

CPI EU News Presents:

***Apple* (C-595/17): ECJ on jurisdiction clauses and private enforcement: “Multinationals, go ahead and abuse your distributors”?**

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Essential Facts

Apple's distribution network in Europe is organized through agreements signed between its Irish subsidiary and resellers in each Member State. These agreements include a jurisdiction clause according to which: (i) the reseller must submit any disputes about "this agreement and the corresponding relationship between the parties" to the Irish courts; and (ii) Apple can choose between Irish courts, the courts of the reseller MS, or any jurisdiction where Apple suffered harm.

In this case, a former French reseller of Apple's (succeeded by its liquidator) sued it in France, for abuse of a dominant position. It argued it was a victim of discrimination, with Apple's own network stores receiving unjustified better conditions.

The 1st and 2nd instance courts found the jurisdiction clause valid and the Irish courts exclusively competent. The 3rd instance court invoked the CJEU's judgment in *CDC Hydrogen Peroxide* and reversed the decision. In the subsequent re-decision of the case, the French court, informed of a ruling on the same clause (in similar circumstances) by the Portuguese Supreme Court, concluding Portuguese courts did not have jurisdiction,² asked the CJEU for clarifications.

Outcome

In *CDC Hydrogen Peroxide*, the Court explicitly said that, under Article 23(1) of Reg. 44/2001,³ a clause like the *Apple* one did not encompass an action for damages arising from a cartel.⁴ Jurisdiction clauses would only cover the cartel if they "referred" to antitrust damages claims.⁵ The offence had to be "reasonably foreseeable" when the contract was signed.

In its judgment on October 24, 2018,⁶ the CJEU reaffirmed *CDC Hydrogen Peroxide* in 5 paragraphs. It said that case-law also applied to 102 if "the alleged anti-competitive conduct has no connection with the contractual relationship" in question (para 27).

But it then added that, while conduct covered by 101 is "in principle not directly linked to the contractual relationship," conduct under 102 "can materialize in contractual relations (...) and by means of contractual terms" (para 28). In a 102 action, taking account of a clause that refers to relationship arising from the contract is not surprising (para 29). Under Article 23, the applicability of a jurisdiction clause "is not excluded on the sole ground that that clause does not expressly refer to" antitrust infringements (para 30).

The Court also said that the applicability of jurisdiction clauses is independent of the follow-on or stand-alone nature of the action.⁷

Author's Opinion

Replacing clarity with obscurity

Three of five judges, including the rapporteur, were the same that sat in *CDC Hydrogen Peroxide*.⁸ AG Wahl advised the Court to mostly go the other way.⁹ One would expect the Court to either just stick to its prior ruling, or to be clear about how it was changing (clarifying) the previous case-law. It did neither.

The almost inexistent reasoning and ambiguous wording suggest friction within the chamber. It feels like the Court couldn't agree on what it was saying. As a result, (relative) clarity has been replaced with legal uncertainty.

The judgment has already been described as meaning that the *Apple* clause is valid.¹⁰ But that's not what the Court said. The only answer clearly provided by the Court is that the applicability of such a clause is not excluded simply because it doesn't expressly refer to antitrust infringements. As discussed below, it's up to the national court to decide if the case-law's criteria are met. If the alleged abuse was unknown, or subsequent to the contract, the clause cannot be applied.

Scope of jurisdiction clauses

When discussing the scope of jurisdiction clauses, legal certainty and contractual autonomy do not come into play. The issue is not whether parties "can" elect a forum for certain disputes (see below), but whether they "have" done so.¹¹

AG Wahl rightfully pointed out that we can't absolutely exclude the possibility that a clause may "implicitly" include antitrust infringements.¹² *CDC Hydrogen Peroxide* said the clause had to "refer" to antitrust disputes, it didn't say the reference had to be explicit. This was now confirmed.¹³

It is clear that it is up to the national court to interpret the jurisdiction clause in each specific case.¹⁴ A case-by-case assessment is always required. But the Court has ruled that EU Law limits that assessment. The issue is which limits, and how far the Court wishes to go in guiding national courts.

The Court must make this choice in an environment where many (non-specialized) national courts frequently throw out complex antitrust private enforcement cases on procedural grounds. And where the transposition of Directive 2014/104/EU will be applicable to a dispute in some MS, but not in others.¹⁵ It should also consider the risk of negative conflicts of competence, for which there may be no solution. Just because the French court interprets the clause, in its context, as including antitrust infringements, meaning that Irish courts are competent, does not mean the Irish court will agree. Unclear CJEU case-law does not help.

Article 23(1) of Regulation 44/2001 is an exception to the jurisdictional rules set out in the Regulation. It must be interpreted restrictively. In *CDC Hydrogen Peroxide* and *Apple*, the CJEU clarified that there are situations which cannot be deemed to "arise in connection with a particular legal relationship" and do not fall under Article 23.¹⁶

According to *CDC Hydrogen Peroxide*, under Article 23, vague jurisdiction clauses do not encompass an action for damages arising from a secret cartel which raised prices, when this action brought together claims from and against different companies (joint liability), with many different jurisdiction clauses relating to different MS.

AG Wahl argued that these were distinctive factors.¹⁷ But the bringing together of different claims subject to different clauses cannot affect the interpretation of the clauses' scope (and context of their acceptance). Whatever inconvenience may be caused, it would only be relevant when discussing effectiveness, whose relevance AG Wahl refuses.

The ruling in *CDC Hydrogen Peroxide* was justified by the need "to avoid a party being taken by surprise by the assignment of jurisdiction." The clause should not cover relationships "other than that in

connection with which the agreement conferring jurisdiction was made.”¹⁸ It goes without saying that the clause does not cover conduct with “no connection with the contractual relationship”¹⁹ (e.g. invoking a clause in a supply agreement for widgets, in a dispute about a refusal to supply blodgets).

It would be disingenuous for the Court to distinguish *Apple* from *CDC Hydrogen Peroxide* by saying conduct under 101 is “in principle” not linked to the contractual relationship, whereas 102 conduct “can” materialize in contractual terms.²⁰ 101 conduct is just as (or more) likely to be linked to the contractual relationship and to materialize in contractual terms as 102 conduct (which may even relate a refusal to contract). In *CDC Hydrogen Peroxide*, the cartel was connected to the agreements in question. It raised prices for the purchased products. So, the Court wasn’t saying that there was no connection between the antitrust practice and the contractual relationship. Discussing a price which is unlawfully high because of a cartel is just as related, or unrelated, to the agreement where that price is set, as discussing a price in a contract which is unlawfully high because of abusive behavior.

The decisive aspect was that the injured party did not know about the cartel and “could not reasonably foresee such litigation” when it signed the agreement.²¹ An unknown and unforeseeable cartel is not connected to the particular legal relationship governed by the contract. Without an explicit reference, an undertaking can’t be assumed to have agreed on how to resolve disputes about an abusively discriminatory agreement, if it didn’t know about the discrimination.

This principle is applicable to all antitrust infringements. Any differentiation between 101 and 102 in this regard has no legal basis.²² Predictability is key.²³

It means, for example, that general jurisdiction clauses must be applicable to 101/102 infringements which derive exclusively from the letter of the agreement (are materialized in contractual terms) - e.g. an absolute territorial protection or RPM clause, or a clause imposing an obviously excessive price. They must also be applicable to any infringement which was (or should have been) known by the injured party when the agreement was signed.

Conversely, general jurisdiction clauses are not applicable to litigation arising from 101/102 infringements which were unknown and could not reasonably be foreseen by the injured party when it signed the contract. That is the case of a secret cartel, but it is also the case of abusive discrimination which was discovered, or only began, at a later date.

It is my understanding that *Apple* hasn’t changed the case-law. In *Apple*, the Court reaffirmed *CDC Hydrogen Peroxide*, reinforced the importance of the “surprise” criterion, noted the superfluosness of an explicit reference, and clarified the need to see if the practice is (wholly) materialized in the contract.

Validity of jurisdiction clauses

But the discussion can’t stop here, or it misses much of the point. There was another, more important, issue, which the Court avoided.²⁴

Whether the clause explicitly or implicitly refers to (current or future) antitrust infringements or not, its inclusion in a contract may: (1) be abusive in itself; and/or (2) make it excessively difficult or impossible for the victim of the antitrust infringement to enforce the right to damages deriving from Articles 101/102 TFEU.

First, it is bizarre to say that, in 102 cases, the abusive clause in a contract that sets, e.g. discriminatory or excessive prices, is null and void. But the clause that reserves competence to a court of another MS which may, in practice, be inaccessible to the victim of the abuse, is valid. It is precisely because the dominant undertaking has so much market power that it can impose such a clause (even an asymmetric one, as in *Apple*).²⁵ It is wrong to say “they signed it,” because that would apply to all abuses materialized in a contract. A dominant undertaking has a special responsibility not to restrict the right of the victims of its anticompetitive practices to litigate in courts accessible to them.

Second, the principle of contractual autonomy cannot override the principle of effectiveness of EU Law.

Clauses such as the *Apple* one can make it impossible or excessively difficult for the injured parties to seek the compensation they are entitled to under EU Law. Such litigation between a distributor and a dominant supplier typically emerges when the distributor has been driven out of business, and is impoverished or bankrupt. There is a reason why the French and Portuguese distributors didn’t sue Apple in Irish courts. Just like there is a reason why Apple wants to impose on its distributors the use of Irish courts, but reserves for itself the right to use the courts of any MS.

This has nothing to do with trusting the courts of other MS.²⁶ It has to do with the practical reality of a distributor’s capacity to litigate in another MS, with a language, law, and legal culture unfamiliar to it, with potentially much greater costs of litigation, at a time when, typically, it is very limited in its financial capacity.

A case-by-case assessment is required: the injured party must be given the chance to show it is too difficult for it to litigate in the other MS. Otherwise, dominant undertakings will be allowed to freely abuse their distributors, with no fear of civil consequences. In the French and Portuguese cases, if the abuse was real, Apple got away with it.

The Court has had an uneven approach to the principle of effectiveness in these contexts. For example, it applied this principle to rules of access to evidence before national courts, but has not clearly done so for access to documents held by the Commission. AG Wahl explicitly argued that clauses must be valid, even if they deprive rights deriving from the Treaty of their *effet utile*.²⁷ AG Jääskinen saw this was problematic, and argued that the principle of effectiveness would have to be applied here... but only when the EU Regulation is not applicable (only national law).²⁸

The principle of effectiveness is a general principle of EU Law. Rights deriving from a rule of primary EU Law (Articles 101/102) cannot be deprived of their effectiveness by a rule of secondary EU Law. Even primary EU Law can be set aside by overriding general principles.²⁹ Thus, if Article 23(1) of Reg. 44/2001 allowed parties to choose a court that was too difficult for the party who suffered damages from an infringement of 101/102 to litigate in, such a provision would have to be set aside in those cases, as it would infringe a hierarchically superior rule.

Another important undertone in this discussion ties into the tendency to perceive these disputes exclusively as an issue of private interest, between the parties. The Court has clarified that there is also public interest behind the pursuit and the assurance of the effectiveness of private enforcement of Articles 101/102. Allowing parties’ rights to be deprived of their effectiveness in this way would be harmful to the public interests pursued by EU competition law.³⁰

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- ¹ Professor at the University of Lisbon Law School. The author would like to thank Thibault Schrepel, Francisco Marcos and Carsten Krüger for their comments to an earlier draft of this paper.
- ² The Portuguese case is often misinterpreted – see analysis in Sousa Ferro, M., “Antitrust Private Enforcement in Portugal and the EU: The Tortuous Topic of Tort,” (2016) 4 *Global Competition Litigation Review* 140.
- ³ Identical to Art. 25(1) of Reg. 1215/2012.
- ⁴ Case C-352/13 *CDC Hydrogen Peroxide* [EU:C:2015:335](#), paras 69-72.
- ⁵ This case-law cannot be directly applied to arbitration clauses – see Opinion of AG Jääskinen in Case C-352/13 *CDC Hydrogen Peroxide* [EU:C:2014:2443](#), para 100.
- ⁶ Case C-595/17 *Apple* [EU:C:2018:854](#), paras 20-30.
- ⁷ CJEU *Apple*, *supra* note 6, paras 31-36.
- ⁸ Same judges: Bay Larsen, Malenovský and Safjan (Rapporteur).
- ⁹ Opinion of AG Wahl in Case C-595/17 *Apple* [EU:C:2018:541](#), paras 67, 69, and 75.
- ¹⁰ See, e.g., Aranze, J., “Apple jurisdiction clause applies to abuse of dominance claim”, *Global Competition Review*, 26 October 2018.
- ¹¹ It is also not important whether the dispute is qualified as tort or contractual, since the jurisdiction clause can also cover tort liability – AG *Apple*, *supra* note 9, paras 34-35.
- ¹² AG *Apple*, *supra* note 9, para 54.
- ¹³ CJEU *Apple*, *supra* note 6, para 30.
- ¹⁴ CJEU *CDC-HP*, *supra* note 4, para 67; AG *CDC-HP*, *supra* note 5, para 103; CJEU *Apple*, *supra* note 6, para 21; AG *Apple*, *supra* note 9, paras 33, 54, and 59.
- ¹⁵ Absent uniformizing intervention by the ECJ, this will be the result of different national understandings of what are procedural/substantive rules and different temporal scope provisions.
- ¹⁶ CJEU *CDC-HP*, *supra* note 4, para 68; CJEU *Apple*, *supra* note 6, para 22.
- ¹⁷ AG *Apple*, *supra* note 9, paras 58-64, and 94.
- ¹⁸ CJEU *CDC-HP*, *supra* note 4, para 68; CJEU *Apple*, *supra* note 6, para 22.
- ¹⁹ CJEU *Apple*, *supra* note 6, para 27.
- ²⁰ *Id.*, para 28.
- ²¹ CJEU *CDC-HP*, *supra* note 4, para 70; CJEU *Apple*, *supra* note 6, para 24. The test cannot be whether the undertaking was “able to envisage the possibility” of an anticompetitive infringement (AG *Apple*, *supra* note 9, para 77). This test proposed by AG Wahl would mean that general jurisdiction clauses would always be applicable to antitrust infringements. Only a very unimaginative, naïve client would not be “able” to imagine there might be a cartel, or that the dominant undertaking might abuse its position.
- ²² CJEU *Apple*, *supra* note 6, para 28; AG *Apple*, *supra* note 9, paras 67, 69-71, and 75; AG *CDC-HP*, *supra* note 5, para 126.
- ²³ AG *Apple*, *supra* note 9, para 64; AG *CDC-HP*, *supra* note 5, paras 111-112 and 130.
- ²⁴ AG *Apple*, *supra* note 9, paras 3 and 103.
- ²⁵ Keep in mind some MS also prohibit abuses of relative dominant position (economic dependency). Analogy may be drawn with Reg. (EU) 1215/2012, Art. 19 – it is because of the asymmetry of information and economic capacity that EU Law does not allow such clauses in consumer contracts.
- ²⁶ AG *CDC-HP*, *supra* note 5, paras 116-117; AG *Apple*, *supra* note 9, para 47.
- ²⁷ AG *Apple*, *supra* note 9, paras 44-49.
- ²⁸ AG *CDC-HP*, *supra* note 5, paras 114-125.
- ²⁹ Case C-309/99 *Wouters* ECLI:EU:C:2002:98.
- ³⁰ AG *CDC-HP*, *supra* note 5, para 124.