Conference Report on Private Antitrust Litigation: A New Era in the EU

The author of this post is Kristina Sirakova, Research Fellow at the MPI Luxembourg. Thanks, Kristina.

On 24 and 25 October 2016, the Academy of European Law (ERA) in cooperation with the French Cour de cassation hosted a conference in Paris on private antitrust litigation in Europe and the challenges that the implementation of the antitrust damages package entails for the EU Member States. The speakers, who were of both academic and professional acclaim, provided interesting insights and lively debate on procedural and substantive issues, arising from the recent legislative developments in the field of private antitrust litigation. Topics included inter alia: compensation and quantification of harm suffered from competition law infringements, the role of competition authorities and of the CJEU in private enforcement, limitation periods, evidence and forum shopping considerations.

This post provides an overview of the presentations and discussions on the issues raised.

The objectives of Directive 2014/104/EU and future steps

In her words of welcome, Jacqueline Riffault-Silk, Judge at the Commercial Chamber of the Cour de cassation, addressed the objectives of the Damages Directive in light of the institutional landscape and historical background of the Directive. The first step towards the Directive was made by the CJEU which ruled in cases *Courage and Crehan* (C-453/99, ECLI: EU:C:2001:465, para 26) and *Manfredi* (C-295/04, ECLI: EU:C:2006:461, para 60) that it is "open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition". Hence, the CJEU established the right to compensation which is the first foundation of the Directive. Furthermore, the Directive is founded on the principles of effectiveness and equivalence. The Directive was eventually proposed by the European Commission in 2013 (COM

(2013) 404 final).

Eddy de Smijter, Head of the European Competition Network and Private Enforcement Unit, DG Competition, European Commission, presented the two main objectives of the Damages Directive, which the Member States must transpose by 27 December 2016. Firstly, it aims at helping victims of cartel law infringements to obtain compensation by removing practical obstacles in different national laws. Secondly, the Damages Directive serves to enhance the interplay between the public and private enforcement of competition law. With regard to *Pfleiderer* (C-360/09, ECLI:EU:C:2011:389), he noted that the CJEU did what it could in the absence of European legislation on the matter. The European Commission subsequently identified in this CJEU judgment a signal to become active.

Mr de Smijter then explained some of the key provisions of the Directive, focusing especially on the principle of full compensation in Article 3. He noted that even though Article 3 (3) Damages Directive excludes the award of punitive damages, the payment of interest could have a similar effect, depending on the duration of the cartel. Regarding the disclosure of evidence, he highlighted the increased possibilities for obtaining access to relevant documents in Article 5 et seq. Damages Directive. However, before granting access to documents, the courts must balance the interests involved: on the one hand, the right to full compensation shall be protected; on the other hand, effective public enforcement shall be ensured.

The morphology and mapping of antitrust damage actions

Assimakis Komninos, Partner at the Brussels office of White & Case LLP, presented "The morphology and mapping of antitrust damage actions" focusing mainly on four key points in damages litigation: types of competition law infringements, types of claimants, follow-on vs. stand-alone claims and types of harm. Firstly, he differentiated between shield litigation and sword litigation. While in shield litigation the claimant seeks for example the nullity of the contract pursuant to Article 101 (2) TFEU, in sword litigation he claims for instance injunctions, damages, restitution or declaratory relief. Secondly, Komninos explained the importance of stand-alone actions for effective judicial protection. In fact, the numbers show that stand-alone actions are more frequently filed than follow-on actions for damages. The claimant's decision to bring a follow-on or a

stand-alone action largely depends on the type of infringement. While follow-on actions are suitable to deal both with exploitative (e.g. cartels) and exclusionary infringements (e.g. foreclosure) stand-alone cases concern mainly exclusionary scenarios. Thirdly, he focused on certain specificities that depend on the type of claimant. Various procedural questions may arise depending on whether the claim was brought by direct/indirect purchasers and/or suppliers, umbrella customers, end consumers, distributors or competitors.

Liability, causality and the principles of effectiveness and equivalence

Sabine Thibault-Liger, Counsel at the Competition/Antitrust department of Linklaters in Paris, presented "Liability, causality and the principles of effectiveness and equivalence". Starting with the principles of effectiveness and equivalence, she explained that they safeguard the effective enforcement of European law. From a substantive standpoint, the effectiveness of the right to compensation depends on the scope of liability which must be sufficiently wide to ensure that the victim is compensated for the damage suffered. In the framework of the personal scope of liability, Thibault-Liger dealt with two problems. Firstly, the Directive does not define the notion of "undertaking"; thus the question arises as to whether an injured party can sue the parent company of an infringing party. She concluded that the concept of "undertaking" shall be understood in the same way as in competition law; thus, the liability of the parental company depends on whether it had decisive influence over its subsidiaries. Secondly, she explored the several liability for multiple infringing parties as regulated in Article 11 Damages Directive. With regard to the material scope of liability, Thibault-Liger raised four main points: the presumption of damage in Article 17 (2) Damages Directive, umbrella claims, the impact of the fault of the victim and the combination of licit and anticompetitive causes for the damage.

Quantification of damages and the passing-on of overcharges

Three presentations dealt with the quantification of damages both from a legal and an economic perspective.

Firstly, Diana Ungureanu, Judge at the Court of Appeal Pitesti, Romania and Marc Ivaldi, Professor of Economics at the Toulouse School of Economics and at the Ecole des Hautes Etudes en Sciences Sociales, jointly presented "The amount of compensation". Ungureanu focused on the principle of full compensation and the

risk of overcompensation. She pointed out the inconsistency between the principle of full compensation and the court's power to estimate the amount of harm. Thus, she concluded that full compensation is a judicial fiction. Ungureanu identified three questions that arise in the framework of the principle of full compensation: Who is damaged? How are they damaged? By how much are they damaged? Focusing on the amount of harm, she warned of the risk of overcompensation which exists in cases of supply chains. If in such a case a direct purchaser brings a claim for damages against his supplier and the defendant is unable to establish the passing-on defense, the direct purchaser would be awarded full damages for the overcharge. In an action for damages brought subsequently by an indirect purchaser against the same defendant, the claimant can rely on the presumption that the overcharge has been passed on (Article 14 (2) Damages Directive). The fact that the defendant was unable to prove the passing-on of overcharges in the previous proceedings, would not be enough to rebut the presumption, thus the defendant will have to pay again. The two judgments would not contradict to each other as each case would be decided according to the applicable rules on burden of proof. Payment of multiple damages by the defendant and unjust enrichment of at least one of the claimants would be likely to arise as a result.

Ivaldi looked at the amount of compensation "through the economic window". He presented the damage as an economic concept, constituting the difference between the economic situation of an actor in the absence of a competition law violation (counterfactual scenario) and the economic situation of the same actor as a result of the competition law violation. He explained that from an economic perspective full compensation has three effects: a direct cost effect (direct overcharge), an output effect and a pass-on effect. The direct cost effect is the price overcharge multiplied by the total quantity purchased, yet the main challenge is to determine the overcharge. The output effect is the cost for the purchaser not to have purchased the desired amount at competitive prices. The sum of the direct cost effect and the output effect is the loss caused by the cartel. On the contrary, the pass-on effect constitutes the gains from higher downstream prices.

In the second presentation on quantification of damages Marc Ivaldi talked about "Quantification in practice: challenges and aids for the national judge". He explained the methods for quantification of harm, which can be divided into two

categories: methods based on an existing price benchmark (so called comparator-based methods) and methods based on a construction of the competitive but-for price (cost-markup methods and simulation analysis). While the comparator-based methods compare existing prices across time and/or across markets to identify the counterfactual price, the cost-markup methods and the simulation analysis construct the counterfactual price by adding to the cost a markup for reasonable profit (cost-markup methods) or a markup for maximized profit (simulation analysis).

The third presentation by Benoît Durand, Partner at RBB Economics, focused on "The study on the passing-on of overcharges arising from competition law infringements: an economic perspective" (the study is now available here). Before explaining the various methods applied to quantify the passing-on effect, Durand commented on the role of economists in private antitrust litigation. He highlighted that they not only provide a framework within which both qualitative and quantitative evidence can be evaluated, but also develop counterfactual analysis to quantify damages. He then pointed out key influences on the extent of passing-on and explained that the passing-on effect is the price increase multiplied by the quantity sold. The main challenge to the quantification of the passing-on effect is thus again to estimate the increase in price. Two approaches can be used for this purpose: Firstly, the direct approach estimates the downstream price increase applying the same comparator-based methods used to estimate the initial overcharge. Secondly, the pass-on rate approach uses the purchaser's pass-on rate and applies it to the input cost increase.

Relationship between public and private enforcement

Wolfgang Kirchhoff, Judge in the antitrust division of the German Federal Court of Justice, presented "Relationship between public and private enforcement". Although public and private enforcement proceedings are separate, they are related through the binding effect which the Commission's and national competition authorities' (NCA) decisions have on courts (Article 16 (1) Reg. 1/2003; Article 9 Damages Directive). German law goes even further than the Directive in this respect and confers on foreign NCA decisions the same binding effect as their own NCA decisions (Article 33 (4) GWB). Kirchhoff explained the scope of the binding effect on the basis of a recent Federal Court judgment in case *Lottoblock II* (KZR 25/14, ECLI:DE:BGH:2016:120716UKZR25.14.0). It follows from it that only the operative part of a final administrative decision and

those parts of the reasons needed to support the final decision with regard to facts and law are binding for courts. He stressed the fact that the binding effect concerns only the competition law infringements and can be extended neither to causality nor to quantification of harm. Furthermore, he explored the possibilities for the Commission and NCAs to act as amicus curiae in private enforcement proceedings and described the extensive German experience with oral statements by the Federal Competition Authority which judges reportedly find very useful. The court, however, is not bound by those statements. Finally, Kirchhoff noted that experience with competition law cases and profound training in competition law are key elements to successful dispute resolution.

The role of the CJEU in interpreting Directive 2014/104/EU

Ian Forrester, Judge at the General Court of the European Union, took a step backwards from the Directive and shared some historical thoughts on the development of European competition law. He explained that in the 70s and 80s it was unusual for firms to bring claims against each other based on competition law. In the 90s, however, the institutionalization of competition law started. Leniency programs were introduced in the US and in Europe. The adoption of competition law measures became desirable and even possibilities to bring actions for damages were mentioned. Yet, in 2003, the case of Courage and Crehan showed how many instances one had to go through to actually be awarded damages suffered from anticompetitive practices. A long discussion followed which finally ended with the adoption of Directive 2014/104/EU. Judge Forrester, however, expressed some doubts about its practical impact. He made a comparison with the Product Liability Directive, which was also controversially discussed before being adopted but has not often been used. He expects that the Damages Directive will share the same destiny because the world has changed since the Directive has been discussed. The law just follows the reality. He stressed the fact that nowadays, settlements are very common in Europe and noted that the need for settlements changes legal professions. This, however, shall not diminish the importance of the Directive, preliminary questions on which will surely be directed to the CJEU. In particular, questions on access to documents, limitation periods, causation and burden of proof are very likely to arise. In his opinion, however, the answers to these particular questions will not be as important as other factors of life.

Limitation periods

Ben Rayment, experienced litigator at Monckton Chambers in London, presented "Limitation periods: When does the clock start and stop?" exploring Articles 10 and 18 Damages Directive. In his presentation he dealt mainly with three groups of issues. Firstly, he addressed factors that start the limitation "clock" and focused on the notion of "knowledge" in Article 10 (2) Damages Directive. Secondly, Rayment discussed issues around stopping the limitation "clock". In other words, he explained under what circumstances time limits can be suspended. Problems can arise in connection with Article 10 (4) Damages Directive because it might not be sufficiently clear when an investigation of an infringement is started and/or finalized. Moreover, Article 18 Damages Directive leaves the question open as to whether formal arrangements for consensual dispute resolution are necessary to suspend the time limit. Thirdly, he addressed some transitional issues arising out of Article 22 Damages Directive. Finally, he concluded that the rules on limitation in the Directive are generous to claimants and are therefore consistent with the aim of the Directive to facilitate private enforcement.

Evidence

Eric Barbier de la Serre, Partner at Jones Day, presented issues of evidence. On the one hand, the Directive aims at facilitating compensation and solving information asymmetry between parties. On the other hand, however, coordination between public and private enforcement requires the protection of leniency statements and settlements. Barbier de la Serre discussed five types of remedies for this controversy: a change of liability test, a definition of proxies, a lower standard of proof, an introduction of presumptions and a facilitation of the collection of evidence. To a certain extent, the Directive adopts to his opinion all of them. With regard to the collection of evidence, he noted that the Directive still leaves discretion to national judges to order disclosure, so it is unclear whether there is a subjective right to it. Furthermore, it remains to be seen whether costs will act as a deterrent and whether disclosure might become a reason for forum shopping. Concerning the introduction of presumptions, he addressed the presumption in Article 9 Damages Directive that an infringement exists, the presumption of damage for cartels in Article 17 (2) Damages Directive as well as the rules concerning passing-on.

Forum-shopping considerations

Finally, a round table on forum shopping considerations and impact closed the conference.

Jonas Brueckner, Senior Associate of Baker & McKenzie's Competition Law Practice Group, explained firstly the rules of the Brussels Ibis Regulation on the basis of case *CDC Hydrogen Peroxide* (C-352/13, ECLI:EU:C:2015:335) which govern the question of jurisdiction. Secondly, he presented four considerations for the choice of a forum: the applicable procedural law, the applicable substantive law, soft factors as well as the possibility for recognition and enforcement abroad. He pointed out that the softened standard of proof for damages and the possibility to litigate in English make Germany an attractive jurisdiction for claimants. However, high advance payments and a rather hostile attitude of the judiciary towards private antitrust litigation might discourage claimants to start litigation in German courts.

Ben Rayment stressed the soft factors that make the UK an attractive forum. Judges are highly specialized and have by no means a hostile attitude towards private enforcement. Furthermore, claimants are attracted by the rules on disclosure and the different funding options available. The numerous cases with which UK courts have already dealt have also led to the development of the law and have increased legal certainty.

Jacqueline Riffault-Silk noted that there are fewer cases in France than in the UK and The Netherlands. She stressed the fact that private enforcement falls under civil matters. Therefore the principle of party disposition applies. It is for the parties to start litigation and to define the subject matter of the action. A problem arises, however, when various claimants start proceedings in different Member States against the same cartel members. She noted that this deconcentration of proceedings is not favorable to private enforcement.

Comments and discussion

Each presentation was followed by a lively debate. The speakers and participants highlighted the significance of private enforcement and assessed to what extent the Directive is likely to achieve its aim of facilitating private enforcement. In particular, practical issues on quantification of damages and access to evidence were often subject to discussion. The potential consequences of Brexit on private enforcement as well as incentives for consensual settlements were also widely

discussed.

The circulation of people and their family status in a globalized world: the foreigner’s family

Bringing together a team of researchers from Europe and Brazil (Universidade de São Paulo), the *Center of Family Law* of the University Jean Moulin Lyon 3, organizes an international seminar entitled:

The circulation of people and their family status in a globalized world: the foreigner’s family

The Seminar will take place in Lyon, wednesday, November 23, 2016, with the following program:

Morning: 9h – 12h30
Introduction:
What is a “foreigner”? Between regionalization and globalization, *J.-S. Bergé and P. Casella (9h – 9h30)*

I – The dimensions of the foreigner’s family
Presidency: P. Casella

– In the European area, *Fulchiron H., A. Slimani, L. Sorisole* (9h30 – 10h)
– In the South American area, *G. Cerqueira* (10h- 10h30)
– Debate: *A. Bonomi* (subject) (10h30 to 10h45)

Coffee Break: 10h45 – 11h

II – The integration of the foreigner’s family (social rights, integration policies)
Chair: F. Menezes

– In the European area, *B. Baret, L. Eck* (11h – 11h30)
– In the South American area, *F. Menezes, D. Cordeiro* (11h30 – 12h)
– Debate: Discussion *A. Bonomi* (subject) (12h – 12h30)

Lunch: 12h30 to 2h15

III – The protection of the foreigner's family (entry, residence permit, displacement)
Chair: *C. Moises*

– Protection of fundamental rights, *L. Robert, C. Moises* (14h15 – 14h45)
– Protection by special statutes (political areas, economic areas), *E. Durand, G. Monaco* (14h45 – 15h15)

Coffee Break: 15h15 – 15h30

– Debate: *A. Bonomi* (subject) (15h30 – 16h30)
– Closing, *G. Monaco, H. Fulchiron* (16h30 – 17h)

Seminar Directors: Hugues Fulchiron and Gustavo Monaco

Language: French

Venue: 15, quai Claude Bernard, Lyon, France – Université Jean Moulin Lyon 3 (Salle Caillemer)

No participation fee.

New Publication in the Oxford Private International Law Series:

Human Rights and Private International Law

By James J Fawcett FBA (Professor of Law Emeritus, University of Nottingham), Máire Ní Shúilleabháin (Assistant Professor in Law, University College Dublin) and Sangeeta Shah (Associate Professor of Law, University of Nottingham)

Human Rights and Private International Law is the first title to consider and analyse the numerous English private international law cases discussing human rights concerns arising in the commercial and family law contexts. The right to a fair trial is central to the intersection between human rights and private international law, and is considered in depth along with the right to freedom of expression; the right to respect for private and family life; the right to marry; the right to property; and the prohibition of discrimination on the ground of religion, sex, or nationality.

Focusing on, though not confined to, the human rights set out in the ECHR, the work also examines the rights laid down under the EU Charter of Fundamental Rights and other international human rights instruments.

Written by specialists in both human rights and private international law, this work examines the impact, both actual and potential, of human rights concerns on private international law, as well as the oft overlooked topic of the impact of private international law on human rights.

Contents

1: Introduction
2: Human rights, private international law, and their interaction
3: The right to a fair trial
4: The right to a fair trial and jurisdiction under the EU rules
5: The right to a fair trial and recognition and enforcement of foreign judgments under the EU rules
6: The right to a fair trial and jurisdiction under national rules
7: The right to a fair trial and recognition and enforcement of foreign judgments under the traditional English rules
8: The right to a fair trial and private international law: concluding remarks

9: The prohibition of discrimination and private international law
10: Freedom of expression and the right to respect for private life: international defamation and invasion of privacy
11: The right to marry, the right to respect for family life, the prohibition on discrimination and international marriage
12: Religious rights and recognition of marriage and extra-judicial divorce
13: Right to respect for family life and the rights of the child: international child abduction
14: Right to respect for private and family life and related rights: parental status
15: The right to property, foreign judgments, and cross-border property disputes
16: Overall conclusions

For further information, see here.

Journal of Private International Law Conference at Pontifical University of Rio de Janeiro, 3-5 August 2017: Call for Papers

Building on the very successful conferences held in Aberdeen (2005), Birmingham (2007), New York (2009), Milan (2011) Madrid (2013), and Cambridge (2015), we are pleased to announce that the Journal of Private International Law will be holding its next Conference at the **Pontifical Catholic University of Rio de Janeiro, 3-5 August 2017**. We are now calling for abstracts for the Conference. Please submit an abstract if you would like to make a presentation at the Conference and you are willing to produce a final paper that you will submit for publication in the Journal. Abstracts should be up to 500 words in length and should clearly state the name(s) and affiliation(s) of the author(s).

They can be on any subject matter that falls within the scope of the Journal, and can be offered by people at any stage of their career, including postgraduate students. The Journal of Private International Law (J. Priv. Int. L.) was launched in spring 2005 and covers all aspects of private international law, reflecting the role of the European Union and the Hague Conference on Private International Law in the making of private international law, in addition to the traditional role of domestic legal orders. Articles from scholars anywhere in the world writing in English about developments in any jurisdiction on any aspect of private international law are welcomed, as well as shorter articles or analysis from anywhere in the world, including analysis of new treaties and conventions, and lengthy review articles dealing with significant new publications.

Presentation at the Conference will depend on whether your abstract is selected by the Editors of the Journal (Professors Jonathan Harris of King's College, London and Paul Beaumont of the University of Aberdeen) and by the conference organisers in the Pontifical Catholic University (Professors Nadia de Araujo, Daniela Vargas and Lauro Gama). The subsequent article should be submitted to the Journal. Publication in the Journal will be subject to the usual system of refereeing by two experts in the field.

The Conference will be a mixture of plenary (Friday) and parallel panel sessions (Thursday afternoon and Saturday morning). Please indicate on the abstract whether you are willing to present in either or are only willing to do so in one or the other. A willingness to be flexible maximises our ability to select your paper.

The Conference will be held at the main campus of the Pontifical Catholic University of Rio de Janeiro, located in Rio de Janeiro, Brazil (www.puc-rio.br). . Further information will be available soon.

Speakers will not be expected to pay a conference fee but will be expected to pay their travel and accommodation expenses to attend the Conference in Rio de Janeiro. Information on Conference accommodation will be available soon, with a list of hotels and hostels nearby the campus, but the University does not have living arrangements Details about accommodation and the Conference dinner on the Thursday evening will follow.

Please send your abstract to the following email address by November 15th 2016: (jprivintlrioconference2017@gmail.com

The Cambridge International and European Law Conference 2017 'Transforming Institutions'. Call for Papers

The Editors of the Cambridge International Law Journal (CILJ) and the Conference Convenors welcome submissions for the Cambridge International and European Law Conference 2017, which will be held in the Faculty of Law, Cambridge on 23 and 24 March 2017.

Theme

The theme of the Conference is 'Transforming Institutions'. This theme is intended to stimulate the exploration of interactions between law and institutions in transformative contexts. Broadly conceived, transformation may refer to: (1) the manner in which the functions of institutions may change over time; (2) how institutions may act as agents of transformation; and (3) how institutions themselves can be subjected to transformation.

Given the Conference's focus on European and International law, the organisers invite submissions to consider how structures and norms under European and International Legal systems relate to, influence and are affected by 'transforming institutions'.

Abstracts

Abstracts of no more than 300 words should be submitted no later than Friday, 25 November 2016.

The authors of selected papers will be required to submit a 2000 word extended

abstract to conference@cilj.co.uk by Friday 24 February 2017.

Authors who present at the Conference will also be invited to submit their papers for publication in Volume 6(2) of the CILJ, to be published in the summer of 2017. Authors will be contacted about this after the Conference.

The Conference is aimed at both academic and professional attendees and will be CRD accredited.

Further Information

For further information please contact conference@cilj.co.uk

New Canadian Reference on Conflict of Laws

Halsbury's Laws of Canada (first edition) has published a reissue (September 2016) of its volume on Conflict of Laws. It is written by Professor Janet Walker, the author of the leading Canadian textbook in the field. The reissue is highly detailed with over 260 pages of tables (cases, conventions, legislation), an index and a glossary. The substantive content runs to over 600 pages including lengthy footnotes. The reissue can be purchased as a stand-alone reference (without buying the entire Halsbury's collection) for conflict of laws in Canada (publisher information available here).

Forum Conveniens Annual

Lecture, University of Edinburgh

I have been very kindly invited to be the speaker of the *Forum Conveniens* Annual Lecture at the University of Edinburgh this year. It is with great pleasure that I announce it will take place on Wednesday 23rd November 2016, under the title "Farewell, UK. Stocktaking Time for a Continental Europe's Area of Civil Justice". Start is foreseen at 6.00pm, at the following venue: LG.10, David Hume Tower, EH8 9JX.

Attendance is free, however registration is required. For more information please contact:
Professor Gerry Maher (Gerard.Maher@ed.ac.uk or Dr
Veronica Ruiz Abou Nigm (V.Ruiz.Abou-Nigm@ed.ac.uk)

Forum Conveniens is a forum based at Edinburgh Law School and dedicated to International Private Law (Private International Law). Its base in Edinburgh reflects the distinctive role of Scots law in the development of the subject but at the same time the focus of the Forum is international.

It provides a means of bringing together interested parties (including academic lawyers, practitioners, the judiciary, law reformers, and policy makers) for discussion and exchange of ideas in private international law.

Massimo Benedettelli on EU Private International Law of Companies

Professor *Massimo Benedettelli* (University of Bari "Aldo Moro") has just published a highly noteworthy article entitled "Five Lay Commandments for the EU Private International Law of Companies" in the 17th Volume of the Yearbook

of Private International Law (2015/2016).

The author has kindly provided us with the following abstract:

*'While praising European company law as a "cornerstone of the internal market", the EU institutions have devoted limited attention to issues of competent jurisdiction, applicable law and recognition of judgments which necessarily arise when companies carry out their business on a cross-border basis. This is a paradox, especially if one considers that in this area the EU often follows a policy of "minimal harmonization" of the laws of the Member States and that this policy leads to the co-existence of a variety of different rules and institutions directly or indirectly impinging on the regulation of companies, thus to possible conflicts of jurisdictions and/or laws. The European Court of Justice's "*Centros *doctrine" fills this gap only partially: this is due not only to the inherent limits of its case-law origin, but also to various hidden assumptions and corollaries on which it appears to be grounded and which still need to be unearthed. Hence, time has come for a better coordination of the legal systems of the Member States in the field of company law, possibly through the enactment of an ad hoc instrument. To be properly carried out, however, such coordination requires a preliminary clarification of what the EU private international law of companies really is and how it should be handled at the current stage of the European integration. This article tries to contribute to such clarification by proposing five main guidelines, in the form of "commandments" for the European legislator, courts and practitioners. It is submitted that, first, one should understand the different scope of the three legal disciplines (EU law, private international law and company law) which interact in this field so as to assess when and to what extent the lack of coordination of the Member States' domestic laws may affect the achievement of the objectives pursued by the EU. As a second analytical step, the impact that the EU constitutional principles of subsidiarity and proportionality may have on the scope of the relevant regulatory powers of the EU and of the Member States should be determined. Third, the issue of "characterization" should be addressed so that the boundaries of company law vis-à-vis neighbouring disciplines (capital markets law, insolvency law, contract law, tort law) are fixed throughout the entire EU legal space in a uniform and consistent way. Fourth, the Member States' legal systems should be coordinated on the basis of the "jurisdictional approach" method (which* de facto *inspires the ECJ in* Centros *and its progenies) by granting a role of prominence to the Member State under the laws of which a*

company has been incorporated. Fifth, any residual conflict which may still arise among different Member States in the regulation of a given company should be resolved, in principle, by respecting the will of the parties to the corporate contract and the rights "to incorporate" and "to re-incorporate" which they enjoy under EU law. In the author's opinion, an EU private international law of companies developed on the basis of these guidelines not only would achieve a fair balance between the needs of the integration and the Member States' sovereignty, but would also create a framework for a European "market of company law" where a "virtuous" forum and law shopping could be performed in a predictable and regulated way.'

Supreme Court of Canada Allows Courts to Sit Extraterritorially

In *Endean v British Columbia*, 2016 SCC 42 (available here) the Supreme Court of Canada has held that "In pan-national class action proceedings over which the superior court has subject-matter and personal jurisdiction, a judge of that court has the discretion to hold a hearing outside his or her territory in conjunction with other judges managing related class actions, provided that the judge will not have to resort to the court's coercive powers in order to convene or conduct the hearing and the hearing is not contrary to the law of the place in which it will be held" (quotation from the court's summary/headnote).

The qualifications on the holding are important, since some of the earlier lower court decisions had been more expansive in asserting the inherent power of the superior court to sit outside the province (for example beyond the class proceedings context). I am concerned about any extraterritorial hearings that are not expressly authorized by specific statutory provisions, but I do appreciate the utility (from an efficiency perspective) of the court's conclusion in the particular context of this dispute. It remains to be seen if attempts will be made to broaden this holding to other contexts.

The court has also held that “A video link between the out-of-province courtroom where the hearing takes place and a courtroom in the judge’s home province is not a condition for a judge to be able to sit outside his or her home province. Neither the [class proceeding statutes] nor the inherent jurisdiction of the court imposes such a requirement. The open court principle is not violated when a superior court judge exercises his or her discretion to sit outside his or her home province without a video link to the home jurisdiction” (quotation from the court’s summary/headnote).

This aspect of the decision concerns me, since my view is that the open court principle requires that members of the Ontario public and the media can see the proceedings of an Ontario court in an Ontario courtroom. It is a hollow claim that they can fly to another province to watch them there. The separate concurring decision appreciates this aspect of the case more than the majority decision, though it too stops short of requiring a video link. In its view, “While the court should not presumptively order that a video link back to the home provinces be set up where the court sits extraprovincially, members of the public, the media, or counsel can request that a video link or other means be used to enhance the accessibility of the hearing. If such a request is made, or the judge considers it appropriate, a video link or other means to enhance accessibility should be ordered, subject to any countervailing considerations” (quotation from the court’s summary/headnote).

European Data Science Conference in Luxembourg, 7-8 November 2016

The European Association for Data Science (EuADS) will hold the first European Data Science Conference in Luxembourg on 7-8 November 2016. This interdisciplinary event is the inaugural conference of EuADS and aims to provide a setting for fostering communication among all stakeholders of Data Science in

Europe. You may download the flyer of the conference here. Conference topics include, among others, the question of trust, transparency and provenance of data including where data come from and by which mechanisms trust in data might be achieved, as well as legal aspects of data science such as data protection, data privacy and data access. The conference will feature a symposium on “Legal dimensions of Data Science” with contributions by Burkhard Hess (MPI Luxembourg), Advocate General Pedro Cruz Villalón, Gerald Spindler (University of Göttingen), Mark D. Cole (University of Luxembourg) and Jan von Hein (University of Freiburg). The full programme is available here.