

Choice of Forum: Considerations from a Practitioner's Perspective

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- **Choice of forum – what’s the subject?**
- **Decisive factors – substantive law**
- **Decisive factors – procedure**
 - General considerations
 - Costs, cost risks, cost awards
 - CDC’s experience
- **Example case**
- **Final remarks**

- **National cartel cases: plurality of forums under the German Code of Civil Procedure (*Zivilprozessordnung* – ZPO –)**
 - Examples: *Cement, Sugar*
 - Sect. 35 ZPO: “*The plaintiff shall be allowed to select among several jurisdictions*”
 - Sect. 17 ZPO: registered seat as general venue of legal persons
 - Sect. 32 ZPO: jurisdiction for tort
 - Sect. 36(1) no. 3 ZPO: determination of jurisdiction by a court in case of joint and several liability

- **International competence of national courts under Regulation (EU) No 1215/2012 (Brussels I bis)**
 - Cartel damages cases: judgment of the ECJ of 21/05/2015 in Case C-352/13 *CDC Hydrogen Peroxide*
- **Art. 4(1): each cartel member can be sued at domicile**
- **Art. 8(1): co-cartelists can be sued together before one court**
 - In the event of a single and continuous infringement, “claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings”
 - Each addressee of the infringement decision as a potential “anchor” defendant
 - Confirmed by numerous national court decisions in the UK, Netherlands, Germany and Austria
- **Art. 7(2): *forum delicti***
 - Courts of the place in which the cartel was definitively concluded or the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered, or courts of the place where the victim’s own registered office is located
- **Jurisdiction clauses in supply contracts**
 - Only applicable if specifically worded to include antitrust damage claims
 - Not applicable *vis-à-vis* jointly and severally liable co-cartelists
 - Applies *mutatis mutandis* to arbitration clauses (Appeal Court of Amsterdam *Sodium Chlorate* [2015])

- **On so-called “forum-shopping”**

*“I would point out that the existence of a connecting factor required under Article 6(1) of the Brussels I Regulation [= Article 8(1) Brussels I bis] provides an option for the applicant, to whom, in my opinion and in accordance with the Opinions of Advocates General Ruiz-Jarabo Colomer and Mengozzi on the subject of ‘forum shopping’, it is **open to exercise that option in the manner he considers most suitable and advantageous**, and this need not necessarily amount to depriving the proper court of its jurisdiction.”*

(AG Jääskinen, opinion of 11 December 2014 in Case C-352/13 *CDC Hydrogen Peroxide*, para. 89)

*“Within certain limits, ‘forum shopping’, interpreted according to the definition provided by Advocate General Colomer, as ‘[c]hosing a forum according to the **advantages which may arise from the substantive (and even procedural) law applied there**’ is undoubtedly permitted.”*

(AG Mengozzi, opinion of 24 May 2007 in Case C-98/06 *Freeport*, at footnote 38)

- **For infringements after 11 January 2009: Regulation (EC) No 864/2007 (Rome II)**
 - Art. 6(3)(b) contains special conflict of laws rule for EU-wide infringements of competition law, uniform application of *lex fori*:
“[W]here the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court”
- **Extensive parallels in the national laws on private antitrust enforcement**
 - *Acquis communautaire* (e.g., ECJ *Courage/Crehan*; *Manfredi*; *Kone*)
 - Existing case law
 - Further harmonisation by Directive 2014/104/EU
- **However, still essential differences, esp.:**
 - Interest, e.g. rates, compound/non-compound (for details, see EUI study *EU law and interest on damages for infringements of competition law: a comparative report* [2016])
 - Assignability of claims
 - Different implementation of Directive 2014/104/EU by the Member States (e.g. with regard to statutes of limitation)

Decisive factors – procedure

General considerations

- **Language of proceedings**
 - Hearings
 - Evidence (esp. documents)
- **Admissibility and handling of electronic documents**
- **Availability of disclosure, e-discovery**
- **Timing / duration of proceedings**
- **Sufficiently staffed and skilled, experienced, specialized courts**
 - Economic expertise
 - IT competence
- **Precedents in the forum at hand**
- **Existence of presumptions under statute or case law**
 - *E.g.*, presumption of 10% overcharge under Hungarian competition law
- **Availability of class action mechanisms**
- **Different implementation of Directive 2014/104/EU by the Member States**

Decisive factors – procedure

Costs, cost risks, cost awards

- **Bringing cartel cases is very cost-intensive from the outset, as the claimant has to collect economic evidence to substantiate the harm suffered: pre-trial involvement of legal and economic experts necessary**
 - Assessment of the infringement and its effects on the claimant
 - Access to the file of the competition authority
- **“Loser pays” rule: seems to homogenously apply throughout EU**
- **However, still paramount differences, esp. as regards:**
 - Court fees
 - Adverse cost risks
 - Admissibility / position of third-party interveners
 - Possibility / requirement of security deposit for the costs of the proceedings
 - Availability of after-the-event (ATE) insurance
 - Cost awards in case of success vs. actual costs

Decisive factors – procedure

CDC's experience



- **Finland**

- *Case Hydrogen Peroxide II*
- Court fees for 1 day pre-trial and full 4 day hearing in case € 20MM+ claim: € 113 (one hundred and thirteen!)
- Lawyers' fees compensated according to reasonable hourly rates

- **The Netherlands**

- *Cases Sodium Chlorate; Paraffin Wax*
- Max. court fees approx. € 7,500 per instance
- Adverse cost capped at approx. € 25,000 per counterpart/instance
- Separate contribution proceedings (*i.e.* no additional adv. cost risks implied)

- **Germany**

- *Cases Cement I; Cement II; Hydrogen Peroxide I*
- Up-front court fees, capped at € 30MM claims value: approx. € 330K in first, plus € 440K in 2nd, plus € 550K in 3rd instance; and adverse cost risk per defendant of € 835K (three instances)
- In addition identical max. cost risk for any third party intervener in main proceedings

- **Hypothetical scenario**
 - Customer has bought 20,000 pieces of the cartelised product at overcharge of € 5 per piece (based on assumption of overcharge of 10%)
- **Expected in-house costs: approx. € 18,750**
 - Up-front procurement and IT division
 - Data collection
 - Briefing of/by external counsel/economists team
 - Decision-making process
 - Case specific: assumed total of 250+ hrs over 7 years at € 75/ hr (totaling € 18,750)

- **Expected external costs: approx. € 192,500**
 - Access to file of the competition authority through external lawyers, plus appeal to court against regular refusal of access (50+ hrs at € 350/ hr, totaling € 17,500)
 - Court proceedings (incl. written submissions and attendance in hearings and pleading): competition/ trial lawyers (300+ hrs at € 350/ hr, totaling € 105.000)
 - Economists (incl. econometrics): 200+ hrs at €350/ hr (totaling € 70,000) for establishing theory of harm, calculation of damages and interest, and rejecting adverse arguments; providing expert witness/deposition
- **Max. cost compensation in case of full success**
 - Value in dispute: € 100,000, German law
 - 2 court instances (assumed): € 8,005.90
- **Consideration about minimum claims size**
 - Assuming expected internal and external costs totaling € 211,250, compared to max. possible cost compensation by the defendant of about € 8,006 and damages of € 100,000 (plus interest), makes claim enforcement economically unattractive from the outset

- **Article 4(1) of Directive 2014/104/EU**

“In accordance with the principle of effectiveness, Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law.”

- **Any improvement of private antitrust enforcement will not be sufficient as long as the issue of costs, cost risks and cost awards is not adequately addressed**
- **This specifically includes creating a level-playing field for cartel victims *vis-à-vis* the total of the multiple tortfeasors in follow-on cases**
 - Full reimbursement of internal and external costs reasonably incurred in the process of preparation and enforcement of the claim for damages
 - Limitation of overall cost risks of a (potential) plaintiff to an amount equaling the cost compensation he can expect in turn

Thank you for your attention!

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