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Herbert Smith Freehills Competition Law Moot 2023

Problem Question

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RURITANIA IS A FICTIONAL MEMBER STATE OF THE EUROPEAN UNION

REFERENCE TO THE COURT OF JUSTICE OF THE EUROPEAN UNION UNDER ARTICLE 267 TFEU

FROM THE RURITANIAN HIGH COURT IN THE CASE OF:

InstaCharge, EVtricity, EVCharge Plc and EVCharge2* v *Ruritanian Competition Authority

Introduction

1. The following paragraphs set out the factual and legal background to the questions referred to below, together with a summary of the parties' submissions to the Ruritanian High Court.

2. The case raises a number of issues relating to the interpretation of Article 101 of the Treaty on the Functioning of the European Union (Article 101), and it is these issues that form the subject matter of the reference.

Background

The electric vehicle charging market in Ruritania

3. Transport accounts for a fifth of total CO_2 emissions in the European Union (EU). To reach its climate neutrality goal by 2050, the EU is taking action to reduce emissions from cars. Amongst other measures, it has recently adopted legislation banning the sale of new petrol and diesel cars by 2035. Subsequently only sales of zero or low emission vehicles will be allowed, such as electric vehicles (EV), hydrogen fuel cell vehicles and plug-in hybrid electric vehicles.

4. In recent years, sales of EV have increased significantly across the EU, including in Ruritania, especially among environmentally conscious drivers. However, to encourage more drivers to switch to EV, it is essential that there is a comprehensive and competitive EV charging network in place that people can trust and be confident in using. It is also important that charging an EV is as easy as filling up a car with petrol or diesel.

5. In Ruritania, the Government has taken several measures to encourage the use of EV, and to ensure a transition to them prior to the EU ban on the sale of new petrol and diesel cars taking effect. Amongst

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other things, it has agreed to fund upgrades in the electrical grid, i.e., the interconnected network for the delivery of electricity from electricity suppliers to businesses and consumers, to increase its capacity and thus facilitate EV charging. It has also expressed its commitment to support efforts to promote renewable energy supply and consumption.

6. As of October 2022, there were around 10,000 public chargepoints across Ruritania. Further, over 150 new public charging stations are being added each month on average. Nevertheless, EV charging in Ruritania still presents significant challenges.

7. First, for EV drivers it can be difficult and frustrating to find and access public chargepoints and compare costs and pay for charging, especially for those who cannot charge their EV at home or at work. Despite the encouraging progress of the roll-out of charging infrastructure in Ruritania to date, there are still limited public chargepoints and a number of these are unreliable and often out of service.

8. Secondly, EV charging takes a lot of time. Fully charging an EV using a slow charger may take up to 40 hours. Although fast, rapid, and ultra-rapid chargers allow full charging in as little as 20-30 minutes, less than 1,000 public chargepoints in Ruritania offer rapid or ultra-rapid chargers.

9. Thirdly, the existing network of public EV chargepoints is concentrated around motorways and the major urban areas. By contrast, in remote areas, EV drivers have much more limited access to public chargepoints since the business case for their development – especially of rapid and ultra-rapid chargers – is weaker.

10. Fourthly, although the cost of fully charging an EV is currently lower than filling up with petrol or diesel, the recent global energy crisis, which has also affected Ruritania, is increasing the cost of electricity making it likely that the cost of EV charging will soon exceed the cost of filling up with petrol or diesel. There is also concern that possible electricity shortages and rationing will affect the ability to charge at all at some times. A recent study established that the cost of charging an EV at a public charger has increased by 40% in the last year and that three in five drivers in Ruritania have been put off buying an EV because of the rising domestic energy prices.

The parties

11. In Ruritania there are, in addition to several smaller players, three major EV chargepoint providers, InstaCharge, EVtricity and MotionEV. EVtricity is part of the EVCharge group and is wholly owned by EVCharge Plc. Another of EVCharge Plc's wholly owned subsidiaries, EVCharge2 provides aftercare and maintenance services for EV chargepoints in Ruritania.

12. InstaCharge enjoys a market share of 25% and is the most popular EV chargepoint provider in Ruritania. It offers a network of both slow and rapid chargepoints across Ruritania, including in relatively remote areas. InstaCharge offers reliable EV charging with simple contactless payment, or through its InstaCharge app, although its rates are generally higher than the rates of its main rivals.

13. EVtricity enjoys a market share of 15%. Although it is a more recent entrant, it has managed to become established quite quickly by offering a network of rapid and ultra-rapid chargers, which are mainly located at service stations across motorways. EVtricity allows contactless payments, while customers may also pay using its custom-made EVtricity App. EVtricity also offers the most competitive rates for rapid and ultra-rapid EV charging.

14. MotionEV enjoys a market share of 10% and offers a network of fast and rapid chargers only, which are generally located at pubs, restaurants, and supermarkets in the major Ruritanian cities. Customers can only pay for the cost of EV charging using MotionEV's dedicated app.

15. The remaining players in the market have much smaller market shares and networks of mostly slow chargers in various locations across Ruritania.

The agreement between InstaCharge and EVtricity

16. Concerned about the obstacles that EV drivers face and their adverse impact on the uptake of EV in Ruritania, the Ruritanian Government has been urging EV chargepoint providers to take collective action to improve the charging experience for EV drivers, both through making it easier for customers to pay and through allowing them to charge their EV more rapidly and cheaply across a comprehensive network of chargepoints.

17. To address some of the challenges of EV charging and to offer their customers a better EV charging experience at as competitive as possible prices, InstaCharge and EVtricity entered into a roaming agreement on 1 January 2022 that provided for the following:

- InstaCharge and EVtricity customers will be able to charge their EV at any of the chargepoints in their respective networks with a single customer account. To cover the operational costs entailed in making their networks accessible to each other's customers, InstaCharge and EVtricity also agreed on a fee per transaction that InstaCharge would pay to EVtricity whenever an InstaCharge customer uses an EVtricity chargepoint and vice versa (the 'peer-to-peer roaming agreement').

18. Separately, InstaCharge and EVtricity also agreed to cap the wages of their workers and independent contractors and to pay them only according to a fixed hourly rate schedule (the 'wage agreement'). Given the global energy crisis and the rising energy costs, this will allow InstaCharge and EVtricity to ensure the affordability of EV charging within their networks and contribute to pressing sustainability goals in line with the Ruritanian Government's priorities by encouraging customers to switch away from cars with higher emissions.

The Ruritanian Competition Authority's Decision

19. On 15 January 2022, the Ruritanian Competition Authority (RCA) received a complaint that the agreements between InstaCharge and EVtricity violate Article 101. After investigating the complaint, the RCA sent InstaCharge and EVtricity a statement of objections setting out its concerns about the various agreements between them.

20. Following the RCA's administrative procedure, on 15 October 2022 the RCA adopted a decision finding that the agreements between InstaCharge and EVtricity infringe Article 101. Specifically, the RCA found that:

- The peer-to-peer roaming agreement restricts competition by object within the meaning of Article 101(1). The fee per transaction clause sets the floor for the prices that customers pay for charging at InstaCharge and EVtricity chargepoints, so allowing the parties to fix minimum prices for EV charging within their networks. The fee per transaction clause is not objectively necessary to ensure the smooth implementation of the peer-to-peer agreement and the parties failed to cast doubt on the finding that the agreement pursues a restrictive purpose. Further, the parties failed to demonstrate that the peer-to-peer roaming agreement satisfied the conditions of Article 101(3). In particular, the clause imposing a fee per transaction was not indispensable to achieving its objectives: there were less restrictive means of achieving the benefits of the agreement, and the absence of the fee per transaction clause would not make the materialisation of the benefits of the agreement for consumers significantly less likely.

- The wage agreement restricts competition by object in the relevant labour markets by eliminating competition between InstaCharge and EVtricity for workers. Undertakings should set their pay strategy independently and in agreeing to cap the wages for their workers, the parties had coordinated their pricing behaviour. The RCA rejected the parties' argument that the agreement could not give rise to a restriction of competition by object because the conduct led to decreases in the price of charging an EV. Further, the parties' claim that the wage agreement was intended to ensure the affordability of EV charging, given the global energy crisis and the rising energy costs, and to achieve government sustainability objectives, is irrelevant under both Article 101(1) and Article 101(3). An agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives. In any event, measures aiming to secure the affordability of EV charging, assuming there is a crisis in this market, are not for undertakings to adopt, but for the Ruritanian Government to take using mandatory procedures.

21. The RCA imposed fines on InstaCharge and EVtricity. It also found EVCharge Plc and EVCharge2 to have infringed Article 101 and to be jointly and severally liable for the fine imposed on EVtricity.

The Action for Annulment before the Ruritanian High Court

22. On 15 November 2022, InstaCharge, EVtricity, EVCharge Plc and EVCharge2, brought an action for annulment of the RCA's decision before the Ruritanian High Court. The applicants complained that the RCA decision is vitiated by multiple errors of law.

- The RCA was wrong to conclude that the peer-to-peer roaming agreement restricts competition by object within the meaning of Article 101(1). Because the purpose of the agreement is to provide EV owners with access to an expanded network of chargepoints across Ruritania and to improve their EV charging experience by simplifying the payment process and increasing their confidence that they will be able easily to charge their EV, the precise purpose of the agreement is not to restrict competition. Further, the fee per transaction clause is objectively necessary to cover the operational costs of implementing the peer-to-peer roaming agreement. In any event, the fee is indispensable to achieving the objectives of the peer-to-peer roaming agreement within the meaning of Article 101(3). If InstaCharge and EVtricity were not able to cover the operational costs of implementing the peer-to-peer roaming agreement, they would not have concluded it and EV drivers would miss out on its many advantages.

- The RCA was wrong to conclude that the wage agreement restricts competition by object within the meaning of Article 101(1) and does not satisfy the conditions of Article 101(3). Firstly, labour markets fall outside the scope of application of Article 101 entirely. Secondly, even if the wage agreement comes within the scope of Article 101(1), the RCA should have taken into account that the agreement pursued a legitimate objective, that is, to pass on lower costs to EV customers so as to ensure the affordability of EV charging, especially given the global energy crisis and the rising energy costs, and achieve government sustainability objectives, before prohibiting it as a restriction of competition by object. Thirdly, the benefits of an agreement that aims to deal with a crisis in a market and to meet sustainability goals should at the very least be considered in the context of Article 101(3), and the RCA was wrong to dismiss these benefits as irrelevant.

- The RCA was not at liberty to impose a fine on EVCharge Plc and EVCharge2 who were not party to the agreement, who had not been consulted about its compatibility with Article 101, and who were not named in the Statement of Objections.

Questions Referred

23. Faced with such fundamental differences in interpretations and readings of the law, the Ruritanian High Court has decided to stay the proceedings before it and refer a number of questions relating to the interpretation of Article 101 to the Court of Justice of the European Union.

24. The Ruritanian High Court has referred the following questions to the Court of Justice:

Question 1. What principles should be applied to determine whether a peer-to-peer roaming agreement which provides for a fee per transaction, such as the one at issue in the main proceedings, restricts competition by object within the meaning of Article 101(1)? What factors should be taken into account when determining whether a fee per transaction clause, such as the one at issue in the main proceedings, is indispensable within the meaning of Article 101(3) to achieving the objectives of a peer-to-peer roaming agreement, such as the one at issue in the main proceedings?

Question 2. Does an agreement between two employers relating to wages to be paid to employees fall within the scope of Article 101(1)? If so, where the primary stated purpose of such an agreement is lowering prices to consumers and encouraging the take-up of EV in accordance with government policy, can it be deemed to restrict competition by object (and, if so, on what criteria) or must the authority establish a restrictive effect? Must the national governmental policy being pursued be compatible with EU law?

Question 3. To what extent can an agreement designed to counteract the effects of an energy crisis, to ensure lower prices for consumers and the affordability of EV charging for EV owners, and to achieve government sustainability objectives, such as the one at issue in the main proceedings, satisfy the conditions of Article 101(3)?

Question 4. Can a subsidiary company, which is wholly owned by a parent company that wholly owns another subsidiary that has infringed Article 101, be held responsible for the conduct of the infringing subsidiary under Article 101? If so, what test should be applied to decide this? Further, in order for that subsidiary company to be held liable, must it have been specifically named in the statement of objections?

25. The request for a preliminary ruling arrived at the Court of Justice on 20 December 2022. In accordance with Article 23 of the Statute of the Court of Justice, the Registrar has notified the claimant and defendant and has invited them to submit written observations to the Court. The deadline for submission is on 14 April 2023. Oral hearings are provisionally scheduled for 16 and 17 June 2023.

26. Note that in responding to questions posed by a Member State court, the Court of Justice will only deal with questions of EU law. Questions of fact and national law are for the national court to decide.