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.

In this Issue:

United States

A. Federal Trade Commission (FTC)

1. *FTC Votes to Update Rulemaking Procedures, Sets Stage for Stronger Deterrence of Corporate Misconduct.*

In April 2021, in *AMG Capital Management, LLC v. FTC*, the U.S. Supreme Court reached a unanimous decision 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. Following that decision, on July 1, 2021, the FTC voted (3-2) to amend its Rules of Practice, specifically relating to promulgating Trade Regulation Rules under Section 18 of the FTC Act. The updates relate to the FTC's procedure to initiate rulemaking proceedings and how the public can seek an informal hearing in rulemakings. It is expected that the new rules will allow for civil penalties and damages against violators.

2. *FTC Rescinds 2015 Policy that Limited Its Enforcement Ability Under the FTC Act.*

Also on July 1, 2021, the FTC voted (again 3-2) to rescind its 2015 antitrust policy statement relating to the use of its authority to stop "unfair methods of competition." The 2015 FTC statement established a

framework for how the FTC would decide to use its authority under Section 5 on a standalone basis, noting that the FTC would be less likely to challenge an act or practice as an unfair method of competition with Section 5 of the FTC Act if the Sherman or Clayton Acts could address the relevant competitive harm. With the rescission of its statement, the FTC will consider revising its approach to regulating unfair methods of competition, using congressional statements, case law, and other considerations.

3. *FTC Authorizes Investigations into Key Enforcement Priorities.*

In another 3-2 vote on July 1, 2021, the FTC authorized investigations into a number of key enforcement priorities, including a focus on mergers (including proposed transactions and consummated transactions); repeat offenders; big tech companies; the health care industry; harms against workers and small businesses; and COVID-19 scams. The FTC plans to use compulsory process (i.e., subpoenas) in conducting these investigations.

4. *FTC Charges Broadcom with Illegal Monopolization and Orders the Semiconductor Supplier to Cease Its Anticompetitive Conduct.*

On July 2, 2021, the FTC issued a complaint against Broadcom Inc., alleging that Broadcom had illegally monopolized markets for semiconductor components or chips (used for television and broadband internet devices) by entering into long-term exclusive purchasing agreements with its customers. At the same time, the FTC issued a proposed consent requiring Broadcom to stop requiring its customers to exclusively (or near exclusively) purchase these components or chips from Broadcom.

5. *Statement of FTC Chair Lina Khan and Antitrust Division Acting Assistant Attorney General Richard A. Powers on Executive Order's Call to Consider Revisions to Merger Guidelines.*

On July 9, 2021, President Joe Biden signed an executive order on "Promoting Competition in the American Economy," which includes, among other things, encouraging: revisions to the FTC and DOJ's horizontal and vertical merger guidelines; bans or limits to noncompete agreements; removal of unnecessary occupational licensing restrictions; removal of "pay for delay" and similar deals between generic and brand name manufacturers; and restoration of the Obama-era rules on net neutrality. This order is more fully described in a GT alert. In response, Khan and Powers issued a statement that they plan to launch a review of the FTC and DOJ merger guidelines and update them.

6. *Statement Regarding Berkshire Hathaway Energy's Termination of Acquisition of Dominion Energy, Inc.'s Questar Pipeline in Central Utah.*

On July 12, 2021, Dominion Energy and Berkshire Hathaway Energy announced that in response to HSR clearance concerns, they had agreed to terminate their proposed sale of Questar Pipelines to Berkshire Hathaway Energy, with Dominion Energy to begin a new competitive sale process. In response to the abandonment of the proposed transaction, the FTC noted its concerns with the proposed transaction, as the parties are the only two pipelines bringing natural gas to central Utah, and the deal would eliminate that competition.

7. *FTC Rescinds 1995 Policy Statement that Limited Its Ability to Deter Problematic Mergers.*

In yet another 3-2 vote, on July 21, 2021, the FTC voted to rescind a 1995 policy statement that ended what at the time was longstanding FTC practice to require all companies that had proposed unlawful mergers to, going forward, receive prior approval and give prior notice for future transactions. Specifically, the FTC said it is under-resourced during the current surge in merger filings and has had to

review the same deals multiple times in a number of instances, initiating new investigations and court proceedings each time, and that requiring prior approval would alleviate some of this burden.

8. *FTC to Ramp Up Law Enforcement Against Illegal Repair Restrictions.*

In a unanimous vote, on July 21, 2021, the FTC voted to increase enforcement against certain repair restrictions that prevent businesses, workers, and consumers from repairing their own products. The FTC plans to target such repair restrictions through the antitrust laws and the FTC Act.

9. *FTC Withdraws Case Against AbbVie after Supreme Court Decision Strips Consumers of Relief.*

In September 2014, the FTC filed a complaint alleging that AbbVie Inc., along with Besins Healthcare Inc., engaged in filing sham patent infringement lawsuits against potential generic competitors in an attempt to delay generic versions of Androgel (a testosterone replacement drug) from entering the market. During the pendency of these lawsuits, AbbVie and Teva Pharmaceuticals USA, Inc., a counter-party to one of the lawsuits, entered into a settlement agreement with AbbVie agreeing to drop the patent infringement lawsuit in exchange for a license granted to Teva to launch its competitor testosterone replacement drug to the market prior to patent expiry. In June 2018, a district court dismissed the claim relating to the settlement but found AbbVie and Besins had violated the antitrust laws by engaging in sham litigation, with a damage award of $493.7 million for consumers. The Third Circuit in September 2020 affirmed the district court's ruling on the sham litigation claim; however, at the same time it denied the equitable relief to consumers (while also reinstating the pay-for-delay claim). In June 2021, the U.S. Supreme Court declined not to hear AbbVie and Besins's further appeal on the sham litigation claim, meaning the Third Circuit's denial of equitable relief would also stand. As a result, the FTC withdrew the remaining count in its complaint.

On July 30, 2021, FTC Acting Director of the Bureau of Competition Holly Vedova said of the U.S. Supreme Court's decision: "Here, the FTC would have been able to return almost a half billion dollars directly to AndroGel consumers. Instead, AbbVie and Besins can retain all of the ill-gotten gains resulting from their illegal anticompetitive conduct. This case highlights the pressing need for legislation reinstating the FTC's authority to seek equitable monetary relief for consumers in competition cases. Congress should act quickly to restore Section 13(b) of the FTC act and the Commission's ability to return to consumers money lost due to illegal anticompetitive behavior by pharmaceutical companies."

B. Department of Justice (DOJ)

1. *Belgian Security Services Company and Three Former Executives Indicted for Bid Rigging on U.S. Department of Defense Contracts.*

On June 30, 2021, the DOJ announced that a federal grand jury returned an indictment against a Belgium-based company Seris Security NV (Seris) and three of executives relating to violations of the Sherman Act, including a conspiracy to fix prices, rig bids, and allocate customers. The actions specifically related to defense-related security services, including a 2020 contract to provide services to the U.S. Department of Defense in Belgium. This indictment follows the guilty plea of another company, G4S Secure Solution NV (G4S), in the same investigation. The DOJ's Procurement Collusion Strike Force worked on the investigation.

2. *Major International Automotive-Parts Suppliers Restructure Deal to Resolve Antitrust Concerns*.

On July 1, 2021, the DOJ announced that Brazilian Tupy S.A. will restructure its acquisition of Italian Teksid S.p.A. (a subsidiary of Netherlands-based Stellantis), due to DOJ concerns. Both companies are significant providers of parts for heavy-duty engines in North America. The DOJ alleged that the merger would lead to higher prices and reduced quality and speed of service in these components. The original proposed acquisition included Teksid's plant and assets in Mexico that manufactured these iron blocks and heads for U.S. customers. Under the revised agreement, Tupy will acquire Teksid's operations in Brazil and Portugal, with Teksid retaining its Mexico operations, enabling it to continue to compete with Tupy in the United States.

3. *DOJ Withdraws from Settlement with the National Association of Realtors.*

In November 2020, the DOJ filed suit against National Association of REALTORS® (NAR), alleging that NAR established and enforced certain rules that illegally restrained competition in the market for residential real estate services. The DOJ simultaneously filed a proposed settlement that required NAR to update its rules, but also limited the DOJ's ability to investigate other conduct. On July 1, 2021, the DOJ announced it was withdrawing from the settlement and voluntarily dismissing its complaint, in order to allow it to more broadly investigate NAR's conduct and rules.

4. *DOJ and Federal Maritime Commission Sign Memorandum of Understanding to Support Interagency Collaboration.*

On July 12, 2021, the DOJ and the Federal Maritime Commission (FMC) signed an interagency Memorandum of Understanding (MOU) to foster communication (including regular discussions and periodically scheduled meetings) and cooperation between the parties with the goal of enhancing competition in the maritime industry. The parties entered into the MOU to meet the competition objectives of the president's competition executive order, discussed above.

5. *Justice Department Requires Divestitures in Transaction between Global Industrial and Agricultural Equipment Component Manufacturers*.

The DOJ announced on July 14, 2021, that Danish Danfoss A/S and Irish Eaton Corporation Plc will be required to divest assets in order to consummate Danfoss's proposed asset purchase of Eaton's hydraulics business. The complaint alleges that the two companies are the two largest suppliers in the United States of orbital motors (for off-road equipment) and hydraulic steering units. The DOJ is requiring divestitures from each of Danfoss and Eaton's orbital motor and hydraulic steering unit manufacturing businesses, arguing that without the divestitures, the proposed transaction would substantially lessen competition in the design, manufacture, and sale of orbital motors and hydraulic steering units, leading to higher prices and decreased quality and innovation.

6. *Amazon Marketplace Seller Pleads Guilty to Price Fixing DVDs and Blu-ray Discs.*

A Tennessee man was charged with conspiring with others to raise and fix prices of DVDs and Blu-ray Discs sold on Amazon Marketplace from 2018 to 2019, in violation of the Sherman Act. On July 23, 2021, he pled guilty. He was the first person to be charged and plead guilty relating to this alleged conspiracy.

7. *Attorney General Merrick B. Garland's Statement on Aon and Willis Towers Watson Decision to Terminate Merger Agreement.*

As discussed in the July 2021 issue of Competition Currents, on June 16, 2021, 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. As a result, the parties agreed to abandon the transaction. On July 26, 2021, Attorney General Merrick B. Garland released a statement opining that the abandoned transaction "is a victory for competition and for American businesses, and ultimately, for their customers, employees and retirees across the country… The decision to abandon this anticompetitive merger will help preserve competition in insurance brokering."

C. U.S. Litigation

1. *Deslandes v. McDonald's USA, LLC,* 2021 WL 3187668, (N.D.Ill., July 28, 2021).

Two McDonald's Corp. workers leading antitrust litigation against the fast food company lost their bid for class action status when a federal judge in Chicago rejected claims that a "no poach" pact among the chain's locations—discontinued in 2017—had a uniform impact on employees nationwide. Judge Jorge L. Alonso declined to certify the case as a class action, finding that the issues facing all McDonald's workers were dwarfed in significance by regional variations in the labor market. Those differences would defeat the purpose of collective litigation, he said. According to the judge, because the geographic markets for such workers tend to be small, those differences would defeat the purpose of collective litigation, making it inappropriate to allow a nationwide class in the 2017 lawsuit to proceed. The judge noted that about 92% of McDonald's employees work within 10 miles of home, and that only about 900 of McDonald's 3,000 U.S. franchisees operate a restaurant near a McDonald's operating company. As a result, the judge said, the no-poach agreements could have anticompetitive effects in some labor markets and not others. "Even looking at the rough contours of the relevant markets in which plaintiffs sell their labor suggests there are hundreds or thousands of local relevant markets in this case," Alonso wrote.

2. *In re Opana ER Antitrust Lit., Case No. 21-8017 (7th Cir., July 23, 2021).*

Endo International Plc and Impax Laboratories Inc., which face antitrust litigation for allegedly delaying generic versions of the prescription painkiller Opana ER, tentatively won their bid to have a federal appeals court in Chicago overturn a ruling designating the case a class action. The U.S. Court of Appeals for the Seventh Circuit sent the case back to Judge Harry D. Leinenweber, directing him either to carve out two groups of categorically unharmed Opana buyers from the class definition or to explain why they "were not a barrier to certification" of the class action.

Consumers with health insurance who pay a flat rate for all generics, and those with plans that charge the same amount for brand and generic versions of a drug, "fall squarely within the 'could not have been harmed' category of plaintiffs who do not belong in a certified class," the appeals court wrote. The case has been remanded so the district court can revisit class certification in light of the unharmed groups and plaintiffs' proposed amended class definition.

Mexico

A. The Competition Commission and the President of Mexico address competition concerns in the LPG Market.

LPG (Liquefied Petroleum Gas) is a critical commodity in Mexico, due to its daily use among households. Recently, oil prices have experienced volatility, and LPG prices tied to oil prices have been affected due to less supply and higher demand. Higher prices are creating political problems for the president of Mexico, who campaigned in 2018 offering lower LPG prices. Prices are also a concern of the Competition Authority (COFECE), which in 2018 issued a vast study with recommendations to foster more competition and recommended several regulatory changes to induce it.

To address this issue, the president of Mexico announced that Pemex (the state-owned petroleum company) would launch a subsidiary called "*Gas Bienestar*" ("Wellbeing Gas"), and that authorities would seek to establish a maximum LPG price. COFECE publicly announced that it has two ongoing investigations into the LPG market: (i) one seeks to determine whether "effective competitions" exist in the market; (ii) the other is examining possible collusion and price manipulation by distributors. Regarding the first probe, if COFECE determines that there is no effective competition in a national, regional or local market, the Energy Regulatory Commission (CRE) would be able to regulate prices. The second procedure regarding cartel conduct could result in high fines to LPG companies.

The Netherlands

A. Dutch NCA Decisions

1. *Approval change day-ahead capacity calculation for Core.*

On June 4, 2021, the Dutch Authority for Consumers and Markets (ACM) approved the proposal of TenneT TSO B.V. to amend the day-ahead capacity calculation methodology for the Core region, taking into account the revisions by the regulatory authorities of the Core region. This methodology promotes free trade in electricity in Europe and contributes to an affordable, reliable, and sustainable energy supply. The ACM concludes that it has not been found that the proposal is contrary to the provisions of the CACM Regulation.

According to Article 20 of the Commission Regulation (EU) 2015/22 on establishing a guideline on capacity allocation and congestion management (CACM Regulation), Core region transmission system operators should develop a proposal for a common coordinated day-ahead capacity calculation methodology for the Core region. The proposal includes the following amendments on the methodology established by ACER: adjustments to the process of establishing the Flow Reliability Margin (FRM), addition of the extended LTA inclusion process, addition of provisions to allow a non-EU country to provide inputs for the day-ahead capacity calculation methodology, adaptation to the article on the fallback procedure, and change of the date for go-live of the methodology. The transmission system operators of the Core region have drawn up the proposal jointly.

2. *ACM: Agreements between health insurers and hospitals for COVID-19-related financial support in 2021 are in the interest of patients.*

On June 22, 2021, the ACM announced approval of health insurers and hospitals' agreements on financial support in 2021 to prevent major negative consequences of the COVID-19 pandemic. The agreements ensure continuity of care for current and future patients during and after the pandemic. However, the

ACM will monitor the agreements to ensure implementation in practice does not harm patients and insured persons.

The ACM calls attention to the partial agreements about catch-up care and expensive medicine. Due to the pandemic, a lot of delayed regular care must now be provided. The ACM warns that hospitals and health insurers should not make agreements that exclude other health care providers, such as independent treatment centers, as part of catching up on regular care treatments. Such agreements hinder competition and damage the backlog. Expensive medicine has been agreed to guarantee hospitals the same margin as in 2020. Based on its market research, the ACM concluded that the agreement does not have a significant negative impact on the incentives for hospitals to actively and competitively purchase in the interest of patients and insured citizens. All agreements must be limited to 2021.

3. *ACM fines manufacturer Leadiant for excessive price of drug CDCA.*

On July 19, 2021, the ACM found that manufacturer Leadiant charged an excessive price for the drug CDCA-Leadiant. The ACM ruled that Leadiant abused its economic dominance and imposed a fine of EUR 19,569,500.

CDCA-Leadiant has been used for years under different names and at much lower prices. In 2008, Leadiant acquired a CDCA-based product. The maximum price in the Netherlands at that time was EUR 46 per pack of 100 capsules. Over the years the company acquired the right to be the only CDCA-based product to be marketed on the European market for 10 years. Leadiant increased the price several times, peaking at EUR 14,000 in 2017. This led to social outrage, until another player (Amsterdam UMC) was able to prepare the drug in its own pharmacy in January 2020.

The ACM notes that Leadiant held an economic dominant position from June 2017 to December 2019. According to the ACM, the price charged by Leadiant was excessively high and unfair. Excessively high, because the price combined with the low cost and low risks has given Leadiant an excessive return. And unfair because the drug under a different name had been on the market for much longer and at a much lower price. According to the ACM, Leadiant had a particular responsibility to actively and expeditiously achieve a negotiated result at a price that was not excessive. Leadiant has not done this sufficiently and therefore abused its dominant position and breached competition rules.

4. *Acquisition of Deen supermarkets by Albert Heijn, Vomar and DekaMarkt.*

On July 9, 2021, the ACM decided that Vomar Voordeelmarkt, DekaMarkt and Albert Heijn may acquire 80 Deen supermarkets. Albert Heijn will acquire 38 locations, Vomar Voordeelmarkt will acquire 23 locations, and DekaMarkt will acquire 19 locations. ACM has cleared this acquisition of 80 locations because these three supermarket chains face sufficient competition from other chains, and because Albert Heijn decided not to acquire a specific Deen location that would have given Albert Hein control of that particular region. Vomar Voordeelmarkt was allowed to acquire that particular location instead.

B. Dutch ACM conducts market study of IP interconnections.

On July 13, 2021, the ACM announced that it had carried out a study into the market for IP interconnections. IP interconnection ensures that different networks can exchange data. As a result, providers of internet access, content, and services are connected to each other so that end-users are properly served. Since ACM's last study in 2015, the volume of exchanged data has roughly tripled worldwide.

In addition to this increase in volume, the market participants themselves have also grown. Over the past five years, the number of internet providers has decreased as a result of mergers. Data centers have been acquired by other, predominantly U.S. providers. The market for content has become a global market and is also dominated by major competitors.

The ACM sees that, on the market of IP interconnections, economies of scale play an important role in the competitive landscape, like in other digital and tech markets. That makes it more difficult for smaller competitors and new entrants to enter those markets and to grow. However, such smaller competitors and new entrants are important for competition and innovation in the long run on the market for IP interconnections.

C. Dutch Courts

1. *Rotterdam District Court allows ACM to publish fines imposed on sellers of deed paper.*

On July 1, 2021, the ACM published data about fines imposed in a cartel case involving notary paper (special paper that notaries in the Netherlands must use, for example, for mortgages and deeds of purchase). This publication follows a May 11, 2021 order from the District Court of Rotterdam holding that the ACM could publish the 2017 imposed fines. The court upheld the cartel violation and the liability of Koninklijke Joh. Enschedé (KJE) as parent company of its then-subsidiary Joh. Enschedé Amsterdam (JEA) for secret illegal price-fixing agreements in order to limit competition among one another. These suppliers were JEA, Centraal Inkoopbureau (CIB), and XLPapier (XLP).

CIB and XLP had agreed with JEA that they would set their prices no more than 5% below JEA's price. CIB and XLP each knew that the other had made the same agreement with JEA. At the end of each year, JEA sent its new selling prices to CIB and XLP, so that they could adjust their prices. Based on the available evidence, ACM found that JEA, CIB, and XLP each enforced compliance with the 5% rule. One special aspect of this case was that JEA supplied notary paper to CIB and XLP (wholesale) but also sold notary paper to notaries directly. CIB and XLP were therefore JEA's buyers and competitors at the same time. The parties involved therefore argued that the agreements had to be regarded as arrangements between manufacturer and buyer. The ACM, however, argued that the parties involved coordinated the prices that they charged notaries among each other as competitors. The court confirmed ACM's opinion and established that cartel agreements were made between competitors.

2. *The Hague District Court holds that ACM handled digital evidence correctly during company visit.*

At the end of 2019, the ACM raided several large traders in the agricultural sector. These raids focused on possible prohibited agreements on the purchase price that these traders pay to farmers. During the raids, the ACM also found indications of possible agreements about the sale of products and for the involvement of another company in the agreements. This prompted the ACM to expand its investigation.

The material on which the ACM based the expansion of its investigation was found in the digital environment of the companies (chats on mobile phones and emails). The companies stated that the ACM should not have used that material to expand the investigation. According to them, the ACM should only have briefly looked at whether the material was relevant to its investigation. In addition, the companies did not agree with the way in which the ACM had selected the chats relevant to its investigation.

In an opinion published on July 12, 2021, the Hague District Court held that the ACM did no more than briefly review chats and emails relevant to the investigation. In these chats and emails, other (suspicious)

cases were also discussed, and it was therefore not surprising that the ACM encountered this during its investigation. The ACM did not have to ignore these indications of other violations and was therefore allowed to expand its investigation. In addition, the way in which the ACM selects relevant chats – by entering names of relevant people into a chat program – was ruled proportional.

United Kingdom

A. UK Merger Control

Phase 2 merger references have been at a low ebb in the UK this year, but two came along within a couple of weeks of each other in July.

On July 13, 2021, the UK Competition and Markets (CMA) referred the proposed merger of two manufacturers of cargo-handling equipment for a Phase 2 investigation, based on concerns that the merger would substantially lessen competition in the UK supply of reach stackers, straddle carriers, and gantry cranes. The CMA made the reference after the parties asked it to use its fast-track procedure to send the transaction to Phase 2.

The merger is also under investigation in the United States, EU, and China. The European Commission referred it to a Phase 2 investigation under the EU Merger Regulation on July 2, 2021. The timetable for the CMA decision is Dec. 27, 2021. The timetable for an EU decision is less certain, as the EU suspended its investigation on July 22, so the original deadline of Nov. 10, 2021, will be extended by the period of suspension. Regulators often suspend their investigation where the parties are unable to provide information by a specified deadline.

Then, on July 27, the CMA referred the anticipated acquisition of the passive infrastructure assets of CK Hutchison Networks Europe Investments S.À R.L in the UK by Cellnex UK Limited. Passive infrastructure assets are towers and masts to which mobile network operators and other wireless communication network providers attach electronic equipment in order to operate their networks. The CMA's concerns are that Cellnex is already by some distance the largest independent supplier of mobile towers in the UK, having acquired a similar business in 2020, and that the transaction will further strengthen its market position, resulting in higher prices or lower quality services for network operators, with an indirect impact on users of mobile networks across the UK. The timetable for the CMA decision is Jan. 10, 2022.

B. Antitrust Enforcement: Pharmaceutical Industry.

The CMA has been particularly active in enforcing the UK competition rules in the pharmaceutical sector recently. In particular, the CMA has been vocal about the impact of the infringements it has investigated on the finances of the UK taxpayer-funded UK National Health Service (NHS), which is by far the largest purchaser of drugs in the UK.

On July 9, 2021, the CMA announced that it had imposed fines of just under £2.3 million on three suppliers of fludrocortisone, for operating a market-sharing agreement that increased the price paid by the NHS for the drug by 1,800%. Two of the suppliers, Amilco and Tiofarma, had agreed to stay out of the market for fludrocortisone, in exchange for compensation provided by the third supplier, Aspen. Amilco received a 30% share of Aspen's increase in prices for the drug, and Tiofarma received sole rights to manufacture the drug for direct sale in the UK. An important feature of the case is Aspen's approach to the CMA in 2020 with an offer to pay £8 million to the NHS, to help resolve the CMA's concerns and settle the investigation.

The size of the fines, and the impact on NHS costs in the fludrocortisone case, were small in comparison to those in the CMA's decision on July 15 to impose fines of over £260 million on suppliers of hydrocortisone tablets. It found that the sole supplier of the tablets, Auden McKenzie, which was taken over by Actavis UK in 2015, had abused its market-dominant position by charging excessive prices to the NHS between 2008 and 2018, raising prices paid by the NHS by over 10,000% and increasing NHS annual spending on these tablets from £500,000 in 2007 to over £80 million in 2016. The company also entered into illegal market-sharing agreements lasting four years with two potential competitors, Advanz Pharma and Waymade, who agreed not to put their own generic hydrocortisone tablets on the UK market in exchange for monthly compensation payments from Auden Mckenzie. In its press release announcing the fines, the CMA highlighted the fact that its decision enables the NHS to seek damages from the three suppliers, should it choose to do so.

C. Long-term exclusive agreements: electric vehicle charging points at motorway service stations.

On July 22, 2021, the CMA announced an investigation into long-term exclusive agreements concluded by Electric Highway Company Limited and Ecotricity Group Limited with three motorway service area operators, Moto Hospitality Limited, Roadchef Limited, and Extra MSA Holdings (UK) Limited. The CMA's concern is that there is a lack of choice and availability of chargepoints at UK motorway service stations, where competition is limited. The decision to investigate comes after conclusion of the CMA's study of the wider electric vehicle charging sector. Its report on this study, published July 23, 2021, identifies that targeted interventions are necessary to kickstart more investment and unlock competition in specific parts of the sector, including motorway charging.

Italy

A. Italian Competition Authority (ICA) launched a non-compliance procedure against Autostrade per l'Italia

On July 13, 2021, ICA opened a non-compliance procedure against Autostrade per l'Italia S.p.A. (ASPI) - the company awarded the concession for the operation and maintenance of over 3,000 km of freeway network in Italy - for having failed to comply with the ICA's previous resolutions.

On March 16, ICA imposed a fine of EUR 5 million on ASPI and declared certain of ASPI's commercial practices to be unfair, resulting in consumers paying full tariffs on freeway sections affected by significant road problems. These problems were mainly caused by extraordinary works to be carried out to preserve the safety of several infrastructures that suffered as a result of serious deficiencies in management and maintenance. In ICA's view, ASPI had not ceased the above-mentioned conducts and, in particular, had neither reduced the toll costs nor adopted any procedures for granting tariff reductions and refunds to consumers.

By its decision of July 13, ICA declared the measure implemented by ASPI insufficient and not suitable to address ICA's concerns, considering that these measures were mostly of an informative nature and did not involve a reduction in toll payments. For these reasons, ICA determined the conditions for initiating the procedure for non-compliance met; this procedure entails the imposition of a further financial penalty from 10,000 to 5,000,000 Euros, pursuant to Article 27, paragraph 12, of the Italian Consumer Code.

B. ICA opens an investigation on the restrictive effects of an agreement between TIM and DAZN.

On July 6, 2021, ICA opened an investigation into a possible violation of Article 101 of the Treaty on the Functioning of the European Union (TFEU) in relation to certain clauses of an agreement entered into between TIM S.p.A. and DAZN Limited - through its Italian subsidiary DAZN Media Services S.r.l - for the distribution and technological support relating to the audiovisual rights for Serie A soccer championship matches from 2021 through 2024.

The procedure was initiated following reports received from leading telecommunications operators, as well as the audiovisual media services provider Sky Italia S.r.l., highlighting the possible restrictive effects of the agreement in question on competition on the pay-TV market and on retail/wholesale fixed-broadband, ultra-wideband, mobile and telecommunications services markets.

The investigation launched by the ICA is aimed at ascertaining the alleged restrictive nature of the clauses of the agreement that commercially limit DAZN's offering of pay-TV services, with the possible effect of, among other things, reducing its ability to offer discounts to end users and hindering other telecommunications operators from undertaking any commercial initiatives. In addition, ICA is investigating the possible adoption by TIM of technical solutions that are not available to competing telecommunications operators and that could result in obstacles to the adoption of its own technological solutions.

European Union

A. European Commission

1. *EU broadens scope of General Bloc Exemption Regulation on state aid.*

On July 23, 2021, the European Commission broadened the scope of the General Block Exemption Regulation (GBER) to allow governments to adopt more state aid measures without prior scrutiny. The changes affect state aid targeting the green and digital transitions, the COVID-19 economic recovery, and programs under the EU's seven-year budget.

The extension of the scope of the GBER will allow Member States to implement certain aid measures without prior Commission scrutiny. The revised rules concern: (i) aid granted by national authorities for projects funded via certain EU centrally managed programs under the new Multiannual Financial Framework and (ii) certain State aid measures to support the green and digital transition and that are, at the same time, relevant for the recovery from the economic effects of the COVID-19 pandemic. Exempting such aid from prior notification is a major simplification, which facilitates a quick implementation of such measures by Member States, where conditions limiting the distortion of competition in the Single Market are met.

Exempting aid from the obligation of prior notification is possible thanks to the safeguards embedded in EU programs managed centrally by the Commission. In particular, the support granted in the context of these programs: (i) targets a common-interest objective; (ii) addresses a market failure or socio-economic cohesion objectives; and (iii) is limited to the minimum amount necessary. The relevant categories of aid are the aid for energy efficiency projects in buildings, aid for recharging and refueling infrastructure for low-emission road vehicles, and aid for fixed broadband networks, 4G and 5G mobile networks, certain trans-European digital connectivity infrastructure projects, and certain vouchers.

2. *Commission opens in-depth State aid investigation into an arbitration award issued against Spain.*

On July 19, 2021, the European Commission opened an in-depth investigation to evaluate whether an arbitration award, to be enforced against Spain, could qualify as an incompatible State aid. The beneficiary of the alleged aid is Antin, a company that invested in the renewables sector in Spain and benefitted from a support scheme, established in 2007, which was later modified in 2013. The 2007 scheme had been unlawfully implemented because it had not been notified to the EC, contrary to EU State aid rules, whereas the 2013 scheme had been authorized by the EC.

As the 2013 scheme led to a reduction of the benefit accessible to Antin, Antin initiated an arbitration procedure to request compensation for the foregone support it would have received pursuant to the original scheme. In 2018, an arbitral tribunal found that Spain breached its obligation under the Energy Charter Treaty by modifying the renewables support scheme and ordered the infringer to pay a compensation to Antin. The preliminary view of the EC is that the award would constitute State aid because it grants to Antin an advantage equal to those provided under the 2007 scheme, which had been unlawfully implemented by Spain.

B. European Union publishes a draft of the new VBER Regulation and Vertical Guidelines, now undergoing public consultation.

On July 9, 2021, the EU Commission published a draft of the new Vertical Block Exemption Regulation (VBER Draft) and Draft Vertical Guidelines (Vertical Guidelines Draft) that are set to replace the current Commission Regulation (EU) No 330/2010 of 20 April 2010 (Current Regulation), which expires May 31, 2022. The VBER Draft was published for public consultation, and the deadline for submissions of comments is Sept. 17, 2021. The draft was prepared after the evaluation process launched by the Commission in 2018 that aimed to gather views from stakeholders to determine whether the Current Regulation remained fit for purpose after the 2010 update. The main purpose of the EU regulation and guidelines, both current, and the newly proposed drafts, is to set out the principles for assessing vertical agreements (i.e., agreements entered into between businesses operating at different levels of the supply chain) under TFEU Article 101(1).

The VBER Draft and Vertical Guidelines Draft are said to adapt the current rules in specific areas where the current rules provided a lack of clarity or created gaps, or where the current rules are no longer suited to the market realities. In particular the following areas are covered:

- dual distribution;
- online sales and online intermediation services;
- dual pricing in online and offline sales;
- parity obligations (Most Favored Nation/Customer (MFN) Clauses);
- agency agreements;
- hardcore restrictions in exclusive distribution, selective distribution, and free distribution;
- noncompete obligations.

Greater China

On July 12, 2021, Chinese video game streaming platforms Douyu and Huya announced that they would terminate plans to combine after the State Administration for Market Regulation (SAMR) issued a statement blocking the combination. Both Douyu and Huya count Tencent as a major investor. The development is notable as it come against the backdrop of China's recent antitrust enforcement efforts against tech companies and marks the first time a combination has been prohibited by Chinese regulators in the internet space.

As background, Article 21 of China's Anti-Monopoly Law requires business operators to first submit a merger control filing to Chinese antitrust authorities prior to implementing a combination, should either one of two monetary thresholds be met.

- The combined worldwide turnover of all the business operators concerned in the preceding financial year is more than RMB 10 billion, and the nationwide turnover within China of each of at least two of the business operators concerned in the preceding financial year is more than RMB 400 million.
- The combined nationwide turnover within China of all the business operators concerned in the preceding financial year is more than RMB 2 billion, and the nationwide turnover within China of each of at least two of the business operators concerned in the preceding financial year is more than RMB 400 million.

In its statement, the SAMR noted that the proposed combination would "further strengthen Tencent's dominance in the game streaming market" and allow the company to "restrict and exclude competition." In addition, the SAMR noted that in reaching its decision, the SAMR had rejected a proposal to add restrictive covenants to the combination, as the plan "would not effectively address competition concerns." Under the Anti-Monopoly Law, the maximum penalty currently allowed for unreported business combinations is RMB 500,0000. Since 2020, the SAMR has stepped up efforts to tighten its review of business combinations by tech companies.

Japan

A. The JFTC's policy for the IT giants.

On July 9, 2021, U.S. President Joe Biden signed an executive order to increase scrutiny of large corporations including IT giants to promote competition among companies.

In Japan, the Japan Fair Trade Commission (JFTC) also scrutinizes IT giants to create and maintain a competitive environment in the field of digital platforms. On Feb. 1, 2021, the Act on the Improvement of Transparency and Fairness in Trading on Specified Digital Platforms (ITFTS) went into effect. JFTC stated that it is necessary not only to enforce the Antimonopoly Act but also to consider and take action from a variety of perspectives including appropriate regulations under ITFTS and other regulations, and JFTC will continue to work actively on coordination and cooperation with the Headquarters for Digital Market Competition established in the Cabinet and other relevant ministries to maintain a competitive environment.

B. Is collusive activity in technology development a violation of competition law?

On July 8, the European Commission decided to impose fines totaling EUR 875.19 million on five German automakers for cartel activities in the development of exhaust gas purification systems. Although cartels

usually involve restraint of trade such as price manipulation and market division, this case is unique. It found collusive activities related to technological development rather than factors that directly affect price formation and sales volume.

In Japan, JFTC has never found that collusive activities in technological development alone constitute a cartel. However, according to the JFTC, the act of business operators in a competitive relationship in a specific product market forming a patent pool to mutually use the technology required to supply the product is considered a violation of the Anti-Monopoly Act. Such supply restrictions include obtaining a license for the use of the necessary technology through the pool and jointly agreeing on the price, quantity, and supply destination of the product to be supplied using the technology. Following the European Commission's decision, there may be more progress in the debate on whether technology cartels violate the Anti-Monopoly Act in Japan.

Read previous editions of GT's Competition Currents Newsletter.

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