

Client Alert

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European Court of Justice Facilitates follow-on Cartel Damage Claims

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On 21 May 2015, the European Court of Justice (ECJ) confirmed that cartel victims may jointly sue cartelists for damages in an EU Member State where only one of the cartelists is domiciled. This rule applies even if the applicant withdraws his action against the domiciled co-defendant after proceedings were instituted. By taking this position, the ECJ sends a clear signal endorsing the European Commission's efforts to introduce an effective compensation mechanism for cartel injury in Europe.

FACTS

In May 2006, the Commission fined nine companies for participation in the hydrogen peroxide and sodium perborate cartel. Following the decision, civil proceedings were initiated in the Dortmund Regional Court/Germany (the "German Court") by Cartel Damages Claims (CDC), a Brussels-based litigation vehicle, which sued the cartelists seeking compensation for damages suffered due to the hydrogen peroxide and perborate cartel.

CDC brought the claim in Germany because one of the cartelists, Evonik Degussa GmbH, had its registered office in Essen, Germany. The other defendants were domiciled in EU Member States, but they did not have a registered office in Germany. After filing the claim, CDC settled with Evonik Degussa and withdrew its claim against this company.

Following CDC's settlement with Evonik Degussa, the other defendants challenged the German Court's jurisdiction claiming that their contracts with CDC's members contained specific arbitration and jurisdiction clauses that should be taken into account. They also asserted that the settlement was deliberately delayed until proceedings had been instituted in Germany.

ISSUES RAISED BY THE GERMAN COURT AND ECJ'S POSITION

The German Court referred certain questions to the ECJ and asked for a preliminary ruling on the application of the "Brussels I" Regulation (44/2001)¹ in the context of a cartel damages action brought against cartelists registered in different Member States, where the cartelists acted in different places and times. The Regulation stipulates rules for determining jurisdiction in civil and commercial matters. The German Court raised three specific questions:

¹ Regulation No 44/2001; as of 10 January 2015 the Brussels I Regulation has been replaced by the Brussels Ia Regulation (Regulation No 1215/2012): The terms of the former Art. 6 (1) (now Art. 8 (1)) and the former Art. 5 (3) (now Art. 7 (2)) have not been changed.

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1. Should these be one centralized jurisdiction for multiple defendants based in several Member States?

The German Court asked whether the existing rules allow hearings and determining together, applications brought jointly against undertakings, where these undertakings have participated in a single and continuous infringement (SCI) in different places and at different times.

The ECJ held that where a cartel made a decision that resulted in an SCI, the various damage claims should be seen as “closely connected”, and a centralized jurisdiction for all claims would be appropriate. All cartelists can therefore be jointly sued for damages in any EU Member State where one of the cartelists is domiciled. *This rule applies even if the applicant has withdrawn its action against the sole defendant domiciled in the Member State of the court seized after the proceedings were instituted.*

2. Is it possible to sue in a Member State where the “harmful events occurred”?

The German Court further asked the ECJ to clarify the concept “[the location where] harmful events occurred” that appears in the Regulation.

The ECJ ruled that the “place where the harmful event occurred or may occur” shall cover both the place where the damage occurred and the place of the event giving rise to it. Because of the latter, each victim may bring an action before the court of the place where the cartel was concluded or an agreement (amongst many) was reached which was the sole causal event giving rise to the inflicted applicant’s loss. The victim may also choose to bring an action before the courts of the place where the damage is incurred, i.e. generally each victim’s registered office.

3. Should jurisdiction clauses in contracts be taken into account?

Finally, the German Court asked whether, in the case of actions for cartel damages, contractual jurisdiction clauses should be taken into account if doing so would derogate from the rules on international jurisdiction stipulated in the Regulation.

The ECJ ruled that if the national court decides that the jurisdiction clauses are actually enforceable, such jurisdiction-related clauses are generally admissible with respect to cartel damages litigation. However, these clauses may only concern disputes which have already arisen or which may arise from the legal relationship in connection with which clause was agreed upon. In other words, a jurisdiction clause which abstractly refers to all disputes arising from a specific contractual relationship does not extend to a dispute relating to tortious liability rooted in the participation of an unlawful cartel. The ECJ further added that the claimant needs to be in a position to “*reasonably foresee a cartel damages action when it agreed to the jurisdiction clause*”. In practice, the foreseeability criteria will likely be met only if the agreement was entered into after the parties knew or should have known of the existence of the cartel.

CONCLUSION

The ECJ’s judgment confirms the general jurisdiction rules of the Regulation and how they apply with respect to cartel damages claims.

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Drawing on the concept of an SCI, the ECJ confirmed the existence of the already widespread practice of pooling claims against a group of cartelists before a single national court. A one-stop-shopping approach for cartel damage claims will likely facilitate litigation throughout the EU, since cartel victims can limit their litigation risk by choosing favorable jurisdictions.

Finally, the possibility to withdraw from an action against a domiciled anchor-defendant without losing the jurisdiction of the court leaves room for further settlement negotiations after the institution of proceedings.

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