GT Newsletter | Competition Currents | October 2023

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

You Are Invited

WEBINAR: The EU Foreign Subsidies Regulation – NEW Obligations and Risks for Non-EU Companies

Oct. 11, 2023 | 11 a.m. – 12 p.m. Eastern Time

Click here to register.

A new EU regulation on foreign subsidies (FSR) has recently entered into force. It allows the European Commission to review financial contributions granted to businesses by non-EU countries, including requests for information, inspections and ordering redressive measures. **Beginning Oct. 12, 2023, non-EU companies will have new notification obligations in relation to M&A and public procurement activities.**

The webinar will cover the key aspects of the new regulation, including:

- Investigative powers granted to the European Commission over non-EU companies.
- Types of financial contributions that may be questioned.
- New notification requirements for entities receiving significant subsidies.
- Financial and other sanctions for non-compliance.

In This Issue[1]

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

United States

A. Federal Trade Commission (FTC)

1. *FTC reaches consent order with Amgen Inc. and Horizon Therapeutics plc with behavioral remedies to allow Amgen's $27.8 billion acquisition of Horizon to proceed.*

On Sept. 1, the FTC reached an agreement with merging parties Amgen Inc. and Horizon Therapeutics plc to resolve competitive concerns the agency raised and to permit the transaction to proceed. As part of the settlement, the FTC and attorneys general from six states – California, Illinois, Minnesota, New York, Washington, and Wisconsin – also will dismiss the preliminary injunction action in federal court.

As noted in June's Competition Currents, the parties do not directly compete with respect to any existing or pipeline products. Horizon makes drugs for rare diseases, including Tepezza to treat thyroid eye disease (TED) and Krystexxa for chronic refractory gout (CRG). Neither of the two medications currently have competitors. The FTC sought to block the transaction over concerns that, given Amgen's size and market presence in other drug markets, it would "enable Amgen to use rebates on its existing blockbuster drugs to pressure insurance companies and pharmacy benefit managers (PBMs) into favoring Horizon's two monopoly products." The FTC linked its opposition to this deal to its investigations into PBM practices, with the agency expressing concerns that Amgen had previously conditioned rebates on PBMs giving its drugs preferred placement on their list of covered medications.

Under the proposed order, Amgen is prohibited from bundling an Amgen product with either Tepezza or Krystexxa, Horizon's medications used to treat TED and CRG, respectively, and may not condition any product rebate or contract terms for an Amgen product on the sale of either one of these products. Amgen also is barred from using any product rebate or contract term to "exclude or disadvantage any product that would compete with Tepezza or Krystexxa."

Like other recent FTC settlements, this proposed order also requires that Amgen obtain prior approval from the Commission for any acquisition of "any products or interest in any business engaged in the manufacturing or sale of any products, biosimilars, or therapeutic equivalents that treat either TED or CRG" or "any pre-commercial products that have completed FDA clinical trials to treat either thyroid eye disease or chronic refractory gout."

Finally, the FTC announced that the parties also agreed to the following behavioral commitments as conditions to dismissing the preliminary injunction:

- Submit to the monitor all contracts with payers related to the formulary coverage, placement, or positioning of Krystexxa or Tepezza in the United States within 30 days of entering into such contract.

[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.

- Notify the monitor if either Krystexxa or Tepezza meets all three of the following conditions: 1) Krystexxa or Tepezza has been approved by the FDA for patient self-administration; 2) the self-administered version of Krystexxa or Tepezza is available on the market; and 3) the self-administered version of Krystexxa or Tepezza is otherwise eligible to be covered as a pharmacy benefit product.
- Require, annually, that all Amgen employees with direct involvement in contracting or negotiations with payers related to the purchase, coverage, placement, or positioning of Krystexxa or Tepezza in the United States to review the consent order and acknowledge in writing (including by email) that they understand and are complying with the obligations of the order.

The settlement represents the first time in four years that either the FTC or Department of Justice has agreed to a conduct remedy only (as compared to a divestiture of assets) as condition to allowing a deal to proceed. During this time, agency leadership has made repeated statements and speeches disfavoring conduct remedies as unworkable and too difficult to monitor. However, Chair Khan stated that, in this case, "several features" of the anticipated bundling conduct will make the settlement more enforceable.

For Amgen's part, the acquirer asserted consistently that it had neither the incentive nor the ability to engage in the envisaged bundling conduct, primarily due to the way these rare disease drugs are administered as compared to Amgen's "blockbuster" drug portfolio.

2. *FTC challenges "roll-up" acquisitions by private equity firm of anesthesiology practices across Texas.*

On Sept. 21, the FTC filed a complaint in federal district court in Texas alleging that a private equity firm, through portfolio company U.S. Anesthesia Partners, Inc. (USAP), executed a multi-year strategy to consolidate and monopolize anesthesiology practices in several urban markets in Texas, specifically Houston, Dallas, and Austin. The alleged strategy included, first, "a roll-up scheme, systematically buying up nearly every large anesthesia practice in Texas to create a single dominant provider with the power to demand higher prices"; second, a series of "price-setting agreements with remaining independent practices," which had the effect of those independent practices billing at the same, higher rate as USAP; and third, a market allocation agreement with a "significant competitor" designed to "keep it out of USAP's territory." The acquisitions, "individually and as a series," are alleged to have violated Section 7 of the Clayton Act, the price-setting and market allocation agreements are alleged to have violated Section 1 of the Sherman Act, and the overall strategy is alleged to have violated Section 2 of the Sherman Act, preventing monopolization, and Section 5 of the FTC Act, preventing "unfair methods of competition." The complaint does not allege a violation of Section 5 as a standalone count, but only in conjunction with Section 7.

The agency in its complaint alleges that once the private equity firm arranged for an acquisition of an "anchor" practice in the given urban market, starting with Houston and forming USAP, it then proceeded to acquire the next most significant competitor to the anchor firm in the same geographic market, until USAP achieved a dominant share (above 50%). The complaint alleges that as a result the combined firm was able, in each geographic market, to charge rates significantly above a competitive level (the precise increases having been redacted). The complaint sets forth in detail how the unique features of the relevant market, commercially insured hospital-only anesthesia services, allowed USAP following each successive acquisition to charge higher rates, through the acquired firms' exclusive agreements with competing hospitals. The additional actions alleged, including the price-setting and market allocation with the remaining independent competitors, bolstered the strategy to raise rates across USAP's locations throughout Texas.

Notably, the complaint also alleges that the defendants cannot show that “any presented cognizable efficiencies are of a character and magnitude such that [the acquisitions] are not likely to be anticompetitive,” suggesting that synergies other than margin synergies may in the agency’s view provide at least a partial defense to an allegation that a series of “roll-up” acquisitions violated Section 7.

The complaint seeks equitable relief, including “structural” remedies, i.e., divestitures. The Commission voted 3-0 to issue the complaint.

See our GT Alert for more details and analysis of this FTC action.

3. *Louisiana federal court rules that Louisiana hospital merger is exempt from HSR Act obligations.*

On Sept. 27, a Louisiana federal court ruled that Louisiana Children’s Medical Center (LCMC) and a large health care system did not need to report its $150 million merger transaction to the FTC under the HSR Act, notwithstanding that the monetary size of person and size of transaction jurisdictional thresholds were exceeded, because state approval exempted the deal from the requirements of the Act.

The court found that the transaction was covered by the state action doctrine, which shields from the antitrust laws activity that is regulated and actively supervised by a state. The agency argued that the state action doctrine provided a defense to an antitrust suit, but not that it would exempt the parties from complying with the HSR Act.

The court’s order stated that “[t]he hospitals have not asserted that they are immune from an antitrust lawsuit or that they can assert immunity akin to Eleventh Amendment immunity” but instead that “since their transaction is exempt from the federal antitrust laws pursuant to the state action doctrine, they were not required to comply [with the HSR Act].”

On April 19, LCMC filed a complaint in the U.S. District Court for the Eastern District of Louisiana seeking a declaration that its state-issued certificate of public advantage (COPA) preempted the application of the HSR Act to its January acquisition from the large heath care system, a for-profit hospital operator, of three hospitals in Louisiana operating under a partnership with Tulane University. Closing occurred shortly after the Louisiana attorney general’s office issued the COPA authorizing the transaction, based on a determination that the deal would serve the public interest of state residents. The COPA set forth procedures for state oversight of the merged entity.

The FTC on the following day petitioned the federal court in the District of Columbia for a hold separate order until after the agency could assess the deal’s impact on competition. The agency published a white paper in 2022 reasserting long-standing concerns about COPAs, contending they result in higher fees, reduced quality of care, and slower wage growth among health care providers.

B. U.S. Litigation

1. *In re: Pork Antitrust Litigation*, Case No. 01:18-cv-01776 (D. Minn. Sept. 26, 2023).

In late September, Minnesota District Court Judge John R. Tunheim issued a 27-page order denying various pork producers’ motions to dismiss a private antitrust suit brought by a group of 50 individual pork purchasers. This suit alleges that between 2009 and 2018, pork producers entered into a conspiracy to reduce the supply of pork, thereby driving up prices market-wide. These producers sought to dismiss the lawsuit as barred by the four-year statute of limitations, but the court held that the plaintiff purchasers sufficiently alleged the "who, what, when, where" of fraudulent concealment by pointing to public statements to the media in which producers sought to explain supply shortages. This alleged fraud—along with a prior class action lawsuit—allowed plaintiffs to bring the suit nearly 15 years after the alleged conspiracy began.

2. *Mehl v. BP Energy Co.*, Case No. 6:23-cv-01192 (D. Kan.).

On Sept. 11, a series of lawsuits were filed against BP Energy and other natural gas suppliers alleging price gouging during Winter Storm Uri in 2021. The suit alleges that these producers' prior contracts with local distributors relating to a spot market—which tied gas prices to a pricing index that itself was tied to deviation from historical temperature—led the index price to rise from $2.54 per MMBtu to $329.59 in Kansas. This suit seeks to represent approximately 648,000 affected customers, who allegedly were overcharged $300 million over two weeks of the storm. The suit further alleges that these producers redirected gas they agreed to sell at lower prices to sell on this spot market, thereby effectively creating the supply shortage that allowed them to charge higher prices.

3. *In re College Athlete NIL Litigation*, Case No. 4:20-cv-03919 (D.C. N. Cal. Sept. 22, 2023).

On Sept. 21, California District Court Judge Claudia Wilken certified a class of 184,000 college athletes who were seeking an injunction to preclude enforcement of the National Collegiate Athletic Association's (NCAA) rules that preclude athletes from profiting from their name, image, and likeness. The NCAA opposed the injunction, claiming the student athletes each had unique circumstances and that the relief sought was targeted toward athletes in broadcast-heavy sports such as football and basketball. The court rejected the NCAA's argument, holding that its rules apply equally to all athletes. However, the court chose not to rule on a related motion to certify the same class of athletes who were seeking damages for lost revenue they could have received from marketing in the past.

4. *In re Domestic Airline Travel Antitrust Litigation*, Case No. 1:15-mc-01404 (D.C. Cir. Sept. 28, 2023).

Two major domestic airlines filed a motion in late September seeking immediate appeal from the trial court's ruling denying their motion to dismiss a multidistrict antitrust lawsuit alleging the airlines conspire to limit seats, thereby increasing prices. Earlier in September, District Court Judge Colleen Kollar-Kotelly issued an order holding that parallel actions by these competitors could state a plausible claim for anticompetitive behavior in a traditional concentrated market. The airlines sought an immediate appeal of the ruling to the U.S. Court of Appeals for the D.C. Circuit, claiming that Judge Kollar-Kotelly's ruling contradicts clear precedent regarding whether parallel conduct alone can support an inference of unlawful conduct.

The Netherlands

Dutch Authority for Consumers and Markets (ACM) decisions, policies, and market studies

1. *ACM launches in-depth investigation of KPN's acquisition of Youfone.*

Given competition concerns, the ACM has started a Phase II probe of KPN's acquisition of Youfone. KPN is a major mobile network operator in the Netherlands, along with Odido (a result of the merger between T-Mobile Netherlands and Tele2) and VodafoneZiggo. Youfone, on the other hand, operates as a mobile virtual network operator (MVNO) and utilizes KPN's mobile network infrastructure by paying for its use. Youfone is known as a "rapidly growing" and "highly competitive" provider of mobile telecom services, targeting a broad range of consumers with competitively priced, "no-frills" subscription plans, as the ACM notes.

While Youfone currently relies on KPN's mobile network, it can switch to Odido or VodafoneZiggo. Such a move would strengthen Youfone's bargaining position with KPN, potentially allowing the company to offer more competitive prices, as the ACM indicates. However, the concern is that this acquisition may harm competition in the no-frills segment of the mobile telecommunications services market.

2. *ACM issues second resale price maintenance fine*.

The ACM has fined LG Electronics Benelux Sales €8 million for issuing unlawful price recommendations to retailers. In 2021, the agency issued its first resale price maintenance fine against Samsung for influencing the online prices of television sets after launching an investigation in 2018.

The ACM found that LG had engaged in vertical price-fixing agreements by making retailers adhere to "price recommendations" for its televisions between January 2015 and December 2016. According to the ACM, LG consistently pressured retailers to increase prices if they fell below LG's preferred rates and monitored retail prices using online tools. The ACM determined that LG's actions constituted undue interference in competition among retailers and imposed an €8 million fine. LG received, inter alia, a 20% reduction in the fine, which was also granted to Samsung since this was the first time the ACM imposed a fine for this type of infringement, and the price coordination was not codified in contracts or enforced through coercion.

Poland

Office of Competition and Consumer Protection (UOKiK)

1. *Conditional merger clearance on the Polish pharmacy market*.

Subject to Polish merger clearance proceedings, UOKiK has given conditional approval for Gemini Polska Sp. z o.o. to take over two companies, Apteka [Pharmacy] Wrzeszcz and Apteka Trójmiasto, upon condition of selling three pharmacies. Gemini Polska owns 90 pharmacies and a network of 180 franchise pharmacies in Poland; Apteka Wrzeszcz runs 16 pharmacies in nine towns/cities; Apteka Trójmiasto holds 20 pharmacies in 12 towns/cities.

According to the UOKiK President, even though the acquired pharmacies belong to the Gemini franchise network, they represent competition to Gemini's own pharmacies. In selected local markets, defined as a radius of 1 km around the acquired pharmacy, the UOKiK President identified a risk to competition.

In the conditional merger clearance decisions Gemini committed to selling three of its own pharmacies. The UOKiK President must accept the potential buyer, and the purchase agreement must include a clause guaranteeing that the investor will continue pharmacy operations at this location.

As of Sept. 28, the potential for concentration in the pharmacy market in Poland is limited. A newly introduced amendment to the pharmaceutical law effectively prohibits the acquisition of pharmacies by companies (as well as their subsidiaries or officers) already operating at least four pharmacies open to the public. Furthermore, the local pharmaceutical inspector may revoke the license to operate a pharmacy if control was taken in breach of the prohibition. A violation of the prohibition may also result in an administrative fine ranging from PLN 50,000 to PLN 5,000,000 (approx. EUR 10,900 – 1,090,000.)

2. *Carrefour facing charges for unfair market practices*.

The UOKiK President, under his authority to combat the unfair use of contractual advantage in the agricultural products and foodstuffs industry, has charged Carrefour Polska for shifting the risk and operational costs to smaller suppliers who supplied Carrefour Polska's distribution centers. In particular, UOKiK states that Carrefour required its suppliers of agri-food products to pay fees for delivering goods from the distribution center to the chain's stores.

Earlier this year, the UOKiK President brought similar charges against Auchan Polska.

If the proceedings confirm the abuse of a contractual advantage against suppliers of agri-food products, the UOKiK President may impose a fine of up to 3% of the preceding year's turnover.

3. *Charges against e-platforms for breaching disclosure obligations*.

By virtue of the so-called Omnibus Directive, as of Jan. 1, 2023, we have been observing an increasing number of consumer protection proceedings in the Polish e-commerce market. The UOKiK President monitors compliance with the Omnibus Directive disclosure obligations by entrepreneurs operating on the internet.

Under the Omnibus Directive disclosure obligations of e-platforms towards consumers have been strengthened. Trading platforms are required, among other things, to indicate whether an offer comes from a trader or a natural person who is not a professional trader. Providers of online platforms are required to clearly and comprehensibly indicate how the obligations related to the performance of the contract concluded on the platform are divided between them and the providers of the offered products and services.

According to the UOKiK President, 19 out of all monitored platforms have breached their disclosure obligations. The most common practice, according to UOKiK, was failure to communicate in the manner required by law that the entity selling on the platform was a trader.

At the UOKiK President's request, a majority of the platforms have changed their procedures or promised to introduce necessary modifications. The UOKiK President charged three companies: Zalando, Booking and Travelist. These platforms, in contravention of the UOKiK President's requests, neither ceased their infringements nor expressed willingness to implement changes that would ensure compliance with the disclosure obligations.

If the proceedings result in decisions declaring a violation of collective consumer interests, each platform may be subject to a fine of up to 10% of its preceding year's turnover.

Italy

Italian Competition Authority (ICA)

1. *ICA to investigate Bosch's alleged abuse of dominance in the E-bike field*.

On Sept. 5, ICA opened an investigation into Robert Bosch GmbH (Bosch) for an alleged abuse of dominance in the market for drive systems for electric bikes.

According to ICA, Bosch (which holds a dominant position on the European market for E-bike drive systems, also known as "e-kits") allegedly may be leveraging its dominance by hampering the interoperability between its own e-kits and the anti-blockage systems for E-bikes developed by Blubrake S.p.A., an Italian company that, as of today, represents Bosch's only potential competitor on the new European market for ABS for electric bikes.

According to ICA, the investigation must be closed before Dec. 31, 2024.

2. *ICA opens investigation for an alleged abuse of dominant position in the aviation sector*.

On Sept. 14, 2023, ICA resolved to open an investigation for an alleged breach of Article 102 TFEU and Article 3 of Law No. 287/1990 (Italian Competition Law) by the Irish low-cost air carrier Ryanair DAC.

According to the preliminary assessment of ICA, Ryanair (which holds a dominant position in the Italian market for scheduled air transport of passengers on national and international routes) allegedly may be leveraging its dominant position in order to extend its market power into other contiguous markets (such as car rental or hotel booking services) by hindering the ability of traditional travel agencies (brick-and-mortar as well as online) to purchase Ryanair flight tickets through their own website. Travel agencies can only make purchases through a platform subject to conditions (pricing, post-sale and range of services offered) that are significantly less favorable than the one offered on Ryanair's website.

According to ICA, the investigation must be closed before Dec. 31, 2024.

3. *ICA opens a fact-finding investigation in the hearing aid market*.

On Sept. 12, ICA opened a sector inquiry pursuant to Article 12(2) of the Italian Competition Law in the hearing aid field. Such medical devices address a widespread health need affecting millions of Italian citizens, that, accordingly, could have a significant impact – also in terms of expense – not only on consumers but also on the National Healthcare System (since, according to the law, the National Healthcare System might reimburse at least part of the costs for such devices).

In particular, according to ICA, the two relevant markets involved (i.e., the one for the products themselves and the one for audio-prosthetic services) have peculiar structures and dynamics that, in light of recent technological innovations and changes in related legislation, do not seem well structured to guarantee transparency in the pricing of products and services.

The sector inquiry has been launched in parallel with a public consultation.

European Union

European Commission

1. *European Commission fines hand grenade cartel*.

The European Commission has imposed its first fine on a cartel within the defense industry, imposing a €1.2 million penalty on German weapons supplier Diehl for colluding with a rival to allocate markets. Between 2007 and 2021, Diehl and the whistleblower, Swiss defense company RUAG, divided national markets across the EEA and restricted the sale of hand grenades to only those pre-agreed countries. RUAG was spared a €2.5 million fine for exposing the illicit market-sharing arrangement that occurred during a series of meetings.

The European Commission deviated from its usual fine calculation methodology, opting to "significantly increase" the sanctions as a deterrent, as standard calculations would have resulted in minor fines.

2. *EU raids cardiovascular devices company.*

The European Commission conducted a raid on an undisclosed company in the cardiovascular medical devices market as part of a preliminary abuse of dominance investigation. The agency, in collaboration with a national competition authority, is concerned about potential market dominance abuse. The European Commission did not provide further details about the search. This is the agency's first raid since EU Competition Commissioner Margrethe Vestager temporarily stepped aside, with EU Justice Commissioner Didier Reynders assuming the role of antitrust chief. The agency increased its use of dawn raids since the coronavirus pandemic.

3. *European Commission blocks Booking's proposed acquisition of eTraveli.*

After an in-depth investigation, the European Commission has blocked Booking's proposed acquisition of eTraveli Group, given concerns the acquisition would strengthen Booking's dominant position in the European hotel online travel agency (OTA) market. The European Commission's investigation found that:

- Booking is already the dominant hotel OTA in the EEA, with a market share of over 60%, and there's limited competition;
- the proposed transaction aimed to help Booking expand by acquiring a key customer acquisition channel in the flight OTA market, the second-largest OTA sector. eTraveli, a top player in the EEA flight OTA market, could have made Booking the main flight OTA in Europe;
- this expansion would have strengthened Booking's travel services ecosystem, increasing traffic to its platform. Flights are a potent cross-selling avenue for accommodations, retaining more consumers on Booking's platforms; and
- the transaction would have amplified network effects, raising barriers to entry and making it harder for other OTAs to compete.

Booking's proposed remedies involved displaying competing OTAs' hotel offers on the flight check-out page, allowing customers to click and visit the OTA's site. However, the European Commission found these proposed remedies insufficient to address competition concerns. Booking intends to challenge the decision, claiming the European Commission departed from established legal norms by blocking the deal solely on ecosystem concerns.

Japan

A. Major movie theater operator submits a commitment plan.

The Japan Fair Trade Commission (JFTC) was investigating a major movie theater operator on suspicion of violating the Antimonopoly Act by allegedly pressuring movie distributors to distribute films preferentially to its own company and not to distribute films to other companies' movie theaters. In response, the major movie theater operator reportedly submitted a commitment plan that pledges to take corrective measures, including measures to prevent recurrence.

Under the "commitment plan system," if a business operator voluntarily prepares a plan for improvement, and the JFTC finds the plan sufficient and feasible, the business will not be found in violation of the Antimonopoly Act, postponing legal action such as a surcharge order.

B. Bidders for geological survey services ordered by Kochi Prefecture receives Cease and Desist Order and Payment Order.

On Sept. 28, the JFTC issued cease and desist and payment orders to bidders for geological survey services Kochi Prefecture ordered under the provisions of the Antimonopoly Act, alleging that the bidder, in violation of the public interest, substantially restricted competition.

Of 14 offending companies, 13 are subject to cease and desist orders, and 10 are subject to payment orders. The total amount of the payment order was 86.26 million yen.

Read previous editions of GT's Competition Currents Newsletter.

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