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

In this Issue:

United States

A. Federal Trade Commission (FTC).

1. *Final order on Tri Star Energy, LLC's acquisition of Hollingsworth Oil by divesting gas stations in Tennessee.*

On Aug. 12, 2020, the FTC approved a final order settling its complaint that Tri Star Energy, LLC's proposed acquisition of certain assets affiliated with Hollingsworth Oil Company, Inc. would violate federal antitrust law. Both Tri Star and Hollingsworth operate fuel and convenience stores in Tennessee. The FTC's complaint alleged that the proposed acquisition would harm competition for retail gasoline and diesel in two local Tennessee markets, and would result in a merger to monopoly. Under the terms of the settlement, Tri Star agreed to divest retail fuel assets in Whites Creek and Greenbrier, Tennessee, to Cox Oil Company, Inc. within 10 days after completing its acquisition of Hollingsworth. Tri Star also agreed to maintain the competitiveness of those divestiture assets pending the completion of the ordered divestiture sale.

2. *Arko Holdings settles acquisition of Empire Petroleum by divesting gas stations in Indiana, Michigan, Maryland, and Texas*.

On Aug. 25, 2020, Arko Holdings Ltd. and Empire Petroleum Partners, LLC agreed to divest retail gasoline and diesel fuel operations in four states to settle FTC charges that Arko's acquisition of Empire would violate federal antitrust law. The FTC's complaint alleged that the acquisition would harm competition in seven local markets in Indiana, Michigan, Maryland, and Texas for the retail sale of gasoline and in three local markets for the retail sale of diesel fuel, resulting in three or fewer competitors in all of these local markets. Under the settlement, Arko and Empire are required to divest operations in these markets to an independent competitor within 20 days after Arko's acquisition of Empire and to provide transitional services to the divestiture buyers for up to 15 months after divesting these operations.

3. *Final approval of Eldorado Resorts' $17.3 billion acquisition of Caesars Entertainment*.

On Aug. 26, 2020, the FTC gave final approval to its previously announced settlement approving Eldorado Resorts, Inc.'s $17.3 billion acquisition of Caesars Entertainment Corporation; the order requires the parties to divest casino-related assets to Twin River Worldwide Holdings, Inc. in the South Lake Tahoe area of Nevada and the Bossier City-Shreveport area of Louisiana. The FTC's previously announced settlement was discussed in the July 2020 Competition Currents newsletter.

B. Department of Justice (DOJ).

1. *Alleged conspiracy to avoid competition in central Pennsylvania hospitals*.

On Aug. 5, 2020, the DOJ filed suit challenging Geisinger Health's partial acquisition of Evangelical Community Hospital. Geisinger, a large hospital system in central and northeastern Pennsylvania, closely competes with Evangelical, an independent community hospital in Lewisburg, Pennsylvania, for acute-care hospital services for many patients. In a six-county area in central Pennsylvania, Evangelical and Geisinger's two hospitals together account for approximately 71% of the market. The complaint alleges that in February 2019, the parties, recognizing that their merger would violate antitrust laws, entered into a partial acquisition agreement whereby the two hospitals would have significant commercial and competitive coordination and entanglements, which would have the effect of significantly reducing their incentives to compete against one another, substantially lessening competition and unreasonably restraining trade in the market for inpatient hospital services in central Pennsylvania.

2. *Court approves termination of 70-year-old order regarding distribution of films to movie theaters*.

On Aug. 7, 2020, a federal court in the Southern District of New York approved the DOJ's motion to terminate the Paramount Consent Decrees, which for more than 70 years regulated how certain movie studios distributed films to movie theaters. In its motion, DOJ argued that the conspiracies and anticompetitive practices that existed at the time of the DOJ's 1938 film industry litigation no longer exist and that new technology has created many different movie platforms that did not exist at that time, such as cable and broadcast television, DVDs, and steaming and download services. Among other things, the Paramount Consent Decrees had required movie studios to separate their distribution operations from their exhibition operations and also banned various motion picture distribution practices such as block booking, circuit dealing, resale price maintenance, and granting exclusive film licenses for specific geographic areas. The court terminated the decrees effective Aug. 7, with the exception of a two-year sunset period for block booking and circuit dealing in order to permit an orderly commercial transition period for those practices.

3. *DOJ settles CenturyLink's alleged violation of divestiture order from 2018 acquisition*.

On Aug. 14, 2020, the DOJ and CenturyLink, Inc. settled allegations that CenturyLink had violated a court ordered judgment designed to prevent anticompetitive effects arising from its 2018 acquisition of Level 3 Communications, Inc. The DOJ had alleged that CenturyLink, one of the largest wireline telecommunications providers in the United States, violated the terms of that judgment by soliciting former Level 3 customers who had elected to switch their accounts to a DOJ-approved divestiture buyer. That divestiture had been previously ordered to replace competition lost as a result of CenturyLink's acquisition of Level 3. The settlement amends the previously entered 2018 judgment against CenturyLink by extending the non-solicitation period in the Boise Metropolitan Statistical Area (MSA) by two years, appointing an independent monitoring trustee, and requiring CenturyLink to reimburse DOJ for the costs associated with DOJ's investigation of the CenturyLink order violations.

4. *Vortex Commercial Flooring pleads guilty, pays $1.4 million fine, in ongoing investigation into nationwide bid-rigging for commercial flooring services and products*.

On Aug. 27, 2020, the DOJ charged Vortex Commercial Flooring Inc., a Chicago-area commercial flooring contractor, for its role in a long-running antitrust conspiracy to rig bids and fix prices for commercial flooring services and products sold in the United States. Vortex agreed to plead guilty and pay at least $1.4 million in fines and restitution and to cooperate in the ongoing DOJ investigation. According to the one-count complaint, Vortex and its previously charged executives engaged in a conspiracy to suppress and eliminate competition in the commercial flooring market by agreeing with other individuals and companies to submit complementary bids so that the designated company would win the contract.

C. U.S. Litigation.

1. *Humana Inc. v. Mallinckrodt ARD, LLC*, Case No. 2:19-cv-06926 (C.D. Cal. Aug. 14, 2020).

On Aug. 14, 2020, the district court in the Central District of California, while denying Mallinckrodt's motion to dismiss, allowed Humana to amend its complaint. Humana alleged that Mallinckrodt engaged in a scheme to keep its drug off the market and maintain a monopoly for its infant spasm drug Acthar. It also alleged that Mallinckrodt bribed physicians to prescribe its drug and engaged in conduct it alleged constituted a kickback.

2. *In re Glumetza Antitrust Lit.*, Case No. C-19-05822 (N.D. Cal. Aug. 15, 2020).

On Aug. 15, 2020, the court certified a direct purchaser class in a series of consolidated cases. The cases arise from an alleged reverse-payment settlement of a patent infringement suit between manufacturers and marketers of the diabetes drug Glumetza in 2012. In that settlement, Lupin Ltd, which had developed a generic version of Glumetza, a drug to treat Type II diabetes, was granted a license to begin selling its generic Glumetza starting in 2016 – four years prior to patent expiry. As part of its settlement of its claims against Lupin, plaintiffs allege that the brand-named manufacturer agreed not to launch its own authorized generic version of Glumetza until six months after Lupin entered the market. Plaintiffs claim that as a result of the agreement, the price of Glumetza increased from $5.72 a pill to $51 a pill. Direct purchasers of the pills filed a putative class action.

3. *Mish Int'l Monetary Inc., v. Vega Capital London, Ltd.*, Case No. 1:20-cv-04577 (N.D. Ill. Aug. 4, 2020).

On Aug. 4, 2020, crude oil trader Mish International filed a federal class action suit against Vega Capital in the Northern District of Illinois related to Vega's alleged price manipulation during the period in April 2020 when West Texas oil futures contracts were driven negative for the first time in history. According to the suit, Vega made a $500 million profit by manipulating the market, along with others, to drive prices negative after it had improperly pre-gamed the market in order to reap massive profits from a negative futures price. According to the complaint, at least a dozen traders associated with Vega Capital worked together to aggressively sell May 2020 futures contracts and other related instruments for the purpose of depressing the price (including the settlement price) of the May 2020 WTI futures contract. This is the most recent of several filings related to the unprecedented negative prices of the West Texas Crude futures contracts.

4. *Trone Health Servs., Inc. v. Express Scripts Holding Co.*, _____ F.3d _____, 2020 WL 5268511 (8th Cir. Sept. 4, 2020).

Express Scripts Holding Co. defeated a lawsuit by a group of retail pharmacies that accused the company of attempting to monopolize a portion of the pharmacy market by unlawfully using their customer information to steal their customers. The pharmacies, including Trone Health Services Inc. and Reddish Pharmacy Inc., failed to plausibly allege claims for breach of contract, misappropriation of trade secrets, and attempted monopolization based on Express Scripts' practice of automatically enrolling their customers in its mail-order pharmacy service, the Eighth Circuit said. According to the court, plaintiffs failed to establish that Express Scripts did not have permission to use customer information to contact customers directly, nor did plaintiffs properly define the relevant market; market definition is integral to a plaintiff proving a monopolization claim.

The Netherlands

On Aug. 18, 2020, the Dutch Trade and Industry Appeals Tribunal (*College van Beroep voor het bedrijfsleven*) reduced a fine imposed by the Dutch Authority for Consumers & Markets (ACM) by 99%. The fine, imposed on an undertaking, was initially EUR 1 million, but was reduced to EUR 10,000. ACM asked the Tribunal to reduce the fine due to special circumstances, including the COVID-19 outbreak and its consequences for the undertaking. The undertaking had been waiting for a final verdict for some time, and the final verdict could have driven the undertaking into bankruptcy.

The ACM decided in 2017 that three companies made secret, prohibited pricing agreements to restrict competition and, consequently, a fine was imposed. The Rotterdam court upheld ACM's decision but lowered the fine to EUR 1 million in 2018 in a court decision, which has not been published yet. The undertaking is trying to block publication of the enforcement decisions. As a result of this Tribunal verdict, ACM will have to pay back EUR 990,000 to the undertaking, as the fine was apparently already paid. In exchange for lowering of the fine, the undertaking renounced its grounds for appeal. This means that the competition law infringement is now final, and third parties could initiate civil damage claims. This case could have consequences for other fines, including possible reductions.

United Kingdom

A. UK Competition and Markets Authority (CMA).

1. Antitrust Investigations.

On Aug. 21, 2020, the CMA closed its investigation into breaches of competition law by various parties in the entertainment and recreation services sector. The investigation, which started in August 2019, concerned suspected anticompetitive agreements and abuse of market dominance involving unnamed parties. The CMA cited administrative priorities as its reason for closing the case.

2. Merger Control.

a. Fintech.

On Aug. 24, 2020, the CMA cleared the $5.3 billion acquisition by Visa of Plaid, a startup platform provider focusing on infrastructure enabling interconnectivity between digital apps and individuals' bank accounts. In the UK, Plaid provides payment initiation services (PIS) that enable consumers to make direct payments using links from a merchant's app or website rather than paying online using a credit or debit card. The CMA's phase 1 clearance decision found that Plaid would have presented increasing competition to Visa in this new but growing area in the future, but that the existence of several other equally strong PIS providers in the UK market will ensure sufficient competition to Visa after the merger. The CMA also decided that although Visa had a strong position in card-based payments, there were other card-based payment providers, so Plaid's competitors would have a number of other opportunities to provide PIS services.

b. CMA coordination with other regulations assessing same deal.

On Aug. 21, 2020, the CMA issued a notice extending its deadline for deciding whether to accept remedies at phase 1 in order to clear Stryker's acquisition of Wright Medical, one of Stryker's competitors in the supply of ankle replacement devices. This notice extended CMA's deadline by almost two months. The purpose of the extension is to enable the CMA to align the timing of its decision with the decisions to be issued by regulators in other jurisdictions who are also assessing this acquisition.

c. Appeal against merger fine.

The UK Competition Appeal Tribunal (CAT) has given JD Sports Fashion (JD) until Sept. 1, 2020, to submit an appeal against a £300,000 penalty imposed on JD by the CMA for breach of a "hold-separate" order relating to JD's acquisition of competing sports footwear retailer Footasylum in 2019. As is permitted in the UK merger regime, JD did not obtain clearance in advance of the acquisition, but the CMA exercised its right to intervene post-acquisition and imposed an order requiring JD not to integrate Footasylum into JD or direct its operations unless and until the CMA issued a clearance decision. The penalty was imposed after Footasylum announced closure of one of its stores without being able to demonstrate that the decision had been made independently of JD. The CAT specified the Sept. 1 deadline after a dispute between the CMA and JD regarding the date of the penalty decision — important, as there is a 28-day deadline for appeal. The CAT found that the unsigned decision provided by the CMA to JD on July 29, 2020, was not the final decision, so that the deadline was not Aug. 25, but Sept. 1: i.e., 28 days from formal notification. JD's completed acquisition of Footasylum was blocked by the CMA in May 2020 following a phase 2 review. This decision is also under appeal to the CAT.

3. *Market Investigations.*

On Aug. 13, 2020, the CMA published provisional findings and proposed remedies following its market investigation of funeral services in the UK, started on March 28, 2019. The CMA has the power to conduct this type of investigation and impose a wide range of remedies where it has concerns that a market is not working well — there is no need for suspected competition law infringement. The CMA's provisional findings are that there is a low level of customer engagement in the market, caused by the challenging circumstances in which funeral services are purchased. In addition, information provided by funeral directors, including prices and quality of service, is not easily accessible, nor clearly comparable. Further findings are that there is no visibility to customers in relation to the quality of care of the deceased by funeral directors, there are high barriers to entry in the supply of crematorium services, and local crematoria are concentrated in the hands of few firms. The CMA has proposed a number of remedies for funeral directors and crematorium operators relating to transparency of pricing, service content, and ownership.

However, the CMA has concluded that, notwithstanding the need for reform of the sector, these remedies cannot be safely introduced in the current national emergency. It refers to the COVID-19 pandemic as having created "insurmountable obstacles" to designing and implementing suitable reforms, with the substantial increase in demand for funerals making it difficult to obtain information required for the investigation, and government restrictions on the type of funeral service permitted hampering testing of the proposed remedies and forecasting of future revenues. As the CMA has no power to suspend or extend the investigation, it proposes a supplementary investigation when conditions are more stable. In the meantime, the CMA proposes two measures: (i) CMA monitoring of the sector, based on key financial data which funeral directors and crematorium operators will be required to provide on a quarterly basis and (ii) an obligation on funeral directors and crematorium operators to provide customers with information, including prices, on the services and packages they offer.

4. *New developments and proposals.*

a. CMA antitrust investigations procedure.

On Aug. 5, 2020, the CMA published draft revised guidance to its investigation procedures. Key changes relate to increased transparency when the CMA opens a case and the provision of information on proposed penalties at the same time as the CMA issues its statement of objections setting out the case against the firms under investigation. The draft also clarifies the processes for disclosure of certain types of evidence, the process for settlement, and the scope of the Procedural Officer's role. The draft remains open for consultation until Sept. 10, 2020 and could be finalized shortly after that.

b. Cancellations and refunds as a result of COVID-19.

On Aug. 28, 2020, the CMA issued a further publication confirming its view that consumers generally will be entitled to a refund when they have paid money in advance for services or goods that cannot be provided due to the pandemic. The publication addresses two different scenarios: lockdown laws and government guidance.

- Where contracts cannot be performed because of lockdown laws — for example, health protection regulations — the CMA expects customers to be offered a full refund. Where contracts are only partially affected by lockdown laws, customers may be entitled to a refund or price reduction depending on the circumstances and scale of the impact.

- Whether consumers are entitled to a refund because of government guidance depends on the specific circumstances. There are specific protections in place where package holidays in a particular destination are cancelled in light of government advice against travel to that destination. Where government advice does not necessarily mean that a contract cannot be performed, however, consumers may not be entitled to a full refund; where this is the case, businesses should treat their customers fairly and responsibly, including trying to find a mutually acceptable solution.

c. Package holidays and group travel.

One issue the CMA has addressed recently is some package travel organizers' rejections of claims for refunds from groups, on the basis that only individual travelers are entitled to make refund claims. In letters to individual companies, the CMA has made clear its view that the Package Travel Regulations cover both group and individual travel packages.

B. Litigation.

On Aug. 20, 2020, the English High Court issued an interim injunction against UK mail delivery incumbent Royal Mail Group (RMG). The injunction was awarded in proceedings brought against RMG by Preventx, which provides remote diagnostic testing services, partner notification, and onward clinical referral services for sexually transmitted infections (STIs). Preventx had arranged with RMG for Preventx customers to send their samples to Preventx for testing, using RMG's Freepost service, which allowed customers to put their samples in a prepaid package and post it using any available postbox. According to the case report, in February 2020, RMG informed Preventx that the samples were classed as dangerous and that RMG terms and conditions required them to be sent using a much more expensive, tracked, mailing service, with the customer's name and address and the word "Tracked" on the label.

Preventx claimed that these were unfair trading conditions: the requirement to use the word "tracked" on the label could deter customers from using its service on the basis that it might not be confidential, and the steep increase in postage costs, together with the short notice given to it, could result in samples being destroyed. It argued that this was an abuse of RMG's dominant position in the market for untracked, outbound/return postal services for STI test kits and samples. The High Court found that this was a serious question to be tried in a full hearing. It further found that implementation of RMG's demands in the meantime could cause harm to Preventx's reputation and customer confidence in it, and that damages would be an insufficient remedy. Consequently, it ordered RMG to refrain until trial from refusing to continue providing the Freepost service to Preventx.

C. Brexit.

The UK formally left the EU on Dec. 31, 2019. EU law continues to apply in the UK during the transitional period agreed with the EU in the Withdrawal Agreement. This transitional period ends on Dec. 31, 2020; at that point the UK competition law system will operate independently of the EU system. This means that the UK will have separate jurisdiction to review large mergers that also qualify for EU review, and that the UK can investigate infringements of competition law in parallel with the EU. The UK government has allocated additional funds to the CMA and other competition regulators to provide for an increased case load. It has not, however, taken any public steps to implement proposals for reform of the UK competition regime, put forward by the CMA in early 2019. It appears unlikely that, if these proposals were to be progressed, they would take effect from Jan. 1, 2021.

Poland

A. The President of UOKiK imposes a fine of PLN 115 million (approx. EUR 27 million) on the Biedronka chain of stores.

On Aug. 5, 2020, the Office of Competition and Consumer Protection (UOKiK) imposed a fine of PLN 115 million (USD 30 million) on Jeronimo Martins Polska, owner of the well-known Biedronka chain of grocery stores in Poland, for violating consumer rights. UOKiK questioned the practice of presenting different prices on the shelf to those at the checkout, or not displaying prices on the shelf at all. Such practice had been used by Biedronka for several years.

UOKiK's intervention resulted from numerous consumer complaints as well as information provided by Province Trade Inspection Authorities about irregularities concerning price discrepancies in shops belonging to the Biedronka chain. In addition to the fine, shops in the Biedronka chain must inform consumers of their rights in the event of discrepancies between the price of goods displayed on the shelf and those at checkout. The decision is not final and can still be appealed to the Court of Competition and Consumer Protection.

B. President of UOKiK imposes record-breaking fine of PLN 213 million (approx. EUR 50 million) on Russian gas giant Gazprom.

On July 29, 2020, UOKiK imposed a fine of almost PLN 213 million (USD 57 million) on Gazprom for failure to cooperate in proceedings aimed at investigating whether the financing arrangements for the construction of the Nord Stream 2 project (a 1,220 km-long gas pipeline from Russian coast through the Baltic Sea to Germany) between Gazprom and its European partners were concluded in breach of Polish merger control rules – i.e., without the antimonopoly consent from UOKiK. The proceedings were initiated against Gazprom (Russia); Engie Energy (France); Uniper (German); Wintershall (Germany); OMV (Austrian); and Anglo-Dutch Shell (Austrian).

Several times in the course of the proceedings, the president of UOKiK requested Gazprom to submit its agreements with the remaining participants in the joint venture regarding gaseous fuel transmission, distribution, sale, supply, and storage. The documents, however, never reached UOKiK. The president of UOKiK found that Gazprom had not even applied for consent to the relevant Ministry in Russia in order to satisfy UOKiK's request. This was considered, in UOKiK's view, to be an intentional action. The fine for the obstruction reached the maximum level under Polish law, i.e., equivalent of EUR 50 million.

Gazprom is the second company to be fined by UOKiK for failure to cooperate in this case – in 2019, a fine of PLN 172 million (USD 45 million) was imposed on another participant, Engie Energy.

Italy

A. ICA's investigation into alleged abuse of dominant position in the maritime transportation market in the Strait of Messina.

On Aug. 4, 2020, the Italian Competition Authority (ICA) opened an investigation into Caronte & Tourist S.p.A., which carries out ferrying activities across the Strait of Messina. The investigation will ascertain if Caronte – the dominant operator in the Strait of Messina in the "maritime transport of passengers with rubberized means of transport and commercial means of transport with driver" market and that is the de facto monopolist on the route Villa San Giovanni-Messina – applies excessively onerous prices and contractual conditions, violating Italian Antitrust Law. In particular, according to ICA, the prices applied

by Caronte seem to be (i) significantly higher than those practiced by other operators and not connected to the hypothetical costs for providing the service and (ii) discriminatory towards passengers travelling alone with cars.

B. ICA's authorization of the acquisition by BPER of 500 bank branches from UBI.

On Aug. 4, 2020, ICA cleared the acquisition by BPER Banca S.p.A., (BPER) – a bank listed on the Milan Stock Exchange heading the banking group of the same name; active in the offer of banking, financial, and insurance products; and already having 1,350 bank branches – of about 500 further bank branches of Gruppo UBI (UBI). This operation is linked with the acquisition of UBI by Intesa Sanpaolo (ISP), one of the main Italian banking institutions. Indeed, transfer of the above-mentioned branches will be carried out by ISP in order to implement part of the measures imposed by ICA to eliminate its concerns over the acquisition of UBI. The acquisition was cleared by ICA due to the absence of substantial horizontal overlap and absence of possible vertical competition concerns.

European Union Commission

The list of State aid cases published on the Commission's dedicated website shows that during August 2020, the Commission handled about 90 cases concerning measures related to the COVID-19 outbreak. For instance, on Aug. 27, 2020, the Commission adopted a decision not to raise objections concerning certain measures to be implemented by Romania in order to provide support for SMEs and certain related large enterprises to overcome the economic crisis caused by COVID-19. The day before, the Commission approved an amendment to the umbrella scheme implemented by Hungary that was already authorized in July; through the amended umbrella scheme, undertakings can obtain direct grants for investments aiming to preserve or create new job opportunities.

Moreover, on Aug. 21, the Commission authorized a State aid scheme notified by Croatia aimed to support the maritime, transport, transport infrastructure, and tourism sectors impacted by the COVID-19. On the same day, the Commission declared an aid notified by Italy concerning the municipality of Campione d'Italia to be compatible with the internal market. Campione d'Italia is a municipality constituting an Italian exclave in the Swiss territory. Italian authorities affirmed that the COVID-19 outbreak has started to affect the real economy in the municipality of Campione and thus notified an aid measure in the form of tax advantage, in particular: (a) a 50 % reduction in income and regional production (IRAP) taxes; and (b) a tax credit granted to undertakings carrying out investments in that territory.

China

In August 2020, the Anti-Monopoly Bureau of the State Administration for Market Regulation (SAMR), China's primary antitrust enforcement agency, published the *2019 Collection of Antitrust Regulations and Guidelines* (the Guidelines). This contains several previously unreleased guidelines, including the *Guidelines to the Application for Leniency in Horizontal Monopoly Agreements* (the Leniency Guidelines).

As background, Article 46 of China's Anti-Monopoly Law (AML) allows antitrust regulators to exercise discretion when imposing penalties where a "party actively reports the circumstances of a monopoly agreement and provides important evidence." While Article 46 has existed since the promulgation of the AML, its application has been viewed as lacking transparency and certainty. The SAMR's publication of the Leniency Guidelines implicitly recognizes this sentiment, and is widely viewed as an effort to formalize the framework in which leniency is granted. Important details of the Leniency Guidelines include:

- Leniency is only available in the context of horizontal monopoly agreements between competitors.
- Procedures regarding the initiation of the leniency process and information which a whistleblower should provide to receive "cooperation credit." Such information includes, among other things, the identity of the parties to the anti-competitive agreement; facts underlying the anti-competitive agreement such as duration, location, and content; impacted geographic market and market information; whether leniency applications have been made in other jurisdictions; and duration for which the anti-competitive agreement was implemented.
- A tiered immunity based on when the whistleblower comes forward. Although full immunity is not available to any party organizing the anti-competitive behavior, the first whistleblower may be granted immunity or a reduction in applicable fines by 80%; the second whistleblower may be granted a reduction of between 30%-50%; the third may be granted a reduction of between 20%-30%; and any subsequent whistleblowers may be granted a reduction of up to 20%.

It is important to note that the Leniency Guidelines require SAMR to publish its decisions where leniency has been granted. This presents the possibility that information contained in a leniency application may subsequently be made public and used by third parties in private litigation. Such a requirement may have the unintended consequence of discouraging whistleblowers.

Japan

A. Group asks JFTC to issue cease and desist order.

On Aug. 18, 2020, a voluntary group of storekeepers asked the Japan Fair Trade Commission (JFTC) to issue a cease and desist order on the grounds that the penalty system imposed by the group's retailer sponsor violates the Antimonopoly Act (abuse of a superior position). The group alleges the penalty system includes financial penalties or suspension of business. On Jan. 22, 2020, the group also asked the JFTC to investigate the group's retailer sponsor regarding its free shipping policy from the point of the Antimonopoly Act (abuse of a superior position). In that case, the JFTC started an investigation and the group's retailer sponsor voluntarily changed its free shipping policy in March 2020.

B. JFTC approves merger of Z Holdings and LINE, regarding industrial area of QR code payment.

On Aug. 4, 2020, the JFTC announced that it had approved and concluded its review of the merger of Z Holdings Corporation (the parent company of Yahoo Japan Corporation and member of the SoftBank Group Corp., a Japanese IT giant) and LINE Corporation ("the subsidiary of Naver Corporation, the Korean IT giant). The JFTC found that the merger would not substantially restrict competition in certain trading industrial areas on the assumption that the measures proposed by the parties would be taken. JFTC, according to its release, conducted its review on the industrial area of QR code payment, news distribution and advertisement, and found the merger could potentially restrict competition in the industrial area of QR code payment, since the combined share of the industrial area of QR code payment of the Z Holdings and LINE would be more than 60% of the Japanese market. To prevent restriction of competition, Z Holdings and LINE proposed measures that for three years they would (i) regularly report the fee from member companies that intend to use their QR code payment to JFTC and (ii) eliminate all exclusive terms and condition and keep elimination.

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