GT GreenbergTraurig

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

In this Issue:

United States

A. Federal Trade Commission (FTC).

1. *Agency fines officer for violation of HSR Act for failure to file in connection with holdings of company stock.*

On Sept. 2, 2021, the FTC announced that Richard Fairbank, CEO of Capital One Financial Corp., will pay a $637,950 civil penalty to settle charges that his acquisition of Capital One Financial (COF) stock violated the Hart-Scott-Rodino (HSR) Act. The agency alleged that Fairbank's receipt of stock as part of his compensation package was reportable prior to consummation, and that he had previously made acquisitions of COF stock without required HSR notification.

As Fairbank had previously failed to file HSR notification, the FTC staff recommended penalties for this more recent alleged violation. The maximum civil penalty for an HSR violation is currently $43,792 per day, calculated from the day on which the acquisition is consummated through the day on which the waiting period applicable to the corrective notification expires. The fine imposed as part of the announced settlement was just over 2% of the maximum penalty.

2. *Privacy expert Alvaro Bedoya nominated as fifth US FTC commissioner, replacing outgoing Commissioner Chopra.*

On Sept. 13, 2021, President Biden nominated Alvaro Bedoya, a Georgetown University professor and former congressional lawyer focused on privacy-related policymaking, to be the fifth commissioner of the FTC. If confirmed, Bedoya will replace Democrat Rohit Chopra, whose nomination to be director of the Consumer Financial Protection Bureau is still pending. Bedoya would maintain the 3-2 Democratic majority on the Commission, serving alongside Commissioner Rebecca Slaughter and Chair Lina Khan.

Bedoya served as chief counsel for the Senate Judiciary Subcommittee on Privacy, Technology and the Law, where his work involved oversight of mobile location privacy and biometrics. He also drafted portions of the bipartisan National Security Agency reform law, and the USA Freedom Act. Bedoya is also the founding director of Georgetown's Center on Privacy and Technology, which he formed in August 2014.

3. *FTC overhauls consumer protection and competition investigations procedure in key enforcement areas.*

On Sept. 14, 2021, the FTC approved a series of resolutions that will enable agency staff to "efficiently and expeditiously" investigate conduct in core FTC priority areas. Described by the Democratic majority as "streamlining" the process, the resolutions effectively permit a single commissioner to issue compulsory process in the following areas of investigation: (1) Acts or Practices Affecting United States Armed Forces Service Members and Veterans; (2) Acts or Practices Affecting Children; (3) Bias in Algorithms and Biometrics; (4) Deceptive and Manipulative Conduct on the Internet; and (5) Repair Restrictions. (6) Abuse of Intellectual Property; (7) Common Directors and Officers and Common Ownership; and (8) Monopolization Offenses.

According to the FTC: "Streamlining and improving efficiency at the agency is vitally important given the increased volume of investigatory work created by the surge in merger filings. Having already doubled between 2010 and 2020, the number of mergers filed with the antitrust authorities this year hit a record-setting pace of 2,067 acquisitions for the first seven months alone."

4. *FTC withdraws vertical merger guidelines and commentary.*

On Sept. 15, 2021, the Commission via a 3-2 vote withdrew its 2020 Vertical Merger Guidelines and Commentary, stating that the guidelines were predicated on "unsound economic theories that are unsupported by the law or market realities." While not advocating a return to the previously published 1984 Vertical Merger Guidelines, the Commission did not release any replacement set of guidelines, but rather stated that the agency will work with Antitrust Division of the Department of Justice to update merger guidance.

The withdrawn guidelines noted several ways vertical mergers can harm competition, which the statement by the FTC majority recognizes provided valuable analysis. When Commissioner Slaughter voted against issuing the guidelines last year, she wrote that they "appear to put a thumb on the scale in favor of vertical mergers" by over-emphasizing their benefits, warning that "vertical mergers can and frequently do raise serious anticompetitive concerns." In that way, she stated that the 2020 Guidelines were "overly optimistic" in describing efficiencies to be gained from a vertical merger, notably the elimination of double marginalization that can be achieved and actually passed onto consumers.

In updating the guidelines, the FTC will (1) "explore ways to provide clear guidance on the characteristics of transactions that are likely unlawful," (2) "provide guidance on ineffective remedies, based on an evaluation of past remedy practices and any evidence that past remedies may not have fully restored competition," and (3) "expand on the harms identified in the 2020 Vertical Merger Guidelines to consider various features of modern firms, including in digital markets, and impacts of mergers on labor markets." The DOJ did not withdraw the 2020 Guidelines, instead committing to "a robust public engagement process to seek comment on ways the Vertical Merger Guidelines could be improved."

5. *Bureau of Competition director says retail fuel deal investigations need "wider lens."*

On Sept. 21, 2021, Holly Vedova, acting director of the FTC's Bureau of Competition, gave more details via a blog post on Chair Lina Khan's plans to identify additional legal theories to challenge deals involving the acquisition of "family-run" retail fuel businesses by "dominant players." Vedova said the FTC will "examine potential price coordination and other collusive practices in the retail fuel industry by moving against mergers that create the opportunity for harmful pricing behavior." Ordinarily, concerns with retail fuel mergers are solved by divestitures of stations in local overlapping markets that the merging parties serve. However, according to Vedova, the commission chair is concerned that, notwithstanding these localized remedies, consolidation has increased more broadly and created conditions for "systemic price signaling behavior" across a metropolitan area or region.

"Posted gasoline prices, especially when controlled by large national chains with multiple stations in an area, offer opportunities for price signaling," she said, and chains may use software to set prices and monitor competitors. When profits are deemed too low, a chain "may attempt to 'restore' the market by raising price." As a result, the agency vows to scrutinize transactions involving a chain for the effect on price signaling behavior wherever the buyer and seller overlap in any metro area, even if there are no concerning local retail fuel station overlaps.

B. Department of Justice (DOJ).

1. *DOJ requires divestitures in BancorpSouth Bank's merger with Cadence Bank.*

On Sept. 2, 2021, the DOJ announced that BancorpSouth Bank and Cadence Bank have agreed to sell seven branches in northeastern Mississippi, with more than $446 million in deposits, to resolve antitrust concerns arising from BancorpSouth's planned acquisition of Cadence Bank. Under the agreement, the parties will divest seven branches located in Aberdeen, West Point, and Starkville, Mississippi. The assets that must be divested include all the deposits and loans associated with the seven branches, as well as all physical assets. The companies also have agreed to suspend existing noncompete agreements with branch managers and loan officers located in those cities. Finally, the parties agreed that any branches located in any of these markets that are closed within three years of the merger's closing will be sold or leased to an insured depository institution that offers deposit and credit services to small businesses.

2. *DOJ files second civil contempt claim against CenturyLink.*

On Sept. 2, 2021, the DOJ petitioned a federal judge to find CenturyLink in civil contempt after the telecommunications giant allegedly violated a settlement approving its $34 billion proposed merger with Level 3 Communication Inc. for a second time. CenturyLink, now Lumen Technologies Inc., agreed to pay $275,000 for allegedly violating the settlement reached in March 2018. In that settlement, CenturyLink agreed to divest Level 3's assets and promised not to solicit customers who chose to contract with the divestiture buyer. However, shortly after the settlement was reached, the company's sales associates allegedly contacted such customers in Boise, Idaho multiple times.

The DOJ also moved to amend the final judgment to include extra monitoring and extend the non-solicitation provision a further two years, with compliance monitored by an independent trustee. CenturyLink was required to pay the DOJ $250,000 to cover government costs enforcing the original settlement. In a coinciding settlement agreement submitted by the DOJ, CenturyLink would pay an additional $275,000 to reimburse the cost of the investigation.

3. *DOJ charges president of flooring company in ongoing antitrust investigation.*

On Sept. 8, 2021, the former president of a Chicago-based flooring company was indicted on money laundering conspiracy charges. The former president is the sixth individual to be charged in the ongoing antitrust investigation; three companies also have been charged. According to the indictment, the defendant authorized and then concealed kickbacks in exchange for lower pricing, using a shell company and other conspirators over a five-year period to effectuate the scheme.

4. *DOJ files criminal complaints relating to procuring government contracts in Belgium.*

On Sept. 13, 2021, DOJ filed criminal complaints in Washington, D.C. against two individual defendants, alleging their involvement in a conspiracy to allocate the market, rig bids, and fix prices for security services contracts in Belgium, including contracts with the Department of Defense and other entities funded by the U.S. government. According to the filing, the defendants and other conspirators (some of which have been charged elsewhere) entered into agreements and undertook a series of antitrust violations in order to obtain the security contracts beginning in 2019.

5. *DOJ and FTC issue warning to would-be antitrust violators in communities affected by Hurricane Ida.*

On Sept. 14, 2021, DOJ's Antitrust Division and the FTC issued a joint statement to provide guidance (and a warning) to businesses rebuilding communities affected by Hurricane Ida. The guidance noted that DOJ would not tolerate antitrust violations or other fraudulent actions during the process. Acting Assistant Attorney General Richard A. Powers of the Antitrust Division stated, "In the aftermath of Hurricane Ida, the division's Procurement Collusion Strike Force will leverage every tool in its arsenal to root out collusion, corruption and fraud targeting disaster relief."

6. *Contractor pleads guilty to bid-rigging public projects funded by the state of Minnesota.*

On Sept. 28, 2021, a Minnesota concrete contractor pleaded guilty to rigging bids related to construction contracts in the state of Minnesota. According to court documents, the contractor and his co-conspirators targeted public repair and construction contracts offered for bid by the state of Minnesota that were to benefit local governments and school districts. The plea was a violation of Section 1 of the Sherman Act, which in this case authorizes a maximum of 10 years in prison and a $1 million fine (representing either twice the gain or twice the loss derived from the violation). The case was prosecuted with the assistance of the DOJ's procurement task force.

C. U.S. Litigation.

1. *Michael E. Jones, M.D., P.C. v. UnitedHealth Group Inc., et al;* Case Number 1:19-cv-07972, 2021 WL 4443142 (S.D.N.Y. Sept. 28, 2021).

District Judge Valerie Caproni again dismissed claims by Plaintiff Michael Jones, MD, a plastic surgeon, against UnitedHealth Group Inc., United Healthcare Services Inc., and Optum Group LLC. Jones had

filed a putative class action claiming the insurance companies made it difficult for out-of-network doctors to get paid. The court initially dismissed Jones' claims in August 2020 but granted leave for Jones to replead.

Judge Caproni dismissed the amended complaint, noting it did not fix any of the deficiencies detailed in the court's prior opinion. In ruling on the first motion to dismiss, the court dismissed the antitrust claims because plaintiff failed to plead that defendants possessed monopoly power, had a specific intent to monopolize, or conspired to monopolize in the health insurance market. The court granted leave to amend, despite doubts "that Plaintiff will be able to plead sufficient facts to support an antitrust injury or an inference of monopoly power, given Defendants' less than 20% share of the alleged relevant market." In its second opinion, the court stated that "Plaintiff opted to double down on the theory of injury previously rejected by the court"—that withholding payments was a way to force providers to join Defendants' networks. According to the court, this theory fails to address the fact that it does not allege that competition in the insurance market has been affected. The amended complaint also did not provide any facts from which the court could infer that Defendants possessed monopoly power. Because of Plaintiff's failure to address any of the deficiencies identified by the court in the ruling on the motion to dismiss the original claims, the court dismissed Plaintiff's amended complaint with prejudice.

2. *Stromberg, et al v. Qualcomm, Inc.* No. 19-15159, 2021 U.S. App. LEXIS 29395, (9th Cir. Sept. 29, 2021).

The Ninth Circuit overturned a district court order certifying a class of 250 million people in an antitrust litigation against Qualcomm over its alleged monopoly of modern cellphone chips because the district court erred in its choice-of-law analysis. The plaintiffs complained that the company refused to license its standard essential patents (SEPs) to chip supplier competitors and "enter[ed] into exclusive dealing arrangements with [company] that prevented rival chip suppliers from competing with Qualcomm to supply [company]'s chip demand." The panel determined that the district court failed to properly analyze California's choice-of-law rules, and in turn, erroneously held that common issues of law predominate as required by the class action provision of the Federal Rules of Civil Procedure.

The class that plaintiffs sought to certify contained consumers from all 50 states. In order to certify a class, the trial court must find that class members are similarly situated and that common questions predominate their cases. The Ninth Circuit found that this was not the case in the proposed class action because the consumers were not all located in California. The opinion explained that state laws beyond California's antitrust law—which permits indirect purchasers to sue for treble damages—apply to the nationwide suit. The Ninth Circuit determined that other states, including states that do not allow for indirect purchaser claims, "have an interest in how their markets are managed and how best to enforce antitrust violations and regulate commerce in their states."

3. *San Francisco Comprehensive Tours, LLC v. Tripadvisor, LLC*, Case No. 2:20-cv-02117, 2021 WL 4394253 (D. Nev. Sept. 24, 2021).

District Judge Gloria Navarro dismissed a Sherman Act claims against Tripadvisor LLC and its wholly owned subsidiary, Viator, Inc. Plaintiff, a guided-tour company operating in San Francisco and New York, alleged that the defendants participated in a scheme to undercut plaintiff by using phony online "landing pages" to poach and divert web traffic. Judge Navarro dismissed the case, saying multiple fatal flaws each independently doomed the claims brought by plaintiff.

To begin with, the court ruled that it lacked personal jurisdiction over Tripadvisor because Section 12 of the Clayton Act does not confer personal jurisdiction over limited liability companies, stating "multiple

district courts and the Third Circuit have strictly construed the statute and excluded limited liability companies from Section 12 of the Clayton Act . . . . The Court sees no reason to depart from the other courts' plain language reading of Section 12 of the Clayton Act." Because the Court ruled that it had jurisdiction over Viator, it went on to determine whether plaintiffs had adequately alleged their Sherman Act claims. Citing a similar case against Groupon, where almost identical antitrust claims against Groupon were dismissed, the court determined that Tripadvisor did not provide the same interchangeable services as plaintiff, who provides guided tours. Accordingly, the Court determined that plaintiff had failed to allege an adequate relevant market or that it had suffered antitrust injury. With regard to the Section 1 claim, the Court dismissed the claim because Viator is a wholly owned subsidiary of Tripadvisor, and under the *Copperweld* doctrine, a parent and its wholly owned subsidiary cannot conspire in violation of Section 1.

Mexico

A. COFECE fines 17 clubs of the Liga MX, the Mexican Football Federation, and eight individuals for colluding in the market for drafting soccer players.

In Mexico's first-ever case related to labor markets, the Federal Economic Competition Commission (COFECE or Commission) fined 17 soccer clubs of the Liga MX, the Mexican Football Federation (FMF or Federation) and eight individuals 177.6 million Mexican pesos (9 million U.S. dollars) for collusion.

According to COFECE, to avoid or inhibit competition in the market for the drafting of soccer players, the clubs agreed to the following two measures:

1. *Price fixing in wage caps for women soccer players*.

Since the creation of the Women's Soccer league (Liga MX Femenil) in 2016, several clubs agreed to establish a wage cap for these athletes, according to three categories:

(i) those older than 23 years would earn a maximum of 2,000 Mexican pesos;

(ii) those younger than 23 years, 500 Mexican pesos plus a personal training course; and

(iii) the players of Sub17 category would have no income, but could have support for travel, education, and meals.

This agreement was replaced in the 2018-2019 season. The Liga MX informed the clubs that the maximum cap would be 15,000 Mexican pesos, and only four of its women players could earn above such amount. In addition, in-kind support could not exceed 50,000 Mexican pesos per tournament. The first cap on women soccer players' remuneration was a part of the presentation of the Liga MX Femenil project and was approved by the Sports Development Committee of Liga MX. In addition, the Federation issued releases to persuade clubs to comply with the wage cap, in addition to conducting activities to verify compliance.

According to COFECE, the first cap, whose duration was from November 2016 to May 2019, constituted a collusive agreement between clubs that had the purpose and effect of manipulating prices – in this case, of the women players' wages – and preventing clubs from competing through offering better wages, which not only had a negative impact on player income, but also widened the gender pay gap.

2. *Agreement to segment the market for drafting male players.*

COFECE reported that the 17 sanctioned clubs, with the collaboration of the FMF, agreed to apply the right of retention (better known as a "gentlemen's agreement"), whereby each club affiliated with the Federation registered the players with whom they had a contract, but at the expiration of their contract, the club retained the right to keep them. If a different club was interested in contracting with that player, it had to obtain authorization from the first club that had the player in its "inventory" and, often, had to pay a compensation for the exchange.

COFECE found that the conduct constituted a collusive agreement that had the object and effect of segmenting the market of players in order to limit competition of clubs in the hiring of players, unduly restricting the mobility of athletes and limiting their bargaining capacity to obtain better wages. The Commission indicated that the duration of this conduct was at least 10 years, from June 2008 to December 2018, although several economic operators participated for a shorter period.

According to COFECE, the two practices generated a combined harm to the market estimated at 83, 375,000 Mexican pesos.

The Netherlands

A. Dutch ACM decisions, policies and market studies.

1. *ACM: Arriva allowed to run three new train services.*

On Sept. 16, 2021, the Dutch National Competition Authority (ACM) approved the application of Arriva— a Dutch railway company— for three new train services that the transport company wants to start operating in 2023. Based on European legislation, such services may be offered as a so-called open access service as of 2021, provided the services do not have a significant negative impact on an existing concession. After investigation, the ACM concluded that Arriva's proposed expansion would not have such an impact: the maximum negative impact on the profit margin of the main rail network concession, operated by National Railways, would be 0.03%. This marked the first time the ACM carried out such a test.

2. *ACM legal memo: What is meant by a fair share for consumers in article 101(3) TFEU in the context of sustainability?*

What is meant by a fair share for consumers in article 101(3) TFEU - in the context of sustainability - is a highly debated topic. The ACM and European Commission have different opinions with regard to sustainable agreements. EU Commissioner Vestager declared that "there is a fundamental principle that restricting competition for a product can only be justified if the consumers of that product are not worse off on balance." On Sept. 27, 2021, Martijn Snoep, head of the ACM, stated that the ACM opposes this idea and that "a context-specific analysis always should be made."

In this legal memo, the ACM sets out its point of view, which is intended to inform both the discussion on this issue in the context of the European Competition Network and the ACM's own policy towards sustainability agreements. It concludes that (i) out-of-market benefits are counted towards compensation of the consumers negatively affected, in particular if they affect substantially the same group; (ii) out-of-market efficiencies benefiting other consumers also can be counted toward a fair share for consumers overall; and (iii) full compensation for the negatively affected consumers is not required, just conferral of appreciable objective advantages.

3. *Guidelines for network companies and alternative energy carriers on permitted activities under current legislation*.

On Sept. 14, 2021, the ACM published guidelines regarding the opportunities that network companies have with regard to alternative energy carriers. These guidelines explain the statutory framework based on the rules currently in effect.

4. *Electricity storage market research*.

On Sept. 10, 2021, the ACM announced it had made an inventory of possible obstacles to electricity storage and will launch a follow-up investigation into possible tariff-related obstacles, as the different components of the transmission tariffs for electricity cannot be an impediment to the construction and development of power storage installations.

B. Dutch Courts.

1. *The Dutch Trade and Industry Appeals Tribunal agrees with ACM in the appeal of easyJet regarding the Schiphol airport charges*.

On Sept. 14, 2021, the Dutch Trade and Industry Appeals Tribunal (CBb) announced that it agreed with the ACM in rejecting easyJet's complaints about the rates and conditions applied by Schiphol to it since April 1, 2019. EasyJet had requested that the ACM determine that the rates and conditions conflicted with the rules of the Aviation Act. The ACM rejected that request. EasyJet appealed.

The ACM had found that Schiphol sufficiently involved users in the determination of the rates and conditions and the investment program. The CBb confirmed this opinion. The CBb also agreed with the ACM that the charges for landing and take-off and for handling passengers were not unreasonable or discriminatory, contrary to what easyJet argued.

United Kingdom

A. Green Agenda.

1. *Environmental sustainability advice*.

On Sept. 29, 2021, The UK Competition and Markets Authority (CMA) issued a public Call for Inputs, asking for information that will assist it in answering the UK government's request for advice on how the tools available under UK competition and consumer laws can better support the UK's Net Zero and sustainability goals, including preparing for climate change.

The CMA is particularly interested in examples of how competition or consumer laws impact the ability of businesses or consumers to act sustainably. It has also asked for views on changes to the competition rules that would help to achieve the UK's green goals, and on the need for further CMA guidance or engagement. The consultation will remain open until Nov. 10, 2021.

2. *Green Claims – misleading statements*.

On Sept. 20, 2021, the CMA published a Green Claims Code, to help businesses understand how to communicate their "green" credentials to consumers without making misleading statements. In the meantime, the CMA will carry out a full review of misleading green claims at the start of 2022, looking at both online claims and claims made on in-store signs and product labels. Certain sectors will be

prioritized—likely including textiles and fashion, travel and transport, and fast-moving consumer goods, where consumers appear to have the greatest concerns.

B. UK internal market—free flow of goods and services within the UK.

With the UK no longer a member of the EU internal market, its focus is on ensuring that the internal market across the four UK nations operates effectively. On Sept. 21, 2021, the CMA published guidance on the functions of the Office for the Internal Market (OIM), which has been newly established under the auspices of the CMA to monitor and report on the health of the UK internal market.

The OIM will provide non-binding technical and economic advice to all four UK governments on the effect of new regulations they introduce on the ability of firms to sell their products and services throughout the UK, and on competition and consumer choice. It will have particular regard to the UK Internal Market Act's market-access principles, which require that a product legally produced in or imported to, and that legally can be sold in, one part of the UK can be sold in any other part of the UK, with minimal if any barriers to trade, investment and movement of workers, and without discrimination. Similar principles apply to the provision of services and recognition of professional qualifications. The OIM has a duty to produce reports at regular intervals, either on its own initiative or at the request of government. To assist the OIM in fulfilling this and its other obligations, it has the power to issue notices requiring any person to provide it with documents or information.

C. PCR testing for travel.

On Sept. 10, 2021, the CMA published advice to the UK government on ways to make the PCR testing market work better for consumers. After a review of the market, the CMA identified a risk that suppliers of these tests are competing on grounds other than high clinical quality and noted consumer complaints that test kits are expensive, the kits and test results arrive late or not at all, and they are unable to contact providers when things go wrong or they want to request refunds. To help to resolve these issues, the CMA is suggesting upfront regulation, monitoring, and wider sanctions. It has made a number of specific recommendations, including improved standards, a one-stop-shop list with sufficient information to enable consumers to compare quality, approved test providers who have satisfied those standards, and a monitoring and enforcement program to ensure suppliers continue to meet those standards and are removed from the list if they do not.

In the meantime, the CMA is investigating breaches of UK consumer law by two suppliers of these tests and has written to several other suppliers about complaints it has received regarding misleading pricing of PCR travel tests, urging them to bring their practices in line with consumer law requirements.

Poland

A. UOKiK cracks down on Resale Price Maintenance in the dietary supplements market.

On Aug. 30, 2021, the president of the Office of Competition and Consumer Protection (UOKiK) issued a decision stating that the prices of Solgar brand dietary supplements were set in collusion with Solgar's retailers. Solgar is a U.S. company that manufactures dietary supplements such as vitamins and herbs and sells them via internet and retail outlets in Poland. The president of UOKiK discovered that Solgar had agreed to minimum resale prices for its dietary supplements with its retailer counterparties. The investigation showed that since 2010, retailers could not sell Solgar products for lower prices than the prices imposed by the company. Solgar threatened its distributors with retaliation for non-compliance, such as loss of preferential terms of cooperation or even termination of the agreement. Retailers also

monitored each other's rates and informed Solgar if any of them applied lower rates. It was discovered in the proceedings that some members of the management board of Solgar coordinated and supervised the price-setting activities of the company's other employees. A sanction of over PLN 1.2 million (approx. USD 300,000) was imposed on the company and a penalty in the amount of over PLN 280,000 (approx. USD 70,000) was imposed on two members of the management board personally responsible for the collusion.

B. Air Liquide's acquisition of Betamed cleared conditionally by president of UOKiK.

On Sept. 7, 2021, UOKiK gave conditional approval for the takeover of Betamed by Air Liquide. Each of the companies operates in the Polish National Health Fund-financed medical services market. There is concentration overlap between these two companies in regional markets for publicly funded home mechanical ventilation services, which are contracted by the National Health Fund and are available to patients requiring ventilator support who can be cared for at home. Entrepreneurs compete on two levels in this market. First, within the framework of competition proceedings conducted by the National Health Fund. Second, if, in a given area, there are several entities with contracts signed with the National Health Fund, then they compete for patients based on quality of services.

UOKiK found that the transaction would lead to competition concerns in the regional markets in two voivodeships (i.e., provinces), where patients would be deprived of the choice of which entity to use. At the same time, UOKiK stated that it was possible to impose certain conditions on Air Liquide, the fulfilment of which would eliminate the competition and patient health risks. One of the conditions obligates Air Liquide to set up a company (or companies) to which it will transfer Betamed's assets related to the provision of mechanical ventilation services to at-home patients in these two voivodeships, in particular: contracts with the National Health Fund, contracts with employees, accounting, technical and commercial documentation, patient databases as well as equipment and fixed assets necessary to perform the contract with the National Health Fund. These entities will be sold to an independent investor unaffiliated with Air Liquide. The second condition obligates the purchaser to be approved by UOKiK.

Italy

A. ICA opens formal investigation into merger between Nexi S.p.A. and SIA S.p.A.

On Sept. 3, 2021, the Italian Competition Authority (ICA) opened a formal investigation regarding the possible incorporation of SIA S.p.A into Nexi S.p.A. The latter is a public company operating in the payment services sector. SIA is active in the design, implementation, and management of services for financial institutions, central banks, companies and public bodies, as well as in the payment services sector.

The merger would determine the integration of players active at different levels of trade and affect multiple markets within the digital payments sector—in particular merchant acquiring, processing, payment card issuing, retail payment clearing, interbank data transmission, as well as services for the supply and maintenance of ATMs. According to the ICA, given the high market shares of the participants and the vertical integration of many of the sectors involved, the merger of SIA into Nexi could lead to the creation or strengthening of a dominant position by the new entity, with horizontal, vertical, and conglomerate effects.

B. ICA opens investigation over possible abuse of dominance by incumbent operator in the national market of recycling of polyethylene goods.

On Aug. 31, 2021, the ICA initiated an investigation for abuse of dominant position against Consorzio Polieco (Polieco), a private, nonprofit consortium whose members include, among others, producers and users of polyethylene goods. The consortium, which was established by law, is active in the withdrawal, collection, recycling, and recovery of polyethylene goods, excluding packaging. The consortium operated under a monopoly regime since its establishment in 1997 until the creation in 2020 of Consorzio Ecopolietilene (Ecopolietilene) and still holds a dominant position in the national market for the recycling of polyethylene goods. The latter is an autonomous consortium active in the recycling of polyethylene waste, to which entities that are not part of Polieco may adhere. The investigation was initiated following a complaint submitted by Ecopolietilene, alleging that Polieco perpetrated a complex abusive strategy. According to the complainant, Polieco (i) first attempted to prevent the creation of a competitor, by challenging the related ministerial authorization and (ii) then carried out a series of conducts aimed at maintaining its current customers, as well as acquiring potential demand.

In particular, Polieco allegedly tried to "discourage" some companies to join the competing consortium, stressing that the establishment of the latter had been challenged (by a legal action brought by the incumbent operator itself). Moreover, Polieco allegedly solicited several companies to regularize past contributions, offering at the same time financial incentives, conditional on joining Polieco, and threatening legal action and sanctions by the public authorities in case of refusal. In light of the above, ICA opened an investigation against Consorzio Polieco, granting it 60 days to be heard by the ICA. The proceedings must be concluded by Oct. 31, 2022.

European Union

A. EU Courts.

1. *Court of Justice refers a case on tax exemptions granted by Belgium to multinational companies by means of tax rulings back to the General Court for reconsideration*.

On Sept. 16, 2021, the Court of Justice of the European Union (CJEU) set aside the EU General Court's (GC) February 2019 judgment concerning Belgium's system of exemptions for the excess profit of Belgian entities. The CJEU held that the Commission had correctly qualified the measure as an aid scheme (as opposed to a plurality of individual aids).

By its decision of Sept. 16, the CJEU noted that three cumulative conditions must be met for a State measure to be classified as a "scheme": (i) the aid may be granted individually on the basis of an act, a concept including a "consistent administrative practice" by the national authorities; (ii) no further implementing measures are required; (iii) potential beneficiaries must be defined "in a general and abstract manner." According to the CJEU, the GC erroneously found the existence of an aid scheme because (i) it misapplied the concept of an "act" in that it did not consider the "systematic approach" adopted by the Belgian Authority and (ii) it failed to consider that the Belgian tax authorities had systematically granted the excess profit exemption when the conditions were satisfied (i.e., with no further implementing measures).

Accordingly, the CJEU set aside the challenged judgment and referred the case back to the GC for it to rule on the classification of the measure as State aid.

2. *General Court dismisses Altice Europe's action against the Commission decision imposing two fines in relation to the acquisition of PT Portugal.*

On Sept. 22, 2021, the GC issued a judgment confirming the validity of the EC's decision of April 24, 2018, imposing fines against Altice Europe NV—a multinational cable and telecommunications company—in relation to the acquisition of PT Portugal SGPS SA, a telecommunications and multimedia operator.

In the decision, the EC found that Altice implemented the concentration with PT Portugal before having notified the transaction and, thus, without receiving clearance by the EC. According to the EC decision, some of the preparatory clauses of the share purchase agreement gave the acquiring company a right to veto the appointment of senior management of PT Portugal and intervene in its commercial policy. In addition, the EC found that the rights set forth under the clauses actually had been exercised on a number of occasions, also causing the exchange of competitively sensitive information concerning PT Portugal. Therefore, Altice received two fines of € 62,250,000.00 each for having infringed both the obligation to notify the concentration and the prohibition on implementing the concentration prior to its notification and clearance pursuant, respectively, to Article 4(1) and Article 7(1) of the EU Merger Regulation.

The GC rejected Altice's plea that the contested breaches were redundant and that the order violated principles of proportionality and the prohibition of double punishment. According to the judges, the two above-mentioned provisions pursued autonomous objectives and set forth different obligations: an affirmative obligation to notify before implementation and a negative obligation to wait until the EC authorized the deal. The GC also ruled that the acquiring company had a decisive influence—actually exercised on several occasions—over PT Portugal since the former held the power to co-determine the appointment of the senior management, as well as the right to veto any price change or amendment to standard terms and conditions. PT Portugal, in fact, had to require written consent from Altice for such actions, with a penalty in case of violation.

The initial fines were reduced by 10% given that Altice notified the transaction and collaborated with the Commission in the clearance process.

B. EU Commission.

1. *Commission proposes a common charger for electronic devices.*

On Sept. 23, 2021, the EU Commission announced a proposal for a revised Radio Equipment Directive to harmonize charging port and fast-charging technology: USB-C will become the standard port for all smartphones, tablets, cameras, headphones, portable speakers and handheld videogame consoles. In addition, the Commission proposes to unbundle the sale of chargers from the sale of electronic devices to improve consumer convenience and reduce the environmental footprint associated with the production and disposable chargers, thereby supporting the green and digital transitions.

The proposal for a revised Radio Equipment Directive will need to be adopted by the European Parliament and the Council by ordinary legislative procedure. A transition period of 24 months from the date of adoption should give industry ample time to adapt before the revised directive takes effect.

2. *State aid: Commission concludes Italian loans worth €900 million to Alitalia are illegal aid.*

On Sept. 10, 2021, the European Commission concluded that two State loans—worth €900 million—granted by Italy to Alitalia in 2017 are illegal under EU State aid rules. Italy must therefore recover the illegal State aid, plus interest, from Alitalia. Alitalia is an Italian airline, providing domestic and

international air transport services, maintenance, ground handling and cargo transportation. It has been losing money since 2008. In early 2017, Alitalia was in urgent need of liquidity, but it had lost access to credit markets due to its deteriorated financial situation. In order to keep Alitalia operating, in May and October 2017, Italy granted the company two loans for €600 million and €300 million, respectively. At the same time, Alitalia was placed into special bankruptcy proceedings under Italian bankruptcy law.

Under EU State aid rules, public interventions in favor of companies can be considered free of State aid, when the State acts not as a public authority, but on terms that a private operator would have accepted under market conditions (the market economy operator principle). The Commission's investigation showed that, when granting the two loans to Alitalia, Italy did not act like a private investor would have done, as it did not assess in advance the probability of repayment of the loans with interest.

3. *Commission approves merger of BME and Saint-Gobain Distribution the Netherlands*.

On Sept. 7, 2019, the European Commission approved the acquisition by BME Group of Saint-Gobain Distribution the Netherlands (SGDN). BME is active in the distribution of building materials via general builders' merchant (GBM); specialist builders' merchant (SBM); and do-it-yourself (DIY) stores in Austria, Belgium, France, Germany, the Netherlands, Portugal, Spain and Switzerland. BME operates GBM, SBM and cash-and-carry stores under different brands. SGDN is active in the Netherlands as a distributor of building materials via GBM and SBM stores. Moreover, it is active in the wholesale of ceramic tiles and of sanitary, heating, and plumbing products. SGDN operates 35 GBM stores in the Netherlands under three different brands.

The European Commission decided not to oppose the notified concentration and declared it compatible with the internal market and with the EEA Agreement. This decision is adopted in application of Article 6(1)(b) of the Merger Regulation and Article 57 of the EEA Agreement.

Greater China

On Sept. 3, 2021, the State Administration for Market Regulation (SAMR) published 10 exemplary cases of enforcement of China's Anti-Monopoly Law (AML) in 2020. Two international mergers—one in semiconductor and the other in medical product markets—are listed among the examples of mergers that SAMR approved with restrictive conditions. Both cases were cited as examples of SAMR's enhanced scrutiny over international mergers based on analysis of their impact on China's market. A brief recap of the two cases is as follows.

A. Nvidia's acquisition of Mellanox.

In 2019, Nvidia, a graphics processing unit (GPU) supplier, announced its intention to acquire Mellanox, a leading supplier of Ethernet and Infini band smart interconnect solutions. The US $6.9 billion transaction was approved by U.S. and EU regulators in the same year. In China, after a year-long scrutiny with protracted negotiation between SAMR and Nvidia, SAMR conditionally approved the acquisition on April 16, 2020, with certain restrictive conditions imposed.

In its opinion, SAMR identified each of GPU accelerators in which Nvidia is active, and private network interconnection equipment, Ethernet adapters, and data center servers in which Mellanox is active in the relevant markets. SAMR held that each pair of GPU accelerators/private network interconnection equipment and GPU accelerators/high-speed Ethernet adapters are neighboring markets, and that data center servers and ordinary Ethernet adapters are vertical markets. Following the conglomerate theories

of harm and pointing to the complementary nature of the parties' products, SAMR held that the acquisition would restrict competition in both China and global markets.

B. Danaher's acquisition of GE Biopharma.

SAMR's other exemplary case was the conditional approval of Danaher's acquisition of GE's biopharma division on Feb. 28, 2020. In this case, the SAMR found that Danaher and GE had an overlap in 25 product markets for medical equipment. Both parties had significant market shares ranging between 10% to 25% in each market, and SAMR found that the transaction would thus result in a notable increase of Herfindahl-Hirschman Index (HHI) in such relevant markets, making entry into such markets difficult due to the technical and financial barriers. Therefore, SAMR concluded that the transaction would restrict competition in 10 particular product markets. Danaher and the combined business were ordered to divest some of the businesses to address monopoly concerns of SAMR. Specifically, the assets, including certain knowhow and trade secrets, of a research project called Project Emily will be sold to a third-party buyer, among other required divestitures.

Japan

JFTC launches an investigation into IPO pricing.

The Japan Fair Trade Commission (JFTC) has launched an investigation into the pricing of initial public offerings (IPO), the first investigation of its kind. In Japan, the difference between the offer price and the opening share price has been larger than that in the United States and Europe, resulting in companies raising less money.

The JFTC reportedly sent questionnaires to approximately 100 companies listed on the Japanese stock market, requesting the contents of the negotiation with the underwriting securities companies regarding the determination of the IPO price, level of satisfaction with the offer price, etc. The JFTC also will work with the Financial Services Agency to ascertain the facts and scrutinize whether there are any problems under the Antimonopoly Law or in light of Japan's competition policy.

Read previous editions of GT's Competition Currents Newsletter.

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