SLAUGHTER AND MAY

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On 10 May 2017 the European Commission published the final report on its e-commerce sector inquiry. For a detailed analysis of the final report, please see our upcoming briefing on the topic.

Quick Links

European Commission accepts Amazon commitments on e-books parity clauses

On 4 May 2017 the European Commission issued a press release announcing its **decision** to make legally binding the commitments offered by Amazon to address competition concerns identified by the Commission in relation to certain clauses in Amazon's agreements with electronic book (e-book) publishers.

The Commission **initiated** formal antitrust proceedings on 11 June 2015 to examine a number of 'parity' or 'most favoured nation' clauses (MFNs) in certain of Amazon's agreements with e-book publishers, which grant Amazon the right to be informed by the relevant publisher of more favourable or alternative terms offered by the publisher to Amazon's competitors, and/or the right to be offered terms and conditions at least as good as those offered to Amazon's competitors. The Commission considered that Amazon's behaviour may violate EU antitrust rules prohibiting abuses of a dominant market position and restrictive business practices.

To address these competition concerns Amazon has offered, in respect of any e-book it distributes in the European Economic Area (EEA), not to enforce such clauses, and not to include them in any new contract, for a period of five years.

Background

This investigation has been carried out in a context of increasing Commission scrutiny of the digital sector. In the past several years the Commission has brought antitrust proceedings against a number of major technology firms such as Google, Qualcomm, Motorola and Samsung.

The e-book sector in particular has already been subject to Commission scrutiny. In December 2011 the Commission opened proceedings to investigate whether five international publishing houses and Apple had engaged in anti-competitive practices for the sale of e-books in Europe. These companies had jointly switched from a wholesale model to agency contracts which, the Commission found, contained similar key terms for retail prices across the different publishers, including an unusual retail price MFN, maximum retail prices and the same 30 per cent commission payable to Apple. The investigation

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

led to commitments being offered by **four of the publishers** in 2012 and by **the other** in 2013 (all of which were accepted by the Commission).

The Commission's attention subsequently shifted to Amazon, which is currently the largest distributor of e-books in Europe. The e-book market in Europe is a growing one, and is estimated by the Commission to be worth more than €1 billion.

Investigation and competition concerns

The Commission investigated whether certain contract terms in Amazon's distribution agreements with e-book publishers were in breach of EU and EEA rules prohibiting anti-competitive agreements and the abuse of dominant market positions.[1] On 9 December 2016 the Commission issued its preliminary assessment, that Amazon may be dominant in the markets for the retail distribution of English and German language e-books to consumers in the EEA, and that it may have abused any such dominant position. The Commission found a number of MFNs requiring e-book publishers and suppliers to inform Amazon about more favourable or alternative terms offered by the relevant publisher to Amazon's rivals, and requiring the publisher to offer Amazon similar terms and conditions, chiefly in relation to price, promotional arrangements and the range and features of available e-books.[2]

The Commission took the preliminary view that these clauses may amount to a breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU), as they could reduce the e-book suppliers' incentives to support and invest in new business models and reduce Amazon's competitors' ability to develop and differentiate their offerings through such business. They could also, the Commission believed, prevent differentiation and competition between e-book retailers and could hinder them from entering and expanding in the relevant markets. These clauses could therefore strengthen Amazon's potentially already dominant position and lead to higher prices and less choice for consumers.

Amazon disagreed with the Commission's assessment, arguing that the sale of e-books should be considered a separate market from printed books and other media, which it said were characterised by "fierce competition". Nevertheless, Amazon offered commitments to stop enforcing the clauses at issue, and to stop including them in future contracts.

In January 2017 the Commission market-tested the commitments, which were welcomed by most trade groups. In its final commitments, Amazon offered (i) not to enforce relevant clauses requiring publishers to inform and offer Amazon similar non-price and price-related terms and conditions as those offered to Amazon's competitors, (ii) to allow publishers to terminate contracts containing 'Discount Pool Provision' clauses,[3] and (iii) not to include any of these clauses in any new e-book agreement with a publisher. Amazon has offered to apply these commitments for a period of five years and to any e-book in any language that it distributes in the EEA.

The Commission was satisfied with the proposed commitments, which it described as a "timely, effective and comprehensive solution", and rendered the commitments legally binding in a decision adopted on 4 May 2017. If Amazon were to breach the commitments, the Commission could impose a fine of up to

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[1] Articles 101 of the Treaty on the Functioning of the European Union (TFEU) and Articles 53 and 54 of the EEA Agreement.

[2] The following parity clauses have been examined: 'Business Model Parity' clauses, 'Selection and Features Parity' clauses, 'Promotion Parity' clauses, 'Agency Price Parity' and 'Wholesale Price Parity' clauses, 'Discount Pool Provision' clauses and 'Notification Provision' clauses. The Commission has provided a full description of these in the **Market Test Notice**.

[3] These are clauses which link discount possibilities for e-books to the retail price of a given e-book on a competing sales platform.

10 per cent of Amazon's total annual turnover in the preceding business year, without having to find a violation of the EU competition rules.

Comment

This case has revealed a further sector of online commerce where MFNs have been found to raise competition concerns. MFNs have in recent years been at the centre of a series of competition investigations across the EU in relation to the online hotel booking sector. The Commission and 10 European national competition authorities (NCAs) have recently published a **report** on the effect of these clauses in agreements between hotels and online search platforms, in an attempt to address the divergence of views previously adopted at NCA level.[4] It is likely that MFNs will continue to be subject to close regulatory scrutiny, especially in growing and relatively transparent online markets characterised by the presence of large firms.

Other developments

Merger control

GE / Alstom provides insight on European Commission's innovation concerns

On 2 May 2017 the European Commission published the full text of its **decision** of September 2015 clearing General Electric (GE)'s acquisition of Alstom's energy businesses, subject to conditions, following an in-depth investigation.

The Commission was concerned that the proposed merger would eliminate one of GE's main global competitors, have negative effects on innovation and result in higher prices in the markets for the sale and servicing of 50 Hz heavy duty gas turbines (HDGT), a technology key to meeting climate change goals.

The Commission's investigation showed that Alstom had significant research and development (R&D) capabilities which made it a key competitor of GE in terms of R&D spend, R&D headcount, product pipeline, testing facilities and technological abilities. The Commission found that, post-transaction, GE would have "*likely eliminated most of Alstom's R&D capabilities related to HDGTs*", meaning that the merged entity would not go on to develop Alstom's advanced technology.[5] Furthermore the transaction would have "*reduced the overall incentives to invest significantly in innovation*".[6] Given the very high barriers to entry in the HDGT industry[7], this would have had long-term negative effects on prices and the choices available to customers in parts of the market for 50 Hz HDGTs.

The deal was eventually cleared on the condition that GE divested the technologically most advanced parts of Alstom's HDGTs business to its Italian competitor Ansaldo Energia. The assets to be divested included a large number of Alstom R&D engineers who will continue to develop the Alstom HDGT

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[4] See the Slaughter and May Competition Group's briefing: **Dealing with divergence - a new way forward following the online hotel bookings cases?**

[5] Para. 43, **Summary of Commission Decision of 8 September 2015** (Case M.7278 — General Electric/Alstom (Thermal Power — Renewable Power & Grid Business)).

[6] Para. 44, Ibid.

[7] At the time of the decision, the only other competitors in the global market were Siemens and Mitsubishi Hitachi Power Systems.

technology, two test facilities in Switzerland and existing upgrades and pipeline technology. The Commission held that the divestments would guarantee the continuation of Alstom's distinctive HDGT technology and give Ansaldo the resources and incentives to "*replicate Alstom as an important innovator*" and "*continue on Alstom's innovation path*".[8]

The decision serves as useful guidance on the factors that might lead the Commission to take issue with a merger from an innovation and technology point of view. It suggests that companies that invest large amounts in R&D, disproportionate to their market shares and overall resources, could be regarded as key innovators and might therefore attract careful examination from competition regulators. The decision indicates that the Commission may also consider the number of employees involved in a company's R&D, the sophistication of its testing facilities and whether it spends more on R&D than its competitors.

General competition

Digital Economy Bill receives Royal Assent

On 27 April 2017 the Digital Economy Bill received Royal Assent, becoming the **Digital Economy Act 2017**. The **Act's aims** include (i) ensuring broadband access for everyone, (ii) improving infrastructure, and (iii) enabling better public services. The Act creates a new broadband universal service obligation (USO) to be implemented by way of a universal service order to be made by the Secretary of State. This obligation must give UK households the legal right to request a fast broadband connection of at least 10 megabits per second.

The Office of Communications (Ofcom)'s regulatory powers have also been increased. Under the Act, the regulator's new powers include the power to:

(i) Specify requirements in relation to switching arrangements for end-users;

(ii) Require communications providers to compensate end-users for failure to meet a specified standard or obligation;

(iii) Prepare reports on electronic communications and networks matters. These powers supplement Ofcom's existing requirement to produce infrastructure reports every three years;

(iv) Carry out and publish comparative overviews of the quality and prices of public electronic communications services; and

(v) Subject to certain conditions, require a communications provider to publish information it holds, or to provide this information to Ofcom to publish it.

The standard of review for appeals against Ofcom decisions has also been changed. Rather than being determined "on the merits", the Competition Appeal Tribunal will be required to decide an appeal "*by applying the same principles as a court would apply on an application for judicial review*". This standard will also apply to the determination of price control issues by the Competition and Markets Authority.

[8] Paras. 60 and 64, Summary of Commission Decision of 8 September 2015 (Case M.7278 — General Electric/Alstom).

Hong Kong Competition Commission announces findings of its study into Hong Kong's auto-fuel market

On 4 May 2017 the Hong Kong Competition Commission (HKCC) released a **report** outlining the findings of its study into the auto-fuel market in Hong Kong. The HKCC's study commenced in April 2015 (before the Competition Ordinance took full effect) and was conducted in order to determine the state of competition in the market, and was partly triggered by news reports highlighting Hong Kong's petrol prices as some of the highest in the world.

The HKCC concluded that while the auto-fuel market's unique structure hinders high levels of competition and gives rise to perceptions that fuel prices in Hong Kong are expensive, it found no evidence of any anti-competitive behaviour. In other words, the fact that petrol prices in Hong Kong are high and consistent across oil companies is not conclusive of any anti-competitive conduct. The report identifies a number of underlying structural and behavioural characteristics which the HKCC believes to be hindering competition and which would likely have contributed to high auto-fuel prices in the territory. The report also makes recommendations, summarised in the HKCC **press release**, on how to address these issues with the aim of furthering competition in the market.

The Competition Ordinance does not give the HKCC any information-gathering powers to conduct market studies, which meant that the HKCC had to rely on the voluntary cooperation of the relevant stakeholders. This prevented the HKCC from doing an in-depth analysis of retail margins. For example, it was noted that information on profits, operating costs and sales discounts were lacking, but the HKCC maintained that it obtained enough information to preserve the integrity of the report. Within the report, the HKCC recommends that its investigative powers be expanded in the market study context to enable it to compel the production of materials.

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