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GT Newsletter | Competition Currents | January 2022

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

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United States

A. Federal Trade Commission (FTC)

1. *Agency issues annual report on ethanol market concentration.*

On Dec. 1, 2021, the FTC issued its 2021 Report on Ethanol Market Concentration. The Energy Policy Act of 2005 directs the Commission to perform an annual review of market concentration in the ethanol production industry "to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior."

The FTC report concludes that "[t]he low level of concentration and large number of market participants in the U.S. ethanol production industry continue to suggest that the exercise of market power to set prices, or coordinate on price or output levels, is unlikely on a nationwide basis." The Commission vote to approve the report was 4-0.

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2. *FTC challenges U.S. chip supplier's $40 billion acquisition of U.K. chip design provider*.

On Dec. 2, the FTC filed an administrative complaint challenging a U.S. chip supplier's proposed acquisition of a UK chip design provider. The agency alleges that the vertical deal—a combination of one of the largest semiconductor chip suppliers and a firm that creates and licenses microprocessor designs and architectures used by rival chip suppliers—would constrain those rivals and provide the combined firm with "the means and incentive to stifle innovative next-generation technologies, including those used to run datacenters and driver-assistance systems in cars."

According to the FTC's complaint, the acquisition will harm competition in three worldwide markets in which the U.S. company competes using the UK company's products: High-Level Advanced Driver Assistance Systems for passenger cars; DPU SmartNICs, which are advanced networking products used to increase the security and efficiency of datacenter servers; and CPUs for Cloud Computing Service Providers. The complaint also alleges that the acquisition will harm competition by giving the U.S. company access to the competitively sensitive information of the UK company's licensees, some of whom are the U.S. company's rivals. The UK company licenses its processor technology using an industry-described neutral, open licensing approach and is often dubbed the "Switzerland" of the semiconductor industry, according to the complaint.

The FTC's Commissioners voted 4-0 to challenge the deal, but did not also authorize FTC complaint counsel to seek a preliminary injunction that would temporarily block the merger while the in-house challenge proceeds. Moving forward with an administrative challenge does not preclude the FTC from seeking an injunction later.

3. *Great Outdoors Group, LLC and Sportsman's Warehouse Holdings, Inc. abandon transaction following FTC investigation*.

On Dec. 3, the FTC issued a statement in response to Great Outdoors Group, LLC and Sportsman's Warehouse Holdings, Inc. abandoning their proposed merger following the FTC's nearly year-long investigation. The FTC alleged that the transaction would have combined two close retail competitors selling hunting, shooting, fishing, camping, and other outdoor gear. Competition Bureau Director Holly Vedova stated: "Under its Bass Pro Shops and Cabela's banners, Great Outdoors competes closely with Sportsman's Warehouse to offer customers a broad and deep in-store assortment of outdoor gear, alongside expert sales staff, creating a one-stop shopping experience for outdoor enthusiasts. This competition has benefited customers in at least two dozen local markets throughout the United States."

4. *FTC faces lawsuit over merger policy changes*.

On Dec. 8, a nonprofit group backed by Charles Koch, the Americans for Prosperity Foundation, filed suit seeking documents tied to the FTC's recent changes to its merger and antitrust enforcement policies. The group had filed a Freedom of Information Act (FOIA) request in October 2021 seeking "communications, memoranda or other documentation" tied to a series of decisions made under the leadership of Chair Lina Khan. The FTC is still processing the FOIA request.

"The FTC's aggressive agenda on antitrust enforcement is out of step with mainstream legal thinking and is best regarded as anti-consumer, anti-innovation, and harmful to economic growth and prosperity," the request reads. "The public has a compelling need to understand what the agency is doing, why it is doing it, and what the Commission has chosen as working law in the wake of discarding the consumer welfare standard." The group alleges the FTC violated FOIA by not responding in the 20-day timeline and by not arranging an "alternative time frame" for completion of the request.

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5. *FTC fines Clarence L. Werner, founder of truckload carrier Werner Enterprises, Inc., for alleged HSR Act violation.*

On Dec. 22, the FTC announced that Clarence L. Werner, founder of the truckload carrier Werner Enterprises, Inc., would pay a $486,900 civil penalty to settle charges that his acquisition of Werner stock violated the Hart-Scott-Rodino (HSR) Act. The FTC alleged that Mr. Werner made several acquisitions of Werner stock over a 12-year period, beginning in 2007, by way of option exercises, open market purchases, and vesting of restricted stock, and that his aggregate holdings crossed an HSR notification reporting threshold.

The complaint noted that counsel for Mr. Werner alerted the agency in January 2020 that Mr. Werner may have had to submit several corrective HSR filings for crossing the $100 million (as adjusted) filing threshold as a result of the above-referenced acquisitions. Thereafter, on March 4, 2020, Mr. Werner submitted corrective filings for acquisitions consummated in 2007, 2012, and 2019. Other than these corrective filings, Mr. Werner apparently had not previously submitted a corrective HSR filing. However, before submission of those corrective filings but after counsel alerted the FTC to the possible HSR violation, Mr. Werner consummated two more acquisitions of Werner stock through the vesting of restricted stock awards.

6. *FTC fines Biglari Holdings Inc. for alleged HSR Act violation.*

Also on Dec. 22, the FTC imposed its second fine to settle an alleged violation of the HSR Act's notification and waiting period requirements. The FTC announced that restaurant chain owner and investment fund operator Biglari Holdings Inc. would pay a $1.4 million civil penalty to settle charges that two acquisitions made on March 26, 2020, of shares of restaurant operator Cracker Barrel Old Country Store, Inc. crossed a notification threshold; no exemption was available so an HSR filing was required but was not done. Biglari previously paid $850,000 for alleged HSR violations in 2011 related to earlier purchases of Cracker Barrel stock, for which Biglari improperly relied on the exemption available for acquisitions "solely for the purpose of investment."

While the 2020 acquisitions resulted in Biglari crossing a threshold for which it already had filed an HSR notification, the 2020 acquisitions were consummated outside of the five-year period during which an exemption from filing is available. Aggravating factors leading to the amount of the fine in this action included the fact that the acquirer had previously settled alleged HSR Act violations, that Biglari admitted it had not sought advice from counsel prior to consummating the 2020 acquisitions, and that the FTC first contacted Biglari to inquire why a filing was not submitted for these 2020 acquisitions (rather than the acquirer self-reporting).

7. *FTC judge extends deadline for ruling on Altria's acquisition of minority stake of Juul.*

On Dec. 17, the FTC's administrative law judge ordered a 30-day extension to file a final decision over a challenge to Altria Group Inc.'s $12.8 billion purchase of a 35% stake in e-cigarette maker Juul Labs Inc. FTC Chief Administrative Law Judge D. Michael Chappell cited an "extraordinarily high" volume of material presented at trial in granting the extension, noting a record including 2,480 exhibits and 3,410 pages of trial transcript from 37 witnesses.

The FTC's April 2020 enforcement action alleges that Altria's acquisition of the 35% stake in Juul was part of an illegal agreement between the companies not to compete. FTC counsel argued that the acquisition agreement, executed in 2018, was contingent upon Atria eliminating its own rival e-cigarette product.

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B. Department of Justice (DOJ)

1. *Justice Department seeks additional public comments on bank merger competitive analysis*.

On Dec. 17, the DOJ's Antitrust Division announced that it is seeking additional public comments until Feb. 15, 2022, on whether and how the Division should revise the 1995 Bank Merger Competitive Review Guidelines. The goal is to "ensure that the Banking Guidelines reflect current economic realities and empirical learning." The potential revisions to the Banking Guidelines are part of an ongoing effort by the federal agencies responsible for banking regulation and supervision.

"The Antitrust Division shares with its federal partners an interest in ensuring bank mergers do not harm competition and the competitive process," Antitrust Division Assistant Attorney General Jonathan Kanter said.

C. U.S. Litigation

1. *In re Libor-Based Financial Instruments Antitrust Lit.,* Case 17-2360 (2d Cir. Dec. 30, 2021).

JPMorgan Chase & Co., UBS Group AG, and other global banks are subject to U.S. jurisdiction for allegedly manipulating the London Interbank Offered Rate, the federal appeals court in New York ruled. A three-judge panel ruled that U.S. courts can exercise "conspiracy jurisdiction" over the banks if other members of the conspiracy took steps to advance the scheme from within the United States. The appeals court reversed a 2016 ruling by U.S. District Judge Naomi Reice Buchwald, who had dismissed claims on the ground that her court lacked jurisdiction over the bank defendants. U.S. Circuit Judge Richard Sullivan stated on behalf of the three-judge Panel, "Plaintiffs have alleged overt acts taken in the United States to advance the suppression conspiracy; at this stage of the Litigation, that is enough to establish Personal Jurisdiction."

2. *Linet Americas, Inc. v. Hill-Rom Holdings, Inc., Civil Action No. 1:21-cv-06890 (N.D. Ill. Dec. 19, 2021).*

A lawsuit filed in Illinois alleges that medical equipment provider Hill-Rom uses its alleged monopoly power to unfairly limit competition in the U.S. market for hospital beds.

Linet Americas Inc.'s complaint alleges that Hill-Rom is the main provider of hospital beds in the United States and uses "anti-competitive" practices to slow Linet's growth in the U.S. market, including allegedly "coercing" hospital administrators into locking entire health systems into long-term agreements. Linet further alleges that the agreements were a key part of a "monopoly broth" Hill-Rom created, which Linet claims also included encouraging multiple Hill-Rom products to be purchased together and closing off enhanced features in its nurse call system to non-Hill-Rom beds. According to the complaint, Hill-Rom makes up at least 70% of standard, intensive-care, and birthing beds installed in U.S. hospitals. In the 104-page complaint, Linet alleges Hill-Rom has "extinguish(ed) any meaningful challenge to its dominance" and "the severe consequences of that market reality are now reverberating throughout our public health system."

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3. *Casey's Distributing Inc. v. National Football League Inc. et al., Case No. 3:21-cv- 09905,* and *Hastings v. National Football League Inc. et al.*, Case No. 3:21-cv-09908, (N.D. Cal. Dec. 22, 2021).

The National Football League, its teams, and its licensing partner Fanatics Inc. were hit with federal antitrust claims in San Francisco by a merchandise business and a consumer claiming they have conspired to monopolize NFL product sales through a third-party marketplace.

The lawsuits, filed in the U.S. District Court for the Northern District of California, accuse the league of tilting the scales in favor of Fanatics, of which the NFL is a part-owner, through new onerous restrictions on third-party marketplace sales by its competitors. The two companies are accused of stifling competition on the third-party marketplace by placing major restrictions on other merchandisers selling NFL products. According to the lawsuits, the NFL began threatening to withhold fan gear licensing from distributors who supplied the merchandise to third-party marketplace retailers other than Fanatics after investing about $95 million in Fanatics in 2017. The lawsuit reads, "Fanatics recognized the problem that robust competition on [the third-party marketplace] posed to it … Distributors were forced to abandon business relationships with smaller retailers, but Fanatics allegedly told them it would mitigate the loss by snapping up more of the distributor's product itself."

Mexico

A. Mexico's Competition Authority preliminarily finds a lack of effective competition in the distribution of gas to consumers.

On Dec. 1, 2021, the Federal Economic Competition Commission (COFECE or Commission) preliminarily found a lack of effective competition in 213 of the 220 geographic markets defined for liquefied petroleum gas (LPG) distribution to end users through plants and auto tankers.

In Mexico, LPG is the main fuel used by families and businesses to cook, heat water, and provide heating in homes. According to COFECE, the following are among the elements identified that inhibit competition:

- An alleged high concentration in multiple regional markets.
- The existence of alleged barriers for potential competitors to enter these markets due to high investment costs, such as those related to the establishment and operation of a distribution plant, the acquisition of vehicle fleet and portable cylinders, a long-term return (between three and 10 years), as well as high sunk costs.
- Regulatory barriers, which COFECE qualifies as a "high number of standards and legal requirements," and the need to interact with at least five authorities, both local and federal, to obtain permits.
- Commission agents and clandestine groups and pseudo unions whose conduct constitutes a barrier to entry, as they inhibit the concentration of distributors in certain geographic areas, especially in Mexico City.

Economic agents interested in this proceeding may present statements and arguments they consider pertinent to COFECE for it to consider before issuing its final resolution. If the preliminary opinion is confirmed, the industry regulator will be able to regulate prices.

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B. COFECE finds an absence of conditions for effective competition in maritime passenger transportation (ferries) in and out of Cozumel, Cancún, Playa del Carmen, and Isla Mujeres.

COFECE found a lack of effective competition conditions in the maritime passenger transportation service, in cabotage navigation, and in the modality of ferries in markets that include the routes, with origin and/or destination, Cozumel Island-Playa del Carmen; Isla Mujeres-Puerto Juárez or Gran Puerto, in Cancún; as well as Isla Mujeres with origin and/or destination to the docks El Caracol, Playa Tortugas and El Embarcadero, also in Cancún.

COFECE identified that Naviera Magna (Magna) had an unusually high market share in the routes and substantial market power in the ports of Puerto Juarez and Hotel Zone – in the latter, Magna is the only provider of the service, while in the Cozumel-Playa del Carmen route, Magna and Golfo Transportación (Winjet) have high market shares and demonstrate similar behavior in terms of tariffs and schedules.

COFECE found there to be regulatory, economic, and structural barriers that limit the entry of potential participants:

- Indivisibility of the infrastructure to provide the service: the assets cannot be adapted to the seasonal demand of the service, which directly affects the investment decisions and fixed costs of the carriers.
- High investment amounts required to enter the market.
- Access barriers to port infrastructure. In certain cases, there are physical limitations that hinder the simultaneous operation of several service providers; in others the use of docks is for exclusive use (Magna in the Hotel Zone) and there is no additional infrastructure for docking.
- High advertising costs.

Following this determination, the regulatory authority (Ministry of the Navy) can set tariff regulations for these services.

The Netherlands

A. Dutch Competition Authority (ACM) decisions, policies, and market studies.

1. *ACM prohibits proposed acquisition by Mediq of Eurocept Homecare*.

On Dec. 23, the Dutch Competition Authority (ACM) blocked (link in Dutch) the proposed acquisition by Mediq of Eurocept Homecare after an in-depth review. Mediq is an international supplier of medical products and health care solutions. Eurocept Homecare provides medical-specialty care in patient homes in consultation with health care professionals. The ACM concluded that the acquisition would give Mediq a very strong position in the field of ambulatory electronic infusion pumps for patients at home and that the acquisition would lead to higher prices and lower quality services. Therefore, the ACM decided not to grant a license (clearance) for this acquisition.

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2. *ACM prohibits proposed acquisition by Bergman Clinics of Mauritskliniek.*

On Dec. 24, the ACM announced (link in Dutch) that after an in-depth review, the Bergman Clinics may not acquire Mauritskliniek. Bergman Clinics and Mauritskliniek are independent treatment centers that provide scheduled medical-specialist care. The ACM concluded that Bergman Clinics already has a particularly strong position with respect to health insurance companies, which would become even stronger if the acquisition were permitted, potentially leading to further price increases. The ACM reiterated that while independent growth is possible, when a dominant party takes over other smaller health care providers, the growth could be limited.

3. *ACM announces draft guidance on health care information technology.*

On Dec. 20, the ACM announced (link in Dutch) that in 2022 it would publish draft guidance relating to IT in healthcare, clarifying the framework and obligations for IT suppliers and other market participants arising from competition rules. The ACM reiterated that, within the limits of the competition rules, there are possibilities for cooperation between hospitals to strengthen their negotiating position vis-à-vis IT suppliers (this statement is similar to the position the ACM has taken previously on sustainability agreements). Currently, hospitals are dependent on their current health care information system/electronic patient record (HIS/EPD) provider. Because switching to another HIS/EPD system is complicated and expensive, suppliers are in a strong position, which can raise health care costs and reduce innovation. Ultimately, according to ACM, patients pay the price for a "vendor lock-in" due to inefficiencies or lower quality of care.

4. *ACM finalizes decision to deregulate market for high-quality wholesale access (HWT).*

On Dec. 23, the ACM finalized its decision to abolish the regulation of the market for high-quality wholesale access (HWT). The European Commission assessed ACM's decision and issued no comments. On the HWT market, telecom operators extend access to their networks to other telecom operators. These types of access services are high quality and reliable, catering exclusively to business end-users. ACM's market analysis showed that the HWT market does not have any bottlenecks resulting from a single market participant's market power, and only limited use is being made of the regulated access. Therefore, the ACM concluded that the market can also function well without regulation, while the ACM will continue to closely follow developments on the business market and this access market.

5. *ACM announces new European rules will offer consumers better protection when making digital purchases.*

On Dec. 17, the ACM announced that new European rules offering consumers protection if something is wrong with their (digital) purchases will come into effect in 2022. These rules are set out in the EU Sales of Goods Directive and the EU Digital Content Directive and will come into effect as soon as their implementation into Dutch law has been completed. In addition, these rules take into account that, when shopping online, consumers increasingly make purchases outside of their own countries, and that more products and services have digital elements. The "legal guarantee" (i.e., the right of consumers to products without defects) will thus also apply to products with a digital element (such as "smart" products), to digital services (such as streaming), and to digital content (such as e-books).

Sellers will have to ensure that consumers can use their purchases properly and safely during the normal lifespans of those products. Therefore, sellers are also required to provide product updates for an agreed, reasonable period. If the product concerns an ongoing service, it must function properly throughout the period of use. In addition, the provider must repair any defects free of charge.

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6. *Supermarket chains Plus and Coop may merge under certain conditions*.

On Dec. 22, the ACM decided (link in Dutch) that supermarket chains Plus and Coop may merge subject to certain conditions. Together, the two supermarket chains have approximately 600 supermarkets, and additionally, Plus controls the Spar supermarket chain, raising the total number of supermarkets between Plus and Coop to approximately 1,000 stores. At the national market level, the ACM does not envisage competition problems, as strong competitors such as Albert Heijn and Jumbo remain. At the local retail level, however, the ACM requires 12 supermarkets to be divested to a competitor to leave sufficient competition from other supermarkets within the local market.

7. *ACM investigates possible cartel in the food processing sector*.

On Dec. 1, the ACM announced that it is investigating a possible cartel in the food processing sector. As part of that investigation, the ACM conducted unannounced inspections (so-called "dawn raids") at several food processing companies in the Netherlands, and also at a company located outside the Netherlands, with the help of the agency in that other country.

According to the ACM, the food processing companies allegedly conspired to fix the purchase prices of agricultural products, and the prices of their own goods. Additionally, the companies are accused of concluding anti-competitive market sharing agreements. As is standard practice in the Netherlands, the ACM did not disclose the names of any of the companies allegedly involved in the cartel and/or raided.

United Kingdom

A. Merger control

1. *Interim measures rules revised*.

Although the UK merger regime permits acquisitions to be completed without CMA clearance, the CMA can investigate a completed merger any time up to four months from the later of completion of the transaction and public announcement of the transaction. This intervention power is reinforced through the CMA's power to impose interim measures on the acquirer, requiring it to suspend integration of the target until the CMA's investigation has completed and clearance has been granted. The CMA's increasingly strict use of this power, in imposing penalties for non-compliance and refusing derogations from the acquirer's "hold-separate" obligations, has been the subject of challenge recently. In December 2021, the CMA published guidance to clarify when interim measures will apply and the steps the parties must take to ensure compliance.

2. *JD Sports/Footasylum*.

On Dec. 6, 2021, the CMA provisionally approved JD Sports' divestment of Footasylum, after a prolonged engagement lasting over two years. The CMA's investigation of the completed acquisition started in mid-2019 and, after a phase 2 investigation, led to a decision in mid-2020 to block the transaction. JD Sports appealed this prohibition to the CAT, which upheld JD Sports' claim that the CMA had acted irrationally by failing to make sufficient inquiries about the impact of the COVID-19 pandemic on Footasylum. The CMA failed in its appeal of the CAT's decision in the Court of Appeal. As a result, CMA's decision blocking the transaction was quashed, and a fresh investigation of the acquisition resulted in a new CMA decision, on Nov. 4, 2021, to block the transaction. Shortly afterwards, on Nov. 8, the CMA announced it was investigating JD Sports and Footasylum for breach of the interim measures put in place at the start of

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CMA's second investigation. This is the second such investigation, the first one having ended with the CMA withdrawing in October 2020 the £300,000 penalty imposed on JD Sports in July 2020.

3. *Veolia/Suez.*

Standing out from a number of pre-holiday merger clearances, Veolia's proposed public takeover of Suez has been referred for a phase 2 investigation based on CMA concerns that it would result in a loss of competition in the supply of certain waste and water management services in the UK, leading to higher costs to local authorities and taxpayers. The CMA had offered Veolia the option of providing undertakings in lieu of a reference to resolve these concerns, but Veolia opted to proceed to phase 2, which is scheduled to conclude June 6, 2022.

4. *Cargotec/Konecranes.*

This proposed merger involves the first phase 2 investigation the CMA has conducted in parallel with a review by the European Commission since Brexit. The merger is also being reviewed by a number of other competition authorities, and the CMA has engaged with them and the European Commission to progress its investigation. On Nov. 26, 2021, after the parties opted to use the UK fast-track procedure to phase 2, the CMA issued its provisional findings. The deadline for the CMA's final decision is April 1, 2022.

5. *Circle Health/BMI Healthcare.*

Circle Health completed its acquisition of BMI in January 2020 and, after a CMA phase 1 investigation, agreed to avoid a phase 2 investigation and resolve the CMA's competition concerns by undertaking to divest two of its own businesses. The undertakings were provided to the CMA in June 2020, but Circle was unable to find a buyer for one of the divestment businesses within the relevant deadline. It applied to the CMA to vary the undertakings, on the basis of a change in circumstances since the undertakings were originally given. On Nov. 26, 2021, the CMA issued a provisional finding report indicating it was inclined to accept that there had been a change in circumstances and to agree to alternative remedies. Its final decision is due in February 2022.

B. New national security rules affecting merger timetables.

On Jan. 4, 2022, a mandatory filing regime began for acquisitions of 25% or more of any business operating in one of the below-listed 17 sectors. This regime will impact merger timetables because completion of any transaction subject to the regime is prohibited until the UK Secretary of State has granted approval.

Advanced Materials	Critical Suppliers to Government	Military and Dual-Use
Advanced Robotics	Critical Suppliers to the Emergency Services	Quantum Technologies
Artificial Intelligence	Cryptographic Authentication	Satellite and Space Technologies
Civil Nuclear	Data Infrastructure	Synthetic Biology

Communications	Defence	Transport
Computing Hardware	Energy	

C. Antitrust Investigations – penalties.

On Dec. 16, 2021, the CMA published its revised Guidance as to the appropriate amount of a penalty (CMA73). While confirming that the CMA is not bound by previous cases, the guidance also confirms that the CMA should ensure there is broad consistency in its approach to cases. It highlights the CMA's duty in multi-party cases to observe the procedural requirements of fairness and rationality and provides more detail on its approach to assessing whether a penalty presents sufficient deterrence, is proportionate, and the basis on which it will reduce a penalty on grounds of financial hardship.

D. Antitrust litigation.

The CMA has for the first time joined a private antitrust action as an interested third party. On Dec. 6, 2021, the CAT gave it provisional permission to intervene in an action by Epic Games against Google.

Poland

A. Commitments imposed on Benefit Systems aim to increase competition in the fitness industry.

Benefit Systems is a major operator of a benefits program offering access to sports and leisure facilities, and its own fitness club chain. The UOKiK president suspected that Benefit Systems entered into anticompetitive agreements with certain fitness club chains. The agreements aimed to ensure Benefit Systems' exclusivity in cooperating with certain fitness clubs and ensure that Benefit Systems would not cooperate with fitness clubs other than those covered by the agreement.

In its Dec. 7 decision, the UOKiK president accepted Benefit Systems' commitments to implement certain measures to increase competition, including:

- to offer at least one other benefits program operator access to certain large fitness clubs on fair, reasonable, and non-discriminatory terms,
- to publish on the Benefit Systems website a list of all criteria required for inclusion of fitness clubs in the benefits programs operated by Benefit Systems, and
- to cooperate on non-discriminatory terms with all the clubs that meet the criteria.

The decision is not final, as it can be appealed before the Court of Competition and Consumer Protection. If finalized, the decision would determine timeframes for implementing the commitments and enable Benefit Systems to avoid a fine of up to 10% of the company's turnover in the preceding year.

B. PLN 76-million fine imposed on Eurocash for unfair use of contractual advantage.

On Nov. 30, 2021 the UOKiK president issued decision no. RBG-3/2021, imposing a fine exceeding PLN 76 million (approx. EUR 16.5 million, USD 20.2 million) on Eurocash for unfair use of contractual advantage in its relationships with entities supplying food and agricultural products to retail stores.

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Eurocash is a major fast-moving consumer goods wholesaler in Poland. It is also active in retail through various retail store chains.

Eurocash was accused of charging suppliers of agricultural and food products with numerous unjustified fees. The suppliers not only received no information on the cost and results of certain services for which they were charged but also paid for services never rendered or that should have been provided without additional charges.

According to the UOKiK president, none of the questioned fees constituted remuneration for the diligent provision of services to suppliers; rather, they simply served as a means to reduce the consideration paid by Eurocash to its suppliers. The decision of the UOKiK president is not final, as it can be appealed before the Court of Competition and Consumer Protection.

Italy

A. Italian Competition Authority (ICA) fines Unieuro, Mediaworld, Leroy Merlin and Monclick for a total of over 10 million euros for unfair commercial practices.

On Dec. 23, 2021, the Italian Competition Authority (ICA) concluded three proceedings for unfair commercial practices against Unieuro S.p.A. and its subsidiary Monclick, Leroy Merlin Italia S.r.l. and Mediamarket S.p.A. (Mediaworld). The companies were fined a total of EUR 10.9 million.

The investigations established that the four companies—conducting e-commerce activity on their own corporate websites for consumer electronics products and other home products—acted in a manner the ICA considered unfair against consumers. First, the ICA found the companies disseminated inaccurate and misleading information on the availability and prices of products sold online, as well as on delivery times. In other cases, the companies charged payment before the conclusion of the contract or unilaterally cancelled consumer orders. Second, the ICA found the companies delayed or failed to deliver products purchased and paid for by consumers, provided misleading information about the status of shipments, or even delayed and created obstacles in relation to the exercise of consumer rights of withdrawal and refund. In addition, the companies had suspended numerous activities of customer care during the pandemic.

The ICA qualified such conduct as misleading and aggressive towards consumers, given that consumers were deceived and forced to agree to unduly limit their contractual rights. The ICA also stressed that e-commerce must be developed in a balanced manner so that consumer rights, particularly during the pandemic when reliance on online channels is heightened, are fully and clearly articulated.

B. Italian Competition Authority updates state of consumer and retail spending in meeting with consumer associations.

On Dec. 15, 2021, ICA President Rustichelli met with consumer and user associations to present highlights of 2021 ICA activity and results. President Rustichelli focused on ICA's strong commitment to consumers, particularly during the pandemic. According to Mr. Rustichelli, consumers were particularly affected by the negative economic effects of the pandemic.

He noted that between January 2019 and July 2021, ICA activity led to economic relief for more than 580,000 consumers, with more than EUR 34 million returned. In addition, Mr. Rustichelli stressed the crucial role of consumer associations in reporting to the ICA possible misconduct, ensuring the continuity of the Authority's efforts to protect the most vulnerable categories in the market.

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In addition, through proposed legislation the government has followed several ICA suggestions to strengthen the merger control system. First, the government has proposed that ICA be given the power to request notification of certain transactions that do not exceed the turnover thresholds set forth in Law no. 287/90. Moreover, the government has proposed to amend Article 9, of Law no. 192/1998 by establishing a presumption of economic dependence upon operators with a commercial relationship with providers of intermediation services via digital platforms which "play a decisive role in reaching end users and/or providers, also in terms of network effects and/or data availability." The bill then indicates certain conduct that may constitute an abuse of economic dependence.

European Union

A. European Commission

1. *European Commission fines certain European money center banks for taking part in forex trading cartel.*

On Dec. 2, 2021, the European Commission announced the completion of its cartel investigation into the Foreign Exchange (Forex) spot trading market and imposing of fines totaling EUR 334 million on certain European money center banks. One bank received a 100% discount of its fine as a successful immunity applicant; and others received discounts under the European Commission's Leniency Notice and the Commission's Settlement Notice.

The European Commission's investigation revealed that some traders of the Forex spot trading of G10 currencies – the most liquid and traded currencies worldwide – acting on behalf of the banks fined, had exchanged sensitive information and trading plans, and had sometimes coordinated their trading strategies online in violation of the cartel prohibition of article 101 TFEU. The information exchanges enabled traders to make informed market decisions whether and when to sell or buy the currencies in their portfolios, as opposed acting independently with the risk inherent to these decisions.

2. *European Commission conditionally approves the proposed acquisition by Veolia of Suez.*

On Dec. 14, 2021, the European Commission announced it had approved the proposed acquisition by Veolia of Suez, subject to conditions. The parties are leading players in the water treatment and waste management sectors. The approval is conditional upon full compliance with a divestment package offered by Veolia in relation to the water and waste markets.

The European Commission's investigation revealed that the transaction as initially notified would have led to competition concerns such as significant horizontal overlaps in various markets in France and the European Economic Area. This would have risked eliminating the competitive pressure exerted by Suez on Veolia and created a market leader at a European and national and/or local level.

B. EU Policy Developments

1. *European Parliament greenlights EU Digital Markets Act.*

On Dec. 15, 2021, the European Parliament adopted its position on the proposal for a Digital Markets Act (DMA) by giving approval to begin negotiations with EU Member States on rules setting out what big online platforms will be allowed to do within the EU. The DMA is a European regulation on contestable and fair markets in the digital sector that seeks to address the negative consequences arising from platforms acting as digital "gatekeepers" to the internal market. The Parliament has found the platforms

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have the power to act as private rule-makers that can create bottlenecks between businesses and consumers. Therefore, the DMA sets out rules defining and prohibiting unfair practices by gatekeepers and providing an enforcement mechanism based on market investigations. The mechanism aims to ensure that the obligations set out in the regulation are kept current in the evolving digital sphere.

2. *EU-US Joint Technology Competition Policy Dialogue launched*.

On Dec. 7, 2021, the European Commission, the United States Department of Justice Antitrust Division, and the United States Federal Trade Commission launched the EU-US Joint Technology Competition Policy Dialogue (Joint Dialogue), which—in addition to other cooperation efforts—is intended to collaborate to ensure and promote fair competition. In the Joint Dialogue, mutual interest was reaffirmed in cooperating on competition policy and enforcement overall and especially in the technology sector. This cooperation will include sharing insights and experience to coordinate as much as possible on policy and enforcement.

Through the Joint Dialogue, the agencies also intend to explore new ways to facilitate coordination and knowledge and information exchanges to ensure that enforcement authorities are sufficiently equipped to address new challenges together. In addition to enhancing enforcement and policy coordination, the Joint Dialogue will help inform similar domestic efforts, potentially contributing to greater alignment on these issues.

3. *European Commission publishes first annual report on screening foreign direct investments into the EU*.

On Nov. 23, 2021, the European Commission published its first annual report regarding the application of the EU Foreign Direct Investment (FDI) Screening Regulation. Prior to the Regulation taking effect Oct. 11, 2020, there was no EU-wide formalized cooperation among EU Member States, and the European Commission had no role in screening FDI into the EU.

Highlights from the report include: FDI figures and trends, legislative developments in EU Member States, screening activities by EU Member States in 2020, an overview of the Regulation's cooperation mechanism from Oct. 11, 2020 until June 30, 2021, and the impact of the Regulation since its full implementation.

4. *EU Platform Work Package*.

On Dec. 9, 2021, the European Commission proposed a Platform Work Package (PWF) to improve the working conditions in platform work and to support the sustainable growth of digital labor platforms in the EU. These new rules aim to ensure that people working through digital labor platforms can enjoy the labor rights and social benefits they are entitled to. The PWF consists of a communication, a proposal for a directive, and draft guidelines.

The draft guidelines clarify the application of EU competition law to collective agreements of solo self-employed people (i.e., independent contractors), including those working through digital labor platforms. The draft guidelines aim to bring legal certainty and ensure that EU competition law does not obstruct worker efforts to collectively improve their working conditions, including remuneration in cases where they are in a relatively weak position (e.g., where they face a significant imbalance in bargaining power). As article 101 TFEU prohibits agreements that restrict competition, the European Commission recognized a need to clarify that EU competition law does not stand in the way of such collective agreements.

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C. **European Court of Justice (ECJ) answers a preliminary question regarding the principle of effective legal protection set forth in article 19 TEU (Treaty on EU).**

On Dec. 21, 2021, the ECJ answered a preliminary question raised by the Italian Court of Cassation regarding whether an Italian domestic constitutional law that does not allow individual parties to challenge Italy's highest administrative court conforms to the ECJ and is compatible with 19 TEU.

The ECJ ruled that such a provision is consistent with EU law. Indeed, given the EU principle of procedural autonomy, each Member State is entitled to establish procedural rules for remedies to ensure effective legal protection for individuals in any of the fields covered by EU law, provided (i) such rules are not less favorable than those applied in similar domestic situations (principle of equivalence) and (ii) they do not make it impossible or excessively difficult in practice to exercise the rights conferred to individuals by EU law (principle of effectiveness).

Nevertheless, the Court pointed out that the solution adopted by Italian law does not affect the right of individuals – who may have been harmed by the infringement of their right to an effective remedy as a result of a decision of a court of last instance – to invoke the responsibility of the Member State, provided that the conditions laid down by EU law to that effect are satisfied.

Greater China

The active pharmaceutical ingredient (API) industry has been a focus of China's enforcement of its Anti-Monopoly Law (AML). On Nov. 18, 2021, the Anti-Monopoly Committee of the State Council published the Anti-Monopoly Guideline for the Active Pharmaceutical Ingredient Industry (Guideline). This Guideline is the third industry-specific anti-monopoly guideline. following the issuance of Anti-Monopoly Guideline for the Platform Economy Industry, published in February 2021, and the Anti-Monopoly Guideline for the Vehicle Industry, published in September 2021. The Guideline is the culmination of the Anti-Monopoly Bureau's experience gained from over a dozen enforcement cases over the last decade. Highlights of the Guideline follow.

1. *Definition of the relevant market*.

While acknowledging substitutability as the cornerstone of defining a relevant market, the Guideline proclaims that, as a principle, one specific API usually forms an independent product market. When needed, the Guideline allows for further dividing the product market of a specific API into production and distribution. The geographic market for an API industry, as the Guideline opines, is usually country specific.

2. *Prohibited monopoly agreements*.

The AML prohibits both horizontal and vertical monopoly agreements. The Guideline sheds light on certain practical issues regarding such prohibited agreements or actions in the API industry. The following acts are specified in the Guideline as constituting, as a principle, a prohibited horizontal monopoly agreement or action:

a) API manufacturers' entering into joint production, procurement, sales, bidding agreements with competitors regarding production volumes, sales volumes, sales prices, customers and regions of sales;

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b) API manufacturers' communication and coordination of competitively sensitive information, including sales price, production capacity and volume, plan of production and sales through third parties (e.g., dealers, downstream drug production enterprises), trade fairs or industry associations;

c) API manufacturers entering into compensation agreements with competitors in exchange for the competitor not producing or selling certain products;

d) API distributors' communication and coordination of competitively sensitive information with other distributors on procurement volume, suppliers, sales price, sales volume and customers.

As a rule of thumb, the following agreements or actions are treated as prohibited vertical agreements under the Guideline:

a) Fixing resale price (including the lowest resale price) through contracts, oral agreements, written correspondence, emails, notifications of price adjustment.

b) Disguised resale price fixing, including fixing the margins, rate discounts and rebates of distributors, usually compounded with offering incentives like extra discounts and imposing penalties like discontinuation of supply.

c) Imposing geographic or customer restrictions on downstream distributors. The Guideline further elaborates that geographic and customer restrictions may lead to market segregation, price discrimination, impairment of competition in the API market, and possible reduction of dealer and manufacturer access to API.

Certain rules adopted in the Guideline are different from guidelines applicable to other industries. For example, in the anti-monopoly guideline for the automobile industry, joint production and joint procurement agreements are generally deemed to benefit market competition and increase market efficiency and consumer welfare. Conversely, such collaborative agreements are treated as generally prohibited horizontal agreements.

3. *Abuse of market dominance.*

The Guideline provides for the consideration of a number of factors for determining market dominance in the API industry, including market share, competitive landscape, production capacity and volume, control over the market, financial and technical conditions, and reliance of downstream enterprises. Because exclusive or sole distribution is prevalent in the API industry, the Guideline further adds that the sales volume of a manufacturer controlled by a distributor should be considered when evaluating the distributor's market share. The Guideline also identifies certain types of common abusive behavior, including: (1) excessing pricing, including excessively increasing the price without justifiable reasons; (2) unfairly rejecting or prohibiting transactions, including prohibiting distributors from purchasing from other suppliers; (3) tied selling, including requiring purchase of excipient or packaging materials together with the API, (4) imposing unfair conditions on transactions, including sharing the margin of the counterparty or asking the counterparty to pay an excessive deposit for the transaction, and (5) discriminatory behavior, including discriminatory pricing.

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Japan

A. JFTC closes investigation into Rakuten.

On Dec. 6, the Japan Fair Trade Commission (JFTC) announced that it had closed its investigation into Japanese IT giant Rakuten.

In 2019, Rakuten notified shop operators on their e-commerce site that it would uniformly introduce a "fee shipping line" starting in March 2020. In February 2020, the JFTC filed a petition with the Tokyo District Court for an emergency cease-and-desist order pursuant to the Antimonopoly Act, requesting a temporary halt to Rakuten's uniform introduction of the free shipping line. In response, Rakuten announced it would take measures to exclude shop operators from the application of the free shipping line at the operators' discretion, and subsequently established a procedure for operators to apply for an exemption. The JFTC withdrew the petition but continued to investigate whether there were Antimonopoly Act violations. The JFTC examined remedial measures implemented by Rakuten, found they resolved the above suspicions, and terminated the investigation.

B. JFTC closes investigation into online funeral service provider.

On Dec. 2, 2021, the JFTC closed its investigation into an online funeral service provider because the provider voluntarily abolished its unfair trade practice that violated the Antimonopoly Act.

The online funeral service provider receives funeral requests via its website from consumers; these requests are passed onto funeral operators – which conduct the funerals – under contracts with the provider. In June 2018, the provider introduced the "Special Contract Member System," under which the funeral operators seeking a special contract with the provider were required to apply to the provider stating that they would comply with the prohibition on transactions with other online funeral operators. Under the system, the funeral operators paid a lower fee to the provider.

Read previous editions of GT's Competition Currents Newsletter.

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