SLAUGHTER AND MAY

Competition & Regulatory Newsletter

20 May - 2 June 2020 / Issue 11

Quick Links

Main article
Other developments
Merger control
Antitrust
General competition

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

European Commission publishes final report on the evaluation of the Vertical Agreements Block Exemption Regulation and accompanying Guidelines

The European Commission has published its **final report** containing results of studies that were commissioned to support the Commission's evaluation of **Regulation 330/2010**, otherwise known as the Vertical Block Exemption Regulation (VBER), and the accompanying **Guidelines** on Vertical Restraints (Guidelines).

Background: Current legal framework

Article 101(1) of the Treaty on the Functioning of the European Union (TFEU) prohibits agreements between undertakings which restrict competition, including agreements between two or more undertakings operating at different levels of the supply chain (vertical agreements). Article 101(1) may be declared inapplicable in accordance with Article 101(3) TFEU where such agreements contribute to improving the production or distribution of goods, or promoting technical or economic progress (while allowing consumers a fair share of these benefits).

The VBER sets out certain categories of vertical agreements for which it can be assumed that the conditions in Article 101(3) TFEU are satisfied i.e. agreements to which Article 101(1) TFEU will not apply. The current VBER (adopted in 2010) is due to expire on 31 May 2022.

The Commission commenced a review of the VBER and the Guidelines in October 2018 to decide whether it should let the VBER lapse, prolong its duration, or revise it in light of certain developments in the market since 2010 (particularly the emergence of online platforms).

The support study

As part of its review, the Commission carried out a support study to look at the relevance, effectiveness and efficiency of the VBER and Guidelines. With the publication of the report, the Commission is now due to publish a staff working document (SWD) which will shed light on the initial assessment. The SWD will be

followed by an impact assessment phase, at the end of which the Commission will recommend either extending the current Regulation, allowing it to lapse, or (more likely) adopting a revised VBER. To that end, the results from this study provide a helpful steer on the potential grounds on which the VBER may be revised.

Findings on relevance

The report concludes that the VBER and Guidelines *"remain relevant"* to the landscape of vertical agreements but do not cover the latest developments in the market. In particular, the expansion of online trade has led to the rise of new business models and different ways in which firms use vertical agreements.

Given the increase in the use of online sales channels, the report found that agreements such as exclusive and selective distribution, which are already covered in the VBER and Guidelines, could benefit from further clarification. Increased price transparency and reduced customer search costs have been used as explanation for the increased use of online sale restrictions. Other types of agreements (for example those that contain parity clauses – and which are widely used in the hotel booking sector) have gained importance, but are not explicitly covered by the Guidelines.

Consumer behaviour has also adapted, and online channels are becoming increasingly important to the entire purchaser process. Consumers are using online channels to obtain information about desired products, alternative sales channels and to complete their purchase. The extent to which consumers are using online channels, and which online channels they are using, vary greatly, depending on socio-demographic factors, personality, the extent of the consumer's involvement in the purchasing process and whether it is a repeat purchase or not. Consumers value the wide choice of channels and the ability to access one and the same retailer/supplier via several channels.

Findings on effectiveness

The report refers to the perceived need to revisit the existing framework in light of developments in e-commerce and the increasing importance of online platforms, *"in particular to address the lack of clear definitions and guidelines specifically tailored to online sales"*. In the study, the Commission considered the vertical clauses that have been addressed most frequently by national competition authorities (NCA) and courts in the past 10 years.

- *Selective distribution:* Stakeholders generally thought that selective distribution agreements should continue to fall within the VBER, as they protect the development of additional sales services by excluding retailers that do not provide the contracted level of service. In the vast majority of the NCA cases considered, the undertakings involved were required to modify certain terms of their selective distribution agreements or to remove specific clauses, rather than having to discard the agreement altogether.
- *Most favoured nation (MFN)*: MFN clauses protect a particular intermediary against the supplier offering better terms to other intermediaries. In the mass market segment, they are beneficial as retailers can avoid continuous price negotiations with manufacturers and maintain a competitive

price for the products concerned. However, there are concerns that the use of MFN clauses could lead to higher prices for consumers by preventing price differentiation.

- *Resale price maintenance:* Retail price maintenance refers to the situation where one party, typically a manufacturer or supplier, attempts to restrict the ability of the other, typically a distributor or retailer, to price its goods and services below a minimum level. Overall, the use of resale price maintenance has reduced in the past 10 years. However, the complexity of the resale price maintenance assessment in the NCA cases considered suggests that the Guidelines may lack clarity (and definitive examples) as to the exact circumstances when resale price maintenance can be anti-competitive, and more importantly for market players, pro-competitive and thus permissible.
- *Cumulative effects*: Cumulative effects refer to situations where access to a market is significantly restricted by the cumulative effect of similar vertical agreements practised by competing suppliers or buyers. The report suggests that cumulative effects have the potential to cause significantly more harm to competition and economic efficiency than their isolated use by individual competitors. For example, where MFN clauses cover a substantial part of the market, they can give rise to significant price rigidity by making discounts more unlikely.

Findings on efficiency

The Commission received feedback suggesting that the VBER and Guidelines *"do not sufficiently reflect market changes, especially digital progress, and consequently their relevance and effectiveness has been gradually decreasing"*. The report concluded that the costs generated by the VBER and Guidelines are "*in principle proportionate to the benefits they bring to undertakings in the EU*" as they provide legal certainty for the assessment of vertical agreements, which results in reduced legal costs for undertakings.

Other developments

Merger control

SAMR conditionally approves WABCO/ZF transaction

On 15 May 2020 the Chinese State Administration for Market Regulation (SAMR) conditionally approved ZF Friedrichshafen's proposed acquisition of fellow auto-parts manufacturer WABCO. SAMR's concerns were focused on the vertical effects arising from the merger, which resulted in three behavioural remedies being imposed.

SAMR found horizontal overlaps in the markets for steering columns and hydraulic power steering gear for commercial vehicles. However, SAMR's focus was on the vertical issues it identified in the market for the supply of automatic mechanical transmission (AMT) controllers, in which WABCO had a 75 per cent market share globally and 45 per cent in China. SAMR was concerned that WABCO could foreclose access to AMT controllers to ZF Friedrichshafen's competitors on the market for AMTs post-transaction, given its existing AMT controller supply relationships with those competitors.

The transaction was cleared subject to the following conditions that are all behavioural in nature. The merged entity must continue, for a period of six years, to:

- supply existing customers with AMT controllers, whilst maintaining current contractual specifications for price, quality, quantity, delivery, level of the technology and after-sales services;
- supply Chinese customers with AMT controllers in accordance with fair, reasonable and non-discriminatory (FRAND) principles; and
- supply Chinese customers with opportunities to develop AMT controllers themselves, to facilitate future supply.

Of the three conditions, the first two are fairly common in conditional cases involving behavioural remedies. However, the third condition is an interesting one, and compliance will depend on how far the merged entity will need to go in order to provide such "*opportunities*" to help their potential competitors to develop these AMT controllers.

This decision comes amid growing expectation of a change to merger control thresholds in China. SAMR and the State Council are expected to revise the thresholds for the first time in 12 years. Local reports suggest that this will likely involve an increase in merger control thresholds and, more speculatively, transaction value thresholds to capture "*killer acquisitions*" in line with recent changes in some other jurisdictions.

Antitrust

Court of Appeal rules against the CAT, finding it made errors in consideration of limitation rules in Dixons damages action against MasterCard

On 22 May 2020 the UK Court of Appeal handed down its **judgment** on an appeal by Dixons against a ruling of the Competition Appeal Tribunal (CAT) in relation to limitation in Dixons' damages action against MasterCard. This stems from Dixons' follow-on action against MasterCard based on the European Commission's **decision of 19 December 2007** finding that MasterCard's EEA multilateral interchange fee violated EU antitrust provisions. Dixons are claiming damages from 22 May 1992 to 21 June 2008 but MasterCard previously argued that there was a limitation defence barring proceedings relating to 22 May 1992 to 21 June 2008 and seeking summary judgment.

The CAT ruled on these as preliminary issues in its **judgment** of 14 February 2019 on the basis of Rule 31 of the 2003 version of **the CAT Rules** (the 2003 Rules). The CAT held that:

- Rule 31(4) was not engaged and claims before 20 June 1997 were not time-barred. It dismissed MasterCard's application for summary judgment against Dixons.
- If Rule 31(4) were engaged, Dixons would not have been able to rely on Section 32(1)(b) of the **Limitation Act** in relation to MasterCard's intra-EEA multilateral interchange fee. However, Dixons could rely on Section 32(1)(b) insofar as the UK multilateral interchange fees were concerned.

MasterCard and Dixons appealed the CAT's judgment. The Court of Appeal found that the CAT erred on various points. The CAT erred in deciding the question of whether Dixons had established a reasonably arguable case that the period for bringing their claims in respect of both intra-EEA and domestic transactions should be extended under Section 32(1)(b) on the basis of deliberate concealment. Whether there is a trigger point, i.e. whether a claimant could with reasonable diligence have discovered the relevant concealment, is a question of fact in each case.

The Court of Appeal held that the CAT erred in its interpretation of Rule 31(4). It found that the claims in respect of pre-20 June 1997 transactions are prima facie time-barred under Rule 31(4). Furthermore, the CAT erred in concluding that Dixons could not succeed in extending time for the claims under Section 32(1)(b) in respect of pre-20 June 1997 intra-EEA transactions. It erred in concluding that Dixons could succeed in extending time for the claims under Section 32(1)(b) in respect of pre-20 June 1997 domestic transactions. These were questions of law. Both these questions need to be tried to be determined.

The Court concluded that the question of whether Dixons could with reasonable diligence have discovered their claims in respect of both intra-EEA and domestic transactions needed to be tried. It therefore allowed MasterCard's appeal but, given the points raised by Dixons, dismissed MasterCard's application for summary judgment. It held that the *"result was the same in the [CAT] but for different reasons."* The CAT should, instead, have dismissed MasterCard's application for summary judgment.

General competition

CMA launches investigation into misleading online reviews

On 22 May 2020 the UK Competition and Markets Authority (CMA) launched an **investigation** into several major websites to assess whether they are doing enough to protect shoppers from fake and misleading reviews. As consumers' online shopping has increased since the start of the COVID-19 pandemic, the CMA will focus on how websites currently detect, investigate and respond to misleading and fake reviews. It will focus on issues such as:

- businesses manipulating how reviews about their products and services are presented (for example, whether they combine positive reviews for certain products with other products' reviews);
- suspicious reviews (for example, where a single user reviews an unlikely range of products or services); and
- how websites deal with reviews where the reviewer receives a payment or other incentive to review.

Andrea Coscelli, CMA CEO, has **stated** that: *"During lockdown, we're more dependent than ever on online shopping, so it's really important that the online reviews we read are genuine opinions. … Our investigation will examine whether several major websites are doing enough to crack down on fake reviews. And we will not hesitate to take further action if we find evidence that they aren't doing what's required under the law"*.

The CMA wants to take a tough stance and ensure that sites have "*robust systems*" to identify and remove fake or misleading reviews. It has made clear that it intends to take enforcement action to ensure any necessary changes are made, including legal action and identifying specific companies.

Main article
Other developments
Merger control
Antitrust
General competition

The timing of this investigation coincides with the CMA accepting **commitments** from Facebook-owned Instagram to tackle the risk that users can buy and sell fake and misleading reviews through the platform.

Brussels	London	Hong Kong	Beijing
T +32 (0)2 737 94 00	T +44 (0)20 7600 1200	T +852 2521 0551	T +86 10 5965 0600

© Slaughter and May 2020

This material is for general information only and is not intended to provide legal advice. For further information, please speak to your usual Slaughter and May contact.