GT GreenbergTraurig

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

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United States

A. Federal Trade Commission (FTC)

1. *FTC issues statement criticizing acquisition of Speedway stores by 7-Eleven*

On May 14, 2021, FTC Acting Chairwoman Rebecca Slaughter and Commissioner Rohit Chopra issued a public statement criticizing the announced closing of 7-Eleven's acquisition of roughly 3,900 Speedway retail gasoline and convenience stores from Marathon Petroleum Corporation. In an unusual development, Slaughter and Chopra noted that the closed transaction raised significant competitive concerns in hundreds of local retail gasoline and diesel fuel markets across the country, resulting in a merger-to-monopoly scenario or reducing the number of competitors from three to two. The deal parties had been unable to come a definitive divestiture agreement with the FTC to address those concerns by the end of the statutory HSR review period. Slaughter and Chopra indicated that the FTC would continue to investigate the closed transaction and that "[t]he parties have closed their transaction at their own risk" and that the FTC "will determine an appropriate path forward to address the anticompetitive harm and will also continue to work with States Attorneys General."

2. *FTC announces intention to block acquisition of Keystone Cement Co. by rival Lehigh Cement*

On May 20, 2021, the FTC announced that it was seeking to block Lehigh Cement Company's $151 million acquisition of its rival Keystone Cement Company, based in Philadelphia, alleging that the proposed acquisition would harm regional competition in the market for the key ingredient to make concrete. Lehigh owns several facilities that sell cement in direct competition with Keystone, including two plants within 40 miles of Keystone's Bath, Pennsylvania plant. The FTC authorized suit in federal court seeking to enjoin the proposed acquisition pending the outcome of an administrative trial. The FTC alleges that the acquisition would reduce competition in eastern Pennsylvania and in western New Jersey by reducing the number of competitors from four to three; would give Lehigh, which is the leading cement supplier in the area, more than 50% of cement sales in those areas; and would eliminate Keystone's aggressive pricing in the market, which had caused Lehigh to lower its cement prices in those markets. The FTC also alleges that the acquisition would make anticompetitive coordination among the remaining cement suppliers more likely to occur, noting that these and the other cement suppliers have expressly colluded within the recent past in other geographic markets with similar characteristics.

B. Department of Justice (DOJ)

1. *DOJ resolves antitrust concerns from proposed acquisition of TCF Financial Corp. by Huntington Bancshares Inc.*

On May 25, 2021, DOJ announced that Huntington Bancshares Inc. and TCF Financial Corp. have agreed to sell 13 bank branches in Michigan, with approximately $872.3 million in deposits, to resolve antitrust concerns arising from Huntington's proposed acquisition of TCF Bank. The assets to be divested include all of the deposits and loans associated with the divested branches as well as the physical branch assets. Under the divestiture agreement, the parties will divest bank branches in 10 locales in Michigan and in several other market overlap areas in Ohio. The parties also agreed to suspend existing, and not to enter into new, non-compete agreements with branch managers and loan officers located in those areas for a period of 180 days following the consummation of the proposed acquisition. In addition, the parties agreed that any branches located in those areas that are closed within three years of the proposed acquisition's closing will be sold or leased to an insured depository institution that offers deposit and credit services to small businesses.

2. *Claxton Poultry charged in ongoing price-fixing conspiracy.*

On May 20, 2021, a federal grand jury in Denver, Colorado returned an indictment charging an executive of Claxton Poultry Farms with participating in a conspiracy to fix prices and rig bids for broiler chicken products. According to government filings, Claxton and two of its top executives, along with co-conspirators, worked together to illegally suppress and eliminate competition for sales of broiler chicken products, which are sold to grocers and restaurants. To date, two individuals from Claxton have been charged and they join 10 others in a superseding indictment that was first brought in October 2020. Pilgrim's Pride Corporation, another chicken producer, pleaded guilty and was sentenced in February 2021 to pay a criminal fine over $107 million for its role in the conspiracy.

3. *Indictments handed down in estate auction bid-rigging case.*

On May 21, a federal grand jury in the Western District of Kentucky returned an indictment charging two Kentucky real estate professionals with conspiring to rig bids at an estate auction for farmland and timber rights. According to government filings, the individuals conspired with others to rig bids at a 2018 auction for hundreds of acres of farmland and a tract of timber rights. The indictment alleges that the defendants demanded and accepted a $40,000 payoff from competing auction participants to stop bidding, artificially suppressing the sales price of the farmland.

C. U.S. Litigation

1. *Federal Courts in New Jersey Considering Rule to Require Litigants to Disclose Litigation Funding*.

On April 14, 2021, United States District Court for the District of New Jersey proposed an amendment to Local Civil Rule 7.1.1, requiring all parties to a suit to disclose whether an entity not a party to the suit is providing litigation funding. If so, the litigant must disclose the identity of the funding source, whether the funder's approval is necessary for ligation decisions or settlement, and a description of the nature of the financial interest. The U.S. Chamber of Commerce supports the proposal. The International Legal Finance Association, a trade group that advocates for the litigation funding industry, has filed comments against the proposed rule, arguing that the rule would lead to increase litigation and fishing expeditions into irrelevant topics related to the funding. DRI, Inc., which represents defense counsel, is seeking even stricter disclosure requirements. In 2017, the U.S. District Court for the Northern District of California adopted a rule requiring disclosure of litigation funding arrangements in class action cases.

2. *O.M. v. National Women's Soccer League, LLC;* Case No. 21-cv-00683 (D. Or. May 24, 2021).

On May 24, 2021, a 15-year-old athletic prodigy won the right to compete for a spot in the National Women's Soccer League, persuading a federal judge in Oregon that the league has likely violated antitrust laws by enforcing a minimum age while its counterpart for men, Major League Soccer, lets teenagers play. The preliminary ruling on May 24th clears the way for Olivia Moultrie, who already practices and scrimmages with the NWSL's Portland Thorns, to sign a contract with the league while her case proceeds in court. The lawsuit accuses the 10-team league of flouting antitrust laws and international norms by preventing its teams from signing Moultrie, who turned professional at age 13 after signing a multi-year Nike contract. Moultrie would be eligible to play in MLS if she were male and "in France if she were French," the suit says. The policy is allegedly harming her long-term career prospects by depriving her of professional seasoning. The NWSL has countered the rule is shielded from antitrust scrutiny by the league's early stage, but ongoing collective bargaining talks with its players' association.

Mexico

A. The Teams of the Mexico's First Division Soccer League are Under the Spotlight of COFECE Over Possible Cartel Conduct.

The Federal Economic Competition Commission (COFECE or Commission) announced that it has notified several companies with a "statement of probable responsibility" in conducting cartel conducts in the market for the draft of professional soccer players in the national territory. With this notification a trial-like procedure is initiated so that those notified can present their defense. This probe is the first one initiated in connection with conduct that may restrict the mobility of workers and affect the determination of wages in a market.

The notified parties may present their defense before the Commissioners. If the accusation stands, companies may be fined with up to 10% of their income. Additionally, natural persons who acted in representation of a company may face a criminal procedure that entails sanctions of 5 to 10 years of prison.

B. COFECE Makes Available to the Public the Preliminary Version of the Study of Competition in Rail Freight transport.

On May 24, 2021, COFECE published the preliminary version of the *Study of competition in the public service of rail transport of load* (Study), in order to receive comments June 26, 2021. COFECE reported that the railway network has practically not grown in the past 30 years, and that the participation of the railway in total freight transport is low (25%), compared to other countries. The study identified the following competition problems:

1. *The original design of the network presents asymmetries in the access of the rail companies to the most important nodes of the country.*

2. *The network operates in a fragmented manner.*

3. *There is a lack of clear criteria to extend the licenses.*

4. *Absence of regulation for access license exclusivities expire.*

5. *The Railway Transport Regulatory Agency (ARTF or Agency) lacks enough information to carry out its regulatory task.*

COFECE made 25 recommendations on achieving three goals:

a) Remove obstacles that limit the use of existing rights of way and hinder the creation of new ones;

b) Establish a more expeditious procedure for rate regulation of towing rights in the first and last mile, when they become more expensive and / or hinder interline services;

c) Strengthen the institutional design of the ARTF so that it has enough information and powers to exercise its regulatory task.

The Netherlands

A. Dutch NCA Decisions.

1. *ACM investigates market for cloud services*

The Netherlands Authority for Consumers and Markets (ACM) has launched a study in order to determine whether the market for cloud services is functioning well for people and businesses in the Netherlands. The objective of the first study phase is the collection of information. For example, ACM will look into the design of cloud services and their impact on services that function on the basis of cloud services. In addition, ACM will assess whether there are any market imperfections such as market power, lock-in effects and information asymmetry. ACM expects this first phase to be completed by September. ACM will then decide whether a more in-depth study should be carried out. The objective of this market study is to expand ACM's knowledge about cloud services. Cloud services are on the list of core-platform services in the draft version of the Digital Markets Act (DMA) of the European Commission. That means that it is possible that, at some point, cloud services operated by businesses that have been designated as gatekeepers may fall under the scope of this act.

2. *Acquisition of Telekom Infra by Cellnex (a transmission tower operator)*

The ACM decided that transmission tower operator Cellnex may acquire Telekom Infra (which is currently still part of Deutsche Telekom). Cellnex and Telekom Infra both have an extensive network of antenna locations, which include large telecom towers and transmission towers on the ground or on roofs. The ACM concludes that, after the acquisition, sufficient competition in the relevant market will remain, as there are several other providers of antenna locations and telecom companies can choose these sites of different providers almost everywhere. In addition, telecom companies themselves can apply for a license to install transmission towers. This is one of the opportunities for telecom companies to influence competition in the market.

3. *KPN and APG allowed to set up joint venture (for the construction of fiberglass)*

The ACM approves telecom company KPN's joint venture with pension administrator APG to lay fiber. KPN and APG have no overlapping activities. According to the ACM, the joint venture will not reduce

competition in the laying and management of fiber optic networks in the Netherlands. The joint venture will lay fiber networks to households and businesses in areas where KPN does not yet have a fiber network. KPN will be the main user of these networks, but other telecom providers will also have access. The ACM assumes that equivalent and competitive conditions apply, which results in as much choice as possible for consumers and businesses. The ACM is also investigating whether regulation of telecom networks is necessary and desirable to safeguard competition, as several competitors expressed their concerns about competition problems in the construction and access to fiberglass.

4. *SIDN does not need to provide a list of all domain names (regarding possible abuse of dominant position); decision regarding enforcement request Dataprovider B.V.*

SIDN, the only administrator of ".nl" domains, has refused to provide a list of all domain names to Dataprovider B.V. SIDN sells information to trademark owners about possible infringements of their trademark rights. Dataprovider B.V. also provides online trademark protection services. The ACM found in an initial substantive investigation that the requested list is not necessary for Dataprovider B.V. to be active in the field of online trademark protection services and that the present refusal to supply results does not eliminate all competition in the market in which Dataprovider offers its online trademark protection service. Therefore, the ACM does not consider it plausible that the refusal to supply constitutes an abuse of an economic dominant position (art. 24 *Mededingingswet* and/or art. 102 TFEU). Moreover, the fact that SIDN has exclusive possession of the ".nl" zone files does not appear to provide such an advantage as to prevent the significant number of competing providers from operating in this market.

B. Truck Cartel Private Enforcement

On May 12, 2021, the Amsterdam District Court rendered a further interlocutory judgment in cartel damages cases concerning trucks, providing various substantive decisions on the claims for damages brought against multiple truck manufacturers, following a settlement decision adopted by the European Commission in 2016 on, in short, collusion by truck manufactures on truck pricing and on passing on the costs of compliance with stricter emission rules. According to the settlement decision, those practices constituted an infringement of EU competition law (Article 101 TFEU).

The Amsterdam District Court ruled that it is generally accepted that a cartel can have a lingering effect covering a longer period than the sanctioned infringement. However, in these particular damages cases it is currently not possible to establish whether there have been any lingering effects giving rise to claims for compensation, since it has not been established whether in these cases the infringement has had any effects at all and further analysis is required. In addition, the Court ruled – with reference to the ECJ's Otis-judgment and article 16 (1) of Regulation 1/2003 – that it shall consider the entirety of the settlement decision as binding. However, it does not consider itself bound to the very brief description of the specific, factual conduct provided in the settlement decision. The court has not yet assessed whether every individual claimant indeed suffered harm as a result of unlawful acts of the truck manufacturers. Every individual claimant will now have to make plausible that it has (potentially) suffered harm. A further hearing has been scheduled for May 27, 2021, to discuss the next steps of the proceedings.

United Kingdom

A. Cartel Cases: Appeal Increases Settlement Penalty

In the UK, it is possible to settle a price fixing investigation and obtain a reduction in cartel penalty that reflects the administrative savings that settlement provides to the Competition and Markets Authority. In a recent case, a UK producer of electric drum kits settled a CMA investigation by admitting to resale price maintenance, accepting liability for a penalty of just over £4 million, which included a 20% settlement discount and agreeing not to appeal. After the CMA issued its formal decision in the case, however, the producer appealed to the Competition Appeal Tribunal (CAT) to reduce the penalty, on the basis that it had been wrongly calculated. In its judgment, the CAT decided that it would calculate the amount of penalty without the 20% discount, on the basis that the producer had breached the terms of the

settlement. It then dismissed the producer's appeal and increased the amount of the penalty by the amount of the settlement discount, to just over £5 million.

B. Mergers – The UK Share of Supply Test

The UK merger regime applies to transactions that increase to 25% or more the merged firm's share of the supply of any product or service of any description in the UK or part of the UK. The CMA's application of this "share of supply" test was challenged by Sabre in an appeal to the CAT against the CMA's decision to assert jurisdiction over Sabre's proposed acquisition of Farelogix on the basis that this test was satisfied. The CMA went on to block the acquisition.

The CAT rejected Sabre's challenge and upheld the CMA's finding that the share of supply test was met. The judgment is important, as it endorses the CMA's flexible use of the test, which has come under some criticism recently. In particular, the CAT confirmed that the CMA has wide discretion as to the criteria it applies in determining the description of the services used as a basis for calculating the 25% share. It found that the CMA's choice of description in this case was not too wide and was reasonable, as it took account of the underlying statutory purpose of the test, which is to identify mergers that do not meet the alternative turnover test but that give rise to sufficient prospect of a competition concern arising from an overlap in relevant commercial activity. In addition, the CAT found that the UK aspect of the test was satisfied where a UK customer could receive a merging party's services indirectly, so it was not necessary for Farelogix to supply its services directly to a UK customer. Finally, the CAT decided that the CMA took a reasonable approach to calculating the 25% share of supply.

Poland

A. Obstructing a Search at an Entrepreneur's Premises heavily fined by UOKiK

The President of the Office of Competition and Consumer Protection (UOKiK, President of UOKiK) issued two decisions imposing fines for obstructing a search at Platinium Wellness's premises, a fitness chain based in Kraków.

In its recent decision dated May 13, 2021, the President of UOKiK concluded that the President of the Management Board of Platinium Wellness had obstructed a search conducted by UOKiK by altering the password to the mailbox used in conducting its business. This change led to an interruption in the downloading process which, in turn, prevented the officials from securing the content of the said mailbox for the purposes of its further review. UOKiK claims that the President of the Management Board of Platinium Wellness not only established a new password but also refused to provide it to officials upon their request. For the actions described above, an individual fine in the amount of PLN 150,000 (i.e. approx. EUR 33,000) was imposed on Mr. Gibala, the Management Board President. The above-mentioned fine imposed on a managerial person is in addition to a fine totaling PLN 500,000 (i.e., approx. EUR 109,000) which was imposed on the company earlier this year for obstructing the search procedure. At the time of writing, the full text of the decisions has not yet been published.

B. Further Decisions with Respect to Payment Gridlock, and More to Follow

In May 2021, UOKik issued two decisions imposing fines, two decisions not imposing fines, and ordered the discontinuance of two proceedings. As reported in the March edition of Competition Currents, the President of UOKiK received new regulatory authority enabling him to instigate and lead proceedings on excessive delays in monetary payments, as well as to impose fines on entities for accumulating delays in payments to their suppliers in an amount exceeding PLN 5 million for a period of three consecutive months.

The President of UOKiK is not slowing down actions in the sphere of payment gridlock, however. As announced on its website, eight other proceedings have been initiated against other companies.

C. UOKiK's Report: Certain Types of Discounts Applied by Retail Chains may be Considered Unfair Trade Practices

At the end of April 2021, the President of UOKiK published a report on trade discounts applied in relation to large trade networks and suppliers of agricultural or food products operating in Poland (Report). The Report was created as a result of verifying the activities of 19 of the largest retail chains and questionnaires sent to 20 suppliers of agri-food products (i.e., meat producers, fruit and vegetable growers, dairies, fish producers, spice producers, and grain milling processors).

As part of the explanatory proceedings, UOKiK verified the types of discounts applied in trade with suppliers of agri-food products as well as the method and date of granting them. The analysis conducted by UOKiK identified several types of practices that may be considered a sign of unfair use of contractual advantage by retail chains:

- Introduction of new discounts after the completion of transactions. UOKiK explained that its reservations stem primarily from the unilateral nature of the solutions employed and from the fact that granting a discount means that the supplier does not receive the revenue anticipated. This practice resulted in UOKiK's decision against Jeronimo Martins, in which it imposed a PLN 724 million fine, as detailed in the January edition of Competition Currents.
- Defining the terms of relationships with suppliers, including with respect to discounts, for a given period after the period has already started, when the supplier has already committed its resources to making deliveries. In UOKiK's opinion, this could lead to a considerable cost burden for the supplier and cause a significant reduction in contract profitability.
- simultaneous application of multiple discounts (e.g., monthly, quarterly, and annual).
- excessive contractual penalties related to settlement of discounts granted by suppliers.
- chains unilaterally lowering the sales threshold that constitutes the basis for granting a particular discount.

As a result of the Report, the President of UOKiK initiated investigations against Kaufland Polska Markety, Eurocash and SCA PR Polska. Furthermore, UOKiK proposed an amendment to the Act, consisting of an absolute prohibition on the practice of unjustified reduction of payments for the supply of agricultural or food products after delivery, particularly if there is a buyers demand for a discount.

Italy

A. ICA Launches an Investigation on a Possible Collusion Concerning Insurance Companies and Price Comparison Service Providers for Motor Civil Liability Insurance

On May 11, 2021, the Italian Competition Authority (ICA) initiated an investigation concerning the main insurance companies providing motor vehicle liability policies and the main operators offering the related price comparison services. These entities would have exchanged sensitive information in the market for the direct sale of motor civil liability (RCA) policies throughout Italy. On May 20, 2021, ICA carried out inspections at the premises of some of the companies involved.

According to ICA, since 2012 the above-mentioned companies coordinated their commercial strategies in the direct sale of RCA policies, offering smaller discounts to final consumers by reason of the mutual knowledge of the sales conditions offered on the comparison portals. The exchange of strategic information would have taken place, on a constant and periodic basis, through the sharing of reports prepared and distributed by the price comparison companies, concerning, among other things, the positioning of the competitors on the comparison portals, the difference with the premium quoted by the competitors, the price quotations and consumers' data.

If confirmed, the conduct described by ICA would constitute a breach of article 101 of the Treaty on the Functioning of the European Union (TFEU). The investigation shall be over by October 31, 2022.

B. ICA Opens an Investigation Concerning Unfair Commercial Practices and Social Media

On May 31, 2021, ICA opened an investigation concerning the company BAT Italia S.p.A. and three Italian influencers. ICA is investigating the dissemination of posts made by influencers with a commercial relationship with BAT Italia S.p.A., containing an invitation to followers to publish content with tags and hashtags linked to the advertising campaign for the product Glo Hyper, a heated tobacco device produced and marketed by the above-mentioned company. The advertising effect obtained by the influencers - and deriving from the tags to the brand and hashtags - is not, however, recognizable in its commercial nature because there are no graphic or textual warnings that allow consumers to identify the promotional purpose.

The investigation is in line with several previous decisions where ICA ruled that an influencer is required to make the public aware of the fact that he or she is providing a professional service. One of the main ways to make public that relationship is through the use of various hashtags or links to the brand's website and tags to the brand's page on social networks. Such investigation is part of a line of investigation that, following the evolution of marketing techniques adopted on social media, aims to hit the apparently neutral and disinterested communications that are, in reality, instrumental to promote products and, as such, able to influence consumer choices.

C. ICA Clears the Acquisition by Intesa Sanpaolo of Cargeas Assicurazioni

On May 3, 2021, ICA's bulletin published the news that it had cleared the acquisition by Intesa Sanpaolo (ISP), one of the leading Italian banking operators, of Cargeas Assicurazioni S.p.A. (Cargeas), a company active in the insurance sector wholly owned by Cardif, a French company belonging to the BNP Paribas Group. The transaction comprises the acquisition of the entire share capital of Cargeas by ISP, through its subsidiary Intesa Sanpaolo Vita S.p.A.

The agreement between the parties also contains a commitment to amend the distribution agreement signed between Cargeas and the banking operator BNL, concerning the marketing of certain types of Cargeas' insurance policies through BNL. The amendment will be aimed at ensuring to BNL a continuity in the supply of insurance products. In view of the limited market shares held by Cargeas in all the markets concerned, ICA considered that the transaction will not lead to an appreciable increase in Intesa Sanpaolo's market shares.

European Union

A. The General Court Upholds Ryanair's Appeals and Annuls Two Commission's Decisions Authorizing State Support to TAP and KLM

On May 19, 2021, the General Court (GC) annulled two of the Commission's positive decisions, both authorizing State aid granted to airlines to remedy the adverse effects of the COVID-19 pandemic. In more detail, the judgments at issue concern, respectively: (i) a state guarantee and state loan, with a total budget of € 3.4 billion, granted by Netherlands to KLM, a subsidiary of the Air France-KLM holding company (KLM judgment) and (ii) a loan, for a maximum budget of € 1.2 billion, granted by Portugal to TAP (TAP judgment).

In the KLM judgment, the GC found that the contested Commission's decision failed to explain why a previous state aid granted by France to Air France – an affiliate of KLM – had no influence on the assessment as to the compatibility with the internal market of the aid to KLM. Particularly, in the GC's view, the challenged decision did not contain details as regards the functional, economic, and organic

links between Air France and KLM, although it is apparent that the same holding company is involved in the administration of the envisaged aid for both beneficiaries.

In the TAP judgment, the Court annulled the contested decision on the grounds that the Commission failed to analyze whether the conditions required by Article 22 of the Guidelines on aids to undertakings in difficulty were met, namely whether: (i) the beneficiary belonged to a group; (ii) assuming the beneficiary was part of a group, that its difficulties were intrinsic and were not the result of an arbitrary allocation of costs to the benefit of its shareholders or other subsidiaries; (iii) said difficulties were too severe to be dealt with by the recipient's shareholders. Interestingly, in both cases, the Court decided to suspend the effects of the annulment, including recovery of the aid, pending the issuance of a new decision by the Commission. Indeed, the Court found that the immediate calling into question of the receipt of the funds envisaged by the aid would have harmful consequences for the economy and air transport connectivity for both Netherlands and Portugal, having regard to an economic and social context which had already been impacted by the pandemic.

B. The EC Approves Spanish Fund to Support Undertakings Experiencing Difficulties Due to COVID-19 Pandemic

According to a March 23, 2021 press release, the Commission approved modification of three Spanish schemes designed to provide economic support during the COVID-19 pandemic. In July 2020, Spain advised the Commission of its plan to establish a fund, with a budget of EUR 10 billion, to support strategic Spanish undertakings which are experiencing temporary difficulties due to the impact of the COVID-19 pandemic. The support fund is provided for various recapitalization measures; to be eligible, companies have to meet the following conditions: (i) being non-financial entities; (ii) being established in Spain; (iii) having their principal places of business in Spain; and (iv) being considered systemic or strategic for the Spanish economy.

The Commission initially approved the scheme, declaring the notified scheme compatible with the internal market pursuant to Article 107(3)(b) TFEU. The Commission's decision was subsequently challenged by Ryanair though an action for annulment. Four key points summarize the GC decision to not upholding Ryanair's pleas.

First, the GC reviewed the decision in the light of the principle of discrimination. In the GC's view, the scheme's objective satisfied the conditions laid down in Article 107(3)(b) and the restriction provided was both appropriate and necessary in order to achieve the scope of remedying the serious disturbance in the Spanish economy. The measure was also proportionate, as Spain can legitimately rely on the eligibly criteria designed to identify undertakings systematically or strategically important for its economy.

Second, the GC assessed the Commission's decision in the light of the freedom to provide services and freedom of establishment, considering that the former does not apply to the field of transport, which is governed by a special regime.

Third, regarding the alleged infringement of the obligation to balance beneficial and negative effects on trading conditions, the GC affirmed that such a balancing exercise is not required by Article 103(3)(b) TFEU.

Finally, concerning the allegedly incorrect classification of the measure at issue as an "*aid scheme*", the GG affirmed that the provisions of Spanish law constitute the legal basis of the measure at issue.

C. Gatekeepers Should Face Private Enforcement, Extra Merger Rules, Say Germany, France, and the Netherlands.

German Minister Peter Altmaier (Economy and Energy), French Minister Bruno Le Maire (Economy and Finance) and State Secretary Cédric O (Digitalisation) and Dutch State Secretary Mona Keijzer (Economic Affairs and Climate Change) published a joint proposal, where they advocate that all mergers and takeovers by large digital platforms with a gatekeeper position should be assessed by an EU regulator.

This proposal is meant to supplement the Digital Markets Acts (DMA), which introduces supervision and measures for digital platforms with a gatekeeper position (which are companies that entrepreneurs and consumers can hardly avoid) on a European level.

The proposal includes the possibility to intervene, in addition to the general obligations in the DMA with measures that only apply to specific gatekeepers. In order to prevent gatekeepers from continuing to acquire innovative start-ups and thereby eliminating future competitors, it is also very important that all mergers and acquisitions by gatekeepers are assessed by an EU regulator. National regulators would need to signal and support the EU activities, whereas supervision would take place at EU level, according to this proposal. The issue will be (further) discussed by the relevant EU ministers in the Competitiveness Council in Brussels on May 27, 2021.

Greater China

On April 26, 2021, the State Administration for Market Regulation (SAMR), China's antitrust regulator, announced that it had launched an antitrust investigation into tech giant Meituan, China's largest online food delivery service platform. In a statement announcing the investigation, the SAMR indicated that it is focused on a widespread practice known as "choose one from two (*er xuan yi*)" whereby a company requires merchants to choose only one platform as their exclusive distribution channel.

Despite the widespread nature of the "choose one from two" practice, the issue is nuanced as certain types of monopolistic practices, such as exclusivity arrangements and refusals to deal, may be permitted under the PRC Anti-monopoly Law (AML) for entities lacking dominant market positions. Article 19 of the AML defines a dominant market position as the ability to control the price or output of products or other trading conditions in the relevant market or to black or affect the entry of other entities into the relevant market. Further, a rebuttable presumption of dominance is assumed under Article 19 if: (1) one of the entities has ≥ 50% market share; (2) two entities have ≥ 66⅔% joint market share; or (3) three entities have ≥ 75% joint market share, although it excepts entities with under 10% share.

Japan

A. The JFTC Will Conduct a Survey in the Cloud Services Fields

On April 14, 2021, the Japan Fair Trade Committee (JFTC) revealed its plan to conduct a survey in the Cloud Services field. It has been pointed out that an oligopoly by a few digital platform operators may be progressing. From the perspective of improving the competitive environment, the JFTC wants to understand the market situation and actual transactions, as well as to sort out issues under the Antimonopoly Act and competition policy.

At the first phase of this survey, interviews and questionnaires will be conducted with both service providers and users, and if problems can be identified, the JFTC may narrow down the topics and conduct further investigation. This investigation will be conducted as the third one in a series of efforts to understand the actual situation in the digital field, following the previous surveys on online malls and app stores, and on digital advertising.

B. Japanese Government Considering Establishing a Specialized Team

The Japanese government is considering establishing a specialized team within JFTC by 2022 to investigate the competitive environment in the digital, healthcare, and energy sectors, where the market share is growing. In case that M&A becomes more frequent due to the deterioration of business conditions caused by the COVID-19, there is a risk that a small number of large companies will come to dominate the market. Therefore, the new specialized team will investigate whether any trading practices could lead to a particular minority of companies dominating the market.

JFTC plans to strengthen its personnel structure and secure experts familiar with the business fields to be investigated and who can communicate with overseas authorities. Over the next few years, Japan aims to have a team on the same scale as the United States and other countries.

Read previous editions of GT's Competition Currents Newsletter.

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