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Regional Jurisdiction in Private International Law: Dutch Court to Refer Preliminary Questions to the ECJ in Collective Action Proceedings Against Apple

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The District Court of Amsterdam indicated in a decision published on 22 August 2023 that it intends to refer preliminary questions to the European Court of Justice (ECJ) on regional jurisdiction (also referred to as 'territorial' jurisdiction) in the context of a WAMCA (Act on Damages Claims in a Collective Action) collective action claim brought by representative organizations for consumers against *Apple*. In that claim, the representative organizations accuse Apple of abusing its dominant position by applying unreasonable terms, foreclosing competition, and charging excessive commissions for apps in its App Store.

The court intends to ask the ECJ whether, in a situation in which anti-competitive practices are implemented, and consumers are harmed across the Netherlands, one district court may accept jurisdiction under Article 7(2) of the Brussels I-Bis Regulation over the claims for all Dutch consumers, and not just those residing within the court's district.

Under Article 7(2) of the Brussels I-Bis Regulation, international and regional jurisdiction may be established based on "*the place where the harmful event occurred*". The ECJ has interpreted that provision as referring to either the place where the damage was caused (the '*Handlungsort'*) or the place where the damage had effect (the '*Erfolgsort'*). The Dutch court accepted the claimants' arguments that the damage *occurred* in the Netherlands. However, the court was uncertain about which court in the Netherlands should exercise jurisdiction because it considered the reference to "*the place where the harmful event occurred*" to refer not only to international jurisdiction but also to regional jurisdiction. Both elements of the decision are considered below.

The court agreed with the plaintiffs that the damage 'occurred' in the Netherlands

The court agreed with the claimants that courts in the Netherlands have international jurisdiction over the claims because, assuming that the claimants will be able to prove the allegations, both (a) the place where the damage was caused (the '*Handlungsort'*) and (b) the place where the damage had effect (the '*Erfolgsort'*) were in the Netherlands:

- The court ruled, with reference to the ECJ's judgment in FlyLAL, that the damage would have been caused in the Netherlands (the '*Handlungsort'*) if Apple implemented its abusive conduct

on the Dutch market. The fact that the geographic scope of Apple's anti-competitive conduct may have been wider than the Netherlands was considered irrelevant in this context.

- The court also confirmed that the damage would have had effects (*Erfolgsort*) in the Netherlands because that is where consumers would have paid excessive commissions due to the abusive conduct. The court considered, with reference to the ECJ's *Verein für Konsumenteninformation* judgment, that the excessive commissions paid in the Netherlands would have been caused by Apple's behaviour directly, and not as an indirect financial effect of damage that had actually occurred elsewhere (as Apple had argued).

The court's doubts concerning regional jurisdiction

Despite finding that the damage at issue would have occurred in the Netherlands, the court was uncertain about which court in the Netherlands should exercise jurisdiction over the claims. In a situation in which Apple's practices were implemented *across the country*, and consumers *inside as well as outside of the court's district* were harmed, the court wondered whether it was competent to rule on compensation for consumers outside of its district.

The court assessed whether the '*Handlungsort*' and '*Erfolgsort*' conditions were also satisfied to establish its regional jurisdiction over the claims. As regards the *Handlungsort*, the court notes that the abusive conduct would have been implemented across the country, and cannot be allocated to a specific court district. As regards the *Erfolgsort*, the court noted that in the *CDC/Akzo* and *Volvo* cases, the ECJ ruled that this can be the place where the relevant products were purchased or, if products were purchased in multiple locations, the place of establishment of the purchaser.

In the Apple case, however, the products (apps from the App Store) were likely to have been purchased in multiple locations in the Netherlands as they were purchased on mobile phones. At the same time, the court acknowledged that basing jurisdiction on the place of domicile of the purchasers would be highly impractical for consumers in a representative collective action. After all, this would entail that the collective action would be scattered over all the different Dutch districts where consumers are domiciled. Dutch procedural law offers a practical solution for a situation like this: cases before different district courts that are closely connected can be referred to a single court for reasons of procedural efficiency and to prevent conflicting decisions (Article 220 Dutch Code of Civil Procedure). However, the court was not sure whether such bundling of cases is allowed under the Brussels I-Bis Regulation.

In light of these competing considerations, the court intends to ask the ECJ, in essence, the following questions:

- How to determine regional jurisdiction on the basis of the *Handlungsort* in a situation where anti-competitive practices were implemented in the whole country;
- Whether other factors different to the place of domicile can be applied to determine regional jurisdiction on the basis of the *Erfolgsort* in a situation where the place of purchase cannot be determined;
- Whether it is relevant for the application of Article 7(2) of the Brussels I-Bis Regulation that a case concerns a representative collective action for consumers who are domiciled in various court districts; and
- Whether a national rule which provides for the bundling of claims from various district courts

before a single court violates Article 7(2) of the Brussels I-Bis Regulation.

The next step in the proceedings is for the parties to provide their views on the court's draft questions, after which the court will formulate the final questions for the ECJ.

Commentary

It may come as a surprise to some that the Dutch court asks questions about regional jurisdiction to the ECJ, as the territorial organization of a national court system at first view seems to be a prerogative of the Member States. This has to do with a peculiar feature of Article 7(2) Brussels-Bis Regulation. As the ECJ recently confirmed in the *Volvo* case (a follow-on cartel damages case, see an article about this case here) this was not a slip of the pen of the European legislator but a deliberate choice. The explanatory *Jenard Report* on the Convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters – a predecessor of the Brussels I-Bis Regulation, which is still relevant for its interpretation-, shows that the reference to the regional 'place' was meant to facilitate claimants by absolving them of the need to consider the internal law of a Member State to determine where to file their claims. As is often the case, this solution to provide clarity created new questions of law that were probably not foreseen by the drafters, such as how to apply this jurisdictional rule to opt-out collective action claims for consumers.

The question of how to interpret regional jurisdiction under Article 7(2) Brussels I-Bis Regulation is important for collective actions, as claimants often rely on the place where the damage occurred for jurisdiction if the defendant is not established in the relevant jurisdiction (see also, for example, a Dutch collective action claim for privacy violations against *ByteDance and Tiktok*, in which the court accepted jurisdiction on this basis). Indeed, an opt-out collective action system cannot function properly without the possibility of bundling claims before one court.

Earlier, the ECJ ruled in the *Volvo* case that the Member States may not apply criteria for the conferral of regional jurisdiction which differ from those deriving from Article 7(2) Brussels I-Bis Regulation, but this does not preclude the Member States from centralizing jurisdiction before a single specialized court. In the absence of such a specialized court, the court in the district where the goods or services were purchased has jurisdiction. If the goods or services were purchased in several places, the court in the district of the registered office of the victim of the cartel will have jurisdiction.

Two important differences between the *Volvo* and the *Apple* cases are that (i) the Apple case does not concern a direct claim by (a single) victim of the competition law infringement but an opt-out collective action claim for (many) consumers, and ii) the Dutch system does not have a specialized court for collective action claims.

In a Dutch opt-out collective action (a so-called 'WAMCA' action), the representative organization acts on behalf of a group (generally domiciled across the country), while in a direct claim (even when instituted via a claim vehicle), the claimant acts for itself. In opt-out collective actions like in the Apple case, claims could, and often would, be scattered over all Dutch court districts if jurisdiction is based on the place of domicile of the individual victims of the infringement. As the court also notes, this would not be in the interest of the sound administration of justice and may lead to conflicting decisions. Such an outcome would also run counter to the aim of the EU

Directive on representative actions for the protection of the collective interests of consumers, which aims to create effective and efficient procedural mechanisms for collective actions for consumers in the Member States.

The idea of the Dutch WAMCA collective action system is to bundle all claims in relation to a certain event in one case before one court on an opt-out basis. This was chosen by the Dutch legislator as a policy alternative to having a specialized court for collective action claims. This means that while claims in relation to different events can appear before different courts in the Netherlands, claims in relation to the same event should appear before one and the same court.

In light of the above considerations, the solution in the *CDC/Akzo* and *Volvo* judgments to confer jurisdiction to the place of the registered office/place of domicile would not be appropriate in the Apple case.

In my view, a sensible interpretation of Article 7(2) Brussels I-Bis Regulation in an opt-out collective action would be to grant regional jurisdiction to a court if its district (i) is *one of* the places where the harmful practices are implemented (to fulfil the conditions for the *Handlungsort);* or (ii) is *one of* the places where consumers are domiciled who are harmed by the practices (to fulfil the conditions for the *Erfolgsort*). Alternatively, jurisdiction could be based on the place of the registered office of the representative organization as the *Erfolgsort.*

Such an interpretation is appropriate because, in antitrust collective actions, it will seldom be possible to establish a single place for the *Handlungsort* or the *Erfolgsort* (unless the registered office of the representative organization is considered the *Erfolgsort*). This interpretation would be in line with the aim of the Brussels I-Bis Regulation, as the legislative history of Article 7(2) makes clear that the aim of the reference to the regional 'place' was to provide clarity to claimants and to unencumber their claims from the intricacies of domestic jurisdictional rules. The aim was not to make the jurisdictional rules more restrictive or the bundling of claims more difficult. The proposed solution would also provide courts with the opportunity to centralize cases when this is in the interest of the sound administration of justice, in the absence of a single centralized court for dealing with such claims. Additionally, national courts should also be allowed under the Brussels I-Bis Regulation to bundle connected cases from various district courts before a single court for reasons of procedural efficiency and to prevent conflicting judgments.

There are in my view no good arguments against such an interpretation. Requiring claimants in a nationwide collective action case to file claims before all the individual district courts would be highly impractical, as the court itself acknowledged in the reference decision. There is also no real risk of forum shopping. Forum shopping refers to the practice of claimants seeking out the most favourable court for their claim. The main factor for the choice of forum is the applicable law. When it comes to regional jurisdiction, the applicable law will be the same, no matter which district court has jurisdiction.

The preliminary reference will provide the ECJ with the opportunity to further clarify the interpretation of Article 7(2) Brussels I-Bis Regulation. More clarity on the interpretation of the jurisdictional rules will be welcomed by Dutch courts. Indeed, the Apple case is the fourth preliminary reference sent to the ECJ by Dutch courts concerning jurisdiction in antitrust damages litigation in less than a year (the other references are MTB/Heineken, Unilever/Smurfit Kappa c.s. and EWA Bahrain/Prysmian c.s.). In those other cases, the courts asked questions about the interpretation of Article 4 of Brussels I-Bis (place of establishment of the defendant) and Article

8(1) of Brussels I-Bis (the close connection between the ‘anchor defendant’ and other defendants) in light of the ECJ’s Skanska and Sumal judgments. More specifically, the court asked whether a subsidiary or parent company that was itself not addressed in an infringement decision can be used by plaintiffs to ‘anchor’ jurisdiction for other defendants (see an article for more detail here). Clearly, jurisdiction in antitrust cases will remain a contested topic for the foreseeable future.

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This entry was posted on Friday, October 20th, 2023 at 9:00 am and is filed under Collective Redress, Source: UNCTAD“>Damages, Digital, European Court of Justice, Jurisdiction, Jurisdiction clauses, Jurisdictional clause
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