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CMA makes Article 9 request to review Virgin and O2 merger

On 8 October 2020 the UK Competition and Markets Authority (CMA) published a request to the European Commission to refer a proposed joint venture between Liberty Global plc and Telefónica Europe plc (O2) to the CMA for review. The request was made pursuant to Article 9(2) of the EU Merger Regulation (EUMR). The CMA had given the Commission and the notifying parties early notice of its intention to submit an Article 9 EUMR request in July 2020, shortly after the parties submitted the first draft of the notification.

BACKGROUND

In the UK, Liberty Global operates a telecommunications company, Virgin Media, and it also operates Virgin Mobile, a mobile virtual network operator (MVNO). O2, a wholly owned subsidiary of Telefónica S.A., is active in the UK as a mobile network operator, offering voice, SMS and mobile data services through its mobile telecommunications network, and wholesale network access to MVNOs. O2 and Liberty Global intend to establish a 50:50 joint venture, to which they will contribute their UK businesses. The parties notified the proposed joint venture to the Commission on 30 September 2020.

The CMA's referral request states that the parties have horizontal overlaps, in the UK only, in retail mobile telecommunications services, retail fixed telecommunications services, and certain retail business services. The request also argues that certain vertical relationships could arise, again in the UK only, in the provision of wholesale mobile access services and wholesale leased lines and mobile backhaul.

ARTICLE 9 REQUESTS

Article 9 EUMR allows a Member State Competition Authority (NCA) to ask the Commission to refer a notified concentration to that NCA. The NCA must make the request within 15 days of receipt of a copy of the notification. Article 9(2)(a) sets out the criteria to be met for referral: (i) the concentration must threaten to affect significantly competition in a market within a Member State; and (ii) that market must present all the characteristics of a distinct market.[1]

The Commission Notice on Case Referral[2] (the Notice) explains, in relation to the first requirement, that the parties must show that there is a real risk that the transaction may have a significant adverse impact on competition, and thus deserves close scrutiny. Such indications may be no more than preliminary in nature. If this requirement is met,

[1] The CMA relied on Article 9(2)(a); Article 9(2)(b) sets out alternative, slightly different criteria for referrals.

[2] The Commission Notice on Case Referral in respect of concentrations (2005/C 56/02).

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the Commission can either decide to deal with the case itself in accordance with the EUMR, or refer all or part of the case to the NCA.

Additional factors for consideration are also laid out in the Notice. The factors are inter-linked and the weight placed on each factor is case-specific. A key factor in Article 9 referrals is consideration as to whether the NCA is the more appropriate authority for dealing with the merger, having regard to the (i) specific characteristics of the case; (ii) tools and expertise available to the NCA; (iii) likely locus of any impact of competition resulting from the merger; and (iv) administrative effort of any contemplated referral. The Notice also sets out other factors which relate to all referral cases. For example, decisions on referrals should have regard to the importance of maintaining the benefits of the EUMR 'one-stop-shop' arrangements. Further, given the importance of legal certainty regarding jurisdiction, a referral should only be made when there is a "*compelling reason*" to depart from original jurisdiction.

CMA SUBMISSIONS

The CMA argued that their preliminary analysis indicated the nature of the vertical relationships between the parties raised *prima facie* concerns in relation to a possible significant adverse impact on competition in the UK market, in particular as a result of two theories of harm. The first theory of harm was input foreclosure in relation to wholesale mobile services upstream, which O2 supplies, and MVNOs downstream. The second related to input foreclosure in relation to wholesale leased lines, which Virgin Media supplies, and retail mobile telecommunications services downstream. In addition to assessing these vertical relationships, the CMA noted that any review of the transaction would need to consider horizontal effects in relation to retail mobile in the UK. In their submissions the CMA stated that the affected markets were at their widest national, and the impact of the structural changes of the joint venture did not go beyond the borders of the UK.

Regarding the factors in the Notice, the CMA submitted that they were the appropriate authority to consider the concentration, arguing that:

- the CMA has more recent direct experience than the Commission assessing the relevant markets, with reference to the 2016 acquisition by BT Group Plc of EE Limited;
- a referral would be an efficient allocation of administrative resource, particularly as if the Commission retained jurisdiction there was a risk of a conflicting assessment between this case and subsequent UK telecoms cases. This is also a concern given the CMA and the Commission apply different legal tests – the CMA's test of a 'substantial lessening of competition', and the 'significant impediment of effective competition' test applied by the Commission;
- in light of Brexit, the relevance of the case to ensuring the consistency of assessment of EU mergers is less significant;
- the CMA is best placed to assess any UK-specific regional characteristics of the relevant markets and can cooperate with Ofcom, the UK communications regulator; and
- the effects of the joint venture are UK-centric as it concerns undertakings operating fixed and mobile telecommunications services in the UK.

The CMA also argued that concerns regarding preserving the benefits of the EU 'one-stop-shop' were not applicable in light of the upcoming end of the transition period. Finally, the CMA stated there were no reasons on legal certainty grounds against a referral. The CMA argued that the above grounds amounted to a compelling reason to depart from the original jurisdiction, and that Brexit and the end of the transition period were exceptional circumstances which justified the referral.

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CONCLUSION

The CMA's arguments are substantially grounded in the impact of the upcoming end of the transition period on the respective jurisdiction of the CMA and the Commission. The request reflects the challenges faced by both the CMA and the Commission as they seek to negotiate their new relationship as of 1 January 2021, and as they find an appropriate balance between the authorities' jurisdictions before the end of the transition period. The Commission's decision in this case may set an interesting example of how the Commission wishes to characterise this relationship in the next three months.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA REVOKES FINE IMPOSED ON JD SPORTS FOR BREACH OF INTERIM ORDER

On 15 October 2020 the CMA announced that it had withdrawn a penalty notice imposed on Pentland and its subsidiary JD Sports for failing to comply with the requirements of an initial enforcement order (IEO) in the context of the completed acquisition by JD Sports of Footasylum, a transaction the CMA prohibited in its final report of 6 May 2020. On 29 July the CMA issued a penalty notice and imposed a record £0.3 million fine on JD Sports and Pentland for failing to comply with an IEO the CMA had issued on 17 May 2019. The CMA found two main breaches of the IEO which related to Footasylum having made changes to its portfolio of stores without prior consent from the CMA. In particular, the CMA alleged that Footasylum had breached the IEO by closing a Wolverhampton store without the CMA's approval.

When revoking the fine the CMA said that: "*In light of issues raised on appeal, the decision has been made to withdraw the penalty notice dated 29 July 2020. The subsequent appeal of this penalty notice at the Competition Appeal Tribunal, registered 1 September 2020, has therefore also been withdrawn*". The CMA did not provide further information about the reasons for its decision to withdraw the penalty notice.

The CMA prohibited the completed acquisition of Footasylum by JD Sports Fashion in May this year, concluding that the transaction had resulted, or may be expected to result, in an SLC within the supply of sport-inspired casual footwear and apparel products sold in stores and online, leaving customers worse off with fewer discounts or lower-quality customer service. JD Sports challenged the decision before the Competition Appeal Tribunal (CAT), which heard the case at the end of September. JD Sports criticised the CMA for what it alleged was a failure to properly consider the impact of COVID-19 on the market conditions relevant to the transaction. They claimed that this failure included: "*the use of inaccurate and outdated analysis of the UK sports retail competitive landscape*", given the consequences of the COVID-19 pandemic for the retail sector. Judgment on the appeal is still pending.

ANTITRUST

HONG KONG TRIBUNAL FINDS CONTRAVENTION IN FOURTH CARTEL CASE

On 14 October 2020 the Hong Kong Competition Tribunal (Tribunal) handed down its judgment (in Chinese only) in the city's fourth cartel case. Following admissions of liability by all the parties, the Tribunal found six decorator companies to have contravened the prohibition against anti-competitive agreements, known as the First Conduct Rule in Hong Kong.

As one of the rare substantive decisions written in Chinese, the judgment was relatively brief at 67 paragraphs (in contrast to previous judgments with over 300 paragraphs), most of which covered factual findings and legal conclusions, with little analysis on substantive issues. This is unsurprising, given the conduct in question was very similar to an earlier case, in which the Tribunal considered the substantive issues in detail (see our briefing here). These six companies were

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found to have allocated customers and fixed prices for the renovation of a public housing estate in 2017. Two individual representatives of the companies were also found to have been personally liable.

This is the second time in which individuals have been held personally liable by the Tribunal. Since the individuals admitted liability, the Tribunal's judgment did not consider in detail the question of personal liability and how the legal test in section 91 of the Competition Ordinance of being "*a person being involved in a contravention of a competition rule*" should be interpreted. In addition, this is the first case in which a director was found to be "*unfit to be concerned in the management of a company*". He is a director of a company that was a 'repeat offender', as the company had already been found by the Tribunal to have breached competition law in a previous (separate) case. The Tribunal reserved the issue of a director disqualification order to subsequent sanctions hearings, as the Competition Commission's request did not specify a duration for disqualification.

STATE AID

EUROPEAN COMMISSION PROLONGS AND EXPANDS TEMPORARY FRAMEWORK FOR STATE AID MEASURES TO SUPPORT THE ECONOMY IN THE CONTEXT OF COVID-19

On 13 October 2020 the Commission announced its decision to prolong and expand the scope of the State aid Temporary Framework adopted on 19 March 2020 to support the economy in the context of the COVID-19 pandemic. The Temporary Framework was initially set to expire on 31 December 2020, except for recapitalisation measures that would be permitted until 30 June 2021. All parts of the Temporary Framework have now been prolonged for six months until 30 June 2021, and the section enabling recapitalisation support has been prolonged for a further three months, to 30 September 2021.

The reasoning for the decision is to allow Member States to support businesses during the ongoing COVID-19 crisis, especially where the need or ability to use the Temporary Framework has not yet fully materialised. Before 30 June 2021, the Commission will review and examine the need to further extend or amend the Temporary Framework.

Along with the prolongation of the Temporary Framework, the Commission has also expanded its scope. Firstly, the Fourth Amendment to the Temporary Framework introduces a new measure to allow Member States to support companies facing a decline in turnover during the eligible period of at least 30 per cent compared to the same period of 2019, owing to the COVID-19 crisis. The support will contribute to part of the beneficiaries' fixed costs which are not covered by their revenues, up to a maximum of €3 million per undertaking. Secondly, the Commission has adapted the conditions for recapitalisation measures under the Temporary Framework. Provided certain conditions are met, a State that was an existing shareholder prior to the recapitalisation may exit from the equity of such enterprises that was gained during the COVID-19 pandemic, through an independent valuation, whilst restoring its previous shareholding. Thirdly, owing to the lack of sufficient private capacity to insure against all economically justifiable risks for exports to countries listed as marketable risk, the amendment extends until 30 June 2021 the temporary removal of all countries from said list for export-credit insurance purposes.

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