GT GreenbergTraurig

GT Newsletter | Competition Currents | September 2021

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

In this Issue:

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

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United States

A. Federal Trade Commission (FTC)

1. *FTC updates standard notice for merger-review process.*

On Aug. 3, 2021, the FTC announced it was adjusting its merger review process to provide for the sending of standard form letters alerting companies that an FTC investigation remains open and that, upon expiration of the statutory review period (which in most deals is 30 calendar days), companies that close on their transactions do so at their own risk. When sent, the letters will remind companies that the FTC may subsequently determine that their deal is unlawful and that the FTC may seek to undo the transaction.

2. *FTC announces that payoff-of-debt will no longer be excluded as a form of consideration under Hart-Scott-Rodino rule.*

On Aug. 26, 2021, the FTC's Bureau of Competition announced it was abandoning past interpretations under the Hart-Scott-Rodino (HSR) rules that excluded the payoff of debt by a seller as consideration in determining whether the HSR size-of-transaction test (which currently is $92 million) is satisfied. The

change, a departure from long-term practice that was incorporated into many formal and informal interpretations issued by the FTC, has been perceived by some practitioners as another effort by the Commission, under the new leadership of Chairwoman Lina Khan, to discourage the "merger wave" that she has publicly criticized. The Commission stated that "[e]ffective September 27, 2021, the Bureau will begin to recommend enforcement action for companies that fail to file when retirement of debt is part of the consideration for the deal." In addition, the Bureau warned that practitioners should not rely upon published informal interpretations issued by the Bureau's Premerger Notification Office in making determinations whether transactions are reportable under the HSR statute and rules.

B. Department of Justice (DOJ)

On Aug. 6, 2021, the DOJ's Antitrust Division announced that Yama Marifat pleaded guilty to conspiring with other real estate investors to rig bids when purchasing selected properties at foreclosure auctions in San Joaquin, California beginning in April 2009 and continuing until October 2009. According to the indictment, Marifat and his co-conspirators agreed not to bid against each other on selected properties, and instead designated one co-conspirator to bid at the public auction and then held a second, private auction and made payoffs to one another. This was the eleventh individual to plead guilty in the investigation of fraud and bid-rigging of real estate auctions in San Joaquin County. Across the country, the Antitrust Division's prosecution of bid-rigging in real estate foreclosure auctions has resulted in charges against 140 individuals, including 124 guilty pleas and 12 individuals convicted at trial.

C. U.S. Litigation

1. *Animal Science Products Inc et al v Hebei Welcome Pharmaceutical Co et al.*, No. 13-4791, 2021 WL 3502632 (2d Cir. Aug. 10, 2021).

On Aug. 10, 2021, Chinese Vitamin C manufacturers facing price-fixing claims succeeded in overturning a $147 million jury verdict for a second time, when a federal appeals court in Manhattan again found the alleged cartel scheme was justified by Chinese law. The U.S. Court of Appeals for the Second Circuit ruled for Hebei Welcome Pharmaceutical Co. and parent North China Pharmaceutical Group Corp., lifting the antitrust judgment over "international comity" concerns after the U.S. Supreme Court tentatively reinstated the award in 2018. The Supreme Court had ordered a second look, saying federal courts owed only "respectful consideration" to foreign governments' interpretations of their own laws. The Second Circuit, however, dismissed the 16-1/2-year-old case because of a "true conflict" between Chinese and U.S. antitrust laws, and the potential impact on foreign relations, holding that despite the U.S. interest in punishing foreign companies' anticompetitive conduct, the government could address its concerns with China through diplomacy and trade talks. "While the stakes are high for both countries," the court wrote, "the United States' concern with extraterritorial enforcement of a private civil judgment under its antitrust laws is substantially diminished in these circumstances."

2. *Fusion Elite All Stars v. Varsity Brands, LLC*, No. 2:20-cv-026000 (W.D. Tenn. Aug. 26, 2021).

Bain Capital LP subsidiary Varsity Brands LLC must face antitrust litigation over its alleged scheme to dominate "All Star Cheer," the leading form of standalone competitive cheerleading, by conspiring with a standards-setting organization it controls, a federal judge in Tennessee ruled.

The judge allowed the proposed class action to move forward in the U.S. District Court for the Western District of Tennessee. According to the court, plaintiffs adequately alleged a pattern of acquiring market share and then raising prices. The court also observed that because the case is highly fact-intensive and not suitable for a motion to dismiss, defendant would get its chance to prove that its alleged monopoly

was the result of superior products and reputation. The court also rejected defendant's attack on the alleged product and nationwide geographic markets, stating that the complaint properly alleges a unique nationwide market with no reasonable substitutes.

3. *In re Juul Labs Inc Antitrust Litigation*, No. 3:20-cv-02345 (N.D. Cal. Aug. 19, 2021).

On Aug. 19, 2021, a federal judge allowed most claims to go forward in antitrust litigation by e-cigarette purchasers accusing Juul Labs Inc. and Altria Group Inc. of working together to suppress competition in the e-cigarette market. The judge ruled that the plaintiffs—representing proposed classes of direct purchasers, individual indirect purchasers and reseller indirect purchasers—had successfully alleged that they had been harmed by anticompetitive conduct related to Altria's 2018 acquisition of a 35% stake in Juul. In addition, Juul Labs Inc. won its bid to arbitrate rather than litigate the claims of three named direct purchasers who brought a proposed class action seeking to unwind a $12.8 billion deal with Altria Group Inc. that gave Altria a stake in Juul's products and technology. The direct purchasers—individuals who bought Juul e-cigarette devices directly from the company—waived their right to pursue class claims in court when they created online accounts with Juul, according to the judge. He found that the three named direct purchaser plaintiffs had agreed to arbitration when they bought from Juul's website, and so they could not represent the class. However, citing a ruling he had made earlier in the case, the judge said plaintiffs who made their purchases before Aug. 9, 2018, when Juul changed its website to make the arbitration agreement more prominent, were not bound to arbitrate, and he gave the plaintiffs 30 days to substitute suitable class representatives.

4. *Top Agent Network, Inc. v. National Association of Realtors, et al.*, Case No. 3:20-cv-03198, 2021 WL 3616480 (N.D. Cal. Aug. 16, 2021).

The National Association of Realtors (NAR) sidestepped antitrust litigation in a federal court in San Francisco over its policy requiring brokers to list properties on its databases within a day of marketing the "pocket listings" elsewhere. The NAR Clear Cooperation Policy requires brokers to submit listings to a multiple listing service within a day of marketing a property to the public, preventing them from publicizing listings without making them available to other agents.

The judge threw the case out of the U.S. District Court for the Northern District of California, about four months after initially dismissing it in a tentative ruling that authorized an amended complaint by the plaintiff, boutique listings service Top Agent Network Inc. (TAN). The judge ruled that although TAN made a "reasonable" argument that the Clear Cooperation Policy was anticompetitive, it was in fact TAN that would run on an anticompetitive business model if the challenge succeeded. "The Policy leverages NAR's control of the real estate market to coerce most agents into giving up their off-MLS activities entirely, without regard to the competitive value of those activities," the court concluded, while noting that TAN's model, which lets agents conceal listings from NAR's subscribers while benefiting from NAR's multiple listing service, undermined its case. TAN agents can use information from NAR to make their public and exclusive listings more competitive, while agents who are not members of TAN do not have access to that kind of intel. Then, when sellers list homes with TAN agents without listing it on the MLS, competition for that home decreases, the judge said. Thus, TAN was the wrong plaintiff to bring an antitrust suit over the policy, he said, as plaintiffs cannot use antitrust law to shield their own anticompetitive activities.

Mexico

A. Competition authority presents allegations against dominant player in fuels market.

The Comisión Federal de Competencia Económica (COFECE)—the competition authority in Mexico—announced on Aug. 17, 2021, that it has enough evidence to believe that a company with a dominant position in the selling, storage, and transport of fuels has engaged in discriminatory pricing activities that could affect the Mexican markets. COFECE did not disclose the name of the company but clarified that the company will have the opportunity to present a defense against the allegations before the Commissioners.

B. Five pharmaceutical companies fined for cartel conduct.

On Aug. 16, 2021, COFECE fined five companies and 21 individuals with 903.4 million pesos (US $46 million) for cartel conduct (price-fixing and restricting supply) in the drug distribution market. In addition, the Association of Distributors of Pharmaceutical Products of the Mexican Republic (Diprofar) was also fined for assisting in the conduct. According to COFECE, the collusive practice took place over a period of 10 years (from June 2006 to the end of December 2016).

The Netherlands

A. Dutch National Competition Authority (ACM) Decisions

1. *For the time being, no ACM inspection on 'hidden subsidies' via municipalities*.

For the time being, the Dutch National Competition Authority (ACM) is allowing commercial operators of, e.g., sports halls or swimming pools to receive a helping hand via operating contributions from municipalities. These contributions by themselves are not prohibited, for instance when a municipality wants to promote school swimming in a commercial swimming pool. But if applied incorrectly, these contributions can become a so-called "hidden subsidy," putting competition at a disadvantage. The ACM first wants more clarity from the Trade and Industry Appeals Tribunal (CBb) on the role operating fees play within the Public Enterprises (Market Activities) Act (*Wet Market en Overheid*). This Act protects the business community against unfair competition by government parties. The ACM further emphasizes that it will continue to enforce this Act in all other areas.

2. *N.V. Nederlandse Gasunie, Energiebeheer Nederland B.V. and the Port of Rotterdam Authority N.V. are allowed to establish a company*.

On July 29, 2021, the ACM stated (link in Dutch) that N.V. Nederlandse Gasunie, Energiebeheer Nederland B.V., and the Port of Rotterdam Authority N.V are allowed to set up a joint venture. The companies are engaged in the provision of regulated gas transport services, the implementation of government policy with regard to the Mining Act (*Mijnbouwwet*) and the operation, development, and management of industrial areas. The ACM has examined this proposed concentration and decided that a license is not required, as there is no reason to believe that the proposed concentration will significantly affect competition in the Dutch market or a part thereof.

3. *Royal Flora Holland is allowed to acquire three transporters of flowers and plants*.

On Aug. 25, 2021, the ACM allowed Royal Flora Holland (RFH) to acquire three transporters of flowers and plants. After extensive research, which included market research among transporters, growers, and

buyers of floriculture products, the ACM concluded that there is sufficient competition in the transport of flowers and plants by road. RFH will bring together the transport companies De Winter, Van Marrewijk (Wematrans), and Van Zaal in a new company: Floriway. RFH is a cooperative of growers of flowers and plants (ornamental plant products). RFH operates the world's largest auction and trading platform for trading flowers and plants.

The investigation showed that there are enough other carriers that can compete with Floriway. Growers and buyers also see few obstacles if they want to switch to another carrier. Although RFH is the largest auction and trading platform in the world, research shows that this acquisition will not have a major impact on competition. It is unlikely that RFH can restrict competition by, for example, bundling its own auction activities with transportation by Floriway. This is due to a combination of factors, e.g., growers and buyers can and do trade outside RFH. Moreover, there is countervailing power through RFH's cooperative structure and also from critical growers and buyers vis-à-vis RFH.

B. Consumers and businesses may choose their own modem.

Consumers and companies are allowed to connect their own modems and routers to the network of their telecom provider, as set forth in European rules. As a national supervisor of these rules, the ACM provided clarity on the interpretation thereof with the policy rule titled "Enforcement of the End User Equipment Decision." The policy rule was published July 27, 2021, and will take effect six months after publication. This gives the internet providers the opportunity to set up the necessary processes and information provision so that end users can ultimately choose and connect their own modems and routers.

Freedom of choice for users ensures that competition and innovation exist in the market for these devices. Free choice of modems and routers contributes to lower switching barriers for consumers, as it allows them to take their own modem to a new telecom provider in many cases.

C. Dutch Courts

1. *Interlocutory ruling in telecom case on retroactive rate increase after annulment of rate caps*.

The Trade and Industry Appeals Tribunal (CBb) rendered an interlocutory decision in the so-called ND-5 case. This long-running case mainly concerns a dispute about tariff ceilings set by the ACM from 2009-2011. KPN, a Dutch landline and telecommunications company, had increased the tariffs for Main Distribution Frame (MDF) access with retroactive effect after the CBb had annulled the tariff ceilings set by the ACM. The ACM found that the increase resulted in a margin squeeze, meaning that KPN's competitors could not buy access to MDF at the increased price and still profitably sell services to consumers. This margin squeeze is prohibited by what is known as the ND-5 obligation. The CBb ruled that KPN must comply with the ND-5 obligation when recalculating the MDF tariffs.

2. *Court ruling on prioritization of Competition Act enforcement request*.

On July 30, 2021, the Court of preliminary relief upheld (link in Dutch) the ACM's decision not to further investigate Coca-Cola European Partners Nederland B.V. (CCEP-NL). Riedel B.V. requested that the ACM take enforcement action against CCEP-NL, alleging that CCEP-NL is guilty of violating Article 24 of the Dutch Competition Act (Mededingingswet). After an exploratory investigation, the ACM decided on the basis of its prioritization policy not to investigate the case further. Then, the Court in preliminary relief proceedings deemed the investigation conducted by ACM and its reasons for refraining from further investigation sufficient.

United Kingdom

A. Mergers

1. *Competition and Markets Authority (CMA) phase 2 decisions -- background.*

Divestment has featured in recent CMA phase 2 merger cases. The competition regulator is considering divestment remedies in one platform case and has accepted final divestment undertakings in another. It is also reviewing divestment undertakings provided by the parties to a hospitals merger in order to avoid a phase 2 investigation, with a view to determining whether there has been a change in circumstances, e.g., relating to COVID-19, which would mean the undertakings are no longer appropriate, or should be varied or superseded.

2. *CMA initial enforcement undertakings.*

Where a merger has been completed before being investigated under the UK merger rules, the CMA will generally impose hold-separate orders on the parties, to ensure that the target businesses are operated independently pending the outcome of the investigation. The CMA has started to enforce these orders more rigorously and, on Aug. 17, 2021, it published a decision imposing a penalty of £325,000 on ION Investment Group for breach of a hold-separate order in relation to its acquisition of Broadway Technology Holdings. The breach consisted of a joint approach by ION and Broadway to a consultant representing a prospective customer and failure to disclose this approach to the CMA under the reporting requirements contained in the order.

B. Antitrust Enforcement

1. *PCR tests – pricing and reliability.*

On Aug. 6, 2021, the UK secretary of state for health and social care wrote to the chief executive of the CMA, with a request that the CMA conduct a rapid review of the conduct of firms offering COVID-19 PCR tests to international travelers. The letter expressed concerns about excessive pricing and exploitative practices. The CMA is examining these concerns, in particular whether individual firms are in breach of consumer laws and should be the subject of enforcement action; whether there are structural problems in the market for PCR tests that affect the tests' price and reliability; and whether there are any actions the government could take immediately, while the CMA gathers the data it requires.

2. *Pricing of phenytoin sodium capsules.*

In the latest step in the CMA's long-running investigation into the pricing of anti-epilepsy phenytoin sodium capsules, on Aug. 5, 2021, the CMA issued a statement of objections against two pharmaceutical companies for overcharging for the drugs. The investigation began in 2013, proceeded to a statement of objections in 2015, and concluded with a CMA decision in December 2016 imposing penalties on the parties for abusing a market dominant position by charging excessive prices for the capsules. Appeals to the Competition Appeal Tribunal and then the Court of Appeal resulted in the parties' allegations that the CMA had incorrectly applied the legal test for determining whether prices are unfair/excessive being upheld, and the case was remitted to the CMA in March 2020. The CMA began its remittal investigation in June 2020, and the most recent statement of objections provisionally finds that the prices for the capsules were unfairly high. The statement of objections is not a public document, so it remains to be seen how the CMA will apply the legal test this time round.

3. *Football broadcast rights—exclusion order.*

On Aug. 3, 2021, the UK Department of Digital, Culture, Media and Sport (DCMS) announced its decision to bring forward secondary legislation that will enable the UK Premier League to renew its existing agreements with national and international broadcasters for a further three years starting in 2022 on essentially the same terms, without putting the agreements out to tender, as required by competition law. The exclusion was requested by the Premier League in light of the economic crisis faced by English football as a result of the COVID-19 pandemic and the need for certainty regarding the level of revenues received by the Premier League, which provides funding to all levels of football, from grassroots and community to elite. The exclusion is subject to a number of conditions that protect this funding.

C. Policy Developments

1. *Settlement of antitrust investigations.*

A firm under investigation for breach of UK antitrust rules can settle the investigation by agreeing to admit to the infringement under investigation and accept a discounted penalty, both of which will be set out in a published CMA decision. The CMA is currently proposing to make it a condition of settlement that the settling firm must also agree not to appeal against the finding of infringement or the penalty imposed in the decision. The consultation on this proposal ends Sept. 28, 2021.

2. *Reform of UK competition policy.*

Oct. 1 is the deadline for comments on the proposed reforms to the UK's competition policy and also for comments on the proposed new UK competition regime for digital markets.

Poland

A. Entrepreneurs may be encumbered with new obligations – Poland works on a bill aimed at increasing consumer protection.

In July, a draft bill (Draft) implementing EU directive no. 2019/2161 (the so-called "Omnibus Directive") was published. The Omnibus Directive aims to enhance enforcement and modernize the consumer protection framework. The Draft, among other things, introduces new rules on setting discounted prices as well as other provisions aimed at protecting consumer rights. This may result in new obligations for retailers.

1. *New requirements relating to reporting discounted prices.*

With respect to setting discounted prices of goods or services, the Draft provides that:

- whenever the price of a given product (or service) is reduced, the reduced price must be indicated (in the place of sale, including on websites) along with the lowest price in effect during the 30 days prior to the reduction;
- if a given product has been for sale for less than 30 days, the trader will be obliged to present the lowest price in effect starting from when the product was first offered for sale;
- if a given product is perishable or has a short shelf life, the trader will not be obliged to present the lowest price for the last 30 days prior to the reduction. Instead, the Draft requires that the trader present the reduced price along with the price before the discounted was first applied.

- The above rules will apply to advertisements if they include information on discounted prices.

The Draft envisages fines of up to PLN 20,000 (approx. EUR 4,400/USD 5,100) for breaching the new rules, or—if the trader fails to comply with the new obligations at least three times within 12 months—up to PLN 40,000 (approx. EUR 8,800/USD 10,200).

The president of the Polish Competition Authority (UOKiK) may impose a fine of up to 10% of the given entrepreneur's turnover in the preceding year for violation of the new discounted-price reporting requirements. In such case, UOKiK may also impose a fine of up to PLN 2 million on the company's managers who intentionally allowed the infringement.

2. *Other proposed consumer protections*.

In addition, the Draft introduces several changes to the provisions regulating agreements with consumers. Pursuant to the Draft, in particular:

- obligations related to agreements with consumers such as the provision of relevant information or the right of withdrawal will apply not only to agreements where the product or service is provided in exchange for remuneration but also, as a rule, to agreements where the trader supplies digital content/digital services to the consumer free-of-charge but in exchange for the consumer's personal data;
- information obligations are extended to also include online trading platforms;
- rules on informing consumers about individual adjustments to the price based on automated decision-making will be introduced.

The Omnibus Directive requires member states to implement it by Nov. 28, 2021, and to apply the regulations from May 28, 2022. Public consultations have recently ended. Once approved by the government, the Draft will be submitted to the parliament for further legislative work. The Draft is planned to enter into force in the fourth quarter of 2021.

B. UOKiK raises objections to a transaction in the medical services sector.

On Aug. 13, UOKiK issued objections to a planned concentration consisting in major medical services provider Lux Med acquiring Lecznice Citomed, a local medical services provider. UOKiK claims that the parties to the concentration are close competitors and that the proposed concentration may lead to strengthening Lux Med's position in local markets for private medical services. UOKiK noted that in each of the local markets in question, Lux Med's second largest competitors would have much lower shares than the merged entity. According to UOKiK, such a strong position could lead to the elimination of competitors from the market.

It is not clear from the announcement whether the merged entity would achieve a dominant position or whether it is instead a so-called gap case, i.e., a merger in oligopolistic markets where competition would be affected even if the creation or strengthening of dominance may not be established. The proceedings are still pending. This case shows, however, that major players looking to consolidate may face competition challenges on certain local markets, especially given that in terms of the geographic dimension, markets are defined rather narrowly (e.g., territory of a given city and its surroundings).

Italy

A. Italian Competition Authority (ICA) returns to monitor and sanction practices implying abuses of economic dependence, penalizes Poste Italiane for abusive practices in mail operations in Naples.

The ICA has relaunched investigations into practices that may constitute an abuse of economic dependence pursuant to article 9, Law n. 192/1998. This approach shows ICA's revived interest in cases concerning this kind of competition-distortive conduct.

On Aug. 6, 2021, the ICA announced that it has imposed a fine amounting to more than €11 million on Poste Italiane S.p.A. for abusive practices towards Soluzioni S.r.l., an Italian company that has carried out mail distribution and collection for Poste Italiane in the city of Naples. According to ICA, Poste Italiane imposed unjustifiably onerous clauses in the contracts signed in 2012 and 2013 (effective until 2017) with Soluzioni S.r.l. Specifically, Soluzioni S.r.l. was forced, inter alia, to endure the prohibition of joint transport and delivery of Poste Italiane's products and those of third parties, to perform additional unpaid services not provided for in the contracts as well as to allow Poste Italiane to arbitrarily reduce the minimum quantities and to change the type of its products.

In ICA's view, Poste Italiane hindered the development of market competition by excluding an operator that could have both provided its services to alternative postal operators and become a potential competitive player at a local level.

B. ICA opens an investigation into the large retail supermarket-chain sector.

On Aug. 16, 2021, ICA announced it had opened an investigation into a possible breach of Italian competition law by the supermarket chain Fratelli Arena S.r.l. (Arena), related to the merger control proceeding concerning its acquisition of 33 business concerns of SMA S.p.A.; 8 business concerns of Distribuzione Cambria S.r.l. (DC); and 11 business concerns of Roberto Abate S.p.A. in liquidazione (Abate) services.

The concentration was filed in July 2019 and was cleared in phase II in December of the same year. ICA accepted several commitments from Arena, including the divestment of several supermarkets in three geographical areas. Subsequently, the time period to complete the divestment was further extended over 2020 and 2021. Finally, in May 2021, Arena communicated that the competitive conditions in the geographical areas where the supermarkets were located had substantially changed due to new openings by competitors.

ICA now will have to assess whether to revoke or modify the measures imposed on Arena with the adoption of the clearance decision, as well as whether there has been a breach of the commitments undertaken during the merger control proceeding, pursuant to Article 19 of the Italian competition law (l. 289/90).

C. ICA clears the acquisition by the Italian Ministry of Economy of SACE.

On Aug. 3, 2021, ICA allowed the acquisition by the Italian Ministry of Economy (MEF) of SACE S.p.A to move forward. The target is the Italian Export Credit Agency, which provides guarantees and insurance coverage in relation to political, catastrophic, economic, commercial, and exchange-rate issues to which national operators are exposed in their foreign activities. SACE is also authorized to issue guarantees and

insurance coverage for operations of strategic importance for the Italian economy. SACE is currently solely controlled by Cassa Depositi e Prestiti S.p.A. (CDP), which itself is controlled by the MEF.

The concentration has been cleared in phase I, as it does not give rise to competition concerns due to the absence of MEF from the markets involved in the proposed transaction. SACE is substantially the only operator in the market that can offer such products and services benefiting from the state guarantee. Such products and services have characteristics that make them non-substitutable with other products and services offered by third-party operators.

Since EU thresholds for merger control were not met, ICA was the competent antitrust authority to review the proposed transaction. The case seems to represent an application by ICA of the so-called "silo doctrine." Notwithstanding that SACE is already indirectly owned by the MEF through CDP, the proposed transaction has been treated as a concentration between independent undertakings, possibly due to the fact that SACE has to be seen as an autonomous operator on the market.

European Union

A. European Commission

1. *The European Commission approves a Danish aid measure to support coronavirus-related research and new vaccine development.*

In an Aug. 23, 2021 decision, the European Commission authorized aid granted by Denmark in favor of Bavarian Nordic, a company active in vaccine development and manufacturing, in the form of a repayable advance amounting to EUR 108 million. The aid was notified by Denmark and subsequently approved under the State aid Temporary Framework, a regime adopted March 19, 2020, to enable Member States to use the flexibility under State aid rules in the context of the coronavirus outbreak. The above-mentioned framework, in place until the end of December 2021, allows Member States to grant different types of aid, including the support for coronavirus related research and development ("Coronavirus R&D").

The purpose of the Danish aid measure is to support Coronavirus R&D and to strengthen the development of a novel coronavirus vaccine, currently undergoing phase II of the clinical trial. The aid will serve as funding for phase III of vaccine development, consisting in confirming its safety and demonstrating its efficacy, carrying out experimental operations, and working within the regulatory framework.

The Commission found the measure necessary, appropriate, and proportionate to fight the health crisis pursuant to article 107(3)(c) TFEU. Also, the Commission considered the aid in line with the requirements provided for in the Temporary Framework because: (i) the aid will cover less than 80% of the relevant research and experimental development costs and be fully recovered in case of regulatory authorization; moreover, (ii) any results of the research activities would be made available to third parties in the EEA, at non-discriminatory market conditions through non-exclusive licenses.

2. *The Commission opens an investigation into health technology company Illumina for possible breach of the "stand still" obligation.*

On Aug. 20, 2021, the Commission opened an investigation to assess whether Illumina's decision to complete its acquisition of GRAIL—while the Commission's in-depth investigation into the proposed transaction was still pending—constitutes a breach of the "standstill obligation" under Article 7 of the Merger Regulation (EUMR). Pursuant to this provision, to prevent negative impact on competition, a

proposed transaction may not, in principle, be completed before the end of the assessment carried out by the Commission.

Illumina supplies next-generation sequencing (NGS) systems for genetic and genomic analysis, while GRAIL is a customer of Illumina developing cancer detection tests relying on NGS systems. The Commission is reviewing the transaction following the referral submitted by Belgium, France, Greece, Iceland, the Netherlands, and Norway under EUMR Article 22. The transaction did not meet the EUMR's turnover thresholds and was not notified in any Member State. However, according to the Commission, the transaction met the criteria for referral under article 22 EUMR due to its impact on trade and competition in the single market. In particular, the Commission considers that GRAIL's competitive significance is not reflected in its turnover.

On Aug. 18, Illumina pointed out, among other things, that in its view the Commission did not have jurisdiction to review the merger, and the General Court of the European Union will hear Illumina's jurisdictional challenge later this year. Moreover, Illumina explained that the decision of the Commission was expected to be issued after the expiration of the deal. The company also highlighted that, pending the competition and regulatory assessment of the transaction, GRAIL will remain a separate and independent unit.

B. Antitrust questions on Adidas sale published by CJEU.

Following a referral from a French court, the EU's top court published a series of questions relating to the sale of Adidas in the early 1990s. The French commercial court said Crédit Lyonnais failed to notify its control of Adidas to EU merger regulators and asked the EU court what effects that has. The French court also wants to know whether an arrangement between Crédit Lyonnais and other banks amounted to illegal collusion and, given that Crédit Lyonnais was state-owned, the French court enquired about the application of state aid laws.

Greater China

On July 24, 2021, the State Administration for Market Regulation (SAMR), China's antitrust regulator, issued a penalty against the internet giant Tencent for "gun jumping,"—i.e., implementing a concentration with China Music Corporation (CMC) about four years ago without notifying the regulator as required under China's Anti-Monopoly Law (AML). Tencent was fined with RMB500,000, the maximum penalty allowed with respect to the said violation under the current AML, and certain restrictive conditions were imposed on Tencent in order to, as proclaimed by SAMR in their decision, "restore the competition order in the relevant market."

On July 12, 2016, Tencent acquired 61.64% equity interest of CMC and injected Tencent's own online music streaming business, namely QQ music, into CMC. Tencent became the sole controller of CMC's businesses after the transaction. Tencent closed the deal in 2017 without reporting it to China's antitrust regulator. The combined business was later renamed as Tencent Music Entertainment Group and was listed in the United States in 2018.

In the decision, SAMR confirmed that the turnovers of both Tencent and CMC in 2015 crossed the notification thresholds under the AML; thus, the said transaction should have been reported to SAMR. SAMR further clarified that both Tencent and TMC have overlapping businesses in the relevant market of "online music playing platforms" in China, which market shall incorporate all platforms offering music broadcasting services offered to consumers via online streaming or downloading platforms. Tencent and its affiliates were ordered to "restore the competition order in the relevant market" with the following

specific obligations imposed upon Tencent: (1) Tencent must relinquish exclusive copyright licenses with upstream copyright holders within 30 days after the date of the decision, and refrain from entering into new exclusive licenses; (2) Tencent must refrain from requiring upstream copyright holders to grant Tencent terms and conditions (including scope of license, license fees, and term of license) more favorable than those granted to other competitors without justifiable reasons; and (3) Tencent must refrain from making high advances of copyright fees to upstream copyright holders.

Japan

A. The JFTC launches an investigation into the interchange fees of credit card companies.

On July 21, 2021, the Japan Fair Trade Commission (JFTC) revealed its plan to commence an investigation into the actual condition of an interchange fee—i.e., the fee charged to merchants for processing credit card payments. In the report published by the JFTC in 2019, the JFTC pointed out that it would be desirable to disclose the level of an interchange fee, but international-branded credit card companies have not disclosed their interchange fees to the public. Because of that, it has been observed that fair competition among card companies may be hindered, resulting in a heavier burden on restaurants and other merchants.

The JFTC plans to issue questionnaires and conduct interviews with consumers and credit card companies during FY 2021. If the JFTC finds any matters in light of the antimonopoly acts or competition policy, the JFTC will present its position and/or its opinion on the them.

B. Follow-up; Final report on digital advertising.

As mentioned in the March newsletter, the JFTC revealed its final report on digital advertising on Feb. 17, 2021. Afterwards, a meeting was held to exchange opinions on the guidelines, and the minutes were published July 21, 2021.

These minutes provide direction regarding enforcement, i.e., whether to impose a surcharge in case of a violation or to resolve the issue through an agreement between the JFTC and the business entity ("commitment procedure"). According to the JFTC, the purpose of administrative sanctions is to restore competitive order. For that purpose, if a cease and desist order is appropriate, it will be used, and if a commitment procedure is more effective, such method may be applied. JFTC believes that rather than focusing on some measure in advance, it will make a choice in terms of what method will most effectively eliminate the problematic behavior.

Read previous editions of GT's Competition Currents Newsletter.

Contributors

Andrew G. Berg
Shareholder
+1 202.331.3181
berga@gtlaw.com

Gregory J. Casas
Shareholder
+1 512.320.7238
casasg@gtlaw.com

Calvin Ding◇
Shareholder
+86 (0) 21.6391.6633
dingc@gtlaw.com

Miguel Flores Bernés
Shareholder
+52 55.5029.0096
mfbernes@gtlaw.com

Víctor Manuel Frías Garcés
Shareholder
+52 55.5029.0020
friasgarcesv@gtlaw.com

Robert Gago
Shareholder
+48 22.690.6197
gagor@gtlaw.com

Edoardo Gambaro
Partner
+ (39) 02.77197205
Edoardo.Gambaro@gtlaw.com

Pamela J. Marple
Shareholder
+1 202.331.3174
marplep@gtlaw.com

Yuji Ogiwara
Shareholder
+81 (0) 3.4510.2206
ogiwaray@gtlaw.com

Stephen M. Pepper
Shareholder
+1 212.801.6734
peppers@gtlaw.com

Gillian Sproul
Shareholder
+ 44 (0) 203.349.8861
sproulg@gtlaw.com

Hans Urlus
Shareholder
+31 20 301 7324
urlush@gtlaw.com

Dawn (Dan) Zhang
Shareholder
+86 (0) 21.6391.6633
zhangd@gtlaw.com

Mari Arakawa
Associate
+81 (0) 3.4510.2233
arakawam@gtlaw.com

Filip Drgas
Associate
+48 22.690.6204
drgasf@gtlaw.com

Marta Kownacka
Associate
+48.22.690.6231
kownackam@gtlaw.com

Pietro Missanelli
Senior Associate
+ (39) 02.77197280
Pietro.Missanelli@gtlaw.com

Massimiliano Pizzonia
Associate
+ (39) 02.7719771
massimiliano.pizzonia@gtlaw.com

Anna Rajchert
Senior Associate
+48 22.690.6249
rajcherta@gtlaw.com

Jose Abel Rivera-Pedroza
Associate
+52 55.5029.0089
riverapedrozaj@gtlaw.com

Ippei Suzuki
Associate
+81 (0) 3.4510.2232
suzukii@gtlaw.com

Rebecca Tracy Rotem
Practice Group Attorney
+1 202.533.2341
rotemr@gtlaw.com

Chazz Sutherland
Associate
+31 20 301 7448
sutherlandc@gtlaw.com

John Gao
Associate
+86 (0) 21.6391.6633
gaoj@gtlaw.com

◇*Admitted in Indiana. Has not taken the Chinese national PRC judicial qualification examination.*

Administrative Editor

Alan W. Hersh
Associate
+1 512.320.7248
hersha@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Boston. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.¬ Houston. Las Vegas. London.* Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.¤ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.