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The EU Court of Justice rules on the applicability of contractual jurisdiction clauses in the context of abuse of a dominant position, ruling that some competition law violations are more contract related than others (Apple / MJA)

PROCEDURES, DOMINANCE (ABUSE), DISTRIBUTION/RETAIL, DAMAGES, DISTRIBUTION AGREEMENT, PRIVATE ENFORCEMENT, INFORMATION TECHNOLOGY, EUROPEAN UNION

EU Court of Justice, Apple and Others / MJA, Case C-595/17, 24 October 2018

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With its judgment the European Court of Justice ('ECJ') confirms its previous case law indicating that the criterium to determine whether a competition law violation is covered by a contractual jurisdiction clause is the existence of a 'contractual link', adding that this is the case even when such clause does not explicitly refer to disputes relating to liability resulting from a competition law infringement. Interesting is that the ECJ further clarifies that such 'contractual link' is more likely to be present in case of a violation of article 102 TFEU rather than in case of a violation of article 101 TFEU. Unfortunately, the ECJ's reasoning for making this distinction is limited to stating that *"the abuse of a dominant position can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms"*.

- **The parties**

Apple Inc., Apple Sales International and Apple Retail France EURL ('Apple') are all part of the Apple group. Apple Inc. (US) sells consumer electronics, computer and online services. Apple Sales International (Ireland) and Apple Retail France EURL (France) operate as its subsidiaries.

MJA, acting as liquidator of **eBizcuss.com** ('eBizcuss'). Before bankruptcy eBizcuss was an authorised and semi-exclusive reseller of Apple products in France.

- **The facts**

In October 2002, Apple and eBizzcuss concluded a contract recognizing eBizzcuss as an authorised reseller of Apple products ('the contract'). The contract contained a jurisdiction clause conferring jurisdiction on the Irish courts for all cases 'related to this agreement and the corresponding relationships'.

In April 2012, eBizzcuss brought proceedings against Apple before the Commercial Court of Paris claiming among others that Apple abused its dominant position by favouring its own retailer network to eBizzcuss' detriment. Apple raised the lack of jurisdiction referring to the jurisdiction clause included in the contract and was followed by the court which upheld its objection.

Subsequently, the case made its way to the French Court de Cassation. When confronted with the case for a second time the Court de Cassation referred three questions to the ECJ, all three relating to the applicability of jurisdiction clauses in the context of abuse of dominant position. [1]

- **The judgement**

Jurisdictional clauses in the context of competition law violations

The ECJ, analysing the first two questions together, negatively answers to the question whether article 23 of Regulation 44/2001 [2] precludes the application of a contractual jurisdiction clause when an action is brought on the basis of article 102 TFEU. It is important to note that the analysed jurisdiction clause did not expressly refer to disputes relating to competition law violations. If the latter was the case no discussion would have arisen.

- *Principle for the application of jurisdiction clause*

The ECJ starts by recalling that according to article 23 of Regulation 44/2001 a jurisdiction clause can only concern disputes which have arisen or which may arise 'in connection with a particular legal relationship'. The ECJ indicates that *"the purpose of this requirement is to avoid a party being taken by surprise by the assignment of jurisdiction to a given forum as regards all disputes which may arise out of its relationship with the other party to the contract and stem from a relationship other than that in connection with which the agreement conferring jurisdiction was made"* (emphasis added). In other words, a party agreeing to a jurisdiction clause should be able to foresee which types of disputes arising between the contracting parties are covered by such clause.

- *Application of jurisdiction clauses in competition law context – article 101 TFEU*

The ECJ subsequently refers to its *CDC Hydrogen Peroxide* [3] ruling ('*CDC*'). In *CDC*, the ECJ held that a clause which abstractly refers to disputes arising from a contractual relationship does not extend to disputes relating to tortious liability resulting from violations of article 101 TFEU. This is in line with the purpose to *'avoid a party being taken by surprise'* as at the time of conclusion of a contract the contracting party suffering a loss cannot reasonably foresee such litigation and has no knowledge of the cartel involving the other party.

- *Application of jurisdiction clauses in competition law context – article 102 TFEU*

The ECJ continues by examining whether the interpretation introduced in *CDC* in relation to article 101 TFEU violations is also valid with regard to article 102 TFEU violations.

The ECJ starts by stressing that the interpretation provided in *CDC* should be applied in case a competition law violation has no connection with the contractual relationship.

However, the ECJ continues by distinguishing the situation of an article 101 TFEU and article 102 TFEU violation saying that a contractual link will be more easy to establish in the case of an article 102 TFEU violation. [4] According to the ECJ, an article 101 TFEU violation is - on the one hand - in general *"not directly linked to the contractual relationship between a member of that cartel and a third party which is affected"*. On the other hand, an article 102 TFEU violation *"can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms"*.

On the basis of this distinction, the ECJ concludes that the application of a jurisdiction clause that refers to a contract and the corresponding relationship *"cannot be regarded as surprising one of the parties"*. Consequently, the ECJ rules that article 23 of Regulation 44/2001 does not exclude the application of a jurisdiction clause in the context of an article 102 TFEU violation on the sole ground that the clause does not expressly refer to disputes resulting from an infringement of competition law.

Infringement finding Decision is not a prerequisite for the application of a jurisdictional clause

The subject of the third question is whether a finding of an infringement of competition law by a relevant authority constitutes a prerequisite for the application of a jurisdiction clause in the context of an action brought on the basis of article 102 TFEU.

The ECJ clearly states that a prior finding of an infringement is irrelevant when determining whether a jurisdiction clause should apply. In addition, the ECJ clarifies that such requirement would also be contrary to the objective of foreseeability.

- **Comments**

The ECJ's judgement provides two main takeaways for the application of contractual jurisdiction clauses in the context of competition law violations in case these jurisdiction clauses do not expressly refer to disputes relating to competition law violations.

First, the ECJ confirms its previous *CDC* judgment holding that the criterium to determine whether a competition law violation is covered by a contractual jurisdictional clause is a 'contractual link'. This can be linked to the purpose to 'avoid a party to be taken by surprise' and the intertwined required 'foreseeability' of the scope of an agreed upon jurisdiction clause.

Second, adding to its *CDC* judgment, the ECJ seems to rule that not all competition law violations are 'equally contract related' by stating that it is more likely for article 102 TFEU violations to be contract related than article 101 TFEU violations. To substantiate this distinction, the ECJ limits itself to state that *"the abuse of a dominant position can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms"*.

It is unfortunate that the ECJ does not provide more details as to why it judges that article 102 TFEU violations are more likely to be contract related than article 101 TFEU violations. In particular because the ECJ seems to create a general presumption that the abuse of dominant position 'cannot be regarded as surprising to a contract party' and thus contract related.

Finally, it should be noted that each national court should still assess, on a case by case basis, whether there is a sufficient connection between the contract and the article 102 TFEU violation to apply the jurisdiction clause included in the contract as not all article 102 TFEU violations can be considered as being 'unsurprisingly' to the other contract party.

[1] When referring, the Court de Cassation made reference to the *Interlog and Taboada v Apple* judgement of the Supreme Court of Portugal (16 February 2016) in which the Portuguese Supreme Court ruled that a similar jurisdiction clause was applicable in proceedings relating to the same allegation of abuse of a dominant position as the one invoked by eBizcuss.

[2] Article 23 of Regulation (EC) No 44/2001 allows a derogation from the general rules on international jurisdiction defined in that regulation if the parties, one or more of whom is domiciled in a Member State, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen in connection with a particular legal relationship.

[3] Judgment of the Court (Fourth Chamber) of 21 May 2015, *Cartel Damage Claims (CDC) Hydrogen Peroxide SA v Evonik Degussa GmbH and Others* (C-352/13, EU:c:2015:335).

[4] Note that AG Wahl in its opinion for this case stated that such general distinction should be avoided (paragraphs 69-70): "...In that regard, I do not particularly support the notion that cartels prohibited by Article 101 TFEU always produce their harmful effects outside any contractual relationship, while conduct constituting an abuse of a dominant position prohibited by Article 102 TFEU would necessarily have its source in the contract entered into by the victim of the alleged conduct and the person committing such an abuse."