Reports of Cases

OPINION OF ADVOCATE GENERAL
WAHL
delivered on 5 July 2018 [1]

Case C-595/17

Apple Sales International,
Apple Inc.,
Apple retail France EURL
v
MJA, acting as liquidator of eBizcuss.com (eBizcuss)

(Request for a preliminary ruling
from the Cour de cassation (Court of Cassation, France))

(Reference for a preliminary ruling — Area of freedom, security and justice — Jurisdiction in civil and commercial matters — Article 23 of Regulation (EC) No 44/2001 — Jurisdiction clause in a distribution agreement — Action for compensation by the distributor based on infringement of Article 102 TFEU by the supplier)

Introduction

1. The present request for a preliminary ruling concerns the interpretation of Article 23 of Regulation (EC) No 44/2001, [2] which allows a derogation from the general rules on international jurisdiction defined in that regulation if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen in connection with a particular legal relationship.

2. The request was submitted in the context of proceedings between Apple Sales International, Apple Inc. and Apple retail France EURL and MJA, in its capacity as liquidator of eBizcuss.com ('eBizcuss'), concerning an action for damages brought by eBizcuss.com for infringement of Article 102 TFEU.

3. The Court is thus requested to clarify whether and within what limits a jurisdiction clause may be disapplied in order to ensure the effectiveness of actions for compensation for the loss resulting from the conduct of undertakings which is alleged to constitute an abuse of a dominant position.

4. The case thus offers a further opportunity, having regard to the solution reached by the Court in the case that gave rise to the judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335), to provide clarification to the operators concerned in their capacity as drafters of jurisdiction clauses and, in addition, as persons wishing to bring proceedings for compensation for losses the source of which is alleged to lie in an infringement of competition law, in particular of Article 102 TFEU, in what is commonly designated private enforcement.

1 Original language: French.

2 Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001 L 12, p. 1).

Legal framework

EU law

5. Recitals 2, 11 and 14 of Regulation No 44/2001 state:

'(2) Certain differences between national rules governing jurisdiction and recognition of judgments hamper the sound operation of the internal market. Provisions to unify the rules of conflict of jurisdiction in civil and commercial matters and to simplify the formalities with a view to rapid and simple recognition and enforcement of judgments from Member States bound by this Regulation are essential.

…

(11) The rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor. The domicile of a legal person must be defined autonomously so as to make the common rules more transparent and avoid conflicts of jurisdiction.

…

(14) The autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation.'

6. Article 23 of Regulation No 44/2001, which appears in Section 7 of Chapter II of that regulation, entitled 'Prorogation of jurisdiction', provides in paragraph 1:

'If the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction. Such jurisdiction shall be exclusive unless the parties have agreed otherwise. Such an agreement conferring jurisdiction shall be either:

(a) in writing or evidenced in writing; or

(b) in a form which accords with practices which the parties have established between themselves; or

(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade or commerce concerned.'

French law

7. At the time of the facts at issue in the main proceedings, Article 1382 of the code civil (Civil Code) provided that 'any act of a person which causes injury to another shall oblige him by whose fault it occurred to make reparation'.

8. Article L 420-1 of the code de commerce (Commercial Code) provides:

'Concerted actions, agreements, express or tacit arrangements or coalitions, in particular where they are intended to:

1. limit access to the market or the free exercise of competition by other undertakings;

2. prevent prices being fixed by the free play of the market, by artificially favouring price increases or reductions;

3. limit or control production, opportunities, investments or technical progress;

4. share the markets or sources of supply;

shall be prohibited, even through the direct or indirect intermediary of a company in the group established outside France, when they have the object or may have the effect of preventing, restricting or distorting the free play of competition on a market.'

9. Article L 420-2 of the code de commerce is worded as follows:

'The abuse by an undertaking or a group of undertakings of a dominant position in the internal market or a significant part thereof shall be prohibited on the conditions laid down in Article L 420-1. Such abuse may consist, in particular, in a refusal to sell, in tied sales or in discriminatory conditions of sale and in the breaking-off of established business relationships on the sole ground that the partner refuses to accept unjustified business terms.

Where it may affect the functioning or structure of competition, the abusive exploitation by an undertaking or a group of undertakings of the state of economic dependence of a client undertaking or supplier vis-à-vis that undertaking or group of undertakings shall also be prohibited. Such abuse may consist, in particular, in a refusal to sell, in tied sales in discriminatory practices referred to in Article L 442-6 I or in product bundling agreements.'

The main proceedings, the questions for a preliminary ruling and the procedure before the Court

10. On 10 October 2002, eBizcuss, now represented by MJA, entered into a contract with Apple Sales International, a company governed by Irish law, entitled 'Apple Authorized Reseller Agreement', which conferred on it the capacity of authorised reseller of products bearing the Apple brand. That contract, whereby eBizcuss undertook to distribute its contracting partner's products on a virtually exclusive basis and which was subsequently amended on a number of occasions, contained a clause conferring jurisdiction on the Irish courts.

11. That clause, drafted in English, was, in the most recent version of the distribution agreement dated 20 December 2005, worded as follows:

'This Agreement *and the corresponding relationship* between the parties shall be governed by and construed in accordance with the laws of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in the place where Reseller has its seat or in any

jurisdiction where a harm to Apple is occurring.'[3]

12. In April 2012 eBizcuss lodged a claim before the tribunal de commerce de Paris (Commercial Court, Paris, France) against Apple Sales International, the United States company Apple and the French company Apple Retail France, seeking payment of damages in the amount of EUR 62 500 000. In support of its action, eBizcuss maintained, in essence, that the defendant companies were guilty of anti-competitive practices and unfair competition by favouring their own network to its detriment from 2009.[4] eBizcuss relied in that connection on an infringement of Article 1382 of the code civil (now Article 1240 of the code civil), Article L 420-2 of the code de commerce and Article 102 TFEU.

13. By judgment of 26 September 2013, the tribunal de commerce de Paris (Commercial Court, Paris, France) upheld the plea of lack of jurisdiction raised by the defendant companies on the ground that a jurisdiction clause in favour of the Irish courts was contained in the contract between that company and eBizcuss.

14. By judgment of 8 April 2014, the cour d'appel de Paris (Court of Appeal, Paris, France) rejected the objection to the decision on jurisdiction raised against that judgment by eBizcuss, thus confirming that the French courts lacked jurisdiction to settle the claim for damages.

15. By judgment of 7 October 2015, the Cour de cassation (Court of Cassation, France) quashed that judgment on the ground that the cour d'appel de Paris (Court of Appeal, Paris) had infringed Article 23 of Regulation No 44/2001, as interpreted by the Court in the judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335), by taking account of the jurisdiction clause in the contract between eBizcuss and Apple Sales International, when that clause did not refer to disputes relating to liability resulting from an infringement of competition law.

16. By judgment of 25 October 2016, the cour d'appel de Versailles (Court of Appeal, Versailles, France) upheld the objection to the decision on jurisdiction lodged by eBizcuss and remitted the case to the tribunal de commerce de Paris (Commercial Court, Paris).

17. Apple Sales International, Apple Inc. and Apple Retail France lodged an appeal on a point of law against that judgment before the referring court, maintaining, in essence, that where an autonomous action, within the meaning of competition law, has its origin in the contractual relationship, it is necessary to take a choice of jurisdiction clause into account, even if that clause does not make express reference to such an action and no infringement of competition law has first been established by a national or European competition authority.

18. The referring court states that it has in the meantime become aware of a judgment of the Supremo Tribunal de Justiça (Supreme Court, Portugal) of 16 February 2016, *Interlog and Taboada* v *Apple*. That judgment also involved Apple Sales International and a similar jurisdiction clause, drafted in general terms. The Portuguese Supreme Court held that that clause applied to the parties to a dispute relating to the same allegation of abuse of a dominant position in the light of European Union law and concluded that the Portuguese courts lacked jurisdiction.

3 The parties to the main proceedings are not agreed on the translation into French of the passage in italics, which they translate as either 'et la relation correspondante' (the applicant's translation) or 'et les relations en découlant' (the defendant's translation). In spite of that difference, the clause may be translated into French as follows: 'Le présent contrat et *la relation correspondante* (the applicant's translation) /et *les relations en découlant* (the defendant's translation) entre les parties seront régis par et interprétés conformément au droit d'Irlande et les parties se soumettent à la compétence des tribunaux d'Irlande. Apple se réserve le droit d'engager des poursuites à l'encontre du revendeur devant les tribunaux dans le ressort duquel est situé le siège du revendeur ou dans tout pays dans lequel Apple subit un préjudice.'

4 It is apparent from the file submitted to the Court that the applicant — which, by acceding to the 'Apple Premium Reseller' programme, became a virtually exclusive distributor of Apple products — relied in particular on discriminatory practices by comparison with those followed with regard to Apple Stores, as regards both the supply of Apple products and the prices charged.

19. It was in those circumstances that the Cour de cassation (Court of Cassation) decided to stay proceedings and to refer the following questions to the Court for a preliminary ruling:

'(1) Must Article 23 of Regulation No 44/2001 be interpreted as allowing a national court before which an action for damages has been brought by a distributor against its supplier on the basis of Article 102 of the Treaty on the Functioning of the European Union to apply a jurisdiction clause set out in the contract between the parties?

(2) If the first question is answered in the affirmative, must Article 23 of Regulation No 44/2001 be interpreted as allowing a national court before which an action for damages has been brought by a distributor against its supplier on the basis of Article 102 TFEU to apply a jurisdiction clause set out in the contract between the parties, including in cases where that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law?

(3) Must Article 23 of Regulation No 44/2001 be interpreted as allowing a national court before which an action for damages has been brought by a distributor against its supplier on the basis of Article 102 TFEU to disapply a jurisdiction clause set out in the contract between the parties where no infringement of competition law has been established by a national or European authority?'

20. Written observations were lodged by Apple Sales International, eBizcuss, the French Government and the European Commission.

Analysis

21. The present request for a preliminary ruling essentially concerns the interpretation of Article 23 of Regulation No 44/2001 in the specific context of actions for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, namely where the supplier is alleged to have abused its dominant position.

22. As the divergent positions taken by the French courts called upon to adjudicate in the main proceedings demonstrate, it appears that it is the precise scope of the Court's interpretation in its judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335) that is at issue here.

23. More specifically, the question arises whether, in the absence of specific reference to them, a jurisdiction clause applicable to any dispute relating to a contract and to the relations arising therefrom — such as that which, in the main proceedings, confers jurisdiction on the Irish courts — must be disapplied in the event of autonomous actions for damages having as their basis an alleged infringement of Article 102 TFEU. The Court is requested to clarify whether and to what extent a jurisdiction clause agreed between the parties to an agreement (in this instance a distribution agreement) may take effect in the event of disputes in which an infringement of European competition law is relied on.

24. According to a first interpretation, which is the interpretation that seems to have been applied, in particular, by the Court of Cassation in its judgment of 7 October 2015, such a jurisdiction clause can be taken into account only on condition that it refers *expressly* to disputes relating to liability incurred as a result of an infringement of competition law.

25. According to a second interpretation, which is the interpretation that had been applied by the first courts dealing with the main proceedings, but also, in the view of the applicant in the main proceedings, by the Supremo Tribunal de Justiça (Supreme Court), in its judgment of 16 February 2016, *Interlog and Taboada* v *Apple*,[5] a jurisdiction clause *drafted in general terms* would apply to the parties in a dispute relating to an allegation of abuse of a dominant position in the light of EU law.

26. Before I examine the questions for a preliminary ruling, I consider it appropriate to set out, by way of introduction, a number of general considerations on the scope of Article 23 of Regulation No 44/2001.

General considerations concerning Article 23 of Regulation No 44/2001

27. The Court has already been requested on a number of occasions to rule on the interpretation of Article 23 of Regulation No 44/2001, and of the equivalent provision that preceded it, namely Article 17 of the Brussels Convention.[6]

28. As the Court has consistently observed, those provisions must be interpreted in the light of the wider objectives pursued by the Brussels Convention and by Regulation No 44/2001, 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.[7]

29. In the general scheme of Regulation No 44/2001, Article 23 is a fundamental provision: it expresses both the principle of the primacy of the autonomy of the freely-expressed intention of the parties (see recital 14 of that regulation) and the requirement for a high degree of predictability (see recital 11 of that regulation). It sets out to designate, clearly and precisely, a court of a Contracting State which is to have exclusive jurisdiction in accordance with the consensus formed between the parties, which is to be expressed in accordance with the strict requirements as to form laid down therein. The legal certainty which that provision seeks to secure could easily be jeopardised if one party to the contract could frustrate that rule simply by claiming that the whole of the contract was void on grounds derived from the applicable substantive law.[8]

5 It is apparent that the parties to the main proceedings are not agreed on the precise interpretation of that judgment. In its written observations, eBizcuss thus stated that, although the particular solutions reached in the judgments delivered by the French Cour de Cassation (Court of Cassation) and the Suprema Tribunal de Justiça (Supreme Court), respectively, are different, there is, on the other hand, no discrepancy in their interpretation of Article 23 of Regulation No 44/2001. eBizcuss also observes that the Portuguese court declared that the jurisdiction clause at issue was applicable to the case before it after having definitively found that the facts of the dispute related to 'breaches of a contractual programme and/or the damages that could be claimed for cancellation of the contract' and not to 'the liability incurred as a result of an infringement of competition law'.

6 It should be observed that, in so far as Regulation No 44/2001 replaces, in relations between Member States, the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, as amended by the successive conventions relating to the accession of the new Member States to that Convention (OJ 1972 L 299, p. 32, 'the Brussels Convention'), the Court's interpretation of the provisions of that Convention also applies to the provisions of Regulation No 44/2001 where the provisions of the instruments may be characterised as equivalent, which is the case of Article 23 of Regulation No 44/2001, which succeeded to the first subparagraph of Article 17 of the Brussels Convention (see, in particular, judgment of 28 June 2017, *Leventis and Vafeias*, C-436/16, EU:C:2017:497, paragraph 31).

7 See judgment of 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraph 26 and the case-law cited).

8 See judgment of 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraph 29).

30. As the Court has had occasion to emphasise, in that it allows a derogation from the rules on jurisdiction laid down in Regulation No 44/2001, the conditions, both procedural and substantive, to which Article 23 of that regulation makes the validity of jurisdiction clauses subject, must be interpreted strictly.[9] Conversely, provided that the procedural and substantive conditions laid down in that regulation are fulfilled, the jurisdiction agreement must be capable of being applied. In fact, the choice of court in a jurisdiction clause may be assessed only in the light of considerations connected with the requirements laid down in Article 23 of Regulation No 44/2001.[10]

31. As regards the substantive requirement that the conferral of jurisdiction must relate to 'disputes which have arisen or which may arise in connection with a particular legal relationship', its purpose is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which would arise from a relationship other than that in connection with which the agreement conferring jurisdiction was made.[11]

32. Where the applicability of a jurisdiction clause is called in question on the basis of that substantive condition, it is solely for the court before which a jurisdiction clause is relied on to decide whether or not that clause applies to the dispute forming the subject matter of the proceedings.[12]

33. Although that examination, which requires in particular that the court before which the action is brought was *reasonably predictable* for the parties at the time when they agreed to that clause, can be carried out only on a case-by-case basis, a number of lines of interpretation must in my view be borne in mind.

34. First of all, the primacy afforded to the autonomy of the parties, as expressed in the validly agreed jurisdiction clause, means that what matters is whether or not the dispute in question — in the present case an action for damages for the loss allegedly sustained as a result, in essence, of anti-competitive conduct — can be linked to the legal relationship determined in that clause, irrespective of the tortious or contractual nature of the dispute within the meaning of Regulation No 44/2001 and, *a fortiori*, within the meaning of the applicable national provisions.

35. Thus, a dispute which is non-contractual in nature, but which arose in connection with the contractual relationship, is capable of coming within the scope of the jurisdiction clause, provided that that dispute has its origin in the contractual relationship in connection with which that clause was entered into.

36. The binding force of the clause means, next, that it is not required that the court designated by the clause have any link of 'proximity' with the dispute. In other words, the fact that the jurisdiction clause designates a particular court which has no connection with the persons concerned or with the relationship at issue cannot stand in the way of its application.[13]

9 See, in particular, by analogy, judgments of 14 December 1976, *Estasis Saloti di Colzani* (24/76, EU:C:1976:177, paragraphs 6 and 7), and of 28 June 2017, *Leventis and Vafeias* (C-436/16, EU:C:2017:497, paragraph 39).

10 See, by analogy, concerning the interpretation of Article 17 of the Brussels Convention, judgment of 16 March 1999, *Castelletti* (C-159/97, EU:C:1999:142, paragraph 49).

11 See, in particular, judgments of 10 March 1992, *Powell Duffryn* (C-214/89, EU:C:1992:115, paragraph 31), and of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 68).

12 See, to that effect, judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 67 and the case-law cited).

13 See judgment of 16 March 1999, *Castelletti* (C-159/97, EU:C:1999:142, paragraph 46 et seq. and the case-law cited), where the Court observes that Article 17 of the Brussels Convention, which is equivalent to Article 23 of Regulation No 44/2001, dispenses with any objective connection between the relationship in dispute and the court designated. See, by analogy, still concerning Article 17 of the Brussels Convention, the judgment of 24 June 1981, *Elefanten Schuh* (150/80, EU:C:1981:148, paragraph 27), which states that the legislation of a Contracting State may not allow the validity of a jurisdiction clause to be called in question solely on the ground that the language used is not that prescribed by that legislation.

37. In addition, the fact that the jurisdiction clause, as is the case in the main proceedings, is asymmetrical or unilateral, in that only one party undertakes to bring an action before a very specific court while the other reserves the right to bring an action before other courts, cannot in itself be a relevant factor in the assessment of the validity of that clause in the light of the requirements laid down in Article 23 of Regulation No 44/2001,[14] in so far as such a clause nonetheless fulfils the objective of predictability.

38. It means, last, that the substantive law applicable to the dispute has, in principle, no influence on the determination of jurisdiction. It must be borne in mind that it is precisely that irrelevance of the rules of substantive law in the light of the agreement conferring jurisdiction that constitutes a firm guarantee of legal certainty and predictability.[15]

39. I shall return to this point in greater detail below when I specifically address the question how a jurisdiction clause must be perceived in the context of actions designed to ensure the effectiveness of the protection conferred on individuals with respect to infringements of competition law.

First question: the applicability of a jurisdiction clause in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU

40. By its first question, the referring court seeks to ascertain whether, in general, Article 23 of Regulation No 44/2001 allows a jurisdiction clause to be applied when the action for damages is based on an alleged infringement of Article 102 TFEU. In other words, the question arises whether Article 23 of Regulation No 44/2001 must be interpreted as meaning that there is an obstacle *in principle* to the application of a jurisdiction clause to a dispute based on an infringement of Article 102 TFEU.

41. In this case, all the parties which have intervened seem to be agreed that Article 23 of Regulation No 44/2001 must be interpreted as meaning that it allows the national court to apply a jurisdiction clause in such a situation, or at least does not prevent it from doing so.

42. That conclusion cannot be supported.

43. Further to the foregoing considerations, and with the exception of matters specifically referred to in Regulation No 44/2001,[16] the effectiveness of a jurisdiction clause cannot depend on the fulfilment of a substantive condition other than the requirement relating to the subject matter of the clause, which must concern a 'particular legal relationship'.

44. The irrelevance of the rules of substantive law with regard to the validity of a jurisdiction clause, which, I recall, constitutes an important basis for respect for the autonomy of party and predictability, applies in particular where an infringement of competition law is asserted in the dispute.

14 In that regard, the wording of Article 23 of Regulation No 44/2001 contrasts with that of Article 17 of the Brussels Convention, which expressly provided that 'if an agreement conferring jurisdiction was concluded for the benefit of only one of the parties, that party shall retain the right to bring proceedings in any other court which has jurisdiction'. It also differs from Article 25 of Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2012 L 351, p. 1), which has applied to judicial proceedings initiated since 10 January 2015. In the words of the latter provision, the jurisdiction of the courts designated by a jurisdiction clause is to be exclusive 'unless the agreement [on jurisdiction] is null and void as to its substantive validity under the law of that Member State'.

15 See judgment of 3 July 1997, *Benincasa* (C-269/95, EU:C:1997:337, paragraphs 27 and 29).

16 These are the cases of exclusive jurisdiction which concern, in Regulation No 44/2001, disputes relating to insurance contracts (Section 3), contracts entered into with consumers (Section 4) and individual contracts of employment (Section 5) and, on the other hand, the matters set out in Article 22 of that regulation.

45. In the absence of a specific provision in Regulation No 44/2001 that would allow a derogation from the binding force of a jurisdiction clause in such a situation, the principle of the effective implementation of competition law cannot be pleaded in order to defeat such a clause.

46. Admittedly, the practical effect of Articles 101 and 102 TFEU assumes that any individual is able to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.[17]

47. However, and as the Court held in the case that gave rise to the judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/16, EU:C:2015:335), the court seised of the matter cannot, without undermining the aim of Regulation No 44/2001, refuse to take into account a jurisdiction clause which has satisfied the requirements of Article 23 of that regulation solely on the ground that it considers that the court with jurisdiction under that clause would not give full effect to the requirement of effective enforcement of the prohibition of cartel agreements by not allowing a victim of anti-competitive conduct, whether presumed or established, on the part of undertakings to obtain full compensation for the loss it suffered. On the contrary, it must be considered that the system of legal remedies in each Member State, together with the preliminary ruling procedure provided for in Article 267 TFEU, affords a sufficient guarantee to individuals in that respect.[18]

48. Ultimately, the requirement of the effective implementation of the prohibition of abuse of a dominant position does not in itself preclude the parties' ability to derogate, by means of a jurisdiction clause, from the heads of jurisdiction laid down in Regulation No 44/2001.

49. Having regard to all of those considerations, I propose that the answer to the first question should be that Article 23 of Regulation No 44/2001 must be interpreted as meaning that there is no obstacle in principle to the application of a jurisdiction clause in the context of an autonomous action for damages, such as that at issue in the main proceedings, brought by a distributor against its supplier because of an alleged infringement of Article 102 TFEU.

Second question: the requirement for an express reference to disputes relating to liability incurred as a result of an infringement of competition law

50. By its second question, the referring court asks the Court whether Article 23 of Regulation No 44/2001 precludes a jurisdiction clause which does not refer expressly to 'disputes relating to liability incurred as a result of an infringement of competition law'.

51. That question seeks, ultimately, to ascertain the details that jurisdiction clauses must contain in order to be applied in actions based on competition law, in this instance an action for damages for the loss alleged to have been caused by an infringement of Article 102 TFEU.

52. In that regard, I recall that, in so far as Article 23(1) of Regulation No 44/2001 allows parties to derogate from the rules on jurisdiction defined in that article solely for the resolution of 'disputes which have arisen or which may arise in connection with a particular legal relationship', it is up to those parties to draft the clause so that it may best express their intention.

53. The question whether such a clause covers a particular action will always depend on the way in which that clause is drafted and on the way in which it will be interpreted by the court before which the action is brought.

17 See judgment of 13 July 2006, *Manfredi and Others* (C-295/04 to C-298/04, EU:C:2006:461, paragraph 60 and the case-law cited).

18 See, to that effect, judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraph 63).

54. Nor is it possible to respond in the absolute, that is to say, without reference to the actual wording of the jurisdiction clause specifically at issue, whether that clause continues to apply in connection with disputes relating to liability incurred as a result of an infringement of competition law where that clause does not *expressly* refer to such disputes. It is for the national court seised of the matter, which alone has the task of determining the precise scope of that clause, to determine whether the dispute relating to the liability of the contracting party incurred as a result of an infringement of competition law has arisen from the legal relationship in connection with which that clause was entered into.

55. As regards the applicability of a jurisdiction clause in the context of an action for damages in respect of the loss sustained as a result of anti-competitive conduct, it cannot be precluded that that clause forms part of a contractual context and that, accordingly, the court is required to give effect to it, irrespective of the explicit reference to 'disputes relating to liability incurred as a result of an infringement of competition law'.

56. To my mind, it would be disproportionate if in all cases the parties to the dispute were required to have precisely specified the nature of the actions which are supposed to come under the jurisdiction clause, provided that that clause is drafted in sufficiently broad terms to include any action arising immediately or more remotely from the contractual relationship in connection with which that clause was entered into.

57. By entering into a jurisdiction clause, the parties seek, essentially, to confer jurisdiction on a particular court to settle all questions pertaining to the relationship which they have formed, even though they are not always able to foresee and draw up a list of the types of disputes that might arise between them. Were that not so, the function and scope of such a clause would be significantly undermined.

58. That conclusion in my view represents an extension of the solution adopted in the case that gave rise to the judgment in *CDC Hydrogen Peroxide*,[19] and in particular paragraph 69 of that judgment.

59. It should be observed that in that judgment the Court, while pointing out that it was solely for the national court before which a jurisdiction clause is invoked to determine whether the disputes at issue fall within its scope (paragraph 67 of the judgment), set out, in the case of jurisdiction clauses which generally covered 'all disputes arising from or connected with the contract', some principles of interpretation intended to provide guidance for the national court (paragraphs 68 to 71).

60. The Court stated, in particular, that a clause which refers in the abstract to all disputes arising from contractual relationships does not extend to a dispute relating to the tortious liability that a contracting party is alleged to have incurred as a result of its participation in an unlawful cartel. On the other hand, a clause referring to 'disputes in connection with liability incurred as a result of an infringement of competition law' would oblige the court seised to decline jurisdiction.[20]

61. However, remaining within the particular circumstances of the case that gave rise to that judgment, it seems to me that the latter consideration must be placed in context.

19 Judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335).

20 See judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 69 and 71).

62. In the first place, it appears that the dispute at issue in that case related to a class action brought by CDC with the objective of securing, by judicial and extra-judicial means, claims for damages. The action was based on an allegation of an unlawful cartel involving several undertakings established in different Member States which relied on jurisdiction clauses stipulated in some of the contracts of sale with the undertakings claiming to be victims of the cartel the existence of which was established in a Commission decision. [21]

63. The solution adopted by the Court had in that context the advantage of avoiding the compensation proceedings being split up between several fora/courts, as would have resulted from a broad interpretation of the scope of the jurisdiction clauses contained in contracts which to my mind were unconnected with the unlawful cartel concluded between one of the parties to those contracts and third parties. In fact, the action for damages brought by CDC against the defendants in the main proceedings involved undertakings established in five Member States other than the Federal Republic of Germany.

64. In the second place, and above all, the cartel in question was by nature secret and therefore unrelated to the contracts of sale in connection with which the jurisdiction clauses at issue had been entered into. In such a situation, the objective of predictability which justifies the binding force of the jurisdiction clauses — and its corollary, namely the objective that a party must not be 'taken by surprise' by the assignment of jurisdiction to a forum having its origin in relationships other than those in connection with which the clause was agreed (see paragraph 68 of the judgment in *CDC*) — argued in favour of disapplying the jurisdiction clause at issue.

65. To my mind, the requirement of an express reference to 'disputes in connection with liability incurred as a result of an infringement of competition law' appears to be relevant only in the case of disputes which clearly do not have their origin in the legal relationship in connection with which the agreement conferring jurisdiction was entered into.

66. The guidance provided by the Court must thus be understood as being intended to make clear that the disputes at issue must actually have their origin in the contractual relationship between the parties to the contract in question (see, in particular, paragraph 70 of the judgment in *CDC*). Conversely, the solution applied by the Court cannot in my view be interpreted as requiring a jurisdiction clause to state precisely all the disputes of a tortious nature that might arise between the parties.

67. In that regard, it cannot, for example, be precluded that certain types of conduct alleged to constitute a cartel or an abuse of a dominant position, such as the types of conduct that may be employed in the context of a selective distribution system, may have a connection with the distribution agreement and thus be covered by the jurisdiction clause in such a contract which has been drafted in general terms, without expressly specifying the possible actions for breach of the provisions applicable in competition matters.

68. Where, as appears to be the case in the main proceedings, the alleged conduct relates to the pricing conditions or 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. The national court will therefore be in a position, when seised of an action based on infringement of the competition rules, to consider that the facts relied on relate to the contractual relationship in connection with which a jurisdiction clause, even drafted in general terms, was entered into.

21 In that particular instance, Commission Decision 2006/903/EC of 3 May 2006 relating to a proceeding under Article 81 of the Treaty establishing the European Community and Article 53 of the EEA Agreement against Akzo Nobel NV, Akzo Nobel Chemicals Holding AB, EKA Chemicals AB, Degussa AG, Edison SpA, FMC Corporation, FMC Foret S.A., Kemira OYJ, L'Air Liquide SA, Chemoxal SA, Snia SpA, Caffaro Srl, Solvay SA/NV, Solvay Solexis SpA, Total SA, Elf Aquitaine SA and Arkema SA. (Case COMP/F/C.38.620 — Hydrogen Peroxide and perborate) (OJ 2006 L 353, p. 54).

69. An important point must be made. There is no question here of applying Article 23 of Regulation No 44/2001 differently — and more specifically of perceiving the applicability of a jurisdiction clause differently in the event of disputes relating to liability incurred as a result of an infringement of competition law — according to whether the case involves a breach of the prohibition of cartels (Article 101 TFEU) or an abuse of a dominant position (Article 102 TFEU).

70. From a procedural and jurisdictional viewpoint, there is no fundamental reason why those infringements should be treated differently. In that regard, I do not particularly support the notion that cartels prohibited by Article 101 TFEU always produce their harmful effects outside any contractual relationship, while conduct constituting an abuse of a dominant position prohibited by Article 102 TFEU would necessarily have its source in the contract entered into by the victim of the alleged conduct and the person committing such an abuse.

71. 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.

72. In so far as the dispute has its origin in that relationship, it may come within the scope of the jurisdiction clause drafted in general terms without an express reference to the possible bases of the actions that will be brought.

73. Thus, an action for compensation having as its basis an alleged infringement of Article 102 TFEU will be able to benefit from an extension of jurisdiction by agreement, provided that it has its origin in the contract, without there being any need for that action to be expressly mentioned in the clause at issue.

74. That is the position that seems to have been specifically taken by the Supremo Tribunal de Justiça (Supreme Court) in its judgment of 16 February 2016, *Interlog and Taboada*. That court considered that although the claim before it related to anti-competitive conduct, it concerned 'a behavioural departure from the equilibrium (or programme) of the contract [at issue]'. It concluded that the dispute before it did indeed have its origin in the legal relationship in the context of which the clause had been entered into. It followed that the clause was wholly applicable to the facts of the case.

75. Likewise, it might be considered that a claim for damages based, this time, on Article 101 TFEU might, in certain circumstances, have its origin in the legal relationship in connection with which that clause was entered into. That might be the case of an action challenging on the basis of that provision the conduct of a supplier, the head of a selective or exclusive distribution network, towards its distributors.

76. In conclusion, the question whether a jurisdiction clause is or is not applicable where it does not refer expressly to the disputes relating to the liability incurred as a result of an infringement of competition law will depend on the assessment of that clause that will be carried out, in the light of the wording of the clause and the parties' intention, by the national court before which the clause is invoked.

77. If it is established that the parties, who were unable to envisage the possibility that a particular dispute might arise, did not intend to include it in the scope of a jurisdiction clause formulated in an abstract manner, that clause cannot be relied on as against them in such a dispute. That would be the case, in particular, where a dispute turned on whether one of the parties could be held liable because of its participation in a cartel with undertakings not parties to the contractual relationship.

78. Conversely, where, although the dispute is based on an infringement of competition law, it is related to the contractual framework, in that it concerns in particular the conditions on which the parties agreed to enter into a contract, it is apt to be covered by the jurisdiction clause. That may be the case, for example, of actions based on Article 102 TFEU which challenge the pricing and supply conditions agreed in a distribution agreement containing a jurisdiction clause.

79. Having regard to all of those considerations, I am of the view that the answer to the second question should be that Article 23 of Regulation No 44/2001 must be interpreted as meaning that it requires the national court hearing an action for damages based on Article 102 TFEU to apply a jurisdiction clause provided that the dispute in question has its origin in the legal relationship in connection with which that clause was entered into. It is therefore for the national court seised of the matter to determine in each case whether the dispute in question is apt to be covered by such a clause, even when it is drafted in general terms, in the context of disputes relating to liability incurred as a result of an infringement of competition law.

Third question: the requirement of a prior finding by a competition authority of an infringement of competition law for the purposes of the applicability of a jurisdiction clause

80. By its third question, the referring court seeks to ascertain whether the fact that an infringement of competition law has not been established in advance by a national or European competition authority means that the jurisdiction clause can be disapplied.

81. In other words, the question arises whether, although is no indication to that effect is given in the judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C-352/13, EU:C:2015:335), the fact that the action at issue for damages in respect of an infringement of competition law is autonomous (a 'stand-alone' action, which is to be distinguished from a 'follow-on' action such as the action at issue in the case that gave rise to that judgment) can or cannot justify disapplying the jurisdiction clause.

82. I propose, further to the considerations set out above, that that question be answered in the negative.

83. To my mind, the nature of the action for damages (a 'follow-on' action or a 'stand-alone' action) before the court is not a relevant parameter in the assessment of a jurisdiction clause. In fact, the absence or presence of a prior finding by a competition authority of an infringement of the competition rules is a consideration wholly alien to the considerations that must prevail when determining that whether jurisdiction clause is to be applied — or, on the contrary, disapplied — to a particular dispute and, in particular, to an action for compensation for the harm alleged to have been sustained as a result of an infringement of the competition rules.

84. It should be borne in mind that, as stated in recitals 3, 12 and 13 of Directive 2014/104/EU,[22] Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. Thus, anyone who considers that he has suffered harm caused by an infringement of the competition rules may claim damages for the loss caused to him irrespective of a prior finding by a competition authority that such an infringement has taken place.[23]

22 Directive of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of Member States and of the European Union (OJ 2014 L 349, p. 1).

23 See, to that effect, judgment of 14 June 2011, *Pfleiderer* (C-360/09, EU:C:2011:389, paragraphs 28 and 29 and the case-law cited.).

85. In addition, it is accepted that, unlike disputes concerning the penalties imposed by a national authority in the exercise of its regulatory powers, which come within the concept of 'administrative powers', an action for compensation for the loss resulting from alleged infringements of competition law is of a 'civil and commercial' nature for the purposes of Regulation No 44/2001 and therefore comes within the scope of that regulation. [24]

86. Article 23(1) of that regulation allows the parties to derogate not only from the general jurisdiction but also from the special jurisdiction which it lays down by entering into a choice of court agreement. The court seised of a matter may therefore, in principle, be bound by a jurisdiction clause derogating from the general and special jurisdiction laid down in that regulation. [25]

87. Just as that possibility cannot be called in question by the substantive law applicable to the substance of the case, [26] it cannot be dependent on the action at issue being intended to penalise infringements of EU competition law which have first been established by the competition authorities. It must be borne in mind that it is the autonomy of the parties' intention that justifies the primacy granted to the choice of a court other than that which might have had jurisdiction under Regulation No 44/2001. [27]

88. Last, it seems to me that a distinction, when determining the applicability of a jurisdiction clause to a dispute, between 'stand-alone' actions and 'follow-on' actions would clash head-on with the objective of predictability pursued by Article 23 of Regulation No 44/2001, in that the application of such a clause would be dependent on a subsequent finding of an infringement by an authority responsible for competition law. Just as such a finding should not constitute a condition for disapplying a jurisdiction clause, it cannot merely be asserted that the dispute relates to a stand-alone action in order to avoid disapplying such a clause, independently of an actual examination of the clause and of the legal relationship in connection with which it was entered into.

89. I therefore propose that the answer to the third question should be that Article 23 of Regulation No 44/2001 must be interpreted as meaning that the absence of a prior finding of an infringement of competition law on the basis of Article 102 does not in itself allow a jurisdiction clause to be applied or, on the other hand, disapplied in an action for damages based on the competition rules.

Conclusion

90. Having regard to the foregoing developments, I propose that the Court answer the questions referred by the Cour de cassation (Court of Cassation, France) as follows:

(1) Article 23 of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters must be interpreted as meaning that there is no obstacle in principle to the application of a jurisdiction clause in the context of an autonomous action for damages, such as that at issue in the main proceedings, brought by a distributor against its supplier because of an alleged infringement of Article 102 TFEU.

(2) Article 23 of Regulation No 44/2001 must be interpreted as meaning that it requires the national court hearing an action for damages based on Article 102 TFEU to apply a jurisdiction clause stipulated in a contract, provided that the dispute in question has its origin in the legal

24 See judgment of 28 July 2016, *Siemens Aktiengesellschaft Österreich* (C-102/15, EU:C:2016:607, paragraph 34 and the case-law cited).

25 See judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 59 and 61 and the case-law cited).

26 See judgment of 21 May 2015, *CDC Hydrogen Peroxide* (C-352/13, EU:C:2015:335, paragraphs 62 and 63 and the case-law cited).

27 See judgments of 7 July 2016, *Hőszig* (C-222/15, EU:C:2016:525, paragraph 44 and the case-law cited), and of 28 June 2017, *Leventis and Vafeias* (C-436/16, EU:C:2017:497, paragraph 33 and the case-law cited).

relationship in connection with which that clause was entered into. It is therefore for the national court seised of the matter to determine in each case whether the dispute in question is apt to be covered by such a clause, even when it is drafted in general terms, in the context of disputes relating to liability incurred as a result of an infringement of competition law.

(3) Article 23 of Regulation No 44/2001 must be interpreted as meaning that the absence of a prior finding of an infringement of competition law on the basis of Article 102 TFEU does not in itself allow a jurisdiction clause to be applied or, on the other hand, disapplied in an action for damages based on the competition rules.