

GT Newsletter | Competition Currents | January 2023

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



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WEBINAR: Jan. 24, 2023 | 10 a.m. EST | Competition Currents: 2022 Year in Review and 2023 Forecast - Part I

WEBINAR: Jan. 25, 2023 | 10 a.m. EST | Competition Currents: 2022 Year in Review and 2023 Forecast - Part II

LIVE EVENT: Jan. 26, 2023 | 8 a.m. CST | Hot Topics 2023 Competition: Most Relevant aspects at international and national level | Four Seasons Hotel Mexico City

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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.

United States

A. Federal Trade Commission (FTC)

1. *FTC issues annual report on ethanol market concentration 2022.*

On Dec. 2, 2022, the FTC issued its [2022 Report on Ethanol Market Concentration](#). The Energy Policy Act of 2005 directs the FTC to conduct an annual review of market concentration in the ethanol production industry “to determine whether there is sufficient competition among industry participants to avoid price-setting and other anticompetitive behavior.” Similar to its findings in prior years, the FTC report concludes that “[t]he low level of concentration and large number of market participants in the U.S. ethanol production industry continue to suggest that the exercise of market power to set prices, or coordinate on price or output levels, is unlikely on a nationwide basis.”

2. *FTC approves final order preserving farm store competition in the Midwest and the South.*

As discussed in the [November 2022 issue of Competition Currents](#), on Dec. 9, 2022, after the public comment period, the FTC [announced](#) its approval of a final order settling the complaint it filed in October 2022 relating to Tractor Supply Company’s acquisition of rival chain Orscheln Farm and Home LLC. Under the final order, Tractor Supply must divest certain Orscheln stores, as well as Orscheln’s corporate offices and Missouri distribution center. Additionally, Tractor Supply must obtain prior Commission approval to acquire any other farm stores or property that operated as a farm store within six months prior to the date of the proposed acquisition. The FTC had alleged the deal, as originally structured, would likely result in harm to farm store competition in the Midwest and South.

3. *FTC Chair Khan names Aviv Nevo agency’s director of Bureau of Economics.*

On Dec. 15, 2022, the FTC [announced](#) that FTC Chair Lina M. Khan appointed Aviv Nevo as director of the FTC’s Bureau of Economics, starting January 2023. Nevo most recently worked as a professor at the University of Pennsylvania with appointments in the economics department in the School of Arts and Sciences and the marketing department in the Wharton School of Business.

4. *FTC orders Mastercard to change business tactics to stop alleged block on competing debit card payment networks.*

On Dec. 23, 2022, the FTC [announced](#) it had filed a complaint against Mastercard Incorporated, alleging that Mastercard had violated the Electronic Funds Transfer Act, the Durbin Amendment, and the FTC Act, relating to Mastercard’s practice of requiring merchants to route Mastercard-branded debit card payments solely through its own payment processing network (allegedly by withholding necessary information), rather than allowing the use of competing debit payment networks to process these transactions. Under the proposed consent order, Mastercard would be required to provide the necessary information to allow other payment networks to process these transactions.

5. *Merger Filing Fee Modernization Act of 2022.*

The Consolidated Appropriations Act, 2023, which includes the Merger Filing Fee Modernization Act of 2022, was signed into law Dec. 29, 2022. The Merger Filing Fee Modernization Act of 2022 introduces structural changes to the Hart-Scott-Rodino (HSR) Act filing fee tier system. HSR filing fees currently range from \$45,000 to \$280,000 and will soon range from \$30,000 to \$2,250,000. Questions remain,

including when the new filing fees will go into effect. For more information, please review our [GT Alert](#) on the topic.

6. *FTC forces companies to drop noncompete restrictions on thousands of workers.*

On Jan. 4, 2023, the FTC [announced](#) that it would take action against three companies and two individuals, relating to noncompete restrictions applicable to thousands of workers. The FTC alleged these agreements constituted an unfair method of competition under Section 5 of the FTC Act, and issued complaints against Ardagh Group, Prudential Security, and O-I Glass, Inc. In each case, the complaint related to post-employment covenants not to compete in a wide range of positions including security guards, manufacturing workers, and engineers. The FTC alleged that the noncompete agreements prevented employees from obtaining higher wages and prevented other businesses from being able to compete by potentially hiring these employees. These complaints accompany a parallel rulemaking initiative by the FTC to prohibit most noncompete provisions in employment contracts as an unfair method of competition.

B. Department of Justice (DOJ) (Civil)

Justice Department's Antitrust Division and the Office of the Inspector General of the Department of Health and Human Services announce partnership to protect health care markets.

On Dec. 9, 2022, the DOJ's Antitrust Division and the Office of the Inspector General (OIG) of the Department of Health and Human Services executed a [memorandum of understanding](#) (MOU). The MOU commemorates the agencies' plans to work together to "better protect health care consumers and workers from collusion, ensure compliance with laws enforced by OIG and the Antitrust Division, and promote competitive health care markets." The MOU also allows the two agencies to refer potentially illegal activity to each other, as appropriate, as well as to coordinate on information sharing, enforcement activity, and training. This partnership also meets the goals of the president's Executive Order on Promoting Competition in the American Economy.

C. Department of Justice (DOJ) (Criminal)

Criminal charges unsealed against 12 indicted in scheme to monopolize 'transmigrante' industry and extort competitors near U.S.-Mexico border.

On Dec. 6, the DOJ [unsealed an indictment](#) charging 12 individuals with conspiracy to monopolize the market of a cross-border transportation industry centered around the Texas-Mexico border. The industry, known as the transmigrante industry, transports used vehicles and other goods from the United States through Mexico for resale in Central America. According to the indictment filed in the Southern District of Texas, the individuals conspired to fix prices and allocate the market for transmigrante services in violation of Section 1 of the Sherman Act. The individuals allegedly used threats and violence to enforce use of their services, including customs paperwork services and payment of fees such as a common "pool" for the benefit of defendants and specially imposed taxes. The indictment includes other counts of extortion and money laundering alleged to be part of the overall scheme.

D. U.S. Litigation

1. *Deslandes v. McDonald's USA, LLC*, Case No. 22-2333 (7th Cir. Jan. 3, 2023).

On Jan. 3, 2023, McDonald's asked the Seventh Circuit to affirm an Illinois federal district court's ruling that McDonald's previous restrictions on employee hiring between restaurants did not violate antitrust laws. Under its policy, McDonald's prohibited franchisees from hiring employees from other McDonald's franchisees. The district court judge agreed, denied class certification, and held that it was "implausible" that the employment market for any employee was limited to only McDonald's restaurants and therefore the policy used by McDonald's was proper. On appeal, the FTC and DOJ filed amicus briefs arguing that the district court erred by not requiring McDonald's to show its policy was necessary to achieve its alleged pro-competitive end.

2. *Hurley III v. Nat'l Basketball Ass'n, et al.*, 2022 WL 17998878, Case No. 22-3038 (6th Cir. Dec. 30, 2022).

In December 2022, the Sixth Circuit Court of Appeals **upheld dismissal** of a lawsuit an attorney brought against the National Basketball Association (NBA) Players Association's decision to prohibit the attorney from registering as an agent for athletes. The attorney claimed that the Player's Association conspired with NBA teams and others to limit the number of agents. The Sixth Circuit held that as a labor union, the Player's Association was statutorily exempted from antitrust laws. The court held that this exemption extended to the Player's Association's alleged conspiracy with the NBA, noting that the U.S. Supreme Court has extended a "nonstatutory" exemption for any "anticompetitive effect of a properly bargained collective bargaining agreement."

Mexico

A. COFECE launches investigation into competition conditions in maritime passenger transport and roll-on/roll-off cargo in Baja California Sur.

On Nov. 30, 2022, the Federal Economic Competition Commission (COFECE or Commission) announced an investigation into maritime passenger transport services and roll-on/roll-off cargo, as well as into cabotage navigation with origin or destination in Baja California Sur, to determine the existence of effective competition conditions. The investigation was initiated ex officio.

If COFECE finds a lack of effective competition, the corresponding authority may implement regulations to eliminate the effects caused by such absence. In this case, such authority is the Ministry of the Navy. Pursuant to the Federal Antitrust Law, the investigating authority (IA) must conduct the investigation in no less than 15 but no more than 45 business days, which may be extended once for the same period. After this period, if applicable, a preliminary opinion will be issued, in order to subsequently receive notifications from persons with legal interest. Finally, COFECE could issue a resolution on the declaration of effective competition conditions.

Because Baja California Sur is the state with the longest coastline, COFECE explained, maritime transportation of roll-on/roll-off cargo and passengers is key to moving merchandise (such as food, construction materials, and other raw materials), as well as people to and from the state. During this investigation, the IA has the power to request information or documentation from the sector's regulators or to request it from the economic agents that participate in the market, as well as to make use of other investigative powers.

B. Competition problems in health insurance affect COFECE consumers.

On Dec. 6, 2022, COFECE presented its Study on Competition and Free Competition in Medical Expenses Insurance, which identifies problems that reduce competitive pressure to the detriment of consumers. These problems include high costs for changing insurance companies, lack of information on the characteristics of contracted services, the way insurance agents are remunerated, and opacity in the quality of hospital services, among others. COFECE finds that the aforementioned problems cause increased premiums.

COFECE notes that medical expense insurance (MEI) are financial instruments that address the expenses caused by damages or risks to health, in a shared manner with a group of people that contract these services. In Mexico, the MEI market is worth 92 billion pesos a year and covers 13 million people. This, coupled with the aging of the population in Mexico, means that the demand for health services will increase in the coming years, making it necessary to promote greater competition to reduce the price of policies and, therefore, out-of-pocket health expenses.

The study indicates the MEI market is highly concentrated, because the four insurers with the largest share issue 75% of the premiums. In addition, the study shows an upward trend for policy prices for these services, and insurers may have little bargaining power against the larger hospitals. Seventy percent of insurer payments are recorded in Mexico City, Jalisco, Nuevo Leon, and the State of Mexico, where 79% of hospitals with more than 100 beds are concentrated. The prices of hospital services are significantly higher in these entities, even for common conditions.

COFECE further warns that insurers are not obligated to recognize the age of clients who come from other insurers and to cover pre-existing conditions; in addition, waiting periods to treat certain conditions start anew, causing many users to remain tied to their first choice of insurer, regardless of the increase in the price of their policies with the annual renewal.

Additionally, COFECE indicates that the regulation of the exchange of transactional data and insurer information through computer application programming interfaces (open finance) has not been issued, hindering the entry of new providers.

Therefore, to promote competition and free decision making by consumers, COFECE makes several recommendations grouped in four areas:

1. To promote transparency in the hospital services market, the Federal Consumer Protection Agency should develop and publish indicators that measure the price-quality ratio of private hospital services.
2. To promote consumer mobility by establishing mandatory seniority portability, a risk bureau with rules that guarantee its independent operation from the insurers should be established, so that the insurers know the claims history of potential policyholders.
3. To reduce search costs for consumers, the regulatory authorities should promote the establishment of minimum standards for insurer and comparator websites, as well as the establishment of rules to be followed by comparators and other intermediaries that market through digital channels to promote or provide insurance intermediation services.
4. To reduce barriers to the entry of new competitors, it should be mandatory for insurance agents to show consumers information on the commissions and bonuses they receive from insurers and

prohibit prizes, bonuses, or contingent commissions, reducing the conflict of interest arising from the incentive for sales agents to place products from a single insurer. In addition, COFECE recommends that the regulatory authority issue the general provisions referred to in Article 76 of the Law to Regulate Financial Technology Institutions (Fintech Law) on the exchange of data and transactional information, which it says will facilitate the entry of data intermediaries and companies into the market.

C. Andrea Marván Saltiel is the new COFECE Commissioner

On Dec. 13, 2022, Andrea Marván Saltiel took office as COFECE Commissioner for a nine-year term, after being ratified by the Plenary of the Mexican Senate.

Andrea Marván Saltiel was nominated by the head of the Federal Executive, after passing the knowledge exam by the Evaluation Committee provided in Article 28 of the Political Constitution of the United Mexican States. With her ratification, COFECE's Plenary is strengthened by having five out of seven positions filled.

The new commissioner holds a law degree from Universidad Iberoamericana and a master's degree in the same subject from University of Chicago. Marván Saltiel is also a professor at Tecnológico de Monterrey, Santa Fe. In addition, she has 10 years of professional experience at COFECE, where until now, she served as General Director of Competition Promotion.

The Netherlands

Dutch ACM decisions, policies, and market studies

Dutch market for medical devices found to have high risk of anticompetitive behavior.

A Dutch Competition Authority (ACM) **study** has found that, in the high-tech medical device market in the Netherlands, relatively few providers and high barriers for entry create anticompetitive risks for manufacturers. Medical specialists' preference for certain brands makes it increasingly difficult for hospitals to switch to other suppliers. Moreover, the study concludes, the EU is currently imposing stricter requirements on the safety standards of medical devices; these requirements are causing certain manufacturers to abandon their production of certain devices, lowering the number of competitors in the market.

These circumstances may lead to higher prices, lower quality, and less innovation, according to the study. The ACM will investigate any possible anticompetitive behavior in the medical device market, specifically the markets for radiotherapy equipment, heart prostheses and implants, and blood purification equipment.

Poland

A. UOKiK President finds Vectra has not fully complied with conditional merger decision; initiates proceedings to impose financial penalty.

On Dec. 1, the Polish Office of Competition and Consumer Protection ("UOKiK President") **announced** Vectra has failed to fully comply with the administrative body's 2020 condition regarding the purchase of rival Multimedia Polska.

In January 2020 the UOKiK conditionally cleared Vectra's takeover of Polish cable operator Multimedia Polska. The conditions required Vectra to divest its networks in eight towns and offer its customers the option to change their provider at no additional cost in a further 13 markets. The takeover deal, which involves Poland's second and third largest cable companies, was first announced in August 2018. Multimedia Polska had previously been a takeover target of cable market leader UPC, but that deal collapsed due to competition concerns.

The UOKiK President initiated formal proceedings to verify whether Vectra has complied with commitments imposed in the 2020 conditional approval. According to the UOKiK President, Vectra has not yet fully complied with the imposed conditions concerning its structure. The company divested its networks in three towns only (Gorzów Wielkopolski, Pruszcz Gdański and Pogórze). In five others (Kwidzyn, Łowicz, Ostróda, Olsztyn and Stargard), contrary to the UOKiK's instruction, the company has not yet sold its networks.

Once the proceedings confirm that Vectra has failed to comply with the conditional decision, the UOKiK President may impose a penalty of up to EUR 10,000 per each day of delay in implementing the conditions. The UOKiK President may also revoke the conditional merger approval.

B. Implementation of Omnibus Directive, Directive on the Sale of Goods and Directive on Supply of Digital Content and Digital Services.

On Jan. 1, 2023, after a long delay (the deadline to transpose the EU directives into national legislation expired in 2021), several important consumer law regulations came into force. Changes to Polish law result from the implementation of three EU directives: Directive (EU) 2019/2161, known as the Omnibus Directive; Directive (EU) 2019/771 on the Sale of Goods; and Directive (EU) 2019/770 on Supply of Digital Content and Digital Services.

Polish regulations implementing the Omnibus Directive introduce:

- Price reductions – when a promotion or sale is announced, a trader is now obliged to display not only the current price but also the lowest price in the 30 days preceding the reduction.
- Dual quality – if the products sold in other EU Member States have significantly different compositions or characteristics, it is now prohibited to market such goods on the Polish market as identical to those sold elsewhere;
- Consumer reviews – product reviews must now be supported by the information on whether and how the reviews' authenticity is verified, and whether all the reviews are posted or only the positive ones. In addition, now it is prohibited to post false or distorted reviews;
- Information on marketplaces – consumers must be clearly informed whether the entity offering goods, services, or digital content on the marketplace is an entrepreneur or an individual (a natural person), as the consumers' rights are different in each case;
- Rankings and offer placement – consumers must be informed about the main parameters that determine the order in which the search results appear; also paid advertisements or payments made specifically to achieve a higher ranking of products within the search results must be disclosed to consumers;
- Individual price adjustments – if the price is automatically set for a specific consumer depending on the consumer's location, used device, or browsing history, the consumer must be clearly informed

about such adjustments (it does not apply to mechanisms based on factors unrelated to the specific user such as dynamic price profiling or real-time pricing);

Polish regulations implementing the Directive on the Sale of Goods and the Directive on Supply of Digital Content and Digital Services introduce:

- New rules for complaints – instead of “warranty” there is now “liability for non-conformity.” In the event of lack of conformity of the goods, the consumer may choose between repair and replacement of defective goods or demand a refund (partial or full) if the goods cannot be brought into conformity. A presumption that the lack of conformity with the contract existed already at the time of purchase is now extended to two years, while the limitation period for claims is extended to six years;
- Goods with digital elements, digital content and services – such digital goods must now be compliant with their trial version, and consumers must be provided with updates for at least two years;
- Digital content or services paid for with personal data – consumers are now protected even if they receive digital content or services in exchange for their personal data; such consumers have the same rights as those who actually paid money for the content or services.

Italy

Italian Competition Authority (ICA)

1. *ICA investigates Telecom Italia S.p.A. for alleged abuse of dominant position, for refusal to provide competitor access to its mobile coverage maps in the context of a public tender.*

On Dec. 19, 2022, ICA announced its investigation into Telecom Italia S.p.A. for suspected abuse of dominant position, as well as a proceeding to impose precautionary measures. Telecom Italia allegedly rejected multiple requests by Fastweb S.p.A., a telecom operator, to access certain information concerning Telecom Italia’s network, including its mobile coverage maps, which were deemed necessary for Fastweb to formulate offers in the context of a tender run by Consip S.p.A., the central purchasing body of the Italian public administration, for the supply of public phone services for a total value of more than 200 million euros.

Telecom Italia allegedly denied access to its coverage maps for reasons of confidentiality and proposed alternative methods, including the display of coverage rates at the municipal level, following the signing of confidentiality agreements, and the provision of the specific coverage maps directly to Consip, subject to third-party confidentiality, in the event of award by Fastweb. However, ICA found that Telecom Italia’s conduct could amount, *prima facie*, to an abuse of dominant position as the company, which for years has provided the service concerned by the tender, would be given a competitive advantage through its knowledge of the concrete needs of the public administrations to which the service would have to be provided. ICA has set a 60-day deadline for the parties to make requests for hearings.

2. *ICA finds new draft remuneration model for ATM cash withdrawals in Italy’s Bancomat network constitutes a restriction of competition.*

On Dec. 5, 2022, ICA announced its finding that the new draft remuneration model for cash withdrawals from ATM machines in the Bancomat network, the cash withdrawal and payment system for the main Italian banks, would be anti-competitive under Article 101 of the Treaty of the Functioning of the European Union (TFEU), as it would otherwise significantly increase average withdrawal fees. The finding

comes after a detailed investigation initiated in 2020 following Bancomat S.p.A.'s request for an assessment and involving Italy's main credit institution.

Under the current remuneration scheme, the bank that issues the card used for withdrawal pays an interchange fee to the institution that owns the ATM where the withdrawal is made, and the card-issuing bank can charge its customer a fee. Bancomat S.p.A.'s proposal, on the other hand, provides that the bank where the withdrawal is made requests a fee from the cardholder.

In particular, ICA finds the new model would restrict competitive factors between banks in the related services, preventing them from determining the withdrawal fee or deciding not to charge it to customers and increasing the incentives for banks to collude. Furthermore, the proposed model could not be deemed exempt under the conditions of Article 101, paragraph 3, TFEU, since Bancomat S.p.A. did not demonstrate the presence of a direct relationship between the decreased number of ATMs in Italy and the current remuneration model.

ICA's decision can be appealed before Lazio Regional Administrative Court within 60 days from publication.

3. *ICA issues notice regarding implementation of the new regime for sub-threshold mergers recently introduced under Italian Antitrust Law.*

On Dec. 13, 2022, ICA adopted the Notice on the Application of Article 16, paragraph 1-bis, of Law No. 287 of Oct. 10, 1990, clarifying implementation of the provision introduced in August 2022 by Law No. 118 (the "Annual Competition Act") regarding notification of so-called "sub-threshold mergers."

In particular, Article 16, paragraph 1-bis, of Law No. 287 of October 1990 ("Italian Antitrust Law") gives ICA the power to require undertakings to notify mergers in the six months following their completion, even if only one of the two cumulative turnover thresholds referred to in Article 16, paragraph 11, Italian Antitrust Law is met or if the total cumulative worldwide turnover achieved by the companies concerned exceeds 5 billion euros. ICA can exert this power if, based on the evidence in its possession, it finds concrete risks to competition in the national market (or in a relevant part thereof), "taking also into account the detrimental effects for the development of small-scale enterprises characterized by innovative strategies."

In its notice, ICA clarifies that for the purpose of assessing the concrete competitive risks, it will consider several elements, including: (i) structure of the relevant markets; (ii) characteristics of the undertakings involved; (iii) the nature of the activity carried out and its relevance to consumers and/or other operators; (iv) the innovative character of the activity; and (v) competitive constraint exerted by one or more firms beyond market share. For this purpose, the notice indicates quantitative thresholds for market share and the Herfindahl-Hirschman Index suggesting the presence of concrete competitive risks. In any case, especially where turnover is not indicative of competitive pressure, ICA specifies that it may consider additional factors such as, for example, whether a firm is a startup or a major innovator. In addition, the notice clarifies that ICA's power may also cover transactions involving entities that do not generate turnover in Italy, when, in light of the specific characteristics of the transaction and the undertakings involved, the concentration nevertheless appears likely to affect competition in the domestic market.

To determine the existence of a relevant transaction for the purposes of the Italian Antitrust Law, ICA will be able to employ the investigative powers normally provided for merger control. Once the request for notification has been formulated to the companies concerned, notification must be made within 30 days from request. Formulation of the notification request does not preclude ICA's referral of the transaction to

the European Commission, pursuant to Article 22 of EC Regulation No. 139/2004, if the requirements are met. In case of non-compliance with the notification request or requests for information or document production, the same sanctions are imposed as in the ordinary merger control proceedings.

Lastly, ICA specifies that if companies believe that a merger transaction that does not need to be notified to either the European Commission or ICA might fall within the scope of the rule set forth in the Italian Antitrust Law, they may voluntarily inform ICA, even before completion of the transaction, provided that they have already reached an agreement regarding the essential elements of the transaction. ICA, after evaluating the information provided, will inform the undertakings whether it intends to request notification of the transaction pursuant to Article 16, para. 1-bis, of Italian Antitrust Law within 60 days from receipt of the complete voluntary notice.

European Union

A. European Commission

1. *European Commission launches phase II probe into Broadcom's proposed acquisition of VMware.*

The European Commission has begun a phase II probe into Broadcom's proposed acquisition of VMware (with a value of EUR 57.5 billion) given competition concerns regarding certain Broadcom hardware components that interact with VMware software.

Broadcom produces hardware products that allow computers to connect to networks and servers to storage devices. VMware allows companies to run multiple virtual computer systems simultaneously on one server.

The proposed acquisition would, according to the European Commission, enable Broadcom to prohibit its competitors from interacting with the essential software of VMware, restricting competition. The European Commission has until May 11, 2023, to decide on the intended transaction.

2. *Divestment measures to unwind below threshold deal for Illumina/Grail acquisition.*

The first below-threshold acquisition the European Commission reviewed under article 22 EU Merger Regulation was the Illumina/Grail acquisition. In August 2021, the parties completed the acquisition while under European Commission investigation, which resulted in a gun-jumping investigation. A year later, in September 2022, the European Commission blocked the EUR 5.9 billion merger and ordered Illumina to unwind the transaction. The European Commission has now presented a package of measures to be implemented in order to restore the competition in the market for early cancer detection tests.

B. European Decisions

EU General Court upholds readopted fine for packaging manufacturer cartel.

In December 2022, the EU General Court upheld the European Commission's decision to fine a food packaging cartel participant for fixing prices and allocating customers. One of the manufacturers, the Consortium of Production and Labor Cooperatives (CCPL), was fined EUR 33.69 million for its subsidiary's participation in three of the five packaging cartels. In 2019, CCPL appealed to the EU General Court, which annulled the fine.

In 2020 the European Commission issued a new infringement decision, fining CCPL a total of EUR 9.4 million. CCPL argued this fine was substantially higher than the 10% annual turnover threshold applied in the first fine and, therefore, disproportionate. Furthermore, CCPL argued it was unable to pay the fine and that this would risk financial collapse. The EU General Court rejected this appeal, stating CCPL has enough financial stability and that a fine would only be altered if the penalty would “irreparably undermine” the economic viability and deprive the assets of any value, which the court found would not happen.

Japan

A. JFTC reveals penalty plans against three electric power companies on suspicion of cartel.

Since April 2021, the Japan Fair Trade Commission (JFTC) has conducted investigations against four electric companies on suspicion of a cartel. On Dec. 1, 2022, the JFTC notified the three major Japanese electric power companies of its proposed disposition, ordering them to pay a surcharge for violating the Antimonopoly Law (Unreasonable Restraint of Trade) in connection with a cartel involving the supply of electric power to businesses. Because one of the investigated electric companies first voluntarily reported the violation to the JFTC, it was exempted from penalties under the leniency system of the Antimonopoly Act. The total surcharge amount will be approximately JPY 100,000,000,000 (one hundred billion), the highest since the surcharge system started.

B. JFTC activates new data managing system to strengthen its monitoring.

To strengthen its monitoring of violations of the Act against Delay in Payment of Subcontract Proceeds, the JFTC will soon launch a new system that will enable centralized management of information obtained from past violation histories and periodic investigations. The system will aim to help the JFTC quickly identify cases where large companies that have had violations in the past are repeating similar actions and to help investigate cases. Previously, violation information was stored and managed separately for each case, requiring inspectors to search for each suspected violation. By using a new system, corporate numbers and business partners will be linked and managed so that past information can be used efficiently. The system will also incorporate information from the Small and Medium Enterprise Agency, the Labor Standards Inspection Bureau, and other relevant government agencies that examine the business conditions of companies.

C. Bid rigging of Tokyo 2020 Summer Olympics test events.

In November 2022, the Tokyo District Public Prosecutors Office and the JFTC investigated major advertising companies on suspicion of rigging bids for test event planning during the Tokyo 2020 Summer Olympics. This suspicion arose from an investigation into a former director of the Organizing Committee for the Olympics, who was indicted on bribery charges.

Between May 2018 and August 2018, the Organizing Committee for the Olympics conducted 26 auctions for the test events, where it evaluated the bidders' qualifications and prices. Nine companies, including advertising companies and one joint venture company, won bids. The JFTC suspects the companies involved colluded to decide the bidders in advance. Prior to the bidding, the Organizing Committee and a major advertising company prepared a list of potential bidders and communicated the list to some of the bidders by email, etc. The results of the bidding apparently were almost the same as the list of bidders.

One of the companies that participated in the bidding voluntarily reported the violation to the JFTC based on the surcharge reduction and exemption system (leniency) of the Antimonopoly Act. The investigation will focus on whether or not the companies agreed to bid rigging by analyzing the list, emails, and other documents, and by interviewing the people involved.

Read previous editions of GT's Competition Currents Newsletter.

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