

GT Newsletter | Competition Currents | July 2023

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 and Department of Justice (DOJ) propose substantial additions to HSR premerger notification form and rules.*

The Hart-Scott Rodino Act requires parties to certain mergers and acquisitions to file a premerger notification with FTC and DOJ. On June 27, 2023, FTC and DOJ jointly published **proposed changes** to the HSR form and its corresponding rules. The proposed changes include the following: (1) Parties must provide details about the transaction rationale, including details related to investment vehicles or corporate relationships; (2) Parties must provide information related to products or services in both horizontal products and services and non-horizontal business arrangements; (3) Parties must provide details related to revenue, transaction analyses, internal documents describing market conditions, and structure of entities involved; (4) Parties must provide details regarding previous acquisitions; and (5) Parties must disclose information related to employees and their Standard Occupational Classification

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.

System categories. The proposed changes could significantly transform the regulatory review of mergers and acquisitions in the future.

2. *FTC and DOJ summarize workshop on antitrust enforcement in the pharmaceutical industry.*

On June 1, 2023, FTC and DOJ published a summary of a workshop held in June 2022 on potential changes to antitrust enforcement in the pharmaceutical industry. The workshop included participants from the U.S. antitrust agencies, state attorneys general, international enforcement partners, academics, and other experts. Underpinning the workshop was the trend of increased concentration in the pharmaceutical industry. The panelists and speakers discussed a wide range of topics, including the concerns of consolidation (e.g., monopolization, pay-for-delay tactics, product hopping, deceptive practices, and sham petitioning), remedies and possible alternatives (e.g., ongoing monitoring of R&D and patent output post-merger), innovation (e.g., incentives of non-merging firms to innovate), and prior bad acts as factors in pharmaceutical merger reviews.

3. *FTC approves changes to the Commission's Rules of Practice.*

On June 2, 2023, FTC unanimously voted (3-0) to approve changes to the Commission's Rules of Practice. Several minor changes were made to reflect the new Office of Technology. Administrative Law Judges (ALJs) now will issue "recommended" decisions rather than "initial" decisions. Under the Administrative Procedure Act (APA), an agency must automatically review "recommended decisions" and may affirm or reject the ALJ's recommended decision, in whole or in part, and issue its own findings of fact or conclusions of law. In addition, ALJs no longer will have the ability to rule on motions for summary decisions in accordance with the Commission's practice since 2009. Finally, , FTC amended the rules to reflect procedures more clearly for making Touhy and Privacy Act requests. FTC also approved other minor changes to fix misspellings, cross-references, and other ministerial changes.

4. *FTC finalizes consent order preventing Anchor Glass Container Corp. from entering and enforcing employee noncompete restrictions.*

FTC filed a complaint against Anchor Glass Container Corp. in March 2023 related to the company's noncompete restrictions on more than 300 workers with more than 139 job titles, including personnel in accounting, human resources, engineering, quality assurance, technology, and more. The consent order, approved June 2, 2023, prevents Anchor Glass from entering or enforcing noncompete restrictions on such employees. Anchor Glass must also notify all relevant employees that they are no longer subject to noncompete restrictions and make clear to all new hires that they will not be subject to noncompete restrictions.

5. *FTC comments on pending North Carolina Bill that would shield UNC Health from antitrust scrutiny.*

On May 1, 2023, the North Carolina State Senate unanimously passed Senate Bill 743, which includes a provision that would shield University of North Carolina Health Care System and any entity it seeks to collaborate with from antitrust scrutiny. The bill is pending before the North Carolina House. FTC submitted a [comment](#) on the bill to the North Carolina House Health Committee on June 5 expressing its concerns that the bill would authorize anticompetitive conduct that would lead to higher health care costs, lower quality, reduced innovation, reduced access to care, and lower wages for hospital employees.

6. *FTC continues to study pharmacy benefit managers and issues compulsory order to third group purchasing organization, Emisar Pharma Services LLC.*

On June 8, 2023, FTC issued order to Emisar Pharma Services, LLC, requiring the group purchasing organization (GPO) to provide information and records on its business practices. The order comes as part of the FTC's ongoing effort to study pharmacy benefit managers (PBMs) and their impact on the accessibility and affordability of prescription drugs. FTC has previously issued such orders to six PBMs and two other GPOs. Emisar is a UnitedHealth Group subsidiary and negotiates rebates with drug manufacturers on behalf of OptumRx, another UnitedHealth Group subsidiary.

7. *FTC Office of Policy Planning Director applauds Maine for the repeal of its law allowing health care providers to obtain antitrust immunity through certificates of public advantage.*

On April 24, 2023, Maine's governor signed a bill into law that repealed the state's Hospital and Health Care Provider Cooperation Act. The now-repealed law had allowed certain hospital and health care provider agreements to avoid antitrust scrutiny by obtaining a Certificate of Public Advantage (COPA) from the state. On June 13, 2023, FTC Office of Policy Planning Director Elizabeth Wilkins issued a statement commending the state's repeal and noting that FTC has found that "COPAs can be difficult for states to implement and monitor over time and are often unsuccessful in mitigating merger-related price and quality harms."

8. *FTC files amicus brief supporting plaintiffs in Bystolic antitrust litigation—a "pay-for-delay" case against Forest Laboratories Inc. and six generic drug manufacturers.*

On June 20, 2023, FTC filed an amicus brief to the U.S. Court of Appeals for the Second Circuit. The case relates to alleged reverse-payment settlements (or pay-for-delay agreements) between Forest Laboratories Inc. and six generic drug manufacturers that prevented generic competitors from challenging Forest's patents and entering the market in competition with Forest's Bystolic—a once-daily pill to treat high blood pressure—for at least eight years. FTC's brief argues that the legal standard for plaintiffs challenging reverse payment settlements need to plead only market power and facts from which the court can infer a large and unjustified reverse payment was made. FTC argues that the U.S. District Court for the Southern District of New York erred in dismissing the case and wrongly offered hypothetical justification for Forest's agreements with the generic manufacturers.

B. U.S. Litigation

1. *In re HIV Antitrust Litigation*, Case No. 3:19-cv-02573 (N.D. Cal. June 30, 2023).

A California jury cleared Gilead and Teva of liability in an alleged "pay-for-delay" deal that allegedly artificially raised prices for two HIV drugs. The jury concluded that plaintiffs failed to show that Gilead had the requisite market power or that it had paid Teva to delay bringing its generic version of the medications to market. The lawsuit, brought by health plans, insurers, and others, stems from a settlement of patent litigation between Teva and Gilead in which Gilead granted Teva a six-month contract to be the exclusive seller of the generic versions of Gilead's Truvada and Atripla drugs. Plaintiffs in the antitrust claim argued that the exclusive arrangement constituted a "payment," on the theory that the Gilead patents were weak and Teva would have won that patent litigation, thus allowing generics into the market sooner than under the settlement agreement. Gilead argued that the deal allowed Teva and others to enter the market early, before the patents at issue had expired, not late. The jury agreed.

2. *Jeffrey Sulitzer D.M.D et al. v. Joseph Tippins et al.*, Case No. 2:19-cv-08902 (D.C. Cal. June 16, 2023).

SmileDirectClub dropped its antitrust suit against the California state board of dentistry where it had claimed the Board had attempted to stifle competition through an “aggressive, anti-competitive campaign of harassment and intimidation” against the company. The trial court dismissed the case, which was originally filed in 2019, in 2020 on the grounds that the conduct about which SmileDirect complained could have just been the regulator doing its job. However, in 2022 the Ninth Circuit overturned that decision, concluding that the company had alleged sufficient anticompetitive conduct in that it is possible for a group of regulators to form an anti-competitive conspiracy. No settlement details were disclosed.

Mexico

Mexico’s COFECE Investigates Existence of Illegal Practices in Market for Digital Goods and/or Services

The investigative authority of the Federal Economic Competition Commission (COFECE) initiated an investigation into possible anticompetitive practices in the market for the development, marketing, and sale of digital goods and/or services. In particular, COFECE is investigating possible “tied sales” or “raising costs for rivals.” Read more in our [GT Alert](#).

The Netherlands

A. Dutch ACM decisions, policies, and market studies

1. *ACM updates its ‘Guidelines regarding sustainability claims’.*

The Dutch competition authority (ACM) **revised** its guidelines on sustainability claims, which allow companies to assess how to communicate their sustainability commitments to consumers. As consumers increasingly prioritize sustainability, they seek reliable information to make informed choices. Yet many sustainability claims are unclear and lack details. To address this, companies must provide transparent and accurate sustainability claims.

The revised guidelines offer five guides:

- Use correct, clear, specific, and complete sustainability claims
- Substantiate sustainability claims with facts, and keep them up to date
- Make fair comparisons with other products or competitors
- Describe future sustainability ambitions in concrete and verifiable terms
- Ensure that visual claims and labels are useful to consumers, not confusing

The Dutch Authority for the Financial Markets (AFM) has recently published its guidelines on sustainability claims for consultations. These guidelines are aligned with those of the ACM, but they specifically focus on sustainability claims made by financial companies and pension providers.

2. *ACM clears a.s.r.'s acquisition of insurance company rival Aegon.*

The ACM **cleared** ASR Nederland N.V. (a.s.r.)'s acquisition of rival insurance company Aegon Nederland N.V. Both a.s.r. and Aegon sell various financial products and services, such as property and casualty insurance and income protection insurance, e.g., home contents insurance, and disability insurance. Both companies sell pension products with which employers build up supplementary pensions for their employees.

The ACM investigated whether the acquisition would lead to competition problems. After speaking with customers, intermediaries, and competitors, ACM concluded that sufficient competition would remain in the applicable insurance markets.

Poland

A. UOKiK President's dawn raids in the agricultural machinery market.

Based on open-source intelligence, the Office of Competition and Consumer Protection (UOKiK) President launched an investigation against some of the key companies in the agricultural machinery manufacturing sector. UOKiK suspects at least 10 entities of participating in anti-competitive practices that risk dividing the market.

The UOKiK President announced that extensive evidence was collected from dawn raids carried out on the largest scale in UOKiK history. Dawn raids took place at Polish offices of Class Machinery, New Holland Agriculture, Case IH, Steyr Traktoren, Massey Ferguson, Fendt, and Valtra.

As part of the explanatory investigation, the UOKiK President verifies whether both manufacturers and dealers of agricultural machinery engaged in anticompetitive arrangements. The UOKiK President suspects that collusion resulted in higher prices of agricultural machines, to the detriment of farmers.

The proceedings are not yet conducted against any particular entity. If explanatory proceedings confirm the regulator's suspicions, the UOKiK President may launch proceedings against companies.

Under Polish law, an entrepreneur involved in a competition-restricting agreement may be fined up to 10% of its turnover in the preceding year, while managers responsible for effecting the collusion face a penalty of up to PLN 2 million. Based on new regulations in force since May 20th, a fine of up to 10% of turnover may also be imposed on an entity exercising decisive influence over a participant in an anti-competitive agreement. Anticompetitive provisions in contracts are null and void. The entities harmed by an anticompetitive agreement may also seek damages in court.

B. Anticompetitive wage-fixing agreement in the Polish speedway league

The UOKiK President issued a decision on the conclusion of an anticompetitive wage fixing agreement between the Polish Automobile and Motorcycle Federation (Polski Związek Motorowy – PZM) and Ekstraliga Żużlowa (Speedway League). The latter company manages the top league speedway competitions in Poland. PZM, on the other hand, is a sports association responsible for organizing speedway competitions in Poland, and Speedway League manages the competitions under a contract with PZM.

The UOKiK President announced that PZM set the maximum remuneration rates that sports clubs participating in speedway league competitions were allowed to pay their riders. In turn, Speedway League

participated in the development of these regulations. The practices took place in 2013 and concerned the 2014 racing season. In the UOKiK President's view, the mechanism significantly undermined competition among the speedway clubs.

The UOKiK President's decision also found an infringement of Article 101 of the Treaty on the Functioning of the European Union. As the Polish speedway is considered one of the best in the world, the salaries of riders in Ekstraliga clubs and other leagues may serve as a benchmark in other EU countries.

The UOKiK President imposed fines on both participants – approximately PLN 3 million (EUR 650 000) on PZM and approximately PLN 2.3 million (EUR 500 000) on Speedway League. The UOKiK President's decision is not final and can be appealed in court.

This was not the only decision related to wage-fixing. Last year, the UOKiK President fined the top Polish basketball league as well as 16 basketball clubs for arrangements aimed at not paying full salaries to their players.

Italy

A. Italian Competition Authority (ICA)

1. *ICA opens two investigations concerning A2A S.p.A. and Iren S.p.A., the main multi-utility energy provider, respectively, in the regions of Lombardy and Emilia Romagna, for alleged abuse of dominant position in the local district heating networks sectors.*

On June 26, 2023, ICA announced that it had launched an investigation into multi-utility energy companies A2A S.p.A. and Iren S.p.A., as well as several subsidiaries of their respective groups, for two different, although similar, alleged abuses of dominant position in the district heating network sector. According to ICA, the energy companies' abusive conduct concerns the criteria for setting the price for heat sold to end-users through the local district heating networks; for A2A, in the city of Como; for Iren, in the territories of Parma and Piacenza.

A2A and Iren are the main multi-utility energy providers in the northern Italian regions of Lombardy and Emilia Romagna, respectively. According to ICA, the two companies hold a natural monopoly with respect to each of the relevant geographic markets, which are identified as local, because each network constitutes a market in itself. ICA contests A2A and Iren's group companies for linking pricing on the network in the city of Como (operated by a subsidiary of A2A) and in the territories of Parma and Piacenza (operated by a subsidiary of Iren) based on the evolution of natural gas prices, even though the heat supplied to the networks is mainly obtained from different energy sources (waste-to-energy combustion). Indeed, the cost of waste combustion-based heat production should, in principle, be independent of natural gas prices.

Therefore, according to ICA, such conduct, in a period of pivotal increases in the cost of natural gas from the end of 2021, resulted in the transfer to consumers of disproportionate economic burdens compared to the costs the energy companies actually incurred.

The companies concerned have 60 days from the notification of the order to exercise their right to be heard before ICA.

2. *ICA publishes 2023 annual report on its activity.*

On June 27, 2023, ICA presented its annual report on its 2022 activities and priorities for the near future.

In brief, the report shows that, with regard to antitrust, in 2022, ICA concluded 12 proceedings concerning anticompetitive agreements, two of which were closed with the acceptance of commitments. The cases mainly concerned bid rigging and important sectors of the economy, such as telecommunications and banking. The ICA also concluded four investigations into abuses of dominant position, which mainly involved activities related to the “green economy” (electric mobility and waste management) and digital platforms, as well as two proceedings for abuse of economic dependence in the context of franchise networks.

Regarding merger control, between January 2022 and May 2023, ICA examined 127 transactions, four of which were authorized with conditions and one prohibited (in the electricity production and wholesale supply sector, as well as in the dispatching services market in Sicily).

As for consumer protection, from January 2022 to May 2023, ICA concluded 158 proceedings: 80 with a finding of infringement and 66 with the acceptance of commitments. The total sanctions imposed amounted to more than 90 million euros. The main proceedings concerned the banking, insurance, energy, and water sectors, as well as covert marketing on social network platforms.

These figures demonstrate ICA’s increasing antitrust enforcement activity and the exercise of the other powers assigned to it by national law, as well as the substantial alignment of ICA’s policy goals with those of the major European national competition authorities and the European Commission itself, for instance in the digital sector and the green economy.

3. *ICA opens investigation into Balocco S.p.A. Industria Dolciaria for alleged unfair commercial practice in relation to the advertising of Chiara Ferragni branded limited edition pandoro.*

On June 14, 2023, ICA announced it had opened an investigation into Balocco S.p.A. Industria Dolciaria for alleged unfair commercial practice in relation to the commercial initiative “Chiara Ferragni and Balocco together for the Regina Margherita Hospital in Turin” promoted between November and December 2022. During that period, the company offered limited edition pandoro (a traditional Italian Christmas sweet yeast bread) “branded” Ferragni for sale to support research in favor of the Regina Margherita Hospital in Turin.

According to the Authority, the way the initiative was presented—both in press releases and on pandoro packaging—could mislead consumers by appealing to their sensitivity to socially motivated charitable initiatives. Consumers, in fact, could be led to believe that by buying Ferragni’s branded pandoro they were contributing to a donation for the purchase of a new machine for the Turin’s hospital. Independent of the product’s sales performance, Balocco had arranged for a lump-sum donation to the hospital several months before the initiative’s advertising launch.

European Union

A. European Commission

1. *European Commission adopts HBER.*

The European Commission has adopted updated Horizontal Block Exemption Regulations (HBERs), along with revised Horizontal Guidelines (Guidelines). Certain research and development and specialization agreements are exempted from the EU cartel prohibition provision (Article 101(1) of the Treaty on the Functioning of the EU). Moreover, the European Commission – for the first time – included a new chapter on sustainability agreements in the Guidelines. For more information, please see our [GT Amsterdam Law Blog](#) on this matter.

The new HBERs took effect July 1, 2023, while the Guidelines take effect following their publication in the Official Journal of the EU. The transitional period for existing agreements to align with the new regulation is two years.

2. *European Commission starts evaluation of the European framework for screening of foreign direct investments.*

The European Commission has initiated a consultation process to assess the functioning and effectiveness of Regulation (EU) 2019/452, which outlines the framework for screening foreign direct investment (FDI) into the EU.

This consultation is part of the evaluation process mandated by the Regulation, ensuring its continued relevance in an evolving global security context. Based on the evaluation's findings, the European Commission may propose revisions to the rules, maintaining a focus on security and public order. The Commission will publish a summary of the consultation in its evaluation report. The replies will be made available to the public.

Stakeholders are invited to provide feedback until 14 July 2023.

3. *EU raids synthetic turf companies.*

The European Commission has conducted unannounced [inspections](#) at the premises of multiple companies across several EU Member States active in the synthetic turf industry. The Commission initiated the dawn raids because of concerns about potential violations of the EU cartel rules. The European Commission, in collaboration with national competition authorities, carried out the inspections, investigating the companies for potential breaches of Article 101 of the Treaty on the Functioning of the European Union. The recent raids follow similar actions targeting other sectors, including luxury brand Gucci, companies in the fashion industry, and energy drink Red Bull. The increased focus on dawn raids likely arises from the Commission's expanded whistleblower tool, allowing individuals to anonymously report potential competition law breaches.

4. *European Commission sends statement of objection to Orange/MasMovil over their proposed joint venture.*

The European Commission has sent Orange and MasMovil a [statement of objections](#), warning that their proposed joint venture could harm competition by reducing the number of mobile network operators in Spain from four to three.

The European Commission initiated a Phase II investigation in April 2023 and now has disclosed its preliminary findings, which suggest that the partnership might diminish competition in the retail market for mobile and fixed internet services in Spain. Concerns have been raised regarding multi-play bundles, which enable users to connect across various telecom services. The European Commission is particularly worried that the reduction in network operators would eliminate a significant competitor, thus leaving only Telefónica and Vodafone in the retail markets, together with the merged entity.

The European Commission has until Sept. 4 to issue its final decision.

5. *Spanish railway operator Renfe offers data commitments in EU abuse probe.*

Spanish state-owned railway operator Renfe has **proposed** to the European Commission behavioral commitments to address dominance abuse concerns.

The European Commission began investigating Renfe in April 2023 for potentially restricting competition in the Spanish online rail ticketing market by withholding passenger route data from third-party platforms. Renfe has pledged to provide third-party providers with real-time data and access to its online platforms' content by February 2024, with notice of any changes.

The commitments will be monitored for the next decade, and non-compliance could result in fines of up to 10% of Renfe's worldwide turnover. This comes amid broader efforts in Europe to ensure passengers can purchase tickets for various modes of transport from different operators. Interested parties have six weeks to submit comments to the proposed commitments.

B. European Decisions

1. *EU's General Court upholds PKN Orlen/Lotos conditional approval.*

The EU's General Court has **upheld** the European Commission's conditional clearance of a merger between two Polish state-owned oil and gas companies. Paraffin wax producer Polwax appealed to the General Court, claiming that the merger would result in a monopoly in the slack wax sector, an essential component of paraffin wax. Polwax also argued that the market definition was incorrect and that the European Commission disregarded the horizontal effects of the merger in the slack wax production market.

The General Court dismissed the appeal, noting that PKN Orlen does not sell slack wax. It furthermore ruled that Polwax misunderstood the European Commission's decision and did not provide sufficient evidence to support the claim of non-substitutability of different types of wax. The court agreed with the European Commission's analysis that PKN Orlen would face adequate competition with its 40% market share.

The European Commission approved the merger in July 2020, subject to a substantial divestment because of vertical concerns about the upstream slack wax market and the downstream paraffin market. PKN Orlen executed the divestment and completed the acquisition.

Greater China

In a Landmark Decision, China’s Supreme Court Reverses Lower Court Decision Banning Excessively High Prices on a Patent-Protected Pharmaceutical Product

On May 25, 2023, following a three-year appellate review, the Supreme People’s Court (SPC) reversed a lower court’s finding against HIPI Pharma Tech (together with its affiliates, HIPI) for abusive exercise of HIPI’s market dominance. According to the lower court allegations, HIPI had charged its distributor, Yangtze River Pharmaceutical Group (together with its affiliates, Yangtze), an excessively high price for sales of the ingredient loratadine, manufactured by HIPI, which was protected by HIPI’s valid patent. The SPC’s analysis was detailed, and addressed key issues such as whether loratadine could constitute its own product market and whether HIPI’s increased price had actually caused harm. According to SPC, because there were no reasonable substitutes for loratadine, it indeed constituted its own relevant market. SPC also analyzed whether HIPI abused its dominant position, finding that HIPI’s actions were well within its rights as the owner of a validly issued patent. Finally, with regard to whether the price HIPI charged was excessive, SPC noted that because the price of the end product containing loratadine actually decreased during the period at issue, HIPI’s actions did not cause harm to consumers. SPC cautioned prudence when a court is reviewing abusive conduct such as excessive pricing, which was in general welcomed by the pharmaceutical industry as a pro-innovation move. For more details on this case, see our [GT Alert](#).

Japan

Japan Fair Trade Commission’s Analysis of Cease-and-Desist Recurrence Prevention Measures

As part of its evidence-based policymaking, the Japan Fair Trade Commission (JFTC) conducted an investigation into the impact of previously issued cease-and-desist orders and whether the activity subject to the orders is recurring in the market as a whole. This process serves dual purposes: it verifies the effectiveness of the implemented measures, particularly those aimed at preventing unfair trade restrictions according to Article 3 of the Antimonopoly Act, and it generates insights for crafting more effective strategies to avert recurrence. The JFTC’s investigation was based on several hundred responses it received from businesses that previously had been issued cease and desist orders. Key takeaways included: To ensure greater effectiveness of prevention measures, top management involvement and training-centric strategies should be prioritized; and for SMEs, the development of unique, tailored preventive measures could offer additional benefits. For more details on the JFTC analysis, see our [GT Alert](#).

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