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GT Newsletter | Competition Currents | May 2021

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

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

Wednesday, May 18, 2021

1:30 p.m. Tokyo Time (12:30 a.m. EDT, 4:00 a.m. GMT)

In this Issue:

United States

A. Federal Trade Commission (FTC)

1. *FTC approves final order imposing conditions on E. & J. Gallo Winery's acquisition of assets from Constellation Brands, Inc.*

On April 5, 2021, the FTC announced that following the public comment period, it would approve a final order relating to E. & J. Gallo Winery's transaction with competitor Constellation Brands, Inc. Under the order, Gallo agreed to divest several product lines and exclude several others from its deal with Constellation. As discussed further in our January 2021 newsletter, the FTC alleged that the proposed acquisition would eliminate head-to-head competition and constrain competition in six product markets: entry-level on-premise sparkling wine; low-priced sparkling wine; low-priced brandy; low-priced port; low-priced sherry, and high color concentrates.

2. *Acting FTC Chairwoman Slaughter appoints Marta E. Wosińska as director of Bureau of Economics*.

Marta E. Wosińska was appointed director of the FTC's Bureau of Economics by Acting Chairwoman Rebecca Kelly Slaughter, the FTC announced April 13, 2021. Dr. Wosińska's expertise is in the prescription drug and health care marketing industries. She joins the FTC from Duke University and previously was Chief Healthcare Economist of the U.S. Department of Health and Human Services Office of Inspector General and Director for Economics Staff in the Food and Drug Administration's Center for Drug Evaluation and Research.

3. *U.S. Supreme Court limits FTC's authority to seek monetary relief in deceptive practices enforcement cases*.

In *AMG Capital Management, LLC v. FTC*, the U.S. Supreme Court, in a unanimous decision released on April 22, 2021, overturned years of lower court rulings, finding that Section 13(b) of the FTC Act does not authorize the FTC to seek, or a court to award, equitable monetary relief such as restitution or disgorgement. The Court found that the FTC should primarily use the administrative procedures in section 5 of the FTC Act and the consumer redress available under section 19, to seek consumer redress and restitution in most cases. The decision eliminates the FTC's ability to obtain asset freezes and receiverships imposed in temporary restraining order and preliminary injunction cases. GT discusses this case in more detail in this client alert.

In a statement issued the same day as the Supreme Court's ruling, Acting Chairwoman Slaughter said: "In AMG Capital, the Supreme Court ruled in favor of scam artists and dishonest corporations, leaving average Americans to pay for illegal behavior. With this ruling, the Court has deprived the FTC of the strongest tool we had to help consumers when they need it most. We urge Congress to act swiftly to restore and strengthen the powers of the agency so we can make wronged consumers whole." Separately, there are several legislative proposals pending in congress to amend Section 13(b) in order to give the FTC the right to monetary relief that the Supreme Court concluded in *AMG Capital* is not available under section 13(b).

B. Department of Justice (DOJ)

1. *DOJ requires Republic Services to divest assets to proceed with Santek Acquisition*.

On March 31, 2021, the DOJ announced that it had filed a complaint and proposed settlement related to Republic Services Inc.'s proposed acquisition of Santek Waste Services LLC. Under the proposed settlement, Republic must divest waste collection and disposal assets in five states in order to consummate the transaction. The DOJ alleged that as originally structured, the acquisition would have harmed competition in small container commercial waste collection and municipal solid waste disposal services in certain local markets. In the local markets at issue, the parties compete heavily with few alternatives. Additionally, in certain areas of Tennessee and Georgia, the transaction raised vertical concerns, with the combined entity being strong in both collection and disposal, with ability to harm competitors by raising the price of a key input (i.e., disposal services).

2. *Bidder pleads guilty to rigging bids at online auctions for surplus government equipment*.

The DOJ announced on April 7, 2021, that a Missouri man pled guilty to rigging online bids to the General Services Administration (GSA). The GSA held public auctions for government equipment that was no longer needed, and the defendant allegedly conspired to rig bids with others relating to these auctions from approximately 2012 to 2018. To date, three people have been charged and have pled guilty relating to this conspiracy.

3. *Stone Canyon required to divest US Salt to acquire Morton Salt*.

On April 19, 2021, the DOJ announced it had filed a complaint and proposed settlement related to Stone Canyon Industry Holdings LLC's proposed acquisition of Morton Salt Inc. Stone Canyon owns a portfolio company, SCIH Salt Holdings Inc., and under the proposed settlement, Stone Canyon must divest its evaporated salt business in order to complete the transaction. The DOJ alleged that as originally structured, the acquisition would have harmed competition in evaporated salt—including round-can table salt, pharmaceutical-grade salt, and bulk evaporated salt. In the local markets at issue, the parties compete heavily with few alternatives, and the DOJ alleges that the parties are often either the only parties or two of three parties in the markets.

4. *Second individual charged with fixing wages for health care workers and obstructing an FTC investigation*.

The DOJ announced on April 19, 2021, that a federal grand jury issued an indictment charging two Texas men in a conspiracy to fix wages and to obstruct an FTC investigation. The two men (who worked for the same company at the time) allegedly conspired with others to pay lower rates for physical therapy services in 2017, and then the two men also allegedly conspired to obstruct an FTC investigation into their activities by providing false statements, in violation of the Sherman Act.

C. U.S. Litigation

1. U.S. Supreme Court hears argument in *National Collegiate Athletic Association v. Shawne Alston, et al.*, Dkt 20-512.

On April 1, 2021, the U.S. Supreme Court heard oral argument in the above case, involving antitrust challenges to restrictions by the National Collegiate Athletic Association (NCAA) on "education related benefits" that colleges and universities could provide to student athletes. The Supreme Court had granted

certiorari on Dec. 16, 2020, to review the Ninth Circuit's decision (958 F.3d 1239) that the NCAA could limit benefits unrelated to education, but violated the Sherman Act by restricting the value of "education related benefits" provided to student athletes. The Ninth Circuit ordered that the NCAA must allow unlimited education-related benefits (including for tangible items, current and post-eligibility internships, and post-graduate programs or vocational schools); allow cash athletic and academic achievement awards up to a specified cap of $5,980; and that any future NCAA restrictions or definitions of "educated related benefits" would be subject to court approval. The case presents the question of how the rule of reason should be applied to a joint venture (such as the NCAA) that creates a pro-competitive product (consisting of *amateur* athletics) that could not be created without the joint action of horizontal competitors (the schools and conferences belonging to the NCAA). The Supreme Court's decision is expected by June 2021.

2. *In re JUUL Labs, Inc. Antitrust Lit.*, Case No, 3:20-cv-02345, (N.D. Cal. Apr. 21, 2021).

Altria Group Inc. and Juul Labs Inc. may face a proposed antitrust class action seeking to unwind a $12.8 billion deal that gave Altria, the legacy tobacco company, a 35% stake in vaping giant Juul, a federal judge in San Francisco said in an April 21, 2021, "tentative" ruling. The e-cigarette antitrust claims stem from an allegedly anticompetitive agreement between Altria and Juul, whereby Altria agreed to acquire an ownership interest in Juul in exchange for over $12 billion in cash. Altria also allegedly agreed not to compete with Juul and to provide Juul valuable retail shelf space in the e-cigarette market. Through this agreement, Juul allegedly was able to maintain its dominance in the e-cigarette market and earn monopoly profits. Altria then allegedly shared these profits through its ownership stake in Juul. Judge William H. Orrick indicated his inclination to let most of the lawsuit move forward, writing that "[p]laintiffs plausibly allege facts in support of an illegal agreement to restrain trade and conspiracy to do the same." He also signaled he would give a green light to the part of the case seeking to roll back the transaction under Section 7 of the Clayton Act.

3. *Olean Wholesale Grocery Co-op, Inc. v. Bumble Bee Foods LLC*, 993 F.3d 774 (9th Cir. 2021).

StarKist Co. won its bid to overturn a ruling certifying three purchaser classes in multi-district antitrust litigation over an alleged pricing fixing scheme, after the U.S. Court of Appeals for the Ninth Circuit decided April 6 that the lower court failed to resolve a key factual question. The Ninth Circuit held that the lower court abused its discretion in failing to resolve competing expert claims on the reliability of the plaintiffs' statistical models, which was necessary to decide whether common questions of fact predominated over questions affecting individual class members.

The two models offered highly different hypotheses on the percentage of class members who were affected by the alleged price fixing: Plaintiffs contended that nearly 95% of tuna purchasers had suffered an antitrust injury, but defendants said nearly 30% were uninjured. The Ninth Circuit held that the trial court should not have certified the class without resolving that discrepancy. In addition, the 9th Circuit staked out a clear position on the issue of class certification and uninjured class members. The appeals court explicitly held that trial judges may not certify classes that contain more than a minimal number of uninjured class members, but did not set a bright-line standard for an acceptable percentage of uninjured class members, however.

Mexico

The Federal Economic Competition Commission (COFECE) has taken two strong positions against recent amendments to laws in the energy sector.

A. COFECE challenges amendments to Electricity Industry Law.

On April 22, 2021, COFECE filed a constitutional controversy before the Supreme Court of Justice of Mexico against an amendment of the Electricity Industry Law, arguing the amendment would affect COFECE's powers by preventing it from guaranteeing competition in the electricity industry. COFECE indicated that under the current constitutional framework, it is essential that certain requirements exist so that the electricity markets can operate under competitive conditions. These requests are: i) the possibility of open and non-discriminatory access for any generator in the electricity networks; ii) that energy dispatch is governed by objective and efficiency criteria, and iii) that the operator – National Energy Control Center – and the regulator – Energy Regulatory Commission – operate independently and impartially, without favoring or granting undue advantages to any participant.

COFECE takes the position that the amendments to the law:

- Do not respect the rule of open and non-discriminatory access to distribution and transmission networks.
- Eliminate the criteria of economic dispatch of power plants, granting undue advantages in favor of the Federal Electricity Commission (CFE).
- Dilute the rule of open access to networks, enabling denials of access without legitimate justification.
- Allow basic service providers, specifically the CFE, to acquire energy through non-competitive methods, indefinitely expanding the legacy regime, which was meant to be temporary.

B. COFECE challenges amendments to Hydrocarbons Law.

On April 13, 2021, COFECE sent a letter to Mexico's Congress regarding the amendments to the Hydrocarbons Law. COFECE stated that the amendments would negatively affect the competition process for the value chain of hydrocarbons, petroleum, and petrochemicals. In a public opinion, COFECE said that the amendments would:

- Discourage entry of companies and reduce supply by distorting permits regulation, since it grants wide discretion to the Ministry of Energy and the Energy Regulatory Commission to temporarily suspend permits they consider imminent dangers to "national security, energy security or for the national economy" without defining these concepts or providing criteria for their clear application.
- Generate uncertainty by changing from an automatic approval to a presumptive rejection of a permit when the authority does not resolve a request expeditiously.
- Reduce the number of competitors by establishing prior verification of storage capacity prior to granting permits. Requiring this verification prior to the granting permits generates a harmful cycle between the lack of said capacity due to the non-existence of permits, resulting in a lack of infrastructure, thus discouraging investments in this area.

The Netherlands

A. *Sumal, S.L. vs Mercedes Benz Trucks España*, S.L., Case No. C 882/19

On April 15, 2021, advocate general Pitruzzella (AG) concluded in his opinion that holding a subsidiary liable for the infringing conduct of its parent company is compatible with Article 101 of the Treaty on the Function of the European Union (TFEU) when certain strict conditions are met. These conditions are that i) the two entities have operated on the relevant market as a single economic unit and ii) the subsidiary has substantially contributed to the achievement of the objective and the realization of the effects of the parent company's conduct. Subsidiary liability may encourage forum shopping by claimants when initiating damages proceedings.

B. Dutch Authority for Consumers and Markets (ACM) joins France's suit to block Illumina's acquisition of GRAIL.

The European Commission will investigate the acquisition of U.S. pharmaceutical company GRAIL by U.S. biotechnology company Illumina. Various European countries, including the Netherlands, support France's request to the European Commission to investigate this acquisition. Illumina and GRAIL manufacture, among other things, products for tests for detecting cancer at an early stage. The ACM has concerns that this acquisition may be harmful to competition, and may lead to higher prices, reduced quality, or less innovation in the Netherlands and the European Union, where GRAIL has promising technologies and products for early detection of cancer.

GRAIL and Illumina had asked a Dutch provisional-relief judge to prohibit the Netherlands from joining France's request to the European Commission. The court turned down the U.S. companies' request.

C. Highest Dutch Competition Court attributes anti-competitive behavior by an employee of one entity to the entity which is active on the market.

On April 6, 2021, the Dutch Administrative Hight Court for Trade and Industry (CBb) found (link in Dutch) that the infringing behavior of an employee of an unaffiliated entity could be attributed to the sanctioned entity. The CBb found that the employee in fact acted on behalf of the sanctioned entity, both as a proxy holder and materially. Furthermore, the sanctioned entity had knowledge of the third-party employee's conduct.

United Kingdom

A. Mergers: UK, Germany, and Australia

On April 20, 2021, the UK Competition and Markets Authority, the German *Bundeskartellamt* and the Australian Competition and Consumer Commission issued a joint statement on merger control to highlight the need for rigorous and effective merger enforcement on a global basis. It is addressed to businesses, advisers, courts, and governments. The statement was prompted by high levels of concentration across certain markets in the UK, Germany, and Australia; an increase in the number of merger reviews involving dynamic and fast-paced markets; and political pressure to relax merger control where markets have been weakened, including by the pandemic.

Two key related messages emerge from the statement. First, competition authorities and courts must ensure that merger control consistently prevents firms from using M&A to gain market power, even in weakened markets, because it is difficult to reverse the loss of competition and the long-term negative

consequences for businesses and end consumers. Second, the statement reinforces the regulatory preference for structural, divestment remedies to maintain competition where a transaction is viewed as only partially anti-competitive. Behavioral remedies continue to be seen as potentially market-distorting and casting an undue burden on competition authorities and firms as they frequently require extensive post-merger monitoring of the merged business.

Poland

A. The Polish Ombudsman appeals against the Polish Competition Authority's merger clearance of the PKN Orlen/Polska Press deal.

In the March 2021 edition of Competition Currents, we reported that UOKiK had approved the acquisition of Polska Press by PKN Orlen. Polska Press is one of the biggest press publishers in Poland and the leader in regional and local media markets. The merger was cleared unconditionally, even though competitors and organizations, such as the Polish Ombudsman, gave a negative opinion on the transaction, noting it would lead to a significant part of the press market ultimately being controlled by the State.

Following the issuance of UOKiK's decision, the Ombudsman exercised his right to appeal against the decision and at the same time filed a motion to suspend execution of the decision by PKN Orlen. According to the Ombudsman, UOKiK did not examine whether the transaction would result in an unacceptable restriction on the freedom of the press, and UOKiK should take into account all circumstances affecting consumer welfare.

On April 8, 2021, the Court of Competition and Consumer Protection decided to suspend the execution of UOKiK's decision, in accordance with the Ombudsman's motion. This is an interim decision by the Court, and it does not forejudge the Court's final decision regarding the transaction. However, the Court indicated that the transaction should be suspended, as its implementation before the final judgment may prevent execution of the final judgment. Neither UOKiK nor PKN Orlen agree with the Court's interim decision; however, the decision itself is final. The proceedings on the merits should be launched soon, and it is difficult to predict the final verdict at this stage.

B. UOKiK investigates Polish basketball clubs.

UOKiK launched antitrust proceedings against the Polish Basketball League (PLK) and 16 basketball clubs competing in the PLK. UOKiK is investigating whether the PLK and basketball clubs coordinated their behavior with respect to their cooperation with basketball players. The case began in March 2020, when basketball games in Poland were cancelled due to the COVID-19 pandemic. The clubs announced that due to the premature end to the season, they would not pay their players full salaries and would terminate certain players' contracts. The clubs claimed that such behavior was justified, as the obligations of the parties (clubs and players) expired due to the pandemic.

UOKiK indicated that any actions regarding cooperation with players have to be taken by clubs autonomously and cannot be coordinated. According to UOKiK, any cost-cutting measures taken by sports clubs should result from the individual economic situation of a given club. This is not the first such case in the Central and Eastern Europe region. As UOKiK stated, it consulted its actions with the Lithuanian competition authority, which is investigating similar potentially anticompetitive behavior.

Italy

A. The Italian Administrative Supreme Court makes a further reference for a preliminary ruling in the *Novartis/ Hoffmann-La Roche* case.

Two years after the decision of the Italian Administrative Supreme Court (Council of State) confirmed fines imposed by the Italian Competition Authority (ICA) on Novartis and Hoffmann-La Roche, the Council of State made a second request for a preliminary ruling in the same case.

In 2014, the ICA found the existence of an anticompetitive agreement between Novartis and Hoffmann-La Roche aimed at obtaining an artificial "differentiation" between the drugs Avastin (a drug for the treatment of cancer) and Lucentis (a drug for the treatment of ophthalmic diseases). The decision was first confirmed by the Italian Administrative first-instance Court and then upheld in 2019 by the Council of State. The judgment of the Council of State was subsequently challenged by the two undertakings, arguing for its revocation based on the alleged erroneous application of the principles established by the Court of Justice.

In response to this complaint, the Council of State made a preliminary reference, inviting the Court of Justice to rule on (i) the possibility of a court of last instance to review the Council of State's preliminary ruling; (ii) whether the Council of State misapplied the principles established by the Court of Justice in the first preliminary ruling; and (iii) the possibility of using the revocation procedure established by the Italian Administrative Code. In substance, the Court of Justice will be called upon to clarify the distinction between the notions of "interpretation" and "application" of EU competition law.

B. ICA clears the acquisition by ION of Cerved Group.

On April 12, 2021, ICA approved the acquisition of Cerved Group S.p.a. by Castor S.r.l., a subsidiary of the British investment holding company ION Investment Group Limited. The target, a company listed on the Milan Stock Exchange, is the leading Italian provider of corporate, commercial, and financial information and credit assessment services.

The merger, which will be carried out by means of a full takeover bid, concerns the markets for the provision of business information, for the management and debt collection services for third parties and, marginally, for information technology services. With regard to the first two markets, the transaction merely substitutes one market operator with another. As for the provision of information technology services, both ION and Cerved Group do not have significant market shares. Therefore, ICA did not find any competition concerns and approved the concentration at the end of "phase one" without the need for a formal investigation.

European Union

A. AG Bobek delivers his opinion on preliminary reference's criteria.

On April 15, 2021, Advocate General Michal Bobek delivered his opinion in the *Consorzio Italiano Management e Catania Multiservizi* case (C-561/19), affirming that the Court of Justice of the European Union (CJEU) should revisit the *CILFIT* criteria on the duty of national courts of last instance to request a preliminary ruling. AG Bobek focuses his opinion on the boundaries of the duty to refer, arguing that the intervention of the Grand Chamber is necessary in order to revise the current relevant case law, namely the "*CILFIT* criteria". More specifically, AG Bobek proposes that the Court uphold that national courts of last instance have a duty to refer a case for a preliminary ruling on the interpretation of EU law, provided

that three cumulative requirements are met: (i) the case raises a general issue of interpretation of EU law; (ii) the EU law may be reasonably interpreted in more than one way; (iii) the way in which it has to be interpreted cannot be inferred from the existing case law of the Court or from a single, sufficiently clear judgment of the Court.

The case originates from a procedure before the Italian Council of State, where the parties asked the Council to refer a request for preliminary ruling because, in their view, the national rules infringed Directive 2004/17/EC. The Council of State referred two questions to the Court of Justice, which delivered its judgment on April 19, 2018. The parties, however, considered that the Court had not taken a position on certain aspects of the requests and asked the Supreme Administrative Court to refer other questions for a preliminary ruling. Therefore, the Council of State asked to the Court whether TFEU article 267(3) should be interpreted to mean that a national court of last instance is required, in principle, to make a reference for a preliminary ruling on a question concerning the interpretation of EU law.

China

A. SAMR issues series of fines for failure to pre-file notice of market concentration.

The State Administration for Market Regulation's (SAMR) recent enforcement actions have focused on two aspects of antitrust law. The first is the PRC Anti-monopoly Law's (AML) requirement that business operators must first submit a filing to SAMR prior to implementing a concentration that exceeds relevant market thresholds. On April 28, 2021, SAMR issued administrative fines against several companies for failing to submit the necessary filings prior to engaging in a notifiable business concentration. This is in addition to SAMR penalizing dozens of companies the previous month for the same infraction. The maximum penalty currently allowed for unreported business concentrations is 500,000 RMB (approx. 77,000 USD). SAMR's actions indicate a renewed emphasis on pre-concentration filing compliance.

B. SAMR restrains exclusive dealing arrangements by companies with a dominant market share.

The second focus of the SAMR's recent enforcement is the AML's Article 17, which prohibits entities with dominant market positions from pursuing exclusive dealing arrangements with business partners without justifiable business reasons. SAMR's enforcement activities include not only imposing administrative fines but also requiring companies to implement structural remedies to prevent future antitrust violations, as well as enhance internal compliance mechanisms and submit self-inspection reports to the SAMR for a specific time.

While China's recent antitrust enforcement has mostly focused on domestic entities, the actions contain lessons for foreign and multinational companies doing business in China and may illuminate China's enforcement priorities in other industries. Companies with substantial Chinese market presence should carefully review practices implicating exclusive dealing arrangements as well as carefully consider whether a SAMR filing is needed prior to engaging in a business concentration.

Japan

A. The JFTC conducts on-site investigations of four electric power companies on suspicion of cartel.

On April 13, 2021, the Japan Fair Trade Commission (JFTC) conducted on-site investigations against four electric companies, including three major Japanese electric companies. This is the first time the JFTC has investigated cartel charges against major power companies.

In 1995, in response to criticism that electricity prices were too high in Japan, the government started liberalizing electricity sales, and fully liberalized in 2016. As a result, major electric companies are now in danger of losing customer share and seeing prices plummet. It has been reported that the four electric companies are suspected to have agreed to limit new sales to each other and have restricted the acquisition of customers beyond their own area.

B. Algorithms/AI and competition policy in Japan.

With the development of digitalization and e-commerce, some firms use algorithms to collect information about competitors' prices and to automatically set their prices. On March 31, 2021, the JFTC released the report "Algorithms/AI and Competition Policy" ("Report"), which discusses issues and challenges regarding algorithms and AI competition policy in Japan. The main purpose is to enable JTFC to adequately address algorithm/AI-related competitive risks.

The use of algorithms may promote price competition, but there is a concern that they may lead to concerted price settings. For example, some firms have provided various services using ranking. A firm may interfere with transactions between its competitors and their customers by manipulating the order of the ranking it provides to have its own products placed higher in the ranking. The ranking position can be important for competition, and possible ways for JFTC to verify the operation of the algorithm were discussed in the Report. According to the Report, strict action should be taken against businesses that restrict competition by arbitrarily operating algorithms, and the JFTC may well address the issue in the future.

Read previous editions of GT's Competition Currents Newsletter.

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