

Newsletter, 2 October 2015

Jurisdiction of German courts in antitrust damages claims

Lessons learnt from the EU Court of Justice's ruling in *CDC Hydrogen Peroxide*

Due to the growing number of antitrust damages claims in Europe, there appears to be a competition between the EU Member States for the most favorable jurisdiction to file a complaint. Even if plaintiffs may have a wishlist, jurisdiction in a certain country can only successfully be established if the respective requirements are met. Within the EU, not only the national jurisdiction rules apply but also the Council Regulation (EU) 1215/2012 ("*Brussels Ia Reg.*") which sets out the rules governing the jurisdiction of courts in civil and commercial matters in the Member States. This Regulation replaces the previous Regulation (EU) 44/2001 ("*Brussels I Reg.*") and is applicable to cases initiated after 10 January 2015. In its recent judgment in *CDC Hydrogen Peroxide*, the Court of Justice of the EU ("CJEU") specified the application of the *Brussels I Reg.* in the context of an action for damages against EU-based cartel members brought in Germany.¹ Following this CJEU judgment, which is equally relevant for the interpretation of the recast *Brussels Ia Reg.*, it has, *inter alia*, become clear that in actions against several EU-based defendants the special jurisdiction of tort can likely only be established in Germany for individual claims of German-domiciled plaintiffs.

Territorial jurisdiction under German law

The general rule to determine jurisdiction under German law, which also applies to actions for cartel damages, states that a person should be sued in the courts of the location where it is domiciled, i.e. in the case of a legal person, where it has its registered seat. Also under the *Brussels Ia Reg.*, a person should principally be sued in the courts of the Member State where it is seated. In addition, the German jurisdictional rules - like the *Brussels Ia Reg.* - foresee a specific jurisdiction based on tort, i.e. the action

can be brought at the place where the tortious act was committed (Sec. 32 German Civil Code of Procedure - "CCP") which is either where the causal event took place (*Handlungsort*) or where the damage occurred (*Erfolgort*). Pursuant to Sec. 38 CCP, merchants can always enter into an agreement on the competent court (jurisdiction agreement).

International jurisdiction under the *Brussels Ia Regulation*

In its preliminary ruling in the *CDC Hydrogen Peroxide* case, the CJEU had to decide on the question whether a German court had jurisdiction in respect of follow-on damages claims against the non-German (but EU) domiciled defendants under the *Brussels I Reg.* Since the plaintiff, Cartel Damages Claims (CDC), which based its complaint on assigned claims from customers, had settled with the sole German-domiciled defendant, Evonik Degussa GmbH, following initiation of this lawsuit, only defendants domiciled in Member States outside Germany remained within the proceedings.

Special jurisdiction based on close connection

Art. 8(1) *Brussels Ia Reg.* (ex-Art. 6(1) *Brussels I Reg.*) provides that, where a person is domiciled in a Member State and is one of a number of defendants, he may be sued in the courts of the place where any one of the defendants is domiciled, provided the claims are so "closely connected" that it is expedient to hear and decide on them together. In a nutshell, according to the CJEU, such criterion of close connection is only met in the case of damages actions against cartelists if a binding decision of the European Commission exists and if the authority has found a single and continuous infringement of EU competition law.² In those circumstances, the cartel members could have foreseen to be sued in the courts of a Member

¹ CJEU, 21 May 2015, C-352/13 – Cartel Damages Claims (CDC) Hydrogen Peroxide SA v Akzo Nobel NV et al.

² Case C-352/13, para 24.

State in which one of them is domiciled. Based on this reasoning, Art. 8(1) is therefore not applicable in stand-alone damage claims. In view of the settlement concluded between Degussa Evonik and CDC after the complaint was filed, the CJEU stressed that the jurisdiction of close connection would not apply if the parties had colluded to artificially fulfill its applicability and there was firm evidence for such abusive behavior.³

Special jurisdiction of tort

Art. 7(2) *Brussels Ia Reg.* (ex-Art. 5(3) *Brussels I Reg.*) provides that, in matters relating to tort, a person domiciled in one Member State may be sued in another Member State in the courts where the tortious event occurred. For the place of the causal event the plaintiff would have to identify the specific event during which the cartel was definitely concluded.

As, in view of how cartels develop in practice, this sole causal event will be difficult to identify, the specific jurisdiction of tort is *de facto* limited to the place where the damage occurred. According to the CJEU, this is the place where the alleged cartel victim has its registered seat. Therefore, plaintiffs of consolidated or assigned claims such as CDC or special purpose vehicles (SPVs), but also in case of group-internal assignments between affiliated companies, cannot rely on the special jurisdiction of tort but will only be able to bring a follow-on damages action at one of the defendants' registered seat pursuant to Art. 8(1). The CJEU stressed that the SPV's registered seat is not sufficient to establish the special jurisdiction of tort.

Prorogation by jurisdiction agreement

Art. 25 *Brussels Ia Reg.* (ex-Art. 23 *Brussels I Reg.*) provides that if the parties have agreed that a court of a Member State is to have jurisdiction to settle any disputes between the parties in the context of their business relationship that court should have exclusive jurisdiction. In order for such a jurisdiction agreement to be applicable in case of cartel damages claims, the agreement must refer to disputes arising from potential competition law infringements or such claims must otherwise be reasonably foreseeable.⁴

Thus, general choice of forum clauses in supply or framework agreements are unlikely to derogate jurisdiction for antitrust damage claims, unless at the time of entering into the agreement it was publicly known that the

supplier was involved in a cartel infringement or at least subject of a pending cartel investigation.

Lessons from the CDC Hydrogen Peroxide ruling for the jurisdiction of German courts

For EU-domiciled defendants the *Brussels Ia Reg.* continues to apply in order to determine the jurisdiction of German courts. Post-*CDC Hydrogen Peroxide*, an individual plaintiff from Germany is able to use its home advantage and can - based on the special jurisdiction of tort - file a complaint against several EU defendants at the place of its registered seat (in Germany). In addition - based on the special jurisdiction of close connection - any EU-based individual plaintiff as well as plaintiffs of assigned claims can bring a follow-on damages action against several EU-based defendants in Germany, provided that one of them, i.e. the anchor defendant, has its registered seat in Germany. In these cases, it will generally be difficult to dispute the required close connection, unless a willful circumvention can be shown.

Whether a prorogation by a jurisdiction clause, which only applies *inter partes*, is successful depends on the exact scope of such clause and how specific it is in relation to the potential liability resulting from competition law violations. Albeit a jurisdiction agreement constitutes a helpful means to steer the place of venue for potential antitrust damages claims to Germany, it will be a strategic question and also depend on the specific circumstances, if and when a party is willing to negotiate such a detailed clause.

For international defendants domiciled outside the EU the jurisdictional rules under German law apply. In this regard, the CJEU judgment in *CDC Hydrogen Peroxide* is not relevant. Even though the CCP does not provide for a special jurisdiction rule based on close connection, a plaintiff may jointly sue all non-EU defendants pursuant to the applicable rules for international jurisdiction at the seat of the German defendant given that the jointly and severally liable cartel members are co-perpetrators pursuant to Sec. 830 German Civil Code. This special jurisdiction of tort (Sec. 32 CCP) is interpreted much wider by the German courts than the CJEU interprets the special jurisdiction of tort under the *Brussels I Reg.* For example, if cartel meetings or implementing actions of the cartel members took place at a certain location in Germany, e.g. at the registered seat of one of the cartelists, or, even wider, if the cartel allegedly affected competition in Germany, a plaintiff may file its damages claims against all defendants with the

³ Case C-352/13, para 31.

⁴ Case C-352/13, para 70 et seq.

competent regional courts in Germany,⁵ all of which have at least one chamber focusing on competition law related cases. In principle, these considerations apply to individual and assigned claims.

Commeo LLP

Rechtsanwälte und Notar
Speicherstraße 55
60327 Frankfurt am Main
www.commeo-law.com

Dr. Jörg-Martin Schultze, LL.M.
joerg-martin.schultze@commeo-law.com

Dr. Dominique S. Wagener, LL.M.
dominique.wagener@commeo-law.com

Dr. Stephanie Pautke, LL.M.
stephanie.pautke@commeo-law.com

Dr. Johanna Kübler
johanna.kuebler@commeo-law.com

Isabel Oest, LL.M.
isabel.oest@commeo-law.com

Josefa F. Billinger, LL.B./LL.M.
josefa.billinger@commeo-law.com

Christoph Weinert, LL.M.
christoph.weinert@commeo-law.com

Christoph Krüger, LL.M.
christoph.krueger@commeo-law.com

Dr. Thiemo Engelbracht
thiemo.engelbracht@commeo-law.com

Christian Ehlenz
christian.ehlenz@commeo-law.com

Commeo LLP is an independent law firm specialized in antitrust law. We are an established team of experienced lawyers advising clients on all aspects of German and European antitrust law.

This publication is intended to highlight issues. It is not intended to be comprehensive nor to provide legal advice. Any liability which might arise from the reliance on the information is excluded.

⁵ Cf. Dusseldorf Regional Court, 21 February 2007, 34 O (Kart) 147/05.