ALERT MEMORANDUM

European Court of Justice Issues Important Judgment Related to Jurisdiction Clauses for Antitrust Actions

November 26, 2018[1]

In a recent judgment providing a preliminary ruling in the case, *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), the Court of Justice of the European Union ("***CJEU***") affirmed that jurisdiction clauses subject to EU law may be enforced by Member State courts in the context of actions for damages for abuse of dominance based on Article 102 TFEU. The CJEU thereby rejected any requirement that the jurisdiction clause make explicit reference to disputes relating to liability incurred as a result of an infringement of competition law. The CJEU thereby confined its earlier judgment in *CDC v. Akzo Nobel et al.* (C-352/13, May 21, 2015), which had held that such an explicit reference was a prerequisite for applying a jurisdiction clause to cartel-related claims based on violations of Article 101 TFEU.

This memorandum addresses, at **Part I**, the CJEU's *EBizcuss.com* judgment and the clarification that it offers for contracting parties interested in using jurisdiction clauses to secure a preferred forum in connection with competition-related disputes – at least insofar as such disputes concern claims based on infringements of Article 102 TFEU. **Part II** of this memorandum then considers the potential relevance of the CJEU's recent case law to the interpretation of agreements to arbitrate when such agreements are invoked before the EU national courts in an attempt to refer competition-related disputes to arbitration. As discussed further below, the EU national courts have taken varying approaches to this issue, of which companies interested in arbitrating competition-related disputes should be aware.

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[1] The views expressed herein are those of the authors and should not be construed as necessarily reflecting those of the firm or of any of the firm's clients.

I. *Apple Sales International et al. v. EBizcuss.com*: The CJEU Affirms The Utility of Jurisdiction Clauses for Antitrust Actions Based On Article 102 TFEU

The CJEU's *EBizcuss.com* judgment was delivered in response to a request for a preliminary ruling from France's Court of Cassation.[2] The request arose in the context of an action by a distributor (EBizcuss.com) against its supplier (Apple) alleging abuse of dominance based on Article 102 TFEU. At issue before the French courts was the enforceability of a jurisdiction clause in the parties' distribution contract pursuant to which the parties submitted to the jurisdiction of the Irish courts.[3]

Specifically, the Court of Cassation asked the CJEU for guidance in relation to the application of Article 23 of Council Regulation (EC) No. 44/2001 of December 22, 2000 ("***Brussels Regulation***"), which authorizes jurisdictional agreements designating the courts of a particular EU Member State as the forum to hear "*disputes which have arisen or which may arise in connection with a particular legal relationship.*"[4] The Court of Cassation asked the CJEU whether, in the context of claims based on infringements of Article 102 TFEU, Article 23 of the Brussels Regulation permitted the application of a jurisdiction clause stipulating jurisdiction before the Irish courts, where that clause was drafted in general terms and did not "*expressly refer to disputes relating to liability incurred as a result of an infringement of competition law*."[5]

The CJEU answered this question in the affirmative, clarifying that while it is for the national courts of the EU Member States to interpret the scope of jurisdiction clauses entered into pursuant to Article 23 of the Brussels Regulation, EU law does not exclude application of such a clause "*in the context of an action for damages brought by a distributor against its supplier on the basis of Article 102 TFEU . . . 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*."[6]

As the CJEU explained based on principles of EU law, a jurisdiction clause may be applied in connection with a dispute that has arisen "*from the legal relationship in connection with which the agreement was entered into*."[7] The purpose of this requirement is to avoid "*a party being taken by surprise*" by application of the agreement to a different legal relationship than the one subject to the parties' jurisdictional agreement.[8] According to the CJEU's earlier judgment in *CDC v. Akzo Nobel et al*., this would occur if the clause were applied to a dispute that parties "*could not reasonably foresee*" at the time of contracting.[9]

The CJEU observed that claims based on abuse of a dominant position "*can materialize in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms,*" and concluded that applying a jurisdiction clause to such claims would not necessarily or in every case

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2 *See* C. Cass. (*1re Civ., 11 octobre 2017, pourvoi n° 16-25259)*.

3 The clause in the distribution contract provided that: "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 et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 9.

4 Proceedings initiated on or after January 10, 2015 are now governed by the Brussels Regulation (recast) (Regulation (EU) 1215/2012) ("***Brussels Recast***"). While the CJEU was seized of questions under the Brussels Regulation in the cases discussed in this memorandum, it is likely that the same reasoning would be applied by the CJEU in an action arising under the Brussels Recast.

5 *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 19. The CJEU was also asked whether the application of a jurisdiction clause to claims based on Article 102 TFEU should be made contingent upon the prior finding of an infringement. The CJEU answered this question in the negative.

6 *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 30.

7 *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 22.

8 *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 22.

9 *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 22 et seq.

"*surpris[e] one of the parties*" to the jurisdictional agreement.[10]

The CJEU's judgment thereby appears to reaffirm the CJEU's ruling in *CDC v. Akzo Nobel et al*. that claims based on an unlawful cartel pursuant to Article 101 TFEU "*in principle* [*are*] *not directly linked to the contractual relationship between a member of that cartel and a third party which is affected by the cartel*" [11] and, as such, jurisdiction clauses which "*abstractly refer[] to disputes arising from contractual relationships*" should not be applied to disputes related to unlawful cartel arrangements pursuant to Article 101 TFEU. For such disputes, express reference in the jurisdictional agreement to "*disputes concerning liability incurred as a result of an infringement of competition law*" appears to remain necessary.[12]

II. The CJEU's Recent Case Law And Agreements To Arbitrate

The judgment in *Apple Sales International et al. v. EBizcuss.com* did not address agreements to arbitrate and as such has no formal significance for questions of arbitral jurisdiction. Indeed, whereas the CJEU has jurisdiction to resolve questions of EU law related to the scope of jurisdictional agreements subject to the Brussels Regulation, it is questionable whether the CJEU has jurisdiction to resolve questions related to the interpretation of agreements to arbitrate, which are subject to national law.[13]

Nonetheless, following the CJEU's ruling in *CDC v. Akzo Nobel et al*.,[14] national courts in various EU Member States have been asked to consider the relevance of the CJEU's case law related to jurisdiction clauses when deciding whether agreements to arbitrate drafted in general terms should be enforced to refer cartel-based damages claims to arbitration. These Member State courts have reached different conclusions. Companies interested in possibly invoking agreements to arbitrate in relation to claims based on EU competition law before EU Member State courts should be aware of this case law.

In the first such decision, in an action seeking damages based on an infringement of Article 81 of the (old) EC Treaty (now Article 101 TFEU), the Court of Appeal of Amsterdam concluded in a 2015 judgment that there was no "*good reason*" to depart from the rule in *CDC v. Akzo Nobel et al*. when interpreting an agreement to arbitrate drafted in general terms.[15] The Court did not consider in its decision the distinctions that exist between arbitration law and EU law related to jurisdiction clauses.[16]

In a February 2017 judgment in *Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors* [2017] EWHC 374 (Ch), the English High Court was called upon to determine, in the context of an action alleging liability pursuant to Article 101 TFEU, an objection based on EU law to the enforcement of an arbitration agreement. Specifically, while the defendant contended that the claim for damages under Article 101 TFEU was precluded by the parties' agreement to arbitrate in their underlying supply agreement, the claimant contended that that agreement did not reach the claim because it did not refer expressly to disputes concerning liability incurred as a result of a competition law infringement.

The High Court first found that the relevant agreement to arbitrate reached the competition damages claim, relying on the inclusion in the contract of a specific obligation to negotiate pricing in good faith.[17] The English court observed that this obligation would in principle have been breached if pricing was distorted by the existence of a price-fixing cartel.[18] As such, there was a contractual claim falling

[10] *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 29.

[11] *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 28.

[12] *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 25.

[13] Both the Brussels Regulation and the Brussels Recast, in its Article 1(2)d, explicitly exclude its application to arbitration.

[14] For further analysis of this decision, see R. Harms/J. Sanner/J. Schmidt, EuZW 2015, pp. 584-592.

[15] *Kemira Chemicals Oy v. CDC*, Case No. 200.156.295/01 (July 21, 2015, Court of Appeal Amsterdam), para. 2.16.

[16] A similar outcome has been reported to have been reached in a 2016 decision of the District Court of Rotterdam in the case, C/10/439791 / HA ZA 13-1278.

[17] *Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors* [2017]EWHC 374 (CH), para. 67 et seq.

[18] *Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors* [2017]EWHC 374 (CH), para. 67 et seq.

within the arbitration agreement and the parties could be expected to have intended any tortious claim relating to the same matters to be resolved in the same forum as the corresponding contractual claim. The fact that the claimant asserted a purely statutory tort claim and did not rely upon a contractual breach as the basis for its claims did not alter the court's analysis, since the claimant could have alleged contractual claims.[19] To allow otherwise would have allowed the claimant to circumvent the agreement to arbitrate simply by choosing a tortious rather than contractual cause of action.

The English court then addressed the question of whether enforcement of the relevant agreement to arbitrate would be contrary to the requirements of EU law, which would have rendered the agreement inoperable and ineffective if found to be the case. In concluding that this was not the case, the English court considered at length the Opinion of Advocate General Jääskinen in *CDC v. Akzo Nobel et al*., whose arguments in that case were cited by the claimant in opposing arbitration before the High Court. Specifically, the court was referred to the Advocate General's argument that allowing arbitration would undermine EU law, including by causing the fragmentation of the relevant litigation.[20] The English court rejected this line of argumentation, noting that the opinion had not been followed by the CJEU, whose judgment did not in any event reach arbitration. Thus, the English court held as a matter of English law that the arbitration agreement could reach the tortious claim for breach of Article 101 based on an alleged secret cartel.[21]

Most recently, in a judgment dated September 13, 2017, the *Landgericht* (Regional Court of) Dortmund agreed to apply agreements to arbitrate drafted in general terms to cartel-related damages claims based on an infringement decision issued by the *Bundeskartellamt* (Federal Cartel Office). The court observed that, as a matter of principle, arbitration agreements need to be interpreted broadly.[22] Since parties usually do not intend to split claims based on contractual obligations (falling with the scope of an arbitration agreement) and based on statutory tort claims (to be litigated in court unless deemed to fall within the scope of an arbitration agreement), the court found that the arbitration clauses must be fully applied to the relevant competition-based claim.[23]

While the case involved two German parties and was thus not subject to the then-Brussels Regulation, the *Landgericht* Dortmund explicitly declined to follow the CEJU's position on foreseeability in relation to jurisdictional clauses, observing that claims of an unforeseeable nature (such as claims alleging fraud), which are unknown to one party at the time of contracting, may validly be submitted to arbitration under German law. The court questioned the proposition that the CJEU case law relating to jurisdiction clauses subject to EU law could be applied automatically to the interpretation of agreements to arbitrate, and further questioned the competence of the CJEU to interpret agreement to arbitrate in light of the fact that arbitration is expressly excluded from the scope of both the Brussels Regulation and the Brussels Recast.[24] Finally, like the English High Court, the *Landgericht* Dortmund rejected an argument that the principle of effectiveness of EU law would require a different conclusion.[25]

III. Reflections on Recent Case Law

Since many contracting parties agree on forum-selection clauses that are drafted in general terms, the CJEU's *EBizcuss.com* judgment provides helpful

[19] *Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors* [2017]EWHC 374 (CH), para. 72. In a decision pre-dating *CDC v. Akzo Nobel et al*., the Helsinki District Court declined to refer to arbitration claims based on a cartel infringement. Unlike the English court, the Finnish court relied upon the manner in which the claimant had pleaded its claim, which was not based on the terms of the relevant supply contracts. The Helsinki court did not consider whether the claims could have been pleaded on the basis of such contracts. *See CDC v. Kemira* Oyj, Case No. 11/16750 (Helsinki District Court, July 4, 2013).

[20] *Microsoft Mobile OY (Ltd) v Sony Europe Limited & Ors* [2017]EWHC 374 (CH), para. 74 et seq.

[21] The parties to this action settled while an appeal was pending.

[22] Landgericht Dortmund, judgment of September 13, 2017 – 8 O 30/16 Kart, para. 21.

[23] Landgericht Dortmund, judgment of September 13, 2017 – 8 O 30/16 Kart, para. 26.

[24] Landgericht Dortmund, judgment of September 13, 2017 – 8 O 30/16 Kart, para. 37.

[25] Landgericht Dortmund, judgment of September 13, 2017 – 8 O 30/16 Kart, para. 33.

guidance in clarifying that the CJEU's earlier case law should not be construed as automatically precluding reliance on such jurisdiction agreements for all disputes related to infringements of EU competition law. The recent case law should have a similar moderating effect in relation to debates over the applicability of agreements to arbitrate drafted in broad terms, at least in relation to many disputes based on infringements of Article 102 TFEU.

The CJEU's decision to cabin its earlier case law in *CDC v. Akzo Nobel et al*. was not a foregone conclusion. Indeed, prior to referring this question to the CJEU, the Court of Cassation, in an earlier 2015 decision in the same matter, construed *CDC v. Akzo Nobel et al*. as precluding application of the relevant jurisdiction clause to the distributor's claims based on an infringement of Article 102 TFEU.[26] It was only after the Court of Cassation was made aware of a February 2016 decision of Portugal's *Supremo Tribunal de Justiça* (Supreme Court), which had applied a jurisdictional clause drafted in general terms to claims asserted based on an infringement of Article 102 TFEU, that the Court of Cassation agreed to refer this issue to the CJEU.[27]

While the CJEU's *EBizcuss.com* judgment appears to allow for greater contractual flexibility overall, the CJEU's apparent attachment to the decisional logic of the *CDC v. Akzo Nobel et al*. case law raises questions. Where contracting parties have agreed in broad and general terms to refer all disputes related to a contractual relationship to a particular forum, it is unclear why cartel-related claims should be presumed not to be covered (absent explicit reference to infringement-related disputes). While cartel-related claims typically have a statutory basis under the laws of the EU Member States, and may be pursued as tort claims, they may also implicate contractual obligations, for example, in relation to pricing. Nor is foreseeability a satisfactory justification for the CJEU's current distinction between infringements of Article 101 and 102 TFEU. Just as contracting parties rarely contemplate that their contractual relationship will be affected by a secret cartel, contracting parties rarely contemplate distortions resulting from abusive behaviors by a dominant undertaking. If such unexpected and unlawful abusive conduct may be reached by general language in an agreement, it is not clear why special drafting requirements should be imposed in relation to cartel-based claims.

Ultimately, the practical importance of the distinction that has been drawn by the CJEU will depend on parties' willingness to invoke agreements to arbitrate in relation to cartel damages claims. Whereas disputes related to abuse of dominance claims often are bilateral in nature, cartel-damages actions in practice usually involve multiple parties and multiple contractual relationships. Multi-party actions may be more difficult to manage through forum-selection or arbitration clauses found in agreements that bind only a limited number of parties to the action. For example, where a jurisdiction clause or agreement to arbitrate could be invoked by one respondent against one claimant to such an action, that respondent might still face claims by other claimants pending in a court forum. Invocation of arbitration agreements can also raise complexities in connection with contribution claims. Thus, where jurisdiction clauses and agreements to arbitrate are found in contractual relationships implicated by cartel-based actions, parties will need to give careful consideration to potential pros and cons in deciding whether to invoke any such agreement in the context of cartel-damages actions.[28]

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[26] *Apple Sales International et al. v. EBizcuss.com* (C-595/17, October 24, 2018), para. 15 (citing the October 7, 2015 decision of the Court of Cassation). In keeping with its decisional practices, the Court of Cassation did not explain on what basis it considered that the CJEU's decision in relation to unlawful cartels in *CDC v. Akzo Nobel et al*. should be applied to claims based on Article 102 TFEU. *See* C. Cass. *(1re Civ., 7octobre 2015, pourvoi n° 14-16.898).*

[27] C. Cass. (*1re Civ., 11 octobre 2017, pourvoi n° 16-25259).*

[27] C. Cass. (*1re Civ., 11 octobre 2017, pourvoi n° 16-25259).*

[28] For further discussion of related issues, *see* A. Goldsmith, "Arbitration and EU Antitrust Follow-On Damages Actions," 34 ASA Bulletin 1 / 2016, pp. 10-40 (2016).