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 Bureau of Competition Director Holly Vedova delivers remarks at 12th annual GCR Live: Law Leaders Global Conference.*

On Feb. 3, 2023, FTC Bureau of Competition Director Holly Vedova delivered remarks at the 12th Annual GCR Live: Law Leaders Global Conference in Miami, Florida. Vedova's talk focused on (a) the FTC's competition enforcement policy (including the new direction outlined in its November 2022 Section 5 Policy Statement), (b) the FTC's recent crackdown on labor noncompete agreements, and (c) pending revisions to the merger guidelines.

a. **Competition Enforcement Policy**: Vedova noted the FTC was created to advance competition and has "flexible and open-ended power" to fulfill this "unique" role. She stressed that this power has been confirmed "time and again" by the U.S. Supreme Court, with the high court explicitly recognizing that the agency does not have to narrowly list precise

[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.

practices constituting unfair competition. She pointed out that, as previously noted in the FTC's November 2022 Section 5 policy statement, conduct deemed "unfair competition" does not necessarily need to amount to a violation of the Sherman or Clayton Acts, because "Congress intended for the FTC Act to address a broader range of anticompetitive conduct than can be reached under the other antitrust laws." *See* GT's December 2022 Competition Currents for more information on the FTC's November 2022 Section 5 policy statement.

b. **Labor Noncompete Agreements**: Vedova highlighted the FTC's recent focus on labor noncompetes, which she views "through the lens" of the new Section 5 statement. She explained that noncompetes are a particular area of concern, as approximately 30 million (or one in five) American workers are bound by some form of noncompete agreement, amounting to an estimated loss of almost $300 billion per year in earnings across the U.S. labor market. The FTC's proposed new rule, described in its notice of public rulemaking (NPRM), seeks to rectify this issue by generally outlawing future noncompetes and rescinding existing ones. The NPRM also identifies alternative rules for comment such as possible unique treatment for certain groups such as high-wage workers, business owners disposing of their interests, and franchisees. Vedova reminded the audience that the FTC will be accepting comments on the NPRM until March 20, 2023. *See* GT's January 2023 Competition Currents for more information.

c. **Merger Guidelines Revision Project**: Vedova noted the FTC and DOJ are in the midst of revising their merger guidelines, with plans to release draft guidelines for public comment in the coming months. As part of this effort, the agencies have engaged in broad outreach, including hosting multiple public listening sessions and receiving thousands of public comments. Vedova stated that "at a very high level" the public can expect the revised merger guidelines to reflect a recommitment to use of the FTC's full statutory authority, and an emphasis on the fact that Section 7 of the Clayton Act applies an incipiency standard, rather than the rule of reason. She said the agencies are also exploring changes that would better account for the modern economy, including zero-price products, multi-sided markets, and data aggregation. She flagged that monopsony issues, including labor, will likely be discussed more prominently than in prior guidance, and that there will be a correction of the past "blind spots" in merger review. She explained that these updates are generally inspired by the view that the agencies' past approaches to merger enforcement missed transactions that ultimately substantially lessened competition.

   Vedova cautioned that, going forward, companies interested in merging should assess their antitrust risk—including the risk the FTC may move to block a deal—before moving ahead. Executives should not assume the FTC will agree to "piecemeal divestitures" that would allow the remainder of a merger to proceed. "The FTC has neither the resources nor the mandate to function as an industrial planner…parties should expect the agency to be skeptical and risk averse when considering offers to settle," she said.

2. *SUNY Upstate Medical University and Crouse Health System, Inc. abandon their proposed merger; FTC issues statement.*

On Feb. 16, 2023, FTC Office of Policy Planning Director Elizabeth Wilkins issued a statement regarding SUNY Upstate Medical University and Crouse Health System, Inc.'s decision to drop their proposed merger. The FTC felt the deal presented a substantial risk of serious competitive harm (including higher health care costs, lower quality, reduced innovation, and potentially stunted wages). The FTC had an active investigation into the effects of the proposed merger and had voiced opposition to the parties'

request for a certificate of public advantage (COPA) (which could have shielded the merger from antitrust laws). The FTC contended that had the merger gone through, the combined entity would have had a nearly 67% share of commercially insured inpatient hospital services in Onondaga County, New York, and that the number of hospital options available in the market would have been reduced to two.

3. *FTC launches new Office of Technology to bolster agency's work*.

On Feb. 17, 2023, the FTC announced the launch of its Office of Technology, which will have dedicated staff and will be headed by Chief Technology Officer Stephanie T. Nguyen. The office is intended to strengthen the FTC's ability to keep pace with technological challenges in the digital marketplace. It will support FTC investigations, advise and engage with staff on policy initiatives, and highlight market trends and technologies. Chair Lina Khan called this "a natural next step" in ensuring the agency has the in-house skills it needs to "fully grasp evolving technologies and market trends." The FTC said the Office of Technology will bring the agency in line with other antitrust and consumer protection enforcers around the world that already have similar offices. The creation of the new office was approved by a unanimous four-0 Commission vote.

4. *FTC and DOJ issue fiscal year 2021 Hart-Scott-Rodino Premerger Notification Report*.

On Feb. 10, 2023, the FTC and the DOJ Antitrust Division released their 44th Annual Hart-Scott-Rodino (HSR) Report, presenting statistics on the HSR Premerger Notification Program for fiscal year 2021. The report shows that during that year, a record-breaking 3,520 transactions were reported, more than twice the number reported in 2020.

The acquired entities for these transactions spanned a range of industries, including transportation (2.2%), chemicals and pharmaceuticals (4.4%), health services (4.7%), energy & natural resources (4.2%), consumer goods and services (32.4%), information technology (9.1%), manufacturing (9.9%), and banking/insurance (9.7%), with 23.3% of transactions falling into other non-delineated categories. The value range breakdown for the transactions was as follows:

Transaction Value	**Percentage**
up to $100 million	1.4%
$100-150 million	12.7%
$150-200 million	15.8%
$200-300 million	10.9%
$300-500 million	13.4%
$500 million to $1 billion	28.9%
over $1 billion	16.9%

The report also notes that the agencies issued 65 second requests (up from 48 the prior year) and made 32 merger challenges.

5. *FTC and DOJ hold two-day joint workshop as part of APEC Senior Officials Meeting*.

On Feb. 21-22, the FTC and DOJ held a joint workshop as part of the Asia-Pacific Economic Cooperation's (APEC) Senior Officials Meeting in Palm Springs, California. This marks the first time the United States has hosted APEC since 2011. The agencies hosted the workshop to advance the promotion of competitive markets throughout the region and to foster cooperation across APEC's 21 economies. The workshop featured presentations and roundtable discussions on matters such as litigating competition cases and

legislative advocacy. The United States will host APEC senior officials three more times in 2023: in Detroit in May, Seattle in August, and San Francisco in November.

B. Department of Justice (DOJ)

1. *Benteler Steel & Tube Manufacturing Corp. and Tenaris, S.A. abandon merger plan after DOJ Antitrust Division raises concerns.*

Benteler Steel & Tube Manufacturing Corp. and Tenaris, S.A. abandoned their planned merger in early February, after the DOJ's Antitrust Division flagged concerns. The plan was for Tenaris to make a $460 million takeover of Benteler's steel and tube manufacturing facility in Shreveport, Louisiana. The parties' decision to walk away came after the Division noted competition-related concerns with the deal, which would have combined two key U.S. suppliers of certain types of steel pipe used in the extraction of oil and gas. On Feb. 6, 2023, in a press release regarding the abandonment, the Division acknowledged its hardworking staff for its role in preventing the transaction, which it said, "would have eliminated Benteler as an independent competitor and threatened higher prices, lower quality, and less innovation," and would have cemented Tenaris as the "undisputed dominant player" in the market.

2. *Principal Deputy Assistant Attorney General Doha Mekki delivers remarks at GCR Live.*

On Feb. 2, 2023, Principal Deputy Assistant Attorney General Doha Mekki of the DOJ Antitrust Division delivered remarks at the GCR Live: Law Leaders Global 2023 Conference. Her talk focused on four key points related to information exchanges. First, she noted that the Division is revisiting "outdated" policy statements that "no longer reflect market realities." Second, she stressed that the Division must consider information exchanges beyond the "limits of the physical world" to avoid overlooking anticompetitive conduct in so-called new economy markets which have evolved dramatically in recent decades. She explained that with many products and services now being heavily reliant on digital technologies and data at scale, "traditional guideposts" may not be sufficient to detect modern competition harms. Third, she explained that the DOJ Antitrust Division will closely scrutinize mergers in markets with a prior history of collusion (if an industry has already engaged in coordination following a merger, merging parties will "face an uphill battle" in convincing the Division that post-merger coordination is unlikely). Fourth, she stated that a "whole-of-government approach" is being pursued with respect to anticompetitive information exchanges (such as, for example, the DOJ Antitrust Division bringing an action under the Packers and Stockyards Act against poultry processors in July 2022, or the Department of Transportation having the authority to bring anticompetitive actions within the airline industry).

3. *DOJ withdraws certain health care industry policy statements.*

On Feb. 2, 2023, the DOJ withdrew three of its policy statements related to the health care industry (*Department of Justice and FTC Antitrust Enforcement Policy Statements in the Health Care Area* (Sept. 15, 1993); *Statements of Antitrust Enforcement Policy in Health Care* (Aug. 1, 1996); and *Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program* (Oct. 20, 2011)). The Department characterized the statements as "overly permissive," and said the statements no longer served their intended purposes of providing encompassing guidance to the public on relevant health care competition issues. See GT Alert, Justice Department Withdraws Policy Statements Concerning Health Care Information Exchanges.

C. U.S. Litigation

1. *MLW Media, LLC v. World Wrestling Entertainment, Inc.*: Case No. 22-cv-00179 (N.D. Cal. Feb. 14, 2023)

On Feb. 14, 2023, California federal court dismissed without prejudice Major League Wrestling Media (MLW)'s antitrust lawsuit against World Wrestling Entertainment, Inc. (WWE), alleging violations of the Sherman Act and intentional interference with contractual relations and prospective economic advantage. MLW claimed that WWE engaged in anti-competitive conduct, including efforts to prevent MLW from broadcasting its licensed programs on certain media platforms, poaching talent, misappropriating confidential information, and eliminating price competition. MLW alleged WWE's conduct unlawfully restrained and undermined competition and threatened a dangerous probability of success at monopolizing the relevant market, which it defined as "the national market for the sale of broadcasting rights for professional wrestling programs to networks, cable, and streaming services."

The federal court judge determined that MLW failed to allege a relevant market for its antitrust claims, and that the facts, as pled, were "not sufficient to provide an understanding of the characteristics of the relevant market, including the existence or lack of substitutes." The suit was dismissed without prejudice, and MLW was granted leave to amend the complaint within 21 days of the Order. However, the court also noted that "MLW's allegations regarding monopoly power and antitrust injury, as currently pled, [were] unlikely to withstand a motion to dismiss" based upon the arguments outlined in WWE's motion to dismiss.

2. *iMortgage Services, LLC v. Louisiana Real Estate Appraisers Board, et al.*, Case No. 19-849-SDD (M.D. La., Feb. 27, 2023)

On Feb. 27, 2023, a Louisiana federal court judge dismissed iMortgage Services, LLC's antitrust lawsuit against defendants Louisiana Real Estate Appraisers and individual board members, ruling the case is moot due to a 2021 consent decree between the defendants and the FTC.

iMortgage initially brought suit in 2019 seeking injunctive and monetary relief, requesting a declaration that a rule defendants promulgated requiring appraisal management companies like iMortgage to pay appraisal fees equal to or greater than median market fees was unenforceable and invalid under federal antitrust laws. Plaintiff also sought injunctive relief against the defendants to prohibit any further application of this rule (Rule 31101). iMortgage argued that Rule 31101 set minimum fees for appraisals and gave monopoly power to defendants. The FTC agreed, and in May 2017 instituted an action against the Board, alleging the Rule unreasonably restrained competition. In June 2021, the Board entered into a consent decree with the FTC, preventing the Board from "adopting, promulgating, or enforcing any regulation or rule that sets, determines, or fixes compensation . . . including enforcing Rule 31101."

In light of the consent decree, the court determined the claims for declaratory and injunctive relief were moot. While iMortgage still attempted to recover monetary damages it allegedly sustained as a result of defendants' anticompetitive actions, the court determined that defendant had 11th Amendment immunity from the claims because it is characterized as a state agency.

3. *Wood Mountain Fish LLC, et al. v. Mowi ASA (f/k/a Marine Harvest ASA), et al.*, Case No. 1:19-cv-22128 (S.D. Fla. 2022)

On Feb. 28, 2023, a Florida district court granted final approval to a $33 million settlement to a proposed class of indirect salmon purchasers (estimated at over 400,000 businesses that purchased salmon for resale beginning in April 2013), ending antitrust litigation over Norwegian salmon-farming company defendants' alleged scheme to fix prices of salmon nation-wide by allegedly coordinating price hikes, conspiring to manipulate price indices, and exchanging pricing and other competitive information. This settlement follows an $85 million settlement paid by defendants to direct purchaser plaintiffs in May 2022.

4. *Jones v. PGA Tour, Inc.*, 22-cv-04486-BLF (N.D. Cal. Feb. 21, 2023)

On Feb. 16, 2023, a U.S. Magistrate judge ruled that the head of the Public Investment Fund (PIF) – the sovereign wealth fund of Saudi Arabia, and main financial backer of LIV Golf Inc. (LIV) – must sit for depositions and produce documents for LIV's antitrust lawsuit against the PGA Tour. Lawyers for the PIF and its governor, His Excellency Yasir Othman Al-Rumayyan, had attempted to quash subpoenas by claiming they are entitled to sovereign immunity under the Foreign Sovereign Immunity Act (FSIA). However, the judge found that the PIF, which owns 93% of LIV, should be categorized under the commercial activity exception to the FSIA. The judge said, "PIF is not a mere investor in LIV; it is the moving force behind the founding, funding, oversight, and operation of LIV… PIF's actions are indisputably the type of actions by which a private party engages in trade and traffic or commerce." This decision allows the PGA Tour to seek documents and communications related to LIV's business plans and recruitment negotiations with golfers.

The PIF filed a letter challenging the decision with U.S. District Judge Beth Labson Freeman, who is presiding over the case in the Northern District of California. In the letter, the PIF argued that enforcing such subpoenas against PIF in the United States would force PIF to violate Saudi Arabia's laws against disclosure of confidential information, and that recognition of such an exception to common-law foreign official immunity would have considerable implications, even beyond this case. The PIF has also separately indicated that it plans to appeal the decision to the Ninth Circuit. Following the decision, the PGA Tour filed a motion to add the PIF and its governor as counter-defendants to its counterclaim. This motion was granted Feb. 21. The end of written discovery and document production is set for March 30, with trial scheduled to begin in January 2024 (although Judge Freeman acknowledged that the addition of the PIF and its governor to the countersuit could potentially slow down the process).

The case started in August 2022, when a group of professional golfers sued the PGA Tour for suspending them after they signed on to play with LIV. LIV joined the lawsuit later as a party and alleged the PGA Tour was using monopoly power and committing various antitrust violations through actions that interfered with competition within the professional golf industry. *See* September 2022 Competition Currents for more information.

D. Other U.S. Regulatory Agencies

OSHA (Department of Labor) announces interim rule to protect antitrust whistleblowers.

The Occupational Safety and Health Administration (OSHA) of the U.S. Department of Labor implemented an interim final rule, effective Feb. 10, 2023, regarding retaliation complaints under the Criminal Antitrust Anti-Retaliation Act (CAARA) in order to better protect antitrust whistleblowers. The interim rule establishes procedures and timing guidelines for workers to file CAARA complaints related to

forms of retaliation suffered as a result of reporting antitrust violations or assisting in antitrust investigations. A covered individual (employee, contractor, subcontractor, or agent of an employer) who believes they have been retaliated against in violation of CAARA can file a complaint with OSHA. The complaint must be filed within 180 days of the alleged retaliation. Within 60 days of the complaint being filed, OSHA will issue its written findings on whether there is reasonable cause to believe the employer in fact retaliated against the complainant. If reasonable cause is indeed found, OSHA will issue an order regarding the type of relief to be awarded, which could include "reinstatement with the same seniority status that the complainant would have had but for the retaliation; back pay, with interest; and compensation for any special damages sustained as a result of the retaliation, including litigation costs, expert witness fees, and reasonable attorney fees." The complainant and the respondent then have 30 days to file objections to the findings and request a hearing before an Administrative Law Judge.

OSHA is accepting comments on this interim final rule until April 11, 2023.

Mexico

Rodrigo Alcázar Silva and Giovanni Tapia Lezama appointed COFECE Commissioners.

Mexico's Competition Commission (COFECE or Commission) announced that the Senate ratified the nominations of Rodrigo Alcázar Silva and Giovanni Tapia Lezama to the Board after a two-year confirmation process. The COFECE Board of Commissioners is now full.

Commissioner Rodrigo Alcázar Silva, appointed through February 2028, holds a degree in Economics from the Instituto Tecnológico Autónomo de México and a master's degree in Economics, Regulation and Competition in Public Services and Telecommunications from the University of Barcelona in Spain. He has an extensive experience at COFECE where, to date, he has served as executive director of economic studies in the General Directorate of Economic Studies. Previously he was director of market research and prospective analysis in the General Directorate of Relative Monopolistic Practices as well as deputy director of research in Relative Monopolistic Practices. He was also director of the Federal Institute of Telecommunications and Competition Manager of Izzi Telecommunications. He is also a professor at the Instituto Tecnológico de Estudios Superiores de Monterrey.

Commissioner Giovanni Tapia Lezama, appointed for nine years, holds an economics degree from the Centro de Investigación y Docencia Económicas, and until now, was a senior associate at SAI Derecho y Economía. Previously, he was also deputy director general at COFECE and deputy director of the General Directorate of Economic Studies. He was economic advisor at the General Directorate of Pemex Exploration and Production, researcher at the Center for Public Finance Studies at the Chamber of Deputies, and an economic analyst at the General Directorate of Economic Studies at the Bank of Mexico.

The appointments were made after a legal battle between COFECE and the President of Mexico that ended with an order form the Supreme Court that finally forced the president to choose candidates and send them to the Senate for ratification. President Lopez Obrador delayed the decision to send candidates, as he has publicly stated he does not agree with COFECE's existence and would rather have a ministry applying competition law.

The COFECE board is now full; three lawyers (Brenda Hernandez, Alejandro Faya and Andrea Marván) and four economists (Eduardo Mendoza, Ana Maria Reséndiz, Rodrigo Alcázar Silva and Giovanni Tapia Lezama) comprise the board.

The Netherlands

A. Dutch ACM decisions, policies, and market studies

Self-employed workers may negotiate collectively without violating competition rules.

The Dutch Competition Authority (ACM) has amended the Dutch Guidelines on price arrangements between self-employed workers. In making this change, the ACM considered that the bargaining power of self-employed workers is often low, frequently leading to lower pay and working conditions.

The change allows self-employed workers to, among other things, negotiate jointly if they (i) are economically dependent on their client, (ii) effectively work side-by-side with salaried employees, or (iii) work through digital labor platforms (e.g., meal delivery or cabs). This change aims to ensure that branch organizations with self-employed workers and unions can help improve the position of lower-earning self-employed workers. By providing these bargaining opportunities, the ACM hopes to preserve the positive effects of economic dynamism and reduce the negative effects on growth regarding the number of self-employed workers.

B. Dutch Courts

1. *Rotterdam District Court: No advantage to DVI, as subsidies are in line with the market*.

The Dutch Venture Initiative (DVI) is a government fund whose policies are determined by the Dutch Ministry of Economic Affairs and Climate Policy (i.e., DVI is a public undertaking). Therefore, the Ministry is bound by the Public Enterprises (Market Activities) Act (M&O Act), which aims to ensure a level playing field between governments and public companies on the one hand and private companies on the other.

In December 2021, the ACM stated that the Ministry had violated these rules of conduct by encouraging investors to invest in DVI. Such encouragement is prohibited under the M&O Act, as it qualifies as a selective advantage to a public undertaking by the government.

On Feb. 8, 2023, the Rotterdam District Court ruled that the ACM acted negligently in its determination on the selectiveness of the subsidies because it is possible that other market parties could claim similar subsidies under the same conditions. Nevertheless, the Court did not alter the ACM's ruling because no preferential treatment was involved; the subsidies in the form of loans are in line with market conditions. With its ruling, the Court mainly clarifies how the prohibition on selective advantage should be applied to subsidies. It must be clear to everyone under which scheme a subsidy is granted to a public undertaking, and such scheme may not result in other parties not being eligible for a similar subsidy.

2. *Former director held liable for competition violations*.

According to Dutch legislation and case law, the ACM may fine directors when they are de facto leaders and violate Dutch (and/or European) competition rules. However, the imposition of fines was only ever attempted on one occasion until Feb. 21, 2023, when a former director was fined in a private enforcement action.

In this case, the trustees of Heiploeg, a North Sea shrimp trader, held the company's former director liable for losses resulting from a cartel fine the European Commission imposed for a violation of Article 101 Treaty on the Functioning of the European Union. The District Court of Noord-Nederland, in the first

instance, found the former director had improperly performed his duties and was therefore liable for the resulting loss. The Arnhem-Leeuwarden Court of Appeal considered the claim to be consistent with the principle that everyone is entitled to compensation for damages resulting from such a violation and, therefore, the director was ordered to pay damages in the amount of EUR 13 million.

United Kingdom

A. Merger Control – Competition and Markets Authority (CMA)

1. *Chemical admixtures – Phase 2 divestment undertakings*.

On Feb. 21, 2023, the CMA published a notice accepting undertakings provided by Sika to gain clearance for its proposed acquisition of MBCC. Following a Phase 2 inquiry, the CMA found the acquisition would substantially lessen competition in the supply of chemical admixtures for cement, concrete and wet mortar in the UK. Sika's undertakings to divest two of MBCC's divisions, admixture systems and construction systems, in various jurisdictions, will remedy these concerns, according to CMA.

2. *Veterinary services (1)*.

The CMA is investigating 17 of Medivet's completed acquisitions of independent veterinary businesses. Because these acquisitions were all completed before the CMA started to investigate, the authority imposed an initial enforcement order on each acquisition on Dec. 21, 2022, requiring the acquisition to be suspended pending the outcome of the investigation. On Jan. 4, 2023, the CMA also directed Medivet to appoint a monitoring trustee to oversee compliance with the order. The CMA has not yet set a deadline for its Phase 1 investigation.

3. *Veterinary services (2)*.

The CMA is also investigating eight of Independent Vetcare Limited (IVC)'s completed acquisitions of independent veterinary businesses. Its Phase 1 decision, issued Feb. 17, 2023, found the acquisitions might result in a substantial lessening of competition, creating a risk of increased costs and reduced quality of service for pet owners in 23 local areas where the acquisition would result in IVC controlling a significant proportion of all veterinary services. The CMA proposes to refer the acquisitions to a Phase 2 investigation unless IVC offers undertakings to remedy its concerns.

B. Antitrust enforcement – government investigations

1. *Extraterritorial application of the CMA's investigative powers*.

On Feb. 8, 2023, the UK Competition Appeal Tribunal (CAT) upheld BMW and VW's appeals against CMA's notices to their German-domiciled parent companies. The notices required the companies to provide information as part of the CMA investigation into alleged collusion in the end-of-life vehicle recycling business in the UK. VW applied to the UK High Court for judicial review of the notice; BMW appealed to the CAT after the CMA fined it £30,000, plus a daily penalty of £15,000 for failure to respond to the notice. Both firms argued the CMA had no power to require firms domiciled outside the UK and with no UK presence to produce documents and information held outside the UK. VW's application was transferred to the CAT, and the two cases were heard together. The CAT rejected the CMA's argument that its power to issue notices to "undertakings" meant that such power could be exercised extraterritorially. In this context, it found that "undertaking" did not refer to the legal concept of a corporate group but instead to those firms with economic activities in the UK. BMW and VW's parent companies had no branches or

offices in the UK and so did not meet this requirement. The CAT also rejected the CMA's argument that issuance of the notice to an undertaking triggered a legal obligation to respond on the part of companies within that undertaking's group that had no UK nexus. This is a significant restriction on the CMA's powers, particularly post-Brexit, which has meant it can no longer cooperate, and share information, with EU competition regulators. The CMA has announced it is seeking permission to appeal; the CAT has indicated that it would be willing to grant permission.

2. *Airports*.

The CMA and the UK Civil Aviation Authority (CAA), which has concurrent powers with the CMA to apply competition law in the aviation sector, issued a joint letter to airport operators Jan. 26, 2023. The letter expresses concerns about possible breaches of competition law in the sector and indicates the CMA and CAA have intelligence about some of these breaches. It goes on to confirm airports' obligation to consult publicly with customers about increases in airport charges, but also to stress that providing competitors with unpublished, confidential information about future market strategy may reduce competition, leading to increased prices and reduced service or choice and consequently competition law breaches that can have serious consequences.

3. *Wages*.

On Feb. 9, the CMA published guidance to employers, highlighting their obligation under competition law to avoid collusion with other employers competing for the same types of employees in relation to employee pay and working conditions and staff recruitment and retention. The guidance covers no-poaching and wage-fixing agreements among such employers and exchanges of information among them in relation to the terms and conditions in employee contracts. The guidance highlights the risks of penalties and director disqualification if the guidance is not followed.

C. Antitrust Enforcement – private litigation

1. *First successful UK follow-on damages claim*.

On Feb. 7, the CAT awarded Royal Mail and BT Trucking damages against one of the parties to the Trucks cartel. The claim was made on the basis of the EU cartel decision in the Trucks case. The CAT found that the cartel led to Royal Mail and BT being overcharged by 5% of the value of their relevant commerce over the period of the cartel and invited the parties to calculate the exact amount of their damages, including interest and tax.

2. *Refusal of certification*.

On Feb. 22, the CAT declined to certify an opt-out action based on abuse of market dominance by a social networking platform, in the form of unfair user terms and conditions. However, the CAT stayed the case for six months and invited the class representative to strengthen her pleadings and clarify the methodology for quantifying loss. A key point in this case is the extent to which the case rests on damages for breach of competition law, which the CAT can rule on, and damages for misrepresentation, which would be the subject of different proceedings in another forum.

D. Market investigations

1. *Housebuilding*.

On Feb. 28, the CMA announced it had launched a market study focusing on the housebuilding sector in England, Scotland, and Wales, citing widespread concerns about housing availability and in particular concerns that housebuilders are not delivering the homes people need at sufficient scale or speed. The study, which will conclude with a report on Feb. 27, 2024, will consider housing quality, land management, local authority oversight, and innovation. The outcome of the study could include a reference to an in-depth market investigation, at the end of which the CMA could impose remedies.

2. *UK rental sector*.

The CMA also announced on Feb. 28 a market study into consumer rights for those in rented accommodation. This has been triggered by issues the CMA has encountered during its leasehold investigation. The CMA will consider the experience of renters and explore whether more could be done to help landlords and intermediaries understand their obligations. There will be an update on the study's progress in summer 2023.

E. State aids

Waste management.

Max Recycle, a privately owned waste management company, challenged before the CAT a subsidy a local authority granted to its own trade waste collection service, on the basis that this has allowed the council to undercut Max Recycle's own trade waste service. This is the first subsidy case the CAT has heard under new UK subsidy control legislation. The hearing of the case is set for July 2023.

Poland

Court of Appeal upholds first judgment reversing Polish competition authority's prohibition of a transaction

On Feb. 27, the Court of Appeal in Warsaw upheld the District Court in Warsaw (Court of Competition and Consumer Protection)'s judgment. In 2022, the District Court amended in its entirety the President of the Office of Competition and Consumer Protection (UOKiK President) 's Jan. 7, 2021, decision that prohibited Agora S.A. (one of the largest media corporations in Poland) from taking control over Eurozet Sp. z o.o. (one of the leading radio broadcasters in Poland) (the Transaction). More information on this judgment may be found in the June 2022 issue of Competition Currents.

The Court of Appeal confirmed the conditions for granting unconditional approval for the transaction had been met. In particular, the Court confirmed that, taking into account characteristics of the radio market, the so-called Airtours criteria for coordinated effects/tacit collusion (case T-342/99, *Airtours v Commission*) are not met and the transaction would not lead to significant impediment to market competition.

The Court of Appeal disagreed with the UOKiK President that the courts have no right to change the UOKiK's decision prohibiting concentration. According to the UOKiK President, the courts may only annul such decisions. The Court of Appeal noted, however, that the courts enjoy full jurisdiction. This

means that the courts, in the first instance, should rule on the substance, and they are fully competent to change the UOKiK's decision, whereas annulment of the decision is reserved only for exceptional cases.

Moreover, the Court of Appeal does not agree with the UOKiK President that the court of first instance set too high the standard of proof. The Court of Appeal noted that the prerequisite for competition authority for issuing a prohibition is to demonstrate that theories of harm constituting a basis for prohibition of concentration are highly probable, taking into account collected evidence related to specific market circumstances.

In the end, the court rejected all the UOKiK President's pleas.

It is the first judgment in Poland where the court fully reversed the UOKiK President's decision prohibiting a concentration and granted unconditional approval for a transaction. The court's judgment is now final. This allowed the transaction to go through, and Agora acquired a controlling stake in Eurozet.

Competition law lawyers from Greenberg Traurig's Warsaw office provided Agora with comprehensive advice, representing Agora in the proceedings before the UOKiK President and the appeal proceedings before the District Court and the Court of Appeal.

Italy

Italian Competition Authority (ICA)

1. *ICA launches whistleblowing platform*.

On Feb. 27, 2023, ICA, following the European Commission and many other competition authorities, announced the creation of a whistleblowing platform. This platform has been designed to ensure, via an encrypted system, the anonymity of the whistleblower, while allowing him/her to interact directly with ICA.

According to ICA, this new tool will have a positive impact on the fight against secret cartels. ICA believes that the guaranteed anonymity of the reporter will lead to an increase in the number of whistleblowers, since more individuals, including those in close proximity to the undertakings involved, will be persuaded to cooperate with the authority in uncovering potential anticompetitive conduct.

The platform is accessible through the ICA website.

2. *ICA closes its investigation into Benetton Group's franchising agreements*.

On Jan. 31, 2022, ICA closed its investigation into Benetton Group for alleged abuse of economic dependence, by accepting Benetton S.r.l. (group holding) and Benetton Group S.r.l.'s commitments to amend its franchising contracts.

The investigation concerned conduct and contractual clauses in Benetton's franchising contracts that, by facilitating the discretionary management of the amount of Benetton products allocated to each shop, were found to compromise the entrepreneurial autonomy of the franchisee. Such clauses/contractual behaviors included (1) the debt acknowledgment of the potential franchisee upon entering into the contract; (2) the existence of preset fixed budgets aimed at establishing the order of products for each season; (3) the implementation of a heavy order-management system; (4) the use of automated mechanisms for the assortment of goods; (5) the impossibility, for the franchisee, to refuse the delivery of

the goods; (6) the impossibility, for the franchisee, to recover the investments made in Benetton shop furniture.

According to ICA, the amendments Benetton Group made to its franchising contracts were suitable to balance the franchisor's need to maintain certain quality and image standards, on the one hand, and the, although limited, entrepreneurial autonomy of the franchisee, on the other.

European Union

A. European Commission

1. *European Commission reviews Adobe's proposed acquisition of Figma after referral request*.

The European Commission has accepted a referral request from Austria's Federal Competition Authority in relation to Adobe's proposed acquisition of Figma. The Commission accepted the referral request, which 15 other countries joined, announcing that the proposed merger could significantly harm competition in the market for interactive product design and whiteboard software. The request is based on Article 22 EU merger regulation, which allows EU Member States to refer transactions to the European Commission that fall below the national and EU merger control thresholds. This shows the growing tendency of the European Commission to accept referral requests for so-called "killer acquisitions" and cross-border transactions.

2. *European Commission approves joint venture between Deutsche Telekom, Orange, Telefónica and Vodafone*.

The European Commission has unconditionally approved the proposed digital advertising joint venture between Deutsche Telekom, Orange, Telefónica, and Vodafone. The Commission has determined that the proposed transaction would not result in competition concerns within the European Economic Area. In addition to finding that the collaboration would not significantly impair competition in the markets for digital ID services for targeted advertising and site optimization, the Commission also concluded that the platform would not adversely affect competition in the provision of mobile telecommunications services, fixed internet access, audiovisual services, and online advertising.

B. European Decisions

1. *ECJ: national courts may order plaintiffs to pay their own costs where a claim is only partially upheld*.

The European Court of Justice (ECJ) has ruled that national courts must order plaintiffs seeking damages in antitrust cases to pay their own costs when their claim is only partially upheld. This particular case involved Spanish law, which provides that each party bears its own costs when damages are only awarded partially. The ECJ ruled that Spain's national law is compatible with the EU right to full compensation for losses suffered as a result of anticompetitive conduct. This interpretation does not infringe the principle of effectiveness, since ordering claimants to bear some costs for partially unsuccessful claims does not make it "practically impossible or excessively difficult" for them to exercise their damages rights.

2. *General Court annuls European Commission decision on aid granted to the Timişoara International Airport*.

On Feb. 8, the General Court of the European Union annulled the European Commission decision that approved the aid measures Romania granted to Timişoara International Airport in favor of Wizz Air Hungary Légiközlekedési Zrt.

Following preliminary remarks on the admissibility of the action brought by Carpatair SA, a Romanian regional airline, the General Court focused on the various errors of law contradicting the Commission's conclusions regarding the discounts and reductions on airport charges, from which Wizz Air was able to benefit, and the agreements on cooperation, use, and management of ad hoc airport facilities concluded by Wizz Air with the company operating Timişoara International Airport (AITTV). The General Court held such measures do not have constitute state aid within the meaning of Art. 107(1) TFEU.

In particular, the General Court pointed out that, as shown by the European case law, even prima facie measures applicable to undertakings may be de facto selective where they are structured to favor more significantly one undertaking/group of undertakings. Therefore, in the present case, contrary to what the Commission had decided, the reduced airport charges provided substantial discounts of between 72 and 85% for aircraft with a maximum take-off weight of more than 70 tons and with more than 10,000 embarked passengers per month, concretely benefited the only airline that used Timişoara Airport by having at its disposal vehicles of such a size that could accommodate such a flow of passengers, namely, Wizz Air. On this point, therefore, according to the Tribunal, the Commission erred in law.

Also, the General Court found the Commission's decision about the agreements between the Hungarian low-cost carrier and AITTV (i.e., that such agreements could not be considered state aid under Article 107(1) TFEU because they would also have been concluded by a prudent private economic operator in a market economy) was not legitimately grounded. The court said the Commission's decision was based exclusively on evidence (in particular, a 2015 report and complementary economic analyses provided by Wizz Air and the Romanian state during the administrative procedure) that was based on available evidence and foreseeable developments at the time of the conclusion of the agreements in 2008. However, the court stated that the evidence was not an *ex ante* analyses capable of demonstrating compliance with the aforementioned private market economy operator test.

Interested parties can appeal this judgment before the Court of Justice of the EU within two months and 10 days of its notification.

Japan

A. JFTC launches fact-finding survey on recycling used plastic bottles

"Bottle-to-bottle (BtoB)" initiatives to recycle waste plastic bottles into new plastic bottles have been expanding, led by major beverage manufacturers, against the backdrop of the growing problem of marine plastic waste and the trend away from petroleum. Previously, local governments collected used bottles from households, and most of them were accepted by a public interest incorporated foundation and then purchased by recycling companies as recycled plastic material. As a result, a situation emerged where beverage manufacturers and the foundation were competing for the waste plastic bottles, and the price of waste from households skyrocketed. The foundation reportedly sent a letter and argued that individual recycling efforts by beverage manufacturers would be inefficient and increase social costs. Given the letter, the beverage manufacturers reportedly agreed to take a cautious approach in response to this

matter. Based on this, the JFTC is concerned the conventional claims of the recycling industry will put pressure on new initiatives by private companies and therefore, has decided to launch an investigation.

B. Tokyo District Public Prosecutors Office arrests former operations executive with the Tokyo Olympics organizing committee and three others.

On Feb. 8, the Tokyo District Public Prosecutors Office arrested four people, including a former operations executive with the Tokyo Olympics organizing committee, on suspicion of violating the Antimonopoly Law (unfair restriction of trade) in rigging bids for contracts related to Games test events.

There were 26 open bids held in 2018 for the rights to plan test events. Nine companies and one joint venture won the bidding for a total of over 500 million yen. The nine companies were subsequently awarded contracts for the implementation of the test event and the operation of the main competition under negotiated contracts, with the total value of the contracts amounting to approximately 40 billion yen.

The four arrested persons are suspected of restricting competition by agreeing with those in charge of everything from the planning of the test event to the management of the operation of the main competition that they would decide which companies would receive the orders, taking each company's preferences into consideration. Two of the four arrested have admitted to the charges.

Read previous editions of GT's Competition Currents Newsletter.

Contributors

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

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

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

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

Robert Gago
Shareholder
+48 22.690.6197
gagor@gtlaw.com

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

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

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

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

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

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

Tarica Chambliss
Of Counsel
+1 202.533.2312
Tarica.Chambliss@gtlaw.com

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

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

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

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

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

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

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

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

Jose Abel Rivera-Pedroza
Associate
+52 55.5029.0089
riverapedrozaj@gtlaw.com

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

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

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

Administrative Editors

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

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