GT Newsletter | Competition Currents | March 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. *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, the FTC approved a petition from Sartorius Stedim Biotech S.A. to acquire the chromatography equipment business of Novasep Process SAS. Sartorius was the FTC-approved divestiture buyer in 2020, when the FTC ordered Danaher Corporation to divest assets as a condition of acquiring General Electric's biopharmaceutical business, which included chromatography assets. Sartorius agreed to obtain the Commission's prior approval if it proposed to acquire Novasep's chromatography business. Sartorius filed its petition for prior approval of this acquisition Oct. 28, 2021.

2. *Statement of FTC Bureau of Competition Director Holly Vedova regarding termination of U.S. chip supplier's attempted acquisition of UK chip design provider.*

On Feb. 14, 2022, the FTC's Bureau of Competition issued a public statement noting that a U.S. chip supplier had terminated its proposed acquisition of a UK chip design provider. On Dec. 2, 2021, the FTC voted to file an administrative complaint to block the proposed transaction, charging that the acquisition would harm competition in three worldwide markets in which the U.S. chip supplier competes using products of the UK chip design provider. The complaint also alleged the acquisition would have harmed competition by giving the U.S. chip supplier access to competitively sensitive information of some of the UK chip design provider's licensees, some of whom are the U.S. chip supplier's rivals. In its statement, the Bureau said, "The termination of what would have been the largest semiconductor chip merger will preserve competition for key technologies and safeguard future innovation. This result is particularly significant because it represents the first abandonment of a litigated vertical merger in many years."

3. *FTC and Rhode Island attorney general seek to block merger of Rhode Island's two largest health care providers.*

The FTC authorized an administrative complaint Feb. 17, 2022, and a suit in federal court to block the proposed merger of Rhode Island's two largest health care providers, alleging the deal would lead to higher prices and lower quality care. The FTC, jointly with the Rhode Island Office of the Attorney General, will file a complaint in federal district court seeking a temporary restraining order and preliminary injunction to stop the deal and to maintain the status quo pending an administrative trial on the merits of the case.

Lifespan Corp. and Care New England Health System offer a broad range of essential medical and surgical diagnostic and treatment services that require an overnight hospital stay, known as inpatient general acute care, or GAC, services. They also operate the only two standalone inpatient behavioral health facilities in Rhode Island. The complaint alleges the proposed merger of close competitors Lifespan and Care New England would likely reduce competition in the state of Rhode Island and 19 nearby Massachusetts communities for inpatient general acute care hospital services and inpatient behavioral health services. The complaint further alleges that if the merger were consummated, Lifespan Corp. and Care New England would control at least 70% of the Rhode Island market for inpatient general acute care hospital services, and at least 70% of the market for inpatient behavioral health services.

4. *Administrative law judge dismisses FTC antitrust complaint against Altria Group and JUUL Labs, Inc.*

In an Initial Decision announced Feb. 24, FTC Chief Administrative Law Judge D. Michael Chappell dismissed the antitrust charges in a complaint FTC staff issued against tobacco company Altria Group, Inc. and electronic cigarette maker JUUL Labs, Inc. The FTC's April 2020 complaint alleged Altria and Juul had entered into a series of agreements, including Altria's acquisition of a 35% stake in JUUL, that eliminated competition in violation of federal antitrust laws. According to the complaint, this series of agreements involved Altria ceasing to compete in the U.S. market for closed-system electronic cigarettes in return for a substantial ownership interest in JUUL, by far the dominant player in that market. Judge Chappell concluded that complaint counsel failed to demonstrate both the anticompetitive effects of the noncompete provision, and a reasonable probability that Altria would have competed in the e-cigarette market in the near future, through marketing a competing product independently, or through collaboration or acquisition. The FTC is expected to appeal ALJ Chappell's initial decision for full Commission review.

5. *FTC requests public comments on impact of pharmacy benefit managers' practices.*

On Feb. 24, the FTC announced it was soliciting public input on the ways that practices by large, vertically integrated pharmacy benefit managers (PBMs) are affecting drug affordability and access. PBMs are companies that manage prescription-drug benefits on behalf of private health insurers, Medicare Part D drug plans, large employers, and other payers. The FTC's request for information covers a wide range of issues in the PBM market, including contract terms, rebates, fees, pricing policies, steering methods, conflicts of interest, and consolidation. The request seeks information on these practices and their impact on patients, physicians, employers, independent and chain pharmacies, and other businesses across the distribution system.

B. Department of Justice (DOJ)

1. *Justice Department sues to block UnitedHealth Group's acquisition of Change Healthcare.*

On Feb. 24, 2022, DOJ filed a civil lawsuit to stop UnitedHealth Group Incorporated from acquiring Change Healthcare Inc. The complaint, filed in the U.S. District Court for the District of Columbia, alleges that the proposed $13 billion transaction would harm competition in commercial health insurance markets, as well as in the market for a vital technology used by health insurers to process health insurance claims and reduce health care costs. The complaint alleges the proposed transaction would give United, which owns the largest health insurer in the United States, large amounts of its rival health insurers' competitively sensitive information and that, post-acquisition, United would be able to use its rivals' information to gain an unfair advantage and harm competition in health insurance markets.

The complaint also alleges that the proposed transaction would eliminate United's only major rival for first-pass claims editing technology, which the DOJ alleges is a critical product used to efficiently process health insurance claims and save health insurers billions of dollars each year, and would give United a monopoly share in the market. The DOJ complaint further alleges the proposed acquisition would eliminate Change, which provides a variety of participants in the health care ecosystem, including United's major health insurance competitors, with vital software and services, including electronic data interchange (EDI) clearinghouse services, which transmit claims and payment information between insurers and providers, and first-pass claims editing solutions, which review claims under the health insurer's policies and relevant treatment protocols.

2. *Former Contech Engineered Solutions LLC executive convicted of rigging bids and defrauding North Carolina Department of Transportation.*

On Feb. 1, 2022, DOJ announced that a former executive of Contech Engineered Solutions LLC was convicted, following a jury trial, for his participation in bid-rigging and fraud schemes targeting the North Carolina Department of Transportation (NCDOT), for participating in conspiracies to rig bids and submit false certifications of non-collusion for more than 300 aluminum structure projects the state of North Carolina funded between 2009 and 2018. DOJ showed at trial that the executive had instructed a co-conspirator to submit non-competitive bids to NCDOT and to hide his bid-rigging and fraud by varying the number of inflated bids submitted. The executive had also made clear to a co-conspirator that he would hide illegal conduct by deleting text messages he received about the conspiracy. The executive was convicted of conspiring to rig bids; conspiring to commit fraud; and three counts of mail fraud and one count of wire fraud, and faces a maximum penalty of 10 years in prison for conspiring to rig bids and 20 years in prison for each of the other counts. Contech had previously pleaded guilty to one count of bid-rigging under Section 1 of the Sherman Act and one count of conspiring to commit mail and wire fraud, and had agreed to pay a criminal fine of $7 million and restitution to NCDOT in the amount of $1,533,988.

C. U.S. Litigation

1. *In re: EpiPen (Epinephrine Injection, USP) Marketing, Sales Practices and Antitrust Litigation*, Case No. 2:17-md-02785 (D. Kan. Feb. 28, 2022).

EpiPen buyers leading a class action against various Mylan NV defendants are seeking Kansas federal court approval for a $264 million settlement. This settlement, together with a previous settlement with defendant Pfizer, brings the class's total recovery to $609 million.

The settlement provides that Mylan initially will deposit $5 million into an escrow account, with Mylan to deposit the remainder by July 1, or five days before the fairness hearing, whichever occurs first. There will be two pools of funds, one for individual buyers and one for third-party payers like insurers.

In 2016 and 2017, Mylan became the subject of multiple lawsuits after imposing significant price hikes for life-saving epinephrine auto-injectors. The prices led to charges that Mylan violated federal antitrust laws and the Racketeer Influenced and Corrupt Organizations Act (RICO).

The Kansas federal court lawsuits focused primarily on allegations that Mylan "traded" a settlement of its patent claims against another defendant for a deal resolving an unrelated infringement case. In June 2021, the court advanced claims that Mylan "paid" the other defendant to shelve its generic EpiPen by giving it suspiciously favorable terms in the other settlement the companies reached the same day. If true, the judge said in 2021, the allegations established the sort of "reverse payment" deal—so called because it involves concessions from a plaintiff to a defendant, rather than in the usual direction.

2. *JSW Steel (USA) Inc., et al v. Nucor Corp., et al.*; Case No. 4:21-CV-01842 (S.D. Tex. Feb. 17, 2022).

A federal court in Houston has dismissed claims against U.S. Steel Corp., Nucor Corp., AK Steel Corp., and Cleveland-Cliffs Inc. for an alleged scheme to cut off a rival's access to steel slab, a critical component of finished steel products. The court stated that Plaintiff JSW Steel (USA) Inc. did not offer enough circumstantial evidence to make collusion—rather than parallel strategies by similar companies—the most likely explanation for the breakdown in its dealings with the other manufacturers.

While this finding alone merited the case's dismissal, the court went on to determine that the Noerr-Pennington doctrine (a judicially created defense against certain business torts for activity that implicates a party's First Amendment right) and the lack of a cognizable antitrust injury provided additional and alternative grounds for dismissal. As to the former, the only conduct by Nucor that the plaintiff alleged in the complaint involved Nucor's public advocacy relating to the tariffs and objections it filed to oppose JSW's exclusion requests. These constituted lawful acts of petitioning protected from antitrust liability under Noerr-Pennington. As to the issue of antitrust injury, JSW's financial losses stemmed fundamentally from the government-imposed tariffs on imported steel slab. Furthermore, JSW never alleged that Nucor refused to sell it any domestic steel slab.

3. *Roadwire, Inc. and Classic Soft Trim, Inc. v. Katzkin Leather, Inc.*, Case No. 1:22-cv-143 (W.D. Tex. Feb. 16, 2022).

Katzkin Leather, Inc. is facing federal antitrust litigation in Austin, Texas over its alleged "reign of terror" in the market for leather car interiors that owners looking to replace the upholstery sold with their vehicles can install.

The lawsuit accuses Katzkin of systematically monopolizing the leather upholstery aftermarket by defaming rival Roadwire, "strong-arming" and intimidating downstream companies (called "restylers"), and trying to decimate Roadwire's top restyling partner. According to the complaint, "Katzkin did not gain its dominant market position as a consequence of a superior product, business acumen, or historical accident . . . ." Plaintiff alleged that defendant's monopolistic and anticompetitive conduct in the aftermarket leather automotive upholstery industry has stifled Plaintiff Roadwire's ability to compete with Katzkin and essentially driven Plaintiff Classic Soft Trim out of business. Plaintiff claims "Katzkin engaged in a systematic effort to exclude competitors and their products from the aftermarket leather automotive upholstery market." Plaintiffs seek injunctive relief enjoining defendant from further conduct that would violate the Sherman Act.

4. *Shields et al. v. FINA*, Case No. 3:18-cv-07393, and *International Swimming League Ltd. v. FINA*, Case No. 3:18-cv-07394 (N.D. Cal. Feb. 11, 2022).

Professional swimming's world governing body (FINA) defeated three-time Olympic gold medalist Katinka Hosszú of Hungary and U.S. gold medalist Michael Andrew's bid for up to $75 million in class action damages. Hosszú and Andrew are leading federal antitrust litigation against the federation in San Francisco.

Magistrate Judge Jacqueline Scott Corley partly denied class certification to Hosszú, Andrew, and two-time U.S. Olympian Tom Shields, saying the pay structure of the swimming league behind a related case—and its links to Hosszú and Andrew—makes individual damages claims more appropriate.

At the hearing earlier in February, the magistrate judge said she was "troubled" by a proposed method for divvying up possible damages among professional swimmers seeking class certification in an antitrust suit alleging that FINA is using its power to scuttle competitions planned by a nascent swimming league. The magistrate judge further explained, "what I find the most problematic" is the "intraclass conflict" that comes with the plaintiffs' formula for a classwide way of determining damages. She commented that the damages formula "necessarily favors certain swimmers over others."

The swimmers were seeking classwide monetary and injunctive relief, claiming FINA has used its absolute monopoly and boycott power to threaten to strip them of their eligibility to compete in the Olympics if they participated in an event not sanctioned by FINA. The swimmers say this has caused them to lose out on prize money and appearance fees.

5. *In re Packaged Seafood Products Antitrust Litigation*, Case No. 3:15-md-02670, (S.D. Cal. Feb. 7, 2022).

StarKist Co., and its current and former parent companies, and a Bumble Bee Foods LLC affiliate must face trial on the full scope of antitrust claims major retailers brought over an alleged scheme to fix canned tuna prices, a federal judge in San Diego ruled March 1, 2022.

Judge Dana M. Sabraw denied the canned tuna companies' partial summary judgment, which had invoked the four-year statute of limitations in a bid to narrow claims first asserted in 2015 by Dollar General Corp., Kroger Co., Meijer Inc., and others. The judge said the tuna companies did not try to directly rebut the evidence of the alleged concealment, instead claiming the class had enough knowledge by July 2008 to flag the alleged conspiracy. Were this true, the court would bar the claims filed seven years later, in 2015. But Judge Sabraw said the plaintiffs had presented enough evidence to raise genuine issues of material fact as to whether they had enough knowledge at that time to piece together the alleged wrongdoings. "It is entirely possible [the direct action plaintiffs] had access to supply and demand information (a lone puzzle piece), which delivered no further indication to the larger picture into which it fits," the judge said. "When contextualized with later developing events such as a government investigation, extensive media coverage, and discovery in a federal court, the larger picture becomes more apparent."

Since 2015, StarKist, Bumble Bee, and Chicken of the Sea—which together make up the bulk of canned tuna sales in the United States—have been hit with scores of lawsuits accusing them of engaging in a scheme to raise the price of the packaged fish.

Mexico

A. COFECE fines IAC Holdco, GCM, and Franklin, auto parts manufacturers, for failing to obtain prior merger competition clearance.

COFECE (the Mexican competition authority) announced that in April 2018, GCM purchased and accumulated assets and/or control of IAC Holdco and its Mexican subsidiaries. In April 2019, Franklin Mutual Advisers sold GCM shares in IACNA, a firm that owns shares in IAC Holdco, constituting another acquisition by GCM of IAC Holdco and its subsidiaries.

Both transactions exceeded the economic thresholds set by the Federal Law on Economic Competition (LFCE). Accordingly, notification prior to completion of the transactions was mandatory. COFECE explained that the failure to notify prevented COFECE from analyzing the impact and risk these mergers could have on competition in the markets involved.

The companies attempted to file for authorization of the transactions post-closing. COFECE opened a case file to verify compliance with competition rules, as well as to analyze the impact on competition. While COFECE found the mergers did not risk harm to competition and were therefore authorized, it still imposed sanctions for failure to notify in compliance with LFCE in an amount exceeding nine million pesos ($450,000).

The Netherlands

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

1. *Pfizer to discontinue its pricing structure for Enbrel following discussions with ACM.*

On Feb. 11, Pfizer announced it would stop its discount scheme for the sale of the anti-rheumatic drug Enbrel to hospitals in the Netherlands. After Pfizer's patent for the drug expired in 2015, other competitors were able to introduce the active ingredients of the drug into their own production. As a result, Pfizer set up discount schemes to discourage hospitals from switching to another drug manufacturer. In response, the Dutch Competition Authority (ACM) concluded that a risk of substantial financial barrier to switching drugs was emerging for hospitals. After ACM confronted Pfizer regarding this discount clause, Pfizer immediately removed the discount clause from all Enbrel contracts and stated it would use the clause in the future. However, Pfizer did not acknowledge the pricing structure could violate competition law.

2. *ACM positive about cooperating companies to promote sustainability in the energy sector.*

On Feb. 28, the ACM announced that two specific initiatives of competing companies working together to promote sustainability in the energy sector do not conflict with existing competition rules. The first initiative entails the collective purchase of electricity from a wind farm. The second initiative relates to network administrators' agreeing on a fixed price for CO2 in the calculations for investments in electricity networks. In these assessments, the ACM applies the guidelines on sustainability agreements and provides clarity to companies. Also, the ACM emphasizes the importance of sustainability in the energy sector to achieve climate goals.

The initiatives require the companies to (i) purchase electricity from wind farms together, which will lead to a fixed electricity price for the purchasers for several years and prompt other companies to switch to sustainable energy and (ii) agree on a certain price per ton of CO2 when making purchase and investment decisions in 2021. The rationale is that these initiatives lead to making more attractive investments that also generate less CO2 emission, and less CO2 emission will lead to lower costs.

3. *ACM warns employers that non-hiring agreements (known in the United States as no-poach agreements) are prohibited.*

On Feb. 16, the ACM reiterated its stance on the prohibition of non-hiring agreements and noted its concern about such possible illegal arrangements in the Dutch labor market. Agreements about not recruiting or employing another company's staff are detrimental to the employees and society as a whole and thus prohibited by European and Dutch competition law, according to the ACM.

Notwithstanding the potential for there being fewer qualified people available, particularly in the energy and technology sectors, the ACM still prohibits such agreements. The ACM further reasoned that these agreements distort a working labor market and can lead to lower salaries and a decreased quality of employment conditions. Long term, these agreements may lead to less innovation and stimulation, resulting in less efficiency and a weakened labor market. In contrast, higher wages and better working conditions can result in more employees, stimulate technical innovation, and lead to societal welfare gains.

B. Dutch Courts

1. *Court of Appeal of Den Bosch tackles noncompete clauses for medical specialists.*

On Feb. 8, 2022, in a complex dispute involving a hospital's medical specialists, the Court of Appeal of Den Bosch decided that a noncompete clause in the agreements between such specialists was too broad to qualify as an ancillary restraint, and was therefore prohibited. The noncompete clause was intended to prevent the medical specialists involved from participating, directly or indirectly, in any health care offering that would compete with the hospital they were associated with (or any client of the hospital) during the term of their association with the hospital and for two years thereafter.

The court found that an excessive ancillary restraint is not exempted from the application of competition law, and that the ensuing restriction of competition also qualifies as a restriction by object (so-called "hardcore restrictions"). This is significant because in order to find an infringement of competition law for restrictions by object, it is not necessary to prove the adverse impact on actual competition on a counterfactual basis. However, where such restriction by object is capable of harm (as was found in the *Visma* case) such restrictions are prohibited according to Dutch (and European) competition law.

2. *District Court of Rotterdam fines roofers for distortion of competition in tender process.*

On Feb. 3, 2022, the Rotterdam District Court confirmed an ACM fine for two roofing companies after a private tender in 2016 (allegedly) did not comply with the cartel prohibition provision of Art. 6 of the

Dutch Competition Act (DCA). The two companies had secretly agreed in advance on the bid for the customer's work. The ACM deemed this a prohibited agreement as defined in Art. 6 DCA and fined them EUR 24,000.

The Rotterdam District Court determined that the customer, in seeking a roofing contractor, had a legitimate expectation that tendering companies would operate independently. In a tender procedure involving multiple companies, the companies must decide independently whether to respond to the customer's invitation to tender. If a company decides to make a bid, only the bidding company itself may determine the content of this bid, including the price, without coordination with competitors.

United Kingdom

A. Competition Law Enforcement in UK Financial Services.

1. *The PSR fines five companies more than £33 million for cartel behavior in the prepaid cards market.*

On Jan. 18, 2022, the UK Payment Systems Regulator (PSR) imposed cartel penalties totaling over £33 million on five companies that had operated no-poach agreements in relation to customers for the provision of prepaid card services in Great Britain.

The PSR is the UK's independent regulator of payment systems and has the power to enforce UK competition law in the payment systems sector. It exercises its power concurrently with the principal UK competition regulator, the Competition and Markets Authority (CMA).

The pre-paid cards in question were used by UK local authorities to distribute welfare payments to vulnerable members of society, including the homeless, victims of domestic violence, and asylum seekers. The cards were provided through network programs managed by three of the five companies. The no-poach arrangements prevented each of the three program managers from targeting the others' customers, where another program manager either already had a contract with the customer in question or was providing services to them through a pilot program. In some cases, the no-poach agreements extended to customers whose contracts were up for renewal.

In its press release announcing the penalties, the PSR highlighted the reduction in competition caused by these customer allocation arrangements:

> This case is particularly serious because the illegal cartel behaviour meant there was less competition and choice for local authorities. This means they may have missed out on cheaper or better-quality products which were used by some of the most vulnerable in society.

The penalties would have been higher but for the fact that all five parties had agreed to settle the investigation, gaining significant discounts. One party also applied for leniency.

This is the first enforcement decision the PSR issued since its 2015 launch. In the UK financial services sector more generally, the rate of UK competition law enforcement in the last few years has been relatively low.

2. *FCA's regulation of financial services firm conduct*.

The Financial Conduct Authority (FCA), which has regulated the conduct of retail and wholesale financial services firms since 2013, is the other financial regulator with concurrent competition powers. It issued its only (thus far) competition law enforcement decision in February 2019. The FCA found that three asset-management firms had unlawfully shared strategic information on a bilateral basis during one initial public offering and one placing, shortly before the share prices were set. Instead of competing independently to acquire shares, the firms had disclosed to each other their confidential bidding intentions, the price they were willing to pay, and in some cases the volumes they intended to buy, in an effort to keep purchase prices artificially low. In its press release at the time, the FCA highlighted the risks of their conduct to the financial market, as follows:

> Asset management firms must take care to avoid undermining how prices are properly set for shares in both IPOs and placings. Failure to do so risks them acting illegally. The FCA will act when markets that play a vital role in helping companies raise capital in the UK's financial markets are put at risk.

The FCA fined two of the firms and granted the third immunity from fines under its leniency policy. The FCA also took action against one of the individuals involved in the information sharing, because he had risked undermining the integrity of the market and failed to observe proper standards of market conduct.

These cases may well foreshadow an increase in the rate of enforcement in the UK financial services sector. Brexit may also play a part as well. Until Brexit, the European Commission had exclusive power to investigate breaches of competition law that impacted the wider EU. Over the years, the Commission has decided several major financial services cases where its exclusive jurisdiction prevented the UK CMA, together with the competition regulators in the other EU Member States, from launching their own investigations. Now that the UK and EU legal systems are separate, the UK CMA, together with regulators with concurrent powers, may investigate any breach of competition law that impacts competition in the UK, irrespective of size or geographic reach. This ability to investigate in parallel with the European Commission is likely to mean an increase in the number of cases investigated in the UK, including financial sector cases.

Poland

A. UOKiK President initiates proceedings to impose a financial penalty on Dahua Technology Poland for obstructing a search.

In September 2021, the Polish Office for Competition and Consumer Protection (UOKiK President) conducted a search at the headquarters of Dahua Technology Poland related to the ongoing investigation into unauthorized pricing of electronic monitoring equipment. The UOKiK President received information indicating Dahua Technology Poland may have agreed with its distributors to resell Dahua products at prices included in the price list provided to the distributors. Failure to comply with the arrangements or an attempt to sell equipment at a cheaper price could result in withdrawal of discounts, among other consequences.

According to the Polish competition regulations, the UOKiK President can undertake an unannounced search at the premises of an undertaking suspected of breaching competition law, subject to court approval. The UOKiK President is entitled to conduct such a search mainly because prohibited arrangements are notoriously difficult to prove since they almost never take the form of official agreements. When conducting a search, it is critical to maintain the element of surprise in order to prevent the alleged infringer's personnel from deleting or destroying evidence of unlawful activity.

Obstructing or preventing the performance of a search by the competition authority – even unintentionally – is punishable by a fine of up to EUR 50 million imposed on the company and up to 50 times the average remuneration (approx. EUR 64,000) on the managers.

From the competition authority's perspective, it is important to prevent information on the commencement of the search from being communicated to persons not participating in its initiation, as the element of surprise helps the authority collect evidence. When UOKiK officials commenced the search at Dahua Technology Poland, they requested the company's representatives not to alert other employees about the start of UOKiK's actions. Notwithstanding this request, one of the company managers sent a message to his colleagues via a mobile instant messaging app informing them of the search.

Therefore, the UOKiK President initiated proceedings to impose a financial penalty on Dahua Technology Poland for obstructing a search.

B. Anti-monopoly proceedings initiated against 10 pharmaceutical wholesalers for anti-competitive data exchange.

The UOKiK President initiated anti-monopoly proceedings against pharmaceutical wholesalers and software providers (10 entities in total). These companies are accused of an anti-competitive exchange of information about, among other things, applied price lists, discounts, and margins. To obtain such data on competitors, the companies may have used software installed in pharmacies which is offered by specialist service providers.

In September 2020, the UOKiK President conducted searches and inspections at the companies' premises, and the evidence collected indicated there may have been an agreement between competitors to exchange sensitive information. The wholesalers had access to the strategic data of their competitors, which could have reduced uncertainty as to the business actions undertaken by other market players. For instance, access to such information could allow them to adjust prices, prevent price wars, or assist in their negotiations with drug manufacturers. All of these practices could limit competition on the market and, as a result, lead to higher prices of pharmaceuticals for customers.

The allegations concern major Polish pharmaceutical wholesalers. The suspected practices may violate both national and EU competition regulations. If these allegations are confirmed, the companies face penalties of up to 10% of their annual turnover.

Italy

A. ICA fines operators more than 10 million EUR in bid-rigging case in the water meter supply sector.

On Feb. 1, 2022, the Italian Competition Authority (ICA or Authority) imposed fines for more than 10 million EUR in total to several major operators active in the supply of water meters in Italy. According to ICA, between 2011 and 2019, the companies established an anti-competitive agreement. The agreement influenced 161 tenders, organized by providers of water service in Italy, for the supply of water meters for use for the legal measurement of domestic, commercial, or industrial water consumption.

ICA opened an investigation after employees of the involved companies sent a number of anonymous complaints. Subsequently, the Authority was able to collect evidence of the bid rigging from the public entities that issued the requests for tenders to the operators, as well as materials obtained through the ICA's investigation, and an anonymously submitted document ICA received shortly after the start of the investigation. The latter included around 70 copies of faxes exchanged between the companies, aimed primarily at coordinating their conduct prior to the submission of bids.

The investigation revealed constant, sophisticated, and well-organized discussions between the parties. They coordinated via various social media and electronic communication methods and also attended frequent informal meetings.

The parties may appeal the ICA's decision before Lazio's Regional Administrative Court.

B. ICA accepts commitments presented by TIM, KKR Fastweb, and Tiscali in relation to FiberCop S.p.A.

On Feb. 15, 2022, ICA accepted the commitments that TIM, Fastweb, Tiscali, and KKR had presented relating to the FiberCop proceedings.

In September 2020, TIM and KKR entered into a series of agreements for the establishment of FiberCop, a company aimed at promoting the deployment of an ultra-broadband network in Italy. The agreements provided for TIM's transfer of its entire secondary network to the new company. The agreements also provided that KKR would acquire 37.5% of FiberCop's share capital, with a minority share held by Fastweb. Subsequently, FiberCop concluded a strategic partnership agreement with Tiscali for the deployment of the broadband network.

ICA opened an investigation in December 2020 to verify whether the parties' agreements could reduce competition in the wholesale and retail broadband and ultra-wideband telecommunications services markets, in breach of Article 101 of the Treaty on the Functioning of the European Union (TFEU). In particular, ICA was concerned that the agreements could prevent the development of alternative network infrastructures by competing operators.

Overall, the commitments the Authority accepted aim to reduce barriers to customer acquisition, i.e., telecommunications operators, in the wholesale fixed telecommunications market, and provide for a monitoring and supervision system.

First, TIM provided an investment plan timetable for infrastructure development and undertook to provide, together with FiberCop, suitable information for investment planning by alternative operators. Moreover, the commitments decreased the risks of limiting supply for wholesale telecommunications services by telecommunications operators by reducing the guaranteed minimums and the geographical scale of adherence to the project (from national to municipal or sub-municipal) and by introducing adherence profiles to the FiberCop project based on long-term rights, without guaranteed minimums. TIM will also facilitate the development of infrastructure by alternative operators by offering them access to fiber on the primary network, thus reducing costs and saving time.

In addition, Fastweb has committed to a phased development of its business until 2026, so as to access FiberCop's services effectively as an independent operator, while Tiscali has modified some contracts to increase its infrastructure development activity.

C. ICA fines Crédit Agricole 1 million EUR for unfair commercial practices.

On Feb. 28, 2022, the ICA fined Crédit Agricole 1 million EUR for unfair commercial practices. According to the ICA, the bank unduly conditioned consumer behavior relating to the choice of online credit-transfer method.

In particular, Crédit Agricole presented options to customers intending to perform a credit transfer through the bank's app, with the word "suggested" next to the option for the instant credit transfer, which was also the most difficult option to complete.

After consumers chose the ordinary bank transfer option, the bank once again offered them the more difficult solution of the instant bank transfer in pre-set form, through a box with the wording, "Proceed with instant" highlighted in green, while the box "Proceed with ordinary" appeared in white and customers had to choose again through a special (and second) click.

The bank may appeal to the Regional Administrative Court of Lazio within 60 days.

European Union

A. European Commission

1. *European Commission proposes new rules for a fair and innovative data economy.*

On Feb. 23, 2022, the European Commission proposed new measures to ensure fairness in the digital environment as part of the European strategy for data. These measures aim to stimulate competition in the data market. This so-called Data Act aims to generate more competitive prices for aftermarket and new services, and to ensure consistency between data access rights.

B. EU Courts

1. *European Commission conditionally approves proposed merger of port equipment suppliers Cargotec and Konecranes.*

On Feb. 24, 2022, the European Commission announced conditional approval of the proposed merger between Cargotec and Konecranes, subject to the divestiture of certain businesses. The companies are global leaders of container and cargo handling equipment. As many (industrial) players in Europe depend on the companies' equipment, the European Commission aims to ensure the proposed merger will not increase prices.

The proposed mergers sparked Commission concerns regarding lessened competition and higher prices. Therefore, the companies offered certain commitments by divesting several businesses in different markets, and these commitments assuaged the Commission's concerns. The Commission's approval is conditioned on full compliance with these commitments.

2. *EU General Court rules the European Commission does not have to refund heat stabilizers' cartel penalty.*

On Feb. 9, 2022, the EU General Court confirmed the European Commission's decision that the Commission did not have to refund GEA Group the EUR 3.3 million cartel penalty. GEA Group appealed the Commission's decision after the decision in the heat stabilizers cartel was revoked. According to the EU General Court, the Commission had been entitled to refuse the repayment based on the original cartel decision from 2009 and not the later decision in 2016. In the later decision, the fines were not amended or replaced, the ruling was merely a decision about the determination of the joint and several liability, and it did not concern the fines or their amounts.

3. *EU General Court enforces fine of EUR 880 million on Scania*.

On Feb. 2, 2022, the EU General Court upheld the European Commission's EUR 880 million fine on Scania, imposed in 2017, for not complying with European competition law, as Scania's agreements with competitors constituted a restriction of competition. The EU General Court dismissed Scania's argument that it had been treated unfairly due to the hybrid form of the Commission's judgment.

The EU General Court reasoned that although other companies accepted their liability in the settlement procedure, this did not automatically establish Scania's liability. The Commission assured that it accounted for the presumption of innocence and the rights to defense and impartiality. In addition, the Commission sufficiently demonstrated that secret contacts on different levels within Scania's enterprise all had the same goal of minimizing competition. According to the court, because Scania participated in all relevant aspects of this cartel, the Commission reasonably attributed the infringement to Scania. The Commission's fine against Scania was not disproportional and respected the principle of fair treatment and, therefore, EU General Court upheld it.

4. *General Court delivers two judgments concerning Commission decisions related to Gazprom's possible abuse of dominant position in the Eastern European gas market*.

On Feb. 2, 2022, the General Court of the EU delivered two separate judgments concerning the decisions the European Commission adopted in relation to Gazprom's possible abuse of a dominant position in the national markets for the upstream wholesale gas supply in eight Member States: Bulgaria, Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, and Slovakia.

Following an investigation commenced in 2011, the Commission sent a statement of objections to the Russian gas company, claiming three different types of abuse: (i) the application of territorial restrictions in gas wholesale supply contracts; (ii) the application of unfair pricing policies and excessive prices in five of the aforementioned states; and (iii) the imposition of onerous conditions on Bulgarian and Polish wholesalers in relation to the gas transportation infrastructure.

The proceeding terminated with the Commission's acceptance of the commitments Gazprom presented. At the same time, the Commission rejected the complaint Polish wholesaler Polskie Górnictwo Naftowe i Gazownictwo S.A. filed concerning Gazprom's abusive conduct in relation to the Yamal pipeline, which rejection mostly overlapped with the Commission's statement of objections.

Following these decisions, Polskie Górnictwo Naftowe i Gazownictwo (Applicant) brought two actions for annulment before the General Court: the first regarding the Commission's decision accepting Gazprom's commitments, and the second regarding the Commission's decision rejecting Applicant's complaint. The General Court dismissed the first action and upheld the second.

In the first judgment (T-616/18), the General Court reasoned there could be no violation of the principle of loyal cooperation by the Commission resulting from the acceptance of commitments, as their acceptance does not constitute an acknowledgement of an infringement of EU competition law and therefore does not affect the power of national competition authorities or national courts to rule on any anti-competitive behavior relating to the same circumstances.

The General Court also considered that the Commission's opening of two separate proceedings regarding Gazprom's conduct, one related to the Commission's investigation and the other following Applicant's complaint, did not violate the latter's procedural rights, as procedural economy justified it.

In the second judgment (T-399/19), the General Court ruled the Commission violated the Applicant's right to be heard and its right to be informed. The Commission justified the rejection of the complaint lodged by the Polish wholesaler by pointing out that Poland had reformed the investment management system for the Yamal pipeline and entrusted its administration to an independent company, Gaz-System S.A. The rejection also referred to the State action defense, pointing to the relationship between Poland and Russia concerning gas import. According to the General Court, however, the Commission had failed to mention the State action defense in the letter, anticipating the rejection to the Applicant and, therefore, had deprived the latter of the opportunity to comment on the argument.

C. European policy developments.

1. *European Commission sets out new guidance regarding information exchange in dual distribution systems.*

On Feb. 4, 2022, the European Commission published a new draft guideline on information exchange in dual distribution systems (where a supplier sells goods or services in direct competition). The existing vertical block exemption regulation (VBER), which applies to situations where neither party has a market share of more than 30%, has been updated and will now apply only to the exchange of information between a supplier and a buyer "necessary to improve the production or distribution of the contract goods or services."

The guidance includes a list of exchanges that are not exempted, such as non-aggregated customer-specific sales data that can be used to identify customers (unless the information is needed afterwards to optimize servicing and products).

Greater China

A. Regulators Approve AMD-Xilinx Deal with Conditions.

After a year-long review, on Jan. 27, 2022, China's State Administration for Market Regulation (SAMR) granted conditional approval for AMD's all-stock acquisition of Xilinx. The transaction closed Feb. 14, 2022, after the waiting period expired for AMD's pre-merger notification with the U.S. regulator.

AMD designs, manufactures, and sells CPU (central processing unit) and GPU (graphics processing unit), while Xilinx designs, manufactures, and sells FPGA (field programmable gate arrays). In reaching its decision, SAMR found that products such as CPUs, GPUs, and FPGAs were a relevant product market and held that the geographic market for those products was global in scope. Furthermore, SAMR held that CPU and GPU are adjacent markets to FPGA, as all products are offered to the same customers.

SAMR held the acquisition would restrict competition in the relevant markets, based on the following findings:

- Xilinx alone has a dominant position in both the global and Chinese FPGA markets, occupying over 50% market share in 2020. SAMR cited that all products are used as core components of servers for data centers. Thus, if interoperability between CPU, GPU, and FPGA is lowered, server performance will be restricted. SAMR further found the combined business would become the sole business capable of supplying CPU, GPU, and FPGA simultaneously. Thus, it would be possible to tie the sale of CPU and GPU with that of FPGA, or to refrain from supplying FPGA to competitors, or to lower the interoperability between the FPGA products and any competitors' CPU and GPU products, or to leverage dominance in FPGA market.

- The combined business would have an incentive to restrict competition in the relevant markets because, according to a cited economic analysis, a noticeable increase of market share and profitability can be expected if the combined business pursues any of the restrictive behavior mentioned above, including tie-in sales, refusal to supply, or lowering interoperability between the complementary products.
- Effective competition from new market players is unlikely to occur in the near future given the high market barriers.

Based on these findings, SAMR further negotiated with AMD and Xilinx over remedies. SAMR ultimately accepted the following conditions to address the anti-competitive effect:

- No tie-in sales between AMD's CPU and GPU products and Xilinx's FPGAs shall be pursued, and no other unfair conditions shall be attached to such sales. Customers will not be required to purchase each of the said products individually, and no discrimination is allowed against customers who do so in terms of service level, price, and software function.
- AMD and Xilinx shall continue their collaboration with Chinese partners and continue to supply CPU, GPU, and FPGA products and related hardware and software in the Chinese market based on the principles of fairness, reasonableness, and non-discrimination.
- Xilinx's FPGA shall remain adaptable and programmable and continue to support ARM processors.
- The CPU, GPU, and FPGA products supplied by AMD and Xilinx in the Chinese market shall remain interoperable with the CPU, GPU, and FGPA products from third-party manufacturers, and the level of interoperability shall be no less than that between AMD's CPU and GPU products and Xilinx's FGPAs. Any upgrades regarding interoperability shall be provided to third-party manufacturers within 90 days.
- Confidential information of third-party manufactures must be safeguarded. This includes storing such information in a separate physical environment not connected with that of AMD and Xilinx.

These remedial actions have been officially imposed as conditions to the approval, and AMD and Xilinx may apply for removal of such conditions six years following the decision.

B. GlobalWafers' Proposed Takeover of Siltronic Receives Conditional Approval in China.

On Jan. 21, 2022, SAMR conditionally approved Taiwan-based GlobalWafers' proposed takeover of Siltronic, a Germany wafer (a thin slice of semiconductor) manufacturer, notwithstanding the reported failure of the takeover because the German regulator did not timely clear the deal.

GlobalWafers and Siltronic are global competitors manufacturing and supplying wafer. Taking into consideration differences in size and manufacturing processes, SAMR found the relevant product markets in this case were wafers six-inches and under, eight-inch Czochralski wafers (CZ wafers), eight-inch zone-melting wafers, and 12-inch wafers. SAMR found anticompetitive effects in the Chinese market for eight-inch zone-melting wafers.

Pursuant to SAMR's findings, the combined business after the transaction will be the largest global supplier of eight-inch zone-melting wafers and the second largest supplier in the Chinese market. The HHI index (a standard measure of market concentration) in the global and Chinese wafer markets is over 3,000 points, and after the transaction, the HHI index would increase by 723 points in the global market and 196 points in the Chinese market. SAMR found competitors are more likely to coordinate their pricing strategy and there are high barriers for entry, and both such factors contributed to SAMR's finding of anticompetitive effect.

As a result, SAMR ordered GlobalWafers to divest its zone-melting wafer business within six months (with a permitted extension for another three months) after the transaction. Supply to Chinese customers must continue based on the principles of fairness, reasonableness, and non-discrimination. When Chinese customers elect to renew contracts with the combined business upon expiration of existing contracts, the business may not reject renewal without justification, and conditions for the renewal shall be no less favorable.

Japan

A. JFTC releases report regarding the pricing of IPO.

As reported in the October 2021 Competition Currents, the Japan Fair Trade Commission (JFTC) was investigating the pricing of initial public offerings (IPO) in the Japanese market. The JFTC revealed the result of this investigation in January 2022.

Although there are no clear cases that would be problematic under the Antimonopoly Act, the JFTC outlined the following potentially problematic conduct:

(i) requests for a particular securities company to be the lead managing underwriter and unreasonable interference with the underwriting by other securities companies as lead underwriter;

(ii) exchanges of information among securities companies regarding underwriting commission rates;

(iii) unjustly harming a newly listed company by, for example, unilaterally setting the IPO price by a lead manager with strong bargaining power.

B. Surcharge Payment Order of JPY 420 million against three major medicine wholesalers.

The JFTC will soon order three major medicine wholesalers to pay a total of approximately JPY 420 million in surcharges for bid-rigging involving pharmaceuticals made by the Japan Community Healthcare Organization. In June 2021, these three wholesalers were convicted of engaging in bid-rigging in violation of the Antimonopoly Act. The Tokyo District Court sentenced the companies to JPY 250 million in fines, and the sentences are now final.

In Japan, double punishment is considered acceptable when both surcharges and criminal fines are imposed. The surcharge system is an administrative measure that imposes a financial disadvantage on violators in order to ensure social fairness and deter violations. Criminal penalties, on the other hand, serve to morally condemn anti-social violations. Therefore, since the surcharge system and criminal fines have different purposes, objectives, and procedures, the concurrent imposition of surcharges and criminal fines is not considered a violation of the prohibition against double punishment.

Read previous editions of GT's Competition Currents Newsletter.

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