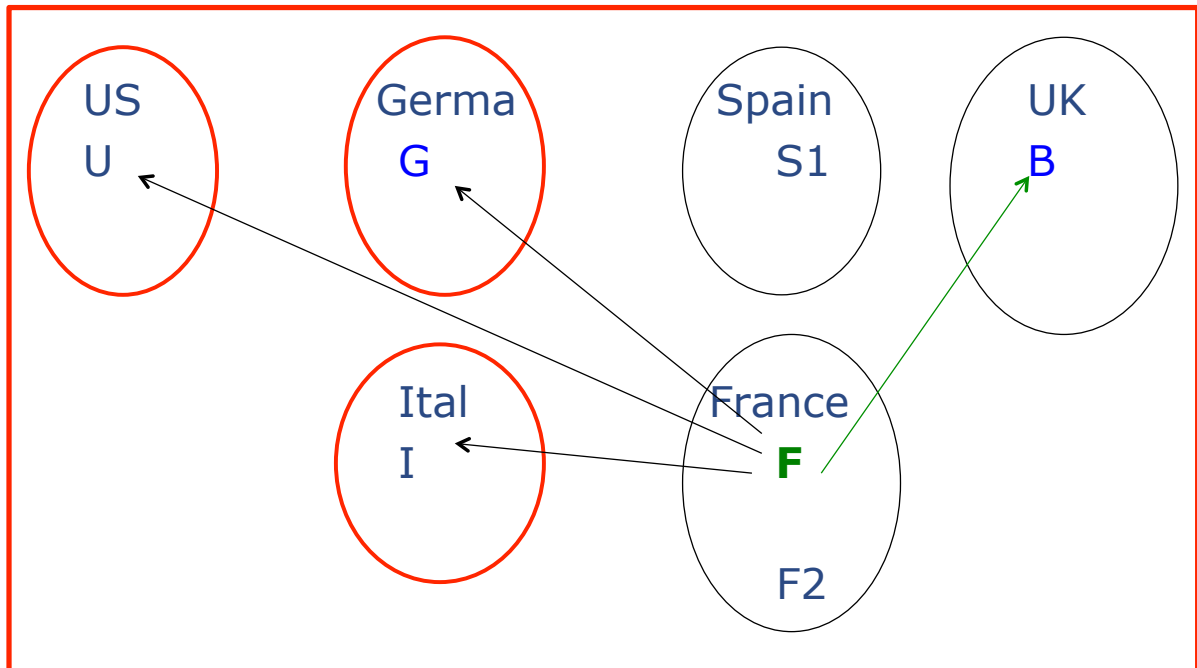
I. Introduction: Let's start with facts...

- Company F, established in France, seeks compensation for loss and damage which it alleges to have suffered as a result of the involvement in the cartel of G, I, and U. F is a customer of G and I and has in the past bought large quantities of contacts strips from both companies
- Claim also directed towards B, the English subsidiary of G – B was not an addressee of the Commission's decision; the claim is not a follow-on action, but a stand alone claim

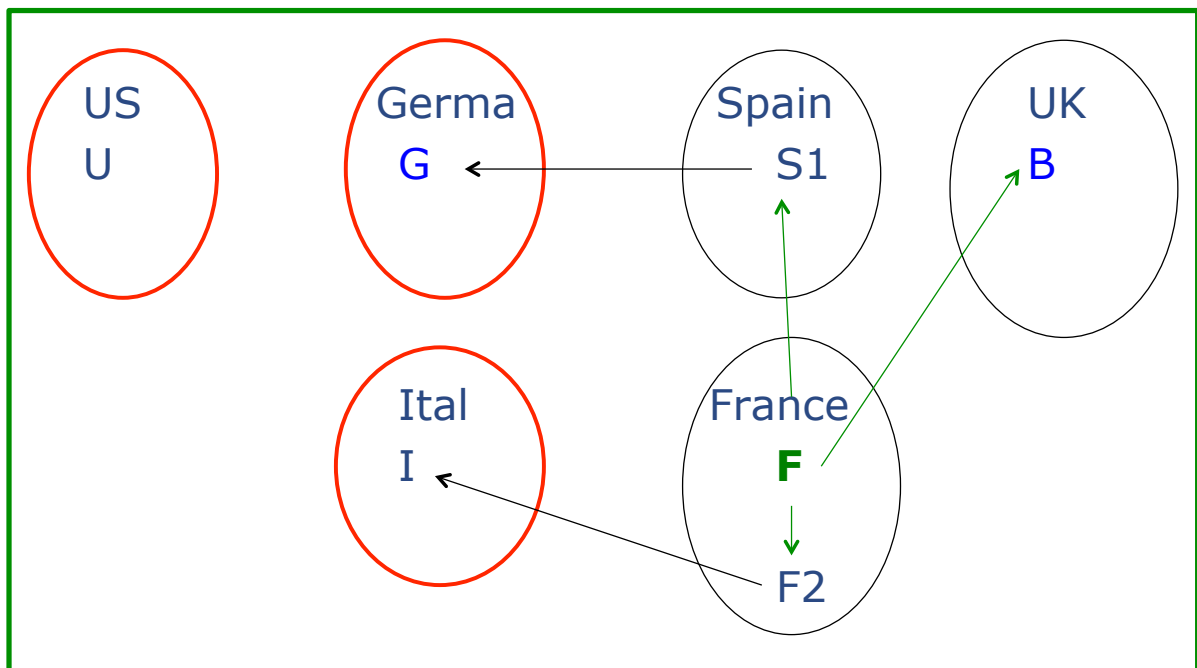
I. Introduction: Let's start with facts...

- B alleges that there is a complete lack of evidence to support key allegations made against it such that the proceedings have no real prospect of success. It is debated whether F ever purchased contact strips from B
- G and I pretend that F never bought contact strips directly from them but rather through other suppliers, namely a Spanish (S1) and a French company (F2), who had acquired the contact strips from G and I

I. Introduction: Let's start with facts...



I. Introduction: Let's start with facts...



II. Let's start the fun: **Jurisdiction...**

2 main options in case def. dom in EU (Brussels I/Ibis):

1. Art. 4 + 8.1° Recast (2 + 6, 1° Brussels I):
action in the Mb State of **domicile** of one def. + sue other EU defendants, in same Mb State, if claims connected
2. Art. 7, 2° Recast (5, 3° Brussels I):
Torts: place where the « **harmful event** » occurred

II. **Jurisdiction**

NB: Alternative options under Brussels I/I bis:

1. Art. 25 Recast (23 Brussels I)
2. Art. 7, 1° Recast (5, 1° Brussels I)
3. Art. 7, 5° Recast (art. 5, 5° Brussels I)

→ Are they neglected and if yes, why?

II. Jurisdiction

NB: Alternative options under Brussels I/I bis: Are they neglected and if yes, why?

- Scope of jurisdiction clause :
 - Interpretation of jurisdiction clause for national court to decide (Duffryn, C-214/89)
 - Provimi Ltd v Roche Products Ltd et al [2003] QBD: scope to be interpreted under law applicable to the contract (could have decided lex fori, law of chosen court...): clauses do not cover torts.
- Contractual nature of claims : 7, 1° or 7, 2° Brussels I bis?
 - Breach of statutory duty v. “obligation freely assumed by one party towards another” (Handte, C-26/91)
 - The way claimant frames his claim v. autonomous interpretation of EU law
- Why is this overlooked? Risk of splitting the litigation

II. Jurisdiction: art. 4 + 8, 1° Recast

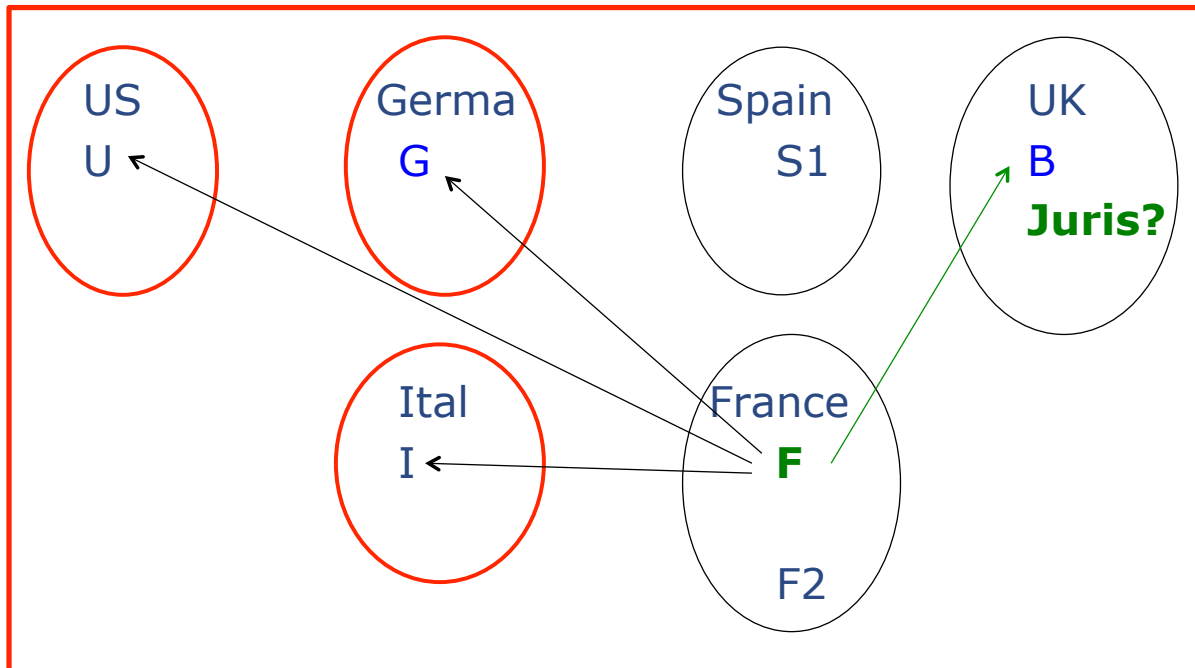
The royal avenue... « Chouchou » of practice in UK

Why? – one forum, all EU defendants, worldwide damage

But 3 C°:

1. Dom 1 defendant in a Mb State
2. Sue other defendants domiciled in a Mb State
3. If « related claims »

II. Jurisdiction: art. 4 + 8, 1° Brussels I bis



II. Jurisdiction: art. 4 + 8, 1° Brussels I bis

Condition 1: Dom 1 defendant in a Mb State

- Art. 8, 1°: « any » defendant
 - UK practice concerning the anchor defendant: **B is a defendant**
 - « Cause of action » : domestic procedural law (« arguable »)
 - 1- A subsidiary who did **not knowingly** implement the cartel ? Yes
 - Use of the concept of “undertraking” in EU competition
 - The “*Provimi* point”
 - 2- Even if claimant **never bought** products from that subsidiary? Yes
 - All infringers (members of undertaking) cause the loss alleged by the claimant (impossible to buy at regular market price)
- = Wide scope of art. 8, 1° Brussels I bis

II. Jurisdiction: art. 4 + 8, 1° Recast

Condition 1: Dom 1 defendant in a Mb State

- Art. 8, 1°: « any » defendant
- UK practice concerning the anchor defendant: **B is a defendant**
- **What would ECJ decide ?** Difficult to predict ...
 - 8, 1°: not fraud (Kalfelis, case 189/97)
 - >> 8, 1°: OK even if the anchor claim is inadmissible under domestic law (Reisch Montag, C-103/05, insolvency)

II. Jurisdiction: art. 4 + 8, 1° Recast

Condition 2: Sue other defendants domiciled in a Mb State

- **How about U (dom US)?**
 - Not under Brussels I/Ibis (art. 4 Brussels I; art. 6 I bis)
 - Under similar provisions of national (procedural) law
 - NB: forum non conveniens

II. Jurisdiction: art. 4 + 8, 1° Recast

Condition 3: « Related claims »

- Standard ? « 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 »
- UK Practice ? Provimi (§45 to 47) : **OK sue G and I in UK with B**
 - All private law claims for damage deriving from same infringement
 - Likely foreign judge would take another position on the « anchor » defendant issue (subsidiary as part the undertaking even if no knowledge)
 - Danger of irreconcilable judgements

II. Jurisdiction: art. 4 + 8, 1° Recast

Condition 3: « Related claims »

2 Remarks:

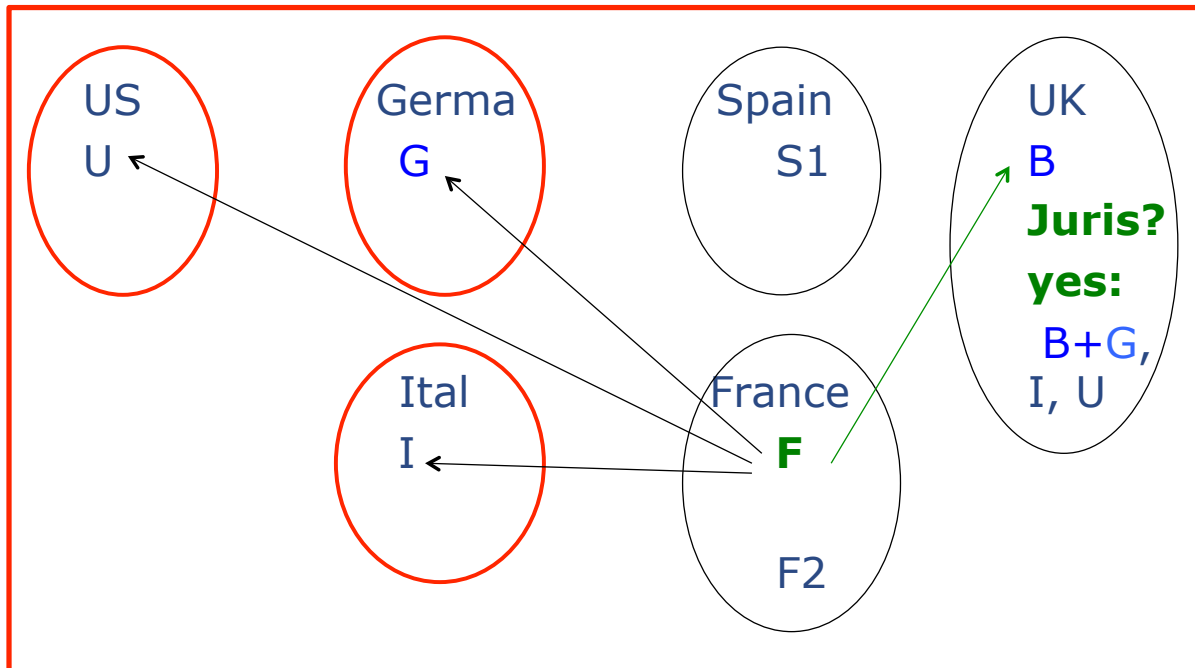
1. What is the real prospect of « **irreconcilable decisions** »?

- infringement ? Follow on
- damage? Directive and Communication on quantifying
- what's left? « treble damage » ; « the Provimi point »

2. **ECJ on related actions?**

- Roche Nederland, C-539/03, 13.07.2006: No risk of irreconcilable judgements if: « possible divergences between decisions (...) would not arise in the context of the same factual and legal situation » → relevant to competition law?
- >< Freeport, C-98/01, 11.10.2007: no need same legal basis + citing Roche; Painer, C- 145/10, 1.1.2011: identity of legal basis not indispensable

II. Jurisdiction: 4 + 8, 1° Brussels I bis



II. Jurisdiction: art. 4 + 8, 1° Recast

Royal avenue but:

- Abuse of right under EU law
- Potential preliminary ruling on “Provim point”
- Mind Roche Nederland

II. Jurisdiction: art. 7, 2° Brussels I bis

Art. 7, 2° : place of the “harmful event”

- **Harmful event:** - where event giving rise to the damage occurred
 - where the damage occurred

< Case 21/76, Bier v. Mines de Potasse

- **Scope of jurisdiction:** - event: the whole damage
 - damage: limited to damage that occurred in the forum

< Shevill, C- 68/93

II. Jurisdiction: art. 7, 2° Brussels I bis

Art. 7, 2° : place of the “harmful event”

1. Locating event giving rise to liability?
2. Locating the damage?

II. Jurisdiction: art. 7, 2° Brussels I bis

Art. 7, 2° : place of the “harmful event”

1. Locating event giving rise to liability?

- Place of the agreement
- Pro: everybody was there
- Contra: fortuitous – diff to prove – might change over time

II. Jurisdiction: art. 7, 2° Brussels I bis

Art. 7, 2° : place of the “harmful event”

2. Locating the damage?

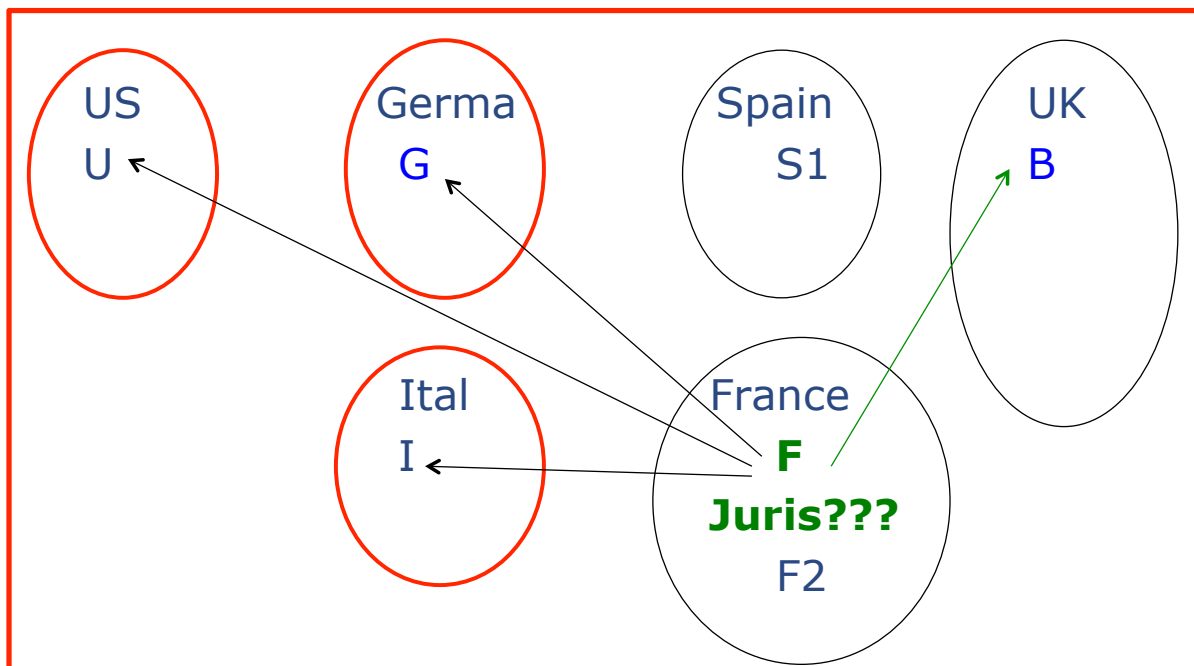
- Where does the damage occur ?
- What happens in case of passing on? Direct damage

II. Jurisdiction: art. 7, 2° Brussels I bis

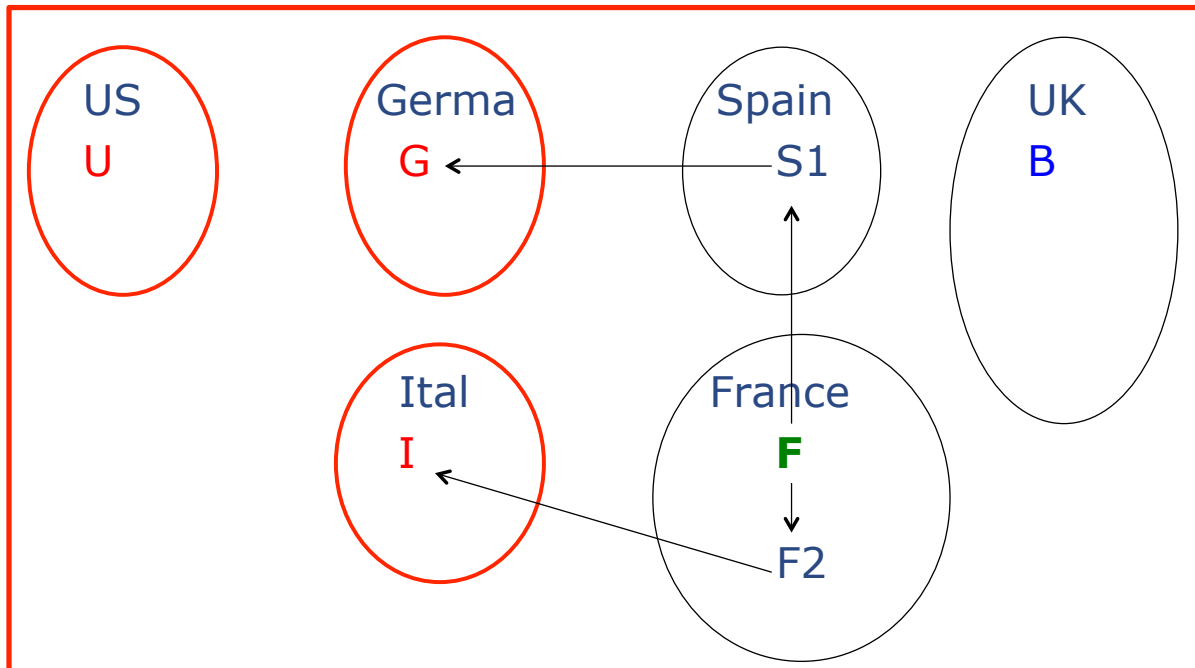
→ Where does the damage occur ?

- **Economic loss** >< material/physical harm
- **Where:** where I buy (?), where contract is signed (outdated!), where goods are delivered, where victim is domiciled, where victim's assets are concentrated?
- **UK practice:** UK claimant = loss in UK ?
- **The ECJ:** - Direct damage : **initial harm**
 - **Not** to be simply confused with claimant's domicile or the "**centre of its patrimony**"
 - = Result of a series of cases: Dumez, Case 220/88; Marinari, C-364/93; Kronhofer, C-168/02

II. Jurisdiction: 7, 2° Brussels I bis



II. Jurisdiction: 7, 2° Brussels I bis



II. Jurisdiction: art. 7, 2° Brussels I bis

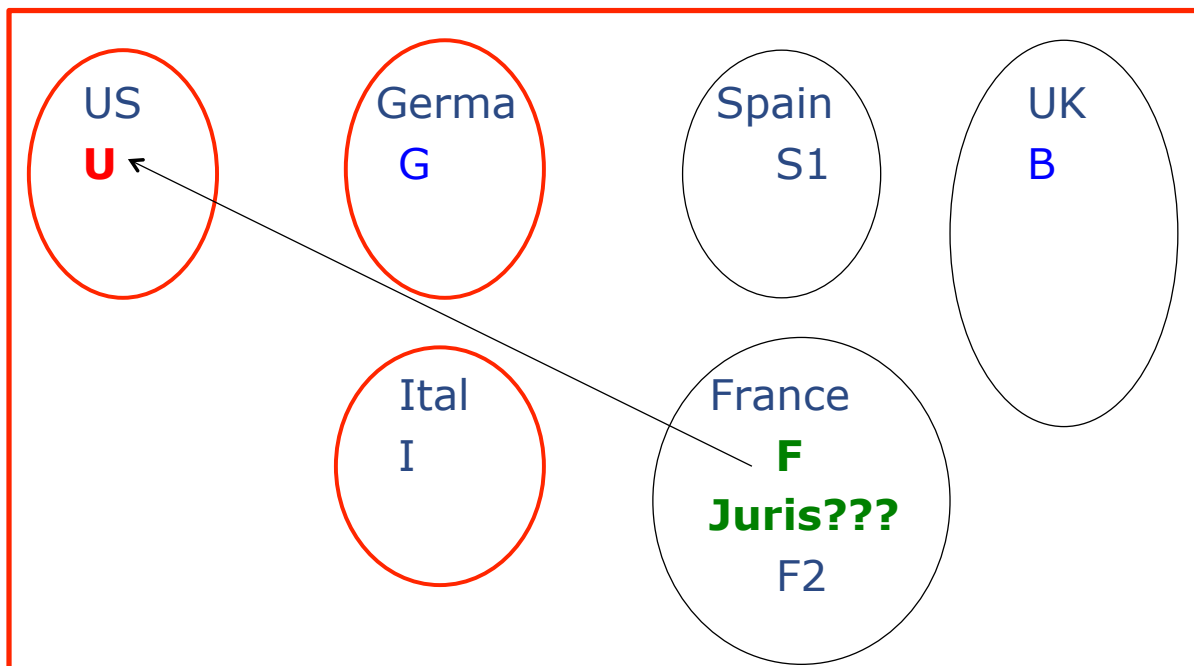
- **Passing on:** Can F sue G, I in France for damage caused by cartel when it bought goods from other retailers?
- Art. 7, 2° Brussels I bis against G, I = initial damage, not the indirect loss (Dumez, Case 220/88) → **where is the initial damage and who is victim thereof ?**
 - Answer of CAT in Deutsche Bahn:
 - vict. + retailer in UK (member of cartel) = UK
 - F + F1 in France = Jurisdiction?
 - Meaning of passing on defence: no harm suffered if “passed”?
 - No initial damage supported by S1 and F1
 - Victim of Initial damage = F ?

II. Jurisdiction: art. 7, 2° Brussels I bis

→ **Desperate Situation ? A Challenge to grow wiser...**

1. Take stock of Rome II? no great help (infra)
2. Place of performance of contract under law applicable to contract (Lehman, 2011: financial contracts)
3. In concreto: all relevant facts (Francq/Wurmnest)
4. Preliminary Ruling from ECJ:
 - Harm on internet? Centre of victim's interest (E-Date/Martinez, C-509/09, C-161/10)
 - Private enforcement?

II. Jurisdiction: How about U ?



II. Jurisdiction: How about U?

- Brussels I/I Bis does not apply (art. 6 Brussels I bis)
 - National Rules on International Jurisdiction
 - Parallel proceedings EU/ US? **Art. 34 Brussels I bis**
 - Case pending in EU against G/I and litigation in US against U, G/I = “related actions”
 - EU court second seized
 - Third State decision likely to be recognized + proper administration of justice
- = stay of proceedings in EU

Global Competition Law Center Antitrust Damages in EU Law and Policy

Jurisdictional Issues and Applicable Law

Stéphanie Francq (UCLouvain) – Patrick
Wautelet (ULiège)

III. How to determine applicable law?

- Is issue of applicable law not purely *academic*?
- In private antitrust litigation, much ground already covered by EU law
- 1st) Issue of infringement of competition law : fully covered by relevant competition law rules (EU/MS/3rd state)

- 2nd) What about liability ('*Karteldelikt*snormen')? – i.e.
 - Does infringement of competition law constitute a 'tort' (breach of statutory duty) / '*faute*' / '*Widrigkeit*'?
 - Does tort/*faute*/etc. lead to compensation – how much?

- → For some issues, national law has lost its monopoly :
 - Right to claim damages for “loss caused ... by conduct liable to restrict or distort competition” (*Courage* § 26; *Manfredi* § 60)
 - Principles of *equivalence* and *effectiveness* (*Courage* §29 / *Manfredi* § 62)

- In the future, role of national law even more limited → Draft directive:
 - *Statute of limitations* (art. 10): common limitation periods (at least 5 years)
 - *Existence of harm* (art. 16-1) : existence of infringement of competition rules creates (rebuttable) presumption that infringement caused harm → dilution (disappearance?) of 'fault' requirement
 - *Quantification of harm* – Communication and Practical Guide
 - *Passing on defence* : existence, burden of proof, neutralization (art. 12)

- Room for national law remains however – *e.g.*
 - Remoteness of damages
 - Standard of proof (required degree of precision in showing amount of harm suffered)
 - Burden of proof (and burden shift)
 - Rules on quantification of damages (simplified rules of calculation, presumption, quantification on the basis of approximate best results, use of equitable considerations etc.)
- Which national law for these issues?

- Key provision : art. 6(3) Rome II Reg.
 - Purpose of Art. 6(3) : *promote private enforcement of competition law in the EU*
 - Has Art. 6(3) reached its goal?

- Art. 6(3) raises many questions – *e.g.*
 - Is it justified to apply specific provisions of Art 6(3) Rome II when there is a contractual nexus between parties? (*Provimi*)? Contract between F and G/I or S1/F2 has not been breached
 - Application of Art. 6(3) and 3rd States (F vs U):
 - Art. 6(3) relevant if infringement of competition rules of 3rd State?
 - May Art. 6(3) lead to application of law of 3rd State (distinction 6(3)(a) / 6(3)(b))

- 1st step : no room for choice of law (but choice of court agreement!)
- But :
 - If parties do not plead foreign law, court may apply its own law – e.g. England
 - Not excluded that court characterizes some of the issues as purely *procedural* – leading to application of local law (e.g. standard of proof; standing to sue) – but not quantification of damages

- 2nd step : basic rule of Art. 6 (3)(a) : obligation arising out of a restriction of competition subject to the “law of the country where the market is, or is likely to be, affected.”

- In a 'follow on' action (*F v. G/I*)
 - Market already defined in EU/NCA decision (or possibly NCA 3rd country)
 - Difficulties :
 - Theoretical : market as abstraction which is not necessarily confined to one State (competition law) / localisation of legal act within national system of law (conflict of laws)
 - Pratical : not always coincidence between market defined under competition law ('implementation test') and 'affected market' ('effects doctrine')
 - Prohibition to deviate from competition law analysis (art. 16 Reg. 1/2003)?

- In a 'stand alone claim' (*F v. B*)
 - Market not yet defined by competition authorities
 - Use of competition law criteria – e.g. Market notice 1997 (coherence) or less sophisticated/technical analysis (pragmatism)? If latter approach, cannot be reduced to search for 'geographic' market
 - Result :
 - Market : covers one State or less – *F v. B* : France?
 - Market covers more than one State

- What if market has only been *indirectly* affected by restriction?
- *e.g.* Belgian company buying pantographs manufactured by F using the contact strips
- Building a threshold in art. 6(3)(a)?
 - Only 'direct' damage (art. 6 as *lex specialis* to art. 4)?
 - Or also indirect damage / spill-over effects. If yes, private liability without application of competition law?

- 3rd step : what if several 'national' markets concerned?
- Very plausible prospect
- Escape clause : concentration option under Art. 6(3)(b) → plaintiff may base entire claim on local law

- Requirements for concentration:
 - 1st requirement : proceedings brought in court of ***defendant*** (e.g. B)
 - 2nd requirement : market in MS seized is “amongst those ***directly and substantially*** affected by the restriction of competition...” - not the 'epicenter' of restriction (largest part of effects) but significant effects – unlikely in *F. v. B*
 - If more than 1 defendant : restrictive action of non-domiciled defendants must have produced direct and substantial effects in MS of 1st defendant (*comp. related claims art 6(1) Brussels I Reg.*)

- 4th step : what if several 'national' markets concerned?
- If concentration option of Art. 6(3)(b) not applicable, application of national laws in a 'distributive' basis (*mosaic* principle)
 - First partition the market into national markets (fragmentation based on apportioning of damage)
 - application of national law to 'national' portion of the damage
- Difficult or impossible? Factor in EU work on damages

- By way of conclusion
- Art. 6(3) : promoting or obstructing private enforcement of competition law?
 - Leaves many questions unresolved
 - Biggest shortcomings:
 - No choice of law
 - Lack of guidance on 'affected market'
 - Art. 30 Rome II → revision?