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Advocate General Kokott proposes that European Court of Justice uphold Google Shopping fine

Introduction

On 11 January, Advocate General (AG) Kokott handed down her opinion that the European Court of Justice (CJ) should confirm Google's €2.4 billion fine for favouring its own comparison shopping service in its general search results.

Background

In June 2017, the European Commission announced its decision that Google had abused its dominant position in general online search services by favouring its own comparison shopping service over competing services, in breach of Article 102 TFEU. Specifically, the Commission found that Google had given prominent placement to its own comparison shopping service in its general search results, and applied algorithms which demoted rival comparison shopping services. This, according to the decision, significantly increased traffic to Google's comparison shopping service at the expense of competitors. The Commission set Google's fine at €2.42 billion.

Google's appeal to the European General Court (GC) was largely dismissed in November 2021 (as we reported in a previous blog post). Google appealed the GC's decision to the CJ, and AG Kokott handed down her opinion on 11 January 2024.

Advocate General Kokott's opinion

AG Kokott noted at the outset that the case raises legal questions of "*great legal and practical importance*". In particular, the case goes to the crux of when a difference in treatment of competitors by an allegedly dominant undertaking is abusive. It also raises questions regarding the application of the "as-efficient competitor" test – a test which looks at the capability of abusive conduct to foreclose a competitor which is as efficient as the dominant undertaking.

Difference in treatment of competitors

Part of Google's appeal related to the GC's failure to apply the *Bronner* criteria – the stringent legal test required to establish that a dominant undertaking has abused its position by refusing access to an "essential facility".

Rather than the *Bronner* criteria, AG Kokott considered the starting point in this case to be Article 102(c) TFEU, which deals with unequal treatment by dominant undertakings. While AG Kokott recognised that the defining example of such conduct in Article 102(c) refers to discrimination as between different trading partners or competitors of the dominant undertaking, she noted that Article 102(a)-(d) TFEU do not constitute an exhaustive list of abusive practices. Therefore, forms of unequal treatment which are similar to, and as harmful to competition as, the example in Article 102(c) may also be abusive.

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AG Kokott considered that the strict *Bronner* criteria should be limited to instances of refusal of access or refusal to supply. This, she considered, reflects the balance that needs to be "*struck between the fundamentally exclusive use of an (intellectual) property right and the contractual freedom enjoyed by the dominant undertaking, on the one hand, and the enablement or maintenance of competition, on the other*", and preserves investment and innovation incentives.

In AG Kokott's view, there is no need for such strict criteria in the context of an abuse such as unequal treatment through self-preferencing. She recalled in this respect that the CJ has already held that the *Bronner* criteria do not apply where an undertaking already grants access to its infrastructure but subjects such access to unreasonable conditions. In AG Kokott's view, Google's self-preferencing constitutes "*an independent form of abuse through the application of unreasonable conditions of access to competing comparison shopping services*".

Applicability of the as-efficient competitor test

AG Kokott agreed with the GC and the Commission that the Commission was under no obligation to apply the as-efficient competitor test when assessing the effects of Google's conduct. AG Kokott considered that the as-efficient competitor test is "*not generally applicable, let alone an essential prerequisite for determining whether the conduct of a* [dominant undertaking] *is in keeping with the means of competition on the merits.*" Rather, it is "*one of a number of means*" by which to assess whether a *price-related* practice is capable of producing exclusionary effects and, in her view, should not be extended to non-price practices (such as that at issue in the case). Moreover, in so far as the test is not applicable, AG Kokott does not consider that the Commission and GC can be compelled to consider arguments in connection with its use from the dominant undertaking.

Conclusion

AG Kokott recommended that the CJ dismiss Google's appeal in its entirety. It is important to note that AG Kokott's opinion is not binding on the CJ. Although the CJ follows AG opinions in the majority of cases, it remains to be seen how the CJ will decide this case.

OTHER DEVELOPMENTS

ANTITRUST

Court of Appeal holds that CMA has extra-territorial power to require documents and information

On 17 January 2024, the UK Court of Appeal confirmed that the UK Competition and Markets Authority (CMA) has the power to require overseas companies to produce documents and information when investigating suspected anti-competitive conduct.[1] The ruling overturned the Competition Appeal Tribunal (CAT) and High Court's single judgment of 8 February 2023 in BMW AG's appeal against a CMA decision (covered in a previous edition of our newsletter and this blog post). In that judgment the CAT and High Court had ruled that the CMA's decision to issue a Section 26 Competition Act notice and the decision to impose a penalty in respect of foreign-domiciled companies with no presence in the UK, in relation to the production of specified documents and information held by those companies outside the jurisdiction, was ultra vires Section 26.

In its unanimous judgment, the Court of Appeal held that Section 26 has extra-territorial effect. The Court stated that it found nothing in "*logic, policy, case law or legislative history*" to support the restrictive interpretation adopted by the CAT and High Court. It stated that if the CMA is denied the ability to exercise Section 26 extra-territorially, and is limited to exercising it only against legal entities physically connected to the UK, a gap in the effectiveness of the CMA to perform its statutory function would arise. It further reasoned that the CMA's ability to conduct competition investigations would be compromised were it unable to obtain information overseas,

[1] The Court of Appeal has not yet published its judgment. The linked judgment has been published by Brick Court Chambers.

creating a "*perverse incentive for conspirators to move offshore to organise cartels directed at harming the UK market*".

Hong Kong Competition Commission accepts commitments offered by online food delivery platforms

On 29 December 2023, the Hong Kong Competition Commission (HKCC) announced that it had accepted the commitments offered by Foodpanda and Deliveroo, the leading online food delivery platforms in Hong Kong.

The HKCC commenced its investigation in 2021 into certain requirements imposed by Foodpanda and Deliveroo on their partnering restaurants that may hinder entry and expansion by new or smaller platforms and/or soften competition in the market, potentially breaching the First Conduct Rule. In June 2023, the HKCC commenced its first consultation on the commitments offered by Foodpanda and Deliveroo (see our previous newsletter), followed by a second consultation in November 2023 on a revised set of proposed commitments by Deliveroo.

Under the commitments, Foodpanda and Deliveroo will, for a period of three years:

- Amend provisions to allow restaurants to partner with new entrants and/or small platforms (defined as platforms with a market share not exceeding 10%) without removing the commercial incentives (such as lower commission rates) that restaurants would otherwise be entitled to when they work exclusively with either Foodpanda or Deliveroo;
- Amend provisions to make it easier for restaurants to switch from working exclusively with either Foodpanda or Deliveroo to also partnering with other online food delivery platforms;
- Remove provisions that prevent restaurants from offering lower menu prices to consumers on their own direct channels and/or, in the case of Foodpanda only, on competing online platforms; and
- In the case of Foodpanda only, remove provisions that require restaurants which use Foodpanda's food delivery services to also use its order-to-pickup services.

Foodpanda and Deliveroo have offered to make the necessary amendments to existing agreements and communicate the changes to partner restaurants within 90 days of the commitments coming into force. The acceptance of the commitments marks the closure of the HKCC's investigation, and no proceedings will be brought in the Competition Tribunal against Foodpanda or Deliveroo regarding the matters covered by the commitments.

GENERAL COMPETITION

European Parliament publishes 2023 annual report on competition policy

At its plenary session on 16 January 2024, the European Parliament adopted the 2023 annual competition policy report. The report includes the following key topics:

- *Merger control*: The report notes that the buying out of start-ups by dominant companies might dry up innovation and eventually competition. The Members of European Parliament (MEPs) further stress the importance of the European Commission paying close attention to "killer acquisitions" in the digital sector. As regards the Commission's initiative to review the market definition notice, the report emphasises the need for a "*more dynamic approach*", especially for digital markets, as it is considered that European companies are sometimes deprived of the opportunity to effectively compete internationally due to too narrow a perspective.
- *Antitrust*: The report calls on the Commission to make better use of structural (interim) measures to stop harmful practices, particularly in digital markets. The Commission is asked to speed up antitrust procedures to avoid lengthy investigations, citing Spotify's 2019 complaint against Apple in respect of which no concrete action has yet been taken. The MEPs also called on the Commission to end the primacy of behavioural remedies in EU law and make better use of structural remedies as a matter of last resort.

- *Competition policy in the digital age*: The Parliament welcomes the designation of six gatekeepers for 22 core platform services under the Digital Markets Act (DMA), however a case was made for both the inclusion of cloud service providers as gatekeepers and designating Apple's iMessage as a core platform service under the DMA. The report also invites the Commission to assess the need for a market investigation on whether emerging technologies that do not currently fall under existing categories, such as generative AI, should be included under the DMA. The MEPs take the view that the Commission should be "*vigilant*" regarding cooperation agreements in the context of AI developments to ensure such cooperation agreements are "*not potentially hidden mergers or killer acquisitions*".

CMA publishes provisional approach to implementing the new Digital Markets competition regime

On 11 January 2024, the CMA published a policy paper setting out its provisional approach to implementing Part 1 of the Digital Markets, Competition and Consumers Bill (DMCC).

The paper provides an overview of the purpose of the new DMCC regime and focuses on the CMA's role and powers. It looks into the positive outcomes the CMA is seeking to achieve, as well as the types of harm it is seeking to prevent or address (including examples).

The CMA has provisionally identified 11 principles which will guide its approach to its new functions and powers. These include the following: to be targeted and proportionate; to address and prevent harms quickly and sustainably, primarily through competition; and to be participative, transparent and coherent with other regulations.

The paper also provides an insight into how the CMA will work with potential Strategic Market Status (SMS) firms and other stakeholders. The paper details the CMA's operational readiness for its role, indicating that it envisages having around 200 people working on its digital markets functions by commencement. As part of its indicative timeline, the CMA assumes that the Parliamentary process will likely conclude in Spring 2024, with the CMA taking up its new powers in Autumn 2024.

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