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Panel 2
All Things Vertical: Divergence or Convergence?

Moderator:
Hon. Douglas H. Ginsburg
Senior Circuit Judge, U.S. Court of Appeals for the District of Columbia

Panelists:
Jeffrey C. Bank
Partner, Wilson Sonsini Goodrich & Rosati

Jean-François Bellis
Managing Partner, Van Bael & Bellis

Isabelle de Silva
President, French Competition Authority

Nils Wahl
Advocate General, Court of Justice of the European Union

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JUDGE GINSBURG: Good afternoon. Welcome back. This panel is on "All Things Vertical." We will probably accommodate only some things vertical, but we'll do our best to cover them all.

The order you see at the table here is not necessarily the order in which we're going to proceed. We're going to hear first from Jean-François Bellis about the Directorate-General for Competition's (DG-Comp) recent activities under Article 101; then from President de Silva of the Autorité of France; from Advocate General Nils Wahl; and from Jeff Bank, who will try to bring some of this together, looking at trends.

Without any further delay, we will turn to you, Jean-François.

MR. BELLIS: Thank you. I will speak about the Commission and DG-Comp's recent activities. But, after having presented a historical summary of how vertical restraints have been handled by the Commission, as you will hear, I have the impression that in fact we are going back to the 1960s when the policy was developed when you look at the most recent decision taken by the Commission in this area.

As you know, vertical restraints have played a major role in the development of European competition law. In the 1960s the Commission decided to put competition law at the service of a higher policy, or I would even say political objective, market integration when it decided that any distribution agreement that partitioned the Common Market should be illegal.

In order to force companies to act consistently with that policy, they developed this very interesting definition of what is a restriction of competition: "Any restriction on the freedom of action of a party is a restriction of competition" coming within the prohibition of Paragraph 1 of what was then Article 85, now Article 101.

For example, an exclusive-dealing agreement in which a manufacturer would undertake not to appoint other distributors in the exclusive territory was an agreement which contained a restriction of competition that came under the prohibition of Paragraph 1 of Article 101 and could be valid only if it were exempted by the Commission.

That very broad interpretation of Paragraph 1 of Article 101 was not shared by the Court of Justice in its early case law.

But this did not deter the Commission from applying this interpretation. Why? Because at the time the Commission had a monopoly over exemptions, and any agreement which fell under the prohibition of Paragraph 1 of Article 101 needed to be notified to the Commission, and exemption could only operate from the date of notification.

This put the Commission in the position of being the final arbiter of what clauses a distribution agreement could validly contain. So the Commission decreed that, for example, in exclusive-dealing agreements the manufacturer could prohibit a dealer from engaging in active sales outside its territory but not passive sales.

For selective distribution agreements these were exemptible if the selection criteria were qualitative and applied in a nondiscriminatory manner. The dealers could be prohibited from selling to dealers outside the selective distribution network but should be allowed to sell to consumers anywhere.

For franchise agreements there was a list of clauses that these agreements could contain, but the common feature of the Commission's policy with respect to all forms of distribution was that resale price maintenance (RPM) was always prohibited.

Of course, with this broad interpretation of Paragraph 1 of Article 101 there was an avalanche of notifications. When you look at the number of the cases handled by the Commission — I think that now the Commission is at around 40,000 — more than 30,000 of those originated in the 1960s when the Commission developed that policy.

To deal with this avalanche of notifications the Commission developed a unique new instrument called the Block Exemption Regulation, in which it codified its policy with respect to specific types of agreements.

The Commission over the years adopted a growing number of such regulations, developing — something which I think was done by no other competition authority in the world — a catalog of clauses: some black, which meant prevented the grant of the exemption; some white, which were consistent with the exemption; and then there were some intermediate clauses, the gray clauses.

This gave European competition law this very unique and strange physiognomy, that of an antitrust law. A significant part of it consisted in these catalogs of clauses, which were legal or illegal depending upon their content but with no consideration whatsoever of the effect on the market of the agreements in which they were included. It looked more like a law of abusive contractual clauses than a real antitrust law.

That was the situation from the 1960s until the late 1990s because the Commission eventually grew tired of enforcing such a system and launched the modernization revolution. It was a revolution because the notification-and-exemption system was abandoned. The Commission also abandoned its monopoly over individual exemptions but retained the power to issue block exemptions.

It's also recognized that economic analysis should play a role in the assessment of anticompetitive practices. It also admitted that it had spent too much time focusing on vertical restraints and should direct its attention to practices which actually restrict more competition, such as cartels.

One could say that it took more than twenty, twenty-five years for some of the Chicago School ideas finally to reach Brussels. But I say only some of the Chicago School ideas because the Commission did not abolish the block exemptions, which is strange because the block exemption was needed because there was such an extreme interpretation of Paragraph 1 of Article

101.

For vertical restraints the Commission consolidated all the block exemptions for specific agreements into one exemption with a streamlined list of black clauses, which still included restriction on sales, on resales, on passive sales, exclusive-dealing agreements, and RPM.

Since the Commission was now accepting the idea that an economic analysis should be conducted before finding a given practice illegal, it has complemented the Vertical Restraints Block Exemption Regulation with Vertical Guidelines. These are very interesting documents because in those Guidelines the Commission explains how economic analysis should be applied to assist the anticompetitive effect of a given vertical restraint.

Very interestingly, for example, in 2010 when the Commission updated the Vertical Restraints Block Exemption Regulation and extended it for twelve years. It also adopted a revised version of the

Guidelines in which it made it clear that what are called “hardcore restrictions” — which are the old list of black clauses which are now called “Article restrictions” — in fact was not like a per se rule. Practices such as RPM, for example, or a ban on passive sales could be permissible when a new product is launched or an existing product is introduced into a new market, or a franchise launches a short-term promotional campaign.

Very interesting ideas, but ideas which the Commission never applied itself because from 2004 until in fact a few weeks ago the Commission stopped adopting decisions on vertical restraints. All its decisions practically concern cartels. Enforcement of vertical restraints was left to the Member State competition authorities with the Commission limiting its intervention to amicus curiae briefs in cases before national courts.

This policy of what might be called “benign neglect” has come to an end with the follow-up of the e-commerce inquiry. In 2015 the Commission launched a sector inquiry into e-commerce. That inquiry was completed last year, and the Commission identified a number of practices which in its view impeded the proper functioning of an EU Digital Single Market, such as territorial restrictions, like geoblocking and a few other practices.

As is common when the Commission conducts a sector inquiry, a number of cases have followed. I will prepare a paper which will be included in the proceedings of this conference in which I list twenty-two investigations which were launched in the last two-and-a-half years which are really the follow-up of the e-commerce sector inquiry.

The majority of those cases deal with territorial restrictions, especially geoblocking, restrictions on online sales, and also RPM. In fact, the first decision which is the product of this resurgence of interest in vertical restraints by the Commission was adopted in July. It concerns four manufacturers in the consumer electronics industry, and it’s a case dealing with resale price maintenance. The decision hasn’t been published yet; there is only a press release and a statement by the Commissioner.

This is a case in which fines were imposed through a new procedure that the Commission has developed, a kind of informal settlement procedure in which the companies agree on the level of the fine, and this will produce probably decisions with very little reasoning.

The question is: Is the protection of the single market again going to be the master of the enforcement of European competition law on vertical restraints? The question is: Are we going to go back to the 1960s with a very formalistic approach that certain practices are illegal regardless of their impact on the market?

In these recent cases on RPM there is a hint that there might be a horizontal aspect to those cases because in her statement about the case, the

Commissioner said that the practices which consisted apparently in the manufacturers taking action against online retailers which were charging the lowest prices could also have a broader horizontal impact because apparently those low prices influenced the results of the pricing algorithms and price-comparison websites which were used by all the retailers to set their pricing. But we have to see when the decision is published exactly what role this played in the analysis.

All of this comes at a time after fourteen years in which the Member States have applied the European competition law on vertical restraints. We see divergences between the Member States, with Germany specifically taking the hardest line on those cases and other Member States, such as, for example, the Netherlands, taking a very different approach.

This is not a new phenomenon. There have always been divergences in the national competition policies of the Member States. The difference is that since the modernization and the regulation that modernization produced, Regulation 1/2003, national competition law has in effect become EU competition law, which explains all those references for a preliminary ruling to the Court of Justice on what are, in fact, national competition cases.

We have now in Europe a competition law on vertical restraints which is going in many different directions, and it will be interesting to see what will be done to ensure that those divergences are reduced, and also that what was the main achievement of modernization, the use of economic analysis, is not lost in the process.

I will stop here.

JUDGE GINSBURG: Thank you, Jean-François.

President de Silva?

MS. de SILVA: Hello to everyone. I am very pleased to be in New York City, so thank you to Fordham University for inviting me. I think that this is the right city in which to talk about vertical issues.

I think one of the reasons we chose this topic for today is that there is a global renewed interest in vertical relations. I think that some of the issues I will be alluding to now are quite different from those that Jean-François tackled that were restriction-in-distribution agreements.

I think that there are some legitimate questions that have been raised: What exactly are agencies looking at in terms of vertical issues; is it a real issue? The second question is, what are the special difficulties in assessing those risks? Finally, is it something that you should look at more in specific sectors — for example, in the digital economy — or is vertical something that you look at in any type of sector, any type of merger?

Maybe a quick reminder about the analytical framework. I think that there is a consensus that in terms of the theoretic principles that are being applied the framework is quite clear.

There was a very interesting study led by the International Competition Network (ICN) quite recently that interrogated a number of agencies. What they found is that most national competition authorities intervened in the last few years in terms of vertical competition issues, at least in one vertical merger in the last few years.

Still, what is interesting also is that those interventions in terms of vertical competition issues are quite rare. It is only one among ten of those interventions, so we can imagine that horizontal issues are more common.

Second, this report by the ICN shows that there is a very consistent approach by the national competition authorities in terms of what they're looking at when they are assessing, for example, vertical mergers. They are looking at customer foreclosure theories of harm. They are looking at ability, incentive, and effect. They are looking at the same factors in all the different countries. For example, what will be the effect upstream and downstream, and what are the efficiencies? I think, at the least, we are discussing a lot about frameworks on digital, but in terms of general concepts in vertical the thing seems pretty clear.

It is also quite common that vertical issues are deemed to be more complex than horizontal issues. This is something I will try to illustrate by two examples.

I wanted also to say that when we talked about vertical issues in Delhi at the ICN meeting there was an interesting remark by Andrea Coscelli from the UK Competition and Markets Authority saying that in those types of vertical issues it’s quite difficult to quantify and to have a very sound and perfect economic analysis, so you must look at all types of different information, look at the market, and really try to understand how the market is working. I will try to illustrate that with two examples.

The first example is a very classic case now in France concerning the media sector. This is related to a very big merger that happened some years ago between Canal+ and TPS, the very big pay-TV broadcasters, and a free-to-watch TV group called Direct 8.

There was when those mergers happened a very thorough analysis because the agency felt there were some very big risks in terms of vertical relation because this new entity that was being created could harm the other independent channels, for example, that were trying to be broadcast on pay TV or satellite TV, and so the power of this new entity could create a barrier for them to be able to reach distribution. This is the type of worry that we had when we looked at the merger.

This led to a very complex decision with a lot of commitments in terms of trying to prevent those risks, for example, by defining the ways the channels could access broadcasting. There were some very detailed commitments to make sure that they would still be able to access broadcasting at an accessible price, for example.

There was also a very big risk perceived in terms of access to movie rights, for example, or premium broadcasting rights in the sport sector. This very complex set of rules was put into place for many years.

Last year we looked anew at this set of commitments, and we did a thorough review of the market of broadcasting and pay TV. What we found is that the market had really changed enormously in the last five years.

To give you a few examples of the new elements that we saw, I think one of the biggest factors was the fact that now you have Netflix; you have over-the-top (OTT) new actors like Amazon that are able to distribute some content over the Internet and not on your classical TV. Really the landscape had changed a lot.

This led us to really change in depth all those commitments that had been in place for five years. This led to a very lengthy and complex analysis that lasted almost a year, which is a lot of time, and really was quite labor-intensive for the agency because we had to look at all the elements of the market.

What can we draw from that?

The first point is that you don’t have that many cases involving complex vertical relations, but when they happen they can be very labor-intensive for the agency and also for all the undertakings involved because you have a number of markets to take into account. Often the effect on competition is not quite as clearcut as you have on horizontal issues. You need to factor in a lot of different elements.

The second question: In the end can you say that the remedies were effective, the remedies that had been in place for five years; did we over-enforce or under-enforce a few years ago? It is always very difficult to answer that question.

What we can say is that we saw that there was a possibility for new effective competitors to arrive in the market. You only need to say “Netflix” or “Amazon” to see that now you have very new competitors.

Also, we were quite keen on preventing any type of barrier to innovation on technology. We saw that there have been huge innovations with the OTT and Netflix and the fact that now you tend to look at TV on your smartphone and not on your TV set at home. We can at least say that the market has been able to change and we have seen new competitors arriving, which is a good thing.

The second example I would like to address now in terms of vertical relation is the food industry and agriculture because I think it’s a very good example of looking at upstream and downstream effects on competition.

In the case of France, this has been a very important issue in terms of competition analysis but even in terms of political issues and debates in Parliament.

What is the problem at the beginning? The problem is that in France, like in many countries, the food retailers are quite powerful and they have some strong competition on price to the customer. Also, they have some very animated discussions when they negotiate prices with the food industry. I think this is something that happens in many countries.

Why it became a political issue is that there is this idea that is being diffused in France that because of those vertical relationships the farmers and the food industry are suffering because the food retailers are too strong, too concentrated, or they are too hard negotiating the prices.

There is also the idea that the customers may be losing in the end because they don't get such good products because the food industry is suffering so much that they don't offer good quality or good diversity in product.

This has led us to a series of interventions in terms of the competition agency, and at the same time a very strong series of initiatives by the Parliament in terms of organizing those vertical relations. I will give you only a few examples.

For many years in France — and this is something that is not common in many countries — there has been specific legislation that says how you are going to negotiate the prices for the food retail industry. You are not free to discuss any way you like; you have to negotiate at a certain time of the year; you have limits in terms of how low the prices can be, for example; and the whole idea is that this is going to protect farmers and the agricultural industry.

There was a new big change and debate starting in 2014 because those big food retailers started negotiating buying alliances together. This led to four buying alliances effectively covering 90 percent of the French market.

At this stage, the agency was asked to give an opinion on whether this was going to have undesirable effects upstream and downstream. For the consumers was there a risk that they were getting lower-quality products? Were the producers, farming and the food industry, they suffering because of those relationships?

This led in 2015 to a new law being applied through the agency that led us to have some new powers when looking at those alliances. There is a specific obligation to notify those buying alliances to the competition agency, which has two months to look at them.

This is something a little bit intermediate because this is not a real approval like you have in a merger regime. But still we are supposed to look at those agreements and say that if there is a competitive issue, then the company should change the agreement of this buying alliance.

But this was not perceived to be enough, so in 2017 and 2018 there was a new movement of alliances with ever-stronger concentration, and also a new trend that now you have international buying alliances. That means, for example, if you are Coca-Cola and you want to be distributed by Carrefour in France and in Brazil, Carrefour is going to negotiate with you an overall alliance for all over the world and for specific regional areas.

This led to a new political debate led by the government and also to new activity in Parliament, and the result of this was that there was a new change to the competition regime. This gave the agency new powers, and now we are able to impose some interim measures specific to those buying alliances if we see a possible harm to competition. This is going to change again the legal framework of those buying alliances.

But this is not the end yet because we decided quite recently — this was a decision by the chief of the investigation in the French agency — that we should also look at those buying alliances in terms of antitrust infringement of alliances that are being put into place. At the same time, the law should be approved in the next few days, and there is going to be an antitrust investigation to look at those agreements to see if they have an adverse effect on the market as a whole and the quality of the product and in the end the product that the customer gets to eat.

Maybe some general lessons that we can draw on those vertical issues have been trying to show, I think, that verticals are at the center of the most difficult topics for us but very sensitive and important topics. These are topics that we need to address.

At the same time, they are quite complex. In the investigation I was alluding to, the Rapporteur General of the Authority asked for information from the market, asking producers to come forward and asking, “Have you been in effect harmed by those relationships and negotiations with the distributors?”

This is going to be needed to gather a lot of data and to also have a very thorough economic analysis to see if we can in the end conclude that those agreements are anticompetitive. I think that this is going to be in the next few months another issue that is going to be quite important for us.

Thank you very much.

JUDGE GINSBURG: Thank you.

Advocate General Wahl?

MR. WAHL: I think it’s fair to say that vertical restraints was not a subject that anyone dealt with at the Court of Justice for a good number of years. If you wanted to read about it in legal journals, you wouldn’t find any up-to-date article.

Why was that so? I don’t really know. It could be as Jean-François said, but I think everything has changed with the exponential growth of e-commerce. I’m telling you this because I want to put into context what I’m going to speak about really. I’m going to speak about a case called *Coty Germany*.

In its Final Report on the e-Commerce Sector Inquiry, which the Commission published in May 2017, the Commission highlighted some structural changes that e-commerce had brought to many markets.

As far as relevance for our subject, the Commission said there was more frequent use of selected distribution system by manufacturers and, more generally, a larger number of vertical restraints in distribution contracts, and in the Commission’s view that phenomenon could raise a number of issues — some new, some perhaps less — from the angle of EU competition law.

To name but a few of these contractual clauses the Commission regarded as potentially requiring deeper scrutiny: as Jean-François said, geoblocking and geofiltering; requirements to set up a brick-and-mortar shop; dual pricing; and also marketplace bans.

No major action was undertaken by the Commission. In fact, the Commission said nothing needs to be done with regard to the vertical group exemption and that that should not be revised before 2020. But, on the other hand, no binding decision from the Commission saw the light in the aftermath of the sector inquiry.

As also said before, national competition authorities were a lot more active in this field. A particularity of them took action against so-called "parity clauses" that are used by certain hotel reservation platforms, such as Booking.com, etc., but most of the proceedings were finally settled as the companies concerned accepted to change their practices and narrowed the scope of those clauses.

In some jurisdictions the authorities went further and required more radical changes. The Commission acted only later by investing similar restrictions in the e-book market, and that procedure, too, was closed by a commitment decision.

From that perspective it is not really surprising that not very many cases came before the Court of Justice that involved vertical restraints. With the exception of the case that I'm going to talk about, *Coty Germany*, none of those cases actually raised anything of interest, to be honest.

Before going into the *Coty Germany* case I also need to menton the situation before this particular case. Already in 2011 the Court of Justice had decided a case called *Pierre Fabre Dermo-Cosmétique*.

In that case a manufacturer had put an explicit ban on selling over the Internet for all its selected distributors of cosmetics. The Court of Justice in this particular case actually said that that was a restriction of competition by object: selling cosmetics was not good enough to have a selective distribution system, selling cosmetics was not as such protected by the so-called *Metro* criteria; and it was considered by object — it didn't need to show anything; it was simply restrictive of competition.

In some jurisdictions — and I think by some commentators — this was taken as an indication that now the Court of Justice was going to go back and say that the approach to vertical restraints would be a lot more strict than before. I'm sure one could have different opinions on that, but it is my view that that was in fact the reason why the situation came up in *Coty Germany*.

Let me go back to what *Coty Germany* was all about. The facts of the case I think were fairly simple.

Coty Germany is a manufacturer of luxury cosmetics and perfumes and it has concluded several selective distributorships, one with a company called Parfümerie Akzente. In these selective distributorships the distributors were required to respect and protect the luxury image of the products and, as a consequence of that, they were not allowed to sell the products over the Internet using discernible third-party platforms. Internet sales could only be effectuated by using their own platforms, which should be designed in a certain way to give the appearance of luxury. In essence, this meant a total ban on using platforms such as Amazon and the like.

Parfümerie Akzente did not accept this clause, and when Coty Germany tried to enforce it before the lower court, Coty actually lost the case. The national court in that case simply said it considered the clause to be anticompetitive and it could not benefit from any kind of exemption. It is interesting to note that the national court actually made explicit reference to the *Pierre Fabre* case as support for its judgment.

Well, why give up in the court of first instance? You appeal, obviously. So Coty Germany did appeal, and the regional court posed a preliminary question to the Court of Justice. In fact, they asked four preliminary questions.

The first issue was in fact whether the protection of the brand image of a product is a legitimate requirement that justifies the setting up a selective distribution system.

The second issue was whether an online marketplace ban amounts to "restriction of competition by object" within the meaning of now Article 101, and by the same token whether or not it would be a hardcore restriction within the meaning of the Vertical Restraints Block Exemption Regulation.

I think it's fair to say that some of the Court's pronouncements in this *Coty* judgment have been a focus for debate on what the Court actually said and what it did not say. For that reason, I was planning on simply saying how I see what the Court actually said, and then to complement the picture I'll simply give my opinion of what it did not say.

As regards the first question, the Court of Justice essentially stated that where the conditions of *Metro I*, which is the mother of all vertical cases in EU law from 1977, are fulfilled, a restraint aimed at preserving the image of a product is presumptively lawful. In other words, it falls outside the scope of Article 101. This is a big thing. It's not even anticompetitive to begin with and you can get an exemption; it simply falls totally outside.

The Court said in Paragraph 24 of the judgment: "The organization of a selective distribution network is not prohibited by Article 101 to the extent that resellers are chosen on the basis of objective criteria of a qualitative nature, laid down uniformly for all potential resellers, and not applied in a discriminatory fashion, that the characteristics of the product in question necessitate such a network in order to preserve its quality and ensure its proper use, and finally that they do not go beyond what is necessary."

The interesting part is that the characteristics of the product in question "necessitate" such a network. That was the whole thing in *Coty*.

Here it's important to emphasize that firms do not compete only on price but also, inter alia, on quality and innovation.

In my view, it is plainly irrelevant to argue that online marketplaces intensify price competition among retailers. I don't think it can be disputed that while restricting intrabrand price competition selective distribution systems promote interbrand competition in other parameters, they encourage producers to compete on the quality of their products and they provide incentives for retailers to improve the shopping experience of end-users.

Why would a restraint that is known to have such positive benefits or effects be restricted by object?

I tried to summarize this in my opinion that I wrote in this particular case. I said, for example, that "what matters for the purpose of identifying whether there is restriction of competition is not so much the intrinsic properties of the goods in question, but rather the fact that it seems necessary in order to preserve the proper functioning of the distribution system, which is specifically intended to preserve the brand image or the image of quality of the contract goods."

To me, actually I think this is supported by another case from the Court of Justice, a case from 2009, called *Copad*, where the Court ruled that a trademark licensor can invoke its right to prevent a licensee from selling to nonmembers of a selected distribution system. I think that ruling is based on the key premise that if companies cannot protect their intangible property — that is, brand name, trademark, goodwill, what have you — when dealing with third parties, they will refrain from licensing and from selling via independent distributions.

So why would EU law penalize firms that sell or produce via third parties and favor those that produce in-house? *Copad* and *Coty*, in my view, suggest that EU law is indifferent about the distribution model that companies use. There is no reason why vertical integration should be favored over licensing or selling via third parties, and there are many good reasons why the latter should not be treated more strictly.

Just by answering the first question I think the Court finally put an end to the interpretation of the *Pierre Fabre* judgment. Before *Coty* some commentators argued that *Pierre Fabre* suggested that the protection of the prestigious image of a product is not a legitimate requirement justifying the sorts of restraints found in the selective distribution system.

The Court, however, in this case clearly said that the *Pierre Fabre* ruling is confined to the specific circumstances of that case. I can always say, like in the discussion we had before lunch, that the case is still there, but it will be circumscribed all the time. It will be written away in a gradual manner. They will not refer to *Pierre Fabre* again in my view, not in that sense anyway.

The second question concerned the actual ban on using third-party platforms. The Court here, because it was a preliminary reference, first pointed out that it is for the referring court to decide this; but when deciding it they should keep in mind that the contractual clause in their view had the objective of "preserving the image of luxury and the prestige of the goods at issue" and the clause was "objective and uniformly applied without discrimination to all authorized distributors."

The prohibition imposed by a supplier of luxury goods on its authorized distributors to use third-party platforms for the Internet sale of those goods was also, according to the Court, "appropriate to preserve the luxury image of those goods" and everything in their view was proportionate.

I can be fairly quick on the third and

fourth questions because the Court dealt with them together.

The third question was basically: to what extent was a restriction like the one in question a hardcore restriction according to the Vertical Restraints Block Exemption Regulation? The Court simply said, "No, it is not."

If that's what the Court said, what did it *not* say?

Here I think it cannot be inferred from the judgment that the Court's findings are limited to the distribution of luxury goods. The purpose of a selective distribution system is procompetitive effects independent of the nature of the products at issue. Trademark law, for that matter, seeks to protect all producers, not only producers of luxury goods. In my view, there's no reason why EU competition law should be different.

I don't think one could say that the *Coty* judgment is limited — and I think we have differences of opinion on that — to luxury goods. It is clear that the Court of Justice in its answer to the national court spoke about luxury goods the whole time. The reason for that is simple: it concerned luxury products. But I don't think the reasoning in itself is limited to it. That is one contentious question that has to be dealt with.

Second, which is also kind of interesting but on the other perspective, is the fact that the Court only dealt with one thing, namely whether or not luxury products could be used in selective distribution systems and whether or not that marketplace ban was okay. It didn't concern anything else. Therefore, Jean-François' idea that there will be more cases is clearly correct.

This was one case, a small case, but I think it was important. What was important really was that it confirmed the normal rules that we had before in vertical restraints. That means that the *Pierre Fabre* case was an isolated event.

Thank you very much.

JUDGE GINSBURG: Thank you.

Jeff Bank, you have the task of reporting from the United States single-handedly.

MR. BANK: Easy enough. Thank you.

I'll start by stating the obvious, but I think it does confirm that there is convergence between the European Union and the United States on a lot of these points. Vertical arrangements in the United States, whether conduct or merger, raise more questions than we have answers for right now. They are extremely complex, they are different than horizontal restraints, and the tools that we have for assessing vertical restraints need to be different.

I think it's fair to say that in the United States we now recognize that vertical restraints perhaps can do more competitive harm than previously thought, at least as the thinking went from the 1970s to the 1990s when these types of restraints were generally ignored.

But the question now is: Should they be assessed in a manner similar to the analyses done for horizontal restraints? What sorts of presumptions should we make about vertical restraints and vertical arrangements? As President de Silva noted, what are the right tests to use, quantitative and qualitative tests? What effects should we look at and focus on?

I think in the United States we have somewhat more guidance on conduct cases than merger cases. We've simply had more conduct cases, especially recently.

But I think about this from a client perspective, and when a client comes to me and asks me about an exclusive arrangement that they want to enter into, the answer is almost always, "It depends." That's just not good enough.

I think it's worth recounting a little bit of the history in the United States, although it somewhat mirrors the history in the European Union.

Before the 1970s vertical restraints were generally policed vigorously. RPMs, exclusive arrangements, rebates, dealer limitations — all of these were subject to liability findings in the courts and by enforcers. The Court in *Brown Shoe*, a very famous merger case, found there was vertical harm.[1]

Then, as in the European Union, the Chicago School of Economics viewpoints started to trickle in and enforcement of vertical restraints and mergers decreased — particularly after courts acknowledged that such vertical arrangements could be pro-competitive in the *Sylvania* case[2] on the conduct side and the *Hammermill Paper* case[3] on the merger side. It showed that the pendulum was swinging to the other end of the spectrum.

From the early to mid-1970s until the mid-to-late 1990s vertical restraints were essentially ignored by the antitrust enforcers, plaintiffs, courts, etc.

[1] *Brown Shoe Co., Inc. v. United States*, 370 U.S. 294 (1962).
[2] *Continental Television Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).
[3] *United States v. Hammermill Paper Co.*, 429 F. Supp. 127 (W.D. Pa. 1977).

I think then a split started that in the United States continues to today. This may be somewhat divergent from the European Union. Horizontal restraints were, of course, inherently suspect, but vertical restraints were not.

Perhaps due to the influence of the Chicago School view, for vertical restraints, whether conduct or merger, efficiencies were assumed to be greater than any anticompetitive harm. There was little analysis done on a merger-specific basis or a conduct-specific basis. It was simply assumed that if the arrangement in question was vertical then the efficiencies would be greater than any harm.

In the late 1990s there was a sea change as a result of the *Microsoft* decision.[4] It provided a, perhaps not new but a more straightforward, framework for analyzing some of this type of conduct.

In the last eighteen to twenty years or so

[4] *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

we've seen much more nuanced analyses in the United States of vertical restraints. There are new quantitative tools that have been proposed by economists and academics. There are new simulation tools available, both on the merger front and on the conduct front, to estimate what the effects will be if certain conduct is allowed to continue or if a merger is allowed to go forward.

There has also been an increase in qualitative evidence. As email and digital communications have proliferated, it becomes a little bit easier for enforcers and courts to better understand exactly why an actor undertakes certain conduct or why a party wants to enter into a certain transaction. Such evidence can better demonstrate intent, but I think it also can help courts and enforcers better understand the potential effects.

I think it's fair to say that right now in the United States vertical arrangements, conduct or mergers, are not inherently suspect, but certainly there have been significant liability findings in recent years. Bundling, exclusive dealing, rebates — courts have found all of these to be unlawful in certain circumstances.

Of course, the *LePage's* decision,[5] *Dentsply*,[6] *Meritor*,[7] and *McWane*[8] are some of the big ones; there's the consent decree with *Intel*.[9] It shows the courts are taking seriously the threat of vertical restraints and trying to weigh the procompetitive benefits of those restraints and arrangements versus the anticompetitive effects.

It is still unclear under exactly which circumstances vertical conduct or mergers are prohibited or should be prohibited and what the right tests are. Should we look at whether an action raises a rival's costs? Should we look at output? Should we look at price? Should we look at whether certain

[5] *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003).
[6] *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181 (3d Cir. 2005).
[7] *ZF Meritor, LLC v. Eaton Corp*, 696 F.3d 254 (3d Cir. 2012).
[8] *McWane, Inc. v. Federal Trade Commission*, 783 F.3d 814 (2015).
[9] Decision and Order, In the Matter of Intel Corp., No.9341 *available at* https://www.ftc.gov/sites/default/files/documents/cases/101102inteldo.pdf.

conduct results in pricing below cost? Should we look at whether an entity is sacrificing short-term profit to knock out a rival? All of these are potential tests, and there is really no answer at the moment as to which test we should look at.

I think this does lead to the recognition that the United States and the European Union may end up with the same result when determining whether a vertical restraint should be permitted, but the jurisdictions probably begin from a different starting point. As I said, the United States tends to look at vertical restraints and vertical arrangements as not being inherently suspect, whereas I think that's not quite the case in the European Union. But, I think the *Intel* decision in the EU shows that the analysis is perhaps getting more nuanced there and closer to how a US court might view the issues.[10] Certainly the *Coty Germany*[11] decision is in line with some recent

[10] Intel Corp. v European Commission, [2017] Case C-413/14 E.C.R. I ___ (Delivered September 6, 2017).
[11] Coty Germany GmbH v. Parfümerie Akzente GmbH, Case C-320/16, [2017] E.C.R. I ___ (Delivered December 6, 2017).

decisions in the United States, like the *Leegin* decision.[12] So there is room for convergence, but we're not quite there yet.

President de Silva noted that there are certain sectors on which enforcers are more focused. I don't think that's necessarily the case in the US. There is certainly no explicitly stated goal like that in the United States. However, certainly on the merger front, as I'll talk about in a second, technology and media platforms have generated a lot of interest in the last ten years or so.

Let me turn to mergers. In the United States the history of vertical merger enforcement has somewhat tracked the history of conduct enforcement, albeit with many fewer decisions and fewer actions taken.

AT&T/Time Warner was the first litigated merger in the United States in forty years.[13] There have only been about twenty-two or so challenges to

[12] *Leegin Creative Leather Products v. PSKS, Inc.*, 551 U.S. 877 (2007).

vertical mergers in the United States since 2000. You can contrast that against the challenges to horizontal mergers. There are about thirty to forty per year. Vertical mergers have not been at the front of the mind for the enforcers, but I think they are growing in importance.

Let me talk about *AT&T/Time Warner* for a couple of minutes.[14] There — I'm sure you all know – the DOJ alleged that the combination would allow the new entity to harm rivals in three different ways primarily.

The first was that the merger would give the new entity leverage to extract higher prices for content provided by Time Warner. To the extent that a rival distributor didn't end up purchasing the Time Warner content, or to the extent there was a blackout and that rival lost customers, well, those customers would just move over to DirecTV, and AT&T would profit anyway. That was, I think, the primary concern by the

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[13] *United States v. AT&T, Inc.*, 290 F. Supp. 3d 1 (2018).
[14] *Id.*

DOJ.

The second was a concern that the new entity would be able to coordinate more easily with Comcast, one of the other major distributors, or to act unilaterally to play gatekeeper and restrict certain must-have content from rivals. In particular, there was concern about competition with some of the virtual distributors who are themselves vertically aligned, like Netflix, like Amazon, like Hulu, who have the ability to reach consumers in new ways. But of course, if Netflix, Hulu, and Amazon don't have access to some of the must-have content that Time Warner was creating, those rivals could be harmed, and the DOJ was concerned about that.

Third and last, the DOJ was concerned and alleged that the new entity would be able to prevent its competitors from using certain content like *Game of Thrones* to promote and market its own system to consumers.

Of course, as you all know, the court rejected the DOJ's contentions and their economic analysis in an almost 200-page opinion. The case is now going up on appeal, although the merger has closed.

I think it's significant, however, to note that the decision is very fact-specific, and we'll have to see if it has any precedential value going forward. Of course, an appellate decision is probably more likely to have precedential value for future mergers, but it is significant to have a decision on a vertical merger. We haven't had one in forty years.

Of the challenged vertical mergers in the last twenty years, almost all of have been approved with either structural or behavioral conditions. Let me give you some examples. *Google/ITA*, in which Google was required to license certain technology to travel intermediaries.[15] There were deals entered into by both Coke and Pepsi with their bottlers where firewalls were set up to prevent the wrongful sharing of information with Coke and Pepsi by the bottlers.[16] There was the *AMC* merger where both structural and behavioral conditions were applied; there were divestitures required and firewalls set up.[17] Other deals have been abandoned when challenged, including the *Comcast/Time Warner* merger a few years ago.[18]

I think, given the lack of precedent here and given the lack of jurisprudence, and given the lack of Vertical Merger Guidelines put out by the agencies in the United States, which I'll talk about in a second, it's very difficult to extract clear guidance for clients. Of course, I keep coming back

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[15] Final Judgment, *United States v. Google and ITA Software, Inc.*, 1:11-CV-00688 (D.D.C. Oct. 5, 2011), *available at* https://www.justice.gov/atr/case-document/file/497636/download.

[16] *See* Decision and Order, In the Matter of The Coca-Cola Company, No. C-4305 (Nov. 5, 2010), *available at* https://www.ftc.gov/enforcement/cases-proceedings/101-0107/coca-cola-company-matter; Decision and Order, In the Matter of PepsiCo, Inc., No. C-4301 (Sept. 28, 2010), *available at* https://www.ftc.gov/enforcement/cases-proceedings/091-0133/pepsico-inc-matter.

[17] Final Judgment, *United States v. AMC Entertainment Holdings, Inc. and Carmike Cinemas, Inc.*, 1:16-CV-02475 (D.D.C. Mar. 7, 2017), *available at* https://www.justice.gov/atr/case-document/file/955041/download.

[18] Press Release, U.S. Dep't of Justice, Comcast Corporation Abandons Proposed Acquisition of Time Warner Cable After Justice Department and the Federal Communications Commission Informed Parties of Concerns (Apr. 24, 2015), *available at* https://www.justice.gov/opa/pr/comcast-corporation-abandons-proposed-acquisition-time-warner-cable-after-justice-department.

to that, but that is my job, and it's very difficult to counsel clients without the guidance there.

I will note, however, that there has been an explicit shift, stated by the DOJ at least, to favor structural remedies over behavioral remedies. DOJ officials have recently given a number of speeches noting the difficulties in monitoring behavioral conditions for mergers, and I think it's fair to say that over the next few years we will likely see mergers, at least when approved by the DOJ, more often approved with structural conditions rather than behavioral conditions.

Finally, how best to assess verticals, and where do we go from here?

One question is: Will the *AT&T* loss make the DOJ more cautious and/or will it make them more likely to accept behavioral conditions on mergers? *Disney/Fox* was just approved with a structural condition; Disney was required to divest certain sports networks; there were no behavioral conditions applied.[19]

I think — this is just my opinion — companies will become more aggressive in terms of vertical mergers because of the *AT&T* decision, but I don't see the DOJ backing down either, and certainly we have a number of potential vertical mergers and vertical restraints coming up in front of the DOJ, including some in the healthcare field. I know there have been some rumors over the past couple of days about those and we'll see where those go in terms of what, if any, conditions are applied.

A second question is: How do we measure and consider the speed of innovation and emerging technology? *Comcast/NBC* was similar to *AT&T/Time Warner*, but Comcast and NBC abandoned their merger, while AT&T and Time Warner decided to challenge DOJ's

[19] Proposed Final Judgment, *United States v. The Walt Disney Company and Twenty-First Century Fox, Inc.*, 1:18-CV-05800 (S.D.N.Y., Jun. 27, 2018) *available at* https://www.justice.gov/atr/case-document/file/1075176/download.

opposition. The additional competition from vertically aligned virtual distributors changes the competitive dynamics; President de Silva noted this also. With Netflix and Hulu and Amazon changing the landscape, I think the enforcers and courts are going to have to figure out how to deal with that.

Last, I'll ask the question: Is it time to revise the Non-Horizontal Merger Guidelines in the United States? They were last revised in 1984. There is a lot of debate about this out there; there are reasons to do it and reasons not to. But it might provide an opportunity for the United States to align itself with the European Union, which more recently revised their Guidelines.

Thank you.

JUDGE GINSBURG: Thank you, Jeff.

I want to throw something out on the table and then we'll ask if there are some cross-comments, but very briefly because we want to leave some time for some questions.

What I find surprising in some of this is that the empirical literature — none of which was available when Bork or Posner were first writing — has been so lopsided in favor of vertical restraints. This is not dealing with mergers.

There are twenty-some studies that uniformly come to the conclusion that the particular industry or restraint investigated was procompetitive. There is a meta study by Francine Lafontaine, who was Chief Economist for the FTC, and Margaret Slade, in which they found 85 percent of all the vertical restraints across these studies were procompetitive. That still leave you with "it depends" because there's that 15 percent, or whatever it really is, so it's not per se one way or another.

But it does strike me as surprising that there is any kind of resurgence of interest in vertical restraints that have been the subject of these kinds of studies, these contractual restraints of the sort that Advocate General Wahl was describing.

By the way, I have remained silent on *AT&T/Time Warner*. The appeal is in my court. I don't know whether I will be on the case, I don't know whether I want to be on the case, but I have no choice one way or another.

Any cross-comments briefly before we turn to the audience?

MR. BELLIS: A brief comment about *Coty*. I'm very concerned about how *Coty* will be applied by national courts and national competition authorities. One week after the *Coty* Court of Justice judgment, a judge in Germany found that ASICS sport shoes were not a luxury product and would not qualify. But the previous year in the Netherlands Nike shoes were considered to be a luxury product. You have antitrust law and are reduced to discussions about whether a shoe is a luxury product or not. I personally find that pathetic.

But there is a problem. A lot of people have difficulty understanding that the interests of a manufacturer in how its product reaches the consumer survives the sale of the product to dealers. These are seen as restrictions of competition which should be put in a box, exempted, restriction by object or not. I think it's a very limited analysis which doesn't really take into account the broader consensus that these restraints normally do not restrict competition.

JUDGE GINSBURG: President de Silva?

MS. de SILVA: I want to underline how interesting it is to see this excellent overview of the American antitrust landscape in terms of verticals to see that we might have some convergence on the general approach.

The first point I want to make is: What is the attitude of the Court in terms of this type of problem? We have a recent decision where the Court decided not to follow the DOJ.

In the case I was mentioning about the merger between Canal+ and TPS, the Court in one of the remedies – the only thing that they changed in the Authority’s decision — felt that the remedies were not going far enough to protect potential vertical effects on the market, and so they decided that the decision should be even more rich in terms of remedies. That’s one case in which the Court deemed really that the vertical competition issues were so serious that the agency should have gone even further. That’s interesting to take into account.

Also, I wanted to react to the very interesting debate about behavioral remedies with respect to structural remedies. We’ve been hearing with interest what Makan has been saying the last few months. We are having an internal discussion about those subjects, and we will be issuing a report making an analysis of behavioral remedies. What can we say about those? Are they effective in terms of the issues that we need to tackle?

Of course, we all agree that structural remedies are much easier to monitor. That is quite obvious. Still, in some cases it's not easy to find even a structural remedy, and you don't want maybe to go too far.

I think there is a real tradeoff between behavioral and structural remedies, and this is going to be one of the important topics in the next few months in France, and maybe in Europe.

MR. WAHL: If I understood you correctly, are we talking about one can have a point of view saying that vertical restraints are nonproblematic from a competition perspective but there are still some parts that might be problematic?

To me, I'm sort of hung up on *Coty Germany*. I beg your pardon for that. I see that as an acknowledgment of going back to the idea that in fact 85 percent is positive; it's procompetitive.

But they are not simply given carte blanche to do anything. They do limit it to that particular clause and sort of, "Come back and ask us more on the other parts."

First of all, it's inherent in the style of the Court not to answer more than they're asked, but even so it is an opening for not saying that everything is gravy. Something is good, and that particular thing was good. Let's see what the rest have to do.

JUDGE GINSBURG: It took us from 1977, when our Supreme Court said territorial restraints were not anticompetitive, until 2010, when it said RPM was not anticompetitive. It was a long time coming.

Questions from the audience? We have time for a few, and we may be able to borrow a few minutes from the break. Question time. Over there. Oh, James.

MR. KEYTE [off-mic]: Do you think there is going to be a distinction drawn as this plays out between price-related vertical restraints and nonprice-related vertical restraints: price-related because you have the real risk of false positives – there are lower prices conveniently passed on, although that can be a subject — versus nonprice, where you might get into some more clear guidance with respect to this? It actually comes out of *Intel* as well, in terms of the length of the restriction, the foreclosing type of restriction. Do you see some clarity coming from that potential fork?

JUDGE GINSBURG: That was the sequence in the United States.

What do you expect in Europe?

MR. BELLIS: *Intel*, of course, again talking about boxes, we put it in a different box, the box of abuses, exclusionary conduct. The discussion that we had here was a discussion which was more about Article 101, so it’s not abuses of dominance.

Price-related and nonprice-related restraints thus far have been put in the same box as hardcore restrictions. I think they will continue to be viewed with great suspicion by competition authorities and courts.

I mentioned this reference in the 2010

Vertical Guidelines to define that some of the Article restrictions, including RPM, could be seen as exemptible. I remember that the Commission officials who were in charge of drafting those Guidelines expressly said that they were paying attention to the discussions in the United States about *Leegin*, but all they were prepared to accept in those Guidelines was very limited use of those clauses in exceptional circumstances. So not the broad treatment of those restrictions, as we're coming now under the rule of reason rather than the perceived prohibition that you find in the United States.

I think that in Europe indeed vertical restraints continue to be seen very negatively. I think that the Commission tried to stay away from that area for a long time, but it has kept the block exemption, which is based on the presumption that these arrangements are a violation of competition law.

So I think it will take a long time to reach a stage where the United States currently stands in

Europe.

JUDGE GINSBURG: We have time for one more.

QUESTION [Andreas Mundt, Bundeskartellamt][off-mic]: Andreas Mundt from the Federal Cartel Office.

I think it's not a secret that we were among those who were a bit worried about the *Coty* judgment because what we see today in our agency — and it may be the same in other agencies in Europe — is we have received a lot of complaints from small dealers who are prevented from selling online by the manufacturers. As a result or a consequence of the *Coty* judgment, we have a very broad movement by manufacturers in Germany to exclude smaller dealers from selling their products via third-party platforms. That is a natural consequence.

We were always worried that if the *Coty* judgment comes as it did, in the very end we wouldn't have had three parties maybe that were able to sell online — that would be the manufacturer, who is always found in the Internet; that would be the huge platforms, like Amazon, that of course are always found by the consumer; and there might be very large dealers, third dealers, who are found, too.

But what happens to the small ones? Don't we see a reduction of the competitive process if we exclude those from dealing online?

All the more, we saw from the sector inquiry from the European Commission on e-commerce that as far as Germany is concerned 65 percent of the dealers said that selling via a third-party platform was vital for that and that they could not be found with their own Internet shop if they didn't have the access to these huge platforms.

That is our concern that we have, a broad limitation of the competitive process, since a great deal of dealers might not be found on the Internet anymore, and that will reduce competition to a small group of those large enough to be found on the Internet.

As I said, since we receive a great many complaints today that exactly this is happening, does that play a role? Is that seen? Or do you think that is a German specificity of the Federal Bundeskartellamt?

JUDGE GINSBURG: It was a U.S. concern in the 1930s but not very recently. This is intrabrand competition you're talking about.

MR. BELLIS: Indeed, this is a very old issue. It's paradoxical, and I understand of course the concern. There is a concern of protecting the small dealer and to allow him to sell its products on Amazon, the platform which eventually may put the dealer and all its competitors out of business anyway. I understand it's a difficult issue, but should competition law be applied to protect the dealers regardless of the broader impact of the practice of competition?

QUESTIONER [Mr. Mundt][off-mic]: It's not about protecting small dealers. If you exclude a great many dealers, you also reduce the choice for the consumer, where he can buy his product and at which price. So it's not about protecting certain companies. It's not about protecting small companies. It's about reducing the choice for the consumer. I think that is a different issue.

QUESTION [Alexander Riesenkampff, University of Freiburg Law School][off-mic]: That's a restraint of competition.

QUESTIONER [Mr. Mundt][off-mic]: That is a restraint of competition. I'm just trying to fuel your debate.

MS. de SILVA: I just want to make a remark about this debate about *Coty*. It's true that many lawyers have questions from their clients, and I am quite impressed by the number of questions that remain after *Coty* or the other questions that the Court didn't have to decide because it was not what was being asked of the Court at that time.

I think that this is so important for

companies because the issue of e-commerce is, of course, completely vital for many companies today, and there is this uncertainty in some cases about how can you translate what the Court said about different products. For example, that's one of the questions you alluded to. What about other types of restrictions that are not in the scope of the Court?

Maybe this can lead us to some thoughts about legal certainty: What are the ways to achieve better legal certainty on those matters, and is it possible?

But I'm really impressed by the fact that before the *Coty* decision there were lots of conferences dealing with it, but there are almost as many conferences and debates after the decision.

JUDGE GINSBURG: I think the last word goes to the Advocate General.

MR. WAHL: I simply think that it's important to remember — and I think that was the point made in *Coty* — that price competition is obviously important, but it’s not the whole thing; there is competition in other parameters, too.

It is sort of self-regulating because what Coty Germany, the company, is doing is in fact trying to sell more, to increase interbrand competition by limiting intrabrand competition.

I don’t see your concern about choice. That presupposes that there are different groups of customers, one going along with the platforms, one going for platforms and individual, and one going for the individual. There are no such indications in the sector inquiry, for example, and I don’t think there is anything in that.

But I do acknowledge that the situation is different in different countries. I know the situation is clearly different in Germany.

QUESTIONER [Mr. Mundt][off-mic]: That’s the point.

MR. WAHL: To be honest, I haven’t really understood why it is so different, but it is different.

Just as a twist, I heard because when I was at a seminar in Düsseldorf that apparently Coty Germany, the mother company, now has started selling on Amazon for some reason or another. I don't know why.

QUESTIONER [Mr. Mundt][off-mic]: I wonder if all this has to be taken into account because these are all new questions that have not been answered by the *Coty* judgment.

MR. WAHL: What is taken into account in the judgment was what was put forward before the Court.

JUDGE GINSBURG: For this very reason we must reconvene in a couple of years and pick up from where we are now.

Please join me in thanking the panel.

MR. KEYTE: So let's take fifteen minutes, and then we'll have the health care panel. Thank you.

[Adjourned: 3:08 p.m.]