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QUICK LINKS

European Commission sends Statement of Objections to Amazon for the use of seller data and opens second investigation into Amazon's e-commerce business practices

On 10 November 2020 the Commission issued a Statement of Objections informing Amazon of its preliminary view that Amazon's use of non-public business data of third-party sellers that conduct business on its marketplace to benefit its own competing retail business is breaching EU competition rules. The Commission also announced that it had formally launched a second investigation into the possible preferential treatment of Amazon's own retail offers and those of marketplace sellers that use Amazon's logistics and delivery services.

BACKGROUND

In July 2019 the Commission announced that it had opened a formal investigation to examine whether Amazon's use of sensitive information about sellers, their products and transactions on the Amazon marketplace constitutes anti-competitive agreements or practices in breach of Article 101 TFEU and/or an abuse of a dominant position in breach of Article 102 TFEU. The investigation followed the Commission's request for information to retailers and manufacturers active on the Amazon marketplace following a series of complaints, including to the Bundeskartellamt. The initial investigation also looked into the role of data in the selection of the winners of the 'Buy Box', discussed further below, and the impact of Amazon's potential use of competitively sensitive information on sellers had on that selection. The Commission appears to be moving at a fast pace in comparison to other antitrust probes it has launched.

STATEMENT OF OBJECTIONS

Amazon's role as an online platform has two features: (i) the provision of a marketplace where third-party businesses are able to sell products directly to consumers; and (ii) the sale of its own products as a retailer, in competition with the third-party businesses present on its marketplace. Amazon's role as a marketplace service provider enables access to non-public business data relevant to third-party businesses that sell products through Amazon, such as a businesses' revenue and past performance, the number of ordered and shipped products, and information relating to consumer claims such as the activated guarantees.

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In its preliminary findings, the Commission noted that employees of Amazon's retail business have access to a significant quantity of non-public seller data which is aggregated and used to calibrate Amazon's retail offers and strategic business decisions, to the detriment of third-party businesses on the marketplace. The Commission found that this enables Amazon to focus its offers in the best-selling products across product categories and to adjust its offers based on non-public data of competing sellers.

The Statement of Objections sets out the Commission's preliminary views that the use of non-public seller data enables Amazon to leverage its dominance in the market for the provision of marketplace services by avoiding the usual risks of retail competition. The Commission's investigation is focused on Amazon's practices in France and Germany – the biggest markets for Amazon in the EU.

INVESTIGATION INTO AMAZON'S E-COMMERCE BUSINESS PRACTICES

The Commission has also formally launched a second investigation into the possible preferential treatment of Amazon's own retail offers and offers of marketplace sellers that use Amazon's logistics and delivery services. The investigation will consider whether the criteria set by Amazon to enable sellers to offer products to Prime users under Amazon's Prime loyalty programme and to select the winner of the 'Buy Box' lead to preferential treatment of Amazon's retail business or of the sellers that use Amazon's logistics and delivery services. Both features are important to competing sellers. The 'Buy Box' is a prominent feature on Amazon's website that allows customers to add items from a specific retailer directly into their shopping carts and generates the majority of all sales on the marketplace. Similarly, Prime users generate more sales than regular users and their ever growing number makes it increasingly important for competing sellers to be able to reach them.

The Commission's investigation will cover the European Economic Area, with the exception of Italy where the Italian Competition Authority has begun to investigate partially similar concerns last year, with a particular focus on the Italian market.

CONCLUSION

If the Commission's views are confirmed, each investigated conduct would infringe Article 102 TFEU that prohibits the abuse of a dominant market position and result in the imposition of a financial penalty for Amazon. This is among a number of ongoing investigations the Commission is conducting probing the dual role of online platforms. Following a series of complaints – by Spotify among others – in June 2020 the Commission opened formal investigations into potential anti-competitive practices by Apple in relation to the mandatory use of Apple's own proprietary in-app purchase system as well as restrictions on the ability of developers to inform iPhone and iPad users of alternative cheaper purchasing possibilities outside of apps.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA LAUNCHES CONSULTATION ON UPDATES TO THE MERGER ASSESSMENT GUIDELINES, WITH A FOCUS ON DIGITAL MARKETS

On 17 November 2020 the UK Competition and Markets Authority (CMA) launched a consultation on a revised version of its Merger Assessment Guidelines (the Guidelines). The CMA explained in its press release that the Guidelines address the evolution of the market since the publication of the current assessment guidelines of 2010, and in particular, respond to the rise of digital technologies and the impact they have had on consumer behaviour and competition. In the consultation guidelines, the CMA notes that digital technologies have '*not introduced new theories of harm or economic principles in*

the field of merger control, but nevertheless require the CMA to consider carefully its approach to assessment of mergers in such digital markets, to ensure that it is delivering on its duties to promote competition for the benefit of customers'.

The Guidelines also largely build on recommendations made by the Furman (Unlocking digital competition: Report from the Digital Competition Expert Panel) and Lear (Ex-post Assessment of Merger Control Decisions in Digital Markets) reports in 2019 on how the CMA should approach its assessment of digital mergers.

Some of the key changes in the Guidelines include: (i) the inclusion of a list of examples of scenarios which may be considered a substantial lessening of competition (SLC); (ii) additional detail on the role of price and non-price aspects of competition; (iii) additional clarity on how the CMA assesses evidence (in particular internal documents and evidence in fast-moving markets); (iv) increased flexibility in the counterfactual time horizon; (v) additional detail on the CMA's assessment of two-sided platforms; (vi) additional detail on the CMA's assessment of potential competition and innovation; (vii) the re-framing of the focus of the CMA's assessment of a merger firm's ability to foreclose; and (viii) additional guidance on how the CMA approaches market definition as an analytical tool.

The consultation will run for over seven weeks and responses should be submitted by 8 January 2021.

This consultation follows recently announced consultations on updates to the CMA's jurisdictional and procedural guidance, and the guidance on the CMA's mergers intelligence function, on which the CMA is inviting responses by 4 December 2020.

CAT PARTIALLY UPHOLDS JD SPORTS' APPEAL AGAINST THE CMA DECISION TO PROHIBIT ITS MERGER WITH FOOTASYLUM

JD Sports Fashion plc's appeal against the CMA's decision to prohibit its takeover of Footasylum plc has been partially successful.[1] The appeal before the Competition Appeal Tribunal (CAT) relates to the CMA decision of 6 May 2020 in which the CMA prohibited the completed acquisition by JD Sports of Footasylum and required JD Sports to fully divest Footasylum. The CMA's final report into the merger concluded that the merger resulted, or could be expected to result in a SLC within the supply of sport-inspired casual footwear and apparel products sold in stores and online. As part of its reasoning, the CMA found that the COVID-19 pandemic would not materially reduce the extent to which the parties were close competitors, or increase materially the aggregate constraints posed by other retailers on the parties.

Although the CAT ruled in favour of the CMA on most of the grounds of appeal brought by JD Sports, it did conclude that, despite the CMA's wide margin of appreciation, it had acted irrationally in determining whether it had a sufficient basis to make the assessments it made in relation to the counterfactual and the competitive effects of the merger.[2] The CAT focused on the CMA's failure to follow up inquiries with suppliers and its failure to make direct inquiries of Footasylum's primary lender to gather evidence on the impact of COVID-19.

This included criticism of the CMA's assumptions about the availability and robustness of such evidence when preparing its final report. One reason the CMA gave to the CAT for not seeking out further information was that the information it had already received from the parties and third parties was insufficiently robust. In light of this, the CAT concluded that the CMA should have sought out further evidence and inquired if more robust evidence had become available in time for inclusion in the final report, rather than deciding that it was not worthwhile to seek more evidence from the parties. The CMA also argued in the CAT that evidence suppliers could provide, such as forecasts, would be too uncertain. The CAT noted that evidence such as forecasts, which are always subject to some uncertainty, lie at the heart of the determination of the statutory question relating to SLC. As a result, the CAT found that the CMA acted irrationally as it came to conclusions about the likely effects of COVID-19 which were of material importance to its overall decision, without having the necessary evidence on which to base those conclusions.

[1] *JD Sports Fashion PLC v Competition and Markets Authority* [2020] CAT 24.

[2] See paras. 137 to 186 of the judgment.

The CAT therefore has quashed the CMA's decision in so far as its conclusions are based on the CMA's assessment of the likely effects of the COVID-19 pandemic (i) on the relevant markets, (ii) on the parties and/or the merged entity, and (iii) on the competitive constraints likely to apply to the parties and/or the merged entity. In light of the material effects of this on the CMA's overall conclusions, the CAT has remitted the case to the CMA for reconsideration.

GENERAL COMPETITION

NEW UK NATIONAL SECURITY AND INVESTMENT BILL SIGNALS NEW FOREIGN INVESTMENT SCREENING REGIME

The UK Government has published the National Security and Investment Bill, which creates a new notification regime for foreign investments which raise national security concerns. Mandatory notification is required in certain sectors deemed to be particularly sensitive, and approval is required prior to closing or else the deal is void. The Bill introduces severe penalties for breach of the mandatory filing requirement: fines up to £10 million and/or up to five years' imprisonment. The Government is currently consulting on which sectors should be subject to the mandatory regime. The notification regime in all other sectors will be voluntary, but the Government could intervene on national security grounds to examine a deal in a voluntary notification sector up to five years after it completes.

The regime as set out in the Bill extends to acquisitions of non-UK companies and assets if they carry on UK activities, and applies to all investors (not just foreign investors). Moreover, if the Bill is passed, the new rules will have retrospective effect, applying to all transactions taking place from 12 November 2020. For further information on the National Security and Investment Bill, see our client briefing of 12 November 2020.

SAMR CONSULTS ON ITS DRAFT ANTI-MONOPOLY GUIDELINES FOR CHINA'S DIGITAL SECTOR

On 10 November 2020 China's State Administration for Market Regulation (SAMR) published (in Chinese) the draft Anti-monopoly Guidelines for the Platform Economy (Guidelines), marking a significant development in antitrust enforcement in the PRC.

The ambitious Guidelines send a strong message to the Chinese internet giants that they should expect increased scrutiny and enforcement in the near future, and appear to go beyond the positions of other global competition authorities in this sector. Amongst other points, the Guidelines set out:

- **VIE structures fall within merger control jurisdiction**. Previously, many transactions involving a VIE structure (a business structure used by foreign and Chinese companies to facilitate offshore financing, amongst other things) were not notified to SAMR (and its predecessor, MOFCOM) on the basis that the legality of VIE structures in China was unclear. Through these Guidelines, SAMR has made it clear that the previous approach will no longer be acceptable. SAMR may also issue some gun-jumping decisions for these previous non-notified transactions to reinforce this message.
- **SAMR's positions on some globally debated antitrust enforcement issues**. SAMR has included various controversial topics in this draft, including the role of algorithms in collusive coordination and vertical price restrictions, the anticompetitive effects of a 'most favoured nation' (MFN) clause, and data as an 'essential facility'. Amongst other things, if it includes all these issues explicitly in the Guidelines, SAMR could be one of the first competition authorities to reach a formal position on these issues, which are still subject to consideration and debate globally.
- **A flexible approach to market definition**. SAMR may be exempted from defining a 'relevant market' when establishing an abuse of dominance case where (i) it would be very difficult to do so and (ii) there is convincing evidence of long-lasting adverse effects flowing from the conduct in question. This potentially affords SAMR a high degree of discretion and could introduce some uncertainty on how SAMR will establish dominance without defining the relevant market.

The implementation of the Guidelines has been given high priority by the PRC Government, as part of a nation-wide reform policy promulgated by China's State Council. Public comments on the draft Guidelines are due by 30 November 2020, and a broad range of stakeholders are expected to submit their views.

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