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EU Competition Law Newsletter

Highlights

- The Court of Justice rules on jurisdiction clauses in antitrust disputes
- The Commission discusses data aggregation in *Apple/Shazam*
- The Commission consults on the Maritime Consortia Block Exemption Regulation

The Court of Justice Rules on Jurisdiction Clauses in Antitrust Disputes

On October 24, 2018, the Court of Justice of the EU ("Court of Justice") issued a preliminary ruling concerning jurisdiction clauses.[1] The judgment clarifies that a choice-of-court clause can establish jurisdiction in damages disputes arising from abuse of dominance claims, even when that clause does not explicitly refer to antitrust disputes.

Case Background

The dispute in this case arose from Apple's contract with its French authorized reseller eBizcuss, which conferred jurisdiction for disputes to the Irish courts. The clause did not specifically refer to competition law disputes. In 2012, eBizcuss brought an action to the Commercial Court in Paris, claiming damages arising from Apple's abuse of dominance, namely discriminatory pricing and the favoring of Apple's own retail outlets. Although French lower courts dismissed the claim based on lack of jurisdiction, in 2017, the French Court of Cassation stayed the proceedings and requested a preliminary ruling from the Court of Justice. The question raised was whether general choice-of-court clauses that do not explicitly refer to disputes arising from potential antitrust liability can establish jurisdiction in an Article 102 TFEU damages claim.

The Court of Justice's Guidance

The Court of Justice answered in the affirmative. First, the Court of Justice recalled that the scope of a general jurisdiction clause is not without limits: in principle it covers only disputes that relate to the particular legal relationship between the contracting parties. It cannot apply to disputes unrelated to the contract as this would risk going beyond the parties' intentions when negotiating the contract, and could take them "by surprise."[2]

Second, the Court of Justice distinguished between the present case, where the damages claim is based on an abuse of dominance allegation, and cases where damages are claimed

[1] *Apple Sales International, Apple Inc., Apple Retail France EURL v. MJA* (Case C-595/17) EU:C:2018:854 ("*Apple Judgment*").

[2] *Apple Judgment*, para. 22.

as a result of cartels. In its 2015 *CDC Hydrogen Peroxide* judgment, the Court of Justice ruled that an abstract jurisdiction clause, referring merely to disputes arising from contractual relationships, could not extend to liability resulting from an unlawful cartel.[3] By contrast, in the context of actions for damages brought on the basis of Article 102 TFEU, the application of a jurisdiction clause is *not* excluded on the sole ground that that clause does *not* expressly refer to antitrust disputes. This is because an abuse of dominance practice "can materialise in contractual relations that an undertaking in a dominant position establishes and by means of contractual terms" and therefore "cannot be regarded as surprising one of the parties."[4]

Third, the Court of Justice clarified that the application of a jurisdiction clause does not depend on whether the action is stand-alone or follow-on (*i.e.*, where a competition authority has already established an infringement).

Conclusion

The judgement clarifies that while cartels are typically unforeseeable and unrelated to a contractual relationship, and therefore require an explicit reference for a jurisdiction clause to apply, abuse of dominance practices are typically more tightly linked to the agreement, and can be covered even by a general jurisdiction clause. The closeness of the tort practice to the contract and its foreseeability at the time of the conclusion of the agreement is ultimately for the national court to interpret.

In light of the Court of Justice's judgment, and if commercially acceptable, parties may avoid any surprises by explicitly stating in the contract that their jurisdiction clause covers antitrust disputes.[5]

The Commission Discusses Data Aggregation in *Apple/Shazam*

On September 6, 2018, following a Phase II investigation, the Commission unconditionally cleared Apple's acquisition of Shazam, the world's most popular music recognition app.[6] The Commission opened its review after receiving a referral from the Austrian competition authority, supported by six other national authorities. Like *Facebook/WhatsApp*,[7] this case may influence the outcome of the Commission's ongoing consultation on the transaction value thresholds expected to conclude before the end of 2018.

Among several theories of harm considered in this case, two are notable as they focus on Apple potentially leveraging Shazam's user data to foreclose rival music streaming services, particularly Spotify. Of interest is the Commission's analysis of datasets' substitutability, structured around the "Four V's" of big data.[8]

The Commission's primary concern was that Apple would gain access to "commercially sensitive data" of its music streaming rivals, in particular the lists of their free and premium subscribers. Having access to such information may harm competition if it "puts competitors at a competitive disadvantage."[9] In this case, the Commission found that the data collected by Shazam allowed it to identify if the user already had a music streaming app installed and if they were a premium or "freemium" subscriber. Apple's access to such data could put its competitors

[3] *CDC Hydrogen Peroxide* (C-352/13) EU:C:2015:335.

[4] *Apple Judgment*, paras. 28–29.

[5] For a more detailed analysis of the Apple Judgment, *see* Cleary Gottlieb Alert Memorandum, European Court of Justice Issues Important Judgment Related to Jurisdiction Clauses for Antitrust Actions, November 26, 2018: https://client.clearygottlieb.com/77/1027/uploads/2018-11-26-european-court-of-justice-issues-important-judgment-related-to-jurisdiction-clauses-for-antitrust-actions.pdf.

[6] *Apple/Shazam* (Case COMP/M.8788), Commission decision of September 6, 2018.

[7] *Facebook/WhatsApp* (Case COMP/M.7217), Commission decision of October 3, 2014.

[8] *See* for instance IBM's infographic on the Four V's of Big Data: https://www.ibmbigdatahub.com/infographic/four-vs-big-data.

[9] Guidelines on the assessment of non-horizontal mergers under the Council Regulation on the control of concentrations between undertakings, OJ 2008 C 265/6.

at a disadvantage because Apple's marketing campaign could specifically target competitors' "freemium" subscribers. The Commission's investigation concluded that such users were the primary targets of customer acquisition efforts by all music streaming services, because existing premium customers rarely switch from one premium subscription to another.

The Commission ultimately agreed with Apple that even if it had the ability and incentive to use Shazam's data in this way, it was unlikely to have a sufficiently significant competitive impact because: (i) rivals would continue to have access to similar information through apps other than Shazam (*e.g.*, Facebook, Google, and Twitter); (ii) in the steadily growing market for music streaming services, providers focus on attracting new customers rather than convincing rivals' subscribers to switch; and (iii) Apple's internal documents showed that the transaction would have a low impact on Apple Music's customer acquisition rate.

More interestingly, the Commission also examined whether Shazam's data would be so useful for improving Apple Music's functionality that, by obtaining and then restricting access to it, Apple would put rival music streaming services at a competitive disadvantage. The Commission has considered similar input foreclosure theories before, for example, in *Facebook/WhatsApp*[10] and *Microsoft/LinkedIn*.[11] In dealing with this theory of harm, the Commission's focus was on whether a similar input was available from other sources. Here, the Commission took a considerably more comprehensive and rigorous approach than it had in previous data aggregation cases. In *Facebook/WhatsApp* and *Microsoft/LinkedIn*, the Commission based its findings on the mere availability of substitutes as identified by market participants. In the present case, the Commission analyzed Shazam's data to assess whether other datasets were truly comparable. For the first time, the Commission incorporated the "Four V's" framework widely accepted in the industry: it analyzed how Shazam's user data compared to other datasets available in the market in terms of their variety, velocity, volume, and value. This analysis showed that even if Apple were to restrict access to Shazam's data, it would not harm rival music streaming providers.

The Commission Consults on the Maritime Consortia Block Exemption Regulation

On October 9, 2018, the Commission launched a 12-week public consultation on whether to extend the Maritime Consortia Block Exemption Regulation (the "Consortia BER")[12] beyond April 25, 2020, when it is currently due to expire.

First introduced in 1995, the Consortia BER was designed to allow maritime carriers to achieve necessary economies of scale. The Commission reasoned that the Consortia BER would promote technical and economic progress in the sector by ensuring more efficient use of vessel capacity. As such, the Consortia BER allows liner shipping carriers with a combined market share of less than 30% to enter into agreements to provide joint cargo transport services, respond to fluctuations in supply and demand, and jointly operate port facilities. Such agreements are exempted from Article 101(1) TFEU, with the exception of those containing hardcore restrictions (including clauses that fix prices, limit capacity or sales, or allocate markets or customers).

The Commission is now considering letting the Consortia BER lapse. In opening its consultation, the Commission pointed to its

[10] *Facebook/WhatsApp* (Case COMP/M.7217), Commission decision of October 3, 2014 (the Commission considered whether WhatsApp's data would enable Facebook to improve the quality of its online ads targeting).

[11] *Microsoft/LinkedIn* (Case COMP/M.8124), Commission decision of December 6, 2016 (the Commission was concerned that LinkedIn's data could be a valuable input into Microsoft's CRM software solutions).

[12] Commission Regulation (EC) No 906/2009 of 28 September 2009 on the application of Article 81(3) of the Treaty to certain categories of agreements, decisions and concerted practices between liner shipping companies (consortia), OJ 2009 L 256/31.

policy of harmonizing competition rules across sectors of the economy. The Commission also referred to the significant consolidation in the liner shipping industry in recent years: following a wave of mergers between 2014 and 2017, the top five carriers now account for around 65% of global capacity.

Responses to the consultation have been mixed. Shipping industry bodies—the World Shipping Counsel, the European Shipowners' Associations, and the International Chamber of Shipping—have advocated for re-adoption of the measure, maintaining that repeal would unnecessarily complicate compliance. The OECD's International Transport Forum has taken the opposing view, claiming that the Consortia BER has reduced shippers' choice and service levels and left the industry vulnerable to the market power of alliances.

News

Commission Updates

The Commission Issues a Statement of Objections in *Siemens/Alstom*

On October 29, 2018, the Commission sent a statement of objections to Siemens and Alstom in its ongoing Phase II investigation.[13] The Commission is concerned that the merger may reduce competition in the supply of several types of trains and signaling systems and lead to higher prices, less choice, and less innovation in the relevant industries. More specifically, the Commission has raised the following issues: (i) in rolling stock, the Commission is concerned that the proposed transaction will remove a strong competitor from the market and reduce the number of suppliers; the merged entity would be over three times larger than its closest competitor in high speed trains, as well as the market leader in mainline and metro rolling stock in the EEA; and (ii) in signaling, the Commission is concerned that the proposed transaction will remove a strong competitor for mainline and urban signaling and that the merged entity will be approximately three times larger than its closest competitor. This, coupled with the Commission's view that the entry of new competitors (such as potential Chinese suppliers) is unlikely, has led the Commission to investigate the transaction further.

The Commission Opens a Phase II Investigation in *Tata Steel/ThyssenKrupp*

On October 30, 2018, the Commission opened an in-depth, Phase II investigation into the proposed joint venture between Tata Steel and ThyssenKrupp.[14] Both parties are integrated producers of flat carbon steel and electrical steel with businesses in the EEA. Following its initial market investigation, the Commission is concerned that the proposed transaction may reduce competition in the supply of various specialty flat carbon steel and electrical steel products. The parties did not submit commitments in Phase I to address these concerns. The Commission has until March 19, 2019 to make a decision on the proposed transaction.

The Commission Opens a Formal Investigation into Car Emissions Collusion

On September 18, 2018, the Commission opened an in-depth investigation into potential collusion between five German car manufacturers, which may have agreed "to limit the development and roll-out of certain emissions control systems for cars sold in the European Economic Area."[15] The Commission's objections follow on-premise inspections carried out in October 2017.

[13] *Siemens/Alstom* (Case COMP/M.8677), decision not yet issued.

[14] *Tata Steel/ThyssenKrupp/JV* (Case COMP/M.8713), decision not yet issued.

[15] *Car Emissions* (Case COMP/AT.40178), decision not yet issued. *See* Commission Press Release IP/18/5822.

The Commission Sends a Statement of Objections to Slovak Rail Company ZSSK for Obstruction During Inspection

On September 25, 2018, the Commission issued a statement of objections, alleging that ZSSK may have: (i) provided incorrect information on the location of the laptop of one of its employees; or (ii) failed to provide requested data from this laptop by allowing its re-installation, which led to an irrecoverable loss of the stored data.[16] This conduct allegedly took place during a June 28, 2016 dawn raid, in which the Commission was investigating anticompetitive agreements between several railway companies aiming to shut out competing rail passenger transport operators from the market.[17]

Courts

The General Court Rejects a Request for Interim Measures Preventing the Commission from Publishing the EIRD Cartel Case Decision

On October 25, 2018, the General Court denied Crédit Agricole's request for interim measures related to the EIRD cartel case.[18] In these proceedings, Crédit Agricole challenged the Hearing Officer's decision rejecting certain confidentiality claims and requested that the General Court enjoin the Commission from publishing the decision while the claim was pending. It appears that Crédit Agricole's confidentiality claims were primarily related to the Commission's description of conduct rather than to actual business secrets or privileged information. Crédit Agricole argued that the disclosure of the Commission's findings would violate the presumption of innocence. The General Court rejected these arguments, holding that EU law does not protect Crédit Agricole's interest in avoiding exposure to private damages claims.

The European Court of Human Rights Requires Slovenian Courts to Review the Competition Authority's Fine Imposed for Dawn Raid Obstruction

On October 23, 2018, the European Court of Human Rights ("ECHR") issued a judgment condemning the Slovenian Supreme Court for failing to hear an appeal against a fine issued by the national competition authority.[19] The Slovenian Competition Protection Office had fined Pro Plus, a Slovenian broadcaster, €105,000 for obstructing a dawn raid in 2012. Under the European Convention on Human Rights, the protections afforded to defendants facing "criminal charges" apply whenever a sufficiently severe penalty is imposed, even if the procedure is not formally classified as criminal under national law.[20] While in past cases the ECHR has applied this principle to addressees of infringement decisions in competition cases, the judgment confirms that penalties for mere procedural violations imposed by competition authorities may also entitle defendants to a full review by an independent and impartial tribunal.

[16] *ZSSK procedural case* (Case COMP/AT.40565), decision not yet issued. *See* Commission Press Release IP/18/5905.

[17] Commission Press Release STATEMENT/16/2438.

[18] *Crédit Agricole and Crédit Agricole Corporate and Investment Bank v. Commission* (Case T-419/18 R) EU:T:2018:726.

[19] *Produkcija Plus Storitveno Podjetje d.o.o. v. Slovenia* (no. 47072/15).

[20] *Engel and Others v. the Netherlands* (no. 5100/71).

Upcoming Events

Date	Conference	Organizers	Location
November 28	The Future of Cartels: Classes, Claims and Criminals	Concurrences	London
November 28	W@ Competition Talk: Excessive Pricing in Pharmaceuticals	W@Competition	Paris
November 30	6th Global Merger Control Conference	Concurrences	Paris
December 4	Competition Law in the Pharmaceutical Sector	Knect365	Brussels
December 5	Economic Developments in Competition Policy	CRA	Brussels
December 5 to 6	Standards & Patents – 12th Annual Conference	Knect365	London
December 12	ADLC et DG COMP: Mêmes Armes, Même Combat?	L'Entente	Brussels
January 31 to February 1 (2019)	14th Annual Conference of the GCLC: Remedies in EU Competition Law: Substance, Process & Policy	GCLC	Brussels

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