Jurisdiction in cartel damages claims under Brussels I

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Introduction

Cartel damages claims are likely to grow in number this year. Firstly, the directors of companies affected by cartels are becoming increasingly cognizant of the need to bring such actions in order to satisfy their own fiduciary obligations. Secondly, the actions themselves are becoming more straightforward.

Jurisdiction is the first battleground for any serious litigant affected by these typically cross-border activities. Paradoxically it is the one thing which has not yet been addressed by the European legislature.

The issue of jurisdiction over such claims has recently come before the Court of Justice. On 11 December 2014, Advocate General Jääskinen delivered his opinion in Case C-352/13 Cartel Damages Claims (Hydrogen Peroxide). His opinion has not been officially translated into English, but a little ad hoc translation and a lot of academic commentary reveals a very interesting picture.

Background

In 2006 the European Commission found a number of pharmaceutical companies to have participated in a cartel relating to the pricing of hydrogen peroxide, dating back to 1994.[2]

Until recently, the availability and ease of private actions for damages resulting from the activities of cartels varied enormously between Member States. In 2008 the Commission

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[2] Case COMP/F/38.620.

proposed a minimum standard for cartel damages actions across the EU. On 11 June 2013 it issued a proposal for a "Directive on rules governing actions for damages for infringements of competition law",[3] approved in the Parliament on 17 April 2014 ("the Directive"). The Directive was signed into law on 26 November 2014.[4]

The Directive requires each EU Member State to adopt a number of measures designed to enhance the claimant's position significantly, for example:

- access to key documents in the control of competition authorities;
- a rebuttable presumption that cartels cause harm;
- rules on joint and several liability; and
- minimum limitation periods.

The one significant area left untouched by the Directive is the question of jurisdiction. European wide cartels involve entities with seats in various Member States and beyond. Their effects are felt the world over. They present rare and peculiar difficulties for the application of existing jurisdictional rules.

The Cartel Damages Claims case is the first to bring those difficulties before the Court of Justice.

The reference

The Cartel Damages Claim was commenced before the regional court in Dortmund (the *Landgericht Dortmund*). The claimant is a Belgian assignee of potential damages claims resulting from the cartel. The defendants have seats across the European Union, including one in Germany (the "anchor-defendant").

[3] The full text of the Proposal is available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0404:FIN:EN:PDF.

[4] The full text of the Directive is available at http://ec.europa.eu/competition/antitrust/actionsdamages/damages_directive_final_en.pdf.

Interestingly, the claim was later discontinued against the German anchor-defendant. The *Landgericht Dortmund* turned its mind the question of jurisdiction and, in the face of considerable difficulty, referred three questions to the Court of Justice.

1. Must Article 6(1) of the Brussels I Regulation be interpreted in a way that, under circumstances like in the case at hand, the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments from separate proceedings? Is it relevant that the claim against the defendant who is domiciled in the Member State of the seized court was withdrawn after service of process to the defendants?

2. Must Article 5(3) of the Brussels I Regulation be interpreted in a way that, under circumstances like in the case at hand, the place where the harmful event occurred or may occur may be located with respect to every defendant in any Member State where the cartel agreement had been concluded or implemented?

3. Does the well-established principle of effectiveness with respect to the enforcement of the prohibition of restrictive agreements allow to take into account a jurisdiction or arbitration agreement, even if that would lead to the non-application of jurisdiction grounds such as Article 5(3) or Article 6(1) of the Brussels I Regulation?

The Advocate General's opinion

Advocate General Jääskinen was clear that, in his view, the Brussels I Regulation is not well suited to the private enforcement of competition law (paragraph 8). His answer to that problem is striking.

The first question: Article 6(1) of Brussels I provides that one of a number of defendants may be sued in the courts for the place where any one of them is domiciled, provided that the

claims are so closely connected that it is expedient to hear them together to avoid the risk of irreconcilable judgments resulting from separate proceedings.

The Advocate General noted the long established position that a risk of irreconcilable judgments must arise in the context of the same situation of fact and law. As to fact, he pointed to the Commission's decision establishing the single and continuous infringement of Article 101 TFEU. As to law, he relied on the fact that members of a cartel are jointly and severally liable. In his view there was a risk that the courts of different Member States might deal with the matter of joint and several liability differently (at least prior to the full implementation of the Directive), and therefore a risk of irreconcilable judgments.

As noted above, the claim against the German anchor-defendant had been withdrawn. Article 6 was now being used to anchor proceedings in the Member State in which a former defendant was domiciled. In the Advocate General's opinion, this was irrelevant. He considered the service of process to be the only relevant point in time for the application of Article 6. The fact that the claim against the anchor-defendant (in whose jurisdiction all claims were being concentrated) had since been withdrawn was of no significance.

The second question: Article 5(3) of Brussels I provides that in matters relating to tort, delict or quasi-delict, a person domiciled in one Member State may be sued in another Member State in which the harmful event occurred or may occur.

Of all of the grounds of special jurisdiction contained in Article 5, Article 5(3) is plainly the only one which encompasses cartel damages claims. Nevertheless, Advocate General Jääskinen held that it was inapplicable. He reasoned that in a case of wide-spread cartel activity such as this, it is impossible to identify a single place where the event causing the harm took place. That must surely be correct. The very nature of the infringement of Article 101 TFEU entails the co-ordination of activities across multiple Member States.

However, it has long been recognized that Article 5(3) may point to the place where the act giving rise to the damage took place *or* the place where the damage occurred. The Advocate General was alive to this but reasoned that the latter cannot apply here because it would have the effect of automatically vesting jurisdiction in the court of the claimant's seat, contrary to the purpose of Brussels I.

Arguably that consequence is not as unpalatable as it might first seem. If the claim is a follow on action, it follows a binding decision of the Commission which found cartel activity. Therefore the defendant has engaged in a highly invidious commercial practice which it knew, or certainly ought to have known, would affect the claimant. Indeed in a very real sense the defendant always intended it to affect the claimant in a manner which enhanced the defendant's profit at the claimant's expense. Viewed against that unusual context, the plight of the cartel participant who finds himself at risk of a private damages action before the courts of his victim evokes considerably less sympathy.

However, the consequences of permitting Article 5(3) to invariably confer jurisdiction on the courts of the claimant's seat would ultimately be unworkable. The facts of the Cartel Damages Claim case demonstrate why. If the claims of various victims of the cartel are assigned, does one take the seat of the assignee as being the relevant jurisdiction, or that of one of the assignors? Either would precipitate forum shopping. In the former case the assignor would simply incorporate an entity in a desirable jurisdiction and assign. In the latter case the assignee would simply ensure that it took an assignment from an assignor seated in a desirable jurisdiction. In both situations the determinative factors are a world away from the principles which underlie the Brussels I Regulation.

The third question: On the subject of jurisdiction agreements, the Advocate General drew the fundamental distinction between those which nominate the courts of Member States and those which do not. In the former category, he reasoned that the obligation of mutual trust and confidence took priority and the principle of effectiveness could not affect the operation of Article 23 in such circumstances. In the latter category, by contrast, the principle of

effectiveness might be capable of rendering such agreements inapplicable if an effective enforcement of EU competition law would not be assured.

There is nothing especially surprising in this conclusion, but it remains to be seen how the effective enforcement of EU competition law is to be measured. The Directive will (hopefully) achieve its effective enforcement before the courts of Member States, but elsewhere will remain at best in the state which preceded the implementation of the Directive.

Analysis

The Advocate General's opinion highlights the need for bespoke jurisdictional rules tailored to the particular incidents of cartel activity (see paragraph 10 in particular). This breaks from the general thrust of promoting Brussels I as an overarching instrument addressing the question of jurisdiction in all civil and commercial matters falling within its scope. The scope of the Brussels I Recast[5] (which comes into force on 10 January 2015) is materially identical, save for a more thorough excision of arbitration, and so provides no assistance.

It is difficult to envisage what might be contained in an instrument devoted to cartel specific jurisdiction rules. The Advocate General has displayed his disapproval of any rule which would simply afford jurisdiction to the courts of the place in which damage was done (the alternative application of the existing Article 5(3)). Tempering that approach with a requirement that it be foreseeable that damage would be sustained in such jurisdictions would only add a layer of complication and introduce a concept rarely seen in jurisdictional circles.

If the Advocate General's suggestion is repeated by the Court of Justice and taken up by the Commission, a great deal of consultation and deliberation will be needed before any legislative draft can be produced. In the meantime, cartel participants are likely to bring the full weight of their considerable resources to bear on disputing the jurisdiction of any cartel damages actions brought against them. The claimant's strongest hand at present appears to

[5] Regulation (EU) No 1215/2012.

be utilizing Article 6 by selecting an anchor defendant in a target jurisdiction, even if the claim against that anchor defendant is later discontinued.

Perhaps the most interesting question before the Court of Justice will be whether Article 5(3) is to be simply disapplied in complex cases such as this, or whether the Court of Justice will develop a solution within the confines of the existing Brussels I jurisdictional regime and avoid (or at least lessen) the need for bespoke jurisdictional rules in this field. In either event, practitioners can expect this to be fertile ground for litigation in the years to come.

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