COMPETITION LAW IN THE DIGITAL AGE

MAY 2023

BONELLIEREDE
BREDIN PRAT
DE BRAUW
HENGELER MUELLER
SLAUGHTER AND MAY
URÍA MENÉNDEZ

QUICK LINKS

CONCENTRATIONS FALLING BELOW MERGER CONTROL THRESHOLDS CAN BE SUBJECT TO EX-POST REVIEW FOR ABUSE OF DOMINANCE

The European Court of Justice (CJ) has held that concentrations that fall below merger control thresholds can still be subject to ex-post review by national competition authorities and courts under the abuse of dominance rules. The Towercast judgment, handed down on 16 March 2023, therefore recognises an additional avenue for regulators to catch concentrations which are not otherwise subject to ex-ante merger control, creating significant legal uncertainty for dominant entities.

Background

In October 2016, the French broadcaster TDF acquired competitor Itas. The acquisition was not subject to ex-ante merger review as it did not satisfy either the French or EU merger control thresholds; nor was it referred to the European Commission under Article 22 of the EU Merger Regulation (EUMR).

A year later, on 15 November 2017, rival broadcaster Towercast lodged a complaint with the French Competition Authority alleging that the acquisition constituted an abuse of a dominant position in that TDF had hindered competition on the upstream and downstream wholesale markets for digital transmission of terrestrial television services. The French Competition Authority issued a statement of objections to this effect in June 2018, but later decided, in January 2020, that the abuse of dominance rules were not applicable in circumstances where a concentration had not met the thresholds for merger control and there was no alleged anti-competitive conduct independent of the creation of the concentration itself.

In March 2020, Towercast lodged an appeal before the Paris Court of Appeal, who in turn referred a question to the CJ for a preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union (TFEU). The question for the CJ was whether a national competition authority could subject a concentration to an ex-post assessment for abuse of dominance under Article 102 TFEU, in circumstances where that concentration does not meet the thresholds for either EU or national merger control regimes.

Judgment

Advocate General Juliane Kokott issued her opinion in October 2022, answering the above in the affirmative. She considered that ex-post review for abuse of dominance provided an additional safety net, alongside the Article 22 EUMR referral process, for regulators to catch so-called 'killer acquisitions' which can have an adverse impact on competition.

On 16 March 2023, the CJ similarly answered the question in the affirmative. The CJ held that, whilst the EUMR "introduces ex-ante control for concentration operations with a community dimension, it does not preclude an ex-post control of concentration operations that do not meet that threshold".

QUICK LINKS

ABUSE OF DOMINANCE & M&A

ARTICLE 22 REFERRALS

MICROSOFT/ACTIVISION PROHIBITION

GERMAN DIGITAL ENFORCEMENT

GOOGLE'S DATA COMMITMENTS

The CJ emphasised that an abuse of a dominant position is prohibited by Article 102 TFEU and that there are no exemptions from this position. Moreover, the types of conduct prohibited by Article 102 TFEU are not exhaustive. Therefore, the question for national competition authorities is whether a purchaser in a dominant position on a given market, who has acquired control of another undertaking on that market, has by that conduct substantially impeded competition on that market. The CJ made clear that simply demonstrating that a dominant undertaking's position has been strengthened by a merger is not sufficient for a finding of abuse.

The CJ also rejected TDF's request to limit the temporal effects of the judgment. TDF had argued that, otherwise, the judgment would have serious consequences in terms of legal certainty for dominant undertakings which had carried out concentrations falling below the merger control thresholds. The CJ rejected this on two grounds. Firstly, the CJ found that TDF could not reasonably have expected the concentration not to be examined for an abuse of dominance under Article 102 TFEU. Secondly, the CJ noted that neither the reference for a preliminary ruling nor the observations submitted to the Court contained any evidence to establish that the interpretation adopted by the Court would entail a risk of serious disturbance.

Consequences

By virtue of the Towercast judgment, national competition authorities and courts are afforded another avenue to catch transactions that may have an impact on competition. There is now greater scope for more merger transactions to be analysed by competition regulators where they would otherwise have avoided scrutiny under the ex-ante merger control rules. In practical terms, this introduces a further degree of uncertainty for merger transactions on top of that already established by the Commission's recent change in policy to encourage national competition authorities to refer mergers under Article 22 EUMR where the jurisdictional thresholds are not satisfied in Brussels or the Member States.

Notably, since the Towercast judgment was published, the Belgian Competition Authority has opened an investigation into a possible case of abuse of dominance by Proximus, relating to its takeover of edpnet. Following the commencement of the investigation on 22 March 2023, the Belgian Competition Authority has since confirmed that the Auditor General has for the first time made use of his prerogative to request the adoption of interim measures, aimed at ensuring the continuity of edpnet's activities and its operational and commercial independence from Proximus pending the outcome of the investigation. A decision on the merits of the request is expected to be given by the Belgian decision-making body by the first half of June.

This marks a divergence from the Belgian Competition Authority's previous approach to non-notifiable transactions, which it has historically been reluctant to investigate. This may serve as an early indication that national competition authorities are eager to embrace this additional avenue to review concentrations falling below the merger control thresholds.

KILLER ACQUISITIONS: NO NATIONAL RECOURSE AGAINST FRENCH COMPETITION AUTHORITY'S DECISION TO REFER BELOW-THRESHOLD MERGERS TO EUROPEAN COMMISSION

Two years since the start of the long-running and multi-faceted saga of the European Commission's jurisdiction to review below-threshold transactions under its new Article 22 referral policy, with the first-ever referral of its kind by the French Competition Authority in the context of the Illumina/Grail transaction in the biotech sector, and while the legal battle rages on before the European Courts, the French Supreme Administrative Court has confirmed that there cannot be any national recourse against the French Competition Authority's referral decision.

While Illumina's challenge to the European Commission's jurisdiction is still ongoing before the European Courts (judgment of the EU General Court of 13 July 2022, currently on appeal to the European Court of Justice), another question was whether there could be any recourse at the national level against a national competition authority's decision to refer a transaction which does not meet the national merger control thresholds.

With respect to France at least, this question has been answered in the negative.

At the time of referral in April 2021, Illumina had already sought, unsuccessfully, an interim injunction from the French Supreme Administrative Court to stop the French Competition Authority's upwards referral to the Commission.

Hearing the case now on its merits, the Court once again ruled that it does not have jurisdiction to review a procedure which, in essence, falls entirely within the scope of European law and under the jurisdiction of the European Courts. In other words: as a preparatory act to a decision by an EU institution, the national competition authority's referral decision cannot be severed from the rest of the merger control review procedure of which it forms part, which is carried out exclusively by the European Commission under the supervision of the European Courts.

The broader question is whether this same solution would apply across Member States. What may come across as a technicality of French procedural law is, however, yet another string to the Commission's bow in its ability to review below-threshold transactions. Whatever the questions around the legitimacy of the Commission's new Article 22 referral policy and indeed, whatever the effects of any referral decision on the undertakings concerned, the French Supreme Administrative Court has decided that the debate is within the realm of European competition law and is not one for it to decide.

UK COMPETITION AUTHORITY BLOCKS MICROSOFT/ACTIVISION

The UK Competition and Markets Authority (CMA) has issued its **final report** on Microsoft's proposed acquisition of Activision Blizzard, blocking the proposed transaction over concerns that it "*would alter the future of the fast-growing cloud gaming market, leading to reduced innovation and less choice*". In January 2022, Microsoft announced that it had agreed to acquire game developer and publisher Activision for a value of $68.7 billion.

In its final report, the CMA concluded that the merger may be expected to result in a SLC in the supply of cloud gaming services in the UK due to vertical effects resulting from input foreclosure. According to the CMA, Microsoft already has a strong position in this market as it owns gaming platform Xbox and leading PC operating systems, and the transaction would make it even stronger. In addition, the CMA considered that Microsoft would find it beneficial to make Activision titles - including Call of Duty and World of Warcraft - exclusive to its own cloud services.

The CMA concluded that the remedies proposed by Microsoft for a ten-year period were behavioural in nature, and that they required Microsoft to behave in a way which (the CMA found) may be contrary to its commercial incentives. They would also require ongoing regulatory oversight. The CMA also found that the proposed remedies package had significant shortcomings in the context of what the CMA sees as the growing and fast-moving nature of cloud gaming services.

Microsoft had also entered into agreements with Nintendo and three cloud gaming service providers to allow certain Activision content to be made available on their platforms. The CMA however found that the impact of these agreements was uncertain, and it could not be confident that they would lead to material benefits for customers. The CMA also considered other factors such as the broader international context and the extra-territorial impact of a prohibition, but found no effective remedy that would address the SLC in the UK without having an impact outside of the UK.

The proposed transaction is still subject to review in other jurisdictions, including in the EU, where a Phase 2 decision is expected by the end of May. The CMA's final decision shows that it continues to be reluctant to accept behavioural remedies other than in very specific circumstances, and that it will not hesitate to block deals even where that has an extra-territorial impact.

QUICK LINKS

ABUSE OF DOMINANCE & M&A

ARTICLE 22 REFERRALS

MICROSOFT/ACTIVISION PROHIBITION

GERMAN DIGITAL ENFORCEMENT

GOOGLE'S DATA COMMITMENTS

GERMANY REMAINS ACTIVE IN THE DIGITAL SECTOR

The digital economy continues to be a key focus of the German Federal Cartel Office (FCO). While the FCO continues to enforce the new gatekeeper rules (Sec. 19a GWB) and traditional competition laws, the German government has imminent plans to furnish the regulator with additional tools.

New investigations and gatekeeper designations under Sec. 19a GWB

While the Digital Markets Act (DMA) is rolled out across the EU, the FCO continues enforcing the German gatekeeper rules (Sec. 19a GWB):

- On 11 January, the **FCO issued a statement of objections against Google's data processing terms** and alleged combination of user data across various services (e.g. Google Search, YouTube, Google Play, Google Maps). According to the FCO, Google does not comply with Sec. 19a GWB as users of certain Google services "are not given sufficient choice as to whether and to what extent they agree to this far-reaching processing of their data across services".
- End of March, the FCO **decided to initiate a proceeding against Microsoft** to determine whether it is a company of "paramount significance for competition across markets" (the German gatekeeper definition) and thereby falls in the ambit of Sec. 19a GWB. According to the press release, the proceeding will focus on Microsoft's expanding product range (e.g., Windows, Office, OneDrive, Teams, Bing, Xbox and gaming sector) and whether that constitutes a digital ecosystem across various markets.
- The FCO **closed its designation proceeding against Apple** in early April and held that it falls under Sec. 19a GWB. According to the FCO, the fact that Apple covers the entire value chain through hardware (e.g., IPhones, IPads), software (e.g., iOS) and complementary services (e.g., App Store) allows Apple "to tie its users to its complex ecosystem". Apple – as Amazon, but unlike Meta and Google – announced its plan to challenge the FCO's decision in court.

New case against PayPal under traditional competition laws

While the FCO's enforcement priorities in the digital space have shifted towards the new Sec. 19a GWB, it recently initiated an investigation against PayPal under the traditional competition rules (Art. 102/101 TFEU and the German equivalent rules) (see **here**). Under investigation are terms and conditions used by PayPal, which allegedly restrict the ability of merchants to offer their goods and services at lower prices if customers choose to use a payment method that is cheaper than PayPal. The FCO also alleges that sellers are not allowed to express a preference for payment methods other than PayPal or make their use more convenient for customers. The FCO will now examine PayPal's market position and whether the terms and conditions foreclose competitors and restrict price competition.

Next amendment to the German competition law on the horizon

Following the revolution of German competition law in 2021, which, in particular, brought about the new gatekeeper rules (Sec. 19a GWB), the next amendment is imminent (see our **November 2022 issue**). On 5 April 2023, the German government has introduced a **Draft Bill**, which will likely be passed in Q2/Q3 of 2023 and then take immediate effect. At the heart of the amendment is a new intervention mechanism (Sec. 32 f GWB), which empowers the FCO to impose behavioral (e.g., grant access to data, establish transparent standards, amend contractual rules) and structural (e.g., organizational separation of business areas) remedies in the context of sector inquiries. As a measure of last resort and subject to certain conditions, the FCO may even order dominant undertakings or undertakings designated as gatekeepers under Sec. 19a GWB to sell shares or assets (ownership unbundling). The new tool takes inspiration from the Commission's "New Competition Tool" and the CMA's "Market Investigation Regime". It shifts the competitive analysis away from sanctioning a specific conduct or infringement towards remedies on market structure. According to the government's estimation, the FCO could initiate one additional sector inquiry and two remedy proceedings under Sec. 32 f GWB per year. Current pending sector inquiries concern non-search-based online advertising (interim report issued in 8/2022) and refineries / fuel wholesale (interim report issued in 11/2022).

QUICK LINKS

ABUSE OF DOMINANCE & M&A

ARTICLE 22 REFERRALS

MICROSOFT/ACTIVISION PROHIBITION

GERMAN DIGITAL ENFORCEMENT

GOOGLE'S DATA COMMITMENTS

The amendment will bring two additional changes. First, the implementation of Art. 38, 39 DMA, allowing the FCO to pre-investigate possible DMA infringements. The FCO would be able to combine (pending) investigations under Sec. 19a GWB with DMA pre-investigations. Second, the introduction of lower requirements for a disgorgement of profits by the FCO, in particular a legal presumption that infringements of Art. 101/102 TFEU (or their German equivalents) or violations of Sec. 19a GWB orders result in profits of at least 1% of the undertaking's domestic turnover for the products or services to which the infringement relates.

QUICK LINKS

ABUSE OF DOMINANCE & M&A

ARTICLE 22 REFERRALS

MICROSOFT/ACTIVISION PROHIBITION

GERMAN DIGITAL ENFORCEMENT

GOOGLE'S DATA COMMITMENTS

ICA PUBLISHES GOOGLE'S COMMITMENTS RELATED TO ITS DATA PORTABILITY PRACTICES

In July 2022, the Italian Competition Authority (ICA) launched an investigation against Google for alleged abuse of dominant position in violation of Art. 102 TFEU. The ICA claimed that Google hindered data-sharing interoperability with other platforms – particularly with the app Weople, which is managed by Hoda, an Italian operator that has developed an investment database.

In its decision to launch the investigation, the ICA alleged that Google's conduct was likely to restrict: (a) the right to personal data portability under Art. 20 of Regulation (EU) 2016/679 (GDPR); and (b) other operators' ability to develop innovative ways of using personal data.

The key issue is data portability, which facilitates data transfers and user mobility. On 21 March 2023, the ICA published (on its website) Google's proposed commitments to remedy the alleged abusive conduct, which are detailed below:

- Google will provide operators effective tools to make it easier for users to select and export their data in Google Takeout (browser history, activity across Google services, YouTube history, location history, etc.). The key tool will be a uniform resource locator (URL) – commonly known as a 'link' – which operators can embed on their websites/apps and which users can click to directly access their Google Takeout profile and manage their data.
- Google will make documentation and detailed information available to operators regarding the data fields included in 'My Activity' that relate to Search history, Chrome browsing history, and YouTube. This will help operators extract and import data and thereby improve interoperability.
- Google will make an early adopter program (EAP) available to operators in preparation for the release of a new data portability mechanism whereby operators will be able to transfer data directly from service to service if so authorised by the user concerned. This new mechanism will guarantee faster data transfer and thereby foster data portability and system interoperability. The EAP will contain an initial version of the application performance interface (API) so that operators can set up their platforms and services to implement direct service-to-service data portability.

The ICA commented that Google's proposed commitments do not appear to be manifestly unfounded but reserved its right to further assess whether they are sufficient to remove the alleged restrictions on competition, including in light of any observations it receives from third parties.

COMPETITION LAW IN THE DIGITAL AGE

MAY 2023

BONELLIEREDE	**www.belex.com** Milan, Genoa, Rome, Addis Ababa*, Brussels, Cairo*, Dubai, London *: *in cooperation with local law firm*
BREDIN PRAT	**www.bredinprat.com** Paris, Brussels
DE BRAUW	**www.debrauw.com** Amsterdam, Brussels, London, Shanghai, Singapore
HENGELER MUELLER	**www.hengeler.com** Frankfurt, Berlin, Dusseldorf, Munich, Brussels, London
SLAUGHTER AND MAY	**www.slaughterandmay.com** London, Beijing, Brussels, Hong Kong
URÍA MENÉNDEZ	**www.uria.com** Madrid, Barcelona, Bilbao, Bogotá, Brussels, Lima, Lisbon, London, New York, Porto, Santiago, Valencia