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European Commission Cracks Down Again on Anticompetitive Cross-Border Trade Restrictions with a Large Fine. Are Your Company's Distribution Practices in Order?

Jody Boudreault and Paul Lugard*

In this article, the authors highlight the European Commission's main findings with respect to its imposition of a large fine on food producer Mondelez, explore the broader context of the case, and discuss the implications and takeaways for businesses.

The European Commission (EC) has imposed a €337.5 million fine on food producer Mondelez for anticompetitive conduct that restricted cross-border trade between EU member states of chocolate, biscuits, and coffee products.

This article:

1. Highlights the EC's main findings,
2. Explores the broader context of the case, and
3. Discusses the implications and takeaways for businesses.

One key message is that price differences between EU member states, at least in certain markets and for the time being, remain a fact of life, but that companies need to be cautious in designing their commercial policies to address those market realities.

What Are the EC's Main Findings?

According to the EC's press release and the remarks made by Executive Vice President and Commissioner for Competition Margrethe Vestager, the EC found two different types of infringements of EU antitrust law.¹

First, the EC found that Mondelēz had entered into more than 20 anticompetitive agreements or concerted practices with its business partners, thereby infringing Article 101 of the Treaty on the Functioning of the European Union (TFEU). Specifically, these agreements and practices, which covered all relevant EU markets:

- Limited the territories or customers to which wholesale customers of Mondelēz could resell the products and, in one instance, required Mondelēz's customer to charge higher prices for exports than for domestic sales; and
- Prevented exclusive distributors active in certain EU member states from selling to customers located in other EU member states, either through contractual restrictions or by requiring the distributors to seek prior permission from Mondelēz on a case-by-case basis.

Second, the EC found that Mondelēz had abused its dominant position in certain national markets for the sale of chocolate tablets, thereby infringing Article 102 TFEU.

Specifically, this unilateral conduct consisted of:

- The refusal by Mondelēz to supply a wholesaler, which aimed to prevent this wholesaler from buying chocolate tablet products in Germany, where they were comparatively less expensive, and then reselling them into four other EU member states where prices were higher (Austria, Belgium, Bulgaria, and Romania); and
- The removal by Mondelēz of certain chocolate tablet products from the market in the Netherlands to prevent them from being imported into Belgium, where Mondelēz was selling the same products at higher prices and in significantly larger quantity.

The EC concluded that these different types of practices prevented retailers from freely sourcing products in EU member states where prices were lower and artificially partitioned the EU's internal market into separate national markets. According to the EC, the objective of the practices was to avoid cross-border trade that would lead to price decreases in EU member states with higher prices. The EC added that these practices allowed Mondelēz to charge higher prices for its own products, to the ultimate detriment of consumers in the European Union.

Mondelēz cooperated with the EC and acknowledged its liability for the infringement. An appeal against the decision is therefore not expected.

What Is the Broader Context of the Case?

This is not the first time that the EC has cracked down on what it considers as anticompetitive restrictions to cross-border trade. For example, in 2019, the EC imposed in a similar case a fine of €200 million on AB InBev, finding that the company had abused its dominant position in the Belgian beer market by hindering imports of less expensive beer from the Netherlands into Belgium, with the objective of maintaining higher prices in Belgium.²

The EU antitrust rules on territorial restrictions are peculiar and not always well known by companies.

Achieving a well-functioning single European market, as opposed to separate national markets in each of the 27 EU member states, is a key objective of the European Union. The single market comprises, *inter alia*, the free movement of goods. In this regard, parallel trade or arbitrage, which involves traders sourcing products in EU member states where prices are lower and reselling them in EU member states where prices are higher is viewed favorably by the EC because it increases consumer welfare—increased competition contributes to lower prices and more consumer choice.

Anticompetitive conduct that restricts parallel trade is therefore considered by the EC as a serious infringement of EU antitrust law. Indeed, such conduct amounts to a non-regulatory barrier to the realization of the single market and fragments the EU's internal market into separate national markets by perpetuating existing price differences between EU member states.

While the *Mondelēz* case follows a long tradition of enforcement action against unlawful restrictions of cross-border trade, its context displays certain peculiarities.

First, Vestager highlighted in her comments that the case was part of the EC's broader effort to enforce the EU antitrust rules in the food retail industry. In that context, she referred to (1) the current economic context characterized by high inflation and cost-of-living concerns for many EU citizens, and (2) the existence of several ongoing investigations in this sector, including regarding food delivery services and energy drinks.³

Second, on the day immediately following the adoption of the decision in the *Mondelēz* case, Vestager announced a fact-finding mission on territorial supply constraints in the European Union. This announcement should be viewed against the background that the EU antitrust rules can only be used to eliminate territorial restrictions where they are implemented through an anticompetitive agreement or concerted practice, or through an abuse of dominance, but not where they stem from unilateral conduct by non-dominant firms.⁴ The announcement of the fact-finding mission followed an initiative from a group of EU member states that suggested the European Union should take action against long-standing price differences between EU member states that are attributable to territorial supply constraints. The initiative encouraged the EC to prohibit—through existing or new common EU rules—unfair practices in business-to-business relations that discriminate against a retailer based on its place of establishment. It also invited the EC to investigate the extent to which manufacturers use differentiated languages on labels and packaging to justify territorial restrictions, and to examine opportunities and risks related to the use of digital labeling.⁵

Interestingly, this new initiative is not entirely unprecedented and can, in fact, be considered as a follow-up to an earlier fact-finding mission in 2020 conducted by another Directorate-General of the EC, DG GROW. The Final Report of that earlier inquiry found that the abolition of territorial supply constraints in the EU retail sector could result in significant consumer savings, representing an estimated €14.1 billion (or 3.5 percent) on consumers' purchases of certain categories of food products (assuming retailers would pass lower purchase prices on to their customers).⁶

The significance of diverging consumer food prices in Europe may also be illustrated by a recent study conducted for the Belgian Ministry of Economic Affairs. This study, published in December 2023, concluded that Belgian citizens paid respectively 10.7 percent, 9.1 percent, and 8.4 percent more for processed branded food products than German, French, and Dutch consumers.⁷

What Are the Implications and Takeaways for Businesses?

With this decision including a fine of almost €340 million, the EC set an example and issued a stark warning to companies

not to engage in anticompetitive restrictions of EU cross-border trade. When announcing the decision during a press conference, Vestager went so far as to explicitly invite companies to scrutinize their contracts for compliance with EU antitrust law.⁸ In addition to a substantial fine, companies risk damages claims, reputational harm, and substantial cost and diversion of resources due to lengthy antitrust investigations.

The EU antitrust risk associated with illegally preventing cross-border sales concerns both dominant and non-dominant companies. While the EC emphasized its enforcement action in the retail food industry, the risk in relation to cross-border restrictions is not limited to a particular sector. Furthermore, while in the *Mondelēz* case the EC only took enforcement action against the supplier, distributors and other buyers may also be held liable under EU antitrust law, in particular where they are parties to anticompetitive agreements or concerted practices.

To mitigate the EU antitrust risk, companies can take a number of steps:

- Companies are well advised to review and, if necessary, update their distribution contracts to ensure they do not contain any anticompetitive restrictions prohibited by Article 101 TFEU, such as the cross-border restrictions sanctioned in this case. However, the scope of Article 101 TFEU is not limited to written contracts. It also catches agreements and concerted practices more generally. This is illustrated by the EC's finding that *Mondelēz* had restricted exclusive distributors from selling into other EU member states by asking them to seek permission on a case-by-case basis before making such sales. It is therefore also important to ensure that day-to-day business practices are compliant with the EU antitrust rules and that suitable guidance is in place. Organizing regular and tailored training for sales personnel and other employees on the relevant EU antitrust rules may be helpful in this regard.
- Companies may want to assess whether they may be considered dominant in one or more markets. If so, they need to apply particular caution as they may then also infringe Article 102 TFEU, through their unilateral conduct (i.e., irrespective of any agreement with another business partner). The *Mondelēz* case shows that the mere refusal

to supply parallel traders may constitute an EU antitrust law violation.

The EC's decision in the *Mondelēz* case also constitutes an important signal for companies such as retailers, traders, or brokers that may be disadvantaged or harmed by anticompetitive territorial restrictions. For instance, wholesalers or importers located in a particular EU member state may feel that they are deprived of lower purchase prices and corresponding profits. Where companies identify unlawful territorial restrictions, the EU antitrust rules offer a strong basis for them to approach the relevant parties and seek appropriate redress, if necessary before the competent national courts. National courts in the EU member states have the power to strike down the alleged anticompetitive restrictions and to award damages for any harm suffered as a result of their application. Disadvantaged parties may also elect to bring the matter to the attention of the EC by lodging a formal or informal antitrust complaint.

Irrespective of their particular position in the supply chain, businesses should be on the lookout for the outcome of the fact-finding mission on territorial supply constraints announced by the EC on May 24, 2024. While it is uncertain to which regulatory or enforcement action the EC's inquiry will lead, it is noteworthy that the EU member states' initiative is centered on a blanket prohibition on territorial restrictions. Such a prohibition may even cover unilateral conduct by non-dominant firms that impedes cross-border trade between EU member states. Given that such conduct is currently not prohibited by EU antitrust law, such a general prohibition would likely imply the adoption of new regulation, as opposed to the enforcement of the existing EU antitrust rules.

Notes

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1. The description of these findings is based on the EC's press release of May 23, 2024, https://ec.europa.eu/commission/presscorner/detail/en/ip_24_2727, and the related remarks made by Vestager on the same day, https://ec.europa.eu/commission/presscorner/detail/en/speech_24_2784. The practices will likely be described in greater detail in the non-confidential

version of the EC's decision, which will be published subsequently. The EC's investigation started in November 2019.

2. EC's press release of May 13, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_2488.

3. There is also a political dimension to the issue of food prices. The *Mondelēz* case takes place against the background of some friction between the EC's Directorates-General for Competition (DG COMP) and for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) on the one hand, which tend to be receptive to concerns of retailers, and the EC's Directorate-General for Agriculture (DG AGRI), on the other hand, which tends to be more receptive to the interests of agricultural producers.

4. Remarks made by Vestager at the press conference of the Competitiveness Council, May 24, 2024 (Internal market and industry—Part 2), <https://newsroom.consilium.europa.eu/events/20240523-competitiveness-council-may-2024>.

5. Information by the delegations of the Netherlands, Belgium, Croatia, Czech Republic, Denmark, Luxembourg, and Slovakia on the need to eliminate territorial supply constraints on the Single Market, May 7, 2024, <https://data.consilium.europa.eu/doc/document/ST-9757-2024-INIT/en/pdf>.

6. Final Report for the Study on territorial supply constraints in the EU retail sector, commissioned by the EC's Directorate-General for Internal Market, Industry, Entrepreneurship and SMEs (DG GROW) and carried out by VVA Economics & Policy and London Economics, published in 2020, <https://op.europa.eu/en/publication-detail/-/publication/831c7de4-2a1e-11eb-9d7e-01aa75ed71a1/language-en>, pages 88-90 and 104.

7. Study by the Price Observatory—Belgian Institute of National Accounts, comparison of consumer price levels of products in Belgium, Germany, France, and the Netherlands, December 20, 2023, <https://economie.fgov.be/fr/publications/comparaison-du-niveau-des-prix>, page 61. Reference is also made to the study on territorial supply constraints commissioned by the Dutch Ministry of Economic Affairs and Climate Policy, conducted by Ecorys and published on November 22, 2023, <https://open.overheid.nl/documenten/8bf2ebbe-c875-4715-9a44-51c06adfd7b3/file>.

8. Remarks made by Vestager at the press conference of the EC, May 23, 2024, <https://audiovisual.ec.europa.eu/en/topnews/M-009632>: “So if anyone out there thinks, maybe we should have a second look at our contracts, this is the time to do that.”