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GT Newsletter | Competition Currents | January 2021

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

Save the Dates!

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

A review of select competition and antitrust subjects by geographic region including key deals, significant investigations and cases, and the anticipated impact due to changes in the political and regulatory arenas.

1. February 16, 2021 at 1 pm EST (6 pm GMT) – North America Region
2. March 2, 2021 at 9 am EST (2 pm GMT) – UK and EU Regions
3. March 16, 2021 at time TBD – Far East Region

Invitations to Follow

In this Issue:

United States | Mexico | The Netherlands | United Kingdom | Poland | Italy | European Union | China | Japan

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United States

A. Federal Trade Commission (FTC).

1. *FTC approves Otto Bock HealthCare North America, Inc.'s application to divest assets in prosthetic knee merger.*

On Dec. 1, 2020, the FTC announced its approval of an application by prosthetics manufacturer Otto Bock HealthCare North America Inc. to divest certain assets it acquired when it consummated its acquisition of FIH Group Holdings LLC (Freedom Innovations), including all microprocessor prosthetic knee (MPK) products and technology.

Otto Bock completed its acquisition of Freedom Innovations in September 2017, and FTC filed an administrative complaint in December of that year. In November 2019, upholding an administrative law judge's decision, the FTC unanimously found that the merger was anticompetitive, and it issued the final order requiring Otto Bock to divest the Freedom Innovations business, with limited exceptions. The Commission vote to approve the application was 5-0.

2. *FTC sues to Block Procter & Gamble's acquisition of Billie, Inc.*

On Dec. 8, 2020, the agency filed an administrative complaint and authorized a suit in federal court to block Procter & Gamble's proposed purchase of Billie Inc., which sells women's razors, saying the deal would eliminate an expanding competitive threat to P&G – the market-leading supplier of women's and men's razors, with brands like Gillette, Venus, and Joy. According to the FTC, Billie sells a "mid-tier" women's system razor targeted at Generation Z and Millennial women, including through marketing attacking the practice of pricing women's razors higher than comparable men's razors. The FTC alleges that the deal also halted Billie's anticipated expansion into brick-and-mortar retail stores, which would have intensified competition between Billie and P&G at retail locations.

"Billie saw an opportunity to challenge P&G's position as the market leader by finding underserved, price and quality conscious customers, and building an innovative brand," Conner said. "As its sales grew, Billie was likely to expand into brick-and-mortar stores, posing a serious threat to P&G. If P&G can snuff out Billie's rapid competitive growth, consumers will likely face higher prices."

The administrative trial is scheduled to begin June 22, 2021.

3. *FTC approves final order imposing conditions on Stryker Corp.'s acquisition of Wright Medical Group N.V.*

On Dec. 11, 2020, following a public comment period, the agency approved a final order settling charges that medical device company Stryker Corp.'s proposed acquisition of competitor Wright Medical Group N.V. would violate federal antitrust law. According to the complaint, the proposed acquisition would likely result in substantial competitive harm to consumers in the U.S. markets for total ankle replacements and finger joint implants. Commission staff and UK Competition and Markets Authority staff together analyzed the proposed transaction and coordinated on potential remedies. The final order requires Stryker and Wright to divest to DJO Global all assets associated with Stryker's total ankle replacements and finger joint implants.

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4. *FTC conditions E. & J. Gallo Winery's acquisition of assets from Constellation Brands, Inc. on package of remedies*.

On Dec. 23, 2020, the agency announced that wine and spirits maker E. & J. Gallo Winery agreed to divest several product lines and remove certain others from its deal with competitor Constellation Brands, Inc., to settle agency charges that the combination would violate federal antitrust law by harming competition in numerous beverage product markets. The FTC alleged that the proposed acquisition would eliminate head-to-head competition and constrain competition in six product markets: entry-level on-premise sparkling wine; low-priced sparkling wine; low-priced brandy; low-priced port; low-priced sherry, and high color concentrates (HCCs), giving the combined company a "significant majority" of market share in each product market.

Constellation agreed to remove its entry-level, on-premise sparkling wine brand, J Roget, and its low-priced sparkling wine brand, Cook's, from the deal. The proposed remedy requires Constellation to take all actions necessary to retain and maintain the full economic viability, marketability, and competitiveness of its J Roget and Cook's assets for four years and appoints a monitor to oversee the settlement obligations. Additionally, Constellation will divest its Paul Masson brandy brand HCC business to other competitors, and Gallo will do the same for its Sheffield Cellars and Fairbanks low-priced port and sherry brands.

B. The Department of Justice (DOJ) requires divestiture of Tufts Health Freedom Plan as Condition to closing merger of Harvard Health Care and Tufts Health Plan.

On Dec. 14, 2020, the DOJ announced that it would require Harvard Pilgrim Health Care and Tufts Health Plan to sell the latter's commercial health insurance business in New Hampshire as a condition to closing the merger. The DOJ's complaint, joined by the New Hampshire attorney general's office, alleged that Harvard Pilgrim and Tufts are two of the top three providers of group health insurance plans in New Hampshire for employers with up to 50 full-time workers and those with between 50 and 100 workers, and that both the smaller and the larger businesses have benefited from direct competition between the companies.

"This merger, as originally structured, likely would have led to higher prices, poorer quality, and reduced choice for many consumers throughout the state," Assistant Attorney General Makan Delrahim of the Antitrust Division said. "Today's settlement with its divestiture will ensure that small groups and CRC groups continue to benefit from the competition that has enabled them to purchase the health insurance plans for their employees at competitive prices in the state." New Hampshire Attorney General Gordon J. MacDonald said in a statement that the state has some of the highest health care costs in the country and that the deal as initially proposed could have led to even higher costs for consumers.

After review of the parties' respective footprints in Massachusetts, the DOJ determined that the merger was not likely to harm competition in that state. The divestiture will also require the parties to provide transition services to the buyer and an opportunity to hire key employees.

C. U.S. Litigation.

1. *Lifewatch Services, Inc. v. Blue Cross Blue Shield Association, et al., 12-CV-05146* (E.D. Pa., Dec. 29, 2020).

The Eastern District of Pennsylvania dismissed a complaint by LifeWatch Services Inc. against Blue Cross Blue Shield Association (BCBS) and five plan administrators alleging that BCBS violated federal antitrust

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laws in a conspiracy to deny coverage of LifeWatch's telemetry monitor products. For more than 10 years, at least 30 BCBS insurance plans have abided by a policy that denies coverage of telemetry monitors, devices that detect changes in cardiac rhythm. "The insurers reached this decision despite multiple medical studies concluding that telemetry monitors are effective and, in some cases, superior to other cardiac monitoring devices," the court explained. LifeWatch, a seller of telemetry monitors, claimed that BCBS violated the Sherman Act in its denial to cover LifeWatch's telemetry monitors. In May 2016, BCBS moved to dismiss the complaint, arguing that the plaintiff failed to state a claim and lacked antitrust standing and that the McCarran-Ferguson Act gives BCBS immunity from antitrust liability; the court agreed that the plaintiff failed to allege anticompetitive effects and dismissed the complaint. Judges for the Third Circuit Court of Appeals, after examining the case, ruled that LifeWatch had "plausibly pled an agreement between the Blue Plans and the Association that unreasonably restrains trade in the national market for outpatient cardiac monitors" and reversed a previous dismissal of the case. Third Circuit judges commented that while they reversed the dismissal, they believed that BCBS "may be exempt from liability under the McCarran-Ferguson Act," and remanded so that BCBS's associated argument could be considered, according to court documents. Under McCarran-Ferguson, the defendant must establish its immunity from antitrust liability. The court explained that conduct that renders a defendant exempt is such that "(1) 'constitutes the business of insurance,' (2) is 'regulated by state law,' and (3) does not 'amount to a boycott, coercion, or intimidation.'" The first two criteria are in dispute by the parties.

On remand, the district judge found that BCBS satisfies the first criterion because "the insurance contract between Blue Cross and its subscribers, by excluding from coverage all telemetry treatment under all circumstances, allocates the risk between the parties," the services offered in BCBS subscriber contracts are "integral to the policy relationship," and, although BCBS is technically an association and not itself an insurer, "it owns the rights to Blue Cross and Blue Shield trademark names and licenses those trade names and trademarks to insurance plans," rendering the association an insurance industry entity under McCarran-Ferguson.

2. *In re Lantus Direct Purchaser Antitrust Lit., No. 16-cv-12652* (D. Mass. Dec. 22. 2020).

A federal judge refused to narrow a class action lawsuit accusing Sanofi-Aventis US LLC of suppressing competing versions of its diabetes drug Lantus, rejecting the company's claim that the named plaintiff, FWK Holdings LLC, lacked standing to challenge actions Sanofi took after FWK stopped buying the drug. U.S. Magistrate Judge Judith Gail Dein ruled that FWK, a drug wholesaler, had standing to pursue the claims because it was part of a single alleged scheme, in which Sanofi is said to have falsely claimed patent protection for Lantus in submissions to the Food and Drug Administration. In October 2020, Sanofi moved to dismiss all of FWK's claims related to actions that happened after June 2016, which include some of the Orange Book patent listings and the lawsuits against Merck and Mylan. It argued that FWK lacked standing to pursue those claims because it admittedly bought no Lantus after June 2016, and so could not have been injured. Judge Dein rejected that argument, finding that FWK had "alleged a continuous scheme" that "continued to cause harm to class members after June 2016," and that allegations of individual acts by Sanofi could not be considered on their own. "They are not separate and distinct claims requiring the named plaintiff to have personally suffered resulting injury," she said.

3. *State of Texas et al v. Google, Inc. No. 20-cv- 00957* (ED Tex. Dec. 16, 2020).

On Dec. 16, 2020, 10 states, led by Texas, filed a lawsuit alleging that certain "Big Tech" companies reached an illegal deal to maintain a "chokehold" over the lucrative digital advertising market. "[Defendant] repeatedly used its monopolistic power to control pricing, engage in market collusions to rig auctions in a tremendous violation of justice," Texas Attorney General Ken Paxton said in a video posted on Twitter announcing the lawsuit. A spokesperson for the Defendant called Paxton's suit "meritless" and

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said the company had "invested in state-of-the-art ad tech services that help businesses and benefit consumers." "Digital ad prices have fallen over the last decade," the spokesperson added. "Ad-tech fees are falling too. [The Company's] ad-tech fees are lower than the industry average. These are the hallmarks of a highly competitive industry." This latest lawsuit is separate from an antitrust case that the Justice Department and 11 state attorneys general filed in October 2020 involving market power in the online search market.

Mexico

A. COFECE recommends that banks break up Mexico's credit card 'near-monopoly.'

On Dec. 16, 2020, COFECE recognized a lack of competition in the settlement and processing of credit card payment network in Mexico due to probable barriers to competition that generate costs and anticompetitive requirements for the entry of new participants in the market. There are only two settlement and processing of card payment companies in Mexico – E-Global and Prosa – both owned by banks.

After assessing the competition conditions, the main findings of COFECE are as follows:

1. There is a sole card payment network that sets rules which preclude coexistence with other payment networks with lower fees and better services.

2. There are anticompetitive requirements that increase the entry costs of new participants in the existing payment network or in a new one.

3. Eight banks are co-owners of the clearinghouses in charge of the payment network; ownership gives the banks information that other banks do not have, granting a competitive advantage.

4. In contrast to other countries, in Mexico the obligation to guarantee the daily liquidity of the transactions does not fall on the clearinghouses – which process the payments and know the risks of each operation – discouraging the entry of other investment and monitoring systems to detect risks to the security of the payment network.

According to the Preliminary Opinion, these conditions generate the following anticompetitive effects:

1. Lack of security, technology, and innovation that results in frequent interruptions in the payment network.

2. Regulatory obstacles for new clearinghouses with different payment networks.

3. High fees charged by banks to businesses for receiving a card payment, reducing interest on businesses in accepting cards, since they must bear this cost.

4. The co-ownership of the shareholder banks in the clearinghouses gives the banks access to information from other participants, constituting an undue advantage since they can anticipate the business strategies of their competitors.

To eliminate these barriers, the Preliminary Opinion proposes to divest 51% of the shares of E-Global and Prosa, in addition to recommending the Bank of Mexico and the National Banking and Securities Commission eliminate the regulatory obstacles detected and issue regulations that ensure competition.

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B. COFECE criticizes new rules for import and export permits granted by the ministry of energy: hydrocarbons and petroleum products.

On Dec. 21, 2020, COFECE sent a non-binding opinion to the Ministries of Energy (Sener) and Economy (SE) on those agencies' Preliminary Draft of the Agreement aimed at regulating the import and export of petroleum products, hydrocarbons, and petrochemicals.

COFECE indicates that the Preliminary Draft:

- Eliminates import permits that are valid for 20 years and replaces them with others for only five years, reducing incentives to invest in transport and storage infrastructure, and strengthening the dominant position of the Mexican State-owned Oil company (Pemex) in the market;
- Without justification, grants wide discretion to Sener to adjust the import and export volumes of petroleum products and petrochemicals contemplated in the permit;
- Establishes an automatic denial of the permits without the need to justify and explain to the applicant the reasons for not granting them;
- Establishes unclear and onerous requirements for the application of permits and grants wide discretion to Sener in its revocation and expiration.

COFECE estimates that competition in the oil products market would be seriously hampered, since the Preliminary Draft could complicate and make it more expensive to obtain gasoline import permits. COFECE stresses that because Pemex is the only company that produces oil products in the national territory, in the gasoline retail market it only faces competition through imports made by other companies.

The Netherlands

A. Dutch Competition Authority (ACM).

1. *ACM announces support for experiment in allowing lawyers to be hired directly by legal-protection insurance companies.*

On Dec. 14, 2020, the ACM announced that the experiment of the Netherlands Bar to allow bar members to be employed directly by legal-protection insurance companies was a step in the right direction. Lawyers employed with legal-protection insurers may assist non-insured persons as well. Legal-protection insurers will be granted temporary exemption. From Jan. 1, 2021, lawyers employed with legal-protection insurers can also represent clients that have not taken out legal-protection insurance. The rules of the Netherlands Bar previously prohibited this. The ACM believes this will bring more opportunities for new types of legal services, promoting innovation and giving consumers more options for legal representation.

This is a result of legal-protection insurer SRK's (BrandMR) complaint with the ACM about Netherlands Bar rules. Partly in response to related questions asked by the ACM, the Netherlands Bar created the opportunity for BrandMR and other legal-protection insurers to act for non-insured persons as well, rendering the complaint moot. This first step of the Netherlands Bar creates a certain degree of leeway for businesses that wish to offer legal assistance by lawyers, but that are not (traditional) law firms. This is a temporary exemption from the existing rules. The Netherlands Bar will evaluate this expansion after five years.

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2. *ACM imposes fines on four construction firms for illegal arrangements in tender processes in Amsterdam.*

On Dec. 3, 2020, the ACM imposed fines totaling EUR 330,000 on four construction companies for conducting illegal arrangements in three bids for the civil-engineering sector in the municipality of Amsterdam. In one or more of the bids, the companies coordinated what bids they would submit. Companies are supposed to compete for these contracts. The ACM seeks to ensure fair competition in tender processes, and takes action if competition is distorted. Martijn Snoep, chairman of the Board of the ACM, commented: "It is extremely important in tender processes that companies compete with one another for those contracts. The client decides who will win the contract, not the bidders among themselves. If competition is distorted, it will result in higher prices, reduced quality, and less innovation. Making any sorts of arrangements regarding bids in tender processes violates the Dutch Competition Act."

The tender processes in this case involved relatively small projects. Several firms submitted bids to keep themselves "in the picture." They feared they would no longer be invited to subsequent tender processes if they did not respond to the tender invitation for these projects. In coordination with the other bidders, they submitted bids, even though they did not want to win the contracts. This is prohibited under the Dutch Competition Act. These four companies acknowledged their violation of the rules and accepted the ACM fines. They have taken measures to comply with the rules in the future, so that tender processes such as these will take place fairly. Because one of the contractors is paying compensation to the municipality, ACM lowered the fine on this contractor by 10%.

3. *Big Tech and the Dutch payment market: tightening of rules needed to maintain a level playing field.*

On Dec. 1, 2020, the ACM clarified that so-called Big Tech companies must ensure that their platforms or devices are suitable for different providers of payment services. The ACM argues in favor of a level playing field for all providers of payment services, now and in the future. The Dutch Ministry of Finance requested the ACM carry out a market study into major tech firms and the Dutch payment market; the study found that the current rules can be supplemented by tightened European rules.

Martijn Snoep, chairman of the Board of ACM, commented: "Big Tech companies can act as a driving force behind competition and, by extension, behind innovation on the Dutch payment market. However, that role does require Big Tech companies to open up their platforms and devices to competing payment services, in the same way that banks do. Only with such a level playing field in place will payment services continue to compete and innovate, and will consumers continue to enjoy freedom of choice. It would be good if the European rules regarding this issue were tightened, before the market is dominated by one or several major competitors."

- Market study into the Dutch payment market: The market study gives an overview of the current and the expected trends and developments regarding Big Tech companies on the Dutch payment market, both online and offline. At the moment, the role of Big Tech companies in the Dutch payment market is still limited, but ACM also sees that Big Tech companies are strengthening their positions in the market through acquisitions and collaborations.
- A level playing field for payment services: Big Tech companies increasingly offer their own methods of payment, both online and offline. In brick-and-mortar stores, more and more options for contactless payments are offered, for example using smartphones or smartwatches.

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> According to ACM, such devices must offer the ability to use various types of payment apps. That is why Big Tech companies must, for example, offer access to other payment services in smartphones or smartwatches. Currently, a popular online platform can refuse competing payment services and can also make it difficult for competitors to function properly on the online platform. This impedes competition and, as a consequence, impedes further innovation.

There are two European rules that help maintain a level playing field for payment services. Big Tech companies that only facilitate payment services currently do not fall under the European rules for open access to payment systems, the PSD2 Directive. The ACM recommends amending this Directive, so that Big Tech companies that only play a facilitating role must also comply with it. In their facilitating role, Big Tech companies are the gateway for payments and can restrict competition and the options for consumers. The second amendment is changing the current competition rules so that conditions can be imposed on dominant platforms in advance.

According to the ACM, online platforms can grow fast and disrupt existing markets. That creates opportunities for innovation but also carries the risk of dominant positions emerging that limit competition and hinder innovation. The result is higher prices, suboptimal products and services for consumers, and fewer opportunities for competitors. Through enforcement actions, market studies, and education, ACM aims to keep the benefits of innovation in the digital economy and to ensure that markets work well for people and businesses, now and in the future.

4. *ACM investigates the role of algorithms in cartels*.

On Dec. 10, 2020, the ACM announced a pilot investigation into the role of algorithms in commercial interactions between market players and the impact on market behaviour these algorithms may have. The ACM intends to use the results of the study to inform market parties on what to expect if the ACM starts an investigation into the functioning of their algorithms. The ACM is conducting the pilot in cooperation with Muziekweb, an online music library. On the same day, the ACM published a position paper on the monitoring of algorithmic applications. The position paper is a starting point from which the ACM intends to further develop this type of monitoring, and provides general guidance on investigations into potential infringements in which algorithmic applications play a role.

United Kingdom

A. Separation of EU and UK legal regimes.

1. *Separation from the end of Brexit transitional period*.

The UK formally left the EU in January 2020, subject only to an 11-month transitional period in which EU law continued to apply in the UK. The transitional period ended at 23:00 UK time on Dec. 31, 2020, when the UK finally left the EU customs union and single market and the EU and UK legal regimes became fully separate.

2. *EU/UK future relationship terms agreed*.

Concerns that the UK and EU would fail to agree to the terms of their future relationship before the end of the transitional period were laid to rest late on Dec. 24, 2020, when UK Prime Minister Boris Johnson and European Commission President Ursula von der Leyen announced that they had agreed the terms of three agreements: a Trade and Cooperation Agreement, an Agreement on Nuclear Cooperation, and an Agreement on Security Procedures for Exchanging and Protecting Classified Information. These

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agreements do not cover all aspects of the future EU/UK relationship, but they clarify the UK's relationship as a third country with the EU. An important consequence of this from an antitrust perspective is that the UK is no longer subject to the EU state aids regime and can devise its own system for providing subsidies.

B. Separation of EU and UK competition regimes.

1. *A standalone UK competition regime increasing risks for businesses*.

Until the end of the transitional period, the UK competition regime was subject to the EU competition regime in several respects. This had benefits for businesses. For example, where both the UK and EU merger regimes applied to a transaction, the UK merger regime was, with limited exceptions, disapplied in favor of the EU merger regime, creating a one-stop-shop that avoided the need for multiple applications for merger clearances throughout the EU. In addition, the European Commission could take over antitrust investigations started in the UK where the agreement or conduct giving rise to the investigation affected the EU more broadly, avoiding multiple investigations. The obligation on the UK competition regulators and courts to apply and enforce EU as well as UK competition law to UK antitrust cases with effects in the EU, and to interpret UK competition law consistently with EU competition law may have had fewer obvious benefits for business, but one advantage was the ability of businesses that had suffered loss as a result of anti-competitive agreements or conduct to rely on infringement decisions of both the UK competition regulators and the European Commission in claiming damages. A similar principle applied to reliance on infringement decisions of the national competition authorities of the other 27 EU Member States.

From Jan. 1, 2021, the UK competition regime is applied independently of the EU competition regime. This creates a new reality for businesses: parallel EU and UK investigations of mergers and acquisitions that fall within the scope of both merger regimes, and of agreements and conduct that breach both the EU and UK antitrust rules. In addition, the UK competition regulators and courts are no longer bound by new EU laws, including court decisions, so businesses seeking antitrust damages cannot rely on any new infringement decision of the European Commission (or the national authority of one of the 27 EU Member States) as the basis for their claims.

2. *Incorporation of some EU rules continuing protection for business*.

Although now independent, the UK competition regime is closely aligned with the EU competition law principles and has "onshored" a number of specific EU rules, including the EU block exemption regulations relating to vertical agreements, technology transfer, and R&D. Businesses relying on the safe harbors provided by these exemptions before Jan. 1, 2021, will be able to continue relying on them in the UK, including in relation to new agreements, subject only to future amendment or revocation by the Secretary of State, acting in consultation with the UK's Competition and Markets Authority (CMA).

3. *UK business continue to be subject to EU law*.

The European Commission published a Notice to Stakeholders on Dec. 8, 2020, explaining the impact on the EU competition regime of the UK's withdrawal from the EU and making the following key points:

> <u>Anti-competitive agreements and conduct</u>: UK businesses will continue to be subject to EU competition law, and to risk investigation by the European Commission, where their anti-competitive agreements or conduct are implemented – or have effects – in the EU. Although the European Commission can no longer conduct "dawn raids" on these businesses' UK

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premises, the Notice warns that the European Commission still has the power to obtain information from them and that the CMA may also have power to investigate them, including conducting dawn raids.

– Merger control: UK businesses will continue to be subject to the EU Merger Regime where their revenues in the remaining 27 EU Member States are of sufficient size and distribution to trigger the requirement to notify their transactions to the European Commission, which will assess their impact on competition and markets in the EU, but not in the UK. If the UK merger regime also applies to these transactions, the CMA may conduct a parallel investigation of their impact on competition and markets in the UK.

C. The Future.

1. *Mergers.*

The CMA anticipates that it will handle an additional 50 merger cases annually given the UK's withdrawal from the EU. The CMA has revised its guidelines to take account of the standalone status of the UK merger regime and is in the process of revising its other guidelines, in particular those relating to its substantive assessment of mergers, which may have to take into account the impact of Brexit on the merging parties' businesses (e.g., reduced competitive pressure within the UK from companies outside the EU).

2. *National Security.*

As mentioned in our December issue, consultation on the UK's proposals for a rigorous new system of controlling transactions and acquisitions of assets that have the potential to impact UK national security ended Jan. 6, 2021. The outcome of the consultation will come too late for this issue of Competition Currents, so we will report on it in a subsequent issue.

3. *Antitrust and damages litigation.*

The CMA and sectoral regulators continue to investigate several cases. Brexit's impact on this work may be seen mainly in the application of UK competition law alone to the investigated agreements and conduct. In the fast-developing arena of competition law damages litigation in the UK, it will be interesting to see how claims arising from infringements that are the subject of new decisions by the European Commission or competition authorities of the 27 EU Member States and not the UK regulators will be formulated.

4. *State aids.*

The issue of state aids was one of the three issues that delayed agreement on the terms of the Trade and Cooperation Agreement between the EU and UK. At present, there is no statutory regime controlling state aids in the UK, but this is expected later in 2021.

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Poland

A. UOKiK's first fine for infringement of competition law imposed directly on a company manager.

Under Polish law, if the president of the Polish Competition Authority (UOKiK) determines a competition law infringement has occurred, he may impose a fine not only on the company but also on persons performing managerial functions in such a company. The fine may be imposed on such persons if they intentionally permitted (through action or omission) an infringement in connection with performing their functions at the time the infringement took place. The maximum fine is PLN 2 million (approx. EUR 440,000, USD 540,000).

Although the abovementioned rules entered into force in 2015, it was only in December 2020 that UOKiK issued the first decision imposing a fine on a company manager. In the proceedings in question, UOKiK found that two major entities from the heating industry, PGNiG Termika and Veolia Energia Warszawa, had divided the market – the first focused on the production of heat; the latter focused on the sale of heat. Both companies jointly agreed on their tender and pricing strategies.

UOKiK found that the presidents of the management boards of the two companies had intentionally caused a restriction of competition, in particular by active participation in arrangements regarding the scope and execution of forbidden activities. Although UOKiK found that both companies had infringed competition law, the fine was only imposed on Veolia companies (approx. EUR 120 million i.e., EUR 26 million, USD 32 million) and on the president of Veolia's management board in the amount of PLN 200,000 (approx. EUR 44,000, USD 54,000). PGNiG companies and the president of the management board avoided fines by taking advantage of the leniency program (i.e., they informed UOKiK about the collusion and provided evidence in this respect).

Italy

A. The Italian Competition Authority opens 14 investigations concerning the agricultural and food sectors.

On Dec. 30, 2020, the Italian Competition Authority (ICA) opened 14 investigations into several operators of the agricultural and food sectors (dairies purchasing raw cow, sheep, and goat's milk) based in Lombardy, Emilia-Romagna, Sardinia and Apulia. The proceedings were all initiated based on a complaint filed by the Ministry of Agricultural, Food and Forestry Policies.

The conduct investigated concerns the practice of (a) regulating methods for the supply of fresh milk (e.g., the total absence of written contracts, the failure to indicate essential elements such as the price or quantity of milk to be supplied, the duration of contracts of less than one year, the delay in payments) and (b) the imposition by the dairies, to the detriment of the supplying breeders, of a unilateral and retroactive reduction in the price of milk contractually envisaged for the months of March and/or April 2020, based on the crisis caused in the dairy sector by the COVID-19 pandemic.

According to ICA, the above-mentioned conduct was carried out within a framework of significant imbalance of commercial strength that characterizes the production and marketing chain of raw milk. This imbalance places farmers in a position of weakness as compared with their contractual counterparts. Therefore, ICA envisages a possible violation of the Article 62 of law decree no. 1/2012 on commercial relations in the agri-food chain.

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B. ICA issues a new communication on antitrust fines.

On Dec. 18, 2020, the ICA decided that the deadlines for the payment of antitrust sanctions are extended to April 30, 2021, without prejudice to the payment of legal interest only. Moreover, ICA specified that companies could request a four-month suspension of payments for fines for which payment by installments has been granted, without prejudice to the payment of the legal interests of the suspended installments.

The ICA made this decision in the context of COVID-19, which has led to a contraction of exceptional magnitude of the gross domestic product and has had a profound impact on Italian production. ICA specifies that, at the end of the third quarter of 2020, GDP for 2020 was down 8.3%, and several studies forecast that by the end of 2020 Italy's gross domestic product will contract by 8.9% compared to the previous year. These extraordinary circumstances led ICA to adjust the payment terms for imposed fines. The ICA can amend the payment terms because the establishment of such terms falls within the discretion of the Authority itself. ICA highlights that its intervention is in-line with the ratio of the measures recently adopted by the Legislature to support workers and the production sector.

European Union

A. European Commission proposes ambitious regulatory framework for the digital sector.

On Dec. 15, 2020, the European Commission presented its proposals for a Digital Services Act (DSA) and a Digital Markets Act (DMA). Until now, the EU has not been a global frontrunner in the area of digital market regulation. The main legal framework regulating online markets currently in place is the e-Commerce Directive, adopted in 2000. Now, however, the Commission aspires to have an EU regulatory framework for the digital sector that becomes a global yardstick for enforcement on digital markets. The Commission has proposed an ambitious reform of the digital space, a comprehensive set of new rules for all digital services, including social media, online market places, and other online platforms that operate in the European Union.

B. General Court.

1. *AG Kokott proposes to set aside the General Court's judgment declaring certain Belgian tax rulings as measures not constituting State aid.*

By judgment issued Feb. 14, 2019, the EU General Court annulled the decision of the Commission declaring that the practice of Belgian tax authorities to make – by way of tax rulings – downward adjustments to the taxable profits of 55 Belgian undertakings forming part of multinational groups constituted an incompatible State aid.

In the opinion delivered Dec. 3, 2020, Advocate General (AG) Kokott proposed to the Court of Justice to set aside the judgment of the General Court on two grounds. First, according to the AG, the Commission sufficiently demonstrated the existence of a consistent administrative practice of Belgian tax authorities constituting an act under State aid rules. On this point, the AG highlighted that the Commission is allowed to examine a specimen and not all the tax rulings of Belgian authorities in order to establish the existence of a consistent practice. Furthermore, in AG's view, the General Court erroneously considered that the two further conditions for the existence of an aid scheme (namely, that no further implementing measures are required and that the beneficiaries are defined in a general and abstract manner) were not met. Therefore, AG Kokott proposed that the case be referred back to the General Court to assess whether the advance tax

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rulings at stake constitute State aid. This question is of great practical importance, given that the present case is a pilot case and that 28 further actions by beneficiaries of the alleged aid are currently stayed.

2. *The General Court's report on the impact of the EU judicial structure*.

The number of cases brought before the General Court has increased regularly over the last several years, with growth around 38% from 2010 to 2015, with proceedings taking an average of three years. On Dec. 16, 2015, the EU legislature adopted a reform of the European Union's judicial structure to reduce the volume of cases pending before the Court and the excessive length of the proceedings. The reform involved doubling the number of judges at the General Court and a series of accompanying measures. The General Court's 2020 report provides an evaluation of the results as of Sept. 30, 2020.

With respect to the reform's impact on pending cases, the report highlights the continuation of a significant proportion of intellectual property cases (about 20%) and a certain stability in the level of competition litigation, which remains low, but for which the individual caseload (in terms of volume and complexity) is far higher than the average for cases in other areas. In general terms, implementation of the reform has had a significantly favorable impact on the length of proceedings. However, the report stresses how this reduction is distributed unequally among the different fields of law: while there is a particularly marked reduction for competition cases, the reduced length has had a limited impact in the field of State aid disputes. According to the report, the percentage of the appeals against on competition and State aid cases was particularly high in 2019; nevertheless, this circumstance might be explained in part by the great importance of certain State aid and competition disputes, giving rise inevitably to an exceptionally high rate of challenged decisions.

Finally, among the measures that could ensure consistency in the case law, the report lists: (a) the extension of the reduction in the length of proceedings to cover types of cases for which the length of proceedings has thus far been reduced only slightly and (b) the automatic devolution to a chamber of five judges of cases relating to particular complex matters, such as competition and State aid.

3. *EU Court upholds role of Court of Arbitration for Sport in applying competition law*.

On Dec. 16, 2020, the EU General Court delivered a ruling in *International Skating Union v. Commission*, Case T-93/18, EU:T:2020:610 on the application of EU competition law to sports authorization rules. The ruling upholds the role of the Court of Arbitration for Sport. The General Court confirmed that the eligibility rules of the International Skating Union, which penalized athletes participating in competitions not authorized by the ISU, infringe EU competition law. While the EU General Court considered it appropriate for sports governing bodies to seek to establish common standards for the organization of sporting events, such rules should not unduly deprive third-party organizers from market access and must be fair and proportionate to the legitimate objectives pursued by these rules. In addition, the EU General Court upheld the role of the Court of Arbitration for Sport as the primary body for the adjudication of sports-related disputes. The judgment provides clarity with practical relevance not only for the sport of skating but for all sporting bodies and their athlete members globally.

China

On Dec. 14, 2020, the State Administration for Market Regulation (SAMR), China's antitrust regulator, imposed fines against three of the country's largest technology companies for failing to submit for merger control review acquisitions of smaller companies. The fined companies are Alibaba Investment Limited, China Literature Limited, an affiliate of Tencent, and Shenzhen Hive-box Network Technology, an affiliate of the logistics company SF Express.

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Based on information released by SAMR, the penalized transactions all involved variable interest entity (VIE) structures, which are 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. In the past, there existed significant uncertainty as to whether businesses utilizing the VIE structure were required to undergo merger control review given the ambiguities involved with respect to the structure's legality and the lack of regulatory guidance. In April 2020, however, the SAMR announced its acceptance of a merger control filing in relation to a different proposed joint venture, representing the first time a filing had been accepted by the Chinese regulator involving a VIE-structured entity. The SAMR also explicitly addressed VIE structures in the recent draft Anti-Monopoly Guide for the Internet Platform Economy Sector, which was released in November 2020.

In addition to the fines, the SAMR recently engaged in a series of regulatory rulemaking and enforcement actions that increasingly signal an intent to enhance regulation in the technology sector. The moves follow a similar pattern of heightened scrutiny of technology companies worldwide, as regulators in the United States and Europe investigate whether companies have violated antitrust laws.

Japan

A. JFTC conducts a survey and revealed draft guidelines for business collaboration with startups.

On Nov. 27, 2020, the Japan Fair Trade Commission (JFTC) revealed the result of a survey investigating the trade practices between start-ups and their investors or funders. The questionnaires were sent to 5593 start-ups selected by the JFTC, and 1447 (approximately 25.9%) answered.

As the result of the survey, the JFTC confirmed that there were actions that could be problems from the perspective of the Antimonopoly Act in (1) transactions and contracts between startups and collaborating businesses (such as unilateral NDAs, license provisions without compensation, and unilateral attributions of intellectual property rights arising from joint development agreements); (2) transactions and contracts between startups and investors (such as a disclosure of trade secrets, breaches of NDAs, and a limitation of research and development); and (3) relationships between startups and competitors (such as competitors' interference with startups sales activities and purchasing (procurement) activities).

On Dec. 23, 2020, the JFTC revealed draft guidelines for business collaboration with startups and started the Public Comment Procedure.

B. Follow-up – Prosecution of the major medicine wholesalers.

On Dec. 9, 2020, the Special Investigation Department of the Tokyo District Public Prosecutors Office prosecuted three major medicine wholesale companies and seven persons in charge of the companies, who engaged in bid-rigging for pharmaceuticals made by the Japan Community Healthcare Organization (JCHO) in violation of the Antimonopoly Act. According to media reports, four major medicine companies have coordinated the winning bidder in advance and restricted competition, over general competitive bidding for pharmaceuticals made by the JCHO in June 2016 and June 2018. Before the bidding, the four companies gathered in a rented conference room and allocated orders to each company. One of the four major medicine wholesales companies involved reported the violation under the Leniency system that grants a reduction in or an exemption from surcharge payment to an enterprise that

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voluntarily discloses its own involvement in cartels or bid riggings to the JFTC. Therefore, JFTC didn't file a complaint against the company that was the first to submit its reports and materials.

Read previous editions of GT's Competition Currents Newsletter.

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