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European Commission clarifies concerns by issuing new Statement of Objections to Apple over App store rules

INTRODUCTION

The European Commission has recently issued a new Statement of Objections to Apple, clarifying its concerns in respect of Apple's App Store rules for music streaming providers. This replaces a prior Statement of Objections sent to Apple in April 2021, and forms part of an investigation initially launched by the Commission following a complaint by Spotify.

BACKGROUND AND PRIOR STATEMENT OF OBJECTIONS

In April 2021, the Commission announced that it had sent a Statement of Objections to Apple, taking the preliminary view that Apple had abused the dominant position it holds in the market for the distribution of music streaming apps through its App Store.

The Commission initially opened its investigation in June 2020 following a complaint received from Spotify, a sizeable player in the music streaming market. Although the 2021 Statement of Objections focused solely on the market for music streaming apps, the investigation initially concerned competition in the markets for both music streaming and e-books/audiobooks.

In its 2021 Statement of Objections, the Commission's preliminary finding was that Apple has a dominant position in the market for the distribution of music streaming apps through its App Store: "*for app developers, the App Store is the sole gateway to consumers using Apple's smart mobile devices running on Apple's smart mobile operating system iOS*". At the time, the Commission stated that it had two primary concerns with how Apple operates its App Store:

- First, Apple requires music streaming app developers to use its own in-app purchase system in order to have access to, and distribute their app via, its App Store (the **IAP obligation**). At the time, Apple took a 30% fee on all subscriptions bought via its payment technology. This harmed consumers, the Commission alleged, as this cost was ultimately passed on to end users in most cases by the raising of prices.
- Second, the Commission took issue with certain 'anti-steering provisions' which app developers must also agree to in order to distribute their apps via the App Store. These provisions limit the ability of app developers to advertise to iPhone and iPad users alternative purchasing possibilities for music streaming services

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outside of the relevant app (e.g. on separate websites). As these alternatives are usually cheaper than subscribing via the app, the Commission initially expressed concerns that app users are paying higher prices for their music subscription services, or at least are being prevented from buying certain subscriptions directly in the relevant apps.

Apple operates a 'closed' system whereby the App Store is currently the only means by which iPhone and iPad users can downloads apps for their mobile devices.

THE NEW STATEMENT OF OBJECTIONS

The Commission's recent Statement of Objections replaces the 2021 Statement of Objections and focusses solely on the legality of the anti-steering obligations contained in the contractual terms between Apple and app developers. The Commission's press statement clarifies that it is no longer taking a position on the IAP obligation issue it had raised in April 2021, but does not provide reasons for this change of position.

The Commission maintains its concerns that the anti-steering provisions "*prevent [app developers] from informing iPhone and iPad users of alternative music subscription options at lower prices outside of the app and to effectively choose those*".

The re-framed Statement of Objections appears to centre on allegations that such provisions would constitute, in the Commission's preliminary view, 'unfair trading conditions' in breach of Article 102 TFEU. In particular, the Commission alleges that the provisions:

- are neither necessary nor proportionate for the provision of the App Store on iPhones and iPads;
- are detrimental to users of music streaming services on Apple's mobile devices who may end up paying more; and
- negatively affect the interests of music streaming app developers by limiting effective consumer choice.

The release of a further Statement of Objections does not prejudge the outcome of the Commission's investigation in this case.

Following receipt of the Commission's Statement of Objections, Apple has a number of response options available to it: the addressees named in the Commission's Statement of Objections can examine the documents in the Commission's investigation file, reply to the Statement of Objection in writing and request an oral hearing to present their comments on the case.

CONCLUSION

This reframing of the Commission's allegations and the replacement of the 2021 Statement of Objections by a fresh one represents an unusual development. The fact that the Commission has chosen not to take a position on Apple's IAP obligation and the associated commission fee suggests that it may have had insufficient evidence to build its case in relation to these practices. The Commission may also have been influenced by the European courts' developing case law and emphasis on the high evidentiary standard and 'effects-based approach' that must be followed in an increasingly broad range of abuse of dominance cases (as reported, for example, in a previous edition of this newsletter).

An Apple spokesperson said in a statement: "*we're pleased that the Commission has narrowed its case and is no longer challenging Apple's right to collect a commission for digital goods and require the use of the In-App Payment systems users trust. The App Store has helped Spotify become the top music streaming service across Europe and we hope the European Commission will end its pursuit of a complaint that has no merit*".

While the Commission has been under pressure by complainants such as Spotify to move forward with its investigation, its press release also sends a clear reminder that "*there is no legal deadline for bringing antitrust investigation to an end*". The Commission reminds in its statement that the duration of an antitrust investigation depends on a number of factors, including the complexity of the case, the extent to which the undertakings concerned cooperate with the Commission and the exercise of the rights of defence.

OTHER DEVELOPMENTS

MERGER CONTROL

CMA CONDITIONALLY APPROVES KOREAN AIR/ASIANA DEAL

On 1 March 2023, the UK's Competition and Markets Authority (CMA) published its decision giving conditional clearance to the proposed €1.31 billion acquisition of a majority stake in Asiana Airlines by Korean Air Lines. Korean Air and Asiana are the first and second largest airlines in the Republic of Korea (Korea) and are the only suppliers of direct air passenger services on the route between London's Heathrow Airport and Seoul's Incheon International Airport.

The CMA launched its Phase 1 investigation in September 2022. In November the CMA announced its preliminary findings that it was concerned that the proposed transaction could lead to higher prices and reduced service quality for passengers flying from London's Heathrow Airport to Seoul's Incheon International Airport. The CMA was also concerned that both parties may face a lack of competition in the direct cargo services sector between the UK and Korea.

In order to address these concerns Korean Air offered a set of undertakings in lieu of reference to a Phase 2 investigation. The CMA consulted on the undertakings offered and agreed the remedies package consisting of the following final undertakings:

- Korean Air is to enter into a framework agreement with Virgin Atlantic Airways (VAA) to facilitate VAA's entry onto the "Relevant Routes" (namely, air passenger services on the London-Seoul route and air cargo services between the EU and Korea). Under the agreement, Korean Air will also make sufficient slots available to VAA at Heathrow and Incheon airports to enable it to provide daily services; and
- should Virgin not enter the Relevant Routes by a target date or operate on these routes for a minimum period, Korean Air is to facilitate the entry of one or more alternative carriers onto these routes.

The CMA concluded that the final undertakings provided by Korean Air are "*appropriate to remedy, mitigate or prevent*" its concerns. The proposed transaction has already been approved in Türkiye, Taiwan, Thailand, Malaysia, Vietnam, Singapore, Korea (subject to remedies), Australia and China (for details on SAMR's conditional Phase 2 clearance, see a previous edition of the newsletter). Review is still pending in some other jurisdictions, including the EU.

SAMR ANNOUNCES PLANS TO ESTABLISH A MERGER REVIEW DATABASE TO VERIFY CASE-RELATED DATA AND INFORMATION

On 21 February 2023, the State Administration for Market Regulation (SAMR), China's competition authority, published an official announcement outlining its plans to develop a merger review data management system. The Competition Policy and Big Data Centre (CPBDC), an internal division of SAMR, has been tasked with delivering

the project, which will involve collecting and processing market data (including systematically retaining data previously submitted to SAMR) and market definitions data for key industries, verifying submitted merger-related data, archiving information regarding concluded merger control cases, and monitoring areas of competition risk.

In addition to these data processing and management activities, it is anticipated that the CPBDC will implement a searchable database and offer a hotline for responding to company queries. To support these services, the CPBDC will also strengthen its monitoring and analytical capabilities with regards to legislative and academic developments in international merger control.

While the database is under development, merging parties should expect potential delays to the review process in the short term. For example, we are seeing that SAMR has increased the scope and complexity of the market competition data requested from parties in recent months, which are currently slowing review timelines somewhat, but the implementation of the proposed data management system is ultimately expected to increase the speed with which SAMR can conduct reviews. For example, it would make it easier for SAMR to categorise cases as falling under either its simplified or complex review processes and reduce the need for duplicative work to verify parties' data. The database will also mean that parties will need to be particularly careful that data in submissions is consistent and accurate, as the new system will mean that SAMR will be able to easily check against previous submissions.

ANTITRUST

CMA ISSUES DRAFT GUIDANCE ON ENVIRONMENTAL SUSTAINABILITY AGREEMENTS

On 28 February 2023, the CMA published its draft Guidance on the application of UK antitrust law to environmental sustainability agreements, in particular, the prohibition on anti-competitive agreements under Chapter I of the Competition Act 1998.

The draft Guidance applies to:

- Environmental sustainability agreements: these focus on improving air or water quality, conserving biodiversity or promoting the sustainable use of raw materials, but exclude broader societal objectives such as improving working conditions; and
- Climate change agreements: these are agreements contributing towards the UK's binding climate change targets (typically by reducing greenhouse gases), which the CMA identifies as a subcategory of environmental sustainability agreements.

The draft Guidance provides details of environmental sustainability agreements which are unlikely to infringe the Chapter I prohibition and those which could infringe the Chapter I prohibition by giving rise to restrictions of competition by object or effect. It also elaborates on the four conditions for exempting environmental sustainability agreements that might otherwise restrict competition. These are:

- The agreement must contribute to certain benefits, namely improving production or distribution or contribute to promoting technical or economic progress;
- The agreement and any restrictions of competition within the agreement must be indispensable to the achievement of those benefits;
- Consumers must receive a fair share of the benefits and the benefits must be substantial and demonstrable; and
- The agreement must not eliminate competition.

The draft Guidance clarifies that - in addition to current benefits - future benefits are relevant to the assessment. It further clarifies that the CMA will take into account non-monetary benefits. In assessing whether "consumers" receive a fair share of the benefits of the agreement, generally this refers to the consumers of the products or services to which the agreement relates – essentially, those "within the market". However, the draft Guidance indicates that there may be circumstances where it would also be appropriate to take into account consumers in a "separate but related" market. As regards climate change agreements, the CMA adopts a more expansive approach to the term "consumers", taking into account the total benefits to all UK consumers arising from the agreement, rather than just those within the relevant market. The CMA justifies this more permissive application of the exemption to these agreements due to the scale of public concern surrounding climate change and the exceptional nature of the threat it poses.

The CMA said it will be operating an open-door policy whereby it invites businesses considering entering into an environmental sustainability agreement to approach the CMA for informal guidance. The consultation closes on 11 April 2023. The draft Guidance will also be the subject of a forthcoming client briefing.

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