QUIETA MOVERE – BUT PLEASE DO NOT DO IT QUIETLY: THE ECJ ON INTERNATIONAL JURISDICTION IN ANTITRUST DAMAGES ACTIONS (TIBOR-TRANS, C-451/18)

QUIETA MOVERE – PERO NO EN SILENCIO POR FAVOR: EL TJUE SOBRE LA COMPETENCIA INTERNACIONAL EN LAS ACCIONES CIVILES DERIVADAS DE ILÍCITOS ANTITRUST (TIBOR-TRANS, C-451/18)

Lukas Rademacher
Institute for Private International and Comparative Law
University of Cologne, Germany

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Abstract: In *Tibor-Trans*, the ECJ has commented on the interpretation of 'the place where the damage occurred' (Art. 7(2) Brussels I *bis* Regulation) to determine international jurisdiction in antitrust damages actions. Contrary to its previous decision in *CDC Hydrogen Peroxide*, the court held that the claimant's purported damage must have occurred in a state which is part of the market affected by the cartel. The court can rely on valid arguments in favour of this position. However, the decision does not explicitly discuss the court's earlier case law. This lacuna in the court's reasoning is detrimental to legal certainty.
Keywords: truck cartel, competition law, antitrust damages, international jurisdiction, place where the damage occurred, pass-on.

Resumen: En *Tibor-Trans*, el TJUE ha comentado la interpretación del 'lugar donde se haya producido el hecho dañoso' (art. 7.2 del Reglamento Bruselas I-bis) para determinar la competencia internacional en las acciones civiles derivadas de ilícitos antitrust. Contrariamente a su decisión anterior en el asunto *CDC Hydrogen Peroxide*, el tribunal sostuvo que el supuesto daño del demandante debe haber ocurrido en un Estado que forma parte del mercado afectado por el cártel. El tribunal se basa en argumentos válidos a favor de esta posición. Sin embargo, la decisión no trata explícitamente la jurisprudencia anterior del tribunal. Esta laguna en el razonamiento del tribunal es perjudicial para la seguridad jurídica.
Palabras clave: cártel de camiones, derecho de la competencia, daños derivadas de ilícitos antitrust, competencia internacional, lugar en el que se produjo el daño, pass-on

I. Introduction

1. The disbandment of the 'truck cartel' and the subsequent imposition of a record fine of almost four billion Euros in 2016 and 2017 is perhaps the most prominent success story of the European Commission in the area of competition law.[1] Five well-known truck manufacturers had admitted to having

[1] Detailed documentation at https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39824.

participated in a price-fixing cartel between 1997 and 2011 throughout the European Economic Area. After the European Commission had completed its investigation, members of the cartel are now facing claims from those who overpaid for their vehicles in various EU countries. According to estimates, potential compensation claims for over four million sold trucks could exceed the already imposed fines many times over.[2] A large share of the aggrieved parties use mechanisms of collective redress and third-party funding to litigate their claims.[3]

2. The EU has harmonized in part the right to compensation for infringements of European antitrust rules (Arts. 101 and 102 TFEU) through Directive 2014/104/EU on Antitrust Damages Actions. Moreover, when pursuing compensation claims aggrieved parties can rely on the findings of the European Commission or national antitrust authorities that are binding on all national courts.[4] Nevertheless, the forum before which a claimant brings an action for antitrust damages may prove decisive for the outcome of a case.[5] Forum shopping continues to play a crucial role in the private enforcement of European competition law. The efficiency of proceedings, the costs, the expertise of specialized or unspecialized judges, the requirements for collective redress, and even important questions of the applicable substantive law may depend on the court seized.[6] Under the requirements of Art. 6(3) lit. b Rome II Regulation, the aggrieved part can opt for the application of the *lex fori*. Since the Directive on Antitrust Damages Actions does not harmonize prescription, loss adjustment, and interests, claimants may have a valid reason to prefer the application of one law over the other.

3. Which courts are internationally competent to rule on a non-contractual antitrust damages action? Pursuant to the general rule of jurisdiction of Art. 4(1) Brussels I*bis* Regulation, defendants that are domiciled in a Member State shall be sued in the courts of that Member State (*actor sequitur forum rei*). Special jurisdiction may lie according to Art. 7(2) Brussels I*bis* Regulation with the courts of the Member State where the harmful event occurred. This encompasses both the place of the tortious activity giving rise to the damage, i.e. the place of the cartel agreement,[7] and the place where the damage occurred. As a fourth option, a claimant who pursues connected claims against multiple defendants domiciled in different Member States, e.g. joint tortfeasors, can bring the entire action before a single court of the domicile of one of the defendants (Art. 8(1) Brussels I*bis* Regulation).

4. In the *Tibor-Trans*[8] case, the claimant sued a single member of the cartel in Hungary where neither the defendant was domiciled, nor had the cartel agreement been concluded. Therefore, Hunga-

[2] cf. https://www.bloomberg.com/news/articles/2019-10-24/truckmakers-face-nearly-1-billion-in-claims-in-cartel-suit.

[3] See Competition Appeal Tribunal, 17 December 2019, *UK Trucks Claim Ltd* v. *Fiat Chrysler Automobiles NV and others* and *DAF Trucks NV and others and Road Haulage Association Ltd* v. *MAN SE and others* and *Daimler AG*, [2019] CAT 28; https://www.handelsblatt.com/unternehmen/handel-konsumgueter/kartellprozesse-us-kanzleien-draengen-mit-sammelklagen-auf-den-deutschen-markt/24934612.html.

[4] For a detailed analysis of the binding effects, see A.-L. Calvo Caravaca, J. Suderow, "El efecto vinculante de las resoluciones de las autoridades nacionales de competencia en la aplicación privada del derecho antitrust", *Cuadernos de Derecho Transnacional*, Vol. 7, 2015, No. 2, pp. 114-157.

[5] A comprehensive account of conflict of laws and international jurisdiction in European antitrust law is provided by A.-L. Calvo Caravaca, J. Carrascosa González, "El Derecho internacional privado de la Unión Europea frente a las acciones por daños anticompetitivos", *Cuadernos de Derecho Transnacional*, Vol. 10, 2018, No. 2, pp. 7-178.

[6] W. Wurmnest, "Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie", *Neue Zeitschrift für Kartellrecht* 2017, pp. 2-10, 3, 10.

[7] ECJ, 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, C-352/13, para. 44. Case notes: J. Suderow, "Acciones derivadas de ilícitos antitrust: el foro especial de la obligación extracontractual después de la sentencia CDC Hydrogen Peroxide", *Cuadernos de Derecho Transnacional*, Vol. 8, 2016, No. 2, pp. 306-329; W.-H. Roth, "Internationale Zuständigkeit bei Kartelldeliktsklagen", *Praxis des Internationalen Privat- und Verfahrensrechts* 2016, pp. 318-326; W. Wurmnest, "International jurisdiction in competition damages cases under the Brussels I Regulation: CDC Hydrogen Peroxide", *Common Market Law Review* 53 (2016), pp. 225-247; P. Mankowski, "Kurzkommentar", *Entscheidungen zum Wirtschaftsrecht* 2015, pp. 687-688; J. von Hein, "Anmerkung", *Kommentierte BGH-Rechtsprechung Lindenmaier-Möhring* 2015, 373398.

[8] ECJ, 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi Kft.*, C-451/18. Case notes: N. Brüggemann, S. Patzer, "Die Rechtsprechung des EuGH zum Deliktsgerichtsstand bei Kartellschadensersatzklagen", *Neue Zeitschrift für Kartellrecht* 2019, pp. 538-543; J. Grothaus, G. Haas, "Anmerkung", *Europäische Zeitschrift für Wirtschaftsrecht* 2019, pp. 793-796; C. Horst-

rian courts could only derive their international jurisdiction from Art. 7(2) Brussels I*bis* Regulation if Hungary was the place where the damage occurred.

II. Factual background and procedural history

5. A Hungarian freight forwarding company sued a Dutch truck manufacturer for antitrust damages. The claimant had leased and purchased trucks from a Hungarian lease provider. The lease provider had purchased the trucks from the defendant in Hungary for artificially high prices. It was therefore a pass-on case, as there was no direct contractual relationship between the cartelist and the aggrieved party. Instead, the lease provider had passed on the distorted prices to the claimant.

6. The court of Győr dismissed the claimant's action for lack of international jurisdiction because the place of the anti-competitive agreements, i.e. the place of the tortious activity giving rise to the damage, was outside Hungary. The court apparently did not address jurisdiction at the place where the damage occurred.

7. The Győr District Court, acting as court of appeal, recognized this shortcoming and therefore examined whether jurisdiction could be based on the place where the damage occurred. The court considered the principles established in *CDC Hydrogen Peroxide* according to which international jurisdictions lies with the courts at the seat of the injured party.[9] However, the Hungarian court had doubts as to whether the case law in *CDC Hydrogen Peroxide* extended to pass-on situations and referred the case to the ECJ for a preliminary ruling.

III. The place where the damage occurred

8. Given its decision in *CDC Hydrogen Peroxide*, the ECJ's answer in the *Tibor-Trans* case may have appeared quite easy to predict. Clearly, the entire loss suffered by the claimant can be located in Hungary. This was where the lease and purchase of the artificially overpriced vehicles took place, where the leasing charge and price were paid, and where the detrimental bargain was registered in the claimant's accounts.

1. Pass-on

9. Indeed, this result cannot be challenged by the well-established principle that only the primary damage (or synonymously: immediate damage) is relevant for the purposes of Art. 7(2) Brussels I*bis* Regulation.[10] Primary damages can be contrasted with consequential damages. In the example of a traffic accident sustained abroad, the victim cannot establish international jurisdiction of the courts of the state of his domicile based on the medical costs incurred for the treatment at home. Only the physical injury suffered in the accident is relevant damage, suitable to justify international jurisdiction of the courts of the state where the accident occurred. Where the tort caused pure economic loss, this loss is the relevant (primary) damage.[11] Frequently, the place where pure economic loss was suffered proves difficult to locate. This is especially the case when the victim holds assets and accounts in several states.[12]

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kotte, A. Palatzke, "Anmerkung", *Zeitschrift für Internationales Wirtschaftsrecht* 2019, p. 273; C. Krüger, "Zur internationalen Zuständigkeit am 'Ort, an dem das schädigende Ereignis eingetreten ist' bei Kartellschäden ('Tibor-Trans')", *Entscheidungen zum Wirtschaftsrecht* 2019, pp. 769f.

[9] ECJ, 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, C-352/13, para. 52.

[10] ECJ, 19 September 1995, *Marinari*, C-364/93, paras. 14-15; ECJ, 10 June 2004, C-168/02, *Kronhofer*, paras. 19-21.

[11] P. Mankowski, "Article 7", in U. Magnus, P. Mankowski (eds.), *European Commentaries on Private International Law, Brussels Ibis Regulation*, Cologne, Otto Schmidt, 2016, paras. 322-325 with numerous further references.

[12] See, e.g., ECJ, 12 September 2018, *Helga Löber*, C-304/17.

10. In *Tibor-Trans*, however, we have not learned of any such complications from the reported facts of the case. The claimant did not suffer damage anywhere else than in Hungary. The conclusion of the contract by the claimant with the lease provider in Hungary constituted the first impact on the claimant's assets, which were located solely in Hungary. Therefore, the ECJ convincingly concluded that the passing of the surcharge down the distribution chain did not prevent the claimant from suffering a relevant primary damage in the sense of Art. 7(2) Brussels I*bis* Regulation.[13] In *CDC Hydrogen Peroxide*, the ECJ justified the jurisdiction of the court of the claimant's domicile with the local court's proximity to the damage suffered.[14] The German *Bundesgerichtshof* has adopted this view also for the determination of local jurisdiction within Germany.[15]

2. Affected market

11. This could have been the end of the story but it was not. About three weeks after the Hungarian district court had referred the case to the ECJ for a preliminary ruling, the ECJ handed down its decision in the case *flyLAL-Lithuanian Airlines*.[16] Perhaps in reaction to the criticism raised against its previous decision in *CDC Hydrogen Peroxide*,[17] the ECJ held in *flyLAL-Lithuanian Airlines* that the place where the damage occurred "covers […], inter alia, the place where the loss of income consisting in loss of sales occurred, that is to say, the place of the market which is affected by that conduct and on which the victim claims to have suffered those losses".[18] Although *flyLAL-Lithuanian Airlines* was based on significantly different facts than *CDC Hydrogen Peroxide*,[19] it was generally regarded as an overruling of the previous case law.[20] The claimant's domicile apparently ceased to play a role in determining the place where the damage occurred. Remarkably, the ECJ's reasons in *flyLAL-Lithuanian Airlines* in this context do not even mention *CDC Hydrogen Peroxide* and the claimant's domicile.[21] Instead, the affected market took centre stage.

12. Indeed, the affected market is an old acquaintance that is used also in Art. 6(3) Rome II Regulation when determining the law applicable to non-contractual obligations arising out of a restriction of competition. As recital 21 of the Rome II Regulation informs us, Art. 6(3) Rome II Regulation is not an exception to the general *lex loci damni* rule in Art. 4(1) Rome II Regulation but rather a clarification of it. In accordance with recital 7 of the Rome II Regulation, we shall strive for consistency between conflict-of-law rules and procedural rules. Therefore, the ECJ in *flyLAL-Lithuanian Airlines* concluded

[13] ECJ, 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi Kft.*, C-451/18, para. 31. This is also relevant for the pending proceedings in the case of *Verein für Konsumenteninformation*, C-343/19; see the request for a preliminary ruling by the District Court Klagenfurt (Austria), 30 April 2019, *beck-online.EU-RECHTSPRECHUNG* 2019, 605997.

[14] ECJ, 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, C-352/13, para. 53.

[15] BGH, 27 November 2018, X ARZ 321/18, *Neue Juristische Wochenschrift Rechtsprechungs-Report Zivilrecht* 2019, pp. 238-240, para. 18.

[16] ECJ, 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/17. Case note: C. Benini, "La localizzacione dell'illecito concorrenziale nel regime di Bruxelles: riflessioni alla luce della Sentenza FLYLAL II della Corte di Giustizia dell'Unione Europea", *Cuadernos de Derecho Transnacional*, Vol. 11, 2019, No. 1, pp. 693-710.

[17] See the case notes in fn. 7.

[18] ECJ, 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/17, paras. 40-43.

[19] Whereas *CDC Hydrogen Peroxide* concerned a horizontal cartel agreement, *flyLAL-Lithuanian Airlines* was about ousting a competitor from the market.

[20] A. Stadler, "Art. 7 EuGVVO", in: H.-J. Musielak, W. Voit (eds.), *Zivilprozessordnung*, Munich, Franz Vahlen, 16th edn., 2019, para. 19b; N. Brüggemann, S. Patzer, "Die Rechtsprechung des EuGH zum Deliktsgerichtsstand bei Kartellschadensersatzklagen", *Neue Zeitschrift für Kartellrecht* 2019, pp. 538-543, 541; C. Benini, "La localizzacione dell'illecito concorrenziale nel regime di Bruxelles: riflessioni alla luce della Sentenza FLYLAL II della Corte di Giustizia dell'Unione Europea", *Cuadernos de Derecho Transnacional*, Vol. 11, 2019, No. 1, pp. 693-710; C. Krüger, "Zur internationalen Zuständigkeit am 'Ort, an dem das schädigende Ereignis eingetreten ist' bei Kartellschäden ('Tibor-Trans')", *Entscheidungen zum Wirtschaftsrecht* 2019, pp. 769-770. But see H.-P. Mansel, K. Thorn, R. Wagner, "Europäisches Kollisionsrecht 2018: Endspurt!", *Praxis des Internationalen Privat- und Verfahrensrechts* 2019, pp. 85-119, 101.

[21] The only reference to *CDC Hydrogen Peroxide* occurs in the context of the place of the tortious activity giving rise to the damage, i.e. the place where the cartel agreement was concluded: ECJ, 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/17, para. 49.

that the *locus damni* in Art. 7(2) Brussels I*bis* Regulation is subject to the same clarification as in Arts. 4(1), 6(3) Rome II Regulation.[22] Although the affected market is notoriously difficult to locate and operate,[23] the ECJ was persuaded by two further arguments in its favour.

13. First, the ECJ considered the proximity of the courts of the affected market.[24] They, the ECJ argues, are more apt to assess the damage caused by the anticompetitive behaviour. It will be recalled that, interestingly, the ECJ in *CDC Hydrogen Peroxide* had used the same argument of proximity to establish jurisdiction of the courts of the claimant's state of domicile without any reference to the affected market.[25] Second, the ECJ in *flyLAL-Lithuanian* Airlines took the interests of the defendant into account and stated that a cartelist can reasonably expect to be sued in the courts of the place where the anticompetitive conduct distorted the rules governing healthy competition.[26] In *CDC Hydrogen Peroxide*, the ECJ seemed still more concerned with ensuring the effectivity of private enforcement.[27]

14. The facts of *Tibor-Trans* resemble more those of *CDC Hydrogen Peroxide* than those of *flyLAL-Lithuanian Airlines*. Both *CDC Hydrogen Peroxide* and *Tibor-Trans* concerned horizontal cartel agreements, i.e. agreements between competing undertakings. Nevertheless, the ECJ in *Tibor-Trans* adopted the reasoning of *flyLAL-Lithuanian Airlines*. The court's grounds in *Tibor-Trans* astonishingly do not refer to *CDC Hydrogen Peroxide*[28] while *flyLAL-Lithuanian Airlines* is cited frequently. In *Tibor-Trans*, the ECJ repeats the formula developed in *flyLAL-Lithuanian Airlines* according to which for the purposes of antitrust damages actions the place where the damage occurred is the place where the market affected by the anticompetitive conduct is and where the alleged damage is purported to have occurred.[29] It should be noted that in *flyLAL-Lithuanian Airlines* this formula still contained a caveat ("inter alia")[30] that left the door open for other methods of determining the place where the damage occurred, e.g. by reference to the claimant's registered office. In *Tibor-Trans*, this caveat has disappeared. We have to assume that the formula now represents the only acceptable method to determine the place where the damage occurred, with the consequence that in front of the competent court the claimant can recover only the damage suffered on this specific market.[31]

15. In *Tibor-Trans*, however, the result remained the same even under the new formula. The 'truck cartel' extended to the entire European Economic Area to which Hungary is a member since 1 May 2004. The claimant thus alleged to have suffered the damage on an affected market. The case, therefore, falls within the jurisdiction of the Hungarian courts. It can be assumed that it is only a matter of time before the ECJ will have an opportunity to decide on a cartel case where the claimant's domicile is not located in a member state that belongs to the affected market. Only then we will know with full certainty the court's position.

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[22] ECJ, 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/17, para. 41.

[23] 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*, Oxford, Hart, 2012, pp. 91-130, 121.

[24] ECJ, 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/17, para. 40.

[25] ECJ, 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, C-352/13, para. 53.

[26] ECJ, 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/17, para. 40.

[27] ECJ, 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA*, C-352/13, para. 54; see also W. Wurmnest, "Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie", *Neue Zeitschrift für Kartellrecht* 2017, pp. 2-10, 5f.

[28] The only mention of *CDC Hydrogen Peroxide* is made when summarizing the procedural history of *Tibor-Trans*: ECJ, 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi Kft.*, C-451/18, paras. 16f., 19.

[29] ECJ, 29 July 2019, *Tibor-Trans Fuvarozó és Kereskedelmi Kft.*, C-451/18, paras. 33, 37.

[30] ECJ, 5 July 2018, *flyLAL-Lithuanian Airlines*, C-27/17, para. 43.

[31] N. Brüggemann, S. Patzer, "Die Rechtsprechung des EuGH zum Deliktsgerichtsstand bei Kartellschadensersatzklagen", *Neue Zeitschrift für Kartellrecht* 2019, pp. 538-543, 541; see on the implied departure from the mosaic principle in *CDC Hydrogen Peroxide* W. Wurmnest, "Forum Shopping bei Kartellschadensersatzklagen und die Kartellschadensersatzrichtlinie", *Neue Zeitschrift für Kartellrecht* 2017, pp. 2-10, 5f.

IV. Quieta movere – but please do not do it quietly

16. In the common law world, courts are obligated to respect the Latin maxim *stare decisis et non quieta movere*. Precedents established in previous cases are binding on a court when deciding subsequent cases with similar issues or facts. Exceptionally, a court may overturn its own precedent, but should do so only for a compelling reason. The ECJ's previous decisions do not have comparably strict precedential, binding effect.[32] Rather, the court is free to change its views at any time and depart from established case law. *Quieta movere*.

17. In *Tibor-Trans* (as well as previously in *flyLAL-Lithuanian Airlines*), the court has considered new arguments which it perhaps did not give thoroughly attention to a few years earlier in the formerly leading case of *CDC Hydrogen Peroxide*. This result is of course perfectly fine from the perspective of methodology. However, in the interest of legal certainty and rationality of legal reasoning, the court should explicitly address the overruling of a previous decision. Understanding the weight given by the court to the various arguments involved is necessary to determine what the current legal situation is and to predict reliably the outcome of future judgments.

[32] A. Arnull, "Owning up to Fallibility: Precedent and the Court of Justice", *Common Market Law Review* 30 (1993), pp. 247-266, 248; A.G. Toth, "The Authority of Judgments of the European Court of Justice: Binding Force and Legal Effects", *Yearbook of European Law* 4 (1984), 1-77, 29-36.