Newsletter EU Law

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Statement of Objections against Apple's App store

On 30 April 2021 the Commission sent a Statement of Objections to Apple on App Store rules for music streaming providers.

Based on its investigation, the Commission initially finds that Apple has a dominant position in the market for the distribution of music streaming apps through its App Store. For app developers, the store is the sole gateway to consumers using Apple's smart mobile devices running on Apple's operating system iOS. Because users of Apple's devices are very loyal to the brand app developers have to distribute their apps via the App Store and apply Apple's mandatory and non-negotiable rules for iPhones and iPads.

The Commission's preliminary view is that Apple's rules distort competition in the market for music streaming services by raising the costs of competing music streaming app developers. Apple charges app developers a 30% commission fee on all subscriptions bought through the mandatory use of Apple's proprietary in-app purchase system. Most streaming providers passed this fee on to end users by raising prices. While Apple allows users to use music subscriptions purchased elsewhere, its rules prevent developers from informing users about alternative, cheaper purchasing possibilities. In addition, Apple becomes the intermediary for all transactions and takes over the billing relationship, as well as related communications for competitors. If confirmed, this conduct would be abusive of a dominant market position.

EU railway companies fined

On 20 April 2021 the Commission fined railway companies Österreichische Bundesbahnen (ÖBB), Deutsche Bahn (DB) and Belgian railways (SNCB) a total of €48m for a customer allocation cartel.

The cross-border rail cargo transport services concerned were carried out on blocktrains without being split up or stopped on the way. Blocktrains usually serve high-volume customers, which often carry a single commodity and run to the same destination for long periods, such as between ports and large industrial sites. The infringement concerned cross-border rail cargo transport services provided by ÖBB, DB and SNCB under the freight sharing model. This is a contract model in international railway law to provide customers with a single overall price for the service required under a single multilateral contract.

Between 2008 to 2014 the railway companies exchanged information on customer requests for competitive offers and agreed on higher quotes to protect their respective business. Such a customer allocation scheme is prohibited. The companies admitted their involvement in the cartel and agreed to settle. The fine for DB was increased by 50% since it had previously been held liable for another cartel on freight forwarding and considered to be a repeat offender. ÖBB received full immunity and DB and SNCB benefited from a reduction for their cooperation with the Commission as well as a 10% reduction because of acknowledgment of the cartel. The fine for DB totaled €48m and for SNCF €0.27m.

Subsidiary liable for anticompetitive conduct of parent company

On 15 April 2021 Advocate General (AG) Pitruzzella proposed to the European Court of Justice (ECJ) that a national court can order a subsidiary company to pay compensation for the harm caused by the anticompetitive conduct of its parent company in a case where the Commission has imposed a fine solely on that parent company.

The AG observed that, in the case where it is the parent company that commits the infringement, the subsidiary's 'top-down' liability results not only from the decisive influence exercised by the parent company, but also from the fact that the subsidiary's business is in some way necessary to give effect to the anticompetitive conduct (for example, because the subsidiary sells the goods that are the subject of the cartel). For a 'top-down' liability to happen therefore, two conditions must be fulfilled. First, the subsidiary and the parent company are a single undertaking. Second, the subsidiary operated in the same area in which the parent company has engaged in anticompetitive conduct and must have been able to give effect to the infringement. A full analysis of the AG's opinion is found here.

Acquisition of Suez waste management companies

On 14 April 2021 the Commission approved the acquisition of certain Suez waste management companies by the Schwarz Group, subject to conditions.

Both the Schwarz Group and the Suez waste management companies concerned are active across the waste management chain in several countries. In particular, the two companies are leaders in the sorting of lightweight packaging (LWP) originating in the Netherlands. The Commission's investigation found that the merged entity would become by far the largest market player, owning more than half of the capacity for LWP sorting in the Netherlands, and an unavoidable trading partner to Dutch customers. The Commission also found that competitors located outside of the Netherlands exert a weaker competitive constraint, as customers prefer waste to be sorted as close to the collection point as possible in order to minimise the financial cost and CO2 emissions associated with road transport.

The Schwarz Group offered to divest the entirety of Suez's LWP sorting business in the Netherlands, including Suez's LWP sorting plant in Rotterdam and all assets necessary for its operation. The Commission concluded that the proposed transaction, as modified by the commitments, would no longer raise competition concerns.

ECJ dismisses appeal by pharma companies

On 25 March 2021 the European Court of Justice (ECJ) dismissed the appeals of a number of manufacturers of medicines involved in an agreement seeking to delay the marketing of the generic antidepressant citalopram.

When pharmaceutical company Lundbeck's patent on an antidepressant medicine known as citalopram expired, it agreed to make significant payments and purchase stock of generic products from manufacturers in return for a commitment not to enter the citalopram market. In 2013 the Commission decided that Lundbeck and the generic manufacturers were at least potential competitors and that the agreements constituted restrictions of competition 'by object'. It fined Lundbeck €93.7m and manufacturers a total €52.2m. In 2016 the General Court dismissed their appeals.

The ECJ holds that it is not required to demonstrate with certainty that undertakings will in fact enter the market concerned. Rather it should be established whether a manufacturer has a firm intention and an inherent ability to enter the market, and does not meet barriers to entry that are insurmountable. The existence of an ancillary patent is not such a barrier. The ECJ also found that the General Court did not err in law in concluding that the agreements at issue constitute restrictions of competition 'by object'. In order to be able to characterise a given agreement as a 'restriction by object', only the specific characteristics of that agreement are significant, from which it is necessary to infer any harmfulness for competition, where necessary following a detailed analysis of that agreement, its objectives and the economic and legal context of which it forms part.

Commission clears acquisition in eyewear sectors

On 23 March 2021 the Commission approved the acquisition of GrandVision by EssilorLuxottica, subject to conditions.

EssilorLuxottica is the largest supplier of ophthalmic lenses and eyewear, both worldwide and in Europe, and has a very large portfolio of brands such as Ray-Ban and Oakley. It is also active in the retail sale of optical products, notably in Italy and the UK. GrandVision is a globally active eyewear retailer, which operates some of the largest optical chains throughout Europe, such as GrandOptical and Pearle. EssilorLuxottica sells its products to optical retailers, including GrandVision, which resell them to final consumers.

Following its in-depth market investigation, the Commission had concerns that the transaction, as initially notified, could worsen rival opticians' access to EssilorLuxottica's. In Belgium, Italy and the Netherlands the merged entity would have the ability and incentive to leverage its important position in the wholesale supply of frames. In Italy, the transaction would in addition bring together the two largest retailers operating in the market through chains.

To address the competition concerns EssilorLuxottica offered to divest part of its retail operations. In Belgium, the GrandOptical chain stores will be sold but without the brand name. In Italy, the merged entity will divest a total of 174 stores. In the Netherlands, 142 stores from the EyeWish chain will be sold. The remedy package also contains additional safeguards to ensure the smooth transfer of the divestment business to the purchaser. The Commission concluded that with these commitments the acquisition would no longer raise competition concerns.

Luther, EU Law Center
Avenue Louise 326, 1050 Brussels, Belgium
Phone +32 2 6277 760, Fax +32 2 6277 761
helmut.janssen@luther-lawfirm.com

Luther.

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