

CDC: The EU weighs in on common tactics in competition litigation

1. LEGAL BACKGROUND

- 1.1 In the EU, claimants are normally required to bring proceedings in the jurisdiction where the defendant is domiciled. When claimants sue to recover losses sustained as a result of an international cartel, this principle can cause complications. Some cartelists may be domiciled in one jurisdiction, while others may be domiciled elsewhere. If a claimant wants to sue all the cartelists together, where should it bring proceedings?
- 1.2 Since at least 2003, various national courts – including those in England and Wales – have proceeded on the basis that claimants may bring proceedings wherever they choose, as long as at least one of the cartelists (referred to as the “*anchor defendant*”) is domiciled there.¹ Until recently, however, there was no authority at the European level on whether this approach was correct.

2. THE CDC CASE

- 2.1 In March 2009, Cartel Damages Claims Hydrogen Peroxide SA (“CDC”), a Belgian special purpose vehicle, brought proceedings before a German court against six defendants for losses allegedly sustained as a result of a cartel in the hydrogen peroxide market. All of the defendants were domiciled in the EU, but only one – the anchor defendant – was domiciled in Germany.
- 2.2 About six months later, CDC settled with the anchor defendant. The other defendants challenged the jurisdiction of the German court on the basis that none of the remaining five defendants was domiciled in Germany, and so the metaphorical anchor had come loose. The German court referred this question, along with two other questions relating to jurisdiction, to the Court of Justice of the European Union (“CJEU”).

3. THE CJEU'S JUDGMENT AND ITS EFFECTS

The use of anchor defendants

- 3.1 The CJEU gave the anchor defendant mechanism its blessing. The CJEU concluded that where there are multiple defendants, they all can be sued together in the court of a single jurisdiction as long as at least one defendant is domiciled there. The CJEU added that if the anchor defendant were subsequently to drop out of the proceedings (for example, because it had settled with the claimant), the claim against the others could nonetheless continue in the same court.

¹ Precisely what counts as a “*cartelist*” for these purposes is vexed: while some English cases have suggested that it includes any subsidiary of a company that is found by a competition authority to have been involved in a cartel (even if the subsidiary did not know about or implement the cartel), other cases have cast doubt on this.

- 3.2 The CJEU went on to say that the anchor defendant mechanism would not be available where the claimant and the settling defendant had “*colluded to artificially fulfil*” its requirements. To illustrate such collusion, however, non-settling defendants would have to show “*firm evidence*”. This is high bar: it seems that it will only be reached where there is good documentary or witness evidence suggesting a conspiracy between the claimant and the settling defendant to abuse the procedural rules and force other defendants before a court of the claimant’s choosing.
- 3.3 The CJEU’s position is in line with what many practitioners were expecting. The reasoning behind this position is that, ordinarily, if a claimant brings proceedings against several defendants, but:
- (A) the claims “*arise in the context of the same situation of fact and law*”; and
- (B) there is a “*risk of irreconcilable judgments resulting from separate proceedings*”,
- then the claims should all be heard together in the same court.
- 3.4 The CJEU seemed to believe that condition (B) would clearly be satisfied in any cartel damages action. In finding that condition (A) was also satisfied, the CJEU relied on the European Commission’s decision that the defendants in *CDC* had all participated in a “*single and continuous infringement*” of European competition law. The CJEU did not consider what would have happened if there had been no such decision; in our view, however, it is unlikely that this would have made a significant difference. The European Commission’s decision allowed the CJEU to take a shortcut, but in reality most European cases against multiple cartelists will raise the same situation of fact (the situation surrounding the establishment and running of the cartel) and of law (breach of European competition law). The absence of a Commission decision might require the claimant to work harder to establish this, but it should be possible in many cases.

Jurisdiction where the harmful event occurred

- 3.5 The German court’s second question concerned a separate European rule of jurisdiction: as an exception to the normal principle that defendants have to be sued where they are domiciled, claimants may sometimes bring proceedings in the jurisdiction “*where the harmful event occurred*”.
- 3.6 The German court asked the CJEU where the harmful event can be said to occur in cartel damages actions. The CJEU answered that it can be either:
- (A) where the cartel was concluded, that is, where the cartel meetings took place or cartel agreements were entered into; or
- (B) where the claimant suffered the loss, which, in the case of a company, will be at its registered address.
- 3.7 In our view, option (A) is unlikely to be of great interest to claimants in most cases, since it will often be hard to identify exactly where the cartel was concluded. Option (B) is more remarkable, because it seems to confer jurisdiction on the courts of the claimant’s home state. This is the opposite of the normal principles of establishing jurisdiction, which, as noted above, confer jurisdiction on the court of the defendant’s home state.
- 3.8 Nonetheless, the CJEU’s stance is perhaps unsurprising, since it has been moving towards allowing claimants to sue in their home states for some time now. In the 1990s, the CJEU took a much less claimant-friendly line, suggesting that a claimant who wanted to bring proceedings where the harmful event had occurred would have to bring separate proceedings in each jurisdiction where events causing the loss had taken place.

The notion was that each national court could award damages in respect of events in its own jurisdiction, and that claimants would have to build up a patchwork of claims, jurisdiction by jurisdiction, to recover all their losses. Later, it became clear that this rule was unsuitable for the Internet age, since websites cannot straightforwardly be said to be located inside or outside any national jurisdiction. Therefore, the CJEU relaxed its position, and said that the place where a claimant had suffered its loss could be the place where the claimant had its "centre of interests". *CDC* therefore represents the next step in this progression: the place where a company has suffered loss (at least in a cartel damages claim) can now simply be its registered address.

The impact of jurisdiction clauses

- 3.9 The German court's third question concerned yet another European rule of jurisdiction: as a further exception to the normal principle, parties can agree in a contract (normally via a "jurisdiction clause") to submit themselves to the courts of any nominated jurisdiction to resolve disputes arising out of the contract. The German court asked the CJEU how that rule applied to cartel damages actions. The CJEU answered that because competition law stems from tort, not from contract, such clauses will not be effective in respect of cartel damages actions unless they specifically refer to disputes arising out of infringements of competition law.
- 3.10 This part of the CJEU's judgment is fairly orthodox. Jurisdiction clauses will normally provide that contractual disputes be subject to the jurisdiction of certain courts, but competition damages actions can often arise even where there is no breach of contract: the dispute is normally about whether the price a customer has paid (in accordance with the contract) has been inflated above competitive levels. Now that the CJEU has made the position clear, however, we may start to see jurisdiction clauses expressly referring to competition damages claims.

4. CONCLUSIONS

- 4.1 *CDC* has made things easier for claimants in two respects. First, the use of anchor defendants is now clearly permissible as a matter of European – not just national – law. This gives claimants a considerable degree of choice regarding where to bring proceedings, since they can opt for any jurisdiction where a cartel is domiciled. Secondly, claimants can now contemplate suing in their own home states, rather than having to go to a defendant's home state. However, there is now scope for contracts to prescribe in advance where competition disputes between the parties will be heard. This will only be of use where there is a contract between the claimant and the defendant, which is likely to be the case only in claims by direct purchasers. This may nonetheless work in favour of suppliers who are able to require customers to sign up to their terms.



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