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Royal Mail plc v Office of Communications [2019] CAT 27: A Case of Incipient Predation Nipped in the Bud, or Justice Delayed being Justice Denied?

Facts and Background

The gradual liberalisation of telecoms and postal markets began in the early 1980s across the EU – with different states moving at different speeds. After a series of liberalising measures, postal services in the EU were fully liberalised in 2006.The Royal Mail has inherited the obligation to provide the universal postal service in the UK from its former position as the state-owned monopoly provider of mail services in the UK. Asa the incumbent monopoly supplier Royal Mail was required to offer competing postal operators access to its postal system at regulated prices.

In January 2014, Royal Mail announced that it would change the pricing for access to its final delivery service. TNT Post, now Whistl UK Limited ("**Whistl**"), had plans to set up its own final delivery service in order to compete with Royal Mail over an end-to-end bulk mail service. In particular, Whistl had carried out a trial of this service in Liverpool in April 2012 and launched a pilot in West London.[1]

Whistl filed a complaint with Ofcom stating that the proposed prices would make its end-to-end operations and future plans in relation to final delivery service uneconomic. At the time of Royal Mail's announcement, Whistl was "the largest access operator in the UK involved in the distribution of around…a quarter of all inland addressed mail volumes."[2]

In February 2014 Ofcom announced the launch of an investigation, which on 14 August 2018 led to a decision that Royal Mail had breached Article 102 **TFEU** and Chapter II **CA98** by abusing its dominant position. Royal Mail was fined £50 million.

Key findings in the decision were that the infringement period was at least the period from 10 January 2014, being the date on which the price notifications were issued, until at the earliest 21 February 2014, being the date on which they were suspended once Ofcom opened its investigation. This aspect of the case is very interesting; Ofcom's investigation was of a price announcement that was effectively in the market for a few weeks- and is authority for the proposition that the industry specific regulator with knowledge of the plans at the time and fulfilled its regulatory purpose – it took quick action that stopped the anticompetitive announcement in a very short timeframe. At this point those that support open and competitive markets should be cheering to the rafters- but the story is a little murkier as it unfolds.

Ofcom found the relevant market to be bulk mail delivery – including the onward sorting of bulk and large letters at inward mail centres and onward delivery to the final recipient being deliveries on the second day after collection or later. Royal Mail was found to hold a dominant position in the relevant market and to have abused its dominance through announcing prices designed to limit nascent competition from Whistl. A case, then, of an industry specific regulator moving swiftly to save the new entrant from harm and the process of competition being preserved to serve consumers well in the future?

On 12 October 2018, Royal Mail filed a Notice of Appeal in the Competition Appeal Tribunal ("**CAT**") against the Decision. The appeal was based on 7 grounds, including whether the Decision erred in law to find that an announcement of future pricing changes constituted the "application" of unlawful discriminatory pricing. And that the Decision erred in imposing a fine in light of the "novel and unforeseeable" application of Article 102(c) to prices which were never actually implemented.

[1] Judgment para 16.
[2] Judgment para 17

Following the hearing, the CAT rejected Royal Mail's appeal, allowing Ofcom's Decision to stand.

Nascent competition and Incipient predation "nipped in the bud"?

Royal Mail tried to argue incipient harm under Article 102 could not be restrained. Royal Mail suggested that Ofcom was taking a "novel approach" to Article 102, since the prices it had announced never actually entered the market. The CAT took a robust position when it held:

"*We were not referred to any authority in price-related abuse cases to the effect that an announced, but unapplied, price plan can be abusive. However, we do not find that this inevitably means that Article 102 cannot apply in the circumstances of this case. The absence of any discussion in the case law as to whether a price announcement can be an infringement of those laws is merely a reflection of the fact that the cases have so far concerned only situations where the dominant undertaking has plainly applied the relevant prices. No discussion of a hypothesis concerning the announcement of such prices was necessary or relevant."*

The CAT went back to first principles and looked at the caselaw of the European Courts. It found that the categories of abuse are not closed and, in view of the basic principles of Article 102, as articulated by the Court of Justice over many years, the absence of specific authority does not exclude the possibility that a dominant undertaking might abuse its position through the publication of intended prices that, had they been applied, would have been unlawful. It referred in particular to *Hoffmann-La Roche& Co AG v Commission of the European Communities*EU:C:1979:36 ("*Hoffmann-La Roche*") and Case C-457/10 *AstraZeneca AB and AstraZeneca plc v European Commission*EU:C:2012:770 ("*AstraZeneca*"). The CAT also emphasised that the Court of Justice in *MEO* specified the matters to be taken into account in determining whether the dominant undertaking's conduct – i.e. the operation of prices in the downstream market - is ***capable*** of producing a competitive disadvantage. Royal Mail argued that Joined Cases T-24,25,26,28/93 *Compagnie Maritime Belge,* EU:T:1996:139 ("*Compagnie Maritime Belge*"), and in particular paragraph 149, is authority for the proposition that the case law requires that allegedly abusive pricing practices must be actually implemented.

The Tribunal disagreed, finding that failure to actually exclude a competitor from the market is not enough to avoid the action being found to be abusive. The Tribunal also found that the announcements were not merely hypothetical acts or '*merely preparatory acts'*, as argued by Royal Mail. They comprised a formal, definitive and public step necessary for the adoption of specific and detailed price and other changes to the access letters contracts. They were intended to, and did, cause customers to make appropriate changes to their activities, contractual and trading arrangements and price schedules. The publication of the price changes were found to be abusive, and Ofcom was found to have been correct in making its decision in that regard.

The importance of evidence of strategic intention.

The EU and UK authorities are currently paying more attention to something well known to US authorities for decades: namely that it is impossible to run any large organisation without a strategy and that strategy has to be effectively communicated and implemented if it is to be of any value at all. Investigating evidence of strategy is thus an important starting point in any abuse of dominance case. In the CAT's findings it allowed evidence of intent and identified the strategic intent of Royal mail as something that is of central importance to the entire case. It stated that: "*Ofcom found that Royal Mail's conduct reflected a deliberate strategy to limit delivery competition from Whistl, its first and only significant competitor. This finding had important implications for the Decision as a whole. An intention to restrict competition does not establish an infringement of Article 102 but it profoundly affected Ofcom's assessment of the actions of Royal Mail, whose dominance in the relevant market was not disputed, and the effects of those actions. The existence or otherwise of*

a strategic intention to exclude competition affects our own consideration of all Royal Mail's grounds of appeal…."

The CAT reviewed pages and pages of evidence of the Royal Mail's strategic intent over time from witnesses and email and documentary evidence- as well as evidence of the Royal Mail's attempts at compliance with the help of external economic consultants at Oxera. It is clear from the decision that Royal Mail was very careful and deliberate in the steps taken. Ofcom was informed but declined to advise – leaving it to the Royal Mail to ensure that its proposed pricing was fully compliant with its obligations. Three points arise:

- The CAT went behind the actions taken into the reasons they were taken. It expressly flagged, for future cases that "***We do find it instructive to see what lay behind the pricing measures that Royal Mail finally announced***."

- It found that as a matter of law, "***The existence or otherwise of a strategic intention to exclude competitors is a very relevant factor in law in assessing the conduct of a dominant undertaking. Its possible existence must therefore be examined, even if it is not in itself determinative of abuse. In this case, however, Ofcom's view that such an intention existed was a key part of its approach to assessing competitive disadvantage and the methodology of assessment that was therefore required. We agree with this approach."***

- As a matter of credibility of the arguments in the case concerning the effect, or lack thereof, of its announcements, the contemporaneous evidence of intent undermined arguments that the announcements were unlikely to have had an effect on the markets concerned. Instead the CAT found that the contemporaneous documents indicated "***a serious attempt to put together a package of measures that would have some actual effect on Royal Mail's own position, not to mention the position of others. We see no reason to doubt that Royal Mail believed that its announced new prices would have some immediate effect on the market***."

So, the case is one that stands for supporting swift action by industry specific regulators- with a detailed examination of the evidence being important to the finding of abuse. But it raises the question that, if evidence of strategic intent is important – why wasn't it before the regulator? Also was it right for the regulator to stand back from advising on compliance – when asked by Royal Mail before the action was taken whether Ofcom had any observations Ofcom's response was to fold its arms and observe that Royal Mail had to ensure compliance with its obligations. Is this really good enough?

Novelty/Legal certainty

Royal Mail, tried to argue that the type of abuse in issue was novel. This argument is a common refuge of the dominant. The CAT found the formulation of the infringement by Ofcom to be clear and understandable. The CAT referenced the Court of Justice said in *AstraZeneca* where the Court said:

"…..those abuses….had the deliberate aim of keeping competitors out of the market…..even though [The European commission and the Courts]had not yet had the opportunity to rule specifically on conduct such as that which characterised the abuses, [AstraZeneca] was aware of the highly anticompetitive nature of its conduct and should have expected it to be incompatible with competition rules…" (Para 164)

Royal Mail argued that Astra Zeneca was different from its own conduct as Astra Zeneca involved dishonesty and deceit. The CAT observed, rather dryly, in the light of the evidence on strategic intent, that the Court in Astra Zeneca did not accept that there was a distinction that could be drawn

based on the issue of intent. The CAT then simply disagreed with the idea that the infringement was “novel”.

Conclusions

The CAT found that Royal Mail was well aware from contemporaneous emails of the likely effects of its actions. A question to ponder is whether, while the right decision may have been reached by Ofcom, abuse could have been entirely prevented had Ofcom asked for and received evidence of strategic intent? Given its importance it perhaps should have been obtained and acted on. More unfortunately, the CAT judgment was given five years after the infringing behaviour. Whistl has exited the bulk mail market. As with so many other competition enforcement cases, has the slow pace of the system meant that the wrongdoer has in many ways benefitted from its abusive actions?