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Commission investigates Apple's App Store rules

On 28 February 2023 the Commission sent a Statement of Objections to Apple clarifying its concerns over the App Store rules for music streaming providers.

The Commission's preliminary view was that Apple abused its dominant position by imposing its own in-app purchase payment technology on music streaming app developers (IAP obligation), and restricting app developers' ability to inform iPhone and iPad users of alternative music subscription services (anti-steering obligations). The Commission no longer takes a position as to the legality of the IAP obligation but rather focuses on the contractual restrictions which it views as potentially resulting in unfair trading conditions.

The Commission is concerned that the anti-steering obligations prevent music streaming app developers from informing consumers about where and how to subscribe to streaming services at lower prices. It stated that these obligations are neither necessary nor proportionate for the provision of the App Store on iPhones and iPads, and are detrimental to users of music streaming services on Apple's mobile devices. The obligation would negatively affect the interests of music streaming app developers by limiting effective consumer choice.

ECJ clarifies costs of action for damages

On 16 February 2023 the European Court of Justice (ECJ) in the case *Tráficos Manuel Ferrer* clarified one further aspect of actions for damages for infringements of competition law.

In 2016 the Commission found that truck manufacturers had participated in a pricing cartel. Two small Spanish undertakings which had purchased trucks claimed damages against Daimler. Both, claimants and defendant, produced reports by experts. The Spanish Court referred questions to the ECJ about EU Directive 2014/104 which contains rules governing actions for damages under national law concerning competition law infringements.

The ECJ stated that the relevant information asymmetry between the parties does not have to be taken into account in the assessment of the possibility for a national court to estimate the harm caused. EU law does not preclude a national rule according to which, in the event that the claim is upheld in part,

costs are to be borne by each party. Consequently, if the party who has suffered harm is unsuccessful in part, it is reasonable for it to bear its own costs, as well as part of the common costs attributable to it, for example due to excessive claims or the manner in which the litigation was conducted.

Commission approves energy state aid

On 13 February 2023 the Commission approved the French measure providing EUR 2.08 billion aid to support the construction and the operation of a floating offshore wind farm which will help France meet its target of producing 33% of its energy needs from renewable sources by 2030.

On 7 February 2023 the Commission approved the Greek scheme of EUR 1.36 billion aid to partially compensate energy-intensive companies for higher electricity prices resulting from indirect emission costs under the EU Emission Trading System. It is aimed at reducing the risk of 'carbon leakage', where companies relocate their production to countries outside the EU with less ambitious climate policies.

On 12 January 2023 the Commission approved the Danish scheme of EUR 1.1 billion aid to support roll-out of carbon capture and storage technologies.

Commission clears telecom joint venture

On 10 February 2023 the Commission cleared the creation of a joint venture by Deutsche Telekom, Orange, Telefónica and Vodafone.

The joint venture will offer a platform to support brands and publishers' digital marketing and advertising activities in France, Germany, Italy, Spain and the UK. Subject to the user's consent, the joint venture will generate a unique digital code derived from the user's mobile or fixed network subscription.

The Commission found that the transaction would not significantly reduce competition in markets for the supply of digital identification services, supply of mobile telecommunications services, fixed internet access and audiovisual services and the supply of online advertising space. There

would be sufficient alternative input providers for the same purpose. The joint venture will not have the ability or incentive to exclude other advertisers and rival providers of mobile telecommunications services. The companies would not have the incentive to force TV broadcasters to subscribe to the digital identification services offered by the joint venture. Finally, the joint venture would not increase the risk of coordination between the four companies in view of the extensive activities that they will retain outside the joint venture.

ECJ rules on Unilever's exclusivity clauses in distribution contracts

On 19 January 2023 the ECJ set out rules for the implementation of the prohibition of abuse by a dominant undertaking whose distribution network is organised exclusively on a contractual basis and the burden of proof borne by the national competition authority.

In 2017 the Italian Competition and Markets Authority (AGCM) imposed a fine of EUR 60 million on Unilever because it had abused its dominant position on the market for the sale of individually packaged ice cream intended for consumption at various sales outlets. The abuse resulted from conduct materially committed by independent distributors of Unilever products who had imposed exclusivity clauses on the operators of those outlets. Hearing an appeal the Council of State of Italy referred questions to the ECJ.

The ECJ held that abusive conduct by distributors forming part of the distribution network of a producer in a dominant position, such as Unilever, may be imputed to that producer if it is established that that conduct was not adopted independently by its distributors, but forms part of a policy decided unilaterally by that producer. In order to determine abuse of a dominant position, the Court states that the balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out only after an analysis of the intrinsic capacity of that practice to exclude competitors that are at least as efficient as the undertaking in a dominant position. The 'as efficient competitor test' is only one of a number of methods. However, the submission of evidence by Unilever capable of demonstrating the inability to produce restrictive effects, gives rise to an obligation for a competition authority to examine that evidence.

ECJ clarifies rules on disclosure of evidence in proceedings for damages

On 12 January 2023 the ECJ ruled in the case *RegioJet* favorably regarding the disclosure of evidence for the purpose of proceedings for damages.

In 2012 the Czech competition authority initiated proceedings concerning the possible abuse of a dominant position by *České dráhy*, the national railway company, concerning its predatory pricing in the provision of rail passenger transport services. *RegioJet* offers rail services and brought an action for damages against *České dráhy* before Czech courts. The Czech Supreme Court raised questions about the interpretation of the EU Directive 2014/104 as regards the disclosure of evidence.

The ECJ decided that national courts may order the disclosure of documents related to an alleged infringement of competition law, even though the proceedings underlying that order, and which concern an action for damages in respect of the infringement at issue, have been suspended pending a decision by the European Commission. That court must, however, ensure that the disclosure of evidence is actually necessary and proportionate for the purpose of the action for damages. The ECJ held that the Czech legislation which prohibits a national court, while proceedings are ongoing before the national competition authority, from ordering not only the disclosure of information 'prepared' specifically for the proceedings of the competition authority, as provided for in the directive, but also of all information 'submitted' for that purpose, does not comply with that directive.

This publication is intended for general information only. On any specific matter, specialised legal counsel should be sought.

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