Anonymised version

Case C-30/20

Request for a preliminary ruling

Date lodged:

22 January 2020

Referring court:

Juzgado de lo Mercantil [n.º 2] de Madrid (Commercial Court [No 2], Madrid, Spain)

Date of the decision to refer:

23 December 2019

Applicant:

RH

Defendants:

AB Volvo

Volvo Group Trucks Central Europe GmbH

Volvo Lastvagnar AB

Volvo Group España, S. A.

COMMERCIAL COURT NO 2, MADRID

[…] [Identification of the proceedings and the parties]

ORDER

[…] Madrid

[…] 23 December 2019.

BACKGROUND FACTS

ONE. The legal proceedings in which the question referred arises are ordinary civil proceedings resulting from a claim for damages for loss and damage suffered by the applicant, RH. The loss and damage were caused by certain anticompetitive practices which have already been penalised and which, according to the claim, were the result of a number of serious collusive acts by the defendant companies, all of which belong to the VOLVO group.

The applicant is bringing a follow-on action, based on the European Commission Decision of 19 July 2016 (Case AT.39824, published in the OJEU of 6 April 2017), […]. Under the decision the main truck manufacturers in the EU market were penalised for participating in a cartel which lasted from January 1997 to January 2011; the European Commission established that in the cartel the firms that were penalised **[Or. 2]** were acting in breach of Article [101] of the Treaty on the Functioning of the European Union (TFEU). According to the applicant, the infringement consisted in collusive agreements on pricing and price increases and on the timing and the passing on of costs for the introduction of emission technologies for medium and heavy trucks required by EURO 3 to 6 standards.

The companies involved in the cartel include the defendant companies, AB VOLVO, VOLVO LASTVAGNAR AB and VOLVO GROUP TRUCKS CENTRAL EUROPE GMBH. The Spanish subsidiary of the group, VOLVO GROUP ESPAÑA, S. A., is also being sued.

The applicant has provided the registered office addresses of the four defendants, three of which (the first three, which are the parents of the Spanish subsidiary) are domiciled in other EU Member States:

AB Volvo, […] Gothenburg, Sweden.

Volvo Lastvagnar AB, […] Gothenburg, Sweden.

Volvo Group Trucks Central Europe GmbH, […] Ismaning, Germany.

The registered office of the Spanish defendant is in Madrid, […].

TWO. All the defendants have entered an appearance in the proceedings and, in accordance with […] the Spanish Ley de Enjuiciamiento Civil (Code of Civil Procedure; LEC), they have submitted a plea — or challenge — to the international jurisdiction of the court. (The Spanish subsidiary has also submitted a plea to the court's jurisdiction in respect of the subject matter of one of the claims filed by the applicant.)

The VOLVO group considers that this Spanish court lacks international jurisdiction to hear the claim, citing Article 7(2) **[Or. 3]** 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. According to this provision (formerly Article 5(3) of Regulation 44/2001), '*A person domiciled in a Member State may be sued in*

another Member State: … in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur'.

The VOLVO group's argument is that the phrase 'place where the harmful event occurred or may occur' is an EU concept which has been interpreted by the Court of Justice and, according to the defendants, under the case-law of the Court of Justice the phrase refers to the place where the event giving rise to the damage occurred (in this case, the place where the truck cartel was formed), and under no circumstances can it be taken to mean the place where the applicant is domiciled: VOLVO maintains that it is clear that the cartel was formed outside Spain, in other EU Member States, meaning that the Spanish courts do not have jurisdiction. […]

THREE. […] an important question arises over the correct interpretation of Article 7(2) of Regulation (EU) No 1215/2012 under EU law.

The factors that need to be taken into account in order to resolve the point at issue in these proceedings are as follows:

1. There is already settled case-law from the Court of Justice on this provision; this states that *'in the case of an action for damages brought against defendants domiciled in various Member States as a result of a single and continuous infringement of Article 101 TFEU and Article 53 of the EEA Agreement, which has been established by the* **[Or. 4]** *Commission, in which the defendants participated in several Member States, at different times and in different places, the harmful event occurred in relation to each alleged victim on an individual basis and each of the victims can, by virtue of Article 5(3), choose to bring an action before the courts of the place in which the cartel was definitively concluded or, as the case may be, the place in which one agreement in particular was concluded which is identifiable as the sole causal event giving rise to the loss allegedly suffered, or before the courts of the place where its own registered office is located'.*

These are the words of the Court of Justice in the […] judgment of 21 May 2015 (C-352/13, *CDC Hydrogen Peroxide*, [paragraph 56]). In other words, while in the case of the truck cartel the causal event is clearly located outside Spain, it is clear from Article 7(2) of the EU Regulation and the case-law of the Court of Justice that the harm occurs in Spain and that, therefore, it would indeed be possible to bring an action against VOLVO within Spanish territory, being the place where the victim's registered office is located. Thus, the judgment of the Court of Justice in *CDC Hydrogen* establishes the following with regard to the current Article 7(2):

'[paragraph] *52 According to the settled case-law of the Court, the place where the damage occurred is the place where the alleged damage actually manifests itself (see judgment in Zuid-Chemie, C-189/08, EU:C:2009:475, paragraph 27). As for loss consisting in additional costs incurred because of artificially high*

prices, such as the price of the hydrogen peroxide supplied by the cartel at issue in the main proceedings, that place is identifiable only for each alleged victim taken individually and is located, in general, at that victim's registered office.

[paragraph] *53 That place fully guarantees the efficacious conduct of potential proceedings, given that the assessment of a claim for damages for loss allegedly inflicted upon a specific undertaking as a result of an unlawful cartel, as already found by the Commission in a binding decision, essentially depends on factors specifically relating to the situation of that undertaking. In those circumstances, the courts in whose jurisdiction that undertaking has its registered office are manifestly best suited to adjudicate such a claim.*' **[Or. 5]**

Subsequently, in a case dealing specifically with the truck cartel penalised by the Commission in the Decision of July 2016 referred to above that provides the basis for the claim in these proceedings, in an identical action brought in Hungary against DAF, the Court of Justice confirmed in the judgment of 29 July 2019 (C-451/18, *Tibor-trans* v *DAF Trucks NV*, paragraph 33) that '*where the market affected by the anticompetitive conduct is in the Member State on whose territory the alleged damage is purported to have occurred, that Member State must be regarded as the place where the damage occurred for the purposes of applying Article 7(2) of Regulation No 1215/2012 (see, to that effect, judgment of 5 July 2018, flyLAL-Lithuanian Airlines, C-27/17, EU:C:2018:533, paragraph 40)*.'

2. However, in applying the above case-law the problem arises of determining first whether the case-law refers to the international jurisdiction of the courts of the Member State in which the harm occurred, or whether it also directly establishes local territorial jurisdiction within that EU Member State. In other words, it is necessary to establish whether Article 7(2) of Regulation 1215/2012 is a pure rule of international jurisdiction, or whether it is a dual, or combined, rule which also operates to determine local territorial jurisdiction.

This question cannot be answered on the basis of the national and EU case-law available at present.

3. In terms of national case-law, the Spanish Tribunal Supremo (Supreme Court) (Order of the 1st Chamber, of 26 February 2019, reiterated subsequently on many occasions, for example most recently on 8 and 15 October 2019), has indeed confirmed that Spanish courts can be considered to have jurisdiction under Article 7(2) of the EU Regulation, but it has opted to reject the proposition that the provision also operates as a direct rule of national territorial jurisdiction without analysing what the Court of Justice has established on this point, and therefore this court of first instance does not have access to such an analysis. **[Or. 6]**

4. With regard to EU case-law, in practice the situation is that the Court of Justice has established a position in respect of contractual liability, and the question that arises is whether Article 7 should be interpreted in the same way in the case of non-contractual liability. The judgment of the Court of Justice of 3 May 2007,

C-386/05, *Color Drack GmbH* v *Lexx International Vertriebs GmbH*), dealt with a case in which, with regard to a contract for the sale of goods between Austria and Germany, the Court was asked whether Article 5(1)(b) of the former Regulation (EC) No 44/2001, now Article 7(1)(b) of Regulation 1215/2012, should be interpreted as meaning that a seller of goods domiciled in one Member State can be sued by the purchaser in an action for breach of the contract, which provided for the goods to be delivered at various places within the State of performance, brought in the courts of one of those places at the purchaser's choice. The Court of Justice's response was that it should, and it established the following:

'The first indent of Article 5(1)(b) of Regulation No 44/2001, determining both international and local jurisdiction, seeks to unify the rules of conflict of jurisdiction and, accordingly, to designate the court having jurisdiction directly, without reference to the domestic rules of the Member States.' [paragraph 30]

The same rule was applied in the later Court of Justice judgment of 9 July 2009 (C-204/08, *Peter Rehder* v *Air Baltic Corporation*), in a case also concerning an action in contract, in this case a contract for the provision of services (air passenger transport).

5. Although a priori the interpretive logic could be considered to be the same, it has not been possible to find any pronouncement by the Court of Justice on Article 7(2) of EU Regulation 1215/2012 which, as we have seen, refers to a different form of liability, namely extracontractual liability. Consequently it is not possible to apply the *acte clair* doctrine or the *acte éclairé* doctrine (also established by the judgment of the Court of Justice of 6 October 1982, C-283/81, *Cilfit*). **[Or. 7]**

6. This question clearly requires an answer: if Article 7(2) of the EU Regulation is a purely international rule which indicates that in the present case the Spanish courts have jurisdiction but does not apply domestically in order also to determine territorial jurisdiction, the national case-law cited above must apply; this states that, in the absence of any specific rule determining territorial jurisdiction in private competition actions, the jurisdiction rules most closely related to such actions are those governing unfair competition cases, established in Article 52(1)(12) of the LEC, and therefore the action should be brought in the court of the place where the vehicle was purchased or the leasing contract was signed, because that is where the harm occurs. By contrast, if Article 7(2) of the EU Regulation is considered to be a combined rule, applying to both international and local territorial jurisdiction, the case-law of the Court of Justice would indicate that jurisdiction lies with the place where the victim's registered office is located.

7. In this case, the purchase of all five of the vehicles (one of them under a leasing contract) on which the claim is based took place in Córdoba [Spain]. And although the applicant's registered office is also in Córdoba [Spain], the defendants have entered an appearance in the proceedings but have not at any

point questioned the territorial jurisdiction of this court, meaning that they must be understood to have tacitly accepted the jurisdiction of the courts of Madrid (Article 56 of the LEC).

On all these grounds, this court, which has jurisdiction to rule on the matter at issue, believes that it is appropriate to refer a question to the Court of Justice for a preliminary ruling […].

FOUR. As part of the process of this reference for a preliminary ruling […] the parties to the proceedings […] have submitted arguments on whether it is appropriate for the question to be referred, […]).

FIVE. On 4 December 2019 the claimant filed a document setting out its arguments, […]. **[Or. 8]**

LEGAL BASES

ONE. The question referred

Article 267 of the Treaty on the Functioning of the European Union (formerly Articles 234 and 177 TEC) is as follows:

'*The Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning:*

a) the interpretation of the Treaties;

b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.

Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court to give a ruling thereon.

Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court.

[…]'

In order to be able to refer a question to the Court of Justice for a preliminary ruling […] the EU law must be relevant to the specific case being brought in the competent national court and it must be applicable. The settled case-law of the Court of Justice defines the two key rules on which the community of law constituted by the European Union is founded as being the principles of the direct application of EU law in Member States and primacy over national law (judgments 26/62 *Van Gend en Loos*; 6/64 *Costa* v *ENEL*; and 106/77 *Simmenthal*). **[Or. 9]**

Moreover, according to the judgment of the Court of Justice of 20 October 2011 (C-396/09, *Interedil*), a national court, having exercised the discretion conferred on it by the second paragraph of Article 267 TFEU, is bound, for the purposes of the decision to be given in the main proceedings, by the interpretation of the provisions at issue given by the Court of Justice and must, if necessary, disregard the rulings of the higher court if it considers, having regard to that interpretation, that they are not consistent with EU law as interpreted by the Court of Justice.

On this point, it should be recalled that under Article 4bis(1) of the Ley Orgánica del Poder Judicial (Organic Law on the Judiciary; 'LOPJ'), '*The courts shall apply the law of the European Union in accordance with the case-law of the Court of Justice of the European Union.*'

[…] [Comments on national law]

TWO. This court is the competent court for deciding questions of international jurisdiction and, where it has international jurisdiction, for ruling on questions of territorial competence submitted to it by the parties for a decision.

Article 21 of the LOPJ stipulates that '*The Spanish civil courts shall hear claims arising in Spanish territory in accordance with international treaties and conventions to which Spain is a party, the rules of the European Union and Spanish law*'. Article 22quinquies of the LOPJ provides that '*In addition, in the absence of any express or implied submission, and even if the defendant is not domiciled in Spain, the Spanish courts shall have jurisdiction: b) In matters of extracontractual obligations, where the harmful event occurred in Spanish territory*'. **[Or. 10]**

The EU rule of law whose interpretation is in question, which has primacy and is of direct application in Spain, (Article 7(2) of EU Regulation 1215/2012) is directly applicable to these proceedings for the purposes of ruling on the plea to jurisdiction.

In view of the reasoning set out above

OPERATIVE PART

IT IS ORDERED that the following question be referred to the Court of Justice of the European Union for a preliminary ruling under Article 267 TFEU:

Should Article 7(2) 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, which establishes that a person domiciled in a Member State may be sued in another Member State: '*… in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred or may occur*', be interpreted as establishing only the international jurisdiction of the courts of the Member State for the aforesaid place, meaning that the national court

with territorial jurisdiction within that State is to be determined by reference to domestic rules of procedure, or should it be interpreted as a combined rule which, therefore, directly determines both international jurisdiction and national territorial jurisdiction, without any need to refer to domestic regulation?

[…] [Procedural formalities]