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Articles

Applicable Law 'Shopping'? Rome II and Private Antitrust Enforcement in the EU

James Segan[1]

Introduction

The private enforcement of competition law, by the bringing of civil proceedings for damages, has been a significant growth area for litigators in the 5½ years or so since the Modernisation Regulation.[2] The English courts have seen substantial private litigation in that period, much of it follow-on litigation from regulatory decisions by the Commission or the Office of Fair Trading (OFT). Such litigation in certain instances clarified the interaction between Community competition law and English private law, for instance as to liability within groups of companies[3] and as to available remedies.[4]

At the European level, the Commission's *White Paper on Damages Actions*,[5] published in April 2008, has provided additional impetus. If its proposals are implemented in due course, which is at present highly uncertain, then there will be a degree of harmonisation within the EU as to the parameters of private damages litigation, including as to standing, disclosure, the fault requirement, the assessment of damages, the availability of a passing-on defence, limitation periods and costs principles.

For the time being, however, and quite probably for some time to come, such aspects of private litigation will remain a matter for domestic law, subject to limited intervention from the European Court of Justice, for instance where, in the field of remedies, the principles of effectiveness or equivalence are jeopardised.[6] As matters stand, there are considerable disparities between Member States in respect of many of the key parameters of private antitrust litigation. For instance, with regard to damages English law allows in principle for

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1 Barrister, Blackstone Chambers.

2 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty (2003) OJ L1/1 (Modernisation Regulation).

3 See, eg, *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm), [2003] 2 All ER (Comm) 683.

4 See, eg, *Devenish Nutrition Ltd v Sanofi-Aventis SA (France)* [2007] EWHC 2394 (Ch), [2008] 2 All ER 249.

5 Commission, *White Paper on Damages Actions for Breach of the EC Antitrust Rules*, COM(2008) 165, 2 April 2008.

6 See, eg, *Manfredi v Lloyd Adriatico Assicurazioni SpA, Cannito v Fondiaria Sai SpA, Tricarico and Murgolo v Assitalia SpA* (Joined Cases C-295/04 to C-298/04) [2006] ECR 1-6619.

exemplary damages,[7] whereas German law may regard such damages as contrary to public policy.[8] As to limitation, the Commission has noted that limitation periods for private antitrust actions currently vary between 1 and 30 years across the Member States.[9] Such disparities are of central importance in the decision whether to bring private proceedings and in what manner and forum.

All of the parameters set out above are determined by the applicable law of the antitrust infringement in question. The applicable law can determine rules on standing, available defences, available remedies and limitation periods. In the context of contractual claims, for example for a declaration that a particular contract is unenforceable by reason of Art 81(2) EC of the Treaty Establishing the European Community 1957 (the EC Treaty),[10] the rules as to applicable law have been harmonised for some time now by the first Rome Convention[11] (Rome I). In the context of non-contractual claims, however, for example by indirect purchasers, the law is still not harmonised. The applicable law of tortious infringements of competition law is still to be determined by reference to the Private International Law (Miscellaneous Provisions) Act 1995, and the applicable law of any restitutionary obligations by reference to the common law.

All this is set to change on 11 January 2009, however, when the 'Rome II' regulation[12] comes into force throughout the Community (save for Denmark). The Rome II regulation seeks to achieve in the field of non-contractual obligations that which the Rome I regulation achieved in the field of contractual obligations, that is, a fully harmonised set of rules as to applicable law which will apply throughout the EU. The Rome II regulation was regarded by the Economic and Social Committee in its opinion on it as an important step in 'the development of a single European legal area'.[13]

The importance of these developments for antitrust practitioners is that Rome II sets out a new and free-standing set of rules as to competition law infringements, as distinct from other non-contractual wrongs. It is that topic which this article will consider, by first, introducing more fully the Rome II regulation, secondly, setting out the rules specific to competition law wrongs; and finally flagging up seven key issues for litigators involved in bringing private damages claims for competition law infringements.

The scheme of Rome II

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7 *Devenish* see n 4, above.

8 M Danov, 'Awarding exemplary (or punitive) antitrust damages in EC competition cases with an international element – the Rome II Regulation and the Commission's White Paper on Damages' [2008] ECLR 430, at p 432.

9 Commission *Staff Working Paper – Annex to the Green Paper – Damages actions for the Breach of EC Antitrust Rules*, Com(2005) 672 final, 19 December 2005, at para 265.

10 See, eg, generally the *Courage v Crehan* litigation.

11 Convention on the Law Applicable to Contractual Obligations, 19 June 1980 (80/934/EEC) (1980) OJ L 266/1.

12 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) (2007) OJ L 199/40.

13 Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II) (2004/C 241/01), at para 1.1.

The ambit of the Rome II regulation is wide: it applies expressly to all 'non-contractual obligations in civil and commercial matters'.[14] Subject to a number of specific exclusions which are for present purposes irrelevant,[15] this includes[16] all obligations arising from the familiar categories of 'tort/delict' and 'unjust enrichment', but also those arising from the more esoteric, for English lawyers at least, categories of 'negotiorum gestio'[17] and 'culpa in contrahendo'.[18] It governs the applicable law of such obligations both when they have already arisen and when they are 'likely to arise'.[19]

The general rule is expressed in Art 4(1), which provides that (emphasis added): '… the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs'. This general rule applies irrespective of the country or countries in which 'the event giving rise to the damage occurred' or in which 'the indirect consequences of that event occur'. It is also not limited to situations in which damage takes place within the EU. On the contrary, Art 4(1) is expressly of universal application.[20] If damage takes place in New York, therefore, then in principle New York law will apply.

The general 'country of damage' rule is subject, in Art 4 itself, to exceptions for the situations in which either: (a) both parties are habitually resident in the same country at the time when the damage occurs, in which case the law of that country applies;[21] and (b) where it is clear from all the circumstances of the case that the tort is 'manifestly more closely connected' with another country.[22]

The scope of the applicable law which is deemed to apply by the Rome II regulation is broad. While it is stated not to include matters of evidence and procedure, which are still a matter for the lex fori,[23] that does not apply insofar as the applicable law 'contains rules which raise presumptions of law or determine the burden of proof'.[24] English law evidential rules, such as

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14 Rome II, see n 12, above, Art 1(1).

15 Ibid, Art 1(2).

16 Ibid, Art 2(2).

17 Negotiorum gestio, although not formally recognised in English law, equates most closely to an agency of necessity. In the words of Lord Goff, 'The old Roman doctrine of negotiorum gestio presupposed ... a prolonged absence of the dominus from home as justifying intervention by the gestor to administer his affairs'. In *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1, at pp 74–75. The concept is recognised in Scots law, in which 'Negotiorum gestio arises where a person without any regular authority intervenes to manage the affairs of another who temporarily or permanently is unable to manage them himself and in circumstances where authority would have been given had the circumstances rendered it possible to apply for it': *Parker's Executors v Esso Petroleum Co Ltd* 1971 SLT (SCt) 28. See also s 126(4) of the Scotland Act 1998.

18 *Culpa in contrahendo*, also not recognised in English law, encompasses the liabilities which can arise in other systems of law (such as German and Italian law) for pre-contractual conduct. Its closest analogue in English law is the duty to disclose all relevant facts when concluding a contract *uberrimae fidei*, but it differs from that duty both because the wrong sounds in damages and because it does so whether or not a contract is subsequently concluded: *Agnew and Others v Länsforsäkringsbolagens AB* [2001] 1 AC 223, Lord Millett, at p 265.

19 Rome II, see n 12, above, Art 2(2).

20 Ibid, Art 3.

21 Ibid, Art 4(2).

22 Ibid, Art 4(3).

23 Ibid, Art 1(3).

24 Ibid, Art 22(1). The wording is familiar from Art 14 of Rome I.

res ipsa loquitur, would therefore appear to be required to be applied, regardless of forum, in proceedings concerning a tortious obligation which is, under the Rome II regulation, governed by English law.

Further, where Rome II operates so as to determine the applicable law, this expressly includes not merely matters of core substantive law such as 'the basis and extent of liability',[25] 'the grounds for exemption from liability'[26] and 'the existence, the nature and the assessment of damage or the remedy claimed',[27] but also more peripheral matters of substantive law such as 'liability for the acts of another person'[28] and even apparently procedural matters such as 'the measures which a court may take to prevent or terminate injury or damage', albeit that the last of those matters is expressed to apply only '… within the limits of powers conferred on the court by its procedural law'.[29]

In the particular context of the UK, Scotland must be treated as a distinct country for the purposes of identifying the applicable law, because it has different rules of law as to non-contractual obligations.[30] This will be relevant only where damage is suffered outside as well as inside the UK, however, as Rome II expressly does not apply so as to resolve conflicts solely between the laws of territorial units within a single Member State.[31]

Rules specific to competition law

Instead of applying the general rule expressed in Art 4 (see above) to competition law infringements, the Commission elected when drafting the Rome II regulation to include applicable law rules which are unique to obligations arising from 'acts of unfair competition' and 'acts restricting free competition'. These rules, which are contained in Art 6 of the regulation, 'may not be derogated from by an agreement',[32] and are accordingly mandatory.

Unfair competition

Articles 6(1) and 6(2) deal with 'unfair competition'. Those articles provide as follows:

> '1. The law applicable to a non-contractual obligation arising out of an act of unfair competition shall be the law of the country where competitive relations or the collective interests of consumers are, or are likely to be, affected.
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> 2. Where an act of unfair competition affects exclusively the interests of a specific competitor, Article 4 shall apply.'

It is not presently clear to which category of wrongs, at least in English law, the wording 'acts

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25 Ibid, Art 15(a).

26 Ibid, Art 15(b).

27 Ibid, Art 15(c).

28 Ibid, Art 15(g).

29 Ibid, Art 15(d).

30 Ibid, Art 25(1).

31 Ibid, Art 25(2).

32 Ibid, Art 6(4).

of unfair competition' is intended to refer. There is no tort of unfair competition in English law. A variety of economic torts, such as trade libel or unlawful interference in trade, concern, at least on some sets of facts, 'acts of unfair competition'. It would be unsatisfactory (and potentially contrary to the requirement of legal certainty), however, for the determination of the applicable law of such torts to depend on whether the conduct in question was viewed, presumably as a matter of autonomous Community law, as 'fair' or 'unfair'. There is certain to be case-law in this area.

Acts restricting free competition

The rules as to private law antitrust claims are contained in Art 6(3), which provides as follows (emphasis added):

> '3. (a) The 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.
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> (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 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 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.'

Before turning to analyse the impact of Art 6(3), it is necessary, since that Article expressly inter-relates with the rules as to jurisdiction, to remind oneself as to Regulation (EC) No 44/2001.[33] Under that regulation, a defendant to a competition law claim is, in general, entitled to be sued in the courts of the Member State in which he is domiciled.[34] That general rule is subject however to four important qualifications:

- First, where a claimant sues in tort, he may sue in 'the courts for the place where the harmful event occurred or may occur',[35] which in competition cases will often be his own Member State.[36]
- Secondly, where a claimant sues multiple defendants who are domiciled in different Member States, he may bring a single action in 'the courts for the place where any one of them is domiciled', provided that he can satisfy a threshold as to the degree of

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[33] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2001) OJ L 12/1 (the Jurisdiction Regulation).

[34] Ibid, Art 2(1).

[35] Ibid, Art 5(3).

[36] *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm), [2003] 2 All ER (Comm) 683, §10, but cf *Scandisk Corp v Philips* [2007] FSR 22.

connection between the claims.[37]

- Thirdly, where the parties have entered into an agreement to confer jurisdiction on the courts of a particular Member State, that court will have exclusive jurisdiction unless the parties have otherwise provided.[38]
- Fourthly, where two group companies (company A and company B) are part of a single undertaking for the purposes of Community law, and where company A is party to an infringing agreement with another undertaking (company C), then a claimant may sue in the courts of the Member State in which company B is resident, because as part of a single undertaking, company B is infringing competition law as well as company A.[39]

Assuming for a moment: (a) that there is no jurisdiction clause; (b) that there is only one defendant; and (c) that that defendant is not part of a cross-border group of companies, then the correct application of Art 6(3) of Rome II (set out above) would appear to be as follows:

- If the market which 'is, or is likely to be, affected' by a restriction of competition is contained *entirely within* a single Member State, then under Art 6(3)(a) of Rome II, the applicable law *must* be the law of that Member State, regardless of whether the claimant sues in that Member State[40] or in the Member State in which the defendant has his domicile (if different).[41]
- If the market which is or is likely to be affected by a restriction of competition stretches across *more than* a single Member State, then the applicable law would appear to be that of *any* of those Member States in which 'the market is, or is likely to be, affected'.[42] Article 6(3)(b) provides no assistance as to how this choice is to be made, save for where the claimant has chosen to sue in the defendant's Member State.[43] In that situation, the claimant may elect under Art 6(3)(b) of Rome II for the law of that Member State, but *only* if the market in that Member State is 'amongst those directly and substantially affected by the restriction of competition'.

On the face of it, this scheme lacks coherence. If the basic test for applicable law is, under Article 6(3)(a), whether 'the market is, or is likely to be, affected', there is no obvious reason for the additional requirement, under Article 6(3)(b), where a defendant is being sued in the courts of the Member State in which he is domiciled, that the market in that state should be '…directly and substantially' affected before the claimant can elect to sue under that law. Unless there is a very considerable lacuna in Art 6(3), the claimant would already have had that choice, because the market in that state would inevitably have been one which 'is, or is likely to be, affected'. The 'directly and substantially' wording has the effect of *raising* the threshold for an election as to applicable law, but *only* in the case where a defendant is being

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37 That threshold being that '… 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': Jurisdiction Regulation, see n 33, above, Art 6(1).

38 Ibid, above, Art 23.

39 *Provimi* see n 36, above, at §31.

40 Jurisdiction Regulation, see n 33, above, Art 5(3).

41 Ibid, Art 2(1).

42 Ibid, Art 6(3)(b).

43 Ibid, Art 2(1).

sued in the Member State in which he has his domicile, and *only* if the claimant wants to choose the law of that state.

To illustrate the problem, suppose that a competition law infringement affects a market stretching across three Member States, being the claimant's home state (State A), the defendant's home state (State B), and a third state (State C). Assuming that the claimant can establish jurisdiction to sue in State A and does so, he would appear to be entitled under Article 6(3)(a) to elect between the law of any of States A, B and C, because the markets in those countries all are, or are likely to be, affected. If, however, the claimant follows the general scheme of the Jurisdiction Regulation and instead sues in State B, he will not be able to choose the law of that state unless he can show under Article 6(3)(b) not only that the market in that country 'is, or is likely to be, affected' but also that the same market is (ie not is likely to be) affected 'directly and substantially'. The reasons lying behind the imposition of this additional test are obscure.

Even in the simplified scenario of no jurisdiction clause and a single defendant therefore, the permutations are many and complex. Where, as in the majority of substantial cartel cases, there are multiple defendants in different countries, often members of the same group, and possibly arbitration clauses, the issues arising from Art 6(3) will become even more complex.

Seven issues for litigators

Against that background, there are at least seven key issues which arise from Rome II for litigators in competition law claims. It is not within the purview of this article to give full treatment to each of those issues; the aim is rather to highlight them and to provoke further debate.

(i) When does Rome II bite? – retrospectivity issues

Rome II will come into force on 11 January 2009.[44] From that date forwards, it will apply to all 'events giving rise to damage which occur' from 11 January 2009.[45] The use of the plural verb 'occur', at least in the English translation, suggests that Rome II will only apply to 'events' taking place after that date, rather than 'damage'. It has been suggested,[46] however, that other translations indicate that it is the 'damage' which must occur after 11 January 2009 in order for Rome II to apply. If so, there will be obvious scope for arguments that Rome II applies so as to govern proceedings in respect of, for instance, anti-competitive agreements entered into long ago but which have given rise to damage after 11 January 2009. A reference to the ECJ on this topic is unlikely to come from the UK, however, where the courts will be likely to apply the clear wording of the English translation absent compelling arguments to the contrary.

(ii) Who does Rome II allow me to sue? – agency/attribution principles

The determination of the applicable law under Rome II expressly includes rules as to 'liability

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44 Rome II, see n 12, above, Art 32.

45 Ibid, Art 31.

46 T Petch, 'The Rome II Regulation: an update: Part 2' [2006] JIBLR 509, at pp 517–8.

for the acts of another person'.[47] Issues of vicarious liability, liability for an agent, and possibly even corporate personality, all of which are expressly outside the scope of Rome I,[48] would all therefore appear to be within the scope of Rome II. Oddly, this would mean that if the applicable law of a competition law infringement were other than English law, it could not be guaranteed that the *Provimi* 'single undertaking' reasoning (see above) would apply, even though that reasoning was itself based upon Community law principles. A claimant would instead be compelled to rely on any equivalent case-law under the law of the Member State whose law governed the infringement.

(iii) When can I sue? – limitation issues

The determination of the applicable law under Rome II also expressly includes rules as to limitation of actions.[49] As noted above, limitation periods in respect of competition law infringements currently vary between Member States from 1 year to 30 years. In the case of a competition law infringement which happened some time ago, therefore, there will be powerful incentives for claimants to identify the market of a Member State with a long limitation period as being one of the markets which 'is, or is likely to be, affected', so as to ensure that any claim is filed in time.

(iv) Which cause of action? – contract vs tort

Rome II applies only to non-contractual obligations. As discussed above, it is possible to frame a competition law claim, especially one under Art 81 EC and/or its domestic analogues, as a contractual claim, seeking for instance a declaration that a particular contract is unenforceable by reason of Art 81(2) EC. In such claims, applicable law will remain to be determined not by Rome II but rather by Rome I.

(v) What relief is available? – remedies

The scope of the applicable law under Rome II includes 'the existence, the nature and the assessment of damage or the remedy claimed'.[50] The remedies available are therefore entirely a matter for the lex causae, not the lex fori.

In theory, therefore, that could lead to, say, a French court having to award exemplary damages where an infringement was governed by English law. In order to circumvent some of the public policy problems such a scenario might have entailed, the Rome II regulation allows a court to refuse to apply a provision of applicable foreign law if that provision is 'manifestly incompatible with the public policy (ordre public) of the forum'.[51] Where exemplary or punitive damages are sought therefore, even if the applicable law permits such damages, claimants will need to study carefully the public policy of the forum in which it is proposed to bring the claim.

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47 Rome II, see n 12, above, Art 15(g).

48 Rome I, see n 11, above, Art 2.

49 Rome II, see n 12, above, Art 15(h).

50 Ibid, Art 15(c).

51 Ibid, Art 26, Recital 32. This wording is familiar from Art 16 of Rome I.

It is relevant also to note that while voluntary trusts are excluded from the ambit of Rome II,[52] involuntary trusts (eg constructive trusts) are not so excluded. In a case therefore where it is arguable under English law that a competition law infringement gives rise to a constructive trust, or in the event that English law takes a more expansive approach to the remedial constructive trust in the near future, it may be possible to obtain such remedies in a foreign court regardless of whether the concept of a trust is recognised by the lex fori.

(vi) How to run the case? – proof of foreign law

As set out above, the applicable law rules under Art 6 of Rome II are non-derogable, even by express agreement between the parties.[53] It will not be possible therefore for the parties to agree to treat a case as if, for example, English law were applicable. Instead, if a claimant fails to prove the foreign law which governs the obligation in question, his claim will be liable to be dismissed.

(vii) How can litigation be avoided? – settlement

The scope of the applicable law under Rome II includes rules as to 'the manner in which an obligation may be extinguished'.[54] It thus applies so as to govern the settlement of any case or cause of action. Before settling a cross-border competition case, therefore, it is arguable that in order to ensure that a properly binding settlement is reached, advisers will have to satisfy themselves that the mode of settlement chosen complies not only with the law of the forum in which the claim has been brought or threatened, but also the law of every Member State in which the market 'is, or is likely to be, affected'.

Conclusion

It is apparent, even from such an attenuated description of the issues raised by Rome II for antitrust practitioners, that its advent in January 2009 will have profound implications for private enforcement of competition law. The issue most in need of immediate clarification is the apparent inconsistency in the operation of Art 6(3), which is described above.

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52 Ibid, Art 1(2)(e).

53 Ibid, Art 6(4).

54 Ibid, Art 15(h).