Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 11 December 2014[1]

Case C-352/13

Cartel Damage Claims (CDC) Hydrogen Peroxide SA
v
Evonik Degussa GmbH,
Akzo Nobel NV,
Solvay SA,
Kemira Oyj,
Arkema France SA,
FMC Foret SA,
Chemoxal SA,
Edison SpA

(Request for a preliminary ruling from the Landgericht Dortmund (Germany))

(Judicial cooperation in civil and commercial matters — Regulation (EC) No 44/2001 — Special jurisdiction — Action for disclosure and damages against companies domiciled in different Member States and having participated in various places and at various times in a cartel agreement declared contrary to Article 81 EC (Article 101 TFEU) and Article 53 of the EEA Agreement — Article 6(1) — Jurisdiction in the case of multiple defendants — Risk of irreconcilable judgments — Withdrawal of the action against the only defendant domiciled in the Member State of the court seised — Maintenance of jurisdiction — Abuse of rights — Article 5(3) — Jurisdiction in matters relating to tort or delict — Definition of 'the place where the harmful event occurred' — Possible jurisdiction in respect of all co-defendants and for all damages claimed on the basis of every place in the territory of the Member States in which the unlawful agreement was entered into and put into effect — Article 23 — Clauses conferring jurisdiction — Arbitration agreements — Effect of the principle of the full effectiveness of the prohibition of agreements, decisions and concerted practices laid down in Union law)

I – **Introduction**

1. The reference for a preliminary ruling from the Landgericht Dortmund (Regional Court, Dortmund, Germany) concerns the interpretation of Articles 5(3) and 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[2] (the 'Brussels I Regulation') and, which is unusual, the interplay between those provisions and the guiding principles of European Union ('EU') competition law relating to Article 101 TFEU.

1 — Original language: French.

2 — OJ 2001 L 12, p. 1. This regulation is due to be replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), the majority of whose provisions will enter into force on 10 January 2015.

2. This request was made in the context of an action for disclosure and damages brought before the German court, by an applicant domiciled in Belgium, against several companies domiciled in various Member States — only one in Germany — which had participated in an infringement declared by a decision of the European Commission to be in breach of the prohibition of agreements, decisions and concerted practices in Article 81 EC (now Article 101 TFEU) and Article 53 of the Agreement on the European Economic Area of 2 May 1992. [3]

3. The parties disagreeing as to the international jurisdiction of the referring court, the latter seeks the Court's interpretation on three main points.

4. In the first place, the referring court questions the applicability, in a dispute such as that before it, of Article 6(1) of the Brussels I Regulation, which authorises an extension of the jurisdiction of the court seised so that it may also deliver judgments in actions relating to defendants other than the defendant domiciled within its jurisdiction, in order to avoid irreconcilable judgments. In addition, those issues are raised in the particular case in which, as here, the applicant has withdrawn its action against the sole co-defendant domiciled in the Member State of the court seised, which can be regarded as the 'anchor defendant' in that it alone can provide grounds for the court's jurisdiction.

5. In the second place, in terms of jurisdiction in matters of tort or delict falling within Article 5(3) of the Brussels I Regulation, the Court has been asked whether the 'place where the harmful event occurred' within the meaning of that provision must be interpreted as allowing that jurisdiction to apply with respect to all the defendants in respect of all the alleged damage, in every one of the numerous places in the Member States in which the unlawful cartel agreement was entered into and/or put into effect and in which, according to the applicant, purchasers' freedom of choice was thereby restricted.

6. In the third place, the referring court appears to start from the premise that some of the clauses conferring jurisdiction, which may fall under Article 23 of the Brussels I Regulation and/or the arbitration agreements invoked by the defendants in the main proceedings, cover the claims for damages made in this case. The referring court has asked the Court to state whether, in the case in point, the principle of effective implementation of the prohibition of agreements, decisions and concerted practices set out in Article 101 TFEU can preclude those clauses being invoked against the claimant for damages when the action has been brought before one of the courts having jurisdiction under Article 5(3) and/or Article 6(1) of the Brussels I Regulation.

7. I would emphasise that this case is the first in which the Court has been asked to adjudicate directly on the interaction between, on the one hand, provisions of primary law guaranteeing freedom of competition within the European Union and, on the other, provisions of EU private international law relating to jurisdiction in civil and commercial matters, in a dispute characterised by a far-reaching cartel agreement which has myriad participants and injured parties and has distorted competition throughout the internal market.

8. First of all, I must point out that it appears to me that the Brussels I Regulation, the aim of which is to create a system of rules of jurisdiction for the Union in respect of cross-border disputes in civil and commercial matters, is not fully geared towards ensuring effective private implementation of the Union's competition law (or 'private enforcement', as it is usually called in this field) [4] in circumstances such as those in this case.

3 — OJ 1994 L 1, p. 3, the 'EEA Agreement'. Given that the wording of Article 53 of the EEA Agreement is, in essence, the same as that of Article 81 EC and Article 101 TFEU, any observations in this Opinion relating to the latter provisions will apply *mutatis mutandis* to the former.

4 — As opposed to the implementation of those provisions in the public sphere ('public enforcement'), which is guaranteed by the Commission and the national competition authorities.

9. The application of certain provisions of that regulation is likely to lead to a territorial division of jurisdiction between the courts of the Member States which might, on the one hand, be inadequate from the point of view of the geographical scope of EU competition law or, on the other hand, make it more difficult for persons adversely affected by unlawful restrictions of competition to seek and obtain full reparation for the damage that they have suffered. It seems to me, therefore, possible that the authors of such restrictions could use those provisions of international private law to bring about a situation in which the civil-law consequences of a single, serious infringement of Union competition rules are to be determined in the context of a series of actions scattered across the various Member States.

10. The general conclusion that I shall draw from this request for interpretation is that, *de lege ferenda*, because of the particular repercussions which cross-border anti-competitive practices are likely to have in terms of judicial cooperation in civil matters, especially when they are complex, as they are in the main proceedings, it would be advisable for the EU legislature to envisage incorporating in the Brussels I Regulation a rule of jurisdiction apt to cover such practices,[5] on the lines of the conflict-of-laws provision which applies specifically to obligations deriving from acts restrictive of competition under the regulation usually known as 'Rome II'.[6]

II – **Legal context**

11. Recitals 11, 12, 14 and 15 in the preamble to the Brussels I Regulation state:

'11. The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

12. In addition to the defendant's domicile, there should be alternative grounds of jurisdiction based on a close link between the court and the action or in order to facilitate the sound administration of justice.

…

14. The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.

15. In the interests of the harmonious administration of justice it is necessary to minimise the possibility of concurrent proceedings and to ensure that irreconcilable judgments will not be given in two Member States. …'

12. Article 1(2)(d) of the Brussels I Regulation excludes arbitration from the scope of the regulation.

5 — The adoption of specific jurisdiction rules for collective actions in the case of infringement of Union competition laws had been identified as a significant problem in the Green Paper on the Review of the Brussels I Regulation (COM(2009) 175 final, point 8.2 *in fine*), but was not actioned in Regulation No 1215/2012, which concluded that review.

6 — See Article 6(3) of 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') (OJ 2007 L 199, p. 40), which governs only the facts giving rise to damage occurring after 11 January 2009, (judgment in *Homawoo* v *GMF Assurances SA*, C-412/10, EU:C:2011:747). Pursuant to recital 21 in the preamble to that regulation, '[t]he special rule in Article 6 is not an exception to the general rule in Article 4(1), [that "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"], but rather a clarification of it'.

13. Chapter II of the regulation lays down a series of rules concerning jurisdiction in civil and commercial matters. Article 2(1) of the regulation lays down the principle that '[s]ubject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State'.

14. Article 5(3) of that regulation, which is part of Section 2 of Chapter II, entitled 'Special jurisdiction', provides that 'a person domiciled in a Member State may, in another Member State, 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'.

15. Article 6(1) in that Section adds that '[a] person domiciled in a Member State may also be sued … where he is one of a number of defendants, in the courts for the place where any one of them is domiciled, 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'.

16. Article 23(1) and (5), in Section 7 of that Chapter, entitled 'Prorogation of jurisdiction', is worded as follows:

'1. If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. …

…

5. Agreements conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 13, 17 or 21, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 22.'

III – **Main proceedings, questions referred for a preliminary ruling and procedure before the Court**

17. The action in the main proceedings is based on a decision of 3 May 2006[7] in which the Commission decided that several companies supplying hydrogen peroxide and/or sodium perborate[8] had participated in a single and continuous infringement of the prohibition of agreements, decisions and concerted practices laid down in Article 81 EC (Article 101 TFEU) and Article 53 of the EEA Agreement, for which reason some of those companies were ordered to pay fines.[9]

18. That decision indicated that the period of infringement taken into account lasted from 31 January 1994 until 31 December 2000 and covered the whole territory of the European Economic Area (EEA). In the main, the cartel agreement in question had involved exchanges of information between competitors concerning prices and sales volumes, pricing agreements and production capacity

7 — Commission Decision C(2006) 1766 final relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa AG, Edison SpA, FMC Corporation, FMC Foret S.A., Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA (Case COMP/F/38.620 — Hydrogen Peroxide and Perborate) (OJ 2006 L 353, p. 54).

8 — Hydrogen peroxide is used as, inter alia, a bleaching agent in the paper and textile industries, for disinfection and for treating waste water. Sodium perborate is mainly used as an active ingredient in synthetic detergents and washing powders (ibid., points 2, 3 and 4).

9 — A summary of the fines imposed and the actions against them brought before the General Court of the European Union and the Court are set out in Press Release No 154/13 of 5 December 2013, which can be found at: the following Internet address: http://curia.europa.eu/jcms/upload/docs/application/pdf/2013-12/cp130154fr.pdf.

reductions, and monitoring of the implementation of anti-competitive agreements. The referring court stressed that those concerted practices took place in the context of meetings and telephone calls which were held principally in Belgium, France and Germany and that the authors of the infringement had participated in different ways but knew that their secret actions to restrict competition were unlawful.

19. Cartel Damage Claims (CDC) Hydrogen Peroxide SA ('CDC') is a company established in Belgium, whose object is to uphold rights to damages transferred to it, directly or indirectly, by some of the undertakings allegedly harmed in connection with that infringement. [10]

20. By application of 16 March 2009, CDC brought a joint action for damages before the Landgericht, Dortmund, against six of the companies fined by the Commission, which were established in various Member States, but only one of them, namely: Evonik Degussa GmbH ('Evonik Degussa'), which has its registered office in Essen (Germany), [11] in the state of the court seised.

21. In September 2009, following notification of the action to all the defendants in the main proceedings but before the expiry of the period prescribed for lodging statements in defence and the opening of the oral procedure, CDC withdrew its action against the German company, as the result of an out-of-court settlement. At the end of 2009, the remaining defendants in the proceedings joined Evonik Degussa and two other companies affected by the Commission decision to the proceedings. [12]

22. CDC submitted that, from 1994 to 2006, the assignor undertakings had purchased, from suppliers having participated in the unlawful cartel, considerable quantities of hydrogen peroxide that were supplied on the basis of contracts to various Member States of the Union and the EEA.

23. The defendants in the main proceedings, pleading that some of those supply contracts contained arbitration and jurisdiction clauses, all raised the objection that the court lacked international jurisdiction.

24. The Landgericht, Dortmund, held that it could have jurisdiction only on the basis of Articles 6(1) and 5(3) of the Brussels I Regulation, unless such jurisdiction was not validly excluded in accordance with a jurisdiction clause under Article 23 of that regulation, or by an arbitration agreement. Accordingly, in a decision lodged on 26 June 2013, it stayed the proceedings and referred the following questions to the Court for a preliminary ruling:

'1

(a) Is Article 6(1) of the [Brussels I] Regulation to be interpreted as meaning that, in the case of an action in which a defendant domiciled in the same State as the court and other defendants domiciled in other Member States of the European Union are together the subject of an application for disclosure and damages on account of a single and continuous infringement of Article 81 EC/Article 101 TFEU and Article 53 of the EEA Agreement which has been established by the European Commission and committed in several Member States and in which the defendants have participated in different places and at different times, it is expedient to hear and determine those claims together to avoid the risk of irreconcilable judgments resulting from separate proceedings?

10 — The order for reference mentions that CDC concluded agreements transferring claims for damages with 32 companies established in 13 different European states, some of which had previously concluded such agreements with 39 other undertakings.

11 — The defendants were Akzo Nobel NV ('Akzo Nobel'), established in the Netherlands, Solvay SA ('Solvay'), established in Belgium, Kemira Oyj ('Kemira'), established in Finland, Arkema France SA ('Arkema France'), established in France (against which CDC later withdrew its claim), FMC Foret SA ('FMC Foret'), established in Spain, and Evonik Degussa, the only one established in Germany (initially a defendant and later an intervening party in support of Akzo Nobel, Kemira and Arkema France).

12 — Chemoxal SA, a party intervening in support of Solvay and FMC Foret, is established in France, whereas Edison SpA ('Edison'), a party intervening in support of Akzo Nobel, Kemira, Arkema France and FMC Foret, is established in Italy.

(b) Is it significant in this regard if the action against the defendant domiciled in the same State as the court is withdrawn after having been served on all the defendants, before the expiry of the periods prescribed by the court for lodging a defence and before the start of the first hearing?

2. Is Article 5(3) of the [Brussels I] Regulation to be interpreted as meaning that, in the case of an action for disclosure and damages brought against defendants domiciled in various Member States of the European Union on account of a single and continuous infringement of Article 81 EC/Article 101 TFEU and Article 53 of the EEA Agreement, which has been established by the European Commission and committed in several Member States and in which the defendants have participated in different places and at different times, the harmful event occurred, in relation to each defendant and in relation to all heads of damage claimed or the overall loss, in those Member States in which cartel agreements were concluded and implemented?

3. In the case of actions for damages for infringement of the prohibition of agreements, decisions and concerted practices contained in Article 81 EC/Article 101 TFEU and Article 53 of the EEA Agreement, does the requirement of effective enforcement of the prohibition of agreements, decisions and concerted practices laid down in EU law allow account to be taken of arbitration and jurisdiction clauses contained in contracts for the supply of goods, where this has the effect of excluding the jurisdiction of a court with international jurisdiction under Article 5(3) and/or Article 6(1) of the [Brussels I] Regulation in relation to all the defendants and/or all or some of the claims brought?'

25. Written observations were lodged by CDC, by Evonik Degussa solely in relation to subparagraph (b) of the first question, by Akzo Nobel, Solvay, Kemira, FMC Foret and Edison, by the French Government solely in relating to the third question, and by the Commission. By letter of 26 August 2013, the referring court informed the Court that CDC had withdrawn its action against Arkema France. No hearing was held.

IV – **Analysis**

A – *Preliminary remarks*

26. In the first place, as regards the general issues arising in this case, I wish to emphasise that the Brussels I Regulation is not, in itself, intended to give effect to the rules of EU competition law. According to, inter alia, recitals 1, 2 and 6 in the preamble, the purpose of that regulation is to promote 'the sound operation of the internal market' and to ensure 'the free movement of judgments in civil and commercial matters' by creating a unified framework for disputes in that field concerning both the allocation of jurisdiction between the courts of the Member States and the recognition and enforcement of the judgments delivered by those courts.

27. However, I consider that the interpretation and application of the Brussels I Regulation must make it possible to preserve the full effectiveness of provisions of EU competition law, which are vitally important for the internal market and constitute a fundamental element of the EU economic constitution [13] because, as the Court has already stressed, Article 85 of the EC Treaty, now Article 101 TFEU, is a 'fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community, and, in particular, for the functioning of the internal market'. [14] Furthermore, the

13 — Regarding this concept see, inter alia, Mestmäcker, E.-J., *Wirtschaft und Verfassung in der Europäischen Union: Beiträge zu Recht, Theorie und Politik der europäischen Integration*, Nomos, Baden-Baden, 2nd edition 2006, particularly pp. 30-39 and pp. 116-132; Christodoulidis, E., 'A default Constitutionalism? A Disquieting Note on Europe's Many Constitutions' in *The Many Constitutions of Europe*, Tuori, K., and Sankari, S., (eds.), Ashgate, Edinburgh Centre for Law and Society series, 2010, p. 31 et seq., particularly pp. 34-38.

14 — See judgment in *Eco Swiss* (C-126/97, EU:C:1999:269, paragraph 36).

procedural rules of EU law must, to a certain extent, serve the substantive rules of EU law, in the sense that the former are an instrument which enables the rights and obligations of private and public persons to be made tangible, particularly in terms of the right to an effective remedy and to a fair trial, as affirmed in Article 47 of the Charter of Fundamental Rights of the European Union. [15]

28. In this connection, it must be held, first, that the main proceedings concern the consequences which are liable to result, in civil law, from an offence consisting of a single continuous infringement of Article 101 TFEU committed by several companies established in the territory of different Member States, the numerous persons adversely affected by it also being established in different Member States.

29. The emergence of players on the judicial scene, such as the applicant in the main proceedings, whose aim it is to combine assets based on claims for damages resulting from infringements of EU competition law, [16] seems to me to show that, in the case of the more complex barriers to competition, it is not reasonable for the persons adversely affected themselves individually to sue those responsible for a barrier of that type. [17]

30. Next, I would point out that, compensation for persons injured by an agreement or practice prohibited by EU law is an entitlement, the essence of which is governed by that law, in accordance with the decisions in *Courage and Crehan* [18] and *Manfredi and Others* [19] concerning the interpretation of Article 81 EC (Article 101 TFEU). That applies both to the existence of that right and to its basic substantive scope, which includes, inter alia, the possibility for injured persons of receiving compensation not only for the actual loss (*damnum emergens*) but also for the loss of profit (*lucrum cessans*) occasioned by such an agreement or practice, together with interest. [20]

31. None the less, as the Court has pointed out, having regard to the current state of EU law, the rules for exercising that right to full compensation remain within the remit of the Member States, provided that the latter observe the principle of equivalence and the principle of effectiveness laid down in that case-law. [21] This retention of legislative competence for the national legislatures in this sphere applies in particular to procedural rules, but no longer holds true for the rules on conflict of laws, because the 'law applicable to a non-contractual obligation arising out of a restriction of competition' must in future be determined by the Rome II Regulation. [22]

15 — The judgment delivered in *Otis and Others* (C-199/11, EU:C:2012:684, paragraph 46) in connection with a claim for damages based on loss caused to the Union by an agreement or practice, points out that the 'principle of effective judicial protection is a general principle of EU law, to which expression is now given by Article 47 of the Charter'.

16 — Regarding the fact that, in Germany, group actions are not permitted, unlike in the United Kingdom, but that actions may be brought by companies which, like CDC, have been established with the sole aim of bringing an action for damages on behalf of their members, see Derenne, J., 'Réparation du dommage concurrentiel dans le droit de l'Union européenne et des États membres', *Concurrences*, 2014, no 3, Colloque, pp. 76-78, paragraphs 120 and 122.

17 — In this field 'litigation concerning damages is not sufficiently developed' and 'the chances of a victim obtaining damages for harm caused by an anti-competitive practice vary significantly between the Member States' due to the 'great diversity of national provisions governing such actions' in the view of Calisti, D., in 'Quelles propositions de l'Union européenne pour une meilleure réparation des dommages concurrentiels?' *Concurrences*, 2014, no 3, pp. 27-31, paragraphs 6 and 7. Regarding the desirability of being able to consolidate the actions of several applicants against the same defendant, specifically in the case of cartel agreements, see also the Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the application of the Brussels I Regulation [COM(2009) 174 final, paragraph 3.5].

18 — C-453/99, EU:C:2001:465.

19 — C-295/04 to C-298/04, EU:C:2006:461.

20 — Ibid. (paragraph 95).

21 — 'In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction to hear actions for damages based on an infringement of the Community competition rules and to prescribe the detailed procedural rules governing those actions, provided that the provisions concerned are not less favourable than those governing actions for damages based on an infringement of national competition rules [*principle of equivalence*] and that those national provisions do not render impossible in practice or excessively difficult the exercise of the right to seek compensation for the harm caused by an agreement or practice prohibited under Article 81 [*principle of effectiveness*]' (ibid., paragraph 72).

22 — See Article 6(3) of that regulation and point 75 of this Opinion.

32. By analogy, the principle of effectiveness of actions for damages so laid down in relation to provisions of national law ought, in my view, *a fortiori* to guide the interpretation and application of the Brussels I Regulation, in that that regulation, being an instrument of secondary law adopted by the Union itself, must not be interpreted in such a way as to make it impossible in practice or excessively difficult in the context of an unlawful cross-border cartel agreement [23] to give effect to that prerogative, which is conferred on the basis of primary law.

33. In the second place, I would stress that it is undisputed, as far as the Court's case-law is concerned, that legal action which seeks, as in the present case, to obtain compensation from undertakings which have infringed Article 101 TFEU is 'civil and commercial in nature', within the meaning of Article 1(1) of the Brussels I Regulation. [24]

34. In the third place, it must be noted that, in so far as, in relations between Member States, the Brussels I Regulation replaced the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Brussels on 27 September 1968 [25] (the 'Brussels Convention'), the Court's interpretation of the provisions of the latter convention applies to the provisions of that regulation too, whenever the provisions of the two instruments may be regarded as equivalent. [26]

35. In the light of the Court's case-law, this equivalence appears to me to have been established for each of the provisions of the Brussels I Regulation referred to in this request for a preliminary ruling, namely: Articles 5(3), 6(1) and 23(1), given that the content of the corresponding provisions of the Brussels Convention, namely: Articles 5(3) and 6(1) and the first subparagraph of Article 17 of the latter, is at the very least similar in substance, if not identical. [27]

36. In the fourth place, I would point out that, in accordance with the objectives of the Brussels Convention, which are also those of the Brussels I Regulation, it is necessary, on the one hand, to avoid, as far as possible, multiplication of the bases of jurisdiction in relation to one and the same legal relationship and, on the other hand, to guarantee legal certainty for applicants and defendants alike through the ability to predict with certainty which court has jurisdiction, particularly by allowing the court seised to give a ruling regarding its own jurisdiction without having to examine the substance of the case. [28]

23 — It is settled law that secondary legislation must be interpreted and applied in accordance with primary legislation. See, inter alia, the judgment in *Spain* v *Commission* (C-135/93, EU:C:1995:201, paragraph 37), which reiterates that 'where the wording of secondary Community law is open to more than one interpretation, preference should be given to the interpretation which renders the provision consistent with the Treaty rather than the interpretation which leads to its being incompatible with the Treaty'. See also the judgment in *Commission* v *Strack Review* (C-579/12 RX-II, EU:C:2013:570, paragraph 40).

24 — See the judgment in *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319, paragraph 29) and the Opinion of Advocate General Kokott in the same case, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2046, point 48).

25 — OJ 1972 L 299, p. 32. Wording as amended by the successive conventions on the accession of new Member States to the Convention. See also the Report by Mr P. Jenard on the Brussels Convention (OJ 1979 C 59, p. 1, the 'Jenard Report') and also the report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Brussels Convention, and to the Protocol on its interpretation by the Court of Justice, signed in Luxembourg on 9 October 1978, produced by Professor P. Schlosser (OJ 1979 C 59, p. 71, the 'Schlosser Report').

26 — See, inter alia, the judgments in *OTP Bank* (C-519/12, EU:C:2013:674, paragraph 21) and *Brogsitter* (C-548/12, EU:C:2014:148, paragraph 19).

27 — See, inter alia, in relation to Article 5(3) of the Brussels I Regulation, the judgments in *Folien Fischer and Fofitec* (C-133/11, EU:C:2012:664, paragraphs 31 and 32) and *ÖFAB* (C-147/12, EU:C:2013:490, paragraphs 28 and 29); in relation to Article 6(1), *Freeport* (C-98/06, EU:C:2007:595, paragraph 39) and *Sapir and Others* (C-645/11, EU:C:2013:228, paragraphs 31 and 42); and, in relation to Article 23, *Refcomp* (C-543/10, EU:C:2013:62, paragraphs 18 and 19).

28 — See, inter alia, in connection with the Brussels Convention, the judgment in *Benincasa* (C-269/95, EU:C:1997:337, paragraphs 26 and 27) and, in connection with the Brussels I Regulation, the judgment in *Melzer* (C-228/11, EU:C:2013:305, paragraph 35).

37. Finally, it appear to me that civil actions for damages resulting from an infringement of competition law are for the most part considered to be a question of tort or delict,[29] although a contractual basis for such actions is not, however, precluded *a priori*, at least not in some national legal systems.[30]

38. I therefore intend to start my examination of the problems submitted for the Court's scrutiny with the second question referred, relating to Article 5(3) of the Brussels I Regulation, which makes provision for a special basis of jurisdiction for civil claims for damages based on tortious liability (B). I shall then examine the first question, relating to Article 6(1) of that regulation, which provides for extended jurisdiction in the case of connected claims brought against several defendants (C). Lastly, I shall examine the third question, which relates to those two provisions and to specific aspects of the choice of court, in relation to the principle of full effectiveness of the prohibition of agreements and concerted practices under EU law (D).

B – *Interpretation of Article 5(3) of the Brussels I Regulation (second question)*

39. In essence, the second question invites the Court to give a ruling on the ambit of Article 5(3) of the Brussels I Regulation and on the extent of the jurisdiction which could be derived from the special rule provided for in that provision (1). I consider, bearing in mind in particular the objectives of that provision, that the application of the latter is problematic and ought even to be precluded in circumstances such as those of the case in the main proceedings, whose special characteristics are undeniable (2).

1. The problem submitted to the Court

40. In the light of its order for reference, the referring court takes it for granted that the action for damages and disclosure pending before it is a 'matter relating to tort or delict' pursuant to Article 5(3) of the Brussels I Regulation and that its own jurisdiction can therefore be based on that provision. Such a classification of actions of this type has recently been accepted by the Court.[31]

41. Furthermore, that court rightly points out that settled case-law makes it clear that, in the case of complex tort or delict,[32] the expression 'place where the harmful event occurred',[33] used in Article 5(3), refers both to the *place of the causal event* giving rise to the alleged damage and to the *place where that damage occurred*, meaning that the applicant can elect to sue the defendants in the court for either of those two places.[34] It also points out that, when more than one harmful event is alleged, a court having jurisdiction on the basis of the latter connecting factor may, however, rule only on claims regarding harm caused in the territory of the State of the court seised.[35]

29 — Regarding the Court's position to this effect, see footnote 31 of this Opinion.

30 — In this connection, see Idot, L., 'La dimension international des actions en réparation. Choisir sa loi et son juge: Quelles possibilités?' *Concurrences*, 2014, no 3, pp. 43-53, in particular paragraph 5.

31 — In accordance with the judgment in *flyLAL-Lithuanian Airlines* (EU:C:2014:2319, paragraph 28), '[t]he action brought [by flyLAL] [in the main proceedings] seeks legal redress for damage relating to an alleged infringement of competition law. Thus, it comes within the law relating to tort, delict or quasi-delict'.

32 — Namely offences whose constituent elements, in other words the causal event and the harmful consequences to which it led, are separate and dispersed over the territory of several Member States.

33 — I would point out that, in this case, the second scenario envisaged by the provision in question, concerning the 'place where the harmful event … may occur', is not important because the applicant has invoked the consequences of tort or delict which have already occurred.

34 — See, inter alia, the judgments in *Hi Hotel HCF* (C-387/12, EU:C:2014:215, paragraph 27) and *Coty Germany* (C-360/12, EU:C:2014:1318, paragraph 46 and case-law cited).

35 — See, inter alia, the judgments in *Shevill and Others* (C-68/93, EU:C:1995:61, paragraph 27 et seq.) and *eDate advertising and Others* (C-509/09 and C-161/10, EU:C:2011:685, paragraph 51).

42. The referring court expresses doubts as to the way in which the alternative criteria so defined by the Court should be given effect in the proceedings before it, given that the contributions of the cartel members which led to an infringement of Article 101 TFEU and to the alleged damage have the particular feature of differing in both place and time. The court is uncertain, principally, whether Article 5(3) of the Brussels I Regulation permits an action to be brought in every 'place where the harmful event occurred', within the meaning of that provision, and against every member of the unlawful cartel, in respect of the overall damage caused by that cartel, even when some of the defendants were not directly involved in the territory of the Member State of the court seised.

43. CDC submits that the Court should reply to the effect that it ought to be possible, pursuant to that provision, for the overall damage suffered as a result of the cartel constituting the infringement to be pleaded before the courts of all the Member States in whose territory at least a part of that cartel agreement was concluded or given effect, or the market concerned was at least partially obstructed, directly and significantly, by that agreement. The Commission adopts a similar approach, but is more guarded concerning the extent of the jurisdiction of the courts that could validly be seised in this respect. [36] Those defendants in the main proceedings that have expressed a view on the second question submit either that the question is inadmissible [37] or, on the merits, that the court should not have overall jurisdiction with respect to all members of the unlawful cartel and for all the damages claimed. [38]

44. I would point out that, in the light of the Court's case-law relating to Article 5(3) of the Brussels I Regulation, there are several guiding principles that govern the interpretation of that provision. First, it is settled case-law that the concepts appearing in it are to be interpreted independently, without reference, therefore, to national legal concepts, regard being had primarily to the general scheme and objectives of the regulation, in order to ensure the uniform application of the latter in all the Member States. [39] Next, this provision being a special rule, in that it derogates from the principle of attributing jurisdiction to the courts of the defendant's domicile as laid down in Article 2 of that regulation, it must be interpreted restrictively, not broadly, [40] in order in particular to prevent the jurisdiction of the *forum actoris* becoming generalised [41] and to prevent the growth in the number of courts with jurisdiction encouraging 'forum shopping'.

45. Furthermore, it is essential to bear in mind that the Court has held, in accordance with the objective of linkage mentioned in recital 12 in the preamble to the Brussels I Regulation, that the rule governing jurisdiction in Article 5(3) is based on the existence of a *particularly close connecting factor* between the dispute and the courts for the place where the harmful event occurred. It is that connecting factor that justifies the exceptional attribution of jurisdiction to those courts for reasons

36 — The Commission suggests interpreting Article 5(3) of the Brussels I Regulation to the effect that, in circumstances such as those in the main proceedings, 'the applicant may bring an action for damages against each of the members of the cartel *either* in the courts of each Member State in which *collusive agreements* were *entered into and implemented (place of the causal event), or* before the courts of each Member State in whose territory the *market* was *affected* by the restriction of competition (*place of the result*); *the former* have jurisdiction to rule on the compensation for the *overall* damage caused by the infringement of the law governing cartels whereas the *latter* have jurisdiction to rule on the damage caused *in the State* of the court seised' (my italics).

37 — Kemira submits that this question for which the court seeks a preliminary ruling is inadmissible because, inter alia, it would not contribute towards showing that unlawful cartel agreements had been entered into or implemented within the jurisdiction of the court seised. In that connection, it will suffice to point out that the questions raised by the referring court in the factual and regulatory context which that court is responsible for defining, and the accuracy of which is not a matter for the Court, enjoy a presumption of relevance which can be overturned only in a limited number of circumstances (see, inter alia, the judgment in *Pohotovost'*, C-470/12, EU:C:2014:101, paragraph 27 et seq.), circumstances which, in my view, do not prevail in this case.

38 — In particular, according to FMC Foret, the courts of a Member State should have jurisdiction only to rule on claims based on the part of the unlawful cartel agreement which was entered into or which produced its effects in that State, whereas Solvay submits that a close link between the court seised and the dispute should be established, by way of a connecting factor for establishing jurisdiction, separately with respect to every defendant and for the overall damage alleged.

39 — See, inter alia, the judgments in *Réunion européenne and Others* (C-51/97, EU:C:1998:509, paragraph 15); *Melzer* (EU:C:2013:305, paragraphs 22 and 34 et seq.); *Weber* (C-438/12, EU:C:2014:212, paragraph 40); and *Coty Germany* (EU:C:2014:1318, paragraph 43).

40 — See, inter alia, the judgment in *Coty Germany* (EU:C:2014:1318, paragraphs 44 and 45).

41 — See, inter alia, the judgment in *Kronhofer* (C-168/02, EU:C:2004:364, paragraphs 14 and 20).

relating to the sound administration of justice and the efficacious conduct of proceedings.[42] Given that identification of one of the connecting factors recognised by the case-law cited[43] must make it possible to establish the jurisdiction of the court objectively best placed to determine whether the elements that constitute the liability of the person sued do in fact exist, it follows that only the court within whose jurisdiction the relevant connecting factor is situated may validly be seised.[44]

46. It is precisely that connection that could be wanting, in the view of the referring court, if in this case it were to be held that, under Article 5(3) of the Brussels I Regulation, any court situated in any one of the many places in which the cartel agreement was conceived, arranged and monitored and in which purchasers' freedom of choice was limited on the relevant market could have jurisdiction in respect of all the defendants sued and all the alleged damage.[45] I share its point of view for the following reasons.

2. Giving effect to the criteria governing the application of Article 5(3) of the Brussels I Regulation in a case such as that in the main proceedings

47. Although application of Article 5(3) of the Brussels I Regulation in the context of an action for damages relating to an infringement of Article 101 TFEU cannot be excluded *in principle*,[46] I am none the less inclined to the view that that provision cannot properly be applied in the *particular case* of a horizontal cartel, which has existed for a long time and has restricted competition throughout Union territory and whose structure is highly complex, since it has given rise to a series of agreements and collusive practices, with the result that both the participants in the cartel and the persons sustaining the alleged damage are scattered over a great many Member States.[47]

48. In circumstances such as those obtaining in this case, the criteria laid down in the case-law for determining 'the place where the harmful event occurred', within the meaning of that provision, are in my view ineffective, due to the considerable geographical dispersal of the causes and effects of the harm invoked. The two aspects of the alternative identified by the Court lead, in this case, to jurisdiction potentially being conferred on a multitude of courts in the Member States, whereas the regulation seeks to limit the number of concurrent proceedings,[48] and do not enable the identification of a court that has a 'particularly close link' with the dispute and is therefore the 'best placed' *ratione loci* to decide the case, whereas that is the basis of Article 5(3).

49. As regards the criterion relating to the place of the event giving rise to the alleged damage, this could theoretically refer to any place in which the unlawful cartel agreement was entered into by its members, a place which it could be difficult, if not impossible, to pinpoint in view of the secret nature of the cartel, unless the various places where the registered offices of the companies concerned are situated are taken into account. That criterion could also relate to all the places where the unlawful agreement was actually put into effect, in other words, every one of the places where the participants actually organised and applied the rules of their collusive agreements aimed at restricting competition,

42 — In matters relating to tort and delict, the courts for the place where the harmful event occurred are usually the most appropriate for deciding the case, in particular on grounds of proximity and ease of taking evidence (see, inter alia, the judgment in *Melzer*, EU:C:2013:305, paragraph 27.

43 — In footnote 34 of this Opinion.

44 — See, inter alia, the judgment in *Coty Germany* (EU:C:2014:1318, paragraphs 47 and 48).

45 — The referring court indicates that this problem arises '[e]ven assuming that liability is attributed to all the defendants, on the ground that the infringement at issue is a single and continuous infringement committed by a number of co-perpetrators contrary to Article 81 EC/Article 101 TFEU'.

46 — See the judgment in *LAL-Lithuanian Airlines* (EU:C:2014:2319, paragraph 28).

47 — On the other hand, Article 5(3) could, in my view, apply to vertical restrictions of competition — provided that the liability invoked is not of a contractual nature — and to cartel agreements whose scope is geographically limited, seeing that the geographical location of both the anti-competitive act and its effect can be clearly identified.

48 — See recital 15 in the preamble to the Brussels I Regulation.

through active anti-competitive practices or inaction.[49] In this connection, I consider, unlike the Commission, that *Melzer*,[50] which excluded the possibility of basing jurisdiction on the place where the harmful event was committed by a co-perpetrator who had not been sued, should lead to the impossibility of attributing the activities of a member of a cartel in the territory of a Member State to other perpetrators of the infringement who refrained from competing freely on the corresponding market in that territory.[51] At all events, in the context of a cartel of long duration at European level, such as that at issue in the main proceedings, these locating factors seem to me to be irrelevant in that they lead to over-generous, too diffuse and fortuitous grounds of jurisdiction,[52] given the large numbers of parties involved and of actions or omissions concerned and, hence, the multiplicity of places where the corresponding harmful facts occurred.[53]

50. With regard to the criterion relating to the place where the alleged damage occurred, it may be considered, from an economic point of view, that the damage occurred either in every one of the places where the persons allegedly adversely affected bought the products covered by the cartel agreement, in other words, the places of signature and/or performance of the contracts whose content was limited by the cartel — in this case the supply contracts between the defendants and the undertakings which transferred their rights to the applicant — or in every one of the places where those persons affected or their branches have their registered office. The persons indirectly injured, who were not contractually bound to a member of the cartel but who were nevertheless harmed by the existence of the latter,[54] ought also to be able to invoke the harm caused to them, within the limits laid down by the case-law of this Court.[55] It should, however, be recalled that the choice of jurisdiction available in the case of tort or delict is not to be interpreted in such a way as to allow a *forum actoris*, because the Brussels I Regulation tends to restrict the latter factor of jurisdiction in order to preserve the effectiveness of the general rule in Article 2.[56] Moreover, account could to advantage be taken of all the places where the market has been affected by the infringement of Article 101 TFEU, given that the purpose of the rules of competition law is to safeguard the proper functioning of economic activity, and not to protect the individual interests of a particular company.[57] In this case, the infringement on which the action for damages is based affects the territories of all the Member States of the Union, which means that a large number of courts could possibly have jurisdiction.[58] Such a broad approach conflicts with the objectives of the Brussels I Regulation,

49 — Regarding the various aspects of the practical implementation of the cartel in this case, see point 18 of this Opinion.

50 — EU:C:2013:305, paragraph 40.

51 — Negative action as a result of a cartel agreement is not equivalent to positive action, because abstention cannot as such be linked to a specific place (see, by analogy, the judgment in *Besix*, C-256/00, EU:C:2002:99, paragraph 49, where the disputed contractual obligation was an undertaking not to act which was not subject to any geographical limit).

52 — See Advocate General Cruz Villalón in his Opinion in *Hejduk* (C-441/13, EU:C:2014:2212, point 42), who pointed out that '[a] criterion which requires a plaintiff to circumscribe the scope of his action according to territorial criteria which are difficult, if not impossible, to determine, is not a criterion which reflects the spirit of the [Brussels I] Regulation'.

53 — In my view there should be a distinction between this situation and those, for example, of a classic cartel managed by a trade association or a cartel whose activity is geographically concentrated because of a single venue for meetings, given that in such situations there would not be an equivalent dispersal of damage-causing events.

54 — Thus, in the judgment in *Kone and Others* (C-557/12, EU:C:2014:1317, paragraph 30 et seq.), the Court held that 'a loss being suffered by the customer of an undertaking not party to a cartel, but benefiting from the economic conditions of umbrella pricing, because of an offer price higher than it would have been but for the existence of that cartel is one of the possible effects of the cartel, that the members thereof cannot disregard'.

55 — In the judgment in *Dumez France and Tracoba* (C-220/88, EU:C:1990:8, paragraph 20), the Court interpreted Article 5(3) of the Brussels Convention as meaning that the person indirectly adversely affected may bring an action, on that basis, only before the court of the place where the event giving rise to the damage directly produced its harmful effects on the person who is immediately adversely affected.

56 — It follows from the provisions of the Brussels I Regulation that the latter limits the cases in which a defendant may be sued before the court of the applicant's domicile (see, in relation to the Brussels Convention, the judgments in *Six Constructions*, 32/88, EU:C:1989:68, paragraphs 13 and 14, and *Dumez France and Tracoba*, EU:C:1990:8, paragraph 19).

57 — In this connection, recital 21 in the preamble to the Rome II Regulation indicates that '[t]he connection to the law of the country where competitive relations … are, or are likely to be affected, [which is laid down, in respect of acts restricting free competition, in Article 6 of that regulation] generally … protect[s] competitors, consumers and the general public and ensure[s] the proper functioning of the market economy'.

58 — Ashton, D., and Henry, D., *Competition Damages Action in the EU, Law and Practice*, Elgar Competition Law and Practice Series, Cheltenham, 2013, p. 179, point 7.030, emphasise that '[i]n the case of a pan-European cartel [the place where the claimant suffered loss] could conceivably be in any Member State, which leads to relatively unrestrained freedom to forum shop in proceedings relating to … abuses with effects felt throughout Europe'.

mentioned above, and particularly with those in Article 5(3) thereof. I would also add that the case-law in *Shevill and Others*[59] implies a point which it is, in my view, neither feasible nor desirable to alter, namely, that jurisdiction based on the place where the harmful event occurred is divided territorially, according to the borders of the Member States,[60] with the associated risk of an explosion of litigation because the court having jurisdiction by virtue of that criterion cannot cover all the multiple instances of damage pleaded.

51. Finally, I would stress that, if the Court were to hold that a multiplicity of courts had jurisdiction in this case under Article 5(3) of the Brussels I Regulation, the possibilities offered to citizens seeking legal redress on that basis would be very significantly opened up, whereas this is a choice of jurisdiction of a special nature, and must, therefore, in principle be interpreted strictly. In addition, there would then be a — far from hypothetical[61] — danger that the perpetrators of an infringement of EU competition law would be enabled to bring 'torpedo actions', in the form of actions for a negative declaration, in accordance with *Folien Fischer and Fofitec*,[62] in a Member State in which proceedings were known to be particularly drawn out, against persons who had been identified as injured parties in the administrative proceedings before the Commission. By contrast, once a Commission decision concerning the existence of an infringement has been given, it ought, in my opinion, no longer to be possible for an action for a negative declaration to be brought, by reason of the binding effect of the Commission decision as to the facts and their legal classification.[63]

52. In conclusion, by analogy with the Court's ruling in *Besix*,[64] I consider that the special jurisdiction rule in matters of tort, delict or quasi-delict, laid down in Article 5(3) of the Brussels I Regulation, is inoperative when, as in the case in the main proceedings, the place where the harmful event allegedly occurred cannot be determined, by virtue of the fact that the infringement of Article 101 TFEU on which the action is based consists of actions notable for the multiplicity of places where they were agreed and/or performed, with the result that it is not possible to determine clearly and usefully what court has a particularly close link with the dispute as a whole.

53. In my opinion, in such a case jurisdiction must be determined either by applying the general rule in Article 2(1) of the Brussels I Regulation or by applying other special jurisdiction rules specified in that regulation, such as the rule in Article 6(1), which allows actions brought against several defendants to be combined before a single court, provided that the conditions for applying one or other of those rules are satisfied in the case in point. In that connection, it must be pointed out that it is possible for account to be taken of the connection between actions against several defendants, as

59 — EU:C:1995:61, paragraph 33, which indicates that 'the courts of each Contracting State [to the Brussels Convention] in which the publication was distributed and where the victim claims to have suffered injury to his reputation, [have] jurisdiction to rule *solely* in respect of the *harm caused in the State of the court seised*' (my italics).

60 — The courts of each Member State are best placed to assess the nature and extent of the damage arising in national territory.

61 — See the specific example mentioned by Idot, L., in 'La dimension internationale des actions en réparation. Choisir sa loi et son juge: Quelles possibilités?', op. cit., paragraph 34.

62 — EU:C:2012:664.

63 — Pursuant to Article 16(1) of 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 [101 TFEU and 102 TFEU] (OJ 2003, L 1, p. 1), in order to guarantee '[u]niform application of Community competition law', '[w]hen national courts rule on agreements, decisions or practices under Article [101 TFEU] which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission'. The judgment in *Otis and Others* (EU:C:2012:684, paragraph 51), indicates that '[t]hat rule also applies when national courts are hearing an action for damages or loss sustained as a result of an agreement or practice which has been found by a decision of the Commission to infringe Article 101 TFEU'.

64 — EU:C:2002:99, paragraph 55. Under the terms of that judgment, 'the special jurisdictional rule in matters relating to a contract laid down in Article 5(1) of the Brussels Convention is not applicable where … the place of performance of the obligation in question *cannot be determined because it* consists in an undertaking not to do something which is not subject to any geographical limit and *is* therefore *characterised by a multiplicity of places* for its performance' (my italics).

a basis for establishing jurisdiction, only in the context of Article 6(1),[65] which provides for that possibility solely where there is the strong connecting link of the domicile of one of the defendants, but not in the context of a provision such as Article 5(3) of the Brussels I Regulation whose application depends on the place where an event occurred.

C – *Interpretation of Article 6(1) of the Brussels I Regulation (first question)*

54. By its first question, the referring court seeks to ascertain whether the rule on centralisation of jurisdiction in the case of several defendants, as provided for in Article 6(1) of the Brussels I Regulation, can apply in the case of an action against undertakings which have participated differently, in terms of place and time, in a single continuous infringement of the prohibition of agreements, decisions and concerted practices laid down in EU law (1). It then asks the Court to rule whether, in the case of an affirmative reply, the withdrawal of such an action with respect to the 'anchor defendant', in other words, the only one of the co-defendants to be domiciled in the Member State of the court seised, impinges on the jurisdiction of the latter under that provision (2).

1. The applicability of Article 6(1) of the Brussels I Regulation in a case such as that in the main proceedings [question 1(a)]

a) The problem raised before the Court

55. It must be emphasised that, as with Article 5(3) of the Brussels I Regulation,[66] the tenor of Article 6(1) of that regulation must be determined independently, so that the concepts appearing in it may not be interpreted as making a reference to the classification that the domestic law applicable gives to the legal relationship at issue before the court seised.[67]

56. In accordance with Article 6(1) of the Brussels I Regulation, all the claims on the part of a single applicant against a number of defendants may be brought before a court of a Member State in whose jurisdiction at least one of those defendants, who will be referred to here as the 'anchor defendant', is domiciled,[68] provided always that there is a connecting link between those heads of claim.[69] In this regard, the relevant provision expressly states that the claims must be 'so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings'.[70]

65 — A finding of a connecting factor can of course also be made in the context of Article 28 of the Brussels I Regulation, but in a different manner (see footnote 70 of this Opinion).

66 — See point 44 of this Opinion.

67 — See, starting from the Court's first judgment interpreting Article 6(1) of the Brussels Convention, the judgment in *Kalfelis* (189/87, EU:C:1988:459, paragraph 10), then later in relation to Article 6(1) of the Brussels I Regulation, inter alia, the judgment in *Reisch Montage* (C-103/05, EU:C:2006:471, paragraphs 27 to 30).

68 — Recital 11 in the preamble to the Brussels I Regulation states that '[t]he domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction' and Article 60(1) provides that, for the purpose of applying the regulation, a company or other legal person is domiciled at the place where it has its statutory seat, central administration, or principal place of business.

69 — As pointed out in the judgment in *Freeport* (EU:C:2007:595, paragraph 53), that condition did not figure in Article 6(1) of the Brussels Convention, but was inferred by the Court in the judgment in *Kalfelis* (EU:C:1988:459, paragraph 12) concerning the interpretation of that provision and was later adopted by the Union legislature, which introduced it into the wording of the Brussels I Regulation.

70 — The condition set out in Article 6(1) of the regulation is formulated in the same manner in Article 28, which defines the concept of connexity in the case of several courts potentially having jurisdiction, whereas Article 6(1), by contrast, provides for an extension of the jurisdiction of the court seised to cover defendants who would not normally fall under its jurisdiction. In the judgment in *Tatry* (C-406/92, EU:C:1994:400, paragraph 53), relating to Article 22 of the Brussels Convention, which equates to Article 28 of the Brussels I Regulation, the Court held that it is sufficient that there is 'a risk of conflicting decisions, even if the judgments can be separately enforced and their legal consequences are not mutually exclusive'.

57. By allowing actions to be centralised before a single court and by extending the jurisdiction of the latter to cover defendants vis-à-vis whom the court would not have been able to give a ruling failing that extension, Article 6(1) reflects the objectives of sound administration of justice, by eliminating unnecessary proceedings and preventing the concomitant risk of concurrent proceedings and conflicting decisions, as referred to in the Brussels I Regulation. [71]

58. However, because that rule of jurisdiction is of a special nature, in that it derogates from the principle of the court for the domicile of each defendant mentioned in recital 11 in the preamble to the Brussels I Regulation and set out in Article 2 thereof, it is settled case-law that it is to be interpreted strictly. [72]

59. Because the application of Article 6(1) must thus remain exceptional, the joining of cases for which it provides is permitted only if those cases do not refer to a single insured person, consumer or worker [73] and only if they relate solely to claims that, while distinct, are none the less closely connected.

60. It is to this latter condition that the first part of the first question in essence relates. It invites the Court to declare whether this connecting factor is to be found in the context of an action such as that before the referring court, namely, an action for disclosure and damages brought jointly and severally against the co-perpetrators of a cartel agreement declared to be in breach of EU law which participated in that cartel in different places and at different times.

61. Those interested parties that have lodged written observations on this matter have differing views, for CDC and the Commission consider that Article 6(1) of the Brussels I Regulation is applicable in this context, whereas the defendants in the main proceedings maintain the contrary. [74]

62. It follows from the Court's case-law concerning the connecting factor required by that provision that, in order for decisions to be regarded as 'irreconcilable', it is not sufficient that there be a divergence in the outcome of the dispute; it is necessary too that that divergence arise in the context of the same situation of fact and law. [75] The attempt to establish these two criteria in circumstances such as those in the main proceedings has led to contrasting observations being submitted to the Court.

71 — See the judgment in *Painer* (C-145/10, EU:C:2011:798, paragraph 77) relating to recitals 12 and 15 in the preamble to the Brussels I Regulation.

72 — See, inter alia, the judgments in *Glaxosmithkline and Laboratoires Glaxosmithkline* (C-462/06, EU:C:2008:299, paragraph 28) and *Painer* (EU:C:2011:798, paragraph 74).

73 — The judgment in *Glaxosmithkline and Laboratoires Glaxosmithkline* (EU:C:2008:299, paragraph 20 et seq.) excludes recourse to that provision where the rules on jurisdiction designed to protect a weak party, contained in Section 5 of Chapter II of the Brussels I Regulation, are applicable.

74 — Kemira submits that the first part of the first question is inadmissible on the grounds that the referring court may in no circumstances claim jurisdiction on the basis of Article 6(1) of the Brussels I Regulation, because only the Landgericht Essen (Regional Court Essen, Germany) has jurisdiction *ratione loci*, not the Landgericht, Dortmund, for the seat of the 'anchor defendant' is in Essen. It is true that that provision refers to the *court* for the place where any one of the defendants in the main proceedings *is domiciled*, and not to all *the courts* of a Member State, as does Article 2 of the regulation. Nevertheless, it is acceptable, in my view, for a domestic rule to operate a centralisation of jurisdiction *ratione materiae*, particularly in the competition field, as in the case of Article 89 of the Act on Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*, GWB) in Germany, provided that such a rule does not discriminate between cross-border disputes and domestic disputes and exclude the former from the jurisdiction of a court which would normally have jurisdiction both *ratione loci* and *ratione materiae*. (See, by analogy, my Opinion in *Sanders and Huber*, C-400/13 and C-408/13, EU:C:2014:2171, paragraph 58 et seq., footnote 72.)

75 — Judgment in *Sapir and Others* (EU:C:2013:228, paragraph 43 and case-law cited).

b) Existence of the same factual situation

63. In the view of the defendants in the main proceedings, the claims relied upon in the application in those proceedings do not satisfy the criterion of a situation that is identical *de facto*, on the grounds that it is irrelevant whether the members of the unlawful cartel all participated in the agreements setting up the cartel, because only the implementation of those agreements could actually have caused damage to the purchasers which transferred their rights to CDC, and that it is necessary for every claim made by the applicant on that basis to be examined separately.

64. In this connection, I am of the opposite view, put forward by the referring court, CDC and the Commission, to the effect that claims such as those made against the various defendants in the main proceedings relate to a single situation of fact, even though the defendants participated in different ways, in different places and at different times, according to the referring court, in the performance of the agreement in question and in the conclusion and performance of the various contracts distorted by that agreement that allegedly harmed the undertakings having transferred their rights to the applicant in the main proceedings.

65. As the referring court points out, the Commission decision on which the claims are based found, in terms binding on the courts of the Member States,[76] that a *single and continuous infringement* of Article 81 EC (Article 101 TFEU) and Article 53 of the EEA Agreement had been committed by the companies sued by CDC and that the conduct in which the other co-participants had engaged could be attributed to every participant as a co-offender, irrespective of its own individual contribution.[77] It adds, quite correctly in my view, that the conduct established in the administrative fine proceedings renders every author of the infringement liable for damages, in civil law, for the tortious conduct of the co-authors and, therefore, for any loss or harm liable to result from that conduct.

c) Existence of the same situation in law

66. The Court has already ruled, in the light of the wording of Article 6(1) of the Brussels I Regulation, that a difference in the legal bases of actions brought against different defendants is not in itself an obstacle to the application of that provision, always provided, however, that the defendants could foresee that they risked being sued in the Member State where at least one of them had its domicile.[78]

67. In this case, the participants in a cartel agreement, established in a single Commission decision and constituting *a single infringement* of *EU* competition law, not committed at the level of various domestic legal orders, find themselves in the same legal situation, in other words, they are confronted with an obligation to pay compensation under EU law derived from the Court's consistent case-law. Thus, they could reasonably expect subsequently to be sued together for compensation before the court for the place where one of them was domiciled. In such circumstances, the principle of the predictability of jurisdiction, laid down by the Court in accordance with the objective expressed in recital 11 in the preamble to the Brussels I Regulation, has therefore been observed.

76 — In this regard, see footnote 63 to this Opinion.

77 — The court refers in this connection to Commission Decision C(2006) 1766 final, paragraphs 31 and 324-327.

78 — See, inter alia, the judgments in *Sapir and Others* (EU:C:2013:228, paragraph 44) and *Painer* (EU:C:2011:798, paragraph 84).

68. Moreover, it is worth emphasising that in *Kalfelis*, which introduced the requirement of a connecting link between actions which could be joined under that provision, the Court referred to the Jenard Report, according to which '[i]n order for this rule [laid down in Article 6(1) of the Brussels Convention] to be applicable, there must be a connection between the claims made against each of the defendants, as *for example* in the case of *joint debtors*'.[79] This is precisely the situation in the dispute in the main proceedings according to the referring court, despite the fact that that classification as jointly liable perpetrators is disputed by some of the defendants.

69. I consider that the mere possibility of joint liability in the case of multiple perpetrators being invoked in one of the relevant Member States, and not in others, is sufficient to create a risk of different and mutually irreconcilable judgments, within the meaning of Article 6(1) of the Brussels I Regulation. In the legal order of that Member State, the liability of each of the defendants could theoretically be extended to include all the damage caused, whereas in the legal systems of the Member States where joint liability would not be countenanced, the level of the damages awarded would be likely to vary considerably, depending on the courts seised. Even in the contrary hypothesis, if that joint liability were accepted in all the relevant Member States, the risk of irreconcilable judgments being given if the claims were judged separately would still exist as regards the apportionment of liability between the members of the cartel, depending on whether they were involved for all or only some of the period concerned.

70. In this connection, it may be noted that, in the light of the indications given by the Commission in its observations, the joint and several liability of the participants for a common infringement of the prohibition of agreements, decisions and concerted practices laid down in Article 101 TFEU appears to be a principle generally accepted in the legal systems of the Member States[80] and that it has been upheld in, inter alia, the relevant directive, which has recently been adopted.[81]

71. I would emphasise that, if it were to be held that Article 6(1) of the Brussels I Regulation was not applicable to proceedings such as the main proceedings in this case, that would mean that different courts would have to examine the alleged damage, without any consultation, in the light of the various domestic legal orders,[82] with the attendant risk that each of the participants in the same unlawful cartel might be ordered to pay different amounts of damages, when it would be desirable, not to say necessary, to rule uniformly on the claims submitted by the same applicant.[83]

72. As the Commission points out, in my view rightly, 'the effectiveness of this provision would be undermined if it were to be interpreted so strictly that it would render impossible, in such circumstances, the bringing of joint actions against all the participants in a cartel before a court which is situated in the domicile of one of the defendants belonging to the cartel, on the sole grounds that it lacked international jurisdiction'.

79 — See the judgment in *Kalfelis* (EU:C:1988:459, paragraph 9) and the Jenard Report, cited above, in particular p. 26 (my italics).

80 — The Commission points out that this is the case 'in Germany, France, the Netherlands, Belgium, Finland and Sweden' and that 'the same applies under the criminal liability systems of Italy, the United Kingdom, Spain, Austria, Romania, Croatia, the Czech Republic, Denmark, Estonia, Greece, Hungary, Ireland, Lithuania, Luxembourg, Poland and Portugal'.

81 — See recital 37 and Article 11(1) of Directive 2014/104/EU of the European Parliament and of 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 (OJ 2014 L 349, p. 1).

82 — See, by analogy, the judgment in *Solvay* (C-616/10, EU:C:2012:445, paragraph 28).

83 — In the judgment in *Sapir and Others* (EU:C:2013:228, paragraphs 47 and 48), the Court stressed the fact that, even though the legal basis relied upon in support of the claim against one defendant is different from that on which the action brought against the other defendants is based, the need to determine the issue uniformly exists where the claims relied upon in the various proceedings are all directed at the same interest.

73. In the light of these factors, I consider that a situation in which several companies established in different Member States are tried separately, before different courts, and not before a single court, for the purpose of obtaining damages in respect of the same infringement of EU competition law, resulting from acts committed at different times and in different places but constituting a single and continuous infringement, is liable to lead to irreconcilable judgments, within the meaning of Article 6(1) of the Brussels I Regulation, if the cases are judged separately.

74. In accordance with the Court's case-law, it will be for the referring court to assess, in the light of all the elements in the case, whether there exists such a risk in the proceedings before it. [84]

75. Like the Commission, I note that such an interpretation has the not inconsiderable advantage of reflecting the intention expressed by the legislature in the Rome II Regulation, especially in Article 6 entitled 'Unfair competition and acts restricting free competition', paragraph 3 of which sets out the possibility, for a claimant suing several defendants in the context of a dispute in this field, of centralising his claims before a single court 'in accordance with the applicable rules on jurisdiction' and of basing his claims on the law of that court. [85] To my mind, due account should be taken of this legal guideline, in the interests of coherence between the instruments of Union law applicable to cross-border disputes, [86] despite the fact that, as the defendants in the main proceedings contend, the Rome II Regulation is not, *ratione temporis*, applicable in this case. [87]

2. The effect, for the purposes of applying Article 6(1) of the Brussels I Regulation, of withdrawal of the action against the sole co-defendant established in the State of the court seised [part (b) of the first question]

76. In the second part of its first question referred for a preliminary ruling, the referring court identifies two problems of interpretation concerning Article 6(1) of the Brussels I Regulation in the case of withdrawal of the action against the 'anchor co-defendant', namely, (a) the possible application of the principle *perpetuatio fori* [88] on the basis of that provision in such a situation, on the one hand, and (b) the inferences to be drawn from a possible abuse of the right to rely on a connecting link on that basis, on the other hand.

77. The answers suggested by the interested parties having lodged observations on these two problems differ most markedly, but it may be noted briefly that the defendants in the main proceedings maintain that the extension of jurisdiction provided for in Article 6(1) ought not to continue in such circumstances, [89] contrary to the view taken by CDC and the Commission, albeit with several nuances in the case of the latter.

84 — See the judgments in *Painer* (EU:C:2011:798, paragraph 83) and *Solvay* (EU:C:2012:445, paragraph 29).

85 — See the second sentence of Article 6(3)(b) and, on the conditions for the application of that provision, Fitchen, J., 'The Applicable Law in Cross-Border Competition Law Actions and Article 6(3) of Regulation No 864/2007', in *Cross-Border EU Competition Law Actions*, Mihail, D., Becker, F., and Beaumont, P. (under the guidance of), Hart Publishing, Oxford, 2013, p. 297 et seq., in particular p. 323 et seq.

86 — Recital 7 in the preamble to the Rome II Regulation expressly states that 'the substantive scope and the provisions [of the latter] should be consistent with the [Brussels I] Regulation'. As part of its task of interpretation, the Court has already effected a parallel between competition rules laid down in the Brussels I Regulation and more recent rules on conflict of laws also flowing from Union law (see, inter alia, the judgments in *Pammer and Hotel Alpenhof*, C-585/08 and C-144/09, EU:C:2010:740, paragraphs 43, 74 and 84, and *Football Dataco and Others*, C-173/11, EU:C:2012:642, paragraphs 29 and 31).

87 — See footnote 6 of this Opinion.

88 — Also known as the principle of *forum perpetuum*, or the principle of *perpetuatio fori*, to use the terminology employed in the order for reference.

89 — Evonik Degussa, for its part, limited its observations to an objection of inadmissibility directed at this part of the first question, on the grounds that it was hypothetical and irrelevant. In my view, the case-law cited in footnote 37 of this Opinion is sufficient justification for rejecting this objection of inadmissibility.

a) Maintenance of jurisdiction based on Article 6(1) of the Brussels I Regulation in the case of withdrawal of the action against the anchor defendant

78. I share the opinion of the referring court, CDC and the Commission that, provided that a connecting link between the claims made against several defendants had been established at the time the action was brought, subsequent withdrawal of the action against the defendant justifying the extended jurisdiction of the court seised, under Article 6(1) of the Brussels I Regulation, is not to have the effect of terminating that jurisdiction.

79. The Court has, it is true, not yet had occasion to give a direct ruling on this problem. However, it should be noted that, in the judgment in *Reisch Montage*, the Court stressed that Article 6(1) makes no reference to the application of domestic rules, which may not therefore stand in the way of the application of that provision, and held that the provision in question must apply 'even when that action is regarded under a national provision as inadmissible, *from the time it is brought*, against the … defendant [domiciled in the Member State of the court seised]'.[90] Furthermore, in its judgment in *Freeport*, the Court expressly identified the bringing of the action as the reference point for determining whether claims are connected.[91]

80. The criterion that appears to me to be decisive, if the effectiveness of the derived jurisdiction under Article 6(1) of the Brussels I Regulation is to remain valid, is that the claim against the 'anchor defendant' should be withdrawn only after the court concerned has been seised in accordance with the requisite procedural conditions.[92] Given that the bringing of proceedings was effective by that date it is, however, of no consequence, in my view, whether the withdrawal took place, as in this case, before the expiry of the period fixed by the court for a defence to be lodged and the start of the first hearing.

81. It is to be recalled in this connection that Article 30 of the Brussels I Regulation defines the time by which a court of a Member State is deemed to be seised, for the purpose of applying the provisions of Article 9 regarding *lis pendens* and related actions.[93] In my view, that definition may also be taken into account with regard to the other sections of Chapter II relating to competition rules, and indeed must be, in relation to Article 6(1), because the latter establishes a rule also based on connexity between claims.[94]

82. In addition, maintaining the grouping together of connected claims before the court seised, made possible by Article 6(1) of the Brussels I Regulation, is consistent with the objectives of sound administration of justice, predictability and legal certainty which underpin the jurisdiction rules in this regulation,[95] because that maintenance makes it possible to prevent irreconcilable judgments being given, at least vis-à-vis the remaining defendants, which already knew, moreover, that they were all being sued before that court at the time of the withdrawal in question.

90 — EU:C:2006:471, paragraphs 27 to 31 (my italics). In that case, the national rule which led to inadmissibility vis-à-vis the anchor defendant precluded individual actions by creditors against a bankrupt debtor.

91 — EU:C:2007:595, paragraph 54.

92 — In this case, the order for reference states that notice of the action was served on the German company Evonik Degussa on 7 April 2009 and that the other defendants in the main proceedings received translated applications in August 2009, whereas the action against Evonik Degussa was withdrawn at the end of September 2009.

93 — Article 30 provides that '[for] the purposes of this Section, a court is deemed to be seised: 1) at the time when the document instituting the proceedings or an equivalent document is lodged with the court, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have service effected on the defendant, or, 2) if the document has to be served before being lodged with the court, at the time when it is received by the authority responsible for service, provided that the plaintiff has not subsequently failed to take the steps he was required to take to have the document lodged with the court'.

94 — In the judgment in *Kalfelis* (EU:C:1988:459, paragraph 11), the Court also established a formal connection between the jurisdiction rule in Article 6(1) of the Brussels Convention (corresponding to Article 6(1) of the Brussels I Regulation) and the provisions relating to connexity in Article 22 thereof (corresponding to Article 28 of the regulation).

95 — See recitals 11 and 12 in the preamble to the Brussels I Regulation and recitals 15 and 16 in the preamble to Regulation No 1215/2012, which recasts the former, the latter being more detailed in this regard.

83. I consider, therefore, that the fact that the applicant withdrew its action against the only co-defendant domiciled in the jurisdiction of the court seised does not in itself affect jurisdiction on the basis of Article 6(1), when that withdrawal is made after the date on which the court was validly seised, provided that a further condition, which I shall go on to examine, is also satisfied.

b) Limit resulting from an abuse of the right to base jurisdiction on Article 6(1) of the Brussels I Regulation.

84. In accordance with the Court's consistent case-law, 'the rule [on jurisdiction laid down in Article 6(1) of the Brussels I Regulation] cannot be interpreted in such a way as to allow a plaintiff 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 Member State in which that defendant is domiciled'. [96] This restriction concerning a potential ousting of jurisdiction of the court seised, which was supported in the Jenard Report [97] is perfectly consistent with the requirement that derogations from the jurisdiction in principle of the courts for the place of a defendant's domicile, laid down in Article 2 of the Brussels I Regulation, should be interpreted restrictively.

85. In *Freeport*, the Court indicated that 'where claims brought against different defendants are connected when the proceedings are instituted', the rule on jurisdiction laid down in Article 6(1) is applicable '*without there being any further need to establish separately* that the claims were *not brought with the sole object* of ousting the jurisdiction of the courts of the Member State where one of the defendants is domiciled'. [98] The issue of the consequences to be drawn from that somewhat ambiguous wording creates a problem for the referring court and divides both the parties to this case and also the legal writers who have commented on that judgment. [99]

86. In this connection, the analysis of the referring court appears to be correct, in that it considers that, when the condition relating to the existence of a connecting factor between claims is satisfied, for the purposes of that provision, the court seised is not obliged to examine systematically whether the extended jurisdiction deriving from the latter provision resulted from an abuse of rights, although it may nevertheless do so if there is sufficient evidence that the applicant availing itself of the extended jurisdiction has so conducted itself as to distort the true purpose of that rule of jurisdiction .

87. In this case, the referring court points to probable collusion between the applicant in the main proceedings and Evonik Degussa, the defendant in the main proceedings domiciled in Germany, which, it appears, deliberately delayed the formal conclusion of their out-of-court settlement until after proceedings had been instituted, although an agreement would have been envisaged, if not decided upon, well before, for the sole purpose of establishing extended jurisdiction in that Member State. [100]

96 — My italics. See, inter alia, *Reisch Montage* (EU:C:2006:471, paragraph 32) and *Painer* (EU:C:2011:798, paragraph 78 and the case-law cited).

97 — According to that report (see p. 27), to which the Court referred in *Kalfelis* (EU:C:1988:459, paragraph 9), it follows from the requirement of a 'connection between the claims made against each of the defendants, … that action cannot be brought solely with the object of ousting the jurisdiction of the courts of the State in which the defendant is domiciled'.

98 — EU:C:2007:595, paragraph 54 (my italics).

99 — See, inter alia, Michinel Álvarez, M. A., 'Jurisprudencia española y comunitaria de Derecho internacional privado', *Revista Española de Derecho Internacional*, 2007, no 2, pp. 754-757; Idot, L., 'Pluralité de défendeurs et fraude à la compétence juridictionnelle', *Europe*, 2007, December, commentary no 364, pp. 35-36; Würdinger, M., 'RIW-Kommentar', *Recht der Internationalen Wirtschaft*, 2008, no 1-2, pp. 71-72; Scott, A., "Réunion' Revised? *Freeport* v *Arnoldsson*', *Lloyd's Maritime and Commercial Law Quarterly*, 2008, no 2, pp. 113-118.

100 — The order for reference indicates that '[i]n the light of the timeline of procedural events relating to the partial withdrawal of the action and taking into account the conduct of the applicant and the former anchor defendant and current intervener Evonik Degussa GmbH in the proceedings, it is not only possible but almost certain that the settlement agreement, or at least the substance and key points of it, had already been reached before the action was brought'.

88. Provided that the deceitful tactics alleged, disputed in this case by the parties concerned, are not just probable but confirmed, which it will be for the national court to establish, such an abuse of rights, which is designed to deprive one or more of the defendants of the general jurisdiction as a rule of the court for the place where they are domiciled, [101] ought in my view to be penalised by refusal to apply Article 6(1) of the Brussels I Regulation in those circumstances, given that the criteria relating to connecting factors were not truly satisfied at the time the action was brought. [102] The advantage of its being the court for the domicile of the 'anchor defendant' that examines and tries the claims against several defendants at the same time, in accordance with that provision, disappeared as soon as a binding transaction put an end, vis-à-vis that defendant, to the legal obligation that the applicant could have relied upon against it before that court. Apart from these specific cases, there is, on the other hand, no need in my view to examine and penalise an abuse of rights in a legal context of this nature.

89. I would point out that the existence of a connecting factor required under Article 6(1) of the Brussels I Regulation provides an option for the applicant, to whom, in my opinion and in accordance with the Opinions of Advocates General Ruiz-Jarabo Colomer and Mengozzi on the subject of 'forum shopping', it is open to exercise that option in the manner he considers most suitable and advantageous, and this need not necessarily amount to depriving the proper court of its jurisdiction. [103] Furthermore, in the case of unlawful agreements such as that in the main proceedings, the application of that provision could, by definition, given its object, lead to one or more defendants having to answer for their conduct before a court other than that of their domicile, and in consequence an objection based on that actual outcome would be irrelevant.

90. In the light of all those matters, I consider that the rule on extended jurisdiction in Article 6(1) of the Brussels I Regulation is not to apply when it has been properly established, according to the court seised, that the applicant had entered into a legally binding transaction with the defendant domiciled in the Member State of the court seised before bringing its action and that it had knowingly concealed the existence of that earlier agreement, for the sole purpose of depriving one of the other defendants of the jurisdiction of the courts of the Member State in which that other defendant is domiciled.

101 — On abuse of rights, and in particular the different effect that it is likely to have, first, concerning jurisdiction and, second, concerning lack of the right to bring an action, see Usunier, L., 'Le règlement Bruxelles I bis et la théorie de l'abus de droit», in *Le nouveau règlement Bruxelles I bis, Règlement No 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, Guinchard, E. (under the guidance of), Bruylant, Brussels, 2014, p. 449 et seq., in particular p. 473.

102 — In this connection, the Commission considers, quite correctly, that the condition of connexity required by Article 6(1) would be wanting if the applicant and the 'anchor defendant' had actually entered into a definitive transaction regarding the disputed legal relationship before proceedings were brought, but if the action had none the less been brought against that defendant, and the transaction concealed, for the sole purpose of depriving one of the other defendants of the jurisdiction of the courts of the Member State where that defendant was domiciled.

103 — In footnote 27 in his Opinion in *Freeport* (C-98/06, EU:C:2007:302), Advocate General Mengozzi indicated that '[*w*]*ithin certain limits, "forum shopping*", interpreted according to the definition provided by Advocate General Colomer as "[*c*]*hoosing a forum according to the advantages* which may arise from the substantive (and even procedural) law applied there" (see the Opinion in *GIE Groupe Concorde and Others*, C-440/97, [EU:C:1999:146], footnote 10), *is undoubtedly permitted*' (emphasis added).

D – *Possible application of jurisdiction and arbitration clauses in a dispute such as that forming the subject-matter of the main proceedings (third question)*

91. The third question, the reasoning of which is, alas, somewhat laconic, asks the Court to rule whether, having regard to the principle laid down by the Court of the full effectiveness of the prohibition of agreements, decisions and concerted practices laid down in Article 101 TFEU and guaranteed by the right of persons injured to claim damages for harm suffered in that connection, [104] it would be permissible, in this case, to derogate from the rules on jurisdiction in Articles 5(3) and/or 6(1) of the Brussels I Regulation as a result of the action of arbitration and/or jurisdiction clauses (1).

92. Given that the latter type of clause falls within the scope of Article 23 of that regulation, unlike arbitration clauses, it is necessary to consider the impact of that provision in this context (2). Moreover, even if the referring court starts a priori from the premise that the two categories of clause invoked by the defendants in the main proceedings can be applicable in the context of an action for damages, as in the main proceedings, [105] which is, in my view, debatable (4), it will in any case be necessary to examine whether, and if so to what extent, such clauses can produce their effects when the content of the contracts in which they appear has been compromised by the unlawful agreement in question (3).

1. The problem put before the Court

93. For the purpose of disputing the jurisdiction of the Landgericht Dortmund, the defendants in the main action have objected that there were arbitration and jurisdiction clauses in some of the supply contracts entered into between the hydrogen peroxide buyers having transferred their rights to CDC and the suppliers having taken part in the unlawful agreement on which CDC's claims for damages are based.

94. The decision for reference does not contain a detailed description of the clauses in question. However, it is apparent from the observations of CDC that, according to the contentions of the defendants in the main action, some of those supply contracts did contain such clauses, either in the form of general conditions relating to a specific contract, [106] or in framework contracts covering several deliveries to a customer over a period other than the period of the cartel, [107] it being indicated that certain customers had concluded several clauses with different suppliers [108] or different clauses in the various contracts with the same suppliers. [109] The question whether the jurisdiction clauses invoked designated courts of the Member States only, or courts of third States too, is not clearly established.

104 — The Court held in the judgment in *Manfredi and Others* (EU:C:2006:461, paragraph 60) that 'the full effectiveness of Article 81 EC [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition (see *Courage and Crehan* [EU:C:2001:465], paragraph 26)'.

105 — The Landgericht Dortmund indicates that, in order to ascertain whether clauses conferring jurisdiction may validly be invoked against statutory jurisdiction rules, it is necessary, by interpreting those clauses, to determine which disputes fall within their scope, which is a matter for the national court alone, and that the same is true of arbitration clauses.

106 — By way of illustration, CDC mentions the supply contract of 20 June 1996 concerning a specific delivery of hydrogen peroxide from the FMC Group to the German factory of the assignee Stora Enso Oyj, which contained the following clause: 'it is hereby agreed between the parties that the court of Düsseldorf [Germany] shall be seised of any dispute arising out of this contract'.

107 — CDC cites as an example 'the contract concluded between Oy Finnish Peroxides AB and the assignor Stora Enso Oyj in early March 2011 concerning deliveries in the period 1 February 2001 to 31 January 2003 and containing the following clause: "All disputes or allegations resulting from or in connection with this contract or any infringement thereof, or concerning its termination or validity, shall be referred to an arbitration tribunal according to the rules of the Helsinki Chamber of Commerce. Arbitration shall take place in Helsinki, Finland"'.

108 — This being the case with Stora Enso Oyj in the examples given in the two preceding footnotes.

109 — CDC indicates that 'Kemira Kemi AB and the assignor Södra Cell AB agreed on 27 June 1996, in respect of the supply period 1 January 1996 to 31 December 1998, that arbitration would take place in Stockholm [Sweden], and on 2 and 30 April, in respect of an unspecified delivery period, that arbitration would take place in Malmö [Sweden]'.

95. As set out in the grounds for the third question put forward by the referring court, the latter considers that if the clauses did cover the claims for damages at issue, which it is for that court alone to determine,[110] the question would then arise whether the principle of effective enforcement of the prohibition of agreements, decisions and concerted practices under EU law precludes the application of such clauses when the court hearing an action of this kind has jurisdiction by virtue of Articles 6(1) and/or 5(3) of the Brussels I Regulation.

96. Of the interested parties having submitted observations to the Court, only CDC claims that those clauses ought not to be taken into account in such a context. The Commission stresses that, in order to resolve the preliminary question whether an arbitration or jurisdiction clause actually covers rights to compensation such as those at issue, the national court will need to consider the fact that those rights do not arise from the supply contracts in question but from the infringement constituted by the cartel agreement, which is not germane to those contracts.

97. Before expressing my opinion on this issue, I should wish to offer clarification of a few points that are, to my way of thinking, important. In the first place, it must be recalled that choice of jurisdiction clauses, under which the parties, at least one of which had its domicile in the territory of a Member State, have designated a court of a Member State to hear and determine disputes arising or likely to arise out of a particular legal relationship, fall within the ambit of Article 23 of the Brussels I Regulation.

98. On the other hand, arbitration clauses are, as a matter of principle, excluded from the scope of that regulation.[111] It follows that questions relating to the validity of, and the possibility of relying on, those clauses ought to be governed by the national law of each of the Member States and by the international conventions binding the latter.[112] Nevertheless, the Court has held that if, because of the main subject-matter of the dispute, that is to say, the nature of the rights to be protected in proceedings, such as a claim for damages, the proceedings brought before a national court fall within the scope of the Brussels I Regulation, then an incidental preliminary issue concerning the applicability of an arbitration agreement, including its validity, falls within the scope of that regulation too and it is, therefore, exclusively for that court to rule on the objection of lack of jurisdiction based on the existence of an arbitration agreement and on its own jurisdiction under the provisions of that regulation.[113]

99. Despite this difference in terms of the applicability of the Brussels I Regulation, it must be recalled that the two categories of clause at issue have the common effect of *derogating from the rules on jurisdiction laid down in that regulation*, by reason of respect for the autonomy of the parties concerning the determination of the court, whether national or arbitral as the case may be, to which they mean to entrust the task of settling their disputes.[114]

110 — In this connection, see point 127 of this Opinion.

111 — Article 1(2)(d) of the Brussels I Regulation excludes arbitration from its scope. Given that the Brussels Convention contained an equivalent clause, paragraph 63 of the Schlosser report, cited above, indicated that '[t]he 1968 Convention as such in no way restricts the freedom of the parties to submit disputes to arbitration. This applies even to proceedings for which the 1968 Convention has established exclusive jurisdiction. Nor, of course, does the Convention preclude national legislation from invalidating arbitration agreements affecting disputes for which exclusive jurisdiction exists under national law or pursuant to the 1968 Convention'.

112 — The Court has held that, by excluding arbitration from the scope of the Brussels Convention, on the ground that it was already covered by international conventions, the Contracting Parties intended to exclude arbitration in its entirety, including proceedings brought before national courts, and that that exclusion extends to such a procedure, whose purpose is to appoint an arbitration tribunal, even if that dispute raises the initial question of the existence or validity of an arbitration agreement (See the judgment in *Rich*, C-190/89, EU:C:1991:319, paragraph 18, and the Opinion of Advocate General Darmon in that case, C-190/89, EU:C:1991:58; see also the judgment in *Van Uden*, C-391/95, EU:C:1998:543, paragraphs 31 and 32).

113 — Judgment in *Allianz and Generali Assicurazioni Generali* (C-185/07, EU:C:2009:69, paragraphs 26 and 27).

114 — Respect for the autonomy of the parties' wishes is mentioned, inter alia, in recital 11 in the preamble to the Brussels I Regulation.

100. Nevertheless, a clause conferring jurisdiction in accordance with Article 23 of the Brussels I Regulation may confer jurisdiction only on the courts of Member States of the European Union and by extension, under the Lugano Convention,[115] on the courts of the Parties to that Convention, whereas an arbitration clause may provide that arbitration is to take place in any third State whatsoever. The likelihood of provisions of EU competition law not being applied, even by way of public policy rules, is much greater when jurisdiction is conferred on arbitrators or courts of States not bound by the Lugano Convention.[116]

101. In the second place, I would emphasise that the interplay between jurisdiction and arbitration clauses, on the one hand, and provisions of EU competition law, on the other, is complex because the legal context of barriers to the free competition affirmed in those provisions offers a wide variety of possible configurations. More specifically, regarding the right to full compensation based on Article 101 TFEU, I recall that it is not always easy to classify the liability of the author of an infringement of that provision as being of a contractual or tortious nature and that there are differences in this regard between the legal systems of the Member States.[117]

102. The existence of various contractual links between the members of the cartel and the persons injured by such an infringement raises the problem of ascertaining whether the clauses concerned can permit derogation, in the present case, from the jurisdiction of a court of a Member State which is based on Articles 5 or 6 of the Brussels I Regulation, despite the fact that the content of the contracts containing those clauses is affected by the infringement at issue.

103. Given that it is for the national court to determine the substantive scope of such clauses,[118] the third question asks the Court, in essence, to determine whether, and if so how, the principles inherent in Article 101 TFEU could influence, first, the application of Article 23 of the Brussels I Regulation in the case of the jurisdiction clauses covered by the latter and, next, the implementation of other types of jurisdiction and arbitration clauses governed by rules belonging to the law of the Member States.

2. Ousting of the rules on jurisdiction laid down in Articles 5 and 6 of the Brussels I Regulation by jurisdiction clauses consistent with Article 23 of that regulation

104. It is, first of all, to be noted that compensation for damage caused by an unlawful agreement, such as that sought by the applicant in the main proceedings, is governed in general terms by the independent decisions of the parties, in that it is a civil-law obligation incumbent on any person having committed an unlawful act that he should make financial reparation for the harm caused to

115 — Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, concluded in Lugano on 16 September 1988 (OJ 1988 L 319, p. 9) between the Member States of the European Economic Community and certain States members of the European Free Trade Association (EFTA), which mirrors the Brussels Convention and was revised by a convention concluded in Lugano on 30 October 2007 between the European Community, the Kingdom of Denmark, the Republic of Iceland, the Kingdom of Norway and the Swiss Confederation [see the Explanatory Report of Mr Pocar concerning that convention (OJ 2009 C 319, p. 1)].

116 — In this connection, the Commission submits that national courts, at least all those which sit in EU territory, are required, under primary law, to guarantee effective exercise of the rights deriving from Article 101 TFEU. Thus, only clauses which confer jurisdiction on a court outside that territory could be problematic from the point of view of the principle of full effectiveness of the prohibition of agreements, decisions and concerted practices in Union law.

117 — See point 37 of this Opinion.

118 — See point 127 of this Opinion.

another person, a field in which the substantive rights of the parties concerned are not unavailable.[119] Likewise, the Brussels I Regulation does not prevent parties from conferring jurisdiction *ratione loci*[120] on a court of a Member State in the context of a dispute relating to such a matter in accordance with Article 23 of that regulation.

105. As regards the interplay between the provisions of the latter article and those of Articles 5(3) and/or 6(1) of the Brussels I Regulation, Kemira correctly states that the Court has previously held that, by concluding an agreement on the choice of court under Article 17 of the Brussels Convention, the parties might derogate, not only from the general jurisdiction under Article 2 thereof, but also from the special jurisdiction laid down in Articles 5 and 6.[121] The Court has held, on the one hand, that 'this interpretation is justified on the ground that Article 17 is based on a recognition of the independent will of the parties to a contract in deciding which courts are to have jurisdiction to settle disputes falling within the scope of the Convention, other than those which are expressly excluded pursuant to the second paragraph of Article 17' and, on the other hand, that 'such an agreement … is nevertheless effective in that it excludes, in relations between the parties, other optional attributions of jurisdiction, such as those detailed in Articles 5 and 6 of the [Brussels] Convention'.[122]

106. The same applies to the equivalent provisions of the Brussels I Regulation, given that, according to recitals 11 and 14 in the preamble and Article 23(5), 'the autonomy of the parties to a contract … to determine the courts having jurisdiction … must be respected', except where either special jurisdiction rules designed to protect the weaker party[123] or the special jurisdiction rules in Article 22 are applicable. Apart from provisions whose application is expressly reserved in this way, which do not include Articles 5 and 6 of that regulation, an agreement conferring jurisdiction pursuant to Article 23 must be fully effective and must, in particular, confer exclusive jurisdiction on the court chosen.

107. That prevailing of the will of the parties applies, in particular, in relation to the objectives of Article 6(1) of the Brussels I Regulation concerning centralisation of jurisdiction and procedural efficiency and, in my view, even though that clause does not expressly state that the parties intended to derogate from that specific provision.

108. Regarding Article 5(3) of that regulation, it must be determined, beforehand, whether a clause conferring jurisdiction can really apply in a dispute such as that forming the subject of the main proceedings, which appears to me to relate to matters of tort rather than of contract,[124] and whether it may be relied upon against an applicant such as CDC, as a result of a substitution in the obligations entered into by the undertakings having transferred their rights to CDC,[125] which it will be for the referring court to ascertain following the relevant guidelines provided by the Court.

119 — However, Article 6(4) of the Rome II Regulation provides that '[t]he law applicable under this Article [entitled "Unfair competition and acts restricting free competition"][to non-contractual obligations] may not be derogated from by an agreement pursuant to Article 14', namely 'an agreement entered into after the event giving rise to the damage occurred' or 'where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred' which also complies with the other conditions set forth in that article.

120 — I would point out that an expression of the wishes of the parties in the form of a jurisdiction clause cannot, on the contrary, alter the jurisdiction *ratione materiae* of a court of a Member State, which is determined by the law of the court seised.

121 — See the judgment in *Estasis Saloti di Colzani* (24/76, EU:C:1976:177, paragraph 7).

122 — See the judgment in *Meeth* (23/78, EU:C:1978:198, paragraph 5).

123 — In relation to insurance, consumer and employment contracts, that autonomy is limited (see recitals 11, 13 and 14 and Articles 13, 17 and 21 of that regulation).

124 — Regarding the classification of the subject-matter of the dispute in the main proceedings and the resultant consequences in terms of the interplay of the arbitration and jurisdiction clauses relied upon, see the comments in point 127 et seq. of this Opinion.

125 — Pursuant to the judgment in *Coreck* (C-387/98, EU:C:2000:606, paragraph 19 et seq.), it is the national law applicable to the substance of the case which determines whether a third party to the initial contract succeeded to the rights and obligations of one of the original parties, such that a jurisdiction clause could apply to the former, even if it had not agreed to it at the time the contract was concluded.

109. I would, in particular, recall that it follows from the Court's case-law in relation to Article 23 of the Brussels I Regulation, on the one hand, that the validity of a jurisdiction clause inserted in a contract is dependent on the parties that concluded it having clearly indicated their agreement to that clause and, on the other hand, that the court seised is required to examine whether that clause was the subject of consensus between the parties. [126]

110. Furthermore, according to that article, an agreement as to the choice of court can apply only to disputes that have arisen or are likely to arise 'in connection with a particular legal relationship'. Having interpreted that criterion in relation to Article 17 of the Brussels Convention, the Court held that '[t]hat requirement is intended to limit the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. Its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made'. [127]

111. Like CDC, I very much doubt that a clause conferring jurisdiction, included in contracts such as those at issue, could satisfy the requirement of clear unvitiated consensus, because the point is the attribution of jurisdiction to the court designated to settle a case relating to the tortious liability of one of the contracting parties deriving from an unlawful cartel when, at the time it concluded the agreement, the person allegedly injured was unaware of the existence of the cartel.

112. On the other hand, it could, to my mind, be accepted that the person injured should enter into an agreement conferring jurisdiction after it had learned of the existence of the unlawful cartel agreement prohibited by Article 101 TFEU, the former agreement being entered into after the dispute arose, and hence accepted in full knowledge of the facts.

113. In this connection, I would stress that Directive 2014/104, mentioned above, which relates to actions for damages under national law for infringements of EU competition law, is intended in particular to promote recourse to consensual dispute resolution mechanisms, such as out-of-court settlements and arbitration, and to increase their effectiveness. [128] This approach appears to me well-founded, in that the parties have fully and freely consented to attribute the matter of claims for damages arising from an unlawful cartel agreement to a particular court, even if that is not the court that would have jurisdiction under Articles 5(3) and 6(1) of the Brussels I Regulation.

114. Whatever the analysis that the referring court will make of those latter points, I consider that there are no grounds for the principle, mentioned in the third preliminary question, of the full effectiveness of the prohibition of agreements, decisions and concerted practices laid down in Article 101 TFEU, to interfere in the particular case of jurisdiction clauses covered by Article 23 of the Brussels I Regulation.

126 — Judgment in *Refcomp* (EU:C:2013:62, paragraph 27 et seq.).

127 — See the judgment in *Powell Duffryn* (C-214/89, EU:C:1992:115, paragraph 31, my italics).

128 — See recital 48 et seq, and Articles 18 and 19 of that directive, in addition to the proposal by the Commission leading to the adoption of that act (COM(2013) 404 final, p. 22 et seq., point 4.6). The European Economic and Social Committee (see OJ 2014 C 67, p. 83, paragraph 4.7), the Council of the European Union (see note entitled 'Analysis of the final compromise text with a view to agreement', of 24 March 2014, 8088/14 RC 6 JUSTCIV 76 CODEC 885, particularly pp. 4, 12 and 37 et seq.) and the European Parliament [see legislative resolution and position adopted at first reading on 17 April 2014, P7_TA(2014)0451, recital 43 and Articles 18 and 19] have all taken a position on this proposal, duly approving the proposed mechanisms.

115. With regard to such a clause, it is not national rules but the provisions of that article that determine, in EU law, the jurisdiction of the courts of the Member States in civil and commercial matters, by laying down the conditions governing the validity and legal effects of that clause.[129] The foregoing considerations concerning the judicial interpretation of Article 23[130] clearly lead to clauses compatible with the requirements of that article particularly as regards the consent of the person allegedly harmed by the unlawful cartel agreement, taking precedence over the bases of jurisdiction resulting from Articles 5 and/or 6 of the regulation.

116. I would add that mutual trust between the courts of the Member States, which is one of the pillars of the system of judicial cooperation established by the Brussels Convention and taken up in the Brussels I Regulation,[131] implies, in my view, that the jurisdiction of the court chosen by the parties in accordance with Article 23 of that regulation is not to be frustrated on the basis of Article 101 TFEU, in the same way as the Court has held that considerations of public policy may not be relied upon in order to contest the enforcement of a judgment given in another Member State on the grounds that EU competition law was incorrectly applied therein to the substance of the case.[132]

117. Consequently, I consider that, given a clause designating a court of another Member State, which has been recognised to be compatible with Article 23 of the Brussels I Regulation and is duly applicable to the dispute of which that court is seised, a court of a Member State ought to decline its own jurisdiction, even where that clause entails disregarding the special rules of jurisdiction laid down in Articles 5 and/or 6 of that regulation, and this notwithstanding the principle of the effectiveness of the prohibition of agreements, decisions and concerted practices in Article 101 TFEU.

3. The effect, vis-à-vis the other types of clause invoked, of the principle of the full effectiveness of the prohibition of agreements, decisions and concerted practices in Article 101 TFEU

118. With regard to the clauses conferring jurisdiction to which Article 23 of the Brussels I Regulation proves not to be applicable and to arbitration clauses, the problem raised by the referring court is more complex, for it must be tackled by applying, not the provisions of that regulation, as interpreted by the Court, but rules of national law, whose implementation must be consistent with the binding provisions of EU primary law, and in particular with Article 101 TFEU.

119. In this connection, I would recall that, according to its consistent case-law in the judgments in *Courage and Crehan* and *Manfredi and Others*,[133] the Court has held that, failing EU legislation in that sphere, it is for the domestic legal system of each Member State to prescribe the detailed rules for exercising the right to compensation for damage resulting from an agreement, decision or concerted practice prohibited under Article 101 TFEU,[134] subject to observance of the principles of equivalence and effectiveness which require, in particular, that those national rules should not hinder the full

129 — In this connection, the second subparagraph of Article 25(5) of Regulation No 1215/2012 states that '[t]he validity of the agreement conferring jurisdiction cannot be contested solely on the ground that the contract is not valid', in line with the principle of the autonomy of such a clause in relation to the substantive conditions of the contract in which it is incorporated, a principle upheld by the Court in the judgment in *Benincasa* (EU:C:1997:337, paragraph 24 et seq.). Moreover, it follows from the judgment in *Eiffer* (38/81, EU:C:1982:79, paragraph 7 et seq.) that such a clause must be applied even if the dispute concerns the constituent parts of the contract.

130 — See point 105 et seq. of this Opinion.

131 — See, inter alia, recitals 16 and 17 in the preamble to the Brussels I Regulation.

132 — In the judgment in *Renault* (C-38/98, EU:C:2000:225, paragraph 29 et seq.), the Court held that, 'without undermining the aim of the Convention', 'the possibility that the court of the State of origin erred in applying certain rules of Community law' such as 'the principles … of freedom of competition', 'does not constitute a manifest breach of a rule of law regarded as essential in the legal order of the State in which enforcement is sought', given that Article 29 and the third paragraph of Article 34 of the Brussels Convention (to which Articles 36 and 45(2) of the Brussels I Regulation equate) provide that '[u]nder no circumstances may a foreign judgment be reviewed as to its substance'. Regarding a review, for public policy purposes, of the observance of the elementary principles of the right to a fair trial, see *flyLAL-Lithuanian Airlines* (EU:C:2014:2319, paragraphs 46 to 54).

133 — Point 30 of this Opinion. See also the judgment in *Kone and Others* (EU:C:104:1317, paragraph 21 et seq.) and the case-law cited.

134 — See, inter alia, the judgment in *Kone and Others* (EU:C:104:1317, paragraph 24 et seq. and paragraph 32). That option forms part of what is usually known as the procedural autonomy of the Member States.

effectiveness of Union competition law and should take account, more specifically, of the objective contained in that article.[135] In my opinion, it therefore follows in this case that the application of national rules may not allow the jurisdiction and/or arbitration clauses at issue to prejudice that full effectiveness.

120. Furthermore, the Court has held that the full effect of Article 101 TFEU and, in particular, the effectiveness of paragraph 1 thereof[136] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or conduct liable to restrict or distort competition, such as the unlawful cartel agreement which, in this case, forms the basis for CDC's claims. The guarantee that individuals may seek such compensation is likely to discourage agreements or practices of this nature, which are often concealed, and it therefore contributes significantly towards maintaining effective competition within the Union.[137]

121. As a general rule, when faced with an arbitration clause, a court of a Member State should decline jurisdiction and refer the parties to arbitration, at the request of one of the parties, unless that court finds that the arbitration agreement relied upon has lapsed, is inoperative or cannot be applied in the dispute before it, following scrutiny within the scope of its own jurisdiction, in the light of the requirements of domestic law,[138] since the Brussels I Regulation does not regulate the conditions governing the validity of such a clause.[139] The same would apply to clauses designating a national court which are not covered by Article 23 of the regulation.

122. However, the principle requiring effective implementation of the prohibition under EU law of agreements, decisions and concerted practices, to which the Landgericht refers, can, in my view, be invoked vis-à-vis the jurisdiction or arbitration clauses at issue for the purpose, in particular, of ensuring that all persons have the right to seek full compensation for losses resulting from a prohibited agreement, such as those alleged in the main proceedings.

123. In this connection, it is to be observed that the Court held in the judgment in *Eco Swiss*, which concerns the relationship between arbitration and the competition rules under EU law, that Article 85 of the Treaty, now Article 101 TFEU, 'may be regarded as a matter of public policy'.[140] The Court held that 'where its domestic rules of procedure require a national court to grant an application for annulment of an arbitration award where such an application is founded on failure to observe national rules of public policy, it must also grant such an application where it is founded on failure to comply with [that article]. Community law requires that questions concerning the interpretation of the prohibition laid down in [that article] should be open to examination by national courts when asked to determine the validity of an arbitration award and that it should be possible for those questions to be referred, if necessary, to the Court of Justice for a preliminary ruling'.[141]

135 — The objective being to guarantee effective and undistorted competition in the internal market and hence prices which are arrived at as a result of free competition.

136 — Given that the provisions of that article produce direct effects in relations between individuals and create rights and obligations for the individuals concerned which the national courts must safeguard (see, inter alia, the judgment in *Kone and Others*, EU:C:2014:1317, paragraph 20).

137 — Ibid. (paragraph 21 et seq.). The explanatory memorandum in the proposal for a directive COM(2013) 404 final, pp. 2 and 4, emphasises that '[d]amages claims for breaches of Articles 101 [TFEU] or 102 [TFEU] constitute an important area of private enforcement of EU competition law' and that '[t]he second main objective [of that proposal] is to ensure that victims of infringements of EU competition rules can effectively obtain compensation for the harm they have suffered'.

138 — The applicable provisions may derive from arbitration rules adopted by the Member State concerned or from international agreements to which the latter is party.

139 — See the judgment in *Allianz and Generali Assicurazioni Generali* (EU:C:2009:69, paragraphs 31 to 33) and, concerning the clarifications made in this regard by recital 12 in the preamble to Regulation No 1215/2012, inter alia, Neilsen, P. A., 'The New Brussels I Regulation', *Common Market Law Review*, 2013, vol. 50, p. 505 et seq., and Menétrey, S., and Racine, J.-B., 'L'arbitrage et le règlement Bruxelles I bis', in *Le nouveau règlement Bruxelles I bis, Règlement No 1215/2012 du 12 décembre 2012 concernant la compétence judiciaire, la reconnaissance et l'exécution des décisions en matière civile et commerciale*, Guinchard, E. (under the guidance of), Bruylant, Brussels, 2014, p. 13 et seq., in particular point 37.

140 — EU:C:1999:269, paragraph 31 et seq., particularly paragraphs 36 and 39.

141 — Idem (paragraphs 37 and 40).

124. By analogy, I consider that national courts are required by EU law not to apply an arbitration clause, or a jurisdiction clause not governed by Article 23 of the Brussels I Regulation, in cases where the implementation of such a clause would hamper the effectiveness of Article 101 TFEU. In this connection, it may with advantage be noted that the judgment in *Eco Swiss* predates those in *Courage and Crehan* and *Manfredi and Others*, which upheld the recognition in EU law of a right to compensation for all damage suffered by persons adversely affected by unlawful barriers to free competition, not only in the interests of those persons but above all in order to preserve the general interests bound up with that freedom. The case-law after those two judgments has further reinforced that approach, by encouraging the private implementation of those competition rules (commonly known as 'private enforcement'), particularly following the removal of the potential obstacles deriving from national provisions. [142]

125. It is true that the application of jurisdiction or arbitration clauses is not *in itself* an obstacle to the effectiveness of Article 101 TFEU within the meaning of the case-law cited. In particular, the fact that clauses of this type may, if they are valid and applicable to the dispute concerned, entail the ousting of the special bases of jurisdiction provided for in Articles 5 and/or 6 of the Brussels I Regulation does not necessarily have the effect of depriving the persons allegedly adversely affected by damage caused by an unlawful cartel agreement of the possibility of obtaining full compensation on that basis, given that they are not prevented from bringing actions before each of the appointed national or arbitration courts, even though, given the wide variety of clauses relied upon in this case, their application would certainly be likely to render such a course of action more difficult.

126. None the less, I consider that it is a matter of some delicacy to put that theoretical position into practice in the particular context of an unlawful cartel agreement, involving numerous participants and persons allegedly adversely affected, whose implementation has generated a multitude of individual supply contracts, possibly concluded between different companies in the group to which a vendor or purchaser belongs. [143] In the case of a horizontal restriction of competition, such as that on which the main proceedings are based, I find it difficult to accept an exclusion of the normal forms of judicial protection, unless the parties allegedly adversely affected have expressly entered into an agreement to that effect and the national or arbitration courts to which jurisdiction has been assigned in this way are required to apply the provisions of EU competition law as rules of public policy.

4. The applicability of jurisdiction and arbitration clauses in a dispute such as that in the main proceedings

127. The essential problem, which will arise by way of a preliminary consideration for the national court, is whether the arbitration and jurisdiction clauses relied upon by the defendants in the main proceedings are really apt to come into play in this case. Admittedly, in accordance with the Court's case-law, [144] it is only the court before which the main action was brought that may, and indeed must, assess the validity and scope of the jurisdiction clause relied upon against it. Although the order for reference is not explicit in this regard, the Landgericht Dortmund appears to take the view that the subject-matter of the dispute could be covered by the two types of clause included in the supply contracts which are binding on the defendants in the main proceedings.

142 — See, inter alia, the judgments in *Pfeiderer* (C-360/09, EU:C:2011:389, paragraph 28 et seq.) and *Donau Chemie and Others* (C-536/11, EU:C:2013:366, paragraph 29 et seq.), which concern the right of an individual harmed by an infringement of Article 101 TFEU, and seeking to obtain damages on that account, to gain access to the documents in proceedings concerning the authors of that infringement, even in leniency proceedings, after the courts of the Member States have weighed up the interests at stake which are protected by Union law.

143 — Concerning the different forms allegedly taken by the clauses concerned, see point 94 of this Opinion.

144 — According to the judgment in *Powell Duffryn* (EU:C:1992;115, paragraphs 33 and 36), 'it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope'.

128. However, as CDC and the Commission both contend, there is considerable doubt as to whether the rights to claim damages invoked by the applicant in the main proceedings are derived from the contracts which contained those clauses.

129. By analogy with the Court's ruling in relation to jurisdiction clauses covered by Article 23 of the Brussels I Regulation,[145] I find it hard to accept that jurisdiction based on the provisions of that regulation could be excluded when the application of the law of a Member State allows another type of jurisdiction or arbitration clause to govern *all disputes* arising out of the relationship between a party and the other party to the contract and stemming from *relationships other than that in connection with which* the clause at issue was agreed. The requirement of a close connection between the clause invoked and a particular legal relationship also seems to be necessary here, in order to guarantee the predictability of jurisdiction.

130. In my opinion, the rights relied upon in this case derive, instead, from the tort consisting of the cartel agreement arranged and put in hand, covertly, by the defendants in the main proceedings. The issue in the case in the main proceedings is the pecuniary consequences of that fraudulent conduct, which is inherently different from the supply contracts invoked.[146] It is not possible that a clause conferring jurisdiction or an arbitration clause should have been validly agreed in such circumstances, in other words, even before the persons allegedly adversely affected knew of the event giving rise to the damage or of the loss so occasioned.

131. After all, the referring court too tends towards this interpretation of the nature of the case in the main proceedings, for it appears to take the view, particularly in relation to its second question, that the civil liability action pending before it comes under matters relating to tort, delict or quasi-delict, covered by Article 5(3) of the Brussels I Regulation, and not under matters relating to a contract, which are covered by Article 5(1) of the regulation.[147] Nevertheless, in certain national legal systems, the classification of the subject-matter of a dispute as a matter relating to tort, delict or quasi-delict does not in itself preclude the applicability of jurisdiction or arbitration clauses, which obviously depends, in each specific case, on the wording of the clause concerned.[148]

132. In consequence, I consider that Article 101 TFEU must be interpreted as meaning that, in the context of an action for compensation for damage caused by an agreement declared to be contrary to that article, the implementation of jurisdiction and/or arbitration clauses does not *in itself* compromise the principle of the full effectiveness of the prohibition of agreements, decisions and concerted practices. In so far as a clause of one or other of those categories could be declared applicable, pursuant to the law of a Member State, in a dispute concerning liability in matters of tort, delict or quasi-delict that might follow from such an agreement, that principle, in my view, precludes

145 — Ibid. (paragraph 31) and point 110 of this Opinion.

146 — In this connection, the Commission submits that, on the one hand, the High Court of Justice (England and Wales), Queen's Bench Division, held that a clause conferring jurisdiction referring to the 'legal relationship' between the parties did not cover the rights resulting from tortious liability arising from an agreement or concerted practice [judgment in *Provimi Ltd.* v *Roche Products Ltd.* (2003) EWHC 961] and, on the other hand, that the Helsingen käräjäoikeus (court of first instance, Helsinki, Finland) ruled, similarly, that an arbitration clause referring to 'all the rights' arising from a supply contract did not cover rights to claim damages as a result of a cartel agreement, in that the latter did not flow directly from that agreement but from a situation which was external to the latter, namely the participation of the defendant in a collusive agreement (interlocutory judgment of 4 July 2013, *CDC Hydrogen Peroxide Cartel Damage Claims SA* v *Kemira Oyj*, Välituomio 36492 no 11/16750).

147 — 'It is apparent from settled case-law that the concept of "matters relating to tort, delict, or quasi-delict" within the meaning of Article 5(3) of the Brussels I Regulation covers all actions which seek to establish the liability of a defendant and which do not concern "matters relating to a contract" within the meaning of Article 5(1) of the regulation. In order to determine the nature of the civil liability claims brought before the referring court, it is important first to check whether they are, regardless of their classification under national law, contractual in nature' (see, inter alia, the judgments in *Engler*, C-27/02, EU:C:2005:33, paragraph 29 et seq., and *Brogsitter*, EU:C:2014:148, paragraph 20 et seq.).

148 — For example, according to the case-law of the Korkein oikeus (Supreme Court, Finland), an arbitration clause contained in a contract is applicable to a dispute concerning extra-contractual liability where failure to comply with the contract invoked constitutes fraud within the meaning of criminal law (see Korkein oikeus, judgment of 27 November 2008, KKO, 2008:102, available at the following Internet address: http://www.finlex.fi/fi/oikeus/kko/kko/2008/20080102).

jurisdiction over that dispute being attributed under a clause of a contract whose content had been agreed when the party against whom that clause is relied on was unaware of the cartel agreement in question and of its unlawful nature, and could not, therefore, have foreseen that the clause could apply to the damages sought on that basis.

V – **Conclusion**

133. Having regard to the foregoing considerations, I propose that the Court of Justice should answer the questions referred to it for a preliminary ruling by the Landgericht Dortmund (Germany), as follows:

(1) (a) Article 6(1) of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the enforcement of judgments in civil and commercial matters is to be interpreted as meaning that, when proceedings are brought against a defendant domiciled within the jurisdiction of the court of one Member State and against defendants domiciled in other Member States of the European Union before that court for disclosure and damages on account of a single continuous infringement of Article 81 EC (Article 101 TFEU), which has been established by the European Commission and in which the defendants have participated in different places and at different times, it is expedient for the cases to be prepared and tried together in order to avoid the risk of irreconcilable judgments resulting from separate proceedings.

(b) Article 6(1) of Regulation No 44/2001 must be interpreted as meaning that the fact that the action against the sole co-defendant domiciled within the jurisdiction of the court seised is withdrawn does not affect the application of that provision, always provided, on the one hand, that the withdrawal occurred after the date on which that court had been validly seised and, on the other hand, that it is not connected with a binding transaction entered into between the applicant and that defendant before that date but which was concealed for the sole purpose of removing one of the other defendants from the courts of the Member State in which that defendant is domiciled.

(2) Article 5(3) of Regulation No 44/2001 is to be interpreted as meaning that, when defendants established in various Member States are sued for damages on account of a cartel agreement, declared by a decision of the European Commission to constitute a single continuous infringement of Article 81 EC (Article 101 TFEU), in which the defendants have participated in several Member States and in various places and at various times, the event giving rise to the damage is not to be regarded as having taken place, in relation to every defendant and in respect of all the heads of damage or the overall loss, in every one of the Member States in whose territory the unlawful cartel agreement was concluded and/or put into effect.

(3) Article 101 TFEU must be interpreted as meaning that, in the context of an action for compensation for damage caused by an infringement of that article, the principle of the full effectiveness of the prohibition of agreements, decisions and concerted practices under EU law does not preclude the implementation of clauses conferring jurisdiction consistent with Article 23 of Regulation No 44/2001, whereas that principle does preclude the implementation of arbitration and/or jurisdiction clauses not covered by Article 23 when the national law applicable allows jurisdiction for that dispute to be attributed under a clause in a contract whose content had been agreed when the party against whom that clause is relied upon was unaware of the cartel agreement in question and of its unlawful nature.