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

In this Issue:

United States

A. Federal Trade Commission (FTC)

1. *FTC approves final order imposing divestitures following Global Partners LP's acquisition of Wheels.*

Following a public comment period, the FTC approved a final order settling allegations that Global Partners LP's acquisition of 27 retail gasoline and diesel outlets owned or operated by Richard Wiehl violated federal antitrust laws.

Under the terms of the settlement, Global and Wiehl must divest to Petroleum Marketing Investment Group six Global retail fuel outlets and one Wheels retail fuel outlet. The FTC order also requires that the divestiture buyer obtain FTC approval before selling the divestiture assets under any circumstances for a three-year period and for a further seven-year period under certain circumstances.

First announced in December 2021, the FTC complaint alleged that the acquisition would have significantly increased concentration in markets for the retail sale of gasoline in the Connecticut towns and cities of Fairfield, Bethel, Milford, Wilton, and Shelton. Specifically, the FTC alleged that the proposed acquisition would have reduced competition from three to two players in three local markets for the retail sale of gasoline and in four local markets for the retail sale of diesel fuel. In the two other local markets, the FTC alleged that competition would have been reduced from four to three participants.

The Commission vote to approve the report was 4-0.

2. *FTC and DOJ hold joint Spring Enforcers Summit*.

The FTC and the Justice Department's Antitrust Division cohosted a Spring Enforcers Summit April 4 to "facilitate discussions on modernizing merger guidelines and interagency collaboration." The Summit included international enforcers and state attorneys general.

The Summit included discussions on how to work with industry regulators as part of a "whole of government" approach to competition policy, and followed the agencies' joint announcement of their comprehensive overhaul of their merger guidelines.

3. *FTC and DOJ also announce "listening forums" on effects of mergers and acquisitions*.

The federal antitrust regulators announced in March a series of listening forums "to hear from those who have experienced firsthand the effects of mergers and acquisitions…including consumers, workers, entrepreneurs, start-ups, farmers, investors, and independent businesses." The dates and industry focus for each forum are as follows:

- Monday, March 28 – Food and Agriculture
- Thursday, April 14 at 2 p.m. EDT – Health Care
- Wednesday, April 27 at 1:30 p.m. EDT – Media and Entertainment
- Thursday, May 12 at 2 p.m. EDT – Technology

The listening forums are open to the public, webcast on the FTC's website, transcribed, posted online, and included as part of the public record.

4. *FTC issues order requiring EnCap to sell off EP Energy Corp.'s Waxy crude oil business in Utah*.

The FTC issued a proposed order requiring the divestiture of energy producer EP Energy Corp.'s entire business and assets in Utah, resolving FTC allegations that EnCap Energy Capital Fund XI, L.P.'s proposed $1.445 billion acquisition of EP Energy Corp. would eliminate head-to-head competition between two of only four significant producers for the sale of Uinta Basin waxy crude oil to Salt Lake City refiners.

EnCap is a private equity fund headquartered in Texas that operates multiple portfolio companies involved in the exploration, production, transmission, marketing, and sale of energy, particularly oil and gas. EP, also headquartered in Texas, has oil and natural gas production operations in the Uinta Basin in Utah and in the Eagle Ford Shale in Texas.

According to the FTC complaint, EP and EnCap, through its subsidiary XCL Resources Holdings, LLC, compete to develop, produce, and sell Uinta Basin yellow and black waxy crude oil to the Salt Lake City area, and the combination would reduce the number of significant producers from four to three, and increase estimated market share of waxy crude from 14% to approximately 40%. Notably, the FTC included in its press release a cartoon image from an internal XCL document boasting that the parties would "try to take over Utah" with the acquisition. The FTC stated that "[w]ithout this divestiture, Salt Lake City refiners would likely have faced increased prices for Uinta Basin crude oil, whether from EnCap alone, or as part of a small group – and would likely try to pass on those costs to consumers."

Crescent Energy Company will acquire the divested assets. Crescent is an experienced operator in crude oil and natural gas production and will be a new entrant in the Uinta Basin. Crescent must obtain FTC approval before selling all of the divestiture assets under any circumstances for a three-year period and for a further seven-year period under certain circumstances.

B. Department of Justice (DOJ)

1. *Justice Department supports "reciprocal switching" rules to address "highly concentrated" railroad market.*

The DOJ's Antitrust Division submitted comments to the Surface Transportation Board supporting proposed rules to facilitate switching between railroad tracks. According to the agency, U.S. railroads have become highly concentrated and railroad rates have more than doubled since 2002. The DOJ stated that the Board's reciprocal switching proposal "is a well-tailored first step to provide captive shippers the benefit of some competition."

2. *Justice Department sues to block Verzatec's proposed acquisition of Crane.*

On March 17, the DOJ filed suit to block the acquisition by Grupo Verzatec S.A. de C.V. of its competitor Crane Composites, a wholly-owned subsidiary of Crane Co. Verzatec is a privately held Mexican corporation with headquarters in Monterrey, Mexico. Stabilit America Inc. is a wholly owned subsidiary of Verzatec based in Tennessee. Verzatec and its subsidiary Stabilit sell building materials and wall coverings, including pebbled fiberglass reinforced plastic (FRP) wall panels, in the United States under several business units, including Glasteel, Marlite, and Nudo. Crane sells pebbled FRP wall panels in the United States under several brand names, including Glasbord and Sequentia.

The complaint, filed in the U.S. District Court for the Northern District of Illinois, alleges that the proposed $360 million transaction would harm competition in the production and sale of pebbled FRP wall panels, which are used as wall coverings in restaurants, grocery stores, hospitals, and convenience stores. These panels are typically favored, according to the complaint, because of their "low cost, durability, and sanitary performance."

Verzatec's internal documents acknowledged that the transaction would eliminate the "fierce competition" between the parties. The agency also stated that Verzatec's senior management wanted to acquire Crane to gain "pricing and market control" and to achieve "FRP dominance." According to the complaint, Verzatec would control about 80% of current sales and production capacity of pebbled FRP wall panels in the United States as a result of the deal.

C. U.S. Litigation

1. *Davitashvili v. Grubhub Inc.,* Case No. 20-cv-3000, 2022 U.S. Dist. LEXIS 58974 (S.D.N.Y. Mar. 30, 2022).

On March 30, 2022, U.S. District Judge Lewis Kaplan denied Grubhub, Uber Eats, and Postmates' motion to dismiss, requiring the three companies to face an antitrust lawsuit by diners who accused them of driving up menu prices by exploiting their dominance in meal deliveries during the COVID-19 pandemic.

Judge Kaplan held it was reasonable to infer that requiring restaurants to accept "no-price competition clauses" left them with "no choice but to raise prices" regardless of where diners ordered meals. Diners claimed the no-price competition clauses barred restaurants from charging lower prices for dining in or ordering takeout, while Grubhub and Uber Eats also forbade restaurants from charging less to customers who ordered on rival platforms.

2. *United States v. Penn,* Case No. 20-cr-00152-PAB (D. Colo. Mar. 29, 2022).

On March 29, 2022, a federal court jury failed to reach a verdict in a criminal proceeding against 10 executives of various poultry companies who the federal government alleged engaged in a widespread price-fixing scheme. This is the second mistrial in this matter after another federal jury failed to reach a verdict against the same defendants in December 2021. Defendants have now moved for acquittal, arguing the government failed to introduce any evidence of an antitrust agreement.

3. *In re Ranbaxy Generic Drug Application Antitrust Litigation,* 1:19-md-02878-NMG (D. Mass. Mar. 23, 2022).

Sun Pharmaceuticals Industries, Ltd. settled a class action case for $485 million. The plaintiffs in the case – a group of generic drug buyers – alleged that Sun Pharma's predecessor, Ranbaxy Laboratories, submitted faulty FDA approval filings to keep low-price generic drugs off the market. Sun Pharmaceutical purchased Ranbaxy in 2014. The settlement terms must still be finalized and require court approval.

4. *Sidibe v. Sutter Health,* Case No. 12-cv-04854-LB (N.D. Cal. Mar. 25, 2022).

A federal jury returned a verdict in favor of Sutter Health in a suit alleging Sutter Health used its market power to require health plans to exclusively use Sutter's affiliated physicians and services. This type of antitrust claim – known as a tying arrangement – alleged that Sutter required insurers to contract with all of Sutter's participants or none at all, meaning those insurers would pay higher out-of-network rates for medical services. At trial, Sutter argued that the above-referenced actions did not prevent robust competition and that Sutter never required an insurer to pay for an unwanted service in order to obtain another.

Mexico

A. COFECE fines Mexico City Airport for abuse of a dominant position (refusal to deal).

The Federal Economic Competition Commission (COFECE or Commission) ruled that the Mexico City International Airport (AICM) committed an abuse of dominance, or refusal to deal, by preventing a company from providing passenger bus and/or coach services to and from the airport and fined AICM USD45 million.

COFECE indicated that through different actions, AICM improperly refused to provide Transportación Terrestre UNE (UNE) access to provide services at the airport. AICM prevented UNE from offering passenger transport services between the airport and Puebla, establishing exclusive advantages in favor of two companies on the same route, isolating them from competition to the detriment of users.

According to the Commission, AICM has substantial power in the market for access to airport infrastructure to provide transport services. COFECE considered that by refusing to provide UNE access, without justification, AICM granted undue advantages to the incumbent permit holders, who maintained their position without competition. This decision resulted in fewer options and higher prices for users of the transport service.

Once notified of the resolution, AICM may ask the Federal Judiciary to review the Commission's actions through a constitutional complaint.

B. COFECE recommends not approving the constitutional reform initiative on electricity due to the risks of impacting consumers and companies.

COFECE sent an opinion to the Mexican Congress opposing the proposal to amend articles 25, 27, and 28 of the Mexican Constitution in energy matters (the Initiative). COFECE warned that the proposal categorically renounces the model for competition in the market for electricity generation and supply (commercialization), replacing it with a vertically integrated industrial model operated by an unregulated state monopoly, which many countries have abandoned due to its inefficiency, inability to meet demand, high costs, and negative impact on public finances.

COFECE says the Initiative's proposed model is against social welfare, because if approved it would:

(i) establish a monopoly in the industry, i.e., in electricity generation, transmission, distribution, and supply (commercialization);

(ii) create a monopsony (single dominant buyer) in the purchase of electricity in the Federal Electricity Commission (Comisión Federal de Electricidad, CFE);

(iii) dismantle the institutional framework that protects the public interest, unduly transferring to the CFE regulatory, and public policy tasks, including the control and planning of the electricity system, as well as the determination of tariffs; and

(iv) eliminate different mechanisms that pursue fundamental objectives, such as ensuring system reliability, diversifying the generation matrix, ensuring equity among participants, applying neutral and technical regulation, improving service, and motivating investment in more efficient and cleaner generation technologies.

Moreover, COFECE states that the proposal does not include mechanisms to ensure that the electricity generated (both by CFE and, where appropriate, by private parties) and dispatched into the system is the least costly. On the contrary, according to COFECE, a change such as the one proposed would delay the exit of older, more polluting and inefficient generation plants from the market. It would also discourage the installation of new projects that could operate with more efficient and environmentally friendly technologies.

According to COFECE, the Initiative considers the cancellation of all existing generation permits and electricity purchase and sale contracts with the private sector, which would necessarily result in a restriction of supply, disablement of assets, and greater disincentives to investment. Although the Initiative foresees that the private sector would be able to generate "up to" 46% of the energy required by the country, this generation will only be for sale to the CFE and under the thresholds, terms, and conditions – as yet unknown – that the latter determines, which turns it into a monopsony in the purchase of electricity and thus allows it to monopolize the entire value chain.

COFECE adds that the shift would lead to increased costs along the electricity industry value chain, resulting in tariff increases that would harm consumers and the competitiveness of companies, or a diversion of resources to subsidize an inefficient public service. In short, according to the Commission, the Initiative would compromise the efficient functioning of the sector and its ability to meet present and future needs.

C. COFECE fines IAC Holdco, GCM, and Franklin for failing to file for competition clearance of a transaction in the auto parts industry.

In April 2018, GCM purchased and accumulated assets and/or control of IAC Holdco and its Mexican subsidiaries. Subsequently, in April 2019, Franklin Mutual Advisers sold GCM shares in IACNA, a firm that owns shares in IAC Holdco, which meant GCM had made another acquisition of IAC Holdco and its subsidiaries.

The Federal Law on Economic Competition (LFCE) sets economic thresholds for transactions that, if exceeded, require a company to file for competition clearance. The companies attempted to notify the Commission of the transactions post-implementation. COFECE reviewed the case to verify competition-rule compliance as well as to analyze the mergers' potential impact on competition and free concurrence. COFECE found both transactions exceeded the threshold and that the failure to notify prevented it from a timely analysis of the transactions.

Notwithstanding the Commission's finding that the mergers did not imply risks in this area and were therefore authorized, COFECE sanctioned the failure to file for competition clearance before they took place with an amount of $500,000.00.

The Netherlands

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

1. *Companies allowed to reach agreements for sustainability*.

On March 21, the European Commission (EC) issued a new proposal, supported by the Dutch Competition Authority (ACM), which leaves more room for companies to reach agreements for cooperation that involve sustainability matters. The proposal fits within Dutch guidelines on sustainability agreements, and the EC and ACM clearly signaled that competition laws should not obstruct sustainability progress. The ACM also proposes some additions to the exemptions, for example for agreements between companies that ensures that the companies and their suppliers comply with national and international requirements. The ACM is positive about the EC's intention to let societal benefits be integrated into considerations when assessing sustainability agreements. Nonetheless, the ACM – as a progressive authority – believes that the EC could go even further and look at company needs regarding those agreements.

2. *ACM introduces additional requirements for energy suppliers in upcoming legislation*.

New and existing energy suppliers will have additional requirements to fulfill before supplying electricity or natural gas to consumers. These requirements, introduced by the ACM on March 23, will pertain to financial, organizational, and technical competencies of these suppliers, and include specifying their risk assessment as well as clarifying financial structures. The goal is to make energy suppliers more resilient to unexpected price increases in the energy market. The ACM will expand on the current legislative criteria for financial, organizational, and technical skills in policy regulation. A draft of the legislation is expected to be released in summer 2022, in advance of the Oct. 1, 2022 new heating season.

3. *ACM fines Dutch trade association for pharmacies' failure to notify ACM of acquisitions*.

The ACM requires merging companies that exceed a certain turnover threshold to notify the ACM prior to making such acquisitions in order to assess whether sufficient competition will remain after the completion of those acquisitions. The Dutch trade association for pharmacies (VNA) did not notify the ACM prior to the acquisition of four pharmacies, and as a result, ACM fined the association EUR 350,000 on March 17. However, the VNA ultimately did notify the acquisitions, and after assessment, the ACM allowed the concentration, concluding that sufficient competition would remain.

B. Dutch Courts

1. *Trade and Industry Appeals Tribunal (CBb) decides on publication of ACM market study*.

On March 22, the ACM completed a market study for hospital information systems (*Ziekenhuisinformatiesystemen*), electronic patient filing systems (*Elektronisch Patienten Dossier-systemen*), as well as digital data exchange in the hospital sector. One organization active in that market has requested that the judge prevent publication of the study. The ACM has a legal authority to publish market studies if deemed necessary and useful for information and transparency purposes. The ACM did not find it disproportionally harmful to publish the results. The CBb, however, has partially granted the request to stop the publication of the market study and indicated that it needs more time to fully assess the issue at hand. Therefore, CBb has only allowed publication of the management summaries of the market study. This appears to be the first-ever ban in the Netherlands on a market study publication.

Poland

A. Polish Competition and Consumer Protection Authority Investigates Photovoltaic Industry

In March 2022, the Polish Office of Competition and Consumer Protection (UOKiK President) announced that the authority is monitoring the photovoltaic market and called on entrepreneurs to respect consumer rights. The photovoltaic industry uses materials and devices to convert sunlight into electrical energy.

The investigation was prompted by an increasing number of customer complaints about the actions of photovoltaic companies in Poland (in 2021 UOKiK received approximately 120 complaints). The UOKiK President launched proceedings regarding an infringement of the collective interests of consumers against two Polish photovoltaic companies.

The UOKiK President's allegations concern:

a) costs related to a consumer's ability to withdraw from contracts (the contractual provisions of both companies may lead to the obligation to pay certain costs related to installation even before the lapse of the statutory 14-day period to withdraw from the contract free-of-charge);

b) obstruction of a consumer's ability to withdraw from the contract (e.g., the UOKiK President suspects one of the investigated companies of making the withdrawal effective only if the consumer sends the declaration by registered letter or submits it at the company's office, even though the law does not require such form);

c) offering a free audit regarding installation and the estimated demand for energy, whereas ultimately consumers are asked to pay for this service when they withdraw from the contract;

d) a lack of important information (such as written information about the procedure for handling complaints under the warranty).

Moreover, FG Energy is accused of making unauthorized references to government institutions, such as the Ministry of Climate and Environment, by suggesting it works with them.

Additionally, the UOKiK President launched preliminary investigations against 10 other companies. Their contract templates, offers, and practices are now being examined for possible violations of the collective interests of consumers and the use of prohibited clauses. The concerns relate to such issues as limiting warranty rights, suggesting links to government programs, making marketing calls without the consumer's prior consent, not respecting the consumer's right to withdraw from the contract, and charging consumers in such cases. Finally, photovoltaic companies often use telemarketing, which creates a risk of phishing and identity fraud.

The UOKiK President's actions suggest that further steps in this matter in the coming months are likely. The case in question also proves the UOKiK President does consider individual consumer complaints if those complaints may prove that a given company's practice leads to infringement of the collective interests of the consumer or use of prohibited clauses. Such complaints may result in a formal UOKiK investigation and a penalty of up to 10% of the company's turnover in the preceding year. In such cases, UOKiK may also fine the company's managers up to PLN 2 million, i.e., approx. €430 thousand.

B. UOKIK President Conditionally Clears PKN Orlen's Merger with PGNiG

On March 15, 2022, the UOKIK President conditionally approved the merger between two state-controlled companies – PKN Orlen and PGNiG.

PKN Orlen is the Polish leader in the oil and petrochemical industry market, active across the supply chain for refined oil products in Poland, Austria, Czechia, Estonia, Latvia, Lithuania, Germany, and Slovakia. Orlen's activities cover all fuel products typically processed at an oil refinery, and it has a network of retail fuel stations across Poland. PKN Orlen also produces a range of petrochemical products at its refineries in Poland and Czechia. It is also active in the electricity and gas markets. PKN Orlen is the biggest gas purchaser in Poland.

PGNiG is the main supplier of natural gas in Poland, at both wholesale and retail levels, and it is also the owner of all existing gas storage facilities in Poland. It has limited activities in the supply of natural gas in Lithuania, Germany, the Netherlands, Austria, Great Britain, and Ukraine. PGNiG is also active in the electricity supply chain in Poland and to a limited extent in the supply of certain refined oil products.

The transaction had an EU dimension, but subject to the parties' reasoned submission pursuant to Article 4(4) of Regulation No 139/2004, the European Commission decided to refer it to the Polish antitrust authority. Although the Commission recognized a number of horizontally and vertically affected markets, the referral decision was ultimately justified by the transaction's impact on Polish markets.

The approval is conditioned on certain measures including PGNiG relinquishing control over its Gas Storage Poland unit to ensure it does not restrict competition in the Polish gas market. The UOKiK President identified a risk that the merged entity could limit its competitors' access to gas storage facilities on wholesale and retail gas sales markets.

Although Gas Storage Poland has been organizationally separated from PGNiG, the UOKiK President stated that the absence of ownership separation may create an incentive to favor a member of its own capital group in Gas Storage Poland's activity.

UOKiK's decision prohibits the potential buyer from operating in natural gas trading markets and requires the UOKiK President's approval for such operation. This divestment will remain in force as long as the share of the merged entity in gas storage in Poland exceeds 40%.

This transaction is another step in PKN Orlen's building of a multi-energy group. It was preceded by, inter alia, the acquisition of Energa S.A. in 2020 and the ongoing merger with Grupa LOTOS S.A.

Italy

A. Italian Competition Authority (ICA)

1. *ICA sends requests for information about fuel price increases.*

On March 18, 2022, following the increase in petrol and diesel prices recorded in recent days as well as numerous complaints received, the Italian Competition Authority (ICA) notified detailed requests for information to major oil companies. The purpose of the request is to verify the reasons for these increases and, if necessary, assess the need for possible intervention limited only to the possible violation of the rules on abuse of dominant position or agreements restricting competition.

This is not the first time ICA launched such an investigation concerning a general increase in prices. As was the case during the first months of the pandemic, ICA, within the scope of its responsibilities, monitors price increases due to crises and to verify that these phenomena do not stem from anti-competitive conduct.

2. *ICA fines Iliad for unfair commercial practices.*

On March 29, 2022, ICA closed an investigation against Iliad Italia S.r.l., imposing a fine of €1,200,000 on the company for the omission and/or misleading wording of essential information on mobile telephone offers, including services with 5G technology, and for the misleading wording of a promotional message relating to one of these offers.

In particular, ICA argued that Iliad advertised a number of mobile telephone offers, emphasizing their compatibility with the latest 5G technology but omitting or providing unclear information on the essential conditions for taking advantage of this technology. These communications were, therefore, not adequate to make the consumer understand that in order to take advantage of the 5G network included in the offers Iliad promoted, it was necessary to be under the geographical coverage of the operator's 5G network and that it was essential to own a device enabled to this specific network.

In addition, ICA argued that Iliad used the claim "100 gigs, unlimited minutes and sms in Italy and Europe" in a text message sent to its former customers to promote the "Flash 100 5G" offer. ICA considered this message likely to mislead the consumer, since the consumer could believe the 100 GB included in the offer were all usable for traffic in Europe, while in reality, in case of connection from other European countries, the traffic included in the offer was only 6 GB.

3. *ICA fines Sky Italia for unfair commercial practices*.

On March 11, 2022, ICA closed an investigation of Sky Italia S.r.l., fining the company €1 million for disseminating misleading information on the awarding of soccer rights to Serie A championship.

ICA argued that Sky Italia, in spring 2021, provided misleading information regarding the awarding of Serie A rights, suggesting that its subscribers could continue to enjoy content relating to the Serie A championship as they had during the previous season. Sky Italia knew it could not offer the Sky Calcio package in its previous format. Despite this, the company provided its customers with information that did not allow them to understand the actual content of the offer relating to the Sky Calcio package for the 2021/2022 season.

Customers who had already subscribed to the company's services, and in particular to the football package, were therefore inclined to keep their existing package, with the expectation of being able to take advantage of the discounts promised for the summer months but also, subsequently, to be able to withdraw without penalty.

European Union

A. European Commission (EC)

1. *European Commission adopts Temporary Crisis Framework for State aid to support economy given Russia's invasion of Ukraine*.

On March 23, 2022, the EC adopted a new State aid Temporary Crisis Framework (TCF) to support the economy in the context of Russia's invasion of Ukraine, based on Article 107(3)(b) of the TFEU, which will be in place until Dec. 31, 2022.

The TCF provides for three types of aid: (i) limited amounts of aid; (ii) liquidity support in form of State guarantees and subsidized loans; and (iii) aid to compensate for high energy prices.

With the first category of aid, EU Member States will be able to set up schemes to grant up to €35,000 for companies affected by the crisis active in the agriculture, fisheries, and aquaculture sectors and up to €400,000 per company affected by the crisis active in all other sectors.

With the second category of aid, EU Member States will be able to provide (i) subsidized state guarantees to ensure banks keep providing loans to all companies affected by the current crisis; and (ii) public and private loans with subsidized interest rates.

With the last category of aid, EU Member States will be able to partially compensate companies, in particular intensive energy users, for additional costs due to exceptional gas and electricity price increases. This support can be granted in any form, including direct grants. The overall aid per beneficiary cannot exceed 30% of the eligible costs, up to a maximum of €2 million at any given point. When the company incurs operating losses, further aid may be necessary to ensure the continuation of economic activity. To that end, Member States may grant aid exceeding these ceilings, up to €25 million for energy-intensive users, and up to €50 million for companies active in specific sectors.

Read more in this GT Alert.

2. *Commission carries out unannounced inspections in automotive sector*.

On March 15, 2022, the EC conducted unannounced inspections at the premises of companies and associations active in the automotive sector in several EU Member States. In parallel, the EC sent out formal requests for information to several companies active in the automotive sector.

The EC is concerned that several companies and associations violated EU antitrust rules prohibiting cartels and restrictive business practices. The Commission officials were accompanied by their counterparts from the relevant national competition authorities. The respective authorities conducted the inspections in coordination with the UK Competition and Markets Authority.

The inspections and requests for information concern possible collusion in relation to the collection, treatment, and recovery of end-of-life cars and vans, which are considered waste.

B. European Courts

1. *Double jeopardy test for EU competition rules*.

The European Court of Justice (ECJ) ruled March 22 that the double jeopardy test for EU competition rules is the same as for all other areas of law. The same person or company cannot be penalized for the same set of material facts twice. The ECJ, in ruling on two antitrust cases, decided that a court cannot penalize a prosecuted person with a sanction where another court has already issued a decision on the same facts. The court also states that there can be an exemption to this rule if there is a legitimate objective of general interest to the EU that could be achieved with said judgment. In the first judgment, which concerned a sugar cartel, Austrian courts were tasked with deciding whether another Member State had already penalized the prosecuted company. In the second case, involving Belgian parties, the court ruled that the company who infringed competition laws could be penalized twice.

C. European Policy Developments

1. *EC and UK Competition and Markets Authority investigates vehicle recycling market*.

On March 16, the EC and UK's Competition and Markets Authority (CMA) launched parallel investigations into the vehicle recycling market. This investigation was initiated after Mercedes-Benz, as leniency applicant, informed the authorities, and the authorities investigated certain companies and associations. The respective organizations have confirmed these investigations relate to arrangements for the recycling of end-of-life vehicles, which are old or written-off cars and vans. The investigations and dawn raids were based on concerns that certain companies and associations were not complying with applicable competition laws regarding the market for the "collection, treatment and recovery of end-of-life cars and vans which are considered waste."

2. *Gazprom under EU investigation relating to alleged anti-competitive behavior*.

Following Russia's attack on Ukraine, Russian state-owned gas provider Gazprom is reportedly under priority EC investigation for prohibited anti-competitive behavior. Gazprom is accused of tampering with the EU gas markets. Several companies, which include Ukrainian companies, state that Gazprom is using its dominant position to restrict gas access to Eastern Europe markets. There are also allegations of Gazprom entirely blocking other gas companies from accessing the Eastern European market.

In parallel, the EC is aiming to reduce the impact of the EU's reliance on Russian gas by providing guidance to states regarding caps on retail energy prices to stem the harm to competition resulting from the invasion. Existing EU energy law helps with this by allowing Member States to set retail energy prices under extraordinary circumstances. It also tries to set out a plan to reduce the amount of gas the EU imports from Russia. This includes diversification of the supply and looking at other, more sustainable options to substitute gas imports.

3. *The EC updates the Horizontal Block Exemptions Regulations (HBER).*

To further cooperation between Member States and to generate substantial economic and sustainability benefits, on March 10 the EC released draft updates to the HBER and its related guidance in connection with sustainability. Article 101(3) TFEU's four conditions must be met to benefit from the exemption, with one condition being that the consumer must realize a certain amount of benefit from the agreement.

4. *European Competition Network (ECN) publishes joint statement with EC about Ukraine war.*

The ECN has joined the EC in its statement condemning the Russian military's action following Russia's invasion of Ukraine. In its March 22 statement, the ECN announced that it supports Ukraine and is fully aware of the social and economic impact of this war for Ukraine and the entire EU/EEA. The ECN understands that this extraordinary situation may lead to companies taking steps to minimize market disruptions, which might result in agreements to ensure the sale, purchase, and honest distribution of scarce goods or to mitigate the impacts caused by following EU sanctions. The ECN will not actively oppose strictly necessary and temporary measures to achieve these goals. The ECN recognizes that competition remains important, and the war should not be an opportunity to undermine an equal playing field between competitors. ECN will not allow any artificial surges of prices or reduced production because of cartels or the abuse of power.

5. *EU reaches agreement on Digital Markets Act (DMA).*

On March 24, a landmark agreement was reached between the European Parliament and the Member States on the DMA. With this agreement, the DMA aims to comprehensively regulate the gatekeeping power of the largest digital companies. It is anticipated that the finalized text will be voted upon in September and would become applicable at the beginning of 2023. The new rules will complement competition law at the EU and national level. Together with the Digital Services Act, the DMA is part of reform that aims to ensure a safe and accountable online environment.

Greater China

A. Munich Re Fined for Failure to Notify of a 2019 Acquisition of a Partial Stake in Covanta Europe

On Feb. 14, 2022, the State Administration for Market Regulation (SAMR) published its decision imposing administrative fine against Munich Reinsurance Group (Munich Re) for, without notifying SAMR, acquiring a 15% stake in Covanta Europe Assets Limited (Covanta Europe), an energy operator running a waste-to-energy facility in Dublin. It is an exceptional case of SAMR investigating and penalizing an offshore transaction when the target of acquisition has no identifiable China operation.

Before the acquisition occurred in 2019, SAMR found that DIF Infrastructure V Cooperatief U.A. (DIF) held a 40% interest in Covanta Europe, with Green Investment Group Limited (GIG), and Covanta Holding Corporation (Covanta Holding) holding the remaining interests Munich Re entered into a share transfer agreement with DIF, acquiring 15% equity interest of DIF's interest in the target. The same decision passed the European Commission's review in September 2019.

In the published decision, SAMR cited the 2018 global and China turnovers of each of Munich Re, Covanta Europe, and GIG, and found the transaction fell within the definition of a reportable transaction because the global and Chinese turnovers of Munich Re and GIG in 2018 had reached the thresholds. As background, a concentration would be reportable under China's Anti-Monopoly Law (AML) if, among other things, at least two business operators concerned have China-originating turnovers in the previous year each exceeding RMB400 million (approximately US$62.5 million). Notably, SAMR cited China turnovers of Covanta Europe, but the exact number was omitted for confidentiality purposes. Therefore, whether Covanta Europe had a meaningful China operation at the time of the transaction was not known.

SAMR further found that, by acquiring a 15% equity interest in Covanta Europe, Munich Re gained joint control over the target with all existing shareholders, and despite no found competition concerns, the failure to notify SAMR in advance of the transaction constituted a violation of the AML. SAMR thus fined Munich Re RMB300,000 (approximately US$46,000).

B. Swiss Pharma's China Subsidiary Fined for Resale Price Maintenance

On Feb. 28, 2022, the Beijing Municipal Administration for Market Regulation (Beijing AMR) published a penalty decision, finding that Geistlich Trading (Beijing) Co. Ltd. (Geistlich Beijing), a wholly owned subsidiary of the Swiss-based Geistlich, breached China's AML by illegally fixing the resale price of Geistlich's dentistry-related products. China's AML prohibits resale price fixing, a category of vertical monopoly agreements.

According to Beijing AMR, Geistlich Beijing imported the products from Geistlich and sold most of them to hospitals in China through distributors at multiple levels. Beijing AMR found that Geistlich Beijing reached resale price fixing agreements with its distributors through written contract and policy, holding conferences and online and verbal communications with distributors.

In particular, Beijing AMR found that Geistlich Beijing included a provision in its distribution agreement from 2008 to 2018 prohibiting the distributors from selling the products at a price lower than the recommended resale prices Geistlich Beijing set, and circulated written policy requiring Geistlich Beijing to approve in advance all online retail prices. Geistlich Beijing was found to have implemented a loyalty program awarding distributors who had complied with the resale price policy, and to have monitored the implementation through means including visiting end-users. In 2017 and 2018, certain distributors were found to have been disciplined by Geistlich Beijing for violating the resale price policy, and their purchase price from Geistlich Beijing was increased as a result.

Geistlich Beijing argued that the resale price was not effectively implemented, citing examples of resale prices which were actually lower than its recommended price. Beijing AMR rejected this argument on the grounds that the price deviations were too infrequent to countervail the persistent price-fixing practice described above.

Beijing AMR also found that Geistlich Beijing's practice had an anti-competitive effect, including reduced market competition and impaired consumer interest, noting that the end price sold to hospitals was maintained at a high level during the past five to 10 years, and no price reduction was ever made during said period.

As a result, Beijing AMR fined Geistlich Beijing 3% of Geistlich's total 2020 revenue in China, which amounts to RMB 9.12 million (approximately USD1.43 million).

C. Supreme People's Court Finds Patent Settlement Arrangement Between Competitors to be an Illegal Cartel

The Supreme People's Court of China (SPC) in a recent appellate review rendered a patent settlement agreement between two competitors invalid, as it constituted an illegal cartel.

In 2015, to settle a patent dispute, Wuhan Taipu, a manufacturer of no-load tap changers (NLTC), and the patent holder entered into an agreement with Shanghai Huaming, a manufacturer of both NLTC and on-load tap changers (OLTC), that allegedly infringed Wuhan Taipu's patent. In the settlement agreement, Shanghai Huaming promised that, in the Chinese market, it would focus on manufacturing a particular model of NLTC, and refrain from manufacturing other models, and in non-China markets, it would distribute only Wuhan Taipu's NLTC products but not other tap changers. Shanghai Huaming further agreed to engage Wuhan Taipu to manufacture main components of such other models at a predetermined price. Liquidated damages equaling 300% of the total invoiced value under the settlement agreement were agreed upon in case Shanghai Huaming breached any of the said covenants.

In 2020, Shanghai Huaming brought a case against Wuhan Taipu, challenging the enforceability of the settlement agreement under China's AML. The local court rejected the case, finding the agreement enforceable given that, among other reasons, "the said covenants aimed to prevent future patent infringement (by Shanghai Huaming)". Shanghai Huaming petitioned for appellate review by SPC.

In its decision, SPC opined that the two companies are competitors in the NLTC market, and further held the said covenants constituted an illegal cartel. Specifically, SPC held that Shanghai Huaming's covenant not to manufacture other models of NLTC in the Chinese market and not to distribute other products in non-China markets amounted to illegal divisions of the sales market. It also held that the same covenant constituted illegal restriction on sales volume, as it effectively locked Shanghai Huaming's output. In addition, Shanghai Huaming's agreement to engage Wuhan Taipu to manufacture main components of such other models at a pre-agreed price was found to be "very likely" to result in a fixation of sales price—as SPC opined, once the supplier of such main components and the supply price were predetermined, the final sales price was largely fixed. All such behavior, including division of sales market, restriction on sales volume, and price fixing, are specified categories of cartel acts under AML, all considered to be anti-competitive and thus illegal.

Notably, SPC went on to refute the lower court's reasoning, indicating that Wuhan Taipu's patent related to a modification to NLTC only, not an essential patent covering all models of NLTC. By entering into the settlement agreement, the parties classified NLTC into different models. These different classifications bore no relation to the patent at issue and exceeded the scope of the patent. Consequently, the agreement was held to be an abusive use of Wuhan Taipu's patent right, which cannot be used to justify the cartel acts.

Citing that the prohibition against cartel acts under AML is of a mandatory nature, SPC reversed the lower court's decision and held that the settlement agreement was invalid in its entirety.

Japan

A. Japan Fair Trade Commission (JFTC) orders JPY 1.7 billion surcharge payment against 24 companies in bid-rigging matter.

As discussed in the December 2021 Competition Currents, the JFTC investigated suspected violations of the Anti-Monopoly Act (unreasonable restraint of trade, bid-rigging) in prints and/or deliveries of notices regarding the Japanese national pension system. The JFTC concluded that the companies involved determined who would be awarded the contract and made it possible for the prospective contractor to be awarded the contract. Based on the foregoing, on March 3, 2022, the JFTC officially issued a surcharge payment order of JPY 1.7 billion against 24 companies and a cease and desist order against 25 companies.

B. JFTC issues cease and desist orders and JPY 14.8 million surcharge payment orders.

JFTC issued cease and desist orders and surcharge payment orders against participants in biddings for specific electronic security services ordered by the public offices in Gunma Prefecture. JFTC found the participants substantially restrained competition in the field by, in concert with one another, designating prospective bidders and cooperation by persons other than the prospective bidder to enable the prospective bidder to receive the order. Four companies were subject to the surcharge payment order in the total amount of JPY 14.8 million. JFTC found a total of seven companies violated the Act, but one of the seven companies stopped and reported the violation in advance through the leniency system, thereby avoiding administrative penalties.

Read previous editions of GT's Competition Currents Newsletter.

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