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Public and Private Enforcement of EU Competition Law in the Age of Big Data
COMPEUTER

The private enforcement of competition law and digital markets: issues of jurisdiction and applicable law

Dr. Alberto Miglio
University of Turin

Introduction

- Cross-border competition cases raise issues of jurisdiction and applicable law
- Increasingly frequent occurrence in digital markets

- involvement of large businesses operating across multiple jurisdictions

- digitalization has enourmously increased the amount of cross-border transactions

→ National courts entrusted with the enforcement of competition law are often confronted with complex issues of jurisdiction and applicable law

→ Private International Law (PIL) is a necessary companion to competition law judges

Structure

1) Characterization (classification) of claims (contract/tort)
2) Tort jurisdiction (Art. 7(2) Brussels I bis)
3) Law applicable to competition law infringements (Art. 6(3) Rome II)
4) The Digital Markets Act (DMA) and PIL

(Not addressed: disputes arising out of the operations of a branch/establishment, counter-claims, consolidation, parallel proceedings, jurisdiction agreements etc.)

Characterization of claims

- Crucial issue:

- different criteria for jurisdiction “in matters relating to a contract” (Art. 7(1) Brussels I bis) and “in matters relating to tort, delict or quasi-delict” (Art. 7(1) Brussels I bis)

- different instruments for determination of applicable law (Rome I/Rome II)

- Dividing line between contractual and non-contractual matters has been dealt with by the CJEU since the 1980s (esp. C-548/12 *Brogsitter* [2014], C-59/19 *Wikingerhof* [2020], C-242/20 *HRVATSKE ŠUME* [2021])

Characterization of claims: *Wikingerhof* (I)

- Reference for a preliminary ruling from the German Supreme Court
- Dispute between a German hotel (Wikingerhof) and Booking (digital markets!)
- Wikingerhof claimed that some contractual terms constituted an abuse of dominant position and sought injunctive relief
- The OLG Schleswig had relied on *Brogsitter* and had no hesitation in classifying the claims as contractual(!)

Characterization of claims: *Wikingerhof* (II)

- The CJEU reiterated its holding in Brogsitter that "an action concerns matters relating to a contract […] if the interpretation of the contract […] appears indispensable to establish the lawful or […] unlawful nature of the conduct complained of."
- Then, it added that "where the applicant relies […] on rules of liability in tort […], and where it does not appear indispensable to examine the content of the contract […] in order to assess whether the conduct […] is lawful or unlawful, since that obligation applies to the defendant independently of that contract, the cause of the action is a matter relating to tort, delict or quasi-delict."

(C-59/19 *Wikingerhof* [2020] paras 32-33)

Characterization of claims: *HRVATSKE ŠUME*

- Preliminary ruling concerning characterization of unjust enrichment

- The CJEU reiterated its holding in *Wikingerhof* and concluded that unjust enrichment is in principle non-contractual, but then added: "However […] a claim for restitution based on unjust enrichment may, in certain circumstances, be closely linked to a contractual relationship between the parties to the dispute and, consequently, be regarded as coming within 'matters relating to a contract' […]. Those circumstances include the situation in which the claim […] relates to a pre-existing contractual relationship between the parties"

(C-242/20 *HRVATSKE ŠUME* [2021] paras 47-48)

→ A specification of or exception to the *Wikingerhof* rule? Does it apply beyond unjust enrichment?

Characterization of claims: conclusion (I)

- Cartel damages claims are non-contractual
- In *flyLAL II* (C-27/17) the CJEU seemed to imply that all abuses of dominance are "matters related to tort", but *Wikingerhof* and *HRVATSKE ŠUME* suggest a more nuanced answer

a) Exclusionary abuses (as in *flyLAL*) → non-contractual (typically actions by competitors)

b) Exploitative abuses arguably non-contractual in light of *Brogsitter* and *Wikingerhof* (source of the obligation is statutory; contract interpretation likely not indispensable to establish lawfulness of the conduct); but *HRVATSKE ŠUME* might suggest a different answer (claim connected to a pre-existing contractual relationship)

Characterization of claims: conclusion (II)

c) Cases of refusal to supply are generally likely to be non-contractual (source of the obligation)

d) Disputes on the legality of termination of a contract are probably contractual according to *HRVATSKE ŠUME* (claim refers to a pre-existing contractual relationship)

- What if *Wikingerhof* had brought a different claim, asking the court to ascertain that the contract was void instead of requesting an injunction? Would that have changed the characterization of the claim?

Tort jurisdiction

- Art. 7(2) Brussels I bis Regulation provides for the jurisdiction of the courts "for the place where the harmful event occurred or may occur"
- In fact two different places!

a) Place of the event giving rise to damage (harmful conduct/causal event)

b) Place where damage is suffered (only "initial damage", not "mere adverse consequences")

→ Alternative fora available to the plaintiff (in addition to defandant's domicile, Art. 4)

- Both place of causal event and place of damage are determined on a case-by-case base and may differ for different types of (competition law) infringements

Tort jurisdiction: place of the causal event in cartel cases

- The CJEU developed a three-step test (C-352/13 *CDC Hydrogen Peroxide* [2015])

1) If a single place of conclusion of the cartel can be identified, then the courts of that place have jurisdiction over all cartel participants and for the whole of the damage.

2) If, by contrast, the cartel consists of a series of collusive agreements concluded in various places, is there an agreement among those which is the sole cause of the event giving rise to the damage suffered by a particular victim? If so, the court of the place where such agreement was concluded has jurisdiction over all the perpetrators, but solely for the loss suffered by that victim.

3) If the loss is not exclusively caused by one agreement among those that make up the cartel, then no place of the causal event can be identified → special jurisdiction for tort can only be established at the place where the damage occurred.

Tort jurisdiction: place of the causal event in abuses of dominance

- In *flyLAL II*, it was uncertain if a predatory pricing practice would fall under Art. 101 or Art. 102 TFEU
- "[T]he event giving rise to the damage in the case of abuse of a dominant position is [based] on the implementation of that abuse, that is to say, the acts performed by the dominant undertaking to put the abuse into practice"

→Jurisdiction lays with the courts of the place where the anticompetitive conduct was implemented

(C-27/17, *flyLAL Lithuanian Airlines* [2018] paras 51-52)

Tort jurisdiction: place of damage (I)

- Place of damage consisting of the overprice paid by victims of a cartel "is identified only for each alleged victim taken individually and is located, in general, at the victim's registered office" (*CDC Hydrogen Peroxide*, para. 52)
- Possible concentration of claims by one victim against all cartel participants
- But different victims having their registered offices in different places must each sue in the place of the respective registered office
- This approach is also confirmed by more recent case law (C-30/20 *Volvo* [2021])

Tort jurisdiction: place of damage (II)

- But in some cases the Court also introduced a somewhat unclear reference to market affectation: “Where the market affected by the anticompetitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred” (C-27/17, *flyLAL-Lithuanian Airlines* [2018] para 40; C-451/18 *Tibor-Trans* [2019] para. 33; C-30/20 *Volvo* [2021] para. 17)

Tort jurisdiction: conclusion

- Plurality of alternative fora
- Concentration of claims in one forum not always possible
- Risk of forum shopping
- Exacerbated by Art. 8(1) Brussels I bis (multiple defendants): plaintiff may sue several defendants in the place where one of them is domiciled if the claims are connected and there is risk of conflicting judgments
- In some cases (e.g. “Wikingerhof” scenarios) this risk can be mitigated through exclusive jurisdiction agreements
- CJEU has overall followed a plaintiff-friendly approach to jurisdiction

→ Extension of the *Courage* logic of encouraging private enforcement of competition law?

The law applicable to competition law infringements (I)

- Art. 6(3)(a) Rome II Regulation: "[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected" (criterion of market affectation)

→Need to assess *prima facie* the affected market in order to determine applicable law!

- Recital 23 clarifies that "restriction of competition" means the types of conduct prohibited by Art. 101 and Art. 102 TFEU → does this provision apply to the DMA?

- What if the whole EU single market or more than one national market are affected?

→ In theory, the court would have to apply the law of each country where the market is affected!

The law applicable to competition law infringements (II)

- Art. 6(3)(b) "[w]hen the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may […] choose to base [the] claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises"

- Look at Art. 6(3)(b) Rome II in light of Art. 8(1) Brussels I bis: plaintiff may sue several alleged perpetrators in the place where one of them is domiciled → some risk of exploitation (forum shopping) in order to concentrate claims, but also to avoid application of multiple laws.

The DMA and PIL

- At least some DMA obligations lend themselves to private enforcement
- The DMA (like the DSA or the GDPR) contains a unilateral conflict rule (delimitation of scope):

"This Regulation shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service" (Art. 1(2) DMA)

- However, no rules on jurisdiction/on the law applicable to issues that are not harmonized

→ Need to coordinate the DMA with the Brussels I bis, the Rome I and the Rome II Regulations

Thank you for your attention!

alberto.miglio@unito.it

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