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by **Marco Hickey**

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On October 24, 2018, the Court of Justice of the European Union (CJEU) delivered its preliminary ruling in the case between Apple and eBizcuss, a former reseller of Apple products. (Case C?595/17).

The judgment addresses a heavily contested issue: the application of contractual jurisdiction clauses in actions for damages for infringements of competition law. Importantly, the preliminary ruling distinguishes between Article 101 of the Treaty of the Functioning of the European Union (TFEU) (which deals with anti-competitive agreements and concerted practices such as cartels) and Article 102 of the TFEU (which deals with abuse of dominance) as regards the applicability of choice of forum clauses to competition damages claims.

Background

In 2012, eBizcuss brought damages proceedings against Apple in France claiming that Apple had abused its dominant position contrary to Article 102 of the TFEU, in particular, by favouring its own distribution network over its third party resellers. Apple, however, argued that the French courts had no jurisdiction in this matter as the choice of forum clause included in the contract between Apple and eBizcuss conferred exclusive jurisdiction on the Irish courts. After five years of proceedings before several French courts, the country's highest court – the Cour de Cassation – referred a request for a preliminary ruling to the CJEU, asking whether a party can rely on a choice of forum clause in the context of claims seeking damages for an abuse of dominance where that clause does not explicitly cover competition law infringements.

CDC Hydrogen peroxide Case

Previously, the CJEU had in the CDC Hydrogen Peroxide case of 21 May 2015 examined Article 23 Brussels I Regulation (44/2001) and ruled that choice of forum clauses can only be upheld in the context of actions for damages based on Article 101 of the TFEU, if they explicitly refer to competition law infringements. The purpose of that requirement, the CJEU stated, is to avoid a party who has no knowledge of an unlawful cartel at the time of the conclusion of the contract, being surprised by the other party invoking a choice of forum clause to shield themselves against damages claims relating to the cartel infringement. It is important to note that the CDC Hydrogen Peroxide case focused on cartel cases, and did not touch upon the issue of abuse of dominance. The Apple case addresses this previously unresolved issue.

CJEU’s Ruling

The CJEU in the Apple case drew a distinction between damages claims based on the infringement of Article 101 and 102 TFEU. The CJEU confirmed that conduct covered by Article 101 TFEU is in principle not directly linked to the contractual relationship between a cartel member and a third party affected by the cartel. Unlike Article 101 TFEU, the anti-competitive conduct covered by Article 102 TFEU can materialise in contractual relations that an undertaking in a dominant position establishes and thus makes it foreseeable.

The Court considered that "while the anti?competitive conduct covered by Article 101 TFEU, namely an unlawful cartel, is in principle not directly linked to the contractual relationship between a member of that cartel and a third party which is affected by the cartel, the anti?competitive conduct covered by Article 102 TFEU, namely 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."

In the present case, the CJEU stated that the reliance on a choice of forum clause in the context of an action for damages based on Article 102 TFEU, where the clause refers to the contract and 'the corresponding relationship', should not come as a surprise to any of the parties. As a consequence, eBizcuss should have expected that the choice of forum clause also covered future claims related to an alleged abuse of dominance.

This judgment provides a much-welcomed legal certainty for antitrust litigants. Since most antitrust infringements are either cross-border or involve parties established in different countries, jurisdiction is the first point of contention when seeking compensation for damages resulting from such infringements. However, the recent Damages Directive does not address this issue at all. Hence, the Apple judgment is welcome in that it fills the gap left by the CDC Hydrogen Peroxide case and provides a clearer and useful roadmap to establishing jurisdiction in antitrust damages cases. It might also limit lengthy debates on jurisdiction before national courts, therefore allowing for quicker and hence more efficient reparation for victims of infringements of competition law.

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