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REVIEW OF ARTICLE 6.3 ON THE LAW APPLICABLE TO NON CONTRACTUAL OBLIGATIONS UNDER ROME II

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Abstract

This paper analyses whether under the Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II). Article 6.3 of the regulation has the necessary clarity and functionality to be fit for purpose.

Introduction

The introduction of the Rome II Regulation[1] in conjunction with Rome I Regulation[2] and the Brussels I Regulation[3] is an attempt by the member states of the European Union to harmonise the conflict of law rules that until there introduction was an area of contention within the European Union. The Rome II Regulation[4] establishes a consistent set of conflict of law rules applicable to all non-contractual obligations[5] arising out of civil and commercial matters applicable to all courts in all member states with the exclusion of Denmark.[6]

[1] Regulation 864/2007 (The law applicable to non contractual obligations)
[2] Regulation 593/2008 (The law applicable to contractual obligations)
[3] Regulation 44/2001 (Recognition of civil jurisdiction and judgements)
[4] henceforth called Regulation
[5] The concept of a non-contractual obligation varies from one member to another. Therefore for the purpose of this Regulation non-contractual obligations should be understood as an autonomous concept.
[6] Article 1(4) For the purpose of this Regulation "member state" shall mean any member state other than Denmark.

The extent of the substantive law[7] determined in compliance with the Rome II Regulation covers a large area of liability related issues, including the determination of who can be held liable, liability for the acts of other persons, the assessment of damages or any remedy claimed for injunctive relief. In respect to unfair competition and competition law the Regulation establishes a pertinent set of substantive competition law rules and also the entire legal regime that govern the civil law arising out of a contravention.

Non-contractual obligations arising from tort/delict are dealt with in chapter 2 of the Regulation and breaches of the competition law rules[8], are encompassed within this category. The Regulation makes reference directly to the substantive law provisions of the applicable country and excludes the application of the country's conflict of law rules and any form of renvoi[9]. Article 3 confirms that this is true even where implementation of the Regulation's provisions means that the substantive law applied is that of a country outside the European Union.

The Interrelationship between Article 4 and Article 6

The Regulation stipulates a general rule which applies to all torts unless covered by a special provision relating to any of the specific type of torts detailed from Articles 5 onwards. Article 4(1) defines the general rule that the applicable law in cases concerning tort and delicts shall be the country where the damages occurred[10]. Article 4(1) is subject to the exception laid down in Article 4(2) in that if the tortfeasor and victims are habitual residents in the same country then the substantive law of that country will apply, or where Article 4(3) is applicable in that where the damage is manifestly more closely connected to another country then the law of that country shall apply.

Contained in Article 6 are special provisions for non-contractual obligations arising out of acts of unfair competition. Article 6(1) applies where the interests of other

[7] Substantive law is the statutory or written law that governs rights and obligations of those who are subject to it. Substantive law defines the legal relationship of people with other people or between them and the state.
[8] "be it unfair competition or restriction of competition"
[9] Regulation 864/2007 Article 24 Exclusion of renvoi
[10] *lex loci damni*… Before the introduction of Rome II it was usual for the principle of lex loci delicti commissi to be applied in most national conflict of law regimes.

competitors, consumers and public are likely to be concerned and Article 6(2) where the act of unfair competition affects the interests of a specific competitor, both Articles 6(1) and 6(2) relate to acts of unfair competition. Article 6(3) specifically relates to restrictions of competition and an analysis of this Article will form the focus for this paper. It is emphasized in Recital 21 that Article 6 is not an exception to Article 4 but a special case of the latter. The presumed intention of this recital was to prevent Article 6 from receiving an overly narrow interpretation from the European Court of Justice according to its insistence that exceptions are to be constructed restrictively[11].

The Perception of the Affected Market

Article 6(3) (a) states that:

> "The law applicable to a non-contractual obligation arising out of a restriction of competition[12] shall be the law of the country where the market is, or is likely to be, affected".

The regulations state that if a market is likely to be or is affected only in one country, then the law of that country is applicable irrespective of where a claimant presents a claim, but if a market is likely to be or is affected in more than one country then the claimant can as long as the conditions of Article 6(3) (b) are satisfied can choose the law of the jurisdiction for the entire claim.

To establish the substantive law applicable to a restriction of competition claim under the Regulations it is essential to characterize the phrase "affected market". The recitals are silent on a definition and the regulation does not define how to establish when a market has been or is likely to be affected;

The concept of the affected market is defined by Hellner M (2007)[13] as something abstract "it *is not a car, a house or a person that can be said to have been physically present at a particular place at a particular time when the injury is suffered"* that to

[11] Jakob Handte & Co v Traitements Mecano-Chimiques des Surfaces SA (TMCS) (C-26/290 [1992] ECR I-3967 as an example

[12] Restriction of competition is meant to cover infringement of Articles 101 and 102 of the Treaty on the Function of the European Union in addition to provisions of national competition laws of member states.

[13] Hellner M *Unfair completion and acts restricting free Competition* ; Yearbook of Private International Law Volume 9 (2007) pp 59

understand the concept of the defined market it is necessary to understand the market definition as a prerequisite[14]. If we examine the development of EC substantive law in relation to antitrust, this has shown that the question of market definition can be difficult to determine. The definition of the relevant market is critical if one is to determination the existence of a dominant position under Article 82 EC Treaty.
EC antitrust law defines the relevant market as consisting of a relevant product market and a relevant geographical market. Under current case law the European Court of Justice has defined the relevant geographical market as an "*area in which the undertaking concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas*"[15]

Using the substantive antitrust law already developed and the concept of relevant geographical market for determining the affected market for the EC choice of law purposes would be a way of mitigating the failure of the Rome II Regulations to define market in the regulations. One of the advantages of using this method of determination of the market would be the simplicity, it is assumed that most private antitrust case are to be follow-on actions and the work of defining the geographical market will already have been completed. The disadvantage of establishing new methods of determining market definition would be that we could be left with three different market definitions, one for the substantive law, one for the choice of law and one to determine jurisdiction under article 5(3) of the Brussels I Regulations.

In the Case of Several Affected Markets

It is envisioned that in most case under the Rome II the effects of the restrictive behaviour will not be limited to the territory of any single country. As such Article 6(3)(a) requires that each of the countries covered by the affected market apply its own law on a distributive basis. The effect of such a strict territorial regime in Article

[14] Dickinson, The Rome II Regulations [2008], supra n.11 paras. 6.63; but it is worth noting that Holzmueller and Koeckrizt ; Private Enforcement of Competition Law under Rome II Regulations (2010) Global Competition Litigation review, disagree with this approach purporting that it is not necessary to determine the definition of market, that the market definition is part of the substantive law of the alleged restriction of competition and as such a matter of substantive competition law
[15] ECJ, C-27/76 *United Brands,* [1978] ECR 207, para. 44; *Michelin,* [1983] ECR 3461 para. 26; *Alsante,l* [1988] ECR 5987 para. 15; Court of first Instance T-504/93 *Tierce Ladbrokes,* [1997] ECR II -923 para. 102.

6(3)(a) is the so called mosaic view[16], and in actions concerning international cartels could lead to claimants having to split their claim into national actions and collect their respective damages in a piece meal process. Because of this the mosaic view has been deemed to be impractical and established an obstacle to recover claims for multinational damages.[17]

Review of Article 6(3)(b) and the Lex Fori Exception

(b*) "When 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 seized, 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 the claimant sues, in accordance with the applicable rules on jurisdiction, more than one defendant in that court, he or she can only choose to base his or her claim on the law of that court if the restriction of competition on which the claim against each of these defendants relies directly and substantially affects also the market in the Member State of that court".*

Where Article 6(3)(a) fails, Article 6(3)(b) offers the possibility of achieving, i.e. the determination of a consistent law for the assessment of an infringement of competition law and the subsequent consequences in cases of affected markets in more than one member state. The logical behind this Article is to concentrate claims arising from then restriction of competition claims affecting more than one market[18] and assist the recovery of damages from International Cartels, limiting the difficulties arising from the application of foreign law[19]. The claimant is offered the choice to choose the application of a single law without the consent of the defendant but is subject to conditions to ensure that forum shopping does not become an issue.

[16] Mosaikbetrachtung
[17] Dickinson, The Rome II Regulations [2008], supra n.11 paras. 6.64; Council document 9009/04 ADD 14 (2004)
[18] Rome II Recital 22
[19] Hellner M *Unfair completion and acts restricting free Competition*; Yearbook of Private International Law Volume 9 (2007).. Informs us that the commission has advocated a n even wider rule without the requirements of residence.

Article 6(3)(B) is applicable to damages claims only, in addition the claimant may only choose the law of the forum and not the law of any other country which the market has / maybe affected. In respect to the lex fori, this choice is only possible if the claimant brings the claim in an EU Member State where at least one of the defendants has their domicile[20]. Unlike Article 6(3)(a) the claimant cannot choose the lex fori because the market is likely to be affected, a market in the forum state must be directly and substantially affected by the competition law breach in question.

Direct and Substantial

Unlike Article 6(3)(b), Article 6(3)(a) does not have the requirement that the market is directly and substantially affected by the competition law infringement, only that the market is or likely to be affected. According to Hellner (2007)[21] this was an oversight and was simply overlooked when the recital was redrafted to reflect the changes made in relation to the restriction of competition with the multi-state effect. The requirement of a direct and substantial affect would appear to be a higher standard requiring that the market in question be tangible, but it remains vague to what extent the standard goes beyond the basis rule of Article 6(3)(a) and has been open for some criticism for its "detrimental effect on legal certainty".[22] The disappearance of the text from Article 6(3)(a) could also be construed as deliberate, that it was not required in this context. That the only appearance of direct and substantial is in Article 6(3)(b), it could be purported that this was deliberate, it is worth noting that in all remaining cases there is no such requirement. One of the key issues is that to assert such a conclusion would not bring any benefit to the interpretation of the Regulation. One of the requirements of Public International Law is that the effects of direct and substantial deals with the rights of states to apply their own competition law to restrictive acts. It should be noted that direct and substantial does appear in other countries Private International Law Provisions, it is a requirement for both Germany and Switzerland and under U.S. Competition Law that there be direct, substantial and reasonable foreseeable effect on the market in question, hence the terms are not unknown in the international legal community.

[20] This allows at least one of the defendants to be acquainted with the law and procedures since it would be the law of their Domicile.
[21] Hellner M *Unfair completion and acts restricting free Competition*; Yearbook of Private International Law Volume 9 (2007).pp 61 to 63
[22] Dicey, Morris and Morse, The Conflict of Laws, 14th Edition (2006) para.35.200

The crux of Article 6(3)(b) is that the forum must be one of the main places where the action of anti-competitive practice has taken place, there must be a legitimate link to the forum state[23], In cases of "restriction by object"[24] the anti-competitive behaviour must be directly aimed at restricting competition in the forum state. Where there is act of "restriction by effect"[25] the forum state must be one of the countries where the anti-competitive effects are directly felt. In cases based on large cartels or clear cut abuses of dominance the claimant will not have to prove the actual anti-competitive effects in each case for Article 6(3)(b) to be applicable. If the claimant can prove that the appropriate conduct by the defendant was clearly aimed at the restriction of competition in the forum state then this would it is hoped be enough to mitigate the requirements for a full economic analysis of the actual events.

Domicile

Article 6(3)(b) mandates that the claim has to be lodged in the country of domicile of at least one of the defendants and the State must be a member of the European Union[26]. The Article stating domicile rather than habitual residence[27] is at first quite unexpected as the Regulation generally avoids the concept of domicile. The purpose of introducing the new concept here was to point to a single place of residence in order to allow for a predictable determination of the applicable law.[28] When one considers the applicable International Jurisdictional Rule in EU Member States it can be seen that the reliance on the concept of domicile is a rational one. The Brussels I Regulation provides a wide-ranging set of rules for the assessment of international jurisdiction. Brussels I Article 2(1) defines the domicile of the defendant as the main criteria for the establishment of international jurisdiction.[29] The ECJ reinforce that this

[23] Dickinson, The Rome II Regulations [2008], supra n.11 paras. 6.72
[24] Restriction by object are those that " by their very nature have the potential of restricting competition" An agreement may be restrictive of competition under article 81(1) either by object of effect.
[25] If an agreement is not Restriction by object it may still have the effect of restricting competition.
[26] Except Denmark, art1(4) Rome II
[27] As defined in Recital 23
[28] Commission proposal Article 19. According to Article 23(1) Rome II, companies have their habitual residence at the place of their central administration. If the damages can be attributed to a local branch , the location of this branch shall be treated as the habitual residence.
[29] Brussels I article 60; a company is domiciled where it has its statutory seat, its central administration, or its principle place of business.

"general jurisdiction" is not subject to territorial limitations[30] and that the court of the defendant's domicile has jurisdiction to award damages for any injury suffered globally with no limitation to the territory of the forum state. Therefore Article 6(3)(b) of the Rome II Regulations ensures that the defendant's domicile court can apply the domestic law of state to all damages worldwide arising out of a violation of the competition law, given that the forum state is amongst the countries directly and substantially affected by the restriction of competition out of which the non-contractual obligation on which the claim is based arises.

More Than One Defendant

In addition to the requirements set out above if the claimant wants to bring and action against more than one defendant the choice of the domestic law of the court is only possible under Article 6(3)(b) if:

i. The Court has jurisdiction for the claim against all the defendants.
ii. The claim relies on the same competition law infringements in each case.
iii. That the infringements directly and substantially affect the market in the forum state.

In regards to jurisdiction, a claim for damages against several defendants would again be determined by the general rules on jurisdiction contained in the Brussels I Regulations. Here it is important to note that Brussels I Article 6(3)(b) requires full jurisdiction of the same court for all claims, not only the international jurisdiction of the courts of the same member states, and Article 6(1) allowing for defendants with different domiciles to be sued in the country where any of them is domicile, providing that the claim(s) are closely connected . The interplay between Article 6(3) Rome II and Article 6(1) Brussels I ensures that a court called upon to deliver a ruling in regards to international large cartels affecting a forum state can apply its own domestic law to the claim against all the defendants.

In regards to ii and iii they ensure that the case brought against the defendants is the same and that it has an actual connection to the forum, Article 6(3)(b) would not

[30] Shell v Press Alliance SA (C-68/93) [1995] 2 A.C. 18; [1995] 2 W.L.R 499; E.C.R I-415 ECJ at 19-33 in relation to a tortuous defamation claim

apply in an action against participant of a number of cartels, all affecting a forum state but with different infringements.

Conclusions

Recital 23 gives an explanatory definition of what constitutes a restriction of competition and refers to "prohibitions of agreement between undertakings, decisions by associations of undertakings and concerning practices" and "the abuse of a dominant position" and explains that such practices and abuse are prohibited by Article 81 and 82 EC and the law of the member states. The Recital has been deliberately drafted to cover a wide area and it would appear that the main purpose of the Article is to include actions for damages for violation of EC Antitrust Law into its scope. We now have, for the first time, antitrust laws that allow national courts to apply competition law of foreign affected market and hence indirectly protect competition in markets outside the territory of the forum. Nevertheless the hastily introduced provisions of Article 6(3) leave certain provisions inexact and will give rise over the next few years to challenges to the ECJ to provide legal certainty.

Another issue will be the development of antitrust law in those countries that at present have do not have a specific area of general torts, the UK being such an example with unfair competition being treated as a branch of IP Law but this is beyond this paper.

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