SECOND EDITION

ELEANOR M. FOX
DAMIEN GERARD

EU COMPETITION LAW

Cases, Texts and Context

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Eleanor M. Fox
Professor of Law Emerita and Walter J. Derenberg Professor of Trade Regulation Emerita, New York University School of Law, USA

Damien Gerard
Visiting Professor, College of Europe and Université catholique de Louvain and Prosecutor General, Belgian Competition Authority

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Preface

> [T]he function of EU competition rules is to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.[1]

From the outset, the development of a competition policy was considered an inherent part of the establishment of the EU single market and as a result, of the whole European integration enterprise. The 1956 Spaak Report, which provided the foundations for the subsequent adoption of the Treaties of Rome, identified monopoly power as a threat to the fundamental objectives pursued by the opening of domestic markets, inasmuch as open markets were to contribute to a 'more rational allocation of resources' and 'a general increase in welfare' in post-World War II Europe. Specifically, the original concerns spelled out in the Spaak Report related to: (i) cartels allocating markets between 'undertakings' (which is the term used to designate businesses in EU competition parlance) that would lead to partitioning effects contrary to the integration project; (ii) agreements limiting output or hampering innovation that would hinder productivity improvements; and (iii) monopolization practices that would pre-empt the welfare gains expected from market integration. Hence, the overarching goal of market integration has since the very beginning encompassed the setting up of 'a system ensuring that competition is not distorted' (former Article 3(g) EC Treaty, now Protocol 27).

The historical connection between competition policy and the establishment of the EU internal market has naturally influenced and continues to affect the enforcement of the EU rules on competition, as now contained in Chapter 1 of Title VII of the Treaty on the Functioning of the European Union ('TFEU'). The prohibition of absolute territorial restrictions in contractual arrangements, the protection of passive cross-border sales in distribution agreements, the particular sensitivity of discriminatory pricing

1 Case C-52/09, *TeliaSonera* [2011] ECR I-527, ECLI: EU:C:2011:83.

practices and the control of State subsidies all illustrate that filiation. Since the beginning, however, market integration and competition policy were conceived as complementary forces aimed at achieving an optimal allocation of resources, i.e., allocative efficiency, without entailing the submission of one to the other. This is not to say that tensions cannot arise, or have not arisen, between both endeavours. Still, since the origins of the Union, competition policy was meant to stand on its own as the recognized engine of a well-performing market economy. Today, the TFEU continues to promote 'the principle of an open market economy with free competition, favouring an efficient allocation of resources' (Article 120 TFEU).

In effect, the protection of the dynamic process of rivalry between firms, aimed at ensuring that the market economy reaches a level of allocation of resources close to an optimal efficiency situation, lies at the core of EU competition policy. It is a robust competitive process that best enables consumers to benefit from lower prices and wider choices of products and services, and that best preserves the incentives of enterprises to perform and innovate. As a result, EU competition policy is naturally tinged with concerns for the protection of the various elements that contribute to shaping competitive market environments. Yet again, competition is viewed as a dynamic process, and competitive markets are not static frameworks. Market players come and go as a result of competitive interactions, and industry concentration, including the acquisition of a certain level of market power, is an acceptable outcome of competition geared towards efficiency. On balance, however, the EU rules on competition are designed in such a way that the protection of competition prevails in the final analysis over alleged benefits arising from the exercise of market power, jointly or unilaterally.

The focus of EU competition law on the protection of the process of competition goes a long way towards explaining the outcome of many hard cases brought by the European Commission as its main original enforcer. In operational terms, it also has the consequence of requiring in each case a contextual assessment of all the circumstances and factors affecting competition in order to evaluate the (likely) effects of the practice(s) in question or the applicability of existing presumptions. Likewise, this process-based focus means that EU competition law enforcement can adjust its analytical framework to the distinctive features of particular industries and also to the evolution of the state of economic knowledge, as well as accommodate other public policy interests, within certain limits. In turn, the focus on the protection of the competitive process requires determinations as to the optimal or acceptable level of competition in particular cases, which are open to various influences, be they particular schools of thought or the views of sophisticated parties. This phenomenon is by no means peculiar to the EU, or to the enforcement of competition law, but the broad wording of the EU rules on competition and the diversity of legal and economic traditions prevailing across the Union make the enforcement of EU competition law particularly open to varying sources of inspiration.

Among these sources, the case law of the US courts in the field of antitrust, combined with the experience of US agencies and the rich scholarship of US academics, has been a constant point of reference for all stakeholders involved in the development of EU competition policy. The benchmarking of the EU experience against that of the US has highlighted over time the specificities of the EU enforcement framework and put a magnifying glass on their shortcomings. That process increased significantly as from the late 1980s with the introduction of the EU merger control regime and the opening of a Brussels office by many US law firms attracted by the completion of the EU Single Market. Since then, a significant body of comparative literature has emerged and revealed differences across the institutional, procedural and substantive dimensions of competition law enforcement on both sides of the Atlantic, as well as the intrinsic interdependence among these three dimensions within each system. Combined with constraints arising from the enlargement of the Union, these iterative transatlantic interactions—including outright criticisms on the occasion of diverging outcomes in the assessment of particular cases—played a significant role in stimulating the comprehensive review of the EU competition law enforcement framework that took place over the turn of the century, as part of the so-called 'modernization' initiative.

While covering all aspects of EU competition policy, this casebook offers various comparative references to the US enforcement context in order to stimulate critical discussions. In fact, it originates in an endeavour to introduce EU competition law to a US audience as part of a broader presentation of the development of EU law.[2] As such, that original endeavour reflected more than two decades of continuous study of the EU enforcement practice as part of an effort to promote transatlantic cooperation and convergence in the field of competition policy. The materials assembled over the years, originally reused with the generous permission of West Academic Publishing, have been carefully updated, completed and expanded in order to turn them into this standalone volume, now in its second edition. While still offering a glimpse of the very foundations of EU competition law, this second edition

2 See R. Goebel, E. Fox, G. Bermann, J. Atik, F. Emmert and D. Gerard (2015), *Cases and Materials on European Union Law*, 4th edn, St Paul, MN: West Academic Publishing.

endeavours to reflect the renewed equilibrium reached in the field after 20 years of implementation and maturation of the EU competition policy modernization project undertaken around the turn of the century. Likewise, it seeks to convey the combined influence on the application of EU competition law of a number of social, economic and policy transformations currently at play, including the digitization of the economy, the green transition and its various sustainability angles, and renewed concerns for equity and fairness against the background of increased economic concentration and inequality.

Nowadays, EU competition law has grown to become a model for various other regimes across the world, notably because of its openness and ability to adjust to different legal and economic traditions. This remarkable evolution makes the study of the EU experience enforcing competition rules ever more important and indeed, informative for (future) practitioners and policy makers beyond Europe. This casebook has therefore been designed to be accessible to a broad audience, including non-EU specialists. As such, it reflects the authors' shared conviction that competition law enforcement benefits from the continuous sharing of experiences and knowledge across forums while equally mirroring the complex social arrangements and tensions underlying each of them. Hence, this casebook is meant to become a collaborative tool by reflecting the outcome of classroom experiences and by adjusting to the requirements of practice in Europe and elsewhere. Users' feedback would therefore be very much appreciated in order to refine the scope and presentation of materials for future editions. Needless to say that the opinions and representations contained in this volume are the authors' own and cannot be attributed to any of the institutions and organizations with which they are affiliated.

Eleanor M. Fox and Damien Gerard
3 February 2023

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Introduction to *EU Competition Law*

This introduction places into historical and institutional context the EU competition law and its interrelation with trade and free movement, and it introduces the seven chapters of the book, which range in coverage from agreements, dominant firm conduct and mergers to State anti-competitive restraints. It explains how these disciplines work to perfect a single internal market while linking the economy to global trade. This introduction provides a snapshot of historical evolution to modern law, which must come to grips with the new forms of global power in the digital economy as well as the increasing traction of nationalism.

Europe was balkanized at the end of World War II. Each nation's borders barricaded trade. Economic nationalism divided Europe. The political economy of the nations varied. Some had statist regimes, with a plethora of State-owned enterprises. Most had significant degrees of government control. The nations were inhospitable to foreign investment, and quotas and tariffs kept out-of-state goods from flowing across the borders. The business enterprises within each nation were plagued by inefficiencies and stagnation. Thus, European business lagged in a world on the brink of global trade and competition.

In 1957, the nations that became the original six EU Member States—Germany, France, Italy, Belgium, Netherlands and Luxembourg—adopted the Treaty establishing the European Economic Community (the 'EC Treaty'), now further elaborated in the Treaty on the Functioning of the European Union or 'TFEU' and for the highest principles, the Treaty on European Union ('TEU'). The EC Treaty was designed to foster peace among the nations and the peoples of Europe by creating interdependencies through the lifting of economic barriers and forming one single market. The four freedoms of movement—goods, services, capital and people—were designed to eliminate State barriers to trade, investment and the establishment of business. Competition policy was tasked to ensure that business actors would not erect or re-erect barriers, exercise special privileges or otherwise abuse their power.

With the traditional tariff and non-tariff barriers removed, competition policy became the trade-and-competition policy for the internal market. National anti-dumping laws were forbidden. State aids were tightly restricted and made transparent. Commercial actors, public as well as private, were forbidden to abuse their dominant positions or enter agreements with the object or effect of restricting competition. State monopolies were prohibited from discriminating against non-nationals, particularly so as not to impair imports or exports.

From the outset, the EC Treaty mandated, as one of the specified activities necessary to carry out the purposes of the Community, 'the institution of a system ensuring that competition in the common market is not distorted ...' (Article 3(f) ECT, subsequently Article 3(1)(g); moved by the Treaty of Lisbon to a clause in Protocol 27 annexed to the Treaties).

EU competition policy is carried out by five sets of principles. First, free movement—the four freedoms—provides a basic framework governing market access. Second, Article 101 TFEU (ex Article 81 EC) prohibits undertakings from making anti-competitive agreements, and Article 102 TFEU (ex Article 82 EC) prohibits dominant undertakings from abusing their dominance; these are the antitrust provisions of the EU Treaties. Third, public undertakings and undertakings to which Member States grant special or exclusive rights are, under Article 106 (ex Article 86 ECT), subject to the competition rules except to the extent that application of those rules would obstruct the performance of their public interest tasks. Fourth, since competition can be distorted by State subsidies, Articles 107 to 109 (ex Articles 87 to 89 ECT) provide for the identification of proposed State aids and their justification or elimination.

Fifth, recognizing that *States* may also unduly obstruct trade and competition, the TFEU imposes obligations on the Member States in addition to the State aid regime. As noted, the TFEU prohibits the Member States from adopting trade-restraining measures; for example, Article 34 (ex Article 28 EC) prohibits quantitative restrictions on imports and measures of equivalent effect. Also, the TFEU requires Member States to 'progressively adjust any State monopolies of a commercial character' to ensure no discrimination in procurement or marketing (Article 37, ex 31 EC). In addition, the TEU requires the Member States to 'facilitate the achievement of the Union's tasks' and abstain from measures that could jeopardize achievement of the Union's objectives (Article 4(3) TEU, ex Article 10 ECT). Accordingly, Member States are restricted in adopting anti-competitive legislation, although this constraint is importantly qualified by States' rights to adopt non-discriminatory regulation in pursuit of justifiable public ends.

The unitary character of the EU's competition policy distinguishes it. In the US, policy regarding public restraints is more sharply separated from policy regarding private restraints, States retain more sovereign power to enact laws that have anti-competitive impacts, and no system disciplines State-granted subsidies.

While attempting to convey the distinctiveness of the EU context, this casebook presents a systematic, focused, up-to-date collection of edited materials covering the whole spectrum of practices and situations falling within the scope of EU competition law, accompanied by questions and commentaries.

Chapter 1 introduces the Treaty provisions directed towards market actors ('undertakings'); namely, Articles 101 and 102 TFEU. It focuses on the procedural framework and on the market-integrating aspects of EU competition policy.

Chapter 2 considers the core anti-competitive restraint, sometimes called hard-core cartels. These are agreements among competitors that have no purpose except to eliminate competition among the competitors, most commonly by market division, price fixing and bid rigging. Chapter 2 introduces the economics of competition law and policy. Also, in connection with transnational cartels, it covers jurisdiction and jurisdictional conflicts.

Competitors engage in many cooperations, and many are not cartels. Their agreements might improve production, distribution, or economic or technological progress. Chapter 3 deals with these agreements, distinguishing permissible collaborations from forbidden ones under Article 101 TFEU.

Chapter 4 addresses a related category of practices arising under Article 101 TFEU: agreements that impose vertical restraints. These are restraints in the course of distribution and licensing, including the licensing of technology. This chapter covers exclusionary and market-blocking restraints, and distribution of goods through selected outlets.

While Article 101 governs anti-competitive *agreements*, Article 102 TFEU governs the unilateral conduct of firms in a dominant position. This major provision of EU competition law—abuse of dominance—is the subject of

Chapter 5. Chapter 5 discusses: when does a firm have a dominant position, and when does conduct by that firm amount to a prohibited abuse?

The law of merger control is covered in Chapter 6. This chapter presents the important EU Merger Regulation, including merger analysis and notification under the merger control system, and conflict and coordination in world merger review.

Finally, Chapter 7 treats competition policy as it applies to actions and measures by the State and to private action authorized or encouraged by the State. European competition law applies to State measures in a number of ways. Public enterprises and State-granted monopolies are subject to competition principles. Member States are required to facilitate the achievement of the Union's tasks. State aids must be reported and justified or eliminated. For private actors tasked by their State to take action that is anti-competitive, the umbrella of State protection is limited, especially when the action puts out-of-state Europeans on an unequal plane. Taken together with the positive freedoms of movement (the four freedoms), the European law principle that constrains State actions and measures harming trade and competition in the internal market rounds the circle of European competition policy.

* * *

1

The Treaty, objectives and the Single Market

Competition laws protect the dynamic process of competition. The process of competition rewards efficiency and inventiveness; it shakes out complacent and bad performers and induces the production and delivery of better goods and services and the provision of a range of goods and services at lower prices. It spurs innovation. It removes obstructions from the path of producers, and it serves people in their capacity as consumers.

Every nation's competition law is a function of its context. Nowhere is this clearer than in the European Union, where the competition provisions are embedded in a Treaty with larger goals. This chapter introduces the European context, as framed originally in the Spaak Report and then restated over time in the European competition policy reports, the mission letters of Commissioners-elect or statements by Competition Commissioners.

A. The objectives of EU competition policy

Competition law is a vital part of EU law. It is informed by many inter-related policies. This was already apparent in one of the first policy documents that thoroughly discussed the rationale for and scope of the EU competition rules as we still know them today;[1] that is, the 1956 Spaak Report.[2] The Spaak Report outlined the contours and articulated the rationales of the 1957 EEC Treaty, including the complementarity between the common market principles and the rules on competition, as follows.

1 Note that the European Coal and Steel Community (ECSC) Treaty of 1951 already contained specific provisions on competition, including concentrations (see Articles 65–67 ECSC).

2 The Spaak Report is named after Paul-Henri Spaak, the then Foreign Minister of Belgium, who chaired an intergovernmental committee tasked to relaunch the European integration process after the failures of the European Defense and Political Communities in the mid-1950s.

Intergovernmental Committee created by the Messina Conference
Reports of the Heads of Delegation to the Ministers of Foreign Affairs

(free translation from the original in French)

Introduction

The purpose of a European common market must be to create a vast area of common economic policy, constituting a powerful unit of production, and allowing for continuous expansion, increased stability, an accelerated rise in the standard of living, and the development of harmonious relations between the States it unites. To achieve these objectives, an integration of the separate markets is an absolute necessity.

* * *

This integration of the markets opens up vast opportunities for the use of the most modern techniques. There are already productions which require such enormous means or machines of such an output that they are no longer suitable for an isolated national market. But above all, in many branches of industry, the national markets offer the chance to reach an optimal scale only to companies which would have a de facto monopoly. The strength of a large market is to reconcile mass production with the absence of monopoly.

Protections which eliminate external competition have, moreover, a particularly harmful consequence for the progress of production and the raising of the standard of living: they facilitate and encourage the elimination of internal competition. In a larger market, it is no longer possible to organize the maintenance of outdated modes of operation which cause both high prices and low wages; and enterprises, instead of preserving immovable positions, are under permanent pressure to invest in order to expand production, improve quality and modernize operations: they must progress in order to maintain themselves.

* * *

In the economic conditions of the modern world, the expansion of markets and competition is not enough to ensure the most rational distribution of activities and the most favorable pace of expansion.

The first fact to be taken into account is the size reached by firms, or the use of agreements between firms and, subsequently, the monopolistic practices, the powers of discrimination, and the risks of market allocation. Competition rules that are binding on companies are therefore necessary to prevent double pricing from having the same effect as customs duties, to prevent dumping from endangering economically sound productions, and to prevent the allocation of markets from replacing their partitioning.

The second fact is the extensive intervention of States in order to favor companies of their nationality. It is therefore necessary to distinguish between aid that is useful to the general interest and to the expansion of production and aid that has the purpose and effect of distorting competition.

* * *

Title II—A common market policy

Chapter 1—Competition rules

Section 1—Standards applicable to undertakings

a) The problem of discrimination

The common market would not in itself lead to the most rational distribution of activities if suppliers were to retain the possibility of supplying users under different conditions, in particular according to their nationality or country of residence. It is in these terms that the problem of discrimination arises.

* * *

b) The problem of monopolies

* * *

More generally, the Treaty must provide for ways of preventing monopoly situations or practices from undermining the fundamental objectives of the common market. In this respect, it will be necessary to prevent

- The allocation of markets by agreement between companies, because this would be tantamount to re-establishing the partitioning of markets;
- Agreements to limit production or to slow down technical progress, because they would run counter to the progress of productivity;
- Absorption or domination of the market for a product by a single firm because it would eliminate one of the essential advantages of a large market, which is to reconcile the use of mass production techniques and the maintenance of competition.

* * *

Section 2—Rules on State aid

One of the essential guarantees that must be given to firms is that the game will not be distorted by artificial advantages enjoyed by their competitors.

* * *

The general rule is that aid in any form whatsoever which distorts competition and the distribution of activities by favouring certain undertakings or the production of certain goods, is incompatible with the common market.

* * *

Since the Spaak Report and the ensuing EEC Treaty, the envisaged 'economic community' has transformed into a sophisticated political Union, yet the common market and the rules of competition have remained the bedrock of the overall enterprise. Over time, in particular following completion of the original market integration project, the reach and objectives of the rules on competition have been restated, while the foundations have remained unchanged. This is apparent from various sources.

Every year, the Directorate-General for Competition of the European Commission publishes a report on competition policy, which discusses the objectives of EU competition policy and states enforcement priorities. Before each newly constituted Commission takes office, the then President-elect also presents a mission letter to the Commissioner-elect in charge of competition, outlining the objectives of her mandate and methodological considerations. EU Competition Commissioners' speeches have further reflected a variety of influences in their own approach to competition policy and enforcement. The following excerpts discuss the various objectives of EU competition policy, as they have evolved over the years. In a way, these excerpts might give the impression that EU competition law is amorphous, whereas it is actually quite well anchored.

European Commission 2021 Report on Competition Policy
Foreword by Margrethe Vestager, Executive Vice-President
and Commissioner for Competition

Unfortunately, the pandemic continued to make itself felt in 2021—both on our health and on our economy. Things seemed to be getting back to normal when, in February 2022, another shock rocked the world—this time Russia's invasion of Ukraine. The European Union stands united with the Ukrainian people and their government, imposing sanctions against Russia and providing aid where it is needed. In addition to human losses and the enormous scale of physical destruction, the Ukraine economy is contracting dramatically.

As the conflict continues to take its toll on the EU economy, the Commission has acted quickly to mitigate the impact by adopting a State aid Temporary Crisis Framework to allow the necessary government support to businesses, while at the same time preserving the integrity of our Single Market. The adoption—only a month after the war started—is an example of how competition policy can be used to swiftly react to needs following external economic shocks.

* * *

Competitive markets and a well-functioning Single Market are important at all times but especially in times of crisis and major change. If we are to make a sustainable and resilient recovery, if we are to deliver on our ambitious agenda for a green and digital future, we need the price signals, the competitive energy and the fresh thinking that competitive, well-functioning markets can deliver. The competition policy the EU pursued in 2021 made a significant contribution to these objectives, and by reviewing and updating our rulebook, we are making sure this will continue in the years to come. If there is one thing we should expect, it is that more unexpected events will occur and that puts the spotlight on agility, adaptation and reform. That is what will equip us to meet these future challenges head on.

European Commission 2013 Report on Competition Policy

[T]he European Parliament's 2013 study on competition policy concluded: 'Competition plays a crucial role in promoting productivity and innovation as drivers of economic growth. This means that competition policy, which intensifies competition, will stimulate growth.'

It applies to all the instruments of competition policy. Antitrust enforcement can thwart dominant companies' attempts to keep new entrants away from the market and prevent them from competing effectively with them. It can also create the conditions for lower input prices for EU industry. Merger control can keep markets open and efficient. State aid policy protects the internal market from distortions and helps to steer public resources towards competitiveness-enhancing objectives.

In addition, competition and competition policy are part and parcel of the general conditions required for innovation to flourish. They provide incentives to innovative enterprises and start-ups, they encourage companies to become more efficient, and they promote subsidies designed to stimulate R&D and innovation.

Competition policy fosters competitiveness in a global context. Healthy competition in the Single Market prepares European companies to do business on global markets and succeed. It also underpins a modern industrial policy, as reflected in the Lisbon Treaty's provisions on industry (Article 173 TFEU) which states that action taken by the EU and the Member States shall be 'in accordance with a system of open and competitive markets.'

Furthermore, competition policy is the necessary counterpart of Single Market regulation. The impact of the regulatory measures on firms' strategies and investment can be undermined if Single-Market and competition rules are not properly enforced.

* * *

European Commission Report on Competition Policy (2006)
Foreword by then Competition Commissioner Neelie Kroes

The experience of the past fifty years of European integration shows that fair and undistorted competition in a single market works to the benefit of everyone in terms of prosperity, consumer choice, and sustainable employment.

'Free competition' is not an end in itself—it is a means to an end. When we strive to get markets working better, it is because competitive markets provide citizens with better goods and better services, at better prices. Competitive markets provide the right conditions for companies to innovate and prosper, and so to increase overall European wealth. More wealth means more money for governments to use to sustain the fabric of our societies and to guarantee social justice and a high-quality environment for generations to come.

When companies fix prices in markets like beer or elevators, customers pay higher prices and the economy at large picks up the bill. When companies abuse a dominant position, they not only exclude competitors but also dampen innovation since other companies know that however good their products are, they cannot compete on the merits. So our European anti-trust rules outlaw such behaviour throughout the Union, to the benefit of consumers.

European companies need to be able to take advantage of an open internal market, by creating efficiencies of scale and diversifying. Our merger control rules allow European champions to grow on their merits, developing into global players, provided that consumers are not harmed through reduced competition.

Our properly balanced State aids discipline prevents undue State intervention which would distort competition on the merits. . . .

The spirit and objectives underlying the European competition rules, and the need to enforce them effectively, remain as pertinent today as ever before. But of course the environment in which competition policy functions changes and develops over time.

European companies, employees and consumers are increasingly part of a global economy, and are having to adjust to reap the benefits globalization has to offer.

European competition policy—the rules and their enforcement—must play its part in supporting this process:

- by continuing to uphold a level playing field in our internal market, since free and fair competition at home allows European companies to learn from experience how to stand up to global competitive pressure . . .;
- by adapting to the realities of the day: in 2006 our ongoing State aid reform focused on the areas where limited amounts of aid can have most added value in terms of spurring on competitiveness and assisting change: training, regional cohesion, research, development and innovation . . .;
- by being better joined up: the mutual interaction of, for example, single market, consumer protection and trade policies with competition policy has never been more important. Sector inquiries and market monitoring are two tools we used in 2006 to identify remaining barriers to free competition—be they the result of business practices, regulation or other State action . . .;
- by working more beyond our European borders: increasing globalization also means more multi-jurisdictional mergers, anti-competitive conduct and even State subsidization across borders. International cooperation is vitally important for all modern competition authorities. Europe must continue to lead the way through day-to-day enforcement cooperation and bilateral and multilateral agreements. . . .

The European Commission remains firm in its resolve to ensure that European competition policy meets the challenge and continues to guarantee open and better functioning markets, not as a goal in itself, but as a means to help ensure that Europe is a net winner of globalization.

Mission Letter from The President-Elect of the Commission to the Vice-President for Digital Market and Competition (2019)

Ursula von der Leyen,
President-elect of the European Commission

Mission Letter — Brussels, 10 September 2019

Margrethe Vestager
Executive Vice-President-designate for a Europe fit for the Digital Age

Dear Margrethe,

* * *

Changes in climate, digital technologies and geopolitics are already having a profound effect on the lives of Europeans. We are witnessing major shifts all the way from global power structures to local politics. While these transformations may be different in nature, we must show the same ambition and determination in our response. What we do now will determine what kind of world our children live in and will define Europe's place in the world.

Our job as the European Commission will be to lead, to grasp the opportunities and to tackle the challenges that these changes present, working hand in hand with people from across Europe and with the governments, parliaments and institutions that serve them.

* * *

Your mission

I would like to entrust you with the role of Executive Vice-President for a Europe fit for the Digital Age.

* * *

In striving for digital leadership, we must focus on making markets work better for consumers, business and society, and must support industry to adapt to globalisation and the twin climate and digital transitions. We need companies that compete on equal terms and consumers that can benefit from lower prices, greater choice and better quality.

As Executive Vice-President, you will have a dual function. You will chair the Commissioners' Group on a Europe fit for the Digital Age. In addition, you will be responsible for the competition portfolio. In leading the work on a Europe fit for the Digital Age, you will ensure all policy dimensions are fully taken into account.

* * *

Competition

Your task over the next five years will be to ensure our competition policy and rules are fit for the modern economy, vigorously enforced and contribute to a strong European industry at home and in the world.

- Competition rules are only as effective as their implementation. I want you to focus on **strengthening competition enforcement** in all sectors. You should focus on improving case detection, speeding up investigations and facilitating cooperation with and between national competition authorities. You should also actively contribute to stronger global cooperation among competition authorities.

* * *

- Competition will have an important role in our **industrial strategy**. The competitiveness of our industry depends on a level playing field that provides business with the incentive to invest, innovate and grow. EU State aid rules should support this where there are market failures and the need to strengthen value chains. As part of this, you should continue to work with the Member States to make the most of Important Projects of Common European Interest.
- As part of the industrial strategy, you should develop tools and policies to better tackle the distortive effects of **foreign state ownership and subsidies** in the internal market.

* * *

Yours sincerely,
Ursula von der Leyen
President-elect of the European Commission

Mission Letter from The President of The Commission to the Competition Commissioner (2014)

Jean-Claude Juncker,
President-elect of the European Commission

Mission Letter Brussels, 10 September 2014

Margrethe Vestager Commissioner for Competition

Dear Margrethe,

You are becoming a Member of the new European Commission at a particularly challenging time for the European Union. With the start of the new Commission, we have an exceptional opportunity, but also an obligation, to make a fresh start, to address the difficult geo-political situation, to strengthen economic recovery and to build a Europe that delivers jobs and growth for its citizens.

* * *

I want the Commission as a whole to be more than the sum of its parts. I therefore want us to work together as a strong team, cooperating across portfolios to produce integrated, well-grounded and well-explained initiatives that lead to clear results. I want us to overcome silo mentalities by working jointly on those areas where we can really make a difference.

* * *

The Competition portfolio

You will be the Commissioner for Competition. You will, in particular, contribute to projects steered and coordinated by the Vice-President for Jobs, Growth, Investment and Competitiveness, the Vice-President for the Digital Single Market and the Vice-President for Energy Union. As a rule, you will liaise closely with the Vice-President for Jobs, Growth, Investment and Competitiveness in defining the general lines of our competition and State aid policies and the instruments of general scope related to them.

Competition policy is one of the areas where the Commission has exclusive competence and action in this field will be key to the success of our jobs and growth agenda. It should contribute to steering innovation and making markets deliver clear benefits to consumers, businesses and society as a whole. Every effort should be made to maximize the positive contribution of our competition policy in support of our overall priorities and to explain and demonstrate its benefits to citizens and stake holders at all levels.

During our mandate, I would like you to focus on the following:

- Mobilising competition policy tools and market expertise so that they contribute, as appropriate, to our jobs and growth agenda, including in areas such as the digital single market, energy policy, financial services, industrial policy and the fight against tax evasion. In this context, it will be important to keep developing an economic as well as a legal approach to the assessment of competition issues and to further develop market monitoring in support of the broader activities of the Commission.
- Pursuing an effective enforcement of competition rules in the areas of antitrust and cartels, mergers and State aid, maintaining competition instruments aligned with market developments, as well as promoting a competition culture in the EU and world-wide.
- Maintaining and strengthening the Commission's reputation world-wide and promoting international cooperation in this area.

* * *

Jean-Claude Juncker

Speech by Commissioner Margrethe Vestager
Fairness and Competition

GCLC Annual Conference, Brussels, 25 January 2018

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And the fact is, the competition rules aren't there just because we think that competition is a good thing in itself. Like any of the other rules that govern our world, we have competition rules because we believe they make our society a better place to live. That they make our markets work more fairly for consumers.

* * *

We know that competition gives consumers the power to demand a fair deal. To shop around to find a better price, or a wider choice of products. To seek out better quality, whatever that means to them—whether it is a more reliable car, or a social network that protects their private data better.

That doesn't mean that we at the Commission see ourselves as superheroes, solving all unfairness, and righting every wrong. It doesn't mean that just because something is unfair, it's automatically also against the competition rules. All it means is that simply by doing our job—simply by enforcing the competition rules in our Treaty—we do our bit to make Europe a fairer place to live.

* * *

In the end, that's what the competition rules are for. Not to stop companies succeeding on their own merits. Not to switch off the competitive spirit. But to make sure that our markets stay competitive enough to give consumers the power to demand a fair deal.

Speech by Commissioner Margrethe Vestager
How competition can build trust in our societies

TED Talk, New York, 20 September 2017

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But why have competition rules at all? Why not just leave it to business to compete? Isn't it in their interests to compete as freely as possible—and in our interest, since more competition means more innovation, better products and services, and lower prices.

Mostly, it is. The problem is that sometimes, for business, competition can be inconvenient.

* * *

So the temptation to avoid competition is powerful. It's rooted in motives that are as old as Adam and Eve. In greed for yet more money. In fear of losing your position in the market, and all the benefits that position brings. And when greed and fear are linked to power, they create a dangerous mix.

We see that in political life. In parts of the world, that mix of greed and fear means that those who get power never give it up freely. One of the many things I like and admire in our democracies are the norms that make sure our leaders hand over power when the voters tell them to.

Competition rules can do a similar job in markets—making sure that greed and fear don't overcome fairness. Because those rules mean that companies can't misuse their power to undermine competition.

* * *

So there are times when we need to step in, to make sure competition works the way it should.

By doing that, we help to make markets work fairly. Because competition gives consumers the power to demand a fair deal. It means companies know that if they don't offer a good price, and a proper service—well, then their customers will simply go somewhere else.

And that sort of fairness is more important than we often realize.

Because most of us don't think about politics all the time. But we do have to deal with the market every single day. We don't want businesses to agree on prices in the back office or divide the market between them or one powerful business to keep their competitors out of the market. If it happens we feel cheated, ignored, taken for granted by the market. And that undermines our trust in the society around us.

* * *

The market is not the society. Our societies are much more than the market—but lack of trust in the market can rub off on the society as such—so we lose trust in our society.

And that is the most important currency our societies have—trust.

We can only trust each other if we're treated as equals. If we all have the same chances, all have to follow the same fundamental rules. Of course, some people and some businesses will be more successful than others. But we don't trust a society if the prizes are handed out before the contest begins.

* * *

That's where competition rules come in. Because they make sure that markets work fairly, that businesses compete on the merits. And that helps to build the trust we need as citizens to feel comfortable and in control—and that our society needs to work well.

Without trust, everything we do becomes harder.

* * *

As our societies grow, trust gets more important than ever—and harder to achieve.

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That's why I'm convinced that real and fair competition has a vital role to play, in building the trust we need to make the best of our societies. And starts with enforcing our competition rules.

Speech by Commissioner Margrethe Vestager
The Values of Competition Policy

CEPS, Brussels, 13 October 2015

I'm often asked about the values underpinning our competition policy. More specifically, people ask about the role of politics.

We can look at the politics of competition enforcement from three angles, starting from whether competition policy is based on political values and principles. The answer is, obviously, yes.

Keeping markets fair, level, and open is good for our economies and societies. It establishes a good environment for business in Europe where companies can generate wealth, create jobs, and invest in the future.

The second question is: Does competition enforcement relate to wider political priorities? And does it inform regulatory and other action taken to implement such priorities? Again, the answer is: Yes, it does.

The Juncker Commission is a political Commission with a clear set of objectives and the College of Commissioners plays as a team.

Competition policy—and I as Competition Commissioner—clearly have our own space in it. But there should be no doubt that I will do my part to help achieve the Commission's broader objectives.

The final question is: Is competition enforcement in individual cases politicized? Here the answer is a resounding No.

We enforce the law and serve the common European interest. We are committed to the principles of fairness, good administration, transparency and due process. There is simply no room to spare for political interference.

Speech by Commissioner Mario Monti
Competition for Consumers' Benefit

European Competition Day, Amsterdam, 22 October 2004

* * *

The promotion of consumer welfare has been at the heart of my mandate as Competition Commissioner. We have moved a long way … in terms of the developments of competition policy which have taken place during these five years. I would like to take this opportunity to look back over some of these achievements and their relevance to the lives of European consumers.

I said in my hearing before the European Parliament back in 1999, just before my term as Competition Commissioner began, that I would give 'central importance to the consumer'.

I said in the same hearing before Parliament that explaining the benefits of competition policy to the citizen was a key task for the Competition Commissioner. This is not only crucial in terms of making the ultimate end users of competition policy, namely the consumers themselves, understand how and why competition helps them and improves their daily living conditions. It is also essential in the mission to bring Europe and its institutions closer to the citizen and let the citizens see what Europe does for them. I believe that competition is one of the fields in which the EU has managed to have a real positive impact on the lives of European citizens.

I want to start by going back to some basic points which have underpinned all my work as Commissioner for Competition and which remind us of the importance of a fully functioning and active competition policy for consumer welfare. The competition policy pursued by the European Commission has a direct impact on the daily life of the citizens of the European Union. For example, the reduction of telephone charges, wider access to air transport and the possibility of buying a car in the EU country in which prices are lowest are tangible results produced by recent policies pursued by the Commission.

* * *

Other, less visible, areas of Community competition policy also produce positive effects for the public. Merger control ensures a diversity of mass-market consumer goods and low prices for the final consumer. Likewise, by contributing to economic and social cohesion, the monitoring of State Aid helps to promote viable and durable jobs throughout the Union. When aid favours certain firms, it is liable to cause damage to competitors in other Member States, which in some cases might go as far as to jeopardize the very survival of those firms and, consequently and crucially, the jobs of their employees. Whether they be consumers, savers, users of public services, employees or taxpayers, the Union's citizens enjoy the fruits of competition policy in the various aspects of their everyday life.

? NOTES AND QUESTIONS

1. Describe in your own words the goals of the competition policy of the EU. Which of the following objectives do you think are most basic and should be preferred in the event of conflict or tension: consumer welfare, strength of European business, opportunity for small and medium-sized enterprises, market integration, market access, market liberalization, level playing field, fairness?
2. Is there a relationship between competition policy and the following? Explain.
   (a) The competitiveness of European businesses in world markets
   (b) Growth
   (c) The environment
   (d) Jobs
   (e) Cohesion (e.g., lifting up the poorest Member States)
   (f) Economic liberalization
   (g) Cartels.
3. Are there advantages and/or disadvantages of linking competition policy with jobs, growth, investment and competitiveness? Of coordinating competition policy with the digital single market? With energy policy?
4. In the US, competition law (antitrust) does not incorporate non-competition objectives, at least not in theory. Since the 1980s, US antitrust law has focused on the integral goals of consumer welfare and efficiency. Antitrust officials often claim that antitrust policy should influence other policies such as trade, but that other policies such as trade should not influence antitrust.
5. Do you observe differences in the rhetoric of US and of EU competition law policy? What differences? What are the advantages and disadvantages of couching competition law in a larger socio-political framework?

B. Institutions and procedures

The enforcement of competition principles by the European Commission and in cooperation with the national competition authorities of the Member States ('NCAs') is governed by Regulation 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty.[3] Another regulation governs merger control proceedings before the Commission and the interactions with NCAs in that context (Regulation

3 [2003] *O.J.* L 1/1.

139/2004 on the control of concentrations between undertakings,[4] often referred to as the 'Merger Regulation'). See Chapter 6 for a discussion of merger control proceedings. Similarly, Regulation 2015/1589 governs the application of EU State aid principles, as discussed in Chapter 7.[5]

In a nutshell, antitrust cases for infringement of Articles 101 or 102 TFEU may be initiated by the Directorate-General for Competition of the Commission ('DG COMP'). The Commission has powers to investigate and to obtain documents by means of requests for information or inspections. After opening proceedings, the Commission issues a reasoned opinion (called a statement of objections or 'SO' in infringement cases), which describes the conduct involved and contains an assessment. The firms involved may then file written arguments, submit documents and request a hearing, which is held before a hearing officer who rules on procedural matters.

The case handlers within the Directorate-General for Competition draft a preliminary decision. The draft is vetted within DG COMP and then by the Legal Service (lawyers to the various directorates of the Commission), by other relevant directorates of the Commission and by an advisory committee of Member State representatives. The resulting revised draft decision is submitted to and ordinarily adopted by the College of Commissioners. The decisions adopted by the Commission include infringement decisions, often imposing multi-million-euro fines. Resolutions may also take the form of settlement decisions, wherein parties acknowledge the infringement, and commitment decisions, entailing the closure of cases without a finding of infringement but with commitments binding on the parties involved.

The firms involved and other persons with a special interest can seek annulment of any Commission decision before the EU General Court. Either party can then appeal the judgement to the EU Court of Justice, whose jurisdiction is then limited to points of law (not facts).

EU competition law cases may also be initiated, investigated and decided by national competition authorities according to applicable national procedures, and may be litigated by private parties in national courts (including in damages actions). In fact, a significant part of the EU competition case law arises from national courts' preliminary references to the EU Court of Justice. National competition authorities and national courts also enforce national competition provisions but are bound to ensure the consistency

4 [2004] *O.J.* L 24/1.

5 Regulation 2015/1589 laying down detailed rules for the application of Article 108 TFEU, [2015] *O.J.* L 248/9.

of the interpretation of such provisions with EU competition principles in cases affecting cross-border trade within the Union. Within the framework of the European Competition Network (or 'ECN'), the Commission and NCAs cooperate extensively in the enforcement of competition rules across the EU by exchanging information and sharing resources.

1. From Regulation 17/62 to Regulation 1/2003

In 1962, the Council adopted Regulation 17 to give the Commission the necessary powers to administer and enforce the Treaty provisions on competition and to give procedural rights to individuals. Regulation 17 remained in force until 2004, when it was replaced by Regulation 1/2003.

Regulation 17 empowered the Commission to carry out investigations, including surprise visits to search and copy documents ('dawn raids'), and to order the termination of infringements and the imposition of fines on undertakings.

Agreements, decisions and concerted practices within the scope of Article 101(1) had to be notified to the Commission, which could give a 'negative clearance'. That is, the Commission could certify that 'on the basis of the facts in its possession, there are no grounds under Article [101(1)] or Article [102] of the Treaty for action'. For agreements of a common and routine sort, such as exclusive distribution, the Commission adopted block exemptions. Agreements that complied with the block exemptions were automatically exempt and did not need to be notified.

By the late 1990s, the notification and prior approval system proved time-consuming, with little pay-off. It distracted the Commission from more important pursuits, such as cartels. Moreover, block exemptions had proliferated, and their dos and don'ts were straightjacketing business transactions. Facing these and other constraints, chiefly the enlargement of the Union with ten new Member States, the Commission's Directorate-General for Competition undertook a programme of modernization in the late 1990s. At the end of 2003, it adopted Regulation 1/2003, which in 2004, replaced Regulation 17.

The introduction of Regulation 1/2003 was a dramatic event. It reflected significant procedural reform whereby powers would devolve to Member States. Member States would still be obliged to carry out EU law, and a new network of national authorities and DG Competition, the ECN, combined with continuing sharing of information about all relevant national court judgements, would assure consistency and coherence.[6]

Besides its institutional dimension, the modernization process also included a substantive dimension to incorporate a more economic approach to the enforcement of EU competition law and a procedural dimension to introduce alternative 'negotiated' enforcement tools, including commitment and later, settlement decisions.

2. The innovations brought about by Regulation 1/2003

In practice, Regulation 1/2003 devolved enforcement powers to the Member States with respect to agreements that restrict competition. It abolished the notification procedure and made Article 101(3) directly effective so that national competition authorities and national courts, as well as the Commission, could decide whether agreements fulfil the requirements of Article 101(3). This sharing of power lightened the Commission's workload, giving it time to consider more serious restraints of Union-wide interest.

Regulation 1/2003 established the following principles to coordinate the sharing of power in the enforcement of EU competition principles, among others:

1. Article 3 imposes two fundamental obligations on the courts and competition authorities of the Member States, to preserve the realm of EU law. First, where national competition law is applied to agreements and abusive practices that may affect trade between Member States, Article 3(1) imposes the obligation on national authorities and courts to apply Articles 101 and/or 102 concurrently with the national law. Second, Article 3(2) obliges the competition authorities and courts of the Member States not to invoke national law to prohibit agreements or concerted practices that may affect trade between Member States but that are not prohibited under EU competition law. Note that abuses of dominance are not in this category; Member States retain the power to prohibit abuses that may fall short of a Treaty violation.
2. The Commission retains its ability to deal with any case affecting trade between Member States. When it does so, it relieves national authorities

6 Read Regulation 1/2003, which is available at: https://competition-policy.ec.europa.eu/antitrust/legislation_en (accessed 3 February 2023).

of their competence to apply EU law in the particular case. Likewise, national courts and national competition authorities are precluded from adopting decisions that would run counter to a pre-existing Commission decision in the same case. In addition, Article 10 of Regulation 1/2003 equips the Commission with the sole power to adopt, on its own initiative and when the Union public interest so requires, ex ante decisions finding that a particular agreement or practice does not infringe Articles 101 or 102 TFEU. The Commission has not made use of that power so far, but the Court of Justice has confirmed its exclusive nature and thus, denied the ability of NCAs to adopt such a finding of inapplicability.[7]

3. In order to ensure the consistent application of EU competition law throughout the Union, Regulation 1/2003 creates mechanisms for information sharing and consultation among national competition authorities and DG COMP through the creation of the ECN—a robust network that has enhanced cooperation in handling cases, facilitated case allocation and produced soft convergence of national laws and procedures. Also, national courts may ask the Commission for its support in the application of Articles 101 and 102 TFEU, and both national competition authorities and the Commission are empowered to make *amicus curiae* submissions before national courts. The Commission is equally entitled to publish opinions on any particular novel or unresolved questions for the application of Article 101 or 102.

Article 7 of Regulation 1/2003 incorporates the pre-existing fining power of the Commission and specifies that the Commission has power to impose any remedy of a behavioural or structural nature that is proportionate to the infringement and necessary to bring it effectively to an end. Under Article 9, the Commission can accept commitments offered by companies to solve the competition issue identified after a preliminary assessment and close its investigation on that basis without a finding of infringement and imposing a fine.

Compared with Regulation 17, Regulation 1/2003 also confers additional investigative powers by empowering Commission officials to (i) seal premises for the period and to the extent necessary for their inspection, (ii) ask oral questions not linked to specific documents, and (iii) enter non-business premises when there is a reasonable suspicion that books and other records relevant for the inspection are being kept there.

7 See Case C-375/09, *Tele2 Polska* [2011] ECR I-3055, EU:C:2011:270.

Consider the virtues of Regulation 1/2003 in terms of devolution, empowerment, shared deliberation, cross-fertilization, coherence and networking. What lessons might Regulation 1/2003 hold for other communities of nations facing multiple and sometimes overlapping systems of law?

As noted, instead of imposing a fine, the Commission can accept commitments under Article 9 of Regulation 1/2003. Consider the advantages of such a procedure for the Commission and defendants. Are there any risks? Consider the judgement of the EU General Court in the Alrosa case,[8] as reversed by the Court of Justice.[9]

Regulation 1/2003 governs the procedures and process for competition proceedings under EU law. Also relevant is a significant body of Court of Justice case law establishing rights of defence and articulating the bounds of legal privilege. These include the right of access to the Commission's investigation file, the right to be heard, the right not to incriminate oneself, the right not to be prosecuted twice for the same infringement (*ne bis in idem*), the right to a reasoned decision and the right to effective judicial review. The Commission codified many of these rights in Regulation 773/2004 on the conduct of proceedings by the Commission[10] and in notices and guidelines.

Over the years, though, following successive assessments of the performance of the decentralized enforcement system put in place by Regulation 1/2003, certain cracks became increasingly apparent. Notably, the Commission reached the view that national laws prevented many NCAs from having the necessary guarantees of independence, resources, and enforcement and fining powers to be able to enforce EU competition rules effectively. For example, many NCAs were found to lack effective tools to find evidence of infringements or the necessary legal basis to fine undertakings in breach of Articles 101 and 102 TFEU. This meant that undertakings engaging in anti-competitive practices might face very different outcomes in proceedings depending on the Member State in which they are active, thereby leading to fragmentation and possible under-enforcement.

In order to ensure a truly common competition enforcement area in the Union and a more even level playing field for undertakings, Directive 2019/1 was adopted with the aim 'to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper

8 Case T-170/06, *Alrosa Co. Ltd v. Commission* [2007] ECR II-2601, EU:T:2007:220.

9 Case C-441/07 P, [2010] ECR I-5949, EU:C:2010:377.

10 [2004] *O.J.* L 123/18.

functioning of the internal market' (also known as the 'ECN+ Directive', [2019] *O.J.* L 11/3). Its concrete ambition was to put in place fundamental guarantees of independence, adequate financial, human, technical and technological resources, and minimum enforcement and fining powers to ensure the effectiveness of the application of Articles 101 and 102 TFEU and national competition law by national administrative competition authorities. The ECN+ Directive has now been transposed in all EU Member States and triggered both the reform of national enforcement frameworks and an increase in the means of national competition authorities.

Note on the effects-based approach

As noted, the modernization process also entailed a substantive dimension. Since the late 1990s and the completion of the Single Market, the rationality underlying EU competition law enforcement has progressively shifted from the protection of the freedom to trade of competitors to the promotion of a competitive process conducive to efficient outcomes and contributing as a result to the welfare of consumers. Initiated under the tenure of Commissioner Monti, that shift has since been affirmed in various policy documents issued by the Commission, including the Article 102 (formerly 82) Guidance Paper (further discussed in Chapter 5). The Guidance Paper states:

> 5. In applying Article [102] to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and that consumers benefit from the efficiency and productivity which result from effective competition between undertakings.
>
> 6. The emphasis of the Commission's enforcement activity in relation to exclusionary conduct is on safeguarding the competitive process in the internal market and ensuring that undertakings which hold a dominant position do not exclude their competitors by other means than competing on the merits of the products or services they provide. In doing so the Commission is mindful that what really matters is protecting an effective competitive process and not simply protecting competitors. This may well mean that competitors who deliver less to consumers in terms of price, choice, quality and innovation will leave the market.

The purpose of achieving efficient market outcomes leads naturally to (i) focus the analysis on the effects of particular commercial practices, rather than on hypothetical views as to the capability of such practices to affect competition, and (ii) articulate theories of harm relying on operative tests capable of balancing the pro- and anti-competitive effects of the practices in question. Hence, the substantive dimension of modernization is often presented as a move towards an 'effects-based approach'. Alternatively, it is also referred to as a shift towards a 'more economic approach' to the enforcement of EU competition rules. This is because: (i) the basic premise of the effects-based approach is of an economic nature, for it acknowledges that the most effective way to achieve allocative efficiency is to maximize individual utility; (ii) the observed rationality shift is also the result of a learning process and of an attempt to factor the evolution of the teachings of economics into the substance of norms; and (iii) the articulation of operative tests to substantiate the effects of particular practices has been made possible by the growing sophistication of tools of economic analysis.

The mutually reinforcing character of the different dimensions of the modernization process—institutional, substantive and procedural—is also remarkable. Thus, the transition from a prior notification to an exception system for the review of cooperation agreements under Article 101 TFEU has effectively unlocked the analytical framework and allowed the move away from a strict bifurcated approach towards a more integrated balancing of the effects of the practice in question in the form of a structured rule-of-reason. That evolution has also had repercussions on the application of Article 102 TFEU, which now follows a similar pattern. Likewise, additional empirical evidence of the actual anti-competitive effects of certain practices has rendered some of them almost unquestionably illegal, thereby allowing expedited enforcement actions in the form of settlements. Conversely, practices with uncertain welfare effects can now be solved by means of commitments without entailing a finding of infringement.

Naturally, it takes time for any paradigmatic change to achieve a state of renewed consistency, and the move towards an effects-based approach has not been immune from cognitive dissonances requiring adjustments. For example, the tendency to rely on an extensive object category to establish infringements of Article 101 TFEU, with the potential of bypassing effects analysis, has been policed by the Court of Justice.[11] Conversely, the restrictive object category defined by the Court as entailing a rebuttable presumption of anti-competitive effects rooted in empirical findings accumulated over time is compatible with a modern enforcement approach that needs

11 Case C-67/13 P, *Groupement des cartes bancaires (CB) v. Commission*, EU:C:2014:2204 (excerpted in Chapter 3).

to remain administrable and does not imply any normative view as to the robustness of markets.

The risk of double standards between the policy options favoured by the Commission and the law as stated by the Court of Justice has been a justifiable concern early in the process. Yet, the Court has demonstrated openness to the teachings of modern economics underpinning the effects-based approach,[12] and over time, a reasonable alignment between policy and law has emerged. This is certainly not to say that there is now unanimity about the soundness of the current state of the law or of the enforcement practice of the Commission or the NCAs. Various cases have proven very controversial in recent times, notably abuse cases in the digital space, while concerns remain on the part of competition authorities about the reasonableness of the standards of proof required under the effects-based approach.

Still, following various important judgements of the Court of Justice (e.g., cases known as Post Danmark I and II, Cartes bancaires, Intel, and Generics UK, discussed in the following chapters), the effects-based system is now largely stabilized and has led to the articulation of a widely accepted analytical framework relying on a structured rule-of-reason with screens based on a variety of structural and other market conditions, robust theories of harm and proper consideration for efficiencies. In turn, that framework is compatible with qualified object rules (i.e., presumptions of illegality) based on empirically testable conditions. Still, when studying the materials contained in the following chapters, you should assess whether and to what extent they are compatible with the effects-based approach, and whether and to what extent the European courts are synchronized with the Commission. Reflect also on whether Member State authorities (NCAs) and courts are well positioned to handle economic analysis. Are they likely to do so in harmony with the European Commission and courts?

3. The private enforcement of EU competition law

Regulation 1/2003 governs public enforcement. The European system also contemplates private enforcement. In *Courage v. Crehan*,[13] a tenant pub that had accepted a beer-tying agreement (Mr Crehan) invoked the illegality of that agreement and requested damages while being sued for unpaid deliveries of beer. The suit was brought in a UK court. The brewer defended on the grounds that a party to an illegal agreement cannot contest the agreement.

12 See, e.g., Case C-209/10, *Post Danmark I*, EU:C:2012:172 (excerpted in Chapter 5).

13 Case C-453/99, *Courage v. Crehan* [2001] ECR I–6297.

On an Article 267 reference, the Court of Justice held that not only is a party to an anti-competitive agreement not barred from suit (this may depend upon degree of complicity), but Articles 101 and 102 TFEU create rights for individuals that national courts must safeguard. 'The full effectiveness of Article [101] . . . would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition', the Court said, and 'actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the Community' (paras. 26–27). Member States thus have an obligation to provide effective procedural vehicles for private action.

There is no procedural vehicle for private actions within the European institutions, but Court of Justice case law obliges the Member States to provide effective procedures under national law to ensure full compensation to victims caused by violations of EU law. Member State systems for private enforcement vary; some, such as in the UK and Germany, are strong, while others are ineffective. The Commission Directorate-General for Competition undertook to develop a framework directive on private damage actions, setting common standards and minimum requirements for Member State systems. A directive on 'certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union' was eventually approved on 26 November 2014 (commonly referred to as the 'Private Damages Directive').[14]

The Private Damages Directive provides that Member States must ensure victims of EU antitrust violations full compensation; that access to certain important evidence must be granted; that a final infringement decision of a national authority must constitute irrefutable proof of the infringement before courts of the same Member State and at least prima facie evidence before courts of other Member States; that indirect purchasers must be able to sue; that pass-on of over-charges must be a defence; and that multiple or punitive damages should not be available.

The directive does not mention class or collective actions. However, a 2013 Commission recommendation on 'common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under EU law' urges Member States to authorize collective actions brought by non-profit representative entities

14 Directive 2014/104/EU [2014] *O.J.* L 349/1.

(i.e., consumers' associations or non-governmental organizations) with the requirement that plaintiffs joining the action opt in, not opt out.[15]

Since the enactment of the Private Damages Directive in 2014, the field of private enforcement has given rise to multiple requests for preliminary rulings addressed to the Court of Justice with their origin in antitrust damages actions. These cases have involved issues that can be broadly classified into three categories: (i) the determination of the jurisdiction(s) competent to hear and decide particular damages claims under the Brussels I Regulation and its recast version; (ii) the interplay between private and public enforcement actions, including the nature of Commission's commitment decisions in follow-on damages actions and the prerogatives of national courts in that respect, as well as the interpretation of the notion of undertaking in situations of succession; and (iii) the interpretation of substantive principles laid down in the Private Damages Directive relating to, e.g., limitation periods or the notion of full compensation.

Overall, the development of the private enforcement of EU competition law over the past 20 years has been remarkable and has led to the emergence of a coherent set of rules and principles deriving from the case law of the European Court of Justice and the Private Damages Directive (2014/104) combined with different pieces of EU guidance, as well as from a growing body of judgements originating from courts located across the Union. This development is all the more remarkable given the inherent complexity of shaping a legal construct through 28 (now 27) diverse judicial systems with their own body of domestic tort, contractual liability, civil procedure or conflict of laws principles.

C. Introduction to Articles 101 and 102 TFEU

The Treaty contains rules prohibiting anti-competitive agreements and concerted practices (Article 101 TFEU) and rules regulating dominant firms' behaviour (Article 102 TFEU). Together with the control of State aids (according to Articles 107 to 109 TFEU) and with the Merger Regulation, these provisions form the heart of European competition policy.

After the EEC Treaty was adopted in 1957, it was necessary for the Council of the EU to adopt legislation to implement the competition provisions

15 Directive 2014/104/EU and the recommendation on collective actions are available at: https://competition-policy.ec.europa.eu/antitrust/actions-damages_en (3 February 2023).

contained therein. The Council adopted the initial implementing measure in 1962. This was Regulation 17, which was replaced in 2004 with Regulation 1/2003.

In short, Article 101(1) declares that agreements that distort competition are incompatible with the common market; Article 101(2) declares such agreements void; and Article 101(3) states that Article 101(1) may be declared inapplicable for agreements or practices that are economically progressive and benefit consumers. Article 102 prohibits abuses of a dominant position. The text of these provisions is set forth in the following, followed by a description of the current procedural regulation.

Article 101 TFEU, ex 81 ECT

1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

   (*a*) directly or indirectly fix purchase or selling prices or any other trading conditions;
   (*b*) limit or control production, markets, technical development, or investment;
   (*c*) share markets or sources of supply;
   (*d*) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
   (*e*) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.
3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:
   — any agreement or category of agreements between undertakings;
   — any decision or category of decisions by associations of undertakings;
   — any concerted practice or category of concerted practices;

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(*a*) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
(*b*) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.

Article 102 TFEU, ex 82 ECT

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

(a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
(b) limiting production, markets or technical development to the prejudice of consumers;
(c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Note the examples of restrictive agreements or conduct in Article 101(1) TFEU and in Article 102 TFEU. Are they virtually identical? What is the major difference?

Restrictive agreements can be justified under Article 101(3) TFEU. Why doesn't Article 102 TFEU include a similar provision for abuses of dominance?

Note on the notion of undertaking

Articles 101 and 102 TFEU apply to 'undertakings'. The notion of undertakings therefore defines the scope *ratione personae* of the antitrust provisions of the Treaty. According to settled case law of the Court of Justice, any entity engaged in an economic activity, irrespective of its legal form and the way in which it is financed, must be considered as an undertaking, and any activity consisting in offering goods or services on a given market is an economic activity. In contrast, activities falling within the exercise of public powers are not of an economic nature. For example, air traffic control is not an activity of economic nature, according to the Court.[16] Still, the fact that an entity has a public law status, is vested with public powers or participates in regulatory processes does not, in itself, prevent it from being classified as an undertaking for the purposes of EU competition law in respect of the remainder of its economic activities. Thus, the classification of an activity as falling within the exercise of public powers or as an economic activity must be carried out separately for each activity exercised by any given entity.

What matters is, therefore, the nature of the activity in question, irrespective of the sector or the purpose sought. For example, the fact that an activity has a connection with sport does not hinder the application of the EU competition rules.[17] Likewise, employment procurement is an economic activity, and public employment agencies involved in that activity are classified as undertakings.[18] Moreover, the fact that the offer of goods or services is made without profit motive does not prevent the relevant entity from being considered an undertaking, since that offer may exist in competition with that of other operators seeking to make a profit. This can be the case of a pension fund organized pursuant to rules set by public authorities and supplementing a basic compulsory scheme, in competition with insurance companies.[19] Non-profit-making associations offering goods or services on a given market may also find themselves in competition with one another. To the contrary, the Court of Justice has found that the management of a public social security system is not an economic activity, insofar as the system is based on the principle of national solidarity and benefits thereof bear no relation to the amount of contributions; hence, the organizations operating such systems are not considered as undertakings within the meaning of Articles 101 and 102 TFEU.[20]

Article 101 TFEU also applies to decisions, including by-laws, of associations of undertakings. Associations of competitors can form breeding grounds for illegal conspiracies. For example, agreements to exchange

16 Case C-364/92, *Eurocontrol* [1994] ECR I-43, EU:C:1994:7, para. 30.

17 Case C-49/07, *Motosykletistiki Omospondia Ellados NPID (MOTOE)* [2008] ECR I-4863, EU:C:2008:376, para. 22.

18 Case C-41/90, *Höfner and Elser* [1991] ECR I-1979, EU:C:1991:161, paras. 21–23.

19 Case C-244/94, *Fédération française des sociétés d'assurance (FFSA)* [1995] ECR I–4013, EU:C:1995:392, para. 22.

20 Joined Cases C-159/91 and C-160/91, *Poucet and Pistre* [1993] ECR I-637, EU:C:1993:63, paras. 18–19.

information may be the tip of the iceberg of a price-fixing cartel. However, associations and societies often play useful functions that rather than suppressing the market, help it work. They may undertake tasks that need to be done. The question is often whether some of the clauses and restrictions have gone too far; whether they have crossed the line from facilitating competition to suppressing it. This is often the nature of the inquiry in connection with collecting societies.

The Court of Justice has analysed in various cases when an organization should be considered an association of undertakings (whose 'decisions' fall under Article 101 TFEU) and when it constitutes a single firm (whose decisions are deemed 'internal' and are therefore not caught by Article 101 TFEU). In *MasterCard*,[21] the banks argued that after its 2007 initial public offering ('IPO'), MasterCard was no longer an association of undertakings but an independent firm that they no longer controlled. The Court disagreed. It found that MasterCard was created as an instrument of coordination between banks. Even after the IPO, the banks continued to exercise decision-making powers in relation to the operation of the payment system. Also, the banks and MasterCard retained a commonality of interest in setting the fees. Therefore, despite its change in form and control, MasterCard remained an association of undertakings, and the banks could not avoid the application of Article 101 because of the IPO.

More generally, the notion of association of undertakings encompasses not only entities such as trade associations, professional regulatory bodies (including bar associations[22]), sports federations (e.g., soccer leagues engaging in the joint negotiation of broadcasting rights) and cooperatives but also associations of associations of undertakings, such as federations of farming syndicates.[23]

Note the functional approach developed by the Court of Justice in drawing the contours of the notion of undertaking. What does it say about the scope of application of the competition provisions of the EU Treaties? The Union is sometimes regarded as unduly pro-market oriented. Does the definition of undertaking feed this perspective? Do you think wider exclusions from the notion of undertaking are warranted? If so, how would you design the exclusions, and based on what criteria?

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21 Case C-382/12 P, *MasterCard v. Commission*, EU:C:2014:2201.

22 See Case C-309/99, *Wouters* [2002] ECR I-1527, EU:C:2002:98, para. 58.

23 Joined Cases T-217/03 and T-245/03, *Fédération nationale de la cooperation bétail et viande (FNCBV) v. Commission* [2006] ECR II-4987, EU:T:2006:391, para. 54.

? NOTES AND QUESTIONS

1. ***Self-employed platform workers***. Echoing the preceding questions, the Commission published in September 2022 Guidelines on the application of EC competition law to collective agreements regarding the working conditions of solo self-employed persons (2022, O.J., C 374/2), notably to address the situation of 'false self-employed' persons working in the online platform economy (think Uber, delivery services and the like). The underlying rationale was twofold: (i) on the one hand, genuine self-employed persons, even if they are individuals working on their own, are in principle undertakings within the meaning of Article 101 TFEU, since they offer their services for remuneration on a given market and perform their activities as independent economic operators; and (ii) historically, the Court of Justice has considered that collective labour agreements intended to improve working conditions fall outside the scope of Article 101 TFEU if they are entered into between organizations representing employers and employees (see, in particular, Case C-67/96, *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*, EU:C:1999:430, paragraph 59, discussed further in Chapter 3). However, the Commission observed that the labour market has undergone significant changes in recent years, notably with the emergence of the online platform economy, leading to a surge in self-employment in the EU. Hence, the Commission acknowledged a state of uncertainty as regards the circumstances under which collective agreements concluded by or on behalf of self-employed persons (mainly 'false' self-employed persons, i.e., in a situation comparable to that of employees) could also be deemed to fall outside the scope of Article 101 TFEU (as recognized by the Court of Justice in Case C–413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411). Against this background, the draft Guidelines clarify that (i) certain categories of collective agreements involving false self-employed persons fall outside the scope of Article 101 TFEU; and (ii) the Commission will not intervene against certain other categories of collective agreements involving solo self-employed persons who are not in a situation comparable to that of employees but may nevertheless be in a weak bargaining position vis-à-vis their counterparties and therefore may be unable to significantly influence their working conditions.

   What do you think of these 'exceptions' created for labour agreements? Is it logical, economical and/or politically legitimate to carve out these agreements from the scope of Article 101 TFEU when they are entered into between 'undertakings'? What is the difference between a wage-fixing and a price-fixing agreement? In reflecting about these issues, consider also Article 3(3) TEU, which provides that the Union shall promote 'a highly competitive social market economy, aiming at full employment and social progress', as well as Article 152 TFEU, whereby the Union recognizes the important role of social dialogue and collective bargaining and commits to 'facilitate dialogue between the social partners, respecting their autonomy'.

2. ***State-owned enterprises***. State-owned/controlled enterprises, also known as 'SOEs', present particular features when it comes to their qualification as 'undertakings'. First of all, they may have different activities, qualifying for some as economic activities and for others as the exercise of public powers. Secondly, it might be particularly challenging and sensitive to ascertain, based on their specific corporate governance models, their level of autonomy from the State (or from intermediate levels within a State structure) and as a corollary, which SOEs belong to one and the same undertaking or to different ones. When it comes to SOEs established outside the Union and operating in different economic contexts (think China PRC), in particular, the challenge is increased by the difficulty of gathering evidence on governance and control within the State concerned and interpreting foreign law.

   Yet, determining the scope of the notion of undertaking when it comes to a particular SOE might have significant implications for, e.g., the applicability of Article 101 TFEU to a particular agreement, knowing that this provision does not apply to intra-company/

undertakings arrangements, the calculation of fines, the determination of merger control jurisdiction or the substantive assessment of particular transactions. Note that as a general matter, Article 345 TFEU provides that the EU must remain neutral in matters of ownership of companies, i.e., vis-à-vis privately owned and State-owned enterprises. This neutrality is repeated in the EU Merger Control Regulation (recital 22), which provides that entities making up an economic unit with an independent power of decision should be considered as separate undertakings.

The renewed interest in the treatment of SOEs under EU competition law is largely the result of the emergence and transformation of very large State-owned enterprises, especially in emerging economies, and their international expansion, supported by sovereign funds or with interests acquired by such funds in domestic EU assets considered of strategic importance. As an illustration of that phenomenon, three of the world's five largest companies by revenue nowadays are Chinese State-owned enterprises, in positions 2 to 4 (State Grid, Sinopec and China National Petroleum—all energy companies).

The latest development in the attempt to curb the power of foreign SOEs is a political agreement in the summer of 2022 to tackle distortions created by subsidies granted by non-EU countries to companies operating in the EU's Single Market. The ensuing Regulation would empower the Commission to examine any economic activity benefiting from a subsidy granted by a non-EU country on the internal market, and to impose remedies and fines (see Chapter 7 for more details).

3. ***The relevance of the notion of undertaking in the realm of private enforcement***. With the advent of the private enforcement of EU competition law, the notion of undertakings has also taken on particular relevance when it comes to determining which entities can be sued for (follow-on) damages claims and where, i.e., in establishing the jurisdiction of particular national courts across the EU. The governing Court of Justice cases in this respect are *Skanska* (Case C-724/17, *Vantaan kaupunki v. Skanska Industrial Solutions Oy and others*, EU:C:2019:204) and *Sumal* (C-882/19, *Sumal S.L. v. Mercedes Benz Trucks España S.L.*, ECLI:EU:C:2021:800). In *Skanska*, the Court held that the notion of 'undertaking' constitutes an autonomous concept of EU law that cannot have a different scope when it comes to determining the scope of the entities liable for an infringement of EU competition law as a matter of public or private enforcement. In *Sumal*, the Court clarified that the notion of undertaking determines the scope of the entities liable for an infringement of EU competition law, not only upward (from the subsidiaries to the mother company) but also downward (subject to the activities of the relevant downward entities being 'connected' to those for which the liability has been incurred in the first place).

D. Market integration and the blockage of imports

1. Overview

When business actors restrain the flow of trade over Member State lines, they may undermine market integration, harm competition and violate Articles 101 and 102 TFEU. This section telescopes three categories of such restraints and concentrates on the third: vertical restraints blocking parallel imports.

First, competitors established in different Member States, feeling the heat of cross-border competition, might enter into a truce with their competitors, repartitioning the common market ('I take France, you take Germany'). In an economic as well as an EU integration sense, this is the worst kind of restraint. Such an agreement frustrates competition and its benefits for consumers and the economy, and it counteracts the liberalizing effort to tear down barriers at Member State lines. Article 101 TFEU is applicable to such market division cartels, which we deal with in Chapter 2.

Second, a dominant firm that has the power to do so might block competitors from entering 'its' Member State market. This is an equally harmful restraint. It keeps out competitors and makes it possible for the dominant firm to continue exercising monopoly power, and in doing so, it undermines market integration. Without the help of the State, however, a firm, acting alone, does not normally have such power; and when a State confers an exclusive right, often this is in response to a 'public interest', as in the case of the Swedish alcohol monopoly (see Chapter 7). Market blockage by a dominant firm can be a serious abuse in violation of Article 102 in combination with Article 106 TFEU. Abuse of dominance is considered in Chapter 5.

Third, a producer might prevent or restrict its product from being shipped from one Member State to another, either to protect its designated distributor from having to compete against the same-brand product shipped in from another distributor's territory or to protect its profit margins where the product in the home State is price-controlled, and shipment of the price-controlled product to a non-regulated State would undercut its profits and squeeze its investment in research. These restraints are vertical restraints; they are intrabrand restraints, and they are restraints against parallel imports.

The next section focuses on this latter form of restraint, first, presenting the landmark case of *Consten and Grundig* followed by notes on related distributor cases, and second, presenting the more contemporary case of *GlaxoSmithKline*, offering a limited relaxation of the rule of *Consten and Grundig*.

Note that the Commission has continued to prosecute such cases on a regular basis in recent years in relation to, e.g., technological markets such as video games (see Chapter 4) but also mature businesses such as beer supply. Thus, in 2019, the Commission fined Anheuser-Busch InBev (AB InBev), the world's largest beer brewer, more than EUR 200 million for abusing its dominant position on the Belgian beer market by hindering cheaper imports of its very popular Jupiler beer from the Netherlands into Belgium. According to the Commission, AB InBev had changed the packaging of some of its Jupiler beer products supplied to retailers and wholesalers in the Netherlands to make these products harder to sell in Belgium, limited the volumes of Jupiler beer supplied to wholesalers in the Netherlands, conditioned the availability of other InBev products to Belgian retailers on limiting imports of Jupiler from the Netherlands, and conditioned the grant of promotions to retailers in Netherlands on not offering the same promotions to its customers in Belgium (see Commission Decision of 13 May 2019 in Case AT.40134 – *AB InBev beer trade restrictions*).

2. Parallel imports

a. Consten and Grundig v. Commission

Grundig, a manufacturer of radios, television sets, tape recorders and dictating machines, appointed Consten to be its exclusive distributor in France. Consten and Grundig wanted Consten to be the only distributor of the Grundig products in France; thus, they wanted Consten to be able to exclude from France Grundig products put on the market in other Member States. To achieve this result, they relied on French trademark law as well as the distribution contract. Since French case law held that only the owner of a trademark was entitled to enforce the trademark, the parties agreed that Consten should apply for and own the trademark GINT (Grundig International). Consten and Grundig agreed that if Consten should cease to be the distributor for Grundig in France, Consten would assign the mark to Grundig. Grundig made similar exclusive distribution and trademark arrangements with each of its distributors in the other EU countries.

Recall that before the Treaty was adopted, the European nations had high tariffs and low quotas, which hindered the flow of goods across national borders. The Treaty required the Member States to remove the quotas and tariffs in the internal market. In the spring of 1961, when French quotas ended, the French discounter UNEF began purchasing GINT television sets, tape recorders, Dictaphones and other electronic equipment from German wholesalers (who had also accepted export bans) and selling them in competition with Consten's dealers in France. Consten sued UNEF under French law for unfair competition and trademark infringement, alleging that UNEF knew that the sales to it were in breach of contract and that the sales by UNEF undermined Consten's contract. Thereupon, UNEF petitioned the Commission to declare the agreement between Consten and Grundig void under Article [101](2). Meanwhile, Regulation 17 came into effect, and Grundig filed a notification of its distribution agreement and sought an exemption under Article [101](3). In justification of the territorial division, Grundig argued that German buyers were familiar with its product and French buyers were not, and that the French market demanded a higher level of service and promotion than the German market. Moreover, it noted that Consten was responsible for guarantees, repair, customer service, accepting advance orders, maintaining stocks and advertising in France. Grundig argued that cheap imports from Germany would undercut Consten's incentives to fulfil these duties, and that Consten's failure to fulfil its duties would undercut the brand's reputation and frustrate sales. Grundig depicted the market for electronics products as highly competitive, with prices dropping steadily even before UNEF's appearance on the French market.

The Commission refused to consider evidence of competition from competitors of Grundig and denied Grundig's request for an exemption under Article [101](3). It observed that prices for Grundig products in France were substantially higher than prices for Grundig products in Germany. Consten and Grundig sued the Commission, seeking annulment of its decision.

The Advocate General, Karl Roemer, criticized the Commission for considering only competition among distributors of Grundig's products and not competition from competing brands. Advocate General Roemer said:

> [I]t is not proper if the Commission proceeds in such a manner that from the very outset it considers *exclusively* the last-mentioned internal competition [intrabrand competition] and completely neglects in its considerations the competition with similar products [interbrand competition]. In fact, it is conceivable that the competition between different products or, to be more precise, between different producers is so severe as not to leave any room worth mentioning for what was called internal competition in a product (possibly with regard to price and service) . . . . Rightfully, it was . . . therefore incumbent on the Commission to make a survey of the entire competition situation . . . . Such a survey of the effects on the market would possibly have led to a result favourable for the plaintiffs . . . . Such more favourable result might have been possible in view of the relatively small share of Grundig in the French market for tape recorders and dictating machines (roughly 17 percent)—as far as we know, the Commission has not conducted any investigations concerning other products—or in view of the plaintiffs' allegation that the markets for television sets . . . and for transistor sets showed so severe a competition of various, and sometimes very strong producers of the Community and of third countries that it repeatedly became necessary to reduce the prices of Grundig sets considerably.
>
> Because of the Commission's narrow concept of the term 'restraint of competition,' no such survey was made, and the Court of Justice in its proceeding cannot be obligated to make the survey itself belatedly. The only thing we can do in

this situation is to find that the results which the Commission arrived at in the investigation of the criterion 'restraint of competition' must be deemed to lack a sufficient foundation and must for that reason be rejected.

* * *

The Court of Justice disagreed. Here are excerpts from its judgement.

CASE

Consten and Grundig v. Commission (Cases 56–58/64)[24]

. . . [A]n agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers. Article [101](1) is designed to pursue this aim, even in the case of agreements between undertakings placed at different levels in the economic process. . . .

The applicants and the German government maintain that since the Commission restricted its examination solely to Grundig products the decision was based upon a false concept of competition and of the rules on prohibition contained in Article [101](1), since this concept applies particularly to competition between similar products of different makes. . . .

The principle of freedom of competition concerns the various stages and manifestations of competition. Although competition between producers is generally more noticeable than that between distributors of products of the same make, it does not thereby follow that an agreement tending to restrict the latter kind of competition should escape the prohibition of Article [101](1) merely because it might increase the former.

Besides, for the purpose of applying Article [101](1), there is no need to take account of the concrete effects of an agreement once it appears that it has as its object the prevention, restriction or distortion of competition.

24 EU:C:1965:60.

CASE *(continued)*

Therefore the absence in the contested decision of any analysis of the effects of the agreement on competition between similar products of different makes does not, of itself, constitute a defect in the decision.

It thus remains to consider whether the contested decision was right in founding the prohibition of the disputed agreement under Article [101](1) on the restriction on competition created by the agreement in the sphere of the distribution of Grundig products alone. The infringement which was found to exist by the contested decision results from the absolute territorial protection created [by] the said contract in favour of Consten on the basis of French law. The applicants thus wished to eliminate any possibility of competition at the wholesale level in Grundig products in the territory specified in the contract essentially by two methods.

First, Grundig undertook not to deliver even indirectly to third parties products intended for the area covered by the contract. The restrictive nature of that undertaking is obvious if it is considered in the light of the prohibition on exporting which was imposed not only on Consten but also on all the other sole concessionaires of Grundig, as well as the German wholesalers. Secondly, the registration in France by Consten of the GINT trade mark, which Grundig affixes to all its products, is intended to increase the protection inherent in the disputed agreement, against the risk of parallel imports into France of Grundig products, by adding the protection deriving from the law on industrial property rights. Thus no third party could import Grundig products from other Member States of the Community for resale in France without running serious risks. . . .

The situation as ascertained above results in the isolation of the French market and makes it possible to charge for the products in question prices which are sheltered from all effective competition. In addition, the more producers succeed in their efforts to render their own makes of product individually distinct in the eyes of the consumer, the more the effectiveness of competition between producers tends to diminish. Because of the considerable impact of distribution costs on the aggregate cost price, it seems important that competition between dealers should also be stimulated. The efforts of the dealer are stimulated by competition between distributors of products of the same make. Since the agreement thus aims at isolating the French market for Grundig products and maintaining artificially, for products of a very well-known brand, separate national markets within the Community, it is therefore such as to distort competition in the Common Market.

It was therefore proper for the contested decision to hold that the agreement constitutes an infringement of Article [101](1). No further considerations, whether of economic data (price differences between France and Germany, representative character of the type of appliance considered, level of overheads borne by Consten) or of the corrections of the criteria upon which the Commission relied in its comparisons between the situations of the French and German markets, and no possible favourable effects of the agreement in other respects,

CASE *(continued)*

can in any way lead, in the face of abovementioned restrictions, to a different solution under Article [101](1) . . .

The applicants maintain more particularly that the criticized effect on competition is due not to the agreement but to the registration of the trade-mark in accordance with French law, which gives rise to an original inherent right of the holder of the trade-mark from which the absolute territorial protection derives under national law.

Consten's right under the contract to the exclusive use in France of the GINT trade-mark, which may be used in a similar manner in other countries, is intended to make it possible to keep under surveillance and to place an obstacle in the way of parallel imports. Thus, the agreement by which Grundig, as the holder of the trade-mark by virtue of an international registration, authorized Consten to register it in France in its own name tends to restrict competition. . . .

That agreement therefore is one which may be caught by the prohibition in Article [101](1). The prohibition would be ineffective if Consten could continue to use the trade-mark to achieve the same object as that pursued by the agreement which has been held to be unlawful.

[The Court did not interfere with the Commission's decision to deny an exemption under Article [101](3). It acknowledged that Consten, as Grundig's distributor in France, was required to perform various obligations such as to accept advance orders and to provide warranty and after-sales service. The Court stated that territorial protection would give the parties to the agreement an advantage in their production and distribution activities. But, it said, to qualify for exemption the 'improvement must in particular show appreciable objective advantages of such a character as to compensate for the disadvantages which they cause in the field of competition', and must be indispensable. The argument that every 'improvement as conceived by the parties to the agreement must be maintained intact' . . . 'not only tends to weaken the requirement of indispensability but also among other consequences to confuse solicitude for the specific interests of the parties with the objective improvements contemplated by the Treaty.']

? NOTES AND QUESTIONS

1. Is it true that the restraint resulted in isolation of the French market and meant that GINT TVs were sheltered from all competition? Why didn't the Court care?
2. How does the rule of *Consten and Grundig* increase market integration?
3. Why do you suppose that German prices were lower than French prices? Why might you want to know? Is the answer relevant to (a) whether the restraint is caught by Article 101(1); or (b) whether the restraint is entitled to an exemption under Article 101(3)?

4. Grundig appointed an exclusive distributor for each territory; Grundig agreed that it, itself, would not distribute GINT-brand product in the assigned territory; and each distributor agreed with Grundig to 'work' its territory. Thus far, these obligations are of the essence of an exclusive distribution agreement. The producer says to the distributor: I appoint you and you alone to distribute my product in this territory. This simple agreement does not fall within Article 101(1). Why?
5. The additional obligations on both Consten and Grundig are the key obligations in the case. What were these additional obligations and why were they of particular concern? Did they lessen competition to the harm of consumers?
6. Note the relationship between French trademark law and EU competition law. Which has the upper hand? Is the Court's answer consistent with Article 345 TFEU reserving to the Member States the right to define property within their States? Did the Court appropriately resolve the tension between free movement/competition principles and the right to exclusive control over one's intellectual property?
7. Under *Consten and Grundig*, can an agreement that absolutely eliminates parallel imports into a Member State ever be justified as essential for improvement of production or distribution? We will see later that allowances have been made at the margins.
8. The US once had a legal rule very similar to the rule of *Consten and Grundig.* Under *United States v. Arnold, Schwinn & Co.*,[25] a manufacturer/distributor agreement for imposition of absolute territorial restrictions on the distributor was held to be illegal on its face. Ten years later, the US Supreme Court overruled *Schwinn*.[26] In *Sylvania*, the Supreme Court observed that non-price restraints on distributors can improve the efficiency and competitiveness of the manufacturer, and it held that improvements in interbrand competition (e.g., competition between Sylvania and Sony TVs) can outweigh any harm from the decrease in intrabrand competition (i.e., competition among Sylvania's own distributors). Thirty years later the Court went much further, viewing preservation of interbrand competition as the goal of the Sherman Antitrust Act and ascribing no independent value to intrabrand competition.[27]

US law presumes that competition among producers (interbrand competition) is likely to force manufacturers to behave competitively and to ensure that vertical restraints on distributors are efficient and procompetitive. It presumes that interbrand competition is likely to pressure manufacturers to distribute their products as efficiently as possible. Can *Consten and Grundig* be reconciled with this line of reasoning? Is the difference justified by context—the market integration goal of the EU?

b. *Development of the rule against market partitioning*

Since *Consten and Grundig*, an absolute territorial restraint at Member State boundaries is considered a 'hard-core' restraint. This does not rule out the possibility of an Article 101(3) justification but for air-tight restraints at

25 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967) (overruled in 1977).
26 *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).
27 See *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007).

nations' borders, justification is unlikely to be successful. For a more recent example involving broadcasters' territorial exclusivity for the retransmission of football games, see Premier League and Karen Murphy.[28] The sting of a rigid *Consten and Grundig* rule has been removed by a body of law that allows sellers to restrain a dealer's *active* solicitation of sales outside its territory—a concept dealt with in Chapter 4 along with the vertical block exemption and vertical guidelines.

The next leading Court of Justice case after *Consten and Grundig* was *Pioneer*.[29] French, German and British distributors of Pioneer's high-fidelity sound equipment agreed to stay out of one another's markets. The agreement, which Pioneer facilitated, aimed to keep low-priced British and German products out of the high-priced French market.

The firms contested the Commission decision on many grounds, including the level of fines, as to which the Court of Justice held:

> 104 According to the Commission, however, such a level is fully justified by the nature of the infringements. After 20 years of Community competition policy an appreciable increase in the level of fines is necessary, in its view, at least for types of infringement which have long been well defined and are known to those concerned, such as prohibitions on exports and imports. In fact those constitute the most serious infringements since they deprive consumers of all the benefits resulting from the elimination of customs duties and quantitative restrictions; they hinder the integration of the economies of the Member States and leave distributors and retailers in a position of subordination towards producers. Heavier fines are particularly necessary where, as in the present case, the principal aim of the infringement is to maintain a higher level of prices for consumers. The Commission states that many undertakings carry on conduct which they know to be contrary to Community law because the profit which they derive from their unlawful conduct exceeds the fines imposed hitherto. Conduct of that kind can only be deterred by fines which are heavier than in the past.

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28 Joined Cases C-403 and C-429/08, *Premier League and Karen Murphy* [2011] ECR I-9083, EU:C:2011:631.

29 Cases 100–103/80, *Musique Diffusion Française v. Commission* [1983] ECR 1825, EU:C:1983:158 ('*Pioneer*').

> 107 [T]he Commission was right to classify as very serious infringements prohibitions on exports and imports seeking artificially to maintain price differences between the markets of the various Member States. Such prohibitions jeopardize the freedom of intra-Community trade, which is a fundamental principle of the Treaty, and they prevent the attainment of one of its objectives, namely the creation of a single market.

* * *

In the 1990s, when the Italian lira was depressed, Volkswagen, maker of Volkswagens and Audis, tried to protect the German and Austrian dealers in its network from a shift of buyers to Italy. It entered into agreements with its subsidiaries and Italian dealers, imposing supply quotas and a bonus system designed to induce the Italian dealers to sell at least 85% of their available vehicles in Italy. The Commission severely fined Volkswagen for partitioning national markets. The Commission describes the case as follows in the 1998 Competition Policy Report:

Opening-up of markets

> 68 The Commission has always kept a close eye on distribution agreements and their restrictive effects in so far as they hindered intra-Community trade. Some exclusive distribution agreements lead to the setting-up of watertight national distribution networks. In particular, clauses which prohibit distributors from supplying customers based outside the contract territory. In this way, national markets are artificially isolated from one another. The Commission considers that measures should be taken to combat this situation, not just in order to re-establish effective competition between economic operators but also in order to promote market integration. In practice, the compartmentalization of national markets prevents price convergence within the Union and restricts access by consumers to the markets with the lowest prices. With the creation of the single currency, price differentials will be obvious because they will be expressed in euros. They will be increasingly viewed as unjustified by ordinary people, who will want to derive full benefit from economic and monetary union.
>
> 69 In 1998 the Commission clearly demonstrated its determination to promote the opening-up of markets, a prime example of this being the *Volkswagen* case [O.J. L 124, 23/4/98]. Since 1995 the Commission had received numerous complaints from European consumers, particularly from Germany and Austria, who had been confronted with various difficulties when attempting to buy new Volkswagen and Audi cars in Italy. These consumers wanted to benefit from the price differentials between their Member State and Italy, where prices

> were particularly advantageous. Following a series of inspections at the offices of Volkswagen AG, Audi AG and Autogerma SpA, which is a subsidiary of Volkswagen and the official importer for both makes in Italy, and at the offices of a number of Italian dealers, the Commission concluded that Europe's largest motor-manufacturing group had been pursuing a market-partitioning policy in the Union for about 10 years. Volkswagen AG had systematically forced its dealers in Italy to refuse to sell Volkswagen and Audi cars to foreign buyers, especially from Germany and Austria. The Commission fined Volkswagen ECU 102 million, the largest fine ever imposed on a single company.

The General Court confirmed the existence and gravity of the infringements, reducing the fine because the Commission had overstated the duration thereof.[30]

In what sense did the system of quotas and of bonuses based on sales in Italy 'partition markets'? Should Volkswagen have been able to protect its German and Austrian dealers from siphoning off sales as a result of an unfavourable exchange rate?

In view of persistent price differentials of cars in different Member States, the Commission adopted a motor vehicle block exemption regulation, specifying restrictions that would be permissible or not. Eventually, the market for the sale of cars approximated the Single Market goals. The sale of parts, servicing and warranties, however, remained restricted. The Commission responded by adopting a specialized sector regulation and block exemption, adopted and later revised.[31] Read the regulation. What restrictions are allowed under the block exemption? What restrictions are not allowed? How important is the rule that qualified dealers with physical locations must be permitted to sell via the internet?

In 2000, the Commission liberalized its policy on vertical restraints in general, but it preserved as a hard-core restraint a restriction that absolutely prevents parallel imports from flowing over Member State lines. This was confirmed by subsequent iterations of the so-called Vertical Block Exemption Regulation ('VBER'), as discussed in Chapter 4.

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30 Case T-62/98, *Volkswagen AG v. Commission* [2000] ECR II-2707, EU:T:2000:180.

31 See: http://ec.europa.eu/competition/sectors/motor_vehicles/legislation/legislation.html (accessed 31 May 2017).

The policy disfavouring restraints on parallel imports and exports has been reaffirmed in more recent pharmaceutical cases, but with a nuance. In *GlaxoSmithKline v. Commission*,[32] the General Court allowed a possible exception in the context of the pharmaceutical industry, where the price is often capped by State regulation, and pharmaceutical companies claim that dual pricing (freedom to export at a higher price) is necessary to obtain sufficient profits for investment in innovation. In *Glaxo*, the Commission flatly prohibited a clause in Glaxo's distribution agreements providing that Glaxo would charge the distributors a certain higher price for sales of its medicines that were not subject to the Spanish price cap; thus, effectively, for sales outside Spain. The General Court held that the Commission improperly failed to consider whether advantages to competition of dual pricing for in-state and out-of-state destined sales outbalanced the disadvantages to competition of dual pricing. The Court of Justice agreed that the Commission was required to seriously consider Glaxo's evidence on this point.[33]

A second *Glaxo* case arose in a Greek court. GlaxoSmithKline AEVE, a dominant firm, cut back the supply of medicines to its Greek wholesalers, who bought the medicines not merely to distribute to the Greek (price-capped) market, as GSK desired, but to sell them into higher-priced States. The wholesalers sued GSK AEVE in Greek court, which referred questions to the Court of Justice. The Court of Justice reaffirmed the strong principle against restraints on parallel imports. It held, nonetheless, that a dominant firm may limit orders to its wholesale customers to protect its commercial interests, but it can do so only to the extent that the limit is proportionate in view of the size of the national market and the firm's previous business relation with the wholesaler (e.g., the customary supply).[34] The Court of Justice expressed its continuing concern about parallel restraints as follows:

> 65 [T]he Court has held that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the objective of the Treaty to achieve the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at

32 Case T-168/01, *GlaxoSmithKline v. Commission*, EU:T:2006:265.

33 Ca C-501/06 P, EU:C:2009:610.

34 See Joined Cases C-468/06 to C-478/06, *Sot. Lelos v. GlaxoSmithKline* AEVE [2008] ECR I-7139, EU:C:2008:504.

> preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that Treaty article.
>
> 66 In the light of the abovementioned Treaty objective as well as that of ensuring that competition in the internal market is not distorted, there can be no escape from the prohibition laid down in Article [102] for the practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States, practices which, by partitioning the national markets, neutralize the benefits of effective competition in terms of the supply and the prices that those exports would obtain for final consumers in the other Member States.

Did GSK, by restricting supply or differentially raising the price of medicines to its Greek wholesalers, partition markets? Divert the natural flow of trade? Undermine market integration? Increase GSK's market power? Hurt consumers? As to each, how? Did the Court weaken the rule of *Consten and Grundig* or simply articulate a narrow exception?

Conclusion

This chapter has stressed the market integration goal of EU competition law. The Single Market objective focuses European competition policy on openness of markets as a combined pro-competition and pro-integration goal. Is the principle of freedom of parallel imports and exports in tension with the goal of efficiency, or does it normally reinforce the goal of efficiency? Chapter 4 on vertical restraints explores this question further.

Note that major current European initiatives lie at the confluence of single-market law and competition law. These include (but are not limited to) Europe's digital single-market strategy and a particular piece of it: the effort against geo-blocking. A regulation against geo-blocking prohibits businesses from discriminating against customers based on their place of establishment. Thus, firms may not make goods or services, or methods of payment for them, available to members of only certain Member States but not others. These issues arise also under competition law. For example, as further discussed in Chapter 4 on vertical restraints, film studios typically grant online broadcasters such as Sky exclusive rights to broadcast films in specified Member States. Also, the studios prohibit their licensees from supplying films to persons in other Member States even if the out-of-State person has requested the film, unsolicited (passive sales). The Commission took issue with these 'passive sales' clauses. These cases involve the delicate relationship between copyright laws and competition market integration law.

The following chapter (Cartels) highlights one point at which market integration and traditional competition goals incontestably converge: market division cartels. Competitors divide markets at Member State boundaries, reinstating the economic borders that the Treaty removed. Even if you should question whether Grundig re-isolated France in an economic sense, you are not likely to question whether Nedchem and its quinine cartel co-conspirators tried to repartition Europe.

2

Cartels

Cartels are 'agreements and/or concerted practices between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition through practices such as the fixing of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.'[1] They are the classic example of anti-competitive agreements. Cartels are a scourge on consumers. They rob consumers of hundreds of millions of euros each year, often for products that are necessities of life. Accordingly, the Directorate-General for Competition of the European Commission ('DG COMP') allocates substantial resources to cartel enforcement.

Before embarking on the study of cartel law, re-read Article 101 TFEU. Note that Article 101(1) TFEU prohibits agreements that restrict competition by either object or effect. Cartels are prime examples of agreements that restrict competition by object because they may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered 'redundant, for the purposes of applying Article [101(1)] TFEU, to prove that they have actual effects on the market.'[2]

In many EU Member States, cartels were an accepted business practice until effective enforcement of the cartel prohibition came into Europe with the EEC Treaty of Rome, therefore requiring a change in culture. The rule against hard-core cartels is now notorious throughout most of the world, and enforcement against such cartels is a top priority of DG COMP and national competition authorities (NCAs).

1 Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] *O.J.* C 298/11, para. 1.
2 Case C-67/13 P, *Groupement des cartes bancaires (CB) v. Commission*, EU:C:2014:2204, para. 51.

Cartels are usually secret, sometimes carried out through trade associations, and often implemented by mechanisms that may give clues as to their existence. They typically take the form of agreements to fix prices, limit output or divide markets, i.e., to preserve domestic markets for domestic producers, often in combination with the exchange of competitively sensitive information. Market division cartels seriously harm the market integration effort pursued at EU level. Also, they remove producers' incentives to perform at the highest level possible, thus undermining the goal of producing robust and competitive businesses, and they keep prices higher and performance lower, thus harming buyers.

In recent years, though, DG COMP and NCAs (as well as other competition authorities worldwide) have stepped up enforcement against so-called 'atypical' cartels aiming to, e.g., exploit buyer power (also known as 'monopsony power') to the detriment of sellers or harm technical development.[3] In particular, two decisions sanctioning buyer cartels have been adopted at EU level in recent years. In 2017, the Commission fined three recycling companies for agreeing on target and maximum prices, as well as volumes, for the purchase of scrap batteries in Germany, France, Belgium and The Netherlands between 2009 and 2012.[4] Similarly, in 2020, the Commission found an infringement on the part of four purchasers of ethylene, a chemical used to make materials like PVC. The conspiracy entailed coordinated negotiation strategies in dealing with ethylene sellers in order to decrease a particular industry reference used in pricing formulas included in supply contracts.[5] The limited enforcement record towards buyer cartels is partly based on scepticism that purchasing power may harm consumers or economic efficiency. However, if market outcomes are altered through purchasing power, this may impact prices and quantities over an entire value chain and ultimately, consumers.

3 In 2021, the Commission settled a case with Daimler, BMW and the Volkswagen group (Volkswagen, Audi and Porsche) that involved for the first time collusion on technical development in the area of nitrogen oxide cleaning, i.e., the injection of urea (also called 'AdBlue') into the exhaust gas stream of diesel engines to reduce harmful emissions. The agreement pertained to AdBlue tank sizes and ranges and on the average estimated AdBlue consumption, and to associated information exchanges, thereby preempting the usage of the technology's full potential beyond what was legally required under the EU emission standards. See Case AT.40178 – Car emissions.

4 See Case AT.40018 – Car battery recycling, as upheld by the Court of Justice in Cases T-240/17 and T-222/17 (EU:T:2019:778), as affirmed in Case C-563/19 P (EU:C:2020:646).

5 See Case AT.40410 – Ethylene. Appeal pending in Case T-590/20, *Clariant v. Commission*.

Note on collusion and labour market competition

In the US, cartel enforcement has focused in recent years on unlawful 'no-poach' and wage-fixing agreements between employers, i.e., agreements whereby companies collude not to hire or recruit one another's employees and thus not to compete for those employees' labour. These agreements chill the employers' competition against one another for an input (the workers), and thus tend to depress the price of that input (wages) by the use of buyer power. The agreements also deprive employees of job opportunities, information and the ability to use competing offers to negotiate better terms of employment. They may also have indirect effects on downstream markets if workers leave the workforce. Under the US antitrust laws, the same rules apply when employers compete for talent in labour markets as when they compete to sell goods and services.

The issue attracted headlines back in 2015 when Apple, Google, Intel and Adobe settled an antitrust class action lawsuit by tech workers, who accused the firms of conspiring to avoid poaching each other's employees. The case was based largely on emails in which Apple co-founder Steve Jobs, former Google Chief Executive Officer Eric Schmidt and their rivals detailed plans to avoid poaching each other's engineers. After this, the Department of Justice ('DOJ') and the Federal Trade Commission ('FTC') issued dedicated 'Antitrust Guidance for Human Resource Professionals' in 2016, and the DOJ intervened in various private antitrust cases before US federal courts while engaging in not only civil but also criminal enforcement on its own.

Labour market competition issues have not received the same attention in Europe so far, even though NCAs have disclosed various ongoing investigations, including against sport federations in relation to athletes' compensation and working conditions. At EU level, Commissioner Vestager has linked no-poach and wage-fixing collusion to the Commission's emerging enforcement practice against buyers' cartels while associating the 'very direct effects on individuals' with restrictions on competition in downstream markets for 'where the key to success is finding staff who have the right skills … a promise not to hire certain people can effectively be a promise not to innovate, or not to enter a new market'.[6] This statement has been widely commented on, for it fits quite naturally with the focus of EU competition law enforcement on abuses of market power distorting the competitive process, irrespective of the level in the value chain. As noted, if the

6 M. Vestager, 'A new era of cartel enforcement', Rome, 22 October 2021.

focus has traditionally been on the selling side of markets, particular attention has been paid in recent years to collusion on the purchasing side, in line with the wording of Article 101(1) TFEU referring to a prohibition against 'fix[ing] purchase or selling prices or any other trading conditions'.

While enforcement actions against practices affecting competition in labour markets are likely to develop in the future under Article 101 (including in relation to non-compete covenants) and possibly Article 102 TFEU (and/or equivalent provisions under national law), extending merger control investigations to effects in labour markets remains so far theoretical. A growing number of economics papers, including empirical ones, have highlighted a negative relationship between labour market concentration and wages, but the analytical and practical difficulties of engaging in such analyses are numerous. They range from jurisdiction issues and the (lack of) relevance of turnover thresholds, to market definition and substitution effects, to the actual assessment of concentration and monopsony power, and to the balancing of harm and benefits across product and labour markets.

* * *

Cartels may be nationwide, and therefore of special concern to an individual NCA, but in view of the tearing down of national barriers to trade in Europe, they are more likely to be trans-European; and in view of the lowering of global trade barriers, they are more and more commonly worldwide. Lower trade and non-trade barriers tend to beget cartels, because firms that had enjoyed protection from competition by State barriers are suddenly confronted by competitive neighbours and often try to hold them back by agreement. World cartels today are often challenged by the US Department of Justice ('DOJ'), the European Commission ('Commission') and authorities of many other countries. For example, in the 1990s, Asian and American producers of lysine, an amino acid used in animal foodstuffs for nutrition, fixed prices and sales quotas and carried on an extensive information exchange to support price and quota fixing for sales worldwide including Europe. The cartel members were prosecuted criminally in the US, resulting in high fines and jail terms (and in a motion picture starring Matt Damon called 'The Informant!'). In Europe, the Commission brought proceedings (no criminal prosecution is available under EU law, and the law applies to 'undertakings' not individuals) and levied fines against the US, Japanese and Korean conspirators totalling nearly €110 million.

Similarly, a worldwide vitamins conspiracy—this time led by the Swiss firm Hoffmann-La Roche—produced US prison terms and US and EU fines in 1999–2001. More recently, in 2010, the Commission fined six liquid crystal display (LCD) panel producers almost €650 million for their participation in a price-fixing cartel that operated mainly from Taiwan. The same companies were criminally prosecuted by the DOJ in the US, leading to plea agreements, the collection of very large fines and significant prison sentences. Later on, the People's Republic of China's competition authority also prosecuted the same cartel and imposed multi-million-RMB fines.

Cartel fines are often severe.[7] In 2007, the Commission took action against a cartel in the elevator market. It imposed a fine of €479 million on ThyssenKrupp and fines totalling €992 million on all members of the elevator cartel combined. In 2008, the Commission proceeded against a cartel in the automobile glass market. It fined Saint-Gobain, a repeat offender, €896 million and assessed total fines against the members of the automobile glass cartel at more than €1.3 billion. In 2019, the Commission fined five banks €1.068 billion for participating in two cartels in the spot foreign exchange market (forex) in numerous currencies.

The highest industry cartel fine imposed by the European Commission is the fine of €2.9 billion imposed on truck producers in 2016 for their participation in a 14-year conspiracy aiming to coordinate gross list prices and to pass on to customers the costs of compliance with emission rules; the case also led to a record fine of €1.008 billion levied against Daimler alone. Cartel fines are regularly adjusted upon review by the EU General Court but very rarely annulled in their entirety.

Detection of cartels is difficult. The task has been greatly aided by leniency or amnesty programmes, which grant total or partial immunity to cartel members who come forward and provide valuable information enabling the detection and prosecution of a cartel. Leniency programmes have flourished all over the world and have become the main source of information on cartels, even though they have somewhat lost their appeal in recent years due to the exposure caused by private enforcement actions. The leniency programmes aim to destabilize cartels by providing a strong incentive for cartel members to turn on their co-conspirators and escape (parts of) fines. Thus, they sow seeds of distrust among cartel members and may discourage cartel conduct in the first place.

7 Fines imposed on companies found in breach of EU antitrust rules are paid into the general EU budget. This money is not earmarked for particular expenses, but Member States' contributions to the EU budget for the following year are reduced accordingly.

The leniency policy of the European Commission grants total immunity to cartel members who are the first to provide sufficient information to launch an inspection against an undetected cartel, and it grants a reduction of fines to others who provide additional information to establish the cartel and its gravity and duration. The benefit of immunity or reduction in fine is conditioned on the full and continuous cooperation of the informants with the Commission investigation.[8]

The following sections begin with a short explanation of the economics of competition and of cartels, followed by a presentation of cartel cases. The cases concern factual as well as legal analysis, particularly regarding proof of the existence of the cartel. Many cartel cases also raise jurisdictional questions: to what extent does the Treaty reach foreign firms that conspire abroad and harm the European market? The chapter closes with a discussion of cartel defences; in particular, it asks whether there is such a thing as a crisis cartel defence.

A. Cartels and the economics of competition

Many analysts assume that a system of free enterprise with competition law exists only to obtain a more efficient allocation of resources or only to prevent price rises to consumers, and that competition law has exactly and only this goal. This is not necessarily the case. Competition law may have other goals as well. In the EU, these goals include market integration, openness and access, control of dominance and competitiveness (the growth of efficient, dynamic and responsive firms for the sake of economic strength in world markets). Pursuit of many of these goals tends to produce allocative efficiency or prevent consumer price rises; thus, the goals may share common ground. But sometimes, goals other than efficiency (in its various forms) may be in tension with efficiency goals, and a society may choose them nonetheless. In either event, it is important to understand the basic principles of the economics of competition law in the service of efficiency.

Firms with sustained market power may have an incentive to act inefficiently, both in the sense of letting costs rise and in the sense of using their power to exploit buyers (and sometimes also sellers; see earlier). Firms with monopoly power may have the incentive to preserve their monopolies by striking down competitors or blocking them from markets. Firms that have grown to a monopoly or dominant size under conditions of free enterprise

8 The policy is described at: http://ec.europa.eu/competition/cartels/leniency/leniency.html (accessed 1 June 2017).

may have achieved their positions by competition on the merits. To preserve incentives to excel as well as to preserve a firm's organic efficiencies, one may wish to control a dominant firm's anti-competitive behaviour and to work on other fronts to reduce barriers rather than to strike down the structure itself. This is the approach of the EU to dominant firms, reflected in Article 102, as we will discuss in Chapter 5.

This chapter deals largely with the less ambiguous economic problem of cartels. In connection with cartels, the efficiency and non-efficiency goals of competition policy converge. A rule against cartels serves goals of efficiency, fairness and market integration.

Here, then, is a brief introduction to market economics.

In an idealized system of perfect competition, there would be a number of sellers, a number of buyers and perfect market information available to all. The sellers, competing among themselves for business, would be induced to make and provide what their customers want. To do so, they would aspire to be inventive and progressive and to minimize costs. The pressures of competition would keep prices near costs. The producers would make and provide as much product as the buyers wanted and were willing to pay for at cost or more. Consumers would be sovereign.

The same responsiveness would be observed even in a market of few sellers if there were no significant barriers to entry into the market and if entry were very quick and easy. In that case, potential competitors would (in theory, for barriers are seldom so inconsequential) provide the same pressures as actual competitors. Also, in theory, sophisticated and powerful buyers could provide the same pressures on sellers to behave competitively, especially if the buyers were in a position to enter the market themselves or to finance entry by others if they were not satisfied with the performance of the existing sellers. Further, in high-technology markets marked by rapid changes in technology (new economy markets), the threat of breakthrough innovations by potential competitors may provide a pressure inducing responsiveness to even a dominant firm.

If all markets in the world were characterized by effective competition—with efficient and fully responsive sellers—competition itself would allocate resources to the production and distribution of all goods and services in the proportions buyers demand. The fullest possible production would then be squeezed out of the world's scarce resources. Demand would remain a function of the existing distribution of wealth, however, for the distribution of wealth influences what people choose to buy.

Real markets deviate substantially from the ideal. Still, competition tends to produce an efficient allocation of resources, push cost downwards, incentivize innovation, and help intermediate buyers and ultimately, consumers get what they want, and at a price more or less near cost (including a reasonable return on investment). Competition is one of the most important mechanisms that society relies on to produce efficiency and serve consumers.

Competition also tends to keep markets free and open, and thereby to provide opportunities for entrepreneurs and small and medium-sized firms. Likewise, competition is a product of freedom of enterprise. It fosters diversity and pluralism, and it provides rewards based on merit. Therefore, competition both reflects and tends to support democratic institutions. Finally, forces of competition know no artificial divisions, such as national borders. If there was a shortage of glass bottle production in France and spare production capacities in Germany, the market would drive bottles across national lines from Germany to France. In that sense, competition is market integrating. Competition policy combined with the free movement principle is to the EU what the free enterprise ethic combined with the interstate commerce clause of the US Constitution is to the US.

While competition and freedom to compete on the merits serve all the above objectives, private firms can sometimes restrain competition and thereby undermine the objectives of competition policy.

The most obvious way in which firms can restrain competition and harm consumers is by forming a cartel. The classic form of cartel is a price-fixing or market division agreement by all significant firms in the market. In theory, parties to a price-fixing agreement could agree to charge a high price and not to compete on price. If buyers have no good substitutes, and barriers to entry are high, the conspirators will have the power to raise prices considerably above the competitive price (i.e., considerably higher than the cost of efficient firms including a reasonable return on investment). The cartel members would naturally be able to sell less at this higher price. They would have to prevent increases in production, for extra production would drive the price back down. Accordingly, the cartel members would hold back output, and they would exploit the buyers who remain in the market. Essentially the same thing would happen if the parties agreed to divide markets; each would become the monopolist in its market and would raise prices; buyers would demand less of the goods at the supracompetitive prices, and the firms would reduce output.

This phenomenon may be depicted graphically as follows (Figure 2.1).

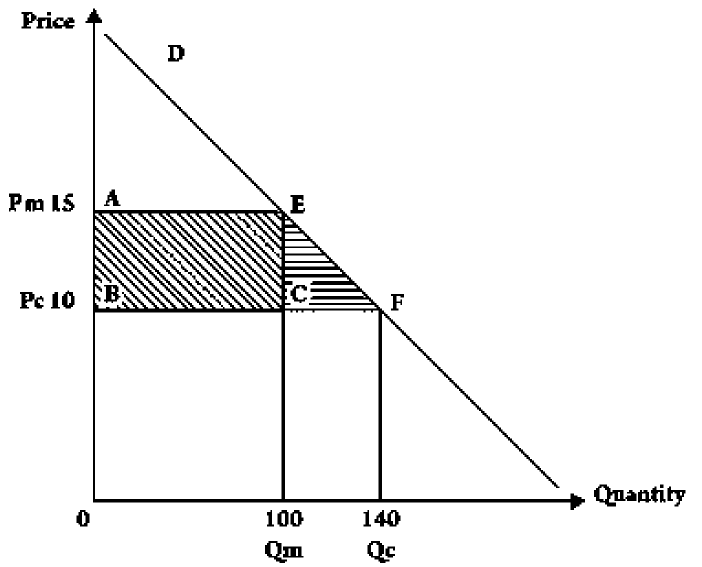

Figure 2.1 The effects of market power: dead weight loss and wealth transfer

The demand curve (D) slopes downwards. The base line represents the quantity demanded at a given price. The vertical line at the left represents the price. Less is demanded as price rises. Therefore, higher price yields lower quantity/output. If the firms' cost is 10 (the competitive price), and upon forming a cartel their profit-maximizing price is 15 (the monopoly price), given the depicted demand function, the cartel members would reduce production from 140 units to 100 units. They would make more money by producing less because of their ability to exploit the remaining customers. Society loses. Triangle CEF is called the dead weight or welfare loss. People wanted to buy the amount depicted by the triangle, and they were willing to buy it at cost or more, but this amount was never produced. Rectangle ABCE represents the product sold at the extra-high price, and it represents a wealth transfer. Under conditions of competition, buyers would have kept the money represented by rectangle ABCE. The cartel empowered the sellers to extract this surplus from the buyers.

As noted, cartelists can use mechanisms other than price fixing to achieve the same ends. They can allocate territories so that each becomes a monopolist in its own territory. They can allocate customers, creating monopoly power over specific customer segments. Or, they can parcel out production quotas—one of the devices used by the OPEC (oil) cartel of the oil-producing nations. Setting quotas as a means of limiting output is the other side of the price-fixing coin. By setting a high price, the quantity demanded will fall. By setting quotas, the collaborators create scarcity, and the price will rise. Several devices can be used in tandem. Cartelists often fix prices and then set quotas (or agree on market shares) to avoid squabbling about who gets to enjoy the high price. Moreover, if no member can sell more than a fixed quota, it will not be able to cheat on its co-conspirators (i.e., secretly violate its obligations) by selling more goods at a lower price.

The preceding has presented the static effect of cartels; that is, a cartel will normally cause the price of a known good, produced in known ways, to be higher and output to be lower than under conditions of independent decision-making. Cartels also have a negative dynamic effect. If firms have agreed not to compete and do not anticipate rivalry, they tend to let costs rise, and their incentives to innovate to find new and better ways of satisfying their customers are muted. This effect is called x-inefficiency.

The effects of a cartel can sometimes be achieved through means short of conspiracy. If a market is highly concentrated (i.e., is 'oligopolistic', namely, there are only a few firms) and incumbents are insulated by barriers to entry—especially if the sellers are relatively similar to one another in cost structure, and the product is homogeneous—the price and output moves of the incumbents may be relatively transparent to one another. The price that will maximize the profits of each is likely to be approximately the same for all. No firm would charge a price higher than the common price, because it would be out-competed and it would lose its sales. None would venture to charge a lower price, because competition would break out, and all producers would be worse off: they would sell approximately the same quantity of goods but at a lower price.

As a result, unless legal risks are sufficiently great, the firms may find it both possible and profitable to form a cartel, and they may be able to achieve cartel effects—higher price, lower output, lower dynamism—even without an explicit agreement.

In an oligopolistic market (one comprised of few firms), firms may coordinate their actions by price leadership and signalling devices. Also, they may coordinate by staying within their own traditional territories. A territorial strategy has often been employed by firms in Europe, where national markets were historically isolated by trade barriers. French firms feared that if they began to sell in Germany, German firms, in retaliation, would dump their products on the French market, and vice versa. Patterns of mutual deference or spheres of influence developed, reinforcing oligopoly behaviour. The more concentrated the market, the less need there was for an explicit agreement, because the result could be achieved without one.

Since merging is one way of reducing the number of players in a market, and the fewness of players makes coordination easier, mergers that result in high concentration may produce cartel-like effects (known as 'coordinated effects'); i.e., the firms left in the market may adopt cooperative rather than competitive modes of interaction. Mergers, however, are integrative and may produce synergies and efficiencies, while cartels are virtually always inefficient and are by definition formed to suppress competition. Therefore, the law treats cartels much more harshly than it treats mergers.

B. Proof of cartels and the boundary between express and tacit collusion

The most powerful and tempting way for firms to control a market is to join with one another, that is, to collaborate rather than to compete. Accordingly, all antitrust or competition laws prohibit certain combinations or concerted practices. In the EU, the prohibition is contained in Article 101 TFEU. While it is not always clear whether a collaboration harms competition, cartels are by nature agreements that harm competition.

Hence, while establishing the anti-competitive nature of a cartel is usually unproblematic, the challenge lies in the proof of the existence of the cartel, which typically involves both basic and complex questions not only of fact, but also of law. For example, as to the facts: did the parties explicitly agree not to compete, and over what period? Can a concerted practice be inferred from the firms' behaviour and from facts about the market? As to the law: who is liable for having participated in the cartel? Does it amount to a single and continuous infringement? May the parties justify their agreement by showing that it did not harm competition or that it had no effect on consumers?

Cartel cases involving quinine, dyestuffs, cement and sugar were formative cases in the development of EU cartel law. The key question at the heart of these cases is whether the set of facts collected by the Commission enabled it to establish to the requisite legal standard the existence of an agreement (based on direct evidence) or a concerted practice (based on circumstantial evidence) caught under Article 101 TFEU, or merely of an instance (or instances) of parallel conduct (also referred to as 'tacit collusion' achieved without direct or indirect communication between firms but by each of them in pursuance of its own profit-maximizing strategy) falling outside of the scope of that provision and of the cartel prohibition. Thus, these cases explore the grey zone between explicit collusion and mere conscious parallelism, sometimes referred to as 'oligopolistic coordination', typically arising in situations where a few suppliers trade relatively homogeneous products under sufficiently transparent market conditions and are able to engage in supracompetitive pricing as the outcome of rational and unilateral market strategies.

In the *Quinine* case that follows, much of the analysis concerns whether the Commission and court could infer from the facts that the firms had entered into a cartel agreement. Consider also, as you read the *Quinine* case, what the firms did to help the formation of a cartel, to make it work and to make it stable. What characteristics about the market and its structure made it more or less likely for a cartel to work? What evidence was the give-away that the cartel continued to operate after 1962? *Quinine* is probably the earliest case of trans-Atlantic agency cooperation in prosecuting an international cartel.

1. Piecing evidence together: the early *Quinine* case

CASE

ACF Chemiefarma v. Commission (Case 41/69) (*'Quinine'*)[9]

[Nedchem and five other Dutch firms, and Boehringer and Buchler, both German firms, produced quinine and quinidine, ingredients used to manufacture drugs to treat malaria and heart disease. In 1958, they entered into a series of agreements to reserve their home markets for themselves and to fix prices and quotas for exports to all other countries. After the German Federal Cartel Office discovered the cartel, Nedchem and Boehringer concluded a new agreement that excluded deliveries within the EU from the arrangement. In March 1960, Nedchem, the two German firms, and French and British producers of quinine and quinidine concluded a new export cartel agreement. The new agreement excluded sales into EU Member States, set quotas for exports to non-member nations, and reserved certain markets outside of the common market for specified cartel members. It also provided for equalization of quantities to be sold by members if quotas were exceeded or not reached and provided that no cartel member could cooperate in the production or sale of quinine or quinidine outside of the common market with firms not participating in the agreement. Each party agreed to supply the others with information about where, to whom, and how much they sold, on the basis of which Nedchem would equalize the quantities to be sold by each.

9 [1970] ECR 661, EU:C:1970:71.

CASE *(continued)*

In April 1960, two gentlemen's agreements were drawn up among the parties—though never signed—which extended the provisions of the export agreements to sales within the common market and reserved home markets. The French parties agreed not to manufacture synthetic quinidine, and all parties agreed that non-compliance with the gentlemen's agreement would terminate the written export agreement and vice versa. The agreements were supplemented by a pool agreement for bark to make quinine. The parties would jointly purchase this critical raw material through Nedchem. Nedchem would buy stockpile surpluses of bark from the US' General Services Administration, allocate the bark among the cartel members, and receive a 2% commission from the members.

In 1962, Regulation 17 went into effect, giving the Commission the powers necessary to enforce the then equivalent to Article 101 TFEU. Also in 1962, a dispute arose regarding the bark pool, and the parties claimed that they abandoned their gentlemen's agreement shortly thereafter.

In 1963–64, the US, needing quinine to save the lives of sick American soldiers in Vietnam, became suspicious of the existence of an international quinine cartel as a result of Nedchem's purchases of large quantities of the US bark stockpile. The Department of Justice conducted extensive investigations (eventually resulting in civil and criminal cases under the US Sherman Antitrust Act ('Sherman Act')), and in 1967 it shared information with the European Commission. The Commission and national authorities began investigations into whether and to what extent the gentlemen's agreements were being applied in the common market after 1962. The Commission found that violations continued until February 1965, and imposed fines.]

115 The defendant bases its view that the gentlemen's agreement was continued until February 1965 on documents and declarations emanating from the parties to the agreement the tenor of which is indistinct and indeed contradictory so that it is impossible to conclude whether those undertakings intended to terminate the gentlemen's agreement at their meeting on 29 October 1962.

116 The conduct of the undertakings in the common market after 29 October 1962 must therefore be considered in relation to the following four points: sharing out of domestic markets, fixing of common prices, determination of sales quotas and prohibition against manufacturing synthetic quinidine.

Protection of the producers' domestic markets

117 The gentlemen's agreement guaranteed protection of each domestic market for the producers in the various Member States.

CASE *(continued)*

118 After October 1962 when significant supplies were delivered on one of those markets by producers who were not nationals, as for example in the case of sales of quinine and quinidine in France, there was a substantial alignment of prices conforming to French domestic prices which were higher than the export prices to third countries.

119 It does not appear that there were alterations in the insignificant volume of trade between the other Member States referred to by the clause relating to domestic protection in spite of considerable differences in the prices prevailing in each of those States.

120 The divergences between the domestic legislation of those States cannot by itself explain those differences in price or the substantial absence of trade.

121 Obstacles which might arise in the trade in quinine and quinidine from differences between national legislation governing pharmaceutical products under trademark cannot relevantly be invoked to explain those facts.

122 The correspondence exchanged in October and November 1963 between the parties to the export agreement with regard to the protection of domestic markets merely confirmed the intention of those undertakings to allow this state of affairs to remain unchanged.

123 This intention was subsequently confirmed by Nedchem during the meeting of the undertakings concerned in Brussels on 14 March 1964.

124 From those circumstances it is clear that with regard to the restriction on competition arising from the protection of the producers' domestic markets the producers continued after the meeting on 29 October 1962 to abide by the gentlemen's agreement of 1960 and confirmed their common intention to do so.

125 The applicant maintains that owing in particular to the shortage of raw materials the sharing out of domestic markets, as emerges from the exchange of letters of October and November 1963, had no effect on competition in the Common Market.

126 Despite the scarcity of raw materials and an increase in the demand for the products in question, as the contested decision finds, a serious threat of shortage nevertheless emerged only in 1964 as a result of the interruption of Nedchem's supplies from the American General Service Administration.

127 On the other hand, such a situation cannot render lawful an agreement the object of which is to restrict competition in the Common Market and which affects trade between the Member States.

CASE *(continued)*

128 The sharing out of domestic markets has as its object the restriction of competition and trade within the Common Market.

129 The fact that, if there were a threatened shortage of raw materials, such an agreement might in practice have had less influence on competition and on international trade than in a normal period in no way alters the fact that the parties did not terminate their activities.

130 Furthermore, the applicant has furnished no conclusive evidence capable of proving that it had ceased to act in accordance with the agreement before the date of expiry of the export agreement.

131 Consequently, the submissions concerning that part of the decision relating to the continuation of the agreement on the protection of the producers' domestic markets until the beginning of February 1965 are unfounded.

Joint fixing of sales prices

132 With regard to the joint fixing of sales prices for the markets which were not shared out, that is to say, the Belgo-Luxembourg Economic Union and Italy, the gentlemen's agreement provided for the application to such sales of the current prices for exports to third countries fixed by mutual agreement, in accordance with the export agreement.

* * *

134 If, as the defendant maintains, the parties to the export agreement continued until February 1965 to apply their current export prices to supplies to the above-mentioned Member States, it would follow that they continued to abide by that part of the gentlemen's agreement relating to the joint fixing of sales prices.

135 With regard to the period from November 1962 to April 1964, the figures supplied by the defendant show a substantial and constant identity between the current prices fixed for export within the framework of the agreement and the prices maintained by the undertakings concerned, including the applicant, for their sales in unprotected domestic markets in the Community.

136 Where such prices deviate from the scale of export prices they do so in terms of rebates or increases corresponding generally to those agreed on under the gentlemen's agreement.

137 The applicant had supplied no evidence capable of proving that this argument is unfounded.

CASE *(continued)*

138 Moreover the increase in prices of 15%, which was jointly decided upon on 12 March 1964 under the export agreement which led Nedchem to withdraw its opposition, was uniformly applied—although that undertaking would have preferred to continue to fix lower prices—with regard to supplies to Italy, Belgium and Luxembourg also.

139 These circumstances show that with regard to sales prices the parties to the export agreement continued after October 1962 to act in the Common Market as if the gentlemen's agreement of 1960 were still in force.

* * *

2. Testing the boundaries: the *Dyestuffs* case

Enterprises in all six of the original Member States, and ICI in the UK, were charged with fixing the prices of dyestuffs and dividing markets. The Commission brought proceedings in 1972, the year before the UK joined the EU. ICI sought dismissal on jurisdictional grounds; but ICI had subsidiaries in the EU, and the Court of Justice held the parent and subsidiaries to be one economic entity with sufficient presence in Europe. See, for jurisdictional aspects, section C following.

Ten large producers supplied 80% of the dyestuffs market. The basic pattern of behaviour was one of price leadership, with one firm announcing its intention to increase prices by a stated percentage, often to take effect at a specified later date. The competitors usually followed suit, often announcing within two or three days their intention to raise prices by the same percentage.

The dyestuff companies argued that the Commission had proved no agreement or concertation; it had merely shown oligopoly behaviour (the tendency of oligopolists to act interdependently even without agreement because of the structure of the market). The Commission disagreed, and the Court of Justice upheld the Commission's decision. Here is an excerpt; while reading it, keep in mind that the law has become more demanding on proof of agreement, as you will see in the *Wood Pulp* case following. Consider: was conspiracy a better story than mere interdependence or any other unilateral action?

CASE

Imperial Chemical Industries Ltd v. Commission (Cases 48, 49, 51–57/69) (*'Dyestuffs'*)[10]

66 Although parallel behaviour may not by itself be identified with a concerted practice, it may however amount to strong evidence of such a practice if it leads to conditions of competition which do not correspond to the normal conditions of the market, having regard to the nature of the products, the size and number of the undertakings, and the volume of the said market.

* * *

109 … [A]lthough parallel conduct in respect of prices may well have been an attractive and risk-free objective for the undertakings concerned, it is hardly conceivable that the same action could be taken spontaneously at the same time, on the same national markets and for the same range of products.

110 Nor is it any more plausible that the increases of January 1964, introduced on the Italian market and copied on the Netherlands and Belgo-Luxembourg markets, which have little in common with each other either as regards the level of prices or the pattern of competition, could have been brought into effect within a period of two to three days without prior concertation.

* * *

118 Although every producer is free to change his prices, taking into account in so doing the present or foreseeable conduct of his competitors, nevertheless it is contrary to the rules on competition contained in the Treaty for a producer to cooperate with his competitors, in any way whatsoever, in order to determine a coordinated course of action relating to a price increase and to ensure its success by prior elimination of all uncertainty as to each other's conduct regarding the essential elements of that action, such as the amount, subject-matter, date and place of the increases.

119 In these circumstances and taking into account the nature of the market in the products in question, the conduct of the applicant, in conjunction with other undertakings against which proceedings have been taken, was designed to replace the risks of competition and the hazards of competitors' spontaneous reactions by cooperation constituting a concerted practice prohibited by Article [101](1) of the Treaty.

* * *

10 [1972] ECR 619, EU:C:1972:70.

3. Establishing a 'concerted practice': the *Sugar Cartel* case

The *Sugar Cartel* case was the last of the formative cartel judgements.[11] Among other things, various sugar producers from the Netherlands, Belgium and Germany allegedly entered into understandings and practices to coordinate their behaviour in order to moderate the impact of overproduction of sugar in Belgium and to restrain the Belgian dealers from exporting large amounts of Belgian sugar to the Netherlands. The firms denied that they had formed a cartel. Further, they argued that the sugar market was so highly regulated by national quotas and an EU-wide intervention purchase price that it was impossible for private parties to distort trade. The Court disagreed on both counts, noting that the government regulation left 'a residual field of competition'. It found a multitude of serious infringements. The case is well known for its definition of the word 'concert':

> 172 SU and CSM submit that since the concept of 'concerted practices' presupposes a plan and the aim of removing in advance any doubt as to the future conduct of competitors, the reciprocal knowledge which the parties concerned could have of the parallel or complementary nature of their respective decisions cannot in itself be sufficient to establish a concerted practice; otherwise every attempt by an undertaking to react as intelligently as possible to the acts of its competitors would be an offence.
>
> 173 The criteria of coordination and cooperation laid down by the caselaw of the Court, which in no way require the working out of an actual plan, must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market including the choice of the persons and undertakings to which he makes offers or sells.
>
> 174 Although it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors, it does however strictly preclude any direct or indirect contact between such operators, the object or effect whereof is either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplate adopting on the market.

11 Cases 40–48, 50, 54–56, 111, 113–114/73, *Suiker Unie v. Commission* [1975] ECR 1663, EU:C:1975:174 ('*Sugar Cartel*').

NOTES AND QUESTIONS

1. In *Quinine*, consider the evidence (esp. paras. 118–124)—which was only circumstantial—from which the Court concluded that the gentlemen's agreements continued after 1962. Did the facts raise an inference that the agreements continued in force? How strong was the alternative inference that, after 1962, the parties had no agreement with respect to sales in the Community; that each one simply chose to follow past patterns of behaviour and hoped that its export partners would do so too? Does the latter scenario constitute concerted action under *Quinine*? *Dyestuffs*? *Sugar Cartel*? In the 1970s and 1980s, the law was still evolving; the issue of proof of concerted action was to come before the Court once again in *Wood Pulp*; see later.
2. In an important American case, motion picture distributors changed their pattern of behaviour in a sudden, dramatic, uniform and exploitative way. Moreover, the change in behaviour was profitable if all firms did the same thing; but if only one of them had raised its prices, it would have priced itself out of the market. As the Supreme Court concluded, it would strain credulity to believe that each firm acted independently. The Supreme Court[12] upheld the lower court's finding of conspiracy under Section 1 of the Sherman Act.[13] But, the Supreme Court has also held that mere conscious parallelism is not equivalent to a combination or conspiracy and therefore does not constitute a violation of the Sherman Act.[14] The Court has dismissed cases of parallel action that can be explained just as plausibly by independent or interdependent action.[15]
3. Note how the quinine export cartel tended to facilitate a domestic (European) cartel. Note also how the parties used various devices that helped to make the cartel work. For example, by pooling raw material purchases in the early years of the agreement, and by designating one of their members—Nedchem—to be their purchasing agent and to allocate the raw material in accordance with assigned quotas, the firms could police their own cartel agreement and be sure that no one cheated by producing too much. Likewise, as a result of sharing extensive information with one another, cheating from their agreement would become obvious, and cheating was explicitly punishable by expulsion from both cartels. Finally, the agreement not to produce synthetic quinine by the French, who were selling at a particularly high price in France, tended to keep off the market a substitute product that could have undermined the cartel by driving down the cartel price.
4. After the *Quinine* case, can firms defend their conduct on grounds that their agreement had no effect because market forces overwhelmed their attempt to raise prices (i.e., they tried to run a cartel, but they failed)? Can they successfully argue that an aborted cartel had no effect on trade between Member States? Should 'no effect' be a defence? Why or why not?[16]
5. Why was the quinine export agreement as such of no interest to the Court? What is the scope of EU law with respect to export cartels selling to destinations outside the European Union? Consult the language of Article 101 TFEU.
   Like EU law, US antitrust law excludes from its scope export cartels that hurt foreigners only.[17] Is this good policy? From the point of view of worldwide free movement and efficiency? From the point of view of sovereignty of nations?

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12 *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 59 S.Ct. 467, 83 L.Ed. 610 (1939).

13 Section 1 of the Sherman Act (15 U.S.C. § 1) provides in relevant part: '*Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.*'

14 *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 74 S.Ct. 257, 98 L.Ed. 273 (1954).

15 See *Twombly v. Bell Atlantic Corp.*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *Matsushita Electrical Industrial Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

16 See *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (lack of effect is not a defence to a cartel violation under US law).

17 See the Foreign Trade Antitrust Improvements Act of 1982, codified in the Sherman Act as Section 7A (15 U.S.C. § 6a).

4. Falling short: the *Wood Pulp* precedent

US, Canadian, Finnish, Swedish and Norwegian firms shipped wood pulp to the EU. The Commission found that the US, Canadian and Finnish firms concerted on prices, and imposed large fines. The companies sought annulment of the Commission decision before the Court of Justice. They asserted lack of jurisdiction by reason of extraterritoriality. Also, they claimed that there was not sufficient evidence from which the Commission could derive concert of action. The *Sugar Cartel* judgement, excerpted earlier, was the common referent for the definition of concertation.

CASE

Ahlström Osakeyhtiö v. Commission (Cases C-89, 104, 114, 116–117, 125–129/85) *('Wood Pulp')*[18]

[The Commission brought proceedings against 40 wood pulp producers from the US, Canada and Finland and three of their trade associations for concerting on price announcements and on price. The producers made quarterly price announcements sometimes simultaneously and sometimes nearly so. Prices were almost always quoted in dollars, a practice that both increased the transparency of the producers' intentions to one another and ensured that shifts in exchange rates in the various Member States would have no impact. Prices and price changes tended to be uniform. The Commission found, for example:

> that the prices announced by the Canadian and US producers were the same from the first quarter of 1975 to the third quarter of 1977 and from the first quarter of 1978 to the third quarter of 1981, that the prices announced by the Swedish and Finnish producers were the same from the first quarter of 1975 to the second quarter of 1977 and from the third quarter of 1978 to the third quarter of 1981 and, finally, that the prices of all the producers were the same from the first quarter of 1976 to the second quarter of 1977 and from the third quarter of 1979 to the third quarter of 1981.

The Commission determined that the pulp producers had engaged in concerted conduct in violation of Article 101.

The Court of Justice annulled most of the Commission's decision.]

18 [1993] ECR I-1307, EU:C:1993:120.

CASE *(continued)*

A. Quarterly price announcements as the infringement

59 According to the Commission's first hypothesis, it is the system of quarterly price announcements in itself which constitutes the infringement of art. [101] of the Treaty.

60 First, the Commission considers that that system was deliberately introduced by the pulp producers in order to enable them to ascertain the prices that would be charged by their competitors in the following quarters. The disclosure of prices to third parties, especially to the press and agents working for several producers, well before their application at the beginning of a new quarter, gave the other producers sufficient time to announce their own, corresponding, new prices before that quarter and to apply them from the commencement of that quarter.

61 Secondly, the Commission considers that the implementation of that mechanism had the effect of making the market artificially transparent by enabling producers to obtain a rapid and accurate picture of the prices quoted by their competitors.

* * *

63 According to the court's judgement in *Suiker Unie* …, a concerted practice refers to a form of co-ordination between undertakings which, without having been taken to the stage where an agreement properly so-called has been concluded, knowingly substitutes for the risks of competition practical co-operation between them. In the same judgement, the court added that the criteria of co-ordination and co-operation must be understood in the light of the concept inherent in the provisions of the Treaty relating to competition that each economic operator must determine independently the policy which he intends to adopt on the common market.

64 In this case, the communications arise from the price announcements made to users. They constitute in themselves market behaviour which does not lessen each undertaking's uncertainty as to the future attitude of its competitors. At the time when each undertaking engages in such behaviour, it cannot be sure of the future conduct of the others.

65 Accordingly, the system of quarterly price announcements on the pulp market is not to be regarded as constituting in itself an infringement of art. [101](1) of the Treaty.

B. Concertation on announced prices as the infringement

66 In the second hypothesis, the Commission considers that the system of price announcements constitutes evidence of concertation at an earlier stage … [T]he Commission states that, as proof of such concertation, it relied on the parallel conduct of the pulp producers in the period from 1975 to 1981 and on different kinds of direct or indirect exchange of information.

CASE *(continued)*

* * *

70 Since the Commission has no documents which directly establish the existence of concertation between the producers concerned, it is necessary to ascertain whether the system of quarterly price announcements, the simultaneity or near-simultaneity of the price announcements and the parallelism of price announcements as found during the period from 1975 to 1981 constitute a firm, precise and consistent body of evidence of prior concertation.

71 In determining the probative value of those different factors, it must be noted that parallel conduct cannot be regarded as furnishing proof of concertation unless concertation constitutes the only plausible explanation for such conduct. It is necessary to bear in mind that, although art. [101] of the Treaty prohibits any form of collusion which distorts competition, it does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competitors.

* * *

(a) System of price announcements

* * *

74 In their pleadings, on the other hand, the applicants maintain that the system is ascribable to the particular commercial requirements of the pulp market.

* * *

76 The experts [appointed by the Court] observe first that the system of announcements at issue must be viewed in the context of the long-term relationships which existed between producers and their customers and which were a result both of the method of manufacturing the pulp and of the cyclical nature of the market. In view of the fact that each type of paper was the result of a particular mixture of pulps having their own characteristics and that the mixture was difficult to change, a relationship based on close co-operation was established between the pulp producers and the paper manufacturers. Such relations were all the closer since they also had the advantage of protecting both sides against the uncertainties inherent in the cyclical nature of the market: they guaranteed security of supply to buyers and at the same time security of demand to producers.

77 The experts point out that it is in the context of those long-term relationships that, after the Second World War, purchasers demanded the introduction of that system of announcements. Since pulp accounts for between 50–75 per cent of the cost of paper, those purchasers

CASE *(continued)*

wished to ascertain as soon as possible the prices which they might be charged in order to estimate their costs and to fix the prices of their own products. However, as those purchasers did not wish to be bound by a high fixed price in the event of the market weakening, the announced price was regarded as a ceiling price below which the transaction price could always be renegotiated.

78 The explanation given for the use of a quarterly cycle is that it is the result of a compromise between the paper manufacturers' desire for a degree of foreseeability as regards the price of pulp and the producers' desire not to miss any opportunities to make a profit in the event of a strengthening of the market.

79 The US dollar was, according to the experts, introduced on the market by the North American producers during the 1960s. That development was generally welcomed by purchasers who regarded it as a means of ensuring that they did not pay a higher price than their competitors.

(b) Simultaneity or near-simultaneity of announcements

81 According to the applicants, the simultaneity or near-simultaneity of the announcements—even if it were established—must instead be regarded as a direct result of the very high degree of transparency of the market. Such transparency, far from being artificial, can be explained by the extremely well-developed network of relations which, in view of the nature and the structure of the market, have been established between the various traders.

* * *

83 First, … a buyer was always in contact with several pulp producers. One reason for that was connected with the paper-making process, but another was that, in order to avoid becoming overdependent on one producer, pulp buyers took the precaution of diversifying their sources of supply. With a view to obtaining the lowest possible prices, they were in the habit, especially in times of falling prices, of disclosing to their suppliers the prices announced by their competitors.

84 Secondly, it should be noted that most of the pulp was sold to a relatively small number of large paper manufacturers. Those few buyers maintained very close links with each other and exchanged information on changes in prices of which they were aware.

85 Thirdly, several producers who made paper themselves purchased pulp from other producers and were thus informed, in times of both rising prices and falling prices, of the prices charged by their competitors. That information was also accessible to producers who did not themselves manufacture paper but were linked to groups that did.

CASE *(continued)*

86 Fourthly, that high degree of transparency in the pulp market resulting from the links between traders or groups of traders was further reinforced by the existence of agents established in the Community who worked for several producers and by the existence of a very dynamic trade press.

* * *

88 Finally, it is necessary to add that the use of rapid means of communications, such as the telephone and telex, and the very frequent recourse by the paper manufacturers to very well-informed trade buyers meant that, notwithstanding the number of stages involved—producer, agent, buyer, agent, producer—information on the level of the announced prices spreads within a matter of days, if not within a matter of hours on the pulp market.

* * *

Conclusions

126 Following that analysis, it must be stated that, in this case, concertation is not the only plausible explanation for the parallel conduct. To begin with, the system of price announcements may be regarded as constituting a rational response to the fact that the pulp market constituted a long-term market and to the need felt by both buyers and sellers to limit commercial risks. Further, the similarity in the dates of price announcements may be regarded as a direct result of the high degree of market transparency, which does not have to be described as artificial. Finally, the parallelism of prices and the price trends may be satisfactorily explained by the oligopolistic tendencies of the market and by the specific circumstances prevailing in certain periods. Accordingly, the parallel conduct established by the Commission does not constitute evidence of concertation.

? NOTES AND QUESTIONS

1. In para. 64, the Court says that the system of quarterly price announcements 'does not lessen each undertaking's uncertainty as to the future attitude of its competitors'. Why not? Argue for the Commission that the system lessens uncertainty. Would this interpretation change the outcome?
2. In para. 71, the Court declares that parallel conduct cannot furnish proof of concertation 'unless concertation constitutes the only plausible explanation for such conduct'. Why such a heavy burden? If agreement was the most probable explanation of the parallel price moves, should the Court have drawn an inference of a concerted practice?

3. The buyers desired advance price information. Does that explain the quarterly price announcements? Does it explain the virtual simultaneity of the price announcements? Does it explain the uniform price rises?
4. Consider, once again, the definition of 'concertation'. When you read the excerpts from the *Sugar Cartel* case, did you infer that oligopolistic interdependence was to be treated as concertation? What do you now believe is the relationship between oligopolistic interdependence and concertation under EU law?

   In the US, the Supreme Court has similarly moved from a soft test for proof of 'combination' or 'concert' to a demanding standard that puts a significant burden on the plaintiff. Compare *Interstate Circuit* with *Matsushita*, p. 48 at notes 7 and 10 earlier. What are the policy reasons for a rigorous standard of proof?
5. Observe the conundrum of oligopoly behaviour. A few firms in a high-barrier market may be able to mimic the effects of a cartel without an explicit agreement or even an understanding. Should this phenomenon be relevant to a judicial construction of the word 'concert'?

5. 'Removing uncertainty': the *Banana* cartel

In *Wood Pulp*, the Court of Justice rejected the Commission's attempt to construe the system of quarterly price announcements as an infringement of Article 101(1) TFEU, notably because concertation inferred from circumstantial evidence was not 'the only plausible explanation for the parallel conduct'. In contrast, direct exchanges of pricing-relevant information between competitors, short of any agreement on price, has been considered a restriction by object under Article 101(1) TFEU. Under what legal conditions? How systematic should the exchange be? How sensitive should the information be? How likely and significant should be the effects on actual market prices? Ask yourself these questions as you read through the following excerpts of the *Dole* case.

CASE

Dole Food and Dole Fresh Fruit Europe v. Commission (C-286/13 P)[19]

[Known as the 'banana cartel', this case involved the bilateral exchange of pre-pricing information between Dole Food, a US importer of bananas into the EU, and other banana importers. According to the Commission, the banana importers engaged in bilateral pre-pricing communications involving the discussion of banana price-setting factors relevant to the setting of future quotation prices. The Commission found that the pre-pricing communications between Dole Food and the other banana importers were liable to influence pricing behaviour

19 EU:C:2015:184.

CASE *(continued)*

and thus, concluded that the undertakings concerned had participated in concerted practices consisting in coordinating their quotation prices for bananas marketed in the EU between 2000 and 2002. After an unsuccessful appeal before the General Court, Dole Food appealed before the Court of Justice and argued that the pre-pricing communications in question were not capable of removing uncertainty as to actual market prices and thus, could not be qualified as a restriction of competition by object. The Court of Justice dismissed the appeal.]

119 In so far as concerns, in particular, the exchange of information between competitors, it should be recalled that the criteria of coordination and cooperation necessary for determining the existence of a concerted practice are to be understood in the light of the notion inherent in the Treaty provisions on competition, according to which each economic operator must determine independently the policy which he intends to adopt on the common market.

120 While it is correct to say that this requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing or anticipated conduct of their competitors, it does, none the less, strictly preclude any direct or indirect contact between such operators by which an undertaking may influence the conduct on the market of its actual or potential competitors or disclose to them its decisions or intentions concerning its own conduct on the market where the object or effect of such contact is to create conditions of competition which do not correspond to the normal conditions of the market in question, regard being had to the nature of the products or services offered, the size and number of the undertakings involved and the volume of that market.

121 The Court has therefore held that the exchange of information between competitors is liable to be incompatible with the competition rules if it reduces or removes the degree of uncertainty as to the operation of the market in question, with the result that competition between undertakings is restricted.

* * *

123 Moreover, a concerted practice may have an anticompetitive object even though there is no direct connection between that practice and consumer prices. Indeed, it is not possible on the basis of the wording of Article [101](1) EC to conclude that only concerted practices which have a direct effect on the prices paid by end users are prohibited.

* * *

126 Lastly, it should be pointed out that the concept of a concerted practice, as it derives from the actual terms of Article [101](1) EC, implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two.

CASE *(continued)*

127 In that regard, the Court has held that, subject to proof to the contrary, which the economic operators concerned must adduce, it must be presumed that the undertakings taking part in the concerted action and remaining active on the market take account of the information exchanged with their competitors in determining their conduct on that market. In particular, the Court has concluded that such a concerted practice is caught by Article [101](1) EC, even in the absence of anticompetitive effects on the market.

* * *

129 …, it is apparent from the extremely detailed findings of the General Court, first, that bilateral pre-pricing communications were exchanged between the Dole companies and other undertakings in the banana sector and, as part of those communications, the undertakings discussed their own quotation prices and certain price trends. Moreover, the Dole companies do not contest that finding.

130 Second, the General Court found, …, that quotation prices were relevant to the market concerned, since, on the one hand, market signals, market trends or indications as to the intended development of banana prices could be inferred from those quotation prices, which were important for the banana trade and the prices obtained and, on the other, in some transactions the actual prices were directly linked to the quotation prices.

134 It also follows that the General Court was entitled to take the view, …, without erring in law, that it was permissible for the Commission to conclude that, as they made it possible to reduce uncertainty for each of the participants as to the foreseeable conduct of competitors, the pre-pricing communications had the object of creating conditions of competition that do not correspond to the normal conditions on the market and therefore gave rise to a concerted practice having as its object the restriction of competition within the meaning of Article [101]EC.

? NOTES AND QUESTIONS

1. In your view, did the *Dole* case involve a 'cartel'? Why yes, or why no? How do the exchanges of information at issue in this case compare with those identified in the *John Deere* or *Wirtschaftsvereinigung* cases discussed in Chapter 3? Does it matter that the exchange of information takes place before or after actual pricing decisions are made?
2. The *Dole* judgement was interpreted as condemning 'by object' any direct exchange of market information, even remotely relevant to the setting of actual prices, under the theoretical assumption that it could enable businesses to infer 'signals, trends or indications' about their competitors' conduct. Do you agree with such interpretation? Do you consider the Court's view as legitimate, and why?

3. The Court of Justice held that companies taking part in a concerted action can be presumed to have taken account of the information exchanged with their competitors in determining their conduct on the market. How could such a presumption be reversed in your view? Isn't adducing such negative proof an unduly burdensome requirement? Or, do you consider this presumption legitimate, and why?
4. How would you reconcile the Court of Justice's position in *Dole* regarding the qualification of the recorded communications as a 'by object' infringement of Article 101(1) TFEU, with the emphasis put in other judgements (chiefly Cartes bancaires, see Chapter 3) on the particular seriousness of the conduct in question for defining a 'by object' restriction?

6. Collusion in the digital age: Eturas and AI

Since the enactment of leniency programmes, the evidentiary burden of competition authorities has been greatly alleviated by the ability to rely on leniency statements disclosing the existence of and participation in a cartel,[20] often in combination with direct evidence submitted by leniency applicants or gathered over the course of inspections carried out on the basis of leads contained in leniency applications. However, with the reduction in leniency applications in recent years, combined with firms' increased sophistication and growing industry concentration, competition authorities have again been testing the boundaries of explicit versus tacit collusion by initiating cases against, e.g., 'hub-n-spoke' or price signalling cartels. Yet, with the digitization of the economy and the development of artificial intelligence ('AI'), a new frontier has emerged.

CASE

Eturas UAB e.a. v. Lietuvos Respublikos konkurencijos taryba ('Eturas') (Case C-74/14)[21]

[The Lithuanian competition authority found that about 30 travel agencies had breached Article 101(1) TFEU by coordinating discounts applicable to clients through a common online travel booking platform called E-turas. The NCA considered that the uniform 3%

20 Nonetheless, on rare occasions, lawyers managed to convince the court that the evidence relied on by the Commission simply did not prove the case. This was so in *Toshiba Corp. v. Commission*, Case T-104/13, EU:T:2015:610, regarding the cathode ray tubes (colour picture TV tubes; CRT) cartel. The General Court agreed with Toshiba that the Commission had failed to establish that Toshiba was aware of the existence of the CRT cartel (before it joined a joint venture with Panasonic) and intended to participate in it. Toshiba was liable vicariously, however, because it had exercised decisive influence on the joint venture with Panasonic, which was a member of the cartel.
21 EU:C:2016:42.

CASE *(continued)*

discount cap applicable on that platform, as stated in a message circulated by the system administrator, amounted to a 'concurrence of wills' between travel agencies without the need for direct contacts. In turn, while the discount cap was automatically implemented by the system, the failure of travel agencies to oppose the discounts cap amounted to tacitly assenting to them. The case went all the way up to the Supreme Administrative Court of Lithuania, which requested a preliminary ruling from the Court of Justice on the possibility to infer the existence of a concerted practice from a presumption that travel agencies had consented to the platform rules, including the discount cap, and more generally on the relevant factors to take into account in determining whether economic operators participating in a common computerized information system have engaged in an infringement of Article 101(1) TFEU. In response, the Court held as follows:]

36 …, according to the case-law of the Court, in most cases the existence of a concerted practice or an agreement must be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition rules.

37 Consequently, the principle of effectiveness requires that an infringement of EU competition law may be proven not only by direct evidence, but also through indicia, provided that they are objective and consistent.

* * *

39 The presumption of innocence precludes the referring court from inferring from the mere dispatch of the message at issue in the main proceedings that the travel agencies concerned ought to have been aware of the content of that message.

40 However, the presumption of innocence does not preclude the referring court from considering that the dispatch of the message at issue in the main proceedings may, in the light of other objective and consistent indicia, justify the presumption that the travel agencies concerned were aware of the content of that message as from the date of its dispatch, provided that those agencies still have the opportunity to rebut it.

* * *

42 In the second place, as regards the participation of the travel agencies concerned in a concerted practice within the meaning of Article 101(1) TFEU, it must be recalled, first, that under that provision, the concept of a concerted practice implies, in addition to the participating undertakings concerting with each other, subsequent conduct on the market and a relationship of cause and effect between the two.

CASE *(continued)*

43 Secondly, it must be pointed out that the case at issue in the main proceedings, as presented by the referring court, is characterised by the fact that the administrator of the information system at issue sent a message concerning a common anticompetitive action to the travel agencies participating in that system, a message which could only be consulted in the 'Notices' section of the information system in question and to which those agencies did not expressly respond. Following the dispatch of that message, a technical restriction was implemented which limited the discounts that could be applied to bookings made via that system to 3%. Although that restriction did not prevent the travel agencies concerned from granting discounts greater than 3% to their customers, it nevertheless required them to take additional technical steps in order to do so.

44 Those circumstances are capable of justifying a finding of a concertation between the travel agencies which were aware of the content of the message at issue in the main proceedings, which could be regarded as having tacitly assented to a common anticompetitive practice, provided that the two other elements constituting a concerted practice, noted in paragraph 42 above, are also present. Depending on the referring court's assessment of the evidence, a travel agency may be presumed to have participated in that concertation if it was aware of the content of that message.

45 However, if it cannot be established that a travel agency was aware of that message, its participation in a concertation cannot be inferred from the mere existence of a technical restriction implemented in the system at issue in the main proceedings, unless it is established on the basis of other objective and consistent indicia that it tacitly assented to an anticompetitive action.

46 In the third place, it must be pointed out that a travel agency may rebut the presumption that it participated in a concerted practice by proving that it publicly distanced itself from that practice or reported it to the administrative authorities. In addition, according to the case-law of the Court, in a case such as that at issue in the main proceedings, which does not concern an anticompetitive meeting, public distancing or reporting to the administrative authorities are not the only means of rebutting the presumption that a company has participated in an infringement; other evidence may also be adduced with a view to rebutting that presumption.

* * *

50 In the light of all the foregoing, the answer to the questions referred is that:

- Article 101(1) TFEU must be interpreted as meaning that, where the administrator of an information system, intended to enable travel agencies to sell travel packages on their websites using a uniform booking method, sends to those economic operators, via a personal electronic mailbox, a message informing them that the discounts on

CASE *(continued)*

products sold through that system will henceforth be capped and, following the dissemination of that message, the system in question undergoes the technical modifications necessary to implement that measure, those economic operators may—if they were aware of that message—be presumed to have participated in a concerted practice within the meaning of that provision, unless they publicly distanced themselves from that practice, reported it to the administrative authorities or adduce other evidence to rebut that presumption, such as evidence of a systematic application of a discount exceeding the cap in question.

- It is for the referring court to examine—on the basis of the national rules governing the assessment of evidence and the standard of proof—whether, in view of all the circumstances before it, the dispatch of a message, such as that at issue in the main proceedings, may constitute sufficient evidence to establish that the addressees of that message were aware of its content. The presumption of innocence precludes the referring court from considering that the mere dispatch of that message constitutes sufficient evidence to establish that its addressees ought to have been aware of its content.

? NOTES AND QUESTIONS

1. The Eturas case raised for the first time the question of whether and to what extent antitrust liability may arise from competitors' reliance on or usage of a common online platform. In this case, the algorithm governing the platform's booking function was parametered by default to cap discounts at 3%. Nowadays, the use of algorithms to assist businesses' decision-making processes has become ubiquitous, including to improve their pricing models, customize services and predict market trends. In effect, algorithms can perform a myriad of tasks, including collecting, sorting, organizing and analysing data, making decisions based on that data and even executing such decisions. This phenomenon generates significant efficiencies but also raises concerns of possible anti-competitive behaviour, as algorithms can make it easier for firms to achieve and sustain collusion without any, or with only limited, formal agreement or interaction. Are the concepts of agreement and concerted practice sufficiently flexible to tackle the various forms of algorithmic collusion, including automatic and systematic price signalling triggering alignments combined with an improved ability to monitor and punish deviations? Or, should these traditional concepts, including those of tacit collusion and conscious parallelism, be revised and adjusted to this new reality?
2. EU Competition Commissioner Vestager once stated:

   > The challenges that automated systems create are very real. If they help companies to fix prices, they really could make our economy work less well for everyone else. … So as competition enforcers, I think we need to make it very clear that companies can't escape responsibility for collusion by hiding behind a computer program.
   >
   > ('Clearing the Path for Innovation', Berlin, 16 March 2017)

   Should competition authorities invest significant resources in tackling these issues? In what way? How much do the risks of collusion depend on the structural characteristics of the relevant industry? Are the risks higher in sectors characterized by a limited number of firms or high barriers to entry, which have been historically prone to cartelization? Or, are these features not (so) relevant in the digital economy? What about other factors, such as market transparency and frequency of interaction? Can digital technologies (e.g., cookies) and increased data collection and processing capacities enhance these features and thereby increase the risks?

3. At its core, the Eturas case is about liability for a restriction of competition resulting from the usage of the platform: can a company be held liable for abiding by, or not opposing, certain platform usage rules? And, who should liable: the users and/or the system administrator (or anybody else, like the algorithm designer/coder)? This is not an easy question to answer, though it is central in algorithmic collusion cases. The Lithuanian NCA found both travel agents and the system administrator liable, the latter for having 'facilitated' collusion while not being in direct competition with the travel agents. This is part of a growing body of case law involving cartel liability for different types of 'facilitators'. Originally, in the AC Treuhand case (C-194/14P, *AC Treuhand AG v. Commission*, EU:C:2015:717; see also Cases T-180/15 and C-39/18P involving the liability of Icap, an interdealer broker and provider of post-trade services, held liable for having facilitated cartels in the Yen Interest Rate Derivatives sector), the Court of Justice upheld the Commission's finding that a consultancy firm may be held liable for infringement of Article 101 TFEU where such a firm actively contributes, in full knowledge of the relevant facts, to the implementation and continuation of a cartel among producers active on a market distinct from that on which the firm itself operates (here, tin stabilizer and epoxidized soybean oil and esters). Thus, for the court:

27 [...] there is nothing in the wording of [Article 81(1)] that indicates that the prohibition laid down therein is directed only at the parties to such agreements or concerted practices who are active on the markets affected by those agreements or practices.

* * *

34 Moreover, it cannot be inferred from the Court's case-law that Article 81(1) EC concerns only either (i) the undertakings operating on the market affected by the restrictions of competition or indeed the markets upstream or downstream of that market or neighbouring markets or (ii) undertakings which restrict their freedom of action on a particular market under an agreement or as a result of a concerted practice.

35 Indeed, it is apparent from the Court's well established case-law that the text of Article 81(1) EC refers generally to all agreements and concerted practices which, in either horizontal or vertical relationships, distort competition on the common market, irrespective of the market on which the parties operate, and that only the commercial conduct of one of the parties need be affected by the terms of the arrangements in question.

* * *

37 in the present case, according to the findings of fact made by the General Court in paragraph 10 of the judgment under appeal, AC–Treuhand played an essential and similar role in both the infringements at issue by organising a number of meetings which it attended and in which it actively participated, collecting and supplying to the producers of heat stabilisers data on sales on the relevant markets, offering to act as a moderator in the event of tensions between those producers and encouraging the latter to find compromises, for which it received remuneration.

38 It follows that the conduct adopted by AC–Treuhand is directly linked to the efforts made by the producers of heat stabilisers, as regards both the negotiation and monitoring of the implementation of the obligations entered into by those producers in connection with the cartels,

the very purpose of the services provided by AC–Treuhand on the basis of service contracts concluded with those producers being the attainment, in full knowledge of the facts, of the anticompetitive objectives in question, namely—as is apparent from paragraph 4 of the judgment under appeal—price-fixing, market-sharing and customer-allocation and the exchange of commercially sensitive information.

39 In those circumstances, contrary to what is claimed by AC–Treuhand, even though those service contracts were formally concluded separately from the commitments entered into by the producers of heat stabilisers among themselves, and notwithstanding the fact that AC–Treuhand is a consultancy firm, it cannot be concluded that the action taken by AC–Treuhand in that capacity constituted mere peripheral services that were unconnected with the obligations assumed by the producers and the ensuring restrictions of competition.

* * *

46 It follows from all the foregoing considerations that the General Court was correct to find, …, that AC–Treuhand's conduct was caught by the prohibition laid down in Article [101](1) EC and that that interpretation could reasonably have been foreseen at the time the infringements were committed.

As noted, the liability of firms benefiting from an algorithm's autonomous decisions is complex and mainly depends on the facts at issue and on whether the restriction of competition enabled by the use of the algorithm could have been anticipated or predetermined by the beneficiaries. Such a case-by-case analysis may involve consideration for the algorithm's capabilities, its design and coded instructions, and the usage reward structure, as well as an inquiry into who controls the activities of the algorithm and to what extent.

* * *

Over the years, the Court of Justice has developed a number of evidentiary principles applicable to the Commission in cartel (and by extension, antitrust) cases. In a nutshell, the Commission is bound to prove the existence of an infringement of Article 101 TFEU 'to the requisite legal standard'. The notion of requisite legal standard is governed by two basic principles: (i) the unfettered evaluation of the evidence; and (ii) the need to rely on a sufficiently precise, credible and consistent body of evidence. This standard is demanding and is very much akin to that used in criminal law. Similarly, the quasi-penal nature of antitrust law implies that any doubt should benefit the defendant, i.e., in cartel cases, the participants to the anti-competitive agreement. The Commission is nevertheless entitled to rely on an overall assessment of the evidence. The Court of Justice has also developed a number of presumptions and specific evidentiary rules with respect to the various constitutive elements of a cartel.

When it comes to establishing the participation of an undertaking in a cartel, the case law provides that attendance of meetings involving anti-competitive arrangements is deemed to amount to participation in a cartel. This presumption is rebuttable, i.e., it is only valid if the parties cannot provide proof of the contrary. Attempts to rebut the presumption of participation usually involve the so-called 'distanciation' requirement, whereby the undertaking must demonstrate that prior to improper meetings, or over the course of those meetings, it expressly shared with the other participants its disagreement over the observed course of action. However, even passive attendance of contentious meetings will give rise to a presumption of participation in a cartel and entail liability thereof, notably because it is presumed that undertakings participating in such meetings and remaining active on the market take account of the information exchanged with their competitors when determining their conduct on that market.

The fact that an undertaking did not proceed to implement any of the measures agreed at the meetings attended is irrelevant to the finding of an infringement. The question whether the undertaking in question considered itself bound—in law, in fact or morally—to adopt the agreed conduct is equally irrelevant. Likewise, it is settled that an undertaking that participates with others in an anti-competitive agreement cannot rely on the fact that it was forced to participate by the other participants. The Court has taken the view that any such undertaking could have complained to the competent authorities about the pressure brought to bear on it and lodged a complaint with the Commission under Article 7 of Regulation 1/2003, rather than participate in the activities in question.

An undertaking can also be held responsible for the whole cartel, even if it is demonstrated that it participated directly only in one or some of the constituent elements of that cartel, if it was aware, or could reasonably foresee, that the collusion in which it participated was part of a more general plan including all the constituent elements of the cartel and was prepared to accept the risk. This is particularly the case when this overall plan is deemed to constitute a single and continuous infringement, i.e., '*a complex of practices adopted by various parties in pursuit of a single anti-competitive economic aim*' (see, e.g., Case C-105/04 P, para. 110).

In practice, disputes often occur as to the date of the cessation of anti-competitive agreements, which has a direct influence on the amount of the fine set by the Commission. There is no shift of the burden of proof in that respect: the Commission cannot consider that once the existence of an agreement has been proven, it is automatically for the parties involved in that agreement to prove that it has come to an end. In essence, the Commission cannot presume that an agreement has continued to be observed after the last known manifestation of its application, and in the absence of evidence of the application of an anti-competitive agreement during a certain period, it would be contrary to the principle of legal certainty to consider that the infringement had continued uninterrupted during that period.

The other main area of dispute in cartel cases is the calculation of the amount of fines, which has given rise to the development of an extensive body of case law and more often than not, constitutes the main or only ground for appeal against cartel decisions. However, hard-core cartels have increasingly been decided in recent years by means of settlement decisions,[22] which imply an acknowledgment of participation in the cartel based on a common understanding of the scope thereof, and an agreement on the amount of the fine. Settlements enable the Commission to spare time and resources, notably in granting access to the case file and subsequently in defending the case in court, against the grant of a 10% reduction in fine. Complexities arise when only certain cartel participants agree to settle, while others don't, which may lead to situations of 'hybrid settlements' followed by infringement decisions against the non-settling parties.[23]

C. World cartels and offshore cartels: jurisdiction, comity, and cooperation

1. Effects, sovereignty and restraint

A conspiracy in one country may harm consumers in another country, or in the world.

The US was the pioneer of the 'effects' doctrine, under which US law catches offshore anti-competitive conduct targeted at Americans. This is the holding of *United States v. Aluminum Co. of America* ('*Alcoa*').[24] For many years, some of the US' trading partners, and particularly the UK, adamantly opposed application of the effects doctrine to their nationals, labelling the doctrine an affront to their sovereignty.

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22 See in that regard the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, [2008] *O.J.* C 167/01).

23 See, *e.g.*, Case C-440/19 P, *Pometon SpA v. Commission*, EU:C:2021:214.

24 148 F.2d 416 (2d Cir.1945). (See Notes and Questions following.)

But as years went by, other nations began to feel the threat of offshore anticompetitive acts targeted at their nation, and some form of the effects doctrine became necessary self-protection.

The first major European Court case on point was the dyestuffs cartel, *Imperial Chemical Industries Ltd v. Commission*, mentioned earlier. ICI, a UK company, was part of the dyestuffs cartel. The UK had not yet joined the EU. ICI sought dismissal for lack of jurisdiction. The Commission rejected ICI's argument and applied the effects test. On appeal, the Court of Justice side-stepped the controversy surrounding the effects doctrine. ICI had subsidiaries in the Union, and, the Court said, ICI exercised 'decisive influence' over them. Therefore, the parent and its subsidiaries were one economic unit. The Court said, at para. 130:

> By making use of its power to control its subsidiaries established in the [Union], the applicant was able to ensure that its decision was implemented on that market.

The question of jurisdiction over offshore actors arose in a starker form in *Wood Pulp* (see following). Not all of the alleged conspirators had subsidiaries in Europe. Sixteen years had passed since *Dyestuffs*. Globalization had increased nations' vulnerability to offshore cartels.

US, Finnish, Swedish and Canadian firms exported wood pulp into the common market, themselves or through export associations. Many years before, to facilitate exports, the US had enacted the Webb-Pomerene Act of 1918. The US wood pulp firms were members of a Webb-Pomerene Association, and the Webb-Pomerene Act exempted the exporters and their association from the US antitrust laws except to the extent that their conduct harmed competition in the US.

The European Commission charged the wood pulp firms and two of their export associations with fixing the price of wood pulp that was being sold to buyers in the EU. The Commission found infringements and imposed fines. The firms sued for annulment on grounds that included lack of jurisdiction. The jurisdictional issue reached the Court of Justice before the question of proof of the cartel, treated earlier. Assume for purposes of the jurisdictional matter that there was in fact a cartel agreement.

CASE

Ahlström Osakeyhtiö v. Commission (Cases C-89, 104, 114, 116–117, 125–129/85) (*'Wood Pulp'*)[25]

3 [T]he Commission set out the grounds which in its view justify the Community's jurisdiction to apply Article [101] of the Treaty to the concertation in question. It stated first that all the addressees of the decision were either exporting directly to purchasers within the Community or were doing business within the Community through branches, subsidiaries, agencies or other establishments in the Community. It further pointed out that the concertation applied to the vast majority of the sales of those undertakings to and in the Community. Finally it stated that two-thirds of total shipments and 60% of consumption of the product in question in the Community had been affected by such concertation. The Commission concluded that: 'The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices.'

* * *

6 All the applicants which have made submissions regarding jurisdiction maintain first of all that by applying the competition rules of the Treaty to them the Commission has misconstrued the territorial scope of Article [101]. They note that in its judgement of 14 July 1972 in Case 48/69 (*ICI v. Commission* [1972] ECR 619) the Court did not adopt the 'effects doctrine' but emphasized that the case involved conduct restricting competition within the common market because of the activities of subsidiaries which could be imputed to the parent companies. The applicants add that even if there is a basis in Community law for applying Article [101] to them, the action of applying the rule interpreted in that way would be contrary to public international law which precludes any claim by the Community to regulate conduct restricting competition adopted outside the territory of the Community merely by reason of the economic repercussions which that conduct produces within the Community.

7 The applicants which are members of the KEA [Kraft Export Association] further submit that the application of Community competition rules to them is contrary to public international law in so far as it is in breach of the principle of non-interference. They maintain that in this case the application of Article [101] harmed the interest of the United States in promoting exports by United States undertakings as recognized in the Webb Pomerene Act of 1918 under which export associations, like the KEA, are exempt from United States anti-trust laws.

25 [1988] ECR 5193, EU:C:1988:447.

CASE *(continued)*

8 Certain Canadian applicants also maintain that by imposing fines on them and making reduction of those fines conditional on the producers giving undertakings as to their future conduct the Commission has infringed Canada's sovereignty and thus breached the principle of international comity.

* * *

Territorial scope of Article [101] and public international law

(a) The individual undertakings

11 In so far as the submission concerning the infringement of Article [101] of the Treaty itself is concerned, it should be recalled that that provision prohibits all agreements between undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the restriction of competition within the common market.

12 It should be noted that the main sources of supply of wood pulp are outside the Community, in Canada, the United States, Sweden and Finland and that the market therefore has global dimensions. Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market.

13 It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article [101] of the Treaty.

14 Accordingly, it must be concluded that by applying the competition rules in the Treaty in the circumstances of this case to undertakings whose registered offices are situated outside the Community, the Commission has not made an incorrect assessment of the territorial scope of Article [101].

15 The applicants have submitted that the decision is incompatible with public international law on the grounds that the application of the competition rules in this case was founded exclusively on the economic repercussions within the common market of conduct restricting competition which was adopted outside the Community.

16 It should be observed that an infringement of Article [101], such as the conclusion of an agreement which has had the effect of restricting competition within the common market, consists of conduct made up of two elements, the formation of the agreement, decision or

CASE *(continued)*

concerted practice and the implementation thereof. If the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.

17 The producers in this case implemented their pricing agreement within the common market. It is immaterial in that respect whether or not they had recourse to subsidiaries, agents, sub-agents, or branches within the Community in order to make their contacts with purchasers within the Community.

18 Accordingly, the Community's jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law.

19 As regards the argument based on the infringement of the principle of non-interference, it should be pointed out that the applicants who are members of KEA have referred to a rule according to which where two States have jurisdiction to lay down and enforce rules and the effect of those rules is that a person finds himself subject to contradictory orders as to the conduct he must adopt, each State is obliged to exercise its jurisdiction with moderation. The applicants have concluded that by disregarding that rule in applying its competition rules the Community has infringed the principle of non-interference.

20 There is no need to enquire into the existence in international law of such a rule since it suffices to observe that the conditions for its application are in any event not satisfied. There is not, in this case, any contradiction between the conduct required by the United States and that required by the Community since the Webb Pomerene Act merely exempts the conclusion of export cartels from the application of United States anti-trust laws but does not require such cartels to be concluded.

* * *

22 As regards the argument relating to disregard of international comity, it suffices to observe that it amounts to calling in question the Community's jurisdiction to apply its competition rules to conduct such as that found to exist in this case and that, as such, that argument has already been rejected.

23 Accordingly it must be concluded that the Commission's decision is not contrary to Article [101] of the Treaty or to the rules of public international law relied on by the applicants.

CASE *(continued)*

(b) KEA

24 According to its Articles of Association, KEA is a non-profit-making association whose purpose is the promotion of the commercial interests of its members in the exportation of their products and it serves primarily as a clearing-house for its members for information regarding their export markets. KEA does not itself engage in manufacture, selling or distribution.

25 It should further be pointed out that within KEA a number of groups have been formed, including the Pulp Group, to cover the different sectors of the pulp and paper industry. Under Article 1 of the by-laws of KEA, undertakings may only join KEA by becoming a member of one of those groups. Article 2 of the by-laws provides that the groups enjoy full independence in the management of their affairs.

* * *

27 It is apparent from the foregoing that KEA's price recommendations cannot be distinguished from the pricing agreements concluded by undertakings which are members of the Pulp Group and that KEA has not played a separate role in the implementation of those agreements.

28 In those circumstances the decision should be declared void in so far as it concerns KEA.

? NOTES AND QUESTIONS

1. Since the 1940s, US courts have exercised 'effects' jurisdiction; that is, if foreigners acted, even abroad, with the intent to affect US commerce, and they caused a reasonably direct effect on US commerce, the US courts were said to have subject-matter jurisdiction, and the Sherman Act applied.[26] US courts could not, however, require foreign firms acting in their home territory to do what their home government forbade, or to abstain from doing what their home government required, for such an order would interfere impermissibly with the sovereignty of the foreign State.[27]

   In the 1960s and 1970s, applications of the *Alcoa* doctrine were criticized by various nations, especially Great Britain, whose nationals were sued for treble damages in US courts as members of world cartels that had targeted American buyers. In response to the criticism and to threats

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26 *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir.1945).

27 See *United States v. Watchmakers of Switzerland Info. Center*, 1963 (CCH) Trade Cas. ¶ 70 600 (S.D.N.Y.1962); 1965 (CCH) Trade Cas. ¶ 71 352 (S.D.N.Y.1965) (judgement revised to apply only to conduct that operated outside Switzerland).

of retaliation by trading partners, US courts developed balancing principles. They stated that courts either lack jurisdiction or should refrain from exercising jurisdiction if foreign nations' and foreign nationals' interests in non-application of US law outbalanced the US' interest in enforcement.[28]

In 1993, the US Supreme Court decided its first antitrust extraterritoriality case in a quarter of a century. Lloyds of London reinsurers had agreed in London with Americans, and some had agreed in London only among themselves, to reduce the coverage of reinsurance policies that they would offer on the US market. When sued, these British defendants moved to dismiss, asserting that the US court lacked jurisdiction or that comity considerations required dismissal. They claimed that their conduct was lawful where performed (in the UK), and that in view of the UK regulatory policy, which conferred the right of self-regulation on Lloyds of London members, a conflict existed that required dismissal of the case against them by the US court. The Supreme Court disagreed. It noted that there was no direct conflict, for the UK law did not require (or encourage) the London firms to boycott the American insurers. In this context, the Court stated:

> [I]t is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States.[29]

Is there any difference between the holding of *Hartford* and the holding of *Wood Pulp*? Has the EU essentially adopted the effects test?

2. Would the outcome of *Wood Pulp* have been the same if the producers sold 'FOB New York' without knowledge that the wood pulp was being shipped directly into the EU? Should the rules of jurisdiction be the same regardless of whether the sale and transfer of title took place in New York or the Netherlands? Is the harm to competition within the European Union the same in either case? Are the sovereignty interests of the affected countries the same?[30]

3. In *Wood Pulp,* why did the Court declare void the Commission's decision against KEA? What would the result have been if there were no sector groups within KEA and if KEA's price recommendations were autonomous and distinct from joint actions of its members? Was the jurisdictional decision regarding KEA harder than the jurisdictional decision regarding the individual producers?

In 1982, the US Congress, responding especially to concerns of American business that US antitrust law was following them into foreign markets, especially for their export collaborations, adopted the Foreign Trade Antitrust Improvements Act ('FTAIA'). The FTAIA cut back or clarified the reach of the Sherman Act in matters involving foreign commerce, principally to protect US sellers from Sherman Act challenges for impacts of their activity abroad. The statute carves out import commerce, which remains subject to pre-existing rules supporting effects jurisdiction. As to all other commerce with foreign nations, the statute provides that the Sherman Act shall not apply unless:

28 *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir.1976); *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287 (3rd Cir.1979).

29 *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993).

30 See, for a theory of jurisdiction, E. Fox (2000), 'National law, global markets, and Hartford: Eyes wide shut', *Antitrust L.J.*, **68**, 73.

(1) such conduct has a direct, substantial and reasonably foreseeable effect—

(A) on [domestic] trade or commerce ... or
(B) on export trade or commerce ... [and]

(2) such effect gives rise to a claim under [the Sherman Act], other than this section....

For actions based on (1)(B), the statute expressly applies only to injury to export business in the US.

Paragraph (2) apparently meant only that the FTAIA itself did not create a substantive cause of action. But, the US Supreme Court construed the paragraph to mean that conspiracies abroad are not within the reach of the Sherman Act unless the US effect of the conduct ('such effect') 'gives rise to' the particular plaintiff's Sherman Act claim.[31]

Since buyers abroad are normally injured by the price fixing, not its US effect, *Empagran* might significantly limit the reach of the Sherman Act, especially in an increasingly integrated world in which firms do business through global value chains, and US consumers suffer from input cartels consummated abroad.[32]

UK courts have been more generous in hosting out-of-state claimants suing out-of-state cartelists—at least when the out-of-staters are European. A German company that bought price-fixed vitamins in Germany from Roche Germany was allowed to sue the cartelists (British, German, Swiss and French) in the UK[33] pursuant to Regulation 44/2001 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters.[34]

The EU courts tend to adopt a broad interpretation of the effects doctrine when establishing their and the Commission's jurisdiction. For example, in the LCD panel cartel case, the Court of Justice rejected InnoLux's argument that taking into account its sales of finished products in the European Economic Area ('EEA') in calculating the fine, when those products

31 *F. Hoffmann-La Roche v. Empagran S.A.*, 542 U.S. 155, 124 S.Ct. 2359, 159 L.Ed.2d 226 (2004).

32 See *Motorola Mobility LLC v. AU Optronics Corp.* (7th Cir. Nov. 26, 2014), dismissing a claim by Motorola for overcharges on liquid crystal display panels price fixed in East Asia, incorporated into cell phones by Motorola subsidiaries in China, and shipped to Motorola-US.

33 *Provimi Ltd v. Roche Products Ltd* [2003] 2 All ER (Comm) 683.

34 [2001] *O.J.* L 12/1, now Regulation 1215/2012/EU [2012] *O.J.* L 351/1.

incorporate LCD panels that were the subject of internal sales outside the EEA, exceeded the Commission's territorial jurisdiction. The Court considered rather that the Commission had jurisdiction to apply Article 101 TFEU to the cartel at issue, since the cartel participants had implemented the cartel, which was worldwide, in the EEA by making direct sales in the EEA of LCD panels to independent third-party undertakings.[35]

Outside the field of cartels, in the case initiated by the European Commission against Intel under Article 102 TFEU for strategies to block Intel's rival AMD from gaining traction in launching its new chip, the General Court held it immaterial that a major customer, Lenovo, procured its chips for delivery in China, and another major customer, Acer, sourced its chips in Taiwan.[36] Intel appealed that finding but the Court of Justice affirmed, thereby contradicting the opinion of the Advocate General.[37] In essence, the Court held that the Commission's jurisdiction is established under the (qualified) effects test when 'it is foreseeable that the conduct in question will have an immediate and substantial effect in the European Union' (para. 49). Because 'foreseeable' in this context means 'probable' (para. 51), sales of chips delivered to, for example, Lenovo in China could fall within the EU's jurisdiction, since Lenovo notebooks could then be sold in the EU. Moreover, the Court found that even negligible sales outside the EU could satisfy the 'substantial' criterion because they were part of a broader strategy aimed at foreclosing AMD's access to important sales channels, i.e., that it is requisite to consider the effects of the conduct in question as a whole without fragmenting it.[38]

2. Cooperation and seeds of a global regime

The EU, the US and other trading partners recognize the need for cooperation and coordination. Europe and the US cooperate formally and informally on many matters. They have a working group on mergers, and their staffs cooperate in vetting mergers of common interest to the extent consistent with confidentiality obligations. Often, the merger partners waive confidentiality so that the merger can be dealt with more expeditiously. Confidentiality obligations are a significant impediment to cooperation in cartel investigations.

The EU has entered into a number of bilateral agreements for cooperation on competition policy. It entered into a cooperation agreement with the

35 Case C-231/14 P, *InnoLux Corp. v. Commission*, EU:C:2015:451, para. 73.

36 Case T-286/09, *Intel Corp. v. Commission*, EU:T:2014:547, para. 221 et seq.

37 Case C-413/14 P, *Intel Corp. v. Commission*, EU:2017:632 (Grand Chamber).

38 See Eleanor M. Fox, 'Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified Effects, and the Third Kind', **42** *Fordham Int'l L.J.* 981 (2019).

US, effective in 1991, wherein the parties promised to notify and confer regarding intended antitrust action that may adversely affect the important interests of the other (negative comity). In 1998, the US and the EU strengthened a commitment to inform the other when anti-competitive activities harming the citizens of either were occurring on the soil of the other. In specified circumstances, each undertook to consider withholding its own enforcement while the notified jurisdiction was taking action to cure the violation (positive comity). The numerous EU bilateral antitrust agreements are linked to the DG COMP website.[39]

The EU has advocated a world competition agreement within the framework of the World Trade Organization ('WTO'), starting with building blocks of cooperation; commitments of transparency, due process, and technical assistance to developing countries; and a substantive commitment of nations to enact and maintain an anti-cartel law.[40] The proposal faced preliminary opposition from the US and from developing countries. After revisions, it became an agenda item on the Ministerial Declaration of the Doha trade round of the WTO (2001). Caught in the crossfire of a dispute on agricultural subsidies, the competition item of the Doha agenda was withdrawn, and it is unlikely to reappear on a WTO agenda for some years. Indeed, the WTO has been deeply weakened in recent years, and new negotiating rounds, even on core trade issues, seem to have a bleak future.

The Directorate-General for Competition of the European Commission is a founding member of the International Competition Network ('ICN'), a virtual network of the antitrust authorities of the world formed in 2001 to discuss a range of practical and policy competition issues, formulate and disseminate best practices, and promote convergence.[41] DG COMP is active in most working groups, including one on cartels. In the absence of international law, the ICN has become the major world forum for international cooperation and convergence on competition issues, and the European Commission is a major player.[42] But, the projects of ICN can be likened to comparative law, not international law. ICN is a roots-up, not top-down, enterprise. It does not bridge oceans or work towards global frameworks. Moreover, it has no power other than the power of persuasion.

39 At: https://competition-policy.ec.europa.eu/international/bilateral-relations_en (accessed 3 February 2023).

40 See Commission, Communication to the Council: Towards an International Framework of Competition Rules, COM (96) 284 final.

41 See: www.internationalcompetitionnetwork.org (accessed 3 February 2023).

42 For a restated EU perspective on cooperation in competition law enforcement and substantive convergence, see Commissioner Vestager, 'Working together to support fair competition worldwide', speech at the UCL Jevons Institute Conference, 3 June 2016.

D. May cartels be justified? Crises and public interests

Is competition always the rule of trade? Can even cartels sometimes be justified? This question has been posed in times of great financial or other economic crisis. It has recently been raised in the context of the Coronavirus crisis, when medical and health care necessities are scarce and are needed immediately to save lives. Finally, it has been raised in connection with the need for environmental sustainability; advocates sometimes claim that collaboration, not competition, can save the planet. We deal with these issues in the following, starting with an Irish beef industry crisis cartel.

1. Industry crisis cartels

Whole industries may fall into crises of overcapacity. Should the competitors be allowed to combine in order to lift themselves out of the crisis?

The Irish beef industry faced such a crisis. The Irish government requested the industry to agree to a plan of rationalization, and in response, all the principal Irish beef processors, accounting for 93% of the Irish industry, formed an association and entered into a rationalization agreement. The Irish Competition Authority challenged the agreement in the *BIDS* case (see following). The Irish court sided with the Irish government and the industry, finding that the industry was in survival mode and needed to be rationalized; the rationalization would save costs and help to restore the industry to efficiency and competitiveness; that no credible evidence had been adduced to show that the agreement would restrict or distort competition or hurt consumers.

The Irish court made a reference to the EU Court of Justice for a ruling on the interpretation of Article 101 TFEU.

CASE

Competition Authority of Ireland v. Beef Industry Development Society Ltd (Case C-209/07) (*'BIDS'*)[43]

11 Having informed BIDS … that it considered the BIDS arrangements [to reduce crisis overcapacity in the Irish beef industry] contrary to Article [101(1) TFEU], the Competition

43 [2008] ECR I-8637, EU:C:2008:643.

CASE *(continued)*

Authority applied to the High Court, for an order restraining BIDS and Barry Brothers from giving effect to them.

12 … [T]he High Court dismissed that application. It held that the agreement between BIDS and Barry Brothers did not fall under the prohibition laid down in Article [101(1) TFEU] but nor did it satisfy the requirements for exemption laid down in Article [101(3) TFEU].

13 The Competition Authority appealed against that decision to the Supreme Court, which decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

where it is established to the satisfaction of the court that:

(a) there is overcapacity in the industry for the processing of beef which, calculated at peak throughput, would be approximately 32%;
(b) the effect of this excess capacity will have very serious consequences for the profitability of the industry as a whole over the medium term;
(c) while … the effects of surplus requirements have not been felt to any significant degree as yet, independent consultants have advised that, in the near term, the overcapacity is unlikely to be eliminated by normal market measures, but over time the overcapacity will lead to very significant losses and ultimately to processors and plants leaving the industry;
(d) processors of beef representing approximately 93% of the market for the supply of beef of that industry have agreed to take steps to eliminate the overcapacity and are willing to pay a levy in order to fund payments to processors willing to cease production, and

the said processors, comprising 10 companies, form a corporate body ('the society') for the purpose of implementing an arrangement with the following features:

— [goers] killing and processing 420 000 animals per annum, representing approximately 25% of active capacity would enter into an agreement with [stayers] to leave the industry and to abide by the following terms;
— goers would sign a two year non-compete clause in relation to the processing of cattle on the entire island of Ireland;
— the plants of goers would be decommissioned;
— land associated with the decommissioned plants would not be used for the purposes of beef processing for a period of five years;
— compensation would be paid to goers in staged payments by means of loans made by the stayers to the society;
— a voluntary levy would be paid to the society by all stayers at the rate of EUR 2 per head of the traditional percentage kill and EUR 11 per head on cattle kill above that figure;
— the levy would be used to repay the stayers' loans; levies would cease on repayment of the loans;

CASE *(continued)*

— the equipment of goers used for primary beef processing would be sold only to stayers for use as back-up equipment or spare parts or sold outside the island of Ireland;
— the freedom of the stayers in matters of production, pricing, conditions of sale, imports and exports, increase in capacity and otherwise would not be affected,

and that it is agreed that such an agreement is liable, for the purpose of application of Article [101(1) TFEU], to have an appreciable effect on trade between Member States, is such arrangement to be regarded as having as its object, as distinct from effect, the prevention, restriction or distortion of competition within the common market and therefore, incompatible with Article [101](1) of the Treaty [on the Functioning of the European Union]?

The question referred for a preliminary ruling

14 By its question, the national court asks, in essence, whether agreements with features such as those of the BIDS arrangements are to be regarded, by reason of their object alone, as being anti-competitive and prohibited by Article [101(1) TFEU] or whether, on the other hand, it is necessary, in order to reach such a conclusion, first to demonstrate that such agreements have had anti-competitive effects.

15 It must be recalled that, to come within the prohibition laid down in Article [101(1) TFEU], an agreement must have 'as [its] object or effect the prevention, restriction or distortion of competition within the common market'. …

16 In deciding whether an agreement is prohibited by Article [101(1) TFEU], there is therefore no need to take account of its actual effects once it appears that its object is to prevent, restrict or distort competition within the common market ….

17 The distinction between 'infringements by object' and 'infringements by effect' arises from the fact that certain forms of collusion between undertakings can be regarded, by their very nature, as being injurious to the proper functioning of normal competition.

* * *

19 BIDS submits that [its] arrangements do not come within the category of infringements by object, but should, on the contrary, be analysed in the light of their actual effects on the market. It argues that the BIDS arrangements, first, are not anti-competitive in purpose and, second, do not entail injurious consequences for consumers or, more generally, for competition. It states that the purpose of those arrangements is not adversely to affect competition or the welfare of consumers, but to rationalise the beef industry in order to make it more competitive by reducing, but not eliminating, production overcapacity.

CASE *(continued)*

20 That argument cannot be accepted.

21 In fact, to determine whether an agreement comes within the prohibition laid down in Article [101(1) TFEU], close regard must be paid to the wording of its provisions and to the objectives which it is intended to attain. In that regard, even supposing it to be established that the parties to an agreement acted without any subjective intention of restricting competition, but with the object of remedying the effects of a crisis in their sector, such considerations are irrelevant for the purposes of applying that provision. Indeed, an agreement may be regarded as having a restrictive object even if it does not have the restriction of competition as its sole aim but also pursues other legitimate objectives. It is only in connection with Article [101(3) TFEU] that matters such as those relied upon by BIDS may, if appropriate, be taken into consideration for the purposes of obtaining an exemption from the prohibition laid down in Article [101(1) TFEU].

22 BIDS argues, in addition, that the concept of infringement by object should be interpreted narrowly. Only agreements as to horizontal price-fixing, or to limit output or share markets, agreements whose anti-competitive effects are so obvious as not to require an economic analysis come within that category

* * *

32 The matters brought to the Court's attention show that the BIDS arrangements are intended to improve the overall profitability of undertakings supplying more than 90% of the beef and veal processing services on the Irish market by enabling them to approach, or even attain, their minimum efficient scale. In order to do so, those arrangements pursue two main objectives: first, to increase the degree of concentration in the sector concerned by reducing significantly the number of undertakings supplying processing services and, second, to eliminate almost 75% of excess production capacity.

33 The BIDS arrangements are intended therefore, essentially, to enable several undertakings to implement a common policy which has as its object the encouragement of some of them to withdraw from the market and the reduction, as a consequence, of the overcapacity which affects their profitability by preventing them from achieving economies of scale.

34 That type of arrangement conflicts patently with the concept inherent in the Treaty provisions relating to competition, according to which each economic operator must determine independently the policy which it intends to adopt on the common market. Article [101(1) TFEU] is intended to prohibit any form of coordination which deliberately substitutes practical cooperation between undertakings for the risks of competition.

CASE *(continued)*

35 In the context of competition, the undertakings which signed the BIDS arrangements would have, without such arrangements, no means of improving their profitability other than by intensifying their commercial rivalry or resorting to concentrations. With the BIDS arrangements it would be possible for them to avoid such a process and to share a large part of the costs involved in increasing the degree of market concentration as a result, in particular, of the levy of EUR 2 per head processed by each of the stayers.

36 In addition, the means put in place to attain the objective of the BIDS arrangements include restrictions whose object is anti-competitive.

37 As regards, in the first place, the levy of EUR 11 per head of cattle slaughtered beyond the usual volume of production of each of the stayers, it is, as BIDS submits, the price to be paid by the stayers to acquire the goers' clientele. However, it must be observed, as did the Advocate General …, that such a measure also constitutes an obstacle to the natural development of market shares as regards some of the stayers who, because of the dissuasive nature of that levy, are deterred from exceeding their usual volume of production. That measure is likely therefore to lead to certain operators freezing their production.

38 As regards, secondly, restrictions imposed on the goers as regards the disposal and use of their processing plants, the BIDS arrangements also contain, by their very object, restrictions on competition since they seek to avoid the possible use of those plants by new operators entering the market in order to compete with the stayers. As the Competition Authority pointed out in its written observations, since the investment necessary for the construction of a new processing plant is much greater than the costs of taking over an existing plant, those restrictions are obviously intended to dissuade any new entry of competitors throughout the island of Ireland.

39 Finally, the fact that those restrictions, as well as the non-competition clause imposed on the goers, are limited in time is not such as to put in doubt the finding as to the anti-competitive nature of the object of the BIDS arrangements.

[S]uch matters may, at the most, be relevant for the purposes of the examination of the four requirements which have to be met under Article [101(3) TFEU] in order to escape the prohibition laid down in Article [101(1) TFEU].

40 In the light of the foregoing considerations, the reply to the question referred must be that an agreement with features such as those of the standard form of contract concluded between the 10 principal beef and veal processors in Ireland, who are members of BIDS, and requiring, among other things, a reduction of the order of 25% in processing capacity, has as its object the prevention, restriction or distortion of competition within the meaning of Article [101(1) TFEU]

* * *

? NOTES AND QUESTIONS

1. What was the purpose of the agreement? Was BIDS' purpose to address the crisis of overproduction of beef in Ireland by reducing overcapacity, thereby resuscitating the industry and making it more competitive? Assume that BIDS and the Irish government thought there was a good chance that the plan would succeed. Is such an agreement caught by Article 101(1) TFEU as a restraint by object? Should it be?
2. BIDS maintained in the Irish court that if caught by Article 101(1) TFEU, the agreement should be exempted under Article 101(3) TFEU. This issue was not before the European Court, but assume that it was. What would the Court decide? Does the text of Article 101(3) TFEU provide any clues?
3. In *Dutch Brickmakers*,[44] the European Commission exempted, under Article 101(3) TFEU, a rationalization agreement by brickmakers who were plagued by overcapacity. The brickmakers agreed to reduce surplus capacity over a limited period of time while not making any agreement on prices. This case is exceptional.

   The wisdom of allowing judicial or administrative authorization of crisis or restructuring cartels is much debated. US law makes no allowance for crises, on the theory that market solutions are better than private solutions, and a crisis justification for cartels would weaken the clear rule of law. Germany and the UK once allowed authorization of crisis cartels in the public interest. They have revised their laws to mirror Article 101 TFEU. Until 1999, Japanese law allowed authorization of depression and rationalization cartels. This authorization was repealed.[45] In some jurisdictions, however, the law provides the possibility of a public interest defence that might allow the authority to approve such a cartel.[46]
4. The European Commission's antitrust fining guidelines contain a section F entitled 'Ability to pay', which reads as follows:

   > In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value.

   Which concern does this section aim to address? What are the risks involved in applying that section, or in the absence thereof? In what context do you think the Commission has made use of that section? For an illustration, see Case AT.40127 – *Canned Vegetables* (2019).
5. See Chapter 7 for an account of the European Competition Commissioner's role in responding to the urgent public needs in the financial crisis of 2008–09, presenting competition as part of the solution, not part of the problem.

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44 *Stichting Baksteen*, Case IV/34.456, [1994] *O.J.* L 131/15 ('*Dutch Brickmakers*').

45 See Anti-Monopoly Law of Japan, § 24(3), Law No. 54, 1947, as amended.

46 See Anti-Monopoly Law of the People's Republic of China (2008), Article 15.

2. Environmental sustainability

May a cartel be justified on grounds that the competitor collaboration is necessary (or very important) to preserve the environment? This is the subject of vigorous debate in Europe. May the washing machine manufacturers get together and agree not to make or sell energy-inefficient washing machines? This means that the cheapest machines will no longer be on the market. May chicken breeders and sellers get together and agree not to raise chickens in dark crowded bins, a condition that harms animal welfare and the environment, and not to sell chickens raised in those conditions? This will raise the price of chicken meat. The collaborators would prefer not to characterize their agreements as cartels. But are they? These problems are treated in more depth in Chapter 3 on Horizontal Restraints.

Two well-known cases involving environmental initiatives have been characterized as 'cartels' by the Commission in the past. The first one related to the 'AISE initiative' targeting dosage and weight reduction of heavy-duty detergent powders intended for washing machines and corresponding packaging material (Case AT.39579—Consumer detergents, 2011). However, in that framework, Henkel, Procter & Gamble and Unilever also agreed that none of them would use the environmental initiative to gain competitive advantage over the others, including by restricting their promotional activity, and to keep prices unchanged throughout the implementation of the different phases of the environmental initiative, i.e., not to decrease prices where products were 'compacted', when the product quantity was downsized or when the number of wash loads per package was reduced. The parties settled with the Commission on a EUR 315.2 million fine.

The second one relates to the technical cooperation between Daimler, BMW and Volkswagen in relation to the 'AdBlue' technology, aimed at reducing emissions from diesel cars by injecting urea into the exhaust gas stream (Case AT.40178—Car emissions, 2021). According to the Commission, Daimler, BMW and Volkswagen reached an agreement on AdBlue tank sizes and ranges and a common understanding on the average estimated AdBlue consumption, thereby removing uncertainty about their future market conduct in relation to car emissions reduction and limiting competition through innovation on product characteristics, with a direct relevance to sustainability concerns. The parties and the Commission eventually settled on a EUR 875 million fine. Since this was the first time the Commission found that collusion on technical development amounted to a cartel, it provided the parties with guidance on aspects of their cooperation that did not raise competition concerns, such as the standardization of the AdBlue filler neck, the discussion of quality standards for AdBlue or the joint development of an AdBlue dosing software platform.

3. Combatting scarcity during the virus pandemic

Coronavirus hit the world in early 2020 and spread to and in Europe, beginning in March 2020. Necessities both for protective equipment and for medical care were scarce. These included critical hospital medicines, respiratory machines, masks and hand gel. Moreover, a vaccine for immunity was badly needed. Big firms began to explore joint ventures. Could the biggest rivals combine? Could they divide markets to eliminate the inefficiencies of competition and be able to produce more supplies faster? Could they divvy up production? What happens if they get market power? Should they get a pass if they agree not to raise prices during the emergency and to end their venture when the emergency ends? The European Competition Network took the following position on March 23:[47]

- The ECN understands that this extraordinary situation may trigger the need for companies to cooperate in order to ensure the supply and fair distribution of scarce products to all consumers. In the current circumstances, the ECN will not actively intervene against necessary and temporary measures put in place in order to avoid a shortage of supply.
- Considering the current circumstances, such measures are unlikely to be problematic, since they would either not amount to a restriction of competition under Article 101 TFEU/53 EEA or generate efficiencies that would most likely outweigh any such restriction. If companies have doubts about the compatibility of such cooperation initiatives with EU/EEA competition law, they can reach out to the Commission, the EFTA Surveillance Authority or the national competition authority concerned any time for informal guidance.
- At the same time, it is of utmost importance to ensure that products considered essential to protect the health of consumers in the current situation (e.g. face masks and sanitising gel) remain available at competitive prices. The ECN will therefore not hesitate to take action against companies taking advantage of the current situation by cartelising or abusing their dominant position.

47 The ECN statement is available at: https://ec.europa.eu/competition/ecn/202003_joint-statement_ecn_corona-crisis.pdf (accessed 27 July 2020).

The European Commission signed on to the statement and adopted a temporary framework for assessing cooperation projects aimed at addressing the shortage of essential goods.[48]

Are the ECN and the Commission correct that the collaborations are not likely to amount to a restriction of competition or else have outweighing efficiencies? Are they suggesting bending the law non-transparently, for a good and pressing cause? Might these collaborations be cartels? They combine the leading firms in concentrated markets and may confer market power on the combination. But, shouldn't the Commission allow combinations likely to produce scarce goods faster and distribute them better, even if they create power to raise prices? Should it accept the companies' commitment that they will not overcharge?

As an illustration, consider the comfort letter issued by the Commission in April 2020 at the request of Medicines For Europe,[49] a trade association representing mainly the generic and biosimilar medicines producers, regarding a cooperative scheme designed to address shortage risks for critical medicines for intensive care patients, such as deep sedatives, neuromuscular blockers, strong analgesics, vasopressors, antibiotics and adjuvants. The cooperation between pharmaceutical manufacturers entailed modelling demand for these critical medicines, coordinating the supply of APIs (active pharmaceutical ingredients), identifying production capacity and existing stocks, optimizing and coordinating production and stocks based on projected or actual demand, and potentially addressing distribution issues.

In spite of its far-reaching scope and given 'the present exceptional circumstances', the Commission concluded that the envisaged cooperation did not raise concerns under Article 101 TFEU. In particular, it found that 'the cooperation is necessary to achieve the increases in production and to improve the supply of those urgently needed COVID-19 medicines across the EU in the most efficient way', while still subjecting it to four conditions: (i) opening the cooperation to any pharmaceutical manufacturer willing to participate; (ii) communication to the Commission of any agreement entered into and minutes of any meetings held as part of the cooperation; (iii) limiting the exchange of information to what is indispensable for effectively achieving the aims of the cooperation; and (iv) limiting the cooperation in time

48 Available at: https://ec.europa.eu/competition/antitrust/coronavirus.html (accessed 27 July 2020).

49 The comfort letter is available at: https://ec.europa.eu/competition/antitrust/medicines_for_europe_comfort_letter.pdf (accessed 7 October 2022).

until the risk of shortages is overcome. The letter finally contained the following warning:

> This comfort letter does not cover any discussion of prices or any other possible coordination on issues which are not strictly necessary for effectively achieving the aims set out above. This comfort letter is also subject to participating undertakings not unduly increasing prices beyond what is justified by possible increases in costs, which you have accepted. Conduct amounting to opportunistically seeking to exploit the crisis as a 'cover' for non-essential collusion or other anticompetitive behaviour will continue not to be tolerated by the Commission.

Possible justifications for agreements or concerted practices likely to restrict competition, and associated conditions, are typically considered under Article 101(3) TFEU, a provision discussed in greater depth in Chapter 3.

* * *

As noted, cartels form the most blatant breaches of competition law principles in the EU and worldwide. According to the Commission, '[s]uch practices are among the most serious violations of Article [101 TFEU].'[50] However, the scope of Article 101 TFEU encompasses a wide range of agreements between firms beyond cartels, which require a careful analysis and balancing of their actual or likely effects before reaching a finding of infringement. The following two chapters discuss successively agreements between competitors (horizontal) and between businesses located at different levels in the supply chain (vertical).

50 Commission Notice on immunity from fines and reduction of fines in cartel cases [2006] *O.J.* C 298/11, para. 1.

3

Horizontal restraints

Chapter 2 dealt with hard-core cartels: agreements among competitors specifically designed to lessen the competition among them. There are many other kinds of collaborations among competitors, often designed for legitimate purposes, such as sharing risks and creating synergies, getting market information, setting standards to facilitate trade and protecting the environment.

Read Article 101 TFEU again. Consider the structure of paragraphs 101(1), (2) and (3). Note that Article 101(1) TFEU prohibits agreements that may affect trade between Member States that 'have as their object or effect' the 'prevention, restriction or distortion of competition'. Article 101(2) declares such agreements void. Article 101(3) declares that 101(1) may be declared inapplicable if the agreement (1) contributes to improving production or distribution or promoting technical or economic progress, (2) allows consumers a fair share of the benefits, (3) does not impose unnecessary restrictions (any restrictions must be 'indispensable to the attainment of [the above] objectives'), and (4) does not give the firms concerned the possibility to eliminate competition in a substantial part of the market.

In cases in which a cartel agreement (e.g., competitors' price fixing or market allocation) is established, few of the nuances of Article 101 TFEU come into play. Cartels are designed to distort competition, and empirical evidence suggests that they do have this effect unless the cartel members' predictions and expectations go awry; as a result, they can virtually never be justified, because by their nature, they suppress competition, hold back efficiency and progress, and harm consumers.

In contrast, when considering agreements among competitors other than hard-core cartels and vertical agreements (agreements between buyers and suppliers, see Chapter 4), the following issues arise:

1. What does 'prevent, restrict or distort' competition mean, such that a restraint is caught by Article 101(1) and needs examination under 101(3)?
2. When may or must Article 101(1) be declared inapplicable by reason of Article 101(3), and who must prove what, under Article 101(3)? This concept is often translated into: when is an agreement entitled to an 'exemption'? But note: this use of the word 'exemption' is very particular. It does not, or does not usually, mean that anti-competitive agreements can be exempted because of some higher public interest. It means that agreements caught by the wide net of Article 101(1) can be shown to be pro-competitive, efficient or technically progressive; if they fulfil the four conditions of Article 101(3), they are not proscribed.

Note on the notion of '(block) exemption'

Under the now superseded Regulation 17/62, as noted in the Introduction, parties whose agreements were caught by Article 101(1) were obliged to file them with the Commission. The Commission could grant a negative clearance, i.e., an opinion that the agreement was not caught by Article 101(1); or could grant an exemption—usually for a term of years and with conditions; or could deny an exemption. From the time the agreement was notified until such a time as the Commission denied an exemption, the agreement was considered not to be void under Article 101(2), and the Commission could impose no fines for that period. The Commission became overwhelmed with notifications of agreements, most of which were routine and posed no antitrust problem. To alleviate the literally mounting burden, the Commission began to issue block exemption regulations in areas of frequent contracting, declaring the subject agreements exempt from notification and automatically entitled to an Article 101(3) exemption if they contained certain mandatory or allowed clauses (whitelist) and contained no prohibited clauses (blacklist). Most of the block exemptions that were issued covered vertical agreements of specified sorts. A few—notably, specialization agreements and research and development agreements—covered agreements between competitors (horizontal).

Although firms could seek individual exemptions, the process took time and effort, and if the agreement was in an area subject to a block exemption, it was convenient for the firms to get the benefit of the ready-made exemption. Therefore, they usually tailored their agreement to fit the requirements of the block exemption. Eventually, the Commission came to recognize the straightjacket-effect of the block exemptions, which were formalistic and overly detailed. At the same time, the Commission's Directorate-General for Competition was moving towards effects-based analysis rather than formalistic rules, and was also recognizing the extent to which the notification and clearance procedure, in a context in which exemption authority lay solely within the Commission, was overwhelming it and distorting priorities. Accordingly, the Commission proposed and the Council legislated dramatic changes. Regulation 1/2003 superseded Regulation 17 in May 2004. Article 101 TFEU in its entirety was declared directly effective, meaning that Article 101(1)–(3) is effectively part of national law, and national authorities and national courts, as well as the Commission, can declare agreements compatible with Article 101. The notification and clearance procedure was abolished. The Commission withdrew some block exemptions and reviewed others, retaining some in order to give guidance and greater certainty.

Analysis moved away from a formalistic approach. The question became, for the most part, not whether certain clauses were present or absent, but whether the agreement was likely to promote competition and benefit consumers, or to harm competition and consumers. Still, the structure of Article 101—first spreading a wide net to catch all agreements that may distort, prevent or restrict competition, and then requiring their justification—would continue to play a role in analysis, including the assignment of burdens of proof or burdens of producing evidence.

The following section, A, examines materials that testify of the analysis used to determine whether a cooperation or collaboration falls within Article 101(1) and if so, whether it is entitled to an exemption because of net positive effects on competition (including efficiency and innovation). Section B then considers whether and when non-competition/efficiency/innovation objectives may be admissible. Finally, section C discusses specific horizontal block exemptions.

A. The reach of Article 101(1)

Modernization entailed the devolution of powers to Member State courts and authorities, more effects-based economic analysis, and commensurately, a move away from the bifurcated analysis encapsulated in the structure of Article 101 TFEU, lightening the line between Article 101(1) and (3) in favour of an integrated analysis. An integrated analysis would ask: does this agreement create, or is it a use of, market power likely to harm consumers and the functioning of the market? If the agreement has some anti-competitive aspects, does it have outbalancing pro-competitive or efficiency/innovation aspects? Can the anti-competitive aspects be eliminated without destroying the pro-competitive ones? However, the Treaty is unchanged, and according to the structure of Article 101 TFEU, one still must ask in the first place: does this agreement fall within Article 101(1)?

Until the late 1990s, the European Commission and courts treated agreements between or among significant competitors as almost perfunctorily falling within Article 101(1). That approach has been modified and eventually codified in guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements (the 'Horizontal Guidelines').[1] The guidelines cover a variety of horizontal practices, including information exchange, joint research and development (R&D), purchasing, production and commercialization agreements, as well as standardization.

As restated by the Horizontal Guidelines, '[t]he first step, under Article 101(1), is to assess whether an agreement between undertakings … has an anti-competitive object or actual or potential restrictive effects on competition'. As a result, the initial question relates to whether an agreement entails a threshold case of object or effect of harm to competition. There are special cases on labour and the professions that place certain subject matters beyond the reach of Article 101(1), for policy reasons and despite some harm to competition, but these are exceptional and consequently discussed at the end of this chapter. Thus, generally, to fall within Article 101(1), an agreement must either have the *object* of distorting or restricting competition or the *effect* of negatively affecting the parameters of competition such as price, output, innovation, and the variety and quality of goods or services. If an agreement is a restriction by object, there is no need to prove effects; logically, the starting point in the analysis is therefore whether the agreement in question falls within the object category.

1. 'By object' restrictions

By definition, cartels have the object to harm competition and thus, are caught automatically. But, what agreements beyond cartels are caught? The Court of Justice has entertained this question in various cases over recent years.

In *T-Mobile Netherlands*,[2] which involved an instance of information exchange between mobile telephony operators in the Netherlands, the

1 Available at: https://competition-policy.ec.europa.eu/antitrust/legislation/horizontal-block-exemptions_en (accessed 3 February 2023).

2 Case C-8/08, *T-Mobile Netherlands BV and Others v. Raad van bestuur van de Nederlandse Mededingingsautoritei* [2009] ECR I-4529, EU:C:2009:343.

Court of Justice significantly expanded the concept of 'by object' restriction. On preliminary reference, the Court held that 'in order for a concerted practice to be regarded as having an anti-competitive object, it is sufficient that it has the potential to have a negative impact on competition ... the concerted practice must simply be capable in an individual case, having regard to the specific legal and economic context, of resulting in the prevention, restriction or distortion of competition within the common market' (para. 31). While showing some hesitations, the Court repeated that language in following cases such as *Allianz Hungaria*,[3] which pertained to an agreement between two insurance companies and auto repair shops, dealers and an association of car dealers specifying costs that would be covered by the insurance and increasing coverage in accordance with the number of policies sold. The uncertainty generated by *T-Mobile Netherlands*' equation between 'by object' restriction and the mere capability of distorting competition was subsequently alleviated in *Cartes Bancaires*, a judgement rendered by the Court of Justice on appeal from a General Court judgement upholding a Commission decision.

CASE

Groupement des Cartes Bancaires (CB) v. Commission (Case C-67/13 P)[4]

[Cartes Bancaires Group ('CB') is a French association of banks that manages a system for bank card payments and withdrawal. The system makes it possible for the members to use their cards at any merchant or ATM belonging to any member. Banks provide two types of services related to payment cards. They issue cards to consumers and provide acquiring services to merchants, allowing them to accept cards. Typically, the issuing side is more profitable than the acquiring one. According to CB, there was a risk that banks would free ride and concentrate too much on issuing cards while neglecting acquiring services. To correct this bias, CB required members to pay fees and submit to other rules that aimed to equalize the revenues from issuing and acquiring functions and balance the banks' incentives. According to the Commission, however, this fee and the other contemplated measures were designed to keep prices artificially high and to deter entry. The Commission found that CB's conduct altogether was a restriction by object. The Court of Justice disagreed. In analysing the conditions for finding a restriction by object, it held:]

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3 Case C-32/11, *Allianz Hungária Biztosító Zrt. and Others v. Gazdasági Versenyhivatal*, EU:C:2013:160.
4 EU:C:2014:2204.

CASE *(continued)*

49 … [I]t is apparent from the Court's case-law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects [citing *BIDS* (the Irish beef case, Chapter 2) and *Allianz Hungaria*].

50 That case-law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition ….

51 Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market … Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.

52 Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent …

53 According to the case-law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of Article 81(1) EC, regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question …

54 In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account.

55 In the present case, it must be noted that, when the General Court defined in the judgment under appeal the relevant legal criteria to be taken into account in order to ascertain whether there was, in the present case, a restriction of competition by 'object' within the meaning of Article 81(1) EC, it reasoned [that] … the agreement or decision must simply

CASE *(continued)*

be capable in the particular case, having regard to the specific legal and economic context, of preventing, restricting or distorting competition within the common market [referring to C-8/08, *T-Mobile Netherlands*].

56 It must be held that, in so reasoning, the General Court in part failed to have regard to the case-law of the Court of Justice and, therefore, erred in law with regard to the definition of the relevant legal criteria in order to assess whether there was a restriction of competition by 'object' within the meaning of Article [101(1) TFEU].

57 First, …, when the General Court defined the concept of the restriction of competition 'by object' within the meaning of that provision, it … fail[ed] to have regard to the fact that the essential legal criterion for ascertaining whether coordination between undertakings involves such a restriction of competition 'by object' is the finding that such coordination reveals in itself a sufficient degree of harm to competition.

58 Secondly, in the light of that case-law, the General Court erred in finding … that the concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.

The Court of Justice also held in *Cartes bancaires* that the General Court had failed to properly characterize the disputed provisions of the Cartes bancaires payment system as having the object of restricting competition, notably in view of the possible justifications for the provisions in question. In particular, the General Court had rejected the relevance of the claim that the 'disputed provisions aimed to develop the acquisition activities of the members of the Cartes bancaires system in order to achieve an optimal rate of balance between issuing and acquisition activities' (para. 72). However, the General Court had also found that, 'in the present case, in a card payment system that is by nature two-sided, …, the issuing and acquisition activities are 'essential' to one another and to the operation of that system: first, traders would not agree to join the CB card payment system if the number of cardholders was insufficient and, secondly, consumers would not wish to hold a card if it could not be used with a sufficient number of traders' (para. 73).

Hence, for the Court of Justice: '[h]aving therefore found…, that there were 'interactions' between the issuing and acquisition activities of a payment system and that those activities produced 'indirect network effects', since the extent of merchants' acceptance of cards and the number of cards in circulation each affects the other, the General Court could not, without erring in law, conclude that the measures at issue had as their object the restriction of competition within the meaning of Article [101(1) TFEU]' (para. 74). Indeed, for the Court of Justice: "[h]aving acknowledged that the formulas for those measures sought to establish a certain ratio between the issuing and acquisition activities of the members of the [Cartes bancairs system], the General Court was entitled at the most to infer from this that those measures had as their object the imposition of a financial contribution on the members … which benefit from the efforts of other members for the purposes of developing the acquisition activities of the system. Such an object cannot be regarded as being, by its very nature, harmful to the proper functioning of normal competition, the General Court itself moreover having found…, that combatting free-riding in the [Cartes bancaires] system was a legitimate objective' (para. 75).

On the nature of two-sided markets and its influence on the assessment of restrictions of competition, consider also the US Supreme Court judgment in the American Express case, excerpted below.

In a later judgment known as *Generics UK*, the Court of Justice clarified whether and to what extent pro-competitive elements associated with the contentious aspects of an agreement or concerted practice, may preclude a finding of 'by object' restriction.

CASE

Generics (UK) Ltd and others v. Competition and Markets Authority (Case C-307/18)[5]

[In 1999, the patent held by GlaxoSmithKline ('GSK') covering the active ingredients in the antidepressant Paroxetine expired. As a result, GSK was exposed to entry by generic producers. In order to preserve its exclusivity, GSK concluded so-called "pay for delay" agreements with several generic producers of Paroxetine. These agreements aimed to settle disputes about

5 EU:C:2020:52.

CASE *(continued)*

the validity of secondary patents held by GSK. Secondary patents relate to the manufacturing process of active ingredients, rather than to the active ingredients themselves. In essence, the pay for delay agreements entailed payments by GSK to the generic producers and for a market entry of generic Paroxetine produced by GSK in limited quantities with a delayed entry of the generic producers on the market. The Competition and Markets Authority ('CMA') found that the entry on the market of a generic version of Paroxetine brought the price of the drug downwards, however not to the same extent as a price drop that would have occurred following an independent market entry by one or several generic producers. As a result, the CMA found that the pay-for-delay agreements amounted to a breach of Article 101 TFEU and to an abuse of a dominant position (within the meaning of the domestic regime). The Court of Justice, presented with a preliminary ruling by the national appeal jurisdiction, held as follows:]

Restriction by object

67 It is clear from the Court's case-law that the concept of restriction of competition 'by object' must be interpreted strictly and can be applied only to some concerted practices between undertakings which reveal, in themselves and having regard to the content of their provisions, their objectives, and the economic and legal context of which they form part, a sufficient degree of harm to competition for the view to be taken that it is not necessary to assess their effects, since some forms of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition [citing *Maxima Latvija, F. Hoffmann-LaRoche and Others*].

103 … [W]here the parties to [an] agreement rely on its pro-competitive effects, those effects must, as elements of the context of that agreement, be duly taken into account for the purpose of its characterisation as a 'restriction by object'… in so far as they are capable of calling into question the overall assessment of whether the concerted practice concerned revealed a sufficient degree of harm to competition and, consequently, of whether it should be characterised as a 'restriction by object'.

104 Since taking account of those pro-competitive effects is intended not to undermine characterisation as a 'restriction of competition' within the meaning of Article 101(1) TFEU, but merely to appreciate the objective seriousness of the practice concerned and, consequently, to determine the means of proving it, that is in no way in conflict with the Court's settled case-law that EU competition law does not recognise a 'rule of reason', by virtue of which there should be undertaken a weighing of the pro- and anticompetitive effects of an agreement when it is to be characterised as a 'restriction of competition' under Article 101(1) TFEU … .

CASE *(continued)*

105 However, taking into consideration such matters presupposes that the pro-competitive effects are not only demonstrated and relevant, but also specifically related to the agreement concerned … .

106 Further, … the mere existence of such pro-competitive effects cannot as such preclude characterisation as a 'restriction by object'.

107 If such effects are demonstrated, relevant and specifically related to the agreement concerned, those pro-competitive effects must be sufficiently significant, so that they justify a reasonable doubt as to whether the settlement agreement concerned caused a sufficient degree of harm to competition, and, therefore, as to its anticompetitive object.

? NOTES AND QUESTIONS

1. Did *Cartes Bancaires* restore clarity to the question of what is a restraint by object and what is a restraint by effect? What is the effect of this judgement on *T-Mobile* and *Allianz Hungaria*? Does the mere 'potential to have a negative impact on competition' suffice to qualify an agreement as a restriction 'by object'? Would/should the agreement in *Allianz Hungaria* be treated as 'by effect'? Does *Cartes Bancaires* now rule out any effects analysis in determining whether a restraint is 'by object'?

   On remand, the General Court found that the measures introduced by CB to balance the banks' incentives to invest in the network's issuing and acquiring functions still amounted to an infringement 'by effect' within the meaning of Article 101(1) TFEU.[6]
2. The Court of Justice's reasoning in *Cartes Bancaires* has since then been reproduced and applied consistently not only in cases such as *ING Pensii*[7] (involving client-sharing agreements between companies managing private pension funds) and *Maxima Latvija*[8] (involving an agreement between shopping mall lessors and an anchor store containing a clause that granted the latter a veto right over the lessor's ability to lease to third-party competitors) but also in judgements rendered on appeal against Commission decisions in *Dole v. Commission*[9] (involving an information-sharing scheme between importers of bananas) or *Toshiba v. Commission*[10] (involving an agreement between producers of power transformers based in the European Economic Area and Japan not to compete in each other's markets).
3. Prior to *Cartes Bancaires,* it was observed that one of the paradoxical consequences of modernization and the turn to a so-called 'effects-based' approach to competition law enforcement was the systematic reliance of the Commission on the 'object' category when finding an

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6 Case T-491/07, RENV, EU:T:2016:379, paras. 157 et seq.

7 Case C-172/14, *ING Pensii, Societate de Administrare a unui Fond de Pensii Administrat Privat SA v. Consiliul Concurenței*, EU:C:2015:484.

8 Case C-345/14, *SIA 'Maxima Latvija' v. Konkurences padome*, EU:C:2015:784.

9 Case C-286/13, *Dole Food Company v. Commission*, EU:C:2015:184.

10 Case C-373/14, *Toshiba v. Commission*, EU:C:2016:26.

infringement of Article 101 TFEU, even beyond cartel cases. What explanations would you give for this tendency? In view of *Cartes Bancaires*, is there necessarily a conflict between favouring an effects-based enforcement and relying on a 'by object' category? If appropriate, how would you reconcile these two concepts?[11]

4. On 8 September 2016, the General Court upheld the Commission's finding that agreements entered into between drug originator Lundbeck and generic companies amounted to 'by object' restrictions of competition.[12] These agreements aimed to settle disputes about possible infringements of Lundbeck's intellectual property ('IP') rights relating to the marketing of the anti-depressant citalopram. In essence, the agreements entailed payments by Lundbeck and the delaying of generic market entry; hence the term 'pay-for-delay' coined to describe these arrangements. It was the first time that the Commission prosecuted such arrangements, so the 'by object' qualification was particularly contentious.[13]

The Commission's main argument was that the size of the payments made by Lundbeck was so significant that it did not reflect the parties' assessment of the strength of their respective rights but rather, amounted to a 'buying-off of competition' with effects similar to that of collusive market-sharing and output-limiting agreements, chiefly higher prices for consumers. The General Court agreed notably because, in its view, the defence of Lundbeck's patents in court could not, even in the most favourable scenario, have led to the same negative consequences for consumers. The Court of Justice affirmed on appeal (in Case C-591/16 P, EU:C:2021:243, see in particular paras. 110–147).

Do you see any weaknesses in the Court's analogy between 'pay-for-delay' settlements and market-sharing cartels? The Commission relied on the *BIDS* case to support its 'by object' qualification (see p. 90); was that appropriate? Generally, is the size of the 'reverse payment' a suitable or determinative indicator? Lundbeck argued that the size of the payment reflected the asymmetry of risks between the parties; do you agree? Does it matter that the generic companies were not actual but potential competitors when the agreements were entered into?

5. In *UK Generics*, the Court of Justice considered again the situation created by a 'pay-for-delay' arrangement, and the extent to which pro-competitive aspects of such agreement can weigh on the characterization of the restriction as 'by object'. To defeat such characterization, according to the Court, 'pro-competitive effects must be sufficiently significant, so that they justify a reasonable doubt as to whether the settlement agreement concerned caused a sufficient degree of harm to competition'. A related question is whether the Commission is required, or even authorized, to weigh com- petitive benefits against competitive harms in determining whether and to what extent an agreement is caught by Article 101(1). Consider the case of *Métropole TV*. Does it still reflect proper analysis?

In *Métropole TV*,[14] six major firms in the French TV sector formed a satellite TV joint venture, TPS, which entered the market dominated by Canal+. The applicants argued that they were entitled to negative clearance (the then available declaration of not being caught by Article 101(1)), rather than exemption, of a clause providing that certain channels were to be broadcast exclusively on TPS. Their argument depended upon the availability of rule-of-reason analysis under Article 101(1). The General Court rejected this approach, holding that

11 For a discussion, see D. Gerard (2012), 'The effects-based approach under Article 101 TFEU and its paradoxes: Modernisation at war with itself?' in D. Waelbroeck and J. Bourgeois (eds), Ten Years of Effects-based *Approach in EU Competition Law Enforcement*, Brussels: Bruylant, p. 17.

12 Case T-472/13, *Lundbeck v. Commission*, EU:T:2016:449, para. 332 et seq.

13 Commission Decision of 19 June 2013 in Case AT.39226—Lundbeck.

14 Case T-112/99, *Métropole Télévision (M6) v. Commission* [2001] ECR II-2459, EU:T:2001:2015, esp. para. 74.

the clause was caught by Article 101(1) because it restricted competition; the competitors of TPS were denied access to programs considered attractive to numerous French viewers. The positive effects had to be weighed under Article 101(3). That solution was reproduced in the Commission Horizontal Guidelines, which still consider that '[t]he balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3)' (para. 20).

How do you reconcile *UK Generics* and *Métropole TV*, as codified in the Horizontal Guidelines? Is there really a balancing exercise at play in the qualification exercise pertaining to the characterization of the restriction as 'by object' or 'by effect' under 101(1) TFEU?

6. The proper application of Article 101 is of particular interest to the Member States, for Article 3(2) of Regulation 1/2003[15] provides that if an agreement, decision or concerted practice capable of affecting trade between Member States is not prohibited by Article 101, it cannot be prohibited by national competition law.

7. In the US, the structure of analysis takes a somewhat different form. If the agreement is clearly anti-competitive (usually meaning price-raising) and clearly without pro-competitive virtue, it may be condemned on its face ('per se'). If the agreement does not meet this threshold but still, from economic learning and experience, the anti-competitive impact seems obvious, the burden shifts to the defendant to explain why the restraint is unlikely to harm consumers or how it is likely to offer offsetting competitive benefits. But if the competitive harm is more ambiguous, the plaintiff must offer a market analysis and demonstrate how the agreement is likely to create or enhance market power to the detriment of consumers. *Polygram Holding, Inc. v. FTC*[16] offers a helpful statement and analysis.

2. 'By effect' restrictions

In *Cartes Bancaires*, the Court of Justice limited the scope of 'by object' restrictions to those categories of agreements (or specific features thereof) whose negative effects on competition can be presumed because 'experience has shown that they lead to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers' (para. 51), i.e., that they have the effect of harming competition. In turn, the qualification of a particular agreement as falling within a 'by object' category requires an analysis of 'the content of its provisions, its objectives and the economic and legal context of which it forms a part' and 'consideration for the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question' (para. 53). Conversely, when a particular agreement does not fall within a 'by object' category, the effects thereof must be considered, and for it to be caught by Article 101(1), 'it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent' (para. 52).

15 Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] O.J. L 1/1.
16 416 F.3d 29 (D.C. Cir. 2005).

The notion of anti-competitive effect constitutes therefore the cornerstone of the notion of restriction of—or 'harm to'—competition, and thus of the scope of Article 101(1), whether it needs to be established or can be presumed. But, what is anti-competitive effect, and how do you establish it? The Horizontal Guidelines indicate that the determinative factor is whether the agreement in question enables the parties to 'maintain, gain or increase market power' and is thereby 'likely to give rise to negative market effects with respect to prices, output, product quality, product variety or innovation'. In other words, an agreement would be deemed to have an anti-competitive effect and to harm competition if it enables the parties to acquire (or strengthen their pre-existing) market power, thereby modifying their incentive and ability (and that of third-party competitors) to profitably raise prices or reduce output, including by degrading product/service quality, reducing variety or hampering innovation.

Conceptually, the first step therefore entails a determination of the (lack of) market power of the parties to the agreement in question, which is traditionally defined as the ability to profitably maintain prices above or output below competitive levels for a period of time (and generally to impose commercial terms) because of a lack of sufficient competitive constraints. As such, market power is a question of degree, and the degree of market power required for finding a restriction of competition under Article 101 is lower than for a finding of dominance under Article 102, which is a level of substantial market power. In practice, establishing market power requires identifying firms that currently operate on the same market as the parties to the agreement at issue. To that end, defining the relevant market is decisive.

Note on market definition

Most competition decisions and judgements in the field of antitrust (Articles 101 and 102 TFEU) or merger control involve market definition. In 1997, the Commission issued a Notice on the definition of the relevant market, also known as the 'Market Definition Notice', of which a revised and expanded version is expected over the course of 2023.[17] Excerpts follow.

> The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify

17 The Notice can be found at: https://competition-policy.ec.europa.eu/antitrust/legislation/legislation-notices_en (accessed 3 February 2023). The ongoing update of the Market Definition Notice aims primarily to (i) take into account the significant developments of the past 20 years, in particular digitalisation and new ways of offering goods and services; and (ii) reflect the increasingly interconnected and globalised nature of commercial exchanges. Upon review of the draft circulated for consultation, the key principles excerpted in this section are due to remain valid in the future.

those actual competitors of the undertakings involved that are capable of constraining their behaviour and of preventing them from behaving independently of an effective competitive pressure. It is from this perspective, that the market definition makes it possible, inter alia, to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying Article [101].

* * *

Relevant product markets are defined as follows:

A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

Relevant geographic markets are defined as follows:

The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

* * *

Competitive constraints

Firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. From an economic point of view, for the definition of the relevant market, demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a given product, in particular in relation to their pricing decisions. A firm or a group of firms cannot have a significant impact on the prevailing conditions of sale, such as prices, if its customers are in a position to switch easily to available substitute products or to suppliers located elsewhere. Basically, the exercise of market definition consists in identifying the effective alternative sources of supply for the customers of the undertakings involved, in terms of both products/services and geographic location of suppliers.

* * *

The assessment of demand substitution entails a determination of the range of products that are viewed as substitutes by the consumer. One way of making this

> determination can be viewed as a thought experiment, postulating a hypothetical small, non-transitory change in relative prices and evaluating the likely reactions of customers to that increase (usually referred to as the SSNIP test for Small but Significant Non-transitory Increase in Price). The exercise of market definition focuses on prices for operational and practical purposes, and more precisely, on demand substitution arising from small, permanent changes in relative prices. This concept can provide clear indications as to the evidence that is relevant to define markets.
>
> Conceptually, this approach implies that starting from the type of products that the undertakings involved sell and the area in which they sell them, additional products and areas will be included into or excluded from the market definition depending on whether competition from these other products and areas sufficiently affects or restrains the pricing of the parties' products in the short term.
>
> The question to be answered is whether the parties' customers would switch to readily available substitutes or to suppliers located elsewhere in response to an hypothetical small (but significant), in the range 5%–10%, permanent relative price increase in the products and areas being considered. If substitution would be enough to make the price increase unprofitable because of the resulting loss of sales, additional substitutes and areas are included in the relevant market. This would be done until the set of products and geographic areas is such that small, permanent increases in relative prices would be profitable.
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> * * *
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> Generally, and in particular for the analysis of merger cases, the price to take into account will be the prevailing market price. This might not be the case where the prevailing price has been determined in the absence of sufficient competition. In particular for investigation of abuses of dominant positions, the fact that the prevailing price might already have been substantially increased will be taken into account.

To define a market, one normally starts with the smallest plausible market hypothesis, i.e., one seeks to define an area wherein if there were only one firm, that firm—the hypothetical monopolist—could exploit its customers, raising price and lowering output, without fear that other suppliers would simply fill the slack. Thus, if the parties to an agreement (or the putative dominant firm) are global producers and marketers of fresh fruits and vegetables, the starting point would be to focus on the product involved in the agreement, such as bananas, not all fruits (let alone all fruits and vegetables). Bananas are a distinctive soft fruit, so a key question is how many people readily substitute other fruit for bananas. If in all significant geographic areas a critical mass of people switch readily, or would do so if banana prices were to increase, a banana producer/importer would not have market power.

There can, of course, be various difficulties in assessing substitutability and cross-elasticity between products/services and thus, in defining relevant product or geographic markets in a particular case, including the availability of the necessary data or evidence. In practice, even though markets must be defined based on the facts prevailing at the relevant time and in the relevant geography, some difficulties may be alleviated by the existence of a large body of precedents defining markets across many industries. Keep in mind, however, that market definition is by nature a factual and empirical exercise based on business realities. As a result, it is inherently dynamic and can evolve over time, for example towards wider geographic markets due to the development of the Single Market or the globalization of the economy.

In addition, the hypothetical monopolist or SSNIP test may not deliver the right outcome in certain circumstances. Consider, for example, a dominant undertaking that is already charging a monopoly price, so that customers would stop buying from it at all if it were to raise price further. If a SSNIP test is applied in these circumstances, it would have the effect of unduly broadening the scope of the relevant market, because buyers are already at the point where they would cease purchasing the dominant product and turn to another solution if prices were to increase (this is known as the 'Cellophane Fallacy' in reference to a famous error made by the US Supreme Court in *United States v. EI du Pont de Nemour and Co.*[18]).

Moreover, in the digital/online economy, the SSNIP test may not be a sound methodological tool and may fail to account accurately for the competitive constraints (or lack thereof) determining a firm's ability to engage in behaviour likely to harm competition and consumers. Consider first the specific case of 'zero price products'. Users typically receive these services in exchange for non-monetary consideration, including their data and attention span, which the SSNIP test cannot capture. Conversely, technology companies offering zero price products typically compete on the quality of their products; hence the proposal—not immune to practical difficulties—of focusing the substitution analysis on product characteristics such as quality instead of price by means of a 'small but significant non-transitory decrease in quality' (SSNDQ) test. But consider also, more generally, the unique features of digital platforms such as strong direct and indirect network effects, extreme returns to scale and economies of scope, marginal

18 17 351 US 377 (1956).

costs close to zero, high and increasing returns on the use of data and low distribution costs allowing a global reach. All these aspects are complex to factor into a price-based analysis and call for a wider consideration of customer substitution, including based on a range of qualitative evidence (e.g., whether and to what extent customers engage in 'multi-homing'), as well as for an inductive approach focused on the conduct in question and the theory of harm supporting its likely effects. Another important and disputed issue, when analysing digital platforms connecting different user groups, is whether the platform is active on one, two or multi-sided markets, and whether and when it is appropriate to carry out the competitive assessment on distinct markets or instead, across interrelated markets, which is often the only way to account for different substitution possibilities by the user groups active on the different sides of the platform.

* * *

Logically, once markets are defined, the examination of market power will focus on the competitive constraints (or lack thereof) exercised by existing competitors, potential entrants and buyers on the ability of firms parties to an agreement (or a single firm in the case of Article 102) to dictate market terms. To that end, market shares are often relied upon as a starting point, even though they are insufficient as such to support a determinative finding of market power or dominance, because they reflect a preference for the supplier in question on the part of a larger or narrower segment of demand and the related (in)ability to profitably forego supplies in case of price increase. For example, the EU block exemptions and associated guidelines on horizontal and vertical agreements rely on market share thresholds (in the range of 20–30%) to define 'safe harbours' based on the presumption that if the parties have a low combined (or individual in the case of vertical agreements) market share, the agreement in question is unlikely to give rise to restrictive effects on competition within the meaning of Article 101 TFEU (see also the note on agreements of minor importance ('*de minimis*') at the end of this section). In practice, it is often informative to consider market shares based on different metrics such as value, volume or capacity but also, e.g., in relation to digital platforms, the number of active users or usage volume.

In turn, the assessment of anti-competitive effects will turn on whether the agreement in question has had or is likely to have an adverse impact on prices, output or other parameters of competition such as innovation, as a result of a reduction of competition between the parties or with third parties. This will typically depend on several factors pertaining to the agreement itself—such as the substance, scope and duration of its terms—and to the market context, including characteristic features of the parties—e.g., their costs structure, the relative importance of the activities covered by the agreement, the closeness of competition between them—and the incentives and abilities of (potential) competitors and customers to respond to the implementation of the said agreement. Likewise, anti-competitive effects may derive directly from the agreement itself or from indirect consequences thereof by, e.g., increasing the likelihood of coordination among the parties.

Practically, the assessment of the actual or potential effects of a particular agreement on competition (or of a possible abuse under Article 102 TFEU, or of a concentration in the case of merger control), including the identification of the relevant parameters supporting a 'theory of harm' to competition, requires building a counterfactual scenario: what would be or have been the competitive dynamics on the market in the absence of that agreement?[19] If the agreement is only envisaged, the point of reference would be the *status quo ante*, adjusted for likely future events. If the agreement has already been implemented, a likely *ex ante* scenario will need to be established based on comparators, adjusted for exogenous factors. In both cases, economic models can assist in simulating market outcomes in the absence of the agreement, and likely future/past events will need to be supported by evidence so that they represent 'a real, concrete possibility'.[20] At this point, however, efficiency gains generated by the agreement are not supposed to be factored into the analysis, for they will be assessed under Article 101(3) TFEU.

In recent years, the case law on the notion of 'by effects' restriction developed in parallel to the one on 'by object' restriction. In fact, the governing 'by effects' case was decided by the Court of Justice on the same day as the *Cartes Bancaires* judgement (see earlier) and involved an appeal against a Commission decision finding that MasterCard's multilateral interchange fees ('MIF') for cross-border payment card transactions infringed Article 101 TFEU.[21]

19 See, originally, Case 56/65, *Société Technique Minière (L.T.M.) v. Maschinenbau Ulm GmbH (M.B.U.)*, EU:C:1966:38, pp. 249–250; more recently, Case T-328/03, *O2 (Germany) v. Commission*, EU:T:2006:116, paras. 68–69 and 71.

20 Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94, *European Night Services v. Commission* [1998] ECR II-3141, EU:T:1998:198, paras. 114–115.

21 Commission Decision of 19 December 2007in Case COMP/ 34.579—*MasterCard*.

CASE

MasterCard v. Commission (Case C-382/12 P)[22]

[MasterCard is a worldwide payment organization grouping several thousand banks issuing cards and/or acquiring merchants, all bound by network rules and a number of joint decisions (MasterCard being considered as an association of undertakings pursuant to Article 101 TFEU). The MIF was a fee ranging between 0.4% and 1.20% of the transaction value (+€0.05) levied on each payment at a retail outlet, which was eventually charged by customers' banks (the 'issuing' banks) to the merchant's bank (the 'acquiring' banks), thereby inflating the base on which acquiring banks charged merchants for accepting payment cards. In fact, the MIF accounted for a large part of the final price businesses paid for accepting MasterCard's payment cards. The Commission concluded that MasterCard's MIF inflated the cost of card acceptance by retailers and of retail consumer prices without leading to proven efficiencies; it gave MasterCard 6 months to withdraw the fees. The Commission equally concluded that MIFs were not illegal as such but that it would accept such fees only where there is evidence that they bring innovation to the system and benefit all users.

The decision defined the relevant markets by distinguishing between an upstream 'system/network market' and downstream markets for 'issuing' payment card (customers side) and 'acquiring' payment card transactions (merchants side). In defining the 'acquiring' market, the Commission relied mainly on product characteristics and past switching behaviour rather than on the results of a SSNIP test because of a significant risk of *cellophane fallacy*:

> 287 In this case the risk of a *cellophane fallacy* is significant for several reasons. Pricing in the issuing and acquiring markets is largely determined by collectively set interchange fees. Also, the concentration in the acquiring business is high in most EEA countries, potentially allowing acquirers to charge supra-competitive prices. Thus, a survey with merchants in these markets asking whether they would cancel a card if the fees were raised by a small but sustainable [amount] can be expected to lead to exaggerated results ….

On the issuing side, the Commission concluded that payment card-related services were part of the market separate from other payment means, including cash, cheques and bank transfers. Both issuing and acquiring markets were considered national in scope. The decision also underlined that: '[t]he primary focus for analysing whether there is an appreciable effect on competition is the position and importance of the parties on the market taking into account the market structure' including, e.g., the network effects of MasterCard's cards business.

22 EU:C:2014:2201.

CASE *(continued)*

The Commission went on to assess the effects of the MIF as follows:

> 408 The assessment of MasterCard's MIF as a restriction of competition is based on its restrictive effects on competition in the acquiring markets. In the absence of a bilateral agreement [between the issuing and acquiring banks], the multilateral rule fixes the level of the interchange fee rate for all acquiring banks alike, thereby inflating the base on which acquiring banks set charges to merchants. Prices set by acquiring banks would be lower in the absence of the multilateral rule and in the presence of a rule that prohibits ex post pricing.

In practice, the Commission conducted different quantitative analyses to establish that the MIF constituted a floor for the merchant fees charged by acquiring banks. It equally relied on evidence from several merchants that the MIF hampered price competition between acquiring banks. Subsequently, the Commission found that: (i) inter-system competition (between, e.g., MasterCard and Visa or domestic payment card systems) generated upward pressures on interchange fees (due to issuing banks' incentive to promote the cards with the higher interchange level, thus bringing them most revenue), thereby amplifying and aggravating the distortions of competition in the acquiring markets; (ii) inter-system competition did not sufficiently constrain MasterCard in maintaining a high level of interchange fees; and (iii) MIF was not subject to constraints from acquirers or merchants (based, e.g., on an analysis of merchants' demand elasticity), so that members of the MasterCard payment organization collectively held market power over merchants and their customers.

The Commission further considered whether any restriction deriving from the MasterCard MIF was directly related and necessary for operating its payment card system, i.e., whether it was ancillary to a legitimate operation compatible with Article 101 TFEU. In that framework, the decision examined at length a 'counterfactual hypothesis' based on whether: (i) banks could cooperate in an open payment card system without the MIF; and (ii) less restrictive means than the MasterCard MIF would have allowed banks to cooperate as well. Both questions were answered in the affirmative:

> 648 … a MIF and its restrictive effects on price competition between acquiring banks are not objectively necessary for the co-operation of banks in the MasterCard payment organization and for the viability of the scheme.

In closing its assessment under Article 101(1), the Commission found that the MasterCard MIF appreciably restricted competition in most European Economic Area (EEA) Member States because of:

CASE *(continued)*

650 …

(i) the substantial economic impact of the MIF within the EEA;
(ii) the strong position of MasterCard on the relevant markets, in particular due to network effects;
(iii) the fact that the MIF is part of a network of inter-related agreements that together have a reinforced cumulative effect; and
(iv) the fact that the MIF is a collective price agreement that determines to a significant degree prices for cross-border and domestic transactions in the downstream acquiring markets and allows MasterCard's members to exploit their market power.

MasterCard appealed the Commission decision before the General Court, which confirmed it, and subsequently, before the Court of Justice. With respect to whether the MasterCard MIF fell within the framework of Article 101(1) TFEU, one of the main grounds of appeal related to the counterfactual analysis relied upon in the Commission's effects analysis. The Court of Justice stated as follows:]

161 As regards [the] criticism … that, in assessing whether a decision has a restrictive effect on competition, the Commission should have considered what the actual 'counterfactual hypothesis' would have been in the absence of the MIF, it should be noted that the Court of Justice has repeatedly held that in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute. As the General Court rightly held, … the same applies in the case of a decision of an association of undertakings within the meaning of Article [101 TFEU].

162 Nevertheless, it is apparent … that, in order to assess the competitive effects of the MIF, the General Court relied on 'the premise of a MasterCard system operating without a MIF—solely on the basis of a rule prohibiting *ex post* pricing', that is to say, on the same 'counterfactual hypothesis' it applied in order to examine whether the MIF could be regarded as an ancillary restriction …, in relation to the MasterCard payment system.

163 … the same 'counterfactual hypothesis' is not necessarily appropriate to conceptually distinct issues. Where it is a matter of establishing whether the MIF have restrictive effects on competition, the question whether, without those fees, but by the effect of prohibiting *ex post* pricing, an open payment system such as the MasterCard system could remain viable is not, in itself, decisive.

CASE *(continued)*

164 By contrast, the Court should, to that end, assess the impact of the setting of the MIF on the parameters of competition, such as the price, the quantity and quality of the goods or services. Accordingly, it is necessary, in accordance with the settled case-law …, to assess the competition in question within the actual context in which it would occur in the absence of those fees.

165 In that regard, the Court of Justice has already had occasion to point out that, when appraising the effects of coordination between undertakings in the light of Article [101 TFEU], it is necessary to take into consideration the actual context in which the relevant coordination arrangements are situated, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question.

166 It follows from this that the scenario envisaged on the basis of the hypothesis that the coordination arrangements in question are absent must be realistic. From that perspective, it is permissible, where appropriate, to take account of the likely developments that would occur on the market in the absence of those arrangements.

167 In the present case, however, the General Court did not in any way address the likelihood, or even plausibility, of the prohibition of *ex post* pricing if there were no MIF, in the context of its analysis of the restrictive effects of those fees. In particular, it did not … address the issue as to how—taking into account in particular the obligations to which merchants and acquiring banks are subject … —the issuing banks could be encouraged, in the absence of MIF, to refrain from demanding fees for the settlement of bank card transactions.

168 Admittedly, … the General Court was not obliged, in the context of the examination of the ancillary nature … of the MIF, to examine whether it was likely that the prohibition of *ex post* pricing would occur in the absence of such fees. Nevertheless, … the situation is different in the separate context of establishing whether the MIF have restrictive effects on competition.

169 In those circumstances, it is correctly submitted in the present case that, in relying on the single criterion of economic viability, … to justify taking into consideration the prohibition of *ex post* pricing in the context of its analysis of the effects of the MIF on competition, and by failing therefore to explain in the context of that analysis whether it was likely that such a prohibition would occur in the absence of MIF otherwise than by means of a regulatory intervention, the General Court made an error of law.

CASE *(continued)*

170 It should be noted, however, that if the grounds of a decision of the General Court disclose an infringement of EU law but its operative part is shown to be well founded on other legal grounds, such infringement is not one that should bring about the annulment of that decision and it is appropriate to carry out a substitution of grounds.

171 That is the case here. The appellants' arguments before the General Court in relation to the objective necessity of the MIF, …, which is not contested in the present appeal, were based in essence on the claim that, without MIF, acquirers would be put at the mercy of issuers, who would be able to determine the level of the interchange fee unilaterally, since merchants and acquirers would be bound to accept the transaction.

172 In … the judgement under appeal, the General Court correctly considered, … that the Commission was fully entitled to conclude that 'the possibility that some issuing banks might hold up acquirers … could be solved by a network rule that is less restrictive of competition than MasterCard's current solution that, by default, a certain level of interchange fees applies. The alternative solution would be a rule that imposes a prohibition on *ex post* pricing on the banks in the absence of a bilateral agreement between them'.

173 It follows from this that, … the only other option presenting itself at first instance as enabling the MasterCard system to operate without MIF was in fact the hypothesis of a system operating solely on the basis of a prohibition of *ex post* pricing. In those circumstances, that prohibition may be regarded as a 'counterfactual hypothesis' that is not only economically viable in the context of the MasterCard system but also plausible or indeed likely, given that there is nothing in the judgement under appeal to suggest, and it is common ground, that it was not in any way claimed before the General Court that MasterCard would have preferred to let its system collapse rather than adopt the other solution, that is to say, the prohibition of *ex post* pricing.

174 Consequently, even though the General Court wrongly considered that the economic viability of the prohibition of *ex post* pricing in the context of the MasterCard system was sufficient, by itself, to justify taking that prohibition into consideration in the analysis of the effects of the MIF on competition, in the circumstances of the present case, … the General Court was entitled to rely in its analysis of the restrictive effects of the MIF on the same 'counterfactual hypothesis' it had used in the context of its analysis of the objective necessity of those fees, albeit for reasons other than those stated by the General Court in … the judgement under appeal. In those circumstances, the error of law established in paragraph 169 of the present judgement has no bearing on the analysis of the restrictive effects carried out by the General Court on the basis of the 'counterfactual hypothesis' in question.

? NOTES AND QUESTIONS

1. The Court of Justice offered a clear reminder of the centrality of the counterfactual method in establishing 'by effect' restrictions under Article 101(1) TFEU. In *MasterCard*, the Commission had not expressly relied on the counterfactual method to establish a restriction of competition but had, rather, done so to assess whether the applicable MIF could be deemed ancillary to the operation of the payment system put in place under MasterCard's umbrella, which was not problematic as such. In the present case, that methodological flaw did not have consequences, but can you think of other circumstances in which it would? What are the conceptual differences between the assessment of the restrictive character of provisions of an agreement and of the ancillary nature of these provisions?

   In the Guidelines on the application of Article 101(3) TFEU (see section C later), the Commission states as follows:

   > In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it. If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction, also fall outside Article [101] (1) .... It follows that the ancillary restraints test is similar to the test [for establishing a restriction of competition]. However, the ancillary restraints test applies in all cases where the main transaction is not restrictive of competition. It is not limited to determining the impact of the agreement on [...] competition (para. 29).

2. The centrality of the counterfactual method is directly associated with the move towards a systematic 'effects-based approach' in EU competition law enforcement. In the field of abuses of dominance under Article 102 TFEU, the Commission recently grounded the assessment of the exclusionary character of unilateral practices in such counterfactual. According to the 2009 Dominance Guidance Paper (as discussed in Chapter 5 and Section C(2) following): 'This assessment will usually be made by comparing the actual or likely future situation in the relevant market (with the dominant undertaking's conduct in place) with an appropriate counterfactual, such as the simple absence of the conduct in question or with another realistic alternative scenario, having regard to established business practices' (para. 21). Likewise, when assessing the competitive effects of a concentration, 'the Commission compares the competitive conditions that would result from the notified merger with the conditions that would have prevailed without the merger' (Horizontal Merger Guidelines, para. 9, discussed in Chapter 6). In turn, the counterfactual method is central to the articulation of well-developed theories of harm to competition in antitrust or merger control cases.
3. In MasterCard, the Court of Justice also blamed the General Court for not examining whether the counterfactual scenario relied upon by the Commission was 'realistic', 'likely' or even 'plausible'. In your view, are these terms synonymous, or do they refer to different evidentiary standards? If they connote different standards, what does each of these standards entail? Should the Court of Justice have drawn a difference between them? In principle, could it make a difference to rely on one or the other standard, and how?
4. In *Generics UK* (C-307/18), excerpted earlier in relation to 'by object' restrictions, the Court of Justice neatly summarized the conditions to characterize a restriction 'by effects', as follows:

   > 115 ... in the event that analysis of the concerted practice concerned does not reveal a sufficient degree of harm to competition, it is then necessary to examine the effects of that practice and, in order to classify that practice as a 'restriction of competition' within

> the meaning of Article 101(1) TFEU, to identify the factors which establish that competition was, in fact, prevented, or restricted, to an appreciable extent.
>
> 116 To that effect, it is necessary to take into consideration the actual context in which that practice occurs, in particular the economic and legal context in which the undertakings concerned operate, the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question.
>
> 117 In accordance with settled case-law, the restrictive effects on competition may be both real and potential, but they must, in any event, be sufficiently appreciable.
>
> 118 In order to assess the effects of a concerted practice with regard to Article 101 TFEU, competition should be assessed within the actual context in which it would occur in the absence of the agreement in dispute ...
>
> 120 The sole purpose of the counter-factual is to establish the realistic possibilities ... in the absence of the agreement at issue. [... i]n order to determine how the market will probably operate and be structured if the agreement concerned is not concluded.

Satisfying the condition that the restrictive effects on competition of a particular provision or measure need to be 'sufficiently appreciable' is facilitated by the Commission's publication of guidance on 'agreements of minor importance' likely to fall outside of the scope of Article 101 TFEU, also known as the 'De Minimis Notice'.

Note on agreements of minor importance ('de minimis')

Irrespective of whether it results from an agreement between competitors (horizontal) or between non-competitors (vertical), a restriction of competition needs to be 'appreciable' to be caught by Article 101(1) TFEU, meaning that an agreement falls outside Article 101 if it has 'only an insignificant effect on the market.'[23] When, then, is a restraint so insignificant that it is below the threshold of Article 101 TFEU? That question is governed by the Commission Notice on agreements of minor importance that do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union ('De Minimis Notice').[24] The Notice provides, in part:

De Minimis Notice[25]

* * *

> 3. In this Notice the Commission indicates, with the help of market share thresholds, the circumstances in which it considers that agreements which may have as their effect the prevention, restriction or distortion of competition

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23 Case C-226/11, *Expedia Inc. v. Autorité de la concurrence and Others*, EU:C:2012:795, para. 16.
24 Available at: http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52014XC0830(01) (accessed 2 June 2017).
25 [2014] O.J. C 291/1.

within the internal market do not constitute an appreciable restriction of competition under Article 101 of the Treaty. This negative definition of appreciability does not imply that agreements between undertakings which exceed the thresholds set out in this Notice constitute an appreciable restriction of competition. Such agreements may still have only a negligible effect on competition and may therefore not be prohibited by Article 101(1) of the Treaty.

4. Agreements may also fall outside Article 101(1) of the Treaty because they are not capable of appreciably affecting trade between Member States. This Notice does not indicate what constitutes an appreciable effect on trade between Member States. Guidance to that effect is to be found in the Commission's Notice on effect on trade, in which the Commission quantifies, with the help of the combination of a 5% market share threshold and a EUR 40 million turnover threshold, which agreements are in principle not capable of appreciably affecting trade between Member States. Such agreements normally fall outside Article 101(1) of the Treaty even if they have as their object the prevention, restriction or distortion of competition.

* * *

8. The Commission holds the view that agreements between undertakings which may affect trade between Member States and which may have as their effect the prevention, restriction or distortion of competition within the internal market, do not appreciably restrict competition within the meaning of Article 101(1) of the Treaty:

(a) if the aggregate market share held by the parties to the agreement does not exceed 10% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are actual or potential competitors on any of those markets (agreements between competitors); or
(b) if the market share held by each of the parties to the agreement does not exceed 15% on any of the relevant markets affected by the agreement, where the agreement is made between undertakings which are not actual or potential competitors on any of those markets (agreements between non-competitors).

9. In cases where it is difficult to classify the agreement as either an agreement between competitors or an agreement between non-competitors the 10% threshold is applicable.

* * *

> 11. [T]his Notice does not cover agreements which have as their object the prevention, restriction or distortion of competition within the internal market. The Commission will thus not apply the safe harbour created by the market share thresholds set out in points 8, 9, and 11 to such agreements. For instance, as regards agreements between competitors, the Commission will not apply the principles set out in this Notice to, in particular, agreements containing restrictions which, directly or indirectly, have as their object: a) the fixing of prices when selling products to third parties; b) the limitation of output or sales; or c) the allocation of markets or customers. Likewise, the Commission will not apply the safe harbour created by those market share thresholds to agreements containing any of the restrictions that are listed as hard-core restrictions in any current or future Commission block exemption regulation, which are considered by the Commission to generally constitute restrictions by object.

* * *

In another 'MIF' case known as 'Budapest Bank', the Court of Justice deepened the understanding of the interplay between the notions of 'by object' and 'by effects' restrictions of Article 101(1) TFEU. While an 'object' restriction does not require proof of (likely) effects to infringe Article 101(1), nothing prevents an examination of such effects whenever appropriate, the Court held, while the counterfactual method is also a useful methodological tool to determine whether a particular conduct may qualify as 'object restriction'.

CASE

Gazdasági Versenyhivatal v Budapest Bank Nyrt. and Others ('Budapest Bank') (Case C-228/18)[26]

[Several Hungarian banks representing a significant share of the market entered into a MIF agreement with Visa and MasterCard. The MIF aimed at establishing a uniform interchange fee for card payments made with cards issued by a bank member of the card payment scheme offered by either Visa or MasterCard. The Hungarian competition authority found in essence that the MIF agreement had both the object and the effect of restricting competition. The Hungarian Supreme Court made a reference to the Court of Justice seeking clarifications on the application of Article 101 TFEU:]

26 EU:C:2020:265.

CASE *(continued)*

40 It follows that the fact that a finding of a restriction of competition 'by object' relieves the competent authority or court having jurisdiction of the need to examine the effects of that restriction in no way means that that authority or court cannot undertake such an examination where it considers it to be appropriate.

* * *

74 The referring court also states that, by neutralising competition between the two card payment systems at issue in the main proceedings as regards the aspect of the cost represented by the interchange fees, the MIF Agreement could have had the result of intensifying competition between those systems in other respects. In particular, the referring court observes that both the Competition Authority's decision and the appeal on a point of law brought before the referring court are based on the premise that the features of the products offered by Visa and MasterCard are substantially the same. The referring court points out that those features may have varied over the period in which the anticompetitive conduct complained of in the present instance would have occurred. According to that court, setting the interchange fees at a uniform level may have triggered competition in relation to the other features, transaction conditions and pricing of those products.

75 If that was actually the case, which is for the referring court to ascertain, a restriction of competition on the payment systems market in Hungary, contrary to Article 101(1) TFEU, can be found only after an assessment of the competition which would have existed on that market if the MIF Agreement had not existed, an assessment which … falls within the scope of an examination of the effects of that agreement.

79 In particular, in the present instance … it is not possible to conclude on the basis of the information produced … that sufficiently general and consistent experience exists for the view to be taken that the harmfulness of an agreement such as that at issue in the main proceedings to competition justifies dispensing with any examination of the specific effects of that agreement on competition. The information relied on by the Competition Authority, the Hungarian Government and the Commission in that connection, that is to say, primarily, that authority's decision-making practice and the case-law of the Courts of the European Union, specifically demonstrates … the need to conduct an in-depth examination of the effects of such an agreement in order to ascertain whether it actually had the effect of introducing a minimum threshold applicable to the service charges and whether, having regard to the situation which would have prevailed if that agreement had not existed, the agreement was restrictive of competition by virtue of its effects.

81 [C]ompetition between the card payment systems in Hungary triggered not a fall but an increase in the interchange fees, contrary to the disciplinary effect on prices which competition normally exerts in a market economy. According to those arguments, this is due, inter

CASE *(continued)*

alia, to the fact that merchants can exert only limited pressure on the determination of the interchange fees, whereas it is in the issuing banks' interest to derive revenue from higher fees.

82 In the event that the referring court were also to find there to be, a priori, strong indications capable of demonstrating that the MIF Agreement triggered such upwards pressure or, at the very least, contradictory or ambivalent evidence in that regard, such indications or evidence cannot be ignored by that court in its examination of whether, in the present instance, there is a restriction 'by object'. … [T]he fact that, if there had been no MIF Agreement, the level of interchange fees resulting from competition would have been higher is relevant for the purposes of examining whether there is a restriction resulting from that agreement, since such a factor specifically concerns the alleged anticompetitive object of that agreement as regards the acquiring market in Hungary, namely that that agreement limited the reduction of the interchange fees and, consequently, the downwards pressure that merchants could have exerted on the acquiring banks in order to secure a reduction in the service charges.

83 In addition, if there were to be strong indications that, if the MIF Agreement had not been concluded, upwards pressure on interchange fees would have ensued, so that it cannot be argued that that agreement constituted a restriction 'by object' of competition on the acquiring market in Hungary, an in-depth examination of the effects of that agreement should be carried out, as part of which … it would be necessary to examine competition had that agreement not existed in order to assess the impact of the agreement on the parameters of competition and thereby to determine whether it actually entailed restrictive effects on competition.

? NOTES AND QUESTIONS

1. Notice how the Court frames the 'by effects' nature of the case by referring to a lack of 'sufficiently general and consistent experience' to determine the harmfulness of the agreement in question, thus ruling out the possibility to 'dispens[e] with any examination of the specific effects of that agreement on competition'. Remember how central this criteria was to the Court's reasoning in *Cartes Bancaires*. But, what does 'sufficiently general and consistent experience' mean in practice? Who is supposed to ascertain the extent of the experience in question, using which tools and against which yardstick?
2. The Court of Justice explains in *Budapest Bank* how the counterfactual analysis can be useful in determining the 'by object' or 'by effects' nature of a particular conduct. In essence, the parties claimed that the agreement in question was not restrictive by object because in its absence, the conditions of competition would have been worse. How do you reconcile this view with the one articulated in *Generics UK* (excerpted earlier) according to which the 'mere existence of … pro-competitive effects cannot as such preclude characterization as a "restriction by object"'?
3. In its analysis, the Court of Justice implies that the pro-competitive effects of an agreement can also be relevant to the assessment under Article 101(1) TFEU and thus, not only under Article 101(3) TFEU. How do you make sense of that possibility? How different, then, are the assessments of the same elements under Article 101(1) and 101(3) TFEU?

Note on US law: proof of anti-competitive effects

In the United States, several credit card cases have been adjudicated, and competitive effects of agreements have been assessed. The most prominent of these is *Ohio v. American Express Co.* Unlike the CJEU in *MasterCard* case, the US Supreme Court was preoccupied with market definition and held that in a unitary transaction of two-sided markets (the merchant side and the customer side depend upon one another and are executed simultaneously), both sides are in the relevant market, and the plaintiff must show net anti-competitive effects–so that if the cardholders gain more than the merchants (and derivatively, shoppers) lose, effects have not been proved.

The conduct/agreement at issue was the following: the major credit card companies, Visa, MasterCard and American Express, forbade merchants to tell customers who offer their card at checkout: 'There are cheaper cards. If you use (for example) a Discover card, my interchange fee will be lower, and I can charge lower prices in the store'. Under the agreements, the merchant could not offer the customers a discount if they used a cheaper card.

The United States and 17 states sued Visa, MasterCard and American Express, alleging that these no-steering clauses were anti-competitive. Visa and MasterCard settled, agreeing to remove the clause. American Express went to trial. The District Court found a violation, the Court of Appeals reversed, and the Supreme Court, in a split decision, sided with American Express. Here are excerpts from the majority opinion and the dissenting opinion.

Ohio v. American Express Co.[27]

JUSTICE THOMAS:

***

Amex competes with Visa and MasterCard by using a different business model. While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than other networks. Due to its superior rewards, Amex tends to attract cardholders who are wealthier and spend more money. Merchants place a higher value on these cardholders, and Amex uses this advantage to recruit merchants. The model sometimes causes friction with merchants. To maintain the loyalty of

27 585 U.S. ___, 138 S.Ct. 2274 (2018).

(continued)

its cardholders, Amex must continually invest in its rewards programme. But to fund those investments, Amex must charge merchants higher fees than its rivals.***

Even though Amex's investments benefit merchants by encouraging cardholders to spend more money, merchants would prefer not to pay the higher fees. One way that merchants try to avoid them, while still enticing Amex's cardholders to shop at their stores, is by dissuading cardholders from using Amex at the point of sale. This practice is known as 'steering'.

* * *

As an initial matter, the plaintiffs' argument about merchant fees wrongly focuses on only one side of the two-sided credit-card market ….To demonstrate anticompetitive effects on the two-sided credit-card market as a whole, the plaintiffs must prove that Amex's antisteering provisions increased the cost of credit-card transactions above a competitive level, reduced the number of credit-card transactions, or otherwise stifled competition in the credit-card market. They failed to do so.

1 The plaintiffs did not offer any evidence that the price of credit-card transactions was higher than the price one would expect to find in a competitive market ….

* * *

2 The plaintiffs did offer evidence that Amex increased the percentage of the purchase price that it charges merchants by an average of 0.09% between 2005 and 2010 and that this increase was not entirely spent on cardholder rewards. The plaintiffs believe that this evidence shows that the price of Amex's transactions increased.

Even assuming the plaintiffs are correct, this evidence does not prove that Amex's antisteering provisions gave it the power to charge anticompetitive prices …. This Court will 'not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level'. [citing Brooke Group] There is no such evidence in this case. [Output is expanding.] …

3 The plaintiffs also failed to prove that Amex's antisteering provisions have stifled competition among credit-card companies. …

* * *

Lastly, there is nothing inherently anticompetitive about Amex's antisteering provisions. [Steering could induce free-riding and undermine Amex's investments.]

* * *

Because Amex's antisteering provisions do not unreasonably restrain trade, we affirm the judgment of the Court of Appeals.

(continued)

JUSTICE BREYER, with whom JUSTICES GINSBURG, SOTOMAYOR, and KAGAN join, dissenting:

* * *

… Many governments around the world have responded to concerns about the high fees that credit-card companies often charge merchants by regulating such fees directly. The United States has not followed that approach. The Government instead filed this lawsuit, which seeks to restore market competition over credit-card merchant fees by eliminating a contractual barrier with anticompetitive effects. The majority rejects that effort. But because the challenged contractual term clearly has serious anticompetitive effects, I dissent.

* * *

… The District Court found that beginning in 2005 and during the next five years, American Express raised the prices it charged merchants on 20 separate occasions. In doing so, American Express did not take account of the possibility that large merchants would respond to the price increases by encouraging shoppers to use a different credit card because the nondiscrimination provisions prohibited any such steering. The District Court pointed to merchants' testimony stating that, had it not been for those provisions, the large merchants would have responded to the price increases by encouraging customers to use other, less-expensive cards.

The District Court also found that even though American Express raised its merchant prices 20 times in this 5-year period, it did not lose the business of any large merchant. Nor did American Express increase benefits (or cut credit-card prices) to American Express cardholders in tandem with the merchant price increases. Even had there been no direct evidence of injury to competition, American Express' ability to raise merchant prices without losing any meaningful market share, in the District Court's view, showed that American Express possessed power in the relevant market.

The District Court also found that, in the absence of the provisions, prices to merchants would likely have been lower. [Discover had to abandon innovations in its low-price business model because the no-steering provisions eliminated any advantage it would get from lower prices; its lower prices would not result in additional transactions.]

[The dissenting Justices concluded that the anti-steering provision had or was likely to have significant anticompetitive effects in merchant-related services; that the significant anticompetitive effects were proof of market power, so market definition was legally unnecessary at this step one of the rule of reason; and that it was therefore improper for the Supreme Court to throw out the case on grounds that the plaintiffs had not satisfied their burden on the first step of the rule of reason.]

NOTES AND QUESTIONS

1. Pitting merchant losses against AmEx benefits, what was the Court weighing? Lower merchant fees that could produce lower store prices against increased AmEx revenues that could produce more frequent flier benefits for its premium card holders?
2. Which opinion do you find more convincing—that of Justice Thomas for the Supreme Court majority or that of Justice Breyer for the dissent? Why? Reflect on the role of facts as well as law.
3. Consider the three different modalities for analysing anti-competitive effects: that of the Court of Justice in MasterCard, that of Justice Thomas and that of Justice Breyer. What drives the differences? Which of the US opinions is more compatible with EU law?

As we proceed to examine the requirements of Article 101(3), consider how the question—what is caught by Article 101(1)?—may still have significance despite modernization and the direct effectiveness of Article 101 in its entirety. Once an agreement is caught by Article 101(1), the undertakings have the burden to justify under Article 101(3). Note the four necessary conditions for the justification, specified in the Treaty. If the agreement is caught by Article 101(1), in particular as a 'by object' restriction, can the undertakings prevail by showing that the agreement did not in fact restrict competition? Or, is restriction of competition conclusively presumed, and does the undertaking thus need to prove offsetting pro-competitive or pro-efficiency effects?

B. Article 101(3): Balancing efficiencies against the likely harm to competition

1. Introduction and guidelines

If an agreement falls within Article 101(1), it must, to be valid, satisfy the four – cumulative and exhaustive – conditions of Article 101(3), namely: (1) contribute to improving production or distribution of goods or promoting technical or economic progress (identified in Commission Guidelines as 'efficiency gains'); (2) allow consumers a fair share of benefits; (3) not impose restrictions indispensable to the attainment of these objectives; and (4) not afford the undertakings the possibility to eliminate competition in respect of a substantial part of the products concerned.

In 2004, the Commission issued Guidelines on the application of Article 101(3) of the Treaty.[28] The Guidelines were motivated by the need to give guidance to the Member States' authorities and courts, which would be applying Article 101(3) for the first time. The Guidelines state:

> 13 The objective … of Article 101 is to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources. Competition and market integration serve these ends since the

28 These are available at: https://competition-policy.ec.europa.eu/antitrust/legislation/legislation-notices_en (accessed 3 February 2023).

> creation and preservation of an open single market promotes an efficient allocation of resources throughout the Community for the benefit of consumers.

The 2004 Guidelines go on to state that they present an analytical framework and methodology based on 'the economic approach'. '[R]eflected in Article [101(3)] ... is the assessment of the positive economic effects of restrictive agreements' (paras. 5 and 32).

The 2004 Guidelines identify certain principles as follows:

> 3.1 General principles
>
> 40 Article [101](3) of the Treaty only becomes relevant when an agreement between undertakings restricts competition within the meaning of Article [101](1). In the case of non-restrictive agreements there is no need to examine any benefits generated by the agreement.
>
> 41 Where in an individual case a restriction of competition within the meaning of Article [101](1) has been proven, Article [101](3) can be invoked as a defence. According to Article 2 of Regulation 1/2003 the burden of proof under Article [101](3) rests on the undertaking(s) invoking the benefit of the exception rule. Where the conditions of Article [101](3) are not satisfied the agreement is null and void, cf. Article [101](2). However, such automatic nullity only applies to those parts of the agreement that are incompatible with Article [101], provided that such parts are severable from the agreement as a whole. If only part of the agreement is null and void, it is for the applicable national law to determine the consequences thereof for the remaining part of the agreement.
>
> 42 According to settled case law the four conditions of Article [101](3) are cumulative, i.e., they must all be fulfilled for the exception rule to be applicable. If they are not, the application of the exception rule of Article [101](3) must be refused. The four conditions of Article [101](3) are also exhaustive. When they are met the exception is applicable and may not be made dependent on any other condition. Goals pursued by other Treaty provisions can be taken into account to the extent that they can be subsumed under the four conditions of Article [101] (3).
>
> * * *
>
> 47 Any claim that restrictive agreements are justified because they aim at ensuring fair conditions of competition on the market is by nature unfounded and must be discarded. The purpose of Article [101] is to protect effective competition by ensuring that markets remain open and competitive. The protection of fair conditions of competition is a task for the legislator in compliance with Community law obligations and not for undertakings to regulate themselves.
>
> * * *

NOTES AND QUESTIONS

1. According to the 2004 Guidelines, are non-competition justifications admissible? What do you learn from para. 42?
2. What does the Commission mean by agreements 'aim[ing to] ensur[e] fair competition' (para. 47)? Give an example. Why is such an agreement the antithesis of a pro-competitive agreement?
3. Read the Commission's *amicus curiae* brief to the Irish Court in the *Irish Beef* case[29] (discussed in Chapter 2). You will recall that the case concerned an agreement between slaughterhouses to reduce capacity at the behest of the Irish government to solve a crisis of over-capacity. On preliminary reference, the Court of Justice found that the agreement was a restriction of competition by object. The case was sent back to the Irish Court to determine whether the agreement should be exempted under Article 101(3) TFEU.

   Did the Commission indicate whether it thought the agreement should be exempted? Which criteria would be the most difficult for the parties to satisfy?

   Should an economic crisis justify a more lenient approach to justifications in order to help companies survive the crisis?
4. Since the publication of the Article 101(3) guidelines, there have been very few cases at EU level discussing in depth the application of the four conditions of Article 101(3) TFEU. Can you hypothesize why it is so? What do you make of the fact that, according to the Article 101(3) guidelines, 'Article [101(3)] … does not distinguish between agreements that restrict competition by object and agreements that restrict competition by effect' (para. 20)? For illustration purposes, consult Commission Decision of 19 December 2007 in Case COMP/34.579—*MasterCard* (referred to earlier at p. 117).

* * *

The tension between Article 101(1) and 101(3) TFEU inherent in the bifurcated structure of that provision is particularly apparent from the analysis of agreements or decisions of associations of undertakings—which may be by-laws of associations—that are designed to foster efficiency or innovation. These tend to fall into two categories: (1) loose agreements, such as exchanges of information and standard-setting decisions; and (2) tighter agreements, which contemplate integration of the participating entities, such as joint ventures or alliances. The tightest joint ventures are concentrations covered by the Merger Regulation, which are discussed in Chapter 6.

2. Loose agreements

a. Agreements to exchange information

Economics teaches that information (knowledge of the market) is good. It helps sellers understand supply and demand; it helps them determine the

29 Available at: https://competition-policy.ec.europa.eu/antitrust/national-courts/amicus-curiae-observations_en (accessed 3 February 2023).

efficient amount to produce, and where, to whom and how much to sell. Similarly, it helps buyers understand the efficient amount of goods or services to buy and the lowest price at which they can buy. Information helps make markets work.

But in highly concentrated, high-barrier markets where firms have incentives to behave cooperatively, the sharing of market information can have outbalancing negative qualities. Oligopolists' knowledge of the sensitive business details of one another can help them coordinate and stabilize prices upwards. When firms are few, aggregated data can be more easily disaggregated. Moreover, when the information is obtained as the result of agreement among the firms, the danger signals are compounded: firms are not likely to give their sensitive information (e.g., cost, output, forecasts) to a competitor if they expect the data to be used against them. They are more likely to share the information if they can expect cooperation in lessening competition.

Often, when market conditions point to a negative (price-raising) effect, one suspects that the data-sharing agreement is meant to facilitate a cartel; for as we saw in Chapter 2, cartelists need to know the most sensitive information about one another to find a joint profit-maximizing price, and they need to police their cartel agreement to prevent defection. Information sharing supports both tasks.

John Deere Ltd v. Commission (T-35/92, C-7/95)

The Agricultural Engineers Association was a trade association of producers and importers of agricultural tractors in the UK. It had some 200 members and was open to membership by all other agricultural tractor companies. The market was oligopolistic; the four largest firms accounted for almost 80% of sales. The firms' market shares were stable, and entry barriers were high. The product was homogeneous. The association organized an exchange of information among its members (who accounted for 88% of sales) based on the information contained in registration forms that were required to be filed in the UK. The data revealed great detail of sales and market shares, broken down by year, quarter, month and week, and by country, region, county and dealer territory, and made it possible to identify not only the sales of each producer but also the imports and exports between dealer territories.

The information exchanged did not directly concern prices, and there was no evidence that the information exchange was designed in support of a cartel. Indeed, there was no claim that the *object* of the agreement was to harm trade or competition; and the Commission was unable to establish that the agreement, which was in force for 20 years, produced an actual anti-competitive effect (higher prices).

(continued)

The Commission found that the information exchange agreement was caught by Article 101(1) and was not entitled to an exemption. The General Court agreed. It upheld Commission findings that the data exchange (1) disadvantaged non-members, who would not have the benefit of the information exchanged; (2) produced *potential* anti-competitive effects among members by providing a forum for facilitating a high price policy; and (3) made it possible for each participating manufacturer to monitor *its* dealers' sales and thus made it possible for [manufacturers] to confer absolute territorial protection on each of their dealers.[30] Further, the association did not show that the restrictions on competition resulting from the agreement were indispensable, 'particularly with regard to the objectives of contributing to economic progress and equitable distribution of the benefits' (para. 105).

The Court of Justice affirmed.[31] It rejected John Deere's arguments, among others, that Article 101(1) does not prohibit purely potential effects on competition, and that the General Court improperly inferred harm to competition from high concentration without any evidence of higher prices or changes in the pattern of trade. In particular:

88. In the present case, in reaching the conclusion that a reduced degree of uncertainty as to the operation of the market restricts undertakings' decision-making autonomy and is consequently liable to restrict competition within the meaning of Article [101](1), the Court of First Instance, …, held in particular that, in principle, where there is a truly competitive market, transparency between traders is likely to lead to intensification of competition between suppliers, since the fact that in such a situation a trader takes into account information on the operation of the market, made available to him under the information exchange system, in order to adjust his conduct on the market, is not likely, having regard to the atomised nature of the supply, to reduce or remove for the other traders all uncertainty about the foreseeable nature of his competitors' conduct. The Court of First Instance considered, however, that on a highly concentrated oligopolistic market, such as the market in question, the exchange of information on the market was such as to enable traders to know the market positions and strategies of their competitors and thus to impair appreciably the competition which exists between traders.

89. In making that assessment, the Court of First Instance took account of the nature of the information exchanged, the frequency with which it was disseminated and of the persons to whom it was disclosed. As regards, first, the nature of the information exchanged, particularly that relating to sales made in the territory of each of the dealerships in the distribution network, the Court of First Instance found, …, that those were business secrets and allowed the undertakings which were parties to the agreement to know the sales made by their dealers within and beyond their allocated territory, and also the sales made by the other competing

30 Case T-35/92, *John Deere Ltd v. Commission* [1994] ECRII-957, EU:T:1994:259, para. 96.
31 Case C-7/95 *P, John Deere Ltd v. Commission* [1998] ECRl-3111, EU:C:1998:256.

(continued)

undertakings and their dealers who were parties to the agreement. Second, the Court of First Instance held, …, that the information on sales was disseminated systematically and at short intervals. Last, …, the Court of First Instance found that the information was shared between the main suppliers, for their sole benefit, to the exclusion of other suppliers and of consumers.

90. In view of that reasoning, the Court of First Instance must be considered to have concluded correctly that the information exchange system reduces or removes the degree of uncertainty as to the operation of the market and that the system is therefore liable to have an adverse influence on competition between manufacturers.

John Deere was the first prohibition by the Commission and the Court of a pure information exchange of non-price information; that is, an information exchange not as part of a cartel.

? NOTES AND QUESTIONS

1. Were the Court and Commission correct? How is such an agreement 'exclusionary' to non-members? How does the exchange of sales information harm competition among members? Do you suspect that the members shared sales data to compete or to lessen competition? Do you believe that this exchange of information chilled parallel imports, i.e., kept each producer's product within each of its dealer's territories and thus kept the producer's product from competing with itself? Could this have been a device to help the producers cartelize? Which of the possible effects would most concern you if you were a competition authority?
2. In *T-Mobile Netherlands* (discussed earlier), representatives of the five big mobile telephone operators 'held a meeting … [on 13 June 2001 at which] they discussed … the reduction of standard dealer remunerations for postpaid subscriptions [commissions to their agents for distributing their product to consumers], which was to take effect on or about 1 September 2001'. They shared confidential information in their discussions (para. 12). When challenged, the firms argued that their conversations had no effect on consumer prices. The Dutch court made a preliminary reference. The Court of Justice held that for a concerted practice to have an anti-competitive object, 'it is sufficient that it has the potential to have a negative impact on competition'. In the case of an anti-competitive object, it is not necessary that there be an anti-competitive effect, which 'can only be of relevance for determining the amount of any fine and assessing any claim for damages' (paras. 30, 31). 'Article [101] … is designed to protect not only the immediate interests of individual competitors or consumers but also to protect the structure of the market and thus competition as such' (para. 38).

   Does this mean that the information exchange agreement was automatically caught by Article 101(1)? Do you think that it was merely a benign or pro-competitive agreement to exchange information and thus get knowledge? Or, was it a thinly veiled attempt to ratchet down commissions payable to the agents?
3. In *Dole Food Company v. Commission* (C-286/13 P, discussed earlier at p. 70),[32] banana producers engaged in bilateral communications relating to price-setting factors before setting their

32 On appeal from T-588/08, EU:T:2013:130 and Commission Decision of 15 October 2008 in Case COMP/39.188—Bananas.

weekly quotation prices. They discussed the factors relevant to the setting of their quotation prices and shared price trends and indications for the coming week. The Court of Justice held that the exchange was a violation by object. It made it possible for the competitors to reduce uncertainty. Accordingly, the Commission did not have to prove effects; nor did it have to prove a direct link between the practice and consumer prices. Do you think the competitors shared the information to coordinate or to compete? In your opinion, what was the key factual element that determined the Commission's analysis, as upheld by the General Court and the Court of Justice?

Wirtschaftsvereinigung Stahl (T-16/98)[33]

On 26 November, the Commission adopted a decision under Article 65 of the ECSC Treaty (the counterpart to Article 101 in the now-expired Coal and Steel Community Treaty) prohibiting an information exchange system notified by Wirtschaftsvereinigung Stahl, the German steel industry association. The system, which had not been implemented, provided for the exchange between association members of sensitive, recent and individualized data on supplies of more than 40 steel products in the various Member States, broken down by steel quality. The exchange would also have concerned the breakdown by consumer sector and the market shares of member companies on the German market.

The leading German steel producers were to have participated in the system.[34] The notified information exchange agreement would have restricted competition between the parties (in the concentrated markets) by increasing market transparency to such a degree that any independent competitive action on the part of one company would have been noticed immediately by its competitor, which would have been able to take suitable retaliatory measures such as systematically canvassing customers or offering temporary or local selective discounts. This increased transparency would thus have been liable to deter companies from trying to increase their market shares, a fundamental competitive activity. In addition, the frequency of the exchange, i.e., monthly, and the freshness of the data exchanged (1 month old), would have reduced considerably the time during which a company could have derived any benefit from behaving competitively.

The decision is consistent with the Commission's practice, which has been upheld by the General Court (citing *John Deere*), of viewing as anti-competitive any systems involving the exchange of sensitive, recent and individualized data on a concentrated market in homogeneous products. What was the principal harm feared from the steel industry's information exchange? In which case—tractors or steel—is the concern of cartel-like or cooperative pricing behaviour stronger?

33 Case T-16/98, *Wirtschaftsvereinigung Stahl and Others v. Commission* [2001] ECR II-1217, ECLI:EU:T:2001:117.

34 Excerpt from European Commission Report on Competition Policy (1997), p. 127.

(continued)

The Commission decision was subsequently annulled because the assessment contained therein was based on information and materials that had not been part of the agreement notified at the time. The General Court held as follows:

44. As is apparent both from the case-law and the practice followed by the Commission in adopting decisions, information exchange agreements are not generally prohibited automatically but only if they have certain characteristics relating, in particular, to the sensitive and accurate nature of recent data exchanged at short intervals. In the contested Decision, the Commission referred expressly and almost exclusively to the UK Tractors case, …, to found its primary position regarding the treatment of information exchange agreements in an oligopolistic market. That case concerned an exchange of extremely accurate data on registered vehicles and the place of their registration, allowing every sale by competitors on the territory of a dealer to be identified as well as sales by a dealer outside his own territory, allowing the activities of dealers to be monitored and imports and exports to be identified and, therefore, allowing parallel imports to be supervised. The Commission states, in recital 40 of the contested Decision, that the exchange of information in the UK Tractors case, …, had the effect of revealing the market positions and strategies of the various individual competitors. According to recitals 42 and 43 of the contested Decision, not only are questionnaires 2-71, 2-73 and 2-74 inextricably linked, but their combined effect is to reveal the strategy of each active producer undertaking in the markets in question.

45. Thus it appears that the Commission based its assessment on the combined effect of the exchange of the three questionnaires 2-71, 2-73 and 2-74, so that the fact that the notified agreement does not provide for the exchange of questionnaire 2-73, which specifically furnishes the most accurate and detailed data and is accordingly likely to reveal the strategy of the various producers, has the effect of completely invalidating the analysis made by the Commission in the contested Decision. If the Commission had taken account of the real scope of the notified agreement, which is limited to data on the sales of the participating undertakings alone, without distinguishing between the different consumer sectors, and which allows market shares to be calculated only approximately, it is not inconceivable that its evaluation would have been different and that it would have considered that the agreement was not contrary to Article 65(1) of the ECSC Treaty.

For a situation where an exchange of information was considered unlikely to infringe Article 101 TFEU, consider the *Asnef-Equifax* judgement of the Court of Justice and reflect on the factors distinguishing this case from the situations underlying the *John Deere* and *Wirtschaftsvereinigung Stahl* cases.

CASE

Asnef-Equifax v. Asociación De Usuarios De Servicios Bancarios (Case C-238/05)[35]

[Financial institutions in Spain agreed to exchange information about solvency of customers and lateness of payment. They planned to establish a register for such information. The Spanish competition authority authorized the register for 5 years on condition that the register be available to all financial institutions on a non-discriminatory basis and that it not disclose the information it contained on lenders. Ausbanc, an association of bank users, sought an annulment in a Spanish court. It alleged that the register would facilitate a boycott against poor credit risks. The Spanish court made an Article 267 reference to the Court of Justice regarding applicability and treatment under Article 101 TFEU. The court identified the various questions of fact regarding economic and legal context that the national court would have to decide, and it gave considerable guidance both as to when Article 101(1) would apply and when the Article 101(3) criteria would be satisfied.]

55 … [R]egisters such as the one at issue in the main proceedings, by reducing the rate of borrower default, are in principle capable of improving the functioning of the supply of credit. As the Advocate General observed, … if, owing to a lack of information on the risk of borrower default, financial institutions are unable to distinguish those borrowers who are more likely to default, the risk thereby borne by such institutions will necessarily be increased and they will tend to factor it in when calculating the cost of credit for all borrowers, including those less likely to default, who will then have to bear a higher cost than they would if the institutions were in a position to evaluate the probability of repayment more precisely. In principle, registers such as that mentioned above are capable of reducing such a tendency.

56 Furthermore, by reducing the significance of the information held by financial institutions regarding their own customers, such registers appear, in principle, to be capable of increasing the mobility of consumers of credit. In addition, those registers are apt to make it easier for new competitors to enter the market.

57 Nonetheless, whether or not there is in the main proceedings a restriction of competition within the meaning of Article [101(1) TFEU] depends on the economic and legal context in which the register exists, and in particular on the economic conditions of the market as well as the particular characteristics of the register.

58 In that regard, first of all, if supply on a market is highly concentrated, the exchange of certain information may, according in particular to the type of information exchanged, be

35 [2006] ECR I-11125, EU:C:2006:734.

CASE *(continued)*

liable to enable undertakings to be aware of the market position and commercial strategy of their competitors, thus distorting rivalry on the market and increasing the probability of collusion, or even facilitating it. On the other hand, if supply is fragmented, the dissemination and exchange of information between competitors may be neutral, or even positive, for the competitive nature of the market. In the present case, it is common ground, … that the referring court premissed its reference for a preliminary ruling on the existence of 'a fragmented market', which it is for that court to verify.

59 Secondly, in order that registers such as that at issue in the main proceedings are not capable of revealing the market position or the commercial strategy of competitors, it is important that the identity of lenders is not revealed, directly or indirectly. In the present case, it is apparent from the decision for referral that the Tribunal de Defensa de la Competencia imposed on Asnef-Equifax, which accepted it, a condition that the information relating to lenders contained in the register not be disclosed.

60 Thirdly, it is also important that such registers be accessible in a nondiscriminatory manner, in law and in fact, to all operators active in the relevant sphere. If such accessibility were not guaranteed, some of those operators would be placed at a disadvantage, since they would have less information for the purpose of risk assessment, which would also not facilitate the entry of new operators on to the market.

61 It follows that, provided that the relevant market or markets are not highly concentrated, that the system does not permit lenders to be identified and that the conditions of access and use by financial institutions are not discriminatory, an information exchange system such as the register is not, in principle, liable to have the effect of restricting competition within the meaning of Article [101(1) TFEU].

62 While in those conditions such systems are capable of reducing uncertainty as to the risk that applicants for credit will default, they are not, however, liable to reduce uncertainty as to the risks of competition. Thus, each operator could be expected to act independently and autonomously when adopting a given course of conduct, regard being had to the risks presented by applicants. Contrary to Ausbanc's contention, it cannot be inferred solely from the existence of such a credit information exchange that it might lead to collective anticompetitive conduct, such as a boycott of certain potential borrowers.

63 Furthermore, since, as the Advocate General observed, … any possible issues relating to the sensitivity of personal data are not, as such, a matter for competition law, they may be resolved on the basis of the relevant provisions governing data protection. In the main proceedings, it is apparent from the documents before the Court that, under the rules applicable to the register, affected consumers may, in accordance with the Spanish legislation, check the information concerning them and, where necessary, have it corrected, or indeed deleted.

CASE *(continued)*

The applicability of Article [101(3) TFEU]

64 Only if the referring court finds, in the light of the considerations set out at paragraphs 58 to 62 of this judgement, that there is indeed in the dispute before it a restriction of competition within the meaning of Article [101(1)] will it be necessary for that court to carry out an analysis by reference to Article [101(3)] in order to resolve that dispute.

65 The applicability of the exemption provided for in Article [101(3)] is subject to the four cumulative conditions laid down in that provision ….

66 It is clear from the documents before the Court, and in particular from the second question referred by the national court, that that court seeks an answer from the Court in respect of, in particular, the second of those conditions, which provides that consumers are to be allowed a fair share of the profit resulting from the agreement, decision or practice in question. The national court asks, in essence, whether, where all consumers do not derive a benefit from the register, the register might nonetheless benefit from the exemption provided for in Article [101(1)].

67 Apart from the potential effects described at paragraphs 55 and 56 of this judgement, registers such as the one at issue in the main proceedings are capable of helping to prevent situations of overindebtedness for consumers of credit as well as, in principle, of leading to a greater overall availability of credit. In the event that the register restricted competition within the meaning of Article [101(1)], those objective economic advantages might be such as to offset the disadvantages of such a possible restriction. It would be for the national court, if necessary, to verify that.

Read the paragraphs of the Horizontal Guidelines dealing with exchanges of information. Apply them to *John Deere*, *T-Mobile*, the German steel exchange and *Asnef-Equifax*.

Note on information exchange in COVID times

Over the course of the COVID pandemic, the Commission issued a number of comfort letters aimed to provide legal certainty to participants in certain initiatives aimed to address critical supply issues. One related to the exchange of commercial information in the course of a so-called 'Matchmaking Event' allowing manufacturers of relevant raw materials, companies with relevant production capacities, or other key inputs for COVID-19 vaccines to engage with the developers and manufacturers of the vaccines seeking to match their demand with the supply of potentially scarce inputs.[36]

The starting point of the Commission's analysis was that

> 'in view of the urgent demand for COVID-19 vaccines, the pharmaceutical industry and other companies active in the production of inputs for vaccines, with the support from the EU and the Member States, are endeavouring to increase supplies of vaccines that are authorized in the EU and address the risk of shortages for COVID-19 vaccines, including by seeking complementary available production capacities along the entire value chain'.

In turn, the Commission held as follows:

> Based on the available information, the information exchanges occurring between participating companies during the Matchmaking Event and aimed at finding partners with complementary capabilities and skills to achieve a faster production of urgently needed COVID-19 vaccines, including through quicker delivery of key inputs, serve to increase the overall output of COVID-19 vaccines. The Commission therefore considers that the organisation of and the participation at the Matchmaking Event, do not raise concerns under Article 101 TFEU in the specific circumstances at hand, provided that:
>
> - in relation to matchmaking meetings between any companies (regardless of whether they are competitors or active at different levels of the supply chain), any exchange of confidential business information will be limited to what is indispensable for effectively resolving the supply challenges linked to Covid-19 pandemic; and
> - in relation to any matchmaking meetings between direct competitors,
>   - companies will not share any confidential business information regarding their competing products, in particular information relating to prices, discounts, costs, sales, commercial strategies, expansion plans and investments, customers list, etc.;
>   - direct competitors will keep a record of which topics they discussed.
>
> If direct competitors were to consider that exchanging confidential business information in relation to competing products would be indispensable to

36 The comfort letter is available at: https://ec.europa.eu/competition/antitrust/comfort_letter_coronavirus_matchmaking_event_25032021.pdf (last accessed on 25 September 2022).

> finding solutions for scaling-up production or supply of COVID-19 vaccines, they should contact the Commission for specific guidance at COMP-COVID-ANTITRUST@ec.europa.eu at least 24 hours before engaging in any such exchange in the context of the Matchmaking Event.

Reflect on the substance of the comfort letter in view of the general principles guiding the assessment of information exchanges under Article 101 TFEU. Did the circumstances of the COVID pandemic require bending the rules or carving out some exceptions? If yes, which ones? If not, why not? Develop a reasoning aimed to (i) support and (ii) criticize the rules of engagement proposed in the comfort letter.

b. Standard setting

Standard-setting organizations are regarded as increasingly important in facilitating innovation, particularly in information technologies such as for mobile phones. It has become common for holders of intellectual property (IP) rights to commit to disclose their IP while standards are being created, and if the standard incorporates their IP, to commit to license it on fair, reasonable and non-discriminatory terms ('FRAND' terms).

In high-profile cases involving Rambus and Qualcomm, the Commission suspected the undertaking of staging a patent ambush: advocating a standard incorporating the firm's IP, failing to disclose the IP and charging high royalties after the standard is adopted. The *Rambus* case resulted in a commitment decision, and the *Qualcomm* case was dropped for failure of proof of wrongdoing.[37]

Obviously drawing from these experiences, the Commission has included standard-setting in its Horizontal Guidelines. The guidelines specify conditions under which standard-setting agreements will not give rise to competition concerns:[38]

- Where participation in standard development is unrestricted and the procedure for adopting the standard in question is transparent, standardisation agreements which contain no obligation to comply with the standard and provide access to the standard on fair, reasonable and

37 See Commission Decision of 9 December 2009 in Case COMP/38.636—Rambus, and Commission Decision of 24 November 2009 in Case COMP/39.247—Texas Instruments/Qualcomm.

38 See link at: http://ec.europa.eu/competition/antitn,st/legislation/horizontal.html (accessed 2 June 2 017)

non-discriminatory (FRAND) terms will normally not restrict competition within the meaning of Article 101(1).

- In particular, to ensure unrestricted participation the rules of the standard-development organization would need to provide that all competitors in the market or markets affected by the standard can participate in the process leading to the selection of the standard. The standard development organizations would also need to have objective and non-discriminatory procedures for allocating voting rights as well as, if relevant, objective criteria for selecting the technology to be included in the standard.
- With respect to transparency, the relevant standard development organization would need to have procedures which allow stakeholders to effectively inform themselves of upcoming, on-going and finalised standardization work in good time at each stage of the development of the standard.
- Furthermore, the standard development organization's rules would need to ensure effective access to the standard on fair, reasonable and non-discriminatory terms.

Many of the FRAND cases arise under Article 102 T FEU, where a holder of an essential patent that it has agreed to license seeks an injunction against an infringing use by a willing licensee. For a discussion of these cases, see Chapter 6.

3. Tighter agreements

Firms may form joint ventures and alliances to share risks and areas of expertise and thus, to create synergies. These are pro-competitive properties. The combination can, however, also have some anti-competitive aspects. For example, it might combine important competitors in a concentrated market, and the partners might otherwise be in a position to continue their competition against one another. Also, the partners might incorporate unnecessary or unreasonably restrictive ancillary restrictions, such as certain exclusive dealing that lessens outsiders' access. In the rare case, a joint venture might be an essential facility that outsiders cannot duplicate and that outsiders must be able to access to compete effectively.

The principal judgement on pro-competitive and anti-competitive effects of joint ventures is *European Night Services*. Here are excerpts from the judgement regarding Article 101(3).

CASE

European Night Services Ltd v. Commission (Cases T-374–375, 384 and 388/94)[39]

[Four railway firms—the railway companies of Britain ('BR'), Germany ('DB'), the Netherlands ('NS') and France ('SNCF')—agreed to form a joint venture, European Night Services ('ENS'), to provide overnight passenger rail services between the UK and the continent by way of the Channel Tunnel. They filed their agreements with the Commission, seeking a negative clearance or an exemption under the regulation applying competition rules to rail transport. The Commission found, as the relevant markets, the market for the transport of business travellers (for whom air travel, among other things, is a substitute) and the market for the transport of leisure travellers (for whom car travel, among other things, is a substitute). It made no reference in its decision to market shares of ENS or any competing operators but later referred to data in the parties' notification to contend that a conservative estimate of ENS' market share was 7% to 8%. The Commission denied a negative clearance and granted an exemption for a period of 8 years on condition that the parent companies supply equivalent services on the same terms to any international grouping of railways and any transport operator wishing to compete with ENS in the Channel Tunnel. The railways appealed, contending that the Commission had not shown grounds for application of Article [101(1) TFEU], that ENS' market share was less than 5% on most routes and in any case was insignificant, and that in any event the conditions imposed by the Commission were disproportionate and improper, and the term of exemption was too short. On the last two points, the General Court said:]

As to the Commission's requirement that the parent railroads supply to competitors of ENS the same necessary services that they supply to ENS

205 According to paragraph 79 of the contested decision, the aim of [requiring ENS to supply services to competitors] is that of 'preventing the restrictions of competition from going beyond what is indispensable'.

* * *

207 … [E]ven if the Commission had made an adequate and correct assessment of the restrictions of competition in question, it would be necessary to consider whether it was a proper application of Article [101] (3) to impose on the notifying parties the condition that train paths, locomotives and crews must be supplied to third parties on the same terms as to ENS, on the ground that they are necessary or that they constitute essential facilities, as discussed by the parties in their pleadings and at the hearing.

39 [1998] ECR II-3141, EU:T:1998:198.

CASE *(continued)*

* * *

209 … [W]ith regard to an agreement such as that in the present case, setting up a joint venture, which falls within Article [101](1) of the Treaty, the Court considers that neither the parent undertakings nor the joint venture thus set up may be regarded as being in possession of infrastructure, products or services which are 'necessary' or 'essential' for entry to the relevant market unless such infrastructure, products or services are not 'interchangeable' and unless, by reason of their special characteristics—in particular the prohibitive cost of and/or time reasonably required for reproducing them—there are no viable alternatives available to potential competitors of the joint venture, which are thereby excluded from the market.

210 The question whether the Commission could validly regard the supply of (a) train paths, (b) locomotives and (c) crews to ENS by its parent undertakings as necessary or essential services which had to be made available to third parties on the same terms as to ENS and whether, in so doing, it provided a valid statement of reasons for its decision must be examined in the light of the above considerations and by analogy with the case law … . Finally, that examination will also serve as the basis for determining whether the Commission made a correct analysis of the alleged restrictions of competition with regard to third parties arising out of the special relationship between the parent undertakings and ENS.

211 With regard, first, to train paths, [the Commission's decision is based on a false premise because it erroneously treated ENS as a transport operator].

212 With regard, second, to the supply of locomotives, as pointed out above, locomotives cannot be regarded as necessary or essential facilities unless they are essential for ENS's competitors, in the sense that without them they would be unable either to penetrate the relevant market or to continue operating on it. However, since the decision defined the relevant market as the market for the transport of business travellers and the market for the transport of leisure travellers, both of which are intermodal, and since ENS's market share does not exceed 7 per cent to 8 per cent according to the Commission, or 5 per cent according to the notification of the parties, on either of those intermodal markets, it cannot be accepted that a possible refusal by the notifying undertakings to supply ENS's competitors with special locomotives for the Channel Tunnel could have the effect of excluding such competitors from the relevant market as thus defined. It has not been demonstrated that an undertaking having such a small market share can be in a position to exert any influence whatever on the functioning or structure of the market in question.

CASE *(continued)*

213 Only if the market under consideration were the completely different, intramodal, market for business and leisure travel by rail, on which the railway undertakings currently hold a dominant position, could a refusal to supply locomotives possibly have an effect on competition. However, it was not that intramodal market which was finally considered relevant by the Commission, but the intermodal market ….

* * *

215 As the applicants have argued, the contested decision does not contain any analysis demonstrating that the locomotives in question are necessary or essential. More specifically, it is not possible to conclude from reading the contested decision that third parties cannot obtain them either directly from manufacturers or indirectly by renting them from other undertakings. Nor has any correspondence between the Commission and third parties, demonstrating that the locomotives in question cannot be obtained on the market, been produced before the Court. As the applicants have stated, any undertaking wishing to operate the same rail services as ENS through the Channel Tunnel may freely purchase or rent the locomotives in question on the market … .

216 … [T]he Commission has … merely asserted that … only the notifying undertakings actually possess such locomotives. That argument cannot, however, be accepted. The fact that the notifying undertakings have been the first to acquire the locomotives in question on the market does not mean that they are alone in being able to do so.

217 Consequently, the Commission's assessment of the necessary or essential nature of the special locomotives designed for the Channel Tunnel and, thus, the obligation imposed on the parent undertakings to supply such locomotives to third parties are vitiated by an absence or, at the very least, an insufficiency of reasoning.

218 For the same reasons, the obligation imposed on the parent undertakings also to supply train crews for special locomotives for the Channel Tunnel to third parties is similarly vitiated by an absence or an insufficiency of reasoning.

219 Consequently, the contested decision is vitiated by an absence or, at the very least, an insufficiency of reasoning in so far as it requires the applicants to supply to third parties in competition with ENS the same 'necessary services' as it supplies to ENS.

* * *

CASE *(continued)*

221 As regards, first, access to infrastructure (train paths), it is true that access for third parties may in principle be hindered when it is controlled by competitors; nevertheless, the obligation of railway undertakings which are also infrastructure managers to grant such access on fair and non-discriminatory terms to international groupings competing with ENS is explicitly provided for and guaranteed by Directive 91/440. The ENS agreements therefore cannot, by definition, impede access to infrastructure by third parties. As regards the supply to ENS of special locomotives and crew for the Channel Tunnel, the mere fact of its benefitting from such a service could impede access by third parties to the downstream market only if such locomotives and crew were to be regarded as essential facilities. Since … they cannot be categorised as such, the fact that they are to be supplied to ENS under the operating agreements for night rail services cannot be regarded as restricting competition *vis-à-vis* third parties. That aspect of the Commission's analysis of restrictions of competition *vis-à-vis* third parties is therefore also unfounded.

[T]he contested decision must be annulled.

? NOTES AND QUESTIONS

1. Was ENS a pro-competitive joint venture? Why? Should the joint venture have an obligation under Article 101 TFEU to give competitors access to the tunnel (had it not been provided by agreement)? What was the Court's concern with imposing conditions on the joint venture? Was it well taken?
2. If, in *ENS*, the market was rail travel and the joint venturers were the only firms that possessed locomotives fit to travel through the Channel Tunnel, would the Commission's requirement that the joint venturers supply locomotives to third parties on the same terms as they supply ENS withstand scrutiny?
3. Today, after modernization, *ENS* would not seek a negative clearance or exemption. It would simply, after consulting its lawyers, proceed with the venture. If the Commission, a national authority in an affected Member State, or a private party that considered itself harmed, brought proceedings, would the analysis differ? Would the outcome differ? Note that under the old Regulation 17, if an agreement fell within Article 101(1) but was justified under Article 101(3), the Commission was likely to impose conditions and would limit any exemption to a term of years. Is the system under Regulation 1/2003 superior?
4. For illustration purposes, consider the following two matters, as summarized by the Commission in its 1996 Competition Policy Report,[40] both of which involve strategic alliances—i.e., synergistic joint ventures that enable the partners to enter new markets and expand their capabilities. Reflect on whether and to what extent the agreements restrict or distort competition. Were its members competitors, or potential competitors? How did the Commission address potential issues?

40 European Commission Competition Policy Report (1996), at p. 121, available at: https://competition-policy.ec.europa.eu/publications/annual-reports_en (accessed 3 February 2023).

Atlas/GlobalOne

On 17 July [1996] the Commission authorized the Atlas project, a joint venture between Deutsche Telekom AG (DT) and France Télécom (FT) aimed at providing telecommunications services to large users in Europe. The services provided by Atlas include network services, outsourcing and very small aperture satellite (VSAT) services. The Commission also authorized the proposed GlobalOne joint venture, an alliance between Atlas and Sprint Corporation (Sprint) for the supply of the above services worldwide. Within GlobalOne, the parties will provide the same services as within Atlas, together with traveller services and telecommunications services to other telecommunications organizations (TOs).

In the relevant markets, the services provided to corporate users raise important issues to do with competition in the EEA. This is the case, for example, with the market for the transmission of data via terrestrial networks. DT and FT have market shares there well in excess of 70% in Germany and France respectively, buttressed by a legal monopoly over the supply of infrastructure. In addition, the Atlas project provided for the elimination of a competitor of DT in Germany, namely FT's local subsidiary, Info AG.

In the course of the proceeding, France and Germany first of all undertook to liberalize the alternative infrastructures by introducing a system under which licences would be granted to any operator meeting certain technical requirements, thereby making competitors less dependent on the networks of FT and DT.

The Commission made the Atlas/GlobalOne authorization conditional on the granting of the first two infrastructure licences in France and Germany.

DT and FT have postponed the transfer of their domestic data transmission networks to the joint venture pending full liberalization of infrastructure services in France and Germany. FT has undertaken to sell Info AG. This modified contractual framework, coupled as it is with strict conditions and obligations, will help to ensure that the two projects satisfy an increasingly urgent demand and compete with the few telecommunications services providers existing at world level without, however, resulting in any elimination of competition.

* * *

Iridium

The Commission, by formal decision, gave the green light to the creation of Iridium, a company led by the US corporation Motorola, which intends to provide from the last quarter of 1998 global digital wireless communications services using a constellation of 66 low earth orbit (LEO) satellites, to be launched and placed in orbit during the next 24 months. Services will include mobile voice telephony, paging and basic data services (such as facsimile) and will be provided via portable hand-held (dual mode or single mode) telephones, vehicle-mounted telephones, pagers and other subscriber equipment.

Apart from Motorola, Iridium is owned by 16 strategic investors including a number of telecommunication services providers and equipment manufacturers from around the world. Two European companies figure among those strategic investors: Stet (Italy; 3.8%) and Vebacom (Germany; 10%). Each of the two has its own gateway service territory covering different parts of Europe and the associated exclusive right to construct and operate a gateway within its respective territory.

In the decision, the creation of Iridium has been concluded to fall outside the scope of both Article [101(1) TFEU] and Article 53(1) of the EEA Agreement. In this respect, it was concluded that none of the strategic investors could be reasonably expected to separately assume the very high level of investments required (nearly USD 5 billion) and the very high risk of technical and commercial failure associated with such a new system. In addition, no investor has all the necessary licences to operate such a system.

Satellite systems like Iridium (commonly referred to as S-PCS systems) are expected to complement wireless terrestrial mobile technologies (such as GSM) in areas where those terrestrial technologies have failed to penetrate (i.e., rural parts of the developed world and both urban and rural parts of lower-income countries) or where terrestrial roaming is not available because of incompatible technologies.

In addition, S-PCS systems are expected to act as a complement and even a substitute for the public switched fixed telephone network, enhancing service coverage in remote areas of low population density and/or where the terrestrial infrastructure is very poor.

The same conclusion as to the inapplicability of the competition rules of both the [TFEU] and the EEA Agreement was reached in respect of several ancillary restraints; namely as regards the distribution of the Iridium services and the pricing policies that Iridium may suggest as guidelines to gateways investor operators.

C. Beyond Article 101(1) and (3): public policy and non-competition goals

The Commission's guidelines on the application of Article 101(3) TFEU state that an agreement falls within Article 101(1) if it restricts competition, and that an Article 101(3) exemption is available only if it has offsetting pro-competitive (including efficiency and innovation) effects. What if the agreement is intended to pursue an important public policy objective? Are there any exceptions from the principle stated in the Article 101(3) guidelines?

1. The 'labour exception'

As already mentioned in Chapter 1 in relation to the notion of undertaking, collective agreements between organizations representing employers and employees fall outside the scope of Article 101 TFEU by reason of the social policy objectives otherwise pursued by the EU Treaties. This exception was carved out by the Court of Justice in a case known as 'Albany'.

CASE

Albany International BV and Textile Industry Pension Funds (Case C-67/96)[41]

[The Netherlands maintains a pension system. A compulsory statutory scheme entitles the whole population to receive a basic pension, calculated by reference to the statutory minimum wage. This amount, however, is quite limited.

Industry sectors are covered by supplementary pensions managed by collective schemes negotiated in the context of collective worker–employer agreements. The law requires employers in the sector to be affiliated with the sectoral fund, subject to satisfying conditions for exemption.

Albany International BV was a textile company. It was not party to the collective agreement. It provided its own supplementary coverage through an insurer of its choice; it sought and was denied an exemption from the statutory scheme, and it refused to pay its mandatory contributions to the statutorily designated fund, the Textile Industry Trade Fund. When sued for arrears, it challenged the Dutch law's requirement of compulsory affiliation, and the collective agreement providing for the designated fund, as contrary to Article 3(1)(g) EC (now in Protocol 27), Article 4(3) TEU, and, Articles 101, 102 and 106 TFEU.[42] Questions were referred to the Court of Justice.]

47 Albany contends that the request by management and labour to make affiliation to a sectoral pension fund compulsory constitutes an agreement between the undertakings operating in the sector concerned, contrary to Article [101](1) of the Treaty.

41 [1999] ECR I-5751, EU:C:1999:430.

42 Article 3(1)(g) EC required 'a system ensuring that competition in the internal market is not distorted'; Article 4(3) TEU requires the Member States to 'facilitate the achievement of the Union's tasks'; Article 106 TFEU requires public and state-privileged undertakings to abstain from measures inconsistent with the nondiscrimination mandate and the competition rules and to comply with the competition rules as long as compliance does not obstruct their performance of public tasks. The interaction of these provisions is further dealt with in Chapter 7.

CASE *(continued)*

48 Such an agreement, in its view, restricts competition in two ways. First, by entrusting the operation of a compulsory scheme to a single manager, it deprives the undertakings operating in the sector concerned of the possibility of affiliation to another pension scheme managed by other insurers. Second, that agreement excludes the latter insurers from a substantial part of the pension insurance market.

49 The effects of such an agreement on competition are 'appreciable' because it affects the entire Netherlands textile sector. They are aggravated by the cumulative effect of making affiliation to pension schemes compulsory in numerous sectors of the economy and for all undertakings in those sectors.

50 Moreover, such an agreement affects trade between Member States in so far as it concerns undertakings which engage in cross-frontier business and deprives insurers established in other Member States of the opportunity to offer a full pension scheme in the Netherlands either by virtue of cross-frontier services or through branches or subsidiaries.

51 Therefore, according to Albany, by creating a legal framework for, and acceding to a request from, the two sides of industry to make affiliation to the sectoral pension fund compulsory, the public authorities favoured or furthered the implementation and operation of agreements between undertakings operating in the sectors concerned which are contrary to Article [101] (1) of the Treaty, thereby infringing Articles [3(1)(g) ECT, 4(3) TEU and 101 TFEU].

52 It is necessary to consider first whether a decision taken by the organisations representing employers and workers in a given sector, in the context of a collective agreement, to set up in that sector a single pension fund responsible for managing a supplementary pension scheme and to request the public authorities to make affiliation to that fund compulsory for all workers in that sector is contrary to Article [101] of the Treaty.

* * *

54 … [I]t is important to bear in mind that, under Article [3(1)(g) and (j)] of the EC Treaty, the activities of the Community are to include not only a 'system ensuring that competition in the internal market is not distorted' but also 'a policy in the social sphere'. Article 2 of the EC Treaty provides that a particular task of the Community is 'to promote throughout the Community a harmonious and balanced development of economic activities' and 'a high level of employment and of social protection'.[43]

43 Now substantially incorporated into Article 3(3) TEU.

CASE *(continued)*

55 In that connection, Article 118 of the EC Treaty[44] … provides that the Commission is to promote close cooperation between Member States in the social field, particularly in matters relating to the right of association and collective bargaining between employers and workers.

56 Article 118b of the EC Treaty adds that the Commission is to endeavour to develop the dialogue between management and labour at European level which could, if the two sides consider it desirable, lead to relations based on agreement.

57 Moreover, Article 1 of the Agreement on social policy (OJ 1992 C 191, p. 91) states that the objectives to be pursued by the Community and the Member States include improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combatting of exclusion.

58 Under Article 4(1) and (2) of the Agreement, the dialogue between management and labour at Community level may lead, if they so desire, to contractual relations, including agreements, which will be implemented either in accordance with the procedures and practices specific to management and labour and the Member States, or, at the joint request of the signatory parties, by a Council decision on a proposal from the Commission.

59 It is beyond question that certain restrictions of competition are inherent in collective agreements between organizations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article [101](1) of the Treaty when seeking jointly to adopt measures to improve conditions of work and employment.

60 It therefore follows from an interpretation of the provisions of the Treaty as a whole which is both effective and consistent that agreements concluded in the context of collective negotiations between management and labour in pursuit of such objectives must, by virtue of their nature and purpose, be regarded as falling outside the scope of Article [101](1) of the Treaty.

61 The next question is therefore whether the nature and purpose of the agreement at issue in the main proceedings justify its exclusion from the scope of Article [101](1) of the Treaty.

44 Article 118 EC has been repealed. Social rights are protected in Article 3(3) TEU and in the Charter of Fundamental Rights of the European Union, annexed to and part of the Treaties.

CASE *(continued)*

62 First, like the category of agreements referred to above which derive from social dialogue, the agreement at issue in the main proceedings was concluded in the form of a collective agreement and is the outcome of collective negotiations between organisations representing employers and workers.

63 Second, as far as its purpose is concerned, that agreement establishes, in a given sector, a supplementary pension scheme managed by a pension fund to which affiliation may be made compulsory. Such a scheme seeks generally to guarantee a certain level of pension for all workers in that sector and therefore contributes directly to improving one of their working conditions, namely their remuneration.

64 Consequently, the agreement at issue in the main proceedings does not, by reason of its nature and purpose, fall within the scope of Article [101](1) of the Treaty.

? NOTES AND QUESTIONS

1. Albany articulated a number of ways in which the requirement of compulsory affiliation harmed competition: it could not choose its own insurer; it could get a better rate from its own insurer, which was likely to be more efficient than a monopolist fund; insurers—including non-Dutch insurers—would be deprived of access to the market. Indeed, the Court, finding the sectoral pension fund to be an undertaking, observed that the fund was engaged in economic activity in competition with insurance companies, and that its pursuit of a social objective through cross-subsidization of risks ('manifestations of solidarity') could render its services less competitive than comparable services (see paras. 84–86). See also paras. 97–98: competition was restricted; firms might otherwise provide their workers with a superior scheme. Why wouldn't these effects bring the agreement within Article 101(1), leaving the question of overriding social benefits for analysis under Article 101(3), if social benefits were an admissible justification?
2. Did the Court simply, in effect, grant an exemption to bona fide labour agreements? Was this a good idea?

   In the US, Section 6 of the Clayton Act[45] grants an antitrust exemption to agreements among workers (e.g., collaboration under the auspices of labour unions). 'The labour of a human being is not a commodity or article of commerce'. The courts have expanded the exemption to cover bona fide labour negotiations, including by employers, and the resulting collective bargaining agreements. This is called the non-statutory labour exemption.
3. After *Albany*, and in view of the Court's invocation of the social aspects of the Treaty, how would you expect the Commission and Court to treat agreements other than collective bargaining agreements that promise benefits to jobs and workers? Can benefits to workers and the economy be balanced against harms to competition as aspects of economic progress under Article 101(3) TFEU?

45 15 U.S.C. § 17.

4. As explained in Chapter 1 (see p. 31), the Court of Justice extended the Albany exception to false independent workers in a case known as '*FNV Kunsten*' (Case C–413/13, *FNV Kunsten Informatie en Media v Staat der Nederlanden*, EU:C:2014:2411, para. 42):

> it is only when self-employed service providers who are members of one of the contracting employees' organizations and perform for an employer, under a works or service contract, the same activity as that employer's employed workers, are "false self-employed", in other words, service providers in a situation comparable to that of those workers, that a provision of a collective labour agreement, such as that at issue in the main proceedings, which sets minimum fees for those self-employed service providers, does not fall within the scope of Article 101(1) TFEU

In September 2022, against the background of the growing number of self-employed service providers active in the online platform economy, the Commission stated that it will not intervene against certain other categories of collective agreements involving solo self-employed persons who are not in a situation comparable to that of employees but may nevertheless be in a weak bargaining position vis-à-vis their counterparties and therefore may be unable to significantly influence their working conditions.

5. Beyond workers and social policy, the EU Treaties promote a range of other public policy objectives. Should these objectives trump the application of EU competition law? As a matter of principle? At a theoretical level, how do you justify the 'labour exception' itself and the limitation of its reach to social policy objectives?

2. The liberal professions and the doctrine of 'inherent restraints'

The Court of Justice has decided important cases on the regulation of the liberal professions and its effect on competition. See *Wouters* (immediately following), *Arduino*[46] and *Cipolla* and *Macrino*.[47] *Arduino* and *Cipolla* concern mandatory fee schedules for Italian lawyers. The Court has ruled that the State can authorize self-regulation by a professional body setting mandatory minimum fees as long as the State retains the decision-making powers and establishes sufficient control mechanisms.

Commission Reports of 2004 and 2005 observe a trend of Member States to deregulate, and they find that countries with little regulation of the liberal professions serve consumers no less well than countries with significant regulation of the professions.[48]

46 Case C-35/99, *Arduino and Others v. Compagnia Assicuratrice RAS SpA* [2002] ECR I-1529, EU:C:2002:97.

47 Cases C-94/04 and 202/04, Cipolla and Macrino [2006] ECR I-11421, EU:C:2006:758.

48 The reports are available at: https://competition-policy.ec.europa.eu/publications/annual-reports_en (accessed 3 February 2023).

CASE

Wouters et Cie (Case C-309/99)[49]

[This judgement arises out of the request for a preliminary ruling referred to the Court by the Netherlands Council of State in the framework of proceedings initiated by Wouters and other members of the Bar seeking to set aside the decisions of the Amsterdam and Rotterdam Bar prohibiting them from practising law in full partnership with accountants. Those decisions were adopted pursuant to the Regulation on Joint Professional Activity adopted by the Bar of the Nederlands in 1993 ('the 1993 Regulation'). The 1993 Regulation prohibits members of the Bar from 'assum[ing] or maintain[ing] any obligations which might jeopardize the free and independent exercise of their profession, including … the relationship of trust between lawyer and client' and 'enter[ing] into or maintain[ing] any professional partnership unless the primary purpose of each partner's respective profession is the practice of the law'. Wouters and his colleagues claimed that the decisions of the Amsterdam and Rotterdam Bar, as well as the 1993 Regulation, were incompatible with the Treaty provisions on competition, right of establishment and freedom to provide services.]

Question 1(a)

56 The question to be determined is whether, when it adopts a regulation such as the 1993 Regulation, a professional body is to be treated as an association of undertakings or, on the contrary, as a public authority.

[The Court answered that the bar is to be treated as an association of undertakings.]

* * *

Question 2

73 By its second question the national court seeks, essentially, to ascertain whether a regulation such as the 1993 Regulation which, in order to guarantee the independence and loyalty to the client of members of the Bar who provide legal assistance in conjunction with members of other liberal professions, adopts universally binding rules governing the formation of multi-disciplinary partnerships, has the object or effect of restricting competition within the common market and is likely to affect trade between Member States.

* * *

49 EU:C:2002:98.

CASE *(continued)*

84 The prohibition at issue in the main proceedings prohibits all contractual arrangements between members of the Bar and accountants which provide in any way for shared decision-making, profit-sharing or for the use of a common name, and this makes any form of effective partnership difficult.

* * *

86 It appears to the Court that the national legislation in issue in the main proceedings has an adverse effect on competition and may affect trade between Member States.

87 As regards the adverse effect on competition, the areas of expertise of members of the Bar and of accountants may be complementary. Since legal services, especially in business law, more and more frequently require recourse to an accountant, a multi-disciplinary partnership of members of the Bar and accountants would make it possible to offer a wider range of services, and indeed to propose new ones. Clients would thus be able to turn to a single structure for a large part of the services necessary for the organisation, management and operation of their business (the 'one-stop shop' advantage).

88 Furthermore, a multi-disciplinary partnership of members of the Bar and accountants would be capable of satisfying the needs created by the increasing interpenetration of national markets and the consequent necessity for continuous adaptation to national and international legislation.

89 Nor, finally, is it inconceivable that the economies of scale resulting from such multi-disciplinary partnerships might have positive effects on the cost of services.

90 A prohibition of multi-disciplinary partnerships of members of the Bar and accountants, such as that laid down in the 1993 Regulation, is therefore liable to limit production and technical development within the meaning of Article [101](1)(b) of the Treaty.

* * *

97 However, not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down in Article [101](1) of the Treaty. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives, which are here connected with the need to make rules relating to organisation, qualifications, professional ethics, supervision and liability, in order to ensure that the ultimate consumers of legal services and the sound administration of justice are provided with the necessary guarantees in

CASE *(continued)*

relation to integrity and experience .... It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.

98 Account must be taken of the legal framework applicable in the Netherlands, on the one hand, to members of the Bar and to the Bar of the Netherlands, which comprises all the registered members of the Bar in that Member State, and on the other hand, to accountants.

* * *

102 [The members of the Bar] should be in a situation of independence vis-à-vis the public authorities, other operators and third parties, by whom they must never be influenced. They must furnish, in that respect, guarantees that all steps taken in a case are taken in the sole interest of the client.

103 By contrast, the profession of accountant is not subject, in general, and more particularly, in the Netherlands, to comparable requirements of professional conduct.

* * *

105 ... The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts.

* * *

107 A regulation such as the 1993 Regulation could therefore reasonably be considered to be necessary in order to ensure the proper practice of the legal profession, as it is organised in the Member State concerned.

* * *

? NOTES AND QUESTIONS

1. Describe the harm to competition likely to result from the bar's regulatory rule.
2. Would a similar self-regulatory restraint be caught by Article 101(1) TFEU if imposed by non-professionals, or by non-lawyers? May accountants agree that accounting firms may not combine with economists' firms? May plumbing firms agree not to allow their members to be electricians or contractors?
3. Why is the lawyers' restraint not subject to examination under Article 101(3) TFEU? Analyse the bar rule under Article 101(3). Does it satisfy the conditions?

4. In *Cipolla* and *Macrino,* Italy set a mandatory minimum fee schedule for lawyers based on a schedule prepared by a lawyers' association. The minimum fee requirement disadvantaged out-of-state lawyers (among others) in their attempts to compete by discounting. The Court of Justice acknowledged that the measure restrained cross-border services, but held that the restraint could be justified if it met overriding requirements relating to the public interest, such as protection of consumers and administration of justice, and if the restraint was proportional to the objective. What is the measure's probable effect on consumers (clients)? What is the public interest in setting a minimum fee? Do you think a public interest concern can outweigh the harm to consumers? Is *Cipolla* consistent with the principles of Article 61 TFEU (Member States may not impair free movement of services based on nationality or residence)? With the combination of Article 4(3) TEU (Member State duty of loyalty to facilitate the tasks of the Union), and Articles 61, 101, and 102 TFEU? See Chapter 7 as to the permissibility of the State restraint.

5. In the US, lawyers may not lawfully agree among themselves that no law firm will integrate with an accountants' or economists' firm. But, lawyers (bar associations) may and do propose that State courts adopt such a rule; and State courts typically mandate the separation as a 'rule of ethics'. State court rules are State action and are not subject to antitrust. Is mandated separation of lawyer/economist/accountant firms wise, efficient, good for clients?

3. Competition policy and sustainability

With the growing threat of climate change and sustainability concerns permeating all kinds of economic activities, an intense debate has emerged in recent years about whether (or not) EU competition principles are standing in the way of sustainability-driven business initiatives and how competition law assessments can properly accommodate sustainability claims. Traditionally, competition law was conceived as the engine of well-functioning markets capable of supporting and complementing regulatory responses to environmental challenges aiming at achieving 'a high level of protection and improvement of the quality of the environment' (see Article 3(3) TEU). Thus, the original discourse was focused on how competition can assist the ecological transition through the promotion of innovation and the right allocation of resources.

However, given the urgency of the climate crisis and the understanding that enacting the ecological transition will require widespread involvement by businesses, various stakeholders backed by a number of vocal NCAs (such as the Dutch ACM and the Hellenic Competition Commission[50]) undertook to challenge the status quo and to require more clarity on the assessment of various types of cooperation agreements pursuing sustainability objectives. These 'sustainability agreements' include industry-wide initiatives to phase out unsustainable products and unsustainable and/

50 See, e.g., the Dutch ACM's Guidelines sustainability claims and the Hellenic Competition Commission's Staff Discussion Paper on Sustainability Issues and Competition Law.

or unethical modes of production; joint procurement of sustainable input products; joint research, development and innovation (R&D&I) and production agreements, in the context of which information may need to be exchanged; or the setting of industry standards for the use of sustainable products and green technologies.

Following in-depth discussions within the ECN, the Commission offered much awaited guidance in the draft 2022 version of the Horizontal Guidelines, under a specific section dedicated to sustainability agreements. Before delving into the technicalities of this 'new EU approach', let's consider earlier examples of the Commission's assessment of sustainability arrangements. Consider first the 1998 Competition Policy Report,[51] containing the following summary of the Commission's practice regarding competition and the environment:

> 129 At the Cardiff European Summit, the Member States recalled the provisions of the Treaty of Amsterdam [Article 6] stipulating that Community policies should take account of environmental protection with a view to achieving sustainable development, an approach which was endorsed at the Vienna Summit. In its XXVth Report on Competition Policy, the Commission spelt out its position regarding implementation of the Community competition rules in the environmental field. In particular, it stated:
>
> When the Commission examines individual cases, it weighs up the restrictions of competition arising out of an agreement against the environmental objectives of the agreement, and applies the principle of proportionality in accordance with Article [101](3). In particular, improving the environment is regarded as a factor which contributes to improving production or distribution or to promoting economic or technical progress.
>
> In that connection, 1998 was marked by four cases reflecting the Commission's commitment to take a positive approach to environmental issues in its competition analyses.
>
> 130 The Commission approved the agreement signed by the European Association of Consumer Electronics Manufacturers (EACEM) and 16 of its members, all major manufacturers of television sets and video cassette recorders. This agreement is a voluntary commitment to reduce the electricity consumption of this equipment when it is in stand-by mode. The Commission exempted

51 Available at: https://competition-policy.ec.europa.eu/publications/annual-reports_en (accessed 3 February 2023).

the agreement under Article [101](3) on the ground that the energy-saving and environmental benefits of the scheme clearly represented technical and economic progress and, by their nature, would be passed on to consumers. The energy saving could amount to 3.2 TWh a year from 2005. This reduction in energy consumption will have a significant impact in terms of the management of energy resources, reductions in CO_2 emissions and accordingly, measures to counter global warming. The Commission also ascertained that the scheme would not eliminate competition in the affected markets and that its restrictive effect was essential to achieving its full benefits.

131 The Association of European Automobile Manufacturers (ACEA) has undertaken, on behalf of its members, to reduce CO_2 emissions from passenger cars. This effort is in line with the Community policy of reducing CO_2 emissions into the atmosphere. ACEA has set a reduction target of 25% by 2008. The Commission and the Member States will monitor the efforts made to achieve that target. The Commission also took the view that this agreement between European automobile manufacturers did not infringe the competition rules. ACEA determines an average reduction target for all its members, but each of them is free to set its own level, which will encourage them to develop and introduce new CO_2-efficient technologies independently and in competition with one another. Accordingly, ACEA's voluntary agreement does not constitute a restriction of competition and is not caught by Article [101](1).

132 [EUCAR is the European Council for Automotive Research and Development. It consists of Opel, BMW (including Rover), Mercedes, Fiat, Ford PSA, Porsche, Renault, VW and Volvo.] In the *EUCAR* case, the Commission adopted a favourable stance on a cooperation agreement between Europe's leading motor manufacturers, which is designed to boost research in the [European] motor industry, particularly on environmental issues. Most of the projects that will be developed involve experimental research on, for example, limiting noise or emission pollution caused by motor vehicles. The products obtained from this research may not be directly usable in a specific type of vehicle. The Commission therefore took the view that the research was at the pre-competitive stage and that the agreements did not infringe Community law.

133 Finally, the Commission approved the membership agreements of Valpak, a non-profit-making, industry-led compliance scheme operating in the United Kingdom which has been set up to discharge the packaging waste recovery and recycling obligations of its members. The legal framework set up in the United Kingdom to implement the [EU] directive [on packaging waste] provides scope for competition in the market for compliance-scheme services which seek to fulfil recovery and recycling obligations on behalf of a business. While Valpak

is currently the largest compliance scheme operating in the United Kingdom, other competing schemes exist and have notified their arrangements to the Commission.

134 Following its examination of Valpak's membership agreements, the Commission concluded that the agreements restricted competition within the meaning of Article [101](1) because they obliged businesses wishing to join the scheme to transfer the totality of their obligations in all packaging materials. This 'all or nothing' approach, which transposes a regulatory provision, restricts the extent to which Valpak and other schemes will be able to compete against one another on a material-specific basis. The Commission went on to consider whether the notified arrangements could benefit from exemption under Article [101](3). In view of the emerging nature of the market and the likelihood that Valpak and other schemes would be obliged to invest in the United Kingdom's collection and/or reprocessing infrastructure in order to meet their members' obligations in the future, the Commission concluded that an 'all or nothing' approach was necessary, at least in the short term, if schemes such as Valpak were to succeed in securing sufficient funding to allow the necessary investment to take place. The Commission informed Valpak at the same time that it reserved the right to reexamine the case after three years.

? NOTES AND QUESTIONS

1. Consider, with respect to each agreement described earlier, the possible harm to competition. Is each agreement caught by Article 101(1)? Do you agree with the Commission's analysis regarding when an exemption is necessary?
2. A Danish recycling law limited bottle types for beer and soft drinks sold in Denmark, creating an obstacle to out-of-state beer and soft drink sellers. The limitation of bottle types—to those most commonly used in Denmark—facilitated recycling and helped protect the environment.[52] Suppose the restraint was imposed by agreement among the Danish beverage makers and their retailers, rather than by the legislature of Denmark. Analyse the agreement. Does it fall within Article 101(1) TFEU? Does it satisfy the conditions of Article 101(3)? Suppose the Danish beverage makers make a convincing case that the proliferation of non-recyclable bottles will impose serious costs on the environment. How should the Commission make the trade-off between free movement, competition and the environment?
3. May the European beef processors agree not to supply beef to wholesalers or retailers that sell beef injected with hormones?
4. Under US antitrust law, an agreement that has anti-competitive aspects can be justified only by outbalancing pro-competitive aspects.[53] Even if competitive price bidding by professional engineers would cause engineers to cut corners and design unsafe buildings, the engineers may not decide to ban price bidding. Regulation should specify minimum safety standards for building

52 See Case 302/86, *Commission v. Denmark* [1988] ECR 4607, EU:C:1988:421.

53 *National Society of Professional Engineers v. United States*, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978).

designs. How would each of the preceding agreements described in the Competition Policy Report fare under US law? Which is the better approach—that of the US or of the EU? Or are they effectively the same?

Consider then the far-reaching European Council of Domestic Appliance Manufacturers (CECED) decision of 2000, as follows:

CECED

Commission Decision, Case IV/F-1/36.718[54]

[Almost all producers and importers of washing machines in Europe entered into an agreement designed to reduce energy consumption and thereby to reduce polluting emissions from washing machines. The agreement was notified to the Commission by their trade association, the European Council of Domestic Appliance Manufacturers ('CECED'). Under the agreement, the producers and importers agreed to stop producing for, and importing into, the EU the least energy-efficient washing machines, designated as categories D to G by a Commission Directive. Categories D to G represented 10–11% of all washing machines sold in the EU and comprised a significant proportion of the sales of some of the agreeing manufacturers. Energy efficiency was an important focus of advertising and sales. The market was fragmented. The agreeing manufacturers accounted for more than 95% of the market.

The Commission granted a short (less than 1-year) exemption, stating, as to the four conditions of Article 101(3) TFEU:]

— The agreement objectively contributes to technical and economic progress, by focusing production on more efficient machines. Such benefits would be unlikely or would occur less quickly without the agreement.
— Consumers derive benefits at the same time individually and for society as a whole: likely higher purchase costs of more efficient washing machines are quickly compensated by savings in electricity bills; the agreement contributes to [EU] environmental objectives and the benefits very largely exceed potential cost increases triggered as a result of the agreement. Even if individual purchasers were not to derive the financial benefits that they actually attain, the magnitude of environmental benefits is such that the net contribution to society's economic welfare would still be positive.

54 [2000] O.J. L 187/47.

— The restrictions of competition are indispensable to attaining those benefits. Consumers do not sufficiently take external costs into account in their purchase decisions. The application of a minimum efficiency ratio mitigates this market failure. Alternatives such as public awareness campaigns or application of ecolabels would be complementary, rather than substitutable to the agreement.
— The agreement does not eliminate competition. Various technical means to improve energy efficiency of washing machines are economically available to all manufacturers; competition remains also on important purchase criteria such as prices, technical effectiveness, brand image etc.; finally, 90% of sales of washing machines are not directly concerned.

? NOTES AND QUESTIONS

1. Are you confident that consumer benefits of the washing machine agreement outweigh costs? What about the consumers who prefer the low price, or other features of machines that happen to fall within categories D to G, and who prefer not to be altruistic?
2. What is the significance of the fact that some of the collaborating manufacturers made D-to-G machines? Would the agreement be more suspect if none of them did? Even so, can we trust these producers to set the standard in the public interest?
3. Suppose you represent a Canadian manufacturer whose washing machines are low priced, offer features householders love, and fall within category D. Your client's machines are relatively new, and its European fortunes—and market share—are fast rising. It is suddenly faced with a private European boycott. Your client and its loyal European consuming public consider a suit to annul the Commission decision granting exemption. Frame your analysis of the anti-competitive effects of the CECED agreement. Review each of the four requirements for exemption. Which are most vulnerable? What are your odds of winning in court?
4. If the EU wanted energy standards that excluded machines in categories D to G, why did it not adopt legislation setting an energy efficiency floor that excluded those categories?

Note on the 'new approach' to sustainability agreements

As apparent from the earlier examples mentioned above, sustainability considerations can affect the assessment of cooperation agreements under both Article 101(1) and Article 101(3) TFEU. The two aspects are covered by the so-called 'new approach' to sustainability agreements,[55] as embodied in a dedicated section introduced in the 2022 version of the Horizontal Guidelines. This dedicated section is anchored in the acknowledgment that 'individual production and consumption decisions can have negative effects ("negative externalities"), for example on the environment, that are not sufficiently taken into account by the economic operators or consumers

55 The term 'sustainability agreement' refers in general to any type of horizontal cooperation agreement that genuinely pursues one or more sustainability objectives, irrespective of the form of cooperation.

that cause them' and therefore need to be 'mitigated or cured by collective actions, for example through public policies, sector specific regulations or cooperation agreements between undertakings that foster sustainable production or consumption'.

Generally, the analytical framework applicable to horizontal cooperation agreements also applies to the assessment of those seeking to achieve sustainability objectives. This means that other sections of the Horizontal Guidelines remain relevant to assess, e.g., R&D, production or purchasing agreements with a sustainability rationale. Conversely, arrangements seeking to disguise price fixing, market or customer allocation, or limitation of output or innovation under a sustainability objective (a phenomenon often referred to as 'greenwashing') are unlikely to satisfy the conditions of Article 101 TFEU.[56] In turn, the 'new approach' innovates in three main respects.

First, it provides a 'soft safe harbour' by means of a list of cumulative conditions according to which sustainability standardization agreements (i.e., agreements between competitors to adopt and comply with certain sustainability standards) are unlikely to produce appreciable negative effects on competition and therefore fall outside the scope of Article 101(1) TFEU. In a nutshell, this is the case for non-binding, minimum and properly monitored sustainability standards resulting from a transparent and inclusive process, which do not entail the exchange of commercially sensitive information or a significant increase in price/decrease in choice, and remain accessible under non-discriminatory terms, including for businesses that have not contributed to the standardization process.

The second innovative feature concerns the scope of the relevant efficiencies capable of balancing the likely harm to competition under Article 101(3) TFEU. The main question in that regard is whether and to what extent 'out-of-market' efficiencies, i.e., efficiencies/benefits occurring outside the market where the harm will take place, may be considered relevant to the assessment. In that respect, the Horizontal Guidelines acknowledge that agreements aiming to internalize negative externalities and bring about sustainability benefits to a larger group, i.e., pursuing 'collective benefits' (e.g., cleaner air), may qualify under Article 101(3) TFEU to the extent that consumers in the relevant market are part of the larger group of beneficiaries. Still, these 'collective benefits' need to be significant enough to compensate

56 For example, an agreement between competitors to translate increased costs resulting from the adoption of a sustainability standard into increased sale prices towards their customers is considered to restrict competition by object.

consumers in the relevant market for the harm suffered, meaning, e.g., that market coverage of the agreement needs to be sufficiently significant.

Third, the 'new approach' is remarkably unspecific when it comes to the magnitude of the required compensation of the harm to competition by means of the relevant sustainability benefits. Put otherwise, it does not expressly insist that consumers be 'fully' compensated for the harm suffered but instead, appears to rely literally on the notion of 'fair share' found in the text of Article 101(3) TFEU. Forthcoming decisions in actual cases will specify the scope of the 'fair share' requirement, but fundamentally, the Horizontal Guidelines appear to recognize a margin of appreciation to competition authorities when it comes to balancing the harm to competition against sustainability benefits in view of the inherent complexity of that exercise.

Other conditions of Article 101(3) continue to apply, notably the non-elimination of competition and the indispensability requirement, according to which the restriction of competition may not go beyond what is reasonably necessary to achieve the claimed sustainability benefits. The latter condition entails that sustainability agreements must aim to achieve genuine benefits that would remain out of reach (including due to cost considerations) if left to the free interplay of market forces, and may not unduly restrict the freedom of participants in setting higher standards or in implementing the agreement in question.

? NOTES AND QUESTIONS

1. How 'new' is this 'new approach' when compared with the CECED case? Which elements can be traced to CECED, and which not?
2. Reflect on the openness towards 'collective benefits'. Hasn't the Commission opened a Pandora's box? Which 'collective benefits' are relevant or acceptable in your opinion? Or do you think the Commission could have gone even further?
3. Why is it that the Commission hasn't been more explicit in departing from the policy requirement of 'full compensation' of the harm suffered (and thus, seem to have left open the meaning of 'fair share') when it comes to sustainability claims? Does it make sense to subject sustainability agreements to a different (more lenient) requirement in that respect?
4. On 'greenwashing', the governing precedent is the Consumer Detergents case of 2011 (Case AT.39579) where the Commission fined Procter & Gamble and Unilever more than EUR 315 million for a price-fixing cartel, together with Henkel. The cartel concerned powder detergents used in washing machines. The cartel started when the companies implemented an initiative through their trade association to improve the environmental performance of detergent products. The environmental objective, however, did not require them to coordinate prices or other anti-competitive practices, and yet, they agreed to keep the price unchanged during the implementation of the different phases of the environmental initiative. In particular, the parties agreed not to decrease prices when products were 'compacted' (that is to say, when the weight of the products was reduced), when the product quantity was downsized (that is to say, when

the product volume was reduced) or on some occasions when they collectively reduced the number of scoops (that is to say, wash loads) per package.

Having in mind these cases involving labour, the liberal professions and the environment, comment on how the EU seeks to blend its competition enforcement with other public policy goals. Has it achieved a wise balance? Is it wise to try to achieve a balance? Are non-competition justifications admissible? To what extent? Why do you think the Commission has been historically reluctant to apply non-competition offsets to competition harms?

D. Block exemptions

As noted at the outset of the chapter, there are two important block exemptions on horizontal cooperation: research and development, and specialization.[57] These block exemptions are being revised and updated on a regular basis, and new draft regulations were published for consultation in March 2022 together with draft revised Horizontal Guidelines, which include guidance on the assessment of R&D and specialization agreements, respectively. Though these revised block exemption regulations will introduce a number of refinements to the analytical framework, the overall structure is likely to remain unchanged.

1. Research and development

R&D lies at the core of innovation, competition and competitiveness. The R&D block exemption singles out cooperative research and development for protection.

Of course, not all R&D agreements fall within Article 101(1) TFEU. Collaborations between small enterprises are normally not caught. Moreover, collaboration on pure R&D, even by large firms, generally does not fall within Article 101(1) unless the parties agree not to carry out R&D in the same field.

Pursuant to Article 101(3) TFEU, the regulation declares exempt joint R&D and joint exploitation of its results, and necessary ancillary restraints

57 Regulation 1217/2010/EU of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of research and development agreements [2010] *O.J.* L 335/36; Regulation 1218/2010/EU of 14 December 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to certain categories of specialization agreements [2010] *O.J.* L 335/43. Both regulations in their current (but also future) versions are available at: https://competition-policy.ec.europa.eu/antitrust/legislation/horizontal-block-exemptions_en (accessed 27 September 2022).

including agreement not to carry out independently or with third parties R&D in the same or a closely related field, as long as the parties' market share does not exceed 25% and the agreement does not include blacklisted clauses. Moreover, to qualify for block exemption: (1) each party must have access to the results in order to further its research; (2) the parties must grant each other access to any pre-existing know-how that is indispensable for the granting of the results; (3) the supplying partner, in the event of specialization not entailing joint distribution, must fulfil orders for supplies from other partners; and (4) in the event of joint exploitation, the results must be IP protected and must be sufficiently important; they must 'be indispensable for the manufacture of the contract products or the application of the contract technologies' (Article 3(4)). The regulation contains a blacklist of clauses that disqualify agreements from exemption (Article 5).

In the same year that the EU adopted its first block exemption for joint R&D, the US Congress enacted the National Cooperative Research Act ('NCRA') of 1984, which was amended in 1993.[58] The US Congress feared that the antitrust laws were chilling R&D, especially in view of the fact that successful private plaintiffs in US antitrust lawsuits are entitled to three times the damages they suffer ('treble damages'). The NCRA states that research joint ventures shall be judged under a rule of reason in view of all relevant market facts and shall not be condemned per se. Also, the Act provides a notification procedure. If a transaction is notified and is later found to lessen competition, the parties can be assessed compensatory damages but not treble damages. This protection applies to the production phase of a research joint venture, but only if the principal production facilities are in the US and the controlling persons are American or from a country with equally favourable antitrust treatment. (Is this consistent with General Agreement on Tariffs and Trade [GATT] obligations of non-discrimination?) A notified transaction may be enjoined if it is found to be anti-competitive. The NCRA applies equally to large and small firms.

Would you expect the European block exemption to encourage R&D? Would you expect the US statute to encourage research and development?

2. Specialization

At the outset, the Commission contemplated reciprocal specialization: one firm made product *A*, the other made complementary product *B*; they would each agree to supply their specialty product to the other, and they

58 15 U.S.C.A. § 4301.

would each agree not to manufacture the product that was the specialty of the other. More recently, firms began to adopt unilateral specialization: *A* outsources from *B*; *B* agrees to manufacture and supply to *A* all of its needs of an input; *A* agrees to cease its production of that input. The 2010 block exemption covers reciprocal specialization and unilateral specialization between competitors. The regulation recites that specialization agreements generally contribute to improving production or distribution because they enable firms to concentrate on the manufacture of certain products and thus, to operate more efficiently and supply goods more cheaply.

The specialization regulation declares exempt agreements for specialization, including ancillary restraints necessary for their implementation, where the combined market shares do not exceed 20%, except for agreements containing blacklisted provisions. The exemption also applies where the parties agree to exclusive purchase or supply in the context of specialization or joint production, or the parties do not separately distribute the objects of specialization but provide for joint distribution or distribution by a non-competitor (Article 2(3)). The exemption does not apply to agreements that have as their object price fixing to third parties, limiting output or sales, or allocating markets or customers (Article 4).

Why is it necessary for each competitor, seeking to achieve the efficiency benefits of specialization, to promise to stay out of the manufacturing market of the other? In the US, this aspect of specialization agreements would normally be regarded as a cartel-like violation of the law unless the parties could show that the commitment was necessary to make the joint venture work.

* * *

The study of horizontal cooperation agreements has allowed a discussion of Article 101(3), and of the interplay between Article 101(1) and 101(3) TFEU, in a way that cartels did not. It also permitted substantiation of the 'economic approach' underlying the analytical framework developed in the Article 101(3) guidelines, which echoes the shift to effects-based analysis that the Commission initiated in the late 1990s, as noted in Chapter 1. Historically presented as the substantive leg of the modernization of EU competition law, this type of analysis was originally introduced in relation to vertical agreements, the area to which the next chapter is devoted.

4

Vertical restraints

Vertical restraints are restraints in the course of distributing a product or service, or in the course of bringing technology and its commercial applications to market. They involve

> agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.[1]

In distribution agreements, a producer might instruct its distributor where or to whom to sell the product, and at what price. Since a producer offers a particular kind or brand of product, the restraints that a producer imposes on its distributors are called intrabrand restraints. Intrabrand restraints may help a producer get to market more efficiently, e.g., by giving the distributor a stronger incentive to work its territory and by preventing 'free riders' (who do not invest in the territory) from 'skimming the cream' off the top of the demand primed by the designated distributor's investment. If the restraints are cost-effective, and if the brands in the market compete robustly against one another, the interbrand competition may ensure that consumers receive the benefits of the restraints. This is why it is generally assumed that for most vertical restraints, competition concerns only arise if there is insufficient interbrand competition at one or more levels of trade, i.e., if there is some degree of market power at the level of the supplier or the buyer or at both levels.[2]

1 Regulation 330/2010/EU on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices [2010] *O.J.* L 102/1, Article 1(a).

2 Commission Notice—Guidelines on vertical restraints ([2022] *O.J.* C 248/1), para. 21 (hereafter: '2022 Guidelines on vertical restraints').

However, intrabrand restraints may also help the producer *exploit* the consumer. For example, in a concentrated, high-barrier market, the restraints may help the few producers coordinate their prices; or they may help an individual producer that has market power extract more money from consumers. They may also suppress innovation in the methods and systems of distribution, such as the internet. Moreover, vertical restraints may be procured by powerful distributors to help form a distributor cartel. For these reasons, resale price-fixing agreements that set minimum prices, resale price maintenance ('RPM'), are regarded as a hard-core restraint in the EU (although justification is possible) and in many other jurisdictions. Economists, however, point out that RPM can be an efficient business strategy to induce distributors to provide more service. In view of efficient uses of RPM that may increase interbrand competition, the US eventually abandoned its nearly century-old per se rule against RPM agreements (see later the discussion on the *Leegin* case).

Other vertical restraints include exclusive selling ('I will sell to you alone and not to your competitors'), exclusive buying (single-branding or requirements contracts), selective distribution, franchising, tying contracts and export restrictions. Technology licensing restrictions are also a form of vertical restraint.

Historically, and until today, the EU has developed a particular approach towards vertical restraints, influenced by the objective of integrating the common market. At the heart of that approach lie concerns such as whether intrabrand restraints that prevent parallel imports can calcify price differentials among Member States and undermine the market integration goal. But, the corollary concern is whether prohibiting those restraints may equally undermine the efficiency goal. Hence, vertical restraints raise the question of the possible existence of a tension between integration and efficiency.

In recent years, the enforcement of Article 101 in relation to vertical restrains has reflected the impact of the growth of online sales and online platforms on distribution models. Notably, consumers' expectations to have a continuous experience across a variety of different channels ('omni-channel'), such as offline and online shops, marketplaces and other online platforms, has led suppliers to increase the number of sales channels used to promote and distribute their products and services. New or more prevalent types of distribution arrangements (such as online intermediation services or dual distribution) or contractual provisions (such as most favoured nation [MFN] or price parity clauses) have emerged as a result and become the focus of enforcement actions.

A. History and the role of block exemptions

Until the final years of the 1990s, vertical restraints were regarded in the EU with great suspicion. This was especially true of restraints that could tend to keep a seller's product from crossing Member State borders, for the restraint then had a market integration dimension as well.

Historically, as soon as Regulation 17 became effective in 1962 as the first regulation implementing Articles 101 and 102, thousands of notifications of distribution agreements began flooding the Commission's Directorate-General for Competition, which was obliged to examine each to determine whether an exemption should issue. The Commission responded to the unmanageable workload, as well as the opportunity to give guidance, by adopting its first block exemption regulation, Commission Regulation 67/67,[3] regarding agreements for the exclusive distribution of goods and agreements for the licensing of intellectual property. The Commission issued superseding block exemption regulations as well as new specialized ones for patents, know-how and motor vehicle distribution. These block exemption regulations provided detailed roadmaps of what parties must, could and must not do in order to have the benefit of exemption without filing a notification and seeking an individual exemption.

Business firms organized entire distribution systems to conform with the block exemptions, since analysis of restraints outside the block exemptions was uncertain. Eventually, the area became rule-bound with a heavy hand, and the system of detailed block exemptions came under severe criticism.[4] They were formalistic. They straightjacketed business transactions. They were not united by any economic or other theory.

The effect was not unlike the effect and treatment in the US through the 1960s and early 1970s, where, too, vertical restraints were treated with much suspicion; for example, they were regarded as schemes by powerful producers to rein in the autonomy of their distributors, thereby also depriving consumers of the benefits that more autonomous distributors would bring; or as schemes to fence out rivals.

3 Regulation 67/67/EEC of the Commission of 22 March 1967 on the application of Article 85 (3) of the Treaty to certain categories of exclusive dealing agreements [1967] *O.J.* 57/849.

4 For a classic criticism of that approach, see B. Hawk, 'System Failure: Vertical Restraints and EC Competition Law', C.M.L.R., 1995, vol. 32, p. 973.

In the US, a sea-change came in the late 1970s and continued to evolve through the 2006 term of the US Supreme Court when in *Leegin*, it overturned the per se rule against agreements that fix resale prices.[5] As illustrated by *Leegin*, the contemporary US perspective is hospitable towards vertical restraints, regarding them as a normally efficient means to get to market and seldom capable of aggrandizing market power.

In the EU, the inhospitality perspective lasted until the late 1990s, after the completion of the Single Market, when the Directorate-General for Competition rethought the appropriate analysis of vertical restraints and in particular, the system of block exemptions. In 1997, it published an influential green paper that proposed a more economic, more sympathetic and less restrictive approach,[6] which recognized the efficiency properties of most vertical restraints and paved the way to the substantive modernization of EU competition law and the move to the 'effects-based' approach (see the discussion on modernization in Chapter 1).

At the conclusion of the long process of re-examination and in the years thereafter, important changes were made. All vertical agreements were exempted from the notification requirement as from June 1999, prior to the replacement of Regulation 17 by Regulation 1/2003, and the Commission and Council subsequently liberalized the block exemptions, eliminating much detail. They issued a general vertical block exemption regulation (or 'VBER') and guidelines for the assessment of vertical agreements first in 2000 and again in 2010,[7] which have shaped the field, including outside the scope of the block exemption.[8] The latest iteration of the VBER was adopted in 2022 and reflects the experience accumulated not only with the

5 *Leegin Creative Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007).

6 Green Paper on Vertical Restraints in EC Competition Policy, 22 January 1997, COM(96) 721 final.

7 Two specific block exemption regulations still remain for: (i) technology transfers covering patents, know-how, design rights, as well as software copyrights (see Regulation 316/2014 of 21 March 2014 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of technology transfer agreements [2014] *O.J.* L 93 / 17, and the associated Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] *O.J.* C 89/3); and (ii) motor vehicles covering agreements between motor vehicle manufacturers and their authorized dealers, repairers and spare part distributors (see Regulation 461/2010/EU of 27 May 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices in the motor vehicle sector [2010] *O.J.* L 129/52, and the associated Supplementary guidelines on vertical restraints in agreements for the sale and repair of motor vehicles and for the distribution of spare parts for motor vehicles [2010] *O.J.* C 138/16). At the time of writing, these were still in the process of being updated.

8 The relevant EU legislation in relation to vertical restraints is available at: https://ec.europa.eu/competition-policy/antitrust/legislation/vertical-block-exemptions_en (last visited on 7 September 2022).

application of previous versions thereof but also with new market developments and notably, the growth of e-commerce.[9]

As you read the cases presented in the remainder of this chapter, be aware of their dates of decision. Consider how the earlier cases might be decided under modern economic concepts, influenced as always by the market integration goals. Remember that the process of notification and individual exemption is a mode of the past; but still, agreements must be analysed under the Treaty provisions, Article 101(1) and (3).

B. Is there an agreement within Article 101(1)?

Normally, a vertical agreement will fall within Article 101(1) if the restraint is not *de minimis* and the restraint has an impact on intrabrand competition (see *Consten and Grundig*, discussed again later) or interbrand competition. This will be especially so where the supplier imposes obligations on its distributor not to buy from its competitors, or imposes customer, territory or price restraints or requires a tie-in, unless the restraints are objectively necessary, for example, to penetrate a market or to guard against a health or safety hazard. A central question will typically be whether proof of robust interbrand competition could take the agreement restricting intrabrand competition out of Article 101(1). However, an important preliminary question is whether an agreement is present at all, for unilateral conduct does not fall within Article 101 TFEU.

> In *Bayer v. Commission* (*'Adalat'*),[4] Bayer, as producer of the cardio-vascular-treating drug Adalat, faced several Member States with widely varying price ceilings. The controlled price in France and Spain was 40% lower than in the UK. Certain wholesale customers of Bayer France and Bayer Spain increased their orders disproportionately, clearly to take advantage of the higher profits in the UK. In response, while not imposing an express export ban, Bayer France and Bayer Spain limited fulfilment of orders to the quantities expected to be demanded in the territory. Allegedly, the wholesalers acquiesced in the *de facto* export ban in order to continue receiving supplies. The Commission found that the conduct was concerted and violated Article 101(1) TFEU. It imposed a fine of €3 million euros. The General Court annulled the decision, however, concluding that there was no 'common intention' between Bayer and the wholesalers. It said:

9 See Commission regulation 2022/720 of 10 May 2022 on the application of Article 101(3) TFEU to categories of vertical agreements and concerted practices, [2022] *O.J.* L 134/4.

> 69 It follows that the concept of an agreement within the meaning of Article [101](1) of the Treaty, ..., centres around the existence of a concurrence of wills between at least two parties, the form in which it is manifested being unimportant so long as it constitutes the faithful expression of the parties' intention.
>
> 70 In certain circumstances, measures adopted or imposed in an apparently unilateral manner by a manufacturer in the context of his continuing relations with his distributors have been regarded as constituting an agreement within the meaning of Article [101](1) of the Treaty.
>
> 71 That case-law shows that a distinction should be drawn between cases in which an undertaking has adopted a genuinely unilateral measure, and thus without the express or implied participation of another undertaking, and those in which the unilateral character of the measure is merely apparent. Whilst the former do not fall within Article [101](1) of the Treaty, the latter must be regarded as revealing an agreement between undertakings and may therefore fall within the scope of that article. That is the case, in particular, with practices and measures in restraint of competition which, though apparently adopted unilaterally by the manufacturer in the context of its contractual relations with its dealers, nevertheless receive at least the tacit acquiescence of those dealers.
>
> 72 It is also clear from that case-law that the Commission cannot hold that apparently unilateral conduct on the part of a manufacturer, adopted in the context of the contractual relations which he maintains with his dealers, in reality forms the basis of an agreement between undertakings within the meaning of Article [101](1) of the Treaty if it does not establish the existence of an acquiescence by the other partners, express or implied, in the attitude adopted by the manufacturer.

The General Court went on to apply these principles to the facts of the case and discussed extensively issues such as Bayer's intention to impose an export ban, including the monitory system Bayer had established, and the alleged intention of the wholesalers to adhere to Bayer's policy to reduce parallel imports, including the notion of implicit acquiescence, before concluding that:

> it follows from the whole of the foregoing considerations that the Commission incorrectly assessed the facts of the case and made an error in the legal assessment of those facts by holding it to be established that there was a common intention between Bayer and the wholesalers referred to in the Decision, which justified the conclusion that there was an agreement within the meaning of [101](1) of the Treaty, designed to prevent or limit exports of Adalat from France and Spain to the United Kingdom (para. 183).

On appeal by the Commission and wholesalers, the ECJ upheld the General Court's judgement[10] and specified, as follows:

> 100 Concerning the appellants' arguments that the [General Court] should have acknowledged that the manifestation of Bayer's intention to restrict parallel imports could constitute the basis of an agreement prohibited by Article [101](1) of the Treaty, it is true that the existence of an agreement within the meaning of that provision can be deduced from the conduct of the parties concerned. [Note: this is especially the case in the framework of continuous business relations, as here between Bayer and its wholesalers.]
>
> 101 However, such an agreement cannot be based on what is only the expression of a unilateral policy of one of the contracting parties, which can be put into effect without the assistance of others. To hold that an agreement prohibited by Article [101](1) of the Treaty may be established simply on the basis of the expression of a unilateral policy aimed at preventing parallel imports would have the effect of confusing the scope of that provision with that of Article [102] of the Treaty.
>
> 102 For an agreement within the meaning of Article [101](1) of the Treaty to be capable of being regarded as having been concluded by tacit acceptance, it is necessary that the manifestation of the wish of one of the contracting parties to achieve an anti-competitive goal constitute an invitation to the other party, whether express or implied, to fulfil that goal jointly, and that applies all the more where, as in this case, such an agreement is not at first sight in the interests of the other party, namely the wholesalers.

The ECJ then referred to the General Court's findings of facts that in this case, there was no declared intention on the part of the wholesalers to join in with the intention of Bayer to prevent parallel imports or any willingness to give Bayer the impression that in response to its declared wish, they were proposing to reduce their orders to a given level (para. 122).

Separately, an agreement under Article 101 also requires that it is entered into between two independent economic operators. This is relevant for certain types of arrangements such as agency relationships, where a person ('the agent') is entrusted with the power to negotiate and/or conclude contracts on behalf of another person ('the principal'), or outsourcing contracts.

10 Joined Cases C-2/01 P and C-3/01 P, *BAI and Commission v. Bayer*, ECLI: EU:C:2004:2.

Outsourcing generally falls outside the scope of Article 101(1),[11] and so does agency in the particular circumstances where the agent bears no—or only insignificant—financial or commercial risks associated with the contracts concluded or negotiated on behalf of the principal, irrespective of the legal qualification of the agreement.[12] These risks can be contract specific but may also relate to market-specific investments and risks related to other activities that the agent is due to undertake at the request of the principal. Their significance is assessed on a case-by-case basis and by reference to the revenues generated by the agent from providing the agency services.

Thus, when the principal bears the commercial and financial risks related to the sale and purchase of the contract goods or services, the selling or purchasing function of the agent is deemed to form part of the principal's activities, and therefore, all obligations imposed on the agent by the principal in relation to the contract goods or services fall outside Article 101(1) (e.g., territorial limitations, resale conditions). In contrast, arrangements between the principal and the agent governing (horizontal) competition between them (e.g., post-term non-compete provisions) remain within the scope of Article 101(1). Likewise, agency agreements may still be subject to Article 101(1) where the use of certain agents by a number of principals aims to facilitate collusion or boycotts.

The Commission also takes the view that providers of online intermediation services generally act as independent economic operators and do not in principle qualify as agents for the purpose of applying Article 101(1). In particular, their size and bargaining power and the fact that they often serve a very large number of sellers in parallel prevent them from effectively forming a part of any sellers' undertakings, while they also typically make significant market-specific investments to sustain their intermediation function.[13] Providers of online intermediation services may also have a hybrid function,

11 See Commission notice of 18 December 1978 concerning the assessment of certain subcontracting agreements in relation to Article 85(1) of the EEC Treaty ([1979] *OJ* C 1/2), which defines subcontracting agreements as agreements under which one firm, called 'the contractor', whether or not in consequence of a prior order from a third party, entrusts to another, called 'the subcontractor', the manufacture of goods, the supply of services or the performance of work under the contractor's instructions, to be provided to the contractor or performed on his behalf.

12 Case C-217/05, *Confederación Espanola de Empresarios de Estaciones de Servicio v CEPSA*, EU:C:2006:784; and Case C-279/06, *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, EU:C:2008:485.

13 See 2022 Guidelines on Vertical Restraints, para. 46.

that is, where they sell goods or services in competition with their intermediation services customers, which may raise horizontal concerns.[14]

Note on the e-books cases

In the original *e-books* case,[15] the Commission raised concerns that five large publishers and Apple had colluded to switch the prevalent business model for the distribution of e-books from a wholesale model (where the retailer determines retail prices) to an agency model (where the publisher determines retail prices) in order to fend off any attempts by Amazon to offer discounted e-book prices.

There were indications that the five publishers had exchanged information about the key terms under which they would enter into such an agency agreement with Apple, including ways to contractually grant Apple's iBookstore the benefit of any preferential prices and conditions available for the same e-book titles from other online retailers, thus including Amazon, by means of a MFN clause. In turn, the Commission viewed these terms as a 'commitment device' to induce each of the five publishers to force Amazon (and other retailers) into accepting the agency model or otherwise face the risk of being denied access to the e-books of each of the five publishers.

The Commission's preliminary view was that the joint switch for the sale of e-books from a wholesale model to an agency model with the same key pricing terms on a global basis amounted to a concerted practice with the object of either raising retail prices of e-books or preventing the emergence of lower prices of e-books.

The case was solved by means of commitments whereby the publishers offered to terminate on-going agency agreements and to exclude certain clauses in their future agency agreements for a certain period of time, while also giving retailers freedom to discount e-books, subject to certain conditions, for a 2-year 'cooling-off' period. Apple on its end committed to terminate its agency agreements with the publishers and not to enter into or enforce any retail price MFN clauses in any new or existing agency agreements for a period of 5 years. Settlements were also entered into by the

14 As a result, providers of online intermediation services exercising a hybrid function in principle do not benefit from the safe harbor provided for under the VBER.

15 Case COMP/39.847—*E-Books*, 12 December 2012 and 25 July 2013.

publishers with the US Department of Justice, while the case against Apple proceeded to trial and was decided against Apple.[16]

In the subsequent Amazon e-books case,[17] while Amazon had entered into 'agency agreements' with various e-book publishers, the Commission raised preliminary concerns about the compatibility of certain 'MFN clauses' or 'parity clauses' and similar provisions contained in these agreements with Article 102 TFEU (i.e., not Article 101), in view of Amazon's possible dominant position in the markets for the retail distribution of English-language and German-language e-books in the EEA.

These clauses required publishers to notify Amazon of more favourable or alternative terms and conditions offered elsewhere (i.e., to other retailers) and/or to make available to Amazon terms and conditions that directly or indirectly depended on the terms and conditions offered to another e-book retailer also bound by an agency agreement. The clauses covered not only prices, discounts and promotions but also various other features whereby a competing retailer could differentiate itself from Amazon, such as an alternative business (distribution) model or the availability of innovative e-book formats or types of content.

The overall concern was that the MFN or parity clauses in question could make it more difficult for other e-book platforms to compete with Amazon by reducing publishers' and competing retailers' ability and incentives to develop new and innovative e-books and alternative distribution services. The clauses may have led to less choice, less innovation and higher prices for consumers due to less overall competition in e-book distribution. The case was eventually solved by means of commitments whereby Amazon would no longer enforce or introduce these clauses in agreements with publishers.

C. Parallel imports and exports, dual pricing and other territorial restrictions (incl. in online sales)

Historically, and until today, the compatibility of vertical restraints with Article 101 has taken place in the context of the wider objective of achieving an integrated internal market against the general premises that market integration enhances competition in the European Union and that companies should not be allowed to re-establish private barriers between Member States where State barriers have been successfully abolished. Hence, territorial restrictions and chiefly contractual clauses affording 'absolute territorial

16 *United States v. Apple Inc.*, 791 F.3d 290 (2d Cir. 2015).
17 Case AT.40153 – E-book MFNs and related matters (Amazon), 28 July 2017.

protection' to suppliers and/or resellers have consistently been considered negatively.

Against that background, it is both telling and unsurprising that the first vertical restraint case to reach the Court was *Consten and Grundig*,[5] as discussed in Chapter 1. Reread the case at p. 36 and the excerpts from the *Pioneer* and *Volkswagen* cases following it. These cases reflect the principled stance in the EU against limitations of parallel imports and exports implemented by means of allocation clauses or pricing mechanisms. Originally, that position extended to a broad range of practices deemed to hinder the cross-border trade in goods and services, including dual pricing schemes.

Note on Distillers Company Ltd v. Commission

Distillers Company Ltd ('DCL'), the world's largest seller of Scotch whiskey, established 38 subsidiaries producing spirits in the UK. It accounted for approximately 70% of all gin sales in the UK, 30% to 50% of Scotch whiskey in the UK, and lower percentages on the Continent.

DCL imposed the following conditions of sale:

(a) '[T]he various allowances, rebates and discounts are designed to meet the particular requirements of the home trade and customers are only entitled to them when the goods are in fact consumed within the UK.'
(b) 'Accordingly, if you wish to buy for export to other Common Market countries you must indicate this on your order and purchase must be made at the gross price.'
(c) ' … If … a customer obtains or claims any home trade allowances, rebates or discounts in respect of goods which he has bought and any of those goods turn up in any country outside the UK, the right is reserved for all companies in the DCL group to sell thereafter to such customer only at the gross price.'

The punitive measures were to be applicable in the following circumstances:

> When a DCL subsidiary has a reasonable belief that any quantity of goods bought by the purchaser from any DCL subsidiary has been or will be consumed outside the United Kingdom;
>
> even when the exports are made by a subsequent purchaser;
>
> regardless of the quantity ordered, until and to the extent that the purchaser produces evidence satisfactory to the selling DCL subsidiary company that the goods will be consumed in the United Kingdom.

When investigated by the Commission, DCL claimed that its dual pricing was justified by the following facts. In the UK, its brands were very well known, prices were depressed by price controls, and DCL sold directly to very large and powerful brewery groups that had retail outlets and that demanded very low prices. Outside the UK, the brands were unknown. Moreover, France banned advertisements, and some countries imposed discriminatory taxes. DCL had to invest significant additional amounts of money for promotion on the Continent if it was to sell there at all.

The Commission declared that DCL's price agreements would not be granted an exemption under Article 101(3) because the dual pricing system interfered with parallel imports and isolated the UK market. Distillers then withdrew Johnnie Walker Red Label and Dimple Haig whiskeys from sale in the UK, stating that it could not make sales at the higher price in the UK and it could not cover promotion costs if it sold at the lower price on the Continent. It announced a new brand to replace Johnnie Walker. DCL sued for annulment of the Commission's decision. The Court of Justice held, simply, that the legal effect of DCL's failure to notify the price terms was that the price terms could not be exempted.[18]

? NOTES AND QUESTIONS

1. Could *Consten and Grundig* meet the requirements of Article 101(3) TFEU today? Would the evidence of interbrand competition be excluded today?
   Consten and Grundig is generally understood as a market integration case. Imposing tight territorial restrictions at Member State lines is anathema to the market integration principle of the EU. Should it be? Might such territorial assignments and allocations increase the efficiency of distribution? Note that the vertical block exemption (Regulation 330/2010, as discussed later), applicable for under 30% market shares, recognizes the efficiency of territorial assignments and generally allows them as long as distributors may accept unsolicited bids from outside the territory. Thus, distributors can be subject to active restraints (not to solicit actively outside the territory) but not to passive restraints.
2. Did DCL's price agreements 'isolate' the UK market? How? Would DCL be likely to satisfy Article 101(3) TFEU today?

In the early 2000s, just as the Commission came to refine its views on vertical restraints in general, including territorial restrictions, two cases involving the pharmaceutical company GlaxoSmithKline put a dent in the unwavering EU rule against restraints of parallel imports. In these cases, the Court of Justice essentially mandated the Commission to assess the possible benefits associated with limitations in the parallel trade of pharmaceutical products and to consider reasonable and proportionate ways to balance the interests of protecting intrabrand and interbrand competition when faced with territorial restrictions.

18 Case 30/78, *Distillers Company Ltd v. Commission* [1980] ECR 229, EU:C:1980:186.

CASE

GlaxoSmithKline Services Unlimited v. Commission (Case T-168/01) (Spanish price ceiling)[19]

[Spanish legislation capped the price of pharmaceuticals sold to pharmacies and hospitals and covered by Spanish reimbursement rules. GlaxoSmithKline ('GSK'), a major pharmaceutical producer, made agreements with its wholesalers that for all other products (i.e., pharmaceuticals not for the domestic market), GSK would charge a price set by objective economic factors, and that this would be the price that GSK had initially proposed to the Spanish government as the reimbursement price plus a cost-of-living adjustment (clause 4 of the General Sales Conditions). The Commission found that the clause violated Article 101 TFEU. In so holding, the Commission discounted GSK's arguments and evidence as to the virtues and advantages of Clause 4. GSK petitioned the General Court to annul the Commission's decision.]

295 In the light of the structure of GSK's arguments and also of the discussion of that point during the administrative procedure, the Decision could not avoid examining, first of all, whether parallel trade led to a loss in efficiency for the pharmaceutical industry in general, and for GSK in particular. …

296 However, a comparison of the evidence provided by GSK with the other evidence invoked by the Commission in the Decision clearly reveals that in the medicines sector the effect of parallel trade on competition is ambiguous, since the gain in efficiency to which it is likely to give rise for intrabrand competition, the role of which is limited by the applicable regulatory framework, must be compared with the loss in efficiency to which it is likely to give rise for interbrand competition, the role of which is central.

297 In those circumstances, the Commission could not refrain from examining, second, whether Clause 4 of the General Sales Conditions could enable GSK's capacity for innovation to be reinstated and thus could give rise to a gain in efficiency for interbrand competition.

298 That, moreover, formed the very core of the prospective analysis which the Commission was under a duty to carry out in order to respond to GSK's request for an exemption. According to the consistent case-law cited …, it is necessary to determine whether the agreement prohibited on account of the disadvantage which it represents for competition (Article [101(1)]) presents an advantage of such a kind as to offset that disadvantage (Article [101(3)]).

19 [2006] ECR II-2969, EU:T:2006:265 (upheld in Joined Cases C-501, C-513, C-515 and C-519/06 P [2009] ECR I-9291, EU:C:2009:610).

CASE *(continued)*

299 The Commission was therefore still required to examine GSK's arguments relating to the advantages expected of Clause 4 of the General Sales Conditions. In that regard, recital 156 to the Decision, the only recital susceptible of attesting to an examination on that point, indicates essentially:

> [I]t is a matter of discretion for pharmaceutical companies to decide how much they wish to invest in R&D. Any savings they might hypothetically make by preventing parallel trade would therefore not automatically lead to higher R&D investments. It is conceivable that these savings might merely be added to the companies' profits. Obviously, the generation of extra profits alone cannot justify an exemption. In this regard, GSK's argument would mean that the first condition for [the application of Article [101(3)] would be fulfilled for every agreement that could be said to contribute to an increase in the revenues of a firm engaged in R&D. The condition would in any case be meaningless, since it is in the nature of any agreement restricting competition to be likely to increase a firm's earnings.

300 However, GSK did not claim that the creation of additional profits would in itself justify an exemption. On the contrary, it maintained that parallel trade prevented it from making the profits necessary for the optimum financing of its R&D, that Clause 4 of the General Sales Conditions would enable it to increase its revenues and that it would have every interest, in the light of the fierce interbrand competition, of the central role played by innovation in that competition and of the methods of financing R&D, in investing a part of this surplus in R&D in order to overtake its competitors or to ensure that it would not be overtaken by them. In other words, it claimed that its General Sales Conditions should be exempted because they would have not merely the immediate effect of increasing its revenues, but above all the secondary effect of increasing its capacity for innovation. Furthermore, it maintained that that advantage must be compared with the fact that, when it was obtained by parallel traders, that surplus did not constitute an advantage, because, not being obliged to engage in genuine competition among themselves, the parallel traders reduced prices only to the extent necessary to attract retailers and therefore kept most of that surplus for themselves, as GSK again submitted at the hearing.

301 The Commission could not merely reject those arguments outright on the ground that the advantage described by GSK would not necessarily be achieved, as it did at recital 156 to the Decision, but was required, in accordance with the case-law, also to examine, as specifically as possible, in the context of a prospective analysis, whether, in the particular circumstances of the case and in the light of the evidence submitted to it, it seemed more likely that the advantages described by GSK would be achieved or, on the contrary, that they would not. It was not entitled to consider, in a peremptory manner and without providing proper arguments, that the factual arguments and the evidence submitted by GSK must be regarded as hypothetical, as it maintained most recently at the hearing.

* * *

CASE *(continued)*

303 It follows from the foregoing that the Decision is vitiated by a failure to carry out a proper examination, as the Commission did not validly take into account all the factual arguments and the evidence pertinently submitted by GSK, did not refute certain of those arguments even though they were sufficiently relevant and substantiated to require a response, and did not substantiate to the requisite legal standard its conclusion that it was not proved, first, that parallel trade was apt to lead to a loss in efficiency by appreciably altering GSK's capacity for innovation and, second, that Clause 4 of the General Sales Conditions was apt to enable a gain in efficiency to be achieved by improving innovation.

The balancing exercise

* * *

306 … [T]he Commission's finding that Clause 4 of the General Sales Conditions restricts competition is well founded only in so far as it finds that Clause 4 has the effect of depriving final consumers of medicines reimbursed by a national sickness insurance scheme of the advantage which they would have derived, in regard to prices and costs, from the participation of the Spanish wholesalers in intrabrand competition on the markets of destination of the parallel trade from Spain.

307 Consequently, the Commission's conclusion that there is no need to carry out a balancing exercise, which would show in any event that the advantage associated with Clause 4 does not offset the disadvantage which it represents for competition, cannot be upheld. The Commission was required, first, to conduct an appropriate examination of GSK's factual arguments and evidence, in order to be in a position to carry out, second, the complex assessment necessary in order to weigh up the disadvantage and the advantage associated with Clause 4 of the General Sales Conditions.

Conclusion

308 It follows from the foregoing that the Commission could not lawfully conclude that, as regards the existence of a contribution to the promotion of technical progress, GSK had not demonstrated that the first condition for the application of Article [101(3)] was satisfied. In those circumstances, there is no need to examine GSK's arguments relating to a contribution to the improvement of the distribution of medicines.

c) Evidence of the advantage being passed on to the consumer, of the indispensability of Clause 4 of the General Sales Conditions and of the absence of the elimination of competition

* * *

CASE *(continued)*

315 … In effect, the fact that Clause 4 of the General Sales Conditions prevents the limited pressure which might exist, owing to parallel trade from Spain, on the price and the cost of medicines in the geographic markets of destination must be related to the facts, put forward by GSK and not disputed by the Commission, that competition by innovation is very fierce in the sector and that competition on price exists in another form, although by law it emerges only when, upon expiry of the patent, manufacturers of generic medicines are able to enter the market. In those circumstances, it was still necessary … to assess what form of competition must be given priority with a view to ensuring the maintenance of effective competition sought by Article 3(1)(g) EC [now in a protocol] and Article [101].

4. *Conclusion*

* * *

317 Accordingly, the Decision must be annulled in so far as, in Article 2, it rejects GSK's request for an exemption.

? NOTES AND QUESTIONS

1. On reconsideration, what must the Commission establish, or decide on the basis of sufficient evidence, to deny the exemption? What must GSK establish to entitle it to an exemption? Is the Commission well placed to conduct the balancing exercise?
2. Is *GSK* a small or large wedge in the door of allowing restraints on parallel imports if justified by (imperative?) considerations of efficiency and innovation? Is the holding likely to be limited to pharmaceuticals?

A related case arose in Greece, wherein GSK's Greek subsidiary, GSK AEVE, cut back the supply of medicines to wholesalers who sold into higher-priced export markets. The wholesalers sued. GSK AEVE justified on grounds of the Greek price-capping legislation; the claim that the trans-shipping wholesalers, not the consumer, profit from parallel imports/exports; and the claim that GSK AEVE had to stem the tide of low-priced exports for the sake of its investments in R&D. The Greek court referred questions to the Court of Justice. The Court, applying Article 102, confirmed the strong principle against restraints on parallel trade but allowed an exception.

CASE

Sot. Lelos KAI SIA EE v. GlaxoSmithKline AEVE (Joined Cases C-468 to C-478/06)[20]

52 The first thing to consider is GSK AEVE's argument that parallel trade in any event brings only few financial benefits to the ultimate consumers.

53 In that connection, it should be noted that parallel exports of medicinal products from a Member State where the prices are low to other Member States in which the prices are higher open up in principle an alternative source of supply to buyers of the medicinal products in those latter States, which necessarily brings some benefits to the final consumer of those products.

54 It is true, as GSK AEVE has pointed out, that, for medicines subject to parallel exports, the existence of price differences between the exporting and the importing Member States does not necessarily imply that the final consumer in the importing Member State will benefit from a price corresponding to the one prevailing in the exporting Member State, inasmuch as the wholesalers carrying out the exports will themselves make a profit from that parallel trade.

55 Nevertheless, the attraction of the other source of supply which arises from parallel trade in the importing Member State lies precisely in the fact that that trade is capable of offering the same products on the market of that Member State at lower prices than those applied on the same market by the pharmaceuticals companies.

56 As a result, even in the Member States where the prices of medicines are subject to State regulation, parallel trade is liable to exert pressure on prices and, consequently, to create financial benefits not only for the social health insurance funds, but equally for the patients concerned, for whom the proportion of the price of medicines for which they are responsible will be lower. At the same time, as the Commission notes, parallel trade in medicines from one Member State to another is likely to increase the choice available to entities in the latter Member State which obtain supplies of medicines by means of a public procurement procedure, in which the parallel importers can offer medicines at lower prices.

57 Accordingly, without it being necessary for the Court to rule on the question whether it is for an undertaking in a dominant position to assess whether its conduct vis-à-vis a trading party constitutes abuse in the light of the degree to which that party's activities offer advantages to the final consumers, it is clear that, in the circumstances of the main proceedings,

20 [2008] ECR I-7139, EU:C:2008:504.

CASE *(continued)*

such an undertaking cannot base its arguments on the premiss that the parallel exports which it seeks to limit are of only minimal benefit to the final consumers.

* * *

65 In relation to the application of Article [101] of the … Treaty, the Court has held that an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the objective of the Treaty to achieve the integration of national markets through the establishment of a single market. Thus on a number of occasions the Court has held agreements aimed at partitioning national markets according to national borders or making the interpenetration of national markets more difficult, in particular those aimed at preventing or restricting parallel exports, to be agreements whose object is to restrict competition within the meaning of that Treaty article.

* * *

67 Although the degree of price regulation in the pharmaceuticals sector cannot therefore preclude the Community rules on competition from applying, the fact nonetheless remains that, when assessing, in the case of Member States with a system of price regulation, whether the refusal of a pharmaceuticals company to supply medicines to wholesalers involved in parallel exports constitutes abuse, it cannot be ignored that such State intervention is one of the factors liable to create opportunities for parallel trade.

68 Furthermore, in the light of the Treaty objectives to protect consumers by means of undistorted competition and the integration of national markets, the Community rules on competition are also incapable of being interpreted in such a way that, in order to defend its own commercial interests, the only choice left for a pharmaceuticals company in a dominant position is not to place its medicines on the market at all in a Member State where the prices of those products are set at a relatively low level.

* * *

70 In that respect, and without it being necessary to examine the argument raised by GSK AEVE that it is necessary for pharmaceuticals companies to limit parallel exports in order to avoid the risk of a reduction in their investments in the research and development of medicines, it is sufficient to state that, in order to appraise whether the refusal by a pharmaceuticals company to supply wholesalers involved in parallel exports constitutes a reasonable and proportionate measure in relation to the threat that those exports represent to its legitimate commercial interests, it must be ascertained whether the orders of the wholesalers are out of the ordinary.

CASE *(continued)*

71 Thus, although a pharmaceuticals company in a dominant position, in a Member State where prices are relatively low, cannot be allowed to cease to honour the ordinary orders of an existing customer for the sole reason that that customer, in addition to supplying the market in that Member State, exports part of the quantities ordered to other Member States with higher prices, it is nonetheless permissible for that company to counter in a reasonable and proportionate way the threat to its own commercial interests potentially posed by the activities of an undertaking which wishes to be supplied in the first Member State with significant quantities of products that are essentially destined for parallel export.

72 In the present cases, the orders for reference show that, in the disputes which gave rise to those orders, the appellants in the main proceedings have demanded not that GSK AEVE should fulfil the orders sent to it in their entirety, but that it should deliver them quantities of medicines corresponding to the monthly average sold during the first 10 months of 2000. In six of the 11 actions in the main proceedings, the appellants asked for those quantities to be increased by a certain percentage, which was fixed by some of them at 20%.

73 In those circumstances, it is for the referring court to ascertain whether the abovementioned orders are ordinary in the light of both the previous business relations between the pharmaceuticals company holding a dominant position and the wholesalers concerned and the size of the orders in relation to the requirements of the market in the Member State concerned.

* * *

76 … [A] producer of pharmaceutical products must be in a position to protect its own commercial interests if it is confronted with orders that are out of the ordinary in terms of quantity. Such could be the case, in a given Member State, if certain wholesalers order from that producer medicines in quantities which are out of all proportion to those previously sold by the same wholesalers to meet the needs of the market in that Member State.

77 In view of the foregoing, the answer to the questions referred should be that Article 102 must be interpreted as meaning that an undertaking occupying a dominant position on the relevant market for medicinal products which, in order to put a stop to parallel exports carried out by certain wholesalers from one Member State to other Member States, refuses to meet ordinary orders from those wholesalers is abusing its dominant position. It is for the national court to ascertain whether the orders are ordinary in the light of both the size of those orders in relation to the requirements of the market in the first Member State and the previous business relations between that undertaking and the wholesalers concerned.

* * *

NOTES AND QUESTIONS

1. Did GSK AEVE's constraint on supply to the wholesaler/exporters harm market integration? How? Did it have positive as well as negative effects for consumers (people needing medications)? Does the rule of the case tend to limit the negative effects (higher prices in a neighbouring State) while freeing up pro-competitive aspects (more innovation, made possible by sales at market price or above)? Or, is the rule calibrated to something else entirely, such as fairness to traditional customers?
2. How will the rule of the case make a difference—to the conduct of GSK AEVE, to consumers, to likelihood of innovation?

As crystallized in the VBER, much of the law on territorial restrictions has narrowed down over time to a distinction between active sales to a particular territory or a customer group allocated to another distributor or reserved to the supplier, which may be constrained under certain conditions, and passive sales in response to unsolicited request from individual customers, which may not (thereby entailing the prohibition of various forms of 'absolute territorial protection' under Article 101(1)). In recent years, the Commission has repeatedly enforced the law against restrictions of passive sales in the distribution of a broad range of products and services ranging from branded apparel (Guess) and licensed sports gear (Nike) to other branded merchandises (Hello Kitty) and video games (Steam), in relation to both offline and online sales.[21]

With the advent of e-commerce, the distinction between active and passive sales has also been transposed to the online world. In particular, the use of a website by a distributor has been considered a form of passive selling, which cannot be restricted irrespective of the fact that a website is by nature accessible from everywhere.[22] Thus, restrictions of online sales or online advertising *de facto* prohibiting or limiting the effective use of the internet to sell the contract goods or services are considered to have the object of restricting passive sales to end users wishing to purchase online. This includes limitations to the aggregate volume of online sales, to the use of entire online advertising channels such as search engines or price comparison services, or measures preventing resellers from establishing or using their own online store.[23] Likewise, limitations on the reach of a distributor's website,

21 See, e.g., cases AT.40428—Guess, 17 December 2018; AT.40432—Character Merchandise, 9 July 2019; AT.40436—Ancillary Sports Merchandise, 25 March 2019; AT.40413, 40414, 40420, 40422 and 40424—Video Games, 20 January 2021. Other similar cases were brought under Article 102, such as AT.40134—AB InBev relating to restrictions on the import of the very popular Jupiler beer into Belgium from The Netherlands and France.

22 See, originally, 2010 Guidelines on Vertical Restraints, para. 52.

23 See 2022 Guidelines on Vertical Restraints, para. 203.

re-routing obligations, transaction termination requirements based on territorial criteria, prior authorization requirements for individual online transactions, or certain dual pricing schemes making online sales unprofitable or financially unsustainable are considered as 'hard-core restrictions' under the VBER.[24] Conversely, specific restrictions on the use of the internet by distributors have been considered compatible with the VBER to the extent that they would lead to active selling into, for instance, other distributors' exclusive territories or customer groups (by means of, e.g., targeted online advertising[25] or the establishment of an online store with a top-level domain corresponding to a territory other than the one in which the seller is established).

It is in that context that the Court of Justice was asked to rule on the compatibility with Article 101 of the constructive refusal by Pierre Fabre Dermo-Cosmétique, as a result of provisions included in its selective distribution contracts, to authorize the sale of its cosmetics and personal care products via the internet.

CASE

Pierre Fabre Dermo-Cosmétique v. Président de l'Autorité de la Concurrence (Case C-439/09)[26]

[Pierre Fabre Dermo-Cosmétique manufactures and markets cosmetics and personal care products under various brands, including Klorane, Ducray, Galénic and Avène, which are sold mainly through pharmacists in France and throughout Europe. In 2007, the Pierre Fabre group held an estimated 20% market share in France. Distribution contracts for products of the Klorane, Ducray, Galénic and Avène brands stipulate that sales must be made exclusively in a physical space, in which a qualified pharmacist must be present. This requirement was deemed to exclude *de facto* all forms of internet sales. The French Competition Authority concluded that the 'online sales ban' imposed by Pierre Fabre on its authorized distributors was contrary to Article 101. Pierre Fabre appealed, and the Paris court of appeal requested a preliminary ruling from the Court of Justice.]

43 It is undisputed that, under Pierre Fabre Dermo-Cosmétique's selective distribution system, resellers are chosen on the basis of objective criteria of a qualitative nature, which are

24 See 2022 Guidelines on Vertical Restrains, paras. 206 and 209.

25 See 2022 Guidelines on Vertical Restraints, paras. 212–214.

26 [2011] ECR I-9419, EU:C:2011:649.

CASE *(continued)*

laid down uniformly for all potential resellers. However, it must still be determined whether the restrictions of competition pursue legitimate aims in a proportionate manner in accordance with the considerations set out at paragraph 41 of the present judgement.

44 In that regard, it should be noted that the Court, in the light of the freedoms of movement, has not accepted arguments relating to the need to provide individual advice to the customer and to ensure his protection against the incorrect use of products, in the context of non-prescription medicines and contact lenses, to justify a ban on internet sales. …

45 Pierre Fabre Dermo-Cosmétique also refers to the need to maintain the prestigious image of the products at issue.

46 The aim of maintaining a prestigious image is not a legitimate aim for restricting competition and cannot therefore justify a finding that a contractual clause pursuing such an aim does not fall within Article 101(1) TFEU.

47 In the light of the foregoing considerations, … Article 101(1) TFEU must be interpreted as meaning that, in the context of a selective distribution system, a contractual clause requiring sales of cosmetics and personal care products to be made in a physical space where a qualified pharmacist must be present, resulting in a ban on the use of the internet for those sales, amounts to a restriction by object within the meaning of that provision where, following an individual and specific examination of the content and objective of that contractual clause and the legal and economic context of which it forms a part, it is apparent that, having regard to the properties of the products at issue, that clause is not objectively justified.

The possibility of a block exemption or an individual exemption

48 If it is established that an agreement or contractual clause restricts competition within the meaning of Article 101(1) TFEU, it will be for the referring court to examine whether the conditions in paragraph 3 of that article are met.

49 The possibility for an undertaking to benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU derives directly from the Treaty. It is not contested in any of the observations submitted to the Court. That possibility is also open to the applicant in the main proceedings.

50 However, in that regard, given that the Court does not have sufficient information before it to assess whether the selective distribution contract satisfies the conditions in Article 101(3) TFEU, it is unable to provide further guidance to the referring court.

* * *

CASE *(continued)*

[The Court then analyses the position under the block exemption that was applicable at the time of the decision of the French Competition Authority.[27]]

53 [I]t follows from Article 4(c) of Regulation No 2790/1999 that the exemption is not to apply to vertical agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object the restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.

54 A contractual clause such as the one at issue in the main proceedings, prohibiting *de facto* the internet as a method of marketing, at the very least has as its object the restriction of passive sales to end users wishing to purchase online and located outside the physical trading area of the relevant member of the selective distribution system.

55 According to Pierre Fabre Dermo-Cosmétique, the ban on selling the contractual products via the internet is equivalent however to a prohibition on operating out of an unauthorised establishment. It submits that, since the conditions for exemption laid down at the end of the provision, cited in paragraph 53, are thus met, Article 4 does not apply to it.

56 It should be pointed out that, by referring to 'a place of establishment' Article 4(c) of Regulation No 2790/1999 concerns only outlets where direct sales take place. The question that arises is whether that term can be taken, through a broad interpretation, to encompass the place from which internet sales services are provided.

57 As regards that question, it should be noted that, as an undertaking has the option, in all circumstances, to assert, on an individual basis, the applicability of the exception provided for in Article 101(3) TFEU, thus enabling its rights to be protected, it is not necessary to give a broad interpretation to the provisions which bring agreements or practices within the block exemption.

58 Accordingly, a contractual clause, such as the one at issue in the main proceedings, prohibiting *de facto* the internet as a method of marketing cannot be regarded as a clause prohibiting members of the selective distribution system concerned from operating out of an unauthorised place of establishment within the meaning of Article 4(c) of Regulation No 2790/1999.

27 Regulation 2790/1999/EC of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices [1999] *O.J.* L336/21.

CASE *(continued)*

59 In the light of the foregoing considerations ... Article 4(c) of Regulation No 2790/1999 must be interpreted as meaning that the block exemption provided for in Article 2 of that regulation does not apply to a selective distribution contract which contains a clause prohibiting *de facto* the internet as a method of marketing the contractual products. However, such a contract may benefit, on an individual basis, from the exception provided for in Article 101(3) TFEU where the conditions of that provision are met.

? NOTES AND QUESTIONS

1. A ban on online sales cannot benefit from the block exemption because it restricts passive sales. Is that the case here? Did the Court discuss how passive sales could occur? Were prices higher in France than they were elsewhere in Europe?
2. Under *Pierre Fabre*, a complete ban of online sales appears contrary to Article 101, even though an individual exemption under Article 101 (3) TFE U remains theoretically possible. What other strategies could a manufacturer use to limit or control sales on the internet? Consider the 2010 Vertical Guidelines, paras. 51–54 and 64, which were applicable at the time of the Pierre Fabre judgement. Are these provisions appropriately protective of brand owners' needs to guard against free riders?
3. *Pierre Fabre* concerned not a Commission decision, but a decision of the French Competition Authority. Since the early 2000s and the adoption of Regulation 1/2003, national authorities have taken the lead in enforcing competition law in vertical agreements, including for online sales, though the Commission has become more active again since 2017 and the completion of its e-commerce sector inquiry.
4. While overall assessment criteria apply across online and offline channels, the 2022 Guidelines on Horizontal Restraints consider that online and offline channels have different characteristics, so that a supplier operating a selective distribution system may impose on its authorized distributors criterial for online sales that are not equivalent to those imposed for sales in brick-and-mortar shops, 'provided that requirements imposed for online sales do not indirectly have the object of preventing the effective use of the internet by the buyer to sell the contract goods or services to particular territories or customers'. Reflect on these distinctions and try to illustrate how they could apply in practice (see also 2022 Guidelines on Horizontal Restraints, para. 235).

The Pierre Fabre judgement led to a spate of decisions not only by national competition authorities (NCAs) but also by the Commission, curtailing similar restrictions in a number of economic sectors. For example, in the *Guess* case, the Commission took issue with the subjection of online selling by authorized retailers to a prior specific authorization by Guess for which the company exercised full discretion instead of relying on specified quality criteria.[28] With the development of online intermediation platforms, uncertainties arose about the practice of various suppliers banning distribution on marketplaces such as Amazon or eBay as part of their selective distribution system. And, the Court of Justice was asked to step in again.

28 Case AT.40428—Guess, 17 December 2018.

CASE

Coty Germany v. Parfümerie Akzente (Case C-230/16)[29]

[Coty Germany sells luxury cosmetics in Germany. It markets certain brands in that sector via a selective distribution network. Parfümerie Akzente has for many years distributed Coty Germany goods, as an authorised distributor, both at its brick-and-mortar locations and over the internet. Internet sales were carried out partly through its own online store and partly via the platform 'amazon.de'. At some point, Coty Germany amended its standard selective distribution contract to exclude sales on third-party online platforms, which Parfümerie Akzente refused to sign.

Coty Germany then brought an action before German courts seeking an order prohibiting Parfümerie Akzente from distributing Coty products via 'amazon.de', which it lost in first instance. On appeal, the court stayed proceedings and requested a preliminary ruling from the ECJ on the compatibility of the contractual prohibition of resale on Amazon with Article 101 TFEU and the vertical block exemption regulation 330/2010.]

38 This question concerns the lawfulness, under Article 101(1) TFEU, of a specific clause in a selective distribution system for luxury and prestige goods.

43 It is … necessary to ascertain whether, in circumstances such as those at issue in the main proceedings, the prohibition imposed by a supplier on its authorised distributors of the use, in a discernible manner, of third-party platforms for the internet sale of the luxury goods at issue is proportionate in the light of the objective pursued, that is to say, whether such a prohibition is appropriate for preserving the luxury image of those goods and whether or not it goes beyond what is necessary to achieve that objective.

44 With regard, in the first place, to the appropriateness of the prohibition at issue in the main proceedings in the light of the objective pursued, it must be observed, first, that the obligation imposed on authorised distributors to sell the contract goods online solely through their own online shops and the prohibition on those distributors of using a different business name, as well as the use of third-party platforms in a discernible manner, provide the supplier with a guarantee, from the outset, in the context of electronic commerce, that those goods will be exclusively associated with the authorised distributors.

45 Since such an association is precisely one of the objectives sought when recourse is had to such a system, it appears that the prohibition at issue in the main proceedings includes a

29 ECLI:EU:C:2017:941.

CASE *(continued)*

limitation which is coherent in the light of the specific characteristics of the selective distribution system.

* * *

47 Second, the prohibition at issue in the main proceedings enables the supplier of luxury goods to check that the goods will be sold online in an environment that corresponds to the qualitative conditions that it has agreed with its authorised distributors.

48 Non-compliance by a distributor with the quality conditions set by the supplier allows that supplier to take action against that distributor, on the basis of the contractual link existing between those two parties. The absence of a contractual relationship between the supplier and third-party platforms is, however, an obstacle which prevents that supplier from being able to require, from those third-party platforms, compliance with the quality conditions that it has imposed on its authorised distributors.

49 The internet sale of luxury goods via platforms which do not belong to the selective distribution system for those goods, in the context of which the supplier is unable to check the conditions in which those goods are sold, involves a risk of deterioration of the online presentation of those goods which is liable to harm their luxury image and thus their very character.

50 Third, given that those platforms constitute a sales channel for goods of all kinds, the fact that luxury goods are not sold via such platforms and that their sale online is carried out solely in the online shops of authorised distributors contributes to that luxury image among consumers and thus to the preservation of one of the main characteristics of the goods sought by consumers.

51 Consequently, the prohibition imposed by a supplier of luxury goods on its authorised distributors to use, in a discernible manner, third-party platforms for the internet sale of those goods is appropriate to preserve the luxury image of those goods.

52 With regard, in the second place, to the question of whether the prohibition at issue in the main proceedings goes beyond what is necessary for the attainment of the objective pursued, it must be noted, first, that, in contrast to the clause referred to in the case which gave rise to the judgment of 13 October 2011, Pierre Fabre Dermo-Cosmétique (C–439/09, EU:C:2011:649), the clause here at issue in the main proceedings does not contain an absolute prohibition imposed on authorised distributors to sell the contract goods online. Indeed, under that clause, the prohibition applies solely to the internet sale of the contract goods via third-party platforms which operate in a discernible manner towards consumers.

CASE *(continued)*

53 Consequently, authorised distributors are permitted to sell the contract goods online both via their own websites, as long as they have an electronic shop window for the authorised store and the luxury character of the goods is preserved, and via unauthorised third-party platforms when the use of such platforms is not discernible to the consumer.

54 Second, it must be noted that, …, despite the increasing importance of third-party platforms in the marketing of distributors' goods, the main distribution channel, in the context of online distribution, is nevertheless constituted by distributors' own online shops, which are operated by over 90% of the distributors surveyed.

55 Those factors support the view that it may be inferred that a prohibition, such as the prohibition which the applicant in the main proceedings imposed on its authorised distributors, on using, in a discernible manner, third-party platforms for the internet sale of luxury goods does not go beyond what is necessary in order to preserve the luxury image of those goods.

56 In particular, given the absence of any contractual relationship between the supplier and the third-party platforms enabling that supplier to require those platforms to comply with the quality criteria which it has imposed on its authorised distributors, the authorisation given to those distributors to use such platforms subject to their compliance with pre-defined quality conditions cannot be regarded as being as effective as the prohibition at issue in the main proceedings.

57 It follows that, subject to inquiries which it is for the referring court to make, such a prohibition appears to be lawful in relation to Article 101(1) TFEU.

? NOTES AND QUESTIONS

1. The reasoning of the Court of Justice is very much focused on the proportionality of the clause in question to preserve the image of luxury and prestige of the goods at issue. Do you find this reasoning appropriate to determine whether a restriction is prohibited under Article 101? Where do you see potential weaknesses? What are the implications for distributors?
2. Can the reasoning of the Court of Justice be transposed outside the sphere of luxury and prestige goods? Does it apply to all selective distribution systems? In the judgement, the Court also repeated its long-standing view that:

> 'the organization of a selective distribution network is not prohibited by Article 101(1) TFEU, to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such

> a network in order to preserve its quality and ensure its propre use and, finally, that the criteria laid down do not go beyond what is necessary' (para. 24)

Also, note that under the VBER, neither active nor passive sales to end users may be restricted within a selective distribution system.

3. Until the Coty judgement, uncertainty prevailed, especially in Germany, as to limitations put to distribution on online marketplaces. In 2014, the German NCA (the Bundeskartellamt) closed proceedings against Adidas AG following the latter's commitment to abandon its ban on sales via online market places and to allow authorised retailers to use Adidas brand-related terms as search words for search engine advertising such as Google AdWords. The President of the Bundeskartellamt declared at the time that: 'The trading possibilities offered by the internet create new challenges for both manufacturers and retailers. In this dynamic market environment, it is our task to keep markets and opportunities open for the benefit of retailers and consumers. It goes without saying that manufacturers can select their distributors according to certain quality requirements. However, both under European and German competition law, they are prohibited from largely eliminating a principal distribution channel such as the web. Our proceedings against Adidas and also against ASICS (which have not yet been concluded) serve as test cases because currently a number of brand manufacturers are contemplating similar measures. We welcome the fact that Adidas now allows its authorised retailers not only to operate their own online shops but also to operate shops at online market places. Not least because of declining customer numbers, this is particularly important for small and medium-sized sports retailers who want to expand their customer base. Consumers will also directly benefit from the amended conditions of sale'

How do you explain the tension between the German NCA's decision and the Coty judgement? What interests did the German Competition Authority protect?

4. The 2010 Vertical Guidelines applicable at the time of the Coty judgement acknowledged that a supplier may require quality standards for the use of the internet to resell its goods, just as it may require quality standards for a shop or for selling by catalogue or for advertising and promotion in general. Thus, according to the guidelines, a supplier may require that its distributors use third-party platforms to distribute the contract products only in accordance with specific standards and conditions, such as the requirement that customers do not visit the distributor's website through a site carrying the name or logo of the third-party platform. Is the Coty judgement in line with that approach? Does it go further, and to what extent?

5. The Commission's current post-Coty analytical framework is now summarized in a dedicated section of the 2022 Vertical Guidelines (see paras. 332 to 341, and also para. 208). A particular section of the 2022 Vertical Guidelines is also devoted to the analysis of restrictions on the use of price comparison services (see paras. 343 to 355).

Note on geo-blocking

With the advent of digital technologies, territorial restrictions in the distribution of products and services online and in the online access to digital media content have attracted particular attention. In the final report of its e-commerce sector inquiry,[30] the Commission identified various practices preventing consumers from making cross-border online purchases

30 Final report on the E-commerce Sector Inquiry, 10 May 2017, COM(2017) 229 final.

or limiting their access to online digital content, for example by blocking access to websites, re-routing customers to websites targeting other Member States or simply refusing to deliver cross-border or to accept cross-border payments. These pervasive practices came to be known as 'geo-blocking'.

The report made it clear that geo-blocking measures may be caught under Article 101 TFEU if they originate in agreements between distinct undertakings and make the interpenetration of national markets more difficult by restricting parallel trade, limiting passive sales or unduly restricting active sales, e.g., beyond territories allocated to other distributors or reserved for the supplier. The Commission subsequently initiated a number of enforcement actions aimed at geo-blocking practices originating in agreements between traders.

In the *Video Games* case,[31] for example, the Commission fined Valve, owner of the online PC gaming platform 'Steam', and five publishers of PC video games for embedding geographical restrictions in the Steam activation keys included in the PC video games edited by publishers and subsequently sold by third-party distributors across the EEA. As a result, users located outside a designated Member State or group of Member States were prevented from activating and playing certain PC video games with Steam activation keys, which amounted to unlawful geo-blocking under Article 101 TFEU.

However, addressing geo-blocking practices by means of Article 101 TFEU has also raised difficulties. First of all, as acknowledged by the e-commerce sector inquiry report, 'the majority of geo-blocking measures in relation to consumer goods result from unilateral business decisions of retailers not to sell cross-border', i.e., they fall outside the scope of Article 101 TFEU (and of Article 102 TFEU, since most retailers of consumer goods cannot be deemed to hold a dominant position). This shortcoming was addressed by means of a specific EU regulation adopted in February 2018 (known as the 'Geo-blocking Regulation'),[32] which banned traders from blocking or limiting access to websites for reasons related to customers' nationality, place of residence or place of establishment, including the re-routing of customers without their prior consent, or from imposing discriminatory terms and

31 AT.40413, 40414, 40420, 40422 and 40424—Video Games, 20 January 2021.

32 Regulation 2018/302 addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market, [2018] *O.J.* L 60/1.

conditions based on nationality, residence or establishment, including with respect to means of payment.[33]

Importantly, audiovisual services are excluded from the scope of the Geo-blocking Regulation, including access to content or broadcasts provided on the basis of exclusive territorial licences. This is the second difficulty in addressing geo-blocking practices by means of Article 101 TFEU, for in relation to copyrighted content, these practices reflect the fact that online rights are to a large extent licensed on a territorial basis, e.g., for a particular country or group of countries sharing a common language. In other words, the attempt to tackle geo-blocking by means of competition rules has exposed the tension between copyright protection and the corollary right of copyright holders to grant licences on a territorial basis, on the one hand, and the historical sensitivity of protecting the integrity of the common market in enforcing Article 101, on the other.

That tension is not entirely new to, or inherent in, access to online digital content.[34] Yet in 2015, in line with the Commission-wide strategy to improve access to online content, the Commission raised objections against licensing agreements entered into between Sky UK and six major US film studios. Among other things, these agreements required Sky UK to block access to films through its online or satellite pay-TV services to consumers located outside the UK and Ireland. This was deemed to restrict Sky UK's ability to accept unsolicited (i.e., 'passive') requests for its pay-TV

33 The application of the Geo-blocking Regulation is without prejudice to the application of the rules on competition, in particular Article 101, notably in relation to agreements restricting active and passive sales (see Article 6). Generally, the Geo-blocking Regulation protects only end users, irrespective of whether they are individual consumers or businesses. Thus, its scope does not extend to businesses purchasing a good or a service for subsequent resale, transformation, processing, renting or subcontracting, and its terms therefore do not aim to interfere with distribution schemes between undertakings in a business-to-business (B2B) context, as they are often negotiated bilaterally and directly linked to specific business models or commercial strategies (e.g., selective and exclusive distribution).

34 In a case known as *Murphy* pertaining to satellite broadcasting, the Court of Justice held that 'where a licence agreement is designed to prohibit or limit the cross-border provision of broadcasting services, it is deemed to have as its object the restriction of competition, unless other circumstances falling within its economic and legal context justify the finding that such an agreement is not liable to impair competition'.

(Joined Cases C-403/08 and C-429/08, *Football Association Premier League Ltd and Others v. QC Leisure and Others (C-403/08)* and *Karen Murphy v. Media Protection Services Ltd*, ECLI:EU:C:2011:631, para. 140). However, the case did not pertain to the actual grant of exclusive licences for the broadcasting of premium content—Premier League football matches—but to ancillary obligations on the broadcasters not to supply decoding devices enabling access to the protected content with a view to their use outside the territory covered by the licence agreement, thereby granting the broadcasters absolute territorial exclusivity in the area covered by their licence.

services from consumers located abroad and thus to amount to unlawful geo-blocking. Likewise, some agreements also contained clauses requiring studios to ensure that other broadcasters would be prevented from making their content available through pay-TV services in the UK and Ireland. Overall, the restrictive clauses were found to reflect US film studios' practice of licensing audiovisual content to a single pay-TV broadcaster in each Member State (or clusters of Member States sharing a common language), thereby providing 'absolute territorial exclusivity' to individual broadcasters, such as Sky UK, and eliminating cross-border competition between pay-TV broadcasters while partitioning the Single Market across national boundaries.

The studios eventually committed to drop the clauses in question, and Sky committed not to apply them, thereby escaping a finding of antitrust liability (and relieving the Commission from the obligation to establish an infringement). In its commitment decisions,[35] the Commission clarified that the mere fact that a right holder has granted to a sole licensee the exclusive right to exhibit or broadcast content from a Member State is not problematic as such. Rather, when licensing agreements contain clauses imposing additional obligations designed to prohibit or limit the cross-border provision of broadcasting services and ensure compliance with territorial limitations, they eliminate cross-border competition between broadcasters and are deemed to have the object of restricting competition. In turn, the Commission acknowledged the resulting limitation to the exercise and remuneration of the intellectual property rights (here copyrights) associated with the (licensing of the) content in question.

However, these decisions remain controversial. Why is it so? Reflect on their potential implications, the existence of a restriction of competition and, as a corollary, the scope of copyright protection across broadcasting platforms.

D. Resale price maintenance: Europe, and a view from the US

Like Europe since the turn of the century, the US took a sceptical stance towards vertical restraints for many years, believing that they impaired the give-and-take dynamic of the competition process and thus harmed

35 See Commission decisions of 26 July 2016 and of 7 March 2019 in Case AT.40023/Cross-border access to pay-TV. These decisions were subsequently annulled and withdrawn, respectively, following the appeal brought by a third party, namely French broadcaster Canal+, alleging a disproportionate limitation of its own contractual rights (see Case C-132/19 P, EU:C:2020:1007).

powerless market actors and consumers. US antitrust law condemned, per se, agreements between a manufacturer and a distributor as to the price, customers or territories at which, to whom or where the distributor must sell.

The Chicago School revolution began to take root in the late 1970s and found particularly fertile ground after the election of Ronald Reagan in 1980. One centrepiece claim of Chicago was the perversity of inhospitality towards vertical restraints. Chicago School theorists saw vertical restraints as a way to realize efficiencies and compete in interbrand markets. If a number of producers occupied a market, and there was no conspiracy among them, each one would have the incentive to design its distribution system in a way most likely to get to market efficiently and to sell the most it could of its product. No one could get market power by a vertical restraint. Indeed, even if there were few producers (but no cartel) or a monopoly producer with the power to charge a supracompetitive price, each would take its profit from its first sale (e.g., to wholesalers) and still would have the incentive to design its distribution system in order to serve consumers efficiently. After the Chicago School revolution began, the Supreme Court overturned the vertical per se rules, one by one. By 2007, there was only one remaining per se rule against a vertical distribution restraint—the nearly century-old rule against minimum RPM agreements.[36] This rule was challenged in *Leegin*, as discussed later.

Meanwhile, Europe and many other jurisdictions, as well as states of the US, likewise condemned RPM agreements. In Europe, they were held to fall categorically into Article 101(1) because they have the object to restrict competition,[37] that is, intrabrand competition, in the first place, but also interbrand competition, inasmuch as they may, e.g., facilitate collusion or raise barriers to entry. They are recognized as a hard-core violation in the vertical block exemption regulation and vertical guidelines[38] insofar as they entail

> the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend

36 *Dr Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911).

37 See, e.g., C-243/83, *Binon v AMP,* EU:C:1985:284, para. 44; C-311/85, *VVR v Sociale Dienst van de Plaatselijke en Gewestelijke Overheidsdiensten,* EU:C:1987:418, para. 17; C-27/87, *Erauw-Jacquery v La Hesbignonne,* EU:C:1988:183, para. 15.

38 As such, they may be entitled to an Article 101(3) exemption in specific instances only, as in the case of newspaper and periodical distribution where RPM constitutes 'the sole means of supporting the financial burden resulting from the taking back of unsold copies … if the latter practice constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers …' (Case 243/83,S,4 *Binon & Cie v. Agence et Messageries de la Presse* (1995) ECR 2015, EU:C:1985:284, paras. 44–46.)

> a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.[39]

RPM arrangements can be applied directly by means of contractual provisions, but they are more often indirect, resulting from incentives to observe a particular price level or disincentives to deviate from a minimum price. As such, they can take various forms, such as making the grant of rebates conditional on the observance of a given price level, or simply result from threats, intimidations, warnings, delay or suspension of deliveries, or contract termination in relation to the observance of a given price level.[40] The qualification of certain conduct or behaviour as amounting to RPM is therefore very facts specific and varies from one case to another. In contrast, maximum resale prices or purely recommended prices are not considered hard-core restrictions, though they may raise concerns in particular circumstances.

Note on RPM in e-commerce

In May 2017, the Commission released the final report on its sector inquiry into e-commerce business practices.[41] That final report revealed that resale price-related restrictions are by far the most widespread restrictions of competition in e-commerce markets. The inquiry also shed light on the increased use of automatic software applied by retailers for price monitoring and price setting.

Subsequently, on 24 July 2018, the European Commission found consumer electronics manufacturers Asus, Denon & Marantz, Philips and Pioneer guilty of imposing fixed or minimum resale prices on their online retailers in breach of Article 101 TFEU, and imposed fines totalling €111 million.[42]

Asus, Denon & Marantz, Philips and Pioneer restricted the ability of their online retailers to set their own retail prices for widely used consumer electronics products such as kitchen appliances, notebooks and hi-fi products. If those retailers did not follow the prices requested by manufacturers, they faced threats or sanctions such as blocking of supplies. Many, including the biggest online retailers, use pricing algorithms that automatically adapt retail prices to those of competitors. In this way, the pricing restrictions

39 See Article 4(a) of Regulation 2022/720 (2022 VBER).

40 For a discussion, see the 2022 Guidelines on Vertical Restraints, paras. 185–201.

41 See Report from the Commission to the Council and the European Parliament—Final report on the E-commerce Sector Inquiry, 10 May 2017, COM(2017) 229 final.

42 Case AT.40181—Philips; Case AT.40182—Pioneer; Case AT.40465—Asus; Case AT.40469—Denon & Marantz.

imposed on low-pricing online retailers typically had a broader impact on overall online prices for the respective consumer electronics products. Moreover, the use of sophisticated monitoring tools allowed the manufacturers to effectively track resale price setting in the distribution network and to intervene swiftly in case of price decreases.

The Commission found that the practices in question limited effective price competition between retailers and led to higher prices with an immediate effect on consumers.

In particular, the Commission noted that Asus monitored the resale price of retailers for certain computer hardware and electronics products such as notebooks and displays, intervened with retailers selling those products below the resale prices recommended by Asus, and requested price increases in both Germany and France. Denon & Marantz engaged in RPM in Germany and the Netherlands with respect to audio and video consumer products such as headphones and speakers, while Philips was found to have engaged in resale price in France with respect to a range of consumer electronics products such as kitchen appliances, coffee machines, vacuum cleaners, home cinema and home video systems, electric toothbrushes, hair driers and trimmers. In parallel to RPM with respect to products such as home theatre products, iPod speakers, speaker sets and hi-fi products, Pioneer also limited the ability of its retailers to sell cross-border to consumers in other Member States in order to sustain different resale prices in different Member States, for example by blocking orders of retailers who sold cross-border.

In the US, the leading authority on the subject is the *Leegin* case decided by the US Supreme Court in 2007, which overturned the *Dr Miles* case, by a vote of 5 to 4. The extensive excerpts following, including of the dissenting opinion, capture the tensions arising in the assessment of vertical restraints, notably pricing restraints such as RPM, and the associated underlying assumptions.

CASE

Leegin Creative Leather Products, Inc. v. PSKS, Inc.[43]

[Leegin was a small designer, producer and distributor of leather accessories, including belts it sold under the brand name 'Brighton'. It sold its products across the US in more than 5000 retail stores.

43 551 U.S. 877, 127 S.Ct. 2705, 168 L.Ed.2d 623 (2007).

CASE *(continued)*

PSKS, which operates Kay's Kloset, was a women's apparel store in Lewisville, Texas. It bought the Brighton brand from Leegin in 1995. While it bought from many other manufacturers as well, Brighton was its most important brand.

In 1997, Leegin established a policy of not selling to retailers who sold Brighton goods below its suggested prices. It explained that it thought consumers were 'perplexed by promises of product quality and support of product which we believe is lacking in … larger stores. Consumers are further confused by the ever popular sale, sale, sale, etc.' Leegin wanted to 'break away from the pack by selling [at] specialty stores' that offer consistently great-quality merchandise and support.

PSKS pledged to adhere to the suggested prices but later marked down its Brighton line by 20% to compete with nearby retailers. Leegin demanded that PSKS stop discounting, and when PSKS refused, Leegin stopped supplying its belts to PSKS. PSKS sued. At trial, in view of *Dr Miles*, the district court excluded Leegin's proffer of testimony regarding the pro-competitive effect of its pricing policy. The jury found that Leegin had entered into vertical resale price agreements and returned a verdict for PSKS, amounting as trebled to a judgement of nearly $4 million.

The Court granted certiorari to determine whether RPM should continue to be per se illegal.]

Justice Kennedy

* * *

Resort to *per se* rules is confined to restraints, like those mentioned [competitor price fixing or market division], 'that would always or almost always tend to restrict competition and decrease output.' *Business Electronics,* [485 U.S.] at 723. To justify a *per se* prohibition a restraint must have 'manifestly anticompetitive' effects, and 'lack … any redeeming virtue,' …

* * *

The reasons upon which *Dr. Miles* relied do not justify a *per se* rule. As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se* rule is nonetheless appropriate.

A

* * *

The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition—the

CASE *(continued)*

competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand. The promotion of interbrand competition is important because 'the primary purpose of the antitrust laws is to protect [this type of] competition.' *Khan*, 522 U.S., at 15. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. Consumers might learn, for example, about the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. Or, consumers might decide to buy the product because they see it in a retail establishment that has a reputation for selling high-quality merchandise. If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services.

Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. '[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labour that is often required in the distribution of products unknown to the consumer.' *GTE Sylvania,* [433 U.S.] at 55 …. New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services ….

CASE *(continued)*

B

While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel. An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to consumers.

Vertical price restraints also 'might be used to organize cartels at the retailer level'. A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance, the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement ....

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs. A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's distribution network. A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants. As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

C

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance 'always or almost always tend[s] to restrict competition and decrease output.' *Business Electronics* .... As the [*per se*] rule would proscribe a

CASE *(continued)*

significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation.

* * *

Respondent also argues the *per se* rule is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods .... Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct .... For, as has been indicated already, the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be increased in the course of promoting procompetitive effects. And resale price maintenance may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful.

Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. ...

* * *

Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry. For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand. Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice. ...

The source of the restraint may also be an important consideration. If there is evidence retailers were the impetus for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct. ...

As a final matter, that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity

CASE *(continued)*

has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. …

The rule of reason is designed and used to eliminate anticompetitive transactions from the market. This standard principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses ….

* * *

Justice Breyer, joined by Justices Stevens, Souter and Ginsburg, dissenting: [After noting information that prices go up when minimum resale pricing is allowed, citing a study showing a 19% to 27% price rise during the period of fair trading laws, and cataloguing possible harms and benefits of resale price maintenance:]

* * *

The case before us asks which kind of approach the courts should follow where minimum resale price maintenance is at issue. Should they apply a per se rule (or a variation) that would make minimum resale price maintenance always (or almost always) unlawful? Should they apply a 'rule of reason'? Were the Court writing on a blank slate, I would find these questions difficult. But, of course, the Court is not writing on a blank slate, and that fact makes a considerable legal difference.

* * *

The upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits …. But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?

* * *

Economic discussion, such as the studies the Court relies upon, can *help* provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which

CASE *(continued)*

depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgement to bear, sometimes applying rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits. …

I have already described studies and analyses that suggest (though they cannot prove) that resale price maintenance can cause harms with some regularity—and certainly when dealers are the driving force. But what about benefits? How often, for example, will the benefits to which the Court points occur in practice? I can find no economic consensus on this point. There is a consensus in the literature that 'free riding' takes place. But 'free riding' often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a 'free ride' on investments that others have made in building a product's name and reputation. The question is how often the 'free riding' problem is serious enough significantly to deter dealer investment.

To be more specific, one can easily *imagine* a dealer who refuses to provide important presale services, say a detailed explanation of how a product works (or who fails to provide a proper atmosphere in which to sell expensive perfume or alligator billfolds), lest customers use that 'free' service (or enjoy the psychological benefit arising when a high-priced retailer stocks a particular brand of billfold or handbag) and then buy from another dealer at a lower price. Sometimes this must happen in reality. But does it happen often? We do, after all, live in an economy where firms, despite *Dr. Miles' per se* rule, still sell complex technical equipment (as well as expensive perfume and alligator billfolds) to consumers.

* * *

All this is to say that the ultimate question is not whether, but *how much,* 'free riding' of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain 'sometimes.' …

How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily.* For one thing, it is often difficult to identify *who*—producer or dealer—is the moving force behind any given resale price maintenance agreement …. For another thing, as I just said, it is difficult to determine just when, and where, the 'free riding' problem is serious enough to warrant legal protection.

* * *

CASE *(continued)*

I recognize that scholars have sought to develop check lists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. But applying these criteria in court is often easier said than done. The Court's invitation to consider the existence of 'market power,' for example, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets. And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties. One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs. …

Are there special advantages to a bright-line rule? Without such a rule, it is often unfair, and consequently impractical, for enforcement officials to bring criminal proceedings. And since enforcement resources are limited, that loss may tempt some producers or dealers to enter into agreements that are, on balance, anticompetitive.

… The question before us is not what should be the rule, starting from scratch. We here must decide whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century.

* * *

Meanwhile, while the US Supreme Court considered and reversed the US ban on resale price maintenance agreements, the European Commission was re-examining its treatment of vertical restraints, including RPM. In 2010, it issued a revised block exemption (Regulation 330/2010) and vertical guidelines, which labelled minimum RPM as a hard-core restriction not eligible for block exemption.[44] After a thorough policy review, the 2022 VBER retained the qualification of minimum RPM as a hardcore restriction removing the benefit of the block exemption (according to Art. 4(a)). See also the discussion in section 6.1.1. of the 2022 Guidelines on Vertical Restraints.

44 Accessible at: https://competition-policy.ec.europa.eu/antitrust/legislation/vertical-block-exemptions_en (accessed 3 February 2023).

NOTES AND QUESTIONS

1. In the US *Leegin* case, who has the stronger argument, Justice Kennedy or Justice Breyer?
2. Under US law, 'rule of reason' entails analysis of the market facts to determine whether the undertaking is likely to get or increase market power, harming consumers, as a result of the challenged conduct or practice. The Court, per Justice Kennedy, said: 'just' raising price is not equivalent to harm to consumers. The higher price might mean more service or more demand. (Is this perspective accepted in Europe?) In some cases, rule of reason analysis can involve shortcuts; e.g., if the challenged conduct is usually harmful, a presumption might be applied, and the conduct might be declared illegal unless the undertaking comes forward with an efficiency justification. This is called a structured rule of reason. If you were to suggest a structured rule of reason for RPM, what would that rule be? Is your proposed rule likely to be acceptable to Justice Kennedy?
3. Consider the US Court's assertions: protecting interbrand competition is 'the primary purpose of the antitrust laws'; higher prices are irrelevant 'absent a further showing of anticompetitive conduct'.
4. Compare the European block exemption and guidelines with the US *Leegin* case. What different perceptions do you observe about the possible harms and possible benefits of RPM? Is the structure of analysis, including burdens of proof, likely to lead to different results? What would be the outcome of the *Leegin* case (agreement not to discount a minor brand of fine belts) in each jurisdiction—US after trial, and EU?

The preceding sections looked at distribution restraints of the sort that constrain the choices of chosen distributors as to the price at which they must sell or the customers to whom or territories in which they may sell. Other vertical restraints require exclusive buying or selling, force the distributor to buy unwanted items or to buy only from designated sellers, foreclose outsiders from entering the distribution network, or as in franchising, combine several of these restraints to foster uniformity. As you read cases decided before approximately the year 2000, and especially cases denying or conditioning exemptions, consider whether those cases accord with the new economic approach, which would protect consumers and the market from uses of market power. Note that cases of exclusionary conduct entail many of the same concepts as do abuse of dominance cases under Article 102 TFEU. Indeed, if the undertaking is dominant, an anti-competitive exclusionary agreement can be condemned under both Articles 101 and 102 TFEU.

E. Single branding, exclusivity, tying and related foreclosures, including parity clauses

A producer or other seller of a product may wish to obligate its distributor or other buyers to buy the product, or a portion of its needs, only from the seller, or to buy a second product from the seller. For example, in *Hoffmann-La Roche*, p. 281, vitamin producer Merck contracted with the dominant vitamin producer Hoffmann-La Roche to buy from Roche its needs of vitamin

B_6 in excess of its own manufacturing capacity. And in *Tetra Pak*, p. 303, the dominant supplier of aseptic cartons for milk and juice required buyers to buy, also, their needs of non-aseptic cartons. In both cases, the Court condemned the restraints as abuses of dominance in violation of Article 102 TFEU on the grounds that they 'deprive[d] the purchaser of or restrict[ed] his possible choices of sources of supply and ... den[ied] other producers access to the market' (quoting from *Hoffmann-La Roche*).

Single-branding and exclusivity requirements or tie-in contracts may also be caught by Article 101(1) TFEU.[45] Under what conditions? How and when can they be justified under Article 101(3) TFEU? An early analysis was provided by the Court of Justice in the *Delimitis* case, which remains a reference to this day.

CASE

Stergios Delimitis v. Henninger Bräu AG (Case C-234/89)[46]

[Stergios Delimitis rented a pub from Henninger Bräu, agreeing to sell only Henninger Bräu beer in the pub. Asserting that the contract violated Article 101 TFEU and was void, Delimitis failed to pay rent, and Henninger deducted the rent from Delimitis' rental deposit. Delimitis sued for return of the rent. Henninger relied on the contract, which presumably was not intended to harm competition but reflected the brewery's desire for an assured outlet for its beer and Delimitis' desire for the premises and an assured supply.

The national court sought a preliminary ruling on whether the contract was caught by Article 101(1) TFEU and if so, whether it fell within the then block exemption on exclusive purchasing. The Court of Justice set forth the following framework for determining whether exclusive contracts that are part of a network of similar contracts have the effect, if not the object, of 'preventing, restricting or distorting competition':]

45 In EU competition parlance, single branding refers to agreements whereby a buyer is obliged or induced to concentrate its orders for a particular type of product or service with one supplier, i.e., purchasing exclusivity extending to non-compete and quantity forcing clauses. Conversely, exclusive supply refers to restrictions that oblige or induce the supplier to sell the contract products or services only or mainly to one buyer, in general for a particular use. In turn, tying refers to situations where customers that purchase one product or service (the tying product) are required to purchase also another distinct product (the tied product) from the same supplier (or a source designated by the supplier).
46 [1991] ECR I-935, EU:C:1991:91.

CASE *(continued)*

15 … [I]t is necessary to analyse the effects of a beer supply agreement, taken together with other contracts of the same type, on the opportunities of national competitors or those from other Member States, to gain access to the market for beer consumption or to increase their market share and, accordingly, the effects on the range of products offered to consumers.

* * *

18 [The relevant market is] the national market for beer distribution in premises for the sale and consumption of drinks.

19 In order to assess whether the existence of several beer supply agreements impedes access to the market as so defined, it is further necessary to examine the nature and extent of those agreements in their totality, comprising all similar contracts tying a large number of points of sale to several national producers. The effect of those networks of contracts on access to the market depends specifically on the number of outlets thus tied to national producers in relation to the number of public houses which are not so tied, the duration of the commitments entered into, the quantities of beer to which those commitments relate, and on the proportion between those quantities and the quantities sold by free distributors.

20 The existence of a bundle of similar contracts, even if it has a considerable effect on the opportunities for gaining access to the market, is not, however, sufficient in itself to support a finding that the relevant market is inaccessible, inasmuch as it is only one factor, amongst others, pertaining to the economic and legal context in which an agreement must be appraised. The other factors to be taken into account are, in the first instance, those also relating to opportunities for access.

21 In that connection it is necessary to examine whether there are real concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses. For that purpose it is necessary to have regard to the legal rules and agreements on the acquisition of companies and the establishment of outlets, and to the minimum number of outlets necessary for the economic operation of a distribution system. The presence of beer wholesalers not tied to producers who are active on the market is also a factor capable of facilitating a new producer's access to that market since he can make use of those wholesaler's sales networks to distribute his own beer.

22 Secondly, account must be taken of the conditions under which competitive forces operate on the relevant market. In that connection it is necessary to know not only the number and the size of producers present on the market, but also the degree of saturation of that market and customer fidelity to existing brands, for it is generally more difficult to penetrate a saturated market in which customers are loyal to a small number of large producers than a

CASE *(continued)*

market in full expansion in which a large number of small producers are operating without any strong brand names. …

23 If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to restrict competition within the meaning of Article [101](1) of the Treaty. They do not, therefore, fall under the prohibition laid down in that provision.

24 If, on the other hand, such examination reveals that it is difficult to gain access to the relevant market, it is necessary to assess the extent to which the agreements entered into by the brewery in question contribute to the cumulative effect produced in that respect by the totality of the similar contracts found on that market. Under the Community rules on competition, responsibility for such an effect of closing off the market must be attributed to the breweries which make an appreciable contribution thereto. Beer supply agreements entered into by breweries whose contribution to the cumulative effect is insignificant do not therefore fall under the prohibition under Article [101](1).

* * *

27 The reply to be given to the first three questions is therefore that a beer supply agreement is prohibited by Article [101](1) of the Treaty, if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

? NOTES AND QUESTIONS

1. *Delimitis* was considered a break-through judgement, prior to which single-branding contracts with significant producers were deemed almost automatically caught by Article 101(1) TFEU and thus were in need of justification.
2. What do you suppose was Delimitis' theory of the case—and its theory of antitrust harm?

Subsequently, a 'flurry' of hard-fought ice cream freezer cases gave the Commission and the EU Courts the opportunity to further develop an analytical framework for the assessment of these types of exclusivity/tying practices under Article 101 TFEU.

CASE

Schöller Lebensmittel v. Commission (Case T-9/93)[47]

[Langnese-Iglo, a subsidiary of Unilever, and Schöller Lebensmittel were the leading firms in Germany in the sale of ice cream; particularly impulse-buying ice cream. Each, separately, had a network of agreements with the sellers requiring that the retailers purchase ice cream only from it, or supplying freezers 'free' and requiring that the retailer use the freezer only for the supplier's ice cream and not for the ice cream of competitors.

Mars, a French manufacturer of ice cream bars, was trying to pierce the German impulse ice cream market. Finding the two firms' supply contracts to be road blocks to market access, Mars complained to the Commission. The Commission brought proceedings against each. The Commission withdrew a comfort letter that it had previously given to Schöller and decided both the question of applicability of Article 101(1) TFEU and the question of entitlement of the applicants to an individual exemption.

In *Schöller*, the Court first examined whether the contested supply agreements had an appreciable effect on competition. It found 'that the applicant holds a strong position in the relevant market'; it held 'more than 25 per cent' in the traditional trade, and, by its agreements, tied more than 10% of the sales outlets. Combined with Langnese's contracts, the tied portion of the market exceeded 30%.]

83 With respect to [other] factors, the Commission has drawn attention to the existence of additional substantial barriers to access to the market, both in the grocery trade and in the traditional trade .... [A]ccess to the market for new competitors is made more difficult by the existence of a system under which a large number of freezer cabinets are lent by the applicant to retailers both in the grocery trade and in the traditional trade ..., the retailers being obliged to use them exclusively for the applicant's products.

84 The Court considers that the Commission was right to treat that factor as contributing to making access to the market more difficult. The necessary consequence of that situation is that any new competitor entering the market must either persuade the retailer to exchange

47 See also Case T-7/93, *Langnese-Iglo v. Commission* [1995] ECR II-1533, EU:T:1995:98, as upheld in Case C-279/95 P, [1998] ECR I-5609, EU:C:1998:447.

CASE *(continued)*

the freezer cabinet installed by the applicant for another, which involves giving up the turnover in the products from the previous supplier, or to persuade the retailer to install an additional freezer cabinet, which may prove impossible, particularly because of lack of space in small sales outlets. Moreover, if the new competitor is able to offer only a limited range of products, as in the case of the intervener, it may prove difficult for it to persuade the retailer to terminate its agreement with the previous supplier.

* * *

86 … [T]he Court considers that examination of all the similar agreements concluded on the market and of other aspects of the economic and legal context in which they operate … shows that the exclusive purchasing agreements concluded by the applicant are liable appreciably to affect competition within the meaning of Article [101](1) of the Treaty.

87 In view of the strong position occupied by the applicant in the relevant market and, in particular, its market share, the Court considers that the agreements contribute significantly to the closing-off of the market.

88 In view of all the foregoing, the Court considers that the Commission was right to conclude that the contested agreements give rise to an appreciable restriction of competition in the relevant market.

* * *

139 In considering whether the Commission was right to refuse to grant an individual exemption, it must first be borne in mind that an individual exemption decision may be granted only if, in particular, the four conditions laid down by Article [101](3) of the Treaty are all met by the agreement in question, with the result that an exemption must be refused if any of the four conditions is not met.

* * *

143 … Although it is apparent … that exclusive purchasing agreements lead in general to an improvement in distribution, in that they enable the supplier to plan the sale of his goods with greater precision and for a longer period and ensure that the reseller's requirements will be met on a regular basis for the duration of the agreement, and even if it is assumed that it would be necessary for the applicant, for reasons of cost, to terminate supplies to certain small sales outlets if it were obliged to give up supplies to them on an exclusive basis, the Commission considers nevertheless that the contested agreements do not give rise to objective and specific advantages for the public interest such as to compensate for the disadvantages which they cause in the field of competition.

CASE *(continued)*

144 In support of that argument, the Commission states, first, that, in view of the strong position on the market held by the applicant, the contested agreements do not … have the effect of intensifying competition between different brands of products. The Commission rightly took the view that the network of agreements at issue constitutes a major barrier to access to the market, with the result that competition is restricted.

145 … [It is clear] that the Commission considered that supplies to any small sales outlets abandoned by the applicant, for reasons of costs, would be taken over either by other suppliers, for example small local producers, or by independent dealers selling several ranges of products. Moreover, the Commission points out that the applicant itself recognised that it continues to supply even very small sales outlets, whose annual turnover hovers around 300 German marks, in those cases where their geographical situation is favourable.

146 Against that background, it must be borne in mind that the intervener, Mars, stated that it is wholly exceptional for impulse products to be distributed using a transport system owned by the producers. The parties agree that it is only in Germany, Denmark and Italy that undertakings in the Unilever group, including Langnese, have concluded exclusive agreements covering sales outlets.

147 Although the applicant claims that it would be obliged, for reasons of cost, to cease supplying a number of small sales outlets if it had to give up its exclusive purchasing agreements, the Court considers that it has not provided any evidence to show that such a situation would be liable to jeopardise regular supplies of impulse ice-cream to the territory as a whole and, in particular, that the small sales outlets concerned would not subsequently be supplied by other suppliers or wholesalers, simply as a consequence of the unrestricted competition which would then prevail. Nor has the applicant produced any convincing evidence of the special conditions in Germany which made it necessary to create an ice-cream distribution system belonging to the producers. The Court therefore considers that the applicant has not shown that the Commission committed a manifest error of assessment in considering that the contested agreements did not fulfil the first condition laid down by Article [101](3) of the Treaty. …

* * *

? NOTES AND QUESTIONS

1. Is an impulse ice cream market in Germany plausible? If Schöller supplied the entire market, could it probably raise its prices to a supra-competitive level without losing so many customers (to packaged ice cream or something else) that the price rise would not be worth it? (Assume that the answer is affirmative as you proceed to analyse the problem.)
2. Did Schöller have market power? Is market power important to the decision? Should it be?

3. What were the effects of the exclusivity and freezer clauses on competitors? On potential competitors? On consumers? Which effects are most important?
4. What were the efficiencies of the exclusive supply contracts? Of the 'free' freezer arrangements? How, in your view, do the efficiencies balance against the anti-competitive aspects of the agreements? What was the Court's view?
5. What was the strongest case for granting the exemption? Was the Commission right to deny it?
6. If you were Mars and if you could not expect the European Commission to grant you relief from your competitors' exclusivity and freezer clauses, what strategies would you adopt?
7. If Schöller and Langnese withdrew the exclusivity obligation and offered retailers the choice of (a) freezers for sale at market price, (b) freezers for rent at market price, or (c) freezers 'free' with an obligation to use only the supplier's ice cream in the freezer, would the new arrangement be permissible? What if virtually all of the retailers chose option (c)?[48]
8. The Irish court took an entirely different view of the freezer arrangement and its effects. Masterfoods (Mars) had been enlisting numerous retailers in Ireland to stock and display Mars bars in their freezers. HB ice cream (of the Unilever family) ('HB'), the dominant impulse ice cream seller in Ireland, sought to enforce its exclusive contracts with the retailers. In 1992, it persuaded an Irish court to permanently restrain Mars from inducing breach of HB's contracts. The Irish court, per Judge Lynch, analysed the contracts as follows:

   > I think that a breach of paragraph (e) [distorting competition by imposing unrelated obligations] does not arise at all in this case. The contracts in question are bailments of freezers whether they be on loan or hire. The terms objected to relate to the very basis of the contract of bailment, namely, the purpose for which the goods (the freezers) are bailed to the bailee (the retailer). The freezers are bailed to the bailees for the purpose of storing, selling and advertising HB ice cream products only. Those terms are not supplementary obligations nor by their nature or according to commercial usage do they not have an essential connection with the contracts of bailment. They do. It would seem that none of the particular breaches set out in paragraphs (a) to (e) of Article [101](1) apply: certainly, none clearly apply to the facts of Article [101] if it was reasonably clear that there was a contravention of the general intention of the article. Is it reasonably likely that these contracts of bailment of freezers may affect trade between Member States of the European Community and may prevent, restrict or distort competition within the common market? I am not satisfied that Mars has made out a sufficient prima facie or serious case to that effect.[49]

   Masterfoods complained to the European Commission about the exclusivity clauses and the Irish court injunction. The Commission, after finding that 40% of sales outlets in Ireland were tied up by the exclusivity clause, held:

   > [T]he exclusivity provision in the freezer-cabinet agreement concluded between HB and retailers in Ireland, for the placement of cabinets in retail outlets which have only one or more freezer cabinets supplied by HB for the stocking of single-wrapped items of impulse ice cream, and not having a freezer cabinet either procured by themselves or provided by another ice-cream manufacturer constitutes an infringement of Article [101](1) of the Treaty.

48 See Commission Decision of 4 September 1998 in Cases IV/34.073, 34.395, 35.436, 98/531—*Van den Bergh Foods Ltd* (subsidiary of Unilever).

49 *H.B. Ice-cream Ltd v. Masterfoods Ltd* (trading as Mars Ireland) [1990] 2 IR 463.

* * *

> HB's inducement to retailers in Ireland to enter into freezer-cabinet agreements subject to a condition of exclusivity by offering to supply them with one or more freezer cabinets for the stocking of single-wrapped items of impulse ice cream and to maintain the cabinets, free of any direct charge, constitutes an infringement of Article [102] of the Treaty.[50]

Meanwhile, the Irish Supreme Court stayed the Irish appeal and asked the European Court of Justice whether its obligation of sincere cooperation (Article 4(3) TEU) required it to stay the Irish case pending the disposition of Van den Bergh's appeal. The Court of Justice responded in the affirmative, holding that Ireland could not maintain a judgement inconsistent with the Community disposition of the same issue.[51]

On its appeal from the Commission decision, Van den Bergh stressed that the retailers were free to terminate their contract with HB or to install freezers not belonging to HB; and it argued that their freedom to do so meant that there was no foreclosure. The General Court responded that the retailers had little incentive to exercise this freedom and seldom did. It noted also the unique circumstances of the market, including the limited space in the retail stores and the popularity of HB's ice cream, and concluded that the Commission did not err in finding that the clause produced a sufficiently high degree of foreclosure to constitute an infringement.[52]

9. The 2022 Guidelines on Vertical Restraints cover the range of exclusionary agreements. Read again the block exemption, and read the framework for analysis of individual cases (Vertical Guidelines, paras. 10–22 and 275–290) and the analysis of single branding (paras. 298–320), exclusive distribution (paras. 321–331) and tying (paras. 389–397). Applying the guidelines, would you come to any different conclusions in the preceding cases? If you need more facts, specify what facts you would need.

10. US law tends to examine more sceptically first, the market power of the seller and second, the feared inability of outsiders to reach the market efficiently notwithstanding exclusivity clauses. Also, US courts would tend to perceive the freezer clause more sympathetically as a good deal for the retailer. But if the undertaking had significant market power, and if its exclusive contract requirements excluded efficient outsiders such that the price of the product (impulse ice cream) was artificially increased, the clause would be likely to offend US law also.[53]

As mentioned, the rise of online sales has profoundly affected the design and implementation of distribution policies in recent years. Notably, the online platform economy has come to play an increasingly important role in the distribution of goods and services, with different players applying different business models. These new ways of doing business have been accompanied by the emergence or expansion of particular commercial practices

50 Commission Decision of 11 March 1998 in Cases IV/34.073, 34.395, 35.436, 98/531—*Van den Bergh Foods Ltd* (subsidiary of Unilever).

51 Case C-344/98, *Masterfoods Ltd (Mars Ireland)* [2000] ECR I-11369, EU:C:2000:689.

52 Case T-65/98, *Van den Bergh Foods v. Commission* [2003] ECR II-4653, EU:T:2003:281, as upheld in Case C-552/03 P [2006] ECR I-9091, EU:C:2006:607.

53 See, e.g., *United States v. Dentsply Int'l Inc.*, 399 F.3d 181 (3d Cir. 2005), cert. denied, 546 U.S. 1089 (2006).

with a very widespread reach due to the underlying technology, which have attracted increased attention on the part of competition authorities. Among these practices, parity clauses stand out.

Generally speaking, contractual clauses containing 'parity obligations', including so-called most favoured nation clauses ('MFNs') or Across Platform Parity Agreements ('APPAs'), require a seller of goods or services to offer the goods or services to another party on conditions that are no less favourable than the conditions offered by the seller to certain other parties or via certain other channels. The conditions may concern prices, inventory, availability, or any other terms or conditions of offer or sale. These parity obligations may also be the result of other direct or indirect measures, such as differential pricing or other incentives whose application depends on the conditions under which the seller offers its goods or services to other parties or via other channels.[54]

Parity obligations may relate to the conditions under which goods or services are offered to end users.[55] These retail parity obligations are often imposed by providers of online intermediation services (for example, online marketplaces or price comparison services) on the buyers of their intermediation services (for example, businesses that sell via the intermediary platform). In turn, one typically distinguishes between 'narrow' and 'wide' retail parity obligations: the narrow ones refer to conditions offered on the direct sales channels of the sellers of goods or services, whereas the wide ones refer to the conditions offered via competing online intermediation services (competing platforms), sometimes in addition to direct sales and possibly all other sales channels.

'Wide' (i.e., across-platform) retail parity obligations are typically the most likely to raise competition concerns by foreclosing entry or expansion by other/new providers of online intermediation services and by limiting competition and/or facilitating collusion between providers of online intermediation services, with the effect of raising prices or reducing the quality of the services in question. Hence, in contrast with other types of parity

54 See 2022 Guidelines on Vertical Restraints, para. 356 and foll.

55 Parity obligations may also be imposed by providers of online intermediation services relating to the conditions under which goods or services are offered to undertakings other than end users, for example to retailers (these are generally referred to as 'upstream parity obligations'). Historically, similar mechanisms have been relied upon by manufacturers, wholesalers or retailers with respect to the conditions under which they purchased goods or services as inputs from suppliers (these are known as 'most favoured customer obligations').

obligations, they are excluded from the benefit of the VBER.[56] However, 'narrow' retail parity obligations may give rise in certain circumstances to similar effects in cases where there are limited alternative providers of similar online intermediation services and/or direct sales channels are particularly significant.

In recent years, all these issues were extensively discussed in cases involving hotel booking platforms (also referred to as OTAs for Online Travel Agencies), most notably Booking.com.

Note on the hotel booking platform cases

As from 2010, several NCAs across the EU started investigating the use of parity clauses by online travel agents in their agreements with hotels. Towards the end of 2013, the German NCA issued a first prohibition decision ordering domestic travel bookings portal 'HRS' (Hotel Reservation Service) to discontinue using wide and narrow parity (or 'best price') clauses in contracts with hotel partners in Germany. According to these clauses, hotels were obliged to always offer to HRS their lowest room price, maximum room capacity, and most favourable booking and cancellation conditions available on the internet or on their own sales channel (including via the hotels' reception desks). The German NCA concluded (and the appeal court affirmed) that these clauses prevented price competition between existing online portals and considerably increased barriers to entry or expansion by new or smaller platforms. At the same time, it initiated proceedings against Booking.com and Expedia based on similar concerns.

Booking.com subsequently offered commitments made binding in April 2015 by the French, Italian and Swedish NCAs to bring to an end investigations brought as a result of complaints by local accommodation services providers and coordinated with the support of the European Commission. In essence, these commitments entailed the replacement of wide by narrow online parity clauses, thus still allowing limitations to the hotels' ability to offer lower rates on their own direct online (but not offline) sales channels.[57] According to the French, Italian and Swedish NCAs, this solution enabled unlocking competition between OTAs and increasing competition by direct sales channels while preserving the OTA business model, notably by containing 'free riding' incentives on the part of end users.

56 See Article 5(1), point (d) and Recital 14 of Regulation 2022/720.

57 Under the commitments, hotels were also allowed to offer preferential rates online as part of fidelity programmes, as well as to reserve room capacity to their own online sales channels.

However, in December 2015, the German NCA took a different view and compelled Booking.com to discontinue all parity clauses, including narrow ones. The President of the German NCA issued the following statement at the time:

> These so-called narrow best price clauses also restrict both competition between the existing portals and competition between the hotels themselves. Firstly they infringe the hotels' freedom to set prices on their own online sales channels. There is little incentive for a hotel to reduce its prices on a hotel booking portal if at the same time it has to display higher prices for its own online sales. Secondly, it still makes the market entry of new platform providers considerably difficult. The 'best price' clauses barely provide an incentive for the hotels to offer their rooms on a new portal cheaper if they cannot implement these price reductions on their own websites as well. There is no apparent benefit for the consumer.

This decision was overturned on appeal but then reinstated by the German Supreme Court in May 2021.

In the meantime, the German NCA had published an *ex post* evaluation of its decision, finding that: (i) Booking.com further consolidated its market position in Germany in spite of the prohibition of narrow parity clauses, (ii) the significance of free-riding issues was overstated (in view of the evolution of the ratio between overall online sales and the growth of the hotels' own direct online sales, and because '99% of all consumers who found their accommodation on Booking.com also actually booked it on Booking.com'), and (iii) hotels' price differentiation activity between the online hotel platforms noticeably increased, as well as a positive correlation between the frequency with which accommodations publish different prices on different online hotel platforms and the claim that they charge lower prices on their own online booking facility.[58]

The divergent conclusions reached by the German and other NCAs as to the likely effect on competition of Booking.com's parity clauses were widely reported as problematic and have been repeatedly presented as a failure of the EU competition law network enforcement scheme. The interplay between the HSR and Booking.com cases in Germany partly explains the situation, but quite remarkably, a number of EU Member States, including France and Italy (but also Austria and Belgium), subsequently decided to

58 'The effects of narrow price parity clauses on online sales—Investigation results from the Bundeskartellamt's Booking proceeding', Bundeskartellamt papers series on Competition and Consumer Protection in the Digital Economy, August 2020 (available at: www.bundeskartellamt.de).

enact statutory bans on the use of both wide and narrow MFN clauses by hotel booking platforms.

To facilitate convergent outcomes, the 2022 Guidelines on Vertical Restraints have introduced a dedicated section sketching the analytical framework and providing a list of relevant parameters to assess the likely effects of parity clauses on competition, starting from the premise that wide parity clauses do not benefit from the VBER, while narrow ones in principle do. In parallel, the EU Digital Markets Act now also prohibits 'gatekeeper platforms' from using wide or narrow retail parity clauses or equivalent measures, i.e.,

> from offering the same products or services to end users through third-party online intermediation services or through their own direct online sales channel at prices or conditions that are different from those offered through the online intermediation services of the gatekeeper.[59]

? NOTES AND QUESTIONS

1. On the controversy of whether or not narrow parity clauses of the types applied by Booking.com are restrictive of competition, which side would you pick and why? Read through section 8.2.5 of the 2022 Guidelines on Vertical Restraints and try to articulate your own views on the different likely effects of narrow versus wide parity clauses and on the reasons that can possibly explain the different approaches adopted by different NCAs in the past.
2. Based on the parameters relevant to the competitive assessment of parity clauses, as provided for in section 8.2.5 of the 2022 Guidelines on Vertical Restraints, try to justify the regulatory option now enshrined in the DMA (see Digital Markets Act, article 5(3)) to prohibit gatekeeper platforms from relying on both wide and narrow parity clauses. What does your analysis reveal about the interplay between EU competition law and the DMA regime?
3. An external market study realized at the request of the Commission on the distribution practices of hotels in a sample of six EU Member States over the 2017–2021 period reveals, among other things, that laws adopted in Austria and Belgium banning the use of wide and narrow parity clauses in the hotel sector do not appear to have led to material changes in hotel distribution practices relative to the other Member States covered by the study (see market study on the distribution of hotel accommodation in the EU, COMP/2020/OP/002, 26 August 2022). Do you find this finding surprising? Why? Justify your opinion.

Following the original review and modernization of the Vertical BER and guidelines and for more than a decade, the Commission essentially left the enforcement of Article 101 TFEU in the area of vertical restraints to NCAs and national courts. The perceived result was the development of varying

59 Regulation 2022/1925 on contestable and fair markets in the digital sector (Digital Markets Act) 2002 O.J. L 265/1, Article 5(3).

standards across Member States in relation to, e.g., evidentiary requirements to establish the existence of RPM or the legality of restrictions to online sales. However, the completion of its e-commerce sector inquiry in 2017 revived the Commission's enforcement practice in the area of vertical restraints.

The number of cases dealt with by the Commission in the aftermath of the sector inquiry, combined with the issuance of a number of important preliminary rulings by the Court of Justice (including in the Pierre Fabre and Coty cases) and a general need for guidance and convergence to accompany the growth of online distribution, have firmly re-established vertical restraints as a dynamic area of EU competition law and policy in recent years. This was confirmed by the vibrant EU-wide debates and rich consultation process that presided over the design and adoption of the 2022 VBER and related guidelines, in close cooperation with NCAs. Next to the adjustments required by the impact of digitization on trading patterns and conditions, sustainability considerations and their impact on distribution arrangements are now likely to attract increased attention, while inflationary trends are bringing back to the fore historical concerns about cross-border territorial restraints.

5

Abuses of dominance

Dominant firm conduct that anti-competitively excludes rivals or exploits buyers or sellers can be one of the most serious violations of the competition law. The offence has been spotlighted in recent years with the growth of the Big Tech platforms and their uses of power. The proscription has been invoked over the years to rein in state-owned enterprises, among other privileged and powerful firms. The relevant Treaty provision is Article 102 TFEU (formerly Article 82 EC), which forbids the abuse of a dominant position. It provides:

> **Article 102**
>
> Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States.
>
> Such abuse may in particular consist in:
>
> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
> (b) limiting production, markets or technical development to the prejudice of consumers;
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection to the subject of such contracts.

At the time of drafting, the drafters of Article 86 (the original EEC Treaty number) drew upon the law of West Germany and also the law of the US. German law had long prohibited market-dominant enterprises from abusing their single-firm or group dominance by hindering competitors or exploiting or discriminating against buyers or sellers.[1] Section 2 of the

1 Act Against Restraints of Competition § 19.

US Sherman Antitrust Act ('Sherman Act') provides that no person shall 'monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize …'.[2]

US antitrust law was adopted at the time of the industrial revolution in response to a distrust of 'big business' and a fear of excessive concentration of private power.[3] German cartel law was adopted at the end of World War II in connection with American aid under the Marshall Plan. By safeguarding freedom of trade, the German law was designed to diffuse power and to prevent the ascendancy of another Nazi regime. The path was laid by the Freiburg School and its Ordoliberal philosophy, which espoused a 'social market economy'.[4]

Among the Western European nations in the 1950s, however, distrust of big business was not the problem. Europe was a continent of many small nations, each isolated by high trade barriers. Private business firms were normally operating below efficient scale. Consolidations, particularly cross-border consolidations, were welcomed in order to increase efficiency and integrate the common market. When adopted in 1957, Article 86 EECT [now 102 TFEU] was seen not as a means to check the size of business but as a vehicle for regulating the conduct of firms that had economic power, including state-owned companies dominating domestic markets.

For 40 years, application of the abuse of dominance article proceeded in a rather formalistic mode of rules prohibiting specific conduct. Beginning in the late 1990s and proceeding especially into the early 2000s, the Commission's Directorate-General for Competition embarked on a programme to modernize European competition law, moving from formalistic rules to effects-based analysis and employing 'sound economics'. This resulted in the issuance of Guidance on the Commission's enforcement priorities in applying Article 82 ECT[5] to abusive exclusionary conduct by dominant undertakings ('Guidance Paper' 2009).[6] Skim this paper now and bookmark it for future reference. The issuance of the Guidance Paper was preceded in 2005 by publication of a discussion paper, which launched a

2 15 U.S.C. § 2.

3 See E. Fox (1981), 'The modernization of antitrust: A new equilibrium', *Cornell L. Rev.*, **66**, 1140.

4 A. Peacock and H. Willgerodt (eds) (1989), *German Neo-Liberals and the Social Market Economy*, London: Palgrave Macmillan.

5 Now Article102 TFEU.

6 The Guidance Paper is available at: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52009XC0224(01).

consultation and an EU-wide debate on the underlying rationale and contours of Article 102 TFEU.[7]

The all-encompassing conversation that surrounded the adoption of the Guidance Paper, which is still unfolding today, caused fundamental questions to resurface, including why Europe has an abuse of dominance prohibition. Is it to protect small and powerless market actors from abuse, or solely to protect consumers? Is it to ensure a level playing field or protect a process that safeguards openness and limits power, or only to enhance efficiencies? Is there a danger that the prohibition will protect small competitors from efficient and innovative rivals, or is there a danger that lax enforcement will protect dominant firms from the discipline of competition? Or both?

Should abuse of dominance law (equivalent to monopolization law in the US) be only reluctantly applied, on the theory that single-firm (non-cartel) action is usually aligned with consumers' interests, or should enforcers be vigilant to break the power of dominant firms and ensure better access to markets for all market players? Which tilt in competition policy is likely to make firms better able to adjust and respond to the changing markets of the world, and to make Europe more competitive? Perspectives on these questions inform virtually every issue covered in this chapter, from whether dominance can be inferred from high market shares and high barriers, to whether dominant firms should have special responsibilities to firms without power, to whether specific conduct forecloses rivals sufficiently to shift the burden of justification to the dominant firm.

A. Dominance

Article 102 TFEU prohibits abuse of a 'dominant position'. The Court of Justice defined dominant position in *Hoffmann-La Roche v. Commission*,[8] and that definition has had lasting importance.

> 38 The dominant position … referred to [in Article 102] relates to a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of the consumers.

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7 See DG Competition discussion paper on the application of Article 82 [now Article 102 TFEU] of the Treaty to exclusionary abuses, available at: https://competition-policy.ec.europa.eu/antitrust/legislation/legislation-notices_en (accessed 3 February 2023).

8 Case 85/76, *Hoffmann-La Roche v. Commission* [1979] ECR 461, EU:C:1979:36.

39 Such a position does not preclude some competition, which it does where there is a monopoly or a quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.

* * *

The existence of a dominant position may derive from several factors which, taken separately, are not necessarily determinative but among these factors a highly important one is the existence of very large market shares.

40 A substantial market share as evidence of the existence of a dominant position is not a constant factor and its importance varies from market to market according to the structure of these markets, especially as far as production, supply and demand are concerned.

* * *

41 Furthermore, although the importance of the market shares may vary from one market to another the view may legitimately be taken that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.

An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for—without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share—is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, already because of this secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position.

* * *

48 On the other hand the relationship between the market shares of the undertaking concerned and of its competitors, especially those of the next largest, the technological lead of an undertaking over its competitors, the existence of a highly developed sales network and the absence of potential competition are relevant factors, the first because it enables the competitive strength of the undertaking in question to be assessed, the second and third because they represent in themselves technical and commercial advantages and the fourth because

> it is the consequence of the existence of obstacles preventing new competitors from having access to the market.

A dominant position connotes economic power in a defined market, power to impose terms on consumers or more generally, power to hinder the maintenance of effective competition. Market definition—determination of both the product market and the geographic market—precedes determination of dominance.

High market shares combined with significant entry barriers are often relied upon as a first indicator of dominance, although high shares are not equivalent to dominance; other factors are relevant. The Court of Justice in *AKZO* said, quoting from *Hoffmann-La Roche*: 'very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position.' It then added: 'That is the situation where there is a market share of 50% such as that found to exist in this case.'[9] In *Hoffmann-La Roche*, a 47% share of one market (Vitamin A) was also held to be enough to confer dominance in view of the structure of the market (the next largest competitors had 27% and 18%), Roche's technological lead over its competitors, the absence of potential competition and Roche's overcapacity. In contrast, the Court overturned a finding of dominance on another market (Vitamin B3) because a market share of 43% did not by itself 'constitute a factor sufficient to establish the existence of a dominant position' in the absence of sufficient corroborative support from other factors.

A firm that has power to raise its prices significantly above its costs and thus charge supracompetitive prices is normally considered dominant. Whether a firm is free of significant competitive constraints is also a test of dominance. In its Guidance Paper, the Commission defines dominance and identifies factors necessary to assess it:[10]

> Dominance entails that the … competitive constraints are not sufficiently effective and hence that the firm in question enjoys substantial market power over a period of time.[11]

An undertaking 'capable of profitably increasing prices above the competitive level for a significant period of time does not face sufficiently effective constraints and can thus generally be regarded as dominant'. Assessments

9 Case 62/86, *AKZO Chemie BV v. Commission* [1991] ECR I-3359, EU:C:1991:286, para. 60.

10 See Guidance Paper, IIIA, paras. 9–18.

11 Guidance Paper, IIIA, para. 10.

of dominance will take account of the competitive structure of the market, including constraints by suppliers/competitors, by the credible threat of entry or expansion, and by buyer power.

The emergence of powerful Big Tech/Big Data platforms has challenged the traditional economic definition of dominance linked to higher prices and lower output. Competition authorities may focus on the sufficiency of competitive constraints to keep the putative dominant firm behaving responsively to buyers, suppliers and users.

Some firms may be 'ultra-dominant' or 'super dominant'—a status that may entail a stronger obligation not to impair undistorted competition—as the General Court characterized in Google in *Google Shopping*.[12]

Note on collective dominance

Article 102 prohibits abuse of a dominant position by 'one or more undertakings'. In theory, dominance can therefore exist on the part of one undertaking (single dominance) and also of two or more undertakings (collective dominance). What is collective dominance within the meaning of this clause?

In *Compagnie Maritime Belge*, members of a shipping conference in the liner market between northern Europe and western Africa collaborated as 'fighting ships' to destroy an independent competitor. The Court defined the critical question as whether 'from an economic point of view [the undertakings] present themselves or act together on a particular market as a collective entity'. '[A] liner conference … can be characterised as a collective entity which presents itself as such on the market vis-à-vis both users and competitors'.[13]

US law does not have an identical concept. But in *E.I du Pont de Nemours & Co. v FTC*,[14] the court stated in dictum that oligopolists' non-collusive adoption of the same oppressive, unjustified anti-competitive business practices could constitute an unfair method of competition within the prohibition of Section 5 of the Federal Trade Commission Act ('FTC Act').[15]

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12 Paras. 180, 183, 224.

13 Joined Cases C-395/96 and C-396/96 P, *Compagnie Maritime Belge Transports SA v. Commission* [2000] ECR I-1365, EU:C:2000:132, paras. 42, 36, 48.

14 729 F.2d 128 (2d Cir.1984).

15 15 U.S.C. § 45.

Section 5 of the FTC Act, unlike the Sherman Act, requires neither joint action nor monopolistic power, but it has been applied with constraint.

The Commission's practice in the area of collective dominance has historically been very limited, and the few reported cases have typically involved situations of strong structural links between the undertakings alleged to hold a collective dominant position. In addition to *Compagnie Maritime Belge*, see *Irish Sugar v. Commission*,[16] *Atlantic Container Line v. Commission*[17] and *Piau v. Commission*.[18] Still, the notion of collective dominance raises interesting questions on the application of competition principles to oligopolistic conduct. Consider the notion of collective dominance vis-à-vis a concerted practice under Article 101 TFEU (see Chapter 2) and with the notion of coordinated effects in merger analysis (see Chapter 6).

B. Abusive conduct

Article 102 TFEU lists four particular practices that may be abusive. The list includes some conduct that is directly associated with the existence of market power and is often referred to as exploitative in that it represents the use of power over price to extract appreciably more than 'fair' or 'competitive' prices from customers. Imposing unfair prices and limiting production fall within this category. Other conduct on the list is coercive, such as requiring a contracting party to accept an obligation that has no relationship to the subject of the contract, forcing acceptance of a second product (a tie-in) or discriminating among customers and thereby placing the disfavoured customer at a competitive disadvantage.

This section deals with a variety of possible abuses of dominance, including excessive pricing, discriminatory pricing, refusals to deal, requirements and exclusive dealing contracts, tying, loyalty rebates, and price predation. It first discusses excessive and discriminatory prices. Excessive prices are by definition an exploitative abuse. Discriminatory pricing has two prongs—a higher price and a lower price—and can involve either exploitation or exclusion or both. It then turns to exclusionary practices, which are the subject of the Commission's Guidance Paper.

16 Case T-228/97, *Irish Sugar v. Commission* [1999] ECR II-2969, EU:T:1999:246 (upheld in Case C-497/99 P, EU:C:2001:393).

17 Joined Cases T-191 and T-212 to T-214/98, *Atlantic Container Line v. Commission* [2003] ECR II-3275, EU:T:2003:245.

18 Case T-193/02, *Piau v. Commission* [2005] ECR II-209, EU:T:2005:22.

1. Excessive and discriminatory prices and unfair terms

a. Excessive pricing

Excessive pricing may be a fraught subject, because it is difficult for a competition authority or a court to determine when prices are excessive and then control the excesses without becoming a regulator. But, cases arise that surmount the difficulties. Indeed, extraordinarily high prices—as in pharmaceuticals and oil—can indicate major market failures that have everyday consequences on people's lives and cry out for remedy. A few major cases set the parameters of the law.

CASE

British Leyland Plc v. Commission (Case 226/84)[19]

[The United Kingdom gave British Leyland the exclusive right to determine whether imported British Leyland cars conformed to UK national standards and to issue certificates of conformity. British Leyland arbitrarily refused to grant certain certificates to applicants who had typically purchased their car outside the UK, and it set much higher fees for left-hand-drive than for right-hand-drive cars.]

27 As the Court held in its judgement in *General Motors*, an undertaking abuses its dominant position where it has an administrative monopoly and charges for its services fees which are disproportionate to the economic value of the service provided.

28 It appears from the documents before the Court and the information provided by the parties that, in the case of both right-hand-drive and left-hand-drive vehicles, in order to issue a certificate of conformity it is necessary to determine from the chassis number the date of manufacture of the vehicle. It is then possible to identify the number of the corresponding NTA certificate. It is, therefore, a simple administrative check which cannot entail significant costs. For left-hand-drive vehicles the certificate is in principle issued before conversion, if they are converted to right-hand-drive. The only difference in relation to the issue of a certificate for a right-hand-drive vehicle lies in the need to verify that the four alterations essential for a left-hand-drive vehicle have been made, namely the adjustment of headlights, full beam and dipped, the calibration of the speedometer in miles per hour, the adaptation of the rear fog lamp and the addition of a wing-mirror on the right front door. That verification does not require an inspection of the vehicle. It is effected on the basis of a certificate furnished by a garage and, on the basis of the cost incurred, cannot therefore justify the charging of different fees for the issue of certificates of conformity according to whether the vehicles are

19 [1986] ECR 3263, EU:C:1986:421.

CASE *(continued)*

right-hand-drive or left-hand-drive. Initially the fee for left-hand-drive vehicles was six times greater than that for right-hand-drive vehicles.

29 Moreover, BL itself admitted at the hearing that the difference which existed at one time according to whether the certificate was requested by a dealer, who was charged UK £150, or by a private individual, who was charged only UK £100, was not based on the cost but on the consideration that the trader who was carrying out a transaction for gain could be required to pay a higher fee. The fact that the fee was first reduced to UK £100 and then UK £50, whilst for right-hand-drive vehicles it remained at UK £25, also suggests that it was fixed solely with a view to making the re-importation of left-hand-drive vehicles less attractive.

30 In those circumstances, the Commission was entitled to conclude that the fee was fixed at a level which was clearly disproportionate to the economic value of the service provided and that that practice constituted an abuse by BL of the monopoly it held by virtue of the British rules.

* * *

33 Finally, BL's argument that the amount of the fee had no detrimental effect on the volume of the re-importations is, as the Court has already stated above, irrelevant.

34 In conclusion, it must be held that the complaints made by the Commission in the contested decision are established.

British Leyland was a toll-taker, enabled by government licence. Moreover, while the fact of excessiveness is usually extremely difficult to determine, in *British Leyland* it was obvious. Further, in this case, the exploitation was a means of market segmentation—a core EU offence.

Some years earlier, the Commission pressed a more ambiguous case of unfair pricing, also involving discriminatory pricing, against United Brands. *United Brands* is a flagship case, often cited in the EU and the world for the test for excessive pricing. See paragraph 252 in the following. Take caution, however, for the standard is Delphic and has been refined by more modern case law, as in the Latvian music copyright case discussed later. In *United Brands,* you are also introduced to the treatment of discriminatory pricing in the context of market integration.

CASE

United Brands Co. v. Commission (Case 27/76) (pricing practices)[20]

[United Brands was the biggest banana producer in the world and in the EU. It was a vertically integrated company that grew bananas in South America, bought from other growers half of the bananas it sold, and accounted for some 40% of the sales of bananas in the Union, which was more than twice that of its nearest rival. It owned and promoted the Chiquita brand, the best-known and the most heavily advertised brand in the world. Its system of distribution involved sales to ripeners/distributors, who would buy the green bananas, ripen them in special sheds and in specified gases, and resell them. The Commission alleged a series of abuses, including the cut-off of a Danish ripener/distributor, excessive pricing and discriminatory pricing.

United Brands sold all bananas to its distributors free on rail Rotterdam or Bremerhaven. There was a 100% difference between the prices charged to the distributor for Ireland, where Chiquita was an unknown brand and demand was low, and the prices charged to the distributor for Denmark, where the brand was well known and demand was strong. There were also disparities between the price charged to the Danish distributors and to the distributors for the other Member States. United Brands' prices were approximately 7% higher than the prices of its nearest rivals, and they were 30% to 40% higher than unbranded bananas. The Commission found discriminatory and excessive pricing violations and ordered United Brands to reduce its prices to distributors other than the distributors for Ireland by at least 15%.]

1. Discriminatory prices

* * *

208 The Commission blames the applicant for charging each week for the sale of its branded bananas—without objective justification—a selling price which differs appreciably according to the Member State where its customers are established.

* * *

212 The price customers in Belgium are asked to pay is on average 80% higher than that paid by customers in Ireland.

213 The greatest difference in price is 138% between the delivered Rotterdam price charged by UBC to its customers in Ireland and the f.o.r. Bremerhaven price charged by UBC to its

20 [1978] ECR 207, EU:C:1978:22.

CASE *(continued)*

customers in Denmark, that is to say the price paid by Danish customers is 2.38 times the price paid by Irish customers.

* * *

225 In fact the bananas sold by UBC are all freighted in the same ships, are unloaded at the same cost in Rotterdam or Bremerhaven and the price differences relate to substantially similar quantities of bananas of the same variety, which have been brought to the same degree of ripening, are of similar quality and sold under the same 'Chiquita' brand name under the same conditions of sale and payment for loading on to the purchaser's own means of transport and the latter have to pay customs duties, taxes and transport costs from these ports.

* * *

232 These discriminatory prices, which varied according to the circumstances of the Member States, were just so many obstacles to the free movement of goods and their effect was intensified by the clause forbidding the resale of bananas while still green and by reducing the deliveries of the quantities ordered.

233 A rigid partitioning of national markets was thus created at price levels, which were artificially different, placing certain distributor/ripeners at a competitive disadvantage, since compared with what it should have been competition had thereby been distorted.

234 Consequently the policy of differing prices enabling UBC to apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage, was an abuse of a dominant position.

2. Unfair prices

* * *

252 The questions … to be determined are whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products.

* * *

258 The Commission bases its view that prices are excessive on an analysis of the differences—in its view excessive—between the prices charged in the different Member States and on the policy of discriminatory prices which has been considered above.

CASE *(continued)*

259 The foundation of its argument has been the applicant's letter of 10 December 1974 which acknowledged that the margin allowed by the sale of bananas to Irish ripeners was much smaller than in some other Member States and it concluded from this that the amount by which the actual prices f.o.r. Bremerhaven and Rotterdam exceed the delivered Rotterdam prices for bananas to be sold to Irish customers c.i.f. Dublin must represent a profit of the same order of magnitude.

260 Having found that the prices charged to ripeners of the other Member States were considerably higher, sometimes by as much as 100%, than the prices charged to customers in Ireland it concluded that UBC was making a very substantial profit.

261 Nevertheless the Commission has not taken into account in its reasoning … a confidential document … pointing out that the prices charged in Ireland had produced a loss.

262 The applicant also states that the prices charged on the relevant market did not allow it to make any profits during the last five years, except in 1975.

* * *

264 However unreliable the particulars supplied by UBC may be (and in particular the document mentioned previously which works out the 'losses' on the Irish market in 1974 without any supporting evidence), the fact remains that it is for the Commission to prove that the applicant charged unfair prices.

265 UBC's retraction, which the Commission has not effectively refuted, establishes beyond doubt that the basis for the calculation adopted by the latter to prove that UBC's prices are excessive is open to criticism and on this particular point there is doubt which must benefit the applicant, especially as for nearly 20 years banana prices, in real terms, have not risen on the relevant market.

* * *

267 In these circumstances it appears that the Commission has not adduced adequate legal proof of the facts and evaluations which formed the foundation of its finding that UBC had infringed Article [102] of the Treaty by directly and indirectly imposing unfair selling prices for bananas.

NOTES AND QUESTIONS

1. What is the relationship between excessive and discriminatory pricing in *United Brands?* Is one offence more central than the other to EU objectives?
2. The Court called the differential prices for different Member States 'just so many obstacles to the free movement of goods' (para. 232). Is price discrimination a barrier to free movement? What was the real barrier to free movement? Why did the Court blame lack of mobility of the bananas on the price discrimination rather than on the green banana clause?
3. Price discrimination can be a way to get more money from those who are willing to pay more, but alternatively, it can be a way to compete—to lower prices and make more sales. United Brands was apparently charging high prices where consumers had a strong preference for bananas and low prices to break into markets where Chiquita was not well known and other fruits were in strong demand. In areas in which demand for Chiquita bananas was strong, was the real question who would get the extra profits, United Brands or its distributor? Would prohibition of price discrimination mean all distributors would get the Irish price?

CASE

AKKA/LAA (Case C-177/16)[21]

[*United Brands* set a very high bar for proof of excessive pricing, leading many to claim that a successful excessive pricing case required the plaintiff to prove both that price was excessively more than costs and the price imposed was unfair in itself or when compared with competing products. The Latvian copyright collective management case challenged this understanding.

The case concerned the rates charged by the Latvian copyright management society, AKKA/LAA, which had a monopoly right to issue licences for the performance of copyrighted music. AKKA/LAA charged significantly higher rates than those charged by Lithuania, Estonia and 20 other Member States, adjusted by use of the purchasing power parity (PPP) index. The Latvian Competition Council found the rates excessive. The decision was challenged before the courts, and the Latvian Supreme Court referred questions to the CJEU on preliminary reference. The CJEU made significant clarifications of the EU law of excessive pricing, including the following. 1) The *United Brands* cost-based approach is not the only accepted methodology; geographic comparison is a valid method. 2) There is no minimum threshold for price to be deemed excessive; simply, the rate must be appreciably higher than objectively selected comparator jurisdictions; there must be a significant and persistent price difference. 3) The dominant firm must justify significant and persistent differences. It might do so by demonstrating objective dissimilarities, including costs and (in the collective management situation) the level of fees paid to the rights holders. Here are excerpts.]

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21 ECLI:EU:C:2017:689.

CASE *(continued)*

35 The abuse of a dominant position within the meaning of that article might lie in the imposition of a price which is excessive in relation to the economic value of the service provided ….

36 In that regard, the questions to be determined are whether the difference between the cost actually incurred and the price actually charged is excessive, and, if the answer to that question is in the affirmative, whether a price has been imposed which is either unfair in itself or unfair when compared with competing products (… United Brands … paragraph 252).

37 Nonetheless, … there are other methods by which it can be determined whether a price may be excessive.

38 Thus, according to the case-law of the Court, a method based on a comparison of prices applied in the Member State concerned with those applied in other Member States must be considered valid. It is apparent from that case-law that, when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in other Member States, and where a comparison of the fee levels has been made on a consistent basis, that difference must be regarded as indicative of an abuse of a dominant position ….

* * *

41 … [A] comparison [with a limited number of Member States] may prove relevant, on condition … that the reference Member States are selected in accordance with objective, appropriate and verifiable criteria. Therefore, there can be no minimum number of markets to compare and the choice of appropriate analogue markets depends on the circumstances specific to each case.

42 Those criteria may include, inter alia, consumption habits and other economic and sociocultural factors, such as gross domestic product per capita and cultural and historical heritage. It will be for the referring court to assess the relevance of the criteria applied in the case in the main proceedings, while taking into account all the circumstances of the case.

* * *

51 In the light of all of the foregoing, the answer to the second, third and fourth questions is that, for the purposes of examining whether a copyright management organisation applies unfair prices within the meaning of point (a) of the second paragraph of Article 102 TFEU, it is appropriate to compare its rates with those applicable in neighbouring Member States as well as with those applicable in other Member States adjusted in accordance with the PPP index, provided that the reference Member States have been selected in

CASE *(continued)*

accordance with objective, appropriate and verifiable criteria and that the comparisons are made on a consistent basis. It is permissible to compare the rates charged in one or several specific user segments if there are indications that the excessive nature of the fees affects those segments.

* * *

53 It should first be recalled that, when an undertaking holding a dominant position imposes scales of fees for its services which are appreciably higher than those charged in the other Member States, that difference must be regarded as indicative of an abuse of a dominant position ….

* * *

55 … There is in fact no minimum threshold above which a rate must be regarded as 'appreciably higher', given that the circumstances specific to each case are decisive in that regard. Thus, a difference between rates may be qualified as 'appreciable' if it is both significant and persistent on the facts, with respect, in particular, to the market in question, this being a matter for the referring court to verify.

56 It should be emphasised in this regard that … the difference must be significant for the rates concerned to be regarded as 'abusive'. Furthermore, that difference must persist for a certain length of time and must not be temporary or episodic.

57 Next, it should be noted that these factors are merely indicative of abuse of a dominant position. It may be possible for the copyright management organisation to justify the difference by relying on objective dissimilarities between the situation of the Member State concerned and that of the other Member States included in the comparison ….

* * *

61 It follows that the answer to the fifth and sixth questions is that the difference between the rates compared must be regarded as appreciable if that difference is significant and persistent. Such a difference is indicative of abuse of a dominant position and it is for the copyright management organisation holding a dominant position to show that its prices are fair by reference to objective factors that have an impact on management expenses or the remuneration of rightholders.

* * *

? NOTES AND QUESTIONS

1. Excessive pricing is an exploitative violation. It signifies that a dominant firm uses its market power to overcharge consumers. Many antitrust regimes prohibit excessive pricing, which may be seen as the most direct economic evil of monopoly. But, the challenges of detection, surveillance and remedies are great and counsel caution in applying the law. For a policy statement on abusive exploitation, see EU Commissioner M. Vestager, 'Protecting consumers from exploitation' (Brussels, 21 November 2016):

   > '… we need to act carefully when we deal with excessive prices. The best defence against exploitation remains the ability to walk away. So we can often protect consumers just by stopping powerful companies from driving their rivals out of the market. But we still have the option of acting directly against excessive prices. Because we have a responsibility to the public. And we should be willing to use every means we have to fulfil that responsibility.'

   In that speech, Commissioner Vestager mentioned the Gazprom case [Commitments, Case AT.39816, 24 May 2018], prices of pharmaceuticals and standard-essential patents.

   The Commission thereafter opened an excessive pricing investigation against Aspen Pharma [settled by commitments, 2021, AT.40394], after the Italian Antitrust Authority fined the company for increasing the price of anti-cancer drugs from 300% to 1500% after the patents expired. The market was too small to incentivise generic competition. Similar huge price hikes in life-saving pharmaceuticals induced several Member States to take action and to manoeuvre the difficult territory of not only determining dominance but also determining benchmarks for excessiveness and appropriate relief.
2. The Covid-19 pandemic in 2020 produced shortages and price gouging of critical protective equipment, respirators, medicines and tests. The merchants who took advantage of the situation were often small businesspeople who did not have traditional market power, much less dominance, but they did have the temporary, circumstantial power to gouge their customers. Does this conduct violate Article 102, assuming cross-border trade? Should it?

US antitrust law does not prohibit excessive pricing. It prohibits price discrimination only if the discriminatory pricing is likely to produce a monopoly (invoking the Sherman Act) or hurt disfavoured buyers in their competition with favoured ones, harming competition (invoking the Robinson-Patman Act.[22]) The US antitrust agencies have seldom enforced the Robinson-Patman Act for fear that most applications are anti-competitive. (Why?) The Biden administration, however, which is concerned with fair distribution and equity, is trying to revitalize the Act. As a result, most Robinson-Patman actions are private actions. Competitors of a price discriminator have been greatly restricted in their ability to sue, however, because they must prove antitrust injury and antitrust damages, and this traditionally requires proof that consumers are harmed. But, consumers might benefit from the low prong of the price.[23]

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22 15 U.S.C. § 13.

23 See, e.g., *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993), treated infra.

On excessive pricing, the Court of Appeals for the US Second Circuit said in *Berkey Photo, Inc. v. Eastman Kodak Co.*:[24]

> Excessive prices, maintained through exercise of a monopolist's control of the market, constituted one of the primary evils that the Sherman Act was intended to correct ....
>
> But unless the monopoly has bolstered its power by wrongful actions, it will not be required to pay damages merely because its prices may later be found excessive. Setting a high price may be a use of monopoly power, but it is not in itself anticompetitive. Indeed, although a monopolist may be expected to charge a somewhat higher price than would prevail in a competitive market, there is probably no better way to guarantee that its dominance will be challenged than by greedily extracting the highest price it can .... Judicial oversight of pricing policies would place the courts in a role akin to that of a public regulatory commission. We would be wise to decline that function unless Congress clearly bestows it upon us.

Some 25 years later, the US Supreme Court went much further in the landmark case, *Trinko*, infra at p. 252, stating that monopoly prices should be welcomed; high prices invite competition. Do the EU Treaty and the *Trinko case* reflect a major divide between US and EU competition law? What should happen when high prices do not attract entry?

b. Price discrimination

A recurrent question in relation to price discrimination has been whether Article 102(c) TFEU forbids the mere charging of different prices for the same good or service within the same market to buyers who are competitors, or whether it additionally requires evidence of harm to competition in the market or between the differentially treated firms. In *British Airways v. Commission,*[25] one issue was whether BA's bonus schemes for achievement of sales targets caused discrimination between travel agents or produced exclusionary effects on competing airlines. The Court of Justice found that the lack of equivalence between travel agents resulting from BA's linkage of the amount of rebates to specific sales targets amounted to a breach of Article 102 TFEU and that no 'actual quantifiable deterioration in the competitive position of [travel agents or competing airlines] taken individually' had to be adduced (para. 145). More recently, in *Post Danmark I,* the Court ruled to the contrary that 'charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of

24 603 F.2d 263, 294 (2d Cir.1979), cert. denied, 444 U.S. 1093 (1980).

25 Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331, EU:C:2007:166.

itself suggest that there exists an exclusionary abuse',[26] i.e., additional evidence of harm to competition is requisite, or, put otherwise, the notion of 'competitive disadvantage' under Article 102(2)(c) cannot be merely inferred from the existence of differential treatment.[27] Which approach is the better one?

CASE

C-525/16—MEO—Serviços de Comunicações e Multimédia v. Autoridade da Concorrencia[28]

[TFEU Article 102(2)(c) specifies as one type of prohibited abuse 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. The MEO case clarifies what is a competitive disadvantage.

MEO is a provider of television services in Portugal. It complained to the Portuguese Competition Authority that the copyright society (GDA) gave more favourable tariffs to its direct competitor, NOS, over a 3-year period, putting it at a competitive disadvantage with NOS. The Authority found no distortion of competition and rejected the complaint. MEO appealed to the court, which made a preliminary reference, noting that the rate difference was small, MEO could absorb the difference, and MEO's market share (in paid TV signal transmission service and TV content) was growing. However, it was possible that MEO's competitiveness was affected. Does Article 102(c) require an analysis of the specific effects of the differential prices on the competitive situation of the disfavoured firm? Does it require assessment of the seriousness of the impact?]

24 In accordance with the case-law of the Court, the specific prohibition of discrimination under subparagraph (c) of the second paragraph of Article 102 TFEU is intended to ensure that competition is not distorted in the internal market. The commercial behaviour of the undertaking in a dominant position may not distort competition on an upstream or a downstream market, in other words, between suppliers or customers of that undertaking. Co-contractors of such undertakings must not be favoured or disfavoured in the area of the competition which they practise amongst themselves .... Thus, it is not necessary that the abusive conduct affects the competitive position of the dominant undertaking itself on the same market in which it operates, compared with its own potential competitors.

25 In order for the conditions for applying subparagraph (c) of the second paragraph of Article 102 TFEU to be met, there must be a finding, not only that the behaviour of an

26 Case C-209/10, *Post Danmark I*, EU:C:2012:172, para. 30.

27 For a general discussion of the treatment of price discrimination under EU competition law, see D. Gerard (2005), 'Price discrimination under Article 82(2)(c) EC: Clearing up the ambiguities', GCLC Research Paper on the Modernisation of Article 82 EC [now Article 102 TFEU], 6 July 2005.

28 EU:C2018:279.

CASE *(continued)*

undertaking in a dominant market position is discriminatory, but also that it tends to distort that competitive relationship, in other words, to hinder the competitive position of some of the business partners of that undertaking in relation to the others ....

26 In order to establish whether the price discrimination on the part of an undertaking in a dominant position vis-à-vis its trade partners tends to distort competition on the downstream market, ... the mere presence of an immediate disadvantage affecting operators who were charged more, compared with the tariffs applied to their competitors for an equivalent service, does not, however, mean that competition is distorted or is capable of being distorted.

27 It is only if the behaviour of the undertaking in a dominant position tends, having regard to the whole of the circumstances of the case, to lead to a distortion of competition between those business partners that the discrimination between trade partners which are in a competitive relationship may be regarded as abusive. In such a situation, it cannot, however, be required in addition that proof be adduced of an actual, quantifiable deterioration in the competitive position of the business partners taken individually ....

28 Therefore, ... it is necessary to examine all the relevant circumstances in order to determine whether price discrimination produces or is capable of producing a competitive disadvantage, for the purposes of subparagraph (c) of the second paragraph of Article 102 TFEU.

29 With regard to the issue whether, for the application of subparagraph (c) of the second paragraph of Article 102 TFEU, it is necessary to take into account the seriousness of a possible competitive disadvantage, it must be pointed out that fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified (see, to that effect, Post Danmark ...).

30 However, in order for it to be capable of creating a competitive disadvantage, the price discrimination referred to in subparagraph (c) of the second paragraph of Article 102 TFEU must affect the interests of the operator which was charged higher tariffs compared with its competitors.

31 When it carries out the specific examination referred to in paragraph 28 above, the competition authority or the competent national court is required to take into account all the circumstances of the case submitted to it. It is open to such an authority or court to assess, in that context, the undertaking's dominant position, the negotiating power as regards the tariffs, the conditions and arrangements for charging those tariffs, their duration and their amount, and the possible existence of a strategy aiming to exclude from the downstream market one of its trade partners which is at least as efficient as its competitors (see, by analogy, judgment of 6 September 2017, Intel v Commission, C-413/14 P, EU:C:2017:632, paragraph 139 ...).

CASE *(continued)*

32 In the present case, in the first place, with regard to the dominant position and the negotiating power relating to the charging of tariffs on the downstream market, it is clear from the file submitted to the Court that MEO and NOS are GDA's main clients. In that regard, the referring court states that there is evidence that they have a certain negotiating power vis-à-vis GDA.

33 In addition, it is apparent from the information submitted to the Court, which it is for the referring court to verify, that the determination of the prices by GDA is subject to legislation which requires the parties to have recourse to arbitration if they cannot reach agreement. In such a situation, GDA, as it did, in any event, at a given moment during the period at issue, with the prices which it charged to MEO, merely applied the prices established by the arbitration decision.

34 In the second place, … as regards the amounts which MEO paid annually to GDA, it is clear from the data set out in the competition authority's decision … that those amounts represented a relatively low percentage of the total costs borne by MEO in its service for retail offerings for subscription television access and that the differentiation in tariffs had a limited effect on MEO's profits in that context. … [W]here the effect of a tariff differentiation on the costs borne by the operator which considers itself to be wronged, or on the profitability and profits of that operator, is not significant, it may, in some circumstances, be deduced that that tariff differentiation is not capable of having any effect on the competitive position of that operator.

35 In the third place, it must be pointed out that, in a situation such as that at issue in the main proceedings where the application of differentiated tariffs concerns only the downstream market, the undertaking in a dominant position, in principle, has no interest in excluding one of its trade partners from the downstream market. In any event, the file submitted to the Court does not contain any indication that GDA pursued such an objective.

36 It falls to the referring court to determine, in the light of all the foregoing considerations, whether the tariff in the main proceedings was capable of placing MEO at a competitive disadvantage.

37 In view of the foregoing, the answer to the questions referred is that the concept of 'competitive disadvantage', for the purposes of subparagraph (c) of the second paragraph of Article 102 TFEU, must be interpreted to the effect that, where a dominant undertaking applies discriminatory prices to trade partners on the downstream market, it covers a situation in which that behaviour is capable of distorting competition between those trade partners. A finding of such a 'competitive disadvantage' does not require proof of actual quantifiable deterioration in the competitive situation, but must be based on an analysis of all the relevant circumstances of the case leading to the conclusion that that behaviour has an effect on the costs, profits or any other relevant interest of one or more of those partners, so that that conduct is such as to affect that situation.

* * *

? NOTES AND QUESTIONS

1. Restate in your own words what these words mean: 'placing them [the disfavoured parties] at a competitive disadvantage'.
2. Has the Court made clear that the discrimination does not have to harm the market, especially to the detriment of consumers? Note that under US antitrust law, the discrimination must harm the market. Is one concept of harm superior to the other?
3. If MEO had had a declining market share and was just breaking even in its profits, would it easily have qualified as the victim of an abuse of dominance? Should the law turn on these factors? Comment on the difference between harm to the market, harm to a competitor's competitiveness, and harm to a competitor.

2. Exclusionary conduct

The remainder of this chapter is devoted to the challenging subject of exclusionary or foreclosing violations. The subject highlights the tension between efficiency and equity; protecting consumers from higher prices and protecting competitors from foreclosure and the opportunity to contest a market segment. Sometimes these goals coincide, and sometimes they diverge. A goal of protecting the competitive processes—which the EU embraces—may protect competition, but it may sometimes result in protecting competitors at the expense of consumers. Should we avoid that result? Should competition law consciously avoid protecting less efficient firms, or should it consciously assist the ease of access of small firms to compete on the merits?

You will find different perspectives on these questions in statements of the Commission and judgements of the Courts; and even differences between different panels of the Court.

We start with the Commission's Guidance Paper, which applies contemporary economic learning, focusing on efficiency and consumers (but note that the Guidance Paper is not necessarily the law and may be revised in view of changing law). The Commission begins its discussion of harm from foreclosure as follows:

> The aim of the Commission's enforcement activity in relation to exclusionary conduct is to ensure that dominant undertakings do not impair effective competition by foreclosing their rivals in an anticompetitive way and thus having an adverse impact on consumer welfare, whether in the form of higher price levels than would have otherwise prevailed or in some other form such as limiting quality or reducing consumer choice. In this document the term 'anticompetitive foreclosure' is used to describe a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a

> result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to be in a position to profitably increase prices to the detriment of consumers.[29]

Even where it finds anti-competitive foreclosure, the Commission will examine claims by the dominant undertaking that its conduct is justified by objective necessity or outbalancing procompetitive or efficiency aspects.

a. *Refusal to deal*

As you begin your study of refusal to deal, read the Commission Guidance on refusal to supply, paras. 74–89. The Commission's Guidance incorporates an economic approach, distancing itself from prior formalism. As you will see, the Courts' judgements have not always followed the Guidance Paper. For all the cases that follow, consider whether the Commission's analysis in the Guidance Paper does or does not align with the Courts' analysis. If not, identify divergences.

(i) Essential facility and duty to give access, to deal fairly

Ownership of or control over an essential facility presents a special case of duty to deal, duty not to exclude, and duty to treat competitors and customers fairly and non-discriminatorily.

The Commission first invoked the essential facility concept in the case of *Sealink*.[30] Sealink owned Holyhead Harbour, which was the only port in the UK serving Ireland for the transport of passengers and cars on the central corridor route. Sealink also operated a car ferry. B&I Line was a rival car ferry operator. Its berth was in the mouth of the narrow Holyhead Harbour. When a Sealink vessel passed a B&I vessel, it so agitated the water that B&I had to lift the ramp that connected the boat to the dock and stop loading or unloading. Sealink then scheduled more frequent sailings of its own vessels, making the disturbances intolerable to B&I. B&I sought interim measures, which the Commission granted. It said:

> 41 A dominant undertaking which both owns or controls and itself uses an essential facility, i.e., a facility or infrastructure without access to which competitors cannot provide services to their customers, and which refuses its competitors access to that facility or grants access to competitors only on terms

29 Guidance Paper, para. 19.

30 Commission Decision of 11 June 1992 in Case IV/34.174—*Sealink/B&I—Holyhead* (interim measures).

> less favourable than those which it gives its own services, thereby placing the competitors at a competitive disadvantage, infringes Article [102] if the other conditions of that Article are met. A company in a dominant position may not discriminate in favour of its own activities in a related market (Case C–260/89, Elliniki Radiophonia, para. 37–38). The owner of an essential facility which uses its power in one market in order to strengthen its position in another related market, in particular, by granting its competitor access to that related market on less favourable terms than those of its own services, infringes Article [102] when a competitive disadvantage is imposed upon its competitor without objective justification.
>
> This was accepted by Sealink through its subsidiary, SHL, when it stated that no agreement would be given to vary schedules if this compromised its ability to provide an acceptable level of service to all port users .... This is particularly so where the physical configuration of the port has obliged operators to accept differences in the services they are offered by the operator of the essential facility, in order to maximize its efficient utilization.
>
> 42 The owner of the essential facility, which uses the essential facility, may not impose a competitive disadvantage on its competitor, also a user of the essential facility, by altering its own schedule to the detriment of the competitor's service, where, as in this case, the construction or the features of the facility are such that it is not possible to alter one competitor's service in the way chosen without harming the other's. Specifically, where, as in this case, the competitor is already subject to a certain level of disruption from the dominant undertaking's activities, there is a duty on the dominant undertaking not to take any action which will result in further disruption. That is so even if the latter's actions make, or are primarily intended to make, its operations more efficient. Subject to any objective elements outside its control, such an undertaking is under a duty not to impose a competitive disadvantage upon its competitor in the use of the shared facility without objective justification ...

Subsequent port cases, particularly where the State owned the port, confirmed the principle. See Chapter 7, section B. See also *Lithuanian Railways*,[31]

31 *Lietuvos geležinkeliai v. Commission*, Case C-42/21 P (EU:C:2023:12). The Court found a violation. Among other things, it held that Lithuanian Railways did not get the benefit of a rule protecting the undertaking's incentive to innovate and invest because it already had a duty to deal under sector regulation and also, it had not invested its own funds in building the infrastructure; its position derived from a State monopoly.

where the Lithuanian railroad, which both managed rail transport services and provided those services in Lithuania, identified a defect in a short segment of track and then hastily removed the whole track just at the time when its big oil-refining customer Orlen was threatening to shift its business to the Latvian national railway; the track removal made the Latvian railway's entry not feasible.

Did Sealink have a legitimate reason to expand its schedule? Should this have been an objective justification? Should a firm that has made the investment in the essential infrastructure be allowed to prefer itself over its rivals in uses of the infrastructure?

For many years, US courts also applied an essential facility doctrine when the duty to grant access would not impair the defendant's own performance. Examples are the telecommunications cases before the break-up of AT&T, when AT&T held the nation's long-distance telephone service monopoly, the local service monopolies, and the local loop bottleneck gateway to the local markets.[32] Sometime after the *AT&T* cases, US authorities and jurists began to fear that essential facility duties undermined incentives to invest, to innovate and to compete. In *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, treated later in the chapter, the US Supreme Court narrowed the law so that there is very little left of an essential facilities doctrine. Consider the effect of duties to deal on incentives to invest, innovate and compete as you read the following cases. Is the 'chilling-effect' concern well taken or not?

A close modern analogue arises in cases of network industry platforms such as Google and Facebook. Access to the platform is not usually *essential* to compete, but it can be very important to effective competition. Do the platform gatekeepers have to give fair access to their platforms to the firms that do business on the platforms in competition with the gatekeepers? This and related critical modern issues are treated below, particularly in the Google Shopping case; and Section C on Regulating Abuse of Power in the Digital Economy shows how the EU has supplemented competition law, adopting the Digital Markets Act to control abuses by the dominant gatekeepers.

32 See *MCI Communications Corp. v. American Telephone & Telegraph Co.*, 708 F.2d 1081 (7th Cir.1983); *United States v. American Telephone & Telegraph Co.*, 524 F.Supp. 1336, 1352 (D.D.C.1981).

(ii) Other duties to deal that may or may not involve an essential facility

CASE

Istituto Chemioterapico Italiano SpA v. Commission (Joined Cases 6 and 7/73) ('Commercial Solvents')[33]

[Commercial Solvents Corporation was a manufacturer of raw materials—nitropropane and aminobutanol—which were used to manufacture ethambutol, an antituberculosis drug.

Aminobutanol was also used as an emulsifier for paint. Commercial Solvents Corporation acquired 51% of the shares of an Italian company, Istituto Chemioterapico Italiano ('Istituto'), which bought the raw materials from its parent, Commercial Solvents, and sold them to another Italian company, Zoja, which used them to manufacture ethambutol-based specialties.

Istituto sought to acquire Zoja, but the negotiations aborted. Istituto then increased the price at which it sold aminobutanol to Zoja. Zoja, however, discovered a cheaper source for aminobutanol—firms that bought the raw material from Commercial Solvents for use in paint. Zoja persuaded Istituto to cancel a large part of Zoja's order. Soon thereafter, Zoja's supply of cheaper aminobutanol dried up, largely because Commercial Solvents forbade its paint-making customers to resell aminobutanol for pharmaceutical use. Commercial Solvents then announced that it was withdrawing from the market for sales of the raw material, and it integrated vertically, using the raw material for its own production. When Zoja tried to reorder aminobutanol from Commercial Solvents, Commercial Solvents refused to accept the order.

The Commission held that Commercial Solvents had a dominant position in the market for the raw material and ordered Commercial Solvents to resume supplying Zoja and to pay a fine for the refusal to sell.]

20 The applicants state that they ought not to be held responsible for stopping supplies of aminobutanol to Zoja for this was due to the fact that in the spring of 1970 Zoja itself informed Istituto that it was cancelling the purchase of large quantities of aminobutanol which had been provided for in a contract then in force between Istituto and Zoja. When at the end of 1970 Zoja again contacted Istituto to obtain this product, the latter was obliged to reply, after consulting CSC, that in the meantime CSC had changed its commercial policy and that the product was no longer available. The change of policy by CSC was, they claim, inspired by a legitimate consideration of the advantage that would accrue to it of expanding its production to include the manufacture of finished products and not limiting itself to that

33 [1974] ECR 223, EU:C:1974:18.

CASE *(continued)*

of raw material or intermediate products. In pursuance of this policy it decided to improve its product and no longer to supply aminobutanol save in respect of commitments already entered into by its distributors.

* * *

25 However, an undertaking being in a dominant position as regards the production of raw material and therefore able to control the supply to manufacturers of derivatives, cannot, just because it decides to start manufacturing these derivatives (in competition with its former customers) act in such a way as to eliminate their competition which in the case in question would amount to eliminating one of the principal manufacturers of ethambutol in the Common Market. Since such conduct is contrary to the objectives expressed in Article 3 [(1) (g)] [now in a protocol] of the Treaty and set out in greater detail in Articles [101 and 102 TFEU], it follows that an undertaking which has a dominant position in the market in raw materials and which, with the object of reserving such raw material for manufacturing its own derivatives, refuses to supply a customer, which is itself a manufacturer of these derivatives, and therefore risks eliminating all competition on the part of this customer, is abusing its dominant position within the meaning of Article [102 TFEU]. In this context it does not matter that the undertaking ceased to supply in the spring of 1970 because of the cancellation of the purchases by Zoja, because it appears from the applicants' own statement that, when the supplies provided for in the contract had been completed, the sale of aminobutanol would have stopped in any case.

* * *

28 … [T]he applicants do not seriously dispute the statement in the Decision in question to the effect that 'in view of the production capacity of the CSC plant it can be confirmed that CSC can satisfy Zoja's needs, since Zoja represents a very small percentage (approximately 5–6%) of CSC's global production of nitropropane.' It must be concluded that the Commission was justified in considering that such statements could not be taken into account.

? NOTES AND QUESTIONS

1. What main principle of law governs this case? Is this principle based on efficiency and consumer interests? Fairness and rights of competitors?
2. The Court gave recognition to a right to refuse to deal in *Oscar Bronner*[34] where the complainant should have been able to fend for itself. The Court rejected the claim of Bronner, owner of a small daily newspaper, that the distribution system of Mediaprint, the near-monopolist publisher and owner of the only nationwide newspaper distribution system in Austria, was

34 Case C-7/97, *Oscar Bronner GmbH & Co. KG v. Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co.*, [1998] ECR I-7791, EU:C:1998:569.

an essential facility to which he had a right of access. The Court said that Mediaprint's refusal to distribute Bronner's newspaper would not amount to an abuse of dominance unless it was 'likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, [and] also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme' (para. 41). Bronner had not made this case. Among other things, there were no technical or legal obstacles preventing Bronner, alone or in combination with other small papers, from setting up an alternative distribution system. How can *Oscar Bronner* be distinguished from *Commercial Solvents*?

* * *

US law applies a strong presumption of freedom of firms to choose to deal or not, as exemplified in the *Trinko* case that follows. *Trinko* embodies the philosophy and perspective of US antitrust—at least as the US Supreme Court sees it; and it is the prime referent for US law on abuse of dominance (monopolization). It paints the uniquely American perspective of trust in markets, and it has become the prime US authority cited as a contrast to much EU case law imposing special responsibilities on dominant firms.

CASE

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko (US)[35]

Justice Scalia:

[Verizon was the incumbent local exchange carrier ('ILEC') serving New York State. This meant that Verizon owned the elements of the local loop—facilities necessary to connect long-distance lines with the local market. When competition in the local telephone service markets became technologically feasible, Congress passed the 1996 Telecommunications Act[36] to facilitate entry into the local markets. Among other things, the statute required the ILECs to give the new local exchange carriers (competitive LECs or CLECs) access to the elements of the local loop on reasonable non-discriminatory terms. Verizon, in order to keep its customers from defecting to new entrants and to limit entry, discriminated against the CLECs, disrupting their service and making it unreliable. Complaints to this effect were

35 540 U.S. 398, 124 S.Ct. 872, 157 L.Ed.2d 823 (2004).

36 47 U.S.C.§ 151 et seq.

CASE *(continued)*

investigated and verified by the Federal Communications Commission, which fined Verizon and enjoined its discriminatory and exclusionary practices.

Plaintiffs were customers of the discriminated-against CLECs. They sued for damages for their losses. (There was a serious question of plaintiffs' standing to sue, but this was not the basis of the decision.) Verizon moved to dismiss on the pleadings. Verizon maintained that it had no antitrust duty to the CLECs not to discriminate against them.

The Court first noted that the Telecommunications Act contained a savings clause preserving applicability of the antitrust laws; therefore the antitrust laws were not pre-empted by the Telecoms Act. The Court then turned to the question of whether a telecom monopoly's denial of full interconnection services to rivals in order to limit their entry constituted a violation of Section 2 of the Sherman Act, which states: No person shall 'monopolize'.]

III

… The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.

Firms may acquire monopoly power by establishing an infrastructure that renders them uniquely suited to serve their customers. Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities. Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill-suited. Moreover, compelling negotiation between competitors may facilitate the supreme evil of antitrust: collusion. Thus, as a general matter, the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.' *United States v. Colgate & Co.,* 250 U.S. 300, 307 (1919).

However, '[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified.' *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 601 (1985). Under certain circumstances, a refusal to cooperate with rivals can constitute anticompetitive conduct and violate § 2. We have been very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm. The question before us

CASE *(continued)*

today is whether the allegations of respondent's complaint fit within existing exceptions or provide a basis, under traditional antitrust principles, for recognizing a new one.

* * *

[The Court answered in the negative. Verizon did not engage in a voluntary course of dealing with its rivals; it supplied them because of statutory compulsion. Moreover, the unbundled elements to which rivals sought fair access did not even exist as a marketed product apart from the 1996 Act. Further, if there is an essential facilities doctrine, it was not available here.] The 1996 Act's extensive provision for access makes it unnecessary to impose a judicial doctrine of forced access. To the extent respondent's 'essential facilities' argument is distinct from its general § 2 argument, we reject it.

IV

Finally, we do not believe that traditional antitrust principles justify adding the present case to the few existing exceptions from the proposition that there is no duty to aid competitors....

* * *

... [Here, the regulatory] regime was an effective steward of the antitrust function.

Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs. Under the best of circumstances, applying the requirements of § 2 'can be difficult' because 'the means of illicit exclusion, like the means of legitimate competition, are myriad.' *United States v. Microsoft Corp.*, 253 F.3d 34, 58 (CADC 2001) (en banc) (*per curiam*). Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 594 (1986). The cost of false positives counsels against an undue expansion of § 2 liability ....

Even if the problem of false positives did not exist, conduct consisting of anticompetitive violations of § 251 [Telecoms Act duty to give access] may be, as we have concluded with respect to above-cost predatory pricing schemes, 'beyond the practical ability of a judicial tribunal to control.' *Brooke Group Ltd v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 223 (1993). Effective remediation of violations of regulatory sharing requirements will ordinarily require continuing supervision of a highly detailed decree. We think that Professor Areeda got it exactly right: 'No court should impose a duty to deal that it cannot explain or adequately and reasonably supervise.' An antitrust court is unlikely to be an effective day-to-day enforcer of these detailed sharing obligations.[37]

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37 'The Court of Appeals also thought that respondent's complaint might state a claim under a "monopoly leveraging" theory ... We disagree. To the extent the Court of Appeals dispensed with a requirement that

CASE *(continued)*

The 1996 Act is in an important respect much more ambitious than the antitrust laws. It attempts '*to eliminate the monopolies* enjoyed by the inheritors of AT&T's local franchises.'... [535 U.S. at 476]. Section 2 of the Sherman Act, by contrast, seeks merely to prevent *unlawful monopolization*. It would be a serious mistake to conflate the two goals. The Sherman Act does not give judges *carte blanche* to insist that a monopolist alter its way of doing business whenever some other approach might yield greater competition. We conclude that respondent's complaint fails to state a claim under the Sherman Act.

* * *

Like *Trinko*, several major EU cases concern acts of incumbent firms in liberalizing markets that fear their customers will migrate to the new entrants and take action to keep the customers in their fold. One such case is *Slovak Telekom*.[38] The Slovakian telecom regulator required the incumbent, Slovak Telekom, to give the new entrants unbundled access to the local loop. Slovak Telekom imposed unfair conditions on the new rivals, and its terms of access did not allow an equally efficient competitor to replicate its retail services without incurring a loss. The Commission found a violation of Article 102 and imposed a large fine. On appeal, Slovak Telekom invoked the freedom to deal principle of *Bronner* (*which found that the new rivals had no right to the dominant competitor's superior newspaper distribution system*).[39] Slovak Telekom argued that the Commission had not carried its burden under *Bronner* to show that access was indispensable, the refusal could not be objectively justified, and the conduct was likely to eliminate all competition.

Affirming the violation, the ECJ held *Bronner* inapplicable. Slovak Telekom had already granted access to the rivals, so the case could not be categorized as a refusal to deal. The Court pointed out that the *Bronner* principle is based on preserving freedom of contract and the right to property. Where the dominant firm has already embarked on a course of dealing, the Court said, imposing antitrust obligations is 'less detrimental' to those freedoms.

In *ENEL*, Italy had liberalized electricity supply. ENEL had been the monopoly supplier and was active in distribution. When the last part of the regulated

there be a "dangerous probability of success" in monopolizing a second market, it erred. In any event, leveraging pre-supposes anticompetitive conduct, which in this case could only be the refusal-to-deal claim we have rejected.'

38 Cases C-152/19 P *Deutsche Telekom AG v Commission* and C-165/19 P *Slovak Telekom* a.*s. v Commission*, 25 March 2021, Press Release No. 50/21, not yet reported.

39 *Oscar Bronner GmbH & Co.KG v. Mediaprint*, C7/97, supra note 34, ECLI:EU:C:1998:569.

regime went on the free market, ENEL used discriminatory methods to make commercial offers to the customers in the segment—which were being served by its subsidiary SEN—'to mitigate the risk of a large-scale departure of SEN's customers to new suppliers …'. The Italian authority condemned the strategy. On appeal, the Italian Council of State made a preliminary reference to the Court of Justice to clarify when conduct of a dominant firm in a liberalizing market constitutes abuse of dominance. The Court clarified:

1. It is not necessary that the impugned practices cause direct harm to consumers. But the dominant firm may justify 'by showing that the exclusionary effect that could result from the practice at issue is counterbalanced or even outweighed by positive effects on consumers.'
2. The impugned conduct must be 'capable of restricting competition' but the law 'does not require … that the desired result … has been achieved.' The dominant firm can defend by showing that the conduct was incapable of producing the alleged exclusionary effects. The competition authority need not prove that the dominant firm had the intention to exclude by means other than competition on the merits; but such intention can be taken into account as a factor relevant to establishing abuse.
3. Dominant firms 'may defend themselves against their competitors, but they must nonetheless do so by using means of "normal" competition alone, that is to say, competition on the merits.'
4. Where the incumbent in a market in the process of liberalisation uses a unique resource (data) in a biased way likely to give itself a comparative advantage in the liberalised market, such conduct is by definition incapable of being adopted by a hypothetical as-efficient competitor; such discrimination against the new rivals is sufficient to show that the conduct was capable of impairing effective, undistorted competition. The fact that actual effects were minuscule was 'not sufficient of itself to show that the practice in question was not capable of producing an exclusionary effect.'[40]

? NOTES AND QUESTIONS

1. *Trinko* is a regulated industries case, but its principles on refusals to deal and exclusionary strategies also apply in non-regulated contexts. Why is the Court so reluctant to allow an antitrust duty to deal?
2. How would *Commercial Solvents, United Brands, Slovak Telekom* and *ENEL* be resolved under *Trinko*; that is, under US law? Why does US law put the exclusionary practice into the category of refusal to deal, and EU law explicitly does not? Is the relationship of competition law to regulation relevant? Which framework—US or EU—is better to achieve the goal of well-functioning markets?

40 Servizio Elettrico Nazionale, Case C-377/20 (ECLI:EU:C:2022:379).

The preceding material provides a framework for analysis of exclusionary practices. We return to more general concepts of exclusionary practices later. But first, we address special issues of intellectual property and interoperability. The cases treated, including *Microsoft*, have significance beyond intellectual property. They feature a large set of dominant firm strategies that foreclose competitors even while they also have aspects that are efficient and innovative and benefit consumers. Later in this chapter, we come to exclusive dealing and loyalty rebates, bundling and tying, price predation and discrimination, margin squeezes, self-preferencing by big online platforms, and finally, new instruments for the digital economy to rein in Big Tech.

(iii) The special relevance of intellectual property

A firm may own intellectual property ('IP') rights, which typically grant the exclusive right to practice, use or license a patent, trademark, copyright or design. If the owner of IP has a dominant position and declines to license its IP, is the case for duty to deal stronger on grounds that the IP right reflects State-granted privileges that may be used to obstruct free movement of goods and to partition the internal market? Or, is the right to refuse to deal stronger because IP is a protected form of property granted as a reward and incentive for innovation?

IP rights are a subject of Article 36 TFEU (ex Article 30 ECT), which provides that Articles 34 and 35, guaranteeing free movement of goods, shall not preclude 'restrictions on imports, exports or goods in transit justified on grounds of … the protection of industrial and commercial property' as long as such restrictions are not 'a means of arbitrary discrimination or a disguised restriction on trade between Member States'. The Court of Justice held, in *Deutsche Grammophon Gesellschaft GmbH v. Metro-SB-Grossmärkte GmbH*:[41]

> … Article [36] only admits derogations from [free movement principles] to the extent to which they are justified for the purpose of safeguarding rights which constitute the specific subject-matter of such property.

In 1988, the Court of Justice considered questions posed by national courts regarding exclusive design rights in automobile parts of Volvo and Renault. In the *Volvo* judgement, the Court said:

> [T]he rights of the proprietor of a protected design to prevent third parties from manufacturing and selling or importing, without its consent, products incorporating the design constitutes the very subject-matter of his exclusive right. It follows … that a refusal to grant such a license cannot in itself constitute an abuse of a dominant position.

41 Case 78/70, *Deutsche Grammophon Gesellschaft GmbH v. Metro-SB-Grossmärkte GmbH* [1971] ECR 487, EU:C:1971:59, para. 11.

> [T]he exercise of an exclusive right by the proprietor of a registered design in respect of car body panels may be prohibited by Article [102 TFEU] if it involves, on the part of an undertaking holding a dominant position, certain abusive conduct such as the arbitrary refusal to supply spare parts to independent repairers, the fixing of prices for spare parts at an unfair level or a decision no longer to produce spare parts for a particular model even though many cars of that model are still in circulation, provided that such conduct is liable to affect trade between Member States.[42]

When is such a refusal to supply 'arbitrary', and when, on the other hand, does it go to the heart of the IP owner's right of exclusivity?

The principle of deference to IP holders' essential rights was tested in a case in which the copyright holders' right to refuse to license conflicted directly with the public's interest in competition. (But doesn't it always, if viewed in the short term?) The question arose as to whether each of the three significant TV broadcasters in Ireland was required to license its TV schedules to a third party that proposed to publish a consolidated TV guide.

CASE

Raidió Teilifís Éireann v. Commission (Joined Cases C-241 and C-242/91 P) *('Magill')*[43]

[Raidió Teilifís Éireann ('RTE'), BBC and Independent Television Publications ('ITP') operated TV stations. Each published weekly listings of its programmes in Ireland and Northern Ireland, gave newspapers its schedule free on a daily basis, and claimed copyright protection over its programme listings. At that time, no composite TV guide existed. Magill conceived the idea of publishing a weekly magazine, the *Magill TV Guide*, listing all available TV programmes in Ireland and Northern Ireland. It sought licences from RTE, BBC and ITP, but the licences were denied. Magill nonetheless proceeded with the publication. In a suit by the three copyright owners, the Irish High Court enjoined Magill from using the copyrighted listings of RTE, BBC and ITP. Magill complained to the Commission. The Commission found that each of the three broadcasters had and abused a dominant position. Two of the stations challenged the decision, claiming that they had done nothing more than exercise their rights under the Irish copyright law. The Irish copyright law protected a TV station's schedule of its programmes. Although this was a protection not extended by laws of other nations, the law itself was valid under Articles 34/36 TFEU, for it conferred IP rights and was not an

42 Case 238/87, *Volvo AB v. Erik Veng (UK) Ltd* [1988] ECR 6211, EU:C:1988:477, paras. 8–9.

43 [1995] ECR I-743, EU:C:1995:98.

CASE *(continued)*

arbitrary discrimination or disguised restriction on trade between Member States. [Re-read Articles 34, 36 and 345 TFEU.] The TV stations claimed that they had done nothing more than exercise their copyright right to refuse to license. Moreover, each station argued that it was not dominant; it supplied less than a third of the market. The General Court upheld the Commission, and the stations appealed.]

(a) Existence of a dominant position

46 So far as dominant position is concerned, it is to be remembered at the outset that mere ownership of an intellectual property right cannot confer such a position.

47 However, the basic information as to the channel, day, time and title of programmes is the necessary result of programming by television stations, which are thus the only source of such information for an undertaking, like Magill, which wishes to publish it together with commentaries or pictures. By force of circumstance, RTE and ITP, as the agent of ITV, enjoy, along with the BBC, a *de facto* monopoly over the information used to compile listings for the television programmes received in most households in Ireland and 30% to 40% of households in Northern Ireland. The appellants are thus in a position to prevent effective competition on the market in weekly television magazines. [They therefore] occupied a dominant position ….

(b) Existence of abuse

48 With regard to the issue of abuse, the arguments of the appellants and IPO wrongly presuppose that where the conduct of an undertaking in a dominant position consists of the exercise of a right classified by national law as 'copyright', such conduct can never be reviewed in relation to Article [102] of the Treaty.

49 Admittedly, in the absence of Community standardization or harmonization of laws, determination of the conditions and procedures for granting protection of an intellectual property right is a matter for national rules. Further, the exclusive right of reproduction forms part of the author's rights, so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position.

50 However, it is also clear from that judgement that the exercise of an exclusive right. by the proprietor may, in exceptional circumstances, involve abusive conduct.

51 In the present case, the conduct objected to is the appellants' reliance on copyright conferred by national legislation so as to prevent Magill—or any other undertaking having the same intention—from publishing on a weekly basis information (channel, day, time and title of programmes) together with commentaries and pictures obtained independently of the appellants.

CASE *(continued)*

52 Among the circumstances taken into account by the [General Court] in concluding that such conduct was abusive was, first, the fact that there was, according to the findings of the [General Court], no actual or potential substitute for a weekly television guide offering information on the programmes for the week ahead. On this point, the [General Court] confirmed the Commission's finding that the complete lists of programmes for a 24-hour period—and for a 48-hour period at weekends and before public holidays—published in certain daily and Sunday newspapers, and the television sections of certain magazines covering, in addition, 'highlights' of the week's programmes, were only to a limited extent substitutable for advance information to viewers on all the week's programmes. Only weekly television guides containing comprehensive listings for the week ahead would enable users to decide in advance which programmes they wished to follow and arrange their leisure activities for the week accordingly. The [General Court] also established that there was a specific, constant and regular potential demand on the part of consumers ….

53 Thus the appellants—who were, by force of circumstance, the only source of the basic information on programme scheduling which is the indispensable raw material for compiling a weekly television guide—gave viewers wishing to obtain information on the choice of programmes for the week ahead no choice but to buy the weekly guides for each station and draw from each of them the information they needed to make comparisons.

54 The appellants' refusal to provide basic information by relying on national copyright provisions thus prevented the appearance of a new product, a comprehensive weekly guide to television programmes, which the appellants did not offer and for which there was a potential consumer demand. Such refusal constitutes an abuse under heading (b) of the second paragraph of Article [102] of the Treaty.

55 Second, there was no justification for such refusal either in the activity of television broadcasting or in that of publishing television magazines ….

56 Third, and finally, as the [General Court] also held, the appellants, by their conduct, reserved to themselves the secondary market of weekly television guides by excluding all competition on that market since they denied access to the basic information which is the raw material indispensable for the compilation of such a guide.

57 In the light of all those circumstances, the [General Court] did not err in law in holding that the appellants' conduct was an abuse of a dominant position within the meaning of Article [102] of the Treaty.

* * *

NOTES AND QUESTIONS

1. From what facts did the Court find dominance? Was each of the three broadcasters dominant?
2. When does a dominant firm's refusal to license IP constitute an abuse? Does *Magill* erode the rule in *Volvo*? What is the significance of the fact that the TV stations 'prevented the appearance of a new product'? If the stations had formed a joint venture to produce a TV guide, could they have lawfully refused to grant a licence to Magill?
3. IP normally embodies the right to refuse to grant a licence. The right of exclusivity is the essence of IP rights, even if a holder of the right is dominant.[44] How and when does the right of exclusivity cease to become an essential ingredient of the IP right? Does it lose this character whenever competition and consumer interests would be better served by the grant of a licence? If so, does Article 102 TFEU eclipse Article 36 TFEU? How does the Court prevent this eclipse?
4. There is an unexplored question in *Magill*: was the Irish copyright law excessive in protecting the mere listing of a TV schedule? Is copyright protection of a TV schedule even arguably necessary or important to preserve incentives to invent and to be creative? Few other jurisdictions protect a mere schedule. However, the Court could not have solved the *Magill* problem by declaring that Ireland stepped out of bounds by trying to give copyright protection to TV listings, for, under the Treaty, Ireland alone had the right to declare the scope of Irish property interests (Article 345 TFEU). Could it have solved the problem by declaring that on the particular facts, the Article 102 interests outweighed the Article 36 interests? Is part of the solution to consider the effect of antitrust enforcement on incentives to create? What impact was the antitrust enforcement in *Magill* likely to have on incentives to create or broadcast innovative programming?

CASE

IMS Health GmbH & Co. (Case C-418/01)[45]

[IMS Health Inc. was a market research company that provided services to the pharmaceutical industry. It devised a 'brick structure' in which it divided Germany into geographic areas that were used to measure and report sales of individual pharmaceutical products. Its efforts culminated in the development of the 1860 brick structure—a format for categorizing and reporting data that was the central feature of its regional and wholesaler data-information services. The format was protected by German copyright law.

National Data Corporation ('NDC') entered the German market to provide marketing data to the pharmaceutical industry in competition with IMS. The pharmaceutical companies wanted the data only in the 1860 format. NDC asked IMS for a licence for the 1860 format, but IMS refused. It thereupon began selling marketing data to the pharmaceutical industry based on copies of the 1860 brick structure.

IMS brought proceedings in a German court to prohibit NDC from using the IMS brick structure on grounds that the brick structure was a database protected by copyright and IMS had the right to refuse to license it. The German court granted the injunction but then stayed the proceedings, observing that IMS could not refuse to license NDC if the refusal constituted

44 *Magill*, para. 49.
45 [2004] ECR I-5039, EU:C:2004:257.

CASE *(continued)*

an abuse of dominance under Article 102 TFEU. The national court referred to the Court of Justice questions concerning the circumstances under which such a refusal constitutes an abuse. The Court of Justice answered: only in exceptional circumstances may the exercise of an exclusive (IP) right constitute an abuse of dominance. First, access to the product, service or IP must be indispensable to enable the undertaking to carry on business in a market.]

28 [To determine indispensability,] it must be determined whether there are products or services which constitute alternative solutions, even if they are less advantageous, and whether there are technical, legal or economic obstacles capable of making it impossible or at least unreasonably difficult for any undertaking seeking to operate in the market to create, possibly in cooperation with other operators, the alternative products or services … [I]n order to accept the existence of economic obstacles, it must be established, at the very least, that the creation of those products or services is not economically viable for production on a scale comparable to that of the undertaking which controls the existing product or service.

* * *

38 [Where access is indispensable,] it is sufficient that three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumers demand, that it is unjustified and such as to exclude any competition on a secondary market.

* * *

45 [I]t is sufficient that a potential market or even hypothetical market can be identified. Such is the case where the products or services are indispensable in order to carry on a particular business and where there is an actual demand for them on the part of undertakings which seek to carry on the business for which they are indispensable.

44 Accordingly, it is determinative that two different stages of production may be identified and that they are interconnected, the upstream product is indispensable in as much as for supply of the downstream product.

45 Transposed to the facts of the case in the main proceedings, that approach prompts consideration as to whether the 1860 brick structure constitutes, upstream, an indispensable factor in the downstream supply of German regional sales data for pharmaceutical products.

46 It is for the national court to establish whether that is in fact the position, and, if so be the case, to examine whether the refusal by IMS to grant a licence to use the structure at issue is capable of excluding all competition on the market for the supply of German regional sales data on pharmaceutical products.

* * *

NOTES AND QUESTIONS

1. If all four of the elements specified in *IMS* are proved (indispensability and the three 'sufficient' conditions), is IMS's copyrighted brick structure an essential facility?
2. Who won on the question of whether there must be two interconnected markets?
3. How likely was NDC to prevail on each necessary element of its case? Which would be the hardest hurdle to overcome?

* * *

The next important refusal-to-deal case is *Microsoft*. The US Department of Justice had already brought a monopolization case against Microsoft and had won a large part of it. The European case involved practices later in time; and they were practices of a different sort. By the time the European Commission brought proceedings, Microsoft had eliminated the more blatantly predatory and coercive acts of the sort condemned in the US case.

(iv) Interoperability, and IP continued

CASE

Microsoft Corp. v. Commission (Case T-201/04)[46]

[The European Commission brought proceedings against Microsoft, a 'superdominant' firm with more than 90% of the PC operating systems market, for abusing its dominant position in violation of Article 102 TFEU. The Commission found two sets of Microsoft's practices to be illegal. (1) Bundling its media player with its operating system (Windows), which had become the standard in the market. RealNetworks had pioneered the media player, and RealNetworks' player was popularly used with Windows. Thereafter, Microsoft made its own media player and bundled it with Windows, foreclosing media player rivals from the most efficient channels to the market. (2) Refusal to deal, in the form of refusing to provide workgroup server software rivals with full interoperability information to connect with Windows and with Microsoft's workgroup server software. Workgroup servers are servers used by small enterprises to interconnect file, printing, document-sharing and management functions of all PCs within the enterprise. Novell and others had pioneered workgroup server software. Before Microsoft developed such software of its own, it gave full interoperability information to the workgroup server software providers. Then Microsoft made its own workgroup server software and withheld from its rivals the full information they needed for seamless interoperability. Microsoft noted that it provided a good deal of interoperability information and claimed that it had no legal duty to help its rivals. Belatedly, it also claimed that its interface

46 [2007] ECR II-3601, EU:T:2007:289.

CASE *(continued)*

protocols containing the withheld interoperability information contained IP and that it had a right of absolute exclusivity of its IP.

For remedies, the Commission ordered Microsoft to supply the full interoperability protocols, offer an unbundled version of Windows without the media player and pay a fine of €497 million for the two violations. Microsoft appealed to the General Court. At this point, we cover only the interoperability (duty to deal) issue.

Microsoft contended that disclosure of the interface protocols would entail disclosure of IP. The Commission disputed this claim but nonetheless argued that the circumstances satisfied the criteria of *Magill/IMS*: (1) access (here, to the complete interoperability information) must be indispensable, (2) the refusal must exclude any effective competition on a neighbouring market, and (3) the refusal must prevent the appearance of a new product for which there is a potential consumer demand. (4) If the criteria are satisfied, it then falls to the dominant firm to prove an objective justification.

The Court first held that the Commission did not err in finding that seamless interoperability was indispensable to efficient operation of rivals, and that the refusal gave rise to a risk of elimination of competition. The Court then summarized the evidence showing the sharp rise of Microsoft's share of workgroup server software, to more than 60%, and the decline of the competitors' shares, as soon as Microsoft stopped providing full interoperability information. It gave examples of how Microsoft killed off two competitors' products, NDS for NT developed by Novell, and PC NetLink developed by Sun Microsystems, by withholding interoperability information. See facts at para. 654.]

* * *

593 The above factors confirm that Microsoft's refusal has the consequence that its competitors' products are confined to marginal positions or even made unprofitable. The fact that there may be marginal competition between operators on the market cannot therefore invalidate the Commission's argument that all effective competition was at risk of being eliminated on that market.

* * *

(3) The new product

* * *

647 The circumstance relating to the appearance of a new product, as envisaged in *Magill* and *IMS Health*, cannot be the only parameter which determines whether a refusal to license an intellectual property right is capable of causing prejudice to consumers

CASE *(continued)*

within the meaning of Article [102(b)]. As that provision states, such prejudice may arise where there is a limitation not only of production or markets, but also of technical development.

* * *

650 … [T]he Commission was correct to observe that '[due] to the lack of interoperability that competing work group server operating system products can achieve with the Windows domain architecture, an increasing number of consumers are locked into a homogeneous Windows solution at the level of work group server operating systems'.

651 … Microsoft's refusal prevented its competitors from developing work group server operating systems capable of attaining a sufficient degree of interoperability with the Windows domain architecture, with the consequence that consumers' purchasing decisions in respect of work group server operating systems were channelled towards Microsoft's products. The Court has also already observed that it was apparent from a number of documents in the file that the technologies of the Windows 2000 range, in particular Active Directory, were increasingly being taken up by organisations. As interoperability problems arise more acutely with work group server operating systems in that range of products than with those of the preceding generation, the increasing uptake of those systems merely reinforces the 'lock-in' effect referred to in the preceding paragraph.

652 The limitation thus placed on consumer choice is all the more damaging to consumers because, as already observed, they consider that non-Microsoft work group server operating systems are better than Windows work group server operating systems with respect to a series of features to which they attach great importance, such as 'reliability/availability of the … system' and 'security included with the server operating system'.

653 In the second place, the Commission was correct to consider that the artificial advantage in terms of interoperability that Microsoft retained by its refusal discouraged its competitors from developing and marketing work group server operating systems with innovative features, to the prejudice, notably, of consumers. That refusal has the consequence that those competitors are placed at a disadvantage by comparison with Microsoft so far as the merits of their products are concerned, particularly with regard to parameters such as security, reliability, ease of use or operating performance speed.

654 The Commission's finding that '[i]f Microsoft's competitors had access to the interoperability information that Microsoft refuses to supply, they could use the disclosures to make the advanced features of their own products available in the framework of the web of interoperability relationships that underpin the Windows domain architecture' is corroborated by the conduct which those competitors had adopted in the past, when they had

CASE *(continued)*

access to certain information concerning Microsoft's products. The two examples which the Commission gives …, 'PC NetLink' and 'NDS for NT', speak volumes in that regard.

PC NetLink is software developed by Sun on the basis of AS/U, which had been developed by AT&T using source code which Microsoft had licensed to it in the 1990s. A document submitted by Microsoft during the administrative procedure shows that the innovative features and added value that PC NetLink brought to Windows work group networks was used as a selling point for that product. Likewise, in its marketing material, Novell highlighted the new features which NDS for NT-software which it had developed using reverse engineering-brought to the Windows domain architecture (in this instance Windows NT).

655 The Commission was careful to emphasise, in that context, that there was 'ample scope for differentiation and innovation beyond the design of interface specifications'. In other words, the same specification can be implemented in numerous different and innovative ways by software designers.

* * *

659 Last, Microsoft's argument that it will have less incentive to develop a given technology if it is required to make that technology available to its competitors is of no relevance to the examination of the circumstance relating to the new product, where the issue to be decided is the impact of the refusal to supply on the incentive for Microsoft's competitors to innovate and not on Microsoft's incentives to innovate. That is an issue which will be decided when the Court examines the circumstance relating to the absence of objective justification.

660 In the third place, the Commission is also correct to reject as unfounded Microsoft's assertion during the administrative procedure that it was not demonstrated that its refusal caused prejudice to consumers.

661 First of all, … the results of the third Mercer survey show that, contrary to Microsoft's contention, consumers consider non-Microsoft work group server operating systems to be better than Windows work group server operating systems on a number of features to which they attach great importance.

* * *

664 Last, … it is settled case-law that Article [102] covers not only practices which may prejudice consumers directly but also those which indirectly prejudice them by impairing an effective competitive structure. In this case, Microsoft impaired the effective competitive structure on the work group server operating systems market by acquiring a significant market share on that market.

* * *

CASE *(continued)*

(4) The absence of objective justification

666 In the first place, Microsoft claims that the refusal to supply the information was objectively justified by the intellectual property rights which it holds over the 'technology' concerned. It has made significant investment in designing its communication protocols and the commercial success which its products have achieved represents the just reward. It is generally accepted, moreover, that an undertaking's refusal to communicate a specific technology to its competitors may be justified by the fact that it does not wish them to use that technology to compete with it.

667 In the reply, Microsoft relies on the fact that the technology which it is required to disclose to its competitors is secret, that it is of great value for licensees and that it contains significant innovation.

668 … [T]he applicant adds that it had an objective justification for not licensing the technology 'given the prejudice to incentives to innovate that would have resulted if Sun (or others) had used that technology to build a "functional equivalent" that would compete against Microsoft's products on the same market'.

* * *

697 The Court finds that, as the Commission correctly submits, Microsoft, which bore the initial burden of proof, did not sufficiently establish that if it were required to disclose the interoperability information that would have a significant negative impact on its incentives to innovate.

698 Microsoft merely put forward vague, general and theoretical arguments on that point …. Microsoft merely stated that '[d]isclosure would … eliminate future incentives to invest in the creation of more intellectual property', without specifying the technologies or products to which it thus referred.

* * *

701 It follows that it has not been demonstrated that the disclosure of the information to which that remedy relates will significantly reduce—still less eliminate—Microsoft's incentives to innovate.

702 In that context, the Court observes that it is normal practice for operators in the industry to disclose to third parties the information which will facilitate interoperability with their products and Microsoft itself had followed that practice until it was sufficiently established on the work group server operating systems market. Such disclosure allows the operators concerned to make their own products more attractive and therefore more valuable. In fact, none

CASE *(continued)*

of the parties has claimed in the present case that such disclosure had had any negative impact on those operators' incentives to innovate.

* * *

711 It follows from all of the foregoing considerations that Microsoft has not demonstrated the existence of any objective justification for its refusal to disclose the interoperability at issue.

* * *

? NOTES AND QUESTIONS

1. Were the *IMS/Magill* criteria faithfully applied to determine whether the refusal excluded 'any effective competition'? Were the *IMS/Magill* criteria faithfully applied to determine whether the refusal prevented the appearance of a new product for which there is a potential consumer demand? Should the *IMS/Magill* criteria be necessary conditions for determining whether Microsoft's withholding of interoperability information harmed competition and constituted abuse of dominance? If not, what would have been an appropriate framework for analysis?
2. How did the Court deal with the effect of the enforcement on incentives to innovate—Microsoft's incentives and the rivals' incentives? What role was played by burdens of proof in this regard? Do you agree with the Court's treatment?
3. How would the US *Trinko* Court have framed the question about incentives? Might it have asked: did Microsoft have a duty to increase the incentives of rivals? Did it have a duty of forced sharing? What presumptions and burdens of proof flow from the way in which the question is asked?

   On the facts, the closest US case to the EU Microsoft interoperability case is *Novell, Inc. v. Microsoft Corp*.[47] The court in *Novell* held that Microsoft did not run afoul of Section 2 of the Sherman Act (monopolization) by withdrawing from Novell, maker of WordPerfect software and the main competitor of Microsoft Word, access to interface shortcuts that had made WordPerfect viable and allowed it to thrive. The court said that Microsoft had the right to refuse to deal; that it had no duty to share its IP; that Novell needed to show—but did not—that Microsoft's conduct was 'irrational but for its anticompetitive effect'. This is a tough standard to meet. Is it tougher than *Trinko* requires?
4. US cases have held that an IP owner has an absolute right to refuse to license its IP when the refusal is not part of an illegal scheme.[48] How would the US courts decide *Magill*, assuming the copyright protection was valid? How would they decide *IMS*? And the EU *Microsoft* case (interoperability)?

47 731 F.3d 1064 (10th Cir. 2013).

48 See *Independent Service Organizations Antitrust Litigation (CSU v. Xerox)*, 203 F.3d 1322 (Fed. Cir. 2000), cert. denied, 531 U.S. 1143 (2001).

5. IP issues have become part of the regular fare of abuse of dominance cases. By one initiative, the European authorities are proceeding against patent holders of pharmaceuticals who are strategically blocking the competition of generic drugs—which usually sell for a fraction of the price of the brand. In *AstraZeneca*, the Court of Justice upheld the General Court and the Commission's findings that AstraZeneca, producer of the Losec ulcer drug, abused its dominant position by deliberately misleading patent offices in order to maintain supplementary protection certificates to delay entry of generic competitors, and that it applied for deregistration of marketing authorizations for Losec capsules to hinder parallel importers who could otherwise rely on those authorizations for regulatory approval. AstraZeneca's conduct offended the principles of freedom to compete on the merits and the responsibility of a dominant firm not to prejudice undistorted competition within the EU.[49]

In a second initiative, the Commission has targeted patent holders who sue for injunctions against infringement in the following circumstances. The industry—such as mobile phones and tablets—has developed a standard, and the members of the industry have agreed to license any patents essential to comply with the standard on fair, reasonable and non-discriminatory terms ('FRAND'). Before the FRAND terms are agreed, the holder of a standard essential patent ('SEP') sues a rival—for example, Samsung sues Apple—for infringement and seeks an injunction against Apple's use of the essential patent; if the injunction is granted, Apple might have to take a generation of iPads off the market. In a case with a similar fact pattern, the Commission found an infringement of Article 102 TFEU by Motorola, and in another, it agreed to commitments by Samsung.[50]

A similar case was subsequently referred to the Court of Justice for a preliminary ruling.[51] The case involved an alleged infringement by ZTE of a Huawei patent declared essential for a standard established by the European Telecommunications Standards Institute ('ETSI'). Huawei had undertaken to grant licences to third parties on FRAND terms, but no licensing agreement could be finalized with ZTE at the end of the negotiations. Huawei subsequently sought an injunction against ZTE prohibiting the marketing of products operating on the basis of the standard embedding its patent, as well as the rendering of accounts, the recall of products and an award of damages. After distinguishing the case from precedents such as Volvo, Magill and IMS Health by reason of the facts that 'the patent at issue is essential to a standard established by a standardization body, rendering its use indispensable to all competitors' and that 'an undertaking to grant licenses on FRAND terms creates legitimate expectations on the part of third parties' (paras. 49 and 53), the Court took the following stance (para. 71):

> … Article 102 TFEU must be interpreted as meaning that the proprietor of an SEP, which has given an irrevocable undertaking to a standardisation body to grant a licence to third parties on FRAND terms, does not abuse its dominant position, within the meaning of Article 102 TFEU, by bringing an action for infringement seeking an injunction prohibiting the infringement of its patent or seeking the recall of products for the manufacture of which that patent has been used, as long as:
>
> — prior to bringing that action, the proprietor has, first, alerted the alleged infringer of the infringement complained about by designating that patent and specifying the way in which it has been infringed, and, secondly, after the alleged infringer has expressed

49 Case C-457/10 P, *AstraZeneca v. Commission*, EU:C:2012:770, para. 98.

50 Commission Decisions of 29 April 2014 in Case AT.39985—Motorola/Enforcement of GPRS Standard Essential Patents, and Case AT.39939—Samsung/Enforcement of UMTS Standard Essential Patents.

51 Case C-170/13, *Huawei Technologies Co. Ltd v. ZTE Corp.*, EU:C:2015:477.

its willingness to conclude a licensing agreement on FRAND terms, presented to that infringer a specific, written offer for a licence on such terms, specifying, in particular, the royalty and the way in which it is to be calculated, and

— where the alleged infringer continues to use the patent in question, the alleged infringer has not diligently responded to that offer, in accordance with recognised commercial practices in the field and in good faith, this being a matter which must be established on the basis of objective factors and which implies, in particular, that there are no delaying tactics.

Prior to reaching that conclusion, the Court of Justice underlined the need to find a fair balance between the interests protected by property rights, including that of effective judicial protection and thus access to court, on the one hand, and those protected by competition principles in view of the risks of exclusionary conduct, on the other hand (paras. 52–55).

How do you assess the 'balance' struck by the Court? Is it fair? Is it efficient? What do you make of the fact that the irrevocable commitment given by Huawei to ETSI to the effect that it would license its patent on FRAND terms, triggered its exposure under Article 102 TFEU? What are the questions left unresolved by the Court? How significant are they?

(v) Self-preferencing ('Google Shopping')

CASE

Google and Alphabet v. Commission (Case T-612/17)[52]

Google offers Google Shopping, a comparative shopping site on its dominant online search platform. After Google's initial forays in comparative shopping did not succeed, Google began to place its own shopping comparison site at the top of returns answering users' queries and to provide other eye-catching layouts and positioning for its own product. It demoted links to competitors' products. Thereafter, the Google product received the highest share of clicks, and its demoted competitors suffered substantial losses of traffic on a lasting basis. The Commission's data showed that the top result of a search receives about 95% of all clicks and that results relegated to page 2 receive only about 1% of all clicks. Traffic generates advertising revenues. The Commission found a violation of Article 102, and Google appealed.

The General Court dismissed Google's appeal, establishing that there may be a self-preferencing violation of Article 102 and holding that the Commission had proved the violation in *Comparative Shopping*. Google had favoured its comparative shopping service on its general results pages through giving its own product more favourable display and relegating competing services to less favourable positions by means of ranking algorithms, thus departing from competition on the merits. The General Court observed that Google is a superdominant firm and that the Google platform has characteristics 'akin to an essential facility', while not

52 ECLI:EU:T:2021:763.

CASE *(continued)*

holding the Commission to the standard of proof for essential facility violations. Critical facts included: comparative shopping service providers depend on the traffic on the Google platform, for which 'there is no actual or potential substitute available that would enable it to be replaced … in an economically viable manner'. Given Google's unique position of power, it had a duty of equal treatment to the rivals it hosts on its platform. Excerpts follow. An appeal is pending.

* * *

176 … Given the universal vocation of Google's general search engine, which … is designed to index results containing any possible content, the promotion on Google's general results pages of one type of specialised result—its own—over the specialised results of competitors involves a certain form of abnormality.

177 The infrastructure at issue, namely Google's general results pages which generate traffic to other websites, including those of competing comparison shopping services, is, in principle, open, which distinguishes it from other infrastructures referred to in the case-law, consisting of tangible or intangible assets (press distribution systems or intellectual property rights, respectively) whose value depends on the proprietor's ability to retain exclusive use of them.

178 Unlike the latter infrastructures, the rationale and value of a general search engine lie in its capacity to be open to results from external (third-party) sources and to display these multiple and diverse sources on its general results pages, sources which enrich and enhance the credibility of the search engine as far as the general public is concerned, and enable it to benefit from the network effects and economies of scale that are essential for its development and its subsistence in a market in which, by their very nature, few infrastructures of that kind can subsist, given those network effects. A very large number of users is needed to reach the critical mass capable of compensating for the service being free of charge on one side of the market and generating advertising income on its other side. Accordingly, for a search engine, limiting the scope of its results to its own entails an element of risk and is not necessarily rational, save in a situation, as in the present case, where the dominance and barriers to entry are such that no market entry within a sufficiently short period of time is possible in response to that limitation of internet users' choice.

179 Consequently, the fact, assuming it to be established, that Google favours its own specialised results over third-party results, which seems to be the converse of the economic model underpinning the initial success of its search engine, cannot but involve a certain form of abnormality. It follows that, in accordance with the case-law cited in paragraph 133 above, it is for the person responsible for that difference in treatment to justify it in the light of competition law ….

CASE *(continued)*

180 It may be observed moreover, for the sake of completeness, that even in a situation that differs from that of the present case, the Court of Justice has ruled, with regard to internet access providers, that the EU legislature had intended, by Regulation (EU) 2015/2120 of the European Parliament and of the Council of 25 November 2015 laying down measures concerning open internet access and amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services and Regulation (EU) No 531/2012 on roaming on public mobile communications networks within the Union (OJ 2015 L 310, p. 1), to impose on those operators a general obligation of equal treatment, without discrimination, restriction or interference with traffic, from which derogation is not possible in any circumstances by means of commercial practices (see, to that effect, judgment of 15 September 2020, *Telenor Magyarország*, C–807/18 and C–39/19, EU:C:2020:708, paragraph 47). The fact that the legislature made that choice and the legal obligation of non-discrimination that follows from it for internet access providers on the upstream market cannot be disregarded when analysing the practices of an operator like Google on the downstream market, given the undisputed ultra-dominant position of Google on the market for general search services and its special responsibility not to allow its behaviour to impair genuine, undistorted competition in the internal market. It is of no relevance in that regard whether or not legislation calls, in general terms, for such non-discriminatory access to online search results, since, as is clear from the case-law, a system of undistorted competition can be guaranteed only if equality of opportunity is secured as between the various economic operators (see judgment of 14 October 2010, *Deutsche Telekom* v *Commission*, C–280/08 P, EU:C:2010:603, paragraph 230 and the case-law cited), which is consistent with the possibility that certain differences in treatment may be considered contrary to Article 102 TFEU when what is at issue are favouring practices established by operators in a dominant position in the internet sector.

181 Furthermore, as VDZ submits, the deviation in relation to competition on the merits of the conduct at issue, assuming it is established, is all the more obvious as it follows a change of conduct on the part of the dominant operator. Google did indeed change its conduct on the market for general search services.

182 It is apparent from the file that, historically, Google initially provided general search services and acquired a 'superdominant' position on that market, which is characterised by very high barriers to entry. On that market, Google displayed results that directed users to comparison shopping services. Furthermore, Google displayed all the results of specialised search services in the same way and according to the same criteria. The very purpose of a general search service is to browse and index the greatest possible number of web pages in order to display all results corresponding to a search.

183 Google subsequently entered the market for specialised comparison shopping search services. At the time when Google started its activities on the market for specialised

CASE *(continued)*

comparison shopping search services, there were already numerous providers of such services. Moreover, in view of its 'superdominant' position, its role as a gateway to the internet and the very high barriers to entry on the market for general search services, it was under a stronger obligation not to allow its behaviour to impair genuine, undistorted competition on the related market for specialised comparison shopping search services.

184 According to the Commission, after Google's launch on the market for specialised comparison shopping search services and after experiencing the failure of its dedicated comparison shopping web page (Froogle), Google changed its practices on the market for general search services which it dominated, the effect of which was to increase the visibility of results from its own comparison shopping service on the general search results pages. After the launch of grouped product results, comparison shopping services were no longer all treated in the same way. Google promoted its own specialised search results (positioning and display) and demoted the results of its competitors which, moreover, were not afforded the same type of display (only 'blue links' without images or rich text). The change in Google's behaviour led to a reduction in the visibility of results from competing comparison shopping services and, at the same time, increased the visibility of results from Google's own comparison shopping service. Thus, the practices at issue enabled Google to highlight its own comparison shopping service on its general search results pages while leaving competing comparison shopping services virtually invisible on those pages, which, in principle, is not consistent with the intended purpose of a general search service.

185 Accordingly, subject to the favouring and its effects identified at the end of the analysis summarised in paragraphs 170 to 173 above having been properly established, Google's conduct cannot, as such, constitute competition on the merits.

186 That conclusion is not undermined by Google's arguments to the effect that the display of Product Universals and Shopping Units cannot be classified as abusive, since those results and those ads constituted quality improvements in its services that were within the scope of competition on the merits.

187 First, it should be pointed out that Google's arguments are based on the incorrect premiss that the conduct at issue consists solely in the special display and positioning of Product Universals and Shopping Units, when in fact that conduct consists in the combination of two practices: the promotion of specialised results from Google's comparison shopping service and the simultaneous demotion of results from competing comparison services by adjustment algorithms. It must be noted in that regard that Google does not describe the demotion on its general results pages of competing comparison shopping services, but not of its own, as a 'quality improvement' that would characterise competition on the merits.

CASE *(continued)*

188 Secondly, contrary to what is suggested by Google, it does not follow from any of the judgments cited by the Commission in recital 334 of the contested decision that conduct leading to a product or service improvement cannot constitute, in itself, an autonomous form of abuse where that improvement results in the dominant undertaking favouring its own product or service through recourse to methods different from those governing competition on the merits and that conduct is capable of having anticompetitive effects. In that regard, as VDZ correctly points out, product or service improvements of a technical or commercial nature can be taken into account only at the stage when any objective justifications and possible efficiency gains that might thereby be achieved are being examined.

* * *

224 It must be noted that Google's general results page has characteristics akin to those of an essential facility … inasmuch as there is currently no actual or potential substitute available that would enable it to be replaced in an economically viable manner on the market (see, to that effect, judgment of 17 September 2007, *Microsoft* v *Commission*, T–201/04, EU:T:2007:289) ….

* * *

440 … [W]here the undertaking concerned maintains that its conduct was not capable of having—even potential—anticompetitive effects, and its case is supported by information about the actual development of the market, the competition authority is required to examine whether that information is such as to have an impact on its assessment of the existence of anticompetitive effects. In the case of practices that have actually been implemented and which are, as in this instance, complex, such information is capable of constituting relevant circumstances that may or may not corroborate the existence of an infringement of Article 102 TFEU.

441 It follows from the above that, in order to find that Google had abused its dominant position, the Commission had to demonstrate the—at least potential—effects attributable to the impugned conduct of restricting or eliminating competition on the relevant markets, taking into account all the relevant circumstances, particularly in the light of the arguments advanced by Google to contest the notion that its conduct had been capable of restricting competition.

442 However, contrary to what is claimed by Google or CCIA, the Commission was not required to identify actual exclusionary effects on the grounds that Google was allegedly not dominant on the national markets for comparison shopping services, that its conduct was part of improvements in its services for the benefit of consumers and online sellers and that that conduct had lasted for many years. Such a requirement of the Commission would be

CASE *(continued)*

contrary to the principle, confirmed by the Courts of the European Union, that the categorisation of a practice as abuse within the meaning of Article 102 TFEU cannot be altered because the practice at issue has ultimately not achieved the desired result ....

443 Nor, a fortiori, was the Commission required to demonstrate that possible consequences of the elimination or restriction of competition actually manifested themselves, for example in the form of less innovation or price increases that could only be explained by the lack of competition. It is accepted in that regard that the weakening of competition is highly likely to have such consequences, as is explained in paragraphs 11 and 19 of the Guidance on the Commission's enforcement priorities in applying [Article 102 TFEU] to abusive exclusionary conduct by dominant undertakings.

444 It must be pointed out that the arguments to the effect that the practices at issue improved the quality of the services, notably for the benefit of the consumer, which, from the point of view of the economic interest, outweighed the exclusionary effects identified, and that therefore those practices were not abusive are arguments that fall outside the scope of an examination as to whether any effects of those practices even exist. Those arguments are therefore ineffective as support for the claim that the Commission failed to demonstrate that the practices at issue had had anticompetitive effects. ...

445 ... [T]he Commission was fully entitled to conclude from that analysis, in respect of the various national markets for comparison shopping services concerned, first, that those practices had led to a reduction of that traffic for almost all competing comparison shopping services and, secondly, that those practices had led to an increase in traffic to Google's comparison shopping service. Those material effects in relation to traffic from Google's general results pages have largely been documented ... and it may be concluded that the Commission established actual effects that are more or less pronounced, depending on the country, but in any event significant.

* * *

523 ... The Commission therefore carried out an analysis according to which the material effects of Google's conduct on traffic from its general results pages to competing comparison shopping services, consisting in a reduction of such traffic, could not be compensated for by those comparison shopping services. That analysis, following the analysis from which it was ultimately concluded that that traffic accounted for a large proportion of the overall traffic of those comparison shopping services, is capable of demonstrating potential effects that are restrictive of competition, which can be sufficient to establish an abuse of a dominant position .... Contrary to CCIA's contention, the Commission was not required to demonstrate the existence of a foreclosure effect, namely that Google's conduct would give rise to the elimination of all competition or, at the very least, that it was intended to prevent internet

CASE *(continued)*

users or online sellers from making use of the services of competing comparison shopping services ….

* * *

527 It follows that, in the light of the pleas and arguments put forward to challenge the contested decision, the Commission correctly established that Google's practices had had significant material effects on traffic from its general results pages, resulting in a decrease in that traffic to competing comparison shopping services and an increase to its own comparison shopping service …; that the comparison shopping services affected by those practices had represented, at the very least, in the alternative scenario of a market encompassing merchant platforms, a not insignificant share of that market in the 13 countries concerned … and that traffic from Google's general results pages accounted for a large proportion of the overall traffic of comparison shopping services competing with Google … In those circumstances, unless the subsequent arguments of Google and of CCIA … are upheld, it appears that the Commission has demonstrated that the practices at issue affected Google's competitors sufficiently or, at the very least, the situation of a significant category of Google's competitors, for the Commission to be able to find that there were anticompetitive effects of an abuse of a dominant position.

* * *

538 In the third place, as regards the arguments … according to which the Commission failed to demonstrate that competing comparison shopping services that had experienced difficulties were as efficient as Google, when in fact they are not, the Commission is correct in maintaining that it was not required to prove this. The use of the as-efficient-competitor test is warranted in the case of pricing practices (predatory pricing or a margin squeeze, for example), in order, in essence, to assess whether a competitor that is as efficient as the dominant undertaking allegedly responsible for those pricing practices, and which, in order not to be driven immediately from the market, would charge its customers the same prices as those charged by that undertaking, would have to do so at a loss and accentuating that loss, causing it to leave the market in the longer term (see, to that effect, judgment of 6 October 2015, *Post Danmark*, C–23/14, EU:C:2015:651 …. In the present case, the practices at issue are not pricing practices.

* * *

553 As regards efficiency gains, it is for the dominant undertaking to show that the efficiency gains likely to result from the conduct under consideration counteract any likely negative effects on competition and consumer welfare in the affected markets, that those gains have been, or are likely to be, brought about as a result of that conduct, that such conduct

CASE *(continued)*

is necessary for the achievement of those gains in efficiency and that it does not eliminate effective competition by removing all or most existing sources of actual or potential competition …; consequently that undertaking has to do more than put forward vague, general and theoretical arguments on that point or rely exclusively on its own commercial interests ….

* * *

557 … Google essentially put forward various arguments. In the first place, it claimed that the mechanisms for the adjustment of generic results had a pro-competitive benefit as they preserved the quality of those results. In the second place, it claimed that the positioning and display of Product Universals, as well as their underlying technologies, had the pro-competitive benefit of ensuring that its search service was of the highest quality for internet users and online sellers. In the third place, it maintained that if it were required to position and display the results from competing comparison shopping services in the same way as those from its own comparison shopping service on its general results pages, that would reduce competition because (i) it is of the very essence of competition and of internet users' expectations that each search service present its own results, and (ii) that would reduce its ability to monetise space on its general results pages. In the fourth place, it mentioned that, technically, it could not rank results from competing comparison shopping services alongside its own in a coherent way and that, moreover, to do so would be to turn them into product results from its own comparison shopping service. In the fifth place, Google argued during the administrative procedure that its fundamental rights were unduly affected, but in the application it does not challenge the response to that point given by the Commission in the contested decision.

558 The first three of Google's arguments summarised in paragraph 557 above consist, as they are presented in the application, in highlighting the pro-competitive characteristics of its conduct, in the sense that that conduct is said to have improved the quality of its search service. Such arguments serve in principle to demonstrate … that the exclusionary effect produced by the conduct complained of is counterbalanced, outweighed even, by advantages in terms of efficiency that also benefit consumers. The fourth argument, summarised in paragraph 557 above, seeks to invoke technical constraints preventing Google from providing the equal treatment sought by the Commission in respect of results from Google's own comparison shopping service and from competing comparison shopping services. Ultimately, Google claims that it constantly sought to improve the comparison shopping service offered to users in a manner consistent with the concerns of competition on the merits, but that it did so within the limits of what was technically possible. Yet the Commission complained that Google had not ensured equal treatment of results, which it was not in a position to ensure, for technical reasons.

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CASE *(continued)*

560 It is apparent from the Commission's response that it did not deny that the adjustment algorithms for generic results or the criteria for the positioning and display of Google's specialised product results may represent—pro-competitive—service improvements, … but the Commission correctly pointed out that Google did not put forward any argument in relation to the unequal treatment in that respect of results from its own comparison shopping service and results from competing comparison shopping services. In other words, in essence, the Commission considered that Google had not presented any evidence to show that the two pro-competitive benefits which it highlighted counterbalanced, outweighed even, the negative effects for competition resulting from the unequal treatment which it had identified in the earlier sections of the contested decision.

* * *

561 Next, in the contested decision, in the light of the third of Google's arguments … generally aimed at showing that the equal treatment sought by the Commission actually reduced competition, the Commission responded … first, that Google had not demonstrated that internet users expected search engines to provide results from a single source and, in the present case, they were not informed that Product Universals were shown on the basis of different mechanisms from those applied to generic results, and, secondly, that ensuring equal treatment of Google's comparison shopping service and its competitors' comparison shopping services on its general results pages did not prevent the monetisation, over which Google had control, of certain spaces on those pages.

562 That response by the Commission consists, first, in demonstrating that, contrary to Google's contention, the fact that it chooses to position and display its product results more favourably than those of its competitors is not better for competition than a situation in which there is equal treatment in that respect. The Commission is rightly doubtful that internet users would expect to find only results from a single specialised search engine on the general results pages. In this case, as the Commission pointed out, the difference in treatment at issue in terms of positioning and display is on the general results pages, on which, in principle, internet users would expect to find results from the whole of the internet and for these to be provided in a non-discriminatory and transparent manner ….

563 The Commission's response … is, secondly, to disagree that Google might be penalised financially by treating its own product results and those of its competitors equally in terms of their positioning and display on its general results pages. Google fails to put forward any argument in the application that would legitimately challenge that assessment and, assuming that Google is penalised financially as a result of making its service accessible to comparison shopping services under the same conditions as its own, that would not constitute a valid justification for its anticompetitive conduct.

* * *

CASE *(continued)*

565 Consequently, the Commission properly rejected Google's third argument highlighting the pro-competitive characteristics of its conduct, by disputing the characteristics of that nature put forward in that argument.

566 The Commission's approach in relation to those first three arguments, concerning the pro-competitive benefits of the practices at issue, is all the more justified as, first, … those practices are capable of foreclosing competing comparison shopping services, which may lead to higher charges for sellers, higher prices for consumers and less innovation both for competing comparison shopping services and for Google's own service. Secondly, … the practices at issue are likely to reduce consumer choice with regard to comparison shopping services, not only because of the reduction in the number of comparison services on the market, given the exclusionary effect of the practices identified …, but also … because consumers' attention is diverted to the results from Google's comparison service owing to their enhanced visibility, despite those results not necessarily being more relevant than those from competing comparison shopping services.

567 In addition, Google does not show how the second aspect of the disputed practices, that is, the demotion via adjustment algorithms of a significant number of competing comparison shopping services in its general results pages, could have generated efficiency gains.

? NOTES AND QUESTIONS

1. What are the parameters of the new abusive conduct violation that the General Court has articulated? Under what conditions does an undertaking that is something less than an essential facility have the duty of granting equal treatment to rivals?
2. How broad is the obligation of equal treatment? Can Amazon still offer Amazon Prime?
3. How did the Commission prove harm to competition—beyond proof that the preferencing caused significant traffic to shift from rivals to Google and the shift could deprive some businesses of the traffic they need to remain viable?
4. Was the General Court on solid ground in concluding that prices would rise and innovation diminish under conditions of favouring as opposed to conditions of equal treatment?
5. Google argued that a duty of equal treatment was anti-competitive. Restate this argument. Is there more to the argument than the General Court perceived?
6. How strong is the narrative that the raison d'être of a search engine is to match each query with the best result; that openness and fairness in doing so are of the essence of the product; and that skewing results to favour the platform that competes with the rivals it hosts is essentially unfair—both to those who pose the queries and to those who vie to serve the potential customers? Does this make a good case for distortion of competition? Should this narrative justify a duty of equal treatment without a [further] showing of harm to competition? What would or should be the elements of a further showing of harm to competition?
7. Is there a tension between *Google Shopping* and the ECJ in *Intel*?
8. Predict the result of Google's appeal.

b. Exclusive dealing and loyalty rebates

Refusals to deal are the tip of the iceberg of the abuse of dominance offence. From the early days in the application of abuse of dominance law, the Court of Justice cautioned dominant firms not to foreclose markets to the detriment of other market actors, notably by means of exclusive purchasing obligations (requiring customers to purchase exclusively or to a large extent only from the dominant player) and/or conditional rebates granted to customers (typically as reward for purchases over a defined reference period exceeding a certain threshold).

Originally, the Court was particularly concerned with dominant firms' advantages over their smaller rivals. In later years, the Commission prioritized consumers' interests. As apparent from the cases discussed in this section, courts commonly assume that competitors' rights to access markets on their merits coincide with consumers' interests. However, these objectives might or might not coincide, depending on whether the dominant firm's conduct is an efficient way to reach consumers, and whether the conduct does or does not deprive the rivals of an efficient and important way for them to reach consumers.

Ask yourself as you read the cases: who and what are the Commission and the Courts trying to protect? Competition? The competition process? Efficiency? Innovation? By what means are they trying to do so—protecting the process? Protecting competitors' access? Protecting the competitive structure of markets? Protecting freedom?[53] Many of the Court of Justice judgements, even contemporary ones, have not accepted the economic/consumer welfare approach of the Commission or (in some cases) of the General Court. In one modern case entailing a charge of selective price cuts, however, the Court of Justice did highlight consumers as the constituency to be protected.[54]

This section first presents excerpts from the three cases—*Hoffmann-LaRoche*, *Michelin II* and *British Airways*—that have formed the backbone of the EU law on special responsibility of the dominant firm and rights of all market players to contest markets on their merits. Keep an open mind, however, for you will see when we reach the major modern case *Intel* that the Court of Justice has clarified [qualified?] the special responsibility rule of *Hoffmann-LaRoche*.

53 For the Commission's Guidance, see Guidance Paper, paras. 31–45.

54 *Post Danmark I*, at note 73 infra.

CASE

Hoffmann-La Roche & Co. AG v. Commission (Case 85/76)[55]

[Hoffmann-La Roche ('Roche') had a dominant position in each of several vitamins. These included vitamin A, of which it held 47%, and vitamin B6, of which it held more than 80%. Roche had contracted with 22 large purchasers, including Merck and Unilever, for the sale of vitamins to them.

Some purchasers agreed to buy several kinds of vitamins exclusively from Roche. Some contracts were requirements contracts, entered into at the request of purchasers who wanted assurance that their requirements would be filled.

In other cases, buyers agreed to buy most of their needs from Roche, and Roche agreed to give the buyer 'fidelity rebates'. These discounts became effective as to all past purchases when the buyer passed certain thresholds representing portions of the requirements of the buyer. The rebates applied cumulatively to the purchase of more than one kind of vitamin.

Many of the fidelity rebate contracts contained 'English clauses'. Under these clauses, if a customer received a better offer from a competitor, and Roche refused to lower its price to meet the better offer, the customer was free to obtain supplies from the competitor without losing the benefit of the rebate. To meet the conditions of the escape clause, the better terms had to be offered by another competitor operating in Europe and on the same scale as Roche, and the offer had to be comparable.

Roche also entered into several contracts with large purchasers tailored to the parties' needs. For example, it had a contract with Merck for the sale of vitamin B6. In the Merck contract, Roche recited that it planned to double its production capacity and would like to cover part of Merck's requirements. Merck agreed to buy from Roche its requirements above its own manufacturing capacity. Roche agreed to give Merck a 20% discount, Merck agreed not to resell the vitamins purchased at this discount, and Roche agreed to buy its requirements of phosphoric ester from Merck under the same conditions.

The Court of Justice held that the exclusive supply and requirements contracts were an abuse of a dominant position, even when entered into at the request of the purchaser. As for the Merck contract, the Court concluded that the purpose was to secure a stable market for Roche's increased production and to protect Roche from 'the risks of competition', and that it, too, offended Article 102.

55 [1979] ECR 461, EU:C:1979:36.

CASE *(continued)*

The fidelity rebates were also singled out for condemnation. The rebates constituted price discrimination based on loyalty, not quantity discounts based on lower costs. Once a purchaser began to buy from Roche, the Court said, the customer had a 'powerful incentive' not to buy elsewhere.]

The Court

89 An undertaking which is in a dominant position on a market and ties purchasers—even if it does so at their request—by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of Article [102] of the Treaty, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate.

The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the undertaking in a dominant position.

90 Obligations of this kind to obtain supplies exclusively from a particular undertaking, whether or not they are in consideration of rebates or of the granting of fidelity rebates intended to give the purchaser an incentive to obtain his supplies exclusively from the undertaking in a dominant position, are incompatible with the objective of undistorted competition within the Common Market, because—unless there are exceptional circumstances which may make an agreement between undertakings in the context of Article [101] and in particular of paragraph (3) of that article, permissible—they are not based on an economic transaction which justifies this burden or benefit but are designed to deprive the purchaser of or restrict his possible choices of sources of supply and to deny other producers access to the market.

The fidelity rebate, unlike quantity rebates exclusively linked with the volume of purchases from the producer concerned, is designed through the grant of a financial advantage to prevent customers from obtaining their supplies from competing producers. Furthermore the effect of fidelity rebates is to apply dissimilar conditions to equivalent transactions with other trading parties in that two purchasers pay a different price for the same quantity of the same product depending on whether they obtain their supplies exclusively from the undertaking in a dominant position or have several sources of supply.

Finally these practices by an undertaking in a dominant position and especially on an expanding market tend to consolidate this position by means of a form of competition which is not based on the transactions effected and is therefore distorted.

CASE *(continued)*

91 … The concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and which, through recourse to methods different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

* * *

A few years later, the Court summarized the concept of abuse in another major exclusive dealing case, *Michelin I*:[56]

> 70 Article [102] covers practices which are likely to affect the structure of a market where, as a direct result of the presence of the undertaking in question, competition has already been weakened and which, through recourse to methods different from those governing normal competition in products or services based on traders' performance, have the effect of hindering the maintenance or development of the level of competition still existing on the market.

Michelin II came before the General Court 20 years later.[57] The Court reaffirmed that fidelity rebates harm competition. Thus:

> 97 … [A]n undertaking in a dominant position has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market. Not all competition on price can be regarded as legitimate. An undertaking in a dominant position cannot have recourse to means other than those within the scope of competition on the merits.

? NOTES AND QUESTIONS

1. In *Hoffmann-La Roche*, consider the network of restraints between the dominant producer of several vitamins and its major buyers, who were also competitors or potential competitors. Were the restraints likely to raise barriers to entry by outsiders, keep competitors at bay and insulate monopoly pricing? Explain.

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56 Case 322/81, *NV Nederlandsche Banden-Industrie Michelin v. Commission* [1983] ECR 3461, EU:C:1983:313 ('*Michelin I*').

57 Case T-203/01, *Manufacture Française Des Pneumatiques Michelin v. Commission* [2003] ECR II-4071, EU:T:2003:250 ('*Michelin II*').

2. Note the Court's categorical principle in paragraphs 89 and 90. Are all requirements (or near-requirements) contracts with a dominant firm likely to harm competition and consumers? Are all dominant firms' programs of fidelity rebates that induce the purchase of requirements or near requirements from the dominant firm likely to harm competition and consumers? What if the customer needs only a small percentage of the product? Give an example of a requirements of fidelity rebates contract with a dominant firm that benefits consumers. Is your example exceptional or not? (That is, are dominant firms' requirements contracts and fidelity rebates that have the effect of requirements contracts almost always harmful?) Note that paragraph 90 expands the prohibitory principle to dominant firms' exclusive dealing. This is the flip side of requirements contracts: you must buy this product exclusively from me, and thus not from my competitors.
3. *Michelin* reinforces and expands the principle by stating that fidelity rebates distort competition and that a dominant firm 'has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market.' What does this mean? Is it a helpful principle if your goal is competition on the market?

By the time the next major fidelity rebate case came to the Court of Justice, the Court spoke in terms of harm to consumers as well as harm to excluded competitors and to competition.

Note on British Airways Plc v. Commission

British Airways ('BA') gave financial incentives to travel agents through discounts and bonuses variable in amount depending on the agent's performance in selling BA tickets. The Commission held that the loyalty and discounting plans abused BA's dominant position in the UK market for air travel agency services. The General Court and the Court of Justice dismissed the appeals.[58] The Court of Justice said:

> 75 … [T]he Court took the view that the pressure exerted on resellers by an undertaking in a dominant position which granted bonuses with those characteristics is further strengthened where that undertaking holds a very much larger market share than its competitors …. It held that, in those circumstances, it is particularly difficult for competitors of that undertaking to outbid it in the face of discounts or bonuses based on overall sales volume. By reason of its significantly higher market share, the undertaking in a dominant position generally constitutes an unavoidable business partner in the market. Most often, discounts or bonuses granted by such an undertaking on the basis of overall turnover largely take precedence in absolute terms, even over more generous offers of its competitors. In order to attract the co-contractors of the undertaking in a dominant position, or to receive a sufficient volume of orders from them, those competitors would have to offer them significantly higher rates of discount or bonus.

58 Case C-95/04 P, *British Airways Plc v. Commission* [2007] ECR I–2331, ECLI:EU:C:2007:166.

76 In the present case, BA's market share was significantly higher than that of its five main competitors in the United Kingdom .... [T]he rival airlines were not in a position to grant travel agents the same advantages as BA, since they were not capable of attaining in the United Kingdom a level of revenue capable of constituting a sufficiently broad financial base to allow them effectively to establish a reward scheme similar to BA's.

77 Therefore, the [General Court] was right to examine whether the bonus schemes at issue had a fidelity-building effect capable of producing an exclusionary effect. * * * [The General Court held that they did.]

[Regarding objective economic justification:]

86 ... It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that system bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that system must be regarded as an abuse.

87 [The General Court made no error in concluding] that those systems were not based on any objective economic justification.

* * *

The second plea, alleging error in not examining the probable effects of the conduct or taking account of evidence that they had no material effect on competing airlines [also held to be unfounded]

* * *

The third plea, alleging that the [General Court] erred in not examining whether BA's conduct involved a 'prejudice [to] consumers' within the meaning of [TFEU Article 102(b)]

106 Moreover, ... Article [102] is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competition structure, such as is mentioned in Article 3(1)(g) EC [now moved to a protocol].

107 The [General Court] was therefore entitled, without committing any error of law, not to examine whether BA's conduct had caused prejudice to consumers within the meaning of subparagraph (b) of the second paragraph of Article

[102], but to examine … whether the bonus schemes at issue had a restrictive effect on competition and to conclude that the existence of such an effect had been demonstrated by the Commission in the contested decision.

* * *

? NOTES AND QUESTIONS

1. Who were the victims of BA's conduct? What market effect was necessary to condemn BA's practice? What effect on consumers was necessary? Were consumers probably hurt? On what would consumer harm turn?
2. A case similar to the European *British Airways* case was brought by rival Virgin Atlantic Airways against BA in US courts. Virgin alleged that BA's incentive agreements with travel agencies and corporate customers, with incentive discounts based on target thresholds, shifted so much business away from Virgin that it frustrated Virgin's efforts to expand service from London Heathrow to five US markets. Virgin claimed that BA's agreements resulted in below-cost pricing, and that BA offset its loss by supracompetitive pricing on its monopoly routes. The court gave summary judgement to BA, stating that Virgin's evidence did not support its below-cost claim or its recoupment claim, that the discounts were competition itself, and that Virgin failed to show how consumers were harmed.[59] What were the differences in concern, emphasis and appreciation of consumer harm in the two cases against BA?

* * *

The Commission's Guidance Paper was adopted in 2009, and it was meant to add rigour to the assessment of exclusionary practices, focusing on harm to consumers. Did it succeed in adding economic rigour to the law? Consider the three contemporary cases following: *Tomra*, *Intel* and *Post Danmark II*.

CASE

Tomra Systems ASA v. Commission (Case C-549/10 P)[60]

[Tomra was the dominant operator of reverse vending machines—machines that accept empty bottles and return cash. It did business in Austria, Germany, the Netherlands, Norway and Sweden. It procured agreements from several supermarket chains that they would purchase from Tomra an agreed quantity of machines corresponding to all or a significant part of their requirements (exclusivity agreements), discount agreements keyed to Tomra's supplying their full or almost full demand (quantity commitments), and individualized retroactive rebates keyed to reaching a particular volume of purchases by the end of a period (loyalty rebates).

59 *Virgin Atlantic Airways Ltd v. British Airways Plc*, 257 F.3d 256 (2d Cir. 2001).
60 EU:C:2012:221.

CASE *(continued)*

The Commission analysed the effects of the agreements, found that competition on the relevant markets was foreclosed, and held that Tomra violated Article 102 TFEU. The General Court affirmed the finding of infringement but held that it was not necessary for the Commission to do an effects analysis; following *Michelin II* and *British Airways*, the General Court said it was enough that the rebates conferred 'an advantage not based on any economic service justifying it' and the rebates tended to restrict the buyers' choices, 'to bar competitors from access to the market, or to strengthen the dominant position by distorting competition' [quoted from the General Court by the Court of Justice, para. 71].

68 The General Court was correct to observe … that, for the purposes of proving an abuse of a dominant position within the meaning of Article 102 TFEU, it is sufficient to show that the abusive conduct of the undertaking in a dominant position tends to restrict competition or that the conduct is capable of having that effect.

* * *

73 Contrary to what is claimed by the appellants, the invoicing of 'negative prices', in other words prices below cost prices, to customers is not a prerequisite of a finding that a retroactive rebates scheme operated by a dominant undertaking is abusive.

74 … The fact that the retroactive rebate schemes oblige competitors to ask negative prices from Tomra's customers benefiting from rebates cannot be regarded as one of the fundamental bases of the contested decision in showing that the retroactive rebate schemes are capable of having anti-competitive effects. Further, the General Court correctly stated … that a whole series of other considerations relating to the retroactive rebates operated by Tomra underpinned the contested decision as regards its conclusion that those types of practices were capable of excluding competitors in breach of Article 102 TFEU.

75 In that regard, the General Court observed, more particularly, that, according to the contested decision, in the first place, the incentive to obtain supplies exclusively or almost exclusively from Tomra was particularly strong when thresholds, such as those applied by Tomra, were combined with a system whereby the achievement of the bonus threshold or, as the case may be, a more advantageous threshold benefited all the purchases made by the customer during the reference period and not exclusively the purchasing volume exceeding the threshold concerned …. Secondly, the rebate schemes were individual to each customer and the thresholds were established on the basis of the customer's estimated requirements and/or past purchasing volumes and represented a strong incentive for buying all or almost all the equipment needed from Tomra and artificially raised the costs of switching to a different supplier, even for a small number of units …. Thirdly, the retroactive rebates often applied to some of the largest customers of the Tomra group with the aim of ensuring their loyalty ….

CASE *(continued)*

Lastly, Tomra failed to show that their conduct was objectively justified or that it generated significant efficiency gains which outweighed the anti-competitive effects on consumers ….

[*Regarding proof of violation by means of loyalty rebates, the Court said:*]

79 The General Court was therefore justified in ruling, in essence …. that the loyalty mechanism was inherent in the supplier's ability to drive out its competitors by means of the suction to itself of the contestable part of demand. When such a trading instrument exists, it is therefore unnecessary to undertake an analysis of the actual effects of the rebates on competition given that, for the purposes of establishing an infringement of Article 102 TFEU, it is sufficient to demonstrate that the conduct at issue is capable of having an effect on competition …

The Court stated that the Commission's Guidance Paper, which was published in 2009 and requires an effects analysis, had no relevance to the legal assessment of the contested decision, which was adopted in 2006 (para. 81).

CASE

Intel Corp. v. Commission (Case C-413/14P)[61]

[Intel occupied approximately 70% of the European market for x86 CPU microprocessors, a key component of any computer's brain. Advanced Micro-Devices ('AMD') was its main competitor after other manufacturers exited the market in the first half of the 2000s. When AMD invented a superior chip, Intel developed a strategy to keep the AMD chip from gaining traction in the market for the crucial first months of the launch. According to the Commission, the strategy had two prongs. First, exclusivity rebates granted to computer manufacturers Dell, NEC, HP and Lenovo, as well as to Media-Saturn, a large European retailer. Second, direct payments to computer manufacturers HP, Acer and Lenovo to postpone or cancel the launch of AMD chips. The price of the chips was falling at all relevant times, and the strategy to exclude or marginalize AMD did not fully work; AMD remained a healthy company.

61 EU:C:2017:632 (Grand Chamber).

CASE *(continued)*

The Commission found a violation by object, and found that the conduct was not justified. As a result, it imposed a fine on Intel of €1.06 billion, which remains the highest fine ever imposed by the Commission on a single company for an infringement of the competition rules. The General Court affirmed. The Court of Justice reversed. The appeal called into question, among other things, whether it was proper to treat Intel's conduct as an abuse 'by object'—thus provable without inquiry into effects; and whether it was proper to declare that even in the case of an effects inquiry, there was no need for the Commission to prove that AMD was an equally efficient competitor.[62]]

133 … [I]t must be borne in mind that it is in no way the purpose of Article 102 TFEU to prevent an undertaking from acquiring, on its own merits, the dominant position on a market. Nor does that provision seek to ensure that competitors less efficient than the undertaking with the dominant position should remain on the market.

134 Thus, not every exclusionary effect is necessarily detrimental to competition. Competition on the merits may, by definition, lead to the departure from the market or the marginalization of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.

135 However, a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market.

136 That is why Article 102 TFEU prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate.

137 In that regard, the Court has already held that an undertaking which is in a dominant position on a market and ties purchasers—even if it does so at their request—by an obligation or promise on their part to obtain all or most of their requirements exclusively from that undertaking abuses its dominant position within the meaning of Article 102 TFEU, whether the obligation is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the undertaking in question, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of loyalty rebates, that is to say, discounts conditional on the customer obtaining all or most of its requirements—whether the quantity of its purchases be large or small—from the undertaking in a dominant position.

62 Case T-286/09, *Intel Corp. v. Commission*, EU:T:2014:547, set aside for further clarification, Case C-413/14 P.

CASE *(continued)*

138 However, that case-law must be further clarified in the case where the undertaking concerned submits, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects.

139 In that case, the Commission is not only required to analyse, first, the extent of the undertaking's dominant position on the relevant market and, second, the share of the market covered by the challenged practice, as well as the conditions and arrangements for granting the rebates in question, their duration and their amount; it is also [re]quired to assess the possible existence of a strategy aiming to exclude competitors that are at least as efficient as the dominant undertaking from the market.

140 The analysis of the capacity to foreclose is also relevant in assessing whether a system of rebates which, in principle, falls within the scope of the prohibition laid down in Article 102 TFEU, may be objectively justified. It has to be determined whether the exclusionary effect arising from such a system, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. That balancing of the favourable and unfavourable effects of the practice in question on competition can be carried out in the Commission's decision only after an analysis of the intrinsic capacity of that practice to foreclose competitors which are at least as efficient as the dominant undertaking [so-called 'AEC test'].

141 If, in a decision finding a rebate scheme abusive, the Commission carries out such an analysis, the General Court must examine all of the applicant's arguments seeking to call into question the validity of the Commission's findings concerning the foreclosure capability of the rebate concerned.

142 In this case, while the Commission emphasized, in the decision at issue, that the rebates at issue were by their very nature capable of restricting competition such that an analysis of all the circumstances of the case and, in particular, an AEC test was not necessary in order to find an abuse of a dominant position (see, inter alia, paragraphs 925 and 1760 of that decision), it nevertheless carried out an in-depth examination of those circumstances, setting out … a very detailed analysis of the AEC test, which led it to conclude … that an efficient competitor would have had to offer prices which would not have been viable and that, accordingly, the rebate scheme at issue was capable of having foreclosure effects on such a competitor.

143 It follows that, in the decision at issue, the AEC test played an important role in the Commission's assessment of whether the rebate scheme at issue was capable of having foreclosure effects on as efficient competitors.

CASE *(continued)*

144 In those circumstances, the General Court was required to examine all of Intel's arguments concerning that test.

145 It held, however, … that it was not necessary to consider whether the Commission had carried out the AEC test in accordance with the applicable rules and without making any errors, and that it was also not necessary to examine the question whether the alternative calculations proposed by Intel had been carried out correctly. …

147 Consequently, … the judgement of the General Court must be set aside, since, in its analysis of whether the rebates at issue were capable of restricting competition, the General Court wrongly failed to take into consideration Intel's line of argument seeking to expose alleged errors committed by the Commission in the AEC test.

The Court of Justice referred the case back to the General Court to determine whether the rebates in question are capable of restricting competition in view of the factual and economic evidence underpinning the Commission's assessment and the arguments put forward by Intel.

The General Court annulled the decision on rebates, holding that the Commission did not adduce sufficient evidence to determine whether the rebates were capable of having foreclosure effects and thus capable of restricting competition. It was impossible to make this determination without knowing the market coverage and duration of the rebates given to each buyer. In so ruling, the Court imposed high burdens on the Commission:

> … [G]iven that the analysis of the capacity of the rebates at issue to restrict competition forms part of demonstrating the existence of an infringement of competition law, in the present case an abuse of a dominant position, the General Court sets out the rules concerning the apportionment of the burden of proof and the standard of proof required. Accordingly, the principle of the presumption of innocence, which also applies in that field, requires the Commission to establish the existence of such an infringement, where necessary by means of a precise and consistent body of evidence, so as to leave no residual doubt in that regard. Where the Commission maintains that the established facts can be explained only by anticompetitive behaviour, it must be found that the infringement at issue has not been sufficiently demonstrated if the undertakings concerned put forward a separate plausible explanation of the facts. However, where the Commission relies on evidence which is, in principle, capable of demonstrating the existence of an infringement, it is for the undertakings concerned to demonstrate that the probative value of that evidence is insufficient.[63]

63 Press Release No. 16/22, 26 January 2022, Judgment in Case T-286/09 *RENV Intel Corporation v. Commission*.

? NOTES AND QUESTIONS

1. Does the ECJ effectively overrule Hoffmann-La Roche and open the door to complete effects analysis? What does the judgement do to the dominant firm conduct that the Court simply presumes harms competition (or that the Court historically presumed not to harm competition, such as quantity rebates)? Does the General Court fill in the necessary benchmarks appropriately? Or, is the bar for the Commission too high?
2. What kind of 'supporting evidence' should be adduced and accepted in order to reverse the presumption of abuse and support the fact that an exclusivity requirement or loyalty rebate is not capable of restricting competition and of producing exclusionary effects? What should be the threshold to force the Commission into an effects analysis?
3. The Court seems to place exclusivity and loyalty rebates in the same basket of 'presumably abusive' restrictions. Does it make sense to establish a presumption of abuse in respect of these two practices and to treat them together? Should differences be drawn between the two categories?
4. After the judgement, what is the likely status of the 'naked restrictions' in Intel? Can the undertaking introduce evidence that these too were not capable of harming competition? Or, is there still some category of restraint that is just so bad (so likely to harm competition, so unlikely to have pro-market benefits) that it should not be allowed? What is this category?
5. What is the status of the AEC test after *Intel*? Is it now a mandatory part of the assessment of rebates and other pricing practices under Article 102 TFEU?
6. Does the ECJ judgement promote greater convergence in the analytical framework and sequence applicable under 101 and 102 TFEU? In particular, do you see analogies with *Cartes bancaires* (as suggested by A.G. Wahl)? Are the scope and strengths of the 'by object' category similar under 101 and 102, or do you see differences/weaknesses?
7. What is, in your view, the likely effect of the ECJ judgement on non-pricing cases (e.g. Google cases)?
8. What is, in your view, the overall likely effect of the ECJ judgement on the enforcement of Article 102 TFEU by the European Commission and NCAs?
9. In *Intel*, the ECJ refers multiple times to the *Post Danmark I* judgement but not a single time to *Post Danmark II*. *Post Danmark I*, below, finds no violation for selective low pricing in itself, and *Post Danmark II*, below at p. 292, holds that retroactive rebates may be anti-competitive and that the AEC test is not always relevant. After you read these two cases, you may want to ask yourself: how does each *Post Danmark* case align, or not, with *Intel*? With each other?

CASE

Post Danmark A/S v. Konkurrencerådet (Case C-23/14) ('Post Danmark II')[64]

[Post Danmark was the postal universal service operator in Denmark and held a statutory monopoly over the distribution of letters weighing up to 50 grams, including direct advertising mail. Post Danmark implemented a standardized rebate scheme for direct advertising mail

64 EU:C:2015:651.

CASE *(continued)*

consisting of a progressive scale of rates from 6% to 16% depending on the customer's aggregate purchases over a 1-year reference period. Thus, the price of mailings for each customer was adjusted at the end of the year, with retroactive effect from the beginning of that same year, on the basis of the quantity of items of mail actually sent.

Acting upon a complaint filed by Post Danmark's only serious competitor on the bulk mail market—which had withdrawn from that market in the meantime—the Danish competition authority (Konkurrencerådet) found the rebate scheme in question abusive, for it had the effect of tying customers and foreclosing competition without benefiting consumers. On appeal, the Commercial Court came to the view that there was uncertainty as to the criteria to be applied in order to determine whether such a scheme was capable of having an exclusionary effect contrary to Article 102 TFEU, and therefore, requested a preliminary ruling from the Court of Justice.]

[Regarding the abusive character of the rebate scheme]

32 As regards, in the first place, the criteria and rules governing the grant of the rebates, it must be recalled that the rebates at issue in the main proceedings were 'retroactive', in the sense that, if the threshold initially set at the beginning of the year in respect of the quantities of mail was exceeded, the rebate rate applied at the end of the year applied to all mailings presented over the reference period and not only to mailings exceeding the threshold initially estimated.

* * *

34 In addition, it must be pointed out that the rebate scheme at issue in the main proceedings was based on a reference period of one year. However, any system under which discounts are granted according to the quantities sold during a relatively long reference period has the inherent effect, at the end of that period, of increasing the pressure on the buyer to reach the purchase figure needed to obtain the discount or to avoid suffering the expected loss for the entire period.

35 Consequently, …, such a rebate scheme is capable of making it easier for the dominant undertaking to tie its own customers to itself and attract the customers of its competitors, and thus to secure the suction to itself of the part of demand subject to competition on the relevant market. That suction effect is further enhanced by the fact that, in the case in the main proceedings, the rebates applied without distinction both to the contestable part of demand and to the non-contestable part of demand, that is to say, in the latter case, to addressed advertising mail weighing less than 50 grams covered by Post Danmark's statutory monopoly.

* * *

CASE *(continued)*

42 In those circumstances [including the particularly high market share of Post Danmark], it must be held that a rebate scheme operated by an undertaking, … which, without tying customers to that undertaking by a formal obligation, nevertheless tends to make it more difficult for those customers to obtain supplies from competing undertakings, produces an anti-competitive exclusionary effect.

* * *

48 [Still], a dominant undertaking may demonstrate that the exclusionary effect arising from its conduct may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer.

[Regarding the relevance of the as-efficient-competitor test referred to in the Guidance Paper]

* * *

57 [I]t is not possible to infer from Article 82 EC or the case-law of the Court that there is a legal obligation requiring a finding to the effect that a rebate scheme operated by a dominant undertaking is abusive to be based always on the as-efficient-competitor test.

58 Nevertheless, that conclusion ought not to have the effect of excluding, on principle, recourse to the as-efficient-competitor test in cases involving a rebate scheme for the purposes of examining its compatibility with Article [102 TFEU].

59 On the other hand, in a situation such as that in the main proceedings, characterised by the holding by the dominant undertaking of a very large market share and by structural advantages conferred, inter alia, by that undertaking's statutory monopoly, which applied to 70% of mail on the relevant market, applying the as-efficient-competitor test is of no relevance inasmuch as the structure of the market makes the emergence of an as-efficient competitor practically impossible.

60 Furthermore, in a market such as that at issue in the main proceedings, access to which is protected by high barriers, the presence of a less efficient competitor might contribute to intensifying the competitive pressure on that market and, therefore, to exerting a constraint on the conduct of the dominant undertaking.

[Regarding the standard of proof and appreciability]

* * *

65 [T]he anti-competitive effect of a particular practice must not be purely hypothetical.

* * *

CASE *(continued)*

69 Such an assessment [of whether a rebate scheme is capable of restricting competition] seeks to determine whether the conduct of the dominant undertaking produces an actual or likely exclusionary effect, to the detriment of competition and, thereby, of consumers' interests.

* * *

73 It follows that fixing an appreciability (de minimis) threshold for the purposes of determining whether there is an abuse of a dominant position is not justified. That anti-competitive practice is, by its very nature, liable to give rise to not insignificant restrictions of competition, or even of eliminating competition on the market on which the undertaking concerned operates.

In addition, the Court of Justice observed that the Guidance Paper 'merely sets out the Commission's approach as to the choice of cases that it intends to pursue as a matter of priority; accordingly, the administrative practice followed by the Commission is not binding on national competition authorities and courts' (para. 52).

? NOTES AND QUESTIONS

1. The Court of Justice emphasized that Post Danmark's rebate scheme was neither quantity-based (presumably lawful) nor tied to an exclusivity requirement (abusive 'by object'?) but was loyalty inducing, thereby requiring evidence of likely exclusionary effects. Likewise, it stressed that benefits for consumers could outweigh such exclusionary effects and thus defeat a *prima facie* finding of abuse. Does that mean that the Court introduced a condition akin to Article 101(3) in the assessment of abusive conduct under Article 102 TFEU? Is that appropriate, and what are the consequences? How likely is it that dominant companies would succeed in invoking counteracting consumer benefits? Does Article 101(3) contain any leads in that regard?
2. The Court denied the need to resort to a price-cost test to assess the likelihood of exclusionary effects when the structure of the market allowed a presumption of such effects, notably when dominance resulted from a statutory monopoly and translated into a very large market share. Do you agree? In these circumstances, should Article 102 protect less efficient competitors, as the Court suggested? How do you reconcile this affirmation with the possibility for consumer benefits to outweigh exclusionary effects? What does it say about the relationship between competition and efficiency under EU competition law?
3. The Court of Justice dismissed the existence of some sort of appreciability threshold under Article 102 TFEU. Do you find the Court's justification persuasive? What does it say about the nature of the inquiry carried out under each of Article 101 and 102 TFEU, and about the nature of the anti-competitive conduct caught by each provision? Is market power a relevant factor, and to what extent? Is bigness a problem as such under EU competition law?
4. The *Intel* requirement—if the undertaking claims with evidence that its conduct would not exclude as-efficient competitors, the Commission must assess the claim -- applies equally to exclusivity clauses. Case C-680/20, Unilever Italia Mkt. Operations, ECLI:EU:C:2023:33. Otherwise, use of the test is optional. Id.
5. The European Commission has been active in challenging the Big Tech platforms for a number of their practices, including tying, bundling, self-preferencing and other exclusionary strategies.

One of these cases, known as 'Google Search (AdSense)' (Case AT.40411, appeal to General Court pending), involves exclusivity arrangements.

AdSense is a program run by Google. Through AdSense, Google is an online intermediary between advertisers and website owners in placing ads in the space around their search results pages. Google has between 75% and 90% of this market in Europe. In 2006, Google contracted with each significant website owner to place adverts on their search results pages and to be the exclusive broker to place such ads. In 2009, Google replaced the exclusivity clauses with Premium Placement clauses, requiring the publishers to reserve the most profitable spaces for Google and requesting a minimum number of Google-placed ads. It also required written approval by Google to change the way in which rivals' adverts were displayed, giving Google control over how attractive the rivals' services are. Google's practices covered half the market.

The Commission found that by reason of these practices, Google's competitors, such as Microsoft and Yahoo, were fenced out of serving the most important customers. They were deprived of an important entry point 'to grow their business and try to compete with Google', harming competition and consumers and stifling innovation. It imposed a fine of €1.494 billion. Appeal is currently pending before the EU General Court under reference T-334/19.

c. Price predation and price discrimination

Antitrust proceedings are frequently triggered by complaints of rivals. Rivals often complain about prices that are too low. They complain that the dominant firm is pricing strategically low to drive the rivals out of the market, after which (they allege) the dominant firm will charge a yet higher monopoly price. For years, many jurisdictions, including the US, listened sympathetically to such complaints, and sometimes found violations and enjoined the 'predatory' pricing. (How might sympathy for the complaining firm be problematic for competition and consumers?)

In more recent times, jurisdictions have toughened their standards for a predatory pricing violation. Moreover, courts have reclassified some 'exclusionary' conduct as merely low-price competition that should be encouraged and thus, conduct that if it is illegal at all, must fit demanding criteria.

This section starts with predatory pricing and discriminatory pricing (which we saw briefly in *United Brands*) and then turns to price squeezes imposed by vertically integrated dominant firms.

For Commission Guidance, see paras. 22–26 (cost benchmarks, and 'as-efficient-competitor concept'), paras. 62–73 (predation) and paras. 79–89 (margin squeeze) of the Guidance Paper. Note that the Commission values '[v]igorous price competition [as] generally beneficial to consumers .... [T]he Commission will normally only intervene where the conduct concerned has already been or is capable of hampering competition from competitors which are considered to be as efficient as the dominant undertaking'. However, 'in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account'. For example, an abusive practice excluding the competitor from network and learning effects may prevent the competitor from achieving efficiencies (paras. 22, 23).

CASE

AKZO Chemie BV v. Commission (Case C-62/86)[65]

[AKZO, a large Dutch multinational firm, and ECS (Engineering and Chemical Supplies Ltd), a small UK firm, both manufactured organic peroxides. AKZO had a market share of 50%. Benzoyl peroxide is the most important organic peroxide. Benzoyl peroxide is a bleaching agent for flour and is also used in plastics as an initiator of the polymer production process. ECS was engaged in the flour segment of the market. For a decade, ECS was content with its sales for the flour business, but in 1979 it developed excess capacity and started to sell to plastics makers, soliciting and selling to some of AKZO's customers. An AKZO official told ECS's manager Sullivan 'that AKZO would take aggressive commercial action on the milling products unless [Sullivan] refrained from supplying his products to the plastics industry'. The AKZO official told Sullivan AKZO would pry away ECS's flour customers at prices far below prevailing prices. When ECS ignored AKZO's threats, AKZO implemented selective, low prices, with the intent to damage the business of ECS.

From the end of 1980 for about 4 years, AKZO targeted ECS's customers in the flour segment, selling to them at prices that were below its average total cost and that were much lower than the previously prevailing rates. Meanwhile, AKZO charged its own loyal customers (whose business was not at risk) about 60% more than the targeted customers of ECS. As part of its strategy, AKZO sold these customers flour milling complements they needed at prices below AKZO's average variable cost, and it sold them some vitamin mixes (which it bought specifically for resale to these customers) below its own purchase price. ECS's business declined by about 70% in 4 years, and its profit margins fell.

The Commission initiated proceedings and obtained an interim order enjoining AKZO's conduct. In its decision on the merits, the Commission noted AKZO's 'clear predatory intent' as well as its scheme of price discrimination. However, the finding of predation had little effect on ECS. ECS's share in the flour additive sector went from 35% to 30%, and AKZO's share went from 52% to 55%.

Placing much weight on AKZO's intent to eliminate its competitor, the Commission found an infringement and levied a fine of 10 million ECUs (i.e., European Currency Units) on AKZO.]

A. Dominant position

60 With regard to market shares the Court has held that very large shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position

65 [1991] ECR I-3359, EU:C:1991:286.

CASE *(continued)*

(judgement in Case 85/76 *Hoffmann-La Roche v. Commission* [1979] ECR 461, paragraph 41). That is the situation where there is a market share of 50% such as that found to exist in this case.

61 Moreover, the Commission rightly pointed out that other factors confirmed AKZO's predominance in the market. In addition to the fact that AKZO regards itself as the world leader in the peroxides market, it should be observed that, as AKZO itself admits, it has the most highly developed marketing organization, both commercially and technically, and wider knowledge than that of their competitors with regard to safety and toxicology …

62 The pleas put forward by AKZO in order to deny that it had a dominant position within the organic peroxides market as a whole must therefore be rejected.

B. Abuse of a dominant position

63 According to the contested decision (point 75) AKZO had abusively exploited its dominant position by endeavouring to eliminate ECS from the organic peroxides market mainly by massive and prolonged price cutting in the flour additives sector.

* * *

69 It should be observed that … the concept of abuse is an objective concept relating to the behaviour of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is weakened and through recourse to methods which, different from those which condition normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition.

70 It follows that Article [102] prohibits a dominant undertaking from eliminating a competitor and thereby strengthening its position by using methods other than those which come within the scope of competition on the basis of quality. From that point of view, however, not all competition by means of price can be regarded as legitimate.

71 Prices below average variable costs (that is to say, those which vary depending on the quantities produced) by means of which a dominant undertaking seeks to eliminate a competitor must be regarded as abusive. A dominant undertaking has no interest in applying such prices except that of eliminating competitors so as to enable it subsequently to raise its prices by taking advantage of its monopolistic position, since each sale generates a loss, namely the total amount of the fixed costs (that is to say, those which remain constant

CASE *(continued)*

regardless of the quantities produced) and, at least, part of the variable costs relating to the unit produced.

72 Moreover, prices below average total costs, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor. Such prices can drive from the market undertakings which are perhaps as efficient as the dominant undertaking but which, because of their smaller financial resources, are incapable of withstanding the competition waged against them.

73 These are the criteria that must be applied to the situation in the present case.

* * *

114 The prices charged by AKZO to its own customers were above its average total costs, whereas those offered to customers of ECS were below its average total costs.

115 AKZO is thus able, at least partly, to set off losses resulting from the sales to customers of ECS against profits made on the sales to the 'large independents' which were among its customers. This behaviour shows that AKZO's intention was not to pursue a general policy of favourable prices, but to adopt a strategy that could damage ECS. The complaint is therefore substantiated.

* * *

140 By maintaining prices below its average total costs over a prolonged period, without any objective justification, AKZO was thus able to damage ECS by dissuading it from making inroads into its customers.

* * *

[The Court concluded that AKZO, at various times, offered customers of ECS prices lower than AKZO's total or average variable costs, and did so as part of its threat to obtain ECS's withdrawal from the plastics sector.]

162 … [I]t must be observed that the infringement committed by AKZO is particularly serious, since the behaviour complained of was intended to prevent a competitor from extending its activity into a market in which AKZO held a dominant position.

[The Court reduced the fine to 7.5 million ECUs—predecessor to the euro—on grounds that the controlling law had not previously been specified and the infraction did not have a significant effect on market shares.]

NOTES AND QUESTIONS

1. Why does the Court require below-cost pricing as a necessary element of the violation? Should it be sufficient that the dominant firm lowered its prices strategically to eliminate or wound its rivals? Explain.
2. Was AKZO's below-cost pricing a strategy to: (1) drive out the competitors and raise price? (2) compete? (3) divide markets? What is the significance of these different hypotheses?
3. In what respect does the Commission Guidance differ from the Court's analysis?

In the US, a pioneer in low-priced, no-frills, non-branded cigarettes sued a major tobacco company for embarking on a predatory pricing campaign to destroy or marginalize the new product. The resulting case, *Brooke Group*, is the leading US case on price predation. It was cited, unsuccessfully, to the EU Court of Justice by a putative predatory pricer that tried to defend its conduct as pro-competitive. (See *Tetra Pak* at p. 303.)

CASE

Brooke Group Ltd v. Brown & Williamson Tobacco Corp. (US)[66]

Justice Kennedy:

[Cigarette manufacturing is a concentrated industry dominated by only six firms, including the two parties here. In 1980, petitioner (hereinafter Liggett) pioneered the economy segment of the market by developing a line of generic cigarettes offered at a list price roughly 30% lower than that of branded cigarettes. By 1984, generics had captured 4% of the market at the expense of branded cigarettes, and respondent Brown & Williamson entered the economy segment, beating Liggett's net price. Liggett responded in kind, precipitating a price war, which ended, according to Liggett, with Brown & Williamson selling its generics at a loss. Liggett filed this suit, alleging, inter alia, that volume rebates by Brown & Williamson to wholesalers amounted to price discrimination that had a reasonable possibility of injuring competition in violation of § 2(a) of the Clayton Act,[67] as amended by the Robinson-Patman Act. Liggett claimed that the rebates were integral to a predatory pricing scheme, in which Brown & Williamson set below-cost prices to pressure Liggett to raise list prices on its generics, thus restraining the economy segment's growth and preserving Brown & Williamson's supracompetitive profits on branded cigarettes. After a jury returned a verdict in favour of

66 509 U.S. 209, 113 S.Ct. 2578, 125 L.Ed.2d 168 (1993).
67 15 U.S.C. § 13.

CASE *(continued)*

Liggett, the District Court held that Brown & Williamson was entitled to judgement as a matter of law. The Court of Appeals affirmed.]

* * *

Liggett contends that Brown & Williamson's discriminatory volume rebates to wholesalers threatened substantial competitive injury by furthering a predatory pricing scheme designed to purge competition from the economy segment of the cigarette market .... [W]hether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low price must prove that the prices complained of are below an appropriate measure of its rival's costs .... Although [we have] reserved as a formal matter the question 'whether recovery should ever be available ... when the pricing in question is above some measure of incremental cost', ... the reasoning in [our] opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws .... As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting ....

Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy ....

The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices .... 'For the investment to be rational, the [predator] must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.' ... Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

CASE *(continued)*

That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: …

Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition ….

For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly. This requires an understanding of the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will …. The inquiry is whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb.

If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, '[i]n order to recoup their losses, [predators] must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices.' Matsushita, 475 U.S., at 590–591.

Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market …. If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed ….

These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury. As we have said in the Sherman Act context, 'predatory pricing schemes are rarely tried, and even more rarely successful,' *Matsushita*, and the costs of an erroneous finding of liability are high ….

* * *

CASE *(continued)*

… While a reasonable jury could conclude that Brown & Williamson's intent was anticompetitive and that the price of its generics was below its costs for 18 months, the evidence was inadequate to show a reasonable prospect of cost recoupment.

* * *

Affirmed.

The *Brooke Group* assumptions and standards have been both defended and questioned in scholarly literature. The legal rule remains a strong one in the US.

Tetra Pak International SA v. Commission[68] involved a predatory pricing claim as well as a tying claim. (See tying part of preceding case.) Tetra Pak noted that the sales below cost took place only on the non-dominated market (non-aseptic cartons) and argued that Tetra Pak had no realistic chance of recouping its losses, since competition would prevent it from raising its prices; it urged the Court of Justice to adopt the rule in *Brooke Group*. The Court declined. It confirmed that recoupment is not a constituent element of a price predation case under European law. Thus:

> 41 In *AKZO* this court did indeed sanction the existence of two different methods of analysis for determining whether an undertaking has practised predatory pricing. First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown.
>
> 42 … For sales of non-aseptic cartons in Italy between 1976 and 1981, … prices were considerably lower than average variable costs. Proof of intention to eliminate competitors was therefore not necessary. In 1982, prices for those cartons lay between average variable costs and average total costs. For that reason … the [General Court] was at pains to establish—and the appellant has not criticised it in that regard—that Tetra Pak intended to eliminate a competitor.

* * *

68 Case C-333/94 P, *Tetra Pak International SA v. Commission* [1996] ECR I-5951, EU:C:1996:436.

> 44 Furthermore, it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalise predatory pricing whenever there is a risk that competitors will be eliminated. The [General Court] found … that there was such a risk in this case. The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.

Note on France Telecom SA v. Commission ('Wanadoo')

The Commission charged Wanadoo, later acquired by France Télécom, with charging residential customers a price below average variable cost for high-speed internet access, and later a price below average total cost, as part of a plan to pre-empt the market in high-speed internet access during a key phase in its development. It found a violation of Article 102 TFEU. The General Court upheld the Commission's findings, and the Court of Justice affirmed.[69]

France Télécom asserted the following claims of error, all unsuccessfully.

1. The claim that Wanadoo's (WIN's) high market share did not prove its dominant position, because its share fell (from 72% to about 63%) and the market was fast-growing. The General Court said: WIN 'had a very high market share which, save in exceptional circumstances, proves that it had a dominant position within the meaning of the case-law' (para. 103). The General Court confirmed that WIN had a dominant position, noting that WIN itself forecast that it would hold at least 60% of the market. The Court stated that WIN's link-up with the network of France Télécom gave it competitive advantages that contributed to its dominance.
2. The claim that WIN had the right to align its prices to those of its competitors, even if those prices were below costs. The General Court said: 'Even a dominant firm must generally be allowed to take reasonable steps to protect its own interests, but this right is not absolute [S]uch behaviour cannot be countenanced if its actual purpose is to strengthen this dominant position and abuse it' (para. 185).
3. The claim that competition was robust, there was no possibility of ousting existing competitors, and barriers were low; there could be no anti-competitive effect. The General Court said, citing *AKZO*, that where prices are below average variable costs, an anti-competitive effect is

69 Case T-340/03, *France Telecom SA v. Commission* [2007] ECR I-107, EU:T:2007:22; Case C-202/07 P, *France Telecom SA v. Commission* [2009] ECR I-2369, EU:C:2009:214 ('Wanadoo').

presumed, because the only interest the undertaking may have is eliminating competitors. Where prices are merely below average total costs, the Commission must prove predatory intent, and it did so—showing an express plan 'to pre-empt' the market. Moreover 'it is clear' that WIN's conduct 'had the effect of discouraging rival undertakings' (para. 214). Moreover, it was no defence that the low pricing would result in economies of scale and learning effects, promising profitability later (presumably at the same low price) (paras. 215–217).

4. The claim that the Commission should have been required to prove a realistic chance of recoupment of losses. Citing *Tetra Pak* (which rejected *Brooke Group*), the General Court reaffirmed that proof of recoupment is not necessary.

? NOTES AND QUESTIONS

1. Comment on each of the four rejected claims. Was the Court right to reject them?
2. The latest predation case decided by the Commission involves Qualcomm's sales of UMTS '3G' chipsets below cost to Huawei and ZTE, between mid-2009 and mid-2011, with the alleged intention of eliminating Icera, an important and growing rival at the time in the market segment offering advanced data rate performance. These baseband chipsets enable voice and data transmission between mobile devices (smartphones and tablets) and cellular networks. The Commission's findings were based on a price-cost test for the chipset categories concerned and qualitative evidence supporting the anti-competitive rationale behind Qualcomm's conduct intended to prevent Icera from expanding and building market presence. In addition, the Commission found that the targeted nature of the price concessions made by Qualcomm towards strategic customers Huawei and ZTE allowed it to maximize the negative impact on Icera's business while minimizing the effect on Qualcomm's own overall revenues from the sale of UMTS chipsets. As a result, Qualcomm's conduct prevented Icera from competing in the market, stifled innovation and ultimately reduced choice for customers. The Commission went on to impose a EUR 242 million fine on Qualcomm as a result. Icera was acquired by US tech company Nvidia in May 2011, which decided to wind down its baseband chipset business line in 2015. Qualcomm's appeal against the Commission decision is pending under reference T-671/19; pleas include a failure to establish an appropriate cost benchmark and the manifestly incorrect application of the price-cost analysis.

A recurrent question in relation to pricing practices has been whether Article 102(c) TFEU forbids pure price discrimination, i.e., the mere charging of different prices for the same good or service within the same market to buyers who are competitors, or whether it additionally requires evidence of harm to competition in the market or between the differentially treated firms.

In *British Airways v. Commission*,[70] one issue was whether BA's bonus schemes for achievement of sales targets caused discrimination between travel agents or produced exclusionary effects on competing airlines. The Court of Justice found that the lack of equivalence between travel agents

70 Case C-95/04 P, *British Airways v. Commission* [2007] ECR I-2331, EU:C:2007:166.

resulting from BA's linkage of the amount of rebates to specific sales targets amounted to a breach of Article 102 TFEU and that no 'actual quantifiable deterioration in the competitive position of [travel agents or competing airlines] taken individually' had to be adduced (para. 145).

More recently, in *Post Danmark I* involving a targeted price cut, the Court ruled to the contrary that 'charging different customers or different classes of customers different prices for goods or services whose costs are the same or, conversely, charging a single price to customers for whom supply costs differ, cannot of itself suggest that there exists an exclusionary abuse',[71] i.e., additional evidence of harm to competition is requisite or, put otherwise, the notion of 'competitive disadvantage' under Article 102(2)(c) cannot be merely inferred from the existence of differential treatment.[72] Which approach is the better one?

CASE

Post Danmark A/S v. Konkurrencerådet (Case C-209/10) ('*Post Danmark I*')[73]

[Post Danmark had a legal monopoly for the delivery of addressed letters and small parcels in Denmark. It had a universal service obligation to deliver this mail, for which it established a network that covered the whole national territory.

Post Danmark and Forbruger-Kontakt were the two largest firms in the sector of unaddressed mail, which includes phone directories, brochures and local newspapers. Effective from 1 January 2004, Post Danmark concluded contracts with Forbruger-Kontakt's major customers, three supermarket chains. It lured one of the three, Coop group, by a price marginally lower than Forbruger-Kontakt's, and the prices Post Danmark charged all three were lower than those Post Danmark charged to its own pre-existing customers. Forbruger-Kontakt complained.

The Danish competition authority found that eliminatory intent could not be established, and given also that it covered its average incremental costs, Post Danmark had not engaged in predatory pricing in the market for unaddressed mail. But, the authority held that Post

71 Case C-209/10, *Post Danmark I*, EU:C:2012:172, para. 30.

72 For a general discussion of the treatment of price discrimination under EU competition law, see D. Gerard (2005), 'Price discrimination under Article 82(2)(c) EC: Clearing up the ambiguities', GCLC Research Paper on the Modernisation of Article 82 EC [now Article 102 TFEU], 6 July 2005.

73 EU:C:2012:172 (Grand Chamber).

CASE *(continued)*

Danmark had abused dominance in unaddressed mail by 'practicing a targeted policy of reductions designed to ensure its customers' loyalty', by price discriminations, by selectively low prices, by not putting its customers on an equal footing, and by favouring its new customers without cost justification.

A Danish court affirmed. Post Danmark appealed the finding of illegal price discrimination, arguing that selectively low pricing cannot be an abuse in the absence of an intention to drive a competitor from the market. The Danish court made a preliminary reference to the Court of Justice. The Court of Justice said:]

19 … [T]he court making the reference asks, in essence, what the circumstances are in which a policy, pursued by a dominant undertaking, of charging low prices to certain former customers of a competitor must be considered to amount to an exclusionary abuse, contrary to Article 82 EC [now Article 102 TFEU], and, in particular, whether the finding of such an abuse may be based on the mere fact that the price charged to a single customer by the dominant undertaking is lower than the average total costs attributed to the business activity concerned, but higher than the total incremental costs pertaining to the latter.

20 It is apparent from case-law that Article 82 EC covers not only those practices that directly cause harm to consumers but also practices that cause consumers harm through their impact on competition …. It is in the latter sense that the expression 'exclusionary abuse' appearing in the questions referred is to be understood.

* * *

22 … [N]ot every exclusionary effect is necessarily detrimental to competition … Competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors that are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation.

* * *

25 Thus, Article 82 EC prohibits a dominant undertaking from, among other things, adopting pricing practices that have an exclusionary effect on competitors considered to be as efficient as it is itself and strengthening its dominant position by using methods other than those that are part of competition on the merits. Accordingly, in that light, not all competition by means of price may be regarded as legitimate ….

* * *

CASE *(continued)*

31 In the present case, the Danish competition authorities had recourse, not to the concept of 'variable costs' mentioned in the case-law stemming from *AKZO v. Commission*, but to another concept, which those authorities termed 'incremental costs'. In this respect, … those authorities defined 'incremental costs' as being 'those costs destined to disappear in the short or medium term (three to five years), if Post Danmark were to give up its business activity of distributing unaddressed mail'. In addition, that government stated that 'average total costs' were defined as being 'average incremental costs to which were added a portion, determined by estimation, of Post Danmark's common costs connected to activities other than those covered by the universal service obligation'.

32 However, as the Danish government stated in its written replies to those questions, a notable feature of the case in the main proceedings is that there are considerable costs related both to the activities within the ambit of Post Danmark's universal service obligation and to its activity of distributing unaddressed mail. These 'common' costs are due, in particular, to the fact that, at the material time, Post Danmark was using the same infrastructure and the same staff for both the activity of distributing unaddressed mail and the activity reserved to it in connection with its universal obligation for certain addressed items of mail. That government states that, according to the Konkurrencerådet, because Post Danmark's unaddressed mail activity used the undertaking's 'common distribution network resources', the costs of its universal service obligation activities could be reduced over a period of three to five years if Post Danmark were to give up distributing unaddressed mail.

33 … [F]or the purpose of estimating what it described as 'average incremental costs', the Konkurrencerådet included, among other things, not only those fixed and variable costs attributable solely to the activity of distributing unaddressed mail, but also elements described as 'common variable costs', '75% of the attributable common costs of logistical capacity' and '25% of non-attributable common costs'.

34 In the specific circumstances of the case in the main proceedings, it must be considered that such a method of attribution would seem to seek to identify the great bulk of the costs attributable to the activity of distributing unaddressed mail.

35 When that estimation was completed, it was found, among other things, that the price offered to the Coop group did not enable Post Danmark to cover the average total costs attributed to the activity of unaddressed mail distribution taken as a whole, but did enable it to cover the average incremental costs pertaining to that activity, as estimated by the Danish competition authorities.

CASE *(continued)*

36 Moreover, it is common ground that, in the present case, the prices offered to the Spar and SuperBest groups were assessed as being at a higher level than those average total costs, as estimated by those authorities. In those circumstances, it cannot be considered that such prices have anti-competitive effects.

37 As regards the prices charged the Coop group, a pricing policy such as that in issue in the main proceedings cannot be considered to amount to an exclusionary abuse simply because the price charged to a single customer by a dominant undertaking is lower than the average total costs attributed to the activity concerned, but higher than the average incremental costs pertaining to the latter ….

38 Indeed, to the extent that a dominant undertaking sets its prices at a level covering the great bulk of the costs attributable to the supply of the goods or services in question, it will, as a general rule, be possible for a competitor as efficient as that undertaking to compete with those prices without suffering losses that are unsustainable in the long term.

39 It is for the court making the reference to assess the relevant circumstances of the case in the main proceedings in the light of the finding made in the previous paragraph. In any event, it is worth noting that it appears from the documents before the Court that Forbruger-Kontakt managed to maintain its distribution network despite losing the volume of mail related to the three customers involved and managed, in 2007, to win back the Coop group's custom and, since then, that of the Spar group.

* * *

The judgement in *Post Danmark I* is decisively based on freedom of low pricing, which benefits consumers. Should the consumer perspective of the Court in *Post Danmark I* apply to other price-related practices? How do you compare the Court's perspective in *Post Danmark I* and *Post Danmark II* (see pp. 292, 306)? Is the Court consistent in its reliance on the notion of 'as efficient competitor'? If not, what justifies the different perspectives developed by the Court? If so, how do you reconcile the two *Post Danmark* judgements?

Article 102(2)(c) TFEU specifies as one type of prohibited abuse 'applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage'. For a discussion of price discrimination, see above section B.1.b. and revisit the MEO case, page 245 et seq.

The next important price-related case involved a price squeeze (*TeliaSonera*), and while citing *Post Danmark*, the Court did not adopt a single-track consumer perspective. The presentation of *TeliaSonera* is preceded by the discussion of a price squeeze case in the US (*linkLine*) and then an EU Court of Justice case involving regulation (*Deutsche Telekom*).

d. Margin squeeze

A margin squeeze occurs when the difference between the cost of an upstream input product or service and the price of a downstream output product or service is either negative or insufficient to cover the specific costs incurred for the production or supply of the downstream output product or service. As a result, it may prevent a competitor as efficient as the supplier of the input product or service from competing effectively for the supply of the downstream product or service.

Note on Pacific Bell Telephone Co. v. linkLine Communications, Inc. (US)

Pacific Bell was the incumbent telephone service provider in an area on the West Coast of the US. It provided a local telephone service and, as the historical incumbent (and former lawful monopolist before technology made competition feasible), owned the elements of the local loop in the area. It also supplied a digital subscriber line ('DSL') service—for fast computer access through phone lines—to internet service providers ('ISPs') at wholesale, and sold DSL service to its own customers at retail. During some periods, it charged its retail customers for DSL less than it charged the ISPs at wholesale. The price of wholesale service was regulated. That is, Pacific Bell proposed the rate; the Federal Communications Commission approved it, which it must do for all filed rates unless they are 'unjust and unreasonable'.

The ISPs sued for an unlawful price squeeze under Section 2 of the Sherman Act. Pacific Bell moved for judgement on the pleadings, arguing that after *Trinko* (see p. 252), a monopolist in a regulated industry has no antitrust duty to deal and no duty to avoid a price squeeze; if there is a problem, it should be resolved by the regulatory agency. The lower courts declined to dismiss the price squeeze case, holding that price squeeze claims survive *Trinko*. The Supreme Court reversed the decision. Since there was no antitrust duty to supply the DSL transport service to the rivals, there was no antitrust duty to refrain from squeezing them out of business. Plaintiffs would have a cause of action only if they could meet the tough requirements for proving that defendant's low retail price was predatory.[74]

CASE

Deutsche Telekom AG v. Commission (Case C-280/08 P)[75]

[Deutsche Telekom ('DT') was the dominant provider of telecom services in Germany and had sole access to the local loop. DT was regulated by the German Regulatory Authority, which imposed price ceilings. DT charged new entrants into the local telecom service market higher fees for wholesale access to the local loop than it charged its customers for services, including DSL for fast-speed internet connection. The competing providers of DSL service complained to the European Commission. The Commission found a margin squeeze in violation of Article 102 TFEU. The General Court upheld the Commission's findings, and the Court of Justice affirmed. DT had a duty to provide competitors access to the local loop. It therefore had a duty not to create a margin squeeze. DT had sufficient scope to eliminate the margin squeeze on terms consistent with the regulation and could go back to the German regulator if it needed an adjustment in price. The Court said:]

80 According to the case-law of the Court of Justice, it is only if anti-competitive conduct is required of undertakings by national legislation, or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, that Articles 81 EC and 82 EC [Articles 101 and 102 TFEU] do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings. Articles 81 EC and 82 EC may apply, however, if it is found that the national legislation leaves open the possibility of competition which may be prevented, restricted or distorted by the autonomous conduct of undertakings.

81 The possibility of excluding anti-competitive conduct from the scope of Articles 81 EC and 82 EC on the ground that it has been required of the undertakings in question by existing national legislation or that the legislation has precluded all scope for any competitive conduct on their part has thus been accepted only to a limited extent by the Court of Justice.

74 *Pacific Bell Telephone Co. v. linkLine Communications*, 555 U.S. 438 (2009).
75 [2010] ECR I-9555, EU:C:2010:603.

CASE *(continued)*

82 Thus, the Court has held that if a national law merely encourages or makes it easier for undertakings to engage in autonomous anti-competitive conduct, those undertakings remain subject to Articles 81 EC and 82 EC.

83 According to the case-law of the Court, dominant undertakings have a special responsibility not to allow their conduct to impair genuine undistorted competition on the common market.

84 It follows from this that the mere fact that the appellant was encouraged by the intervention of a national regulatory authority such as RegTP to maintain the pricing practices which led to the margin squeeze of competitors who are at least as efficient as the appellant cannot, as such, in any way absolve the appellant from responsibility under Article 82 EC.

85 Since, notwithstanding such interventions, the appellant had scope to adjust its retail prices for end-user access services, the General Court was entitled to find, on that ground alone, that the margin squeeze at issue was attributable to the appellant.

86 … [A]ppellant does not challenge the General Court's findings … that, in essence, the appellant was able to make applications to RegTP for authorisation to adjust its retail prices for end-user access services, specifically retail prices for narrowband access services for the period between 1 January 1998 and 31 December 2001, and retail prices for broadband access services for the period from 1 January 2002.

* * *

159 It is clear … that, according to the General Court, it is not the level of the wholesale prices for local loop access services—which, as has already been stated … cannot be challenged in the present appeal—or the level of retail prices for end-user access services which is contrary to Article 82 EC, but the spread between them.

* * *

172 As regards the abusive nature of the appellant's pricing practices, it must be noted that subparagraph (a) of the second paragraph of Article 82 EC expressly prohibits a dominant undertaking from directly or indirectly imposing unfair prices.

* * *

177 It follows from this [special responsibility] that Article 82 EC prohibits a dominant undertaking from, inter alia, adopting pricing practices which have an exclusionary effect on its equally efficient actual or potential competitors, that is to say practices which are capable

CASE *(continued)*

of making market entry very difficult or impossible for such competitors, and of making it more difficult or impossible for its co-contractors to choose between various sources of supply or commercial partners, thereby strengthening its dominant position by using methods other than those which come within the scope of competition on the merits. From that point of view, therefore, not all competition by means of price can be regarded as legitimate.

In the present case, it must be noted that the appellant does not deny that, even on the assumption that it does not have the scope to adjust its wholesale prices for local loop access services, the spread between those prices and its retail prices for end-user access services is capable of having an exclusionary effect on its equally efficient actual or potential competitors, since their access to the relevant service markets is, at the very least, made more difficult as a result of the margin squeeze which such a spread can entail for them.

178 At the hearing the appellant submitted, however, that the test applied in the judgement under appeal for the purpose of establishing an abuse within the meaning of Article 82 EC required it, in the circumstances of the case, to increase its retail prices for end-user access services to the detriment of its own end-users, given the national regulatory authorities' regulation of its wholesale prices for local loop access services.

179 It is true … that Article 82 EC aims, in particular, to protect consumers by means of undistorted competition.

180 However, the mere fact that the appellant would have to increase its retail prices for end-user access services in order to avoid the margin squeeze of its competitors who are as efficient as the appellant cannot in any way, in itself, render irrelevant the test which the General Court applied in the present case for the purpose of establishing an abuse under Article 82 EC.

181 By further reducing the degree of competition existing on a market—the end-user access services market—already weakened precisely because of the presence of the appellant, thereby strengthening its dominant position on that market, the margin squeeze also has the effect that consumers suffer detriment as a result of the limitation of the choices available to them and, therefore, of the prospect of a longer-term reduction of retail prices as a result of competition exerted by competitors who are at least as efficient in that market.

182 In those circumstances, in so far as the appellant has scope to reduce or end such a margin squeeze … by increasing its retail prices for end-user access services, the General Court correctly held … that that margin squeeze is capable, in itself, of constituting an abuse within the meaning of Article 82 EC in view of the exclusionary effect that it can create for competitors who are at least as efficient as the appellant. The General Court was not, therefore, obliged to establish, additionally, that the wholesale prices for local loop access services or

CASE *(continued)*

retail prices for end-user access services were in themselves abusive on account of their excessive or predatory nature, as the case may be.

* * *

(c) i) The complaint concerning the misapplication of the as-efficient-competitor test

* * *

252 The General Court therefore held … without any error of law, that the anticompetitive effect which the Commission is required to demonstrate, as regards pricing practices of a dominant undertaking resulting in a margin squeeze of its equally efficient competitors, relates to the possible barriers which the appellant's pricing practices could have created for the growth of products on the retail market in end-user access services and, therefore, on the degree of competition in that market.

253 [A] pricing practice such as that at issue in the judgement under appeal that is adopted by a dominant undertaking such as the appellant constitutes an abuse within the meaning of Article 82 EC if it has an exclusionary effect on competitors who are at least as efficient as the dominant undertaking itself by squeezing their margins and is capable of making market entry more difficult or impossible for those competitors, and thus of strengthening its dominant position on that market to the detriment of consumers' interests.

254 Admittedly, where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze of its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 82 EC. However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue cannot be classified as exclusionary if it does not make their market penetration any more difficult.

* * *

Then Competition Commissioner Kroes said, in a press release welcoming the judgement of the General Court: 'This [the margin squeeze] was clearly harmful to consumers, because competition between operators is the best means to bring overall prices down'.[76]

76 MEMO/08/232 of 10/04/2008.

Does it matter whether Deutsche Telekom lowers its wholesale price or raises its retail price? Does it matter whether the low retail price is not a predatory price?

How would the European Commission and courts decide the US *linkLine* case? What resolution is best for consumers? Note that the cases involve the relationship between a regulatory regime and antitrust rules. How is that relevant to the analysis?

CASE

Konkurrensverket v. TeliaSonera Sverige (Case C-52/09)[77]

[In Sweden, TeliaSonera was the dominant telecom supplier at retail. Historically, it was the owner of exclusive rights, and it still owned the local loop connecting the service provider to the subscriber's telephone. TeliaSonera also supplied ADSL—fast internet service—at wholesale and retail. It allegedly priced its wholesale service so high and retail service so low that ADSL retail competitors had no margin to supply service. Unlike the facts in *Deutsche Telekom*, TeliaSonera had no regulatory obligation to supply ADSL input services to telephone operators. The Swedish court asked the EU Court of Justice for a preliminary ruling on a number of questions. The Court first observed the function of the competition law and then answered the questions.]

22 The function of [the Treaty's competition] rules is precisely to prevent competition from being distorted to the detriment of the public interest, individual undertakings and consumers, thereby ensuring the well-being of the European Union.

* * *

30 … [A]fter ascertaining whether the other conditions for the applicability of Article 102 TFEU are satisfied in the present case—including whether TeliaSonera holds a dominant position and whether trade between Member States was affected by its conduct—it is for the referring court to examine, in essence, whether the pricing practice introduced by TeliaSonera is unfair in so far as it squeezes the margins of its competitors on the retail market for broadband connection services to end users.

77 [2011] ECR I-527, EU:C:2011:83.

CASE *(continued)*

31 A margin squeeze, in view of the exclusionary effect which it may create for competitors who are at least as efficient as the dominant undertaking, in the absence of any objective justification, is in itself capable of constituting an abuse within the meaning of Article 102 TFEU.

32 In the present case, there would be such a margin squeeze if, inter alia, the spread between the wholesale prices for ADSL input services and the retail prices for broadband connection services to end users were either negative or insufficient to cover the specific costs of the ADSL input services which TeliaSonera has to incur in order to supply its own retail services to end users, so that that spread does not allow a competitor which is as efficient as that undertaking to compete for the supply of those services to end users.

33 In such circumstances, although the competitors may be as efficient as the dominant undertaking, they may be able to operate on the retail market only at a loss or at artificially reduced levels of profitability.

34 It must moreover be made clear that since the unfairness, within the meaning of Article 102 TFEU, of such a pricing practice is linked to the very existence of the margin squeeze and not to its precise spread, it is in no way necessary to establish that the wholesale prices for ADSL input services to operators or the retail prices for broadband connection services to end users are in themselves abusive on account of their excessive or predatory nature, as the case may be.

* * *

41 In order to assess the lawfulness of the pricing policy applied by a dominant undertaking, reference should be made, as a general rule, to pricing criteria based on the costs incurred by the dominant undertaking itself and on its strategy.

42 In particular, as regards a pricing practice which causes margin squeeze, the use of such analytical criteria can establish whether that undertaking would have been sufficiently efficient to offer its retail services to end users otherwise than at a loss if it had first been obliged to pay its own wholesale prices for the intermediary services.

If that undertaking would have been unable to offer its retail services otherwise than at a loss, that would mean that competitors who might be excluded by the application of the pricing practice in question could not be considered to be less efficient than the dominant undertaking and, consequently, that the risk of their exclusion was due to distorted competition. Such competition would not be based solely on the respective merits of the undertakings concerned.

CASE *(continued)*

43 Furthermore, the validity of such an approach is reinforced by the fact that it conforms to the general principle of legal certainty, since taking into account the costs and prices of the dominant undertaking enables that undertaking to assess the lawfulness of its own conduct, which is consistent with its special responsibility under Article 102 TFEU … While a dominant undertaking knows its own costs and prices, it does not as a general rule know those of its competitors.

44 That said, it cannot be ruled out that the costs and prices of competitors may be relevant to the examination of the pricing practice at issue in the main proceedings. That might in particular be the case where the cost structure of the dominant undertaking is not precisely identifiable for objective reasons, or where the service supplied to competitors consists in the mere use of an infrastructure the production cost of which has already been written off, so that access to such an infrastructure no longer represents a cost for the dominant undertaking which is economically comparable to the cost which its competitors have to incur to have access to it, or again where the particular market conditions of competition dictate it, by reason, for example, of the fact that the level of the dominant undertaking's costs is specifically attributable to the competitively advantageous situation in which its dominant position places it.

45 It must therefore be concluded that, when assessing whether a pricing practice which causes a margin squeeze is abusive, account should as a general rule be taken primarily of the prices and costs of the undertaking concerned on the retail services market. Only where it is not possible, in particular circumstances, to refer to those prices and costs should those of its competitors on the same market be examined.

* * *

59 It follows that the absence of any regulatory obligation to supply the ADSL input services on the wholesale market has no effect on the question of whether the pricing practice at issue in the main proceedings is abusive.

Whether an anti-competitive effect is required and whether the product offered by the undertaking must be indispensable

60 The referring court seeks to ascertain, thirdly, whether the abusive nature of the pricing practice in question depends on whether there actually is an anti-competitive effect and, if so, how that effect can be determined. Moreover, it seeks to ascertain whether the product offered by TeliaSonera on the wholesale market must be indispensable for entry onto the retail market.

* * *

CASE *(continued)*

63 … [T]he practice in question, adopted by a dominant undertaking, constitutes an abuse within the meaning of Article 102 TFEU, where, given its effect of excluding competitors who are at least as efficient as itself by squeezing their margins, it is capable of making more difficult, or impossible, the entry of those competitors onto the market concerned.

64 It follows that, in order to establish whether such a practice is abusive, that practice must have an anti-competitive effect on the market, but the effect does not necessarily have to be concrete, and it is sufficient to demonstrate that there is an anti-competitive effect which may potentially exclude competitors who are at least as efficient as the dominant undertaking.

65 Where a dominant undertaking actually implements a pricing practice resulting in a margin squeeze on its equally efficient competitors, with the purpose of driving them from the relevant market, the fact that the desired result, namely the exclusion of those competitors, is not ultimately achieved does not alter its categorisation as abuse within the meaning of Article 102 TFEU.

66 However, in the absence of any effect on the competitive situation of competitors, a pricing practice such as that at issue in the main proceedings cannot be classified as an exclusionary practice where the penetration of those competitors in the market concerned is not made any more difficult by that practice.

* * *

69 In particular, the first matter to be analysed must be the functional relationship of the wholesale products to the retail products. Accordingly, when assessing the effects of the margin squeeze, the question whether the wholesale product is indispensable may be relevant.

70 Where access to the supply of the wholesale product is indispensable for the sale of the retail product, competitors who are at least as efficient as the undertaking which dominates the wholesale market and who are unable to operate on the retail market other than at a loss or, in any event, with reduced profitability suffer a competitive disadvantage on that market which is such as to prevent or restrict their access to it or the growth of their activities on it.

71 In such circumstances, the at least potentially anti-competitive effect of a margin squeeze is probable.

* * *

73 Secondly, it is necessary to determine the level of margin squeeze of competitors at least as efficient as the dominant undertaking. If the margin is negative, in other words if, in the present case, the wholesale price for the ADSL input services is higher than the retail price

CASE *(continued)*

for services to end users, an effect which is at least potentially exclusionary is probable, taking into account the fact that, in such a situation, the competitors of the dominant undertaking, even if they are as efficient, or even more efficient, compared with it, would be compelled to sell at a loss.

74 If, on the other hand, such a margin remains positive, it must then be demonstrated that the application of that pricing practice was, by reason, for example, of reduced profitability, likely to have the consequence that it would be at least more difficult for the operators concerned to trade on the market concerned.

* * *

76 The assessment of the economic justification for a pricing practice established by an undertaking in a dominant position which is capable of producing an exclusionary effect is to be made on the basis of all the circumstances of the case. In that regard, it has to be determined whether the exclusionary effect arising from such a practice, which is disadvantageous for competition, may be counterbalanced, or outweighed, by advantages in terms of efficiency which also benefit the consumer. If the exclusionary effect of that practice bears no relation to advantages for the market and consumers, or if it goes beyond what is necessary in order to attain those advantages, that practice must be regarded as an abuse.

* * *

? NOTES AND QUESTIONS

1. Note the *TeliaSonera* Court's expansive rendition of the goals of EU competition law in para. 22. Is this different from the perspective conveyed by the Court in *Post Danmark I*, para. 20? Is *Post Danmark* unique, in that its low (and above-cost) price was merely price competition to lure a customer from a competitor? If the Court had declared such price competition to constitute an abuse of dominance, can you see the chilling effect on all price competition? The US analogue would be the now discredited case of Utah Pie (condemning price competition by means of a discriminatory price).[78]
2. Does the judgement in *TeliaSonera* have a chilling effect? Why does the US law (*Trinko*, *linkLine*) 'think' so?

e. Tying and bundling

Tying, in the context of an abuse violation, involves a dominant firm's use of its power in one market to require buyers to purchase another product or

78 *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

service. Bundling is a similar practice; it involves offering several products together. Pure bundling implies that the firm offers the products only in a package and not separately. Mixed bundling involves offering the products both as a bundle and separately, with the bundled price being a discounted price. For a violation, must competition be harmed in one of the markets? Must the tie or bundling practice increase or maintain the dominant firm's market power or create market power in the second market? Or, is it enough that the practice fences out competitors from significant opportunities otherwise open to them, and the dominant firm has no good defence, such as: the practice is pro-competitive or efficient and consumers get a fair share of the benefits?

A leading case on tying is *Tetra Pak International SA v. Commission*.[79] Tetra Pak held 90% of EU sales of aseptic packaging machines and packaging (e.g., milk cartons). It required buyers of its non-aseptic machines to also use Tetra Pak cartons for the machines. The Court held the requirement illegal under Article 102 TFEU. For a general discussion of the treatment of tying under EU competition law, read the Commission's Guidance Paper, paras. 46–61.

For more than half a century, the United States had a per se rule against forced tying by a firm with market power.[80] Justifications such as good will, safety and reputation were rejected and also were seldom proved. However, the Supreme Court has retreated from per se concepts and has questioned the continued validity of the rule against tying.[81] Indeed, tying is a form of leveraging, and the Supreme Court said in *Trinko* that there is no leveraging violation in the absence of a dangerous probability of monopolizing a second market. See *Trinko* at p. 252.

In the US *Microsoft* case, the court held Microsoft's tying illegal only where it was combined with a clear predatory act. Microsoft tied its browser with its operating system and commingled code so that removal of Explorer's browser from Windows would disable other functions of Windows. But, the court reversed the district court's holding that Microsoft's mere bundling of its browser with its operating system was illegal per se.[82]

79 Case C333/94P, *Tetra Pak International SA v. Commission*, [1996] ECR I–5951, ECLI:EU:C:1996:436.

80 See, e.g., *International Salt Co. v. United States*, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); *Eastman Kodak Co. v. Image Technical Services*, 504 U.S. 451, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992); *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 32, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984).

81 *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006).

82 *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001).

The European *Microsoft* case was decided several years later. We have already summarized the facts and studied the interoperability portion of the judgement. Following are excerpts from the portion of the case on bundling the media player with the operating system.

CASE

Microsoft Corp. v. Commission (Case T-201/04)

[See background facts at p. 360.]

The foreclosure of competition

1038 … [I]n the first place, it is clear that owing to the bundling, Windows Media Player enjoyed an unparalleled presence on client PCs throughout the world, because it thereby automatically achieved a level of market penetration corresponding to that of the Windows client PC operating system and did so without having to compete on the merits with competing products. It must be borne in mind that it is common ground that Microsoft's market share on the client PC operating systems market is more than 90% and that the great majority of sales of Windows client PC operating systems (approximately 75%) are made through OEMs [original equipment manufacturers], who pre-install Windows on the client PCs which they assemble and distribute. Thus, the figures … show that in 2002 Microsoft had a market share of 93.8% by units shipped on the client PC operating systems market and that Windows—and, as a result, Windows Media Player—was pre-installed on 196 million of the 207 million client PCs shipped in the world between October 2001 and March 2003.

* * *

1088 It follows from the foregoing considerations that the final conclusion which the Commission sets out concerning the anti-competitive effects of the bundling is well founded. The Commission is correct to make the following findings:

— Microsoft uses Windows as a distribution channel to ensure for itself a significant competitive advantage on the media players market;
— because of the bundling, Microsoft's competitors are a priori at a disadvantage even if their products are inherently better than Windows Media Player;
— Microsoft interferes with the normal competitive process which would benefit users by ensuring quicker cycles of innovation as a consequence of unfettered competition on the merits;
— the bundling increases the content and applications barriers to entry, which protect Windows, and facilitates the erection of such barriers for Windows Media Player;
— Microsoft shields itself from effective competition from vendors of potentially more efficient media players who could challenge its position, and thus reduces the talent and capital invested in innovation of media players;

CASE *(continued)*

— by means of the bundling, Microsoft may expand its position in adjacent media-related software markets and weaken effective competition, to the detriment of consumers;
— by means of the bundling, Microsoft sends signals which deter innovation in any technologies in which it might conceivably take an interest and which it might tie with Windows in the future.

1089 The Commission therefore had ground to state that there was a reasonable likelihood that tying Windows and Windows Media Player would lead to a lessening of competition so that the maintenance of an effective competition structure would not be ensured in the foreseeable future ....

* * *

Absence of objective justification

[Microsoft claimed that efficiency gains outweighed any anticompetitive effects; that consumers want one product, pre-installed; that the tying produces efficiencies and enhances technical performance; that adding components piecemeal can create conflicts and cause malfunction; and that removing components degrades the system. The Court held that the Commission appropriately rejected the factual assertions or found that the benefits could be attained in less restrictive ways.]

* * *

1159 Last, the Court notes that ... Microsoft does not show that the integration of Windows Media Player in Windows creates technical efficiencies or, in other words, that it 'lead[s] to superior technical product performance'.

* * *

1165 The Court further considers that Microsoft cannot contend that the removal of Windows Media Player from the system consisting of Windows Media Player and Windows will entail a degrading of the operating system. Thus, Windows XP Embedded can be configured in such a way as not to include Windows Media Player without having any effect on the integrity of the other functionality of the operating system. Furthermore, throughout the period between June 1998 and May 1999, when Microsoft first integrated WMP 6 in its Windows client PC operating system without allowing OEMs or users to remove it from that system, Microsoft offered its streaming media player as separate application software, without any effect on the functioning of the Windows operating system....

* * *

NOTES AND QUESTIONS

1. Microsoft owned a 'ubiquitous' network, which could and did carry its media player. If you were the BBC and had to decide how to distribute your content over the internet, might you choose ubiquitous software over software with some better qualities? Does this mean that the owner of the ubiquitous network must share it with its competitors?
2. Would you predict that Microsoft's bundling would cause the total output of media player software to go down and the price to go up? That Microsoft would eventually get a monopoly in media players for PCs? Might the bundling have entrenched Microsoft in the PC operating system market? Explain.
3. How would the US *Microsoft* court have analysed the same problem?
4. In 2009, the Commission also raised objections about the tying of the Internet Explorer browser to Windows based on the theory of harm that such practice offered Microsoft an artificial distribution advantage not related to the merits of its browser on more than 90% of personal computers. Furthermore, the Commission's preliminary view was that this tying hindered innovation in the market and created artificial incentives for software developers and content providers to design their products or web sites primarily for Internet Explorer. To end the probe, Microsoft committed to offering European users of Windows choice among different web browsers and to allow computer manufacturers (OEMs) and users the possibility to turn Internet Explorer off. Concretely, Microsoft was to make available for 5 years (through the Windows Update mechanism) a 'Choice Screen' enabling users of Windows XP, Windows Vista and Windows 7 to choose which web browser(s) they wanted to install in addition to, or instead of, Microsoft's browser Internet Explorer. See Case AT.39530—Microsoft Browser Tying. Note that Microsoft was then fined EUR 561 million for non-compliance with the browser choice commitment because, to Microsoft's own admission, the browser choice screen had failed to be rolled out on Windows 7 Service Pack 1 from May 2011 until July 2012 (thereby depriving 15 million Windows users in the EU to see the choice screen during this period).
5. The Google Shopping case discussed earlier under 'self-preferencing' has also been referred to as a 'tying case'. While that case was still at the investigation stage, it was argued that it would fit better under a tying theory of harm. Why so? Try to articulate such a tying theory under the Google Shopping set of facts. Eventually, another avenue was preferred, and the main recent precedent for the application of a tying theory of harm became the Google Android case.

Note on the Google Android case

Google owns Android, the preeminent mobile operating system. This matter is about Google's 'tying up' the Android system to entrench Google search and advantage Google browser (Chrome), and protecting Android OS from competition by clones. Google required manufacturers of smartphones running Android to pre-install the Google search app and browser app as a condition for licensing Google's app store; paid large manufacturers and mobile network operators to pre-install the Google search app exclusively (i.e., it paid them not to install any other search app) on their devices; and prohibited manufacturers from making and running alternative versions of Android (an open software) ('Android forks') without Google's approval. About 80% of smart mobile devices in Europe and worldwide are run on Android, with Apple accounting for most of the rest. For licensable smart mobile operating systems (Apple does not license), Google Android accounts for more than 95%. The Commission observed that both search and browser are important entry points for competition. It determined that the restrictions amounted to an abuse of a dominant position and imposed a fine of EUR 4.34 billion on Google, the largest ever antitrust penalty (Case AT.40099—Google Android).

On appeal, the General Court largely confirmed the Commission's decision.[83] First, in assessing Google's power, it held that Apple was not a significant competitive constraint and was not in the relevant market. As to requiring manufacturers who wished to have access to Google's Play Store to pre-install the Google Search app and Chrome browser, requiring them to make Google the default search engine, and forbidding manufacturers that sell phones with pre-installed versions of Android from making their own versions of Android by forking the code, the Court held: the Commission properly determined this conduct to constitute abuses of dominance. The Court noted that the pre-installation requirement could bring about a 'status quo' bias. The Court rejected Google's justification that pre-installation requirements were necessary to provide the Android platform free of charge; the revenues from the Play Store alone were more than sufficient to support investments on the platform.

The Court held that the anti-fork restriction lessened innovation. As an example, it blocked manufacturers from using Amazon's Android fork, Fire OS. Android forks were capable of putting competitive pressure on Android, it said, and therefore, the fork ban plausibly led to strengthening Google's dominant position and deterred innovation.

However, the Court dealt more sympathetically with Google's revenue sharing agreements with manufacturers of mobile phones, under which Google rebates revenues proportionate to the value of the advertising spending on Google. The manufacturers party to these agreements were subject to a sole pre-installation condition; they promised not to pre-install any competing general search services. The Court held that the Commission properly found these to be exclusivity agreements. But, the Commission was required to carry out an analysis of the capability of these agreements to restrict competition under all of the circumstances, and it did not do so properly. The Commission's conclusion of significant market coverage was not supported by the evidence, and the Commission misapplied the as-efficient-competitor

83 Case T-604/18, *Google and Alphabet v. Commission*, ECLI:EU:T:2022:541.

test. The annulled portion of the Commission decision was a small part of the case and resulted in a small reduction in the large fine.

C. Regulating abuse of power in the digital economy

While DG Competition has brought several antitrust cases against the Big Tech platforms for abusing a dominant position, and several of those cases are on appeal, the European Commission has implicitly determined both that antitrust prohibitions are not enough and also that antitrust cases move too slowly through the judicial processes to control the power of Big Tech. It has adopted a regulatory regime for the biggest online platforms active in Europe, in the form of the Digital Markets Act (DMA). The DMA specifies 22 obligations for the 10–15 'digital gatekeepers'. Much of the prohibited or required conduct overlaps with obligations under Article 102 TFEU as thus far interpreted by the Commission, but the DMA specifies that the Act is not an antitrust act; its aim is to achieve 'contestable and fair markets in the digital sector'.

Contestability is closely related to competition law. It is defined as 'the ability of undertakings to effectively overcome barriers to entry and expansion and challenge the gatekeeper on the merits of their products and services'. The prohibition of self-preferencing and the obligations to facilitate interoperability and data portability are aligned with contestability. Fairness is defined as 'an imbalance between the rights and obligations of business users where the gatekeeper obtains a disproportionate advantage' and users cannot 'adequately capture the benefits resulting from their innovative or other efforts'. Fairness underlies rules against exploitation that deprive business users of an adequate reward for their efforts. Here are examples of the dos and don'ts of the DMA, as explained by a press release of the Commission:

> 'Some examples of the 'dos' imposed on gatekeepers include the following:
>
> - Allow end users to easily un-install pre-installed apps or change default settings on operating systems, virtual assistants or web browsers that steer them to the products and services of the gatekeeper and provide choice screens for key services;
> - Allow end users to install third-party apps or app stores that use or interoperate with the operating system of the gatekeeper;
> - Allow end users to unsubscribe from core platform services of the gatekeeper as easily as they subscribe to them;
> - Allow third parties to interoperate with the gatekeeper's own services;

- Provide the companies advertising on their platform with access to the performance measuring tools of the gatekeeper and the information necessary for advertisers and publishers to carry out their own independent verification of their advertisements hosted by the gatekeeper;
- Allow business users to promote their offers and conclude contracts with their customers outside the gatekeeper's platform;
- Provide business users with access to the data generated by their activities on the gatekeeper's platform.

Some examples of the 'don'ts' imposed on the gatekeepers include the following:

- Ban on using the data of business users when gatekeepers compete with them on their own platform;
- Ban on ranking the gatekeeper's own products or services in a more favourable manner compared to those of third parties;
- Ban on requiring app developers to use certain of the gatekeeper's services (such as payment systems or identity providers) in order to appear in app stores of the gatekeeper;
- Ban on tracking end users outside of the gatekeepers' core platform service for the purpose of targeted advertising, without effective consent having been granted.'[84]

There is no efficiency defence to prohibited or obligatory conduct, although the major gatekeepers have different business models, and one size may not be a good fit for all. Regulatory interventions are, however, subject to the test of proportionality.

The DMA will come into force in three stages. The European Commission will adopt a procedural regulation. Undertakings potentially qualifying as gatekeepers will be required to notify the Commission, and the Commission will designate the gatekeepers. Beginning in 2024, the designated gatekeepers will be required to comply with the prohibitions and obligations and to submit compliance reports. The Commission expects to need a team of at least 150 staff members to enforce the Act, with a dedicated enforcement team for nearly every core platform service of every gatekeeper.

84 European Commission, Questions and Answers: Digital Markets Act: Ensuring fair and open digital markets, 23 April 2022, https://ec.europa.eu/commission/presscorner/detail/en/QANDA_20_2349 .

? NOTES AND QUESTIONS

1. There is a perceived need to control the abuses of Big Tech, but what is the best way to do so? How much antitrust and how much regulation? Explain the relationship.
2. How much work do you think enforcement of Article 102 can do to adequately control abuses of market power by the Big Tech platforms? What are the limits of Article 102 in doing so? Consider separately the goals of contestability and fairness.
3. To the extent that there are limits and gaps in the law of Article 102, should regulation fill the slack? What kind of regulation? Is the DMA a good choice? If you would approach the problem differently from the EU, how?

* * *

Take stock, now, of the EU principles and rules that govern abuses of a dominant position. What is the overall perspective of EU law and policy on practices of dominant firms that tend to exclude or make life hard for rivals? When do these practices constitute an abuse of dominance? What is the overall perspective of US law?

To what extent are the following observations true, and do they explain the differences between the two systems?

- The US Supreme Court decisions presume that dominant firm conduct is generally good for consumers. They reflect a concern that antitrust authorities and courts will err, prohibiting pro-competitive and innovative conduct and chilling invention.
- EU competition law, influenced by its market integration tradition and by the fact that many of its markets lack competition, privileges openness and access, is suspicious of dominant firm conduct that tends to fence out rivals, and reflects confidence that antitrust intervention can facilitate the functioning of the market.

6

Merger control

The competition articles of the 1957 Treaty of Rome establishing the European Economic Communities ('EEC') did not mention mergers. Facing trade barriers at every frontier, many business enterprises were too small to be efficient. As a result, mergers—especially mergers between firms from different Member States—held the promise of promoting market integration. However, the Member States were not prepared to yield to the Union over the structure of their economies, and EU competence over mergers was regarded by many as unreasonably intrusive. Article 85 EEC, now Article 101 TFEU, was designed to regulate agreements and ongoing collaborations. Article 86 EEC, now Article 102 TFEU, was designed to regulate the behaviour of dominant firms.

By contrast to the EEC Treaty, the European Coal and Steel Community ('ECSC') Treaty—which was adopted 6 years earlier and has now expired—specifically prohibited mergers that created power 'to determine prices, to control or restrict production or distribution or to hinder effective competition in a substantial part of the market …' (Article 66, para. 2) Thus, from the start, the Member States expressly conceded control over coal and steel mergers, underscoring the deliberateness of the omission of merger control in the EEC Treaty.

Finally, in 1989, the Council promulgated the Merger Regulation, officially providing a merger control system for the Union.

The adoption of European merger control coincided with important economic and political changes in the world. In November 1989, the Berlin Wall fell. Members of the former Soviet bloc and many others adopted merger control as part of the introduction of a domestic competition regime. More than 100 countries now have merger control/notification regimes. Since many of the possibly anti-competitive mergers are between firms that operate across national borders, problems of jurisdiction, conflict and cooperation emerge. These challenges are considered in the present chapter, after a discussion of the concept and detail of the Merger Regulation (also known as the 'EUMR').

A. The Merger Regulation

1. Coverage and procedures

After 16 years of debate, on 21 December 1989 the Council adopted the Merger Control Regulation, with an effective date of 21 September 1990.[1] It was amended in 2004. The Merger Regulation has three major purposes: (1) to provide specific authority for the Commission to challenge mergers and acquisitions that would harm competition, and thus, to put an end to the debate over whether the Treaty conferred such authority; (2) to provide a structure for merger control, giving the Commission necessary market information and the power to stop anti-competitive mergers before their consummation (standstill principle); and (3) to centralize merger enforcement in the hands of the Commission so that enterprises would not be subject to multiple and potentially inconsistent substantive standards, notice requirements and waiting periods ('one-stop-shop' principle).

Specifically, transactions are reviewable at EU level if they amount to a 'concentration', i.e., if they entail a change of control on a lasting basis over a particular target, control being understood as the ability to determine the strategic commercial conduct of the target in question. Joint ventures are 'concentrations' if they are created to 'perform on a lasting basis all the functions of an autonomous economic entity'.[2] These joint ventures are called 'full-function' joint ventures. Full-function joint ventures get the benefit of the one-stop-shop principle if they meet the thresholds. If the joint venture may give rise to coordination of the competitive behaviour of firms that remain independent, or if it entails ancillary agreements that are not obviously directly related and necessary to the concentration, the Commission must appraise its potentially cooperative or exclusionary aspects under Article 101 or 102 TFEU.[3]

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1 Regulation 4064/89/EEC of 21 December 1989 on the control of concentrations between undertakings [1989] *O.J.* L 395/1 ('Merger Regulation'). The Merger Regulation was amended in 2004 and became Regulation 139/2004/EC, [2004] *O.J.* L 24/1. Various procedural issues are further governed by the Regulation 802/2004/EC [2004] *O.J.* L 133/1 (known as the 'Implementation Regulation'). The Merger Regulation and different sets of interpretative guidelines (e.g., jurisdictional notice, horizontal guidelines, non-horizontal guidelines, remedies notice, notice on ancillary restraints) may be found at: http://ec.europa.eu/competition/mergers/legislation/legislation.html (accessed 9 June 2017).

2 Merger Regulation, Article 3(4).

3 On the respective scope of the EU Merger Regulation and of Article 101 TFEU in relation to joint ventures, see Case C-248/16, *Austria Asphalt*, EU:C:2017:643.

Subject to exceptions, the parties to a concentration with an 'EU dimension' (or 'Community dimension', as still referred to in the EUMR) must file pre-merger notification forms[4] and wait until final decision prior to closing and/or putting their transaction into effect (or they would be engaging in 'early implementation', also known as 'gun jumping', which is prohibited by Article 7 EUMR and subject to fines and the imposition of remedial measures[5]). The Commission has exclusive power, vis-à-vis Member State authorities, to allow or disallow these transactions. The Member States have ceded authority to prevent or authorize such transactions, except when legitimate national interests such as security, plurality of media and prudential concerns are at stake, and except in certain circumstances when a distinct market is affected at Member State level. Pursuant to Article 1 EUMR, a concentration then has an 'EU dimension' when:

(a) the combined aggregate worldwide turnover of all the undertakings concerned is more than €5 billion; and
(b) the aggregate Community-wide turnover of each of at least two of the undertakings concerned is more than €250 million, unless each of the undertakings concerned achieves more than two-thirds of its aggregate Community-wide turnover within one and the same Member State.

Concentrations also have an 'EU dimension' and thus fall within the scope of the EU Merger Regulation if:

1. the undertakings have combined aggregate worldwide turnover of at least €2.5 billion;
2. the undertakings have combined aggregate turnover of at least €100 million in at least three Member States;
3. at least two of the undertakings have at least €25 million turnover in the same three Member States; and
4. at least two undertakings have at least €100 million turnover in the Community,

unless each of the undertakings achieves more than two-thirds of its aggregate Community-wide turnover in the same Member State.[6]

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4 These forms and the details of the EU merger control procedure are found in the 'Implementing Regulation' (Commission Regulation 802/2004 implementing council regulation 139/2004 on the control of concentrations between undertakings, [2004] *O.J.* L 133/1, as amended and corrected). For a consolidated version, see https://competition-policy.ec.europa.eu/mergers/legislation/regulation_en (accessed 9 October 2022).

5 For a governing precedent on 'gun jumping', see Case C-633/16, *Ernst & Young*, EU:C:2018:371. For illustrations of 'gun-jumping' situations see, e.g., Case T-609/19, *Canon/Commission*, EU:T:2022:299; Case T-704/14, *Marine Harvest/Commission*, EU:T:2017:753; Case M.10483 and M.10493, *Illumina/Grail*.

6 Merger Regulation, Article 1(2).

The notion of 'undertakings' concerned under the EUMR refers to those businesses acquiring control over a particular target, as well as the target itself (which can be a [combination of] legal entity[-ies] or a collection of assets with a market activity to which a turnover can be ascribed).

Concentrations below the thresholds remain subject to the laws of the Member States. In some cases, a concentration even with an EU dimension threatens competition in a distinct market within one Member State. The Member State authority may ask the Commission to refer such a concentration to it, and the Commission *may* grant the reference; but if the affected territory is not a substantial part of the internal market, the Commission *must* grant the reference. The applicable clause—Article 9—was called the German clause, since it was proposed by Germany in response to its concerns that Germany would be stripped of its power to prohibit concentrations that uniquely harmed Germany. Another clause, Article 22, known as the Dutch clause, allows the Commission to investigate mergers not of Community dimension at the request of one or more Member States. In 2021, the Commission clarified that Article 22 can be triggered even when Member States do not have domestic jurisdiction over the transaction in question.[7] And in March 2023, the Court of Justice confirmed that a concentration falling below national merger control notification thresholds may still be constitutive of an abuse of dominance under Article 102 TFEU, and reviewable as such by national competition authorities, depending on the structure of competition in the national market in question.[8] Articles 4(4) and (5) of the Merger Regulation also organize a pre-notification referral system at the initiative of the parties to the concentration, which allows the allocation of the review thereof to the best-placed authority, e.g., the Commission in the case when a concentration is capable of being reviewed under the domestic merger regime of at least three Member States.

From a substantive point of view, the Commission must assess concentrations to determine whether they are compatible with the internal market, i.e., whether or not they may result in a significant impediment to effective competition (so-called 'SIEC test', discussed in the next section). As apparent from the statistics displayed in the following table, the vast majority of concentrations are cleared in Phase I after preliminary review, within

7 See Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, C(2021) 1959 final. This clarification was upheld by the EU General Court in Case T-227/21, *Illumina/Commission*, EU:T:2022:447 (appeal to the ECJ pending under references C-611/22 P and C-625/22 P). The rationale underpinning this clarification is the ability to catch and review acquisitions of nascent competitors/products (generating limited or no turnover in the EU) by established market players, also commonly referred to as 'killer acquisitions' by reference to the risk of resulting in the discontinuation of the acquired business.

8 Case C-449/21, *Towercast*, EU:C:2023:207.

25 working days of the notification (or 35 days if the parties offer commitments). Most of these cases are also reviewed and cleared under a simplified procedure that dispenses the parties with the submission of certain information[9] and the Commission with a market investigation. In case of serious doubts as to the compatibility of the concentration with the common market at the end of Phase I, the Commission then advances to the stage of initiating proceedings and carrying out an in-depth review called Phase 2, which may last for several months. Serious competitive issues raised by concentrations are typically solved by means of remedies (called 'commitments').[10] Alternatively, parties may simply abandon their transaction and withdraw their notification (note that some transactions are also abandoned in 'pre-notification' following early discussions with DG COMP). In turn, formal prohibitions are very rare, though they constitute most of the few merger control cases that are then litigated before the EU General Court (seldom reaching the Court of Justice).[11]

EU Merger Control Statistics

	2017	2018	2019	2020	2021	2022
Notifications	380	414	382	361	405	371
Phase I clearance	353	366	343	334	384	354
Phase I clearance—simplified procedure	280	302	283	278	309	291
Phase I clearance with remedies	18	17	10	13	7	10
Phase I withdrawals	7	10	12	7	9	8
Phase II clearances without remedies	0	4	0	1	0	0
Phase II clearances with remedies	2	6	6	3	4	2
Phase II withdrawals	2	2	0	2	3	4
Prohibitions	2	0	3	0	0	2

Source: DG COMP—https://competition-policy.ec.europa.eu/mergers/statistics_en (accessed 3 February 2023).

9 See Commission Notice on a simplified procedure for treatment of certain concentrations, [2013] *O.J.* C 366/5.

10 The conditions guiding the assessment of the sufficiency, suitability and effectiveness of proposed remedies are spelled out in the Commission notice on remedies acceptable under Council Regulation 139/2004 and under Commission Regulation 802/2004, [2008] *O.J.* C 267/1 (in short: the 'Remedies Notice').

11 Clearance decisions are also occasionally appealed by third parties, such as competitors, customers or consumer protection organizations.

The Merger Regulation provides that the implementing legislation that empowers Commission enforcement of Articles 101 and 102 TFEU (especially Regulation 1/2003[12]) does not apply to concentrations, whether they fall above or below the thresholds. Moreover, the Commission has represented that it will not normally apply Articles 101 or 102 TFEU to concentrations.[13] Therefore, the EU Merger Regulation (EUMR) has effectively become the only EU measure for controlling concentrations.

2. The substantive standard ('SIEC test')

Initially, the Merger Regulation proscribed only mergers that created or strengthened a *dominant position* that would significantly impede competition in the common market. This wording proved to be too narrow, because it seemed to ignore important oligopoly effects. The 2004 revision of the EUMR accordingly expanded the coverage.

The substantive standard is set forth in Article 2 of the revised Merger Regulation, which provides:

> 1. Concentrations within the scope of this Regulation shall be appraised in accordance with the following provisions with a view to establishing whether or not they are compatible with the common market.
>
> In making this appraisal, the Commission shall take into account:
>
> (a) the need to maintain and develop effective competition within the common market in view of, among other things, the structure of all the markets concerned and the actual or potential competition from undertakings located either within or without the Community;
> (b) the market positions of the undertakings concerned and their economic and financial power, the alternatives available to suppliers and users, their access to supplies or markets, any legal or other barriers to entry, supply and demand trends for relevant goods and services, the interests of the intermediate and ultimate consumers, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.

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12 Regulation 1/2003/EC of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2002] *O.J.* L 1/1.

13 The question of whether a concentration falling outside the scope of the EUMR may constitute an abuse of a dominant position under Article 102 TFEU is currently the subject of a request for preliminary ruling to the Court of Justice in Case C-449/21, *Towercast v. Autorité de la concurrence, Ministère de l'Economie*, pending.

2. A concentration which would not significantly impede effective competition in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared compatible with the common market.
3. *A concentration which would significantly impede effective competition, in the common market or in a substantial part of it, in particular as a result of the creation or strengthening of a dominant position, shall be declared incompatible with the common market. [Italics added.]*

This standard is called the SIEC test, for the question is whether the concentration is likely (i.e., more likely than not) to 'significantly impede effective competition'. In short, the types of effects that may result in a finding of SIEC include unilateral (also known as 'non-coordinated'), coordinated and conglomerate effects (or a combination of these), as discussed in sections B and C following.

The body of the Merger Regulation is preceded by a number of recitals. Recital 23 states that the Community must place its competition appraisal within the framework of the fundamental objectives of the Union referred to in the Treaty. Recital 15 states:

> (32) Concentrations which, by reason of the limited market share of the undertakings concerned, are not liable to impede effective competition may be presumed to be compatible with the common market. Without prejudice to Articles [101] and [102] of the Treaty, an indication to this effect exists, in particular, where the market share of the undertakings concerned does not exceed 25% either in the common market or in a substantial part of it.

? NOTES AND QUESTIONS

1. Review the substantive standard for proscribing concentrations under the Merger Regulation. In considering whether the merger is compatible with the internal market, is the Commission limited to weighing pro-competitive and anti-competitive aspects of the concentration? If the acquisition impedes effective competition, is it relevant that the acquisition also saves jobs? That it produces productive efficiencies that help the firm compete in world markets? That it creates a European champion that by some measure might make Europe better off? If the acquisition is not likely to harm consumers, is it relevant that it will destroy small and middle-sized firms?
2. US law prohibits mergers 'the effect [of which] may be substantially to lessen competition.'[14] In Europe, this is sometimes called the 'SLC' test. (The UK also has an SLC test.) For the US, there is nothing magic in the words 'substantially to lessen competition'. The inquiry is whether the merger is anti-competitive.

14 Clayton Act, § 7, 15 U.S.C. § 18.

US analysis of mergers of competitors is largely congruent with EU analysis, although US analysts have been more likely to use a robust-market assumption: namely, the assumption that actual or near competitive forces will constrain the merging parties from getting or using market power.

The US does not have one-stop shopping. The US federal merger law may be enforced by the Justice Department or the Federal Trade Commission, by the attorney general of any affected states and by private parties threatened with antitrust injury.[15] In addition, the states that have anti-merger laws may seek to enforce them against mergers with local effects even though interstate commerce is also affected. Aware of the costs of multiple overlapping merger laws, the state attorneys general collaborate on the substantive standard for prohibition, and they invite merging parties to make joint filings with all interested states. Moreover, the state enforcers collaborate with the federal enforcers.

State enforcement has played an important role in the US, particularly in the 1980s, when the federal government's market philosophy resulted in an unusually low level of merger challenges.

Should the US adopt the EU approach of centralized enforcement? Is there a need for multinational cooperation in merger control, as more and more mega-mergers have impacts around the world?

B. The EUMR analytical framework

This section reviews some basic principles, largely of an economic nature, governing merger control assessments, principally from a consumer or efficiency point of view. First, it analyses the possible harmful effects of mergers on competition. Second, it returns to the question of market definition, which is guided by the Commission's Notice on the definition of relevant market and is often a controlling question in merger analysis, and discusses notions of concentration and barriers to entry. Third, it considers the positive effects of mergers and the conditions governing the consideration of efficiencies as countervailing factors. This section then closes with a reflection on the interplay between competitiveness concern and merger analysis.

1. Competition-lessening effects

Concentrations may harm competition, causing output to fall and prices to rise or suppressing incentives to innovate, by creating or entrenching market power or facilitating its exercise. They can do this by one of two main routes: (i) creating or entrenching single-firm power (dominance or other unilateral power, thereby causing unilateral or non-coordinated effects); or (ii) creating or entrenching a tight oligopoly wherein the few remaining firms in a market are likely to behave like collaborators rather than rivals (thereby causing coordinated effects). Other, less prominent, sources of concern include anti-competitive foreclosure (of competitors) resulting from vertical or conglomerate mergers, the former entailing the combination of

15 See *California v. American Stores Co.*, 495 U.S. 271, 110 S.Ct. 1853, 109 L.Ed.2d 240 (1990).

businesses located at different levels in the same value chain and the latter the amalgamation of complementary or closely related activities.

The negative effects (principally higher price and lower output, and chilled incentives to invent)[16] cannot be expected if barriers to entry are low, strong potential competitors are waiting in the wings, smaller firms can easily and quickly expand without rising costs, or big buyers credibly threaten to integrate backwards if their suppliers do not perform competitively. In such cases, the market may regulate itself. The economic forces put pressure on the existing market actors, causing them to be responsive to buyers' needs.

a. Horizontal mergers

Of all mergers, mergers of competitors are most likely to harm competition as a result of their structural effects on the relevant markets. Also, mergers between a leading firm and a most important potential competitor can have the same unilateral or coordinated effects. Potential competitors can exert competitive pressure on prices. Incumbents may hold their prices down so as not to attract their entry. If a dominant firm acquires the most or only important potential competitor, the acquisition removes this competitive check. Also, if the potential entrant would have entered the market on its own and added a dynamic force to an oligopolistic or monopolistic market, the merger would prevent this force from materializing.

The review of horizontal mergers, i.e., between competitors, constitutes the 'bread and butter' of competition authorities' exercise of their merger control prerogatives. Most SIEC situations arise in the context of horizontal mergers as a result of their purely structural effects on competition. Note that the assessment of structural market effects resulting from horizontal mergers is exceptional for competition assessments, which otherwise focus on firms' particular conduct. As noted, concerns typically result from the output and price effects that may result from increased concentration in the relevant markets. Lately, though, the Commission has given more prominence in its assessments to effects on innovation, thereby mirroring the increased importance of innovation as a driver of competition in today's knowledge economy.

Note on harm to innovation

The Commission's Horizontal Merger Guidelines identify a reduction in innovation as one of the possible harmful effects, alongside increases in prices or decreases in output, of the (enhanced) market power that may result from

16 Also, at high levels of concentration, loss of choice.

horizontal mergers.[17] In simple terms, economic debates about the impact of market power on innovation have traditionally been framed as opposing a 'Schumpeter-ian' approach, entailing that less competition leads to more innovation by enabling a greater appropriation of returns on innovation, thereby further fuelling incentives to invest in research and development, and an 'Arrow-ian' approach, associating less competition with reduced incentives to innovate, for competitive pressure and rivalry are the prime engine of innovation and resulting profits. The debates have more or less settled on the idea that competition policy would encourage innovation by keeping markets open and contestable, i.e., competitive, while limiting negative effects on appropriability.

In operational terms, the Horizontal Merger Guidelines warn that 'effective competition may be significantly impeded by a merger between two important innovators, for instance between two companies with "pipeline" products related to a specific product market' and that 'similarly, a firm with a relatively small market share may nevertheless be an important competitive force if it has promising pipeline products' (para. 38). Along these lines, the Commission has originally focused its assessments on the significance of the potential competition associated with ongoing innovation projects and the risk of discontinuation or delay of product development projects or re-orientation of research programs as a result of the concentration in question, primarily—but not only—in the pharmaceutical and medical devices industries (see M.7275—Novartis/GlaxoSmithKline's oncology business; M.7326—Medtronic/Covidien; M.7559—Pfizer/Hospira; M.8401—J&J/Actelion). These cases have typically involved very concentrated markets with high barriers to entry and have included assessments of 'market-to-pipeline' and 'pipeline-to-pipeline' competition under reasonable probabilistic assumptions associated with stages of clinical trials.

The Commission subsequently broadened the scope of innovation assessments in cases involving concentrations in the agrochemical industry. In Dow/DuPont (M.7932), starting from the premise that innovation is a key element of competition between pesticide suppliers, both to improve existing products and to develop new active ingredients, the Commission raised concerns not only about the likely discontinuation of overlapping development efforts but also about the concentration's effects on the parties' overall incentives to continue investing in the development of innovative products in the future, notably in view of the limited number of players

17 Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings, [2004] *O.J.* C 31/3, para. 8 (see https://competition-policy.ec.europa.eu/mergers/legislation/notices-and-guidelines_en, accessed on 9 October 2022). See also the Non-Horizontal Merger Guidelines, para. 10.

active through the entire R&D process from discovery to distribution and even more so, in particular innovation spaces.

Specifically, by means of patent data related to crop protection, the Commission inferred the particular importance of both merging parties as innovators, the high degree of concentration in research for new active ingredients (AIs) and the significant combined share of research for new AIs accounted by the merging parties, notably in selective herbicides and insecticides, i.e., their particular closeness as innovation competitors. Over the course of its in-depth investigation, the Commission also uncovered direct evidence regarding the significant planned cutbacks in the parties' innovation efforts (e.g. in terms of planned R&D inputs, such as R&D spend, number of full-time equivalents (FTEs), etc., and output targets), compared with their pre-merger plans.

This novel approach focused on harm to 'innovation competition' unconnected to a specific product or technology market, as later reproduced in the Bayer/Monsanto case (M.8084), sparked intense debates about legal certainty, predictability and the robustness of the underlying methodological framework. Eventually, both cases were cleared based on a commitment to divest relevant R&D assets, notably DuPont's global R&D organization.

b. *Vertical mergers*

Mergers between buyers and suppliers can also lessen competition, although in many cases, they reshuffle buyer and supplier alliances. Vertical mergers may make it more likely that the firms will deal with each other to the exclusion of or in preference to dealing with others, with the risk of resulting in the foreclosure of upstream ('consumer foreclosure') or downstream (by means of 'input foreclosure') competitors. Often, however, a vertical merger is efficient and does not foreclose unintegrated rivals from access to needed supplies or outlets, raising their costs and pushing up price. The rivals may be able to buy from other suppliers or to supply other buyers, or to integrate vertically by contract or acquisition. But if leading firms in their respective fields merge, if barriers to entry are high, if concentration at the relevant market level is high, and if foreclosure of unintegrated rivals from necessary inputs (including key assets or infrastructure) or outlets threatens to squeeze rivals out of the market or incapacitate them, a vertical merger may increase dominance or facilitate oligopoly behaviour in the relevant market, raising consumer prices.

The Commission's prohibition of GRAIL's acquisition by Illumina in September 2022 illustrates these concerns (see M.10188). The concentration entailed the vertical integration of Illumina, by far the largest supplier of Next-Generation Sequencing ('NGS') systems for genetic and genomic analysis, with GRAIL, a customer of Illumina using NGS systems to develop cancer detection tests. According to the Commission, the transaction would have enabled and incentivized Illumina to foreclose GRAIL's rivals, who are dependent on Illumina's technology, from access to an essential input to develop and market their own test. In particular, Illumina could refuse to supply its NGS systems to GRAIL's rivals, increase the prices, or degrade quality and delay supplies, whereas GRAIL and its rivals are currently engaged in an innovation race to develop and commercialize early cancer detection tests on a market predicted to reach more than EUR 40 billion/ year by 2035 on a global basis. Absent sufficiently effective proposed remedies, the Commission prohibited the transaction, and Illumina appealed. [18]

c. *Conglomerate mergers*

Mergers that are neither horizontal, potential-horizontal nor vertical are called conglomerate mergers. Conglomerate mergers are less likely than horizontal, potential-horizontal or vertical mergers to lessen competition and harm consumers, notably because such harm would typically require engaging in particular types of conducts that may be difficult to predict or may be caught under Article 102 TFEU. In some cases, however, merging partners may be able to use leverage by engaging in tying or bundling strategies to create competition-lessening foreclosures (thereby causing 'conglomerate effects').

In the US today, the law treats anti-competitive effects of conglomerate mergers as negligible and speculative, and conglomerate mergers are substantially discounted as a source of competitive concern. Nonetheless, the antitrust agencies of the Biden administration are currently aggressively attacking acquisitions including start-up acquisitions by the Big Tech gatekeepers that would fill out their eco-systems and preempt challenges. In the EU, enforcers and policymakers are more likely to entertain arguments that the merger may cause conglomerate effects and/or that the merged firm will control the gateway to important inputs or outlets. This has been the case in some prominent decisions of the past and has become a concern again in recent years due to the emergence of Big Tech companies and the creation of integrated digital eco-systems.

The review of Google's acquisition of Fitbit in 2020 provides a good illustration of that recent trend (M.9660). Fitbit was a relatively small player

18 A challenge to the same merger is pending before the US Federal Trade Commission. The FTC administrative law judge found the merger not anticompetitive, and the matter is pending before the Commission at this writing.

in Europe in an otherwise fast-growing smartwatch segment in competition with the likes of Apple, Garmin and Samsung. The merger control assessment of the transaction focused on the complementary activities of Google and Fitbit, in particular on: (i) Google's access to and use of health and fitness data collected via Fitbit's wearable devices with potential effects on online advertising markets due to the increase in the amount of data Google could use for the personalization of ads; (ii) Google's ability and incentive to foreclose rivals in the nascent European digital healthcare space by restricting access to Fitbit health and fitness data through a Web Application Programming Interface ('API'); and (iii) the interoperability of rivals' wearable devices with Google's Android operating system for smartphones. To address these concerns, Google offered a range of commitments; aside from guarantees of rivals' continued access to Fitbit's Web API and Android's APIs allowing interoperability, Google also committed to store Fitbit's user data in a 'data silo' kept separate from any other Google data used for advertising.

Note that in practice, certain concentrations may entail both horizontal and non-horizontal, i.e., vertical or conglomerate, effects depending on the relevant markets concerned. Likewise, horizontal effects in the form of price increases or output limitations in markets for intermediary products can generate vertical input foreclosure effects, while an incentive to foreclose downstream rivals can be informative of the likely scope of upstream horizontal effects.[19]

2. Market definition, concentration and barriers to entry

a. Market definition

Market definition is the crucial first step in merger analysis, particularly where the concern is that merging competitors will coordinate their behaviour and thus, act like a cartel. Chapter 3 described the methodologies used to define markets, treating a market as an area in which if there were a single seller, that firm would have market power; it would typically be able to raise the price of its product substantially and profitably for a significant period of time without fear that too many of its customers would shift to another product.

The EU General Court restated the relevant parameters governing market definition in three recent judgements rendered on appeals against Commission prohibition decisions involving, respectively, the

19 For a discussion, see Case T-251/19, *Wieland-Werke/Commission*, EU:T:2022:296, paras. 84–88.

proposed creation of a steel production joint venture between Tata Steel and ThyssenKrupp (M.8713), the proposed acquisition by Wieland of Aurubis Rolled Products and Aurubis' stake in Schwermetall in the copper sector (M.8900), and the proposed takeover of Cemex's cement production assets in Croatia by HeidelbergCement and Schwenk (M.7878).

In Tata/Thyssen, the court restated the principles of the Market Definition Notice and emphasized that in assessing substitution effects, 'the Commission is not bound by any test when determining whether the products concerned may be substitutable and, therefore, it retains the right to choose from that range of evidence whatever it considers the most appropriate in each individual case'.[20] Thus, 'the Commission [is] not required to apply a SSNIP test …, although that type of economic test is indeed a recognised method for defining the market at issue, … [but it] may also take into account other tools for the purposes of defining the relevant market, such as market studies or an assessment of customers' and other competitors' points of view'.[21]

In the Wieland/Aurubis and Cemex Croatia cases, the court emphasized that the definition of relevant product and geographic markets, respectively, does not preclude the possibility of identifying different competitive dynamics across particular segments within said markets:

> 40 …, the existence of an overall market does not affect the possibility of identifying different competitive dynamics in some market segments. Only such a segmentation, which seeks to account for the different competitive dynamics actually at play on the market, is able to respond to the main objective of defining the relevant market for the purposes of EU competition law, in both its product and geographic dimension, which, as stated in paragraph 2 of the Notice on the definition of relevant market, is to identify in a systematic way the competitive constraints that the undertakings concerned face and to determine those actual competitors capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is thus the proper definition of the relevant market, in both its product and geographic dimension, that allows for the effects on competition of the notified concentration to be evaluated in the most rational way possible. The Commission must thus take account of the overall economic context so as to make it possible to assess the actual economic power of the undertakings in

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20 Case T-584/19, *thyssenkrupp/Commission*; EU:T:2022:386, para. 75 (appeal pending before the ECJ under reference C-581/22 P).

21 Idem, para. 76. See also para. 128: in establishing substitution effects, 'the Commission follows an open approach to empirical evidence, aimed at making an effective use of all available information which may be relevant in individual cases'.

> question and the market power of the new entity that will result from the concentration transaction.[22]
>
> 366 …, the concept of a significant impediment to effective competition does not mean that all parts of the [relevant geographic market] must be affected by that impediment equally. Contrary to what the applicants implicitly seem to claim …, the Commission did not find that there was a significant impediment to effective competition in only one part of a geographically differentiated market, in other parts of which there were no effects, or only insignificant effects, on competition. As the Commission explained, due to variations in the conditions in the [areas corresponding to the relevant geographic market], the significant impediment to effective competition was more extensive in the part of those areas corresponding to [a subset of the relevant geographic market], but it nevertheless affected the entire territory of those areas.[23]

To illustrate the concepts governing market definition, consider Volvo's plan to acquire control of Scania back in 2000 (M.1672). Both firms were important Swedish truck makers. Neither made light trucks, and Scania had only a small position in medium trucks. Both were active in Europe and the world in sales of heavy trucks. In heavy trucks, they were particularly strong in Sweden and also in Norway, Finland and Ireland. The merged firm would have held 31% of all heavy trucks in the European Economic Area ('EEA'). DaimlerChrysler was the number two firm with about 20%. The merged firm would have held 90% of Swedish sales and 50% of Irish sales. The two merging firms were the closest competitors to one another. Servicing contracts generally were valid only in the area within which the vehicle was sold.

Was there a product market of heavy trucks (more than 16 tons)? Was the geographic market national? European? Worldwide? The Commission found a heavy truck market. Heavy trucks had a distinctive technical configuration. Engines and axles on heavy trucks were more sophisticated and more durable, which are qualities necessary for transporting heavy loads over long distances. Heavy trucks are produced from different production lines than lighter trucks, and they appeal to different groups of customers. Therefore, competition from other (non-heavy) trucks was not a sufficiently good constraint to hold prices down and to incentivize responsive performance.

Moreover, the Commission found that the geographic markets were national. The Commission observed differences among nations in purchasing habits, technical requirements, price levels and market shares. For

22 T-251/19, *Wieland-Werke/Commission*, EU:T:2022:296.

23 Case T-380/17, *Heidelberg Cement and Schwenk Zement/Commission*, EU:T:2020:471.

example, prices were 10% to 20% higher in Sweden than in Denmark or Norway, and the price differentials did not lead to significant cross-border trade. Sales normally included a local service package that tended to attract local buyers to local sellers, and purchasing was normally done on a national basis. Do you agree with the Commission's geographic market definition? Do you need more information? What would you like to know?[24]

A crucial product market definition question also arose in the case of the planned merger of the New York Stock Exchange Euronext and the Deutsche Börse (M.6166). The parties would have had a near monopoly of exchange-traded European financial derivatives; but if the market included over-the-counter derivatives, the firms' shares would be much smaller. The Commission rejected the parties' argument that over-the-counter derivatives were a good substitute and thus provided a check against exercise of market power, and it prohibited the merger.[25]

After defining the relevant market, the analyst normally counts sales or capacity of each firm in the market and assigns a market share to each. There are two accepted frameworks for counting what is in the market. One is the snapshot method—to count what is actually there; i.e., to record who sells/supplies how much of the relevant product/service. The other is the method employed both by the Commission Notice and by the 2010 US Federal Agency Merger Guidelines: to incorporate, as if already in the market, the goods that would quickly flow into the market if a hypothetical monopolist should try to raise price. The latter method incorporates the near potential competition. Whether or not near potential competition is incorporated directly into the market, it is a positive force that should be taken into account.

b. *Market shares and concentration ratios*

Next, after defining the relevant markets, one usually determines the market position of the parties and their competitors and measures concentration. Market position is typically approximated by means of market shares. Market shares can be calculated on the basis of different metrics, such as

24 See the prohibition decision adopted by the Commission on 15 March 2000 in Case COMP/M.1672—*Volvo/Scania*.

25 See the prohibition decision adopted by the Commission on 1 February 2012 in Case COMP/M.6166—*Deutsche Börse/NYSE Euronext* (as upheld in Case T-175/12, *Deutsche Börse v. Commission*, EU:T:2015:148).

volume, value, capacity, number of users, etc., depending on the specifics of the case and of the industry. A combination of different market share cuts is often more informative. Depending on the sensitivity of the case and the availability and reliability of available data, determining market shares can require a full market reconstruction exercise (i.e., asking all market participants for their individual sales, capacity figures, number of users, etc., and aggregating them) or rely on the parties' best estimates, subject to cross-checks with public data or competitors' estimates. Importantly, the relevance of market shares as a proxy for market power needs to be ascertained carefully in view of the particularities of the relevant markets, and in a dynamic perspective looking at evolutions over a number of years, typically 3 years (as a start).

In turn, there are two recognized ways of stating the measurement of market concentration. One is the use of *n*-firm concentration ratios; e.g., the top two firms account for *x*% of the market; the top four firms account for *y*% of the market. The second is the use of the Herfindahl–Hirschman Index ('HHI'). To calculate the HHI, one lists each firm in the market and its market share, squares each market share, and then adds the squares of the shares. The sum of the squares is the HHI index number, and the delta between the pre- and post-merger HHI indexes captures the increased market concentration. Under each methodology, the key figures are those that represent the increase in concentration and the post-merger concentration. As a rule of thumb, a market is likely to be considered concentrated if the three leading firms have 75% or more of the market, or the market has an HHI of 2000 or more. The bare figures greatly overgeneralize facts and remain static indicators, whereas the analysis should remain fact and context specific.

As an illustration of the need to look beyond market shares and concentration ratios to establish market power, and the link with market definition, consider the EU General Court's discussion of market shares in the appeal brought by Cisco Systems against the Commission decision clearing the acquisition of Skype by Microsoft on the basis of an assessment of the transaction's effects on the (internet) consumer and enterprise communications markets, as well as the combination of their capabilities (M.6281).[26]

26 Case T-79/12, *Cisco Systems and Messagenet/Commission*, EU:T:2013:635.

CASE

Cisco Systems and Messagenet/Commission (Case T-79/12) ('Microsoft/Skype')

[The Commission cleared the acquisition of Skype, then a prevalent internet communications platform enabling instant messaging, voice and video communication, by Microsoft in October 2011. Microsoft, with its Windows Live Messenger service, overlapped with Skype in relation to consumer communications, but the Commission found no competition concerns given the growing number of other players active on that market, including Google. Conversely, Skype was found to have a limited market presence in enterprise communications, where Microsoft was active with its Lync service. The Commission also inquired into possible conglomerate effects but found no incentive for Microsoft to degrade Skype's interoperability with competing services or to tie Skype with the Windows operating system. The Commission further ruled out negative effects on competition resulting from Microsoft's attempt to leverage Skype's consumer base onto the markets for enterprise communications services.]

65 With respect to the very high market share on the narrow market, it is apparent from paragraph 17 of the Guidelines on horizontal mergers and from the case-law to which that paragraph refers that market shares of 50% or more are liable to constitute serious evidence of the existence of a dominant position. However, it should be made clear that market shares may only be used as indicia of competition concerns to the extent that the market to which those shares relate has been defined beforehand. The same is true of the HHI to which the applicants also refer.

66 In the present case, the Commission confined itself to differentiating consumer communications from enterprise communications. However, it did not adopt a position on whether it was necessary to identify, within the category of consumer communications, the existence of narrower markets defined according to the functionality, platform or operating system of those communications, since it found that the notified concentration did not give rise to competition concerns even on the narrowest markets. The Commission found, inter alia, that, even on the basis of the narrow market, the new entity would continue to face significant competitive pressure.

67 The applicants therefore base their complaint relating to market power held by the new entity on an incorrect assumption, in so far as the Commission did not define the existence of a specific market for consumer video communications on Windows-based PCs. The Commission did not therefore establish in the contested decision that operators present on the narrow market could act independently of the competitive pressure from other means of consumer communications, such as services offered on other platforms or other operating systems. In addition, the applicants did not themselves submit any evidence or study to

CASE *(continued)*

support the conclusion of the existence of such a narrow market. By contrast, they merely criticised the factors put forward in the contested decision in order to qualify the significance of market shares. That criticism is moreover unfounded.

68 First, as regards the figures relating to the use of WLM [for Windows Live Messenger, the then Microsoft consumer communication service], it is sufficient to observe that the figures mentioned in the contested decision show a significant fluctuation of WLM's market share over a relatively short period of seven months. Irrespective of whether the market share losses benefited Skype or other providers of video communications services, the fact remains that those figures demonstrate the instability of market shares on the narrow market, on which the Commission relied solely for the purposes of its analysis.

69 Moreover, and above all, as highlighted by the Commission in the contested decision and in the defence as well as by the intervener, the consumer communications sector is a recent and fast-growing sector which is characterised by short innovation cycles in which large market shares may turn out to be ephemeral. In such a dynamic context, high market shares are not necessarily indicative of market power and, therefore, of lasting damage to competition which Regulation No 139/2004 seeks to prevent.

70 Second, although PCs remain the most used platform for consumer video communications, a substantial and growing share of new demand for those services originates from users of tablets and smartphones, sales of those appliances having overtaken those of PCs in Western Europe according to … the contested decision. The Commission and the intervener rightly draw attention to the extent of that growth, which the applicants do not contest, because any attempt by the new entity to exert any market power on the narrow market would risk reinforcing that trend to the detriment of the new entity. The new entity is less present on those other platforms and faces strong competition from other operators, in particular Apple and Google.

71 Third, the intervener is also right in observing that the increasing use of tablets and smartphones for video calls means that a growing number of users expect that it should be possible to make those calls from all types of platform. WLM's weak presence on tablets and smartphones does not allow it to respond to that new demand and therefore reduces its commercial attractiveness. The Commission was therefore right to refer to that limited presence in order to qualify the significance of the high market shares observed on the narrow market which it used as a starting point for its competition analysis in the contested decision.

72 Fourth, the applicants' argument that Facebook would not be an effective competitor of the merged entity cannot be accepted. The only factor that they put forward in support of that argument is that Facebook is a licensee and strategic ally of Skype, which cannot use Skype's software to offer services in competition with the paid services of Skype, called SkypeOut,

CASE *(continued)*

which make it possible to, inter alia, call fixed or mobile telephone numbers and to conduct video calls involving more than two persons. However, they do not submit that that agreement prevents Facebook from offering its video communications services to consumers who might decide to switch away from the new entity if it decided to exert any market power. In this respect, the Commission and the intervener rightly maintain that the use of the same technology by two undertakings does not necessarily affect their competitive relationship.

73 Fifth, contrary to the applicants' submission, the fact that the services are offered free of charge is a relevant factor in assessing the market power of the new entity. In so far as users expect to receive consumer communications services free of charge, the potential for the new entity to set its pricing policy freely is significantly restricted. The Commission rightly observes that any attempt to make users pay would run the risk of reducing the attractiveness of those services and of encouraging users to switch to other providers continuing to offer their services free of charge. Likewise, if the new entity decided to stop innovating in terms of its communications services, it would also run the risk of reducing their attractiveness given the level of innovation on the market in question. It should be borne in mind in this respect that there are no technical or economic constraints which might prevent users from switching providers.

74 It follows that the very high market shares and very high degree of concentration on the narrow market, to which the Commission referred merely as a basis for its analysis, are not indicative of a degree of market power which would enable the new entity to significantly impede effective competition in the internal market.

? NOTES AND QUESTIONS

1. The Commission's assessment of the transaction was to a large extent determined by the definition of two distinct markets for (internet) consumer and enterprise communication services. What do you think of that distinction? What could be the relevant factors to play in favour of or against such a distinction? Consider the alternative scenarios of either one combined (internet) communication services market (including consumer and enterprise applications) or of narrower markets for, e.g., voice versus video communication services. In video consumer communication services, the parties' combined market shares was very significant, above 80%.
2. The General Court dismissed the relevance of market shares in assessing market power in (internet) communication services because it was deemed to be a 'recent and fast-growing sector which is characterised by short innovation cycles'. What do you think of that qualification? Is it accurate? Should it apply across digital markets and related assessments, or not? Should the General Court and the Commission beforehand have considered a different indicator than share in the relevant markets to assess market power and the likely effects of Skype's acquisition by Microsoft? Does it matter that Microsoft was a large conglomerate active throughout the value chain, from operating system to productivity applications? Should the Commission

have gone beyond market definition and considered cross-market effects within the Microsoft 'eco-system'?

3. Part of the Commission's assessment was premised on the fact that Skype was not an enterprise product. And then, Skype became a prevalent enterprise product as 'Skype-for-Business' before being gradually replaced by Microsoft Teams. What does this say about the robustness of merger control assessments? Note that merger control is prospective in nature and must be carried out under reasonable conditions of predictability. But, should digital markets be assessed under different conditions, or should acquisitions by large digital players be considered according to different standards? Reflect again on the notion of cross-market effects and 'eco-system', this time in light of the value creation that can also result from product integration.
4. The Commission relied heavily on the Microsoft/Skype precedent when authorizing Facebook's acquisition of WhatsApp a few months later (M.7217), including on findings not excerpted earlier about, e.g., the insignificance of network effects in 'a fast-moving sector, where customers' switching costs and barriers to entry/expansion are low' (para. 132). That latter decision was very much criticized in retrospect as testifying to a short-sighted appreciation of the dynamics of digital markets. Years later, the US Federal Trade Commission sued Facebook under monopolization grounds and sought to unwind that transaction.

c. Barriers to entry and expansion

Subsequently, barriers and other hurdles to entry and expansion are typically assessed under reasonable conditions of predictability. Even if a market is concentrated, the threat of entry may constitute a significant competitive constraint if entry at an efficient scale can be easily achieved within a reasonably short period of time determined in view of the business cycles and dynamics of the relevant markets and of the capabilities of potential entrants (typically 2 years).

Thus, low barriers to entry can be considered a countervailing factor to an increase in market concentration and can also support the significance of other countervailing factors such as customers' buyer power (notably, their ability to sponsor entry). In contrast, high barriers to entry and expansion are typically used as an indicator supporting a finding of incumbents' market power. However, the level of entry barriers is also relevant to the assessment of a range of possible theories of harm. For example, mergers can by themselves raise barriers to entry and thereby contribute to entrenching market power. In the digitization context, the Commission has assessed in a number of cases whether the combination of datasets under the ownership of one player may have a foreclosing effect for the merging parties' competitors by harming their ability to innovate and improve their products and services (see, e.g., M.8124—Microsoft/LinkedIn, M.8788—Apple/Shazam and M.9660—Google/Fitbit).

Mergers can also entail the acquisition of a potential competitor by an incumbent, and the level of entry barriers can be determinative of the significance of that (loss of) potential competition (see also the earlier note on competition and innovation). In Wabtec/Faiveley (M.7801), for example, the Commission investigated Wabtec's plan to develop a complete break system for rail and challenge the two incumbents Knorr-Bremse and Faiveley. However, the in-depth investigation revealed that barriers to entry were likely too high for Wabtec to effectively enter and that the technical features of its future product made it unsuitable for use in Europe within a reasonable time frame, estimated at 4 to 6 years in view of the characteristics of the industry.

3. Countervailing efficiencies

Mergers may also produce efficiencies; they may increase competition; and mergers between firms from different Member States may increase market integration. A merger may create synergies, as vertical mergers are especially likely to do. Also, they may yield economies of scope as well as scale, as is often the case for mergers between firms that produce complementary products distributed through the same distribution channels. If the market is already competitive, market forces are likely to cause cost savings to be passed on to consumers. In contrast, if the market is monopolistic or oligopolistic, the merging partners are more likely to retain most of the savings and possibly raise prices as well.

Efficiencies may be relevant in two quite different ways. First, if the merger produces cost savings, and the market is competitive (the firms behave rivalrously), the cost savings may be passed on to consumers, and the cost-saving strategies may be mimicked by competitors. These effects are directly relevant to whether competition is helped or hurt by the merger. Second, in some cases, even where a merger lessens competitive rivalry, cost savings may neutralize the price effect facing consumers, or in any event, the producers' gain may be greater than the consumers' loss. This latter aspect is an *efficiency defence*.

To be able to factor efficiency claims in its merger control assessment and be in a position to reach the conclusion that as a consequence of efficiencies, there are no grounds for declaring a merger anti-competitive, the Commission has set forth three cumulative conditions, namely, that these efficiencies have to benefit consumers, be merger-specific and be verifiable. This framework of analysis was endorsed by the EU General Court in *Deutsche Börse/Commission* (T-175/12),[27] as follows:

27 EU:T:2015/148.

> 361 …, first of all, …, it is incumbent upon the parties to the concentration to provide in due time all the relevant information necessary to demonstrate that the claimed efficiencies are merger-specific and likely to be realised. Similarly, it is for the parties to the concentration to show that the efficiencies are likely to counteract any adverse effects on competition that might otherwise result from the merger, and therefore benefit consumers.
>
> 362 It follows that the burden of proving that the claimed efficiencies are verifiable falls on the parties to the concentration. That allocation of the burden of proof can be considered to be objectively justified since, first, it is those parties which hold the relevant information in that regard and, secondly, the argument regarding efficiencies seeks to counteract the Commission's conclusions that the proposed merger would probably significantly impede effective competition by creating a dominant position.
>
> 363 Next, …, efficiencies have to be 'verifiable' such that the Commission can be reasonably certain that the efficiencies are 'likely' to materialise, and be substantial enough to counteract a merger's potential harm to consumers. … the more 'precise and convincing' the efficiency claims are, the better the Commission can evaluate the claims. …, where reasonably possible, efficiencies and the resulting benefit to consumers should be 'quantified' and …, when the necessary data are not available to allow for a precise quantitative analysis, it must be possible to foresee a 'clearly identifiable' positive impact on consumers, 'not a marginal one'. The condition relating to the verifiability of efficiencies does not therefore require the notifying party to provide data capable of being independently verified by a third party or documents, dated pre-merger, which serve to objectively and independently assess the scope for efficiency gains generated by the acquisition.

Aside from counteracting the adverse effects on competition that the concentration might otherwise generate, assessing the nature and scope of efficiency claims can also be a useful way to refine the understanding of the rationale for the transaction and thus to orient the merger control assessment, as well as to guide the design of possible remedies.

4. Competitiveness considerations

It is possible for a merger to yield efficiencies and increase the merged firm's competitiveness in world markets and at the same time, to lessen competition in the domestic market. Despite world competition, domestic competition may be lessened if that local market is concentrated, and the merged firm has (for example) locational or cultural advantages, or the home market maintains barriers to foreign competition. To address the situation in which these two effects (efficiency in global competition and power at home) co-exist, the regulating nation must make a policy judgement as to which costs it wishes to avoid and which benefits it wishes to attain.

US law holds that a merger that lessens competition in the US is illegal regardless of the claim that the merger helps the firm compete in global markets. The claim that a merger that increases market power in the US may enhance global competitiveness is regarded with scepticism and in fact, is rarely substantiated. In contemplating this trade-off for the EU, policymakers typically do not consider the welfare of European consumers versus gains from greater economic strength abroad. However, as internal and European barriers have been dismantled, imports from within and outside the EU have received increased attention, for without barriers to entry, consumers are less likely to be subject to exploitation by local producers, in particular for traded and non-perishable goods (that is, those that move most freely).

In a context of renewed attention to issues of economic sovereignty and industrial policy, partly prompted by the rise of Chinese companies as increasingly global competitors, the tension between competition and competitiveness was revived in 2018 on the occasion of the proposed merger between Siemens' and Alstom's mobility businesses, which was eventually prohibited by the Commission, whereas it was championed by Germany and France (M.8677). The transaction brought together the two largest EU suppliers of various types of rolling stock and railway and metro signalling systems, with leading positions globally. At the end of its in-depth investigation, the Commission found that the proposed transaction would have created a dominant position for very high-speed rolling stock (think TGV and ICE trains), since the parties were the two largest manufacturers of this type of trains in the EU and accounted for a very high share of the world market (which excluded South Korea, Japan and China PRC, as these are not open to competition). Likewise, it would have created a strong market leader in various markets for signalling systems. As part of its investigation, the Commission found that entry from China was 'highly unlikely' to represent a competitive constraint on the merging parties in a foreseeable future with respect to either very high-speed trains or signalling systems. No efficiency claims were formulated, and the proposed remedies were neither sufficient nor effective.

The Commission decision prompted the French and German Ministers of Economic Affairs to issue a manifesto 'for a European industrial policy fit for the 21st century',[28] calling for 'existing [competition] rules to be revised to be able to adequately take into account industrial policy considerations in order to enable European companies to successfully compete on the world stage'. Specifically, the manifesto contained three main proposals, as follows: (i) '[t]aking into greater consideration the state-control of and subsidies for undertakings within the framework of merger control'; (ii) '[u]pdating current merger guidelines to take greater account of competition at the global level, potential future competition and the time frame when it comes to looking ahead to the development of competition to give the European Commission more flexibility when assessing relevant markets', with a view to 'enabl[ing] a more dynamic and long-term approach to competition, at the global scale'; and (iii) '[c]onsider whether a right of appeal of the Council which could ultimately override Commission decisions could be appropriate in well-defined cases, subject to strict conditions'. The first proposal has been largely taken up in the upcoming regulation on foreign subsidies distorting the internal market (see Chapter 7), and the second proposal is currently ongoing by means of the revision of the notice on market definition, while the third proposal has not received much support.

Reflect on the Siemens/Alstom saga: is there a genuine tension between competition policy and competitiveness considerations? Are mergers and increased concentration good industrial policy in general? How would you reconcile the rationale underlying merger control and industrial policies?

C. SIEC assessment under the EUMR

As noted, the substantive standard applicable under the EUMR is that of a 'significant impediment to effective competition' or 'SIEC', which can be established by reference to a range of effects depending on the scope of the parties' respective activities. In short, a merger control analysis aims to assess the likely effects arising from the loss of competition between the parties, including its knock-on effects on competition by third parties, and/or the ability and incentives of the combined entity resulting from the concentration to engage in foreclosure strategies, as well as the likely effects thereof. The range of effects capable of resulting from a concentration is usually captured by the notions of unilateral (also known as 'non-coordinated'), coordinated and conglomerate effects (or a combination of these).

28 A Franco-German Manifesto for a European industrial policy fit for the 21st Century, available at: www.bmwk.de (accessed 9 October 2022).

According to the Court of Justice:

> [t]he Commission's review of concentrations calls for a prospective analysis which consists in an examination of how a concentration might alter the factors determining the state of competition on a given market in order to establish whether it would give rise to a serious impediment to effective competition. Such an analysis makes it necessary to envisage various chains of cause and effect with a view to ascertaining which of them are the most likely.[29]

The onus is on the Commission to produce convincing evidence as to the likelihood of those chains of cause and effect, and in that regard, the Commission can rely on the principle of the unfettered evaluation of the evidence as well as on 'a measure of discretion with regard to economic matters.'[30]

This section illustrates further and discusses key precedents that framed the assessment of the different types of effects and most common theories of harm relied upon in support of a finding of SIEC under the EU Merger Regulation.

1. Mergers creating or strengthening dominance

Article 2 EUMR states that a SIEC may result 'in particular' from the creation or strengthening of a dominant position. The reason is historical: the applicable substantive standard under the original Merger Regulation of 1989 was the creation or strengthening of a dominant position, echoing the wording of Article 102 TFEU, which thus guided the first 15 years of merger control enforcement at EU level. The restatement of the EUMR in 2004 aimed to broaden the substantive standard to encompass, beyond the concept of dominance, the anti-competitive effects resulting from the unilateral (or non-coordinated) conduct of undertakings even absent dominance on the relevant market(s).[31] A SIEC thus now includes but extends 'beyond the concept of dominance'.

In turn, as the EU General Court recently clarified, 'the concepts of the creation or strengthening of a dominant position and of the existence of non-coordinated horizontal effects due to the elimination of a significant

29 See, e.g., for a recent restatement, Case T-584/19, thyssenkrupp/Commission, EU:T:2022:386, para. 278 (appeal pending before the ECJ under reference C-581/22 P).

30 Idem, para. 277.

31 See, in particular, recital 25 EUMR.

competitive constraint on an oligopolistic market are perfectly compatible and are not mutually exclusive'.[32] To the contrary, 'both concepts take account of the structure of the markets concerned and the effects of the concentration on competition in those markets', and 'a market may be dominated by an individual undertaking and at the same time be oligopolistic', with the result that the Commission might find 'both an SIEC resulting from the creation of a dominant position and an SIEC resulting from non-coordinated horizontal effects in oligopolistic markets'.[33]

This section illustrates the historical and continuing relevance of the notion of creation and strengthening of dominance for the purpose of establishing a SIEC.

a. An early case: Boeing/McDonnell Douglas (M.877)

Boeing was the largest manufacturer of commercial jet aircraft in the world, accounting for about 64% of world market sales. Its only competitors were McDonnell Douglas, with about 5%, and Airbus Industrie, with about 30%. Airbus was (and to a large extent remains) a consortium of manufacturers in Britain, France, Germany and Spain. Those countries had helped to finance Airbus.

Boeing and McDonnell Douglas were US companies and had no production assets in Europe, although they regularly made sales there. McDonnell Douglas also produced military jets, and its technology portfolio included patents from research and development undertaken with US government financing. In the commercial jet market, McDonnell Douglas had failed to invest in important new-generation developments and was facing financial and competitive difficulties. Its market share was withering. Boeing, meanwhile, had recently concluded 20-year exclusive supply agreements with the three big American airlines that were the most important launch customers for new-generation aircraft—Delta, American and Continental. The exclusive supply agreements represented about 11% of all world purchases of big commercial jets.

Commercial jet airplanes are very complex and expensive. An order from an airline is typically worth billions of dollars. In view of the fact that each sale

32 Case T-584/19, thyssenkrupp/Commission, EU:T:2022:386, para. 562 (appeal pending before the ECJ under reference C-581/22 P).

33 Idem.

to an airline is so significant, Airbus and Boeing were fierce competitors for sales around the world.

Boeing and McDonnell Douglas filed pre-merger notifications in the US and in the EU. European Competition Commissioner Karel Van Miert immediately expressed concerns about the merger and the exclusive agreements. On the US side, the Federal Trade Commission ('FTC') opened an investigation. The European Commission and the FTC made notifications to one another under the 1991 agreement, and the European and American officials shared their perspectives. They sharply disagreed on the analysis of anti-competitive effects.

Early on, politicians entered the fray, with Europeans declaring that the merger was blatantly anti-competitive and seriously harmful to competition and to Airbus, and Americans declaring that the merger was good for the American economy. Laura D'Andrea Tyson, former head of the Council of Economic Advisors, was quoted in the *Washington Post* as saying that this merger was good for America 'even if consumers of airplane seats are somewhat worse off.'[34] European Competition Commissioner Van Miert threatened that if the merger were consummated without European approval, the European Commission would impose prohibitive fines on Boeing and might seize Boeing planes flying into the EU.

On 1 July 1997, the US FTC issued a statement announcing the closing of its investigation.

Matter of Boeing Company/McDonnell Douglas Corporation

US Federal Trade Commission, Statement[35]

> After an extensive and exhaustive investigation, the Federal Trade Commission has decided to close the investigation of The Boeing Company's proposed acquisition of McDonnell Douglas Corporation. For reasons discussed below, we have concluded that the acquisition would not substantially lessen competition or tend to create a monopoly in either defence or commercial aircraft markets.
>
> [First, the FTC disclaims any attempt to support a national champion, which, it states, it has no power to do.]
>
> On its face, the proposed merger appears to raise serious antitrust concerns. The transaction involves the acquisition by Boeing, a company that accounts

34 *Washington Post*, 4 May 1997, p. H6.
35 (1 July 1997).

> for roughly 60% of the sales of large commercial aircraft, of a non-failing direct competitor in a market in which there is only one other significant rival, Airbus Industrie, and extremely high barriers to entry. The merger would also combine two firms in the U.S. defense industry that develop fighter aircraft and other defense products. Nevertheless, for reasons we will now discuss, we do not find that this merger will substantially lessen competition in any relevant market.
>
> * * *
>
> The evidence collected during the staff investigation, including the virtually unanimous testimony of 40 airlines that staff interviewed, revealed that McDonnell Douglas's commercial aircraft division, Douglas Aircraft Company, can no longer exert a competitive influence in the worldwide market for commercial aircraft. Over the past several decades, McDonnell Douglas has not invested at nearly the rate of its competitors in new product lines, production facilities, company infrastructure, or research and development. As a result, Douglas Aircraft's product line is not only very limited, but lacks the state of the art technology and performance characteristics that Boeing and Airbus have developed. Moreover, Douglas Aircraft's line of aircraft do not have common features such as cockpit design or engine type, and thus cannot generate valuable efficiencies in interchangeable spare parts and pilot training that an airline may obtain from a family of aircraft, such as Boeing's 737 family or Airbus's A-320 family.
>
> In short, the staff investigation revealed that the failure to improve the technology and efficiency of its commercial aircraft products has led to a deterioration of Douglas Aircraft's product line to the point that the vast majority of airlines will no longer consider purchasing Douglas aircraft and that the company is no longer in a position to influence significantly the competitive dynamics of the commercial aircraft market.
>
> * * *

Procedurally, the closing of the investigation was not a judicial finding that the merger was lawful under US law. Unlike a decision in Europe, an initial US decision not to challenge a merger does not preclude subsequent challenge. It remained theoretically possible for the merger to be tested in the US courts, e.g., in a private action by Airbus or in a suit by a state attorney general, if not by the Federal government. Nonetheless, immediately after the FTC closed its investigation, the US government (the Clinton administration) began to take an active political role in defending the merger to Europe. Key White House officials, including the President of the US, argued to key European officials, including the President of the European

Commission, that the merger was not anti-competitive, that it was important to the defence interests of the United States (because the military assets of McDonnell Douglas would be best preserved in the hands of Boeing) and to employment in the US, and that the US was 'considering how to retaliate against Europe if it makes good on its threat to try and undermine the merger of [the] U.S. aerospace giants ....'[36] Reportedly, the administration officials were considering imposing tariffs on European planes, limiting flights between the US and France (the most adamant objector to the merger) and filing a protest with the World Trade Organization in view of European subsidies to Airbus.

Meanwhile, Boeing was negotiating with the European Commission, and at the 11th hour it agreed to conditions acceptable to the Commission. The conditions were not acceptable to France, however, which maintained that only a prohibition would cure the essential problems. On 30 July 1997, the European Commission issued its decision in *Boeing/McDonnell Douglas*.[37]

The Commission concluded that Boeing held a dominant position and that the acquisition would strengthen its dominant position. It was expected to do so by, among other things, increasing Boeing's market share of large commercial aircraft from 64% to 70%, taking one of Boeing's only two remaining competitors off the market, further foreclosing the market, increasing Boeing's ability to entice airlines into exclusivity deals with it, since it would be able to offer the advantages of a larger family of planes, and giving Boeing access to US government-funded research and development and intellectual property acquired from military and space functions of McDonnell Douglas. On the basis of significant commitments by Boeing, the Commission cleared the merger.

Boeing undertook, among other things: not to enforce its exclusivity rights under the agreements with American, Delta and Continental; not to enter into exclusive agreements until 2007; not to 'use its privileged access to the existing fleet in service of DAC [Douglas Aircraft Corporation] aircraft in order to leverage its opportunities for persuading current DAC operators to purchase Boeing aircraft'; to license to competitors upon request all US-funded patents usable in the manufacture or sale of commercial jet aircraft; and not to leverage its relationship with suppliers to refuse to deal with Boeing's competitors or to grant preferential treatment to Boeing.

36 *Washington Post*, 17 July 1997, p. C1.
37 Commission Decision of 30 July 1997 in Case COMP/M.877—*Boeing/McDonnell Douglas*.

b. Contemporary mergers to dominance

To date, the creation or strengthening of a dominant position has remained an important source of concerns under the EUMR and the most straightforward way to establish a SIEC absent countervailing factors.

In 2012, for example, the Commission blocked the merger of Deutsche Börse and the NYSE Euronext on grounds of 'dominance or near monopoly position' in various relevant markets (M.6166, paras. 1022, 1070, 1131, 1483). 'Given that it is unlikely that a timely entry would occur and sufficiently constrain the merged entity in its market behaviour, and in the absence of countervailing buyer power', the Commission found that in markets for the trading of exchange-traded European financial derivatives, the merger would have led to higher fees, less product innovation, service offerings, and responsiveness to users who 'de facto [would] have no choice of trading platform for these products'. Moreover, each partner had its own clearing house, and the resulting single house would have raised the already high barriers to entry. Regarding efficiencies, the parties argued that the merger would produce greater liquidity and lower trading costs, but the Commission found that these benefits were overstated and in any event, the proof of efficiencies did not hurdle the bar, which is set quite high where the impediment to competition is so substantial.

Likewise, and earlier, the Commission prohibited Ryanair's hostile takeover of Aer Lingus (M.4439). The General Court affirmed.[38] The merger would have produced overlaps on more than 30 routes from and to Ireland; it would have combined the two largest airlines at the Dublin airport, where the firms would have had 80% of European short-haul traffic; and the two airlines were the closest of competitors—both, no frills. Neither the threat of entry nor the claimed efficiencies were sufficient to offset the anti-competitive effects; and besides, the claimed efficiencies were not verifiable and had to be rejected for this reason too.

In January 2022, the Commission prohibited the acquisition of Daewoo's shipbuilding activities by Hyundai Heavy Industries because the merger between the two South Korean shipbuilders would have created a dominant position in the worldwide market for the construction of large LNG carriers by combining two of the three large players (M.9343). According to the Commission, the parties enjoyed very large and increasing market shares, over 60%, leaving *de facto* only one other large competitor available

38 Case T-342/07, *Ryanair Holdings v. Commission* (2010) ECRil-3457, EU:T:2010:280.

for customers since the fourth player focused on domestic projects, with insufficient capacity to cover the projected market demand. Moreover, very high barriers to entry were found to result from the highly sophisticated and differentiated nature of large LNG carriers, whereas the customer base was considered to be fragmented and confronted with limited choice.

? NOTES AND QUESTIONS

1. In *Boeing*, how did the merger create or strengthen a dominant position if Airbus would remain a good competitive check on Boeing, which the Commission assumed?

   What is the significance of the fact that Boeing would gain a fuller line of jet planes, and that buyers (the airlines) saved money and time—including pilot training costs and replacement and maintenance costs—by dealing with one producer? What is the significance of the fact that Boeing would have access to technology that was funded by the US government?

   What is the significance of the facts that McDonnell Douglas was 'no longer a real force in the market for the sale of new aircraft on a stand-alone basis' (para. 58); no one but Boeing wanted to acquire McDonnell Douglas; and if the merger were prohibited, Boeing would probably absorb McDonnell Douglas' share anyway (all acknowledged in the decision)?

   Did the Commission confuse unfairness to Airbus (or a competitive advantage over Airbus) with harm to competition and consumers? Did it want to protect Airbus from efficient competition from Boeing?
2. If the merger did strengthen Boeing's dominance, was France correct that a prohibition was the best remedy?
3. Comment on the statement by the US Federal Trade Commission. Was the national aspect argument irrelevant? Should it be?

   Was *Boeing/McDonnell Douglas* purely a competition case? Who had the stronger side of the argument: the Europeans, most of whom seemed to believe that the US green light was industrial policy to promote Boeing as the US national champion, or the Americans, most of whom seemed to believe that the EU opposition was industrial policy to protect Airbus as the European champion?[39]
4. Many mergers today are new economy mergers, involving high technology and fast-changing markets. In the face of fast-changing markets, where the market leader today may be eclipsed tomorrow, enforcers are more reluctant to intervene. Where, however, the merged firm may become the 'gatekeeper' to the market (control access), enforcement may occur.

   In 2000, the then Competition Commissioner Mario Monti described the Commission's approach to new economy mergers. He gave examples of two recent cases, one concerning a European market and the other a worldwide market:

   > First, the *Vodafone/Mannesmann* transaction raised competition concerns on the emerging market for pan-European seamless mobile telephony services. The merged company, with its extensive network, would be in a unique position vis-à-vis its competitors to roll out such services. In order to remedy these concerns, *Vodafone* agreed to give competitors non-discriminatory access to its integrated network. However, in order to ensure that competitors would not exclusively rely on the merged company, neglecting the

39 See E. Fox (1998), 'Antitrust regulation across national borders: The United States of Boeing versus the European Union of Airbus', *Brookings Review*, 16, 30.

> development of their own infrastructure, the Commission limited the undertaking to 3 years. The Commission considered, inter alia, that in this period, Universal Mobile Telecommunications System (UMTS) licences would be awarded in sufficient number to allow competitors to replicate the Vodafone network.
>
> Second, in June this year [2000], the Commission prohibited the merger between the two US communications companies *MCI WorldCom* and *Sprint*. It found that the combination of the parties' extensive internet networks and large customer bases would have allowed the merged entity to dictate terms and conditions for access to its internet networks in a manner that could have had significant anti-competitive effects and hindered innovation. The Commission's investigation, which was carried out in close cooperation with the American antitrust authorities, showed that despite liberalization, regional and local providers are still dependent on the largest top-level providers to gain full and effective access to the internet.[40]

In these examples, was the Commission wisely proactive or overly aggressive in intervening in new economy mergers?

5. Consider the parallel with Article 102 concerns when a single firm becomes a gatekeeper—but by internal growth and (perhaps) anti-competitive strategies? Look again at the *Microsoft* case in Chapter 5, the interoperability problem.

Note on the failing firm defence

In spite of causing a SIEC, even by creating or strengthening a dominant position, a concentration may be authorized if one of the merging parties is a 'failing firm'. To qualify as a failing firm, the undertaking in question would be forced out of the market in the near future because of financial difficulties if not taken over by another undertaking. Moreover, there cannot be a less anti-competitive alternative purchase than the notified merger. Third, in the absence of a merger, the assets of the failing firm would inevitably exit the market. In the exceptional circumstances where these conditions are met, then the Commission might conclude that the deterioration of the competitive structure of the market is not directly caused by the merger but would take place at least to the same extent in the absence of the merger.

40 Mario Monti (2001), 'European competition policy for the 21st century', in B. Hawk (ed.), *International Antitrust Law & Policy*, *Fordham Corporate Law 2000,* New York: Juris, Ch. 15.

CASE

France v. Commission (Joined Cases C-68/94 and C-30/95) ('Kali + Salz')[41]

[After the fall of the Berlin Wall and in view of the plan and then the reality of German unification, Germany established the Treuhandanstalt ('Treuhand'), a public institution entrusted with the task of restructuring the firms of the former German Democratic Republic. The Treuhand had title to, among others, Mitteldeutsche Kali AG ('MdK'), which held all of the GDR's operations in potash and rock salt. The business had escalating losses and was likely to close down if not taken over by a private firm. The only available, willing purchaser was Kali und Salz AG ('K+S'), a subsidiary of BASF chemicals group. It was proposed that K+S buy 51% of the stock of MdK, leaving 49% with the Treuhand. This would result in K+S's achieving 98% of the German market for potash and salt-based products for agricultural use.

With respect to the German market:]

11 … [A]pplying the theory of the 'failing company defence', [the Commission] reached the conclusion that the proposed concentration was not the cause of the strengthening of the dominant position of K+S on the German market …. [T]he conditions for the 'failing company defence' were met, namely that K+S's dominant position would be reinforced even in the absence of the merger, because MdK would withdraw from the market in the foreseeable future if it was not acquired by another undertaking and its market share would then accrue to K+S; it can be practically ruled out that an undertaking other than K+S would acquire all or a substantial part of MdK …. The Commission further observed … that, given the severe structural weakness of the regions in East Germany which were affected by the proposed concentration, and the likelihood of serious consequences for them of the closure of MdK, the conclusion it had reached was also in line with the fundamental objective of strengthening the Community's economic and social cohesion, referred to in the 13th recital in the preamble to the Regulation.

[France sought annulment of the Commission's decision to allow the acquisition with respect to the German market without imposing any conditions. The Court of Justice rejected this claim.]

* * *

111 It appears from point 71 of the contested decision that, in the Commission's opinion, a concentration which would normally be considered as leading to the creation or

41 [1998] ECR I-1375, EU: C:1998:148.

CASE *(continued)*

reinforcement of a dominant position on the part of the acquiring undertaking may be regarded as not being the cause of it if, even in the event of the concentration being prohibited, that undertaking would inevitably achieve or reinforce a dominant position. Point 71 goes on to state that, as a general matter, a concentration is not the cause of the deterioration of the competitive structure if it is clear that:

— the acquired undertaking would in the near future be forced out of the market if not taken over by another undertaking,
— the acquiring undertaking would gain the market share of the acquired undertaking if it were forced out of the market,
— there is no less anticompetitive alternative purchase.

* * *

[The Commission was entitled to conclude that there was an 'absence of a causal link between the concentration and the deterioration of the competitive structure of the German market ….' In this case, 'it is not possible … to attach any condition whatever to [the] declaration of the concentration's compatibility.' (para. 124).]

? NOTES AND QUESTIONS

1. The failing firm defence seldom justifies a merger because the three criteria are seldom met. For example, in 2011, when the Greek airline Aegean sought to acquire the troubled Greek airline Olympic, and the merger would have produced a monopoly on six domestic routes, the Commission found the proof of imminent failure lacking and prohibited the transaction.[42] But by 2013, as Olympic's fortunes continued to plummet, Aegean tried again, and this time ultimately with success. It was highly unlikely that Olympic would become profitable in the foreseeable future, its benefactor was planning to discontinue support, no other purchaser was available, and absent the merger, Olympic would have exited the market. The merger was cleared.[43]
2. US case law also contains a failing firm defence.[44] It is similarly difficult to meet the necessary criteria.
3. Note the Commission's industrial policy argument in para. 11 of *Kali + Salz:* saving MdK would save jobs in the former East Germany and strengthen economic and social cohesion. Is this argument admissible under the Merger Regulation? Would it have saved the merger if there were a causal link between the concentration and the entrenchment of monopoly power? Should it have? Look again at the statement referenced. Was it a part of the *ratio decidendi* of the judgement, or just an observation of a welcome by-product?

42 Commission Decision of 28 January 2011 in Case COMP/M.5830—*Olympic/Aegean Airlines*.
43 Commission Decision of 23 April 2013 in Case COMP/M.6796—*Aegean/Olympic II*.
44 See *Citizen Publishing Co. v. United States*, 394 U.S. 131, 89 S.Ct. 927, 22 L.Ed.2d 148 (1969).

4. Why wasn't the causal link between the concentration and the harm to competition similarly lacking in *Boeing/McDonnell Douglas* (see earlier section b), given the Commission's concessions that: '[I]t has to be concluded that DAC is today no longer a real force in the market on a stand-alone basis' (para. 59); '[D]ue to the deterioration of the situation of DAC ... only Boeing is prepared to take over MDC's commercial aircraft business' (para. 60).

2. Unilateral (non-coordinated) effects in horizontal mergers

On revising the Merger Regulation in 2004, the Commission was aware of a class of anti-competitive mergers of competitors that would not fall into the language of single-firm dominance (or collective dominance). There was a gap. This was a major reason for the revision.

To understand the gap, consider two firms merging that are particularly close competitors to one another, for each is the second choice of consumers who prefer the other; their combination may allow the merged firm to raise prices profitably even if other competitors on the market do not follow suit. This phenomenon is called 'unilateral effects' because the merged firm can get power acting on its own, even without reaching a threshold of dominance. The phenomenon is also referred to as 'non-coordinated effects' to emphasize that the effect may not only be unilateral, i.e., resulting from the loss of competition between the merging firms, but may also change the incentives of competitors and trigger a price adjustment upwards of the remaining firms on the market. Thus, Recital 25 of the Merger Regulation says:

> 25 In view of the consequences that concentrations in oligopolistic market structures may have, it is all the more necessary to maintain effective competition in such markets. Many oligopolistic markets exhibit a healthy degree of competition. However, under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition. The Community courts have, however, not to date expressly interpreted Regulation (EEC) No 4064/89 as requiring concentrations giving rise to such non-coordinated effects to be declared incompatible with the common market. Therefore, in the interests of legal certainty, it should be made clear that this Regulation permits effective control of all such concentrations by providing that any concentration which would significantly impede effective competition, in the common market or in a substantial part of it, should be declared incompatible with the common market. The notion of 'significant impediment to effective competition' in Article 2(2) and (3) should

> be interpreted as extending, beyond the concept of dominance, only to the anti-competitive effects of a concentration resulting from the non-coordinated behaviour of undertakings which would not have a dominant position on the market concerned.

Since 2004, the notion of unilateral or non-coordinated effects has therefore aimed to capture the most direct way through which both concentrations giving rise to situations of dominance and those gap cases may significantly impede effective competition, 'by eliminating important competitive constraints on one or more firms, which consequently would have increased market power, without resorting to coordinated behaviour'. As the Commission puts it, the main concern is that '[t]he reduction in these competitive constraints could lead to significant price increases in the relevant market', either by creating or strengthening the dominant position of a single firm or by eliminating important competitive constraints that the merging parties previously exerted on each other and on their remaining competitors.[45]

* * *

Mobile telecoms consolidations provide good examples of gap cases giving rise to unilateral effects. In the first of a wave of concentrations in that sector, the Commission cleared the acquisition of Orange Austria by Hutchinson 3G Austria in 2012,[46] subject to significant commitments (including spectrum divestiture and wholesale access) in order to alleviate concerns of upward price pressure. Orange and Hutchinson were the third and fourth mobile telephony operators in Austria, and their combined share of 27% was lower than that of the other two players T-Mobile (31%) and Mobilkom (41%). There was therefore no question of dominance. Still, the merging firms were the most significant competitors of each other. Hence, the Commission found that the market power of the merging parties would have been higher than what their market shares suggested. The analytical inquiry was whether one firm's price rise would divert so much sales to the other merger partner (rather than to the rest of the market) that a price rise would pay for the merging firms. It would not be necessary for all rivals to collectively follow suit to make the upward pricing worth it, though there was a risk that they would follow because of a reduction in overall competitive constraints.

45 Commission Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] *O.J.* C 31/5, paras. 22–25 ('Horizontal Merger Guidelines').

46 Commission Decision of 12 December 2012 in *Comp/M.6497 - Hutchison 3G Austria/Orange Austria*.

A similar pattern of analysis was followed in subsequent mobile telecom cases leading either to clearance[47] or to prohibition/withdrawal.[48] Contrary to the Austrian case referred to before, the concentration between Hutchison and Telefonica mobile operations in the UK (respectively, 'Three' and 'O2') would have created a new market leader—though not a dominant player—and given the merged entity full overview of the network plans of their two remaining competitors, with which they had entered into network sharing arrangements. Hence, the Commission concluded that the concentration would remove an important competitor, thereby significantly reducing competition for mobile services, increasing the incentive and ability of the merging parties and other operators to raise prices, and degrading quality of service over time. In the absence of acceptable commitments, the transaction was prohibited (M.7612—Hutchinson 3G UK/Telefónica UK). The parties subsequently appealed, and the EU General Court annulled the Commission decision on all grounds in a remarkable judgement containing a broad range of principled statements about unilateral effects assessments, which is now under review by the ECJ.

CASE

CK Telecoms UK Investments/Commission[49] (Case T-399/16)

85 The Courts of the European Union have not, to date, expressly interpreted Regulation No 4064/89 or Regulation No 139/2004 as regards the compatibility with the internal market of concentrations giving rise to non-coordinated effects on an oligopolistic market.

86 It is apparent from the preparatory work for, and the wording of Article 2(3) of, Regulation No 139/2004 (see, in particular, the words 'in particular') that that provision was adopted in order to achieve the following three objectives.

87 In the first place, it was a question of extending the scope of substantive review by enabling the Commission to catch, in the specific context of oligopolistic markets, transactions significantly impeding effective competition even if they do not enable the undertakings concerned to create or strengthen an individual or collective dominant position.

47 Commission Decision of 28 May 2014 in COMP/M.6992—*Hutchison 3G UK/Telefonica Ireland*; Commission Decision of 2 July 2014 in COMP/M.7018—*Telefonica Deutschland/E-Plus*, under appeal in Cases T-307/15, *1&1 Telecom v. Commission* and T-305/15, *Airdata v. Commission*.

48 Commission Decision of 11 September 2015 in COMP/M.7419—*TeliaSonera/Telenor*; Commission Decision of 11 May 2016 in COMP/M.7612—*Hutchison 3G UK/Telefonica UK*.

49 EU:T:2020:2017, appeal pending under reference C-376/20 P.

CASE *(continued)*

88 In the second place, Article 2(3) of Regulation No 139/2004 was intended to maintain and even strengthen the concept of a dominant position by recognising the role played by that concept in the system established within the European Union by competition law, as interpreted by the Courts of the European Union, which is to enable the authorities to intervene, in a context marked by the freedom to conduct a business, when faced with transactions which, if implemented, would enable one or more operators to determine the competitive conditions and to eliminate competition in whole or in part on the relevant market without fear of the reaction of competitors and consumers.

89 In the third place, that provision was intended to increase legal certainty and render the Commission's analysis of concentrations more transparent and more foreseeable.

90 In order to take those factors into account, Article 2(3) of Regulation No 139/2004 must be interpreted as allowing the Commission to prohibit, in certain circumstances, on oligopolistic markets concentrations which, although not giving rise to the creation or strengthening of an individual or collective dominant position, are liable to affect the competitive conditions on the market to an extent equivalent to that attributable to such positions, by conferring on the merged entity the power to enable it to determine, by itself, the parameters of competition and, in particular, to become a price maker instead of remaining a price taker.

* * *

95 … recital 25 of Regulation No 139/2004 states that, 'under certain circumstances, concentrations involving the elimination of important competitive constraints that the merging parties had exerted upon each other, as well as a reduction of competitive pressure on the remaining competitors, may, even in the absence of a likelihood of coordination between the members of the oligopoly, result in a significant impediment to effective competition'.

96 Thus, Article 2(3) of Regulation No 139/2004 must be interpreted in the light of recital 25 thereof, which lays down two cumulative conditions in order that non-coordinated effects arising from a concentration may, under certain circumstances, result in a significant impediment to effective competition: the concentration must involve (i) 'the elimination of important competitive constraints that the merging parties had exerted upon each other' and (ii) 'a reduction of competitive pressure on the remaining competitors'.

97 It follows that the mere effect of reducing competitive pressure on the remaining competitors is not, in principle, sufficient in itself to demonstrate a significant impediment to effective competition in the context of a theory of harm based on non-coordinated effects.

* * *

CASE *(continued)*

118 In the context of an analysis of a significant impediment to effective competition the existence of which is inferred from a body of evidence and indicia, and which is based on several theories of harm, the Commission is required to produce sufficient evidence to demonstrate with a strong probability the existence of significant impediments following the concentration. Thus, the standard of proof applicable in the present case is therefore stricter than that under which a significant impediment to effective competition is 'more likely than not', on the basis of a 'balance of probabilities', as the Commission maintains. By contrast, it is less strict than a standard of proof based on 'being beyond all reasonable doubt'.

* * *

241 Second, the Court notes that the concept of a 'close competitor' … allows account to be taken of the fact that rivalry between the merging parties is an important source of competition on the market, and may therefore be a central factor in the analysis, as is apparent from paragraph 28 of the Guidelines. Furthermore, it should be borne in mind that the applicability of Article 2(3) of Regulation No 139/2004, read in the light of recital 25 of that regulation, requires the elimination 'of important competitive constraints that the merging parties had exerted upon each other', which constitutes the most direct unilateral effect of a concentration on an oligopolistic market, as the Commission rightly pointed out before the General Court.

242 However, most of the examples mentioned in the contested decision are not intended to identify how close the parties are, or to show that they exerted important competitive constraints on each other, but are aimed above all at showing that Three and O2 are 'close competitors' rather than 'particularly close competitors'. Thus, the Commission seems more to analyse the closeness of competition between Three and O2, on the one hand, and the other two mobile network operators, on the other. It concludes, …, that the four mobile network operators, and not only Three and O2, 'compete closely'.

* * *

274 Third, even if the Commission had proved to the requisite legal standard in the contested decision that the concentration would be liable to encourage the merged entity to increase prices, and had quantified that price increase in the contested decision, the Commission has not, in any event, demonstrated in the present case that the quantified price increase would be significant.

* * *

276 It must be held that, because of the competitive conditions on such a market, concentrations in an oligopolistic market tend to lead almost automatically to an increase in prices in

CASE *(continued)*

the short term on account of the loss of competition between the merging parties. It is only in the medium term that external competition from players already present on the market or, depending on how high barriers to entry are, from new players, will force the merged entity to lower its prices.

277 Similarly, any concentration will lead to efficiencies, the extent of which will also depend on external competitive pressure. Those efficiencies stem in particular from the rationalisation and integration of production and distribution processes by the merged entity. Indeed, that entity will generally eliminate duplicate structures in the production and distribution chains, and will redeploy members of staff or make them redundant. Depending on the circumstances, those rationalisation efforts may lead the merged entity to lower its prices.

278 It must be stated that the Commission did not include those standard efficiencies in its quantitative analysis, taking the view …, that it was for the notifying party to demonstrate their existence and referring for that purpose to Section 8.5 of the contested decision relating to efficiencies.

279 The Commission thus confuses two types of efficiencies, namely those referred to in Section VII of the Guidelines and those specific to each concentration. Efficiencies within the meaning of the Guidelines must be taken into account in the overall competitive appraisal of the concentration, in order to ascertain whether they are likely to counteract the restrictive effects of the concentration. However, the category of efficiencies at issue in the present case is merely a component of a quantitative model designed to establish whether a concentration is capable of producing such restrictive effects. It is therefore an evidential matter relating to the existence of restrictive effects which arises prior to the overall competitive appraisal as provided for in paragraph 76 of the Guidelines.

* * *

282 It must therefore be concluded that the quantitative analysis carried out in the present case lacks probative value, since the Commission has not demonstrated with a sufficient degree of probability that prices would increase 'significantly' following the elimination of the important competitive constraints which the parties to the concentration exerted upon each other.

? NOTES AND QUESTIONS

1. Judgements on appeal of merger control decisions are typically very facts intensive, discussing alleged manifest errors of facts or of law in an inherently case-specific fashion. The CK Telecom judgement is different. It derives conclusions from positions of principle on a range of issues pertaining to the analytical framework applicable to the assessment of unilateral effects. The judgement's starting point is that the EU General Court had not yet had a chance of interpreting the EUMR in a case involving non-coordinated effects on an oligopolistic market. But in

construing the judgement the way it did, the EU General Court invited the Commission to appeal it to the ECJ, which is now seized of the matter.

2. Many of the principled positions taken by the CK Telecom judgement are controversial, and their sources and rationale are unclear. What does it mean concretely that unilateral effects are supposed to affect competitive conditions 'to an extent equivalent' as dominant positions, and why should the merged entity be able to determine by itself the parameters of competition, notably by becoming a price maker instead of a price taker? Does the EUMR require the Commission to adduce cumulatively (and separately?) evidence of a loss of competition between the merging firms and with the remaining competitors? What is, and how does one determine, a 'strong probability' of SIEC resulting from unilateral effects, and why did the court depart from the 'more likely than not' standard that has prevailed until now? What are 'standard efficiencies' arising from a merger, and why should these be accounted for if they don't fulfil the applicable conditions (endorsed by the General Court in prior cases), notably that they benefit consumers?
3. Closeness of competition is central to unilateral effects assessments. It translates in plain language the economic concept of diversion ratio that determines the effects arising from the loss of competition between parties in horizontal mergers. Should it matter that the diversion ratio between the merging firms is higher or lower than with other competitors, notably in a 4-to-3 context? Does it make sense to focus the assessment on the relative closeness of competition between parties or instead, on their absolute closeness (and intrinsic consequences)? Put otherwise, do merging parties have to be closer competitors to each other than to the (few) remaining ones, or is it sufficient that they be considered as alternatives by a significant customer group? What does it depend on?
4. The 'S' of SIEC stands for 'significant'. But, what should be the standard of proof for establishing such significance? Should it require a precise quantification, a comparative exercise across cases (whose value the EU General Court has otherwise traditionally rejected), or should such significance be presumed in the absence of evidence to the contrary if effects are likely, notably to account for the margin of appreciation historically recognized to the Commission in merger control assessment?

3. Coordinated effects in horizontal mergers

As noted, the original text of the Merger Regulation prohibited the creation or strengthening of *dominance* that may impede effective competition. The Commission soon had to confront the limits of the word 'dominance'. Could the word be stretched to cover duopoly and oligopoly?

Part of the answer was given in the previous section when considering unilateral or non-coordinated effects. With respect to coordinated effects, the Court of Justice originally responded to the dilemma. In *Kali und Salz*, the Court held that the 1989 Merger Regulation caught mergers that create or strengthen a 'collective dominant position' likely to have a significant effect on competition. It stated that collective dominance might be established if the firms remaining on the market have 'close commercial links', such as participation in export cartels to third countries, joint ventures and buyer/supplier relationships.[50]

50 [1998] ECR I-1375, EU:C:1998:148, paras. 165–178.

Gencor/Lonrho was decided in the wake of the case law language stating that 'links' may justify finding dominance in an oligopolistic market. The case is important not for the semantic challenge (which was cured by an amendment to the regulation) but for the substantive question: by what theory was this merger anti-competitive in view of the fact that other players remained on the market? After *Gencor/Lonrho,* the General Court's annulment of the Commission decision in *Airtours* ushered in modern analysis of how a merger of firms in an oligopoly may harm competition by cooperative effects.

CASE

Gencor Ltd v. Commission (Case T-102/96)[51]

[Two South African platinum and rhodium mining companies merged, combining Implats, a subsidiary of Gencor, having about 17% of world market sales, and LPD (a subsidiary of the UK firm, Lonrho), having about 15% of sales. The combined firm would have had 32% of sales. The leading firm, Anglo American ('Amplats'), had about 43% of sales. Together the two resulting South African firms would have held about 89% of world reserves. Russia, through its firm Almaz, had a 22% share of sales and 10% of reserves. North American producers accounted for 5% of sales and had 1% reserves; and recycling firms accounted for 6% of sales. Russia was expected to dispose of its stocks in 2 years.

The Commission found that the concentration would create a dominant duopoly and was therefore incompatible with the common market, and it prohibited the concentration. Gencor contested the decision. The General Court analysed as follows the evidence regarding whether the merger did indeed create a market structure in which the resulting two leading firms would gain collective dominance.]

222 [G]iven the similarity in the market shares, shares of world reserves and cost structures of the undertakings at issue, the Commission was entitled to conclude that, following the concentration, the interests of Amplats and Implats/LPD with regard to the development of the market would have coincided to a higher degree and that this alignment of interests would have increased the likelihood of anticompetitive parallel behaviour, for example restrictions of output.

* * *

51 [1999] ECR II-753, EU:T:1999:65.

CASE *(continued)*

Characteristics of the market

[The Commission was entitled to find high transparency of price, production, sales, reserves and new investment; and that given slow growth in demand, new competitors would not be encouraged to enter the market, and existing competitors would not be encouraged to adopt aggressive strategies to capture additional demand.]

248 The applicant points out in that regard that the South African government's letter of 19 April 1996 indicates that world reserves outside South Africa and Zimbabwe could theoretically satisfy world demand for 20 years.

* * *

252 As regards the applicant's argument that the 37% of the market accounted for by the marginal sources of supply and other influences would have curbed price increases, the Commission points out that the South African producers alone accounted for 63% of the market in 1995, a figure that was to increase significantly (to a level approaching 80%) when, from 1997, Russia would no longer be selling from its stocks. Furthermore, a significant proportion of the marginal competition was hypothetical and could not in any event have exerted any pressure on the market for some years.

* * *

254 The applicant's view has no factual basis ....

* * *

264 The applicant claims that the Commission ... has failed to demonstrate the existence of structural links or to prove that the merged entity and Amplats intended to behave as if they constituted a single dominant entity ....

* * *

The Court

273 In its judgement in the *Flat Glass* case, the Court referred to links of a structural nature only by way of example and did not lay down that such links must exist in order for a finding of collective dominance to be made.

* * *

276 Furthermore, there is no reason whatsoever in legal or economic terms to exclude from the notion of economic links the relationship of interdependence existing between the parties

CASE *(continued)*

to a tight oligopoly within which, in a market with the appropriate characteristics, in particular in terms of market concentration, transparency and product homogeneity, those parties are in a position to anticipate one another's behaviour and are therefore strongly encouraged to align their conduct in the market, in particular in such a way as to maximise their joint profits by restricting production with a view to increasing prices. In such a context, each trader is aware that highly competitive action on its part designed to increase its market share (for example a price cut) would provoke identical action by the others, so that it would derive no benefit from its initiative. All the traders would thus be affected by the reduction in price levels.

277 That conclusion is all the more pertinent with regard to the control of concentrations, whose objective is to prevent anti-competitive market structures from arising or being strengthened. Those structures may result from the existence of economic links in the strict sense argued by the applicant or from market structures of an oligopolistic kind where each undertaking may become aware of common interests and, in particular, cause prices to increase without having to enter into an agreement or resort to a concerted practice.

* * *

279 The Commission was entitled to conclude, relying on the envisaged alteration in the structure of the market and on the similarity of the costs of Amplats and Implats/LPD, that the proposed transaction would create a collective dominant position and lead in actual fact to a duopoly constituted by those two undertakings.

* * *

? NOTES AND QUESTIONS

1. Gencor argued (and the South African authorities maintained) that the combination of Implats and LPD would create a more efficient number two firm that could and would better compete against the dominant firm, Amplats. Who was probably correct—Gencor and South Africa, or the European Commission? What are the most important points on each side?
2. Did the Commission have to prove that Amplats and the merged firm would collude, at least tacitly, and thereby behave like *one* dominant firm? Or, was it enough for the Commission to prove that the firms would behave interdependently, taking into account one another's probable strategies and estimating whether and when they would be jointly served by higher prices?
3. What is the significance of the Russian stocks? Why wouldn't Implats/LPD raise prices immediately and expect Amplats and Almaz to follow, or at least not increase their output?
4. South Africa argued that it was not necessary to stop the merger; that if the merger did create conditions that made collaborative behaviour more likely, and if the merger did eventually produce such behaviour, it would (and authorities should) intervene at that point to stop the behaviour. Was this a plausible tack?

* * *

The theory of collective dominance was tested further in *Airtours/First Choice,* involving a merger from four to three firms in the short-haul holiday (air and hotel) package market. The post-merger shares were 32% for Airtours/First Choice, 27% for Thomson and 20% for Thomas Cook. The Commission found that the market was characterized by stagnant demand, a low level of innovation, low price sensitivity and similar cost structures of the three market leaders, with commercial links, transparency and interdependence among them. It found that the merger would have significantly reduced fringe firms' ability to provide charter airline seats, thereby reducing the competitive threat of mavericks. Stating that collective dominance is 'not just about tacit collusion', the Commission found that the resulting three leading firms would hold a collective dominant position after the merger, and it prohibited the merger.

CASE

Airtours v. Commission (Case T-342/99)[52]

[Airtours, a British firm operating in the UK, sold package holidays for short-haul destinations such as Spain, Greece and Turkey. Four significant firms occupied the UK market for short-haul foreign package holidays: Thomson—27%, Thomas Cook— 20%, Airtours—21% and First Choice—11%. Thus, the four firms occupied 79% of the market. All four operated charter airlines and travel agencies as well as tour operations. Airtours sought to take over First Choice. The takeover would have made Airtours number one with 32% of the market.

Many small tour operators occupied the market. In general, they did not own charter airlines or travel agencies. The three largest of these held between 1.7% and 2.9% of the market. Several hundred accounted for less than 1% each.

Agreeing with a 1997 UK Monopolies and Mergers Commission Report ('MMC Report'), the Commission observed that the market had been competitive. It determined, however, that increased concentration and vertical integration had occurred since the MMC Report; that Airtours' takeover of First Choice would further increase the transparency of the market and the interdependence of the big firms; and that the remaining three big players would mutually restrict capacity, knowing that by doing so, they would all be better off and that if any one of the three decided not to go along, there would be oversupply and serious financial consequences for all. The Commission determined further that the smaller operators, already marginalized, would be further marginalized, since they would lose First Choice as a supplier of airline seats and as a potential distribution channel; and in any event, the small operators

52 [2002] ECR II-2585, EU:T:2002:146.

CASE *(continued)*

would not have the ability to offset capacity reductions by the big three. As a result, capacity would be tightened, and prices would rise, thus creating a collective dominant position impeding competition in violation of the Merger Regulation.

Airtours brought suit in the General Court for annulment of the Commission's decision.]

59 It is apparent from the case law that 'in the case of an alleged collective dominant position, the Commission is … obliged to assess, using a prospective analysis of the reference market, whether the concentration which has been referred to it leads to a situation in which effective competition in the relevant market is significantly impeded by the undertakings involved in the concentration and one or more other undertakings which together, in the concentration and one or more other undertakings which together, in particular because of factors giving rise to a connection between them, are able to adopt a common policy on the market and act to a considerable extent independently of their competitors, their customers, and also of consumers' [citing *Kali & Salz* and *Gencor*].

* * *

61 A collective dominant position significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration in its structure that the transaction would entail, the latter would make each member of the dominant oligopoly, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article [101] and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.

62 As the applicant has argued and as the Commission has accepted in its pleadings, three conditions are necessary for a finding of collective dominance as defined:

— first, each member of the dominant oligopoly must have the ability to know how the other members are behaving in order to monitor whether or not they are adopting the common policy. As the Commission specifically acknowledges, it is not enough for each member of the dominant oligopoly to be aware that interdependent market conduct is profitable for all of them but each member must also have a means of knowing whether the other operators are adopting the same strategy and whether they are maintaining it. There must, therefore, be sufficient market transparency for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the way in which the other members' market conduct is evolving;

CASE *(continued)*

— second, the situation of tacit coordination must be sustainable over time, that is to say, there must be an incentive not to depart from the common policy on the market. As the Commission observes, it is only if all the members of the dominant oligopoly maintain the parallel conduct that all can benefit. The notion of retaliation in respect of conduct deviating from the common policy is thus inherent in this condition. In this instance, the parties concur that, for a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy, which means that each member of the dominant oligopoly must be aware that highly competitive action on its part designed to increase its market share would provoke identical action by the others, so that it would derive no benefit from its initiative;

— third, to prove the existence of a collective dominant position to the requisite legal standard, the Commission must also establish that the foreseeable reaction of current and future competitors, as well as of consumers, would not jeopardise the results expected from the common policy.

63 … [W]here the Commission takes the view that a merger should be prohibited because it will create a situation of collective dominance, it is incumbent upon it to produce convincing evidence thereof. The evidence must concern, in particular, factors playing a significant role in the assessment of whether a situation of collective dominance exists, such as, for example, the lack of effective competition between the operators alleged to be members of the dominant oligopoly and the weakness of any competitive pressure that might be exerted by other operators.

64 Furthermore, the basic provisions of Regulation No 4064/89, in particular Article 2 thereof, confer on the Commission a certain discretion, especially with respect to assessments of an economic nature, and, consequently, when the exercise of that discretion, which is essential for defining the rules on concentrations, is under review, the Community judicature must take account of the discretionary margin implicit in the provisions of an economic nature which form part of the rules on concentrations.

* * *

[Airtours claimed, successfully, (1) that the Commission had failed to prove that the market had become non-competitive, and (2) that it had failed to prove that the three remaining large tour operators would have an incentive to cease competing with each other. (3) In any event, cooperating industry members would have no means to discipline a cheating (competitive) member, and (4) in any event, smaller operators, new entrants and consumers could and would react to any capacity restrictions by, in the case of suppliers, adding capacity and in the case of consumers, shifting their business to the smaller operators. The Court annulled the decision.]

NOTES AND QUESTIONS

1. *Airtours* was framed as a case of collective dominance. Today (had the facts been stronger), the theory would be stated as: significant impediment to effective competition by producing coordinated effects, i.e., 'by changing the nature of competition in such a way that firms that previously were not coordinating their behaviour, are now significantly more likely to coordinate and raise prices or otherwise harm effective competition' or by making 'coordination easier, more stable or more effective for firms which were coordinating prior to the merger'. The 'Airtours criteria' have been integrated into the Horizontal Merger Guidelines and now form the established framework of analysis for the assessment of the incentives and ability of firms in a concentrated market to coordinate their conduct (on price, production, capacity, customers, etc.) as a result of a merger, even without entering into an agreement or concerted practice within the meaning of Article 101 TFEU.[53]
2. What level of scrutiny did the Court give to the Commission's findings of mixed basic and economic facts—such as whether the market was competitive, and whether the smaller firms would be marginalized? Why were the Commission's findings not within the margin of appreciation to which the Commission is normally entitled?
3. In *Sony/BMG (Impala)*, the General Court annulled a Commission decision *authorizing* a joint venture between Sony and Bertelsmann that combined their recorded music activities. In its Statement of Objections, the Commission had concluded that the joint venture would probably produce collective dominance effects in view of high concentration and the high degree of transparency in the market. On further investigation, the Commission concluded that the market was not transparent and that collective dominance effects were not likely to result.

   Annulling the clearance, the General Court stated that the Commission had not sufficiently explained the reversal of its position since it issued the Statement of Objections. It thought that collective dominance effects were plausible. It disagreed that promotional discounting of music undermined the transparency necessary for coordinated effects, and it stated that retaliatory measures against cheaters appeared to be available. Thus, the General Court ruled, the Commission had committed manifest errors of assessment. On appeal, however, the Court of Justice set aside the judgement of the General Court.[54] The Court of Justice noted that nothing in the Merger Regulation 'imposes different standards of proof in relation to decisions approving a concentration, on the one hand, and decisions prohibiting a concentration, on the other' (para. 46), thus rejecting the Commission's argument that its burden was lighter in clearing than in prohibiting a merger. On the substance, the Court of Justice held that the General Court had misconstrued the principles for analysis concerning market transparency in the context of collective dominance.

   The Court of Justice said:

   > 122 A collective dominant position [today, 'coordinated effects'] significantly impeding effective competition in the common market or a substantial part of it may thus arise as the result of a concentration where, in view of the actual characteristics of the relevant market and of the alteration to those characteristics that the concentration would entail, the latter would make each member of the oligopoly in question, as it becomes aware of common interests, consider it possible, economically rational, and hence preferable, to adopt on a lasting basis a common policy on the market with

53 Horizontal Merger Guidelines, paras. 22(b) and 39–57.

54 Case C-413/06 P, *Bertelsmann AG and Sony Corporation of America v. Independent Music Publishers and Labels Association (Impala)* [2008] ECR I-4951, EU:C:2008:392.

> the aim of selling at above competitive prices, without having to enter into an agreement or resort to a concerted practice within the meaning of Article 101 and without any actual or potential competitors, let alone customers or consumers, being able to react effectively.
>
> 123 Such tacit coordination is more likely to emerge if competitors can easily arrive at a common perception as to how the coordination should work, and, in particular, of the parameters that lend themselves to being a focal point of the proposed coordination. Unless they can form a shared tacit understanding of the terms of the coordination, competitors might resort to practices that are prohibited by Article [101] in order to be able to adopt a common policy on the market. Moreover, having regard to the temptation which may exist for each participant in a tacit coordination to depart from it in order to increase its short-term profit, it is necessary to determine whether such coordination is sustainable. In that regard, the coordinating undertakings must be able to monitor to a sufficient degree whether the terms of the coordination are being adhered to. There must therefore be sufficient market transparency for each undertaking concerned to be aware, sufficiently precisely and quickly, of the way in which the market conduct of each of the other participants in the coordination is evolving. Furthermore, discipline requires that there be some form of credible deterrent mechanism that can come into play if deviation is detected. In addition, the reactions of outsiders, such as current or future competitors, and also the reactions of customers, should not be such as to jeopardise the results expected from the coordination.

* * *

Interestingly, the Court also emphasized the need to 'avoid a mechanical approach involving the separate verification of each of [the Airtours] criteria taken in isolation' and thus, the importance of taking into account 'the overall economic mechanism of a hypothetical tacit coordination' (para. 125). The assessment of the transparency of a particular market, the Court suggested, should be carried out 'using the mechanism of a hypothetical tacit coordination as a basis' so as to ascertain whether any elements of transparency that may exist on that market are, in fact, capable of facilitating the reaching of a common understanding on the terms of coordination and/or allowing competitors to monitor whether these terms are being adhered to (para. 126).

4. Non-horizontal mergers: vertical and conglomerate effects

Mergers of firms that are not competitors (non-horizontal mergers) may be divided into two categories: vertical mergers and conglomerate mergers. Vertical mergers are mergers of firms in the buyer–supplier line. Conglomerate mergers are mergers other than horizontal or vertical. Vertical mergers may give rise to concerns whereby because of the merger, unintegrated rivals will be foreclosed from an important source of supply or outlet; barriers to entry may rise, upping the stakes and thus, the likelihood of entry, and perhaps so insulating the market that the risk of oligopolistic coordination or of dominance is increased. Conglomerate mergers may entail similar foreclosure concerns when buyers of one partner's product also need the other partner's product, leading to a tying or bundling effect and steering business away from unintegrated rivals because of leverage, not innovative, cost or quality benefits.

In the early days of enforcement of the Merger Regulation, the Commission was worried about foreclosure; it was concerned that large firms, especially multi-product firms, would get unfair advantages over their rivals and distort the playing field. *Boeing/McDonnell Douglas* is an example. When consumers, not competitors, later became the focus of inquiry, the Commission—under prodding by the General Court—took seriously two important points: (1) a vertical or conglomerate merger may bring benefits to consumers; (2) it takes more than a loose foreclosure story (e.g., that life is more difficult for rivals) to harm competitors in a way that will harm market competition. Indeed, a merger that integrates complementary products or functions may benefit consumers in ways that rivals are incentivized to emulate, and the competitive pressure may cause rivals to find ways to outcompete the integrating firm; and (3) vertical and conglomerate mergers do not by their *nature* harm competition, as offending horizontal mergers do. They do not take a competitor off the market. They do not create a structure that may predictably produce a price rise even in the absence of an agreement. It takes *action* to foreclose rivals, such as forcing customers to accept a product they would not otherwise buy from that firm. If that conduct is itself illegal, is the law likely to deter the conduct, so that the whole merger need not be prohibited simply because the conduct might occur?

These aspects lurked in *Tetra Laval/Sidel* and later, in *GE/Honeywell.*

CASE

Tetra Laval BV v. Commission (Case C-12/03 P) *('Tetra/Sidel')*[55]

[Tetra Laval, a French firm and the world leader in the market for packaging milk, juice and other liquids in cartons, acquired the stock of its French rival Sidel, a leading producer of plastic containers for liquids by polyethylene terephthalate equipment ('PET'). The Commission

55 [2005] ECR I-987, EU:C:2005:87.

CASE *(continued)*

declared the acquisition incompatible with the common market principally on grounds that Tetra Laval would use its dominance in the aseptic carton market to leverage itself into dominance in the PET packaging equipment market and that removing Sidel as a potential competitor to Tetra would strengthen Tetra's dominant position on the carton packaging markets.

The Commission ordered the parties to undo the merger. The parties sought an annulment. The General Court annulled the prohibition for lack of sufficient evidence, and the Court of Justice upheld the General Court.]

39 Whilst the Court recognises that the Commission has a margin of discretion with regard to economic matters, that does not mean that the Community Courts must refrain from reviewing the Commission's interpretation of information of an economic nature. Not only must the Community Courts, inter alia, establish whether the evidence relied on is factually accurate, reliable and consistent but also whether that evidence contains all the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusions drawn from it. Such a review is all the more necessary in the case of a prospective analysis required when examining a planned merger with conglomerate effect.

* * *

44 The analysis of a 'conglomerate-type' concentration is a prospective analysis in which, first, the consideration of a lengthy period of time in the future and, secondly, the leveraging necessary to give rise to a significant impediment to effective competition mean that the chains of cause and effect are dimly discernible, uncertain and difficult to establish. That being so, the quality of the evidence produced by the Commission in order to establish that it is necessary to adopt a decision declaring the concentration incompatible with the common market is particularly important, since that evidence must support the Commission's conclusion that, if such a decision were not adopted, the economic development envisaged by it would be plausible.

45 It follows from those various factors that the [General Court] did not err in law when it set out the tests to be applied in the exercise of its power of judicial review or when it specified the quality of the evidence which the Commission is required to produce in order to demonstrate that the requirements of Article 2(3) of the Regulation are satisfied.

* * *

75 However, it would run counter to the Regulation's purpose of prevention to require the Commission, as [the General Court held], to examine, for each proposed merger, the extent

CASE *(continued)*

to which the incentives to adopt anticompetitive conduct would be reduced, or even eliminated, as a result of the unlawfulness of the conduct in question, the likelihood of its detection, the action taken by the competent authorities, both at Community and national level, and the financial penalties which could ensue.

* * *

78 Consequently, the [General Court] erred in law in rejecting the Commission's conclusions as to the adoption by the merged entity of anti-competitive conduct capable of resulting in leveraging on the sole ground that the Commission had, when assessing the likelihood that such conduct might be adopted, failed to take account of the unlawfulness of that conduct and, consequently, of the likelihood of its detection, of action by the competent authorities, both at Community and national level, and of the financial penalties which might ensue ....

* * *

? NOTES AND QUESTIONS

1. Why are the chains of cause and effect so dimly discernible, uncertain and difficult to establish in conglomerate mergers as opposed to mergers of competitors? Consider the charge: Tetra, dominant in packaging liquids in aseptic cartons, a declining segment, will increase its dominance by acquiring Sidel, dominant in packaging liquids in stretch blown plastic bottles, a growing segment, and vice versa. How would the acquisition increase dominance? Would it happen naturally, or would Tetra/Sidel have to *do* something to leverage power from one market (assuming it is a market) to the other? What would it have to do? On what would the likelihood of its strategy and the success of its strategy depend? How is Article 102 TFEU relevant?
2. A few years before the Court judgement in *Tetra*, General Electric Company ('GE'), the world's largest producer of jet engines, announced that it planned to acquire Honeywell International, a leading firm in the production of navigating equipment and other jet aircraft components, as well as a producer of jet engines. Both firms were US companies, with assets also in Europe and elsewhere, doing business worldwide. GE first notified the planned merger to the US authorities. The Antitrust Division vetted the merger, found anti-competitive horizontal overlaps in engine production, and cleared the merger after requiring a spin-off of the offending assets. After the spin-off, it regarded the merger as almost entirely conglomerate. The US generally has no antitrust concerns with conglomerate mergers.

   GE then sought clearance by the European Commission. The Commission identified a number of vertical and conglomerate (leveraging and foreclosure) concerns and a horizontal concern regarding jet engine overlap that was not worrisome to the US authority. It analysed the problems, found anti-competitive effects (e.g., that GE would prevail upon its engine customers to use Honeywell avionics in their aircraft, lowering prices for the bundle, marginalizing Honeywell's rivals and later raising prices) and prohibited the merger. The prohibition evoked the ire of many Americans, including antitrust officials, the Secretary of the Treasury and senators.

GE sought an annulment of the Commission decision. Its case came to the General Court after the judgement in *Tetra Laval*, which had set the standard of review and the standard of proof for vertical and conglomerate effects. The General Court upheld the Commission decision prohibiting the GE/Honeywell merger, but only on grounds of a horizontal overlap of engines. As for the conglomerate grounds, the General Court engaged in an extensive analysis of the facts and held that the Commission could not conclude from the facts that a merged GE/Honeywell was likely to engage in bundling. Its customers could not be pressured to accept a bundle they did not want.[56,57]

3. Regarding jet engine starters: GE was dominant in jet engines, Honeywell held more than 50% of the market for engine starters, and barriers to entry into engine starters were high. The Commission thought the merger would harm competition by giving GE incentives to manipulate the starter supply. The Court reversed this holding because the Commission had failed to consider the possible deterrent effect of Article 102 TFEU.

Should it have been enough, for proof of a violation, that the merged firm controlled an input essential to its rivals? Would you expect the merged firm to deny engine starters to its competitors? Would you expect the merged firm to manipulate the supply of this necessary ingredient in subtle and not always detectable ways?

4. Suppose the Commission had proved that the merged firm would probably have engaged in bundling. Would the Court have agreed that this was an anti-competitive practice? See Article 102 case law earlier. Would US authorities and courts have so agreed? The US authorities that cleared the GE/Honeywell merger argued that if the merged firm bundled Honeywell's avionics products with GE's engines, it would save costs of double marginalization, and the bundle would be efficient.

5. Energias de Portugal ('EDP') and Gas de Portugal ('GDP') proposed to merge. EDP was dominant on all electricity markets in Portugal. GDP was dominant on most gas markets in Portugal and was the monopoly supplier of gas to electricity producers, which used gas to power their new plants. GDP was the most likely important potential competitor in electricity. EDP was a major customer of GDP. Portugal owned significant shareholdings in both firms and 'appear[ed] to be the real architect' of the merger.

The Commission prohibited the merger.[58] It found anti-competitive horizontal effects in the electricity and gas markets through the elimination of GDP and EDP, respectively, as the most likely potential competitor to each other, in a context of nascent liberalization of the electricity and gas markets throughout the EU. Moreover, since gas was one of the most efficient ways to produce electricity in Portugal, the concentration would have given rise to anti-competitive vertical effects on wholesale electricity markets in view of EDP's preferred access to the available gas resources in Portugal and the possible incentive and ability of the merged entity to increase the production costs of its competitors. Likewise, the concentration would have also led to foreclosure of a significant part of the gas demand (controlled by EDP), thus harming future competing gas producers.

56 Case T-210/01, *General Electric v. Commission* [2005] ECR II-5575, EU:T:2005:456 ('*GE/Honeywell*').

57 For the backstory of the star-crossed GE/Honeywell merger, see Eleanor Fox (2007), '*GE/Honeywell:* The U.S. merger that Europe stopped—A story of the politics of convergence', in Eleanor Fox and Daniel Crane (eds), *Antitrust Stories*, Foundation, Ch. 12.

58 Commission Decision of 9 December 2004 in COMP/M.3440—*EDP/ENI/GDP*.

Although the merging parties had offered commitments that held near-term benefits in the gas sector, the Commission determined that the advantages would not offer a better situation than GDP's potential entry into electricity markets, and the General Court upheld the prohibition.[59]

6. The Commission's experience with vertical and conglomerate mergers ultimately led to its guidelines on non-horizontal mergers.[60]

D. The international dimension

In 1988, the Court of Justice decided, in *Wood Pulp* (see Chapter 2), that European competition law reprehends offshore cartels 'implemented' in the Union, e.g., when a 'concertation' is put 'into effect by selling at prices which are actually coordinated'. This 'effects doctrine' has since become the source of antitrust jurisdiction throughout the world, thus implying that cross-border practices are reviewable by multiple competition authorities worldwide, with the ensuing risk of conflicts and need for enforcement coordination.

Likewise, cross-border transactions may be reviewable by multiple competition authorities under their own merger control regime. In the field of merger control, coordination is complicated by the time-sensitive nature of mergers and acquisitions, and the different geographic focus of the companies involved may result in effects of a different nature or magnitude across jurisdictions. Thus, the risk of conflicts is real and may well determine the fate of a transaction.

Historically, the two main merger control jurisdictions in the world have been the US and the EU, and while they coordinate their merger control investigations closely when issues are arising on both sides of the Atlantic, conflicts have occurred in the past in relation to very prominent transactions. For example, the European Commission vetted Boeing's acquisition of McDonnell Douglas in 1997 (two US firms with no assets in Europe but which did business in a world market). The Commission nearly enjoined the acquisition, which had been cleared by US authorities, but in the end allowed it subject to important conditions. See p. 354. (The US authorities, too, freely challenge offshore mergers that hurt their interests.) In 2001, the Commission prohibited the GE/Honeywell merger, which had been approved by the US authorities. The General Court affirmed the prohibition. In 2012, the European Commission blocked a merger between

59 Case T-87/05, *EDP-Energias de Portugal SA v. Commission* [2005] ECR II-3745, EU:T:2005:333.
60 Available at: http://ec.europa.eu/competition/mergers/legislation/notices_on_substance.html (accessed 9 June 2017).

Deutsche Börse and NYSE Euronext, which the US authorities had cleared; but the market effects were more serious in the EU than in the US. Various transactions have also been cleared in both jurisdictions subject to different conditions, as in the acquisition of LinkedIn by Microsoft in 2016.

All these situations illustrate the important jurisdictional questions lying at the heart of cross-border concentrations, which then translate into cooperation issues when it comes to their actual review and assessment. To be sure, these situations also occur—more or less openly—with multiple other jurisdictions, such as Australia (e.g., in relation to Google's acquisition of Fitbit in 2020), Brazil, Canada, China PRC, Korea, the UK (post-'Brexit', e.g., in relation to the acquisition of Konecranes by Cargotec in 2022) or South Africa, as in the *Gencor/Lonrho* case, which offers a good overview of these questions and their treatment in practice.

Note on Gencor Ltd v. Commission

See facts at p. 370. In 1999, the European Commission enjoined the merger of Gencor and LPD (Lonrho), two South African firms, one of which had a presence in Europe. The General Court affirmed. This was the first merger prohibited and aborted on grounds of collective dominance (coordinated effects).

After the South African platinum mining companies Gencor and LPD agreed to merge, the South African Competition Board vetted the merger and found no competition problem. The European Commission vetted the merger and was concerned that when the Russian stocks were depleted in a couple of years, Gencor/LPD (Lonrho) and Anglo American, the world market leader, would jointly exercise dominant market power (collective dominance). Recall that LPD's parent, Lonrho, was a British firm, and Lonrho maintained its principal sales office in Belgium.

Examining the proposed merger, DG COMP invited comments from the South African authorities. The South African Deputy Minister of Foreign Affairs officially submitted his government's observations. He stated in a letter to the European Commission that the South African government favoured the consolidation. As to competitive effects, the Minister noted that the two remaining platinum firms in South Africa were now more equally matched, and he conveyed the South African view that the market would work better with two equally matched competitors than under market domination by Anglo American. The Minister did not contest the intervention of the Commission. However, he wrote that '[h]aving regard to the importance of mineral resources to the South African economy', South Africa favoured allowing the consolidation and attacking any collusion between Anglo American and Gencor/LPD if and when it arose (judgement, para. 3).

The Commission prohibited the merger. Gencor sought annulment in the General Court on both jurisdictional and substantive grounds. Gencor argued that the Union had no jurisdiction over this concentration, since it involved economic activities conducted within the territory of a non-member country and had been approved by authorities of that country.

Gencor contended that the Merger Regulation applies only to concentrations carried out within the Union. It based its construction on the language of the Merger Regulation (especially recitals), the Treaty articles on which the regulation was based and the international law principle of territoriality. Gencor distinguished the *Wood Pulp* case, wherein the Court of Justice had asserted jurisdiction over an offshore cartel designedly raising prices in Europe, on grounds that the cartel was implemented in Europe. Gencor said, of *Wood Pulp*, that while the high prices were agreed to offshore, the conspiracy to raise prices was implemented by selling at the conspiratorial prices into the Union. By contrast, the platinum merger was implemented in South Africa and 'is thus primarily relevant to the industrial and competition policy of that non-member country' (para. 56).

The General Court rejected Gencor's construction of the Regulation. The Court said:[61]

> According to *Wood Pulp*, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter.

The Court proceeded to assess the legitimacy of jurisdiction under international law. Noting that the transaction entailed the merger of the firms' marketing operations throughout the world, including the Community, it said:

> Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community. [para. 90]

61 Case T-102/96, *Gencor Ltd v. Commission* [1999] ECR II-753, EU:T:1999:65, para. 87.

The Court concluded that the merger's effect in the Union (formerly, the 'Community') would be immediate, substantial and foreseeable. It construed 'immediate' to include 'medium term'—after Russian platinum stocks were exhausted and thus, after a force that could be disruptive of Anglo and Gencor's duopoly behaviour would have been removed. It concluded that an ***abuse*** (a price rise resulting from collective behaviour) need not be immediate; it is enough that a transaction causes a lasting structural alteration, making abusive behaviour economically rational.

As to substantiality of the effect, Gencor claimed that the merging parties' sales and market shares in Europe were too small to cause a substantial effect and that the merging parties' greater sales elsewhere—Japan and the United States—undermined 'substantiality'. The Court rejected this claim. It said:

> The fact that, in a world market, other parts of the world are affected by the concentration cannot prevent the Community from exercising its control over a concentration which substantially affects competition within the common market by creating a dominant position.

Likewise, the Court rejected the claim that the exercise of jurisdiction violated an international principle of non-interference, if there is such a principle, or the principle of proportionality. The Court said that there was no conflict between the laws of the two jurisdictions and therefore, no interference, because South Africa did not require the firms to do what the EU required them not to do. Nor was it shown how the completion of the merger would enhance South Africa's vital economic or commercial interests.

Moreover, as the Commission had argued, the merger was like an export cartel. Only a small amount of platinum was sold in South Africa. South Africa stood to gain more by exploiting the world than it stood to lose by exploiting its own consumers.

Thus, the Court held, it had jurisdiction.

South Africa did not further resist prohibition of *Gencor/Lonrho*. But when, 2 years later, the Commission signalled its serious problems with the GE/Honeywell merger, US senators, cabinet members and the President declared the European 'intrusion' into the 'American' merger inappropriate. After the European prohibition, US Assistant Attorney General in charge of Antitrust, Charles James, issued a statement taking issue with the European analysis, not with the assertion of jurisdiction. 'Antitrust laws protect competition, not competitors', he said. The merger 'would have been procompetitive and beneficial to consumers .... [The European Commission] apparently concluded that a more diversified, and thus more competitive GE, could somehow disadvantage other market participants .... This matter points to the continuing need ... to move toward a greater policy convergence'.[62]

NOTES AND QUESTIONS

1. In *Gencor/Lonrho*, was the Court's concept of conflict the same as or different from that of the US Supreme Court in *Hartford* (see p. 86, text at note 29)? Was there really no conflict?
2. Does the European Commission have subject matter jurisdiction over offshore mergers? Does *Wood Pulp* help you answer the question? The US federal antitrust agencies' 1995 International Guidelines declare that the US agencies have jurisdiction to challenge an anti-competitive merger of foreign firms that hurts US consumers; and that they even may challenge an offshore merger that hurts US exporters as long as it also hurts foreign consumers (but query whether subsequent case law may have put such mergers beyond reach).[63]

   Is there anything to be said for a rule of law that would give only the US the right to enjoin a merger of US firms with substantial sales (and thus consumers) in the US, and only the EU the right to prohibit a merger of European firms with substantial sales in the EEA? What if the merger harms consumers beyond the borders of the home country (e.g., *Gencor/Lonrho*)? What if the merger harms only producer interests (e.g., rights of access to markets), and the foreign law protects these interests? (Compare *Boeing/McDonnell Douglas*.)
3. Do these cases—mergers in global markets having impacts around the world—suggest a need for international law or principles? Philip Condit, then Chairman of Boeing, told the *Washington Post*[64] at the conclusion of Boeing's negotiations with the EU to settle the merger challenge: 'In a global economy, a single set of rules is, in fact, preferable[.] Over time, we have to keep working in that direction'.

   Comment on Mr Condit's statement. Is it realistic? How is a single set of merger rules for the world achieved? How—and by whom—might the single set be applied, objectively and without nationalistic bias? Consider also the case of worldwide mergers creating monopolies in (third world) jurisdictions devoid of merger control regime or of the means to enforce merger rules.

   The competition-law nations of the world (more than 130) have achieved some convergence of procedure and process in pre-merger notification requirements. They are moving towards convergence of some substantive standards, albeit with a significant margin of difference on some points. The major forum for convergence is the International Competition Network—a virtual network of the antitrust authorities of the world.[65] A common approach, however, does not always mean common outcomes when several jurisdictions rule upon the same transnational merger. Market conditions sometimes differ from nation to nation, as in *Deutsche Börse/NYSE Euronext*. Moreover, as in *GE/Honeywell*, different analysts may apply different presumptions, often affecting market definition and assessment of competitive effects.

62 81 Bureau of National Affairs (now Bloomberg BNA) Antitrust & Trade Reg. Rep. 15 (6 July 2001).

63 Antitrust Enforcement Guidelines for International Operations (April 1995), available at: www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations, Illustrative Example H (accessed 9 June 2017).

64 *Washington Post*, 24 July 1997, E1.

65 A description of their initiatives and the documents that comprise their growing work product are available at: www.internationalcompetitionnetwork.org (accessed 3 February 2023). (Select 'By Working Group'; select 'Mergers'.)

7

The State and competition

From the outset, State monopoly, State-granted benefits and privileges, and State power co-opted by private interests posed serious market interference issues. For some Member States, the State was *the* problem. In some States, business—especially in basic goods and services—was also run by State or State-privileged monopolies. These enterprises were dominant by reason of privilege, not by reason of skill, foresight or inventiveness. By the nature of their operations, these enterprises were a major obstacle to achieving a common market. They tended to procure goods only from their nationals (and procurement by State enterprises represented a sizeable percentage of GDP). In offering goods or services, they were often nationalistic and discriminatory. They often had leverage to exclude competitors, and their large presence and connections, themselves, chilled entry. It was predictable that several articles of the Treaty would be addressed to the problem of the State in the market and that from the outset, the Commission would have a sharp eye on State monopolies of a commercial character and firms that held privileges bestowed by the State.

Ports, and discriminatory access to them, present a good example of State monopoly abuses. The ports cases are also a good example of application, jointly, of two or more Treaty articles, such as Articles 102 and 106 TFEU—abuse of dominance, and limits on the conduct of public undertakings and those granted special or exclusive rights. Other combinations of Treaty articles that came into common use are the former Article 3(1)(g), stating that the EU must ensure that competition is not distorted (now in Protocol 27), and Article 4(3) TEU, whereby Member States have a duty to cooperate in carrying out the tasks of the EU, along with Articles 101 and 102 TFEU and the various articles facilitating free movement and prohibiting discrimination, such as Articles 18, 34, 35 and 56 TFEU.

State-granted aid and other subsidies to domestic businesses were likewise a major problem. Each of the Member States was subsidizing 'its' firms as and when it chose, often responding to powerful private interests or trying to puff-up domestic champions to give them a competitive edge over their neighbours, undermining competitive opportunities of out-of-State firms; thus, the importance of Articles 107–108 TFEU—prohibiting State aid unless authorized.

When the financial crisis hit Europe in 2008, the then Competition Commissioner, Neelie Kroes, gave a speech.[1] She decried State aids that would simply dump one nation's crisis onto the others. She said:

> Were it not for the State aid rules, there was a real risk that national governments would have been forced into a costly and damaging subsidy race, wasting billions upon billions of taxpayers' money competing with each other's largesse rather than focusing the money where it was most needed. Were it not for the State aid rules, we could have been faced with beggar thy neighbour policies that could have undermined the solutions that governments were putting in place
>
> * * *
>
> The European Single Market's role is all the more vital during periods of economic difficulties—together we stand, divided we fall. The Single Market will attenuate any economic downturn and accelerate recovery. Which is why, despite siren calls to the contrary, we need to ensure that the Single Market functions as well as possible at this crucial moment, which means enforcing the antitrust and State aid rules as diligently as ever.

Commissioner Kroes gave prompt guidance on circumstances in which State aid would be approved (in general, approval would be possible when the aid was focused on growth and the future), and when it would be disapproved. The intensifying financial crisis, however, put her principles under pressure.[2]

When the coronavirus hit Europe in 2020, the European Commission adopted new State aid rules. In March 2020, it adopted a temporary framework to help Member States support their economies, and it adopted several amendments thereafter. It approved €3.2 trillion in State aid, including a €7 billion package from the French government to Air France, 'to provide urgently needed liquidity for companies, save jobs, enable research and development and ensure the supply of products to fight the coronavirus

1 'EU competition rules—part of the solution for Europe's economy', Speech/08/625, 18 November 2008.
2 For an overview of the immediate response to the crisis, see D. Gerard (2009), 'EC competition law enforcement at grips with the financial crisis: Flexibility on the means, consistency in the principles', *Concurrences*, **1**, 46.

outbreak'. Executive Vice-President and Competition Commissioner Margrethe Vestager said:

> We continue to work closely with Member States to ensure that European businesses have access to urgently needed liquidity. Our rules now also enable such support through subordinated debt. As the crisis evolves, many businesses will also need capital to stay afloat. If Member States decide to step in, we will apply today's rules to ensure that taxpayers are sufficiently remunerated and their support comes with strings attached, including a ban on dividends, bonus payments as well as further measures to limit distortions of competition. And for public transparency, large companies also have to report on the use of aid received and compliance with their responsibilities linked to the green and digital transitions. Because we have to uphold European values and the need for a level playing field to be able to bounce back strongly from this crisis.
>
> That's also why much more is needed than State aid control. We need a European recovery plan that is green and digital and to the benefit of all European consumers. That's in the interest of all of Europe—to make sure that this global symmetric crisis does not transform into an asymmetric shock to the detriment of Member States with less possibility to help their industry and the EU's competitiveness as a whole.[3]

The temporary framework to support the economy during the coronavirus outbreak expired in June 2022.

This chapter starts with ports cases as an example of abuse of power of State-owned or recently privatized firms, depriving rivals of access to infrastructure facilities. These cases are a fortiori examples of violation of Article 102 TFEU. It then reviews the compatibility of State monopoly and monopoly privileges with the Treaty. Subsequently, it deals with public restraints and asks when anti-competitive State measures violate the competition provisions in combination with other articles, such as Article 4(3) TEU and Article 101 TFEU, and when State measures shield anti-competitive private action that they facilitate. Finally, the chapter closes by discussing the Treaty provisions that control State distortions of competition by grants of subsidies, called State aids.

3 Available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_20_838 (accessed on 27 July 2020).

A. State ownership, abuses and a note on liberalization

Ports and ports authorities were principally owned by States. They were literally and figuratively gateways to markets. Typically, States adopted measures to bolster ports' powers to exclude; and exclusion, discrimination and exploitation were common. The ports cases are, therefore, helpful illustrations of (1) factually, problems of State ownership and exclusive privilege, and (2) legally, the interrelationship of Treaty articles applied to address the problems of abuse, promote liberalization and ensure non-discriminatory access.

This section reviews cases and measures revolving around two ports—the Port of Rødby, Denmark, and the Port of Genoa, Italy—and ends with two additional contemporary concerns about State power.

Port of Rødby
Commission Decision 94/119/EC[4]

> [DSB was a Danish public undertaking that operated as a department of the transport ministry. It held the exclusive right to organize railroad traffic in Denmark, owned the Port of Rødby, and operated ferry services between Denmark and neighbouring countries. Stena was a Swedish shipping group that specialized in ferry services and wished to operate between Denmark and Germany (Puttgarden), which essentially links eastern Denmark with Germany and the rest of western Europe.
>
> Stena requested permission from the Danish government to use the existing port facilities at Rødby or to build a port in the vicinity. The Danish government refused. Stena complained to the Commission.]
>
> *Abuse of dominant position*
>
> 12 The refusal to allow 'Euro-Port A/S', a subsidiary of the Swedish group [Stena] to operate from Rødby has the effect of eliminating a potential competitor on the Rødby-Puttgarden route and hence of strengthening the joint dominant position of DSB and DB on that route.
>
> According to the case law of the Court, an abuse within the meaning of Article [102 TFEU] is committed in cases where, without any objective necessity, an undertaking holding a dominant position on a particular market reserves to itself an ancillary activity which might be carried out by another undertaking as

4 Commission Decision 94/119/EC of 21 December 1993 [1994] *O.J.* L 55/52.

part of its activities on a neighbouring but separate market, with the possibility of eliminating all competition from such undertaking.

Thus an undertaking that owns or manages and uses itself an essential facility, i.e. a facility or infrastructure without which its competitors are unable to offer their services to customers, and refuses to grant them access to such facility is abusing its dominant position.

Consequently, an undertaking that owns or manages an essential port facility from which it provides a maritime transport service may not, without objective justification, refuse to grant a shipowner wishing to operate on the same maritime route access to that facility without infringing Article [102 TFEU].

13 According to the case law of the Court, Article [106(1) TFEU] prohibits Member States from placing, by law, regulation or administrative provision, public undertakings and undertakings to which they grant exclusive rights in a position in which those undertakings could not place themselves by their own conduct without infringing Article [102 TFEU]. The Court added that, where the extension of the dominant position of a public undertaking or an undertaking to which the State has granted exclusive rights resulted from a State measure, such a measure constituted an infringement of Article [106], read in conjunction with Article [102] of the Treaty …

Thus, for the reasons given above, any firm in the same position as DSB which refused to grant another shipping operator access to the port it controlled would be abusing a dominant position. Where, as in the present case, a Member State has refused such access and has strengthened the effects of the refusal by also refusing to authorize the construction of a new port, it constitutes a State measure in breach of Article [106 TFEU], read in conjunction with Article [102 TFEU].

14 The reasons given by the Danish Transport Ministry for rejecting both requests of 'Euro-Port A/S' are the following:

- the plan of 'Euro-Port A/S' (Stena), to build a new terminal is not acceptable as that undertaking has allegedly 'not established that there is an unsatisfied demand for a ferry service' and it is 'most unlikely that such a demand would arise' …
- 'Euro-Port A/S' (Stena) could not operate from the existing port facilities as this would have the effect of preventing the companies already operating in the port from expanding their activities.

* * *

The Commission concludes … that:

— there was indeed an unsatisfied demand for ferry services in May 1990 since one year later DSB and DB had expanded their services,
— the increase in the activities of DB and DSB in 1991 confirms that the port of Rødby was not saturated.

15 The Commission also considers that there is no evidence that the existing facilities at Rødby would today be saturated or that, subject to alterations which Stena has informed the Commission it is prepared to finance, existing port capacity is unable to cope with an increase in trade. The Commission also notes that the Swedish group (Stena) has acquired land adjacent to the port facilities of Rødby which is perfectly suitable for development as a terminal by Stena.

It therefore concludes that there are no technical constraints preventing the Stena group from sailing between Rødby and Puttgarden.

16 In their letter of 22 February 1993 which constitutes the reply to the letter of formal notice sent by the Commission on 24 November 1992, the Danish authorities rejected the latter's request, stressing that their refusals were justified under Community law. They stated that it would be impossible to allow Stena access to the existing facilities, giving technical reasons and referring for the first time, without any further details, to obligations incumbent upon DB and DSB in the general interest.

This would appear to indicate that, in the view of the Danish authorities, the technical feasibility of access to the port is not a problem or is not the only problem and that they also have a duty to protect the public undertaking DSB from a competitor on the market for ferry services.

Nor can the Commission share the view of the Danish authorities that the alleged saturation of the existing port facilities would make pointless any attempt to introduce competition since this could not in any event lead to an increase in the number of sailings between Rødby and Puttgarden.

Even on a saturated market, an improvement in the quality of products or services offered or a reduction in prices as a result of competition is a definite advantage for consumers; this could also lead to an increase in demand which, in the present case, could be met by expanding the port.

* * *

Article [106(2) TFEU]

18 The Commission considers that the application of the competition rules in the present case does not impede the particular task entrusted to the public undertaking DSB namely to organize rail services and manage the port facilities at Rødby. Therefore the exception provided for in Article [106](2) does not apply.

* * *

CONCLUSION

19 In view of the foregoing, the Commission considers that the measures referred to in paragraphs 1 and 2 constitute infringements of Article [106](1) of the Treaty, read in conjunction with Article [102].

The Commission subsequently refined the remedy. It

> became apparent that establishing competing facilities, especially in the case of nationwide networks, requires a great deal of investment and is usually inefficient. So the European Commission developed the concept of legally separating the provision of the network from the commercial services using the network.[5]

What are the merits of this structural remedy?

CASE

Merci Convenzionali Porto di Genova v. Siderurgica Gabrielli SpA (Case C-179/90)[6]

[The Italian Navigation Code established an exclusive right to organize dock work for third parties, and required retention of dock work companies that employed only registered workers of Italian nationality. Carriers coming to port were not permitted to use their crew to load and unload. The organizer of dock work was generally controlled by the port authority.

5 Available at: https://ec.europa.eu/competition/general/liberalisation_en.html (accessed on 13 August 2022).

6 [1991] ECR I-5889, EU:C:1991:464.

CASE *(continued)*

Merci enjoyed the exclusive right to organize dock work. Siderurgica Gabrielli SpA arrived in the Port of Genoa with goods, but Merci delayed in providing unloading services, and Siderurgica Gabrielli suffered damages, for which it sought compensation. The Italian court asked the Court of Justice whether the Italian rules violated Article 4(3) TEU and Articles 34 (free movement of goods), 45 (free movement of workers), 102 and 106 TFEU, and whether Siderurgica Gabrielli had a remedy.

Advocate General Van Gerven pinpointed the anti-competitive and discriminatory effects inherent in the Italian law:]

22 [W]e must now consider whether these abuses of a dominant position within the meaning of Article [102 TFEU]—in so far as the national court regards them as established— are imposed, or facilitated, or made inevitable by the relevant national legislation. I think there can be little doubt about this. In fact, the scale of charges and other, presumably unfair, contractual conditions applied by Merci and Compagnia are made possible, if not inevitable, by the national legislation applicable and are facilitated, if not made compulsory, by the port authorities under the powers conferred on them by national legislation. The other abuses too are made possible by that legislation. But for the monopoly for the performance of dock work conferred on it by the Italian legislation, Compagnia could certainly not have afforded to abstain from using modern technology, and it is clear also that the dissimilar treatment of trading parties was possible only as a result of the monopoly granted to Merci and the complexity and lack of transparency of the scale of charges devised by the authority.

[The Court ruled:]

19 [I]t appears from the circumstances described by the national court and discussed before the Court of Justice that the undertakings enjoying exclusive rights in accordance with the procedures laid down by the national rules in question are, as a result, induced either to demand payment for services which have not been requested, to charge disproportionate prices, to refuse to have recourse to modern technology, which involves an increase in the cost of the operations and a prolongation of the time required for their performance, or to grant price reductions to certain consumers and at the same time to offset such reductions by an increase in the charges to other consumers.

20 In these circumstances it must be held that a Member State creates a situation contrary to Article [102] of the Treaty where it adopts rules of such a kind as those at issue before the national court, which are capable of affecting trade between Member States as in the case of the main proceedings, regard being had to the factors mentioned in … this judgement relating to the importance of traffic in the Port of Genoa.

CASE *(continued)*

21 As regards the interpretation of Article [34] of the Treaty requested by the national court, it is sufficient to recall that a national measure which has the effect of facilitating the abuse of a dominant position capable of affecting trade between Member States will generally be incompatible with that article, which prohibits quantitative restrictions on imports and all measures having equivalent effect (see Case 13/77 *GB-INNO-BM v. ATAB* [1977] ECR 2115, paragraph 35) in so far as such a measure has the effect of making more difficult and hence of impeding imports of goods from other Member States.

22 In the main proceedings it may be seen from the national court's findings that the unloading of the goods could have been effected at a lesser cost by the ship's crew, so that compulsory recourse to the services of the two undertakings enjoying exclusive rights involved extra expense and was therefore capable, by reason of its effect on the prices of the goods, of affecting imports.

23 It should be emphasized in the third place that even within the framework of Article [106], the provisions of Articles [34], [45] and [102] of the Treaty have direct effect and give rise for interested parties to rights which the national courts must protect (see in particular, as regards Article [102] of the Treaty.

24 The answer to the first question, as reformulated, should therefore be that:

> Article [106(1)] of the … Treaty, in conjunction with Articles [34], [45] and [102] of the … Treaty, precludes rules of a Member State which confer on an undertaking established in that State the exclusive right to organize dock work and require it for that purpose to have recourse to a dock-work company formed exclusively of national workers; Articles [34], [45] and [102] of the Treaty, in conjunction with Article [106], give rise to rights for individuals which the national courts must protect.

Following the judgement, Italy revised its law to open up competition for port-handling. The Commission, however, was not satisfied. It found that local authorities systematically refused to grant operating licences to potential competitors of long-established dock services companies. Italy, in response, issued a licence.[7] The Commission again found that the Italian reform was insufficient and indeed, that it created new problems. It found additional infringements by Commission Decision 97/744.[8]

7 European Community, XXVth Report on Competition Policy (1995), pp. 58–59.

8 Commission Decision 97/744/EC of 21 October 1997 pursuant to Article 90 (3) of the EC Treaty on the provisions of Italian ports legislation relating to employment [1997] *O.J.* L 301/17.

The port cases reflect principles and problems common to a range of infrastructure industries and regulated sectors, including transport, post, telecommunications and energy. The law that applies to restrictive State measures and to abusive action by undertakings is intertwined. In some sectors, notably energy and telecommunications, major liberalization projects, aided by framework directives, are under way. The objective is to improve conditions of competition, not just to prevent its restriction.[9]

In the rest of this chapter, you will see numerous ways in which the State might unduly interfere with the market or where the very fact of State ownership tends to skew incentives. Two recent cases underscore this problem and demonstrate the EU's alertness to it.

In *Lietuvos geležinkeliai AB (Lithuanian Railroads) v. Commission*, the national railway company removed a strategic sector of the track to the Latvian border just at the moment when one of its main customers (a big oil shipper) threatened to shift its business to a Latvian potential competitor, which it needed to get to the border of Latvia and the Latvian port. The Lithuanian Railroad defended that it had to remove the track to fix a defect. There was a defect on a very small part of the track but a huge segment was removed, apparently without plans to replace it; the railroad was lobbying the government not to rebuild the removed track. The General Court affirmed the Commission, which found a violation of Article 102 TFEU. The Court of Justice affirmed that the General Court did not err.

Noting that there is normally no duty of a dominant firm to grant access except in exceptional circumstances, the General Court interrogated the reason for the rule: to induce the firm to invest in essential facilities. The Court said, in paras. 91, 94, 98:

> [S]uch a requirement to protect the incentive of the undertaking in a dominant position to invest in the creation of essential facilities is not present where the applicable regulatory framework already imposes a duty to supply on the undertaking in a dominant position or where the dominant position which the undertaking has acquired on the market derives from a former State monopoly.
>
> * * *
>
> In the present case, it must be noted in the first place that the applicant holds a dominant position on the market for the management of railway infrastructure

9 See N. Kroes (2008), 'Improving competition in European energy markets through effective unbundling', in B. Hawk (ed.), *International Antitrust Law & Policy, Fordham Competition Law 2007*, New York: Juris, Ch. 9, p. 247.

> which derives from a statutory monopoly. Also, the applicant has not invested in the Lithuanian railway network, which belongs to the Lithuanian State and was built and developed using public funds.
>
> * * *
>
> … [T]he conduct in question, namely the removal of the entirety of the Track, cannot be analysed in the light of the case-law established in relation to refusal to provide access to essential facilities, but must be analysed as conduct capable of hindering market entry by making access to the market more difficult and thus leading to an anticompetitive foreclosure effect.[10]

Thus, not only does the State have responsibilities; it may have higher responsibilities. The railroad case should remind you of the port cases—with so much opportunity to cut the ground from beneath competitors and also for pretextual excuses.

Another matter challenged the State on a wholly different level. The Commission had rejected a complaint by a Polish entity, which alleged abuse of dominance by the State-controlled rail freight transport company, PKP Cargo. The Commission rejected the complaint on grounds that Poland was best placed to deal with the matter. However, the EU had found Poland to have systematic deficiencies in its application of the rule of law. Neither the judges nor the competition authority were independent of the State. The competition authority might be lenient to the State-owned firm. If the matter remained in Poland, there was a real risk of a breach of the applicant's rights to fair adjudication of its claim. These facts were relevant to the question of who was best placed to deal with the complaint, and they were erroneously not considered by the Commission.[11]

B. State monopolies of a commercial character: application of Articles 34 and 37 TFEU

While the ports cases clarify duties of State monopolies not to discriminate, exclude and thereby harm competition, a yet more conceptual, more basic question about the essence of the political economy of the EU was to arise: did the Treaty adopt a rule of free enterprise? Did it merely tolerate State-owned monopoly? And even if so, were new nationalizations inconsistent with the Treaty?

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10 Case T-814/17, *Lietuvos geležinkeliai AB (Lithuanian Railroads) v. Commission*, ECLI:EU:T:2020:545, appeal dismissed, Case C-42/21 P, ECLI:EU:C:2023:12.

11 Case T-791/19, *Sped Pro, SA v Commission*, ECLI:EU:T:2022:67.

In 1962, Italy nationalized its electricity industry, transferring all of the assets of the nationalized firms to ENEL. Mr Costa, a lawyer, refused to pay €3 of his electric bill and sued for a declaration that the nationalization act was void as inconsistent with the Treaty and that his debt was void. He came before an ideologically sympathetic magistrate in Milan, who agreed with him that nationalization violated EU law. He later came before a hostile Italian Supreme Court and was derided by an indignant Italian government. He ultimately suffered dismissal of his case for lack of standing without having received an answer from the Court of Justice as to whether nationalization was or was not permissible under the Treaty.[12]

Reflect on the unanswered question in *Costa*: is the creation of a new State monopoly by nationalization consistent with the Treaty?

The principal relevant provision of the Treaty is Article 37 TFEU, which must be read together with Article 34 TFEU, which prohibits Member States from imposing quotas or tariffs or measures of equivalent effect; that is, from unduly restricting trade.

Article 37 TFEU, ex 31 ECT

1. Member States shall adjust any State monopolies of a commercial character so as to ensure that no discrimination regarding the conditions under which goods are procured and marketed exists between nationals of Member States.

The provisions of this Article shall apply to any body through which a Member State, in law or in fact, either directly or indirectly supervises, determines or appreciably influences imports or exports between Member States. These provisions shall likewise apply to monopolies delegated by the State to others.

2. Member States shall refrain from introducing any new measure which is contrary to the principles laid down in paragraph 1 or which restricts the scope of the Articles dealing with the prohibition of customs duties and quantitative restrictions between Member States.

* * *

12 See Case 6/64, *Costa v. ENEL* [1964] ECR 585, EU:C:1964:66, ruling that Article 37 TFEU, prohibiting any new commercial monopoly giving rise to national discrimination in procuring or marketing goods, is directly effective.

To address a serious problem of alcohol abuse, Sweden brought the liquor business under State control. It formed a State-owned company, V&S, with exclusive rights to produce and export spirits and to import beer, wine and spirits. It formed another State-owned company, Systembolaget, and gave it the exclusive right to sell alcoholic beverages at wholesale to restaurants and the exclusive right to sell alcoholic beverages at retail.

To facilitate its accession to the EU, Sweden abolished the privileges of V&S and the wholesale privileges of Systembolaget and replaced them with a system of licences while retaining for Systembolaget its retail monopoly. Licences for import, export, production and wholesaling were to be issued at the discretion of the Alcohol Inspectorate upon the making of an application, which required documentation and the payment of a high, non-reimbursable fee. The fees, including annual renewal fees, were much higher per litre for low sales volume than for high sales volume, and thus, the fee structure favoured the large incumbent supplier, V&S.

Advocate General Elmer, on a reference involving the criminal prosecution of an unauthorized wine importer, summarized the basis and workings of the Swedish system as follows:

> The fundamental aim of Swedish alcohol policy throughout the twentieth century has been to limit the effect of market forces, namely competition and private profits. The reason for this was the conviction that competition and private profits encourage active marketing and active selling, which lead to increased consumption. The greater the number of undertakings having an interest in increased alcohol sales, the better alcoholic beverages will fare in the competition for consumers' money. In the case of a sector which society does not wish to see expand, market mechanisms such as competition and profit are not particularly suitable as means of control.
>
> In the government's view, the principle of limiting private profits in the alcohol trade remains valid (*Franzen*; see additional excerpts from his opinion later.)

CASE

Franzen (Case C-189/95) *(Swedish alcohol monopoly)*[13]

[Harry Franzen, without a licence, imported wine from Denmark and sold it in Sweden. Prosecuted for a criminal violation, he pleaded that the Swedish law was invalid for violating Articles 34 and 37 TFEU. The national court referred questions to the Court of Justice.

13 [1997] ECR I-05909, EU:C:1997:504.

CASE *(continued)*

Advocate General Elmer agreed with Mr Franzen that the Swedish alcohol monopoly violated EU law. The advocate general said that Article 34 TFEU 'is intended to ensure access to the market of products from other Member States' (para. 59) and 'to prevent lacunae in the protection of free movement' (para. 65). As to Article 37 TFEU:]

[Excerpts from the Opinion of Advocate General Elmer]

68 … Article [37] of the Treaty refers to the traders who supply the market in products. That provision therefore differs from Article [34] of the Treaty, first by being limited to discrimination and secondly by not protecting the free movement of goods as such but by protecting the traders of the other Member States who participate in the free movement of goods.

69 That was confirmed in … *Commission v. Greece* [Case C-347/88,[1990] ECR I-4747, EU:C:1990:470], where the Court held that to maintain in force the State's rights with regard to the importation and marketing of petroleum products gave rise to discrimination within the meaning of Article [37(1) TFEU] against exporters established in other Member States. Presumably, the determining factor in that case was that the State's monopoly was of such a kind as to prevent certain traders, in particular those with whom the Greek State's monopoly did not have commercial relations, from exporting to the Greek market. There was therefore discrimination between nationals of the Member States, as mentioned in Article [37(1)].

* * *

72 Furthermore, in its decisions the Court has sometimes applied Articles [34] and [37 TFEU] concurrently to a national monopoly of a commercial character and sometimes applied only Article [34] to exclusive rights conferred on a national monopolistic undertaking. Thus in … *Commission v. Greece*, the Court held that the exclusive right to import and market finished petroleum products was contrary to both Article [34] and Article [37(1) TFEU]. In the telecommunications terminals judgement [Case C-202/88, *France v. Commission* [1991] ECR I-1223, EU:C:1991:120] the Court held that exclusive rights to import and market terminal equipment constituted a measure having equivalent effect to a quantitative restriction on imports within the meaning of Article [34] of the Treaty.

* * *

[The Advocate General concluded that the Swedish monopoly and regulation necessarily hindered trade in violation of Article 34 TFEU; that it had the same effect as an import monopoly and therefore, a discriminatory effect in violation of Article 37 TFEU; and that the system was not justified under Article 36 TFEU, since health and life could be protected by less restrictive means. The Court did not entirely agree.]

CASE *(continued)*

The Court

The rules relating to the existence and operation of the monopoly [The Retail Monopoly]

39 The purpose of Article [37] of the Treaty is to reconcile the possibility for Member States to maintain certain monopolies of a commercial character as instruments for the pursuit of public interest aims with the requirements of the establishment and functioning of the common market. It aims at the elimination of obstacles to the free movement of goods, save, however, for restrictions on trade which are inherent in the existence of the monopolies in question.

40 Thus, Article [37] requires that the organization and operation of the monopoly be arranged so as to exclude any discrimination between nationals of Member States as regards conditions of supply and outlets, so that trade in goods from other Member States is not put at a disadvantage, in law or in fact, in relation to that in domestic goods and that competition between the economies of the Member States is not distorted.

41 In the present case, it is not contested that, in aiming to protect public health against the harm caused by alcohol, a domestic monopoly on the retail of alcoholic beverages, such as that conferred on Systembolaget, pursues a public interest aim.

42 It is therefore necessary to determine whether a monopoly of this kind is arranged in a way which meets the conditions referred to in paragraphs 39 and 40 above.

* * *

The monopoly's sales network

53 Mr Franzen contends that the sales network maintained by Systembolaget is restricted and does not offer the full range of beverages available, which restricts even more the possibilities of sale.

54 It is true that a monopoly such as Systembolaget has only a limited number of 'shops'. However, it does not appear from the information provided to the Court that the number of sales outlets are limited to the point of compromising consumers' procurement of supplies of domestic or imported alcoholic beverages.

55 First of all, under the agreement which it has made with the State, Systembolaget must establish or close sales outlets on the basis of management constraints, consumer demand and the necessities of alcohol policy and ensure that each commune which so wishes has a sales outlet and that all points of the territory are served at least by dispatch deliveries.

CASE *(continued)*

56 Second, according to the information provided to the Court, alcoholic beverages may be ordered and supplied in the monopoly's 384 'shops', through around 550 sales outlets as well as along 56 bus routes and on 45 rural post rounds. Furthermore, there is at least one 'shop' in 259 of the 288 Swedish communes and Systembolaget is planning for every commune to have at least one 'shop' in 1998.

57 Finally, even if the retail network of Systembolaget is still imperfect, this circumstance does not adversely affect the sale of alcoholic beverages from other Member States more than the sale of alcoholic beverages produced in Sweden.

The promotion of alcoholic beverages

58 Mr. Franzen also contends that the system for promoting alcoholic beverages favours the marketing of beverages produced in Sweden. He points out that the promotion of alcoholic beverages is confined to mere provision of information about the products, varying in form depending on whether the products are in the 'basic' assortment or in the 'by order' assortment, that the information is provided by the monopoly alone, without any control by suppliers and, furthermore, that suppliers may not canvas persons in charge of the monopoly's 'shops'.

59 As far as these points are concerned, it must be observed first of all that the restriction of the possibilities for promoting alcoholic beverages to the public is inherent in the situation where there is only one operator on the market for their retail.

60 Second, the monopoly rules do not prohibit producers or importers from promoting their products to the monopoly ….

61 It must also be pointed out that the promotion of alcoholic beverages to the public is subject, in the Member State in question, to a general restriction, the validity of which has not been called in question by the national court nor challenged by Mr Franzen. That restriction consists, in particular, of a ban on advertising on radio and television and in all newspapers or other periodicals, that is to say the means traditionally used by producers to promote their products to the public. However, alcoholic beverages selected by Systembolaget may be advertised in written material available at sales outlets. Furthermore, any alcoholic beverage may be mentioned in press articles.

* * *

64 Finally, it must be noted that the method of promotion used by the monopoly applies independently of products' origin and is not in itself apt to put at a disadvantage, in fact or in

CASE *(continued)*

law, beverages imported from other Member States in relation to those produced on national territory.

* * *

66 So, having regard to the evidence before the Court, it appears that a retail monopoly such as that in question in the main proceedings meets the conditions for being compatible with Article [37] of the Treaty ....

Article 34 [The Production and Wholesaling Restrictions]

68 ... Mr Franzen observes that the monopoly may obtain supplies only from holders of production licences or wholesale licences whose grant is subject to restrictive conditions and that such an obligation necessarily impedes imports of products from other Member States.

* * *

70 In a national system such as that in question in the main proceedings, only holders of production licences or wholesale licences are allowed to import alcoholic beverages, that is to say traders who fulfil the restrictive conditions to which issue of those licences is subject.

According to the information provided to the Court during the proceedings, the traders in question must provide sufficient personal and financial guarantees to carry on the activities in question, concerning in particular their professional knowledge, their financial capacity and possession of storage capacity sufficient to meet the needs of their activities. Furthermore, the submission of an application is subject to payment of a high fixed charge ... which is not reimbursed if the application is rejected. Finally, in order to keep his licence, a trader must pay an annual supervision fee, which is also high ....

71 The licensing system constitutes an obstacle to the importation of alcoholic beverages from other Member States in that it imposes additional costs on such beverages, such as intermediary costs, payment of charges and fees for the grant of a licence, and costs arising from the obligation to maintain storage capacity in Sweden.

72 According to the Swedish government's own evidence, the number of licences issued is low (223 in October 1996) and almost all of these licences have been issued to traders established in Sweden.

73 Domestic legislation such as that in question in the main proceedings is therefore contrary to Article [34] of the Treaty.

CASE *(continued)*

74 The Swedish government has, however, invoked Article [36] of the … Treaty. It maintains that its legislation was justified on grounds relating to the protection of human health.

75 It is indeed so that measures contrary to Article [34] may be justified on the basis of Article [36] of the Treaty. All the same, according to established case-law (Cassis de Dijon …), the domestic provisions in question must be proportionate to the aim pursued and not attainable by measures less restrictive of intra-Community trade.

76 Although the protection of human health against the harmful effects of alcohol, on which the Swedish government relies, is indisputably one of the grounds which may justify derogation from Article [34] of the Treaty, the Swedish government has not established that the licensing system set up by the Law on Alcohol, in particular as regards the conditions relating to storage capacity and the high fees and charges which licence-holders are required to pay, was proportionate to the public health aim pursued or that this aim could not have been attained by measures less restrictive of intra-Community trade.

77 It must therefore be held that Articles [34] and [36] of the Treaty preclude domestic provisions allowing only traders holding a production licence or a wholesale licence to import alcoholic beverages on conditions such as those laid down by Swedish legislation.

? NOTES AND QUESTIONS

1. What is the practical effect of the judgement? Why can Sweden keep its retail monopoly? Must it abandon its import and wholesale monopoly?
2. The *New York Times* assessed the impact of the judgement on Sweden in an article, 'Europe making Sweden ease alcohol rules':[14]

> … [P]iece by piece, Sweden is being forced to take apart its anti-alcohol policies because most violate the European Union's rules of fair competition. Some liquor stores are open late and on Saturdays. A few have been remade into cheerfully decorated self-service stores. And wine lovers can delight in a wide selection.
>
> * * *
>
> Experts say that what is happening in Sweden over alcohol policy is in many ways a prime example of the difficulties the European Union faces as it tries to extend its reach and harmonize policies. Stretching from freezing climates to desert regions and incorporating vastly different cultures, the union is seeing that what may be a market commodity in one country is a health issue in another.

14 *New York Times*, 28 March, 2001, Int'l edn, p. A1.

'On this issue, we can't even really understand each other', said Dr. Gunar Agren, the executive manager of Sweden's National Institute of Health. 'We just see things very differently and in fact we have different problems with alcohol'.

Is this criticism fair? Is the *Franzen* judgement a triumph of free movement and free competition over monopoly? Or a triumph of European regulation over national cultural choices?

3. How did the Swedish alcohol system harm competition? Who was hurt? Consider all of Mr Franzen's arguments. Were the harms Mr Franzen identified essentially costs the nation was willing to pay for a national social policy? Or were they harms also to the whole Union? When effects of national, market-restricting policies spill over to other nations, who should decide whether the costs are worth the benefits?

The Court of Justice has dealt with related problems in free movement cases; especially cases under Article 34 TFEU, which prohibits Member States from imposing 'quantitative restrictions on imports and all measures having equivalent effect.' The case law strongly disfavours restraints on free movement but admits an exception where the restriction (such as health and safety standards that may impede trade) is necessary to satisfy important public interest objectives that take precedence over free movement.[15] Moreover, if the allegedly offending measures are merely 'selling arrangements'—time, place and manner of sale, with no discriminatory effect in law or in fact—the State prerogative is recognized; the measure does not fall within Article 34 and no justification is necessary.[16] *Keck* overturned precedent that would have required France to justify the below-cost ban because of its effect on trade. Under the older precedent, France would have been required to show that the restraint was not only warranted by an important public interest but was proportional to it.

Is the Court's approach in *Franzen* consistent with its approach in *Keck*?

4. In view of *Franzen*, was Mr Costa right or wrong?

5. A decade later, Klas Rosengren and ten other Swedes ordered Spanish wine through a Danish website, which offered wine at lower prices than Systembolaget, the Swedish retail alcohol monopoly. Systembolaget confiscated Rosengren's wine on the grounds that Swedish law prohibited its citizens from importing wine from other EU countries. Rosengren sued in a Swedish court. Systembolaget defended that its law was justified as a means of preventing alcohol abuse. The Swedish court referred the question of the legality of the Swedish ban to the Court of Justice, which ruled for Rosengren. The Court held that the ban restricted trade in violation of Article 34 TFEU and was a disproportionate means to protect the health of Swedish citizens.[17]

C. Exclusive privileges: Article 106 TFEU

Article 106 TFEU prohibits public undertakings and undertakings to which Member States grant special or exclusive rights from violating the

15 Case 120/78, *Rewe-Zentral v. Bundesmonopolverwaltung Fur Branntwein (Cassis de Dijon)* [1979] ECR 649, EU:C:1979:42.

16 Joined Cases C-267 and C-268/91, *Keck and Mithouard* [1993] ECR I-6097, EU:C:1993:905 (holding not within Article 34 a French law prohibiting retail prices of less than acquisition cost, even though the law had the effect of keeping out of France low-priced, non-monopolistic cross-border trade).

17 Case 170/04, *Klas Rosengren and Others* [2007] ECR I-4071, EU:C:2007:313.

competition provisions insofar as application of those rules does not obstruct the performance of the tasks assigned. Specifically:

Article 106 TFEU, ex 86 ECT

1. In the case of public undertakings and undertakings to which Member States grant special or exclusive rights, Member States shall neither enact nor maintain in force any measure contrary to the rules contained in this Treaty, in particular to those rules provided for in Article 18 [non-discrimination] and Articles 101 to 109 [restrictive agreements, abuse of dominance, State aids].
2. Undertakings entrusted with the operation of services of general economic interest or having the character of a revenue-producing monopoly shall be subject to the rules contained in this Treaty, in particular to the rules on competition, insofar as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them. The development of trade must not be affected to such an extent as would be contrary to the interests of the Community.

* * *

The next two cases ask when enjoyment of a State-granted monopoly right, which is the right to keep out the competition, violates Article 106 TFEU.

CASE

Hofner v. Macrotron GmbH (Case C-41/90)[18]

[German law, intended to achieve a high level of employment and to improve the distribution of jobs, conferred on the Bundesanstalt für Arbeit (Federal Employment Office) the exclusive right of placement, i.e., exclusivity as employment agent. The law required the Office to provide the service free of charge. Placement activities by others were punishable by fine.

Messrs Höfner and Elser contracted with Macrotron to present to Macrotron a suitable candidate for the post of sales manager, for a fee. They presented such a candidate, but Macrotron decided not to employ him and refused to pay the fee stipulated, alleging, inter alia, that the contract was void by reason of the German law. Höfner and Elser rejoined that the German law was void because it unnecessarily restrained their competition in violation of Article

18 [1991] ECR I-1979, EU:C:1991:161.

CASE *(continued)*

106 TFEU, and exclusion of their competition amounted to abuse of dominance under Article 102 TFEU. The national court referred questions to the Court of Justice.]

16 In its fourth question, the national court asks more specifically whether the monopoly of employment procurement in respect of business executives granted to a public employment agency constitutes an abuse of a dominant position within the meaning of Article [102 TFEU], having regard to Article [106(2) TFEU] ….

17 According to the appellants in the main proceedings, an agency such as the Bundesanstalt is both a public undertaking within the meaning of Article [106(1)] and an undertaking entrusted with the operation of services of general economic interest within the meaning of Article [106(2)] of the Treaty. The Bundesanstalt is therefore, they maintain, subject to the competition rules to the extent to which the application thereof does not obstruct the performance of the particular task assigned to it, and it does not in the present case. The appellants also claim that the action taken by the Bundesanstalt, which extended its statutory monopoly over employment procurement to activities for which the establishment of a monopoly is not in the public interest, constitutes an abuse within the meaning of Article [102] of the Treaty. They also consider that any Member State which makes such an abuse possible is in breach of Article [106(1) TFEU] and of the general principle whereby the Member States must refrain from taking any measure which could destroy the effectiveness of the Community competition rules.

18 The Commission takes a somewhat different view. The maintenance of a monopoly on executive recruitment constitutes, in its view, an infringement of Article [106(1)] read in conjunction with Article [102] of the Treaty where the grantee of the monopoly is not willing or able to carry out that task fully, according to the demand existing on the market, and provided that such conduct is liable to affect trade between Member States.

* * *

21 It must be observed, in the context of competition law, first that the concept of an undertaking encompasses every entity engaged in an economic activity, regardless of the legal status of the entity and the way in which it is financed and, secondly, that employment procurement is an economic activity.

22 The fact that employment procurement activities are normally entrusted to public agencies cannot affect the economic nature of such activities. Employment procurement has not always been, and is not necessarily, carried out by public entities. That finding applies in particular to executive recruitment.

CASE *(continued)*

23 It follows that an entity such as a public employment agency engaged in the business of employment procurement may be classified as an undertaking for the purpose of applying the Community competition rules.

24 It must be pointed out that a public employment agency which is entrusted, under the legislation of a Member State, with the operation of services of general economic interest … remains subject to the competition rules pursuant to Article [106(2)] of the Treaty unless and to the extent to which it is shown that their application is incompatible with the discharge of its duties.

25 As regards the manner in which a public employment agency enjoying an exclusive right of employment procurement conducts itself in relation to executive recruitment undertaken by private recruitment consultancy companies, it must be stated that the application of Article [102] of the Treaty cannot obstruct the performance of the particular task assigned to that agency in so far as the latter is manifestly not in a position to satisfy demand in that area of the market and in fact allows its exclusive rights to be encroached on by those companies.

26 Whilst it is true that Article [102] concerns undertakings and may be applied within the limits laid down by Article [106(2)] to public undertakings or undertakings vested with exclusive rights or specific rights, the fact nevertheless remains that the Treaty requires the Member States not to take or maintain in force measures which could destroy the effectiveness of that provision ….

* * *

29 … [T]he simple fact of creating a dominant position of that kind by granting an exclusive right within the meaning of Article [106(1)] is not as such incompatible with Article [102] of the Treaty. A Member State is in breach of the prohibition contained in those two provisions only if the undertaking in question, merely by exercising the exclusive right granted to it, cannot avoid abusing its dominant position.

30 Pursuant to Article [102(b)], such an abuse may in particular consist in limiting the provision of a service, to the prejudice of those seeking to avail themselves of it.

31 A Member State creates a situation in which the provision of a service is limited when the undertaking to which it grants an exclusive right extending to executive recruitment activities is manifestly not in a position to satisfy the demand prevailing on the market for activities of that kind and when the effective pursuit of such activities by private companies is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void.

* * *

CASE *(continued)*

34 In view of the foregoing considerations, it must be stated in reply to the fourth question that a public employment agency engaged in employment procurement activities is subject to the prohibition contained in Article [102] of the Treaty, so long as the application of that provision does not obstruct the performance of the particular task assigned to it. A Member State which has conferred an exclusive right to carry on that activity upon the public employment agency is in breach of Article [106(1)] of the Treaty where it creates a situation in which that agency cannot avoid infringing Article [102] of the Treaty. That is the case, in particular, where the following conditions are satisfied:

— the exclusive right extends to executive recruitment activities
— the public employment agency is manifestly incapable of satisfying demand prevailing on the market for such activities
— the actual pursuit of those activities by private recruitment consultants is rendered impossible by the maintenance in force of a statutory provision under which such activities are prohibited and non-observance of that prohibition renders the contracts concerned void
— the activities in question may extend to the nationals or to the territory of other Member States.

CASE

Commission v. DEI (Case C-553/12 P) *(Greek lignite)*[19]

[Greece liberalized its electricity market as mandated by EU directives. It created a wholesale market in which electricity producers compete for the right to sell power for the next day. The cheapest source of electricity in Greece comes from lignite (brown coal).

Through various legislative tools, Greece had granted an exclusive licence to explore and exploit lignite to DEI, the former electricity monopoly still majority owned by the Greek government at the time of the decision.]

8 [In its decision] the Commission found, inter alia, that the grant and maintenance of those rights was contrary to Article [106(1) TFEU], read together with Article [102 TFEU], since it created a situation of inequality of opportunity between economic operators as

19 EU:C:2014:2083.

CASE *(continued)*

regards access to primary fuels for the purposes of generating electricity and allowed DEI to maintain or reinforce its dominant position on the Greek wholesale electricity market by excluding or hindering any new entrants.

* * *

10 According to the Commission, DEI held a dominant position on both those markets [lignite and wholesale electricity], with a market share of more than 97% and 85% respectively. In addition, there was no prospect of new market entrants being capable of significantly reducing DEI's share of the wholesale electricity market, since imports, which represent 7% of total consumption, did not constitute a genuine competitive restraint on that market.

11 Concerning the State measures in question, the Commission notes that DEI had been granted, pursuant to Legislative Decree No 4029/1959 and Law No 134/1975, exploitation rights for 91% of public deposits of lignite for which rights were granted .... The Commission adds that power stations operating on lignite, which are the least costly in Greece, are the most used, since they produce 60% of the electricity permitting the supply of the interconnected network.

12 According to the Commission, by granting DEI and maintaining in its favour quasi-monopolistic lignite exploration rights which ensure that it has privileged access to the most attractive fuel in Greece for the purposes of generating electricity, the Hellenic Republic thereby created inequality of opportunity between economic operators on the wholesale electricity market and thus distorted competition, maintaining or reinforcing DEI's dominant position and excluding or hindering any new entrants, despite the liberalisation of the wholesale electricity market.

* * *

[DEI obtained the annulment of the Commission's decision before the General Court.]

* * *

43 It is clear from the Court's case-law that a system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured as between the various economic operators.

44 It follows that if inequality of opportunity between economic operators, and thus distorted competition, is the result of a State measure, such a measure constitutes an infringement of Article [106(1) TFEU] read together with Article [102 TFEU].

CASE *(continued)*

45 The Court has moreover had occasion to state in that regard that, although the mere fact that a Member State has created a dominant position by the grant of exclusive rights is not as such incompatible with Article [102 TFEU], the [Treaty] nonetheless requires the Member States not to adopt or maintain in force any measure which might deprive that provision of its effectiveness.

46 It follows … that … infringement of Article [106(1) TFEU] in conjunction with Article [102 TFEU] may be established irrespective of whether any abuse actually exists. All that is necessary is for the Commission to identify a potential or actual anti-competitive consequence liable to result from the State measure at issue. Such an infringement may thus be established where the State measures at issue affect the structure of the market by creating unequal conditions of competition between companies, by allowing the public undertaking or the undertaking which was granted special or exclusive rights to maintain (for example by hindering new entrants to the market), strengthen or extend its dominant position over another market, thereby restricting competition, without it being necessary to prove the existence of actual abuse.

* * *

[The Court of Justice reversed the General Court's judgement and sent the case back for analysis of the other pleas raised by DEI.[20]]

? NOTES AND QUESTIONS

1. Compare the standards for running afoul of Article 106 TFEU in *Höfner* and in *DEI*.
2. What type of abuse would DEI be led to commit due to its privileges? Would the abuses be exclusionary or exploitative? Could DEI avoid committing an abuse?
3. Does the Court in *Höfner* require an efficiency audit of the Federal Employment Office to determine whether it can satisfy demand? Isn't the Office's ability to satisfy demand a function of the resources the German government makes available to it? Why does the EU care whether Germany sufficiently funds its free employment service? Do all dominant firms abuse their dominance by simply not providing enough goods or services (at what price level?), or is it critical that the government-granted exclusive privilege prevents anyone else from serving the market?
4. Messrs Höfner and Elser also claimed a violation of Article 56 TFEU (Member States may not restrict freedom to provide services in respect of nationals of Member States) in conjunction with Article 18 TFEU (no discrimination on grounds of nationality); but since all parties, including the employment candidate, were German, the Court found Article 56 inapplicable. If the candidate or the private employment agency were Belgian, would Article 56 TFEU protect the private agency's right to its fee?

20 On remand, the General Court dismissed the appeal. The Court held that the Commission had proved that there was inequality of opportunity to the disadvantage of new competitors.

5. In *Régie des Postes v. Corbeau*,[21] a Belgian law—enacted before the development of courier service—gave exclusive mail delivery rights to the Belgian Post Office and prohibited private mail delivery. Mr Corbeau set up a private mail delivery service in Liège. Corbeau collected mail from his clients and guaranteed delivery before noon the following day to all addressees within town limits. He delivered in-town mail and dispatched the out-of-town mail by post. When prosecuted, Corbeau asserted a violation of Article 106 TFEU.

   In an Article 267 reference, the Court of Justice advised the Belgian court that an undertaking charged with the provision of universal service may not restrict competition more than necessary to achieve its public mission in view of contemporary market conditions, leaving it to the national court to determine what was more than necessary.

   Was Corbeau skimming the cream from the Belgian Post's business? At some point, would cream-skimming compromise the economic stability of the post office and disable it from fulfilling its obligation to provide universal service? How can the national court determine how much competition is too much competition for the Belgian Post to fulfil its public mission?
6. There is, however, a gap in the coverage of Articles 101, 102 and 106 TFEU. State bodies are subject to those Treaty obligations only if they carry out economic activities. Bodies that regulate the market but do not participate in it are not covered. In *FENIN v. Commission*,[22] the Court of Justice acknowledged that the public bodies that ran the Spanish national healthcare system and provided free services funded by social security contributions and other State funding were not 'undertakings', and it held that a State body that is not an undertaking does not become so in its role as purchaser of goods—here, medical goods and equipment. The purchasing activity is not 'dissociable from the service subsequently provided'. The holding of *FENIN* means that suppliers to State bodies carrying out public functions are not protected by Article 102 TFEU from the State body's exploitative and discriminatory purchasing conduct. Does this holding shield too much activity from the antitrust provisions? Is it sufficient protection that the State is subject to Article 18 TFEU, prohibiting discrimination based on nationality?

CASE

Albany International BV and Textile Industry Pension Funds (Case C-67/96)[23]

(see additional facts at p. 152, excerpt regarding Article 101—labour)

[Albany International, a textile firm that wished to provide pensions for its workers through an insurer of its choice, contended that the Dutch law granting to a specified fund an exclusive right to manage supplementary textile industry pensions violated Articles 102 and 106 TFEU. Citing *Höfner*, the Court repeated that mere creation of a dominant position (which the Netherlands conferred on the pension fund) is not incompatible with Article

21 Case C-320/91, *Régie des Postes v. Corbeau* [1993] ECR I-2533, EU:C:1993:198.

22 Case C-205/03 P, *FENIN v. Commission* [2006] ECR I-6295, EU:C:2006:453.

23 [1999] ECR I-5751, EU:C:1999:430.

CASE *(continued)*

102 TFEU. Rather, to run afoul of the law, the Member State must create a situation in which the undertaking cannot avoid abusing its dominance.]

98 It is therefore necessary to consider whether, as contended by the Fund, the Netherlands government and the Commission, the exclusive right of the sectoral pension fund to manage supplementary pensions in a given sector and the resultant restriction of competition may be justified under Article [106(2)] of the Treaty as a measure necessary for the performance of a particular social task of general interest with which that fund has been charged.

* * *

102 It is important to bear in mind first of all that, under Article [106(2)] of the Treaty, undertakings entrusted with the operation of services of general economic interest are subject to the rules on competition in so far as the application of such rules does not obstruct the performance, in law or in fact, of the particular tasks assigned to them.

103 In allowing, in certain circumstances, derogations from the general rules of the Treaty, Article [106(2)] of the Treaty seeks to reconcile the Member States' interest in using certain undertakings, in particular in the public sector, as an instrument of economic or fiscal policy with the Community's interest in ensuring compliance with the rules on competition and preservation of the unity of the common market.

104 In view of the interest of the Member States thus defined they cannot be precluded, when determining what services of general economic interest they entrust to certain undertakings, from taking account of objectives pertaining to their national policy or from endeavouring to attain them by means of obligations and constraints which they impose on such undertakings.

105 The supplementary pension scheme at issue in the main proceedings fulfils an essential social function within the Netherlands pensions system by reason of the limited amount of the statutory pension, which is calculated on the basis of the minimum statutory wage.

* * *

107 Next, it is not necessary, in order for the conditions for the application of Article [106(2)] of the Treaty to be fulfilled, that the financial balance or economic viability of the undertaking entrusted with the operation of a service of general economic interest should be threatened. It is sufficient that, in the absence of the rights at issue, it would not be possible for the undertaking to perform the particular tasks entrusted to it, defined by reference to the obligations and constraints to which it is subject or that maintenance of those rights is necessary to enable the holder of them to perform tasks of general economic interest which have been assigned to it under economically acceptable conditions.

108 If the exclusive right of the fund to manage the supplementary pension scheme for all workers in a given sector were removed, undertakings with young employees in good health

CASE *(continued)*

engaged in non-dangerous activities would seek more advantageous insurance terms from private insurers. The progressive departure of 'good' risks would leave the sectoral pension fund with responsibility for an increasing share of 'bad' risks, thereby increasing the cost of pensions for workers, particularly those in small and medium-sized undertakings with older employees engaged in dangerous activities, to which the fund could no longer offer pensions at an acceptable cost.

109 Such a situation would arise particularly in a case where, as in the main proceedings, the supplementary pension scheme managed exclusively by the Fund displays a high level of solidarity resulting, in particular, from the fact that contributions do not reflect the risk, from the obligation to accept all workers without a prior medical examination, the continuing accrual of pension rights despite exemption from the payment of contributions in the event of incapacity for work, the discharge by the Fund of arrears of contributions due from an employer in the event of insolvency and the indexing of the amount of pensions in order to maintain their value.

110 Such constraints, which render the service provided by the Fund less competitive than a comparable service provided by insurance companies, go towards justifying the exclusive right of the Fund to manage the supplementary pension scheme.

111 It follows that the removal of the exclusive right conferred on the Fund might make it impossible for it to perform the tasks of general economic interest entrusted to it under economically acceptable conditions and threaten its financial equilibrium.

* * *

[The Fund has the power to grant exemptions from its own exclusivity. It has the duty to grant such exemptions if specific criteria are met, thus providing a check against discriminatory or arbitrary denials.]

122 Finally, as regards Albany's argument that an adequate level of pension for workers could be assured by laying down minimum requirements to be met by pensions offered by insurance companies, it must be emphasized that, in view of the social function of supplementary pension schemes and the margin of appreciation enjoyed, according to settled case-law, by the Member States in organizing their social security systems, it is incumbent on each Member State to consider whether, in view of the particular features of its national pension system, laying down minimum requirements would still enable it to ensure the level of pension which it seeks to guarantee in a sector by compulsory affiliation to a pension fund.

123 The answer to the third question must therefore be that Articles [102] and [106] of the Treaty do not preclude the public authorities from conferring on a pension fund the exclusive right to manage a supplementary pension scheme in a given sector.

NOTES AND QUESTIONS

1. Does the Court in *Albany* grant wide berth to the State to carry out its social purpose of solidarity, despite the fact that its chosen solution might block competition and not be efficient? Or, does the Court imply some level of serious scrutiny? If the Netherlands can ensure an adequate level of pensions by laying down minimum requirements, must it abandon its system of granting an exclusive right to a chosen fund? See para. 122. Who determines whether adequate pensions can be ensured by less restrictive means? Does para. 122 mean that a grant of exclusive rights can, in itself, violate the Treaty simply because it restricts competition, and the restriction was unnecessary to achieve the public goal?
2. Since the late 1970s, the Commission and Courts have taken a number of actions to limit the power of State-owned monopolies and undertakings enjoying exclusive rights. In 1980, the Commission issued a directive under Article [106(3)] TFEU requiring Member States to reveal financial information about their State-owned enterprises.[24]

   In a number of situations, the case is a straightforward Article 102 case, and the fact of State ownership or State-granted privilege does not provide a shield. In *British Telecom*, the Court held that a State telecommunications monopoly abused its dominance by preventing private message-forwarding agencies from receiving and forwarding international telephone calls.[25] In *Telemarketing*, the Court stated that a broadcasting monopoly enterprise would abuse its dominant position by refusing to sell broadcasting time to a telemarketing firm that competed with the monopoly firm's subsidiary.[26]
3. EU competition law is in the vanguard in controlling State-granted privileges that harm competition.[27]

D. State measures that restrict competition or facilitate private restrictions

1. State responsibility

State legislation is a frequent source of distortion of competition. Distortions may result from national laws on price control, sector regulation (e.g., oil, tobacco, transport), taxation, and various social and national industrial policies.[28]

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24 Commission Directive 80/723/EEC of 25 June 1980 on the transparency of financial relations between Member States and public undertakings [1980] *O.J.* L 195/35, amended by Commission Directive 85/413, [1985] *O.J.* L 229/20.

25 Case 41/83, *Italy v. Commission* [1985] ECR 873, EU:C:1985:120 ('*British Telecom*').

26 Case 311/84, *Centre Belge d'Études de Marché-Télémarketing SA v. Compagnie Luxembourgeoise de Télédiffusion SA* [1985] ECR 3261, EU:C:1985:394 ('*Telemarketing*').

27 See, for a study of various jurisdictions' competition law coverage of State-related restraints, E. Fox and D. Healey (2014), 'When the state harms competition: The role for competition law', *Antitrust Law Journal*, 79, 769.

28 Supra. See also OECD, Competitive neutrality in competition policy (2021), available at: www.oecd.org/competition/competitive-neutrality.htm (accessed 11 August 2022), cataloguing overly restrictive State measures and arguing for a level playing field where the State would otherwise enjoy a competitive advantage over private firms.

To what extent do Article 4 TEU, the competition articles and the freedoms of movement suggest a broad pre-emption by EU competition policy of anti-competitive State legislation? The Court bowed in the direction of a broad pre-emption in *INNO/ATAB*.[29] The Court said, regarding a Belgian law requiring, for tax collection purposes, that tobacco products be sold at a price affixed to the label by the manufacturer or importer:

> [W]hile it is true that Article [102 TFEU] is directed at undertakings, nonetheless it is also true that the Treaty [now Article 4(3) TEU] imposes a duty on Member States not to adopt or maintain in force any measure which could deprive that provision of its effectiveness. [para. 31]

But in the years after *INNO/ATAB,* the Court backed away from a strong view of Member State duties not to restrain competition unnecessarily. Especially since the *Keck* 'revolution' in 1993 (see p. 405), the Court has been reluctant to condemn Member States' regulatory laws for undermining Articles 101 and 102 TFEU. Three competition cases decided at the time of *Keck* reflect the, then new, deference to Member States in adopting measures that have anti-competitive effects; namely, *Ohra*, *Meng* and *Reiff.*

Ohra, a Dutch insurance firm that dealt directly with customers rather than through intermediaries, tried to become more competitive by giving credit cards to its customers. Ohra was prosecuted for violating a Dutch law that prohibited insurance companies and their agents from granting rebates or other things of value. Ohra responded that the law was anti-competitive and constituted a violation of Member States' obligations under Articles 3(1)(g) (now in a protocol) and Article 4(3) TEU, as linked with Articles 101 and 102 TFEU.[30]

In *Meng*, in the face of a similar German law, insurance agent Meng rebated his commissions to his clients. When prosecuted, he presented the same defence as Ohra: he was competing; the prohibition was illegal.[31]

Reiff involved a German law that delegated truck tariff-setting to tariff boards whose members were appointed by the Federal Minister upon the recommendation of the truckers themselves. In setting the tariffs, the board members were obliged to take account of the public interest criteria laid down by the public authority, and the Minister of Transport was entitled to

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29 Case 13/77, *NV GB-INNO-BM v. Vereniging van de Kleinhandelaars in Tabak* [1977] ECR 2115, EU:C:1977:185 ('*INNO/ATAB*').

30 Case C-245/91, *Ohra Schadeverzekeringen NV v. Netherlands* [1993] ECR I-5851, EU:C:1993:887 ('*Ohra*').

31 Case C-2/91, *W. Meng v. Germany* [1993] ECR I-5751, EU:C:1993:885 ('*Meng*').

participate in the meetings, to reject tariffs that were not in the public interest, and to set tariffs himself. A trucking company charged Reiff, a shipper, a price lower than the mandated tariff. The federal office proceeded against Reiff for the difference, and Reiff defended on grounds that the law was anti-competitive and void.[32]

The three cases came to the Court of Justice on Article 267 references. The Court held that a Member State would infringe Articles 3(1)(g) [now in a protocol] and 4(3) TEU if it 'requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU], or reinforces such effects, or deprives its own legislation of its official character by delegating economic responsibility to private traders' (quoting from *INNO/ATAB*). It held that none of the three laws fit the prohibited category.

Do you agree? What are the anti-competitive effects in each case? In which of the cases can you make the best argument that the national measure would tend to reinforce a private cartel or that it delegated economic responsibility for an anti-competitive act to private traders?

The question remained: how broadly or narrowly would the Court construe its mandate that the State must not undermine the effectiveness of Articles 101 and 102 TFEU?

CASE

Consorzio Industrie Fiammiferi (Case C-198/01) ('Italian matches')[33]

[In *Consorzio Industrie Fiammiferi* (*Italian matches*), Italy organized a match cartel by relying on an 80-year-old Royal Decree. Italy required the Italian match producers to join a consortium. The Minister was required to set the price for matches, and the consortium of competitors was required to allocate quotas. Government officials had the duty to oversee the quotas. A German match producer complained to the Italian Antitrust Authority that it was having difficulty entering the Italian market. Swedish producers later complained that they were denied a fair quota and could sell only to the Italian match consortium. The Italian Antitrust Authority opened proceedings. It found Treaty violations both by Italy and by the Italian producers. An Italian tribunal referred questions to the Court of Justice. Here is the Statement of the Court regarding Italy's responsibility.]

32 Case C-185/91, *Gebrüder Reiff GmbH & Co. KG v. Bundesanstalt für den Güterfernverkehr* [1993] ECR I-5801, EU:C:1993:886 ('*Reiff*').
33 [2003] ECR I-8055, EU:C:2003:430.

CASE *(continued)*

45 … [A]lthough Articles [101 and 102 TFEU] are, in themselves, concerned solely with the conduct of undertakings and not with laws or regulations emanating from Member States, those articles, read in conjunction with Article [4 TEU], which lays down a duty to cooperate, nonetheless require the Member States not to introduce or maintain in force measures, even of a legislative or regulatory nature, which may render ineffective the competition rules applicable to undertakings.

46 The Court has held in particular that Articles [4 TEU and 101 TFEU] are infringed where a Member State requires or favours the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU] or reinforces their effects, or where it divests its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere.

47 Moreover, since the Treaty of Maastricht entered into force, the … Treaty has expressly provided that in the context of their economic policy the activities of the Member States must observe the principle of an open market economy with free competition ….

48 It is appropriate to bear in mind, second, that in accordance with settled case-law the primacy of Community law requires any provision of national law which contravenes a Community rule to be disapplied, regardless of whether it was adopted before or after that rule.

49 The duty to disapply national legislation which contravenes Community law applies not only to national courts but also to all organs of the State, including administrative authorities, which entails, if the circumstances so require, the obligation to take all appropriate measures to enable Community law to be fully applied.

50 Since a national competition authority such as the Authority is responsible for ensuring, *inter alia*, that Article [101 TFEU] is observed and that provision, in conjunction with Article [4 TEU], imposes a duty on Member States to refrain from introducing measures contrary to the Community competition rules, those rules would be rendered less effective if, in the course of an investigation under [101 TFEU] into the conduct of undertakings, the authority were not able to declare a national measure contrary to the combined provisions of Articles [4 TEU] and [101 TFEU] and if, consequently, it failed to disapply it.

51 In that regard, it is of little significance that, where undertakings are required by national legislation to engage in anti-competitive conduct, they cannot also be held accountable for infringement of Articles [101 and 102 TFEU]. Member States' obligations under Articles 3(1)(g) EC (now in a protocol), [4 TEU, 101 TFEU and 102 TFEU], which are distinct from those to which undertakings are subject under Articles [101 and 102 TFEU], nonetheless continue to exist and therefore the national competition authority remains duty-bound to disapply the national measure at issue.

CASE

Cipolla v. Fazari and Macrino v. Meloni (Joined Cases C-94 and C-202/04)[34]

[Pursuant to a 73-year-old Italian law, Italy adopted maximum and minimum fee schedules for lawyers, from which there could be no derogation except in narrow circumstances. The schedules were based on a draft prepared by the National Lawyers' Council—a professional body of lawyers. In connection with three fee disputes, an Italian court referred to the Court of Justice questions regarding the validity of the Italian law.]

48 … [T]he fact that a Member State requires a professional organisation composed of lawyers, such as the CNF, to produce a draft scale of fees does not, in the circumstances specific to the cases in the main proceedings, appear to establish that that State has divested the scale finally adopted of its character of legislation by delegating to lawyers responsibility for taking decisions concerning them.

49 Although the national legislation at issue in the main proceedings does not contain either procedural arrangements or substantive requirements capable of ensuring with reasonable probability that, when producing the draft scale, the CNF conducts itself like an arm of the State working in the public interest, it does not appear that the Italian State has waived its power to make decisions of last resort or to review implementation of that scale.

50 First, the CNF is responsible only for producing a draft scale which, as such, is not binding. Without the Minister of Justice's approval, the draft scale does not enter into force and the earlier approved scale remains applicable. Accordingly, that Minister has the power to have the draft amended by the CNF. Furthermore, the Minister is assisted by two public bodies, the Consiglio di Stato and the CIP, whose opinions he must obtain before the scale can be approved.

51 Secondly, Article 60 of the Royal Decree-Law provides that fees are to be settled by the courts on the basis of the criteria referred to in Article 57 of that decree-law, having regard to the seriousness and number of the issues dealt with. Moreover, in certain exceptional circumstances and by duly reasoned decision, the court may depart from the maximum and minimum limits fixed pursuant to Article 58 of the Royal Decree-Law.

52 In those circumstances, the view cannot be taken that the Italian State has waived its power by delegating to private economic operators responsibility for taking decisions

34 [2006] ECR I-11421, EU:C:2006:758.

CASE *(continued)*

affecting the economic sphere, which would have the effect of depriving the provisions at issue in the main proceedings of the character of legislation.

53 Nor … is the Italian State open to the criticism that it requires or encourages the adoption by the CNF of agreements, decisions or concerted practices contrary to Article [101 TFEU] or reinforces their effects, or requires or encourages abuses of a dominant position contrary to Article [102 TFEU] or reinforces the effects of such abuses.

* * *

Free movement of services

58 The prohibition of derogation, by agreement, from the minimum fees set by a scale such as that laid down by the Italian legislation is liable to render access to the Italian legal services market more difficult for lawyers established in a Member State other than the Italian Republic and therefore is likely to restrict the exercise of their activities providing services in that Member State. That prohibition therefore amounts to a restriction within the meaning of Article [56 TFEU].

59 That prohibition deprives lawyers established in a Member State other than the Italian Republic of the possibility, by requesting fees lower than those set by the scale, of competing more effectively with lawyers established on a stable basis in the Member State concerned and who therefore have greater opportunities for winning clients than lawyers established abroad.

60 Likewise, the prohibition thus laid down limits the choice of service recipients in Italy, because they cannot resort to the services of lawyers established in other Member States who would offer their services in Italy at a lower rate than the minimum fees set by the scale.

61 However, such a prohibition may be justified where it serves overriding requirements relating to the public interest, is suitable for securing the attainment of the objective which it pursues and does not go beyond what is necessary in order to attain it.

62 In order to justify the restriction on freedom to provide services which stems from the prohibition at issue, the Italian government submits that excessive competition between lawyers might lead to price competition which would result in a deterioration in the quality of the services provided to the detriment of consumers, in particular as individuals in need of quality advice in court proceedings.

63 According to the Commission, no causal link has been established between the setting of minimum levels of fees and a high qualitative standard of professional services provided by

CASE *(continued)*

lawyers. In actual fact, quasi-legislative measures such as, inter alia, rules on access to the legal profession, disciplinary rules serving to ensure compliance with professional ethics and rules on civil liability have, by maintaining a high qualitative standard for the services provided by such professionals which those measures guarantee, a direct relationship of cause and effect with the protection of lawyers' clients and the proper working of the administration of justice.

64 In that respect, it must be pointed out that, first, the protection of consumers, in particular recipients of the legal services provided by persons concerned in the administration of justice and, secondly, the safeguarding of the proper administration of justice, are objectives to be included among those which may be regarded as overriding requirements relating to the public interest capable of justifying a restriction on freedom to provide services … on condition, first, that the national measure at issue in the main proceedings is suitable for securing the attainment of the objective pursued and, secondly, it does not go beyond what is necessary in order to attain that objective.

* * *

70 Having regard to the foregoing, the answer to the fourth and fifth questions … must be that legislation containing an absolute prohibition of derogation, by agreement, from the minimum fees set by a scale of lawyer's fees such as that at issue in the main proceedings for services which are (a) court services and (b) reserved to lawyers, constitutes a restriction on freedom to provide services laid down in Article [56 TFEU]. It is for the national court to determine whether such legislation, in the light of the detailed rules for its application, actually serves the objectives of protection of consumers and the proper administration of justice which might justify it and whether the restrictions it imposes do not appear disproportionate in the light of those objectives.

* * *

? NOTES AND QUESTIONS

1. Do paras. 48 to 53 in *Cipolla* surprise you, after *Italian matches*?
2. What is the argument, contrariwise, that setting minimum lawyer fees harms free movement *and* consumers and on its face is not justified? What is the argument that the Italian law requires or facilitates an illegal agreement among lawyers? Note the Commission's argument that enforced price floors do not correlate with higher-quality services. Note also that in most jurisdictions, competitors have a right to combine to procure government action—a point relevant to 'Private responsibility' in the next section.
3. How will the national court determine whether the law 'actually serves the objectives of the protection of consumers and the proper administration of justice' and whether the restrictions are 'disproportionate in light of those objectives'? Would a bright line (e.g., no minimum fees) have been superior? Italy, in fact, proceeded to abolish minimum lawyer fees.

4. Given their alleged public policy objectives, should public restraints be assessed exclusively under the free movement rules of the Treaty instead of the competition rules? What would be the possible benefits, or pitfalls, of such an approach? As a general rule, should State measures be subject to the same as or another discipline than private conduct?[35]
5. See, for the Court's treatment of lawyers' agreements that restrict competition, *Wouters* in Chapter 3. Is the Court too deferential to agreements among professionals that may restrict competition, or has it struck the right balance?

   In the US, professionals, when carrying on their commercial activities, are fully subject to the antitrust laws. But, States may regulate lawyers and other professionals in the public interest. For example, the State may limit the number of lawyers in the State through State bar examinations.[36]

2. Private responsibility

Private actors may avoid responsibility on grounds that the anti-competitive act was not theirs; it was the act of the State, and they had no room for autonomous conduct (akin to 'State compulsion' doctrine).

CASE

Commission and France v. Ladbroke Racing Ltd (Joined Cases C-359 and C-379/95 P)[37]

[French law created Pari Mutuel Urbain ('PMU') as a joint service of the authorized racing companies to manage their rights in off-track betting, and it granted PMU exclusive rights to run off-track betting on horse races held in France and horse race betting organized in France. French law prohibited anyone, other than PMU, from placing or accepting bets on horse races.

Ladbroke Racing Ltd, an operator of off-track betting, lodged with the Commission a complaint against France under Article 106 TFEU, and a complaint against the ten main racing companies in France and PMU under Articles 101 and 102 TFEU. Before taking a position on the Article 106 claim, which included allegations of illegal State aid, the Commission rejected the allegations of violation of Articles 101 and 102 on grounds that those articles did not apply.

The General Court annulled the Commission's decision to reject the complaint, on grounds that a definitive determination could not be made by the Commission before completing its investigation regarding the compatibility of the French law with the competition rules. The Commission and France appealed to the Court of Justice.]

35 For a discussion, see D. Gerard (2010), 'EU competition policy after Lisbon: Time for a review of the "State action doctrine"?', *Journal of European Competition Law & Practice*, **3**, 202.
36 See *Hoover v. Ronwin*, 466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984).
37 [1997] ECR I-6265, EU:C:1997:531.

CASE *(continued)*

20 … [T]he Commission submits that it is necessary to distinguish between State measures requiring undertakings to engage in conduct contrary to Articles [101] and [102 TFEU] and measures that do not require any conduct contrary to those rules but simply create a legal framework that itself restricts competition. In the first case, the Commission considers that Article [101] remains applicable to undertakings' conduct despite the existence of national statutory obligations and irrespective of the possible application of Articles 3(1)(g) [ECT, now in protocol 27], [4 TEU] and [101 TFEU] with regard to those State measures. In fact, the Commission argues that an undertaking can and, by virtue of the primacy of Community law and the direct effect of Articles [101(1)] and [102] of the Treaty, must refuse to comply with a State measure that requires conduct contrary to those provisions.

21 In the second case, by contrast, Article [101 TFEU] may in certain circumstances not apply. That is the case here, since the 1974 legislation does not require the conclusion of an agreement between the main racing companies but itself grants the PMU the exclusive right to organize off-course totalizator betting. The restriction of competition thus flowed directly from the national legislation, without any action on the part of undertakings being necessary.

* * *

33 Articles [101] and [102] of the Treaty apply only to anti-competitive conduct engaged in by undertakings on their own initiative. If anticompetitive conduct is required of undertakings by national legislation or if the latter creates a legal framework which itself eliminates any possibility of competitive activity on their part, Articles [101] and [102 TFEU] do not apply. In such a situation, the restriction of competition is not attributable, as those provisions implicitly require, to the autonomous conduct of the undertakings.

34 Articles [101] and [102 TFEU] may apply, however, if it is found that the national legislation does not preclude undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.

35 When the Commission is considering the applicability of Articles [101] and [102] of the Treaty to the conduct of undertakings, a prior evaluation of national legislation affecting such conduct should therefore be directed solely to ascertaining whether that legislation prevents undertakings from engaging in autonomous conduct which prevents, restricts or distorts competition.

[The Commission was therefore entitled to find Articles 101 and 102 TFEU inapplicable without completing its investigation into the compatibility of the French legislation with the competition law. The Court set aside the judgement of the General Court.]

NOTES AND QUESTIONS

1. Describe the anti-competitive aspects of the French off-track betting system. Why might France desire such a system nonetheless?
2. The Commission held that there was no *private* anti-competitive action. Defend the result, including the distinction made by the Commission in paras. 20–21.
3. What do paras. 33 and 34 mean? Give examples.
4. Were the State measures (apart from State aid) likely to be compatible with Article 106 TFEU? What if the PMU establishments shut their doors at 17.00h. and gamblers claimed they were shut out of betting? (Consider *Höfner*.) Would the outcome of the case have been different if the PMU were an undertaking in the sole control of the ten racing companies?

CASE

Commission v. Italy (Case C-35/96) ('CNSD')[38]

[Customs agents are professionals who offer services to carry out customs formalities relating to the import, export and transit of goods, and related monetary, fiscal and commercial services. In Italy, the Departmental Councils of Customs Agents, whose members are elected by the customs agents, are constituted by Italian law to supervise the activity of the customs agents. Also constituted by Italian law, the Consiglio Nazionale degli Spedizionieri Doganali (National Council of Customs Agents, or 'CNSD') governs the Departmental Councils. It is legally responsible for setting the tariff for the services provided by customs agents on the basis of proposals from the Departmental Councils. Its members are customs agents elected by the Departmental Councils. Customs agents who deviate from the tariff are subject to discipline, which can include suspension or removal from the register of customs agents.

The Commission brought an action against Italy under Article 258 for a declaration that Italy failed to fulfil its obligations under Articles 4 TEU and 101 TFEU by requiring the CNSD to adopt a decision by an association of undertakings (a minimum compulsory tariff; i.e., to price fix) contrary to Article 101 TFEU.

In connection with Articles 4 TEU and 101 TFEU, Italy argued that the customs agents were professionals exercising a liberal profession; that their activity was intellectual, and that they and their association CNSD were not 'undertakings' subject to Article 101 TFEU.

The Court held first, that CNSD engaged in economic activity on the market and therefore was an association of undertakings and second, that its setting of maximum and minimum fees infringed Article 101(1) TFEU.]

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38 [1998] ECR I-3851, EU:C:1998:303.

CASE *(continued)*

52 Thirdly, the question of the extent to which that infringement can be attributed to the Italian Republic must be considered.

53 Although Article [101] of the Treaty is, in itself, concerned solely with the conduct of undertakings and not with measures adopted by Member States by law or regulation, the fact nevertheless remains that Article [101] of the Treaty, in conjunction with Article [4 TEU], requires the Member States not to introduce or maintain in force measures, even of a legislative nature, which may render ineffective the competition rules applicable to undertakings (for Article [101] of the Treaty, see *Van Eycke*, *Reiff*).

54 Such would be the case if a Member State were to require or favour the adoption of agreements, decisions or concerted practices contrary to Article [101 TFEU] or to reinforce their effects, or to deprive its own rules of the character of legislation by delegating to private economic operators responsibility for taking decisions affecting the economic sphere (see *Van Eycke*, *Reiff*).

55 By adopting the national legislation in question, the Italian Republic clearly not only required the conclusion of an agreement contrary to Article [101] of the Treaty and declined to influence its terms, but also assists in ensuring compliance with that agreement.

56 First, Article 14(d) of Law No 1612/1960 requires the CNSD to compile a compulsory, uniform tariff for the services of customs agents.

57 Secondly, … the national legislation in question wholly relinquished to private economic operators the powers of the public authorities as regards the setting of tariffs.

58 Thirdly, the Italian legislation expressly prohibits registered customs agents from derogating from the tariff on pain of exclusion, suspension or removal from the register.

59 Fourthly, … the Decree of the Minister for Finance of 6 July 1988 bestowed upon [the tariff] the appearance of a public regulation. First, publication in the 'General Series' of the *Gazzetta Ufficiale della Repubblica Italiana* gave rise to a presumption of knowledge of the tariff on the part of third parties, to which the CNSD's decision could never have laid claim. Second, the official character thus conferred on the tariff facilitates the application by customs agents of the prices that it sets. Lastly, its nature is such as to deter customers who might wish to contest the prices demanded by customs agents.

60 In the light of the foregoing considerations, it must be held that, by adopting and maintaining in force a law which, in granting the relative decision-making power, requires the CNSD to adopt a decision by an association of undertakings contrary to Article [101], consisting of setting a compulsory tariff for all customs agents, the Italian Republic has failed to fulfil its obligations under Articles [4 TEU] and [101 TFEU].

* * *

In *Consorzio Industrie Fiammiferi* (*Italian matches*) (see facts at p. 417), the Italian Antitrust Authority also held that the Italian match producers violated the competition law to the extent that they took autonomous action in fixing quotas. Although the match producers were required by law to set quotas, and government officials had the duty to oversee the quotas, the producers had the power to divvy up the quotas in the most anti-competitive way.

The Court of Justice substantially agreed with the Italian Authority. Not only did the national competition authority have the *duty* to disapply the national law, which required an agreement of competitors and legitimized and reinforced its anti-competitive effects, but the private quota-setting could be sufficiently autonomous to merit antitrust condemnation even though the State fixed the price.[39]

? NOTES AND QUESTIONS

1. In the aftermath of *CNSD*, can the Italian government take back its decision-making prerogative and set the tariff itself? If so, is the probable effect of the Court's judgement merely to cause the government to take on this tariff-setting task? Or, is the government likely to rethink whether the public interest requires price-setting?
2. Is the judgement unfair to CNSD, which was held to have acted pursuant to the command of its government? Note the Court's choices. It could have regarded CNSD as protected from an Article 101 violation by State command. But if it had recognized CNSD's State action defence, could it have held Italy to be in violation of Article 4 TEU read together with TFEU Article 101? Re-read paras. 53–55.
3. Is *CNSD* consistent with *Ladbroke*? Where is the private autonomous action in *CNSD*?
4. In *Italian matches*, did the producers have sufficient autonomy to be held responsible? Is the problem only that the Italian producers were nationalistic quota-assigners? Will the ministry now set the quotas as well as the prices? Would it have any interest in doing so if it cannot divvy up the market among the Italians? Would a discriminatory allocation by the State violate Articles 18 and 34 TFEU?
5. What does *Cipolla* add to your assessment of the validity of the Italian law?
6. US law is similar. A person or firm that merely follows an anti-competitive command of the State (e.g., not to advertise) has no antitrust liability; it has done no act that violates the law. But, a State of the US may not delegate to private parties the power (and duty) to fix prices and shield them from federal liability for price fixing.[40]
7. In other respects, also, US law is somewhat similar to EU law on State action and supremacy, but the EU institutions have far broader power than US courts to override anti-competitive State legislation by virtue of the free movement principles. When Congress passed the US antitrust

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39 See E. Fox (2004), 'State action in comparative context: What if *Parker v. Brown* were Italian', in B. Hawk (ed.) (2004), *International Antitrust Law & Policy, Fordham Corporate Law 2003*, New York: Juris, Ch. 19.

40 *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

laws, it could have chosen to pre-empt anti-competitive State law that adversely affected interstate commerce, but it did not. Accordingly, subject to the constraint of the commerce clause in the US Constitution, States of the US may adopt and enforce regulatory statutes that have significant anti-competitive effects.[41] Moreover, antitrust laws of the US States—even law that is more prohibitory than federal antitrust law—is normally valid, and it functions in tandem with federal law.[42] Private parties acting under a lawful but anti-competitive State regime are protected from federal antitrust enforcement as long as the State has clearly articulated its policy that displaces competition with regulation and supervises the private action.[43]

A State may not impose an unreasonable burden on interstate commerce (e.g., discrimination against imports); but seldom is such a burden found when the law applies equally to residents and outsiders.[44] Even a law that gives preference to in-State facilities might be justified where, for example, it is part of an environmental programme that internalizes costs.[45]

8. For a survey and analysis of antitrust laws of jurisdictions that reach and may prohibit anti-competitive measures of the nation/State and its subdivisions, see Eleanor Fox and Deborah Healey (2014), 'When the state harms competition: The role for competition law', *Antitrust Law Journal*, 79, 769. The European Union is the leader in this regard.

E. State aid

States are tempted to give money and other benefits to support local firms and to attract other business. Frequently, they are asked to favour one competitor, sector or region over another, often to save a failing business and to save jobs. In the mid-twentieth century, extensive State support of industry was the norm in Europe. If trade barriers had been removed but State aid flourished, Europe would never have become one common market. Thus, in order to contain State aid and provide transparency for permissible aid, the Treaty included Articles 107 to 109 TFEU. Over time, the control of State aid has evolved into a full-fledged discipline and a peculiar and discrete part of competition enforcement in Europe. It now accounts for half of the enforcement activity of the Directorate-General for Competition. This section offers a high-level presentation of the main principles governing

41 See, e.g., *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) (prohibiting oil producers/refiners from operating retail service stations in the state for fear that they would favour their own stations), though in recent years, the Supreme Court has sometimes taken a more aggressive view of pre-emption. See, for an application of the commerce clause to strike down a purely protectionist regulation of casket-making, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

42 *California v. ARC America Corp.*, 490 U.S. 93, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989) (allowing California to authorize indirect purchaser lawsuits even though federal law disallows them).

43 *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985).

44 Compare *Exxon Corp. v. Governor of Maryland*, note 41, with *West Lynn Creamery v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

45 *United Haulers v. Oneida-Herkimer Solid Waste Mgmt Authority*, 550 U.S. 330, 127 S.Ct. 1786, 167 L.Ed.2d 655 (2007).

State aid control. For an in-depth presentation, we suggest that you refer to specialized treatises.[46]

1. Notion of State aid

State aid is 'any aid granted by a Member State or through State resources in any form whatsoever'. Historically, direct subsidy has been the most common form of aid, but State aid also includes exemptions from fiscal or social charges, credit guarantees, credit at low interest, credit or equity investments that would not be available in the market, payment by the State of a higher price to domestic suppliers, sale by the State below the market price to domestic buyers, assumption by the State of part of an undertaking's risk, tax concessions (e.g., to encourage the takeover of an ailing firm), and virtually any other benefit conferred by the State on terms that would not be acceptable to a private investor.

a. State aid criteria and ex ante review

Article 107(1) TFEU declares that any State aid that 'distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, insofar as it affects trade between Member States, be incompatible with the common market'. Hence, the notion of State aid requires: (i) an intervention by the State or through State resources (ii) that is likely to affect trade between Member States, (iii) confers a selective advantage on the recipient(s), and (iv) distorts or threatens to distort competition.[47]

The Treaty, however, gives the Commission the power to approve State aid for the reasons listed in Article 107(2) and (3) TFEU. To obtain approval, Member States must notify to the Commission their plans to grant State aid prior to implementation. The Commission may then authorize the aid without conditions, authorize the aid after agreed modifications or open formal proceedings, after which it might prohibit the aid from being granted. The Commission must give notice to concerned parties to submit their comments.[48]

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46 Including C. Quigley, *European State Aid Law and Policy* (2022), 4th ed., Oxford: Hart/Bloomsbury Publishing, 1128 pp.

47 For a detailed discussion, see Commission Notice on the notion of State aid as referred to in Article 107(1) TFEU [2016] *O.J.* C 262/1.

48 See Regulation 2015/1589/EU laying down detailed rules for the application of Article 108 TFEU [2015] *O.J.* L 248/9.

If the Commission finds that State aid is not compatible with the internal market, or that aid is being misused, it must direct the State to abolish or alter the aid within a specified time period, or to recover aid unlawfully granted. If the Member State fails to comply, the Commission or an interested Member State may refer the matter to the Court of Justice. If aid is granted prior to its approval, in breach of the notification requirement and standstill principle, i.e., it is unlawful aid, its suspension and/or recovery can also be sought from national courts.

b. Compatible aid

The grounds to approve State aid are set out in paras. (2) and (3) of Article 107 TFEU.

Paragraph (2) lists forms of aid that 'shall be compatible' with the internal market. Aid that shall be compatible under paragraph (2) is [as slightly edited]:

(a) aid of a social character granted to individual consumers without discrimination as to origin of products,
(b) damage relief in natural disasters or exceptional occurrences, and
(c) aid to the economy of certain areas of the Federal Republic of Germany affected by the division of Germany insofar as it is required to compensate for economic disadvantages caused by that division.

Paragraph (3) specifies aid that the Commission *may* declare compatible with the common market. Frequently invoked by Member States, this section empowers the Commission to declare compatible aid in the following five categories [as slightly edited]:

(a) aid to promote the economic development of areas where the standard of living is abnormally low or where there is serious underemployment …;
(b) aid to promote the execution of an important project of common European interest or to remedy a serious disturbance in the economy of a Member State;
(c) aid to promote cultural and heritage conservation where such aid does not affect trading conditions and competition in the Community to an extent that is contrary to the common interest; and
(d) other categories added by decision of the Council.

To eliminate red tape and to concentrate on the cases that matter most, the Commission has enacted block exemption regulations that eliminate the need for notification if certain conditions are met. The General Block Exemption Regulation 651/2014[49] covers a wide array of State aid objectives, including aid for environmental protection, risk capital, R&D and innovation, newly created small enterprises, and broadband rollout. The *de minimis* Regulation 1407/2013[50] also exempts Member States from the notification requirement for small amounts of aid. Various horizontal and sector-specific rules and guidelines clarify the Commission's policy to approve different forms of aid.

c. *The market economy operator principle*

There is considerable case law on what is a State aid. Although Member States may not favour firms by using State aid, the Treaty does not prevent a State from participating in the economy as long as it acts as a 'market economy operator'. The State can therefore be a shareholder and participate in capital increases without breaching Article 107 TFEU if the transaction is at market rate.

In its progressive privatization of Electricité de France ('EDF'), the former electricity monopoly, France restructured EDF's accounts. It converted a debt it was owed by EDF into equity. The transaction had fiscal consequences; EDF avoided paying a tax by incorporating the debt into capital. France argued that this was neutral from a State aid perspective; it could have requested EDF to pay the tax and later make a capital injection to the amount of the tax. In other words, France argued, it acted as a market economy operator and provided no advantage to EDF.

The Commission disagreed. It found that it was not possible to apply the market economy operator test to a fiscal operation, since taxation is the exclusive province of the State, and it is not possible to compare its fiscal policy with that of a hypothetical private investor.

The Court of Justice annulled the Commission decision in *EDF v. Commission*.[51] It recalled that Article 107(1) TFEU covers State aid 'in any form whatsoever'. The form of the measure does not matter; only its effects do. Therefore, the Commission must take a global view of the measures adopted and assess their overall effects. A Member State that wishes to rely

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49 Commission Regulation 651/2014/EU of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty [2014] *O.J.* L 187/1.
50 Commission Regulation 1407/2013/EU of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid [2013] *O.J.* L 352/1.
51 Case C-124/10 P, *EDF v. Commission*, EU:C:2012:318.

on the market economy operator principle needs to demonstrate, using evidence prepared before or at the moment of its investment decision, that it was rational for it do so as an investor. Policy considerations such as social or environmental objectives cannot be taken into account here (although they might be relevant in assessment of the compatibility of the aid).

d. *Public service compensation*

Does a privatized transport enterprise receive State aid when the State continues to cover the costs of public service obligations? Altmark Trans sought to organize public transport in a new East German länder. In *Altmark Trans GmbH*,[52] the Court of Justice held that public subsidies for transportation services are not State aids, and therefore do not require notification and justification, where they constitute proportionate compensation for the discharge of public service obligations (known as 'services of general economic interest' or 'SGEI'). Such subsidies fall outside Article 107 TFEU if the following conditions are satisfied: (1) the recipient must be required to discharge clearly defined public service obligations, (2) the formula for calculating the compensation must be established beforehand in an objective and transparent matter, (3) the compensation must not exceed what is necessary to discharge the public service, and (4) either the undertaking must be chosen in a public procurement procedure or the level of compensation needed to fulfil the public service obligation must have been determined on the basis of the costs of a typical, well-run undertaking.

Given the importance of public services in the economy of most Member States and the ubiquity of compensations thereof, the Commission has elaborated detailed rules based on the *Altmark* principles in order to enable States to self-assess their practices and increase legal certainty. The SGEI package includes Commission communications, a decision and a Regulation setting forth specific *de minimis* thresholds for the compensation of public services.[53]

e. *State v. private resources*

Germany decided to promote windmill energy. German law obliged all regional public electricity suppliers to buy windmill power as a portion of

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52 Case C-280/00, *Altmark Trans GmbH and Regierungspräsidium Magdeburg v. Nahverkehrsgesellschaft Altmark GmbH, and Oberbundesanwalt beim Bundesverwaltungsgericht* [2007] ECR I-7747, EU:C:2003:415 ('*Altmark Trans GmbH*').

53 Available at: https://competition-policy.ec.europa.eu/State-aid/legislation/sgei_en (accessed on 13 August 2022).

their energy and to pay for the wind-generated electricity at a price higher than the price of other energy; and it obliged upstream electricity suppliers to pay to the regional suppliers a part of the extra costs. PreussenElektra, an upstream supplier, tried to avoid paying part of the extra costs of windmill energy on the grounds that its supplementary payment to the regional supplier (Schleswag, which happened to be Preussen's own subsidiary) would constitute an illegal subsidy of wind energy. The Court rejected the argument. It ruled that PreussenElektra's supplementary payment, although commanded by the State, was merely a private payment and did not take the mantle of German aid.[54]

Why wasn't the supplementary payment in fact a subsidy? Did this interpretation bless an end run around Article 107 TFEU? Could Preussen and Schleswag sue Germany for maintaining a State measure that restrained trade by putting them at a competitive disadvantage vis-à-vis EDF and others in violation of Article 34 or 35 TFEU?

Consider then the case of Pearle, a company trading optical equipment in the Netherlands that sought to obtain the refund of levies imposed by the Central Industry Board for Skilled Trade ('the Board'), a trade association governed by public law, to finance a collective advertising campaign for opticians. The Board exercised statutory delegated powers as the governing body of various trading professions, and its by-laws were approved by a State entity. Supported by the Commission, Pearle claimed that the advertising campaign financed by the levies amounted to unlawful State aid because it occurred through a body designated by the State and benefited selected businesses. On preliminary reference, the Court of Justice denied Pearle's claim because the advertising campaign was funded not by resources made available by the State but rather, by levies earmarked for the organization of the advertising campaign and paid by the beneficiaries thereof. 'Since the costs incurred by the public body for the purpose of that campaign were offset in full by the levies imposed on the undertakings benefiting therefrom', no advantage was granted that constituted 'an additional burden for the State or that body'.[55]

f. *Selectivity*

Many State aid cases revolve around the determination of whether the State measure in question is selective or not and can thus result in a selective

54 Case C-379/98, *PreussenElektra AG v. Schleswag AG* [2001] ECR I-2099, EU:C:2001:160.
55 Case C-345/02, *Pearle BV* [2004] ECR I-7139, EU:C:2004:448, para. 36.

advantage. This is notably because the condition of distortion of competition in the context of State aid control is largely presumed whenever the State measure gives an advantage to its beneficiary/-ies in relation to their competitors. In other words, the notion of distortion of competition under EU State aid law can be equated with that of harm to competitors, which is markedly different than the interpretation of that notion in the fields of antitrust or merger control.

In brief, the assessment of the notion of selectivity requires a determination of whether a particular legal regime or national measure is such as to

> favour certain undertakings or the production of certain goods over other undertakings which, in the light of the objective pursued by that regime, are in a comparable factual and legal situation and who accordingly suffer different treatment that can, in essence, be classified as discriminatory.[56]

In turn, the Commission and the EU courts have construed the notion of selectivity broadly. Selectivity is deemed established when an aid is granted to one specific company or a category of companies depending on, e.g., its size (large undertakings versus SMEs[57]), its type of business (manufacturing versus services), its sector of activity (textile, transport, steel, etc.), its geographical location (particular region within a Member State) or its date of incorporation (such as newly created companies). Likewise, selectivity can derive from the scope of the measure itself (*de jure*) or from its practical effects (*de facto*).

The distinction between general and selective State measures is particularly arduous in relation to tax advantages. Generally, although not involving a direct transfer of State resources, national measures of a fiscal nature may procure a selective advantage if they place the addressees thereof in a more favourable position than other taxpayers. In order to classify a national tax measure as selective, the Court of Justice has held that the Commission must begin by identifying the ordinary or 'normal' tax system applicable in the Member State in question and thereafter demonstrate that the tax measure is a derogation from that ordinary system and thereby differentiates between operators that are in a comparable factual and legal situation 'in the light of the objective pursued by that ordinary tax system'.[58] How

56 See, e.g., Joined Cases C-106 and C-107/09 P, *Commission and Spain v. Government of Gibraltar and United Kingdom* [2011] ECR I-11113, EU:C:2011:732, paras. 75 and 101.

57 Small to medium-sized enterprises.

58 See, e.g., Joined Cases C-78 and C-80/08, *Paint Graphos and Others* [2011] ECR I-7611, EU:C:2011:550, para. 49.

to then determine the ordinary tax system against which the existence of a derogation must be assessed?

In *World Duty Free Group*,[59] the Court of Justice considered the selectivity of a provision of Spanish corporate tax law whereby the goodwill resulting from the acquisition by an undertaking taxable in Spain of a shareholding of at least 5% in a 'foreign company', and thus to the exclusion of companies established in Spain, was deductible from the taxable base in the form of an amortization to the extent that the interest in question was retained for an uninterrupted period of at least 1 year. The General Court found no selectivity because the measure was not applicable to an identifiable group of undertakings with specific characteristics. The Court of Justice overturned this holding:

> 68 It is apparent from the judgements under appeal that the Commission relied, in the contested decisions, in order to establish that the measure at issue was selective, on the fact that the consequence of that measure was that resident undertakings were not treated equally. Pursuant to that measure, only resident undertakings who acquired at least 5% shareholdings in foreign companies could, under certain conditions, qualify for the tax advantage at issue, whereas resident undertakings making the acquisition of such a shareholding in undertakings taxable in Spain could not obtain that advantage, notwithstanding the fact that, according to the Commission, they were in a comparable situation in the light of the objective pursued by the ordinary Spanish tax system.
>
> 69 However, the General Court considered that the measure at issue, on the grounds that it did not affect any particular category of undertakings or the production of any particular category of goods, that it was applicable regardless of the nature of an undertaking's activity and that it was accessible, a priori or potentially, to all undertakings that wanted to acquire shareholdings of at least 5% in foreign companies and that held those shareholdings without interruption for at least one year, had to be regarded not as a selective measure but as a general measure .... In so doing, the General Court erred in law.
>
> 70 Thus, ... the General Court held that, if the condition relating to the selectivity of a national measure relevant to the recognition of State aid, in respect of a measure that is a priori accessible to any undertaking, is to be satisfied, it is always necessary that a particular category of undertakings, who are exclusively favoured by the measure concerned and who can be distinguished by reason of specific properties, common to them and characteristic of them, be identified.

59 Joined Cases C-20 and C-21/15 P, *World Duty Free Group and Others* EU:C:2016:981.

> 71 However, the imposition of such a supplementary requirement to identify a particular category of undertakings, additional to the analytical method applicable to selectivity in tax matters that may be deduced from the Court's settled case-law, which essentially involves ascertaining whether the exclusion of certain operators from the benefit of a tax advantage that arises from a measure derogating from an ordinary tax system constitutes discrimination with respect to those operators, cannot be inferred from the Court's case-law ….

The Court of Justice added that the selective nature of a measure is not affected by the fact that the number of undertakings able to claim entitlement under that measure is very large, that these undertakings belong to various economic sectors or that the measure applies to undertakings regardless of their activity. What matters is that the measure is discriminatory.

* * *

The implications of the Court of Justice's judgement in *World Duty Free Group* are significant. Why? Consider that the selective advantage in the case resulted from the mere fact of carrying out an investment, and the investment was in a foreign company as opposed to a domestic one. Note that Germany, Ireland and Spain intervened in support of the defendants and against the Commission.

According to the standard set by the Court of Justice in *World Duty Free Group,* what tax measures can still be deemed general and not selective? Is the selectivity criterion still meaningful to determine whether a tax measure qualifies as State aid? What are the practical consequences of this broad definition of selectivity for the system of State aid control?

In view of the measure at issue, what kind of justification would you offer for the outcome? How would such justification relate to the socio-historical context of EU competition policy and State aid policy in particular? Revisit this question after reviewing the next section and a final section devoted to the recent tax forgiveness cases.

Note that in *Fútbol Club Barcelona,* the Court clarified the limits of the Commission's burden of proof in tax advantage/State aid cases. The Commission need only show that the scheme, taken as a whole, at the time of its adoption is capable of resulting in a lower tax liability than under the general tax regime.[60]

60 Case C-362/19 *European Commission v Fútbol Club Barcelona*, ECLI:EU:C:2021:169.

2. State aid policy

As noted, State aid control is a major facet of EU competition policy and developed into a highly technical and somewhat distinct area of practice. It played a particularly important role in the wake of the financial crisis commencing in 2008, as nations were tempted to pour subsidies into 'their own' banks at the expense of cross-border competition. The following remarks of successive Competition Commissioners Joaquín Almunia and Margrethe Vestager highlight the place of State aid policy in the EU and in the world.

Competition, State Aid and Subsidies in the European Union
Joaquín Almunia, Vice President and Commissioner for Competition
9th Global Forum on Competition, Paris, 18 February 2010

Ladies and gentlemen,

I'm very pleased to be here today in only the second week as Competition Commissioner ….

My key priority for the next five years is the same as it was under my previous responsibility as Commissioner for Economic and Financial Affairs: to help overcome the current financial and economic crisis and ensure that Europe emerges better equipped for balanced and sustainable growth and more jobs. This is an ambition which we all share for our respective countries—and the reason why we are meeting here at the OECD, to work together to achieve this ambition.

This is also the aim of the proposals the new European Commission is preparing for what we call 'The EU 2020 Strategy': to lay the foundations for a more dynamic, knowledge-based, socially inclusive and greener economy that is both sustainable and fair.

* * *

Competition policy is sometimes thought of as only addressing the behaviour of companies and businesses: cartels or abuses of market power, or mergers whose impact on competition needs to be assessed. But State subsidies to business ('State aid' in EU Treaty language) can also distort competition. A review of the impact of subsidies is, I believe, an important aspect of competition policy.

Subsidies are of course an essential tool for policy makers and governments. Government measures to support the financial system and other sectors of the economy over the past 18 months are a case in point. It is widely acknowledged that the money governments poured or committed in support of financial institutions prevented a catastrophic collapse of the global banking system.

On top of the immediate reactions needed to avoid a meltdown of the economy, in normal times subsidies can help remedy a market failure, promote investment in environmentally friendly technologies, or foster economic and social development in a particularly depressed region. These are important public policy objectives— and it is crucial to ensure that governments have the best-designed tools available to achieve these objectives.

Our aim in recent years, before the crisis emerged, has been to ensure that subsidies are targeted towards horizontal objectives such as these, and to prevent subsidies that merely keep inefficient firms on life-support. In the mid-1990s, around 50 per cent of government subsidies to industry and services in the EU were earmarked for horizontal objectives as opposed to individual bailouts. By 2008 this figure had risen to nearly 90 per cent.

* * *

The EU system for reviewing State subsidies

What we have in the EU is a system that requires the European Commission to review State subsidies to business and to assess their impact on competition. The fundamental principles were laid down in 1957, as a necessary condition to achieving a common market in goods and services in the EU, and remain unchanged today in the new Lisbon Treaty. A single market across the EU requires a level playing field between businesses in different Member States, so that our review of subsidies looks not only at the impact on competition between businesses in a given country, but also at the impact on cross-border competition.

What we do is essentially carry out a balancing exercise, weighing up the efficiency and equity benefits that are expected to result from a subsidy, against the negative effects the subsidy might have on competition in the EU and on trade between EU Member States.

Specifically we consider whether the government's objective in providing the subsidy does not run counter to the common interest of EU Member States— including growth, employment, regional development, the environment, or research and development.

One element we take into account is whether the subsidy addresses a market failure. For instance, we recognise that small businesses find it difficult to access risk capital because of high transaction costs to assess small projects compared to the expected gains from investment. So subsidies to facilitate access to risk capital may be acceptable. Similarly, we are happy to encourage subsidies for the extension of broadband to remote regions, which is not profitable under normal market circumstances. Likewise, we allow subsidies to cover part of the costs of a research project knowing that markets are not always ready to take on the full risk of research especially when the profitability horizon is very long.

We check that, in practice, the subsidy will help achieve that objective, that it creates the right incentives for companies to adjust their behaviour. We also check that the subsidy is proportionate, i.e. that the same adjustments to company behaviour could not be obtained with lower subsidy.

This balancing exercise, based on an economic assessment of the impact of the measure, is carried out before the subsidy is implemented. It can lead to the Commission imposing conditions to minimise the distortion of competition, for instance, a reduction in the amount of the subsidy. This helps ensure that subsidy measures do not have an unduly distortive effect on competition in the EU. It also gives Member States an insight into the effectiveness of a planned subsidy and whether it will give value for money to the taxpayer.

Of course, what we don't do—thankfully—is review every single subsidy measure adopted by EU Member States. Following recent reforms, far fewer measures require notification to the Commission. Some of them do not distort competition or trade between Member States, others benefit from a general exemption laid down by regulation, or a general scheme (for instance for aid to research and development, development of small businesses, training and the creation of new jobs, etc). The Commission only carries out an in-depth, individual, review of those large subsidies which have the potential to be really harmful to competition ....

However, where we find that a State subsidy is unlawful—that is, it violates our rules for its acceptance—it must be recovered in full. That is the only effective way of remedying the distortion of competition created by the subsidy.

Why it works

I've mentioned before the role of State subsidies in the global financial crisis. Let me come back to this issue.

Early action by the European Commission helped ensure a common approach by Member States to financial sector bail-outs. Member States may have adopted different measures—those which they felt were best suited to their respective market situation—whether guarantee schemes, recapitalisation measures, or impaired asset relief measures, or a mixture of these. But the European Commission required that all of these measures complied with certain fundamental principles—non-discriminatory access to national schemes, subsidies limited to what was necessary, mechanisms to prevent abuse of State support, restructuring measures for certain financial institutions that received large amounts of aid.

This helped keep to a minimum any distortions of competition between banks within and across national borders, and helped preserve the integrity of the EU internal market. It prevented costly and damaging subsidy races between Member States, with each trying to outdo the other in an attempt to prevent business moving away.

Going forward, EU policy on reviewing State subsidies—notably through the restructuring measures being agreed as a condition of approving bank subsidies—is helping rebuild viable financial institutions which are able to carry out the essential function of providing finance to the real economy.

Reviewing subsidies at national, supranational and international level?

Naturally, the EU perspective on the control of subsidies is closely associated with its powers and role as a supranational body, pursuing common EU objectives such as a level playing field for business and the internal market.

But the underlying principle—that subsidies should not unfairly distort competition between businesses so that companies can compete on merit to the benefit of consumers—is equally important at national level and on national markets for goods or services. Creating or supporting a national champion creates domestic casualties too—those companies that are not chosen for government support.

Measures to support inward investment may result in obvious rewards—but it may be worth assessing for just how long those measures continue to produce net benefits, in particular if such support is open-ended.

National regimes for reviewing State subsidies do exist—for instance in Spain, my own country, the national competition authority has the power to issue opinions on subsidies granted by the regions or the central government. On the other hand, countries that are candidates to join the EU are required to set up systems for reviewing State subsidies. One of them, Croatia, has a system that mirrors the EU system—with the national competition authority entrusted with the relevant powers. Looking further afield, Russia also has a system of subsidy control and the Mexican competition authority has powers to deliver opinions on the impact of subsidies on inter-State trade.

I believe that there is scope for individual countries outside the EU to consider adopting a system of controlling State subsidies, for the benefit of business environment and quality of public policies.

What about the international level?

All of us here today recognise the benefits of open markets and the downsides of protectionism. Subsidies can be an instrument of protectionism, countering the benefits of trade liberalisation. The WTO rules on subsidies for goods can play a role in removing the most harmful subsidies—but no rule can be applied properly without transparency. So I fully endorse the OECD ministerial conclusions of last June which state that government measures to support industry must be transparent and WTO consistent. Transparency helps contain protectionist measures by opening them up to public scrutiny—and helps ensure a level playing field for business in markets across the world.

With this in mind, I welcome the initiative by WTO Director General Pascal Lamy to report quarterly on measures adopted by G20 countries to counter the crisis. This is particularly important since the G20 is leading the drive towards a coordinated route out of the crisis for the world economy. In a move which underlines the importance we attach to transparency, the EU has already introduced this principle and reports regularly on all Member State actions, regardless of their G20 status.

* * *

Conclusion

* * *

The EU rules on government subsidies are a key element of EU competition policy in that they help maintain a level playing field for business within Member States and across Europe. They have proved their worth in the context of the financial and economic crisis, helping avoid damaging subsidy races between EU Member States and minimising the distortions of competition resulting from large-scale government bail-outs for financial institutions.

But rules on government subsidies are not an exclusive EU issue. They have a place in all competition regimes—whether national, federal, supranational or international. They help maintain the level playing field between businesses implanted within a country, across regions, and across national borders. They help open up markets to international trade. Ultimately, they help governments assess the effectiveness of proposed subsidy measures, and help channel funds to where they are the most necessary and can deliver the most benefit to taxpayers.

Commissioner Almunia was succeeded by Margrethe Vestager. Commissioner Vestager gave an early speech on State aids that foreshadowed investigations into Member State tax structures and tax benefits as impermissible State aid.

The EU State Aid Rules:
Working Together for Fair Competition
Margrethe Vestager, Commissioner for Competition
High Level Forum on State Aid Modernisation, Brussels
3 June 2016

Businesses need State aid rules to protect them from unfair competition.

But they don't want our rules to slow down the delivery of support that doesn't hurt competition .... Less than one in ten State aid measures now come to us for a decision. The rest fall under the general block exemption regulation ....

But even with the best intentions, we can't always be sure whether State aid is doing good. I am often asked, does taxpayers' money actually deliver faster development in our poorest regions, or do companies just pocket the money, and go on doing exactly what they were doing before? ...

State aid and corporate taxation

One of the biggest threats to fair competition is when multinationals don't pay their fair share of tax.

The Commission has made action against tax avoidance one of its top regulatory priorities .... Because others have to pay more, when multinationals don't pay their share.

But tax avoidance also hurts competition. When a government lets a company avoid paying its share, that company gains just as if it received a handful of cash.

I know that's not news to you: State aid is about the benefit received, not the form it takes.

What is new about our work on State aid and tax is that, over the last three years, it has become clear that general rules and schemes are not the only way that governments hand out tax benefits. In fact, you often don't know what benefits a company has, until you look at the tax rulings it has received.

We've therefore looked at more than a thousand tax rulings, to see if they gave special treatment to the companies that received them.

Not because we think rulings are a bad thing. The vast majority of them don't give us any concern at all. We know tax codes can be complicated, and that many authorities simply use tax rulings to give companies clarity on what they can expect to be taxed. This is about giving legal certainty, in the interests of the companies and other taxpayers.

Applying the arm's length principle

But our investigations show that tax rulings are also sometimes used in other ways: to grant individual companies a benefit that's not available to others.

How do we know if that's the case? The principle is very simple.

Governments should treat multinationals in the same way as companies that operate individually.

Local companies have to pay the market price when they buy a service. They don't have the option to do anything else.

So when one company in a group buys from other group companies, it should report transfer prices that come as close as possible to the market price. This is where the arm's length principle comes in: it is the best way to be sure you're treating every company fairly.

I know it's not always easy to decide what the market price should be. It's often a good idea to just look at what prices are actually paid in the market. But even that can be misused to support tax avoidance. We've seen tax rulings that claim to use this method even though there's actually no market to compare against ….

The basic principle is simple. What really matters from a State aid angle is that the transfer pricing methodology used to calculate the profits of a group leads to a reliable approximation of a market-based price.

To see if that is the case for a particular ruling, you have to look at all the details. But our investigation shows that some methods are more often linked to aggressive tax planning than others.

For example, so-called 'one-sided' methods don't even try to split a company's profits between the countries that might have a claim to tax them. Instead, one country simply works out the taxable profit based on an indicator, such as operating expenses. But those figures can be a poor indicator of how successful a company is, so using them to set the taxable profit is only appropriate in a limited number of cases.

* * *

The Commission is not a tax authority. We are not there to reassess the work of national tax authorities. Tax rulings which reflect economic reality and actually make sense are not an issue for us.

But we have seen some examples of unrealistic transfer prices, without any sign that the authorities had a convincing reason to accept them. That's where State aid can be involved, and where the Commission does have to act.

* * *

? NOTES AND QUESTIONS

1. Article 107(1) prohibits State aid that 'distorts or threatens to distort competition by favouring certain [firms or goods]'. What does 'distort[ing] competition' mean? Does the phrase mean the same thing in Article 107(1) as in Article 101(1) TFEU?
2. Do you agree that State aid normally 'distorts competition'? In what sense? Does it harm competition from the viewpoint of consumers? From the viewpoint of competitors? From the vantage of protecting the competition process and the right to compete on the merits? Can State aid intensify competition? How can or should the Commission and the Court deal with procompetitive effects (lower prices, more business formation) of State aids?
3. The US, in contrast to the EU, has no national subsidy control, except as required by the General Agreement on Tariffs and Trade/World Trade Organization, and except for prohibition of discriminatory subsidies that impose a burden on interstate commerce.[61] US law reflects the belief that freedom of State and local governments to grant subsidies or other benefits, whether to compete for business establishment or to prop up business in financial difficulty, is a healthy form of State autonomy and competition.[62] Are there good reasons why Europe has State aid control and the US does not?
4. Firms in Europe frequently challenge a grant of State aid to their rivals, and typically, they are accorded standing to do so. Thus, when Ford and Volkswagen set up a joint venture in Portugal to make multi-purpose vehicles—a new endeavour for both joint venture partners—Matra, the dominant maker of MPVs, complained that Portugal's grant of infrastructure aid to the new entrant violated Article 107 TFEU, and that the joint venture agreement itself violated Articles 101 and 102 TFEU, in part because the aid distorted competition.

61 See *West Lynn Creamery v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994).

62 See *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 589, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997); and see Justice Scalia, dissenting, at 605–608.

(How would Matra argue this point?) Matra lost on the merits; both the aid and the joint venture were allowed.[63]

Why would a firm challenge a grant of aid to its rival? Why, in particular, would a dominant firm challenge a grant of aid to a new entrant? Is the complainant likely to be complaining about harm to competition, about unfair advantages or about competition itself? Would buyers of the products produced by a subsidized firm ever have an interest in challenging a State aid? Would it be accurate to view rivals' complaints about grants of State aid as complaints about *unfair* competition?

5. Explain the relationship between the State aid body of law and the antitrust (Articles 101 and 102 TFEU) and merger control bodies of law. While there are many differences, Europe took advantage of the synergies of its laws in the financial crisis of 2008, using its combined powers of subsidy control, merger control and restructuring, and doing so on an emergency basis.[64]

3. Member State tax forgiveness as State aid

Since 2013, the Commission has targeted favourable tax treatment to certain large corporations by certain Member States as illegal State aid. It opened proceedings against the Netherlands for tax rulings favourable to Starbucks, Ireland for tax rulings favourable to Apple, and Luxembourg for tax rulings favourable to Fiat, McDonald's and Amazon, as well as against Belgium for operating an excess profit exemption scheme. As expressed by Commissioner Vestager in the speech excerpted earlier, the overall concern is that Member States artificially reduce certain companies' tax base and overall burden by means of rulings relying on transfer prices and/or allocation of profits not reflecting economic reality, with the effect of underestimating taxable profits.

The Commission characterizes this initiative as part of an overall plan for 'fair and effective taxation' aimed at tackling tax avoidance (and conversely, fiscal dumping). It has attracted criticisms for its wide interpretation of core State aid concepts, such as 'advantage' and 'selectivity'. How does the Commission establish selectivity in relation to the application of domestic corporate taxes by means of tax rulings? What is the system of reference that would allow the identification of selected beneficiaries? Is it relevant that transfer pricing issues arise only for multinational companies? Is the 'arm's length principle' mentioned by Commission Vestager useful and legally sound? Is the Commission right to compare Member States'

63 See Case T-17/93, *Matra Hachette SA v. Commission* [1994] ECR II-595, EU:T:1994:89.

64 See N. Kroes, 'Competition law in an economic crisis', Opening address at the 13th Annual Competition Conference of the International Bar Association, Fiesole, 11 September 2009 (SPEECH/09/385). For a discussion, see also D. Gerard (2009), 'EC competition law enforcement at grips with the financial crisis: Flexibility on the means, consistency in the principles', *Concurrences*, 1, 46.

practices against a certain 'realistic' counterfactual? Does the Commission confuse the notions of advantage and selectivity?

The Member States involved contested the Commission's orders. On appeal, the General Court held that Luxembourg's tax break to Fiat was illegal State aid and thus, that Luxembourg had to recover it from Fiat. Regarding Netherlands/Starbuck's and Ireland/Apple, the General Court held that the Commission had not proved its case that the State gave the multinational a selective advantage that distorted competition in the EU. In the three rulings, the General Court confirmed the Commission's approach in general; that is, that special tax advantages can be State aid and can be condemned by the Commission. Thus, the Commission overcame the argument that tax forgiveness cannot be State aid because the design of the national tax systems is a matter for the Member States.

The Fiat and Starbucks matters involved alleged aid of €20–30 million each; the Apple matter involved alleged aid of €13 billion. The *Fiat* case concerned calculation of the taxable basis in Luxembourg for the financing activities of Fiat Chrysler Finance Europe. The transfer pricing methodology that the State used minimized Fiat's revenues and resulted in a lower tax. The Commission found, and the General Court affirmed, that the tax ruling conferred an economic advantage. However, the Court of Justice reversed; the Member State was entitled to apply its own rules when identifying the normal taxation system. The Court held that there is no autonomous, generalized arm's-length principle in EU law.[65]

The *Starbucks* case involved the royalty paid by Starbucks to a UK entity in the Starbucks group for intellectual property royalties for coffee roasting. The Commission argued that the methodology Starbucks used for transfer pricing did not reflect arm's length pricing; that the price to the UK group was too high, allowing Starbucks to reduce its tax bill. Starbucks and the Netherlands argued that the Commission was not entitled to use the arm's length principle as a basis for assessing State aid, and that in any event, the methodology had not resulted in an economic advantage for Starbucks. The General Court held (prior to the Fiat judgment above) that it was proper to use the arm's length principle but that the Commission had not proved that the wrong methodology had led to a reduction of the tax burden.[66]

Apple was the most contentious case. The Commission ordered Apple to reimburse €13 billion (plus interest) to Ireland due to the alleged 'artificial

65 Case C-885/19 P (Joined Cases C-885/19 P, C-898/19 P), *Fiat Chrysler Finance Europe v. Commission*, ECLI:EU:C:2022:859.

66 Cases T-760/15, *Netherlands v. Commission* (Starbucks), EU:T:2019:669.

allocation' of Apple's EU profits.[67] The Commission took issue with two tax rulings issued by Ireland to Apple in 1991 and 2007 allowing it to allocate almost all of its sales profits to a 'head office' that existed only on paper instead of to its subsidiaries established in Ireland, namely Apple Sales International (ASI) and Apple Operations Europe (AOE), thus avoiding paying taxes on a very large share of its earnings. The allocation of profits to that 'head office', with virtually no employees or physical existence, had allowed Apple's effective corporate tax rate to be set as low as 1% in 2003 and 0.005% in 2014, compared with the 12.5% tax rate provided for in Ireland's corporate tax legislation.

The General Court annulled the Commission's order. It held that the Commission had not shown that the untaxed profits were attributable to activities carried out by Apple's Irish branches, and for this and other reasons, it had not proved 'selectivity'—i.e., that Ireland had given Apple a selective comparative advantage—which the Commission suggested was designed to incentivize job creation in Ireland. The General Court did, however, once again support the Commission's use of the arm's length principle (but see Fiat judgement above), even though Ireland had not formally incorporated the principle into its law; but, it held that the principle was not correctly applied. Although Apple gave IP licences to its Irish branches royalty free, and the profits were allocated entirely to the non-Irish titular head office, which had no employees, the question was whether the IP licences were controlled by the Irish branches, and they were not. Also, the Court agreed with the Commission that the Irish tax authorities had made methodological errors, but, the Court said, the Commission failed to link them to a selective advantage conferred by Ireland.[68]

The tax forgiveness State aid cases created a trans-Atlantic storm. US companies charged the Directorate-General for Competition with undermining their pro-competitive moves to the European Union by applying an irrelevant and arcane corner of the competition law. Tim Cook, the CEO of Apple, responded to the Commission decision disallowing tax rulings regarding Apple with this Statement:

> The European Commission has launched an effort to rewrite Apple's history in Europe, ignore Ireland's tax laws and upend the international tax system in

67 See Commission Decision of 30 August 2016, State Aid SA.38373 (2014/C) (ex 2014/NN) (ex 2014/ CP)—Ireland, Alleged aid to Apple; Appeal Case before the Court of Justice C-465/20, *Ireland v. Commission* and Appeal Case before the Court of Justice C-633/18 P—*Apple Distribution International v. Commission, Apple Sales International and Apple Operations Europe v. Commission*.

68 Appeal Case before the Court of Justice C-465/20, *Ireland v. Commission (Apple),* EU:T:2020:338.

> the process. The opinion issued on August 30th [2016] alleges that Ireland gave Apple a special deal on our taxes. This claim has no basis in fact or in law. We never asked for, nor did we receive, any special deals. We now find ourselves in the unusual position of being ordered to retroactively pay additional taxes to a government that says we don't owe them any more than we've already paid The Commission's move is unprecedented and it has serious, wide-reaching implications. It is effectively proposing to replace Irish tax laws with a view of what the Commission thinks the law should have been. This would strike a devastating blow to the sovereignty of EU Member States over their own tax matters, and to the principle of certainty of law in Europe.[69]

The Commission, meanwhile, has expressed its commitment to pursue Member States' grants of selective tax breaks that give the favoured firm an unfair economic advantage in the internal market. It has announced plans to ensure fairer trade across the union by controlling selective tax forgiveness.

Is it wise and natural to control selective and significant tax forgiveness as State aid? Is this a competition problem? Are tax rulings better treated as national tax questions alone, within the sole purview of the Member States? The Ireland/Apple appeal is still pending as of this writing. Has the Fiat judgement foreshadowed the outcome?

F. Control of distortive foreign subsidies

The EU has become concerned that subsidies from non-EU governments have distorted competition within the EU's internal market, especially by giving recipients an unfair advantage in acquiring companies or winning contracts for public procurement in the EU. To address this problem and close the regulatory gap, the Council of the European Union and the European Parliament reached a political agreement on a Foreign Subsidies Regulation (FSR),[70] which was adopted on 28 November 2022 and will become directly applicable 6 months thereafter.

Under the Regulation, parties to a merger, acquisition or joint venture will be required to submit a notification in cases in which the transaction generates an EU turnover of at least €500 million and the transaction involves a foreign financial contribution of at least €50 million, and bidders in public

69 For more details on the tax forgiveness cases, see the Commission's working paper on State aid and tax rulings, http://ec.europa.eu/competition/State_aid/tax_rulings/index_en.html (accessed 12 June 2016).

70 Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, PE/46/2022/REV/1, OJ L 330, 23.12.2022, pp. 1–45.

procurement will have to notify bids involving a financial contribution by a non-EU government where the contract value is at least €250 million and the bid involves a foreign financial contribution of at least €4 million per third country. The Commission may request notifications for smaller amounts where it suspects that the subsidy has market-distortive effects.

For distortive foreign subsidies, the Commission will be charged with balancing the distortive effects with positive effects, such as aid to the environment, to determine the net effects and to assess commitments. For repressive effects and commitments, the Commission may apply or accept a range of remedies. It may prohibit subsidized concentrations and disqualify subsidized procurement bids. It will be able to require divestment of certain assets and provide access to infrastructure.

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This chapter examined State interventions, elaborated how State actions may harm trade and competition, and demonstrated the application of the Treaties to anti-competitive harms.

It is often said that, for harms to competition, the State is the biggest culprit, because it can erect impenetrable barriers and privilege itself and its friends as no private actor can do. But of course, the State is also a guardian of the public good. Through Article 4 TEU and Articles 34, 35, 37, 56 and 106 in tandem with 101 and 102, and 107–109 TFEU, the EU attempts to do the job of limiting the anti-competitive, trade-restraining excesses of the Member States, particularly when they undermine the internal market. In matters of constraining excessive and unjustified State action, competition and internal market policy are intertwined. The EU is ahead of the rest of the world in realizing the synergies.

Afterword

The development of EU competition policy has been an ambitious, evolving and largely successful enterprise, despite some false starts entailing overregulation and rigid rules and some cognitive dissonances inducing systemic tensions between institutional actors. The genius of the enterprise is hard to dispute. Europe has proved that undue public anti-competitive restraints and undue private anti-competitive restraints are often integral, and that a common market cannot be created without coherent, Union-wide competition law. Even while US antitrust looks inward in the sense of dissociating antitrust from political economy and from links with adjacent disciplines such as trade, European competition policy acknowledges the links and seeks a coherent conception that takes account of neighbouring values and objectives. The EU model, as it has evolved to incorporate more economics and less formalism while remaining sensitive to deep social transformations, has become a model or referent of choice for various younger antitrust jurisdictions of the world. Thus, this study of the competition law of the EU has relevance and application well beyond Europe.

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