Reports of Cases

OPINION OF ADVOCATE GENERAL
BOBEK
delivered on 28 February 2018 [1]

Case C-27/17

AB flyLAL-Lithuanian Airlines, in liquidation
v
Starptautiskā lidosta Rīga VAS
Air Baltic Corporation A/S
joined parties:
ŽIA Valda AB,
VA Reals AB,
Lietuvos Respublikos konkurencijos taryba

(Request for a preliminary ruling from the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania))

(Reference for a preliminary ruling — Cooperation in civil and commercial matters — Jurisdiction in matters of tort, delict and quasi-delict — Anticompetitive agreements — Loss of income caused by anticompetitive acts by competitors — Notion of 'place where the harmful event occurred' — Dispute arising out of the operations of a branch, agency or other establishment — Notion of 'operation of branch')

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1 Original language: English.

I. Introduction

1. AB flyLAL — Lithuanian Airlines ('flyLAL') operated flights from Vilnius airport in Lithuania until it was put into liquidation.

2. According to flyLAL, its demise was caused by predatory (that is, below cost) pricing by the Latvian airline Air Baltic Corporation A/S ('Air Baltic'). That predatory pricing was, it is alleged, part of an anticompetitive strategy agreed between Air Baltic and the operator of Starptautiskā lidosta Rīga (Riga international airport in Latvia, 'Riga Airport'). Thus, Riga Airport and Air Baltic agreed to drastically reduce the prices paid by Air Baltic for services at Riga airport. The savings were then used by Air Baltic to finance the predatory pricing that drove flyLAL out of the market in Vilnius, Lithuania.

3. flyLAL sued Air Baltic and Riga Airport for damages before the courts in Vilnius. The first-instance court found that Air Baltic and Riga Airport had infringed EU and national competition law and awarded damages of EUR 16.1 million, plus interest, against Air Baltic (but not against Riga Airport). Air Baltic and Riga Airport ('the Defendants') appealed against that judgment before the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania), challenging the jurisdiction of the Lithuanian courts to hear the dispute.

4. In that context, the referring court puts three questions to this Court about jurisdiction under Regulation (EC) No 44/2001.[2] They relate, in essence, to the place where the harmful event occurred, whether loss of profits counts as 'harm' for the purposes of establishing jurisdiction and whether the dispute can be seen as arising out of the operations of Air Baltic's branch in Lithuania.

II. Legal framework

5. Recitals 11 and 12 of Regulation No 44/2001, which was applicable at the relevant time, state that:

'(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.'

6. According to Article 2(1) of Regulation No 44/2001:

'Subject to this Regulation, persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.'

7. Article 5 of Regulation No 44/2001 falling under Section 2 'Special jurisdiction', provides that:

'A person domiciled in a Member State may, in another Member State, be sued:

…

3. in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur;

…

2 Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

5. as regards a dispute arising out of the operations of a branch, agency or other establishment, in the courts for the place in which the branch, agency or other establishment is situated.'

III. Facts, procedure and questions referred

8. In 2004, flyLAL was the main airline carrier operating out of Vilnius airport. In 2004, Air Baltic, the main airline carrier operating out of Riga airport also began operating flights out of Vilnius airport. At least some of those flights were to the same destinations that flyLAL served.

9. Subsequently, flyLAL's market position in Vilnius declined, whilst that of Air Baltic strengthened. Following significant financial losses, flyLAL was put into liquidation.

10. flyLAL considers that its demise was caused by predatory pricing practised by Air Baltic on routes from Vilnius airport, thereby driving flyLAL out of the market. According to flyLAL, the predatory pricing was financed by discounts granted by Riga Airport in relation to services provided to Air Baltic at Riga airport.

11. Regarding those discounts, by decision of 22 November 2006 made in separate proceedings, the Latvijas Republikas Konkurences padome (Latvian Competition Council) held that Riga Airport had introduced a reduction system with effect from 1 November 2004, providing for reductions of up to 80% for aircraft take-off, landing and security services. The Latvijas Republikas Konkurences padome (Latvian Competition Council) stated that the reduction system infringed Article 82(c) of the EC Treaty (now Article 102(c) TFEU). It ordered Riga Airport to stop applying the system.

12. flyLAL sued Air Baltic and Riga Airport before the Vilniaus apygardos teismas (Regional Court, Vilnius, Lithuania) seeking a declaration that the Defendants' conduct amounted to a prohibited agreement and to abuse of a dominant position, being contrary to Articles 81 and 82 TEC (now Articles 101 and 102 TFEU[3]), and an order that the Defendants jointly and severally pay EUR 57 874 768.30 by way of compensation for material damage.

13. In response, the Defendants maintained that they were legal persons registered in the Republic of Latvia and thus the dispute had to be heard in the Latvian courts.

14. By judgment of 27 January 2016, the Vilniaus apygardos teismas (Regional Court, Vilnius) upheld the action in part, ordering Air Baltic to pay flyLAL EUR 16 121 094 by way of damages and 6% of annual interest on that amount. It dismissed separate claims filed by the third parties ŽIA Valda AB and VA Reals AB ('the flyLAL shareholders'). It also held that under Article 5(3) and (5) of Regulation No 44/2001 the dispute had to be heard in the Lithuanian courts.

15. flyLAL, Air Baltic and Riga Airport appealed against that judgment before the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania). By its appeal, flyLAL requests that the judgment of the Vilniaus apygardos teismas (Regional Court, Vilnius) be set aside and that the action be upheld in full. The Defendant, Air Baltic, requests that that first-instance judgment be set aside on account of infringement of the rules on jurisdiction and that the action be left unheard. Air Baltic states that the dispute is not connected with the operations of its Lithuanian branch and therefore Article 5(5) of Regulation No 44/2001 is not applicable. Article 5(3) of the regulation is not applicable either as the alleged unlawful acts were not committed in Lithuania. Moreover, the latter provision does not grant a right to bring an action before the courts of the State where indirect losses in the form of a reduction in financial resources have arisen. In its appeal, Riga Airport puts forward essentially the same arguments relating to jurisdiction over the dispute as Air Baltic.

3 For simplicity, in the rest of this Opinion, I will use the post-Lisbon numbering of the Treaty Articles.

16. The referring court points out that it has already been established by the Court in its judgment in *flyLAL I*,[4] which addressed the question as to whether the dispute between the parties falls within the scope of Regulation No 44/2001, that the dispute is civil and commercial in nature. The referring court is therefore in no doubt that Regulation No 44/2001 is applicable in the present case. It nonetheless notes that the judgment in *flyLAL I* examined only the question of the application and enforcement in the Republic of Latvia of the interim protective measures ordered by the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania). However, jurisdiction as to the substance of the dispute was not addressed.

17. In the light of the above, the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) puts the following questions to the Court:

'(1) In the circumstances of the present case, is the notion "place where the harmful event occurred" in Article 5(3) of [Regulation No 44/2001] to be understood as meaning the place of conclusion of the defendants' unlawful agreement infringing Article 82(c) of the Treaty establishing the European Community (Article 102(c) TFEU), or the place of commission of acts by which the financial benefit obtained from that agreement was exploited, by means of predatory pricing (cross-subsidisation) when competing with the applicant in the same relevant markets?

(2) In the present case, can the damage (loss of income) suffered by the applicant on account of the specified unlawful acts of the defendants be regarded as damage for the purpose of Article 5(3) of [Regulation No 44/2001]?

(3) Are the operations of the branch of Air Baltic Corporation in the Republic of Lithuania, in the circumstances of the present case, to be regarded as operations of a branch within the meaning of Article 5(5) of [Regulation No 44/2001]?'

18. Written submissions were lodged by flyLAL, Air Baltic, Riga Airport, ŽIA Valda and VA Reals, the Latvian and Lithuanian Governments, and the European Commission. The interested parties that participated in the written stage, with the exception of ŽIA Valda and VA Reals, also presented oral argument at the hearing held on 16 November 2017.

IV. Assessment

A. Introduction

19. This case raises questions about jurisdiction to hear an action for damages with a relatively complex chain of facts. The national court and parties refer to three alleged infringements of competition law: (i) abuse of dominance consisting in the system of reductions implemented by Riga Airport; (ii) an anticompetitive agreement between Riga Airport and Air Baltic; and (iii) abuse of dominance in the form of predatory pricing by Air Baltic. Those infringements, it is argued, were interrelated, forming part of a strategy to oust flyLAL from the market in Vilnius and move passengers to Riga airport to the benefit of both Riga Airport and Air Baltic.

20. I wish to stress clearly at the outset that this Opinion will address *issues of jurisdiction alone* and not the substantive application of EU competition law in this case. The latter considerations are outside the scope of the referring court's questions.

4 Judgment of 23 October 2014, *flyLAL-Lithuanian Airlines* (C-302/13, EU:C:2014:2319).

21. Moreover, the general guidance provided on the issue of jurisdiction in this Opinion is also bound to remain rather abstract. That is not only because of the division of the roles between this Court and the national courts, but also because from the order for reference the interaction between the three alleged infringements remains somewhat unclear. In particular, the referring court mentions in its first question and also in its reasoning that there has been an *agreement* infringing Article 102(c) TFEU, despite the fact that the latter provision by definition concerns unilateral behaviour. Thus, while seeking to provide some useful guidance to the referring court, this Opinion will necessarily remain at the level of hypotheses and options, which it would be for the referring court to verify and apply in the case as appropriate.

22. As far as international jurisdiction is concerned, the general rule laid down in Regulation No 44/2001 is that a dispute must be heard in the court of the place where the defendant is domiciled (Article 2(1)). Article 5(3) of that regulation provides that a person may also 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'.

23. According to well-established case-law, the expression 'place where the harmful event occurred' is intended to cover both the 'place where the damage occurred' and the 'place of the event giving rise to it', so that the defendant may be sued in the courts for either of those places. [5]

24. The main issue raised in this case is how those two alternatives — 'the place where the damage occurred' and the 'place of the event giving rise to it' — are to be understood in the present context. Those issues correspond to the referring court's second and first questions respectively. I will consider them first (B and C) before turning to the third question on the operations of a branch under Article 5(5) of Regulation No 44/2001 (D).

B. Question 2: The 'place where the damage occurred'

25. By its second question, the referring court enquires into the meaning of 'damage' (as an aspect of 'harmful event') for the purposes of applying Article 5(3) of Regulation No 44/2001. Specifically it asks whether the financial damage (loss of income) alleged by flyLAL is to be regarded as 'damage' in that sense.

26. I understand that the basic aim of that question is to determine whether special jurisdiction arises under that provision at the place where the loss of income occurred, by implication: Lithuania.

27. In my opinion, the place of the financial damage (loss of income) does not amount here to the 'place where the damage occurred'. In a case such as this one, the 'place where the damage occurred' is the place within the markets affected by the competition law infringement where the claimant alleges loss of sales.

28. In addressing the referring court's second question, I will first consider the distinction between, on the one hand, 'harmful event' for the purposes of determining jurisdiction and, on the other, 'damage' in the context of the substantive assessment (1). Then, I will consider the 'place where the damage occurred' for the purposes of determining jurisdiction in competition law based actions (2) and apply those findings to the present case (3).

5 Already in judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraph 19); recently confirmed in judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 29).

1. 'Harmful event' and 'damage'

29. Since the judgment in *Bier*, the 'place where the *harmful event* occurred' appearing in the text of Article 5(3) of Regulation No 44/2001 includes the 'place where the damage occurred' and the 'place of the event giving rise to it'.[6] *Bier* thus effectively split the notion of 'harmful event' into two separate notions of cause and consequence: the 'damage' and the 'event giving rise to the damage'. It follows that 'damage' (or 'harm'[7]) in this context is an *aspect of the 'harmful event'* which is a concept of EU law *used to determine jurisdiction* by identifying those places with a *close relationship to the dispute*.

30. That notion of damage as an aspect of the 'harmful event' is therefore different from the notion of 'damage' which is part of the *substantive assessment* and identifies the *adverse consequences* for a specific claimant that serve as the basis for the calculation of pecuniary damages.[8] Damage in the latter sense is (to a great extent[9]) defined under *national law*.

31. The Court has thus clearly distinguished in its case law the notion of 'damage' as part of the substantive assessment from the jurisdictional notion of 'damage' as an aspect of the 'harmful event'. The jurisdictional notion of damage has, moreover, been qualified in two important ways by the Court. First, 'damage' in the latter sense in principle refers to 'specific damage' as opposed to 'general damage'. Secondly, it is limited to 'initial' damage.

32. Torts, delicts and quasi-delicts can protect against adverse effects on both the public interest (general damage) and the private interests of individuals (specific damage). For example, 'environmental' type torts can protect against both atmospheric pollution generally and against harm to an individual's health specifically. That raises the question of whether, when identifying the 'place where damage occurred' for the purposes of applying Article 5(3) of Regulation No 44/2001, 'damage' must be understood as the *general damage* or the *specific damage* that the rule protects against.

33. The Court's case-law confirms that 'the place where the damage occurred' is subject to the condition that such a place is situated within a Member State which actually protects the right allegedly infringed.[10] Within the territorial scope of that protection, the 'place where the damage occurred' refers more precisely to the place of the specific damage.

34. In that regard, it is useful to consider the facts and the context of *Bier*. In that case, the alleged harmful event was the discharge of massive amounts of saline waste in Mulhouse, France (the cause), which polluted the Rhine, eventually damaging the claimants' horticulture business in Rotterdam (the consequence). The discharge of waste therefore caused general damage along a stretch of the Rhine several hundred kilometres long in France, Germany and the Netherlands. In its reasoning, the Court

6 Judgment of 30 November 1976 (21/76, EU:C:1976:166, paragraph 19).

7 In English, the Court mostly uses the term 'damage' in this context, although 'harm' is also used occasionally. Therefore, although in my view it can be the source of some confusion, I will generally use 'damage'. Some of the ambiguity in terminology that has arisen in this area is I think attributable to linguistic variability. Thus, two different 'root words' exist in certain languages and are used when talking about these concepts (for example in English: 'harmful event'/'harm', on the one hand, and 'damage', on the other) but do not exist or are not always used in other language versions. That can be seen by comparing Article 5(3) of Regulation No 44/2001 and the various language versions of the judgment of 30 November 1976, *Bier* (21/76, EU:C:1976:166, paragraph 19) — for example French ('*dommage*' and '*fait dommageable*'); Dutch ('*schade*' and '*schadebrengende feit*'); or Italian ('*danno*' and '*evento dannoso*'). The German language version, also uses the same root word, but makes the difference somewhat clearer ('*Schadenserfolg*' and '*schädigende Ereignis*').

8 'Damage' refers to the adverse effects on the victim. 'Damages' is the pecuniary amount paid which includes the monetary expression of the 'damage' (compensation) but can also cover punitive damages or symbolic damages.

9 EU law requires national law to provide for the possibility to bring actions for damages for breaches of EU competition law (see judgment of 20 September 2001, *Courage and Crehan* (C-453/99, EU:C:2001:465, paragraph 26)). Case-law and EU legislation set down basic conditions for establishing liability and require national law to respect the principles of equivalence and effectiveness. See judgment of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 92) and 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).

10 See, for example, judgment of 22 January 2015, *Hejduk* (C-441/13, EU:C:2015:28, paragraph 29 and the case-law cited).

stated that 'the place of the event giving rise to the damage no less than the place where the damage occurred can, depending on the case, constitute a significant connecting factor from the point of view of jurisdiction. Liability in tort, delict or quasi-delict can only arise provided that a *causal connexion* [sic] *can be established between the damage and the event in which that damage originates*'. [11]

35. In other words, the 'place where the damage occurred' does not refer to the general damage but the harm to specific individual claimants. The action for damages requires a causal connection to be established specifically with the harm caused to the claimant and in relation to which compensation is sought. Advocate General Capotorti is indeed much more explicit in his Opinion in that case, referring to 'the place in which the damage *for which compensation is claimed* occurred'. [12]

36. That conclusion is also confirmed by the reasoning in *Bier* and later judgments that the 'place where the damage occurred' would have a close connection to *the dispute* (as opposed to a general connection to the tort). [13]

37. Moreover, specific damage will only constitute a relevant aspect of the 'harmful event' and provide a basis for jurisdiction under Article 5(3) of Regulation No 44/2001 if it is the 'initial harm', as opposed to subsequent adverse consequences. That approach is consistent with the notion of 'harmful event' as a specific occurrence that can be isolated from indirect effects. [14]

38. That point can be illustrated by the Court's judgment in *Marinari*. [15] In that case, promissory notes were sent to a bank in the United Kingdom, confiscated by the bank and handed over to police. Mr Marinari was arrested. He subsequently sued the United Kingdom bank before the Italian courts on the basis that he had suffered financial damage in Italy as a result of the confiscation.

39. In responding to the national court's questions on the interpretation of Article 5(3) of the Brussels Convention, [16] the predecessor of Article 5(3) of Regulation No 44/2001, the Court began by confirming that the term 'place where the harmful event occurred … cannot be construed so extensively as to encompass any place where the adverse consequences can be felt of an event which has already caused damage actually arising elsewhere'. [17]

40. The Court concluded that the 'initial harm' (sequestration of the notes and arrest) had been suffered in the United Kingdom, and any consequential (financial) damage suffered in Italy was insufficient to confer jurisdiction on the Italian courts: 'the place where the harmful event occurred … does not … cover the place where the victim claims to have suffered financial damage following upon initial damage arising and suffered by him in another [Member] State'. [18]

41. The above points can also be seen clearly in the Court's judgment in *Dumez*. In that case the Court confirmed that the place where the damage occurred is the 'the place where the event giving rise to the damage, and entailing tortious, delictual or quasi-delictual liability, directly produced its harmful effects upon the person who is the immediate victim of that event'. [19]

11 Judgment of 30 November 1976 (21/76, EU:C:1976:166, paragraphs 15 and 16). Emphasis added.

12 Opinion of Advocate General Capotorti in *Bier* (21/76, EU:C:1976:147, point 10).

13 Judgments of 30 November 1976 (21/76, EU:C:1976:166, paragraphs 11, 17 and 18).

14 That also constitutes another factor distinguishing 'damage' as an aspect of the 'harmful event' from 'damage' as part of the substantive assessment. The latter is a broader concept encompassing not only initial harm but also potentially subsequent adverse consequences. See, for example, Article 12(1) of Directive 2014/104. According to that provision it must be possible to obtain compensation for harm caused to indirect consumers as a result of infringements of EU and national competition law. '… Member States shall ensure that … compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer …'

15 Judgment of 19 September 1995 (C-364/93, EU:C:1995:289).

16 Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, OJ (1978) L 304, p.36.

17 Judgment of 19 September 1995, *Marinari* (C-364/93, EU:C:1995:289, paragraph 14).

18 Judgment of 19 September 1995, *Marinari* (C-364/93, EU:C:1995:289, paragraph 21 and the operative part).

19 Judgment of 11 January 1990, *Dumez France and Tracoba* (C-220/88, EU:C:1990:8, paragraph 20).

42. I have dwelt at some length on the meaning of 'damage' as an aspect of 'harmful event' since it is of particular relevance in the context of the referring court's second question.

43. The present case concerns alleged infringements of competition law. Similarly to the example of environmental damage discussed above, competition law has both a public and a private dimension. Private operators bring competition law based damages claims to recover compensation for damage to their individual interests. However, competition law exists, arguably primarily, to prevent distortions of competition and resultant harm to general economic welfare.

44. Moreover, in the case of economic torts where the damage to individual market operators is principally financial, there is, in my view, an even greater risk of confusing the jurisdictional concept of 'damage' (as an aspect of the 'harmful event') and the substantive concept of 'damage' (in the sense of adverse consequences relevant to establishing liability and calculating quantum). For that reason, I consider the above clarifications as to the basis of the distinctions being drawn as being of particular importance. I assume that it is indeed at least partly a desire to avoid such confusion that is behind the referring court's second question.

45. I will address these points further in the following section.

2. Distortions of competition and 'place where the damage occurred'

46. The coexistence of public and private dimensions of EU competition law leads to an ambiguity as to what could constitute 'the place where the damage occurred' for the purposes of applying Article 5(3) of Regulation No 44/2001 in competition law based damages actions. It could be interpreted as being the place of 'general' damage to the market (distortion of competition), or the place of 'specific' damage to individual undertakings.[20] It also raises the question of what type of 'specific' damage is referred to in this context.

47. In cases such as the present, where the anticompetitive behaviour has the effect of *excluding* undertakings from markets by preventing them from doing business or making it more difficult,[21] I would suggest that the 'place where the damage occurs' is the *place within the market affected by the infringement*[22] *where the victim alleges loss of sales*.

48. That conclusion is consistent with the general analysis made above (Section 1) and is confirmed by three further considerations. First, there is (a) the need for consistency between the scope of protection offered by the competition rules generally and rules on applicable law; (b) the need for a particularly close connecting factor with the dispute; and (c) the fact that the 'initial damage' in the sense of specific damage to the victim is loss of sales and not ensuing financial damage.

20 See in that sense, for example, Idot, L., 'La dimension internationale des actions en réparation. Choisir sa loi et son juge : Quelles possibilités?', *Concurrences* No°3-2014, point 30, where the place of specific damage is preferred; Vilá Costa, B., 'How to apply Articles 5(1) and 5(3) of the Brussels I Regulation to Private Enforcement of Competition Law: a Coherent Approach', in *International Antitrust Litigation : Conflict of Laws and Coordination*, Basedow, J., et al., eds., Hart Publishing, Oxford and Portland, Oregon, 2012, which proposes both the place of the general damage (referred to by that author as 'generic harm') and the specific damage.

21 To the extent it involves predation and collusion to exclude through the use of predation.

22 It being understood that that market may include multiple Member States.

(a) Scope of protection offered and consistency with applicable law

49. I consider that, as a general proposition, in cases of infringement of the rules on undistorted competition, the 'place where the harmful event occurred' in the sense of the 'place where the damage occurred' must be situated within the markets affected by such infringements. In that sense, and in line with what was suggested as a general point above,[23] 'specific damage' is also, in geographic terms, a logical subset of 'general damage'.

50. The Court's case-law indeed confirms that identification of the 'place where the harmful event occurred' for the purpose of applying Article 5(3) must take into account the *scope of protection offered by the substantive provision of law* at issue. Thus, in the *Concurrence* case, the Court held that 'the place where the damage occurred may vary according to the *nature of the right allegedly infringed*' and also that the 'likelihood of the damage occurring in a particular Member State is subject to the condition that the *right whose infringement is alleged is protected* in that Member State'.[24]

51. The main EU competition law provisions, Articles 101 and 102 TFEU, primarily aim at protecting undistorted competition. For that reason alone, I find it impossible to conceive of jurisdiction being granted, on the basis of Article 5(3) of Regulation No 44/2001 and the 'place where the damage occurred', to courts outside the markets affected by the infringement.

52. Moreover, the above limitation of the 'place where the harmful event occurred' in competition law cases is consistent with the relevant EU rules on applicable law.[25] Thus, Article 6(3)(a) of the Rome II Regulation provides that in case of competition law based damages actions the applicable law is that of the 'country where the market is, or is likely to be, affected'.

53. Finally, identifying the place where the damage (specific harm) occurred as being situated within the markets affected by such infringements (general harm) provides greater predictability. An undertaking that engages in anticompetitive conduct must expect to be liable to be sued in those places where its actions have repercussions on the market. In principle it should not, however, expect to be sued outside those markets.

(b) Any market affected?

54. That raises the question of whether the claimant in a competition law based damages action can sue in *any* place where the market is affected by the infringement.[26] I find that proposition problematic on a number of levels.

55. First, such an interpretation of the 'place where the harmful event occurred' has the potential in competition law cases of allowing an almost limitless choice of places to sue where infringements have a broad geographic impact. That outcome in itself seems difficult to reconcile with the fact that Article 5(3) is a special rule and an exception, which must be interpreted narrowly.[27]

23 Above, point 33 of this Opinion.

24 Judgment of 21 December 2016 (C-618/15, EU:C:2016:976, paragraph 30). Emphasis added.

25 The need for consistency between the rules on applicable law under Regulation No 864/2007 and jurisdiction under Regulation No 44/2001 is explicitly referred to in recital 7 of the former regulation (see 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).

26 The present case concerns exclusively the issue of jurisdiction and the corresponding question of where actions for damages relating to different alleged infringements of competition rules may be brought. I readily acknowledge that the question that immediately arises after that is what exact damage may be claimed in each of the jurisdictions? That question arises in particular in view of the recently confirmed *mosaic approach* of the Court in the judgment of 17 October 2017, *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:766, paragraph 47). That issue is, however, beyond the scope of the present case and this Opinion.

27 Judgments of 5 June 2014, *Coty Germany* (C-360/12, EU:C:2014:1318, paragraphs 43 to 45), and of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 25).

56. Second, the granting of jurisdiction to the 'place where the damage occurred' is based on the logic that there is 'a particularly close linking factor between *the dispute* and the courts [of that place]'.[28] 'The dispute', that is, the specific action for damages, is not concerned generally with harm to markets. It is concerned specifically with the harm allegedly done to the particular claimant in that specific case.

57. Third, an interpretation allowing a claimant to sue in *any market* affected is, to my mind, also at odds with the Court's existing case-law, which focuses on the place of initial damage to specific victims as being the 'place where the damage occurred'. In that regard, I refer to the analysis of the *Bier* case made above.[29] Further support can also be found in more recent case-law.

58. The *Concurrence*[30] case concerned a selective distribution agreement that prohibited internet sales. The applicant, a distributor in the selective distribution network, argued essentially that the prohibition was not applied uniformly throughout the network. As a result, it had lost potential sales to the online retailer Amazon. The Court held that the 'place where the damage occurred is to be regarded as the *territory of the Member State which protects the prohibition on resale* by means of the action at issue, *a territory on which the appellant alleges to have suffered a reduction in its sales*'.[31]

59. Thus, the Court did not discuss whether the 'place where the damage occurred' might extend to any place where competition or markets might be affected by the discriminatory application of the contractual clauses of the selective distribution agreement. Instead, it immediately qualified the place where the damage occurred as being the place where sales were lost.

60. Similarly in *CDC*, which concerned a cartel on the market for hydrogen peroxide, the Court held that the place where the damage occurred was considered to be the place where 'additional costs [were] incurred because of artificially high prices'.[32]

61. For the above reasons, I consider that the 'place where the damage occurred' in cases such as the present must be considered as the place within the market affected by the infringement where the victim alleges it has suffered damage.

(c) The nature and place of the specific damage

62. The working definition set out immediately above leads to the specific point raised by the referring court's second question. What is 'damage'? For the purposes of determining the 'place where the damage occurred', is the financial damage allegedly suffered by the claimant to be considered, or is it some other damage?

63. In my view, it is not the place of the financial damage but the place of the alleged loss of sales.

(1) General rule: financial damage is 'downstream' from the harmful event

64. As already indicated above,[33] it is certainly not always the case that the place of the occurrence of financial damage can be used to identify the 'place of the harmful event' for the purposes of Article 5(3) of Regulation No 44/2001. The Court's case-law indicates rather that financial damage is generally 'downstream' of the harmful event. In that regard, the Court confirmed in *Marinari* that the

28 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 39). Emphasis added.

29 Points 34 and 35 of this Opinion.

30 Judgment of 21 December 2016 (C-618/15, EU:C:2016:976).

31 Judgment of 21 December 2016, *Concurrence* (C-618/15, EU:C:2016:976, paragraph 35 and the operative part). Emphasis added.

32 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 52).

33 Points 37 to 41 of this Opinion.

place of *indirect* financial damage *following on* from *initial damage* (sequestration of property and arrest) was not the 'place where the harmful event occurred'.[34] In the *Concurrence* case referred to above, the 'harmful event' identified by the Court was clearly the loss of sales. The financial damage *ensued* from those lost sales. However, it was in that sense 'merely' a corollary of the loss of sales and not referred to in the operative part of the judgment.[35]

65. In the more recent judgment in *Universal Music* the Court went on to confirm that the place of *direct* financial damage may not be the 'place of the harmful event' either.[36]

66. In *Universal Music* the Court held that the 'place where the harmful event occurred' may not be construed as being, *failing any other connecting factors*, the place in a Member State where the damage occurred, when that damage consists exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another Member State'.[37] 'It is *only where other circumstances specific to the case also contribute to attributing jurisdiction* to the courts for the place where a purely financial damage occurred, that such damage could, justifiably, entitle the applicant to bring the proceedings before the courts for that place.'[38]

67. Thus, what matters is the location of the initial damage to the protected interest of the claimant. If it is concluded that the initial damage is financial and materialises directly in the claimant's bank account, the 'place where the damage occurred' will only be the place of that financial damage if there is another connecting factor to that place.

(2) 'Place where the damage occurred' in competition cases

68. In the case of anticompetitive conduct having the effect of (partially or wholly) excluding undertakings from markets by preventing them from doing business or making it more difficult, such initial damage in the sense of specific damage will almost certainly *not* be financial damage. Instead it is very likely to be loss of sales.

69. That is, in my view, rather clearly confirmed by the abovementioned *Concurrence* case,[39] where the Court did refer to the fact that financial loss *ensued* from loss of sales, but explicitly based jurisdiction on the loss of sales itself. Although the legal basis for the action brought by *Concurrence* is not stated specifically to be an infringement of EU competition law, I see no reason why the logic should not be transposed here.

70. Of course, as a general proposition it seems fair to assume that financial damage will often 'ensue' from loss of sales.[40] That does not, however, mean that those events will happen in the same place. There may be a very significant overlap, but not necessarily.

71. Thus, the victim of a competition law related tort or delict may suffer most (or indeed all) of the pecuniary consequences of a breach of competition law at its registered office (occurrence of financial damage). However, those losses may well relate to lost sales in different places.

34 Judgment of 19 September 1995 (C-364/93, EU:C:1995:289, paragraph 21).

35 Judgment of 21 December 2016 (C-618/15, EU:C:2016:976, paragraphs 33 and 35 and the operative part).

36 Judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449). However, Advocate General Szpunar in that case did not consider that the financial damage was direct (Opinion in *Universal Music International Holding* (C-12/15, EU:C:2016:161, points 30 to 33)).

37 Judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 40).

38 Judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 39). Emphasis added.

39 Judgment of 21 December 2016 (C-618/15, EU:C:2016:976).

40 Loss of income would, in principle, ensue. Whether that leads to loss of profits will of course depend on costs.

72. In addition to the above, I recall that the rule of special jurisdiction found in Article 5(3) is supposed to be based, as recitals 11 and 12 state, on the existence of a close link between the dispute and the courts of the place where the damage occurred or may occur, which justifies the attribution of jurisdiction to those courts for reasons relating to the sound administration of justice. Those courts are usually the most appropriate for deciding the case in question, also as far as the ease of taking evidence is concerned. If the claimant complains of lost sales (on the market(s) affected by the distortion of competition) and ensuing loss of income (mainly suffered at its financial centre, which may be outside the market affected), in my view, the courts of the former place would generally seem better or at least as well placed as the latter to decide the case. [41]

73. That said, it is fair to acknowledge that this reasoning does not sit easily with one aspect of the ruling in the abovementioned *CDC* case. [42] That case concerned a cartel on the market for hydrogen peroxide. The Court held in that case that the damage included 'additional costs incurred because of artificially high prices'. As a result, the Court pinpointed the 'place where the damage occurred' as being the place where the victim suffered the greatest financial consequences, namely the place of its registered office. [43]

74. In its written pleadings in the present case, albeit without saying that *CDC* was wrongly decided, the Commission expressed serious doubts about the fact that that judgment could in practice lead to the establishment of a broad *forum actoris* rule. That would completely reverse the general rule in Article 2(1) of Regulation No 44/2001 that jurisdiction is for the courts in the defendant's place of domicile.

75. I also harbour strong reservations about that particular aspect of the judgment in *CDC*. This part of the Opinion seeks to explain why the search for a principled answer to the question of jurisdiction for private competition law based damages actions ought to be approached somewhat differently. Given the potentially far-reaching nature of the judgment in *CDC*, the Court may well be called upon at some stage in the future to take another look at the issue. [44]

76. Nonetheless and at any rate, the present case can be, at least to some extent, distinguished. The *CDC* case concerned a price cartel, that is, an agreement aimed at ensuring the transfer of wealth from customers to cartel members through the charging of higher prices. Thus, one way of considering the cartel is that it was designed specifically to inflict direct financial damage. Therefore, the particular way in which the harm manifested itself in *CDC* provides a possible basis for distinguishing the present case. The present case does not involve a price cartel. The restriction of competition is exclusionary (loss of sales and market marginalisation) rather than exploitative in nature (charging of inflated cartel prices to customers).

41 Relativisation of that statement is called for. Where a competition law based damages claim is not a 'follow-on', that is, where there is no pre-existing decision finding an infringement, the evidentiary hurdles in terms of proving an infringement may be extremely significant in comparison to proving and quantifying damage.

42 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335).

43 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 52 and 56).

44 As far as that has not already happened. *CDC* also appears difficult to reconcile with the (later) judgment in *Universal Music*. It seems that in *CDC* the damage probably did 'consist exclusively of financial damage which materialises directly in the bank account of the applicant and is the direct result of an unlawful act committed in another Member State'. The Court did not, however, identify a particular additional connecting factor as referred to and required by its subsequent ruling in *Universal Music* — see judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 40). In my opinion, the connecting factor in such cases could be the place of purchase of the cartelised goods (or services).

3. Application to the present case

77. In the present case, flyLAL alleges that Air Baltic and Riga Airport conspired to distort markets for flights to and from Vilnius through predatory pricing, which caused flyLAL a significant loss of sales. From that loss of sales a loss of income and profits ensued, which resulted, ultimately, in flyLAL's bankruptcy.

78. In accordance with the reasoning set out in the preceding section, the 'place where the harmful event occurred' in the sense of 'the place where the damage occurred' can be identified *generally* as the market(s) affected by those alleged infringements.

79. For the purposes of establishing jurisdiction *specifically* in relation to flyLAL, the 'place where the damage occurred' is the place within those market(s) affected by those alleged infringements, where flyLAL has suffered initial damage (specific harm) in the form of loss of sales. It is not the place of the financial damage suffered by flyLAL which ensued from that loss of sales.

80. On the basis of the facts presented to this Court, but naturally subject to the referring court's assessment of the facts, that loss of sales appears likely to be focused on Vilnius, which is the common point of departure/destination of the various routes on which flyLAL operated, and also where, I understand, Air Baltic's comparative advertising campaign and alleged predatory pricing was targeted.

81. In the present case, the 'place where the damage occurred' for the purposes of applying Article 5(3) of the regulation could therefore be Lithuania. That does not mean it was the *only* such place but, in terms of loss of sales, it indeed appears to be the main one.

82. That leads me to my final point in relation to the referring court's second question. That question refers to the damage caused 'on account of the specified unlawful acts of the *defendants* [in the plural, that is, Air Baltic and Riga Airport]'. The line of reasoning above responds to the *what and where* parts of the referring court's question: what is the harmful event (in the sense of initial damage which has been suffered) and where did it occur? However, critically, it does not answer the *who* enquiry implicit in the question: who should the defendants be?

83. That point will be addressed in the context of the next section, which answers the referring court's first question, essentially: what event caused the harm and where did it take place?

4. Conclusion on the second question

84. In the light of the foregoing, I propose the following response to the referring court's second question:

In a case such as the present one, the 'harm' suffered by the applicant for the purposes of establishing jurisdiction under Article 5(3) of Regulation No 44/2001 is the applicant's loss of sales caused by the impugned distortion of competition. The 'place where the damage occurred' for the purposes of establishing jurisdiction under that provision is the place within the market affected by the infringement where the victim alleges loss of sales.

C. Question 1: Place of the event giving rise to the harm (and identity of the defendants)

85. By its first question, I understand that the referring court asks essentially how to identify the place of the event giving rise to the damage.

86. The referring court offers two options: the place where the agreement between Air Baltic and Riga Airport was concluded and the place of execution of that agreement (that is, where the predatory pricing was allegedly practised by Air Baltic [45]).

87. On the basis of the facts as presented by the referring court, I consider that the answer is that *both* of those places could be considered to be the place of the event giving rise to the harm. One of the key elements dictating that conclusion is the fact that the actions of Air Baltic in implementing the agreement *in themselves* amount to an infringement of Article 102 TFEU. [46]

88. In addressing the referring court's first question, I will begin by considering the differences between causation for the purposes of jurisdiction and as part of the substantive assessment (1). Then I will look at the identification of the event giving rise to the harm when there is a complex factual background (2). I will go on to consider how to identify the event giving rise to the harm specifically in competition law cases (3), and finally I shall apply those principles to the present case (4).

1. Differences between causation for purposes of jurisdiction and substance

89. Causation with regard to jurisdiction and identification of the event giving rise to the damage is different from the notion of causation for the purposes of the substantive assessment. In that respect, I make the following observations.

90. First, the 'event giving rise to the damage' is an aspect of the 'harmful event', which is a concept of EU law used to determine jurisdiction by identifying those places with a close relationship to the dispute. It is therefore different from the notion of causation as part of the *substantive assessment* which is used essentially for attributing responsibility. The notion of causation for the purposes of the substantive assessment in EU competition law based damages claims is largely left to the Member States to define, subject to the principles of equivalence and effectiveness as interpreted by this Court. [47]

91. Second, the Court has already explicitly rejected recourse to notions of causation in national substantive law for the purposes of determining jurisdiction under Article 5(3). Thus, in *Melzer*, the Court held that 'a solution which consists in making the identification of the connecting factor dependent on assessment criteria having their source in national substantive law would be contrary to the objective of legal certainty since, depending on the applicable law, the actions of a person which took place in a Member State other than that of the court seised might or might not be classified as the event giving rise to the damage for the purpose of the attribution of jurisdiction under Article 5(3) of Regulation No 44/2001. That solution would not allow the defendant reasonably to predict the court before which he might be sued'. [48]

92. Third, the concepts of causation for jurisdiction and substance are a fortiori different since their application involves a different type and level of evidential enquiry. Determination of jurisdiction should be as swift and easy as possible. [49] Thus, a jurisdictional assessment is by definition a prima facie one. The court seised takes as established the alleged claims and seeks only to identify 'those points of

45 The referring court does not refer to other possible acts of implementation, such as the granting of discounts to Air Baltic.

46 Again, as stated above in points 19 to 21 I take that conclusion as a given, since the present opinion discusses only jurisdiction and not substance.

47 See above footnote 9. That was the case at the relevant time and has since been confirmed in Directive 2014/104. That directive indeed explicitly states that 'all national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or Article 102 TFEU, including those concerning *aspects not dealt with in this Directive such as the notion of causal relationship* between the infringement and the harm, must observe the principles of effectiveness and equivalence' (recital 11, emphasis added, see also Article 4).

48 Judgment of 16 May 2013 (C-228/11, EU:C:2013:305, paragraph 35).

49 See my Opinion in *Bolagsupplysningen and Ilsjan* (C-194/16, EU:C:2017:554, point 68).

connection with the State in which that court is sitting that support its claim to jurisdiction under [Article 5(3)]'.[50] By contrast, the substantive assessment of causation is factually more detailed and requires consideration of all relevant causes (including, for example, actions by the claimants themselves that might have contributed to the damage).

2. Causation for the purposes of jurisdiction, in cases involving complex facts

93. Notwithstanding those fundamental differences between the jurisdictional and substantive assessments and the notions employed to conduct them, both assessments are carried out in relation to the same set of facts. As a result there are some common elements.

94. The jurisdictional assessment will, in practice, require a review of the basic factual and legal characteristics of the case at an abstract level. Such a review will need to be conducted to determine whether the case falls within the concept of 'tort, delict or quasi-delict'.[51] Within that category, the type of tort alleged must be identified, since that will alter the basic approach to identifying, among others, the place giving rise to the harm. Thus, for a specific kind of tort involving a chain of events, a specific event along that chain will be considered as having particular importance.[52]

95. For example, the essence of the tort of libel is the publication of a false statement that is damaging to a person's reputation. Commission of that tort is likely to involve a complex set of acts. Those include, for example, making a written record of the statement, transmission to the publisher, printing, release, distribution, and ultimately it being read by members of the public. In principle, all of those are *necessary* events from the point of view of factual causation. However, from the point of view of jurisdiction under Article 5(3) of Regulation No 44/2001, the 'place of the event giving rise to the harm' is considered to be the place where the publisher is established.[53]

96. The choice of a specific event as being relevant for the purposes of establishing jurisdiction prevents a proliferation of jurisdictions. That is in accordance with the special nature of the jurisdiction under Article 5(3) and the need for a restrictive interpretation. It also aids predictability. Moreover, special jurisdiction under Article 5(3) is based on the existence of a particularly close linking factor between the dispute and, in this case, the courts of the place of the event giving rise to the harm. In the chain of necessary events leading up to the commission of libel, it is very possible that some or perhaps most will occur in a place where the courts would certainly not be most appropriate for deciding the case.

97. Take for example, a libellous statement concerning a French resident initially penned in Germany, posted in the United Kingdom to a publisher in Luxembourg and sent across the border for printing of hard copies in Slovakia, before being distributed and read across Europe. Also (or especially) in such extreme 'textbook case' circumstances, a selection needs to be made for the purposes of jurisdiction. Ideally, unless there is a very specific and compelling reason, a *single* event should be selected for those purposes. That is consonant with the nature of special jurisdiction and also reflects the use in the case-law of the singular ('*the* event giving rise to the harm').

98. Finally, in determining the (place of) the event giving rise to the harm, it is important not to lose sight of one of the main reasons why the Court first made a distinction between the place where the harm occurred and the place of the event giving rise to it and to treat both as a basis for jurisdiction.

50 Judgment of 16 June 2016, *Universal Music International Holding* (C-12/15, EU:C:2016:449, paragraph 44).

51 Opinion of Advocate General Jacobs in *DFDS Torline* (C-18/02, EU:C:2003:482, point 52).

52 See examples given in *European Commentaries on Private International Law: Brussels Ibis Regulation*, 2nd ed., Vol.1, Mankowski, P., and Magnus, U., Sellier European Law Publishers, Cologne, 2016, p. 293 et seq.

53 Judgment of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraph 24).

99. Thus, already in the *Bier* case, the Court held that 'to decide in favour only of the place of the event giving rise to the damage would, *in an appreciable number of cases*, cause confusion between the heads of jurisdiction laid down by Articles 2 and 5(3) of the [Brussels] Convention, so that the latter provision would, to that extent, lose its effectiveness'.[54] In other words, it is *normal* that the place of the event giving rise to the harm often coincides with the domicile of the defendant. The case-law has already balanced that out by identifying the place where the harm occurred as an alternative forum. In principle, therefore, that is not a disadvantage that needs further compensation by a broad interpretation of the notion 'place of the event giving rise to the harm'.

3. Place of the event giving rise to the harm in competition law based damages actions

100. The place giving rise to the harm in competition law based damages actions is likely to be different depending on whether the alleged infringement is an anticompetitive agreement (infringement of Article 101 TFEU) or anticompetitive unilateral conduct (abuse of dominance under Article 102 TFEU).

(a) Article 101 TFEU

101. Broadly, in case of infringements of Article 101 TFEU, the 'place of the event giving rise to the harm' could be: (i) the place of the conclusion of the agreement, or (ii) the place of its implementation, or (iii) both.[55]

102. In the *CDC* case, the Court opted for (i).[56] I consider that to be, in principle, the correct approach, for several reasons.

103. First, a proliferation of 'special' jurisdictions should be avoided. That in itself is a strong reason against (iii).

104. Second, on a broad reading of the case-law, it appears to me that the 'event giving rise to the harm' is often identified as that first act by which the tortfeasor 'brings the tort into the world' for example by effectively communicating the information to the audience (publication[57]) or setting in motion a chain of events that will or is likely to lead to the harm that the law seeks to prevent (activation of the technical process for displaying an internet advert;[58] announcement of industrial action[59]). On that basis, I see the conclusion of the agreement as the first relevant link in the causal chain.

105. Third, approach (i) can of course be criticised. For example, it might be argued that parties to an anticompetitive agreement might deliberately choose a place to conclude the agreement that frustrates the subhead of special jurisdiction — 'event giving rise to the harm'. Difficulties in proving the place of conclusion might also be cited. However, it must be underlined that the claimant can always sue in the Member State where the defendant is domiciled. The special head of jurisdiction under Article 5(3) of Regulation No 44/2001 does not give an absolute right to an alternative jurisdiction within the EU. In that regard, I refer again to the reasons for which the 'place where the damage occurred' was

54 Judgment of 30 November 1976 (21/76, EU:C:1976:166, paragraph 20).

55 See, for example, Danov, M., *Jurisdiction and Judgments in Relation to EU Competition Law Claims*, Hart Publishing, Oxford, 2011, p. 92.

56 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 50).

57 Judgment of 7 March 1995, *Shevill and Others* (C-68/93, EU:C:1995:61, paragraph 24).

58 Judgment of 19 April 2012, *Wintersteiger* (C-523/10, EU:C:2012:220, paragraph 34).

59 Judgment of 5 February 2004, *DFDS Torline* (C-18/02, EU:C:2004:74, paragraph 41).

conceptually split into the place where the harm occurred and place of the event giving rise to it.[60] It was not to ensure that the latter place of the event is *always* different from domicile and to provide an additional, alternative place to sue. Instead, it was to ensure that where those two did not coincide, the place where the harm occurred could potentially serve as an alternative.

106. Fourth, to the extent that the claimant has actually suffered harm caused by an anticompetitive agreement, it seems to me that the place where the damage occurred, as defined above in Section 2, is very likely to constitute a subset of the place of implementation.

107. For the reasons given above, I consider that in the case of infringements of Article 101 TFEU, the place of the event giving rise to the harm should be interpreted as the place where the agreement was concluded.[61]

(b) Article 102 TFEU

108. Since there is no agreement under Article 102 TFEU, there is no place of the conclusion of the agreement. A different solution is needed, but one which still respects the same logic: how (and accordingly when and where) was the tort brought into the world, when did it enter the external forum?

109. In my opinion, the event giving rise to the harm in cases of abuse is its implementation. In other words, the acts adopted by the dominant undertaking to put the abuse into practice on the market, in contrast to any internal development by that undertaking of an abusive commercial policy.

110. Abuse of dominance is an objective concept defining a type of behaviour on the market.[62] By its very nature it requires implementation. A 'mere' intention to abuse is not an abuse. The preparation of a commercial strategy or policy that would amount to an abuse *if* it were to be acted upon is still not an abuse in itself.

111. For that reason, I consider that the acts preceding implementation, including the development of the relevant commercial strategy through, for example, the adoption of pricing schedules cannot constitute 'events giving rise to the harm'. They may be necessary causal elements from a factual perspective but, from the point of view of Article 5(3) of Regulation No 44/2001, they are merely preparatory acts.

112. That of course begs the question: what acts of implementation constitute events giving rise to the harm?

113. There is no exhaustive list of behaviours that can amount to abuse and those that have been identified crystallise in very different ways. Thus, the concrete assessment of what constitutes implementation in a specific case is likely to differ, depending on the type of abuse in question and the specific facts of each case. For example, predation involves offering and selling products or services at a particular price (below cost); tying essentially involves refusing to offer a given product on a stand-alone basis; refusal to license might manifest itself as an offer of a licence on terms deemed unacceptable.

60 Above, points 98 and 99.

61 I cite the main reasons here. Others might also be invoked, for example, the fact that in principle 'restrictions by object' constitute violations of Article 101(1) TFEU even without proof of implementation or effects (although a claimant would obviously not get very far with a damages claim if it could not show effects).

62 Judgment of 13 February 1979, *Hoffmann-La Roche* v *Commission* (85/76, EU:C:1979:36, paragraph 91).

114. In the present case, the Court is asked to identify the 'place of the event giving rise to the harm' in cases of predatory pricing. In my view, since implementation of predatory pricing involves the offering and selling of products or services at prices below cost, the place of the event giving rise to the harm is the *place where the predatory prices are offered and applied*.

4. Application to the present case

115. As already stated above,[63] the factual background and substantive assessment in this case are complex. Moreover, the interaction between the three alleged infringements is not entirely clear. Therefore, the facts and substantive legal assessment are taken as presented by the referring court, leading to the following basic alternatives regarding the 'place of the event giving rise to the harm', outlined separately for behaviour potentially falling within Article 101 TFEU on the one hand and Article 102 TFEU on the other.

(a) Place of the event giving rise to the harm

116. On the basis of the principles set out above, as regards the alleged anticompetitive agreement between Air Baltic and Riga Airport concluded in infringement of Article 101 TFEU, the place of the event giving rise to the harm (that is, the loss of sales by flyLAL), is the place of the conclusion of the agreement. Assuming all other conditions are fulfilled, the courts of that place would have jurisdiction on the basis of Article 5(3) of Regulation No 44/2001 to hear an action against both those entities for damages caused by that anticompetitive agreement.

117. As regards the alleged predatory pricing by Air Baltic in infringement of Article 102 TFEU, the place of the event giving rise to the harm is the place where the predatory prices were offered and applied. Assuming all other conditions are fulfilled, the courts of that place would have jurisdiction, on the basis of Article 5(3) of the regulation to hear an action against Air Baltic for damages caused by that predatory pricing.

(b) Identity of the defendants

118. It is important to underline that in each of the two alternative scenarios — infringement of Article 101 or 102 TFEU — the event giving rise to the harm involves different actors. In relation to Article 101 TFEU, it is suggested that both Air Baltic and Riga Airport concluded the anticompetitive agreement. By contrast, only Air Baltic offered and applied the predatory prices.

119. Thus, in relation to the alleged abuse of dominance in the form of predatory pricing, the place of the event giving rise to the harm is the place where the predatory prices were offered and applied *by Air Baltic*. Since those acts of implementation of the abusive conduct were not carried out by Riga Airport, the latter cannot be pursued *on that basis* under Article 5(3).

120. By contrast, the alleged anticompetitive agreement was said to be concluded between Air Baltic and Riga Airport. In principle, therefore, both may be pursued as defendants on the basis of Article 5(3) before the courts of the place the agreement was concluded.

121. Admittedly the above solution may appear complex. However, that is to a great extent a consequence of the degree of complexity of the present case and the fact that a number of acts appear to have been bundled together. In such a context, 'simpler' solutions designed in order to dispose of such a singular case may well create problems of application in subsequent cases.

63 Points 19 to 21 of this Opinion.

122. Thus, for example, it could be argued that jurisdiction should be granted also against Riga Airport on the basis of Article 5(3) at the place where the predatory prices were offered or applied. However, that would be tantamount to accepting that, in case of anticompetitive agreements, jurisdiction arises at the place of conclusion of the agreement *and at the place of implementation irrespective of who implements there*. Such an approach is not acceptable for the reasons set out above in points 101 and following.

123. Alternatively, it could be argued that only the place of the conclusion of the agreement should be recognised as the 'place of the event giving rise to the harm' to the exclusion of the place of offering and application of predatory pricing. That would, in my view, also be the wrong approach. Whilst it is true that on a certain construction, predation in this case might be interpreted as an act of implementation of an anticompetitive agreement, it has the peculiarity of constituting *in itself* a stand-alone infringement of competition law. That is indeed a very specific and distinguishing aspect of this case. For that reason it would, in my opinion, be incorrect to conclude that the place of offering and application of predatory prices cannot be considered the 'place of the event giving rise to the harm'. It can, but yet again, for a different type of infringement of the EU law competition rules (unilateral abuse of dominance) which in turn has implications for the identity of the defendant(s).

5. Conclusion on the first question

124. In the light of the foregoing, I propose to answer the referring court's first question as follows:

In circumstances such as those of the present case, the notion 'place where the event giving rise to the harm occurred' under Article 5(3) of Regulation No 44/2001 is to be understood as meaning, as regards the alleged anticompetitive agreement, the place of the conclusion of the agreement, and as regards the alleged abuse of dominance consisting in predatory pricing, the place where the predatory prices were offered and applied.

D. Question 3

125. By its third question, the referring court asks whether the operations of the branch of Air Baltic in Lithuania constitute 'operations of a branch'[64] within the meaning of Article 5(5) of Regulation No 44/2001.

126. The answer this Court can provide to the referring court's third question is inherently limited by the fact that it is for the national court to make factual findings and evaluations. Thus, the question whether or not the branch of Air Baltic *effectively operated* as a branch pursuant to Article 5(5) of the regulation is a question for the national court.

127. What this Court can provide, however, is general guidance on the conditions and criteria to consider when making that assessment. Simply put, the answer to the referring court's third question is yes, to the extent that it has been established that the branch has participated in the commission of the alleged predation.

128. I would add that, in my opinion, this question clearly envisages the possibility of the dispute in relation to alleged predatory pricing by Air Baltic arising out of the operations of its branch in Lithuania. It does not concern the alleged illegal agreement between Air Baltic and Riga Airport. In that regard, I agree with the Commission that there is no indication in the request for a reference that the branch of Air Baltic in Lithuania was in any way involved in that agreement.

64 As far as terminology is concerned, it might recalled that there is no reason to distinguish between the terms 'branch, agency or establishment' for these purposes — see in that regard, judgment of 6 October 1976, *De Bloos* (14/76, EU:C:1976:134, paragraph 21).

129. It follows that the potential jurisdiction based on Article 5(5) of Regulation No 44/2001 is jurisdiction over the claim of predation against Air Baltic, committed in infringement of Article 102 TFEU. Riga Airport cannot, on the basis of that provision alone and with regard to that alleged anticompetitive behaviour, be assigned as a defendant before the Lithuanian courts.

1. Ratio legis and conditions of Article 5(5)

130. The special jurisdiction provided for under Article 5(5) of Regulation No 44/2001 can be understood as an extension of the rule of domicile under Article 2 of that regulation. In cases where the defendant has established a subsidiary within a jurisdiction, the courts of that place have jurisdiction to hear an action against the subsidiary directly on the basis of Article 2. That is, however, not so in the case of a branch which has no separate legal personality. It is therefore the special jurisdiction under Article 5(5) that caters for such cases where the defendant has extended its activities beyond its domicile via permanent establishments but without creating subsidiaries, and the dispute relates to the activities of those establishments. [65]

131. In order to fall within the scope of Article 5(5) and justify extension of jurisdiction to the place of the branch, the branch must meet certain minimum conditions. Those include, in particular, its permanency and the perception by third parties that they do not have to deal directly with the parent body but may transact business at the place where the branch is situated. [66]

132. Article 5(5) also requires that the 'dispute aris[es] *out of the operations* of the branch'. In other words, there must be a nexus between the activities of the branch and the dispute.

2. Is there a 'branch'?

133. In its request for a preliminary ruling, the referring court states explicitly that it has 'no doubts that the branch of Air Baltic Corporation in the Republic of Lithuania constitutes a branch within the meaning of Article 5(5)' of Regulation No 44/2001. In that regard, the referring court mentions a number of factors leading it to that conclusion, including the right of the branch to establish economic and commercial relations with third parties, develop commercial activities and set prices for services and stock. Also, the referring court confirms that the object of the branch's activity is, among others, international carriage of passengers, cargo and mail by air.

134. The determination of the existence of a 'branch' within the meaning of Article 5(5) of Regulation No 44/2001 requires a fact-specific assessment. Since the referring court already made that factual conclusion, that point must be taken as established.

3. Nexus with the dispute

135. I therefore understand that the purpose of the referring court's third question rather relates to whether there is a sufficient nexus between the activities of the branch carry and the dispute.

65 Jurisdiction under Article 5(5) might in that sense be referred to as a 'quasi defendant's domicile for the purposes of jurisdiction'. See *European Commentaries on Private International Law: Brussels Ibis Regulation*, 2nd ed., Vol.1, Mankowski, P., and Magnus, U., Sellier European Law Publishers, Cologne, 2016, p. 350.

66 Judgments of 22 November 1978, *Somafer* (33/78, EU:C:1978:205, paragraph 12); of 18 March 1981, *Blanckaert & Willems* (139/80, EU:C:1981:70, paragraphs 9 to 13); and of 6 April 1995, *Lloyd's Register of Shipping* (C-439/93, EU:C:1995:104, paragraph 19).

136. In that regard, the referring court specifically highlights the fact that the branch does not prepare summary accounts that are separate from those of the parent, Air Baltic Corporation A/S. Instead, during the relevant period, the branch's financial performance data were incorporated into the financial statements of the parent. Also, whilst the referring court confirms that the branch did have the power to set flight prices, there is no indication that it actually did so.

137. In case of tort-based claims, in order for the dispute to arise out of the operations of the branch, the branch must participate in at least some of the actions constituting the tort.

138. In my view, the fact that the branch's financial performance data were incorporated into the financial statements of the parent is, in principle, neutral as regards the question of whether the dispute arises out of operations of the branch. The establishment of separate summary accounts might constitute one factor among others in the assessment of the existence of a 'branch' and might also help identify the activities carried out by the branch. However, at least in this case, I do not see how it could be decisive, in itself, in the assessment of whether the branch has participated in the tort. That said, ultimately, the evidential value of the details of the accounting system used is a question for the national court.

139. The second factor mentioned above — the lack of clarity as to whether prices were actually fixed by the branch — is arguably of more relevance.

140. If it can be established that the branch did in fact fix the prices that are allegedly predatory, then, in my view, the dispute can indeed be considered as having arisen out of the operations of the branch. For the reasons explained above,[67] the fixing of predatory prices, to the extent it remains an activity entirely internal to the dominant undertaking, cannot be considered to constitute the 'event giving rise to the harm'. However, it does constitute a necessary precondition[68] to the abuse. It amounts to participation and, in a way, complicity in bringing about the anticompetitive behaviour in question. As such, the act of fixing the prices constitutes sufficient participation in the tort to justify the application of Article 5(5) of Regulation No 44/2001.

141. I understand that the issue facing the referring court is that it is not clear whether the branch did in fact set the relevant prices. What then if that fact remains unestablished to the standard of proof required?

142. In my opinion, the branch can still be considered to have participated in the predatory pricing, such that the dispute arises out of the operations of the branch, even if it has not *fixed* the predatory prices itself, but would have *offered* those prices on the market or have otherwise been instrumental in concluding contracts for services at those prices. In such cases, the branch has again participated in the commission of an act that constitutes a necessary precondition for the abuse.

143. Whether that is the case is ultimately a question of fact for the referring court to decide. The purpose of such factual assessments is to ascertain whether or not the branch participated in bringing about the anticompetitive behaviour. If that is indeed the case, it must be accepted that the dispute arises out of the operations of the branch.

67 Above, points 110 and 111.

68 See by analogy, judgment of 5 February 2004, *DFDS Torline* (C-18/02, EU:C:2004:74, paragraph 34). The notion of 'necessary precondition' in this sense is clearly broader than the notion of 'event giving rise to the harm'.

144. In the light of the foregoing, I propose replying to the referring court's third question as follows:

In cases such as the present one, a dispute relating to alleged predatory pricing must be considered as arising from the operations of a branch for the purposes of Article 5(5) of Regulation No 44/2001 if the branch has participated in the commission of acts constituting a necessary precondition to the abuse, including in particular by fixing predatory prices, by offering those prices on the market or by otherwise being instrumental in the conclusion of contracts for services applying those prices.

V. Conclusion

145. I propose that the Court answer the questions referred by the Lietuvos apeliacinis teismas (Court of Appeal, Lithuania) as follows:

(1) In circumstances such as those of the present case, the notion 'place where the event giving rise to the harm occurred' under Article 5(3) of Regulation (EC) No 44/2001 of 22 December 2001 on jurisdiction and the recognition of judgments in civil and commercial matters is to be understood as meaning, as regards the alleged anticompetitive agreement, the place of the conclusion of the agreement, and as regards the alleged abuse of dominance consisting in predatory pricing, the place where the predatory prices were offered and applied.

(2) In a case such as the present one, the 'harm' suffered by the applicant for the purposes of establishing jurisdiction under Article 5(3) of Regulation No 44/2001 is the applicant's loss of sales caused by the impugned distortion of competition. The 'place where the damage occurred' for the purposes of establishing jurisdiction under that provision is the place within the market affected by the infringement where the victim alleges loss of sales.

(3) In cases such as the present one, a dispute relating to alleged predatory pricing must be considered as arising from the operations of a branch for the purposes of Article 5(5) of Regulation No 44/2001 if the branch has participated in the commission of acts constituting a necessary precondition to the abuse, including in particular by fixing predatory prices, by offering those prices on the market or by otherwise being instrumental in the conclusion of contracts for services applying those prices.