

# German Legal Culture and the Globalization of Competition Law:

## A Historical Perspective on the Expansion of Private Antitrust Enforcement

By  
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### I.

One major focus of studies regarding Germany's post-war history is the country's economic development following 1945.<sup>1</sup> Particularly the evolution of modern competition law—a process at the intersection of political, economic and social goals—provides a window into the forces propelling the country's reintegration into the international economic community. From the occupation period through the development of modern German competition law to the regionalization of competition law within the European Union, one can trace the various external influences at work in post-war Germany and the ultimate emergence of a local regulatory culture. Today, competition law continues to evolve, responding to globalization's challenges with a variety of transnational and regional mechanisms. For instance, recent years have brought a sharp increase in legal instruments used to coordinate enforcement efforts across national boundaries,<sup>2</sup> as well as various initiatives focused on achieving some level of substan-

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1. This is a theme touched on in much of the honoree's scholarship. See, e.g., RICHARD M. BUXBAUM & KLAUS J. HOPT, *LEGAL HARMONIZATION AND THE BUSINESS ENTERPRISE* (1998); Richard M. Buxbaum, *Incomplete Federalism: Jurisdiction Over Antitrust Matters in the European Economic Community*, 52 CAL. L. REV. 56 (1964); Richard M. Buxbaum, *Antitrust Regulation Within the European Economic Community*, 61 COLUM. L. REV. 402 (1961).

2. These include Memoranda of Understanding between regulatory agencies in different jurisdictions, as well as treaties providing for mutual legal assistance in cases with cross-border elements. See ABA SECTION OF INTERNATIONAL ANTITRUST LAW, *INTERNATIONAL LAW ANTITRUST CORPORATION HANDBOOK* 305-70 (2004) (compiling such instruments).

tive harmonization across national laws.<sup>3</sup> Because these forms of regulation intersect with existing national competition regimes, they raise the question how local regulatory cultures and preferences affect the development of global regulatory strategies. This essay will take up one specific aspect of global competition regulation: the growing role of private antitrust litigation. It examines Germany's resistance to that development, and considers the extent to which that resistance has roots in the country's legal and economic history.

In recent years, two developments in particular have indicated the expansion of private enforcement in ways relevant to Germany's domestic regulatory scheme. One arose in the regional context, in the form of a new European Council Regulation modernizing competition law enforcement.<sup>4</sup> The other arose in the transatlantic context, in the form of a series of cases that threatened to expand further the jurisdiction of U.S. courts over extraterritorial anticompetitive conduct.<sup>5</sup> In both contexts, Germany strongly protested the potential undermining of its local competition enforcement philosophy. At one level, these protests seemed unnecessarily strident, as neither the E.C. Regulation nor the relevant provisions of U.S. antitrust law challenged the substance of German competition rules with respect to particular conduct. The U.S. cases considering expanded jurisdiction, for instance, addressed hard-core price fixing—conduct that violates German and E.U. law as well as U.S. law. Similarly, the material objectives of the E.U. modernization program—primarily to preserve European Commission resources for the prosecution of the most economically harmful anticompetitive behavior—are consistent with Germany's own interests. In this light, the German response seemed an overly abstract statement about the role of sovereign states within the international community and the need to respect national regulatory authority within an increasingly globalized regulatory framework. It therefore raised the legitimate question whether certain substantive regulatory goals outweighed the interest in protecting national sovereignty *per se*.<sup>6</sup>

At another level, however, the German response suggests something more than insistence on sovereign authority as an abstract concept. It raises echoes of the development of modern German competition law following World War II. During both the occupation era and then the stage of European regionalization, the country struggled to shape an indigenous competition enforcement regime. The combination of internal and external forces at play during those periods affected the substantive orientation of the resulting legal regimes. In addition, the process by which those forces were reconciled established certain patterns—

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3. These include the Draft International Antitrust Code and also, more broadly, suggestions to bring competition issues under the umbrella of the World Trade Organization.

4. Council Regulation 1/2003 on the Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty, 2002 O.J. (L 1). See discussion *infra*, Part III.A.

5. See discussion *infra*, Part III.B.

6. See, e.g., Ralf Michaels & Daniel Zimmer, *US-Gerichte als Weltkartellgerichte?*, IPRax 2004, Heft 5, 451, 456 (noting that it is somewhat difficult to understand why a country would protest litigation in the United States against a cartel whose conduct that country was itself prosecuting).

particularly of pressure and resistance with respect to the American influence—that create the backdrop to these current developments in competition regulation: on the one hand, jurisdictional expansion of U.S. law itself, and on the other, a modernization of regional law that brings E.U. law closer to the U.S. model.

This essay examines the process by which Germany crafted its competition regime in the post-war period, focusing on the emergence of an indigenous regulatory philosophy within the framework of the transatlantic relationship. It then turns to current German attitudes toward protecting the country's system of competition regulation, as well as associated elements of its civil justice system, from the recent trend toward increased reliance on private enforcement. The essay attempts to uncover some of the specific perceptions that lie behind assertions of sovereignty or territorial authority in international discourse regarding global competition regulation. It thereby suggests more generally that the search for transnational regulatory systems capable of addressing global conduct must continue to account for the diversity of historical and cultural contexts that underpin various national regimes.<sup>7</sup>

## II.

Following World War II, German competition law developed against the backdrop of U.S. influence, exerted in part directly, during the occupation years, and in part indirectly, through U.S. involvement in the subsequent shaping of both German and E.U. competition policy. The law's development is a story of the successful integration of that influence into a local philosophy regarding competition enforcement. Part A of this section traces two stages of that history. It begins by addressing the transition from occupation law to modern German competition law, a process that reflects the absorption of U.S. influence, but with an important interweaving of German priorities and philosophies regarding market regulation such that a national regulatory identity can be seen to emerge. It then considers the subsequent regionalization of competition law within the E.U., examining the extent to which the German regulatory identity withstood complete subsumption within the regional framework. Part B then turns to one substantive aspect of competition enforcement: the role of private antitrust litigation. This issue touches on Germany's civil justice system as well as its competition regime, revealing the limits of U.S. influence where that influence was inconsistent with local competition enforcement philosophy.

### A.

In the pre-war era, U.S.-style antitrust regulation was unknown in Ger-

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7. For a reminder of the importance of legal culture to the successful coordination or harmonization of laws in the global context, see Richard M. Buxbaum, *Die Rechtsvergleichung Zwischen Nationalem Staat und Internationaler Wirtschaft*, 60 RABELS ZEITSCHRIFT 201 (1996).

many. Early German judicial opinions confirmed the legality of cartel agreements, prohibiting only certain abusive effects,<sup>8</sup> even the cartel law enacted in 1923 was designed to control, rather than eliminate, such agreements.<sup>9</sup> The German regulatory regime thus recognized cartels as a fundamental component of the Germany economy.<sup>10</sup> U.S. influence on modern German competition law began with the period immediately following World War II. U.S. occupation law was in force in the U.S. zone, and U.S. hegemony quickly led U.S. economic policies to dominate the reconstruction process in the other western zones as well.<sup>11</sup> At the earliest stage of the occupation, the goal of many U.S. policy-makers in shaping laws related to competition was not to facilitate the emergence of an indigenous regulatory system, but rather to eliminate elements of the German economy that had played a role in the war.<sup>12</sup> The most extreme view of competition policy's role in this regard was embodied in the short-lived Morgenthau plan, which proceeded from the assumption that stamping out Nazism would require not only the elimination of cartels but the elimination of German industry in its entirety.<sup>13</sup> Even more moderate U.S. views, however, saw the role of anti-cartel law not only as protecting conditions of free competition, as in the United States, but also as limiting Germany's military capability. The restrictive aspect of U.S. policy during this period was reflected in occupation law itself: thus, for instance, Law 56, intended to eliminate "concentrations of economic power . . . which could be used by Germany as instruments of political or economic aggression."<sup>14</sup>

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8. KNUT WOLFGANG NÖRR, *DIE LEIDEN DES PRIVATRECHTS: KARTELLE IN DEUTSCHLAND VON DER HOLZSTOFFKARTELLENTSCHEIDUNG ZUM GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN* 8-9 (1996) [hereinafter NÖRR, *LEIDEN DES PRIVATRECHTS*] (discussing the 1897 decision of the Reichsgericht in the Saxon Woodpulp case, which recognized reasonable cartels as lawful); see also Ivo E. Schwartz, *Antitrust Legislation and Policy in Germany—A Comparative Study*, 105 U. PA. L. REV. 617, 626-31 (1957).

9. NÖRR, *LEIDEN DES PRIVATRECHTS*, *supra* note 8, at 56-65. See also DAVID J. GERBER, *LAW AND COMPETITION IN TWENTIETH CENTURY EUROPE: PROTECTING PROMETHEUS* 124-25 (1998) [hereinafter GERBER, *PROTECTING PROMETHEUS*] (describing the goal of the law as "rely[ing] on administrative measures to combat the abuses of power" and not to "eliminate or even harm cartels.").

10. For an examination of German competition law in the decades preceding the war, see generally NÖRR, *LEIDEN DES PRIVATRECHTS*, *supra* note 8, at 31-100 (analyzing the role of cartels in Germany's political, economic and legal framework between 1918 and 1933).

11. See MARIE-LAURE DJELIC, *EXPORTING THE AMERICAN MODEL: THE POSTWAR TRANSFORMATION OF EUROPEAN BUSINESS* 79-81 (1998) (describing the hegemony of the United States in the Trizone).

12. See John C. Stedman, *The German Decartelization Program—The Law in Repose*, 17 U. CHI. L. REV. 441, 443 (1950) (discussing early decartelization policy and "[t]he extent to which these evil practices participated in bringing about World War II"); see also JOHN O. HALEY, *ANTITRUST IN GERMANY AND JAPAN: THE FIRST FIFTY YEARS, 1947-1998* 15 (2001) (describing the emergence in the United States of the view "that cartels and industrial concentration were intrinsic to German fascism and vital to Germany's capacity for military aggression").

13. RICHARD MAYNE, *THE RECOVERY OF EUROPE: FROM DEVASTATION TO UNITY* 75-76 (1970) (describing Morgenthau's proposal that Germany "be 'pastoralized.'").

14. U.S. Military Government Law No. 56, Jan. 28, 1947, preamble. Law 56, applicable in the U.S. zone, was mirrored by similar laws enacted in the British and French zones. See DJELIC, *supra* note 11, at 80.

Within a relatively short time, the goal of economic policymakers in the United States shifted away from this negative orientation. Germany's economic recovery was important to the United States for numerous reasons, including minimizing the possibility of Germany's lapse into communism and anchoring the emerging economic stability in Western Europe.<sup>15</sup> The country's industrial capacity was clearly critical to successful recovery, and competition regulation came to be viewed not as a tool of repression but as a necessary element of a functional economic system.<sup>16</sup> Thus, while the anti-cartel elements of German economic law may initially have been imposed for repressive purposes, they were eventually embraced as part of the foundation for Germany's reintegration into the international economic community.

Following the founding of the West German Republic in 1949, although occupation law remained in force, West German and U.S. policymakers participated jointly in the process of developing a national competition law. The United States continued to influence the law's formation in a variety of ways—not only by making the enactment of a competition law a condition of turning over sovereignty, but also by providing direct advice as to substantive provisions and by educating its drafters about the U.S. system.<sup>17</sup> During this period, however, Germans had increasing control over the legislative process, and the influence of German policymakers became stronger. Most importantly, an indigenous strain of economic theory became the intellectual foundation of the developing competition law: the minister of economics guiding the legislative process, Ludwig Erhard, drew on the ideas of the Freiburg school of "ordoliberalism."<sup>18</sup>

Ordoliberalism, a theory developed in the 1930s that focused on the interrelationships between the economy and the legal and political systems, provided

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15. See generally VOLKER R. BERGHAHN, *THE AMERICANISATION OF WEST GERMAN INDUSTRY 1945-1973*, 88, 109 (1986) [hereinafter BERGHAHN, *AMERICANISATION*]; see also HALEY, *supra* note 12, at 39.

16. See BERGHAHN, *AMERICANISATION*, *supra* note 15, at 88 ("there emerged, ever so slowly, not only the idea not to destroy Germany's industrial potential but to use it as the engine of material reconstruction in Europe; more crucially, it also produced the concept of using the West German economy as the lever for a restructuring of the whole of Western Europe's industry . . . according to the American 'model' of capitalism."); see also Volker Berghahn, *Resisting the Pax Americana? West German Industry and the United States, 1945-55*, in *AMERICA AND THE SHAPING OF GERMAN SOCIETY, 1945-1955*, at 85 (Michael Ermarth ed., 1993) [hereinafter Berghahn, *Pax Americana*].

17. See Schwartz, *supra* note 8, at 688-89 ("The American influence has been effective . . . by direct theoretical and practical studies of American antitrust law" by German commissions and study groups.); LISA MURACH-BRAND, *ANTITRUST AUF DEUTSCH: DER EINFLUSS DER AMERIKANISCHEN ALIIERTEN AUF DAS GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN (GWB) NACH 1945* 133-40 (2004) (detailing U.S. involvement in the law's development).

18. See David J. Gerber, *Constitutionalizing the Economy: German Neo-liberalism, Competition Law and the "New" Europe*, 42 AM. J. COMP. L. 25 (1994) [hereinafter Gerber, *Constitutionalizing the Economy*] (discussing ordoliberal thought and its role in the reconstruction of the German economy). As Gerber points out, members of the ordoliberal school, as some of the few economists not involved with Nazism, were well positioned to work with U.S. economists. *Id.* at 31. But see BERGHAHN, *AMERICANISATION*, *supra* note 15, at 158-59 (questioning the link between Erhard's own regulatory philosophy and ordoliberalism).

the theoretical underpinning for the new competition law.<sup>19</sup> It rested on the concept of an "economic constitution" (*Wirtschaftsverfassung*) that would embody the country's political choices regarding the shape of its economy, and would thereby establish the conditions within which market forces would operate.<sup>20</sup> Competition law was the centerpiece of this system, as it would constrain the exercise of private economic power that threatened to undermine conditions of complete competition.<sup>21</sup> Most directly through the work of Franz Böhm, a legal scholar, and Walter Eucken, an economist, ordoliberal theory informed the emerging legal system.<sup>22</sup> Thus, as one scholar put it, while the U.S. occupation provided the political impetus for the development of German competition law, "the intellectual origins of the law were domestic."<sup>23</sup>

It is indisputable that the Law Against Restraints of Competition (GWB), ultimately enacted in 1957,<sup>24</sup> reflects strong U.S. influence—seen perhaps most clearly in the general prohibition of contractual cartel arrangements.<sup>25</sup> Nevertheless, a comparison of U.S. antitrust laws and the GWB reveals significant differences. To begin with, the GWB contains a number of exceptions, unfamiliar to U.S. law, that were critical to its passage in the 1950s. These exceptions authorize, among other arrangements, "rationalization cartels" (agreements designed to promote technological progress or increase the efficiency of the members) and "structural crisis" cartels (agreements designed to prevent the loss of

19. For a discussion of the development of the GWB, and the particular influence of the ordoliberal school in that process, see GERBER, PROTECTING PROMETHEUS, *supra* note 9, at 233-61. On the principles of Ordoliberalism, see also WOLFGANG FIKENTSCHER, WIRTSCHAFTSRECHT, BAND II 42-50 (1983); NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 112-14 (outlining Böhm's work and its connection to economic theory).

20. See NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 114-15; GERBER, PROTECTING PROMETHEUS, *supra* note 9, at 245-46.

21. See Gerber, *Constitutionalizing the Economy*, *supra* note 18, at 43 (stating that "complete competition" in the ordoliberal sense meant "competition in which no firm in a market has power to coerce other firms in that market."); see also *id.* at 43 n.86 (distinguishing "complete competition" from "perfect competition").

22. See NÖRR, LEIDEN DES PRIVATRECHTS, *supra* note 8, at 140-58. On Böhm in particular, see KNUT WOLFGANG NÖRR, AN DER WIEGE DEUTSCHER IDENTITÄT NACH 1945: FRANZ BÖHM ZWISCHEN ORDO UND LIBERALISMUS (1993) [hereinafter NÖRR, BÖHM].

23. See JAMES MAXEINER, POLICY AND METHODS IN GERMAN AND AMERICAN ANTITRUST LAW 7 (1986); see also Gerber, *Constitutionalizing the Economy*, *supra* note 18, at 64 ("U.S. ideas have been absorbed into an intellectual tradition with its own dynamics—they did not provide the structures of that tradition.").

24. Germany's Gesetz Gegen Wettbewerbsbeschränkungen (Law Against Restraints of Competition) was enacted on July 27, 1957, shortly after the signing of the Treaty of Rome, and went into effect on January 1, 1958. Gesetz Gegen Wettbewerbsbeschränkungen, v.27.7.1957 (BGBl I S.1081), as amended by Acts of Sept. 15, 1965, Aug. 3, 1973, June 28, 1976, April 26, 1980, December 22, 1989, and August 26, 1998 [hereinafter GWB].

25. See GWB § 1 (prohibiting "agreements between competing undertakings . . . which have as their object or effect the prevention, restriction or distortion of competition."); MARTIN HEIDENHAIN ET AL., GERMAN ANTITRUST LAW 107 (1999). One historian describes the GWB as "profoundly influenced by the American experience," and cites its development as an example of how "economic integration . . . concentrated on . . . those elements [of the German industrial system] which were deemed to be dysfunctional to the multilateral 'Open Door' world trading system and to the dominant American model." Berghahn, *Pax Americana*, *supra* note 16, at 85, 97.

business due to short-term declines in demand).<sup>26</sup> The inclusion of such provisions reflected the political compromise reached between proponents of a more U.S.-modeled system and supporters of cartels as a sometimes-necessary institution of the German economy.<sup>27</sup> More generally, the GWB has a different substantive focus than U.S. antitrust law: while U.S. law prohibits firms from deliberately attaining (or attempting to attain) monopolistic power, the GWB condemns only the abusive use of market-dominant power.<sup>28</sup> In addition, the systems have substantially different theoretical orientations. U.S. antitrust law constitutes a set of justiciable rules enforced in the courts as well as by administrative agencies; the GWB, on the other hand, grants the Federal Cartel Office discretionary authority to regulate conduct that amounts to abuse of market-dominant power.<sup>29</sup> These differences highlight the extent to which the GWB is not a mere transplantation of U.S. law, but an expression of the German competition philosophy built on the ordoliberal foundation.<sup>30</sup>

The legislative process, and the GWB itself, thus bear witness to the tension between U.S. influence and local control in the transition from occupation law to the domestic competition regime, and reflect the ultimate resolution of that tension in a way that absorbed but also diluted U.S. influence. That resolution took years to achieve: whatever the mix of motivations underlying early occupation law, the first steps taken toward decartelization and deconcentration of the German economy understandably generated lasting hostility toward the United States. Some industry representatives criticized early U.S. policy as an attempt to de-industrialize the entire economy,<sup>31</sup> some politicians attacked it as a step toward the re-destruction of the country,<sup>32</sup> and some commentators cast it as a wholesale imposition of victor's justice.<sup>33</sup> These reactions carried over into opposition to the continued influence of U.S. policy in the subsequent drafting of the GWB, and to the perceived importation of laws that were inconsistent

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26. See MURACH-BRAND, *supra* note 17, at 234-49 (Appendix C) (including excerpts of a 1952 letter from the Office of the U.S. High Commissioner for Germany to the Secretary of State, evaluating these exemptions).

27. See Gerber, *Constitutionalizing the Economy*, *supra* note 18, at 65-66.

28. See generally CORWIN D. EDWARDS, *AMERICAN AND GERMAN POLICY TOWARD CONDUCT BY POWERFUL ENTERPRISES: A COMPARISON* (1977).

29. *Id.* See also GERBER, *PROTECTING PROMETHEUS*, *supra* note 9, at 278 (describing the approach as an "administrative-judicial mix").

30. See Lawrence A. Sullivan & Wolfgang Fikentscher, *On the Growth of the Antitrust Idea*, 16 BERKELEY J. INT'L L. 197, 217 (1998) (noting that the Freiburg School "provided for the philosophy of German economic recovery after World War II in general, and German antitrust and its Law Against Trade Restraints of 1958 in particular.").

31. See generally BERGHAHN, *AMERICANISATION*, *supra* note 15, at 80-84 (analyzing these views).

32. See HALEY, *supra* note 12, at 4 (noting that with the exception of Ludwig Erhard, German political leaders in the post-war period viewed these laws not as a development that would be positive for the nation's economy but as "antithetical to economic recovery and growth."); see also Stedman, *supra* note 12, at 450-51.

33. See, e.g., Oskar Klug, *Die Problematik der amtlichen deutschen Kartellpolitik*, in KARTELLE IN DER WIRKLICHKEIT: FESTSCHRIFT FÜR MAX METZNER 153, 155 (Ludwig Kastl ed., 1963) (criticizing Law 56 and describing it in part as "antideutsch").

with the country's own regulatory experience, economic practices and policies.<sup>34</sup> The ultimate emergence of a system incorporating indigenous elements of competition enforcement policy was therefore a successful compromise by which Germany crafted a national identity against the backdrop of U.S. influence. As one historian describes it:

As is well known, the history of the Federal Republic began under foreign auspices, under the patronage of the Western Occupying Forces. But from the beginning, there flowed into this history so much of indigenous substance, indigenous convictions and values, so much was based on indigenous contributions, that the new governmental structure, if initially under the caveat of its provisional status, was soon widely accepted by the population and won its approval....[I]n other words, an identity arises....<sup>35</sup>

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Like the transition from occupation law to national law, the regionalization of competition law exposed Germany's enforcement regime to external influence. Regionalization began with the development of the European Coal and Steel Community ("ECSC"), a process which raised some of the same issues regarding Germany's military and economic situation that had been raised in the early post-war period. One of the goals of the ECSC was to continue the deconcentration of the German steel industry, begun under British occupation law,<sup>36</sup> by bringing the production of the Ruhrgebiet under some level of external control. More broadly, as one of the architects of the Treaty of Paris later expressed, European integration was viewed as "the real way to solve the German problem" because "[she] will have defended herself against an individualism that too rapidly takes the form of nationalism, whose effects we know."<sup>37</sup> As during the occupation period, U.S. influence in forming cartel policy was pronounced. Concerns on the part of U.S. policymakers that a regional coal and steel union would simply function as a big cartel led them to remain involved—if often behind the scenes—during the region's formative period.<sup>38</sup> The United

34. See BERGHAIN, *AMERICANISATION*, *supra* note 15, at 155-81 (describing the legislative planning process). Berghain recounts in particular the resistance of German industry to "American-style capitalism." *Id.*

35. NÖRR, BÖHM, *supra* note 22, at 5. See also NÖRR, *LEIDEN DES PRIVATRECHTS*, *supra* note 8, at 3, 139 (noting the contribution of ordoliberalism's legal aspects to the formation of an identity for the new German republic).

36. See DJELIC, *supra* note 11, at 165.

37. See MAYNE, *supra* note 13, at 251 (quoting a 1956 letter by Paul-Henri Spaak, one of the architects of the European Coal and Steel Community, in which he outlined some of his reasons for supporting European integration: "First of all, this I believe is the real way to solve the German problem . . . . A Germany which is integrated in European entities, and, through them, in the Atlantic Pact, will have defended herself against an individualism that too rapidly takes the form of nationalism, whose effects we know, and at the same time against the temptation to approach the Russians by herself in an attempt to solve with them, directly, the problems in dispute, without taking account of the general interests of the West . . .").

38. See BERGHAIN, *AMERICANISATION*, *supra* note 15, at 134-54 (describing the United



States supported a version of the ECSC's constitutive treaty more restrictive of horizontal agreements than various competing proposals, including Germany's, and the treaty incorporated general principles of free competition more prevalent at the time in the United States than in European countries.<sup>39</sup> Nevertheless, the competition provisions of the ECSC did not mirror U.S. law precisely. They contemplated significant central control by the High Authority; in addition, due to the need for enhanced production of materials necessary for reconstruction, the High Authority retained both the power to intervene in emergency situations and the authority to approve horizontal agreements when necessary to ensure productivity.<sup>40</sup> As in the development of Germany's domestic law, then, U.S. influence was present but not determinative.<sup>41</sup>

In subsequent stages of European integration, German influence played an increasingly substantial role in the development of competition policy. This was partly due to the fact that at the time, of the member states, Germany had the most substantial experience with competition regulation.<sup>42</sup> Its Federal Cartel Office had been actively involved in enforcement (although it was at that stage still enforcing Allied law); in addition, parallel with the development of the treaty forming the European Community (E.C. Treaty), Germany was drafting the GWB.<sup>43</sup> Thus, while the architects of regional law recognized the need to suppress the national policies of individual states in the service of regional goals,<sup>44</sup> it was also inevitable that the German experience would influence the emerging law.<sup>45</sup> Indeed, Germans were active participants in the formation of the European Community, and proponents of ordoliberalism, in particular, promoted that theory's principles during the formation of European economic institutions.<sup>46</sup>

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States' use of its leverage in Europe to influence the treaty's provisions, as well as the feeling at the time of some German commentators that the ECSC had its roots in American ideals and the protection of American interests rather than in European ideals).

39. *Id.* at 134, 140.

40. *Id.* at 144-45. Berghahn examines the "interventionist powers" of the High Authority, concluding that "it is important to emphasise that the anti-cartel clauses of the ECSC treaty were not an exact replica of the American model." *Id.*

41. See Sullivan & Fikentscher, *supra* note 30, at 226-27 (discussing this blend of influences).

42. See D.G. GOYDER, *EC COMPETITION LAW* 28 (4th ed. 2003).

43. See *supra* notes 19-30 and accompanying text.

44. See, e.g., Eberhard Günther, *Europäische und Nationale Wettbewerbspolitik*, in *WIRTSCHAFTSORDNUNG UND RECHTSORDNUNG: FESTSCHRIFT ZUM 70. GEBURTSTAG VON FRANZ BÖHM* 279, 318 (Helmut Coing et al. eds., 1965) (noting that the effectuation of European competition policy would depend on the willingness of member states to subordinate their own interests to those of the community).

45. See, e.g., Eberhard Günther, *Kann das deutsche Kartellgesetz Vorbild einer Wettbewerbsregelung im Gemeinsamen Markt sein?*, in *WIRTSCHAFTS- UND FINANZPOLITIK IM GEMEINSAMEN MARKT* 101, 104 (Friedrich-Ebert-Stiftung. ed., 1963); see also *id.* at 115-17 (concluding that of the competition laws of the six member states, Germany's was the best suited to influence the developing European law); GERBER, *PROTECTING PROMETHEUS*, *supra* note 9, at 332 (noting that "German ideas [had] a natural 'headstart'" in serving as a source of experience within Europe).

46. See Gerber, *Constitutionalizing the Economy*, *supra* note 18, at 71 (describing European

Of course, the German experience and German theory were not the only forces shaping the developing European regime, and in the end the E.C. Treaty's competition articles reflected a blend of various influences. These include the influence of the United States: Articles 85 and 86<sup>47</sup> in many respects resembled Sections 1 and 2 of the U.S. Sherman Act,<sup>48</sup> and were perceived at the time as resting at least in part on the U.S. model. Despite this substantive similarity, however, the E.C. competition regime had from its inception a different rationale than the U.S. system. As part of the treaty establishing a common market, Articles 85 and 86 were intended to protect not only competition itself, but also regional integration policy.<sup>49</sup> In addition, through Article 85(3)'s review and exemption mechanism, the Article established an administrative apparatus for the review of all arrangements and practices affecting free trade.<sup>50</sup> In this focus on administrative control, it is quite unlike the Sherman Act's conception of judicially enforceable law that prohibits outright certain arrangements.<sup>51</sup> Within this architecture, one can trace certain aspects of the German regulatory approach, including in particular the focus on abuse of market-dominant positions rather than the creation of monopolistic power.<sup>52</sup> The intellectual foundation of German antitrust law was therefore present, though tempered, in the regional approach. While a great degree of Germany's regulatory authority shifted to the regional level, then, the national identity reflected in Germany's domestic regime survived the process of regionalization.

### B.

Defining the role of private antitrust litigation in the enforcement of competition law is an exercise that reveals Germany's preservation of a unique competition culture, as well as its ambivalence toward U.S. influence. As noted

unification as "the main vehicle for disseminating the ordoliberal version of neo-liberalism outside of Germany"). See also GERBER, *PROTECTING PROMETHEUS*, *supra* note 9, at 263-65 (describing the involvement of Walter Hallstein, Hans von der Groeben and Alfred Müller-Armack in crafting European policy).

47. In its historical discussion, this paper uses the original numbering of these provisions; they have subsequently been re-numbered Articles 81 and 82, respectively.

48. 15 U.S.C. §§ 1, 2 (2004).

49. See Barry E. Hawk, *Antitrust in the EEC—The First Decade*, 41 *FORDHAM L. REV.* 229, 231-32 (1972).

50. Julian M. Joshua & Sarah Jordan, *Combinations, Concerted Practices and Cartels: Adopting the Concept of Conspiracy in European Community Competition Law*, 24 *NW J. INT'L L. & BUS.* 647, 650 (2004).

51. *Id.* at 657. See also HALEY, *supra* note 12, at 50; David J. Gerber, *Europe and the Globalization of Antitrust Law*, 14 *CONN. J. INT'L L.* 15, 25 (1999) [hereinafter Gerber, *Europe and Globalization*] ("While U.S. antitrust law operates primarily according to a judicial model, European systems place primary responsibility for enforcing competition law in the hands of administrators . . . [who] often operate within legal frameworks and according to legal constraints that are very different from those in the United States.").

52. See Ernst-Joachim Mestmäcker, *DIE VERMITTLUNG VON EUROPÄISCHEM UND NATIONALEM RECHT IM SYSTEM UNVERFÄLSCHTEN WETTBEWERBS* 171 (1969); HALEY, *supra* note 12, at 50 (concluding that "[t]he result . . . was to extend both American and ordo-liberal influence beyond German borders as European institutions and competition law have expanded.").

above, the German system is control-based and assigns enforcement responsibility to government administrators. Although the GWB does permit private actions based on certain violations of competition law,<sup>53</sup> the concept of *Schutznormen* (protective standards) greatly limits that right. If the provision in question is intended to protect the general public, rather than a specific individual interest, it cannot be the basis of a private remedial action.<sup>54</sup> Thus, a court may award private damages in cases of "targeted infringement," but not when the anticompetitive conduct in question affects an entire market.<sup>55</sup> In sum, although the GWB technically permits private antitrust litigation, it has never been a substantial component of competition law enforcement in Germany. Relatedly, Germany's civil justice system does not incorporate the procedural rules that would facilitate meaningful private enforcement. Mechanisms that are central to the success of private attorney general actions in the United States, including broad pre-trial discovery, contingency fees and class actions, in Germany appear not only undesirable, but often as contrary to public policy.<sup>56</sup>

While differences between civil justice systems often create problems in other types of international litigation,<sup>57</sup> they have particular salience in antitrust litigation. The post-war period brought increasing conflicts between Europe and the United States regarding the extraterritorial application of U.S. antitrust law. In 1945 the Second Circuit recognized effects-based jurisdiction, holding in the *Alcoa* case that U.S. antitrust law could be applied to conduct taking place abroad as long as that conduct caused harmful effects within the United States.<sup>58</sup> Since that decision, U.S. courts have been active in using domestic law to counter foreign anticompetitive conduct.<sup>59</sup> While other countries, including Germany,<sup>60</sup> also recognize effects-based jurisdiction, it is not used frequently

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53. Section 33 provides in part that "[w]hoever violates a provision of this Act or a decision taken by the cartel authority shall, if such provision or decision serves to protect another, be obliged vis-à-vis the other to refrain from such conduct; if the violating party acted willfully or negligently, it shall also be liable for the damages arising from the violation." GWB § 33 (English version available in HEIDENHAIN ET AL., *supra* note 25, at 147).

54. RAINER BECHTOLD, *KARTELLGESETZ, GESETZ GEGEN WETTBEWERBSBESCHRÄNKUNGEN* 348-49 (2002). The reference in section 33 to the "protect[ion of] another" is interpreted in accordance with the general principle stated in § 823(2) of the German Civil Code, which allows damages stemming from the infringement of a statute "intended for the protection of others." For comparative analysis of the conditions under which U.S. law recognizes private rights of action implied from regulatory statutes, see RICHARD M. BUXBAUM, *DIE PRIVATE KLAGE ALS MITTEL ZUR DURCHSETZUNG WIRTSCHAFTSPOLITISCHER RECHTSNORMEN* 30-36 (Juristische Studiengesellschaft Karlsruhe, No. 105, 1972).

55. This limitation was relevant in litigation arising from the vitamins cartel itself. See *infra* note 122 and accompanying text.

56. See generally HAIMO SCHACK, *INTERNATIONALES ZIVILVERFAHRENSRECHT* 371-74 (2002).

57. Products liability litigation is one such area.

58. *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

59. See GARY B. BORN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* 584-607 (1996).

60. See GWB § 130(2): "This Act shall apply to all restraints of competition having an effect within the area of application of this Act, also if they were caused outside the area of application of this Act." HEIDENHAIN ET AL., *supra* note 25, at 259. For an early examination of extraterritoriality

outside the United States.<sup>61</sup> Moreover, antitrust litigation in the United States carries with it the possibility of treble damages awards, the availability of which exacerbates disputes over divergent procedural rules.<sup>62</sup> Some countries have responded to this conflict by adopting blocking statutes designed to limit the effect of U.S. litigation within their borders, and sometimes to recover any amounts paid by their nationals to satisfy multiple damage awards.<sup>63</sup> While Germany is not among them, its courts have applied Section 328 of the Civil Procedure Code to limit the effect of U.S. judgments in such cases. That section provides in part that recognition of a foreign judgment may be denied if it would "lea[d] to a result that is irreconcilable with material principles of German law, especially if recognition is irreconcilable with constitutional rights."<sup>64</sup> Courts have invoked this provision to deny recognition of multiple damages awards in antitrust cases, on the basis that under German law civil awards must be purely compensatory.<sup>65</sup>

As the preceding paragraph indicates, Germany is not alone in rejecting the U.S. civil litigation model and resisting the application of U.S. procedural and remedial rules in cross-border litigation. But because there is a legal cultural context for this dispute as well, the German position on this transatlantic debate relates to the country's particular legal history. One commentator has identified the continuity of the American legal culture, as compared to the disrupted legal history in Europe, as one of the sources of the perennial *Justizkonflikt* between Europe and the United States.<sup>66</sup> He argues that due to political events, no continental European system<sup>67</sup>—particularly not the German system—was able to maintain and perpetuate its "consciousness of legal cultural identity."<sup>68</sup> In his view, therefore, U.S. judges do not, and perhaps might not be expected to, respect the European legal practice as a consolidated whole; in short, the European legal culture does not stand on equal footing historically with the U.S. culture.<sup>69</sup>

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of anti-cartel law in particular, see generally ECKARD REHBINDER, *EXTRATERRITORIALE WIRKUNGEN DES DEUTSCHEN KARTELLRECHTS* (1965).

61. For a discussion of the extraterritoriality of E.U. competition law, see GOYDER, *supra* note 42, at 498-502. See also JÜRGEN BASEDOW, *LIMITS AND CONTROL OF COMPETITION WITH A VIEW TO INTERNATIONAL HARMONIZATION* 27-29 (2002) for a discussion of effects jurisdiction in various national regimes.

62. See ANDREAS F. LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS* 150-66 (1996) (describing some of the high-profile cases in this area).

63. See BORN, *supra* note 59, at 586-87 (discussing blocking statutes).

64. *Zivilprozeßordnung* (Code of Civil Procedure) § 328(1)(4), translated in PETER L. MURRAY & ROLF STÜRNER, *GERMAN CIVIL JUSTICE* 536 (2004).

65. See SCHACK, *supra* note 56, at 373 (noting the continuing debate about this question); Joachim Zekoll & Nils Rahlf, *US-amerikanische Antitrust-Treble-Damages-Urteile und deutscher ordre public*, *JURISTENZEITUNG* 8/1999 384 (1999).

66. DER JUSTIZKONFLIKT MIT DEN VEREINIGTEN STAATEN VON AMERIKA 36-37 (Walther J. Habscheid ed., 1985) (contribution of Rolf Stürner).

67. *Id.* at 37 (noting the possible exception of Switzerland).

68. *Id.* at 61.

69. *Id.* at 37-38. Professor Stürner refers in his English summary to this partly as a matter of "historical self-confidence." *Id.* at 62. But see MURRAY & STÜRNER, *supra* note 64, at 580-81 (suggesting that the "[s]uspicion of German institutions" that may have colored U.S. views of German

On this view, the conflict over civil justice systems—like the conflict over competition rules themselves—touches on the historical context of particular relationships within the international community.

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World War II exposed Germany's economic law framework to forces beyond its sovereign control. The modern German competition enforcement culture was therefore shaped by a process of influence and resistance. With respect to the transatlantic relationship, in particular, it is possible to construct competing narratives of this process. Analyzing modern German competition law, some scholars tell a story of an indigenous theory defeating the attempted transplantation of a foreign system;<sup>70</sup> others, a story of the United States' co-optation of a local group in order to achieve its own geopolitical aims.<sup>71</sup> From either reading, though, two conclusions emerge. First, Germany has retained, to a substantial degree, a distinct national regulatory culture. Second, the German experience in shaping this culture—in navigating shifting regional and global political currents in order to form domestic competition policy—involved both the absorption of and partial resistance to external influence, particularly that of the United States.<sup>72</sup>

### III.

The direction of global competition law and policy is not yet clear. Policymakers and commentators disagree about the means by which to make the transition from a system based on the coordination of diverse national regimes to one based on convergence or harmonization of national laws.<sup>73</sup> The past five

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civil procedure in the past should be diminished by now).

70. See, e.g., NÖRR, *LEIDEN DES PRIVATRECHTS*, *supra* note 8; GERBER, *PROTECTING PROMETHEUS*, *supra* note 9, at 340; HALEY, *supra* note 12, at 39 (noting that "the Germans, led by Ludwig Erhard . . . seized the moment to provide their country with an authentically German approach to competition policy.").

71. See, e.g., DJELIC, *supra* note 11, at 108 (describing the process as one in which U.S. authorities co-opted the Freiburg School, only after which the school "gained a legitimacy of [its] own and economic reforms were, in time, appropriated locally."); see also Reinhard Neebe, *Optionen westdeutscher Außenwirtschaftspolitik 1949 – 1953*, in *VOM MARSHALLPLAN ZUR EWG: DIE EINGLIEDERUNG DER BUNDESREPUBLIK DEUTSCHLAND IN DIE WESTLICHE WELT* 163, 165 (Ludolf Herbst et al. eds., 1990) (outlining the U.S. foreign policy goals regarding Germany).

72. This is especially true because theories regarding the Americanization of Germany—including in the economic arena, but more broadly as well—have become such a focal point for thinking about German society. See Michael Ermarth, *The German Talks Back: Heinrich Hauser and German Attitudes Toward Americanization After World War II*, in *ERMARTH*, *supra* note 16, at 101, 103 ("Whether employed with favor, disfavor or nonpartisan neutrality, Americanization has been a defining *topos* for Germany in the twentieth century.").

73. See ANTITRUST DIVISION, INTERNATIONAL COMPETITION POLICY ADVISORY COMMITTEE, FINAL REPORT TO THE ATTORNEY GENERAL AND ASSISTANT ATTORNEY GENERAL FOR ANTITRUST (2000), at [www.usdoj.gov/atr/icpac/finalreport.htm](http://www.usdoj.gov/atr/icpac/finalreport.htm); see also *THE FUTURE OF TRANSNATIONAL ANTITRUST—FROM COMPARATIVE TO COMMON COMPETITION LAW* (Josef Drexler ed., 2003) (a recent collection of essays on these issues).

years have brought one development, however, that is particularly relevant to the transatlantic debate over these questions: an enlargement of the role of private antitrust litigation within the panoply of enforcement mechanisms. This section discusses two forces—one regional, one American—behind this development, and analyzes the German reaction to them.

#### A.

A recent Council Regulation has implemented long-planned changes to modernize the enforcement of competition law within the European Union.<sup>74</sup> The Regulation's goal is to decentralize regulatory authority within the E.U.'s competition law framework. This shift was deemed necessary to achieve a better allocation of enforcement resources at the Commission level, largely by reducing the administrative burden associated with the existing notification and exemption procedure.<sup>75</sup> It will permit the Commission to focus on larger policy questions and on pursuing the most economically damaging violations, in particular those involving cartel activity.<sup>76</sup>

Under the previous regime, national authorities were permitted to apply Article 81(1) of the E.C. Treaty—that is, to conclude that an agreement was prohibited as a restraint of trade.<sup>77</sup> However, only the Commission had the authority to grant exemptions to notified agreements under Article 81(3);<sup>78</sup> therefore, the administration of the *ex ante* notification and exemption procedure rested entirely at the Commission level. The Regulation re-allocates this authority, making all of Article 81, including Article 81(3), directly applicable in member states. It thereby eliminates the Commission's exemption monopoly and replaces the system of notification and authorization with an *ex post* enforcement system in which both the Commission and national authorities will play a role.<sup>79</sup>

One anticipated concomitant of the move to an *ex post* system of competition enforcement is an increase in private antitrust litigation. As then-

74. Council Regulation, *supra* note 4.

75. Claus-Dieter Ehlermann, *The Modernisation of EC Antitrust Policy: A Legal and Cultural Revolution*, 37 COMMON MARKET L. REV. 537, 541 (2000) [hereinafter Ehlermann, *Modernisation*] (describing the then-draft Regulation).

76. See generally White Paper on Modernisation of the Rules Implementing Articles 85 and 86 of the EC Treaty, Commission Programme No. 99/027 COM (1999) 101, Apr. 1999 [hereinafter White Paper] ¶¶ 7, 8, 45 (noting specifically the need for stronger cartel policy within the enlarged Union). See also Walter van Gerven, *Substantive Remedies for the Private Enforcement of EC Antitrust Rules Before National Courts*, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 53 (2003), 70-73 (Claus-Dieter Ehlermann & Isabela Atanasiu eds., 2003). Van Gerven concludes that "the overall effect of the [then-]draft Regulation should be to enable the Commission to concentrate on its policy function and to limit its involvement in the enforcement of competition rules by following up complaints, or acting on its own initiative, only in matters which have a clear Community interest." *Id.* at 72.

77. Council Regulation (EEC) No. 17/62, OJ[1962] L 13/204, Art. 9(3).

78. *Id.* at art. 9(1).

79. See generally Ehlermann, *Modernisation*, *supra* note 75, at 586-88; Philip Lowe, *Current Issues of E.U. Competition Law: The New Competition Enforcement Regime*, 24 NW. J. INT'L L. & BUS. 567 (2004).

Commissioner Mario Monti stated, "[I]t is our aim that undertakings and individuals should increasingly feel encouraged to make use of private action before national courts in order to defend the subjective rights conferred on them by E.C. competition rules."<sup>80</sup> Despite longstanding recognition of the right of parties harmed by violations of competition law to bring private actions under Articles 81 and 82,<sup>81</sup> private enforcement has to date played only a minor role in the E.U. The Commission's monopoly of the power to declare exemptions under Article 81(3) meant that a defendant in judicial proceedings could stop those proceedings simply by initiating a procedure before the Commission.<sup>82</sup> Under the Regulation, however, national courts may apply Article 81 directly in its entirety. They will therefore retain jurisdiction in such cases and be able to provide prompt civil enforcement against restrictive agreements.<sup>83</sup> In addition, the Regulation explicitly requires the competition authorities and national courts of member states to apply Articles 81 and 82 of the E.C. Treaty when they consider conduct that falls within the scope of those articles; in such cases, member states may no longer rely on national law alone.<sup>84</sup> This change too will facilitate private enforcement, as the availability of damages in private actions has been defended more strongly at the regional level than it has been in most member states. Indeed, recent jurisprudence of the European Court of Justice has specifically reinforced the availability of damages in private actions under Article 81. In the 1999 case of *Courage v. Crehan*, the Court held that even a party to a contract violating Article 81 could sue its counterparty for damages.<sup>85</sup> The decision reflected a commitment to realizing the "full effectiveness" of Article 81, recognizing the importance of private remedies in serving that goal.<sup>86</sup>

It is true that the Regulation, standing alone, cannot (and is not designed to) establish a full-scale private attorney general-type mechanism. The national

80. Mario Monti, *Effective Private Enforcement of EC Antitrust Law*, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 3 (2003). For general discussion of these developments, see Donnchadh Woods, *Private Enforcement of Antitrust Rules—Modernization of the E.U. Rules and the Road Ahead*, 16 LOY. CONSUMER L. REV. 431 (2004).

81. See, e.g., *Belgische Radio en Televisie v. SV Sabam*, Case 127/73 (No. 1), 1974 E.C.R. 51 (1974); see also [1999] OJ C39/6 (discussing coordination between the national courts of member states and the Commission in this regard).

82. See also White Paper, *supra* note 76, ¶ 100; see generally Wouter P.J. Wils, *The Modernisation of the Enforcement of Articles 81 and 82 EC: A Legal and Economic Analysis of the Commission's Proposal for a New Council Regulation Replacing Regulation No. 17*, 24 FORDHAM INT'L L.J. 1655 (2001) [hereinafter Wils, *Modernisation*].

83. See White Paper, *supra* note 76, at ¶ 100.

84. Council Regulation, *supra* note 4, art. 3(1); discussed in Lowe, *supra* note 79, at 568-69. Pursuant to the older *Walt Wilhelm* case, national competition law and E.U. competition law were viewed as creating two independent barriers to anticompetitive conduct; more stringent national law could therefore be applied unless the Commission had granted an exemption to the conduct concerned.

85. Case C-453/99, *Courage Ltd. v. Bernard Crehan*, 2001 E.C.R. I (Eng. C.A. 1999). The decision made an exception for cases in which the plaintiff bore "significant responsibility" for the violation in question. *Id.*

86. See GOYDER, *supra* note 42, at 468-69; articles collected in EUROPEAN COMPETITION LAW ANNUAL 2001, *supra* note 76.

laws of E.U. member states continue to govern civil litigation procedure, often presenting substantial barriers to private enforcement.<sup>87</sup> Most member jurisdictions, for instance, do not permit the sort of evidentiary discovery that would enable a plaintiff to meet the burden of establishing the facts leading to a finding of prohibited behavior.<sup>88</sup> In addition, they do not recognize various procedural mechanisms, such as class action suits and contingent fee arrangements, that would create the necessary incentives for private litigation. Nevertheless, the drafters of the Regulation stated clearly their objective to promote private enforcement, and therefore to seek the additional procedural reforms necessary "in order to instil real life" into the private right of action in Europe.<sup>89</sup> These reforms will be substantial, and indicate a significant reorientation in competition enforcement within the E.U.

German competition agencies, and many commentators, initially responded<sup>90</sup> with strong criticism of the change in enforcement philosophy reflected in the Regulation.<sup>91</sup> Some of these objections addressed not the new approach per se, but rather the process the Commission chose—challenging the Regulation's compatibility with the Rome Treaty, for instance, and stressing the need for uniform competition enforcement within the E.U.<sup>92</sup> Others, however, indicated a resistance to the cultural change of course that the new enforcement model embodied.

Perhaps the most negative statement was made in the 1999 report of the German *Monopolkommission* (Monopoly Commission), responding to the White Paper in which the European Commission had first proposed the modernization plan.<sup>93</sup> The Monopoly Commission criticized the move to *ex post* enforcement, not only because it disagreed with the change as a matter of competition pol-

87. Wouter P.J. Wils, *Does the Effective Enforcement of Articles 21 & 82 EC Require Not Only Fines on Undertakings, But Also Individual Penalties and in Particular Imprisonment?*, in EUROPEAN COMPETITION LAW ANNUAL 2001 411-52 (2003).

88. See ERNST-JOACHIM MESTMÄCKER, WIRTSCHAFT UND VERFASSUNG IN DER EUROPÄISCHEN UNION 237 (2003).

89. Mario Monti, *supra* note 80, at 5. The EC also sponsored a survey of member states regarding their capacity for private enforcement actions, further indicating a desire to move in that direction. See STUDY ON THE CONDITIONS OF CLAIMS FOR DAMAGES IN CASE OF INFRINGEMENT OF EC COMPETITION RULES, available at <http://www.europa.eu.int/comm/competition/antitrust>.

90. See discussion *infra* at notes 104-08 and accompanying text (discussing the subsequent moderation of this response).

91. See, e.g., ERNST-JOACHIM MESTMÄCKER, *supra* note 88, at 228-46; Arved Deringer, *Stellungnahme zum Weissbuch der Europäische Kommission über die Modernisierung der Vorschriften zur Anwendung der Art. 85 und 86 EG-Vertrag (Art. 81 und 82 EG)*, 1/2000 EuZW 5 (2000); see also Karsten Schmidt, "Privatisierung" des Europakartellrecht—Aufgaben, Verantwortung und Chancen der Privatrechtspraxis nach der VO Nr. 1/2003, 4/2004 Zeitschrift für Europäisches Privatrecht 881, 881 (2004) (summarizing by noting that the Regulation was not welcomed by the Germans).

92. MESTMÄCKER, *supra* note 88, at 228-35. See also Ehlermann, *Modernisation*, *supra* note 75, at 559 (summarizing arguments that because the Rome Treaty requires the exercise of administrative discretion, direct effect in member states is improper).

93. *Kartellpolitische Wende in der Europäischen Union?*, 28 SONDERGUTACHTEN DER MONOPOLKOMMISSION ZUM WEISSBUCH DER KOMMISSION (1999), at [http://www.monopolkommission.de/sg\\_28/text\\_d.htm](http://www.monopolkommission.de/sg_28/text_d.htm).



icy,<sup>94</sup> but also on the grounds that the proposed system could not be instituted without amending the E.C. Treaty.<sup>95</sup> To some degree, it cast its objections as opposition to the U.S. enforcement model. The report notes that the Commission's change in direction "may have been influenced by U.S. antitrust law,"<sup>96</sup> and at various points outlines broad differences between the U.S. and E.U. economic and legal landscapes that would make a transplant of the U.S. system unviable.<sup>97</sup> In some respects, these passages quite clearly echo the debates over the drafting of the GWB, in which recognition of the particular historical and economic role of cartels in Germany was reflected in the exceptions permitting various cartel arrangements.<sup>98</sup>

The Monopoly Commission directed some of its strongest criticism at the move toward more substantial reliance on private actions.<sup>99</sup> The report outlines the German preference for administrative control and discomfort with the various civil and criminal penalties that private enforcement would require.<sup>100</sup> It discusses the aspects of U.S.-style civil procedure that would be necessary to effective private enforcement, noting that many of them, such as pre-trial discovery and contingent fee arrangements, would counter German conceptions of civil justice.<sup>101</sup> The report also argues that the more entrepreneurial role played by attorneys in U.S. private litigation is inconsistent with the German conception of an attorney's role.<sup>102</sup> In some respects, the report states, the changes that would flow from the modernization would violate German public policy: for instance, the institution of multiple damages awards (which it refers to throughout as "punitive damages").<sup>103</sup>

Following the Council's adoption of the Regulation in 2002—and, perhaps, acceptance of the inevitable—German resistance to these changes faded.<sup>104</sup> In 2001, the Monopoly Commission, under largely new membership, submitted a

94. *Id.* at ¶¶ 22-32.

95. *Id.* at ¶¶ 14-18 (arguing that the proposed system would both violate the competition articles of the EC Treaty and conflict with jurisprudence of the European Court of Justice regarding the application of Article 81(1)). In this section, the report also warned of potential conflict with the German Constitution under the German Constitutional Court's Maastricht decisions. *Id.* at ¶ 19.

96. *Id.* at ¶ 36. See also Ehlermann, *supra* note 75, at 586-88 (describing criticism of the White Paper for its apparent reliance on the U.S. model).

97. *Kartellpolitische Wende*, *supra* note 93, at ¶¶ 26, 37. The report discusses both regulatory differences (for instance, the U.S. rule of reason approach) and economic differences (for instance, the linkages between major companies and between those companies and their banks that enable cartel formation in Europe).

98. See discussion *supra* at footnotes 26-27 and accompanying text.

99. *Kartellpolitische Wende*, *supra* note 93, at ¶¶ 36-40.

100. *Id.* at ¶ 37.

101. *Id.* at ¶ 39. See also Arved Deringer, *Reform der Durchführungsverordnung zu den Art. 81 und 82 des EG-Vertrages*, 2/2001 EuR 2001, 306, 306 (stating that drawing from the U.S. system would be inappropriate, as that system is "supported by an entire set of procedural rules unknown to [Germany]").

102. *Kartellpolitische Wende*, *supra* note 93, at ¶ 39 (stating that a German attorney is seen as an agent for the administration of justice and not as a profit-seeking entrepreneur).

103. *Id.* at ¶ 38.

104. See Schmidt, *supra* note 91, at 882 (noting that the reforms are moving beyond the German objections).

second report that focused less on challenging the modernization program and more on identifying and describing potential difficulties that would arise in its implementation.<sup>105</sup> Germany prepared the necessary amendments to its own competition law, bringing the GWB into conformity with the regional approach.<sup>106</sup> In 2004, the Monopoly Commission published an additional report supporting the GWB revision, and in some respects calling for even more substantial change—including the introduction of double damages—in furtherance of the new regime.<sup>107</sup> While debate remains over the extent to which private actions will play a role,<sup>108</sup> German regulators and commentators seem to have accepted the shift in the enforcement culture within Europe.

### B.

The second challenge to Germany's system of competition enforcement came from a series of U.S. cases addressing the application of domestic antitrust law to foreign conduct.<sup>109</sup> The decisions in these cases generated a split among the circuit courts, which then reached the U.S. Supreme Court in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*<sup>110</sup> This case arose out of the activities of an in-

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105. *Folgeprobleme der europäischen Kartellverfahrensreform*, Sondergutachten der Monopolkommission, 2001. This report details further the aspects of material and procedural German law that provide local alternatives for private actions, and suggests that further inspection of the procedural framework for private actions is necessary in order to ensure the effective strengthening of that form of enforcement. *Id.* at ¶ 66. It also notes that greater incentives for private plaintiffs will also likely be necessary—which to date have been permitted in Germany only in very narrow circumstances (outside antitrust). *Id.* at ¶¶ 72-73.

106. Entwurf eines Siebten Gesetzes zur Änderung des Gesetzes gegen Wettbewerbsbeschränkungen, BR-Drucksache 15/3640, August 12, 2004. Draft Section 33, for instance, clarifies that private claims for damages may be asserted even when the alleged violation was not targeted at a particular entity. See also Karl Wach et al., *Germany Report*, available at [http://europa.eu.int/comm/competition/antitrust/others/private\\_enforcement/national\\_reports/germany\\_en.pdf](http://europa.eu.int/comm/competition/antitrust/others/private_enforcement/national_reports/germany_en.pdf) (describing the draft legislation); Rolf Hempel, *Privater Rechtsschutz im deutschen Kartellrecht nach der 7. GWB-Novelle*, 4/2004 WuW 362 (2004) (same).

107. Monopolkommission, *Das allgemeine Wettbewerbsrecht in der Siebten GWB-Novelle*, March 2004. In particular, see ¶¶ 75-83 (discussing multiple damages as an incentive to private suits). For commentary supporting the introduction of multiple damages, see also Jürgen Basedow, *Private Enforcement of Article 81 EC: A German View*, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 143 (2003) ("If the [European] Commission wants to use private initiative for the purposes of enforcing competition laws in the public interest, it should consider the US model of a private attorney general who is spurred to enforce the law by the expectation of treble damages."); JÜRGEN BASEDOW, *WELTKARTELLRECHT* 100 (1998).

108. See Karsten Schmidt, *Procedural Issues in the Private Enforcement of EC Competition Rules: Considerations Related to German Civil Procedures*, in EUROPEAN COMPETITION LAW ANNUAL 2001: EFFECTIVE PRIVATE ENFORCEMENT OF EC ANTITRUST LAW 253, 256 (2003) ("In my view, direct applicability of Article 81(3) EC will not bring about a strengthening of private enforcement, but rather the contrary."); Hempel, *supra* note 106, at 368-69.

109. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003); *Den Norske Stats Oljeselskap As v. Heeremac V.O.F.*, 241 F.3d 420 (5th Cir. 2001); *Kruman v. Christie's Int'l PLC*, 284 F.3d 384 (2d Cir. 2002).

110. 124 S. Ct. 2359 (2004). For a discussion of the case, see Hannah L. Buxbaum, *National Courts, Global Cartels: F. Hoffman-LaRoche Ltd. v. Empagran, S.A.*, 5 GERMAN L. J. 1095 (2004) [hereinafter Buxbaum, *National Courts, Global Cartels*].

ternational price-fixing cartel in the vitamin industry. Unlike traditional extra-territoriality cases, in which domestic law is applied to foreign conduct that has effect locally, *Empagran* contemplated jurisdiction over foreign conduct that caused *foreign* harm: the plaintiffs were foreign purchasers who had suffered damages in purchase transactions taking place outside the United States.<sup>111</sup> Many foreign governments were concerned that the availability of U.S. actions in such cases would threaten their own enforcement regimes, as foreign plaintiffs would choose to sue in the United States rather than under local law in their home countries.<sup>112</sup>

Germany filed an amicus brief in the case, together with Belgium, in which it argued strenuously against the exercise of extraterritorial jurisdiction in contravention of foreign competition enforcement rules.<sup>113</sup> The brief argues primarily for limiting the exercise of prescriptive jurisdiction by national courts in order to recognize the competing interests of sovereign states within the international community. Thus, Germany's major objection is that permitting litigation in U.S. courts would result in "the encroachment of other countries' laws," including Germany's, regarding competition law enforcement.<sup>114</sup> If foreign civil litigants could bring lawsuits in the United States, the brief reasoned, they would circumvent the remedial schemes established in their home jurisdictions and in effect override the regulatory interests of other sovereign states.<sup>115</sup> In addition, of course, foreign defendants would be increasingly subject to litigation in U.S. fora, with its associated burdens.<sup>116</sup>

The brief suggests that respect for foreign sovereignty alone is sufficient basis for denying jurisdiction.<sup>117</sup> However, it strengthens its argument by emphasizing the differences between German and U.S. competition law. Because German and U.S. law agreed on the illegality of the conduct of the vitamins cartel, it is issues of enforcement philosophy that here differentiate them. For in-

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111. *Hoffman-LaRoche*, 124 S. Ct. at 2364. The theory for extending U.S. jurisdiction to such claims rested on connections alleged between the harm caused by the cartel in foreign countries and the harm caused within the United States. The case has been remanded for consideration of that issue. See *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337 (D.C. Cir. 2004).

112. In addition to Germany and Belgium, Canada, Ireland, Japan, the Netherlands and the United Kingdom filed amicus briefs.

113. Brief of the Governments of the Federal Republic of Germany and Belgium as Amici Curiae, *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, 124 S. Court. 2359 (2004) (No. 03-724), 2004 WL 226388 [hereinafter Brief]. See also Otto Graf Lambsdorff, *Wettbewerbsrecht als Ordnungsfaktor einer globalisierten Marktwirtschaft*, 7/8 WIRTSCHAFT UND WETTBEWERB 710 (2003).

114. Brief, *supra* note 113, at \*2. Germany also objected to the potential application of treble damages awards in lawsuits against German companies (*Id.* at \*2, \*28) and to the possibility that U.S. jurisdiction would undermine the leniency programs established in other countries (*Id.* at \*28-\*30).

115. *Id.* at \*14.

116. In the vitamins litigation itself, the German company BASF was a defendant. See Clifford A. Jones, *Foreign Plaintiffs, Vitamins, and the Sherman Antitrust Act After Empagran*, EUR. L. REP. JULY/AUGUST 270, 275 (2004).

117. Brief, *supra* note 113, at \*14 ("[I]rrespective of whether a different outcome may result under the various systems, U.S. law should not trump Germany's and Belgium's sovereign rights . . .").

stance, while the brief concedes that hard-core cartels of the type at issue “are prohibited almost universally,”<sup>118</sup> it then turns to other areas of competition law, unrelated to the case, in which differences remain (distinguishing, for instance, the U.S. “rule of reason” analysis from the German evaluative approach).<sup>119</sup> Its strongest arguments highlight the different orientation of German enforcement efforts: “[T]he German system sets a different balance between the civil and administrative punishment of violations of competition law. While in Germany private parties can also claim damages, . . . Germany’s focus in obtaining the desired deterrent effect of illegal restraints of trade is on prosecution through its competition authorities.”<sup>120</sup> This passage notes the limitation placed on private enforcement by the concept of *Schutznormen*.<sup>121</sup> (If anything, in fact, the brief understates this limitation on private actions. At the time the brief was filed, three German courts had heard cases brought by companies harmed by the vitamins cartel. Each court held that because the violations harmed the market generally, and were not targeted infringements, no damages were available.<sup>122</sup>) In addition, the brief focuses on the procedural differences between U.S. and German law, citing again the public policy against multiple damages and contingency fees.<sup>123</sup> Indeed, the brief contains a warning in this regard: “One consequence of foreign disapproval with U.S. encroachments on other nation-states’ antitrust enforcement efforts will be a refusal to enforce judgments obtained in U.S. lawsuits.”<sup>124</sup>

The Supreme Court was receptive to these sovereignty-based arguments, citing in its opinion the briefs filed by Germany and other nations.<sup>125</sup> It noted specifically the right of foreign countries to make their own choices regarding remedies and enforcement policy, and the obligation of the United States to respect those choices.<sup>126</sup> To that extent, then, the opinion stands for the proposition that the international regulatory community must accommodate different regulatory systems built on different legal and political decisions. However, it is important to note that the Court predicated its opinion on the assumption that the

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118. *Id.* at \*12.

119. *Id.* at \*14.

120. *Id.* at \*11-\*12.

121. See discussion, *supra* at notes 54-55 and accompanying text.

122. See, e.g., LG Mannheim, Urt. V. 11.7.2003—7 O 326/02, summarized in GRUR 2004 182 (concluding that the vitamins cartel’s goal was to maintain artificially high prices in the entire market, and not to affect particular market participants); LG Mainz, Urt. V. 15.1.2004—12 HK O 52/02, summarized in NJW-RR 2004 478 (accord). See also Friedrich Wenzel Bulst, *Private Kartellrecht durchsetzung durch die Marktgegenseite—deutsche Gerichte auf Kollisionskurs zum EuGH*, 31/2004 NJW 2201 (2004) (discussing these cases and noting their inconsistency with the European Court of Justice’s holding in *Courage v. Crehan*). Since the brief’s filing, one court has awarded damages in related litigation: LG Dortmund, Urt. v. 1.4.2004, 13 O 55/02, summarized in 11/2004 WuW 1182 (2004) (viewing the cartel’s effect on ascertainable market participants as a sufficient basis for liability).

123. Brief, *supra* note 113, at \*11.

124. *Id.* at \*26.

125. *F. Hoffman-LaRoche, Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2368 (2004).

126. *Id.* at 2368-69.

harm suffered by foreign purchasers of the price-fixed goods was independent of the harm caused in the United States, and ultimately remanded the case for a determination of that factual point.<sup>127</sup> Whether respect for the regulatory authority of foreign countries will be enough to restrain U.S. jurisdiction in cases involving interdependent harms flowing from global cartels remains to be seen.<sup>128</sup>

Considered together with the recent developments in the E.U., Germany's brief in the *Empagran* case is an interesting statement about the country's right to maintain its chosen system of competition enforcement in the face of global misconduct. Germany filed the brief after its criticism of the E.U. modernization program had been overridden, after the Monopoly Commission's second, more moderate report had been issued, and, indeed, after the draft amendment to the GWB had been prepared.<sup>129</sup> The brief's point that private antitrust litigation in U.S. courts would override different substantive and remedial policies observed in Germany is therefore somewhat inconsistent with the trend developing in the E.U.,<sup>130</sup> and signals that Germany's acceptance of an increased role for private enforcement does not necessarily translate into acceptance of civil litigation in U.S. courts as a vehicle for that enforcement. For that very reason, the brief serves as a reminder that the process of convergence of laws has a cultural as well as an instrumental component,<sup>131</sup> which may affect attitudes toward particular means chosen to effect that convergence.

#### IV.

One plan for achieving—or at least approaching—a truly global competition law regime focuses on identifying the fundamental policies that are shared across systems and building a harmonized system outward from that base. Cartel law has become the standard illustration of an area in which such shared policies already exist, and which might therefore serve as a foundation for future convergence. Anti-hard core cartel policy is one of the “core principles” of the Doha Declaration, intended to draw competition law under the umbrella of the WTO;<sup>132</sup> similarly, an anti-cartel program is a policy priority of the Organisa-

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127. *Id.* at 2372. On remand the circuit court indicated its intent to review as a matter of law the question “whether the nature of the alleged link between foreign injury and domestic effects is legally sufficient” to support U.S. jurisdiction. *Empagran S.A. v. F. Hoffman-LaRoche, Ltd.*, 388 F.3d 337, 339 (D.C. Cir. 2004).

128. See Buxbaum, *National Courts, Global Cartels*, *supra* note 110, at 1102-03; Peter Hay & Tobias Krätzscher, *Begrenzt der U.S. Supreme Court die extraterritoriale Anwendung US-amerikanischen Antitrust-Rechts?*, 9/2004 RIW 667, 671 (2004).

129. See discussion, *supra* notes 105-06 and accompanying text. The brief does cite the draft parameters for the then-planned Seventh Amendment of the GWB, but not in connection with the shift toward facilitating private enforcement. Brief at \*12 n.6.

130. Clifford Jones speculates that this is the reason the Commission itself did not file an amicus brief in the *Empagran* litigation. Jones, *supra* note 116, at 274.

131. Buxbaum, *Rechtsvergleichung*, *supra* note 7, at 205.

132. See Eleanor M. Fox, *International Antitrust and the Doha Dome*, 43 VA. J. INT'L L. 911, 913 (2003).

tion for Economic Co-operation and Development.<sup>133</sup> Commentators also regularly refer to anti-cartel policy as a platform for the construction of international antitrust law.<sup>134</sup> However, as this essay has attempted to demonstrate, even this sort of accretive convergence requires the fitting together not only of discrete substantive rules but also of broader enforcement policies and philosophies woven into the fabric of different legal systems. This is a difficult process, and it is not surprising that attitudes toward it reflect the historical and cultural conditions of the countries involved.<sup>135</sup> Identifying those conditions will be a necessary step in the globalization of competition law and enforcement strategies.

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133. See Organization for Economic Cooperation and Development, *Council Recommendation Concerning Effective Action against Hard-Core Cartels* (1998) (initiating the OECD's anti-cartel program), at <http://www.oecd.org/dataoecd/39/4/250131.pdf>.

134. See, e.g., GOYDER, *supra* note 42, at 514 (including hard-core cartels in the group of "motherhood and apple pie" issues on which everyone agrees); Sullivan & Fikentscher, *supra* note 30, at 232 ("Perhaps the strongest reason for thinking that the time is right for international antitrust is the nearly world-wide proliferation of anti-cartel policies."); Harry First, *The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law*, 68 ANTITRUST L. J. 711, 727 (2001) ("were the argument over international competition law limited to whether there should be some international agreement on 'hard core' cartels, those in favor of such an agreement could declare victory now.").

135. See David J. Gerber, *The U.S. — European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective*, 34 NEW ENG. L. REV. 123 (1999) (identifying some current perceptions and preferences that affect development of global solutions).