damage occurred, it must be noted that that place depends on whether the issue concerns the initial damage, resulting directly from the event giving rise to the damage, in which case the place where such damage occurred may provide a basis for jurisdiction under Article 7, (2) of Regulation No 1215/2012, or whether it concerns subsequent adverse consequences which are not capable of providing a basis for jurisdiction under that provision (see, to that effect, judgment of 5 July 2018, C 27/17, *flyLAL-Lithuanian Airlines*, EU:C:2018:533, para. 31).

(…)

30. As is apparent from the file before the Court and without prejudice to the findings of fact in the main proceedings which it is for the referring court to make, the damage alleged by Tibor-Trans consists of additional costs incurred because of artificially high prices applied to trucks following collusive arrangements constituting a single and continuous infringement of Article 101 TFEU which had been effective throughout the EEA between 17 January 1997 and 18 January 2011 and in which 15 international truck manufacturers, including DAF Trucks, had participated. It is also clear from the file before the Court that Tibor-Trans did not purchase trucks directly from the participants in the cartel at issue, as they were initially sold to Hungarian vehicle dealerships which passed the costs of the price increase on to the end users, such as Tibor-Trans.

31. As regards the nature of the damage alleged, it should be noted that it is not merely a financial consequence of the damage that could have been suffered by direct purchasers, such as Hungarian vehicle dealerships, and which could have consisted of a loss of sales following the price increase. By contrast, the damage alleged in the case in the main proceedings results essentially from the additional costs incurred because of artificially high prices and, therefore, appears to be the immediate consequence of an infringement pursuant to Article 101 TFEU and thus constitutes direct damage which, in principle, provides a basis for the jurisdiction of the courts of the Member State in which it occurred.

(…)

On those grounds, the Court (6th Ch.) hereby rules:

Article 7, (2) of 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, must be interpreted as meaning that, in an action for compensation for damage caused by an infringement of Article 101 TFEU, consisting, *inter alia*, of collusive arrangements on pricing and gross price increases for trucks, "the place where the harmful event occurred" covers, in a situation such as that at issue in the main proceedings, the place where the market which is affected by that infringement is located, that is to say, the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations.

Noot

Case Review: Tibor-Trans Fuvarozó és Kereskedelmi Kft. / DAF TRUCKS NV (C-451/18)

Reza BEHESHTI[1]

I. INTRODUCTION

Private enforcement of competition law is a fast-growing field. Private actions pursued against anti-competitive practices may involve entities located in different countries and thus entail procedures in more than one jurisdiction. This means that judicial and administrative authorities of various countries may encounter difficulties associated with the international character of antitrust infringements. There is therefore increasing concern about the effective and uniform application of rules on jurisdiction, the applicable law and recognition of judicial decisions. *Tibor-Trans Fuvarozó és Kereskedelmi Kft. / DAF TRUCKS NV* is an interesting case concerning follow-up damages action against collusive and restrictive agreements arranged by a cartel, which deserves an analysis.

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II. FACTUAL BACKGROUND

Tibor-Trans Fuvarozo (Tibor) is a freight transport company which, from the early 2000 and until end of 2008, invested intensely in the purchase of new trucks. Tibor, as an end user, was unable to make a direct purchase from the manufacturers. Instead, it was obliged to use dealerships established in Hungary. It acquired financing from various leasing companies, also established in Hungary, through the means of financial leasing contracts involving definite transfer of ownership.

In July 2017, Tibor commenced legal proceedings before a first-instance civil court in Hungary for non-contractual damages against DAF Trucks (DAF). Tibor claimed that damages resulted from a cartel that took the form of a single and continuous infringements of Article 101 of the Treaty of Functioning of the European Union (TFEU). In particular, Tibor claimed that the trucks were purchased at a price artificially distorted by the collusive arrangements. Consequently, it had suffered financial harm. It sued DAF, a company governed by Dutch law, who had participated in cartel, while Tibor never purchased and received trucks directly from DAF. DAF argued that such a claim was not reasonably foreseeable, and that any such action should be brought before the courts of the Member State where it was domiciled, rather than Hungarian courts.

This dispute emerged from the European Commission's decision on 19 July 2016 concerning the Truck Cartel.[2] The European Commission confirmed that 15 truck manufacturers engaged in a cartel activity between 17 January 1997 and 20 September 2010. All cartel meetings took place in Germany. It was found that the cartel conducted collusive arrangements on pricing and gross price increase in the European Economic Area for trucks as well as the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks.

The Commission held that the infringement of Article 101 TFEU extended to the whole of the EEA and lasted from 17 January 1997 until 18 January 2011. The Commission took a severe decision by imposing a high level of fines on all the entities involved, including DAF, with the exception of one entity which was given immunity. However, the first instance court of Hungary decided that it did not have jurisdiction through the application of Article 7, (2) Regulation (EU) No 1215/2012 (Recast), as Hungary was not the place where the harmful event occurred, since the collusive arrangements had taken place in Germany. On appeal, the Gyr Regional Court of Appeal was unsure about the application of the special jurisdictional rule under Article 7 of the Recast, in the absence of a contractual relationship between the parties. The Regional Court of Appeal stayed proceedings and referred a question to the Court of Justice of European Union (CJEU) for a preliminary ruling.

The CJEU, first, found that the damage suffered by Tibor was additional costs through distortion of prices and artificially high prices incurred that passed on to end-users such as Tibor through Hungarian dealers. The damage was not a consequential loss that could have been suffered by a direct purchaser, such as a loss of sales by a dealer. An immediate financial consequence of the cartel was felt by Tibor in Hungary. This also linked to the second finding that the cartel extended to the entire EEA. A claim for such direct damage could therefore be brought in Hungary. Third, DAF, as a participant of the cartel, could reasonably foresee that single market be affected by its anti-competitive behaviour and thus to be sued in any Member States courts, including the Hungarian court.

III. COMPETITION LAW INFRINGEMENT AND CONSEQUENTIAL DAMAGE

Cartels are arguably the most harmful anti-competitive practice known to competition law. Competitors are supposed to compete with one another for the business of their customers, and should not collude with one another to distort the process of competition. The most serious restrictions and distortion of competitions are horizontal agreements between independent undertakings to fix prices, divide markets, limit output and fix the outcome of supposedly competitive tenders. Mario Monti, the former Commissioner for Competition, once described cartels as "cancers on the open market economy".[3] In this case, the European Commission found that a number of undertakings were involved in collusive arrangements on pricing and gross price increases in the European Economic Area for trucks.[4]

Civil litigation originated from international cartels may naturally involve actions against defendants from different countries.[5] Cross-border nature of such civil litigations is

2. 2017/C 108/03.
3. www.ecb.europa.eu/press/key/date/2005/html/sp051106.en.html
4. *Official Journal of the European Union* of 6 April 2017 (*OJ* 2017 C. 108, p. 6, "the decision at issue").
5. M. DANOV, F. BECKER and P. BEAUMONT, *Cross-Border EU Competition Law Actions*, London, Hart Publishing, 2013, 169; see also D. MIHAIL, *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, Hart Publishing, 2011, 86; M. WILDERSPIN, "Cross-border Non-contractual Disputes: The Legislative Framework and Court Practice" in P. BEAUMONT, M. DANOV, K. TRIMMINGS and B. YUKSEL, *Cross-Border Litigation in Europe*, Oxford, Hart Publishing, 2017, 640.

quite noticeable at the EU internal market that has established an area of free movement of goods and services, coupled with the free movement of persons. The internal market provides a perfect breeding ground for cross-border litigation where parties from different Member States are involved. Litigation concerning possible competition law infringements gives rise to cross-border private enforcements and follow-on damages action cases, since the effects of restrictive practices or abusive market behaviours are easily felt on markets extending beyond the national territories of the State where they are carried out.[6] Private international law therefore plays a crucial role in analysing the private enforcement of competition law, acting as a supplement to its public enforcement.

The enforcement of competition law was historically in the preserve of the European Commission and the National Competition Authorities (NCA). However, the number of private actions brought before national courts based on the infringement of Articles 101 and/or 102 TFEU has risen dramatically in the last decade. Such a development may be attributed to a number of reasons. First, NCAs have limited resources and may be unable to scrutinise and investigate every alleged infringement of the competition rules. Second, the victims have gained an overall greater awareness of competition law-based rights, following the pro-private enforcement approach adopted by the European institutions. The European Court of Justice in the landmark case of *Courage Ltd / Crehan* confirmed its position that Articles 101 and 102 are directly applicable in the sense that it would be open to any individual to claim damages for loss caused to them by a contract or by conduct liable to restrict or distort competition.[7] Later the Court repeated its position, by reiterating the full effectiveness of Article 101 that "any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 101 TFEU".[8]

The European Council adopted Regulation No 1/2003 that ensures an effective enforcement of the competition rules established in Articles 101 and 102 TFEU.[9] This Regulation allows the national competition authorities to play a central role in the enforcement of the competition rules in TFEU, and gives jurisdiction to national courts in applying those rules. Article 6 of this regulation states that "national courts shall have the power to apply [Articles 101 and 102 TFEU]". This indicates that claimants may decide to have recourse to the courts to vindicate their rights on a "standalone" basis where they may achieve a remedy from a national court more quickly than from a public authority. It is worth noting that only courts can award damages for violations of competition law: this power cannot be exercised by public authorities.[10] The European Commission then published Green and White Papers on the complex question of how to quantify harm and award damages in competition cases.[11] The White Paper opens with stating that "full compensation" of all victims of infringements of EU competition law will be the "first and foremost guiding principle" of private enforcement in Europe.[12] It follows that any third party, including the consumer and end user of a service, may be entitled to rely on the invalidity of collusive agreements prohibited under Article 101 TFEU and claim damages where there is a causal link between the loss incurred and the prohibited agreement.

IV. INCURRED DAMAGE AND PRIVATE INTERNATIONAL LAW

Prior to analysing the matters concerning private international law, it is necessary to analyse the damage incurred in this case and the EU competition law's approach toward such damages. The CJEU in *FlyLAL* has already confirmed that loss resulting from alleged infringements of European Union competition law is categorized as "civil and commercial matters" and, therefore, falls within the scope of Brussels Regulation.[13] Contrary to this decision, the nature of damage alleged in the main proceedings of the case at hand did not merely concern a financial consequence of the dam-

6. J. BASEDOW, F. STEPHANIE and I. LAURENCE, *Anti-trust Litigation: Conflict of Laws and Coordination*, Hart Publishing, 2012, 2; see also G.V. CALSTER, *The EU Rules on Jurisdictions for and the Law Applicable to, Follow-on, and Stand-alone Damages Following Competition Infringement*, 148-149.
7. C-453/99, EU:C:2001:465
8. *Otis Gesellschaft m.b.H. and Others / Land Oberösterreich and Others*, C-435/18 (2019).
9. Council Regulation No. 1/2003 of 16 December 2002, [2003] *OJ* L. 1.
10. *Pre-insulated pipes*, Commission decision of 21 October 1998, para. 172; *Nintendo*, Commission decision of 30 October 2002, paras. 440–441; *Independent Schools*, OFT decision of 20 November 2006, para. 1427.
11. EUROPEAN COMMISSION, "Damages actions for breach of the EC antitrust rules", *Green Paper*, COM (2005) 672 final; EUROPEAN COMMISSION, "Damages actions for breach of the EC antitrust rules", White Paper, COM (2008) 165 final.
12. EUROPEAN COMMISSION, "White Paper on Damages actions for breach of the EC antitrust rules" (hereinafter the "White Paper").
13. *FlyLAL-Lithuanian Airlines AS / Starptautisk lidosta Rga VAS*, C-302/13. Note that in *Gazdasági Versenyhivatal / Siemens Aktiengesellschaft Österreichthe*, C 102/15, the CJEU ruled that an action for recovery of sums not due on the ground of unjust enrichment, with its origin in the repayment of a fine imposed in competition law proceedings is not characterized as "civil and commercial matters" within the meaning of Brussels I Regulation. This case is quite distinctive in the sense that the legal action concerned the recovery of fine imposed by Hungarian Competition Authority for breaching competition rules against Siemens. The legal action in this case does not fall within the ambit of Brussels I Regulation, since a public authority was acting in exercise of its public powers and should be viewed as an administrative matter.

age that could have been suffered by direct purchasers, such as Hungarian dealerships, and which could have included a loss of sales due to the price increase. The alleged damage was the additional costs incurred following artificially high prices arranged by the cartel. The damage incurred thus appeared to be the immediate consequence of an infringement pursuant to Article 101 TFEU.

Damages, as the most effective remedy for victims injured by agreements prohibited by EU competition law, are available as an entitlement, in accordance with the decisions in *Courage and Crehan*[14] and *Manfredi and Others.*[15] These cases established the possibility of receiving compensation not only for the injured party's actual loss but also for the loss of profit incurred by such anti-competition agreements. Effective compensation mechanisms mean that the infringers, and not the victims, should bear the costs of antitrust infringements.

The case at hand is quite distinctive in the sense that the infliction of the anti-competitive behaviours of undertakings participating in the cartel led to the specific and tangible damage of additional costs, following the artificial high price arrangement. The nature of this damage is different from a "generic and broad harm", which may be inflicted by any collusive arrangements harming the market. It is also different from the factually similar case of *CDC Hydrogen Peroxide*, where the alleged cartel and collusive agreements thereof restricted the buyer's freedom of contract.[16] The buyer was prevented from being supplied at a price determined by the rules of supply and demand. Damage appeared to be remote and not tangibly felt. In contrast, in the case under review Tibor was directly and tangibly affected by the cartel's anti-competitive, collusive arrangements.

Where cartels are international in scope and damage customers across the borders, the injured persons seeking damages would have a choice of where to start their actions. The basic rule under Article 4 of Brussels I Recast is that a defendant domiciled in a Member State should be sued in the courts of that Member State. However, various additional rules under Article 7 of Recast may provide more beneficial options for the injured party. The alternative fora for litigation is justified on the ground of a close connection between the court and the action or in order to facilitate the sound administration of justice.[17] The key question in this case was to what extent Article 7, (2) allows proceedings in a competition law litigation to be pursued in the forum most beneficial to the injured person. Related to this enquiry is whether the injured party's legal action in its own national forum against an undertaking resident in another Member State is consistent with the principles of proximity and certainty.

As shown in the facts of the case, the injured party, Tibor, has no direct contractual relationship with any members of the cartel and does not seek to dispute the validity of the agreements concluded by the cartel. In addition, Recital (22) of the Rome II Regulation states that a damages claim for the alleged violation of EU competition law is tortious in nature. Article 7, (2) should therefore be applied to confer the special jurisdiction in Tibor's legal action. According to this article, a claim arising from a tort, delict or quasi-delict may be lodged in the court "for the place where harmful event occurred or may occur". This is so on the grounds of proximity, the efficacious conduct of proceedings and ease of taking evidence. *Kalfelis* established that "matters relating to tort" cover all actions that seek to establish the liability of a defendant and which are not concerned with a contractual relationship.[18] The "place where the harmful event occurred or may occur" has been interpreted by the Court of Justice in a dual sense: referring to both the place "where the damage occurred" as well as the "place of the event giving rise to the damage".[19] This means that Tibor could choose to sue DAF in the courts for either of these two places, i.e., Germany where the cartel concluded the collusive agreement, or Hungary where additional costs due to artificially high prices were incurred.

The wide interpretation of special jurisdictional rule under Article 7, (2) is justified with two key considerations.[20] First, the expression "place where the damage occurred" was added, since in a majority of cases, the place of event giving rise to the damage would be the same as the place of the defendant's domicile. Second, the principle of proximity implies that there may be a particularly close connecting factor between a dispute and the court achieving the efficacious conduct of the proceedings. Both the place of the event giving rise to damage and the place where the damage occurred can therefore constitute important connecting factors. It was apparent from the CJEU's decision that the infringements by the cartel established in Article 101 TFEU extended to the whole of the EEA. This means that the distortion of the EU law competition in that market would also entail Hungary, which has been a Member State since 1 May 2004. Hungary could be regarded as the place where the damage had occurred for the purpose of applying Article 7, (2). Such a widening of the injured party's jurisdictional options must be reconciled with subsequent impacts on cross-border litigation. Claimants may engage in opportunistic forum shopping that endangers defendant's jurisdictional expectations.

14. *Courage Ltd / Bernard Crehan*, C-453/99, 2001.
15. *Vincenzo Manfredi / Lloyd Adriatico Assicurazioni SpA*, C-295/04, 2006.
16. *Cartel Damage Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV, Solvay SA/NV, Kemira Oyj*, C-352/13.
17. Recital 16, (1) B1R.
18. *Kalfelis / Schröder and Others*, C-189/87.
19. *Handelskwekerij Bier / Mines de Potasse D'Alsace* [1976], C- 21/76; *Marinari / Lloyds Bank* [1995], C-364/93.
20. See A. BRIGGES, *The Conflict of Laws*, 4th ed., OUP, 2019, 76; LORD COLLINS OF MAPESBURY and J. HARRIS, *Dicey, Morris & Collins on the Conflict of Laws*, 15th ed., Sweet & Maxwell, 2018, paras. 11-285.

However, it appears that the CJEU strived to narrow down such wide interpretation of Article 7, (2) by recognising the need to ensure defendant's certainty interest. Recital (16) of the Recast confirms that the existence of alternative grounds of jurisdiction based on the close connection should ensure legal certainty and avoid the possibility of the defendant being sued in a court of a Member State which they could not reasonably have foreseen. In this regard, the Court, following the judgment in *FlyLAL*, opined that the term "place where the harmful event occurred" cannot be interpreted so widely as to include any place where the adverse consequences of an event can be felt. Jurisdiction cannot therefore be established in the place where the indirect consequences of the harm was felt, while the initial harm occurred in a different place. Instead, jurisdiction should be established in the place where direct and immediate considerable consequences of infringements of Article 101 of TFEU were felt, even though the injured party had no direct dealings with any participants of the cartel. In this case, Tibor suffered considerable harm of gross high prices paid for trucks in Hungary, following the collusive and anti-competitive arrangements of the cartel.

The CJEU's decision is thus a welcome addition to the case law concerning private enforcement of cross-border competition disputes. The CJEU clarified that an injured party can invoke Article 7, (2) to pursue its legal proceedings against participants of a cartel in the place where the market prices are distorted and the victim has suffered the direct, consequential loss.