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# Should Jurisdictional Clauses be Interpreted Differently in Competition Law Cases?

A Comment on Case C 595/17 *Apple*

ECLI:EU:C:2018:854

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November 2018

## Introduction

Does a widely worded jurisdictional clause encompass competition law disputes? In Europe, the starting point for this analysis is Article 23 of Regulation No 44/2001 - i.e. the Brussels I Regulation - which allows parties to agree on the jurisdiction where to settle any disputes which have arisen or which may arise in connection with a particular legal relationship.

In *CDC Hydrogen Peroxide*,<sup>2</sup> the European Court of Justice (“ECJ”) held that a generally worded jurisdiction clause “can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of an agreement conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into.”<sup>3</sup> It follows that generally worded jurisdiction clauses cannot extend to a dispute relating to the tortious liability that one party allegedly incurred as a result of its participation in an unlawful cartel. This is because a cartel could not have been reasonably foreseen by the parties when they entered into such a clause, and such litigation cannot be regarded as stemming from a contractual relationship.<sup>4</sup>

What if one party in a contract brings a claim against the other on the basis of another competition infringement, such as an abuse of a dominant position under Article 102 TFEU? This question arose in the recent *Apple* case.<sup>5</sup>

## The Facts

Apple entered into a distribution contract with eBizcuss (the “authorized reseller” or “distributor”). The contract contained a clause granting jurisdiction to the courts of Ireland regarding questions arising from the agreement “and the corresponding relationship.” The distributor brought claims in France regarding an abuse of a dominant position by Apple. A dispute concerning whether French or Irish courts had jurisdiction - and the correct interpretation of *CDC Hydrogen Peroxide* - arose, and went all the way to the French *Cour de Cassation*. This court concluded that, following *CDC Hydrogen Peroxide*, generally worded jurisdiction clauses did not apply to competition matters, and that French courts were therefore competent.

The case then went back to the first instance court - i.e. the *tribunal de commerce de Paris* (Commercial Court, Paris, France) - which became aware of a decision taken by the Portuguese Supreme Court which, confronted with a similar set of facts and jurisdictional clause, held that the jurisdictional clause extended to the abusive conduct and that the Irish courts were competent. The first instance court decided to refer a preliminary question to the ECJ on how to interpret such a clause.

## The Advocate General Opinion

Advocate General (“AG”) opinions often help understand the somewhat Delphic pronouncements of the ECJ. In this case, however, the thoughtful opinion of AG Wahl is difficult to square with the judgment.

According to AG Wahl, the interpretation of generally worded jurisdictional clauses must take into account Article 23 of the Brussels I Regulation, which allows parties to agree on the jurisdiction where any disputes which have arisen or which may arise in connection with a particular legal relationship

will be settled. Such a connection with a relevant legal relationship will arise when the dispute is reasonably foreseeable for the parties at the time when they agreed to the jurisdiction clause.<sup>6</sup>

While reasonable foreseeability is something that must be assessed on a case-by-case basis by courts, the AG identifies a number of supporting principles for this exercise.<sup>7</sup> The first principle is that generally worded jurisdictional clauses are not limited to contractual disputes; non-contractual disputes can also fall within the scope of the jurisdictional clause as long as the dispute originates from the relevant contractual relationship.<sup>8</sup> The second principle is that the designated court need not have any connection with the parties or the legal relationship.<sup>9</sup> The third principle is that substantive law - i.e. whether a dispute concerns competition law or not, or whether it concerns Articles 101 or 102 TFEU - is not relevant to the determination of jurisdiction.<sup>10</sup> This means that jurisdiction clauses should not apply differently depending on whether the case involves a breach of the prohibition of cartels (under Article 101 TFEU or an abuse of a dominant position under Article 102 TFEU. Cartels do not always produce their harmful effects outside a contractual relationship, nor do abuses always have their source in contracts entered with a victim. Instead, “it is necessary to determine in each case, and therefore independently of the legal basis of the action, whether the conduct at the origin of the dispute is linked to the contractual relationship in connection with which the jurisdiction clause was entered into.”<sup>11</sup>

Ultimately, whether a jurisdictional clause extends to competition claims depends on that clause’s content.<sup>12</sup> A generally worded jurisdictional clause would not normally encompass secret cartels. On the other hand, a jurisdictional clause referring to “disputes in connection with liability incurred as a result of an infringement of competition law” likely would.<sup>13</sup>

In line with the principles outlined above, antitrust infringements will fall within the scope of generally worded jurisdictional clauses as long as they are related to the contract - as is arguably the case of abusive conduct arising in the context of a selective distribution scheme.<sup>14</sup> As such, in a case such as this, where the alleged conduct relates to the pricing conditions, and to supply conditions imposed in a discriminatory manner, it cannot be precluded that the dispute has its origins in the legal relationship between a supplier and his distributor.<sup>15</sup>

## The Judgment

The judgment refers solely to *CDC Hydrogen Peroxide*, which is described throughout as settled law and which the court purports to interpret. *CDC Hydrogen Peroxide* requires courts to interpret jurisdiction clauses in order to determine which disputes fall within their scope. However, the scope of jurisdiction clauses is limited to disputes which arise from the legal relationship in connection with which the agreement was entered into.<sup>16</sup> For example, a clause which abstractly refers to disputes arising from contractual relationships does not extend to a tortious dispute concerning competition damages flowing from an unlawful cartel because the undertaking which suffered the loss was unaware of the cartel and could *not reasonably foresee* such litigation at the time that it agreed to the jurisdiction clause.<sup>17</sup> A similar conclusion applies to anticompetitive conduct without a connection to the contractual relationship in the context of which the jurisdiction clause was agreed.<sup>18</sup>

Nonetheless, an abuse of a dominant position “can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms.”<sup>19</sup> In such a context, the application of a jurisdictional clause cannot be said to be surprising.<sup>20</sup> As a result, “the application, in the context of an action for damages brought by a distributor against its supplier on the basis of

Article 102 TFEU, of a jurisdiction clause within the contract binding the parties is not excluded on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law.”<sup>21</sup>

### **Author Opinion**

The succinct reasoning adopted in the judgment, and the way it departs from the AG’s approach, opens the door to a number of possible interpretations.

One such interpretation is that the ECJ made a distinction as regards the scope of jurisdictional clauses depending on whether the case relates to Article 101 - which is concerned with conduct that is “in principle not directly linked to the contractual relationship,” and hence is not caught by generally worded jurisdictional clauses<sup>22</sup> - or to Article 102 TFEU - which refers to conduct that “can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms.”

It is undeniable that the ECJ sought to make a distinction as regards how to interpret jurisdictional clauses which builds on the type of anticompetitive conduct at stake. Yet, such a hard-edged interpretation of the judgment is problematic.

First, there are situations where an abusive conduct will be completely unrelated to any contract that may exist between the parties. Second, not all Article 101 TFEU conduct is secret or a cartel; instead, such conduct may be in the reasonable contemplation of the parties (e.g. consider disputes on the validity of contractual clauses regarding resale price maintenance or the operation of selective distribution systems). Third, and as pointed out by the AG, there is no necessary link between the applicable substantive rules (i.e. Articles 101 and 102 TFEU) and whether a specific dispute is connected to a contractual relationship or in the reasonable contemplation of the parties.

A potential argument for this interpretation of the judgment is that the court tried to develop an approach to jurisdictional clauses based on the applicable substantive competition law provisions because this will provide greater legal certainty and guidance to national courts than a case-by-case analysis. Criticisms regarding the lack of legal certainty arising from this line of case law have been made by a number of authors, particularly in the context of its potential impact on arbitration clauses.<sup>23</sup>

While these criticisms have strength, an approach to jurisdictional clauses that focuses on whether the underlying dispute concerns Articles 101 or Art. 102 TFEU would not lead to increased legal certainty. Such a solution finds no support in the normative reasons for recognizing jurisdictional clauses - namely “to reinforce the legal certainty of persons established in the Union by, at the same time, allowing the applicant to identify the court before which he may bring an action and the defendant reasonably to foresee the court before which he may be sued.” These reasons go well-beyond competition cases, and will continue to apply to jurisdictional clauses in general.<sup>24</sup> It is thus likely that the proposed approach would lead to increased uncertainty, e.g. regarding how to treat abusive conduct that did not fall within the reasonable contemplation of the parties, or collusive conduct that is perceived by a reasonable impartial observer as having been in contemplation by the parties.

Furthermore, no argument has been advanced that Article 23 of the Brussels I Regulation should be interpreted differently when competition law is at stake. Absent valid reasons for competition

provisions being subject to special treatment - and clear criteria to distinguish between those cases which are competition cases from those which are not - a differentiated approach to jurisdictional clauses on the basis of the applicable substantive competition provision would not only amount to an unjustified departure from the general approach to jurisdictional clauses, but it would also have serious knock-on effects on the interpretation of such clauses more widely.<sup>25</sup> Instead, in *Apple* the court expressly sought to rely on traditional principles when interpreting Article 23 of the Brussels I Regulation: it is only because it cannot be regarded as surprising for parties to a contract that a dispute based on Article 102 TFEU will arise - i.e. because such a dispute will be reasonably foreseeable, in line with settled case law - that a jurisdictional clause will extend to such a dispute.<sup>26</sup>

In the light of this, we are left with a tension in the case law. On the one hand, both *CDC Hydrogen Peroxide* and now *Apple* adopt a substantive threshold based on reasonable foreseeability when determining whether a dispute falls within the scope of a jurisdictional clause. On the other hand, the ECJ has also adopted an approach that assesses whether a dispute meets that substantive threshold on the basis of the type of anticompetitive conduct at stake.

It is nonetheless submitted that it is possible not only to reconcile this tension, but also the AG's opinion with the court's judgment, and, ultimately, the *CDC* and *Apple* cases' outcomes with their underlying rationale.

As set out in the operative part of the *Apple* judgment: "the application, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, of a jurisdiction clause within the contract binding the parties is not excluded on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law."

This creates a presumption that abuses by a supplier who holds a dominant position which have caused losses to its distributor will usually be sufficiently linked to the contractual relationship and would, in the context of distribution contracts, normally be in the reasonable contemplation of the parties. Such a presumption merely operationalizes the principles governing the interpretation of jurisdictional clauses in the context of distribution - and potentially, other vertical - relationships. Such an approach also allows the presumption not to apply whenever evidence that the dispute was not in the reasonable contemplation of the parties is adduced. This mechanism is in line with the court's conclusion that a jurisdictional clause should not be excluded "on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law."<sup>27</sup>

This interpretation also explains the ECJ's take on secret cartels in *CDC Hydrogen Peroxide* - particularly the ECJ's finding of absence of reasonable foreseeability on the part of cartel victims when agreeing to generally worded jurisdictional clauses.

By adopting these presumptions in furtherance of the underlying legal principles, these judgments incrementally enhance legal certainty while ensuring doctrinal coherence. The decisions provide guidance to national courts and enhance legal certainty, but also ensure that a party could "avoid (...) being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made."<sup>28</sup>

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<sup>1</sup> OECD, DAF/COMP. The opinions expressed in this piece are personal. They do not, in any way, reflect the views of the OECD, its Secretariat, Committees or committee members. The usual academic disclaimer applies.

<sup>2</sup> Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and Others* ECLI:EU:C:2015:335.

<sup>3</sup> *Id.* para. 68.

<sup>4</sup> *Id.* paras. 69-70.

<sup>5</sup> Case C-595/17 *Apple* ECLI:EU:C:2018:854.

<sup>6</sup> AG Wahl Opinion in Case C-595/17 *Apple* ECLI:EU:C:2018:541, para. 31.

<sup>7</sup> *Id.* para. 33.

<sup>8</sup> *Id.* paras. 34-35.

<sup>9</sup> *Id.* para. 36.

<sup>10</sup> *Id.* para. 37.

<sup>11</sup> *Id.* paras. 69-71.

<sup>12</sup> *Id.* paras. 53-55.

<sup>13</sup> *Id.* paras. 60-66.

<sup>14</sup> *Id.* paras. 66-67.

<sup>15</sup> *Id.* para. 68.

<sup>16</sup> Case C-595/17 *Apple* ECLI:EU:C:2018:854, paras. 21-22.

<sup>17</sup> *Id.* para. 23-25.

<sup>18</sup> *Id.* para. 27.

<sup>19</sup> *Id.* para. 28.

<sup>20</sup> *Id.* para. 29.

<sup>21</sup> *Id.* para. 30.

<sup>22</sup> *Id.* para. 28.

<sup>23</sup> Olga Sendetska "Arbitrating Antitrust Damages Claims: Access to Arbitration," (2018) *Journal of International Arbitration* 35(3) 357; James Segan "Arbitration Clauses and Competition Law," (2018) *Journal of European Competition Law & Practice* 9(7) 423.

<sup>24</sup> As noted by the AG at paras. 26-27 of his Opinion, these principles have long governed not only the interpretation of Article 23 of Regulation No 44/2001, but also the equivalent provision that preceded it, namely Article 17 of the Brussels Convention. See Case C-269/95 *Benincasa* EU:C:1997:337, paragraph 26 and the case-law cited therein.

<sup>25</sup> The papers reviewed in fn. 23 above grapple with exactly this concern as regards the interpretation of arbitration clauses.

<sup>26</sup> Case C-595/17 *Apple* ECLI:EU:C:2018:854, para. 28.

<sup>27</sup> Emphasis is mine.

<sup>28</sup> Case C-352/13 *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v. Evonik Degussa GmbH and Others* ECLI:EU:C:2015:335, para. 68; Case C-595/17 *Apple* ECLI:EU:C:2018:854, para. 22.