

GT Newsletter | Competition Currents | September 2023

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



In This Issue¹

United States | Poland | Italy | European Union

United States

A. Federal Trade Commission (FTC)

1. *FTC and DOJ announce 30-day extension for public comment to proposed premerger notification form changes.*

On Aug. 4, the FTC and DOJ's Antitrust Division **announced** a 30-day extension of the deadline for public comment on proposed changes to the premerger notification form and associated instructions, as well as the premerger notification rules implementing the Hart-Scott-Rodino (HSR) Act. With the extension, the agencies will be accepting comments on the proposed changes until Sept. 27, 2023, extended from the original deadline of Aug. 28.

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 approves consent order preventing entanglements between Quantum Energy Partners and EQT Corporation.*

On Aug. 16, the FTC **resolved** antitrust concerns surrounding a \$5.2 billion cash-and-stock deal between private equity firm Quantum Energy Partners and natural gas producer EQT Corporation by approving a consent order that prevents entanglements between the two companies and the exchange of confidential, competitively sensitive information. Quantum and EQT are direct competitors in the production and sale of natural gas in the Appalachian Basin, the largest natural gas-producing region in the United States. The proposed acquisition would have made Quantum one of EQT's largest shareholders and give Quantum – an active investor in natural gas production in the region – a seat on EQT's board of directors, violating the antitrust laws and harming competition in this industry, according to the FTC. The FTC consent order would resolve the Commission's competition concerns through provisions that, among other things, would:

- Prohibit Quantum from serving on EQT's Board for the duration of the order and on the Board of any of the top seven Appalachian Basin natural gas producers, which account for a substantial majority of the market, without prior Commission approval.
- Require Quantum to sell its EQT shares by a non-public date certain.
- Require that during the period when Quantum owns EQT shares, the shares will be held in a voting trust, and any votes will be carried out by the trustee proportional to all other EQT shareholders.

3. *Henry Liu appointed to serve as director of FTC's Bureau of Competition.*

On Aug. 22, FTC Chair Lina M. Khan appointed Henry Liu to serve as director of the FTC's Bureau of Competition. Liu joins the FTC from a private practice law firm, where he was a partner in the firm's litigation and antitrust practices, bringing more than 14 years of experience litigating complex antitrust cases. Previously, Liu served as a law clerk to the Honorable R. Guy Cole, Jr. of the U.S. Court of Appeals for the Sixth Circuit.

4. *FTC and DOJ to co-host new merger guidelines workshops.*

On Aug. 28, the FTC and Justice Department announced they are co-hosting three workshops to facilitate public dialogue on the new Merger Guidelines, which were announced in July. See [GT Alert](#).

The workshops aim to promote a dynamic discussion about the draft guidelines to complement the public comments currently being submitted to the agencies. The goal of the merger guidelines update is to better reflect how the agencies determine a merger's effect on competition in the modern economy and evaluate proposed mergers under the law. The first workshop was held online Sept. 5, with subsequent workshop dates to be announced.

5. *FTC approves consent order with ICE and Black Knight to resolve antitrust concerns.*

On Aug. 31, the FTC **approved** a proposed consent order to resolve antitrust concerns surrounding Intercontinental Exchange, Inc. (ICE)'s proposed \$13.1 billion acquisition of Black Knight, Inc. The proposed settlement ensures Black Knight's divestiture of Empower and Optimal Blue, two businesses that provide critical services in the mortgage origination process. The FTC also secured other concessions to promote the success of the divested businesses.

B. Department of Justice (DOJ)

1. *Two Pinterest Directors resign from Nextdoor Board of Directors in response to Justice Department's enforcement efforts around Section 8 of the Clayton Act.*

On Aug. 16, the Antitrust Division announced that two directors of Pinterest Inc. resigned their positions on the Board of Directors of Nextdoor Holdings Inc. in response to the Division's ongoing efforts around Section 8 of the Clayton Act. To date, the Division's enforcement initiative has led to 15 interlocking director resignations from 11 boards. Nextdoor is a large social network that connects users, businesses, and other neighborhood stakeholders, and Pinterest is a leading social network and image sharing service. Both are Delaware corporations headquartered in San Francisco.

2. *Asphalt paving company and two executives plead guilty to bid rigging.*

On Aug. 17, the Division announced that a senior executive of a Michigan asphalt paving company pleaded guilty in the U.S. District Court in Detroit for his role in two separate conspiracies to rig bids for asphalt paving services contracts in the state of Michigan.

According to court documents filed in the case, Kevin Shell, vice president of Estimating for Clarkston-based F. Allied Construction Company Inc., conspired with two unnamed asphalt paving companies and their employees to rig bids in each other's favor. Shell participated in the two conspiracies from June 2013 through June 2019, and from July 2017 through May 2021, respectively.

On Aug. 29, the Division announced that Allied and its president, Andrew Foster, pleaded guilty to conspiring with two asphalt paving companies and their employees to rig bids in each other's favor. Allied and Foster participated in the two conspiracies from June 2013 through June 2019, and from July 2017 through May 2021, respectively. The co-conspirators coordinated each other's bid prices so that the agreed-upon losing company would submit intentionally non-competitive bids. These bids gave customers the false impression of competition when, in fact, the co-conspirators already had decided among themselves who would win the contracts.

3. *Two Military Contractors sentenced for bid rigging in Eastern District of Texas.*

On Aug. 23, the Division announced that two military contractors were sentenced in the U.S. District Court for the Eastern District of Texas, Texarkana Division, for their roles in a bid-rigging scheme involving the maintenance and repair of military tactical vehicles in Texas. The multi-year scheme secured more than \$17 million in taxpayer dollars.

Aaron Stephens of Queen City, Texas was sentenced to 18 months in prison and ordered to pay a criminal fine of \$50,000. According to a plea agreement filed Jan. 12, Stephens and his co-conspirators rigged bids on certain government contracts from May 2013 to January 2018 to give the false impression of competition and secure government payments. The conspirators submitted coordinated, higher-priced and non-competitive bids to ensure a designated company won each contract. Stephens and his co-conspirators rigged six different contracts for work performed for the Red River Army Depot in Texarkana, Texas. The projects included heavy military equipment work like refurbishing armor kits for military trucks and turrets for Humvees.

John "Mark" Leveritt of Heath, Texas was sentenced to six months in prison and ordered to pay a criminal fine of \$300,000. According to a July 13, 2022, plea agreement, Leveritt engaged in the same conspiracy from May 2013 to April 2018 involving seven bids.

4. *Doctor pleads guilty to antitrust conspiracy to allocate oncology treatments for cancer patients in Southwest Florida.*

On Aug. 24, the Division announced that a medical oncologist and former president and managing partner of Florida Cancer Specialists & Research Institute LLC (FCS) pleaded guilty to conspiracy to allocate oncology treatments for cancer patients in Southwest Florida.

According to court documents filed in the U.S. District Court in Ft. Myers, Florida, Dr. William Harwin participated in a conspiracy from 1999 to September 2016 to suppress competition by agreeing to allocate chemotherapy treatments for cancer patients to FCS and radiation treatments to another oncology company in Lee, Collier, and Charlotte Counties. Harwin pleaded guilty to one count of violating Section One of the Sherman Act.

C. U.S. Litigation

1. *Jacob Fabel, et al. v. Boardwalk 1000, LLC d/b/a Hard Rock Hotel & Casino Atlantic City, et al.*, Case No. 1:23-cv-06576 (D.N.J.)

In an Aug. 21 proposed class-action complaint, plaintiff Jacob Fabel alleges that several New Jersey Casino-Hotels forced guests to pay artificially inflated room rates after conspiring to switch from occupancy-driven pricing to a revenue-increasing model. Specifically, plaintiff complains that an algorithm provided by a platform called Rainmaker generated room rates that helped the casino-hotel defendants rebound from the COVID-19 pandemic and generate revenue in 2021 that far exceeded their pre-pandemic profits. Plaintiff claims that the algorithm used information from a variety of sources, including room rates provided by the casino-hotels themselves, to recommend prices that would maximize revenue instead of occupancy rates. Plaintiff claims that defendant Cendyn Group, which acquired Rainmaker in 2019, advised its customers to “not chas[e] after occupancy growth” and “avoid the infamous ‘race to the bottom.’”

Plaintiff alleges that the conspiracy is an unlawful restraint of trade in violation of Section 1 of the Sherman Act. He claims that the conspiracy began in 2018 and that it caused plaintiff and other similarly situated to pay artificially inflated prices directly to the casino-hotels and their co-conspirators. Plaintiff has characterized the alleged conspiracy as a “hub-and-spoke conspiracy in which Rainmaker . . . served as the hub and individual Casino-Hotel Defendants served as spokes.” In furtherance of the conspiracy, plaintiff claims that: (a) “Casino-Hotel Defendants provided internal pricing and supply data to a single-third-party... for use in the Rainmaker algorithm”; (b) “Rainmaker, and later Cendyn, sold and operated the Rainmaker pricing algorithm platform that provided room pricing recommendations to the Casino-Hotel Defendants”; (c) “Casino-Hotel Defendants knowingly used the same pricing algorithm platform that incorporated pricing and supply data from other Casino-Hotel Defendants in recommending optimal room rates” to charge guests; (d) “Casino-Hotel Defendants priced their rooms pursuant to the optimal rates the Rainmaker pricing algorithm platform recommended”; (e) “Defendants exchanged competitively sensitive pricing and supply information with each other”; and (f) Defendants engaged in various forms of information-sharing “that had the purpose and effect of maintaining and reinforcing their anticompetitive scheme.” Plaintiff further claims that the casino-hotel defendants possess market power in the relevant market and that the alleged conspiracy led to “anticompetitive effects in the form of supra-competitive prices Plaintiff and other Class members have paid directly to the Casino-Hotel Defendants.”

2. *Jacksonville Police Officers and Fire Fighters Health Ins. Trust v. Gilead Sciences, Inc., et al.*, Case No. 20-cv-06522-JSW (N.D. Cal.)

On Aug. 28, U.S. District Judge Jeffrey S. White **granted** defendants' motion to dismiss plaintiffs' second amended class action complaint but granted plaintiffs final leave to amend. In their second amended complaint, plaintiffs claim that defendants entered into anticompetitive reverse-payment settlement agreements to protect Gilead's patents on its brand name drugs. Plaintiffs assert they were injured because defendants' conduct allegedly kept a co-packaged, generic version of Truvada, an HIV medication, off the market. Defendants moved to dismiss, arguing that plaintiffs' allegations are still speculative. In support of their second amended complaint, plaintiffs allege that the generic drug manufacturer, Cipla, "never sought approval from the FDA to market a co-packaged emtricitabine/TDF product 'despite strong indications from the FDA that such an application would be approved.'"

Plaintiffs also allege that the FDA "encourage[d] sponsors to submit applications... for approval of fixed dose combination... and co-packaged versions of previously approved' HIV drugs, that those products would be eligible for priority review, and that even if individual drugs were still protected by a patent, the FDA could 'grant tentative approval so that [a] fixed-dose combination or co-packaged configuration could be marketed as soon as' a patent expired." Despite these indications, however, plaintiffs claim Cipla failed to file an abbreviated new drug application (ANDA) on Truvada, while choosing to file ANDAs for the drugs Viread and Emtriva. In granting the motion to dismiss, the court explained that "[a]lthough Plaintiffs have provided greater factual support for the allegation that FDA approval of a co-packaged version of Truvada was 'virtual certainty,' . . . their allegations about whether Cipla, or any other generic manufacturer, intended to seek approval for a co-packaged version of Truvada are based on speculation and conjecture and are insufficient to plausibly allege their theory of injury." However, because the court could not "say it would be futile" for plaintiffs to amend the complaint, the court granted plaintiffs one final opportunity to amend.

Poland

Office of Competition and Consumer Protection (UOKiK)

1. *UOKiK President fines company and influencers for hidden advertising.*

The UOKiK President fined Olimp Laboratories sp. z o.o., a company producing, among other things, drugs and dietary supplements, approximately PLN 5 million (approx. USD 1.2 million / EUR 1.1 million), for hidden advertising. According to the UOKiK President, the company used social media influencers' posts and stories to promote Olimp's products. The UOKiK President established that the company's activity was misleading to consumers as the company had paid influencers for promotion, but the posts/stories were not clearly marked as paid promotion. According to the UOKiK President, the company provided specific guidelines to influencers on how to publish posts or stories promoting Olimp's products, including requests to provide vague information as to the promotional character of the posts.

At the same time, UOKiK fined three influencers with whom Olimp cooperated, in the total amount of approx. PLN 40 thousand (approx. USD 11,000 / EUR 10,000). According to the UOKiK President, influencers, being professionals, should be aware of the requirements related to conducting their activity in compliance with law.

This is the first decision in Poland where both advertiser (company) and influencers have been penalized for related infringements, and demonstrates UOKiK's increased scrutiny in the social media sector. In

2022, UOKiK issued their **recommendations** to influencers on how to designate advertising content on social media.

UOKiK may deem the provision of misleading information to consumers as infringing consumers' collective interests, and may fine a company up to 10% of its turnover in the preceding year, and up to PLN 2 million on the company's managers who intentionally allow the infringement.

2. *UPC Polska faces charges for charging extra for unsolicited services.*

The UOKiK President charged UPC Polska, a leading television and Internet provider in Poland, for increasing fees for telecommunication services.

The allegedly unfair mechanism caused customers with indefinite contracts to receive messages from the company stating they would be given access to more channels or faster internet for an additional fee. If they did not want to accept the offer, the consumers had to act to, in particular, cancel the additional services or terminate the contract.

As the UOKiK President noted, additional fees cannot be charged for services the customers did not order themselves, and adding any services to contracts concluded with consumers should take place only after obtaining the customer's express consent. Consumers cannot be compelled to opt out of additional services.

If the UOKiK President confirms the infringement, the company may be fined up to 10% of its turnover in the preceding year. The case is pending.

3. *UOKiK President fines an entity offering alternative investment products.*

In August 2018, the UOKiK President fined Aforti Holding, which operates a currency exchange platform and is active in lending, factoring, and debt collection, approximately PLN 790 thousand (approximately USD 193,000 / EUR 177c,000). According to UOKiK, Aforti misled consumers and improperly encouraged investments in promissory notes by falsely assuring consumers that such products would bear no risk and the profits were guaranteed even though the promissory notes were unsecured, and the investors risked losing their funds.

The UOKiK President stated that Aforti used the money gathered from consumers to finance its activities, thus transferring risk of conducting its business straight to consumers. As the government stressed, a promissory note serves as collateral for debt, and using it as an investment product is contrary to its function. UOKiK said the company's practices were misleading in particular because consumers were deprived of true and complete information on the risks associated with purchasing promissory notes. This lack of information could impact consumer decisions to buy the investment products.

In addition, the UOKiK President notified the district prosecutor of a suspected crime.

Italy

Italian Competition Authority (ICA)

1. *ICA fines Roxtec AB and Roxtec Italia S.r.l. for abuse of dominant position in the E.U.-wide market for production and distribution of modular-based sealing systems.*

On July 18, 2023, ICA fined Roxtec AB and Roxtec Italia S.r.l. €15,117,795 for implementing an abusive strategy aimed at excluding from the market for the production and distribution of modular-based sealing systems WallMax S.r.l.

Roxtec became the quasi-monopolist in that market given the success of its patented modular-based sealing system. However, the expiration of such patent in 2010 paved the way for the entry of new producers of sealing systems based on the same technology, among which was Wallmax, an Italian company that, between 2011 and 2015, became Roxtec's closest competitor.

According to ICA, in 2015 Roxtec began to implement a number of strategies (i.e., instrumental EU trademarks applications, legal actions against Wallmax and its distributors under various jurisdictions worldwide, and a discrediting campaign against Wallmax) to preserve its dominant position in the market for the production and distribution of modular-based sealing systems after the expiration of its patent, aimed specifically at excluding its main competitor from the market.

The concerned undertakings could appeal ICA's decision before Lazio's Regional Administrative Tribunal within 60 days.

2. *ICA gives conditional green light on a transaction between two major Italian oil groups.*

On Aug. 1, 2023, ICA cleared Italiana Petroli S.p.A.'s acquisition of the Italian downstream oil business of Esso Italiana S.r.l. (with the sole exception of the lubricants and chemicals branches), together with Esso's logistic assets, supply contracts for bitumen and other products, and shareholdings in Sarpom, Engycalor and Disma.

According to the ICA, the merger, involving two of Italy's major oil groups, will significantly impact competition in the markets for the off-network wholesale and retail distribution of oil products, the retail distribution of gas in the road and highway network, and the distribution of traditional road bitumen, even creating dominant positions in such markets. For instance, the merged entity, on top of being a vertically integrated operator in all the stages of the supply chain, will become the leading industry player in the retail distribution of gas in Italy, holding 29% of the pumps and distributing between 20 and 25% of the gas in Italy.

Accordingly, ICA's clearance is conditional on Italiana Petroli's implementation of a set of measures to mitigate its potential anticompetitive effects, such as assuring third-party access to gas, LPG and kerosene or to stocking and distribution infrastructures.

The concerned undertakings may appeal ICA's decision before Lazio's Regional Administrative Tribunal within 60 days.

European Union

European Commission (EC)

1. *EC clears Prada and Zegna's acquisition of minority Fedeli shareholdings.*

On Aug. 7, 2023, the European Commission cleared Prada and Ermenegildo Zegna's acquisition of minority shareholdings of Luigi Fedeli e Figlio via the simplified procedure.

In particular, each of the two fashion powerhouses will acquire a 15% shareholding in Fedeli, an Italian family business based in Monza and established in 1934 that has a long-standing tradition in the high-end textile industry, and whose flagship products are cashmere and jersey fabrics.

While Prada and Zegna will join the Fedeli board of directors, Mr. Luigi Fedeli, previously the sole shareholder of the company, will keep the remaining 70% shareholding in Fedeli, as well as his role as president and CEO of the company.

2. *EU sends Pierre Cardin statement of objection over sale restrictions.*

On July 31, the European Commission sent a statement of objection to French brand Pierre Cardin and its major licensee Ahlers Group, accusing them of restricting cross-border clothing sales. Provisional findings suggest the companies may have violated EU cartel rules by strategizing against parallel imports and constraining sales of Pierre Cardin-branded items to specific customer groups through licensing agreements. This anticompetitive practice persisted for over a decade, hindering rival licensee sales and customers' ability to sell these products online and offline in regions where Ahlers held licenses. The arrangement also limited Ahlers' competitors and customers from selling discounted products in those countries. The European Commission highlights the "ultimate objective" of safeguarding Ahlers' territorial exclusivity in the regions covered by its Pierre Cardin licensing agreements.

Formal investigation began in January 2022, and the potential fine for the companies could be up to 10% of their annual global turnover. In April, the European Commission conducted raids on fashion brands like Gucci due to cartel suspicions, and earlier raided Red Bull over anticompetitive agreements and abuse of dominance allegations.

3. *EU opens in-depth probe into Adobe/Figma.*

The European Commission has followed the UK's antitrust enforcer in **launching** an in-depth investigation into Adobe's \$20 billion acquisition of web-design platform Figma. A Phase II probe was initiated given concerns about the potential reduction of competition in the markets for interactive product design software and digital asset creation tools worldwide.

Adobe and Figma are close rivals in interactive product design tools, and the merger could eliminate a significant competitive force, according to the Commission. Furthermore, the Commission believes that the deal might empower Adobe to suppress competition in interactive product design supply and hinder Figma's growth as a competitor to Adobe's asset-creation tools. The European Commission is also examining whether the merger could result in Adobe bundling Figma with its Creative Cloud suite, thereby restricting rival providers of interactive product design tools.

The merging parties announced the deal last year and notified the European Commission about the transaction in June, following a referral by 16 member states under Article 22 of the EU Merger

Regulation that allows member states to refer deals to the European Commission that fall below its filing rules. This announcement follows Adobe's recent refusal to suggest remedies to address the agency's concerns. The deadline for a decision is Dec. 14, 2023.

4. *European Commission reviews European Energy Exchange /Nasdaq Power deal.*

The European Commission is reviewing the proposed acquisition of Nasdaq Power, a global technology company, by the European Energy Exchange, a subsidiary of Germany's largest stock exchange, Deutsche Börse. The European Commission has accepted requests from competition authorities in Denmark, Finland, Sweden, and Norway to assess the acquisition of Nasdaq's European power trading and clearing business by Europe's leading energy exchange. This marks the third investigation under Article 22 of the EU Merger Regulation. Despite not meeting EU and national merger notification thresholds, the deal is being examined due to its impact on Nordic power contract trading and clearing.

The acquisition's potential to affect energy market competition and stability is a primary concern, as Nasdaq Power's services are "key for more stable and predictable energy prices." The European Commission has requested the European Energy Exchange to notify the transaction, emphasizing the need for approval before completion.

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