SLAUGHTER AND MAY/

NEWSLETTER

7 - 20 SEPTEMBER 2022

ISSUE 17

COMPETITION & REGULATORY NEWSLETTER

QUICK LINKS

General Court issues judgment in Google Android case

On 14 September 2022, the European General Court (GC) handed down its judgment in the Google Android case. The GC largely confirmed the European Commission's infringement decision, but reduced Google's fine from €4.343bn to €4.125bn and recognised some flaws both in the Commission's effects analysis and in its approach to Google's rights of defence.

BACKGROUND

On 18 July 2018, the Commission issued an infringement decision imposing a €4.343bn fine against Google in the Android case. The Commission found that Google had abused its dominant position by imposing certain restrictions in its contracts with manufacturers of Android mobile devices and mobile network operators. Google has since changed the terms of its contracts.

At the time, the Commission considered that Google had imposed three types of anti-competitive restrictions on manufacturers of Android phones (OEMs):

- restrictions in distribution agreements that required OEMs to pre-install both the Google Search app and the Google Chrome browser in order to be able to install Google's app store (Google Play) on their devices;
- restrictions in anti-fragmentation agreements that required OEMs to undertake not to sell phones using versions of the Android operating system (OS) not approved by Google, to be able to install the Google Search app and Google Play on their devices; and
- restrictions in revenue share agreements that required OEMs to undertake not to pre-install a competing search engine on a pre-defined portfolio of devices, in order to receive a share of Google's advertising revenue.

ISSUES ON APPEAL

Google appealed the Commission's decision on three key grounds:

- the Commission erred in its definition of the relevant markets by failing properly to take into account competition from non-licensable OSs, in particular Apple's iOS, and the competitive pressure resulting from the open-source nature of the Android licence. It had therefore erred in its subsequent assessment of Google's dominant position in those markets;
- the Commission was incorrect in finding that the restrictions outlined above were abusive; and
- Google's rights of defence had been infringed because its rights to access the file and to be heard had not been respected.

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

Square de Meeûs 40
1000 Brussels
Belgium
T: +32 (0)2 737 94 00

One Bunhill Row
London EC1Y 8YY
United Kingdom
T: +44 (0)20 7600 1200

GENERAL COURT JUDGMENT

DEFINITION OF RELEVANT MARKETS AND ASSESSMENT OF GOOGLE'S MARKET POSITION

The GC sided with the Commission's finding that non-licensable operating systems exclusively used by vertically-integrated developers, such as Apple's iOS, are not part of the same market as the market for the licensing of smart mobile device OSs, where Google operates. The GC also upheld the Commission's finding that Google had a dominant position in that market.

THE ABUSIVE NATURE OF THE RESTRICTIONS

On the distribution agreements, the GC sided with the Commission's analysis that pre-installation gave rise to a status quo bias as a result of users' tendency to use the search engine and web browser apps already pre-installed on their devices, rather than searching for and using new apps. The Commission was also entitled, according to the GC, to find that the restrictions relating to Google's anti-fragmentation agreements had led to the strengthening of Google's market position on the market for general search services and deterred innovation.

As regards the portfolio-based revenue share agreements, the GC agreed with the Commission that these should be analysed as exclusivity agreements. However, the GC identified various deficiencies in the Commission's analysis of the market coverage of the agreements and in its application of the 'as efficient competitor' test (AEC test). The GC concluded that the AEC test as applied by the Commission did not support the finding of abuse and upheld Google's plea.

GOOGLE'S RIGHTS OF DEFENCE

On Google's right of access to the file, the GC observed that the Commission had failed to discharge its obligation to draw up a proper record of some of its interviews with third parties. The GC considered, however, that it was not established that Google would have been better able to ensure its defence had there not been that failure, and so the GC did not annul the corresponding finding.

The GC also observed that the Commission had refused to grant Google a hearing on the AEC test, in circumstances where there were deficiencies in the Commission's application of that test. As Google was deprived of the opportunity to exercise its right to be heard, the GC annulled the corresponding finding as to the revenue share payments, meaning the finding was annulled on both procedural and substantive grounds.

CONCLUSION

While the Commission will largely see this judgment as a victory, the GC was critical of the Commission's 'effects' analysis and application of the AEC test for Google's portfolio-based revenue share agreements. The GC sent a clear message that the AEC test "*must be conducted rigorously*" and reaffirmed the high threshold the Commission must meet in exclusivity cases, consistent with its recent judgment in Qualcomm (as reported in a previous edition of this newsletter). The Commission was also reminded that its investigations and decisions must properly comply with procedural rules, or risk being annulled where the Commission has failed to observe an undertaking's rights of defence.

The judgment can be appealed to the European Court of Justice on points of law.

OTHER DEVELOPMENTS

MERGER CONTROL

EUROPEAN COMMISSION PROHIBITS ILLUMINA/GRAIL MERGER

On 6 September 2022, the European Commission announced that it has decided to prohibit the acquisition of GRAIL by Illumina, Inc.

Illumina, headquartered in the US, is a global genomics company, which develops, manufactures and commercialises next generation sequencing (NGS) systems. GRAIL is a healthcare company developing blood-based cancer tests based on genomic sequencing and data science tool. The Commission's decision follows the recent ruling in the US which dismissed the US Federal Trade Commission's challenge of the merger.

In September 2020 Illumina announced that it would acquire GRAIL. On 19 April 2021, the Commission accepted a referral request from the French Competition Authority to review the US/US biotech deal which did not fall for merger control review anywhere in the EEA. It did so after writing to the national competition authorities of the 27 EU Member States, inviting them to make a referral under the procedure set out in Article 22 of the EU Merger Regulation. (For further details on the referral, see our client briefing). On appeal, the General Court issued a judgment on 13 July 2022 in which it confirmed the Commission's jurisdiction to review the transaction.

The transaction was notified to the Commission on 16 June 2021 and on 22 July the Commission referred the transaction for a Phase II investigation citing concerns for competition and innovation in the market for cancer detection tests based on NGS technology. On 18 August 2021, Illumina announced that it had decided to complete its acquisition of GRAIL.

In its press release announcing the decision, the Commission acknowledged that "*there is still uncertainty about the exact results of th[e] innovation race (to develop and commercialise early cancer detection tests) and the future shape of the market for early cancer detection tests*". However, it concluded that Illumina would have had the ability and the incentive to engage in foreclosure strategies against GRAIL's competitors, which would have resulted in a detrimental effect on competition in developing and marketing NGS-based cancer detection tests in the EEA.

Illumina offered remedies to address the Commission's concerns, including a licence open to NGS suppliers to some of Illumina's NGS patents, a commitment to stop patent lawsuits in the US and Europe against the NGS supplier BGI Genomics (China) for three years, and a further commitment to conclude agreements with GRAIL's competitors under conditions set out in a standard contract, to ensure they would enjoy continued access to Illumina's NGS systems until 2033. However, the Commission found that the remedies offered by Illumina were insufficient to address its concerns. Illumina intends to appeal the Commission's decision.

CMA UNCONDITIONALLY CLEARS NORTONLIFELOCK/AVAST PHASE 2 MERGER

On 2 September 2022, the UK Competition and Markets Authority (CMA) announced that it has cleared the anticipated acquisition of Avast plc by NortonLifeLock, Inc. following a Phase 2 investigation. The anticipated merger was announced on 10 August 2021 and on 19 January 2022, the CMA announced the launch of its merger inquiry. NortonLifeLock and Avast both provide a broad consumer cyber security (CCS) solution offering to consumers in the UK, including a core endpoint security solution as well as other CCS solutions, such as online privacy (VPN) and identity protection.

In March 2022, the CMA referred the deal for an in-depth Phase 2 investigation after concluding in its Phase I investigation that the proposed transaction gave rise to a realistic prospect of a substantial lessening of competition in the UK. The CMA initially found that the parties are close competitors, and two of the three largest independent providers of endpoint security (antivirus) solutions in the UK by both revenue and volume. The CMA did not initially consider the competitive constraints provided by other CCS solution providers as sufficient to offset the loss of competition between parties resulting from the merger.

However, after its in-depth investigation, the CMA provisionally concluded in August 2022 that the merger may not be expected to result in a substantial lessening of competition as a result of horizontal unilateral effects in

the supply of CCS solutions in the UK. On 2 September 2022, the CMA upheld its provisional findings and unconditionally cleared the deal.

In its Phase 2 report, the CMA found that the supply of cyber safety software to consumers is rapidly evolving. It concluded that the merged entity would in fact face significant competition in the supply of CCS solutions. Such competition would principally come from McAfee, which was found to exert a strong competitive constraint on NortonLifeLock and Avast but also a range of other suppliers that currently have a smaller market position in the UK. The CMA also found that security applications offered by Microsoft are increasingly important alternatives for consumers. In particular, Microsoft – which holds a unique position as the owner of the Windows operating system for which the parties to the merger primarily supply CCS solutions to their customers - has recently improved its built-in bundled security application and, in addition, it has recently launched new applications such as Microsoft Defender for Individuals. The CMA has therefore found that through its established and new CCS applications, Microsoft exerts a material competitive constraint on the merging parties and this constraint is likely to strengthen going forward.

ANTITRUST

HONG KONG COMPETITION COMMISSION REVISES LENIENCY POLICY FOR INDIVIDUALS INVOLVED IN CARTEL CONDUCT

On 8 September 2022, the Hong Kong Competition Commission (HKCC) published a revised leniency policy for individuals involved in cartel conduct. The revised policy provides increased incentives for individual cartel participants to make a leniency application and clarifies the HKCC's position on a number of points.

The changes mean that it is now clear that the first individual to disclose their involvement in a cartel before the HKCC has begun its investigation, or the first individual to provide substantial assistance to the HKCC after it begins its investigation, may benefit from leniency.

Leniency is now also available to individuals who first report a cartel to the HKCC even if leniency has already been granted to an undertaking in the same case. This change aims to address the issue in the previous policy where individuals could not obtain leniency if an undertaking had already done so, meaning the HKCC could not benefit from the assistance an implicated individual may have been able to provide. This means individuals are now no longer under pressure to take action before an undertaking in the same case.

Employees of undertakings that have been granted leniency are generally already covered in the relevant undertaking's leniency agreement. This suggests that the revised policy is intended to incentivise employees of undertakings that have not applied for leniency to come forward, and thus increase the potential sources of evidence to strengthen the HKCC's case in cartel investigations.

London
T +44 (0)20 7600 1200
F +44 (0)20 7090 5000

Brussels
T +32 (0)2 737 94 00
F +32 (0)2 737 94 01

Hong Kong
T +852 2521 0551
F +852 2845 2125

Beijing
T +86 10 5965 0600
F +86 10 5965 0650