**Varazdin Development and Entrepreneurship Agency**
in cooperation with
**University North, Croatia**
**Faculty of Management University of Warsaw, Poland**

# Economic and Social Development

23rd International Scientific Conference on Economic and Social Development

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## Book of Proceedings

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# PRIVATE ENFORCEMENT OF COMPETITION LAW: BEFORE WHICH EU MEMBER STATE COURTS?

**Danijela Vrbljanac**
*Faculty of Law University of Rijeka, Croatia*
*dvrbljanac@pravri.hr*

***ABSTRACT***

*In 2004, when Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty entered into force, it replaced the centralised system of competition enforcement and allowed litigation on competition law before courts of the EU Member States in its entirety. An incentive for an even greater private enforcement of competition law has been provided by a more recent piece of legislation - Directive 2014/104/EU on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, the aim of which is removing obstacles for compensation of the harm sustained as a result of the infringement of competition laws. In a legal environment in which the private enforcement of competition law is encouraged and an increasing number of competition disputes have a cross-border element, establishing which EU Member State courts are competent to discuss the case becomes a crucial matter. Therefore, this paper deals with the issue of establishing international jurisdiction for private competition claims in the EU. Rules on international jurisdiction for civil and commercial cases are contained in Regulation (EU) No 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the Brussels I bis Regulation), one of the most important sources of the EU private international law. This paper identifies which Brussels I bis provisions are applicable for establishing international jurisdiction in private competition claims characterised as non-contractual liability.*

***Keywords:*** *Brussels I bis Regulation, competition law, European law, international jurisdiction*

## 1. INTRODUCTION

The first major step towards private enforcement of competition rules in the European Union (hereinafter: the EU) was taken by the Court of Justice of the European Union (hereinafter: the CJEU) in *BRT v SABAM* (judgment of 27 March 1974, *BRT v SABAM*, C-127/73, EU:C:1974:25) in which it was established that Arts. 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter: the TFEU) produce direct effects between individuals which must be safeguarded by national courts. Later on, in its landmark judgments, *Courage and Crehan* (judgment of 20 September 2001, *Courage and Crehan*, C-453/99, EU:C:2001:465) and *Manfredi* (judgment of 13 July 2006, *Manfredi*, C-295/04 to C-298/04, EU:C:2006:461), the CJEU granted the right to seek compensation for damage resulting from the competition law infringement to all individuals. Approximately at the same time, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (OJ L 1, 4.1.2003, pp. 1-25) entered into force and replaced the centralised system with the directly applicable exception system according to which the provision of Art. 101(3) of the TFEU on block exemptions gained the direct effect and could be applied by national authorities and Member States' courts (Danov, 2011, p. 4). The most recent impetus for private enforcement of competition rules was the adoption of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (OJ L 349, 5.12.2014, pp. 1-19), for which the transposition deadline expired in December 2016. The Directive seeks to improve coordination between public and private

enforcement of competition law and ensure full compensation to parties who sustained damage as a result of the competition law infringement. Since large-scale infringements of competition law often have an international element (see Danov, 2016, p. 79), international jurisdiction plays an important role in private enforcement of competition law. The main source of rules on international jurisdiction in civil and commercial matters in the EU is the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, pp. 1-32, hereinafter: the Brussels I bis Regulation) which replaced Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, pp. 1-23, hereinafter: the Brussels I Regulation). European Commission confirmed in its Notice on the co-operation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC (OJ C 127, 9.4.2016, pp. 13-21) that the Brussels I bis Regulation is applicable to all competition cases of civil or commercial nature. Private actions arising from the infringement of the competition law arise either from cartel or abuse of dominant position (Basedow, Francq, Idot, 2012, p. 3; for more on cartels and abuse of dominant position see Frenz, 2016, pp. 175 et seq and 639 et seq, respectively) and should be characterised as matters relating to contracts or matters relating to tort, delict and quasidelict (Poillot-Peruzzetto and Lawnicka, 2012, pp. 131-157; Danov, 2011, pp. 19-69, 86-104). Due to the length restriction, this paper will focus on the latter category, since these disputes are more frequent. It will outline Brussels I bis provisions and their interpretation applicable in proceedings between private parties arising out of the competition law infringement which are to be characterised as non-contractual liability.

## 2. JURISDICTIONAL BASES

The rules on jurisdiction in the Brussels I bis Regulation which are applicable in private competition law claims will be inspected in the hierarchical order of jurisdictional bases: submission to jurisdiction, prorogation of jurisdiction, special jurisdiction in torts, general jurisdiction and multiple defendants (Van Calster, 2016, pp. 25, 71-72).

### 2.1. Submission to Jurisdiction

Hierarchically speaking, the first provision which may be applied for establishing international jurisdiction for private actions arising out of the competition law infringement is the provision of Art. 26 of the Brussels I bis Regulation (formerly Art. 24 of the Brussels I Regulation) on submission to jurisdiction. According to Art. 26, the defendant may tacitly give his or her consent to the seised court's jurisdiction by entering the appearance without contesting the jurisdiction. The provision on submission to jurisdiction represents one of the exceptions to the *ratione personae* ambit of the Brussels I bis Regulation since it is not required that the defendant has his or her domicile in the EU in order for the provision to be applied (judgment of 13 July 2000, *Group Josi*, C-412/98, EU:C:2000:399, paragraph 44). As the CJEU established, contesting the jurisdiction does not mean that the defendant cannot make the assertions as to the merits of the case (judgment of 22 October 1981, *Rohr v Ossberger*, C-27/81, EU:C:1981:243; judgment of 31 March 1982, *C.H.W. v G.J.H.*, C-25/81, EU:C:1982:116; judgment of 14 July 1983, *Gerling Konzern Speziale Kreditversicherung AG and Others v Amministrazione del Tesoro dello Stato*, C-201/82, EU:C:1983:217).

### 2.2. Prorogation of Jurisdiction

Provision of Art. 25 of the Brussels I bis Regulation (formerly Art. 23 of the Brussels I Regulation) allows to parties to choose the court which will discuss the dispute which may arise from a particular legal relationship. Even though this possibility is more likely to be used by

parties in a contractual relationship, its application is not excluded in matters relating to tort, delict or quasidelict. On 1 October 2015, the Hague Convention of 30 June 2005 on Choice of Court Agreements entered into force in the EU which allows to parties to choose the competent court in civil and commercial cases with an international element. The relationship between the Brussels I bis and the Hague Convention on Choice of Court Agreements is governed by Art. 26(6) of the Hague Convention on Choice of Court Agreements. According to it, with respect to the rules on jurisdiction, the Hague Convention on Choice of Court Agreements will have priority over the Brussels I bis Regulation if at least one of the parties is resident in a Contracting State to the Convention, except when both parties are EU residents or come from third states, which are not Contracting States to the Convention (Proposal for a Council Decision on the approval, on behalf of the European Union, of the Hague Convention of 30 June 2005 on Choice of Court Agreements Brussels, 30.1.2014, COM(2014) 46 final, 2014/0021 (NLE), p. 1.3). Unlike Art. 23 of the Brussels I Regulation which required that at least one of the parties had domicile in the EU, Art. 25 of the Brussels I bis Regulation prescribes that parties, regardless of their domicile, may agree on a competent court. In order for the prorogation clause to be valid, the prorogation must be in writing or evidenced in writing, in a form which accords with established parties' practices or in international trade or commerce, in a form which accords with a usage of which the parties are or should be aware and which in such trade or commerce is widely known to parties to contracts of the type involved in the particular trade or commerce concerned. Besides formal, the Brussels I bis Regulation contains a rule on material validity of the prorogation clause stating that the material validity is governed by the laws of the Member State in which the court whose jurisdiction is prorogated is located.

Private competition claims involve legal persons who often use terms and conditions in their business. Hence, it is important to consider the CJEU's case-law on validity of prorogation clause in terms and conditions. In *Estasis Salotti*, the Italian and German undertaking concluded a contract for the supply of machines. The contract was signed in Milan, on the memorandum of the German undertaking. On the back of the contract, there were general conditions of sale, including a clause conferring jurisdiction to German courts. The text of the contract did not refer directly to those general conditions of sale. However, the text of the contract did refer to the previous offers made by the German undertaking which expressly referred to the general conditions. The CJEU established a principle according to which, in case a prorogation clause is included among the general conditions of sale of one of the parties, printed on the back of a contract, the requirement of writing is satisfied only if the contract signed by both parties contains an express reference to those general conditions. If the contract was concluded by reference to earlier offers, which referred to the general conditions of one of the parties including a prorogation clause, the requirement of a writing is satisfied only if the reference is express and can therefore be checked by a party exercising reasonable care (judgment of 14 December 1976, *Estasis Salotti v Ruewa*, C-24/76, EU:C:1976:177). In *Segoura*, the CJEU further explained that, in the situation in which one of the parties sends the confirmation of the contract to the other party in writing which contains a prorogation clause, the requirement of writing is satisfied only if the confirmation has been accepted in writing by the other party (judgment of 14 December 1976, *Segoura v Bonakdarian*, C-25/76, EU:C:1976:178). As for the form which accords with usage in international trade or commerce, the CJEU clarified that the consent to the jurisdiction clause is presumed to exist where the parties' conduct is in accordance with a usage which governs the area of international trade or commerce in which they operate and of which they are or should be aware. The existence of such usage is to be determined in relation to the branch of trade or commerce in which the parties conduct business. The usage exists if it is generally and regularly followed by operators in that branch when concluding contracts of a particular type.

However, neither it is necessary for such usage to be established in specific countries, nor in all the Member States (judgment of 16 March 1999, *Castelletti*, C-159/97, EU:C:1999:142). In *CDC Hydrogen Peroxide* (judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335), the CJEU had the opportunity of discussing the validity of prorogation clauses in private proceedings which are result of competition law infringement, particularly, proceedings for damages instituted as a result of cartel. Following the Commission Decision 2006/903/EC of 3 May 2006 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement in which the European Commission found that several undertakings supplying hydrogen peroxide and sodium perborate participated in a single and continuous infringement of the prohibition of cartel agreements, a Belgian company, CDC, established for the purpose of pursuing claims for damages of undertakings affected by a cartel, instituted the proceedings against those undertakings domiciled in different Member States. CDC sought from the court to order these undertakings to pay damages jointly and severally and to provide disclosure. CDC instituted the proceedings in Germany and the defendants objected to the jurisdiction of the German court relying on the jurisdiction and arbitration clauses in certain supply contracts. In connection to the prorogation clauses, the CJEU recalled that a prorogation clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship. The party may not be bound by the prorogation clause with respect to all disputes which may arise with the other party to the contract. Therefore, a clause which refers to all disputes arising from a contract does not extend to a dispute arising from the non-contractual liability. Since the undertaking which suffered the damage could not reasonably foresee such litigation at the time they agreed to the jurisdiction clause and had no knowledge of the unlawful cartel at that time, such litigation cannot be regarded as stemming from a contractual relationship the consequence of which is the fact that a such a prorogation clause cannot derogate from the jurisdiction of the court which is otherwise competent. On the other hand, if the clause refers to disputes concerning liability for infringement of competition law, such prorogation clause may derogate from jurisdiction of the courts competent based on provisions of the Brussels I bis Regulation under the condition that the dispute arises from the non-contractual liability. In addition, the CJEU emphasised that the validity of the prorogation clause cannot be called into question based on requirement of effective enforcement of the prohibition of cartel agreements.

### 2.3. Special Jurisdiction in Torts

A number of private competition law actions are to be characterised as non-contractual liability. A private competition law claim brought by a third party should be characterised as tort, delict and quasidelict, as well as the claim by a contracting party after the prohibited agreement has been invalidated (Danov, 2011, p. 86). Therefore, the provision which will often serve as the basis for establishing jurisdiction is the provision on special jurisdiction for tort, delicts and quasi-delicts. Art. 7(2) of the Brussels I bis Regulation reads that in matters relating to tort, delict and quasi-delict, jurisdiction is conferred to courts of the Member State in which the harmful event occurred. This provision may be resorted to even for the preventative actions. The CJEU clarified in *Henkel* (judgment of 1 October 2002, *Henkel*, C-167/00, EU:C:2002:555) that the provision on special jurisdiction for torts, delicts and quasidelicts may be used for establishing jurisdiction in proceedings the purpose of which is the prevention of the occurrence of damage. Early on in its case law, the CJEU adopted the ubiquity approach in interpreting this provision by stating that harmful event embodies both the harmful act and the damage arising out of it. Hence, in so called "distant tort" cases, i.e. cases in which the harmful act is committed in one state, while the damage arises in another, the plaintiff will have the option of choosing before courts of which Member State he or she will institute the proceedings.

The ubiquity principle was first established in *Bier* in which the CJEU answered in the affirmative to the question referred for the preliminary ruling whether the Dutch plaintiff can institute the proceedings before Dutch courts against the company managing a French mine which released the saline waste into the Rhine in France that subsequently damaged his crops in the Netherlands. If the CJEU had opted only for the place of the harmful act as the jurisdictional criterion, in a certain number of cases, this criterion would coincide with the defendant's domicile. In situations in which the place of the event giving rise to the damage does not coincide with the domicile of the tortfeasor, the decision in favour only of the place where the damage arised, would exclude a helpful connecting factor with the jurisdiction of a court which is closely connected to the harmful event (judgment of 30 November 1976, *Handelskwekerij Bier v Mines de Potasse d'Alsace*, C-21/76, EU:C:1976:166).

**2.3.1. Place of the Harmful Act in Private Competition Law Claims**

In *CDC Hydrogen Peroxide*, besides the prorogation of jurisdiction in private competition law claims, the CJEU discussed the operation of the provision on non-contractual liability in these proceedings. As for the harmful act as one of the constituting elements of the harmful event, the CJEU identified it as the restriction of the buyer's freedom of contract as a result of that cartel in the sense that that restriction prevented the buyer from being supplied at a price determined by the rules of supply and demand. If there is one place in which the cartel was concluded, the harmful act should be deemed to occur in that place. However, in circumstances like the one in this case, it is not possible to identify a single place where the cartel was concluded because it consisted of a number of collusive agreements in various places in the EU. In such circumstances, the particular agreement which gave rise to damage should be identified and court of the Member State in which that agreement was concluded is competent. In both cases, the court should establish whether several participants in that cartel may be hauled before the same court. In rendering its decision in *CDC Hydrogen Peroxide*, the CJEU decided to depart from the proposal of the Advocate General Jääskinen (opinion of Advocate General Jääskinen delivered on 11 December 2014 in case *CDC Hydrogen Peroxide*, C-352/13, EU:C:2014:2443) who suggested that Art. 7(2) of the Brussels I bis Regulation should not be used as a jurisdictional basis in cases like this one which include a complex, long-operating, horizontal cartel, which consist of series of agreements and collusive practices, and produced effects in many EU Member States. He also pointed out that it might be difficult to determine the place where the cartel agreement was concluded bearing in mind the secret nature of the cartel.

The solution for which the CJEU opted is appropriate from the perspective of close connection between the dispute and the competent court, which is one of the Brussels I bis cornerstones (recital 16 of the Brussels I bis Regulation). The court of the Member State in which the cartel agreement was concluded will be in the best position to conduct the proceedings, collect evidence, hear the witness etc. On the other hand, the argument the Advocate General presented on difficulty in determining the place in which the cartel agreement was concluded is justified, but his proposal might not be entirely acceptable. It does not seem reasonable to deny the victim of the cartel the possibility of bringing a suit in the Member States whose courts are competent based on Art. 7(2) of the Brussels I bis Regulation just because the task of determining the place where the cartel agreement was concluded is complex. The place where the domicile or seat of the undertaking participating in the cartel is located, should not be disregarded. Harmful act, after all, is committed in the Member State in which each undertaking acts with the purpose of applying the cartel agreement (for a similar approach see Mankowski, 2016, pp. 302-303, para. 316).

Furthermore, this criterion would be in line with the CJEU's judgment in *Wood Pulp Cartel* case in which the CJEU identified the place where the agreement is implemented as the relevant place (judgment of 27 September 1988, *Ahlström Osakeyhtiö and Others v Commission*, C-89/85, C-104/85, C-114/85, C-116/85, C-117/85, C-125/85, C-126/85, C-127/85, C-128/85 and C-129/85, EU:C:1993:120). The latter option was also considered by the Advocate General who rejected it on account that it would lead to the fact that only the undertaking who has domicile in a particular Member State could be sued in that Member State based on the harmful act as jurisdictional criterion regardless of the fact that other undertakings, domiciled elsewhere restricted free competition in the territory of that Member State. That argument does not seem too convincing, since the plaintiff will always have the option of suing several defendants based on Art. 8(1) of the Brussels I bis Regulation provided that there is a close connection between the claims (see infra 2.5. Multiple Defendants).

The CJEU explained how to determine the harmful act in case of private competition claims which are the result of the cartel agreements. It did not, however, have the chance to discuss the harmful act in case of the abuse of dominant position. Unlike the prohibited agreements, the abuse of dominant position represents a unilateral act on the part of the undertaking that has a dominant position on the market (Butorac Malnar, Pecotić Kaufman, Petrović, 2013, p. 188). Therefore, the harmful act in private competition claims which are the result of the abuse of the dominant position should be located in the Member State in which the domicile or the seat of the undertaking is located (for a similar solution, see Mankowski, 2016, p. 300, para. 311). It is reasonable to presuppose that the decision of the undertaking to abuse the dominant position is made in the undertaking's domicile. Such solution accords with the legal certainty and predictability. Any other approach might lead to a fortuitous and random forum. Furthermore, this is in line with the previous case law in which the CJEU held that the harmful act was committed in the tortfeasor's establishment (judgment of 7 March 1995, *Shevill and Others v Presse Alliance*, C-68/93, EU:C:1995:61; judgment of 25 October 2011, *eDate Advertising and Others*, C-509/09, C-161/10, EU:C:2011:685; judgment of 19 April 2012, Wintersteiger, C-523/10, EU:C:2012:220; judgment of 22 January 2015, *Hejduk*, C-441/13, EU:C:2015:28; judgment of 28 January 2015, *Kolassa*, C-375/13, EU:C:2015:37; judgment of 3 April 2014, *Hi Hotel HCF*, C-387/12, EU:C:2014:215; judgment of 16 January 2014, *Kainz*, C-45/13, EU:C:2014:7; judgment of 5 June 2014, *Coty Germany*, C-360/12, EU:C:2014:1318).

### 2.3.2. Place of the Occurrence of Damage in Private Competition Law Claims

After *Bier*, the next important step in interpreting the provision on special jurisdiction in torts was taken in *Dumez France and Others v Hessische Landesbank and Others*. In it, the CJEU explained that only direct, immediate damage is the admissible criterion for jurisdiction. The case concerned French companies which sued German banks before French courts based on Art. 7(2) of the Brussels I bis Regulation. The plaintiffs considered that the damage was sustained in France where they sustained a loss as a consequence of a damage sustained by their German subsidiaries after German banks cancelled the loans to the main contractor. Since the direct damage is the one sustained by the German subsidiaries as directly injured parties, the French courts are not competent. The reasoning behind such decision is the principle that multiplication of competent courts should be avoided since it increases the risk of irreconcilable judgments (judgment of 11 January 1990, *Dumez France and Others v Hessische Landesbank and Others*, C-220/88, EU:C:1990:8). The principle established with the respective judgment plays an important role in private competition law claims in which the initial damage was passed on to the next undertaking in the supply chain (for more on passing on in competition law see Bukovac Puvača, Butorac, 2008, pp. 34-36).

The place of the occurrence of damage in the sense of Art. 7(2) of the Brussels I bis Regulation for all undertakings in the supply chain is the registered office of the undertaking who sustained the initial damage, since this is the place where the direct damage was sustained. The CJEU already held in its case law that the place of occurrence of the damage is the place where the alleged damage actually manifests itself (judgment of 16 July 2009 *Zuid-Chemie*, C-189/08, EU:C:2009:475). Accordingly, the CJEU established in *CDC Hydrogen Peroxide* that the damage which is the result of a cartel consists in additional costs incurred because of artificially high prices, and is to be located at the victim's registered office. This jurisdictional criterion is justified by the principle of efficacious conduct of proceedings, since the assessment of a claim for damages depends on circumstances of that undertaking. The courts of the victim's registered office have jurisdiction with respect to claim against any one of the participants in the cartel or against several of them for the entire damage sustained by the undertaking. Since the jurisdiction of the court is limited to the damage suffered by the undertaking whose registered office is located in its jurisdiction, an applicant such as CDC, to whom the claims have been transferred by undertakings, needs to institute separate actions for each undertaking before the courts in Member States in which their registered offices are located. First of all, the said courts are best placed to discuss the case due to their proximity to the parties and the dispute. Second, this approach seems to strike the right balance between the interests of the cartel victims and the violators. In the procedural sense, the cartel victims' interests are protected by allowing them to sue before the courts of the Member State in which their registered office is located for the damage they sustained in that Member State and the violators may reasonably predict which undertakings will sustain the direct damage and accordingly before courts of which Member States they may be sued.

In *CDC Hydrogen Peroxide*, the plaintiff claimed for the damage of paying artificially high price for the product. However, if the competition infringement resulted with a damage other than overpaying for goods and services, it seems as if it would be appropriate to localise such damage in Member States whose markets were affected (for a similar solution, see Mankowski, 2016, p. 333, para. 385) and to limit the jurisdiction of the Member State court only to damage sustained in that jurisdiction. This is so because, in cases such as *CDC Hydrogen Peroxide*, the direct damage is the financial one, i.e. paying the artificially high price and it may be considered that it occurs in the victim's registered office. On the other hand, if the competitor who is a victim of a competition law infringement sustains a different kind of damage, for instance is excluded from the market, the direct damage occurs where the market has been affected, i.e. denied to a certain competitor. In the latter case, the undertaking does suffer the financial damage, as well, but this damage is not a direct one. The same approach should be accepted for private competition claims which are the result of the abuse of dominant position. On top of that, jurisdictional basis which confers jurisdiction to Member State whose market has been affected would be in coordination with Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 31.7.2007, pp. 40/49) which contains rules on applicable law for non-contractual liability and uses the connecting factor of state whose market has been affected for determining the law applicable to acts restricting free competition (See Art. 6 (2)).

### 2.4. General Jurisdiction

The rule on general jurisdiction is contained in Art. 4 of the Brussels I bis Regulation and prescribes that the person domiciled in EU Member State may be sued before courts of that Member States. It embodies the principle *actor sequitur forum rei* and, besides being the rule on general jurisdiction, this provision establishes the Brussels I bis personal scope of application.

Pursuant to Art. 62 of the Brussels I bis Regulation, in order to determine whether the natural person has domicile in a particular Member State, the laws of that Member State are to be applied. In case the natural person's domicile is not known, his or her last domicile will be relevant for the purposes of the Brussels I bis Regulation (judgment of 17 November 2011, *Hypoteční banka*, C-327/10, EU:C:2011:745). The domicile of the legal persons is autonomously determined by Art. 63 of the Brussels I bis Regulation; it is located in the Member State(s) in which the legal person has its statutory seat, central administration or principal place of business.

**2.5. Multiple Defendants**

Art. 8(1) of the Brussels I bis Regulation allows for the possibility of suing multiple defendants before the courts of the Member State in which one of them has his or her domicile, provided that claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments. As the CJEU explained in *Freeport*, the fact that claims against defendants have different legal bases does not preclude the application of this provision (judgment of 11 October 2007, *Freeport*, C-98/06, EU:C:2007:595). In the latter case, the claim against one of the defendants was of contractual nature, while the other one was based on non-contractual liability. In another case of a more recent date, the German court wanted to ascertain whether it can establish its jurisdiction according to Art. 7(2) of the Brussels I bis, on the basis that one of the perpetrators causing the damage, who is not a party to the proceedings acted in the jurisdiction. Such "reciprocal attribution to the place where the event occurred" is possible under German law. The parties to the dispute were Mr. Melzer, domiciled in Germany, and MF Global, an English brokerage company holding an account for Mr. Melzer. German company WWH, solicited Mr. Melzer as a client by telephone, managed his file, and opened the said account for Mr. Melzer with MF Global, a brokerage company established in England. After losing his investment, he instituted the proceedings claiming that he was not informed on the risk. The CJEU expectedly decided that the courts of the Member State in which the harmful event, imputed to the perpetrator who is not a party to the proceedings, occurred cannot declare itself competent over another presumed perpetrator of that damage who has not acted within the jurisdiction of the court seised. Still, such attribution of jurisdiction to hear disputes against persons who have not acted within the jurisdiction of the court seised remains possible under Art. 8(1) of the Brussels I bis Regulation if the conditions laid down by that provision are fulfilled (judgment of 16 May 2013, *Melzer*, C-228/11, EU:C:2013:305).

In *CDC Hydrogen Peroxide*, the CJEU was called upon to clarify whether the provision of Art. 8(1) may be applied for establishing jurisdiction of the court in the Member State in which the party against whom the proceedings were discontinued has domicile. Parties to the dispute alleged that an out-of-court settlement was reached between the CDC and one of the undertakings domiciled in Germany before the proceedings were commenced. However, according to these allegations, the formal conclusion of that settlement was intentionally delayed until proceedings had been instituted with the aim of bringing all undertakings before the German court. After initially establishing that separate actions for damages against undertakings domiciled in different Member States who participated in a single and continuous cartel may lead to irreconcilable judgments, the CJEU found that the fact the negotiations were held cannot call into question applicability of Art. 8(1) of the Brussels I bis Regulation. However, the situation would be different if the settlement had been concluded, and concealed so that other undertakings may be sued before the courts of the Member State in which the undertaking with whom the settlement has been reached has his or her domicile.

## 3. CONCLUSION

Since infringements of competition law often have an impact on markets of more than one state, one of the initial issues in private competition claims will be determining which court is competent. The Brussels I bis Regulation, one of the most important sources of European procedural law, contains rules on international jurisdiction in civil and commercial cases. Brussels I bis rules which may be applied in private competition claims based on non-contractual liability are submission to jurisdiction, prorogation of jurisdiction, special jurisdiction in torts, delicts and quasidelicts, general jurisdiction an multiple defendants. Among these jurisdictional bases, the rule on special jurisdiction in torts, delicts and quasidelicts deserves special attention since the courts are confronted with the task of determining the place of harmful event in private competition claims. In *CDC Hydrogen Peroxide*, the CJEU has explained how to localise the harmful event in case of claim for damages which is the result of the cartel. It decided that the harmful act occurs in the place where the cartel was concluded or where one of the agreements which gave rise to damage was concluded. As for the damage, the CJEU held that the place of occurrence of damage is in the Member State in which the cartel victim's registered office is. As for the private competition claims which are the result of abuse of dominant position, localisation of the harmful event has not been the topic of discussion before the CJEU. The latter cases differ from the cartel cases inasmuch as the abuse is a unilateral decision by the undertaking in the dominant position which leads to conclusion that it would be reasonable to consider that the harmful act occurred in the Member State in which the tortfeasor has his or her domicile or seat. As for the damage, if the damage consists in overpaying for products or services due to the cartel agreement as was the case in *CDC Hydrogen Peroxide*, the damage arises in the registered office of the cartel victim. On the other hand, if the damage sustained was other than paying an artificially high price, the damage should be localised in the Member States whose markets were affected. The same should be valid with respect to the private competition claims which are the result of the abuse of dominant position.

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