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GT Newsletter | Competition Currents | April 2021

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

Reminder: *GT Competition Currents in China* Rescheduled – Please Register!

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

Tuesday, April 20, 2021

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

In this Issue:

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

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United States

A. Federal Trade Commission (FTC)

1. *FTC abandons challenge to Philadelphia hospital merger.*

On March 1, 2021, the FTC, suffering its first loss in a hospital merger challenge since 2016, voted 4-0 to end its effort to stop the proposed $599 million merger of Philadelphia-area health care systems Jefferson Health and Albert Einstein Healthcare Network. The FTC's decision comes about a month and a half after the Pennsylvania Attorney General's office dropped out of the joint challenge.

The FTC challenged the merger on the basis that it would hurt competition in the Philadelphia-area health care market, and after a defeat at the district court, told the appellate court that the judge had applied "faulty economic reasoning." The FTC alleged that a combined network would control over 60% of the market for inpatient general acute care services in and around North Philadelphia and at least 45% of the market for those services in and around Montgomery County. The FTC alleged that the defendants also control some 70% of the market for inpatient rehabilitation services in the Philadelphia area for those recovering from serious, acute conditions such as a stroke, traumatic brain injury, or spinal cord injury.

The district court judge found, however, that the FTC's alleged markets wrongly "focus more on patients" than the insurers that would feel the immediate impact of any price increase. He found that the FTC had failed to show that the insurance companies would not just turn to health care providers outside the immediate areas in the face of those price increases.

2. *Georgia health care systems abandon merger in response to FTC recommendation to challenge.*

On March 3, 2021, the FTC voted to close its investigation of the proposed merger between Atrium Health Navicent, Inc. and Houston Healthcare System, Inc. following the parties' decision to abandon the deal.

The parties described the transaction not as a merger but as a partnership. Nonetheless, FTC staff determined that the tie-up would have eliminated "intense competition" between the two biggest hospital systems in central Georgia's Macon-Warner Robins area, and recommended that the proposed transaction be challenged. FTC staff alleged that the transaction would hinder quality of patient care improvements, investment in facilities and technologies, and expansion of access to health care services.

3. *US, EU, UK, and other antitrust enforcers enter collaboration on review of pharma deals.*

On March 16, 2021, the U.S. antitrust agencies and those of the United Kingdom, European Union, and Canada announced a joint review of how they analyze pharmaceutical mergers, aiming for "concrete and actionable steps" to revise and implement a coordinated approach.

FTC Acting Chair Rebecca Slaughter stated to media: "[G]iven the high volume of these mergers that we're seeing, skyrocketing drug prices and ongoing concerns about anti-competitive conduct in the pharma industry, it's imperative that we rethink our approach toward pharmaceutical merger review." Slaughter, now leading the FTC on an acting basis, had been in the minority under the Trump administration and was a regular critic of remedies imposed in pharma deals which, in her view, were too narrowly focused on only the product overlap with particular drugs within merging pharma companies' portfolios.

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The FTC announcement did not say that different standards would apply to pharmaceutical deals. Instead, it listed several issues to be considered as the working group undertakes its task, including how to expand and refresh existing theories of harm and what evidence might be needed to use those theories in a challenge, the full range of effects a pharma merger can have on innovation, how to consider conduct like price-fixing and pay-for-delay deals which restrict or stall generic drug competition, and requirements for a successful divestiture process.

4. *FTC challenges Illumina's proposed acquisition of cancer detection test maker Grail.*

On March 30, 2021, the FTC filed an action in federal court to block Illumina's $7.1 billion proposed acquisition of Grail, a producer of an early detection liquid biopsy test that can screen for multiple types of cancer in asymptomatic patients using DNA sequencing. The FTC alleges that Illumina is the only provider of DNA sequencing that is a viable option for these multi-cancer early detection (MCED) tests in the United States.

The agency's challenge rests on a theory of harm specific to vertical mergers, the subject of a revised set of guidelines and commentary published in 2020. While the parties do not currently compete in the development or production of MCED tests, the FTC is concerned that Illumina provides the DNA sequencing Grail competitors need to produce competing testing kits. The FTC alleges that, post-acquisition, Illumina could impede the research and development efforts of Grail's rivals or raise the prices it charges for these critical sequencing products the rivals require. In addition, the FTC alleges that Illumina could refuse or delay licensing agreements that all MCED test developers need to distribute their tests to third-party laboratories.

For its part, Illumina has offered its oncology customers "contractual guarantees of equal and fair access" to its DNA sequencing products and has committed to lowering prices by more than 40% by 2025.

B. Department of Justice (DOJ)

1. *DOJ settles challenge to Central PA hospital deal.*

On March 3, 2021, the DOJ reached a settlement with Central Pennsylvania health care systems Geisinger Health and Evangelical Community Hospital that resolved the DOJ's action challenging Geisinger's partial acquisition of Evangelical. Among other terms, the settlement requires Geisinger to cap its ownership interest in Evangelical at a 7.5% passive interest and eliminates additional entanglements between the two competing hospitals.

The DOJ first challenged the partial acquisition of Evangelical on Aug. 5, 2020, which would have given Geisigner a 30% stake. The DOJ alleged that Geisinger and Evangelical are close competitors for inpatient general acute-care hospital services for patients in a six-county area in central Pennsylvania, where the two hospital systems together account for approximately 70% of the market. According to the DOJ complaint, Geisinger first sought to acquire Evangelical in its entirety out of fears that an insurer would acquire it and thereby compete against Geisinger in the region. The complaint further alleges that the parties recognized the antitrust challenges of a full acquisition and instead structured the deal as a minority investment and "collaboration" agreement.

As settled, the minority investment, according to Evangelical, will be used for a planned patient room expansion and modernization project, including renovation of the intensive care unit. The agreement also guarantees Geisinger the right of first refusal for any future joint ventures by Evangelical and for

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transactions that result in asset sales or a change-of-control, and permits Evangelical to obtain new electronic health record information technology systems and related support from Geisinger.

2. *Guilty pleas entered in suit alleging construction companies fraudulently represented themselves as Veteran-Owned Businesses.*

On March 4 and March 17, 2021, guilty pleas were filed related to an alleged conspiracy of construction companies to defraud the government by obtaining veteran-preference contracts administered by the U.S. Small Business Administration (SBA). On March 4, Michael Wibracht, owner of a San Antonio, Texas construction company, entered a guilty plea. On March 17, an indictment was returned charging Michael Angelo Padron, a former construction company owner also located in San Antonio. A third defendant, Ruben Villarreal, had entered a guilty plea in 2020.

According to court papers, the three defendants were involved in a 13-year conspiracy in which Villarreal, a service-disabled veteran, was installed as the owner of the construction companies, thus qualifying them as a Service-Disabled Veteran-Owned Small Businesses (SDVOSB). Wibracht and other co-conspirators, however, exercised disqualifying financial and operational control over the companies, securing over $250 million in government contracts that were set aside for SDVOSBs. Wibracht and Padron face a maximum penalty of five years in prison and $250,000 fines. The indictment against Padron remains pending. The investigation has included the U.S. Army CID's specialized unit, the Major Procurement Fraud Unit, and the SBA's Inspector General office.

3. *Biden nominee promises robust enforcement of antitrust laws.*

On March 9, 2021, Vanita Gupta, President Biden's nominee to be Associate Attorney General, testified at her confirmation hearing on Capitol Hill, promising a robust enforcement of antitrust laws as part of her responsibilities in the number two spot at DOJ. Biden has not yet made official his nominee to head the Antitrust Division.

4. *Indictment issued in suit alleging price-fixing conspiracy to fix wages for nurses.*

On March 30, 2021, an indictment was returned charging a health care staffing company and a former staffing manager with conspiracy to allocate and fix wages of nurses, in violation of the Sherman Act. According to court papers, the staffing company, Las Vegas-based VDA OC LLC (formerly Advantage On Call LLC) and the manager, Ryan Hee, entered into an agreement in 2016 and 2017 not to recruit or hire nurses staffed by their respective companies and to refrain from raising the wages of those nurses. A violation of the Sherman Act carries a statutory maximum penalty of 10 years in prison and a $1 million fine for individuals and a maximum penalty of a $100 million fine for corporations, which can be increased in certain circumstances. The investigation involved the DOJ Antitrust Division's San Francisco Office, the International Corruption Unit of the FBI, and the U.S. Attorney's Office for the District of Nevada. The charges are connected to the Antitrust Division's focus on anticompetitive conduct affecting American labor markets.

C. U.S. Litigation

1. *Go New York Tours, Inc. v. Gray Line New York Tours, Inc. et al;* 20-1350.

On March 22, 2021, a New York City "hop on, hop off" tour bus line asked the U.S. Supreme Court to revive claims that its larger rivals bullied top tourist attractions into a boycott, saying two lower courts adopted an "overly restrictive" framework that leaves out "inherently logical" antitrust allegations.

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According to the plaintiff, the lower courts rigidly required Go New York Tours Inc. to plead "recognized plus factors" instead of taking a holistic view of robust circumstantial evidence that does not fit neatly into those categories, according to the petition asking the justices to take up the case.

According to the Second Circuit, "while Go New York Tours Inc. successfully alleged that Gray Line New York Tours Inc. and Big Bus Tours Group Holdings Ltd., plus their affiliated companies, considered Go New York a disruptive, low-priced competitor from whom they wanted to protect "their comparatively high prices," that does not mean the motive to conspire against the plaintiff would be "so obvious or compelling that it suffices to create more than a 'suspicion.'" The appeals court also stated, "Defendants' allegedly anticompetitive acts would have been objectively rational even if done independently of one another, and plaintiff pleads no facts suggesting that they in reality emerged from an agreement." Further, "[t]he 'actions against self-interest' plus factor relates specifically to the interdependent or parallel actions by the alleged conspirators, rather than third parties like the tourist attractions," the panel said. "Here, Go New York does not plead that defendants took any actions against their own economic self-interest. Because Go New York has failed to state a claim under Section 1 of the Sherman Act, we affirm the judgment of the district court."

2. *Sidibe v. Sutter Health,* No. 3:12-cv-04854 (N.D. Cal., Mar. 9, 2021).

On March 9, 2021, Sutter Health won dismissal of several antitrust claims but must proceed to trial on other claims in a federal lawsuit alleging anticompetitive behavior by the Northern California health provider. The main issue in the lawsuit is whether Sutter uses its market power to tie its dominant, noncompetitive markets with its competitive markets. According to plaintiffs, Sutter is forcing insurers through Sutter's systemwide contracts to pay more. The result, the individuals and companies allege, is hundreds of millions of dollars in higher in-patient services, costs, and premiums. The federal antitrust case was brought by four patients and two companies that purchase insurance for employees, alleging Sutter tied purchasers into all-or-nothing plans and violated the state's unfair business practices act. The plaintiffs contend Sutter's practices violate the federal Sherman Act and California's antitrust statute.

Sutter won summary judgment on claims involving the years 2008 to 2010, because the purchasers failed to prove damages, meaning that they failed to establish injury, U.S. Magistrate Laurel Beeler said. Sutter also won summary judgment on monopolization and attempted monopolization claims, because the individuals and companies did not produce evidence showing disputes of material fact. But Judge Beeler held that genuine disputes exist about Sutter's power in the market, where it is dominant. The Court will allow plaintiffs' claims for restraint of trade and tying to proceed to a jury.

3. *PharmacyChecker.com LLC v. National Association of Boards of Pharmacy, et al.,* Case No.: 7:19-cv-07577 (S.D.N.Y. March 30, 2021).

The National Association of Boards of Pharmacy (NABP) must face antitrust claims over its alleged scheme to "choke off" online information about affordable Canadian drugs by blacklisting websites that include foreign pharmacies in their comparison shopping features, a federal judge in Manhattan ruled.

According to Pharmacy Checker's complaint, the Alliance of Safe Online Pharmacies (ASOP), the Center for Safe Internet Pharmacies, Ltd. (CSIP), and LegitScript seek to deny safe online pharmacies access to customers in the United States, and suppress information about those pharmacies, by creating a blacklist and pressuring various internet intermediaries to enforce it. The complaint quotes a 2010 press release from ASOP announcing a goal of "requiring Internet search engines, domain name registrars, and other 'gatekeepers' to stop enabling rogue Internet drug outlets." In practice, says the complaint, NABP tried to convince the International Corporation for Assigned Names and Numbers (ICANN), the organization that

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sets policy for the domain name system, to require domain name registrars to suspend companies that appeared on NABP's blacklist, effectively removing them from the internet. The pharmacy organizations also allegedly persuaded vendors that maintain other blacklists used by parental controls and firewalls to list Pharmacy Checker as "not safe," "malicious," or "promoting illegal activity." And, the complaint says, they convinced Microsoft to show a red CAUTION shield and warning dialog when Pharmacy Checker appeared in Bing search results and a user clicked on the link. Other initiatives included working to create a ".pharmacy" top-level domain and excluding both Pharmacy Checker and legitimate Canadian pharmacies from that domain.

On March 30, 2021, Judge Kenneth M. Karas let Pharmacy Checker move forward with allegations that pharmaceutical trade groups led by the NABP engineered an illegal boycott through a "coordinated misinformation campaign" aimed at search engines, social media companies, shippers, and payment processors. Judge Karas found that Pharmacy Checker offered significant "circumstantial evidence of a conspiracy," including "joint press releases," meetings "and other communications suggesting that defendants coordinated their activity against plaintiff." According to the Court, the case can proceed based on circumstantial evidence of a conspiracy.

Mexico

A. COFECE issues a formal accusation for cartel conduct against Liquefied Petroleum Gas (LPG) companies.

On March 15, 2021, the Federal Economic Competition Commission (COFECE or Commission) notified several companies and individuals of a statement of probable responsibility (formal accusation) for price fixing and market segmentation in the distribution and commercialization of LPG in Mexico. This investigation is the broadest carried out by COFECE's Investigative Authority, as it involves the analysis of conduct carried out by several participants in multiple states.

LPG is the most widely used fuel for domestic use in Mexico – 76% of Mexican families consume it. The accused companies will have the opportunity to present a defense before the Board of Commissioners of COFECE. In accordance with the Federal Economic Competition Law, collusive conduct can be sanctioned with fines of up to 10% of the company's annual income. Additionally, individuals who participate in a cartel can face criminal charges and a ruling of five to 10 years in prison.

The Netherlands

A. National Competition Authority (NCA)

1. *Acquisition of PGB by Global Automotive.*

On March 10, 2021, the Netherlands Authority for Consumers and Markets (ACM) cleared the acquisition of PGB by Global Automotive. Global Automotive and PBG are mainly active in the distribution of replacement tires and replacement wheels for cars and vans.

After conducting a detailed market study among manufacturers, competitors, and buyers of tires, ACM established that enough alternatives will remain in the market for tires for retailers. ACM expects that enough competitive pressure will continue to be exerted, and that the new combination will not raise prices or reduce the quality of services. ACM also assessed what the consequences would be for the market for replacement wheels. ACM has established that, in that market too, enough competition will remain.

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2. *Further investigation needed into acquisition of three floriculture-product transport companies by Dutch cooperative Royal Flora Holland.*

Royal FloraHolland (RFH), a Dutch cooperative of floriculture growers, seeks to acquire three transport companies – De Winter, Van Marrewijk (Wematrans), and Van Zaal – that specialize in the handling of flowers and plants. The combined activities will be housed in a new company: Floriway. On March 5, 2021, the ACM stated it cannot rule out possible anticompetitive concerns regarding the transport of flowers and plants. Therefore, it said, further investigation into this acquisition is warranted.

If the parties decide to continue with their proposed acquisitions and file an application for a license with ACM, ACM will then further investigate the planned acquisition's consequences, looking at the market for both floriculture-product transport and floriculture-product trading.

3. *Europe Container Terminals (ECT) implements the commitments it made to ACM.*

On March 22, 2021, the ACM announced that ECT has implemented its 2019 and 2020 commitments to ACM about ECT's planning criteria for inland-shipping barges that transport containers between ECT's deep sea terminals in the port of Rotterdam and its hinterland. ECT has made its planning criteria more transparent, and it has also implemented these criteria. As a result of the new planning criteria, barge operators know how the planning is established and what requirements they must meet in order to be given priority.

B. Implementation of the ECN+ Directive

The Dutch Implementing Act entered into force on Feb. 18, 2021. The Act seeks to safeguard the independence of National Competition Authorities (NCAs) and their ability to effectively enforce competition law. The main amendments are:

- more limited use of information obtained from leniency statements and settlements;
- judicial authorization required for all for inspections;
- obligation to seek the views of market participants before adopting commitments;
- reinforced ACM competencies:
  - (i) to adopt a decision establishing that an infringement occurred in the past without having to impose a fine;
  - (ii) to impose interim measures on undertakings and associations of undertakings, with or without a periodic penalty payment where the risk of serious and irreparable harm to competition requires urgent measures.

C. Sanoma – Iddink second phase merger approval annulled by appeals court.

In a rare annulment decision (link in Dutch), the District Court of Rotterdam on March 4, 2021, annulled the merger permit, issued by the ACM on Aug. 29, 2019, after a second phase investigation into the acquisition by Sanoma of Iddink Group. Both companies offer student administration systems (SIS) for vocational education and access to digital learning resources. The court decided, in the appeal lodged by the competing publisher Noordhof, that the ACM failed to adequately reason the absence of incentives to effect bundling, whereas a substantial portion of schools (the primary customer of the products) were looking for bundling to achieve efficiencies.

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United Kingdom

A. Cartel investigation and director disqualifications.

In March 2021, three additional company directors were disqualified for several years, following a cartel investigation of their companies by the UK Competition and Market Authority (CMA).

The CMA's investigation of leading rolled-lead manufacturers Associated Lead Mills and Royston Sheet Metal (both owned by International Industrial Metals) and H.J. Enthoven (owned by Eco-Bat Technologies and trading as BLM British Lead) (BLM) culminated in an infringement decision and penalties totaling £9 million (approx. EUR 10.5 million, USD 12.5 million). A key finding was that the infringements had taken place at a very senior level, involving directors who concealed actions that they knew, from having undergone competition compliance training, were in breach of competition law.

Although the companies settled the investigation, the three directors were still disqualified. Two directors who had been directly involved in the infringements were disqualified from being directors and from holding other roles in relation to companies for six and a half and four years, respectively. A third director who had been aware of the infringement but took no steps to prevent it was disqualified for three years. These disqualifications reflect the CMA's continuing policy of considering director disqualification in most if not all cartel cases.

B. Mergers

Notable developments in UK merger control in March 2021 include:

- The CMA's announcement on March 25, 2021, that it would refer the completed acquisition by Facebook, Inc. of Giphy, Inc. to an in-depth phase 2 review, unless the parties offer acceptable undertakings to address the CMA's concerns. Giphy is an online database and search engine that allows users to share GIFs and stickers, including via Facebook and rival platforms. The CMA's phase 1 investigation raised concerns that the transaction would result in a reduction in competition in display advertising and vertical foreclosure, as Giphy could stop supplying GIFs to rival platforms.
- The CMA's provisional findings, published March 24, 2021, in its phase 2 investigation into the anticipated merger between Crowdcube Limited and Seedrs Limited and the abandonment of the transaction the following day. The parties are the two leading providers of equity crowdfunding (ECF) platforms in the UK, and the CMA provisionally concluded that the merger may be expected to result in a substantial lessening of competition in the market for the supply of ECF platforms to small- or medium-sized enterprise (SMEs) and investors in the UK.
- On March 29, 2021, proving that not all "tech" deals require in-depth scrutiny, the CMA announced its phase 1 unconditional clearance decision in relation to the anticipated acquisition by Uber Technologies, Inc. of GPC Computer Software Limited (Autocab). Autocab supplies booking and dispatch technology software to taxi companies. It also operates a referral network for taxi and private hire operators.

Poland

A. President of UOKiK to review intended merger of energy sector groups Orlen and PGNiG.

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On March 26, 2021, the Polish Competition Authority (UOKiK) announced that it would review the merger between two Polish energy sector groups pertaining to PKN Orlen acquiring direct control over PGNiG (Transaction). PKN Orlen is the Polish leader in the oil and petrochemical industry market, active in extracting and manufacturing natural gas and crude oil, as well as in trading in asphalts and fuels (including aviation fuels). Earlier in 2021, PKN Orlen was granted UOKIK consent to take over Polska Press, one of the biggest press publishers in Poland. PGNiG is a public company engaged in the exploration and production of natural gas and crude oil, as well as in the import, distribution, storage and supply of natural gas, supply of heat, and the generation of electricity and heat.

Due to the community-wide effects of the Transaction, it was originally subject to the jurisdiction of the European Commission. According to EU laws, however, participants in a transaction can request that the transaction be examined by a national competition authority if the transaction may have a significant impact on competition in a given Member State. Based on PKN Orlen's request, the European Commission referred the case to UOKiK.

The merger proceedings will be initiated once a formal submission is made to UOKiK; according to PKN Orlen's announcements, this will take place shortly. As reported by UOKiK, this is the first transaction in 2021 where an undertaking requested UOKiK to take over from the European Commission.

B. Sports gear distributor fined for price fixing.

On March 4, 2021, the President of UOKiK issued a decision against Spokey, a distributor of scooters, rollerblades, and sports mats sold under its own brand, and fined the undertaking over half a million PLN (approx. EUR 120,000) for entering into anticompetitive price fixing agreements with its retail partners. As UOKiK established, Spokey sells its products through its own online store as well as through a network of business partners who sell Spokey sports gear online via various websites, including the Allegro platform. In the course of the proceedings, supported by evidence gathered as a result of a search at Spokey's premises, the President of UOKiK concluded that Spokey set minimum prices for its products. This practice was in place for eight years (2010-2018), during which time Spokey not only set minimum prices but also developed mechanisms to influence its partners with respect to the prices they used.

Spokey benefitted from the EU leniency program. Due to Spokey's close cooperation with UOKiK, UOKiK determined the duration of the agreement and the rules under which it was in place, and the company obtained a 50% reduction in its fine. Instead of over PLN 1.1 million, the sanction amounted to PLN 568,679. If Spokey had not withdrawn from the declaration of voluntary submission to the penalty, the fine would have been up to 10% lower.

Italy

A. Italian Competition Authority (ICA)

1. *The Italian Competition Authority clears the acquisitions by Intesa Sanpaolo of two insurance companies.*

The Italian Competition Authority (ICA) issued a bulletin March 15, 2021, reporting that it cleared the acquisition by one of the main Italian banks, Intesa Sanpaolo, of two insurance companies: Aviva Vita S.p.A (Aviva), which has a EUR 2/3 billion turnover, and Lombarda Vita S.p.A. (Lombarda), which has a EUR 1/2 billion turnover.

Both targets were already partially owned by Intesa Sanpaolo through UBI Banca S.p.A. (UBI), which held 20% of Aviva and 40% of Lombarda. The transactions in question enabled Intesa Sanpaolo to acquire sole control over the two targets, thus increasing its role as a distributor of insurance products. In both cases, the favorable opinion of the was needed. Both transactions were cleared by the Italian Insurance Authority in phase I: they were deemed not to give rise to significant competition concerns, due to the presence of strong competitors in the Italian insurance sector, such as Generali, Unipol, Gruppo Assicurativo Poste Vita and Allianz.

2. *The ICA adjusts the turnover thresholds for merger filing purposes*.

On March 9, 2021, the ICA adjusted the relevant turnover thresholds for merger filing purposes to reflect the variations of the index of the GDP price deflator. Following this adjustment, a filing obligation in Italy is triggered if the following cumulative thresholds are met:

(i) the aggregate turnover of all participating undertakings exceeds EUR 511 million (whereas the previous threshold was EUR 504 million);

(ii) the turnover of each of at least two of the participating undertakings exceeds Euro 31 million.

3. *The ICA proposes that the government amend the Italian Antitrust Law (Law n. 287/1990)*.

On March 23, 2021, the ICA submitted its annual recommendation to the government setting out its proposals for the so-called Legge Annuale per il Mercato e la Concorrenza (Yearly Law on Markets and Competition). In the recommendation, the ICA, among others, advised the government to introduce the following amendments to the Italian Antitrust Law (L. 287/1990):

- Adjust the substantial assessment test to align it to the one currently applied by the European Commission pursuant to the EU Merger Regulation, thereby addressing the "non-collusive oligopolies gap";
- Update the methodology to calculate the turnover of financial institutions in order to align national rules with those set forth at EU level;
- In order to prevent certain deals from escaping merger control, confer upon the ICA the power to require the notification of transactions that do not meet the turnover thresholds, provided that (i) either the merging parties meet one of the two turnover thresholds provided by Italian Law or their combined turnover exceeds Euro 5 billion; (ii) the ICA makes the request within six months of the completion of the transaction and (iii) the ICA finds that there is a concrete risk of anti-competitive effects.
- Extend the maximum duration of the phase 2 of the merger review (i.e., the in-depth investigation) from 45 to 90 days.
- Introduce a rebuttable presumption that undertakings are economically dependent upon digital platforms to the extent that the latter "play a crucial role to reach end-users and/or suppliers, also taking into account network effects and/or data access."
- Confer upon the ICA the power to impose structural or behavioral remedies on undertakings operating in multi-sided markets, such as digital platforms providing intermediation services between undertakings and end-users/suppliers;
- Introduce the settlement procedure in antitrust investigations;

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- Strengthen the ICA's power to impose sanctions in the event of non-compliance with requests for information, even if such requests are not made in connection with investigations.

European Union

A. European Commission

1. *The Commission publishes specific guidance on Article 22 EU Merger Regulation (EUMR) referrals.*

On March 26, 2021, the Commission published a Notice on referrals under Article 22 of the EUMR, i.e., referrals made at the request of national competition authorities (or by invitation of the Commission itself). Under its previous policy, the Commission discouraged referrals from Member States that had no jurisdiction to review the transaction. Thus, the provision has rarely been used when the deal was not notifiable in the referring Member State (Sara Lee/P&G case). However, on Sept. 11, 2020, Commissioner Vestager stated that, in order to extend merger control rules to such transactions, the Commission will start accepting referrals from national competition authorities of mergers that are worth reviewing at the EU level – whether or not national thresholds are met.

According to the Commission's notice, the categories of cases that will normally be appropriate for a referral under Article 22 EUMR, where the merger is not notifiable in the referring Member State(s), consist of transactions where the turnover of at least one of the undertakings concerned does not reflect its actual or future competitive potential. For instance, cases where the undertaking: (1) is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues; (2) is an important innovator or is conducting potentially important research; (3) is an actual or potential important competitive force; (4) has access to competitively significant assets (e.g., raw materials, infrastructure, data or intellectual property rights); and/or (5) provides products or services that are key inputs/components for other industries. In its assessment, the Commission may also consider how the value of the consideration received by the seller compares to the turnover generated.

While the referral is subject to the deadlines set out in Article 22, the fact that a transaction has already been closed does not preclude a Member State from requesting a referral. However, the Commission would generally not consider a referral appropriate where more than six months has passed after the implementation of the concentration.

B. State aid: the CJEU dismisses the appeal brought by the Commission against the General Court's judgment in the Tercas case.

On March 2, 2021, the EU Court of Justice (CJEU) upheld the March 19, 2019, judgment of the General Court (GC), by which the latter annulled a Commission decision finding that certain measures (a financial contribution and guarantees) granted by the Italian deposit guarantee fund (FITD) to an Italian bank, Banca Tercas, were incompatible state aid. The CJEU confirmed the decision of the General Court that the measures at issue did not qualify as State aid because they did not entail the use of State resources and were not imputable to the State.

In its judgment, the CJEU dismissed the Commission's argument that the GC set a higher standard of proof for demonstrating that a measure was imputable to the State where that measure was granted by a private entity – such as FITD, a consortium of Italian banks governed by private law – rather than by a public undertaking. Conversely, the CJEU pointed out that the Italian legislation did not confer to a public

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entity, namely the Italian Banking Authority (Banca d'Italia), the power to influence the content of the measures taken by FITD. Moreover, following the opinion given by AG Tanchev, the CJEU stressed that the elements adduced by the Commission did not demonstrate that the measures were imputable to the State, especially in light of the limited role of the Bank of Italy in the context of the adoption of said measures. Finally, the CJEU dismissed the argument of the Commission that the GC had not considered the elements of proof globally but rather examined them in an "atomistic" manner.

C. CJEU annuls the judgment of the General Court (GC) in the Fútbol Club Barcelona case.

On July 4, 2016, the Commission found that Spain had granted an unlawful and incompatible aid in favor of four football clubs by introducing a tax regime providing for a preferential corporate tax rate for clubs operating as nonprofit legal persons (as opposed to those operating as public limited companies). Such decision was then set aside by the GC which – in its judgment dated Feb. 26, 2019 – found that the Commission had not proved to the requisite legal standard the existence of an economic advantage conferred on the beneficiaries of the measure at issue.

On March 4, 2021, the CJEU annulled the aforesaid GC judgment, finding that the GC erred in law when it found that the Spanish measure had to be classified both as an individual aid and an aid scheme whereas – in the CJEU's view – the measure had to be qualified solely as an aid scheme. That said, the CJEU found that such error in law invalidated the GC's reasoning as to the standard of proof applicable to the Commission's assessment of the advantage.

According to the CJEU, the GC erroneously required the Commission to assess the individual situation of each beneficiary in order to verify whether certain deductions available to beneficiaries were capable of offsetting the advantage deriving from the preferential tax rate. Given the above, the CJEU concluded that the aid scheme at issue was, from the time of its adoption, liable to favor clubs operating as nonprofit entities over clubs operating as public limited sports companies, thereby conferring on them an advantage.

China

On March 12, 2021, the State Administration for Market Regulation (SAMR), China's antitrust regulator, issued fines against 12 tech companies for violating Article 21 of China's Anti-Monopoly Law, which requires business operators to first submit a filing to Chinese antitrust authorities prior to implementing a concentration should either of two monetary thresholds be met.

- The combined worldwide turnover of all business operators concerned in the preceding financial year is more than RMB10 billion (USD 1.5 billion), and the nationwide turnover within China of each of at least two of the business operators concerned in the preceding financial year is more than RMB400 million (USD 60 million).
- The combined nationwide turnover within China of all business operators concerned in the preceding financial year is more than RMB2 billion (USD 304 million), and the nationwide turnover within China of each of at least two of the business operators concerned in the preceding financial year is more than RMB400 million.

Each of the 12 companies were fined RMB500,000 (USD 76,000), the maximum penalty currently allowed for unreported business concentrations. While the fines may appear relatively small given the size

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of the companies being punished, the fines may indicate intensified scrutiny over the nation's tech giants and a renewed emphasis on pre-concentration filing compliance.

Japan

A. Guidelines formulated for freelance workers.

From February to March 2020, the Japanese Cabinet Secretariat, in cooperation with the relevant ministries and agencies, conducted an integrated survey to ascertain the actual situation of freelance workers (Freelancers) who do not belong to any company or organization.

On March 26, 2021, based on those survey results, the guidelines for Freelancers were formulated to protect Freelancers under the Antimonopoly Acts, Subcontract Acts, and Labor Laws.

The guidelines clarify the following main concepts relating to Freelancers under the Antimonopoly Acts:

1. Restrictions on the abuse of a dominant position in transactions with Freelancers.
2. Delivery of documents clarifying the terms and conditions of transactions at the time of placing an order.
3. The types of acts that may cause problems under the Antimonopoly Acts (abuse of a dominant position) and the Subcontract Acts.

B. Follow-up: Conviction for bid-rigging in the construction of a magnetic levitation train.

On March 1, 2021, the Tokyo District Court convicted two construction companies and two former officials of each company of bid-rigging for the construction of a magnetic levitation train. The two former officials were sentenced to 18 months in prison, suspended for three years, and the two companies were ordered to pay 250 million yen (USD 2.25 million) each in fines. One of the two companies said it is considering an appeal.

Read previous editions of GT's Competition Currents Newsletter.

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