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Competition Disputes: Will a Jurisdiction Clause Govern Where They are Brought?

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The European Court of Justice (CJEU) held recently in *Apple Sales International v MJA acting as liquidator of eBizcuss.com*[1] that claims alleging abuse of a dominant position could come within the terms of a jurisdiction clause even where the clause did not expressly refer to claims based on competition law.

Relevant Rules

The rules of jurisdiction within the EU are designed to be transparent and predictable. Brussels I Recast, which subject to some exceptions, governs civil and commercial claims, provides as a default position that persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State.

Apart from this rule of general jurisdiction, there are certain rules of special jurisdiction. Article 25 of Brussels I Recast, the successor of Article 23 of the Brussels I Regulation[2], provides that if parties, regardless of their domicile, agree that the courts of a particular Member State are to have jurisdiction to settle any disputes between them in connection with a particular legal relationship, those courts shall have jurisdiction, unless the agreement is null and void under the law of that Member State. This jurisdiction is exclusive unless the parties have agreed otherwise.

Background

eBizcuss was an Apple distributor in France and sued Apple in France for abuse of a dominant position alleging that Apple was favouring its own distributor network. However, a clause in the distribution agreement between the parties provided that the agreement and the corresponding relationship between them was to be governed by Irish law, with the parties also submitting to the jurisdiction of the Irish courts. Notably the clause was framed in general terms and contained no reference to disputes concerning liability incurred as a result of an infringement of competition law. The French courts had to consider the effect of this provision on their jurisdiction to hear the matter and in that context questions were referred to the CJEU for a preliminary ruling on the interpretation of Article 23.

Of relevance to the issues arising was the CJEU's decision in *CDC Hydrogen Peroxide**[3]* which held that a jurisdiction clause which abstractly referred to disputes arising from contractual relationships did not extend to a dispute relating to the alleged liability in tort of one party to that contract following its participation in an unlawful cartel. This was on the basis that the other party to the contract which suffered the loss could not reasonably have foreseen such litigation when it agreed to the jurisdiction clause. Where it had no knowledge of the unlawful cartel involving the other party, the CJEU found that the litigation could not be regarded as stemming from the contractual relationship. Therefore, in the context of those proceedings arising from the activities of a cartel, the CJEU's view was that Article 23 permitted a jurisdiction clause in a contract for the supply of goods to only be taken into account where the clause expressly referred to disputes concerning liability incurred as a result of an infringement of competition law.

The Latest CJEU Decision

The CJEU held in the *Apple* case that, in an action for damages brought by a distributor against its supplier for abuse of a dominant position, Article 23 should be interpreted as meaning that the application of a jurisdiction clause within the contract binding the parties was not excluded solely because the clause did not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law.

The CJEU noted that a jurisdiction clause can only apply to disputes arising in connection with a particular legal relationship. This avoids a party being taken by surprise by the assignment of jurisdiction to a certain forum for all disputes which may arise out of its relationship generally with the other party but which may stem from a relationship other than that in connection with which the jurisdiction clause was agreed.

In reaching its decision the CJEU distinguished two types of anti-competitive behaviour:

- anti?competitive conduct in the form of an unlawful cartel and arising under Article 101 TFEU, which is in principle not directly linked to the contractual relationship between a member of a cartel and a third party affected by that cartel; and
- abuse of a dominant position arising under Article 102 TFEU, which can materialise in contractual relations involving an undertaking in a dominant position.

In respect of the latter, the CJEU noted that it could not be regarded as surprising to one of the parties that a court would take account of a jurisdiction clause that referred to a contract and "the corresponding relationship" arising from it.

Comment

The *Apple* judgment reiterates the need for drafters of jurisdiction clauses to focus on the question of where disputes concerning liability incurred as a result of an infringement of competition law are to be dealt with and for antitrust litigators alike to take cognisance of the terms of such clauses prior to initiating proceedings.

[1] *Apple Sales International v MJA acting as liquidator of eBizcuss.com*, Case C-595/17.

[2] While there are some differences between the two provisions, those aspects of Article 23 considered by the court are reproduced in Article 25 of the new instrument.

[3] *CDC Hydrogen Peroxide*, Case C?352/13.

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