GT GreenbergTraurig

GT Newsletter | Competition Currents | November 2020

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

Congratulations to our GT Mexico City colleagues who were recently ranked "Top Tier" for Competition & Antitrust work in *The Legal 500 Latin America 2021 Guide*, along with "Leading Lawyers" Miguel Flores and Víctor Frías, and "Recommended Lawyers" José Abel Rivera Pedroza, Valery García Zavala, and Rocío Olea Salgado.

In this Issue:

United States

A. Federal Trade Commission (FTC)

1. *Statement of FTC Bureau of Competition Director Ian Conner on Peabody Energy Corporation and Arch Coal's Abandonment of Their Proposed Joint Venture.*

On Sept. 29, 2020, Peabody Energy Corporation and Arch Coal announced they would abandon their proposed joint venture to combine their coal mining operations in northeastern Wyoming following a U.S. District Court's decision granting the FTC's request for a preliminary injunction. The FTC had alleged that the proposed joint venture would eliminate competition between the two major competitors in the market for thermal coal in the area, as well as the two largest coal-mining companies in the country. The FTC alleged that in 2018, Peabody and Arch Coal produced more than 60% of all coal mined an all coal reserves in the area.

In response to the announced abandonment by the parties, the FTC's Bureau of Competition Director Ian Conner stated: "Peabody and Arch Coal's decision to abandon their joint venture will preserve competition in the market for thermal coal, which is sold to power-generating utilities that provide electricity to millions of Americans. The joint venture likely would have raised the price of coal to the utilities, and ultimately to consumers."

2. *FTC Approves Final Order Imposing Conditions on Arko Holdings Ltd.'s Acquisition of Empire Petroleum Partners, LLC.*

As noted in GT's September Competition Currents, in August 2020, Arko Holdings Ltd. and Empire Petroleum Partners, LLC agreed to divest retail gasoline and diesel fuel operations in four states to settle FTC charges that Arko's acquisition of Empire would violate federal antitrust law. After the conclusion of the public comment period, on Oct. 7, 2020, the FTC approved a final order settling charges that Arko's acquisition of Empire would violate federal antitrust law. Under the settlement, Arko and Empire are required to divest operations in four states to an independent competitor within 20 days after Arko's acquisition of Empire and to provide transition services to the divestiture buyers for up to 15 months after divesting these operations.

3. *FTC Requests Public Comment on Otto Bock HealthCare North America, Inc.'s Application to Approve Divestiture of Assets It Gained through Acquisition of FIH Group Holdings, LLC.*

On Oct. 9, 2020, the FTC announced that it was accepting public comments on a proposal by Otto Bock HealthCare North America, Inc. (Ottobock), a prosthetics manufacturer, to divest assets it acquired through its acquisition of FIH Group Holdings, LLC (Freedom Innovations), to the divestiture buyer Proteor, Inc. (Proteor). The divested assets include microprocessor prosthetic knee (MPK) products and technology. In September 2017, Ottobock consummated the acquisition of Freedom Innovations in a transaction that was not subject to premerger notification requirements. After learning about the transaction, the FTC issued a complaint alleging that "the consummated acquisition harmed competition in the U.S. market for [MPKs] by eliminating head-to-head competition between the two companies . . . ." In May 2019, an administrative law judge upheld the FTC's complaint, and in November 2019, the FTC issued its opinion and order upholding the Administrative Law Judge's decision.

While the FTC's Final Order is still under review, Ottobock has requested to move forward with a proposed divestiture to Proteor, subject to a 30-day public comment period.

4. *FTC to Hold Virtual Q&A Sessions in November on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking*.

As discussed in GT's October Competition Currents, 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. 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.

On Oct. 19, 2020, the FTC announced plans to hold three public sessions examining this initiative. Public comments are due 60 days after publication in the Federal Register of the FTC's rulemaking proposals.

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

B. Department of Justice (DOJ)

1. *Justice Department Sues Google, Alleging Violations of Antitrust Laws*.

On Oct. 20, 2020, DOJ, along with eleven State Attorneys General, filed a civil suit against Google in federal district court alleging that Google had entered into exclusionary agreements in the search and search advertising markets. The DOJ complaint alleges that Google has unlawfully maintained monopolies in these markets by, among other things, entering into agreements that forbid pre-installation of competing search services and entering into tying agreements forcing pre-installation of its search applications on mobile devices. The DOJ complaint alleges that these anticompetitive practices harm competition and consumers and reduce the ability of innovative new companies to develop and to compete against Google, which the complaint alleges accounts for almost 90 percent of all search queries in the United States. In response, Google has stated that if the DOJ action is successful it would instead result in higher prices for consumers because Google would have to raise the cost of its mobile software and hardware.

2. *Justice Department Requires Waste Management to Divest Assets in Order to Proceed with Advanced Disposal Services Acquisition*.

On Oct. 23, 2020, the DOJ announced that in order to complete its acquisition of Advanced Disposal Services, Inc. (ADS) in a transaction valued at $4.6 billion, Waste Management, Inc. (WMI) would be required to divest assets comprising 15 landfills, 37 transfer stations, 29 hauling locations, over 200 waste collection routes, and other assets. The assets would be divested to GFL Environmental Inc. (GFL), or to an alternate divestiture buyer approved by the DOJ. The DOJ alleged that the proposed acquisition as originally structured would "substantially lessen competition for small container commercial waste collection or municipal solid waste disposal services in over 50 local markets" in 10 states. Five state attorney generals (Florida, Illinois, Minnesota, Pennsylvania, and Wisconsin) also filed suit to block the transaction.

At the same time, the DOJ filed a proposed settlement that, if approved by the court, would resolve the competitive harm alleged in the complaint. The United States District Court for the District of Columbia entered the proposed Asset Preservation Stipulation and Order on Oct. 27, 2020, and both WM's acquisition of ADS and the related divestitures to GFL closed on Oct. 30, 2020.

3. *Justice Department Requires Divestiture in Order for Liberty Latin America to Acquire AT&T's Telecommunications Operations in Puerto Rico and the U.S. Virgin Islands*.

The DOJ on Oct. 23, 2020, announced that Liberty Latin America Ltd.will be required to divest fiber-based telecommunications assets and customer accounts in Puerto Rico as a condition to Liberty's proposed acquisition of AT&T Inc.'s (AT&T) wireline and wireless telecommunications operations in Puerto Rico and the U.S. Virgin Islands. DOJ approved WorldNet Telecommunications, Inc. as the divestiture buyer.

The DOJ alleged in its complaint that the parties are "two of the three largest wireline telecommunications providers in Puerto Rico and own two of the three most extensive fiber-based network infrastructures on the island." As a result, DOJ had concerns that the proposed transaction would have eliminated competition for fiber-optic-based telecommunications services.

C. U.S. Litigation

1. *In re Pork Antitrust Lit.*, 2020 WL 6149666 (Oct. 20, 2020, D. Minn.).

Three putative classes of plaintiffs allege defendants, comprising 80% of America's pork integration market, conspired to limit the supply of pork and fix prices in violation of state and federal antitrust laws. Over a year ago, the court granted defendants' motion to dismiss, but granted plaintiffs an opportunity to replead. *See In re Pork Antitrust Lit.*, 2019 WL 3752497. In its Oct. 20, 2020, ruling, the court held that the plaintiffs had plead their antitrust claims properly and denied defendants' renewed motions to dismiss. The court focused its analysis again on whether the amended complaints sufficiently alleged "how any of the individual Defendants acted" to determine "which, how many, or when any of the individual Defendants may have affirmatively acted to reduce the supply of pork." After reviewing the new allegations about the individual pork integrators, the court found that the new allegations, when viewed as a whole, were sufficient to plausibly plead parallel conduct against all of the defendants, except one. The court explained that the amended complaints adequately alleged that after nearly a decade of sustained growth, pork supply decreased based on sizeable reductions by the first, second, and sixth largest producers. The court then proceeded to deny defendants' challenges based on the statute of limitations. The court also dismissed most of plaintiffs' claims under various state antitrust claims and consumer protection claims.

2. *United States v. Harwin,* Case No. 2:20-cr-00115 (M.D. Fla.).

In a rare criminal antitrust indictment, on Sept. 23, 2020, DOJ announced that the president of an oncology group was indicted for an alleged market allocation conspiracy. According to the indictment, the defendant agreed to allocate medical oncology treatments for cancer patients to his company, FCS, and radiation oncology treatments for cancer patients to another practice in Southwest Florida. Defendant is charged with conspiring to restrain trade in violation of Section 1 of the Sherman Act for activity occurring from 1999 through 2016. On Oct. 9, the defendant moved to dismiss the indictment, arguing that the DOJ has failed to sufficiently allege an actual antitrust violation and that the statute of limitations bars some of the criminal counts.

3. *Ass'n of Am. Physicians & Surgeons, Inc. v. Am. Bd. of Med. Specialties*, 2020 U.S. Dist. LEXIS 173853 (E.D. Ill. Sept. 22, 2020).

On Sept. 22, 2020, a federal district court dismissed with prejudice a suit brought by the Association of American Physicians and Surgeons (AAPS), a rival competitor to the American Board of Medical Specialties (ABMS), alleging that ABMS conspired with hospitals and insurers to force physicians to pay for specialty recertification programs. AAPS alleged that ABMS conspired with insurers, hospitals, and other specialty groups to require participation in ABMS' certification maintenance programs. The court rejected the claim as unclear and failing to sufficiently define a relevant market.

Mexico

A. COFECE initiates probe on leasing of non-residential real estate spaces.

The Mexican Comisión Federal de Competencia Económica (COFECE or Commission) announced a probe involving cartel conduct in the leasing of non-residential real estate spaces in Mexico. The market for non-residential real estate spaces is an estimated $5.4 billion. Real estate services are offered to the commercial and tourism sectors, which have been among the most affected by the COVID-19 pandemic and lockdown.

As of Oct. 7, 2020, the timeframe for this probe is up to 120 working days, which can be extended for an equal term up to four times. If, at the end of the investigation, no evidence is found that shows anticompetitive behavior, COFECE will close its investigation. If evidence indicates a violation of law, those who may be responsible will be called to a trial-like procedure to present their defense.

If cartel conduct is confirmed, companies may be fined up to 10% of their annual income. Those who contributed, incited, or induced the commission of these practices could be sanctioned as well. Individuals that may have participated in the order, execution, or conclusion of these type of agreements among competitors may be sentenced to up to 10 years in prison.

B. COFECE proposes 12 measures on competition matters to support the recovery of the Mexican economy.

In October 2020, COFECE presented an ambitious plan named "Proposals on Competition Matters to Support the Recovery of the Mexican Economy (Propuestas en materia de competencia económica para contribuir a la reactivación de la economía mexicana)." The document lists 12 actions to promote the participation of the largest possible number of companies in markets that are relevant to the national economy. The proposals are fundamentally derived from diverse market studies and opinions previously issued by COFECE.

COFECE notes that the COVID-19 crisis caused a drop in production, with small- and medium-sized companies most affected; companies with greater capital have been more likely to remain in the markets, thereby increasing the risk of higher market concentration.

The main actions proposed by COFECE are the following:

1. Expand access to credit for a greater number of Mexicans and small companies by facilitating their credit score assessment through the data held by the government on their compliance with payment of utilities such as water and electricity, and credits granted by government housing funds.

2. Increase options for the purchase of medicine at better prices and accelerate the entry of generic drugs to the market.

3. Reduce electricity costs by guaranteeing compliance with the legal framework in force concerning the economic dispatch of electricity, including assuring non-discriminatory access to transmission and distribution grids.

4. Promote the lowest possible prices of gasoline through expediting import and retail permits for gasoline and diesel, encouraging competition along the whole value chain, with the elimination of several requirements that hinder the issuance of import permits.

5. Guarantee that, for the benefit of taxpayers, the government timely contracts goods and services at the best price and quality conditions, through a reform to the Government Procurement Law (Ley de Adquisiciones) to maximize competition and free market access in public procurement procedures.

6. Reduce the price of federal land transportation of passengers, with a modification to the regulation that fosters competition among companies and that allows the participation of new

players through mandatory open and non-discriminatory access to bus terminals, and by allowing more locations to offer these services.

7. Allow the entry of more companies at the state level in markets for gasoline, liquified petroleum gas, and freight transport through expedited issuance of guidelines from the National Council for Regulatory Improvement.

8. Maintain the purchase options of Mexican consumers by reviewing international trade measures, avoiding the imposition of restrictive measures on foreign trade without a prior analysis of consumer harm.

The Netherlands

A. ACM imposes fine on Innova Energie.

On Sept. 30, 2020, the Dutch Authority for Consumers and Markets (ACM) imposed a fine of EUR 1,250,000 on Dutch energy company Innova Energie B.V., because Innova Energie offered energy contracts with termination fees that ACM deemed too high to consumers that were also registered with the Dutch Chamber of Commerce. In many cases, the energy was supplied to self-employed workers at their home addresses for private use. Innova Energie demanded up to a EUR 1,000 termination fee for this group of consumers. This resulted in consumers not being able to switch to another energy company and many complaints. The Netherlands has a statutory maximum in place of EUR 250 for termination fees based on consumer protection rules. This means that consumers that are independent contractors are entitled to consumer protection. The ACM previously warned Innova Energie in 2017 about their termination fees.

B. ACM clears acquisition of container terminal of APM Terminals.

On Oct. 15, 2020, the ACM cleared Hutchison Ports Netherlands, parent company of container terminal operator ECT, to acquire container terminal APM Terminals Rotterdam. ACM does not anticipate that the acquisition will have any significant effects on competition. After the acquisition, sufficient competition should remain in the market for the handling of containers carried by deep-sea container ships.

C. Dutch tour operator Sunweb can acquire rival operator Corendon.

On Oct. 26, 2020, the ACM cleared the acquisition of Dutch tour operator Corendon by rival operator Sunweb. ACM has looked at the competitive landscape with respect to beach holiday tours along the Mediterranean coast, so-called “package tours” in particular. ACM has concluded that, after the acquisition, sufficient competition will remain in the market, although the number of large tour operators will decrease from three to two. Besides Sunweb and Corendon, tour operator TUI is a major competitor, and several smaller tour operators also offer package tours.

Martijn Snoep, Chairman of the Board of ACM, commented: “Over the past few years, consumers looking for beach holidays have had many options, also in part because of the growing selection online. Package tours remain as popular as ever because of their low prices and the convenience of a one-stop-shop with regard to the booking process. Sunweb and Corendon are currently the numbers 2 and 3 in the market, and, after the acquisition, will become about as big as the market leader TUI. That is why we wanted to conduct a thorough investigation into whether this acquisition would restrict competition, which would lead to higher prices or reduced quality. That has turned out not to be the case here.”

United Kingdom

A. Antitrust Investigations

1. *Sectoral Regulators—use of concurrent powers*.

Two cases this month highlight the role of the UK sectoral regulators in enforcing competition law compliance in the sectors for which they are responsible. These regulators have concurrent jurisdiction with the main UK competition enforcement agency, the CMA, in their sectors and usually take the lead in investigating the firms they regulate.

2. *Concurrent powers – Ofgem – abuse of dominance in the energy sector*.

On Sept. 30, 2020, Ofgem – the regulator for the electricity and downstream natural gas markets in Great Britain – issued a statement of objections to PayPoint Plc and its subsidiaries, setting out its provisional findings following an investigation started in August 2017. PayPoint provides over-the-counter payment services for energy customers who pay their energy costs in advance. Ofgem alleges that PayPoint had a dominant market position in the supply of these services for over nine years until October 2018 and that, through the use of exclusivity clauses, it abused its dominance by limiting its customers' freedom to use its competitors' services.

3. *Concurrent powers – Ofcom – exchanges of competitively sensitive information among telecoms competitors*.

On Oct. 23, 2020, UK telecoms regulator Ofcom issued a statement of objections against Motorola and Sepura, stating its provisional view that they exchanged competitively sensitive information during a procurement exercise. The exercise was run by the UK Police ICT company, acting as a central purchasing body for users of the Airwave private network – primarily the UK emergency services. Its purpose was to increase the supply of TETRA-standard two-way radio devices, accessories, and related services required for use of the network. Ofcom alleges that Motorola and Sepura disclosed their future pricing intentions to each other during the process.

4. *CMA abuse of dominance investigation*.

On Oct. 6, 2020, the CMA announced the launch of an investigation into suspected abuse of dominance in the supply of lithium-based medication for the treatment of bipolar disease. CMA alleges that Essential Pharma's planned discontinuation of the supply of Priadel, one of its lithium-based drugs, would require the thousands of patients that rely on Priadel to switch to more expensive drugs, including Essential Pharma's Camcolit. The CMA indicates that this may cause difficulties and health complications for these patients. It also indicates that, since patients using Priadel make up the vast majority of UK patients taking a lithium-based drug, this will significantly raise costs. Both of these factors are likely to increase pressure on the UK National Health Service. The CMA's investigation started following a complaint brought by the UK Department of Health and Social Care (DHSC), which had been in discussions with Essential Pharma in relation to the pricing of its non-Priadel lithium-based drugs. DHSC also asked the CMA to impose interim measures (equivalent to an injunction) obliging Essential Pharma to continue supplies of Priadel pending the outcome of the investigation. Essential Pharma removed the need for interim measures by agreeing to continue supplies of Priadel, but given that continued supplies are reliant on an agreement between essential Pharma and DHSC, the CMA has not closed its investigation.

B. Competition and Markets Authority (CMA)

1. *Interim Chair of the CMA*.

On Oct. 9, 2020, the UK Department for Business, Energy and Industrial Strategy appointed Jonathan Scott as interim chair of the CMA for up to one year, while it conducts a recruitment exercise to find a permanent replacement for Lord Andrew Tyrie, who resigned in June 2020. Mr Scott's background includes partnership at a city law firm and a number of government posts including Gambling Commissioner, chair of the Audit and Risk Assurance Committee, and senior independent member of the CMA board.

2. *Competition law post-Brexit*.

On Oct. 2, 2020, the CMA launched a consultation on the content of draft guidance on its functions after the UK's Brexit transition period, which ends at 23:00 on Dec. 31, 2020. The guidance addresses the impact the end of the transition period will have on the CMA's powers and processes in relation to merger control, cartel, and other antitrust investigations and consumer law enforcement. It also addresses the treatment of live cases still under review by the European Commission and CMA on 31 Dec. 31, 2020.

3. *Digital markets*.

In a speech on Oct. 9, 2020, CMA Chief Executive Andrea Coscelli contributed to the global debate on control of digital platforms by calling for a new digital markets regulatory regime in the UK and international cooperation to address problems affecting multiple geographic markets.

4. *Renewed focus on criminal cartel offence prosecutions?*

The criminal cartel offence has been on the UK statutory books since 2003, but there have been few prosecutions, and the CMA has had limited success in those that have been brought. This is despite the removal in 2014 of the requirement to prove that a defendant had acted dishonestly. The Oct. 21, 2020, publication of an updated Memorandum of Understanding (MoU) between the CMA and the Serious Fraud Office suggests renewed focus in this area. The MoU replaces a 2014 MoU and sets out the basis on which the CMA and SFO will work together in investigating and prosecuting individuals suspected of the offence where there is also suspicion of serious or complex fraud. It covers exchanges of information and intelligence and allocation of cases between the two regulators, together with the impact of leniency and no-action letters issued by the CMA in civil cartel proceedings.

5. *Merger review roundup*.

The CMA currently has a relatively low number of cases undergoing phase 1 review, but many cases are being referred to in-depth phase 2 reviews (or requiring remedies at phase 1 to avoid such a reference). The extraordinary intervention/deal "mortality" rate in phase 2 continues unabated. Notable developments in October 2020 include:

- **Phase 1**: the CMA is consulting on proposed remedies offered by Ardonagh Group to avoid a phase 2 reference into its **completed acquisition of Bennetts Motorcycling Services Limited**. The phase 1 investigation 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. The proposed remedies would result in a complete divestment of the target business, thereby effectively unwinding the merger.

- **Phase 1**: CMA is reviewing **the anticipated acquisition by Crowdcube Limited of Seedrs Limited**. The parties, who both operate crowd equity fundraising platforms in the UK, have requested that the review be fast tracked to an in-depth phase 2 review. This procedure is rarely used but can significantly reduce the duration of the phase 1 review. It is usually applied for where the parties consider that a transaction raises clear and complex competition issues which cannot be resolved within the framework of a phase 1 review.
- **Phase 1**: the CMA has made a request under Article 9 of the EU Merger Regulation to refer the **proposed joint venture between Liberty Global plc and Telefónica SA**, which would merge their UK businesses (Virgin Media/Virgin Mobile and O2). Until the end of the transitional period on Dec. 31, 2020, the European Commission will continue to have exclusive jurisdictions to review transactions meeting the jurisdictional thresholds of the EU Merger Regulation, including in respect of the UK. The European Commission must decide by Nov. 19, 2020 whether to refer the case to the CMA.
- **Phase 2**: the CMA issued its provisional findings in relation to the **anticipated acquisition by Yorkshire Purchasing Organisation (YPO) of Findel Education Limited**, provisionally concluding that the transaction may be expected to result in a substantial lessening of competition in the supply of educational resources (such as stationery, furniture, art and craft materials, as well as office-related and cleaning products) to educational institutions (nurseries, primary schools and secondary schools) in the UK by generalist suppliers. The CMA is consulting on potential remedies and provisionally considers that prohibition of the merger is likely to be an appropriate remedy but will consider any proposed partial divestment and/or behavioural remedies. On Nov. 2, 2020, the CMA announced that it has cancelled the phase 2 inquiry because YPO has abandoned the proposed acquisition.
- **Phase 2**: the CMA has issued its provisional findings in relation to the **completed acquisition by PUG LLC (viagogo) of StubHub**. The CMA has concluded that the transaction results in a substantial lessening of competition in the supply of "uncapped secondary ticketing platform services in the UK." The CMA is consulting on potential remedies and provisionally considers that full divestiture of StubHub would constitute an appropriate remedy but will consider any proposed partial divestment and/or behavioral remedies.
- **Phase 2**: the CMA has issued its provisional findings in relation to the **completed acquisition of 3G Truck & Trailer Parts Limited (3G) by TVS Europe Distribution Limited**, provisionally finding that the merger may be expected to result in a substantial lessening of competition in "wide range wholesale supply" of commercial vehicle and trailer parts to motor factors in the independent aftermarket in the UK. The CMA is consulting on potential remedies and provisionally considers that full divestiture of 3G would constitute an appropriate remedy but will consider any proposed partial divestment and/or behavioral remedies.

Poland

A. Poland imposes $7.6 billion fine on Gazprom (Russia) – world's largest fine for infringement of competition law.

On Oct. 6, 2020, the President of the Polish Competition Authority (UOKiK) imposed a recordbreaking fine of over PLN 29 billion (approx. EUR 6,5 billion, USD 7.6 billion) on Gazprom (Russian gas giant), and of over PLN 234 million (approx. EUR 51 million , USD 61 billion) in total on five other entities (including Engie Energy Uniper, OMV, and Wintershall) involved in the construction of the Nord Stream 2 gas pipeline without UOKiK merger clearance.

In 2015 the entities notified UOKiK of a transaction comprising the creation of a joint venture for the purpose of constructing and operating the Nord Stream 2 gas pipeline (a pipeline from the Russian coast through the Baltic Sea to Germany). Ultimately, after UOKiK issued a statement of objections, the parties withdrew their notification. In UOKiK's view, the transaction could have led to a restriction of competition on the market. UOKiK established that despite having no clearance, the would-be parents of the joint venture signed a number of agreements anyway for financing of the pipeline. The agreements also allowed the parties to exert certain influence over the operation of Nord Stream 2. Moreover, the parties established pledges on Nord Stream 2 stocks that allowed them to take over the stocks in case of a default under the loan agreement. UOKiK deemed the parties' activities an attempt to circumvent the merger clearance obligation.

The fine imposed on Gazprom is the highest in UOKiK's history. Other companies involved were also fined with maximum fines reaching 10% of their annual turnover: Engie Energy is obliged to pay over PLN 55.5 million; Uniper – almost PLN 30 million; OMV – PLN 87.7 million; and Wintershall – PLN 30.7 million. Moreover, pursuant to the UOKiK decision, the companies must terminate the agreements for financing Nord Stream 2. The decision is not final and may be subject to appeal to the Competition and Consumer Protection Court in Warsaw.

B. Draft amendment to the Polish Act on Competition and Consumer Protection—more powers for the competition watchdog, UOKiK.

On Sept. 23, 2020, the new draft amendment to the Polish Act on Competition and Consumer Protection were published for public consultation. The draft aims to expand UOKiK's powers to exercise consumer protection provisions more effectively, in particular in the online environment. According to the draft law, UOKiK would be entitled to require entrepreneurs to post consumer warnings, delete certain website content, restrict access, or even delete websites. Such requests could be addressed to entrepreneurs without launching any formal proceedings. Additionally, UOKiK would maintain a register of banned internet domains based on proceedings on infringing collective consumer interests.

Moreover, UOKiK would be authorized to conduct searches related to infringement of collective consumer interests or the application of abusive clauses in relations with consumers. Currently, searches may be conducted only with respect to practices that restrict competition.

Another important change includes authorization for UOKiK to buy products undercover (i.e., using a fake identity) for the purpose of investigations conducted by UOKiK.

Italy

A. The Italian Competition Authority fines four taxi booking service operators.

By decision published Oct. 5, 2020, the Italian Competition Authority (ICA) fined four taxi-driver cooperatives operating in Naples – which managed a taxi booking service (by phone and online) – for participating in an anticompetitive agreement. The infringers entered into a binding agreement, according to which all their members committed not to use any booking service other than those approved and used by the cooperatives themselves, thus preventing other providers of the same services to access the market. According to the ICA, the purpose of the agreement was to strengthen the cartel members' market position by foreclosing platforms who recently developed taxi booking apps, such as the one offered by the complainant, Mytaxi. The ICA also found evidence that the infringers threatened or banned the taxi drivers who used unauthorized services. Given the above, the infringement was qualified as a restriction

by object. Interestingly, the ICA applied an 80% fine reduction in light of the crisis of the taxi sector caused by the COVID-19 pandemic.

B. The Italian Competition Authority presents its 2019 Annual Report.

On Oct. 10, 2020, the President of the Italian Republic, Sergio Mattarella, received the President of the ICA and the members of the ICA Council as well as the Secretary General, who presented the 2019 annual report. The presentation was made on the ICA's 30th anniversary. The annual report shows that in 2019, ICA acted particularly strongly against cartels between companies, especially those affecting public tenders: ICA conducted 34 investigations for breaches of competition law, abuse of economic dependence, and rules of commercial relations regarding the sale of agricultural and agri-food products. Moreover, 82 advocacy opinions were issued and a sector inquiry on big data was concluded. Fines of almost EUR 1.6 million were imposed for abuses of dominant position engaged by companies operating in the transport sector and in the leisure, cultural, and sporting activities sector. Finally, ICA examined 65 concentrations and carried out 62 inspections.

European Union

A. AG Kokott proposes to uphold the European General Court's (GC) judgment declaring the Polish retail tax and the Hungarian advertisement tax as measures not constituting State aid.

By judgments issued May 16, 2019 and June 27, 2019, respectively, the GC annulled two European Commission decisions declaring the Polish retail tax and the Hungarian advertisement tax incompatible state aid, because the selectivity requirement was not met. With her opinion issued Oct. 15, 2020, Advocate General (AG) Kokott proposed that the EU Court of Justice uphold the GC judgments. Both regimes at issue consist of direct taxes calculated based on turnover and characterized by a progressive rate structure. According to the AG, general taxation systems, such as the ones at issue, do constitute aid to the extent they are designed in a manifestly inconsistent way. Absent such inconsistency, the regimes under scrutiny cannot be considered selective and therefore do not constitute State aid. The AG added that Member States are free to introduce a turnover-based tax, if they deem it appropriate; conversely, State aid rules do not require Member States to provide for the taxation which, in the Commission's view, is the most appropriate.

B. EU Commission

1. *Extension of the State Aid Temporary Framework*.

On Oct. 13, 2020, the EU Commission resolved to prolong and extend the scope of the State Aid Temporary Framework adopted March 19, 2020, to support the economy amid COVID-19. Specifically, by means of the newly published amendment, the existing provisions of the Temporary Framework – originally set to expire on Dec. 31 – are prolonged at current limits for six months, until June 30, 2021, with a view to catering to the continued needs of businesses, especially where the ability to use the Temporary Framework has not fully materialized yet. At the same time, the scope of the Temporary Framework is extended through the introduction of a new measure which addresses the need to support companies facing significant turnover losses (at least equal to 30% if compared with the same period in 2019) by contributing to part of their uncovered fixed costs, up to a maximum amount of EUR 3 million for each enterprise. Lastly, the amendment introduces new possibilities for States to exit from recapitalized companies while maintaining their previous stake in those companies and limiting distortions to competition.

2. *Partial annulment of Commission's decisions ordering dawn raid inspections*.

In a Oct. 5, 2020 decision, the General Court of the EU partially annulled decisions of the European Commission. In these decisions, on-the-spot dawn raids of a number of French retailers (in the food and non-food distribution sector) was ordered. In February 2017, the Commission conducted dawn raids concerning the exchange of information. The information that was obtained during the dawn raids led to a formal investigation. Three of the inspected companies began proceedings to annul the dawn raid inspection decisions. The General Court found that the European Commission failed to demonstrate that it had sufficiently strong evidence to suspect exchanges of information with respect to the future commercial strategies of the companies.

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

On Sept. 29, 2020, the EU Commission fined the Brose and Kiekert companies EUR 18 million for taking part in two cartels. These cartels affected supplies of closure systems for cars in the EU. More specifically, the cartels took part in the supplies of door modules and window regulators for a certain model car and the supplies of latches and strikers to that car manufacturer and one of its competitors. A third involved company, Magna, was not fined because it had revealed the cartels to the EU Commission. All three car equipment suppliers tried to preserve each party's existing business by coordinating pricing behavior and exchanging commercially sensitive information. Magna avoided a fine of EUR 6 million by revealing both cartels. Brose and Kiekert received fine reductions for their cooperation with the investigation. In addition, Kiekert received partial immunity for being first in submitting compelling evidence.

China

Given the relatively few manufacturers that compete in certain active pharmaceutical ingredients (API) markets and China's strict certification system for supervising the production and importation of APIs, the State Administration for Market Regulation (SAMR), China's antitrust watchdog, has long made anti-monopoly law enforcement in the API market a priority. For example, in April 2020, the SAMR fined three domestic manufacturers of injectable calcium gluconate a total of RMB 326 million for abuse of market dominance, representing the largest antitrust penalty in China in the pharmaceutical industry. To further promote the healthy development of the API industry and provide additional clarity on how cases will be assessed, on Oct. 13, 2020, the SAMR issued the Draft Anti-Monopoly Law Guidelines for the API Industry (the Draft Guidelines) for public comment. Comments were due before Oct. 30, 2020.

Highlights of the Draft Guidelines include the following:

- The Draft Guidelines clarify that in assessing the relevant product market for APIs, the SAMR may subdivide the market into the API manufacturing market and the API distribution market.
- The Draft Guidelines expressly state that "API manufacturers shall avoid concluding any agreement through consultation with competitors regarding API production quantity, sales volume, sales price, sales targets, etc." Further, distribution cooperation agreements and procurement cooperation agreements with competitors are given as examples of arrangements which may be at odds with the law.
- Perhaps as a reaction to the prevalence of resale price restrictions in the API market, the Draft Guidelines specifically list examples of illegal behavior. Such behaviors include: (1) implementing direct resale price restriction against downstream distributors, drug manufacturers, etc. in such forms as oral agreement, written letter, email and price adjustment notice; (2) restricting the prices of resale

by distributors and drug manufacturers in a disguised form through taking such measures as fixing the profits, discounts, and rebates for distributors; (3) restricting the prices of resale by downstream distributors and drug manufacturers through such measures as canceling kickbacks, reducing discounts, or even cutting off supply or terminating agreements as a threat; and (4) restricting the prices of resale by downstream distributors and drug manufacturers through such incentive measures as providing kickbacks, and prioritized supply and support.

While the Draft Guidelines are still in draft form, they do reveal important considerations in the SAMR's enforcement policies and potential enforcement trends in the future.

Japan

A. Japan Fair Trade Commission (JFTC) can investigate business alliance or M&A deals regarding startups.

On Oct. 12, 2020, regarding the planned acquisition of a wearable device start-up by an IT company, JFTC revealed its idea that regardless of whether it is involving startups or not, JFTC can investigate any business alliance or merger-and-acquisition deals if the size of the deals are large enough.

Kazuyuki Furuya, JFTC chairperson since Sept. 16, 2020, announced that he intends to continue the former chairperson's policy (i.e., aggressive application of antimonopoly act to protect customers and consumers from giant IT companies) toward improving market competition in the digital space; the above-referenced idea regarding investigation is consistent with that announcement.

B. On-site inspection to major medicine wholesalers.

On Oct. 13, 2020, JFTC and the Tokyo District Public Prosecutors Office proceeded with an on-site inspection of four major medicine wholesales companies (Companies). The inspection was based on the suspicion that the Companies colluded to fix the successful bidder for the Japan Community Healthcare Organization (JCHO), which provides medical service – especially in local areas of Japan – with 57 hospitals, 26 nursing and caring centers, and six nursing schools as an independent administrative institution. The Companies are suspected to have colluded regarding competitive bids held in 2016 and 2018. According to an article from Nikkei, one or some of the Companies reported the collusion voluntarily prior to the inspection and applied for leniency program.

Under the Japanese Pharmaceutical Affaires Law, drug price usable in insurance-covered health care shall be specified by the Minister of Health, Labor and Welfare (MHLW) every two years (Drug Pricing System). As MHLW states, due to the Drug Pricing System and high bargaining ability of the pharmaceutical companies, medicine wholesalers sometimes face severe negative primary margin.

Read previous editions of GT's Competition Currents Newsletter.

Contributors

Andrew G. Berg
Shareholder
+1 202.331.3181
berga@gtlaw.com

Gregory J. Casas
Shareholder
+1 512.320.7238
casasg@gtlaw.com

Calvin Ding◇
Shareholder
+86 (0) 21.6391.6633
dingc@gtlaw.com

Miguel Flores Bernés
Shareholder
+52 55.5029.0096
mfbernes@gtlaw.com

Víctor Manuel Frías Garcés
Shareholder
+52 55.5029.0020
friasgarcesv@gtlaw.com

Robert Gago
Shareholder
+48 22.690.6197
gagor@gtlaw.com

Edoardo Gambaro
Partner
+ (39) 02.77197205
Edoardo.Gambaro@gtlaw.com

Yuji Ogiwara
Shareholder
+81 (0) 3.4510.2206
ogiwaray@gtlaw.com

Stephen M. Pepper
Shareholder
+1 212.801.6734
peppers@gtlaw.com

Gillian Sproul
Shareholder
+ 44 (0) 203.349.8861
sproulg@gtlaw.com

Hans Urlus
Shareholder
+31 20 301 7324
urlush@gtlaw.com

Dawn (Dan) Zhang
Shareholder
+86 (0) 21.6391.6633
zhangd@gtlaw.com

Filip Drgas
Associate
+48 22.690.6204
drgasf@gtlaw.com

Simon Harms
Senior Associate
+44 (0) 203.349.8767
harmss@gtlaw.com

Marta Kownacka
Associate
+48.22.690.6231
kownackam@gtlaw.com

Shuhei Mikiya
Associate
+81 (0) 3.4510.2229
mikiyas@gtlaw.com

Pietro Missanelli
Associate
+ (39) 02.77197280
Pietro.Missanelli@gtlaw.com

Jose Abel Rivera-Pedroza
Associate
+52 55.5029.0089
riverapedrozaj@gtlaw.com

Ippei Suzuki
Associate
+81 (0) 3.4510.2232
suzukii@gtlaw.com

Rebecca Tracy Rotem
Practice Group Attorney
+1 202.533.2341
rotemr@gtlaw.com

◇*Admitted in Indiana. Has not taken the Chinese national PRC judicial qualification examination.*

Administrative Editor

Alan W. Hersh
Associate
+1 512.320.7248
hersha@gtlaw.com