The Private Enforcement of Competition Law and Digital Markets: Issues of Jurisdiction and Applicable Law

Alberto Miglio [*]

Summary: 1. Introduction. – 2. Contract or tort? Characterisation of claims under EU private international law. – 3. Jurisdiction under the Brussels Ia Regulation. – 3.1. Defendant's domicile. – 3.2. Jurisdiction for contractual claims. – 3.3. Jurisdiction for tort claims. – 3.4. Multiple defendants, counterclaims, choice-of-court agreements. – 4. Applicable law. – 4.1. Law applicable to contractual obligations. – 4.2. Law applicable to non-contractual obligations. – 5. Private international law issues in the private enforcement of the Digital Markets Act. – 6. Conclusion.

1. Introduction

For national courts entrusted with the application of EU competition law, having to address issues of jurisdiction and applicable law is an increasingly frequent occurrence. If that is true of competition law in general, it may be the case especially in digital markets, since digitalisation has led to a multiplication of cross-border transactions [1]. Judges adjudicating competition law disputes in EU Member States are therefore expected to be familiar with the main tools of EU private international law.

Private international law is a complex, highly technical subject. Competition law cases relating to digital markets may prove especially challenging due to the interaction between private international law rules and

[*] Associate Professor of EU Law at the University of Turin, Italy, staff member of the COMP.EU.TER Project.

[1] Cf. OECD/ICN, *Report on International Co-operation in Competition Enforcement*, 2021, p. 3, available at www.oecd.org.

public law regulation [2]. Private international law addresses private relationships and is typically viewed as the realm of private autonomy, notably in contractual matters. By contrast, antitrust law constrains private autonomy for the purposes of enhancing market efficiency and maximising consumer welfare or, especially in the EU, protecting the competitiveness of the market structure and fostering the realization of the internal market [3].

Public law constraints are particularly significant in digital markets, which are heavily regulated in the EU. This entails that national courts may have to coordinate private international law not with one, but with several sets of regulatory measures. In addition to competition law proper, other regulatory regimes may very well be relevant to competition cases relating to digital markets. The 2023 *Meta* judgment [4], where the Court of Justice held that Member States' National Competition Authorities ("NCAs") are entitled to consider breaches of the General Data Protection Regulation (the "GDPR") [5] for the purpose of assessing the existence of a breach of competition law, and in doing so are bound by decisions of national data protection supervisors, is illustrative in this regard [6]. If the overlap between different regulatory regimes is relevant for administrative authorities, so it is *a fortiori* for national courts when private parties attempt to enforce the rights they derive from those regulatory measures. In addition to the GDPR, the recently enacted Digital Services Act (the "DSA") [7] and the proposed AI Act [8] come to mind as EU

[2] M. LEHMANN, *Regulation, Global Governance and Private International Law: Squaring the Triangle*, in *Journal of Private International Law*, Vol. 16, Iss. 1, 2020, p. 1.

[3] On the goals of EU competition law, with reference to digital markets, see A. EZRACHI, *EU Competition Law Goals and the Digital Economy*, 2018, available at www.beuc.eu; I. LIANOS, *Polycentric Competition Law*, CLES Research Paper Series 4/2018, available at deliverypdf.ssrn.com.

[4] Court of Justice, case C-252/21, *Meta Platforms and Others* [2023] ECLI:EU:C:2023:537.

[5] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[6] See C. CELLERINO, *Personal Data: Damages Actions Between EU Competition Law and the GDPR*, in this *Book*, p. 257.

[7] Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19

regulatory instruments that are expected to have a major impact on digital markets [9].

In addition, in the EU digital markets have become a testbed for a new approach to the regulation of competition, where *ex-ante* obligations complement the *ex-post* enforcement of rules prohibiting anticompetitive conducts [10]. This approach is enshrined in the Digital Markets Act (the "DMA") [11], which contains provisions capable of private enforcement [12]. Yet, the task of national courts in giving effect to the DMA is not made easier by the lack of coordination between regulatory law and private international law rules. Typically, pieces of digital markets regulation define their territorial scope, but do not address – or only partially and imperfectly address – issues of jurisdiction and applicable law [13]. However, those issues may surface and require courts to deal with complex private international law questions.

Against this backdrop, the present chapter provides an overview of private international law aspects that are relevant to the adjudication of competition law disputes in the Member States. In line with the focus of the COMP.EU.TER Project, special emphasis is placed on issues that can be frequently encountered in digital markets.

The chapter is structured as follows. First, the question of characteri-

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October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act).

[8] Commission proposal of 21 April 2021 for a Regulation of the European Parliament and of the Council laying down harmonised rules on artificial intelligence (Artificial Intelligence Act).

[9] For a comparison of those measures and a general assessment of the objective pursued by EU regulation of digital markets, see G. DI GREGORIO, P. DUNN, *The European Risk-based Approaches: Connecting Constitutional Dots in the Digital Age*, in *Common Market Law Review*, Vol. 59, Iss. 2, 2022, p. 473.

[10] See C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, in this *Book*, p. 139.

[11] Regulation (EU) 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

[12] See F. CROCI, *Judicial Application of the Digital Markets Act: The Role of National Courts*, in this *Book*, p. 233.

[13] See T. LUTZI, *The Scope of the Digital Services Act and Digital Markets Act: Thoughts on the Conflict of Laws*, in *Dalloz IP/IT*, forthcoming, available at www.ssrn.com.

sation is addressed in light of the case law of the Court of Justice (paragraph 2). Subsequently, the chapter reviews the rules on jurisdiction set forth in Regulation (EU) 1215/2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels Ia")[14], focussing in particular on tort jurisdiction (paragraph 3), and provides an overview of the rules on applicable law contained in Regulation (EU) 593/2008 on the law applicable to contractual obligations ("Rome I")[15] and especially in Regulation (EU) 864/2007 on the law applicable to non-contractual obligations ("Rome II")[16] (paragraph 4). The overview is completed by a discussion of the interplay between the DMA and EU private international law (paragraph 5). The conclusion sums up the main findings (paragraph 6).

2. Contract or tort? Characterisation of claims under EU private international law

Competition law applies to a wide range of conducts, some of which may raise issues of characterisation. In private international law, characterisation (or classification) consists of assigning a legal question arising from a given case to a legal category[17]. One of the main questions is whether competition law claims should be qualified as contractual or non-contractual. In EU private international law this is a decisive question, because both jurisdiction and the determination of the applicable law rest on different connecting factors for contractual and non-contractual obligations. Criteria for establishing the jurisdiction of Member State courts are different for «matters relating to contract» (Article 7(1) of the Brus-

[14] Regulation (EU) 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 (recast).

[15] Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

[16] Regulation (EC) 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

[17] See S. BARIATTI, *Classification (characterization)*, in J. BASEDOW, G. RÜHL, F. FERRARI, P. DE MIGUEL ASENSIO (eds.), *Encyclopedia of Private International Law*, Elgar, Cheltenham, 2017, p. 358.

sels Ia Regulation) and for «matters relating to tort, delict or quasi-delict» (Article 7(2) of the Brussels Ia Regulation). The choice of applicable law is even addressed in distinct instruments for contractual and non-contractual obligations (the Rome I Regulation and the Rome II Regulation, respectively), which adopt different connecting factors. For instance, the Rome II Regulation includes a special set of rules on the law applicable to antitrust infringements. Limits to choice of law also differ depending on the characterisation of the claim as contractual or tortious.

Drawing a clear-cut line dividing contractual and non-contractual obligations has always proved a hard task, giving rise to several preliminary rulings by the Court of Justice, including in cases involving competition law issues.

At the outset, it should be considered that (*i*) the notion of «matters relating to contract» and «matters relating to tort» should be interpreted autonomously, regardless of the characterisation of a claim under national law; and that (*ii*) contractual and non-contractual matters are mutually exclusive. If a claim is contractual, it cannot be tortious, and vice versa.

In *Handte*, the Court of Justice ruled that «matters relating to contract» do not include situations «in which there is no obligation freely assumed by one party towards another» [18]. However, despite its frequent reiteration by subsequent case law, this criterion remains vague and is of limited value in distinguishing between contractual and non-contractual matters. Rather, the Court has resorted to «a case-by-case, piecemeal approach» [19] that may yield different outcomes depending on the type of claim.

According to the Court of Justice's case law, claims for damages intended to offset the overcharge incurred by purchasers as a result of price-fixing cartels qualify as non-contractual [20]. This is so irrespective of whether the plaintiffs purchased the goods or services affected directly from the alleged infringer or through a dealer or intermediary [21]. In such

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[18] Court of Justice, case C-26/91, *Handte* [1992] ECLI:EU:C:1992:268, para 15.

[19] M. REQUEJO ISIDRO, E. WAGNER, M. GARGANTINI, *Article 7*, in M. REQUEJO ISIDRO (ed.), *Brussels I Bis. A Commentary on Regulation (EU) No 1215/2012*, Cheltenham-Northampton, 2022, p. 96.

[20] Court of Justice, case C-133/11, *Folien Fischer* [2012] ECLI:EU:C:2012:664, para 32; case C-352/12, *CDC Hydrogen Peroxide*, [2015] ECLI:EU:C:2015:335, paras 34-56; case C-451/18, *Tibor-Trans* [2019] EU:C:2019:635, paras 22-25.

[21] See M. DANOV, *Private International Law and Competition Litigation in a Global Context*, Hart, Oxford, 2023, p. 112; see also, more broadly, Opinion of AG Saugmandsgaard

cases, the tortious characterisation makes sense because the overcharge paid does not depend on the purchase contract, but on the *ex-ante* coordination of prices by cartel participants [22].

Some cases involving abuses of dominant position, where the competition law claim is connected to the implementation of a pre-existing contract, may be more difficult to classify and require a more complex analysis on the part of the court seised.

In *Kalfelis*, Advocate General ("AG") Darmon had suggested that claims should be characterised as contractual in case of overlap between contractual and non-contractual grounds [23]. The Court of Justice did not follow the AG and instead found that «the concept of "matters relating to tort, delict and quasi-delict" covers all actions which seek to establish the liability of a defendant and which are not related to a "contract"» [24], paving the way for characterising claims as tortious in the context of a contractual relationship.

In the *Brogsitter* judgment, more than 25 years later, the Court of Justice started by noting that a claim for damages qualifies as contractual if it arises from a breach of contract, which can be established in light of the purpose of the contract. The decisive criterion, according to the Court, is whether «the interpretation of the contract which links the defendant to the applicant is indispensable to establish the lawful or, on the contrary, unlawful nature of the conduct complained of against the former by the latter» [25]. If that is the case, the claim concerns «matters relating to a contract», otherwise it must be classified as non-contractual [26].

The Court of Justice further elaborated on the dichotomy between contractual and non-contractual matters in *Wikingerhof* [27]. The case is il-

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Øe, case C-59/19 *Wikingerhof*, para 25 («it is clear from the Court's case-law that, in principle, civil actions for damages based on infringement of the rules of competition law come within 'matters relating to tort', within the meaning of Article 7(2) of the Brussels I bis Regulation»).

[22] S. FRANCQ, W. WURMNEST, *International Antitrust Claims under the Rome II Regulation*, in J. BASEDOW, S. FRANCQ, L. IDOT (eds.), *International Antitrust Litigation. Conflict of Laws and Coordination*, Hart, Oxford, 2012, p. 97.

[23] Opinion of AG Darmon, case 189/87, *Kalfelis* [1988] ECLI:EU:C:1988:312, para 29.

[24] Court of Justice, case 189/87 *Kalfelis* [1988] ECLI:EU:C:1988:459, para 17.

[25] Court of Justice, case C-548/12 *Brogsitter* [2014] ECLI:EU:C:2014:148, para 25.

[26] *Ivi*, para. 27.

[27] Court of Justice, case C-59/19, *Wikingerhof* [2020] ECLI:EU:C:2020:950.

lustrative for our purposes, because it involved an alleged abuse of dominant position by a digital platform. The plaintiff, a company operating a hotel in Germany, had entered into a contract with Booking in order to have the hotel listed on the platform. Contending that some of Booking's terms were unfair and amounted to an abuse of dominant position, Wikingerhof brought an action for injunctive relief before a German court. The claim was based on competition law rules, which were regarded in national law as relating to non-contractual matters, but arose out of a contractual relationship.

After reiterating the main holding of *Brogsitter*, the Court specified the indispensability criterion. It held that the interpretation of the contract is indispensable to establish the lawfulness of the conduct, in particular, in «the case of an action based on the terms of a contract or on rules of law which are applicable by reason of that contract» [28]. By contrast, if the plaintiff «relies […] on rules of liability in tort, delict or quasi-delict, namely breach of an obligation imposed by law, and where it does not appear indispensable to examine the content of the contract concluded with the defendant in order to assess whether the conduct of which the latter is accused is lawful or unlawful, since that obligation applies to the defendant independently of that contract, the cause of the action is a matter relating to tort, delict or quasi-delict within the meaning of point 2 of Article 7 of Regulation No 1215/2012» [29].

The test developed in *Brogsitter* and refined in *Wikingerhof* is problematic in two respects. First, its complexity and the vagueness of the criteria national courts are expected to apply may lead to divergent outcomes and undermine predictability [30]. It is telling that commentators are split on the implications of this line of cases. Some view it as endorsing «a conceptual preference for a contractual characterisation of a dispute» [31] and interpret *Wikingerhof* as a confirmation of *Brogsitter*, despite conceding that this judgment, «at first sight, may be taken as meaning exactly the opposite» [32]. Others, by contrast, view *Wikingerhof* as depart-

[28] *Ivi*, para. 32.

[29] *Ivi*, para. 33.

[30] See M. DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., p. 116.

[31] M. REQUEJO ISIDRO, E. WAGNER, M. GARGANTINI, *Article 7*, cit., p. 99.

[32] *Ibidem*.

ing from *Brogsitter* and criticise the Court of Justice for expanding the scope of torts at the expense of contracts and for characterising as torts claims that could be framed as issues of contractual validity [33].

Second, the characterisation of a claim may too easily depend on the way it is framed by the plaintiff, rather than on objective factors, as is typically the case in the continental European private international law tradition [34]. This flexibility could provide an incentive to forum shopping, since parties could strategically frame their claims as contractual or non-contractual in order to trigger the jurisdiction of a forum that is closer or is perceived as more favourable.

Unfortunately, the Court has further blurred the line between contractual and non-contractual matters in its most recent case law. In *HRVATSKE ŠUME*, a case relating to the characterisation of unjust enrichment, it appears to have introduced an exception to the rule established in *Wikingerhof*. Relying on *Wikingerhof*, the Court of Justice came to the conclusion that unjust enrichment in principle qualifies as non-contractual, but then added that «a claim for restitution based on unjust enrichment may, in certain circumstances, be closely linked to a contractual relationship between the parties to the dispute and, consequently, be regarded as coming within "matters relating to a contract"» [35]. It also noted that such circumstances «include the situation in which the claim […] relates to a pre-existing contractual relationship between the parties» [36].

How does the test apply to cases of abuse of dominance? The Court of Justice's judgement in *flyLAL II*, where at issue was a predatory pricing practice by an airline company, may be viewed as implying that all abuses of dominance are «matters related to tort» [37]. However, *Wikingerhof* and *HRVATSKE ŠUME* suggest a more nuanced answer. Exclusionary abuses – as was the conduct at issue in the *flyLAL* case – are certainly

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[33] A. BRIGGS, Wikingerhof*: A View from Oxford*, in *EAPIL Blog*, 7 December 2020, available at www.eapil.org.

[34] For the view that the *Wikingerhof* judgment endorses concurrent claims, see S. PEARI, M. TEO, *Justifying Concurrent Claims in Private International Law*, in *Cambridge Law Journal*, Vol. 81, Iss. 1, 2023, p. 139.

[35] Court of Justice, case C-242/20, *HRVATSKE ŠUME* [2021], ECLI:EU:C:2021:985, para 47.

[36] *Ivi*, para 48.

[37] Court of Justice, case C-27/17, *flyLAL-Lithuanian Airlines* [2018] ECLI:EU:C:2018:533.

non-contractual, since plaintiffs typically are competitors, rather than contractual partners of the infringers. The characterisation of exploitative abuses is less straightforward. In the light of *Brogsitter* and *Wikingerhof*, they are arguably non-contractual, because the source of the obligation is statutory and the interpretation of the contract is unlikely to be indispensable in order to rule on the lawfulness of the conduct [38]. However, if its rationale applies beyond the specific case of unjust enrichment, the *HRVATSKE ŠUME* judgment might suggest a different answer in that the claim is connected to a pre-existing contractual relationship. The same considerations – statutory source of the obligation, but link between the claim and a pre-existing contractual relationship – apply to cases of refusal to supply, whereas disputes on the legality or termination of a contract should probably be viewed as contractual, especially after *HRVATSKE ŠUME*.

In conclusion, the guidance provided by the Court of Justice to Member State courts adjudicating competition law claims is still of limited value due to the Court's continuous refining of its interpretation of the contractual/non-contractual divide in light of the specificities of cases referred for preliminary ruling. The facts of the *Wikingerhof* case are illustrative of the difficulties facing domestic courts. While the German Supreme Court, which referred the case to Luxembourg, was inclined to characterise the claim as tortious (and was ultimately proved correct) [39] the Higher Regional Court of Schleswig had had no doubt in upholding the opposite view [40]. To add further confusion, one might ask whether the outcome of the test would have changed if the plaintiff had sought a different remedy. For example, had it requested a declaration of contractual nullity, would the claim still have been non-contractual? The answer arguably depends on whether the remedy sought by the plaintiff is viewed as a factor that must be taken into account in the characterisation of claims, as suggested by some authors [41].

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[38] Cf. W. WURMNEST, *Plotting the Boundary between Contract and Tort Jurisdiction in Private Actions against Abuses of Dominance:* Wikingerhof v. Booking, in *Common Market Law Review*, Vol. 58, Iss. 5, p. 1584.

[39] Case C-59/19, *Wikingerhof*, cit., para 17.

[40] Case C-59/19, *Wikingerhof*, cit., para 12.

[41] See, in this respect, M. DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., pp. 116-119, who argues that the desired legal remedy should be a relevant factor in characterisation.

3. Jurisdiction under the Brussels Ia Regulation

3.1. Defendant's domicile

Under Article 4(1) of the Brussels Ia Regulation, a person may be sued in the courts of the Member State where he or she is domiciled. Domicile thus performs a dual function: it delimits the scope of the Brussels Ia Regulation, preventing the application of most of its heads of jurisdiction vis-à-vis defendants domiciled in third countries, and it identifies the general forum of the defendant.

In commercial litigation, defendants typically are not natural persons but companies, or other legal persons. Pursuant to Article 63 of the Brussels Ia Regulation, they are deemed to be "domiciled" in the place where they have either (*i*) the statutory seat, (*ii*) the central administration, or (*iii*) the principal place of business. While these criteria may point to the same Member State, it is also relatively frequent for a company to have the statutory seat in a country that is not its principal place of business, for instance because of its lenient tax policy. Since the connecting factors listed in Article 63 of the Regulation are alternative, not cumulative, a company can thus be domiciled – and be sued – in more than one Member State. An infringer can be sued in the place of domicile for the entirety of the damage caused by the infringement. Instead, this is not always possible under the special jurisdiction for tort [42].

For the purposes of applying Article 4(1) of the Brussels Ia Regulation to competition law infringements, one must bear in mind that under EU competition law companies of the same group are part of a single economic unit, and thus form a single undertaking, if they do not determine independently their own conduct on the market [43]. Since all entities of which the economic unit was made of when the infringement was committed are jointly and severally liable for it, actions for damages may be brought against other companies of the same group as the one(s) which committed the infringement.

Based on this premiss, the Court of Justice held in *Sumal* that «where the existence of an infringement of Article 101(1) TFEU has been estab-

[42] See *infra*, para 3.3.

[43] Court of Justice, case C-97/08 P, *Akzo Nobel and Others v Commission* [2009] EU:C:2009:536, paras 54-55.

lished as regards the parent company, it is possible for the victim of that infringement to seek to invoke the civil liability of a subsidiary of that parent company rather than that of the parent company» [44]. The only limitation is that the victim must prove the existence of a specific link between the economic activity of the subsidiary and the subject matter of the infringement committed by the parent company [45].

The potential for forum shopping is evident, because alleged victims can choose the most suitable jurisdiction among those where the infringing company has subsidiaries, provided that the latter exercises a connected economic activity. This risk of forum shopping is further exacerbated by the possibility of suing multiple defendants in the place where one of them is domiciled, pursuant to Article 8(1) of the Brussels Ia Regulation [46].

The risk of forum shopping would be even greater if the single economic unit doctrine, as suggested by the Hungarian Supreme Court in a pending reference for preliminary ruling, were also to apply in the reverse, i.e. whether it could be invoked by a parent company in order to claim damages suffered by its subsidiaries as a result of a competition law infringement in the courts of the place where the victim's holding is registered. AG Emiliou rejected this view in his opinion, which the Court will likely follow, noting that this possibility does not find support in the case law and that it would be incompatible with the requirement of predictability and the objective of consistency between the forum and the applicable law [47].

3.2. Jurisdiction for contractual claims

Since competition law claims might, in certain circumstances, qualify as contractual, a brief summary of the rules of jurisdiction for contractual disputes is in order.

Article 7(1)(a) of the Brussels Ia Regulation grants jurisdiction in con-

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[44] Court of Justice, case C-882/19, *Sumal* [2021] ECLI:EU:C:2021:800, para 51.

[45] *Ibidem*.

[46] See *infra*, para 3.4.

[47] Opinion of AG Emiliou, case C-425/22, *MOL* [2024] ECLI:EU:C:2024:131, paras 70-72.

tractual matters to «the courts for the place of performance of the obligation in question». As this criterion gives rise to uncertainties and may incentivise forum shopping, it is accompanied by a specification in Article 7(1)(b) of the Brussels Ia Regulation: for sales contracts, the place of performance for the obligation in question is identified with the place of delivery under the contract; for services contracts, it is the place «where, under the contract, the services were provided or should have been provided».

Special rules exist for consumer contracts (Articles 17-19 of the Brussels Ia Regulation). Consumers may bring proceedings either in the courts of the Member State where the other party is domiciled or in the courts of their own domicile [48], whereas they may only be sued in the courts of the State where they are domiciled [49]. The obvious rationale of the alternative forum is to facilitate access to justice for consumers, who might face excessive hurdles if they were to bring proceedings in a foreign jurisdiction. As a corollary of this provision, Article 19 of the Brussels Ia Regulation sets forth limitations to the choice of forum in consumer contracts. Jurisdiction agreements are valid only if (*i*) they are entered into after the dispute has arisen, (*ii*) grant the consumer additional fora, or (*iii*) confer jurisdiction on the courts of the Member State where both the consumer and the other party are habitually resident, provided that the choice-of-court agreement is not contrary to the law of the prorogated forum.

The application of the special rules on jurisdiction over consumer contracts may not be straightforward in the context of digital services.

First, they apply where the contract was «concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession» (Article 17(1) of the Brussels Ia Regulation). The distinction between commercial or professional purpose, on the one hand, and personal, non-professional purpose of the transaction, on the other, may be difficult to apply in the context of the provision of certain digital services. The typical example is the mixed (professional and non-professional) use of social media. If I use a social media account to interact with friends and post photos of my vacations, but also to promote my publications, do I qualify as a consumer vis-à-vis the provider of the social

[48] Article 18(1) of the Brussels Ia Regulation.

[49] Article 18(2) of the Brussels Ia Regulation.

media service (e.g. Meta)? In *Schrems II*, the Court of Justice held that for a person to qualify as consumer in a contract for the provision of digital services the link between the contract and his or her trade or profession must be marginal [50]. Additionally, the consumer status is lost if the predominately non-professional use of those services subsequently becomes predominately professional [51].

Second, for services contracts, Articles 17-19 of the Brussels Ia Regulation apply on the premiss that the other party «pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities» (Article 17(1)(c) of the Brussels Ia Regulation). For the activities to be "directed" to the Member State of the consumer's domicile it is not sufficient that a website is accessible from that State [52]. Evidence of the intention to solicit local customers is required, and may include factors such as the international nature of the activity, the use of different languages or currencies, the use of a top-level domain name other than that of the Member State in which the trader is established, or of neutral top-level domain names [53].

3.3. Jurisdiction for tort claims

In addition to the Member State where it has its statutory seat, central administration or principal place of business, a company may be sued «in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur» (Article 7(2) of the Brussels Ia Regulation). This rule applies not only to damages claims arising out of antitrust infringements, but also to negative declaratory actions brought by the potential infringer [54].

Despite its apparent simplicity, the provision hides several complex

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[50] Case C-498/16, *Schrems* [2018] ECLI:EU:C:2018:37, para 32.

[51] *Ivi*, para 38.

[52] Court of Justice, joined cases C-585/08 and C-144/09, *Pammer and Hotel Alpenhof* [2010] ECLI:EU:C:2010:740, para 73.

[53] *Ivi*, paras 83-84.

[54] Case C-133/11, *Folien Fischer*, cit., paras 36-54.

interpretative issues. To begin with, it points not to one, but to two different places. According to long-standing case law of the Court of Justice, the «place where the harmful event occurred or may occur» corresponds both to the place where the *damage* arose and to the place where the *harmful conduct* giving rise to damage took place [55]. If the two places differ, as is often the case in digital markets, the plaintiff has the choice between two alternative fora [56].

Neither the determination of the place of the causal event nor that of the place of damage rests on a single criterion applicable to all torts. By contrast, the Court of Justice has followed a case-by-case approach, whereby the location of either place rests on different factors depending on the type of tort concerned. Several cases decided over the course of the past decade provide clarifications as to how Article 7(2) of the Brussels Ia Regulation should be interpreted in relation to claim for damages arising out of competition law infringements. The test to be applied may differ according to the nature of the competition law breach.

The place of the causal event is determined based on different criteria in relation to cartels and abuses of dominance, respectively. As regards cartel cases, in *Cartel Damage Claims (CDC) Hydrogen Peroxyde* the Court of Justice devised a three-step test. If (*i*) a single place of conclusion of the cartel can be identified, then the courts of that place have jurisdiction over all cartel participants and for the whole of the damage. If, by contrast, (*ii*) the cartel consists of a series of collusive agreements concluded in various places, the court should ascertain whether there is among those a single agreement which is the sole cause of the event giving rise to the damage suffered by a particular victim. In that case, the court of the place where such agreement was concluded has jurisdiction over all the perpetrators, including those domiciled in other Member States, but solely for the loss suffered by the specific victim concerned. Finally (*iii*), if the loss is not exclusively caused by one agreement among those that make up the cartel, then no place of the harmful conduct can be identified, and jurisdiction under Article 7(2) of the Brussels Ia Regulation can only be established at the place where the damage occurred [57].

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[55] See Court of Justice, case 21/76, *Handelskwekerij Bier v. Mines de Potasse d'Alsace* [1976] ECLI:EU:C:1976:166, paras 15-18.

[56] *Ivi*, para 19.

[57] Case C-352/12, *CDC Hydrogen Peroxide*, cit., paras 43-50.

In cases of abuse of dominance, since the event giving rise to damage does not consist in one or several agreements, the connecting factor must be different. The Court of Justice held in *flyLAL II* – given the uncertain classification of a predatory pricing practice under Article 101 or Article 102 TFEU – that «the event giving rise to the damage in the case of abuse of a dominant position is [based] on the implementation of that abuse, that is to say, the acts performed by the dominant undertaking to put the abuse into practice» [58]. The court must therefore assess where the anti-competitive conduct was implemented. If several events together, as part of a common strategy, contribute to the occurrence of the alleged damage, it must be established which event is of particular importance for the implementation of that strategy [59].

For abuses allegedly committed in digital markets, it may be difficult to identify an event pinpointing a precise place of implementation of the anticompetitive conduct, as illustrated by a pending reference for preliminary ruling from the District Court of Amsterdam [60]. The reference originates from a collective action brought against Apple. The plaintiffs in the main proceedings argue that Apple has a dominant position in the market for distribution of apps that work on IOS devices and claim that it charges excessive commissions on the sale of paid apps and digital in-app products, distorting competition and harming the users. The conduct allegedly implementing the abuse therefore consists of maintaining an online sales platform (the App Store) with a language version specifically directed at the Dutch market, selecting the apps and digital in-app products that are offered on that platform, determining the conditions under which they are offered and deducting a commission. According to the referring court, since the sales platform is directed at the whole Dutch market, the criteria outlined in *flyLAL II* suggest that the place where the harmful event occurred is in the Netherlands, but do not pinpoint any specific location and therefore do not identify which court within that Member State is competent to hear the case. Against this background, the Amsterdam court seeks guidance as to how it should construe the place of the harmful conduct in such a scenario and wonders, in that regard,

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[58] Case C-27/17, *flyLAL Lithuanian Airlines*, cit., para 51.

[59] Case C-352/12, *CDC Hydrogen Peroxide*, cit., para 52.

[60] Rechtbank Amsterdam, case C/13/708095 / HA ZA 22-1 [2023] ECLI:NL: RBAMS:2023:8330.

whether the worldwide accessibility of the platform is also a factor that should be taken into account.

Turning to the place where the damage is suffered, in *CDC Hydrogen Peroxide* the Court of Justice held that the place of damage consisting of the overprice paid by victims of a cartel «is identifiable only for each alleged victim taken individually and is located, in general, at the victim's registered office» [61]. In more recent cases, the Court emphasised the connection between the place of damage and the market affected by the infringement [62], finding that the court having jurisdiction over the action for compensation is the court of the place where the goods are purchased, provided that the purchases occurred within the market affected by the restriction of competition and entirely within the jurisdiction of a single court [63]. The criterion of the victim's registered office remains valid where purchases occurred in several places [64].

The Court of Justice has not explicitly stated that the victim's registered office, in order to be the relevant criterion for the identification of the place of damage, must be within the market affected by the infringement. However, the opinions of AG Bobek in *flyLAL II* and AG Emiliou in *MOL* support this conclusion. Both AGs argued that it would be inconceivable to locate the place where the damage occurred outside the affected market [65].

Where the criterion of the victim's registered office applies, all infringers can be sued before the courts of that place, but if a number of victims have their registered offices in different places, they will need to bring suit each in the place of the respective registered office.

The order for reference by the District Court of Amsterdam in the aforementioned *Apple* case assumes that the criterion of the victim's registered office also applies to cases of abuse of dominance and requests clarification on how this criterion applies to lawsuits brought by associa-

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[61] Case C-27/17, *flyLAL Lithuanian Airlines*, cit., para 52.

[62] *Ivi*, paras 38-43; case C-451/18, *Tibor-Trans*, para 33.

[63] Court of Justice, case C-30/20, *Volvo and Others* [2021] ECLI:EU:C:2021:604, paras 39-40.

[64] *Ivi*, paras 41-42.

[65] Opinion of AG Bobek, case C-27/17, *flyLAL Lithuanian Airlines* [2018] ECLI:EU:C:2018:136, para 51; opinion of AG Emiliou, case C-425/22, *MOL*, cit., para 55.

tions representing collective interests, where the actual victims remain unknown [66].

Finally, the "damage" relevant for the purposes of Article 7(2) of the Brussels Ia Regulation is only the initial damage resulting directly from the event giving rise to damage, whereas it is irrelevant where indirect financial consequences are felt [67]. Thus, the loss occurs, in principle, in the place where sales would have been made, rather than where the losses are recorded in the accounts [68].

3.4. Multiple defendants, counterclaims, choice-of-court agreements

Actions for antitrust damages often involve multiple parties, especially in cartel cases. Article 8(1) of the Brussels Ia Regulation, dealing with multi-party proceedings, is therefore highly relevant to the private enforcement of competition law. Pursuant to that provision, the courts for the place where a defendant is domiciled also have jurisdiction on any co-defendants, «provided the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings». If those conditions are met, undertakings participating in a cartel may be sued together in the courts of the place where one of them has its statutory seat, central administration or principal place of business.

To limit incentives to forum shopping, the Court of Justice held that Article 8(1) of the Brussels Ia Regulation «cannot be interpreted as allowing an applicant to make a claim against a number of defendants for the sole purpose of removing one of them from the jurisdiction of the courts of the State in which the defendant is domiciled» [69]. However, ac-

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[66] Rechtbank Amsterdam, case C/13/708095 / HA ZA 22-1, cit., para 7.7.

[67] Case C-27/17, *flyLAL Lithuanian Airlines*, cit., paras 31-32; case C-451/18, *Tibor-Trans*, paras 27-28. The distinction is consistent with the Court of Justice's general approach to the determination of the place of damage in case of purely financial loss (see Court of Justice, case C-709/19, *Vereniging van Effectenbezitters* [2021] ECLI:EU:C:2021:377, para 37).

[68] Case C/13/708095 / HA ZA 22-1, cit., para 7.7.

[68] Case C-27/17, *flyLAL Lithuanian Airlines*, cit., para 32; case C-451/18, *Tibor-Trans*, cit., para 28.

[69] Case C-352/13, *CDC Hydrogen Peroxide*, cit., paras 27-29; case C-832/21, *Beverage City Polska* [2023] ECLI:EU:C:2023:635, para 43.

cording to the Court that risk does not materialise «where there is a close connection between the claims brought against each of the defendants» at the time when proceedings are initiated [70].

The potential for forum shopping is especially high in follow-on actions – i.e. actions brought after that a decision ascertaining the antitrust violation has been issued by the European Commission (the "Commission") or a NCA – in cartel cases due to the jurisdictional implications of the single economic unit doctrine drawn by the Court of Justice in *Sumal* [71]. Since all companies of a group are deemed to constitute a single economic unit, alleged victims may (*i*) bring indemnification claims against a company of the group other than the one taking part in the cartel (anchor defendant) and (*ii*) rely on Article 8(1) of the Brussels Ia Regulation to sue all cartel participants as co-defendants, irrespective of where they have their seat of principal place of business. Numerous businesses allegedly harmed by cartels have begun to exploit this possibility of concentrating claims, prompting several references for preliminary ruling by Dutch courts [72]. All pending references, which are likely to be joined and decided together, relate to the interpretation of the "close connection" requirement under Article 8(1) of the Brussels Ia Regulation. In essence, the Court of Justice is requested to clarify whether such close connection exists between claims against an anchor defendant that is not an addressee of the Commission's (or NCA's) cartel decision and the claims against the co-defendants.

It should also be recalled that jurisdiction of a court hearing a claim on the basis of the Brussels Ia Regulation extends to counter-claims, provided that they arise «from the same contract or facts on which the original claim was based» [73].

Finally, choice-of-court agreements are admissible in relation to competition law claims [74] as long as they satisfy the conditions laid down in

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[70] Court of Justice, case C-98/06, *Freeport* [2007] ECLI:EU:C:2007:595, paras 52-54; case C-832/21, *Beverage City Polska*, cit., para 44.

[71] See *supra*, para 3.1.

[72] Case C-393/23, *Athenian Brewery and Heineken* (request for a preliminary ruling from the Hoge Raad der Nederlanden); case C-672/23, *Electricity & Water Authority of the Government of Bahrain and Others* (request for a preliminary ruling from the Gerechtshof Amsterdam); case C-673/23, *Smurfit Kappa Europe and Others* (request for a preliminary ruling from the Gerechtshof Amsterdam).

[73] Article 8(3) of the Brussels Ia Regulation.

[74] Case C-352/13, *CDC Hydrogen Peroxide*, cit., paras 59-63.

Article 25 of the Brussels Ia Regulation. The admissibility of choice-of-court agreements creates a mismatch between jurisdiction and applicable law, since the Rome II Regulation does not allow the parties to choose the law applicable to obligations arising out of acts of unfair competition or of restrictions of competition [75].

4. Applicable law

4.1. Law applicable to contractual obligations

Article 3(1) of the Rome I Regulation provides that contracts are governed by the law chosen by the parties. However, party autonomy encounters some limits. Where all other elements relevant to the situation at the time of choice are located in a country other than the one whose law was chosen, the choice of law shall not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement [76]. Similarly, the mandatory provisions of EU law may not be derogated from where all other relevant elements are located in one or more Member States [77].

Absent a choice, Article 4(1) of the Rome I Regulation resorts to different connecting factors for different types of contracts. In particular, contracts for the provision of services are governed by the law of the country where the service provider has his or her habitual residence [78]. Franchise and distribution contracts are governed by the law of the country of habitual residence of the franchisee [79] and the distributor [80], respectively. Contracts not listed in Article 4(1) of the Regulation are governed by the law of the country where the party required to effect the characteristic performance of the contract is habitually resident [81].

Like the Brussels Ia Regulation, the Rome I Regulation includes spe-

[75] See *infra*, para 4.2.

[76] Article 3(3) of the Rome I Regulation.

[77] Article 3(4) of the Rome I Regulation.

[78] Article 4(1)(b) of the Rome I Regulation.

[79] Article 4(1)(e) of the Rome I Regulation.

[80] Article 4(1)(f) of the Rome I Regulation.

[81] Article 4(2) of the Rome I Regulation.

cial rules for consumer, insurance and employment contracts. In particular, with regard to consumers, the contract is governed by the law of the country where the consumer has his or her habitual residence, provided that the professional pursues his or her commercial or professional activities in the country of the consumer's habitual residence, or directs them to that country, and the contract falls within the scope of such activities (Article 6(1) of the Rome I Regulation). Pursuant to Article 6(2) of the Regulation, in addition to limitations on choice of law under Article 3, the choice may not «have the result of depriving the consumer of the protection afforded» by mandatory provisions of the country where he or she is habitually resident. The latter provision is relevant especially with regard to third countries, as from the substantive viewpoint the protection of consumers is largely harmonized at the EU level, so that it is not frequent for mandatory provisions to exist only in a given Member State.

4.2. Law applicable to non-contractual obligations

The Rome II Regulation includes specific provisions on the law governing damages arising out of restrictions of competition. Under Article 6(3)(a) of the Rome II Regulation, «[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be, affected».

Recital 23 of the Regulation provides some clarification as to the scope of the provision. The notion of «restrictions of competition» is meant to «cover prohibitions on agreements between undertakings, decisions by associations of undertakings and concerted practices which have as their object or effect the prevention, restriction or distortion of competition within a Member State or within the internal market, as well as prohibitions on the abuse of a dominant position within a Member State or within the internal market, where such agreements, decisions, concerted practices or abuses are prohibited by Articles [101] and [102] of the Treaty or by the law of a Member State».

There are at least two problems with this definition. The first is whether the rule could also apply to restrictions of competition prohibited by the law of third countries [82]. Whilst the debate was mostly theoretical until the

[82] In favour of an extensive reading of Article 6(3) of the Rome II Regulation, see M.

UK withdrawal from the EU, it gained some practical relevance after Brexit. On the one hand, since the Rome II Regulation was still applicable as such in the UK during the transitional period, it had to be established whether UK courts could apply Article 6(3)(a) thereof to infringements affecting the market in the UK, which by then was no longer a Member State. On the other hand, the issue may even surface before courts in EU Member States, if the restriction affects (also) the British market.

The second problem is that the definition only covers the categories of anticompetitive conduct prohibited under Articles 101 and 102 TFEU. However, some national legislations have a broader reach and prohibit specific conducts by non-dominant undertakings. In this case, it is unclear whether (*i*) recital 23 is non-exhaustive and Article 6(3) of the Rome II Regulation applies nonetheless, (*ii*) the obligation should be considered as one arising out of an act of unfair competition pursuant to Article 6(1), or (*iii*) the general rule on the law applicable to torts under Article 4 of the Rome II Regulation applies. The first option appears to be the most reasonable, as it is the only one that would prevent applying different connecting factors to essentially analogous situations [83].

As to the connecting factor employed, Article 6(3)(a) of the Rome II Regulation rests on the criterion of (actual or potential) market affectation. This is a different notion compared to that of geographic market for the purposes of ascertaining whether an undertaking has market power or a conduct is anticompetitive [84]. From the perspective of the court seised, the criterion of the country where the market is or is likely to be affected requires the performance of some economic analysis at an early stage of the proceedings, for the sole purpose of determining the applicable law. This may be particularly complex in stand-alone cases, i.e. when actions are brought without a decision being previously issued by the Commission or a NCA.

DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., p. 289. *Contra*, S. FRANCQ, W. WURMNEST, *International Antitrust Claims under the Rome II Regulation*, cit., p. 100.

[83] See T. ACKERMANN, *Antitrust Damages Actions under the Rome II Regulation*, in M. BULTERMANN, L. HANCHER, A. MCDONNELL, H. SEVENSTER (eds.), *Views of European Law from the Mountain. Liber Amicorum Piet Jan Slot*, Kluwer Law International, Austin-Boston-Chicago-New York-The Netherlands, 2009, p. 116.

[84] M. DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., pp. 292-293.

Since EU competition law infringements typically have a cross-border dimension, the restriction may well affect a plurality of national markets. This is particularly evident in follow-on actions where a Commission decision established an infringement affecting the whole EU/EEA market [85]. As a result, a court may be required to apply a plurality of different national laws to a single action for damages. Pursuant to Article 6(3)(a) of the Rome II Regulation courts should in principle apply the law of each country where the market is affected. Since this is often impractical, courts tend to avoid applying the law of States whose markets are only marginally affected by the restriction or where the plaintiff suffered minimal damage [86]. Such solution may be justified by implicitly reading into Article 6(3)(a) of the Regulation a requirement that the affectation of the market be somewhat significant [87].

In some cases, however, the Rome II Regulation explicitly provides an alternative to the fragmentation of applicable law described above. For that purpose, Article 6(3)(b) of the Rome II Regulation introduces a special rule for cross-border infringements, offering the plaintiff the option for the application of the sole law of the forum on certain conditions. According to this provision, «[w]hen the market is, or is likely to be, affected in more than one country, the person seeking compensation for damage who sues in the court of the domicile of the defendant, may instead choose to base his or her claim on the law of the court seised, provided that the market in that Member State is amongst those directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises». Where there are multiple defendants, the plaintiff may choose the law of the forum only if the restriction on which the claim against each of the defendants relies affects directly and substantially the market of the forum State. This requirement may somewhat mitigate the effect of the combined applica-

[85] Case C-451/18, *Tibor-Trans*, cit., para 32.

[86] R. MEIJER, E.-J. ZIPPRO, *Private Enforcement in the Netherlands*, in F. WOLLENSCHLÄGER, W. WURMNEST, T.M.J. MÖLLERS (eds.), *Private Enforcement of European Competition and State Aid Law. Current Challenges and the Way Forward*, Kluwer Law International, Alphen aan den Rijn, 2020, pp. 174-175, with references to Dutch court practice; M. DANOV, *Private International Law and Competition Litigation in a Global Context*, cit., p. 297.

[87] T. ACKERMANN, *Antitrust Damages Actions under the Rome II Regulation*, cit., pp. 114-115.

tion of Article 8(1) of the Brussels Ia Regulation and of Article 6(3)(b) of the Rome II Regulation: plaintiffs could rely on the former in order to concentrate claims against multiple defendants in one jurisdiction, and then exploit the latter to subject the whole dispute to the law of the forum.

Apart from the option granted to the plaintiff under Article 6(3)(b), which does not properly constitute a choice of law as it is a unilateral option afforded to one of the parties, the Rome II Regulation excludes choice of law in relation to competition law infringements. According to Article 6(4) of the Rome II Regulation, the law designated by virtue of the connecting factors listed in Article 6 may not be derogated from by agreement.

5. Private international law issues in the private enforcement of the Digital Markets Act

As cases discussed in this chapter show, the private enforcement of competition law, particularly against digital platforms, is not limited to damages claims. Increasingly, plaintiffs turn to court to request injunctive relief, raising questions of characterisation of claims [88]. This trend is likely to increase in the wake of the DMA having become applicable in May 2023. The DMA imposes specific obligations on undertakings offering core platform services and designated as gatekeepers [89]. Provisions of the DMA that are sufficiently precise and unconditional are capable of having direct effect and can thus be relied upon before national courts by business- or end- users of platform services. This is also implicit in several provisions of the DMA that address the relationship between public enforcement by the Commission and court proceedings [90]. DMA provi-

[88] See *supra*, para 2.

[89] For a comprehensive overview of gatekeepers' obligations, see C. LOMBARDI, *Gatekeepers and Their Special Responsibility under the Digital Markets Act*, cit.

[90] See Article 39(1) of the DMA, which refers to information national courts may request from the Commission in «proceedings for the application of [the DMA]»; Article 39(2) and (5) of the DMA, which refer to judgments issued by national courts in that respect; Article 42 of the DMA, which extends the applicability of Directive (EU) 2020/1828 of the European Parliament and of the Council of 25 November 2020 on representative actions for the protection of the collective interests of consumers and repealing Directive

sions imposing obligations on gatekeepers (Article 5, and likely also Articles 7 and 6) may thus be enforced in domestic courts, primarily in order to seek injunctive relief and, possibly, to claim damages [91].

Like more traditional competition law cases, the private enforcement of the DMA is likely to give rise to questions of jurisdiction and applicable law. Whilst the Regulation contains neither provisions on jurisdiction nor bilateral conflict-of-law rules that determine the applicable law based on connecting factors, it includes a unilateral conflict norm that delimits its scope. Pursuant to Article 1(2) thereof, the DMA «shall apply to core platform services provided or offered by gatekeepers to business users established in the Union or end users established or located in the Union, irrespective of the place of establishment or residence of the gatekeepers and irrespective of the law otherwise applicable to the provision of service». This provision rests on the so-called marketplace approach, whereby the DMA applies to services offered to European citizens – *rectius*, more broadly, to individuals located in the EU – and to businesses established in the EU [92]. The same criterion has been employed, with some variations, in other measures regulating digital markets, such as the GDPR [93] and the DSA [94]. The last sentence of Article 1(2) of the DMA also makes clear that the EU legislature views the entire regulation as a set of mandatory norms (a *loi de police*) that applies irrespective of the law governing the contract for the provision of services.

From the perspective of national courts in private enforcement actions, this criterion may raise two types of issues. First, the interpretation of the marketplace criterion itself may prove contentious. In particular, it is uncertain whether the notion of providing or offering services to users established or located in the EU corresponds to that of "directing" services to the State of domicile of a consumer within the meaning of Article 17(1)(c) of the Brussels Ia Regulation or is broader as the different wording might suggest.

2009/22/EC to «the representative actions brought against infringements by gatekeepers of [DMA provisions] that harm or may harm the collective interests of consumers».

[91] See F. CROCI, *Judicial Application of the Digital Markets Act*, cit., pp. 248-251.

[92] T. LUTZI, *The Scope of the Digital Services Act and Digital Markets Act: Thoughts on the Conflict of Laws*, cit., 2.

[93] Article 3(1) of the GDPR.

[94] Article 2(1) of the DSA.

Second, the unilateral conflict rule of Article 1(2) of the DMA does not do away with the need to address issues of jurisdiction and applicable law pursuant to the Brussels Ia, Rome I and Rome II Regulations. Obviously, a Member State court may only decide on a claim provided it has jurisdiction over the case, which must be determined according to the Brussels Ia Regulation (or possibly domestic private international law, if the defendant is domiciled in a third country and the case falls within the residual jurisdiction of national courts) [95].

But even as regards the applicable law, the DMA is hardly self-sufficient. Suffice it to note here that, whilst it provides for unform substantive law obligations, the DMA does not harmonise remedies. In the context of damages actions, the applicable national law matters even more than in proceedings for the private enforcement of Articles 101 and 102 TFEU, since Directive 2014/104/EU, which harmonises several aspects of antitrust actions, does not apply to the enforcement of the DMA [96].

In sum, the lack of coordination between the DMA and the main EU private international law instruments is likely to be a source of additional challenges for national judges expected to apply this complex new piece of legislation.

6. Conclusion

The analysis carried out in this chapter has shown that issues of jurisdiction and applicable law may pose significant challenges in the private enforcement of EU competition law claims. With respect to characterisation, the case law of the Court of Justice has struggled so far to provide

[95] In this regard, the DMA differs from the GDPR, which contains a special head of jurisdiction for actions against controllers or processors (Article 79(2)).

[96] Directive 2014/104/EU of the European Parliament and 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. The Directive applies to infringements of competition law defined as «infringement[s] of Article 101 or 102 TFEU, or of national competition law» (Article 2(1) of Directive 2014/104/EU, cit.). In turn, the notion of "national competition law" is limited to «provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition» (Article 2(3) of Directive 2014/104/EU, cit.).

consistent guidance to national courts. Whilst the Court in the preliminary ruling procedure is tasked with interpreting provisions of EU law beyond the specificities of a given case, its rulings must also provide guidance to national courts in actual litigation. In light of the cases it was confronted with, the Court of Justice has thus provided answers that national courts can apply to individual cases with a certain degree of flexibility. However, this course of action increases the burden on national courts and can potentially undermine the consistent application of EU rules on jurisdiction and applicable law.

As regards heads of jurisdiction in tort matters, the case law has interpreted them broadly, opening avenues for forum shopping. In respect of cartel damages actions, perhaps the most controversial development is the finding in *Sumal* that victims may bring proceedings against different companies of the group the infringer belongs to [97]. Combined with the generous conditions for suing multiple defendants under Article 8(1) of the Brussels Ia Regulation, this ruling encourages forum shopping. While similar cases are less likely to arise in digital markets than in markets for physical goods, the chapter has shown that issues of jurisdiction are equally crucial when it comes to claims arising out of alleged competition law infringements in those markets, and that the logic of facilitating private enforcement – the same underpinning the seminal *Courage* and *Manfredi* judgments that kickstarted the private enforcement of EU competition law [98] – continues to play a key role in the interpretation of heads of jurisdiction.

Finally, the impending private enforcement of the DMA calls upon courts to carefully coordinate this new instrument of market regulation with the rules granting them jurisdiction in particular cases and with those determining the law applicable to issues not exhaustively addressed in the DMA.

Open questions and pending references show a need of further guidance from Luxembourg on several issues and suggest that new developments in the case law of the Court of Justice should be expected.

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[97] Case C-882/19, *Sumal*, cit.

[98] See Court of Justice, case C-453/99, *Courage and Crehan* [2001] ECLI:EU:C:2001:181; case C-295/04, *Manfredi* [2006] ECLI:EU:C:2006:461.