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QUICK LINKS

Competition Appeal Tribunal upholds CMA's decision to block Cérélia/Jus-Rol merger

Introduction

On 1 September 2023, the UK Competition Appeal Tribunal (CAT) delivered its judgment in Cérélia's appeal against the Competition and Markets Authority's (CMA) decision to block Cérélia's completed acquisition of Jus-Rol. The CAT unanimously dismissed each of the four grounds for appeal put forward by Cérélia, requiring the company to unwind the merger.

Background

On 31 January 2022, Cérélia acquired the Jus-Rol business of General Mills. Jus-Rol is the largest supplier of branded dough-to-bake products to grocery retailers in the United Kingdom, while Cérélia is the largest supplier of own-brand dough-to-bake products, making these items on behalf of some of the UK's largest grocery retailers. Since 2016, Cérélia had also manufactured the majority of Jus-Rol products in the UK.

In June 2022, the CMA launched an in-depth investigation into the completed acquisition, after an initial Phase 1 investigation identified possible competition concerns. The CMA issued its Phase 2 final report in January 2023.

In its final report, the CMA concluded that the merger resulted in a substantial lessening of competition in the UK market for the supply of dough-to-bake products to grocery retailers, which "*could leave UK retailers and shoppers facing higher prices and lower quality products*". In particular, the CMA's decision identified Cérélia and Jus-Rol as being linked horizontally (rather than just vertically) because both Cérélia and Jus-Rol supplied dough-to-bake products to retailers.

The CMA concluded that the only acceptable remedy was an asset divestment involving the sale of the entire Jus-Rol business to an independent buyer, in effect unwinding the merger. The CMA's decision was covered in more detail in a previous edition of this newsletter.

CAT judgment

Cérélia had appealed the CMA's decision on the following four judicial review grounds: (i) irrationality of the CMA's decision and investigation; (ii) disproportionality of the divestiture remedy; (iii) procedural unfairness of the investigation; and (iv) illegality of the CMA's extension of the Phase 2 statutory timetable.

Irrationality

On the substantive point of characterising the relationship between Cérélia and Jus-Rol, the CAT found that the CMA had acted rationally in finding horizontal links, and that the

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CMA had adequately considered the vertical aspects of the manufacturing relationship between Cérélia and Jus-Rol. The CAT dismissed the suggestion that the CMA had over-relied on the statements of retailers, noting that "*it is legitimate for the CMA to take serious account of the views of customers who would be affected by a merger*" and that the CMA had not misunderstood such views in reaching its decision.

Rejecting Cérélia's argument that the investigation was irrational, the CAT confirmed that "*the Tribunal will not intervene merely because it considers that further inquiries would have been desirable or sensible, but only if no reasonable authority could have been satisfied on the basis of the enquiries made*". As such, the CMA was found to have adapted its investigation to market developments and investigated evidence reasonably. In response to the suggestion that the CMA had misrepresented evidence, the CAT reaffirmed that CMA decisions are to be read in a "*generous, not a restrictive way*". Even if evidence had been misrepresented, the CAT concluded that it would not necessarily follow that the CMA's decision was flawed as a whole.

Disproportionality

On the disproportionality ground, the CAT specifically accepted the CMA's view that it was proportionate and not irrational for the remedy package to extend beyond Cérélia and Jus-Rol's overlapping products, given "*the risks to the effectiveness of the remedy or to the attractiveness of the divestment package to potential purchasers*". The CMA's dismissal of other possible remedies as effective measures was, according to the CAT, "*well within the margin of its appreciation and with reasonable foundation*".

Procedural unfairness

Cérélia argued, among other things, that the CMA had not given "*advance notice of its thinking in sufficient detail so as to enable Cérélia to know the case it needed to answer*", in particular by disclosing its theory of harm in its provisional findings, published little more than 2 months before the Phase 2 decision.

The CAT rejected the argument of procedural unfairness, finding that the provisional findings restated, rather than introduced, the case against Cérélia. The CMA's argument that the further consultation was conducted fairly was accepted, and the CAT noted that, with respect to evidence gathering, "*the Tribunal would need to be shown a strong case that the CMA drew the line in the wrong place*". Whether the CMA had unreasonably refused Cérélia's disclosure requests was held to be a matter of whether the CMA had provided an "*adequate gist*" on the issues adverse to Cérélia's interests on which the CMA proposed to base its decision. The CAT clarified that "*the CMA was not obliged during its investigation to disclose every piece of specified information it received*" and determined that the CMA's provisional findings and subsequent consultation paper had provided an adequate gist.

Illegality

Cérélia asserted that the reasons cited for the eight-week extension to the deadline to publish the CMA's final report were not "*special reasons*" for the purposes of the Enterprise Act 2002, and that the extension was therefore illegal.

The CAT was reluctant to give a special meaning to 'special reasons' and found that the term should generally amount to "*good, case-specific reasons*". The CAT noted that some of the CMA's stated reasons were either broad and generic or case-specific but vague and that, in the future, the CMA should do more to explain its position in cases involving extensions to the Phase 2 statutory timetable. Ultimately, however, the CAT found that the key issues of the case were continuing to be contested at a sufficiently late stage to justify the CMA's conclusion that it had special reasons for an extension.

Comment

The judgment confirms the largely deferential standard that the CAT will apply to its review of CMA merger prohibition decisions, in regard to the CMA's substantive assessment as well as procedural aspects of the CMA's investigations. The CAT was critical of the CMA's lack of reasoning in its notice extending the Phase 2

investigation timetable for "*special reasons*"; it remains to be seen whether the CMA will follow the CAT's suggestion that it should provide more case-specific reasons for its extensions in future decisions.

Cérélia had already given final undertakings to sell the Jus-Rol business but the process had been suspended pending the outcome of Cérélia's appeal. Following the CAT judgment, the CMA has stated that it expects Cérélia to commence the sale process, in effect unwinding the merger.

OTHER DEVELOPMENTS

MERGER CONTROL

European Commission accepts Article 22 referral requests in EEX/Nasdaq Power and Qualcomm/Autotalks

On 18 August 2023, the European Commission announced that it had accepted the requests of 15 EU Member States to assess the proposed acquisition of semiconductor company Autotalks by Qualcomm under Article 22 of the EU Merger Regulation (EUMR). Three days later, the Commission further announced that it had also accepted to review the proposed acquisition of Nasdaq's European power trading and clearing business, Nasdaq Power, by European Energy Exchange (EEX) under the same provision, this time with three Member States and one European Free Trade Association Member State having made the referral request.

Article 22 allows Member States to request that the Commission examines a concentration notwithstanding the fact that the concentration does not have an EU dimension (and so does not satisfy the turnover thresholds under the EUMR) if that concentration affects trade between Member States and threatens to significantly affect competition within the territory of the Member State(s) making the request (irrespective of whether the transaction is notifiable in the referring Member State). Prior to March 2021, the Commission discouraged Article 22 referral requests from Member States which themselves did not have national jurisdiction over the transaction at stake. However, on 26 March 2021, the Commission published guidance which reappraised Article 22 and encouraged Member States to make referrals in certain circumstances. For further details, see a previous edition of our newsletter.

After Illumina/Grail, the two proposed acquisitions mark the second and third occasions on which the Commission has accepted Article 22 referral requests in application of its 2021 Guidance. The Commission stated that an acquisition of Autotalks by Qualcomm would "*combine two of the main suppliers of V2X semiconductors in the EEA*" and raise entry barriers to an already concentrated vehicles-to-everything chips market. Similarly, in its press release, the Commission considered the proposed acquisition of Nasdaq Power by EEX to meet the criteria for referral under Article 22 on the basis that it "*appears to combine the only two providers of services facilitating the on-exchange trading and subsequent clearing of Nordic power contracts*". Given the wider turbulence in the energy markets, the Commission emphasised the importance of a "*strong and competitive trading and clearing ecosystem*" in the sector.

The acceptance of these two referral requests makes clear that the Commission is still prepared to assert jurisdiction under its new Article 22 policy, notwithstanding the appeal in Illumina/Grail which is currently pending before the European Court of Justice.

ANTITRUST

Amazon sued in China for abuse of European market dominance

The Guangzhou Intellectual Property Court (Court) has accepted a lawsuit filed by Guangzhou Mengbian Information Technology (Mengbian), a cross-border e-commerce company based in China, against Amazon Services Europe (Amazon) in relation to Amazon's abuse of market dominance in Europe, according to a press release published by the Court's WeChat account. This will be a landmark case as there appears to be limited nexus to China; the relevant e-commerce activity takes place in Europe and Amazon's alleged dominance is in Europe, yet the case is being heard by a Chinese court.

Mengbian claims that Amazon holds a dominant position in the e-commerce market in Europe and used its Business Solutions Agreement to close Mengbian's online shop and block its account without legitimate reasons.

Mengbian requested that Amazon unblock its account and make changes to its "buy box" function (which makes one seller more prominent to allow users to make their purchase quickly) and platform algorithms, so that Mengbian can freely choose its logistics service provider and compete with Amazon's own products fairly. Mengbian also demanded a refund of its account balance and compensation for the losses it had incurred.

The Court stated in its press release that its jurisdiction is based on Article 2 of the Anti-Monopoly Law, which states that the law applies to anti-competitive behaviour outside the People's Republic of China if it has an exclusionary or restrictive effect on competition in the domestic market. The Court also noted that Amazon may have a dominant position in a market related to e-commerce overseas, which may have a direct, substantive and significant impact on Mengbian's ability to compete in the domestic Chinese market.

GENERAL COMPETITION

European Commission designates six gatekeepers under the DMA

On 6 September 2023, the European Commission announced that it has designated Alphabet, Amazon, Apple, ByteDance, Meta and Microsoft as gatekeepers under the Digital Markets Act (DMA). In particular, the Commission has designated 22 core platform services provided by the six gatekeepers: Alphabet: Chrome, Google Ads, Google Android, Google Maps, Google Play, Google Search, Google Shopping, and YouTube; Amazon: Amazon Ads and Amazon Marketplace; Apple: App Store, Safari and iOS; ByteDance: Tiktok; Meta: Facebook, Instagram, WhatsApp, Messenger, Meta Ads and Meta Marketplace; and Microsoft: LinkedIn and Windows PC OS. The six companies now have until 6 March 2024 to ensure full compliance with their DMA obligations.

Samsung had also notified the Commission about its potential gatekeeper status in relation to the Samsung Internet Browser but eventually was not retained by the Commission as a gatekeeper. The Commission similarly acknowledged that Alphabet's Gmail and Microsoft's Outlook.com do not qualify as gateways. Didier Reynders (who on 5 September 2023 was temporarily appointed as the European Commissioner for Competition while incumbent Commissioner Margrethe Vestager campaigns for the position of President of the Management Committee of the European Investment Bank), commented that the DMA will create "*a level-playing field for all companies competing in the European digital market*" and bring about "*more contestability and openness*".

However, others have expressed concern that the reasoning behind gatekeeper designations can be opaque and unpredictable. Microsoft and Apple have both claimed that some of their core services (Bing, Edge and Microsoft Advertising; and iMessage, respectively), despite meeting the thresholds, do not qualify as gateways and the Commission has opened corresponding market investigations which it should complete no later than within five months. In addition, the Commission has opened a market investigation to further assess whether - despite not meeting the thresholds - Apple's iPadOS should be designated as gatekeeper. The DMA provides for a timeframe of up to 12 months for the Commission to complete its investigation.

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