RH v AB Volvo: A Call for Centralized and Specialized Courts in the Midst of Jurisdictional Dispersion

Case Note: C-30/20, ECLI:EU:C:2021:604

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On 15 July 2021, the CJEU handed down its first judgment on a string of preliminary questions which have been referred to it by the Spanish commercial courts pursuant to Article 267 TFEU in the context of the so-called "Trucks Litigation". This first referral was made by Madrid Commercial Court n° 2 pursuant to an order of 23 December 2019 and relates to the interpretation of Article 7(2) of the Brussels I bis Regulation in connection with claims for damages arising out of a competition law infringement.[2] The case is interesting, not only for its ruling on the scope and meaning of Article 7(2) in competition cases, but above all for what it says about the organization of national court systems, and the possibility, need even, for centralized and specialized competition courts in this technically complex area of law.

1. Background

It is worth understanding the context within which the *Volvo* case arose. The Trucks Litigation is a new phenomenon in civil procedure in the EU, certainly in the area of competition law. The Trucks Decision has provoked an unprecedented number of claims for damages, in an unprecedented number of national jurisdictions. The case raises huge challenges in the management of complex mass litigation and will, no doubt, mark a watershed in this area in many jurisdictions.

In the case of Spain, the competent commercial courts have been inundated with thousands of relatively small claims: claims for damages – usually, alleged overcharges - in relation, typically, to just one, or a handful, of truck purchases made during the infringement period. The commercial courts are spread around the Spanish territory (at least one per province), number over eighty in total and, outside the main judicial centers of Madrid and Barcelona, previously had relatively little experience of applying competition law.[3] At the appeal level, there is one court per province.[4]

Many of the claims in the Trucks Litigation are essentially identical, filed by the same law firm in the same terms and accompanied by the same economic expert report quantifying the same alleged overcharge throughout the Spanish market. That is, there are claimant groups. The largest is the CETM road haulier association grouping, which represents over 5,000 claimant truck purchasers. With limited exceptions, claimant law firms have not sought to

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2. Namely, the infringement which was the subject of the Commission's Decision of 19 July 2016 imposing fines on the principal manufacturers of medium and heavy trucks in the EU (Case AT.39824 - Trucks), the "Trucks Decision".
3. The competences of the commercial courts extend to a number of areas of commercial law, including insolvency, unfair competition, intellectual property, company, transport, maritime, consumer collective actions, as well as national and EU competition law (pursuant to Article 86 ter of the Law of the Judicial Power 6/1995 of 1 July 1985, as amended).
4. Final appeals can be made to the Supreme Court where the relevant conditions (breach of due process, minimum value or sufficient legal interest) are satisfied: Articles 473 and 477 of the Spanish Civil Procedural law.

join these claims together, however.[5] Rather, they have filed individual claims around Spain relying principally on the "place of harm" as the relevant jurisdictional hook.

The result has been that most claims are dealt with individually by different courts around the country giving rise to varying outcomes depending on which court is assessing the evidence.[6] The flip side is that proceedings have been exceedingly quick. There have already been over 1,000 judgments at first instance ruling on the merits of the case and over 300 at the appeal level.[7]

2. The issue in the case

The Volvo case concerned a claim for damages brought by an individual based in Córdoba (Andalucía) who had purchased 5 trucks from an independent Volvo dealer, also based in Córdoba, during the infringement period. The claimant sued three non-Spanish companies (two Swedish and one German) which had all been named in the Commission Decision as infringers. It also sued Volvo's Spanish subsidiary, Volvo Group España, S.A., domiciled in Madrid, which had not been so named.

One might be excused for wondering why a jurisdictional issue arose at all. After all, the Madrid court clearly had jurisdiction to hear the case against the Spanish subsidiary, since it was domiciled in Madrid. Accordingly, it may have been arguable that the non-Spanish defendants could be joined to that anchor claim pursuant to Article 8(1) of the Brussels Regulation to avoid the risk of irreconcilable judgments, subject to the argument that the anchor claim were spurious or abusive.[8] That is, the question of jurisdiction could perhaps have been resolved pursuant to the Brussels Regulation without recourse to Article 7(2) or Spanish law. However, that argument apparently was not run.[9]

An initial perusal of the facts and arguments reveals a further apparent conundrum: whether there was, in fact, a relevant issue for referral in this case. The Volvo defendants challenged the international jurisdiction of the Madrid court. They did so on the basis that the "place of the harmful event" under Article 7(2), which determines the special place of jurisdiction in tort cases, was determined exclusively by EU law and referred only to the place where the event causing the harm (i.e. the infringement) took place, which was outside Spain. The court took another view on the interpretation of Article 7(2), namely that, according to the CJEU's case-law, in particular *CDC Hydrogen Peroxide*,[10] a claimant could also sue in the place where the harm occurred[11] and that this place coincides with the claimant's registered office. However, it concurred with Volvo that it was necessary to determine whether Article 7(2) determined directly the place within Spain where damage had occurred or whether it merely determined the jurisdiction of Spanish courts, territorial competence being determined by Spanish law. This, in abstract, was a relevant question since the Spanish Supreme Court had already decided on a number of occasions in the Trucks Litigation that Spanish law, and not Article 7(2), determined territorial jurisdiction – and, in addition, that this should coincide with the place where the relevant purchase was made (or leasing contract concluded).[12]

On the facts, one could be excused, at this point, however, for wondering whether this issue was relevant to the case at hand given that both the place of the truck purchases and the claimant's domicile were Córdoba and, accordingly, the Madrid court should have declined jurisdiction, whatever the correct interpretation of Article 7(2). However, as the court notes in its order for referral, the defendants had submitted tacitly to the Madrid court's territorial jurisdiction in accordance with Spanish law,[13] and hence the Spanish rule on place of harm (Córdoba), if applicable, was displaced in favour of Madrid.

5. Since the outbreak of Covid-19, there have been some interesting initiatives, by courts themselves and some parties, to have groups of claims case managed together, or even formally joined. These offer some real promise for cases to be dealt with more effectively and efficiently and illustrate the concern of many commercial courts to address these issues using intelligently the tools which are already available under Spanish law.
6. The majority of cases in Spain (at the date of writing) have given rise to a judicial estimation of harm with quite a wide range of overcharges. See, further, the article of G Martín Martín in this volume.
7. By contrast, there have been scarcely any reported decisions on the merits in the rest of the EU. For its part, the Spanish Supreme Court is expected to rule next year, foreseeably after the CJEU has ruled on a referral from the Appeal Court of León relating to the temporal application of Directive 2014/104, including the faculty of judicial estimation under Article 17.1 (C-267/20).
8. Case C-103/05, *Reisch Montage*, EU:C:2006:471, at paragraph 32.
9. It is also true that until the time of writing most courts, including the Madrid courts, have considered that there is no valid claim against subsidiaries which have not been identified as infringers in the decision. However, this was before the CJEU's ruling on the second Spanish referral has yet had the chance to have an impact on Spanish proceedings (judgment of 6 October 2021 in Case C-882/19, *Sumal*, EU:C:2021:800).
10. Case C-352/13, EU:C:2015:335.
11. As the CJEU confirmed at paragraph 29 of the *Volvo* judgment.
12. Orders of 26 February 2019 and 19 March 2019, among others.
13. Article 56 of the Spanish Civil Procedural Law.

3. The Court's ruling on Article 7(2)

The Court's ruling on the specific question referred – i.e. whether Article 7(2) determines international and national territorial jurisdiction – was, predictably, resolved in the affirmative. The parties themselves and the interveners supported that interpretation. The defendants argued that the answer to the question was indeed *acte clair*. However, given that the Spanish Supreme Court had taken the contrary view in its prior jurisdiction rulings in the Trucks Litigation, the CJEU was of the view that it was important to clarify the matter (to the extent the Madrid court considered it was relevant for the case before it) and so admitted the referral. I will refer to this as the "main question". As we will see, the CJEU also took the opportunity to try to further clarify the application of Article 7(2) to competition cases, in particular as to the place within the Member State where harm should be understood to have occurred. I will refer to this as the "subsidiary question".

The Court dedicates just one paragraph of the judgment to the main question (paragraph 33), holding that Article 7(2) determines both international and territorial jurisdiction, with the result that "Member States may not apply criteria for the conferral of jurisdiction which differ from Article 7(2)" (paragraph 34, first line). It did so on the basis of the wording of Article 7(2) which - by contrast to the general jurisdiction of Article 4(1) where reference is made to the courts of the Member State in which the defendant is domiciled - refers more specifically to the courts of the "*place* where the harmful event occurred" (my emphasis). This interpretation was also supported by the Jenard report.[14]

The Advocate General's Opinion notes that this interpretation is, furthermore, consistent with that adopted in relation to other EU special jurisdictions (namely, contract and family maintenance).[15] Those cases underline the need for a close connection with the court, and the objective of sound administration of justice, factors expressly identified in recital 16 to the Regulation, and in turn reflect concerns around the protection of the weaker party and easier access to justice.[16]

The subsidiary question raises a number of complex issues, which this is not the place to address fully, so I will be brief. Previous case-law seemed to establish fairly clearly that the place of harm coincides with the country which forms part of the affected market and where the claimant alleges to have suffered harm (such as, loss of sales or overcharges),[17] a position which has the benefit of consistency with the specific rule under Article 6(3) of the Rome II Regulation on applicable law in competition civil actions. These cases accepted, furthermore, that such loss was not pure financial loss nor indirect harm.[18] In particular, the CJEU held in *Tibor-Trans* that an overcharge alleged to have been passed on to, and suffered, by an indirect purchaser was direct harm which served for jurisdictional purposes under Article 7(2).[19] However, it was not clear from those cases where the place of harm should be within the Member State (i.e. the question of territorial jurisdiction). As noted by the Madrid court in its referring order, the court had answered in *CDC Hydrogen Peroxide* that the territorial place of harm should ("in general") be the victim's registered office; however, some questioned the extension of that *forum actoris* rule to cases which did not concern direct purchasers (the facts of *CDC*), but rather indirect purchasers (as in *Tibor-Trans* or *Volvo*).[20] Hence, the need for some clarification.

What did the CJEU answer? It sought to make sense of, and combine, its previous Article 7(2) case-law. First, it invoked the rule established in the Volkswagen diesel emission case, whereby the place of harm is the place of the relevant transaction which, due to the tort, incorporates an additional cost to the price and causes harm to the victim.[21] Second, it used the *CDC* rule to offer a solution in those cases where the relevant transactions had taken place in a number of different places, so that the place of harm would then be the place of the victim's registered office.

Whether this ruling has solved the problem remains to be seen. Outstanding questions may arise where the factual situations are more complex, and the CJEU may struggle to continue to fit the rules in the way it is currently doing. It is perhaps already forcing the bounds of concepts, for example in the way in which it seeks to differentiate between material and purely financial loss.[22] The rules are maybe calling for a revamped and specific solution. In the meantime, the current jurisdictional panorama continues to be complex, has the consequence of multiplying the number of competent courts and increasing the fragmentation of proceedings in cases like Trucks, as can be seen particularly keenly in its Spanish *dénouement*, and this raises risks of contradictory judgments. [23] This brings us to the last, and perhaps most interesting aspect of the *Volvo* case.

14. OJ 1979 C 59/1.
15. C-386/05, *Color Drack*, EU:C:2007:262, and C-400/13 and 408/13, *Sanders and Huber*, EU:C:2014:2461.
16. AG Opinion in *Volvo*, EU:C:2021:322, paragraph 44, and the judgment in *Sanders and Huber*, at paragraph 29.
17. See, respectively, C-27/17, *flyLAL*, EU:C:2018:533, and *Tibor-Trans*, EU:C:2019:635.
18. *flyLAL*, paragraphs 31 to 36, *Tibor Trans*, paragraphs 27 to 29 and the case-law cited.
19. Paragraph 31.
20. See, for instance, paragraph 54 of the Opinion in *Volvo*.
21. Case C-343/19, *Verein für Konsumenteninformation*, EU:C:2020:534.
22. See the explanation of Advocate General de la Tour at paragraphs 82 and 83 of his Opinion and the discussion in the judgment in *Verein* (paragraphs 33 to 35).
23. See, in relation to collective redress generally, P Oberhammer, 'Collective Redress and jurisdiction in Europe', Mass Claims Journal, vol. 1, June 2021. Recall that, as in the case of the Collective Redress Directive (Directive 2020/1828), jurisdiction was excluded from the scope of the Competition Damages Directive (Directive 2014/104).

4. The issue of specialized courts

As noted by the CJEU, while Article 7(2) determines the place of harm of a particular action for jurisdictional purposes, which court is competent to hear that action is part of the organizational competence of the Member State. In Spain, it is the commercial court of the province corresponding to that place of harm, since this is a matter of competition law. This raised a further discussion in *Volvo*, which fell clearly beyond the scope of the referral, was entirely hypothetical and indeed came within the scope of national procedural autonomy. For these very reasons, it is especially noteworthy. The concern of the intervening parties, among them the Commission and the French Government,[24] was whether Article 7(2) should impede the creation of centralized courts, with exclusive jurisdiction for all or a major part of the national territory, since this could be seen to contradict the principle of proximity under Recital 16.

A similar matter has been broached in other areas of EU law, namely the Common Agricultural Policy (*Agrokonsulting*) and jurisdiction in matters of family maintenance (*Sanders and Huber*). In both these cases, the Court has paid careful attention to specific circumstances (and potential disadvantages) of the relevant litigant's access to a centralized court to evaluate whether the principle of proximity (or effectiveness, in the case of *Agrokonsulting*)[25] risked being compromised. At the same time, it has balanced this with, and emphasized, the potential contribution that centralized specialized courts can make to the sound administration of justice. The Commission and the German Government have been particularly vocal about this, pointing to the benefits of a specialized court to develop specific expertise and contribute to uniform practice. The CJEU in *Volvo* echoes this thinking (citing *Sanders and Huber*, specifically), adding that the technical complexity of competition law damages actions "may also militate in favour of a centralization of jurisdiction".[26] Indeed, this reflects a developing line of case-law on the right to a fair trial, which underlines the need to bear in mind if a case pertains to a technical field of which the judge has little or no knowledge and where, for instance, expert evidence is likely to have an important influence on the assessment of facts.[27]

In conclusion, these statements in *Volvo* are an indication to Member States that the path to court specialization and/or centralization in competition law is open to them should they wish to follow it.[28] In this way, the precise territorial location of the harmful event within each country, which potentially opens up an unhelpfully large number of competent courts, so jeopardizing consistency and quality, would become somewhat otiose since there would be only one (or only a few) centralized and specialized national court(s) with competence to hear the case. Such a development is, in my view, to be encouraged.

24. The author has been granted access to the observations of the interveners pursuant to the Transparency Regulation.
25. Case C-93/12, EU:C:2013:432.
26. Paragraph 37.
27. See, for instance, Case C-276/01, *Steffensen*, EU:C:2003:228 and the case -law of the ECtHR in relation to Article 6(1) ECHR, such as *Matovanelli*, ECtHR 18 March 1997, no. 21497/93.
28. Examples already include the UK Competition Appeal Tribunal and, in the EU, the Portuguese Competition and Regulation Supervision Court and the three specialized centers in Italy.