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Game Over: Valve And PC Video Game Publishers Fined For "Geo-Blocking" Practices

On January 20, 2021, the Commission imposed fines totaling €7.8 million on Valve, the owner of the video gaming platform Steam, and five PC video game publishers[1] for breaching Article 101 TFEU. The Commission found that the companies prevented gamers from activating certain PC video games purchased from sellers in eight Central and Eastern European Member States, where prices are generally lower than in other Member States (so-called "geo-blocking").[2] This decision is a reminder of the Commission's strict stance on cross-border sales restrictions.

The unlawful practices

Steam is an online PC video gaming platform that allows consumers to directly download or stream video games. Gamers can also purchase video games elsewhere than through the Steam platform (*e.g.*, brick-and-mortar stores or third-party website downloads), which they can then play on Steam by using so-called activation keys.[3] Valve supplied such keys to the five video game publishers for use in their video games. At the publishers' request, Valve set up geographic restrictions to prevent consumers located outside the eight designated Central and Eastern European Member States[4] from activating the games purchased in these

[1] Brandai Namco, Capcom, Focus Home, Koch Media, and ZeniMax.

[2] Commission Press Release IP/21/170, "Antitrust: Commission fines Valve and five publishers of PC video games € 7.8 million for 'geo-blocking' practices," January 20, 2021 ("*Video Games*"), available at: www.ec.europa.eu/commission/presscorner/detail/en/IP_21_170. We reported on the Statement of Objections in our April 2019 EU Competition Law Newsletter.

[3] An activation key is a unique code that permits a consumer to activate and play a video game on an online platform.

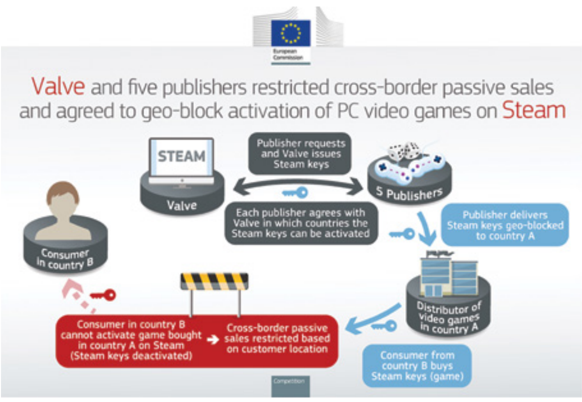
[4] Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia.

lower-price markets (in brick-and-mortar or online stores) and playing the games on Steam from another Member State. In return for the geo-blocked activation keys, the game publishers granted Valve a non-exclusive license to distribute their games globally through the Steam platform.

The Commission found that Valve and the five game publishers engaged in two types of practices that restricted cross-border (passive) sales in violation of Article 101 TFEU:

— Bilateral agreements and/or concerted practices between Valve and each of the five game publishers implemented by blocked activation keys, which prevented users from playing video games outside the eight designated countries; and

— Bilateral licensing and distribution agreements between four out of the five game publishers and some of their distributors (other than Valve), which contained clauses restricting the distributors from selling select video games on the basis of consumers' location.



Source: European Commission Press Release

These geo-blocking practices affected around 100 video games, which Valve claims is just about 3% of all games available on Steam. The Commission, however, concluded that the restrictions prevented consumers from buying cheaper games from brick-and-mortar stores and third-party websites located in other Member States, thereby denying consumers the benefits of the EU's Digital Single Market to shop around for the lowest prices.

The video game publishers each received a fine reduction of 10-15% for their cooperation with the investigation under the Commission's now well-established practice of rewarding cooperation in non-cartel cases. Valve, by contrast, was not granted a fine reduction because it refused to acknowledge the infringement—indicating that it may appeal the Commission's decision. This outcome reflects the Commission's continued willingness to provide fine reductions for cooperation in non-cartel cases when "companies are willing to acknowledge their liability for an infringement (including the facts and their legal qualification)."[5]

Interplay with copyright

Copyright law is, at least for the time being, inherently territorial in nature as companies are required to obtain licenses on a country-by-country basis to lawfully market copyright-protected content. As a result, copyright law confers a form of territorial exclusivity for license holders which sits uneasily with EU competition rules. Indeed, firms often attempt to justify cross-border sales restrictions by invoking intellectual property rights. In the present case, the game publishers may have sought to rely on their copyright over the video games to justify the geo-blocking practices.

Video Games signals the Commission's strict approach to resolving the tension between copyright and competition—specifically that copyright holders may not use their rights to restrict passive sales and, in the Commission's view, artificially partition the EU's Single Market. The approach in *Video Games* seems consistent with the Commission's preliminary conclusions in *Pay-TV* that cross-border passive sales restrictions in licensing agreements between a TV broadcaster and several Hollywood film studios conferred absolute territorial protection to the licensees,

[5] *See*, Commission Fact Sheet, Cooperation – FAQ, available at: www.ec.europa.eu/competition/publications/data/factsheet_guess.pdf.

and thus amounted to a by-object restriction.[6] A similarly tough stance was also taken by the Court of Justice in *Premier League*, a case that involved licensing agreements restricting cross-border provision of broadcasting services. The Court of Justice held that agreements aimed at "partitioning national markets according to national borders or make the interpenetration of national markets more difficult" infringe Article 101(1) TFEU by object.[7]

As the *Video Games* press release does not provide any details of the Commission's legal analysis, it remains to be seen how the Commission tackles copyright-based justifications for cross-border passive sales restrictions, especially since Valve has argued that the elimination of geo-blocking will ultimately harm consumers by prompting publishers to increase prices in "less affluent regions" to thwart price arbitrage.[8] In practice, *Video Games*, however, signals that, in the Commission's view, any passive sales restrictions related to copyrighted content are likely to be considered a by-object restriction and unlikely to be exempted under Article 101(3) TFEU because practices conferring absolute territorial protection generally go beyond what is necessary to protect copyrights.[9]

Broader context

Video Games is the latest Commission decision stemming from the concerns identified in the Final Report on the e-commerce sector inquiry.[10] The e-commerce inquiry has already resulted in a number of infringement decisions, including *Pioneer*, *Guess*, *Nike*, *Sanrio*, and *Meliá*—all of which concerned practices restricting cross-border sales.[11]

The inquiry was also followed by the enactment of the Geo-Blocking Regulation in 2018, which prohibits geography-based restrictions that undermine online shopping and cross-border sales.[12] While the Geo-Blocking Regulation covers both offline and online sales of goods and services, it currently does not apply to audio-visual services (*e.g.*, streaming and downloading of movies) and copyright-protected content that is supplied digitally (*e.g.*, music and online games).[13] This, however, does not prevent the Commission from investigating geo-blocking practices relating to copyrighted content sold online through its antitrust powers. In that sense, *Video Games* complements the Geo-Blocking Regulation.

6 *Cross-border access to pay-TV* (Case COMP AT.40023), Commission decision of March 7, 2019, paras. 75–76. The Commission did not adopt an infringement decision in this case and the commitments offered by one of the film studios were subsequently annulled by the Court of Justice for breaching the principle of proportionality. *See*, our Alert Memorandum "ECJ Annuls Paramount Commitments On Cross-Border Pay-TV Restrictions," published January 4, 2021.

7 Joined cases *Football Association Premier League Ltd and Others v. QC Leisure and Others* (Case C-403/08) and *Karen Murphy v. Media Protection Services Ltd* (Case C-429/08) EU:C:2011:631, para. 139.

8 *See*, "Valve responds to European Commission's demands regarding geo-locking," April 5, 2019, available at: https://steamdb.info/blog/steam-geo-locking-europe/.

9 *See*, *Groupe Canal + v. Commission* (Case T-873/16) EU:T:2018:904, para. 68.

10 Report from the Commission to the Council and the European Parliament, Final Report on the E-commerce Sector Inquiry, COM/2017/0229 final of May 10, 2017, available at: www.eur-lex.europa.eu/legal-content/EN/ALL/?uri=COM:2017:0229:FIN.

11 *See*, our analysis of these cases in the December 2018, March 2019, July 2019, and February 2020 editions of our EU Competition Law Newsletter.

12 Regulation (EU) No. 2018/302 of the European Parliament and of the Council of February 28, 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No. 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ 2018 L 60/1.

13 The Commission has recently announced its plans to potentially expand the scope of the Geo-Blocking Regulation to include copyright-protected content supplied digitally. *See*, "Commission publishes its short-term review of the Geo-blocking Regulation," November 30, 2020, available at: www.ec.europa.eu/digital-single-market/en/news/commission-publishes-its-short-term-review-geo-blocking-regulation.

One-Size-Fits-All: The Ethylene Decision Confirms The Commission's Practice To Apply A 10% Fine Uplift To Purchaser Cartels

On January 22, 2021, the Commission published the non-confidential version of its July 2020 settlement decision, fining three purchasers of ethylene[14] a total of €260 million for infringing Article 101 TFEU.[15] The case is only the second purchaser cartel sanctioned by the Commission under the 2006 Fining Guidelines, after its *Car battery recycling* decision.[16]

Background

The conduct at issue took place on the market for purchasing ethylene. To alleviate the risks from price volatility, ethylene supply agreements use a pricing formula, which often includes the industry benchmark as one of the pricing elements. This benchmark is set each month based on bilateral negotiations between ethylene purchasers and suppliers. The Commission found that the purchasers colluded in an attempt to lower this price benchmark, and by consequence the price they pay for ethylene. Specifically, the conduct consisted of two practices: (i) exchanging sensitive pricing-related information (*e.g.*, oil and naphtha prices, level of ethylene supplies, *etc.*); and (ii) coordinating negotiations on an element of pricing *vis-à-vis* ethylene suppliers (*e.g.*, price targets for benchmark negotiations, offers received by suppliers, *etc.*). The Commission found this conduct to constitute an infringement by object.[17]

Fine uplift for purchaser cartels and recidivism

In setting the fines, the Commission found that the value of sales—usually used as a starting point for the fine calculation—did not reflect the gravity and nature of the infringement, because the cartel concerned purchases and not sales. The Commission explained that "the more successful a sales cartel is, the higher the value of sales and thus the amount of the fine."[18] The inverse is true for purchaser cartels: "[t]he more successful the cartel members were in reducing the purchase price, the lower the value of purchases on which the fine is calculated would be."[19]

As a result, the Commission chose to depart from its Fining Guidelines[20] just as it had done in the previous *Car battery recycling* case and applied a 10% uplift to the basic amount of each party's fine without specifying how it arrived at the 10% figure or suggesting that the purchasers had, in fact, been successful in depressing ethylene prices by 10%.

The *Ethylene* decision confirms the Commission's practice to add a 10% uplift to the basic amount of the fines in purchaser cartels to avoid under-deterrence, first introduced in *Car battery recycling.*[21] This earlier Commission decision was upheld by the General Court in its *Recylex* and *Campine* judgments.[22] In these judgments, the General Court confirmed that the Commission

[14] The fourth participant escaped a fine on account of its successful immunity application.

[15] *Ethylene* (Case COMP/AT.40410), Commission decision of July 14, 2020.

[16] *Car battery recycling* (Case COMP/AT.40018), Commission decision of February 8, 2017.

[17] *Ethylene*, para. 71.

[18] *Ethylene*, para. 142.

[19] *Ethylene*, para. 143.

[20] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation (EC) No. 1/2003, OJ 2006 C 210/2, para. 37.

[21] *Car battery recycling*, para. 364.

[22] *Recylex v. Commission*, (Case T-222/17), EU:T:2019:356, as reported in our May 2019 EU Competition Law Newsletter; *see also*, *Campine and Campine Recycling v. Commission*, (Case T-240/17) EU:T:2019:778, as reported in our November 2019 EU Competition Law Newsletter.

did not need to establish that the cartel did in fact depress the value of purchases, since the conduct amounted to a by-object infringement, for which the Commission does not need to prove effects.[23] In other words, the mere aim of the cartel to reduce the purchase price was enough to support the uplift; there was no need for the Commission to further justify the uplift.

In *Campine*, the General Court deferred to the Commission's broad discretion and did not require it to justify the exact level of the uplift either. Instead, the General Court satisfied itself with the explanation in the *Car battery recycling* decision that "the percentage of 10% is justified by the fact that this is the first time the Commission has imposed an increase in a case concerning a purchaser cartel."[24] This suggests that the Commission will be under greater scrutiny to provide detailed reasoning justifying the level of the uplift in subsequent purchaser-cartel decisions. Yet the *Ethylene* decision provides little explanation as to why the level of the uplift was set at exactly 10%. This "mechanical application" of a 10% uplift will be litigated before the General Court as part of Clariant's appeal against the decision.[25]

Ethylene is one of the rare instances in which a party settling with the Commission has appealed the resulting settlement decision. To date, *Printeos* is the only successful appeal against a settlement decision.[26] In its 2016 judgment, the General Court found that the fine imposed on Printeos was vitiated by the Commission's failure to state adequate reasons. In 2018, the Commission re-adopted the decision and imposed the same fine on Printeos with a more substantiated reasoning. Printeos' appeal concerned the Commission's failure to comply with an essential procedural requirement, rather than challenging the Commission's substantive findings. Clariant's appeal against the *Ethylene* decision is on two issues that were discussed (and likely agreed) in the settlement process, which raises the question whether such an appeal is even appropriate under the settlement rules.

Clariant's appeal also challenges the 50% uplift that the Commission applied to the basic amount of Clariant's fine on account of its previous involvement in the *Monochloroacetic acid* cartel.[27] The Commission considered the *Ethylene* purchaser cartel "sufficiently similar" to the *Monochloroacetic acid* supplier cartel, because they both concern infringements of Article 101 TFEU.[28] *Ethylene* is thus the first Commission decision explicitly stating that purchaser cartels are considered "similar" to classic supplier cartels, at least for the purposes of assessing recidivism. This finding will be litigated before the General Court.

Implications

The *Ethylene* decision further cements the Commission's approach to making the 10% uplift a standardised practice in purchaser cartel decisions. This transpires from the lack of any analysis in the decision as to whether the unlawful conduct had actually depressed the value of purchases and, if so, by how much. Clariant's appeal presents an opportunity for the General Court to revisit its *Recylex* and *Campine* judgments and re-assess the Commission's one-size-fits-all fine uplift for purchaser cartels.

23 *Recylex*, para. 127; *Campine*, para. 345.

24 *Campine*, para. 347.

25 Action brought on September 25, 2020, *Clariant and Clariant International v. Commission* (Case T-590/20), OJ 2020 C 399/42.

26 *See*, *Printeos and Others v. Commission* (Case T-95/15) EU:T:2016:722, where the General Court found that the Commission failed to state adequate reasons (as Clariant argues in the *Ethylene* appeal) and annulled the fine. Another such appeal was lodged and later withdrawn by Société Générale against *Euro Interest Rate Derivatives* (Case COMP/AT.39914), Commission decision of February 7, 2016. Société Générale withdrew its appeal following the Commission's adoption of an amendment decision unilaterally reducing Société Générale's fine.

27 Clariant was indirectly involved in the *Monochloroacetic acid* cartel (*i.e.*, as a parent company of one of the direct participants in the infringement). The infringement was a supplier cartel consisting of two practices: (i) the exchange of pricing information; and (ii) the allocation of volumes and customers. *See*, *MCAA* (Case COMP/AT.37773), Commission decision of January 19, 2005, paras. 84–92.

28 *Ethylene*, para. 138, third bullet point. This approach seems consistent with the General Court's 2007 judgment in *BASF AG and UCB SA v. Commission* (Joined Cases T-101/05 and T-111/05) EU:T:2007:380, para. 64.

The Commission's Initiative On Shielding Collective Bargaining From Antitrust Scrutiny

On January 6, 2021, the Commission published an inception impact assessment[29] on its latest policy initiative: allowing for more collective bargaining under EU antitrust rules to improve working conditions for self-employed individuals, in particular in relation to digital platform workers (*e.g.*, food delivery services).[30] On March 5, 2021, the Commission launched a public consultation inviting all interested parties to submit feedback on the initiative until May 28, 2021.[31] The proposed policies, which may be implemented through a legislative or non-legislative instrument, are set to be adopted in the fourth quarter of 2021.[32]

The self-employed and antitrust rules

The Court of Justice has long recognized that collective bargaining between employees and employers is not caught by EU competition rules because employees are not considered "undertakings" under EU law.[33] By contrast, self-employed individuals may be considered "undertakings" such that agreements between them on working conditions, including fee arrangements, risk violating Article 101 TFEU.[34]

The Commission's initiative notes that this distinction between employees and self-employed has become "increasingly blurred" as a result of digitalization and the demand for greater flexibility in the labor market. Individuals engaging in both platform work and those using individual commercial service contracts in the offline economy face challenges ensuring representation, fair earnings, and access to social protections. The Commission considers that self-employed workers, like traditional employees, are increasingly dependent on the counterparty economically. In the absence of EU intervention, the lack of clarity surrounding self-employed individuals' legal status under antitrust rules may have a "chilling effect" preventing them from bargaining collectively.

Four policy options to help support the self-employed

The initiative explores four policy options depending on the type of self-employed persons covered. The first (and narrowest) option exempts only those self-employed workers providing their own labor (online and on-location) through digital platforms. The second option also includes those providing their own labor to "professional customers," *e.g.*, independent contractors and freelancers operating in the offline economy. This option sets a minimum size threshold for the counterparty with whom the self-employed may bargain collectively—to prevent the balance of negotiation power tilting in favor of the self-employed. The third option excludes self-employed individuals in "regulated/liberal" professions. The fourth (and widest) option covers both types of self-employed person (as per Option 2 and 3) but without a minimum size threshold or excluded professions.[35]

[29] Commission Inception Impact Assessment, "Collective bargaining agreements for self-employed – scope of application of EU competition rules," available at: www.ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12483-Collective-bargaining-agreements-for-self-employed-scope-of-application-EU-competition-rules. An inception impact assessment sets out the Commission's plans for new policy initiatives.

[30] This initiative forms part of the Commission's wider public consultation on the adoption of the Digital Services Act package, which aims to strengthen user protection and facilitate competition in the EEA through further rules and obligations for digital platforms. *See*, Communication from the Commission, "Shaping Europe's Digital Future," February 19, 2020, available at: www.ec.europa.eu/info/sites/info/files/communication-shaping-europes-digital-future-feb2020_en_4.pdf.

[31] Commission Press Release IP/21/988, "Competition: Commission invites stakeholders to provide comments on the application of EU competition law to collective bargaining agreements for self-employed" March 5, 2021, available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_21_988.

[32] The Commission envisions implementing the proposed policies through a Council Regulation or Commission Communication.

[33] *Jean Claude Becu* (Case C-22/98) EU:C:1999:419 (the Court of Justice held that workers are incorporated into the undertaking that employs them for the duration of their work contract, thus, they do not independently constitute undertakings within the meaning of EU competition law); and *Albany International BV v. Stichting Bedrijfspensioenfonds Textielindustrie* (Case C-67/96) EU:C:1999:430 (the Court of Justice held that collective bargaining between workers and employees falls outside the scope of EU competition law as the social objectives pursued by these agreements would be seriously undermined otherwise).

[34] Indeed, collective agreements between self-employed persons to obtain better fees or working conditions from their counterparty may reduce competition, and amount to fixing the price or other conditions of labor.

[35] The initiative does not specify a number of details, including the scope of the terms "professional customer," "regulated/liberal profession," and "digital labor platform," as well as the possible minimum size thresholds.

	Option 1	Option 2	Option 3	Option 4
Type of self-employed individual	Limited to self-employed platform workers.	Platform workers (as in Option 1) and individuals serving "professional customers."	Same as Option 2, but excludes "regulated/ liberal professions."	Same as Option 2.
Counterparty Size	No size threshold.	Minimum size threshold.	No size threshold.	No size threshold.

Implications for platform workers

All four policy options seek to provide self-employed workers with the assurance that they can form unions to negotiate their earnings, social protection, and other labor conditions with digital labor platforms (*e.g.*, Uber and Deliveroo), without the risk of breaching EU competition law. Despite the ambiguity around collective bargaining rules, platform workers are already joining unions across Europe for this purpose—some of whom have already managed to negotiate agreements with digital labor platforms (*e.g.*, in Norway[36] and Italy[37]). Some Member States have actually clarified that platform workers can collectively negotiate without breaching national competition laws.[38]

Conclusions

The initiative is reflective of the general trend of the Commission seeking to address broader policy objectives through competition law, for instance to achieve environmental objectives.[39] While it is subject to debate whether designated labor regulations are not a more effective tool to improve the welfare of self-employed individuals, providing further guidance on the application of EU antitrust rules is a welcome development.

The Commission Approves London Stock Exchange's Acquisition Of Refinitiv, Subject To Access Remedies: A (Likely) First In The Industry

On January 13, 2021, the Commission conditionally approved the acquisition by the London Stock Exchange Group ("LSEG") of Refinitiv, following an in-depth Phase II investigation.[40] The decision likely marks the first-ever access commitment in a merger decision approved by the Commission in the financial sector.[41]

[36] On September 27, 2019, delivery couriers on the app Foodora (the food delivery platform) in Norway reached the first ever collective bargaining agreement between a food delivery platform and a union. The agreement guarantees couriers a minimum wage, equipment allowance, and a pension scheme. *See*, "Norway: Latest developments in working life Q3 2019," November 25, 2019, available at: www.eurofound.europa.eu/ga/publications/article/2019/norway-latest-developments-in-working-life-q3-2019.

[37] On September 16, 2020, a coalition of food delivery companies (Uber, Deliveroo, Glovo, Just Eat, and others) reached an agreement with a union in Italy that would provide platform workers with a minimum wage and bonuses. This agreement was denounced by other unions for failing to improve the working conditions of couriers which led to Just Eat announcing its withdrawal from the coalition and its intention to hire couriers as employees in 2021. *See*, "Collective voice for platform workers: riders' union struggles in Italy," December 10, 2020, available at: www.socialeurope.eu/collective-voice-for-platform-workers-riders-union-struggles-in-italy.

[38] The Dutch competition authority published guidance on lawful pricing arrangements between self-employed workers in November 2019. *See*, "Guidelines on price arrangements between self-employed workers," November 26, 2019, available at: www.acm.nl/en/publications/guidelines-price-arrangements-between-self-employed-workers.

[39] *See*, the Commission's call for contributions on the "Competition Policy Supporting the Green Deal," October 13, 2020, available at: www.ec.europa.eu/competition/information/green_deal/call_for_contributions_en.pdf (we reported on this development in an Alert Memorandum of October 19, 2020).

[40] *London Stock Exchange Group/Refinitiv* (Case COMP/M.9564), Commission decision of January 13, 2021 (not yet published).

[41] Access remedies have also been accepted in related industries, notably in *Worldline/Equens/PaySquare* (Case COMP/M.7873), Commission decision of April 20, 2016, in which the parties were active in the provision of payment and related services. In that decision, the remedies included, *inter alia*, licensing certain software and maintenance services to third-party network service providers and granting access to the source code.

Analysis

In its decision to open an in-depth investigation, the Commission raised concerns both about horizontal overlaps in the market for electronic trading of European Government Bonds ("EGBs") as well as vertical concerns in the markets for: (i) trading of over-the-counter interest-rate derivatives ("OTC IRDs");[42] (ii) consolidated real-time datafeeds ("CRTDs") and desktop services; and (iii) index licensing. The parties ultimately offered remedies to mitigate each concern and secure clearance.

EGBs electronic trading. LSEG and Refinitiv both own electronic trading venues for EEA, UK, and Swiss EGBs. These trading venues (LSEG's MTS and Refinitiv's Tradeweb) are close competitors, both with leading market positions. The Commission found that the transaction would have led to the creation or strengthening of a dominant position in the market for EGB electronic trading and its potential sub-segments. To remedy this concern, LSEG proposed an upfront-buyer remedy, offering to divest its 99.9% stake in the Borsa Italiana group, which includes MTS, to a suitable purchaser.[43]

OTC IRDs trading. LSEG offers clearing of OTC IRDs performed by the London Clearing House Swapclear, while Refinitiv's Tradeweb is a venue for trading OTC IRDs. The Commission found that the transaction would have led to a combined entity with significant market power in both trading (upstream) and clearing (downstream) of OTC IRDs. As a result, LSEG would have the ability and incentive to foreclose competing trading venues and related software providers in the upstream market.

To address these foreclosure concerns, LSEG offered an access remedy with a ten-year duration: LSEG commits to continue offering its global OTC IRD clearing services on an open access and non-discriminatory basis. In particular, LSEG undertakes not to discriminate against customers—for example in terms of clearing charges or service quality—based on the source (*i.e.*, whether Refinitiv's Tradeweb or third-party's trading venue) of the OTC IRD trade they submit for clearing.

CRTDs and desktop services & index licensing. Refinitiv aggregates financial data from different sources in the form of consolidated real-time datafeeds (or CRTDs) and desktop services,[44] which it offers in packages to traders, asset managers, and other data users. Three types of data offered by LSEG are a significant input for Refinitiv's datafeeds and desktop services, often without an alternative.[45] The Commission found that, following the proposed transaction, the merged entity could deny competing CRTDs and desktop services access to LSEG's necessary input data.

Refinitiv also offers foreign exchange indices (its WM/R FX benchmarks), which are among the most important inputs for index design and calculation. The Commission found that Refinitiv's benchmarks and CRTDs are a necessary input for financial index providers, without a viable alternative. As such, Refinitiv's foreign exchange indices are widely used by the major financial index providers globally, including LSEG's FTSE Russell. The Commission found that, as a result of the transaction, the merged entity could deny competitors in index licensing access to Refinitiv's necessary input data.

To address these concerns about access to essential inputs, LSEG proposed data access remedies in: (i) CRTD and desktop services; and (ii) index licensing. LSEG commits to provide access on non-discriminatory terms to the LSE venue data, FTSE Russell Indices, and Refinitiv's WM/R FX benchmarks to all existing and future downstream competitors for ten years. It also

[42] An interest-rate derivative (or IRD) is a derivative whose payments are determined through calculation techniques where the underlying benchmark product is an interest rate, or set of different interest rates. An over-the-counter IRD is a financial IRD contract arranged between two counterparties with minimal intermediation or regulation.

[43] To that end, LSEG and Euronext signed a binding purchase agreement on October 9, 2020.

[44] Datafeeds allow for the transmission of data from computer to computer, while desktop services provide on-screen display of data.

[45] The three types of LSEG's input data are: (i) LSE's venue data, (ii) UK Equity Indices through FTSE Russell, and (iii) security identifiers called SEDOLs.

undertakes to build a firewall to ensure that sensitive information LSEG receives from its customers is not transmitted to the competing Refinitiv CRTD and desktop services businesses.

Conclusion

The Commission approved the acquisition—subject to a mix of structural remedies and behavioral commitments—after almost seven months of in-depth review. In line with the principles of the Remedies Notice, the Commission generally has a preference for structural remedies in merger cases,[46] as they offer a permanent solution without requiring additional monitoring and also offer a remedy that may satisfy authorities in multiple jurisdictions.[47] Behavioral commitments, by contrast, are much more prevalent in antitrust cases. That being said, the Commission may accept behavioral commitments in merger decisions, especially where it aims to ensure interoperability or access for competitors and customers to essential inputs or patents.

The Commission is increasingly willing to accept behavioral remedies in vertical and conglomerate mergers where its concerns relate to foreclosure risks rather than increased market power. This has been particularly relevant in cases concerning essential digital services, which are akin to the access to clearing services and data inputs at issue in this decision.[48]

The parties' behavioral commitments in this case, *i.e.*, offering access and licensing on non-discriminatory terms, could serve as guidance for resolving vertical and conglomerate concerns, especially those related to essential inputs, where the divestment of upstream or downstream businesses would be disproportionate.

News

Court Updates

The Court Of Justice: Bid-Rigging Cartels End With The Signing Of The Tender Contract

On January 14, 2021, the Court of Justice held that a bid-rigging infringement[49] ends when the essential characteristics of the tender contract, in particular the amount to be paid for the works that are the subject of the tender contract, have been definitively agreed.[50] This is the moment when the successful bidder and the contracting authority conclude the tender contract, regardless of whether the payment instalments are made, or the works are completed, after this date.

Background

In April 2007, the Finnish state-owned electricity transmission grid operator, Fingrid Oyj, published a tender for the construction of an electricity transmission line. In June 2007, Eltel submitted a winning bid and signed the contract for the construction work. The works were completed in November 2009 and the last instalment was paid in January 2010.

In January 2013, the Finnish competition authority opened an investigation. It found that, between October 2004 and March 2011, Eltel and Empower coordinated their bids in public tenders for the construction of electric power transmission lines

[46] Indeed, in another case involving LSEG, the Commission blocked its merger with Deutsche Börse after the parties indicated that they would only be prepared to offer a set of behavioral measures to provide access to MTS's essential trading feeds, but refused to divest MTS; *see*, *Deutsche Börse/London Stock Exchange Group* (Case COMP/M.7995), Commission decision of March 29, 2017.

[47] Commission Notice on remedies acceptable under the Council Regulation (EC) No. 139/2004 and under Commission Regulation, O.J. C267/1, ("Remedies Notice"), paras. 13 and 80.

[48] *See*, for example, *Qualcomm/NXP* (Case COMP/M.8306), Commission decision of January 18, 2018 (in which Qualcomm committed to continue to license certain NXP technologies and trademarks on fair terms and ensure interoperability with its chipset for eight years, as well as not to acquire NXP's standard essential patents); *Microsoft/LinkedIn* (Case COMP/M.8124), Commission decision of December 6, 2016 (in which Microsoft committed to ensuring that PC manufacturers and distributors would be free not to install LinkedIn on Windows, maintaining interoperability with Microsoft's Office suite, and granting competing professional social networks access to the Microsoft Graph gateway for software developers).

[49] Bid-rigging refers to the manipulation of a tender procedure for the award of a public contract typically by means of coordination on the bid to be submitted for that tender.

[50] *Kilpailu- ja kuluttajavirasto v. Eltel Group Oy ja Eltel Networks Oy* (Case C-450/19) EU:C:2021:10 ("*Kilpailu*").

in Finland. In October 2014, the authority applied to fine Eltel for bid-rigging. The application was dismissed by the national court, finding that the infringement was time-barred because the application was not submitted within five years after the infringement ended.

The case reached the Finnish Supreme Administrative Court, which referred a question to the Court of Justice for a preliminary ruling. It asked whether a bid-rigging infringement continues while performance and payment in accordance with the tender contract are still ongoing; or whether it ends earlier—with the submission of the tender or the signing of the tender contract.

Analysis

The limitation period to impose a penalty on undertakings violating EU antitrust rules begins to run on the day the infringement ceases to exist.[51] The Court of Justice recalled the principle that the infringement lasts as long as the conduct causes restrictive effects on competition, thus it may continue after unlawful contacts cease, so long as such effects persist.[52]

The Court of Justice, however, distinguished bid-rigging cartels from other types of cartels. Bid-rigging infringements are distinct because "the restrictive effects of the cartel on competition disappear [...] when the essential characteristics of the contract, and in particular the overall price to be paid [...] have been definitively determined [...] between the successful tenderer and the contracting authority."[53] At that moment, the contracting authority is "definitively deprived of the opportunity to obtain the [works subject to the contract] under normal market conditions."[54]

In other words, the bid-rigging collusion has no impact on the price once it has been agreed with the contracting authority; the infringement therefore ceases to exist regardless of events after the tender contract is concluded (such as payment instalments or adverse economic effects on other market players).[55] The Court of Justice concluded, therefore, that Eltel's participation in the cartel ceased when the essential characteristics (in that case, the total price) of the construction contract were definitively determined with the contracting authority (*i.e.*, at the signing of the tender contract).

This judgment clarifies at what moment a standalone bid-rigging infringement ends: as soon as the price has been agreed in the tender contract. This early end date could be of significant practical importance because it triggers the limitation period for public enforcement. The judgment is, therefore, a rare limitation of the powers of competition authorities to pursue hardcore cartels. But its implications appear limited to bid-rigging cartels and would likely not extend to other types of Article 101 TFEU infringements.

The Court Of Justice Expands The Rebuttable Presumption Of Decisive Influence In Cartel Cases

On January 27, 2021,[56] the Court of Justice confirmed a 2018 General Court judgment,[57] upholding a 2014 Commission decision which found Goldman Sachs jointly and severally liable, together with its former subsidiary Prysmian, for Prysmian's participation in a cartel. The judgment strengthens the parental liability doctrine with potential implications for financial investors.

On April 2, 2014, following a five-year investigation, the Commission fined 26 legal entities for their participation in a cartel in the high-voltage power

[51] Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/18, Article 25(2).

[52] *See*, *Kilpailu*, paras. 30 and 34. For example, the duration may span the entire period in which unlawful prices are applied, despite the unlawful agreement having already formally ceased to be in force.

[53] *Kilpailu*, paras. 35–38. While the restrictive effects of bid-rigging infringements on competition disappear once the contract is signed, wider adverse economic effects on other market participants could last longer (*e.g.*, higher tariffs paid by customers). Therefore, these participants may seek damages before national courts even though the limitation period for public enforcement expired.

[54] *Kilpailu*, para. 35.

[55] *See*, *Kilpailu*, para. 36.

[56] *The Goldman Sachs Group, Inc. v. Commission* (Case C-595/18 P) EU:C:2021:73.

[57] *The Goldman Sachs Group, Inc. v. Commission* (Case T-419-14) EU:T:2018:445.

cable sector. Relying on the *Akzo Nobel* parental liability doctrine[58]–that a parent company holding all or almost all of a subsidiary's capital is presumed to have exercised a decisive influence over the conduct of the subsidiary–the Commission found Goldman Sachs jointly and severally liable with its indirect subsidiary Prysmian for violating Article 101(1) TFEU. This was because Goldman Sachs held all of the voting rights in Prysmian despite holding less than all of the capital (as detailed below). On appeal, the General Court endorsed the Commission's approach.

The Court of Justice equally dismissed Goldman Sachs' appeal. It confirmed that Goldman Sachs was rightly presumed to have exercised decisive influence over the conduct of the Prysmian subsidiary—not due to the level of its holdings in Prysmian's capital, but because Goldman Sachs controlled all of the voting rights associated with Prysmian's shares during the entire infringement period, even after its shareholding decreased to between 84.4% and 91.1%.[59]

In this regard, the judgment goes one step further than another recent Court of Justice judgment related to the same power cables cartel, *Pirelli*, where the parent was held liable on account of its more significant shareholding (98.75%) in the subsidiary.[60] *Goldman Sachs* sends a warning signal to financial investors: regardless of the level of shareholding—and absent any robust evidence that they did not exercise decisive influence—financial investors are jointly responsible for wrongdoings of acquired companies in which they retain all of the voting rights. It remains to be seen whether the courts will further expand this doctrine: for example, to cases with majority-only voting rights.

The Court Of Justice Confirms The Commission's Wide Discretion In Defining The Scope Of A Request For Information

On January 28, 2021, the Court of Justice upheld the General Court's ruling that the Commission's request for information ("RFI") issued during its predatory pricing investigation of Qualcomm was necessary and proportionate.[61] The judgment further strengthens antitrust authorities' broad discretion in deciding on the scope of RFIs.

Background

In April 2010, Icera complained that Qualcomm engaged in predatory pricing intended to eliminate it from the chipset market. The Commission commenced proceedings in June 2010. In January 2017, having issued several RFIs and a Statement of Objections ("SO"), the Commission sent an extensive RFI to Qualcomm, allowing for four weeks to respond.[62] Qualcomm refused to do so because it perceived the request as overly broad and burdensome.

In turn, the Commission adopted a legally binding decision (the "Decision") under Article 18(3) of Regulation No. 1/2003,[63] obliging Qualcomm to reply to the information requested within eight weeks, and threatening it with a periodic penalty payment of €580 000 for each day of delay. Before the deadline expired, and after having submitted responses to the Commission's questions, on June 13, 2017, Qualcomm appealed to the General Court, challenging in particular the necessity and proportionality of the Decision. The General Court upheld the Commission's Decision.[64]

[58] *See Akzo Nobel NV and others v. Commission* (Case C-97-08 P) EU:C:2009:536, para. 60.

[59] *The Goldman Sachs Group, Inc. v. Commission* (Case C-595/18 P) EU:C:2021:73, paras. 34–36.

[60] *Pirelli & C. SpA v. Commission* (Case C-611/18 P) EU:C:2020:868, as reported in our November 2020 EU Competition Law Newsletter.

[61] *Qualcomm and Qualcomm Europe v. Commission* (Case C-466/19 P) EU:C:2021:76.

[62] This RFI was a "simple" and non-legally binding request.

[63] Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/18.

[64] *Qualcomm and Qualcomm Europe v. Commission* (Case T-371/17) EU:T:2019:232, as reported in our April 2019 EU Competition Law Newsletter.

Analysis

The Court of Justice dismissed Qualcomm's appeal in its entirety, holding that nothing prevents the Commission from addressing a new RFI to a company after the SO, provided that the RFI is adequately reasoned for the purposes of the investigation, necessary, and proportionate.

Necessity. Qualcomm argued that the General Court wrongly concluded that the Commission was entitled to request information covering periods that fell outside of the scope of the investigation as set out in the SO and, more generally, that the information requested was necessary. The Court of Justice disagreed. It recalled that the Commission is not bound by the SO, as a "provisional" document that "is liable to be changed." The Commission must be able to consider factors that arise during the investigation as they may allow it to refine its assessment.[65] Accordingly, the Court of Justice agreed with the General Court's finding that it was necessary for the Commission to request information related to periods of time that are adjacent to the period of the infringement set out in the SO.

Proportionality. As a principle, the Court of Justice held that the mere fact of the request creating a high workload for an undertaking could not sufficiently justify a finding that the request was disproportionate. In particular, the alleged predatory pricing practice justified requiring a large amount of information, which was necessary to achieve the investigatory aims.[66]

Implications

This judgment affirms the Commission's considerable discretion when sending RFIs, insofar as the Commission is able to decide which information is necessary to request for the purposes of its investigation.[67] The Court of Justice now confirmed that the Commission is entitled to request: (i) information relating to periods falling outside of the infringement period as set out in the SO; and (ii) information resulting in a significant burden on the company's resources, provided that it is necessary for the Commission's investigation.

Challenging the Commission's broad discretion in issuing and defining the scope of RFIs before the EU Courts is unusual.[68] Companies wishing to appeal RFIs will need to show an egregious breach of the necessity or proportionality of an RFI.

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[65] *Qualcomm*, paras. 66, 67 and 73.

[66] *Ibid*, para. 109.

[67] *See*, *Orkem v. Commission* (Case C-374/87) EU:C:1989:387, para. 15; *see also*, *Roquette Frères* (Case C-94/00) EU:C:2002:603, para. 78; *see also AM & S v. Commission* (Case C-155/79) EU:C:1982:157.

[68] A rare case of a successful challenge is *HeidelbergCement v. Commission* (Case C-247/14 P) EU:C:2016:149 (where the ECJ upheld the principle that the Commission may require the disclosure of information which allows it to investigate a presumed infringement, so long as the requested information is necessary in relation to the "purpose of the RFI," as set out in a sufficiently precise manner (paras. 23–25); but ultimately annulled the RFI because the statement of reasons provided by the Commission was too vague and generic to allow the undertaking concerned to understand the reasons justifying such an investigation (paras. 27–40)).

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