COMMON MARKET LAW REVIEW

CONTENTS Vol. 53 No. 1 February 2016

Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Common Market Law Review is published bimonthly.
Subscription prices 2016 [Volume 53, 6 issues] including postage and handling:
Print subscription prices: EUR 818/USD 1157/GBP 583
Online subscription prices: EUR 773/USD 1097/GBP 555
This journal is also available online. Online and individual subscription prices are available upon request. Please contact our sales department for further information at +31(0)172 641562 or at sales@kluwerlaw.com.
Periodicals postage paid at Rahway, N.J. USPS no. 663–170.
U.S. Mailing Agent: Mercury Airfreight International Ltd., 365 Blair Road, Avenel, NJ 07001.
Published by Kluwer Law International B.V., P.O. Box 316, 2400 AH Alphen aan den Rijn, The Netherlands

---

Printed on acid-free paper.

COMMON MARKET LAW REVIEW

Managing Editor: Alison McDonnell
Common Market Law Review
Europa Instituut
Steenschuur 25
2311 ES Leiden
The Netherlands
e-mail: a.m.mcdonnell@law.leidenuniv.nl
tel. + 31 71 5277549
fax: + 31 71 5277600

Aims

The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

Editorial policy

The editors will consider for publication manuscripts by contributors from any country. Articles will be subjected to a review procedure. The author should ensure that the significance of the contribution will be apparent also to readers outside the specific expertise. Special terms and abbreviations should be clearly defined in the text or notes. Accepted manuscripts will be edited, if necessary, to improve the general effectiveness of communication.

If editing should be extensive, with a consequent danger of altering the meaning, the manuscript will be returned to the author for approval before type is set.

Submission of manuscripts

Manuscripts should be submitted, together with a covering letter, to the Managing Editor. At the time the manuscript is submitted, written assurance must be given that the article has not been published, submitted, or accepted elsewhere. The author will be notified of acceptance, rejection or need for revision within three to nine weeks.

Authors may be requested to submit a hard copy of their manuscript, in addition to a digital copy, together with a summary of the contents. Articles should preferably be no longer than 28 pages (approx. 9,000 words). Annotations should be no longer than 10 pages (approx. 3,000 words). The title of an article should begin with a word useful in indexing and information retrieval. Short titles are invited for use as running heads. All notes should be numbered in sequential order, as cited in the text, *Except for the first note, giving the author's affiliation.The author should submit biographical data, including his or her current affiliation.

Further details concerning submission are to be found on the journal's website
http://www.kluwerlawonline.com/productinfo.php?pubcode=COLA

Common Market Law Review **53**: 225–248, 2016.

International jurisdiction in competition damages cases under the Brussels I Regulation: *CDC Hydrogen Peroxide*

Case C-352/13, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA* v. *Akzo Nobel NV, Solvay SA/NV, Kemira Oyj, FMC Foret SA,* Judgment of the Court (Fourth Chamber) of 21 May 2015, EU:C:2015:335.

1. Introduction

Follow-on actions for damages against international horizontal cartels have increased significantly over the last years in Europe. Such transnational cases can raise complex questions regarding jurisdiction and applicable law.[1] Price-fixing or market-sharing agreements often cover various markets over many years, involve several participants and have myriad victims. Given that cross-border actions for damages against competition law infringers are a rather novel development in Europe, many issues are not yet settled.

The *Cartel Damage Claims Hydrogen Peroxide* dispute is the first case in which the ECJ was asked to rule on the application of the European rules relating to jurisdiction in civil and commercial matters in competition law cases. The Court had to strike a balance between, on the one hand, the objective of Regulation 44/2001 (Brussels I Regulation, hereafter: BR)[2] to provide for "highly predictable" rules of jurisdiction (Recital 11 BR) centred around the basic principle that the claimant has to sue at the home of the defendant and, on the other, the effective enforcement of the European competition regime established in *Courage* v. *Crehan*.[3] The judges of the Fourth Chamber seized the opportunity to clarify some of the most disputed issues in competition cases, namely the reach of tort jurisdiction (Art. 5(3)

1. See the contributions to Basedow, Francq and Idot (Eds.), *International Antitrust Litigation: Conflict of Laws and Coordination* (Hart Publishing, 2012); Danov, Becker and Beaumont (Eds.), *Cross-Border EU Competition Law Actions* (Hart Publishing, 2013); Nietsch and Weller (Eds.), *Private Enforcement: Brennpunkte kartellprivatrechtlicher Schadensersatzklagen* (Nomos, 2014). See also Danov, *Jurisdiction and Judgments in Relation to EU Competition Law Claims* (Hart Publishing, 2010) and the overview given by Wurmnest, "Internationale Zuständigkeit und anwendbares Recht bei grenzüberschreitenden Kartelldelikten", (2012) EuZW, 933–939.

2. Council Regulation 44/2001/EC of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2001, L 12/01.

3. Case C-453/99, *Courage Ltd* v. *Crehan*, EU:C:2001:465, paras. 25–29.

BR), jurisdiction over multiple defendants (Art. 6(1) BR) and jurisdiction agreements (Art. 23 BR). The Court's interpretation also applies also with regard to the rules in Articles 7(2), 8(1) and 25 of Regulation 1215/2012 (Brussels I Regulation (recast), [hereafter: BR (recast)]) which replaced those in the BR in January 2015.[4]

2. Factual and legal background

In 2006, the European Commission fined several chemical undertakings for a single and continuous infringement of (now) Article 101 TFEU and Article 53 EEA Agreement regarding the chemicals hydrogen peroxide and sodium perborate. This cartel lasted several years and covered the entire EEA territory. The undertakings involved, *inter alia*, exchanged commercially important information, allocated market shares and customers, fixed prices and agreed on limitations of production to raise prices above the competitive level.[5] These agreements were adapted and modified at regular intervals, but were primarily concluded in a series of meetings that took place in various EU Member States, including Belgium, France and Germany.[6]

In the aftermath of the Commission's decision, the Cartel Damages Claims group (hereafter: CDC) – a special enforcement entity based in Brussels[7] – concluded agreements on the transfer of damage claims with companies in 13 different European States allegedly harmed by the cartels activities. Those companies had either directly bought chemicals at inflated prices from the cartel members or had themselves agreed with direct purchasers on the transfer of their respective claims.[8] Such agreements are becoming more and more frequent in Germany[9] given that victims of anticompetitive conduct cannot bring a class action against the competition law infringers.

4. Regulation 1215/2012/EU of the European Parliament and of the Council of 12 Dec. 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. 2012, L 351/1.

5. Commission Decision of 3 May 2006 (Case COMP/F/38.620) – *Hydrogen Peroxide and perborate*, O.J. 2006, L 353/54.

6. A.G. Jääskinen, Opinion of 11 Dec. 2014, EU:C:2014:2443, para 18.

7. On the purpose and the activities of CDC, see <www.carteldamageclaims.com> (last visited 22 Nov. 2015).

8. Opinion, para 19 with note 10.

9. Another case is currently pending before the Landgericht Köln. The claimant is the Barnsdale Cartel Damage Solutions AG, a subsidiary of Deutsche Bahn which is used as a vehicle for the enforcement of various damages claims of that group. It sues various airlines for damages resulting from their participation in the air cargo services cartel. Other victims of this cartel, such as freight forwarders, have ceded their claims to this entity to allow for a bundling

In March 2009, CDC filed before the Landgericht Dortmund actions for damages and disclosure against six chemical undertakings addressed in the Commission's infringement decision of 2006. Of these six undertakings, only Evonik Degussa GmbH was registered in Germany. The other five defendants were registered in Belgium (Solvay SA), France (Arkema France SA), Finland (Kemira Oyj), the Netherlands (Akzo Nobel NV) and Spain (FMC Foret SA).[10] All defendants were duly served. Before the period for lodging statements in their defence had expired and the oral procedure had been opened,[11] CDC withdrew the action with regard to the German defendant Evonik Degussa due to an out-of-court settlement, thus leaving the Landgericht Dortmund to decide whether it had international jurisdiction over the remaining out-of-state defendants.[12] The defendants contested the court's international jurisdiction. In essence, the dispute on the court's jurisdiction revolved around three issues.

The first issue concerned the reach of Article 6(1) BR (now Art. 8(1) BR (recast)). Put simply, according to this ground of jurisdiction a court has jurisdiction over several defendants provided that two prerequisites are met. First, one of the defendants (the "anchor defendant") has his domicile in the State of the court in the EU seized, and, second, the claims against the anchor defendant and his co-defendants "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" (the "close connection criterion"). The co-defendants argued that the second requirement is not met in actions brought jointly against undertakings which participated in different places and at different times in a single and continuous infringement of Article 101 TFEU, whereas CDC was of the opinion that Article 6(1) BR covers such cases. Additionally, the question arose whether jurisdiction under Article 6(1) BR must be denied when the plaintiff withdraws the action against the anchor defendant shortly after lodging it due to an out-of-court settlement.

The second issue arose with regard to the application of Article 5(3) BR (now Art. 7(2) BR (recast)). Pursuant to this provision in matters relating to tort, delict or quasi-delict, the courts at the place where the harmful event occurred or may occur have international jurisdiction. This jurisdiction

of the claims. In total, Barnsdale is claiming over one billion Euros in damages plus interest from the airlines, see <www.juve.de/nachrichten/verfahren/2014/12/luftfrachtkartell-deutsche-bahn-verlangt-mit-redeker-milliarden-von-fluggesellschaften> (last visited 22 Nov. 2015).

10. Opinion, para 20 with note 11.

11. Ibid., para 21.

12. After the reference for a preliminary ruling was initiated, CDC also withdrew the action against Arkema France SA in 2013 (see Opinion, para 25), presumably because another out-of-court settlement was reached.

ground has two prongs, as the plaintiff can sue either at the place where the damage occurred or the place of the event giving rise to it.[13] Since the claims for damages raised by CDC concerned a cartel that was concluded and implemented in various EU Member States, the question arose how to delineate the two prongs of Article 5(3) BR.

The last issue touched upon the reach of jurisdiction and arbitration agreements contained in the purchase agreements that many cartel members had concluded with their customers. If these agreements were valid and covered the claims for damages at stake and prorogated exclusive jurisdiction in favour of courts or tribunals other than the Landgericht Dortmund, this court could not base its jurisdiction on the special jurisdiction grounds laid down in Articles 5(3) and 6(1) BR. The Landgericht had doubts whether the ousting of jurisdiction pursuant to Articles 5(3) and 6(1) BR through such agreements would be in line with the principle of effective enforcement of the European competition rules, as the possibility for plaintiffs to concentrate actions before one court would be hampered.

In April 2013, four years after CDC had filed the action, the Landgericht Dortmund referred three questions to the ECJ for a preliminary ruling.[14]

The first question concerned the application of Article 6(1) BR to claims for damages against cartels. In addition, the referring court wanted to know whether any significance attaches to an action against the anchor defendant being withdrawn after the action has been duly served on all the defendants but before the expiry of the periods for lodging a defence prescribed by the court.

Second, the referring court asked for a clarification as to how the "place where the harmful event occurred" according to Article 5(3) BR ought to be interpreted in cases of damages actions against cartel members that concluded and implemented their anticompetitive agreements in different places and at different times throughout Europe.

Third, the Landgericht inquired whether the requirement of effective enforcement of Article 101 TFEU allows the taking into account of arbitration and jurisdiction clauses contained in contracts for the supply of goods that have the effect of excluding the jurisdiction of a court under Articles 5(3) and 6(1) BR with regard to all the defendants and/or all or some of the claims brought.

13. See e.g. Case C-360/12, *Coty Germany* v. *First Note Perfumes NV*, EU:C:2014:1318, para 46; Case C-375/13, *Kolassa* v. *Barclays Bank*, EU:C:2015:37, para 45.

14. The entire order for reference (*Vorlagebeschluss*) is published in (2013) WuW, 872 = *Beck-Rechtsprechung* (2013), 10006.

3. Opinion of Advocate General Jääskinen

Advocate General Jääskinen delivered his Opinion on 11 December 2014. His reasoning shows that the ECJ's previous case law allows for a variety of (diverging) answers to the questions referred to the Court, given that key concepts in the European jurisdiction rules have not yet been fully elaborated.

3.1. *Jurisdiction over multiple defendants, Article 6(1) BR*

Regarding the interpretation of Article 6(1) BR, the Advocate General recalled that a sufficiently close connection between the actions for damages against multiple defendants may be assumed if there is a risk that courts hearing the actions separately would issue irreconcilable judgments. According to the ECJ's case law, such a risk requires a predicted divergence in the outcome of the disputes arising in the context of the same situation of fact and law (para 62). Applying these principles to the case, the Advocate General concluded that Article 6(1) BR allows for the centralization of actions for damages brought against a number of cartel members that have allegedly infringed Article 101 TFEU in different places and at different times. These claims are based on the same factual situation, as they concern a single infringement of the European competition rules. They are also based on the same situation in law, as the co-defendants might be jointly liable for the damage caused (paras. 68–69).

Turning to the second part of the first question, the Advocate General reasoned that CDC's withdrawl of the action against the anchor defendant before the oral procedure had been opened does not have the effect of frustrating the international jurisdiction of the court seized (paras. 78–83). To avoid abuses of law, however, Article 6(1) BR should not be applicable to cases in which it can be proved that the plaintiff had settled the dispute in a legally binding way with the anchor defendant before instituting the proceedings against the co-defendants and conceals this agreement (para 90).

3.2. *Tort jurisdiction, Article 5(3) BR*

Regarding the second question, Advocate General Jääskinen recalled that Article 5(3) BR must be construed narrowly to restrict forum shopping, and that the objective of this special ground of jurisdiction is to confer jurisdiction on courts that have a particularly close connection to the dispute (paras. 44, 45).

Against this background, the Advocate General discussed possible connecting factors for localizing the place of the causal event giving rise to the alleged damage and the place where that damage occurred, in cases concerning "complex" horizontal cartels. He concluded that Article 5(3) BR cannot be applied to actions for damages brought against a cartel whose structure is characterized by a series of varying agreements for the restriction of competition on the entire European market with victims in various Member States, because all possible connecting factors for the localization of the place where the harmful event occurred would either create an unwarranted multiplication of courts having international jurisdiction or would establish a *forum actoris* contrary to the general principle set forth in Article 2 BR (paras. 49–53).

3.3. *The effect of general jurisdiction and arbitration agreements*

With regard to the effect of jurisdiction agreements and arbitration clauses contained in purchase contracts, Advocate General Jääskinen favoured a bifurcated solution. Jurisdiction clauses covered by Article 23 BR, reasoned the Advocate General, confer jurisdiction on the court or courts chosen by the parties. This choice may not be frustrated by recourse to the principle that the European competition rules must be effectively enforced (paras. 104–117). By contrast, for agreements not covered by Article 23 BR, i.e. arbitration clauses and clauses conferring jurisdiction to courts in non-EU Member States, the Advocate General took the view that the principle of effective enforcement may be applied (para 124).

With regard to both types of clauses, the Advocate General had, however, severe doubts that agreements in purchase contracts abstractly relating to disputes arising out of this contractual relationship can be interpreted as covering claims for damages brought against cartel members (paras. 129–130).

4. Judgment of the Court

4.1. *Jurisdiction over multiple defendants, Article 6(1) BR*

Regarding the interpretation of Article 6(1) BR, the ECJ shared the Advocate General's conclusion, albeit with a slightly different reasoning. The Court held that actions for disclosure and damages brought jointly against undertakings which have participated in different places and at different times in a single and continuous infringement violating Article 101 TFEU

may be centralized in the State of domicile of one of the co-defendants, provided that an infringement decision of the Commission addressed all defendants. To bolster this finding, the ECJ primarily relied on the aims of Article 6(1) BR, namely the sound administration of justice and the minimization of concurrent proceedings leading to different outcomes (para 19).

Against this background, the Court analysed whether the connection between the actions for damages brought by CDC against the cartel members was close enough to justify hearing and determining them together in order to avoid irreconcilable judgments. This presupposes, recalled the ECJ, that the divergence of the outcome must arise in the context of the same situation of fact and law (para 20). The Court held that these requirements are met in cases of actions for damages against cartel members which were fined for a single infringement by a binding decision of the Commission (para 24).

The first requirement (same situation of fact) was not elaborated in detail. It was apparently obvious for the Court that it was met, given that the heart of the claims against all defendants concerned their participation in the same unlawful cartel. The Court's focus therefore lay on the second requirement (same situation of law) (paras. 21–26). The ECJ first observed that the liability of the co-defending cartel members is partly governed by EU law, which determines the unlawfulness of the defendants' conduct, and partly by national law, which determines the other prerequisites of a tortfeasor's liability, including the question whether the cartel members are jointly liable. The fact that various national laws might apply to the claims does not, however, preclude the application of Article 6(1) BR, reasoned the ECJ. The Court explained that although parts of the claims are governed by different legal orders, Article 6(1) BR can be applied insofar as the co-defendants could foresee that they might be sued in the Member State where at least one of them is domiciled. The foreseeability requirement was fulfilled in the case at hand as there had been a binding decision of the Commission stating that all defendants had infringed European competition law. In those circumstances, the addressees of the decision must expect to be sued by victims of the cartel in the courts of a Member State in which one addressee is domiciled.

Regarding the effect of the withdrawal of the action against the anchor defendant due to an out-of-court settlement, the Court held that Article 6(1) BR does not apply if there is "firm evidence that, at the time that proceedings were instituted, the parties concerned had colluded to artificially fulfil, or prolong the fulfilment of, that provision's applicability" (para 31). The ECJ underscored that negotiations aiming at a settlement between the plaintiff and the anchor defendant at the time when the proceedings were instituted do not in themselves prove such a collusion. Things would change, however, if a

settlement had in fact been concluded before the proceedings were instituted, but concealed to create the impression that the requirements of Article 6(1) BR were fulfilled (para 32).

4.2. *Tort jurisdiction, Article 5(3) BR*

Regarding the application of Article 5(3) BR to competition cases, the ECJ did not follow the solutions proposed by the Advocate General at all. After recalling the general principles of this special base of jurisdiction (paras. 35–42), the Court first analysed how the place of the causal event giving rise to the alleged damage must be delineated (paras. 43–50). The ECJ held that in cases of damages claims against horizontal cartels that have altered the market conditions, the place of the causal event leading to the alleged harm is the place of the conclusion of the cartel. If the place of the cartel's formation is known, the courts of that place have jurisdiction over all cartel members under Article 5(3) BR (para 44). But this rule applies not only if there is merely one single place where the cartel was concluded. If it can be proved that among various agreements infringing Article 101 TFEU there was one particular agreement causing the loss allegedly inflicted on the plaintiff, the courts in whose jurisdiction this agreement was formed have international jurisdiction to decide claims concerning the damage thereby inflicted upon that person (para 46).

With regard to the delineation of the place where the damage occurred, the Court held that in case of damages caused by artificially high prices for cartelized goods, this place may be located at each victim's registered office (para 52).

4.3. *The effect of general jurisdiction and arbitration agreements*

Referring to the third question on the effect of general jurisdiction and arbitration clauses, the Court pointed out that the Landgericht Dortmund had not given sufficient information on clauses falling outside the scope of Article 23 BR. Unlike Advocate General Jääskinen, the Court thus did not elaborate on the derogating effect of arbitration agreements or jurisdiction clauses prorogating jurisdiction in favour of courts outside the EU (para 58).

With regard to agreements covered by Article 23 BR, the ECJ recalled that parties to a dispute are free to derogate a court's international jurisdiction pursuant to Articles 5 and 6 BR and held that this general principle must also apply to competition cases, as such agreements do not violate the principle of effective enforcement (paras. 61–64). A derogation of jurisdiction provided

for by Articles 5(3) and 6(1) BR in cartel cases presupposes, however, that the jurisdiction agreement refers to disputes concerning the liability incurred as a result of an infringement of competition law. Clauses in supply contracts which abstractly refer to all disputes arising from the contractual relationship, reasoned the ECJ, usually do not extend to tort claims in connection with the supplier's participation in an unlawful cartel and can therefore not derogate a court's international jurisdiction under the general rules (paras. 68–70).

5. Comment

5.1. *Shaping the reach of Article 6(1) BR*

CDC Hydrogen Peroxide is the first case in which the ECJ had to rule on the application of Article 6(1) BR to damages actions against cartel members. The general concept underlying this special ground of jurisdiction can be summarized as "Tous pour un, un pour tous".[15] The ECJ, however, had severe difficulties in spelling out in a clear and comprehensive manner the prerequisites allowing for a centralization of jurisdiction against multiple defendants.[16] According to the wording of Article 6(1) BR, actions against several defendants domiciled in the EU[17] can be brought before the court at the domicile of one of them, if 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." This requirement was essentially developed by the ECJ in *Kafelis* with regard to the predecessor of this jurisdiction rule in the Brussels Convention,[18] and it

15. Basedow and Heinze, "Kartellrechtliche Schadensersatzklagen im europäischen Gerichtsstand der Streitgenossenschaft (Art. 6 Nr. 1 EuGVO)", in Bechthold, Jickeli and Rohe (Eds.), *Recht, Ordnung und Wettbewerb: Festschrift zum 70. Geburtstag von Wernhard Möschel* (Nomos, 2011), p. 63 with reference to Dumas, *Les Trois Mousquetaires I* (reprint Gallimard, 1966), p. 106.

16. Lund, "Verschwommene Konturen: Das Luxemburger Porträt der Konnexität des Art. 6 Nr. 1 EuGVVO", (2012) *Recht der internationalen Wirtschaft*, 377 (criticizing the "blurred contours" of Art. 6(1) BR).

17. Art. 6(1) BR does not apply to defendants that are not domiciled in an EU Member State, see Case C-645/11, *Land Berlin* v. *Sapir*, EU:C:2013:228, paras. 55–56. In addition, Art. 6(1) BR does not apply to matters of insurance contracts, consumer contracts and individual labour contracts, for which the Regulation lays down special jurisdiction rules aiming at the protection of weaker parties, see Case C-462/06, *Glaxosmithkline* v. *Rouard*, EU:C:2008:299, para 35 (regarding labour disputes). The reformed BR allows however application of this jurisdiction rule in proceedings brought against an employer, cf. Art. 20(1) BR (recast).

18. Case 189/87, *Kalfelis* v. *Bankhaus Schröder*, EU:C:1988:459, paras. 8–12.

was codified when the Convention was transformed into a European regulation in 2001.

The ECJ shaped the contours of the close connection requirement in *Roche Nederland,* a case concerning the liability of various undertakings belonging to the same group for infringements of a European patent in various EU Member States; the undertakings were sued at the seat of one of the infringers. The ECJ held that decisions may not be regarded as irreconcilable in the sense of Article 6(1) BR just because they might lead to a divergence in the outcome of the dispute. Rather, the divergence must also arise in the context of the "same situation of law and fact".[19] Applying these prerequisites to the patent infringement, the ECJ concluded that the various actions did not arise in the context of the same legal situation since, pursuant to Article 64(3) Munich Convention,[20] any claim for infringement of a European patent must be examined according to the rules of the national law of the State for which the patent has been granted.[21] The Court's reasoning was partly understood as saying that a divergence in the outcome based on the same legal situation may be assumed only if the actions are based on identical legal rules, which is not the case if the law is not fully harmonized.[22]

In *Freeport*[23] the ECJ clarified, however, that an identity of legal bases is not required to apply Article 6(1) BR, and in *Painer* the Court confirmed this finding.[24] The legal norms according to which claims are brought against multiple defendants are thus only one consideration in determining whether there is a risk of irreconcilable judgments. Whether a sufficiently close connection exists must be assessed in light of all the elements of the case.[25]

Given that the newer case law does not demand an identity of the legal rules on which the claims rest, it does not come as a surprise that the ECJ – in line with the decisions of many national courts[26] and the majority of

19. Case C-539/03, *Roche Nederland BV* v. *Primus and Goldenberg*, EU:C:2006:458, para 26.

20. Convention on the Grant of European Patents of 5 Oct. 1973 (so-called Munich Convention) (as amended).

21. Case C-539/03, *Roche Nederland BV* v. *Primus and Goldenberg*, paras. 29–30.

22. See A.G. Trestenjak, Opinion in Case C-145/10, *Painer* v. *Standard VerlagsGmbH*, EU:C:2011:239, para 76 with note 28.

23. Case C98/06, *Freeport plc* v. *Arnoldsson*, EU:C:2007:595, paras. 38–47.

24. Case C-145/10, *Painer* v. *Standard VerlagsGmbH*, EU:C:2011:798, paras. 80–81.

25. Ibid., para 83; similarly Case C98/06, *Freeport plc* v. *Arnoldsson*, para 41.

26. For Austria see OGH, decision of 14 Feb. 2012, 5 Ob 39/11p, available at < www.ris.bka.gv.at> (last visited 22 Nov. 2015); for England and Wales see *Cooper Tire & Rubber Co* v. *Shell Chemicals UK Ltd*, [2009] EWHC 2609 (Comm) paras. 34–64 (Tear J); appeal dismissed *Cooper Tire & Rubber Co Europe Ltd* v. *Dow Deutschland Inc*, [2010] EWCA Civ 864, both judgments are available at <www.bailii.org> (last visited 22 Nov. 2015); for the Netherlands see Rechtbank Midden-Nederland, decision of 27 Nov. 2013, NL:RBMNE:2013:5978; see also Gerechtshof Amsterdam, decision of 21 July 2015,

commentators[27] – allowed for the application of Article 6(1) BR to claims for damages against several cartel members. Departing from the reasoning that shaped *Roche Nederland*, but in line with *Painer*, the Court assumed in *CDC Hydrogen Peroxide* that the actions have a sufficiently close connection because the unlawfulness of the co-defendants' conduct (the infringement of Art. 101 TFEU) was determined according to EU law. The fact that the other requirements of the damages claims against the cartel members (joint liability, assessment of the damage, amount of interest, limitation periods, etc.) are governed by (non-harmonized)[28] national law did not convince the ECJ to reject the application of Article 6(1) BR. The same holds true for the argument that for actions for damages to which the Rome II Regulation does not apply *ratione temporae* (as was the case in the main proceeding before the Landgericht Dortmund), the requirement of the same situation of law cannot be met, given that in separate proceedings in different countries each court seized would apply its own rules of private international law to determine which law governs each claim for damages.[29] In sum, the Court was persuaded that centralizing the actions against the cartel members before one court fosters the sound administration of justice.

The ECJ's victim-friendly interpretation opens ample possibilities for persons harmed by horizontal cartels to shop for the best forum, given that

NL:GHAMS:2015:3006 (applying the reasoning voiced in *CDC*), both judgments are available at <uitspraken.rechtspraak.nl> (last visited 22 Nov. 2015).

27. Bulst, "The *Provimi* decision of the High Court: Beginnings of private antitrust litigation in Europe", 4 *European Business Organization Law Review* (2003), 643; Mäsch, "Vitamine für Kartellopfer – Forum shopping im europäischen Kartelldeliktsrecht", (2005) *Praxis des internationalen Privat- und Verfahrensrechts*, 513; Hess, "Cross-border collective litigation and the Regulation Brussels I", (2010) *Praxis des internationalen Privat- und Verfahrensrechts*, 118–119; Mankowski, "Der europäische Gerichtsstand der Streitgenossenschaft aus Art. 6 Nr. 1 EuGVVO bei Schadensersatzklagen bei Kartelldelikten", (2012) WuW, 950; Weller, "Kartellprivatrechtliche Klagen im Europäischen Prozessrecht: 'Private Enforcement' und die Brüssel I-VO", (2013) *Zeitschrift für vergleichende Rechtswissenschaft*, 100–101; Lund, *Der Gerichtsstand der Streitgenossenschaft im europäischen Zivilprozessrecht*: *Allgemeine Lehren, Anwendung im Patent- und Kartellrecht* (Mohr Siebeck, 2014), pp. 241–316 (with certain restrictions). For a contrary view see Basedow and Heinze, op. cit. *supra* note 15, pp. 63–84; Börger, "Internationale Zuständigkeit für kartellprivatrechtliche Schadensersatzklagen nach Art. 6 Nr. 1 EuGVO", in Nietsch and Weller, op. cit. *supra* note 1, pp. 61, 73; Wagner, "Art. 6 EuGVVO", in Stein and Jonas (Eds.), *Kommentar zur Zivilprozessordnung*. Vol. 10, 22nd ed. (Mohr Siebeck, 2011), paras. 35–37.

28. Thus far, the rules of national tort and damages law on which the claimants must rely to enforce the EU competition rules need only comply with the European principles of equivalence and effectiveness, see Joined Cases C-295-298/04, *Manfredi* v. *Lloyd Adriatico Assicurazioni SpA*, EU:C:2006:461, para 71.

29. This argument was advanced to justify the non-application of Art. 6(1) BR to claims for damages against complex cartels by Basedow and Heinze, op. cit. *supra* note 15, p. 83; Börger, "Internationale Zuständigkeit für kartellprivatrechtliche Schadensersatzklagen nach Art. 6 Nr. 1 EuGVO", in Nietsch and Weller, op. cit. *supra* note 1, pp. 69–70.

jurisdiction can be established before the courts of any Member State in which one of the cartel members has its domicile. Given that the law of damages[30] as well as the rules of civil procedure vary greatly across Europe and that these differences will not be weeded out completely in the near future when the Cartel Damages Directive is implemented,[31] plaintiffs should not underestimate the benefits of centralizing their actions before a convenient forum.[32] For claims that arise after 11 January 2009, Article 6(3)(b) Rome II Regulation provides another boon to victims, by conferring on them the right to demand the application of the law of the court.

It is important to note that *CDC Hydrogen Peroxide* is not a simple application of the rules set out in *Painer*, as the ECJ somewhat "upgraded" the criterion of foreseeability when assessing the close connection criterion. In *Painer,* the Court held that the application of Article 6(1) BR to situations in which there are differences between the legal bases of the actions requires that the defendants could foresee that they might be sued at the seat of one of the co-defendants, but the Court did not elaborate on the application of this criterion.[33] In the case annotated here, the Court fleshed out this requirement by pointing out that in damages actions against cartel members the foreseeability criterion is met when all co-defendants were subject to a binding decision by the Commission regarding the infringement of the EU competition rules.

The Court's recourse to the Commission's decision is not very convincing. The principle of legal certainty demands that the cartel members must have been able to foresee at the time of the implementation of their unlawful action that they might be sued in any Member State where one of them is domiciled. A Commission decision, which often becomes binding years after the cartel has ceased to exist, is therefore not a very solid basis for establishing the criterion of foreseeability. But given that the conspirators had the chance to inquire at the time of the conclusion of the cartel which other undertakings participate in the unlawful conduct,[34] it was nevertheless correct to find foreseeability in *CDC Hydrogen Peroxide*.

30. For a comparative overview see the contributions to Foer and Cuneo (Eds.), *The International Handbook on Private Enforcement of Competition Law* (Edward Elgar, 2012) (Europe is treated in Part III of this book).

31. Directive 2014/104/EU of the European Parliament and of the Council of 26 Nov. 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, O.J. 2014, L 349/01 (hereafter: Cartel Damages Directive). This Directive needs to be implemented by the Member States by 27 Dec. 2016.

32. Wiegandt, Annotation of Case C-352/13, *CDC*, (2015) *Zeitschrift für Europäisches Wirtschafts- und Steuerrecht*, 158.

33. Case C-145/10, *Painer* v. *Standard VerlagsGmbH*, para 81.

34. Similarly Mankowski, op. cit. *supra* note 27, 949.

Against this background it must also be possible to apply Article 6(1) BR to defendants that are not addressed in the Commission's decision (or by a decision of a national competition authority) provided that the foreseeability threshold is met.[35] Whether Article 6(1) BR applies to undertakings not addressed in the Commission's infringement decision was however not decided by the ECJ,[36] so that a national court confronted with this issue should initiate a preliminary ruling procedure to give the ECJ the possibility to clarify whether Article 6(1) BR applies in such a case.

Another important question in this context relates to the question of which undertakings (not addressed in the Commission's decision) can be sued (as anchor or co-defendant) based on the single economic unit doctrine. According to this doctrine, a company is liable for the participation of another company in cartel activities provided that both firms form an economic unit. Such a unit can be assumed if the company that participated in the cartel, although having a separate legal personality, is subject to the decisive influence of the other company and therefore does not decide independently upon its commercial activity on the market.[37] It seems widely accepted, even though the ECJ has not ruled on this issue, that also claims against the parent (or grandparent) company (not addressed in the Commission's decision) of a firm that has participated in the cartel (and was fined by the Commission) can be centralized by virtue of Article 6(1) BR, provided that both companies form a single economic unit.[38] Much more controversial is the question whether also a subsidiary of a firm that has participated in a cartel – and which has distributed the cartelized product in a Member State without being aware of the cartel agreement concluded by its parent company – may serve as an anchor defendant. In the Commission's administrative proceedings in which the single economic unit doctrine was shaped, this question is of no real importance, as cartel authorities generally look "upwards" and try to fine (prosperous) parent companies of the cartel participants based on this doctrine to ensure that the fine can be enforced. In civil proceedings, however, claimants have chosen distributing subsidiaries that implemented the cartel as anchor defendants (without demonstrating that the subsidiary had knowledge

35. Concurring Wiegandt, op. cit. *supra* note 32, 159.

36. Weller and Wäschle, annotation of Case C-352/13, *CDC*, (2015) *Recht der internationalen Wirtschaft*, 604.

37. Case C-97/08 P, *Akzo Nobel NV* v. *Commission*, EU:C:2009:536, paras. 55–60. This doctrine was developed in the context of fining undertakings for infringements of the EU competition rules. It is also applied to issues of jurisdiction (see OGH, decision of 14 Feb. 2012, 5 Ob 39/11p, available at <www.ris.bka.gv.at> (last visited 22 Nov. 2015)) and substantive tort law (see Kersting, "Wettbewerbsrechtliche Haftung im Konzern", (2011) *Der Konzern*, 445–459).

38. See, in general, Lund, op. cit. *supra* note 27, pp. 268–284 with further references.

of the anticompetitive agreement concluded by its parent company) in order to establish jurisdiction based on Article 6(1) BR and have succeeded with this manoeuvre before the High Court of England and Wales.[39] As this interpretation makes all cartel members essentially amenable to justice in all Member States in which one of them has a subsidiary that distributed the cartelized good it is doubtful whether this interpretation is consistent with the requirement of foreseeability set out by the ECJ in the case annotated here.[40] National courts confronted with the interplay of the European jurisdiction rules and the single economic unit doctrine should therefore commence a preliminary proceeding to clarify these questions.

5.2. *The effect of settlements on the application of Article 6(1) BR*

As a second important finding, the ECJ held that a withdrawal of the action against the anchor defendant on account of an out-of-court settlement shortly after the court was seized does not, in itself, oust the international jurisdiction of that court by virtue of Article 6(1) BR. To avoid abuses, a court seized must however deny jurisdiction based on Article 6(1) BR when the rule of jurisdiction laid down in that provision has been circumvented. For good reasons, the ECJ set the hurdles very high for showing such a circumvention. There must be "firm evidence" in support of the finding that the parties concerned had colluded to artificially prolong the applicability of Article 6(1) BR (para 31). This is the case when the plaintiff had actually reached a settlement with the anchor defendant but this fact was concealed when instituting the proceedings (para 32). The Landgericht Dortmund thus has to assess whether CDC had (according to the applicable national law)

39. *Provimi Ltd* v. *Roche Products Ltd and other actions*, [2003] EWHC 961 (Comm) para 36 (Aikens J); *Cooper Tire & Rubber Co* v. *Shell Chemicals UK Ltd*, [2009] EWHC 2609 (Comm) paras. 63–64 (per Tear J). Recently, however, the Court of Appeal has rejected the application of the single economic unit doctrine to implementing subsidiaries that had no knowledge of the cartel agreement, see *Toshiba Carrier UK Ltd.* v. *KME Yorkshire Ltd.*, [2012] EWCA Civ 1190 paras. 37–39 (Lord Justice Etherton) (all judgments are available at <www.bailii.org> (last visited 22 Nov. 2015)).

40. To minimize excessive forum shopping, another restriction is proposed by Lund, op. cit. *supra* note 27, pp. 315–316, who argues that Art. 6(1) BR should apply to all undertakings that have participated in the cartel, including parent companies and subsidiaries that have distributed the goods, according to the single economic unit doctrine. If the plaintiff centralizes the actions based on Art. 6(1) BR at the place of one of these subsidiaries (that was not addressed in the Commission's decision and implemented by the cartel only at the order of the parent company), the jurisdiction of the court seized is restricted to the damage caused by that subsidiary. By contrast, the courts at the domicile of the cartel participants and their parent companies liable under the single economic unit doctrine have international jurisdiction to adjudicate actions concerning the entire damage caused by the cartel.

already concluded a settlement agreement with the German anchor defendant before the proceeding was initiated and concealed this fact to create the impression that the requirements of Article 6(1) BR were met.[41]

The ECJ's reasoning is convincing. Settlement agreements between the parties, be they out-of-court or in the context of a civil proceeding, are vital for the functioning of the judicial system. They reduce the workload of the judiciary considerably. From the viewpoint of a sound administration of justice, such agreements are especially useful in complex business tort cases in which courts have to adjudicate numerous claims with difficult questions on causation and assessment of damages, as is the case in the proceeding before the Landgericht Dortmund.[42]

Any rule that weakens the willingness of the parties to settle would have a negative impact on the sound administration of justice. The solution presented by the ECJ does not have this effect, as parties are free to negotiate and can conclude their settlement agreement even shortly after the action became pending without losing the advantage of centralizing proceedings before the chosen court by virtue of Article 6(1) BR. To avoid allegations of collusion, the parties should however be careful if they finalize their agreement in writing before instituting the proceeding and sign it shortly after the commencement of that proceeding unless they have a proper reason for the delay in signing. The court seized might qualify such behaviour as an artificial prolongation of the applicability of Article 6(1) BR and dismiss the action against the anchor defendant.

5.3. *Tort jurisdiction I: The place where the event giving rise to the damage occurred*

Another point meriting attention is the ECJ's holding that the international jurisdiction of courts at the place of the event giving rise to the alleged harm is not irrelevant in actions for damages against "complex" horizontal cartels, as was suggested by Advocate General Jääskinen[43] and a national court.[44] The Court's conclusion merits applause. It was right to reject the analysis presented by the Advocate General, who had correctly summarized

41. At the time of writing this note (Sept. 2015), the Landgericht had not decided on this issue.

42. On the difficulties in settling an action for damages arising out of competition law infringements, see Krüger, "Vergleiche zwischen Opfern und Tätern von Kartelldelikten gemäß dem Richtlinienvorschlag der Kommission – Segen oder Fluch?", in Nietsch and Weller, op. cit. *supra* note 1, pp. 103–110.

43. Opinion, para 49.

44. *Cooper Tire & Rubber Co* v. *Shell Chemicals UK Ltd*, [2009] EWHC 2609 (Comm) para 65 (Tear J).

the case law of the ECJ but overemphasized the complexities of the case at hand.[45]

The Court's analysis starts from the insight that the connecting factor "place of the event giving rise to the alleged harm" usually ensures that the court seized has a particularly strong connection with the dispute, which justifies the defendant being amenable to jurisdiction at this place. Only in cases in which this connecting factor does not point to a court that is best placed to determine whether the elements that constitute liability do in fact exist must jurisdiction at the place where the event giving rise to the damage occurred be restricted. Applying these principles to damages actions arising from infringements of Article 101 TFEU, it is important to take into consideration the particularities of the case at hand, as cartels may be structured in very different manners.[46]

As the Court noted, there are cartels that are formed at one single place (para 44). The courts at that place have international jurisdictions over the damages claims against all cartel members. Given that Article 5(3) BR also deals with "local jurisdiction", it is not sufficient that the cartel was formed within the territory of one State to confer jurisdiction upon a court under Article 5(3) BR. Rather, the agreement must have been concluded at one "place" (court district) within the territory of that State. As the ECJ did not spell out additional requirements to be met, the courts at the place of the cartel's formation have jurisdiction even if the cartel has no strong organizational structure pointing to this place.[47] Thus, if a cartel is set up in the context of annual meetings of business organizations or trade fairs taking

45. That the courts of the place in which the cartel was formed may have jurisdiction to adjudicate actions for damages against the cartel members is also advocated by Ashton and Vollrath, "Choice of court and applicable law in tortious actions for breach of Community competition law", (2006) *Zeitschrift für Wettbewerbsrecht*, 7; Basedow, "Jurisdiction and choice of law in the private enforcement of EC competition law", in id. (Ed.), *Private Enforcement of EC Competition Law* (Kluwer Law, 2007), p. 250; Fawcett and Torremans, *Intellectual Property and Private International Law*, 2nd ed. (OUP, 2011), para 9.198; Mankowski, "Der europäische Gerichtsstand des Tatortes aus Art. 5 Nr. 3 EuGVVO bei Schadensersatzklagen bei Kartelldelikten", (2012) *Wirtschaft und Wettbewerb*, 800–803.

46. Basedow, "Der Handlungsort im internationalen Kartellrecht – Ein juristisches Chameleon auf dem Weg vom Völkerrecht zum internationalen Prozessrecht", in FIW (Ed.), *Wettbewerbspolitik und Kartellrecht in der Marktwirtschaft: Festschrift 40 Jahre FIW* (Carl Heymanns Verlag, 2010), p. 148; Wurmnest, op. cit. *supra* note 1, 934; Roth, "Der europäische Deliktsgerichtsstand in Kartellstreitigkeiten", in Meller-Hannich et al. (Eds.), *Rechtslage – Rechtserkenntnis – Rechtsdurchsetzung: Festschrift für Eberhard Schilken zum 70. Geburtstag* (C.H. Beck, 2015), p. 431.

47. It was argued that courts at the place where a horizontal cartel agreement was formed should not have international jurisdiction as long as the cartel in question lacks a strong organizational structure ensuring the connection between this court and the dispute. According to this view, the fact that a cartel was formed in meetings at one single place to which the cartel

place in the same venue every year, the courts at that place have international jurisdiction.

By contrast, if it is not possible to identify a single place where the cartel was formed and maintained because, for example, the meetings took place in various countries, the courts at the places where the meetings took place usually cannot adjudicate claims for damages (para 45). As the Court noted, there are however instances in which the cartel was concluded or altered at meetings in different countries, but it can still be demonstrated that one particular agreement (concluded – as described above – at one single place) out of the various anticompetitive arrangements was the sole cause for the loss allegedly inflicted on the buyer. In this situation the courts at that place have international jurisdiction over all cartel members participating in that particular agreement (paras. 46–49). An example would be the case in which it can be demonstrated that the cartel fixed prices for markets A and B in different meetings and agreed during one meeting in A to extend the cartel to market C. In this instance the courts of State A would have international jurisdiction to hear claims of buyers harmed by the agreement concerning State C.[48] In sum, also in complex cases it is not entirely excluded that a court at the place of the causal event has international jurisdiction to adjudicate actions for damages. Such cases, however, often pose difficult problems regarding the proof of the causal link between the single agreement and the damage,[49] so that this ground for jurisdiction will only play a marginal role in suits against complex cartels.[50]

Whether courts at other places in which the cartelists acted, for example by implementing the cartel,[51] also have international jurisdiction to hear claims against the conspirators was not discussed by the ECJ, and the judgment should not be read to exclude such places *a priori*.

participants residing in different Member States travelled in order to fix prices does not confer jurisdiction on the court at the place of the cartel's formation, see Roth, op. cit. *supra* note 46, pp. 432–433.

48. For a similar example see Wurmnest, op. cit. *supra* note 1, 935.

49. On these difficulties in cases of complex cartels see Basedow, op. cit. *supra* note 46, p. 140 (who rejects jurisdiction at the place of acting for complex cartels).

50. Wiegandt, op. cit. *supra* note 32, 159.

51. See Danov, op. cit. *supra* note 1, p. 94; Mankowski, op. cit. *supra* note 45, 801–802; see also Basedow, op. cit. *supra* note 46, p. 141, who argues that courts at the place of implementation have international jurisdiction as far as the cartel's organizational structure ensures a close connection to that place. By contrast, other commentators argue that the place of implementation cannot be regarded as the place where the event giving rise to the damage took place as this location is rather the place where the damage occurred, see Roth, op. cit. *supra* note 46, p. 433. But given that the ECJ localizes the place where the damage occurred at the seat of the harmed person (see *infra* 5.4.), one should not deny jurisdiction at the place where the cartel was implemented based on the first prong of Art. 5(3) BR ("place of acting").

5.4. *Tort jurisdiction II: The place where the damage occurred*

Building on earlier case law, the ECJ also decided how to localize the place where the damage arising out of cartel activity occurred. According to the settled case law of the ECJ, the place where the damage occurred is "the place where the damage . . . actually manifests itself".[52] With regard to damages caused by horizontal cartels, the ECJ held in *CDC Hydrogen Peroxide* that this "place is identifiable only for each alleged victim taken individually and is located, in general, at that victim's registered office" (para 52). The courts at these places have jurisdiction "to hear an action brought either against any one of the participants in the cartel or against several of them for the whole of the loss inflicted upon that undertaking as a result of additional costs that it had to pay to be supplied with products covered by the cartel concerned" (para 54). Unlike in *Shevill*, the ECJ thus refrained from restricting the international jurisdiction of the courts at the place where the damage occurred to the harm caused in the State of the court seized.[53] This interpretation is advantageous for victims that enforce their claims themselves. By contrast, for plaintiffs such as CDC who bundle claims, this ground of jurisdiction is of little interest, as they would have to initiate proceedings before the courts in the various countries in which the harmed undertakings have their seat, given that an assignment of the claim does not alter the place where the harmful event occurred (para 55).

Contrary to the view of Advocate General Jääskinen, the Court thus embraced a connecting factor establishing a *forum actoris*. As justification, the Court explained that jurisdiction at the place where a victim has its seat "fully guarantees the efficacious conduct of potential proceedings, given that the assessment of a claim for damages for loss allegedly inflicted upon a specific undertaking as a result of an unlawful cartel, as already found by the Commission in a binding decision, essentially depends on factors specifically relating to the situation of that undertaking" (para 53). Hence, the plaintiff-friendly interpretation of Article 5(3) BR is grounded on the assumption that the courts in whose jurisdiction the harmed person has its registered office are in the best position to adjudicate claims for damages because the evidence to be collected lies essentially at the victim's seat.

52. Case C-189/08, *Chemie BV* v. *Philippo's Mineralenfabriek NV/SA*, EU:C:2009:475, para 27.

53. Case C-68/93, *Shevill* v. *Presse Alliance SA*, EU:C:1995:61, para 33. The ECJ has stated an exception for claims alleging the infringement of personality rights via the internet, see Joined Cases C-509/09 & 161/10, *eDate Advertising GmbH* v. *X* and *Martinez* v. *MGN Limited*, EU:C:2011:685, paras. 42–52.

This rationale is not entirely persuasive. In follow-on actions against cartels, courts have essentially to decide on the issues of causation and damages. One cannot say that the evidence to be collected for deciding on these requirements is "essentially" located at the registered office of the harmed undertaking, even though it cannot be denied that some evidence can be found there.[54] The core of the damages assessment in follow-on actions concerns the evaluation of the hypothetical market price for the cartelized good (i.e. the price without unlawful conspiracy) and the price for that good as altered by the anticompetitive agreement. The difference between those two prices is essentially the damage caused by the cartel.[55] The calculation of the hypothetical market price is usually not based on information that is primarily located at the seat of the victims of a cartel but on general economic data, for example on a comparison with the price level in the market after the cartel has ceased to exist.[56] Also when looking at stand-alone actions against competition law infringers, one cannot say that the evidence usually lies at the victim's seat. Rather, the opposite is the case. The evidence is usually in the hands of the defending party that has infringed the rules of competition law. This observation has even led the European legislature to include a rule on the disclosure of evidence in the Cartel Damages Directive.[57] In sum, the alleged ease in the collection of evidence can therefore not serve as sound justification for locating the place where the damage occurred at the victim's registered office.[58]

54. Heinze, "Der Deliktsgerichtsstand als Klägergerichtsstand? – Zum Einfluss materiellrechtlicher Wertungen auf die Auslegung des Art. 7 Nr. 2 EuGVO", in Büscher et al. (Eds.), *Rechtsdurchsetzung – Rechtsverwirklichung durch materielles Recht und Verfahrensrecht* (Heymanns, forthcoming 2016), p. 5 (of the manuscript that is on file with the author) What follows in the text is also discussed by Heinze.

55. In addition, if the artificial price affects resale activities (which is often difficult to prove in practice), loss of profits (*lucrum cessans*) can be claimed, see Fuchs, "Anspruchsberechtigte, Schadensabwälzung und Schadensbemessung bei Kartellverstößen", in Remien (Ed.), *Schadensersatz im europäischen Privat- und Wirtschaftsrecht* (Mohr Siebeck, 2012), pp. 55, 85.

56. On the complex task of assessing damages caused by hard core cartels, see Niels and Noble, "Quantifying antitrust damages: Economics and the law", in Hüschelrath and Schweitzer (Eds.), *Public and Private Enforcement of Competition Law in Europe: Legal and Economic Perspectives* (Springer, 2014), pp. 121–140; Lianos, Davis and Nebbia, *Damages Claims for the Infringement of EU Competition Law* (OUP, 2014), paras. 6.01–6.140.

57. Heinze, op. cit. *supra* note 54, p. 5; Art. 5 Cartel Damages Directive. Correspondingly, Recital 14 of the Cartel Damages Directive states: "The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by, or accessible to, the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU."

58. Heinze, op. cit. *supra* note 54, pp. 6–7.

Given that rules for the safeguard of a system of undistorted competition are to protect a given market,[59] the delineation of the place where the damage occurred, should – as was suggested by the Commission[60] – be based on the harmful effects caused by the cartel on a given market. According to this approach, which is also advocated by many commentators[61] and some national courts,[62] the courts of those Member States have jurisdiction in whose territories the market was affected by the restriction of competition.[63] This connecting factor ensures that jurisdiction and applicable law will be assessed in light of the same approach, given that for non-contractual obligations arising out of a restriction of competition Article 6(3)(a) Rome II Regulation calls for the application of the law of the country whose market is to be affected by the anticompetitive conduct.[64] That the ECJ did not try to base its analysis on this internationally accepted connecting factor is a setback in the attempts to build a coherent legal framework for cross-border competition actions.

59. Rodriguez Pineau, "Conflict of laws comes to the rescue of competition law: The new Rome II Regulation", 5 *Journal of Private International Law* (2009), 320; Wagner-von Papp and Wurmnest, "Einl", in *Münchener Kommentar, Europäisches und Deutsches Wettbewerbsrecht (Kartellrecht)*. *Vol. 1: Europäisches Wettbewerbsrecht*, 2nd ed. (Beck, 2014), para 1543.

60. See the summary in the Opinion, para 43 with note 36.

61. Maier, *Marktortanknüpfung im internationalen Kartelldeliktsrecht* (Peter Lang Verlag, 2011), pp. 152–159; Tzakas, *Die Haftung für Kartellverstöße im internationalen Rechtsverkehr* (Nomos, 2011), p. 119; Vilà Costa, "How to apply Articles 5(1) and 5(3) Brussels I Regulation to private enforcement of competition law: A coherent approach", in Basedow, Francq and Idot (Eds.), op. cit. *supra* note 1, p. 27; Mankowski, op. cit. *supra* note 45, 806–807; Wurmnest, op. cit. *supra* note 1, 935; Roth, op. cit. *supra* note 46, p. 437.

62. BGH judgment of 29 Jan. 2013, KZR 8/10, (2013) *Gewerblicher Rechtsschutz und Urheberrecht – Rechtsprechungs-Report*, 228, para 16, (2013) WuW, 514.

63. Some commentators argue in favour of a third connecting factor. They argue that the courts at the place where the economic loss of the cartel victim occurred should have jurisdiction, i.e. courts at the places where the branch of the bank or the cash register is located from which inflated price was transferred to the seller, see Mäsch, op. cit. *supra* note 27, 516. This connecting factor does not reflect the fact that the direct damage resulting from a price-fixing conspiracy is the restriction of competition in a market. The economic losses of the buyers are rather a consequential damage which often has no close connection to the case, especially when the buyer transferred the money from a bank account located in another State for tax reasons. This connecting factor is therefore rightly rejected by Mankowski, op. cit. *supra* note 45, 804; Roth, op. cit. *supra* note 46, p. 437.

64. For more details see Dickinson, *The Rome II Regulation: The Law Applicable to Non-Contractual Obligations* (OUP, 2008), paras. 6.58–6.67.

5.5. *Jurisdiction clauses and the principle of effective enforcement*

Another important holding of the judgment is that the principle of effective enforcement of the European competition rules cannot restrict the possibility for the parties to derogate the international jurisdiction of courts under Articles 5(3) and 6(1) BR by a jurisdiction agreement pursuant to Article 23 BR. As a consequence, courts are bound also in competition cases by the will of the parties to allocate jurisdiction to one or several court(s) of their choice in Europe. This interpretation makes sense. The Court was right to point out that rules applicable to the substance of a case cannot affect the validity of a jurisdiction clause agreed upon in accordance with Article 23 BR (*CDC* at para 62). In addition, it is apparent that if a court could question whether a court in another Member State will give full effect to the requirement of effective enforcement, the aim of the BR to create a system of mutual trust between Member State courts would be put in peril (*CDC* at para 63). Allowing national courts to deny the enforcement of jurisdiction agreements based on a violation of the principle of effective enforcement would, furthermore, have undermined jurisdiction agreements' objective of providing legal certainty and predictability with regard to the courts having jurisdiction in international commercial transactions.[65]

5.6. *Interpreting the subject-matter of jurisdiction clauses*

Finally, the Court clarified the subject-matter of jurisdiction agreements in cartel cases covered by Article 23 BR. In *Powell Duffryn* and *Benincasa* the Court had stated that "it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope".[66] In *CDC Hydrogen Peroxide*, the Court recalled this general principle (para 67), but then explained in detail why general jurisdiction agreements in purchase agreements – i.e. clauses abstractly referring to disputes arising from the contractual relationship – do not extend to disputes relating to the tortious liability of one contractual partner for participation in an unlawful cartel (paras. 68–70). Such clauses therefore do not have the effect of depriving a court of international jurisdiction existing pursuant to Articles 5(3) or Article 6(1) BR in follow-on damages actions against cartels.

65. For more details see Wurmnest, "Gerichtsstandsvereinbarungen im grenzüberschreitenden Kartellprozess", in Nietsch and Weller (Eds.), op. cit. *supra* note 1, pp. 94–97.

66. Case C-214/89, *Powell Duffryn plc* v. *Petereit*, EU:C:1992:115, para 37; Case C-269/95, *Benincasa* v. *Dentalkit Srl*., EU:C:1997:337, para 31.

The ECJ's interpretation of the subject-matter of a jurisdiction agreement can be hailed from the perspective of a uniform application of EU law. That general jurisdiction clauses in purchase contracts do not extend to claims for damages brought against cartel members is, however, very doubtful. Given that the aim of jurisdiction clauses is to ensure legal certainty, one should interpret such clauses broadly. Commercial logic thus rather speaks in favour of an extension of general clauses in purchase contracts to claims against cartel members.[67]

In any event, the judgment cannot be interpreted as meaning that such general jurisdiction agreements never extend to claims based on competition law, as the Court's reasoning concerned only follow-on actions for damages against cartels. In addition, the Court conceded that clauses actually referring to disputes in connection with liability incurred as a result of an infringement of competition law can derogate a court's jurisdiction under Articles 5(3) and 6(1) BR (para 71). In light of the aim of jurisdiction agreements one should understand this finding also to include agreements that implicitly refer to such disputes. An example of such a situation is the inclusion of compliance clauses in the contract which enable the harmed party to avoid the contract because of a violation of the rules of competition law by the other party. By the incorporation of such clauses in their agreement, the parties implicitly declare that they are aware that the other side might violate the rules of competition law, and consequently it is arguable that a general jurisdiction clause covering all disputes arising from the contractual relationship extends to claims for damages for the infringement of Article 101 TFEU.[68]

6. Conclusion

The judgment sets important signposts for the application of European jurisdiction rules to follow-on actions brought against cross-border cartels. The Court facilitated the enforcement of damage claims against cartel participants. Victims may centralize their claims against all European cartel

67. Basedow and Heinze, op. cit. *supra* note 15, p. 83; Pfeiffer, "German jurisdiction clauses in anti-cartel cases before English courts – And some remarks relating to the interpretation of foreign laws", in Hestermeyer et al. (Eds.), *Coexistence, Cooperation and Solidarity: Liber amicorum Rüdiger Wolfrum* (Martinus Nijhoff, 2012), pp. 2060–2069; Wurmnest, "Die Einbeziehung kartellrechtlicher Ansprüche in Gerichtsstandsvereinbarungen", in Mankowski and Wurmnest (Eds.), *Festschrift für Ulrich Magnus zum 70. Geburtstag* (Sellier elp, 2014), pp. 580–582; Lund, op. cit. *supra* note 27, p. 334; for a contrary view, see Vischer, "Der Einbezug deliktischer Ansprüche in die Gerichtsstandsvereinbarung für den Vertrag", in Mansel et al. (Eds.), *Festschrift für Erik Jayme, Vol. I* (Sellier elp, 2004), pp. 997–998; Maier, op. cit. *supra* note 61, p. 166.

68. Wurmnest, op. cit. *supra* note 65, pp. 85–93.

members at the place where one of them is domiciled based on Article 6(1) BR/Article 8(1) BR (recast). Each victim can also bring an action for the entire damage sustained before a court at his or her domicile based on the second prong of Article 5(3) BR/Article 7(2) BR (recast), as the Court locates the place where the damage occurred at each victim's registered office. Depending on the cartel's structure, also courts at the place where the cartel was agreed upon may have international jurisdiction based on the first prong of Article 5(3)BR/Article 7(2) BR (recast). Given that the judgment has not answered all issues regarding the application of the European rules on jurisdiction in competition cases, national courts should not hesitate to initiate further preliminary proceedings, for example to clarify the impact of the single economic unit doctrine on the delineation of international jurisdiction.

Wolfgang Wurmnest*

* Professor of Private Law, Economic Law, Comparative and Private International Law, Universität Augsburg.

COMMON MARKET LAW REVIEW

Subscription information
Online subscription prices for 2016 (Volume 53, 6 issues) are: EUR 773/USD 1097/ GBP 555. Print subscription prices for 2016 (Volume 53, 6 issues):
EUR 818/USD 1157/GBP 583
Personal subscription prices at a substantially reduced rate are available upon request. Please contact our sales department for further information at +31 172641562 or at sales@kluwerlaw.com.

Payments can be made by bank draft, personal cheque, international money order, or UNESCO coupons.

Subscription orders should be sent to:

Kluwer Law International
c/o Turpin Distribution Services Ltd
Stratton Business Park
Pegasus Drive
Biggleswade
Bedfordshire SG18 8TQ
United Kingdom
e-mail: sales@kluwerlaw.com

All requests for further information and specimen copies should be addressed to:

Kluwer Law International
P.O. Box 316
2400 AH Alphen aan den Rijn
The Netherlands
fax: +31 172641515

or to any subscription agent

For Marketing Opportunities please contact marketing@kluwerlaw.com

Please visit the Common Market Law Review homepage at http://www.kluwerlawonline.com for up-to-date information, tables of contents and to view a FREE online sample copy.

Microfilm and Microfiche editions of this journal are available from University Microfilms International, 300 North Zeeb Road, Ann Arbor, MI 48106, USA.

The Common Market Law Review is indexed/abstracted in Current Contents/Social & Behavioral Sciences; Current Legal Sociology; Data Juridica; European Access; European Legal Journals Index; IBZ-CD-ROM: IBZ-Online; IBZ-lnternational Bibliography of Periodical literature on the Humanities and Social Sciences; Index to Foreign Legal Periodicals; International Political Science Abstracts; The ISI Alerting Services; Legal Journals Index; RAVE; Social Sciences Citation Index; Social Scisearch.