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. Legislative Updates

1. *House releases legislative agenda targeting "Big Tech."*

In June 2021, the U.S. House of Representatives announced a bipartisan legislative agenda aimed at curbing "Big Tech" monopoly power, comprised of five separate bills focused on prohibiting discriminatory conduct by dominant platforms; prohibiting acquisitions of competitive threats; eliminating the ability to leverage control over one line of business to gain advantages in another; lowering barriers to entry and switching costs; and updating increasing merger filing fees for deals valued in excess of $1 billion.

The agenda, titled "A Stronger Online Economy: Opportunity, Innovation, Choice," results from a 16-month investigation into the state of competition in the digital marketplace:

- The "American Innovation and Choice Online Act" would prohibit discriminatory conduct including self-preferencing.

- The "Platform Competition and Opportunity Act" would prohibit certain acquisitions of competitive threats by "dominant" platforms.
- The "Ending Platform Monopolies Act" would also eliminate the ability of dominant platforms to leverage scale across business lines to self-preference.
- The "Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act" would attempt to clear barriers to entry and reduce switching costs for businesses and consumers through interoperability and data portability requirements.
- The "Merger Filing Fee Modernization Act" would update filing fees for mergers for the first time in two decades, increasing them for deals valued above $1 billion.

"The Committee's bipartisan investigation into digital markets uncovered overwhelming evidence of anti-competitive conduct that has seriously impacted consumers and small businesses," said House Judiciary Committee Chairman Jerrold Nadler. On June 24, these five House bills that would impose sweeping changes to federal antitrust law were passed out of the House Judiciary Committee, teeing them up for a full House vote.

2. *Senate introduces legislation in response to House antitrust agenda.*

On June 15, Senate Republicans led by Mike Lee (R-UT) unveiled the "Tougher Enforcement Against Monopolies (TEAM) Act," which responds to and criticizes the House bills for not doing enough to reign in Big Tech.

The TEAM Act's key features include:

- Transferring all merger review to DOJ (eliminating differences in review and enforcement process between FTC and DOJ);
- A repeal of the *Illinois Brick* and *Hanover Shoe* doctrine; which cases effectively barred indirect purchasers from claiming damages under federal law;
- Authority granted to DOJ to recover trebled damages on behalf of consumers;
- Lowering of burden of proof for transactions that result in a company holding a market share of at least 33%; and a prohibition on mergers resulting in a 66% share except when "necessary to prevent serious harm to the national economy";
- Codification of the so-called "consumer welfare" standard: courts can consider the impact of conduct or a transaction on price, output, quality, innovation, and consumer choice;
- Increase in merger filing fees similar to those proposed by the House.

B. Federal Trade Commission (FTC)

1. *Pennsylvania cement producers Keystone Cement and Lehigh Cement abandon transaction in response to FTC recommendation to challenge.*

On May 20, 2021, the FTC announced that it had voted to file an administrative complaint and authorize FTC Staff to seek a temporary restraining order and preliminary injunction in federal court to stop Lehigh Cement Company LLC's proposed $151 million acquisition of Keystone Cement Company. Keystone owns

and operates a plant in Bath, PA. Lehigh owns and operates two plants at nearby Evansville and Nazareth, PA.

The FTC alleged that the proposed acquisition would harm competition in the market for gray portland cement in eastern Pennsylvania and western New Jersey, reducing the number of significant competitors from four to three. The scope of competition did not count the current presence or potential entry of importers. In the face of the FTC challenge, the deal parties subsequently abandoned the transaction.

2. *Lina Khan confirmed to FTC by Senate, named chair.*

On June 15, Lina Khan received a 69-28 vote in the U.S. Senate to join the FTC as a Commissioner for a term set to expire in September 2024. Khan will complete a term that began in 2017 for a position that had been filled by former Chairman Joe Simons, who had resigned his seat just ahead of the changeover in presidential administrations. Thereafter, Khan was swiftly named by President Biden to chair the FTC. At age 32, Chair Khan is the youngest chair in FTC history.

The Biden administration nominee becomes the third Democratic appointee on a five-member Commission that has been evenly split between Republicans and Democrats. The Commission cannot have more than three Commissioners from the same party.

While espousing views generally seen as progressive, Khan has also attracted conservative support on the belief that she will aim to combat the growing influence of Big Tech. Khan is well-known for her 2017 law review article arguing that current measures of market power and anticompetitive effects too narrowly focused on prices to consumers fails to address a certain tech giant's dominance.

3. *FTC approves final order imposing conditions on Casey's General Stores, Inc.'s acquisition of Buck's Intermediate Holdings, LLC.*

Following a public comment period, the FTC approved a final order settling charges that Casey's General Stores, Inc.'s acquisition of Buck's Intermediate Holdings, LLC would violate federal antitrust law. The final order requires Casey's to divest six retail fuel outlets, three Casey's outlets and three Bucky's outlets, to Western Oil II, LLC and its affiliate Danco II, LLC within 10 days after Casey's completes the acquisition. The parties are also required to provide the FTC notice before acquiring retail fuel assets within a fixed distance of any Casey's outlet in a market involving a divestiture for 10 years.

According to the complaint, which was first announced in April 2021, the proposed acquisition would likely harm competition for retail sale of gasoline in seven local markets in Nebraska and Iowa. In four of these local markets, the FTC alleged that competition for the retail sale of diesel fuel would also be negatively impacted.

The FTC vote to approve the final order was 4-0.

C. Department of Justice (DOJ)

1. *Justice Department requires divestitures in Zen-Noh Acquisition of Grain Elevators from Bunge.*

On June 1, the DOJ allowed Zen-Noh Grain Corp.'s acquisition of more than three dozen grain elevators located along the Mississippi River from Bunge Ltd. to proceed after agreeing to sell several elevators in

overlap areas. The facilities would be operated by CGB Enterprises Inc., a 50-50 joint venture between Zen-Noh and Itochu Corp.

Zen-Noh agreed to divest nine grain elevators in Arkansas, Iowa, Illinois, Louisiana and Missouri to resolve DOJ concerns that reduced prices would be paid to farmers for corn and soybeans in those states absent a remedy. Acting Assistant Attorney General Richard Powers said in connection with the announced settlement: "American farmers produce the crops that feed our nation and the world. The divestiture of these assets protects vital competition in our nation's agricultural industry.

According to the DOJ's competitive impact statement, Zen-Noh operates an export elevator on the Mississippi River in Louisiana that receives grain purchased from inland farmers largely via barge and rail through CGB. Enforcers said that in some areas along the Mississippi and Ohio rivers, farmers have few options for buyers of their grain because they have to sell locally due to the cost of transporting the crops. In the nine areas of concern, Zen-Noh's affiliate and Bunge are currently two of "only a small number of grain purchasers."

2. *DOJ sues to block Aon's acquisition of Willis Towers Watson.*

On June 16, the DOJ filed a civil antitrust lawsuit to block Aon's $30 billion proposed acquisition of Willis Towers Watson, a transaction that would combine two of the "Big Three" global insurance brokers. The DOJ complaint alleges that the merger threatens to eliminate competition, raise prices, and reduce innovation for American businesses, employers, and unions that rely on these important services.

Attorney General Merrick B. Garland said, in announcing the complaint, that "Today's action demonstrates the Justice Department's commitment to stopping harmful consolidation and preserving competition that directly and indirectly benefits Americans across the country," and "American companies and consumers rely on competition between Aon and Willis Towers Watson to lower prices for crucial services, such as health and retirement benefits consulting. Allowing Aon and Willis Towers Watson to merge would reduce that vital competition and leave American customers with fewer choices, higher prices, and lower quality services."

The complaint further alleges that Aon and Willis Towers Watson compete head-to-head to provide these services and that, if permitted to merge, Aon and Willis Towers Watson would be able to use their increased leverage to raise prices and reduce the quality of products. The parties had previously agreed to certain divestitures in connection with investigations by various international competition agencies. But the complaint alleges that these proposed remedies are insufficient to protect U.S. consumers, particularly in the areas health benefits and commercial risk brokering.

The lawsuit is the first major merger challenge by DOJ under the five-month-old Biden administration.

3. *Contech ordered to pay $8.5 million in plea agreement.*

On June 7, 2021, a North Carolina engineering firm was sentenced to pay $7 million and $1.5 million in restitution based on an earlier plea agreement involving bids with the North Carolina Department of Transportation. The firm, Contech Engineered Solutions LLC, had pleaded guilty to one count of violating the Sherman Act (for bid rigging) and one count of conspiracy to commit fraud. A Contech executive remains under indictment.

4. *DOJ announces support for enforcement of Packers and Stockyard Act.*

On June 11, 2021, Acting Assistant Attorney General Richard A. Powers issued a statement in support of the USDA's proposed rules to support enforcement of the Packers and Stockyard Act. The statement commended the USDA for taking steps to improve competition in agricultural markets and concluded that DOJ "remains committed to vigorous enforcement of the antitrust laws to protect American farmers, ranchers, and consumers."

5. *Belgian security firm pays $15 million fine in bid-rigging conspiracy*.

On June 25, 2021, a Belgian security firm agreed to plead guilty and pay a $15 million criminal fine for its role in a conspiracy to rig bids, allocate customers, and fix prices for defense-related security services, including a 2020 multimillion-dollar contract to provide services for U.S. military bases in Belgium. This was the first international resolution of the Procurement Collusion Strike Force. The charges alleged that from 2019 to 2020 the company conspired with others to allocate services and set prices for the contract. The related investigation is ongoing, and the company is cooperating with federal prosecutors.

Shortly after the above guilty plea, DOJ indicted another Belgium firm and three executives for their roles in a conspiracy to fix prices, rig bids, and allocate customers for security and defense-related services. The indictment, alleging Sherman Act violations and brought in federal court in Washington, DC, is the first of the Procurement Collusion Strike Force, and follows the first charges of the Strike Force entered June 25, 2021. The prosecution is the effort of several DOJ divisions and is being led by the Antitrust Division's New York office.

D. U.S. Litigation

1. *Salveson v. JPMorgan Chase & Co*, Case No. 20-2658, 202 WL 2657561 (2d Cir. June 29, 2021).

The Second Circuit declined to resurrect a long-running dispute over so-called "interchange fees" charged by several major banks, ruling that the Mastercard and Visa Inc. cardholders did not themselves pay the fees and, therefore, do not have standing to challenge them in court. In an unpublished decision, the three-judge panel rejected the appeal from a group of cardholders, who had alleged that the banks conspired to fix the interchange fees.

The cardholders had asked the appellate court to reverse a lower court's refusal to reconsider its final judgment tossing their case, arguing that a pair of U.S. Supreme Court decisions had changed the decisional law regarding antitrust standing. But the Second Circuit said that cardholders still do not directly pay the heightened interchange fees that they claim are the result of the banks' alleged conspiracy.

In denying the cardholders' requested, the New York federal court noted that the Supreme Court's decisions did not call that matter into question. "Plaintiffs' complaint still failed to plausibly allege that they were direct payors of the interchange fees," the Second Circuit said. "We identify no abuse of discretion in the district court's ruling."

2. *FTC v. Facebook, Inc.*, Case No. 20-3590, 2021 WL 2643724 (D.D.C. June 28, 2021).

A federal court dismissed the FTC's antitrust complaint against Facebook, as well as a parallel case brought by 48 state attorneys general, dealing a major setback to the agency's complaint, which could have resulted in Facebook divesting Instagram and WhatsApp.

The FTC sued Facebook last December, arguing that Facebook engaged in a systematic strategy to eliminate threats to its monopoly, including the 2012 and 2014 acquisitions of Instagram and WhatsApp, respectively, which acquisitions the FTC previously cleared. However, the court ruled that the FTC had failed to prove its main contention and the cornerstone of the case: that Facebook holds monopoly power in the U.S. personal social networking market.

"Although the Court does not agree with all of Facebook's contentions here, it ultimately concurs that the agency's Complaint is legally insufficient and must therefore be dismissed," the filing from the U.S. District Court for the District of Columbia reads. "The FTC has failed to plead enough facts to plausibly establish a necessary element of all of its Section 2 claims — namely, that Facebook has monopoly power in the market for Personal Social Networking (PSN) Services." "The Complaint is undoubtedly light on specific factual allegations regarding consumer-switching preferences," the court wrote. "These allegations — which do not even provide an estimated actual figure or range for Facebook's market share at any point over the past ten years — ultimately fall short of plausibly establishing that Facebook holds market power."

3. *Chandler v. Phoenix Servs. LLC*, Case No. 202-1848, 2021 WL 2371238 (Fed. Cir. June 10, 2021).

An appeal of an antitrust suit alleging Phoenix Services LLC obtained a patent fraudulently and asserted it in bad faith belongs in the Fifth Circuit, the Federal Circuit ruled.

The U.S. Court of Appeals for the Federal Circuit has jurisdiction over all appeals arising under the patent laws of the United States. But this case arises under antitrust law and does not depend on resolution of a substantial question of patent law, the Federal Circuit said in a precedential order. The Court narrowly distinguished a prior case involving a Walker Process claim where it held it did have subject matter jurisdiction. Here, the patent had already been declared unenforceable in a prior proceeding. Therefore, according to the Federal Circuit, "[a]ny discussion of the '993 patent would be merely hypothetical, and would not change the result of the prior federal patent litigation."

"Simply put, this is not a patent case," the Federal Circuit said. "Rather, this case purports to raise novel Fifth Circuit antitrust issues. *See Chandler v. Phoenix Servs.*, No. 7:19-CV-00014-O, 2020 WL 1848047, at *12 (N.D. Tex. Apr. 13, 2020) ("Whether a parent may be liable for the attempted monopolization of its subsidiary is an issue of first impression in the Fifth Circuit."). "We find it unpersuasive that we should exercise jurisdiction over such questions merely because a now-unenforceable patent was once involved in the dispute."

4. *Duke Univ. v. Endurance Risk Sols. Assur. Co.*, Case No. 5:20-cv-672, 2021 WL 2345014 (E.D.N.C. June 8, 2021)

In June 2015, Dr. Danielle Seaman filed an antitrust class action against Duke University and the University of North Carolina at Chapel Hill, alleging the schools had conspired since 2012 to suppress wages for medical faculty by agreeing not to compete for each other's medical members. The parties eventually settled the case in 2019. However, in May 2020, a second proposed antitrust class action was filed by professor Lucia Binotti, who brought the same allegations as Seaman against Duke and UNC.

Defendant Endurance Risk Solutions Assurance Co. has refused to pay for Duke's legal bills and asked the court to drop Duke's breach of contract claim regarding the 2020 class action, contending the events alleged in the 2020 action did not happen within the policy period. The insurer also said the policy excludes alleged wrongful acts that happened before 2015.

But Judge Boyle held Duke had sufficiently shown that the 2020 class action alleged events covered within the policy period. Duke has claimed that the 2020 class litigation alleged that the faculties, led by Seaman, discovered in 2015 that Duke suppressed their wages, so the underlying alleged events happened after the policy period started, the judge said.

5. *Nat'l Collegiate Athletic Ass'n v. Alston*, No. 20-512, 141 S. Ct. 2141 (June 21, 2021)

The United States Supreme Court ruled unanimously that the NCAA cannot limit education-related benefits that schools could offer their student athletes. The high court agreed with a lower court's determination that NCAA limits on the education-related benefits to athletes who play Division I basketball and football violate antitrust laws. Justice Neil Gorsuch wrote for the Court that the NCAA sought "immunity from the normal operation of the antitrust laws," an argument the court rejected. Gorsuch said that allowing colleges and universities to offer "enhanced education-related benefits … may encourage scholastic achievement and allow student-athletes a measure of compensation more consistent with the value they bring to their schools."

Justice Brett Kavanaugh, in his concurring opinion, stated that there are "serious questions" about whether the NCAA's other restrictions on compensating athletes can stand. According to Justice Kavanaugh, "[n]owhere else in America can businesses get away with agreeing not to pay their workers a fair market rate on the theory that their product is defined by not paying their workers a fair market rate," adding that "[t]he NCAA is not above the law."

Mexico

A. Federal court resolves online markets jurisdiction dispute between Competition Commission and telecom watchdog.

On June 18, 2021, the First Circuit Court—specializing in competition and telecommunications matters—decided that the Competition Commission (COFECE) has jurisdiction over the markets for online search services, social networks, and cloud computing. Through this determination, the Court resolved a dispute between COFECE and the Federal Telecommunications Institute (IFT), providing more certainty to companies that participate in economic activities related to the digital marketplace.

In accordance with Article 28 of the Mexican Constitution, COFECE is the competition authority in charge of overseeing all markets, except for the telecommunications and broadcasting sectors, which are under the exclusive jurisdiction of IFT. There have been several cases where there are uncertainties regarding which authority must resolve a matter, in markets where this is not clear.

Recent developments and the use of multiple technologies have allowed for the digitization of markets, i.e., businesses and companies that operate via digital platforms, in which the internet is an input for their operations. The courts have previously determined that the fact that certain markets use the internet as an input does not grant the IFT or COFECE advance jurisdiction over those markets, and each case must be analyzed on its merits. The Federal Law on Economic Competition provides that in those cases where COFECE and the IFT do not agree on who has jurisdiction, the Federal Circuit Court must decide.

In October 2020, the IFT initiated a probe for possible barriers to competition and essential facilities in the markets for online search, social networks, mobile operating systems, and cloud computing services. This jurisdiction was contested by COFECE. The court's decision is that COFECE has jurisdiction on the

markets for online search services, social networks ,and cloud computing services. The IFT will have jurisdiction over the market for mobile operating systems.

The Netherlands

A. Authority for Consumers and Markets (ACM) decisions.

1. *Trade and Industry Appeals Tribunal rules ACM has not sufficiently demonstrated that railway company has an economically dominant position.*

On June 1, 2021, the Trade and Industry Appeals Tribunal (*College van beroep voor het Bedrijfsleven* (the "Tribunal")) upheld (link in Dutch) the District Court's ruling annulling the ACM's decision imposing a €40,950,000 fine on National Railways (NS). According to ACM, NS abused an economically dominant position on the Dutch main rail network (MRN) when participating in a tender issued by Limburg for the concession for public transport in the province of Limburg.

ACM stated that, as holder of the main rail network concession, NS had (and would have) at least a 100% market share on the MRN until 2025. The ACM referred to EU case law that says, in the event of a very large market share or the granting of a statutory monopoly, an undertaking can be considered to have a dominant position. Furthermore, the ACM considered possible contraindications and examined the extent to which there is (potential) competition for the main rail network.

The Tribunal noted that the ACM is not ultimately concerned with competition in executing the MRN-concession, but with competition to acquire the MRN-concession. It follows that what is at issue is whether the State has an alternative railway other than NS who could be granted the MRN-concession. According to the Tribunal, it appears that it was not obvious that the MRN-concession would be awarded to NS or would be awarded again to NS in the future.

2. *ACM clears acquisition of VHE Holding by Torqx Capital Partners.*

On June 21, 2021, the ACM decided (link in Dutch) that Torqx Capital Partners B.V. (Torqx) may acquire VHE Holding B.V. (VHE). Torqx is an investment company specializing in medium-sized companies located in the Benelux. Torqx is active in the field of production, distribution, and assembly of specialty cables and cable connectivity solutions (through subsidiary Cable Connectivity Group or Capable B.V.) and distribution of fixing materials and related products (through subsidiary Fabory). Other portfolio companies of Torqx are Fri-Jado, Folat, Sonic Equipment, Descroes and Verhoef. VHE Holding is a company that specializes in the design, development, production and execution of control panels, modules and cable assemblies.

3. *KOG Investments and Agroamerica Tropical Oil Holding allowed to set up joint venture.*

On June 16, 2021, the ACM decided (link in Dutch) that investment company KOG Investments Pte Ltd. may set up a joint venture with Agroamerica Tropical Oil Holding Corp. KOG is a subsidiary of Wilmar International Limited, which is active in the agricultural sector. Agroamerica is part of the AgroAmerica Group, which is a farm that is active in the production of tropical fruits and sustainable palm oil products. Agroamerica itself is active in the production and commercialization (export) of palm oil-based products. The joint venture, Agroamerica Wilmar Corp., intends to build, own, and operate an edible oil refinery in Guatemala.

4. *ACM approves acquisition of Hemink by NIBC Co-Investments Holding.*

On June 3, 2021, the ACM decided that NIBC Co-lnvestments Holding B.V. may acquire Hemink Management Team B.V., Hemink Vastgoedzorg B.V. Schildersbedrijf H.J.F. Hemink B.V., Hemink Servicecenter B.V., Energieteam B.V., SmartPrefab B.V. and Hemink Groep B.V. (all acquired entities hereinafter jointly: Hemink). NIBC is part of the NIBC Group, a bank that focuses on medium-sized enterprises in a number of different sectors, namely Fintech, Infrastructure, Technology, Shipping and Commercial Real Estate. NIBC Group is part of the group of Blackstone Group Inc., a U.S. investment firm that holds interests in various (financial) companies. Hemink offers energy-efficient renovations and services in the field of real estate in the Netherlands. This includes planned maintenance, painting, small construction projects, service and maintenance and prefab solutions.

B. Rotterdam District Court holds Bencis liable competition violations of its subsidiary.

On May 26, 2021, Bencis was held liable (link in Dutch) as the parent company for a fine imposed on its subsidiary portfolio company. Due to a coincidence, Bencis's private equity role in the portfolio company was not acknowledged as creating parental liability, resulting in two separate penalty decisions—one against Bencis and one against its subsidiary. A subsidiary's violation of the competition does not itself constitute a tort by the parent, because the relativity requirement under tort law has not been met. It is, however, conceivable that incorrectly answering questions about competition law infringements within the scope of due diligence by the portfolio company at the time of the acquisition constitutes an unlawful act. The case was referred back to the cause list for further litigation on this issue. This may also bring into play discussions as to seeking recovery from the management responsible for both the infringement as well as the lack of disclosure in the due diligence.

C. Bill to amend the 'House for Whistleblowers Act' and other laws to implement Directive (EU) 2019/1937.

On May 21, 2021, the Dutch legislature introduced a bill (link in Dutch) to amend the current 'House for Whistleblowers Act' (*Wet Huis voor Klokkenluiders*). The new law will be called 'Whistleblower Protection Act' (*Wet bescherming klokkenluiders*). This bill is to implement the EU Whistleblower Protection Directive. The bill expands the protection of whistleblowers who report suspected wrongdoing. In addition, reporters of a breach will receive protection in various areas of European Union law. For example, reporters who are wronged will no longer have to prove that they have been wronged because of their report. The burden of proof shifts to the employer. The employer will have to demonstrate that the disadvantage has nothing to do with the report.

Furthermore, the circle of protected persons is extended. Anyone who, in the context of his or her activities, comes across an abuse or violation of European Union law, reports it on reasonable grounds and is disadvantaged as a result will soon be protected. In addition, internal reporting procedures of employers must meet stricter requirements. Also, 'competent authorities', including the Whistleblower House, will be designated to receive reports and to investigate or take measures in response to a report of a violation of European Union law.

United Kingdom

A. UK supermarket chain seeks to divest certain petrol stations to obtain merger approval.

On June 28, the UK Competition and Markets Authority (CMA) accepted the proposed asset divestiture necessary before approving the merger of two supermarket chains. The acquirers of one of the UK's

largest supermarket chains, Bellis, has given undertakings to the CMA in order to avoid a phase 2 investigation. The CMA's concerns are focused not on groceries but on retail supplies of road fuel and auto-LPG, as Bellis and its owners have 395 petrol stations in the UK and their activities overlap to a significant extent with Asda's 323 petrol stations. Bellis and its owners have undertaken to divest road fuel outlets in 36 local areas and an auto-LPG in one local area, to a purchaser approved by the CMA. To obtain CMA approval, the purchaser must be independent of the acquirers and have the financial resources, expertise, incentive, and intention to maintain and operate the divested outlets as a viable business in competition with the acquirers and Asda; and Bellis and its owners must demonstrate that the sale to the purchaser is a complete remedy for the CMA's concerns and does not itself raise competition concerns. The deadline for divestment is, as is usual, not stated in the undertakings, but is typically around six months from the date of the undertakings.

B. Market investigations: *Funeral Services Market Investigation Order*.

On June 16, 2021, the CMA issued an order remedying a number of adverse effects on competition found during the CMA's intensive and detailed investigation of the funeral services market begun in March 2019. The Order requires all funeral-services firms ("directors") to improve transparency by providing clear and prominent information about their pricing and the services they offer, so that these can be compared with those of their competitors. In addition, they are prohibited from soliciting for business by making payments to hospitals, hospices, care homes, and other similar institutions, or through contacts with coroners and police. Crematorium operators are also under an obligation of transparency as regards the pricing information they provide to funeral directors.

As well as issuing the Order, the CMA has made a recommendation to government to set up an inspection and registration regime to monitor the quality of funeral directors' services, with a view to establishing a regulatory regime for funeral services more generally. In the meantime, the CMA intends to monitor this sector actively to identify and address harmful behavior and to publish annual reports. Sector operators are required by the Order to provide the CMA with specific price and volume information for this purpose. The CMA also intends to consider whether to consult on a further market investigation once the impact and consequences of COVID-19 on the sector are sufficiently understood and the sector has stabilized.

C. Consumer protection: *Leasehold Housing Undertakings*.

Many homeowners in England and Wales, particularly apartment owners, own their properties on a leasehold basis. This means that they take a long lease, generally between 99 and 999 years, from the freeholder, agreeing to pay the freeholder a "ground rent" for the duration of the lease. Traditionally, the ground rent payable has been a "peppercorn," i.e., a small sum; however, substantial increases in ground rents, together with alleged mis-selling of leasehold properties, triggered recent enforcement action by the CMA.

On June 23, 2021, a firm with portfolios of freehold properties on which leasehold homes had been built gave an undertaking to the CMA to remove lease terms that regularly doubled the ground rent payable by leaseholders, to provide for indexed increases only and to repay the excess amount paid by their leaseholders. On the same date, a housebuilding firm gave an undertaking to the CMA to allow its leaseholders to buy the freehold of their properties at a discount that reflected the price they expected to pay at the time they originally purchased their property. The housebuilder also undertook to give refunds to leaseholders who had already purchased freeholds at higher prices. The CMA has contacted other firms asking them to remove doubling clauses from their leases.

Poland

A. UOKiK investigates care dealers.

On June 8, 2021, the Polish Competition Authority (UOKiK) launched exploratory proceedings to verify whether certain practices related to sales of Kia vehicles infringe competition law provisions. UOKiK suspects that Kia Polska and Kia car dealers may have concluded anticompetitive agreements related to market sharing, price fixing, and bid rigging.

Although at this stage no proceedings are being conducted against particular entities, UOKiK has already conducted on-premise searches with respect to four entrepreneurs. If evidence gathered by UOKiK confirms its initial suspicions, antitrust proceedings against the entrepreneurs will be launched. Such antitrust proceedings may end in a fine being imposed on each entity of up to 10% of the entity's annual turnover generated in the preceding year. Additionally, UOKiK may impose a per-infringement fine of up to PLN 2 million on persons performing managerial functions who, in connection with performing their functions, at the time of the ascertained infringement, intentionally allowed an infringement, through action or omission.

B. UOKiK investigates discount policies of Kaufland Polskie Markety.

On June 23, 2021, the president of UOKiK instigated proceedings against the owner of the Kaufland chain in Poland, questioning the cooperation between the chain and its agri-food suppliers. Primarily, UOKiK's concerns relate to the circumstances under which contract negotiations with Kaufland are conducted. UOKiK claims that between the beginning of a given year and the date of executing the contract, suppliers are not aware of the terms of their cooperation with Kaufland. As the authority observed, during this period, the existing discounts increase, certain additional discounts are imposed in the new contract, and suppliers are required to pay Kaufland Polska Markety compensation. In addition, Kaufland is said to impose an additional discount, not included in the contract, on some of its agri-food suppliers. In UOKiK's view, this causes uncertainty for suppliers with respect to the timing and level of the discount required from them.

The proceedings in question are closely related to UOKiK's recent actions targeting certain types of discounts used by chain stores, summarized in its report on trade discounts applied in relations between large trade networks operating in Poland and suppliers of agricultural or food products published at the end of April 2021. For further information, please see the June 2021 edition of Competition Currents.

Italy

A. Italian Competition Authority (ICA)

1. *ICA opens an investigation into an alleged abuse of dominance in the Italian market for modular cable and pipe sealing systems.*

On June 14, 2021, the ICA announced the opening of an investigation against Roxtec AB, the world leader in cable and pipe sealing systems, and its Italian subsidiary, Roxtec Italia S.r.l., to ascertain whether the two companies have abused their dominant position in violation of Article 102 of the TFEU.

The investigation was initiated following a competitor complaint that reported the adoption of an exclusionary strategy by Roxtec, aimed at preventing competing undertakings from producing and marketing modular sealing systems (so-called multi-diameter cable gland modules) based on the

technology covered by patent EP no. 0429916B1, acquired by the same company in 1990 and expired in 2010. According to the Authority, the two companies, which hold a share of more than 60% of the national market for the production of modular sealing systems, have used administrative and judicial procedures in order to extend the monopoly position held while the patent was in force.

In particular, allegedly they have filed multiple applications with the European Union Intellectual Property Office for the registration of EU trademarks, all concerning the same image of the product with different colors, some of which were declared illegitimate by the Court of Justice of the EU. Moreover, the ICA reported that the procurement of a high number – more than 250 – of product certifications that were allegedly unnecessary and expensive to obtain, was aimed at raising a strategic barrier to entry in the relevant market. In addition, Roxtec has initiated numerous legal actions against the complainant which, due to their number, timing, modalities and object, were considered specious by the Authority.

The parties' lawyers were given 60 days to exercise their right to be heard by the ICA, which has until April 30, 2022, to complete its investigation.

2. *ICA opens an investigation on a possible bid rigging concerning maintenance services for the Milano Serravalle highway.*

On June 14, 2021, the ICA published its decision to open proceedings to investigate a potential bid rigging between three Italian operators active in the construction of highways and other infrastructure. This agreement, if confirmed, would have covered the award of three lots in the framework of a tender for maintenance services concerning the highway Milano-Serravalle.

On May 16, 2021, ICA received a complaint regarding possible anticompetitive conducs and, subsequent to several requests for information, found a series of elements deemed indicative of possible collusion between the above-mentioned operators. The first element was the symmetrical decision by the companies in question to request that the others act as a subcontractor; because Italian law prohibits a subcontractor from directly bidding for the same lot for which it acts as subcontractor, this symmetrical decision meant that each company was bound by law not to submit a bid for two of the three lots. Other indicators of the potential anticompetitive collusion concerned the reductions offered by the companies: in the three lots to be tendered such reductions were not too far apart (between 20% and 26%) and significantly lower than those of the bids awarded in the previous procedures (which were positioned between about 42% and 46%).

The parties' lawyers were given 60 days to exercise their right to be heard by the Authority. ICA has until Dec. 31, 2022, to complete its investigation.

3. *ICA opens an investigation concerning abuses in the waste management sector.*

On May 18, 2021, the ICA opened an investigation into the following undertakings:

(i) Erion Weee consortium (Erion) – a collective management system for waste electrical and electronic equipment, incorporated on Oct. 1, 2020, following the merger of the Ecodom and Remedia consortia;

(ii) the consortium Erion Compliance Organization S.c.a.r.l. (ECO);

(iii) the service company Remedia Tecnologie e Servizi per il Riciclo S.r.l. (Remedia TSR); and

(iv) two other companies active in the waste management of electrical and electronic equipment.

The investigation concerns the management of electrical and electronic equipment waste—specifically the collection, transportation, treatment, recovery, and environmentally compatible disposal of electrical and electronic waste equipment.

The ICA is investigating the best price clause included, by Ecodom first and then also by Erion, in agreements with treatment plants, under which the plants were obliged to guarantee Ecodom the best possible transport and treatment tariffs. Secondly, the ICA will investigate the possible strategic use by Erion (previously by Ecodom and Remedia) of the reserves generated by excess profits for exclusionary purposes to artificially reduce the amount of the environmental contribution offered to producers, with a view to retain adhering producers and acquire new ones, to the prejudice of competing systems. Last, the ICA is investigating the clause, contained in Erion's bylaws, under which the treatment plants are required to guarantee the latter the best possible transport and treatment tariffs.

Having considered that the conduct of Erion, ECO, and Remedia, TSR is likely to constitute one or more infringements of Article 102 TFEU, the ICA has decided to open an investigation, giving the parties a deadline of 45 days from the date of notification of the measure to exercise their right to be heard.

European Union

A. European Commission

1. *Status regarding review HBER*.

In May 2021, the European Commission completed its review of the horizontal block exemption regulations and guidelines. Both proved useful and relevant instruments, but the review identified a number of potential problems.

Among other things, the scope of the Research and Development Block Exemption Regulation does not appear to make it possible to identify all categories of agreements that meet the conditions for exemption under Article 101(3) TFEU. In particular, small and medium-sized enterprises (SMEs) find it difficult to assess their R&D agreements themselves and therefore sometimes refrain from entering into such agreements. Furthermore, R&D agreements with research institutes and/or academic institutions are a thorny issue, as it is not always clear whether they should be considered competing undertakings according to the definitions of the Regulation. With regard to the Specialization Block Exemption Regulation, the definition of unilateral specialization agreements may hinder the conclusion of pro-competitive agreements and here, too, SMEs found it difficult to assess their specialization agreements themselves. It was generally suggested that the rules in the Block Exemption Regulations and the Horizontal Guidelines are insufficiently adapted to recent market developments. This applies in particular to developments in the field of digitalization and the pursuit of sustainability goals.

The Commission has made several policy proposals. For instance, the Commission will examine options to ensure that the current rules do not discourage SMEs, research institutes, and/or academic institutions from participating in R&D and specialization agreements that do not raise competition concerns. This includes the possibility of creating a specific category of R&D agreements and specialization agreements covered by the R&D Block Exemption or Specialization Block Exemption, as well as clarifying the definitions of competing undertakings in case research institutes and/or academic bodies are involved in

R&D agreements. Furthermore, the Commission will consider broadening the scope of the Specialization Block Exemption by extending the definition of unilateral specialization to more parties.

B. The General Court annuls the Commission decision approving State aid granted by Germany to Condor.

In an April 2020, the European Commission (EC) authorized an aid granted by Germany in favor of an airline, Condor Flugdienst, in the form of two loans amounting to Euro 550 million. The measure was aimed at compensating damages borne by Condor as a consequence of travel restrictions imposed during the COVID-19 pandemic.

The decision was challenged by Ryanair before the General Court (GC) on the grounds that the EC failed to adequately state reasons as to the compatibility of the notified measure. According to Ryanair, the EC did not provide any explanation of the reasons which led it to include, in calculating the damage which the aid measure intended to compensate, the costs associated with the extension of the period of Condor's insolvency following its abortive sale to a potential investor. At the outset, the GC stressed that, under Article 107(2) TFEU, only economic damage directly caused by natural disasters or exceptional occurrences may be compensated through State aid (i.e., there must a direct link between the damage caused by the exceptional occurrence and the State aid). The GC then pointed out that the EC did not explain why it was legitimate to add the additional costs incurred due to the extension of Condor's insolvency proceedings to the damage claimed.

In light of the above, on June 9, 2021, the GC annulled the decision on the grounds that it did not contain an adequate statement of reasons as regards the direct causal link between the costs derived from the extension of the insolvency period and the flight cancellations and rescheduling caused by the travel restrictions. As already seen in other recent cases, the GC suspended the effects of the annulment pending the adoption of a new decision by the EC, stressing that the immediate calling into question of sums granted pursuant to the aid measure would have harmful consequences for the German economy in an economic and social context already seriously impacted by the pandemic.

Greater China

On April 15, 2021, Yangtze River Pharmaceutical Group (Yangtze River), one of China's largest pharmaceutical manufacturers, was fined RMB 764 million, representing 3% of the Jiangsu-based company's 2018 revenue, by the State Administration for Market Regulation (SAMR), China's antitrust regulator. According to the SAMR, the company was accused of fixing drug prices with retailers to restrict market competition, i.e., engaging in retail price maintenance (RPM), and squeezing out competitors. The decision highlights the SAMR's renewed focus in RPM enforcement in the life sciences industry and offers important insights on how the SAMR approaches RPM practices in the enforcement context.

Key insights from the Yangtze River decision include the following.

- A Presumption of Illegality in Analyzing RPM. In the course of the SAMR's investigation, Yangtze River argued that in order to establish a violation under the Anti-Monopoly Law (AML), SAMR had the burden of showing that the alleged RPM had the effect of restricting or eliminating competition in the relevant market. Further, Yangtze River argued that because its market share in the relevant market was low, the alleged RPM agreements did not affect pricing within the relevant market. SAMR, however, rejected these arguments, indicating that RPM is prohibited in principle unless a legally recognized exception applies.

- Difficulty in Establishing Legally Recognized Exceptions. RPM is prohibited by Article 13 of the AML. Article 15 of the AML, however, recognizes certain exceptions to Article 13. In responding to the SAMR investigation, Yangtze River argued that short-term RPM involving new products should be exempted, as such measures may (i) improve technology and research for new products; and (ii) realize public interests, both recognized exceptions under Article 15. The SAMR, however, found that the relevant circumstances contemplated by Article 15 were not met and that Yangtze River failed to show that its RPM activities would not seriously restrict competition.
- Formation of a Monopoly Agreement. In the Yangtze River case, the SAMR found that in addition to written agreements such as "cooperation agreements" and the issuance of "price adjustment letter," the illegal monopoly agreements were formed through oral communications, through the use of instant messaging apps, and through other, non-contractual means. Consequently, the Yangtze River case reaffirms the principle that the substance, rather than the form of the agreement, determines the nature of the agreement.

The Yangtze River case highlights the SAMR's position that RPM is presumptively illegal, and the difficulties companies face in arguing that a legally recognized exception applies. In light of the Yangtze River case, companies should pay close attention to antitrust compliance issues in managing relationships with retailers and distributors.

Japan

A. The JFTC publishes a collection of consultation cases on the Antimonopoly Act (FY 2020 edition).

On June 9, 2021, the Japan Fair Trade Commission (JFTC) released a collection of consultation cases on the Antimonopoly Act in the fiscal year 2020 (from April 2020 to March 2021). The JFTC routinely responds, from the Antimonopoly Law perspective, to prior consultations on specific actions that business operators intend to take. And based on the consultations, the JFTC annually publishes a collection of cases that provide business operators with instructions for preventing violations of the Antimonopoly Law and conducting appropriate business activities.

This collection includes 11 cases:

(i) Consultation on activities related to new COVID-19 infections (three cases),

(ii) Consultation on activities of business operators (four cases) and

(iii) Consultation on activities of business organizations (four cases).

The JFTC provides commentaries and interpretations for every case from the Antimonopoly Law perspective, and pointed out that there are problems under the Antimonopoly Law in some cases.

B. JFTC's Decision on the Antimonopoly Act (Unfair Trade Practices).

In the above-referenced collection of cases, a guideline was announced regarding whether making someone purchase other products in conjunction with the supply of products (known as "tying arrangements") constitutes an unfair trade practice illegal under the Antitrust Law. The following two cases were judged: (a) to use the analysis equipment manufactured and sold by Company X, the IC chip, a product manufactured and sold by Company X, must be used, and make it impossible to use a non-genuine product; and (b) when using analytical instruments manufactured by Company X, if genuine

Company X products are used, the quality and performance shall be guaranteed, whereas if non-genuine Company X products are used, the guarantee shall not apply.

It is considered illegal under the Antitrust Law when a customer is forced to use a specific product in using the analysis equipment manufactured and sold by Company X, which eliminates or reduces the opportunity to trade a product other than the specific product in the market.

In the case of (a), it was judged that there was a potential problem under the Antitrust Law. The reason given was that by making non-genuine products uniformly unavailable, all non-genuine products not manufactured by Company X would be excluded from the market. This effect of restricting competition would be enormous.

In the case of (b), the fact that the guarantee only covers the case where a genuine product of Company X is used to ensure the safety and analytical accuracy of analytical instruments manufactured by Company X, and this basis is reasonable. Even if a non-genuine product is indicated as not being covered by the guarantee when used, it is possible to use the non-genuine product in Company X's analytical instruments. Therefore, the effect of excluding the non-genuine product in the market of the product is small, and it was judged that there is no problem under the Antitrust Law.

Read previous editions of GT's Competition Currents Newsletter.

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