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Antitrust Damages in EU Law and Policy

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

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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…

US U

Germa G

Spain S1

UK B

Ital I

France F

F2
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

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 » \(\rightarrow\) 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

Royal avenue but:
- Abuse of right under EU law
- Potential preliminary ruling on “Provimi 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

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

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
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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 ('Karteldeliktsnormen')? – 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)
    
    • Practical : 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?