GT GreenbergTraurig

GT Newsletter | Competition Currents | June 2022

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 orders Medtronic to divest Intersect ENT.*

On May 10, 2022, the FTC ordered Medtronic, Inc. to divest a subsidiary of Intersect ENT, Inc. as a condition of Medtronic's proposed acquisition. The subsidiary, Fiagon, which makes ear, nose, and throat (ENT) navigation systems and balloon sinus dilation products, will be sold to Hemostasis, LLC. The FTC was concerned the deal otherwise would lead to higher prices and reduced innovation in the ENT market. Under the terms of the FTC's Proposed Order, Medtronic and Intersect must divest the entire Fiagon business to Hemostasis no later than 10 days after Medtronic acquires Intersect. Additionally, Medtronic and Intersect must obtain prior FTC approval for 10 years before buying ENT navigation systems and balloon sinus dilation assets to address any future attempts to consolidate those markets. In addition, Hemostasis must obtain prior approval for three years before transferring any of the divested assets to any buyer, and for seven additional years before transferring any divested assets to a buyer that manufactures and sells ENT navigation systems or balloon sinus dilation products.

2. *Alvaro Bedoya sworn in as an FTC commissioner*.

On May 16, 2022, Alvaro Bedoya was sworn in as an FTC commissioner for a term that expires Sept. 25, 2026. Bedoya was the founding director of the Center on Privacy & Technology at the Georgetown University Law Center, where he was a visiting professor of law. He has been influential in research and policy in the areas of privacy and technology, with an emphasis on law enforcement and the risks that technology poses to privacy, civil liberties, and civil rights. Bedoya previously served as chief counsel to the Senate Judiciary Subcommittee on Privacy, Technology and the Law, and counsel and chief counsel to former Sen. Al Franken (D-Minnesota).

3. *FTC announces inquiry into infant formula shortage*.

On May 24, 2022, the FTC announced the initiation of an inquiry into the ongoing infant formula shortage in the United States. The FTC is seeking information and public comment on the nature and prevalence of any deceptive, fraudulent, or otherwise unfair business practices aimed at taking advantage of families during the infant formula crisis. It also aims to shed light on the factors that have led to concentration in the infant formula market and the fragility of the supply chains for these crucial products. The FTC's request for information also seeks public input on whether the FTC itself or state or federal agencies may have inadvertently taken steps that contributed to fragile supply chains in the market for these products. The FTC's study will examine the pattern of mergers and acquisitions in the infant formula market to better understand current concentration, how it came to be, and how that should inform future merger reviews.

4. *FTC announces virtual workshop related to pharmaceutical industry*.

On May 31, 2022, the FTC announced a two-day virtual workshop to be held June 14 and June 15, 2022, to explore new approaches to enforcing the antitrust laws in the pharmaceutical industry. The sessions will examine new learning about competition in the pharmaceutical industry and will assesses whether current enforcement approaches accurately reflect marketplace conditions. The workshop is the culmination of the work of the Multilateral Pharmaceutical Merger Task Force, formed in March 2021 by then-Acting Chairwoman Slaughter. Task force members include staff from the FTC, the Department of Justice Antitrust Division, Offices of State Attorneys General, Canada's Competition Bureau, the European Commission Directorate General for Competition, and the UK Competition and Markets Authority.

B. Department of Justice (DOJ)

1. *Grupo Verzatec S.A. de C.V. abandons proposed acquisition of Crane Composites*.

On May 26, 2022, the DOJ's Antitrust Division announced Grupo Verzatec S.A. de C.V. had abandoned its proposed acquisition of Crane Composites, a wholly owned subsidiary of Crane Co. According to the DOJ, the proposed transaction would have eliminated intense competition between Verzatec and its biggest competitor, Crane, allowing Verzatec to dominate the industry and harm American businesses. On March 17, the Division filed suit in federal court alleging that the proposed $360 million transaction would harm competition in production and sale of pebbled fiberglass reinforced plastic wall panels, whose product and performance characteristics make it the preferred wall covering for many restaurants, grocery stores, hospitals, and convenience stores in the United States.

2. *Military contractor indicted for rigging bids*.

On May 20, 2022, a federal grand jury indicted a military contractor for rigging bids on public military contracts and otherwise defrauding the United States in relation to projects in Texas, Michigan, and California. According to the indictment, defendant Aaron Stephens and multiple co-conspirators agreed to rig bids on certain government contracts to give the false impression of competition while securing government payments. The indictment recounts two different schemes involving eight military contracts, ultimately garnering $15 million in payments from the government. Filed in the Eastern District of Texas, the indictment contains one count of bid rigging in violation of the Sherman Act and two counts of conspiracy to defraud the United States and follows several indictments and plea agreements in March and April based on other alleged anticompetitive conduct in the U.S. government contracting process.

C. U.S. Litigation

1. *Broiler Chicken Grower Antitrust Litigation (No. II),* Civil Docket 6:20-md-02977 In the U.S. District Court Eastern District of Oklahoma.

Koch Foods Inc. has agreed to pay $15.5 million to settle a class-action lawsuit that claimed chicken processors colluded to fix wages paid to farmers and limit production volumes. According to the class plaintiffs, Koch and the other defendants engaged in a scheme to drive down compensation for chicken farmers, who are mostly immigrant workers, turning them into permanently indebted "modern-day sharecroppers." Koch represents about six percent of the relevant poultry market among the defendants. Two other defendants settled their claims in February for a combined $36 million. As part of the settlement, Koch has agreed to refrain from enforcing class action waivers for five years.

2. *Tonkawa Tribe of Indians of Oklahoma, et al., v. Scientific Games Corporation et al*.; Civil Action No. 1:21-cv-04626; In the United States District Court for the Northern District of Illinois.

A district court judge ruled that a pair of Native American casinos must take to arbitration their proposed class action alleging that Scientific Games Corp. (SG) monopolized the market for automatic card shuffling machines causing a price injury to casinos that lease the machines. Plaintiffs alleged that the defendant's predecessors obtained two patents in 2003 and 2009 by fraudulently concealing known prior art from the U.S. Patent and Trademark Office, and then asserted the invalid patents against rival companies. Plaintiffs alleged that those lawsuits forced multiple competitors out of the market, directly affecting the price of automatic playing card shufflers for casinos. Several competitors sued SG, and in August 2018, they obtained a $315 million verdict. Plaintiffs here filed suit to take advantage of the adverse ruling against SG. However, years before plaintiffs' suit, the casinos entered into lease agreements with Bally, which was ultimately acquired by SG. Those leases all contained a binding agreement to arbitrate "any and all" disputes that came about from the lease. Plaintiffs opposed arbitration, stating that the lease terms waived the treble damages available for antitrust cases, making the arbitration clauses void as against public policy. The court disagreed, finding that the agreements "do not expressly prohibit plaintiffs from recovering federal statutory remedies, including treble damages, under the Clayton Act."

3. *Leeder v. Nat'l Ass'n of Realtors*, No. 21-cv-430 (N.D. Ill. May 2, 2022).

The National Association of Realtors (NAR) and four top brokerages avoided antitrust litigation by home buyers over the structure of the residential real estate industry. The home buyers alleged the broker fees were set at an artificially high level, resulting in sellers inflating home prices to cover the commissions. The court in Chicago ruled that their allegations duplicated a parallel case filed by home sellers with stronger legal claims. The court dismissed the home buyers' claims shortly after a Missouri court certified

a class of home sellers. According to the Illinois court, the home buyers were indirect purchasers, and the home sellers were better positioned to attack the way NAR and other brokerages established their broker fees. Multiple other suits involving the industry remain pending, and NAR is subject to a Justice Department probe into home-listing policies.

The Netherlands

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

1. *ACM imposes fine for gun-jumping*.

The Netherlands Authority for Consumers and Markets (ACM) fined modular building rental company Modulaire Group and its subsidiary Algeco EUR 1.85 million for "gun-jumping," i.e., implementing a notifiable concentration that was not filed with the agency.

The Modulaire Group's turnover exceeded the thresholds for merger notifications in the Netherlands, resulting in a notification obligation regarding the acquisition. However, Algeco only notified the authority after it acquired the competitor. The ACM unconditionally cleared the acquisition afterwards because it found the deal did not harm competition. Given the companies' extensive cooperation during the investigation and their decision to rectify the breach, ACM reduced the fine by 35%.

2. *ACM approves DELA's sale of crematoria to Funecap*.

On May 10, 2022, the ACM approved funeral company DELA's sale of seven crematoria to Funecap, with DELA meeting the conditions for the ACM's approval of the acquisition of Yarden.

On Aug. 3, 2021, the ACM determined that Funecap's acquisition of funeral home Yarden from DELA would result in too few options of funeral homes in nine regions in the Netherlands. To remedy these concerns, the parties to the transaction offered to divest several Yarden and DELA crematoriums in different regions.

ACM previously approved the divestment of the crematoriums of Yarden. The ACM now has approved the divestment of the crematoria of DELA to Funecap, a large French funeral home company entering the Dutch market with the purchase of these crematoria.

3. *ACM warns suppliers against restricting freedom in setting prices*.

After receiving several reports about suppliers imposing minimum prices on retailers, the ACM warned certain undisclosed suppliers against illegally influencing the retail prices of their products. According to the ACM, suppliers can only give retailers non-binding recommendations regarding selling prices, because binding advice will limit competition in the relevant markets. ACM states that retailers should be able to set prices so they can compete fairly with each other, and consumers can choose the best price for the goods or services. The warnings give suppliers an opportunity to remedy any violations.

4. *ACM approves Boni's acquisition of eight Plus supermarkets*.

The ACM determined that supermarket chain Boni may acquire eight Plus supermarket stores as part of the divestment package the parties offered for the merger between Plus and Coop. In December 2021, the ACM approved the merger between Plus and Coop on the condition that 12 stores would be divested to a third-party competitor.

B. Dutch Courts

1. *Hague Court of Appeal finds two parties abused their dominant positions.*

On May 24, 2022, the Hague Court of Appeal ruled that Buma/Stemra, the Dutch collecting society for composers and music publishers, violated competition law by abusing its dominant position by applying different conditions for the same performance. Members of ABMD, an interest group for background music suppliers, pay a license fee per customer for the business use of background music according to the Buma/Stemra determined rate. Buma/Stemra charges ABMD members a higher fee for distributing music than the fee it charges consumer streaming services, which are used for playing music in business premises.

According to the Court of Appeal, Buma /Stemra abused their dominant position through (a) a fee for making music available for commercial playback but not for streaming services, while (b) issuing licenses to undertakings for commercial playback without making a distinction between whether the supplier had paid a fee for making music available or not. The Court of Appeal ruled that each new license renewal grant will have to contain a condition requiring that the license granted does not include the right to play for commercial purposes music a streaming service provided solely for private use. The inequality resulted, or at least was likely to result, in a competitive disadvantage within the meaning of the dominance abuse prohibition provisions of Article 24 of the Dutch Competition Act and Article 102 Treaty on the Functioning of the European Union.

United Kingdom

A. UK State of Competition

On April 29, 2022, the UK's primary competition regulator, the Competition and Markets Authority (CMA), published its second report on the state of competition in the UK. Because the first report was published in November 2020, this second report adds useful information on the state of competition in light of the COVID-19 pandemic, the UK's full independence from the EU starting January 2021, disruption to supply chains and shipping, and rising energy costs.

The CMA acknowledges that the strength of competition is not directly observable but can be inferred from the following indicators. Concentration in UK industries remains above pre-2008 crisis levels but has recently fallen, indicating a strengthening of competition that international trade may in part explain. However, the five largest firms' profitability in each industry, based on average price markups, is higher than before the 2008 crisis, and profitability is also higher for the 10% most profitable firms. In addition, the CMA has identified that the largest and most profitable firms have been able to sustain their strong position for longer than before. Where the same owners control in whole or part companies in the same market (the proportion varies significantly between industries), the CMA has identified weaker incentives to compete.

The report will inform the CMA's future policies and enforcement choices, which now will also need to take account of the impact of the war in Ukraine, in particular, on the cost of living in the UK.

1. *Digital – Preparation for Upcoming Ex Ante Regulation.*

CMA's second state of competition report assesses digital commerce. As mentioned in previous editions of Competition Currents, the UK government has been developing plans to introduce ex ante controls on large firms operating in this expanding and fast-moving space that underpins most commercial activities

in the UK. However, the UK legislative agenda for the next 12-month parliamentary session, announced by the UK government May 10, 2022, refers only to draft legislative proposals, in the form of a Digital Markets, Competition and Consumer Bill, and not to any timeline for the final legislation. Therefore, the legislation may not be debated and voted on for at least 12 months.

In anticipation of the legislation, the CMA has established a dedicated Digital Markets Unit (DMU), which is considering a number of digital market issues, alongside CMA investigations of big tech companies under the UK prohibition on abuse of market dominance.

In the meantime, on May 6, 2022, the CMA published joint advice the DMU and Ofcom prepared for the UK Department of Digital, Culture, Media and Sport in November 2021, on how a code of conduct could apply to the relationship between digital platforms and content providers such as newspapers. Ofcom is the UK's communications regulator and has concurrent competition powers with the CMA in the UK communications sector. The CMA and Ofcom advise that an enforceable code of conduct, whose requirements the DMU could set, could secure fair compensation for use of content in a number of ways, including by addressing concerns about the transparency of algorithms, giving publishers control over presentation and branding of their content, improving the sharing of user data, and providing a framework for determining fair financial terms for publisher content hosted on large platforms with significant market status.

B. Antitrust enforcement

1. *Vertical agreements*.

When the UK left the EU after the transitional period ending on Dec. 31, 2020, it retained a number of EU laws. One of these was the EU vertical agreements block exemption regulation, which exempts vertical agreements such as distribution and franchising agreements from the prohibition on anti-competitive agreements. This EU regulation will expire May 31, 2022, and will be replaced by a new UK vertical agreements block exemption order, adopted May 9, 2022, in force June 1, 2022, and expiring after six years on May 31, 2028. In the meantime, agreements that comply with the EU regulation will continue to be exempt for one year after its expiration.

The UK order preserves much of the EU verticals regime, while making changes that reflect market developments since the EU regulation was adopted in 2010. The order expands the types of dual distribution agreements covered by the exemption to include wholesalers and importers. Wide retail parity obligations, which require a supplier not to offer better terms through any other sales channel, including the supplier's own website, now will be treated as a hardcore restriction, meaning that the benefit of the exemption is withdrawn from any agreement containing these obligations. In addition, suppliers will be able to apply different terms, including pricing, for online and offline sales, and restrict the use of specified sales channels, without losing the benefit of the UK exemption. An unusual requirement in the UK order is that any party to a vertical agreement must provide information on the agreement to the CMA within 10 days of the CMA's request.

Detailed CMA guidance on application of the UK order, published in draft in March 2022 for a consultation period ending May 5, 2022, is due to be finalized before the UK order comes into effect June 1, 2022, but it may be delayed. There are differences between the new EU exemption regulation and the UK order that will require careful treatment when drafting vertical agreements designed to cover both territories.

2. *Dawn raids ramping up again*.

The CMA's Director of Enforcement has signaled an increase in the regulator's use of unannounced on-the-spot inspections to obtain access to the information it needs for cartel investigations. The end of the temporary suspension of these inspections, or dawn raids, during the pandemic is confirmed by recent activity, including dawn raids carried in March 2022 at the premises of several firms active in the recycling of end-of-life vehicles. The director also confirmed that the CMA would, where appropriate, conduct inspections at domestic premises, though these are likely to be rare.

3. *CMA enforcement focus: cost of living*.

The CMA's enforcement director has also highlighted the importance of addressing cost-of-living concerns, by using its competition enforcement power to control anti-competitive agreements and practices that raise prices unnecessarily and its consumer protection powers to control trading practices that are unfair to consumers— a recent example being terms and conditions that make it difficult for consumers to terminate online subscriptions.

4. *Supporting sustainability*.

Supporting the transition to low-carbon growth, including through the development of effective competitive markets, is one of the CMA's top five strategic objectives for 2022-2023. A previous edition of Competition Currents reported the CMA's investigation of an exclusivity award given to a single provider of electric-car-charging points at motorway services stations, which was resolved through commitments to reduce the duration of exclusivity, opening the relevant markets to more competition. In March 2022, the CMA began an investigation of anti-competitive arrangements among vehicle manufacturers and industry bodies in relation to the recycling of old or written-off cars and vans, which are required by law to be disposed of sustainably. The CMA's investigation is likely to last until at least the end of 2022.

5. *Appeal against CMA enforcement decisions – costs*.

On May 25, 2022, the UK Supreme Court ruled that the CMA was liable to pay costs Pfizer and Flynn Pharma incurred in their successful appeal to the UK Competition Appeal Tribunal (CAT) against competition law penalties the CMA imposed following an investigation into their pricing of epilepsy drugs. The CAT ordered the CMA to pay a proportion of Pfizer's and Flynn's costs. The CMA appealed to the Court of Appeal, arguing it was not liable, based on a 2000 case that said where a tribunal's power to make a costs order does not include an express general rule or default position, the starting point is that no order for costs should be made against a public body unsuccessful in the exercise of its statutory functions. The Court of Appeal agreed with the CMA, and Pfizer and Flynn appealed to the Supreme Court, which overturned the Court of Appeal's judgment and upheld the CAT's costs order as a proper exercise of its costs jurisdiction, arrived at after considering all relevant factors, including the CMA's argument that liability to pay costs would have a chilling effect on enforcement.

C. Antitrust litigation

1. *Collective proceedings – opt-in/opt-out?*

In January 2021, on behalf of British Telecommunications (BT) customers, claimants' representative initiated collective proceedings at the CAT for £589 million damages based on BT's alleged excessive landline pricing and overcharging. In September 2021, the CAT certified the claim in a collective proceedings order. At the same time, the CAT ordered the claim to proceed on an opt-out basis, which

entitled around 2.3 million customers to compensation. BT challenged the CAT's order in an appeal to the Court of Appeal, arguing among other things that there was a general preference for opt-in proceedings. The claimants' representative argued there was a preference for opt-out claims. On May 6, 2022, the court issued the first appellate decision to consider whether claims should be certified as opt-in or opt-out, finding that the legislative starting point is one of neutrality, not preference, and that the CAT was entitled to conclude that, if it ordered an opt-in, only a limited number of potential claimants would join. Even if those potential claimants could be identified as current or past BT customers and contacted with information about the proceedings, the large size of the class and the relatively low sums at stake could deter the take-up of opt-in proceedings. The court also found that the CAT was right to take account of the third-party litigation funder's preference for an opt-out claim, since the financial position of the claimants, including their ability to attract funding to make their claim viable, was a relevant factor. The trial is scheduled for early 2024.

2. *Collective proceedings – lawfulness of litigation funding*.

On May 27, 2022, the UK Supreme Court gave truck manufacturer DAF permission to appeal the CAT and Court of Appeal's respective dismissals of its application to strike out two competing collective damages claims. DAF argues that both claims are unlawful because the litigation funding arrangements that underpin them constitute damages-based agreements in the form of claims management services, which are unlawful and unenforceable in the context of collective claims. The claims are based on a 2016 cartel decision the European Commission issued against DAF and other truck manufacturers. The CAT has not yet issued a decision on their respective applications for a collective proceedings order.

3. *Collective proceedings – energy*.

On May 10, 2022, consumers made an application to the CAT to commence collective proceedings against cable manufacturers Nexans, NKT and Prysmian. The claim is for damages to compensate UK consumers for higher consumer electricity charges resulting from overcharges members of a long-running global cartel of cable suppliers to electricity network operators made. The claim is a follow-on action that relies on a 2014 European Commission cartel decision to prove defendants' liability.

D. Mergers

1. *Statistics*.

For the year April 1, 2021, to March 31, 2022, the CMA has published merger inquiry outcome statistics showing the Authority issued 55 Phase 1 decisions, an increase from 38 in the previous year. CMA cleared 33 cases unconditionally, six with conditions, one based on the de minimis size of the market affected; one merger was abandoned and four were found not to qualify for investigation. The CMA referred the remaining 10 to a Phase 2 inquiry; some of which had not yet been completed. Of the eight Phase 2 cases the CMA decided in 2021-22, CMA cleared two unconditionally, two subject to divestment remedies, and one merger was abandoned due to the Phase 2 reference. CMA blocked the remaining three, the most recent being Cargotec Corporation's acquisition of Konecranes on April 1, 2022 (*see* May 2022 Competition Currents).

2. *De minimis markets*.

The CMA has discretion to clear at Phase 1 a merger that affects a market or markets with a total value of under £15 million and would otherwise be referred to a Phase 2 investigation. The use of this *de minimis* exception is rare; CMA will not apply it where there is a clear remedy (invariably divestment) that can be

given to avoid a Phase 2 reference but may apply it where it considers that the public cost of a Phase 2 investigation outweighs the potential harm to consumers that may arise from the merger. On April 5, 2022, the CMA applied the exception and cleared Energystore's acquisition of Warmfill, notwithstanding that the parties were close competitors with a high combined market share. The merger affected two markets for insulation products in Northern Ireland whose aggregate value was between £5 million and £15 million. No clear divestment remedy was available, as the Northern Ireland businesses could not be separated from those in other jurisdictions. The CMA's analysis considered two significant factors: the merged business would be subject to constraints exercised by the Northern Ireland energy regulator, due to its control of sustainability funds that supported the installation of most of the insulation; and the competitive threat to the merged business from large multinational suppliers of insulation.

3. *"Failing firm" acquisitions.*

The CMA also may clear one competitor's acquisition of another where it is satisfied that the target would inevitably have exited the market in the absence of the merger and that no alternative, less anti-competitive purchaser could have operated the target business as a competitor. These cases are rare and require substantial and convincing evidence for this defense to succeed. A recent example, decided March 30, 2022, is the CMA's Phase 1 clearance of Freshways' acquisition of Medina. Both parties supplied fresh milk, cream and other dairy and grocery products in the UK, but Medina had been in financial difficulty for the previous five years. The CMA found Medina had breached key financial covenants in its financing agreements with lenders, had to delay payments to creditors, and had been unable to obtain refinancing. Restructuring to reduce costs, including reducing headcount, selling assets, taking measures to reduce distribution and procurement costs, renegotiating with key customers and obtaining debt write-offs from creditors had had only a temporary effect. The CMA also found that no alternative purchaser was available to operate the Medina business as a competitor. Its consultation with other competitors elicited no interest in purchasing the business or all its assets, and only speculative interest in purchasing piecemeal assets which would not mitigate the loss of competition arising from Medina's exit.

Poland

A. The first-ever judgment reversing Polish competition authority's prohibition of a transaction.

On May 12, 2022, the District Court in Warsaw (Court of Competition and Consumer Protection), announced a judgment amending in its entirety the President of the Office of Competition and Consumer Protection's (UOKiK President) Jan. 7, 2021, decision that prohibited Agora (one of the largest and best-known media corporations in Poland) from taking control over Eurozet Sp. z o.o. (one of the leading radio broadcasters in Poland) (the Transaction).

In 2021, the UOKiK President claimed the Transaction could lead to a "close-to-duopoly" situation, as the two leading radio groups (Agora (after acquisition of Eurozet) and competing radio group RMF FM) would have held an approximately 70% joint market share. According to UOKiK, the largest radio groups could then have coordinated their behavior to squeeze out smaller broadcasters.

However, the Court did not share the UOKiK President's concerns, agreeing with Agora's position and concluding that the Transaction would not significantly restrict market competition. The Court emphasized that the condition for issuing a decision prohibiting a concentration is to demonstrate a high probability of significant restriction of competition resulting directly from the concentration. To do so, according to the Court, the UOKiK President should consider various possible post-transaction scenarios, perform detailed analysis of economic circumstances related to each of the scenarios, and examine their

likelihood. Only then should it select the most probable outcome. In particular, the authority should not adhere to one hypothesis and reject evidence that does not fit such hypothesis. In the Court's judgment, the hypothetical scenarios the UOKiK President presented of entrepreneurs' coordination activities that may significantly restrict competition were speculative and not highly likely. In the Court's view, the hypotheticals were not based on the market realities and economic conditions established in the course of evidentiary proceedings.

Moreover, the Court established that the evidence did not demonstrate the Transaction directly triggered a change in market conditions that would likely lead to competitors abandoning competition in favor of mutual coordination and tacit collusion. In this respect the Court followed the well-established *Airtours* criteria (case T-342/99 *Airtours plc v Commission*) and concluded that conditions for coordination were not met. The evidence also did not confirm the hypothesis about the possible marginalization of competitors. The Court noted that such a squeeze-out scenario is conditional on the prior ability of coordination between the largest broadcasters and that in the present case, such coordination was unlikely. Further, the Court agreed with Agora's argument that listenership is the key parameter in determining a broadcaster's position in the radio advertising market, and the Transaction itself could not significantly increase market power since the listenership parameters of the radio stations will not be affected. The Court also noted that national advertising campaigns are usually organized to ensure relatively wide reach, as the ads should be communicated to millions of listeners; therefore, media houses in a majority of campaigns need to buy the airtime from at least four different radio groups. Thus, there was no significant risk of elimination from the market of the other radio groups that still have sizeable listenership parameters, or that target specific demographic.

It is the first-ever judgment in Poland where the Court fully reversed the UOKiK President's decision prohibiting a concentration and granted unconditional approval for a transaction. The Court's judgment is not final, and the UOKiK President may still appeal.

B. Polish speedway league on UOKiK President's radar for wage fixing.

The UOKiK President has launched antitrust proceedings against the Polish Automobile and Motorcycle Federation (Polski Związek Motorowy – (PZM)) and Ekstraliga Żużlowa (Speedway Ekstraliga). The latter company manages speedway competitions at the highest league level in Poland. PZM is a sports association responsible, in particular, for organizing speedway competitions in Poland. Speedway Ekstraliga manages competitions based on an agreement with PZM.

The UOKiK President is concerned with the organizational regulations PZM adopted in coordination with Speedway Ekstraliga, which regulations provide for maximum salary rates that Polish speedway clubs can pay their riders. The UOKiK President is investigating whether PZM and Speedway Ekstraliga's coordinated behavior could limit the ability of speedway clubs to compete for the best riders, and as a result reduce competition. According to the UOKiK President, none of the Ekstraliga clubs are permitted to offer a speedway rider a salary exceeding the amounts agreed in the regulations. As a result, clubs are deprived of an important element of rivalry for the best speedway riders. The effects of this practice may be more extensive than it seems because contracted riders have a direct influence on a club's market position, and as a result also on ticket sales and acquisition of sponsors.

The UOKiK President noted the alleged practice could also affect trade between EU member states because salaries in the Polish league could be used as a benchmark for other countries.

These are not the first proceedings of this type the UOKiK President has undertaken. The May 2021 Competition Currents highlighted that the UOKiK President had launched antitrust proceedings against the Polish Basketball League (PLK) and 16 basketball clubs competing in the PLK. The UOKiK President was investigating whether the PLK and basketball clubs coordinated their behavior with respect to their cooperation with basketball players. Furthermore, wage fixing and other agreements related to labor markets are starting to attract the European Commission's scrutiny as well. In 2021, Commissioner Margrethe Vestager signaled that the Commission will also pay attention to potential abuses in this respect.

Italy

A. Italian Competition Authority (ICA)

1. *Italian Competition Authority fines Leadiant Group approximately EUR 3.5 million for excessive prices in the pharmaceutical sector*.

On May 17, 2022, the Italian Competition Authority (ICA) fined Essetifin S.p.A., Leadiant Biosciences Ltd., Leadiant GmbH, and Sigma-Tau Arzneimittel GmbH, all belonging to the Leadiant Group, for abuse of dominant position by imposing excessive prices, in the Italian market for the production and sale of drugs based on chenodesoxycholic acid (CDCA).

CDCA is essential for the treatment of an ultra-rare disease, cerebrotendinous xanthomatosis, which causes severe disabilities and early death. Leadiant held a dominant position in the market for the production and sale of CDCA-based medicines, subsequently strengthened by the execution of an exclusive supply agreement (in 2008, renewed in 2016) with Prodotti Chimici Alimentari S.p.A. (PCA), the world leader for the supply of raw CDCA.

According to ICA, since 2017, Leadiant implemented an elaborate strategy aimed at exploiting its monopoly position to substantially increase its profit margins on CDCA-based products. In brief, Leadiant planned the launch of a specific drug for the treatment of cerebrotendinous xanthomatosis, CDCA Leadiant (L-CDCA), fully equivalent but aimed at replacing the off-label use of Xenbilox. Before obtaining the regulatory approval for the new product, Leadiant had increased the price of Xenbilox to prepare the market for the future price of the specific drug. In ICA's view, Leadiant had withdrawn Xenbilox and introduced the new product using separate companies and presenting the two products as different, to avoid the price caps on equivalent drugs in several European countries, such as Italy and Germany.

According to ICA, Leadiant then obstructed the negotiation of the price of the new product with the Italian Pharmaceutic Authority (AIFA), forcing the latter to accept a price for the sale of L-CDCA initially amounting to approximately 15,500 euros per pack, which was unjustifiably onerous compared to the original price of Xenbilox or galenic compounds, i.e., less than 100 euros per pack, considering the negligible research and development costs of the new product.

ICA fined Leadiant approximately EUR 3.5 million. The decisions may be appealed within 60 days before the Lazio Regional Administrative Tribunal.

2. *ICA ends an investigation into alleged anticompetitive agreement on price comparators with commitments*.

On May 11, 2021, ICA initiated an investigation into the major operators providing price comparison services and the major insurance companies for possible anticompetitive activity in the national non-life insurance market, motor third-party liability (MTPL) segment.

The companies involved allegedly coordinated their commercial strategies in the direct sale of MTPL policies, practicing mitigated discounts to end consumers thanks to mutual knowledge of the sales conditions offered to end consumers on the comparison portals. Specifically, the information exchange (e.g., the position of competitors on the price comparison portals, differences between offers quoted by the competitors, etc.) was allegedly achieved through the periodic sharing and discussion of reports the price comparison companies prepared and distributed by describing insurance companies' terms of sale.

During the investigation, the Authority determined the information exchange itself did not appear unambiguously aimed at setting higher premiums but could be used for formulating more attractive offers. Thus, the information exchange could not be characterized as a restriction "by object" but at most a restriction "by effect" under Article 101 TFEU.

In response to ICA's competition concerns, the parties submitted a series of commitments, including the exclusion from the reports of the comparison platforms of any company/user-specific information (e.g., premiums and tariffs) and the presentation of information in anonymous and aggregate form. In addition, the price comparison companies agreed to publish reports no more than weekly, containing information no less than six months old, as well as to conduct meetings exclusively on a bilateral basis with a single insurance company.

ICA accepted the commitments and closed the investigative proceedings. Implementation of the commitments will be subject to periodic review.

3. *ICA fines ASPI for non-compliance with a previous decision on unfair practices*.

On May 20, 2022, the Autostrade per l'Italia S.p.A. (ASPI) non-compliance proceeding concluded. The proceeding was to address ASPI's failure to follow up on the ICA's warning requiring it to cease an unfair practice ascertained in ICA's March 2021 decision — the lack of a toll-reduction system for serious inconveniences to the use of the freeway service attributable to ASPI.

ASPI initially presented an experimental program of progressive toll reimbursement, called *Cashback*, which was the subject of an in-depth analysis and multiple discussions with both ASPI and the Ministry of Infrastructure and Sustainable Mobility. Critical issues emerged, and the Cashback program was refined.

ASPI was fined for the delays in implementing the *Cashback* program. However, the measures ASPI ultimately took will enable a wide range of users who accrue the right to obtain refunds ranging from 25% to 100% of the toll depending on the mileage range traveled and the delay accumulated due to inefficiencies generated by work sites. Refunds will be provided for delays starting at 10 minutes for trips up to 99 km and at least 15 minutes for all other ranges (up to over 500 km), calculated by referencing the historical average speed, which for light vehicles is 100 km/h, while for heavy vehicles is 70 km/h.

Considering the complexity of the measures, ICA fined ASPI the minimum amount provided by the law, i.e., EUR 10,000.00.

European Union

A. European Commission

1. *CJEU judgment on Servizio Elettrico Nazionale*.

On May 12, 2022, the Court of Justice of the European Union (CJEU) ruled on Servizio Elettrico Nazionale and Others (C-377/20).

The judgment arose in the context of an appeal of the 2018 *Autorità Garante della Concorrenza e del Mercato* (AGCM) decision finding that ENEL (the former monopolist in the Italian electricity generation market) implemented an exclusionary strategy to preserve its dominant position. AGCM did so by trying to transfer the customer base of Servizio Elettrico Nazionale S.p.A. (a subsidiary company born after ENEL's unbundling and entrusted with the management of the "*servizio di maggior tutela*" market, i.e., a market, encompassing households and SMEs, on which certain protections on prices were still in force) to ENEL Energia (ENEL's subsidiary active on the free market).

In particular, the Italian *Consiglio di Stato* referred the matter to the CJEU seeking clarification on whether an undertaking that exploits the means or resources it holds as a consequence of such dominant position in order to preserve its incumbency on that market might be in breach of competition law, in particular under Article 102 TFEU. The CJEU established that any undertaking in a dominant position can always defend its position on the market against its competitors; however, it must do so exclusively via competition "on the merits" (i.e., "normal competition"). Thus, an undertaking that, during the process of liberalization of a given market, loses its legal monopoly, should not attempt to preserve its dominant position through means or resources that are unavailable because of the position it previously held in that market.

Moreover, in the ruling, the CJEU also acknowledged that the existence of an economic unit between the parent company and its subsidiary, besides being assumed as existing whenever almost all the subsidiary's capital is (directly or indirectly) held by the parent company at the material time, is sufficient to hold the parent company liable for its subsidiary's behavior without need to provide any additional evidence; unless the parent company can show that the subsidiary was acting independently from it.

Finally, the CJEU also remarked on the burden of proof of the competition authority in the event of abuse of dominance cases. In particular, the CJEU makes clear that:

a) the competition authority doesn't have to prove conduct might cause direct harm to consumers; proof of the ability of such conduct to adversely affect the competitive structure of a given market is sufficient;

b) the competition authority doesn't have to demonstrate the exclusionary intent of the undertaking; proof that the given conduct might produce anticompetitive effects suffices. The existence of evidence of such an intention might nonetheless be considered for the assessment of the abuse.

B. EU Decisions

1. *EFTA court upholds regional enforcer's EUR 112 million fine.*

The European Free Trade Association (EFTA) Court has fully rejected Telenor's (a Norwegian majority state-owned telecommunications company) appeal against the 2020 EFTA Surveillance Authority (ESA) decision regarding the EUR 112 million fine imposed on Telenor. Between 2008 and 2012, Telenor charged competitors more for wholesale access to its network than it charged its own retail customers. According to the ESA, this conduct amounted to a margin squeeze on part of the Norwegian broadband market.

The EFTA Court held that the ESA correctly defined the relevant market, classified the conduct of Telenor as abuse, and concluded that the infringements were not time-barred. As Telenor "could not be unaware of the anticompetitive nature of its practice," the EFTA Court deemed ESA's calculation of the fine appropriate.

2. *EU General Court upholds block of copper manufacturer deal.*

The EU's General Court confirmed the European Commission's 2019 decision that prohibits the transaction between Wieland Werke and Aurubis, both flat-rolled copper manufacturers. The Commission blocked the deal at the time because it allegedly would have eliminated competition and allowed the two manufacturers to become dominant in the rolled copper product market in the European Economic Area.

Wieland argued the European Commission's decision contradicted earlier clearance it gave to a deal with identical relevant markets. However, the General Court ruled that the Commission is not always bound by the previous findings and economic assessments with similar or even identical markets at issue.

3. *EU Court of Justice lays out "competition on the merits" criteria in non-price abuse cases.*

During consideration of Enel (Italian energy company)'s appeal against an EUR 93 million abuse of dominance fine Italian national competition authority issued, the European Court of Justice (ECJ) stated that the as-efficient competitor test applies to both pricing and non-pricing conduct.

The as-efficient competitor test is typically used to determine whether the pricing practices (e.g., loyalty rebates or predatory pricing strategies) of dominant companies can be deemed abusive.

In a preliminary ruling, the ECJ clarified that non-pricing conduct from dominant companies that as-efficient rivals cannot replicate will equally not constitute "competition on the merits." Hence the principle of competition on the merits will be breached. Alongside lower prices, competition on the merits includes behaviors that promote consumer choice by placing new products on the market or improving the quantity or quality of already offered goods.

4. *EU General Court upholds EUR 28 million gun-jumping fine.*

The European Commission had imposed a €28 million fine on Canon in June 2019 for gun-jumping, as the Commission claimed that Canon partially implemented the contemplated acquisition of Toshiba and thereby violated the standstill obligation. Under the EU Merger Regulation, it is required to respect a standstill period until the contemplated acquisition has been approved.

The General Court rejected Canon's appeal as regards the fine for gun-jumping and decided that the transaction structure had a "direct functional link" with the change of control. The General Court agreed with the Commission's decision that Canon was able to exercise a certain degree of influence before the approval of the contemplated acquisition.

C. European Policy Developments

1. *European Commission adopts new VBER.*

The European Commission has adopted the new Vertical Block Exemption Regulation (VBER) and Vertical Guidelines. A thorough evaluation and review of the 2010 rules provided several significant developments, including readjusting the safe harbor and clarifying some other rules, specifically regarding online sales restrictions.

The revised regulations include changes to dual pricing rules and the equivalence principle. They also provide more flexibility and protection for exclusive and selective distribution systems, allowing so-called shared exclusivity and certain additional sales restrictions.

The new VBER and Vertical Guidelines entered into force June 1, 2022, with a transitional period until May 31, 2023, to align existing agreements with the new rules.

2. *European Commission works on changes to simplified merger control review.*

The European Commission has launched a public consultation on the draft revised Merger Implementing Regulation and the Notice on Simplified Procedure.

The review process of the procedural and jurisdictional aspects of EU merger control rules aims to "target and simplify" merger control procedures for non-problematic mergers dealt with under the simplified procedure.

The draft regulation expands and clarifies the categories of cases that can benefit from the simplified process, introduces a "tick-the-box" format for the notification of simplified cases, reduces and clarifies information requirements for non-simplified cases, and provides the possibility to submit documents electronically. Interested parties may submit their comments on the draft by June 3, 2022.

3. *EU Advocate General clarifies impact of damages directive on suspended proceedings.*

Maciej Szpunar, advocate general at the European Court of Justice, has clarified that the 2014 EU damages directive does not prevent national courts from making disclosure orders in suspended private competition enforcement cases. However, national courts have the discretion to determine if local procedural rules prevent making such orders, and the suspension of a case must be considered as part of the proportionality assessment.

This opinion resulted from consideration of RegioJet's excessive pricing claim against České dráhy, the Czech Republic's biggest rail transport provider.

4. *European Commission launches public consultation on the update of the Informal Guidance Notice.*

The European Commission published the draft text of the revised Notice on Informal Guidance, which aims to provide businesses with more flexibility and legal certainty. The Commission intends to release a revised notice by the end of 2022.

The Commission's draft proposes several updates, including changing some requirements for the authority when assessing the "economic importance" of the goods or services. The changes also allow requesting guidance, not only when there is no clarification but also when existing clarification is not sufficient. The draft also clarifies that those requesting guidance must provide its potential value.

Interested parties may submit their feedback on the draft revised text of the Notice by June 21, 2022.

5. *European Commission raids fashion companies in several EU countries based on cartel concerns.*

On May 17, 2022, the European Commission, assisted by national competition authorities, raided undisclosed companies in the fashion industry in several EU countries based on concerns the companies "may have violated Article 101 of the Treaty on the Functioning of the European Union and Article 53 of the European Economic Area Agreement, which prohibits cartels and other restrictive business practices." For more information, *see* June 6 GT Alert, European Commission Raids Fashion Companies Over Anti-Competitive Concerns.

Japan

A. The Procedure for Approval of the Commitment Plans in Japan

The procedure for approval of the commitment plans is for voluntarily resolving alleged violations of the Antimonopoly Act through an agreement between the Japan Fair Trade Commission (JFTC) and the business entity. The procedure allows the correction of a competition problem more quickly than a cease-and-desist order or surcharge payment order. The procedures are as follows:

1. The JFTC initiates an investigation against the subject business entity;

2. The JFTC notifies the subject business entity with a summary of the suspected violation of the Antimonopoly Act and the provisions of the Act;

3. Within 60 days of receipt of the above notice, the subject business entity voluntarily files an application for a commitment plan with the JFTC;

4. The JFTC approves or rejects the commitment plan.

The commitment plan will be approved if (i) it is sufficient to eliminate the violation or to ensure that the alleged violation has been eliminated, and (ii) the commitment measures are expected to be implemented with certainty. Once the commitment plan is approved, the JFTC will not issue a cease-and-desist order or surcharge payment order. The JFTC's approval of the commitment plan does not constitute a determination by the JFTC that the subject business entity violated the Antimonopoly Act. In addition, even if the subject business entity does not apply the commitment plan to the JFTC, the subject business entity will not be treated unfavorably in investigations because of failure to apply.

The procedure for approval of the commitment plans came into force in 2018 in Japan, and the procedure has been used since then. The next section highlights a case in which a commitment plan was approved.

B. Approval of the Commitment Plan submitted by Booking.com B.V.

The JFTC investigated Booking.com B.V. on suspicion that its conduct fell under Trading on Restrictive Terms prescribed in the Antimonopoly Act. According to the JFTC, Booking.com B.V. had required, in the contract with its operators of accommodations located in Japan on the online travel agencies' websites ("Booking.com" operated by Booking.com B.V.), that the room rates and availability of the accommodations listed on the Booking.com website be equivalent to or more favorable than those offered through other sales channels. In the course of the procedure, Booking.com B.V. submitted an application to the JFTC for approval of the Commitment Plan of measures necessary to eliminate the conduct. This Plan includes that (i) Booking.com B.V. will cease the conduct and (ii) Booking.com B.V. will not perform any conduct similar. Having considered the Commitment Plan submitted by Booking.com B.V., the JFTC approved it pursuant to the Act, and ceased the investigation procedures against Booking.com B.V. on March 16, 2022.

Read previous editions of GT's Competition Currents Newsletter.

Contributors

Andrew G. Berg
Shareholder
+1 202.331.3181
berga@gtlaw.com

Gregory J. Casas
Shareholder
+1 512.320.7238
casasg@gtlaw.com

Robert Gago
Shareholder
+48 22.690.6197
gagor@gtlaw.com

Edoardo Gambaro
Partner
+ (39) 02.77197205
Edoardo.Gambaro@gtlaw.com

Pamela J. Marple
Shareholder
+1 202.331.3174
marplep@gtlaw.com

Yuji Ogiwara
Shareholder
+81 (0) 3.4510.2206
ogiwaray@gtlaw.com

Stephen M. Pepper
Shareholder
+1 212.801.6734
peppers@gtlaw.com

Gillian Sproul
Shareholder
+ 44 (0) 203.349.8861
sproulg@gtlaw.com

Hans Urlus
Shareholder
+31 20 301 7324
urlush@gtlaw.com

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

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

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

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

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

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

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

Carlotta Pellizzoni
Associate
+ (39) 02.771971
Carlotta.Pellizzoni@gtlaw.com

Chazz Sutherland
Associate
+31 20 301 7448
sutherlandc@gtlaw.com

Ippei Suzuki
Associate
+81 (0) 3.4510.2232
suzukii@gtlaw.com

Rebecca Tracy Rotem
Practice Group Attorney
+1 202.533.2341
rotemr@gtlaw.com

Administrative Editors

Becky L. Caruso
Associate
+1 973.443.3252
carusob@gtlaw.com

Emily Willis Collins
Associate
+1 512.320.7274
collinse@gtlaw.com