GT GreenbergTraurig

GT Newsletter | Competition Currents | February 2021

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

Please remember to register!

GT Competition Currents in North America — 2020 Wrap-up and 2021 Preview: "Mergers, Monopolies and More"

Tuesday, Feb. 16, 2021

1:00 p.m. EST (6:00 p.m. GMT)

In this Issue:

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

United States

A. Federal Trade Commission (FTC).

1. *FTC to study impact of physician group and health care facility mergers*.

As part of its Merger Retrospective Program, on Jan. 13, 2021, the FTC issued an Order to File a Special Report to six health insurance companies. The FTC plans to use information gathered through the Special Report (e.g., patient-level data from 2015 to 2020) to analyze the competitive impact of physician and health care facility consolidation, as well as mergers and acquisitions, in markets for health care services.

© 2021 Greenberg Traurig, LLP

2. *FTC approves final order imposing conditions on combination of Pfizer Inc.'s Upjohn and Mylan N.V.*

On Jan. 28, 2021, the FTC announced its final order approving the combination of the Upjohn division of Pfizer Inc. and Mylan N.V. in a spinoff, forming Viatris Inc. The FTC alleged that the proposed acquisition would harm competition in generic drug markets. The final order requires the parties to divest certain rights and assets in seven current generic drug markets as well as FTC approval for any future transactions involving three developing generic markets.

3. *Following FTC staff recommendation to challenge the transaction, Tronox Holding plc. abandons proposed acquisition of TiZir Titanium and Iron.*

In May 2020, Tronox Holdings plc announced its intention to acquire TiZir Titanium and Iron (TTI) from Eramet S.A. Tronox is a producer of titanium oxide pigment, and TTI produces chloride slag, which is an input to the product. On Jan. 4, 2021, Tronox issued a press release stating that the British Competition and Markets Authority, which was examining whether the proposed transaction would foreclose the supply of chloride slag for competitors, planned to open a Phase 2 investigation into the proposed transaction. Given that investigation, on Jan. 18, 2021 Tronox announced it was terminating the acquisition agreement, and on Jan. 29, 2021 the FTC closed its investigation of the proposed acquisition.

B. The Department of Justice (DOJ).

1. *Visa and Plaid abandon merger after Antitrust Division's suit to block.*

On Jan. 12, 2021, Visa Inc. and Plaid Inc. abandoned their proposed merger following DOJ filing suit in November 2020 to block the transaction. Plaid, whose products enable customers to share their financial information with apps and services, is developing its own payments platform. The DOJ complaint alleged that Visa is a monopolist in the online debit industry, that Plaid is an innovative, nascent competitor, and that the proposed transaction would eliminate Plaid as a competitor before Plaid had a chance to succeed.

2. *Health care company indicted for labor market collusion.*

On Jan. 7, 2021, Surgical Care Affiliates LLC, an owner and operator of outpatient medical care centers, was indicted in a two-count federal grand jury indictment under the Sherman Act for conspiracy and agreements not to compete with competitors regarding the solicitation of senior, high-level employees from approximately 2010 to 2017. This is the first indictment in an ongoing investigation of such employee allocation agreements. According to DOJ Assistant Attorney General Makan Delrahim, the charges "demonstrate the Antitrust Division's continued commitment to criminally prosecute collusion in America's labor markets."

3. *DOJ concludes its investigation of D.C.-area private high schools' decision to stop offering Advanced Placement courses.*

In June 2018, several Washington, D.C.-area private schools announced that they had planned to stop offering Advanced Placement (AP) courses by 2022. DOJ, on Jan. 11, 2021, announced that although it was investigating this collective decision as a potential violation of the Sherman Act, as a result of the schools' representations that they are not bound by any agreements and would refrain from entering into any agreements in the future with other schools relating to AP curriculum offering, DOJ would exercise prosecutorial discretion and not bring an enforcement action.

© 2021 Greenberg Traurig, LLP

4. *DOJ issues positive business review letter to companies developing plasma therapies for COVID-19.*

Baxalta US Inc., Emergent BioSolutions Inc., Grifols Therapeutics LLC, and CSL Plasma Inc., which are plasma collection companies, proposed to participate with the Biomedical Advanced Research and Development Authority to design standards in COVID-19 convalescent plasma collection. DOJ, reviewing the proposed collaboration under its business review letter process, announced on Jan. 12, 2021, that it did not intend to challenge the proposed collaboration, based on its conclusion that the collaboration would help to treat COVID-19.

5. *DOJ issues business review letter for proposed university technology licensing program.*

In another business review letter, DOJ on Jan. 13, 2021, announced that its review of University Technology Licensing Program's (UTLP) proposed joint patent licensing among participating universities (specifically, with respect to their physical science patents relating to certain emerging technologies), was unlikely to harm competition, reasoning that the proposal helps universities commercialize inventions for the benefit of the public. UTLP also agreed to put in place competitive safeguards as part of the proposed program.

6. *DOJ issues favorable business review letter to Institute of International Finance for sovereign debt information sharing principles.*

The Institute of International Finance (IIF) sought a DOJ business letter review for its plan to establish voluntary guidelines designed to enable public disclosure of information relating to sovereign debt issuance. DOJ concluded that the guidelines were unlikely to harm competition in part due to various competitive safeguards, reasoning that more transparency in the area would help with more efficient pricing.

7. *Foreign-language training companies admit to participating in conspiracy to defraud the United States.*

On Jan. 19, 2021, DOJ announced felony charges against Comprehensive Language Center Inc. and Berlitz Languages Inc. for allegedly participating in a conspiracy to defraud the United States related to bidding on a foreign-language training contract for the National Security Agency (NSA). The charges allege that the parties submitted false information to the NSA as part of the bidding process, hindering the competitive bid process. Relatedly, DOJ announced deferred prosecution agreements with the parties admitting participation in the conspiracy, agreeing to cooperate fully with the investigation, instituting ethics programs designed to prevent future problems, and paying fines including criminal penalties and victim compensation.

C. U.S. Litigation.

1. *In re La. Real Estate Appraisers Bd., US Sup. Ct. Dkt. No. 9374; La. Real Estate Appraisers Board v. FTC*, Case Number 19-30796 (5th Circuit).

The Louisiana Real Estate Appraisers Board has asked the U.S. Supreme Court to rule that appellate courts may quickly dispense with antitrust allegations against "unquestionably public bodies," rather than forcing such entities to wage lengthy battles in district or federal administrative courts first.

© 2021 Greenberg Traurig, LLP

The FTC first filed the administrative complaint against the appraiser board in 2017, asserting that the Louisiana appraiser board, "a state agency controlled by licensed real estate appraisers, has unreasonably restrained price competition for real estate appraisal services." The FTC contended that the board carried out this price-fixing through its regulation of fees paid to appraisers by appraisal management companies and through its enforcement actions – while being controlled by the board's eight appraiser members, who allegedly had private interests in higher fees.

One of the Louisiana board's asserted defenses was something called "state-actor immunity." Under this defense, the Louisiana board argued that the alleged anti-competitive actions of the board and its members were not illegal because they were state government-sanctioned actions and policy decisions. The FTC's counter to the defense was that the protection did not apply because the Louisiana board was controlled by "market participants" – i.e., private appraisers with an interest in the outcome. When the FTC ruled that the appraiser board could not rely on the defense, the board challenged the ruling by suing the FTC in federal court and asking the federal court to overrule the FTC. The Fifth Circuit Court of Appeals recently ordered the board's court case be dismissed and the FTC's administrative proceeding go forward.

The board filed a motion for a rehearing, which the Fifth Circuit denied. In response, the board first sought high court intervention in December 2020, asking the court to stay the FTC action. Justice Alito refused to issue the emergency stay. In January 2021, the board filed a petition for certiorari, arguing that the Supreme Court should take the case now because, "Layering a restrictive jurisdictional limitation on immediate appeals on top of N.C. Dental's limitation on the set of government entities that will obtain immunity on the merits will leave unquestionably public bodies exposed to the threat of federal antitrust suit, without the ability to get a definitive answer on their immunity from a court of appeals until it is too late." The board further warned that the "predictable result" of denying immediate appeals would mean more government boards forced to settle under threat of litigation from private plaintiffs or government enforcers. Enforcers like the FTC, it warned, would have "the unique power to delay any neutral decisionmaker from reaching the immunity question until after expensive proceedings have concluded.

2. *McCarthy et al v. Intercontinental Exchange, Inc. et al.*, Civil Action No.: 3:20-cv-05832 (N.D. Cal.)

Several of the world's biggest banks have asked a U.S. federal district judge not to immediately terminate the Libor interbank offered rate in response to a lawsuit filed by borrowers contending that the benchmark was the product of a "price-fixing cartel." The plaintiffs, which include 27 consumer borrowers and credit card users, are also seeking monetary damages. Defendants in the case contend, in a November filing, that an injunction abruptly ending Libor would "wreak havoc" on financial markets and undermine years of work seeking to reform the reference rate. A San Francisco judge has said he will render a decision on the banks' motion for an injunction without a hearing. The judge held a hearing, however, earlier in January on a request by the banks to transfer the case to Manhattan federal court; the judge has not yet decided that motion.

Libor is derived from a daily survey of bankers who estimate how much they would charge each other to borrow. It has been used throughout the world in determining the cost of borrowing in many types of loans, such as student loans, mortgages, interest-rate swaps and collateralized loan obligations. For over three years, policymakers around the globe have been developing new benchmarks to replace Libor by the end of 2021. In November, officials proposed an extension for some dollar Libor tenors until mid-2023, to help firms manage the transition process.

© 2021 Greenberg Traurig, LLP

The borrower plaintiffs want Libor either to be prohibited or to be set at zero, with borrowers repaying capital but not interest. The banks contend, in their November filing, that the plaintiffs have not shown that they paid interest based on Libor, and that the suit is built on "baseless theories of antitrust liability." The banks also say that regulators have warned that even a temporary disturbance of Libor "could devastate" financial markets. The banks further argue that "Plaintiffs allege that the highly regulated process of setting a benchmark that is a fundamental part of the global economy is a per se antitrust violation. . . But legitimate cooperative activities, even those involving competitors, often benefit competition."

Mexico

A. COFECE fines "Eco Comercializadora" for false statement during probe of cartel conduct in gas service stations in Baja, California.

The Mexican Federal Economic Competition Commission (COFECE) determined that "Eco Comercializadora" (EC) made false statements while being investigated for cartel conduct in the gasoline marketing industry in several municipalities. COFECE fined the company 9,873,000 pesos (US$450,000.00).

In August 2020, COFECE fined several companies and individuals for colluding in the gasoline marketing industry in the same geographic areas. Upon review of several filings, COFECE noticed an inconsistency between the information provided by EC during the probe and the information provided by Grupo Eco (the economic interest group of which EC is a part) during a follow-up procedure.

The Commission said that EC did not report changes to the company's names and timely shareholding structure of all the companies in its group timely, even though this information had to be updated immediately during the investigation. EC's failure to update the file affected the enforcement powers of COFECE and the decision-making ability of the Investigating Authority. EC's actions prevented the Investigating Authority from determining whether to subpoena even one entity that likely participated in the cartel.

Because EC failed to provide information timely, the Investigating Authority wasted time and resources investigating dissolved entities, which could not legally be charged. COFECE notified the Attorney General to determine if the EC's actions warranted further legal proceedings.

B. Seven banks and traders receive a minor fine in price-rigging case in the peso bond market.

COFECE concluded an investigation into potential collusion by banks in central-bank auctions involving sales of debt securities issued by the Mexican government. The investigators said they found evidence in electronic chats from 2010 to 2013 of cartel behavior, proving that the banks and traders manipulated prices and established obligations not to trade and/or not to acquire certain government securities in specific transactions. The manipulation had a direct impact on the price of the debt securities in the secondary market.

COFECE stated that investors suffered US$1.4 million in damages. Seven banks were fined a combined 29.4 million pesos (US$1.4 million) out of a potential total range of fines of up to 680 million pesos. Eleven traders were fined a total of 5.7 million pesos out of a possible range of fines up to 108.5 million pesos (US$250,000). The decision has been criticized by the specialized media and the federal government and can be challenged before antitrust specialized federal court.

© 2021 Greenberg Traurig, LLP

The Netherlands

A. Policy: Ensuring the markets work well in 2021.

In 2021, the Netherlands Authority for Consumers and Markets (ACM) will focus on three areas: the effects of COVID-19, the digital economy, and the energy sector's transition to sustainable energy. The digital economy and the energy sector's transition had already been included on the 2020-2021 ACM agenda. In those areas, many actions have already been taken that will be continued and expanded in 2021. Attention to COVID-19's effects on the economy is a logical expansion of ACM's agenda.

1. *COVID-19.*

Martijn Snoep, Chairman of the Board of ACM, says: "The coronavirus pandemic has enormous consequences for the economy. Some sectors are hit hard, such as the hospitality industry, the events industry, the public-transport sector, and the travel industry. We want to help combat the negative effects of the pandemic on the economy, and to prevent markets from becoming permanently disrupted. As an independent government agency, we have a social responsibility to help find solutions to social problems. The laws that we enforce offer opportunities to do just that."

For example, ACM allows close collaborations in the health care sector in the fight against COVID-19. In 2021, ACM says it will pay more attention to vulnerable consumers, who are hit harder by the virus. For example, additional educational efforts will be initiated to remind these consumers of their rights. ACM will also launch an exploratory study into the effects of the coronavirus crisis on brick-and-mortar stores. The increase in online shopping, which started during the coronavirus crisis, is expected to be permanent to some degree. This means that, in the near future, more brick-and-mortar stores and shopping malls will stay vacant. ACM will examine whether it can play a role in finding a solution to this problem.

2. *Energy transition.*

The Netherlands is focusing on transitioning to sustainable energy, with the task of achieving carbon neutrality by 2050. ACM will offer system operators opportunities for experiments that promote the energy transition, including, for example, experiments with hydrogen. ACM also foresees that the energy transition will lead to higher costs. In addition to sustainability, energy affordability for consumers is paramount. Accordingly, ACM will launch a study into energy affordability for consumers, including long-term affordability.

3. *Digital economy.*

The digital economy offers many benefits, such as ease of product comparison and ordering. Although ACM endeavors to ensure that fast broadband connection is widely available, digital markets do not always work well for all. In 2021, ACM will take enforcement action against misleading practices involving online products. In addition, ACM will launch an investigation into the access of payment apps to NFC chips on mobile phones, and it will complete its investigation into the terms and conditions for app stores. A sector inquiry into IT systems in the health care sector will be published in 2021.

4. *What more will ACM do in 2021?*

Besides these focus areas, ACM will make additional efforts to ensure that markets work well. For example, ACM will focus on excessive prices of prescription drugs. In addition, ACM will launch follow-up studies into the prices of foodstuff in its agricultural monitor and ACM will complete an investigation into

© 2021 Greenberg Traurig, LLP

a possible buyer cartel in the agricultural sector. ACM will also complete investigations this year into suppliers that put undue pressure on retailers to raise their prices. ACM will also study the effectiveness of online communications that improve transparency.

B. Further investigation needed into acquisition of gas company Primagaz by rival company Benegas.

In the face of the gas company Benegas's intent to acquire rival company Primagaz Nederland, the ACM has concluded that a further investigation is needed into the potential market for lightweight gas bottles in order to ensure sufficient competition remains in the market after the proposed acquisition.

Both companies supply propane in bulk storage tanks and in gas bottles. Propane gas is used for various purposes, including, for example, heating purposes, and propane gas in bottles is used for diverse consumer and commercial uses.

ACM has determined that, after the acquisition, sufficient competition will remain with regard to the selling and supply of bulk propane gas. ACM is investigating whether, in the leisure segment, sufficient competition will remain for smaller and lighter gas bottles. If both companies decide to continue to pursue the proposed acquisition and file an application for an acquisition license with ACM, ACM will launch a follow-up investigation into the effects of the planned acquisition. The follow-up investigation will include, among other steps, further questions to market participants and consumers about the potential consequences of the acquisition.

United Kingdom

A. UK merger control – a new dawn?

The start of 2021 coincides with the end of the transition period following the UK's withdrawal from the EU. In turn, this brings about the most significant change to UK merger control since the introduction of the current UK regime by the Enterprise Act 2002.

This is because, as reported in previous editions of Competition Currents, one of the key consequences of the end of the transition period is that the EU's "one-stop shop" merger control regime no longer covers the UK: new M&A transactions are now potentially subject to parallel investigations in Brussels and London.

The UK's Competition and Markets Authority (CMA) anticipates that it will handle up to an additional 50 merger cases annually as a result of Brexit. To put that figure into perspective, the CMA has in the last five years investigated an average of 60 merger cases per year. In addition to the expected significant increase in case volume, the additional cases will also enrich the CMA's merger "diet" as they are likely to involve substantially larger and more multinational transactions than the CMA's (already varied) existing caseload – requiring significantly more coordination with regulators in other jurisdictions to minimize the risk of divergent timelines and, more importantly, outcomes.

B. Key features of the UK regime.

While it is significant that the UK merger control regime operated by the CMA has now "decoupled" from the EU merger control regime administered by the European Commission, the key features of domestic UK regime remain unchanged:

© 2021 Greenberg Traurig, LLP

- The CMA continues to operate a voluntary regime, meaning that acquirers are not obliged to notify the CMA of transactions that exceed the jurisdictional thresholds, and parties generally do not need to await clearance before closing.
- The CMA is, however, empowered to "call in" for mandatory review any qualifying non-notified transaction, and it frequently does so. When the CMA calls in a completed deal, it will invariably impose wide-ranging "hold-separate" obligations on the merging parties – freezing integration (often on a worldwide basis) for the duration of the CMA's review.
- The CMA's jurisdictional thresholds are flexible, and the CMA has in a number of recent decisions further stretched the outer limits of its jurisdiction, capturing (and ultimately blocking) foreign-to-foreign transactions with only a limited UK nexus.
- The CMA has wide-ranging powers to remedy anti-competitive mergers – including divestment orders – regardless of whether a deal is anticipated, completed, voluntarily notified, or called in by the CMA. Indeed, many of the CMA's recent prohibition and unwinding decisions concerned non-notified mergers that completed before CMA intervention.

While the key features of the regime remain the same, the CMA has in recent months undertaken an extensive exercise in updating and streamlining its key merger control guidance, including the following:

- On Dec. 23, 2020, the CMA published the final version of its revised jurisdictional and procedural mergers guidance – the first update since 2014. Amendments and revised sections include jurisdictional and procedural changes brought about by the UK's withdrawal from the EU, the introduction of new jurisdictional thresholds (enabling public interest "national security" reviews of certain transactions) as well as updates reflecting the latest CMA decisional practice and case law, in particular in relation to the way in which the CMA approaches its extremely flexible jurisdictional tests.
- The CMA has recently completed a consultation on its draft revised Merger Assessment Guidelines, which detail the substantive approach taken by the CMA in its analysis of mergers. The current version was published in 2010 and pre-dates the creation of the CMA. The revised guidelines take account of the CMA's recent experience and case law, with a particular focus on rapidly evolving dynamic – often digital – markets (e.g., an increased focus on the potential for future competition, innovation theories of harm and other non-price-related effects). The revised guidelines are expected to be adopted in the near future.

C. Recent developments in UK merger enforcement.

The CMA has in recent years developed a formidable merger enforcement track record, notwithstanding that the body of mergers investigated by the CMA in any one year contains a higher proportion of problematic mergers, due to the voluntary nature of the UK regime. Many non-problematic mergers are not notified to the CMA, and the CMA generally starts own-initiative investigations only where it identifies that non-notified mergers may raise concerns.

While each case hinges on its own facts, in the last year, nearly 25% of phase 1 cases were referred to in-depth phase 2 review. Coupled with that, the CMA's intervention rate at phase 2 is also currently very high – of the transactions referred to phase 2 in the last two years:

- 72% were prohibited, ordered to unwind or abandoned by the parties during phase 2;
- a further 8% were cleared conditionally (i.e., subject to remedies); and

© 2021 Greenberg Traurig, LLP

- only 20% were cleared unconditionally.

The first few weeks of 2021 suggest a continuation of the CMA's enforcement record:

- On Jan. 4, 2021, the CMA announced its intention to refer the anticipated acquisition by Tronox Holdings plc of TiZir Titanium and Iron A.S. for an in-depth phase 2 investigation unless acceptable undertakings in lieu of reference were offered. The target business is one of the two main global suppliers of chloride slag, one of the minerals used to make titanium dioxide pigment, and Tronox is one of the main producers of titanium dioxide pigment. The CMA's phase 1 investigation found that Tronox intended to use all of the target's chloride slag in its own production and discontinue future sales to third parties. According to the CMA's phase 1 findings, this would have left Rio Tinto (the target's main competitor) with an effective monopoly.

  Tronox offered undertakings to avoid a phase 2 reference but the CMA announced on Jan. 18, 2021, that it would not accept them, as they were not sufficiently clear-cut. As noted above, Tronox subsequently announced that it would not proceed with the acquisition.
- On Jan. 12, 2021, the CMA issued its final decision in relation to the completed acquisition of 3G Truck & Trailer Parts Limited by TVS Europe Distribution Limited. The CMA found that the deal may be expected to result in a substantial lessening of competition in the "wide range wholesale supply of commercial vehicle and trailer parts to motor factors in the independent aftermarket in the UK" – serving as a useful reminder, if needed, that the CMA is not opposed to defining relevant markets narrowly.

  The CMA's final report concludes that full divestiture of the acquired business is the only effective and comprehensive remedy.

In other noteworthy recent UK merger control developments:

- On Dec. 24, 2020, the CMA announced that it took the unprecedented step of asking the Competition Appeal Tribunal (CAT) to overturn the CMA's own decision in relation to FNZ's completed acquisition of GBST. The CMA's final report in question found in November 2020 that this fintech merger resulted in a substantial lessening of competition in the supply of retail platform solutions to investment platforms and required divestiture of GBST. FNZ appealed the decision to the CAT. Following receipt of the FNZ's appeal, the CMA confirmed that it had identified "certain potential errors in its market share calculations as a result of the provision of inconsistent information during the course of the CMA's investigation" and asked the CAT to remit the case back to the CMA for reconsideration.
- The first example of a potential parallel review of a transaction under the EU and UK merger control regimes may be the anticipated acquisition by NVIDIA Corporation of the Intellectual Property Group business of Arm Limited. The deal is understood to be notifiable in Brussels under the EU regime and the CMA issued a preliminary invitation to comment on Jan. 6, 2021. This information-gathering step often precedes a formal CMA investigation.

Poland

A. Planned amendment to Polish Act on Competition and Consumer Protection significantly impacts liability principles.

On Jan. 14, 2021, the draft amendment (Draft) to the Polish Act of 16 February 2007 on Competition and Consumer Protection (Competition Act) was published. The Draft aims to implement Directive 2019/1, adopted by the European Parliament and the Council on 11 December 2018 (ECN+ Directive). The Draft

© 2021 Greenberg Traurig, LLP

introduces several changes, and certain new principles regarding liability for competition law infringements are noteworthy.

First, according to the Draft, both infringing entrepreneurs and entrepreneurs that exercise decisive influence over them will be liable for entering prohibited agreements or abusing a dominant position. This liability will be independent of guilt, which means that the mere fact of violation by a dependent entrepreneur may trigger the liability of the entrepreneur that exercises decisive influence. The turnover of entrepreneurs exercising decisive influence will also be taken into account when calculating the basis for the fine (the fine amounts to 10% of turnover). The Polish Competition Authority (UOKiK) will be authorized to impose a joint fine on the direct infringer and the entrepreneur exercising decisive influence over it. In such a situation, their liability will be joint and several.

Second, there is a change concerning the liability of business associations. Such associations may already be held liable for competition law infringements, but the fine is calculated on the basis of the association's turnover. However, under the Draft, if an association's infringement relates to the activity of its members, the fine imposed on it cannot exceed 10% of the total turnover of all its members who conduct activity in the market impacted by the infringement. In case of the insolvency of a business association, the Draft obliges the association to call on its members to make contributions to cover the penalty. If the contributions are not made within the period of time set by UOKiK, it may require the fine to be covered by all entrepreneurs whose representatives were members of the association's decision-making bodies.

Besides the above, the Draft also includes procedural amendments such as regulations regarding legal professional privilege as well as structural ones such as terms of office of the president of UOKiK.

The Draft is currently undergoing consultation and is expected to enter into force in Q1 2021.

Italy

A. Italian Competition Authority (ICA) authorizes Poste Italiane's acquisition of Nexive, subject to behavioral remedies.

By decision published on ICA's Official Journal on Jan. 11, 2021, the ICA conditionally authorized Italian postal incumbent Poste Italiane's (PI) acquisition of its main competitor, Nexive.

The merger was approved pursuant to Article 75, Law Decree n. 104/2020, a coronavirus-related provision, according to which ICA may not prohibit mergers seen as in the interest of public economy (nor may ICA impose structural remedies). Such limitation of the merger control rules applies to mergers involving labor-intensive companies that have borne losses for three consecutive years and incur the risk of their business ceasing. Mergers affected by said provision must be cleared within 30 days of the notification.

In the decision, ICA noted that the merger is likely to affect competition in the postal services market in Italy because (i) the target was the only competitor of PI equipped with an end-to-end network, thus representing the only constraint on the incumbent and (ii) post-merger PI will find itself in a monopoly position in certain markets, such as the one for postal services in favor of business users.

In order to mitigate these concerns, the ICA imposed behavioral remedies on PI, including (i) a commitment to maintain service levels with existing customers and (ii) an obligation to grant access to its storage points for unreturned registered mail to smaller competitors not equipped with an appropriate territorial organization.

© 2021 Greenberg Traurig, LLP

B. ICA imposes fine for abuse of dominant position in the market for sale of tickets for live music events.

On Jan. 19, 2021, ICA imposed a fine of over 10 million euros on the CTS Eventim-TicketOne group (TicketOne) for an abuse of a dominant position under Article 102 TFEU.

According to the ICA, TicketOne implemented a complex abusive strategy of an exclusionary nature which prevented competing ticketing operators from selling, by any means and through any channel, a particularly high quota of tickets for live music events. ICA highlighted that such a strategy was articulated in a series of actions implemented at least since 2013, which consisted of: (i) the stipulation of exclusive contracts with producers and organizers of live light music events; (ii) the acquisitions of several companies active as national promoters; (iii) the imposition of exclusivity clauses on local promoters; (iv) the stipulation of commercial agreements with smaller or local ticketing operators; and (v) retaliatory and boycotting behavior towards competitors.

Interestingly, in its decision, ICA assesses the acquisition of another operator as giving rise to a violation of Article 102 TFEU, at least where this acquisition is combined with other potentially anticompetitive conduct (such as the conclusion of exclusivity agreements). ICA's decision thus confirms that antitrust rules (i.e., Articles 101 and 102 TFEU) continue to apply to M&A operations even where the national thresholds for a notification under merger control rules are not exceeded.

European Union

A. European Commission (EC or the Commission).

1. *The Commission consults member states on the proposal to further prolong and adjust the State Aid Temporary Framework.*

In view of the evolving COVID-19 pandemic, on Jan. 19, 2021, the Commission sent to member states for consultation a draft proposal to prolong and further adjust the scope of the State aid Temporary Framework (Temporary Framework), initially adopted March 19, 2020, and subsequently amended April 3, May 8, June 29, and Oct. 13, 2020, to support the economy given the current crisis. The draft proposal takes into account the initial feedback received from member states in the framework of a survey of December 2020 concerning the implementation of the Temporary Framework. Specifically, the draft proposes to:

- prolong the existing provisions of the Temporary Framework from June 30, 2021, to Dec. 31, 2021;
- increase the ceilings for (i) limited amounts of aid granted under the Temporary Framework (currently up to Euro 120,000 per company active in the fishery and aquaculture sector, Euro 100,000 per company active in the production of agricultural products, and Euro 800,000 per company active in all other sectors) and for (ii) measures contributing to the fixed costs of companies that are not covered by their revenues (currently up to Euro 3 million per company);
- enable member states to convert, at a later stage, granted repayable instruments (including loans) into direct grants, for an amount up to Euro 800,000 per company (or up to Euro 120,000 and Euro 100,000 per company active in the fishery sector and in the production of agricultural products, respectively).

© 2021 Greenberg Traurig, LLP

The above measures aim to address the persistent economic uncertainty due to COVID-19, especially by enabling further aid by member states to companies affected by the crisis, mainly in the form of repayable instruments.

2. *The EC issues a decision concerning publishers of PC video games alleging geo-blocking practices.*

On Jan. 20, 2020, the Commission issued a decision concerning several undertakings following an antitrust investigation opened in February 2017. According to the Commission, by agreeing to restrict cross-border sales of personal computer (PC) video games based on customer location within the EEA (so called "geo-blocking practices"), Valve and five publishers partitioned the EEA market. As a consequence, the Commission imposed fines totaling approximately € 7.8 million.

The allegedly anticompetitive practices consisted in: (i) bilateral agreements and/or concerted practices implemented by means of geo-blocked activation keys, which prevented the activation of certain of these publishers' PC video games outside Czechia, Poland, Hungary, Romania, Slovakia, Estonia, Latvia and Lithuania, in response to unsolicited consumer requests (so-called "passive sales") and (ii) geo-blocking practices in the form of licensing and distribution agreements concluded bilaterally between four out of the five PC video game publishers and some of their respective PC video games distributors in the EEA, containing clauses which restricted cross-border (passive) sales of the affected PC video games within the EEA.

The geo-blocking practices concerned around 100 PC video games and had the effect of preventing consumers from activating and playing PC video games sold by the publishers' distributors either on physical media or through downloads. Reductions ranging from 10% and 15% were granted to five operators, which cooperated by providing evidence to the investigation and by expressly acknowledging the facts and the infringements of EU antitrust rules.

B. AG Pitruzzella proposes to confirm the GC judgment qualifying the Spanish treatment of financial goodwill as state aid.

On Jan. 21, 2021, Advocate General (AG) Pitruzzella delivered his opinion on the "Spanish financial goodwill" case, which concerns several appeals by Spanish companies against the General Court's judgment that confirmed that Spain's tax treatment of financial goodwill qualified as illegal state aid. AG Pitruzzella advised to dismiss the appeals and to confirm the challenged judgment, with specific reference to the selectivity analysis set forth therein, which was contested by the applicants.

After recalling the main principles on selectivity developed by the EU courts, the AG stressed that, in order to assess whether the condition is met, it is crucial to determine whether the measure at issue provides for an unjustified discrimination between undertakings that are in a comparable situation. Indeed, state aid rules set boundaries on the fiscal sovereignty of member states by sanctioning such discriminations.

Based on such approach, the AG affirmed that the General Court correctly determined both the reference system and the objective on the basis of which the selectivity analysis had to be carried out. Additionally, the AG advised dismissal of the pleas alleging that the General Court committed an error of law in connection with (i) the allocation of the burden of proof and (ii) the imposition of an excessively high standard of proof on the member state and beneficiaries.

© 2021 Greenberg Traurig, LLP

China

On Jan. 21, 2021, the People's Bank of China (PBOC), China's central bank, issued the draft Regulations on Non-bank Payment Institutions for public comment (Draft Regulations). The Draft Regulations aim to "strengthen the supervision and management of non-bank payment institutions, regulate the behavior of non-bank payment institutions," and "prevent payment risks." The Draft Regulations are widely seen as the most recent iteration of China's enhanced enforcement of antitrust laws vis-à-vis the tech sector, which culminated in November 2020 when governmental authorities ordered the suspension of the Ant Group's IPO.

The Draft Regulations provide that the PBOC may recommend that the State Administration of Market Regulation (SAMR), China's antitrust enforcement agency, take measures against non-bank payment institutions, such as suspending the operations, enjoining activities which constitute an abuse of market dominance, or breaking them up if such institutions breach principles of "safety, efficiency, integrity and fair competition" which can "seriously affect the healthy development of the payment services market."

Under the Draft Regulations, government authorities may initially summon and issue warnings to non-bank electronic payment institutions if one provider reaches one-third, two providers reach one half, or three providers reach three-fifths of the market share in the national non-bank electronic payments market. In addition, the Draft Regulations provide that the PBOC may request that SAMR conduct antitrust investigations where a single non-bank electronic payment institution reaches one half, two providers gain two-thirds, or three institutions gain three-fourths of the market in the national non-bank electronic payments market. While the PBOC did not offer guidance on how market share will be determined for purposes of the Draft Regulations, how the term is defined will have significant consequences for the future of China's electronic payment market. The Draft Regulations are open to public feedback until Feb. 19, 2021.

Japan

A. The revised Antimonopoly Act comes into effect.

On Dec. 25, 2020, the revised Antimonopoly Act (AMA) came into effect. The major amendments (i) strengthen Japan Fair Trade Commission (JFTC) authority to investigate cartels, (ii) create a new leniency system, and (iii) strengthen attorney-client privilege.

First, the JFTC's heightenend authority to investigate cartels, means, for example, that the JFTC is entitled to order companies to pay an increased surcharge. Second, though only up to five companies were subject to the earlier leniency system, the amended AMA does not place a limit on this number. The number of reductions will be determined based on companies' measure of cooperation. Third, while attorney-client privilege typically applies to communications between a company and external lawyers (i.e., as a general rule, communications between a company and its in-house counsel are not covered by the privilege.), if the documents meet the requirements of rules, the JFTC determination officer, who is independent of the investigation, will return them to the company without investigators looking at the content.

B. JFTC imposes JPY 4.3 billion penalty on two major construction companies.

On Dec. 22, 2020, JFTC issued penalty orders against two construction companies and cease-and-desist orders against four construction companies for bid-rigging in the construction of a magnetic levitation train. According to the JFTC press release, since February 2015 at the latest, the four companies have

© 2021 Greenberg Traurig, LLP

restricted competition by deciding in advance which contractors would award construction contracts and adjusting the quoted prices.

JFTC imposed JPY 3.1 billion and JPY 1.2 billion penalties on two major construction companies, respectively. The penalties were reduced by 30%, as the companies voluntarily reported the violation under the leniency system. The other two companies were not penalized, as they had not been awarded any construction contracts. In the cease-and desist orders, JFTC directed the four companies to take required preventive measures and inform their employees about these measures, etc.

Read previous editions of GT's Competition Currents Newsletter.

Contributors

Andrew G. Berg
Shareholder
+1 202.331.3181
berga@gtlaw.com

Gregory J. Casas
Shareholder
+1 512.320.7238
casasg@gtlaw.com

Calvin Ding◊
Shareholder
+86 (0) 21.6391.6633
dingc@gtlaw.com

Miguel Flores Bernés
Shareholder
+52 55.5029.0096
mfbernes@gtlaw.com

Víctor Manuel Frías Garcés
Shareholder
+52 55.5029.0020
friasgarcesv@gtlaw.com

Robert Gago
Shareholder
+48 22.690.6197
gagor@gtlaw.com

Edoardo Gambaro
Partner
+ (39) 02.77197205
Edoardo.Gambaro@gtlaw.com

Yuji Ogiwara
Shareholder
+81 (0) 3.4510.2206
ogiwaray@gtlaw.com

Stephen M. Pepper
Shareholder
+1 212.801.6734
peppers@gtlaw.com

Gillian Sproul
Shareholder
+ 44 (0) 203.349.8861
sproulg@gtlaw.com

Hans Urlus
Shareholder
+31 20 301 7324
urlush@gtlaw.com

Dawn (Dan) Zhang
Shareholder
+86 (0) 21.6391.6633
zhangd@gtlaw.com

Mari Arakawa
Associate
+81 (0) 3.4510.2233
arakawam@gtlaw.com

Filip Drgas
Associate
+48 22.690.6204
drgasf@gtlaw.com

Simon Harms
Senior Associate
+44 (0) 203.349.8767
harmss@gtlaw.com

Marta Kownacka
Associate
+48.22.690.6231
kownackam@gtlaw.com

Pietro Missanelli
Senior Associate
+ (39) 02.77197280
Pietro.Missanelli@gtlaw.com

Massimiliano Pizzonia
Associate
+ (39) 02.7719771
massimiliano.pizzonia@gtlaw.com

© 2021 Greenberg Traurig, LLP

Anna Rajchert
Senior Associate
+48 22.690.6249
rajcherta@gtlaw.com

Jose Abel Rivera-Pedroza
Associate
+52 55.5029.0089
riverapedrozaj@gtlaw.com

Ippei Suzuki
Associate
+81 (0) 3.4510.2232
suzukii@gtlaw.com

Rebecca Tracy Rotem
Practice Group Attorney
+1 202.533.2341
rotemr@gtlaw.com

* Special thanks to Sera Hendrix for her assistance preparing this GT Newsletter.

◊*Admitted in Indiana. Has not taken the Chinese national PRC judicial qualification examination.*

Administrative Editor

Alan W. Hersh
Associate
+1 512.320.7248
hersha@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.¬ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.¤ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

*This Greenberg Traurig Newsletter is issued for informational purposes only and is not intended to be construed or used as general legal advice nor as a solicitation of any type. Please contact the author(s) or your Greenberg Traurig contact if you have questions regarding the currency of this information. The hiring of a lawyer is an important decision. Before you decide, ask for written information about the lawyer's legal qualifications and experience. Greenberg Traurig is a service mark and trade name of Greenberg Traurig, LLP and Greenberg Traurig, P.A. ¬Greenberg Traurig's Berlin office is operated by Greenberg Traurig Germany, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. *Operates as a separate UK registered legal entity. +Greenberg Traurig's Mexico City office is operated by Greenberg Traurig, S.C., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. »Greenberg Traurig's Milan office is operated by Greenberg Traurig Santa Maria, an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ∞Operates as Greenberg Traurig LLP Foreign Legal Consultant Office. ^Greenberg Traurig's Tel Aviv office is a branch of Greenberg Traurig, P.A., Florida, USA. ¤Greenberg Traurig's Tokyo Office is operated by GT Tokyo Horitsu Jimusho and Greenberg Traurig Gaikokuhojimubengoshi Jimusho, affiliates of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. ~Greenberg Traurig's Warsaw office is operated by Greenberg Traurig Grzesiak sp.k., an affiliate of Greenberg Traurig, P.A. and Greenberg Traurig, LLP. Certain partners in Greenberg Traurig Grzesiak sp.k. are also shareholders in Greenberg Traurig, P.A. Images in this advertisement do not depict Greenberg Traurig attorneys, clients, staff or facilities. No aspect of this advertisement has been approved by the Supreme Court of New Jersey. ©2021 Greenberg Traurig, LLP. All rights reserved.*