

## GT Newsletter | Competition Currents | August 2020

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



### In this Issue:

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#### United States

##### A. Federal Trade Commission (FTC)

1. *Allimentation and CrossAmerica agree to \$3.5 million civil penalty.*

On July 6, 2020, retail fuel station and convenience store operator Allimentation Couche-Tard and its former affiliate CrossAmerica Partners **agreed** to pay a \$3.5 million civil penalty to settle FTC allegations that they violated a 2018 FTC consent order requiring that they divest, by June 2018, 10 retail fuel stations in Minnesota and Wisconsin. The FTC alleged that the parties had failed to divest the required fuel centers to FTC-approved buyers in six Minnesota and three Wisconsin divestiture markets; failed to maintain the viability and competitiveness of the Hibbing, Minnesota retail fuel station and failed to divest it as an ongoing business; failed to submit accurate regularly required compliance reports regarding their efforts to divest these fuel centers; and failed to submit accurate regularly required compliance reports regarding their efforts to maintain the viability of the Hibbing retail fuel station. The FTC's 2018 divestiture order settled its complaint that the parties' acquisition of 380 retail fuel stations from Holiday Companies was anticompetitive because it increased the risk of both unilateral and coordinated anticompetitive effects in 10 local retail fuel markets.

2. *Elanco Animal Health and Bayer Animal Health ordered to divest products.*

On July 15, 2020, the FTC **required** Elanco Animal Health and Bayer Animal Health, two global suppliers of animal products, to divest three animal health products to settle FTC charges that Elanco's proposed \$7.6 billion acquisition of Bayer would be likely to cause anticompetitive effects in those markets. The three impacted markets are low-dose prescription treatments for canine otitis externa; fast-acting oral treatments that kill fleas on dogs; and brand-name cattle pour-on insecticides. The FTC's complaint alleged that the acquisition would create a merger in the market for the first two products and that the third market would be highly concentrated because Elanco, the third largest competitor, would be acquiring Bayer, the market leader.

3. *Invidior, Inc. agrees to pay \$10 million fine to settle opioid antitrust charges.*

On July 26, 2020, Invidior, Inc. **agreed** to pay \$10 million to settle FTC charges that it violated antitrust laws through a deceptive scheme to thwart lower-priced generic competition with its branded opioid replacement therapy drug Suboxone. Among other things, the FTC's complaint alleged that in an effort to thwart emerging generic competition, Invidior filed a meritless citizen petition with the FDA reciting unsupported safety claims and requesting that the FDA reject any generic Suboxone tablet application. The proposed stipulated judgment also permanently enjoined similar such conduct in the future.

## **B. Department of Justice (DOJ)**

1. *Avanci's platform for licensing 5G communications technology to automotive industry.*

On July 28, 2020, the DOJ **issued** a Business Review Letter approving Avanci's proposed platform for licensing 5G cellular telecommunications technology for application in the automotive industry. The proposal provided for the licensing of cellular standard essential patents related to vehicle connectivity at fair, reasonable and nondiscriminatory (so-called "FRAND") rates for incorporation by automakers into connected vehicles. Under the DOJ Business Review Letter process, DOJ's review of the Avanci proposal resulted in a conclusion that DOJ would not challenge the proposed action under the antitrust laws based on the information set forth in the proposal, the competition safeguards incorporated in the proposal, and the input received by DOJ from a broad range of stakeholders, including automakers, automotive suppliers, and potential licensors.

2. *Alleged conspiracy to manipulate procurement process relating to strategic petroleum reserve.*

On July 2, 2020, in a one-count complaint, the DOJ **charged** Cajun Welding & Rentals, alleging that Cajun conspired to defraud the United States in violation of the Procurement Integrity Act. According to the complaint, Cajun conspired with unnamed co-conspirators by corrupting and impairing the government procurement process and by obtaining non-public pricing and cost information in order to secure subcontract awards in connection with the U.S. Department of Energy's operation of the U.S. Strategic Petroleum Reserve.

3. *Taro Pharmaceuticals agrees to \$205 million penalty for alleged collusion on generic drugs.*

On July 23, 2020, Taro Pharmaceuticals **agreed** to pay a \$205 million criminal penalty under a deferred prosecution agreement based on DOJ charges that Taro conspired with a competitor and its executives to fix prices, allocate customers, and rig bids for generic drugs. The alleged conspiracies involved the

marketing of generic drugs, from March 2013 through December 2015, for the prevention and control of seizures and to treat bipolar disorder, pain and arthritis, and various skin conditions.

### C. Litigation

1. *In re Capacitors Antitrust Litig. (III)*, N.D. Cal., No. 17-md-2801

On July 10, 2020, a class of direct purchasers received preliminary approval of a \$252 million settlement in the civil class actions against several defendants in the market for electrolytic and film capacitors market. The agreements call for payments of \$65 million by AVX Corp., \$62 million by KEMET Electronics Corp., \$45 million by Panasonic, \$28 million by Holy Stone Enterprise Co., and \$25 million by ELNA Co., as well as a seven-figure payment by Shinyei Technology Co., Shizuki Electric Co., and Taitso Corp. Panasonic also agreed to provide cooperation against certain non-settling defendants.

2. *In re: Cathode Ray Tube (CRT) Antitrust Litigation*, MDL No. 1917, in the U. S. District Court for the Northern District of California (Indirect Purchaser Claims)

On July 23, 2020, in a public decision, the Ninth Circuit set aside its stay prohibiting disbursement of a \$513 million settlement fund that resolves indirect purchasers claims by consumer and retailer classes related to defendant's alleged antitrust violations in the market for the sale of cathode ray tubes.

3. *In re Rail Freight Fuel Surcharge Antitrust Litig.*, No. 07-mc-489 (D.D.C.).

On July 28, 2020, the DOJ filed a statement of interest regarding the breadth of the possible antitrust exemptions set forth in the Staggers Act, a deregulatory statute that was enacted to give railroads flexibility in setting their own rates in exchange for antitrust immunity when they cooperate. The lawsuit alleges that the main rail carriers conspired on fuel charges billed to shippers. The carriers argued that the Staggers Act exempts discussion or agreement covering interline cargo trips. Plaintiffs argued that the Staggers Act allows the admission of interline rate discussions that might suggest a conspiracy, even if they only show parallel acts that could be legal.

The DOJ stated that both sides went too far. According to the DOJ, the statute places the burden on railroads to establish that a rate discussion would not violate antitrust laws, "which does not depend on whether the evidence is direct or circumstantial. Carriers cannot pluck discrete items of evidence from the record and argue, out of context, that the 'discussion or agreement'" is inadmissible "because the item does not independently prove an antitrust violation." The case is back before the district court as a multi-district litigation after the D.C. Circuit dismissed the certification of the class action last year.

4. *Food Lion LLC v. Dairy Farmers of Am. Inc.*, No. 20-cv-442 (M.D.N.C.).

On July 24, 2020, the United States District Court for the Middle District of North Carolina **denied** Dairy Farmers of America's motion to dismiss a suit challenging its acquisition of the bankrupt Dean Foods, the country's largest milk producer. Dairy Farmers of America previously received regulatory approval to acquire Dean Foods, but the acquisition was challenged by Food Lion, a regional supermarket chain in North Carolina, and by the Maryland and Virginia Milk Producers Cooperative Association. According to the suit, the purchase will give Dairy Farmers of America market power at two levels of the supply chain, permitting it to "wipe out any remaining pockets of competition." In allowing the suit to proceed, the court disregarded the failing firm defense, which could have shielded Dairy Farmers of America from liability given that the purchase was the only plausible method for rescuing a distressed business. The suit

seeks additional divestitures to reduce the impact on competition. A related suit is ongoing in Vermont federal court.

5. *Nat'l Football League v. Ninth Inning Inc.*, No. 19-1098 (U.S.).

On July 14, 2020, a group of sports bars filed their **response** opposing the National Football League (NFL) petition for certiorari, asking the Supreme Court to overturn the Ninth Circuit's ruling that allowed sports bars to challenge the NFL's Sunday Ticket, the league's out-of-market television broadcast package. The NFL raises two challenges to the Ninth Circuit's opinion. First, the NFL challenges the appellate court's analysis under the rule of reason, claiming that the plaintiff's complaint lacked sufficient facts to move ahead to fact discovery. The NFL's second point is that the bar owners are indirect purchasers, and lack standing to raise an antitrust challenge. The NFL argues that plaintiffs purchased Sunday Ticket from DirecTV and not from the NFL. The Ninth Circuit held that the agreement between the NFL and DirecTV was an overarching conspiracy, and therefore presented an exception to *Illinois Brick*. The NFL alleges that the Ninth Circuit's ruling exacerbates a split in the circuits on this issue. In their response, the sports bars dispute that such a split exists.

## Mexico

In July 2020, a Federal Circuit Court specialized in competition matters cancelled the Mexican Competition Commission's attempt to regulate Mexico City's Airport operation. The Court decided the dispute between the Mexican Competition Commission (COFECE, *Comisión Federal de Competencia Económica*) and the Federal Ministry of Communications, which has the authority to regulate the operation of Mexico City's airport. The decision favored the federal government, significantly reducing COFECE's authority in various matters.

In 2012, COFECE was granted the authority to define and regulate "essential facilities." There were high expectations as to the scope of this new superpower. In 2017, COFECE concluded that Mexico City's Airport (AICM, *Aeropuerto Internacional de la Ciudad de México*) engaged in several activities that created anticompetitive effects. AICM challenged COFECE's actions as unconstitutional. The court agreed, holding that COFECE's decision exceeded its material and authorized limits, and that it interfered with the federal government and its agencies' powers. The Circuit Court stated that the Mexican Constitution granted the President, the SCT, and the DGAC the power to enforce public policies and regulate and supervise aviation and airport industries, with respect to air traffic and slot allocation regulations, and indirectly limited COFECE's alleged authority to regulate essential facilities in many circumstances.

## The Netherlands

### A. Revised guidelines on sustainability agreements.

On July 9, 2020, the Netherlands Authority for Consumers and Markets (ACM) **opened a consultation** for revised guidelines on sustainability agreements. The consultation seeks to widen the scope of the statutory exemption from the cartel prohibition for those agreements aimed at achieving certain sustainability objectives, particularly environmental benefits. This should apply both with respect to the cartel prohibitions set forth in Section 6(1) of the Dutch Competition Act and Article 101(1) of the Treaty on the Functioning of the European Union (TFEU). The consultation period ends on September. 30, 2020.

## **B. Acquisition of Corendon by Sunweb requires further (phase 2) investigation.**

On July 13, 2020, the ACM **ruled** that further investigation is needed into the effects that the acquisition of Dutch tour operator Corendon by rival operator Sunweb will have on competition. Sunweb therefore cannot yet acquire Corendon. Sunweb and Corendon are both major providers of package tours to beach destinations on the Mediterranean coast, among other destinations. After the acquisition, few other package-tour providers would remain active in the Netherlands. The reduction in competition may lead to more expensive or lower-quality package tours for holiday-goers. In addition, the Sunweb/Corendon combination may become so large that other providers may have a harder time booking airplane seats for their package tours.

## **C. Public-transportation companies cleared to create mobility platform, but under strict conditions.**

On July 9, 2020, the ACM **held** that Dutch Railways NS and the municipal public-transportation companies in the three largest Dutch cities – Amsterdam (GVB); Rotterdam (RET); and the Hague (HTM) – are allowed to create a digital mobility platform to which they admit other market participants that offer mobility services to travelers. The ACM has attached strict conditions to its clearance of this collaboration. These conditions serve to ensure that access to the platform is guaranteed for mobility-service providers, that innovation is stimulated, and that a level playing field will remain in place.

Mobility services that help travelers plan, book, and pay for a trip from doorstep to destination are called ‘Mobility as a Service’ (MaaS). On their proprietary digital platforms, MaaS-providers combine different transportation services (such as train, bus, subway, car-sharing programs, and bike-sharing programs) as well as related services. According to ACM, the strict conditions that have been attached to the joint platform are sufficient to remove possible anticompetitive concerns. For example, NS, GVB, HTM, and RET have committed to offering other mobility providers and MaaS-providers access to the platform under equal conditions. In that context, they will not demand exclusivity. ACM will conduct a market study to take stock of the current situation regarding such access and integration for MaaS-providers (existing and potential ones): to which public-transportation services of other market participants do they currently have access, and under what conditions?

## **United Kingdom**

### **A. Litigation**

On July 3, 2020, the English High Court **granted** the Competition and Markets Authority’s (CMA) first application for a director disqualification order on competition law grounds. Michael Martin was a director of an estate agent firm that had agreed with five of its competitors on commission rates to be charged to residential customers. The Court ordered that Mr. Martin should be disqualified from being a director for seven years and ordered him to pay £100,000 in costs to the CMA. In previous cases, the CMA has accepted disqualification undertakings from directors of firms involved in cartel conduct, avoiding the need to apply to the court for an order. In this case, Mr. Martin challenged the CMA’s case, claiming that he was unaware of the cartel.

## **B. COVID-19: Andrew Tyrie on the impact of the COVID-19 crisis on competition policy.**

The CMA has published a [link to a paper](#) by its outgoing chairman, Andrew Tyrie, entitled *How should competition policy react to coronavirus?* The paper assesses the long- and short-term consequences of the COVID-19 pandemic for markets and competition.

Lord Tyrie's thesis is that the pandemic is likely to make the UK economy less competitive by increasing market concentration, the power of digital markets, and public distrust of markets, and that competition policy and the UK competition authorities have a crucial role to play in mitigating the resulting problems. In the short term, he argues, the CMA's function should be to protect consumers from exploitation by businesses and to ensure that enforcement does not obstruct necessary business cooperation. In the longer term, Lord Tyrie argues, the pandemic is likely to reshape the economy, causing lasting changes to consumer behaviour, businesses, supply chains, and the regulatory environment. He refers to a need for stronger merger control, control over inefficient bailouts, and close oversight and monitoring of changes in markets and consumer outcomes across the UK economy. He advocates a dispassionate approach to controlling the power of "Big Tech," protection of the vulnerable, and protection of domestic competition.

## **C. Competition and Markets Authority (CMA)**

### *1. Ophthalmology: price-fixing cartel settlement.*

On July 1, 2020, the CMA [announced](#) a decision finding that Spire Healthcare, a private health care provider, and seven consultant ophthalmologists breached the Chapter I prohibition of the Competition Act 1998 by illegally fixing the price of initial ophthalmology consultation fees for private self-paying patients. The addressees of the decision admitted breaching the prohibition – the consultant ophthalmologists by agreeing to fix the price of initial consultations and Spire Healthcare by instigating and facilitating the infringement. The CMA imposed a fine of £1.2 million on Spire Healthcare. Fines imposed on six of the consultants ranged from £642 to £3,859. One consultant benefited from immunity under the CMA's leniency policy. The fines include a 20% "settlement discount."

### *2. Pharmaceuticals: market-sharing settlement.*

On July 9, 2020, the CMA concluded a long-running antitrust investigation by issuing an infringement [decision](#), finding that various subsidiaries of Aspen Pharmacare, Amilco, and Tiofarma had breached the Chapter I prohibition and Article 101 TFEU by entering into a market-sharing agreement. According to the CMA's decision, the market-sharing agreement was aimed at ensuring that Aspen remained the sole supplier of fludrocortisone acetate tablets in the UK, a prescription-only drug mainly used to treat adrenal insufficiency (Addison's Disease). In return for staying out of the fludrocortisone market, Amilco received 30% of the increased prices charged by Aspen and Tiofarma was appointed as sole manufacturer of the drug for direct sale in the UK. According to the CMA, prices paid by the National Health Service (NHS) increased by up to 1,800% after the market-sharing agreement was carried out.

Taking account of settlement discounts, the CMA imposed fines of approximately £2.3 million on the infringing companies and accepted director disqualification undertakings from an Amilco director, preventing him from taking up a director role or being involved in the management of any company based in England, Scotland, or Wales for five years. In addition, the CMA announced that Aspen has now paid £8 million in compensation directly to the NHS, as it had agreed to do under the commitments.

### 3. *Price gouging: abuse of dominance.*

On June 18, 2020, the CMA **launched** four investigations under Chapter II of the Competition Act 1998 into four pharmacies and convenience stores, alleging that the firms were abusing a dominant market position by charging excessive and unfair prices for hand sanitizer during the COVID-19 crisis. The majority of these investigations were short-lived: on July 13, 2020, the CMA announced that it had **closed** three of the investigations. In one investigation the CMA found no grounds for action, concluding that the hand sanitizer price charged was not excessive under competition law. The CMA closed two other investigations based on its prioritization principles. The fourth investigation remains ongoing.

### 4. *Additional merger control thresholds in force.*

On July 21, 2020, the Enterprise Act 2002 (Share of Supply Test) Amendment Order 2020 and Enterprise Act 2002 (Turnover Test) Amendment Order 2020 entered into force. These **orders** amend sections 23 and 23A of the Enterprise Act 2002, thereby expanding the categories of transactions qualifying as “relevant merger situations” over which the CMA has jurisdiction as part of the UK’s voluntary merger control regime. The orders add three additional economic sectors – artificial intelligence, cryptographic authentication, and advanced materials – to the definition of “relevant enterprise.” As a result, lower jurisdictional thresholds apply to transactions in these sectors: the CMA can assert jurisdiction if the target’s UK turnover exceeds £1 million per annum or the target’s share of supply of sales or purchases in the UK exceeds 25% (no increment required).

These amendments mirror similar orders made in 2018 enacting lower jurisdictional thresholds for transactions involving targets active in the development or production of items for military or military and civilian use, quantum technology and computing hardware. Both the 2018 and 2020 orders allow UK government intervention on public interest grounds in transactions meeting the lower thresholds in the specified sectors. The UK Department for Business, Energy and Industrial Strategy (BEIS) has published updated guidance taking account of the addition of these three economic sectors.

### 5. *Merger review round-up.*

The CMA continues to have a strong merger pipeline. In July 2020, notable actions include the CMA’s announcements that:

- it has **referred** the anticipated acquisition by Outbrain, Inc. by Taboola.com Ltd to in-depth phase 2 investigation – the parties are active in the supply of content recommendation platform services to publishers in the UK;
- it is **considering undertakings** in lieu of reference to a phase 2 investigation of the anticipated acquisition by Stryker Corporation of Wright Medical Group N.V. – the phase 1 investigation concluded that the merger may be expected to result in a substantial lessening of competition in the supply of total ankle replacement prostheses products in the UK;
- it is **considering undertakings** in lieu of reference to a phase 2 investigation of the completed acquisition by ION Investment Group Limited of Broadway Technology Holdings LLC – the parties provide trading systems to financial organizations which allow the trading of foreign exchange and fixed income securities; and
- its **provisional findings** in its phase 2 investigation into the completed acquisition by Hunter Douglas N.V. of 247 Home Furnishings Ltd – the CMA has provisionally concluded the merger is likely to result

in a substantial lessening of competition in the market for UK online retail supply of made to measure blinds.

## Poland

### **A. Fines for Idea Bank from the Polish Competition Authority for mis-selling investment products.**

On July 16, 2020, the Polish Competition and Consumers Protection Authority (UOKiK) issued four decisions against Idea Bank, imposing fines totaling to over PLN 17.2 million on the bank and ordering the bank to pay PLN 38,000 in compensation to each consumer who purchased investment certificates issued by Lartiq. Three of these decisions concern the violation of consumer rights in offering complex financial products: investment certificates, structured deposits, and unit-linked life insurance plans. The fourth decision relates to applying abusive clauses in model agreements.

UOKiK found that the bank was providing consumers with incorrect information about unit-linked life insurance plans with funds engaged in the Non-Standard Closed-End Securitization Fund. The company did not fulfill its disclosure obligation towards consumers with respect to the risk associated with the investments, while the risk of the investment was relatively high. The last of the decisions concerns the offering of structured investment deposits by Idea Bank. The bank is also obliged to post information about the decision of the UOKiK on its website. None of these decisions are yet final. Idea Bank may still appeal them. Once the decisions of the President of UOKiK become legally binding, they will have the status of a prejudicial ruling.

### **B. UOKiK further proceedings in the agri-food sector.**

In July 2020, UOKiK concluded its inquiry into the biggest companies in the agri-food market; the inquiry was conducted under the Act on Contractual Advantage. UOKiK thoroughly analyzed the terms and conditions of agreements concluded between the retail chains, food producers and their suppliers, the terms of trade and pricing policy, as well as the mutual settlements. As a result, UOKiK initiated proceedings against the commercial retail chains: Auchan Polska, Eurocash, Makro Cash, and Carry Polska, SCA Intermarche – i.e., the entities that have not remedied the identified irregularities and have not settled payments to their suppliers. They have been accused by UOKiK of unfair abuse of contractual advantage. The maximum financial penalty is 3% of the annual turnover for each identified instance of such practices.

## Italy

### **A. ICA investigation on the boycott of free open-air cinemas.**

The Italian Competition Authority (ICA) recently opened an investigation into the national association of the cinema and audiovisual industry (ANICA), which represents movie distributors, and the national association of the undertakings who manage cinemas (ANEC), in relation to alleged anticompetitive agreements in breach of Articles 101 TFEU and 2 of Italian law on competition (Law 287/1990). The investigation was opened following complaints from undertakings and associations who organize free open-air film screenings during the summer. The complainants contend that, since Summer 2018, ANICA and ANEC engaged in a collective boycott by denying or limiting access to movies. In particular, the investigation has shown that the movie distributors association issued guidelines and recommendations to its members which limited the licensing of movies to free open-air cinemas.



On July 8, 2020, the ICA considered that such decisions were prima facie qualified as restrictions of competition under Article 101 TFEU and 2 of the Italian law on competition and imposed interim measures on ANICA and ANEC, ordering the immediate revocation of any communications on commercialization strategy.

### **B. ICA's conditional approval of the merger between Intesa San Paolo and UBI Banca.**

On February 17, 2020, Italy's largest bank, Intesa San Paolo (ISP), launched a voluntary public purchase and exchange offer on all ordinary shares of UBI Banca (UBI), the fourth largest banking operator in Italy in terms of volumes handled. On May 12, 2020, the ICA **opened** an in-depth investigation, stressing that the proposed transaction could lead to the creation or strengthening of ISP's dominant position in several local retail banking markets for current accounts, loans to consumers and small enterprises. Further competition concerns were identified in relation to other markets, such as those concerning the management of assets and funds and the distribution of life insurance products.

The first set of remedies offered by ISP – contemplating the divestiture of 400 to 500 branches to Banca Popolare dell'Emilia Romagna (BPER) – was rejected by the ICA on grounds that, among others, the remedy package was not sufficiently clear-cut and, in any case, not suitable to remove the competition concerns identified in several regional markets. On July 16, 2020, the ICA conditionally **authorized** the transaction on the basis of a revised divestiture package, which included a higher number of branches (over 500), most of which could be acquired by BPER. The public purchase and exchange offer process is ongoing.

### **C. ICA's report on removing obstacles to the development of ultra-wide bands.**

On July 1, 2020, the ICA issued a report to several Italian authorities (i.e., the Government, the Italian Parliament, the Italian Communication Authority, and the Italian Association of Municipalities) on the development of ultra-wideband fixed and mobile infrastructure, aimed at highlighting several obstacles to its development, installation, and operation addressed. In summary, the ICA suggests reducing the administrative burdens and barriers to entry through interventions on the authorization procedures and restrictions to subcontracting. Moreover, the ICA encourages providing tools to support demand – through vouchers and electronic devices for less well-off families – pursuing the objectives of social inclusion and education in the digital world. Finally, the ICA suggests amending contract law in order to prevent operators from claiming unjustified fees in the event of an early withdrawal, e.g., to excessively restrict a customer's ability to change operator.

## **European Union**

### **A. European Court of Justice (ECJ)**

#### *1. EU-US data protection shield invalidated.*

In its July 16, 2020, **judgment** in *Data Protection Commissioner v Facebook Ireland and Maximillian Schrems* (Case C-311/18), the ECJ invalidated Decision 2016/1250 on the adequacy of the protection provided by the EU-US Data Protection Shield. However, it found that Commission Decision 2010/87 on standard contractual clauses for the transfer of personal data to processors established in third countries is valid. The General Data Protection Regulation (GDPR) provides that the transfer of such data to a third country may, in principle, take place only if the third country in question ensures an adequate level of data protection. According to the GDPR, the Commission may find that a third country ensures, by reason of its domestic law or its international commitments, an adequate level of protection. In the absence of an

adequacy decision, such transfer may take place only if the personal data exporter established in the EU has provided appropriate safeguards, which may arise, in particular, from standard data protection clauses adopted by the Commission, and if data subjects have enforceable rights and effective legal remedies. Furthermore, the GDPR details the conditions under which such a transfer may take place in the absence of an adequacy decision or appropriate safeguards.

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

In July 2020, the Advocate General issued an **opinion** arguing in favor of a more open interpretation of the criteria of direct concern in *Région de Bruxelles-Capitale v. Commission Advocate General Bobek* (Case C-352/19 P). The opinion considers that, by denying standing to the Brussels Capital Region concerning the approval of the active substance glyphosate, the General Court erred in law. On March 8, 2018, the Brussels Capital Region brought an action for annulment of Commission Implementing Regulation (EU) 2017/23241 renewing the approval of the active substance glyphosate before the General Court. By the order under appeal, the General Court declared the action inadmissible on the ground of lack of standing to bring proceedings. More specifically, the General Court held that the Brussels Capital Region was not directly affected by the contested regulation. In its appeal, the Brussels Capital Region asked the EJC to set aside the order under appeal, declare the action for annulment admissible, and refer the case back to the General Court. In his opinion, Advocate General Michal Bobek finds that by denying standing to the Brussels Capital Region, the General Court erred in law, misinterpreting the fourth paragraph of article 263 TFEU, as well as a number of provisions of applicable secondary law.

## **B. EU Commission**

1. *Internet of things.*

On July 16, 2020 the EU Commission **launched** an antitrust competition inquiry into the Internet of Things. The inquiry will focus on consumer products and services that connect to a network, including voice assistants, mobile devices, smart home appliances, and wearables. As part of the inquiry, so-called information requests will be sent out to a wide range of players in the sector. This inquiry could result in both (i) investigations into potential breaches of competition law uncovered by the inquiry, as well as (ii) providing information for the Commission's proposals for the specific regulation of platforms as a part of the Commission's wider and ongoing focus on digital markets and the impact of big data on competition in consumer markets.

2. *Confidentiality of business secrets in private enforcement.*

On July 22, 2020, the EU Commission published its **notice** on the communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law in the Official Journal of the European Union (2020/C 242/01). In the notice, the Commission provides the national courts of the Member States with guidance on how to treat requests for the disclosure of evidence containing business secrets.

3. *State Aid.*

As of July 27, 2020, the EU Commission has authorized the adoption of 217 state aid measures since the beginning of the COVID-19 pandemic, with a view to enable Member States to directly support their economies against the collateral effects of the outbreak. In detail: 185 measures have been adopted under the State Aid Temporary Framework, aimed at supporting otherwise viable companies that have entered into financial difficulty as a result of the pandemic; 21 measures have been adopted under Article 107(2)b

TFEU, in order to provide companies with adequate compensation for damages suffered because of the outbreak; 10 measures have been adopted under Article 107(3)b TFEU, with a view to address more generally the economic downturn deriving from the COVID-19 crisis. A single aid was granted under Article 107(3)c TFEU (i.e., aid to facilitate the development of certain economic activities or of certain economic areas) for the benefit of the major network airline operating in Portugal (TAP Air Portugal), which was not eligible to receive support under the State aid Temporary Framework.

#### 4. *EU Commission conditionally clears acquisition of Lotos by PKN Orlen.*

On July 14, 2020, the EU Commission **approved** the acquisition of Grupa Lotos by PKN Orlen. The approval is conditioned on full compliance with a commitments package offered by PKN Orlen.

The EU Commission's conditional clearance to the merger of PKN Orlen with Grupa Lotos is one of the most important events for the Polish energy sector this year, as well as the largest merger of Polish companies. PKN ORLEN is the largest company in Poland and a leader in the fuel and energy market in the Central and Eastern Europe and the owner of one of the two Polish refineries (it also owns refineries in Lithuania and the Czech Republic). It operates on the wholesale and retail market of refined oil products in Poland, Austria, Czech Republic, Estonia, Latvia, Lithuania, Germany and Slovakia. The other refinery in Poland is owned by Lotos. It operates mainly in Poland, but also in the Czech Republic, Estonia, Latvia, Lithuania and Slovakia.

Despite its initial serious competition concerns expressed in the Statement of Objection, the Commission after a one-year in-depth investigation found that a combination of divestitures and other commitments would enable the purchasers and other competitors to compete effectively with the merged entity in the relevant markets in Poland. The most important conditions of the EU Commission require PKN ORLEN to sell 30% of shares of the Lotos refinery, and also require PKN ORLEN to reserve for the purchaser approximately 50% of the refinery production capacity in diesel and gasoline, as well as access to 389 retail stations in Poland, constituting about 80% of the Lotos network. Interestingly, each of the parties currently is controlled by the Polish state. Ultimately, if the remedies are implemented, a significant portion of the Lotos assets would need to be sold to an independent investor.

## China

In January 2020, China's State Administration of Market Regulation (SAMR), the Chinese governmental authority for regulating market competition, invited public opinion on the Draft Amendment to the Anti-Monopoly Law (the Draft). Solicitation of public comment concluded on Jan. 31, and the Draft is currently undergoing assessment by the State Council and the National People's Congress. While no fixed date for the formal adoption of the Draft has been announced, commentators have indicated that the Draft may be enacted in 2021.

The Draft represents the first time that major changes to the current Chinese Anti-Monopoly Law (AML), which has been in effect since 2008, have been proposed. At present, no fixed timetable regarding the adoption of Draft has been announced.

The Draft proposes notable changes to the existing AML. These include: (1) adding a definition of "control" in merger reviews; (2) delegation of merger control revenue thresholds to the SAMR; (3) prohibition on companies aiding or abetting others to engage in a monopoly agreement; (4) special considerations for the internet industry in determining market dominance; and (5) significant increases in maximum fines for antitrust violations, with the maximum fine for monopoly agreements increased to

up to 10% of the company's revenue in the previous year, or where the entity involved had no revenue in the previous year, a fine of up to RMB 50 million (approximately USD 7 million).

## Japan

### A. JFCT releases details of merger and acquisition reviews.

On July 22, 2020, the Japan Fair Trade Commission (JFTC) released the details of its merger and acquisition reviews conducted in the fiscal year 2020 (from April 2019 to March 2020). The JFTC received notifications for 310 mergers in the 2020 fiscal year. The JFTC has also published the details of examination of 10 major merger cases which may contribute to the reference of companies planning business combinations.

### B. Cease and desist letter issued to uniform makers.

On July 11, 2020, the JFTC issued a cease-and-desist order to local uniform makers for violation of Article 3 of the Antimonopoly Act (AMA) in a bid-rigging case tied to the supply of police uniforms to Yamagata Prefecture. One of the makers received a penalty of JPY 1.41 million (approximately USD 13,000). The makers had been colluding to decide on the winners of the supply contracts, as well as colluding on bid prices, since April 1, 2015. No administrative order was issued against one maker, and no penalty was imposed on the other maker, as the two makers sought leniency. Additionally, the JFTC has urged Yamagata Prefecture to improve its system of procuring uniforms for police officers.

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