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GT Newsletter | Competition Currents | May 2023

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

In This Issue[1]

United States | Mexico | The Netherlands | United Kingdom | Poland
Italy | European Union | Japan

United States

A. Federal Trade Commission (FTC)

1. *FTC seeks TRO in Intercontinental Exchange's $11.7 billion merger with Black Knight.*

On April 10, the FTC sought a temporary restraining order from a California federal court to halt the $11.7 billion merger of Intercontinental Exchange, Inc. (ICE) and mortgage loan technology provider Black Knight, Inc. while the agency conducts its in-house adjudication. The FTC filed its complaint March 3, 2022, and the in-house trial is slated to begin July 12. The parties agreed to an outside date in November 2023 to consummate the transaction.

As noted in the April 2023 issue of Competition Currents, ICE is the nation's largest provider of home mortgage loan origination systems (LOS) and other key lender software tools, and Black Knight is allegedly its top competitor. The FTC asserts in its complaint that the deal would drive up costs, reduce innovation, and reduce lender choices for tools necessary to generate and service mortgages. The FTC further argues that the merger would harm competition for product pricing and eligibility engines, or

[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.

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PPEs, and other various ancillary services that are add-ons to loan origination software, eliminate PPE competition between the merging parties, and increase ICE's ability and incentive to use control of its LOS to undermine competition and harm rival PPEs and other add-on providers. Without having Black Knight as a competitor, the FTC argues ICE would hike lender costs and pass along those higher costs to homebuyers.

ICE asserts there is "intense competition" from a number of other providers and the transaction would actually make the industry more transparent.

In order to forestall an agency challenge, the companies offered to divest Black Knight's loan origination system Empower to a Constellation Software subsidiary. However, the FTC viewed the offer negatively, pointing to numerous entanglements between Constellation and the merging parties that FTC said include Constellation's reliance on ICE to "supply many ancillary services to Empower customers via a resale agreement," thereby "limit[ing] the flexibility with which Constellation could innovate, discount, and offer the array of services Black Knight operates in conjunction with Empower today."

2. *FTC's director of competition warns merging parties of pitfalls in HSR compliance.*

In a blog post published March 31, at the conclusion of the ABA Antitrust Section Spring Meeting in Washington, D.C., FTC Bureau of Competition Director Holly Vedova spelled out a few areas of Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976 compliance where the FTC apparently has seen parties fall short. "Parties need to take seriously their obligation to collect and submit the information required by the HSR Act and Rules, and to appreciate the consequences when they fail to do so," she noted.

In particular, she pointed to parties' obligation to submit documents required to be submitted by Items 4(c) and 4(d) of the HSR Form, suggesting that an increasing number of filing parties may not be conducting a thorough search for such materials. Consequences for failure to file a document the agency later discovers can be severe in terms of timing of review of a transaction, reputation of the filing party before the regulators, and civil penalties. As Vedova stated, "if we discover, for instance in a Second Request production, that there is a 4(c) document that was not submitted with the HSR filing, the [Premerger Notification Office (PNO)] can bounce the original filing if the waiting period has not expired. This is true even if the agency has issued Second Requests: if the newly revealed 4(c) document changes the scope of the agency's investigation, the PNO may require a new filing and the agency may issue a new Second Request." Further, the agency may assert that a document submitted with a filing for a later acquisition should have been submitted with a filing for an earlier acquisition. In those cases, the FTC may require a "corrective filing" for the earlier deal and impose fines for non-compliance.

Vedova also wrote that parties should consult the PNO to discuss any changes to the structure of a transaction occurring after making the HSR filing, to determine if they are material enough to warrant an amended or new filing. "During an investigation, material changes to the terms and scope of a transaction may alter the proposed transaction so much that it is no longer the one the parties intend to consummate."

On a related note, Vedova emphasized that a filing "cannot be made on a hypothetical deal … because of the time and resource constraints on agency staff." Sometimes – and with greater frequency since the FTC has suspended grants of early termination of the HSR waiting period – parties will file HSR notification on a letter of intent, with the plan to allow the waiting period to expire prior to execution and immediate closing of a definitive agreement. However, Vedova wrote, "there must be an agreement in principle or

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letter of intent executed by the parties" and "[a] mere indication of interest or a document that is no more than an agreement to file HSR and wait to see what the Agencies do is not sufficient."

3. *FTC orders Illumina to divest cancer detection test maker GRAIL.*

On April 3, the FTC issued an order reversing the September 2022 decision of its own administrative law judge (ALJ) and requiring Illumina and GRAIL to unwind their 2021 acquisition. The parties immediately announced their intention to appeal the Commission's order to the U.S. Court of Appeals for the Fifth Circuit. The FTC on April 24 granted Illumina and GRAIL's application to stay the agency's order to unwind their deal pending Fifth Circuit review.

"Under the unusual circumstances presented here, where the [European Commission's] interim measures prevent Illumina and GRAIL from integrating and monitor Illumina and GRAIL's compliance, a stay of our Final Order — until the issuance of the Court of Appeals' mandate — is appropriate," the April 24 order said.

GRAIL makes an early-stage-cancer screening test that makes use of DNA sequencing to analyze genetic material, and Illumina is a provider of such sequencing platforms and reagents. The Commission determined that the acquisition would "diminish innovation in the U.S. market for [cancer-detection] tests while increasing prices and decreasing choice and quality of test." The ALJ, however, found that the companies' proposed remedy, a 12-year supply agreement signed by Illumina and several key competitors, was sufficient to constrain Illumina from foreclosing rivals or increasing costs.

The appeal represents the first time an appellate court will consider a "fix-it-first" approach in a transaction, where the merging parties present in litigation a divestiture or other remedy package as a means to resolve any competitive concerns, and where the court is asked to assess the anticompetitive effects of a transaction with the "fix" in place. This strategy is becoming more popular as the antitrust enforcement agencies have repeatedly expressed resistance to settling complaints with these types of remedies.

4. *FTC sues to stop integration of New Orleans area hospitals over failure to follow federal reporting law.*

On April 19, Louisiana Children's Medical Center (LCMC) filed a complaint in the U.S. District Court for the Eastern District of Louisiana seeking a declaration that its state-issued certificate of public advantage (COPA) preempts the HSR Act under the state action doctrine. LCMC claims its January acquisition from HCA Healthcare, a for-profit hospital operator, of three hospitals in Louisiana operating under a partnership with Tulane University, was not subject to HSR Act requirements. Closing occurred shortly after the Louisiana Attorney General's office issued the COPA authorizing the transaction, based on a determination that the deal would serve the public interest of state residents. The COPA set forth procedures for state oversight of the merged entity.

The FTC on the following day petitioned the federal court in the District of Columbia for a hold separate order until after the agency can assess the deal's impact on competition. The Commission has also ordered the parties to submit the required HSR notifications.

The parties assert that the state action doctrine as evidenced by the COPA, which allows states to immunize private conduct from federal antitrust scrutiny under certain circumstances, fully exempts them from HSR Act filing requirements, and any penalties for alleged non-compliance.

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"By threatening LCMC with these penalties, notwithstanding Louisiana's decision to authorize the Acquisition, the FTC's apparent goal is to prevent States from enacting or implementing COPA statutes," LCMC wrote in its declaratory judgment complaint. Louisiana AG Jeff Landry expressed support and vowed to fight the FTC's "federal overreach."

The FTC published a white paper in 2022 reasserting long-standing concerns about COPAs, contending they result in higher fees, reduced quality of care, and slower wage growth among health care providers.

5. *Supreme Court allows upfront constitutional challenges to FTC proceedings*.

On April 14, a unanimous Supreme Court held that private parties may directly challenge the constitutionality of the FTC's administrative proceedings in federal court without first having to bring these claims before the FTC's ALJ.

Justice Elena Kagan, writing for the majority, stated that constitutionality claims "cannot receive meaningful judicial review" when the merits of an agency's case against an individual or company are being decided, and therefore U.S. district courts can review them. Otherwise, she wrote, parties would "lose their rights not to undergo the complained-of agency proceedings if they cannot assert those rights until the proceedings are over." The FTC argued that federal courts lack jurisdiction to rule on administrative actions, including on the constitutionality of those actions, until the agency completes its underlying proceedings.

The FTC in January 2020 issued an administrative complaint challenging Axon Enterprise, Inc.'s acquisition of body-worn camera systems from competitor VieVu, LLC, consummated in May 2018. The two companies provide body-worn camera systems to large, metropolitan police departments across the United States. According to the complaint, the acquisition reduced competition in an already concentrated market.

Once the FTC issued its administrative complaint, which the ALJ would adjudicate in-house, the parties challenged the constitutionality of the FTC's process for adjudication. A decision by the ALJ may be appealed to the FTC commissioners themselves, and only thereafter to a federal court of appeals.

Kagan also wrote that when constitutional claims are at issue, those suing the government have a right to have those issues decided first, rather than first being subject to the full adjudicatory process.

The court made clear it was not deciding the merits of the parties' constitutional claims, but rather removing the barrier of first having to exhaust administrative processes in order to have constitutional arguments heard.

B. Department of Justice (DOJ) Criminal Antitrust Division

1. *United States v. Bill R. Miller; United States v. William D. Opp; United States v. Choon Foo "Keith" Yong*. US District Court, E.D. CA.

Two contractors and a former California public official were sentenced in April for their roles in a bribery and bid-rigging scheme involving improvement and repair contracts the California Department of Transportation (Caltrans) awarded. All pleaded guilty in late 2022. One contractor, Bill R. Miller, was sentenced to 78 months in prison and ordered to pay nearly $1 million in restitution. Miller admitted to organizing the scheme, including paying bribes and soliciting sham bids in order to secure contract awards. The second contractor, William D. Opp, was sentenced to 45 months in prison and ordered to pay

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nearly $800,000 in restitution. Opp admitted to creating a false company in order to submit sham bids and also to making cash bribes totaling nearly $800,000. The public official, Choon Foo "Keith" Yong, was sentenced to 49 months in prison and ordered to pay nearly $985,000 in restitution. Yong admitted to participating in the conspiracy from 2015 through 2019 by accepting bribes in the form of cash payments, wine, furniture, and remodeling services on his home, receiving nearly $1 million.

2. *United States v. Manahe et al.*, No. 2:22-cr-00013 (D. Maine).

In late March, DOJ lost another "no-poach" case when a jury found four business managers of home health agencies not guilty of conspiring to fix wages and entering into illegal no-poach agreements. DOJ alleged the four defendants entered into an agreement during the pandemic to fix wages paid to personal care services workers and not to poach each other's workers. According to the indictment, the scheme occurred right after Maine health officials announced their plan to increase pay raises to personal support specialists. After a two-week trial, the jury acquitted all four defendants.

3. *FTC Bureau of Competition director reports on Criminal Liaison Unit.*

FTC Competition Bureau Director Holly Vedova recently reported that her Bureau's Criminal Liaison Unit (CLU) was "off to the races," with strong leadership and multiple referrals since it was established in 2022. The report notes the unit was established to protect the public from criminal conduct, is headed by two former DOJ Antitrust Division criminal prosecutors, and has been successfully working to identify and refer criminal conduct uncovered during the course of FTC investigations and litigations. "With the CLU's increased emphasis on spotting and referring obstructive conduct to the appropriate criminal authorities, BC staff will be able to focus their energies on the important work of enforcing our antitrust laws on behalf of American consumers."

C. U.S. Litigation

1. *In re SoClean, Inc. Mktg., Sales Practices & Prod. Liab. Lit.*, Case No. 2:22-MC-00152 (W.D. Pa. Apr. 28, 2023).

On April 28, 2023, the Honorable Judge Joy Conti heard argument on Koninklijke Philips N.V.'s (Philips) motion to dismiss SoClean, Inc.'s false-advertising claim brought under the Lanham Act. SoClean alleges that when Philips issued a recall for its continuous positive airway pressure (cpap) machines, Philips falsely blamed SoClean's disinfecting machine for degrading the cpap's sound-insulating foam. SoClean claims that these recall notices were meant to falsely "scapegoat" SoClean for defects in Philips' machines, thereby allowing Philips to present newer models without harming Philips' reputation with consumers.

According to Philips' motion, the Lanham Act only precludes false advertising designed to hurt competitors, and since Philips' cpap machine and SoClean's disinfectant products were actually distinct, complementary products, SoClean did not compete with Philips. SoClean responded by arguing that Philips had plans to launch its own disinfecting products in the near future—as evidenced by recent patents—and thus the recall notice was a preemptive attempt to weaken a future competitor.

2. *Borozny, et al. v. Raytheon Tech. Corp.*, Case No. 3:21-cv-01657 (D. Conn. Apr. 5, 2023).

In a civil class action brought on behalf of current and former aerospace engineers, defendant Agilis Engineering, Inc. admitted to entering into an agreement with Raytheon Technologies, Corp. to restrict the hiring and recruiting "of engineers and other skilled labor employees," and further admitted that the agreement was "a criminal violation of Section 1 of the Sherman Act." According to the lawsuit, Raytheon

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entered into a "no-poach agreement" with several aerospace companies—including Agilis, one of Raytheon's suppliers—whereby each company sought to prevent valuable employees from changing jobs.

According to its answer, Agilis did not know at the time that it was entering into an illegal anticompetitive agreement, and therefore should not be liable for punitive damages. Furthermore, Agilis claimed that Raytheon's executives—who were facing criminal charges at that time—were the "ringleaders" of the alleged conspiracy. Shortly after Agilis filed its answer, those same executives were acquitted of criminal charges brought by the DOJ relating to this conspiracy.

Mexico

A. COFECE formally accuses gasoline, diesel station companies of illegal merger.

The Federal Economic Competition Commission (COFECE or Commission) issued a formal accusation to several economic agents and individuals in the gasoline and diesel sale and distribution market of conducting an illegal merger and not reporting a transaction as required by the Federal Economic Competition Law (LFCE), as well as selling such products in service stations in the national territory.

The accused parties will take part in a trial proceeding led by the Technical Secretariat of the Commission, where the parties may offer evidence related to the accusations against them and make their own arguments. Upon completion of the proceeding, the Commissioners will render their decision.

If the Commission's accusations are proven true, sanctions may be imposed on each of the economic agents and individuals involved.

B. COFECE announces natural gas market study.

COFECE has approved a market study on natural gas production, distribution, and sales. Energy is critical for manufacturing, hence its inclusion by the Commission as a priority sector in its 2022-2025 Strategic Plan. Natural gas is relevant because, according to the Energy Information System, it generates 52% of the country's electricity and is used as an input in other industries and as energy in homes. In 2021, Mexico ranked 11th in worldwide natural gas consumption.

Individuals, institutions, and economic agents interested in submitting comments, recommendations, and other information they deem important for the natural gas market study, from a competition perspective, are encouraged to participate in the study.

C. Institute for Federal Telecommunications (IFT) initiates probe into market for mobile operating system app stores and internet distribution of audiovisual content.

The IFT, which has jurisdiction to apply Mexican competition law in the telecommunications and broadcasting industries, has opened an investigation (following a complaint) into the market for mobile operating system application stores, and related markets, and the distribution of audiovisual content through internet platforms in Mexico, for abuse of a dominant position.

IFT is investigating possible tying agreements, exclusivity, discriminatory pricing, and elevation of cost to rivals conducted through the app stores of mobile operating systems. These investigations typically last more than a year. If the IFT investigators make a formal accusation, the IFT commissioners will oversee an adjudicatory procedure analyzing the investigation's findings.

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The Netherlands

A. Dutch ACM decisions, policies, and market studies

ACM conditionally approves Roompot's acquisition of Landal GreenParks.

The Dutch Competition Authority (ACM) conditionally approved Roompot's acquisition of Landal Greenparks. Roompot and Landal, which are holiday village park chains active in the Dutch market, overlap in holiday home rentals at holiday parks and in offering rental services and marketing services to holiday home and holiday park owners. Based on its investigation, the ACM concluded that Roompot/Landal would become the largest provider of holiday parks. Therefore, Roompot and Landal proposed to divest 30 holiday parks to Dormio, a resort and hotel chain, to make Dormio a substantial competitor. The ACM stated that this divestment would remedy its competition concerns.

B. Dutch Courts

1. *Amsterdam District Court partially dismisses forex damages claim for lack of jurisdiction.*

On March 29, 2023, the Amsterdam District Court ruled that it has only partial jurisdiction over two Dutch pension funds and a subsidiary in the EU forex cartel lawsuit. The other 28 plaintiffs, based abroad, cannot pursue their damages claims. Stichting Forex Claim is claiming damages resulting from the banks' collusion in the foreign exchange market. In 2021, the European Commission (EC) had fined several of these banks a total of 344 million euros after finding they unlawfully shared exchange rate information.

The Court held that the fact that the cartel conduct covered the entire European Economic Area was insufficient to justify the extension of jurisdiction, and the claimant failed to demonstrate that the conduct had taken place in the Netherlands, and that each plaintiff had been individually affected by the conduct in the country. The Court also rejected the argument that the UK was an expensive place to bring claims and that other courts might misinterpret EU competition law, as it had not established that the claimant would not be guaranteed a fair trial in a foreign jurisdiction.

2. *Dutch Supreme Court refers case to CJEU on the application of 'parental liability.'*

On April 21, 2023, the Dutch Supreme Court issued an interim judgment to refer to the EU Court of Justice (CJEU) for a preliminary ruling in relation to a Greek brewer's follow-on claim against Heineken. The Dutch Supreme Court suggested the following questions (subject to comment by the relevant parties) for referral:

a. Can a national court in assessing its jurisdiction based on a 'close connection' under Article 8(1) Regulation (EU) No 1215/2012 (Brussels I Recast) rely on the competition law concept of 'parental liability' and corresponding presumption of a parent company's decisive influence over the economic activity of its subsidiary that is the subject of the dispute?

b. Where it is disputed that the parent company exercised such decisive influence, is it sufficient to assume jurisdiction to hear the claim against the subsidiary if it cannot be ruled out a priori that such decisive influence was exercised?

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United Kingdom

Digital Markets – Competition Regulation and Consumer Protections

The UK government introduced to Parliament, on April 25, 2023, the long-awaited Digital Markets, Competition and Consumers Bill. If passed into law, the Bill would introduce significant reforms not only to digital markets but also to the UK competition and consumer law landscape as a whole. The four main reforms are summarized briefly below.

- *Consumer protection*: UK consumer protections would be expanded, and the CMA would have the power to investigate suspected infringements of the legislation and impose penalties on infringing firms of up to 10% of their global turnover. This structure is a familiar one – it mirrors the UK competition law enforcement regime – and may cause a significant increase in the number of enforcement cases.
- *Firms with strategic market status*: Firms designated as having strategic market status (SMS) would be subject to a new *ex ante* regulatory regime enforced by the CMA's Digital Markets Unit (DMU) and empowering the CMA to impose penalties of up to 10% of infringers' global turnover. The CMA would be able to designate any firm as having SMS where it finds such firm had substantial and entrenched market power and a position of strategic significance in relation to any digital activity. If passed into law, the new regime would require firms with SMS to conduct themselves in the relevant markets in such a way as to ensure fair trading, open choice, and trust and transparency. The CMA would also have the power to make "pro-competition interventions" in digital markets to remedy adverse effects on competition. Finally, firms with SMS would be required to report to the CMA all M&A and joint venture transactions that exceeded special thresholds, which are lower than those in the mainstream UK merger control regime, and to obtain clearance before completing these transactions. This new approach to digital markets would increase risks for firms with SMS, in their dealings with both non-SMS firms as well as consumers.
- *New thresholds for merger control*: The UK merger regime would be expanded to apply to transactions between parties with a UK nexus and involving any firm with a greater than 33% share of the supply of any product and UK turnover exceeding £350 million. This would give the CMA greater power to intervene in global transactions that impact the UK, and in transactions where there is no horizontal overlap between the parties' activities. Two further reforms would be the increase in the UK turnover threshold in the existing regime, from £70 million to £100 million, and a new exemption for small mergers involving parties with UK turnover below £10 million.
- *Greater powers of investigation and enforcement*: The CMA's information-gathering and enforcement powers would be enhanced to include powers to impose greater fixed penalties for:
  - non-compliance with information requests or notices, destroying or falsifying evidence and providing false or misleading information to the CMA – the maximum fixed penalty of £30,000 would be increased to 1% of annual turnover; the daily penalty would be increased from £15,000 to 5% of daily turnover; and
  - non-compliance with CMA orders or remedies, or commitments given to the CMA – the maximum penalty would be 5% of annual turnover, with a daily penalty of 5% of daily turnover.

The CMA also would have enhanced powers to interview individuals, seize evidence from domestic premises, and require preservation of all evidence relevant to an investigation. It would also have greater authority to coordinate with competition agencies in other jurisdictions. Finally, the CMA's powers to

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investigate entire markets would be expanded to give it more flexibility and to enable it to impose remedies more quickly.

Poland

A. PLN 60 million (approx. 14 million USD) fine imposed on Biedronka for providing misleading information to consumers upheld by the court of first instance.

On April 21, the Polish Court of Competition and Consumer Protection issued a judgment upholding the President of the Polish Office for Competition and Consumer Protection (UOKiK)'s decision. The UOKiK imposed a PLN 60 million fine on Jeronimo Martins S.A. (owner of Biedronka – a major chain of food retail stores in Poland) (the Company) for infringement of collective consumers interests.

According to UOKiK, the Company misled consumers by providing an incorrect indication of the country of origin of fruits and vegetables offered in its retail stores. UOKiK launched its proceedings as a result of multiple consumer complaints, as well as an audit conducted by the Trade Inspection – a specialized unit within UOKiK. The audit revealed that certain products originated from countries different than those indicated in stores. According to UOKiK, the violations were systemic and long-lasting. The Trade Inspection audited 263 stores (Biedronka has more than 3,300 stores in Poland), and irregularities had been detected in more than a quarter of the stores. UOKIK indicated that reliable information about offered products is a basic retailer obligation and an inherent consumer right.

The Company appealed, but the Court dismissed the appeal and upheld the UOKiK's decision. The Court confirmed that providing incorrect information regarding various features of products, including country of origin, may indeed constitute infringement of collective consumer interests. The Court agreed with UOKiK on the merits, and also sustained the amount of the fine imposed on the Company.

The Company may appeal to the Court of Appeal. According to the press, the Company intends to argue that material evidence submitted to and considered by the Court was one-sided and not proportional. The Company maintains that the scale of incorrect information was marginal and was the result of human error, and therefore the conduct was not systemic.

B. Polish president signs amendment to the Act on Competition and Consumer Protection into law; amendment introduces more stringent rules for penalizing entrepreneurs by the Antimonopoly Office.

1. *Implementation of the ECN+ directive.*

It took more than two years to finalize the discussions and work on the amendment to the existing Act on Competition and Consumer Protection (the Act). The purpose of the amendment is to implement the ECN+ Directive (*Directive (EU) 2019/1 of the European Parliament and of the Council of 11 December 2018 to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market*), which was meant to be implemented by 4 February 2021. The ECN+ Directive aims to increase the effectiveness of enforcement of EU competition law and force changes in the national competition protection systems, in particular in the area of strengthening the independence and impartiality of national antitrust authorities.

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2. *Strengthening the position of the UOKiK president.*

The amendment sets a five-year term of office for the UOKiK President and limits the removal before the end of the term to strictly defined reasons, such as conviction of a criminal offense, resignation, illness or other permanent obstacle preventing the UOKiK President from performing his duties. On the amendment's effective date, the current UOKiK President will be appointed for his first term pursuant to the new rules (without holding a new open competition), and he will remain in office for five more years.

3. *Scope of the amendment.*

In addition to the elements implementing the ECN+ Directive requirements, the amendment also introduces a wide range of changes that significantly tighten the punitive rules and penalty levels and modify the rules of proceedings before the UOKiK President, including changes to the provisions concerning inspections and searches.

4. *Legislative procedure.*

The amendment bill was submitted to the Sejm on 31 January 2023. The proposed changes were controversial (in terms of, among other things, their compliance with the ECN+ Directive) and raised objections from the business community, which resulted in the Senate rejecting the bill. On Friday 14 April 2023, the Sejm voted to reject the Senate's resolution rejecting the amendment to the Act. As a consequence, the President signed the amended Act into law on 26 April 2023. It will become effective 14 days after the announcement.

5. *Stricter punishment rules at the UOKiK President's disposal.*

NEW - PARENTAL LIABILITY **Parent companies can now be liable for their subsidiaries; actions**	
NEW: Liability of an entrepreneur exercising decisive influence for the actions of a subordinate entrepreneur	• DECISIVE INFLUENCE – DEFINITION: some economic, legal or organizational ties between entrepreneurs may cause an entrepreneur that is under another entrepreneur's decisive influence to carry out or follow instructions given by the entrepreneur exercising such decisive influence, in such a way that it limits or prevents the former's independent market behavior. • LEGAL ASSUMPTION: an entrepreneur exercises decisive influence if its share in the capital of another entrepreneur exceeds 90%. • If an entrepreneur engages in prohibited anticompetitive practices, **the entrepreneur with decisive influence also commits the violation.** • If the actions were intentional, the managers of the entrepreneur exercising decisive influence over the entrepreneur violating the prohibitions to enter into anticompetitive agreements may also be held liable.

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Scope of liability	• A violation of the prohibition to enter into anticompetitive agreements. • A violation of the prohibition to abuse a dominant position.
Penalty	• A total fine of up to 10% of turnover may be imposed not only on the entrepreneur directly committing the violation but also on the entrepreneur exercising decisive influence. • The penalty may be based on the turnover of the entire capital group controlled by the entrepreneur (e.g., by the parent company, but in some cases it may be another company at a higher level of the group structure, e.g., the grandparent company, if decisive influence over violating entity can be attributed to it). • Joint and several liability of the violating entity and the entrepreneur exercising decisive influence.
Possible liability of several parent entities	• In accordance with the substantiation submitted to parliament along with the bill, decisive influence can be exercised by one or more entities (e.g., a parent company and a grandparent company).
NEW - accountability of members of industry associations	
Before	• A fine imposed on a business association proven to have breached the competition law of no more than 10% of the association's turnover.
Now	• The penalty imposed on the business association may be as high as 10% of the total turnover of each member of the association. • In the event of the insolvency of the association, its members will be required to make contributions to cover the amount of the fine. If the contributions are not made on time, the UOKiK President may demand payment of a penalty amount from each of the entrepreneurs whose representatives were part of the decision-making bodies of the association.
Penalty for providing false data, violations in connection with an inspection or interrogation, and failure to provide the information requested by the UOKiK President	
Before	• A fine up to a maximum of EUR 50,000,000, imposed regardless of the entrepreneur's turnover.
Now	• A fine of up to 3% of the turnover generated in the year preceding the year in which the fine is imposed.

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Penalty for non-compliance with the obligations imposed by the President of UOKiK	
Before	• Previously, the penalty for failure to implement decisions, orders or judgments was the equivalent of up to EUR 10,000 for each day of delay.
Now	• A fine of up to 5% of the entrepreneur's daily average turnover (for the year preceding the penalty) for each day of delay.

The new disciplinary rules will apply to new proceedings involving "old practices"

The current provisions are to be applied to cases in which proceedings before the UOKiK President were initiated before the effective date of the new law. This means that **the new rules may apply to practices that took place previously, before the new regulations entered into force, but for which UOKiK initiated an inquiry into the matter later**. Entrepreneurs will therefore be liable on terms that did not exist at the time the offenses were committed.

6. *Updates to internal compliance software required.*

The amendments send a clear signal that the UOKiK President's policy of penalizing competition law violations will get more pronounced.

Italy

A. Italian Competition Authority (ICA)

1. *ICA fines Vodafone, Wind, Telecom, and Fastweb for unfair commercial practices*.

On April 3, ICA published a decision fining Vodafone S.p.A., Wind Tre S.p.A., Telecom S.p.A. and Fastweb S.p.A. a total of 1 million euros for allegedly implementing unfair practices in managing the terminations of fixed and mobile telephone user contracts.

ICA noted various critical issues in the management of internal procedures concerning users' contractual terminations, which led (starting at least from January 2020) to billing phone charges to users after termination or, in the case of change to a different operator, to double billing by both the new and the previous operator.

According to ICA, the illegitimate continuation of billing after the request for termination of service was attributable to technical issues in the companies' internal IT management systems, with respect to which they, albeit to varying degrees, had not timely intervened or adopted effective controls.

In addition to the fine, ICA required the four telephone companies to cease such conduct and inform ICA within 90 days of the steps taken to that end. The companies may appeal ICA's decision to the Lazio Regional Administrative Tribunal within 60 days.

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2. *ICA approves guidelines for assignment of audiovisual rights of Italian soccer competitions from 2024-2025 through 2028-2029 seasons.*

On March 28, ICA approved the Lega Calcio Serie A guidelines for the assignment of the audiovisual rights for the 2024-2025, 2025-2026, 2026-2027, 2027-2028 and 2028-2029 seasons of the Italian Serie A Championship, as well as of the Coppa Italia (Italian Cup), the Supercoppa (Italian Super Cup), and the Youth Championship, Italian Cup, and Super Cup. ICA has been granted the special power to assess and approve such guidelines by Legislative Decree n. 9/2008.

Such guidelines were designed to ensure a level playing field in the market for audiovisual rights. Accordingly, Lega Calcio Serie A must ensure that all platforms can compete against one another in absolute fairness, transparency, and non-discrimination, thus providing all the required rules, including those on the bidding process and the structure of the match packages.

In doing so, ICA underscored the importance of encouraging competition among the various platforms (specifically, the pay-tv market). Such a competitive environment could be reached, for instance, by removing any kind of condition of exclusivity (or contractual mechanism having similar content or effect) on packages that have a significant share of common events. Eliminating such burdens would allow platforms to offer to consumers packages that are adverse to one another (rather than complementary), thus increasing the consumer choice and, more importantly, reducing the price of such packages. Indeed, according to ICA, ensuring fair competition on the market for Lega Calcio Serie A's audiovisual rights is particularly important after the recent amendment to the Legislative Decree n. 9/2008, which made possible the granting of such audiovisual rights for up to five seasons.

B. Superior Courts

Italian Council of State annuls ICA's decision on abuse of economic dependence

On April 5, the Italian Council of State (Consiglio di Stato) – i.e., the highest administrative court – issued a ruling quashing ICA's Order No. 28043 of Dec. 20, 2019, which qualified as an abuse of economic dependence, pursuant to Article 9, c. 3-bis, of Law No. 192 of June 18, 1998, the conduct of two companies, M-Dis Distribuzione Media S.p.A. (M-Dis) and To-Dis S.r.l. (To-Dis), both national newspaper and periodical distributors. According to ICA, the companies allegedly interrupted the supply of newspapers and periodicals to a local distribution company. The two companies had thus been fined, jointly and severally, 321,597.21 euros.

The Council of State's decision affirmed the ruling of November 2, 2021, by the Lazio Regional Administrative Tribunal (T.A.R.) – i.e., the administrative court of first instance – which had already annulled ICA's decision, although on different grounds. In particular, the April 5 ruling accepts ICA's defenses on the alleged violations of procedural safeguards in the investigation initiated against M-Dis and To-Dis; however, it found, on the merits, that the withdrawal of the two companies from the supply relationship with the territorial distribution company – which allowed them to dissolve the contract before its natural expiration – did not constitute an abuse of economic dependence but rather a legitimate exercise of their contractual rights. Indeed, such conduct was deemed justified in light of the conduct of the other party, which had entered into a business transfer contract with a third party without giving prior notice to its suppliers, as required by the contract with the latter.

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The ruling constitutes one of the first Council of State pronouncements on the notion of abuse of economic dependence under Article 9, c. 3-bis, of Law No. 192 of June 18, 1998, helping to clarify certain elements of its definition and to specify the burden of proof ICA must satisfy in the exercise of its enforcement powers.

European Union

A. European Commission (EC)

1. *EU grants temporary approval to UBS/Credit Suisse merger despite standstill obligation.*

The EC has lifted the standstill obligation under its merger control rules, allowing UBS to acquire Credit Suisse prior to EU merger control clearance. UBS bought Credit Suisse in March 2023 for €2.9 billion with the help of the Swiss government, which occurred after Credit Suisse's value dropped by almost €5 billion in two days.

The Swiss government used emergency powers to allow the sale of Credit Suisse to UBS, overriding the country's own merger control rules. The government made this decision under the country's antitrust law, which allows the Swiss financial market regulator to bypass the Swiss national competition authority if it deems a bank deal necessary for lenders' interests. Although the merger has been fully approved under Swiss law, other jurisdictions must still approve it. Credit Suisse will still need to notify the merger to the EC, but a derogation decision ensures that the banks will not violate EU competition law rules by executing the transaction prior to receiving a possible clearance.

2. *EU opens Phase II probe into Orange/MasMovil deal.*

The EC has launched an in-depth investigation into the contemplated joint venture between Orange and MasMovil, due to competition concerns. The EC is also considering whether to refer the transaction to Spain's national competition authority. The EC has until Aug. 21, 2023, to publish its Phase II findings.

3. *EU conducts unannounced inspections in fashion industry over suspected antitrust violations.*

On April 18, the EC conducted unannounced inspections at the premises of fashion industry companies in several EU Member States and sent formal requests for information to other companies in the same sector. The EC suspects that the companies may have violated EU antitrust rules that prohibit cartels and restrictive business practices, including certain horizontal and vertical restrictions. In 2021 and 2022, the EC also carried out inspections in the same industry; however, the operations this month were unrelated, according to the EC.

Italian luxury fashion brand Gucci confirmed the EC raided it over concerns that it had violated EU antitrust rules. The raid reinforces EU Competition Commissioner Margrethe Vestager's commitment to increase the agency's dawn raid activity as part of its plan to revitalize cartel enforcement.

4. *EU concerns over Broadcom's acquisition of VMware's potential impact on competition.*

The EC has expressed concerns to Broadcom that its contemplated acquisition of VMware may lead to competition restrictions in the market for certain hardware components that interoperate with VMware's virtualization software. Broadcom is currently the world's leading provider of hardware components and storage adapters, while VMware is a top supplier of server virtualization software.

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The EC has conducted an in-depth investigation and believes that Broadcom may restrict competition in global markets for the supply of hardware components and storage adapters by foreclosing competitors' hardware by delaying or degrading their access to VMware's server virtualization software. The EC has until June 21, 2023, to make a final decision.

5. *EU extends MVBER and updates Supplementary Guidelines for automotive sector*.

The EC has extended the Motor Vehicle Block Exemption Regulation (MVBER) for five years until May 31, 2028, allowing the EC to react in a timely manner to market changes such as vehicle digitalization, electrification, and new mobility patterns. The Supplementary Guidelines for the automotive sector have also been updated to help companies in the industry assess the compatibility of their vertical agreements with EU competition rules, while ensuring that aftermarket operators, including garages, continue to have access to vehicle-generated data necessary for repair and maintenance.

6. *EC publishes 2022 State Aid Scoreboard*.

On April 24, the EC published the 2022 State Aid Scoreboard, a document in which the EC provides an analysis of Member States' State aid expenditure in 2021.

In particular, according to the 2022 State Aid Scoreboard, more than half of the approximately EUR 335 billion aid measures granted in 2021 at the EU level (excluding aids granted to railways and services of general economic interest) have been addressed at tackling the impact of the coronavirus pandemic on the Member States' economies (adding up to around EUR 191 billion), with Malta and Greece being the Member States that have spent the most in relation to their annual GDP on COVID-19 related aid measures, and Sweden and Belgium the ones that have spent the least (always in relation to their GDP). These data show how important State aid measures have been in helping the EU economy navigate the pandemic while ensuring the existence of a level-playing field for all EU members.

The remaining 43% of aids granted in 2021 (about EUR 144 billion) were granted for measures not related to COVID-19. Specifically, the non-pandemic-related objectives on which Member States spent the most were (i) environmental protection and energy savings (EUR 69 billion), confirming the trend of the last few years; (ii) research and development (EUR 18.77 billion), with an increase of around 30% of the amount spent for the same objectives in 2020; and (iii) regional development (EUR 14.21 billion).

B. European Decisions

CJEU rules that application of EU Damages Directive cannot be relied upon for nullification of antitrust infringements.

The CJEU has ruled that private actions seeking to nullify contracts for antitrust infringements cannot rely on the EU Damages Directive. The court held that the directive is limited solely to damages claims and does not extend to other types of action. However, plaintiffs can still use findings of infringements by competition authorities as prima facie evidence of infringement until national courts are presented with evidence to the contrary. Therefore, if a plaintiff can prove that the provisions they seek to annul are not severable from the unlawful agreement itself, they will succeed in bringing a claim for nullity of a contract under Article 101(2) of the Treaty on the Functioning of the European Union.

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Japan

A. JFTC Issues Record Surcharge Payment Order Against Electric Power Companies Engaged in Cartels.

On March 30, 2023, the Japan Fair Trade Commission (JFTC) issued a cease-and-desist order and surcharge payment order under the Antimonopoly Act against three major electric power companies and two of their subsidiaries. Four of the companies were subject to the surcharge payment order, and the amount of the surcharge ranged from approximately 2.7 billion yen to approximately 70.7 billion yen, for a total of 101,033,999,000 yen. According to the JFTC, those companies have engaged in a cartel and violated the Antimonopoly Law regarding the supply of electricity to businesses and bidding to public offices in certain regions.

Given the orders, two of the five companies (one major electric power company and its subsidiary) released statements that since there is a difference of opinion with the JFTC regarding the factual findings and interpretation of the law, they are preparing to file a revocation suit. In addition, two other companies (another major electric power company and its subsidiary) also released statements that they are considering filing a revocation suit after carefully examining the contents of each order.

B. Tokyo District Public Prosecutors Office indicts 6 major advertising companies and 7 people.

The Tokyo District Public Prosecutors Office indicted six major advertising companies and seven people, including a former deputy director of the Organizing Committee and executives from each company, for Antimonopoly Law violations.

According to the Tokyo District Public Prosecutors Office, the six companies, a former deputy director of the Organizing Committee, and others are accused of violating the Antimonopoly Law by improperly coordinating the receipt of orders totaling 43.7 billion yen from the Organizing Committee, including bids for planning work for sport test events as well as for management work for the main event. Although it is suspected that a major advertising group company was also involved in the bid-rigging, criminal charges are expected to be dropped because that company first voluntarily reported the fraud to the JFTC.

Read previous editions of GT's Competition Currents Newsletter.

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