THE SINGLE ECONOMIC UNIT'S DOCTRINE AND JURISDICTION IN MATTERS RELATING TO ANTI-COMPETITIVE PRACTICES

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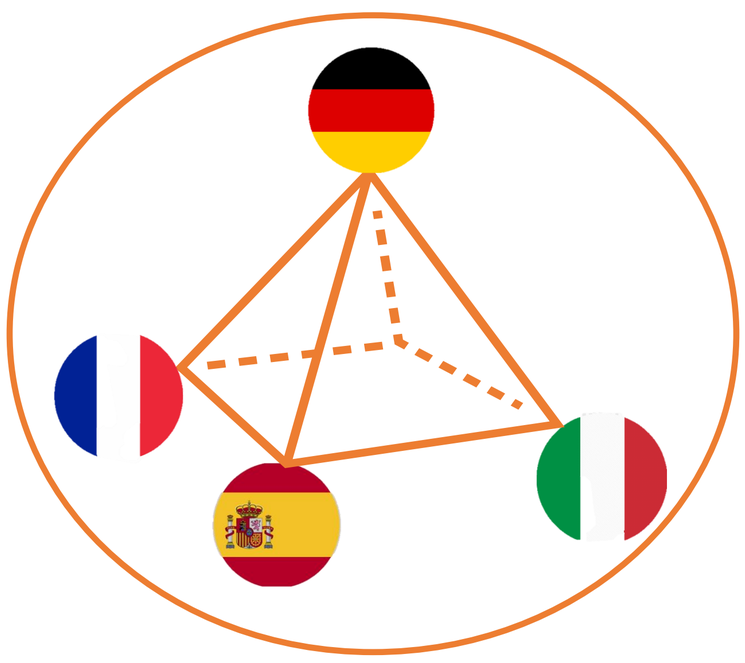
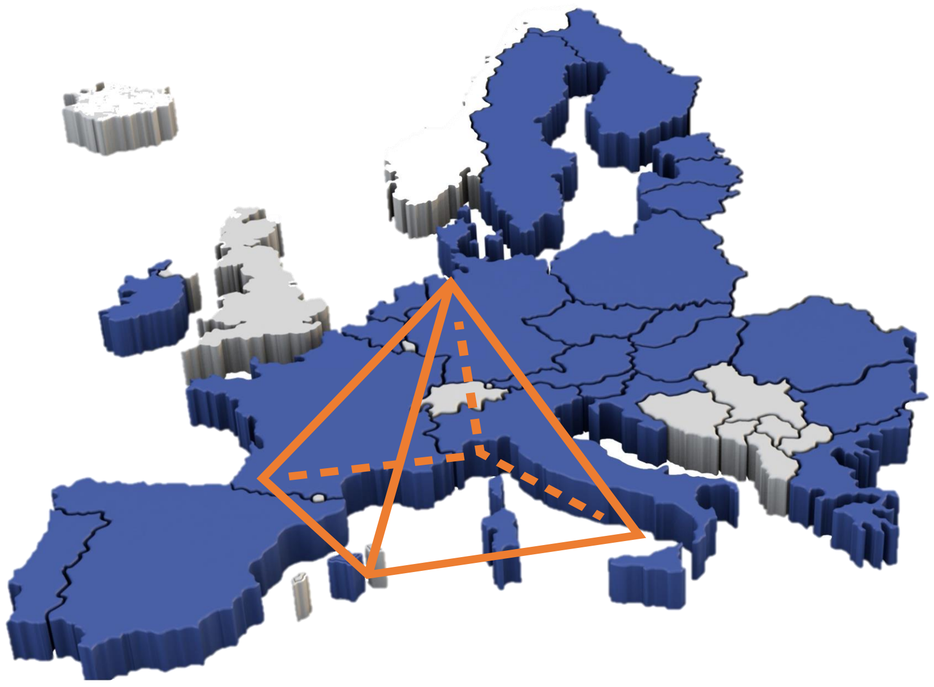
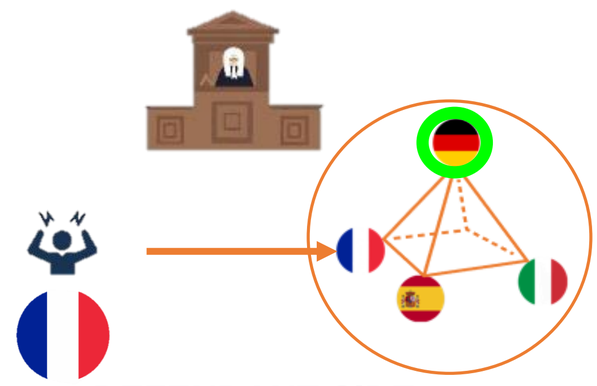
SINGLE ECONOMIC UNIT

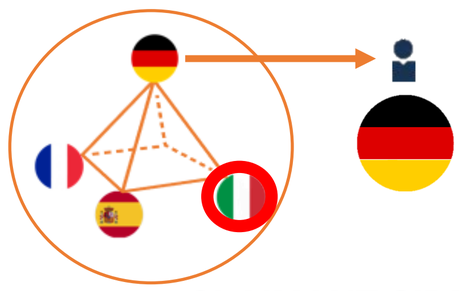




JURISDICTION



DEFENDANT SIDE



CLAIMANT SIDE

TOPIC

The notion of **UNDERTAKING** under Arts. 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) specifies the addressees of these rules in the framework of EU competition law. Given its significance in delineating the scope of application of EU competition law, this notion undergoes an **EU AUTONOMOUS INTERPRETATION**.

However, a definition of undertaking has not been positivized in the Treaties of the EU legal order; thus, the case law of the European Court of Justice (ECJ) has developed the doctrine of the **SINGLE ECONOMIC UNIT**. According to this doctrine, undertaking can be the result of economic entities which consists of a unitary organization of personal, tangible and intangible elements, which pursue a specific economic aim on a long-term basis. Consequently, the notion of undertaking must be understood in the sense that it designates an economic unit even if, from a legal perspective, that unit comprises multiple (natural or legal) persons. This can include scenarios such as corporate groups where a parent company controls numerous subsidiaries, or various companies connected by contractual relationships.

Consequently, in the event of violation of EU competition law, doubts may arise as to which is the **LEGAL ENTITY LIABLE** within the economic unit. Indeed, in the **PUBLIC ENFORCEMENT** as well as in the private enforcement of EU competition law, the notion of undertaking may generate controversy where it leads to the attribution of liability to a company for the anti-competitive practices committed by another company on the basis they form part of the same undertaking, understood as single economic unit. And particularly in **PRIVATE ENFORCEMENT**, after the Skanska and Sumal cases, and amidst debates surrounding theories of parental, subsidiary, and sister liability, this complexity may result in the possibility of having additional *fora* where to file the dispute.

The rules on **JURISDICTION** in matters relating to anti-competitive practices are outlined in the Brussels I *bis* Regulation. According to the case law of the ECJ, a dispute involving the violation of obligations imposed by law such as anti-competitive practices falls under the category of civil and commercial matters, specifically within the realm of non-contractual obligations. As per Arts. 4 and 63 of the Brussels I *bis* Regulation, the courts of the defendant's domicile, which may include its statutory seat, central administration, or principal place of business, holds primary jurisdiction in such cases. In addition to the general criterion, the Brussels I *bis* Regulation also provides for two cases of **SPECIAL JURISDICTION** under:

- **ART. 8(1)**: 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.
- **ART. 7(2)**: a person domiciled in a Member State may be sued in another Member State in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur.

WORKING HYPOTHESIS

The impact of the single economic unit's doctrine on jurisdiction in cross-border anti-competitive matters is at least twofold: on the defendant (1) and on the claimant (2) side.

1) In relation to the **DEFENDANT**, i.e. the party brought before the court, the jurisdiction criterion under **ART. 8(1)** has been strategically used in the English case law pertaining to claims for damages against violations of competition law stemming from cartels activities involving companies based in multiple States. In such scenarios, claimants have initiated legal proceedings in English courts against a company that is part of the same economic unit as the defendant. By leveraging the jurisdiction criterion under Art. 8(1), claimants also attracted the claims against the parent company based elsewhere before the English courts, provided there is a sufficiently close connection between the claims to warrant a unitary proceeding. This legal reasoning / strategy, developed in the "Provimi" case, is commonly referred to as the "Provimi point". The assumption for the application of Art. 8(1) in the private enforcement of EU competition law of corporate groups would be the reference to the EU notion of undertaking. Under this framework, all the companies within the economic unit are deemed part of the undertaking's notion, disregarding their internal structure, with the focus instead placed on identifying the single economic unit as the obliged person, thereby embracing the concept of single economic unit in the substantial reading of Arts. 101-102 TFEU.

2) In relation to the **CLAIMANT**, i.e. the party who files the dispute, the doctrine of the single economic unit could also play an important role. Let us consider a scenario where a parent company controls several subsidiaries directly impacted by the anti-competitive practices of an infringing entity, resulting in damages for the subsidiaries. Even if the parent company itself did not suffer direct economic losses, it may still have a genuine interest in seeking compensation for the losses incurred by its subsidiaries. By doing so, the parent company could enhance its overall value by bolstering the financial standing of its subsidiaries. In such cases, the parent company would like to bring the proceedings before the courts of its registered office. Pursuant to **ART. 7(2)** this would be allowed provided that the economic and financial interests of the corporate group can be traced to the location of the registered office. This would mean applying the single economic unit's concept on the side of claimant: the parent company would seek damages for the losses sustained by its subsidiaries, which may be considered indirect to the parent company, and insofar irrelevant, but are deemed direct losses within the context of the single economic unit, thereby underscoring their relevance in the legal proceedings.

METHODOLOGY

The methodology of this research provides, first of all, for an in-depth, interdisciplinary analysis of the legal framework; an analysis of the relevant case law is then undertaken; a review of the legal scholars views via books, monographs, policy documents, papers, articles is to be conducted; finally, the comments coming from authorities and practitioners, which deal with these issues on a daily basis.

RELEVANCE

The topic is relevant for the antitrust and regulation community from both a practical and theoretical standpoints. From the **PRACTICAL SIDE**, it implies the possibility of multiple *fora* being accessible to companies, thereby expanding their access to justice and potentially fueling increased litigation activity. From the **THEORETICAL SIDE**, it offers an opportunity to examine the interaction between a theory within EU substantive law and the rules of EU private international law, shedding light on their interconnectedness and implications.

EXPECTED RESULTS

The expected results concern to strike a delicate **BALANCE** that maximizes the full effectiveness of EU substantive provisions (Arts. 101-102 TFEU) while preventing forum shopping and respecting rules and principles under EU private international law. It is an entirely internal **EU LAW ASSESSMENT,** among EU primary and EU secondary law.

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