SLAUGHTER AND MAY/

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QUICK LINKS

Deutsche Telekom wins bid to receive default interest on annulled EU antitrust fine

On 19 January 2022 the European Commission was ordered by the European General Court (GC) to pay Deutsche Telekom approximately €1.8 million in default interest following the reduction of a fine previously paid by the company.

BACKGROUND

On 15 October 2014 the Commission fined Deutsche Telekom AG and its Slovakian subsidiary Slovak Telekom a.s. €38.8 million for engaging in an abusive strategy to bar competitors from the Slovakian broadband and telecoms market, in breach of EU competition law. Specifically, the Commission found that Slovak Telekom had refused to supply its competitors and imposed a margin squeeze on alternative operators; Deutsche Telekom as parent company was jointly and severally liable for the fine. The Commission also fined Deutsche Telekom a separate and further €31.07 million for recidivism (it had previously been fined in 2003 for a margin squeeze in broadband markets in Germany) and to ensure sufficient deterrence.

The parties brought actions for annulment of the Commission's October 2014 decision. By its judgment of 13 December 2018 the GC, whilst largely upholding the Commission's findings of abuse, reduced the fines from €38.8 million to €38.06 million (for the fine imposed jointly on Slovak Telekom and Deutsche Telekom) and from €31.07 million to €19.03 million (for the additional fine imposed on Deutsche Telekom). In accordance with the judgment, the Commission reimbursed Deutsche Telekom over €12 million in February 2019.[1]

Nevertheless, the Commission refused to pay default interest on the amount of the reduced fine. Deutsche Telekom therefore brought an action before the GC seeking annulment of that decision and an order directing the Commission to pay compensation for lost revenue as a result of the loss of use of the principal amount of the €12 million portion of the fine wrongly paid. Alternatively, it sought compensation for the harm suffered as a result of the Commission's refusal to pay default interest.

GENERAL COURT JUDGMENT

On 19 January 2022 the GC upheld Deutsche Telekom's action in part and ordered that the Commission pay the company default interest in the amount of €1.75 million.

For further information on any EU or UK Competition related matter, please contact the Competition Group or your usual Slaughter and May contact.

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[1] On 25 March 2021 the European Court of Justice dismissed Deutsche Telekom's and Slovak Telekom's challenges against the GC's December 2018 judgment.

The GC rejected Deutsche Telekom's claim for compensation for the alleged loss of revenue which it claims resulted from the loss of use of the €12 million portion of the fine wrongly paid - it found that Deutsche Telekom had not demonstrated that it would necessarily have invested the amount of the fine wrongly paid, nor that the loss of use of that amount had led it to abandon projects.

As regards Deutsche Telekom's claim in the alternative, the GC found that the Commission had infringed Article 266 TFEU, which requires an institution whose act has been declared void by the EU courts to take all necessary measures to comply with that judgment. The GC found that the payment of default interest is an essential aspect of this obligation - the Commission was obliged to take all necessary steps to restore Deutsche Telekom to its original position and, by refusing to pay default interest on the amount of the fine repaid for the entire period in question, had failed to fulfil its obligation. Moreover, the GC found that the Commission must pay default interest even if the repaid monies did not yield any interest whilst in the Commission's possession.

CONCLUSION AND NEXT STEPS

On its face, the ruling is potentially troubling for the Commission, which could now face considerable exposure to other applicants who have similarly had fines annulled or reduced. The Commission will no doubt be only too aware of this as it digests the GC's annulment last week of its €1.06 billion fine on Intel - to be covered in a forthcoming client briefing.

One possible next step is an appeal by the Commission to the European Court of Justice. In the meantime, many applicants will no doubt be watching to see how this newfound obligation placed upon the Commission evolves.

OTHER DEVELOPMENTS

MERGER CONTROL

SAMR CONDITIONALLY CLEARS TWO SEMICONDUCTOR DEALS (GLOBALWAFERS' ACQUISITION OF SILTRONIC AND AMD'S ACQUISITION OF XILINX)

Right before the Chinese New Year holidays, China's State Administration for Market Regulation (SAMR) conditionally cleared two semiconductor transactions it had been reviewing for over 12 months. The SAMR required remedies in both cases, highlighting the sensitivity and importance of the semiconductor sector to China.

First, on 21 January 2022 the SAMR cleared the acquisition of German wafer manufacturer Siltronic by its Taiwan-listed competitor GlobalWafers. The SAMR's concerns related the global and Chinese market for eight-inch zone melting wafers.

The deal was approved conditionally, with the SAMR imposing obligations on the parties to:

- divest the GlobalWafer's zone melting wafer business;
- continue to supply the products on fair, reasonable and non-discriminatory terms in the Chinese domestic market;
- ensure the conditions attached to the contract renewals are not inferior to the original contracts; and
- provide training to staff and take necessary measures to implement the remedies.

It is noteworthy that the SAMR issued both structural and behavioural remedies in this case, even though the combined Chinese market shares of both parties were only 30-35 per cent and were lower than their 55-60 per cent combined global market share. Previously, the SAMR has typically imposed structural remedies in cases with higher market shares (often 40 per cent or higher) in China.

Second, on 27 January 2022 the SAMR conditionally cleared Advanced Micro Devices' acquisition of Xilinx. The SAMR's concerns related to the global and Chinese markets for central processing units, graphics processing unit accelerators, and field-programmable gate array (FPGA) devices. Xilinx's FPGA market share was 50-55 per cent last year, making it the largest player in China and globally.

The deal was approved conditionally, with SAMR imposing obligations on the parties to:

- refrain from tying or imposing unreasonable trading conditions or otherwise discriminating against customers that purchase the products separately in the Chinese domestic market;
- continue to supply the products on fair, reasonable and non-discriminatory terms in the Chinese domestic market;
- ensure the flexibility and programmability of products in line with Xilinx's plans prior to the deal;
- continue to guarantee the interoperability of products; and
- take protective measures to protect the confidential information of third-party product manufacturers in the Chinese domestic market.

ANTITRUST

PSR ANNOUNCES FINES OF £33 MILLION FOR TWO PREPAID CARDS MARKET-SHARING CARTELS

On 18 January 2022 the UK Payment Systems Regulator (PSR) announced its decision to fine five companies (Mastercard, allpay, Prepaid Financial Services, Advanced Payment Solutions and Sulion – together, the Parties) more than a total of £33 million for breaching competition law by participating in two cartels into the prepaid cards market in Great Britain. This brought to a close an investigation opened by the PSR in October 2017. The PSR imposed the largest fine at £31.6 million on Mastercard. The other parties were fined £1.7 million in total.

The prepaid credit cards in question enable local public authorities to direct welfare payments to the vulnerable. The PSR found that the Parties had infringed competition law by agreeing not to compete or poach each other's customers in the prepaid cards market in Great Britain. Specifically, the PSR found two separate cartels. First, between 2012 and 2018 the Parties had agreed that in the context of the National Prepaid Cards Network - a Mastercard-sponsored network that brought together public sector bodies and programme managers from Mastercard (in the context of this case these are allpay, Prepaid Financial Services, Advanced Payment Solutions and Sulion) – to not target or poach each other's public sector customers and to divide business leads among themselves. Second, Prepaid Financial Services and Advanced Payment Solutions were party to a separate arrangement not to target each other's public sector customers during contract renewal periods between 2014 and 2016. All Parties chose to settle, for which in return the PSR applied a discount to the penalty of 20 per cent or 10 per cent, depending on whether the settlement was reached before or after the issuing of the statement of objections, respectively.

The decision demonstrates the PSR's determination to protect competition in the payments systems sphere, particularly where the public sector is involved, with Chris Hemsley, the PSR's Managing Director, remarking: "*This investigation and the significant fines we have imposed send a clear message that the PSR has zero tolerance for cartel behaviour. … This case is particularly serious because the illegal cartel behaviour meant there was less competition and choice for local authorities. This means they may have missed out on cheaper or better-quality products which were used by some of the most vulnerable in society*".

STATE AID

COURT OF JUSTICE REMITS MICULA STATE AID CASE TO GENERAL COURT

On 25 January 2022 the European Court of Justice (CJ) set aside a General Court (GC) judgment which found that the European Commission did not have the competency to review an arbitral award by Romania to Ioan and Viorel Micula (Micula brothers), and referred the case back to the GC.

Prior to Romania's accession to the EU (in 2007), Romania offered tax incentives to those investing in 'disfavoured' regions. In 2005, as part of the accession process, Romania repealed these incentives to align its State aid policies with EU State aid rules. The Micula brothers, however, launched International Centre for Settlement of Investment Disputes (ICSID) arbitration proceedings against this decision. The arbitration tribunal ruled that Romania had infringed a bilateral investment treaty between Romania and Sweden (as the Micula brothers held Swedish citizenship) and ordered Romania to compensate the investors. But, in March 2015 the Commission decided that payment of the compensation constituted incompatible State aid (as paying compensation would result in advantages equivalent to those provided for in the investment incentive scheme). It therefore ordered Romania to recover any compensation paid.

On appeal, in June 2019 the GC overturned the Commission's decision in its entirety. The GC held that, as the EU State aid rules were not applicable to Romania before its accession, the Commission could not exercise its State aid enforcement powers to censure the Romanian investment scheme for the period predating accession. In parallel, the arbitral tribunal was not required to apply EU law to events occurring prior to accession and the Commission was wrong in exercising its powers retroactively.

However, the CJ upheld the Commission's appeal, ruling that EU law applied and that the Commission was indeed competent to adopt its 2015 decision. In doing so, it first looked at the date when State aid must be considered to have been granted by the Member State, in order to establish whether the law on State aid was applicable at that time, and whether the Commission was competent to adopt the decision at issue. The CJ recalled that the decisive factor for establishing that date is the acquisition by those beneficiaries of a definitive right to receive the aid in question and the corresponding commitment, by the State, to grant that aid. In this case, the right to compensation for the damage alleged by the Micula brothers was only granted by the ICSID award of 11 December 2013 when the amount was quantified. This means that the aid measure in question was granted after Romania's accession to the EU, and so the GC therefore erred in law in holding that the Commission lacked competence to adopt the decision at issue under Article 108 TFEU.

The case before the CJ involved one of the multiple jurisdictions in which litigation is being fought by the Micula brothers, who notably enjoyed more success in the UK Supreme Court (see a previous edition of our newsletter for further details). This development represents another step in the long-running Micula saga, and the CJ's judgment means the case will be adjudicated again by the GC on its merits.

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