



EUROPEAN COMMISSION
Competition DG

CASE AT.40632 – MONDELEZ TRADE RESTRICTIONS

(Only the English text is authentic)

ANTITRUST PROCEDURE Council Regulation (EC) No 1/2003

Articles 7 and 23(2) Regulation (EC) 1/2003

Date: 23/05/2024

This text is made available for information purposes only. A summary of this decision is published in all EU languages in the Official Journal of the European Union.

Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...].



Brussels, 23.5.2024
C(2024) 3313 final

COMMISSION DECISION

of 23.5.2024

**relating to a proceeding under Article 101 and Article 102 of the Treaty on the
Functioning of the European Union**

(AT.40632 - Mondelez Trade Restrictions)

(Only the English text is authentic)

TABLE OF CONTENTS

1.	Introduction.....	4
2.	The undertaking concerned	5
3.	The product and geographic areas concerned	6
4.	Procedure.....	6
5.	Conduct under investigation	8
5.1.	Overview of Mondelēz’s activities	8
5.2.	The distribution of Mondelēz’s products	9
5.3.	Anticompetitive conduct	11
5.4.	Agreements and/or concerted practices that had the object of restricting parallel trade in Mondelēz products	11
5.4.1.	Agreements that had the object of preventing certain exclusive distributors from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz.....	11
5.4.1.1.	Express contractual restrictions on passive sales	12
5.4.1.2.	Other agreements restricting passive sales and other parallel trade.....	14
5.4.2.	Agreements that had the object of limiting the territories or customers to which certain brokers could sell Mondelēz products.....	18
5.4.2.1.	Restrictions imposed on [broker 1] ¹ /Mondelēz Germany – April 2012	20
5.4.2.2.	Restrictions imposed on [broker 2]	20
5.4.2.3.	Restrictions imposed on [broker 3]	21
5.4.2.4.	Restriction imposed on [broker 4].....	23
5.4.2.5.	Restriction imposed on [retailer 1]/[parent company of retailer 1].....	23
5.4.2.6.	Restriction imposed on [broker 5].....	24
5.4.2.7.	Restriction imposed on [broker 6]/Mondelēz Netherlands – December 2017.....	24
5.5.	Unilateral conduct aimed at market partitioning.....	24
5.5.1.	Restricting parallel trade by a broker in order to prevent the decrease of prices in certain EU countries	24
5.5.2.	Ceasing the supply of products in one Member State to prevent them from being imported into a neighbouring Member State.	27
6.	Legal assessment.....	28
6.1.	Application of Article 101 of the Treaty.....	28
6.1.1.	Agreements and/or concerted practices between undertakings	28

¹ Parts of this text have been edited to ensure that confidential information is not disclosed. Those parts are replaced by a non-confidential summary in square brackets or are shown as [...].

6.1.1.1. Principles.....	28
6.1.1.2. Application to this case	29
6.1.2. Restrictions of competition by object	32
6.1.2.1. Agreements that had the object of preventing exclusive distributors from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz	33
6.1.2.2. Application to this case	34
6.1.2.3. Agreements that had the object of limiting the territories or customers to which certain brokers could sell Mondelēz products.....	35
6.1.3. Single and repeated infringement.....	39
6.1.3.1. Principles.....	39
6.1.3.2. Application to this case	40
6.1.4. Effect on trade between Member States.....	43
6.1.4.1. Principles.....	43
6.1.4.2. Application to this case	43
6.1.5. Appreciable impact on competition	43
6.1.5.1. Principles.....	43
6.1.5.2. Application to this case	44
6.1.6. Application of Article 101(3) of the Treaty	44
6.1.6.1. Principles.....	44
6.1.6.2. Application to this case	45
6.1.7. Conclusions regarding infringements of Article 101(1) of the Treaty.....	45
6.2. Application of Article 102 of the Treaty.....	47
6.2.1. Market definition.....	47
6.2.1.1. Relevant product market	47
6.2.1.2. Relevant geographic market.....	52
6.2.2. Dominance	56
6.2.3. Application to this case	57
6.2.4. Abuses of Mondelēz’s dominance in markets for the wholesale supply of chocolate tablets	65
6.2.4.1. Principles.....	65
6.2.4.2. Partitioning of the Internal Market by restricting cross-border trade as an abuse by nature.....	67
6.2.4.3. Application to this case	69
6.2.4.4. Impact on competition and consumers.....	72

6.2.4.5. Objective justification and efficiencies.....	73
6.2.4.6. Effect on trade between Member States.....	74
6.2.4.7. Conclusions regarding infringements of Article 102 of the Treaty	75
7. Scope and duration of the infringements	75
8. Addressees.....	78
8.1. Principles.....	78
8.2. Application to this case	79
9. Remedies and Fines.....	83
9.1. Remedies under Article 7 of Regulation (EC) No 1/2003:.....	83
9.2. Article 23(2) and (3) of Regulation (EC) No 1/2003	84
10.1.1.1.General methodology	84
10.1.1.2.The value of sales.....	85
10.1.1.3.Gravity.....	87
10.1.1.4.Duration.....	88
10.1.1.5.Additional amount.....	88
10.1.1.6.Aggravating or mitigating circumstances	88
10.1.1.7.Deterrence	88
10.1.1.8.Application of the 10% turnover limit	89
10.1.1.9.Reduction of the fine in view of cooperation.....	89
10.1.2. Conclusion: final amount of the fine.....	89

COMMISSION DECISION

of 23.5.2024

CASE AT.40632 - MONDELEZ TRADE RESTRICTIONS

(Only the English text is authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty², and in particular Articles 7 and 23(2) thereof,

Having regard to the Commission decision of 28 January 2021 to initiate proceedings in this case³,

Having given the undertaking concerned the opportunity to make known its views on the objections raised by the Commission pursuant to Article 27(1) of Regulation (EC) No 1/2003 and Article 12 of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the Treaty⁴,

After consulting the Advisory Committee on Restrictive Practices and Dominant Positions,

Having regard to the final report of the hearing officer in this case,

Whereas:

1. INTRODUCTION

- (1) In this Decision, the Commission finds that at different periods between 18 December 2006 and 7 March 2020 Mondelēz International, Inc., and one of its subsidiaries (either Mondelez Europe GmbH or Mondelez Middle East & Africa FZE, respectively) engaged in 22 infringements of Article 101 of the Treaty and two infringements of Article 102 of the Treaty, which can be categorised as follows:

² OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102, respectively, of the Treaty. The two sets of provisions are, in substance, identical. For the purposes of this Decision, references to Articles 101 and 102 of the Treaty should be understood as references to Articles 81 and 82, respectively, of the EC Treaty when where appropriate. The Treaty also introduced certain changes in terminology, such as the replacement of ‘Community’ by ‘Union’ and ‘common market’ by ‘internal market’. Where the meaning remains unchanged, the terminology of the Treaty will be used throughout this Decision.

³ The Commission decision of 28 January 2021 to initiate proceedings in this case has been amended through a Correcting Decision adopted on 7 March 2024.

⁴ OJ L 123, 27.4.2004, p. 18.

- (a) Agreements falling under Article 101 of the Treaty that had the object of preventing certain exclusive distributors from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
 - (b) Agreements falling under Article 101 of the Treaty that had the object of limiting the territories or customers to which certain brokers could sell Mondelēz's products;
 - (c) Abuse of dominant position falling under Article 102 of the Treaty by restricting parallel trade by a broker in order to prevent the decrease of prices in certain EU Member States;
 - (d) Abuse of dominant position falling under Article 102 of the Treaty by ceasing the supply of products in one Member State to prevent them from being imported into a neighbouring Member State.
- (2) When in this Decision reference is made to 'Mondelēz', this signifies for each of these infringements Mondelēz International, Inc., its subsidiary or subsidiaries directly participating in the respective infringement and, if appropriate, Mondelez Europe GmbH.

2. THE UNDERTAKING CONCERNED

- (3) Mondelēz is a global food and beverage company focused on snack products, which together with its direct and indirect subsidiaries is active in more than 150 countries with its headquarters in the USA⁵. It is listed on the Nasdaq Global Select Market under the symbol 'MDLZ'. Mondelēz was created in October 2012 as a result of Kraft Foods Inc. splitting into two publicly traded companies: Mondelēz International, Inc., which focuses on snacking and food products and is active globally, and Kraft Foods Group, Inc., which focused on grocery products in North America and which is now part of the Kraft Heinz Company. In this Decision, the subsidiaries of Kraft Foods Inc. that became part of Mondelēz will be referred to by the name of the successor Mondelēz subsidiary.
- (4) Mondelēz's core business is the production, marketing and distribution of chocolate, biscuits and baked snacks. Other businesses include candy, cheese, and powdered beverages. In the Union, Mondelēz is primarily active in relation to chocolate confectionery, biscuits, candy and cheese. Mondelēz sells chocolate confectionery under a range of brands (including Milka, Côte d'Or, Toblerone, Cadbury, Marabou, Daim, Mirabell and Suchard) and biscuits under other brands (Oreo, Belvita, LU, Ritz, LiGa, Mikado).
- (5) Until 2 July 2015 Mondelēz was also active in the production, marketing and sales of coffee products⁶. Its portfolio included brands such as Jacobs, Gevalia, Carte Noire, Kaffee HAG, Jacques Vabre, Grand' Mère, Kenco, Saimaza, Maxwell House, Onko, Splendid and Tassimo hot beverage system⁷. In 2015, Mondelēz 'deconsolidated' this segment of its activities and combined it with D.E Master Blenders 1753 B.V. in

⁵ 905 West Fulton Market, Suite 200, Chicago, IL 60607, United States.

⁶ Mondelēz's beverages business, including coffee, accounted for 11% (USD 3.8 billion) of its 2014 revenue (Mondelēz 2015 Annual Report, p. 4).

⁷ Kraft Foods Inc. 2011 Annual Report, p. 4.

order to focus on its core snack business. The two companies formed Jacobs Douwe Egberts (now part of JDE Peet's N.V.), a new coffee business, in which Mondelēz held a non-controlling interest of 43.5% at the time of formation⁸.

- (6) In 2023, Mondelēz's global net revenue was USD 36 billion (EUR 33 billion), of which USD 12.9 billion (EUR 11.9 billion) came from sales in Europe⁹. About 48 % (EUR 5.8 billion) of this amount was derived from chocolate products and around 34 % (EUR 4.1 billion) from biscuits and baked snacks¹⁰.

3. THE PRODUCT AND GEOGRAPHIC AREAS CONCERNED

- (7) The Mondelēz products that are the focus of this Decision include various chocolate confectionery, biscuit and coffee products sold by Mondelēz under various brands, such as: Cadbury, Côte d'Or and Milka chocolate products; LU, Oreo, and Ritz biscuit products; and Carte Noire and HAG coffee products. The Commission has previously found in the context of merger control investigations that chocolate confectionery products are generally divided into various segments, including chocolate tablets, countlines, pralines, and small bites, each of which may constitute a distinct relevant product market¹¹. Biscuit products can be further divided into sweet biscuits, savoury biscuits, soft cakes and baby biscuits, which largely correspond to the segmentations observed in prior Commission merger control decisions¹². Other such decisions have found that coffee products can be further divided into roast and ground ('R&G') coffee, instant coffee, and coffee capsules for specific coffee machine systems, each of which may constitute a distinct relevant product market¹³.

- (8) The products concerned by this Decision are generally sold throughout the Union. As will be discussed below, the geographic area covered by Mondelēz's various anticompetitive practices varied. Many practices covered all or substantially all of the Union, while some covered a smaller number of Member States.

4. PROCEDURE

- (9) Between 18 and 22 November 2019, the Commission carried out on-the-spot inspections under Article 20(4) of Regulation (EC) No 1/2003 at the premises of Mondelēz in Bremen (Germany), Mechelen (Belgium) and Vienna (Austria), assisted by the German, Belgian and Austrian national competition authorities, respectively.

⁸ Mondelēz 2015 Annual Report, in particular p. 23-24.

⁹ Mondelēz Annual Report on Form 10-K for the fiscal year ended 31 December 2022. Exchange rate applied (ECB 2022 average): 1.0530.

¹⁰ Mondelēz Annual Report on Form 10-K for the fiscal year ended 31 December 2022. Exchange rate applied (ECB 2022 average): 1.0530.

¹¹ Commission decision of 6 January 2010 in case M.5644 – *Kraft Foods/Cadbury*, paragraph 24; Commission decision of 16 October 2000 in case M.2072 – *Philipp Morris/Nabisco*, paragraph 11.

¹² Commission decision of 9 November 2007 in case M.4824 – *Kraft/Danone Biscuits*, paragraph 13; Commission decision of 6 January 2010 in case M.5644 – *Kraft Foods/Cadbury*, paragraph 31.

¹³ Commission decision of 5 May 2015 in case M.7292 – *DEMB/Mondelez/Charger OPCO*, paragraphs 103, 123, 142 and 151.

- (10) On 28 January 2021, the Commission initiated proceedings in the present case within the meaning of Article 2(1) of Regulation (EC) No 773/2004¹⁴. The investigation covered conduct in the period between 18 December 2006 and 7 March 2020 ('Investigation Period').
- (11) In the course of 2021 and 2022 the Commission sent requests for information under Articles 18(2) and 18(3) of Regulation (EC) No 1/2003 to Mondelēz, its competitors, its customers and third parties to gather additional evidence.
- (12) On [...] Mondelēz expressed interest in beginning cooperation discussions with the Commission. The cooperation discussions took place in the period between September 2022 and January 2024.
- (13) On [...] Mondelēz submitted a formal offer to cooperate in this case in view of the adoption of a decision pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 (the 'Settlement Submission'). By way of its Settlement Submission Mondelēz:
- (a) acknowledged joint and several liability for its participation in the infringements of Articles 101 and 102 of the Treaty as described above and that liability for certain of the infringements as set out below should be imputed to Mondelez Europe GmbH and Mondelez Middle East & Africa FZE as the legal entities exercising decisive influence over the relevant Mondelez subsidiaries that directly participated in the respective constituent elements of the infringements, and that liability should be ultimately attributed to Mondelēz International, Inc. for all of the infringements described above in its capacity as the ultimate parent company holding directly or indirectly 100% of the shares of all the legal entities that directly participated in those infringements and the legal entities that exercised decisive influence over them;
 - (b) declared that its worldwide turnover amounted to approximately EUR 33.3 billion in 2023, the most recent year for which audited financial statements are available, and that the respective value of sales of its products to which the infringements directly or indirectly relate in the last full business year of the infringement was as stated in this Decision;
 - (c) acknowledged that the percentage of the value of sales to be taken into account in this case should be set at 10 % for each infringement to reflect the degree of gravity of the infringements in accordance with point 19 of the Guidelines on Fines¹⁵, and that that percentage is proportionate in view of the number of infringements and the fact that they pursued the same anticompetitive objective;
 - (d) acknowledged that, in view of its total turnover of approximately EUR 33.3 billion in the most recent year for which audited financial statements are available, the basic amount of the fine warrants an increase of 10 % in application of point 30 of the Guidelines on Fines;

¹⁴ This decision was amended by way of a Correcting Decision of 7 March 2024.

¹⁵ (a) of Regulation No 1/2003 (OJ C 210, 1.9.2006, p. 2).

- (e) agreed with the view that the added value it has provided to the investigation deserves to be taken into consideration and acknowledged that a reduction of 15 % is warranted; and
 - (f) acknowledged that it would be appropriate for the Commission to formally establish the described infringement and impose a fine for all infringements acknowledged above, in light of the fining parameters set out above, not exceeding EUR [...], for which Mondelēz International, Inc. would be jointly and severally liable for the whole amount, and that it would be appropriate to hold Mondelez Europe GmbH jointly and severally liable with respect to certain of those infringements for an amount which does not exceed EUR [...] and to hold Mondelez Middle East & Africa FZE jointly and severally liable with respect to certain other infringements for an amount which does not exceed EUR [...].
- (14) On 7 March 2024, the Commission issued a statement of objections addressed to Mondelēz, in which it raised objections on the basis of the events as described in Section 5 of this Decision. Mondelēz replied to the statement of objections on 22 March 2024 by confirming that the facts and the legal assessment of the infringement as set out in the statement of objections reflect the contents of their settlement submission and that they remained committed to following the cooperation procedure.

5. CONDUCT UNDER INVESTIGATION

5.1. Overview of Mondelēz’s activities

- (15) Mondelēz’s operation and management structure currently consists of four operating regions worldwide: Latin America; Asia, Middle East and Africa; Europe; and North America. Mondelēz’s European operations are managed out of Switzerland and are carried out by legal entities engaged in various business activities, including national sales companies.
- (16) In most cases, the individual Mondelēz national sales company in a given country is Mondelēz’s main channel for sales to the retailers (and to a lesser extent, the wholesalers) that operate in that country.
- (17) In addition to sales through national sales companies, Mondelēz also made sales to customers in Europe during the Investigation Period through its World Travel Retail (‘Mondelez WTR’) and European Export (‘EU Export’) divisions¹⁶, each of which had a distinct mandate:
- (a) Mondelez WTR had a global mandate within Mondelēz to market a portfolio of Mondelēz categories & brands in global travel retail;
 - (b) EU Export handled Mondelēz’s European sales to distributors in cases where no local Mondelēz affiliate existed (e.g. Iceland and Malta) or where the local Mondelēz affiliate did not handle non-core categories / brands / channels (e.g. Daim and Marabou in Germany), and occasionally provided transitional distribution services for recently acquired brands for a limited period after being acquired.

¹⁶ Mondelez WTR and EU Export are unincorporated divisions of Mondelez World Travel Retail GmbH.

- (18) Other Mondelēz entities that occasionally sold products in Europe were Mondelēz Eastern Europe, Middle East & Africa FZE, which was in 2017 renamed Mondelez Middle East & Africa FZE ('Mondelez MEA') and Kent Gıda Maddeleri San. Ve Tic. A.Ş. (Türkiye).

5.2. The distribution of Mondelēz's products

- (19) During the Investigation Period, Mondelēz distributed its products in the Union mainly at national level. Mondelēz's national sales companies in a given Member State would sell a wide range of products to customers in that Member State or, in Member States where there was no national sales company or the national sales company did not carry certain products, Mondelēz would sell products through a local distributor through its EU Export division. The customers of the national sales companies and local distributors were primarily retailers or wholesalers that were active within the relevant Member State. Mondelēz's national sales companies also occasionally sold products to 'brokers', which sometimes were based in another Member State. Mondelēz internal documents describe brokers, sometimes called 'traders', as *'opportunistic international trading companies that buy fresh products, aging stock and obsolete products at discounted prices on a non-regular basis and sell these products to their network of customers, as opposed to distributors with which Mondelēz generally has ongoing supply relationships'*¹⁷. In particular, brokers often resold Mondelēz products *'outside the standard channels and mainly outside the country of origin'*¹⁸.
- (20) On top of this predominantly national distribution structure, Mondelēz's EU Export and Mondelez WTR divisions sold products to distributors and specialized customers throughout Europe. The EU Export division generally worked through distribution agreements that would give a single distributor in a given Member State the exclusive right to distribute a specific brand, while the Mondelez WTR division generally sold through duty free channels, border stores, etc., either directly or through distributors. The two divisions' customers occasionally competed against each other, for example, in the German-Danish border region, where border stores targeting customers travelling from Scandinavia competed with local supermarkets.
- (21) The demand side comprised a range of different types of retail customers, including modern retail (e.g. supermarkets, hypermarkets and hard discounters) and non-food retailers (i.e. retailers whose assortments are primarily made up of non-food products).
- (22) Modern retail customers purchased Mondelēz products primarily from the Mondelēz subsidiary within the Member State in which the retailer was active, or from Mondelēz's national distributor if Mondelēz did not have a subsidiary in that Member State. They would also occasionally source some Mondelēz products from wholesalers within the same Member State or from brokers who sourced the products in other Member States. Small shops purchased mainly or exclusively from wholesalers and brokers.
- (23) Non-food retail customers often purchased from distributors and brokers, including from distributors or brokers located in different Member States. Modern trade retail

¹⁷ ID 573.

¹⁸ ID 296-4013.

customers frequently paid attention to the prices offered not only by other modern trade retailers, but also to the prices offered by important non-food retailers.

- (24) During the Investigation Period, the same Mondelēz products were often available at different prices in different Member States. This was known to many of Mondelēz's customers that had operations in multiple Member States, some of which had centralised purchasing departments that negotiated on behalf of multiple local entities. This was also known to other customers that sometimes received offers from brokers or which observed that their competitors' shops were offering products that had been imported from other Member States at lower prices than the customer was able to obtain directly from Mondelēz. Customers sometimes sought to take advantage of those differences to obtain Mondelēz products more cheaply, either by using their existence as a bargaining tool vis-à-vis Mondelēz or by shifting purchases away from Mondelēz to an alternative supply source that directly or indirectly obtained the products in other Member States.
- (25) During the Investigation Period, there were three main sources of supply of Mondelēz products across borders.
- (26) First, Mondelēz often found itself with surplus products that Mondelēz's national sales companies had difficulty selling to their national customers, for example, because the national sales companies had overestimated demand, a customer had decided not to purchase the volumes it had forecast, the products were excess seasonal products or the product in question was being discontinued. Such products were generally referred to as 'residuals'. Residuals were sometimes called 'obsoletes' if they had a best-before date that was less than the trade life guarantee (modern trade retailers often have minimum requirements for the shelf-life remaining on products when they receive them). Mondelēz's national sales companies would occasionally sell such products to brokers, who would in turn sell them to customers that could be located in a different Member State or through a sales channel that Mondelēz did not actively serve.
- (27) Second, Mondelēz personnel within the respective national sales companies were under pressure to meet sales targets that were [business secrets – sales strategy]. One way to increase sales volumes was to offer products opportunistically to brokers at low prices in order to meet sales volume targets. Because these sales carried the risk that the broker would undercut the price that the national sales company charged other customers within the territory, salespeople tended to sell to brokers who they were confident would resell the products outside the national sales company's territory. However, this meant that the products sold by a national sales company in a Member State could indirectly undercut the sales of a national sales company in a different Member State. [business secrets – sales strategy] Mondelēz's national sales companies in different Member States.
- (28) Third, customers with operating entities in multiple Member States could buy through an entity in a Member State where Mondelēz was charging a lower price and transfer the goods to entities in Member States where Mondelēz was charging higher prices.
- (29) All these forms of cross-border sourcing had an impact on the price of Mondelēz products at the retail level, because once a retailer sold imported products in a Member State at a lower price than the price offered by the Mondelēz's national

sales company in that Member State, there was a significant likelihood that other retailers in the market would reduce their retail prices accordingly. This would put pressure on Mondelēz's national sales company in that Member State not only at that moment in time but also with respect to future sales.

- (30) During the Investigation Period, this was a serious concern for Mondelēz's management, both because it reduced Mondelēz's overall profits and because having a national sales company increasing its sales [business secrets – sales strategy] Mondelēz's national sales companies in other Member States was [business secrets – sales strategy] within the company. Mondelēz therefore sought to control parallel trade in order to minimise that [business secrets – sales strategy] and increase its profits, and took steps to ensure that its sales staff did not enter into parallel trade to the detriment of another national sales company.

5.3. Anticompetitive conduct

- (31) During the Investigation Period, Mondelēz engaged in a series of practices throughout the Union aimed at restricting the ability of its customers to engage in parallel trade. These practices concerned Mondelēz's chocolate confectionery and biscuits businesses, as well as Mondelēz's coffee business (before it was spun off in July 2015).

- (32) The practices in question fall under four main categories:

- (a) agreements preventing certain exclusive distributors from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (b) agreements limiting the territories or customers to which certain brokers could resell Mondelēz products;
- (c) restricting parallel trade by a broker in order to prevent the decrease of prices for chocolate tablet products in the territories of Austria, Belgium, Bulgaria and Romania;
- (d) an instance of ceasing the supply of products in one Member State to prevent them from being imported into a neighbouring Member State.

5.4. Agreements and/or concerted practices that had the object of restricting parallel trade in Mondelēz products

5.4.1. Agreements that had the object of preventing certain exclusive distributors from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz

- (33) Mondelēz entered into various agreements with certain exclusive distributors that had the object of preventing the distributors from directly or indirectly making passive sales into territories where those sales could have put downward pressure on the prices of Mondelēz products. As explained in the following sections, a number of Mondelēz's distribution agreements prior to the end of 2017 included express contractual restrictions on making passive sales. In one case, the agreement between the EU Export and the distributor extended beyond a mere passive sales restriction to encompass a general agreement to control parallel trade in and out of the distributor's exclusive territory. In addition, there is evidence of agreements between EU Export

and two distributors under which the distributors would ask permission from Mondelez before making passive sales outside their allocated territories, notwithstanding the absence or removal of the express contractual restriction on passive sales.

5.4.1.1. Express contractual restrictions on passive sales

- (34) Seven distribution agreements between Mondelez's EU Export division and distributors contained the following express restriction on the ability of the distributors to make passive sales:

'Distributors shall in particular refrain from selling contractual products to customers outside the contractual territory nor permit contract customers to export contractual products, unless prior written consent has been given by [Mondelez], whereby said consent shall apply only to the specific single case in question'.

- (35) Mondelez and the various individual distributors amended or replaced their respective distribution agreements at various points between 2013 and 2017, modifying the requirement that the distributor seek Mondelez's permission before making passive sales so that it only applied to sales outside the EEA.
- (36) This clause was present in the following distribution agreements for the following periods in relation to the following products:

5.4.1.1.1. Exclusive distribution agreement between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 1].

- (37) An agreement containing the clause referred to in paragraph (34), which covered the territory of Austria, was signed on 20 December 2006 and 25 January 2007, with retroactive application from 18 December 2006¹⁹. The portfolio of products covered by the distribution agreement varied over time and included: Oreo biscuit products from the beginning of the agreement until 31 December 2010²⁰, Daim chocolate confectionery products from 1 September 2008²¹ and Cadbury chocolate confectionery products from 12 March 2012²², as well as certain Marabou chocolate confectionery products between November 2013 and January 2014²³. The agreement was amended to allow the distributor to make unrestricted passive sales within the EEA at the end of 2016²⁴. The express passive sales restriction affecting [exclusive distributor 1] was thus in place from 18 December 2006 until 31 December 2016.

5.4.1.1.2. Exclusive distribution agreement between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 2].

- (38) An agreement containing the clause referred to in paragraph (34), which covered the territory of Finland, was signed on 16 and 30 April 2007, with effect from the 30 April 2007²⁵. The portfolio of products covered by the distribution agreement

¹⁹ ID 557-77.

²⁰ ID 557-57.

²¹ ID 1954.

²² ID 1954.

²³ ID 1954.

²⁴ The copy of the contract amendment provided by Mondelez was undated. In the absence of evidence to the contrary, it can be assumed that the amendment took effect as of 31 December 2016.

²⁵ ID 297-2999.

included various Mirabell chocolate confectionery products over various periods. The agreement was amended to allow the distributor to make unrestricted passive sales within the EEA on 10 October 2016²⁶. The express passive sales restriction affecting [exclusive distributor 2] was thus in place from 30 April 2007 until 10 October 2016.

5.4.1.1.3. Exclusive distribution agreement between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 3].

(39) An agreement containing the clause referred to in paragraph (34), which covered the territories of Germany and Austria, was signed on 15 and 19 May 2008, with effect from 19 May 2008²⁷. The distribution agreement covered Ritz biscuit products. The agreement was terminated with effect on 30 June 2016²⁸. The express passive sales restriction affecting [exclusive distributor 3] was thus in place from 19 May 2008 until 30 June 2016.

5.4.1.1.4. Exclusive distribution agreement between Kraft Foods World Travel Retail GmbH and [exclusive distributor 4].

(40) An agreement containing the clause referred to in paragraph (34), which covered the territory of Germany, was signed on 15 and 23 September 2011, with effect from 23 September 2011²⁹. The distribution agreement covered Cadbury Wunderbar and Cadbury Curly Wurly chocolate confectionery products. The agreement was amended to allow the distributor to make unrestricted passive sales within the EEA on 27 September 2017³⁰. The express passive sales restriction affecting [exclusive distributor 4] was thus in place from 23 September 2011 until 27 September 2017.

5.4.1.1.5. Exclusive distribution agreement between Kraft Foods World Travel Retail GmbH and [exclusive distributor 5].

(41) An agreement containing the clause referred to in paragraph (34), which covered the territory of Hungary, was signed on 25 January 2012 and 1 February 2012, with effect from 1 February 2012³¹. The portfolio of products covered by the distribution agreement varied over time and included Mikado biscuit products from the beginning of the agreement, Mirabell chocolate confectionery products from 21 May 2015, Côte d'Or chocolate confectionery products from 12 November 2015, and Toblerone chocolate confectionery products from 30 May 2016³². The agreement was replaced with a new distribution agreement that allowed the distributor to make unrestricted passive sales within the EEA on 2 June 2016³³. The express passive sales restriction affecting [exclusive distributor 5] was thus in place from 1 February 2012 until 2 June 2016.

²⁶ ID 1797.

²⁷ ID 519-31.

²⁸ ID 519-23.

²⁹ ID 557-74.

³⁰ ID 557-36.

³¹ ID 901.

³² ID 1957.

³³ ID 296-1609.

5.4.1.1.6. Exclusive distribution agreement between Kraft Foods World Travel Retail GmbH and [exclusive distributor 6]

(42) An agreement containing the clause referred to in paragraph (34), which covered the territory of Poland, was signed on 5 March 2012, with effect from the day of signature³⁴. The portfolio of products covered by the agreement varied over time and included: Toblerone and Daim chocolate confectionery products and Mikado and Ritz biscuit products from 5 March 2012³⁵. The agreement was amended to allow the distributor to make unrestricted passive sales within the EEA on 3 November 2017³⁶. The express passive sales restriction affecting [exclusive distributor 6] was thus in place from 5 March 2012 until 3 November 2017.

5.4.1.1.7. Exclusive distribution agreement between Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7]

(43) The investigation also found evidence of an exclusive distribution agreement between Mondelēz's Turkish subsidiary, Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7], which obliged the distributor to *'refrain from selling Contractual Products to customers outside the Contractual Territory nor permit Contract Customers to export Contractual Products, unless prior written consent has been given by Mondelēz International'*³⁷. The Member States covered by the contractual territory were Germany, Austria, France, Belgium and the Netherlands. The express passive sales restriction affecting [exclusive distributor 7] was in place from 31 December 2016 until 31 December 2017³⁸. The agreement covered a single Milka chocolate small bites product that was only produced in Turkey³⁹.

5.4.1.2. Other agreements restricting passive sales and other parallel trade

(44) The investigation also found evidence of specific Mondelēz practices that had the object of restricting passive sales and other forms of parallel trade, not only through written contractual provisions as described in section 5.4.1.1, but also through informal means. In one instance, there is evidence of a reciprocal understanding that the distributor would prevent direct or indirect parallel exports from its territory, in return for which Mondelēz's EU Export division undertook to protect the distributor from parallel trade originating outside its territory. In other instances, EU Export entered into less formal understandings with exclusive distributors that they would not sell products into territories where Mondelēz or another distributor sold the same products, even though the exclusive distribution contracts with the respective distributors did not contain formal restrictions on passive sales within the Union at the time. This primarily took the form of an understanding that the exclusive distributor must obtain Mondelēz's permission before filling unsolicited sales requests from outside their exclusive territories, but in the case of at least one distributor there is also evidence that Mondelēz required the exclusive distributor to take steps to prevent its customers from engaging in parallel trade.

(45) Each of these practices had the object of limiting passive sales.

³⁴ ID 903.

³⁵ ID 1952.

³⁶ ID 557-2.

³⁷ ID 1604-3.

³⁸ ID 1604-3.

³⁹ ID 1604-3.

5.4.1.2.1. Agreement with [exclusive distributor 8] with the object of limiting parallel sales – 2008 - 2017.

- (46) There is evidence of agreements and concerted practices between EU Export and [exclusive distributor 8] to partition Czechia and Slovakia from the rest of the Union, which included an obligation on [exclusive distributor 8]’s part to obtain EU Export’s permission before making passive sales outside of Czechia and Slovakia, an obligation on the part of EU Export to control parallel trade going into Czechia and Slovakia as well as to carry out additional measures, such as imposing resale restrictions on their respective customers to prevent their goods from being resold outside of Czechia and Slovakia, and a reciprocal commitment by Mondelēz to prevent the import of the relevant products from other EU markets into Czechia and Slovakia.
- (47) The evidence shows that EU Export and [exclusive distributor 8] coordinated to try to shut down parallel trade flows that affected the territory of the other (or, in the case of EU Export, other affiliates or distributors). The evidence includes:
- (a) The use of a clause in the exclusive distribution agreement between [exclusive distributor 8] and EU Export requiring [exclusive distributor 8] to obtain EU Export’s prior permission before making passive sales of any product covered by the distribution agreement in the Union outside of Czechia and Slovakia. The clause was in effect in the various versions of the exclusive distribution agreements between the parties between 17 April 2008 and 17 June 2013, when a new distribution agreement was entered into that did not contain the passive sales restriction. However, as explained in paragraph (48), the evidence shows that at least in February 2015 the parties resumed their cooperation to partition Czechia and Slovakia from the rest of the Union. The specific portfolio of products covered by the distribution agreements in force during that period varied over time and included:
- (1) Côte d’Or chocolate confectionery products from 17 April 2008;
 - (2) Mirabell chocolate confectionery products from 17 April 2008;
 - (3) Toblerone chocolate confectionery products from 17 April 2008;
 - (4) Hag coffee products from 17 April 2008;
 - (5) Daim chocolate confectionery products from 1 September 2011;
 - (6) Mikado biscuit products from 1 August 2011;
 - (7) Ritz biscuit products 1 August 2011;
 - (8) Oreo biscuits from 19 November 2012.
- (b) Complaints by [exclusive distributor 8] to EU Export about parallel imports of Mirabell products into Czechia and Slovakia by customers of Mondelēz Austria between 2012 and 2017, together with evidence that EU Export took steps to cut off those trade flows in cooperation with Mondelēz Austria, including confirmation to [exclusive distributor 8] of the steps taken⁴⁰.

⁴⁰ ID 189-1134; ID 189-264; ID 189-1306; ID 189-1421; ID 189-1421; ID 189-1421; ID 297-1666; ID 169-32; ID 297-266; ID 169-267; ID 169-1271; ID 296-71; ID 296-3140.

- (c) Complaints by Mondelēz Belgium and Mondelēz Chocolate Category that were communicated to [exclusive distributor 8] by EU Export personnel regarding parallel imports of various Côte d’Or chocolate tablets, mignonettes and bouchées by [exclusive distributor 8]’s customers into Belgium between 2015 and 2017, together with agreements between EU Export and [exclusive distributor 8] that: (1) [exclusive distributor 8] would not make passive sales to Belgium and would impose resale restrictions on its wholesale customers and (2) that EU Export and [exclusive distributor 8] would implement a plan to increase the net prices charged by [exclusive distributor 8] to wholesaler customers relative to the net prices charged by [exclusive distributor 8] to large retail customers in order to reduce parallel trade without negatively impacting domestic sales in Czechia and Slovakia⁴¹.
 - (d) Complaints by [exclusive distributor 8] to EU Export in 2015 and 2016 regarding parallel imports of Toblerone chocolate tablets into Czechia by a customer of Mondelēz in the UK, together with steps taken by EU Export within Mondelēz to stop those sales⁴².
 - (e) Statements by EU Export personnel that actions by [exclusive distributor 8] to restrict parallel trade flows out of Czechia and Slovakia were directly linked to actions taken by Mondelēz to restrict parallel trade flows into Czechia and Slovakia⁴³.
 - (f) Statements by [exclusive distributor 8] personnel that it could not make even unsolicited sales of products into territories that were served by a Mondelēz national sales company or another distributor⁴⁴.
 - (g) Statements by Mondelēz personnel indicating that they understood that [exclusive distributor 8] would only sell Mondelēz products outside its exclusive distribution territory with Mondelēz’s approval⁴⁵.
- (48) The agreement covered all products that [exclusive distributor 8] bought from EU Export. It began in the context of the distribution agreement that was signed in 2008 and ended in June 2017 following intervention by Mondelēz’s legal department⁴⁶. The agreement was interrupted when the new exclusive distribution agreement was signed in June 2013, but evidence shows that at least in February 2015 the parties resumed their cooperation to partition Czechia and Slovakia from the rest of the Union.

5.4.1.2.2. Informal restrictions on passive sales involving [exclusive distributor 9] – February 2018.

- (49) Emails exchanged in February 2018 record that a salesperson at [exclusive distributor 9], which was Mondelez EU Export’s exclusive distributor for various products in Germany⁴⁷, received an email from a representative of a Slovak

⁴¹ ID 296-2218; ID 297-2153; ID 179-1485; ID 296-4731; ID 169-1775; ID 296-3040; ID 297-522; ID 296-1733; ID 2279.

⁴² ID 169-1546; ID 169-523.

⁴³ ID 1483-258; ID 296-3040; ID 296-3140.

⁴⁴ ID 169-1284; ID 169-1284; ID 169-716.

⁴⁵ ID 297-2153; ID 296-97.

⁴⁶ ID 297-493; ID 1486.

⁴⁷ ID 557-40.

wholesaler whom the sales person had met at the ISM convention, requesting prices for ‘Cadbury tablets’, ‘Marabou tablets’ and ‘Mozart products’ (i.e. Mirabell products), inter alia. The salesperson forwarded the request to their superior, who in turn forwarded the email to EU Export, asking: ‘*And one more ... What do you think about your brands?*’ EU Export responded: ‘*Mirabell and Cadbury no, Marabou would be OK.*’⁴⁸ This evidence shows that there was an understanding between Mondelēz and [exclusive distributor 9] that [exclusive distributor 9] could not make passive sales outside its exclusive territory without Mondelēz’s prior permission. The agreement was in place until 5 March 2018.

5.4.1.2.3. Informal restrictions on passive sales involving [exclusive distributor 4] and [exclusive distributor 1] – March 2019.

- (50) Emails exchanged in March 2019 record that an Austrian retailer had approached [exclusive distributor 4], EU Export’s exclusive distributor for Cadbury Wunderbar and Curly Wurly chocolate countlines in Germany (see section 5.4.1.1.4, above), seeking to buy those products. [exclusive distributor 4] emailed EU Export, explaining that [exclusive distributor 4] had received the request and asking ‘*are we allowed to act with them, or for Austria does everything go through the distributor?*’⁴⁹ EU Export responded that [exclusive distributor 1], EU Export’s exclusive distributor for those products in Austria, already had good relations with the Austrian retailer, and that there were already promotions for Daim and Marabou products going on in Austria, ‘*therefore, please do not make an offer!*’⁵⁰ EU Export asked [exclusive distributor 4] to refer the Austrian retailer to [exclusive distributor 1], adding that he would contact [exclusive distributor 1] directly⁵¹. EU Export then emailed [exclusive distributor 1], informing them that [exclusive distributor 4] had received the request from the Austrian retailer and would refer it to [exclusive distributor 1]⁵². This evidence shows that there was an understanding between Mondelēz and [exclusive distributor 4] that [exclusive distributor 4] could not make passive sales outside its exclusive territory without Mondelēz’s prior permission. The agreement was in place until 13 April 2019.

5.4.1.2.4. Informal restrictions on passive sales involving [exclusive distributor 9] – February 2020.

- (51) Emails exchanged in February 2020 record that a salesperson at [exclusive distributor 9], Mondelez EU Export’s exclusive distributor for various products in Germany, received an email from a representative of a Romanian distributor whom the salesperson had met at the ISM convention, asking for an offer for ‘Cadbury range’ and ‘Marabou’, among other products. The salesperson forwarded the email to EU Export, writing ‘*[he] asks below about Cadbury and Marabou. May we make an offer here?*’ EU Export replied: ‘*For the time being, simply don’t answer, please - put it off for two weeks – need for clarification.*’⁵³ This evidence shows that there

⁴⁸ ID 296-2435. Original text: ‘*Und noch einer... Was denkst du über deine Marken?*’; ‘*Mirabell und Cadbury nein, Marabou wäre ok.*’

⁴⁹ ID 557-19. Original text: ‘*Können wir mit denen agieren - oder läut AT komplett über den Distributeur?*’.

⁵⁰ ID 557-19. Original text: ‘*Daher bitte nicht anbieten!*’

⁵¹ ID 557-19.

⁵² ID 557-1.

⁵³ ID 557-10.

was an understanding between Mondelēz and [exclusive distributor 9] that [exclusive distributor 9] could not make passive sales outside its exclusive territory without Mondelēz's prior permission. The agreement was in place until 7 March 2020.

5.4.1.2.5. Conclusions regarding informal restrictions on passive sales

(52) The instances described above demonstrate clear understandings between EU Export and its distributors [exclusive distributor 9], [exclusive distributor 8] and [exclusive distributor 4], respectively, that, at a minimum, the distributors had to seek permission from Mondelēz before filling passive sales requests, and that they would not make such sales if EU Export objected. In the cases of [exclusive distributor 9] and [exclusive distributor 4], the distributors understood that they could not make passive sales outside their exclusive territory without Mondelēz's prior permission. These were not merely instances of the distributors informing Mondelēz of new sales activities or checking stock levels. Mondelēz clearly understood that the distributors were asking for permission to make unsolicited sales to customers outside their exclusive territories, and knew that it could – and, the evidence shows, did on at least two, possibly three, occasions – withhold its permission and stop the sales. In the case of [exclusive distributor 8], the evidence shows that the understanding went further, in that the parties both understood that they each had a reciprocal obligation, entailing a commitment by [exclusive distributor 8] to prevent the export of the relevant products from Czechia and Slovakia into other EU markets and a commitment by Mondelēz to prevent the import of the relevant products from other EU markets into Czechia and Slovakia.

5.4.2. *Agreements that had the object of limiting the territories or customers to which certain brokers could sell Mondelēz products*

(53) Mondelēz entered into various agreements with brokers that had the object of limiting the territories or the customers to which those brokers could resell Mondelēz products. Mondelēz tended to sell products to brokers when it had products that it could not sell to its regular customers at its regular prices. Most commonly, these were residual products, as described above in paragraph (26).

(54) Selling such goods to brokers allowed Mondelēz to generate revenue from residual products that it otherwise would not be able to sell to its existing retail or wholesale customers at prevailing prices. Particularly in cases where the goods were obsolescent as described above in paragraph (26), it was often more economical to sell the obsolete goods to a broker than it would have been to incur the cost of destroying the goods if Mondelēz could not sell them before their expiration date. By selling residual product by brokers, Mondelēz faced the risk that the broker would resell the goods at a low price either to a Mondelēz customer or to a competitor of a Mondelēz customer. This could put downward pressure on the prices that Mondelēz's local subsidiaries were able to charge in that country. Mondelēz therefore attempted to limit this risk.

(55) Mondelēz's national sales companies that sold goods to brokers at low prices were [business secrets – sales strategy] to avoid sales to brokers that could indirectly affect the sales and profits of national sales companies in other Member States. In a number of instances, this was done by agreeing with brokers to limit the brokers' freedom to determine the Member State in which or the customer in the Union to which they could resell the Mondelēz products. The agreements took various forms, depending

on the particular circumstances (e.g. prevailing prices, whether the same or similar goods were sold in other markets that would allow for price comparisons, the quantity of goods sold, etc.). Of particular importance was the difference between prices in the purchasing market and prices in the potential selling market, as well as the relationship between the local Mondelēz entity and its retail customers in the latter. Sales by brokers into EU territories where there was a significant difference in price between the local and foreign goods were undesirable for Mondelēz because they led to substantial pressure on the prices it charged its local customers. First, when brokers offered products to retail customers at a lower price than Mondelēz's national sales company, those customers sometimes demanded that the Mondelēz sales entity offer them the products at the same prices. Second, sales by brokers to retail customers which were not direct customers of the Mondelēz national sales company resulted in retail sales at a lower price than at the retail shops of Mondelēz's direct customers and those customers noticed the lower prices as they regularly monitored their competitors. After noticing the lower prices in the retail markets, frequently Mondelēz's direct customers matched those lower prices to keep or attract consumers and in turn they asked for compensation from Mondelēz or requested lower prices for their purchases from Mondelēz.

- (56) The investigation found numerous instances in which Mondelēz national sales companies tried to sell only to brokers which were known to be careful not to sell into territories or customers where the sales could put downward pressure on the prices of Mondelēz's retail customers, sometimes describing such brokers as 'trustworthy'⁵⁴. The ability to know where a given broker was going to sell the goods was frequently a crucial element in Mondelēz's decision making whether it would sell to that broker. In deciding whether to sell a particular lot of goods to a particular broker, the Mondelēz entity would sometimes ask the broker to which Member State or to which customer the broker intended to resell the goods and would make the resale to that country or customer an implicit or explicit condition of the sale.
- (57) In a number of cases, Mondelēz national sales companies agreed with brokers to limit the EU territories in or customers to which brokers would be allowed to resell the goods they bought from Mondelēz. The purpose of such agreements was to prevent brokers from disrupting prices either in the same Member States as Mondelēz's national sales company or in Member States served by different Mondelēz national sales companies. The restrictions prevented those brokers from choosing the most economically optimal distribution route for goods they had purchased.
- (58) The evidence in the file contains numerous instances in which brokers made clear to Mondelēz that they understood that they should take care not to disrupt prices if they wanted to maintain a lasting commercial relationship with Mondelēz⁵⁵.
- (59) By limiting the EU territories in which the brokers could resell Mondelēz products, the restrictive agreements aimed to limit the potential disruption to Mondelēz's prices in various EU markets. The evidence regarding such restrictive practices is discussed below, organised by counterparty.

⁵⁴ ID 297-1673.

⁵⁵ ID 297-1673; ID 296-139; ID 296-3671; ID 296-329; ID 296-120; ID 297-835.

5.4.2.1. Restrictions imposed on [broker 1]/Mondelēz Germany – April 2012

(60) Mondelēz Germany and [broker 1] agreed as a condition for continuing their business relationship that they would discuss in advance the territories into which [broker 1] would be able to resell products it purchased from Mondelēz⁵⁶. A Mondelēz manager of the broker business in Germany set out the condition for doing further business with [broker 1] by stating that: *‘So I would ask you in the future to confirm in advance where you resell the goods, this becomes a condition so that we can come together again’*⁵⁷, to which [broker 1] replied: *‘At [broker 1], we take requests. If you say: sales only in certain countries, then its clear.’*⁵⁸ This agreement concerned the whole of the Union and lasted until the end of December 2014. The products to which the practice related were certain Milka chocolate tablets and small bites products, Toblerone chocolate tablet products and Belvita sweet biscuit products⁵⁹.

5.4.2.2. Restrictions imposed on [broker 2]

5.4.2.2.1. [broker 2]/Mondelēz Austria – May 2013

(61) Mondelēz Austria agreed before May 2013 with [broker 2] as a general condition of sale that [broker 2] would not resell products purchased from Mondelēz Austria in Germany⁶⁰. An email chain shows that a Mondelēz Germany manager complained to a Mondelēz Austria manager that brokers were reselling Mondelēz Austria products in Germany and asked the Mondelēz Austria manager to ‘sensibilise’ his people⁶¹. The Mondelēz Austria manager forwarded the email to two Mondelēz Austria employees, asking *‘apparently goods are showing up in DE. What can we do?’*⁶². The response indicated that the sales were probably made by their customer Benefit, adding: *‘With [broker 2], it’s fixed – Germany is taboo’*⁶³. This agreement on the territorial destination of sales related to the sale of various Milka chocolate tablet products in Germany⁶⁴. The practice was in place until January 2016 when the manager in charge of the commercial relationship with [broker 2] was replaced.

5.4.2.2.2. [broker 2]/Mondelēz Austria – January 2017

(62) Mondelēz Austria agreed in January 2017 with [broker 2] as a general condition of sale that [broker 2] would not resell products purchased from Mondelēz Austria to the trader [customer of broker 2]. The two reached the agreement following complaints about [customer of broker 2] reselling goods in Germany at low prices that caused issues for Mondelēz Germany. In January 2017, a Mondelēz Austria employee stated: *‘According to [broker 2], he has sold very small quantities to*

⁵⁶ ID 1483-14; ID 1483-1203.

⁵⁷ ID 1483-14. Original text: *‘Ich würde Sie also bitten, mir in Zukunft schon im Voraus zu bestätigen, wohin Sie die Ware Weiterverkaufen, dies wird zur Bedingung, damit wir wieder zusammenkommen können.’*

⁵⁸ ID 1483-18; Original text: *‘Bei [broker 1] geht Wunschkonzert. Wenn Sie sagen: Abverkauf nur in bestimmten Ländern, dann geht das klar.’*

⁵⁹ ID 1682.

⁶⁰ ID 189-850.

⁶¹ ID 189-850. Original text: *‘kannst du bitte deine Leute auch sensibilieren’.*

⁶² ID 189-850. Original text: *‘anscheinend taucht ware in DE auf - das sollte keinesfalls sein - was können wir tun?’*

⁶³ ID 189-850. Original text: *‘Bei [broker 2] ist es fix – Deutschland ist Tabu.’*

⁶⁴ ID 2000.

*[customer of broker 2] - has been a recurring issue in the past according to him... He is aware of the problems and will stop doing business with [customer of broker 2] as much as possible in the future*⁶⁵. This agreement on selling products to [customer of broker 2] affected sales of certain Milka, Mirabell and Suchard products in Germany⁶⁶. The agreement was in place until December 2018 when the sales by Mondelēz Austria to [broker 2] significantly decreased.

5.4.2.3. Restrictions imposed on [broker 3]

(63) There is evidence in the file of four occasions on which various Mondelēz national sales companies imposed territorial and customer resale restrictions on [broker 3].

5.4.2.3.1. [broker 3]/Mondelēz Netherlands – April 2015

(64) Mondelēz Netherlands agreed orally in April 2015 with [broker 3] as a condition of sale that it would not resell products it purchased from Mondelēz Netherlands into Belgium. A Mondelēz Netherlands employee sent confirmation of the offer to [broker 3] by email, stating: *'We discussed the possibilities for marketing channels by telephone.'*⁶⁷ The email was circulated within [broker 3] with the qualification *'Must be sold outside Bnlx.'*⁶⁸ Separately, the employee emailed their superior to approve the sale, stating: *'These obsoletes will be sold outside Benelux.'*⁶⁹ The superior approved the sale, adding: *'And please check in which country [broker 3] will sell this order, that would be desirable.'*⁷⁰ The employee responded: *'Obsoletes will likely be sold to Germany/France.'*⁷¹ This restriction on the territorial destination of sales covered sales of certain Velours Noir R&G coffee capsules in Belgium and the Netherlands⁷² and was in place until 23 May 2015.

5.4.2.3.2. [broker 3]/Mondelēz Eastern Europe, Middle East & Africa – December 2016

(65) Mondelez MEA agreed in December 2016 with [broker 3] as a general condition of sale that [broker 3] would not resell the products it purchased from Mondelez MEA in the Union other than to non-food retail customer⁷³. Responding to a complaint by another Mondelēz national sales company that goods sold to [broker 3] by Mondelez MEA had been found at the retailer Action in the Benelux and at modern trade customers in other EU Member States, [broker 3] protested that it had observed the agreement, explaining: *'As mentioned we NEVER sell to chains like Aldi or Lidl or any other Traditional retail channel. We only sell to Non Food Retail channels'*⁷⁴.

⁶⁵ ID 1403-481. Original text: *'Laut [broker 2] hat er sehr geringe Mengen an [customer of broker 2] verkauft – war in der Vergangenheit laut seiner Aussage auch immerwieder ein Thema..... Er ist sich der Probleme bewusst und wird in Zukunft die Geschäftsbeziehung mit [customer of broker 2] weitestgehend einstellen'*.

⁶⁶ ID 2005.

⁶⁷ ID 1206. Original text: *'Telefonisch hebben wij besproken wat de mogelijkheden zijn voor afzetkanalen.'*

⁶⁸ ID 1206. Original text: *'Moet buiten Bnlx verkocht worden.'*

⁶⁹ ID 1403-97. Original text: *'Deze obsoletes worden verkocht buiten Benelux.'*

⁷⁰ ID 1403-97. Original text: *'En mocht je na kunnen gaan in welk land [broker 3] deze partij afwil zetten, zou dat wenselijk zijn.'*

⁷¹ ID 297-853. Original text: *'Obsoletes zullen vermoedelijk worden verkocht aan Duitsland/Frankrijk.'*

⁷² ID 1604-83.

⁷³ ID 1403-521; ID 1403-531; ID 1403-532; ID 1403-533; ID 1403-652; ID 179-170; ID 1403-678; ID 1403-689; ID 179-173.

⁷⁴ ID 1043-531.

On another occasion, responding to complaints about its products ending up in parallel trade, [broker 3] wrote to Mondelez MEA: *'Today I will once again screen our customer list to make sure that the offers and distribution of your products continue safely and without disturbing local markets... For us it is very important to keep us updated about any issues with your products. If Mondelez has a problem with one of our distribution points, please tell it to us, so that we can solve the problem.'*⁷⁵ This agreement not to sell to customers other than non-food retail customers prevented [broker 3] from reselling the products to modern retail anywhere in the Union and covered a variety of products of the Toblerone (chocolate tablets, small bites), Oreo (sweet biscuits), Milka (chocolate tablets, small bites, countlines), Côte d'Or (chocolate tablets), Daim (small bites), and LU (countlines) brands⁷⁶. The agreement was in place until November 2019 when the Commission initiated its inspection in the current case.

5.4.2.3.3. [broker 3]/Mondelēz Eastern Europe, Middle East & Africa – October 2017

(66) Mondelez MEA agreed at some point before 27 October 2017 with [broker 3] as a condition of sale that [broker 3] would not resell certain products in Belgium⁷⁷. In an email from October 2017, [broker 3] reported on the implementation of the agreement by stating: *'As you can see we deliver only 1 customer which is Action. They are selling these items only in their stores in France. We forbid them to sell this items in Belgium'*⁷⁸. This agreement on the territorial destination of sales (excluding Belgium) related to certain Côte d'Or chocolate tablets⁷⁹. The agreement was in place until 15 November 2017.

5.4.2.3.4. [broker 3]/Mondelēz Germany – June 2019

(67) Mondelēz Germany agreed in June 2019 with [broker 3] as a condition of sale that [broker 3] would not resell the products purchased from Mondelēz Germany to the non-food retailer Action⁸⁰. A Mondelēz Germany employee concluded the negotiations with [broker 3]. After being asked by a colleague if they knew to whom [broker 3] would supply the goods, the employee stated: *'In principle, [broker 3] is actually in a business relationship also with Action. He told us, however, that he will not supply Action with these articles. According to him, he has mainly [a Mondelēz employee]'s classic residual customers and will not approach the classic [food retail trade].'*⁸¹ This agreement on the destination of sales to exclude a specific customer (Action) involved the territories of Austria, Belgium, Germany, France, Luxembourg, the Netherlands and Poland where that customer was active at the time. The agreement related to certain Milka countlines, pralines and chocolate tablet

⁷⁵ ID 1403-652.

⁷⁶ ID 2061.

⁷⁷ ID 1403-521; ID 1403-531; ID 1403-532.

⁷⁸ ID 1403-531.

⁷⁹ ID 1403-532; ID 1403-533; ID 296-4470; ID 296-4464; ID 296-4467; ID 296-4461.

⁸⁰ ID 297-1673; ID 1403-740; ID 1403-746; ID 1403-763.

⁸¹ ID 297-1673. Original text: *'Grundsätzlich ist [broker 3] tatsächlich in Geschäftsbeziehung auch mit Action. Er hat uns gesagt, dass er Action jedoch nicht mit diesen Artikeln beliefern wird. Er hat lt seiner Aussage hauptsächlich die klassischen [...] bekannten Postenkunden und wird nicht auf den klassischen LEH zugehen.'*

products and Oreo sweet biscuits products⁸². The agreement was in place until 15 July 2019.

5.4.2.4. Restriction imposed on [broker 4]

(68) Mondelēz Austria agreed in December 2015 with [broker 4] that [broker 4] would not resell biscuits it had purchased from Mondelēz Austria to customers in Belgium⁸³. An email chain shows that Mondelēz Belgium complained that the non-food retailer Action was sourcing biscuits through parallel trade, which was damaging the Belgian business, stating that *‘it is critical that we stop importation in action before it kills our price points in BE’*⁸⁴. A Mondelēz Austria manager asked another Mondelēz Austria manager to check the net-net price (i.e. the price after discounts and off-invoice rebates) to see whether Mondelēz Austria could be the source of the business. The next email in the chain is from a third Mondelēz Austria manager, reporting that 40 stores in Belgium received 3 articles from Mondelēz Austria, adding: *‘There are no longer any goods going to Belgium.’*⁸⁵ The third manager forwarded the statement to a representative of [broker 4]. This agreement on the territorial destination of sales (excluding Belgium) related to certain Milka biscuit products⁸⁶. The agreement was in place until 31 December 2015.

5.4.2.5. Restriction imposed on [retailer 1]/ [parent company of retailer 1]⁸⁷

(69) In May 2017 Mondelez WTR entered into an agreement with [retailer 1] that its affiliate [parent company of retailer 1] would rescind an offer to a customer of EU Export in order to limit parallel trade.

(70) [retailer 1] is a retailer that operates on the German/Danish border, taking advantage of differences in sugar and alcohol taxation. Mondelēz sold confectionery products to [retailer 1] through a distributor. [retailer 1]’s parent company, [parent company of retailer 1], distributed confectionery products. Although [parent company of retailer 1] was not formally a Mondelēz distributor, it resold Mondelēz products purchased by [retailer 1] to other customers in Germany.

(71) [exclusive distributor 9], EU Export’s exclusive distributor in Germany, complained to an EU Export manager that [parent company of retailer 1] had offered Danish-sourced goods to EDEKA, a leading German retailer, at prices that were lower than what [exclusive distributor 9] could offer. EDEKA threatened to stop all purchases of Marabou products from [exclusive distributor 9] unless [exclusive distributor 9] reduced its prices to [parent company of retailer 1]’s levels⁸⁸.

(72) The EU Export manager informed their superior about [exclusive distributor 9]’s complaint, who in turn asked a Mondelez WTR manager based in Denmark, who had a relationship with [retailer 1], to look into the matter⁸⁹.

⁸² ID 1604-140.

⁸³ ID 189-1431.

⁸⁴ ID 189-1431.

⁸⁵ ID 189-1431. Original text: *‘Es geht keine Ware mehr nach Belgien’*.

⁸⁶ ID 2002.

⁸⁷ The parent company of [retailer 1] operated as a “broker”.

⁸⁸ ID 169-266.

⁸⁹ ID 1483-397.

(73) The Mondelez WTR manager contacted a manager at [retailer 1] regarding the offers to EDEKA. After the conversation, the manager at [retailer 1] forwarded to the Mondelez WTR manager a copy of an email from [parent company of retailer 1] to EDEKA withdrawing the offer from [parent company of retailer 1] to EDEKA for the Marabou products, explaining: *'It is really important for me, that you see/know we are always keeping our promises. There has been no special Marabou offer out to German chains! The tablets are in the system of [parent company of retailer 1] - therefore they were part of the assortment matrix, which has been sent to EDEKA. Sorry that this has caused so much trouble.'* The Mondelez WTR manager responded: *'Thank you for your active involvement I hope this will secure our future business development with you.'*⁹⁰ The agreement to rescind the offer to EDEKA implicated Marabou chocolate tablet products carried by [exclusive distributor 9] in Germany⁹¹. The agreement was in place until 16 June 2017.

5.4.2.6. Restriction imposed on [broker 5]

(74) Mondelēz Netherlands agreed in October 2017 with a Dutch broker⁹² as a condition of sale that it would not resell the goods it purchased from Mondelēz Netherlands to customers in Belgium, France and the Netherlands⁹³. A Mondelēz Netherlands employee offered the goods subject to the condition that *'[t]his consignment should not enter Benelux and France.'*⁹⁴, which the trader accepted. This agreement on the territorial destination of sales (which covered the Union outside of Belgium, France, and the Netherlands) covered certain Côte d'Or chocolate tablet products⁹⁵. The agreement was in place until 15 November 2017.

5.4.2.7. Restriction imposed on [broker 6]/Mondelēz Netherlands – December 2017

(75) Mondelēz Netherlands agreed in December 2017 with [broker 6]/ as a condition of sale that [broker 6]/would not resell certain Mondelēz products in the Netherlands⁹⁶. A Mondelēz Netherlands employee stated in the offer that *'[a]s indicated above, I cannot finance the above rebate for the Dutch market'*⁹⁷, to which [broker 6]/ agreed after further negotiations. The agreement concerned all sales of certain LiGa Evergreen and LiGa Milkbreak sweet biscuit products in the Netherlands⁹⁸. The agreement was in place until 15 January 2018.

5.5. Unilateral conduct aimed at market partitioning

5.5.1. Restricting parallel trade by a broker in order to prevent the decrease of prices in certain EU countries

(76) The investigation found evidence that Mondelēz Germany refused to supply residual products to brokers that could not be trusted not to disrupt Mondelēz's prices by

⁹⁰ ID 1483-403.

⁹¹ Marabou 220g/250g chocolate tablet products; ID 1483-405.

⁹² The broker has requested that its identity be kept confidential.

⁹³ ID 733.

⁹⁴ ID 733. Original text: *'Deze partij mag niet in de Benelux en Frankrijk terecht komen.'*

⁹⁵ ID 733.

⁹⁶ ID 597.

⁹⁷ ID 597. Original text: *'Zoals aangegeven kan ik de bovenstaande korting niet financieren voor de Nederlandse markt.'*

⁹⁸ ID 597; Liga Evergreen Krenten (225g), Bosvruchten (250g), Appel (250g) and Liga Milkbreak Melk (245g), Duo Melk/Aardbei (245g), Duo Bosvruchten/Framboos (245g).

engaging in parallel trade⁹⁹. For example, in response to a query in 2011 as to whether Mondelēz Germany sold overproduction or production mistakes to brokers, a manager at Mondelēz's Lörrach production facility, replied: *'No, not at all. Because one cannot control it'*¹⁰⁰.

- (77) The investigation found one instance where the refusal to supply brokers who could not be trusted not to disrupt prices constituted a refusal to supply goods in relation to which Mondelēz held a dominant position in some Member States. [broker 3], a Dutch broker with a German subsidiary, purchased Toblerone 400g white chocolate tablets on two occasions in 2014¹⁰¹. In January 2015, Mondelēz Germany offered a variety of residual Toblerone chocolate tablets to [broker 3]¹⁰². Subsequently, in March 2015, Mondelēz Germany offered to sell residual Milka chocolate spoon eggs to [broker 3], which [broker 3] accepted¹⁰³.
- (78) Then, in May 2015, when a buyer representing [broker 3] asked a manager of the broker business at Mondelēz Germany to make an offer for the supply of residual chocolate tablets, setting out the terms that would be acceptable to [broker 3], the manager of the broker business in Germany responded: *'our strategy regarding residuals has not changed and I cannot offer residual tablets. Moreover, the price that you offer is far below what I get from my trusted brokers. Times change, and so do the prices on the market...'*¹⁰⁴. The buyer representing [broker 3] replied: *'I'm sorry to hear that. We actually know rather well what is being paid for 100g tablets and for what prices Germany products are showing up in Holland.'*¹⁰⁵
- (79) In March 2016, the buyer representing [broker 3] emailed the then Mondelēz manager of the broker business in Germany, asking for Mondelēz Germany's regular prices for Toblerone tablets and whether Mondelēz Germany had any Milka chocolate spoon eggs available like in 2015¹⁰⁶. There is no evidence that the Mondelēz manager of the broker business in Germany responded to that email.
- (80) In June 2016, the buyer representing [broker 3] emailed the Mondelēz manager of the broker business in Germany, asking: *'Are the 'Lila Liebling' tablets for which I am currently getting offers still available from you? I would prefer to buy them directly from you.'*¹⁰⁷ This appears to refer to special multi-product promotional displays which contained a range of chocolate and biscuit products and which offered consumers a plush toy if they purchased any five Milka products in the display¹⁰⁸. There is no evidence that Mondelēz Germany responded to that email.

⁹⁹ ID 1707.

¹⁰⁰ ID 169-1275. Original text: *'Nein, gar nicht. Weil man es nicht unter Kontrolle hat.'*

¹⁰¹ ID 1604-2.

¹⁰² ID 1708.

¹⁰³ ID 611 (it is unclear whether the sale was finally completed).

¹⁰⁴ ID 1707. Original text: *'unsere Strategie bezüglich Posten hat sich nicht geändert und ich kann Ihnen keine Tafelposten anbieten. Außerdem ist der Preis, den Sie bieten, weit unter dem, den ich von meinen vertrauten Postenhändlern erhalte. Die Zeiten ändern sich und die Preise am Markt auch...'*

¹⁰⁵ ID 1707. Original text: *'Tut mir leid das zu hören. Wir wissen nämlich ziemlich gut was im Handel bezahlt wird für 100gr Tafeln und auch für welche Preisen deutsche Ware im Holland auftauchen. Wann sich etwas ändert möchte ich gerne darüber nochmals sprechen.'*

¹⁰⁶ ID 1708.

¹⁰⁷ ID 1705.

¹⁰⁸ ID 296-2670; ID 297-4677; ID 189-141.

- (81) In March 2017, the buyer representing [broker 3] emailed the Mondelēz manager of the broker business in Germany, explaining that the German subsidiary of Action had asked [broker 3] for a price for 150 000 units of 150g Milka Choco Brownies, a sweet biscuit/soft cake product. The manager’s supervisor contacted Mondelēz Netherlands, stating: *‘We’ve got a request from the distributor [broker 3] for Milka Choco Brownie to be delivered to Action Germany (22,5to) – we aren’t keen to work with [broker 3] and would prefer to negotiate with Action Germany directly but understand we must wait. If we do so, we expect that all other countries won’t deliver to [broker 3] either and Milka Choco Brownie won’t pop up at Action Germany.’*¹⁰⁹ There is no evidence that Mondelēz Germany provided a price quote to [broker 3].
- (82) In April 2017, in response to a query from another Mondelēz national sales company about whether Mondelēz Germany had supplied certain goods to [broker 3], the Mondelēz manager of the broker business in Germany stated: *‘[broker 3] keeps making inquiries, but I haven’t sold anything to them for at least two years, for among other reasons because I know that they offer the goods wildly around Europe’*¹¹⁰.
- (83) In 2019, Mondelēz Germany decided to resume trade with [broker 3]. In June 2019, the manager’s supervisor, announced in an internal email that: *‘in order to set the broker business on a firmer footing and proactively address a possible imminent departure of the elderly gentlemen of Wissgott and MCV, we have had discussions inter alia with a contact of [the Mondelēz manager of the broker business in Germany] from earlier times. [The Mondelēz manager of the broker business in Germany] has just reached a “test deal” with the firm “[broker 3]” for a residual order of 17 tons ... at a price that the others declined. We are also in discussions with [broker 3] on the topic starting distribution in ethnic channels and DIY stores together.’*¹¹¹
- (84) A higher-level manager at Mondelēz Germany responded, asking: *‘do you know whom [broker 3] will supply? I draw the line at, inter alia, Action. If that happens, we need to be careful of the prices.’*¹¹² The supervisor replied: *‘In principle, [broker 3] is indeed in a business relationship with Action. They have told us that they will not however supply Action with these products. According to them they will primarily target [the first manager’s] classic residuals customers and will not go for classic*

¹⁰⁹ ID 296-4141.

¹¹⁰ ID 296-3440. Original text: *‘[broker 3] fragt immer wieder bei uns an, ich habe denen aber seit mindestens 2 Jahren nichts mehr verkauft, unter anderem weil ich weiß, dass sie dann die Ware quer durch Europa wild anbieten’.*

¹¹¹ ID 297-1673. Original text: *‘um das Brokerbusiness auf breitere Beine zu stellen und ein mögliches nahendes Ausscheiden der älteren Herren von Wissgott und MCV proaktiv anzugehen, hatten wir Gespräche u.a. mit einem Kontakt von [...] aus früheren Zeiten. [...] konnten nun gleich im ersten „Testdeal“ bei der Firma „[broker 3]“ einen Posten von 72to (u.a. 16to Collage und 40to Peanut 90g, Riegel 7,7to mit 3 Wochen bis zum MHD) zu einem Preis verkaufen, den die anderen abgelehnt hatten. Wir sind mit [broker 3] auch im Gespräch, um das Thema Distribution in ethnische Kanäle und Baumärkte ggf. gemeinsam anzugehen.’*

¹¹² ID 297-1673. Original text: *‘weißst Du an wen [broker 3] liefert? Mein letzter Stand ist u.a. ACTION. Wenn das so ist müssen wir bei den Preisen aufpassen.’*

*food retail. [The first manager] will follow this closely to see whether the test promises to deliver what [broker 3] had promised'*¹¹³.

(85) The sale referred to in the email exchange was completed at the end of June, 2019¹¹⁴. The restriction of parallel trade by the broker was therefore in effect between March 2015 and June 2019.

5.5.2. *Ceasing the supply of products in one Member State to prevent them from being imported into a neighbouring Member State.*

(86) In 2015, Mondelēz ceased the supply of certain Côte d'Or chocolate tablets in the Netherlands that it continued to sell in Belgium through a process known as 'delisting'¹¹⁵.

(87) Mondelēz's internal documents and communications with customers make clear that Mondelēz sought to delist the products specifically to reduce the pressure on the prices for those products in Belgium following the entry of a Dutch retailer into the Belgian market in 2011. The price at which the Dutch retailer purchased the product in the Netherlands was considerably lower than the price charged by Mondelēz's subsidiary in Belgium, where the Côte d'Or brand was much stronger and the tablets had higher sales volumes. Mondelēz sold the products to the Dutch retailer in the Netherlands at the lower Dutch price, so the Dutch retailer imported those products into Belgium, where it could sell the product for less than what its competitors were charging consumers. Other retailers in Belgium aligned their prices downward and demanded lower purchase prices¹¹⁶. Colruyt responded by purchasing the 150g Côte d'Or chocolate tablets through parallel trade¹¹⁷. This put pressure on Mondelēz's margins on the Côte d'Or chocolate tablet products in Belgium.

(88) Mondelēz initially sought to limit the pressure on Belgian prices from parallel trade by delisting the Côte d'Or chocolate tablet products only at the Dutch retailer¹¹⁸, but when that proved difficult, it delisted the tablet products throughout the Netherlands¹¹⁹.

(89) Mondelēz delisted the Côte d'Or chocolate tablet products in March 2015 and had not reinstated the listings of the same products in the Netherlands as of the date of the inspections at Mondelēz' premises in November 2019.

¹¹³ ID 297-1673. Original text: '*Grundsätzlich ist [broker 3] tatsächlich in Geschäftsbeziehung auch mit Action. Er hat uns gesagt, dass er Action jedoch nicht mit diesen Artikeln beliefern wird. Er hat lt seiner Aussage hauptsächlich die klassischen [...] bekannten Postenkunden und wird nicht auf den klassischen LEH zugehen. [...] wird das Thema eng monitoren um zu schauen, ob der Test auch das verspricht was der AP versprochen hat.*'

¹¹⁴ ID 1403-773.

¹¹⁵ In order for a product to be sold through a modern retailer, a specific product must be 'listed', i.e. be on the retailer's list of products that it sells and be on the list of products that the manufacturer or wholesaler sells to the retailer. When a retailer or manufacturer removes a product from the list that it buys from/sells to the other, it is referred to as 'delisting'.

¹¹⁶ ID 1403-128; ID. 1403-880.

¹¹⁷ ID 297-3695.

¹¹⁸ ID 297-3706; ID 297-3695.

¹¹⁹ ID 296-3700; ID 296-1675; ID 1403-128.

6. LEGAL ASSESSMENT

6.1. Application of Article 101 of the Treaty

- (90) Article 101(1) of the Treaty prohibits all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. These agreements, decisions and concerted practices include in particular those which (a) directly or indirectly fix purchase or selling prices or any other trading conditions; (b) limit or control production, markets, technical development, or investment; (c) share markets or sources of supply; (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
- (91) The assessment under Article 101 of the Treaty consists of various steps. The first step is to assess whether the conduct in question constitutes an agreement or concerted practice. The next step is to assess whether the arrangement between undertakings has an anti-competitive object or actual or potential restrictive effects on competition. Consequently, it must be assessed whether the arrangement in question is capable of affecting trade between Member States and whether its impact on competition is appreciable. The final step, under Article 101(3) of the Treaty, which only becomes relevant when an agreement is found to be restrictive of competition within the meaning of Article 101(1) of the Treaty, is to determine the pro-competitive benefits produced by that agreement and to assess whether those pro-competitive effects outweigh the restrictive effects on competition. The balancing of restrictive and pro-competitive effects is conducted exclusively within the framework laid down by Article 101(3) of the Treaty.

6.1.1. *Agreements and/or concerted practices between undertakings*

6.1.1.1. Principles

- (92) In order for there to be an agreement for the purposes of Article 101(1) of the Treaty, it is sufficient that at least two undertakings have expressed their joint intention to conduct themselves on the market in a specific way¹²⁰. Although Article 101(1) of the Treaty draws a distinction between the concept of concerted practices and agreements between undertakings, the object is to bring within the prohibition of that Article a form of co-ordination between undertakings by which, without having reached the stage where an agreement has been concluded, they knowingly substitute practical co-operation between them for the risks of competition¹²¹.
- (93) The concepts of an agreement and a concerted practice are fluid and may overlap. Indeed, it may not even be possible to make such a distinction, as an infringement may present simultaneously the characteristics of each form of prohibited conduct,

¹²⁰ Judgment of 11 January 1990, *Sandoz Prodotti Farmaceutici v Commission*, 277/87, EU:C:1990:6, paragraph 13; Judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242, paragraphs 67 and 173.

¹²¹ Judgment of 14 July 1972, *ICI v Commission*, 48/69, EU:C:1972:70, paragraph 64; Judgment of 4 June 2009, *T-Mobile Netherlands and others*, C-8/08, EU:C:2009:343, paragraph 26.

while when considered in isolation some of its manifestations could accurately be described as one rather than the other¹²².

6.1.1.2. Application to this case

(94) The conduct described in sections 5.4.1 and 5.4.2 presents all the characteristics of agreements and/or concerted practices entered into between undertakings. The agreements in question are between:

- (1) Kraft Foods Schweiz AG, EU Export and [exclusive distributor 1] in place from 18 December 2006 until 31 December 2016 and covering certain Oreo products, Daim chocolate confectionery products and Cadbury chocolate products, as well as Marabou chocolate products. The agreement had the object of preventing [exclusive distributor 1] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (2) Kraft Foods Schweiz AG, EU Export and [exclusive distributor 2] in place from 30 April 2007 until 10 October 2016 and covering certain Mirabell products. The agreement had the object of preventing [exclusive distributor 2] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (3) Kraft Foods Schweiz AG, EU Export and [exclusive distributor 3] in place from 19 May 2008 until 30 June 2016 and covering certain Ritz biscuit products. The agreement had the object of preventing [exclusive distributor 3] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (4) Kraft Foods World Travel Retail GmbH and [exclusive distributor 4] in place from 23 September 2011 until 27 September 2017 and covering certain Cadbury Wunderbar and Cadbury Curly Wurly chocolate confectionery products. The agreement had the object of preventing [exclusive distributor 4] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (5) Kraft Foods World Travel Retail GmbH and [exclusive distributor 5] in place from 1 February 2012 until 2 June 2016 and covering certain Mikado biscuit products. The agreement had the object of preventing [exclusive distributor 5] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (6) Kraft Foods World Travel Retail GmbH and [exclusive distributor 6] in place from 5 March 2012 until 3 November 2017 and covering certain Toblerone and Daim chocolate confectionery products and Mikado and Ritz biscuit products and Mirabell chocolate confectionery products. The agreement had the object of preventing [exclusive distributor 6] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;

¹²² Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 81.

- (7) Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7] in place from 31 December 2016 until 31 December 2017 and covering certain Milka Bonibon products. The agreement had the object of preventing [exclusive distributor 7] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (8) EU Export and [exclusive distributor 8] in place from 17 April 2008 until 2 June 2017 (with an interruption between 17 June 2013 and 25 February 2015) and covering all Mondelēz products distributed by [exclusive distributor 8], including certain Cadbury, Côte d'Or, Daim, Hag, Mikado, Mirabell, Toblerone, Ritz and Oreo products. The agreement and/or concerted practice had the object of partitioning Czechia and Slovakia from the rest of the Union, which included an obligation on [exclusive distributor 8]'s part to obtain EU Export's permission before making passive sales outside of Czechia and Slovakia, an obligation on the part of EU Export to control parallel trade going into Czechia and Slovakia as well as to carry out additional measures, such as imposing resale restrictions on their respective customers to prevent their goods from being resold outside of Czechia and Slovakia, and a reciprocal commitment by Mondelēz to prevent the import of the relevant products from other EU markets into Czechia and Slovakia;
- (9) EU Export and [exclusive distributor 9] in February 2018 and covering certain Cadbury, Marabou and Mirabell products. The agreement had the object of preventing [exclusive distributor 9] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (10) EU Export and [exclusive distributor 4] in March 2019 and covering certain Cadbury Wunderbar and Curly Wurly chocolate countlines. The agreement had the object of preventing [exclusive distributor 4] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (11) EU Export and [exclusive distributor 9] in February 2020 and covering certain Cadbury and Marabou products. The agreement had the object of preventing [exclusive distributor 9] from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz;
- (12) Mondelēz Germany and [broker 1] in place from 1 April 2012 until 31 December 2014 and covering certain Milka chocolate tablets and small bites products, Toblerone chocolate tablets products and Belvita sweet biscuits products. The agreement had the object of limiting the territories or customers to which [broker 1] could resell Mondelēz products;
- (13) Mondelēz Austria and [broker 2] in place from 1 May 2013 until 31 January 2016 and covering certain Milka chocolate tablet products. The agreement had the object of limiting the territories or customers to which [broker 2] could resell Mondelēz products;

- (14) Mondelēz Netherlands and [broker 3] in place from 23 April 2015 until 23 May 2015 and covering certain Velours Noir coffee capsules. The agreement had the object of limiting the territories or customers to which [broker 3] could resell Mondelēz products;
 - (15) Mondelēz Austria and [broker 4] in place from 1 December 2015 until 31 December 2015 and covering certain Milka biscuit products. The agreement had the object of limiting the territories or customers to which [broker 4] could resell Mondelēz products;
 - (16) Mondelez MEA and [broker 3] in place from 1 December 2016 until the start of the Commission's inspections on 18 November 2019 and covering certain products of the Toblerone (chocolate tablets, small bites), Oreo (sweet biscuits), Milka (chocolate tablets, small bites, countlines), Côte d'Or (chocolate tablets), Daim (small bites), and LU (countlines) brands. The agreement had the object of limiting the territories or customers to which [broker 3] could resell Mondelēz products;
 - (17) Mondelēz Austria and [broker 2] in place from 1 January 2017 until 31 December 2018 and covering certain Milka, Mirabell and Suchard products. The agreement had the object of limiting the territories or customers to which [broker 2] could resell Mondelēz products;
 - (18) Mondelez WTR and [retailer 1]/[parent company of retailer 1] in place from 16 May 2017 until 16 June 2017 and covering certain Marabou chocolate tablet products. The agreement had the object of limiting the territories or customers to which [retailer 1]/[parent company of retailer 1] could resell Mondelēz products;
 - (19) Mondelez MEA and [broker 3] in place from 15 October 2017 until 15 November 2017 and covering certain Côte d'Or chocolate tablet products. The agreement had the object of limiting the territories or customers to which [broker 3] could resell Mondelēz products;
 - (20) Mondelēz Netherlands and [broker 5] in place from 15 October 2017 until 15 November 2017 and covering certain Côte d'Or chocolate tablet products. The agreement had the object of limiting the territories or customers to which [broker 5] could resell Mondelēz products;
 - (21) Mondelēz Netherlands and [broker 6] in place from 15 December 2017 until 15 January 2018 and covering certain LiGa Evergreen and LiGa Milkbreak sweet biscuit products. The agreement had the object of limiting the territories or customers to which [broker 6] could resell Mondelēz products;
 - (22) Mondelēz Germany and [broker 3] in place from 15 June 2019 until 15 July 2019 and covering certain Milka countline, praline and chocolate tablet products and Oreo sweet biscuit products. The agreement had the object of limiting the territories or customers to which [broker 3] could resell Mondelēz products.
- (95) There is evidence of a concurrence of wills in all of the agreements and/or concerted practices presented. There is no indication that the evidence does not represent the faithful expressions of the parties' intentions. Each of the practices described in

sections 5.4.1 and 5.4.2 above thus constitutes an agreement and/or concerted practice between undertakings in the meaning of Article 101(1) of the Treaty.

6.1.2. *Restrictions of competition by object*

- (96) Certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects¹²³. Such reasoning derives from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition¹²⁴.
- (97) Consequently, certain types of conduct such as those limiting parallel trade or partitioning the EEA along national markets, may be considered so likely to have negative effects, in particular on the price, choice, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 101(1) of the Treaty, to prove that they have actual effects on the market¹²⁵.
- (98) In *Consten and Grundig*, the Court held that agreements restricting out-of-territory active and passive sales make it possible for undertakings to charge prices for the products in question which are sheltered from all effective competition by artificially maintaining separate national markets within the EEA¹²⁶.
- (99) Even an agreement which does not explicitly contain an export ban or confer absolute territorial protection on a distributor may be found to restrict competition if such is its purpose or if it makes parallel imports more difficult by subjecting them to treatment less favourable than that reserved for official imports or by restricting the buyer's freedom to use the goods supplied in accordance with its own economic interests¹²⁷. In this respect, Union Courts and the Commission's case-practice have found that certain types of conduct falling short of an outright prohibition on out-of-territory sales also constitute anticompetitive infringements. These include situations where letters are sent discouraging or prohibiting exports¹²⁸, where export is permitted only if the consent of the producer is obtained¹²⁹, where the producer must be contacted before exporting via the internet¹³⁰, where an agreement requires a

¹²³ Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 49; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 113.

¹²⁴ Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 50; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 114.

¹²⁵ Judgment of 4 October 2011, *Football Association Premier League and others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 139; Judgment of 6 October 2009, *GlaxoSmithKline Services and others v Commission and others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 59. See, to that effect, also Judgment of 11 September 2014, *CB v Commission*, C-67/13 P, EU:C:2014:2204, paragraph 51; Judgment of 19 March 2015, *Dole Food and Dole Fresh Fruit Europe v Commission*, C-286/13 P, EU:C:2015:184, paragraph 115.

¹²⁶ Judgment of 13 July 1966, *Consten and Grundig v Commission*, 56 and 58-64, EU:C:1966:41, p. 343.

¹²⁷ Opinion of Advocate General Tizzano delivered on 25 October 2005, *General Motors Nederland and Opel Nederland v Commission*, C-551/03 P, EU:C:2005:639, paragraph 72, quoting the Judgment of 8 November 1983, *IAZ v Commission*, 96-102, 104, 105, 108 and 110/82, EU:C:1983:310, paragraph 6.

¹²⁸ Judgment of 26 October 2000, *Bayer v Commission*, T-41/96, EU:T:2000:242.

¹²⁹ Judgment of 14 July 1994, *Parker Pen v Commission*, T-77/92, EU:T:1994:85, paragraphs 37 and 44; Judgment of 14 December 1983, *Société de vente de ciments v Kerpen & Kerpen*, 319/82, EU:C:1983:374, paragraph 6.

¹³⁰ Commission Decision of 16 July 2003 in case AT.37975 – *PO/YAMAHA*.

distributor to pass on any customer enquiries coming from outside the contract territory to the producer¹³¹, where discounts are reduced or additional fees charged in the event of sales outside the destination territory¹³², or where a producer threatens to terminate or actually terminates contractual arrangements with distributors or dealers which sell outside their allocated territory¹³³.

(100) Finally, it should be recalled that the fact that restrictions on cross-border trade are not strictly enforced is irrelevant since the very existence of those clauses may create a ‘*visual and psychological*’ background contributing to the division of the markets¹³⁴.

6.1.2.1. Agreements that had the object of preventing exclusive distributors from directly or indirectly making passive sales to customers outside their allocated sales territories without prior permission from Mondelēz

6.1.2.1.1. Principles

(101) As explained in section 6.1.2, agreements aimed at partitioning national markets along national borders or making the interpenetration of national markets more difficult must be regarded, in principle, as agreements whose object is to restrict competition within the meaning of Article 101(1) of the Treaty. The Guidelines on Art. 101(3) of the Treaty further state that the category of restrictions by object includes restrictions providing absolute territorial protection, including restrictions on passive sales¹³⁵.

(102) Furthermore, restrictions on active and passive sales are also defined as hardcore restrictions of competition in the respective applicable vertical block exemption regulation that was in force during the Investigation Period¹³⁶. The only exception relates to restrictions on active sales into the exclusive territory or to an exclusive

¹³¹ Judgment of 19 May 1999, *BASF v Commission*, T-175/95, EU:T:1999:99, paragraph 87.

¹³² Judgment of 9 July 2009, *Peugeot and Peugeot Nederland v Commission*, T-450/05, EU:T:2009:262, paragraph 47.

¹³³ Judgment of 6 July 2000, *Volkswagen v Commission*, T-62/98, EU:T:2000:180, paragraph 44.

¹³⁴ Judgment of 1 February 1978, *Miller v Commission*, 19/77, EU:C:1978:19, paragraph 7.

¹³⁵ Commission Guidelines on the application of Article 81(3) of the Treaty (OJ C 101, 27.4.2004, p. 97), paragraph 23. On the issue of granting absolute territorial protection designed to enable parallel imports to be controlled and hindered, see Judgment of 8 February 1990, *Tipp-Ex v Commission*, 279/87, EU:C:1990:57.

¹³⁶ See Article 4(b) of Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, (OJ L 336, 29.12.1999, p. 1), which was in force until 31 May 2010, and Article 4(b) of Commission Regulation (EU) No 330/2010 of 20 April 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 L 102, 23.4.2010, p. 1), which was enforce from 1 June 2010 until 31 May 2022. The requirements of Regulation (EC) No 2790/1999 and Regulation (EU) No 330/2010 do not differ for the purposes of the current case. Therefore, for the purpose of this case the reference to the applicable vertical block exemption regulation should be understood as implying a reference to either Regulation (EC) No 2790/1999 or Regulation (EU) No 330/2010, depending on which instrument was in force at the relevant point in time. The qualification of an agreement as a hardcore restriction may be taken into account when assessing whether the agreement constitutes also a restriction by object, but it does not dispense the Commission of having to carry out the assessment that the agreement presents a sufficient degree of harm to competition, taking into account the nature of its terms, the objectives that it seeks to attain and all of the factors that characterise the economic and legal context of which it forms part. See Judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraphs 38 et seq.

customer group reserved to the supplier or allocated by the supplier to another buyer, where such a restriction does not limit sales by the customers of the buyer.

6.1.2.2. Application to this case

- (103) As evidenced by the practices described in section 5.4.1, Mondelēz entered into agreements with certain distributors, with the object of restricting the ability of those distributors of Mondelēz products to make passive sales outside their exclusive distribution territories. This was done through express contractual provisions (as set out in section 5.4.1.1) and less formal agreements or concerted practices (as set out in section 5.4.1.2).
- (104) Each of the express contractual restrictions laid down a prohibition against engaging in passive sales outside the exclusively allocated territory of the distributor without Mondelēz's prior permission.
- (105) The less formal agreements or concerted practices are evidenced by several instances in which Mondelēz's exclusive distributors requested – and were sometimes denied – permission from Mondelēz to make passive sales and an instance, in which Mondelēz effectively agreed with its exclusive distributor to raise the price for products sold outside the exclusively allocated territory for that distributor, with the object of preventing the distributor's customers from engaging in parallel trade. Mondelēz imposed those informal restrictions even though no formal contractual restrictions had applied to the distributors in question.
- (106) The investigation found evidence of such restrictions in the following instances:
- (1) The clause in the agreement between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 1] from 18 December 2006 until 31 December 2016 covering certain Oreo products, Daim chocolate confectionery products and Cadbury chocolate products, as well as Marabou chocolate products, which had the object of restricting parallel trade;
 - (2) The clause in the agreement between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 2] from 30 April 2007 until 10 October 2016 covering certain Mirabell products, which had the object of restricting parallel trade;
 - (3) The clause in the agreement between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 3] from 19 May 2008 until 30 June 2016 covering certain Ritz biscuit products, which had the object of restricting parallel trade;
 - (4) The clause in the agreement between Kraft Foods World Travel Retail GmbH and [exclusive distributor 4] from 23 September 2011 until 27 September 2017 covering certain Cadbury Wunderbar and Cadbury Curly Wurly chocolate confectionery products, which had the object of restricting parallel trade;
 - (5) The clause in the agreement between Kraft Foods World Travel Retail GmbH and [exclusive distributor 5] from 1 February 2012 until 2 June 2016 and covering certain Mikado biscuit products, which had the object of restricting parallel trade;
 - (6) The clause in the agreement between Kraft Foods World Travel Retail GmbH and [exclusive distributor 6] from 5 March 2012 until 3 November 2017 covering certain Toblerone and Daim chocolate confectionery products and

Mikado and Ritz biscuit products and Mirabell chocolate confectionery products, which had the object of restricting parallel trade;

- (7) The clause in the agreement between Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7] in place from 31 December 2016 until 31 December 2017 and covering certain Milka Bonibon products, which had the object of restricting parallel trade;
 - (8) The agreement between EU Export and [exclusive distributor 8] to partition Czechia and Slovakia from the rest of the Union from 17 April 2008 until 2 June 2017 (with an interruption between 18 June 2013 and 24 February 2015) and covering all Mondelez products distributed by [exclusive distributor 8], which had the object of restricting parallel trade;
 - (9) The implementation of an understanding between [exclusive distributor 9] and Mondelez EU Export in February 2018 regarding the obligation to seek Mondelez's prior permission before making passive sales, in relation to a request from a Slovak customer to buy Cadbury, Marabou and Mirabell products, which had the object of restricting parallel trade;
 - (10) The implementation of an understanding between [exclusive distributor 4] and Mondelez EU Export in March 2019 regarding the obligation to seek Mondelez's prior permission before making passive sales, in relation to a request from an Austrian customer to buy Cadbury Wunderbar and Curly Wurly chocolate countlines, which had the object of restricting parallel trade;
 - (11) The implementation of an understanding between [exclusive distributor 9] and Mondelez EU Export in February 2020 regarding the obligation to seek Mondelez's prior permission before making passive sales, in relation to a request from a Romanian customer to buy Cadbury and Marabou products, which had the object of restricting parallel trade.
- (107) The agreements or concerted practices described above each facilitated the partitioning of the internal market into national markets in the Union along national borders. Each agreement or concerted practice therefore constitutes a restriction by object within the meaning of Article 101(1) of the Treaty. As the practices described above all involve restrictions on the territories into which Mondelez's customers may make passive sales, they fail to satisfy the conditions of Article 4 of the applicable vertical block exemption regulation.

6.1.2.3. Agreements that had the object of limiting the territories or customers to which certain brokers could sell Mondelez products.

6.1.2.3.1. Principles

- (108) As discussed above in section 6.1.2, the Court of Justice made its first pronouncement on the fact that measures that partition the market constitute restrictions by object in the *Consten and Grundig* case. There the Court of Justice stated that any practice that facilitates the partitioning of the internal market runs

counter to the very object of the of the Treaty to eliminate national barriers¹³⁷. This has been further reaffirmed in the *VW* case¹³⁸.

- (109) The Court of Justice specifically dealt with agreements restricting the territories where customers can sell in the *Lelos* case where it concluded that ‘*an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the objective of the of the Treaty to achieve the integration of national markets through the establishment of a single market*’¹³⁹. Furthermore, in the *Miller* case it said that ‘*by its very nature, a clause prohibiting exports constitutes a restriction on competition, whether it is adopted at the instigation of the supplier or of the customer since the agreed purpose of the contracting parties is the endeavour to isolate a part of the market*’¹⁴⁰. The Court added that the fact that a supplier is not strict in enforcing such a prohibition does not entail that the prohibition has no effects since the very existence of the prohibition may create a ‘*visual and psychological*’ background which satisfies customers and contributes to a more or less rigorous division of the markets¹⁴¹.
- (110) The Court considered also specifically that agreements restricting the customers to which products could be resold with a view to restricting parallel trade are an infringement of Article 101 of the Treaty by object. This was the case in the *BMW Belgium* case where BMW dealers in Belgium were prohibited from selling cars outside Belgium or ‘*to firms who propose to export them*’¹⁴² i.e. there was an agreement in place restricting the customers to which the products could be sold with a view to preventing parallel trade. The Court of Justice stated that, based on the tenor in which the conditions were set, their legal and factual context and the conduct of the parties, there was an intention to put an end to all exports outside of Belgium¹⁴³. The Court of Justice further elaborated upon this in the *Javico* case¹⁴⁴, explaining that ‘*an agreement intended to deprive a reseller of his commercial freedom to choose his customers by requiring him to sell only to customers established in the contractual territory is restrictive of competition within the meaning of Article [101(1) of the Treaty]*’¹⁴⁵

6.1.2.3.2. Application to this case

- (111) As evidenced by the practices described in section 5.4.2., Mondelēz entered into agreements with certain brokers with the object of preventing them from reselling products in certain EU territories or to certain EU customers without Mondelēz’s permission:

¹³⁷ Judgment of 13 July 1966, *Consten and Grundig v Commission*, 56 and 58-64, EU:C:1966:41, p. 340.

¹³⁸ Judgment of 6 July 2000, *Volkswagen v Commission*, T-62/98, EU:T:2000:180, paragraph 178.

¹³⁹ Judgment of 16 September 2008, *Sot. Lélos kai Sia*, C-468/06 to C-478/06, EU:C:2008:504, paragraph 65.

¹⁴⁰ Judgment of 1 February 1978, *Miller v Commission*, C-19/77, EU:C:1978:19, paragraph 7.

¹⁴¹ *Ibid.*

¹⁴² Judgment of 12 July 1979, *BMW Belgium v Commission*, 32/78, 36/78 to 82/78, EU:C:1979:191, paragraphs 5 and 22.

¹⁴³ *Ibid.*, paragraph 28.

¹⁴⁴ The case concerned an agreement whereby a supplier had entrusted a distributor the distribution of products in a country outside of the Union but had prohibited the distributor from selling the products in any other country, including in the Union.

¹⁴⁵ Judgment of 28 April 1998, *Javico v Yves Saint Laurent Parfums*, C-306/96, EU:C:1998:173, paragraph 13.

- (1) An agreement between Mondelēz Germany and [broker 1] on 1 April 2012 that, as a condition for continuing the companies' commercial relationship, [broker 1] must obtain Mondelēz Germany's permission on a case-by-case basis with respect to the territories in which [broker 1] would resell the products it purchased from Mondelēz Germany. The restriction was in force until 31 December 2014. The agreement had the object of restricting parallel trade in all products that [broker 1] purchased from Mondelēz during that period, namely, certain Milka chocolate tablets and small bites products, Toblerone chocolate tablets products and Belvita sweet biscuits products.
- (2) An agreement between Mondelēz Austria and [broker 2] on or around 1 May 2013 that, as a general condition of sale, [broker 2] would not resell certain products to customers in Germany. The restriction was in force until 31 January 2016. The agreement had the object of restricting parallel trade in certain Milka chocolate tablet products.
- (3) An agreement between Mondelēz Netherlands and [broker 3] on 23 April 2015 that, as a condition of sale, [broker 3] would not resell certain Velours Noir coffee products it purchased from Mondelēz Netherlands into Belgium or the Netherlands. Because the restrictive agreement related to a single transaction, the restriction would have been in place until the broker had cleared the stocks it had purchased. As it is no longer possible to identify the date of the last sales of those products, the restriction is conservatively presumed to have lasted one month, i.e. until 23 May 2015. The agreement had the object of restricting parallel trade in certain Velours Noir coffee products.
- (4) An agreement between Mondelēz Austria and [broker 4] on 1 December 2015 that, as a condition of sale, [broker 4] would not resell certain Milka biscuit products it purchased from Mondelēz Austria to customers in Belgium. Because the restrictive agreement related to a single transaction, the restriction would have been in place until the broker had cleared the stocks it had purchased. As it is no longer possible to identify the date of the last sales of those products, the restriction is presumed to have lasted one month, i.e. until 31 December 2015. The agreement had the object of restricting parallel trade in were certain Milka biscuit products.
- (5) An agreement between Mondelez MEA and [broker 3] on or about 1 December 2016 that, as a general condition of sale, [broker 3] would not resell the products it purchased from Mondelez MEA to customers in the Union other than to non-food retailers. The agreement was expanded in March 2018 so that [broker 3] would not resell the products it purchased from Mondelez MEA to the non-food retailer Action. The restriction was in force until the start of the Commission's inspections on 18 November 2019. The agreement had the object of restricting parallel trade in certain products of the Toblerone (chocolate tablets, small bites), Oreo (sweet biscuits), Milka (chocolate tablets, small bites, countlines), Côte d'Or (chocolate tablets), Daim (small bites), and Lu (countlines) brands.
- (6) An agreement between Mondelēz Austria and [broker 2] on or about 1 January 2017 that, as a general condition of sale, [broker 2] would not resell the products it purchased from Mondelēz Austria to the broker [customer of broker

2] in Germany. The restriction was in force until 31 December 2018. The agreement had the object of restricting parallel trade in certain Milka, Mirabell and Suchard products.

- (7) An agreement between Mondelez WTR and [retailer 1]/[parent company of retailer 1] on 16 May 2017 that [parent company of retailer 1] would rescind an offer to the retailer EDEKA in Germany concerning certain Marabou products for the benefit of a distributor of Mondelez WTR. The effects of the rescission are understood to have lasted a month, i.e. until 16 June 2017 since this is the period of time it would take for the goods to be sold by the retailer. The agreement had the object of restricting parallel trade in concerned certain Marabou chocolate tablet products.
- (8) An agreement between Mondelez MEA and [broker 3] on 15 October 2017 that, as a condition of sale, [broker 3] would not resell certain Côte d'Or products it purchased from Mondelez MEA to customers in Belgium. The effects of the restriction are understood to have lasted one month, i.e. until 15 November 2017. The agreement had the object of restricting parallel trade in certain Côte d'Or chocolate tablet products.
- (9) An agreement between Mondelēz Netherlands and [broker 5] on 15 October 2017 that, as a condition of sale, the broker would not resell the products it purchased from Mondelēz Netherlands to customers in Belgium, France and the Netherlands. The effects of the restriction are understood to have lasted one month, i.e. until 15 November 2017. The agreement had the object of restricting parallel trade in certain Côte d'Or chocolate tablet products.
- (10) An agreement between Mondelēz Netherlands and [broker 6] on 15 December 2017 that, as a condition of sale, [broker 6] would not resell certain LiGa Evergreen and LiGa Milkbreak products it purchased from Mondelēz Netherlands to customers in the Netherlands. The Commission finds that the effects of the restriction lasted one month, i.e. until 15 January 2018. The agreement had the object of restricting parallel trade in certain LiGa Evergreen and LiGa Milkbreak sweet biscuit products.
- (11) An agreement between Mondelēz Germany on [broker 3] on 15 June 2019 that, as a condition of sale, [broker 3] would not resell certain Milka and Oreo products to the non-food retailer Action, which was active in Austria, Belgium, Germany, France, Luxembourg, the Netherlands and Poland. The Commission finds that the effects of the restriction lasted one month, i.e. until 15 July 2019. The agreement had the object of restricting parallel trade in certain Milka countline, praline and chocolate tablet products and Oreo sweet biscuit products.
- (112) These restrictive agreements and/or concerted practices all facilitated the partitioning of the internal market and aimed at restoring the national divisions in trade between Member States. They must therefore be regarded as by-object restrictions of Article 101(1) of the Treaty. As the practices described above all involve restrictions of the territory into which, or of the customers to whom, Mondelēz's broker customers – who are neither exclusive distributors or part of a selective distribution system – are allowed sell the contract goods or services, they fail to satisfy the conditions of Article 4 of the applicable vertical block exemption regulation.

6.1.3. *Single and repeated infringement*

6.1.3.1. Principles

- (113) An infringement of Article 101 of the Treaty can result not only from an isolated act, but also from a series of acts or from a course of conduct, even if one or more aspects of that series of acts or continuous conduct could also, in themselves and taken in isolation, constitute a single infringement of that Article. It follows from the express terms of Article 101 of the Treaty that an agreement may consist of a series of acts or a course of conduct¹⁴⁶.
- (114) A single infringement may be characterised as continuous or repeated. The practical consequence of finding a single repeated infringement rather than a single continuous infringement is that although in both cases the Commission may impose a fine in respect of the whole of the period of the infringement, in the case of a single repeated infringement it may not do so for the period during which the infringement was interrupted¹⁴⁷.
- (115) In both cases, it is necessary to establish that the conduct comprising the infringement pursued a single objective in the time in which the infringement was in effect, a circumstance which may be deduced from the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings and, lastly, of the geographical scope of those practices¹⁴⁸. In practice, the General Court refers to these criteria as the existence of an ‘overall plan’¹⁴⁹.
- (116) The Court has held with respect to the establishment of an overall plan that when: *‘[...] the different actions form part of an ‘overall plan’, because their identical object distorts competition within the common market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole.’*¹⁵⁰ It also held that the existence of an ‘overall plan’ (and thus a single infringement) can be established by a finding that the participants in a series of practices and/or agreements collusively aimed at restricting competition between them¹⁵¹.
- (117) Accordingly, if the different actions form part of an ‘overall plan’ because their identical object distorts competition within the internal market, the Commission is entitled to impute responsibility for those actions on the basis of participation in the infringement considered as a whole¹⁵².

¹⁴⁶ Judgment of 8 July 1999, *Commission v Anic Partecipazioni*, C-49/92 P, EU:C:1999:356, paragraph 81.

¹⁴⁷ Judgment of 16 June 2015, *FSL and others v Commission*, T-655/11, EU:T:2015:383, paragraph 484.

¹⁴⁸ Judgment of 16 June 2015, *FSL and others v Commission*, T-655/11, EU:T:2015:383, paragraph 484.

¹⁴⁹ Judgment of 16 June 2015, *FSL and others v Commission*, T-655/11, EU:T:2015:383, paragraphs 490 and 491.

¹⁵⁰ Judgments of 7 January 2004, *Aalborg Portland and others v Commission*, C-204/00 P, C-205/00 P, C-211/00 P, C-217/00 P and C-219/00 P, EU:C:2004:6, paragraph 258; Judgment of 21 September 2006, *Technische Unie v Commission*, C-113/04 P, EU:C:2006:593, paragraph 178.

¹⁵¹ Judgment of 21 September 2006, *Nederlandse Federatieve Vereniging voor de Groothandel op Elektrotechnisch Gebied v Commission*, C-105/04 P, EU:C:2006:592, paragraphs 162-163.

¹⁵² Judgment of 24 June 2015, *Fresh Del Monte Produce v Commission and Commission v Fresh Del Monte Produce*, C-293/13 P and C-294/13 P, EU:C:2015:416, paragraph 156.

- (118) To demonstrate the existence of an overall plan, it is necessary to demonstrate for the purposes of characterising various instances of conduct as a single and continuous infringement that they display a link of complementarity, in that each of them is intended to deal with one or more consequences of the ‘normal pattern’ of competition and that, through interaction, they contribute to the attainment of the set of anti-competitive effects desired by those responsible, within the framework of a global plan having a single objective. In that regard, it will be necessary to take into account any circumstance capable of establishing or of casting doubt on that link, such as the period of implementation, the content – including the methods used – and, correlatively, the objective of the various agreements and concerted practices in question¹⁵³.
- (119) If the participation of an undertaking in the infringement may be regarded as having been interrupted and the undertaking may be regarded as having participated in the infringement prior to and after that interruption, that infringement may be categorised as repeated if — as in the case of a continuing infringement — there is a single objective which it pursued both before and after the interruption, a circumstance which may be deduced from the identical nature of the objectives of the practices at issue, of the goods concerned, of the undertakings which participated in the collusion, of the main rules for its implementation, of the natural persons involved on behalf of the undertakings and, lastly, of the geographical scope of those practices. The infringement is then single and repeated and, although the Commission may impose a fine in respect of the whole of the period of the infringement, it may not do so for the period during which the infringement was interrupted¹⁵⁴.

6.1.3.2. Application to this case

- (120) The evidence in the file shows the existence of an overall plan to distort competition with respect to the course of conduct involving Mondelēz’s EU Export division and [exclusive distributor 8] discussed above in section 5.4.1.2.1.

6.1.3.2.1. Arrangements with [exclusive distributor 8]

- (121) **Same objective.** The conduct in section 5.4.1.2.1 pursued the same objective: partitioning Czechia and Slovakia from the rest of the Union by preventing parallel trade in Mondelēz products originating in one party’s territory from disrupting price levels in the other party’s territory (or in the case of EU Export, the territories of other Mondelēz entities and distributors that sold substantially the same products). Statements of Mondelēz employees make clear that addressing parallel imports of Côte d’Or products from Czechia to Belgium was necessarily connected to addressing parallel imports of Mirabell products from Austria to Czechia and Slovakia¹⁵⁵ and the discussion of ‘*parallels in both directions*’¹⁵⁶. On [exclusive distributor 8]’s side, this is also evidenced by its acceptance of the formal passive sales restriction in the distribution agreements from at least February 2008 through June 2013 and by its statements to both Mondelēz and to customers that it would not make passive sales to customers in territories where a Mondelēz national sales

¹⁵³ Judgment of 12 December 2012, *Almamet v Commission*, T-410/09, EU:T:2012:676, paragraph 154.

¹⁵⁴ Judgment of 16 June 2015, *FSL and others v Commission*, T-655/11, EU:T:2015:383, paragraph 484.

¹⁵⁵ ID 1483-258; ID 296-3040; ID 296-3140.

¹⁵⁶ ID 1483-258.

company or distributor carried the product in question¹⁵⁷. The scope of the understanding in both cases covered the entire range of products that [exclusive distributor 8] distributed on behalf of Mondelez. This was stated expressly in the passive sales restriction contained in the distribution agreements between 2008 and 2013, and is implicit in the discussion in 2015 of the need to align prices across the full range of products carried by [exclusive distributor 8] and [exclusive distributor 6]¹⁵⁸. The later instances tend to deal with specific instances of parallel trade. This reflects the fact that both parties implemented the agreement and for the most part there were limited parallel trade inflows to and outflows from [exclusive distributor 8]’s territory.

- (122) **Same product scope.** The conduct was not limited to specific products but rather included any parallel trade issues that arose between the parties. For example, the instances of infringing conduct with respect to parallel trade in Côte d’Or, Mirabell and Toblerone products – the three brands that accounted for the bulk of the products covered by the distribution relationship – overlapped in time, particularly between 2015 and 2017¹⁵⁹. Moreover, numerous documents make clear that action taken to control inbound trade in certain products was necessarily linked to controlling outbound trade in other products¹⁶⁰.
- (123) **Same undertakings and personnel.** The same personnel at the same undertakings were involved on both sides throughout the period of the infringing conduct.
- (a) Mondelez World Travel Retail LLC (or its direct corporate predecessors) was the contracting entity on the EU Export side for all versions of the distribution agreement with [exclusive distributor 8] between 2008 and 2017 and was the entity mentioned on all [exclusive distributor 8] business plans.
 - (b) [exclusive distributor 8] was the contracting entity on the [exclusive distributor 8] side at all times during the infringing conduct.
 - (c) The same sales manager at EU Export was directly responsible for EU Export’s commercial relationship with [exclusive distributor 8] from 2005 through at least 2020. That manager signed Annex E of the 2008 Distribution Agreement¹⁶¹, negotiated the 2016 version of the distribution agreement with [exclusive distributor 8]¹⁶² and was significantly involved in all other practices involving [exclusive distributor 8] discussed in section 5.4.1.2.1.
 - (d) The superior of the sales manager at EU Export signed the 2011, 2013 and 2016 versions of the distribution agreement with [exclusive distributor 8], and was significantly involved in most of the other practices involving [exclusive distributor 8] discussed in section 5.4.1.2.1.
 - (e) Another senior manager at EU Export signed every version of the distribution agreement between 2008 and 2017, and was not only copied on several items

¹⁵⁷ ID 169-1284; ID 169-1284; ID 169-716.

¹⁵⁸ ID 169-1359.

¹⁵⁹ See paragraph (47).

¹⁶⁰ See paragraph (47).

¹⁶¹ ID 557-6.

¹⁶² ID 296-2222.

of correspondence but played an active role in resolving the Côte d'Or/Mirabell parallel trade issues in 2015-2017.

- (f) The same senior manager at Mondelēz Austria was significantly involved in many of the practices, insofar as the person took action at the request of EU Export to try to cut off parallel imports of Mirabell products from Austria into Czechia and Slovakia.
 - (g) The same senior manager at [exclusive distributor 8] signed every version of the distribution agreement between 2008 and 2017 and was also significantly involved in all other practices involving [exclusive distributor 8] discussed in section 5.4.1.2.1.
 - (h) The same sales manager at [exclusive distributor 8] signed the 2016 version of the distribution agreement and was significantly involved in all practices discussed in section 5.4.1.2.1 from 2015.
- (b) **Same geographic scope.** As regards the geographic scope of the practices, all the individual practices relate to parallel trade flows into or out of [exclusive distributor 8]'s territory, i.e. Czechia and Slovakia¹⁶³.
- (124) In view of the foregoing, it must be concluded that the conduct described in section 5.4.1.2.1 forms part of an overall plan with a common anticompetitive objective, constituting a single infringement of Article 101(1) of the Treaty that began on or around 17 April 2008 and ended on or around 2 June 2017.
- (125) The parties removed the express contractual passive sales restriction from the distribution agreement on 17 June 2013 with the consequence that such restriction was not explicitly present in the distribution agreements between Mondelēz and [exclusive distributor 8] after that date. At the same time, evidence on the file shows that EU Export put pressure on Mondelēz Austria to cut off an Austrian distributor that was selling Mirabell products into Czechia in February 2014. This shows that Mondelēz continued to prevent parallel trade consistently with its previous behaviour also after June 2013. However, in view of the fact that there was no direct communication between Mondelēz and [exclusive distributor 8] in the period from 17 June 2013 until 25 February 2015, the infringement should be regarded as interrupted during that period.
- (126) In conclusion, the conduct described in section 5.4.1.2.1 forms part of an overall plan with a common anticompetitive objective, constituting a single repeated infringement of Article 101(1) of the Treaty that lasted from 17 April 2008 until 2 June 2017, with an interruption between 18 June 2013 and 24 February 2015.

¹⁶³ The one arguable exception relates to an apparently authorised sales relationship between [exclusive distributor 8] and a Dutch online retailer, in which [exclusive distributor 8] reports apparent parallel trade from some other country into the Netherlands. However, even in that case, other communications relate to an export relationship of [exclusive distributor 8] that was subject to EU Export's control, and it is clear that both parties shared the same objective of restricting unauthorised parallel trade in Mondelēz's products.

6.1.4. *Effect on trade between Member States*

6.1.4.1. Principles

- (127) The effect on trade criterion is an autonomous Union law criterion, which must be assessed separately in each case¹⁶⁴. It is a jurisdictional criterion, which defines the scope of application of EU competition law. EU competition law is not applicable to agreements and practices that are not capable of appreciably affecting trade between Member States.
- (128) According to the case law of the Court of Justice, for an agreement to be capable of affecting trade between Member states, it must be possible to foresee with a sufficient degree of probability, on the basis of a set of objective factors, that it may have an influence, direct or indirect, actual or potential, on the pattern of trade between Member States¹⁶⁵.
- (129) According to the Guidelines on Effect on Trade, agreements are in principle not capable of appreciably affecting trade between Member States when the following cumulative conditions are met: (a) The aggregate market share of the parties on any relevant market within the Community affected by the agreement does not exceed 5 %, and (c) ‘[...] *In the case of vertical agreements, the aggregate annual Community turnover of the supplier in the products covered by the agreement does not exceed 40 million euro [...]*’¹⁶⁶
- (130) However, paragraph (53) of the Guidelines on Effect on Trade states that in the case of agreements that *by their very nature* are capable of affecting trade between Member States, for example, because they concern imports and exports or cover several Member States, there is a rebuttable positive presumption that such effects on trade are appreciable if the turnover of the parties in the products covered by the agreement calculated as indicated in paragraphs (52) and (54) of the Guidelines on Effect on Trade exceeds 40 million euro. However, this presumption does not apply where the agreement covers only part of a Member State.

6.1.4.2. Application to this case

- (131) The current investigation deals with restrictions of exports of goods across the Union covering multiple Member States. Mondelēz’s EU-wide turnover exceeds the EUR 40 million threshold. The agreements should therefore be regarded as by their very nature capable of affecting trade between Member States.

6.1.5. *Appreciable impact on competition*

6.1.5.1. Principles

- (132) Article 101(1) of the Treaty prohibits agreements between undertakings which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market. The Court of Justice has clarified that that provision is not applicable where the impact of

¹⁶⁴ See Commission Guidelines on the effect on trade concept contained in Articles 81 and 82 of the Treaty (OJ C 101, 27.4.2004, p. 81, ‘Guidelines on Effect on Trade’), paragraph 12.

¹⁶⁵ See for example Judgment of 14 December 1983, *Société de vente de ciments v Kerpen & Kerpen*, 319/82, EU:C:1983:374, paragraph 9; Judgment of 29 June 2023, *Super Bock Bebidas*, C-211/22, EU:C:2023:529, paragraph 60.

¹⁶⁶ Guidelines on Effect on Trade, paragraph 52.

the agreement on trade between Member States or on competition is not appreciable¹⁶⁷.

- (133) The Court of Justice has also clarified that an agreement which may affect trade between Member States and which has as its object the prevention, restriction or distortion of competition within the internal market constitutes, by its nature and independently of any concrete effects that it may have, an appreciable restriction of competition¹⁶⁸.

6.1.5.2. Application to this case

- (134) Given that the agreements subject to the current investigation may affect trade between Member States and have as their object the prevention, restriction or distortion of competition within the internal market, they constitute by their nature appreciable restrictions of competition.

6.1.6. Application of Article 101(3) of the Treaty

6.1.6.1. Principles

- (135) Article 101(1) of the Treaty may be declared inapplicable pursuant to Article 101(3) of the Treaty where an agreement or concerted practice contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and the agreement or concerted practice does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives, and (b) afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.
- (136) The Commission is empowered to adopt block exemption regulations that declare Article 101(1) of the Treaty inapplicable to certain categories of agreements that may fall within Article 101(1) of the Treaty but which can normally be regarded as satisfying all the conditions of Article 101(3) of the Treaty. During the Investigation Period, Commission Regulation (EC) No 2790/1999 or its successor, Commission Regulation (EU) No 330/2010, applied to certain categories of vertical agreements.
- (137) Even where a restriction by object pursuant to Article 101(1) of the Treaty is established and the applicable vertical block exemption regulation does not apply, there is in principle the possibility of an exemption from the prohibition in Article 101(1) of the Treaty if the parties prove that the agreement fulfils the four conditions for exemption set out in Article 101(3) of the Treaty¹⁶⁹.
- (138) Undertakings claiming the benefit of Article 101(3) of the Treaty bear the burden of proving that the conditions of that paragraph are fulfilled¹⁷⁰.

¹⁶⁷ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) (OJ C 291, 30.8.2014, p. 1), paragraph 1.

¹⁶⁸ Judgment of 13 December 2012, *Expedia*, C-226/11, EU:C:2012:795, in particular paragraphs 35, 36 and 37.

¹⁶⁹ Judgment of 15 July 1994, *Matra Hachette v Commission*, T-17/93, EU:T:1994:89; Judgment of 13 October 2011, *Pierre Fabre Dermo-Cosmétique*, C-439/09, EU:C:2011:649, paragraph 59.

¹⁷⁰ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, Article 2.

6.1.6.2. Application to this case

(139) In line with the above-mentioned principles in section 6.1.2, territorial and customer supply restrictions are restrictions by object. Restrictions of competition by object are types of coordination between undertakings which can be regarded as being harmful by their very nature to the proper functioning of normal competition. On the basis of the evidence before the Commission, there are no indications to suggest that the conditions of Article 101(3) of the Treaty could be fulfilled in this case. There are no indications that Mondelēz's conduct was indispensable for improving the production or distribution of goods or to promoting technical or economic progress. Moreover, as shown in section 6.1.2, the restrictions implemented by Mondelēz had the object of reducing competition for the supply of goods, potentially limiting consumer's possibilities for wider choice and lower prices.

6.1.7. *Conclusions regarding infringements of Article 101(1) of the Treaty*

(140) On the basis of the foregoing, Mondelēz committed the following infringements of Article 101(1) of the Treaty:

- (1) the express passive sales restriction agreed between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 1] discussed in section 5.4.1.1.1, for the period 18 December 2006 until 31 December 2016;
- (2) the express passive sales restriction agreed between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 2] discussed in section 5.4.1.1.2, for the period 30 April 2007 until 10 October 2016;
- (3) the express passive sales restriction agreed between Kraft Foods Schweiz AG, EU Export and [exclusive distributor 3] discussed in section 5.4.1.1.3, for the period 19 May 2008 until 30 June 2016;
- (4) the express passive sales restriction agreed between Mondelez EU Export and [exclusive distributor 4] discussed in section 5.4.1.1.4, for the period 23 September 2011 until 27 September 2017;
- (5) the express passive sales restriction agreed between Mondelez EU Export and GmbH and [exclusive distributor 5] discussed in section 5.4.1.1.5, for the period from 1 February 2012 until 2 June 2016;
- (6) the express passive sales restriction agreed between Mondelez EU Export and [exclusive distributor 6], discussed in section 5.4.1.1.6, for the period from 5 March 2012 until 3 November 2017;
- (7) the express passive sales restriction agreed between Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7] discussed in section 5.4.1.1.7, for the period from 31 December 2016 until 31 December 2017;
- (8) the agreement and/or concerted practices between Mondelez EU Export and [exclusive distributor 8] to restrict parallel trade discussed in section 5.4.1.2.1 for the periods 17 April 2008 until 17 June 2013 and 25 February 2015 until 2 June 2017;
- (9) the agreement between Mondelez EU Export and [exclusive distributor 9] to restrict passive sales to Slovakia discussed in section 5.4.1.2.2, for the period 5 February 2018 until 5 March 2018;

- (10) the agreement between Mondelez EU Export and [exclusive distributor 4] regarding passive sales to Austria discussed in section 5.4.1.2.3, for the period 13 March 2019 until 13 April 2019;
- (11) the agreement between Mondelez EU Export and [exclusive distributor 9] restricting passive sales to Romania discussed in section 5.4.1.2.4, for the period 7 February 2020 until 7 March 2020;
- (12) the agreement between Mondelēz Germany and [broker 1] to clear the destination of the goods before sale discussed in section 5.4.2.1, from 1 April 2012 until 31 December 2014;
- (13) the agreement between Mondelēz Austria and [broker 2] not to resell certain products in Germany discussed in section 5.4.2.2.1, for the period 1 May 2013 until 31 January 2016;
- (14) the agreement between Mondelēz Austria and [broker 2] not to sell to a certain distributor discussed in section 5.4.2.2.2, for the period 1 January 2017 until 31 December 2018;
- (15) the agreement between Mondelēz Netherlands and [broker 3] regarding the destination of sales of certain products discussed in section 5.4.2.3.1, for the period 23 April 2015 until 23 May 2015;
- (16) the agreement between Mondelez MEA and [broker 3] not to resell certain products other than to non-food retailers discussed in section 5.4.2.3.2, for the period 1 December 2016 until the start of the Commission's inspections on 18 November 2019;
- (17) the agreement between Mondelez MEA and [broker 3] not to resell certain products in Belgium discussed in section 5.4.2.3.3, for the period 15 October 2017 until 15 November 2017;
- (18) the agreement between Mondelēz Germany and [broker 3] not to resell certain products to a certain non-food retailer discussed in section 5.4.2.3.4, for the period from 15 June 2019 until 15 July 2019;
- (19) the agreement between Mondelēz Austria and [broker 4] not to resell certain biscuits in Belgium discussed in section 5.4.2.4, for the period 1 December 2015 until 31 December 2015;
- (20) the agreement between Mondelez WTR and [retailer 1] to withdraw an offer to a customer discussed in section 5.4.2.5, for the period 16 May 2017 until 16 June 2017;
- (21) the agreement between Mondelēz Netherlands and [broker 5] not to resell certain products in Belgium, France and the Netherlands discussed in section 5.4.2.6, for the period 15 October 2017 until 15 November 2017; and
- (22) the agreement between Mondelēz Netherlands and [broker 6] not to resell certain products in the Netherlands discussed in section 5.4.2.7, for the period from 15 December 2017 until 15 January 2018.

6.2. Application of Article 102 of the Treaty

(141) Article 102 of the Treaty prohibits undertakings that hold a dominant position in a relevant market from abusing that position. To determine whether a firm has infringed Article 102 of the Treaty, it is necessary: (a) to define the relevant market(s) on which the firm operates and on which the conduct occurs; (b) to determine whether the undertaking is dominant on the relevant market(s); and (c) to determine whether the conduct in question is abusive within the meaning of Article 102 of the Treaty.

6.2.1. Market definition

(142) The first step in determining whether an undertaking holds a dominant position is to define the relevant market, both in its product and geographical dimension, and second to assess the market power of that undertaking on that market, including assessing the possibilities of competition existing in the context of the relevant product and geographic market definitions retained.

6.2.1.1. Relevant product market

(143) The relevant product market comprises all those products that customers regard as interchangeable or substitutable, based on the products' characteristics, their prices and their intended use, taking into consideration the conditions of competition and the structure of supply and demand on the market¹⁷¹.

(144) Firms are subject to three main sources of competitive constraints: demand substitutability, supply substitutability and potential competition. The substitutability of a product or service from a demand-side perspective is the most important assessment criterion since it constitutes the most immediate and effective disciplinary force on the suppliers of a given product or service, in particular in relation to their pricing decisions¹⁷².

(145) However, supply-side substitutability may also be taken into account when defining markets in those situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy¹⁷³. There is supply-side substitution when, cumulatively, most, if not all, suppliers are able to switch production to the relevant products and market them effectively in the short term by incurring only insignificant additional sunk costs or risks due to switching their production and when suppliers have the incentive to and would do so when relative prices or demand conditions change¹⁷⁴. When these conditions are met, the additional production that is put on the market will have a disciplinary effect on the competitive behaviour of the companies involved¹⁷⁵.

¹⁷¹ Judgment of 30 January 2020, *Generics (UK) and others*, C-307/18, EU:C:2020:52, paragraph 129.

¹⁷² Judgment of 4 July 2006, *easyJet v Commission*, T-177/04, EU:T:2006:187, paragraph 99. See also Commission Notice on the definition of the relevant market for the purposes of Union competition law (OJ C, C/2024/1645, 22.2.2024, 'Market Definition Notice'), paragraph 23, in particular point (a).

¹⁷³ Market Definition Notice, paragraph 32.

¹⁷⁴ Market Definition Notice, paragraphs 32 and 33.

¹⁷⁵ Market Definition Notice, paragraph 32.

6.2.1.1.1. Prior practice with regard to product market definition

- (146) Although the relevant product market must be defined on the basis of the circumstances of the particular case, past findings with respect to market definition are often a useful starting point for that exercise¹⁷⁶. In its decision in *Kraft Foods/Cadbury*, which related to a concentration involving Mondelēz's predecessor companies, the Commission found '*that competitive conditions are distinct in the various chocolate confectionery segments in all considered Member states and for the purpose of the present decision, separate markets are defined for countlines, tablets and pralines.*'¹⁷⁷
- (147) Prior merger control decisions have also considered the possibility that sales of private label snack foods may belong to separate relevant product markets¹⁷⁸. Because Mondelēz's market position would simply be stronger if private label chocolate tablets were excluded from the overall market for chocolate tablets, it is not necessary to take a position in this case on whether private label chocolate tablets and branded chocolate tablets belong to the same or to distinct relevant product markets.
- (148) The Commission's investigation in the present case concerns abuses of dominance in the sale of chocolate tablet products. It therefore focuses on whether chocolate tablets constitute a relevant product market that is distinct from other chocolate confectionery products. The practices took place at the wholesale level of the supply chain for chocolate products. The wholesale and retail levels are however interrelated to the extent that the suppliers (Mondelēz and its competitors) and the customers at the wholesale level (the retailers) take into account for their agreements at wholesale level a number of elements at retail level, inter alia the demand of consumers and price developments at retail level. In assessing the relevant product market, the investigation thus assessed the demand and supply characteristics and potential competition not only at wholesale level but also at retail level where appropriate.

6.2.1.1.2. Demand-side substitutability

- (149) As explained below, the evidence in the Commission's file indicates that there is limited demand-side substitutability between chocolate tablets and other chocolate confectionery products. In particular, the evidence indicates that consumers' consumption habits with respect to chocolate tablets are distinct from their consumption habits with respect to other chocolate confectionery products, that consumers of chocolate tablets do not readily switch to other chocolate confectionery products in response to small price increases, that there are significant differences between the prices of chocolate tablets and the prices of other chocolate confectionery categories, and that the prices of chocolate tablets appear to move independently of the prices of other chocolate confectionery categories.

¹⁷⁶ Market Definition Notice, paragraph 14.

¹⁷⁷ Commission decision of 6 January 2010 in case M.5644 – *Kraft Foods / Cadbury*, paragraph 24.

¹⁷⁸ Commission decision of 5 May 2000 in case M.1920 – *Nabisco / United Biscuits*; Commission decision of 15 May 2013 in case M.6891 – *Agrofert / Lieken*; Commission decision of 21 November 2021 in case M.10350 – *Mondelēz / Chipita Industrial and Commercial Company*.

6.2.1.1.2.1. Consumption habits and evidence of substitution

- (150) The evidence in the Commission's file indicates that although consumers may purchase tablets, pralines and countlines over the course of a year, their choice of chocolate confectionery product is based on different consumer needs and is reflected in different purchasing and consumption patterns. A number of retailers¹⁷⁹ and producers¹⁸⁰ observed that consumers tended to purchase chocolate tables for different reasons than for pralines or countlines and tended to consume chocolate tablets on different occasions or in different locations. For example, countlines tend to be impulse purchases that are consumed alone on the go, whereas tablets tend to be purchased for consumption at home, and are often shared. Pralines are generally purchased for special occasions and for gifting.
- (151) Mondelēz stated that countlines are now increasingly consumed as an at-home treat, and meet the same consumption needs as tablets¹⁸¹. Mondelēz submitted that over the last ten years, consumers' habits have evolved considerably, and that consumers now typically have a repertoire of brands/products that they purchase from, and consume all types of chocolate confectionery products. According to Mondelēz, consumers generally perceive chocolate confectionery products as a treat which satisfies various emotional and functional 'need states', such as hunger, mood boosting, sharing, pampering, taking a break, gifting, etc. Mondelēz argued that those need states often coexist, and can be satisfied by various formats of chocolate confectionery. Mondelēz argued that no single need state is satisfied exclusively by a single format¹⁸². However, Mondelēz's internal documents tend to associate the different purchasing reasons and consumption occasions closely with specific categories of chocolate confection¹⁸³.
- (152) Mondelēz's position is also at odds with the view of many of the major retailers who sell chocolate tablets to consumers in the four Member States under consideration. Twelve retailers constituting the substantial majority of sales in Austria, Belgium, Bulgaria and Romania responded to requests for information regarding issues of market definition and dominance. Seven of the twelve retailers expressed their view that chocolate tablets constituted a relevant product market that was distinct from other chocolate confectionery products¹⁸⁴. Two retailers expressly stated that their customers did not tend to view other categories of chocolate confectionery as substitutes for chocolate tablets¹⁸⁵. Two retailers provided evidence that a substantial portion of their customers who buy chocolate confections exclusively or to a large extent only buy chocolate tablets¹⁸⁶.
- (153) Six retailers explained that consumers' decisions to purchase chocolate tablets were not significantly affected by the prices of other chocolate confectionery categories¹⁸⁷.

¹⁷⁹ ID 1226; ID 1323; ID 1275; ID 1267; ID 1291; ID 1307; ID 2674; ID 2731; ID 1262; ID 1463.

¹⁸⁰ ID 830; ID 729.

¹⁸¹ ID 1132-22.

¹⁸² ID 1132-22.

¹⁸³ See for example ID 297-3147; ID 179-2068; ID 189-905; ID 189-471; ID 297-3438; ID 189-372.

¹⁸⁴ ID 1303; ID 1226; ID 1267; ID 1275; ID 2674; ID 2731; ID 1262.

¹⁸⁵ ID 1267; ID 1291.

¹⁸⁶ ID 1303; ID 1226.

¹⁸⁷ ID 1226; ID 1303; ID 1307; ID 2674; ID 2731; ID 1261.

- (154) When asked whether consumers would switch between chocolate tablets and other categories of chocolate confectionery, Mondelez stated that it *‘does not systematically track this specific consumer switching behaviour between chocolate tablets and other products in its ordinary course of business’*, and that *‘[w]hile in the past Mondelez has sometimes conducted ad hoc internal analyses in connection with price increases, these were focused on specific segments and measured the impact of the price increase on Mondelez’ own sales, and did not also consider consumers’ specific switching behaviour, or impact across different segments.’*¹⁸⁸
- (155) The views of other producers tended to support the position that chocolate tablets constitute a distinct relevant product market. Although one producer argued that there would be significant substitution away from chocolate tablets to other categories of chocolate confectionery if the price of chocolate tablets increased by 5-10% relative to the other categories¹⁸⁹, three other producers stated that chocolate tablet consumers were unlikely to switch to other categories in response to a price increase¹⁹⁰.
- (156) Although the results of the market investigation with respect to substitution between chocolate tablets and other categories of chocolate confectionery were not unanimous, the preponderance of the evidence provided by market participants supports the conclusion that consumption patterns for chocolate tablets are sufficiently different from consumption patterns for other forms of chocolate confectionery and that neither consumers nor retailers generally consider other chocolate confectionery categories to be close substitutes for chocolate tablets. Although some respondents, including Mondelez, provided some evidence of consumers buying both chocolate tablets and other types of chocolate confectionery to argue that chocolate tablets belong to a broader market for chocolate confectionery, on balance that evidence did not clearly show that customers would readily switch between chocolate confectionery categories in order to avoid a small change in the relative prices within the categories, particularly when viewed in the light of the statements to the contrary by the majority of respondents.

6.2.1.1.2.2. Prices of various chocolate products

- (157) Differences between the prices of different products may impact the degree of substitutability between products and may indicate that the products do not belong to the same product market¹⁹¹. The Commission’s investigation found that the prices of chocolate tablets differed significantly from the prices of pralines and countlines. There were prevailing price differences between countlines and tablets, and between pralines and tablets in the geographic markets under consideration. The price differences (in terms of prices per kg), varied between 2% and 27% for countlines and tablets, and between 22% and 81% for pralines and tablets¹⁹². The consistent price differences and the magnitude of these differences in most cases suggest that chocolate tablets should be seen as belonging to a relevant product market that is separate from countlines and pralines.

¹⁸⁸ ID 1132-22.

¹⁸⁹ ID 874.

¹⁹⁰ ID 830; ID 775; ID 1181.

¹⁹¹ ID 1306.

¹⁹² ID 1170 (Austria); ID 1177 (Belgium); ID 1172 (Bulgaria); ID 1173 (Romania).

6.2.1.1.2.3. Price movements of chocolate tablets and other chocolate confectionery

- (158) If the prices of two products change in a similar way over time, this tends to indicate that the products belong to the same relevant product market. In such cases, one would expect to see that even if the prices of the products changed, the relative price differentials would remain fairly constant. By contrast, if the prices of two products move independently of each other, this tends to indicate that demand for the products is different and that the products belong to separate relevant product markets.
- (159) Data provided by Nielsen relating to the relative prices of chocolate tablets and other chocolate confectionery products and the developments thereof indicate that the prices of chocolate tablets tended to move independently of the prices of other chocolate confectionery over time. For Austria¹⁹³ and Belgium¹⁹⁴, the only countries for which there was data over a sufficiently long period to identify discernible trends, the price of chocolate tablets moved independently of the prices of both pralines and countlines.
- (160) The Nielsen data indicates that the prices of chocolate tablets in Austria and Belgium tend to move independently of the prices of pralines and countlines, therefore, in the present case chocolate tablets are considered to belong to a relevant product market that is distinct from that of other chocolate confectionery products.

6.2.1.1.3. Supply-side substitutability

- (161) Supply-side substitutability may also be examined when defining markets in situations in which its effects are equivalent to those of demand substitution in terms of effectiveness and immediacy. In this context, it has to be determined whether undertakings that produce chocolate confectionery products other than chocolate tablets could in the short term switch to producing chocolate tablets when relative prices or demand conditions change without incurring significant costs and in order to compete more intensely on that market¹⁹⁵.
- (162) According to Mondelēz, the techniques for producing tablets and other chocolate products are very similar. It argued that countlines are manufactured in exactly the same way as chocolate tablets, depending on whether they are solid chocolate bars, bars with fillings or bars with solid centres¹⁹⁶.
- (163) Mondelēz claimed that any chocolate player can successfully enter any segment with just 'some investment'¹⁹⁷, as production lines have become increasingly flexible, allowing manufacturers to run different production lines at the same time using the same technology and easily switching between formats¹⁹⁸. Mondelēz also stated that it had [business secrets – marketing and sales strategy], but did not provide any concrete evidence in relation to the investment, costs, duration, marketing expenses, etc.
- (164) The views of other producers tended not to support Mondelēz's view. One producer argued that existing chocolate confectionery manufacturers could in some cases

¹⁹³ ID 1168.

¹⁹⁴ ID 1168.

¹⁹⁵ Market Definition Notice, paragraph 33.

¹⁹⁶ ID 1132-22.

¹⁹⁷ ID 1132-22.

¹⁹⁸ ID 1132-22.

introduce new production lines for chocolate tablets without requiring high investments, but did not provide any evidence of supply-side substitution or any indication of the necessary time and investment to repurpose production lines¹⁹⁹.

- (165) By contrast, three other producers explained that switching production between different categories would require investing in new production lines, which would require substantial investments and take significant time²⁰⁰. A fourth producer explained that although shifting production lines between different categories was possible, it was difficult due to economic, time and market-entry constraints²⁰¹. A fifth producer explained although switching production between different categories was possible in principle, it would be costly and risky, not only because of the capital requirements, but also because of the need for investment in marketing and promotional activities and listing fees by retailers²⁰².
- (166) Based on the preponderance of the evidence provided by responding market participants, for the purposes of the present case that supply-side substitution by producers of chocolate confections other than tablets does not impose a significant competitive constraint on the supply of chocolate tablets.

6.2.1.1.4. Conclusion

- (167) In view of the evidence presented above on product characteristics, demand side substitution, price levels and movements, and supply-side substitution, the wholesale supply of chocolate tablets constitutes a relevant product market that is distinct from other markets for the wholesale supply of other types of chocolate confectionery for the purposes of the present case.

6.2.1.2. Relevant geographic market

- (168) The relevant geographic market covers the territory in which the undertakings concerned operate with regard to the products or services concerned in sufficiently homogeneous conditions of competition²⁰³. According to established case-law, the relevant geographic market comprises an area in which the undertakings concerned are involved in the supply and demand of the relevant products or services, in which area the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas in which the prevailing conditions of competition are appreciably different²⁰⁴. The definition of the geographic market does not require the conditions of competition between traders or providers of services to be perfectly homogeneous.
- (169) In its previous merger decisions, the Commission found the relevant geographic markets for the supply of chocolate confectionery to be national in scope²⁰⁵. In the *Kraft Foods/Cadbury* merger decision, Mondelēz took the view that chocolate

¹⁹⁹ ID 709.

²⁰⁰ ID 742; ID 2763; ID 775.

²⁰¹ ID 830.

²⁰² ID 1181.

²⁰³ Market Definition Notice, paragraphs 38 and 62.

²⁰⁴ Ibid.

²⁰⁵ Commission decision of 16 October 2000 in case M.2072 – *Philipp Morris/Nabisco*, paragraph 17; Commission decision of 9 November 2007 in case M.4824 – *Kraft/Danone Biscuits*, paragraph 19; Commission decision of 6 January 2010 in case M.5644 – *Kraft Foods/Cadbury*, paragraph 43.

confectionery markets are national in scope²⁰⁶, a position it did not contradict in the course of the investigation²⁰⁷.

- (170) The territories concerned by the potential infringements at hand are Austria, Belgium, Bulgaria and Romania. The Commission investigated: (1) various demand and supply characteristics, such as differences in taste and national brand preference; (2) differences between the market positions of the largest chocolate tablets suppliers in national markets in each of Austria, Belgium, Bulgaria and Romania as compared with their respective neighbouring Member States; and (3) differences between the average retail price for chocolate tablets in each of Austria, Belgium, Bulgaria and Romania as compared with their respective neighbouring Member States.
- (171) The practices took place at the wholesale level of the supply chain for chocolate tablet products. The wholesale and retail levels are however interrelated to the extent that the suppliers (Mondelēz and its competitors) and the customers at the wholesale level (the retailers) take into account for their agreements at wholesale level a number of elements at retail level, inter alia the demand of consumers and price developments at retail level. In assessing the relevant geographic market, the investigation thus assessed the demand and supply characteristics and potential competition not only at wholesale level but also at retail level where appropriate.

6.2.1.2.1. Demand and supply characteristics

- (172) The information in the Commission's file indicates that consumer demand for chocolate tablets differs significantly from country to country. The main drivers for these differences are differences in consumer tastes and preferences in different countries²⁰⁸. For example, in Northern Europe (e.g. Austria, Germany), consumers tend to prefer milk chocolate, whereas in Southern Europe (e.g. France, Italy), consumers tend to prefer dark chocolate²⁰⁹. Mondelēz provided evidence showing that consumer perceptions of different brands varied from Member State to Member State, and that in many Member States there was a strong preference for local brands²¹⁰. Two other producers also submitted evidence that consumption patterns differ from country to country²¹¹.
- (173) The differences in consumer demand at national level are reflected in the way retailers purchase chocolate tablets. Mondelēz explained that *'the majority of retailers make their purchasing decisions at the national level, reflecting differences in national tastes.'*²¹² Mondelēz and its competitors generally sell to customers in a given Member State either through a dedicated national sales organisation (e.g. a local subsidiary) or through a local distributor²¹³.
- (174) The regulatory framework tends to heighten the differences between the conditions of competition in different Member States. Mondelēz explained that within the

²⁰⁶ Commission decision of 6 January 2010 in case M.5644 – *Kraft Foods/Cadbury*, paragraph 42.

²⁰⁷ ID 1132-22.

²⁰⁸ ID 1132-22; ID 711; ID 746; ID 729; ID 775.

²⁰⁹ ID 1132-22; ID 711; ID 775.

²¹⁰ ID 1132-22.

²¹¹ ID 784; ID 709.

²¹² ID 1132-22.

²¹³ ID 1132-22; ID 775; ID 746; ID 180; ID 729.

framework of the Directive 2000/36/EC²¹⁴, ‘*manufacturers are free to tailor their recipes to meet local consumer demands and expectations, and as a result, there are different compositions, manufacturing and labelling practices across the EU Member States.*’²¹⁵ Labelling tends to differ from Member State to Member State because of the requirement that mandatory food information appears in a language easily understood by consumers in the Member State in which the food is marketed. Although labelling requirements are in principle determined by Union legislation, Mondelez provided extensive evidence that the uneven application of that legislation at national level led in practice to different labelling requirements in different Member States²¹⁶.

6.2.1.2.2. Differences in the identities and market shares of the four largest chocolate tablets suppliers in different Member States

(175) Although not conclusive on its own, the fact that there are significant differences in the identities and shares of sales of the leading suppliers in different geographic areas is often an indication that conditions of competition in those areas are heterogeneous. The market investigation found that although Mondelez was the leading chocolate tablet supplier in Austria, Belgium, Bulgaria and Romania, the identities and shares of the three next largest competitors varied considerably from Member State to Member State²¹⁷.

6.2.1.2.3. Differences between the average retail price for chocolate tablets in different Member States

(176) When conditions of competition are homogenous across a given area, price levels tend to be homogenous throughout that area. Although there may be some price differences across the area due to factors such as distribution and transportation costs, prices will tend to move in parallel. Conversely, the facts that price levels are significantly different in different areas tend to indicate that conditions of competition are different in the different areas.

(177) The following charts compare the average price of chocolate tablets in each of Austria, Belgium, Bulgaria and Romania with the average price of chocolate tablets in their respective neighbouring Member States between 2016 and 2019.

Table 6.2.1.2.3.A – Comparison of average retail prices for chocolate tablets in Austria and its neighbouring Member States

Average price TOTAL (Euro/Kg)				
	2016	2017	2018	2019
AUSTRIA	9.9€	10.0€	10.0€	10.0€
ITALY	10.17€	10.44€	10.71€	10.76€
GERMANY	8.34€	8.38€	8.25€	8.30€
CZECH REPUBLIC	7.91€	8.26€	8.34€	8.04€
SLOVAKIA	8.52€	8.78€	8.91€	8.84€

²¹⁴ Directive 2000/36/EC of the European Parliament and of the Council of 23 June 2000 relating to cocoa and chocolate products intended for human consumption, OJ L 197, 3.8.2000, p. 19. The directive standardises terminology and harmonises the labelling rules for cocoa and chocolate products.

²¹⁵ ID 1132-22.

²¹⁶ ID 1132-22.

²¹⁷ See Section 6.2.3.1.1.

SLOVENIA	9.93€	9.50€	8.30€	8.22€
HUNGARY	8.45€	8.76€	8.62€	8.16€

Source: Nielsen²¹⁸

Table 6.2.1.2.3.B – Comparison of average retail prices for chocolate tablets in Belgium and its neighbouring Member States

Average Price TOTAL Euro/kg				
	2016	2017	2018	2019
BELGIUM	9.80€	10.0€	10.20€	10.20€
FRANCE	9.78€	10.02€	10.21€	10.39€
GERMANY	8.34€	8.38€	8.25€	8.30€
NETHERLANDS	8.70€	9.04€	9.37€	9.82€

Source: Nielsen²¹⁹

Table 6.2.1.2.3.C – Comparison of average retail prices for chocolate tablets in Bulgaria and its neighbouring Member States

Average price TOTAL (Euro/Kg)				
	2016	2017	2018	2019
BULGARIA	8.60€	8.30€	8.40€	9.00€
GREECE	13.02€	13.05€	13.17€	13.13€
ROMANIA	6.90€	7.00€	7.20€	7.00€

Source: Nielsen²²⁰

Table 6.2.1.2.3.D – Comparison of average retail prices for chocolate tablets in Romania and its neighbouring Member States

Average price TOTAL (Euro/kg)				
	2016	2017	2018	2019
ROMANIA	6.90€	7.0€€	7.2€	7.00€
HUNGARY	8.45€	8.76€	8.62€	8.16€
BULGARIA	8.60€	8.30€	8.40€	9.00€

Source: Nielsen²²¹

(178) As the above tables show, the average prices for chocolate tablets in each of Austria, Belgium, Bulgaria and Romania differ significantly from the average prices for chocolate tablets in most of their respective neighbouring Member States. Moreover, the tables show that the average prices for chocolate tablets in each of Austria, Belgium, Bulgaria and Romania tended to move independently of the average prices for chocolate tablets in most of their respective neighbouring Member States. Although these data are not conclusive on their own, they are generally consistent with a finding that relevant geographic markets for chocolate tablets are national in

²¹⁸ ID 1553. No records for 2015 are available.

²¹⁹ ID 1553. No data for 2015 are available.

²²⁰ ID 1553. No data for 2015 are available.

²²¹ ID 1553. No data for 2015 are available.

scope. Although the differences between Belgium and France and between Austria and Italy are relatively small, this fact on its own does not indicate that the two pairs of countries belong to the same relevant geographic market, particularly in view of the other factors considered in sections 6.2.1.2.1 and 6.2.1.2.2.

6.2.1.2.4. Conclusions on the relevant geographic market

(179) The evidence in the Commission's file indicates that conditions of competition for the wholesale supply of chocolate tablets differ from Member States to Member State. There are significant differences in consumption patterns for chocolate in different Member States. Retailers tend to purchase chocolate tablets on a national basis, and producers generally sell through either a dedicated national sales organisation or through a local distributor. The identities and shares of sales of chocolate tablet producers differ significantly between each of Austria, Belgium, Bulgaria and Romania and their respective neighbouring Member States²²². Similarly, the averages prices of chocolate tablets in each of Austria, Belgium, Bulgaria and Romania tend to differ from, and to move differently than, the average prices of chocolate tablets in some of their respective neighbouring Member States. Having considered all these factors, the relevant geographic markets for the wholesale supply of chocolate tablets are national in scope and Austria, Belgium, Bulgaria and Romania each constitute distinct relevant geographic markets for the wholesale supply of chocolate tablets.

6.2.2. Dominance

- (180) According to settled case law, dominance is '*a position of economic strength enjoyed by an undertaking, which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, its customers and ultimately of consumers.*'²²³
- (181) A finding of dominance does not require that the concerned undertaking is able to eliminate all opportunity for competition in the relevant market²²⁴. A finding of dominance is also not precluded by the existence of lively competition on the concerned market, provided that the undertaking is able to act without having to take account of such competition in its market strategy and without suffering detrimental effects from such behaviour²²⁵. Therefore, the fact that there may be competition on the market is a relevant but not decisive factor for determining whether a dominant position exists²²⁶.
- (182) The existence of a dominant position derives from a combination of several factors which, if taken separately, may not necessarily be determinative²²⁷.
- (183) One important factor is the position of the undertaking in the relevant market. The fact that an undertaking holds a very large share of the relevant market, save in

²²² ID 1553.

²²³ Judgment of 14 February 1978, *United Brands v Commission*, 27/76, EU:C:1978:22, paragraph 65.

²²⁴ Judgment of 14 February 1978, *United Brands v Commission*, 27/76, EU:C:1978:22, paragraph 113.

²²⁵ Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraph 70.

²²⁶ Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraph 101.

²²⁷ Judgment of 14 February 1978, *United Brands v Commission*, 27/76, EU:C:1978:22, paragraph 66; Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraph 39.

exceptional circumstances, is evidence of a dominant position²²⁸. This is the case where a company has a market share of 50% or above²²⁹. An undertaking which holds a very large market share over an extended period, without smaller competitors being able to rapidly meet the demand of customers who would like to shift their purchases away from that undertaking, is in a position of strength which makes it an unavoidable trading partner and secures for it, at the very least during relatively long periods, the freedom of action which is the special feature of a dominant position²³⁰.

- (184) Another important factor for assessing dominance is the existence of barriers that prevent or hinder potential competitors from having access to the market or prevent or hinder actual competitors from expanding their activities on the market²³¹.
- (185) Lastly, an important factor for assessing whether an undertaking holds a dominant position is whether the undertaking's customers are in a position to exert any meaningful competitive constraint on the undertaking's market power²³². If customers have sufficient countervailing buyer power, they may be able to deter or defeat an attempt by a dominant undertaking to behave independently from its competitors on the relevant market by, for example, preventing that undertaking from being able to increase prices profitably.

6.2.3. *Application to this case*

- (186) Mondelēz enjoyed a position of dominance on the respective markets for the wholesale supply of chocolate tablets in Austria, Belgium, Bulgaria, and Romania throughout the period relevant to the unilateral conduct in question i.e. March 2015 – June 2019 (the ‘Relevant Period’).
- (187) This finding is based on the following factors in each of those Member States: (1) the market shares of Mondelēz, both in absolute terms and in comparison with the shares of Mondelēz’s competitors (section 6.2.3.1.1); (2) the existence of barriers to significant entry and expansion in the relevant market (section 6.2.3.1.2); and (3) the limited countervailing buyer power of Mondelēz’s customers with respect to chocolate tablets (section 6.2.3.1.3). Each of these factors is discussed below with respect to each of Austria, Belgium, Bulgaria, and Romania.

²²⁸ Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraphs 39 and 41; Judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraph 154.

²²⁹ Judgment of 3 July 1991, *Akzo v Commission*, 62/86, EU:C:1991:286, paragraph 60; Judgment of 30 January 2007, *France Télécom v Commission*, T-340/03, EU:T:2007:22, paragraph 100; Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 150.

²³⁰ Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraph 41; Judgment of 22 November 2001, *AAMS v Commission*, T-139/98, EU:T:2001:272, paragraph 51; Judgment of 23 October 2003, *Van den Bergh Foods v Commission*, T-65/98, EU:T:2003:281, paragraph 154; Judgment of 29 March 2012, *Telefónica and Telefónica de España v Commission*, T-336/07, EU:T:2012:172, paragraph 149.

²³¹ Judgment of 14 February 1978, *United Brands v Commission*, 27/76, EU:C:1978:22, paragraphs 91 and 122; Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraph 48.

²³² Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraph 38; Judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraphs 97-104.

6.2.3.1.1. Market shares

(188) As demonstrated below, Mondelēz consistently had very large shares of the relevant market for chocolate tablets in Austria, Belgium, Bulgaria and Romania. As reliable data were not available for sales at the producer level, it was necessary to rely on sales data at retail level as a proxy for sales data at the producer level. This necessarily includes data on private label sales, which would have the effect of understating Mondelēz’s position were private label chocolate tablets to be considered to belong to a different relevant product market than branded chocolate tablets.

6.2.3.1.1.1. Austria

(189) Throughout the Relevant Period, on the basis of Mondelēz’s own estimates, Mondelēz had very large shares of the market for chocolate tablets in Austria, above or close to 50%, as illustrated in table 6.2.3.1.1.1.A.

Table 6.2.3.1.1.1.A – Mondelēz Shares of Chocolate Tablet Market in Austria – 2013-2010 (including private label)

	Year							
	2013	2014	2015	2016	2017	2018	2019	2020
Value ('000 EUR)	[80,000-90,000]	[80,000-90,000]	[80,000-90,000]	[85,000-95,000]	[85,000-95,000]	[80,000-90,000]	[75,000-85,000]	[85,000-95,000]
Volume (tonnes)	[9,500-10,500]	[9,500-10,500]	[8,500-9,500]	[9,000-10,000]	[9,000-10,000]	[8,5000-9,5000]	[8,000-9,000]	[8,500-9,500]
Value share (%)	[60%-70%]	[60%-70%]	[55%-65%]	[50%-60%]	[45%-55%]	[45%-55%]	[45%-55%]	[45%-55%]
Volume share (%)	[65%-75%]	[65%-75%]	[65%-75%]	[50%-60%]	[50%-60%]	[45%-55%]	[45%-55%]	[45%-55%]

Source: Mondelēz (based on Nielsen)²³³

(190) The data from Nielsen set out in table 6.2.3.1.1.1.B are consistent with Mondelēz’s estimates and show that Mondelēz’s share of the relevant market in Austria was much larger than those of its competitors. Between 2016 and 2019, Mondelēz’s share of the chocolate tablets market in Austria was approximately five times larger than that of the next largest branded competitor (Lindt), approximately two and a half times as large as that of the three next largest branded competitors combined, and approximately two and a half times as large as the share of all private label chocolate tablet sales combined.

²³³ AT.40632 - RFI 2 - Updated Section II Questions 1-4 - Confidential(10227515324.3).xlsx.

Table 6.2.3.1.1.1.B – Competitor Shares of Chocolate Tablet Market in Austria, by Value – 2016-2019 (including private label)

	2016	2017	2018	2019
Mondelēz	[50%-60%]	[45%-55%]	[45%-55%]	[45%-55%]
Lindt	[5%-15%]	[5%-15%]	[5%-15%]	[5%-15%]
Alfred Ritter	[5%-10%]	[5%-10%]	[5%-10%]	[5%-10%]
Ferrero	[5%-10%]	[5%-10%]	[5%-10%]	[5%-10%]
Ludwig Schokolade	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Storck	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Heidi Chocolat	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Stollwerck	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Josef Manner	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Nestle	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
All Other Brands, Combined	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
All Private Labels, Combined	[15%-25%]	[15%-25%]	[15%-25%]	[15%-25%]

Source: Nielsen²³⁴

(191) Although Mondelēz saw a reduction of its share of the chocolate tablets market in Austria over the Relevant Period even by the end of the Relevant Period its share of the chocolate tablet market in Austria remained very large at around [45%-55%] of the relevant market, more than four times the share of its nearest competitor²³⁵.

6.2.3.1.1.2. Belgium

(192) Throughout the Relevant Period, on the basis of Mondelēz’s own estimates, Mondelēz had very large shares of the relevant market in Belgium, substantially above 50% in value terms, as illustrated in table 6.2.3.1.1.2.A²³⁶.

Table 6.2.3.1.1.2.A – Mondelēz Shares of Chocolate Tablet Market in Belgium– 2013-2020 (including private label)

	Year							
	2013	2014	2015	2016	2017	2018	2019	2020
Value ('000 EUR)	[65,000-75,000]	[65,000-75,000]	[70,000-80,000]	[70,000-80,000]	[70,000-80,000]	[75,000-85,000]	[70,000-80,000]	[85,000-95,000]
Volume (tonnes)	[6,000-7,000]	[6,000-7,000]	[6,000-7,000]	[6,000-7,000]	[6,000-7,000]	[6,000-7,000]	[6,000-7,000]	[7,000-8,000]
Value share (%)	[55%-65%]	[55%-65%]	[55%-65%]	[55%-65%]	[55%-65%]	[55%-65%]	[50%-60%]	[50%-60%]
Volume share (%)	[45%-55%]	[45%-55%]	[45%-55%]	[45%-55%]	[45%-55%]	[45%-55%]	[45%-55%]	[45%-55%]

Source: Mondelēz (based on Nielsen)²³⁷.

²³⁴ ID 1168.

²³⁵ ID 297-2058.

²³⁶ ID 1458.

- (193) The data from Nielsen set out in table 6.2.3.1.1.2.B are consistent with Mondelēz’s estimates and show that Mondelēz’s share of the relevant market in Belgium was much larger than those of its competitors. Between 2016 and 2019, Mondelēz’s share of the chocolate tablets market in Belgium was approximately ten times larger than that of the next largest branded competitor (Ferrero), approximately four times as large as that of the three next largest branded competitors combined, and more than twice as large as the share of all private label chocolate tablet sales combined.

Table 6.2.3.1.1.2.B – Competitor Shares of Chocolate Tablet Market in Belgium, by Value – 2016-2019(including private label)

	2016	2017	2018	2019
Mondelēz	[55%-65%]	[55%-65%]	[50%-60%]	[50%-60%]
Ferrero	[0%-5%]	[5%-10%]	[5%-10%]	[5%-10%]
Nestle	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Jacques	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Galler	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Lindt	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Tonys	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Alfred Ritter	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Ethiquable	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Storck	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Libeert	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Ludwig Schokolade	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Gunz	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
All Other Brands, Combined	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
All Private Labels, Combined	[20%-30%]	[20%-30%]	[20%-30%]	[20%-30%]

Source: Nielsen²³⁸

6.2.3.1.1.3. Bulgaria

- (194) Throughout the Relevant Period, on the basis of Mondelēz’s own estimates, Mondelēz had very large shares of the relevant market in Bulgaria, significantly above 60%, as illustrated in table 6.2.3.1.1.3.A²³⁹.

Table 6.2.3.1.1.3.A – Mondelēz Shares of Chocolate Tablet Market in Bulgaria– 2010-2020 (including private label)

	Year							
	2013	2014	2015	2016	2017	2018	2019	2020
Value ('000 EUR)	[35,000-45,000]	[35,000-45,000]	[30,000-40,000]	[30,000-40,000]	[30,000-40,000]	[35,000-45,000]	[30,000-40,000]	[35,000-45,000]
Volume (tonnes)	[4,500-	[4,000-	[3,500-	[3,500-	[4,000-	[4,000-	[4,000-	[4,000-

²³⁷ AT.40632 - RFI 2 - Updated Section II Questions 1-4 - Confidential(10227515324.3).xlsx.

²³⁸ ID 1168.

²³⁹ ID 1458.

	5,500]	5,000]	4,500]	4,500]	5,000]	5,000]	5,000]	5,000]
Value share (%)	[70%-80%]	[65%-75%]	[65%-75%]	[65%-75%]	[65%-75%]	[65%-75%]	[60%-70%]	[55%-65%]
Volume share (%)	[70%-80%]	[65%-75%]	[60%-70%]	[65%-75%]	[65%-75%]	[65%-75%]	[60%-70%]	[60%-70%]

Source: Mondelēz (based on Nielsen)²⁴⁰.

(195) The data from Nielsen set out in table 6.2.3.1.1.3.B are consistent with Mondelēz’s estimates and show that Mondelēz’s share of the relevant market in Bulgaria was much larger than those of its competitors. Between 2016 and 2019, Mondelēz’s share of the chocolate tablets market in Bulgaria was more than five times larger than that of the next largest branded competitor (Lindt), more than twice as large as that of the three next largest branded competitors combined, and more than 15 times as large as the share of all private label chocolate tablet sales combined.

Table 6.2.3.1.1.3.B – Competitors Shares of Chocolate Tablet Market in Bulgaria, by Value– 2016-2019 (including private label)

	2016	2017	2018	2019
Mondelēz	[65%-75%]	[65%-75%]	[65%-75%]	[60%-70%]
Lindt	[5%-10%]	[5%-10%]	[5%-10%]	[5%-15%]
Roshen	[0%-5%]	[0%-5%]	[0%-5%]	[5%-10%]
Ion	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Kruger	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Ferrero	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Alfred Ritter	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Storck	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Heidi Chocolat	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Nestle	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Gunz	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Slavyanka Group	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Lotte	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Elah Dufour	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Ludwig Schokolade	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
All Other Brands, Combined	[5%-10%]	[0%-5%]	[0%-5%]	[0%-5%]
All Private Labels, Combined	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]

Source: Nielsen²⁴¹

6.2.3.1.1.4. Romania

(196) Throughout the Relevant Period, on the basis of Mondelēz’s own estimates, Mondelēz had very large shares of the relevant market in Romania, close to 50%, as illustrated in Table 6.2.3.1.1.4.A²⁴².

²⁴⁰ AT.40632 - RFI 2 - Updated Section II Questions 1-4 - Confidential(10227515324.3).xlsx.

²⁴¹ ID 1168.

Table 6.2.3.1.1.4.A – Mondelēz Shares of Chocolate Tablet Market in Romania – 2012-2020 (including private label)

	Year							
	2013	2014	2015	2016	2017	2018	2019	2020
Value ('000 EUR)	[55,000-65,000]	[60,000-70,000]	[55,000-65,000]	[60,000-70,000]	[60,000-70,000]	[60,000-70,000]	[60,000-70,000]	[65,000-75,000]
Volume (tonnes)	[6,500-7,500]	[7,000-8,000]	[6,500-7,500]	[7,500-8,500]	[8,000-9,000]	[8,000-9,000]	[8,000-9,000]	[9,000-10,000]
Value share (%)	[40%-50%]	[40%-50%]	[40%-50%]	[45%-55%]	[45%-55%]	[45%-55%]	[40%-50%]	[45%-55%]
Volume share (%)	[35%-45%]	[35%-45%]	[35%-45%]	[35%-45%]	[40%-50%]	[40%-50%]	[35%-45%]	[40%-50%]

Source: Mondelēz (based on Nielsen)²⁴³

(197) The data from Nielsen set out in table 6.2.3.1.1.4.B are consistent with Mondelēz’s estimates and show that Mondelēz’s share of the relevant market in Romania was much larger than those of its competitors. Between 2016 and 2019, Mondelēz’s share of the chocolate tablets market in Romania was approximately three times that of the next largest branded competitor (KEX Confectionery), more than twice as large as that of the three next largest branded competitors combined, and more than three times as large as the share of all private label chocolate tablet sales combined.

Table 6.2.3.1.1.4.B – Competitor Shares of Chocolate Tablet Market in Romania, by Value– 2016-2019 (including private label)

	2016	2017	2018	2019
Mondelēz	[40%-50%]	[45%-55%]	[45%-55%]	[40%-50%]
Kex Confectionery	[5%-10%]	[10%-20%]	[10%-20%]	[10%-20%]
Kruger	[5%-10%]	[5%-10%]	[0%-5%]	[5%-10%]
Ferrero	[5%-10%]	[0%-5%]	[0%-5%]	[5%-10%]
Roshen	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Alfred Ritter	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Lindt	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Storck	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Gunz	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Nestle	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Tonys	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Swisslion-Takovo	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
Stollwerck	[0%-5%]	[0%-5%]	[0%-5%]	[0%-5%]
All Other Brands, Combined	[5%-15%]	[0%-5%]	[0%-5%]	[0%-5%]
All Private Labels, Combined	[10%-20%]	[10%-20%]	[10%-20%]	[10%-20%]

Source: Nielsen²⁴⁴

²⁴² ID 1458.

²⁴³ AT.40632 - RFI 2 - Updated Section II Questions 1-4 - Confidential(10227515324.3).xlsx.

6.2.3.1.2. Barriers to entry and expansion by competitors in the relevant market

(198) The investigation showed that although there were relatively few technical or regulatory barriers to entry, the strength of Mondelēz’s tablet brands relative to those of its competitors was a high barrier to entry and expansion, both for branded competitors and retailers’ private label offerings.

6.2.3.1.2.1. Austria

(199) In Austria, the strength of Mondelēz’s Milka brand acted as a barrier to customer switching, making it difficult for competitors and retailers’ private label offerings to enter or expand in the market.

(200) An internal Mondelēz document from 2014 observed that ‘70% of all Austrian households buy Milka tablets, only 11% are Milka non-buying HH and 19% do not buy chocolate tablets at all’, and that ‘Milka reach is way ahead of competition’, showing that it’s 70% penetration rate was more than twice as high as its two next closest competitors (Ritter – 32%; Lindt – 26%)²⁴⁵.

(201) An internal Mondelēz document from May 2018 found that Mondelēz’s Milka brand exhibited strong ‘market effects’ as compared with other chocolate brands in Austria, defining ‘market effects’ as ‘perceived physical factors that cause the brand to lose or gain share’, and that these market effects gave Milka a substantial advantage over other firms, which needed to spend much more on advertising and promotional activities to be able to compete.

(202) Retailers observed that the strength of the Milka brand limited the ability of other competitors to take customers away from Mondelēz. One retailer provided an analysis of customer switching patterns showing that the two closest substitutes for tablet customers were almost invariably other tablets from the same brand or manufacturer²⁴⁶. Two retailers also observed that customers generally would not switch to private label products²⁴⁷.

(203) There was no evidence of successful entry during the Relevant Period.

6.2.3.1.2.2. Belgium

(204) Similarly to the situation in Austria, the loyalty of consumers to Mondelēz’s Côte d’Or brand in Belgium acted as a barrier to entry or expansion for competitors and retailers’ private label offerings. Two Belgian retailers explained that there was strong consumer loyalty to the Côte d’Or brand, as a result of which they did not switch brands easily, giving Mondelēz a strong position that made it difficult for other suppliers to enter the market²⁴⁸.

(205) Internal Mondelēz documents also show that Mondelēz was well aware of the very strong brand position of Côte d’Or tablets. For example, a 2015 analysis observed that ‘Côte d’Or has greater name recognition than Coca Cola’ in Belgium²⁴⁹.

²⁴⁴ ID 1168.

²⁴⁵ ID 189-758.

²⁴⁶ ID 1226.

²⁴⁷ ID 1226; ID 1303.

²⁴⁸ ID 1267; ID 1291.

²⁴⁹ ID 1403-128. Original text: ‘En ook waar Cote d’Or een grotere naamsbekenheid heeft dan Coca Cola.’

(206) There was no evidence of successful entry during the Relevant Period.

6.2.3.1.2.3. Bulgaria

(207) The investigation found some indications that there was greater scope for entry and expansion in Bulgaria relative to some other markets, and one new supplier, Roshen, entered the Bulgarian market in 2017²⁵⁰. An internal Mondelēz presentation from June 2019 notes that ‘*Roshen continues gaining share in Chocolate by aggressive overinvestment*’²⁵¹. However, the documents do not indicate that Roshen’s entry had a significant impact on Mondelēz’s prices, and despite Roshen’s entry, Mondelēz’s share of the tablet market in Bulgaria remained above 60% in the Relevant Period²⁵².

6.2.3.1.2.4. Romania

(208) The investigation found some evidence that brand strength is a barrier to entry in Romania. One retailer explained that Mondelēz’s brand loyalty was so strong that consumers would not buy competing products if they could not find the Mondelēz brand²⁵³. Another retailer reiterated the importance of Mondelēz’s brand loyalty, and provided evidence showing that consumers also would not switch between branded and private label products²⁵⁴.

(209) The evidence in the file shows that Mondelēz was aware of the strong position of its [...] brand in Romania. For example, a presentation to senior management on Mondelēz’s strategy for South-Central Europe in 2020 reports ‘*Brand Equity - very strong equity, world class - above competitors and above other MDLZ local brands; [...] #1 brand in chocolate in RO, BG, SRB*’, and recommended with respect to Romania to ‘*[m]aintain (defend?) leadership position while consolidating [...]’s position of superbrand*’²⁵⁵.

(210) The investigation found that Roshen also entered the market in Romania in 2017, but did not have a significant impact on the market during the Relevant Period, and had only managed to take a 3.5% share of the market by 2019.

6.2.3.1.3. Limited countervailing buying power of Mondelēz’s customers

6.2.3.1.3.1. Austria

(211) Retailers in Austria indicated that they had little leverage vis-à-vis Mondelēz with respect to chocolate tablets. Although some customers did not consider themselves to be significantly disadvantaged with respect to their overall negotiating position, they considered Mondelēz’s chocolate tablets to be ‘must-have’ products, i.e. they were at risk of losing significant business if they did not carry those products²⁵⁶, or at least that Mondelēz chocolate tablets were sufficiently important to their shoppers that their negotiating leverage was reduced with respect to chocolate tablets²⁵⁷.

²⁵⁰ ID 1226.

²⁵¹ ID 189-1202.

²⁵² See Table 6.2.3.1.1.3.

²⁵³ ID 2731.

²⁵⁴ ID 2674.

²⁵⁵ ID 512-388.

²⁵⁶ ID 1226; ID 1303.

²⁵⁷ ID 1275.

6.2.3.1.3.2. Belgium

(212) Retailers in Belgium indicated that they had little leverage vis-à-vis Mondelēz with respect to chocolate tablets. One retailer explained that Mondelēz's chocolate tablets were 'must-have' products that it could not delist Mondelēz brands because of the risk that consumers would shop at other retailers²⁵⁸. Another retailer provided an analysis of the feasibility of delisting Côte d'Or tablets, which concluded that if it delisted Côte d'Or it would lose 80% of the associated revenues, i.e. only 20% of consumers would shift their purchases to other brands or to private label²⁵⁹.

6.2.3.1.4. Bulgaria

(213) Retailers in Bulgaria indicated that they had little leverage vis-à-vis Mondelēz with respect to chocolate tablets. Two retailers described Mondelēz's chocolate tablets as 'must-have' products, with one stating explicitly that consumers would shop at competing retailers if it did not carry those products²⁶⁰.

6.2.3.1.4.1. Romania

(214) Three retailers indicated that they did not believe that Mondelēz had any particular bargaining leverage over them, or *vice versa*²⁶¹. However, read in conjunction with the same retailers' statements regarding the strength of Mondelēz's brands in Romania, the comments do not directly contradict the other indications of Mondelēz's very strong position in the market.

6.2.3.1.5. Conclusions on dominance

(215) In summary, based on the evidence on file and the above considerations, Mondelēz consistently had very large market shares in the markets for chocolate tablet products in Austria, Belgium, Bulgaria and Romania throughout the investigation. The evidence in the file indicates that, throughout the Relevant Period, Mondelēz faced limited competitive constraints by its competitors and there was limited countervailing buyer power on the part of its customers. Accordingly, Mondelēz occupied a dominant position on the markets for the wholesale supply of chocolate tablets in Austria, Belgium, Bulgaria and Romania throughout the Relevant Period.

6.2.4. *Abuses of Mondelēz's dominance in markets for the wholesale supply of chocolate tablets*

(216) Having established that Mondelēz occupied a dominant position in the markets for the wholesale supply of chocolate tablets in Austria, Belgium, Bulgaria and Romania, respectively, throughout the Relevant Period, it remains to be determined whether the practices described in sections 5.5.1 and 5.5.2 constitute abuses of that dominant position.

6.2.4.1. Principles

(217) Article 3(3) TEU sets as an aim of the Union the establishment of an internal market, which, in accordance with Protocol No 27 on the Internal Market and competition,

²⁵⁸ ID 1267.

²⁵⁹ ID 1291.

²⁶⁰ ID 1307; ID 1226.

²⁶¹ ID 1264; ID 2674; ID 2731.

annexed to the TEU, is to include a system ensuring that competition is not distorted within the internal market.

- (218) Article 102 of the Treaty is one of the main provisions ensuring a system of undistorted competition referred to in Protocol No 27. Article 102 of the Treaty prohibits any abuse by a dominant undertaking of its position within the market that may affect trade between Member States.
- (219) In considering the scope of an abuse of dominance, the Court has established that a dominant undertaking has a special responsibility not to allow its behaviour to impair genuine, undistorted competition on the internal market²⁶². The precise content of the special responsibility incumbent on the dominant undertaking has to be considered in light of the specific circumstances of the case and the evidence showing how and to what extent competition has been weakened²⁶³.
- (220) Article 102 of the Treaty generally prohibits a dominant undertaking from protecting or strengthening its position by adopting methods that are other than those which come within the scope of competition on the merits²⁶⁴.
- (221) The concept of abuse of a dominant position is an objective concept relating to the behaviour of an undertaking in a dominant position which, on a market where the degree of competition is already weakened precisely because of the presence of the undertaking concerned, through recourse to means different from those governing normal competition, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition²⁶⁵.
- (222) An abuse of a dominant position does not necessarily have to consist in the use of the economic power conferred by a dominant position. An abuse of such a position is prohibited under Article 102 of the Treaty regardless of the means and procedure by which it is achieved and irrespective of any fault²⁶⁶.

²⁶² Judgment of 9 November 1983, *Michelin v Commission*, 322/81 EU:C:1983:313, paragraph 57; Judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 105; Judgment of 27 March 2012, *Post Danmark*, C-209/10, EU:C:2012:172, paragraph 23; Judgment of 6 September 2017, *Intel v Commission*, C-413/14 P, EU:C:2017:632, paragraph 135.

²⁶³ Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and others v Commission*, C-395/96 P and C-396/96 P, ECLI:EU:C:2000:132, paragraph 114; Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 84.

²⁶⁴ Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraph 91; Judgment of 3 July 1991, *Akzo v Commission*, 62/86, EU:C:1991:286, paragraph 70; Judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraph 111; Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 354; Judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 124.

²⁶⁵ Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraph 91; Judgment of 9 November 1983, *Michelin v Commission*, 322/81 EU:C:1983:313, paragraph 70; Judgment of 3 July 1991, *Akzo v Commission*, 62/86, EU:C:1991:286, paragraph 69; Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 66; Judgment of 2 April 2009, *France Télécom v Commission*, C-202/07 P, EU:C:2009:214, paragraph 104; Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 174; Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 27; Judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 125.

²⁶⁶ Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, 6/72, EU:C:1973:22, paragraphs 27 and 29; Judgment of 13 February 1979, *Hoffmann-La Roche*, 85/76, EU:C:1979:36, paragraph 91; Judgment of 12 December 2000, *Aéroports de Paris v*

- (223) In the same vein, the Commission is under no obligation to establish the existence of an abusive intent on the part of the dominant undertaking in order to render Article 102 of the Treaty applicable. While intent is not a necessary prerequisite to show an abuse, it is, however, one of the criteria which can be used for assessing the abusive nature of behaviour under Article 102 of the Treaty ²⁶⁷.
- (224) Article 102 of the Treaty does not require the dominance, the abusive conduct and the effects all to be in the same market. In *Tetra Pak II*, the Court of Justice highlighted that the fact that a dominant undertaking's abusive conduct has its adverse effects on a market distinct from the dominated one does not detract from the applicability of Article 102 of the Treaty²⁶⁸. Moreover, as the Court emphasised in *TeliaSonera*, Article 102 of the Treaty gives no explicit guidance as to what is required in relation to where on the product markets the abuse takes place²⁶⁹. Consequently, '*certain conduct on markets other than the dominated markets and having effects either on the dominated markets or on the non-dominated markets themselves can be categorised as abusive*'²⁷⁰. In previous cases, the case law confirmed that an abuse can also take place in a market where an undertaking is not dominant in order to protect its position in the market where it is dominant²⁷¹. Therefore, the application of Article 102 of the Treaty cannot be excluded where the abusive practices take place in another geographic market than where the undertaking holds its dominant position in so far as these practices enable the undertaking to better exploit its dominant position on the dominated market.
- 6.2.4.2. Partitioning of the Internal Market by restricting cross-border trade as an abuse by nature
- (225) Refusals to supply in order to partition markets along national lines may be regarded as contrary to Article 102 of the Treaty if engaged in by a dominant undertaking. In the *United Brands* case, the Court found that the refusal to supply a distributor was '*inconsistent with the objectives laid down in Article 3 (f) of the Treaty, which are set out in detail in Article [102 of the Treaty], especially in paragraphs (b) and (c), since the refusal to sell would limit markets to the prejudice of consumers and would amount to discrimination which might in the end eliminate a trading party from the relevant market.*'²⁷²
- (226) While Article 102 of the Treaty does not explicitly refer to market partitioning through refusals to supply as a specific category of abuse of dominance, the list of abusive practices set out in Article 102 of the Treaty is not exhaustive²⁷³. Practices

Commission, T-128/98, EU:T:2000:290, paragraph 170; Judgment of 1 July 2010, *AstraZeneca v Commission*, T-321/05, EU:T:2010:266, paragraph 354.

²⁶⁷ Judgment of 19 April 2012, *Tomra and others v Commission*, C-549/10 P, EU:C:2012:221, paragraphs 19-22.

²⁶⁸ Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 25.

²⁶⁹ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 84-86.

²⁷⁰ Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 85, with reference to Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 25.

²⁷¹ Judgment of 6 April 1995, *BPB Industries and British Gypsum v Commission*, C-310/93, EU:C:1995:101.

²⁷² Judgment of 14 February 1978, *United Brands v Commission*, 27/76, EU:C:1978:22, paragraph 183.

²⁷³ Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, 6/72, EU:C:1973:22, paragraph 26; Judgment of 16 March 2000, *Compagnie Maritime*

mentioned explicitly in Article 102 of the Treaty are mere examples of an abuse²⁷⁴. Any practice that leads to a compartmentalisation of the internal market is seen by the Court to run counter to the fundamental objective of the Treaties of eliminating national barriers: ‘*Finally, an agreement between producer and distributor which might tend to restore the national divisions in trade between Member States might be such as to frustrate the most fundamental objectives of the Community. The Treaty, whose preamble and content aim at abolishing the barriers between States, and which in several provisions gives evidence of a stern attitude with regard to their reappearance, could not allow undertakings to reconstruct such barriers.*’²⁷⁵

- (227) Article 102 of the Treaty has been applied on several occasions to the unilateral conduct of dominant undertakings that restricted intra-EU trade and intra brand competition²⁷⁶. In *British Leyland*, a dominant company was found to have violated Article 102 of the Treaty by refusing to issue type certificates for vehicles that had been re-imported to the UK from the continent; the Court held that this refusal manifested ‘*a deliberate intention [...] to create barriers to re-importations.*’²⁷⁷ In *Irish Sugar*, a dominant company granted a special rebate to customers solely by reference to their geographical location which was intended to deter imports of sugar, including reimports of its own sugar, from a neighbouring Member State. The Court held that it is of the very essence of a common market that the pricing policy of companies active principally on a neighbouring market influences that of companies active on another national market. ‘*Anything which restricts that influence must therefore be regarded as an obstacle to the achievement of that common market and prejudicial to the outcome of effective and undistorted competition, especially with regard to the interests of consumers. Therefore, where such obstacles are brought*

Belge Transports and others v Commission, C-395/96 P and C-396/96 P, ECLI:EU:C:2000:132 and *Dafra-Lines v Commission*, C-396/96 P, paragraph 112; Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 37; Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 57.

²⁷⁴ Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, 6/72, EU:C:1973:22, paragraph 26; Judgment of 16 March 2000, *Compagnie Maritime Belge Transports and others v Commission*, C-395/96 P and C-396/96 P, ECLI:EU:C:2000:132 and *Dafra-Lines v Commission*, C-396/96 P, paragraph 112; Judgment of 14 November 1996, *Tetra Pak v Commission*, C-333/94 P, EU:C:1996:436, paragraph 37; Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraph 57; Judgment of 17 September 2007, *Microsoft v Commission*, T-201/04, EU:T:2007:289, paragraphs 860 and 861; Judgment of 14 October 2010, *Deutsche Telekom v Commission*, C-280/08 P, EU:C:2010:603, paragraph 173; Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 26.

²⁷⁵ Judgment of 13 July 1966, *Consten and Grundig v Commission*, 56 and 58-64, EU:C:1966:41, paragraph 340; Judgment of 4 October 2011, *Football Association Premier League and others*, C-403/08 and C-429/08, EU:C:2011:631, paragraph 139; Judgment of 6 October 2009, *GlaxoSmithKline Services and others v Commission and others*, C-501/06 P, C-513/06 P, C-515/06 P and C-519/06 P, EU:C:2009:610, paragraph 61; Judgment of 16 September 2008, *Sot. Lélos kai Sia*, C-468/06 to C-478/06, EU:C:2008:504, paragraph 65.

²⁷⁶ See for example Judgment of 16 September 2008, *Sot. Lélos kai Sia*, C-468/06 to C-478/06, EU:C:2008:504; Judgment of 14 February 1978, *United Brands v Commission*, 27/76, EU:C:1978:22; Judgment of 16 December 1975, *Suiker Unie and others v Commission*, 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174; Judgment of 22 November 2001, *AAMS v Commission*, T-139/98, EU:T:2001:272.

²⁷⁷ Judgment of 11 November 1986, *British Leyland v Commission*, 226/84, EU:C:1986:421, paragraph 24.

about by an undertaking holding a dominant position [...], that is an abuse incompatible with [Article 102 TFEU],²⁷⁸.

- (228) Also under Article 102 of the Treaty, certain types of conduct are by their very nature capable of restricting competition²⁷⁹. With reference to its case law regarding market partitioning agreements as a restriction by object under Article 101 of the Treaty, the Court in *Sot.Lelos* held for the application of Article 102 of the Treaty: '*In the light of the Treaty objectives, and of ensuring that competition in the Internal Market is not distorted, there can be no escape from the prohibition laid down in Article 102 TFEU for practices of an undertaking in a dominant position which are aimed at avoiding all parallel exports from a Member State to other Member States [...]*'.²⁸⁰ Such practices, by partitioning the national markets, neutralise the benefits of effective competition in terms of supply and the prices that those exports would obtain for final consumers in other Member States.
- (229) Accordingly, the Court in *Sot.Lelos* found that an undertaking '*in a dominant position, in a Member State where prices are relatively low, cannot be allowed to cease to honour the ordinary orders of an existing customer for the sole reason that that customer, in addition to supplying the market in that Member State, exports part of the quantities ordered to other Member States with higher prices.*'²⁸¹
- (230) In the following subsections the Commission will establish that Mondelēz abused its dominant position in the instances referred to in sections 5.5.1 and 5.5.2.

6.2.4.3. Application to this case

6.2.4.3.1. Refusal by Mondelēz Germany to supply [broker 3] with chocolate tablet products to limit imports of those products in order to prevent the decrease of prices in the markets where Mondelēz is dominant

- (231) The evidence in the file shows that Mondelēz was very concerned that sales of obsolete products to brokers in one Member State could disrupt Mondelēz's prices in other Member States, in particular in markets in which Mondelēz occupied a dominant position. Mondelēz abused its dominant position in the markets for the wholesale supply of chocolate tablets in Austria, Belgium, Bulgaria and Romania by the categorical refusal of Mondelēz Germany to sell residual products, including Milka and Toblerone chocolate tablets, to [broker 3] because Mondelēz could not determine the countries in which [broker 3] would resell the products, instead selling residual products to brokers that it 'trusted'²⁸².
- (232) First, as is set out in section 6.2.3.1.5, Mondelēz occupied a dominant position in the markets for the wholesale supply of chocolate tablets in Austria, Belgium, Bulgaria

²⁷⁸ Judgment of 7 October 1999, *Irish Sugar v Commission*, T-228/97, EU:T:1999:246, paragraph 185.

²⁷⁹ For parallel trade cases, see Judgment of 14 December 1983, *Société de vente de ciments v Kerpen & Kerpen*, 319/82, EU:C:1983:374, paragraph 6.

²⁸⁰ Judgment of 16 September 2008, *Sot. Lélos kai Sia*, C-468/06 to C-478/06, EU:C:2008:504, paragraph 66.

²⁸¹ Judgment of 16 September 2008, *Sot. Lélos kai Sia*, C-468/06 to C-478/06, EU:C:2008:504, paragraph 71.

²⁸² ID 296-359.

and, Romania in the Relevant Period. Mondelēz was concerned that parallel imports would undermine its position in those markets²⁸³.

- (233) Second, the evidence in the file indicates that [broker 3] was an existing wholesale customer for chocolate tablets, having purchased two separate lots of residual or obsolete 400g Toblerone white chocolate tablets from Mondelēz in the year prior to the refusal²⁸⁴.
- (234) Third, [broker 3]’s requests were ordinary, given the nature of the broker business. Brokers primarily buy products that are relatively close to their best before date at a significant discount relative to the same products with a longer remaining shelf life. Because such products are not produced intentionally, they are only available sporadically, and the assortment of residual products that are available to brokers is constantly changing. In this context, [broker 3]’s opportunistic requests to purchase residual products, including chocolate tablets, must be considered to be ordinary. This conclusion is not undermined by the fact that [broker 3] may have been able to purchase the same or similar products from other Mondelēz national sales companies during the period, because each national sales company would have offered a different mix of products in different quantities at different prices and at different points in time. Moreover, Mondelēz Germany [business secrets – marketing and sales strategy]²⁸⁵. Given the significant discounts at which residuals were sold, [broker 3] would likely have resold some of the products in Austria, Belgium, Bulgaria and Romania²⁸⁶.
- (235) Fourth, Mondelēz refused to meet [broker 3]’s requests for supply. The evidence in the file, as described in section 5.5.1, indicates that Mondelēz Germany refused to supply [broker 3] in Germany between 20 March 2015 and 13 June 2019, as evidenced by:
- (a) Mondelēz Germany’s failure to respond to the request for an offer on 20 March 2015²⁸⁷;
 - (b) its refusal to sell Milka chocolate tablets to [broker 3] on 13 May 2015²⁸⁸ on the grounds that ‘*our strategy regarding residuals has not changed and I cannot offer residual tablets*’²⁸⁹;
 - (c) the confirmation by an employee of Mondelēz Germany in an internal email dated 25 April 2017 that despite repeated requests over the ‘*last two years*’, they had systematically refused to sell products to [broker 3] because ‘*I know that they will offer the goods like crazy all across Europe*’²⁹⁰; and

²⁸³ ID 169-1885; ID 296-1511; ID 169-60; ID 169-18; ID 169-3378; ID 169-1742; ID 1852; ID 297-3947; ID 296-4040; ID 296-3486; ID 297-2022; ID 296-4013.

²⁸⁴ ID 1604-2.

²⁸⁵ ID 296-4013.

²⁸⁶ ID 296-4013.

²⁸⁷ ID 1393; ID 1604-141.

²⁸⁸ ID 609.

²⁸⁹ ID 1707. Original text: ‘*unsere Strategie bezüglich Posten hat sich nicht geändert und ich kann Ihnen keine Tafelposten anbieten. Außerdem ist der Preis, den Sie bieten, weit unter dem, den ich von meinen vertrauten Postenhändlern erhalte. Die Zeiten ändern sich und die Preise am Markt auch...*’

²⁹⁰ ID 296-3440.

- (d) the acknowledgment by the same Mondelēz Germany employee on 13 June 2019 that they had not done business with [broker 3] since 2015²⁹¹.
- (236) Fifth, as demonstrated by the expressed concern that [broker 3] would ‘offer the goods around Europe like crazy’, Mondelēz’s motivation for refusing to sell residual products to [broker 3] was in significant part to prevent [broker 3] from reselling residual products in Member States where prices were higher, thus putting Mondelēz’s own sales of the same products (with longer shelf lives) under pressure. By selling to brokers who it trusted would not resell the residual products into markets where they would undercut the prices charged by Mondelēz’s national sales companies, Mondelēz sought to restrict parallel trade in those products and thereby maintain the partitioning of geographic markets for chocolate tablets along national lines. Insofar as, absent the refusal, [broker 3] would have likely resold some of the residual chocolate tablets it had purchased into Austria, Belgium, Bulgaria or Romania, this practice had the effect of protecting Mondelēz’s dominant position in the markets for chocolate tablets in those countries²⁹².
- (237) In other words, during the period between 20 March 2015 and 13 June 2019, Mondelēz Germany refused to supply [broker 3] in part to prevent it from reselling any Mondelēz products, including chocolate tablets, into Member States in which Mondelēz occupied a dominant position in the supply of chocolate tablets, namely, Austria, Belgium, Bulgaria, and Romania. The mere fact that [broker 3] would be unable to resell goods purchased in Germany into those countries was sufficient to eliminate all effective competition from [broker 3] in those countries.
- (238) In conclusion, Mondelēz infringed Article 102 of the Treaty by refusing to deal with [broker 3] for the wholesale supply of chocolate tablets thereby obstructing the internal market by partitioning markets for chocolate tablets along national lines, thereby protecting its dominant position in the markets for the wholesale supply of chocolate tablets in Austrian, Belgium, Bulgaria, and Romania.

6.2.4.3.2. Delisting of Côte d’Or tablets in the Netherlands

- (239) The evidence in the file indicates that Mondelēz abused its dominant position in the market for the wholesale supply of chocolate tablets in Belgium by delisting certain 150g Côte d’Or tablets in the Netherlands from 2015 to prevent retailers, in particular Albert Heijn, from buying those tablets in the Netherlands and reselling them in Belgium. By reselling Dutch-sourced tablets in Belgium, Albert Heijn was able to reduce its selling price, which provoked competitive responses by other retailers including by provoking another retailer in Belgium to begin purchasing the tablets through parallel trade²⁹³. Mondelēz was concerned that this would significantly impact on the profitability of the Belgian business, which outweighed the margin on the small volumes sold in the Netherlands. Mondelēz therefore decided to protect its position in Belgium by cutting off the supply of certain 150g Côte d’Or tablets in the Netherlands. As one internal document explained: ‘*Belgium is facing difficulties because of this [i.e. parallel trade in Côte d’Or Classic tablets] and it has been agreed to delist it nationally in NL (40T putting 1500T at risk in Belgium)*’.

²⁹¹ ID 297-1673.

²⁹² See paragraph (232) above.

²⁹³ See paragraph (87) above.

- (240) First, as is set out in section 6.2.3.1.5, Mondelēz occupied a dominant position in the market for the wholesale supply of chocolate tablets in Belgium, a position that it continued to occupy through the end of the Investigation Period.
- (241) Second, the record shows that Albert Heijn was an existing customer for the Côte d’Or tablets, having purchased them on a regular basis from Mondelēz for at least three years before the delisting, given that Mondelēz had already decided to delist the products by some point in 2012²⁹⁴.
- (242) Third, there is no indication in the file to suggest that Albert Heijn had started placing orders that were out of the ordinary prior to the delisting. The evidence in the file indicates that Mondelēz and Albert Heijn had already concluded their annual global price negotiations by the beginning of 2015, including with respect to chocolate tablets, and that Albert Heijn was taken by surprise by the delisting of the 150g Côte d’Or Classic tablets in the Netherlands²⁹⁵.
- (243) Fourth, by delisting, Mondelēz ceased to accept orders for certain 150 g Côte d’Or Classic tablets in the Netherlands²⁹⁶.
- (244) Fifth, the cessation of supply was expressly motivated by the desire to prevent Albert Heijn from reselling products it purchased in the Netherlands into Belgium, where prices were higher. For example, one internal document justified the delisting on the grounds that ‘*[i]f the position of a product in NL does not outweigh the risks in Belgium, we may decide to find a solution in NL and, if there is not one, to reduce the position in the Netherlands.*’²⁹⁷ Mondelēz also explained internally that ‘*the objective of that operation ... is to eliminate the risk of net-net comparison*’ between prices in Belgium and the Netherlands²⁹⁸. By delisting, Mondelēz ensured that no other retailers would be able to tranship certain 150g Côte d’Or tablets from the Netherlands to Belgium, thus completely removing an important source of competitive pressure on the price of those 150g Côte d’Or tablets in Belgium.
- (245) In conclusion, Mondelēz infringed Article 102 of the Treaty by refusing to supply certain 150g Côte d’Or tablets to existing customers in the Netherlands, thereby partitioning national markets by restricting parallel imports of those tablets into Belgium, thereby protecting its dominant position in the market for the wholesale supply of chocolate tablets in Belgium.

6.2.4.4. Impact on competition and consumers

- (246) The Union Courts have ruled that, for the purposes of establishing an infringement of Article 102 of the Treaty, it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect.²⁹⁹

²⁹⁴ ID 297-3706.

²⁹⁵ ID 1403-168.

²⁹⁶ ID 1403-144; ID 1403-880.

²⁹⁷ ID 1403-128.

²⁹⁸ ID 1403-187.

²⁹⁹ Judgment of 17 December 2003, *British Airways v Commission*, T-219/99, EU:T:2003:343, paragraph 293; Judgment of 9 September 2009, *Clearstream v Commission*, T-301/04, EU:T:2009:317, paragraph

(247) Moreover, Article 102 of the Treaty is aimed not only at practices which may cause prejudice to consumers directly, but also at those which are detrimental to them through their impact on an effective competitive structure³⁰⁰.

6.2.4.4.1. Impact of Mondelēz's conduct on the relevant markets and on consumers

6.2.4.4.1.1. Refusal by Mondelēz Germany to supply [broker 3] with chocolate tablet products to limit imports of those products in order to prevent the decrease of prices in the markets where Mondelēz is dominant

(248) The evidence in the file shows that cross-border sales by brokers had the potential to have a significant impact on prices in the national markets in which they materialised. Although many modern trade retailers tended not to purchase from brokers for a variety of reasons, the evidence in the file shows that such retailers frequently paid attention to the resale prices offered by customers who did purchase from brokers and would often adapt their own resale prices or demand compensation from Mondelēz for the price differentials³⁰¹. By refusing to supply a broker that Mondelēz was concerned would disrupt prices, Mondelēz removed this potential competitive constraint, thereby potentially reducing downward pressure on resale prices for chocolate tablets in Austria, Belgium, Bulgaria and Romania.

6.2.4.4.1.2. Delisting of Côte d'Or tablets in the Netherlands

(249) The evidence in the file shows that Mondelēz's delisting of certain 150g Côte d'Or tablets in the Netherlands had direct negative effects on consumers and competition in both the Netherlands and Belgium. The delisting prevented retailers that were active in both the Netherlands and Belgium from transshipping the tablets from the Netherlands to Belgium, limiting their ability to compete on the price of those products. The delisting removed from the Dutch market a product for which there was profitable consumer demand, depriving Dutch consumers of a product they enjoyed, and reduced the competitive pressure on retail prices for those products in Belgium³⁰².

6.2.4.5. Objective justification and efficiencies

(250) Exclusionary conduct may escape the prohibition of Article 102 of the Treaty if the dominant undertaking can provide an objective justification for its behaviour or it can demonstrate that its conduct produces efficiencies which outweigh the negative effect on competition. The burden of proof for such an objective justification or efficiency defence is on the dominant company³⁰³. It is for the company invoking the

144; Judgment of 25 March 2021, *Slovak Telekom v European Commission*, C-165/19 P, EU:C:2021:239, paragraph 109; Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraph 77; Judgment of 21 December 2023, *European Superleague Company*, C-333/21, EU:C:2023:1011, paragraph 129.

³⁰⁰ Judgment of 15 March 2007, *British Airways v Commission*, C-95/04 P, EU:C:2007:166, paragraphs 106-107; Judgment of 21 February 1973, *Europemballage Corporation and Continental Can Company v Commission*, 6/72, EU:C:1973:22, paragraph 26; Judgment of 17 February 2011, *TeliaSonera Sverige*, C-52/09, EU:C:2011:83, paragraphs 22 and 24; Judgment of 12 May 2022, *Servizio Elettrico Nazionale and others*, C-377/20, EU:C:2022:379, paragraphs 44 and 46, as well as the case-law quoted therein.

³⁰¹ See for example ID 297-3391; ID 179-1771; ID 179-1340; ID 179-409; ID 179-131; ID 179-1162; ID 179-1164; ID: 297-3393; ID 297-4754; ID 179-1674.

³⁰² ID 297-3700.

³⁰³ Judgment of 30 September 2003, *Michelin v Commission*, T-203/01, EU:T:2003:250, paragraphs 107-109.

benefit of a defence against a finding of an infringement to demonstrate to the required legal standard of proof that the conditions for applying such defence are satisfied³⁰⁴. *Mondelēz* has not offered any such objective justification for the abuses discussed in sections 6.2.4.3.1 or 6.2.4.3.2.

6.2.4.6. Effect on trade between Member States

- (251) Article 102 of the Treaty prohibits any abuse of dominant position within the common market or in a substantial part of it insofar as it may affect trade between Member States. An abuse of a dominant position affects trade between Member States when it is capable of influencing, either directly or indirectly, actually or potentially, the pattern of trade in goods and services between Member States³⁰⁵.
- (252) As the Court of Justice held in *United Brands*, if the undertaking holding a dominant position established in the common market aims at eliminating competitors also established in the common market, it is immaterial whether this behaviour relates directly to trade between Member States once it has been shown that such elimination will have repercussions on the patterns of competition within the common market³⁰⁶.
- (253) The Court of Justice held that ‘*Article [102 of the Treaty] does not require it to be proved that abusive conduct has in fact appreciably affected trade between Member States, but that it is capable of having that effect*’³⁰⁷. The Court has also clarified that it follows from well-established case-law that the interpretation and application of the condition relating to effects on trade between Member States contained in Articles 101 and 102 of the Treaty must be based on the purpose of that condition, which is to define, in the context of the law governing competition, the boundary between the areas respectively covered by Union law and the law of the Member States³⁰⁸.
- (254) Thus, EU law covers any agreement or any practice which is capable of constituting a threat to freedom of trade between Member States in a manner which might harm the attainment of the objectives of a single market between the Member States, in particular by sealing off domestic markets or by affecting the structure of competition within the internal market³⁰⁹.
- (255) Given that the objective of each of the abuses of dominance discussed above was to affect cross-border sales, the restriction was capable of affecting trade between Member States.

³⁰⁴ Recital 5 and Article 2 of Regulation (EC) No 1/2003.

³⁰⁵ Judgment of 21 January 1999, *Bagnasco and others*, C-215/96 and C-216/96, EU:C:1999:12, paragraphs 47-48.

³⁰⁶ Judgment of 14 February 1978, *United Brands v Commission*, 27/76, EU:C:1978:22, paragraph 201.

³⁰⁷ Judgment of 9 November 1983, *Michelin v Commission*, 322/81, EU:C:1983:313, paragraph 104.

³⁰⁸ Judgment of 31 May 1979, *Hugin v Commission*, 22/78, EU:C:1979:138, paragraph 17; Judgment of 25 October 2001, *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 47; Judgment of 25 January 2007, *Dalmine v Commission*, C-407/04 P, EU:C:2007:53, paragraph 89.

³⁰⁹ Judgment of 31 May 1979, *Hugin v Commission*, 22/78, EU:C:1979:138, paragraph 17; Judgment of 25 October 2001, *Ambulanz Glöckner*, C-475/99, EU:C:2001:577, paragraph 47; Judgment of 25 January 2007, *Dalmine v Commission*, C-407/04 P, EU:C:2007:53, paragraph 89.

6.2.4.7. Conclusions regarding infringements of Article 102 of the Treaty

(256) On the basis of the foregoing, Mondelēz committed the following infringements of Article 102 of the Treaty:

- (1) The refusal by Mondelēz Germany to supply [broker 3] with chocolate tablet products to limit imports of those products in order to prevent the decrease of prices in the markets where Mondelēz is dominant as discussed in section 5.5.1 for the period from 20 March 2015 until 13 June 2019;
- (2) the delisting of certain products by Mondelēz Netherlands for the purposes of limiting parallel trade between the Netherlands and Belgium as discussed in section 5.5.2 for the period from 1 March 2015 until the start of the Commission's inspections on 18 November 2019.

7. SCOPE AND DURATION OF THE INFRINGEMENTS

(257) The individual infringements affected the following product and geographic areas and were in effect for the following periods:

- (1) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 1] discussed in section 5.4.1.1.1 affected the sale of certain Oreo biscuits, certain Daim, Cadbury and Marabou chocolate confectionery products in the EU outside of Austria. It started on 18 December 2006 and ended on 31 December 2016.
- (2) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 2] discussed in section 5.4.1.1.2 affected the sale of certain Mirabell chocolate confectionery products in the EU outside of Finland. It started on 30 April 2007 and ended on 10 October 2016.
- (3) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 3] discussed in section 5.4.1.1.3 affected the sale of certain Ritz biscuits in the EU outside of Austria and Germany. It started on 19 May 2008 and ended on 30 June 2016.
- (4) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 4] discussed in section 5.4.1.1.4 affected the sale of Cadbury Wunderbar and Cadbury Curly Wurly chocolate confectionery products in the EU outside of Germany. It started on 23 September 2011 and ended on 27 September 2017.
- (5) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 5] discussed in section 5.4.1.1.5 affected the sale of certain Mikado biscuits, certain Côte d'Or, Mirabell and Toblerone chocolate confectionery products in the EU outside of Hungary. It started on 1 February 2012 and ended on 2 June 2016.

- (6) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 6] discussed in section 5.4.1.1.6 affected the sale of certain Mikado and Ritz biscuits, certain Daim and Toblerone chocolate confectionary products in the EU outside of Poland. It started on 5 March 2012 and ended on 3 November 2017.
- (7) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7] discussed in section 5.4.1.1.7 affected the sale of a single Milka small bites product in the EU outside of Austria, Belgium, France, Germany and the Netherlands. It started on 31 December 2016 and ended on 31 December 2017.
- (8) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 8] to restrict parallel trade discussed in section 5.4.1.2.1 affected the sale of certain Côte d'Or, Mirabell, Toblerone, and Daim chocolate confectionary products, certain Mikado, Ritz and Oreo biscuit products and certain Hag coffee products throughout the EU. It started on 17 April 2008 and ended on 2 June 2017, with an interruption between 18 June 2013 and 25 February 2015.
- (9) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 9] to restrict passive sales to Slovakia discussed in section 5.4.1.2.2 affected the sale of Marabou, Cadbury and Mirabell chocolate confectionary products in the EU outside of Germany. It started on 5 February 2018 and ended on 5 March 2018.
- (10) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 4] regarding passive sales to Austria discussed in section 5.4.1.2.3 affected the sale of Cadbury Wunderbar and Cadbury Curly Wurly chocolate confectionary products in the EU outside of Germany. It started on 13 March 2019 and ended on 13 April 2019.
- (11) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 9] restricting passive sales to Romania discussed in section 5.4.1.2.4 affected the sale of certain Marabou biscuits, certain Cadbury and Marabou chocolate confectionary products in the EU outside of Germany. It started on 7 February 2020 and ended on 7 March 2020.
- (12) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Germany and [broker 1] to clear the destination of the goods before sale discussed in section 5.4.2.1 affected the sale of certain Milka and Toblerone chocolate confectionary products and certain Belvita biscuits. It started on 1 April 2012 and ended on 31 December 2014.
- (13) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 2] not to resell certain products in Germany discussed in section 5.4.2.2.1 affected the sale of certain Milka

chocolate tablet products in Germany. It started on 1 May 2013 and ended on 31 January 2016.

- (14) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 2] not to sell to a certain distributor discussed in section 5.4.2.2.2 affected the sale of certain Milka, Mirabell and Suchard products in Germany. It started on 1 January 2017 and ended on 31 December 2018.
- (15) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 3] regarding the destination of sales of certain products discussed in section 5.4.2.3.1 affected the sale of certain Velours Noir R&G coffee capsules in Belgium and the Netherlands. It started on 23 April 2015 and ended on 23 May 2015.
- (16) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez MEA and [broker 3] not to resell certain products other than to non-food retailers discussed in section 5.4.2.3.2 affected the sale of a variety of products of the Toblerone (chocolate tablets, small bites), Oreo (sweet biscuits), Milka (chocolate tablets, small bites, countlines), Côte d'Or (chocolate tablets), Daim (small bites), and LU (countlines) brands throughout the EU. It started on 1 December 2016 and ended with the start of the Commission's inspections on 18 November 2019.
- (17) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez MEA and [broker 3] not to resell certain products in Belgium discussed in section 5.4.2.3.3 affected the sale of certain Côte d'Or chocolate tablets in Belgium. It started on 15 October 2017 and ended on 15 November 2017.
- (18) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Germany and [broker 3] not to resell certain products to a certain non-food retailer discussed in section 5.4.2.3.4 affected the sale of certain Milka countlines, pralines and chocolate tablet products and Oreo sweet biscuits in Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Poland. It started on 15 June 2019 and ended on 15 July 2019.
- (19) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 4] not to resell certain biscuits in Belgium discussed in section 5.4.2.4 affected the sale of certain Milka biscuits in Belgium. It started on 1 December 2015 and ended on 31 December 2015.
- (20) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez WTR and [retailer 1] to withdraw an offer to a customer discussed in section 5.4.2.5 affected the sale of certain Marabou chocolate tablet products in Germany. It started on 16 May 2017 and ended on 16 June 2017.
- (21) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 5] not to resell certain products in Belgium, France and the Netherlands discussed in section 5.4.2.6 affected the sale of Côte d'Or chocolate tablet products. It started on 15 October 2017 and ended on 15 November 2017.

- (22) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 6] not to resell certain products in the Netherlands discussed in section 5.4.2.7 affected the sale of certain LiGa Evergreen and LiGa Milkbreak sweet biscuits in the Netherlands. It started on 15 December 2017 and ended on 15 January 2018.
- (23) The infringement of Article 102 of the Treaty in relation to the restriction by Mondelēz Germany of [broker 3] from engaging in parallel trade discussed in section 5.5.1 affected the sale of certain Milka and Toblerone chocolate tablet products in Austria, Belgium, Bulgaria and Romania. It started on 20 March 2015 and ended on 13 June 2019.
- (24) The infringement of Article 102 of the Treaty in relation to the delisting of certain products by Mondelēz Netherlands for the purposes of limiting parallel trade discussed in section 5.5.2 affected the sale of certain Côte d'Or chocolate tablet products in Belgium and the Netherlands. It started on 1 March 2015 and ended with the start of the Commission's inspections on 18 November 2019.

8. ADDRESSEES

8.1. Principles

- (258) Union competition law applies to the activities of undertakings. The notion of an undertaking covers any entity engaged in an economic activity, irrespective of its legal status or the way in which it is financed³¹⁰.
- (259) When an economic entity infringes the competition rules, it falls, according to the principle of personal responsibility, to that entity to answer for that infringement. However, the infringement must be imputed unequivocally to a legal person on whom fines may be imposed, and the decision must be addressed to that person. Where several legal persons may be held liable for an infringement committed by one and the same undertaking, they must be regarded as jointly and severally liable for the infringement³¹¹.
- (260) The conduct of a subsidiary may be imputed to the parent company, even though the parent company does not participate directly in the infringement, if the parent company and the subsidiary form a 'single economic unit' and therefore a single 'undertaking' for the purposes of Union competition law. In particular, that may be the case where a subsidiary, despite having a separate legal personality, does not decide independently upon its own conduct on the market, but carries out, in all material respects, the instructions given to it by the parent company, regard being had in particular to the economic, organisational and legal links between those two legal entities³¹².
- (261) In the specific case, however, in which a parent holds all or almost all of the capital in a subsidiary that has committed an infringement of Union competition rules, there is a rebuttable presumption that that parent company in fact exercises a decisive

³¹⁰ Judgment of 13 June 2013, *Versalis v Commission*, C-511/11 P, EU:C:2013:386, paragraph 51.

³¹¹ Judgment of 10 April 2014, *Areva and others v Commission*, Joined Cases C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 120.

³¹² Judgment of 29 September 2011, *Elf Aquitaine v Commission*, C-521/09 P, EU:C:2011:620, paragraph 54.

influence over its subsidiary. In such a situation, it is sufficient for the Commission to prove that all or almost all of the capital in the subsidiary is held by the parent company in order to take the view that that presumption applies³¹³.

8.2. Application to this case

(262) Having regard to the conduct described in section 5, and without prejudice to the application of Article 25 of Regulation (EC) No 1/2003, liability for each of the infringements of Articles 101 and 102 of the Treaty should be imputed to Mondelez Europe GmbH, and Mondelez Middle East & Africa FZE as the legal entities exercising decisive influence over the relevant Mondelēz subsidiaries that directly participated in the respective constituent elements of the infringements³¹⁴. Liability should be ultimately attributed to Mondelēz International, Inc., in its capacity as the ultimate parent company holding directly or indirectly 100% of the shares of all the legal entities that directly participated in those infringements and the legal entities that exercised decisive influence over them. Liability for exercising decisive influence should be attributed as follows:

- (1) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 1] discussed in section 5.4.1.1.1:
 - (a) Mondelēz International, Inc., for the period 18 December 2006 until 31 December 2016;
 - (b) Mondelez Europe GmbH for the period 18 December 2006 until 31 December 2016.
- (2) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 2] discussed in section 5.4.1.1.2:
 - (a) Mondelēz International, Inc., for the period 30 April 2007 until 10 October 2016;
 - (b) Mondelez Europe GmbH for the period 30 April 2007 until 10 October 2016.
- (3) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 3] discussed in section 5.4.1.1.3:
 - (a) Mondelēz International, Inc., for the period 19 May 2008 until 30 June 2016;
 - (b) Mondelez Europe GmbH for the period 19 May 2008 until 30 June 2016.

³¹³ Judgment of 10 September 2009, *Akzo Nobel and others v Commission*, C-97/08 P, EU:C:2009:536, paragraph 60.

³¹⁴ Mondelēz's management structure does not fully correspond to its corporate structure, with personnel frequently having reporting relationships with personnel employed by different Mondelēz corporate entities. The decisive influence of Mondelez Europe GmbH and Mondelez Middle East & Africa FZE over the subsidiaries that were directly involved in the infringements is supported by the fact that these legal entities had ultimate management responsibility for the personnel who were directly involved in the infringements. Liability is attributed to Mondelēz International, Inc as the ultimate parent entity of all of the Mondelēz entities that directly or indirectly participated in the infringements.

- (4) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 4] discussed in section 5.4.1.1.4:
 - (a) Mondelēz International, Inc., for the period 23 September 2011 until 27 September 2017;
 - (b) Mondelez Europe GmbH for the period from 23 September 2011 until 27 September 2017.
- (5) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 5] discussed in section 5.4.1.1.5:
 - (a) Mondelēz International, Inc., for the period from 1 February 2012 until 2 June 2016;
 - (b) Mondelez Europe GmbH for the period from 1 February 2012 until 2 June 2016.
- (6) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 6], discussed in section 5.4.1.1.6:
 - (a) Mondelēz International, Inc., for the period from 5 March 2012 until 3 November 2017;
 - (b) Mondelez Europe GmbH for the period from 5 March 2012 until 3 November 2017.
- (7) Mondelez World Travel Retail GmbH for the period from 5 March 2012 until 3 November 2017. The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7] discussed in section 5.4.1.1.7:
 - (a) Mondelēz International, Inc., for the period from 31 December 2016 until 31 December 2017;
 - (b) Mondelez Europe GmbH for the period from 31 December 2016 until 31 December 2017.
- (8) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 8] to restrict parallel trade discussed in section 5.4.1.2.1:
 - (a) Mondelēz International, Inc., for the periods 17 April 2008 until 17 June 2013 and 25 February 2015 until 2 June 2017;
 - (b) Mondelez Europe GmbH for the periods 17 April 2008 until 17 June 2013 and 25 February 2015 until 2 June 2017.
- (9) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 9] to restrict passive sales to Slovakia discussed in section 5.4.1.2.2:
 - (a) Mondelēz International, Inc., for the period from 5 February 2018 until 5 March 2018;

- (b) Mondelez Europe GmbH for the period from 5 February 2018 until 5 March 2018.
- (10) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 4] regarding passive sales to Austria discussed in section 5.4.1.2.3:
- (a) Mondelēz International, Inc., for the period 13 March 2019 until 13 April 2019;
 - (b) Mondelez Europe GmbH for the period 13 March 2019 until 13 April 2019.
- (11) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 9] restricting passive sales to Romania discussed in section 5.4.1.2.4:
- (a) Mondelēz International, Inc., for the period 7 February 2020 until 7 March 2020;
 - (b) Mondelez Europe GmbH for the period 7 February 2020 until 7 March 2020.
- (12) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Germany and [broker 1] to clear the destination of the goods before sale discussed in section 5.4.2.1:
- (a) Mondelēz International, Inc., for the period 1 April 2012 until 31 December 2014;
 - (b) Mondelez Europe GmbH for the period 1 April 2012 until 31 December 2014.
- (13) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 2] not to resell certain products in Germany discussed in section 5.4.2.2.1:
- (a) Mondelēz International, Inc., for the period 1 May 2013 until 31 January 2016;
 - (b) Mondelez Europe GmbH for the period 1 May 2013 until 31 January 2016.
- (14) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 2] not to sell to a certain distributor discussed in section 5.4.2.2.2:
- (a) Mondelēz International, Inc., for the period 1 January 2017 until 31 December 2018;
 - (b) Mondelez Europe GmbH for the period 1 January 2017 until 31 December 2018.
- (15) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 3] regarding the destination of sales of certain products discussed in section 5.4.2.3.1

- (a) Mondelēz International, Inc., for the period 23 April 2015 to 23 May 2015;
 - (b) Mondelez Europe GmbH for the period 23 April 2015 to 23 May 2015.
- (16) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez MEA and [broker 3] not to resell certain products other than to non-food retailers discussed in section 5.4.2.3.2:
- (a) Mondelēz International, Inc., for the period 1 December 2016 until the start of the Commission's inspections on 18 November 2019;
 - (b) Mondelez Middle East & Africa FZE for the period 1 December 2016 until the start of the Commission's inspections on 18 November 2019.
- (17) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez MEA and [broker 3] not to resell certain products in Belgium discussed in section 5.4.2.3.3:
- (a) Mondelēz International, Inc., for the period 15 October 2017 until 15 November 2017;
 - (b) Mondelez Middle East & Africa FZE for the period 15 October 2017 until 15 November 2017.
- (18) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Germany and [broker 3] not to resell certain products to a certain non-food retailer discussed in section 5.4.2.3.4:
- (a) Mondelēz International, Inc., for the period from 15 June 2019 until 15 July 2019;
 - (b) Mondelez Europe GmbH for the period from 15 June 2019 until 15 July 2019.
- (19) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 4] not to resell certain biscuits in Belgium discussed in section 5.4.2.4:
- (a) Mondelēz International, Inc., for the period 1 December 2015 until 31 December 2015;
 - (b) Mondelez Europe GmbH for the period 1 December 2015 until 31 December 2015.
- (20) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez WTR and [retailer 1] to withdraw an offer to a customer discussed in section 5.4.2.5:
- (a) Mondelēz International, Inc., for the period 16 May 2017 until 16 June 2017;
 - (b) Mondelez Europe GmbH for the period 16 May 2017 until 16 June 2017.
- (21) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 5] not to resell certain products in Belgium, France and the Netherlands discussed in section 5.4.2.6:

- (a) Mondelēz International, Inc., for the period 15 October 2017 to 15 November 2017;
 - (b) Mondelez Europe GmbH for the period 15 October 2017 to 15 November 2017.
- (22) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 6] not to resell certain products in the Netherlands discussed in section 5.4.2.7:
- (a) Mondelēz International, Inc., for the period from 15 December 2017 until 15 January 2018;
 - (b) Mondelez Europe GmbH for the period from 15 December 2017 until 15 January 2018.
- (23) The infringement of Article 102 of the Treaty in relation to the restriction by Mondelēz Germany of [broker 3] from engaging in parallel trade discussed in section 5.5.1:
- (a) Mondelēz International, Inc., for the period from 20 March 2015 until 13 June 2019;
 - (b) Mondelez Europe GmbH for the period from 20 March 2015 until 13 June 2019.
- (24) The infringement of Article 102 of the Treaty in relation to the delisting of certain products by Mondelēz Netherlands for the purposes of limiting parallel trade discussed in section 5.5.2:
- (a) Mondelēz International, Inc., for the period from 1 March 2015 until the start of the Commission's inspections on 18 November 2019;
 - (b) Mondelez Europe GmbH for the period from 1 March 2015 until the start of the Commission's inspections on 18 November 2019.

9. REMEDIES AND FINES

9.1. Remedies under Article 7 of Regulation (EC) No 1/2003:

- (263) Where the Commission finds that there is an infringement of Article 101 or 102 of the Treaty, it may by decision require the undertakings concerned to bring such infringement to an end in accordance with Article 7(1) of Regulation (EC) No 1/2003. For this purpose, it may also impose any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end.
- (264) The requirement that a remedy has to be effective also empowers the Commission to require the undertaking concerned to refrain from repeating the act or conduct in question and to refrain from any act or conduct having the same or a similar object or effect³¹⁵.

³¹⁵ See for example Judgment of 6 October 1994, *Tetra Pak v Commission*, T-83/91, EU:T:1994:246, paragraph 220; Judgment of 27 October 1994, *Fiatagri and New Holland Ford v Commission*, T-34/92, EU:T:1994:258, paragraph 39; Judgment of 20 April 1999, *LVM v Commission*, T-305/94, T-306/94, T-

(265) Notwithstanding the fact that Mondelēz already brought the majority of the infringements to an end before the inspections conducted by the Commission, the Commission requires Mondelēz to refrain from any agreement or concerted practice and any abuse of a dominant position which might have the same or a similar object or effect.

9.2. Article 23(2) and (3) of Regulation (EC) No 1/2003

(266) Under Article 23(2) of Regulation (EC) No 1/2003, the Commission may by decision impose upon undertakings fines where, either intentionally or negligently, they infringe Article 101 or 102 of the Treaty. For each undertaking participating in the infringement, the fine shall not exceed 10% of its total turnover in the preceding business year³¹⁶.

10. In the present case, it has been established that Mondelēz engaged in 22 infringements of Article 101 of the Treaty and two infringements of Article 102 of the Treaty. The Commission considers that, based on the facts described above, each of the infringements has been committed intentionally or at least negligently. The infringements of Article 101 of the Treaty described above consist of express passive sales restrictions or express agreements put in place by Mondelēz in order to limit the territories or customers to which distributors and brokers were allowed to resell its products. Both infringements of Article 102 of the Treaty were the result of conscious actions that protected Mondelēz's dominant position in certain Member States. Setting of the fines

10.1.1.1. General methodology

(267) Pursuant to Article 23(3) of Regulation (EC) No 1/2003, in fixing the amount of a fine, the Commission must have regard to all relevant circumstances and particularly to the gravity and the duration of the infringement. The Commission will also refer to the principles laid down in its Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 ('the Guidelines')³¹⁷.

(268) In setting the fines the Commission will, first, determine a basic amount. The basic amount of each fine will be set by reference to the value of sales to which the infringement directly or indirectly relates in the relevant geographic area within the EU³¹⁸. The basic amount consists of a percentage of the value of sales up to a maximum percentage of 30%³¹⁹, depending on the degree of gravity of the infringement, multiplied by the number of years of the infringement³²⁰. The Commission may also include in the basic amount an additional amount of up to 25% of the value of sales (an 'entry fee') to deter undertakings from entering into anticompetitive agreements³²¹.

(269) Second, the Commission may increase or decrease the basic amount to take into account any aggravating or mitigating circumstances in accordance with points 28

307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94, EU:T:1999:80, paragraph 1254.

³¹⁶ Article 23(2) of Regulation (EC) No 1/2003.

³¹⁷ OJ C 210, 1.9.2006, p. 2.

³¹⁸ Point 13 of the Guidelines.

³¹⁹ Point 21 of the Guidelines.

³²⁰ Point 19 of the Guidelines.

³²¹ Point 25 of the Guidelines.

and 29 of the Guidelines. It will do so on the basis of an overall assessment which takes account of all the relevant circumstances³²².

- (270) Third, the Commission pays particular attention to the need to ensure that fines have a sufficiently deterrent effect³²³.

10.1.1.2. The value of sales

- (271) For the calculation of the value of sales, the Commission will normally take into account the sales made by the undertaking during the last full business year of the occurrence of the infringement³²⁴. If the last year is not sufficiently representative because the value of sales in that year differs significantly from the yearly value achieved over the first years of the infringement, the Commission may take into account another year and/or other years for the determination of the value of sales. The value of sales will be assessed before VAT and other taxes directly related to the sales³²⁵.

- (272) Following the Guidelines, the starting point for determining the value of sales for a given infringement will be the value of Mondelēz's sales of the relevant chocolate, biscuit or coffee products during the last full business year of the relevant infringement³²⁶. In the case of infringements that lasted less than one year, the Commission intends to use the full business year within which the infringement was committed as the reference year. The specific product sales that the Commission intends to include within the value of sales are the sales of the specific product offerings to which the infringement related and substantially identical versions of those product offerings (i.e. product offerings with the identical flavour and weight, but different packaging). In the case of agreements that restricted the customer's ability to resell outside a specified territory, the Commission intends to include in the value of sales all sales in the EU outside of that territory, or, in the case of restrictions that restricted sales within a certain territory, the sales within that territory.

- (273) In view of the foregoing, the value of sales of products directly or indirectly related to the infringement is based on Mondelēz's relevant sales in the last available full business year of that infringement, with the exception of the infringement discussed in section 5.4.2.1 above, for which with respect to certain products that had been discontinued by the last full business year of the infringement, it was necessary to take into account the last full business years in which there were substantial sales of the product. The value of sales for each infringement is as follows:

- (1) the infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Mondelez EU Export and [exclusive distributor 1] discussed in section 5.4.1.1.1: EUR [...];

³²² Point 27 of the Guidelines.

³²³ Point 30 of the Guidelines.

³²⁴ Point 13 of the Guidelines.

³²⁵ Point 17 of the Guidelines.

³²⁶ Point 13 of the Guidelines. Note that in one case, in which certain products that were affected by the infringement were not sold in the last full business year during which the infringement was committed, the Commission intends to use the last full business year during which those products were sold as the reference year for the value of sales for those products.

- (2) the infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Mondelez EU Export and [exclusive distributor 2] discussed in section 5.4.1.1.2: EUR [...];
- (3) the infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Mondelez EU Export and [exclusive distributor 3] discussed in section 5.4.1.1.3: EUR [...];
- (4) the infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Mondelez EU Export and [exclusive distributor 4] discussed in section 5.4.1.1.4: EUR [...];
- (5) the infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Mondelez EU Export and [exclusive distributor 5] discussed in section 5.4.1.1.5: EUR [...];
- (6) the infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Mondelez EU Export and [exclusive distributor 6] discussed in section 5.4.1.1.6: EUR [...];
- (7) the infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7] discussed in section 5.4.1.1.7: EUR [...];
- (8) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 8] to restrict parallel trade discussed in section 5.4.1.2.1: EUR [...];
- (9) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 9] to restrict passive sales to Slovakia discussed in section 5.4.1.2.2: EUR [...];
- (10) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 4] regarding passive sales to Austria discussed in section 5.4.1.2.3: [...];
- (11) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 9] restricting passive sales to Romania discussed in section 5.4.1.2.4: EUR [...];
- (12) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Germany and [broker 1] to clear the destination of the goods before sale discussed in section 5.4.2.1: EUR [...];
- (13) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 2] not to resell certain products in Germany discussed in section 5.4.2.2.1: EUR [...];
- (14) the infringement of Article 101(1) TFEU in relation to the agreement between Mondelēz Austria and [broker 2] not to sell to a certain distributor discussed in section 5.4.2.2.2: EUR [...];
- (15) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 3] regarding the destination of sales of certain products discussed in section 5.4.2.3.1: EUR [...];

- (16) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez MEA and [broker 3] not to resell certain products other than to non-food retailers discussed in section 5.4.2.3.2: EUR [...];
- (17) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez MEA and [broker 3] not to resell certain products in Belgium discussed in section 5.4.2.3.3: EUR [...];
- (18) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Germany and [broker 3] not to resell certain products to a certain non-food retailer discussed in section 5.4.2.3.4: EUR [...];
- (19) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 4] not to resell certain biscuits in Belgium discussed in section 5.4.2.4: EUR [...];
- (20) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez WTR and [retailer 1] to withdraw an offer to a customer discussed in section 5.4.2.5: EUR [...];
- (21) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 5] not to resell certain products in Belgium, France and the Netherlands discussed in section 5.4.2.6: EUR [...];
- (22) the infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 6] not to resell certain products in the Netherlands discussed in section 5.4.2.7: EUR [...];
- (23) the infringement of Article 102 of the Treaty in relation to the restriction by Mondelēz Germany of [broker 3] from engaging in parallel trade discussed in section 5.5.1: EUR [...]; and
- (24) the infringement of Article 102 of the Treaty in relation to the delisting of certain products by Mondelēz Netherlands for the purposes of limiting parallel trade discussed in section 5.5.2: EUR [...].

10.1.1.3.Gravity

- (274) The gravity of the infringement determines the percentage of the value of sales to be taken into account in setting the fine. In assessing the gravity of the infringement the Commission will have regard to a number of factors, such as the nature of the infringements, the total number of infringements, the need for consistency when sanctioning economically equivalent infringements under Article 101 and 102 of the Treaty, and the geographic scope of the infringement³²⁷.
- (275) In the present case, the Commission has taken 10% of the value of sales as the appropriate percentage to be used for setting the fine taking into account the following factors:
 - (a) restrictions on cross-border imports and exports are very serious infringements that serve to undermine the most fundamental aims of the Union, particularly the attainment of the internal market;

³²⁷ Point 22 of the Guidelines.

- (b) the relevant markets affected by the infringements are of significant economic importance; this means that any anticompetitive behaviour on these markets is likely to have had a considerable impact;
- (c) the anticompetitive objective of the infringing practices, namely to partition markets along national borders was the same regardless of whether the practice infringed Article 101 or 102 of the Treaty;
- (d) most of the infringements covered a substantial number of Member States, and taken as a whole affected a substantial part of the Union.

10.1.1.4.Duration

- (276) In order to correctly reflect the economic importance of the infringements, the value of sales for the last available full business year of the infringements is multiplied by the period of time during which the relevant infringements were in place³²⁸. As a general approach, the duration of each infringement is calculated as the number of days during which the infringement lasted, expressed as fractions of years.
- (277) In the case of certain of the infringements involving exclusive distribution agreements, namely, those discussed in sections 5.4.1.1.1, 5.4.1.1.5, 5.4.1.1.6 and 5.4.1.2.1, the portfolio of products covered by the infringing passive sales restriction changed over the period of the infringement. To ensure that the fines for those infringements only take into account the periods in which individual products were actually subject to the infringement, the Commission first calculated the duration on a product-by-product basis in order to apply a weighted average duration for the infringement that reflected the actual periods in which the various individual products were actually subject to the infringement³²⁹.

10.1.1.5.Additional amount

- (278) It is not necessary to include any additional amount in the basic amount.

10.1.1.6.Aggravating or mitigating circumstances

- (279) No aggravating or mitigating circumstances apply in this case.

10.1.1.7.Deterrence

- (280) Point 30 of the Guidelines provides for the possibility of increasing the fine to ensure that fines have a sufficiently deterrent effect in the case of undertakings which have a particularly large turnover beyond the sales of goods and services to which the infringement relates.
- (281) In the present case, the Commission applies a deterrence multiplier of 1.1 to the basic amount in view of Mondelēz's particularly large turnover beyond the sales of goods to which the infringements relate to ensure that the fines have a sufficiently deterrent effect.

³²⁸ Point 24 of the Guidelines.

³²⁹ Although the restrictive agreement covered all products in the distributor's portfolio, the composition of that portfolio changed over time, and thus not every product was subject to the restriction for the entire period during which the restrictive agreement was in place.

10.1.1.8. Application of the 10% turnover limit

(282) In no case does the fine for any given infringement exceed 10% of Mondelēz's total turnover relating to the business year preceding the date of adoption of this Decision pursuant to Article 23(2) of Regulation (EC) No 1/2003.

10.1.1.9. Reduction of the fine in view of cooperation

(283) Point 37 of the Guidelines allows the Commission to depart from the methodology set out in those Guidelines if the particularities of the case justify it.

(284) In the present case, the Commission considers that Mondelēz has cooperated with the Commission. The Commission takes account of Mondelēz's cooperation before the issuance of a statement of objections beyond its legal obligation to do so by acknowledging the infringements of Articles 101 and 102 of the Treaty arising from the conduct.

(285) In view of the effective cooperation provided by Mondelēz in this case, the Commission considers that the amount of the applicable fine should therefore be reduced by 15%.

10.1.2. Conclusion: final amount of the fine

(286) The final amount of the fines to be imposed for the infringements discussed above is as follows:

- (1) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 1] discussed in section 5.4.1.1.1: EUR 30 441 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (2) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 2] discussed in section 5.4.1.1.2: EUR 5 398 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (3) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft Food Schweiz, EU Export and [exclusive distributor 3] discussed in section 5.4.1.1.3: EUR 2 589 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (4) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 4] discussed in section 5.4.1.1.4: EUR 1 222 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (5) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 5] discussed in section 5.4.1.1.5: EUR 7 745 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.

- (6) The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kraft World Travel Retail GmbH and [exclusive distributor 6], discussed in section 5.4.1.1.6: EUR 18 397 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (7) Mondelez World Travel Retail GmbH for the period from 5 March 2012 until 3 November 2017. The infringement of Article 101(1) of the Treaty in relation to the express passive sales restriction agreed between Kent Gıda Maddeleri San. Ve Tic. A.Ş and [exclusive distributor 7] discussed in section 5.4.1.1.7: EUR 28 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (8) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 8] to restrict parallel trade discussed in section 5.4.1.2.1: EUR 54 141 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (9) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 9] to restrict passive sales to Slovakia discussed in section 5.4.1.2.2: EUR 128 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (10) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 4] regarding passive sales to Austria discussed in section 5.4.1.2.3: EUR 12 700, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (11) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez EU Export and [exclusive distributor 9] restricting passive sales to Romania discussed in section 5.4.1.2.4: EUR 200 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (12) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Germany and [broker 1] to clear the destination of the goods before sale discussed in section 5.4.2.1: EUR 14 225 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (13) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 2] not to resell certain products in Germany discussed in section 5.4.2.2.1: EUR 47 683 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (14) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 2] not to sell to a certain distributor discussed in section 5.4.2.2.2: EUR 41 083 000, for which Mondelēz

International, Inc., and Mondelez Europe GmbH are jointly and severally liable.

- (15) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 3] regarding the destination of sales of certain products discussed in section 5.4.2.3.1: EUR 2 500 for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (16) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez MEA and [broker 3] not to resell certain products other than to non-food retailers discussed in section 5.4.2.3.2: EUR 87 315 000, for which Mondelēz International, Inc., and Mondelez Middle East & Africa FZE are jointly and severally liable.
- (17) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez MEA and [broker 3] not to resell certain products in Belgium discussed in section 5.4.2.3.3: EUR 5 900, for which Mondelēz International, Inc., and Mondelez Middle East & Africa FZE are jointly and severally liable.
- (18) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Germany and [broker 3] not to resell certain products to a certain non-food retailer discussed in section 5.4.2.3.4: EUR 172 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (19) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Austria and [broker 4] not to resell certain biscuits in Belgium discussed in section 5.4.2.4: EUR 12 800, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (20) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelez WTR and [retailer 1] to withdraw an offer to a customer discussed in section 5.4.2.5: EUR 49 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (21) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 5] not to resell certain products in Belgium, France and the Netherlands discussed in section 5.4.2.6: EUR 3 900, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (22) The infringement of Article 101(1) of the Treaty in relation to the agreement between Mondelēz Netherlands and [broker 6] not to resell certain products in the Netherlands discussed in section 5.4.2.7: EUR 59 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.
- (23) The infringement of Article 102 of the Treaty in relation to the restriction by Mondelēz Germany of [broker 3] from engaging in parallel trade discussed in

section 5.5.1: EUR 21 798 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.

- (24) The infringement of Article 102 of the Treaty in relation to the delisting of certain products by Mondelēz Netherlands for the purposes of limiting parallel trade discussed in section 5.5.2: EUR 4 812 000, for which Mondelēz International, Inc., and Mondelez Europe GmbH are jointly and severally liable.

HAS ADOPTED THIS DECISION:

Article 1

Mondelēz International, Inc., and Mondelez Europe GmbH engaged in agreements and/or concerted practices that had the object of restricting competition and thus infringed Article 101(1) of the Treaty:

- (1) by restricting passive sales in the EU outside of Austria of [exclusive distributor 1] from 18 December 2006 until 31 December 2016 for certain Oreo biscuits, certain Daim, Cadbury and Marabou chocolate confectionery products covered by the exclusive distribution agreement with [exclusive distributor 1];
- (2) by restricting passive sales in the EU outside of Finland of [exclusive distributor 2] from 30 April 2007 until 10 October 2016 for certain Mirabell chocolate confectionery products covered by the exclusive distribution agreement with [exclusive distributor 2];
- (3) by restricting passive sales in the EU outside of Austria and Germany of [exclusive distributor 3] from 19 May 2008 until 30 June 2016 for certain Ritz biscuits covered by the exclusive distribution agreement with [exclusive distributor 3];
- (4) by restricting passive sales in the EU outside of Germany of [exclusive distributor 4] from 23 September 2011 until 27 September 2017 for Cadbury Wunderbar and Cadbury Curly Wurly chocolate confectionery products covered by the exclusive distribution agreement with [exclusive distributor 4];
- (5) by restricting passive sales in the EU outside of Hungary of [exclusive distributor 5]. from 1 February 2012 until 2 June 2016 for certain Mikado biscuits, certain Côte d'Or, Mirabell and Toblerone chocolate confectionery products covered by the exclusive distribution agreement between Kraft World Travel Retail GmbH and [exclusive distributor 5];
- (6) by restricting passive sales in the EU outside of Poland of [exclusive distributor 6] from 5 March 2012 until 3 November 2017 for certain Mikado and Ritz biscuits, certain Daim and Toblerone chocolate confectionery products covered by the exclusive distribution agreement with [exclusive distributor 6];
- (7) by restricting passive sales in the EU outside of Austria, Belgium, France, Germany and the Netherlands of [exclusive distributor 7] from 31 December 2016 until 31 December 2017 for a single Milka small bites product covered by the exclusive distribution agreement with [exclusive distributor 7];

- (8) by restricting parallel trade of [exclusive distributor 8] for certain Côte d'Or, Mirabell, Toblerone, and Daim chocolate confectionary products, certain Mikado, Ritz and Oreo biscuit products and certain Hag coffee products throughout the EU from 17 April 2008 until 2 June 2017, with an interruption between 18 June 2013 and 25 February 2015;
- (9) by restricting passive sales of [exclusive distributor 9] to Slovakia for Marabou, Cadbury and Mirabell chocolate confectionary products from 5 February 2018 until 5 March 2018;
- (10) by restricting passive sales of [exclusive distributor 4] to Austria for Cadbury Wunderbar and Cadbury Curly Wurly chocolate confectionary products from 13 March 2019 until 13 April 2019;
- (11) by restricting passive sales of [exclusive distributor 9] to Romania for certain Marabou biscuits, certain Cadbury and Marabou chocolate confectionary products from 7 February 2020 until 7 March 2020;
- (12) by requiring [broker 1] to clear the destination of the goods before sale from 1 April 2012 until 31 December 2014 affecting the sale of certain Milka and Toblerone chocolate confectionary products and certain Belvita biscuits;
- (13) by requiring [broker 2] not to resell certain products in Germany from 1 May 2013 until 31 January 2016 affecting the sale of certain Milka chocolate tablet products;
- (14) by requiring [broker 2] not to sell to a certain distributor from 1 January 2017 until 31 December 2018 affecting the sale of certain Milka, Mirabell and Suchard products in Germany;
- (15) by requiring [broker 3] not to resell certain products in Belgium and the Netherlands from 23 April 2015 until 23 May 2015 affecting the sale of certain Velours Noir R&G coffee capsules;
- (16) by requiring [broker 3] not to resell certain products to a certain non-food retailer from 15 June 2019 until 15 July 2019 affecting the sale of certain Milka countlines, pralines and chocolate tablet products and Oreo sweet biscuits in Austria, Belgium, France, Germany, Luxembourg, the Netherlands and Poland;
- (17) by requiring [broker 4] not to resell certain biscuits in Belgium from 1 December 2015 until 31 December 2015 affecting the sale of certain Milka biscuits;
- (18) by requiring [retailer 1] to withdraw an offer to a customer from 16 May 2017 until 16 June 2017 affecting the sale of certain Marabou certain Marabou chocolate tablet products in Germany;
- (19) by requiring [broker 5] not to resell certain products in Belgium, France and the Netherlands from 15 October 2017 to 15 November 2017 affecting the sale of Côte d'Or chocolate tablet products; and
- (20) by requiring [broker 6] not to resell certain products in the Netherlands from 15 December 2017 until 15 January 2018 affecting the sale of certain LiGa Evergreen and LiGa Milkbreak sweet biscuits.

Mondelēz International, Inc., and Mondelez Middle East & Africa FZE engaged in agreements and/or concerted practices that had the object of restricting competition and thus infringed Article 101(1) of the Treaty:

- (1) by preventing [broker 3] from reselling certain products other than to non-food retailers from 1 December 2016 until 18 November 2019 affecting the sale of products of the Toblerone (chocolate tablets, small bites), Oreo (sweet biscuits), Milka (chocolate tablets, small bites, countlines), Côte d'Or (chocolate tablets), Daim (small bites), and LU (countlines) brands throughout the EU; and
- (2) by preventing [broker 3] from reselling certain products in Belgium from 15 October 2017 until 15 November 2017 affecting the sale of certain Côte d'Or chocolate tablet products.

Mondelēz International, Inc., and Mondelez Europe GmbH abused their dominant position in violation of Article 102 of the Treaty:

- (1) through the refusal to supply [broker 3] with chocolate tablet products from 20 March 2015 until 13 June 2019 affecting the sale of certain Milka and Toblerone chocolate tablet products in Austria, Belgium, Bulgaria and Romania;
- (2) by delisting in the Netherlands certain Côte d'Or chocolate tablet products from 1 March 2015 until 18 November 2019 affecting the sale of these products in Belgium and the Netherlands.

Article 2

For the 24 infringements referred to in Article 1, fines totalling EUR 337 522 800 are imposed on Mondelēz International, Inc., out of which:

- (a) EUR 250 201 900 are imposed on Mondelēz International, Inc., and Mondelēz Europe GmbH, jointly and severally;
- (b) EUR 87 320 900 are imposed on Mondelēz International, Inc., and Mondelez Middle East & Africa FZE, jointly and severally.

The fines shall be credited, in euros, within three months of the date of notification of this Decision, to the following bank account held in the name of the European Commission:

BANQUE CENTRALE DU LUXEMBOURG
2, Boulevard Royal
L-2983 Luxembourg

IBAN: LU27 9990 0001 1400 100E
BIC: BCLXLULL
Ref.: EC/BUFI/AT.40632

After the expiry of that period, interest shall automatically be payable at the interest rate applied by the European Central Bank to its main refinancing operations on the first day of the month in which this Decision is adopted, plus 3.5 percentage points.

Where an action is brought before the General Court by an undertaking referred to in Article 1 against this Decision, that undertaking shall cover the fine by the due date, either by providing an

acceptable financial guarantee or by making a provisional payment of the fine in accordance with Article 108 of Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council³³⁰.

Article 3

The undertakings listed in Article 1 shall immediately bring to an end the infringements referred to in that Article insofar as they have not already done so.

They shall refrain from repeating any act or conduct described in Article 1, and from any act or conduct having the same or similar object or effect.

Article 4

This Decision is addressed to:

Mondelēz International, Inc., 905 West Fulton Market, Suite 200, Chicago, IL 60607, United States of America;

Mondelez Europe GmbH, Lindbergh-Allee 1, 8152 Glattpark, Switzerland;

Mondelez Middle East & Africa FZE, No 3 The Galleries, 5th Floor, Downtown Jebel Ali, P.O. Box 261983, Dubai, United Arab Emirates.

This Decision shall be enforceable pursuant to Article 299 of the Treaty.

Done at Brussels, 23.5.2024

For the Commission

(Signed)

Margrethe VESTAGER
Executive Vice-President

³³⁰ Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union (OJ L 193, 30.7.2018, p. 1).