GT Newsletter | Competition Currents | May 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 final order prohibiting Louisiana Real Estate Appraisers Board from fixing prices for appraisal services.*

On April 5, 2022, following the conclusion of a public comment period, the FTC announced its approval of its May 2017 settlement with the Louisiana Real Estate Appraisers Board (LREAB). The 2017 complaint alleged LREAB had restrained price competition for appraisal services in Louisiana by setting appraisal rates. Per the final order, LREAB is prohibited from setting a fee schedule for appraisal services or otherwise setting fees for appraisal services.

2. *FTC extends public comment period for request for information on impact of pharmacy benefit managers.*

On April 13, 2022, the FTC announced an extension until May 25, 2022, of the public comment period on its request for information relating to pharmacy benefit managers (PBMs). On Feb. 24, 2022, the FTC announced it was soliciting public input on the ways that PBM practices are affecting drug affordability

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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 information related to contracts, fees, pricing, and consolidation in the industry.

3. *Statement regarding Texas jury's verdict that former owner Neeraj Jindal obstructed FTC's investigation into physical therapy staffing company.*

On April 14, 2022, a federal jury in Texas found Neeraj Jindal, a former owner of a physical therapy staffing company, guilty of obstructing an FTC investigation into alleged antitrust violations by the company. The FTC had referred the case to the DOJ. Regarding the verdict, Holly Vedova, director of the FTC's Bureau of Competition, stated: "[t]oday's guilty verdict should serve as a warning to companies and their top executives that contemplate obstructing FTC investigations. The FTC will continue to work closely with the DOJ and will not hesitate to refer companies and executives for criminal prosecution for obstructing FTC investigations and threatening the Agency's ability to protect competition and American consumers."

4. *FTC preserves competition for development and marketing of steroid injectable drug.*

On April 19, 2022, the FTC announced a consent decree relating to Hikma Pharmaceuticals PLC's acquisition of Custopharm, Inc. Under the consent decree, which is subject to public comment, Custopharm's parent company, Water Street Healthcare Partners, LLC, must retain the assets related to Custopharm's triamcinolone acetonide (TCA), an injectable steroid used to treat skin conditions, allergies, and inflammation. The FTC found there are two competitors currently marketing generic injectable TCA, with Custopharm receiving FDA approval to market its injectable TCA product in 2022, and with Hikma having an injectable TCA product in its pipeline. The FTC had concluded this remedy was necessary in order to preserve competition in the TCA market and prevent price increases.

5. *FTC requires Prince and Ferro to divest three facilities amid concerns deal would increase concentration in North American market for porcelain enamel frit.*

On April 21, 2022, the FTC announced it would enter into a consent agreement allowing Prince International Corp. (whose parent company is American Securities Partners VII, L.P. (APS)) to acquire Ferro Corp., with divestitures. Under the consent agreement, Prince is required to divest three of its facilities that make porcelain enamel frit (an ingredient in coatings for appliances), glass enamel (a product added to glass surface for color), and forehearth colorants (a product used to give glass bottles a color) to KPS Capital Partners, LP. The FTC found that Prince and Ferro were the two largest producers of enamel frit in North America, and that the world market for glass enamel and forehearth colorants was highly concentrated. The FTC concluded there are no real substitutes for these products and the proposed acquisition, absent the required divestiture, would eliminate competition from these two players, leading to price increases and making coordination among the remaining competitors more likely. The consent decree requires both APS and KPC to obtain prior approval from the FTC in future transactions involving these products and markets.

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B. Department of Justice (DOJ)

1. *DOJ opposes convicted canned-tuna market conspirator's petition to Supreme Court to review criminal conviction under Sherman Act.*

On March 30, 2022, DOJ filed a brief in opposition to the petition of Christopher Lischewski requesting U.S. Supreme Court review his criminal conviction under section 1 of the Sherman Act. Mr. Lischewski was convicted on one count of conspiring to fix prices in the canned-tuna market and sentenced to 40 months' imprisonment. The Ninth Circuit affirmed the conviction in July 2021. The issue presented, as summarized in the government's brief, was "[w]hether, in a criminal antitrust case, application of the rule that certain categories of anticompetitive conduct are per se violations of the Sherman Act's prohibition on agreements in restraint of trade, 15 U.S.C. 1, is consistent with the constitutional requirement that the government prove every element of a crime beyond a reasonable doubt."

2. *DOJ updates Leniency Policy, demonstrating its commitment to leniency process.*

On April 4, 2022, DOJ's Antitrust Division announced it had updated its Leniency Policy and issued a revised policy and updated set of FAQs. The Leniency Policy allows the first individual or company to self-report its involvement in an antitrust cartel to avoid prosecution if it cooperates with the Division's investigation and meets certain other conditions. The updates focus on requiring the corporate applicant to promptly self-report its wrongful conduct and undertake remedial measures. The Division also launched a new, dedicated email address to make it easier for companies and individuals to apply for leniency.

3. *Former Caltrans contract manager pleads guilty to bid-rigging and bribery.*

On April 11, 2022, the Antitrust Division announced that a former contract manager for the California Department of Transportation (Caltrans) had pleaded guilty for his role in a bid-rigging and bribery scheme involving Caltrans improvement and repair contracts. The plea agreement was entered in the Eastern District of California in Sacramento and detailed a conspiracy that began in 2015 and continued through 2019, involving rigging bids to favor companies the defendant controlled. The agreement also detailed bribes the defendant received as a state employee.

4. *DOJ unseals federal indictment in Florida, revealing charges against three defendants for conspiracy to rig bids for customized promotional products to the U.S. Army.*

On April 12, 2022, DOJ unsealed a federal indictment in Florida that charges three defendants with conspiring to bid rig for customized promotional products to the U.S. Army. The indictment also contains charges of conspiracy to defraud the United States. The allegations assert the defendants exchanged company bid templates and submitted false bids as part of a scheme to eliminate competition and secure sales for a pre-arranged winner. All three defendants are charged with violating the Sherman Act. The Procurement Collusion Strike Force, established in 2019, is assisting with the case.

5. *Labor markets remain high priority for DOJ despite recent setbacks in criminal prosecutions.*

In mid-April, the Division experienced setbacks in its efforts to criminally prosecute alleged antitrust violations in the labor market (below). Nonetheless, DOJ has indicated that pursuit of anticompetitive conduct in labor markets is among DOJ's highest priorities and it is not likely to discontinue these efforts. *See also* Attorney General Merrick B. Garland's remarks.

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On April 14, 2022, a jury in Sherman, Texas acquitted two health care staffing executives of several price-fixing charges relating to alleged agreements to share and fix nonpublic pay rates for physical therapists and their staff. In that case, *United States v Neeraj Jindal et al*., the defendants had been charged with participating in an illegal agreement to fix rates paid to therapists for treating home health agency patients in the Dallas/Fort Worth area. One of the defendants was convicted of obstructing the underlying FTC investigation.

C. U.S. Litigation

1. *Deselms v. Occidental Petroleum Corp.*, Case No. 2:19-cv-00243 (D. Wyo. Apr. 26, 2022)

Mineral owners filed a Section 2 monopsonistic practices claim against Occidental, alleging that it improperly excluded competitors from operating in the North DJ Basin of Laramie County to the detriment of the mineral owners. Plaintiffs alleged that because defendant had monopsony power for access to its landholdings, it could demand exorbitant royalty rates from potential developers, making development unprofitable and excluding competitors from the market, which negatively impacted the mineral owners' royalty payments. The court certified an issue class under Rule 23(c)(4) as to whether defendant had power in the relevant market and used that power to commit an antitrust violation by excluding competitors. The court, however, denied certification of a damages class because plaintiffs failed to present a damages model that matched their antitrust theory, which focused on class-wide impact of defendant's royalty rates.

2. *Host Int'l, Inc. v. MarketPlace, PHL, LLC*, No. 20-2848, 2022 U.S. App. LEXIS 11358 (3d Cir. Apr. 27, 2022)

Plaintiff won a bid for two retail concession spaces at the Philadelphia airport, intending to open a coffee shop in one location and a restaurant in the other. While negotiating the lease, the defendant landlord insisted on enforcing a "pouring-rights agreement" that gave it exclusive control over what brands of beverages vendors to sell at the airport. Plaintiff refused to comply with the landlord's attempt to enforce the "pouring rights agreements" and sued under Section 1 of the Sherman Act. The district court dismissed, and the Third Circuit affirmed, holding plaintiff lacked antitrust standing for two reasons. First, though Host argued that the attempted enforcement of the agreement constituted an exclusion from the Philadelphia airport, the court reasoned that host was not excluded—it simply walked away from a contract negotiation. Second, Host only alleged an injury to itself, not to competition as a whole in the airport. The Third Circuit also rejected plaintiff's tying theory, ruling that the landlord's control over the beverages sold at the airport stemmed from its role as landlord, not any market power over the tying product.

3. *PLS.COM, Ltd. Liab. Co. v. Nat'l Ass'n of Realtors*, No. 21-55164, 2022 U.S. App. LEXIS 11203 (9th Cir. Apr. 26, 2022)

Plaintiff and defendant were competitors in the market for real estate network services (multiple listing services (MLS). Most MLSs are controlled by defendant's members. Plaintiff's service launched in 2017 and was relatively successful. Two years later, defendant adopted a policy, referred to as the "Clear Cooperation Policy," requiring agents who posted listings on competing services to also post the listing on the appropriate MLS. Plaintiff challenged this policy as a violation of Section 1 of the Sherman Act and California's Cartwright Act. The district court dismissed, ruling that plaintiff had not alleged antitrust injury, but the Ninth Circuit reversed. Holding that the district court relied on an overly narrow definition of "consumer harm," the Ninth Circuit explained that "[b]usinesses that use a product or service as an input to provide another product or service can be consumers for antitrust purposes. Therefore, PLS was

not required to allege harm to home buyers and sellers to allege antitrust injury. Its allegation that the Clear Cooperation Policy harmed real estate agents—who are the consumers of PLS's and the MLSs' listing network services—may suffice." The court also ruled that the Clear Cooperation Policy plausibly constituted a per se group boycott because "coercing a competitor's suppliers to sell to that competitor only on 'unfavorable terms' constitutes a group boycott even if the competitors do not completely cut off the competitor's access to inputs it needs."

4. *Olean Wholesale Grocery Coop., Inc. v. Bumble Bee Foods LLC*, No. 19-56514, 2022 U.S. App. LEXIS 9455 (9th Cir. Apr. 8, 2022)

The Ninth Circuit, sitting en banc, affirmed a district court ruling certifying three subclasses of tuna purchasers who alleged a price-fixing conspiracy in violation of Sherman Act Section 1. The court explained that, in seeking certification, plaintiffs proved by a preponderance of the evidence facts needed to carry the burden of establishing Rule 23's requirements, meaning plaintiffs established that essential elements of the claim, including the antitrust violation and antitrust impact, were established through a common body of evidence, applicable to the whole class. The Ninth Circuit also stated that district courts may weigh competing expert evidence but may not deny certification merely because it considers plaintiffs' evidence unpersuasive. When individualized questions relate to whether class members have been injured, district courts must determine whether the individualized inquiries would predominate over common questions. But the court rejected the argument that a class cannot be certified because it potentially includes more than a de minimis number of uninjured class members, thus creating a split with at least the First and D.C. Circuits.

5. *Celestin v. Caribbean Air Mail, Inc.*, No. 20-1412, 2022 U.S. App. LEXIS 8508 (2d Cir. Mar. 31, 2022)

Plaintiffs, a putative class of nationwide and state specific classes, allege that in April 2011, Michel Joseph Martelly, the then-President-elect of Haiti, devised a "wide-ranging scheme" to impose fees and fix prices on money transfers, food remittances, and international calls between the United States and Haiti. According to Plaintiffs, because this scheme impacted U.S. citizens, federal antitrust and various state laws applied. In addition to Caribbean Air Mail, Plaintiffs sued the government of Haiti, the current president of Haiti, two former presidents of Haiti and several other companies, alleging that the prices and fees established under the "scheme" violated Section 1 of the Sherman Act. The district court dismissed the case based on the act of state doctrine. Reversing, the Second Circuit held that the act of state doctrine does not bar a claim merely because the claim turns on the propriety of official acts of a foreign sovereign. Instead, the doctrine applies only if the antitrust claim would require a court to declare that an official act of a foreign sovereign was invalid. The court explained that "[d]efendants have pointed to nothing in the antitrust claim that rests on the proposition that the Presidential Order and Circulars [the official acts allegedly providing for the price fixing "scheme"] are invalid. That conclusion is separate from the question of whether Defendants unlawfully agreed to fix the prices of remittances and telephone calls." Thus, the court reasoned, "[w]e may give the Presidential Order and Circulars their full purported legal effect and still conclude that Plaintiffs have plausibly alleged illegal price-fixing under the Sherman Act. That is so even assuming the facts establishing such collusion would also necessarily imply that the acts are void." The Second Circuit reversed the dismissal of the antitrust claim and vacated the dismissal of the plaintiffs' 15 state law claims for reanalysis under the proper standard as set forth in its opinion.

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The Netherlands

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

1. *The ACM requires further investigation for the acquisition of a waste-management company (AEB/ AVR).*

The Netherlands Authority for Consumers & Markets (ACM) has decided that the proposed acquisition of AEB by rival company AVR, both active in waste-management, will require further investigation.

Both AEB and AVR hold leading positions in the processing of large quantities of household and industrial waste. During the preliminary investigation, it was established that the proposed acquisition would result in higher prices for waste processing and low-level hazardous waste, reduction of quality and less innovation due to the competition being reduced.

The ACM has indicated that the filing for an acquisition license is required should the companies wish to proceed with the proposed acquisition and the continuation of the investigation by the ACM. This follow-up investigation would examine in greater detail the effects of the acquisition on the industry.

2. *ACM launches investigation into possible street-furniture and road-furniture cartel.*

The ACM is currently investigating the street-furniture and road-furniture market as it suspects that there has been contact between suppliers in relation to bids that would be submitted to government tender processes. The ACM conducted a dawn raid as part of this assessment.

According to EU and Dutch competition law, it is prohibited for undertakings to engage in price-fixing agreements, including during tender processes. Therefore, the ACM will investigate whether competition rules have been violated, in which case a fine would be imposed.

B. Dutch Courts

1. *CBb annuls decision of ACM on maximum tariffs imposed by Essent.*

On April 5, 2022, the Dutch Trade and Industry Appeals Tribunal (CBb) granted energy supplier Essent's appeal lodged against the ACM's imposition of maximum tariffs. The ACM established that some gas and electricity tariffs in 2018 were too high. The CBb decided that the ACM's assessment and investigation lacked diligence regarding the reasonableness of the tariffs. Moreover, the ACM had not clearly communicated to Essent the motivations for the tariffs. Therefore, the CBb annulled the ACM's decision and, as a result, Essent does not have to adjust the 2018 tariffs.

2. *CBb annuls ACM's penalty on rental agency.*

On April 19, 2022, the CBb annulled ACM's penalty on rental agency Duinzigt regarding Duinzigt's requirement that tenants pay registration costs and administration fees for tenants to move into residences. According to the ACM, this constituted an unfair trade practice, as Duinzigt acted contrary to professional standards in the sector.

Although the mediation costs are prohibited, CBb did not agree with the ACM's decision, as the tenants themselves should have acted against these prohibited mediation costs. The ACM is unable to enforce any unfair trade practice, which results in rental agencies being able to charge these fees if they are transparent about these costs.

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3. *District Court of Rotterdam dismisses appeal against KPN and APG's joint venture.*

On March 31, 2022, the District Court of Rotterdam allowed the joint venture between KPN – the Dutch incumbent telecommunications company – and APG – part of one of the largest pension administrators worldwide, and rejected the telecommunications company's appeal. According to the district court, the two companies have no overlap in activities and therefore will not restrict competition in the Netherlands. The joint venture will provide wholesale broadband access services on its own fiber optic network; it will not provide retail services.

United Kingdom

A. UK Competition Law Post-Brexit

1. *Post-Brexit UK action in relation to dominant pharma company.*

The European Commission's investigation of Aspen pharmaceutical company, started in 2017, concluded in October 2021 with Aspen's commitments to reduce its prices across the EU for six off-patent cancer drugs. The EU investigation had focused on Aspen's dominant position in the relevant market and the extent to which the prices it was charging for the drugs constituted an abuse of dominance. The European Commission accepted Aspen's undertakings to reduce prices of the six drugs by an average of around 73%, to guarantee supply of the drugs for five years and to continue supply, or allow other suppliers to use its marketing authorization, for a further five years. Although Aspen offered the undertakings when the UK was still an EU member, they did not become binding under EU law until October 2021, after the UK had left the EU. To ensure the content of the commitments also will apply in the UK, the UK competition regulator, the Competition and Markets Authority (CMA), worked with the UK National Health Service to secure undertakings from Aspen that make the UK elements of the commitments enforceable by the UK courts.

2. *New investigation: software supply.*

On April 27, 2022, the CMA opened an investigation of possible abuse of dominance in the market for the supply of management information software for schools. CMA is concerned that the main supplier of this type of software may be abusing its market dominance by requiring schools to move from one-year to three-year contracts without sufficient time to consider whether to move to an alternative provider, making it more difficult for its competitors to win business. In its announcement, the CMA indicated it was considering whether to impose interim measures, to suspend the move to three-year contracts until its investigation concludes.

B. Merger control

On March 29, 2022, the CMA blocked Cargotec's acquisition of competitor Konecranes, based on concerns the merger would harm competition in the supply of container handling equipment products in the UK by removing a significant competitor, reducing the number of alternative suppliers in the market. This is but one of a small number of deals the CMA has blocked recently.

In the meantime, the CMA announced April 7, 2022, that it was considering an offer of undertakings by a private equity manager, to avoid a reference to a phase 2 investigation of CDR's completed acquisition of Morrisons. Morrisons, one of the UK's major supermarket chains, operates gas stations next to its supermarkets. CDR also operates gas stations, 121 of which are in the same local areas as Morrisons gas stations. The undertakings would result in CDR divesting gas stations in some or all of those local areas.

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C. A step closer to reform of the UK competition and consumer protection regime.

On April 20, 2022, the UK government published its response to the results of its July 2022 consultation on reform to UK competition and consumer policy. It is due to publish a Consumer and Competition Bill in May 2022, with a large number of detailed and wide-ranging proposals. A summary of key legislative proposals follows:

1. ***General duty of expedition***: The CMA will have a statutory duty to conduct its competition and consumer cases as efficiently as possible, to reduce uncertainty and disruption for businesses.

2. ***Merger control***: There will be no change to the voluntary, non-suspensory nature of the regime. However, the government proposed the following changes:

   – Thresholds: The UK turnover threshold above which the CMA has jurisdiction to investigate will rise from £70 million to £100 million, while the alternative, share of supply, threshold remains at 25% for now, although the government is monitoring its operation and may reform it in future. An additional set of thresholds is designed to give the CMA jurisdiction over "killer acquisitions" and mergers not involving direct competitors where at least one of the merger parties has (i) a 33% or more share of supply of goods or service in the UK or a substantial part of it and (ii) a UK turnover of £350 million.
   – Small mergers – safe harbor: Mergers of parties that each have UK turnover less than £10 million will be exempt from review.
   – Procedure: Proposed enhancements to the CMA's merger procedures include the power to accept commitments earlier in the phase 2 process, making the merger fast track procedure more efficient and updating the CMA's obligation to publish its merger notice.

3. ***Antitrust***: The government aims to strengthen enforcement, to deliver faster and more flexible investigations that identify and resolve anti-competitive conduct more quickly. Proposed changes include the following:

   – *Evidence gathering*: The CMA will acquire the power to interview any individual as part of an antitrust investigation into a business, regardless of that individual's connection to the business being investigated. Firms under any antitrust investigation (not just cartel investigations) will be required to preserve evidence. The CMA will be able to seize and sift evidence when inspecting domestic premises under a warrant. The CMA will have greater powers to obtain information stored remotely.
   – *Interim measures*: CMA will no longer determine appeals against interim measures after a merits review, but on the basis of judicial review principles.
   – *Confidentiality rings*: These will be subject to a new framework that will include civil penalties for breach.
   – *Immunity from financial penalty*: Firms with revenues below £20 million, reduced from £50 million, will be immune from financial penalties for abuse of market dominance.
   – *Criminal cartels*: CMA powers to prosecute individuals for the cartel offense to be enhanced.
   – *Exemplary damages*: The UK courts and Competition Appeal Tribunal (CAT) will have discretion to award exemplary damages for breach of competition law.
   – *CAT ability to provide declaratory relief*: The CAT will be able to issue declarations as well as award damages.

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4. ***Market inquiries***: The CMA's power to investigate markets in which competition appears not to be working effectively and to impose remedies will be enhanced, including through improved procedures, more flexible and versatile remedies, and an ability to amend remedies for 10 years after publication of its conclusions.

5. ***General competition enforcement powers of the CMA***: Proposals to enhance the CMA's powers to impose penalties for breaches of procedural requirements include the following.

   – *Penalties on firms*: Firms failing to comply with any CMA investigative measure, for example, not responding to an information request or concealing, falsifying, or destroying evidence, risk a penalty of up to 1% annual worldwide turnover and a daily penalty of 5% of daily worldwide turnover for as long as non-compliance continues. Firms that breach CMA orders imposed and undertakings and commitments accepted risk a civil penalty of up to 5% of annual worldwide turnover and a daily penalty of 5% of daily turnover.
   – *Penalties on individuals*: The CMA may impose on individuals who conceal, falsify, or destroy evidence, or provide false or misleading information, a fixed penalty of up to £30,0000 and a daily penalty of up to £15,000 for as long as non-compliance continues.
   – *Cooperation with overseas competition authorities*: The CMA will have increased powers to share information with overseas competition authorities and will have the power to gather information on behalf of overseas authorities.
   – *Algorithms*: The CMA will have enhanced powers to test and verify whether the use of algorithms by businesses complies with UK competition law.

6. ***Consumer rights and CMA powers***: Existing consumer rights will be strengthened to include greater rights in relation to the following:

   – *Online subscriptions*: including pre-contract information, warnings regarding auto-renewal of subscriptions, free trials, introductory offers, and exit mechanisms.
   – *Fake reviews and online exploitation*: these will be treated as automatically unfair practices and will attract greater enforcement.
   – *Prepayment*: protection for consumers' money in savings schemes such as Christmas clubs will be strengthened.
   – *Package travel*: the existing rules will be updated and simplified.
   – *CMA decision-making powers*: the CMA will acquire the right to decide for itself, without applying to the courts, where consumer protection laws have been breached and impose remedies that include directions to change business practices and penalties very similar to competition law remedies.
   – *Alternative dispute resolution (ADR)*: the government will work on support for consumers in individual disputes with firms as part of its examination of new ways of mainstreaming ADR for all types of dispute.

These are not the only reforms the government has proposed to the UK competition and consumer protection regimes. The government is considering further reforms to the CAT's powers and procedures to ensure the appeal and damages cases it hears are handled more quickly, efficiently, and cheaply, and stricter controls over firms operating in digital markets.

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Poland

A. Telecom operators commit to reimburse consumers for services added without their explicit consent.

The Polish Office of Competition and Consumer Protection (UOKiK President) has issued decisions regarding telecommunications operators Netia, Orange, and P4's practices infringing collective consumer interests. To avoid administrative fines the telecom companies committed to reimburse consumers for the fees they charged to activate additional paid services such customers did not explicitly order. UOKIK's investigation showed that during contract conclusion or renewal (either online or offline), the company automatically activated additional services without explicit consumer consent, and it was incumbent on consumers to turn off such services before the end of the free usage period. The UOKiK President received numerous claims from consumers that they were not aware of such an obligation and were charged additional fees by telecoms companies.

The Consumer Rights Act requires companies that include additional paid services to secure the subscriber's express consent. According to the UOKiK President, the company does not fulfill this obligation by, at the very end of the process, providing consumers with information about the inclusion of services or telling consumers they must deactivate, when the contract's main terms and conditions have already been determined. The UOKiK President emphasized that a company may not imply consumer consent for additional paid services and that consumers should express consent as a "yes" or "no" statement to the operator's offer.

Under UOKIK's decisions, Netia, Orange Poland and P4 (Play) are obliged to change their practices and to compensate consumers for the costs charged for additional services. The decisions apply to current and former subscribers.

B. The UOKiK President investigates dietary supplement company Natural Pharmaceuticals.

The UOKiK President has launched proceedings against a company selling dietary supplements, accusing it of violating the collective interests of consumers. Consumers can order supplements online, over the phone, or by filling out a printed copy of a purchase order. In each case the UOKiK President has concerns regarding the sales process. These concerns include:

- Non-transparent information the company provides to consumers about participation in the annual supply program (subscription), as the company writes such information in small print at the bottom of the order form. With phone orders, the consultant reads out information very quickly, and the consumer does not participate actively in the conversation, which can make it difficult for them to make an informed purchasing decision.
- Presenting order confirmation in a way that may be misleading because after the consumer places an order online for a free product sample, the company shows the order confirmation page and, at the same time, a special offer for an annual supply of the product at a reduced price with a gift. The company presents information confirming the order of the free product in small print, while the button to confirm the order of the paid version of the supplement is highlighted. When the customer clicks the "Order" button, this confirms an order for the paid annual supply of the product; the customer can do this by mistake.
- Providing misleading information to make the purchase of the supplements seem credible to consumers. The company's advertisements referred to the European Food Safety Authority,

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even though this institution has not issued a recommendation for the products sold by Natural Pharmaceuticals. Also, the advertisements suggested that more than one million consumers were satisfied with a particular dietary supplement, while this information applied to the total customer base of the company, including those using free samples.

The UOKiK President also initiated proceedings to fine the person managing the company. This seems to be a new standard for such infringements.

C. AmeriGas gun-jumping case judgment.

On Feb. 16, 2022, the Court of Competition and Consumer Protection in Warsaw issued a judgment dismissing the appeal of AmeriGas Polska Sp. z o.o. The judgment concerns the UOKiK President's decision in which the authority fined AmeriGas approx. EUR 160,000 for acquiring control of the company Gas Distribution Center (Centrum Dystrybucji Gazu Sp. z o.o.) without obtaining the UOKiK President's prior consent.

AmeriGas and Gas Distribution Center entered into a lien agreement that guaranteed AmeriGas additional powers to influence key management decisions of Gas Distribution Center. In general, temporary acquisition or take-up by an undertaking of stocks or shares for the purpose of securing claims does not require a merger clearance decision, provided that the undertaking securing the claims does not exercise the rights in these stocks or shares, other than the right to sell them. In the case at hand, AmeriGas exercised these rights, e.g., by blocking the sale of an organized part of the assets of Gas Distribution Center, which was then partly acquired by AmeriGas. The court found that UOKiK President's position in the contested decision is correct. The evidence, the analysis of the contractual provisions, and the manner of their execution by AmeriGas all justified the assumption that AmeriGas obtained joint control over Gas Distribution Center and exercised it, and at the same time failed to notify the UOKiK President of the intention to concentrate.

Italy

A. Italian Competition Authority (ICA)

1. *ICA fines Italian associations for film distribution and screening for entering into an anti-competitive agreement aimed at preventing the distribution of movies to free movie arenas.*

On March 15, 2022, ICA fined the Associazione Nazionale Industrie Cinematografiche Audiovisive e Multimediali (ANICA) and the Associazione Nazionale Esercenti Cinema (ANEC), as well as its regional section, ANEC Lazio, a total of approximately EUR 90,000 for entering into an anti-competitive agreement, pursuant to Articles 101 of the Treaty on the Functioning of the European Union (TFEU) and Article 2 of Law no. 287/90, in the national market for film distribution and screening.

ANICA represents the Italian cinema and audiovisual industries, including national film distribution companies and Italian branches of major U.S. film studios, while ANEC brings together the Italian movie theaters operators.

According to ICA, the associations aimed to condition and direct the economic activity of their members towards free movie arenas, to obstruct distribution companies' issuing licenses and supplying movies. ICA highlighted that ANICA and ANEC had boycotted free movie theaters via guidelines and notices to their members, culminating in an April 2020 ANEC meeting where the distributors agreed not to supply films to free movie theaters.

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Several associations and companies that manage open-air movie theaters during the summer in Rome and Milan in underserved neighborhoods and small municipalities in other regions of Italy initiated proceedings.

On July 8, 2020, as a precautionary measure ICA suspended the contested conduct. ANEC and ANICA appealed the decision before the Regional Administrative Court of Lazio, which upheld ICA's decision. The complainants subsequently claimed that ANICA and ANEC failed to comply with the precautionary measure, leading the ICA to reactivate the preliminary investigation, which ended with the fines described above.

2. *ICA opens antitrust probe regarding suspected cartel among gas stations.*

On April 11, 2022, ICA announced an antitrust probe of allegedly anti-competitive conduct in breach of Italian competition law against 11 companies active (at least until 2021) in the business of gas stations in the custom-free area of the Municipality of Livigno.

The ICA's probe is based on the Antitrust Unit of the Italian Financial Police report, which was based on a report of a territorial Unit of the Italian Financial Police of Bormio.

The Italian Financial Police collected evidence that revealed what seemed to be coordination on fuel prices by the gas station in Livigno and coordination between 2012 and 2019. Evidence of coordination was further supported by the fact that, at least since 2014, all the gas stations belonging to the investigated companies consistently applied the same prices for gas and diesel.

Subject to further postponements, ICA's final decision is expected in June 2023.

3. *ICA fines leading ferry operator on the Strait of Messina almost EUR 4 million for imposing excessive prices on consumers.*

On March 29, 2022, ICA fined shipping company Caronte & Tourist S.p.A. for abusing its largely dominant position in the market for ferry transport of passengers with cars across the Strait of Messina, which separates Sicily from the Italian peninsula. The alleged abusive behavior consisted of the application of unjustifiably onerous prices for consumers.

ICA applied a two-stage test—derived from EU Court of Justice United Brands case-law—to determine whether the prices were excessive: (i) the tariffs applied to passengers with cars were disproportionate to the costs incurred (excessiveness); and (ii) such disproportion was unreasonable in relation to the economic value of the service provided (unfairness).

ICA found significant disparity between the revenues and costs of the shipping operator and prices, especially when compared with international benchmarks. In fact, the ferry operator applied much higher tariffs than comparable routes, in Italy and abroad, which offered significantly more advanced services. Caronte & Tourist's fleet was in fact characterized by a high average age (27 years), and most users judged the service poorly.

According to ICA, the alleged abuse was particularly serious, considering the economic power of Caronte & Tourist and the relevance of transport on the Strait of Messina, which is crossed by approximately 10 million people and cars every year. Therefore, ICA fined the company more than EUR 3.7 million. Caronte & Tourist may appeal the decision before Lazio's Regional Administrative Court within 60 days.

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European Union

A. European Commission

1. *EU General Court upholds air cargo decision by European Commission but also reduces several airline fines.*

The re-adopted air cargo cartel decision by the European Commission has been largely confirmed by the EU General Court. The European Commission imposed a fine totaling EUR 790 million. However, the EU General Court also reduced the fines imposed on six airlines for their role in the price fixing, given (i) issues related to the statute of limitations and (ii) the lack of participation in aspects of the cartel.

2. *European Commission appeals annulment of EUR 1 billion fine imposed on Intel.*

The European Commission challenged the annulment of the EUR 1 billion fine it imposed on Intel for dominance abuse. The EU General Court recently annulled the fine, as it found that the European Commission did not prove Intel's conditional rebates harmed competition. Even though the court rejected only part of the decision, it annulled the entirety of the fine because it could not establish which part of the fine related to the conditional rebates. As a result of this appeal, the Intel proceedings will continue.

3. *EU drops probe into Qatari gas supply agreements.*

The European Commission has decided not to proceed with its investigation into liquefied natural gas supply agreements between Qatar Energy and several European gas importers, as the evidence failed to show that these agreements contain anticompetitive restrictive clauses. The European Commission suspected that certain clauses in the supply agreements restricted, directly or indirectly, the freedom of suppliers to supply Qatari gas in the EEA. However, the collected evidence during its almost four-year investigation was not sufficient to establish such restriction.

4. *European Commission conditionally approves proposed acquisition between two leading global aerospace component suppliers.*

The European Commission has approved Parker's proposed acquisition of Meggitt subject to Parker's full compliance with certain commitments. Both companies are leading suppliers of global aerospace components.

According to the Commission, the transaction would have resulted in the merged entity becoming the largest supplier in the relevant markets and would reduce the already limited number of suppliers. To alleviate the concerns, Parker will divest the entire aircraft wheels and brakes division to maintain the current level of competition on the market. As a result, market overlaps in the design, manufacturing, and supply of aircraft wheels and brakes will be removed.

5. *European Commission approves proposed acquisition of Landal by Roompot.*

The European Commission has approved Roompot's proposed acquisition of Landal. Landal is an owner, manager, and franchisor of holiday parks, and Roompot manages, operates, and acts as a booking agent for holiday parks and campsites, with both companies operating in the Netherlands.

In 2021, the European Commission referred the assessment relating to the effects of the proposed acquisition on the relevant markets in the Netherlands to the ACM. The Commission's April 19, 2022,

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decision relates to its assessment of the proposed acquisition's effect outside of the Netherlands. The Commission concluded that there would be no antitrust concerns due to the presence of many alternative holiday parks. This is noteworthy, as the ACM decided earlier that further investigation was needed due to the proposed acquisition leading to an overly strong position in the Netherlands holiday parks market.

6. *EU drops another Phase II probe due to deal collapse.*

After an in-depth Phase II probe into the merger, Kingspan has abandoned its acquisition of Trimo from Innova Capital. Both Kingspan and Trimo are leading suppliers of high-quality mineral fiber sandwich panels. The European Commission found that Kingspan and Trimo are direct competitors in several European countries, that the acquisition would result in even higher market shares, and that remaining competitors would hold significantly smaller market shares. The European Commission established that the proposed acquisition would lead to restriction of competition in the EU and would negatively affect sustainability objectives. Trimo was subsequently sold to rival Recticel.

7. *European Commission and Germany raid multiple companies in natural gas sector due to possible abuse of dominance.*

Suspecting dominance abuse, both the European Commission and the German national competition authority (the *Bundeskartellamt*) conducted dawn raids on multiple natural gas companies, including Gazprom. The investigation will probe whether these companies increased their gas prices in violation of EU competition law and whether they are to blame for the current energy crisis. The companies reportedly show unusual business behavior and restrict the supply of gas into Eastern Europe.

8. *European Commission launches in-depth investigation into Kronospan's proposed acquisition of Pfleiderer Polska.*

The European Commission has launched a Phase II investigation into Kronospan's proposed acquisition of Pfleiderer Polska, leading suppliers of wood-based panels in Europe. The Commission's main concern is that the transaction would result in a reduction of competition regarding the supply of various types of woodboard panels in Poland and neighboring regions.

Greater China

SAMR Penalizes Non-Chinese Buyers for Failure to Report Acquisitions of China Assets

On March 28, 2022, the State Administration for Market Regulation (SAMR) published decisions holding that two Apollo asset management vehicles failed their obligation under China's Anti-Monopoly Law (AML) to obtain merger clearance with SAMR for acquisition of China-based businesses.

The penalties against Apollo relate to two equity acquisitions of real estate companies operating China-based assets, although these two transactions were closed a few years ago. In 2017, one Apollo vehicle based in BVI acquired 45% equity interest in Guangri, a BVI-based holding company that indirectly owns and operates industrial real estate in Shanghai, and in the same year, another Apollo vehicle based in Delaware acquired 50% equity interest in Weixun, another BVI-based holding company that indirectly owns and operates industrial real estate in Suzhou, China. The seller in both cases were Gemdale Properties & Investment, a leading real estate developer in China. In both cases, Apollo was found to have gained joint control with Gemdale over the targets, and since Apollo and Gemdale's revenues have crossed the thresholds, SAMR found that Apollo failed in its obligation to report the transaction to SAMR before

closing the transactions. Though SAMR did not find an anti-competition effect, it still fined Apollo RMB 400,000 in each case for failure to report.

Japan

A. JFTC releases report on investigation into credit card companies' interchange fees.

The Japan Fair Trade Commission (JFTC) has been investigating the actual condition of interchange fees—i.e., the fee charged to merchants for processing credit card payments, and on April 8, 2022, the JFTC released its findings. Given disclosure of the standard rate of interchange fees in over 60 countries, the JFTC stated it is appropriate for international credit card brands to disclose their standard rates of interchange fees in Japan. The JFTC said that once standard rates were made public, the settlement commission for merchants would be lowered because negotiations between merchants and credit card companies (i.e., acquirers) or competitions among credit card companies (i.e., acquirers) would occur more frequently based on standard rates. Additionally, the JFTC pointed out that clauses such as prohibiting surcharges, cash discounts, steering, and the unilateral alteration of contractual terms may violate the Antimonopoly Law.

B. JFTC moves to strengthen review of giant IT Acquisitions.

The JFTC has established a specialized department to strengthen its review of mergers and acquisitions. Specifically, as of April 1, 2022, JFTC created a new department dedicated to economic analysis. While the JFTC has already had a market analysis team, members held multiple roles and were often assigned to other cases.

The JFTC reviews about 300 merger proposals and investigates whether there is a risk of restricting market competition. For these reviews, economic analysis is a key tool to determine how much competition will increase or decrease as a result of the merger. The IT industry is characterized by the capturing of customer data to increase the convenience of services and is prone to market monopolization. Therefore, market analysis is becoming increasingly important.

Read previous editions of GT's Competition Currents Newsletter.

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