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GT Newsletter | Competition Currents | July 2020

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

We are pleased to present our inaugural issue of "GT Competition Currents," a monthly newsletter from the GT Antitrust Litigation & Competition Regulation Practice. A collaborative effort by team members across our international platform, the newsletter focuses on recent developments in the area of global competition law. We encourage you send it to your clients and general counsels you may know with an interest in antitrust and competition law.

We also welcome your suggestions to improve the newsletter and to enhance its value as a resource both inside GT and to our clients.

Andrew Geoffrey Berg

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United States

A. Federal Trade Commission (FTC)

1. FTC approves final settlement with Safariland, LLC.

On June 16, 2020, the FTC approved a final order settling its complaint that Safariland, LLC, which sells equipment for law enforcement, military, and recreational markets, entered into anticompetitive agreements with body-worn camera system seller Axon. The anticompetitive agreements barred

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Safariland from competing with Axon on all of Axon's products, limited solicitation of customers and employees by either company, and stifled potential product innovation and expansion by Safariland. The final FTC order requires Safariland and Axon to rescind the non-compete and non-solicitation provisions that the FTC had alleged were anticompetitive.

2. Tri Star Energy, LLC agrees to divestiture.

Under a June 24, 2020, divestiture agreement in connection with Tri Star Energy, LLC's acquisition of assets of Hollingsworth Oil Company, Inc., the parties agreed to divest retail gasoline and diesel operations in the Whites Creek, Tennessee and Greenbrier, Tennessee markets. Under the terms of the settlement with the FTC, Tri Star is required to divest these operations to Cox Oil Company, Inc., and to maintain the competitiveness of these assets pending completion of the required divestitures.

3. Eldorado Resorts, Inc. required to divest certain casino-related assets.

The FTC is requiring casino operator Eldorado Resorts, Inc. to divest casino-related assets in the South Lake Tahoe, Nevada, and Bossier City-Shreveport, Louisiana areas to settle FTC charges that Eldorado's acquisition of Caesars Entertainment Corp. would be anticompetitive. The settlement also gives the FTC the option to require an additional divestiture if a pending sale of one of Eldorado's Isle of Capri casinos in Kansas City, Missouri does not close within 60 days of the Caesars acquisition closing.

4. New Vertical Merger Guidelines issued.

On June 30, 2020, the FTC and the DOJ issued new Vertical Merger Guidelines that outline how the federal antitrust agencies evaluate the likely competitive impact of vertical mergers and whether those mergers comply with U.S. antitrust law. The new Guidelines are the first time the FTC and DOJ have issued joint guidelines on vertical mergers and are the first major revision to guidance on vertical mergers since DOJ's 1984 Non-Horizontal Merger Guidelines, which DOJ withdrew in January 2020.

B. Department of Justice (DOJ)

1. Sentencing in canned tuna price-fixing case.

As a result of DOJ's ongoing investigation into price fixing in the packaged-seafood industry, Christopher Lischewski, former CEO and President of Bumble Bee Foods LLC, was sentenced to serve 40 months in jail and pay a $100,000 criminal fine for his leadership role in a three-year conspiracy to fix the prices of canned tuna. Lischewski was convicted after a four-week trial in late 2019 on a single count of participating in the price-fixing conspiracy. Previously, Bumble Bee pleaded guilty and was sentenced to pay a $25 million criminal fine, and in September 2019, StarKist Co. was sentenced to pay the statutory maximum $100 million criminal fine arising from the same conduct.

2. Indictments in chicken-broiler price-fixing investigation.

On June 3, 2020, as the result of a DOJ investigation into price-fixing activities in the chicken-broiler industry, a federal grand jury returned an indictment against four executives from two major chicken-broiler producers for their role in a conspiracy to rig bids and fix prices for broiler chickens sold to grocers and restaurants for human consumption.

C. U.S. Litigation

1. *In re Processed Egg Prod. Antitrust Litig.*, No. 19-1088, 2020 U.S. App. LEXIS 19310 (3d Cir. June 22, 2020).

The United States Court of Appeals for the Third Circuit held that the district court properly tried the case under the rule of reason analysis. In December 2019, the jury rejected claims by opt-out retail purchaser plaintiffs of a previously certified class action that egg producers had conspired to raise prices by reducing production. The jury decided that the egg producers' explanation of reduced output due to introducing more humane hatcheries, involving larger cages and fewer chickens per plant, was not pretextual and that plaintiffs had not established a conspiracy among defendants to raise prices. The plaintiffs appealed, arguing that the district court should have applied the *per se* rule which presumes anticompetitive harm rather than allowing the jury to conduct a rule of reason balancing test. Writing for the Third Circuit, Judge Kent A. Jordan agreed with the district court's rule of reason approach, stating, "confronted with practices having far less certain motives and far more complicated economic consequences" than a naked price-fixing conspiracy, the district judge "quite rightly" applied the rule of reason.

2. *City of Long Beach v. Total Gas & Power N. Am.*, No. 19 Civ. 8725, 2020 WL 3057796 (S.D.N.Y June 8, 2020).

Judge Lewis A. Kaplan of the United States District Court for the Southern District of New York dismissed a class action against Total Gas & Power North America (Total Gas); its French parent company Total, S.A. (Total S.A.); and a U.K. subsidiary, Total Gas & Power Ltd. (Total Ltd.). Plaintiffs alleged that Total Gas manipulated the Monthly Index Prices for natural gas at the Southwestern Hubs during the Class Period, raising prices to purchasers such as the City of Long Beach. Judge Kaplan dismissed the claims against foreign defendants Total SA and Total Ltd. for lack of personal jurisdiction. The court found that the two foreign defendants had insufficient contacts with New York and that the entities were unaware of the alleged illegal activities of Total Gas. The judge dismissed the claims against Total Gas for failure to state a claim, holding that because the plaintiff did not purchase gas at any of the Southwestern Hubs, it lacked antitrust injury. Further, the court reasoned that plaintiff failed to allege that Total Gas had market power or that its ability to manipulate prices was the result of that market power. Plaintiffs have filed an appeal to the Second Circuit, which upheld the dismissal of a related case in 2018.

3. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 19-963 (U.S. Supreme Court, June 15, 2020).

In an unusual posture, this case will be addressed by the United States Supreme Court twice in as many years. In January 2019, the Supreme Court decided the question of whether a court may disregard a contract provision which states that an arbitrator should decide whether a dispute is subject to arbitration when the argument in favor of arbitration is "wholly groundless." *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524 (2019) *(Schein I*). In a unanimous opinion written by Justice Brett Kavanaugh, the court held that any "wholly groundless" exception to arbitrability violates the Federal Arbitration Act. *Schein I*, 129 S.Ct. at 529-30 (citing 9 U.S.C. § 1 et seq.). Therefore, the Court held that a valid delegation of arbitrability should be honored even if a court believes the argument for arbitration to be "wholly groundless." On remand, the Fifth Circuit again denied the motion to compel arbitration. *Arch & White Sales, Inc. v. Henry Schein, Inc.*, 935 F.3d 274 (5th Cir. 2019) (*Schein II*). The Fifth Circuit concluded that the parties' arbitration clause did not clearly and unmistakably delegate the question of arbitrability to the arbitrators. *Id.* at 281. The court then held that, based on an exclusion in the clause for "actions seeking injunctive relief," the dispute in question was not arbitrable. On June 15, 2020, the Supreme Court agreed to grant petition for certiorari a second time to address the Fifth Circuit's new

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holding. *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 19-963, 2020 WL 3146679 (June 15, 2020) (*Schein III*).

The Netherlands

A. Competition Authority

1. Dawn raids resumed in the Netherlands.

On June 12, 2020, the Netherlands Authority for Consumers and Markets (ACM) published that it will resume carrying out interrogations and unannounced dawn raids of companies and private homes, as well as resume organizing public hearings. This announcement comes after some Coronavirus Disease 2019 (COVID-19) measures have been eased in the Netherlands. The ACM had suspended these activities for the past three months.

B. Courts

1. Rotterdam Court annuls the Governmental Merger Permit for PostNL/Sandd merger.

PostNL acquired Sandd, its only competitor in the postal parcel distribution, based on a merger permit issued by the deputy minister for Economic Affairs and Climate. Some providers of mail services using the distribution system of Sand appealed this permit, which was issued to overrule the refusal to allow the merger after a second phase investigation by the Dutch Competition Authority (DCA), now known as the ACM. On Sept. 27, 2019, the Dutch government overruled the competition concerns of the DCA with respect to the contemplated creation of a near-monopoly for reasons in the public interest broader than competition itself, including continuity of mail services, reduction of costs because of the unified distribution system, protection of employment, the financial interests of the Dutch government, and risk of bankruptcy and disruption of mail services if the merger failed.

In its permit, the Dutch government remedied competition concerns by (a) requiring that PostNL provide its competitors access to PostNL's distribution network and (b) requiring PostNL to maximize yield on its unified services.

On June 11, 2020, the Rotterdam district court found the reasoning of the decision to grant the permit insufficient for various reasons and annulled the decision to grant the permit. As the merger already had been implemented, the government asked to court to allow for the effects of the merger to remain. The court denied this request, as interested parties had not been permitted to express their views in the process, resulting in adopting the decision to grant the merger permit. During the hearing, the government indicated it would appeal any decision to annul.

United Kingdom

A. Supreme Court

The UK Supreme Court ruled on June 17, 2020, that Visa and Mastercard had restricted competition in the way they set the fees they charged to retailers, confirming the ability of the retailers to pursue their claims for compensation for overpayment of credit card multilateral interchange fees.

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B. Competition and Markets Authority (CMA)

1. Musical instruments: resale price maintenance.

On June 29, 2020, the CMA published its decision in the latest in a series of five cases against musical instrument manufacturers making sales in the UK. The finding in the decision is that a manufacturer of synthesizers, Korg UK, has infringed competition by engaging in resale price maintenance (RPM) in the form of instructions to its retailers to sell its synthesizers at or above a minimum price. The fine of £1.5 million imposed on Korg UK and its U.S. parent company, Korg Inc., includes a 20% discount for early admission of the infringement and cooperation in the CMA investigation under a settlement agreement. Separate cases have been brought against manufacturers of drum kits, pianos, keyboards, and guitars. Total penalties in these cases amount to £13.7 million. The case illustrates the stricter approach that is taken in the EU generally, as compared with the U.S., towards restrictions imposed by manufacturers on their distributors and retailers' freedom to decide the resale price of the manufacturers' products.

As well as bringing cases against the manufacturers, the CMA also, for the first time, brought a case against a retailer of music instruments that had agreed with one of the manufacturers not to discount below a minimum price. This case, in which the CMA has announced it proposed to fine the retailer, has raised the stakes for retailers that follow the pricing instructions of their suppliers.

Finding that RPM is widespread in the UK music industry, the CMA has also issued warning letters to over 70 manufacturers and retailers across the sector, warning them that RPM is illegal and that they need to take swift action to ensure they comply with the law, or else face investigations and fines.

2. Director Disqualifications: cartel conduct.

June 2020 saw the CMA obtain disqualification on competition law grounds of a number of directors. These include a director of a pharmaceutical company that had divided up the supply of certain medications with its competitors and fixed the prices they charged to a large wholesaler. The director gave an undertaking not to take up any director role, or be involved in the management of any company, for five years. The CMA sees director disqualification as a key enforcement tool, and the number of disqualifications has increased in recent years.

3. Price Gouging: alleged abuse of market dominance.

On June 18, 2020, the CMA launched investigations of four pharmacies and convenience stores, alleging that the firms are abusing a dominant market position by charging excessive and unfair prices for hand sanitizer during the COVID-19 crisis. The case is at an early stage.

4. Merger control.

On June 23, 2020, the UK government brought into force emergency legislation imposing controls on any acquisitions of UK businesses that are critical to combating COVID-19 and future public health emergencies. The basis for the emergency legislation is a concern that the economic disruption caused by the COVID-19 pandemic may have made some UK businesses with critical capabilities more susceptible to takeovers. The controls are general in nature and not expressly directed against foreign investment. However, the government's June 22 press release, announcing the new legislation, confirms that the aim is to control acquisitions arising from "outwardly hostile approaches" and the sale of financially distressed firms to "malicious parties" and quotes the UK Secretary of State for Business, Energy and Industrial Strategy, Alok Sharma, as saying that while the UK is open for investment it is not open for exploitation.

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The new powers conferred by the legislation enable the government to intervene in any case where a UK business that is directly involved in a pandemic response, or that contributes to the maintenance of a UK health emergency response where there is no immediate crisis, becomes a takeover target.

This emergency legislation is one of a number of steps being taken by the government towards strengthening controls on acquisitions of UK businesses that are of strategic importance to the UK. The principal focus of the reform is national security.

Poland

A. UOKik—The Polish competition authority

1. Enforcement during COVID-19 outbreak.

UOKik has been particularly active during the pandemic. Over the past few months, UOKiK intervened or launched proceedings in a variety of different sectors. This includes investigating whether agri-food producers and retail chains unfairly use their contractual advantage vis-á-vis smaller contractors in the agri-food industry. Also, UOKiK has instigated explanatory proceedings in the banking sector in relation to the grace period for repayments of loans ("payment holidays"). In particular, UOKiK has focused on whether consumers were properly informed about the terms of such payment holidays.

2. The new competences with respect to control of certain foreign investments will soon take effect.

Beginning July 24, 2020, UOKiK, in addition to its responsibilities in the field of merger control proceedings, will gain new powers with respect to controlling certain foreign investments in Polish territory. Pursuant to the new law, entities who do not have their seat on the territory of EU, EEA, or OECD will be obliged to notify UOKiK of transactions resulting in acquiring a dominant or significant participation in an entity seated in Poland. The scope of investment in target entities that are subject to notification to UOKik is wide and includes public companies as well companies active in certain strategic sectors such as energy, oil and gas, information technology, telecommunications, or agri-food. Investments in entities whose turnover did not exceed EUR 10 million in either of the two preceding years are exempted from the notification.

The act envisages severe penalties for failure to notify, including fines, up to PLN 5 million (approximately EUR 1.2 million), as well as prison sentences. Moreover, the transactions conducted in breach of the new provisions will be null and void. The new control powers are temporary (they have been introduced due to the COVID-19 outbreak). They are currently set to expire after two years.

3. Access to information – UOKiK gains new powers.

Under the new Polish law (so-called Crisis Shield 4.0), UOKiK has been granted access to sensitive data of taxpayers. The information regarding taxpayers may be conveyed by the tax offices to UOKiK in relation to proceedings conducted by UOKiK. The scope of information that UOKiK will have access to includes information classifiable as banking secrets – e.g., a taxpayer's bank account, safe deposits, and loan agreements – if such information is included in tax filings. This amendment demonstrates that the Polish legislature seeks to expand UOKiK's access to information possessed by other administrative bodies.

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4. UOKiK's proceedings in the field of preventing late payment chains.

Recently, UOKiK launched proceedings relating to late payment chains – a situation in which the customer's failure to pay a supplier results in the supplier losing liquidity, thereby preventing the supplier from paying its debts. These proceedings include 51 entities, among which are the largest Polish entrepreneurs, manufacturers, and logistic companies. The proceedings were the result of an analysis conducted by UOKiK based on information obtained from the Polish National Fiscal Administration.

In 2019, UOKiK was granted new powers with respect to preventing late payment chains. UOKiK may intervene if the sum of an entrepreneur's overdue payments exceeds PLN five million for three consecutive months. Starting in 2022, the sum will be reduced to PLN two million. UOKik may also impose a fine on such entrepreneurs. The fine amount depends on the value of unpaid or delayed payments and the period of delay.

European Union

A. EU Commission

1. White Paper on "Leveling the Playing Field" regarding foreign subsidies.

On June 17, 2020, the EU Commission published its *White Paper on levelling the playing field as regards foreign subsidies*. This policy paper proposes options for enabling the EU to control the use of foreign, non-EU subsidies that distort the EU Single Market and give subsidized firms an advantage over non-subsidized firms – for example, by facilitating the acquisition of EU businesses; by distorting the subsidized firm's investment decisions, market operations, or pricing policies; or by distorting bidding in public procurement.

If the proposals are adopted, following a consultation that ends Sept. 23, 2020, the EU Commission will put in place a regime that requires firms owned or backed by non-EU states to notify the EU supervisory authority (most likely the EU Commission) about the subsidies they receive from those states. The proposal would require firms to receive approval in advance of taking any steps that could distort the EU Single Market, in particular, by acquiring an EU firm, bidding in an EU procurement process, or applying for EU funding.

B. European Courts

1. Advocate General wants to set aside the General Court's annulment of fines for heat stabilizer cartel.

In a June 4, 2020, opinion, an EU advocate general (AG) stated that the EU General Court misapplied the theory of joint and several liability. The AG, therefore, opined that the European Commission's decision to fine three companies involved in a heat stabilizer cartel should not have been annulled.

2. The Court of Justice upholds decision of EU Commission on State aid.

On June 11, 2020, the EU Court of Justice upheld a decision of the EU Commission, in which the EU Commission concluded that health insurance bodies operating under Slovak State supervision do not fall within the rules of EU law on State aid. The EU Court of Justice, applying the principle of solidarity, has thereby reaffirmed its case law on the inapplicability of State aid rules to health insurance bodies

operating under State supervision within the context of a social security scheme that is pursuing a social objective.

China

In April 2020, the State Administration for Market Regulation (SAMR), China's anti-monopoly regulator, announced its acceptance of a merger control filing (Merger Filing) in relation to Shanghai Mingcha Zhegang Management Consulting Co., Ltd.'s proposed establishment of a joint venture with Huansheng Information Technology (Shanghai) Co., Ltd. (the Mingcha Transaction). This represents the first time a Merger Filing has been accepted by the Chinese regulator involving a variable entirest entity (VIE).

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. Under the VIE structure, a foreign "parent" company does not actually own any shares in its Chinese subsidiary, but rather controls the subsidiary through a series of contractual arrangements. The continued prevalence of the VIE structure has come under scrutiny, most recently in 2015 when the Chinese Ministry of Commerce released the draft Foreign Investment Law which, among other things, aimed to restrict the usage of the structure as a way to circumvent applicable foreign investment laws.

Prior to the Mingcha Transaction, and given the ambiguities involved with respect to the structure's legality, the SAMR had never officially accepted or cleared any Merger Filing in relation to transactions involving the VIE structure. As a result, many practitioners adopted the view that no Merger Filing was needed when one of the parties to the transaction involved the VIE structure (even though the monetary thresholds for a Merger Filing were met). Going forward, the SAMR may take a more proactive posture in reviewing mergers involving VIE-structured entities. Companies and practitioners should take note of this possibility and carefully assess whether a Merger Filing should be made.

Japan

A. Japan Fair Trade Commission (JFTC)

1. Examination of share acquisition in multinational joint venture.

The JFTC has been examining the impact of a share acquisition of a joint venture company (the Company), which was incorporated by Hyundai Heavy Industries Group and Korean Development Bank, from Daewoo Shipbuilding & Marine Engineering Co., Ltd. The JFTC determined that a more detailed examination of said share acquisition was necessary; therefore, the JFTC requested that the Company submit a report for more detail. In addition, the JFTC has decided to accept opinions from third parties regarding the impact of the said share acquisition. The Japanese government has filed a request to the World Trade Organization for a consultation with the Korean government regarding the excess public support provided from the Korean government to its shipbuilding industry. That consultation was held on March 31, 2020.

2. Examination of DIC Corporation's acquisition of BASF pigment entities.

The JFTC has been examining the impact of DIC Corporation's share acquisition from BASF Colors & Effects Japan Ltd. The JFTC determined that a more detailed examination of said share acquisition was necessary; therefore, the JFTC requested that DIC submit a report for more detail. In addition, the JFTC has decided to accept opinions from third parties regarding the impact of the said share acquisition.

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According to the JFTC news release, DIC Corporation is planning to acquire all issued shares of all companies under BASF SE that produce or sell pigment.

3. Upcoming guidelines for the revised Japanese Antimonopoly Act.

On June 25, 2020, the JFTC revealed the draft of procedural guidelines concerning the revised Japanese Antimonopoly Act (JAMA). The revised JAMA includes the introduction of attorney-client privilege regarding administrative investigation for Unreasonable Restraint of Trade (e.g., cartels). This privilege typically will apply to communications between a company and external lawyers. On the other hand, as a general rule, communications between a company and its in-house counsel are not covered by the privilege. The details of the terms and conditions concerning privilege will be set in the procedural guidelines.

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