SLAUGHTER AND MAY/

NEWSLETTER

11 - 24 OCTOBER 2023

ISSUE 19

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

CMA clears Microsoft's acquisition of Activision Blizzard

Introduction

On 13 October 2023, the UK Competition and Markets Authority (CMA) announced that it had cleared Microsoft's acquisition of Activision Blizzard under a new deal in which Microsoft would not acquire Activision's cloud streaming rights outside the EEA. In April this year, the CMA had blocked Microsoft's original proposed acquisition of Activision, having rejected the remedies put forward by Microsoft at the time.

Background

Microsoft and Activision are both developers and publishers of games for PCs, consoles and mobile devices as well as distributors of games for PCs. Microsoft also distributes games for consoles and offers the Xbox gaming console as well as other products and services, including the cloud computing service Azure and the PC operating system Windows. Among the games developed by Activision is the blockbuster franchise 'Call of Duty'.

On 18 January 2022, Microsoft announced that it had agreed to acquire Activision for a value of $68.7 billion. The transaction was notified to various competition authorities, including in the UK and EU.

The CMA reviewed the proposed transaction and on 26 April 2023, following a Phase 2 investigation, published its decision blocking the transaction on the basis that it may be expected to result in a substantial lessening of competition in the supply of cloud gaming services in the UK due to vertical effects resulting from input foreclosure (as reported in a previous edition of this Newsletter). The CMA considered that the behavioural remedies offered by Microsoft at the time had significant shortcomings and were insufficient to address its concerns.

A few weeks later, on 15 May 2023, the European Commission approved the proposed transaction subject to conditions. Following an in-depth review of the deal, the Commission had concluded that the licensing commitments offered by Microsoft would fully address its competition concerns (as reported in more detail in a previous edition of this Newsletter).

On 24 May 2023, Microsoft lodged its appeal against the CMA's decision at the Competition Appeal Tribunal (CAT). On 17 July 2023, the CAT adjourned the proceedings on the grounds that Microsoft and the CMA were discussing the terms of the CMA's final order, the deadline for the publication of which had been extended to 29 August 2023. The CMA ultimately rejected Microsoft's arguments that there had been material changes in the circumstances of the transaction which would justify the acceptance by the CMA of the remedies that Microsoft had initially proposed. On 22 August 2023, the CMA made its final order prohibiting the proposed transaction and prohibiting Microsoft from acquiring an interest in Activision for 10 years without the CMA's prior written consent.

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New transaction

The same day, the CMA announced the launch of a merger inquiry into a new transaction on substantially the same terms, except that (importantly) Microsoft would not acquire Activision's non-EEA cloud streaming rights, which would instead be acquired by Ubisoft immediately prior to completion of the main transaction.

The CMA's new Phase 1 decision, published on 22 September 2023, concluded that there remained "*residual concerns*" about the possibility for the agreement with Ubisoft to be "*circumvented, terminated or not enforced*", particularly given Microsoft's relationship with Ubisoft, and therefore about Microsoft's ability to foreclose cloud gaming rivals. As a result, the CMA found that the restructured transaction may be expected to result in a substantial lessening of competition as a result of vertical effects in cloud gaming services in the UK. Microsoft and Activision therefore offered undertakings in lieu of a reference to Phase 2 (UILs), aimed at ensuring that the divestment to Ubisoft was fully implemented. The CMA accepted the UILs on 13 October 2023 and on the same day provided consent under the original prohibition order (allowing Microsoft to acquire Activision subject to the UILs and the cloud streaming rights divestment).

Conclusion

This latest outcome from the CMA highlights once again the increasing divergence of approach between the CMA and the Commission. While the Commission was satisfied that Microsoft's original commitments were fundamentally pro-competitive and would "*unlock significant benefits for competition and consumers*", the CMA's view was that the remedies initially offered by Microsoft were insufficient to address its concerns.

With the FTC having failed so far in its efforts to block the deal (although it continues to appeal) and approvals having been received in the other key jurisdictions where the transaction was notified, Microsoft closed the acquisition on 13 October 2023.

OTHER DEVELOPMENTS

MERGER CONTROL

ACCC clears merger on environmental grounds in "ground-breaking" decision

On 10 October 2023, the Australian Competition and Consumer Commission (ACCC) conditionally cleared the A$18.7 billion (approximately £9.7 billion) acquisition of electricity provider Origin Energy Limited by a fund operated by Canadian asset manager Brookfield and the liquified natural gas company MidOcean. The ACCC cleared the merger on the grounds that the environmental and sustainability benefits arising from the transaction outweighed the competition concerns - the first time that a merger clearance decision has been secured on ESG grounds in Australia, if not globally.

The ACCC considered vertical concerns related to links between Origin and a number of Brookfield's other investments, most notably its 45.4% interest in AusNet, which owns most of the state of Victoria's electricity transmission network. The ACCC was "*not satisfied that there would not*" be a substantial lessening of competition, with AusNet potentially able to favour Origin's generators over its rivals due to the vertical integration of the monopoly transmission network and Origin's electricity generation business (despite the mitigating forces of economic regulation, ring-fencing rules, and the degree of separation between the Brookfield entities). The ACCC also considered issues in respect of Origin and MidOcean Group's overlapping LNG interests but found that these were less significant.

Under Australian law the ACCC may clear a merger if its "*public benefits*" outweigh any anti-competitive effects. The parties argued that the sustainability benefits of the transaction – in particular, the acceleration of renewable energy generation and storage development for Origin and a decrease in Origin's emissions intensity - outweighed any potential anti-competitive harm. The ACCC ultimately agreed, noting that these benefits would be likely to result in the acceleration of renewable generation and storage build-out and the reduction of greenhouse gas emissions in Australia as a whole.

The public benefits argument was supported by the undertakings given by the parties, including Brookfield's commitment to invest A$20 to A$30 billion in a green build-out plan which promotes renewable energy and storage until 2033, a range of separation and ring-fencing measures within Brookfield itself and between Brookfield, AusNet and Origin, the independent auditing of these commitments and a number of other behavioural undertakings from Brookfield and MidOcean.

While the balancing of potential public benefits against competition concerns is in some ways unique to the Australian merger regime, many other competition authorities have mechanisms allowing them to take into account public interest considerations, such as ESG, when reviewing deals. We expect the emphasis on such environmental and other ESG arguments in merger review to increase as global interest in this area continues to grow.

ANTITRUST

Clariant loses cartel settlement challenge

On 18 October 2023, the General Court (GC) issued a judgment dismissing Clariant's appeal against a 2020 Commission decision imposing a €155.8 million fine on Clariant for its role in the ethylene price purchasing cartel. The GC also dismissed a counterclaim issued by the Commission to increase the fine. In its 2020 settlement decision, the Commission had imposed fines totalling €260 million on three ethylene purchasers who had colluded to lower purchase prices of ethylene between 2011 and 2017 (for more details on the Commission settlement decision, see a previous edition of this Newsletter).

Clariant's claims were centred around two arguments: (i) the fine being disproportionately increased by 50% due to its previous involvement in the monochloracetic acid (MCAA) cartel (in which Clariant received full immunity and no fine was imposed); and (ii) the natures of the MCAA cartel and the ethylene price purchasing cartel being substantially different.

In relation to the first ground, the GC confirmed that the Commission had broad discretion to consider repeat offences when setting the fine. Notwithstanding Clariant's claim that the MCAA cartel was active for 14 years prior to Clariant becoming implicated in the cartel when it acquired one of the cartelists, the GC referred to the brief time between the MCAA cartel decision and Clariant entering into the ethylene price purchasing cartel agreement as justification for the fine imposed. The GC also dismissed Clariant's argument that it was not a repeat offender because it was not fined in the MCAA cartel. The GC stated that the concept of repeat infringement does not necessarily imply that a fine has been imposed in the past, but merely that a finding of infringement of EU competition law has been made in the past.

In relation to the second ground, Clariant had argued that as the MCAA cartel had involved increasing downstream sales prices, as compared with driving purchases prices down in the ethylene case, it was too substantially different to be considered a repeat offence. However, the GC held that the Commission was correct to conclude that both cartels breached price-fixing rules and Article 101.

In addition, the Commission had issued a counterclaim, requesting the GC to increase Clariant's fine by 10% in order to remove the reduction it had received for settling, even though the company subsequently challenged the decision. The GC dismissed the counterclaim, ruling that it is not required of parties entering into settlement to accept the final amount of a fine and the related parameters for setting that fine, but only a likely range or maximum amount of the fine.

GENERAL COMPETITION

JFTC issues market study report on the recycling of plastic bottles

On 16 October 2023, the Japan Fair Trade Commission (JFTC) issued a market study report on the recycling of polyethylene terephthalate (PET) bottles, shortly following its announcement that it would update its sustainability guidelines.

A large proportion of PET bottles in Japan (86%) are recycled, in part because of various Japanese laws and rules enacted to encourage recycling, including through the Japan Containers and Packaging Recycling Association (JCPRA). The JCPRA collects used PET bottles from municipalities and sells them to recycling companies, with approximately two-thirds of all used PET bottles being recycled through the JCPRA route. However, the JFTC's report identified certain behaviour that potentially raises competition concerns. For example, the JFTC found that JCPRA discouraged the bottler trade group from collecting bottles directly from municipalities (without going through JCPRA). Furthermore, the bottler trade group agreed that its members would not collect directly from municipalities. This has led to complaints being raised by the local governments.

As is clear from its sustainability guidelines, the JFTC has done a lot of work in looking at the application of competition law to sustainability issues. However, this market study shows that the JFTC will remain vigilant in identifying competition issues in sustainability-related sectors.

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