First Application of ECJ's Ruling in C-352/13, CDC Hydrogen Peroxide, in Dutch Private Enforcement Proceedings

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July, 21st 2015 has marked another important step in the private enforcement of competition law in Europe. Only two months after the long awaited preliminary ruling in the case *CDC Hydrogen Peroxide* (C-352/13) was delivered on May, 21st, the Amsterdam Court of Appeal seems to be the first one to apply the new ECJ case law on jurisdiction in cartel damage cases. Its judgment (accessible here in Dutch and German) dealt with compensation claims against members of the sodium chlorate cartel and applied the recently established ECJ principles even before the referring court itself (the Dortmund District Court) could render a judgment on its jurisdiction.

Background of the case is the bundled enforcement of the claims of damaged customers in the aftermath of the Decision of the EU Commission from June, 11th 2008 fining a number of undertakings for their participation in a sodium chlorate cartel operating EEA wide. Following this decision, Cartel Damage Claims, a special purpose vehicle based in Brussels, started buying off claims of the cartel victims and filed a suit against several cartel members before the District Court of Amsterdam. The latter accepted jurisdiction with a judgment from June, 4th 2014: a judgment which was subject to scrutiny and eventually confirmed by the Amsterdam Court of Appeal.

The application in the appeal proceedings questioned the jurisdiction of the Dutch courts over a cartel member seated in Finland. The Amsterdam judges confirmed the decision of the lower court according to which, since one of the co-defendants in the first instance proceedings was seated in the Netherlands, jurisdiction can be based on ex-Article 6 (1) of the Brussels I Regulation. Transposing the reasoning of the ECJ in *CDC Hydrogen Peroxide* – issued in a parallel scenario –

to the proceedings at hand, the Court of Appeal considered the EU jurisdictional rule on joint defendants applicable. The close connection between the claims in the sense of ex-Article 6 (1) and in particular the same situation of fact and law – a requirement well established in ECJ case law – was deemed fulfilled: Following *CDC Hydrogen Peroxide*, the national appellate court decided that the commitment of a continuous competition law infringement sanctioned by the Commission's Decision was sufficient to create an identical factual and legal background of the cartel damage claims. In addition, the court clarified that a company which has been held responsible for the cartel by the Commission can serve as an anchor defendant for the purposes of ex-Article 6 (1) even where the latter is a parent company of a cartel member and has not directly participated in the infringement.

Finally, the Amsterdam Court of Appeal (upholding the first instance decision) confirmed that the standard jurisdiction and arbitration clauses contained in the supply agreements between the cartel members and their customers do not apply to cartel damage claims. As far as the evoked jurisdiction agreements were concerned, the appellate court applied the reasoning of the ECJ in *CDC Hydrogen Peroxide* relating to the interpretation ex-Article 23 (para 70 f.). The disputes were qualified as deriving from a competition law infringement previously unknown to the customers and not from the multiple contractual relationships between suppliers and customers as such. They could thus not be covered by the standard wording of a jurisdiction clause regulating the contractual relation of the parties. Regarding the arbitration agreements, the court saw no reason to deviate from the aforementioned interpretation.

The appeal of the Finish cartel member was thus dismissed.

It is interesting to note that in this judgment the national Court of Appeal merely confirms what the Amsterdam District Court had already decided in 2014, long before the ECJ rendered its *CDC Hydrogen Peroxide* ruling. Even though the lower court did not await the judgment of the ECJ, its result seems to fall completely in line with the now EU-wide binding principles formulated by the Luxembourg judges. This demonstrates that the ECJ case law now simply prescribes what private enforcement friendly jurisdictions were doing anyway.

What is perhaps more intriguing, is to observe where the national court went even one step further than the ECJ in completely transposing the considerations

on the material scope of the choice-of-court clauses to the other type of dispute resolution clauses at issue, i.e. the arbitration agreements. This was motivated by the sole consideration that there are no reasons to judge differently in this regard. While this might be a welcome interpretation, the issue of the applicability and interpretation of arbitration clauses was left untouched by the ECJ ruling (see para 58, particularly evident in comparison to the Advocate General's opinion in the *CDC Hydrogen Peroxide* proceedings which dealt extensively with the issue, see there at para 118 ff.). Nevertheless, the equal treatment of the two types of (standard) dispute resolution clauses as regarding their scope seems to be common before Member State courts. This feature might prove to broaden the actual effect of the *CDC Hydrogen Peroxide* case law beyond its explicit scope (see e.g. the judgment of the District Court of Helsinki from of the July, 4th 2013, also concerning the Hydrogen Peroxide cartel). It remains to be seen how other jurisdictions will see the application of arbitration clauses in cartel damage cases.

The mentioned proceedings are only instances of a much broader landscape of private enforcement of cartel damage claims in the EU conducted to a great extent by special vehicles such as CDC. It seems that the Dutch jurisprudence might be, once again, setting an example on how international jurisdiction in competition law damage cases is to be dealt with by member state courts.