SLAUGHTER AND MAY

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European Commission imposes interim measures on Broadcom

The European Commission has **imposed** interim measures on Broadcom in relation to exclusivity practices in TV and modem chipsets markets. The measures require Broadcom to stop applying certain provisions contained in agreements with six of its main customers. This is the first time in 18 years that the Commission has imposed interim measures in an antitrust investigation, and the first time it has done so since the interim measures provision under **Council Regulation No 1/2003 of 16 December 2002** came into force in 2004.

Background

Broadcom is the world leader in the supply of chipsets for TV set-top boxes, smartphones and Wi-Fi modems, including so-called systems-on-a-chip which combine electronic circuits of various components in a single unit and constitute the 'brain' of a set-top box or modem.

In the second half of 2018 the Commission received information about Broadcom's alleged exclusionary practices. On 26 June 2019 the Commission **announced** that it had opened formal proceedings to investigate whether Broadcom had breached Article 102 of the Treaty on the Functioning of the European Union (TFEU) by implementing a range of exclusionary practices. These practices included setting exclusive purchasing obligations, granting rebates or other advantages conditioned on exclusivity or minimum purchase requirements, product bundling, pursuing "abusive IP-related strategies" and deliberately degrading interoperability between Broadcom products and other products.

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

In parallel to opening formal proceedings, the Commission issued a statement of objections setting out its preliminary conclusions that (i) Broadcom is likely to hold a dominant position in various markets for the supply of systems-on-a-chip for TV set-top boxes and modems, (ii) there may be exclusivity agreements in place, whose provisions affect competition and stifle innovation in the markets concerned, and (iii) an interim measures decision may be *"indispensable to ensure the effectiveness of any final decision taken by the Commission at a later date"*. On 16 October the Commission published its decision to impose interim measures on Broadcom.

The Commission's decision

The Commission has concluded that interim measures are warranted to prevent *"serious and irreparable damage"* to competition in certain markets for systems-on-a-chip for TV set-top boxes and modems as a result of Broadcom's conduct.

The decision finds that Broadcom is, at first sight, dominant in three different markets (namely, systems-on-a-chip for (i) TV set top boxes, (ii) fibre modems and (iii) xDSL modems) and has breached EU competition rules by abusing its dominant position. In particular, Broadcom has entered into agreements with six manufacturers of TV set-top boxes and modems, which include the following anticompetitive provisions:

- clauses containing exclusive or quasi-exclusive purchasing obligations and commercial advantages, such as rebates and other non-price related advantages that are conditional on the customer buying systems-on-a-chip for TV set top boxes, fibre modems and xDSL modems exclusively or quasi-exclusively from Broadcom; and
- clauses granting customers in these markets commercial advantages conditional on the customer buying systems-on-a-chip for cable modems exclusively or quasi-exclusively from Broadcom.

In order *"to ensure the effectiveness of the Commission's competition law enforcement powers and of any final decision on the legality of Broadcom's conduct"*, the Commission has ordered Broadcom to stop applying the anticompetitive provisions in question. It must also refrain from agreeing to the same or similar provisions in other agreements with these customers, and refrain from implementing retaliatory practices having an equivalent object or effect.

Broadcom must comply with these measures within 30 days of the Commission's decision. The interim measures apply until the earlier of three years or the date of adoption of a final decision on the substance of Broadcom's conduct or the closure of the Commission's investigation.

Reaction to the Commission's decision

Broadcom reportedly intends to appeal the decision but will, in the meantime, comply with the interim measures order. Referring to the contract provisions identified by the Commission, Broadcom stated that it does *"not believe that these provisions have a meaningful effect on whether the customers choose to purchase Broadcom products"*.

The imposition of interim measures by the Commission during an antitrust investigation is a rarity, with Commissioner Margrethe Vestager calling it *"a special occasion"* at a press conference in Brussels. The Commission last imposed interim measures in 2001 on Intercontinental Marketing Services Health, in the context of its refusal to licence the use of its copyrighted data collection system to its competitors in Germany. The Commission ultimately withdrew the order in 2003 following a ruling from the European Court of Justice (CJ) that there was no longer proven urgency requiring an interim measures order.

In December 2018 national competition authorities urged the Commission to make more use of its powers to impose interim measures as part of the submissions made to the Commission regarding competition issues in the digital economy. In March 2019 the **Furman report**, also suggested that interim measures would bolster antitrust enforcement in an increasingly digital and global world.

Whether this decision signals a greater use of interim measures in future antitrust cases remains to be seen. In a statement on the decision, Vestager indicated that this could be the case, stating *"interim measures are one way to tackle the challenge of enforcing our competition rules in a fast and effective manner. (…) Whenever necessary, I am therefore committed to making the best possible use of this important tool"*.

Other developments

Antitrust

Court of Justice upholds General Court's dismissal of Alcogroup dawn raid appeal

In its judgment of 17 October 2019 the CJ upheld the European General Court's (GC) judgment to dismiss an appeal made by ethanol producer Alcogroup in relation to alleged breaches of its defence rights which took place during unannounced inspections ("dawn raids").

The Commission carried out dawn raids at Alcogroup's premises in October 2014 and April 2015. These related to suspected breaches of Article 101 of the TFEU in the biofuels market. In relation to the second inspection, Alcogroup argued that the Commission officials had wrongly included in its scope and viewed documents that had been prepared in the context of its defence following the first inspection, notwithstanding its request to the Commission at the beginning of the second inspection not to review such documents. Alcogroup subsequently asked the Commission to suspend its investigations in relation to the company. The Commission rejected this request by letter and Alcogroup lodged an action before the General Court seeking annulment of the second inspection decision and the Commission's letter.

The GC dismissed the action, concluding that the second inspection decision did not produce the legal effects alleged by Alcogroup, and that the letter sent by the Commission is not an act subject to appeal. The GC further clarified that the Commission, in its letter, does not rule on whether or not the documents in question are covered by the obligation of legal professional privilege but, at most, confirms to the applicant that the documents have not been read by the Commission.

Alcogroup appealed to the CJ on the basis that the GC had erred in law, and infringed the obligation to state reasons and the right to effective legal protection. The CJ dismissed the appeal in its entirety, holding that the GC correctly concluded that the Commission did not need to take special precautions to respect legal privilege when conducting a second raid. Moreover, Alcogroup had not identified any

concrete rule establishing a legal obligation for the Commission to include specific precautionary measures in the inspection decision relating to the protection of documents covered by legal privilege.

The CJ further stated that inspections must be challenged upon appeal against any final decision or through a liability claim against the Commission.

UK construction firms fined £36m for participation in pre-cast concrete cartel

The UK's Competitions and Markets Authority (CMA) on 23 October 2019 announced that it had issued fines totalling more than £36m on three construction firms for taking part in a Great Britain-wide cartel.

The CMA found that, for nearly 7 years, the companies fixed or coordinated prices in relation to certain concrete drainage products, shared the market by allocating customers, and exchanged competitively sensitive information. The illegal activity took place from July 2006 to March 2013 and involved meetings between senior executives of each firm, some of which the CMA recorded and used as evidence.

The CMA fined Northern Ireland-based FP McCann Ltd circa £25m for its part in the scheme. It imposed reduced fines of circa £7m and £4m on Stanton Bonna Concrete Ltd and CPM Group Ltd respectively as settling parties for admitting their involvement in the cartel, and the former for reporting the cartel to the CMA. The CMA decision does not confirm why Stanton benefited only from a reduction in its fine despite having "reported" the cartel to the CMA, but there have been suggestions elsewhere that the CMA had already started its investigation before Stanton came forward.

The CMA further noted that the products affected by the cartel are vital for large infrastructure projects, and that at the time of the infringement, the firms were the leading players in the market. CMA Chief Executive Andrea Coscelli, commented that the conduct was *"totally unacceptable as it cheats customers out of getting a good deal"*.

PRC Supreme People's Court issues final ruling on jurisdiction in Alibaba case

PRC's highest court published its final ruling on 9 October 2019 in the appeal brought by Alibaba that the Beijing courts have no jurisdiction over its alleged abuse of dominance, in a case that was initiated in the court by a complaint brought by rival JD.com and a service provider to the website. The current jurisdictional challenge was filed by Alibaba after the Beijing Higher People's Court (Beijing HPC) ruled against it in 2017.

The complaint concerned various measures which JD.com alleged to have restricted competition in the PRC market for business-to-customer e-retailing platforms and allegedly harmed the legitimate interests of the complainants, other businesses and consumers. Such measures include exclusive agreements with businesses which obliged them to operate exclusively on Alibaba's online platforms and prohibited them from participating in events or promotions launched by the complainants. The complainants alleged that

Alibaba's actions amounted to abuse of dominance and sought the Beijing HPC to order, inter alia, payment of damages of RMB 1 billion (approximately £110 million).

Alibaba subsequently challenged the Beijing HPC's jurisdiction and asked for the case to be transferred to the Zhejiang courts as Alibaba is not resident in Beijing, and Beijing is neither the place of implementation nor the place affected by the effects of the measures in question.

The challenge was dismissed by the Beijing HPC, emphasising the legislative purpose of the PRC Anti-Monopoly Law is to prevent and prohibit abuse of dominance. Given the nature of e-trading platforms, the impact on competition as a result of exclusive agreements is not confined to Alibaba's city of residence nor to the place of implementation. Thus, the Beijing HPC held that it has jurisdiction, considering that the alleged acts of abuse would impact free competition in Beijing.

This decision was reaffirmed by the Supreme People's Court (SPC) on appeal. Based on relevant news reports, the SPC found that Alibaba had entered into exclusive agreements with businesses in Beijing, and therefore upheld the ruling of the Beijing HPC. Alibaba further argued that this effects-based approach would generalise the courts' jurisdiction, but the SPC declined to comment.

This case is significant for establishing jurisdiction in antitrust cases in the e-commerce sector. As a result of this SPC ruling, it may now be easier for potential claimants to "forum shop" when bringing antitrust cases before the PRC courts.

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