Horizontal Agreements

ECJ Advocate General Opinions

APVE and Others (Case C-671/15), Opinion of Advocate General Wahl

On April 6, 2017, Advocate General Wahl issued an opinion following a preliminary ruling request from the French Court of Cassation.[1] In 2012, the French Competition Authority sanctioned several producer organizations ("POs")[2] and associations of producer organizations ("APOs") for their involvement in a cartel in the agricultural sector.[3] The French Competition Authority found that the parties agreed on the price of endives, using different coordination mechanisms such as marketing policies.

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

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

The first issue was whether POs or APOs can adopt potentially anticompetitive policies that are not explicitly covered by the Derogation Regulations. In assessing this question, Advocate General Wahl distinguished between an internal and external configuration.

Advocate General Wahl defined an internal configuration as a situation in which potentially anticompetitive policies are adopted within a PO or APO. The policies adopted under an internal configuration by a PO or APO in charge of managing production and commercialization of the agricultural products at issue would be outside the scope of EU competition rules, even if they are not explicitly within the Derogation Regulations, as long as (1) the policies are necessary to accomplish the POs' and APOs' duties, and (2) linked to the objectives of the Derogation Regulations. Conversely, potentially anticompetitive policies adopted within a PO or APO with no production and marketing duties fall within the scope of EU competition rules.

Advocate General Wahl defined an external configuration as a situation in which the POs or APOs adopt policies with other POs/APOs or with third-party entities not in charge of managing production and commercialization of agricultural products. In this configuration, EU competition law should apply if POs and APOs adopt potentially anticompetitive policies. Policies beyond what is "strictly necessary" for POs or APOs to fulfill their production and marketing tasks, as provided by the

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

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

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

Derogation Regulations, should not escape the applicability of EU competition rules.

The second issue was whether POs or APOs can adopt policies on price-fixing, coordination on product quantities, and exchange of strategic information. Advocate General Wahl suggested that price-fixing should not escape the applicability of EU competition rules. For coordination on product quantities and exchange of information, the national court should differentiate between the internal and external configuration. The national court should assess whether the policies are necessary or permitted to accomplish marketing objectives and have been adopted in accordance with or in the context of the Derogation Regulations.

Advocate General Wahl thus favored the primacy of CAP rules over competition rules. He attempted to extend the application of the Derogation Regulations, suggesting a valid distinction between the internal and external configuration as a decisive factor to assess whether competition law is applicable.

Fining Policy

ECJ Judgments

Akzo Nobel and Others v. Commission (Case C-516/15 P)

On April 27, 2017, the Court of Justice dismissed an appeal by Akzo Nobel NV ("Akzo NV") and two of its subsidiaries, Akzo Nobel Chemicals GmbH ("Akzo GmbH") and Akzo Nobel Chemicals BV ("Akzo BV"),[4] to partially annul the Commission's fine on Akzo Nobel NV for its participation in the *Heat Stabilizer*[5] cartels.[6] The Court of Justice confirmed the General Court's finding that the expiration of the limitation period for an infringement perpetrated by subsidiaries of a single economic unit could not result in the annulment of the fine imposed on the parent company held jointly and severally liable for the same infringement.

In 2009, the Commission fined Akzo NV and several of its subsidiaries for participating in two sets of anticompetitive agreements and concerted practices in the tin stabilizer sector and the epoxidised soybean oil and esters sector (the "ESBO/esters sector") in violation of Article 101 TFEU. The undertakings concerned were found to have participated in those infringements during various periods between February 1987 and March 2000 in relation to the tin stabilizers sector, and between September 1991 and March 2000 in relation to the ESBO/esters sector.

On appeal, the General Court annulled the parts of the Commission's decision relating to Akzo GmbH's and Akzo BV's fines for the infringement period before June 28, 1993 (the "first infringement period"). It accepted the applicants' claim that the Commission was time-barred as of June 28, 1998. Article 25(1)(b) of Regulation 1/2003 provides that the Commission can only impose penalties for infringements of Article 101 TFEU up to five years after the infringement ends, which was June 28, 1993 for the first infringement period. The Commission's first actions were not taken until early 2003, nearly ten years after the expiration of the limitation period. The General Court found, however, that the fact that a subsidiary benefits from the expiration of the limitation period does not prevent the Commission from holding the parent company liable, even where the parent company's liability is entirely based on the subsidiary's. This is because the expiration of the limitation period does not cause the infringement to cease to exist, but only enables those that benefit from it to avoid proceedings. The infringement therefore continues to exist and can cause proceedings to be initiated in relation to the parent company whose subsidiaries alone benefit from the expiration of the limitation period.

On appeal to the Court of Justice, Akzo NV, Akzo GmbH, and Akzo BV unsuccessfully claimed that the

[4] *Akzo Nobel and Others v. Commission* (Case C-516/15 P) EU:C:2017:314.

[5] Heat stabilizers—in solid or liquid form—are added to PVC products to improve their thermal resistance. They also increase the plasticity, rigidity, and transparency of final PVC products and protect them from discoloration.

[6] *Heat Stabilizers* (Case COMP/AT.38589), Commission decision of November 11, 2009.

General Court had erred in law in upholding Akzo NV's fine for the first infringement period because its liability was derived entirely from that of its subsidiaries, whose fines had been annulled. The Court of Justice found that the anticompetitive activities during the first infringement period could still be regarded as having been carried out by Akzo NV itself, since it formed a single economic entity with Akzo GmbH and Akzo BV. The Court of Justice noted that factors specific to the parent company justify assessing its liability and that of its subsidiaries differently, even if the liability of the former is based exclusively on the unlawful conduct of the latter. Akzo NV, unlike its subsidiaries whose participation ended on June 28, 1993, was involved in the infringements in both sectors until March 2000.

The limitation period had therefore expired only for Akzo GmbH and Akzo BV, and did not preclude Akzo NV from being held liable for the first infringement period.

ECJ Advocate General Opinions

Toshiba v. Commission (Case C-180/16 P), Opinion of Advocate General Tanchev

On April 26, 2017, Advocate General Tanchev delivered his opinion in the appeal by Toshiba Corporation ("Toshiba") against the General Court's judgment[7] upholding the Commission's decision to reimpose fines on Toshiba for its participation in the worldwide *Gas Insulated Switchgear* cartel between 1988 and 2004.[8]

In 2011, the General Court annulled the original Commission decision[9] on the grounds that the Commission had infringed the principle of equal treatment when calculating the fine by using different reference years[10] for the Japanese (2001) and European (2003) cartelists, respectively.[11] In 2012, the Commission adopted a new decision and reimposed a fine on Toshiba using 2003 as a reference year. Toshiba had no gas insulated switchgear sales in 2003 because in 2002 it had transferred the business to a joint venture with Mitsubishi Electric Corporation ("Melco"), another cartelist. The Commission thus calculated the starting amount of Toshiba's fine on the basis of the hypothetical starting amount of a fine that would have pertained to the joint venture (based on its turnover in 2003), rather than by reference to Toshiba's (non-existent) gas insulated switchgear turnover in 2003. The Commission determined the starting amount of Toshiba's fine by splitting the joint venture's starting amount between Toshiba and Melco on the basis of their shares of sales of gas insulated switchgear in the year before they transferred this business to the joint venture, namely 2001.

After unsuccessfully appealing the readopted decision to the General Court, Toshiba appealed to the Court of Justice. First, Toshiba argued that the Commission must issue a new statement of objections before adopting a new decision. Advocate General Tanchev agreed with the General Court's finding that the Commission did not have to issue a new statement of objections because the General Court's annulment of the original decision had no effect on the statement of objections. Advocate General Tanchev emphasized that it is sufficient for the Commission to indicate in a statement of objections the elements of fact and law on which it would base its fine calculation. The Commission does not need to explain how it would use each of those elements in the statement of objections or in the procedural stages that follow.

Second, Toshiba contended that the Commission infringed the principle of equal treatment by calculating its fine on the basis of the hypothetical starting amount of the fine for its joint venture, rather than by reference to the joint venture's turnover. In contrast, the Commission had calculated the fines for

[7] *Toshiba v. Commission* (Case T-404/12) EU:T:2016:18.
[8] *Gas Insulated Switchgear – fines* (Case COMP/39.966), Commission decision of June 27, 2012.
[9] *Gas Insulated Switchgear* (Case COMP/F/38.899), Commission decision of January 24, 2007.
[10] A reference year stands for the last full year of the infringement, and is relevant to determine the value of the cartelists' worldwide sales. The value of worldwide sales is, in turn, used to calculate the starting amount of fine.
[11] *Toshiba v. Commission* (Case T-113/07) EU:T:2011:343.

European producers on the basis of their gas insulated switchgear turnover.

Advocate General Tanchev opined that the Commission had correctly used different methods to calculate the starting amount of fines for the European producers, on the one hand, and for Toshiba and Melco, on the other, because the European producers actually had sales of gas insulated switchgear in the last full year of the infringement, 2003, whereas Toshiba and Melco did not. Advocate General Tanchev also noted that the Commission's fine calculation method accurately represented Toshiba's market position because the Commission attributed to Toshiba a share of the joint venture's starting amount that corresponded to Toshiba's market share in gas insulated switchgear in the last full year before it transferred this business to the joint venture (2001).[12] Advocate General Tanchev concluded that the method applied by the Commission in fact used the joint venture's turnover, albeit indirectly, because the starting amount was determined based on the joint venture's turnover in 2003, and dismissed Toshiba's claim that the starting amount of its fine had been calculated contrary to the principle of equal treatment.

Advocate General Tanchev therefore dismissed the alternative calculation method suggested by Toshiba as unlikely to allow for a more direct use of the joint venture's turnover or to provide a more accurate picture of Toshiba's market position in 2003.

Commission Decisions

Non-Confidential Version of a Decision in Yen Interest Rate Derivatives (Case COMP/AT.39861) and Non-Confidential Version of the Euro Interest Rate Derivatives Decision (Case COMP/AT.39914)

On May 12, 2017, the Commission published the non-confidential version of a decision in *Yen Interest Rate Derivatives* ("YIRD"), in which it fined the broker ICAP for facilitating several cartels that the Commission had settled with the participants in 2013.[13] On June 30, 2017, the Commission also published a non-confidential version of its *Euro Interest Rate Derivatives* ("EIRD") settlement decision.[14] Both settlement decisions are the first cartel decisions in the financial sector since the start of the financial crisis in 2008. The Commission found that several international financial institutions had infringed Article 101 TFEU by participating in several cartels relating to interest rate derivative ("IRD") pricing elements.

IRDs are financial products globally traded by investment banks and are used, among others, by corporations and financial institutions as a tool for managing their interest rate risk exposure or for speculation purposes. IRDs are intended to reflect the cost of interbank lending in a given currency, and their value changes on a daily basis. This is because one of the components of their price is a reference interest rate, such as the London Interbank Offered Rate ("LIBOR"), which is in turn used for various currencies including the Japanese yen ("JPY LIBOR"), or the Euro Interbank Offered Rate ("EURIBOR"), whose value is determined daily. Notably, a reference interest rate is set for different loan maturities ("tenors") on the basis of daily submissions from banks that are members of a panel for each particular interest rate ("panel banks"). Every day, the panel banks submit estimates of interest rates at which they would lend to or borrow from other prime banks within a particular market (such as the Euro zone for EURIBOR or the London interbank money market for JPY LIBOR). After determining the average of the panel banks' submissions, the reference interest rates are made available to the public. The process repeats every business day.

In the 2013 *YIRD* decision, the Commission found that between 2007 and 2010 UBS, RBS, Deutsche Bank,

[12] As opposed to simply using the share that corresponded to Toshiba's ownership stake in the joint venture (50%).

[13] *Yen Interest Rate Derivatives* (Case COMP/AT.39861), Commission decision of February 4, 2015, following a settlement decision *Yen Interest Rate Derivatives* (Case COMP/AT.39861), Commission decision of December 4, 2013.

[14] *Euro Interest Rate Derivatives* (Case COMP/AT.39914), Commission decision of December 4, 2013.

JPMorgan Chase, and Citigroup took part in seven distinct bilateral infringements. Traders from these banks discussed certain JPY LIBOR and Euroyen TIBOR (together, "YIRD") submissions, which benefited their trading positions with respect to derivatives. In addition, the traders exchanged competitively sensitive information relating to their trading positions and future YIRD submissions. The Commission also found that the broker RP Martin had facilitated one of the infringements by contacting the banks that did not participate in the infringement to influence their JPY LIBOR submissions. Notably, RP Martin attempted to influence the banks' submissions in directions desired by UBS and provided them with misleading "spoof bids" that were aimed at influencing the banks' perception of rates at which they are able to borrow. In return, UBS would compensate RP Martin through trading commissions. The Commission fined the banks involved and RP Martin €669 million in total. UBS benefitted from full immunity under the Commission's 2006 Leniency Notice.[15]

In the same investigation, the Commission opened separate proceedings against the cash broker ICAP, which refused to take part in the settlement procedure, and fined it €14.9 million for facilitating the infringement.[16] The Commission found that ICAP directly contacted the banks that did not take part in the infringement, and provided them with misleading information aimed at influencing the banks' JPY LIBOR submissions. In addition, ICAP served as a communication channel between certain participants to the infringement.

In the 2013 *EIRD* decision, the Commission found that Barclays, Deutsche Bank, RBS, and Société Générale participated in a single and continuous infringement between September 2005 and May 2008. The Commission concluded that the banks occasionally, on a bilateral basis, exchanged information on their desired or future submissions for the EURIBOR and shared detailed information on their trading strategies that was not available to the public. The Commission fined Deutsche Bank, RBS, and Société Générale over €1 billion in total, whereas Barclays benefitted from full immunity under the Commission's 2006 Leniency Notice. The Commission later reduced Société Générale's fine on the basis of corrected sales data. This decreased the total combined fine to €825 million.[17]

Crédit Agricole, HSBC, and JPMorgan Chase refused to take part in the settlement procedure for the EIRD cartel. Accordingly, the Commission fined each approximately €485 million under the standard cartel procedure.[18] HSBC's and JPMorgan Chase's appeals to the General Court are pending.[19]

Abuse

ECJ Advocate General Opinions

Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība (Case C-177/16), Opinion of Advocate General Wahl

On April 6, 2017, Advocate General Wahl delivered an opinion on a Latvian court's request for a preliminary ruling on abuse of dominance through excessive pricing.[20]

The Latvian Competition Council ("LCC") had fined the dominant copyright collecting society, Autortiesību un komunicēšanās konsultāciju aģentūra – Latvijas Autoru apvienība ("AKKA/LAA"), for charging excessive rates. The LCC had found that

[15] Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ 2006 C 298/17.

[16] *Yen Interest Rate Derivatives* (Case COMP/AT.39861), Commission decision of February 4, 2015.

[17] Commission Press Release, "AMENDED – Antitrust: Commission fines banks €1.49 billion for participating in cartels in the interest rate derivatives industry," December 4, 2013. The amended decision, *Euro Interest Rate Derivatives* (Case COMP/AT.39914), Commission decision of April 6, 2016, is not publicly available.

[18] Commission Statement 16/4307, "Statement by Commissioner Vestager on decision to fine Crédit Agricole, HSBC and JPMorgan Chase €485 million for euro interest rate derivatives cartel," December 7, 2016.

[19] *HSBC Holdings and Others v. Commission* (Case T-105/17) and *JPMorgan Chase and Others v. Commission* (Case T-106/17).

[20] *Autortiesību un komunicēšanās konsultāciju aģentūra - Latvijas Autoru apvienība* (Case C-177/16), opinion of Advocate General Wahl, EU:C:2017:286.

AKKA/LAA's rates were appreciably higher than the rates in neighboring countries and were among the highest in the EU. The LCC concluded that these rates were unjustified and in breach of Article 102 TFEU.

Advocate General Wahl recalled that the Court of Justice in *United Brands* had set a two-step analysis to determine whether a price was excessive.[21] First, there must be an appreciable difference between the price charged by the dominant undertaking and the price it would hypothetically have charged had there been effective competition in the market (the "benchmark price"). Second, there must be no legitimate reason for this price difference.

Advocate General Wahl also revisited the methods used in other cases to determine the benchmark price, including comparing the dominant undertaking's and other undertakings' prices, analyzing price changes over time or across regions, and comparing prices and costs. He noted that each of these tools had shortcomings and none could be used in all circumstances because relevant information could be missed or important parameters could be overlooked (resulting in comparing dissimilar situations).

Advocate General Wahl noted that prices may differ over time and across regions for many legitimate reasons, including as a result of market entry, higher costs due to external factors, or a shift in consumer preferences. To minimize potential errors, competition authorities should use all suitable methods for a specific case and factor all results into their decision. Advocate General Wahl observed that, as a general matter, excessive prices could only arise in regulated markets where barriers to entry or expansion are high.

The LCC had compared AKKA/LAA's rates with the rates in Lithuania and Estonia—where consumption habits, citizen welfare, and cultural heritage were relatively similar to those in Latvia—as well as with the rates in other comparable EU Member States based on their purchasing power parity index (the "PPP index"). Advocate General Wahl confirmed the need to select comparable Member States based on objective, appropriate, and verifiable criteria and not to limit the analysis to neighboring countries or countries where prices "suit" the authority's case. He also observed that the PPP index could help ensure that the comparison is made on a homogeneous basis. However, Advocate General Wahl also encouraged the referring court to take all available factors into consideration. For example, the referring court should consider whether and the extent to which customers (such as retail shops) may grow their business by purchasing collecting societies' rights to play music on their premises and the impact of this benefit on the benchmark price.

Advocate General Wahl acknowledged that it may often be difficult to assess when the difference between the dominant undertaking's price and the benchmark price is excessive, especially given the complexity and uncertainty of the benchmark price calculation. Advocate General Wahl noted that an excessive price should not be too close to the benchmark price and that competition authorities are not equipped to act as price regulators. Advocate General Wahl therefore concluded that a price was excessive only if it was significantly and persistently above the benchmark price, that is, the price difference was of such a magnitude that almost no doubt remained as to the abuse.

Finally, Advocate General Wahl observed that competition rules should safeguard dominant undertakings' incentives to innovate and that a given conduct could only breach competition law if the underlying motives are anticompetitive. A dominant undertaking must therefore have the possibility to show its legitimate reasons for charging higher prices, including higher production or marketing costs (not resulting from internal cost inefficiencies), or the higher economic value of its products or services.

[21] *United Brands v. Commission* (Case C-27/76) EU:C:1978:22.

Vertical Agreements

Commission Decisions

E-Book MFNs and Related Matters (Amazon) (Case COMP/AT.40153)

On May 4, 2017, the Commission accepted commitments by Amazon.com Inc. ("Amazon") following the Commission's investigation into agreements containing parity clauses that required electronic book ("e-book") publishers to give Amazon most favored nation ("MFN") treatment.[22] The Commission was concerned that the existence and Amazon's enforcement of these clauses constituted an abuse of dominance in breach of Article 102 TFEU.

In the e-books sector, publishers acquire rights from authors, which are then commercialized through agreements with online distributors (*i.e.*, retailers/agents).[23] Agreements between suppliers and distributors can take the form of either (1) an agency model, in which the e-book supplier (*i.e.*, a publisher or an intermediary[24]) determines the final price for consumers and the distributor cannot offer rebates, or (2) a wholesale model, in which the retailer sets its own retail prices. Although an increasing number of e-book suppliers use the agency model, many e-books are still supplied on wholesale terms.

Amazon is a U.S.-based corporation active in online retail, e-commerce services, digital content, and internet infrastructure computing services. In addition to manufacturing its own dedicated e-book readers and tablets under the "Kindle" brand name, Amazon is also active vertically in the e-books sector, operating as a publisher with its own publications (upstream), and as an e-book retailer for e-book suppliers, self-publishing authors, and its own licensed e-books (downstream).

The Commission initiated proceedings on June 11, 2015, following concerns that clauses in Amazon's agreements with suppliers could constitute an abuse of dominance in the e-book markets. The Commission defined markets for English-language and German-language e-books, noting that their geographic scope could be national, regional, or EEA-wide, but that its assessment would not be affected by geographic market definition as Amazon was dominant in each potential geographic market.

The Commission identified seven categories of parity clauses in Amazon's agreements with suppliers. Two of these clauses were "non-price related parity clauses," which required suppliers to offer Amazon the same or equivalent terms of distribution for e-books[25] and to offer Amazon equivalent functionality for any e-books with new features. These clauses contractually obligated suppliers to notify Amazon of the e-book distribution terms offered to other retailers and to offer Amazon the same or equivalent terms.[26]

[22] *E-book MFNs and Related Matters (Amazon)* (Case COMP/AT.40153), Commission decision of May 4, 2017. MFN clauses are contractual provisions through which a seller is under an obligation to offer a buyer the most favorable terms made available to the buyer's competitors.

[23] While large publishers sign agreements with e-book distributors directly, smaller publishers may use intermediaries (*i.e.*, traditional wholesalers and aggregators). Some publishers distribute their e-books directly through their own distribution platforms, although the Commission's investigation found that this only took place to a marginal extent within the EEA.

[24] Such as traditional wholesalers that have extended their retail activity to e-books and e-book aggregators, which distribute content to one or more platforms.

[25] Specifically, Business Model Parity Clauses and Selection Parity Clauses.

[26] In particular, "Business Model Parity Clauses" contractually obligated e-book suppliers to offer Amazon the same terms under a given business model (i.e., print and e-book bundles, pay-as you-read, and book club models, subscription models, smartphone applications) as they had offered to competing platforms. In addition to the Business Model Clauses, Amazon also made use of "Selection Parity Clauses," which obliged e-book suppliers to: (i) make e-books available through Amazon within given territories and/or on specific dates; (ii) notify Amazon if any e-books may not display well on Kindle due to formatting and provide assistance to adapt the e-books for Amazon's devices; and (iii) make available to Amazon any feature, element, or content made available to other distributors for a given book.

The remaining five "price-related parity clauses"[27] granted Amazon the right to identical or equivalent discounts, commissions, or agency-set prices as other e-book distributors. For agency agreements for English-language e-books,[28] Amazon required suppliers to offer it the same prices, commissions, or discounts offered to other distributors, with some agreements using a "discount pool" that allowed Amazon to discount its prices to match lower priced competitor offerings. These clauses ensured retail price parity downstream, reducing competing distributors' incentives to discount downstream or charge lower commission fees upstream.

Amazon's agreements with suppliers also contained notification provisions, which required suppliers to inform Amazon of any distribution or pricing terms offered to other distributors. The Commission was concerned that the price and non-price related parity clauses and notification provisions conferred MFN treatment on Amazon.

Non-price related parity clauses. The Commission found that the non-price related parity clauses reduced e-book distributors' and suppliers' ability and incentive to develop alternative business models to differentiate themselves from competitors, as any business model agreement concluded with an e-book supplier would have to be notified and offered to Amazon. The Commission found that the Business Model Parity Clause reduced distributors' competitiveness by limiting their ability to differentiate on the basis of new business models, weakening competition and new entry and, therefore, strengthening Amazon's dominant position.

The Commission concluded that the non-price related parity clauses reduced competing e-book distributors' and suppliers' ability to differentiate regarding content, availability, format, and features, and reduced innovation, quality, and choice. The Commission also found that the clauses had a particularly detrimental impact on the development of e-books with innovative new features (*e.g.*, animated e-books and special editions), as distributors would be unwilling to invest in new features or special editions because Amazon could "free ride" on their efforts, and suppliers were unwilling to develop new features for a non-Amazon distributor as they would be obliged to help Amazon implement those features.

Price-related parity clauses. The Commission noted that, absent the price-related parity clauses, competing e-book distributors selling under agency agreements would have had an incentive to compete on the commission charged to their e-book suppliers, which would have an incentive to direct sales to those distributors by offering them better retail prices. Distributors that were willing to compete on commission would have therefore increased the volume of e-books sold on their platform, growing their market share.

The Commission found that each category of parity clauses introduced by Amazon individually represented an abuse of Amazon's dominant position in the e-book distribution markets for English- and German-language e-books, and that the various clauses also had mutually reinforcing effects as they covered essentially all aspects of competition between e-book distributors. The Commission found that, taken together, the various clauses reduced the distributors' and suppliers' ability and incentive to experiment with alternative business models and pricing schemes, and prevented effective competition at the distribution level by discouraging or preventing competitors from undercutting Amazon's prices.

Amazon disagreed with the Commission's assessment, but, to address the Commission's concerns, agreed not to enforce its parity clauses and notification requirements with e-book suppliers or introduce new ones. The commitments initially proposed by Amazon were revised after a market test to clarify definitions to

[27] Specifically, Agency Price Parity Clauses, Discount Pool Provisions, Promotion Parity Clauses, Wholesale Price Parity Clauses, and Agency Commission Parity Clauses.

[28] The Commission excluded German-language e-books from its assessment of agency-related parity clauses as the principal national markets for German e-books, Austria and Germany, have statutory provisions that allow publishers to impose retail price maintenance and directly control downstream pricing.

prevent circumvention, and will last for five years and cover all e-books distributed by Amazon within the EEA, regardless of language. This is the second investigation that has led to commitments in the e-books sector, following the Commission's Article 101 TFEU investigation into agreements between Apple Inc. and five publishers, which resulted in commitments decisions in 2012 and 2013.[29]

Mergers And Acquisitions

ECJ Advocate General Opinions

Austria Asphalt v. Bundeskartellanwalt (Case C-248/16), Opinion of Advocate General Kokott

On April 27, 2017, Advocate General Kokott delivered an opinion on a request for a preliminary ruling from the Austrian Supreme Court, the first on the subject of EU merger control.[30] The case concerns the reportability under Article 3 EUMR[31] of an acquisition of joint control by two companies over a business (previously solely controlled by one of the companies) that has no autonomous presence in the market.

The Austrian construction company Austria Asphalt GmbH & Co OG ("AA") owns an asphalt mixing plant that supplies AA almost exclusively. Following the transaction, AA and Teerag Asdag AG ("TA") will jointly control the plant, which will continue to supply asphalt exclusively to its parent companies and therefore will not act in the market as an autonomous economic entity. The Austrian Supreme Court asked the Court of Justice to determine whether this change of control over the plant constitutes a reportable concentration under Article 3(4) EUMR.

The Advocate General examined the question in accordance with the wording, purpose, and context of Article 3(4) EUMR, which states that: "The creation of a joint venture performing on a lasting basis all the functions of an autonomous economic entity shall constitute a [reportable] concentration."

The Advocate General noted that a literal reading of Article 3(4) EUMR offered no clear answer to the question. On the one hand, it could be argued that the requirement of "performing on a lasting basis all the functions of an autonomous economic entity" applies to all joint ventures. Under this interpretation, the transaction would not amount to a reportable concentration because the plant does not meet the autonomy requirement. On the other hand, the autonomy requirement might be understood as applying only to "the creation" of a joint venture. Under this interpretation, the establishment of joint control over an existing undertaking would constitute a reportable concentration regardless of whether the target undertaking has an autonomous presence in the market.

As to the purpose of Article 3(4), the Advocate General noted that the EUMR applies only to significant structural changes in the market. Structural changes can occur only when a transaction concerns an undertaking having an autonomous presence in the market.

With respect to the context of Article 3(4), the Advocate General observed that, while merger control applies only to changes in the structure of the market, companies' behavior that does not result in such changes is subject to Articles 101 and 102 TFEU. A transaction involving an undertaking with no autonomous presence in the market concerns the behavior of the parent companies, and is not a structural change in the market.

The Advocate General called on the Court of Justice to clarify that the requirement of "performing on a lasting basis all the functions of an autonomous economic entity" applies to all undertakings brought under joint control, whether they are pre-existing or newly established.

In its judgment of September 7, 2017, the Court of Justice by and large followed the Advocate General's line of reasoning as to the wording, purpose, and

[29] *Ebooks* (Case COMP/39.847), Commission decisions of December 12, 2012 and July 25, 2013.

[30] *Austria Asphalt* (Case C-248/16), opinion of Advocate General Kokott, EU:C:2017:322.

[31] Council Regulation No. 139/2004 on the control of concentrations between undertakings (the EC Merger Regulation), OJ 2004 L 24/1 ("EUMR").

context of Article 3(4), upholding her conclusions that the autonomy/full functionality requirement should apply to both existing and newly created joint ventures and that, accordingly, the proposed transaction did not amount to a reportable concentration.

Commissions Decisions

Phase I Decisions With Undertakings

Teva/Allergan (Case COMP/M.7746)

On March 10, 2016, following a Phase I investigation, the Commission conditionally approved the acquisition of Allergan plc's generic drugs[32] business ("Allergan Generics") by Teva Pharmaceuticals Industries Ltd. ("Teva").[33] The transaction brought together two of the four largest generic pharmaceuticals producers worldwide.

Market definition. Consistent with the Commission's decisional practice regarding generic pharmaceuticals, the starting point for market definition was the molecule level,[34] with a further distinction by pharmaceutical form (so-called New Form Code 1 level) where relevant.[35]

Horizontal concerns. The Commission found that the transaction would bring together two important competitors with combined shares ranging from 35–100% in several marketed and pipeline[36] generics in 24 EEA countries.

Vertical (input foreclosure) concerns. The Commission identified vertical concerns stemming from Allergan Generics' strong position in the upstream market for out-licensing of dossiers[37] and Teva's significant share in several related downstream generics markets. The merged entity would have the ability and incentive to foreclose competitors in the downstream markets because it could: (i) easily terminate its supply relationship with the out-licensees; and (ii) profitably expand sales downstream due to the loss of foreclosed competition.

"Big picture" concerns. In an unprecedented move in a pharmaceutical merger, the Commission's concerns went beyond the traditional product-by-product overlaps. The Commission identified country-wide competition concerns in Iceland, Ireland, and the United Kingdom, where the parties were the largest generics suppliers, giving rise to a risk of higher prices and lower quality of supply in the overall sale of

[32] A generic is a pharmaceutical drug equivalent to an originator drug in dosage, efficacy, route of administration, quality, performance, and intended use.

[33] *Teva/Allergan* (Case COMP/M.7746), Commission decision of March 10, 2016.

[34] In pharmaceutical cases, the Commission usually defines relevant markets based on the Anatomical Therapeutic Classification ("ATC") system developed and maintained by the European Pharmaceutical Market Research Association (EphMRA), under which the active substances are divided into different groups according to the organ or system on which they act and their therapeutic, pharmacological and chemical properties. The Commission usually starts its analysis at the ATC3 level (which groups products by their specific therapeutic indications, *i.e.*, their intended use), but may examine the products at issue at a more granular level if higher-level analysis does not adequately show the extent of substitutability between the products. Given that a generic molecule is the closest substitute to the generic pharmaceutical based on the same molecule or active ingredient, when generics are involved, the Commission defines the market at molecule (ATC5) level.

[35] The New Form Code 1 differentiates between forms for systemic and topical effect, site of application (oral, nasal, parenteral, or rectal), and long-acting and ordinary forms.

[36] The Commission identified concerns related to pipeline generics where: (i) one party was planning to launch a generic pipeline product in a market where both parties were already active and had a combined market share exceeding 35%; (ii) one party was planning to launch a generic pipeline product in a market where the other party held a market share exceeding 35%; (iii) both parties were planning to launch generic pipeline products in a market with only two or fewer competitors; and (iv) one party was planning to launch a generic version of a product for which the other party was the originator.

[37] Pharmaceutical companies may out-license products to third parties, which commercialize these under their own name, usually with a right to use a dossier to obtain marketing authorization in one or more countries. The licensor may or may not remain active in the downstream market.

generics (so-called "big picture" effects). In the United Kingdom, the parties were the only two generics suppliers with sufficiently broad portfolios to bypass wholesalers and sell directly to pharmacies, making them unique and close competitors, particularly with respect to their ability to grant portfolio discounts to the pharmacies. The concern was that the transaction would reduce competition at that level, resulting in less generous portfolio discounts to the pharmacies. In Ireland, the parties were recent entrants that had quickly become the generics market leaders, in particular through aggressive pricing strategies. In Iceland, Allergan, historically the dominant generics supplier, had been recently challenged by Teva.

Remedies. To address the Commission's concerns, the parties proposed a divestiture package that included: (i) either Teva's or Allergan's version of each marketed and pipeline molecule giving rise to horizontal or vertical concerns in the EEA; (ii) Teva's entire portfolio of marketed and pipeline molecules in Iceland; and (iii) the vast majority of Allergan's marketed and pipeline generics activities in the United Kingdom and Ireland. The second and third elements of the package addressed the Commission's "big picture" concerns by effectively replicating the portfolio each party could offer its customers pre-merger. The divestments of pipeline products would ensure that the divested business remains competitive while it establishes its own R&D.

Unlike in previous generics transactions that involved fewer molecule divestitures, the Commission required the divestment of Allergan's manufacturing plant in the United Kingdom, together with supply and distribution assets and a transitional supply and technology transfer agreement related to divested molecules that were produced elsewhere. The divestment involved many non-overlapping products, which was deemed necessary to give the purchaser the scale and scope to effectively compete with the merged entity post-transaction.

The Commission's vertical concerns regarding out-licensing were addressed through a combination of structural and behavioral remedies. The structural remedy, which Commission policy favors, consisted of the divestiture of either the upstream dossiers/licensing rights or the downstream manufacturing assets and supply rights for a country in question. In some countries, however, the vertical relationship related to Allergan out-licensing molecules to Aurobindo Pharma Limited ("Aurobindo") under a transitional arrangement stemming from Aurobindo's 2014 acquisition of the relevant molecules from Allergan. The Commission recognized that this arrangement was temporary, and therefore accepted a behavioral remedy according to which Teva agreed to continue the out-licensing arrangement under the same terms until Aurobindo would take over the manufacturing.

AB InBev/SABMiller (Case COMP/M.7881)

On May 24, 2016, the Commission conditionally approved the acquisition of SABMiller plc ("SABMiller") by Anheuser-Busch InBev SA/NV ("AB InBev").[38] AB InBev and SABMiller are the world's largest and second largest brewer, respectively. AB InBev and SABMiller are active in the production, marketing, and distribution of beer and soft drinks, and each has a portfolio of over 200 beer brands.[39] The Commission's approval was conditional on AB InBev divesting almost the entirety of SABMiller's European beer business.

Market definition. The Commission assessed the product market for beer as distinct from the markets for other beverages, such as wine or soft drinks. Consistent with its decisional practice, the Commission also considered segmentation by channel (on- and off-trade), positioning (value, mainstream, premium, and super-premium), and style (lager, ale, stout, and specialty beers). The Commission ultimately

[38] *AB InBev/SABMiller* (Case COMP/M.7881), Commission decision of May 24, 2016.

[39] AB InBev's brands include Budweiser, Corona, and Stella Artois, as well as other multi-country and local brands. SABMiller's brands include Grolsch, Peroni, Miller, and Pilsner Urquell, which SABMiller sells in the United State through its joint venture with US brewer Molson-Coors.

concluded that segmentation could be a useful reference point, but should not be understood rigidly.[40]

Horizontal non-coordinated effects. The Commission found that in several markets the market share increment resulting from the transaction was sufficient to raise unilateral effects concerns—*i.e.*, concerns that the transaction would remove an important competitive constraint, allowing the combined company to profitably exercise market power (by, *e.g.*, raising prices or reducing output).

Horizontal coordinated effects. The Commission raised concerns that the transaction would lead to coordination between competitors, resulting in higher prices in the European countries where SABMiller was previously active. First, the Commission found that beer markets were already prone to price coordination, in particular in the form of "follow-the-leader" pricing whereby the market leader sets the price level and its competitors follow. The Commission found evidence in the parties' internal documents that brewers analyze how to establish and maintain price coordination. The Commission also noted that it had previously found cartels in the beer markets in Belgium, the Netherlands, Luxembourg, and France. Second, the Commission reasoned that the transaction would enhance factors facilitating collusion in the beer markets by: (i) reducing the number of competitors; (ii) creating and transforming structural links between competitors; and (iii) increasing the number of commercial interactions in other markets between the same competitors.

Reduction in the number of competitors. The Commission found that in Italy, the Netherlands, the UK, Romania, and Hungary the transaction would result in the loss of an important competitor, thereby increasing the likelihood of tacit price coordination.

Link to Molson-Coors in Eastern Europe. Prior to the merger, Molson-Coors ("MC") and SABMiller were close competitors in the Czech Republic, Hungary, Romania, and Slovakia where AB InBev was not active. The Commission found that, in those countries, the transaction would transform the vertical relationship between AB InBev and MC in licensed brewing and distribution into a horizontal one. The transaction would create a commercially significant structural link between SABMiller and Molson-Coors—in the EEA, as well as in Russia and Ukraine—reducing MC's incentive to continue competing with the merged entity. The Commission was also concerned that AB InBev could leverage its contractual rights under the bottling and distribution agreement to discipline MC's potential deviation from coordinated prices.

Multi-market contacts in the EEA. The Commission found that, as a result of the transaction, AB InBev would extend its significant market position to Hungary, Romania, Poland, and the Czech Republic. That, in the Commission's view, could either strengthen existing coordination or enable previously non-coordinating firms to coordinate their behavior. In particular, the additional multi-market contacts would enhance market transparency and increase Carlsberg's and Heineken's potential to punish AB InBev by refusing to follow its lead, thereby reducing AB InBev's incentive to deviate from coordinated pricing in the EEA. Notably, while the Commission's analysis focused on multi-market contacts within the EEA, it also observed that contacts and coordination outside the EEA could help establish or stabilize coordination between the same competitors within the EEA.

Vertical effects. The Commission examined the possibility raised by respondents to the market investigation that the enhanced buyer power of the merged entity would allow it to foreclose competitors' access to key inputs, such as beer ingredients and packaging. The Commission found that many of the parties' suppliers were large competitors with significant market power and that, post-transaction, the parties were unlikely to have the ability or incentive to pursue any input foreclosure strategy. The Commission ultimately concluded that any concerns would be resolved by the submitted commitments.

[40] Consistent with its previous decisional practice in the beer sector, the Commission defined the relevant geographic markets as national.

Conglomerate effects. In line with its previous merger decisions,[41] the Commission dismissed concerns that the merged entity's increased power could allow it to force on-trade and off-trade customers to purchase brands in its portfolio in bundles to the detriment of its competitors. First, the Commission did not find any instances of full-line forcing in the beer markets, even where AB InBev already has a strong position. Furthermore, the market investigation indicated that to compete effectively, on- and off-trade retailers have to select the brands they sell according to their customers' preferences, thereby allowing even small but popular brewers to effectively compete.

Commitments. AB InBev had, from the outset, offered to divest SABMiller's business in France, Italy, the Netherlands, and the UK, for which it had already accepted an offer from the Japanese brewer Asahi. When these initial commitments proved insufficient to address the Commission's concerns, AB InBev modified the commitments to also include SABMiller's business in the Czech Republic, Hungary, Poland, Romania, and Slovakia.

Boehringer Ingelheim/Sanofi Animal Health Business (Case COMP/M.7917)

On November 9, 2016, the Commission conditionally approved the acquisition of Sanofi's animal health business (Merial) by Boehringer Ingelheim ("BI").[42] The transaction was part of an asset swap by which BI acquired Merial in exchange for BI's consumer healthcare business.

Market definition. BI's and Merial's businesses overlapped in the three main animal health products: biologicals (vaccines), pharmaceuticals, and feed supplements (medicinal and nutritional).

Horizontal effects. The Commission found that the transaction would result in overlaps in monovalent vaccines[43] for porcine circovirus ("PCV2"), porcine parvovirus ("PPV"), bovine viral diarrhea ("BVD"), and porcine respiratory syndrome ("PRRS"), as well as non-steroidal anti-inflammatory drugs ("NSAIDs"),[44] including injectable multiple species NSAIDs, oral NSAIDs for horses, and oral NSAIDs for pets.

Animal Vaccines. The Commission found that, in 14 EEA countries, BI's and Merial's combined market shares in PCV2 vaccines would be at least 70−80% and the transaction would reinforce BI's already dominant position. The Commission also found that the merger would reinforce Merial's strong position in the markets for PPV vaccines in France, Italy, and Slovakia, and would eliminate competition between BI's recently launched and promising BVD vaccines and Merial's competing substitutes.

As to PRRS vaccines, the Commission found that the transaction would eliminate competition between the second and fourth largest competitors in Europe. Merial's and BI's combined market shares exceeded 30−40% in Belgium, Denmark, Italy, and Slovakia. According to the Commission, these shares did not accurately reflect the parties' competitive position, which was expected to grow following BI's launch of two innovative and promising PRRS vaccines (Ingelvac PRRS FLEXEU and ReproCyc PRRS EU). The Commission noted that, due to the absence of generics[45] and other solutions to control the PRRS disease, the PRRS vaccines market is contestable and competition is driven by innovation. According to the Commission, the transaction could cause a loss of innovation in the market. The Commission concluded that the transaction would eliminate actual competition in Belgium, Denmark, Germany, Hungary, Italy, Portugal, and Slovakia, as well as potential competition in other EEA countries.

NSAIDs. The Commission also assessed overlaps in multi-species injectable drugs and in tablets for pets

[41] *See, e.g., Molson Coors/Starbev* (Case COMP/M.6587), Commission decision of June 6, 2012 and *Suntory/Beam* (Case COMP/M.7178), Commission decision of April 16, 2014.
[42] *Boehringer Ingelheim/Sanofi Animal Health Business* (Case COMP/M.7917), Commission decision of November 9, 2017.

[43] Vaccines may be monovalent or multivalent.
[44] Pharmaceuticals used to treat inflammations, pain, and fever.
[45] As vaccines are biologic in nature, no bioequivalent and therefore no generic alternative is available.

and horses. Although generic NSAIDs are available, the Commission considered that their penetration in Europe was low and that BI (with its originator drug Metacam) and Merial were two of the leading producers in Europe. The Commission concluded that, even though sufficient competition in NSAID tablets for pets would continue to be exerted, the transaction would eliminate actual and potential competition in nine national markets for multi-species injectable drugs and tablets for horses.

Remedies. To address the Commission's concerns, BI proposed to divest Merial's EEA-wide business of multi-species injectable NSAIDs and oral NSAIDs for horses and Merial's worldwide business of PCV2, PRRS, PPV, and BVD vaccines, excluding Merial's PCV2 business in the United States. The divested businesses included both pipeline and marketed products.

The initial commitments were market-tested, and results indicated that implementation of the commitments would be highly complex, long in duration, and raise a number of risks that were not properly mitigated. According to the market test results, transferring vaccine production technology is a highly complex process, which may fail unless a suitable buyer meeting stringent criteria is found. The criteria identified included experience in bioreactor technology, successful track record in vaccine technology transfer, access to all relevant raw materials, R&D capabilities, a distribution network, experience with regulatory authorities, and a portfolio of complementary vaccines. According to market test respondents, it was uncertain whether a suitable purchaser could be found.

On receipt of the market test results, BI withdrew its notification shortly before the deadline for the Commission's Phase I investigation. The transaction was re-notified almost two months later, and a new set of commitments was submitted. The final commitments notably proposed a "fix-it-first"[46] remedy identifying Ceva Santé Animale ("Ceva"), a global veterinary health company headquartered in France with an existing animal vaccine business, as the purchaser, fulfilling the criteria stemming from the initial market test. Following a second market test, the Commission approved the sale agreement to Ceva in its clearance decision in Phase I. Phase I clearance was made possible by the "pull and re-notification" BI opted for, which gave Merial and BI sufficient time to identify a suitable purchaser before the notification was re-filed, and allowed the Commission to verify that the first market test's requirements were met and approve the purchaser within the clearance decision. *BI/Sanofi Animal Health Business* may be interpreted as suggesting that withdrawing and resubmitting the filing (a practice already in use in the United States) may also find broader acceptance in Europe.

State Aid

Commission Decisions

Orderly Liquidation of Banca Popolare Di Vicenza and Veneto Banca - Liquidation Aid (Case SA.45664)

In June 2017, the Commission and Italian authorities agreed on a plan to liquidate Banca Popolare di Vicenza ("BPVI") and Veneto Banca ("VB"), two small Italian commercial banks in the Veneto region, with part of their assets and liabilities being sold to Intesa Sanpaolo ("Intesa"), Italy's largest bank. The decision to grant €17 billion of Italian government money for this liquidation, while protecting senior bondholders, has spurred controversy.

Since 2015, BPVI and VB have suffered from continuous outflow of deposits (for example, between June 2015 and March 2017, the banks lost 44% of their deposit base). To improve their liquidity, Italy requested liquidity support measures in the form of State guarantees amounting (initially) to €10 billion.

[46] Under both "fix-it-first" and "upfront buyer" remedies, closing is subject to prior identification of a suitable purchaser of the divested business. Under "fix-it-first" remedies, a binding agreement is approved by the Commission in the decision. Under "upfront buyer" remedies, although it can be entered into during the investigation, a binding agreement is not approved in the decision, and the parties commit not to close the transaction until the Commission's approval is granted after the decision is adopted.

The Commission approved these guarantees in January 2017 following the conclusion by the banks' supervisory authority, the European Central Bank ("ECB"), that the two banks were solvent.[47]

In June 2017, however, the ECB revised its assessment and declared that the two banks were "failing or likely to fail."[48] Subsequently, Italy notified the Commission of its plan to provide cash injections of approximately €4.8 billion and State guarantees of a maximum of approximately €12 billion.

Competition Commissioner Margrethe Vestager noted that the Italian authorities considered the measures "necessary to avoid an economic disturbance in the Veneto region."[49] On June 25, 2017, the Commission announced that Italy's measures were in line with EU State aid rules, in particular the 2013 Banking Communication.[50] According to the Commission, existing shareholders and subordinated debt holders have fully contributed to the costs, reducing the cost of the intervention for the Italian State. Moreover, BPVI and BV will be wound down in an orderly fashion and exit the market, while the transferred activities will be restructured and significantly downsized by Intesa, limiting distortions of competition arising from the aid.[51] The Commission concluded that the measures did not constitute aid to Intesa because Intesa was selected after an open, fair, and transparent sales process, fully managed by Italian authorities, ensuring that the activities were sold at the best offer available.[52]

This case is nonetheless noteworthy for the controversy it spurred about the future of the European Banking Union. BPVI and VB were not put into "resolution" under the Bank Recovery and Resolution Directive ("BRRD"). Resolution occurs when authorities determine that a failing bank cannot go through normal insolvency proceedings without harming public interest and causing financial instability, and the BRRD aims to protect taxpayers from having to bail out banks by holding the banks' shareholders and creditors, including senior bondholders, liable for losses. The Single Resolution Board, the European Banking Union's resolution authority, deemed resolution "not warranted in the public interest"[53] because it did not expect the banks' failure to have a "significant adverse impact on financial stability."[54] Instead, BPVI and VB are subject to Italian insolvency procedures under which it is possible to protect senior bondholders to the detriment of taxpayers.

New Aid and Amended Restructuring Plan of Banca Monte Dei Paschi Di Siena (Case SA.47677)

On June 1, 2017, Competition Commissioner Margrethe Vestager and the Italian Minister of Economy and Finance Pier Carlo Padoan agreed "in principle" on the restructuring plan of the Monte dei Paschi di Siena bank ("MPS"). The agreement was conditional on: (i) the ECB confirming that MPS is solvent and meets capital requirements; and (ii) Italy obtaining a formal commitment from private investors to purchase the bank's non-performing loan portfolio. On July 4, 2017, when both conditions were fulfilled,

[47] *Liquidity support to Banca Popolare di Vicenza* (Case SA.47149), and *Liquidity support to Veneto Banca* (Case SA.47150), Commission decisions of January 18, 2017. The public versions of these decisions are not yet available.

[48] European Central Bank Press Release, "ECB deemed Veneto Banca and Banca Popolare di Vicenza failing or likely to fail," June 23, 2017.

[49] Commission Press Release IP/17/1791, "State aid: Commission approves aid for market exit of Banca Popolare di Vicenza and Veneto Banca under Italian insolvency law, involving sale of some parts to Intesa Sanpaolo," June 25, 2017.

[50] *Orderly liquidation of Banca Popolare di Vicenza and Veneto Banca - Liquidation aid* (Case SA.45664), Commission decisions of June 25, 2017. The public version of this decision is not yet available.

[51] Commission Press Release IP/17/1791, "State aid: Commission approves aid for market exit of Banca Popolare di Vicenza and Veneto Banca under Italian insolvency law, involving sale of some parts to Intesa Sanpaolo," June 25, 2017.

[52] *Ibid*.

[53] Single Resolution Board Press Release, "The SRB will not take resolution action in relation to Banca Popolare di Vicenza and Veneto Banca," June 23, 2017.

[54] *Ibid*.

the Commission approved €5.4 billion in State aid to be granted by Italy.[55]

In 2013, the Commission approved a State aid measure to support the restructuring of MPS.[56] However, after a 2016 stress test on MPS suggesting a capital shortfall if economic conditions were to worsen, the Italian authorities decided to apply for additional State aid in the form of a precautionary recapitalization.

EU rules, in particular the BRRD, allow States to inject capital into a solvent bank, provided that certain criteria are met. State aid can be granted to prepare for a possible capital need that would materialize were economic conditions to worsen. Precautionary recapitalization involves the use of taxpayer money, and therefore EU State aid rules aim to ensure that public funds can only be injected in a bank that is profitable in the long-term. To this end the bank must undergo in-depth restructuring to ensure its long-term viability and the State must be sufficiently remunerated for its capital injection.

MPS's in-depth restructuring plan includes the following aspects: (i) MPS will dispose of its entire non-performing loans portfolio (€26.1 billion) on market terms; (ii) MPS's shareholders will contribute to the costs of restructuring, in accordance with State aid rules on burden-sharing (€4.3 billion); (iii) MPS will implement a number of measures aimed at increasing efficiency; and (iv) MPS will compensate retail junior bondholders who were mis-sold by converting these bonds into equity and buying those shares from retail investors (€1.5 billion). According to Pier Carlo Padoan, at the end of the five-year restructuring plan, the Italian state would own 70% of MPS.

The MPS case stands out because of the application of precautionary recapitalization—a principle that until now was only applied to two Greek banks in 2015.[57] The Commission approved the aid measures, which involve significant job cuts and branch closures, about a week after it decided not to object to Italy's €17 billion rescue of the failing banks BPVI and VB. BPVI and VB also applied for precautionary recapitalization in March 2017, which was rejected because this principle may only be applied to solvent banks and, in June 2017, the ECB established that these two banks were "failing or likely to fail."[58]

Policy and Procedure

ECJ Judgments

Pacific Fruit v. Commission (Case C-469/15 P)

On April 27, 2017, the Court of Justice dismissed the appeal brought by FSL Holdings NV, Firma Léon Van Parys NV, and Pacific Fruit Company Italy S.p.A. (together, "Pacific Fruit") requesting that the Court of Justice set aside the General Court's judgment[59] that only partially upheld its action for the annulment of the Commission's *Exotic Fruit (Bananas)* decision.[60]

In 2011, the Commission fined Pacific Fruit €8.9 million for participating in a cartel with Chiquita Brands International Inc. ("Chiquita") relating to the importation, marketing, and sale of bananas in Portugal, Italy, and Greece. The Commission found that Pacific Fruit and Chiquita had exchanged competitively sensitive information on an almost weekly basis between at least July 2004 and April 2005 and coordinated their commercial strategy regarding future prices, price levels, and trends. Chiquita received full immunity from fines under the Commission's Leniency Notice. During its

[55] *New aid and amended restructuring plan of Banca Monte dei Paschi di Siena* (Case SA.47677), Commission decision of July 4, 2017. The public version of this decision is not yet available.

[56] Commission Decision C (2013) 8427 of November 27, 2013 (SA. 36175 (2013/N)) OJ 2014 C 117/1.

[57] Commission Decision C (2015) 8626 of November 29, 2015 (SA. 43364 (2015/N)) OJ 2016 C 104/8; and Commission Decision C (2015) 8930 of December 4, 2015 (SA. 43365 (2015/N)) OJ 2016 C 220/6.

[58] European Central Bank Press Release, "ECB deemed Veneto Banca and Banca Popolare di Vicenza failing or likely to fail," June 23, 2017.

[59] *FSL and Others v. Commission* (Case T-655/11) EU:T:2015:383.

[60] *Exotic Fruit (Bananas)* (Case COMP/39482), Commission decision of October 12, 2011.

investigation, the Commission used as evidence several documents it received from the Italian tax authorities. These documents were seized during a tax inspection carried out at the home and office of a Pacific Fruit employee.

Pacific Fruit appealed the Commission's decision to the General Court on several grounds. In 2015, the General Court partially upheld the appeal and reduced the fine to €6.7 million, finding that the infringement was interrupted between August 2004 and January 2005. It, however, dismissed the arguments that the Commission had breached essential procedural requirements by relying on documents transmitted by the Italian tax authorities during a national investigation.

On appeal, Pacific Fruit sought the annulment of the General Court's decision alleging, in relevant part, that the General Court had erred in law by not finding that the transmission of evidence by a national authority to the Commission infringed essential procedural requirements and rights of defense. Pacific Fruit claimed that such transmission of evidence is not governed solely by national law, but must also comply with EU law. It also argued that, contrary to EU law requirements,[61] the Commission did not use the documents for the same purposes for which they were collected by the Italian authorities.

The Court of Justice held that the General Court was correct in concluding that the transmission of information to the Commission by national authorities is a question governed by national law, and that it cannot be inferred from EU law that there is a general rule preventing the Commission from using information transmitted by national authorities other than national competition authorities on the sole ground that the information was obtained for other purposes. Such a rule would excessively hamper the Commission's supervision of the proper application of EU competition law. The Court of Justice further clarified that the prevailing principle of EU law is that evidence may be freely adduced and the only relevant criterion is its credibility.

Pacific Fruit also argued that the Commission had breached its rights of defense by waiting two years before informing it that it possessed these documents. The Court of Justice held that the Commission was not under an obligation to inform Pacific Fruit about the evidence it had until issuing the statement of objections and giving it access to the file. These procedural steps ensured that the rights of defense were observed.

The Court of Justice dismissed this ground of appeal and all other grounds raised by Pacific Fruit in their entirety and ordered Pacific Fruit to pay the costs.

General Court Judgments

Guardian Europe v. European Union (Case T-673/15)

On June 17, 2017, the General Court partially upheld[62] an action brought by Guardian Europe Sarl ("Guardian") for compensation for damage suffered as a result of the General Court's failure to adjudicate within a reasonable time in dismissing Guardian's appeal against the Commission's *Flat Glass* decision.[63] The General Court ruled in favor of Guardian as to material damage caused by the delay, but rejected Guardian's claims as to non-material damage. The General Court also dismissed Guardian's claims for damage caused by the Commission's infringement of the principle of equal treatment, and by the General Court in upholding the Commission's decision.[64]

In *Flat Glass*, the Commission fined Guardian and three other companies a total of €486.9 million (of

[61] Article 12(2) of Council Regulation (EC) No. 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1/1 ("Regulation 1/2003") provides that "[i]nformation exchanged shall only be used in evidence for the purpose of applying Article [101 or 102 TFEU] and in respect of the subject-matter for which it was collected by the transmitting authority."

[62] *Guardian Europe v. European Union* (Case T-673/15) EU:T:2017:377.

[63] *Flat Glass* (Case COMP/39165), Commission decision of November 28, 2007 ("*Flat Glass*").

[64] *Guardian Industries and Guardian Europe v. Commission* (Case T-82/08) EU:T:2012:494.

which Guardian's fine was €148 million) for coordinating price increases and other commercial conditions for flat glass deliveries. Guardian appealed this decision to the General Court in February 2008. In September 2012, the General Court dismissed Guardian's appeal. Guardian subsequently appealed to the Court of Justice, which, in its November 12, 2014 judgment,[65] set aside the General Court's judgment to the extent that it had dismissed Guardian's claims that the principle of non-discrimination had been infringed. The Court of Justice also reduced Guardian's fine to €103 million. On November 19, 2015, Guardian filed the present claim for compensation for the General Court's failure to adjudicate within a reasonable time in its 2012 decision.

In assessing Guardian's claim for compensation, the General Court (sitting in a new configuration) applied the standard developed in its previous judgments,[66] namely, that in competition cases, which are inherently complex, it is presumed that 15 months is a reasonable delay between the closing of written and the opening of oral proceedings. To the extent that there are multiple parallel proceedings, one month is added for each. Given that, in the case at issue, the oral proceedings started 41 months after the written proceedings closed (and there were no parallel appeals), the General Court found an unreasonable delay of 26 months.

In line with its previous judgments, while the General Court granted Guardian compensation for the additional bank guarantee charges due for those 26 months, it dismissed Guardian's claims for lost profits for lack of a causal link with the delay.

Guardian further sought €14.8 million for reputational damage due to an incorrect perception that it had a higher degree of responsibility for the infringements concerned. While in its previous judgments the General Court had awarded (minimal) compensation for non-material damage (*e.g.*, €5,000 in *Gascogne*[67]) for the extended period of uncertainty caused by delay, Guardian did not base its claim on uncertainty and therefore was not entitled to compensation. Further, the General Court held that Guardian had not proven that the failure to adjudicate within a reasonable time had damaged its reputation beyond the harm caused by the Commission's *Flat Glass* decision. The General Court held that its finding of unreasonable delay was in any event sufficient to remedy any reputational damage.

CLEARY GOTTLIEB

[65] *Guardian Industries and Guardian Europe v. Commission* (Case C-580/12 P) EU:C:2014:2363.

[66] *E.g.*, *Gascogne Sack Deutschland and Gascogne v. Union* (Case T-577/14) EU:T:2017:1; *ASPLA and Armadna Alvarez v. European Union* (Case T-40/15) EU:T:2017:105; *Kendrion v. European Union* (Case T-479/14) EU:T:2017:48; and *Aalberts Industries NV v. Union* (Case T-725/14) EU:T:2017:47.

[67] *Gascogne Sack Deutschland and Gascogne v. Union* (Case T-577/14) EU:T:2017:1.

Our Offices

New York
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

Washington
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

Paris
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

Brussels
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

London
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

Moscow
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

Frankfurt
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

Cologne
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

Rome
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

Milan
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

Hong Kong
Cleary Gottlieb Steen & Hamilton (Hong Kong)
37th Floor, Hysan Place
500 Hennessy Road
Causeway Bay
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

Beijing
Cleary Gottlieb Steen & Hamilton LLP Beijing Representative Office
45th Floor, Fortune Financial Center
5 Dong San Huan Zhong Lu
Chaoyang District, Beijing, 100020
China
T: +86 10 5920 1000
F: +86 10 5879 3902

Buenos Aires
CGSH International Legal Services, LLP-
Sucursal Argentina
Carlos Pellegrini 1427 – Floor 9
C1011AAC Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

São Paulo
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Prof. Atílio Innocenti, 165 – 14th Floor
São Paulo, SP Brazil 04538-000
T: +55 11 2196 7200
F: +55 11 2196 7299

Abu Dhabi
Al Sila Tower, 27th Floor
Abu Dhabi Global Market Square
Al Maryah Island, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

Seoul
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 04539, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099