GT GreenbergTraurig

GT Newsletter | Competition Currents | November 2022

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

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United States

A. Federal Trade Commission (FTC)

1. *FTC approves consent order addressing concerns over Tractor Supply's acquisition of Orscheln Farm and Home.*

On Oct. 11, 2022, the Federal Trade Commission approved a consent order addressing FTC concerns related to Tractor Supply Company's acquisition of rival chain Orscheln Farm and Home LLC, a farm store chain with over 150 stores in the Midwest and South. Under the consent order, Tractor Supply must divest some Orscheln stores, as well as Orscheln's corporate offices and Missouri distribution center, to Bomgaars, an Iowa-based farm store chain, and other stores to Buchheit, another chain with farm stores in Missouri and Illinois. Tractor Supply must also assist Bomgaars and Buchheit as they convert the stores and transition Orscheln's Missouri distribution center to Bomgaars. Additionally, Tractor Supply must obtain prior Commission approval before acquiring any other farm stores or property that operated as a farm store within six months prior to the date of the proposed acquisition. The consent agreement also

[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.

requires that for a period of three years, the companies buying the divested farm stores, Bomgaars and Buchheit, must obtain prior Commission approval before selling any of the Orscheln stores they acquired. After the initial three years, the companies must get prior approval before selling any acquired store to a person who operates a farm store within a 60-mile radius of the store to be sold.

2. *FTC approves final order against JAB Consumer Partners to protect pet owners from private equity firm's rollup of veterinary services clinics*.

On Oct. 14, 2022, the FTC finalized a consent order against JAB Consumer Partners designed to prevent the private equity firm from further consolidating control over specialty and emergency veterinary clinics.

As a condition of JAB's proposed $1.65 billion acquisition of the parent company of veterinary clinic owner Ethos, in June 2022, the FTC ordered the divestiture of clinics in Virginia, Colorado, San Francisco, and Washington, D.C. The Commission also imposed prior approval and prior notice requirements on both JAB and its divesture buyers for future acquisitions of specialty and emergency veterinary clinics.

3. *FTC staff opposes proposed certificate of public advantage that could shield SUNY Upstate Medical University's acquisition of Crouse Health System from antitrust scrutiny*.

On Oct. 14, 2022, the FTC staff submitted a staff comment to the New York State Department of Health opposing a request by SUNY Upstate Medical University and Crouse Health System to grant a certificate of public advantage that could shield the merger from antitrust laws and potentially lead to higher health care costs, lower quality and less access to care, and depressed wages for area hospital workers. According to FTC staff, in Onondaga County, N.Y., where the effects of the proposed merger would likely be felt most acutely by area patients and hospital workers, the merged entity would have a combined share of nearly 67% of commercially insured inpatient hospital services. Moreover, the proposed merger between SUNY Upstate and Crouse would reduce the number of hospital options available for nearly all patients in Onondaga County from three to two, according to the comment.

B. Department of Justice (DOJ) Civil Antitrust Division

1. *Directors resign from boards of five companies in response to Justice Department concerns about potentially illegal interlocking directorates*.

On Oct. 19, 2022, the Justice Department announced that seven directors resigned from corporate board positions in response to Antitrust Division concerns that their roles violated the Clayton Act's prohibition on interlocking directorates. Section 8 of the Clayton Act prohibits directors and officers from serving simultaneously on the boards of competitors, subject to limited exceptions. Over the last several months, the Division announced its intent to reinvigorate Section 8 enforcement. In response to the Division's competition concerns, the following companies and directors unwound the interlocks without admitting to liability:

a) Definitive Healthcare Corp. and ZoomInfo Technologies Inc. Definitive and ZoomInfo operate go-to-market information and intelligence platforms used by third-party sales, marketing, operations, and recruiting teams across the United States. One director served simultaneously on the boards of both companies and resigned from Definitive's board in response to the Division's concerns about the alleged interlock.

b) Maxar Technologies Inc. and Redwire Corp. Maxar and Redwire are providers of space infrastructure and communications products and services. One director served simultaneously on the boards of both companies and resigned from Redwire's board in response to the Division's concerns about the alleged interlock.

c) Littelfuse Inc. and CTS Corp. Littelfuse and CTS are manufacturers of components and technologies for use in transportation applications, including sensors and switches for use in passenger and commercial vehicles. One director served simultaneously on the boards of both companies and resigned from CTS's board in response to the Division's concerns about the alleged interlock.

d) Skillsoft Corp. and Udemy Inc. Skillsoft and Udemy are providers of online corporate education services. One director served simultaneously on the boards of both companies, as did the investment firm Prosus, through that director, because he represented Prosus on both boards at the same time. The director resigned from Udemy's board in response to the Division's concerns about the alleged interlock.

e) Solarwinds Corp. and Dynatrace, Inc. Solarwinds and Dynatrace are providers of Application Performance Monitoring (APM) software. One director served simultaneously on the boards of both companies, as did the investment firm Thoma Bravo, through this director, because he represented Thoma Bravo on both boards at the same time. Two additional directors also represented Thoma Bravo on the Solarwinds board. All three directors resigned from Solarwinds's board in response to the Division's concerns about the alleged interlock.

2. *Justice Department obtains permanent injunction blocking Penguin Random House's proposed acquisition of Simon & Schuster*.

On Oct. 31, 2022, the U.S. District Court for the District of Columbia ruled in favor of the Justice Department in its civil antitrust lawsuit to block book publisher Penguin Random House's proposed $2.2 billion acquisition of Simon & Schuster. The court found the proposed merger would substantially lessen competition in the market for the U.S. publishing rights to anticipated top-selling books.

The court's decision follows a 13-day trial in August 2022. In November 2021, the Justice Department sued to stop the merger under Section 7 of the Clayton Act.

C. Department of Justice (DOJ) Criminal Division

1. *Former contractor pleads guilty to bid rigging and bribery: United States v. William D. Opp, Case No. 2:22-CR-0144 KJM in the Eastern District of California*.

On Oct. 3, 2022, a second construction contractor pleaded guilty for participating in a bid-rigging and bribery scheme involving improvement and repair contracts with California's Department of Transportation (Caltrans). According to the plea agreement, the defendant conspired with competitors from 2015 through August 2018 to manipulate bids and direct the award of contracts to companies they controlled. In furtherance of the conspiracy, the defendant allegedly formed a separate construction company for the purpose of submitting sham bids. The defendant faces 10 years' imprisonment and substantial fines at his sentencing hearing on Jan. 30, 2023.

2. *DOJ obtains first no-poach guilty plea: United States v. Hee et al., Case No. 2:21-cr-00098, in the U.S. District Court for the District of Nevada*.

On Oct. 17, 2022, the DOJ obtained its first "no-poach" guilty plea from a health care staffing company that pleaded guilty to conspiracy to allocate nurses and fix their wages in a Nevada school district from October 2016 to July 2017. According to plea documents, an employee from the health care company VDA, then known as Advantage On Call LLC, entered into an agreement with a primary competitor to suppress competition in the school district. VDA was sentenced to pay a criminal fine of $62,000 and restitution of $72,000 to victim nurses.

3. *DOJ drops last chicken price-fixing case: United States v. McGuire et al., Case No. 1:21-cr-00246, in the U.S. District Court for the District of Colorado*.

The DOJ dropped the last pending criminal price-fixing case involving the chicken industry after Colorado District Judge Daniel D. Domenico ruled in favor of the three remaining poultry executive defendants to exclude co-conspirator statements, after holding a James hearing. In this and related criminal cases, the DOJ had alleged that executives from the country's largest suppliers of broiler chicken, the primary chicken sold for human consumption, conspired to rig bids made to restaurant chains and grocery stores between 2012 and 2019. One major supplier applied for leniency and cooperated with the investigation, and another supplier pled guilty with a criminal fine in excess of $100 million. Multiple related civil litigation against the broiler chicken suppliers remain pending in the Northern District of Illinois. The first civil trials are likely to begin in the fall of 2023.

4. *Connecticut federal judge denies motion for bill of particulars in DOJ "No-Poach" Case: United States v. Patel et al., Case No. 3:21-cr-00220, in the U.S. District Court for the District of Connecticut*.

A district court judge denied a motion for a bill of particulars without prejudice in a DOJ "no-poach" case in Connecticut. In the motion, the defendants requested the names of alleged co-conspirators and the names of employees allegedly targeted and/or affected by the conspiracy alleged. The court found the DOJ provided a sufficiently detailed indictment and that the government was not required to provide the requested information because the criminal antitrust case and agreement underlying the conspiracy alleged was not complex.

5. *Libor-rigging charges against bank executive dismissed: United States of America v. Tom Alexander William Hayes et al, Case No. 1:17-cr-00750, in the U.S. District Court for the Southern District of New York*.

On Oct. 27, 2022, Libor-rigging charges against Tom Hayes, a former bank executive, were dismissed. The district court judge signed a motion to dismiss Hayes' U.S. indictment after a federal appeals court overturned similar convictions earlier in 2022. The development marks the latest in a seven-year global investigation of allegations of banks and executives to rig Libor, a benchmark interest rate used to price trillions of dollars of securities.

6. *Construction company executive pleads guilty to criminal attempted monopolization: United States v. Nathan Zito, Case No. 1:22-cr-00113, in the U.S. District Court for the District of Montana*.

On Oct. 31, 2022, the DOJ announced that the president of a Montana construction company pleaded guilty to attempting to monopolize the market for highway crack-sealing services in Montana and

Wyoming. According to court documents, filed in the U.S. District Court of the District of Montana, the president had proposed that his company and a competitor company enter into a "strategic partnership" where they would agree to not compete on certain projects, thus allocating the regional market. The president allegedly also offered to pay the competitor $100,000 as additional compensation for the lost business, intending to monopolize the markets in the two states. Defendant pleaded guilty to one count of attempted monopolization in violation of the Sherman Act and faces a maximum sentence of 10 years' imprisonment and fine of $1 million at his sentencing on Feb. 23, 2023.

D. U.S. Litigation

1. *Dream Big Media Inc. v. Alphabet Inc.*, Case No. 22-cv-02314, 2022 U.S. Dist. LEXIS 199908 (N.D. Cal. Nov. 1, 2022).

On Nov. 1, 2022, U.S. District Judge Jeffrey S. White issued an 11-page opinion granting Google and parent company Alphabet, Inc.'s motion to dismiss a nationwide antitrust class action. The plaintiffs, which include a California-based digital advertising company, a Pennsylvania-based e-commerce auto parts store, and a Texas-based mobile app developer—alleged that Google improperly used its market power to require advertisers to purchase bundled various digital products in order to gain access to services for Google Maps. Under this alleged tying arrangement, the businesses alleged Google would "ratchet up" the prices for their bundled services after customers were "locked in" to using Google maps.

Judge White dismissed the suit, holding that Google's terms of service do not require customers to purchase the alleged bundled products in order to use Google maps. The court explained there were nothing but "conclusory allegations" that customers were forced to bundle products rather than mix Google mapping programs with non-Google products. The court also rejected plaintiffs' definition of the alleged market, holding that the "business-to-business market" was too vague and undefined to support an antitrust suit.

2. *Nostalgic Partners, LLC v. Office of the Comm'r of Baseball*, No. 21-cv-10876, 2022 U.S. Dist. LEXIS 195273 (S.D.N.Y. Oct. 26, 2022).

A federal district court in New York dismissed a lawsuit four minor league professional baseball teams brought against Major League Baseball (MLB). The teams alleged MLB abused its monopoly power by cutting 40 minor league teams through its major league counterparts. The district court explained that although the minor league teams had alleged a plausible antitrust claim, the MLB nevertheless was shielded by a century-old Supreme Court decision that shields MLB from antitrust scrutiny.

Notably in the case, the DOJ previously filed an amicus brief urging the court to interpret MLB's antitrust exemption narrowly. Nevertheless, the court held that even when interpreting it narrowly as the DOJ suggested, "the exemption is wide enough to encompass the claims here." The court's opinion indicates that this may be a steppingstone toward appeals ultimately aimed at narrowing or eliminating MLB's long-held antitrust shield.

3. *Guzman v. Robinhood Markets, Inc.*, Case No. 22-11873 (11th Cir. Nov. 14, 2022).

On Nov. 14, 2022, over 40 investors filed an appeal to the Eleventh Circuit seeking to revive their class action lawsuit against stock-investment platform, Robinhood Markets Inc. The investors sued Robinhood, claiming it conspired with Citadel Securities, LLC to freeze trading on so called "meme stocks" that became volatile because of internet speculation. According to investors, Robinhood artificially lowered prices for short-selling stock, thereby allowing Citadel to increase profits when stock prices went down

while ensuring Robinhood had sufficient revenue to bolster its public offering. The investors explained that when trading in the meme stocks became volatile, Citadel leveraged its relationship with Robinhood for Robinhood to freeze trading on those stocks, thereby protecting the value of Citadel's stock values.

This suit was previously dismissed in the trial court because the investors failed to allege facts supporting a conspiracy designed to restrain trade. Namely, the trial court held there was too big a gap between Robinhood's business as a stock-purchasing platform and Citadel as a stock purchaser/seller to raise an inference that their actions were anticompetitive. On appeal, the investors claim the trial court took too narrow a view of the relationship between the companies and that multiple business ties led to Robinhood's decision to restrict stock trading.

Mexico

A. COFECE investigates public procurement procedures for the acquisition, leasing, maintenance, and managed services of information and communication technologies.

On Oct. 12, 2022, the Federal Economic Competition Commission (COFECE or Commission) announced its investigation into absolute monopolistic practices (collusive or cartel conduct) in public procurement for the acquisition, leasing, maintenance, and managed services for information and communication technologies in Mexico.

COFECE's investigation includes contracts, agreements, arrangements, or combinations between competing economic agents, whose object or effect is the manipulation of prices, restriction or limitation of supply or demand, division or segmentation of markets, cooperation or coordination of bids in tenders, as well as the exchange of information between them to carry out any of the above-mentioned conduct.

The investigation covers the purchase and/or leasing procedures of products such as desktop and laptop computers, televisions, photocopiers, computer cameras, storage equipment and related products, in the national territory. Additionally, the investigation includes the contracting or purchasing of information and communication technologies such as transmission services, software licensing, and internet servers, as well as maintenance services and managed services related to information technologies. As a result, any government contracting procedure through public procurement in the market under investigation would also be subject to this investigation.

The term for this investigation is up to 120 business days, counted as of March 31, 2022, which is the investigation's start date, and which may be extended for the same period up to four times. If at the end of the investigation there are no elements that demonstrate such anticompetitive practices have occurred, the Plenary may resolve to close the investigation. If elements that support a violation of the Law are found, those responsible will be called to a proceeding in the form of a trial to present their defense.

Pursuant to the Federal Antitrust Law, if the existence of an absolute monopolistic practice is proven, economic agents could be fined up to 10% of their income. Those who have aided, abetted, encouraged, or induced such practices may also be economically sanctioned. Individuals who have participated in the execution of these type of agreements between competitors may be sanctioned with up to 10 years' imprisonment in accordance with the Penal Code.

B. COFECE determines a lack of effective competition in the distribution of LPG to end users.

- The Plenary of the Commission determined there are no effective competition conditions in 213 of the 220 geographic markets defined for the distribution of liquefied petroleum gas (LPG).
- The Energy Regulatory Commission must establish the regulation on the considerations, prices, or rates for the sale of this product to the public.

On Oct. 13, 2022, COFECE determined a lack of effective competition conditions in 213 of the 220 relevant markets consisting of the distribution of LP gas to end users, through distribution plants and tank trucks with a regional geographic dimension.

This determination is fundamental because LPG is a basic consumer good with a direct impact on consumer purchasing power. In Mexico, LPG is the main fuel families and businesses use for cooking, water heating, and heating of residences.

Derived from COFECE's analysis in case DC-001-2021, the following considerations, among others, led to this determination:

- The high degrees of economic concentration observed, where few economic interest groups have high shares in the defined markets.
- The high gross-profit margins at the national level obtained by the distributors.
- The existence of significant economic and regulatory barriers to entry, as well as barriers to exit.
- The participation of "commission agents," especially in the Metropolitan Area of the Mexican Valley, whose conduct inhibits or hinders the concurrence of distributors in certain geographic zones.
- The scarce or non-existent entry of new distributors, despite the increase in profit margins.

Pursuant to the current regulatory framework, the impacted economic agents were notified of this resolution – in accordance with the Federal Economic Competition Law – with copies sent to the Head of the Federal Executive Power, the Ministry of Energy, and the Energy Regulatory Commission. The Energy Regulatory Commission will oversee establishing the regulation it deems pertinent.

C. COFECE sanctions companies and executives for manipulating prices and segmenting routes in the passenger trucking market.

COFECE fined 18 companies and 31 individuals more than 1,218 million pesos for participating in various absolute monopolistic practices, which manipulated prices and segmented routes in the land passenger transportation service market.

Using information gathered in the investigation, the Plenary of the Commission demonstrated that 18 transportation companies, as well as 31 individuals who acted on their behalf, took part in the absolute monopolistic practices prohibited in sections I and III of Article 9 of the previous Federal Economic Competition Law and Article 53 of the current Federal Economic Competition Law.

Among those sanctioned are companies from the most important groups in the country: ADO, Estrella Blanca, Estrella Roja, IAMSA, Senda, and Pullman, corresponding to multiple routes in Mexico, covering the Central, Central-South, and South-Southeast geographic areas, as well as the state of Tamaulipas.

The sanctioned conduct consists of six independent and distinguishable agreements between different competitors, implemented with different terms from 2000 to 2021. The competitors manipulated and fixed prices and also divided and distributed routes, either through arrangements between carriers to avoid competing among themselves, or through the distribution of markets, in some cases even compensating income and expenses according to the previously agreed percentages. As a result, the Plenary of the Commission estimated that this conduct caused an approximate damage to consumers through the payment of overprices of 3,384 million pesos.

According to the then Ministry of Communications and Transportation, in 2019 77.15% of users who traveled by land utilized impacted land passenger transportation.

The violations were deemed serious given the damage caused, the effect on users, and the deterioration of the supply conditions of a service of public interest and of special relevance for the economy and society in general. Therefore, the maximum possible fines were imposed for each infringer in accordance with applicable competition law according to each act and considering their economic capacity.

Economic agents may challenge this resolution by means of an indirect amparo trial before the Federal Judicial Power.

D. COFECE investigates services related to credit card transactions in the form of deferred payments with interest-free months.

On Oct. 27, 2022, COFECE announced an ex officio investigation into possible absolute monopolistic practices in the credit card transactions (TDC) market in the form of deferred payments in months without interest (MSI).

A TDC is a product a financial institution offers to a user (cardholder) through which the user can make payments for products and services using a line of credit. Payments for such purchases can be made on the next TDC cut-off date, or payments can be deferred to MSI (usually 6, 12, 18, or 24 months).

To carry out such transactions, there must be payment systems, physical stores with point-of-sale, or virtual terminals that offer the option to make purchases under this modality, as well as financial institutions that offer credit lines and an associated card, payment clearing and settlement services, among others that make MSI purchases possible. Notably the investigation does not cover cardholders, but only the economic agents participating in the market under investigation.

Absolute monopolistic practices, the object of this investigation, are those prohibited in Article 53, sections I, II and V of the Federal Economic Competition Law (LFCE), as well as those established in sections I and II, of Article 9 of the previous Economic Competition Law. This conduct is based on fixing prices, establishing mechanisms to restrict supply in the investigated market, and the exchange of strategic information that could cause any of the two mentioned scenarios.

According to the 2022-2025 Strategic Plan, the financial sector is a priority for COFECE, given that the services offered are essential to carry out multiple economic activities, such as purchases with TDC from MSI. In addition, this sector accounted for 5% of the country's 2022 gross domestic product.

This investigation is not a prejudgment on any economic agent's responsibility, since up to now, no violations of the regulations on economic competition have been identified, nor any subject(s) who would be deemed responsible at the end of the investigation.

The term for this investigation is of up to 120 business days, with a start date of April 29, 2022, which is the start date of the investigation and which may be extended for the same period up to four times. If at the end of the investigation there are no elements that demonstrate such anticompetitive practice has occurred, the Plenary may resolve to close the investigation. If elements that support a violation of the Law are found, those responsible will be called to a proceeding in the form of a trial to present their defense.

Pursuant to the LFCE, if an absolute monopolistic practice is proven, economic agents could be fined up to 10% of their income. Those who have aided, abetted, encouraged, or induced such practices may also be subject to economic sanctions. Individuals who have participated in the celebration, execution, or order of this type of agreement between competitors may be sanctioned with 10 years' imprisonment. However, those who have participated in this type of conduct may avail themselves of the benefits of the Immunity and Sanction Reduction Program the Commission offers.

The Netherlands

A. Dutch NCA decisions, policies, and market studies

ACM approves proposed acquisition of Monta by DHL.

The Dutch Competition Authority (ACM) has decided that Deutsche Post International B.V. (DHL) may acquire sole control over Monta Holding B.V., since sufficient competition will remain after the proposed acquisition. The proposed acquisition underlines DHL's strategy to strengthen its core logistics business and deliver long-term growth by focusing on the fast-growing e-commerce and e-fulfillment business.

B. Dutch Courts

Amsterdam District Court appears to imply in judgment that a non-compete clause is a necessary ancillary restriction.

The Amsterdam District Court has ruled that the post-contractual non-compete clauses in the franchise contracts of Multicopy Netherlands – a printing, advertising, and online communications company – did not violate European or Dutch competition law. The franchisees argued that no know-how was transferred by Multicopy Netherlands. The court followed the definition of know-how as included in the Dutch Franchise Act (which entered into force Jan. 1, 2021). The Act stipulates that know-how is a collection of practical information, not protected by intellectual property rights, which derives from the experience of the franchisor and from the research conducted by it and which information is secret, substantial, and identified.

The court found that the one-year post-term non-compete was justified since Multicopy Netherlands, as the franchisor, transferred know-how to the franchisees. This appears to imply that, according to the court, a post-term non-compete constitutes a necessary ancillary restriction.

United Kingdom

A. Merger Control

1. *Multi-functional taps – undertakings to avoid a Phase 2 reference.*

On Oct. 26, 2022, the UK Competition and Market Authority (CMA) accepted undertakings from Culligan to avoid a Phase 2 reference of its anticipated acquisition of Waterlogic. The acquisition would have reduced from four to three the number of suppliers of multi-functional taps (MFTs) to non-residential customers in the UK. Culligan, which sells ZIP-branded MFTs, has undertaken to divest to a third party the whole of Waterlogic's global Billi-branded MFT business, including its R&D and manufacturing functions, the Billi brand and associated IPR, customer contracts, and specified personnel. The sale of the divestment package must be agreed with the buyer, Strix, before the CMA accepts the undertakings and the remainder of the transaction, involving water coolers, can be implemented.

2. *Convenience stores – undertakings to avoid a Phase 2 reference.*

On Oct. 27, the CMA accepted an offer of divestment undertakings to avoid a phase 2 reference. The undertakings were provided by Morrisons, a major UK grocery chain, to divest 28 of the 1,100-plus stores it had purchased from McColl's. These stores were situated in local areas within a short distance (around one mile) or driving time (around five minutes) from a competing Morrisons store. The parties had accepted at an early stage of the phase investigation that there would be concerns in some areas and had asked the CMA to expedite discussion of remedies to address these concerns.

3. *Multilateral compression services – Phase 2 clearance.*

On Oct. 25, 2022, the CMA issued a rare Phase 2 clearance concerning a vertical merger – London Stock Exchange Group plc (LSEG)'s anticipated acquisition of Quantile Group Limited. Quantile provides services to financial institutions trading in derivative instruments to reduce capital requirements and overall regulatory costs. Those services include multilateral compression services (MCS). The acquisition was referred to Phase 2 due to concerns that LSEG's majority shareholding in the London Clearing House (LCH) could disadvantage Quantile's MCS competitors. A clearing house acts as a central counter-party, which helps the parties to contracts in financial markets reduce costs and risk. Suppliers of MCS depend on the LCH to provide their services. The CMA stated in its clearance decision that the Phase 2 investigation involved a higher threshold than the Phase 1 investigation, and that during Phase 2 it had been able to engage extensively with LSEG, Quantile, and their customers and competitors to understand better the impact of the transaction, which it found would not reduce options available to businesses or consumers.

4. *Chemical admixtures – Phase 2 fast track remedy.*

On Oct. 25, the CMA announced that merger parties Sika AC and MBCC Group had asked it to consider a fast-track remedy to address concerns about the impact of the £4.5 billion merger on the supply of chemical admixtures, an essential ingredient in construction products such as concrete and cement. The merger was referred to Phase 2 because the parties are the two largest UK suppliers, with the strongest reputations for innovation, and account for over 50% of UK supply.

B. Antitrust Enforcement – Courts

Collective damages claim – trucks – challenge to rival certification.

In June 2022, the UK Competition Appeal Tribunal (CAT) issued a collective proceedings order (CPO) authorizing the Road Haulage Association (RHA) to represent claimants in proceedings against a number of truck manufacturers for damages resulting from a price-fixing cartel. A rival litigation vehicle, UK Truck Claims (UKTC), was refused authorization on the basis that the RHA claim was more suitable. On Oct. 28, the CAT granted UKTC permission to appeal the CAT's own decision; the RHA proceedings have been suspended pending the outcome of the appeal.

C. State Aids

New UK subsidy regime – mandatory pre-award referral required in some sectors.

The UK Department for Business, Energy and Industrial Strategy (DBEIS) announced Oct. 20 that the new, post-Brexit, UK subsidy regime will come into force Jan. 4, 2023. On the same date, DBEIS published regulations defining the categories of subsidy the public authority awarding the subsidy must refer to the CMA before the award can be made. If a public authority does not make a referral, the Secretary of State may issue it with a directive to do so.

Mandatory referral applies to "subsidies of particular interest" and has a low threshold. It covers the award of all subsidies amounting to over £5 million in sensitive sectors, and to all other subsidies amounting to over £10 million. The calculation of the subsidy value must take into account related subsidies, i.e., subsidies to the same recipient for the same project or activities within the previous three years. Subsidies in sensitive sectors are those for the supply of goods or services in connection with basic iron and steel and ferro-alloy production, aluminum and copper production, motor vehicle and motorcycle production, shipbuilding and construction of other floating structures, aircraft, spacecraft and related machinery production, and electricity production.

The referral is made to the CMA's new Subsidy Advice Unit (SAU), which has 30 working days from receipt of all necessary information to issue a report on the compatibility of the subsidy with the rules. If the report is not issued by this deadline, the public authority may award the subsidy. If the report is issued in time, the public authority must wait five working days before making the award. The report, which is made public, is not binding, meaning the public authority in question may still award the subsidy, although doing so could increase the risk of legal challenge.

A voluntary referral regime sits alongside the mandatory regime. Public authorities may refer "subsidies of interest" to the CMA on a voluntary basis. These include any subsidies over £5 million granted to a single enterprise, all rescue subsidies, and all tax measures and relocation subsidies that are not subject to mandatory referral. The 30-day timetable described above will apply, but the public authority does not need to await the CMA report before proceeding with the award.

Permitted and prohibited subsidies fall outside the scope of the referral regime. Prohibited subsidies include unlimited state guarantees and subsidies for restructuring failing or insolvent businesses where there is no credible plan for making the business viable again. Permitted subsidies include those awarded for the protection of national security or, if awarded by or on behalf of the Bank of England, in pursuit of monetary policy, or to compensate damage caused by exceptional events such as natural disasters, or to respond to national or global emergencies. Other exempt subsidies are those for up to £315,000 per recipient within a period of three years.

The new rules have a number of implications. Due to the relative complexity of the new rules, public authorities may choose to make voluntary referrals rather than risk a later challenge, increasing the SAU's workload with a large number of non-problematic cases to review. Although the obligation to make a referral to the CMA is on the relevant public authority, the new regime also has implications for recipients of subsidies, including the right of any interested party to challenge the subsidy in an application to the CAT for judicial review (see below for limitation period), publication of the SAU report, and publication of details of the subsidy in a new UK subsidy database within three months of the award. The implications for those seeking to challenge the award of a subsidy are both positive and negative: publication of the SAU report, the subsidy database, and a right to obtain supplementary information after publication all are helpful, but a one-month challenge period from publication in the subsidy database or receipt of supplementary information if requested provides significantly more limited protection of their interests when compared to the EU regime.

Poland

A. Anticompetitive agreement between basketball clubs.

The President of the Polish Office of Competition and Consumer Protection ("UOKiK President") has fined the Polish top basketball league, the Polish Basketball League (PLK), as well as 16 basketball clubs competing in the PLK for entering into an anticompetitive agreement.

Starting in March 2020, basketball games in Poland were cancelled due to the COVID-19 pandemic. The clubs announced that due to the premature end to the season, they would not pay their players full salaries and would terminate certain players' contracts.

According to the UOKiK President, such arrangements between the clubs violated competition law, as any actions regarding players must be taken by clubs autonomously and without coordination. The UOKiK President indicated that the clubs may have exchanged sensitive information and eliminated rivalry for basketball players. Given the clubs' coordinated actions, the risk of players moving to another club decreased. This restricted competition between clubs for the best players on the market. UOKiK noted that players have a direct impact on club market position. Better players should result in better performance in the league, which in turn translates into higher revenues.

The basketball clubs and PLK were fined nearly PLN 1 million in total (approx. EUR 200,000, USD 200,000). The decision may be appealed in court.

This is not the only case related to the Polish sports labor market. The UOKiK President previously launched antitrust proceedings against speedway organizations in Poland and is investigating whether it fixed maximum salaries for speedway riders (details of this investigation were provided in the June 2022 Competition Currents).

The UOKiK President's abovementioned actions are consistent with broader enforcement trends. The EU Commissioner Margrethe Vestager noted in her speech in October 2021 that some buyer cartels have a direct effect on individuals or competition, such as when companies collude to fix the wages they pay, or when companies use so-called "no-poach" agreements as an indirect way to keep wages down, restricting talent from moving where it serves the economy best. This may suggest that such arrangements could now be under the wider scrutiny of competition authorities—not only in the sports industry but also in other businesses.

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

B. UOKiK President issues statement of objections to joint venture between ArcelorMittal and Moris.

In December 2020, ArcelorMittal Poland (AMP), producer and seller of various steel products including rails, and Moris, reseller of steel products including rails, notified the UOKiK President of their intention to create a joint venture. The joint venture would act as manufacturer and distributor of rail products and railway accessories as well as a provider of related services.

In October 2022, after almost two years of proceedings (note that the statutory deadline for phase 2 proceedings is five months), the UOKiK President issued a statement of objections to the transaction. According to the UOKiK President, a market test revealed that the transaction could lead to a restriction of competition in the domestic market for the sale of rolled rail to end buyers.

The UOKiK President noted that from the perspective of end buyers, AMP and Moris are the only significant competitors on the market. Thus, he said, the transaction might eliminate competitive constraints and result in higher prices for end buyers, and the concentration might also limit the ability of new suppliers to enter the market (market entry foreclosure). It is, however, not entirely clear from the press release whether the UOKiK President's theory of harm relates only to horizontal relations between the parents to the JV or if there are also vertical concerns given that Moris also resells AMP products.

The statement of objections does not determine the final outcome of the ongoing proceedings. Under Polish law, as a rule, entities have 14 days to respond to objections.

Italy

A. Italian Competition Authority (ICA)

1. *ICA opens investigation into alleged abuse of dominance against Autostrade per l'Italia S.p.A.*

On Oct. 11, 2022, ICA opened an investigation for the alleged infringement of Article 102 TFEU allegedly put in place by Autostrade per l'Italia S.p.A., the leading motorway operator in Italy, in the market for the national electronic toll system.

UnipolTech S.p.A., which developed an electronic toll device to compete with the incumbent device, filed a complaint with ICA. Upon review, ICA found that Autostrade per l'Italia S.p.A. potentially exploited its leading role in the Italian Association of Motorway and Tunnel Concessionaires (AISCAT) to hinder the entry of new competitors in the national electronic toll system.

In particular, Autostrade per l'Italia allegedly tried to divert potential new market entrants toward the European Electronic Toll System and the Interoperable Electronic Toll System for heavy vehicles; systems that are more burdensome than the national one both in terms of accreditation requirements/procedure and applied conditions. Further, Autostrade per l'Italia is also being investigated for having presumably hindered and postponed the actual implementation of the European Electronic Toll System on Italian motorways (which, as of today, has not yet been implemented).

2. *ICA and ARERA joint statement clarifies application of national emergency rules aimed at protecting customers amid energy crisis*.

On Oct. 13, 2022, ICA issued a joint statement with the Italian Regulatory Authority for Energy, Networks and Environment (ARERA), clarifying the scope of the Italian legislature's national emergency rules to protect consumers amid the exceptional situation currently affecting the national energy market.

The statement follows consumer complaints that reported alleged infringements of such emergency rules, in particular of Article 3 of the Law Decree n. 115/2022, which provides for the suspension, until April 30, 2023, of unilateral changes in contractual terms pertaining to prices imposed by gas and electricity suppliers. ICA and ARERA concluded that the aforementioned suspension applies exclusively to contractual clauses that explicitly give the seller the right to vary specific contractual terms in a unilateral manner (excluding, for instance, automatic changes in prices that are already provided for in contractual provisions agreed upon by both parties, etc.).

3. *ICA closes investigation into Optima Italia S.p.A. for unfair commercial practices*.

On Oct. 21, 2022, ICA announced it closed its investigation of Optima Italia S.p.A. for unfair commercial practices in the supply of electricity and gas on the free market.

The ICA established that Optima Italia, while promoting its commercial offers, misled and omitted information on the economic terms for the supply of gas and electricity on the free market. For instance, ICA found a significant lack of transparency as to information Optima Italia provided on the duration of the proposed discounts and the consequences of termination of the supply contract. Indeed, consumers were not adequately informed of the fact that, following early termination of the contract, Optima Italia would recover all discounts granted in the closing invoice. ICA considered this conduct aggressive toward consumers.

The investigation reopened a previous investigation the ICA carried out for the same conduct, which was previously closed with the acceptance of the undertakings Optima Italia had proposed (and accordingly, the ICA has simultaneously opened—and closed—an infringement procedure against the company).

Given Optima Italia's efforts to improve the transparency of its contractual documents and to ensure fair reimbursement for consumers who have been subject to its aggressive commercial practices following the opening of the proceedings, ICA reduced the fine to 1.3 million euros.

European Union

A. European Commission

1. *European Commission conditionally approves proposed acquisition of Real Alloy Europe by KPS*.

Subject to commitments, the European Commission has approved the proposed acquisition of Evergreen Holding Germany GmbH and Real Alloy UK Holdco Ltd by KPS Special Situations Fund V (through its subsidiary Speira BidCo I GmbH).

The remedy package consists of the divestment of two recycling facilities, as there were competition concerns relating to the recycled aluminum industry.

2. *European Commission conditionally approves Celanese's proposed acquisition of DuPont Mobility & Materials*.

The European Commission has conditionally approved Celanese's proposed acquisition of DuPont Mobility & Materials. The remedy package consists of Celanese's divestment of its global thermoplastic copolyester business.

Pursuant to the European Commission's investigation, the proposed acquisition would have resulted in the largest producer of thermoplastic copolyester in the EEA and worldwide, with only a few alternative suppliers.

3. *European Commission closes investigation regarding Czech railway predatory pricing*.

After a six-year investigation, the European Commission has closed its investigation into České dráhy, a Czech Republic state-owned railway operator. Two years ago, the Commission sent a Statement of Objections regarding the possible violation of EU competition rules by charging prices below costs to illegally shut out new rivals.

However, the European Commission has now decided to close the investigation into the railway operator.

4. *Preliminary ruling by European Court of Justice regarding interpretation of European competition law*.

On Oct. 27, 2022, the European Court of Justice ruled that – in relation to Article 30 of Directive 2001/14/EC on the allocation of railway infrastructure capacity and the levying of charges for the use of railway infrastructure – national courts may apply Article 102 TFEU and national competition laws concurrently to hear and determine a claim for reimbursement of infrastructure charges, where the competent national authority already ruled on the lawfulness thereof.

Therefore, the national courts must consider decisions by such national authority when determining their own position, and sincere cooperation is required.

B. European Policy Developments

1. *European Commission adopts revised Informal Guidance Notice regarding application of EU competition rules*.

The European Commission has adopted a revised Informal Guidance Notice that enables informal guidance for businesses on the application of EU competition rules to novel or unresolved questions. This revised version includes more flexible conditions and aims to increase legal certainty. The Informal Guidance Notice derives from Regulation (EC) 1/2003, which set up an enforcement system based on self-assessment for EU competition rules.

2. *European Commission adopts new guidelines regarding exemption EU competition rules for gig workers*.

The European Commission has adopted Guidelines on the application of EU competition law to collective agreements regarding the working conditions of certain self-employed individuals. Since self-employed people are considered "undertakings," they risk infringing EU competition rules when collectively negotiating on working conditions.

The Guidelines aim to clarify when certain self-employed people can cooperate to collectively negotiate better working conditions without breaching EU competition rules. The exemption applies to self-employed persons who are "considered to be in a situation comparable to that of workers."

Greater China

Chongqing AMR Outlines Details of Pre-Notification Consultation in Merger Control Filing.

Under the newly introduced case-delegation policy of the State Administration for Market Regulation (SAMR), an applicant in a merger-control filing may apply for pre-notification consultation with the relevant delegated provincial branch (as detailed in the August 2022 Competition Currents).

On Oct. 19, 2022, Chongqing Administration for Market Regulation (Chongqing AMR) issued a guideline relating to applications for pre-notification consultation whereby the application may be submitted to either SAMR or Chongqing AMR before SAMR accepts the case. Pre-notification consultation is not a mandatory procedure in merger-control filing, so the applicant may decide whether to apply or not.

Chongqing AMR states that the application should include: (1) basic information about the proposed transaction and parties to the transaction; (2) issues to be consulted; (3) information about the personnel involved in the consultation; (4) proposed date of consultation; (5) contact information of the responsible person; and (6) the power of attorney of the personnel attending the consultation. Only applications for real and definite transactions and related questions will be accepted. Hypothetical questions and applications relating to an undecided transaction will not be accepted.

Such pre-notification consultation will help the applicant to determine: (1) if merger-control filing is required for the proposed transaction; (2) if simple-review procedure applies to the case; (3) if the documents are complete for the filing; (4) detailed legal and factual issues; and (5) clarification on procedural issues, etc.

Among the five delegated branches, Chongqing AMR is the first to outline details of pre-notification consultation.

Japan

JFTC issues cease-and-desist orders and surcharge payment orders against some companies bidding for computer equipment.

On Oct. 6, 2022, the Japan Fair Trade Commission (JFTC) announced that it had issued cease-and-desist orders and surcharge payment orders under the provisions of the Antimonopoly Act to several companies participating in bidding for specified computer equipment ordered by the Hiroshima Prefectural Board of Education or by Hiroshima City. According to the JFTC, the order by Hiroshima City was intended to procure computer equipment for use in municipal schools, which equipment was to be ordered via general competitive bidding, with its bidding process subject to the WTO's Agreement on Government Procurement (GPA). Under the GPA, overseas companies may participate in bidding for governments and municipalities. GPA also requires governments and municipalities not to discriminate between suppliers from their own country and those from other countries in their bidding projects (procurement). So far, no foreign participants have been reported to be excluded due to the aforementioned bid rigging.

Read previous editions of GT's Competition Currents Newsletter.

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