GT Newsletter | Competition Currents | March 2021

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GT Competition Currents in China —
"Competition Law 2021: New Laws, New Administrations, and What Chinese companies can expect at home and abroad"

Tuesday, March 16, 2021

1:00 p.m. Beijing Time (1:00 a.m. EDT, 5:00 a.m. GMT)

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United States

A. Federal Trade Commission ('FTC')

1. *New FTC officials announced*.

On Jan. 21, 2021, President Joseph Biden designated Commissioner Rebecca Kelly Slaughter as acting chair of the FTC. Slaughter, a Democrat, has served as an FTC commissioner since May 2018.

On Jan. 25, 2021, FTC Chairwoman Slaughter announced a number of FTC staff leadership changes, including replacement appointments of the acting general counsel, acting directors of the FTC's three operating bureaus (the Bureau of Consumer Protection, the Bureau of Competition, and the Bureau of Economics), as well as the acting director of the Office of Policy & Planning. The previous leaders in those offices resigned effective Jan. 29, along with departing FTC Chairman Joseph Simons.

2. *FTC announces review and suspension of early-termination procedure for pre-merger waiting period*.

On Feb. 4, 2021, the FTC announced it would be reviewing the processes and procedures used to grant early terminations of the 30-day waiting period for pre-merger notification filings made under the Hart-Scott-Rodino Act (HSR Act). Pending that review, FTC and the Department of Justice (DOJ) will not be granting early terminations. FTC and DOJ imposed a similar such suspension of early termination grants in March 2020 following the FTC Premerger Notification Office's establishment of its e-filing system.

3. *FTC adjusts filing thresholds under Clayton Act*.

On Feb. 5, 2021, the FTC announced the adjustment of various filing thresholds under Section 7A of the Clayton Act, also known as the HSR Act, as well as the thresholds applicable to certain interlocking memberships on corporate boards of directors under Section 8 of the Clayton Act. Among other HSR Act thresholds, the size-of-transaction thresholds for pre-merger notification filings was adjusted down from $94 million to $92 million. The FTC revises the HSR thresholds annually based on annual changes in the U.S. gross national product.

B. Department of Justice/Antitrust Division

1. *Richard Powers announced as new acting head of DOJ Antitrust Division*.

On Feb. 8, 2021, Deputy Assistant Attorney General Richard Powers was designated acting assistant attorney general of the DOJ's Antitrust Division, filling the position vacated by Makan Delrahim In January 2021. Powers has spent the bulk of his career at the Antitrust Division, joining through the Attorney General's Honors Program and accumulating a variety of experience in the financial services, health care, and other sectors over the years. Powers is a West Point graduate and holds a J.D. from the University of Alabama.

2. *Pilgrim's Pride pleads guilty to price fixing, agrees to pay $107 million fine*.

On Feb. 23, 2021, one of the nation's largest chicken producers pleaded guilty to price fixing and agreed to a $107 million criminal fine. Pilgrim's Pride Corporation, a major broiler-chicken producer based in Colorado, has pleaded guilty for its participation in a conspiracy to fix prices and rig bids for broiler-chicken products. According to filings in the case, Pilgrim's Pride participated in a conspiracy to suppress

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and eliminate competition for sales of broiler-chicken products that affected at least $361 million in Pilgrim's Pride sales. Pilgrim's Pride is the first company to plead guilty for its role in a conspiracy to fix prices and rig bids for broiler-chicken products. Ten executives and employees at major broiler-chicken producers have also previously been charged. The investigation is ongoing.

3. *Executive charged with corrupting U.S. Department of Energy's procurement process*.

On Feb. 25, 2021, charges were brought against a Louisiana energy executive for violating the Procurement Integrity Act, continuing the Antitrust Division's focus on prosecuting fraud in the U.S. procurement process. The charges allege that the executive conspired with Cajan Welding & Rentals, Ltd. and other unnamed co-conspirators to defraud the United States by corrupting and impairing the government procurement process. Specifically, the executive allegedly obtained non-public pricing and cost information in order to obtain subcontract awards and payments from the U.S. Department of Energy in connection with its operation of the nation's Strategic Petroleum Reserve.

C. U.S. Litigation

1. *Leib et al. v. Geisinger Health et al.*, Civil Action No. 4:21-CV-00196, (M.D. Penn.).

Geisinger Health and Evangelical Community Hospital face a proposed class action over an alleged agreement between the two competitors to not recruit, or "poach," each other's employees. The suit, filed on Feb. 3, 2021, claims Geisinger and Evangelical conspired not to poach each other's physicians, nurses, psychologists, therapists and other health care professionals in Central Pennsylvania, where the defendants are headquartered. According to the lawsuit, the no-poach agreement between the defendants began May 2015 and ran until at least Aug. 5, 2020, when the DOJ initiated a civil antitrust action to block Geisinger's acquisition of Evangelical. According to the complaint, the agreement between the defendants "was intended to, and did, reduce competition" for health care workers in Central Pennsylvania, and suppressed the job mobility and wages of proposed class members below the levels that would have existed absent the apparent no-poach deal. "Together, during the proposed Class Period, Defendants have employed approximately 70 to 75 percent of hospital Healthcare Workers in Central Pennsylvania," the suit says.

2. *In re Broiler Chicken Antitrust Litigation* (Direct Purchaser Plaintiff Action), Civil Action No. 1:16-cv-08637, (N.D. Ill.).

On Feb. 23, 2021, the chicken wholesalers leading a proposed price-fixing class action over an alleged industrywide scheme won preliminary approval from a federal judge in Chicago for a $155 million settlement with Tyson Foods Inc. and JBS SA subsidiary Pilgrim's Pride Corp. Judge Thomas M. Durkin gave his tentative approval to the settlement, which calls for payments of $75 million by Pilgrim's and $80 million by Tyson. The ruling came the same day Pilgrim's Pride separately became the first chicken processor to plead guilty to price fixing, summarized above.

If ultimately approved, the civil settlement will resolve antitrust allegations against these two companies on behalf of a class of "direct purchasers," but not parallel retailer and consumer claims consolidated with them in the U.S. District Court for the Northern District of Illinois. Tyson said last month it will pay $221.5 million to escape the entire case, a day after groups of "indirect commercial and institutional indirect purchasers" and "end-user consumer plaintiffs" notified Durkin of agreements in principle.

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3. *The People of the State of California v. Vitol, Inc.*, (Super. Ct. of Cal.).

On Feb. 25, 2021, the court denied a request by Vitol Inc. and SK Trading International Co. to throw out a California lawsuit accusing them of taking advantage of a 2015 refinery explosion near Los Angeles to inflate the price of gasoline. Superior Court Judge Andrew Cheng ruled that the lawsuit, filed by California Attorney General Xavier Becerra, sufficiently supported the claim that the companies' "alleged invidious conduct" resulted in higher prices for consumers at gas pumps. The judge also found that the state had supported its claim that the companies conspired in violation of antitrust law.

In the complaint, Becerra alleges that Vitol and SK violated California's antitrust laws and engaged in fraudulent practices that raised the price of gasoline in the state. A February 2015 explosion at a gasoline refinery in Torrance knocked out 10% of California's gasoline supply and caused an undersupply of refined gasoline in the state. The lawsuit claims Vitol and SK took advantage of the disruption by colluding to drive up the price of reported benchmark trades in order to increase the price of gasoline in the state. The complaint also alleges the firms executed certain trades to hide the scheme and share profits, and that their actions illegally suppressed competition within the gasoline market.

Mexico

A. COFECE fines Interjet and HBC for failure to timely notify the agency of HBC's acquisition of Interject stock.

The Federal Economic Competition Commission ("COFECE" or "Commission") authorized the transaction between ABC Aerolineas (Interjet) and HBC International, in which HBC acquired part of the capital stock of Interjet. However, the Commission fined the companies for not notifying it of the transaction before closing, as required by the Federal Economic Competition Law (LFCE).

COFECE was informed that, in June 2020, Interjet increased its capital stock, which was purchased by HBC, resulting in the acquisition of part of Interjet. However, it was not until August 2020 that the companies notified COFECE of the transaction. At the same time, the parties acknowledged that they should have given prior notice and waited for authorization before consummating the transaction. COFECE imposed fines totaling 955,680 pesos (US $47,000) after finding that HBC and Interjet failed to comply with the legal obligation to notify the Commission of the transaction.

B. COFECE publicizes preliminary version of the document on Clean Energy Certificates, seeking public comment.

On Feb. 8, 2021, COFECE made available to the authorities, unions, permit holders, academia, and the general public the preliminary version of "Transition to Competitive Energy Markets: Clean Energy Certificates (CEL) in the Mexican electricity industry." Comments and suggestions may be submitted between Feb. 8 and March 5 via the link above or by email to certificatesenergia@cofece.mx.

The current draft allows private participation in electricity generation and commercialization activities in a competitive environment that encourages lower costs, both economic and environmental, for the benefit of consumers and productive sectors. As part of this legal framework, the regulation contemplates that the Ministry of Energy (SENER) will establish the obligation for suppliers and certain users of electricity to have a certain amount of CEL certificates, which they can acquire from the producers from whom they buy electricity. These producers, in turn, secure CELs by proving to the Energy Regulatory Commission (CRE) that they produce a certain amount of energy from clean energy sources. The objective is to

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incentivize the installation of new electricity generation projects based on clean sources to, among other objectives, comply with Mexico's international commitments on environmental matters.

The document highlights issues such as:

1. **Energy providers' barriers to entry into electricity supply market**. For example, the constant changes to methodology for calculating the rates of the State-owned Electricity Company (CFE) prevent competition with CFE and discourage large users, who are supplied by CFE, from making purchases in the wholesale electricity market. In this way, CEL's obligations are concentrated in CFE, preventing users from having more options for energy providers.

2. **Delayed granting of generation permits**. Until October 2020, CRE had 99 permit requests and 153 modifications and transfers of permits still pending review. Permit procedures can take up to 300 business days or more to resolve applications.

3. **Lack of expansion of transmission and distribution networks**. This creates difficulty in interconnecting new projects, especially solar and wind.

4. **Cancellation of long-term auctions without justification**. Auctions for the sale of electricity and CELs have been suspended since 2019, making it difficult to finance new clean energy generation.

C. COFECE declares lack of competition in passenger ferries in Isla Mujeres and Cozumel.

On Feb. 11, 2021, COFECE announced its preliminary conclusion that there is no effective competition in six passenger-ferry routes (a) between Isla Mujeres and Puerto Juárez, Gran Puerto, El Caracol, Playa Tortugas and El Embarcadero and (b) from Cozumel to Playa del Carmen.

The Investigative Authority established that Naviera Magna (Magna) has a high market share in those routes and that there are economic and regulatory barriers that allow Magna to set super-competitive rates.

In this market, users do not have the option of other means of transport, such as land or air, that allow them to move between the islands and the mainland. Although there are other forms of maritime transport (such as nautical tourism, tender and charter, as well as private boats and motorboats), these satisfy different needs than those covered by passenger ferries. During the investigated period (January 2015 to July 2020), the entry of several companies to the market was observed, without Magna reducing its rates in response to this new competition.

Following publication of this preliminary conclusion, interested economic agents may present statements and allegations they consider pertinent, so that the Board of Commissioners may issue the final resolution of this case. If this Preliminary Opinion is confirmed, the sector's regulatory authority may be able to issue rates regulation.

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D. COFECE issues a formal accusation for possible collusion in hygiene products manufactured with cellulose.

On Feb. 15, 2021, COFECE summoned several companies and individuals upon finding evidence of collusion in the market for hygiene products manufactured with cellulose, which produces everyday goods such as baby diapers, feminine sanitary protection and incontinence products, among other related products. If the unlawful conduct is proven, companies may be fined, and individuals may face criminal proceedings with penalties ranging from five to 10 years in prison.

E. COFECE recommends to the Congress not to approve the initiative to reform the Electricity Industry Law.

COFECE recommended that the Mexican Congress not approve the proposed terms by which various provisions of the Electricity Industry Law would be added or amended, since the changes could severely affect competition surrounding electric energy generation and commercialization.

The current constitutional framework contemplates the possibility of competition in the generation and supply (commercialization) of electricity. For their part, transmission and distribution networks, as strategic areas in charge of the State, must be operated in a neutral manner and under the open-access principle. This dynamic encourages the production and supply of energy at competitive prices.

COFECE asserts that if the proposed changes are approved, competition would be prevented by:

1. Giving priority to hydroelectric plants (which are mostly owned by the CFE), over wind, solar, and private combined cycles. This would eliminate competition between generators by reducing costs and discouraging the installation of more efficient and cleaner generation projects, to the detriment of consumers and the environment.

2. Violating the guarantee of open access to the National Transmission Network and the General Distribution Networks, which are an essential input for there to be competition in generation and supply. In order to compete and carry out energy from power plants to end users, generators and suppliers inevitably require open access to these networks that is not unduly discriminatory. The proposed amendment would give the National Center for Energy Control (CENACE) authority to grant such access "when technically feasible," without stating the criteria for how CENACE will exercise that discretion.

3. Allowing CFE Supplied of Basic Services (CFE SSB) to acquire electricity without resorting to competitive mechanisms. The proposed amendments would allow the state-owned energy supplier (CFE) to continue to buy its energy from its own power plants – including newly acquired plants – rather than through competitive auctions. This implies that around 84% of the existing generation could be acquired by the country's main supplier through non-competitive methods.

4. Allowing CRE to deny permits without just cause, to stop granting permits, and to close the generation market.

The Netherlands

A. Regulatory matters in the telecom industry.

Under the Netherlands Authority for Consumers and Markets' (ACM) guidelines, Telecom operators are allowed to collaborate, under certain conditions, in order to invest in the capacity, quality, and coverage of mobile networks. ACM had previously submitted guidelines for consultation to market participants in the telecom industry. Their responses have been incorporated into the final version, published Feb. 2, 2021. Below is a summary of those guidelines.

1. *ACM: telecom operators are allowed to work together for a fast roll-out of mobile networks.*

Well-functioning mobile services are crucial for the Netherlands. Mobile-data consumption has been increasing for years, and, in 2020, consumption was more than 10 times higher than five years ago. This growth is expected to continue over the next few years. ACM finds it important that telecom operators invest efficiently to expand the capacity, quality, and coverage of mobile networks.

2. *ACM finds that acquiring locations for telecom towers does not impair competition.*

Given much-needed growth in the number of mobile antennas and decreasing availability of locations, it is becoming increasingly difficult for telecom operators to find tower locations. To resolve this, operators hope to be able to coordinate their search. ACM does not expect that, within the boundaries set out in the guidelines, competition between operators of mobile services will be jeopardized if they work together to find tower locations.

3. *Spectrum leasing*

The new Dutch Telecommunications Act will allow operators to lease spectrum (frequencies for mobile-data traffic). Leasing frequencies to, for example, an operator of local business networks could lead to new services and increased competition. Since the spectrum-auction of mid-2020, the maximum number of frequencies that a single operator can use has been capped at 40%. ACM's guidelines state that this cap will ensure that, in general, competition will not be jeopardized.

4. *Roaming using 2G or 3G networks.*

Over the next few years, Dutch telecom operators will switch off their 2G or 3G networks. This could impact the so-called machine-to-machine services (M2M services) that rely on these networks, such as smart-energy meters or automatic emergency contact systems in cars. In 2020, more than 7.5 million M2M devices were operational. If an operator shuts down a 2G or 3G network, the M2M services are able to use, through roaming, the network of another operator that still offers 2G or 3G, allowing more time to migrate these devices to 4G or 5G. Therefore, ACM is generally in favor of such national roaming agreements, provided that the agreements are compliant with competition rules.

B. Cases.

1. *Interim injunction granted to block terminated retailer's contract with bicycle manufacturer for retailer selling unassembled bikes below required price.*

On Jan. 22, 2021, an Amsterdam District Court found (link in Dutch) that a system of selective distribution (i.e., sales to end-users only) that allowed for the distribution of a range of uniformly branded

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race, mountain, and city bikes likely violated antitrust laws. The bicycle manufacturer in the case included strict terms within its contracts that required retailers to sell bicycles only to end-users, required that all bikes be preassembled before sale, and set a minimum price for all sales. After the retailer breached this contract by selling boxed bicycles online and below the minimum price set, the manufacturer terminated its contract. Despite acknowledging the above contract breaches, the retailer sued, claiming that the selective distribution provisions violated vertical antitrust laws.

It is unclear whether the EU's Vertical Agreements Block Exemption Regulation (VBER) allows selective distribution agreements for any product. This will have to be clarified in the recast VBER.

2. *Administrative court rules that online gambling ban is lawful*.

The Highest Dutch Administrative Court ruled (link in Dutch) on Feb. 17, 2021, that the current absolute Dutch ban on online gambling is not in breach of the right of freedoms for services as per article 56 Treaty of the Functioning of the European Union (TFEU). This overruled a lower court ruling, which found that the absolute ban, when tested for proportionality under the test required by article 56, was disproportional, given that licenses under a new set of laws would be available after mid-2021. The Administrative law division of the State Council, however, found that a total ban was an adequate manner to achieve the current objectives of the current Gambling Act. The upcoming new laws will allow licensed online gambling in the future and do not violate the complete ban.

United Kingdom

A. UK Competition Law Post-Brexit—Policy/Legislation

1. *CMA announces review of retained Vertical Block Exemption Regulation*.

Although the UK has left the EU, many important elements of EU competition legislation have been retained in UK law. One such example is the EU's Vertical Block Exemption Regulation (VBER), which provides for an important "safe harbor" from EU competition law enforcement for vertical agreements (for example, distribution and franchising arrangements) meeting certain criteria. During the UK's membership in the EU, the VBER had a direct effect in the UK and did not require implementation in UK law. Following the Brexit transition period, an "onshored copy" of the VBER exists in UK law.

The current VBER dates from 2010 and expires May 31, 2022. The European Commission (the "Commission") is currently undergoing an extensive process of review and revision with the aim of implementing an updated version of the VBER and associated guidance when the current regulation expires. While the EU is expected to retain the broad framework and key elements of the current VBER, important updates are expected to take account of market and technological developments since 2010, particularly as they relate to the digital economy.

The new EU regulation will not form part of UK law; any updating will need to be effected by the UK. In this context, the UK Competition and Markets Authority ("CMA") announced on Feb. 10, 2021, that it is conducting its own review of the retained VBER currently in force in the UK. CMA is required to provide the Secretary of State with a recommendation as to whether to renew the retained VBER and on whether any amendments would be appropriate. CMA is planning to go out to public consultation on the content of this recommendation later this year. While the CMA has stated that it currently considers that retained VBER is largely fit for purpose, it will carry out an in-depth review to ensure that it serves the interests of UK businesses and consumers.

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The parallel reviews by the Commission and the CMA of essentially identical current legislation and guidance provide an early opportunity to see whether, and if so how far, the EU and UK competition regimes will diverge in the post-Brexit world.

2. *UK government consults on new subsidy control regime.*

Following its withdrawal from the EU, the UK is no longer subject to the long-established EU state aid regime, which regulates subsidies within the EU to avoid distortions of competition within the EU's internal market. On Feb. 3, 2021, the UK's Department for Business, Energy and Industrial Strategy (BEIS) launched a consultation on the proposals of the UK government for a new subsidy control regime for the UK.

The government's stated intention is to create a framework capable of "providing more flexible and tailored financial support to businesses"; representing a "clear departure from [the] inflexible and bureaucratic EU state aid regime[;] and tailored to better support start-ups, small businesses and new industries" while avoiding "a return to the 1970s approach of government trying to run the economy or bailing out unsustainable companies." In addition, the new regime will also need to ensure that the UK complies with its international commitments under World Trade Organization rules, the UK-EU Trade and Co-operation Agreement (UK-EU TCA) and other trade agreements.

The regime proposed by the government would:

- Require all UK public authorities to comply with seven key principles when awarding subsidies. The majority of these mirror the principles set out in the UK-EU TCA, but the UK government is proposing an additional principle requiring public authorities to minimize any harmful or distortive effects on competition within the UK internal market.
- In line with obligations under the UK-EU TCA, prohibit certain types of subsidies perceived to be particularly harmful (such as export and local content subsidies) and subject others to conditions.
- Include exemptions for certain categories of subsidy, including subsidies of low value, those relating to emergencies, and public services.
- Not contain a requirement for *ex ante* notification to, and approval of subsidies by, an independent regulator. The government is consulting on the extent to which the as-yet-to-be-determined regulator should have post-award enforcement powers.

The consultation ends March 31, 2021. The government will publish its response to the consultation summarizing the responses received and setting out the actions it will take in developing its final proposals.

B. UK Competition Law Post-Brexit—Digital markets strategy

On Feb. 9, 2021, the CMA announced a refreshed digital markets strategy, with a revised set of priorities. The refresh reflects several significant developments in the international and national political and regulatory environment since the CMA originally announced its strategy in 2019 – including the Digital Markets Act proposals published by the European Commission in December 2020; regulatory developments in the United States, Germany, Australia, and Japan; and increased antitrust enforcement activity in digital markets.

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A key next step for the CMA is the establishment of the Digital Markets Unit (DMU) within the CMA by April 2021. The DMU will oversee and enforce a new UK "pro-competition" regime for digital businesses that have Strategic Market Status (SMS) and will monitor competition in digital markets more generally. In brief, the aim of the pro-competition regime is to enable the DMU to preempt harm occurring in digital markets as well as to act quickly when harm does occur.

The DMU's powers have not yet been enshrined in legislation which, the CMA has indicated, the UK government will introduce as soon as parliamentary time allows. In the meantime, the CMA's intention is to focus on using its existing competition and consumer tools to maximum effect. Cooperation with other UK regulators, especially Ofcom and the Information Commissioner's Office, and international cooperation through the Organisation for Economic Co-operation and Development, the International Competition Network, and the International Consumer Protection and Enforcement Network, will form part of this process.

C. UK Competition Law Post-Brexit—Antitrust

1. *Infringement decision on wide MFN clauses in contracts with home insurers*.

On Feb. 9, 2021, the CMA published its decision finding that a number of companies within the corporate group trading as ComparetheMarket had infringed the Chapter I prohibition of the Competition Act 1998 (and Article 101 TFEU) by imposing wide "most favored nation" (MFN) clauses on providers of home insurance selling via the group's price-comparison website. The CMA found that ComparetheMarket was party to agreements with 32 home insurers that contained wide MFN clauses which restricted the prices that the home insurers were allowed to offer on other price comparison websites. The CMA found that the MFNs prevented insurers from offering lower prices on rival price comparison websites and had an appreciable effect of preventing, restricting, or distorting competition.

The CMA imposed a fine of £17.9 million on ComparetheMarket. The decision is under appeal at the Competition Appeal Tribunal.

2. *CMA warning and advisory letters*.

The CMA does not have the resources to enforce UK competition law against all infringing firms. Where it receives evidence indicating infringement and decides not to proceed with a formal investigation, it may send the firms concerned a warning or advisory letter, which is then published in a CMA register. The CMA issued a statement on Feb. 18, 2021, announcing a record number of these letters in 2020 – 14 advisory letters and 97 warning letters, as opposed to two advisory letters and 25 warning letters in 2019. It attributes this significant increase to evidence received rather than a change in approach.

D. UK Competition Law Post-Brexit—Mergers

1. *CMA issues final report on StubHub's acquisition of viagogo*.

On Feb. 2, 2021, the CMA issued its final report into the completed acquisition of viagogo of the StubHub business of eBay Inc. According to the report, the parties are the two main providers of secondary ticketing platforms in the UK (with a combined market share in excess of 90%). The CMA found that the transaction may cause a substantial lessening of competition and that the merged entity would be able to increase fees or reduce service quality. To address its concerns, the CMA is requiring viagogo to sell StubHub's business outside of North America to an independent third party, subject to prior approval by the CMA.

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2. *CMA announces in-depth review of Advenita's acquisition of eBay Classifieds Group.*

On Feb. 16, 2021, the CMA announced that it would refer the anticipated acquisition by Adevinta ASA of eBay Classifieds Group (eCG) from eBay Inc., and eBay Inc.'s acquisition of a minority stake in Adevinta to an in-depth phase 2 review, unless the parties offer acceptable undertakings to address the CMA's concerns. Adevinta and ECG both operate online classified advertising platforms in the UK. Adevinta's Shpock and eCG's Gumtree allow people to buy and sell a broad range of used or new goods.

Poland

A. UOKiK obliges UPC Polska, a telecommunication and cable television provider, to pay compensation to consumers.

On Dec. 29, 2020, the President of UOKiK issued a commitment decision (Decision) in the proceedings against UPC Polska (UPC). The proceedings were initiated because of various complaints lodged by consumers who found irregularities when concluding or amending the terms of remote contracts for the provision of telecommunications services. In the course of the proceedings the president of UOKiK established that UPC had been activating additional "UPC Security Package" anti-virus software for an additional fee, without obtaining the prior consent of consumers.

To address UOKiK's concerns, UPC committed to modify the procedure for concluding contracts with anti-virus software by obtaining from consumers explicit consent to pay a fee for the "UPC Security Package." Certain categories of consumers, as defined by UOKiK, who opted out of the "UPC Security Package" after the trial mode had expired will be eligible for a refund of fees already charged by UPC (provided no such refund has been received already). Additionally, UPC committed to accept complaints concerning the payment of the fees in question and refund up to the first six payments with respect to complaints already submitted and those that will be submitted.

B. UOKIK unconditionally approves the acquisition of Polska Press by PKN Orlen.

On Feb. 5, 2021, the Polish leader in the oil and petrochemical industry market, PKN Orlen, was granted UOKIK consent to take over Polska Press. Polska Press Group is one of the biggest press publishers in Poland, and the leader in regional and local media markets. PKN Orlen owns Ruch, which distributes press and sells it to retail clients, mainly through a network of newspaper stands. This vertical merger mainly affects regional markets for press advertising. However, UOKiK avoided a market test among direct competitors, i.e., press publishers, notwithstanding that it found both vertical (Polska Press's dominance in the local press market) and conglomerate relations (including Polska Press's dominance with respect to the printing houses market).

During the UOKIK proceeding, which was launched on Dec. 10, 2020, competitors and organizations such as the Polish Ombudsman, the Helsinki Foundation for Human Rights and the Journalists Association (Towarzystwo Dziennikarskie) gave a negative opinion on the transaction, noting it would lead to a significant part of the press market – press publishing, printing, distribution, and retail – being concentrated in one entity.

According to UOKIK, the transaction does not threaten competition in any of the analyzed markets and, for this reason, the companies have been given unconditional consent for the merger. UOKIK also stated that not all submitted opinions concerning media pluralism were included in the subject-matter assessment of the concentration, as they did not fall within UOKIK's scope of authority.

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C. The president of UOKiK issues first decisions in payment gridlocks proceedings.

The president of UOKiK has taken increased action on late payments, resulting in the instigation of approximately 100 proceedings concerning payment gridlocks. Fines were imposed in two of the first four issued decisions; entrepreneurs avoided fines in the remaining two.

The fines, totaling over PLN 470 thousand, were imposed on companies operating in the freight transport services sector, i.e., Locotranssped and Havi Logistics. The proceedings revealed that in the period under scrutiny, the former failed to pay or paid late outstanding amounts of almost PLN 24.5 million (approx. EUR 5.7 million); for the latter, PLN 155 million (approx. EUR 36 million). Two other companies, the courier company UPS Polska and Galicja Tomaszek – primarily involved in the manufacture of home appliances and equipment – did not have to pay fines, as both were victims of payment gridlocks themselves.

As of Jan. 1, 2020, the president of UOKiK has new regulatory authority to impose fines on entities for accumulating delays in payments to suppliers in an amount exceeding PLN 5 million for a period of three consecutive months (the threshold will be lowered for proceedings instigated next year). A fine is imposed for each day of delay beyond the payment deadlines agreed in the contract unless UOKiK finds a justification for such delay or the entity demonstrates that it is itself a victim of payment gridlock.

Italy

A. Italian Competition Authority (ICA) opens investigation into SIAE for alleged abusive exclusionary conduct in the management and intermediation of copyright-related rights.

The ICA has opened an investigation against Società Italiana degli Autori ed Editori (“SIAE”), a public entity active in the management, protection, and intermediation of copyright-related rights. The preliminary investigation, launched because of complaints issued by certain competitors, aims to verify whether the conclusion of several agreements between SIAE and the main associations of Italian artists has the effect of hindering the activities of new operators. In particular, the above-mentioned agreements would allegedly restrict competition concerning access to the market for collecting fees that, per Italian law, must be paid to authors, producers, and artists for non-professional/non-commercial use of their copyrighted works.

Given SIAE’s leading market position, the ICA considered that the above-referenced conduct could result in the exclusion of potential new competitors in the field of management and intermediation of copyright-related rights.

B. ICA clears BPER’s acquisition of about 620 branches of UBI and Intesa Sanpaolo.

On Feb. 2, 2021, ICA cleared Italian banking operator BPER Banca S.p.A.’s (BPER) acquisition of about 620 branches of UBI Group and Intesa Sanpaolo Group, generating a payment of about EUR 2-3 billion. The transaction is closely linked to Intesa Sanpaolo Group’s acquisition of UBI Group, which ICA cleared on July 16, 2020, subject to divestment of a number of branches.

With this acquisition, BPER has become one the main Italian banking operators. However, because the combined market shares of BPER and the acquired branches does not exceed 25% of the relevant markets, except for few provinces in the North (Varese) and South of Italy (Crotone), the acquisition was cleared in phase I, as it did not raise competition concerns.

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European Union

A. European Commission

1. *The Commission publishes a July 2019 prohibition decision concerning an anticompetitive agreement in the sector of reinforcing steel bars.*

On Feb. 12, 2021, the Commission made public its prohibition decision against five Italian manufacturers of reinforcing steel bars for concrete. In its decision, the Commission imposed total fines of EUR 16,074,000 for the companies' participation in a price-fixing cartel between December 1989 and July 2000. In 2017, the General Court and the EU Court of Justice had annulled on procedural grounds two Commission decisions from 2002 and 2009 relating to the cartel.

The 2021 decision addressed the procedural issues and re-imposed fines on the five Italian operators. The re-adopted decision includes an exceptional 50% fine reduction for all five companies, in recognition of the long duration of proceedings.

2. *The Commission fines Valve, owner of the online PC gaming platform "Steam," and five video-game publishers EUR 7.8 million for breaching EU antitrust rules.*

According to the Commission, Valve and the publishers restricted cross-border sales of certain PC video games on the basis of users' geographical location within the European Economic Area ("EEA"), entering into so-called "geo-blocking" practices. Because the publishers cooperated with the Commission, the EUR 6 million in fines imposed on them was reduced. Valve did not to cooperate with the Commission and was fined more than EUR 1.6 million.

Executive Vice President Margrethe Vestager, head of competition policy, said: "More than 50% of all Europeans play video games. The videogame industry in Europe is thriving and it is now worth over € 17 billion. Today's sanctions against the 'geo-blocking' practices of Valve and five PC video game publishers serve as a reminder that under EU competition law, companies are prohibited from contractually restricting cross-border sales. Such practices deprive European consumers of the benefits of the EU Digital Single Market and of the opportunity to shop around for the most suitable offer in the EU."

The Commission found that by bilaterally agreeing to geo-block certain PC video games from outside a specific territory, Valve and each publisher partitioned the EEA market in violation of EU antitrust rules. The geo-blocking practices concerned around 100 PC video games of different genres, including sports, simulation, and action games. They prevented consumers from activating and playing PC video games sold by the publishers' distributors either on physical media, such as DVDs, or through downloads. These business practices therefore denied European consumers the benefits of the EU's Digital Single Market to shop around between Member States to find the most suitable offer.

3. *Mondelēz revisited.*

The Commission has opened a formal antitrust investigation to assess whether Mondelēz, one of the largest producers of chocolate, biscuits, and coffee in the EU, has – in breach of EU antitrust rules – restricted competition in a range of national markets by hindering the cross-border trade of these products between Member States. Competition policy head Margrethe Vestager said: "Chocolates, biscuits and coffee are products consumed by European citizens daily. We are opening a formal investigation to see whether Mondelēz, a key producer of these products, might have restricted free competition in the markets concerned by implementing various practices hindering trade flows, ultimately leading to higher

prices for consumers. Trade in the internal market can lower prices and increase the variety of products offered across Member States."

The Commission is concerned that Mondelēz may have restricted the so-called "parallel trade" of its chocolates, biscuits, and coffee between EU Member States through agreements and unilateral practices. Traders and retailers try to procure products in the internal market where the prices are lower and trade them to markets where prices are higher. Restrictions to such parallel trade can lead to the isolation of a national market whereby the manufacturer or supplier can charge higher prices. This can lead to less product diversity.

In particular, the Commission will investigate certain potentially anti-competitive practices by Mondelēz including:

- limiting the sales territories within the EU through agreements that determine where a Member State a trader can or cannot sell the products, or restricting passive sales;
- curtailing parallel trade through agreements that raise prices or limit volumes specifically for customers that trade the products across Member States;
- agreements with customers not to engage in parallel trade or not to procure products from parallel trade, inter alia, in exchange for payments or other forms of compensation;
- restrictions on the languages used on packaging either unilaterally or through agreements with traders, thereby creating friction on sales to certain other EU Member States; and
- refusing to supply certain traders, with a view to restricting imports into certain markets.

4. *The Commission publishes a decision concerning infringements in the car-window market.*

In a February 2021 decision, the Commission found that automotive supplier MAGNA and automotive producer BROSE, and their respective affiliate entities, engaged in the following infringements of EU law:

- price coordination and exchange of commercially sensitive information with a view to reducing competitive uncertainty for sales of door modules and window regulators to certain manufacturers of passenger cars in the EEA.
- price coordination and exchange of commercially sensitive information with a view to reducing competitive uncertainty for sales of latches and strikers in relation to certain manufacturers of passenger cars in the EEA.

B. The General Court ("GC") dismisses Ryanair's challenge against a Commission decision authorizing a tax payment deferral introduced to support airlines.

Ryanair brought an action for annulment of the Commission's decision approving a tax-payment deferral introduced by France to support airlines holding a French license. The measure was approved pursuant to Article 107(2)(b) TFEU, according to which aids aimed at remedying damages caused by natural disasters or exceptional occurrences are deemed compatible with the internal market.

In a Feb. 17, 2021 judgment, the GC first confirmed that the COVID-19 pandemic and related travel restrictions fall within the notion of "exceptional occurrences" under Article 107(2)(b) TFEU. It being undeniable that the purpose of the measure was to compensate the damages borne by airlines in the context of the pandemic, the Court found that the tax deferral satisfies the conditions for the application

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of Article 107(2)(b) derogation. This said, the GC upheld that limiting the deferral to companies having a French license is appropriate to achieve the aforesaid objective, having regard to the stable reciprocal links between France and the beneficiaries. Considering that State resources are limited, the Court also confirmed that France correctly used its resources to support those airlines most severely affected by the travel restrictions implemented in the national territory, i.e., airlines having a French license which mostly operate flights in, to, and from France.

Additionally, the Court stated that the Commission correctly assessed the value of the advantage granted to the beneficiaries, stressing that the harm suffered by airlines is likely higher than the value of the deferral, so that there was no risk of overcompensation.

China

On Feb. 7, 2021, the Anti-monopoly Committee of the State Council issued the Anti-monopoly Guide for the Platform Economy Sector (the "Platform Guide"). The Platform Guide represents a finalization of a previous draft released in November 2020. The rules under the Platform Guide apply to activities of the internet platform economy.

Highlights of the Platform Guide include the following:

- Definition of the Relevant Market. In contrast to the general requirement that a market must be clearly defined before assessing market harm, the Platform Guide appears to create an exception when investigating cases in the internet platform economy. Article 4.3 of the Platform Guide suggests that there may be instances where the relevant market is not required.
- MFN Clause. The Platform Guide provides that if a platform operator requires entities conducting business to agree to "most favored nation" (MFN) clauses, such a requirement may be considered a monopolistic agreement and abuse of market dominance. Even before promulgation of the Platform Guide, Chinese regulators were already scrutinizing MFN clauses, although not in the internet sphere.
- Necessary Facilities. The Platform Guide specifies that if an internet platform is a "necessary facility," then the platform operator shall not refuse to deal with operators that wish to utilize or conduct business on the platform without justifiable reasons. To determine whether a platform constitutes a "necessary facility," factors such as the substitutability of alternative platforms, the platform's data occupancy, and the degree of dependence of operators on that platform may be considered.

Japan

A. The Japan Fair Trade Commission ("JFTC") reveals its final report on digital advertising.

On Feb. 17, 2021, the JFTC revealed its final report on digital advertising. This survey regarding trade practices in the digital advertising sector was conducted to promote efforts to prevent violations of the Antimonopoly Act ("AMA") and ensure a fair and free competitive environment. As a result of the survey, JFTC stated that to create a competitive environment in the field of digital platforms, it is necessary not only to enforce the AMA but also to consider and take action under a variety of other regulations. The JFTC will continue to work actively on coordination and cooperation with the Headquarters for Digital Market Competition and other relevant ministries to maintain a competitive environment.

B. New regulation concerning specific digital platforms goes into effect.

On Feb. 1. 2021, "the Act on the Improvement of Transparency and Fairness in Trading on Specified Digital Platforms" went into effect. For now, the Act covers online malls and app stores with a certain amount of domestic sales, but some commentators expect that this new regulation will apply to the digital-advertising market this spring.

C. First case fine imposed under the Exclusionary Private Monopolies guidelines.

On Feb. 19, 2021, JFTC issued a JPY 6,120,000 (approx. USD 60,000) penalty order against a company that sells aviation fuel. The case concerns the sale of aviation fuel at airports. JFTC found that the company effectively restricted competition by forcing its business partners not to receive refueling from newly entered competitors, thereby eliminating said competitors' business activities. The company had warned its business partners that if they mixed their fuel with that of newly entered competitors, the business partners would not be able to continue fueling, and asked them to sign a document stating that they would not seek damages resulting from an accident after receiving fuel from the competitor.

This is the first case in Japan where a company has been ordered to pay a penalty for violation of the Exclusionary Private Monopoly guidelines. The guidelines, issued in 2019, prohibit an act by which an entrepreneur, alone or jointly with other entrepreneurs, attempts to monopolize a market by excluding competitors from the market or by obstructing new entrants.

Read previous editions of GT's Competition Currents Newsletter.

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