

Court of Justice of the European Union Rules on Questions of International Jurisdiction in Cartel Damages Cases

In a landmark judgment handed down on May 21, 2015, the Court of Justice of the European Union (the “CJEU” or the “Court”) issued a long-awaited decision on several jurisdictional issues in multinational cartel damages cases (Case C-352/13 – *CDC*).

The judgment will be of major importance to numerous pending and forthcoming lawsuits. In the European Union (“EU”), actions for damages brought by alleged victims following cartel decisions by the European Commission or other national competition authorities (so-called “follow-on actions”) have been on the rise for years. The question of jurisdiction over these cases, which often span multiple jurisdictions, had been unresolved to date. The judgment focuses on the interpretation of Regulation (EC) No. 44/2001 (“Brussels I Regulation”). It will nevertheless equally be applicable to cases which were initiated after January 10, 2015, and, thus, fall under the recast Regulation (EU) No. 1215/2012 (“Brussels Ibis Regulation”).

I. Background

CDC, a Belgian special purpose vehicle (“SPV”), collected damage claims from various undertakings that were allegedly affected by the so-called “Hydrogen Peroxide Cartel” (Case COMP/F/38.620 – *Hydrogen Peroxide and Perborate*), and, in March 2009, brought an action for damages against six chemicals producers before the Regional Court of Dortmund in Germany. With the exception of one defendant, *Evonik Degussa GmbH* (“*Evonik*”), all defendants were domiciled in EU Member States other than Germany. In September 2009, *CDC* withdrew its action against *Evonik*, following an out-of-court settlement. The remaining defendants subsequently challenged the court’s international jurisdiction. The adjudicating Regional Court of Dortmund (the “Dortmund Court”) decided to stay the proceedings and refer several questions to the CJEU for a preliminary ruling. In short, the Dortmund Court asked:

1. Whether in complex cartel damages cases, all defendants can be sued in one EU Member State if one of the defendants is domiciled in that state (the so-called “anchor defendant”, in this case *Evonik*), and, if so, whether this changes in the event that the action against the anchor defendant is withdrawn after initiation of the lawsuit;

2. whether in complex cartel damages cases, the EU Member States' courts have jurisdiction at the venue for the place of tort, and if so, which place that would be;
3. whether courts need to consider contractual jurisdiction clauses.

II. The Decision

In summary, the CJEU held that in multinational and complex cartel cases with defendants seated in the EU:

- Plaintiffs can always establish jurisdiction against all EU cartel participants before the court at the statutory seat of an anchor defendant (see 1. below);
- plaintiffs can – with some limitations – establish jurisdiction against cartel participants based on the venue for the place of tort, which is the place where the aggrieved party is domiciled and the place where the cartel was founded (see 2. below);
- contractual jurisdiction (and possibly arbitration) clauses should only be taken into account if they refer specifically to infringements of competition law (see 3. below).

1. Jurisdiction of the courts where an anchor defendant is domiciled can always be established

The CJEU clearly ruled in support of the jurisdiction of the courts where an anchor defendant is domiciled in multinational cartel damages cases. The Court stressed that the relevant provision (Article 6(1) Brussels I Regulation), which derogates from the principle that jurisdiction is based on the defendant's domicile (Article 2 Brussels I Regulation), must be interpreted narrowly and strictly. It applies only if a connection exists between the claims brought against the anchor defendant and the other defendants of such a kind that it is expedient to decide on those actions together to avoid the risk of irreconcilable judgments resulting from separate proceedings in different EU Member States, and if the claims are based on the same situation of fact and law.

The requirement that there be the same situation in fact and law was particularly disputed in complex cartel damages litigations, where various victims sued various cartel participants over purchases based on various supply relationships subject to different governing laws. In the Court's view, the sole circumstance that the European Commission found that the cartel agreement amounted to a "single and continuous infringement" of EU competition law sufficed to assume the same situation in fact.

Regarding the same situation in law, the judgment does not clearly explain whether the CJEU would generally assume that complex cartel cases like the one at hand constitute an identical situation in law. In any event, the CJEU held that this requirement plays no role if the defendants could foresee that they might be sued in a EU Member State where one of the co-defendants has its statutory seat, and that this is the case for a “single and continuous infringement” of EU competition law where every cartel participant is jointly and severally liable for any damages suffered.

Consequently, the Court held that an action for cartel damages can be brought before the court of any EU Member State where an anchor defendant is domiciled against the other defendants domiciled in other EU Member States.

Finally, with respect to the withdrawal of *CDC*'s action against the anchor defendant *Evonik*, some of the defendants claimed that the settlement between *CDC* and *Evonik* had already been reached before initiation of the proceedings in Dortmund, and that the parties had intentionally delayed the formal conclusion of the out-of-court settlement solely to secure the jurisdiction of the German court. The CJEU indicated that such an allegation of purposeful circumvention may be a valid defense but must be “supported by firm evidence that [...] the parties concerned had colluded to artificially fulfill, or prolong the fulfillment of, [the applicability of Article 6(1) Brussels I Regulation]”. While the CJEU clarified that it is for the national court to assess such evidence, it stated that mere settlement negotiations would not by themselves be suitable to prove such collusion.

2. Jurisdiction at the venue for the place of tort can be established

The special jurisdiction rule in Article 5(3) Brussels I Regulation stipulates that a defendant domiciled in one EU Member State may be sued in another EU Member State “in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur”. According to the CJEU’s case law, the “place where the harmful event occurred” covers both the “place of the event giving rise to the damage” and the “place where the damage occurred”.

In this case, the CJEU first confirmed that the fact that the claims in question had been transferred to *CDC* by the allegedly harmed purchasers of Hydrogen Peroxide had no impact on the determination of jurisdiction. The “place where the harmful event occurred” must therefore be determined for each claim independently of any subsequent assignment.

a) Jurisdiction at the place of the event giving rise to the damage

Regarding the place of the event giving rise to the damage, the Court held that in cartel-related cases, the causal event is not the potential breach of contractual obligations, but the restriction of the purchaser’s freedom of contract as a result of the unlawful restriction of competition resulting from a cartel agreement. Since cartels

prevent purchasers from being supplied at the market price, the place of the event giving rise to the damage, according to the Court, is the place where the cartel was founded.

One may also rely on the place where a particular cartel agreement (amongst other cartel agreements) was concluded if it is not possible to identify a single place of a cartel's conclusion. This specific cartel agreement would then be regarded as the sole causal event giving rise to the damage claimed by a purchaser arising from that specific cartel agreement, and the courts of the place where it was concluded therefore have jurisdiction limited to damages incurred by that purchaser solely as a result of that specific cartel agreement.

b) Jurisdiction at the place where the damage occurred

Regarding the other possible venue for tort actions, the “place where the damage occurred”, the CJEU ruled that such place is generally the aggrieved party's statutory seat. The Court found that courts at this place are “manifestly” best suited to deal with the particularities of the case and of the damaged party. Their jurisdiction encompasses damage claims against all cartel participants and the entire damages incurred by the aggrieved party.

However, in cases where a claimant bases its claims (partly) on assignments, a model which is used by SPVs such as *CDC*, *Deutsche Bahn* affiliate *Barnsdale* or even by parent companies suing on behalf of their subsidiaries, the claimant would need to bring separate actions for those damages allegedly incurred by each of the assignors before the courts at the place of the assignors' statutory seats (unless jurisdiction can be established at the statutory seat of an anchor defendant or the “place of the event giving rise to the damages”).

3. Jurisdiction clauses are only relevant if they mention competition infringements

The third question referred by the Dortmund Court relates to whether EU Member States' courts must consider contractual jurisdiction clauses. The CJEU held that such jurisdiction clauses are, in principle, admissible and binding on the court seized of a matter. Surprisingly enough, the CJEU was silent on arbitration clauses.

However, the Court considered that disputes concerning damages flowing from a cartel can be governed by such a clause only if the victim can be deemed to have consented to it.

Consequently, a jurisdiction clause that only abstractly refers to disputes arising from the contractual relationship is not applicable to disputes relating to the tortious liability of a cartel participant. Since the harmed party could not foresee such litigation at the time it agreed to the jurisdiction clause, such litigation cannot, in the Court's view, be seen as arising from the contractual relationship. On the contrary, a jurisdiction

clause must expressly refer to disputes relating to liability as a result of an infringement of competition law.

The reasons for the CJEU not to rule on arbitration clauses are not entirely clear. This may be due to the fact that arbitration does not fall within the scope of the Brussels I Regulation (Article 1(2)(d)). Interpreting the scope of arbitration clauses falls within the sole competence of the national courts based on the relevant national laws. However, the CJEU also missed the opportunity to opine on the disputed question whether an arbitration over follow-on actions complies with the effectiveness principle and is thus permissible at all. This issue remains unresolved.

III. Discussion and Implications

While the CJEU's conclusions may, in part, represent a defensible position, the reasoning itself is disappointing and surprisingly shallow. The Court has chosen a pragmatic approach without making any effort to embed its findings in a persuasive and conclusive legal discussion.

In the context of the venue of an anchor's defendant's statutory seat, the CJEU refrained entirely from elaborating whether there would actually be risk of irreconcilable judgments if claims were brought in different jurisdictions. In particular, in light of the significant differences between national laws, this aspect would have deserved, if not required, some reflection. Moreover, this decision only deals with the situation where the anchor defendant was an addressee of the European Commission decision. It is not clear whether the court would have come to the same conclusion if the anchor defendant was not an addressee of the European Commission decision.

With respect to the venue for the place of tort, while Advocate General *Jääskinen* had recommended in his Opinion of December 2014 to entirely abandon the notion of the "place where the harmful event occurred" in complex cartel damages cases since too many connecting factors are theoretically feasible in this regard, the CJEU did not follow suit. Indeed, it did not even mention the Advocate General's Opinion. Without discussing other possible and frequently proposed options as regards the place of tort, such as the places of deliveries of cartelized goods or the implementation of cartel agreements, the Court considers the purchaser's freedom of contract as being restricted at the place where the cartel agreements were concluded.

It is to be expected that the "place of the event giving rise to the damage" will not play a significant role in future cartel damages disputes. Although it will technically be possible for any victim to bring lawsuits at the place of a cartel's conclusion, it will be challenging to identify those places based on public information. In complex cartel cases, even the European Commission struggles to identify a specific "founding meeting", and the non-confidential version of the European Commission's decision is often not detailed enough to identify one specific venue. It will be even more challenging to allocate specific damages to one particular meeting, should the victim

decide to bring a lawsuit at the venue of one specific meeting, which, in principle, also remains possible.

However, the “place where the damage occurred” may enable individual plaintiffs to establish jurisdiction before the court of their statutory seat. The courts for the place of a victim’s statutory seat are competent to hear an action brought against any cartel participant for the whole of the loss inflicted upon that victim.

This is remarkable for three reasons: First, the CJEU ignores the prevailing view in the EU Member States’ case law and literature that cartel delicts are classified as market delicts and that the “place where the harmful event occurs” should consequently be the place where a restriction of the market has an impact. Second, the CJEU did not apply its so-called “*Shevill* Doctrine”, according to which the adjudicating court at the “place where the damage occurred” is only competent to rule on damages arising in the respective EU Member State (also known as the “mosaic principle”). Third, the Court’s findings seem to be in stark contradiction to the CJEU’s earlier case law, which recognized that the jurisdiction rules in matters relating to tort may not be construed in a way which ultimately leads to a justification of a general forum at the plaintiff’s seat – a result which would be the exact opposite of the Brussels I Regulation’s general rule that claims be brought in the EU Member State of the defendant’s domicile.

Nonetheless, this judgment finally brings some clarification to a number of unresolved issues concerning international jurisdiction for cartel follow-on actions against defendants with their statutory seat in the EU. The CJEU set forth disputable but very specific guidelines for potential plaintiffs and the courts of the EU Member States:

- If a cartel victim is only suing in its own right and does not bring forward any (assigned) claims on behalf of subsidiaries or other victims with their statutory seat elsewhere, it can use the “home advantage” and sue any and all cartel participants before its home court.
- However, should a plaintiff bring claims assigned to it, either as a SPV specifically set up in order to bundle damage claims or as a parent company for one or more subsidiaries with statutory seats in different jurisdictions, it will likely have to select the court at the statutory seat of one of the cartel participants.
- Contractual jurisdiction clauses must specifically address cartel damage claims. It will be interesting to see whether this gives rise to the introduction of “cartel jurisdiction clauses” in supply agreements or framework contracts. In any case, arbitration does not seem to be an appropriate means to deal with complex cartel damages cases, given the great number of entities usually involved (for example, various direct and/or indirect purchasers on the

plaintiffs' side and all or most of the cartel participants on the defendants' side).

Note, however, that the Court's decision does not have any bearing on non-EU defendants since neither the Brussels I Regulation nor the Brussels Ibis Regulation are applicable to such defendants in cartel damages cases.

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