Horizontal Agreements

ECJ Judgments

APVE and Others (Case C-671/15)

On November 14, 2017, the Court of Justice delivered a judgement on a preliminary ruling request from the French Court de Cassation.[1] In 2012, the French Competition Authority sanctioned several producer organizations ("POs")[2] and associations of producer organizations ("APOs") for their involvement in a cartel in the agricultural sector.[3] The French Competition Authority found that the parties[4] agreed on the prices of endives using different coordination mechanisms such as marketing policies and collective price fixing.

The parties appealed the decision of the French Competition Authority to the national court. The French Court of Cassation requested a preliminary ruling to clarify the interaction between the common agricultural policy ("CAP") and EU competition rules. POs and APOs perform various organizational and marketing duties, and their functioning is regulated at the EU level. Article 42 TFEU provides that the CAP benefits from derogations from competition rules, which are expressly defined in a number of EU Regulations ("Derogation Regulations"). The Derogation Regulations acknowledge that certain forms of coordination and concertation are necessary for agricultural producers to carry out the functions that they are tasked with under EU law, namely adjusting production to demand, reducing the costs of production, and stabilizing producers' prices.[5]

The French Court of Cassation requested that the Court of Justice clarify whether agricultural policies on fixing minimum prices, agreeing on product quantities, and exchanges of information between POs, APOs, and professional organizations that are not expressly included in the Derogation Regulations could nevertheless also benefit from the derogation from competition law rules because they are part of the CAP.

The Court of Justice followed Advocate General Wahl's opinion,[6] distinguishing between polices adopted within the same PO or APO ("internal configuration") and policies adopted between different POs/APOs or between POs/APOs and external parties ("external configuration").

It held that policies adopted under the internal configuration can escape the applicability of EU competition rules if: (i) the relevant POs and APOs are officially recognized by the pertinent Member State; and (ii) the policies they adopt are "actually and strictly" linked to the objectives of the CAP and

[1] *APVE and Others* (Case C-671/15) EU:C:2017:680.

[2] POs are legal entities composed of several producers created to manage production, reduce costs, and promote environmental practices in the agricultural sector.

[3] French Competition Authority, Decision No. 12-D-08 of March 6, 2012.

4 The Association des producteurs vendeurs d'endives ("APVE"), the Comité économique régional agricole fruits et légumes de Bretagne ("Cerafel"), Fraileg SARL, Prim'Santerre SARL, the Union des endiviers, formerly the Fédération nationale des producteurs d'endives ("FNPE)", Soleil du Nord SARL, the Comité économique fruits et légumes du Nord de la France ("Celfnord"), the Association des producteurs d'endives de France ("APEF"), the Section nationale de l'endive ("SNE"), the Fédération du commerce de l'endive ("FCE"), France endives société coopérative agricole, Cambrésis Artois-Picardie endives ("CAP'Endives") société coopérative agricole, Marché de Phalempin société coopérative agricole, Primacoop société coopérative agricole, Coopérative agricole du marais audomarois ("Sipema"), Valois-Fruits union de sociétés coopératives agricoles and Groupe Perle du Nord SAS as well as the ministre de l'Économie, de l'Industrie et du Numérique (French Minister for the Economy, Industry, and the Digital Sector).

[5] *See* European Competition Report, April–June 2017, pp. 1–2.

[6] *APVE and Others* (Case C-671/15), opinion of Advocate General Wahl, EU:C:2017:281.

Derogation Regulations. By contrast, the policies adopted under the external configuration cannot escape the applicability of EU competition rules, even if these policies were adopted to achieve the objectives of the CAP and Derogation Regulations.

The Court of Justice pointed out that it had not been proven that the professional organizations involved had been recognized by the French Authorities as POs or APOs, as required by the Derogation Regulations.

The Court of Justice found that policies adopted within the external configuration cannot escape the applicability of EU competition rules, even if these policies have been adopted to achieve the objectives of the CAP and Derogation Regulations. Furthermore, the Court of Justice noted that in the internal configuration, these policies should be proportionate to the objectives pursued, namely to ensure that production is planned and adjusted to demand, to concentrate supply and placing on the market of the products produced by POs/APOs members, and to stabilize producer price. It concluded that, within the internal configuration, the exchange of strategic information and coordination regarding quantities of products to be placed on the market and pricing policies are proportionate to the CAP's objectives.

The Court of Justice found, however, collective fixing of minimum sale prices to be disproportionate to the objectives pursued, regardless of the configuration, because it has the effect of reducing the (already low) level of competition in the agricultural market.

Fining Policy

ECJ Judgments

***Global Steel Wire v. Commission* (Cases C-454/16 P and C-457/16 P); *Moreda-Rivière Trefilerias v. Commission* (Cases 455/16 P and C-461/16 P); *Trefilerias Quijano v. Commission* (Cases C-456/16 P and C-460/16 P)*; and* *Trenzas y Cables de Acero v. Commission* (Cases C-458/16 P and C-459/16 P)**

On October 26, 2017, the Court of Justice dismissed the appeals brought by Global Steel Wire SA ("Global Steel Wire"), Moreda-Rivière Trefilerias SA ("MRT"), Trefilerias Quijano SA ("Trefilerias Quijano"), and Trenzas y Cables de Acero PSC SCL ("TYCSA") to annul the General Court's judgment[7] upholding the Commission's *Pre-Stressing Steel* decision.[8] In 2010, the Commission fined 18 companies €518.5 million for participating in a cartel relating to the production of pre-stressing steel across Europe.

The Court of Justice's first judgment[9] concerned the appellants' claims against the Commission's *Pre-Stressing Steel* decision, while the second judgment[10] concerned their request to the Commission during the proceedings to review their inability to pay the fine. under Point 35 of the Fining Guidelines[11] and Chapter V of the 2010 Information Note.[12]

In their first set of appeals, against the *Pre-Stressing Steel* decision, the appellants argued that the General Court had committed errors of law in assessing the imputability of the infringement to a single economic unit and issues of corporate succession. Further, the appellants contested the General Court's assessment of their ability to pay the fine on the basis of, among other things, a violation of their rights of defense.

The appellants also maintained that the Commission erred in law in establishing Global Steel Wire's control over the infringing subsidiaries of its corporate predecessor, TYCSA, during the relevant period. It argued that the share capital held by Global Steel Wire

[7] *Moreda-Riviere Trefilerias and Others v. Commission* (Cases T-426/10 to T-429/10 and T-438/12 to T-441/12) EU:T:2016:335.

[8] *Pre-Stressing Steel* (Case COMP/38.344), Commission decision of June 30, 2010.

[9] *Global Steel Wire and Others v. Commission* (Joined Cases C-457/16 P and C-459/16 P to C-461/16 P) EU:C:2017:819.

[10] *Global Steel Wire and Others v. Commission* (Joined Cases C-454/16 P to C-456 /16 P and C-458/16 P) EU:C:2017:818.

[11] Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No. 1/2003, OJ C 210/2, ("Fining Guidelines").

[12] Information note by Mr. Almunia and Mr. Lewandowski, Inability to pay under paragraph 35 of the 2006 Fining Guidelines and payment conditions pre- and post-decision finding an infringement and imposing fines, SEC (2010) 737/2, ("Information Note").

during the relevant period was not always sufficient to presume that it had exercised decisive influence. The Court of Justice affirmed that Global Steels Wire's decisive influence over its subsidiaries for the entirety of the infringement period did not need to stem exclusively from the presumption of control over the subsidiaries' capital, but could also be based on a combination of factors, including corporate succession and evidence of a single economic unit.

The appellants also argued that the Commission had infringed their rights of defense when it based its assessment of the appellants' ability to pay solely on information provided to the Commission by the appellants themselves. The Court of Justice, however, found that the information on which the Commission based its assessment was provided by the appellants precisely to enable the Commission to assess whether the conditions under Point 35 of the Fining Guidelines were met. The final fining decision was therefore adopted based on the evidence of which the appellants were fully aware and respecting their rights of defense.

The Court of Justice dismissed the first set of appeals in their entirety.

The second set of appeals, concerning the appellants' inability to pay, alleged errors of law in the General Court's assessment of their ability to pay the fine and assessment of the evidence.

The Commission had rejected the appellants' first request for a reduction of the fine on the basis of an inability to pay under Point 35 of the Fining Guidelines. Subsequently, they made a second request under Point 35 of the Fining Guidelines and Chapter V of the Information Note, which allows the filing of a new application alleging the absence of contributory capacity after the adoption of a decision imposing a penalty. They argued that the Commission should have carried out a new examination of their ability to pay the fine, regardless of whether their financial situation had improved since their first request. The Court of Justice dismissed this argument, finding that the submission of a second request to review the ability to pay may be justified only when there are developments likely to substantially alter the financial situation of the applicant. This was not the case here because the appellants had only shown an improvement in their ability to pay the fine.

The Court of Justice, therefore, dismissed the second set of appeals in their entirety.

General Court Judgments

***Icap and Others v. Commission* (Case T‑180/15)**

On November 10, 2017, the General Court partially annulled the Commission's decision fining broker Icap nearly €15 million for having facilitated the Yen Interest Rate Derivatives ("YIRD")[13] cartel.[14] The General Court found that the Commission had not established Icap's participation in one of the infringements, and that its conclusion on the duration of Icap's involvement in three infringements was excessive. The General Court annulled Icap's fine concluding that the Commission had failed to provide sufficient reasons for the methodology used for its calculation.

In 2013, the Commission reached a settlement with UBS, RBS, Deutsche Bank, JPMorgan, and Citigroup over their participation in seven distinct infringements in which they discussed their JPY LIBOR submissions, and imposed fines totaling nearly €670 million.[15] The infringements concerned discussions between the banks' traders on certain JPY LIBOR

[13] YIRDs are financial products globally traded by investment banks and are mainly used by corporations and financial institutions as a tool for managing their interest rate risk exposure or for speculation purposes. This is because the value of YIRDs is determined by reference to the JPY LIBOR, which is a set of indicative average interest rates at which a sample of banks ("the panel banks") are prepared to lend one another funds denominated in Japanese Yen. The value of JPY LIBOR is set on the basis of daily submissions of panel banks and fluctuates daily, which in turn determines the value of YIRDs.

[14] *Yen Interest Rate Derivatives (YIRD)* (Case COMP/AT.39861), Commission decision of February 4, 2015, partially annulled by the General Court in *Icap and Others v. Commission* (Case T-180/15) EU:T:2017:795.

[15] *Yen Interest Rate Derivatives (YIRD)* (Case COMP/AT.39861), Commission decision of December 4, 2013. As the leniency applicant, UBS benefitted from full immunity from fines.

submissions, which benefited the banks' trading positions with respect to YIRDs. The traders also exchanged commercially sensitive information relating to trading positions or future JPY LIBOR submissions. In addition, the Commission fined the broker RP Martin for facilitating one of the infringements by contacting banks that did not take part in the infringement to influence their JPY LIBOR submissions.

Icap chose not to participate in settlement proceedings. The Commission continued its investigation of Icap under the "normal" procedure and adopted the contested decision in February 2015. The decision found that Icap had facilitated six of the seven YIRD infringements by providing misleading information to certain panel banks that did not participate in the infringement to influence their JPY LIBOR submissions. In addition, Icap served as a communication channel between traders of Citi and RBS to facilitate implementation of their bilateral infringement. The Commission concluded Icap infringed Article 101 TFEU and fined Icap nearly €15 million.

On appeal, the General Court partially annulled the Commission's decision. First, the General Court confirmed the rule that *facilitation* of conduct prohibited by Article 101 TFEU also amounts to an infringement. It found, however, that the Commission did not prove Icap's participation in a particular infringement involving UBS and RBS in 2008 because the Commission could not reasonably conclude from the available evidence that Icap was or should have been aware that UBS's requests at that time were part of its collusion with RBS.

Second, the General Court ruled that the Commission had overestimated the duration of Icap's involvement in three infringements. The General Court stated that, because JPY LIBOR rates are set on a daily basis, the effects of manipulating those rates are limited in time. For these effects to be continued, the manipulation needs to be repeated. To establish Icap's liability for the entire duration of individual infringements, the Commission should have proved that Icap was adopting positive measures on a daily basis (or at least on a basis sufficiently limited in time).

Third, the General Court held that the Commission had breached Icap's presumption of innocence in the 2013 settlement decision by specifying on multiple occasions how Icap had "facilitated" the infringements imputed to the banks that participated in the settlement procedure. Even though the Commission did not legally qualify Icap's conduct, the General Court stated that its position could be easily inferred from the 2013 decision. The General Court emphasized the Commission's obligation to respect the presumption of innocence of undertakings that decided not to settle in "hybrid" cases, but concluded that the Commission's previous conduct had no impact on the contested decision because of the separate and independent nature of the settlement proceedings and the "normal" procedure against Icap. Nevertheless, the General Court indicated that the Commission could safeguard the presumption of innocence by adopting decisions addressed to all parties of a cartel on the same day.

Finally, the General Court found that the Commission had not sufficiently explained the methodology it used to calculate Icap's fine. The Commission found that the usual baseline for the calculation of fines, the value of sales—namely, Icap's brokerage fees—did not reflect the gravity and nature of Icap's infringements because Icap was not active on the YIRD market. Consequently, the Commission determined the basic amount of Icap's fine on the basis of an alternative calculation method. The contested decision merely stated that the fine reflected the gravity, duration, and nature of Icap's involvement in the infringements, and ensured a sufficiently deterrent effect, but did not provide any further details. The General Court held that the decision did not enable Icap to understand the alternative method the Commission used to calculate the fine, nor did it allow the General Court to verify whether it was justified. Consequently, the General Court annulled the part of the decision that determined the fine.

The General Court's judgment raises the fundamental question of balancing the efficiencies of the settlement procedure with the presumption of innocence of non-settling parties in "hybrid" settlement cases. The Commission has challenged the judgment and the appeal is currently pending before the Court of Justice.[16]

Abuse

ECJ Advocate General Opinions

Meo – Serviços de Comunicações e Multimédia (Case C-525/16), Opinion of Advocate General Wahl

On December 20, 2017, Advocate General Wahl delivered an opinion following a request for a preliminary ruling from the Portuguese Competition, Regulation, and Supervision Tribunal (the "Portuguese Tribunal") on the interpretation of the concept of placing an undertaking at a competitive disadvantage under Article 102(c) TFEU. The Portuguese Tribunal inquired in particular whether, as part of this analysis, it is necessary to examine the effects that differentiated prices have on the affected undertaking's competitive position.[17]

In 2014, MEO - Serviços de Comunicações e Multimédia SA ("MEO"), a provider of retail television services, filed a complaint against the dominant collecting society in Portugal, Cooperativa de Gestão dos Direitos dos Artistas Intérpretes ou Executantes ("GDA"), alleging that GDA had been charging discriminatory wholesale tariffs for artists' rights licenses.

On March 19, 2015, the Portuguese Competition Authority ("PCA") rejected the complaint, concluding that GDA's practice of charging different prices for equivalent transactions was not likely to place MEO at a significant competitive disadvantage. MEO challenged the PCA's decision before the Portuguese Tribunal, which then requested a preliminary ruling from the Court of Justice.

Advocate General Wahl first expressed his reservations about the referring court's conclusions that GDA was dominant and charged different prices for equivalent transactions. However, after clarifying that those doubts could render Article 102 TFEU inapplicable, Advocate General Wahl acknowledged that those issues were outside the scope of the questions referred for a preliminary ruling.

Advocate General Wahl then presented the following methodology to determine whether an undertaking is placed at a competitive disadvantage.

First, Advocate General Wahl distinguished first and second degree price discrimination. First degree price discrimination refers to pricing practices that aim to attract customers of suppliers that compete in the same market and at the same level as the dominant undertaking. First degree price discrimination includes practices such as predatory pricing, differentiated discounts, and margin squeeze. Second degree price discrimination refers to practices that affect trading partners in the market downstream or upstream of that in which the undertaking at issue operates. It includes, in particular, cases where the dominant undertaking applies different prices to its customers, *e.g.*, entities with which it does not compete directly. The analysis that must be carried out to analyze price discrimination practices is different depending on what type of discrimination is at issue. First degree price discrimination practices are capable of creating immediate exclusionary effects whereas second degree price discrimination practices may fall within the scope of Article 102(c) only after an examination of the circumstances.

In this connection, Advocate General Wahl stated that price differentiation is not in itself an anticompetitive practice; its effects on competition can vary. To result in a competitive disadvantage, the application of unequal conditions to equivalent transactions by a dominant undertaking must actually distort competition between the favored and disfavored trading partners.

The existence of such a disadvantage cannot be presumed, but should be established in light of all

[16] *Commission v. Icap and Others* (Case C-39/18 P).

[17] *Meo – Serviços de Comunicações e Multimédia* (Case C-525/16), opinion of Advocate General Wahl, EU:C:2017:1020.

relevant circumstances.[18] Demonstrating a competitive disadvantage requires meeting a higher standard of proof than showing a difference in treatment. To result in a competitive disadvantage, price discrimination must distort competition. It is therefore necessary to conduct a detailed assessment clearly proving that the price discrimination is likely to affect the disadvantaged undertaking's competitive position. To evaluate the distortion, Advocate General Wahl suggested examining: (i) the nature and importance of the difference in pricing; and (ii) the cost structure of the undertakings concerned. If the dominant undertaking's price represents a significant portion of the total costs borne by the disadvantaged customer, the price discrimination could have an effect on the customer's competitive position.

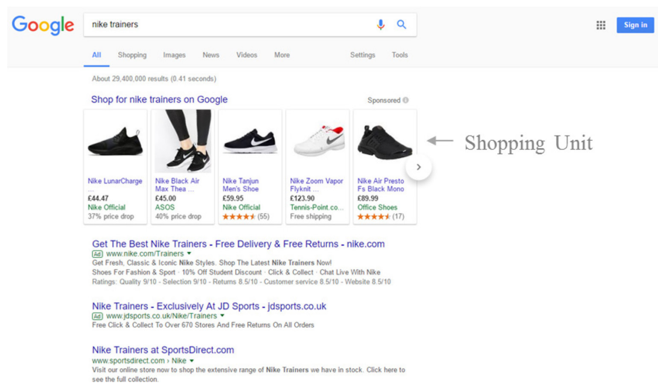
Advocate General Wahl's opinion clarifies the concept of "competitive disadvantage" and indicates that assessing whether particular conduct competitively disadvantages an undertaking within the meaning of Article 102 should entail an examination of the effects that the differentiated prices have on the affected undertaking's competitive position. Advocate General Wahl moves away from the approach taken by the Court of First Instance in *Clearstream*,[19] which he characterizes as partially outdated insofar as it establishes a presumption that price discrimination leads to a competitive disadvantage. If followed by the Court of Justice, this opinion has the potential to confirm the shift to an effects-based approach in price discrimination cases.

Commission Decisions

Google Search (Shopping) (Case AT.39740)

On June 27, 2017, after almost seven years of investigation, the Commission adopted a prohibition decision in the Google Shopping case.[20] The decision has potentially far-reaching implications for how companies design their products, the circumstances under which firms have a duty to provide access to their facilities, and whether a product improvement can constitute an abuse of Article 102 TFEU.

The decision concerns groups of specialized ads for product offers (called Shopping Units) that Google shows in the ad space of its general result pages. It also concerns groups of specialized search results for products (called Product Universals) that Google showed in the past:



The decision's theory of harm is novel. Its case is that showing Shopping Units (and, in the past, Product Universals) favored a Google comparison shopping service ("CSS"). Showing these results and ads allegedly diverted Google search traffic from rival CSSs to Google's CSS. This allegedly has the potential to foreclose CSSs and may lead to anticompetitive effects by enabling Google to raise prices and diminish innovation.

In legal terms, the decision characterizes the abuse as a practice that extends dominance from general search to comparison shopping. As a remedy, the decision stipulates that, if Google continues to show Shopping Units, it must position and display results from CSSs using the same underlying processes and methods. As a penalty, it imposes a record fine of €2,424,495,000.

Google contests the allegations in the decision. On September 11, 2017, it submitted its appeal to the General Court seeking the decision's annulment.[21]

[18] *British Airways v. Commission* (Case C-95/04 P) EU:C:2007:166.
[19] *Clearstream v. Commission* (Case T-301/04) EU:T:2009:317.
[20] *Google Search (Shopping)* (Case AT.39740), Commission decision of June 27, 2017.
[21] The Official Journal published the summary of Google's appeal on October 31, 2017. *See* Case T-612/17: Action

The main elements of the decision are discussed in more detail below.

On favoring, the decision claims that Google positions and displays a Google CSS more favorably in its general result pages than rival CSSs. The decision makes clear, however, that Product Universals and Shopping Units are not a CSS. The Google CSS identified in the decision is the separate page that Google provides where users can search specifically for products and product offers (today, called Google Shopping).[22]

Instead, the decision's favoring claim describes factual differences in the way that Google shows Shopping Units (and, in the past, Product Universals) compared to generic, blue link results that lead to CSSs. The decision complains that Product Universals and Shopping Units appear with pictures and prices and are not subject to Google's algorithms that are used to rank generic results. By contrast, CSSs appear in generic results, without rich display features, and are ranked by Google's generic algorithms, which are "prone" to demoting CSSs

The decision, however, does not claim that algorithms that Google uses to rank CSSs in generic results, including demotion mechanisms, are abusive. To the contrary, it finds that these algorithms "improve the relevance of [Google's] generic search results," and it states that the Commission does not seek to prevent Google from applying these algorithms.[23]

brought on 11 September 2017 — *Google and Alphabet v. Commission*, OJ 2017 C 369/37.

[22] Google initially referred to this page as Froogle, then Google Product Search, and today Google Shopping. Google Shopping result pages do not appear on Google's general result pages.

[23] The decision's objection is that these algorithms are not applied to Product Universals and Shopping Units. This objection, though, is subsumed within the general objection to Google showing Product Universals and Shopping Units. If Google ended the display of Product Universals and Shopping Units, all objections would end. The decision does not identify an abuse in countries where Google applied generic search algorithms (including demotions), but did not show Product Universals and Shopping Units.

The decision does not discuss how its favoring claim fits with established case law on discrimination. A claim of favoring implies discrimination. For discrimination to arise, comparable situations must be treated differently.[24] But the decision does not explain why showing Product Universals and Shopping Units differently to generic results for CSSs treats comparable situations differently. For example, Google argues that product ads in Shopping Units are improved ads that serve to monetize Google's general result pages. These product ads are different to generic results for CSSs. Google contends that it legitimately treats them differently to generic results as part of its ad-funded business model.

To support its diversion claim, the decision sets out a series of charts showing that Google search traffic to CSSs has declined, while traffic to the Google CSS has increased. But the decision does not connect these traffic patterns to the alleged abusive conduct at issue—the favorable positioning and display of Product Universals and Shopping Units.

By contrast, Google's difference-in-differences analysis discussed in the decision compares CSS traffic patterns in countries with and without Product Universals and Shopping Units. The analysis shows that traffic patterns are similar—suggesting that showing Product Universals and Shopping Units does not cause CSS traffic movements. As to the traffic increase claim to the Google CSS, the decision attributes clicks on product ads in Shopping Units as traffic to a Google CSS. But these clicks go to third-party advertisers; they do not go to Google.

Regarding foreclosure, the decision identifies potential foreclosure in a market for CSSs that excludes merchant platforms, such as Amazon and eBay. The decision accepts that Amazon and eBay, like CSSs, allow users to search for and compare products. But it claims that platforms do not compete with CSSs because—in addition—they allow users to buy

[24] *Michelin v. Commission* (C-322/81) EU:C:1983:313, para. 90.

products.[25] In terms of anticompetitive effects, the decision claims that Google's conduct has the potential to foreclose CSSs, which may lead to higher fees for merchants, higher prices for consumers, and less innovation. But the decision does not set out evidence of these effects (despite the conduct alleged lasting for nine years).

The decision's legal analysis is short. It claims that Google's conduct is a well-established form of leveraging abuse because it extends dominance from general search into comparison shopping. The decision, however, does not square its theory with past case law on tying and refusal to supply, that identify leveraging abuses only subject to specific legal conditions. Instead, the decision rejects the *Bronner* duty to supply criteria because:[26] (i) the alleged abuse is not a passive refusal to grant CSSs access to Shopping Units; and (ii) to end the infringement, Google is not required to enter into agreements with CSSs.

The decision, however, does not explain how this fits with the remedy it effectively requires Google to implement to end the abuse. The decision makes clear that Google is not required to stop showing Product Universals and Shopping Units. It does not contest that these results and ads benefit users and advertisers. To the contrary, the decision considers that the improvement Product Universals and Shopping Units bring is so beneficial that Google, as a remedy, should show CSSs in Product Universals and Shopping Units based on the same processes and methods. Google, for its part, argues that this is a requirement to give access to—and contract with—CSSs, and therefore the *Bronner* criteria need to be satisfied.

[25] The decision also points to the fact that merchant platforms purchase product ads on Google as a reason to exclude them from the market. But the decision does not explain why a customer relationship is relevant for demand substitution and users' choices.

[26] *Bronner* (Case C-7/97) EU:C:1998:569. The refusal to grant access to a facility is only abusive if access is indispensable for rivals to compete and refusal to grant access would eliminate all competition.

Vertical Agreements

ECJ Judgments

Coty Germany (Case C-230/16)

On December 6, 2017, the Court of Justice held that EU competition law allows luxury good suppliers to prohibit members of their selective distribution network from selling through third-party "discernible" online platforms.[27] This is an important development in the evolving approach to online sales in the context of selective distribution.

This landmark judgment arises from a dispute between Coty, a leading supplier of luxury cosmetics in Germany, and Parfümerie Akzente, a longstanding member of Coty's selective distribution network.[28] Parfümerie Akzente sold Coty's products in its retail stores and online (through its online store and Amazon's German webstore "amazon.de"). Following Coty's revision of the selective distribution network agreements, online sales continued to be authorized, but distributors were no longer allowed to operate these either under a different name or by engaging a discernible non-authorized third-party platform. Parfümerie Akzente refused to adhere to the new limitations. In response, Coty sued Parfümerie Akzente in a German national court to prevent the sales made through amazon.de. Following a lower court's dismissal, Coty appealed to the Higher Regional Court in Frankfurt, which referred the case to the Court of Justice for a preliminary ruling.

In the referral, the German court sought answers to three questions regarding the compliance of Coty's selective distribution network contracts with Article 101 TFEU ("Article 101": (i) whether the protection of luxury good's "luxury image" is sufficient justification for operating a selective distribution network; (ii) whether a ban on sales for luxury goods through discernible third-party platforms is legitimate; and (iii)

[27] *Coty Germany* (Case C-230/16) EU:C:2017:941.

[28] A selective distribution system is a network of authorized distributors selected on the basis of certain criteria and subject to a commitment not to sell the contractual goods to unauthorized distributors.

whether a ban on sales through discernible third-party platforms constitutes a hardcore restriction of competition that prevents the application of the Vertical Block Exemption Regulation ("VBER").[29]

In a key precedent, *Pierre Fabre*,[30] the Court of Justice held that an outright ban on online sales of cosmetics and body hygiene products in a selective distribution network was incompatible with Article 101 and constituted a hardcore restriction under the VBER. In *Coty*, the Court of Justice essentially followed Advocate General Wahl's opinion and distinguished this case from *Pierre Fabre*.[31]

The Court of Justice recalled settled case law that, to be compatible with Article 101(1), selective distribution must be based on objective and qualitative criteria used in a uniform and proportionate manner.[32]

The Court of Justice then referred to the *Copad* judgment (a trademark case),[33] and followed Advocate General Wahl's opinion that luxury goods are defined not only by their "material characteristics," but also by "the specific perception which consumers have of them, and more particularly ... the 'aura of luxury' which they enjoy with consumers."[34]

The Court of Justice concluded that a selective distribution network aimed at protecting the luxury image of goods was compatible with Article 101. The Court of Justice thus established that luxury can legitimately justify certain restrictions of competition and dispelled the notion that *Pierre Fabre*[35] excluded protection of brand image as a legitimate purpose for selective distribution networks.

The Court of Justice found that the ban of sales of luxury products through "discernible" third-party online platforms was proportionate because the absence of any contractual relationship between the supplier and third-party platforms made it impossible to ensure compliance with the qualitative criteria preserving the "aura of luxury." The Court of Justice concluded that the restriction was necessary and appropriate to fulfill the purpose of the selective distribution network. The Court of Justice further noted that authorized distributors could still sell their products: (i) on their own independent website; and (ii) through unauthorized third-party platforms when the use of such platforms was not discernible to the consumer (*e.g.*, if the distributor uses the third-party platform as an invisible host for its own website).

Finally, the Court of Justice addressed the question of whether a ban of sales through discernible third-party online platforms constitutes a hardcore restriction under the VBER.

The VBER creates safe harbors regarding certain restrictions. Safe harbors, however, do not apply to hardcore restrictions, such as the allocation of customers and restrictions of passive sales. The Court of Justice concluded that the relevant ban on discernible third-party platforms did not exclude any category of customers and the access to the distributor's website, *e.g.*, through online search engines, was sufficient and unrestricted. The Court of Justice concluded that the restriction at issue, limiting only certain online sales, was not a hardcore restriction. Accordingly, antitrust authorities and courts would need to examine similar restrictions on a case-by-case basis to assess their competitive effect. In addition, the VBER's safe harbors could apply to the restriction if the applicable requirements were met.

[29] Specifically, the Court of Justice's inquiry pertained to Article 4(b) and Article 4(c) of Regulation No. 330/2010 of April 20, 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, OJ 2010 L 102/1.

[30] *Pierre Fabre Dermo-Cosmétique* (Case C-439/09) EU:C:2011:649, ("*Pierre Fabre*").

[31] *Coty Germany* (Case C-230/16), opinion of Advocate General Wahl, EU:C:2017:603.

[32] In particular *Metro v. Commission* (Case C-26/76) EU:C:1977:167; and *L'Oréal v. De Nieuwe AMCK* (Case C-31/80) EU:C:1980:289.

[33] *Copad* (Case C-59/08) EU:C:2009:260, paras. 24-29. The Court of Justice found that luxury goods have an inherent "aura of luxury", and that a selective distribution system may legitimately seek to preserve the aura of luxury associated with a trademark.

[34] *See Coty Germany* (Case C- 230/16), opinion of Advocate General Wahl, EU:C:2017:603, para. 72.

[35] *Pierre Fabre*, para. 46.

The Court of Justice for the first time clearly recognized that luxury goods suppliers can set up a selective distribution network aimed at preserving brand image. Likewise, luxury brand owners can now prohibit their distributors from selling products on Amazon or eBay without breaching EU competition law. The Court of Justice's decision is therefore at odds with recent precedent from German and French competition authorities that predate the *Coty* judgment, notably the *Adidas* cases.[36] It remains to be seen how national authorities and courts will react and adapt their analysis to reflect the judgment.

The Court of Justice held that luxury is "not just the result of [products'] material characteristics, but also the allure and prestigious image which bestow on them an aura of luxury",[37] but offered no guidance on how authorities and courts should assess this. Competition authorities will therefore need to develop their own analytical framework to assess whether a product qualifies as a luxury good, and whether they may therefore be sold through a selective distribution system that restricts online sales.

General Court Judgments

***CEAHR v. Commission* (Case T‑712/14)**

On October 23, 2017, the General Court dismissed an appeal by the *Confédération Européenne des Associations d'Horlogers-Réparateurs* ("CEAHR") against the Commission's 2014 decision[38] closing its investigation into the supply of spare parts and provision of repair and maintenance services for luxury/prestige watches in several members states (notably France, Germany, Italy, Spain, and the UK).[39] The Commission closed its investigation because it concluded that there was limited likelihood of finding an infringement of Article 101 or 102 TFEU.

In July 2004, CEAHR (which consists of nine national associations of independent watch repairers) filed a complaint alleging an agreement or concerted practice between several Swiss watch manufacturers[40] and an abuse of dominance resulting from their refusal to continue to supply spare parts to independent watch repairers. In July 2008, the Commission rejected the complaint on the grounds of insufficient EU interest.[41] In December 2010, the General Court annulled the Commission's decision, finding that the Commission had erred in concluding that the market for watch repair and maintenance services was part of the market for luxury/prestige watches, and that this error had vitiated its conclusion that there was a low probability of establishing an infringement under Article 101 or Article 102. In July 2014, the Commission rejected CEAHR's complaint again.

On appeal, CEAHR: (i) alleged an error in the Commission's description of the Swiss watch manufacturers' market power; (ii) claimed an error in the assessment of a possible abuse arising from the refusal to supply spare parts to independent repairers; (iii) contested the Commission's finding that the selective repair system and refusal to supply spare parts were objectively justified; and (iv) argued that the Commission erred in concluding the absence of agreements or concerted practices in breach of Article 101.

The General Court considered the criteria applicable to whether a selective repair system falls outside Article 101. The General Court first recalled the Court of Justice's judgment in *Metro v. Commission*,[42] which confirmed that the requirement that selective

[36] *Adidas* (Case B3-137/12), Bundeskartellamt decision of June 27, 2014; French Competition Authority, *The Autorité de la concurrence has closed an investigation against Adidas*, Press release of November 18, 2015.
[37] *Coty,* para. 25.
[38] *Watch Repair* (Case AT.39097), Commission decision of July 29, 2014.
[39] *CEAHR v. Commission* (Case T-712/14) EU:T:2017:748.
[40] The Swatch Group SA, Richemont International SA, LVMH Moët Hennessy Louis Vuitton SA, Rolex SA, Manufacture des montres Rolex SA, Société anonyme de la Manufacture d'horlogerie Audemars Piguet & Cie, and Patek Philippe SA Manufacture d'Horlogerie ("the Swiss watch manufacturers").
[41] *Independent Watch Repairers* (Case COMP/E-1/39.097), Commission Decision July 10, 2008, upheld by the General Court in *CEAHR v. Commission* (Case T‑712/14) EU:T:2017:748.
[42] *Metro v. Commission* (Case C-75/84) EU:C:1986:399, para. 54.

distribution systems be objectively justified, non-discriminatory, and proportionate, can be applied by analogy to selective repair systems. CEAHR argued that, even if the selective repair system fulfilled these conditions, the Commission should have considered the harmful effect of the system on competition. The General Court rejected this argument, concluding that selective distribution systems necessarily affect competition and there was no requirement for the Commission to consider whether the system resulted in the elimination of competition.[43]

The Commission found that the selective repair system was objectively justified, non-discriminatory, and proportionate. CEAHR challenged this on the basis that the significant investment required to become an authorized repairer rendered the system discriminatory. The General Court held that the Commission had discretion to consider the system non-discriminatory because the criteria used were objective, despite being onerous. Given that the number of authorized repairers was increasing, the amount of investment required was clearly not excessive. It is notable that, while the General Court accepted the Commission's finding that the system was objectively justified, it criticized one of the factors on which the Commission relied: protection of the supplier's brand. The General Court held that the goal of protecting a prestigious brand image did not render Article 101(1) inapplicable to a restriction.[44] However, the Commission relied on other factors in its analysis of objective justification, such as increased complexity of prestige watches and preservation of quality.

Further, CEAHR challenged the Commission's finding that the gradual adoption of decisions refusing to supply spare parts to independent watch makers was more likely to be a series of independent commercial decisions adopted by the Swiss watch manufacturers, rather than the result of an agreement in breach of Article 101.[45] The General Court found that, in the absence of evidence of an agreement or collusion, the Commission was not wrong to conclude that the refusals to supply were unlikely to be part of a concerted practice.

CEAHR also argued that the Swiss watch manufacturers' refusal to supply constituted an infringement of Article 102. The Commission left open the question of whether the Swiss watch manufacturers held a dominant position. The General Court confirmed that refusal to supply by a dominant undertaking is only an abuse when the conduct has no objective justification and is liable to eliminate competition,;[46] and the goods or services are indispensable to the competitor's business.[47] The General Court upheld the Commission's finding that lack of objective justification alone did not constitute abusive conduct in breach of Article 102. CEAHR further argued that the Commission had based its finding of non-infringement of Article 102 on its view that Article 101 had not been infringed. The General Court held that lawfulness under Article 101 could be indicative, though not conclusive, of lawfulness under Article 102. The General Court noted that the Commission had also relied on other additional factors, such as the existence of competition between authorized repairers on the market.[48]

CEAHR further argued, in relation to Article 102, that the Commission erred in its analysis of the Swiss watch manufacturers' market power. Having already concluded that the Commission could find that the selective repair systems did not constitute abusive conduct, the General Court found that the degree of

[43] *AEG v. Commission* (Case C-107/82) EU:C:1983:293, para. 33; and *Pierre Fabre*, para. 39.

[44] *See Pierre Fabre* ("the aim of maintaining a prestigious image is not a legitimate aim for restricting competition"), para. 46.

[45] *CEAHR v. Commission* (Case T‑427/08) EU:T:2010:517, paras. 131 and 132.

[46] *Istituto Chemioterapico Italiano and Commercial Solvents v. Commission* (Joined Cases C-6/73 and C-7/73) EU:C:1974:18, para. 25; and *United Brands v. Commission* (Case C-27/76) EU:C:1978:22, para. 183.

[47] *Bronner* (Case C‑7/97) EU:C:1998:569, para. 41; and *Clearstream v. Commission* (Case T‑301/04) EU:T:2009:317, para. 147.

[48] *Watch Repair* (Case COMP/AT.39097), Commission decision of July 29, 2014, para. 118.

market power was irrelevant. Market power would have been relevant only if the Commission had established abusive conduct.

Overall, the General Court found that the Commission was justified in closing its investigation into selective repair systems. The Commission had adopted the correct legal tests and had discretion to conclude that an eventual finding of anticompetitive behavior was unlikely. The General Court found that the stricter rules applied by the Commission in the motor vehicles sector (where authorized repairers must be able to sell to independent repairers even in the context of a selective repair system) were confined to that sector and should not have broader application.

Mergers And Acquisitions

General Court Judgments

Marine Harvest v. Commission **(Case T-704/14)**

On October 26, 2017, the General Court confirmed the Commission's decision to fine a Norwegian seafood company, Marine Harvest ASA ("Marine Harvest"), for failure to notify the acquisition of Morpol ASA ("Morpol") and closing the transaction before its clearance.[49]

In December 2012, Marine Harvest acquired 48.5% of Morpol's shares. In March 2013, it purchased 38.6% of the remaining shares as part of a mandatory public bid. Finally, in November 2013, the purchase of all shares was completed and Morpol de-listed. The transaction was notified to the Commission only in August 2013, and was conditionally cleared the following month.

The Commission found that Marine Harvest had acquired control over Morpol with the first purchase of shares, allowing it to obtain a clear majority at the shareholders' meetings. The Commission therefore fined Marine Harvest for infringing two provisions of the EU Merger Regulation ("EUMR"): Article 4(1), requiring notification of a concentration before its implementation, and Article 7(1), prohibiting the implementation of a concentration before the Commission's approval.

The General Court confirmed that Marine Harvest had acquired *de facto* sole control over Morpol in December 2012 with a single acquisition of shares from one seller, and not with the subsequent public bid. Therefore, the transaction could not benefit from the exception to the standstill obligation provided for in Article 7(2) of the EUMR (for public bids or acquisitions of securities from various sellers). The General Court also rejected Marine Harvest's claim that the three steps of the acquisition, considered as one and the same concentration, closed in November 2013.

The General Court upheld the Commission's decision to impose a fine for the infringement, finding that Marine Harvest acted with negligence. In particular, the General Court found that Marine Harvest did not seek appropriate legal advice as to the timing of the required notification, and did not take in into account the Commission's precedent on the issue.

The General Court also held that imposing two penalties on Marine Harvest for the same conduct (under each of Article 4(1) and 7(1) of the EUMR) was not contrary to the prohibition of double jeopardy (*i.e.* no undertaking should be punished twice for the same infringement). First, that principle cannot apply to the present case because the penalties were imposed by the same authority in a single decision. Second, Marine Harvest was liable for two different infringements: the failure to notify the acquisition (*i.e.* an infringement occurring at a single point in time) and its implementation before clearance (*i.e.* a continuous infringement starting with the closing of the acquisition and lasting until the clearance decision). The General Court held that these two infringements could not be subsumed into one another for the purpose of calculating the corresponding fine.

Marine Harvest's appeal against the General Court's judgment is pending before the Court of Justice.

[49] *Marine Harvest v. Commission* (Case T-704/14) EU:T:2017:753.

Commission Decisions

Phase II Decision with Undertakings

Dow/DuPont (Case COMP/M.7932)

On March 27, 2017, the Commission conditionally cleared a merger between Dow Chemical Company ("Dow") and E.I. du Pont de Nemours and Company ("DuPont").[50] Dow is active in plastics and chemicals, agricultural sciences, and hydrocarbon and energy products and services. DuPont is active in the production of a variety of chemical products, polymers, agro-chemicals, seeds, food ingredients, and other materials.

Market definition. Dow's and DuPont's businesses overlapped in the areas of crop protection ("CP,") which includes chemical substances used in agriculture to protect crops from harmful pests; seeds; gene editing; material science; and specialty products. Within these areas, the Commission raised competitive concerns in certain CP and material science markets. In its analysis of CP markets, which include the broader categories of herbicides, insecticides, fungicides, and nematicides, the Commission defined relevant markets at the level of segmentation by crop/pest combinations (*e.g.*, broadleaf weeds in cereal crops) in consideration of farmers' requirements for specific end uses. Consistent with its precedent, the Commission defined the geographic scope of CP markets as national. Within material science, the Commission's review focused on the at least EEA-wide markets for acid co-polymers ("ACP") and ionomers, for which the Commission had not previously assessed the geographic market.

CP. The Commission was concerned that the transaction would create or strengthen a dominant position and/or eliminate an important actual or potential competitor in a number of CP markets. In particular, the Commission found that the transaction would significantly reduce competition in several national markets for certain types of selective herbicides, insecticides, and fungicides.

— **Herbicides**. The Commission identified competitive concerns with respect to several herbicides markets.[51] The Commission also took into account the promising outlook of some of Dow's and DuPont's pipeline products, in contrast to the limited competitive constraints expected from the remaining R&D-integrated companies[52] (which focused on different product areas and did not seem to have sufficiently promising pipeline products to compete with the merged entity), or from generic suppliers (because the Commission found that Dow and DuPont would successfully adopt defense strategies against generic suppliers).

— **Insecticides**. Comparing Dow and DuPont's combined product portfolio and pipelines with those of competing suppliers, the Commission concluded that the merged company would not face sufficient competitive constraint in a number of national markets for insecticides controlling chewing and sucking insects on various crops. The assessment took into account a foreseeable scenario under which regulatory pressures would likely limit competing products' future marketability.

CP innovation competition. The Commission raised concerns regarding the transaction's effects on innovation. The Commission did not view innovation as a distinct product market, but as an input for downstream (formulated products) and upstream (active ingredient ("AI") licensing technology) markets. It found that: (i) innovation is a key element of competition in the CP industry; (ii) rivalry is a driving factor for pesticide companies' innovation activities; and (iii) the merger would have combined

[50] *Dow/DuPont* (Case COMP/M.7932), Commission decision of March 27, 2017.

[51] Namely, the national markets for cereals (pre- and post-emergence broadleaf and post-emergence cross-spectrum), oilseed rape (post-emergence broadleaf), sunflower (post-emergence broadleaf), rice (post-emergence cross-spectrum), and pasture (selective) herbicides.

[52] That is, companies that are active throughout the entire R&D process, from discovery of new active ingredients (molecules producing the desired biological effect), their development, testing, and regulatory registration, to the manufacture and sale of final formulated products through national distribution channels.

two of the five entities worldwide that had sufficient R&D capabilities to discover, develop, and launch new AIs in Europe. The Commission also analyzed the transaction's impact on what it called "innovation spaces," a series of narrowly defined areas of R&D (which were ultimately found to be narrow crop/pest combinations and therefore similar to downstream formulated product markets), where Dow and DuPont were allegedly both more important innovators than their downstream market shares and R&D expenditures would suggest, and where they allegedly had "overlapping lines of research.[53]" Given the high barriers to entry in the CP industry, the Commission found that the transaction would significantly reduce the merging parties' incentives to keep innovating in overlapping lines of research, which would likely result in some of these lines of research (or early pipeline products) not being advanced to the development stage, instead being "deferred or redirected.[54]" The Commission also found that the transaction would reduce overall innovation competition in the industry (*i.e.*, a significant impediment of effective competition would arise from the reduced incentive to discover and develop the same number of AIs as Dow and DuPont did pre-merger, and competitors would not have the ability and incentive to "fill the gap").

Material science. The Commission found that the transaction would significantly impede effective competition in ACP and ionomers. First, the Commission concluded that the transaction would reduce the number of ACP competitors from four to three, bringing together two close competitors with high combined market shares (30–50%). Second, the Commission found the transaction would eliminate an appreciable competitive constraint in the market for ionomers, where DuPont's share was or approached 100%.

Remedies. To address the Commission's concerns, Dow and DuPont agreed to divest a substantial portion of DuPont's global CP business and R&D organization in all areas of concern, in addition to Dow's ACP business including two manufacturing sites, and Dow's contract with a third party for the sourcing of ionomers. The Commission concluded that these commitments would adequately address its concerns. It also agreed the divestiture of DuPont's CP business to a single buyer would preserve CP innovation by creating a viable R&D competitor, in particular enabling the divestiture buyer to effectively replace the competitive constraints previously exerted by DuPont.

Phase I Decisions with Undertakings

DuPont/FMC (Health and Nutrition Business) (COMP/M.8440)

On July 27, 2017, the Commission cleared the acquisition of FMC Corporation's Health and Nutrition Business ("FMC H&N") by DuPont in Phase I, subject to commitments.[55] The Commission required remedies to address the overlap in alginates, natural hydrocolloids (water-soluble biopolymers) extracted from various brown seaweeds and used as chemical components to stabilize texture or promote thickening, gelling, and film formation. The Commission also assessed the overlaps in carrageenan, pectin, microcrystalline cellulose, and systems (products that consist of two or more ingredients) but ultimately did not raise concerns.

Market definition. The Commission defined two relevant product markets for alginates based on the application: (i) alginates used in pharmaceutical preparations, potentially further segmented into alginates used as an active pharmaceutical ingredient ("API applications") and as a pharmaceutical excipient;[56] and (ii) alginates used in food applications,

[53] According to the Commission, these "comprise the set of scientists, patents, assets, equipment and chemical class(es) which are dedicated to a given discovery target whose final output are successive pipeline AIs targeting a given innovation space." *Dow/DuPont* (Case COMP/M.7932), Commission decision of March 27, 2017, para. 1958.

[54] *Dow/DuPont* (Case COMP/M.7932), Commission decision of March 27, 2017, para. 2016.

[55] *DuPont/FMC (Health and Nutrition Business)* (Case COMP/M.8440), Commission decision of July 27, 2017.

[56] Pharmaceutical excipients are substances contained in pharmaceutical products, which do not serve therapeutic

potentially further segmented by food type. In defining the relevant markets, the Commission relied on the results of the market investigation. First, the market investigation showed that customers could not readily switch between types of alginates due to different regulatory requirements to alginates for each application. Second, alginate suppliers could not quickly switch production between different types of hydrocolloids because that would require regulatory approvals. Third, necessary raw materials for alginates varied, depending on the application. The parties' internal documents supported sub-segmentation of the two defined relevant markets.

As for the relevant geographic market, the Commission concluded that it was EEA-wide, rather than worldwide, as the parties claimed. During the market investigation, customers indicated that, due to the lower quality of alginates outside EEA, substitution to non-EEA products may be limited.

Horizontal concerns. The Commission assessed potential horizontal effects of the transaction in the markets for alginates for pharmaceutical excipients, where the parties' combined shares would reach 80-90%, and food application where the parties' combined shares would be in the 20–30% range. The Commission took into account the following considerations. First, DuPont was an important alternative to FMC H&N—it not only had a significant market share of 10–20% but also respondents to the Commission's market investigation identified DuPont as FMC H&N's close competitor. Second, the Commission found that the parties' customers faced high switching costs because changing suppliers required initiating an internal qualification process, which could takes 9–18 month. Third, the Commission concluded that barriers to entry in the market for alginates were high, given the sparseness of seaweed harvesting locations. Fourth, with regards to alginates for pharmaceutical application, the Commission found that FMC H&N already held a dominant position and, in alginates for food applications, the market share of 20–30% was likely understated. The Commission ultimately concluded that the transaction raised competition concerns in both markets.

Remedies. DuPont's initial remedy proposal envisaged divestment of its global alginate business, including its production plant in Landerneau, France. The potential buyer would also get an option to acquire the pectin-alginate mixture-line and related assets. Furthermore, DuPont would transfer all trademark licenses related to the business, most notably the product name GRINDSTED*Alginate* and commit not to re-enter the market for a period of time ("black-out period").

After the respondents to the market investigation raised doubts as regards the initial commitments, DuPont updated its remedy proposal. DuPont agreed to include the pectin-alginate mixture line in the overall divestiture and provide for an optional supply arrangement of pectin. It also agreed to extend the duration of the license to use DuPont's trademark name and the block-out period. The Commission concluded that the improved commitments safeguarded competition in the alginates market and cleared the transaction.

***ASL/Arianespace* (Case COMP/M.7724)**

On July 20, 2016, the Commission approved the acquisition by Airbus Safran Launchers ("ASL") of Arianespace Participation S.A. and Arianespace S.A. (together, "Arianespace"), a satellite launch services provider.[57] ASL is a joint venture controlled by Airbus Group S.E. ("Airbus") and Safran S.A. ("Safran"), combining Airbus's and Safran's rocket ("launcher") and satellite subsystems activities. The Commission approved the acquisition following a Phase II review, subject to behavioral commitments.

Market definition. The Commission considered the following relevant markets:

action, but are necessary to aid the manufacturing, protection or patient acceptability of the pharmaceutical product.

[57] *ASL/Arianespace* (Case COMP/M.7724), Commission decision of July 20, 2016.

— **Market for launchers used by Arianespace**. The Commission reasoned that, because Arianespace is obliged to use the Ariane, Vega, or Soyuz launchers, the market is these three suppliers. In line with previous decisions,[58] the Commission considered that the geographic market is EEA-wide, because the only customer—Arianespace—is European. In any event, the Commission left the precise market definition open.

— **Market for launch services**. The Commission accepted a distinction between launcher ranges, *i.e.*, between geostationary transfer orbit ("GTO"), where satellites intended for geosynchronous orbit are released, and non-GTO launchers, which are used for low-altitude payloads. It did not distinguish further between these types of launchers. In line with previous decisions,[59] the Commission then segmented the GTO and non-GTO markets for launch services by client, distinguishing between open launches (*i.e.*, launches for commercial clients, open to competition) and captive launches (*i.e.*, launches for institutional or governmental clients, which select launch providers without competition). Finally, the Commission considered the open market for launch services (GTO and non-GTO) to be worldwide; and the captive market to be national in scope where the customer is national, and EEA in scope where the customer is a European organization.

— **Market for satellites**. Airbus manufactures satellites. Airbus, Safran, and ASL manufacture satellite components and subsystems. In line with previous decisions, the Commission distinguished between satellites on the basis of their applications.[60] It segmented the market into the following product and geographic markets: (i) the market for European institutional satellites (EEA-wide or worldwide, depending on the customer); (ii) the market for national institutional satellites within the EU (EEA-wide or national, depending on the customer); (iii) the market for the export of institutional satellites; (iv) the market for commercial satellites (worldwide); and (v) the market for military satellites (national if a national supplier exists, otherwise worldwide).

Vertical concerns. Satellites and launch services are complementary. The Commission's concerns focused on the vertical link created by the transaction between Airbus as manufacturer of satellites and Arianespace as a launch provider. It identified two concerns, namely: (i) the exchange of sensitive information between Airbus and Arianespace; and (ii) Arianespace's ability and incentives to foreclose Airbus's rivals by favoring launches of Airbus's satellites.

— **Information exchange**. As a launch provider, Arianespace necessarily has access to sensitive technical information about the satellites it launches. The Commission found that Arianespace would have the ability and incentive to share this information with Airbus. This could lead to less competitive tenders, because Airbus would adjust its pricing strategy to beat rivals, and discourage rivals from innovating, because Airbus would be able to take advantage of their developments. The Commission also found that Airbus would have the ability and incentive to share information about other launch service providers, such as their pricing and availability of launch slots with Arianespace, and that this would lead to a significant impediment of effective competition.

— **Input foreclosure and bundling**. The Commission found that bundling and input

[58] *Dassault Aviation/TSA/Thalès* (Case COMP/M.5426), Commission decision of March 10, 2009.

[59] *Boeing/Lockheed Martin/United Launch Alliance JV* (Case COMP/M.3856), Commission decision of August 9, 2005.

[60] *Dassault Aviation/TSA/Thalès* (Case COMP/M.5426), Commission decision of March 10, 2009; *Alcatel/Finmeccanica/Alcatel Alenia Space & Telespazio* (Case COMP/M.3680), Commission decision of April 28, 2005; and *Thalès/Finmeccanica/AAS/Telespazio* (Case COMP/M.4403), Commission decision of April 4, 2007.

foreclosure concerns were unwarranted. The presence of other, credible launch providers like SpaceX and ILS, the dynamism of the market—since SpaceX's entry, launch prices have fallen sharply—and satellite operators' countervailing buyer power would eliminate the gains from any foreclosure strategy. In addition, satellite manufacturers are often subsidized by public funding, have a backlog of orders keeping them profitable in the short-term, and can adapt their capacity to a lower level of activity if their sales are reduced.

Remedies. The market investigation revealed that standard launch service contracts between Arianespace and other satellite manufacturers and between Airbus and other launch providers were insufficient to prevent an exchange of sensitive information between the parties. Airbus and Arianespace initially proposed setting up firewalls and imposing employment restrictions within Airbus, ASL, and Arianespace for 15 years.

The Commission found the proposal wanting. The space industry has long product development cycles, with some programs lasting for more than 30 years. The 15-year duration proposed by Airbus and Arianespace was, therefore, too short. In addition, to reduce the burden of monitoring compliance with the commitments, the Commission required the inclusion of a dispute resolution mechanism to be enforced by market participants themselves.

Airbus and Arianespace's final commitments expanded the definition of sensitive information for the firewall, redefined the scope of the employment restrictions, and introduced an arbitration clause into non-disclosure agreements between Airbus and other launch providers and between Arianespace and other satellite manufacturers. Finally, the duration of the commitments was extended to 25 years. The Commission accepted the final commitments, and cleared the transaction.

State Aid

ECJ Judgments

Comunidad Autónoma de Galicia and Retegal v. Commission (Case C-70/16 P)

On December 20, 2017, the Court of Justice upheld an appeal by the Autonomous Community of Galicia and Retegal against the General Court's 2015 confirmation[61] of the Commission's 2013 decision[62] that aid granted to the operators of a terrestrial television platform was unlawful and incompatible with the internal market.[63]

Between 2005 and 2009, the Spanish authorities adopted a series of measures to facilitate the transition from analogue to digital television. To manage this digitization, Spain was divided into three distinct areas (I, II, and III). Area II, which consists of remote and less urbanized territories, was the only area that received funding from the Spanish public authorities. Under this funding scheme, the central government, regional governments (*i.e.*, the autonomous communities), and town councils granted subsidies to digital terrestrial television ("DTT") operators for the deployment, operation, and maintenance of the DTT network.

SES Astra (a European satellite operator) complained to the Commission about this scheme and, in June 2013, following a formal investigation, the Commission decided that the subsidies granted to DTT

[61] *Spain v. Commission* (Case T-461/13) EU:T:2015:891; *Comunidad Autónoma del País Vasco and Itelazpi v. Commission* (Case T-462/13) EU:T:2015:902; *Comunidad Autónoma de Cataluña and CTTI v. Commission* (Case T-465/13) EU:T:2015:900; *Navarra de Servicios y Tecnologias v. Commission* (Case T-487/13) EU:T:2015:899; *Comunidad Autónoma de Galicia and Retegal v. Commission* (Joined Cases T-463/13 and T-464/13) EU:T:2015:901; and *Abertis Telecom and Retevisión I v. Commission* (Case T-541/13) EU:T:2015:898.

[62] Commission Decision C (2014) 28599 of June 19, 2013 (State Aid C 23/10 (ex NN 36/10, ex CP 163/09)), OJ 2014 L 217/52.

[63] *Comunidad Autónoma de Galicia and Retegal v. Commission* (Case C-70/16 P) EU:C:2017:1002.

operators in Area II constituted aid within the meaning of Article 107(1) TFEU. In particular, the Commission found that the aid did not comply with the principle of technological neutrality. The Commission ordered the recovery of the aid.

The Kingdom of Spain, a number of the autonomous communities, and various DTT operators appealed to the General Court. In November 2015, the General Court dismissed the appeals and confirmed the Commission's decision.

Subsequently, the Kingdom of Spain, a number of the autonomous communities, and various DTT operators appealed the General Court's decision to the Court of Justice. The Court of Justice annulled the Commission's decision on the basis that it breached the duty to state reasons in the analysis of the selectivity of the measures at issue.

The Court of Justice found that neither the Commission's decision nor the General Court's judgment explained why: (i) undertakings active in the broadcasting sector should be regarded as being in a factual and legal situation comparable to that of undertakings active in other sectors; and (ii) undertakings using terrestrial technology should be regarded as being in a factual and legal situation comparable to that of undertakings using other technologies. These inadequacies did not allow full judicial review of whether the operators benefiting from the measures were in a comparable factual and legal situation to that of the operators excluded from it. The Court of Justice was therefore unable to determine whether the measures at issue breached the EU prohibition on selective aid.

Rejecting the Commission's contention that no reasoning was necessary because the selectivity condition is automatically satisfied if a measure applies exclusively to a specific economic sector or to undertakings in a particular geographic area, the Court of Justice reiterated its holding in *Commission v. Hansestadt Lübeck* that a measure benefitting only one economic sector or some of the undertakings in that sector is not necessarily selective.[64] It is selective only if, within the context of a particular legal regime, it has the effect of conferring an advantage on certain undertakings over others, in a different sector or the same sector, which are in a comparable factual and legal situation in light of the regime's objective.[65]

The judgment is significant because it requires the Commission to provide more detailed analysis in its decisions on why undertakings that benefit from a certain measure are, or are not, in a comparable legal and factual situation to undertakings that do not benefit from the measure. While the Commission had implicitly considered this question in other parts of its decision, particularly with regard to the issue of technological neutrality, the Court of Justice made clear that the Commission must make this reasoning explicit in the section of the decision dedicated to the selectivity of the measure at issue.

***Commission v. TV2/Danmark* (Case C-656/15 P); *Viasat Broadcasting UK v. TV2/Danmark* (Case C-657/15 P); and *TV2/Danmark v. Commission* (Case C-649/15 P)**

On November 9, 2017, the Court of Justice rendered its judgments in three cases concerning state aid granted by Denmark to TV2/Danmark, a public broadcasting company owned by the Danish state.[66]

In 1995 and 1996, advertising space on TV2/Danmark was sold by another Danish public undertaking, TV2 Reklame. The income from those sales was transferred to TV2/Danmark through a third Danish public undertaking, the TV2 Fund. In 2006, the Commission found that this advertising revenue constituted "state resources" in accordance with the

[64] *Commission v. Hansestadt Lübeck* (Case C‑524/14 P) EU:C:2016:971.

[65] *Commission v. Hansestadt Lübeck* (Case C‑524/14 P) EU:C:2016:971, para. 61.

[66] *Commission v. TV2/Danmark* (Case C-656/15 P) EU:C:2017:836; *Viasat Broadcasting UK v. TV2/Danmark* (Case C-657/15 P) EU:C:2017:837; and *TV2/Danmark v. Commission* (Case C-649/15 P) EU:C:2017:835.

first limb of the *Altmark*[67] test for the classification of aid.[68]

In 2008, the General Court annulled the Commission's decision, holding that the Commission had failed to state why it considered advertising revenue when deciding whether state resources were involved.[69] The Commission re-examined the measures and again concluded that the measures were state aid.[70] This decision was once again annulled by the General Court in 2011.[71]

On appeal to the Court of Justice, the Commission, supported by Viasat Broadcasting UK, argued that the General Court had misinterpreted the concept of "state resources." It submitted that TV2's status as a public undertaking wholly under the control of the Danish state meant that its resources had to be tantamount to state resources, and that their *source* was not relevant.

The Court of Justice agreed with the Commission and General Court. It noted that the rules of state aid cannot "be circumvented merely through the creation of autonomous institutions charged with allocating aid."[72] It emphasized that the "entire distribution channel" of the implicated revenue was governed by Danish legislation, and therefore under public control and at the state's disposal. Therefore, the *source* of the revenue (*i.e.*, advertisers) was not relevant, and the revenue constituted state resources."

Finally, the Court of Justice distinguished the case at hand from that of *PreussenElektra*,[73] in which the Court of Justice ruled that the requirement that private electricity suppliers purchase electricity at fixed minimum prices did not involve the transfer of state resources. It clarified that *PreussenElektra* involved *private* undertakings bound by an obligation to purchase through their own financial resources (and the funds were never under public control), while *TV2/Danmark* concerned *public* undertakings created by the Danish state to administer the revenue concerned.

***Commission v. Italy* (Case C-467/15 P)**

On October 25, 2017, the Court of Justice[74] partially upheld the Commission's appeal against the judgment of the General Court in *Italy v. Commission*,[75] which annulled a Commission decision on the deferral of payment of the milk levy in Italy.[76] The Court of Justice's judgment focuses on the conditions under which changes to an "existing" aid measure transform it into "new" aid.

The case concerns an EU levy imposed on Italian milk producers for exceeding the milk quota allocated to Italy between 1995–1996 and 2001–2002. To help milk producers, Italy set up a European state aid scheme that allows Italy to repay the levy and then gradually recover the amounts from the milk producers. The measure was approved by the Council in July 2003.[77] Its compatibility was subject to two conditions: (i) the debt had to be repaid in equal yearly instalments; and (ii) the repayment period was 14 years starting in January 2004. Consequently, the Italian authorities adopted a law requiring that the milk producers fully repay the levy to Italy, without interest and over 14 years. In 2010, the Italian authorities adopted another law extending the time limit for the annual instalments due on December 31, 2010 by six months.

[67] *Altmark Trans and Regierungspräsidium Magdeburg* (Case C-280/00) EU:C:2003:415.
[68] Commission Decision C (2004) 1814 of May 19, 2004 (State Aid C 2/03 (ex NN 22/02)), OJ 2006 L 85/1.
[69] *TV2/Danmark and Others v. Commission* (Joined Cases T-309/04, T-317/04, T-329/04, and T-336/04) EU:T:2008:457.
[70] Commission Decision C (2011) 2612 of April 20, 2011 (State Aid C 2/03 (ex NN 22/02)), OJ 2011 L 340/1.
[71] *TV2/Danmark v. Commission* (Case T-674/11) EU:T:2015:684.
[72] *Commission v. TV2/Danmark* (Case C-656/15 P) EU:C:2017:836, para. 45.
[73] *PreussenElektra* (Case C-379/98) EU:C:2001:160.
[74] *Commission v. Italy* (Case C-467/15 P) EU:C:2017:799.
[75] *Italy v. Commission* (Case T-527/13) EU:T:2015:429.
[76] Commission Decision C (2013) 4046 of July 17, 2013 (State aid 11/C (ex SA.33726 11/NN)), OJ 2013 L 309/40.
[77] Council Decision 2003/530/EC on the compatibility with the common market of an aid that the Italian Republic intends to grant to its milk producers, OJ 2003 L 184.

In 2012, the Commission found that the 2010 law providing for the deferral of payment infringed one of the conditions in the Council's decision and that, as a result, the entire aid measure transformed into new aid. Following the administrative procedure, the Commission concluded that each of the two measures—the system of staggered payments and the deferral of payment—constituted new and unlawful aid, incompatible with the internal market.[78] Further, the Commission found that the aid could not benefit from the then-applicable *de minimis* regulation because Italy could not verify that the aid received by all beneficiaries and sources would not exceed the applicable ceiling. Consequently, the Commission ordered Italy to recover the sums granted to milk producers that had benefitted from the deferral of payment, together with interest.

In September 2013, Italy appealed the Commission's decision to the General Court. The General Court classified the aid scheme as a modification of existing aid and not as new aid, because the Commission had failed to prove that the alteration affected the very substance of the existing aid.[79] The Commission appealed the General Court's judgement.

The Court of Justice reversed the General Court's judgment. It first recalled that the authorizing decision of the Council was subject to two conditions, namely that the debt be repaid in annual instalments of equal size and within 14 years. The Court of Justice found that, by extending the time limits, an alteration to the aid was made, which transformed the existing aid into new and unlawful aid.

The Court of Justice clarified that this finding followed from the definitions of: (i) new aid as all aid that is not existing aid, including alterations to existing aid; and (ii) existing aid as authorized aid.[80] The Court of Justice ruled that existing aid, which has been altered in breach of the compatibility conditions, can no longer be regarded as authorized and, as a result, loses the status of existing aid in its entirety.[81] With regards to the measure at issue, the Court of Justice confirmed that it was adopted in breach of an authorization condition ensuring the compatibility of the aid measure—and was not a purely formal or administrative alteration incapable of affecting the compatibility of the aid.[82] The Court of Justice concluded that the Commission correctly regarded the measure as new aid. The Court of Justice held that the General Court had misconstrued the concept of new aid and thereby committed an error of law in classifying the aid scheme as a modification of existing aid.

This judgment is noteworthy because it clarifies the concepts of new and existing aid. The Court of Justice takes a broad approach: (i) suggesting that any alteration to the authorization conditions turn existing aid into new aid; and (ii) clarifying that—to promote compliance by Member States—this notion covers not only the alteration made by the Member State to an existing aid measure, in breach of the authorization conditions, but also the entire aid scheme that was altered.[83] This implies that a Member State that alters an authorized aid scheme in breach of an authorization condition risks losing the advantages granted on the basis of that scheme.

[78] Commission Decision C (2013) 4046 of July 17, 2013 (State Aid 11/C (ex SA.33726 11/NN)), OJ 2013 L 309/40.

[79] *Italy v. Commission* (Case T-527/13) EU:T:2015:429, para. 76.

[80] Council Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 1999 L 083 ("the procedural regulation"), Articles 1(c) and 1(b)(ii).

[81] *Italy v. Commission* (Case C-467/15 P) EU:C:2017:799, para. 54.

[82] In particular, the Court of Justice clarified that the deferral of payment could not be classified as an increase to the original budget of an aid scheme within the meaning of Article 4(1) of Regulation No. 794/2004 implementing Council Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty, OJ 2004 L 140/1 ("the implementing regulation").

[83] *Italy v. Commission* (Case C-467/15 P) EU:C:2017:799, para. 49.

Policy and Procedure

ECJ Judgments

***Gasorba and Others* (Case C-547/16)**

On November 23, 2017, the Court of Justice issued a preliminary ruling[84] on a question from the Spanish Supreme Court on whether Article 16 of Regulation 1/2003 precludes a national court from declaring the agreement in question invalid when the Commission has made commitments binding under Article 9.1 of the same regulation.

In 2004, the Commission initiated a proceeding against Repsol under Article 101 TFEU, finding that its long-term exclusive supply agreements raised anticompetitive concerns. Repsol agreed to refrain from entering into long-term exclusive agreements, offered the existing service station tenants incentives to terminate the existing agreements early, and agreed to refrain from buying additional service stations with no current supply relationship for a certain time. In April 2006, the commitments were made binding by the Commission under Article 9 of Regulation 1/2003.[85]

In 2008, Gasorba SL and others that had entered into long-term contracts with Repsol brought an action against Repsol before the Commercial Court of Madrid asking for an annulment of the lease as contrary to Article 101 TFEU. After the case was dismissed by both the Commercial Court of Madrid and the Court of Appeal, Gasorba SL and the others appealed the decision to the Spanish Supreme Court, which referred the case to the Court of Justice.

The Court of Justice reiterated that EU competition law is based on a system of parallel powers, in which both the Commission and national authorities may apply Articles 101 and 102 TFEU. While national courts should not adopt decisions contrary to those contemplated or adopted by the Commission, a commitment decision does not conclude whether the agreement it concerns is anticompetitive. As such, national courts are not precluded from examining the agreement, finding that it infringes Article 101 TFEU, and declaring it void. It also follows that a decision taken under Article 9 of Regulation 1/2001 cannot create legitimate expectations of compliance with Articles 101 or 102 TFEU for the undertaking in question.

Nonetheless, national courts are guided by the principles of sincere cooperation of Article 4(3) TFEU as well as the objective of applying EU competition law effectively and uniformly, and should take the Commission's preliminary decision into account and regard it as an indication of the anticompetitive nature of the agreement. The Court of Justice, therefore, addresses the interaction between the Commission's power to accept commitments under Regulation No. 1/2003 and national competition authorities' power to apply competition law under the same Regulation.

General Court Judgments

***VIMC v. Commission* (Case T-431/16)**

On October 26, 2017, the General Court refused to annul the decision in which the Commission[86] rejected a complaint by Vienna International Medical Clinic ("VIMC") alleging a breach of Article 102 TFEU.[87] The General Court's dismissal of VIMC's action confirmed its deferential interpretation of Article 13(1) of Regulation 1/2003[88] on the interplay between the

[84] *Gasorba and Others* (Case C-547/16) EU:C:2017:891.

[85] *Repsol C.P.P. SA - Distribution de Carburants et Combustibles* (Case COMP/B-1/38.348), Commission decision of April 12, 2006.

[86] *VIMC/WK&FGB* (Case AT.40231), Commission Decision of May 27, 2016.

[87] *VIMC v. Commission* (Case T-431/16) EU:T:2017:755.

[88] Article 13(1) of Council Regulation No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1 ("Regulation 1/2003") provides that "[w]here competition authorities of two or more Member States have received a complaint or are acting on their own initiative under Article [101 TFEU] or Article [102 TFEU] against the same agreement, decision of an association or practice, the fact that one authority is dealing with the case shall be sufficient grounds for the others to suspend the proceedings before them or to reject the complaint" and that "[t]he Commission may likewise reject a complaint on the ground that a competition authority of a Member State is dealing with the case" (emphasis added).

Commission and national competition authorities ("NCAs") when dealing with a complaint.

In September 2014, VIMC, a German private healthcare institution active in Austria, alleged that Austria's economic chamber (*Wirtschaftskammer Österreich*) and association for healthcare sector undertakings (*Fachverband der Gesundheitsbetriebe*) infringed Article 102 TFEU by refusing to admit it to the Austrian fund for financing of private healthcare institutions. In May 2016, the Commission rejected the complaint under Article 13(1) of Regulation 1/2003 because the Austrian Competition Authority ("BWB") was dealing with the same practices.

VIMC sought annulment of the Commission's decision before the General Court. VIMC argued that the Commission had violated Article 13(1) of Regulation 1/2003 by failing to take account of the international circumstances of the case and ignoring BWB's refusal of the complaint due to lack of resources, which did not amount to "dealing with" the complaint. Article 13(1) of Regulation 1/2003 provides that, when the Commission and an NCA receive complaints against identical practices, "[t]he Commission may reject a complaint on the ground that a competition authority of a Member State is dealing with the case."

In interpreting Article 13(1) of Regulation 1/2003, the General Court reiterated its holding in *Si.mobil*[89] that for the Commission to reject a complaint, an NCA must be "dealing with" a case that relates to the same alleged anticompetitive practices.[90] The General Court interpreted "dealing with" to require a present or past investigation of the case by the NCA.[91] The Commission must determine this on the basis of all pertinent elements of law and fact. In its review of the Commission's appraisal, the General Court can only determine whether there has been a manifest error of assessment or misuse of powers.[92] In light of the evidence submitted by the BWB (in particular, letters informing the VIMC of the investigation's progress),[93] the General Court concluded that the Commission had not committed a manifest error of appraisal in finding that the BWB was "dealing with" the complaint.[94]

Concerning the failure to account for the international circumstances of the case, the General Court recalled that both the Commission and NCAs have parallel competence to apply Articles 101 and 102 TFEU. VIMC had no right for the case to be handled by the Commission rather than the BWB. Finally, the General Court held that the BWB's protracted investigation did not infringe VIMC's right to judicial protection because VIMC could have acted before national courts directly at any time during the investigation.

VIMC v. Commission confirms the Commission's broad discretion in choosing whether to reject complaints on the grounds that an NCA is dealing or has already dealt with the subject-matter of the complaint.

CLEARY GOTTLIEB

89 *Si.mobil v. Commission* (Case T-201/11) EU:T:2014:1096, paras. 36 and 37.
90 *VIMC v. Commission* (Case T-431/16) EU:T:2017:755, para. 21.
91 *Ibid.*, para. 22.
92 *Ibid.*, para. 25.
93 *Ibid.*, paras. 28 and 29.
94 *Ibid.*, para. 30.

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