

# COMPETITION AND REGULATORY NEWSLETTER

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## European Court of Justice issued judgment on duration of bid-rigging infringement

On 14 January 2021 the European Court of Justice (CJ) delivered its [judgment](#) ruling that the duration of a winning company's participation in a bid-rigging infringement, where the last element of the infringement is the submission of coordinated tenders, ends when the contract is signed. The CJ was responding to a reference for a preliminary ruling from the Supreme Administrative Court of Finland, in a case concerning whether an infringement decision against electricity transmission firms Eltel Group Oy and Eltel Networks Oy (Eltel) is time-barred. The national court was considering four possible points in time when the participation in a bid-rigging infringement might come to an end: when that undertaking has submitted its tender, when the contract has been concluded, when payment of the last instalment of the price has been made, or when the work has been completed.

### BACKGROUND

In April 2007 Fingrid Oyj, which owns and is responsible for developing the high voltage network used for mains electricity transmission in Finland, published a call for tenders for the construction of a high-voltage transmission line. On 4 June 2007 Eltel submitted its (winning) bid and later that month signed a contract with Fingrid Oyj. Eltel completed the works on 12 November 2009, and Fingrid Oyj paid Eltel the last instalment of the price for those works on 7 January 2010.

On 31 January 2013 Empower Oy submitted a leniency application to the Finnish Competition and Consumer Authority (FCCA), which led to an investigation into the existence of an agreement between Empower Oy and Eltel. By decision of 31 October 2014 the FCCA submitted an application to the Market Court for the imposition of a €35 million fine on Eltel for infringement of Article 101 TFEU and national competition law. The FCCA alleged that Eltel had reached an agreement with Empower Oy on prices, margins and market sharing for the design and construction of electricity transmission lines in Finland.

On 30 March 2016 the Market Court dismissed the application for the fine, concluding that the relevant infringement was time-barred. Under Finland's five-year limitation period for competition cases, the fine could only stand if Eltel was still participating in the restriction of competition on 31 October 2009 (since the FCCA's application was submitted on 31 October 2014); the Market Court held that this was not the case. The FCCA therefore brought an appeal before the Supreme Administrative Court of Finland. It argued that until 7 January 2010, the date on which Fingrid Oyj paid Eltel the final instalment of the price, the illegal pricing resulting from the cartel was applied.

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Alternatively, the restriction on competition had ended at the earliest on 12 November 2009, when the construction works were completed. Eltel denied the existence of any agreement between it and Empower Oy relating to the high-voltage line in question. Furthermore, Eltel argued that the limitation period begins to run from the date on which the tender is submitted, or in the alternative, in cases where the price can be negotiated after submission of the tender, the limitation period begins to run when the contract is signed (in this case, both were June 2007). In those circumstances, the Supreme Administrative Court decided to stay the proceedings and refer the question of the duration of the competition infringement to the CJ.

On 10 September 2020 Advocate General Giovanni Pitruzzella issued a non-binding legal [opinion](#) advising that a bid-rigging cartel ceased when the infringer entered into the contract, discounting the ensuing period in which the contract was in force.

**JUDGMENT**

The CJ held that, with respect to the cessation of an undertaking's participation in an Article 101 TFEU infringement, according to settled case-law, Article 101 TFEU is concerned with the economic consequences of agreements (or coordination), rather than with their legal form; so Article 101 TFEU may continue to apply beyond the date on which the unlawful contacts formally come to an end.

The CJ noted that an infringement of Article 101 TFEU must be held to last as long as the restriction of competition resulting from the conduct concerned persists. The CJ held, however, that in circumstances such as this, the restrictive effects of the cartel on competition disappear, in principle, at the latest at the time when the essential characteristics of the contract, and in particular the overall price to be paid, have been definitively determined (where appropriate, by the conclusion of a contract between the successful tenderer and the contracting authority). It is at that moment that the authority is definitively deprived of the opportunity to obtain the goods, works or services in question under normal market conditions.

The CJ considered the argument that the harmful economic effects of the cartel on the price agreed in the contract lasted until the final instalment of that price was paid, and that the cartel could have had harmful economic repercussions downstream, in particular in the form of higher electricity distribution tariffs to be paid by Fingrid Oyj's customers. The CJ concluded, however, that a distinction must be drawn between the restrictive effects of the cartel on competition (the exclusion of competing tenderers and/or the potential artificial restriction of the contracting authority's choice), and the resulting wider adverse economic effects on other market players, on the basis of which such players may seek redress before the national courts. Furthermore, the questions of whether the authority can seek damages or have the contract terminated are distinct from the question of when a competition infringement ends.

Finally, the CJ stated that since Union law recognises that the actions available to the European Commission and the national competition authorities to prosecute and penalise infringements of Article 101 TFEU are subject to limitation, the effective implementation of Article 101 cannot justify artificially extending the duration of the infringement period in order to allow its prosecution.

It is now up to the referring court to verify the date on which the essential characteristics, including the overall price to be paid, have been definitively determined.

**CONCLUSION**

This judgment sheds light on the limits of EU regulators' powers to prosecute cartels and provides guidance on the duration of competition law infringements, in particular with respect to bid-rigging cartels.

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On 13 January 2021 the European Commission [announced](#) that, after a Phase II investigation, it has conditionally approved the proposed acquisition of Refinitiv by the London Stock Exchange Group (LSEG). LSEG is a global financial markets infrastructure business, and also offers financial data products. Refinitiv is a provider of financial data products, and also controls Tradeweb, which operates trading venues.

The Commission had concerns that the transaction, as initially notified, would have harmed competition in the following areas:

- **Horizontal concerns in electronic trading of European Government Bonds (EGBs).** Both parties were active in the trading of EGBs and the Commission was concerned that the transaction would have created or strengthened a dominant position in the market for EGB electronic trading, and its potential sub-segments.
- **Vertical concerns in trading of dealer-to-customer over-the-counter interest-rate derivatives (OTC IRDs).** The Commission was concerned that the transaction would allow LSEG to restrict the access of Refinitiv's competitors to Tradeweb's rival trading venues and middleware providers.
- **Vertical concerns in consolidated real-time datafeeds (CRTDs) and desktop services.** The Commission was concerned that LSEG might restrict the access of Refinitiv's competitors to LSEG's venue data and equity indices.
- **Vertical concerns in index licensing.** The Commission had concerns that, following the proposed transaction, competitors in index licensing would be denied access to Refinitiv's necessary input data.

The Commission accepted a package of commitments offered by LSEG. The package will last for ten years and will be monitored by an appointed trustee:

- **Divestment commitment.** LSEG will divest its 99.9 per cent stake in the Borsa Italiana group, which includes MTS (LSEG's trading venue for EGBs), to a suitable purchaser. To this end, on 9 October 2020 LSEG and Euronext signed a definitive and binding sale and purchase agreement. This commitment fully removes the horizontal overlap between the companies' activities in EGB electronic trading.
- **OTC IRD Open Access commitment.** LSEG commits to continue offering its global OTC IRD clearing services on an open access basis. LSEG has also committed to not engage in commercial strategies that would discriminate against competitors of Tradeweb based on the source of the OTC IRD trade submitted to LSEG for clearing.
- **Data Access commitment.** LSEG commits to continue to provide access to its venue data, equity indices and benchmark data to all existing and future downstream competitors. Specifically, LSEG commits to not degrade technology, quality or service compared to that provided intragroup.

**SAMR GRANTS CONDITIONAL CLEARANCE IN CISCO/ACACIA**

On 14 January 2021 China's State Administration for Market Regulation (SAMR) [conditionally approved](#) Cisco's acquisition of Acacia subject to a range of behavioural remedies. This concludes an investigation that took almost 15 months to review during a period of heightened Sino-US geopolitical tensions.

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The remedies, which will be in place for five years, require the combined entity to continue with existing customer contracts, sales practices and procedures on the same terms as before the merger (including not terminating contracts unless the Chinese customer wishes to do so), and to supply Chinese digital signal processor customers on FRAND terms without tying or other unreasonable conditions in the supply of coherent digital signal processors. Cisco, Acacia and the merged entity must also conduct training sessions for management staff and employees.

An interesting aspect of the case is the dispute that the timing of clearance sparked between Cisco and Acacia. The merger, announced in July 2019, was conditional on obtaining necessary regulatory approvals before the long-stop date of 8 January 2021. At that time, only SAMR's approval was outstanding. Acacia announced its [termination](#) of the merger agreement due to the lack of SAMR's approval on 8 January. In response, Cisco launched litigation on the basis that approval was given on 7 January in the form of an email from the SAMR case team saying that the parties' remedies proposal was "*sufficient to address the relevant competition concerns*". However, as noted above, the formal clearance decision was not issued until 14 January 2021.

The litigation highlights the difficulties associated with the time required for the internal processes within SAMR. In this case, the seven days between SAMR's email and the formal approval were critical for this transaction. In the end, however, the parties jointly dropped the proceedings after Cisco agreed to increase its purchase price from \$70 to \$115 per share.

## GENERAL COMPETITION

### CMA PUBLISHES PAPER ON "ALGORITHMS: HOW THEY CAN REDUCE COMPETITION AND HARM CONSUMERS" AND OPENS CALL FOR INFORMATION

On 19 January 2021 the UK Competition and Markets Authority (CMA) [published](#) new research on algorithms, illustrating how algorithms can reduce competition in digital markets and harm consumers if they are misused. The CMA is now [seeking evidence](#) from academics and industry experts on the potential harms to competition and consumers resulting from the deliberate or unintended misuse of algorithms.

The research illustrates how algorithms can be used to personalise services in ways that can be difficult to identify, causing search results that can be manipulated to reduce choice or artificially change consumers' perceptions. One example of this is misleading messages which suggest a product is in short supply. Companies can also use algorithms to change the way in which they rank products on websites, favouring their own products and excluding competitors. More complex algorithms can assist collusion between businesses without firms directly sharing information, potentially leading to higher prices for products and services. Since the majority of algorithms used by private firms online are currently not subject to much, if any, regulatory oversight, the research concludes that more monitoring and action is required by regulators, including the CMA. The CMA has previously considered the impact of algorithms on competition and consumers in earlier investigations, such as [when looking into the pricing practices of online travel agents](#).

The research and feedback is part of the CMA's work in digital markets, and will inform its creation of the new [Digital Markets Unit](#) and the regulatory regime that it will oversee.

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