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Specialized courts: The Versailles Court of Appeal, unspecialized jurisdiction for anticompetitive practices, rules in a dispute in which the existence of such practices is only alleged and dismisses the defendant's pleas of inadmissibility (*Openhealth ex Celtipharm / Iqvia ex IMS Health*)

FRANCE, UNFAIR PRACTICES, ALL BUSINESS SECTORS, ADMISSIBILITY (COMPLAINT), COMPETENCE, PUBLIC ORDER, CONCURRENT JURISDICTIONS

Versailles Court of Appeal, Dec. 3rd, 2020, Openhealth Company ex Celtipharm / Iqvia ex IMS Health, RG n° 19/02161

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Jean-Michel Vertut | Jean-Michel Vertut - Avocat (Montpellier)

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Facts

Openhealth/Celtipharm (hereinafter "Open") accused its competitor, IMS Health (hereinafter "IMS"), of unfair competition, some of which, in particular legal actions, had anti-competitive purposes. Open had brought the matter before the Commercial Court of Nanterre, a non-specialized court in matters of "PAC". The latter had dismissed the objection raised by IMS.

On appeal before the Versailles Court of Appeal, Open argued that this Court was competent to judge all the acts of unfair competition brought before it. IMS again invoked this ground for dismissal. According to IMS, Open was inadmissible and, in any event, ill-founded to pursue the harmful consequences of the alleged anti-competitive acts allegedly committed by IMS, since the assessment of those consequences would first require an analysis of the alleged anti-competitive acts, which was not within the jurisdiction of the Court of Appeal. IMS asked the Court to dismiss all of Open's *"near"* applications based on anti-competitive practices, as well as all of Open's claims based on anti-competitive practices. Open argued that the scope of the court's jurisdiction was based on the appellant's claims, and that none of its claims were based on article L. 420-2 of the C. com. It argued that the allegation of anti-competitive practices was only an argument and not a plea or a request. Thus, this argument did not come before the court, which is only by way of a plea set out in the operative part. The Court's

review of the proceedings shows that Open had, in its conclusions, asked the Court to declare itself materially competent to judge all the acts of unfair competition brought before it and to declare admissible its claims based on the former Articles 1382 and 1134 of the Civil Code, and in no way on Articles L. 420-1 et seq. The Court of Appeal of Versailles confirms the first judgment.

Problem

In the event of a dispute relating to facts the judicial treatment of which is not devolved to courts specialising in anti-competitive practices, does the reference to such practices when the court seised is not one of the specialised courts entail *ipso facto* the inadmissibility of the claim?

Solution

The allegation of an anti-competitive practice, if it is not followed by any inference of a legal nature, constituting a mere plea of fact, is a point in the argument which does not bind the judge as to the classification to be given to the legal claims which he must decide.

Analysis

Legal action for acts of anti-competitive practices must be brought before the specialized courts, which alone have the jurisdictional power to rule on such disputes. The same applies to disputes relating to abusive commercial practices. The Paris Court of Appeals has exclusive jurisdiction to hear and determine decisions handed down by these courts. Beyond its apparent simplicity, the implementation of this rule of jurisdiction can sometimes prove to be complex, particularly when the facts in question are both a matter specifically assigned to certain courts, such as the examination of anti-competitive practices, and an area that non-specialized courts have the power to deal with, such as the examination of facts constituting a breach of unfair competition. It is in this factual context of mixed facts that the present case is set. The issue at stake was whether, from the allegation of a fact of anti-competitive practices flows, *ipso facto*, the lack of jurisdictional power of the court seised if that court is not one of the specialised courts, as was the case here for the Tribunal de Commerce de Nanterre. In other words, what room for manoeuvre is there for the plaintiff who wishes to raise the possible existence of an anti-competitive practice before a non-specialised court, without incurring the inadmissibility of his claim? The Court of Versailles answers this question in a judgment in which it refrains from any dogmatic or formal approach.

The Court does not merely note that an anti-competitive practice has been alleged, in order to mechanically decide on the inadmissibility of the application. That allegation of an anti-competitive practice, " *if it is not followed by any inference of a legal nature, constituting a mere plea of fact, is a point in the argument which does not bind the judge as to the characterisation to be given to the legal claims which he must decide* ". In the present case, the fact that the plaintiff "refers *to anti-competitive practices in the body of its pleadings cannot justify the lack of jurisdiction* (i.e., dismissal) of the *commercial court seised, if no claim is made in respect of the anti-competitive practices and if the claims should not be reclassified as relating to such practices* ". The Court therefore sets limits which the applicant must not cross if he wishes to avoid inadmissibility and, incidentally, specifies the scope of possibilities when he wishes to contextualise his application. The Court also noted in its reasoning that the appellant's and former plaintiff's conclusions did not refer to Articles L. 420-1 et seq. of the Commercial Code and dealt with facts of unfair competition. Would it have been otherwise if those articles had been expressly referred to? It does not seem to us in view of the aforementioned solution and its application to the case at hand. This pragmatic approach can moreover be compared to that noted in a recent judgment which, after analysing the data of a commercial dispute in which restrictive practices were also evoked, had finally considered that the basis of the claim was contractual (Trib. com. Paris, Sept. 1, 2020, Lettre distribu. 10/2020, nos obs.). These solutions, if they show a refusal by

the judge to be dogmatic when assessing his jurisdictional power (or his competence, Rappr. Lettre distribu. 10/2020, prec.), may nevertheless lead to questioning the usefulness of bringing before non-specialized courts, practices devolved to specialized courts (anti-competitive practices or abusive commercial practices), since the said practices cannot be discussed there, under penalty of seeing the application inadmissible. And even if the plaintiff, while exercising restraint, does not discuss them before the non-specialized court seized, we may wonder whether it is appropriate to allege, *a fortiori* by name, such practices in view of the rather narrow margin of manoeuvre available to the plaintiff. Does not the evidence incumbent on the plaintiff, whose assertion, without being able to establish it, exposes him, for an uncertain interest, to a refusal to accept, which may, if necessary, hit the nail on the head according to the judge's assessment? The cost-benefit ratio of the mere allegation could then appear to be quite dissuasive.