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EU - The *CDC* decision: the CJEU rules on jurisdiction in cartel damages claims

On 21 May 2015, the CJEU handed down judgment in the *CDC* case (C-352/13). In a highly significant ruling, the CJEU has addressed the operation of the EU jurisdiction rules in the context of cartel damages claims. In line with the EU's aim to promote such claims, reflected in the recent Directive on antitrust damages actions, the judgment offers encouragement to claimants and will therefore contribute to the further development of the EU as a venue for this type of litigation.

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The facts of *CDC*

The case concerns the well-known *Hydrogen Peroxide* cartel in respect of which, in 2006, the European Commission handed down a Decision[1] finding that the defendants in the proceedings, and a number of other undertakings, participated in a price-fixing cartel in violation of what is now Article 101 TFEU. It established that the cartel activities took place mainly in Belgium, Germany and France and consisted of a number of meetings and conversations.

A number of purchasers of hydrogen peroxide sought to recover damages based on the defendants' breaches of Article 101 TFEU. In so doing they transferred their claims to CDC, an entity established for the purpose of facilitating the pursuit of such claims.

CDC commenced proceedings in Germany against a German member of the cartel and five other participants all domiciled elsewhere in the EU. The case before the CJEU concerned whether the German courts had jurisdiction over the proceedings, and it involves some points of fundamental importance to actions for damages brought before the EU courts based on a violation of Article 101 TFEU.

The legal background

Jurisdiction in civil and commercial matters before the EU courts is primarily governed by EU legislation. In proceedings commenced up until 10 January this year the principal statute is EU Regulation 44/2001 (the "**Brussels I**

[1] Commission Decision 2006/903/EC of 3 May 2006.

Regulation"), whilst in proceedings commenced on or after that date it is EU Regulation 1215/2012 (the "**Brussels I Recast**"), the latter instrument being an evolution of the former. The *CDC* decision fell to be decided under the Brussels I Regulation, but, as the articles to be discussed are, for the purposes of the particular issues in the *CDC* decision, generally the same under the Brussels I Recast, the conclusions in *CDC* will continue to be relevant (save as noted otherwise).[2]

The Brussels I Regulation sets out the jurisdictional bases upon which claims in such matters can be brought in the EU courts. In *CDC* a number of such bases of jurisdiction were in play.

First, Article 2. This permits an EU-domiciled defendant to be sued in the Member State in which it is domiciled. Thus CDC could bring proceedings in Germany against the German defendant. As against the other defendants, the relevance of Article 2 is its relationship to Article 6(1) (see below).

Second, Article 5(3). This provides that, in matters relating to tort or quasi-delict, an EU-domiciled defendant can be sued in the Member State where the harmful event occurred. This concept carries an expanded meaning: a claimant can sue in either the Member State where the events giving rise to the alleged damage took place or the Member State where the alleged damage was suffered. In *CDC*, therefore, this Article might provide a basis upon which proceedings could be brought against the non-German, but EU-domiciled, defendants - provided Germany was either of these places.

Third, Article 6(1). This permits an EU-domiciled defendant to be sued in the Member State in which another defendant is domiciled provided that the claims are so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments. Article 6(1) has proven to be a very useful tool for claimants in cartel damages claims, allowing EU-domiciled cartel participants to be sued together in one Member State.[3] Thus, in *CDC*, the German defendant was the "anchor" which would permit the other EU-domiciled defendants to be sued in Germany provided the other requirements of Article 6(1) were met.

Finally, Article 23. This requires Member State courts to give effect to jurisdiction clauses in favour of EU courts.[4] Under a number of the relevant sales contracts, there were exclusive jurisdiction clauses in favour of other Member States. This is an important point because, under the Brussels I Regulation, such a clause would ordinarily "trump" any jurisdiction conferred by the above mentioned Articles so as to force the proceedings into the

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[2] Article numbering under the Brussels I Regulation is used throughout. Readers can ascertain the relevant numbering in the Brussels I Recast by simply adding two to the relevant Article number (with the exception of Article 5(3) Brussels I Regulation which, under the Brussels I Recast, is Article 7(2)).

[3] See e.g. the English High Court decision in *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm).

[4] Article 23 also fully applies only where one party to the agreement is also domiciled in the EU. Its successor article under the Brussels I Recast (Article 25) removes this requirement and so simply applies to any jurisdiction clause in favour of an EU Member State, irrespective of the parties' domicile. Whilst the observations in this note on clauses falling within Article 23 still apply to Article 25 (although note a point of difference at footnote 8), it is worth keeping this extension in mind if considering matters under the Brussels I Recast.

nominated jurisdiction. Such jurisdiction clauses might, therefore, be considered a barrier to the effective enforcement of competition law claims, in particular, by fragmenting related proceedings between different EU courts.

The questions referred to the CJEU

Against this background, the German court, in attempting to assess whether it had jurisdiction to hear the claims in issue, referred a number of questions to the CJEU regarding the operation of the above Articles. The issues considered were, in the order dealt with by the CJEU, as follows (numbers in square brackets in the text refer to paragraph numbers in the CJEU's judgment):

Article 6(1)

The first issue under this Article was whether the requirement concerning the risk of irreconcilable judgments was met in a case where there was a single and continuous infringement of Article 101 TFEU in respect of which the defendants participated at different times and in different places.

In relation to this, the CJEU noted that, in order for there to be a risk of irreconcilable judgments, not only must there be a potential divergence in the outcome of the dispute, but the divergence must arise in the context of the same factual and legal situation [20]. Did the lack of uniformity in the way that the defendants participated prevent the factual requirement from being satisfied? In the CJEU's view, no, because the Commission's Decision determined that the cartel involved a single and continuous infringement [21]. Further, the fact that different national laws might govern the various claims against the defendants did not result in a different legal situation: what mattered was whether it was foreseeable by the defendants that they may be sued in a Member State in which one of them was domiciled. This requirement was, again, met by the liability and infringement findings in the Commission Decision [22-24]. Accordingly, any factual and legal differences of the type discussed above (which will often be present in such a claim) were disregarded for the purposes of Article 6(1) [25].

Second, the CJEU considered what might happen if proceedings against the "anchor" defendant were withdrawn. This was relevant as CDC had settled with the German defendant, leading to the claim against it being withdrawn. In addition, it was alleged that this settlement had been reached before proceedings were instituted but then put off until afterwards in order to artificially engage Article 6(1). In response to this, the CJEU held that withdrawal of proceedings against the "anchor" defendant would not generally affect the German court's ability to rely on Article 6(1) against the others. This was unless there was firm evidence that, at the time the proceedings had been commenced, the parties to the settlement had colluded to artificially engage that Article. Merely having settlement discussions pre-commencement would *not* show such collusion, but evidence that a settlement was reached at that stage and then concealed until after the proceedings were instituted would have done [26-33].

Article 5(3)

The question for the CJEU in this regard was where could the "harmful event" be said to have occurred, if at all, in a case where the defendants participated in a cartel across several Member States and at different times.

In relation to the first limb of Article 5(3) (place where the event giving rise to the alleged damage occurred), the CJEU noted that ordinarily this would point to the place of the conclusion of the cartel. However, this was a case where, due to the nature of the defendants' participation, this could not easily be assessed. Notably this had led the AG in the case to opine that Article 5(3) could not apply.[5] The CJEU adopted a more flexible approach. It held that if the cartel was constituted, not by one event in one place, but by the conclusion of a number of agreements, in a number of meetings, the task was to find the place where the particular agreement which was the sole causal event giving rise to the loss inflicted on the buyer was concluded. If that could be done, a claimant should be able to sue all the participants in the relevant cartel together [43-50].

In relation to the second limb of Article 5(3) (place where the alleged damage occurred), the CJEU held that this was, in the case of loss consisting of additional costs incurred because of cartel behaviour, to be taken as being the place of the alleged victim's registered office. Given that assessing the actual loss suffered by an entity as a result of an unlawful cartel will often involve detailed examination of the alleged victim's circumstances, the CJEU took the view that the courts of the claimant's home jurisdiction were "manifestly best-suited to adjudicate such a claim" [51-56].

Article 23

What, then of the effect of any exclusive jurisdiction clauses in favour of other EU courts in the underlying purchase contracts and falling within Article 23? The CJEU thoroughly examined their potential application to tortious claims based on a breach of Article 101 TFEU.

First, no exception could be made to the effectiveness of a such a jurisdiction clause simply because the case involved a competition law claim. If this proposition was founded on an otherwise applicable substantive rule of national law then it was bound to fail, such rules being irrelevant to the assessment of a clause's validity under Article 23. Further, it was not possible to interpret the scheme of the Brussels I Regulation as otherwise permitting such a derogation [61-62].

That being the case, if such a clause was valid under Article 23 and the claim was within the clause's scope, the clause had to be given effect [61,66]. However, the CJEU found that, under Article 23, although it has always been for a national court to interpret the scope of a jurisdiction clause, its effect is limited to the *particular legal relationship* to which that clause relates. That being the case, a clause expressed in general terms to catch all disputes arising from a particular contract simply could not be regarded as extending

[5] Opinion of 11 December 2014 at paragraph 52.

to a tortious claim based on Article 101 TFEU. Such a claim arose from an entirely separate legal relationship which the jurisdiction clause would have to expressly refer to in order to catch it [66-72].

Analysis and conclusions

The CJEU's ruling in this case has been much anticipated. In particular, the interaction between the scheme of the Brussels I Regulation and cartel damages claims within the EU has been the subject of much debate and discussion. In the *CDC* case itself, for example, the AG had, in his opinion, expressed the view that the Brussels I Regulation was ill-suited to promoting the effective resolution of such claims and that legislative reform may be necessary.[6]

Set against that background, the CJEU's decision is notable in its efforts to set aside the reservations of the AG and to mould that instrument into a form which promotes such actions by maximising the availability of fora for claimants. This is particularly apparent in the CJEU's refusal to allow technicalities to fetter the application of Article 6(1) and the conclusions it reaches as to the application of Article 5(3).

Equally notable are the CJEU's conclusions on the operation of exclusive jurisdiction clauses in favour of EU Member States in underlying purchase contracts (and governed by Article 23). Significantly, the CJEU differentiates for these purposes between a purely tortious cartel damages claim and a claim under the purchase contract, under which the goods were acquired, by reference to an autonomous EU Law standard as to the nature of the legal relationship involved.[7] The consequence is that the former is, *per se*, not to be regarded as within the scope of the jurisdiction clause in the purchase contract (irrespective of how any applicable national law might interpret that clause), unless the clause specifically says so.

In relation to that proposition, however, it is hard to see how, commercially, use of specific wording to catch a tortious cartel damages claim can be seen as a sensible or realistic course of action. For suppliers of goods and services, focussing on competition law compliance is likely to be a more sensible risk management strategy than attracting the inevitable attention and negative inferences likely to arise as a result of insisting on such express contractual wording.[8] On the other hand, for purchasers, the fact that the clause will not extend to such a claim is unlikely to be a problem – in particular because of the other options granted to claimants by the CJEU's interpretation of the relevant Articles of the Brussels I Regulation in this case.

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[6] *Ibid* at paragraphs 8-10.

[7] Here, a contrast may be drawn with the approach of the English courts in, for example, *Provimi Ltd v Roche Products Ltd* [2003] EWHC 961 (Comm) and *Ryanair v Esso* [2014] EWCA (Civ) 1450, where national law principles of construction were applied to answer the question.

[8] In relation to any such clause, it should also be noted that under Article 25 of the Brussels I Recast, a new rule on substantive validity provides that a jurisdiction clause in favour of an EU Member State is effective *"unless…null and void as to its substantive validity under the law of that* [i.e. the chosen] *Member State*" (this test includes the concept of *renvoi* – see Recital 20). This forms a potential point of departure from the CJEU's reasoning deployed at [62]. Under the Brussels I Recast it would seem that if the applicable national law does not allow the parties to conclude an effective jurisdiction agreement over competition law claims then the clause ought not to be given effect.

Ultimately, *CDC* is therefore only likely to further promote the growth of cartel damages claims within the EU. To the extent it is in line with the approach certain Member States (such as the UK) have already taken in interpreting the Brussels I Regulation, things may not change much in those territories. For other Member States, (and for claimants wishing to cast the jurisdictional net broadly), the impact may be more pronounced. It is useful, however, to keep the boundaries of the judgment in mind. One is that, under the Brussels I Regulation, the jurisdictional analysis may be materially different in the event that any cartel defendant is domiciled outside the EU. In particular, jurisdiction over that defendant would then, generally speaking, fall to be determined by national law and, for example, Articles 5(3) and 6(1) would not be available.

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