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 proposes new rule banning employee non-compete agreements.*

On Jan. 5, 2023, the FTC proposed a new rule that would prevent employers from entering non-compete agreements with their employees. Non-compete agreements prohibit employees from working for a competing employer or starting a competing business, typically within a set geographic area and for a set period of time, after the employee's employment ends. As proposed, the FTC's proposed rule would prevent employers from entering into non-compete agreements with employees and would require employers with existing non-compete agreements to rescind such agreements and notify their employees that they may seek a position in competition with the employer at any time following their employment. In support of this proposed rule, the FTC argues that non-compete agreements violate Section 5 of the FTC Act because they restrict workers' ability to pursue better job opportunities and obtain higher wages.

[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.

The FTC is seeking public comment on the proposed rule through March 10, 2023. See GT Alert for more information.

2. *FTC prohibits three companies from entering and enforcing non-compete agreements with employees*.

On Jan. 4, 2023, the FTC filed three administrative complaints against Prudential Security, Inc. and Prudential Command Inc. (including owners Greg Wier and Matthew Keywell), O-I Glass, Inc., and Ardagh Group S.A., alleging the companies illegally imposed non-compete restrictions that prevented their employees from seeking or accepting work with another employer or competing business after leaving their current employment.

The FTC's complaint against Prudential alleges the company and its owners exploited their superior bargaining power against low-wage security guards by entering and enforcing non-compete agreements that restricted employees' ability to work for a competing business for two years within a 100-mile radius and imposed a $100,000 penalty for any violations. The FTC's complaint against O-I Glass, a glass manufacturer, alleges the company imposed non-compete restrictions on more than 1,000 employees that prevented those employees from working for, owning, or being involved in any other way with any U.S. business selling similar products or services for one year without the company's prior written consent. The FTC's complaint against Ardagh Group, a glass food and beverage container manufacturer, alleges the company restricted employees from directly or indirectly performing the "same or substantially similar services" to any business in the United States, Canada, or Mexico that is "involved with or that supports the sale, design, development, manufacture, or production of glass containers."

The FTC entered consent agreements with each of the companies, prohibiting them, and where applicable, their owners, from imposing, enforcing, and threatening to enforce non-compete agreements with employees. The companies also must rescind any existing non-compete agreements, provide copies of the consent orders to all affected employees, provide a copy of the complaint and consent order to any persons responsible for hiring and recruitment, and provide clear and conspicuous notice for 10 years to any new employees that they are free to seek and obtain competitive employment at any time following their employment. Further, the companies may not communicate to any employee that they are subject to a non-compete agreement.

3. *FTC revises jurisdictional thresholds under HSR Act and for prohibition of interlocking directorates*.

On Jan. 23, 2023, FTC approved for publication two separate notices in the Federal Register, one which revises the premerger notification thresholds for mergers and acquisitions under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, and a second which, for the first time in over two decades, pursuant to the Merger Filing Fee Modernization Act of 2022 as a part of the 2023 Consolidated Appropriations Act, updates filing fees. See GT Alert for more details.

4. *FTC seeks order holding Martin Shkreli in contempt for violating compliance reporting and access to information provisions in an order banning Shkreli from future participation in the pharmaceutical industry*.

In June 2022, U.S. District Court Judge Denise Cote found that Martin Shkreli had orchestrated an illegal anticompetitive scheme to perpetuate a monopoly for the life-saving drug Daraprim, and banned Shkreli from ever participating in the pharmaceutical industry. The FTC is investigating whether Shkreli has violated the court's pharmaceutical industry ban through his new company, Druglike, Inc. But Shkreli has

ignored the FTC's repeated requests that he provide a compliance report and access to relevant records and sit for an interview.

On Jan. 20, 2023, FTC filed a motion asking the court to hold Shkreli in contempt of the court's June 2022 order, which required Shkreli to provide compliance reports and contained access-to-information provisions.

5. *FTC adjusts maximum civil penalty dollar amounts for violations of laws*.

On Jan. 11, 2023, new maximum civil penalties became effective for violations of 16 provisions of FTC-enforced laws. In accordance with the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, which requires the FTC to implement annual inflation adjustments based on a prescribed formula, the following adjustments have been made:

Statute	**Prior Maximum Civil Penalty**	**New Maximum Civil Penalty**
Section 7A(g)(1) of the Clayton Act, 15 U.S.C. 18a(g)(1)	$46,517	$50,120
Section 11(l) of the Clayton Act, 15 U.S.C. 21(l)	$24,714	$26,628
Section 5(l) of the FTC Act, 15 U.S.C. 45(l)	$46,517	$50,120
Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. 45(m)(1)(A)	$46,517	$50,120
Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. 45(m)(1)(B)	$46,517	$50,120
Section 10 of the FTC Act, 15 U.S.C. 50	$612	$659
Section 5 of the Webb-Pomerene (Export Trade) Act, 15 U.S.C. 65	$612	$659
Section 6(b) of the Wool Products Labeling Act, 15 U.S.C. 68d(b)	$612	$659
Section 3(e) of the Fur Products Labeling Act, 15 U.S.C. 69a(e)	$612	$659
Section 8(d)(2) of the Fur Products Labeling Act, 15 U.S.C. 69f(d)(2)	$612	$659
Section 333(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6303(a)	$503	$542

Statute	Prior Maximum Civil Penalty	New Maximum Civil Penalty
Section 525(a) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(a)	$24,714	$26,628
Section 525(b) of the Energy Policy and Conservation Act, 42 U.S.C. 6395(b)	$46,517	$50,120
Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. 1681s(a)(2)	$4,367	$4,705
Section 1115(a) of the Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, as amended by Pub. L. No. 115-263, 21 U.S.C. 355	$16,445	$17,719
Section 814(a) of the Energy Independence and Security Act of 2007, 42 U.S.C. 17304	$1,323,791	$1,426,319

B. Department of Justice (DOJ) Civil Antitrust Division

Justice Department withdraws previous enforcement policy statements.

On Feb. 3, 2023, the DOJ's Antitrust Division announced it was withdrawing three antitrust policy statements relating to enforcement in health care markets due to market changes in the last 30 years rendering the prior policy statements "outdated." The three withdrawn policy statements include the 1993 Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area, the 1996 Statements of Antitrust Enforcement Policy in Health Care, and the 2011 Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program. See GT Alert for more information.

C. DOJ Criminal Division

1. *Military contractor pleads guilty to bid-rigging*.

On Jan. 12, a military contractor pleaded guilty to rigging bids on public military contracts in Texas in violation of Section 1 of the Sherman Act. According to the court filings, the contractor conspired with others to rig bids from 2013 to 2018 by giving the false impression of competition and to secure government payments in excess of $17 million. The contract involved heavy military equipment work such as refurbishing armor kits for military trucks and turrets for Humvees. One of the co-conspirators previously pleaded guilty in July 2022.

2. *Construction company owner sentenced for fraud in securing millions of dollars in contracts intended for service-disabled veteran-owned small businesses*.

On Jan. 18, DOJ announced that a previously convicted construction company owner had been sentenced to 27 months in prison and ordered to pay a $1.75 million fine. The defendant, who owned several companies, had been convicted in June 2022 of a long-running scheme that obtained Service-Disabled Veteran-Owned Small Businesses contracts valued over $240 million when in fact the companies did not qualify for such contracts. The Antitrust Division prosecuted the case.

D. U.S. Litigation

1. *CSX Transportation Inc. v. Norfolk Southern Railway Co. et al.*, Case No. 2:18-cv-00530 (E.D.Va. Jan. 27, 2023)

On Jan. 27, 2023, a federal court rejected CSX Transportation Inc.'s request for an order granting it access to a Virginia port controlled by Norfolk Southern Railway Co., ruling that railroads are exempt from the type of antitrust injunction requested. According to the court, federal courts are barred from issuing injunctions in private lawsuits against rail "common carriers" — including defendants Norfolk Southern Railway Co and Norfolk & Portsmouth Belt Line Railroad Co — that are subject to federal Surface Transportation Board regulation. The court held that the 1995 Interstate Commerce Commission Termination Act clearly blocked CSX Transportation Inc.'s bid for injunctive relief. The legislation changed the Clayton Act to limit antitrust injunctive relief bids to the federal government "against any common carrier subject to the jurisdiction of the Surface Transportation Board." Earlier in January, the court dismissed CSX's claim for several hundred million dollars in damages.

2. *Heritage Guitar, Inc. v. Gibson Brands, Inc.*, Case No. 1:20-cv-229 (W.D. Mich.)

In January 2023, Heritage Guitar agreed to drop its antitrust lawsuit against Gibson Brands in a settlement that also ended Gibson's trademark counterclaims—which a Michigan federal judge had already deemed "baseless."

Heritage was formed several decades ago by former Gibson employees. The parties entered into an agreement in 1991 that set out the guitar shapes Heritage could make. Irrespective of this agreement, following multiple cease-and-desist letters from Gibson, Heritage filed a declaratory lawsuit seeking a determination that it did not infringe Gibson's intellectual property and that it had not breached the prior agreement between the parties. Gibson counterclaimed, alleging the company's guitars violated Gibson's trademarks in its original instrument shapes. In response, Heritage amended its complaint and filed antitrust claims, alleging Gibson engaged in several types of anticompetitive conduct designed to allow Gibson to obtain monopoly power, including filing of its baseless trademark infringement claims.

As part of its defense to the antitrust claims, Gibson relied on 'Noerr-Pennington immunity,' which immunizes a party from antitrust liability when it seeks to protect its intellectual property through infringement claims. The court ruled, however, that "a narrow exception to this doctrine exists where the lawsuits are a 'sham' and filed for the purpose of interfering with competition." The court ruled Gibson's claims and pre-litigation conduct relating to certain of its body shape trademarks were objectively baseless for the purpose of the sham litigation exception to the Noerr-Pennington doctrine, meaning Gibson was not immune to antitrust litigation just because it was trying to enforce its trademarks. After Gibson successfully raised new counterclaims for violations of federal and state trade secret acts, the parties reached a confidential settlement, dismissing the claims and counterclaims with prejudice.

3. *Richard Gibson and Heriberto Valiente v. MGM Resorts International et al.*, Case No. 2:23-cv-00140 (D. Nev)

This recently filed lawsuit in Nevada federal court alleges Caesars Entertainment, Treasure Island, Wynn Resorts Holdings, and MGM Resorts International used pricing algorithms to set hotel room rates instead of making "independent pricing and supply decisions." The lawsuit alleges that "Rainmaker, a revenue management platform used by an estimated 90% of Vegas Strip hotels, collects real-time pricing and supply information from competitors and provides room rental rate recommendations designed to unlawfully maximize profits for its hotel operator users." According to plaintiffs' attorneys, the use of this algorithmic pricing model constitutes price fixing and violates Section 1 of the Sherman Act.

Plaintiffs allege that Caesars, MGM, Wynn, and Treasure Island violated the Sherman Antitrust Act and seek to hold them liable for repayment for guests who overpaid, according to a press release.

The hotel operators named in the lawsuit control roughly 20 of the 30 total available Strip hotels, and plaintiffs claim that defendants' control of the market enabled the scheme.

In public statements, the defendants deny the allegations in the complaint and vow to defend against the claims.

4. *Borozny v. Raytheon Technologies Corp, Pratt & Whitney Division et al.*, Case No. 3:21-cv-01657-SVN (D. Conn.)

On Jan. 20, 2023, the district court denied six aerospace manufacturers' motion to dismiss antitrust litigation asserting the defendants' alleged pact pledging to refrain from recruiting one another's jet propulsion engineers.

The decision also lines up—broadly, at least—with the Federal Trade Commission's push this year to ban non-compete clauses in employment contracts.

The manufacturers argued there was an "innocent explanation." The court, however, said such defenses are for "another day." The court ruled that plaintiffs' complaint "adequately alleges that the no-poach agreements at issue had no legitimate business purpose." But, the court noted, "whether plaintiffs will eventually be able to produce evidence to substantiate this claim at summary judgment or trial is a question for another day."

The Netherlands

A. Dutch ACM decisions, policies, and market studies

1. *ACM launches preliminary investigation into possible competition law infringement by pharmaceutical companies.*

Given concerns about anti-competitive conduct in the pharmaceutical sector, the Dutch Competition Authority (ACM) has requested information from three companies allegedly charging excessive prices and imposing unreasonable conditions under which products and services are sold to health care providers by obligating them to purchase bundles (i.e., tying).

Once it reviews the requested information, the ACM may decide to investigate further and may eventually find the companies violated EU and/or Dutch national competition law. If so, ACM may impose a fine or penalty.

2. *ACM concludes proposed merger between Talpa and RTL would result in dominant position.*

Talpa and RTL are media companies active in the Dutch market and overlap in advertising and channel distribution. The ACM indicated earlier that a Phase II (i.e., an in-depth investigation) was needed, as a merger between the companies would have negative effects on price, quality, and innovation.

On Jan. 30, 2023, the ACM concluded that the remedies offered – which have not been made public yet – in the context of RTL's proposed acquisition of Talpa are insufficient to remove competition concerns. A formal ACM decision with detailed reasoning will follow.

United Kingdom

A. Merger Control

1. *National Grid gas transmission and gas metering business – 60% acquisition by consortium cleared.*

On Nov. 22, 2022, the CMA cleared the anticipated acquisition by a consortium between Macquarie Infrastructure and Real Assets (Europe) Limited and British Columbia Investment Management Corporation of a 60% shareholding in the gas transmission and gas metering business of National Grid plc. Although there are some overlaps between National Grid and Macquarie, the CMA found the acquisition would not result in a substantial lessening of competition in the UK.

2. *Airlines – delay to acceptance of undertakings in lieu of a reference to Phase 2.*

Korean Air and Astana Airlines are the only carriers offering direct passenger flights, and the main suppliers of direct air cargo services, between London and Seoul. On Nov. 28, 2022, the CMA decided to refer the merger to a Phase 2 investigation unless the parties gave undertakings to resolve its concerns. On Dec. 8, 2022, it issued a consultation on the undertakings offered by the parties, with a view to accepting the undertakings on Jan. 26, 2023. On the same date, it issued a notice extending the deadline to March 23, 2023, stating it was unable to reach a decision on the undertakings within the original deadline given the need to approve the remedy taker and conduct material engagement with third parties.

3. *Vehicle salvage services – reference to Phase 2.*

The CMA referred Copart's completed acquisition of Hills Motors to a Phase 2 in-depth investigation on Nov. 28, 2022, citing concerns the merger of the two vehicle salvage competitors would reduce the number of salvage services providers available to customers, including the insurance industry, finance companies, and rental car companies, and could limit the vehicles available to suppliers of recycled vehicle parts, often known as "green parts." Copart decided not to offer undertakings to avoid a reference to a Phase 2 in-depth investigation, so the CMA referred the acquisition on Dec. 9. The CMA's Phase 2 decision is due by May 25, 2023.

4. *Poultry feed joint venture – reference to Phase 2.*

On Jan. 9, 2023, the CMA referred to Phase 2 the proposed formation of a joint venture combining the animal feed milling operations of two manufacturers of feed for chickens and other poultry. The CMA's concerns include the reduction in competition in the supply of feed in four local areas in a part of eastern England. No undertakings to avoid a reference were agreed.

5. *Engineering foams – Phase 2 divestment undertakings.*

Following a Phase 2 investigation of Carpenter Co's proposed acquisition of a competitor, the engineered foams business of Recticel NV/SA, on Jan. 23, 2023, the CMA accepted final undertakings from Carpenter to resolve the CMA's competition concerns that the acquisition would substantially lessen competition in the UK supply of comfort foam, technical foam, and converted comfort foam. Carpenter has agreed to divest the UK assets and operations of the Recticel foam business to an upfront buyer with sufficient R&D capabilities and chemical procurement experience to ensure the divested business remains an effective competitor. The divestment must be made within a prescribed period, which has not been published, but is normally around six months.

6. *Emergency service software – divestment of part of acquirer business.*

After a Phase 2 investigation, the CMA required NEC Software Solutions to divest part of its business to resolve CMA concerns arising from NEC's completed acquisition of SSS Public Safety Limited and Secure Solutions USA LLC. Both NEC and SSS produce essential software used by UK blue light emergency services (mainly police, fire and rescue services and ambulance trusts) and transport service providers (such as Transport for London and rail operators). The CMA found the acquisition had resulted in a substantial lessening of competition in the supply of software used in control rooms and software used for planning and scheduling staff shifts. NEC intends to divest its own businesses rather than those of SSS, and CMA is determining the terms of divestment.

7. *Pastry dough – deal blocked.*

On Jan. 20, 2023, the CMA issued its final report following a Phase 2 investigation of Cerelia's completed acquisition of the assets of General Mills' Jus-Rol UK and Ireland pastry dough business. The CMA found the acquisition had resulted in a substantial lessening of competition in the wholesale supply of dough-to-bake products to grocery retailers in the UK and decided the only remedy for the loss of competition between the two parties was divestment of all Jus-Rol assets.

B. Antitrust – regulation

1. *Horizontal guidance.*

On Jan. 25, 2023, the CMA issued draft guidance on the UK prohibition on anti-competitive agreements' application to horizontal agreements. The UK-specific guidance will replace the EU horizontal guidelines that have applied in the UK to date. It also addresses the new UK Specialisation Agreements Block Exemption Order 2022 and the new Research and Development Block Exemption Order 2022, both of which came into force Jan. 1, 2023. The consultation will end March 8, 2023.

2. *Cooperation on climate change initiatives – draft sustainability guidance.*

The CMA will soon commence consultation on draft guidelines to assist competitor firms wishing to cooperate with each other on climate change initiatives in avoiding breaches of UK competition law.

C. Antitrust enforcement – government investigations

1. *Recycling end-of-life vehicles – suspected anti-competitive agreements – information notices sent to a party outside the UK.*

In March 2022, the CMA started an investigation into anti-competitive practices relating to the recycling of old or written-off vehicles and involving a number of vehicle manufacturers and some industry bodies. The investigation, due to continue until at least July 2023, concerns agreements relating to the use of recycled materials in cars, their recyclability, and the arrangements for recycling old or written-off vehicles. The CMA believes some of these agreements have been made outside the UK and has issued a notice requiring one of the UK-based parties and its Germany-based parent company to provide further information. Although the UK-based party has responded, its parent company has not, on the basis that the CMA does not have jurisdiction outside the UK. The CMA disagreed, and on Dec. 6, 2022, issued a notice imposing a £30,00 lump sum penalty, plus a £15,000 daily penalty on the parent company and its group.

2. *Money transfer services – suspected anti-competitive agreements – statement of objections.*

On Jan. 25, 2023, the UK Financial Conduct Authority (FCA), which alongside the CMA has the power to enforce UK competition law in the UK financial services sector, issued a statement of objections against three money-transfer firms. It alleges the three firms colluded over flat-rate transaction fees and the sterling-to-Pakistan-rupee exchange rate charged for a period in 2017 to their customers in Glasgow, Scotland, for the transfer of money from the UK to Pakistan. The statement of objections, which is not made public, sets out the FCA's provisional case against the three firms, which now may respond to the statement of objections in writing and at an oral hearing.

3. *School management software – commitments.*

On Jan. 10, 2023, the CMA announced it had obtained commitments from Education Software Solutions Ltd (ESS), the UK's largest supplier of school management information system software, to end its investigation of ESS under the UK prohibition on abuse of market dominance. The CMA found that ESS's contracts had limited schools' ability to choose alternative suppliers and made it difficult for ESS's rivals to compete. ESS's commitments will enable schools that had considered switching providers but reasonably concluded they did not have sufficient time to do so under the ESS contract, to apply to an independent adjudicator for a 12-month break clause that will allow them to exit their current three-year contract with ESS on March 31, 2024, and sign up with an alternative provider. The deadline for applications is Feb. 10, 2023.

4. *Telecoms equipment used by UK emergency services – bid rigging penalty.*

On Dec. 16, 2022, UK communications regulator Ofcom penalized Sepura £1.5 million for colluding with competitor Motorola to rig a tender for telecommunications equipment used by UK emergency services. A senior Sepura employee had disclosed its pricing intentions to a senior Motorola employee in a 2018 text. Because Motorola disclosed this to Ofcom in 2019, it obtained leniency and was not fined.

D. Markets/Consumers

1. *Digital.*

The Digital Regulation Cooperation Forum, which brings together four UK regulators, the CMA, Ofcom, the Information Commissioner, and the Financial Conduct Authority, has called for input on its 2023/2024 workplan, inviting views about issues it should take into consideration as it develops its plan of work.

2. *Groceries – unit pricing review.*

The CMA announced Jan. 31, 2023, that it has opened a project to consider the use of unit pricing, both in-store and online, in the groceries sector. Unit pricing involves labeling that displays the cost of different products according to standard units of measurement, principally weight or volume, to help consumers compare the costs of products irrespective of their packet size. However, in a 2015 case, the CMA identified complexities and inconsistences that made it difficult for consumers to make meaningful choices. It has decided to revisit the issue now, given the rising cost of living and the importance to consumers of making informed choices when shopping for food and other essentials. It will assess whether the issues identified in 2015 persist, whether retailers are complying with the law in this area, and the extent of consumer awareness and use of unit pricing information. The CMA's project is expected to continue through most of 2023.

3. *FMCG - household food and drinks – greenwashing review.*

The CMA announced Jan. 26, 2023, it had opened a project to analyze environmental claims made online and in-store about a wide range of essential items purchased regularly by consumers, including food, drink, cleaning products, toiletries, and personal care items. It will consider whether businesses are complying with the law and cites problematic claims such as the use of vague and broad "eco-statements" (e.g., "sustainable," "better") on packaging and in marketing, and misleading claims about the use of recycled or natural materials in products and about the ability of a product to be recycled. The project is part of a wider CMA review of misleading environmental claims, which in 2022 involved the fashion industry – the CMA's investigation of three fashion companies is ongoing.

E. State aids

The new UK state aids rules, in the Subsidy Control Act 2022, came into force Jan. 1, 2023. See the November 2022 issue of Competition Currents for details.

Poland

The President of the UOKIK fines Kärcher for fixing prices with distributors.

On Dec. 28, 2023, the President of the Polish Office for Competition and Consumer Protection ("UOKiK President") fined Kärcher for retail price fixing with its distributors.

Kärcher is a global company operating in Germany that mainly manufactures cleaning equipment such as pressure washers, vacuum cleaners, and steam cleaners. The company is suspected of setting retail prices for its products in consultation with its dealers since the beginning of its operations in Poland in the late 1990s. At first these operations were both brick-and-mortar and online; later (after 2005), mainly online platforms.

Kärcher's cooperation agreements with its distributors contained, among other things, provisions by which distributors could sell products only on Kärcher's terms. Distributors who sold at lower prices were penalized with withdrawn discounts, deprivation of marketing support, shortening of payment terms, or even termination of cooperation agreements. Some of the distributors were actively involved in disciplining the rest of the entities by informing Kärcher of the lower prices.

UOKiK considers vertical price-fixing arrangements (resale price maintenance) one of the most serious restrictions of competition. Kärcher faced a financial penalty of PLN 26 million (approx. USD 6 million). The penalty would have been significantly higher but for the leniency program. Kärcher admitted to infringing the law and cooperated with the UOKiK President during the investigation, allowing Kärcher to apply for a reduction of the fine. However, Kärcher did not obtain a full waiver of the financial penalty because it had induced other distributors to participate in the illegal conduct.

Italy

Italian Competition Authority (ICA)

1. *ICA fines four companies for bid-rigging in the road construction and maintenance sector*.

On Jan. 2, 2023, ICA announced its finding that an anticompetitive agreement infringing Article 101 of the Treaty on the Functioning of the European Union existed between several road construction and maintenance companies. This alleged agreement occurred, ICA found, in the bid for routine road maintenance for an entire network owned by one toll road operator.

The investigation started in 2019, following a report the contracting authority received about some anomalies in the company bids. Indeed, only three companies participated in the bid procedure, and each was awarded a contract. Moreover, the companies appeared intermingled through reciprocal subcontracts.

ICA found the companies had colluded through correspondence and the exchange of commercially sensitive information. They did this, according to ICA, to eliminate competition in the bidding process by agreeing on its outcome, while guaranteeing each other's participation in subcontracts for ancillary work.

The companies were fined a total of about 4 million euros and may within 60 days appeal the decision before the Regional Administrative Tribunal of Lazio.

2. *ICA rejects request for precautionary measures in investigation into telecom company for alleged abuse of dominance*.

On Jan. 2, 2023, ICA announced its decision to reject Fastweb S.p.A.'s request for temporary measures against Telecom Italia S.p.A. (TIM) for TIM's alleged abuse of dominant position. Fastweb is a telecommunications company; TIM holds the national public telephone network and provides telecommunications services.

Fastweb requested temporary measures in conjunction with a complaint—in response to which ICA opened an investigation—that TIM allegedly rejected multiple Fastweb requests to access certain information concerning TIM's network, including its mobile coverage maps. Fastweb deemed the information necessary for it to formulate offers in the context of a bid by Consip S.p.A., the central purchasing body of the Italian public administration, for the public supply of phone service worth over 200 million euros.

However, according to ICA, TIM had already provided Fastweb sufficient information, following signed confidentiality agreements, in the form of coverage rates at the municipal level. The ICA determined that further information was unnecessary to effectively participate in Consip's bid, especially given the additional clarifications and extensions it received in relation to this issue. Therefore, ICA found the precautionary measures request lacked the requirement of both *fumus bonis iuris* (prima facie case) and *periculum in mora* (urgency) and rejected it.

Fastweb has 60 days to appeal the decision before the Regional Administrative Tribunal of Lazio.

3. *ICA fines YOOX Net-a-Porter Group for unfair commercial practice*.

ICA fined online fashion retailer YOOX Net-a-Porter Group for unfair commercial practices. The authority said the unfair commercial practices involved the unilateral blocking of user accounts that exceeded a certain return threshold and the misleading presentation of prices and discounts applied to the products sold on the platform. This conduct allegedly occurred between 2019 and 2022.

According to ICA, product prices and discounts applied to them are among the main competitive levers directing consumers' commercial decisions. YOOX Net-a-Porter Group's allegedly account-blocking conduct represents a new method through which online platforms might jeopardize the aforementioned fair development of the overall environment of online sales, the authority said.

ICA fined the group more than 5 million euros. YOOX can appeal ICA's decision before the Lazio Regional Administrative Court within 60 days.

4. *ICA fine on Telepass Group for unfair commercial practices upheld on appeal*.

With a judgment published Jan. 13, 2023, the Lazio Regional Administrative Court dismissed Telepass S.p.A. and Telepass Broker S.r.l.'s appeal of ICA's 2021 decision that fined the companies for unfair commercial practices in the distribution of motor liability policies.

According to ICA, the two companies provided customers who requested an insurance quote through the Telepass app with misleading and/or lacking information on both the collection and the processing of the data and the quote process. For instance, users were not informed that the data collected was also used for commercial purposes. Moreover, ICA said, the companies gave no information to users about the actual identity of the insurance companies involved in the process, or about how the quote was calculated.

In its ruling, the Lazio Regional Administrative Court rejected all of the companies' arguments: neither their compliance with privacy rules nor the fact that the used algorithm was in line with Institute for Insurance Supervision (IVASS) parameters were considered sufficient elements to neutralize the alleged unfair nature of the conduct.

Moreover, the court confirmed the 2 million euro fine, declaring the companies' cessation of their unfair practices after the first objections irrelevant for fining purposes. The companies may appeal the judgment to the Council of State within 60 days.

European Union

A. European Commission

1. *European Commission launches public consultation regarding draft Guidelines for sustainability agreements in agriculture sector*.

On Jan. 10, 2023, the European Commission invited interested parties to comment on its draft guidelines on how to design sustainability agreements in the field of agriculture (Guidelines). Exemptions to the EU competition rules were introduced during the recent reform of the common agricultural policy.

In principle, competition-restricting agreements between companies are prohibited pursuant to the cartel prohibition provision of Article 101 of the Treaty on the Functioning of the European Union (TFEU). However, an exemption applies if agreements in the agricultural sector are indispensable to achieve sustainability standards (Article 210a of EU Regulation 1308/2013 establishing a common organization for the agricultural products market). The draft Guidelines, among other things, aim to clarify and define the scope of such exclusion and the eligibility of sustainability objectives. The European Commission intends to adopt the final Guidelines in December 2023 and will implement any necessary changes as a result of the consultation.

2. *Foreign Subsidies Regulation enters into force*.

On Jan. 12, 2023, the Foreign Subsidies Regulation (FSR) entered into force, introducing new rules to address distortions in the EU market due to foreign subsidies. The FSR applies to all economic activities and enables the European Commission to investigate financial contributions that foreign (i.e., non-EU) countries grant to companies engaging in economic activity in the EU and, if necessary, correct any distorting effects.

The FSR will apply as of July 12, 2023, and at that time, the European Commission will be able to launch ex-officio investigations. As of Oct. 12, 2023, companies engaging in (i) mergers and/or acquisitions or (ii) a public procurement procedure in the EU, triggering the applicable thresholds in the FSR, will be required to submit formal notifications. In such situations, companies must await European Commission approval.

B. European Decisions

1. *ECJ rules 'Intel test' applies to exclusivity clause analysis*.

The European Court of Justice (ECJ), in its preliminary ruling, confirmed that (national) competition authorities deciding on cases of exclusivity clauses in distribution contracts must analyze whether "in light of all the relevant circumstances and in view of, where applicable, the economic analyses produced by the undertaking in a dominant position as regards the inability of the conduct at issue to exclude competitors that are as efficient as the dominant undertaking from the market, that those clauses are capable of restricting competition."

Moreover, the so-called as-efficient competitor test applies to both rebate practices and exclusivity clauses since both are capable of being objectively justified. The ECJ also stated that the evidence on exclusionary effects must be assessed by the (national) competition authority if the undertaking concerned submits results of such test during an investigation.

2. *ECJ clarifies EU Damages Directive in preliminary ruling*.

Following a request for a preliminary ruling by the Czech Republic's Supreme Court in 2021, the ECJ has clarified certain provisions in Directive 2014/104/EU (EU Damages Directive). According to the ECJ, national courts must be able to order disclosure – that is necessary and proportionate – in private enforcement cases where a damages claim for the same conduct is suspended pending a decision by the European Commission. Furthermore, the disclosure restrictions included in the EU Damages Directive do not apply to information that exists independently of the investigation and happens to be included in the file because it is relevant. Therefore, restrictions that entirely prohibit the disclosure of any evidence regarding a suspended antitrust investigation are not in line with EU legislation.

Greater China

China's Supreme Court Proposes to Revise Rules over Civil Litigation under AML.

On Nov. 18, 2022, the Supreme People's Court (SPC) of China published an amended draft of the judicial interpretation (Draft Rules) of the recently revised Anti-Monopoly Law (AML) of China. The draft interpretive rules provided both procedural and substantive guidance for Chinese courts to hear and adjudicate litigation under AML, with a series of highlights as follows:

1. *Exclusivity in jurisdiction of the IP and intermediary courts*.

The Draft Rules provide that all litigation brought under AML will be heard exclusively by the intellectual property courts or the intermediary court SPC appoints. A court of competent jurisdiction will be able to hear and adjudicate any claim under AML even when there is a valid arbitration clause between the parties.

2. *Detailed rules on burden of proof*.

The Draft Rules propose detailed rules regarding the allocation of burden of proof for different AML claims. For example, in civil litigation claims arising from illegal conduct the administrative body has determined through an investigation, the plaintiff does not need to prove the existence of such illegal conduct, and the court may solicit opinions and explanations from the administrative body regarding such conduct.

In addition, the Draft Rules require plaintiffs to prove the existence of a relevant market where the alleged illegal conduct occurred and provide supporting evidence. As an exception, the plaintiff alleging any horizontal monopolistic behavior as prescribed under sections (1) through (5) of Article 17 of AML (i.e., acts of cartel that are illegal per se under AML, like collusive price-fixing, reduction of supply, allocation of market, etc.) or any vertical monopolistic behavior as prescribed under sections (1) and (2) of Article 18 of AML (i.e., fixing resale price) are exempt from the duty to prove the relevant market. The exception will lower the cost for plaintiffs injured by such illegal conduct.

3. *Incorporation of the test formulated in the "pay-for-delay" case*.

The Draft rules also incorporate rules formulated by SPC in certain recent landmark AML cases. For example, in December 2021, SPC for the first time adjudicated the legality of a reverse payment agreement (i.e., a "pay for delay" deal) and formulated a two-step test to determine whether an agreement where a patent holder pays a non-patent drug maker for agreeing not to take actions including challenging

the patent. The Draft Rules set forth a rule of general application that any agreement having the following two characteristics shall be deemed illegal under AML:

- The patent holder grants or offers to grant the generic drug maker a substantial amount of money or compensation, and
- The generic drug maker promises not to challenge the patent at issue or delay its own drug product's entry into market.

At the same time, the Draft Rules clarify that if the parties show evidence that such compensation was reasonable in amount to settle the patent-related dispute or has other justification, such agreement will not be treated as violating AML.

4. *Introduction of the "single economic entity" theory into determination of "horizontal monopoly*."

The Draft Rules introduce the concept of "single economic entity" (SEE) when clarifying that if two business undertakings constitute an SEE, they shall not be treated as competitors. Thus, any horizontal agreement between such constituent entities of an SEE is exempt from the prohibition against horizontal monopoly under AML. Without providing any definition of the term, the Draft Rules request the deciding court to look into whether a particular entity has control or the ability to impose decisive influence over the other entity, or if both entities are controlled by or being decisively influenced by a third party.

5. *Reasonable test to evaluate vertical restraints*.

The Draft Rules clarify that, in civil claims, the prohibition against vertical restraints will be subject to a reasonability test, i.e., the court shall find an alleged vertical restraint to be illegal when (a) the evidence showing the competition-restricting effect outweighs the evidence of pro-competitive effect, and (b) the defendant has significant market power in the relevant market. Such potential competition-restricting effect shall include increasing the barriers to market entrants, impeding efficiency improvement in distribution, restricting inter-brand competition; potential pro-competition effects include prevention of free-riding, increasing intra-brand or inter-brand competition, protecting the brand, improving pre-sale or post-sale services, and incentivizing innovation.

Importantly, the Draft Rules provide for three exemptions to the vertical restraint prohibition in civil claims if the defendant can prove that: (a) the counterparty is a mere agent of the defendant without bearing any substantive commercial or operational risk, or (b) defendant's market share is lower than the State Administration for Market Regulation (SAMR)'s threshold percentage as published under the "safe harbor rule," or (c) the restraint is to incentivize the counterparty to market new products and is implemented within a reasonable period of time. As background, in a draft "safe harbor rule" SAMR published in June 2022 (not in effect yet), unless with countervailing evidence that the anti-competition effect exists, the vertical restraint between two business undertakings is not prohibited if the market share of each undertaking in the relevant market is below 15%.

6. *Clarifying rules to determine dominant market power and abusive practices*.

The Draft Rules allow the court to presume that dominance exists in a relevant market if there is supporting evidence that (a) the business undertaking is able to, over a comparatively long period, maintain the price obviously higher than the market level and there is obvious shortage of competition, innovation, and new entrants in the relevant market, or (b) the undertaking is able to in a comparatively long period, maintain the market share obviously higher than the other competitors and there is obvious shortage of competition, innovation, and new entrants in the relevant market. The Draft Rules request

court to consider the actual market and competition structure, and to apply common sense and economy theory when determining whether the dominance exists.

The Draft Rules further clarify the "rule of thumb" to determine existence of typical abusive practices by an undertaking holding dominant market power.

For example, for unfair pricing (i.e., excessively high sale price or excessively low price of purchase), the Draft Rules allow a court to find a market dominant undertaking's practice abusive if both of the following conditions are satisfied: (1) the sale/purchase price effective between undertaking and its customer/supplier is higher/lower than the price that the same undertaking is selling/purchasing the same or comparable commodity in the upstream/downstream markets, and (2) the difference between the prices mentioned above are squeezing the margin of the counterparty, preventing the counterparty from competing in the relevant market. Except for the price in the upstream/downstream markets as noted in the first part of the test, the Draft Rule also requests the court to consider whether the alleged price is "appreciably" higher/lower than the comparable price by other competitors or in other geographic markets.

As another example, the Draft Rules provide for a three-part test for a court to determine the existence of a market-dominant undertaking's illegal "refusal to deal": (1) the undertaking has either declined to enter into the transaction with the counterparty or insisted on unacceptable conditions resulting in the failure of the transaction, (2) the transaction is feasible from commercial, technical, and legal perspectives, and (3) the "refusal" has an appreciable effect on restricting competition in upstream or downstream markets. The Draft Rules provide for examples of "justifiable causes" as an exemption to the abusive act satisfying the above three-part test, including change of circumstances or force majeure preventing the conclusion of the transaction, acts of bad faith or other events on the counterparty's part resulting in the reduced capability to conclude the transaction, etc.

For predatory pricing (i.e., selling at a price below cost), the Draft Rules allow a court to find such act by a business with market dominance as abusive in either of the following circumstances: (a) the business undertaking is selling the commodity consistently below the average variable cost (AVC) or the average avoidable cost (AAC) during a comparatively long period, or (b) despite a price above AVC or AAC, the undertaking is selling the commodity below the average total cost for a comparatively long period, plus evidence of the intention to prevent competition in the relevant market.

In addition to abusive conduct in offline markets, the Draft Rules also provide for special considerations the court should consider when determining the existence of "dominance" or typical abusive practice for internet platform businesses.

Japan

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

In February 2022, in the context of rising of oil prices and weakening of the Japanese yen, the Japan Fair Trade Commission (JFTC) proposed that it will be deemed an "abuse of dominant bargaining position" if (i) companies keep their current price without open discussions at the negotiation stage regarding the necessity of reflecting price increase per rising costs about labor, material, energy and the like or (ii) companies keep their current price without explaining why in writing or email despite requests to increase the trade price per rising costs about labor, material, energy and the like. After this announcement, the JFTC conducted urgent investigations into "abuse of a superior bargaining position" under the

Antimonopoly Act in order to ascertain the actual situation concerning cases of suspected conduct falling under (i) or (ii) above in transactions between businesses, in order to realize appropriate price shifting. On Dec. 27, 2022, the JFTC revealed it found cases of suspected Anti-Monopoly Act violations and published the names of 13 companies identified as having a significant impact on business activities. According to the JFTC, the purpose of publishing the company names is to encourage discussion on price shifting. The publication does not mean those companies have violated the Antimonopoly Act or the Subcontract Act.

B. Tokyo Metropolitan Government's Interim Report on Tokyo 2020 Summer Olympics events.

The Tokyo Metropolitan Government (TMG) had previously launched an investigation into the response to media reports of bid rigging of Tokyo 2020 Summer Olympics events. In December 2022, the TMG released an interim report on the investigation conducted to confirm the appropriateness of contracting procedures, etc. In the report, the TMG "confirmed that bidding and contracting procedures were generally carried out in accordance with the rules and regulations." In its investigation, the TMG interviewed approximately 100 TMG employees who had been seconded to the Organizing Committee about their involvement in the operation of the test event, but the results of the interview were not included in the report. The investigation team will release the results of the interviews when they are finalized.

Read previous editions of GT's Competition Currents Newsletter.

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