GT GreenbergTraurig

GT Newsletter | Competition Currents | December 2020

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

Coming to you live via webinar in early 2021:

"*GT Competition Currents* — 2020 Wrap-up and 2021 preview"

Details to follow in the new year.

In this Issue:

United States

A. Federal Trade Commission (FTC)

1. *Consent decree for Stryker Corp. to divest assets as part of $4 billion acquisition of Wright Medical Group N.V.*

On Nov. 3, 2020, the FTC announced that it would require Stryker Corp. and Wright Medical Group N.V. to divest assets related to Stryker's total ankle replacements and finger joint implant products to remedy antitrust concerns that Stryker's proposed $4 billion acquisition of Wright would harm competition in those markets. The FTC consent decree requires the divestiture of those assets to DJO Global, Inc., permitting it to become an independent, viable, and effective competitor to Stryker. The proposed consent

decree also requires Stryker to supply DJO Global with transition assistance and to act as an intermediary supplier until DJO Global obtains FDA approval to be the legal manufacturer of the divested products.

2. *FTC files administrative complaint to block CoStar Group's acquisition of competitor, RentPath.*

On Nov. 30, 2020, the FTC filed an administrative complaint and authorized a federal court suit to block CoStar Group Inc.'s $575 million proposed acquisition of competitor RentPath Holdings, Inc. CoStar and RentPath both operate a number of websites matching prospective renters with available apartments. The complaint alleges that the proposed acquisition would significantly increase concentration in the already highly concentrated markets for internet listing services advertising for large apartment complexes in 49 U.S. metropolitan areas. The complaint alleges that CoStar and RentPath are one another's closest competitors by vying to sell internet listing services to property management companies and to attract prospective renters to use their listing services, and that each has targeted the other with sales campaigns and significant discounts to win and retain advertising customers.

B. Department of Justice (DOJ)

1. *DOJ files suit to block Visa's acquisition of Plaid, Inc.*

On Nov. 5, 2020, the DOJ filed a civil antitrust suit to stop Visa Inc.'s proposed $5.3 billion acquisition of Plaid Inc. The DOJ complaint alleges that Visa is a monopolist in online debit services and that Plaid, which is a successful fintech firm, is developing a nascent payments platform that would challenge Visa's monopoly. The complaint alleges that Plaid, which is the leading financial data aggregation company in the United States, was developing a disruptive lower-cost option for online debit payments that would allow consumers to pay merchants directly from their bank accounts using bank credentials rather than a debit card. The complaint further alleges that Visa was making the proposed acquisition of Plaid as an "insurance policy" in order to reduce the threat of increased competition that would undermine Visa's U.S. debit business and force Visa to accept lower margins for its merchant services.

2. *President of Chicago-area flooring company pleads guilty in bid-rigging conspiracy.*

On Nov. 18, 2020, DOJ announced that the president and principal owner of a Chicago-area flooring company had pleaded guilty for his role in a conspiracy to rig bids and fix prices for commercial flooring services and products sold in the United States. According to the plea agreement filed in court, from at least 2009 through June 2017 the defendant engaged in a conspiracy to suppress and eliminate competition in the commercial flooring market by agreeing with competitors to submit complementary bids so the designated company would win the bid. The defendant's guilty plea is the sixth such plea in the DOJ investigation (*See* September 2020 Competition Currents for more information).

3. *DOJ files suit against National Association for Realtors.*

On Nov. 19, 2020, DOJ filed a civil lawsuit against the National Association of Realtors (NAR) alleging that it had established and enforced illegal restraints on the ways that it competes, along with a proposed settlement that requires NAR to repeal and modify its rules to remedy those practices. The proposed changes will provide greater transparency to home buyers about the commissions charged by buyers' brokers; require brokers to cease misrepresenting that buyers' brokers are free; eliminate rules that prohibit filtering multiple listing services based on the amount of buyer broker commissions; and change its rules which limit access to lockboxes to only NAR-affiliated real estate brokers. The DOJ alleges that

the effect of the NAR practices has been to decrease price and services competition among real estate brokers.

4. *DOJ requires Intuit to divest as part of Intuit's acquisition of Credit Karma*.

On Nov. 25, 2020, DOJ announced that it would require Intuit Inc., the creator of TurboTax, and Credit Karma Inc. to divest Credit Karma's tax business to Square Inc. as a condition to permitting Intuit to proceed with its $7.1 billion acquisition of Credit Karma. DOJ said that without the required divestiture, the proposed transaction would substantially lessen competition for "digital do-it-yourself" tax preparation products, which are software programs used by American taxpayers to prepare and file their federal and state tax returns. Intuit's TurboTax is the largest supplier of such products in the United States, and Credit Karma is the fifth-largest provider of such services. The complaint alleges that Intuit's TurboTax has a dominant position in the market for such tax preparation products, that Credit Karma Tax has become a disruptive competitor with a significant competitive impact in the market since entering four years ago, and that Credit Karma's "always-free" business model enables Credit Karma to compete aggressively for filers who pay for TurboTax, thereby constraining TurboTax prices and forcing Intuit to improve its TurboTax offerings. Under the terms of the proposed settlement the parties must divest to Square, Inc. the assets that comprise Credit Karma Tax, including all relevant software and intellectual property, agree to Square's hiring certain key Credit Karma employees that support Credit Karma Tax, and provide certain transition support services to Square while Square integrates Credit Karma Tax into its Cash App platform.

C. U.S. Litigation

1. *In re Rotavirus Vaccines Antitrust Litigation*, No. 18-cv-1734, 2020 WL 6828123 (E.D. Pa. Nov. 20, 2020).

Three pediatric medical practices can proceed with a proposed class action accusing Merck & Co, Inc. of illegally stifling competition to its rotavirus vaccine RotaTeq after a judge rejected the drug maker's bid to send the case to arbitration. Putative class plaintiffs were all members of PBGs, which allow doctors' offices to join together and obtain group pricing discounts for vaccines from a manufacturer. Merck had argued that, to the extent the PBGs signed contracts with it on behalf of themselves and their members, then any medical practices that bought vaccines through the PBGs were subject to those agreements' arbitration clauses. Judge Joyner said that while the contracts contained clauses reflecting Merck's desire to impose the agreements' terms on individual practices, Merck could not establish that the PBGs had the authority to enter into arbitration agreements on their behalf.

The District Court stated that Merck needed to be able to show that the PBGs were acting as the medical practices' agents in order to argue that they were bound by the terms of the arbitration clauses since they had not themselves signed the contracts. "Based upon all of the foregoing, the Court simply cannot find that sufficient grounds exist to compel the Plaintiffs to arbitrate their anti-trust claims in this case," Judge Joyner wrote.

From 2006 to 2008, Merck's RotaTeq was the sole rotavirus vaccine available in the United States. In 2008, the U.S. Food and Drug Administration approved GlaxoSmithKline's vaccine, Rotarix. According to the lawsuit, which was filed in April, Merck responded to GSK's entry into the market by adding a condition to its contracts that required customers to buy rotavirus vaccines from it or face price penalties on its other vaccines. According to the putative class plaintiffs, the provision meant that any customer who wanted to buy Rotarix from GSK had to be willing to pay substantially more to purchase other pediatric vaccines from Merck, including those for which it was the sole supplier.

The lawsuit alleged that Merck's conduct violated the federal antitrust laws and caused medical practices to pay artificially inflated prices for rotavirus vaccines.

2. *In re Local TV Advertising Antitrust Lit.*, MDL No. 2867, 2020 WL 6557665 (N.D. Ill. Nov. 6, 2020).

Several media companies face a price-fixing class action lawsuit alleging that they conspired to raise TV advertisement prices in violation of antitrust laws. Plaintiffs allege that during the Class Period, Defendants secretly orchestrated a unitary scheme to supra-competitively raise the prices of broadcast television spot advertisements by agreeing to fix prices and exchange sales data, including pacing data. Broadcaster defendants first sought to dismiss the complaint on the grounds that it did not contain an adequate allegation of an antitrust injury, and that Plaintiffs accordingly lack standing to sue. Plaintiffs claim that Defendants' collusion and price-fixing scheme allowed the Broadcaster Defendants to avoid price competition, harming direct purchasers of broadcast television spot advertising in DMAs throughout the United States. Plaintiffs allege that a number of plus connect Defendants to an antitrust conspiracy. Plaintiffs also rely on evidence of the settlements and consent decrees stemming from a 2018 DOJ investigation into the same or similar conduct against these defendants. According to the court, a DOJ investigation alone is not enough to support an inference of antitrust conspiracy, but the allegations here are that the investigations produced results, namely consent decrees and settlements. The plus factors that Plaintiffs allege include: an information exchange of competitively sensitive information, a motive to conspire, actions and conduct that would be against the Broadcaster Defendants' unilateral self-interest in the absence of an anticompetitive agreement, opportunities to collude through trade associations and otherwise, high market concentration, and high barriers to entry. According to the court, Plaintiffs' alleged explanation for increased prices in the face of declining demand—that Defendants exchanged sensitive information—satisfies the plausibility standard.

3. *Pac. Steel Grp. v. Commercial Metals Co.*, No. 4:20-cv-07683, (N.D. Cal. Nov. 23, 2020).

San Diego-based rebar fabricator and installer Pacific Steel Group (PSG) seeks damages and injunctive relief in a suit alleging federal antitrust and California business practices law violations by Commercial Metals Co. (CMC), Irving, Texas, and its principal plant builder, Danieli Corp., Cranberry Township, Pa. The suit details the efficiency of vertical integration in rebar production, fabrication, and installation, especially in light of micro mill technology from Danieli, which has built low-cost production lines for market-leading CMC in Texas and Oklahoma. Pacific Steel Group (PSG) alleges that Commercial Metals Company (CMC) conspired with Danieli Corporation to prevent PSG from building a Danieli micro mill to begin manufacturing its own rebar. PSG further alleges that CMC has priced its fabrication and installation services below cost for the purpose of injuring PSG and destroying competition in violation of two California statutes. The suit was filed in U.S. District Court for the Northern District of California, naming as defendants CMC and two subsidiaries, plus Danieli.

Mexico

A. COFECE announces retail industry antitrust probe.

The Federal Economic Competition Commission (COFECE or Commission) has announced an abuse of a dominant position investigation in the **retail sale of consumer goods and related services**. Recently, the Commission published a *Market Study on Competition in the Retail Industry*, focusing on food and beverages. In that study COFECE indicated that big retail companies forced terms and conditions on their suppliers (such as delaying payments or applying discounts), creating uncertainty for

small suppliers and transferring to them the risk of unsold products. According to COFECE, the probe aims to ascertain if there are dominant players in the retail market committing "relative monopolistic practices," the official term to describe an abuse of a dominant position in Mexico.

In this case, COFECE's main line of investigation is the existence of an abuse of a dominant position related to:

i. The imposition of the price or other conditions that a distributor or supplier must observe when providing, marketing, or distributing goods or services; and/or

ii. The action of one or more Economic Agents whose object or effect, direct or indirect, is to increase costs or hinder the production process or reduce the demand faced by one or more other Economic Agents.

COFECE emphasizes that this investigation is not a prejudgment on the responsibility of any economic agent; to date, violations of the economic competition regulation have not been identified definitively, nor have the subject or subjects who would be considered responsible for the violations. The timeframe for this investigation is up to 120 working days, starting July 24, 2020, and can be extended for the same period up to four times. If an abuse of a dominant position is proven, the responsible company could face a fine of up to 8% of their annual income and an order to stop the conduct.

B. COFECE issues an opinion on a proposal to regulate the commissions charged by pension funds.

COFECE has recommended not approving amendments to the Social Security Law and the Retirement Savings System Law, which established a limit on the fees charged by pension funds in Mexico. The initiative that was presented in the Chamber of Deputies establishes, among other changes, a cap on the fees charged by the pension funds administrators (*Afores*), so that these fees are not higher than the average of the fees charged in Chile, Colombia, and the United States.

According to the Commission, having indicators of other countries as a reference is a mechanism used in the design of regulation. However, there is a need to validate the comparability between savings systems in terms of different variables, such as the number of accounts and balances that are managed in each system, and the type of fees that can be charged in each country. In this case, the proposed amendments did not have a justification for the selection criteria of the referenced countries chosen. COFECE also found that the proposed criteria would create inflexibility to adapt the regulation as the market changes.

Instead, COFECE has asked for changes in the regulation that: (i) avoid establishing predefined limits and allow the modification of fees in accordance with the changes that occur in the market; (ii) elevate returns for workers; and (iii) foster competition through cost reduction.

The Netherlands

A. T-Mobile Netherlands May Acquire Simpel.

On Nov. 17, 2020, the Netherlands Authority for Consumers and Markets (ACM) cleared the acquisition of telecom operator Simpel by rival operator T-Mobile Netherlands (T-Mobile). Over its fixed and mobile networks, T-Mobile offers consumers various services, such as telephony, broadband access, and television. Simpel sells mobile-telecom services, such as sim-only plans for mobile phones. For its mobile-telecom services, Simpel uses T-Mobile's network, as do several other operators.

ACM's investigation has shown that this acquisition does not create any anticompetitive concerns, as it will not have a significant impact on the competitive landscape in the market for mobile-telecom services. The investigation has also shown that, after the acquisition, T-Mobile will continue to face sufficient competition from telecom operators KPN, VodafoneZiggo, and various telecom operators without networks of their own.

ACM has also assessed whether, after the acquisition, telecom operators with mobile networks of their own will continue to have the incentive to offer access to telecom operators without networks of their own. ACM's investigation has shown that, after the acquisition, telecom operators with their own networks continue to have sufficient incentives to offer wholesale access to their networks. This acquisition of an operator without a its own network by an operator with its own network hardly changes this.

United Kingdom

A. UK Competition Law Post-Brexit

EU law will cease to apply in the UK on Jan. 1, 2021.[1] At the time of writing this newsletter, there is still no agreement between the EU and UK on the terms of their future relationship. However, it is clear that, starting on Jan. 1, 2021, the UK competition regime will operate separately from the EU competition regime, with the following impacts on businesses.

1. *Mergers and acquisitions*.

The one-stop shop created by the EU Merger Regulation (EUMR), providing a single merger clearance decision for the whole of the EU, will no longer apply in the UK. Businesses contemplating mergers affecting the UK and qualifying for investigation under both the EUMR and the UK Enterprise Act will have to prepare for the possibility of parallel UK and EU merger investigations. The only exception will be the few cases where the European Commission has already started to investigate a merger that also qualified for investigation under the UK regime. In those cases, the UK Competition and Markets Authority (CMA) will not start an investigation. Instead, the Commission will continue with its investigation of the UK as well as EU impact of the merger, and its decision, even if issued after Dec. 31, 2020, will be binding in relation to the UK as well as in relation to the remaining 27 EU Member States. In the meantime, the CMA has published proposals to update its jurisdictional guidance for 2021.

2. *Agreements*.

Agreements that have an impact on trade and competition in the UK as well as in the EU will no longer be subject to EU competition law as far as their UK impact is concerned – only UK competition law will apply. In practice, at least initially, Brexit is unlikely to change significantly the basis on which these types of agreements are analyzed for competition law compliance, since the principles that underpin both EU and UK rules relating to anti-competitive agreements are similar. Consequently, the drafting of these agreements should not need to change fundamentally. However, in the longer term, the two regimes may diverge.

3. *Firms with market power*.

[1] Due to the time difference between Belgium (Brussels) and UK, the UK will in fact become independent of the EU's legal regime at 23:00 GMT on 31 December 2020.

The terms on which firms with market power do business in the UK will be subject to UK competition rules relating to abuse of market dominance. Where those firms also operate in the EU, the EU rules on market dominance will apply. Here too, the UK and EU principles are similar, and there is unlikely to be a fundamental change in analysis between the two separate jurisdictions initially, with the possibility of divergence in the longer term.

4. *Investigations of agreements and conduct*.

Businesses operating anti-competitive agreements, or abusing a position of market dominance, in the UK may be investigated by the CMA. There is a risk of parallel UK/EU investigations where the agreement or abusive conduct in question impacts on competition and trade in both the UK (investigation by the CMA) and the EU (investigation by the European Commission). However, from Jan. 1, 2021, the Commission will not have jurisdiction to conduct "dawn raids" at those businesses' UK premises.

5. *State aid*.

From Jan. 1, 2021, the UK will no longer be subject to the EU rules on state aid. The UK government has developed proposals for the UK's own state aid regime, but these may not become law until later in 2021.

B. National Security and Foreign Investment

On Nov. 12, 2020, the UK published proposals for a substantially stricter and more comprehensive system for controlling transactions and acquisitions of assets that have the potential to impact on UK national security. These proposals include mandatory filing and clearance in advance of completing a transaction that falls within its scope. The consultation on these proposals ends on Jan. 6, 2021.

Poland

A. Potential impact of recent Nord Stream 2 decision on UOKiK review of joint ventures.

In November 2020, we reported that the president of the Polish Competition Authority (UOKiK) imposed a record-breaking fine of over PLN 29 billion (approx. EUR 6,5 billion, USD 7.6 billion) on Gazprom (the Russian gas giant), and over PLN 234 million (approx. EUR 51 million or USD 61 billion) in total, on five other entities involved in the construction of the Nord Stream 2 gas pipeline without UOKiK merger clearance. In November, the full text of UOKiK's decision was published. The decision sheds light on UOKiK's reasoning in the case and provides guidelines on how UOKiK may potentially consider similar cases in the future.

According to the Polish Act on Competition and Consumer Protection (Competition Act) the creation of a joint entrepreneur by other entrepreneurs is subject to merger control notification (if the relevant turnover thresholds are met). To date, in practice, the creation of a joint entrepreneur has been typically associated with the acquisition of shares in such entrepreneur. In the Nord Stream 2 case, the parties argued that a shareholding participation is necessary in order to establish the creation of a joint entrepreneur. The parties, however, did not acquire shares in the new entrepreneur but instead signed agreements for the financing of the pipeline with such entrepreneur. According to UOKiK, such action constitutes circumvention of the merger clearance obligation because, in particular:

i. irrespective of whether the parties acquired shares in the company or signed the financing agreements, the parties have the same common business goal: financing the construction of the pipeline;

ii. each of the parties took an economic risk, as they potentially could lose the funds that they lent.

UOKiK also stated that the parties had secured the financing agreements with an option to convert the loan into shares in the company. Finally, according to UOKiK, despite the parties deciding to change the form of cooperation (from the acquisition of shares in the new company to cooperation on the basis of financing agreements), a joint entrepreneur was created. Such reasoning may impact how UOKiK considers contractual joint ventures, i.e., cooperation between entrepreneurs without the creation of a separate company in which the parties hold shares.

B. UOKiK's recent activities in the field of anticompetitive agreements.

In November 2020, UOKiK announced that it had launched explanatory proceedings in order to investigate whether pharmaceutical wholesalers exchange commercial data, including information on prices. According to UOKiK's information, this could be achieved by special software used by wholesalers that allows them to check the prices applied by their competitors. UOKiK conducted dawn raids on the wholesalers' premises and the software providers. UOKiK will investigate whether the software could have been used for the purpose of an anticompetitive agreement.

Earlier in November, UOKiK announced it had fined Yamaha Music Europe for resale price maintenance. The fine seems low (approx. PLN 0.5 million, which is approx. EUR 113 000 or USD 139 000), taking into account that the infringement lasted for 13 years. UOKiK indicated, however, that the fine would have been significantly higher, but Yamaha cooperated with UOKiK within the leniency program and voluntarily submitted to the penalty.

C. Interchange fee saga continues: 14 years after the UOKiK decision was issued, the case returns to the Court of First Instance.

On Nov. 21, 2020, the Court of Appeal delivered a ruling repealing the judgment of the District Court of Competition and Consumer Protection (SOKiK) and referring the case back to that court (Court of First Instance). The Court of Appeal's judgment concerns UOKiK's unprecedented decision issued in December 2006 against 20 banks for concluding an anticompetitive agreement pertaining to setting fees for transactions carried out using Visa and Mastercard payment cards. As a result of the decision, a PLN 164 million fine was imposed on the banks. Since UOKiK issued the decision, the case has gone through all instances of the Polish judicial system (including the Supreme Court) – some instances several times.

In the oral justification of its judgment, the Court of Appeal reiterated the Supreme Court's Feb. 6, 2019, position (no. III SK 38/16) that the agreement in question does not restrict competition by its very nature and therefore its effects should have been thoroughly analyzed. SOKiK will need to consider both the anticompetitive and the procompetitive effects of the agreement, bearing in mind these effects can appear either horizontally or vertically, or both, as compared to the relevant market of the agreement. It has been emphasized by the Court of Appeal that the motions to permit evidence for the exemption of the concerned agreement from the laws prohibiting illegal agreements were rejected unjustifiably and need to be reconsidered. Also, due to ownership changes that took place with respect to certain banks, SOKiK should decide which entity is liable under the potentially anticompetitive agreement.

Italy

A. Italian Competition Authority (ICA)

1. *ICA opens investigation into ANIA.*

On Nov. 16, 2020, the ICA opened an investigation into the National Association of Insurance Companies (ANIA). The investigation stems from a communication sent by ANIA to the ICA concerning an "anti-fraud project" in the life (pure risk) and non-life sectors; the communication provides, among other things, for the creation of databases and the development of common algorithms to determine fraud risk indicators that insurance companies could use in both the liquidation and hiring phases.

The ICA considers that, as currently designed, ANIA's "anti-fraud project" presents a number of critical competition issues. In particular, the preliminary assessment showed the risk that – since the project is developed by an association representing the interests of insurance companies – there are insufficient guarantees from third parties such that the anti-fraud activity can actually be carried out for the benefit of all stakeholders. ICA will also assess whether and to what extent the exchange of information inherent in the project and useful to its success could cause an artificial increase in transparency in the markets concerned, facilitating collusion between competitors. With regard to this issue, the development of common algorithms and the sharing of a large amount of data could influence and standardize the choices of companies in important phases of the insurance business.

2. *The ICA fines the consortium Corepla for abuse of dominant position.*

On Nov. 10, 2020, the ICA published its decision fining the plastic supply chain consortium Corepla for having abused of its dominant position on the Italian market for services aimed at the recycling and recovery of PET bottles for food use. The bottles are offered to producers to comply with relevant environmental obligations.

Specifically, the ICA found that Corepla implemented a structured strategy with a view to hampering its competitor Coripet, a consortium involving the producers of plastic bottles for food liquids, formerly belonging to Corepla. Coripet was authorized in 2018 by the Italian Ministry of the Environment to participate in an innovative project for pet bottle recovery and recycling. The ICA's investigation revealed that Corepla used abusive tactics in order to prevent Coripet from executing the aforesaid project, thus distorting competition, impeding innovation in the services related to recovery and recycling of pet bottles for food use, and hindering the competitive dynamics provided for by the Consolidated Environmental Law. Before issuing the 27 million euros fine, the ICA adopted interim measures for the timely elimination of Corepla's exclusive claims on materials derived from urban waste sorting.

3. *ICA opens investigation into Benetton for abuse of economic dominance.*

On Nov. 25, 2020, the ICA opened an investigation against Benetton, a leading player in the clothing market, relating to an alleged abuse of economic dependence against a franchisee. In Italy, the ICA can open investigations into businesses that abuse bargaining power with respect to other businesses that are placed in a situation of economic dependence.

According to the ICA, the franchisee was economically dependent on Benetton because the former was contractually obliged to establish an organizational structure tailored to the franchisor's needs. Therefore, the franchisee's ability to reconvert its business or switch to other commercial partners was significantly hindered. Therefore, the ICA found that certain clauses of the franchising agreement enabled Benetton to

determine the purchase orders, with regard to both quantities and timing, thus influencing the activity of the franchisee, which was *de facto* unable to exercise its business autonomously.

Given Benetton's leading position in the clothing market, the ICA considered that the issue affects competition in the interested market rather than just the specific contractual relationship. In this respect, the ICA stressed that the use of similar contractual arrangements by an operator managing a large franchising network may affect all the undertakings which are part of such network, to the detriment of competition in the relevant market.

European Union

A. European Commission

The European Commission (the Commission) has recently taken a significant step towards revising Vertical Block Exemption Rule (VBER), which provides a safe harbor for specific types of vertical agreements by exempting those agreements from the cartel prohibition. The revised VBER may have far-reaching implications for businesses starting in mid-2022, when it will enter into force. On Oct. 23, 2020, the Commission published its "Inception Impact Assessment," providing its plans to reform the VBER together with the vertical guidelines to address the problems identified during the VBER evaluation, which was published Sept. 8, 2020.

B. Court of Justice brings proceedings against online hotel booking platforms.

On Nov. 24, 2020, the Court of Justice ruled in Case C-59/19 re *Wikingerhof* that a hotel using the platform Booking.com may, in principle, bring proceedings against Booking.com before a court of the Member State in which that hotel is established in order to bring to an end a possible abuse of a dominant position. Even though the practices which are the subject of complaint are implemented within the context of a contractual relationship, the rule of special jurisdiction in matters relating to tort, delict, or quasi-delict laid down in the Brussels Ia Regulation is applicable to them.

C. According to AG Tanchev, the CJEU should dismiss the appeal brought by the Commission against the General Court's judgment in the *Tercas* case.

By judgment of March 19, 2019, the General Court annulled an earlier Commission decision that held certain measures (both a financial contribution and guarantees) granted by the Italian deposit guarantee fund (FITD) to an Italian bank, Banca Tercas, were incompatible aid. Notably, the GC found that the measures at issue did not qualify as State aid because they did not entail the use of State resources and were not imputable to the State. The Commission appealed such judgment before the CJEU.

In its Oct. 29, 2020, opinion, AG Tanchev dismissed the Commission's argument that the GC set a higher standard of proof for demonstrating that a measure was imputable to the State where that measure was granted by a private entity – such as FITD, a consortium of Italian banks governed by private law – rather than by a public undertaking. Conversely, according to the AG, the GC merely pointed out that the Italian legislation did not confer to a public entity, namely the Italian Banking Authority (Banca d'Italia), the power to influence the content of the measures taken by FITD.

Additionally, the AG stressed that, even if the Commission's plea regarding the application of a higher standard of proof was grounded, the appeal should nevertheless be rejected. In this respect, the AG pointed out that the elements adduced by the Commission did not demonstrate that the measures were

imputable to the State, especially in light of the limited role of the Bank of Italy in the context of the adoption of said measures.

China

On Nov. 11, 2020, the Anti-Monopoly Bureau of the State Administration of Market Regulation (SAMR) released the draft Anti-Monopoly Guide for the Internet Platform Economy Sector (Platform Guide) for public comment.

Under the Platform Guide, practices such as demanding that business partners only enter into transactions with one platform operator or engaging in price discrimination based on a customer's shopping history or user profile could potentially be made illegal. The Platform Guide represents the first time that the SAMR has attempted to address competitive practices specifically pertaining to internet companies under the PRC Anti-Monopoly Law. The public comment period ended Nov. 30, 2020.

Additional highlights of the Platform Guide include the following:

- To address perceived difficulties in applying traditional market definitions to the internet industry, the Platform Guide provides that under certain circumstances, anti-competitive conduct can be directly inferred without defining the relevant product and geographic markets.
- As background, the VIE structure is frequently used to facilitate foreign financing of Chinese businesses in industries where foreign equity is legally prohibited or restricted under the Chinese foreign investment regime. The VIE structure is widely used in the Chinese internet industry. The Platform Guide expressly contemplates that internet companies organized under the VIE structure also fall within the scope of merger control review, assuming relevant thresholds are met.
- The Platform Guide provides additional insight on how the SAMR views anticompetitive conduct such as refusal to deal, selling below cost, tie-in sales, or imposing other anticompetitive conditions in the internet space. Additionally, the Platform Guide recognizes that internet companies may reach monopoly agreements using algorithms and other technical methods.

While the Platform Guide has yet to be finalized, the document indicates that the SAMR could enhance antitrust enforcement in the internet sector.

Japan

A. Japanese convenience store companies submit action plan to Ministry of Economy, Trade and Industry (METI).

On Oct. 29, 2020, METI revealed that Japanese major convenience store companies and the Japan Franchise Association – which includes major convenience store companies – had submitted their action plan regarding the report of the survey conducted by Japan Fair Trade Commission (JFTC).

This JFTC report regarding transactions between convenience store companies and its member stores (including their franchisees) was revealed on Sept. 2. According to the report, some of the member stores said that they were misled by convenience store headquarters' failure to provide them with accurate information (such as number of visitors, labor costs, waste loss, inventory loss, etc.) before signing the franchise agreement. Member stores also said that they were forced by the headquarters to purchase a certain volume, and the headquarters were refusing to negotiate regarding shortened opening hours.

B. JFTC issues administrative orders in the maglev train bid rigging.

Nikkei Shimbun reports that JFTC issued administrative orders and surcharge payment orders to general contractors in connection with the maglev train bid-rigging case. In that case, four Japanese major general contractors are accused of having rigged bids to settle price and winners of the bids for maglev train construction worth over USD 85 billion. All of the contractors were prosecuted for criminal charges, and two of the contractors already have been sentenced and ordered to pay approximately USD 2 million in fines. In October JFTC issued (i) administrative orders to all of the four contractors to prevent future similar bid rigging and (ii) surcharge payment orders to two contractors of approximately USD 30 million and USD 11 million, respectfully. The surcharge payments appear to be reduced for leniency.

Read previous editions of GT's Competition Currents Newsletter.

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