SLAUGHTER AND MAY/

NEWSLETTER

29 MARCH – 18 APRIL 2023

ISSUE 7

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

European Commission revises Article 102 Guidance

INTRODUCTION

The Commission has recently adopted a package of initiatives marking a significant policy shift in its approach to abuse of dominance cases, as currently set out in the Commission's 2008 Guidance on enforcement priorities regarding Article 102 TFEU (the 2008 Guidance). The package includes a call for evidence on the adoption of new detailed Guidelines on exclusionary abuses of dominance, a communication amending the 2008 Guidance with immediate effect (the Revised Guidance), and a Policy Brief explaining the background to these initiatives.

BACKGROUND

The 2008 Guidance, although not intended by the Commission to be a statement of the law, provided clarity regarding the Commission's general approach in selecting which abuse of dominance cases to pursue as a priority. It was seen as the start of a shift away from a formalistic approach to enforcing Article 102 TFEU, where cases were prioritised based on a 'rules-based' approach, to an 'effects-based' approach meaning that the Commission's priorities were set having regard to the potential effects of the relevant conduct, based on economic analysis.

Since then, the EU courts have affirmed the high evidentiary standard and analytical rigour expected of the Commission in exclusionary abuse cases, endorsing the use of an 'effects-based' approach for a broad range of Article 102 cases (see for example the *Unilever Italia* judgment, as reported in a previous edition of this newsletter). This has recently posed difficulties for the Commission: the EU courts have annulled several high-profile Commission decisions, in whole or in part, on the basis that the Commission's economic analysis had failed to meet the requisite legal standard.[1]

Against this background, the package of initiatives announced by the Commission on 27 March is two-fold:

- The Commission has amended the 2008 Guidance with immediate effect, to clarify the Commission's enforcement approach and better reflect the case law of the EU courts.
- For the first time, the Commission has launched a call for evidence on the adoption of new detailed Guidelines on exclusionary abuses of dominance, with a view to publishing

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[1] See for example the *Qualcomm* and the *Google Android* judgments, as reported in this newsletter here and here.

draft Guidelines in 2024. The Revised Guidance is intended to serve as an interim solution while the detailed Guidelines are being developed.

KEY CHANGES IN THE REVISED GUIDANCE

ANTICOMPETITIVE FORECLOSURE

The Revised Guidance clarifies that the notion of anticompetitive foreclosure should account for different types of exclusionary conduct that a dominant firm can implement, not limited to the full exclusion or marginalisation of competitors. The Commission considers that 'anticompetitive foreclosure' refers to a situation where the conduct of a dominant firm adversely impacts an "*effective competitive structure*", thereby enabling it to "*negatively influence, to its own advantage and to the detriment of consumers, the various parameters of competition, such as price, production, innovation, variety or quality of goods or services*".

The Revised Guidance also clarifies that the Commission will no longer consider the profitability of a dominant firm's conduct for the purpose of its enforcement priorities – and references to dominant firms being able to "*profitably*" increase prices, or "*profitably*" influence output, innovation or the variety of goods and services as a result of the relevant conduct, have been struck out.

AS-EFFICIENT COMPETITORS

The 2008 Guidance used the notion of 'as-efficient competitors' to delineate harmful from non-harmful behaviour and stated that the Commission would "*normally*" only intervene where conduct would harm as-efficient competitors. The Revised Guidance has softened this language to allow the Commission more flexibility in considering less-efficient competitors, recognising that genuine competition "*may also come from undertakings that are less efficient than the dominant firm*", in terms of their cost structure. In its Policy Brief, the Commission explains that it is keen to move away from an unduly strict and dogmatic application of this standard, particularly in certain digital markets where, in the Commission's view, "*barriers to entry and expansion are significant*".

As regards the use of the price-cost as-efficient competitor test (AEC Test), the Revised Guidance and Policy Brief state the Commission's updated view that, in line with the case law of the EU courts, the AEC Test, where it is carried out, remains "*only one element in the overall competitive assessment*". The Revised Guidance now refers to the fact that the Commission "*may*" examine economic data relating to cost and sales prices.

REFUSAL TO SUPPLY

The Revised Guidance now draws a distinction between cases concerning an outright refusal to supply and those involving a constructive refusal to supply (meaning a situation where the dominant undertaking makes access subject to unfair conditions). The Commission's view is that the set of criteria established in *Bronner*[2] used by the Commission to determine whether it should intervene should only apply to cases involving an outright refusal to supply, and not to those involving a constructive refusal to supply. The Revised Guidance implements this distinction and narrows the circumstances where the Commission will apply the *Bronner* criteria, in line with the Commission's decisional practice and developments in the case law.

[2] Case C- 7/97 *Oscar Bronner v. Mediaprint (Bronner)*, judgment of 26 November 1998.

CONCLUSIONS AND NEXT STEPS

While the case law of the EU courts has progressively enshrined the 'effects-based' approach for exclusionary abuses of dominance, this has led to some uncertainty and several high-profile losses for the Commission. It remains to be seen how the EU courts will interpret the Revised Guidance and the weight that will be given to it.

Looking ahead, the Commission intends to develop the first detailed Guidelines on exclusionary abuses of dominance, which are likely to go beyond the topics covered in the Revised Guidance. The detailed Guidelines will be published in draft form in mid-2024 for consultation and formally adopted in 2025, at which stage the 2008 Guidance (as amended by the Revised Guidance) is expected to be withdrawn.

OTHER DEVELOPMENTS

MERGER CONTROL

SAMR CONDITIONALLY CLEARS WANHUA CHEMICAL'S ACQUISITION OF YANTAI JULI

On 7 April 2023, China's State Administration for Market Regulation (SAMR) published a decision which conditionally cleared a proposed acquisition of sole control of Yantai Juli Fine Chemical by Wanhua Chemical Group. Both entities are Chinese companies that produce caustic soda and toluene diisocyanate (TDI).

SAMR found that the proposed transaction might eliminate or restrict competition in the Chinese market for TDI for the following reasons:

- The transaction will increase the market control of the merged entity, particularly as Wanhua Chemical was the largest player before the transaction. The combined market share will be 35%-40% (in terms of sales volume) or 45%-50% (in terms of production capacity, including capacity under construction).
- The transaction will increase the concentration of the TDI market by reducing the number of players from six to five, with the three largest players having a combined market share of circa 75%.
- SAMR thought it unlikely any new effective competitor would emerge in the short term.
- Downstream customers tended to be small, which meant they lacked bargaining power.

To address these concerns, SAMR imposed a number of conditions on the clearance of the transaction, which will largely stay in place for at least five years. These include:

- The parties should supply TDI to Chinese customers at an annual average price no higher than the average price during the previous two years and any drop in the price of the main raw materials for TDI should be reflected in the price for Chinese customers.
- Unless there are legitimate reasons, the volume of production of TDI in China and the parties' R&D efforts should be maintained or expanded.
- The parties should supply TDI to Chinese customers on fair, reasonable and non-discriminatory terms and should not reject, limit or delay the supply of products to Chinese customers or lower the quality of supply or service. Similarly, the parties should not treat Chinese customers differently unless that is a reasonable business practice.

- The Parties should not force Chinese customers to purchase TDI exclusively from them or bundle sales of TDI with other products.

The decision demonstrates that SAMR continues to be willing to show a degree of flexibility regarding remedies and clear deals subject to behavioural remedies, which we have seen in previous cases (see our previous newsletter for Korean Air's acquisition of shares in Asiana Airlines).

GENERAL COMPETITION

CAT QUASHES CMA DECISION TO MAKE A MARKET INVESTIGATION REFERENCE INTO MOBILE BROWSERS AND CLOUD GAMING

On 31 March 2023, the UK's Competition Appeal Tribunal (CAT) handed down a judgment which quashed the Competition and Markets Authority (CMA) decision of 22 November 2022 to make a market investigation reference into the supply of mobile browsers and the distribution of cloud gaming services through app stores on mobile devices in the UK. In June 2021, the CMA issued a market study notice relating to mobile ecosystems. When publishing its interim report on the market study, the CMA decided not to make a market investigation reference. However, when it published its final report on the market study in June 2022, the CMA consulted on making the market investigation reference and subsequently, on 22 November 2022, the market investigation reference was made.

Apple made the application for review of the decision to make the reference, submitting that the CMA's decision was *ultra vires* as it fell outside the statutory time limits prescribed by the Enterprise Act 2002. A proposal for a market investigation reference must be made within six months of publishing a market study notice and the CMA must make a decision to launch such investigations in its final report, which must be issued within 12 months of the notice.

The CAT ruled that the CMA failed to comply with these deadlines, meaning that the CMA's decision of 22 November 2022 lacked the statutory pre-requisites, and quashed the CMA decision as *ultra vires*. It held that the decision to make a market investigation reference could not be seen as a freestanding reference – it followed on from the market study notice. The CMA has breached the statutory deadlines by consulting on its proposal to make a market investigation reference when publishing its final market study report (12 months after the market study notice) rather than when publishing its interim report (six months after the market study notice).

As regards the decision of the CMA in December 2021 not to make a market investigation reference, the CAT considered that when this decision was made, the CMA had found that the test for making a reference was met. However, the CMA had chosen not to make a reference in light of anticipated legislation conferring new powers on the CMA to investigate digital markets. The CAT held that the CMA did not have the option to decide not to make a reference at all with a reservation, entitling it to revisit that decision.

CMA PUTS PRICE CAP ON AIRWAVE NETWORK FOR EMERGENCY SERVICES

On 5 April 2023, the CMA issued a summary of its final report on its market investigation into the supply of land mobile radio (LRM) network services for public safety in the UK. The market investigation focused on the communication network services relied upon by the emergency services which are currently provided by the Airwave Network (the Network). The Network is owned and operated by Airwave Solutions (which was acquired by Motorola in 2016). It was set up in 2000 following a public procurement exercise. The contract was due to end in late 2019 and a replacement ESN network was scheduled to come into place. However, due to a delay in the

delivery of the new network which is not expected to be operational until 2026 and most likely even later, the emergency services continue to use the Network.

The CMA has concluded that the terms under which the Network provides the services since 2019 reflect "*a virtually unconstrained monopoly position on the supplier's part rather than the result of a competitive process*". Since 2019 prices are established in bilateral negotiations between Airwave Solutions (the monopoly supplier) and its owner, Motorola, and the Home Office.

The CMA found that features of the market for the supply of communications network services for public safety, individually or in combination, prevent, restrict or distort competition in connection with the supply of LMR network services for public safety in the UK. The CMA found there to be an adverse effect on competition in that market. The CMA expressed particular concern about Motorola being able to set and maintain a price which is substantially above the level expected in a well-functioning market. Other factors include the fact that the Airwave Network is critical national infrastructure, and that the Home Office is "*locked in*" to a "*monopoly provider*" until at least 2026. Furthermore, the CMA found that Airwave Solutions would be in a position to delay or hamper the interworking that is required during the transition to the ESN network. The CMA also estimated that Airwave Solutions and Motorola would likely make supranormal profits of around £1.2 billion between 1 January 2020 and 31 December 2029.

To address the CMA's concerns about Airwave Solutions' and Motorola's unilateral market power, the CMA has decided to impose a charge control, which will limit the price of the Airwave Network services at a level that would apply in a competitive market, to mitigate the detrimental effects on customers from Airwave Solutions' market power. The CMA is also recommending that the Home Office develop and implement a plan to ensure that the supply of communications network services is subject to competitive pricing arrangements or measures to a similar effect.

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