

# Competition & Regulatory Newsletter

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## European Commission fines NBCUniversal EUR14.3 million for restricting sales of film merchandise products

On 30 January 2020 the European Commission [announced](#) it had fined several companies belonging to Comcast Corporation, including NBCUniversal, EUR14.3 million for restricting the countries in which and the customers to whom licensees could sell. In some instances, licensees were also restricted from selling online.

### Background

NBCUniversal is an American media conglomerate owned by Comcast Corporation. It operates cable and broadcast networks, as well as film and television production companies worldwide. NBCUniversal licenses the intellectual property rights for the production and sale of products featuring popular films, such as "Minions", "Jurassic Park", and "Trolls". In exchange, the licensees pay NBCUniversal a part of their revenue as a royalty.

In June 2017 the Commission opened an antitrust investigation into certain licensing and distribution practices of NBCUniversal, alongside parallel investigations into the practices of Nike and Sanrio.<sup>1</sup> The investigation considered whether NBCUniversal illegally restricted traders from selling licensed merchandise freely within the EU Single Market.

### Decision

The Commission found that NBCUniversal's non-exclusive licensing agreements breached EU competition rules in a number of respects:

- NBCUniversal restricted the ability of licensees to sell outside their assigned territory, by imposing, for example, clauses prohibiting such sales, obligations to notify NBCUniversal of such sales, limitations on the languages used on the merchandise products, and obligations to pay NBCUniversal revenues generated from out-of-territory sales;

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<sup>1</sup> The Commission fined [Nike](#) EUR12.5 million in March 2019, and fined [Sanrio](#) EUR6.2 million in July 2019.

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- NBCUniversal also restricted sales beyond allocated customers or groups - for example, by prohibiting such sales or requiring the licensee to pay revenues from such sales to NBCUniversal;
- NBCUniversal imposed a number of measures restricting online sales, such as clauses prohibiting online sales, clauses restricting out-of-territory online sales, or clauses only allowing online sales via specific retailers;
- NBCUniversal required licensees to pass on these sales restrictions to their customers, by preventing its licensees from supplying their products to customers who could be selling outside the licensees' allocated territories or customer groups; and
- NBCUniversal also engaged in a series of tactics to encourage compliance with the sales restrictions, including carrying out audits, and terminating contracts if licensees did not respect the sales restrictions.

The Commission concluded that the illegal activity had the effect of partitioning the Single Market and preventing licensees in Europe from selling products cross-border and across customer groups, to the ultimate detriment of consumers. The practices had been in place from 1 January 2013 until 25 September 2019, more than six and a half years.

## Fine

The Commission fined NBCUniversal EUR14.3 million, reflecting a 30% reduction for cooperating beyond its legal obligation to do so. NBCUniversal acknowledged the infringement, provided additional evidence to the Commission that strengthened its ability to prove the infringement, and waived certain procedural rights resulting in administrative efficiencies.

## Conclusion

Executive Vice-President Vestager has [commented](#) that this decision and the decisions in Nike and Sanrio “send a clear message” that the Commission “will not tolerate restrictions which undermine the EU single market”. She has also made clear that the decisions are part of the Commission’s drive to make sure the Single Market works well in the era of digitalisation. Since completing its sector inquiry into e-commerce markets in May 2017, the Commission has imposed a total of EUR184 million in fines on companies creating barriers to cross-border trade.

Nevertheless, the Commission continues to reward cooperation with non-cartel antitrust investigations. In the last two years, the Commission has adopted 10 decisions involving companies that have cooperated with its investigation. It has also issued [informal guidance](#) on cooperation in non-cartel antitrust investigations (as reported in a [previous edition](#) of our newsletter).

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## Other developments

### Antitrust

#### European General Court dismisses request by Silgan for interim measures in respect of Commission information request

On 29 January 2020 the European General Court (GC) [rejected](#) Silgan's request for interim measures suspending the effect of a European Commission request for information (RFI) decision while an appeal against the decision to impose the RFI is pending.

Silgan is challenging a Commission RFI sent to them in November 2019 in the context of a metal packaging cartel investigation. Silgan claimed the existence of serious and irreparable harm arguing that pending the challenge, the effect of the RFI should be suspended as any information given in response would influence the ongoing investigation. Silgan also argued that other parties could gain access to the information provided in response to the RFI, and the effects of such a disclosure to third parties could not be remedied even if the RFI was subsequently withdrawn.

The GC found that the company failed to prove the urgency and serious and irreparable harm required to grant interim relief under EU law. The court concluded that the potential harm outlined by the applicant's arguments was purely hypothetical and the potential to cause irreparable and serious harm could not be established.

Silgan's first argument was rejected on the basis that the Commission would be obliged to remove the evidence if the RFI decision were to be annulled. As such, it would be impossible for officials to use any of the information obtained via the RFI. The applicant's assumption that the Commission would breach this obligation did not justify interim relief. The GC rejected the second argument on the basis that it is unlikely that the Commission would be ordered to disclose the information, but even if it were, only non-confidential information could be transmitted to third parties, while confidential data would be protected.

#### European Court of Justice dismisses appeals by Czech national rail operator against Commission dawn raids

On 30 January 2020 the European Court of Justice (CJ) [dismissed](#) two appeals by Czech national rail operator České dráhy (CD) against GC judgments on two European Commission decisions. The decisions ordered that CD be subjected to dawn raids: the first in the Falcon investigation and the second in the Twins investigation, conducted in April and June 2016, respectively.

In relation to the Falcon investigation, in June 2018 the GC had upheld the Commission decision insofar as it related to the predatory pricing on the Prague to Ostrava route. The GC had upheld the Commission decision in relation to the Twins investigation in full. More details are available in a [previous edition](#) of our Newsletter.

Regarding the Falcon raid, the CJ rejected CD's arguments that the GC failed to take into account the fact that the Commission had been given information by the Czech competition authority prior to the raid and

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that the GC had not adequately assessed whether the alleged predatory pricing affected trade between EU Member States. It held that the Commission could not be expected to rely solely on documents provided by a National Competition Authority.

Regarding the Twins raid, CD argued that the decision was invalid as it was based on information unlawfully gathered by the Commission in the Falcon raid. In dismissing this appeal, the CJ referred to the GC ruling which had found that during a dawn raid, the Commission could gather any documents that might help it gather information about a company's costs. The CJ agreed with this finding but further clarified that the Commission was restricted to gathering evidence specific to the subject matter. In a predatory pricing investigation, the Commission is entitled to collect any documents related to either costs incurred by a company or the company's commercial strategy. The CJ concluded that the GC was entitled to find the three documents relied upon in the decision to carry out the Twins dawn raid as they were within the scope of the Falcon investigation.

## General competition

### Japan's new transparency bill and South Korea's new guidelines target tech companies

The tech industry continues to come under the spotlight in the APAC region. In January 2020 there were developments in both Korea and Japan to increase transparency obligations on tech companies and to combat unfair negotiations between smaller local tech companies and their global counterparties.

On 27 January 2020 the South Korea Communications Commission (SKCC) introduced a new set of guidelines on the contract terms and conditions offered by tech companies and internet service providers. The guidelines set out unfair trade practices that the SKCC has identified in network usage and pricing negotiations, including rejecting or delaying contract signing for unjustified reasons and offering contract terms that unfairly restrict competition. The new guidelines are not legally binding but could serve as a basis for future legislation.

One day later, the Japanese Cabinet Secretariat's panel on competition in the digital markets adopted an outline of the new Digital Platform Transparency Bill. Notably, designated digital platform operators (including Amazon, Rakuten, Yahoo Japan, Google and Apple) will be required to: (1) submit an annual report to the Ministry of Economy, Trade and Industry (METI) on their business practices; (2) disclose in advance when they change terms with business users; and (3) set up internal complaint-handling procedures. Upon identifying a potential violation of the Japanese Antimonopoly Act, the METI may ask the Japan Fair Trade Commission to investigate the issue.

These developments are consistent with the worldwide trend of increasing focus on the tech industry, and it is anticipated that regulators will continue to introduce new tools to scrutinise tech companies in APAC and other regions.

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**Brussels**

T +32 (0)2 737 94 00

**London**

T +44 (0)20 7600 1200

**Hong Kong**

T +852 2521 0551

**Beijing**

T +86 10 5965 0600

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