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.

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United States

A. Federal Trade Commission (FTC)

1. *FTC enters final order in Broadcom semiconductor monopolization case.*

On Nov. 4, 2021, the FTC approved a final order settling charges that Broadcom Inc. had illegally monopolized markets for semiconductor components used to deliver internet services through exclusive dealing and related conduct. Under the FTC's final order, Broadcom is prohibited from entering into certain types of exclusivity or loyalty agreements for the supply of key semiconductor chips for traditional broadcast set top boxes and DSL and fiber broadcast internet services. Broadcom also is required to stop conditioning access to, or requiring favorable supply terms for, these chips on customers committing to exclusivity or loyalty for the supply of related chips.

2. *FTC orders divestiture in Price Choppers and Tops Markets' merger.*

On Nov. 9, 2021, the FTC entered an order requiring Price Choppers and Tops Markets to divest 12 Tops supermarkets to C&S Wholesale Grocers to settle FTC charges that their proposed merger likely would be anticompetitive in 11 local markets across upstate New York and Vermont. The FTC complaint alleged the

proposed merger would result in highly concentrated markets in these 11 local markets and likely would enable the newly merged entity to increase prices above competitive levels either unilaterally or in coordination with competitors. In addition to mandating the required divestitures, the FTC's order prohibits C&S from selling any of the divested stores for a period of three years without prior FTC approval and also, for an additional seven-year period, requires that C&S obtain prior approval to sell any of the divested stores to a buyer that operates one or more supermarkets in any of the 11 identified counties.

3. *FTC requires divestiture in ANI and Novitium pharmaceutical merger*.

On Nov. 10, 2021, the FTC entered an order requiring ANI Pharmaceuticals and Novitium Pharma LLC to divest ANI's development rights to one generic drug (sulfamethoxazole-trimethprim aka SMX-TMP) used to treat common infections, as well as assets relating to another generic drug (dexamethasone) used to treat inflammation to settle FTC charges that ANI's acquisition of Novitium likely would be anticompetitive. ANI is a current participant and Novitium is one of a limited number of entrants in the SMX-TMP market, and both ANI and Novitium have products in the market treated by dexamethasone. Under the terms of the FTC's order, ANI and Novitium are required to divest rights and assets to generic SMX-TMP and dexamethasone to Prasco LLC. The proposed order also requires that the parties obtain prior FTC approval for any future acquisitions in these two markets as well as in two related markets.

4. *FTC agrees to modify divestiture in Bristol-Myers Squibb's acquisition of Celgene*.

On Nov. 12, 2021, the FTC agreed to modify divestiture agreements relating to Bristol-Meyer Squibb's 2019 acquisition of Celgene. The modifications relate to confidential provisions of the divestiture agreements pertaining to maintaining Amgen, Inc.'s continuation as a viable competitor with the Otezla product. As a condition of its 2019 acquisition of Celgene, Bristol-Meyers Squibb was required to divest to Amgen the psoriasis treatment drug Otezla.

5. *FTC expands criminal referral program*.

On Nov. 18, 2021, the FTC approved an expansion of its criminal referral program as part of its efforts to stop and deter corporate criminal misconduct in the consumer protection and antitrust areas. The new measures are intended to ensure that cases are promptly referred to local, state, federal, and international criminal law enforcement agencies so that corporations and their executives are held accountable for criminal conduct.

6. *FTC modifies prior order relating to NEXUS's acquisition of Generation Pipeline*.

On Nov. 24, 2021, the FTC agreed to modify its 2019 order entered in conjunction with NEXUS Gas Transmission, LLC's acquisition of Generation Pipeline LLC. The 2019 order had required the parties to remove a noncompete provision in the acquisition agreement and prohibited NEXUS and its joint venture parents from participating in any agreement that restricted competition with one another in the provision of natural gas pipeline transportation in certain Ohio counties. The FTC's order modification relates to the deletion of DTE Energy and inclusion of DT Midstream Inc. as parties to the order, given the sale by DTE of its natural gas pipeline, storage, and gathering business to DT Midstream. Through that sale, DT Midstream has become a successor to DTE with respect to the FTC order and has agreed to comply with the order's obligations.

7. *FTC orders information relating to supply-chain disruptions*.

On Nov. 29, 2021, the FTC ordered nine large retailers, wholesalers, and consumer goods suppliers to provide detailed information relating to the FTC's section 6(b) study of ongoing supply disruptions and resulting hardship to U.S. consumers and competition. The FTC's study will examine whether supply chain disruptions are leading to specific bottlenecks, shortages, and anticompetitive practices, or contributing to rising consumer prices. Section 6(b) of the FTC Act authorizes the FTC to conduct wide-ranging studies that do not have a specific law enforcement purpose.

B. Department of Justice (DOJ)

1. *DOJ announces conditions on Lactalis acquisition of Kraft Heinz*.

On Nov. 10, 2021, the DOJ announced that it would require Lactalis and Kraft Heinz to divest Kraft Heinz's Athenos and Polly-O businesses as a condition to Lactalis's proceeding with its proposed acquisition of Kraft Heinz's natural cheese business in the United States. The DOJ complaint alleges the proposed acquisition would result in higher-priced and lower-quality feta and ricotta cheeses. Lactalis and Kraft Heinz are the two largest suppliers of feta and ricotta cheeses to grocery stores and other retailers in the New York City metropolitan and in four Florida metropolitan areas. The proposed settlement requires the divestiture of Kraft Heinz's Athenos business to Emmi Roth USA and the divestiture of Kraft Heinz's Polly-O brand to BelGioioso Cheese Inc.

2. *S&P Global required to divest three price reporting agencies*.

On Nov. 12, 2021, the DOJ announced it would require S&P Global Inc. to divest three of IHS Markit Ltd.'s price reporting agency (PRA) businesses to resolve antitrust concerns arising from their proposed $44 billion merger. PRAs provide critical price discovery for numerous commodity markets. The divestitures of Oil Price Information Services (OPIS); Coals, Metals, and Mining; and Ptrochem Wire will maintain competition in PRA services and protect consumer access to essential pricing information. The settlement will also require OPIS to end a 20-year noncompete agreement with GasBuddy, which is a crowd-sourced retail price information app that has provided OPIS with pricing data for resale to commercial customers. According to the DOJ complaint, absent the agreed-upon divestitures, the merger would have eliminated significant head-to-head competition between S&P's Platts division and IHS's OPIS as well as other IHS commodity price discovery services; PRA price assessments are frequently used as a price term in supply agreements and used for settling hedging instruments like futures contracts. The proposed settlement requires the divestiture of these business lines to Dow Jones as well as waiving the exclusivity and noncompete provisions contained in the data license agreement between OPIS and Gas Buddy.

3. *Jonathan Kanter sworn in as assistant attorney general for Antitrust Division*.

Jonathan Kanter was sworn in as assistant attorney general for the DOJ's Antitrust Division on Nov. 18, 2021. AAG Kanter previously was in private law practice in several national law firms and also worked as a staff attorney in the FTC's Bureau of Competition.

4. *DOJ sues to block U.S. Sugar acquisition of Imperial Sugar Co*.

On Nov. 23, 2021, the DOJ filed a civil lawsuit seeking to stop U.S. Sugar's proposed acquisition of its rival Imperial Sugar Company. The complaint alleges the proposed transaction will put an overwhelming majority of refined sugar sales in the southeast U.S. in the hands of only two producers, and consequently

American businesses and consumers will pay more for refined sugar. The complaint alleges that U.S. Sugar and Imperial Sugar compete head-to-head to supply refined sugar to customers in the southeast U.S., and that that competition has resulted in lower prices, better-quality products, and more reliable service for customers in that region. If the proposed transaction is permitted to proceed, the complaint alleges it would leave only two significant sugar producers (U.S. Sugar and Domino) in that region, a market already significantly concentrated. U.S. Sugar is the world's largest vertically integrated sugar milling and refining operation.

C. U.S. Litigation

1. *Wolfire Games LLC. v. Valve Corporation*, Case No. C21-0563, 2021 WL 5415305 (W.D. Wash. Nov. 19, 2021).

A federal judge in Seattle has dismissed claims by Wolfire Games related to Valve Corporation's Steam distribution platforms for PC games, allowing Wolfire to replead with additional details, if possible.

Judge John C. Coughenour dismissed the case without prejudice, saying the stability over time of Steam's commission rate—which has remained 30% for years, despite its growing share of the $10 billion annual market—undermined allegations that Valve began squeezing developers as it cemented its dominance. The ruling references the fact that Valve's fees have remained a constant, even with competition and even when it was not the market leader. The ruling also notes that other platforms have charged less than Valve and failed:

> The market reality, at least as plead in the [Complaint] is that, in spite of Defendant's "supracompetitive" fee, others who charge less have failed, even though they had significant resources at their disposal. Therefore, it would appear that the market reality, at least as plead, is that Defendant's fee is commensurate with the Steam Platform's- value to game publishers.

The opinion also gives short shrift to allegations that Valve's actions have resulted in a reduction in output and quality. According to the court, "If anything, the facts provided by the [Complaint], at least with respect to output, suggest the opposite—a consistent increase in the number of games available in the market and on the Steam Platform." Plaintiffs have thirty days to replead.

2. *Prevent USA Corp. v. Volkswagen AG*, 17 F.4th 653 (6th Cir. Nov. 8, 2021).

Volkswagen AG secured a technical victory in a $750 million antitrust lawsuit brought by affiliates of European auto-parts supplier Prevent Group, when a federal appeals court in Cincinnati upheld a ruling sending the dispute to Germany.

The U.S. Court of Appeals for the Sixth Circuit affirmed a decision by Judge Bernard A. Friedman, who in March dismissed claims that VW engaged in a wide-ranging campaign to block Prevent from acquiring smaller suppliers. According to the district court in ruling on Volkswagen's forum *non conveniens* challenge, and affirmed by the Sixth Circuit, Prevent is already engaged in protracted litigation against Volkswagen in Germany over essentially the same issues. In that case, the German court has the jurisdiction to reach more conduct and more alleged injuries than the district court. Moreover, many of the documents are in German and Portuguese, which makes the German court a better forum than the district court sitting in Michigan.

Prevent also argued that the court cannot dismiss an antitrust case under forum *non conveniens* grounds, citing *Industrial Investment Development Corp. v. Mitsui & Co.*, 671 F.2d 876, 890–91 (5th Cir. 1982).

The Sixth Circuit disagreed, citing *Cap. Currency Exch., N.V. v. Nat'l Westminster Bank PLC*, 155 F.3d 603, 606 (2d Cir. 1998), which held that antitrust claims may be dismissed under forum *non conveniens*. Further, the court stated that Prevent overstated the impact of dismissing an antitrust claim based on forum *non conveniens*. "The U.S. Department of Justice, the fifty state attorneys general, and any consumers harmed by higher car prices could still sue the company under the Sherman Act and would be less likely to have their lawsuits dismissed under forum *non conveniens*."

3. *In re Pre-filled Propane Tank Antitrust Lit.*, Case No. MDL No. 2567, 2021 WL 5632089 (W.D. Mo. Nov. 9, 2021).

A federal court denied a class certification motion by indirect purchasers in a proposed $351 million federal antitrust suit against Ferrellgas LP, which sells propane tanks under the Blue Rhino name. The named plaintiffs are able to pursue their claims individually. The case arises out of claims that Ferrellgas pressured retailers to sell underfilled tanks at full price.

In denying class certification, U.S. District Judge Gary A. Fenner stated that the indirect purchasers could not show predominant legal issues among the members of the putative class, which is a key test for class certification. The court also determined that the putative class's expert's use of averaging and aggregating data covered up the existence of uninjured class members, which prevented certification of the class. Further, even though the plaintiffs' common proof with respect to overcharges failed, the court also addressed the expert's use of pass-through studies to show that the indirect purchasers had been injured. According to the court: "the fundamental problem with [the expert's] pass-through analysis is that its reliance on averages and its miniscule sampling of retailer data cannot reliably account for the variation in wholesale and retail prices across AmeriGas's and Ferrellgas's thousands of retailer customers. The evidence is undisputed that those retailer customers paid individually negotiated wholesale prices and then resold AmeriGas and Blue Rhino propane exchange tanks at individually-set retail prices. [The expert's] pass-through studies do not account for any of this variation…."

Mexico

A. COFECE warns that president's order deeming Mexican government's projects and works of public interest and national security carries risks to competition.

The Federal Economic Competition Commission (COFECE) warns that the presidential order published in the *Federal Official Gazette* Nov. 22, 2021, requiring agencies to carry out projects and works deemed important to the public interest, national security, and national development poses serious risks to competition.

According to COFECE, the order grants preferential treatment to a wide range of projects considered to be of public interest and national security. The order instructs the agencies and entities of the Federal Public Administration—inconsistently with the applicable laws in different areas—to grant within a maximum term of five business days a 12-month provisional authorization for permits or licenses necessary for public works. Even when provisional authorization is not granted, the order establishes an automatic approval ("afirmativa ficta") without justification. According to COFECE, this could grant agencies asymmetric and preferential treatment with respect to public and private projects, without regard to established, risk-based requirements and procedures.

COFECE further claims that, according to the order, even if a project is declared of public interest and national security, this should not imply that the related projects fall into an exception to the public-bidding process pursuant to various statutes. COFECE believes that public bidding should be favored so

that the Mexican government can obtain the best contracting conditions. "Exceptions must respond to specific and delimited cases, where there is a clear rationale of danger, risk or alteration to public safety in accordance with the applicable regulations."

The Netherlands

A. Dutch Competition Authority (ACM) decisions, policies, and market studies.

1. *ACM continues action against misleading sustainability claims in the clothing sector*.

Because some clothing companies market themselves as sustainable but exaggerate and cannot substantiate their claims, in early 2021 ACM published five rules for honest sustainability claims and then launched investigations and asked over 70 companies in the clothing sector to critically examine their claims. The ACM itself looked into the sustainability claims of 10 major clothing companies for accuracy, clarity, and verifiability, and requested information from two Dutch and four non-Dutch clothing companies to assess seemingly misleading claims.

On Nov. 4, 2021, ACM announced the results of its investigations and will ask regulators in the non-Dutch company countries to take action against those companies. ACM can take action against the two Netherlands-based companies and can impose fines or orders subject to periodic penalty payments on companies that misled consumers about the sustainability aspects of their products.

2. *ACM penalizes energy company Enstroga for continuing to terminate energy supply to customers with fixed-rate energy contracts*.

On Nov. 2, 20211, ACM announced a penalty against energy company Enstroga for continuing to terminate energy supply to customers that did not agree with changes to their fixed-rate energy contracts. Initially, ACM ordered Enstroga to comply with the regulation and imposed incremental penalty payments. Nevertheless, the energy company continued to terminate contracts because it was struggling with high energy prices. Given Enstroga's ongoing noncompliance, ACM penalized the company EUR15,000.

3. *New European rules to protect consumers against fake discount offers*.

Because consumers sometimes do not know whether a "special deal" is real – i.e., whether the "sales" price or limited-time offer price is a legitimate discount – Dutch law prohibits sellers from misleading consumers with fake discounts. Products must have been sold at the presented "was" price for three months prior to the special offer. (The "was" price also is referred to as the reference price against which the "now" price is compared.)

On Nov. 24, 2021, the ACM announced the result of its investigation into "special offers" using "was" and "now" prices, concluding that web shops regularly made non-genuine offers. New European rules will come into effect mid-2022 to better protect consumers against fake offers. To prevent businesses from charging a high price for a short period before the special price offer – thereby overstating the price advantage for consumers – the "was" price must be the lowest price the trader has charged for 30 days prior to the special offer.

4. *EU Court of Justice ruling on independence of German energy regulator has consequences for ACM's energy-related duties.*

In September 2021, the highest European court ruled on the independence of the German energy regulator, finding that the creation of certain energy-related rules fall under the purview not of a national legislature but of the member state's independent national regulator. Therefore, this ruling affects the ACM's energy-related obligations.

On Nov. 29, 2021, the ACM discussed the importance of independent regulators and the ruling's consequences for Dutch regulations and ACM's decision-making processes. Setting transmission and distribution tariffs and setting rules for system connection and access to the national grids are within ACM's purview. ACM will determine what these other consequences will be over the next few months.

United Kingdom

A. Previews for 2022

1. *Reform of the UK system?*

On July 20, 2021, the UK government published a consultation paper setting out proposals for wide-ranging reform to the UK's competition and consumer protection policy. The consultation ended Oct. 1, and on Oct. 4 the UK Competition and Markets Authority (CMA) published its response to the consultation. Reform proposals supported by CMA include:

- Merger control: Due to concerns about large firms acquiring startups or potential new entrants, CMA proposes an additional threshold that gives it jurisdiction over a merger involving at least one party with supply share of at least 25% of a particular category of goods and services and a UK turnover of more than £100 million. The existing turnover threshold applies to the target business only and may increase to £100 million.
- Antitrust enforcement: To further incentivize firms to apply for immunity, CMA proposes extending full immunity from liability for damages to those undertakings currently granted immunity in cartel investigations.

In parallel, to protect competition in digital markets from a concentration of power in a small number of large digital companies, the UK government proposed a new, pro-competition regime for digital markets. On Sept. 29, 2021, CMA published a brief, supportive response to the digital proposals. As the government is still considering responses to its consultation, it may be some time before further steps are taken towards legislation.

2. *Implementation of CMA's Annual plan.*

On Dec. 2, 2021, CMA published a consultation draft of its 2022/2023 annual plan, which sets out the five main themes on which CMA will focus when the plan is implemented in April 2022.

- Protecting consumers from unfair behavior by businesses, during and beyond the COVID-19 pandemic: CMA's future focus will include enforcing consumer protection rules in markets where consumers appear to suffer detriment – examples listed include leasehold housing, misleading green claims, fake and misleading online reviews, social media endorsements, children's social care provision, and IVF. CMA will also continue to enforce the UK

competition rules against firms that price at artificially high levels through resale price maintenance and excessive and unfair pricing.

- Fostering competition to promote innovation, productivity, and long-term growth across the UK: CMA intends to use existing tools to promote competition and protect consumers, given the ongoing impact of the pandemic. CMA recently has imposed significant penalties on firms that failed to provide information to CMA, or to comply with orders to hold an acquired business separate pending the outcome of CMA's merger investigation.
- Promoting effective competition in digital markets: CMA will continue its work with the UK government on proposals for legislation that will introduce a pro-competition regime for digital markets. Timing is unclear, but when in force this new regime will provide for intervention to open digital markets to greater competition and require firms designated by CMA's Digital Markets Unit as having strategic market status (SMS) to notify CMA of their mergers under a special merger control regime that requires them to suspend completion until CMA approval has been granted.
- Supporting the transition to low carbon growth, including through development of healthy competitive markets in sustainable products and services: CMA is expected to provide advice on this subject to the UK government in early 2022. In the meantime, CMA will continue to combat practices that may impede the transition to a low carbon economy, including measures to reduce the foreclosure effect of exclusive agreements in the electric car charging market.
- Delivering CMA's new responsibilities and strengthening its position as a global competition and consumer protection authority: Brexit has expanded the range of issues within CMA's remit. Many merger, cartels, and abuse of dominance cases with an EU dimension that included the UK would previously have been the exclusive purview of the EU. Now, CMA alone can take action over the UK aspects, investigating in parallel with regulators in other jurisdictions. Due to Brexit, the EU Single Market rules no longer apply to the UK; however, goods and services must be able to move freely across the four UK nations, and monitoring obstacles to the effective operation of the UK internal market is now CMA's responsibility, through its Office for the Internal Market.

3. *Greater international cooperation following the November 2021 G7 summit.*

The heads of the competition authorities of the G7 (Canada, France, Germany, Italy, Japan, UK, USA, together with the EU and guest countries Australia, India, South Africa, and South Korea) held their first-ever two-day digital summit at the end of November 2021, hosted by CMA at its London headquarters. The aim of the summit was to increase collaboration on competition issues in digital markets and discuss policy priorities and competition law issues arising from a number of digital market features, such as app stores, online marketplaces, digital advertising, mobile ecosystems, cloud computing, and algorithms. At the same time, the attendees jointly published a compendium outlining their approaches to addressing competition issues in digital markets and highlighting shared approaches and tactics. The compendium provides a useful overview of key issues for the G7, the steps being taken to strengthen competition authorities' capacity and knowledge base to enable them better to address these issues, areas for reform of their enforcement tools, and the importance of cooperation among regulators, both nationally and internationally.

Poland

A. First foreign direct investment decision issued in second phase proceedings.

Due to the COVID-19 pandemic, in 2020 Poland implemented a temporary foreign direct investment control regime (FDI). The regime grants the president of the Polish Office of Competition and Consumer Protection ("UOKiK") powers to examine transactions concerning the acquisition of Polish undertakings with turnover exceeding EUR 10 million in any market where the undertaking is:

1. active in particularly significant sectors of industry including IT, telecommunication, energy, fuels, pharma and medical devices, food processing, and arms and ammunition; and

2. which have at least one share admitted to trading on a regulated market or introduced to trading in an alternative trading system in Poland; or

3. which possess property disclosed in the official list of facilities, installations, devices, and services included in critical infrastructure.

The obligation to report transactions to UOKiK applies to acquirers with their registered office or citizenship (for natural persons) outside a member country of the EU, European Economic Area, and Organisation for Economic Co-operation and Development. Clearance under the FDI regime does not exempt acquirers from the obligation to obtain separate antitrust merger clearance if relevant conditions to notify the transaction are met.

The investment control procedure consists of two phases. The first phase is the preliminary investigation, serving to examine simple cases that require no further investigation. Most cases end at this stage. However, cases that may pose a serious threat to public order, public safety, or public health may be referred for more detailed control proceedings (phase two).

The acquisition of Odlewnia Zawiercie by Meide Group was the first case that required a second phase investigation. During the proceedings, UOKiK asked various Polish ministers for their opinions on the transaction, including the minister of defense and the minister of internal affairs and administration. The proceedings lasted approximately five months. Ultimately, the transaction was cleared, as the investigation showed no threat to public safety and order. The UOKIK president noted that manufacture and sale of weapons-related products represents an insignificant part Odlewnia Zawiercie's business activities.

B. UOKiK president investigates misleading practices in influencer marketing.

The UOKiK president initiated an investigation into influencer activity aimed at misleading consumers, commonly known as scams. Scams include, among other things, informing consumers about non-existent promotions, concealing important features of a product, exaggerating the properties or purpose of the advertised product, or offering products harmful or dangerous to health. According to the UOKiK president, recipients of social media content are mostly young people who, despite their familiarity with new technologies, cannot necessarily distinguish between neutral information and advertising.

In accordance with Polish law provisions, commercial content on influencer profiles on various social media sites should be labelled as advertising. However, most of the commercial content on social media is not marked at all or is labelled insufficiently. For instance, influencers use only the hashtag #ad or #sponsoredby, which may not be comprehensible to Polish internet users. Also, influencers generally are

not aware of their responsibility and legal obligations, as some of them did not even reply to the UOKiK president's request for information.

Italy

A. ICA opens investigation into Wind Tre S.p.A. for abuse of economic dependence against its resellers.

On Nov. 4, 2021, the Italian Competition Authority (ICA) launched an investigation into the telecommunication company Wind Tre S.p.A. regarding a possible abuse of economic dependence relating to Wind's imposition of economically unsustainable terms and conditions on its resellers. The procedure was initiated following a reseller complaint.

First, the contracts at issue provided for an exclusivity obligation in favor of Wind by virtue of a noncompete clause as well as several tying obligations regarding furniture and commercial materials to be used by resellers. Moreover, Wind allegedly imposed value added tax (VAT) costs upon the resellers through a reverse charge mechanism, under which the entire credit, including the VAT paid by the end consumer, was transferred to Wind, and the reseller had to pay the VAT on each transaction, deducting the amount from the commissions accrued.

Furthermore, according to the ICA, Wind required several unilateral changes to the resellers' compensation plan and, in the end, it withdrew from the contracts with some of the resellers without justification or penalty. On the other hand, any withdrawal on the part of the reseller would have entailed the repayment of commissions already received in relation to installments not yet paid by customers.

Wind now has 60 days to be heard by the ICA, with the procedure due to terminate before Dec. 31, 2022.

B. Italian government approves draft Law on Market and Competition of 2021: main provisions.

On Nov. 4, 2021, the Italian Council of Ministers approved the draft Law on Market and Competition of 2021. The draft law, which is part of the National Recovery and Resilience Plan, now is being reviewed by the Italian Parliament, which must give final approval.

The text incorporates many of the legislative proposals made by the ICA in March 2021, and it aims to, among other things, align the latter's action to that of the European Commission with reference to anti-competitive agreements and merger control. As for the agreements, the government has agreed to introduce the settlement procedure in national antitrust proceedings. Regarding merger control, the government intends to adapt the test for the substantial assessment of mergers set out in the EU Merger Regulation and used by the European Commission, i.e., the significant impediment of effective competition (SIEC) test. Moreover, the system for calculating the turnover of credit and financial institutions will be aligned with the EU Merger Regulation, and the distinction between concentrative and cooperative joint ventures will be removed.

In addition, the government has followed several of the ICA's suggestions regarding strengthening the merger control system. First, the ICA would be given the power to request notification of certain transactions that do not exceed the turnover thresholds set forth in Law no. 287/90. Moreover, the government proposes to amend Article 9, of Law no. 192/1998 by establishing a presumption of economic dependence upon operators who have a commercial relationship with providers of intermediation services via digital platforms which "play a decisive role in reaching end users and/or providers, also in terms of

network effects and/or data availability." The bill then indicates a series of conduct that may constitute an abuse of economic dependence.

European Union

A. AG Rantos clarifies temporal scope of the Damages Directive.

A Spanish National Court—in an action for damages brought by an alleged victim of the "truck cartel"—referred to the EU Court of Justice (CJEU) a question on the temporal scope of certain provisions of Directive 2014/104/EU on actions for damages under national law for competition law infringements ("Damages Directive"). Specifically, the question concerned the scope *ratione temporis* of the provisions regarding the limitation period and the assessment of harm.

In its Oct. 28, 2021 opinion, Advocate General Athanasios Rantos first stressed that the Damages Directive distinguishes between substantive provisions, which do not apply retroactively to "situations existing" before its effective date, and procedural provisions that can be applied retroactively. According to the AG, the provision regarding the five-year limitation period does not apply to an action that concerns facts that occurred before the latter entered into force. Likewise, the provision setting out a presumption of harm caused by cartels has a substantive nature. Hence, it is not applicable to actions related to infringements that occurred before the effective date of national "transposing laws"— i.e., the State measures to implement the Damages Directive.

By contrast, national transposing measures concerning the courts' power to assess the harm caused by the infringement have a procedural nature. Therefore, they can apply to actions related to infringements that ceased before the effective date of the national transposing legislation.

B. European Court of Justice (ECJ) answers preliminary questions regarding article 101 TFEU.

On Nov. 18, 2021, the ECJ answered preliminary questions on criteria that need to be assessed when analyzing compliance of client reservation systems between distributors. In December 2013, the Latvian Competition Authority (LCA) fined SIA Visma Enterprise for a clause in its accounting software distribution agreements that, according to the LCA, restricted competition between its distributors.

The ECJ ruled (link in Dutch) that Art. 101 (1) TFEU must be interpreted to mean that a prohibition "by object" only exists when there is a sufficiently appreciable level of distortion (i.e., the relevant agreements are intended to prevent, restrict, or distort competition). Furthermore, the ECJ stated that Art. 101 (3) TFEU may be justified if the agreements satisfy the four cumulative conditions set forth in paragraph 3. This requires that the benefits of the restriction outweigh any anticompetitive effects.

C. EU Commission imposes EUR 20 million fine for participating in cartel of canned vegetable retailers.

The European Commission fined Conserve Italia EUR 20 million for breach of EU antitrust rules, finding that Conserve Italia and other market participants engaged in a cartel for the supply of certain types of canned vegetables to retailers in the EEA for more than 13 years. They fixed prices, agreed on market shares and volume quotas, allocated customers and markets, exchanged commercially sensitive information, and coordinated their replies to tenders. Three other participants in the cartel settled with the European Commission in 2019, but Conserve Italia did not settle at that time. According to the

European Commission, the level of the fine reflects the gravity of their anti-competitive behavior and the importance of competition law.

D. According to the European Court of Justice, civil courts may also award damages for cartel damage during the transitional regime period.

In 2017, the European Commission fined 19 airlines for price coordination in respect of air cargo services. The price-fixing related to fuel surcharges, security surcharges, and the payment of commissions thereon. Subsequently, to claim damages an action was brought before the referring court in the Netherlands on behalf of purchasers of air freight services. The airlines had argued that, because of the transitional regime of Articles 104 and 105 TFEU, it was not for the national courts to enforce European competition rules.

On Nov. 11, 2021, the ECJ ruled (link in Dutch) that an aggrieved party can invoke European competition rules to obtain damages and, in addition, that the cartel ban of Article 101 TFEU also can be invoked for the period when Articles 104 and 105 TFEU were still applicable. According to the ECJ, Regulation 1/2003 does not contain a provision on the retroactive approval of agreements or practices prior to its effective date. Therefore, Article 101 TFEU is also to be applied before Regulation 1/2003 became effective, and the ECJ found no limitation on the referring court's ability to establish the existence of infringement of the competition rules and to order compensation for the resultant loss.

Greater China

A. China establishes a consolidated anti-monopoly mechanism.

On Nov. 18, 2021, the State Anti-Monopoly Bureau was officially established as a consolidated anti-monopoly mechanism, composed of Competition Policy Coordination Division, No. 1 Anti-Monopoly Enforcement Division, and No. 2 Anti-Monopoly Enforcement Division. The Competition Policy Coordination Division will be responsible for (i) drafting anti-monopoly policy and guidelines, enforcement against administrative monopoly, and domestic and international communication; (ii) the No. 1 Anti-Monopoly Enforcement Division for enforcement against monopoly agreements, abuse of market dominance, and abuse of intellectual property; and (iii) the No. 2 Anti-Monopoly Enforcement Division for merger control review. Being a separate department often means abundant staffing and budget. Before the reform, these three functions worked under the State Administration for Market Regulation (SAMR) rather than as a specialized anti-monopoly component.

B. Another internet giant fined for "pick one from two" policy.

On Oct. 8, 2021, the SAMR imposed a fine of about RMB 3.4 billion (approx. US$ 533 million, equating to 3% of its 2020 domestic revenue) on a food delivery internet giant Meituan for abuse of market dominance in its "pick one from two" practice, and ordered the cessation of such "pick one from two" practice. The company also must return RMB 1.29 billion of deposits stemming from exclusivity arrangements.

The legality of "pick one from two," a variety of policies and practices adopted by internet platforms aiming to compel merchants to have exclusive partnerships or distribution channels with the platforms, remains a crucial issue in this case. SAMR found that Meituan forced merchants to enter into an exclusive partnership with Meituan by differentiated commission rates and delayed the online launch of non-exclusive merchants. Furthermore, Meituan implemented internal policies to cause its employees to enhance "pick one from two" in dealing with the merchants and monitored the performance of "pick one from two" by big data, disciplinary measures, and collecting deposits from exclusive merchants. According

to SAMR's ruling, these practices restrict competition in the internet food delivery market and harm the interests of the merchants and consumers. As a company dominant in the internet food delivery market, Meituan's "pick one from two" practices have violated Subparagraph 4, Subsection 1 of Article 17 of Anti-Monopoly Law, which prohibits an undertaking with market dominance from forcing its counterparties to trade exclusively with it without justification.

Japan

A. JFTC announces proposed penalties in a bid-rigging matter.

On Nov. 5, 2021, the Japan Fair Trade Commission (JFTC) announced proposed penalties for bid-rigging on prints and/or deliveries of notices regarding the Japanese national pension system. In October 2019, the JFTC launched an investigation (including on-site inspection) into suspected violations of the Anti-Monopoly Act (unreasonable restraint of trade, bid-rigging). The Japan Pension Service orders more than 5 billion yen per year for these services. The JFTC suspected that, in advance of bids, the companies colluded to determine which companies received the orders to prevent the order price from falling.

These proposed penalties include (i) a total of approximately 1.4 billion yen in surcharge payment orders to approximately 20 companies and (ii) a "cease and desist order" to take necessary measures to eliminate violations and prevent a recurrence.

B. JFTC submits opinion to court on algorithmic restaurant evaluation.

A restaurant filed a lawsuit in the Tokyo District Court challenging the fairness of restaurant evaluations by a gourmet website. The restaurant claims that a unilateral change in the algorithm used to calculate restaurant evaluation scores on a gourmet website caused the chain's restaurant evaluations to drop, resulting in a decrease in restaurant sales. JFTC submitted its opinion to the Tokyo District Court regarding whether there was an Antimonopoly Act violation.

JFTC assessed that the act of rating restaurants by points constituted a "transaction" between the gourmet website and the restaurants, as the restaurants may conclude a paid membership contract with the gourmet website to increase their ratings. In addition, JFTC said the change in the algorithm in this case may constitute unfair discrimination depending on the influence of gourmet website. Furthermore, if a large percentage of customers came to the restaurant through the gourmet website, changing the algorithm without prior notice could be considered an abuse of the dominant position held by the restaurant.

In March 2020, JFTC released a report on the actual transaction situation regarding gourmet websites, and this lawsuit will determine how the Antimonopoly Act will be applied in the Algorithmic digital fields.

Read previous editions of GT's Competition Currents Newsletter.

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