# GT Newsletter | Competition Currents | August 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. *President Biden nominates two Republicans for the FTC.*

On July 3, 2023, President Biden announced the nominations of Andrew N. Ferguson and Melissa Holyoak to serve as FTC commissioners. If confirmed by the Senate, the two Republicans will fill out the Commission, which currently has two Democratic commissioners: Rebecca Kelly Slaughter and Alvaro Bedoya, and a Democratic chair: Lina Khan. (Republican Christine S. Wilson departed the Commission in March 2023, and Republican Noah Phillips departed in October 2022). Melissa Holyoak currently serves as solicitor general with the Utah Attorney General's Office. Andrew Ferguson currently serves as the solicitor general of the Commonwealth of Virginia.

[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.

2. *FTC joins DOJ in withdrawing certain health care policy statements*.

On July 14, 2023, the FTC issued an announcement officially withdrawing certain antitrust policy statements related to health care. The specific policy statements, Statements of Antitrust Enforcement Policy in Health Care (1996), and Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program (2011), set forth "safety zones" delineating certain types of transactions, joint ventures, and activities within the health care space, that the FTC and DOJ would not challenge unless extreme circumstances existed. The FTC said that the statements "no longer serve as useful guidance or reflect market realities" given how much the market has changed over the last 30 years, and that withdrawal of the statements is the best course of action for promoting fair competition in health care markets. With both the FTC and DOJ having withdrawn these policy statements, the agencies will now rely on general principles of antitrust enforcement and competition policy when it comes to evaluating health care transactions and arrangements, without regard to such special health care industry framework(s). For more details, see our February 2023 GT Alert.

3. *FTC Bureau of Competition issues policy statement regarding contracts impeding voluntary cooperation*.

On July 15, 2023, the FTC's Bureau of Competition issued a policy statement, titled *Contracts That Impede Bureau of Competition Investigation*, addressing certain contractual provisions that can encumber investigations. The Bureau issued this statement because interviewees are increasingly invoking contractual terms to justify not answering questions or providing information during voluntary interviews. The Bureau expressed its view that contract provisions are void and unenforceable "insofar as they purport to (1) prevent, limit, or otherwise hinder a contract party from speaking freely with the FTC; or (2) require a contract party to disclose anything to an investigation target about the FTC's outreach or communications."

The Bureau notes that the types of contracts that generally contain the concerning provisions are confidentiality agreements (prohibiting all contracting parties from disclosing certain information to others), nondisclosure agreements (prohibiting a specified party from disclosing information to others), and notice-of-agency-contact provisions (requiring the covered person or business to give notice of any contact with a government agency – sometimes also requiring a party to summarize any discussions they have with regulators). In the statement, the Bureau warns that investigation targets and their attorneys should be keenly aware that "attempts to obstruct FTC investigations and enforcement actions may be viewed as unlawful efforts to discourage or influence cooperation with the FTC" and that "[such] conduct can potentially rise to the level of a criminal violation, and the FTC may refer appropriate matters to the U.S. Department of Justice."

4. *FTC reaches proposed settlement with Surescripts in monopolization case*.

On July 27, 2023, the FTC filed a proposed order in federal court that would prohibit health information technology company Surescripts from engaging in exclusionary conduct and executing or enforcing non-compete agreements with employees (both current and former). The FTC's proposed order would resolve a suit, originally filed in April 2019, alleging that Surescripts used anticompetitive tactics to illegally monopolize two e-prescription drug markets.

FTC Bureau of Competition Director Holly Vedova called the proposed order "a victory in creating a fair and competitive playing field in the e-prescription drug market." The FTC's proposed order has a 20-year term and would prohibit Surescripts from engaging in certain types of exclusionary conduct. Specifically, the proposed order states that it would:

- *"prohibit Surescripts from entering into, maintaining, or enforcing contracts that impose a majority share requirement on its routing and eligibility customers, including through all-unit discounting*
- *prohibit Surescripts from implementing other problematic provisions it has used to prevent or limit the ability of customers to do business with Surescripts' competitors*
- *bar Surescripts from preventing customers from promoting competitors' services; preventing and limiting customers' ability to communicate with competitors; and requiring that customers provide Surescripts a right of first refusal*
- *bar Surescripts from entering into, maintaining, or enforcing agreements that prevent rivals from competing with Surescripts in routing and eligibility*
- *prohibit Surescripts from discriminating against or threatening customers who refuse to agree to a majority share requirement*
- *extend the same relief to Surescripts' medication history and on-demand formulary services, and*
- *bar Surescripts from entering into or enforcing any employee non-compete agreement with current and former employees that would prevent those employees from working for a competing e-prescribing service provider."*

**B. FTC and Department of Justice (DOJ)**

*FTC and Justice Department seek comment on Draft Merger Guidelines*.

On July 19, 2023, the FTC and DOJ released updated Draft Merger Guidelines to reframe the agencies' reviews of mergers and acquisitions. With the updated guidelines, the agencies seek to reflect the ways they evaluate proposed mergers under the law in the modern economy. In the Draft Merger Guidelines, the agencies set forth the following 13 specific guiding principles: (1) mergers should not significantly increase concentration in highly concentrated markets; (2) mergers should not eliminate substantial competition between firms; (3) mergers should not increase the risk of coordination; (4) mergers should not eliminate a potential entrant in a concentrated market; (5) mergers should not substantially lessen competition by creating a firm that controls products or services that its rivals may use to compete; (6) vertical mergers should not create market structures that foreclose competition; (7) mergers should not entrench or extend a dominant position; (8) mergers should not further a trend toward concentration; (9) when a merger is part of a series of multiple acquisitions, the agencies may examine the whole series; (10) when a merger involves a multi-sided platform, the agencies may examine competition between platforms, on a platform, or to displace a platform; (11) when a merger involves competing buyers, the agencies may examine whether it may substantially lessen competition for workers or other sellers; (12) when an acquisition involves partial ownership or minority interests, the agencies may examine its impact on competition; and (13) mergers should not otherwise substantially lessen competition or tend to create a monopoly.

Comments regarding the Draft Merger Guidelines are due by Sept. 18, 2023. For more details, see our July 2023 GT Alert.

### C. Other U.S. Agencies

*USDA launches partnership with bipartisan state attorneys general to help reduce anticompetitive barriers across food and agriculture supply chains.*

On July 19, 2023, U.S. Department of Agriculture (USDA) announced a partnership with state attorneys general "to enhance competition and protect consumers in food and agricultural markets, including in grocery, meat and poultry processing, and other markets." Under this new partnership, USDA will invest in combining state and federal authorities, market insights, and expertise, and will leverage funding to support research for use in future cases.

USDA's stated categories of focus include: "1) anticompetitive market structures and practices, as well as price gouging, 2) lack of choices for consumers and producers, and 3) conflicts of interest and anticompetitive barriers across the food and agriculture supply chains, such as in seed markets."

USDA also announced that to facilitate the logistics of this new partnership, it is teaming up with the Center for State Enforcement of Antitrust and Consumer Protection Laws.

### D. U.S. Litigation

1. *Flextronics Int'l USA, Inc. v. Panasonic Holdings Corp. et al.*, Case No. 22-15231 (9th Cir. July 21, 2023).

On July 21, 2023, the Ninth Circuit reversed the district court's dismissal of Flextronics (Flex)'s case against Panasonic and other Japanese electronics companies for an alleged conspiracy to fix prices for inductors in violation of Section 1 of the Sherman Act. In February 2022, the district court dismissed Flex's complaint on the basis that Flex relied solely on circumstantial evidence and failed to plead plausible evidence of parallel pricing from which to infer a conspiracy. The Ninth Circuit reversed that decision, holding that Flex alleged parallel pricing and several plus factors sufficient to "nudge" its claim "across the line from conceivable to plausible."

2. *Block, Inc. v. Visa, Inc., et al.*, Case No. 1:23-cv-053477 (U.S. District Court for the Eastern District of New York).

Visa Inc. and Mastercard Inc. are facing a new antitrust lawsuit that alleges the credit card companies conspired to vastly overcharge the Square payment platform, causing consumers to pay higher retail prices. Block Inc., the company formerly known as Square Inc., claims that Visa and Mastercard conspired to fix inflated "interchange" fees and maintain market power. Block's Square payment processing platform directly contracts with Visa and Mastercard to facilitate card transactions for millions of merchants. Square is the direct payer of the interchange fees, also known as swipe fees, which Visa or Mastercard and their member banks charge each time a customer uses a credit or debit card to make a transaction. "The effect of these artificially inflated fees — assessed to and paid by Square — is higher retail prices paid by consumers economy-wide," Block Inc. said in the suit. The company further claimed that these fees are "highly complex, difficult to calculate, and unavoidable," especially now that Visa and Mastercard are raising the fee incurred by Square based on the number of merchant locations they provide for. Visa and Mastercard faced similar accusations in an antitrust case stemming from interchange fees in the United Kingdom.

## Mexico

### A. Cofece summons companies and individuals for possible illegal agreements in the waterproofing market.

The investigating authority of the Federal Economic Competition Commission (Cofece or the Commission) summoned several companies and individuals after finding evidence of probable collusion to manipulate the selling price (considered an illegal absolute monopolistic practice under Mexican law) in the market for production, distribution, and sales of waterproofing products in Mexico.

Waterproofing products protect buildings against water damage. According to the 2020 National Housing Survey (Encuesta Nacional de Vivienda 2020 or ENVI), 44.2% of houses in Mexico have structural problems due to water infiltration, which is why waterproofing products have become necessary for the maintenance of the more than 35 million homes.

The investigation concluded Feb. 21, 2023. Trial is set to begin with the Technical Secretary of the Commission in charge. Both the companies and the individuals summoned will be able to make a statement, offer evidence, and present arguments. Then the Plenary of COFECE will resolve the matter in accordance with the law.

If the Plenary deems absolute monopolistic practices occurred, they may impose sanctions on the summoned parties in accordance with the applicable Federal Law of Economic Competition.

### B. Cofece recalls the importance of competition compliance programs in relation to a collusion case in the sale of tortillas in Huixtla, Chiapas.

In September 2019, Cofece began an investigation into cartel conduct in the markets for production, distribution, and marketing of corn tortillas, in the municipality of Huixtla, in the State of Chiapas. During the investigation, the Investigating Authority of the Commission determined that several tortilla producers in Huixtla and large retail stores (with a national presence) such as Soriana and Chedraui agreed to set the price and limit the sale of corn tortilla, with the approval of the government delegate of Huixtla Chiapas.

The tortilla producers noted that in April 2019, they faced challenges regarding several retail companies' corn tortilla prices. Therefore, through a group identified as the Huixtla Union (la Unión Huixtla), they requested that the Huixtla, Chiapas government delegate hold meetings to discuss the price of tortillas in the municipality.

At the meeting held on May 8, 2023, the companies agreed that Soriana and Chedraui would not sell wholesale or bulk corn tortillas to a single customer.

During the session held on May 25, 2023, the Plenary of Cofece decided that all the companies were involved in cartel conduct and that the government delegate of Huixtla, Chiapas acted as a collaborator. Cofece imposed several fines that together amounted to 2,072,405 Mexican pesos (~120,000 USD). In addition, two individuals were banned from holding executive positions in the companies involved for a period of four months.

Cofece used this case to underscore the importance of knowing and complying with the Federal Law of Economic Competition (*Ley Federal de Competencia Economica*) (LFCE). Companies must make sure that all their employees comply with the provisions set forth in competition law.

Cofece stated that one way to promote knowledge of LFCE within companies is through compliance programs and policies, which can help prevent and detect possible illegal conduct in a timely matter. Effective compliance programs and policies help companies align their operations and activities to adhere to the law, regulations, and applicable standards. This is achieved through adequate training and the implementation of response mechanisms that dissuade and prevent anti-competitive practices. Cofece pointed out that having a compliance program does not exempt companies from abiding by the provisions of the LFCE. However, it can prevent violations of the law, and at the same time, guide companies on actions to take if violations of the Law occur, e.g., joining the leniency program.

Citing a 2019 study, Cofece indicated the following basic elements that all compliance programs should consider:

1. *Encouragement of a corporate competitive culture*: Make a visible commitment to comply with the LFCE from the highest corporate level, including competition principles in the conduct and ethics codes, and generate synergies and savings by including the obligations related to the Law along with other topics such as anticorruption and money laundering, security, and environmental care, among others.

2. *Investment*: The amount of resources required varies according to the size of the organizations and the risks they face. Likewise, it is suggested that companies designate a responsible individual, preferably with a support team, who has direct communications with and the support of high-ranking company directors. Also, it is important to assign enough resources to the program for its design, implementation, evaluation and continuous improvement.

3. *Risk assessment*: Prepare a risk matrix identifying the specific, significant risks to the company, enabling the establishment of mitigation actions and controls to provide adequate and proportional solutions for each.

4. *Elaborate guides, manuals, and compliance policies*: Create documents that contain the instruments of compliance, such as guides, manuals or internal policies that shepherd the employees through the steps to follow in the event of non-compliance with the LFCE.

5. *Ongoing and customized training*: The goal must be, at least, to define the LFCE's scope and to provide company personnel the necessary knowledge to identify situations that could lead to unlawful conduct.

## The Netherlands

### A. Dutch ACM decisions, policies, and market studies.

1. *ACM reduces first excessive pricing fine after appeal.*

Pharmaceutical company Leadiant Biosciences convinced the Dutch Authority for Consumers & Markets (ACM) to reduce its 2021 fine for overcharging on a drug used to treat a rare genetic metabolic disorder, the ACM's first excessive pricing penalty. The ACM partially granted the appeal, reducing the fine from €19.5 to €17 million.

In July 2021, the ACM found that Leadiant acquired a CDCA (bile acid)-based drug in 2008, rebranded it, and radically raised the prices. The appeal only partially succeeded because the relevant market should have included compounded CDCA products, leading to a temporary loss of Leadiant's dominant position.

2. *ACM fines two companies for price-fixing agreements*.

The ACM fined Brimos and Agmi for prohibited price-fixing agreements related to bids for making traffic signs, resulting in less competitive offers for the National Signage Service. In 2020, the two companies secretly coordinated their prices and discussed tender outcomes for four assignments. However, their cooperation with the ACM during the investigation and acknowledgment of the violations led to reduced fines.

**B. Dutch courts**

1. *Rotterdam District Court upholds €82 million tobacco cartel fines*.

Four tobacco manufacturers failed in their initial attempt to challenge the ACM's EUR 82 million fines for exchanging information on cigarette prices. The companies had exchanged information from 2008 to 2011, leading to increased profits and reduced market uncertainty. The Rotterdam District Court ruled that the ACM correctly and proportionately imposed the fines. The ACM's evidence demonstrated that the anticompetitive conduct surpassed vertical information exchange. The companies actively sought price lists from competitors through wholesalers and were aware of their rivals having the same information.

2. *Amsterdam District Court blocks company subsidiaries from claiming damages from the air cargo cartel*.

The Amsterdam District Court has blocked several subsidiaries of Unilever, Siemens, Parker Hannifin, and ZF Group from claiming damages in the EU air cargo cartel case. Due to a lack of sufficient evidence to support their claims, the Amsterdam District Court removed numerous corporate group subsidiaries from cartel claims vehicles SCC and Equilib, which were prosecuting two lawsuits on behalf of entities that had purchased freight forwarding services.

The claimants argued that the entire corporate group's use of airline services should be sufficient for their claims, but the court ruled that subsidiaries could not seek damages for harm caused to other companies in the group. The case stems from the European Commission fining 11 airlines in 2010 for colluding to fix air cargo surcharge prices on global flights.

## Poland

**A. Suspected bid-rigging among ambulance manufacturers.**

The UOKiK (Office of Competition and Consumer Protection) President announced an explanatory investigation into potential bid-rigging in purchases of ambulances by hospitals and emergency medical services, which may have employed anti-competitive practices since 2014.

UOKiK conducted the first dawn raid in April, covering four locations of businesses involved in ambulance production. As the UOKiK President underscores, the collected evidence is still being examined. However, the evidence suggests that more industry players were involved in bid-rigging.

The proceedings are not directed against any particular entity at this stage. If explanatory proceedings confirm the regulator's suspicions, the UOKiK President may launch proceedings against particular companies.

Bid-rigging qualifies as a competition-restricting agreement. Such agreements may have the form of bid rotation, complementary bidding, or bid suppression. They lead to ineffectiveness in the management of public funds, which in this case may work to the detriment of the health care sector.

Under the Polish law, an entrepreneur involved in a competition-restricting agreement may be subject to a fine of up to 10% of its turnover for the preceding year, while the managers responsible for effecting the collusion face a penalty of up to PLN 2 million. In addition, a fine of up to 10% of turnover may also be imposed on an entity exercising decisive influence over a participant in such an agreement. De minimis exemptions do not apply to collusive bidding, and anti-competitive provisions in contracts are null and void. The entities harmed by an anti-competitive agreement may also seek damages in court pursuant to private antitrust enforcement. Moreover, bid-rigging is the only form of a competition-restricting agreement that may be also subject to criminal penalties including imprisonment.

**B. UOKiK President's first proceedings related to presenting information on price discounts in accordance with the Omnibus Directive.**

On Jan. 1, 2023, provisions implementing the EU Omnibus Directive became Polish law, requiring merchants who use discount promotions to inform consumers of the lowest price from 30 days preceding the promotion. The regulation is designed to increase transparency, making it easier for consumers to make purchase decisions and to determine whether the price proposed by the merchant is indeed as attractive as advertised. The new provisions aim to stamp out false discounts, in which traders artificially inflate the price just before a promotion in order to increase the attractiveness of their offer.

The UOKiK President, together with the Trade Inspection, will closely monitor compliance with the new provisions, both on the traditional and e-commerce market. The UOKiK President has also decided to issue guidance for entrepreneurs on how to properly inform about price reductions. In the past six months, the UOKiK President undertook a number of interventions, both in the form of soft statements and explanatory proceedings.

In July 2023, the UOKiK President announced charges against the first four entrepreneurs in relation to alleged infringements of the rules on proper presentation of price reductions. These entrepreneurs are: Zalando (online retailer of clothing and footwear), Media Markt (retailer of consumer electronics), Sephora (retailer of perfumes and beauty products) and Glovo (food delivery platform). Each of these entities is active on e-commerce markets.

According to UOKiK, their conduct allegedly included, among other things, failing to indicate the lowest price in the 30 days before the discount was introduced or informing about such price in an unclear manner, applying filters and presenting offers that have not referred to the lowest price as well as using other reference points in an inconsistent manner.

The UOKiK President may impose a fine of up to 10% of the entrepreneur's turnover in the preceding year for a violation of the discounted-price reporting requirements. In such case, UOKiK may also impose a fine of up to PLN 2 million on the company's managers who intentionally allowed the infringement.

Proceedings against all the above-mentioned entrepreneurs are pending.

## Italy

**Italian Competition Authority (ICA)**

1. *ICA investigates an alleged cartel in the market for cargo handling services in Naples Port.*

On July 18, 2023, ICA opened an investigation for an alleged breach of Article 2(2) of Law No. 287/1990 (Italian Antitrust Law) and of Article 101(1) TFEU against four undertakings active in the market for cargo handling services in the port of Naples.

Beginning Feb. 1, 2023, the four undertakings (CO.NA.TE.CO. – Consorzio Napoletano Terminal Containers S.p.A., Società Terminal Contenitori – SO.TE.CO. S.r.l., Marinvest S.r.l. e Terminal Flavio Gioia S.p.A., i.e., all the companies active in the provision of cargo handling services in the port of Naples) allegedly reached an agreement on the tariffs to be applied to all the containers imported in the port.

According to ICA, such coordination of the commercial behaviors of these players active in the port of Naples, which is one of the main ports in Italy for both domestic and international sea freight routes, would alter the ordinary course of competitive dynamics within the aforementioned relevant market, as well as to affect intra-EU trade.

The investigation is expected to close by July 31, 2024.

2. *ICA extends unfair commercial practice investigation into Balocco S.p.A. in relation to the advertising of Chiara Ferragni branded limited edition pandoro.*

As mentioned in the July 2023 issue of Competition Currents, ICA recently opened an investigation into Balocco S.p.A. Industria Dolciaria for the allegedly unfair commercial practices put in place by the confectionary company in the promotion of the commercial initiative "Chiara Ferragni and Balocco together for the Regina Margherita Hospital in Turin."

On July 19, 2023, ICA issued a press release confirming the extension of the investigation to Fenice S.r.l. and TBS Crew S.r.l., two companies directly associated to Chiara Ferragni, the worldwide famous Italian businesswoman and blogger. Inspections at the premises of the aforementioned Fenice S.r.l. and TBS Crew S.r.l. were carried out on the same date.

3. *ICA fines telco company Tim S.p.A. and TV operator Dazn for an anticompetitive agreement on TV rights on the 2021-2024 Serie A soccer championship.*

On July 17, 2023, ICA published its decision closing the investigation into certain clauses of the agreement between one of the largest Italian telco operators, Tim S.p.A., and TV company Dazn, which holds the rights to the broadcasting of Serie A soccer championship matches in the period 2021-2024. ICA found that said clauses constituted an anticompetitive agreement in violation of Article 101 TFEU and, thus, it fined Tim €760,776.82 and Dazn €7,240,250.84.

As background, in January 2021 Tim and Dazn entered into an agreement for the distribution of the Serie A matches on Tim's digital streaming platform, TimVision, which provided, inter alia, for an exclusivity in favor of Tim and a prohibition on Dazn of partnerships with Tim's competitors in the telecommunications sector. Therefore, following the agreement, Tim was the only operator able to market a bundled offer, including TimVision and Dazn content and connectivity service. According to ICA, this resulted in a reduction of the competitive pressure on Tim in the telecommunication sector, in particular in the markets for connectivity services and retail sale of pay TV services, as the agreement deprived Tim's competitors of the possibility of distributing on their streaming services highly valuable content, such as the Serie A championship matches, for the period 2021 through 2024.

However, the effects of the agreement were limited, since ICA initiated a preliminary investigation, applying precautionary measures, only one month after its execution, which led the undertakings to discontinue the application of the contested clauses during the 2021-2022 Serie A season. The original agreement was then replaced by a new contract, signed Aug. 4, 2022, which eliminated the exclusivity altogether. This allowed all interested operators to enter into partnerships with Dazn and, thus, to offer in combination connectivity services and audiovisual content related to the Serie A soccer league.

4. *ICA's decision could be appealed by the undertakings concerned before Lazio's Regional Administrative Tribunal within 60 days*.

ICA concludes proceeding against the Italian Volleyball Federation regarding the restrictions on transfer of non-professional athletes between affiliated sports clubs.

On July 10, 2023, ICA published its decision concerning the alleged anti-competitive nature of the prohibition on the transfer of non-professional athletes between amateur clubs established by the Italian Volleyball Federation (FIPAV, i.e., the national federation of sports clubs and associations based in Italy practicing volleyball, beach volleyball and sitting volleyball).

Following a 2017 complaint, as part of a pre-investigation proceeding, ICA contacted FIPAV to discuss the removal of the restrictions on transferring non-professional athletes. According to FIPAV bylaws then in force, athletes between the ages of 14 and 24 were subject to a 10-year ban on transferring to a different sports association. Between the ages of 24 and 34, the restriction was five years. At that time, FIPAV had announced its intention to adopt new regulations, starting in 2020, that would provide for shorter restrictions. However, the new FIPAV bylaws, adopted in 2021, did not include the promised changes.

Therefore, on Sept. 27, 2022, ICA initiated preliminary investigation proceedings against FIPAV for the violation of Article 101 TFEU in light of the alleged anticompetitive nature of FIPAV's bylaws. In particular, ICA argued that the excessive and unjustified duration of the restriction on transfer, applied among other things to underage athletes, resulted in direct damage to athletes and their families, as well as a general reduction in the incentive for sports clubs to compete. Indeed, the restriction would result in substantial market partitioning, crystallizing for each sports club operating on the market its own "clients," reducing competition on factors such as, for example, registration costs and fees or the provision of better services (e.g., quality of sports facilities or technical sports personnel employed).

In its recent decision, ICA concluded the proceeding by accepting FIPAV's proposed commitments to remove the aforementioned restrictions. The new rules, which will come into effect no later than June 30, 2024, will provide that athletes will be registered with sports clubs for one year, with the possibility of renewing the membership or exercising the right of withdrawal at the end of each year.

ICA's decision could be appealed before Lazio's Regional Administrative Tribunal within 60 days.

## European Union

### A. European Commission

1. *The European Commission clears Advent/GfK in Phase I with remedies*.

The European Commission imposed structural and behavioral conditions on Advent's acquisition of market research provider GfK due to concerns about potential anticompetitive effect. Advent, a U.S. private equity firm, indirectly controls NielsenIQ, a leading retail data services provider in the European Economic Area, which competes with GfK's market research panels. To address those concerns, Advent agreed to sell GfK's global consumer panel services business, except for its operations in Russia. Additionally, Advent will provide transition services to the buyer for up to three years to ensure competition and viability.

2. *EU closes retail purchasing agreement probe*.

The European Commission found no evidence of breached cartel rules by international retail alliances AgeCore and Coopernic. The agency examined their trading terms with manufacturers and concluded that the negotiated discounts and rebates did not harm competition or consumers. The alliances' collective bargaining power allowed supermarkets to reduce retail prices and compete effectively, especially during times of high inflation.

The European Commission's incoming horizontal block exemption rules differentiate between legitimate purchasing alliances and unlawful buyer cartels, emphasizing the importance of joint purchasing agreements to negotiate lower prices for consumers. For more information on the rules, please see our GT Amsterdam legal alert on this matter.

3. *The European Commission conditionally clears Broadcom's €55 billion acquisition of VMware*.

The European Commission has imposed remedies on Broadcom's acquisition of VMware despite its Phase II probe largely resolving earlier concerns. Concerns about the deal favoring Broadcom over its main rival, Marvell, were fully addressed by Broadcom's commitment to granting access to VMware's cloud computing software for other hardware suppliers. The concerns narrowed down to the supply of Fibre Channel Host-Bus Adapters (FC HBAs), which Broadcom agreed to address by providing source code and necessary inputs to Marvell and potential rivals for developing and certifying FC HBAs.

The European Commission found that Broadcom does not hold a dominant position in the market for storage adapters and network interface cards, and other concerns were also alleviated. The commitments will run for 10 years. The deal is expected to close this fiscal year.

4. *Illumina plans to appeal against the record EUR432 million gun-jumping fine*.

The European Commission issued a record gun-jumping penalty against Illumina for unlawfully closing its acquisition of Grail before the end of the probe.

The EUR 432 million fine, 10% of Illumina's annual turnover, comes after biotechnology company Illumina closed its EUR 5.9 billion acquisition of Grail in August 2021 during the European Commission's Phase II probe. The case marked the first time the authority had investigated a deal that fell below national and EU notification thresholds.

 

The European Commission found that Illumina intentionally breached the EU merger rules' standstill obligation. Illumina announced plans to appeal the penalty, citing its reliance on public statements from the European Commission and ongoing legal challenges. The European Commission also ordered divestment and transitional measures to restore competition. In the United States, Illumina is facing a legal battle over the FTC's decision to unwind the merger.

**B. European Decisions**

*ECJ reverses General Court's decision on CK Hutchison and Telefónica tie-up.*

The European Commission received a reprieve from the European Court of Justice (ECJ) regarding its prohibition of the CK Hutchison and Telefónica UK subsidiaries' tie-up in 2016. The European General Court's judgment in May 2020 overturned the European Commission's decision, which had significant implications for telecoms sector mergers and merger control in general.

On July 13, the ECJ set aside the judgment and identified errors in the European General Court's decision, stating that it lacked necessary information for a final ruling. The ECJ clarified that the appropriate standard of proof for demonstrating significant impediments to competition in a merger is "more likely than not," not a "strong probability" as the European Commission previously stated. It also upheld the European Commission's authority to establish a significant impediment without proving the merging parties were "particularly close competitors."

## Greater China

**SAMR Clarifies Rules in Determining Abusive Exploitation of Intellectual Property Rights**

On June 25, 2023, the State Administration for Market Regulation of China (SAMR) released the Regulations on Banning Abusive Use of Intellectual Property Rights to Exclude or Restrict Competition (New Regulation), which took effect Aug. 1, 2023. Replacing an existing regulation published by SAMR in 2015 (2015 Regulation), the New Regulations provide clarity over certain important rules regarding interplay of intellectual property rights (IPR) and China's Anti-Monopoly Law (AML). Highlights of the New Regulation are set forth below.

1. *Narrowed application of safe harbor rule.*

The 2015 Regulation provided a "safe harbor" for both horizontal monopoly agreement and vertical monopoly agreement, granting businesses with market shares below a certain level block exemption from the prohibition of monopolistic agreements.

The amended AML in 2022 only allows such market-share-based exemption for vertical monopoly agreements. As a consequence, referring to the statement as provided in the Anti-Monopoly Guidelines in the Intellectual Property Industry issued by the State Council in 2019 (Guidelines), the New Regulation narrows the application of the "safe harbor" rule such that the parties to a vertical agreement involving use of IPR can presume non-contravention of AML if (1) each party to the agreement holds less than 30% in its market, or (2) in case it is difficult to obtain accurate statistics of market share, there are four or more independently controlled technologies apart from the technologies controlled by the parties to the agreement that are substitutable at a reasonable cost.

Notably, under the New Guidelines, the cited “safe harbor” rule does not apply to a hardcore restriction in any vertical agreement including fixation of the resale price, which exclusion is incorporated into New Regulation by reference.

2. *Refined considerations for IPR-related abuses of market dominance*.

   a. Unfair Pricing. Consistent with the 2022 AML, the New Regulation adds a new provision prohibiting unfairly high pricing by an IPR holder possessing dominance in the relevant market, and sets forth the factors to determine whether the pricing is justified: (1) research and development cost and payback cycle of the technology, (2) method of royalties calculation and conditions of the license; (3) comparable historical royalties and fee standards of the technology; and (4) other undertakings made by the business relating to the technology.

   b. Exclusive Dealing. The 2015 Regulation prohibits an IPR holder with market dominance to require the counterparty to exclusively deal with the IPR holder or its designated party without justification. The New Regulation adds another scenario prohibiting such an IPR holder to require the counterparty not to deal with any particular business, which addition is understood to reflect the development of the recent law enforcement in the internet platform industry.

   c. Tying. The New Regulation revamps the prohibition against unjustified tying providing that a dominant IPR holder must not engage in any of the following tying activities in violation of trading custom or consumer habit or ignoring products functions: (i) directly or indirectly forcing licensee to purchase other unnecessary products or (ii) directly or indirectly forcing licensee to accept a package of license.

3. *Acceptable justifications to abuse of market dominance*.

The New Regulation sets forth certain “justifiable causes” which exempt an otherwise prohibited abusive conduct as described above. Such causes include: (1) promoting innovation and fair competition, (2) being necessary to implement or protect the IPR, (3) being necessary to ensure the safety, technical effect and performance of the product, (4) satisfying the actual need of the counterparty in conformity to the trade custom.

Read previous editions of GT’s Competition Currents Newsletter.

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