

# Crackdown on abuse of dominance heats up

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Only days after confirming a more effects-based approach to rebates in the [Intel](#) ruling (see our earlier [In context](#) article), the European Court of Justice has provided more guidance on the concept of excessive pricing in abuse of dominance cases. Dominant companies may very well take this guidance to heart given the recent wave of fines: the European Commission recently fined Google a record-breaking EUR 2.42 billion for favouring its own comparison shopping service, and is still investigating Google's Android mobile operating system and AdSense's advertising programme for potential antitrust violations. Lithuanian Railways was fined nearly EUR 28 million for obstructing competition on the rail freight market. The first excessive pricing investigation in the pharmaceutical industry was launched. The Dutch Authority for Consumers and Markets had its first case of predatory pricing in a tender procedure, imposing a fine of nearly EUR 41 million on Dutch Railways for abuse of dominance in a regional tender process.

Cracking down on abuse of dominance could be the new enforcement trend, and so dominant companies are well-advised to double-check their day-to-day conduct with suppliers, customers and competitors.

The European Commission recently [imposed](#) a fine of nearly EUR 28 million on Lithuanian Railways for abusing its control over the national rail infrastructure to prevent one of its major customers from using the services of a competing rail operator. The way it did so was quite novel: it dismantled a 19km section of railway track to avoid its major customer from redirecting its freight from Lithuania to Latvia by using the services of another rail operator. The Commission considered that Lithuanian Railways failed to demonstrate any objective justification for removing the track.

The Dutch Authority for Consumers and Markets (ACM) [found](#) that Dutch Railways (NS) likely had similar reasoning when abusing its dominant position in a regional tender process. According to the ACM, NS wanted to prevent its competitors from winning the tender at all costs, because the tender process served as a pilot for a further decentralisation of the main railway network. NS was [fined](#) nearly EUR 41 million for abusing its dominant position on the main railway network by:

1. submitting a loss-making bid for a public transport contract in the Dutch province of Limburg. The ACM compared the NS's internal rate of return (IRR) when performing the concession with its weighted average costs of capital (WACC) and concluded that the IRR would be lower than the WACC. As a result, the concession's expected revenue would be insufficient to recover the anticipated costs. According to the ACM, this made it impossible for As Efficient Competitors (AEC) to match or outbid the NS bid without incurring loss, and
2. setting its competitors at a disadvantage by: (i) using

confidential information it had obtained from a former director of one of its competitors, (ii) providing delayed and incomplete responses to competitors' access requests to certain services and facilities owned by NS, and (iii) passing on confidential information about its competitors to its subsidiary, which participated in the tender process.

Meanwhile, Google had the dubious honour of receiving the largest fine ever imposed on a single company. The Commission [fined](#) Google EUR 2.42 billion for abusing its dominant position as a search engine by giving illegal advantages to its own comparison-shopping service. According to the Commission, Google systematically provided prominent placement exclusively to its own shopping service, and demoted competing comparison shopping services through lower ranking in its generic search results. Google has since submitted a plan to the Commission setting out how it intends to comply with the Commission's requirement to provide equal treatment to its own and competing comparison-shopping services in its search results. But Google is not off the hook yet: not only did Competition Commissioner Vestager warn Google that this decision may serve as a precedent for Google's continued favouring of its own products other than its comparison-shopping service, she also mentioned that two other inquiries into certain Google practices regarding [Android](#) and [search advertising](#) are nearly final, with the preliminary conclusion that these violate EU antitrust rules.

The Commission has also launched its first [investigation](#) into excessive pricing in the pharmaceutical industry. It is investigating whether pharmaceutical company Aspen Pharma engaged in excessive pricing practices for five of its cancer medicines. Interestingly, the Commission's investigation covers all of the EEA except Italy. The Italian competition authority already [imposed](#) a fine of EUR 5 million on Aspen in 2016.

Excessive pricing is difficult to establish, as it is difficult to determine the level in which a high price can be regarded as excessive in relation to the economic value of the service provided. The European Court of Justice (ECJ) recently [clarified](#) the concept of excessive pricing for copyright collecting societies. According to the ECJ, a comparison of the collecting society's rates with the rates applicable in neighbouring member states, as well as with those applicable in other member states adjusted in accordance with the Purchasing Power Parity index, can be appropriate. However, the member states chosen for reference should be based on objective, appropriate and verifiable criteria, and the comparisons need to be made on a consistent basis. In addition, the ECJ ruled that the difference between the rates may indicate abuse of a dominant position if that difference is significant and persistent. It is then up to the dominant copyright management organisation to show that its prices are fair, taking objective factors into account (such as, for instance, management expenses or the remuneration of rightholders).