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GT Newsletter | Competition Currents | February 2022

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

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Competition Currents: 2021 Year in Review and 2022 Forecast

Part 1: Tuesday, Feb. 22, 2022

9:00 a.m. EST

Join GT's Global Antitrust Litigation & Competition Regulation Practice Group for a two-part webinar series discussing the most significant antitrust and competition cases and trends from 2021, and significant risks and issues for companies to watch for in 2022.

Part One, Feb. 22, will focus on merger control trends, key deals, and significant regulations in the United States, Latin America, Europe, and Asia. Click here to register.

In this Issue:

United States

A. Federal Trade Commission (FTC)

1. *FTC publishes inflation-adjusted civil penalty amounts for 2022.*

On Jan. 6, 2022, the FTC announced increases to the maximum penalty for violations of the laws it enforces. For violations of Sections 5(l), 5(m)(1)(A), and 5(m)(1)(B) of the FTC Act, 7A(g)(l) of the Clayton Act, and Section 525(b) of the Energy Policy and Conservation Act, it increased the maximum civil penalty amount from $43,792 to $46,517.

2. *FTC approves final order imposing strict limits on future mergers by dialysis service provider DaVita, Inc.*

The FTC, on Jan. 12, 2022, approved a final order including a limitation on future mergers by DaVita, Inc. This final order followed the public comment period relating to its proposed order in October 2021 regarding DaVita's purchase of certain assets of Total Renal Care, Inc.'s dialysis clinics. The complaint alleged that the acquisition would reduce dialysis clinic competition in the Provo, Utah area. The final order requires DaVita to divest three clinics in the area, and restricts it from entering into any non-compete agreements with employees of the seller. Additionally, the FTC requires DaVita to obtain prior approval, for 10 years, for the acquisition of any new interest in a dialysis clinic in Utah.

3. *FTC approves final order requiring generic drug marketers ANI Pharmaceuticals, Inc. and Novitium Pharma LLC to divest rights and assets to generic antibiotic and inflammation markets.*

On Jan. 12, 2022, the FTC approved a final order, settling charges that ANI Pharmaceuticals, Inc.'s proposed acquisition of Novitium Pharma LLC would harm competition in antibiotic and inflammation drug treatments markets. The order requires ANI and Novitium to divest rights and assets to generic SMX-TMP (a generic drug used to treat common infections) and dexamethasone (used to treat inflammation) to Prasco LLC. The proposed order also requires that the parties obtain prior FTC approval for any future related acquisitions in these markets.

4. *Statement of Chair Lina M. Khan on ruling by Judge Denise L. Cote in FTC et al v. Vyera Pharmaceuticals, LLC et al.*

On Jan. 14, 2022, in a ruling in a case brought by the FTC and seven states, a U.S. district court found Martin Shkreli liable for antitrust claims relating to raising the price of the drug Daraprim by 4,000% in 2015. The court banned Shkreli from participating in the pharmaceutical industry for life and also ordered him to pay $64.6 million in disgorgement. In response to the decision, FTC Chair Lina Khan commented: "Judge Cote's decision to ban Shkreli for life from the pharmaceutical industry is a significant victory for American consumers. This precedent-setting relief should be a warning to corporate executives everywhere that they may be held individually responsible for the anticompetitive conduct they direct or control."

5. *FTC and Justice Department seek to strengthen enforcement against illegal mergers.*

On Jan. 18, 2022, the FTC and DOJ jointly announced that they would seek public input as the agencies update their Merger Guidelines to better enable them to detect and prevent anticompetitive transactions in the modern market. The agencies noted that many industries are becoming more consolidated amid a

surge in mergers, with the number of pre-merger filings doubling from 2020 to 2021. The agencies seek comments on changes in the modern-day economy and evidence of mergers' effects on competition, as they consider revisions to the Merger Guidelines. Specifically, the agencies are looking at whether distinctions between horizontal and vertical transactions continue to be warranted, how to quantify presumptive anticompetitive transactions, whether market definitions should be updated to better address non-price competition, whether to update the guidelines with respect to potential and nascent competition, how to address monopsony power (or buyer power) including in labor markets, and how to address unique aspects of new digital markets in the guidelines.

6. *FTC announces annual update of size-of-transaction thresholds for premerger notification filings and interlocking directorates.*

On Jan. 24, 2022, the FTC published a notice in the Federal Register revising the premerger notification thresholds for mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). Also on Jan. 24, the FTC published revisions to the thresholds that trigger, under Section 8 of the Clayton Act, a prohibition preventing companies from having interlocking memberships on their corporate boards of directors. These revisions are the annual adjustment of thresholds based upon changes in the gross national product, which are discussed in a separate GT alert: Revised Jurisdictional Thresholds Under HSR Act and for Prohibition of Interlocking Directorates.

7. *FTC approves final order requiring northeast Supermarkets Price Chopper and Tops Market Corp. to sell 12 stores as a condition of merger.*

On Jan. 24, 2022, following the public comment period, the FTC approved a final order settling charges that The Golub Corp.'s (owner of the Price Chopper chain) proposed merger with Tops Market Corp. likely would be anticompetitive in 11 local markets across upstate New York and Vermont. The order requires Price Choppers and Tops Markets to divest 12 Tops supermarkets to C&S Wholesale Grocers. In addition, the FTC's order prohibits C&S from selling any of the divested stores for a period of three years without prior FTC approval and also, for an additional seven-year period, requires that C&S obtain prior approval to sell any of the divested stores to a buyer that operates one or more supermarkets in any of the 11 identified counties.

8. *FTC approves Sartorius Stedim Biotech S.A.'s petition for prior approval of its acquisition of the chromatography equipment business of Novasep Process SAS.*

On Feb. 1, 2022, the FTC announced, following a public comment period, that it had approved Sartorius Stedim Biotech S.A.'s acquisition of the chromatography equipment business of Novasep Process SAS. In May 2020, Danaher Corporation agreed to divest assets to settle charges that its proposed acquisition of General Electric's biopharmaceutical business, GE Biopharma, violated federal antitrust law, with Sartorius as the approved divestiture buyer. At the time, Sartorius agreed to obtain prior approval if, in the future, it proposed to acquire Novasep's chromatography business. The FTC determined that the proposed transaction would be unlikely to reduce competition in the relevant market under current market conditions, including an upcoming launch of a new product by MilliporeSigma into the market.

B. Department of Justice (DOJ)

1. *Justice Department and Agriculture Department issue share principles and commitments to protect against unfair and anticompetitive practices.*

On Jan. 3, 2022, the White House held an event on competition in agriculture, at which both Attorney General Merrick Garland and Agriculture Secretary Tom Vilsack announced their commitment to enforce federal antitrust laws and the Packers and Stockyards Act to protect agricultural producers and growers from unfair and anticompetitive practices. The DOJ and Department of Agriculture (USDA) already collaborate on enforcement efforts under these federal competition laws, and will continue to share information and cooperate on cases; prioritize enforcement relating to competition in agriculture; and will create a centralized, accessible process to submit complaints regarding potential violations of the antitrust laws, from which the USDA will report violations to the DOJ.

2. *DOJ requires divestitures in Neenah Enterprises Inc.'s acquisition of US Foundry.*

On Oct. 14, 2021, the DOJ announced that Neenah Enterprises Inc. would be required to divest more than 500 gray iron municipal casting pattern assets (which are customized molded iron products including manhole covers to access underground areas) in order to proceed with its proposed acquisition of almost the entirety of the assets of U.S. Foundry and Manufacturing Corporation. Both companies are two of three main suppliers of gray iron municipal castings in 11 states. The DOJ alleged the merger as originally structured would lead to higher prices, lower quality, and slower delivery times for the products.

C. U.S. Litigation

1. *In re: Packaged Seafood Products Antitrust Litigation*, Case No. 3:15-md-02670, 2022 WL 228823 (S.D. Cal. Jan. 26, 2022).

The consumers, restaurants, and bulk tuna buyers leading class action litigation over an alleged industry-wide price-fixing scheme won preliminary approval from a San Diego federal judge for a trio of settlements with Chicken of the Sea International worth about $40 million. Judge Dana M. Sabraw preliminarily approved the agreements, which would resolve antitrust claims on behalf of "direct purchasers," "end payers," and "commercial food preparers" after more than six years of litigation. End payers will receive a settlement totaling $20 million, with $5 million used to cover administrative and notice-related costs, according to the order.

2. *In re Bystolic Antitrust Litigation*, Case No. 1:20-cv-05735 (S.D.N.Y. Jan. 24, 2022).

AbbVie Inc. and a group of generic drug manufacturers notched an initial victory against antitrust litigation over their alleged scheme to delay generic versions of the blood pressure medication Bystolic, when a federal judge in Manhattan tentatively tossed the consolidated case.

Judge Lewis J. Liman dismissed a pair of proposed class actions without prejudice, where a group of pension funds and retail pharmacies are pursuing claims on behalf of end payers and resellers, respectively. The judge dismissed complaints from both sets of plaintiffs, giving them until Feb. 22 to file an amended complaint. The decision is rooted in a 2013 Bystolic settlement with numerous generic drugmakers including Actavis, Alkem, Amerigen, Glenmark, Hetero, Indchemie and Torrent, many of which are also involved in the antitrust litigation. The settlement provided licenses for the companies to market their generic versions of Bystolic.

3. *Staley v. Gilead Sciences Inc.*, Case No. 19-CV-02573, 2022 WL 126116 (N.D. Cal. Jan. 13, 2022).

Teva Pharmaceutical Industries Ltd. succeeded in scaling back its potential antitrust exposure for allegedly helping delay generic versions of Gilead Sciences Inc.'s blockbuster HIV drugs, when a federal judge in San Francisco ruled that some claims against Teva were filed too late.

Judge Edward M. Chen narrowed the allegations against Teva, one of several pharmaceutical companies accused of taking a "reverse payment" from Gilead to shelve its generic version of Truvada as part of a settlement resolving patent infringement litigation. Teva argued plaintiffs' claims expired because any alleged anticompetitive acts occurred more than four years prior to the filing of the case on Sept. 21, 2021. Plaintiffs argued that because Teva was identified as a co-conspirator in a suit in September 2020, all claims against it were tolled. The court disagreed, stating that merely mentioning Teva in the 2020 suit, but not actually naming it as a defendant, was insufficient to toll the statute of limitations under the Supreme Court's 1974 decision in *American Pipe & Constr. Co. v Utah,* which established a doctrine that stops the clock on claims against a defendant once they are named as a co-conspirator in an antitrust class action. During oral argument on the motion to dismiss, the court noted its disagreement with plaintiff's interpretation of *American Pipe*: "It definitely seems a very substantial extension of *American Pipeline*, the rationale of which doesn't jump out at me."

4. *Henry v. Brown Univ.*, 22-cv-125, (N.D. Ill. Jan. 9, 2022).

Plaintiffs sued more than a dozen top U.S. colleges for allegedly conspiring to manipulate the admissions system to hold down financial aid for students and benefit wealthy applicants. The proposed antitrust class action lawsuit alleges a "cartel" among universities of a long-running scheme to collectively adopt "a common formula for determining an applicant's ability to pay" tuition, rather than competing freely over financial aid by trying to attract students through more generous aid offers. At the same time, according to the complaint, more than half of the schools have given preferential treatment to wealthy applicants by tilting the scales to favor the children of "past or potential future donors" and "through a largely secretive practice known as 'enrollment management.'"

5. *Salveson v. JPMorgan Chase & Co.*, Dkt No. 21-722, 142 S. Ct. 773 (Jan. 10, 2022).

The U.S. Supreme Court declined to revive consumer antitrust litigation over allegations that banks were involved in imposing heightened Visa and Mastercard "swipe fees." The justices said they will not review a decision by the U.S. Court of Appeals for the Second Circuit which dismissed the plaintiffs' complaint and held that the consumers are downstream "indirect" purchasers ineligible for federal antitrust damages. This Second Circuit reached this result after considering two recent rulings modifying the legal framework for antitrust cases involving credit cards. According to the Second Circuit, "Plaintiffs' complaint still failed to plausibly allege that they were direct payors of the interchange fees." At the Second Circuit, the cardholders had pointed to the Supreme Court's 2018 decision in *Ohio v. American Express Co.*, in which the high court invalidated the two-market principle that plaintiffs claimed that the district court had relied on. The following year, in *Apple v. Pepper*, the Supreme Court held that when a consumer buys from and directly pays an antitrust violator for a product manufactured by a third-party—and the antitrust violator takes an illegal commission from the consumer's payment—it is the consumer who pays the commission as a matter of law. However, the Second Circuit disagreed with the plaintiffs and said that the plaintiff cardholders had overstated the scope of the *American Express* decision, which "did not directly address antitrust standing at all." And as far as the *Apple* decision, that case "turned on the basic fact that the iPhone owner plaintiffs, who alleged they were injured by the 30% commission, also purchased the apps directly from Apple," the Second Circuit said. According to the Second Circuit,

"[h]ere, we and the district court have repeatedly rejected as implausible plaintiffs' allegation that cardholders pay the interchange fee directly to the defendant banks."

Mexico

A. COFECE suspends enforcement decisions over lack of commissioners.

Mexico's antitrust authority (COFECE) suspended several of its procedural deadlines, including for the investigation into whether effective competition conditions exist in clearinghouses in the country's card payment system.

The Mexican Competition Law establishes that the affirmative vote of at least five commissioners is required to resolve these types of procedures, and the governing body currently has only four of the seven members required by constitutional mandate. Pursuant to the Mexican constitution, the president of Mexico is obligated to propose to the Senate individuals to fill the vacancies in the governing body of COFECE, which must be selected from the three lists that an evaluation committee (formed by the Bank of Mexico and the National Institute of Statistics and Geography), already sent to the president in November 2020, March 2021, and November 2021. The candidates are experts in economic competition who have passed a technical knowledge exam and undergone a rigorous evaluation process. In December 2021, COFECE filed a constitutional controversy before the Supreme Court to enforce the Constitution, and issued a communication urging the president and the Senate to make the appointments.

The Netherlands

A. Dutch NCA decisions, policies, and market studies.

1. *ACM fines locksmith service provider and one of its executives for misleading and aggressive practices*.

On Jan. 14, 2022, the Dutch Competition Authority (ACM) fined KeyService Nederland/Plumberservice, and one of its executives for misleading consumers into believing they would be dealing with a qualified local locksmith. The company's website gave the false impression that it checked the quality of the locksmiths it dispatched. In addition, the company listed fake positive reviews on its website, did not provide cost information in advance, and sometimes pressured consumers into immediately paying hefty bills, which could amount to € 2,200 for just a few minutes of work. The ACM found that, in reality, KeyService dispatched random locksmiths from its network, and its intent was to make as much money as possible in the shortest amount of time. The ACM fined the company € 200,000 and the executive € 50,000.

2. *ACM continues campaign against misleading sustainability claims in the energy sector*.

In May 2021, the ACM asked more than 60 consumer-supplying energy providers to critically examine their sustainability claims using the so-called five rules of thumb for honest sustainability claims. The ACM subsequently checked the sustainability-related claims made by 10 major energy suppliers for accuracy, clarity, and verifiability. Based on its findings, the ACM announced Jan. 25, 2022, a follow-up investigation into two energy suppliers where the ACM found the highest number of misleading sustainability claims, which the ACM claims lead to a distortion of competition.

3. *Dutch Ministry of Economic Affairs and Climate Policy gives preferential treatment to state-controlled investment fund.*

On Jan. 24, 2022, the ACM announced its conclusion that the Dutch Ministry of Economic Affairs and Climate Policy (EZK) gave investment fund Dutch Venture Initiative (DVI) preferential treatment over other investment funds by providing DVI assistance with fundraising activities. DVI is a Dutch state-controlled entity, as EZK can determine DVI's strategy. Since 2012, EZK has granted DVI subsidies totaling € 230 million. The ACM concluded EZK has sought to raise investor interest in DVI. As such, EZK provided DVI a service that it did not offer to other competing businesses. According to the ACM, this has impeded fair competition between DVI and other private investment funds, which is prohibited under the Dutch Market & Government Act.

4. *ACM indicates travel industry must present prices that include all costs.*

On Jan. 20, 2022, the ACM stated its view that tour operators often use unclear prices. Tour operators that offer accommodations or trips must include in their prices all costs, including any supplemental costs. Over the past few months, the ACM has checked the websites of various tour operators, revealing the advertised price often does not mention or include the additional costs. In addition, the ACM found the websites do not clearly present such costs. It is common to present additional costs behind the "information" symbol, which practice, according to studies the ACM cited, is not sufficiently clear to consumers, meaning that in practice consumer do not read the information. The ACM therefore sees the use of this symbol as non-transparent.

5. *ACM indicates in-depth review of proposed merger between RTL and Talpa is necessary.*

On Jan. 28, 2022, the ACM announced a further and extensive investigation in relation to the proposed merger between RTL and Talpa, two major media companies. According to the ACM, the proposed merger may have negative effects on price, quality, and innovation. RTL and Talpa compete for television show procurement and production, television channel selection and distribution, and television channel ad sales. ACM further notes that, combined, the two companies would have many commercial television channels, as well as various production companies that produce and sell television shows, and together, they would be by far the largest provider of airtime for television ads in the Netherlands.

RTL and Talpa are now applying for a merger license—the equivalent to a Phase II review—and the ACM will supplement its investigation of the proposed merger with a focus on price effects, show quality effects, and television channel transmission.

B. Dutch Courts

1. *Court of Appeal rules on quantification of damages due to competition law violation.*

The Court of Appeal issued its opinion in a damage-quantification procedure for the Chamber of Commerce's (KvK) violation of a competition prohibition. From 2000 until 2006, Easystart B.V., in a joint venture with Visionplanner B.V. (together, Easystart), had an agreement with the KvK to offer a software program to the KvK with which business plans could be drawn up. This software was available as a sales channel, and Easystart advertised on its own website stating its product was recommended by the KvK. In addition, the KvK referred to Easystart's products on its website.

However, the KvK also offered its own competitive software program from 1996 until 2006. In November 2006, Easystart ordered the KvK to stop offering its own software due to a violation of Article 30 of the

KvK Act (the competition prohibition), stating Easystart violated the agreement. By its judgement of 16 September 2009, the District Court of the Hague ruled in favor of Easystart and ordered the KvK to pay compensation to Easystart for the damage incurred as a result of this unlawful act.

On Dec. 28, 2021, the Court of Appeal ruled on the amount of damages KvK had to pay for the tort. The Court stated that Easystart's loss should be calculated on the total price of business plans sold by KvK, multiplied by the market share of Easystart. This resulted in damages of almost € 500,000.

2. *Court rules on scope of joint hearing*.

Vestel's legal entities based in Turkey and Germany have requested that the District Court of the Hague, inter alia, declare as a matter of law that the proposals of Philips, Advance, GEVC and IP Bridge (collectively, Philips c.s.) to license standard essential patents (SEPs) notified for the High Efficiency Video Coding (HEVC) standard from the Access Advance Patent Pool are not fair, reasonable, and non-discriminatory (FRAND). Given a landmark decision by Court of Justice the European Union (CJEU), the FRAND defense is treated as part of abuse of dominant market position claim.

For the moment, the SEPs and FRAND licensing dispute before the District Court of the Hague focuses on the competence of the Court. Philips c.s. has contested the Dutch courts' international jurisdiction against co-defendants Advance, GEVC, and IP Bridge, which are established in the United States and Japan respectively. According to Philips c.s., it follows from Article 6 of Regulation (EU) 1215/2021 that the jurisdiction vis-à-vis these defendants—who are not domiciled in the territory of an EU Member State—is governed by the Dutch common rules on international jurisdiction.

On Jan. 18, 2022, the District Court of the Hague published its decision that Article 8(1) of Regulation (EU) 1215/2021 can be interpreted broadly, and that to have jurisdiction over the non-EU defendants, the District Court must look at the true relationships between the parties in the dispute at hand. As the claims and the grounds for the claims against the defendants are identical and cover the same territory, the District Court of the Hague deems itself internationally competent to deal with the dispute.

United Kingdom

A. Merger Control—Interim Enforcement Orders

A key feature of the UK merger regime that distinguishes it from most other merger regimes is that a transaction that qualifies for investigation under the regime does not need to be cleared by, or even notified to, the UK merger regulator, the UK Competition and Markets Authority (CMA) before closing. However, this so-called "voluntary" aspect of the regime is misleading. The CMA on its own initiative may still investigate qualifying mergers that have not been notified, and this can occur any time within four months after completion of the transaction or public announcement of the transaction, whichever is later. This timeline often means that an acquirer has integrated, or at least started to integrate, the target into its organisation. The CMA will often impose an initial enforcement order (IEO), ordering the acquirer to keep the operations of the target separate from its own and to suspend further integration, and even to unwind integration, pending the outcome of the CMA's investigation.

B. Merger Control—Cartels

The CMA continues to focus on competitor collusion to increase the prices of pharmaceuticals supplied to the UK National Health Service (NHS). On Feb. 3, 2022, it imposed fines totaling £35 million on four pharmaceutical firms and their parent companies, which include private equity firms. According to the

CMA, the firms had operated an anti-competitive arrangement between 2013 and 2018 that resulted in increases of around 700% in the prices paid by the NHS during that period for prochlorperazine, which is used to treat nausea, dizziness, and migraines. Under the arrangement, two firms, Lexon and Medreich, agreed to abandon their joint development of a version of prochlorperazine in exchange for a share of the profits generated from sales of the competing version, manufactured by Alliance and distributed by Focus. The CMA previously fined some of the firms and their parent companies for similar breaches in relation to other pharmaceuticals.

Poland

A. Dawn raids on radio advertising market.

In January 2022, the Polish Office for Competition and Consumer Protection (UOKiK President) inspected the premises of the main radio broadcasters in Poland. The regulator launched proceedings to investigate the activities of radio groups that are members of the Radio Research Committee (so-called "KBR"). The inspections are the result of signals the UOKiK President received from various sources, including under the whistleblower program.

KBR brings together competing radio groups, the largest commercial radio broadcasters. The members of KBR jointly commission and finance the Radio Track survey, carried out by an external entity, that is a basis for preparing lists of radio station listenership, which any interested party (not only KBR members) may purchase. Interested parties may use the Radio Track survey to evaluate radio station advertising time which, according to the UOKiK President, can be used as a "settlement currency" on the radio advertising market for negotiations with media houses.

According to the President, the proceedings aim to verify whether there may be an unlawful exchange of information or anti-competitive practices within KBR in terms of audience research, the joint planning of advertising by radio stations, and advertising bundling. At this stage, the regulator is not conducting proceedings against specific entities.

B. Fines for truck dealer companies and their managers.

On Jan. 12, 2022, the UOKiK President issued two decisions imposing fines on six dealer cartels and eight of their managers for a total of approximately EUR 26.5 million. DAF truck-dealer collusion meant vehicle purchasers had no free choice of dealer and were overcharged for years.

1. *Conspiracy to allocate geographic markets.*

In the first decision, the UOKiK President concluded that five companies had made a market-sharing agreement restricting competition by jointly agreeing that each would sell DAF vehicles in a specific area and would not compete for customers in other parts of Poland. The truck dealers exchanged information about prices and, in some instances, also about tenders. As a result, a potential buyer could only buy DAF vehicles at a certain price from a particular seller and could not find a less expensive option in another part of the country. According to the UOKiK President's decision, the collusion lasted for at least seven years and the truck dealers had acted with full knowledge and the unambiguous intention not to compete with each other.

The highest fine imposed in these proceedings was approximately EUR 9.8 million. Two of the parties involved benefited from the leniency program and had their fines reduced by 50% (their fines were only approximately EUR 0.4 to 1 million). In addition, UOKiK established that managers of the fined

companies were active in the agreement restricting competition by, inter alia, disciplining their salespeople to adhere to the arrangements, even under the threat of dismissal or withholding of remuneration. Consequently, the UOKiK President imposed fines on eight managers in the joint amount of approximately EUR 370,000.

2. *Bid-rigging for public purchases.*

The second decision concerned bid-rigging practices between DAF dealers (two of whom were also fined in the decision summarized above). The UOKiK President determined that three truck dealers divided the market for DAF vehicles between themselves. They had jointly agreed that each would compete in public tenders only in a certain territory and would not bid in the areas assigned to the other parties to the agreement. The highest fine in this decision was approximately EUR 280,000.

C. Initiation of antitrust proceedings against Kärcher.

In January 2022, the UOKiK President initiated antitrust proceedings against Kärcher due to suspicions that Kärcher may have been fixing for many years the retail prices of its products with distributors. Kärcher is a global German company that mainly manufactures cleaning equipment such as pressure washers, vacuum cleaners, and steam cleaners. UOKiK suspects the company set retail prices for its products in consultation with its dealers since the beginning of its operations in Poland in the late 1990s—at first in both brick-and-mortar shops and online, and later (after 2005) mainly online.

According to the UOKiK President, evidence shows Kärcher's cooperation agreements with its distributors contained provisions according to which distributors could sell products only on terms Kärcher set; thus their clients could not buy them cheaper. Distributors who sold at lower prices could be subject to penalties such as shortening of payment terms or, ultimately, termination of cooperation agreements. Vertical price-fixing arrangements (resale price maintenance) are considered among the most serious restrictions of competition. If UOKiK confirmed the evidence, Kärcher may face a financial penalty up to 10% of its turnover. UOKiK may fine the managers responsible for collusion up to approximately EUR 435,000.

Italy

A. ICA fines operators for entering anti-competitive agreement in maritime transport market.

On Dec. 21, 2021, the Italian Antitrust Authority (ICA) fined several companies operating in the marine transport of flammable products and waste in the Gulf of Naples for entering into an anti-competitive agreement, in violation of Article 2 of Law no. 287/1990 (corresponding to Article 101 TFEU). Following the complaints from several municipalities, consumers associations, and oil companies, and after several inspections, ICA found the shipping companies had colluded in order to allocate services and routes, to increase fees charged and establish the conditions for their operation, dividing revenues based on the historical shares of shipowners.

The Authority did not deem suitable the commitments the entities under investigation offered, including the commitment to refrain from any form of concerted action and the voluntary application of price caps to transport services. The ICA established the conduct at issue constituted a single "overall infringement of competition," resulting from the intentional collaboration of all companies involved; therefore, the ICA found the conduct amounted to a single, complex, and continuous agreement restricting competition.

ICA imposed a fine of more than 1.25 million EUR. The companies have now six months to appeal to the Lazio Regional Administrative Tribunal.

B. ICA imposes approximately 5 million EUR in fines on nine companies for aggressive and misleading commercial practices.

On Jan. 26, 2022, the ICA fined nine companies a total of about five million EUR for aggressive and misleading commercial practices. ICA issued the measures between July and October 2021, but published them in the January 2022 official bulletin. The ICA examined conduct consisting of unsolicited inclusion (and subsequent requests for payment) of micro-enterprises in the investigated companies' databases. The different types of conduct were, in fact, all based on the micro-enterprises' fear of being disadvantaged by failure to comply with advertising requirements, falsely described as mandatory.

In particular, the misleading practices ranged from covert subscription to expensive advertising services to the request to fulfill fictitious legal obligations or sanctions (e.g., from the Chamber of Commerce or WIPO) or the request for money that appeared to originate with the organizing body of trade fairs in which the company had participated. In most cases, these requests were followed by numerous attempts to collect the sums unjustifiably demanded through reminders, warnings, and threats to initiate costly international legal actions.

European Union

A. European Commission

1. *General Court partially annuls European Commission decision to fine microprocessor manufacturer Intel for abuse of dominance.*

In May 2019 the European Commission fined Intel EUR 1.06 billion for alleged abuse of dominance in the worldwide market for computer processor x86. According to the Commission, Intel engaged in two types of abusive conducts vis-a-vis its trading partners, specifically naked restrictions and conditional rebates. Intel moved for the annulment of such decision, criticizing the Commission for failure to examine the controversial rebates in light of all relevant circumstances and, in particular, for failure to conduct the "as efficient competitor test" to determine whether the rebates could foreclose a competitor as efficient as Intel. On Sept. 6, 2017, the European Court of Justice set aside the appealed judgment and referred the case back to the General Court for it to examine, given Intel's arguments, the capability of the rebates at issue to restrict competition.

In its Jan. 22, 2022 decision, the General Court annulled in part the contested decision in so far as it considered the rebates at issue abusive within the meaning of Article 102 TFEU and fined Intel for all of its actions characterized as abusive. The General Court found the Commission failed to analyze the anticompetitive effects of these rebates. Finally, the General Court annulled in its entirety the section of the contested decision that fined Intel EUR 1.06 billion for infringement.

2. *Commission prohibits Korean shipbuilding deal.*

On Jan. 13, 2022, the Commission blocked Hyundai Heavy Industries' $2 billion acquisition of Daewoo Shipbuilding & Marine Engineering after an in-depth (i.e., Phase II) review. The Commission held that the merger would have created a dominant position for the merged entity and reduced competition in the global market for the construction of large liquefied natural gas (LNG) carriers. The companies have a combined market share in the large LNG carrier sector of over 60%, with only one other competitor.

However, according to the Commission, that rival cannot exert sufficient competitive restraint on the merged business to offset competition concerns. Also, there are high barriers to entry. The merger was previously cleared unconditionally in China and Singapore.

B. EU Courts

1. *European Commission commits serious breach by withholding default interest from Deutsche Telekom.*

On Jan. 19, 2022, the EU General Court ordered the European Commission to pay Deutsche Telekom (DT) EUR 1.75 million in compensation, as—according to the General Court—the Commission had no discretion to refuse the default interest for an overpaid fine. The Commission had refused to pay DT default interest after the General Court reduced the Commission's margin squeeze fine imposed on DT from EUR 31 million to EUR 19 million in December 2018.

C. European policy developments

1. *European Commission publishes final report on sector inquiry into IoT.*

On Jan. 20, 2022, the European Commission published its final report in relation to its sector inquiry into the internet of things (IoT). The Commission noted respondents emphasized the need for both competition enforcement and regulation to address potentially harmful practices. The IoT sector has high barriers to entry.

Additionally, the final report indicates the cost of technology investment and development and the vertical integration of smart device operations system providers and voice assistants are particularly important barriers to entry and expansion in the voice-assistant market. According to the final report, some voice-assistant providers license their voice assistants only together with other types of software or applications. The European Commission stated that it may open case-specific follow-up investigations where the concerns identified appear to result from potentially anticompetitive conduct.

2. *European Parliament states need for earlier review of foreign subsidies' legislation.*

On Jan. 25, 2022, the European Parliament's Committee on the Internal Market and Consumer Protection (IMCO) indicated the European Commission needs to assess within three years its own enforcement of its proposed rules to tackle distortive foreign subsidies. In its proposal, the Commission suggested it would present a review report within five years of the proposed rules entering into force. The IMCO's opinion notes that this timeline should be shortened because there is not yet enough data on the impact of third-party subsidies in Europe. Also, IMCO's draft opinion proposes cooperation with national public procurement authorities.

3. *European Parliament approves Digital Services Act proposal.*

On Jan. 20, 2022, the European Parliament voted in favor of the Digital Services Act (DSA), which aims to provide transparency and security in digital markets to better protect consumers and includes new rules and obligations for companies offering online services in the EU. The European Parliament and the Council still need to agree on the DSA's final text. It is expected the DSA will take effect in 2022 or early 2023.

China

A. China's Supreme Court Clarifies Standard of Review over "Reverse Payment" Provisions.

On Dec. 17, 2021, China's Supreme People's Court (SPC) rendered a decision for an appellate review of a patent litigation between an international patent-holding pharmaceutical company and a Chinese generic drug maker. In the decision, SPC for the first time opined that a "reverse payment" provision also known as a "pay for delay" provision, by which a drug patent holder compensates generic drug makers in exchange for the generic maker's promise not to challenge the patent at issue or to delay the generic maker's entry into market, may have an anti-competitive effect, and thus warrants a special court review under the Anti-Monopoly Law (AML) including for non-AML litigations like patent infringement. If the SPC finds any anti-competitive effect, it may reject a request to withdraw the case based on any settlement agreement containing such a provision, and as SPC has indicated, it also may refer the case to AML enforcement agency for further investigation.

In the decision, SPC established a two-pronged approach to evaluate whether a reverse payment provision has an anti-competitive effect: (i) as the first part of the analysis, the court will evaluate whether the generic drug maker will invalidate the patent at issue, and if the likelihood of invalidation is low, the the court will presume the provision is without anti-competition effect; and (ii) if the likelihood of invalidation is high, the court should proceed to the second part of the analysis, i.e., whether entering into a settlement containing such a provision will substantively prolong the patent holder's market exclusivity or will hinder or delay the entry into market by potential generic drug makers; if the answer to either question is yes without other justifiable reasons, an anti-monopoly effect will be found to exist.

For the patent dispute at issue, SPC allowed the patent holder to withdraw the case, noting the patent at issue already expired in March 2021, and there was consequently no need to evaluate the anti-monopoly effect. As background, SPC's clarification of its standard of review came a few months after China unveiled its own "patent linkage" system in 2021, under which generic drug makers are allowed to declare their patent status, and patent-holding pharmaceutical companies are given the chance to litigate against the generic makers. The system is expected to spawn a series of patent disputes during which settlements including "reverse payment" provisions may abound.

Notably, in the Anti-Monopoly Guideline for the Active Pharmaceutical Ingredient (API) Industry published by the State Anti-Monopoly Bureau in November 2021, compensation for non-production or non-sale covenants between API manufacturers or distributors are categorically prohibited as a type of horizontal agreement under the AML. Such non-production or non-sale covenants resemble reverse payment provisions discussed above.

B. State Anti-Monopoly Bureau Publishes 13 Penalties for Failing to Report Concentrations including Certain Minority Investment.

On Jan. 5, 2022, the State Anti-Monopoly Bureau (SAMB) published 13 decisions penalizing certain Chinese internet giants for alleged failure to report concentrations to SAMB. In each case, the party was fined RMB 500,000, the maximum monetary penalty allowed under the current AML for failing to report the transaction without other anti-competition issues.

Notably, a majority of the transactions involved were minority investments under which investors acquiring less than a 10% share were found to have gained control or joint control over the target business, thus triggering a mandatory merger control filing under AML. In a majority of the decisions,

SAMB based its findings over the contractual terms provided in the investment agreements, shareholders agreements, and/or articles of association at issue. SAMB did not disclose which terms it reviewed and led to its findings of the existence of "control" or "joint control" in such minority investment cases.

Japan

A. JFTC begins discussions on pre-regulation of IT giants.

On Dec. 23, 2021, the Japan Fair Trade Commission (JFTC) announced that government authorities, including the JFTC, have started to discuss a rule on pre-regulating IT giants. These regulations are expected to supplement the current Antimonopoly Act that regulate incidents ex post facto. Generally speaking, digital businesses are seen as prone to monopolies by the companies that hold data. The EU already has introduced a type of pre-regulation of IT giants.

The JFTC chairman said they were aware that the current Antimonopoly Act framework might not deal with matters regarding IT giants whose business developed so rapidly. The chairman also said they would need to discuss the necessity of adopting some regulations introduced in other countries.

B. Follow-up – major medicine wholesalers again suspected of bid-rigging.

On Nov. 9, 2021, JFTC conducted an on-site inspection of six major medicine wholesalers in Kyushu suspected of bid-rigging pharmaceuticals ordered by the National Hospital Organization. According to the JFTC, from around 2016 at the latest, six medicine wholesalers are suspected of trying to coordinate orders for 31 hospitals drugs by selecting in advance the winning bidder. The annual order size is around JPY 20 billion.

On Jan. 7, 2022, three of the six medicine wholesalers were convicted of engaging in bid-rigging for pharmaceuticals made by the Japan Community Healthcare Organization in violation of the Antimonopoly Act in 2019. The JFTC fined each of the three companies 250 million yen and imposed a suspended sentence on seven former company executives.

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

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

Christoph Enaux
Shareholder
+49 30.700.171.140
christoph.enaux@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

Yuqing (Philip) Ruan
Shareholder
+86 (0) 21.6391.6633
ruanp@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

Robert Hardy
Local Partner
+31 20 301 7327
Robert.Hardy@gtlaw.com

Filip Drgas
Senior Associate
+48 22.690.6204
drgasf@gtlaw.com

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

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

Lucas Wusthof
Senior Associate
+49 30.700.171.236
lucas.wuesthof@gtlaw.com

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

Anna Bryńska
Associate
+48 22.690.6179
Anna.Brynska@gtlaw.com

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

Marta Kownacka
Associate
+48.22.690.6231
kownackam@gtlaw.com

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

Chazz Sutherland
Associate
+31 20 301 7448
sutherlandc@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

Administrative Editor

Alan W. Hersh
Of Counsel
+1 512.320.7248
hersha@gtlaw.com