



EUROPEAN COMMISSION
Competition

CASE AT.40609 – Polish fuel app

ANTITRUST PROCEDURE

Council Regulation (EC) 1/2003 and Commission Regulation (EC) 773/2004

Article 7(2) Regulation (EC) 773/2004

Date: 03/12/2020

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EUROPEAN COMMISSION

Brussels, 03.12.2020
C(2020)8689 final

SENSITIVE* : *COMP Operations*

JustDrive Poland SP. Z.O.O
Ul. Chmielna 85/87
00-805 Warsaw, Poland

Subject: Case AT.40609 – Polish fuel app
Commission Decision rejecting the complaint
(Please quote this reference in all correspondence)

Dear Sirs,

- (1) I am writing to inform you that the European Commission (the "Commission") has decided to reject your complaint against Polski Koncern Naftowy ORLEN S.A ("PKN Orlen"), pursuant to Article 7(2) of the Commission Regulation (EC) 773/2004.¹

1. THE COMPLAINT

- (2) By letter dated 24 July 2018, you submitted a complaint ("Complaint") requesting the Commission investigate certain practices of PKN Orlen vis-à-vis JustDrive Poland SP. Z O.O. ("JustDrive"), which you consider to be in violation of Article 102 of the Treaty on the Functioning of the European Union ("TFEU").
- (3) You alleged that JustDrive devised a mobile application ("the App"). The App was supposed to match consumers with vendors of various products and services affiliated with acquiring and using motor vehicles (e.g. purchasing or renting of such vehicles, obtaining motor insurance, renting parking spaces, etc.)². The App was initially marketed to allow fleet clients (business customers) to purchase fuel at PKN Orlen's petrol stations via a mobile device³.

* Handling instructions for SENSITIVE information are given at <https://europa.eu/db43PX>

1 Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, Official Journal L 123, 27.04.2004, pages 18-24.

2 Complaint, paras. 3-4.

3 Complaint, para. 5.

- (4) You claim that the agreement with PKN Orlen was that you would buy fuel from PKN Orlen and resell it to your own business customers via the App, at PKN Orlen's petrol stations⁴. You explained that the App's initial aim was to attract a critical user base, which would motivate various other service providers to join the platform and offer their services via the App. You allege this was necessary for the App's development into a multisided online platform⁵.
- (5) You explain that PKN Orlen has in place a modern IT system for settlement of transactions conducted with fleet cards – the Fleet Transaction Settlement System ("FTS System") which was developed for PKN Orlen by ITMAGINATION, your sister company⁶. You clarify that while the FTS System for PKN Orlen was being developed, PKN Orlen decided to develop a mobile app called "mFlota", which could fulfil the same function as the fleet card. You specify that this was before JustDrive created its own App⁷.
- (6) The "mFlota" app allows fleet clients to make payments at the pump through the mobile application associated with a physical card issued to fleet clients. The "mFlota" app was implemented in June 2016⁸. You specify that the FTS System was devised from the outset with the idea in mind of communicating with "mFlota"⁹. Furthermore, ITMAGINATION created an 'Application's Programming Interface' ("API") in PKN Orlen's FTS System, through which "mFlota", or any similar app, would be able to communicate with the FTS System. When JustDrive conceived its own App, it knew that it could use the same API¹⁰.
- (7) You claim that you could not have launched the App with any other retailer in Poland, as none of them had the necessary IT system in place, which could be adapted to work with your App. You explain that the transaction settlement systems of operators of other petrol station chains in Poland were inapt to process transactions conducted automatically, via the App, because they did not provide for connection with individual pumps at the petrol stations¹¹. You claim the only exception was CircleK, which had a sufficiently modern fleet transactions settlement system in place in its Polish network, but did not have a sufficiently wide and dense network of petrol stations that would enable the App's success¹².
- (8) You claim that on 31 August 2017 JustDrive signed, for the duration of 3 years, a cooperation contract with PKN Orlen for the "issue and use of Fleet Cards" ("the Agreement"). You argue this was the typical cooperation contract PKN Orlen would conclude with a fleet client. You explain that JustDrive was to become another fleet

4 Complaint, para. 10.

5 Complaint, paras. 4-5.

6 Complaint, paras.10 and 46.

7 Complaint, paras. 47-48.

8 Reply by PKN Orlen to the RFI, paras. 14 and 38.

9 Complaint, para. 48.

10 Complaint, para. 48.

11 Complaint, para. 50.

12 Complaint, para. 51.

client of PKN Orlen with the exception that JustDrive's fleet would consist of the users of the cards. These users were supposed to be issued physical fleet cards¹³.

- (9) Furthermore, you claim that on 12 October 2017, JustDrive signed with PKN Orlen an Annex to the Agreement ("Annex I") allowing the use of PKN Orlen's "mFlota" app by the members of JustDrive's "fleet" (its customers). You claim Annex I was not particularly important as you planned on using your own App instead of "mFlota", but that it was a standard element of PKN Orlen's contractual package for fleet clients and you had to sign it¹⁴.
- (10) Lastly, a second annex, Annex II, guaranteed that the members of JustDrive's fleet would be able to use the App, instead of "mFlota". You claim that Annex II guaranteed to JustDrive the right to use its own App to sell fuel purchased from PKN Orlen to the fleet users of the App. You claim that according to this Annex II, PKN Orlen was supposed to allow JustDrive's App to communicate with the FTS System through its API, which is the same interface that is used by "mFlota". JustDrive signed Annex II on 30 November 2017 but PKN Orlen never signed it. However, you claim that PKN Orlen relied on Annex II in its dealings with JustDrive, thus confirming that the annex was concluded validly¹⁵.
- (11) However, you claim that one day after the launch of the App on 1 February 2018, PKN Orlen, disconnected the App from its IT system and terminated the Agreement¹⁶.
- (12) In sum, you allege that:
 - (a) By disconnecting the App devised by JustDrive from its IT system, PKN Orlen refused to deal¹⁷ with JustDrive, a behaviour that you consider amounts to an abuse of a dominant position in the meaning of Article 102 TFEU, which prevented a new, competitive, EU-based online platform from emerging¹⁸.
 - (b) PKN Orlen is a dominant player¹⁹ with an unrivalled coverage of petrol stations in Poland and the only one equipped with the necessary IT infrastructure to launch a payment app like the one developed by JustDrive²⁰. Therefore, it would be impossible for JustDrive to partner with any competitor of PKN Orlen in order to launch the App²¹. Hence, by foreclosing JustDrive's App from the market, PKN Orlen is significantly limiting innovation and competition²².

13 Complaint, para. 56.

14 Complaint, para. 57.

15 Complaint, para. 58.

16 Complaint, para. 11.

17 Complaint, para. 11.

18 Complaint, para. 15.

19 Complaint, para. 20-21, plus point B (iii) PKN Orlen's dominant position on the upstream "input market", paras. 99-112.

20 Complaint, paras. 50 and 101-102.

21 Complaint, paras. 41-44, 105-112.

22 Complaint, para. 13.

- (13) You also requested that the Commission orders interim measures, given the risk of harm to JustDrive and to competition in the European Union²³.
- (14) The Commission, with your consent, sent on 12 October 2018 a non-confidential version of the Complaint to PKN Orlen together with a request for information. On 5 November 2018, PKN Orlen responded in writing to the request for information and submitted its comments on the Complaint.
- (15) In its observations, PKN Orlen considered that:
- (a) The reasons to terminate its Agreement with JustDrive were among others the following: (i) the App launched by JustDrive on 1 February 2018 did not correspond to the app that PKN Orlen had previously tested and approved in the development process²⁴; (ii) the launched App could have led to the violation of security rules related to user identification and fraud²⁵; (iii) JustDrive misled PKN Orlen with regard to the loyalty/fleet fuel card offering model of the App and the planned method of settlement with customers. PKN Orlen explains that users were to settle the purchased fuel with JustDrive based on a collective invoice issued by PKN Orlen to JustDrive in a billing period. However, the App launched enabled direct payment from users to PKN Orlen, by using a payment card registered in the App. This was a fundamental change of business process and entailed numerous critical risks and new security requirements²⁶.
- (b) These inconsistencies justified the termination of the Agreement²⁷.
- (c) PKN Orlen has only a market share of less than 25% of the petrol stations operating in Poland and its competitors are strong international players like BP, Shell and CircleK (formerly Statoil)²⁸. PKN Orlen claimed that JustDrive could partner with these competitors in order to launch its App²⁹.
- (d) Based on its experience with the “mFlota” mobile application, equipping fuel service stations with items enabling fuel mobile payment applications requires only limited special expenditure and would not be too lengthy. PKN Orlen claims that it is possible for competing petrol stations chains with similar base solutions to implement a mobile payment application within a few months³⁰.
- (e) PKN Orlen started the development of its own mobile tanking app “mFlota” for fleet clients already in 2016, prior to the cooperation with JustDrive³¹.

23 Complaint, para. 15.

24 Reply by PKN Orlen to the RFI, paras. 15h and 23.

25 Reply by PKN Orlen to the RFI, paras. 12, 15j, 21 and 23.

26 Reply by PKN Orlen to the RFI, paras. 7-11 and 15a and 24c.

27 Reply by PKN Orlen to the RFI, para. 21-36.

28 Reply by PKN Orlen to the RFI, point 8 - Information on the market for the retail supply of motor fuels in Poland, pages 17-18.

29 Reply by PKN Orlen to the RFI, paras. 37, 40, 42-43, 49 and 53.

30 Reply by PKN Orlen to the RFI, paras. 38-40.

31 Reply by PKN Orlen to the RFI, paras. 14 and 38.

- (16) You made an additional written submission to the Commission by letter of 29 November 2018. In your submission you presented arguments on why the Commission should treat this Complaint as a priority case and open an investigation. In support of this submission you also produced an economic report by E.CA Economics on the “Economic assessment of refusal to supply”. The expert report addresses the question whether PKN Orlen has abused its dominant position by refusing to supply Justdrive with the input necessary to serve its customers³².
- (17) You made a further written submission to the Commission on 23 September 2019. In that submission, you briefly argue that PKN Orlen is dominant as it is able to disregard consumer expectations and harm their interests without facing any effective pressure from competitors³³.
- (18) By letter of 20 February 2020 (the “Article 7(1) letter”), the Commission informed you of its intention to reject your Complaint.
- (19) In response, you made additional observations in your letter of 23 March 2020 (“Observations on the Article 7(1) letter”) essentially stating that the Commission had left out of its initial analysis the Complaint’s potential to contribute to the development of EU competition law in aspects which are crucial from the viewpoint of the EU competition policy in the digital era³⁴.
- (20) You claim that the case raises an important question whether, and if so – when – European undertakings pursuing innovative digital business models can rely on European competition law for fair access to essential physical assets controlled by their “brick-and-mortar” incumbent competitors³⁵. You also claim that this aspect of the case is relevant for assessing the existence of a “European Union interest” in investigating the Complaint³⁶.

2. THE NEED FOR THE COMMISSION TO SET PRIORITIES

- (21) The Commission is unable to pursue every alleged infringement of EU competition law which is brought to its attention. The Commission has limited resources and must therefore set priorities, in accordance with the principles set out at points 41 to 45 of the Notice on the handling of complaints³⁷.
- (22) When deciding which cases to pursue, the Commission takes various factors into account. There is no fixed set of criteria, but the Commission may take into account whether a national court or national competition authority might be well-placed to examine the allegations made.

32 E.CA Economics report on “Economic assessment of refusal to supply” dated 29 November 2018 and sent to the Commission as addition to the Complaint, executive summary.

33 Justdrive’s submission dated 23 September 2019.

34 Observations on the Article 7(1) letter, para. 3.

35 Observations on the Article 7(1) letter, para. 4.

36 Observations on the Article 7(1) letter, para. 5.

37 OJ C 101, 27.04.2004, p. 65. See also the Commission’s Report on Competition Policy 2005, p. 25-27.

3. ASSESSMENT OF YOUR COMPLAINT

- (23) After a careful examination of the factual and legal elements put forward by you, the Commission does not intend to conduct a further investigation into your claims for the reasons set out below.

3.1. National courts and authorities appear to be well-placed to handle the matters raised

- (24) In the Article 7(1) letter, the Commission has explained that the Polish Competition Authority (the Office of Competition and Consumer Protection) and the Polish courts appear to be well-placed to handle the matters raised in your Complaint, in accordance with the principles set out at points 8 and 9 of the Notice of cooperation within the Network of Competition Authorities.
- (25) You claim that the relevant markets for this case would be: for the downstream market, the retail sale of motor fuel made at fuel dispensing service stations via mobile applications and may have to be further segmented according to different categories of customers (B2B, B2C, etc.). As far as the geographic aspect of this market you align with Commission's previous conclusions in merger cases where the market is defined as national, with local elements of competition³⁸.
- (26) Furthermore, you claim that there is another downstream market being "the market for mobile applications functioning as digital marketplace platforms for products and services connected with acquiring or using motor vehicles"³⁹. You claim this is a multi-sided market, where the digital platform (the product in question) is offered to buyers as well as to vendors of all products that could be offered on the platform⁴⁰. You claim the geographical scope of the second downstream market would be national in certain aspects but European or even global in others⁴¹. However, you do not substantiate this definition.
- (27) For the upstream "input" market, you claim the relevant market would be that of the physical retail infrastructure, this is to say, the network of petrol stations. However, you go further to add that the physical infrastructure would also take into account the sufficient coverage and the equipment of proper IT systems⁴². For this upstream market, you claim the geographic dimension would be national⁴³.
- (28) As claimed by both you and PKN Orlen in your submissions, the centre of gravity of the Complaint is Poland. Based on your Complaint, the relevant geographical markets as of today seem to be mostly national⁴⁴, even if PKN Orlen is an international operator and Justdrive's plans were to develop the App into a digital platform. This geographic scope is in line with previous Commission merger cases,

38 Complaint, para.78.

39 Complaint, para. 80.

40 Complaint, paras. 79-80.

41 Complaint, para. 82.

42 Complaint, para. 95.

43 Complaint, para. 94.

44 Complaint, paras. 78, 82 and 94.

where the geographic market for the retail supply of motor fuel is considered to be national in scope⁴⁵ or national with local elements⁴⁶. This is furthermore discussed in the economic assessment, dated 29 November 2018. The report refers to a Commission merger decision and considers the geographic dimension of the retail fuel sales market, to business and non-business customers, to be “national with elements of local competition”⁴⁷. The report adds, “[c]oncerning fuel cards for business in Poland, major fuel retailers offer similar products and quality standards indicating a national market [...]. In the case of “virtual” fuel cards, however, the market is national for the reason that the centralised POS systems with API are built on national level”⁴⁸. This geographic scope is confirmed by PKN Orlen in its reply to the request for information of 12 October 2018⁴⁹.

- (29) In addition, it appears that the alleged infringement would be taking place only in Poland. Even if the plans of Justdrive were to eventually develop the App into a digital platform, that could potentially offer services and products from other Member States to Polish end-users, so far, the App was only used in Poland and you have not substantiated in your Complaint that on the basis of this secondary potential downstream market you refer to in your Complaint, the geographic coverage would be wider than Poland. For these reasons, it appears likely that any possible effects of the alleged infringement would primarily be felt in Poland.
- (30) In your observations to the Article 7(1) letter, you claim that if a case can contribute to the development of EU competition law, it cannot be rejected and referred to a national competition authority or a national court, merely because it concerns an infringement, the effects of which would predominantly be felt in one Member State⁵⁰.
- (31) You admit yourself in the observations to the Article 7(1) letter that the fact that a case may potentially contribute to the development of EU competition law does not compel the Commission to carry out an investigation⁵¹. The General Court confirmed that “*in view of the Commission’s broad discretion in setting priorities for the development of EU competition law, the fact that a case may potentially contribute to the development of a new aspect of that law cannot have the effect of compelling the Commission to carry out an investigation [...]*”⁵².

45 See European Commission merger cases: M. 9014 – PKN Orlen/Grupa Lotos, M.5796 – Eni/Mobil Oil Austria and M.3375 – Statoil/SDS.

46 See European Commission merger cases: M.7849 – MOL Hungarian Oil and Gas/ENI Hungaria/ENI Slovenija and M.7603 – Statoil Fuel and Retail/Dansk Fuels.

47 E.CA Economics report on “Economic assessment of refusal to supply” dated 29 November 2018 and sent to the Commission as addition to the Complaint, p. 11.

48 E.CA Economics report on “Economic assessment of refusal to supply” dated 29 November 2018 and sent to the Commission as addition to the Complaint, p. 12.

49 Reply by PKN Orlen to the RFI, Exhibit 3, para. 61, where PKN Orlen states that “The geographic market is the national market – the territory of the Republic of Poland”.

50 Observations on the Article 7(1) letter, para. 10.

51 Observations on the Article 7(1) letter, para. 11.

52 Case T-480/15 Agria Polska sp. z o.o. and Others v Commission, EU:T:2017:339, paragraph 73.

- (32) The Commission notes that in the observations on the Article 7(1) letter, you do not bring forward any new facts or evidence. However, you admit in your observations that PKN Orlen's infractruture was not the only one which could be relied on and that with some investments other retail networks could have partnered with Justdrive⁵³ and also that PKN Orlen terminated the relevant agreement with Justdrive (signed in Auguts 2017) with notice⁵⁴.
- (33) It should be clarified, that this notice concerned the main Agreement⁵⁵ while the refusal/"cut-off" stemmed from the (lack of) agreement on Annex II, which as you admit in your Complaint was never signed by PKN Orlen⁵⁶.
- (34) In your observations, you merely put forward two aspects to explain why in your view this case is likely to contribute to the development of EU competition law:
- a) The criteria of indispensability (objective necessity) of input in the digital economy and in particular for the digital era;
 - b) The need to put less emphasis on analysis of market definition, and more emphasis on identification of anticompetitive strategies in the digital economy⁵⁷.
- (35) Lastly, in your obervations you argue that the Commission has refrained from adducing evidence offered by JUSTDRIVE and chose to rely on unverified Orlen's allegations⁵⁸.
- (36) Firstly, you claim that under the *Oscar Bronner*⁵⁹ criteria (for refusal to deal) an input controlled by a given undertaking is not "indispensable", if there are other providers of such input or alternatives available⁶⁰. You consider this test not to be adequate in the digital economy⁶¹. You conclude there is a need to revisit the *Oscar Bronner* precedent and to adopt a proper, more nuanced interpretation of its indispensability criteria, which would take duly into account the peculiarities of the digital and platform economy and in particular the extremely strong network externalities and return to scale experienced therein and the phenomemon of the so-called "economy of scope"⁶².
- (37) Secondly, you claim there is a need to put less emphasis on analysis of market definition, and more on identification of anticompetitive strategies⁶³. You claim that

53 Observations on the Article 7(1) letter, para. 17.

54 Observations on the Article 7(1) letter, para. 41.

55 See above para. 8 for an explanation of the coverage and scope of the Agreement.

56 See above para. 10 and Complaint, para. 58.

57 Observations on the Article 7(1) letter, para. 6.

58 Observations on the Article 7(1) letter, para. 35.

59 Case C-7/97 Oscar Bronner GmbH & Co v Mediaprint Zeitstungs- und Zeitschriftenverlag GmbH & Co KG and others, EU:C:1998:569.

60 Observations on the Article 7(1) letter, para. 19.

61 Observations on the Article 7(1) letter, para 20.

62 Observations on the Article 7(1) letter, para 26.

63 Observations on the Article 7(1) letter, para. 6-I-B

PKN Orlen's conduct was blatantly abusive and anticompetitive by its very aim, and that the fact alone that PKN Orlen has been able to engage in such conduct and harm consumers (by depriving them of a better and more innovative product) without losing market share, was in itself proof of its dominance and should be the focus of the Commission's investigation⁶⁴.

- (38) However, the Commission considers your claims not to be of such a nature that would imply that only the Commission can investigate and assess them. The Polish Competition Authority or national courts are equally capable of investigating and assessing the case, as they can apply Article 102 TFEU. In this sense, national competition authorities in the EU also have experience with cases relating to digital markets.
- (39) Thirdly, while besides the complaint you have yourself provided the Commission with the two additional written submissions including an economic report and over 60 exhibits, you also claim that the Commission did not request the additional evidence that you were ready to offer.
- (40) The Commission has in its analysis of the case reviewed all evidence submitted to it by Justdrive and by PKN Orlen. However, the Commission, has no duty to take additional investigative steps⁶⁵ nor it is obliged to take account of facts which the complainant did not bring to its attention and which could only have been discovered by an investigation⁶⁶. As to the Commission's reliance on – what you refer to as – “unverified PKN Orlen's allegations”⁶⁷, it has to be observed that the Commission is entitled to carry its own assessment of the evidence available to it and in particular that it is entirely permissible for the Commission to assess the probative value of evidence independently⁶⁸.
- (41) Lastly, you have not raised any elements that would bring doubt as to whether the Polish Competition Authority would be capable of investigating, accessing evidence and bringing the infringement to an end or imposing a sanction, if so needed. National competition authorities have parallel competence with the European Commission to enforce the EU competition rules and are well placed to do so in matters relating to their national territory.
- (42) In your Complaint you also mentioned your intention to apply for interim relief to a Polish court⁶⁹. National courts are also competent to apply EU competition law and could equally deal with your allegations. In addition, national courts can grant interim relief and damages, may uphold contract performance claims and order interim measures if necessary. National courts may apply EU competition law and national competition law, as well as other relevant national laws applicable to the case, such as contract law.

64 Observations on the Article 7(1) letter, para. 34.

65 C-367/10 P EMC Development, EU:C:2011:203, para. 73.

66 T-70/15 Trajektna luka Split d.d., EU:T:2016:592, para. 63 and T 296/09, EFIM v Commission, EU:T:2011:693, para. 41.

67 Observations on the Article 7(1) letter, para. 35.

68 T-699/14 Topps Europe v Commission, EU:T:2017:2, para 52.

69 Complaint, paras. 135-136.

- (43) In these circumstances, the Commission considers the Polish Competition Authority and national courts to be well-placed to examine the allegations you have made, which are essentially confined to the territory of Poland.

4. CONCLUSION

- (44) In view of the above considerations, the Commission, in its discretion to set priorities, has come to the conclusion that there are insufficient grounds for conducting a further investigation into the alleged infringement(s) and consequently rejects the Complaint pursuant to Article 7(2) of Regulation No. 773/2004.

5. PROCEDURE

5.1. Possibility to challenge this Decision

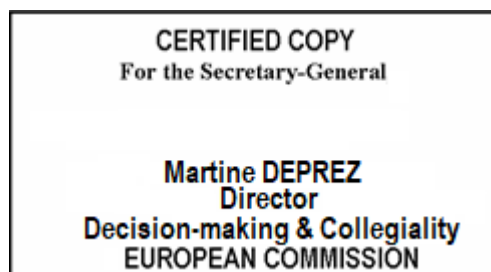
- (45) An action may be brought against this Decision before the General Court of the European Union, in accordance with Article 263 TFEU.

5.2. Confidentiality

- (46) The Commission reserves the right to send a copy of this Decision to PKN Orlen. Moreover, the Commission may decide to make this Decision, or a summary thereof, public on its website.⁷⁰ If you consider that certain parts of this Decision contain confidential information, I would be grateful if within two weeks from the date of receipt you would inform Ana CAINZOS (e-mail: ana.cainzos@ec.europa.eu). Please identify clearly the information in question and indicate why you consider it should be treated as confidential. Absent any response within the deadline, the Commission will assume that you do not consider that the Decision contains confidential information and that it can be published on the Commission's website or sent to PKN Orlen.
- (47) The published version of the Decision may conceal your identity upon your request and only if this is necessary for the protection of your legitimate interests.

For the Commission

Margrethe VESTAGER
Executive Vice-President



⁷⁰ See paragraph 150 of the Commission notice on best practices for the conduct of proceedings concerning Articles 101 and 102 TFEU, OJ 2011/C 308/06.