

A GLIMPSE AT RECENT GENERAL COURT CASE LAW IN THE COMPETITION CASES

CHALLENGES AND SUCCESSES



**CCA International Conference
25 YEARS OF CHALLENGES AND SUCCESS
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Prof. Dr. Vesna Tomljenović
Judge at the General Court EU

LAST 12 MONTHS - THE GENERAL COURT LANDMARK JUDGMENTS

- 👉 10.11.2021 T-612/17, *Google and Alphabet/ Commission (Google Shopping)*
- 👉 26.01.2022 T-286/09 RENV, *Intel Corporation/Commission*
- 👉 15.06.2022 T-235/18, *Qualcomm Inc. /Commission*
- 👉 13.07.2022 T-227/21, *Illumina / Commission*
- 👉 14.09.2022 T-604/18, *Google and Alphabet/ Commission (Google Android)*

EX ANTE CONTROL AND IN INNOVATIVE MARKETS

⇒ *Illumina judgment* (Article 22 referral of the Merger Regulation)

- ⇒ GC confirmed the EC decision to accept referral request from France (and others) for the assessment of Illumina's acquisition of Grail
- ⇒ Commission can review proposed transactions which, even below the EU and national notification thresholds, could potentially raise antitrust issues

⇒ Digital market challenge

- ⇒ Are the competition authorities EU wide equipped with sufficient tools to foresee acquisitions in a digital environment and to rely on Article 22 referral?
 - ⇒ competitive dynamics in digital economy → exponential growth of market power, etc ...

COMMISSION INVESTIGATION POWERS AND TOOLS PART I.

⇒ 20 years of Regulation 1/2003

- ⇒ Regulation 1/2003 provided, inter alia, enhanced investigation tools
- ⇒ Are there checks and balances to the Commission's enhanced investigatory powers?

⇒ *Intel landmark judgment* → “a victory for EU competition law and policy”

- ⇒ GC annulled (partially) the EC decision imposing 1.06 billion fine for a rebate scheme on Intel's CPUs
- ⇒ The Commission analysis is incomplete and does not make it possible to establish to the requisite legal standard that the rebates were capable of having, or likely to have, anticompetitive effects
- ⇒ The AEC test – key issue in the context of loyalty rebates
 - ⇒ A tool to assess whether companies losing out to the dominant company are in this position because they are less efficient, or because illegal conduct is stifling competition
 - ⇒ A detailed «robust» economic analysis is needed in abuse of dominance cases

COMMISSION INVESTIGATION POWERS AND TOOLS

PART II.

⇒ Are there checks and balances to the Commission's enhanced investigatory powers?

⇒ Qualcomm judgment (exclusivity payments)

⇒ GC annulled the EC decision imposing a nearly 1 billion euro fine on Qualcomm (on account of exclusivity conditioned payments made to Apple in breach of Article 102 TFEU)

⇒ The EC procedural errors affecting Qualcomm's right of defence resulted in the annulment of the contested decision

⇒ Proper Commission case management 🖱️ Commission has to register its interviews (precise content) and keep a complete file so that the investigated party can challenge the Commission's case

⇒ Commission did not give Qualcomm opportunity to be heard on the point of the UMTS market – infringement of Qualcomm's rights of defence

NOT EVERYTHING WAS IN VAIN ... PART I.

GC, however, confirmed as correct the EC's course of investigation in complex and challenging cases of abuse of dominant position on digital markets

➡ „... (Commission) can be creative and rigorous”

⇒ *Google Shopping judgment*, T-612/17

⇒ 2017 – EC found out that Google had abused its dominant position on the market for online general search services by favouring its own comparison shopping service, a specialised search service, over competing comparison shopping services

⇒ Result of product search made using Google's general search engine were positioned and displayed in a more eye-catching manner when the results came from Google's own comparison shopping services than when they came from competing comparison shopping services

⇒ GC largely dismissed the action against Commission decision, finding that Google abused its dominant position by favouring its own comparison shopping service over competing shopping services, and confirmed a fine imposed by EC

NOT EVERYTHING WAS IN VAIN ... PART II.

⇒ **Google (Android) judgment** (T-604/18)

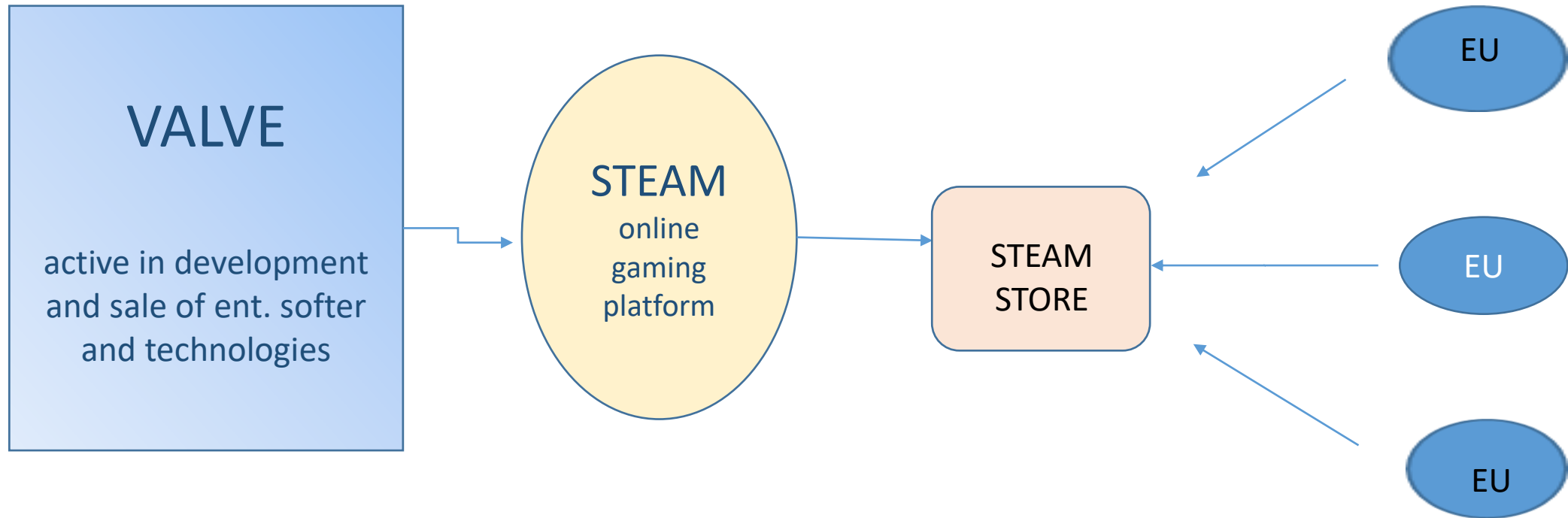
- ⇒ 2018 🖱️ EC fined Google for having abused its dominant position by imposing anticompetitive contractual restrictions on manufactures of mobile devices and on mobile network operators
- ⇒ GC largely confirmed the EC decision that Google imposed unlawful restrictions on the manufactures of Android mobile devices and mobile network operators in order to consolidate the dominant position of its search engine
- ⇒ GC did not validate EC's finding on abuse regarding restrictions contained in Google's portfolio-based revenue share agreements, inter alia, for failure to prove that ACT test was met
- ⇒ GC reduced Commission's fine on Google from €4.343 to €4.125 billion

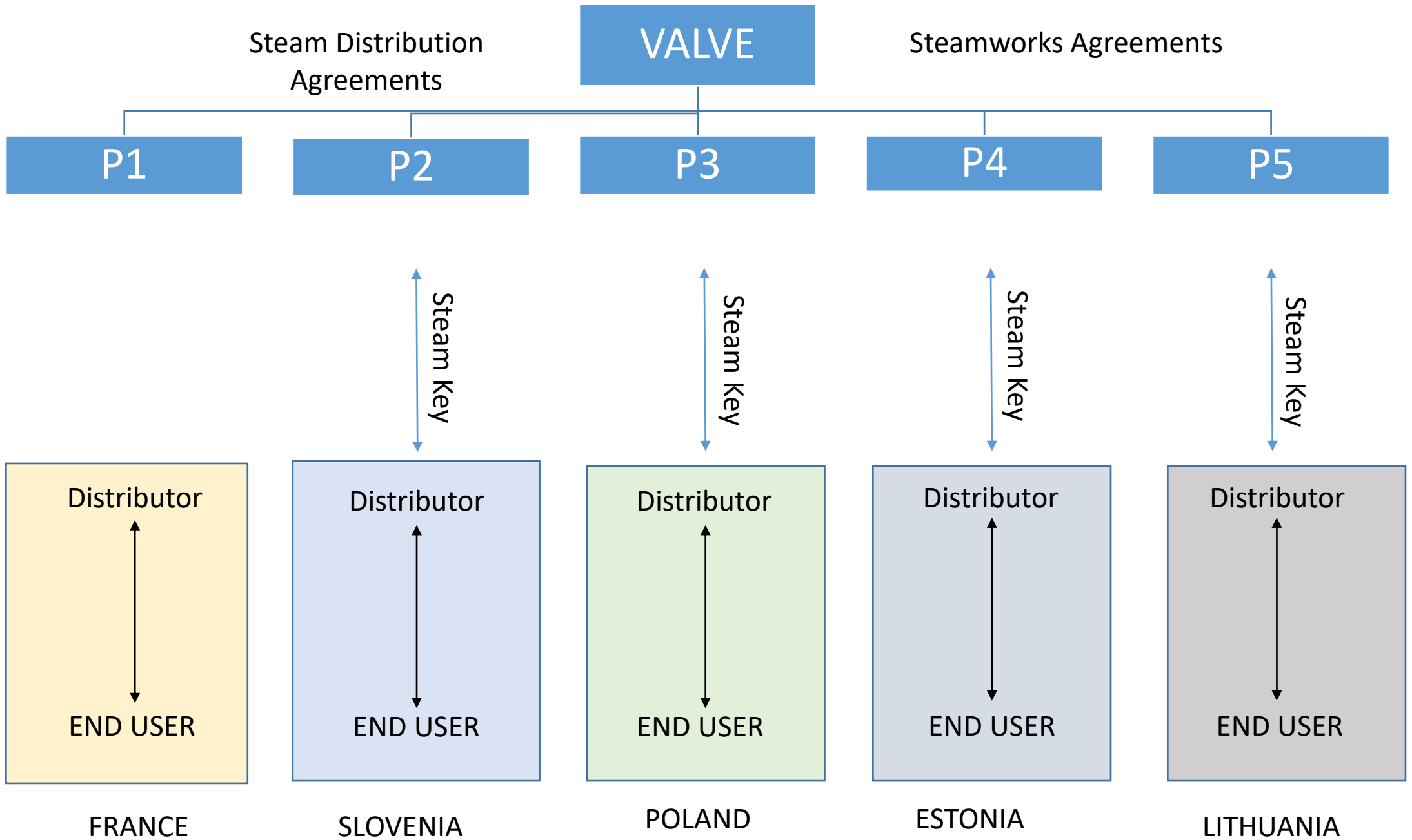
THERE IS MORE TO COME....

REGARDING VERTICAL RESTRAINTS DIGITAL PLATFORMS – ARTICLE 101 TFEU

- ⇒ Do digital platforms pose special problems *post Google Shopping* and *Google Android* judgments ?
- ⇒ Stay tuned for Case T-721/21 *Valve / Commission*
 - 2021 EC decided that Valve was party to agreements and /or concerted practices with 5 publishers aimed at restricting cross-border sales of certain PC video games outside of designated MSs based on geographical location of the user
 - Valve is liable for restriction of competition (Article 101 TFEU) by partitioning markets or making the interpenetration of national markets more difficult by geo-blocking certain video games, thereby preventing or hindering companies from responding to unsolicited requests for those PC video games from outside a specific territory
 - Case law of the EU courts ⇒ ⇒ an agreement which might tend to restore the divisions between national markets is liable to frustrate the Treaty's objective (the establishment of the internal market) and must be regarded, in principle, as restriction of competition by object, unless other circumstances falling within its economic and legal context justify the finding that it is not liable to impair competition

STEAM WORLDWIDE GAMING PLATFORM





- ⇒ New competition issues may arise, for instance, due to the context of geo-blocking practices
 - ⇒ PC videogames – copyright protected goods → relevant EU copyright legal framework
 - ⇒ Relevant EU geo-blocking regulation → Article 4(1)b of the Geo-blocking Regulation

- ⇒ Can these practices be addressed using traditional notions such as those of parallel trade?

CONCLUSION: CHALLENGES AND SUCCESS?

- ❑ At the administrative level, the Commission has faced challenges in balancing the effective conduct of complex multi-year investigations in technology intensive and rapidly changing sectors (e.g. digital) with the rights of defence of the investigated parties.
- Yet, the Commission has succeeded in completing its cases with exemplary fines which have been confirmed (or only slightly reduced) by the General Court
- ❖ *Are national authorities ready for taking up such challenges?*
- ❑ At the judicial review level, there have been certainly challenges ... which the General Court has certainly has experienced (see Intel saga...)
- Yet, the General Court has succeeded in conducting its in-depth review of complex cases involving econometric models and studies which the Court has had no hesitations to control in its administration of justice
- ❖ *Stakes are also important for national courts, particularly, in the context of private litigation on damages for antitrust infringements*

THANK YOU