Freedom, Security & Justice: European Legal Studies

Rivista giuridica di classe A

2025, n. 1

EDITORIALE SCIENTIFICA

Rivista quadrimestrale on line "Freedom, Security & Justice: European Legal Studies" www.fsjeurostudies.eu
Editoriale Scientifica, Via San Biagio dei Librai, 39 - Napoli
CODICE ISSN 2532-2079 - Registrazione presso il Tribunale di Nocera Inferiore n° 3 del 3 marzo 2017

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2025, n. 1

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CROSS BORDER PRIVATE ENFORCEMENT OF EU COMPETITION LAW: IN QUEST OF LOCALISATION

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1. Introduction: the emergence of cross border private litigation in competition matters

In the latest years, private enforcement of EU Competition Law has gained momentum[1]. This success can be motivated by several reasons: the harmonisation by the EU through Directive 2014/104[2]; the more widespread information concerning at least

Double-blind peer reviewed article.
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Funded by the European Union. This Contribution is published in the framework of the Jean Monnet Module: "European Private International Law: Recent Trends and Challenges" (EuPIL*ART*), co-funded by the EACEA. Views and opinions expressed are however those of the author only and do not necessarily reflect those of the European Union or the EACEA. Neither the European Union nor the EACEA as granting authority can be held responsible for them.

[1] A. L. CALVO CARAVACA, J. CARRASCOSA GONZÁLEZ, *El Derecho internacional privado de la Unión Europea frente a las acciones por daños anticompetitivos*, in *Cuadernos de derecho transnacional*, 2018, n. 2, pp. 7-178; B. J. RODGER, M. SOUSA FERRO, F. MARCOS (eds.), *Research handbook on private enforcement of competition law in the EU*, Cheltenham, 2023; P. CARO DE SOUSA, *The private enforcement of competition law*, Oxford, 2024.

[2] Directive 2014/104/EU of the European Parliament and of the Council, *on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States*

some infringements among the general public[3]; not last, the sensitive injury caused by some cartels[4]. It being considered as a helpful sword flanking the more classic public enforcement system[5], the development of private enforcement testifies the current interests of private parties in the assessment of their own interests, the re-establishment of a fair and undistorted competition and the restoration of damages occurred as a consequence of EU Competition Law infringements.

In this framework, also EU civil judicial cooperation has its role to play. Indeed, the infringement of EU Competition Law has natural legal consequences in the internal market. Article 101 of the TFEU clearly states that the antitrust behaviour shall "affect trade between Member States" prevent, restrict or distort "competition within the internal market"; abuses of dominant position pursuant to Article 102 of the TFEU "may affect trade between Member States". The infringements must have a wide impact in the internal market, or at least in more than one Member State. These multiple effects give rise to difficulties in the frame of both public enforcement[6] and private enforcement[7]. In private cross border cases, EU Regulations 1215/2012, Brussels I*bis*[8], on jurisdiction and

and of the European Union, of 26 November 2014, in OJ L297, 4 November 2011, pp. 1-8; P.L. PARCU, G. MONTI, M. BOTTA (eds.), *Private enforcement of EU competition law: the impact of the damages directive*, Cheltenham, 2018; M. STRAND, V. BASTIDAS, M.C. IACOVIDES (eds.), *EU Competition Litigation. Transposition and First Experiences of the New Regime*, London, 2023; F. DÍEZ ESTELLA, *Una década de la Directiva 2014/104/UE, de acciones de daños antitrust, a través de las sentencias del TJUE*, in *Cuadernos de derecho transnacional*, 2024, n. 2, pp. 539-551.

[3] We only need to think of the "trucks case" (Commission decision, Cartel, AT.39824, *Trucks*, of 27 September 2017) that hit the headlines of both specialised and general communication media (see, for example, in Italy, the *ANSA* news, available at: https://www.ansa.it/pressrelease/economia/2024/03/04/new-class-action-against-the-truck-cartel-another-chance-for_d6d3669a-a4ca-4f01-a538-23aebd720ebc.html).

[4] The "trucks cartel" lasted 14 years and had as object the price increase of the goods. It has originated a big amount of private enforcement claims, although mostly purely internal: B. BORNEMAN, J. SUDEROW, *España a la cabeza en la litigación derivada del cartel de los fabricantes de camiones. Primeras sentencias del Tribunal Supremo Español y su relevancia en Europa*, in *Cuadernos de derecho transnacional*, 2023, n. 2, pp. 1040-1050.

[5] Recital 6 of the Directive 2014/104; Court of Justice, Second Chamber, judgment of 14 March 2019, *Skanska Industrial Solutions and others*, case C-724/17, par. 45.

[6] Neither Council Regulation (EC) 1/2003, *on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty*, of 16 December 2002, in OJ L1, 4 January 2003, pp. 1-25 nor Directive (EU) 2019/1 of the European Parliament and of the Council, *to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*, of 11 December 2018, in OJ L11, 14 January 2019, pp. 3-33 establish criteria for the determination of the proper Competition Authority to investigate the antitrust infringement, thus creating potential problems of functional competence and coordination (A.M. ROMITO, *Ruolo e funzioni dell'*European Competition Network, Bari, 2020, pp. 38-49).

[7] P. IANNUCCELLI, *La responsabilità delle imprese nel diritto della concorrenza dell'Unione Europea e la direttiva 2014/104*, Milano, 2015, pp. 157-216; G. BRUZZONE, A. SAIJA, Private *e* public enforcement *dopo il recepimento della direttiva. Più di un aggiustamento al margine?*, in *Mercato, concorrenza, regole*, 2017, pp. 9-36; O. PALLOTTA, Public *e* private antitrust enforcement *alla luce della direttiva 2014/104/UE: l'equilibrio alterato*, in *Studi sull'integrazione europea*, 2017, pp. 621-640; W.P.J. WILS, *Private Enforcement of EU Antitrust Law and Its Relationship with Public Enforcement: Past, Present, Future*, in *World Competition: Law and Economics Review*, 2017, pp. 3-46.

[8] Regulation (EU) 1215/2012 of the European Parliament and of the Council, *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, of 12 December 2012, in OJ L351, 20 December 2012, pp. 1-32.

864/2007, Rome II[9], on the applicable law are of assistance. The former provides for a general ground of jurisdiction, based on the domicile of the defendant (para. 2.1) and a wide possibility of prorogation of jurisdiction (para. 2.2); for the purposes of cross border private enforcement of EU Competition Law, alternative grounds of jurisdiction can come into play (paras. 3 and 5). Article 6 of the Regulation 864/2007 establishes a special connecting factor for claims related to non-contractual obligations arising out of a restriction of competition (para. 6).

Notwithstanding the apparently clear structure of the two Regulations, the determination of the jurisdiction and of the applicable law is not always an easy task, due to the intricated black letter formulation of Article 6 of the Regulation 864/2007[10], the existing possible alternatives and, very unfortunately, the not always consistent interpretation by the Court of Justice of the European Union (hereafter: CJEU). The most difficult assignment is indeed that of localisation, the geographical (although theoretical) placement of a claim within a (Member) State for the purposes of assessing jurisdiction, or determining the applicable law, or both[11].

The present paper aims at analysing the possibilities of localisation of the infringement of EU Competition Law, for the purposes of its private enforcement, trying to offer solutions to the classic private international law issues within the framework of the Regulations in force.

2. The determination of jurisdiction: the application of the general rules in competition cases

The first step consists of an analysis of the general grounds of jurisdiction provided for by Regulation Brussels I*bis*, having in mind the specific characters of private enforcement of EU Competition Law. The continuity of the EU legal instruments enacted in the field of civil and judicial cooperation[12], although recast, offers an important set of CJEU's case law on the interpretation of the rules on jurisdiction, starting from the 1968

[9] Regulation (EC) 864/2007 of the European Parliament and of the Council, *on the law applicable to non-contractual obligations* (Rome II), of 11 July 2007, in OJ L199, 31 July 2007, pp. 40-49.
[10] C. HONORATI, *Regolamento n. 864/2007 sulla legge applicabile alle obbligazioni non contrattuali*, in F. PREITE, A. GAZZANTI PUGLIESE (a cura di), *Atti notarili. Diritto comunitario e internazionale*, Torino, 2011, p. 536.
[11] A. A. EHRENZWEIG, *Specific Principles of Private Transnational Law*, in *The Hague Academy Collected Courses*, Volume 124, 1968; G. VAN HECKE, *Principes et méthodes de solution des conflits de lois*, in *The Hague Academy Collected Courses*, Volume 126, 1969; K. LIPSTEIN, *The General Principles of Private International Law*, in *The Hague Academy Collected Courses*, Volume 135, 1972; recently: O. BOSKOVIC (ed.), *Localisation of Damage in Private International Law*, Leiden, Boston, 2024.
[12] Recital 34 of the Regulation 1215/2012; Court of Justice, Third Chamber, judgment of 12 September 2013, *Sunico*, case C-49/12, par. 32; recently: Court of Justice, Third Chamber, judgment of 20 May 2021, *CNP spółka z ograniczoną odpowiedzialnością*, case C-913/19, par. 49; Court of Justice, Third Chamber, judgment of 8 June 2023, *BNP Paribas SA*, case C-567/21, par. 39; Court of Justice, Seventh Chamber, judgment of 14 September 2023, *Club La Costa*, case C-821/21, par. 41.

Brussels Convention[13]. Cross border private enforcement of EU Competition Law is quite a new field; nevertheless, the CJEU's case law can be re-read in the light of its specific features.

2.1. The domicile of the defendant

The domicile of the defendant in a Member State is at the same time a limit to the subjective scope of application[14] and the general rule on jurisdiction in civil and commercial matters (Article 4 of the Regulation 1215/2012). The domicile of a legal person[15] is defined by Article 63, it being alternatively the place of the statutory seat, or of the central administration, or of the principal place of business. Therefore, the claimant has a potential choice among three possibly different national courts, since the three places can be located in different Member States, as the CJEU's jurisprudence on the right of establishment confirms[16]. In case of multiple defendants, sued for the same infringement, as the violation of Article 101 of the TFEU typically is, the possible choice amplifies, since at least theoretically each wrongdoer might have three different domiciles. This leaves wide room to the claimant for the choice of the best national court, according to his/her purposes or needs. At the same time, it could be a proper forum for the defendant(s), too, which has strong connections with the Member State of the seat of the judge vested with jurisdiction, where the localisation is realised.

2.2. Availability of prorogation of jurisdiction

In civil and commercial matters, prorogation of jurisdiction is possible pursuant to arts. 25 and 26 of the Regulation 1215/2012[17]. The requirements for a valid express agreement are quite soft. Nevertheless, in the scope of EU Competition Law, pursuant to the CJEU's case law, its practical availability must be distinguished depending on whether the case refers to the violation of Article 101 or of Article 102 of the TFEU.

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[13] 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, in OJ L299, 31 December 1972, pp. 32-42.

[14] This rule is subject to exceptions, as exclusive grounds of jurisdiction according to Article 24 (for its operation, Court of Justice, Grand Chamber, judgment of 25 February 2025, *BSH Hausgeräte GmbH*, case C-339/22); choice of court agreements pursuant to Article 25; some rules devoted to the protection of weaker contractual parties.

[15] For the claims in competition matters, the case of the natural person as defendant seems a mere theoretical hypothesis.

[16] Court of Justice, judgment of 9 March 1999, *Centros*, case C-212/97; Court of Justice, Third Chamber, judgment of 25 April 2024, *Edil Work 2 Srl*, case C-276/22.

[17] This possibility is subject to exceptions (exclusive grounds of jurisdiction) and limitations (rules of jurisdiction concerning consumer, insurance and employment contracts), that do not pertain to the private enforcement of EU Competition Law. *Ex multis*: F. MARONGIU BUONAIUTI, *Le obbligazioni non contrattuali nel diritto internazionale privato*, Milano, 2013, p. 71; F. GARCIMARTÍN ALFÉREZ, *Prorogation of Jurisdiction*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, 2015, pp. 277-312; J. NOWAG, L. TARKKILA, *How much effectiveness for the EU Damages Directive? Contractual Clauses and Antitrust Damages Actions*, in *Common Market Law Review*, 2020, p. 440.

For the former, the CJEU made it clear that a jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship. This condition avoids surprises to the detriment of the parties, because they can be sued in the chosen court only for those claims that are connected with the contract where the jurisdiction clause is included. Therefore, an agreement which refers generally to disputes arising from contractual relationships does not extend to a dispute relating to the tortious liability resulting from the participation of one contractual party to a cartel. Indeed, the contractual party allegedly victim of the infringement could not reasonably foresee this kind of litigation at the time of the agreement, since it had no knowledge of the cartel involving the other party. Thus, the claim cannot be regarded as stemming from a contractual relationship. Eventually, a jurisdiction clause does not bind the parties, if the cause of action is the private enforcement of Article 101 of the TFEU, unless the clause itself refers to liability for an infringement of EU Competition Law.

The same interpretation cannot be extended to the infringement of Article 102 of the TFEU. Indeed, the abuse of dominant position can materialise in contractual clauses, for example impacting on selling prices or conditions. Therefore, the action before the chosen court cannot surprise the undertaking in a dominant position and the application of the jurisdiction clause is not excluded on the sole ground that it does not expressly refer to disputes relating to the infringement of EU Competition Law[18].

This seems to be the only meaningful difference between cartels and abuse of dominant position in the determination of jurisdiction in cross border private enforcement of EU Competition Law. The rationale does not seem really strong[19]: in both situations, the contractual party which suffered the loss might not be aware of the anticompetitive conduct of the other party at the time of concluding the contract. Then, the infringement can have repercussions on the contractual clauses and relationships. Finally, the wrongdoer should be self-conscious of its illegal conduct. Furthermore, the need for foreseeability seems to be read in different directions in the two cases, in favour of the victim within the scope of Article 101 of the TFEU, in favour of the wrongdoer in the field of Article 102 of the TFEU, leading to two different solutions, despite the fact that foreseeability should be a general feature of the rules of law[20].

Tacit prorogation of jurisdiction shall not depend on this distinction. Indeed, the case is lodged: the claim, the cause of action and the claimant's requests are known. Therefore, the defendant can simply decide to accept or not to accept the court's jurisdiction, according to any objective or subjective evaluation on convenience.

[18] Court of Justice, Third Chamber, judgment of 24 October 2018, *Apple*, case C-595/17.
[19] L. IDOT, *Précisions importantes sur l'application des articles 5, point 3, et point 5, du règlement aux actions en réparation du fait de pratiques anticoncurrentielles*, in *Europe*, 2018, p. 102; P. GOFFINET, R. SPANGENBERG, *Les clauses attributives de jurisdiction à l'épreuve du droit de la concurrence*, in *Journal de droit européen*, 2019, pp. 199-201.
[20] N. SAUVAGE, *La dangereuse notion de « prévisibilité raisonnable » et l'exigence de sécurité juridique*, in *Revue de l'Union européenne*, 2012, p. 518.

3. Special grounds of jurisdictions relevant for the private enforcement of EU Competition Law

Arts. 7 and 8 of the Brussels I*bis* Regulation provide for special and alternative grounds of jurisdiction that widen the possibility to choose the competent court in favour of the claimant. Failing any specific rule referring to claims related to the infringement of EU Competition Law, Article 7(5) on the operation of a subsidiary, and Article 8(1) on consolidation of claims against multiple defendants are likely to come into play. Their grounds are examined below.

3.1. The relevance of the location of a subsidiary combined with the principle of economic unity

According to the current Article 7(5) of the Regulation 1215/2012, a person domiciled in a Member State can be sued in another Member State, where a branch, an agency or another establishment is situated, as regards a dispute arising out of its operations. Despite the necessity of a strict interpretation of the special rules, the definition of branch, agency or establishment is quite wide, since it encompasses every "centre of operations which has the appearance of permanency, such as the extension of a parent body. It must have a management and be materially equipped to negotiate business with third parties, so that they do not have to deal directly with the parent body"[21]. Therefore, the legal status or personality of the branch is irrelevant, provided that it is permanent, it appears connected with the parent company and can deal with third parties in its place.

The only (very reasonable) limit lies in the fact that the claim shall be based on acts performed by the branch, or commitments assumed in the name and in the interest of the parent company that shall be implemented in the State where the branch is situated[22]. Both the black letter formulation of the rule and its teleological interpretation, seeking sound administration of justice and procedural economy, come out on the side of this necessary connection between the claim and the branch's activity.

This connection plays an important role in EU Competition Law thanks to the well-established principle of economic unity. As regards private enforcement, in its *Sumal* judgment[23] the CJEU recalled that EU Competition Law targets the activities of undertakings, focussing on their conducts on the market. The formal separation between

[21] Court of Justice, Third Chamber, *CNP spółka z ograniczoną odpowiedzialnością*, cit., par. 52. In the same sense: Court of Justice, Grand Chamber, judgment of 19 July 2012, *Mahamdia*, case C-154/11, par. 48; Court of Justice, Second Chamber, judgment of 5 July 2018, *flyLAL*, case C-27/17, par. 59; Court of Justice, Third Chamber, judgment of 11 April 2019, *Ryanair*, case C-464/18, par. 33.

[22] It follows that a claim on the ownership of business premises where an undertaking carries out activities is excluded from the scope of application of the rule (Court of Justice, Sixth Chamber, order of 19 July 2019, *INA*, case C-200/19). Moreover, the mere existence of a subsidiary is irrelevant, if it has not had any role in the conclusion and in the implementation of the claimed contract (Court of Justice, Second Chamber, *Ryanair*, cit.).

[23] Court of Justice, Grand Chamber, judgment of 6 October 2021, *Sumal*, case C-882/19.

companies, the legal status and their different legal personalities do not preclude unity and unicity of market behaviours[24] as well as pursuing unitary specific economic aims. When an economic unit is detected, it is liable for the infringement of EU Competition Law, according to the principle of personal responsibility. This principle applies regardless to the fact that the infringer was the parent company or the subsidiary: indeed, it entails the application of joint and several liability amongst the entities of which the economic unit is made up at the time that the infringement was committed[25]. According to the recent decision in *Athenian Brewery*, the presumption is rebuttable, but firm evidence must be given.

Since this unit leads to undistinguishable behaviours on the market, liability can also be recognised to the subsidiary due to acts of the parent company. In this case, since the organisation of groups of companies can be very different from one group to another, and quite complicated, the liability of the subsidiary cannot be invoked automatically: the claimant must prove "the existence of a specific link between the economic activity of that subsidiary and the subject matter of the infringement for which the parent company was held to be responsible"[26].

These conditions being satisfied, the claimant can choose between suing the parent company or the subsidiary for the infringement of Article 101 of the TFEU, making use, whether the case might be, of the alternative ground of jurisdiction provided for by Article 7(5) of the Regulation 1215/2012. This solution has been expressly confirmed in the case *flyLAL II*, concerning the private enforcement of Article 102 of the TFEU, provided that the subsidiary had participated effectively to the antitrust conduct. This condition seems perfectly consonant with the case law briefly mentioned, that requires a factual link between the activities of the parent company and of the branch even within the economic unit. The same solution can be extended, for the same reasoning, to the enforcement of Article 101, with regard to all undertakings or groups of companies participating to the collusive conduct[27].

The combination of the principle of economic unity and the alternative ground of jurisdiction in Article 7(5) of the Regulation 1215/2012 has a multiplier effect in terms

[24] Court of Justice, judgment of 14 July 1972, *Imperial Chemical Industries v. Commission*, case 48/69, par. 140; Court of Justice, Third Chamber, judgment of 14 December 2006, *Confederación Española de Empresarios de Estaciones de Servicio*, case C-217/05, par. 41; Court of Justice, Third Chamber, judgment of 10 September 2009, *Akzo Nobel and others v. Commission*, case C-97/08 P, parr. 54 and 55; Court of Justice, Second Chamber, judgment of 1 July 2010, *Knauf Gips v. Commission*, case C-407/08 P, parr. 84 and 86; Court of Justice, Fifth Chamber, judgment of 27 April 2017, *Akzo Nobel and others v. Commission*, case C-516/15 P, parr. 47 and 48.

[25] Court of Justice, First Chamber, judgments of 26 January 2017, *Villeroy & Boch v. Commission*, case C-625/13 P; Court of Justice, Second Chamber, judgments of 25 November 2020, *Commission v. GEA Group*, case C-823/18 P; Court of Justice, Fifth Chamber, judgment of 13 February 2025, *Athenian Brewery*, case C-393/23.

[26] Court of Justice, Grand Chamber, *Sumal*, cit., par. 51.

[27] The principle of economic unity cannot be interpreted so extensively as to allow the service of judicial documents to the subsidiary, when the action is started against the parent company (Court of Justice, Fifth Chamber, judgment of 11 July 2024, *Volvo*, case C-632/22). The claimant has the possibility to choose the defendant and the competent court and must pursue proceedings accordingly, giving the defendant the opportunity to defend through a personal service of documents instituting the claim.

of potentially competent national courts, amplifying the choice in favour of the claimant. This reduces the foreseeability of the competent court. As a counterpart for the defendant(s), jurisdiction is granted to a court closely connected with the defendant, it being the Member State where it is situated and where it operates.

3.2. Jurisdiction in respect of connected claims

This broad provision for alternative *fora* seems convenient for the victim also in light of the rule on jurisdiction in respect of connected claims envisaged in Article 8(1) of the Regulation 1215/2012 as a special ground of jurisdiction. It enables to sue multiple defendants, domiciled in different Member States[28], before the court of the domicile of one of them. The claims against the defendants must be closely connected so that it is expedient to hear them together in order to avoid future potentially irreconcilable judgments. The connection is helpful especially when the causes of action against the co-defendants are not the same, but intertwined. A meaningful example could be the possibility to sue the parent company as anchor defendant before the court of its domicile, when the presumption of economic unity is rebutted; or the action of the indirect victim before the same judge against all undertakings located in the value chain[29], in case of partial passing on of the damage[30].

The case against the anchor defendant must be real and effective[31]. This does not preclude the assessment of jurisdiction if the claimant renounces to the case against it, provided that this mechanism is not abusive[32]. This rule has been confirmed in the field of competition law[33], too.

4. The infringement of EU Competition Law as matters (mainly) relating to tort, delict or quasi-delict

Within the scope of Article 7 of the Brussels I*bis* Regulation, a doubt may arise on the characterisation of private enforcement of EU Competition Law as a contractual matter, thus calling to the application of Article 7(1), or as a tort or delict, according to

[28] Some EU Member States' law offer wider connection possibility, that allows to sue co-defendants wherever domiciled. This opportunity has proved useful in some climate change cases, such as the Hague District Court, judgment of 26 May 2021, *Mileudefensie v. Shell*. In Competition Law, this rule would be useful too. Indeed, EU Competition Law covers all misconduct that produces effects in the internal market despite the seat of the tortfeasor (Court of Justice, judgment of 25 November 1971, *Béguelin*, case 22/71). Therefore, it could be convenient to join all claims against all cartels' participants before one national court for the same infringement of EU Competition Law.

[29] S. SMITH, *The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment*, in *Journal of competition law & economics*, 2021, pp. 642-685.

[30] EU Commission, *Study on the Passing-on of Overcharges*, 2016, final report.

[31] Jurisdiction must be confirmed even if the case against the anchor defendant is inadmissible: Court of Justice, Second Chamber, judgment of 13 July 2006, *Reisch Montage*, case C-103/05.

[32] Court of Justice, Third Chamber, judgment of 11 October 2011, *Freeport*, case C-98/06.

[33] Court of Justice, Fifth Chamber, judgment of 21 May 2015, *CDC*, case C-352/13.

Article 7(2)[34]. Indeed, two sorts of legal relationships are likely to arise in the domain concerned: the relationships between the parties to an agreement resulting in a restriction of competition, which by their very nature are normally contractual, and the relationships between the said parties, or any of them, and third parties. Despite these possible legal relationships and consequent claims, many relevant factors lead to the conclusion that all these claims are tortious. Firstly, in the *flyLAL I* case[35], the CJEU referred directly to Article 5(3) of the Regulation 44/2001[36], the immediate predecessor of Article 7(2) of the Regulation 1215/2012, even if the request for a preliminary ruling did not even mention this rule or the problem of characterisation of the claim. The Court at para. 28 of its judgment clearly stated that damages actions for the infringement of EU Competition Law amount to torts or delicts. Secondly, current CJEU's case law mainly interprets Article 7(2) of the Regulation 1215/2012 in damages actions[37] without even mentioning Article 7(1). Lastly, the existence of a special rule in the Rome II Regulation[38] seems to definitively characterise these claims as non-contractual. However, some other clues point to a different conclusion, so that a small set of claims can have contractual nature.

In order to characterize cross border private enforcement of EU Competition law, it is important to recall briefly that, according to the well-established CJEU's case law on the former Article 5(1) and (3) of the Regulation 44/2001, special jurisdictions are an exception to the general provision of the domicile of the defendant. Therefore, they must be interpreted restrictively[39]. The contractual liability rests on the existence of an obligation freely assumed by one party towards another. The non-contractual liability has a residual definition and covers those cases where liability is invoked if this freely assumed obligation does not exist[40].

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[34] G. VAN CALSTER, *The EU Rules on Jurisdiction for and the Law Applicable to, Follow-on, and Stand-alone Damages Following Competition Infringement*, in *Journal of European comparative law and practice*, 2020, p. 153.

[35] Court of Justice, Third Chamber, judgment of 23 October 2014, *flyLAL I*, case C-302/13.

[36] Council Regulation (EC) 44/2001, *on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*, of 22 December 2000, in OJ L12, 16 January 2001, pp. 1-23.

[37] Court of Justice, Fifth Chamber, *CDC*, cit.; Court of Justice, Sixth Chamber, judgment of 29 July 2019, *Tibor Trans*, case C-451/18.

[38] The CJEU call for a parallel interpretation of the Regulations on jurisdiction and on applicable law (see, for example, Court of Justice, Eight Chamber, judgment of 10 February 2022, *UE*, case C-595/20), with limited exceptions (the most remarkable is Court of Justice, Fourth Chamber, judgment of 16 January 2014, *Kainz*, case C-45/13, where the CJEU did not interpret Article 5(3) of the Regulation 44/2001 according to Article 5 of the Regulation 864/2007, since it would have been " unconnected to the scheme and objectives pursued by that regulation", par. 20). Further: E. LEIN, *La nouvelle synergie Rome I/ Rome II/ Bruxelles I*, in *Yearbook of Private International Law*, 2008, pp. 27-48; E.B. CRAWFORD, J. M. CARRUTHERS, *Connection and Coherence between and Among European Instruments in the Private International Law of Obligations*, in *The International and Comparative Law Quarterly*, 2014, pp. 1-29.

[39] Court of Justice, judgment of 19 September 1995, *Marinari*, case 364/93; Court of Justice, Fifth Chamber, judgment of 27 September 1988, *Kalfelis*, case 189/87; Court of Justice, Fifth Chamber, judgment of 15 January 2004, *Blijdenstein*, case C-433/01; Court of Justice, Second Chamber, judgment of 10 June 2004, *Kronhofer*, case C-168/02.

[40] Recently: D. MARTINY, *Coordination of contractual and tort claims in the European law of jurisdiction*, in *Cuadernos de derecho transnacional*, 2024, n. 2, pp. 1099-1113.

In EU Competition Law cases, a contract can indeed exist, among tortfeasors, or between a wrongdoer and a supplier or customer, or between parties in the distribution or value chain. Still, it needs to be scrutinised whether this fact is meaningful in terms of characterisation. The *Apple* case is relevant because it is the only judgment in which the Court had to reason expressly on the relationships between an existing contract and an infringement of EU Competition Law. Following the CJUE's reasoning, the main point here is that this violation had no repercussions on the interpretation, the effects, the implementation of a contract: allegedly, it only reduced the business of one of the parties[41]. Therefore, the contract seems to be irrelevant: the commercial loss was likely to be suffered regardless of the contractual relationship due to the allegedly abusive distribution chain created and exploited by the tortfeasor.

The same irrelevance of a contract between the parties appears in *Volvo*. Here the applicant was a customer of one of the companies, that was party to an antitrust agreement, suffering the unfair consequences deriving from the original restriction of competition. It seized multiple co-defendants for damages resulting from a collusive agreement. One of them was its direct seller. Despite the contractual relationship between the claimant and one of the defendants, this contract of purchase did not affect the applicability of Article 7(2) of the Brussels I*bis* Regulation: it was not even mentioned in the grounds of the judgment.

Yet, a distinction has been drawn in *Wikingerhof*[42]. It lies on the grounds of the claim. If it is based on the implementation or on the interpretation of a contract, the claim shall be contractual. If it is grounded on the infringement of the (EU Competition) Law, it constitutes a delict. Therefore, according to the CJEU, a claim based on Article 102 of the TFEU is tortious, because the contract between the parties is the tool for the realisation of the anticompetitive infringement[43]: the contract is based on terms imposed by the stronger party as a consequence of its decision to exploit its dominant position and constitute the performance of the abuse. This conclusion explains better the *Apple* case, too.

Also in *Amazon*[44], although on the use of unfair commercial terms, the CJEU draws a very (too?) subtle distinction between the use and the assessment of a particular contractual term, the former being tortious, the latter contractual.

This distinction seems the clarification of the CJEU's case law on Article 5(1) and (3) of the Regulation 44/2001 for the purposes of cross border private enforcement of EU Competition Law. It mirrors, too, the black letter formulation of Article 6(3) of the Rome II Regulation, that expressly refers to non-contractual obligations, taking from granted

[41] The applicant, a distributor who concluded a distribution agreement with Apple, claimed that the defendant abused its dominant position while preferring its own chain of distribution, thus jeopardising its business.
[42] Court of Justice, Grand Chamber, judgment of 24 November 2020, case C-59/19, *Wikingerhof*.
[43] W. WURMNEST, *Plotting the boundary between contract and tort jurisdiction in private actions against abuses of dominance:* Wikingerhof v. Booking, in *Common Market Law Review*, 2021, p. 1581.
[44] Court of Justice, Third Chamber, judgment of 28 July 2016, *Amazon*, case C-191/15.

the existence of contractual obligations arising out of the infringement of EU Competition Law.

Therefore, the main point is to verify when infringements of EU Competition Law can have contractual nature. The cause of action must focus on the interpretation or on the implementation of the contract as such, regardless the infringement of EU Competition Law and its consequences on the sphere of the applicant. This is a contractual matter, because the claim is focussed on the contract itself and not on other possible legal relationships between the parties or on other infringements. The restriction of competition must be caused by an agreement between the parties, which is disputed. Therefore, it seems to be exactly the *Courage* case, the judgment that gave official birth to the private enforcement of EU Competition Law[45]: a claim on the full enforcement[46] of the contract binding the applicant and the defendant where the contract itself is a collusive agreement. Therefore, the contractual nature seems truly residual with respect to the tortious characterisation: one of the tortfeasors must challenge the antitrust agreement.

5. The identification of the place of the harmful event

This characterisation as tort causes the well-known problem in the application of Article 7(2) of the Regulation 1215/2012, that is the localisation of the harmful event. Due to the simultaneous relevance of the places of the causal event and of the harm[47], even if located in more than one Member State[48], this rule can attribute alternative jurisdiction to a multiplicity of different national courts. This is a general principle in the interpretation of the rule[49]. In EU Competition Law, there is a natural risk of proliferation of competent forums. In cartel cases, the conduct requires the action of two or more undertakings, that could have their legal seats and centres of interests and of business in more than one Member State. Furthermore, according to arts. 101 and 102 of the TFEU, the conduct must be detrimental to the internal market and affect trade between Member States, so that losses can be suffered in more than one Member State. Although anti-competitive conduct can hardly be detrimental in *all* Member States, it has by nature the potential to affect more than just one national market[50]. This first impact harm is followed

[45] Court of Justice, judgment of 20 September 2001, *Courage*, case C-453/99. In the same sense: M. HELLNER, *Unfair Competition and Acts Restricting Free Competition. A Commentary on Article 6 of the Rome II Regulation*, in *Yearbook of Private International Law*, 2007, p. 66.
[46] Or, on the opposite, on nullity: M. FALLON, S. FRANCQ, *Private Enforcement of Antitrust Provisions and the Rome I Regulation*, in J. BASEDOW, S. FRANCQ, L. IDOT (eds.), *International Antitrust Litigation*, Oxford and Portland, 2012, p. 83.
[47] Court of Justice, judgment of 30 November 1976, *Bier*, case 21/76.
[48] Court of Justice, judgment of 7 March 1995, *Shevill*, case C-68/93.
[49] P. MANKOWSKI, *Art. 7*, in U. MAGNUS, P. MANKOWSKI (eds.), *European Commentaries on Private International Law, Brussels Ibis Regulation*, vol. I, Köln, 2023, p. 260.
[50] P. MANKOWSKI, *Article 7*, in U. MAGNUS, P. MANKOWSKI (eds.), *European Commentaries on Private International Law, Brussels Ibis Regulation*, vol. I, Köln, 2016, p. 333.

by individual damage to companies in the relevant market[51], i.e. specific damage, consisting of, for example, economic or commercial loss, loss of customers, orders or profits, and, following the causal chain, increasingly more specific injuries suffered by the buyers of these companies, by the whole value chain, up to the consumers. Taking into account the entire chain of production, distribution and sale, damages and losses are to be found everywhere.

The CJEU's case law actualised these places for some kinds of torts[52], granting more legal certainty in its application. This pattern is developing in recent years in private enforcement of EU Competition Law, too, so that it can be distinguished from other torts, although not all main issues have already been dealt with, nor all solutions can be considered optimal.

5.1. The place of the causal event

The event giving rise to damage is composed by two parts: the decision (to take the anticompetitive conduct) and its implementation. According to the *flyLAL II* judgment, both are relevant in the establishment of the jurisdiction to decide on the whole loss suffered by the victim[53]. At the same time, both are difficult to localise univocally. Indeed, in *Tibor Trans* the CJEU stated that none of the anticompetitive agreements took place in the State of the seized court, this meaning that all agreements – and all decisions, could operate as localising elements establishing jurisdiction. If the undertakings met and concluded several antitrust agreements in different Member States, the place of the casual event is manifold[54]. These places can be easily decided by the undertakings for abusive purposes[55]. The globalisation of this place is evident if the contracts among undertakings were all or mainly at distance. In the worst cases, there is no agreement[56].

A partial limitation to multiplicity is set in the *CDC* case, since only the final agreement, or whether the case may be, the agreement in particular that is identifiable as the sole causal event should be considered. This specification does not really help for the localisation for distance contacts only. However, it seems to deprive of importance open-

[51] Communication from the Commission, Commission Notice on the definition of the relevant market for the purposes of Union competition law (C/2024/1645), in OJ 22 February 2024, pp. 1-35.
[52] E. LEIN, *Special Jurisdiction*, in A. DICKINSON, E. LEIN (eds.), *The Brussels I Regulation Recast*, Oxford, 2015, p. 156.
[53] Court of Justice, Grand Chamber, judgment of 25 October 2011, *eDate*, joined cases C-509/09 and C-161/10.
[54] M. BECKER, *Kartelldeliktsrecht: § 826 BGB als "Zuständigkeitshebel" im Anwendungsbereich der EuGVO?*, in *Europäisches Wirtschafts- und Steuerrecht*, 2008, p. 230; J. BASEDOW, *Der Handlungsort im internationalen Kartellrecht*, in FIW FORSCHUNGSINSTITUT FÜR WIRTSCHAFTSVERFASSUNG (hrsg.), *Wettbewerbspolitik und Kartellrecht in der Marktwirtschaft, 50 Jahre FIW 1960-2010*, Köln, 2010, pp. 129-142; E. LEIN, *Special Jurisdiction*, cit., p. 164. Therefore, the place of the conduct should be set aside, or considered secondary: S. BARIATTI, *Problemi di giurisdizione e di diritto internazionale privato nell'azione antitrust*, in L.F. PACE (a cura di), *Dizionario sistematico del diritto della concorrenza*, Napoli, 2013, p. 269.
[55] P. MANKOWSKI, *Article 7*, cit., 2016, p. 300.
[56] L. IDOT, *Précisions*, cit., p. 64.

ended meetings, or agreements, or changes to previous agreements, or new agreements, concluded by the same parties but that do not affect directly or indirectly the claimant. The assessment of jurisdiction shall consider the specific allegations of the victim and the claimed anticompetitive behaviour.

The identification of the conduct giving rise to damage can be easier in order to determine the place where the relevant decision was taken in case of infringement of Article 102 of the TFEU[57]. Being the tortfeasor one undertaking only, its domicile, in the threefold sense of Article 63 of the Regulation 1215/2012, seems the proper place where decisions are taken.

For both infringements, the place of the implementation of the decision tends to coincide with the place of damage, due to the relevance of the affected market, that is, at the origin, the Member State where the anticompetitive conduct took place, as discussed below.

5.2. The place of the damage

The *mosaic principle*[58] has a potential multiplier effect on the number of possible courts having jurisdiction due both to the definition of the anticompetitive conducts and the EU market's freedoms. Furthermore, the notion of *victim* of an infringement of EU Competition Law is very broad[59]. In a wide approach, the harm could be the price increase of goods, paid by a single consumer domiciled in a Member State, where only one product has been sold.

The CJEU's case law limits these potentially extreme interpretations for the purposes of civil judicial cooperation.

Firstly, the injury should be a direct consequence of the causal event[60]. Indirect damages cannot be held for grounds of jurisdiction[61]. Therefore, the indirect victim cannot sue before the court of the place where he/she suffered damage[62], since the passed-on damage is by definition an indirect damage[63]. Neither the parent company can ground jurisdiction on its domicile, as the place of damage, when claiming for losses suffered by its subsidiaries domiciled elsewhere[64].

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[57] L. IDOT, *Contentieux international des actions en réparation pour violation du droit de la concurrence: l'arrêt* CDC *revisité*, in *Revue critique de droit international privé*, 2019, p. 804.
[58] The mosaic principle was developed by the CJEU for the purposes of jurisdiction in respect of violations of privacy or personality rights (Court of Justice, *Shevill*, cit.; Court of Justice, Grand Chamber, *eDate*, cit.; Court of Justice, Grand Chamber, judgment of 21 December 2021, *Gtflix Tv*, case C-251/20).
[59] Court of Justice, *Courage*, cit.; Court of Justice, Fifth Chamber, judgment of 5 June 2014, *Kone and others*, case C-557/12; Court of Justice, Second Chamber, *Skanska Industrial Solutions and others*, cit.; Court of Justice, Fifth Chamber, judgment of 12 December 2019, *OTIS*, case C-435/18.
[60] Court of Justice, First Chamber, judgment of 16 July 2009, *Zuid-Chemie*, case C-189/08, par. 27.
[61] Court of Justice, Sixth Chamber, judgment of 11 January 1990, *Dumez*, case C-220/88.
[62] M. REQUEJO ISIDRO, E. WAGNER, M. GARGANTINI, *Article 7*, in M. REQUEJO ISIDRO (ed.), *Brussels I*bis, *a Commentary on Regulation (EU) No 1215/2012*, Cheltenham, 2022, p. 115.
[63] P. MANKOWSKI, *Article 7*, cit., 2023, p. 292.
[64] Court of Justice, Fifth Chamber, judgment of 4 July 2024, *MOL*, case C-425/22.

Secondly, purely financial losses cannot be considered relevant[65]. In general, this depends on the first limit, since an economic loss is frequently a secondary consequence, a follow up to a first-impact harm. Furthermore, the place of this loss usually coincides with the domicile of the victim, and a *forum actoris* cannot be accepted outside the limited hypothesis expressly established by the Regulation, such as the consumers' contracts[66]. Indeed, Article 7(2) does not intend to protect the victim as a weak party[67] and an almost unconditioned *forum actoris* would not be desirable[68].

Finally, and for the same reason, the rule is not conditional upon the targeting or to addressing the companies' activities in one Member State (where the victim's interests were jeopardised)[69]. Indeed, Article 7(2) aims to grant proximity and predictability[70], thus setting aside different purposes that could be realised through a materially-oriented private international law[71].

These specifications only serve the purpose not to extend indefinitely the places of the injuries and thus the courts potentially retaining jurisdiction, but do not help in an unequivocal determination of jurisdiction.

Yet the same principle of specificity, already applied in the determination of the place of the causal event, can be adapted to the identification of a unique place of the harm, or at least in a reasonable alternative between a reduced number of courts[72]. This pragmatism is clear in the *flyLAL II* case, where the rationale in the interpretation of the place of the injury is focussed on the case at stake[73]. More clearly, in *Tibor Trans* the localisation of the harm depends on the combination of the affected market that shall coincide with the place where the victim claims to have suffered damage. The direct harm is suffered in the

[65] For example, the Court of Justice, First Chamber, judgment of 9 July 2020, *Verein für Konsumenteninformation*, case C-343/19 did not consider relevant the financial loss of the consumer, buyer of a vehicle with defective devices. Indeed, the damage is the purchase of car that does not have the advertised environmentally friendly features, and the financial loss (in the bank account of the consumer) is derivative only.

[66] H. RÖSLER, *Protection of the Weaker Party in European Contract Law: Standardized and Individual Inferiority in Multi-level Private Law*, in *European Review of Private Law*, 2010, pp. 729-756; V. VAN DEN EECKHOUT, *Private International Law in an Era of Globalisation. 'Neutral' Private International Law!? An Analysis Through the Lens of Protection of Weak c.q. Vulnerable Parties*, 2020, available at SSRN: https://ssrn.com/abstract=3677937.

[67] L. MARI, *Il diritto processuale civile della Convenzione di Bruxelles* I, *Il sistema della competenza*, Padova, 1999, p. 389; S.M. CARBONE, C. TUO, *Il nuovo spazio giudiziario europeo in materia civile e commerciale*, Torino, 2016, p. 135; according to M. REQUEJO ISIDRO, E. WAGNER, M. GARGANTINI, *Article 7*, cit., p. 111 the decisions on online defamation challenge this assumption.

[68] P. MANKOWSKI, *Article 7*, cit., 2023, p. 290.

[69] P. MANKOWSKI, *Article 7*, cit., 2023, p. 260.

[70] This was expressly stated already in the *Bier* judgment, par. 21.

[71] P. PICONE, *Les méthodes de coordination entre ordres juridiques en droit international privé*, *Cours général de droit international privé*, in *Recueil des cours de l'Académie de La Haye*, 1999, Volume 276, pp. 9 ff.

[72] J. BASEDOW, *International Cartels and the Place of Acting under Article 5(3) of the Brussels Regulation*, in J. BASEDOW, S. FRANCQ, L. IDOT (eds.), *op. cit.*, p. 33; M. BECKER, *Kartelldeliktsrecht*, cit., p. 231.

[73] See also Cour de Cassation, Civ. 1ere, 1 February 2012, in *Revue critique de droit international privé*, 2013, p. 464.

affected market[74], where a distortion of competition took place[75], according to the victim's allegation. It is of no importance if the same conduct caused losses to other victims, in other States or affected markets.

Therefore, the localisation shall not depend on the general impact of the antitrust conduct on the internal market, but rather on the specifically affected market where the victim complains losses. This is all the truer since the court of the place of the injury has jurisdiction to decide on the loss suffered in the Member State where it sits, and other prejudices become irrelevant for the purposes of those specific proceedings.

The place of the injury can be localised where the market conditions were distorted and in which the victim claims to have suffered that damage, that is the affected market, to the extent that the claimant operated in that market. In an extreme perspective, neither the tortfeasors, nor the victim might have the domicile, or a subsidiary, in that State. This definition is consistent with the aims of the enforcement of EU Competition Law, as rules that are considered EU system's pillars[76], while the protection of individual interests plays a subordinated role.

Furthermore, this interpretation would help limiting the fragmentation and the potential globalisation of the ground of jurisdiction.

This approach reduces difficulties and sensitiveness in the localisation, because the claimant bears the responsibility to identify the markets where it suffered damage[77]. The absolute globalisation exists, in fact, only if tortfeasors and victims are multinational corporations organised in groups of companies, forming an economic unit, with a strong value chain. In these cases, parcelling out the harm might have a reduced convenience and the identification of the proper place of the damage seems almost meaningless.

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[74] The German literature has been focussing on the *Marktortprinzip* as the place of the direct harm, even before the outbreak of the CJEU's case law; see, for example: H. I. MAIER, *Marktortanknüpfung im internationalen Kartelldeliktsrecht*, Frankfurt am Main, 2011; W. WURMNEST, *Internationale Zuständigkeit und anwendbares Recht bei grenzüberschreitenden Kartelldelickte*, in *Europäische Zeitschrift Für Wirtschaftsrecht*, 2012, p. 934. More recently: A. STADLER, *Schadensersatzklagen im Kartellrecht – Forum shopping welcome! Zugleich Besprechungvon EuGH, Urteil v. 21.5.2015 – C-352/13*, in *JuristenZeitung*, 2015, pp. 1138-1149; B. SCRABACK, *Marktortanknüpfung bei Kartellen?*, in *Zeitschrift für das Privatrecht der Europäischen Union*, 2019, n. 2, p. 69; H. MEYLE, *Rethinking "the place of the damage rule" in private international law*, in *Yearbook of Private International Law*, 2020/2021, p. 505; for further remarks on German literature and reactions to the CJEU's case law: R. MONICO, *La giurisdizione in materia extracontrattuale nello spazio giudiziario europeo*, Torino, 2022, p. 250.

[75] Therefore, the violation of EU Competition Law does not cause purely economic losses. These torts continue challenging the case law (Court of Justice, *Marinari*, cit.; Court of Justice, Second Chamber, judgment of 16 July 2016, *Universal Music International Holding*, case C-12/15; further: T. HARTLEY, *Jurisdiction in tort claims for non-physical harm under Brussels 2012, Article 7*(2), in *International and Comparative Law Quarterly*, 2018, pp. 987-1003).

[76] Court of Justice, judgment of 1 June 1999, *Eco Swiss*, case C-126/97.

[77] A mere *prima facie* evidence is satisfactory, because it is not possible to fully instruct the case for the sole purpose of the establishment of jurisdiction (Court of Justice, Fourth Chamber, judgment of 28 January 2015, *Kolassa*, case C-375/13, paras. 61- 63; Court of Justice, Fifth Chamber, *Athenian Brewery*, cit., par. 42). The court shall rely on the available uncontested facts (Court of Justice, Fifth Chamber, judgment of 7 April 2022, *VA*, case C-645/20, par. 42). Even if the court must consider all the elements at disposal (Court of Justice, Second Chamber, *Universal Music International Holding*, cit., par. 45), the applicant does not need to satisfy a disproportionate burden of the proof (Court of Justice, Fourth Chamber, judgment of 6 July 2023, *BM*, case C-462/22, par. 37).

Therefore, from a practical perspective, the jurisdiction shall be better grounded on the place of the causal event or on the general rule of the domicile of the defendant, in order to avoid the need to split the damage, quantify it in the Member States of the seized courts and possibly lodging complaints in more jurisdictions.

Following this approach, the localisation of the tort does not seem to be a nightmare[78]. The problem arises because of three elements. Firstly, the fact that the same conduct can generate harms in more Member States means that private enforcement actions can be lodged in different courts, at the same time, by different claimants. This consequence cannot be properly faced by the law, since risks inherent in the cross-border nature of an activity are innate, when an undertaking does business in more States. Whether the case might be, rules on *lis alibi pendens* or, most probably, related actions (arts. 29-34 of the Brussels I*bis* Regulation) are applicable[79].

Secondly, the rule is applicable to actions for negative declarations[80]. In these proceedings, the identification of any place related to the harmful event is extremely difficult, since the applicant maintains that there is no harmful event. Therefore, the line of reasoning risks being quite complicated, since we need to localise the place of the direct damage, had any causal event occurred[81]. This place might not immediately coincide with the domicile of the defendant, who might suffer only from indirect losses in its domicile. However, these difficulties are typical features of all actions for negative declarations: private enforcement of EU Competition Law does not seem to make them even harder, at least in general.

Finally, unfortunately the CJEU's judgments in *CDC* risks creating confusion[82]. In the interpretation of the place of damage, the Court stressed the relevance of the place where the harm manifests itself, actualising it in the loss consisting in additional costs

[78] Therefore, Article 7 of the Regulation 1215/2012 does not need a reform that considers expressly antitrust claims (B. VILÀ COSTA, *How to Apply Articles 5(1) and 5(3) Brussels I Regulation to Private Enforcement of Competition Law. A Coherent Approach*, in J. BASEDOW, S. FRANCQ, L. IDOT (eds.), *op. cit.*, p. 19.

[79] R. FENTIMAN, *Introduction to Articles 29-30*, in U. MAGNUS, P. MANKOWSKI (eds.), *European Commentaries on Private International Law*, cit., 2023, p. 728 analyses whether a parent company and a subsidiary can be considered the same economic entity for the purposes of *lis alibi pendens*. Being its requirements quite strict, the only possibility would appear to be the exploitation of the principle of economic unity.

[80] Court of Justice, First Chamber, judgment of 25 October 2012, *Folien Fischer*, case C-133/11.

[81] The best solution would be to assume the existence of a causal event and to identify the place where it would have caused injuries. According to Bundesgerichtshof, judgment of 29 January 2013, KZR 8/10 (BPatG), in *Gewerblicher Rechtsschutz und Urheberrecht, Rechtsprechungs-Report*, 2013, p. 228, if two foreign companies compete in Germany, here can be found a place of the injury even for a negative declaration.

[82] O. GEISS, D. HOSRT, *Cartel damage Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV and Others: A summary and critique of the judgment of the European Court of Justice of May 21, 2015*, in *European Competition Law Review*, 2015, p. 430; K. HAVU, *Private Claims Based on EU Competition Law. Jurisdictional Issues and Effective Enforcement Case C-352/13 CDC Hydrogen Peroxide, EU:C:2015:335*, in *Maastricht Journal of European and Comparative Law*, 2015, p. 879; A. STADLER, *Schadensersatzklagen im Kartellrecht – Forum shopping welcome! Zugleich Besprechung von EuGH, Urteil v. 21.5.2015 – C-352/13*, in *JuristenZeitung*, 2015, pp. 1138-1149; W. WURMNEST, *International jurisdiction in competition damages cases under the Brussels I Regulation:* CDC Hydrogen Peroxide, in *Common Market Law Review*, 2016, p. 225.

occurred due to artificially higher prices. Therefore, the place of the damage is located at the victim's registered office. This conclusion creates a *forum actoris*, where a financial loss is frequently suffered. It contradicts the above-mentioned established case law on indirect financial losses, without considering the direct harm[83]. It also allows further fragmentation, since even a body consolidating antitrust claims and representing the interests of more victims shall file more claims, with the courts of the places of the registered offices of each victim.

The place of the registered office lost momentum in the subsequent case law[84]. As already made it clear above, although the CJEU keeps on referring to the place where the victim suffered harm, this place is to be connected with an affected market. Therefore, the focus is more on the market, and then on the effects of the behaviour on the victim. The ground of jurisdiction of the affected market can lead to a *forum actoris*, as the cases *flyLAL* very clearly demonstrate, but this is not an automatic nor necessary coincidence, while the use of the registered office of the victim as ground of jurisdiction cannot but lead to the domicile of the victim, by definition.

Furthermore, the *CDC* case cannot be considered as a general precedent, since the claimant represented the interests of more victims. For this, it is not a standard victim – wrongdoer(s) claim, in which the specificity of one single harm, although dispersed in more States, must be analysed in quest of localisation. Nevertheless, its peculiarity was not stressed in the rationale of the judgment[85], if not in the limited part referring to the different victims' registered offices, in order to state that they all bear the same weight. At best, this case shall be evaluated as a specific solution in peculiar actions, those lodged by a claimant representing more victims.

5.3. Assessing collective interests

These last remarks do not mean that collective or representative actions do not have standing in the private enforcement of EU Competition Law, but only that they cannot be dealt with as being identical to direct claims between a victim and wrongdoer(s). EU Law tries to develop collective actions, although Directive 2020/1828[86] does not apply to private enforcement of EU Competition Law within the material scope of Directive

[83] A. PATO, *Collective redress for cartel damage claims in the European Union after* CDC v Akzo NV and others, in *Yearbook of Private international Law*, 2015/2016, p. 491; L. IDOT, *Précisions*, cit., p. 64; H. MEYLE, *Rethinking "the place of the damage rule"*, cit., p. 484.
[84] L. IDOT, *Contentieux international*, cit., p. 805; ID., *Contentieux en réparation pour violation du droit de la concurrence: de nouvelles précisions sur le lieu de matérialisation du dommage*, in *Revue critique de droit international privé*, 2020, p. 135; H. MEYLE, *Rethinking "the place of the damage rule"*, cit., p. 491; L. RADEMACHER, Quieta movere – *but please do not do it quietly: the ECJ on international jurisdiction in antitrust damages actions (*Tibor-Trans, *C-451/18)*, in *Cuadernos de derecho transnacional*, 2020, n. 1, p. 677; M. REQUEJO ISIDRO, E. WAGNER, M. GARGANTINI, *Article 7*, cit., p. 129.
[85] M. WELLER, J. WÄSCHLE, *Kommentar*, in *Recht der Internationalen Wirtschaft*, 2015, p. 603.
[86] Directive (EU) 2020/1828 of the European Parliament and of the Council, *on representative actions for the protection of the collective interests of consumers and repealing Directive 2009/22/EC*, of 25 November 2020, in OJ L409, 4 December 2020, pp. 1-27.

2014/104. According to the principle of procedural autonomy[87], Member States can regulate collective or representative actions, outside the boundaries provided for by EU Law. Requirements and conditions will therefore depend exclusively on national laws.

Article 7(2) applies to collective or representative actions. This is very clear already from the *Henkel* case[88]. The *CDC* judgment is the only decision on these kinds of actions in private enforcement of EU Competition Law. According to the CJEU, the transfer of the claims by initial creditors cannot have an impact on the determination of the court having jurisdiction under Article 7(2), which must be interpreted in the same way regardless of the nature of the plaintiff.

Therefore, the identification of the place of the causal event follows the same path, with the clarifications described above. Considering the place of the loss, the collective or representative actor does not need to prove its specific or individual harm.

However, the analogous treatment of individual and collective actions does not favour the latter. Indeed, the final outcome of the *CDC* judgment is that collective actions must be considered a bundle of individual claims, for which the places of the injury must be determined independently. Consequently, this ground of jurisdiction is *de facto* useless or unusable, because it hinders the consolidation of claims before the court of the place of the injury, unless all represented victims claim for a loss suffered in one State only – a quite specific hypothesis.

The real possibilities for a collective or representative body to file a unique claim rest therefore on the general jurisdiction according to Article 4 of the Brussels I*bis* Regulation, in combination with the special forum based on connected claims pursuant to its Article 8(1); or the place of the causal event, if unequivocally identified. The fact that the collective entity represents undertakings' or consumers' interests do not seem to impact on these remarks, since, according to the *Henkel* judgment, the claim is tortious and does not involve any contractual relationship or obligation, and least of all a consumer contract.

6. The law applicable to acts restricting free competition

The characterisation of private enforcement of EU Competition Law as (mostly) tortious is coherent with its purposes, too, which stem clear from art 6(3) of the Rome II Regulation[89]. This special rule confirms that it is first and foremost concerned with free

[87] D.-U. GALETTA, *Procedural Autonomy of EU Member States: Paradise Lost?: A Study on the "Functionalized Procedural Competence" of EU Member States*, Berlin, Heidelberg, 2010; B. KRANS, A. NYLUND (eds.), *Aspects of Procedural Autonomy*, Cambridge, 2020.

[88] Court of Justice, Sixth Chamber, judgment of 1 October 2022, *Henkel*, case C-167/00.

[89] The rule refers to non-contractual obligations arising out of a restriction of competition. This black letter formulation leaves open the possibility of contractual claims, to be regulated according to Regulation (EC) 593/2008 of the European Parliament and of the Council, *on the law applicable to contractual obligations (Rome I)*, of 17 June 2008, in OJ L177, 4 July 2008, pp. 6-16 (E. RODRIGUEZ PINEAU, *Conflict of Laws Comes to the Rescue of Competition Law: the New Rome II Regulation*, in *Journal of Private International Law*, 2009, p. 320), specially arts. 3, 4 and 6 (M. ILLMER, *Article 6*, in U. MAGNUS, P. MANKOWSKI (eds.), *Rome II Regulation – Commentary*, Köln, 2019, p. 274). Following the CJEU's clarifications in

and undistorted competition[90], while the individual right has a secondary role. Indeed, the rule is a specification of the general connecting factor of Article 4, the place of the direct damage (recital 21 of the Regulation). It is actualised taking into consideration the affected market, although with different shades related to the structures of the claims. The prejudice to the market is the direct harm envisaged in Article 4, and all other losses are mere consequences thereof, to be considered as indirect damages that are not meaningful in order to determine the applicable law. The loss of the victim is not even mentioned in Article 6(3)[91].

The CJEU mentioned Article 6(3) of the Regulation 864/2007 in the interpretation of Article 7(2) of the Regulation 1215/2012[92], clearly transposing its objectives and values into the rule on jurisdiction.

This approach is consistent with the well-known theory of the effects in EU Competition Law[93], that calls to its application to the extent that the anticompetitive conduct produces effects within the internal market[94], regardless to the seats of the companies involved and of the place(s) of the conduct. EU Competition Law would thus be applicable to an infringement, whether it was scrutinised under the public and/or the private enforcement systems, since the outbreak of effects in the internal market lets it fall into EU interests[95].

Wikingerhof (see above, para. 4) contractual obligations arise only to the extent that the claimant seeks the full and correct implementation of the contract.

[90] C. HONORATI, *The Law applicable to Unfair Competition*, in A. MALATESTA (ed.), *The Unification of Choice of Law Rules in Torts and Other Non-Contractual Obligations in Europe*, Padova, 2006, p. 151; P. FRANZINA, *Il regolamento n. 864/2007/CE sulla legge applicabile alle obbligazioni extracontrattuali («Roma* II»), in *Le nuove leggi civili commentate*, 2008, p. 1008; E. RODRIGUEZ PINEAU, *Conflict of Laws*, cit., p. 312; M. ILLMER, *Article 6*, cit., p. 272.

[91] C. HONORATI, *Regolamento n. 864/2007*, cit., p. 534. This element must be stressed, because Article 6(1) on unfair competition refers to the collective interests of the consumers, making clear the different values protected by the rules.

[92] Court of Justice, Second Chamber, *flyLAL*, cit., par. 41; Court of Justice, Sixth Chamber, *Tibor Trans*, cit., par. 35; Court of Justice, Fifth Chamber, *Volvo*, cit., par. 32; Court of Justice, Fifth Chamber, *MOL*, cit., par. 40.

[93] Notwithstanding some characterisation problems (T. ROSENKRANZ, E. ROHDE, *The Law Applicable to Non-contractual Obligations Arising out of Acts of Unfair Competition and Acts Restricting Free Competition under Article 6 Rome II Regulation*, in *Nederlands Internationaal Privaatrecht*, 2008, p. 436; J. FITCHEN, *Choice of Law in International Claims Based on Restrictions of Competition: Article 6(3) of the Rome II Regulation*, in *Journal of Private International Law*, 2009, p. 347; E. RODRIGUEZ PINEAU, *Conflict of Laws*, cit., p. 319; M. ILLMER, *Article 6*, cit., p. 260; G. VAN CALSTER, *The EU Rules on Jurisdiction*, cit., p. 154), infringements of Article 101 or 102 of the TFEU are surely included in the scope of application of Article 6(3) (recital 23 of the Regulation).

[94] Court of Justice, judgment of 30 June 1966, *LTM-MBU*, case 56/65; Court of Justice, judgment of 13 July 1966, *Costen and Grunding*, joined cases 56 and 58/64; Court of Justice, judgment of 25 November 1971, *Béguelin*, case 22/71; Court of Justice, judgment of 14 July 1972, *Imperial Chemical Industries Ltd. v. Commission* (ICI), case 48/69; Court of Justice, judgment of 21 February 1973, *Europemballage Corporation and Continetal Can Company Inc. v. Commission* (Continental Can), case 6/72; Court of Justice, judgment of 6 March 1974, *Istituto Chemioterapeutico*, joined cases 6 and 7/73.

[95] This remark shall be combined with the partial harmonisation of the private enforcement of EU Competition Law realised by the Directive 2014/104 in EU purely internal situations. Indeed, the relevant applicable Competition Law is that of the EU Treaties; Member States' national laws on damages actions after infringement of Competition Law are consistent and coherent with the set of principles and rules established by the Directive. It becomes apparent that conflict of laws issues is becoming less cutting with

The protection of competition is so important, that Article 6(4) excludes the possibility of an agreement as to the applicable law: the connection with the law of the affected market is mandatory for the (at least tentative) purpose to protect (the whole internal) market and overshadows potentially different private interests (in the application of another law, for whatever reasons)[96].

6.1. The place of the damage: the affected market

Article 6(3) of the Rome II Regulation distinguishes two hypotheses. The first is the general rule, that determines the applicable law as that of the State where the market is, or is likely to be, affected (lit. (a)). It is thus confirmed that the provision is a specification of Article 4 of the Regulation, because it is focussed on the direct harm. Indirect losses are not relevant for the determination of the applicable law[97].

Legal scholars discussed the meaning of the concept of affected market for the purposes of determining the applicable law, especially in relationship with the notion of market used in public enforcement of EU Competition Law[98]. The two meanings cannot coincide because the rules containing them serve different purposes: in the former case, to localise a tort in order to determine the applicable law; in the latter, to verify an anticompetitive conduct. Therefore, in Article 6(3) the notion of affected market has only a geographical facet, barely meaning a place where the harm was allegedly suffered. No product market nor economic evaluations are necessary at this stage for two reasons. Firstly, Article 6(3)(a) does not require a substantial injury, nor establishes any quantitative threshold: therefore, the strict analysis of the impact of the conduct, the products market and the quantification of the harm are useless at this stage. Secondly, it does not require an excessive burden of the proof in order to establish a ground of jurisdiction or a connecting factor. An accurate analysis of the elements of the anticompetitive conducts, including the quantification of the harm, will take place at a second stage[99], while evaluating the elements of the non-contractual liability.

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regards to private enforcement in EU cases (T. BALLARINO, *L'art. 6 del regolamento Roma II e il diritto* antitrust *comunitario: conflitto di leggi e principio territorialistico*, in *Rivista di diritto internazionale*, 2008, p. 74; M. ILLMER, *Article 6*, cit., p. 274).

[96] P. FRANZINA, *Il regolamento n. 864/2007/CE*, cit., p. 1009; F. MARONGIU BUONAIUTI, *Le obbligazioni non contrattuali*, cit., p. 129; J. FITCHEN, *Choice of Law*, cit., p. 344. In general: TH. M. DE BOER, *Party Autonomy and its Limitations in the Rome II Regulation*, in *Yearbook of Private International Law*, 2007, pp. 24-25.

[97] Therefore, damages actions of indirect victims are governed by the law of the State of the affected market, regardless of the place where they suffered from the loss. This solution is consistent with the determination of jurisdiction.

[98] M. HELLNER, *Unfair Competition*, cit., p. 59; T. ROSENKRANZ, E. ROHDE, *The Law Applicable to Non-contractual Obligations*, cit., p. 437; J. FITCHEN, *Choice of Law*, cit., p. 360; S. FRANCQ, W. WURMNEST, *International Antitrust Claims under the Rome II Regulation*, in J. BASEDOW, S. FRANCQ, L. IDOT (eds.), *op. cit.*, p. 120; M. ILLMER, *Article 6*, cit., p. 270; P. MANKOWSKI, *Article 7*, cit., 2023, p. 324. Despite the different positions, the CJEU has not yet had the opportunity to interpret this notion.

[99] In this, there might be differences whether the claim is a stand-alone or follow on action, since a decision from a Competition Authority might help in the definition of the relevant market.

Article 6(3)(a) realises the so called *Mosaikbetrachtung* in multistate anticompetitive conducts[100], calling for the application of all the national laws of the States whose markets are affected. The territorial principle thus embedded requires that each national law shall apply to "its" national damages. This solution seems consistent with the CJEU's case law on the jurisdiction of the court sitting in the place of the harm, which is limited to the prejudices suffered therein. Consequently, if the case is fragmented in different actions lodged with the courts of the places of the injuries, each court could apply its *lex fori* in order to decide on the harms caused there. This coincidence between *forum* and *ius* can ease the work of the judge. On the opposite, if the seized court has general jurisdiction, it must apply different national laws to different parts of the harm.

The *Mosaikbetrachtung* bears different effects if applied in the determination of jurisdiction or of the applicable law. In the former case, it means that the plaintiff has a possibility to choose among different competent (although potentially limited) courts. The seized court only needs to verify if it is one of the possibly competent courts[101]. In the latter, fragmentation means alternativity or cumulation of the applicable laws, according to the competence to decide granted to the seized court, without leaving any choice to the claimant, nor to the court itself.

6.2. The substantially affected Member State's market

This fragmentation is partly overcome in multistate cases by Article 6(3)(b), that concentrates the applicable law in coordination with the jurisdictional grounds[102]. It is applicable if more than one country is affected, thus implicitly confirming that (a) does not work perfectly well in multistate losses cases. Therefore, the *Mosaikbetrachtung* is limited in those hypotheses where the risk of fragmentation is very high due to the multiplicity of the places of injuries, and/or the number of co-defendants. For this effect, (b) seems a useful rule for the concentration of the applicable law in collective actions[103].

The rule envisages two cases. In the former, the victim sues in the court of the domicile of the defendant. The court shall have general jurisdiction and each national loss shall be governed by a different national law (cumulation). Nevertheless, the plaintiff can choose to base the claim on the law of the State of the domicile of the defendant, if the market of the Member State of the seized court is directly and substantially affected by the anticompetitive conduct. This condition confirms that the Member State of the domicile of the defendant may not correspond to any of the places of the injury. However,

[100] W. WURMNEST, *Internationale Zuständigkeit*, cit., p. 938.
[101] In EU civil judicial cooperation there is no margin of appreciation in the assessment of jurisdiction: Court of Justice, Grand Chamber, judgment of 1 March 2005, *Owusu*, case C-281/02.
[102] J. FITCHEN, *Choice of Law*, cit., p. 357.
[103] In the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of Regulation (EC) No 864/2007 on the law applicable to noncontractual obligations (Rome II Regulation), {SWD(2025) 9 final}, of 31 January 2025, COM(2025) 20 final, a short statement is devoted to collective redress (p. 10), only to state that further reflections are needed on the potential benefits of a future reform of the Regulation on the topic.

contrary to (a), it poses a quantitative threshold, a substantial harm[104]. This is not defined. Therefore, the court shall be satisfied that at least a meaningful part of the loss occurred in that country, although neither a fixed threshold nor a percentage can be established, nor suggested[105]. Moreover, the said condition shall be interpreted with caution: strictly, it means that the court shall determine the whole loss and that suffered in the State where it sits, then deciding if the latter is a substantial part of the former. This would require full investigation and ascertainment of the facts for the purposes of the determination of the applicable law. This conclusion seems too burdensome. Therefore, a *prima facie* determination seems appropriate in this case, too. In *follow on* cases, the existence of a Competition Authority decision on the effects of the harm can be extremely helpful.

It is interesting to stress that in this case the claimant can localise the antitrust conduct. Indeed, he/she can choose to base the claim on the *lex fori*, and therefore to decide to localise the multistate tort in a place which is highly connected with it, it being both the domicile of one of the defendants and one of the places of the injuries. Most probably, the choice is determined by the claimant's convenience; nevertheless, it is fruitful also in terms of localisation.

This possibility of choice of law is partly dissonant with Article 6(4)[106] and seems to reduce the relevance of the protection of the free and undistorted competition within the internal market. However, setting aside these considerations on the coherence of the system, this opportunity generates overwhelming advantages. It avoids cumulation, leading to the application of one national law to the whole claim. Furthermore, it eases the work of the judge in the ascertainment of the substance of the applicable law. The conditions stated in the rule do not diminish the importance of the free and undistorted competition in the EU. Indeed, it applies only where there is a strong EU interest, and, in particular, if the defendant has its domicile in the EU, pursuant to Article 4 of the Regulation 1215/1215. Therefore, the *lex fori* cannot but be the law of a Member State, and EU Competition Law is applicable[107]. Consequently, even if the consolidation option is left to the claimant (and to his/her interests), this potential concentration strengthens the protection of EU interests and avoids the application of third countries laws that might risk undermining EU objectives in the internal market.

The second hypothesis envisaged in Article 6(3)(b) refers to multistate and multiparty claims, clarifying the extent of the first hypothesis. If the claimant sues more than one

[104] The fact that the loss should be direct is already contemplated in Article 6(3)(a), it being a necessary quality according to Article 4 of the Regulation 864/2007.
[105] The analysis should be done on a case by case. Elements could be market shares; turnover; absolute number of goods or services (M. ILLMER, *Article 6*, cit., p. 284).
[106] E. RODRIGUEZ PINEAU, *Conflict of Laws*, cit., p. 327.
[107] The rule protects an EU interest (E. RODRIGUEZ PINEAU, *Conflict of Laws*, cit., p. 323; P. MANKOWSKI, *Ausgewählte Einzelfragen zur RomII-VO: Internationales Umwelthaftungsrecht, Internationales Kartellrecht, Renvoi, Parteiautonomie*, in *IPRax*, 2010, p. 389; C. HONORATI, *Regolamento n. 864/2007* cit., p. 538; S. FRANCQ, W. WURMNEST, *International Antitrust Claims*, cit., p. 100). Without the choice, a non-EU national law could be applicable to the part of the harm to the market affected in a third Country, as one of the laws cumulatively concurring. The choice, framed and limited under Article 6(3)(b) can only lead to a law of a Member State, and does not contradict the universal application of the rules on the applicable law according to Article 3 of the Regulation.

defendant, the consolidation of the claims (which is a free decision of the plaintiff) cannot be abusive against the co-defendants with domiciles in other Member States. Therefore, their acts implying restriction of competition must directly and substantially affect the market of the State of the seized judge. The rule grants predictability in the consolidation of jurisdiction and the concentration of the applicable law with an eye to the co-defendants: indeed, they shall know, or reasonably foresee, where their conducts are likely to cause direct and substantial losses, and in this case the law of the State of such affected market can be applicable, without surprises or frauds. The localisation, that seems reasonable if referred to one defendant, must be further conditioned, if referred to more than one defendant. This rule seems particularly useful in cases of breaches of Article 101 of the TFEU, if the claimant decides to sue all the cartelists, for example because he/she is an indirect victim and had no direct relationships with any of the wrongdoers. Nevertheless, it might be difficult to prove, even *prima facie*, that each tortfeasor's conduct caused losses in one State (that of the seized judge), except again in *follow on* cases, where the Competition Authority decision on the effects of the conduct might prove very helpful.

7. Some final remarks: the localisation of the non-contractual liability arising out of a restriction of competition

A positive aspect of Article 6(3) of the Regulation 864/2007 is the tentative coordination with jurisdiction in some difficult cases. In civil and commercial matters, the adoption of two separate regulations, one on jurisdiction, enforcement and recognition of judgments, one on the applicable law[108], in different moments, risks preventing an evaluation of the mutual interactions[109]. Due to the possibly articulated nature of the claims considered therein (multistate or multistate and multiparty claims), the solutions envisaged try to ease the coordination, favouring the *lex fori*. This option produces several advantages. First and foremost, it is left to the plaintiff's option, softening the prohibition of agreements as to the applicable law. The unilateral choice provokes a positive effect towards the victim, that is a possible choice of the law better protecting his/her interests, although Article 6(3) is not modelled in order to strengthen the victims' protection[110].

[108] This is clearly due to the fact that the Brussels regulations replace the Brussels Convention of 1968, conceived to deal exclusively with jurisdiction and judgments, in civil and commercial matters, while the Rome II Regulation was intended to complete the unification of choice of law rules in matters of obligations initiated with the Rome Convention of 1980. At that initial stage, it was not realistically feasible to adopt an instrument dealing at the same time with jurisdiction and with applicable law. Therefore, the tentative coordination of Article 6(3) shows a very positive attitude.

[109] This procedural safeguard is indeed established in Article 6(3) only, while similar problems can arise in the scope of application of other provisions of the Rome II Regulation (C. HONORATI, *Regolamento n. 864/2007*, cit., p. 539).

[110] The sole rule protecting victims in the Rome II Regulation is Article 7, on environmental damages: S. LAMONT-BLACK, E. GUINCHARD, *Environmental Law - the Black Sheep in Rome II's Drive for Legal Certainty: Article 7 of Regulation (EC) No. 864/2007 on the Law Applicable to Non-Contractual Obligations in Context*, in *Environmental Liability: Law, Policy and Practice*, 2009, pp. 161-172.

This favour does not undermine the EU protection of general interests, such as free and undistorted competition in the internal market, since the option left to the applicant is conditioned to proximity and localisation, so that the chosen applicable law is surely strongly connected with the case and it is a national law of a Member State.

A unilateral option is however difficult, not only because of the not very well clear-cut conditions established therein and of the margin of appreciation left to the judge on the evaluation of the substantial harm, but especially because the victim shall still compare his/her personal benefits in the application of the *lex fori*, on one side, and of the cumulative application of more concurring national laws (in case, including that of third States). In case of mistake in this evaluation, the application of a unique law has repercussion on the whole claim. In case of cumulative application of more laws, the fact that one of these is not favourable to the victim, for whatever reasons, impacts on a part of the loss only, that suffered in the affected market whose law is indeed not favourable, without jeopardising the rest of the case, nor the damages to other parts of the harm. The concentration can be risky. It is not by chance that the CJEU has not yet had the opportunity to interpret this rule: it has been barely invoked.

Furthermore, the experience so far in the application of the rules of jurisdiction in Article 7(2) of the Regulation 1215/2012 demonstrates that the current practice in private enforcement of EU Competition law is not that complicated as it could actually be. This does not mean that practitioners shall not be ready to face multistate and multiparty (claimants and defendants) cases, since infringements of EU Competition Law are indeed the proper situations where these hypotheses can occur. The main point is that the victims wish to recover damages: therefore, they do not show any interest in complicated cases, preferring, very naturally, to find out an alleged wrongdoer and claim directly against it, even in the scope of Article 101 of the TFEU. There is this a “one-to-one” case, where the elements of the situation are not particularly fragmented and the localisation can take place in a few Member States, even only two, not giving rise to serious difficulties. Further, there is no need to reason on indirect losses, that might be useful to find indirect victims and potential claimants, but not courts with jurisdiction and potentially applicable laws.

Difficulties of localisation are thus tempered, because the claimant can tailor the cause of action in order to match its interests at best, without really caring about the fact that the anticompetitive conduct had global effects, or that other direct or indirect victims suffered loss. This consequence favours the victim, at the end. This pragmatic approach is not only typical (and correct) from a claimant’s point of view, but it is justified by the same CJEU’s case law, that does not go in depth in the analysis of all the features of the infringement, but looks (carefully) at the elements of the concrete cause of action. At the end, in the establishment of jurisdiction, the court needs to be satisfied that any of the element used as grounds of jurisdiction is located in the State where it sits; then, it is only left to establish if it has general or limited jurisdiction.

In the determination of the applicable law, the court can make use of the general rule of Article 6(3)(a) of the Regulation 864/2007, trying to distinguish between a law that

can govern the whole, or a part of the claim. The fact that the affected market can be both a ground of jurisdiction and a connecting factor, it being also frequently the place of the domicile of the claimant, or of one of its subsidiaries, helps: the determination of the applicable law can follow immediately the establishment of the jurisdiction. This produces a convergence of the *forum* and the applicable law. This market is also most probably the place where the claimant suffered the most substantial harm[111], and consequently is not interested in recovering any other damages, wherever caused, erasing the problem of multiplicity.

Furthermore, the fragmentation does not necessarily cause conflicts of judgments, if the claimant lodges cases with the courts of the places of the losses. Each court is competent for a part of the harm only, and the following decisions might logically differ because they pertain to different situations, at least concerning the existence and the quantification of the harm.

These remarks do not aim to oversimplify the challenges of potentially global claims, as the consequences of the infringements of EU Competition Law can be, nor underestimate the classic issues of evidence of the liability and of costs of the proceedings – only partly faced by Directive 2014/104. However, if the interpretation of the rules focusses on the specific element of the claim, localisation is indeed possible. It might not be unique, it can leave room to choices in favour of the claimant, but these consequences are absolutely acceptable in a system, such as that of EU civil judicial cooperation, that reduces the cases of exclusive jurisdiction, is based on the freedom of the parties (or of one party), and establishes possible alternatives in the determination both of jurisdiction and of the applicable law.

ASTRACT: The article tackles the sensitive issue of localisation of the infringements of EU Competition Law for the purposes of the determination of jurisdiction and the applicable law in the context of cross-border private enforcement proceedings. The analysis considers the relevant EU Regulations and the CJEU's case law that tries to limit multiplicity and fragmentation for these specific cases, notwithstanding the availability of alternative grounds of jurisdiction and the application of the *Mosaikbetrachtung* in the determination of the applicable law. The final remarks focus on quite well-realised consistency of the solutions in a system that is modelled on alternative options and the possibility of a choice by the parties.

KEYWORDS: private enforcement of EU competition law – multistate torts – affected market – alternative grounds of jurisdiction – special rules on applicable law.

[111] C. HONORATI, *Regolamento n. 864/2007*, cit., p. 536.