GT GreenbergTraurig

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A monthly newsletter for Greenberg Traurig clients and colleagues highlighting significant developments in global antitrust and competition law in September 2020.

In this Issue:

United States

A. Federal Trade Commission (FTC)

1. *FTC Approves Final Order Imposing Conditions on AbbVie Inc.'s Acquisition of Allergan plc.*

On Sept. 4, 2020, the FTC approved a final order settling its complaint that AbbVie's $63 billion acquisition of Allergan would violate federal antitrust law. Under the terms of the settlement, AbbVie and Allergan agreed to divest to Nestlé, S.A. Allergan's Zenpep and Viokase, which are currently sold to treat exocrine pancreatic insufficiency (EPI), and to AstraZeneca plc Allergan's rights and assets related to brazikumab, an IL-23 inhibitor in development.[1] The parties agreed to complete the divestitures within 10 days after completing the acquisition of Hollingsworth, and to maintain the competitiveness of those divestiture assets pending the completion of the ordered divestiture sales.

[1] IL-23 inhibitors are a class of drug that treats both moderate-to-severe Crohn's disease and moderate-to-severe ulcerative colitis.

2. *FTC Approves Final Order Requiring Animal Health Product Suppliers Elanco Animal Health, Inc. and Bayer Animal Health GmbH to Divest Assets in Three Product Markets as a Condition of Acquisition*.

On Sept. 11, 2020, the FTC approved a final order settling its complaint that animal health products supplier Elanco Animal Health, Inc.'s proposed $7.6 billion acquisition of Bayer Animal Health, Inc. would be anticompetitive. As a condition to closing the acquisition, the final order requires Elanco to divest its canine otitis external treatment, Osurnia, to Dechra Limited; its fast-acting oral treatment that kills adult fleas on dogs, Capstar, to PetIQ, LLC; and its brand name cattle pour-on insecticide, StandGuard, to Neogen Corporation.[2] A monitor was also appointed to ensure compliance with the terms of the order. The parties agreed to complete the divestitures within 10 days after completing the acquisition of Hollingsworth, and to maintain the competitiveness of those divestiture assets pending the completion of the ordered divestiture sales.

3. *FTC's Bureau of Economics to Expand Merger Retrospective Program*.

On Sept. 17, 2020, the FTC's Bureau of Economics announced a revamped Merger Retrospective Program, which will expand and formalize the Bureau's retrospective research efforts that have already produced studies analyzing the effects of a range of consummated mergers over the last 35 years. Merger retrospective analysis seeks to determine, after the fact, whether a merger has affected competition in the way enforcers predict at the time of their review of a proposed combination. The analysis can help the agencies assess their thresholds for bringing an enforcement action in a merger, as well as the veracity of tools used to predict the effects of a proposed merger, such as merger simulation models.

The Merger Retrospective Program will include an annual report on the lessons from recent retrospective studies, specific evaluation of predictive tools, a new website devoted to research on retrospectives that includes a bibliography of retrospective studies, and regularly scheduled major economic conference sessions devoted to recent research under the Program.

4. *FTC and DOJ Seek Comments on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking*.

On Sept. 21, 2020, the FTC, with the support of the Antitrust Division of the Department of Justice (DOJ), published a Notice of Proposed Rulemaking (NPRM) to revise the premerger notification rules (Rules) for mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The proposed revisions would create a new reporting exemption for certain de minimis investments of 10% or less of an issuer, but with several important limitations on the proposed exemption, such as when a private equity investor holds an equity interest of 1% or greater in a competitor of the issuer. At the same time, the proposed revisions would also significantly expand the scope of private equity investment transactions that would be subject to HSR Act notification, as well as the information and documents which must be included in a notification under the HSR Act. In the latter case, the proposed revisions would require additional detail with respect to portfolio holdings of private equity funds which are not directly participating in the acquisition, but which are commonly managed within the same "family" as the fund(s) participating in the investment.

[2] Each divestiture includes a transfer of all supply input and other manufacturing contracts, business information, product approvals, intellectual property, and other related assets.

Additionally, on the same day, the FTC published an Advance Notice of Proposed Rulemaking (ANPRM) to solicit information on several topics to "help determine the path for potential future amendments" to the Rules. These topics include: how parties must calculate the size of transaction for threshold value; how current filing exemptions are applied to acquisitions by real estate investment trusts (REITs); minority acquisitions of limited partnerships and LLCs (non-corporate entities); minority acquisitions of voting securities; "influence outside the scope of voting securities" such as acquisitions of convertible securities or rights to board observers; the impact on jurisdictional thresholds of issuing extraordinary dividends to shareholders prior to closing a transaction; and other miscellaneous issues pertaining to the HSR filing process, such as exemptions for certain incremental purchases of stock in the same issuer, and the scope of prior acquisitions of an acquirer that must be reported in a notification. Interested parties are invited to submit comments on the NPRM and ANPRM, per the instructions provided therein, no later than sixty (60) calendar days following publication of the NPRM and ANPRM in the Federal Register, which is expected shortly.

See our recent GT Alert for further details on the NPRM and ANPRM and their applicability to various types of investing entities.

B. Department of Justice (DOJ)

1. *Antitrust Division Seeks Public Comments on Updating Bank Merger Review Analysis*.

On Sept. 1, 2020, the DOJ announced that it is seeking public comments as to whether its Antitrust Division should revise the 1995 Bank Merger Competitive Review guidelines (Banking Guidelines) to "reflect emerging trends in the banking and financial services sector and modernize its approach to bank merger review under the antitrust laws." Competitive review of bank mergers requires both approval by the relevant bank regulatory agency and a competitive review conducted by the DOJ. Historically, bank merger applications are initially reviewed by DOJ based on the Banking Guidelines using market shares, market concentration thresholds, and other market facts and conditions. The DOJ's review of bank mergers is "independent" from review by the Federal Reserve (and other bank regulators), and "a transaction that meets the Federal Reserve's HHI delegation threshold still may raise concern in the division's review."

The DOJ invites comment from banks, other financial institutions, and industry stakeholders to help it evaluate "whether the division should revise the Banking Guidelines or change the way it analyzes bank mergers to reflect modern trends in financial services and banking competition." Comments must be received no later than Oct. 16, 2020.

2. *Justice Department Issues Modernized Merger Remedies Manual*.

On Sept. 3, 2020, the DOJ released an updated Merger Remedies Manual (Manual). This 2020 manual updates the DOJ's prior 2004 Policy Guide to Merger Remedies.

According to the updated Manual, a divestiture is strongly preferred to a "behavioral" or "conduct" remedy as a means to resolve agency objections to a merger or acquisition because the DOJ strives to avoid ongoing government regulation and monitoring post-close. The Manual states that a conduct remedy may be appropriate to help facilitate a structural remedy, such as in the case of temporary supply agreements to a divestiture buyer, or firewall provisions. Less often the DOJ will approve of standalone conduct relief, and only where merging parties can prove that: "(1) a transaction generates significant efficiencies that cannot be achieved without the merger; (2) a structural remedy is not possible; (3) the conduct remedy will completely cure the anticompetitive harm, and (4) the remedy can be enforced

effectively." Importantly, the Manual clarifies that the DOJ will evaluate strategic and private equity divestiture buyers using the same criteria.

The FTC did not join in this Manual, and it remains to be seen how their approach to merger remedies may differ from the DOJ's.

3. *Justice Department Requires Divestiture in Order for Anheuser-Busch To Acquire Craft Brew Alliance*.

On Sept. 18, 2020, the DOJ announced that it is requiring Anheuser-Busch InBev SA/NV (ABI), its wholly-owned subsidiary Anheuser-Busch Companies LLC (AB Companies), and Craft Brew Alliance Inc. (CBA) to divest CBA's entire Kona brand business in the state of Hawaii to PV Brewing Partners and to license to the acquirer the Kona brand in Hawaii as conditions to AB Companies, a minority shareholder in CBA, acquiring all of the remaining shares of CBA. PV Brewing Partners LLC was formed by VantEdge Partners LP, a private equity company based in metropolitan Kansas City, and is headquartered in Overland Park, KS.

The settlement requires the sale of the Kona brewing facilities in Hawaii, including a new 100,000-barrel capacity brewery currently under construction, and a perpetual, exclusive license of the Kona brand for the brewing, distribution, and sale of Kona beer in Hawaii.

C. U.S. Litigation

1. *In re Delta Dental Antitrust Litigation*, Civil Action No. 19-CV-6734 (N.D. Ill.)

In 2019, dental service providers filed Section 1 claims against 39 dental service corporations who use the Delta Dental name, together with the Delta Dental Plans Association, Delta Dental Insurance Company and related companies, alleging that the defendants engaged in a multifaceted conspiracy to restrain competition in the dental insurance business. The plaintiffs alleged that the defendants allocated markets, agreed to fix artificially low reimbursement rates, and limit the revenue a plaintiff could derive from selling non-Delta-Dental-branded dental insurance.

In September 2020, the court denied the defendants' motion to dismiss, saying the industry does not resemble the credit card market on which the U.S. Supreme Court based a landmark antitrust ruling about "two sided" platforms.[3] "While there are indeed some similarities between the role credit card companies play in facilitating transactions" and "the role dental insurance companies play in facilitating" care, the defendants "overstate" the decision's impact and "overreach in their characterization of the dental insurance market as a two-sided transaction platform," the judge wrote. Here, the district court ruled "dental insurance lacks the 'key feature' of a transaction platform: simultaneity of the exchange." Dental insurance policyholders "typically pay insurers fixed premiums at regular intervals, regardless of when or even whether they visit the dentist," and their premiums depend on their plan's "terms and coverage, "not on the cost of the goods or services." The court also stated that it was unconvinced that the "nuanced analysis" called for in two-sided market cases required it to apply the rule of reason rather than holding the agreements per se illegal.

[3] The defendants had argued that their insurance plans resembled a two-sided market, addressed in the Supreme Court's 2018 ruling in *American Express Co. v. Ohio*, where the court found that certain industries, like payment processing, involve two-sided markets, in which the "customers" stand on both sides of the platform and the "product" is the transaction itself. Practices that harm only one side of the market can benefit the other side enough to attract more users, creating a feedback loop, or "network effect," that offsets any anti-competitive impact, the court said.

2. *In re Broiler Chicken Antitrust Litigation, Civil Action No. 1:16-cv-08637 (N.D. Ill.)*

Since 2016, several classes of purchasers and numerous direct-action plaintiffs have been litigating claims that the major producers of broiler chickens engaged in supply manipulation and price fixing. Earlier in 2020, the DOJ indicted four executives of Pilgrim's Pride and Claxton Poultry, alleging that these individuals engaged in bid rigging in the market for broiler chickens sold to restaurants and restaurant-chains. In response to those indictments, four new plaintiffs filed complaints that included bid-rigging claims as well as the prior supply manipulation and price-fixing claims. Defendants moved to dismiss the bid-rigging claims from the consolidated cases, saying "they are not part of this case" because the claims were not present in the original cases when the consolidated case was formed. Plaintiffs, however, claimed that "bid-rigging has been at the heart of the case since its inception," and voiced their intention to add the claim to all of the complaints.

On Sept. 22, the court ordered each direct-action plaintiff to specify which bid-rigging claims they are bringing. All bid-rigging claims will be included in the consolidated complaint, which should be filed before Oct. 23. The court specified that the bid-rigging claims will continue on a separate track from the other two claims that are already being heard, in an effort to streamline the case. The court noted that "this should not be a war of attrition," and that the case needed to progress towards an end.

3. *In re Keurig Green Mountain Single Serve Coffee Antitrust Litigation*, Case No. 1:14 MD-02542 (S.D.N.Y.)

On Sept. 30, 2020, plaintiffs and Keurig asked the federal district court to approve a $31 million settlement in a case alleging that Keurig had monopolized the single-serve coffee pod market. The class of consumers could number in the hundreds of thousands. This indirect class action is one of eight cases brought against Keurig and consolidated in 2014. The consolidated cases included class claims by direct purchasers and competitors of Keurig, all arguing that Keurig uses tactics such as exclusive contracts and bogus patent infringement lawsuits to drive competitors from the market and allow Keurig to maintain its prices at an artificial level. Counsel for Keurig and the Indirect Purchaser class argued that the $31 million settlement was reasonable in light of the difficulties in tracking the costs involved in producing the coffee pods as well as the potential financial footing of the company impacted by the COVID-19 pandemic.

Mexico

A. COFECE imposes US $28 million in fines to companies and individuals for bid-rigging in laboratory studies and blood banks in tenders organized by public health institutes.

The Federal Economic Competition Commission (COFECE or Commission) imposed fines in the amount of MXN 626 million to Selecciones Médicas (Seme), Selecciones Médicas del Centro (Semece), Centrum Promotora Internacional (Centrum), Impromed, Hemoser, Instrumentos y Equipos Falcón (Falcón), Dicipa, Grupo Vitalmex (Vitalmex), Vitalmex Internacional, Vitalmex Administración and Vitalmex Soporte Técnico, as well as to 14 individuals that participated on their behalf, for bid-rigging and/or exchanging information in tenders organized by the Mexican Social Security Institute (IMSS) and the Institute of Social Security and Social Services for State Employees (ISSSTE) to acquire comprehensive services of laboratory studies and blood banks.

COFECE explained that the performance of clinical or blood bank laboratory tests is one of the main inputs for the right holders' care, since they are essential to identify and diagnose diseases and health care. The Commission announced that the companies established a non-aggression pact to, instead of

competing, divide the positions in seven tenders called by the IMSS and the ISSSTE in 2008, 2010, 2011 and 2015.

COFECE points out that, in 2008, representatives of Seme and Semece, as well as Centrum, Hemoser, Impromed, Falcón, and Dicipa agreed to share the tenders launched to provide comprehensive services of laboratory studies in various IMSS offices and High Specialty Medical Units (HSMU), through identifying the installed capacity that each one had in the corresponding delegations, so that each member would be left with the tender that had the greatest capacity to supply that position. To obtain the allocation, the potential winner set the price to be offered, from which the rest of the participants would submit a losing proposal with a higher price, abstain from participating or make their technical proposal insolvent by omitting the submission of the commitment letter.

According to COFECE, damage suffered by both institutes is estimated at more than MXN 1.2 billion, resulting from surcharges – for some tests it was up to 58.8% – paid over 10 years by the IMSS and the ISSSTE. Accordingly, the Commission fined the participants of the cartel – 11 companies and 14 individuals – MXN 626.4 million pesos (US $28 million). Pursuant to the government procurement law, COFECE does not have the legal power to limit or disqualify the participation of any company that has been sanctioned or is being investigated by the authority in public procurement processes. In this context, given that the resolution evidences the companies' participation in an anticompetitive practice, the Commission also ordered this matter referred to the Ministry of Public Affairs for the appropriate legal ramifications, as well as to the IMSS and ISSSTE.

B. Mexican competition commission fines several companies for price fixing in gasoline prices in Tijuana and Mexicali, in Baja California.

The Commission resolved that several companies (Gasmart, Rendichicas, Appro, Magigas, Eco and the companies Colorado, Florido, Becktrop, Ravello, Dagal and Cargas), as well as 11 individuals who acted on their behalf, engaged in anticompetitive practices in the gasoline market in Tijuana and Mexicali, in the state of Baja California. It also concluded that Onexpo Baja, the Association of Gasoline Stations of Tijuana (APEGT), the Association of Gas Stations of Mexicali (Onexpo Mexicali) and four individuals contributed to, encouraged, or induced this anticompetitive conduct.

The anticompetitive practices consisted of price fixing among competitors to maintain gasoline prices at the maximum price determined by the government, through the Ministry of Finance and Public Credit (SHCP, as per its initials in Spanish). COFECE imposed MXN 51 million (US $2.3 million) in fines. The calculated overpricing of gasoline caused by the anticompetitive conducts was at least 10 cents per liter in Tijuana, and up to 60 cents per liter in Mexicali, generating an estimated MXN 27.4 million in damages.

According to COFECE, the sanctioned conduct was serious, particularly because it was intentional and directly affected consumers who use motor vehicles, as well as other sectors including public and freight transport for which this good is an input.

C. COFECE initiates a probe in the market for waterproofing products.

The Commission announced a cartel probe in the market of production, distribution, and commercialization of waterproofing products in the country. COFECE considers waterproofing products an indispensable input for the construction industry, but also for Mexican families who provide preventive maintenance to their homes. The timeframe for this investigation is 120 business days from Nov. 29, 2019, the day the investigation initiated, which may be extended for up to four additional periods.

Should the investigation end without evidence confirming execution of anticompetitive conduct, COFECE's Board of Commissioners may close the investigation. If evidence points to the infringement of the law, those allegedly responsible may be called to a trial.

According to the Federal Economic Competition Law, in the event an absolute monopolistic practice is confirmed, the companies involved may be fined up to 10% of their income. Those who have contributed, fostered, or induced the practices may also be sanctioned. Natural persons who participated in the order, execution, or conclusion of these types of agreements among competitors may be sentenced to prison for up to 10 years as per the Federal Penal Code.

D. Mexican Senate ratifies appointment of Ana María Reséndiz Mora as COFECE's new commissioner.

The Mexican Senate unanimously ratified the appointment of Ana María Reséndiz Mora as a new Commissioner at COFECE, for a period of nine years beginning on Sept. 22 and ending on the last day of February 2029. She replaces Ignacio Navarro Zermeño, who finished his term as Commissioner on Feb. 28, 2020.

Thus, there are now three female Commissioners in the Plenary, out of a total of seven positions. The new Commissioner has a degree in economics from the Universidad Nacional Autónoma de México (Mexico's National Autonomous University), a master's degree in economics from the Colegio de México and has also completed master's and PhD studies at Georgetown University. Prior to her new position, she was General Coordinator of Economic Analysis at COFECE, where she analyzed issues that were presented to the Plenary. Previously, she was an advisor at the Federal Institute of Telecommunications, and a collaborator at the Ministry of Finance and Public Credit and the National Commission of the Retirement Savings System. In the academic field, she was a research assistant in economic issues at the Colegio de México and at the Latin American Faculty of Social Sciences.

The Netherlands

A. Dutch investigation into home décor cartel.

On Sept. 18, 2020, the Dutch Authority for Consumers & Markets (ACM) stated that it was investigating a potential cartel in the home décor sector. The ACM suspected these companies of price-fixing arrangements to the consumers and pricing agreements. The ACM has carried out dawn raids on the premises of suspected companies, the first dawn raids in the Netherlands since the COVID-19 outbreak. The ACM is currently investigating whether any competition infringement has occurred.

B. Dutch competition authority fines price information exchange in tabaco industry.

On Sept. 28, 2020, the ACM imposed fines totaling more than EUR 82 million on four major cigarette manufacturers who, between July 2008 and July 2011, distorted competition by exchanging information, through wholesalers among other channels, about future prices of cigarette packs. Martijn Snoep, Chairman of the Board of ACM, explained: "It was common practice for cigarette manufacturers to receive information from wholesalers about the retail prices of their competitors' cigarette packs before those prices came into effect. With that information, the manufacturers were able to adjust their prices to their competitors' prices in advance. That distorts competition. The manufacturers knew that exchanging this type of information was at odds with competition rules. However, that did not lead to changes in their behavior."

C. Director's liability following a cartel fine by the European Commission.

The court of Northern Netherlands ruled on Sept. 23, 2020, on director liability following a cartel fine imposed by the European Commission. One of the questions was whether a director was liable for the fine for cartel agreements and infringing competition law that was imposed on the company of which it was director. The bankruptcy trustees of some of the involved bankrupt companies in the cartel tried to claim damages from the director. These claimed damages amounted to the cartel fine of EUR 27 million. The court did not find the director liable based on a tort. However, there was partial director liability pursuant to article 2:9 of the Dutch Civil Code; partial, because it could not be proven that the director was responsible for the full damages. Alternatively, the bankruptcy trustees claimed for 48.05% of the cartel fine, calculated on the period for which the director was appointed. The court concluded that the director was liable for an amount of EUR 13 million, which was 48.05% of the actual imposed cartel fine instead of the original cartel fine as requested by the bankruptcy trustees.

United Kingdom

A. Litigation

On Sept. 1, 2020, the Competition Appeal Tribunal (CAT) published a summary of the appeal by Roland (UK) Limited and Roland Corporation (Roland) against a fine of £4,003,321 imposed by the Competition and Markets Authority (CMA) on Roland for engaging in online resale price maintenance (RPM) relating to electronic drumkits and associated products. RPM exists where a supplier directs the prices charged by its distributors/retailers when they resell the supplier's products and is treated as a serious infringement of competition law.

This was a settlement case. As such, it does not involve an appeal by Roland against the CMA's finding of infringement; the appeal relates solely to the amount of the fine imposed by the CMA. Roland contends that the 19% starting point used for the fine calculation was excessive because, in Roland's view, the CMA overstated the seriousness of RPM and failed to take account of the very narrow scope of the RPM that it found in its decision. In addition, Roland contends that its 20% leniency discount was too low.

B. COVID-19: Changes to Competition Act 1998 exclusion orders.

The Secretary of State previously exercised its authority to permit anticompetitive agreements in the COVID-19 crisis and implemented a number of exclusion orders applicable to specific sectors of the economy:

- **Health care**: The Competition Act 1998 (Health Services for Patients in England) (Coronavirus) (Public Policy Exclusion) Order 2020 exempts certain information-sharing, coordination, and joint purchasing agreements between National Health Service bodies with and amongst independent providers in England. A corresponding order has been issued for Wales.
- **Ferry services**: The Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020 exempts agreements on coordination of timetables and routes and the sharing of labour services between maritime operators providing passenger and freight crossings to and from the Isle of Wight.
- **Groceries**: The Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020 exempts certain agreements relating, amongst other things, to the coordination of "anti-hording" measures, labour- and facility-sharing, coordination of product ranges, exchanges of

stock positions and shortages, coordination in relation to the provision of groceries to vulnerable groups and coordination of temporary store closures and opening hours.

The Secretary of State has now decided to revoke the above groceries order as of Oct. 8, 2020, because the exceptional and compelling conditions for which it was required have abated. In addition, a similar order applicable to the dairy sector (the Competition Act 1998 (Dairy Produce) (Coronavirus) (Public Policy Exclusion) Order 2020) expired on Sept. 25, 2020.

The remaining orders have been amended to the effect that each will now end when revoked by statutory instrument (rather than when the Secretary of State issues a notice).

C. Competition and Markets Authority (CMA)

1. *Mutual assistance and co-operation among UK, U.S., Canadian, Australian and New Zealand competition authorities*.

On Sept. 2, 2020, the CMA announced that it has entered into the Multilateral Mutual Assistance and Co-operation Framework for Competition Authorities (MMAC) with the Australian Competition and Consumer Commission, the New Zealand Commerce Commission, Competition Bureau Canada, the U.S. Department of Justice, and the U.S. Federal Trade Commission. The MMAC includes a memorandum of understanding focused on improving existing cooperation and coordination on investigations. It also includes a model agreement to support the development of individual arrangements among the participating agencies, which may include the exchange of case information and assistance in individual competition investigations, to the extent permitted by respective national laws.

2. *Changes to CMA leniency guidance for resale price maintenance (RPM) cases*.

On Sept. 24, 2020, the CMA adopted an addendum to its Guidance on leniency and no-action applications in cartel cases. The addendum explains how the CMA will approach its discretion when granting leniency discounts in so-called "Type B" RPM cases, where a supplier directs the prices charged by its distributors/retailers when they resell the supplier's products. In the UK, RPM is treated as a serious infringement of competition law, by both supplier and distributors/retailers.

Type B leniency arises where the CMA is already conducting an investigation and the leniency applicant is the first to report and provide evidence of a serious infringement. The new addendum states that, while the CMA may grant Type B applicants in cartel cases a penalty discount of up to 100%, it would not generally expect to grant discounts of more than 50% to Type B applicants in RPM cases.

3. *Further director disqualifications and CMA statement of intent*.

On Sept. 2, 2020, the CMA announced that it has secured a two-year competition disqualification undertaking from Mr Robin Davies, a director of Alissa Healthcare Research Limited (Alissa Healthcare), on the grounds of his involvement in Alissa Healthcare's cartel conduct. The CMA adopted an infringement decision finding that Alissa Healthcare had breached the UK and EU prohibitions on anticompetitive agreements by exchanging commercially sensitive information with competitors in relation to the drug nortriptyline. In a contested application connected to the same infringement decision, the CMA is also seeking disqualification of Mr. Pritesh Sonpal, a director of Lexon (UK) Limited.

In this context, it is noteworthy that the CMA has recently issued guidance for company managers, directors, and their advisors stating that the CMA has now disqualified 20 directors for anticompetitive

behavior (having not used its director disqualification powers prior to 2016). The guidance also notes that the CMA will now consider director disqualifications in all cases of competition law infringement.

4. *Price gouging: abuse of dominance*.

As previously reported, in June 2020, the CMA launched four investigations under Chapter II of the Competition Act 1998, alleging that four pharmacies and convenience stores were abusing a dominant market position by charging excessive and unfair prices for hand sanitizer during the COVID-19 crisis. Three of these investigations were closed on July 13, 2020.

On Sept. 2, 2020, the CMA announced that it has closed the last of its investigations.

5. *Merger Review Roundup*.

The CMA[4] continues to have a strong pipeline of both anticipated and completed transactions currently in phase 1 and phase 2 review. Notable developments in September 2020 include:

- Phase 1: The CMA is consulting on undertakings in lieu of reference to a Phase 2 investigation of the anticipated acquisition by Stryker Corporation of Wright Medical Group N.V. The Phase 1 investigation concluded that the merger could result in a substantial lessening of competition in the supply of total ankle replacement prostheses products in the UK. In order to avoid an in-depth phase 2 review, Stryker has offered to divest its Scandinavian Total Ankle Replacement (STAR) product and related assets.
- Phase 1: The CMA considers that undertakings offered in lieu of reference to a Phase 2 investigation of the completed acquisition by Breedon Group plc of certain assets of Cemex Investments Limited to be acceptable in principle. The Phase 1 investigation found that the merger could result in a substantial lessening of competition in the supply of ready-mixed concrete, non-specialist aggregates, or asphalt in 15 local markets across the UK. In addition, the CMA is concerned that the deal may give rise to coordinated effects in the East of Scotland by enabling suppliers in that region to profitably align their market conduct. In order to avoid a phase 2 reference, Breedon has offered to divest, to an upfront buyer, assets in each of the relevant local areas as well as Breedon's cement import terminal in Dundee.
- Phase 1: The Phase 1 investigation into the completed acquisition by Ardonagh Group Limited of Bennetts Motorcycling Services Limited concluded that the deal gives rise to a realistic prospect of a substantial lessening of competition in the distribution of motorcycle insurance to private customers in the UK. On Sept. 30, 2020, the CMA announced that Ardonagh Group has offered to divest the target business, thereby effectively unwinding the merger (except that the target does not revert to its previous owners). The CMA will consult on Ardonagh Group's proposal in accordance with its standard procedures but, in principle, considers that the proposal is capable of addressing its concerns.
- Phase 1: The CMA is consulting on undertakings in lieu of reference to a Phase 2 investigation of the completed acquisition by ION Investment Group Limited of Broadway Technology Holdings LLC. The Phase 1 investigation concluded that the merger may result in a substantial lessening of

[4] Contrary to most other jurisdictions, the UK operates a voluntary merger-control regime, meaning that acquirers are not obliged to notify CMA of transactions to which the regime applies and that the parties generally do not need to await clearance before closing a transaction. That said, the CMA is empowered to "call in," for mandatory review, any non-notified transaction which it suspects may be subject to the regime. If it satisfies itself that this is the case, it will issue an order prohibiting (further) integration for the duration of its review. Indeed, many of the CMA's prohibition decisions in recent times concern completed mergers that have not been notified.

competition in relation to the supply of sell-side front-office systems for electronic trading of fixed income securities. In order to avoid a Phase 2 reference, ION has offered to divest the Broadway fixed-income business to a specified upfront buyer.

- Phase 2: The CMA has published the final report on the completed acquisition by Hunter Douglas N.V. of 247 Home Furnishings Ltd. The CMA had concluded that the transaction has resulted, or may be expected to result, in a substantial lessening of competition in the online retail supply of made-to-measure window blinds in the UK and has required Hunter Douglas to divest its majority stake in 247.
- Phase 2: The CMA announced the cancellation of its Phase 2 investigation into the anticipated acquisition of Outbrain, Inc. by Taboola.com Ltd, because Taboola confirmed the abandonment of the deal. Both parties are active in the supply of content recommendation platform services to publishers in the UK.
- Merger appeals: The Competition Appeal Tribunal (CAT) published details of an appeal brought by JD Sports Fashion plc and its parent company, Pentland Group Limited, against a CMA decision to fine them £300,000 for failure to comply with an initial enforcement order issued in the context of the completed acquisition by JD Sports of Footasylum plc (which was prohibited by the CMA, a decision also being appealed at the CAT).

Poland

A. UOKiK president issues commitment decision ordering Play to reimburse pre-paid amounts.

Following a recent decision by the president of the UOKiK, the telecommunication service provider Play is obliged to return consumer funds remaining when pre-paid accounts expire. The mechanism for returning the money remaining on the pre-paid account is to be implemented by Play within one month from the entry into force of the commitment decision against the company. This is not the first decision regarding the retention of unused money by telecoms. Previously, other companies experienced similar proceedings – Polkomtel was hit with a hefty fine for infringing collective consumer interests to the tune of over PLN 20 million, T-Mobile was obliged to change its commercial practices, and with respect to Orange Polska, the proceedings are still underway.

B. Retrospective discounts under investigation.

The UOKiK president initiated explanatory proceedings to investigate whether retail chains in Poland use unfair practices which may constitute unfair leveraging of contractual advantage in relation to their suppliers. The UOKiK's main concerns relate to the fact that when entering into a contract, the supplier is not able to determine the value of the discount they must grant to the retail chain, or the basis for the criteria. Such activities may be deemed unfair leveraging of contractual advantage. The first charges in that respect were already raised against Jeronimo Martins Polska, the owner of Biedronka chain of stores.

As part of the explanatory proceedings, the UOKiK president sent questionnaires to certain suppliers from the food sector (including meat, dairy, vegetables) regarding discounts applied by retail chains. Explanatory proceedings are being conducted in the case, but not against any entity yet.

Italy

A. Italian competition authority initiates a phase II in the merger control proceeding concerning multiutility operators.

On Sept. 8, 2020, the Italian Competition Authority (the AGCM or ICA) initiated a so-called Phase II in the merger control procedure concerning the acquisition by A2A – a multiutility operator that generates, distributes, and markets renewable energy, electricity, gas, integrated water supply, and waste management services A2A – of Ambiente Energia Brianza, a competitor active in the geographical region of Brianza (Northern Italy). The ICA found that the transaction could potentially give rise to a dominant position in several markets located in the area around Milan, due to the strong presence of A2A, which is jointly controlled by the Municipalities of Milan and Brescia. In Italy, the phase II of a merger control procedure usually lasts 45 calendar days, and the AGCM may impose remedies to the parties before clearing the transaction.

B. Italian competition authority fines against Italian postal operator for unfair competition.

By its decision of Sept. 8, 2020, the ICA fined Poste Italiane for having conducted an unfair commercial practice in violation of the Italian Consumer Code, consisting in the misleading promotion of certain of its services for the delivery and collection of registered mail. In detail, the AGCM found that Poste Italiane: (i) frequently failed to deliver registered mail in a way consistent with the timing and efficiency characteristics of the service advertised by Poste Italiane and (ii) caused unacceptable burdens on consumers as well as several delays in the service of judicial documents and, consequently, a serious damage to the justice system. The ICA imposed on Poste Italiane the maximum fine established by law. However, the ICA emphasized that the sanction would probably have been much higher if Directive 2019/2161 A2A – which sets as maximum penalty in similar cases a fine up to 4% of annual turnover A2A – had already been implemented in Italy.

European Union

A. European Court of Justice (ECJ)

1. *The ECJ upholds fine on Italian cable maker Prysmian*.

Prysmian SpA received a fine by the European Commission in 2014 of approx. EUR 104 million for orchestrating a global high-voltage power cable cartel between 1999 and 2009. The ECJ decided on Sept. 24, 2020, that the fine should be upheld and that the European Commission did not act out-of-line when copying the hard drives of the company involved without first ascertaining whether the data on the hard drives were relevant for the investigation. This was justified, according to the ECJ, because all irrelevant data was deleted.

2. *A more open interpretation of the criteria of direct concern*.

The European General Court determined on Sept. 23, 2020, that Spain must recover the state aid which it provided under a tax lease scheme to shipping companies. The scheme allowed the shipping companies to benefit up to 30% on the price of vessels built by Spanish shipyards, and became a discussion topic after some companies complained they did not receive shipbuilding contracts due to the tax lease scheme. The European Commission concluded that the scheme gave a selective advantage to some companies which were in breach of the state aid rules. The General Court concurred with the European Commission

3. *The ECJ declares invalid a Commission's decision on French measures qualified as State aid.*

On Sept. 17, 2020 the ECJ declared invalid the EU Commission's July 14, 2004, decision, by which the latter found that certain French measures granting all fishery undertakings a 50% reduction in social security contributions was State aid. The judgment of the ECJ was adopted in the framework of a preliminary reference from the French Conseil d'Etat, in a proceeding concerning the recovery of the aid from Compagnie des pêches de Saint-Malo. In its judgment, the ECJ pointed out that the examination of the validity of the Commission's decision could not be carried out if Compagnie des pêches de Saint-Malo would have had standing to seek annulment of the Commission's decisions with a direct action under Article 263 TFEU, which can be exercised within two months from the adoption of the decision. In fact, the landmark ruling of the ECJ in TWD would prevent an undertaking to "abuse" of the preliminary reference procedures where it would have been possible for it to act directly before the ECJ. However, in this case the ECJ accepted the referral since it was only after 2011 that Compagnie des pêches de Saint-Malo was informed that it was concerned by the recovery of the aid. Having clarified this procedural aspect, the ECJ declared invalid the Commission's decision given that the French measures provided no advantage to the fisheries undertakings, which merely acted as an intermediary for the employees.

4. *The ECJ rules on State aid to Hinkley Point nuclear power station.*

By a judgment of Sept. 22, the ECJ confirmed the validity of the Commission's decision which authorized the aid granted by the UK to the Hinkley Point C nuclear power station. Such decision had already been appealed by Austria before the General Court, which rejected such action. The authorized aid consisted of three measures granted in favor of the nuclear plant future operator, NNB Generation, and included measures to ensure price stability during the operational phase of the plant as well as a credit guarantee on bonds to be issued by the beneficiary. The ECJ rejected the appeal brought by Austria on the grounds that: (i) the precautionary principle and the need to protect the environment do not prevent Member States from granting aids in favor of a nuclear plant operator and (ii) the assessment of the proportionality of the aid does not require the Commission to take into account the negative effects of the measure on environmental protection.

5. *The ECJ and national competition authorities (Anesco).*

In a Sept. 16, 2020, judgment known as an Anesco, the ECJ ruled that the preliminary request of the Spanish National Commission on Markets and Competition (CNMC) was inadmissible because the CNMC was not a 'court or tribunal' for the purpose of Article 267 TFEU. In 1992, the ECJ accepted a reference from a Spanish competition authority; however, at that time the institutional framework in Spain was different, with a competition court distinct from the competition investigatory body. Currently, Spain follows a model where the investigative and decision-making activities are functionally separate but handled by one (administrative) institution. The ECJ concluded that the competition proceedings by the CNMC are of an administrative nature, so no dialogue between the CNMC and the European Court of Justice was possible.

B. EU Commission

1. *European Commission publishes findings on the evaluation of the Vertical Block Exemption Regulation (VBER).*

The European Commission launched the review of the VBER, which will expire on May 31, 2022. As a result it published a Staff Working Document on Sept. 8, 2020, summarizing the findings of the evaluation of the VBER, together with the Vertical Guidelines. The aim of the evaluation was to assess the

functioning of the VBER, together with the Vertical Guidelines, in order to decide whether it should lapse, be renewed, or be revised. Based on the evaluation, the European Commission will launch an impact assessment to evaluate the policy options for a revision of the rules. Based on this evaluation, revised VER and Vertical Guidelines can be expected.

2. *Commission opens in-depth investigation into a Belgian capacity mechanism*.

Belgium notified the Commission of its intention to implement a capacity mechanism aimed at ensuring security of electricity supply within the country, should resource adequacy issues arise in the future. The mechanism designed by Belgium provides for a support in the form of a capacity payment in favor of energy providers that will offer their availability to supply electricity to the transmission system operator (TSO) during stress events. The beneficiaries will be selected by means of a competitive bidding procedure. Based on its preliminary findings, the Commission raised concerns that the Belgian capacity mechanism may not be compliant with the EU State Aid rules, notably with the Guidelines on State aid for environmental protection and energy, and accordingly decided to open an in-depth investigation. The investigation will focus on the following issues: (i) Belgium has not sufficiently proved possible future issues of electricity adequacy; (ii) the Commission will assess whether the measure may discriminate against certain technologies, such as renewables; (iii) the Commission will investigate whether the resources' allocation provided for by the mechanism could have a negative impact on competition and trade between Member States.

China

On Sept. 11, 2020, China's State Administration for Market Regulation (SAMR) published the Anti-Monopoly Compliance Guidelines for Business Operators (the Guidelines). The Guidelines are intended to provide a set of best practices that businesses may adopt in establishing antitrust compliance management systems, lower risk of non-compliance, and increase awareness of relevant laws. The Guidelines are intended to provide "general guidance," and are not mandatory.

The Guidelines provide key areas of consideration which include:

- Tone from the Top: Senior officers of a business are encouraged to make and fulfill clear and open antitrust compliance commitments.
- Antitrust Law Compliance Function: Businesses having the ability to do so are encouraged to establish antitrust compliance management departments or incorporate antitrust compliance management into their existing compliance management systems. Such departments should have sufficient independence and authority to effectively implement antitrust compliance efforts. In addition, it is recommended that such departments proactively organize and conduct internal antitrust compliance audits to identify risk (and implement mitigation measures when issues are discovered), formulate internal compliance policies, compile compliance reports, and coordinate both internally and externally to respond to antitrust investigations when they arise.
- Risk Identification and Assessment: Businesses are encouraged to proactively identify antitrust compliance risks based on the characteristics of the business itself and market/industry characteristics, possibility of occurrence and severity of consequences.
- Training: Businesses are encouraged to invest resources in compliance training for employees.

The Guidelines are notably silent, however, on whether a business' compliance efforts will be credited in the calculation of fines at the conclusion of a governmental investigation. Further clarification on this point would further incentivize businesses to implement robust antitrust compliance management systems.

Japan

A. The JFTC performs on-site inspection to a distributor of Wilson Sporting Goods.

According to the news release on Sept. 10, AMER SPORTS JAPAN, INC. (AMER), the designated distributor in Japan of Wilson Sporting Goods, is under investigation by the JFTC – including on-site inspection – for violation of Antimonopoly Act. AMER is reported to have pressured other distributors outside of Japan into not trading with parallel importers in Japan, and pressured wholesalers into not selling goods to distributors that deal with parallel importers. The JFTC is investigating AMER's reported actions impeding parallel import as preventing fair competition.

Read previous editions of GT's Competition Currents Newsletter.

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