SLAUGHTER AND MAY/

NEWSLETTER

24 JANUARY – 6 FEBRUARY 2024

ISSUE 2

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

Amazon/iRobot proposed transaction withdrawn due to EU competition concerns

On 29 January 2024, Amazon and iRobot announced their mutual agreement to abandon their proposed merger ahead of the February deadline for the European Commission's review of the deal. Earlier in January, the Commission had informed Amazon of its intention to prohibit the acquisition in the absence of satisfactory remedies offered by Amazon.

Background

On 5 August 2022, Amazon announced that it had signed an agreement to acquire iRobot. iRobot is a manufacturer of floor care products, and designs and builds consumer robots and other smart home devices for cleaning, mapping and navigation, most notably the Roomba robot vacuum cleaner.

The proposed acquisition was notified to the Commission under the EU Merger Regulation. On 6 July 2023, the Commission opened an in-depth investigation into the proposed transaction. The Commission was concerned that the deal would allow Amazon to restrict competition in the market for the manufacturing and supply of robot vacuum cleaners (RVCs) and would also allow it to strengthen its position as an online marketplace provider, through Amazon's access to iRobot's users' data.

In November 2023, the Commission issued a Statement of Objections (SO) to Amazon over the proposed acquisition. The SO set out the Commission's preliminary view that the transaction may restrict competition in the EEA-wide and/or national markets for RVCs, by hampering the ability of rival suppliers of RVCs to effectively compete against the merged entity. The Commission dropped its second concern over the impact of the deal on Amazon's position in the market for online marketplace services.

On 18 January 2024, the Commission informed Amazon of its intention to veto the proposed acquisition ahead of the February deadline for its Phase 2 decision. Less than two weeks later, Amazon and iRobot announced that they had entered into a mutual agreement to terminate the acquisition agreement, citing "*undue and disproportionate regulatory hurdles*".

The Commission's concerns

As part of its investigation, the Commission reviewed the dual role of Amazon as a platform operator and market participant, as well as the implications of Amazon merging with the owner of an RVC product for which, according to the Commission, "*Amazon is already an important sales channel*".

The Commission found a risk that Amazon may have the ability and the incentive to foreclose iRobot's competitors. It also noted that Amazon's online marketplace was a

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

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

particularly important channel to sell RVCs in a number of EEA Member States, including France, Germany, Italy and Spain.

In particular, the Commission found that:

- Amazon would have the ability and incentive to restrict competition in the market for the manufacturing and supply of RVCs by engaging in foreclosing strategies aimed at preventing competitors from selling RVCs on Amazon's online marketplace. These would include (i) delisting rival RVCs; (ii) favouring iRobot's RVCs in both non-paid and paid results; (iii) limiting access to certain widgets or certain commercially attractive product labels; and/or (iv) raising the cost of iRobot's competitors to advertise and sell their RVCs on Amazon's marketplace.
- Amazon may have an incentive to foreclose iRobot's competitors as it could be economically profitable to do so. This is because the merged entity would, according to the Commission, likely gain more from additional sales of iRobot RVCs than it would lose from fewer sales of iRobot's rivals and related products on Amazon. The Commission found that "*such gains include benefits from additional data gathered from iRobot's users*".

According to the Commission, such foreclosure strategies were liable to restrict competition in the market for RVCs, eventually leading to higher prices, less innovation and lower quality for consumers.

Throughout the investigation, Amazon maintained that the transaction would not harm competition and would bring benefits to consumers by providing iRobot with the resources to accelerate innovation and invest in critical features while lowering prices. Amazon also emphasised that it continues to face robust competition from other online and "brick and mortar" retailers.

Comment

Commenting on the lack of path for regulatory approval in the EU, Amazon stated that this outcome "*will deny consumers faster innovation and more competitive prices*" and noted that "*acquisitions like this help companies like iRobot better compete in the global marketplace, particularly against companies, and from countries, that aren't subject to the same regulatory requirements in fast-moving technology segments like robotics*".

This latest outcome continues the trend of intense regulatory scrutiny impacting the M&A plans of technology and online platform companies. It also highlights once again the increasing divergence of approach between the Commission and the UK Competition and Markets Authority (CMA). Unlike the Commission, the CMA unconditionally cleared the transaction at Phase 1 on 16 June 2023, citing the fact that iRobot's market position in the UK is modest and that it faces several significant competitors in the UK market, some of which boast a higher market share than iRobot.

The approach taken by the Commission also raises a question on the role of the Digital Markets Act (DMA) during merger reviews. Amazon has been designated as a "gatekeeper" under the DMA. Some of the concerns expressed by the Commission in relation to the foreclosure of iRobot's competitors echo the prohibition on "self-preferencing" behaviour under Article 6 of the DMA, which is due to apply from March 2024. It remains to be seen if the behavioural rules in the DMA will affect the Commission's substantive assessment when reviewing mergers involving designated gatekeepers.

OTHER DEVELOPMENTS

MERGER CONTROL

China amends merger filing thresholds

In January 2024, China adopted long-awaited amendments to its merger notification thresholds, wrapping up a complete overhaul to China's merger review regime alongside revisions to the merger review rules promulgated in April 2023.

The new amendments significantly raise the existing notification thresholds, which had remained unchanged since their debut in 2008. In particular, the Chinese turnover requirement for individual parties has now doubled, meaning transaction parties will need a greater presence in China in order to trigger a filing obligation, which in turn should result in fewer notifiable transactions (potentially reducing the number of total filings by as much as 30%, according to the State Administration for Market Regulation (SAMR)). The most significant change is to the individual Chinese turnover threshold, which doubled from RMB 400 million (approximately £45.5 million) to now RMB 800 million (approximately £90.9 million) or higher.

During the initial consultation in 2022, SAMR had proposed an additional threshold aimed at capturing "killer acquisitions", which did not make the final cut. Nevertheless, SAMR reserves the power to "call in" transactions that fall below the thresholds if it considers the transaction to have potential anti-competitive effects. Furthermore, SAMR announced on 31 January that it is researching and formulating rules to strengthen its oversight of killer acquisitions. As such, dealmakers continue to face some uncertainty over whether SAMR may intervene in a "below threshold" transaction.

The revised thresholds take effect immediately without any transition period, meaning that previously notified transactions which fall below the new thresholds can now be closed without merger clearance. SAMR is expected to exercise discretion in allowing parties to withdraw filings unless there are circumstances meriting further review.

For further detail on China's revamped merger review regime, see our separate client briefing here.

ANTITRUST

Advocate General Medina advises that the European Court of Justice dismiss the Commission's appeal in Intel

On 18 January 2024, Advocate General (AG) Medina issued her opinion that the European Court of Justice (CJ) should dismiss the European Commission's appeal against the European General Court's (GC) judgment to annul Intel's €1.06 billion fine for abusing its dominant position by imposing exclusivity rebates and other conditional restrictions.

In May 2009, the Commission imposed a fine of €1.06 billion on Intel for abuse of dominant position on the market for x86 central processing units. In 2014, the GC dismissed Intel's appeal against the Commission decision. Intel launched a further appeal to the CJ, which set aside the GC judgment and referred the case back to the GC for re-examination. In 2022, the GC issued a new judgment, finding that the "as-efficient-competitor" (AEC) test applied by the Commission was vitiated by various errors, and ordered the partial annulment of the Commission decision and annulled the €1.06 billion fine in its entirety. For details on the case, see our previous client briefings here and here.

The Commission subsequently lodged an appeal against the GC's 2022 judgment. AG Medina advised on two of the six grounds of appeal raised by the Commission: that the GC erred (i) in law and infringed the Commission's rights of defence in the context of the examination of the AEC test with regard to Hewlett-Packard; and (ii) in its interpretation of the AEC test and of Article 102 TFEU, distorted the evidence and infringed the Commission's rights of defence in the context of the examination of the AEC test with regard to Lenovo.

As regards the alleged errors in the application of the AEC test in relation to Hewlett-Packard, the AG concluded that none of the Commission's claims were "*capable… of calling into question the conclusion of the General Court that the contested decision failed to demonstrate the foreclosure effect of the rebates*" granted by Intel to Hewlett-Packard for the entire period between November 2002 and May 2005. In particular, the AG concluded that the GC could not be criticised for having infringed the Commission's margin of discretion in complex economic matters. She also found that the GC had been correct in not giving evidential weight to Intel's implicit acknowledgment of the reference period for the AEC test during the administrative proceedings. AG Medina also took the view that the GC had been correct in finding that additional evidence submitted by the Commission was inadmissible; and that the GC had been entitled to find that the Commission's error was sufficient to vitiate its findings in relation to the whole of the exclusivity rebate.

As regards the alleged errors in the application of the AEC test in relation to Lenovo, the AG concluded that the Commission's criticism, in particular relating to the quantification of two non-cash advantages granted by Intel in exchange for its exclusivity obligation, are not well founded and ought to be rejected.

The AG therefore recommended that these grounds of the appeal be dismissed.

GENERAL COMPETITION

CMA publishes its report on competition and market power in UK labour markets

On 25 January 2024, the CMA published a report on competition and market power in UK labour markets. This is the first report issued by its Microeconomics unit which was created in 2022 to inform the CMA and wider government of emerging economic issues. In her speech, Sarah Cardell, the CMA's Chief Executive, welcomed the report and further elaborated on how it would impact current work being undertaken by the CMA and other policy makers.

The report looks into employer market power and labour market concentration. Amongst other things, the report finds that labour market concentration, which is the ratio between the number of workers and the number of employers, has remained roughly the same in the UK over the last 20 years (contrary to the US, where it has increased). There is, however, a large degree of variation between regions, occupations and firms. According to the report, wages can be up to 10% lower in the most concentrated markets, compared to the least. Interestingly, the report shows that collective bargaining counteracts the negative effect on wages of market power, but only in concentrated industries (in the private sector).

The report also focuses on changes in the labour market more generally, in particular the increase in hybrid and flexible working, and the increasing importance of the gig economy. The report also looks into the prevalence of restrictive covenants and finds that 'non-compete' clauses impact around 30% of UK workers and are found across the economy in all industries and across the whole income distribution. However, Sarah Cardell noted that such agreements "*do not generally*" breach UK competition law but "*typically*" fall under employment law, and must be distinguished from no-poach agreements between competing employers. Cardell also said that "*While we are clear in our intent to take action against illegal labour market cartels, this does not mean the CMA will step in to use its competition enforcement powers in every case involving labour relations*".

European Commission proposes new regulation on the screening of Foreign Direct Investments

As part of a newly adopted trade, investment and research package, the Commission, on 24 January 2024, adopted a proposal for a Regulation to amend the EU Foreign Direct Investments (FDI) Screening Regulation, which entered into force in October 2020.

The proposed reform builds on the evaluation, lessons learnt and implementation of the current FDI screening system and aims to improve the existing Regulation. It proposes that all Member States have a screening mechanism in place within 15 months of the Regulation entering into force and that their scope must include critical areas, such as semiconductors, artificial intelligence, critical medicines and dual-use and military items.

The revision is also aimed at harmonising national rules to make cooperation between Member States and the Commission more effective and efficient. Moreover, it also extends screening to investments by EU entities which are ultimately controlled by non-EU individuals or entities. We will be covering the proposed Regulation in more detail in an upcoming client briefing, which will be available on our website.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650