

COURT OF JUSTICE OF THE EUROPEAN UNION 24 OCTOBER 2018

COMPETENCE

Jurisdiction clause – Competition law – Damages – Private enforcement

A jurisdiction clause in a contract can only concern disputes which have arisen or may arise in connection with a particular relationship. This is to avoid surprises for either party to the agreement. Hence, tortious conduct falls in principle outside a jurisdiction covering disputes arising from a contract. However, this can be different if an anti-competitive conduct in breach of Article 102 TFEU materialises in contractual relations that an undertaking in a dominant position establishes. This holds true for an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU. In this context, it is irrelevant whether the action is a stand-alone or a follow-on action.

COMPÉTENCE

Clause attributive de compétence – Comportement fautif – Concurrence – Dommages et intérêts, exécution privée

Une clause attributive de juridiction dans un contrat ne peut concerner que les litiges nés ou à naître à l'occasion d'une relation particulière. Il s'agit d'éviter des surprises pour l'une ou l'autre des parties à l'accord. Par conséquent, un comportement fautif ne relève en principe pas de la compétence d'un tribunal compétent pour connaître des litiges découlant d'un contrat. Toutefois, il peut en aller autrement si un comportement anticoncurrentiel contraire à l'article 102 TFUE s'inscrit dans les relations contractuelles nouées par l'entreprise en position dominante. Ceci vaut pour une action en dommages-intérêts intentée par un distributeur contre son fournisseur sur la base de l'article 102 TFUE. Dans ce contexte, il importe peu que l'action soit une action autonome ou une action de suivi.

Apple Sales International / eBizcuss.com

Zet.: M. Vilaras, President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Saffjan (Rapporteur) and D. váby, Judges,

O.M.: N. Wahl (Advocate General)

Pl.: F. Molinié, J.-C. Jaïs and C. Cavicchioli, J.-M. Thouvenin and L. Vidal

Case: C-595/17

(...)

The dispute in the main proceedings and the questions referred for a preliminary ruling

8. On 10 October 2002 Apple Sales International, a company established under Irish law, entered into a contract with eBizcuss recognising the latter as an authorised reseller of Apple products. That contract, by which eBizcuss undertook to semi exclusively distribute its contractual partner's products, contained a jurisdiction clause conferring jurisdiction on the Irish courts.

9. That clause, drafted in English, was worded as follows in the final version of the distribution contract, dated 20 December 2005: "This Agreement and the corresponding relationship between the parties shall be governed by and construed in accordance with the laws of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple [Sales International] reserves the right to institute proceedings against Reseller in the courts having jurisdiction in the place where Reseller has its seat or in any jurisdiction where a harm to Apple [Sales International] is occurring."

10. The parties to the main proceedings do not agree on the exact French translation of the words "and the corresponding

relationship", translating them either as "et la relation correspondante" (the translation of eBizcuss) or as "et les relations en découlant" (the translation of Apple Sales International).

11. Despite that disagreement, the clause can be translated [in French] as follows.

"Le présent contrat et la relation correspondante (the translation of eBizcuss)/et les relations en découlant (the translation of Apple Sales International) entre les parties seront régis par et interprétés conformément au droit de l'Irlande et les parties se soumettent à la compétence des tribunaux de l'Irlande. Apple [Sales International] se réserve le droit d'engager des poursuites à l'encontre du revendeur devant les tribunaux dans le ressort duquel est situé le siège du revendeur ou dans tout pays dans lequel Apple [Sales International] subit un préjudice."

12. In April 2012 eBizcuss brought proceedings against Apple Sales International, Apple Inc., a company established under United States law, and Apple Retail France, a company established under French law, before the tribunal de commerce de Paris (Commercial Court, Paris, France), in respect of an action to establish liability for acts of unfair competition and abuse of a dominant position, on the basis of Article 1382 of the Civil Code, of Article L 420-2 of the Commercial Code and of Article 102 TFEU.

(...)

Consideration of the questions referred

The first and second questions

20. By its first and second questions, which it is appropriate to examine together, the referring court seeks to ascertain, essentially, whether Article 23 of Regulation No. 44/2001 must be interpreted as precluding the application, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, of a jurisdiction clause, set out in the contract binding the parties, which does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law.

21. In that regard, according to the Court's settled case-law, it is for the national court to interpret the clause conferring jurisdiction invoked before it in order to determine which disputes fall within its scope (judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C 352/13, EU:C:2015:335, paragraph 67 and the case-law cited).

22. However, a jurisdiction clause can concern only disputes which have arisen or which may arise in connection with a particular legal relationship, which limits the scope of a clause conferring jurisdiction solely to disputes which arise from the legal relationship in connection with which the agreement was entered into. The purpose of that 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 (judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C 352/13, EU:C:2015:335, paragraph 68 and the case-law cited).

23. Having regard to that purpose, the Court held that a clause which abstractly refers to disputes arising from contractual relationships does not extend to a dispute relating to the tortious liability that one party allegedly incurred as a result of its participation in an unlawful cartel (judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C 352/13, EU:C:2015:335, paragraph 69).

24. Given that the undertaking which suffered the loss could not reasonably foresee such litigation at the time that it agreed to the jurisdiction clause and that that undertaking had no knowledge of the unlawful cartel involving the other party to the contract at that time, such litigation could not be regarded as stemming from the contractual relationship (judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C 352/13, EU:C:2015:335, paragraph 70).

25. In the light of those considerations, the Court held that Article 23 (1) of Regulation No. 44/2001 allows, in the case of actions for damages for an infringement of Article 101 TFEU and Article 53 of the Agreement on the European

Economic Area of 2 May 1992 (*OJ* 1994 L 1, p. 3), account to be taken of jurisdiction clauses contained in contracts for the supply of goods, provided that those clauses refer to disputes concerning liability incurred as a result of an infringement of competition law (judgment of 21 May 2015, *CDC Hydrogen Peroxide*, C 352/13, EU:C:2015:335, paragraph 72).

26. In the light of that case-law, it is appropriate to examine whether that interpretation of Article 23 of Regulation No. 44/2001 and the grounds on which it is based are also valid with regard to a jurisdiction clause invoked during a dispute that relates to the tortious liability allegedly incurred by one contracting party as a result of a breach of Article 102 TFEU.

27. That is the case where the alleged anti competitive conduct has no connection with the contractual relationship in the context of which the jurisdiction clause was agreed.

28. However, 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.

29. It must therefore be stated that, in the context of an action based on Article 102 TFEU, taking account of a jurisdiction clause that refers to a contract and 'the corresponding relationship' cannot be regarded as surprising one of the parties within the meaning of the case-law mentioned at paragraph 22 of the present judgment.

30. In the light of all the foregoing, the answer to the first and second questions is that Article 23 of Regulation No. 44/2001 must be interpreted as meaning that the application, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, of a jurisdiction clause within the contract binding the parties is not excluded on the sole ground that that clause does not expressly refer to disputes relating to liability incurred as a result of an infringement of competition law.

The third question

31. By its third question, the referring court seeks to ascertain, in essence, whether Article 23 of Regulation No. 44/2001 must be interpreted as meaning that a prerequisite for the application of a jurisdiction clause, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, is the finding of an infringement of competition law by a national or European authority.

32. That question must be answered in the negative.

33. As the Advocate General observed in point 83 of his Opinion, the existence or absence of a prior finding by a competition authority of an infringement of competition rules has no connection with the considerations that must prevail when determining whether a jurisdiction clause is to apply in an action for damages allegedly suffered as a result of an infringement of competition rules.

34. In the context of Article 23 of Regulation No. 44/2001, a distinction dependent on the existence or absence of a prior finding by a competition authority of an infringement of competition law would also be contrary to the objective of foreseeability which underpins that provision.

35. Moreover, in accordance with the Court's settled case-law (see, to that effect, judgment of 13 July 2006, *Manfredi and Others*, C 295/04 to C 298/04, EU:C:2006:461, paragraph 60 and the case-law cited), and as mentioned in recitals 3, 12 and 13 of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national

law for infringements of the competition law provisions of the Member States and of the European Union (*OJ* 2014 L 349, p. 1), Articles 101 and 102 TFEU have direct effect in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. It follows that the right of any person that considers himself or herself prejudiced by an infringement of competition law rules to seek compensation for the harm suffered is independent of the prior finding of such an infringement by a competition authority.

36. In the light of the foregoing, the answer to the third question is that Article 23 of Regulation No. 44/2001 must be interpreted as meaning that it is not a prerequisite for the application of a jurisdiction clause, in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU, that there be a finding of an infringement of competition law by a national or European authority.

Note

Private Enforcement of EU Competition Law and the Relevance of Choice of Court Agreements

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I. THE CASE

The facts of the *Apple* case² can be summarised very briefly: Apple Sales International, a company established under Irish law, on 20 December 2005 entered into a contract with eBizcuss recognising the latter as an authorised reseller of Apple products. eBizcuss undertook to semi-exclusively distribute its contractual partner's products. The jurisdiction clause in their contract read: "This Agreement and the corresponding relationship between the parties shall be governed by and construed in accordance with the laws of the Republic of Ireland and the parties shall submit to the jurisdiction of the courts of the Republic of Ireland. Apple reserves the right to institute proceedings against Reseller in the courts having jurisdiction in the place where Reseller has its seat or in any jurisdiction where a harm to Apple is occurring." Later-on, in April 2012, eBizcuss sued Apple Sales International, its mother company Apple Inc. and Apple Retail France in Paris

for damages due to acts of unfair competition and abuse of a dominant position. Apple Sales International raised the objection of lack of jurisdiction based on the derogatory effect of the jurisdiction clause. The Tribunal de commerce de Paris and the Cour d'Appel de Paris upheld this. The Cour de Cassation on further appeal squashed it³. After a referral back to the Cour d'appel de Versailles the appeal of eBizcuss was allowed and the case was returned to the Tribunal de commerce de Paris. Against this the three Apple companies appealed in turn⁴. The Cour de cassation, seised for a second time, referred questions for a preliminary ruling to the CJEU which touch upon the relation between Article 23 Brussels I Regulation and Article 102 TFEU⁵. The CJEU decided after hearing A-G WAHL⁶. It cited at length from its preceding judgment in *CDC Hydrogen Peroxide*⁷. In the result, the CJEU extended *CDC Hydrogen Peroxide* to Article 102

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² CJEU 24 October 2018 – Case C-595/17, ECLI:EU:C:2018:854 – *Apple Sales International v. eBizcuss.com* (hitherto cited as: *Apple*).

³ Cass. (1^{re} civ.) D. 2015, 811 = JCP G 2015, 600 note L. D'AVOUT; Cass. (1^{re} civ.) D 2015, 2082 = JCP G 2015, 1123 note F. MAILHÉ = Petites affiches n° 234, 24 novembre 2015, 8 note V. LEGRAND = Clunet 143 (2016), 929 note C. KLEINER; further references may be found in L. Usunier, "Valse-hésitation à la Cour de cassation à propos du sort des clauses attributives de juridiction dissymétriques", *RTD civ.* 2015, 844.

⁴ Versailles Procédures 2017 comm. 7 critical note C. NOURISSAT.

⁵ Cass. (1^{re} civ.) CCC 2017 comm. 247 note N. MATHEY = Resp. civ. ass. 2018 comm. 38 note N. CIRON.

⁶ A-G WAHL, Opinion of 5 July 2018 in Case C-595/17, ECLI:EU:C:2018:541.

⁷ CJEU 21 May 2015, C-352/13, *Cartel Damages Claims (CDC) Hydrogen Peroxide SA / Akzo Nobel NV*, ECLI:EU:C:2015:335.