Who can bite the Apple? The CJEU can shape the future of online damages and collective actions

Written by Eduardo Silva de Freitas (Erasmus University Rotterdam), member of the Vici project Affordable Access to Justice, financed by the Dutch Research Council (NWO), www.euciviljustice.eu.

Introduction

In the final weeks leading up to Christmas in 2023, the District Court of Amsterdam referred a set of questions to the CJEU (DC Amsterdam, 20 December 2023, ECLI:NL:RBAMS:2023:8330; in Dutch). These questions, if comprehensively addressed, have the potential to bring clarity to longstanding debates regarding jurisdictional conflicts in collective actions. Despite being rooted in competition law with its unique intricacies, the issues surrounding the determination of online damage locations hold the promise of illuminating pertinent questions. Moreover, the forthcoming judgment is expected to provide insights into the centralization of jurisdiction in collective actions within a specific Member State, an aspect currently unclear. Recalling our previous discussion on the Dutch class action under the WAMCA in this blog, it is crucial to emphasize that, under the WAMCA, only one representative action can be allowed to proceed for the same event. In instances where multiple representative foundations seek to bring proceedings for the same event without reaching a settlement up to a certain point during the proceedings, the court will appoint an exclusive representative. This procedural detail adds an additional layer of complexity to the dynamics of collective actions under the WAMCA.

Following a brief overview of the case against Apple, we will delve into the rationale behind the court's decision to refer the questions.

The claim against Apple

The claim revolves around Apple's alleged anticompetitive behavior in the market

for the distribution of apps and in-app products on iOS devices, such as iPhones, iPads, and iPod Touch. The foundations argue that Apple holds a monopoly in this market, as users are dependent on the App Store for downloading and using apps.

According to the foundations, Apple's anticompetitive actions include controlling which apps are included in the App Store and imposing conditions for their inclusion. Furthermore, Apple is accused of having a monopoly on payment processing services for apps and digital in-app products, with the App Store payment system being the sole method for transactions.

The foundations argue that Apple charges an excessive commission of 30% for paid apps and digital in-app products, creating an unfair advantage and disrupting competition. They assert that Apple's dominant position in the market and its behavior constitute an abuse of power. Users are said to be harmed by being forced to use the App Store and pay high commissions, leading to the claim that Apple has acted unlawfully. The legal bases of the claim are therefore abuse of economic dominance in the market (Article 102 TFEU) and prohibited vertical price fixing (Article 101 TFEU).

The jurisdictional conundrum

Apple Ireland functions as the subsidiary tasked with representing app suppliers within the EU. The international nature of the dispute stems from the users purportedly affected being located in the Netherlands, while the case is lodged against the subsidiary established in Ireland. The District Court of Amsterdam has opted to scrutinize the jurisdiction of Dutch courts under Article 7(2) Brussels I-bis Regulation. This provision grants jurisdiction to the courts of the place where the harmful event occurred or may occur, encompassing both prongs of the *Bier* paradigm. However, Apple contends that, within the Netherlands, the court would only possess jurisdiction under Article 7(2) Brussels I-bis Regulation with regard to users residing specifically in Amsterdam.

In the court's view, the ascertainment of the *Handlungsort* should pertain only to allegations under Article 102 TFEU. In relation to Article 101 TFEU, the Netherlands was not considered the *Handlungsort*. This is due to the necessity of identifying a specific incident causing harm to ascertain the *Handlungsort*, and the absence of concrete facts renders it challenging to pinpoint such an event.

The court's jurisdictional analysis commences with a reference to Case C?27/17

flyLAL-Lithuanian Airlines (ECLI:EU:C:2018:533), in which the CJEU established that the location of the harmful event in cases involving the abuse of a dominant position under Article 102 TFEU is closely linked to the actual implementation of such abuse. In the present case, the court observes that Apple's actions, conducted through the Dutch storefront of the App Store tailored for the Dutch market, involve facilitating app and in-app product purchases. Acting as the exclusive distributor for third-party apps, Apple Ireland exerts control over the offered content.

Applying the criteria from *flyLAL*, the court concludes that the *Handlungsort* is situated in the Netherlands. However, the court agreed that the specific court within the Netherlands responsible for adjudicating the matter remains unspecified.

The court initiated its analysis of the *Erfolgsort* based on the established premise in CJEU case law which posits that there is no distinction between individual and collective actions when determining the location of the damage. The court clarified that the concept of the place where the damage occurs does not encompass any location where the consequences of the event may be felt; rather, only the damage directly resulting from the committed harm should be considered. Moreover, the court emphasized that when determining the *Erfolgsort*, there is no distinction based on whether the legal basis for the accusation of anticompetitive practices is grounded in Article 101 or Article 102 TFEU.

The court reiterated that the App Store with Dutch storefront is a targeted online sales platform for the Dutch market. Functioning as an exclusive distributor, Apple Ireland handles third-party apps and in-app products, contributing to an alleged influence of anticompetitive behavior in the Dutch market. It's acknowledged that the majority of users making purchases reside in the Netherlands, paying through Dutch bank accounts, thus placing the *Erfolgsort* within the Netherlands for this user group. Nevertheless, the court reiterated that the particular court within the Netherlands tasked with adjudicating this case remains unspecified.

The questions referred

Despite the court having its perspective on establishing jurisdiction under Article

7(2) Brussels I-bis Regulation, it opted to seek clarification from the CJEU for the following reasons.

First, the court expresses reservations regarding the complete applicability of the *flyLAL* precedent to the current case. It emphasizes that the *flyLAL* case involved a precise location where the damage could be pinpointed. In contrast, the present case involves anticompetitive practices unfolding through an online platform accessible simultaneously in every location within a particular Member State and globally. The court is uncertain whether the nature of this online distribution makes a significant difference in this context, especially when considering whether the case involves a collective action.

Second, as mentioned above, the WAMCA stipulates that only a single representative action can be allowed to proceed for a given event. In situations where multiple representative foundations aim to commence legal proceedings for the same event without reaching a settlement by a specific stage in the proceedings, the court will designate an exclusive representative. In addition to that, Article 220 Dutch Code of Civil Procedure offers the opportunity to consolidate cases awaiting resolution before judges in various districts and involving identical subject matter and parties, allowing for a unified hearing of these cases.

Nevertheless, the court has reservations about the compatibility of relocating from the *Erfolgsort* within a Member State under the consolidation of proceedings, as Article 7(2) Brussels I-bis Regulation impacts the establishment of jurisdiction within that Member State. In questioning whether such relocation would run contrary to EU law, the court highlights the Brussels I-bis Regulation's overarching objective of preventing parallel proceedings. This triggers a skepticism towards the interpretation that each District Court within the Netherlands would have competence to adjudicate a collective action pertaining to users situated in the specific *Erfolgsort* within their jurisdiction.

However, the court finds it necessary to refer these questions to the CJEU, considering that, in its assessment, the CJEU's rationale in Case C?30/20 *Volvo* (ECLI:EU:C:2021:604) is not easily transposable to the current case. In *Volvo*, the CJEU permitted the concentration of proceedings in antitrust matters within a specialized court. This is not applicable here, as the consolidation of proceedings under the described framework arises from the efficiency in conducting the

proceedings, not from specialization.

These are, in a nutshell, the reasons why the District Court of Amsterdam decided to refer the following questions to the CJEU:

Question 1

1. *What should be considered as the place of the damaging action in a case like this, where the alleged abuse of a dominant position within the meaning of Article 102 TFEU has been implemented in a Member State through sales via an online platform managed by Apple that is aimed at the entire Member State, with Apple Ireland acting as the exclusive distributor and as the developer's commission agent and deducting commission on the purchase price, within the meaning of Article 7, point 2, Brussels I bis? Is it important that the online platform is in principle accessible worldwide?*
2. *Does it matter that in this case it concerns claims that have been instituted on the basis of Article 3:305a of the Dutch Civil Code by a legal entity whose purpose is to represent the collective interests of multiple users who have their seat in different jurisdictions (in the Netherlands: districts) within a Member State under its own right?*
3. *If on the basis of question 1a (and/or 1b) not only one but several internally competent judges in the relevant Member State are designated, does Article 7, point 2, Brussels I bis then oppose the application of national (procedural) law that allows referral to one court within that Member State?*

Question 2

1. *Can in a case like this, where the alleged damage has occurred as a result of purchases of apps and digital in-app products via an online platform managed by Apple (the App Store) where Apple Ireland acts as the exclusive distributor and commission agent of the developers and deducts commission on the purchase price (and where both alleged abuse of a dominant position within the meaning of Article 102 TFEU has taken place and an alleged infringement of the cartel prohibition within the meaning of Article 101 TFEU), and where the place where these purchases have taken place cannot be determined, only the seat of the*

user serve as a reference point for the place where the damage has occurred within the meaning of Article 7, point 2, Brussels I bis? Or are there other points of connection in this situation to designate a competent judge?

2. *Does it matter that in this case it concerns claims that have been instituted on the basis of Article 3:305a of the Dutch Civil Code by a legal entity whose purpose is to represent the collective interests of multiple users who have their seat in different jurisdictions (in the Netherlands: districts) within a Member State under its own right?*
3. *If on the basis of question 2a (and/or 2b) an internally competent judge in the relevant Member State is designated who is only competent for the claims on behalf of a part of the users in that Member State, while for the claims on behalf of another part of the users other judges in the same Member State are competent, does Article 7, point 2, Brussels I bis then oppose the application of national (procedural) law that allows referral to one court within that Member State?*

[Translation from Dutch by the author, with support of ChatGPT]

Discussion

The CJEU possesses case law that could be construed in a manner conducive to allowing the case to proceed in the Netherlands. Notably, Case C?251/20 *Gtflix Tv* (ECLI:EU:C:2021:1036) appears to be most closely aligned with this possibility, wherein the *eDate* rule was applied to a case involving French competition law, albeit the CJEU did not explicitly address this aspect (though AG Hogan did). Viewed from this angle, the Netherlands could be deemed the centre of interests for the affected users, making it a potential *Erfolgsort*.

Regarding the distinction between individual and collective proceedings, the CJEU, in Cases C-352/13 *CDC* (ECLI:EU:C:2015:335) and C-709/19 *VEB* v. *BP* (ECLI:EU:C:2021:377), declined to differentiate for the purpose of determining the locus of damage. We find no compelling reason for the CJEU to deviate from this precedent in the current case.

The truly intricate question centers on the feasibility of consolidating proceedings in a single court. In Case C-381/14 *Sales Sinués* (ECLI:EU:C:2016:252), the CJEU established that national law must not hinder consumers from pursuing individual

claims under the Unfair Contract Terms Directive (UCTD – 93/13) by employing rules on the suspension of proceedings during the pendency of parallel collective actions. However, it is unclear whether this rationale can be extrapolated to parallel concurrent collective actions.

Conclusion

This referral arrives at a good time, coinciding with the recent coming into force of the Representative Actions Directive (RAD – 2020/1828) last summer. Seeking clarification on the feasibility of initiating collective actions within the jurisdictions of affected users for damages incurred in the online sphere holds significant added value. Notably, the inclusion of both the Digital Services Act and the Digital Markets Act within the purview of the RAD amplifies the pertinence of these questions.

Moreover, this case may offer insights into potential avenues for collective actions grounded in the GDPR. Such actions, permitted to proceed under Article 7(2) Brussels I-bis Regulation, as exemplified in our earlier analysis of the TikTok case in Amsterdam, share a parallel rationale. The convergence of these legal frameworks could yield valuable precedents and solutions in navigating the complex landscape of online damages and collective redress.