Cartel Damage Claims, Non-Exclusive Jurisdiction Clauses and the "One-Stop Shop" Presumption: What Do Rational and Reasonable Businessmen Really Want?

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On November 19th the England and Wales Court of Appeal (Civil Division) ruled on the scope of a contractual non-exclusive jurisdiction clause in the context of a damage claim for breach of EU competition law (*Ryanair Ltd v Esso Italiana Srl* [2013] EWCA Civ 1450). The Court opted for a narrow interpretation of the clause and decided against the inclusion of a purely tortious cartel damage claim in its scope.

The dispute at issue arose between the Irish airline Ryanair and the Italian jet fuel supplier Esso Italiana. The parties had concluded a fuel supplying contract containing the following clause:

> *For the purposes of the resolution of disputes under this Agreement, each party expressly submits itself to the non-exclusive jurisdiction of the Courts of England.*

After a decision of the Italian Competition Authority finding that Esso Italiana participated in a jet fuel cartel, Ryanair initiated proceedings in London seeking damage recovery from it. The claims were based on breach of contract and of statutory duty.

The Commercial Court held that it had jurisdiction under the agreement. Justice Eder based his reasoning on the presumption that reasonable and rational businessmen would generally intend one-stop adjudication and that in the given case there was "an almost complete overlap" between the contractual and the tortious claim. He relied on the so called *Fiona Trust* doctrine (see *Fiona Trust & Holding Corp v. Privalov* [2007] UKHL 40) and *The Angelic Grace* case-law (*The*

Angelic Grace [1995] 1 Lloyd's Rep 87), both dealing with the parallel issue of interpretation of arbitration clauses.

The Court of Appeal, however, reversed this decision, stating that any "one-stop shop" presumption requires a parallel contractual claim. Where such a claim has no prospects of success, as was the case with Ryanair's contractual claim, Lord Justice Rix saw no reason to presume that the parties would have wanted a dispute purely based on breach of competition law to be covered by the contractual jurisdiction agreement. Despite the evident relevance of Article 23 of the Brussels I Regulation, at no point did he refer to European procedural law.

This interpretation might come as a surprise. Against the background of the *Provimi* judgment (*Provimi Ltd v. Aventis Animal Nutrition SA* [2003] WHC 961), the decision not to extend the presumption in favour of one-stop adjudication to tortious cartel damage claims was not an inescapable outcome. In *Provimi*, the High Court ruled on the scope of a contractual jurisdiction clause and decided that an interpretation under Swiss, German and French law excluded claims based on breach of competition law. The reasoning of the High Court in *Provimi* was, however, generally interpreted as implicitly suggesting that English law would favor a different, broader interpretation of jurisdiction clauses. In the aftermath of the *Ryanair* judgment, such an assumption seems rather questionable.

At first sight, the *Ryanair* decision focuses primarily on the lack of a founded contractual claim. The contract between Ryanair and Esso Italiana contained a clause imposing a price adjustment obligation in case of non-conformity with relevant "applicable laws, regulations or orders". The Court correctly observed that the parties could not have envisaged a breach of competition law to fall under this provision. An implied contractual obligation that the prices would not be inflated due to breach of competition law was also regarded as an unnecessary construction. Since in the Court of Appeal's view the justification of the one-stop adjudication presumption lies in the close connection between the tortious claim and the analogous contractual one, in the absence of a founded contractual claim the presumption was decided to be inapplicable. This conclusion was reinforced by the fact that the parties explicitly excluded claims "for indirect or consequential damages" from their agreement on jurisdiction and choice of law.

Furthermore, it is necessary to bear in mind that the case before the Court of

Appeal was different from the typical situation insofar as the jurisdiction clause was non-exclusive. Such contractual terms promote forum shopping to a great extent and should, therefore, be interpreted with extreme caution. Where the parties have opted for this kind of a wider choice of jurisdiction, an intention in favor of one-stop adjudication is by no means evident. Against this background, it seems questionable whether the "*Ryanair* presumption" could be extended to exclusive jurisdictional agreements.

The specific circumstances of the case, the prospects of success of the particular contractual claim and the non-exclusive character of the particular jurisdiction clause should not, however, lead to an undervaluation of the general significance of the ruling. For the *Ryanair* judgment might set a new trend in English case-law: It remains to be seen whether it will mark the emergence of a new presumption on the intention of rational and reasonable parties – one that does not assume they would have wanted to adjudicate cartel disputes before the court designated to rule on their contractual disputes. This might be a first step towards a turnabout of the concept of the will of the reasonable contracting parties. The underlying policy decision is revealed in the last paragraph of the judgment: The fact that the buyer wants to limit the tortious claim to one cartelist should not enable the cartel member to rely on a contractual jurisdiction clause. In other words, private enforcement of competition law should be encouraged regardless of individual jurisdiction agreements.

The narrow interpretation of the jurisdiction clause is in line with the recent developments in Europe: On July 4th, 2013, an interlocutory judgment of the Helsinki District Court in the *Hydrogen Peroxide Cartel* case also decided that cartel damage claims are not covered by jurisdiction clauses contained supply agreements.

If this approach is further pursued and a default narrow interpretation of jurisdiction (and arbitration) clauses in the context of breach of competition law is established, prorogation arguments would practically be excluded in the majority of cartel damage disputes. Unless the jurisdiction clause is clearly drafted in favour of a broad interpretation, a claimant seeking to obtain damages for breach of competition law would be able to proceed against all EU domiciled cartel members by making use of Article 6 (1) of the Brussels I Regulation. This trend is to be welcomed – it would remove significant hurdles on the way to private

enforcement of competition law.