GT GreenbergTraurig

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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 cautions states against issuing Certificates of Public Advantage in hospital mergers.*

State Certificate of Public Advantage (COPA) laws allow a state to “green light” hospital mergers, immunizing them from federal antitrust scrutiny in favor of state oversight. Through such COPA laws, a state may determine the likely benefits of a hospital merger outweigh any disadvantages from lessened competition.

On Aug. 15, 2022, the FTC published a policy paper and fact sheet urging state lawmakers not to issue COPAs to merging hospitals. To support its position, the agency presented research showing that COPAs granted in certain prior hospital mergers resulted in higher prices and reduced quality of care and cautioned that state oversight, including price controls, rate regulations, mechanisms for sharing cost savings and efficiencies, and contractual commitments between hospitals and commercial payors, is not

[1] Due to the terms of GT’s retention by certain of its clients, these summaries may not include developments relating to matters involving those clients.

only burdensome to the state but also an insufficient alternative to competition between hospitals. The FTC further explained that COPAs undermine FTC authority to review hospital mergers and often grant hospitals unwarranted market power. The FTC warned state lawmakers against "using COPAs to shield otherwise anticompetitive hospital mergers."

2. *FTC votes to expand omnibus resolution authorizing compulsory process in any merger investigation.*

Earlier in 2022, the FTC's Democratic Commissioners approved an omnibus resolution authorizing the use of compulsory process to compel testimony, documents, and data from targets of an investigation and third parties in HSR-reportable mergers. On Aug. 26, 2022, the FTC voted 3-to-2 to expand this omnibus resolution to authorize compulsory process in "any merger, acquisition or transaction."

In dissent, Commissioners Phillips and Wilson expressed concerns about the broad scope of this omnibus resolution, writing that "the suggestion that the merger omnibus resolution will somehow put more deals on our radar is, in our view, disingenuous," as the FTC has the authority to and does investigate deals that are not reportable under the HSR Act, and instead, the omnibus resolution takes away important FTC oversight.

3. *FTC issues strategic plan for next five years and 2021-2023 Performance Report and Performance Plan.*

On Aug. 26, 2022, the FTC published its Strategic Plan for Fiscal Years 2022 to 2026, which sets out the FTC's goals to protect against unfair or deceptive acts and methods of unfair competition, to promote fair competition, and to advance the FTC's effectiveness and performance. Part of this strategy involves the FTC taking enforcement action against anticompetitive mergers and practices, researching and promoting public awareness of the benefits of fair competition, collaborating with domestic and international partners on matters involving unfair methods of competition, and supporting equity for historically underserved communities through the FTC's competition mission.

The FTC also published its Annual Performance Report for Fiscal Year 2021 and Annual Performance Plan for Fiscal Years 2022 to 2023. The agency notes it concluded 19 matters where it took action to maintain competition in 2021, including four consent orders and six abandoned transactions. The FTC also concluded four of seven merger litigations in initial stages after the parties abandoned the proposed transactions. And, as part of its Performance Plan, the FTC set a goal of $2.4 billion in total consumer savings and other measurable benefits generated by antitrust enforcement in 2022 and 2023.

4. *FTC and DOJ issue joint comment on Federal Energy Regulatory Commission's proposed rulemaking.*

On April 21, 2022, the Federal Energy Regulatory Commission (FERC) issued a Notice of Public Rulemaking, explaining it is seeking to remedy deficiencies in existing regional transmission planning and cost allocation requirements. One proposed change would permit the exercise of federal rights of first refusal (ROFR) for transmission facilities selected in a regional transmission plan for purposes of cost allocation. Such ROFR is conditioned on the incumbent transmission provider with the federal ROFR for such regional transmission facilities establishing joint ownership of the transmission facilities.

On Aug. 17, 2022, the FTC and DOJ published a joint comment, expressing concern that reinstating the ROFR is not justified. The agencies note the ROFR could cause consumers to "lose the many benefits that competition can bring, including lower rates, improved service, and increased innovation." Further, the agencies note the ROFR is one of many proposals the FERC is considering, and as such, they urge the FERC to first evaluate the impact of those proposals.

B. Department of Justice (DOJ)

1. *China International Marine Containers Group abandons proposed acquisition of Maersk Container Industry A/S and Maersk Container Industry Qingdao Ltd.*

On Sept. 28, 2021, China International Marine Containers Ltd. (CIMC) and Maersk Container Industry announced they had entered an agreement whereby CIMC would acquire Maersk Container Industry and Maersk Container Industry Qingdao Ltd. (collectively, MCI). According to DOJ, CIMC and MCI are "two of the worlds' four suppliers of insulated container boxes and refrigerated shipping containers" and the combination of the two parties would "consolidate[] control of over 90% of insulated container boxes and refrigerated shipping container production worldwide in Chinese state-owned or state-controlled entities." Following a presumably months-long investigation, the parties announced Aug. 25, 2022, they were abandoning the proposed transaction.

C. U.S. Litigation

1. *Mickelson et al v. PGA Tour, Inc.,* 3:22-cv-04486 (N.D. Cal. Aug. 3, 2022)

On Aug. 3, Phil Mickelson and 10 other professional golfers filed suit against the PGA Tour over their suspension from playing in PGA tournaments because of their participation in the Saudi-financed LIV Golf events. The golfers, who are independent contractors, allege that through a series of anticompetitive restrictions on players, the PGA has made it "risky and costly for players to affiliate with another promoter and prohibitively difficult for any would-be entrant to challenge the Tour's monopoly." According to the players, these restrictions amount to unlawful monopolization of the market for elite golf in violation of the Sherman Act and unlawful agreements in restraint of trade in violation of the Cartwright Act. Several of the golfers sought a temporary restraining order seeking to restrain the PGA from prohibiting their participation in the FedEx Cup. On Aug. 10, a district court judge denied the motion in part because the players could not establish they would be irreparably harmed absent the ability to play. On Aug. 28, LIV Golf and seven of the original plaintiffs including Phil Mickelson filed an amended complaint, arguing, in addition to the unlawful monopolization and agreements in restraint of trade, the PGA Tour had "threatened sponsors, vendors, broadcasters, and agents to coerce players to abandon opportunities to play in LIV Golf events and "organized a group boycott with the European Tour." As to LIV Golf specifically, the complaint alleges the PGA Tour's conduct has forced LIV Golf to offer "supracompetitive compensation" and has made it impossible to conduct business with various vendors including media companies, sporting apparel businesses, technology companies and others. Trial currently is scheduled for January 2024.

2. *Mayor & City Council of Baltimore v. AbbVie Inc.,* 42 F.4th 709, 713 (7th Cir. 2022)

On Aug. 1, a Seventh Circuit panel upheld a district court decision dismissing private antitrust claims Humira buyers brought, accusing AbbVie of using a "patent thicket" to unlawfully suppress competition to its immunosuppressant drug in violation of section 2 of the Sherman Act. In doing so, the Seventh Circuit concluded there was nothing wrong with the more than 130 patents covering the drug, explaining that "the patent laws do not set a cap on the number of patents any one person can hold – in general or pertaining to a single subject," nor with prosecuting patent infringement claims based on those patents. The panel found the district court judge had correctly concluded that the bulk of the lawsuit was protected by the Noerr-Pennington doctrine which, in part, shields activity intended to enforce existing laws.

Likewise, the Seventh Circuit found nothing unlawful in AbbVie reaching agreements with various companies producing biosimilar drugs under which AbbVie would drop the patent litigation and give the companies access to the European market if they stayed out of the U.S. market until 2023. Because AbbVie was allowing entry into markets before the last patent expired and was not paying for delays, the Seventh Circuit found the settlements did not create an unlawful cartel among AbbVie and its competitors.

3. *Carbone, et al. v. Brown Univ., et al.,* No. 22-C-125, 2022 WL 3357249 (N.D. Ill. Aug. 15, 2022).

On Aug. 15, a district court judge denied motions to dismiss a class action antitrust claim brought against 17 private universities for violation of section 1 of the Sherman Act. Plaintiffs allege that the defendant universities engaged in unlawful anticompetitive behavior by "participating in a price-fixing cartel that is designed to reduce or eliminate financial aid as a locus of competition, and that in fact has artificially inflated the net price of attendance for students receiving financial aid." Among other things, the defendants argued they were exempt from liability under section 568 of the Improving America's Schools Act of the 1994. The rule 568 exemption allows universities to collaborate on financial aid offerings without incurring antitrust liability if all admission decisions are "need-blind." Plaintiffs argued that the schools were not entitled to the protection of the 568 exemption because the "enrollment management" the schools employed for waitlisted and transfer students favored "the children of wealthy past or potential future donors." The court agreed, finding that, while plaintiffs may need more to prevail at trial or to avoid summary judgment, the allegations were sufficient to plausibly establish that the defendant schools had considered financial need in admissions decisions thus were unable to rely on the 568 exemption.

Mexico

A. COFECE investigates public procurement procedures for acquisition of electoral documentation.

The Federal Economic Competition Comission (*Comisión Federal de Competencia Económica*) (COFECE, or the Commission) has publicized its investigation into bid-rigging in the acquisition of electoral material and documentation by public authorities through bidding procedures, at the three levels of government and throughout Mexico. "Electoral ballots, indelible liquid, ballot boxes, desks, modular elements, instructions, labels and any other good acquired in the framework of an electoral procedure" are the products covered by COFECE's probe.

COFECE also states it will prioritize government procurement and bid-rigging investigations in the coming years. If it proves cartel conduct, economic agents may be fined up to 10% of their annual income. Individuals who have participated in the creation, execution, or order of this type of agreements between competitors may be imprisoned for up to 10 years in accordance with the Penal Code. However, COFECE offers a leniency program for those who have participated in this type of conduct.

B. COFECE warns against risks to competition in natural gas market resulting from Ministry of Energy strategy.

COFECE has warned that the Ministry of Energy's (SENER) "Supply Guarantee Strategy for the optimization of capacity in the Integrated National Natural Gas Transportation and Storage System" (the Strategy) poses risks to competition and free market access.

According to COFECE, “users or those interested in receiving natural gas transportation services at the Integrated National Natural Gas Transportation and Storage System (Sistrangas) interconnection points must prove they receive the supply from Petróleos Mexicanos (Pemex) or the Federal Electricity Commission (CFE),” both state-owned enterprises; and that the provision of the service is ensured by contracting transportation capacity in pipelines with any of these companies.

Also, Cenagas (the entity responsible for the management, administration, and operation, independently of its users, of the Sistrangas infrastructure, as well as for guaranteeing its open, non-unduly discriminatory access) told natural gas transportation users that those with a service contract must submit documentary evidence that they comply with the Strategy’s requirements no later than Aug. 13, 2022.

COFECE warned that the conduct would seriously and irreparably impact competition in the natural gas and electricity markets in the following ways:

- It would prevent users who decide not to contract with the state-owned companies from having equal access to Sistrangas interconnection points, unfairly benefiting Pemex and CFE. The capacity of Sistrangas is limited and constitutes an essential facility to compete in the natural gas market, given that this system has the most important infrastructure for both the transportation and importation of natural gas.
- It would disincentivize potential natural gas participants and nullify the ability of current participants to compete. As a result, the conduct would prevent contracting with the most efficient supplier and, instead, establish a mandatory intermediation that would substantially affect supply conditions.
- It would generate distortions for the CFE’s competitors in the electricity production market, since users who use natural gas to produce electricity and require transportation services would be obliged to acquire this input through competitor CFE. In this way, the CFE could have incentives to increase the cost of natural gas to its competitors.

Furthermore, according to COFECE, implementation of the conduct could result in higher fuel prices that would be passed on to final consumers, as well as a deterioration in supply conditions. Additionally, energy security could be affected due to the position both CFE and Pemex would assume, instead of diversifying supply sources. For these reasons, COFECE urges SENER, the Energy Regulatory Commission, and Cenagas not to implement the conduct and to enforce the competition principles set forth in the current legal framework.

On July 19, the Office of the U.S. Trade Representative announced it believed Mexico’s actions (including the conduct) violated the United States-Mexico-Canada Agreement (USMCA).

C. COFECE subpoenas economic agent for possible “abuse of dominance” in LPG market.

COFECE notified a company for its likely abuse of dominance (price discrimination) in the import, commercialization, transport, storage, distribution, and sale of liquefied petroleum gas to the Mexican public. The investigation concluded March 29, 2022.

The subpoena starts the process toward a trial before the Commission’s technical secretary, where the party may defend itself with statements and related evidence. The Commissioners then resolve the matter in accordance with the Competition Law. If undue price discrimination is proven, the Commission will order correction or elimination of the illegal practice, and the economic agent could be fined up to 8% of its revenue.

D. COFECE fines five companies for failing to notify a transaction for prior merger control review.

COFECE fined Banco Invex, S.A., Institución de Banca Múltiple, INVEX Grupo Financiero (exclusively in its capacity as trustee of the Irrevocable Trust for the Issuance of Development Trust Certificates No. 2695 (2695)); Banco Invex, S.A., Institución de Banca Múltiple, INVEX Grupo Financiero (exclusively in its capacity as trustee of Irrevocable Administration Trust No. F/3436 (3436)); Neology Inc. (Neology USA); Neology, S. de R.L. de C.V. (Neology mx) and an individual 1.8 million pesos for failure to notify a transaction pursuant to the Federal Law of Economic Competition.

The penalties stem from the companies' request for authorization of a transaction comprising the acquisition or subscription by the Investment Trusts 2695 and 3436 of a portion of the capital stock of Neology mx, owned by Neology USA, in association with Controles Electromecánicos, S. A. de C.V. However, after the transaction, the investment trusts entered into an association with an individual and Neology USA; that is, they closed the transaction in a different manner than what COFECE had authorized.

The Netherlands

A. Dutch ACM decisions, policies, and market studies

1. *ACM sends proposed acquisition of CFG Benelux (Stegeman) by Ter Beke to Phase II.*

The Dutch Competition Authority (ACM) has determined in phase I of its investigation that meat producer Ter Beke N.V. may not yet acquire competitor CFG Benelux (Stegeman), since the contemplated acquisition may have a negative impact on competition. Both companies produce, cut, and package meat products and primarily supply supermarkets and butcher shops. Because buyers have few alternatives to these the two competitors, the contemplated acquisition would strengthen their market position, according to ACM. This could, in turn, result in higher prices, reduced quality and/or less innovation. Therefore, if the two competitors move forward, they should apply for a license (i.e., the equivalent in the Netherlands of a Phase II review) with the ACM. In its in-depth review, the ACM will further assess the effects of the proposed merger on the relevant markets and possible alternatives.

B. Dutch Courts

1. *DPG Media not abusing its dominant position in relation to Blendle's digital news kiosk.*

On Aug. 2, 2022, the Amsterdam Court of Appeal dismissed Blendle's claims regarding DPG Media's alleged dominance abuse. In the appeal proceedings Blendle claimed DPG should be ordered to provide content for the digital news kiosk of Blendle. Blendle alleged DPG abused its dominant position by refusing to grant Blendle a license for the use of DPG's newspaper articles, an unlawful act against Blendle under Dutch tort law.

According to a previously concluded non-exclusive license agreement between DPG and Blendle, DPG sold individual articles to Blendle users, not through a license that would make all articles available to the users at once. Since there is no absolute refusal to supply articles, the Amsterdam Court of Appeal dismissed Blendle's claim.

Poland

A. UOKiK President launches antitrust proceedings against Dell.

The President of the Office of Competition and Consumer Protection (UOKiK President) has initiated proceedings to verify whether Dell sp. z o.o., the Polish subsidiary of technology company Dell, has entered into a competition-restricting agreement with its authorized dealers and distributors.

The allegations relate to Dell's sales system, in particular sales of Dell and Dell EMC IT infrastructure products to professional customers (i.e., companies and institutions). Dell does not sell its products independently; its distribution system is based on authorized distributors. Distributors report a potential transaction with a customer in the internal sales system. If a sale to a particular customer is reported, Dell may prevent other distributors from submitting offers to that particular customer, notwithstanding a customer's explicit request.

Therefore, according to the UOKiK President, customers may have been deprived of the possibility of choosing a less expensive offer for Dell and Dell EMC products. The UOKiK President is investigating in particular whether the restrictive agreement involved limiting the possibility of passive sales, i.e., when a sale is not initiated by the distributor actively targeting such customer but takes place in response to a customer's unsolicited request. The UOKiK President is concerned that such restriction could lead to market sharing. Generally, according to the Polish and EU competition regulations on vertical distribution, passive sales restrictions may be qualified as a hardcore restriction of competition and are not subject to block exemptions (except from, in particular, passive sales restrictions in case of selective distribution system which may be allowed if relevant conditions stipulated in law are met).

Under Polish law, an entrepreneur involved in a competition-restricting agreement may be fined up to 10% of its turnover in the preceding year, while the managers responsible for effecting the collusion may be penalized up to PLN 2 million. Anticompetitive provisions are null and void. Entities harmed by an anticompetitive agreement may also seek damages in civil court.

Last year, the Court of Justice of the European Union also handled a case related to a client reservation system (case no C-306/20 Visma). It appears from this judgment that if such system meets certain criteria (e.g., the end client's right to object to being served by the distributor who registered such client first), such system is not restrictive "by object," but instead it must be proved that there is a risk of anticompetitive effects. As public information about both the Dell and *Visma* cases is limited, it is difficult to say to what extent they are similar.

B. UOKiK President's actions in the grain market.

In his first actions in the grain market, the UOKiK President is investigating compliance with the provisions on unfair use of contractual advantage in the agricultural and food sector. So far, the UOKiK President has fined Polish Agri—the leader in grain exports in western Poland—over PLN 300,000, and Cefetra Polska over PLN 2 million for unfair use of contractual advantage.

According to the UOKiK President, both companies demanded all amounts of contracted grain from farmers even if it was impossible to fulfill the terms of supply for reasons beyond their control.

The UOKiK President announced an investigation of the entire market, including foreign companies. Initially, the activities of seven grain purchaser will be examined. According to an official statement, the

UOKiK President intends to act to protect farmers involved in grain production, as they have found themselves in a difficult situation due to the war in Ukraine and unfavorable weather conditions.

The practices under consideration may constitute unfair use of contractual advantage for which the penalty is up to 3% of the company's annual turnover.

Italy

Italian Competition Authority (ICA)

1. *ICA fines two of the main motor vehicle liability insurance companies in Italy for unfair commercial practices.*

The Italian Competition Authority (ICA) recently closed two proceedings for the two main Italian insurance operators' unfair commercial practices in the settlement of motor vehicle liability insurance claims.

According to the ICA, the companies delayed or made harder (if not impossible) consumer access to their claim records, failed to provide claimants with pertinent information concerning amount of compensation (or, in the alternative, the reasons why their compensation claims were rejected), and hampered the insureds' ability to exercise the rights attached to the motor vehicle liability insurance contract.

The ICA considered this conduct misleading, aggressive, and severe enough to justify penalizing each company EUR 5 million, the legal maximum for unfair commercial conduct in Italy.

2. *Italian annual competition bill takes effect.*

On Aug. 27, 2022, the annual competition bill went into effect in Italy (Law No. 118/2022). The bill amends the Italian Antitrust Law (Law No. 287/90) to ensure more coordination with EU competition law rules and extends ICA's procedural powers.

The main modifications relate to: (i) the introduction of a new substantive test for assessing mergers (which is what the EU Commission now applies after the 2004 merger control reform); (ii) the rules applicable to the assessment of joint ventures; and (iii) the calculation, for merger control purposes, of turnover for credit and financial institutions, which is now aligned with the provisions of the Regulation (EC)139/2004.

Among other things, the competition bill also establishes a presumption of economic dependence towards digital platforms on undertakings using their intermediation services to reach final users or suppliers and identifies certain conduct to be considered abusive if enacted by digital platforms. Finally, the competition bill empowers ICA to review transactions that do not reach Italian turnover threshold for merger control.

3. *ICA opens investigation into alleged abuse of dominance against Trenitalia S.p.A., the main operator of public passenger transport services by rail in Italy.*

The ICA has opened an investigation for an alleged breach of Article 102 of the Treaty on the Functioning of the European Union (TFEU) against Trenitalia S.p.A. in the Italian market for the long-distance public passenger transport services by high-speed rail.

In Italy, there are only two players in this market: Trenitalia (the incumbent), which is also the incumbent player—if not the monopolist—in the markets for medium-to-long-distance public passenger transport services on conventional rails and for regional public passenger transport services, and Nuovo Trasporto Viaggiatori S.p.A. (NTV), which, on the contrary, is active exclusively in the market for the passenger transport services by high-speed rail. However, as of today, and despite NTV's requests, Trenitalia is the only operator who can jointly sell, on the same sale platforms, tickets for—its own—high-speed services and those for conventional/regional public passenger transport services. As a result, Trenitalia is, in practice, the sole alternative for connecting passengers to purchase tickets for their entire trips.

Accordingly, the ICA's investigation aims at establishing whether Trenitalia is actually infringing Article 102 TFEU by leveraging its dominant position in the other markets for the public passenger transport services to protect—if not to strengthen—its dominant position on the market for the long-distance public passenger transport services by high-speed rail.

4. *ICA and Italian Civil Aviation Authority to develop common ADR procedure guidelines*.

The ICA and the Italian Civil Aviation Authority (ENAC) have set up a joint working group to draw up and publish specific guidelines on alternative dispute resolution (ADR) procedures in the air transport sector, to help guide sector operators in defining ADR procedures and/or in choosing the ADR body for out-of-court settlement of disputes with consumers/passengers.

The initiative will be followed by coordination with the Transport Regulatory Authority which, following approval of the competition bill, will have jurisdiction over ADR mechanisms for all transport sectors.

The decision to develop ADR guidelines follows a number of ICA actions in the air-transport field. For instance, in 2021 ICA concluded six investigations into the illegal conduct of carriers relating to the cancellation of air-transport services because of the COVID-19 pandemic. In June 2022, ICA closed a case concerning misleading information on ADR an air transport operator provided to consumers.

European Union

A. European Commission

1. *European Commission investigates takeover of Belgian telecom company*.

Belgian telecom company Orange's proposed EUR 1.8 billion acquisition of Belgian telecom companies Voo and Brutélé is subject to European Commission Phase II review. Orange is the second-largest mobile network operator in Belgium. Voo and Brutélé, subsidiaries of Nethys, are the second-largest providers of fixed and mobile telecom services in Brussels and Wallonia.

According to the European Commission, the proposed deal may result in reduced competition in the telecom sector and cause competition-related problems in several other markets, most negatively affecting Wallonia and Brussels.

2. *EU consultation regarding Consortia Block Exemption Regulation*.

The Consortia Block Exemption Regulation (CBER), which exempts liner shipping companies under certain conditions from the ban on agreements that restrict competition, comes to an end mid-2024. In view of the new market conditions, the European Commission opened a public consultation into whether the CBER should be prolonged. The key question is whether the CBER still has added value, especially given the developments surrounding COVID-19.

The CBER remained in place in 2020 because the prices were on average 30% lower due to the subject agreements. Furthermore, the level of service improved. However, recently several trade associations have asked the European Commission for an early review of these agreements. The consultation is open to the public for eight weeks. The assessment of whether the CBER is still fit-for-purpose will also consider: (i) the trend towards consolidation between carriers; (ii) their vertical integration; and (iii) cross-membership between consortia since 2020.

3. *European Commission publishes market study regarding EU hotel distribution practices.*

On Aug. 26, 2022, the European Commission published the results of a market study demonstrating that the competitive situation in the hotel accommodation distribution sector has not significantly changed in the EU.

The European Commission will continue to monitor the hotel accommodation distribution sector. It is expected that the Digital Markets Act (DMA) – which likely will enter into effect later in 2022 – will influence competition in this sector, since the DMA restricts the ability of gatekeeper platforms to use broad or narrow retail parity clauses or similar commercial measures, which were the subject of previous antitrust and legislative decisions.

B. European Decisions

1. *European Commission trucks cartel decision also applicable to garbage trucks.*

According to a preliminary European Court of Justice (ECJ) ruling Aug, 1, 2022, relating to a follow-on damages claim arising from the European Commission's *Trucks* decision, the Commission's 2016 fine for fixing prices and passing on costs for environmental purposes also applies to special purpose trucks. In the follow-on damages claim, Daimler contended that collection vehicles did not qualify as trucks, yet the ECJ has clarified that only turnover from military trucks is excluded from the total turnover upon which the fine is ultimately based. The criterion for the turnover certain trucks generated was based on weight, not truck function. The case has been referred back to the German court, where the question turnover of special trucks arose due to follow-on damage claims.

Greater China

A. SAMR publishes another round of penalties for failure to report concentrations.

On July 10, 2022, the State Administration for Market Regulation (SAMR) published a total of 28 administrative decisions penalizing failures to report concentrations from 2011 to 2020. In a majority of the decisions, the companies found guilty of the failure are Chinese internet giants, and the transactions involved are minority investments where those companies acquired only 7% to 20% interest in the target businesses.

In the February 2022 issue of *Competition Currents*, we reported on certain similar decisions where SAMR found that investors gaining minority interest have gained "joint control" over the target businesses without elaborating on the facts leading to such decisions. Notably, SAMR published at least two decisions in July that clarified that the minority investor's veto power over the target company's significant matters, including its financial budget and appointment and removal of senior officers, was a manifestation of the investor's "control" over the target business, thus qualifying the transaction as a concentration under the Anti-Monopoly Law (AML).

In all of those decisions, SAMR found no anticompetitive effect and fined each investor failing the reporting obligation RMB 500,000, the maximum permitted under the AML then in effect. As the AML was officially amended as of Aug. 1, 2022, the maximum administrative fine is now increased to RMB 5 million for failure to report, even if no anti-competitive effect is found.

B. SAMR's Beijing Office penalizes education franchise for illegally fixing resale price.

On July 27, 2022, the Beijing Municipal Market Regulation Bureau (BMMRB) issued a penalty decision, ending an investigation started in 2021. In the decision, BMMRB held that Beijing CollegePre Education Technology Co. Ltd., the exclusive licensee of the "Sesame Street English" program in China that entered into franchise agreements with various training centers offering English-language programs to pre-school and K12 students in China, committed illegal vertical restraints through fixing resale prices of the training programs its training centers offered. For the AML violation, SAMR fined CollegePre close to RMB 1 million, equaling 3% of its 2020 China-wide revenue.

In the decision, CollegePre was found to have carried out, from 2014 to 2021, the following activities that were held to constitute resale price fixing: (1) CollegePre inserted provisions into the franchise agreements with training centers explicitly banning such franchisees from changing the retail prices of training programs or offering discount to consumers, (2) CollegePre formulated and circulated to franchisees certain management rules requiring franchisees to obtain preapproval from CollegePre for any change to the retail price, (3) CollegePre informed franchisees in different regions the region-specific retail prices and discount programs, and banned the franchisees from making any changes thereto; and (4) in answering complaints from consumers, CollegePre's representatives admitted that the region-specific retail price was formulated by CollegePre, and no training centers in any school district were able to change it. CollegePre was further found to have implemented the above program through a formal approval process and to have disciplined certain franchisees deviating from the program, including by fining the franchisee and ceasing the franchise agreement.

Relying on the above findings, BMMRB further elaborated on the anti-competitive effects of these activities: (1) such resale price fixing has reduced intra-brand competition because once a particular franchisee intends to lower the retail price, the other franchisees in the region would report it to CollegePre, who would then stop the first franchisee's plan engage in price competition; (2) such resale price fixing has reduced inter-brand competition because the franchisees in a particular region have no freedom to adjust the retail price in response to changing pricing strategies employed by their competitors in the region; and (3) the price fixing has caused damages to consumers who otherwise would benefit from more franchisee price discounts.

Notably, CollegePre argued that the franchise agreement in effect was actually registered with China's Ministry of Commerce (MOFCOM) according to China's regulation over commercial franchise and thus its price control program, as a part of the franchise agreement, should be treated as an exception to the prohibition against resale price fixing under Article 15(7) of AML. BMMBR rejected the argument on two grounds: (1) no current regulation on franchise has explicitly referred to "price control," so it is not a requisite element of the regulated commercial franchise regime, and (2) throughout the investigation, CollegePre has failed to prove the said price control is necessary to protect the uniformity of the franchised business mode and the common identity of the brand. BMMRB said its opinions are consistent with consultations with MOFCOM and industrial experts.

The CollegePre case is the first published penalty against a franchisor for carrying out illegal vertical restraints against franchisees. The key takeaway from the case is that even being filed with MOFCOM, any price management provision in a franchise agreement still will be scrutinized under China's AML in the context of vertical restraints and misuse of market power.

Japan

A. JFTC's 2021 cease-and-desist orders lowest number on record.

According to the Japan Fair Trade Commission (JFTC) FY 2021 annual report, the JFTC issued only three orders, the lowest amount of orders ever. It appears the low number was due to the pandemic, which limited the JTFC's ability to conduct its investigations, including hearings and onsite investigations. The JFTC indicated it intends to continue to improve its investigation methods under current circumstances of COVID-19, including utilizing online interviews with operators and collections of materials, among other things.

B. Manufacturer's instructions to distributors on selling price.

A new approach to selling electrical products is attracting attention in Japan, allowing appliance manufacturers to bind the distributor's selling price.

Under the Antitrust Act in Japan, in principle, an appliance manufacturer's restraint of a distributor's selling price constitutes an unfair trade practice and a violation of the Act. However, in cases where the distributor acts as an intermediary and the appliance manufacturer is deemed to be selling the product, it usually is not illegal for the manufacturer to instruct the selling price to the distributor. Therefore, if the manufacturer is willing to take on the risk of unsold products, such as repurchasing them from the distributor, then the manufacturer can dictate the selling price. Major manufacturers are beginning to adopt this new sales method.

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

Christoph Enaux
Partner/Shareholder
+49 30.700.171.140
christoph.enaux@gtlaw.com

Robert Gago
Shareholder
+48 22.690.6197
gagor@gtlaw.com

Robert J. Herrington
Shareholder
+1 310.586.7816
herringtonr@gtlaw.com

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

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

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

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

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

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

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

Dawn (Dan) Zhang
Shareholder
+86 (0) 21.6391.6633
zhangd@gtlaw.com

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

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

Lucas Wüsthof
Senior Associate
+49 30.700.171.236
lucas.wuesthof@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

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

Elizabeth S. Kraus
Associate
+1 561.650.7927
Elizabeth.Kraus@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

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

Victor Manuel Frías
Shareholder
+52 55.5029.0020
friasgarcesv@gtlaw.com

Jose Abel Rivera-Pedroza
Associate
+52 55.5029.0089
riverapedrozaj@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

Albany. Amsterdam. Atlanta. Austin. Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Germany.¬ Houston. Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.¤ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

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