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GT Newsletter | Competition Currents | April 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. *Public comment period for proposed rulemaking ban on noncompetes extended until April 19.*

On March 6, the FTC announced it was extending the public comment period for its proposed new rule to ban employers from imposing noncompete provisions on their workers. With the extension, the FTC will now be accepting comments on the proposed rule until April 19 (the original deadline was March 20). The FTC's proposed rule is based on a preliminary finding that noncompetes constitute an unfair method of competition and therefore violate Section 5 of the Federal Trade Commission Act. For more information on the proposed rule, see January 2023 GT Alert.

2. *FTC votes to block Intercontinental Exchange, Inc. and Black Knight, Inc.'s proposed merger.*

On March 9, the FTC voted to block the proposed merger between Intercontinental Exchange, Inc. (ICE), the nation's largest provider of home mortgage loan origination systems (LOS) and other key lender

[1] Due to the terms of GT's retention by certain of its clients, these summaries may not include developments relating to matters involving those clients.

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software tools, and its top competitor, Black Knight, Inc., alleging the deal would drive up costs, reduce innovation, and reduce lender choices for tools necessary to generate and service mortgages. The FTC asserts the deal would also harm competition for product pricing and eligibility engines, or PPEs, and other various ancillary services that are add-ons to loan origination software. Lenders use PPEs to obtain the best interest rates for the homebuyer. The FTC alleges the deal would eliminate PPE competition between the merging parties and increase ICE's ability and incentive to use control of its LOS to undermine competition and harm rival PPEs and other add-on providers. In response, ICE said it "strongly disagrees with, and will vigorously oppose, the [FTC]'s challenge to ICE's previously announced acquisition of Black Knight, Inc."

3. *FTC orders Anchor Glass Container Corp. to drop noncompete restrictions*.

On March 15, the FTC ordered manufacturing company Anchor Glass Container Corp. to drop noncompete restrictions it imposed on its workers. The FTC complaint alleges that Anchor and its owners, Lynx Finance GP, LLC and Lynx Finance L.P., imposed noncompete restrictions on more than 300 workers across a variety of positions, including salaried employees who work in the plants' furnaces and with forming equipment and in other glass production, engineering, and quality-assurance positions. According to the FTC's complaint, the noncompete restrictions barred covered employees for one year from working with another employer in the United States to provide "rigid packaging sales and services which are the same or substantially similar to those in which Anchor deals," and from selling products or services to "any customers or prospective customers of Anchor with whom the worker had any interaction."

B. Department of Justice (DOJ)

1. *Antitrust Division continues focus and enforcement efforts on Section 8 of the Clayton Act*.

On March 9, the DOJ announced that five more directors resigned from four corporate boards and one company declined to exercise board appointment rights in response to the DOJ's ongoing focus and enforcement efforts around Section 8 of the Clayton Act. Section 8, which Congress made a *per se* violation of the antitrust laws, prohibits directors and officers from serving simultaneously on the boards of competitors, subject to limited exceptions. This announcement brings the number of interlocks unwound or prevented as a result of the DOJ's recent efforts to at least 13 directors from 10 boards.

2. *Health care staffing executive indicted for fixing nurses' wages*.

On March 16, the DOJ announced that a federal grand jury in Las Vegas returned an indictment charging a health care staffing executive with conspiring to fix the wages of Las Vegas nurses, in violation of the Sherman Act.

According to the one-count felony indictment, the charged individual held executive positions at three different home health agencies. For each company, the individual oversaw recruitment, hiring, retention and assignments of nurses and other health care staff. The individual and other unnamed co-conspirators are charged with agreeing to suppress and eliminate competition for nursing services between March 2016 and May 2019. Specifically, the individual and his co-conspirators are charged with participating in a series of meetings and communications to fix nurses' wages.

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3. *Military contractors convicted of fraud and conspiring to defraud the United States*.

On March 29, the DOJ announced that a federal jury in the Northern District of Georgia convicted three military contractors on one count of conspiring to defraud the United States and two counts of major fraud.

According to court documents and evidence presented at trial, former Envistacom LLC president and co-founder Alan Carson, former Envistacom Vice President Valerie Hayes, and the owner of another company, Philip Flores, conspired to defraud the United States at least from September 2014 through November 2016, by preparing and procuring sham quotes for government contracts totaling over $7.8 million. Carson, Hayes, and Flores also fraudulently prepared "independent" government cost estimates and other procurement documents for the award of these contracts and made false statements, representations, and material omissions to federal government contracting officials regarding these estimates being legitimate independent cost estimates and the sham quotes being "competitive."

C. U.S. Litigation

1. *Tamenang Choh et al. v. Brown University et al.*, Case No. 3:23-cv-00305 (D.C. Conn. March 2023).

On March 7, two former Brown University student athletes filed a putative class action lawsuit against eight Ivy League universities alleging a price-fixing schemed designed to raise the costs of education and decrease the compensation student athletes receive for their services on behalf of the schools. The lawsuit alleges that the Ivy league institutions agreed not to provide their Division I athletes with scholarships or any other form of payment and effectively enforced the agreement through the Ivy league's governing body, the Ivy League Council of Presidents. According to the lawsuit, without the agreement, the Ivy League schools would compete for the student-athlete talent, unilaterally determine whether to provide scholarships, in what numbers, in what form, and for which sports. The suit alleges the agreement constitutes a *per se* violation of section of the Sherman Act.

2. *Ucharima Alvarado et al., v. Western Range Assoc.*, Case No. 3:22-v-00249 (D. Nev. 2022)

On March 22, a Nevada district court denied a motion to dismiss a suit accusing the West Range Association (WRA) of wage fixing. The suit alleges the WRA (an association of more than 200 members who allegedly "dominate" the sheep ranching industry) agreed to pay their shepherds the minimum wage allowed by the U.S. Department of Labor (DOL) and further agreed not to hire each other's workers. The district court rejected the argument that the complaint was barred by a previous action brought in Colorado and that the association was immune from antitrust claims. In addressing the wage-fixing scheme, the court found that the testimony of a former WRA executive director that the association directs its members not to pay more than the minimum required by the DOL "suggests more than mere informing about the minimum wage; it is the type of 'further circumstance pointing toward a meeting of the minds' that plausibly alleges at least a tacit agreement between the WRA and its members." The suit seeks to represent a putative class of shepherds who were paid about $1800 a month (amounting to about $4 or $5 per hour over the typical 80–90-hour work week).

3. *In re Pork Antitrust Litigation*, Case No. 0:18-cv-01776 (D. Minn. 2023)

On March 29, a Minnesota district court granted class certification to three classes of direct and indirect buyers in multidistrict litigation over an alleged scheme to inflate the price of pork. In a 69-page order, the court found that the three proposed classes (direct purchasers, consumer indirect purchasers, and

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commercial indirect purchasers) all depend on common contentions that can be resolved class-wide. "Class plaintiffs all seek class certification for a per se antitrust claim: that they overpaid for pork due to the defendants' conspiracy to restrict supply and stabilize prices in the pork market." According to the court, "proof of and defenses to the defendants' alleged conspiracy will be common to all class members, as is typical of all nationwide horizontal price-fixing conspiracy class actions."

The judge also allowed the class plaintiffs' "rule or reason" claim based on the alleged conspiracy to exchange anticompetitive information to proceed. The court found that the class plaintiffs had established commonality over the relevant geographic and product markets, finding that the relevant geographic market was the entire United States, and the product market was "raw pork bacon" and other forms of "fresh or frozen" pork because they "constitute a comparable cluster of products."

D. 2023 ABA Antitrust Section Spring Meeting Highlights

The Antitrust Section of the American Bar Association's annual Spring Meeting took place from March 29 through March 31, 2023, in Washington, D.C. At the conference, global antitrust enforcers spoke about hot topics in antitrust enforcement and agency priorities.

Both U.S. and international enforcers noted an increased focus on enforcement of digital platforms and big tech and modernizing antitrust laws to apply to today's evolving markets and the commercial realities of a new era of digital markets.

Regarding merger remedies, the U.S. antitrust agencies noted they are becoming increasingly adverse to merger remedies (and seldom, if ever, would they approve behavioral remedies). The agencies said they feel remedies have gotten too complex and prone to failure, and that the public bears the risk of failed remedies. Therefore, if remedies are accepted, the agencies want to ensure they are adequate. In contrast, the EU and its member states are more open to behavioral remedies. An evolving strategy to a global deal could include obtaining approval of behavioral remedies abroad, and then trying to convince a U.S. court or administrative law judge to approve a similar remedy.

Common themes among U.S. enforcers included a renewed emphasis on aggressive enforcement of antitrust laws, bringing big cases, and using the full panoply of antitrust enforcement tools Congress has provided. They view many U.S. markets as generally concentrated. There is new emphasis in the FTC's use of section 5 of the FTC Act (considering noncompetes as an unfair method of competition), section 6(g) of the FTC Act (to promulgate rules), and section 8 of the Clayton Act (new enforcement of interlocking directorate rules). U.S. antitrust enforcers are also prioritizing labor markets. They view labor issues as affecting almost the entire population and impacting the ability of individuals "to pursue the American Dream."

The agencies hope to soon announce updates to the HSR form and drafts of revised Merger Guidelines. The expected updates are likely to elaborate on how already established principles apply to the modern economy and a more complex world.

In terms of HSR, there will likely be increased resources for HSR Act and gun jumping violations, and the agencies want to ensure they are getting all information required in the form, especially including item 4(c)/(d) documents. They made special note that companies need to consider how chats and third-party messaging platform documents are captured. There are consequences for failure to submit Item 4 documents if discovered later in a second request or subsequent HSR filing, for example. Penalties could include a filing being bounced if an unfiled document changes the scope of an investigation, imposition of fines, or undoing an already consummated transaction.

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Parties should also take care to ensure HSR filings reflect the actual agreement between the parties. If there are any changes to a merger agreement during the pendency of an HSR filing review, it could require updates or a new filing. Parties should reach out to the Premerger Notification Office to discuss any changes as needed.

Mexico

A. COFECE imposes a 61.5 million-peso fine on two economic agents for failing to comply with all steps of the concentration notice procedure.

The Federal Economic Competition Commission (COFECE or Commission) sanctioned HP, Inc. and Plantronics, Inc. (POLY) a total of 61,580,800 pesos for closing a transaction before the Plenary had issued the corresponding resolution and, therefore, for failing to comply with the provisions of articles 86, 87, 88, 90 and 127, section VIII of the Federal Economic Competition Law (LFCE).

On Aug. 29, 2022, the sanctioned companies completed a transaction whereby HP indirectly acquired all shares and absolute control of POLY. The transaction closed before Commission authorization, preventing COFECE from analyzing, in a timely and preventive manner, any resultant risk to competition and free markets. Consequently, the verification procedure was initiated.

At the conclusion of the procedure, the Plenary of COFECE determined that the transaction did not pose a risk to competition and free markets, and therefore authorized the concentration. However, COFECE deemed HP's and POLY's conduct highly serious because it hindered the Commission's exercise of its authority; therefore, COFECE imposed corresponding sanctions.

According to COFECE, the concentration notice is a preventive procedure that requires compliance with a set of obligations that begins with the concentration notice and concludes with the resolution of the Plenary that may authorize, object, or subject authorization of the concentration to the fulfillment of conditions. In particular, the LFCE establishes that undertaking must wait for the resolution authorizing or conditioning the execution of a concentration in order to close the notified transaction.

Once the matter has been resolved and the parties notified, the sanctioned economic agents may appeal to the federal judicial power to review the legality of COFECE's actions.

B. COFECE investigates probable collusive agreements in the radiological material market acquired by the health sector.

On March 2, 2023, COFECE announced it was opening an ex officio investigation into possible illegal agreements between competitors to agree or coordinate positions in the market for radiological and related material acquired by the health sector in the national territory, under article 53, section IV. COFECE's announcement explained that collusion in the health sector is serious because it has a direct impact on the number and quality of medical supplies government institutions purchase with public resources.

The investigating authority notes possible absolute monopolistic practices. The investigation may take up to 120 business days, starting Aug. 26, 2022, which period may be extended for the same period up to four times. If at the end of the investigation there is no evidence suggesting absolute monopolistic practices, the plenary of the COFECE will close the file. However, if the investigation uncovers evidence suggesting a LFCE violation, those allegedly responsible will be called on to present their defense at a trial.

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Responsible economic agents could be fined up to 10% of their income. Those who have aided, abetted, encouraged, or induced absolute monopolistic practices could also be economically sanctioned. Individuals who have participated in the execution of these types of agreements between competitors could be punished with up to 10 years of imprisonment, in accordance with Article 254 bis of the Federal Criminal Code.

C. Andrea Marván Saltiel is designated COFECE's presidential commissioner.

Commissioner Andrea Marván Saltiel assumed the presidency of COFECE for a period of four years, renewable once, according to the provision of Article 28 of the Mexican Constitution, after being ratified by the Plenary of the Mexican Senate. Brenda Gisela Hernández Ramírez served as president since September 2021; in accordance with LFCE Article 19, she was entrusted with the position of presiding commissioner in substitution for vacancy.

In December 2022, the federal executive nominated and the Plenary of the Upper Chamber ratified Andrea Marván Saltiel, after passing the Evaluation Committee's knowledge exam, to be COFECE commissioner for a nine-year term. The new Commissioner has a law degree from Universidad Iberoamericana and a master's degree in the same subject from the University of Chicago; she has held various positions at COFECE for 10 years. In addition, she was a professor at Tecnológico de Monterrey.

D. COFECE determines existence of barriers to competition in the turbosine value chain market.

COFECE determined five barriers to competition and free concurrence exist that restrict efficient operation of the turbosine market.

The barriers identified, as well as recommendations and orders to eliminate them, are:

- *Barrier B-1 in the relevant primary commercialization market*. The prior import permit regime has provisions that limit the entry and permanence of economic agents. COFECE recommends that the Ministry of Economy and the Ministry of Energy modify several agreements limiting the importation of turbosine.
- *Barrier B-2 in the relevant external storage market*. There is a shortage and lack of access to external storage infrastructure for turbosine, inhibiting current and potential participants' ability to compete in the relevant commercialization markets. COFECE recommends that the Energy Regulatory Commission increase marketer access to external storage infrastructure without discriminatory restrictions.
- *Barrier B-3 in the relevant external storage market*. Most of the capacity in the country is contracted with Pemex Transformación Industrial, and there are no maximum limits to its capacity reserve, thus limiting competitor entry. COFECE recommends that the Energy Regulatory Commission establish a regulation that determines the maximum participation of Pemex Transformación Industrial in the capacity reserve in external storage facilities at a regional level.
- *Barrier B-4 in the relevant secondary commercialization and supply markets*. Aeropuertos y Servicios Auxiliares is vertically integrated in several segments of these relevant markets, and has not completed its functional, operational, and accounting separation, thus restricting competition in secondary marketing and supply. COFECE recommends that the Ministry of Infrastructure, Communications and Transportation, the Ministry of Finance and Public Credit and the Ministry of Public Function evaluate and, if necessary, modify the current Organic Statute of Aeropuertos y

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Servicios Auxiliares, so that it complies and guarantees the obligations of separation of the commercialization and storage activities, in the terms ordered by the Energy Regulatory Commission. COFECE has ordered the Board of Directors of Aeropuertos y Servicios Auxiliares to comply with the obligations of functional, operative, and accounting separation, making a clear distinction in the separation of the functions, procedures, and personnel of the administrative units responsible for the commercialization activity and the storage activity, ordered by the Energy Regulatory Commission, including the publication in the *Official Gazette of the Federation* of the Organizational Manual of Aeropuertos y Servicios Auxiliares.

- *Barrier B-5 in the relevant internal storage and dispatch market*. Some concession titles for the operation and administration of airports contain exclusivity clauses in favor of Aeropuertos y Servicios Auxiliares and, although these provisions ceased to be in effect with the entry into force of the Hydrocarbons Law, indirectly it may be limiting competition to new entrants in the dispensing market. COFECE recommends that the Ministry of Infrastructure, Communications and Transportation issue and publish in the *Official Gazette of the Federation* a general notice stating that such exclusivities of Airports and Auxiliary Services are no longer in force.

In these cases, the recommendations are not legally binding, but the orders are, and therefore the Board of Directors of Aeropuertos y Servicios Auxiliares must comply with the obligations of any ordered functional, operational, and accounting separation. The penalty for non-compliance with an order to eliminate a barrier to competition is 10% of the economic agent's revenues.

The Netherlands

A. Dutch National Competition Authority (ACM) decisions, policies, and market studies.

1. *Suppliers warned against limiting retailer freedom to decide on their own retail prices*.

On March 20, the ACM warned suppliers in various sectors that they may have exerted prohibited influence on their products' retail prices, as retailers should be able to set their prices independently and suppliers may only give non-binding recommendations. In response, the suppliers are conducting internal investigations, enhancing compliance training, and reviewing agreements. The ACM is monitoring companies for compliance on a continuous basis. Companies risk a fine of up to €900,000 or 10% of turnover if they violate the competition rules.

2. *ACM blocks merger between media companies Talpa and RTL*.

In January 2023, the ACM concluded that RTL's contemplated acquisition of Talpa would result in a dominant position. Furthermore, the proposed remedies were insufficient to remove the ACM's competition concerns. The ACM has now announced its final decision to refuse a license, blocking the proposed transaction indefinitely. The authority found that Talpa and RTL, two major companies in the Netherlands in the television channel distribution market, would become too dominant if merged.

B. Dutch Courts

1. *Rotterdam District Court overturns ACM decision regarding Mediq's contemplated acquisition of Eurocept*.

On March 24, the Rotterdam District Court ruled that the ACM did not properly define the relevant product market when it denied Mediq's contemplated acquisition of Eurocept Homecare and overturned

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the ACM's decision. Mediq and Eurocept Homecare both provide ambulatory electronic infusion pumps to health care organizations for at-home patient care.

The ACM had previously denied the acquisition due to concerns about reduced competition, but the Rotterdam District Court found that the ACM did not adequately demonstrate that other infusion pumps were not interchangeable with the ambulatory electronic infusion pumps that Mediq and Eurocept Homecare provided. The parties may appeal within six weeks of the judgment.

2. *Oost-Brabant Court orders electronics companies to pay over EUR 33 million in damages*.

The Oost-Brabant District Court has ordered members of the international cathode ray tube cartel to pay over EUR 33 million in damages to three Brazilian claimants, in three separate judgments. This is one of the first successful follow-on damages claims in the Netherlands whereby substantial damages were awarded.

The claim results from a 2015 decision by Brazil's Administrative Council for Economic Defence, which fined the companies for colluding to fix prices, share markets and restrict their output of color cathode ray tubes from 1996 to 2006. The claimants argued that they suffered damages due to the cartel's overcharging for cathode ray tubes.

C. Dutch Government

Dutch proposal under DMA broadens powers of investigation, exceeding those of European Commission.

The EU Digital Markets Act (DMA) has generated controversy regarding the European Commission's exclusive power to enforce the law. Several national competition authorities tried to claim a role in enforcing the new rules, but the European Commission's power was largely retained in the final text. However, Article 38(7) allows individual EU member states to grant their national competition authority the ability and investigative powers to review non-compliance in relation to the DMA.

The Dutch government is the first member state to consult on draft legislation to grant its national competition authority (i.e., the ACM) powers that exceed those of the European Commission. While national competition authorities cannot take decisions on DMA infringements or impose fines, an investigation under Article 38(7) can have serious consequences for gatekeepers even if it does not lead to European Commission enforcement. The Dutch proposal could serve as a model for other member states.

United Kingdom

A. Merger control

1. *Dentist services*

The UK Competition and Markets Authority (CMA) has accepted undertakings to resolve its competition concerns regarding Portman Healthcare Group's proposed acquisition of Dentex Healthcare Group. The CMA was concerned that the acquisition would reduce competition in orthodontist and dentist services in nine local areas in Devon, Cornwall, and northeast England. Under the undertakings, agreed on March 20, one of Dentex or Portman's dental practices in each of those areas will be sold to third parties to maintain the pre-acquisition level of competition. This case reflects the approach taken in the two

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veterinary services cases we reported in the March issue of Competition Currents, both of which involved mergers of a number of local veterinary practices.

2. *Pastry dough*

On March 10, the CMA announced that it proposed to accept final undertakings from Cérélia to divest the "Jus-Rol" pastry dough assets it had acquired from General Mills in January 2022. The CMA commenced its investigation of the completed acquisition in February 2022 and referred it to an in-depth Phase 2 investigation in June 2022. It found at the end of this investigation, on Jan. 20, 2023, that the acquisition substantially lessened competition in the wholesale supply of dough-to-bake products to grocery retailers in the UK and decided that the only remedy was divestment of all of the acquired assets to a CMA-approved purchaser. Cérélia has applied to the UK Competition Appeal Tribunal (CAT) for a review of the CMA's decision; the undertakings are without prejudice and subject to the outcome of the CAT's review. In particular, the time period for divestiture of the assets will not commence until the day after the CAT decision, assuming it upholds the CMA decision.

3. *Petrol stations*

On March 28, the CMA announced it was considering undertakings to divest 13 of the 132 petrol stations and attached grocery stores UK supermarket chain Asda acquired in October 2022, when it purchased Arthur Foodstores, a UK supermarket chain Co-op set up to sell the 132 petrol forecourt sites. In the area where each of the 13 sites was located, the CMA had concerns that the acquisition would substantially reduce competition.

4. *Health care technology and data*

On March 17, following an initial Phase 1 investigation, the CMA announced its concerns that UnitedHealth's proposed acquisition of EMIS would reduce competition in the supply of population health management and medicines optimization software, leading to worse outcomes for the UK National Health Service and ultimately patients and taxpayers. Unless undertakings are provided to resolve these concerns, the CMA proposes to refer the acquisition to a phase 2 investigation.

B. Antitrust enforcement – government investigations

Fragrances and fragrance ingredients

On March 7, the CMA launched an investigation into alleged anticompetitive conduct in the supply of fragrances and fragrance ingredients for use in the production of consumer products such as household and personal care products. The European Commission and Swiss Competition Commission have launched parallel investigations, and the regulators concerned are coordinating with the U.S. DOJ. A number of companies were subject to "dawn raids" (unannounced inspections at their premises), and others received formal requests for information. The CMA has listed the names of the companies under investigation: Firmenich International SA, Givaudan SA, International Flavours and Fragrances Inc and Symrise AG, together with their UK subsidiaries. An association active in the fragrance sector has also been looked at. According to a statement by the Swiss authority, the focus of the investigations is coordination of these companies' pricing policies, refusals to supply certain customers, and limitations of the production of certain fragrances.

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C. Antitrust enforcement – private litigation

1. *Pharmaceuticals – follow on damages claim launched.*

On March 7, the Scottish government and a number of Scottish regional health boards issued a follow-on damages claim in the English High Court against four companies, based on CMA cartel decisions.

2. *Power cables – follow on damages claim launched.*

On March 10, two RWE renewables companies launched a claim for follow-on damages in the UK CAT against Prysmian Cavi e Sistemi S.r.l and Prysmian S.p.A. The claim is based on Prysmian's involvement in a price-fixing cartel operating in the supply of high-voltage power cables between February 1999 and January 2009, as found by the European Commission in its April 2014 cartel decision imposing penalties on the parties. The two RWE companies operate the first wind farms in Scotland, Robin Rigg, and they are claiming £9.42 million in damages. This claim is the latest in a number of claims based on the EU cartel decision.

D. Market investigations

Trading market data

The Financial Conduct Authority, the UK's financial services regulator, has launched a market study in response to concerns that competition in the supply of good quality and fairly priced wholesale data may not be working effectively. The study will cover, among other matters, the provision of information on the prices and volumes traded on stock exchanges, benchmarking, and credit ratings.

Poland

A. Broad amendment to Polish Competition Law would result in more restrictive fines, including "parental liability."

On the March 9, the Lower Chamber of Parliament passed a bill (the Bill) to amend the Polish Act of Feb. 16, 2007, on Competition and Consumer Protection. The Bill aims to implement Directive (EU) 2019/1 of the European Parliament and of the Council of December 2018 to empower EU member state competition authorities to more effectively enforce and to ensure the proper functioning of the internal market (Directive ECN+), for which the February 2021 deadline for transposition has long passed. The Senate is considering the Bill and may send it to the Polish president for signature shortly if no amendments are adopted.

The Bill also introduces a broad package of significant changes that the Directive ECN+ does not require. It would extend the President of the Office of Competition and Consumer Protection (UOKIK President)'s powers over penalizing entrepreneurs and limit the rights of entrepreneurs under legal professional privilege and the right to obtain the statement of objections before the UOKiK President takes a decision.

The Bill would introduce so-called parental liability in relation to fines imposed on entrepreneurs for abuse of a dominant position or concluding anticompetitive agreements. Where UOKiK proved the entrepreneur infringing the antitrust rules is under the parent company's decisive influence, UOKiK would be able to fine (up to 10% of turnover) the infringing party and its parent company. Therefore, the basis for the penalty would be the turnover of both entities.

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According to the Bill, exerting decisive influence occurs where such economic, legal, or organizational ties exist such that the entrepreneur on whom decisive influence is exerted carries out or adapts to orders given to them by the entrepreneur exerting decisive influence in a way that restricts or prevents its independent behavior on the market. The Bill presumes that decisive influence occurs when the parent company has a share in the capital exceeding 90%.

The Bill also would increase the fines that could be imposed on trade associations for infringing antitrust rules. So far, the fine has been calculated as a percentage of the turnover of the union itself; if the amendment were adopted, the penalty would be calculated on the turnover of all association members.

Moreover, the Bill would restrict legal professional privilege to external lawyers only, so the UOKiK President would be able to claim access to internal correspondence with in-house lawyers. The Bill also would remove the UOKiK President's obligation to present a statement of objections containing the detailed justification for the allegations (SUZ) before issuing the decision. Instead of the SUZ, the UOKiK President would be obliged to justify the decision to initiate antimonopoly proceedings, and this justification would need to contain the elements of the SUZ. This proposed change might not comply with Directive ECN+, which in art. 3 requires national competition authorities to adopt a statement of objections prior to taking a decision. Such a change might also limit the entrepreneur's right to defense, as at the beginning of the proceedings, full evidence and argumentation proving the alleged violation of the law are not yet known.

Further, if the Bill were adopted, its effective date would raise questions, particularly with regard to the possibility of more restrictive fines. Article 13 of the Bill provides that the previous provisions would apply to cases where proceedings before the UOKiK President were initiated before the Bill's effective date. Thus, if the UOKiK President initiated antimonopoly proceedings after the amendments entered into force, but the proceedings concerned actions that began before its entry into force, then applying the amendments would (i) impose a penalty for action that was not punishable at the time of its occurrence, and (ii) apply the new, less favorable, provisions on penalties for the entrepreneur's action (compared to those applicable when the entrepreneur committed the infringement). The American Chamber of Commerce in Poland has expressed similar concerns in a letter to the Senate.

In accordance with the requirements of the Directive, the Bill introduces a five-year term of office for the UOKiK President and limits the possibility of dismissal to cases listed in the Bill. The Bill also would prohibit political pressure on the UOKiK President. These changes aim to ensure the UOKiK President's independence from ruling party influence. Incumbent President Tomasz Chróstny would to be appointed for the first term of office under the new rules.

B. UOKiK President fines Merida Polska PLN 2.5 million due to its restrictive policy limiting e-commerce sales.

UOKiK fined Merida Polska sp. z o. o., a Polish distributor of bikes, bike parts, and cycling accessories, PLN 2.5 million for anticompetitive agreements with resale partners who operate both online and physical shops.

On Feb. 28, 2023, the UOKiK President issued a decision finding that the Merida Polska was a party to an agreement with its distributors limiting internet sales of bikes. The potential purchaser was unable to finalize the transaction online and was ultimately obliged to collect the bike in person, thus being deprived of door-to-door delivery. The agreement was found to be an anticompetitive market division in breach of art. 6.5 of Polish Act on competition and consumer protection and simultaneously a prohibited

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agreement in light of Article 101 of the Treaty on the Functioning of European Union. The alleged practice lasted for six years.

Merida Polska, as the only distributor of Merida bikes in Poland, limited the sales of bikes via the internet. It restricted the possibility of online trade, as the customer was obliged to visit a physical shop to collect the purchase. The company's distributors could only present images of the goods and related information but could not send the ordered products via delivery services. Additionally, the company banned suppliers from using auction portals to facilitate sales. This included all means of presentation and transacting. According to the UOKiK President, these actions restricted competition and were incompatible with internal market rules.

The UOKiK President's decision is not binding, and Merida Polska can appeal within one month of receipt. The company has announced it will appeal to the Court of Competition and Consumer Protection in Warsaw.

Italy

A. Italian Competition Authority (ICA)

ICA publishes annual update of the turnover thresholds for merger control.

On March 27, 2023, ICA published a resolution updating the cumulative turnover thresholds above which the notification of potential concentrations becomes mandatory.

Accordingly, starting from March 27, 2023, the notification of a concentration to ICA is mandatory whenever (i) the aggregate nationwide turnover of all the undertakings concerned exceeds 532 million euros; and (ii) the individual nationwide aggregate turnover of at least two of the undertakings concerned exceeds 32 million euros.

Pursuant to Article 16(1) of the Italian Competition Law, the ICA reassesses such thresholds on an annual basis in the light of changes in the GDP price deflator index. Therefore, such changes affect neither the ICA's overall merger control (since they do not change the cumulative nature of the thresholds or their scope) nor the assessments of the merger transactions carried out before the above-mentioned date of publication of the updated resolution.

B. Superior Courts

Council of State annuls TAR Lazio judgment of concerning HERA.

With a judgment issued March 1, 2023, the Council of State (i.e., the Italian administrative court of last instance) upheld the ICA's appeal against the judgment of TAR Lazio (i.e., the Italian administrative court of second instance) and finding concerning an abuse of dominant position allegedly carried out by companies belonging to the Hera Group (HERA), the monopolist in the market for the cellulosic waste collection services in many municipalities of the Emilia-Romagna region.

Such abusive conduct consisted, in short, in HERA's decision to withdraw from COMIECO, the Italian consortium of companies active in collecting and recycling cellulosic-based packaging, in order to sell such waste to its subsidiary, Akron, active in the downstream market for cellulosic waste treatment. Such conduct allegedly excluded Akron's competitors from access to an essential raw material and also

impacted end users of the waste collection and disposal services, since the tariffs imposed on them eventually increased.

In its ruling, the Council of State recalled settled EU Court of Justice case law on abuse of dominance, and, in particular, on the "special responsibility" of the undertakings holding a dominant position in a given market. The Council of State also pointed out that, in these circumstances, even potential benefits to the system in terms of quality or innovation might not be enough to justify the abusive conduct.

European Union

A. European Commission

1. *European Commission finds that 2019 € 400 million state loan to Alitalia is state aid*.

On March 27, the European Commission (EC) established that a loan granted by Italy to Alitalia Società Aerea Italiana S.p.A. and Alitalia CityLiner S.p.A. in late 2019 should be qualified as a State aid.

The EUR 400 million loan, which was granted to Alitalia by a decree-law approved in December 2019 and converted into law by the Italian Parliament in January 2020, was aimed at facilitating the streamlining of Alitalia, in an attempt to sell its assets within 31 May 2020.

In closing the SA.55678 case, opened in 2020, the EC concluded that no private investor in a market economy would have granted such a loan to Alitalia (which was placed in extraordinary administration), and that such loan gave an unfair economic advantage to Alitalia vis-à-vis its direct competitors, on national, European, and world routes. Furthermore, since Alitalia had already benefitted from previous aid measures in 2017, the additional loan was also in breach of the "one time, last time" principle enshrined in the Rescue and Restructuring Guidelines.

Accordingly, Italy must now recover the funds, including interest, from the former national airline. Indeed, as established by the EC itself in 2021, ITA Airways, the new national carrier, cannot be considered the economic successor of Alitalia; thus, it cannot be held liable for the repayment of the aid.

2. *European Commission conditionally approves Orange's proposed acquisition of Voo and Brutélé*.

The EC has approved Orange's EUR 1.8 billion acquisition of Belgian telecom providers Voo and Brutélé, subject to certain conditions after an in-depth investigation (i.e., Phase II review). The proposed remedies, whereby Orange would (i) provide Telenet with access to Voo and Brutélé's fixed internet service networks in Wallonia and Brussels for at least 10 years and (ii) allow Telenet to access Orange's future "ultra-fast" fiber cable network, removed the EC's competition concerns.

3. *EC and national authority cross-border competition law enforcement*.

Competition authorities in the European Union, the United Kingdom, the United States, and Switzerland have carried out coordinated dawn raids on fragrance manufacturers Firmenich International, Givaudan, Symrise and International Flavors & Fragrances. The companies are being investigated for possible collusion in pricing policies, the restriction of fragrance production, and the prevention of rivals from supplying certain customers. This is the second time EU and UK enforcers have conducted parallel raids.

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Notwithstanding that in recent years there was little cross-border enforcement, partly due to a decline in leniency applications, the recent raids indicate again the close cooperation between enforcers. The raids also underline the importance of compliance within trade associations, since the focus is increasingly shifting to "atypical" cartel conduct.

B. European Decisions

European Court of Justice (ECJ) confirms below-threshold mergers may be reviewed ex-post and can violate Article 102 TFEU.

The ECJ has found in its preliminary ruling that national competition authorities can launch abuse of dominance investigations (art. 102 TFEU) into mergers below EU review thresholds, even if they have already been completed. It also means that deals may be investigated even if the transaction was not subject to review under EU or national merger control rules (art. 101 TFEU) – also retroactively. This ruling confirms the trend of reviewing so-called "killer acquisitions."

Greater China

API Manufacturer Fined 2% of Sales for Price Hike

In February 2023, the Administration for Market Regulation of Liaoning Province (Liaoning AMR) issued a penalty against Northeast Pharm (NE Pharm), a state-owned manufacturer of an active pharmaceutical ingredient (API) and distributor of pharmaceutical products for its abuse of market dominant power, closing a 3.5-year investigation launched against the API manufacturer in July 2019. With this penalty, NE Pharm was ordered to pay a RMB 133 million (~USD 19.3 million) fine, which equaled to 2% of its sales revenue in China in 2018.

NE Pharm was found to sell L-carnitine, an API, to prepare for medicines to treat diseases like chronic kidney failure, at an unfairly high price during the period from November 2018 through June 2019. Liaoning AMR found that the production of L-carnitine API constituted a distinct relevant market from other APIs and L-carnitine as dietary supplements, as it was the essential and irreplaceable API for manufacturing L-carnitine preparations. Further, other companies including manufacturers of other APIs and non-API L-carnitine could not switch to manufacture API-level L-carnitine without making substantial investment and going through a lengthy approval process. The relevant geographic market was limited to China, as an import license was required to import L-carnitine, and no such license had been granted to foreign-made L-carnitine.

NE Pharm's dominance in the relevant market was established by the finding that its market share reached close to 100% in terms of quantity of sales and revenue in 2017 and 2018 and more than 80% in the first six months of 2019. The dominant market power was compounded by the findings that (i) downstream manufacturers had little bargaining power to negotiate terms of supply with NE Pharm given that there was only one alternative supplier who entered the market in late 2018 and that the cost to discontinue supply was substantial for downstream manufacturers, (2) the barrier to market entry was high, considering that, among other things, the manufacturing process involved processing of sodium cyanide, an extremely hazardous chemical.

According to Liaoning AMR's penalty decision, from November 2018 to June 2019, NE Pharm raised the average sales price of L-carnitine from RMB 2,526 per kilo to RMB 5,168 per kilo on average despite its stable production cost. The price increase during this period was found to be disproportionately excessive

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as compared to the year-on-year increase of its production cost. Additionally, NE Pharm's average sales price during January to June 2019 was 1.64 times the price of its only competitor.

Liaoning AMR believed that NE Pharm had restricted the competition in L-carnitine market by implementing the price hike. In addition, the drug procurement prices of hospitals are fixed through volume-based procurement negotiation. The downstream preparation manufacturers were found to be actually damaged by the price hike because, while they were forced to procure ingredients from NE Pharm at the high price, such manufacturers were obligated to supply the final preparations at the pre-negotiated price to the hospitals. The unjustified price hike was found detrimental to consumer welfare and public interest, as it caused excessive expenditure from the national medical insurance fund without justification.

Japan

A. JFTC releases report examining extremely low-priced smartphone sales.

On Feb. 24, 2023, the Japan Fair Trade Commission (JFTC) released a report of its survey of extremely low-priced sales of smartphones, including sales for one yen. According to the report, many of the smartphone distributors were selling them at extremely low prices, which were unprofitable. The report says that, in cases where the price was below the cost for distributors of major cell phone companies, the cell phone companies made up the deficit with revenues from communication charges and options. The JFTC points out that such sales methods may constitute sales at unreasonably low prices (i.e., dumping). In addition, the JFTC states that if such sales methods are likely to make it difficult for a company exclusively selling smartphones without a telecommunications contract of cell phone companies competing against major cell phone companies, it may be considered unfairly low-cost sales, and both the cell phone company and the sales agent may be in violation of the Antimonopoly Act.

B. JFTC releases report on fintech business survey.

Some businesses utilizing fintech have been offering new financial services and improving user convenience. As a result, the JFTC surveyed these businesses to understand competition policy issues in the fintech sector and released its report on antitrust violations on March 1.

The report describes, for example, fintech businesses that are electronic payment agents who provide household financial bookkeeping services, a tool that allows easy management and input of household accounts from a smartphone. The service is linked to the application programming interfaces (APIs) of various financial institutions to enable automatic management of bank deposit/withdrawal history and credit card usage history. As a result of the investigation, the JFTC found that in some API use agreements with banks, the operators sometimes demanded high reference API connection fees from the banks. The JFTC stated that if a bank's trading position is superior to that of an electronic settlement agent, and the bank revises the contract to unfairly disadvantage the electronic settlement agent in light of standard business practices, this may be a violation under the Antimonopoly Act.

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Contributors

Andrew G. Berg
Shareholder
+1 202.331.3181
berga@gtlaw.com

Gregory J. Casas
Shareholder
+1 512.320.7238
casasg@gtlaw.com

Miguel Flores Bernés
Shareholder
+52 55.5029.0096
mfbernes@gtlaw.com

Victor Manuel Frías
Shareholder
+52 55.5029.0020
friasgarcesv@gtlaw.com

Robert Gago
Shareholder
+48 22.690.6197
gagor@gtlaw.com

Edoardo Gambaro
Partner
+ (39) 02.77197205
Edoardo.Gambaro@gtlaw.com

Yuji Ogiwara
Shareholder
+81 (0) 3.4510.2206
ogiwaray@gtlaw.com

Stephen M. Pepper
Shareholder
+1 212.801.6734
Stephen.Pepper@gtlaw.com

Marc T. Rasich
Shareholder
+1 801.478.6920
Marc.Rasich@gtlaw.com

Yuqing (Philip) Ruan
Shareholder
+86 (0) 21.6391.6633
ruanp@gtlaw.com

Gillian Sproul
Shareholder
+ 44 (0) 203.349.8861
Gillian.Sproul@gtlaw.com

Hans Urlus
Shareholder
+31 20 301 7324
urlush@gtlaw.com

Dawn (Dan) Zhang
Shareholder
+86 (0) 21.6391.6633
zhangd@gtlaw.com

Tarica Chambliss
Of Counsel
+1 202.533.2312
Tarica.Chambliss@gtlaw.com

Robert Hardy
Local Partner
+31 20 301 7327
Robert.Hardy@gtlaw.com

Alan W. Hersh
Of Counsel
+1 512.320.7248
hersha@gtlaw.com

Filip Drgas
Senior Associate
+48 22.690.6204
drgasf@gtlaw.com

Pietro Missanelli
Senior Associate
+ (39) 02.77197280
Pietro.Missanelli@gtlaw.com

Anna Rajchert
Senior Associate
+48 22.690.6249
rajcherta@gtlaw.com

Mari Arakawa
Associate
+81 (0) 3.4510.2233
arakawam@gtlaw.com

John Gao
Associate
+86 (0) 21.6391.6633
gaoj@gtlaw.com

Elizabeth S. Kraus
Associate
+1 561.650.7927
Elizabeth.Kraus@gtlaw.com

Carlotta Pellizzoni
Associate
+ (39) 02.771971
Carlotta.Pellizzoni@gtlaw.com

Jose Abel Rivera-Pedroza
Associate
+52 55.5029.0089
riverapedrozaj@gtlaw.com

Chazz Sutherland
Associate
+31 20 301 7448
sutherlandc@gtlaw.com

Ippei Suzuki
Associate
+81 (0) 3.4510.2232
suzukii@gtlaw.com

Rebecca Tracy Rotem
Practice Group Attorney
+1 202.533.2341
rotemr@gtlaw.com

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Administrative Editors

Becky L. Caruso
Associate
+1 973.443.3252
Becky.Caruso@gtlaw.com

Emily Willis Collins
Associate
+1 512.320.7274
Emily.Collins@gtlaw.com

Albany. Amsterdam. Atlanta. Austin. Berlin.¬ Boston. Charlotte. Chicago. Dallas. Delaware. Denver. Fort Lauderdale. Houston. Las Vegas. London.* Long Island. Los Angeles. Mexico City.+ Miami. Milan.» Minneapolis. New Jersey. New York. Northern Virginia. Orange County. Orlando. Philadelphia. Phoenix. Portland. Sacramento. Salt Lake City. San Diego. San Francisco. Seoul.∞ Shanghai. Silicon Valley. Tallahassee. Tampa. Tel Aviv.^ Tokyo.¤ Warsaw.~ Washington, D.C.. West Palm Beach. Westchester County.

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