SLAUGHTER AND MAY

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European Commission consults on commitments offered by Broadcom concerning TV set-top box and modem chipset markets

On 27 April 2020 the European Commission invited interested parties to comment on the commitments offered by Broadcom addressing the Commission findings that its practices in the markets for the supply of systems-on-a chip for TV set-top boxes and modems were anti-competitive.

Background

Broadcom is a leader in systems-on-a-chip, front-end chips, WiFi chipsets and components for head office/front-end equipment. On 26 June 2019 the Commission opened a **formal investigation** into Broadcom's allegedly exclusionary practices in these markets, including: (i) exclusive purchasing obligations; (ii) rebates and other advantages conditioned on exclusivity or minimum purchase requirements; (iii) product bundling; (iv) abusive IP-related strategies; and (v) deliberate degradation of interoperability of Broadcom products with other products.

On the same day the Commission issued a **Statement of Objections** against Broadcom, setting out the preliminary conclusions of its investigation and seeking to impose interim measures. It found that:

- Broadcom was likely to hold a dominant position in markets for the supply of systems-on-a chip for TV set-top boxes and modems;
- Agreements between Broadcom and its main customers contained exclusivity provisions that could result in those customers purchasing systems-on-a-chip, front-end chips and WiFi chipsets exclusively or almost exclusively from Broadcom; and
- The provisions in those agreements could affect competition and stifle innovation, harming consumers in those markets.

On 16 October 2019 the Commission published its **decision** concluding that interim measures were warranted to prevent Broadcom's conduct from affecting future tenders and preventing other chipset suppliers from effectively competing. The Commission ordered the following interim measures against

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Broadcom: to unilaterally cease applying these anticompetitive provisions and inform its customers to this effect, and to refrain from agreeing the same or equivalent provisions with its customers (including punishing or retaliatory practices).[1]

On 23 December 2019 Broadcom **appealed** the Commission's interim measures decision before the European General Court, seeking an annulment. Broadcom argued, amongst other things, that the Commission erred in finding that the interim measures were urgently needed to address a risk of serious and irreparable damage to competition on any of the relevant markets at issue resulting from, amongst other things, *"the Commission's introduction of an unknown urgency concept which is only justified by the slow pace of its own proceedings contradicting the measures' inherently exceptional character"*.

The commitments offered

On 1 April 2020 Broadcom proposed **commitments** in response to the Commission's concerns at worldwide (excluding China) and EEA levels.

Broadcom committed:

- Not to require or induce, through certain kinds of advantages, original equipment manufacturers to obtain more than fifty per cent of their requirements for systems-on-a-chip for TV set top boxes, xDSL modems and fibre modems from Broadcom;
- Not to condition the supply or granting of advantages for systems-on-a-chip for TV set top boxes, xDSL modems and fibre modems on original equipment manufacturers obtaining more than fifty per cent of their requirements from Broadcom, for these products or any other products within the scope of the Statement of Objections or interim measures decision of 16 October 2019. These products are systems-on-a-chip for cable modems; front end chips for TV set-top boxes and modems; and/or WiFi chips for TV set-top boxes and modems; and
- Not to take any action to circumvent the above commitments.

Broadcom would report to the Commission within two weeks of their implementation, and subsequently on an annual basis. The scope of these commitments appears to go beyond what the Commission had ordered in its interim measures. The commitments have been offered for a duration of five years and were offered on a worldwide, rather than just EU, basis.

Broadcom has said in a **statement** to Reuters that *"In these uncertain times, we welcome the opportunity to avoid protracted litigation and to resolve the investigation without recognition of liability or the imposition of a fine"*. Although it disagrees with the Commission's Statement of Objections and interim measures decision, Broadcom offers these commitments on the *"understanding that the Commission will adopt a decision pursuant to Article 9 of Council Regulation (EC) 1/2003 making the Commitments binding, concluding that there are no grounds for further action against Broadcom and its subsidiaries, and closing the Investigation"* against Broadcom.

[1] For further information on this decision, see this **previous edition of our Newsletter**.

The proposed commitments were published on 27 April 2020, the same day the Commission **announced** that it would be seeking interested parties' views on them. On 30 April 2020 the Commission published the **market test notice**, triggering the six week period for parties to submit feedback. In it, the Commission states that it intends to adopt a decision under Article 9(1) of **Council Regulation No 1/2003 of 16 December 2002** declaring Broadcom's commitments binding, subject to market testing.

Conclusion

While interim measures have been imposed by the Commission in the past,[2] Broadcom was the first case in which the Commission used its powers under Article 8(1) of **Council Regulation No 1/2003 of 16 December 2002**.

The Commission will determine whether Broadcom's proposed commitments go far enough in its consultation with interested parties.

Other developments

Merger control

CMA clears previously prohibited hospital merger

On 27 April 2020 the Competition and Markets Authority (CMA) announced its **decision** to clear the proposed merger between The Royal Bournemouth and Christchurch Hospitals NHS Foundation Trust and Poole Hospital Foundation Trust at Phase 1.

In 2013 a proposed merger between the two hospitals was **prohibited** by the CMA's predecessor, the Competition Commission, as it would give rise to a substantial lessening of competition in the Dorset area in respect of 19 elective inpatient services, 34 outpatient services, one non-elective inpatient service (maternity) and one private service (cardiology). The parties also entered into a **10-year commitment** that they would not merge without the prior written consent of the UK competition authority.

In its announcement, the CMA explained that, since the 2013 decision, there have been significant changes to NHS policy which have affected the role that competition plays in the provision of public healthcare services. Given the way the two hospitals trusts are now funded, it was found that collaboration, rather than competition is *"often viewed as a better way to meet increasing demands for care and deliver better value"*. Since the parties have limited incentive to compete with one another, it was concluded that there would be no significant loss of competition in the provision of NHS services in

[2] The Commission's power to impose interim measures stems from the judgment of the Court of Justice in Case 792/79 *R Camera Care Ltd v Commission of the European Communities*, of 17 January 1980. Since then, interim measures have been imposed in only nine cases, out of a total of 13 cases in which they were considered.

the east Dorset area as a result of the merger. The parties were also released from their earlier commitment not to merge.

The CMA has also confirmed that, with regard to potential future hospital mergers, it fully supports longer-term proposals to exempt mergers between NHS hospitals from CMA review, as set out in its March 2019 **response** to the Health and Social Care Committee.

Antitrust

The race to #1: Hong Kong updates its leniency policy

The Hong Kong Competition Commission (HKCC) published its revised leniency policy on 16 April 2020. This consists of an updated version of the leniency policy for **undertakings** and a newly formulated leniency policy for **individuals**. While the revised policy provides some welcome clarifications, notably removing the automatic need for an admission of liability, leniency applicants should be mindful of the uncertainties which remain in the new framework.

The HKCC will now distinguish between the first undertaking to reveal the existence of a previously unknown cartel (Type 1) and the first undertaking to provide "substantial assistance" after the HKCC has already launched an investigation into a suspected cartel (Type 2). Whilst the HKCC will not bring enforcement proceedings against successful leniency applicants in either case, the key difference between Type 1 and Type 2 is that there are no circumstances that would require a Type 1 applicant to admit liability. However, to allow initiation of prospective private follow-on actions, the HKCC may issue an infringement notice against Type 2 applicants, which would require the applicant to admit to violating the Competition Ordinance and thus bring the Type 2 leniency applicant squarely into any follow-on proceedings.

The HKCC has also published a new leniency policy for individuals. The first individual to disclose cartel conduct and cooperate with the HKCC, before any undertaking, can now seek leniency of his/her own volition and without consulting any other party (including his/her employer). The conditions for granting leniency to individuals mirror that for companies, which creates a significant burden on individuals, so in practice it may not be easy for an individual to benefit from the policy.

Both undertakings and individual applicants are disqualified from obtaining leniency where they have acted as a ringleader or coerced others to participate in the illegal conduct. The ringleader concept was removed from the European Commission's 2002 Leniency Notice, but remains in the US leniency policy. It will be interesting to see how this impacts incentives for cartelists to come forward if they know the ringleader is excluded from leniency in Hong Kong.

Decorator cartel members fined in Hong Kong's first antitrust penalty decision

On 29 April 2020 the Hong Kong Competition Tribunal (Tribunal) imposed its first pecuniary penalties in the decorators' cartel case, pursuant to its powers in the Competition Ordinance. The **decision** clarifies both the method of determining pecuniary penalties in Hong Kong and the extent to which the costs of the

Hong Kong Competition Commission (HKCC) are payable following the Tribunal's finding of a Competition Ordinance contravention.

In its decision, the Tribunal applied a four step methodological framework inspired by the EU and UK approaches to setting fines, as follows:

- **Step 1 - base amount calculation:** the Tribunal calculated a base amount based on the undertaking's sales related to the contravention in the relevant geographic area in Hong Kong, applied a 'gravity multiplier' of 24 per cent and multiplied that figure by one for a duration of five months for the cartel conduct;
- **Step 2 - adjustments for aggravating and mitigating circumstances**: the base amount was reduced for some respondents due to the fact that they had sub-licensed the works to third parties and thus were only minimally involved in the cartel. There were no aggravating factors in these cases;
- **Step 3 - Application of 10 per cent cap**: the statutory cap of 10 per cent of turnover in Hong Kong during the applicable financial year was applied. This resulted in a lower fine for 7 out of 10 respondents; and
- **Step 4 - Cooperation and inability to pay**: no reductions were held to be necessary for cooperation or inability to pay.

The respondents were also held liable for 80 per cent of the HKCC's costs (a reduction was granted given the novelty of the law considered and the fact that this was one of the first cases before the Tribunal). The Tribunal further held that this would be borne by the respondents in equal shares and taxed on a party and party basis. The HKCC's request for further payment of costs incurred during the investigation stage was denied due to a lack of evidence to support the HKCC's claims.

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