GT GreenbergTraurig

GT Newsletter | Competition Currents | March 2024

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

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United States

A. Federal Trade Commission (FTC)

1. *FTC submits comment on march-in rights to promote efforts to lower drug prices.*

On Feb. 1, 2024, the FTC submitted a comment in response to the National Institute of Standards and Technology (NIST)'s request for information on its Draft Interagency Guidance Framework for Considering the Exercise of March-In Rights under the Bayh-Dole Act. Under the Bayh-Dole Act, the federal government has the right to "march in" on patents on inventions created using taxpayer funds—to require the patent holder to license the federally funded patent to other applicants. The draft interagency framework provides guidance outlining when the government should exercise its march-in rights, which have never been utilized. The draft framework makes clear that high price is an appropriate basis for exercising march-in rights.

[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.

The FTC comment applauds NIST for its efforts to reactivate march-in rights as an important check on companies charging Americans inflated prices for drugs developed with taxpayer-funded research. In the comment, the FTC expresses support for an expansive and flexible approach to march-in rights, including providing that agencies can march in on the basis of high prices.

2. *FTC and HHS seek public comment on generic drug shortages, and competition among powerful middlemen.*

On Feb. 14, 2024, the FTC and the U.S. Department of Health and Human Services (HHS) jointly issued a Request for Information (RFI) to understand how the practices of two types of pharmaceutical drug middlemen groups—group purchasing organizations (GPOs) and drug wholesalers—may be contributing to generic drug shortages.

The joint RFI seeks public comment regarding market concentration among large health care GPOs and drug wholesalers, as well as information detailing their contracting practices. The RFI seeks to understand how both GPOs and drug wholesalers may impact the overall generic pharmaceutical market, including how these entities may influence the pricing and availability of pharmaceutical drugs. The joint RFI is asking these questions to help uncover the root causes and potential solutions to drug shortages.

B. Department of Justice (DOJ)

1. *DOJ Antitrust Division and California US Attorneys and state and local government agencies host summit to discuss emerging threats.*

On Feb. 8, 2024, the DOJ's Antitrust Division, along with the U.S. Attorney's Office for the Central District of California and Procurement Collusion Strike Force (PCSF), hosted a summit where procurement officials and law enforcement partners from across Southern California convened to discuss emerging threats and raise awareness.

At the summit, agency officials detailed the resources the Antitrust Division has dedicated to combat procurement collusion, emphasizing the importance of law enforcement partnerships and a whole-of-government response to persistent threats in government spending. Agency officials also explained how they had worked to sharpen the PCSF's focus on the challenges, risks, and opportunities posed by increased federal spending in Southern California. The officials also discussed the importance of defending critical programs from procurement collusion risk under the Infrastructure Investment and Jobs Act, the Inflation Reduction Act of 2022, and the Creating Helpful Incentives to Produce Semiconductors (CHIPS) and Science Act of 2022.

2. *Four erosion control company representatives plead guilty to bid rigging and price fixing in ongoing investigation of Oklahoma transportation construction contractors.*

On Feb. 27, 2024, the Antitrust Division announced that four erosion control company owners or managers pleaded guilty to rigging bids and fixing prices as part of a conspiracy targeting a total of over $100 million in publicly funded transportation construction contracts across Oklahoma. According to court documents filed in the U.S. District Court in Oklahoma City, those four individuals had conspired, along with others, to rig bids, fix prices, and allocate contracts for erosion control products and services. Starting in 2017, these individuals along with their co-conspirators agreed to raise prices and divvy up contracts across different areas of Oklahoma. As part of this criminal conspiracy, they often sent intentionally high-priced bids or outright refused to bid.

C. U.S. Litigation

1. *Pfizer pays $93 million to settle antitrust litigation relating to cholesterol medication.*

On Feb. 14, 2024, Pfizer Inc. announced a deal to settle multiple class action lawsuits relating to marketing of the cholesterol medication, Lipitor. In the underlying suits, distributors and direct purchasers of Lipitor—including wholesalers—alleged that Pfizer conspired with other pharmaceutical companies to delay the release of cheaper generic alternatives as settlement for Pfizer's patent infringement claims. These class actions were filed over 12 years ago, and the proposed settlement now must be approved by the federal court.

2. *Federal judge refuses to dismiss Total Vision's antitrust claims against alleged monopolist eye-care insurance provider.*

Judge Cormac J. Carney issued an opinion on Feb. 20, 2024, denying eye-care insurance giant Vision Service Plan (VSP)'s motion to dismiss Total Vision's lawsuit alleging various antitrust activity surrounding VSP's alleged scheme to acquire Total Vision's network of retail optometrists. Total Vision is a private-equity-backed group of approximately 60 rolled up optometry practices located in California. According to the lawsuit, VSP owns 65% of the eye-care insurance market in the United States and has allegedly continuously imposed onerous terms on Total Vision that pressure patients into purchasing VSP-affiliated frames and lenses at anticompetitive prices. These terms included (1) terms to limit Total Vision's growth by barring coverage if Total Vision reached a certain market size; (2) required the various Total Vision stores to purchase a minimum of $35,000 in VSP frames to maintain insurance coverage; and (3) required that at least 50% of Total Vision's lens sales were from an allegedly higher-priced VSP brand. Then, according to Total Vision, VSP allegedly increased its pressure by refusing to include Total Vision in its network unless TV was allowed to invest. When Total Vision refused, VSP allegedly retaliated by declaring Total Vision out of network. In response to this pressure, Total Vision alleges it entered into a series of agreements with VSP under which VSP required it to waive any antitrust complaints against VSP. In short, Total Vision alleged that VSP abused its market power to obtain a waiver of antitrust claims.

VSP moved to dismiss the suit, alleging these same agreements barred Total Vision's suit. But Judge Carney ruled that Total Vision had plausibly alleged that the agreement was the result of anticompetitive duress, and thus unenforceable.

3. *Tennessee court enjoins NCAA's rules regarding colleges' efforts to recruit student-athletes using NIL packages.*

Recent legal rulings have allowed student athletes to profit from their name, image, and likeness (NIL) while still in college. As a result, many college programs have begun negotiating valuable NIL packages with boosters, local businesses, and sporting-brands that the university can in turn offer to high school and college athletes as part of their recruiting efforts. The National Collegiate Athletic Association (NCAA) issued interim rules that prohibit such NIL recruitment packages, but the states of Virginia and Tennessee sued to enjoin those rules as anticompetitive. On Feb. 23, 2024, a federal judge in Tennessee granted the state's a preliminary injunction—effectively barring the NCAA from enforcing its rule while the lawsuit is pending.

4. *WWE settles lawsuit with rival wrestling organization for $20 million.*

On Feb. 26, 2024, World Wrestling Entertainment Inc. (WWE) announced the details of its $20 million settlement with rival professional wrestling company Major League Wrestling (MLW). MLW sued WWE

for allegedly monopolizing wrestling broadcast through various anticompetitive agreements with media markets, venues, and wrestling talent. The WWE and MLW initially advised the court of their settlement in December 2023, and now they have publicly disclosed the settlement details.

Mexico

Federal Economic Competition Commission

1. *Cofece summons several economic agents for possible collusion in the non-residential real estate leasing market.*

The Federal Economic Competition Commission (Cofece or Commission) announced a formal accusation (assessment of probable responsibility) against companies and individuals for allegedly manipulating prices in the non-residential real estate leasing market nationwide. Cofece labeled these allegedly collusive agreements as absolute monopolistic practices prohibited under Article 53 of the Federal Economic Competition Law (LFCE).

The summons procedure allows for the allegedly responsible parties to defend themselves by stating their rights, offering evidence rebutting the charges, and arguing their case. Once completed, the Plenary of Cofece will make a determination. If it is proven that an absolute monopolistic practice was carried out, the Commission could impose sanctions under the Federal Competition Law.

In the announcement, Cofece stated that "[m]ost of the businesses in Mexico establish their stores in non-residential properties that they lease depending on their needs, in this way they can offer their goods and services to people in different areas and compete for consumer preference. In addition, in many cases, they are an important source of employment for Mexicans. When there are anticompetitive conducts in the real estate sector, their effects could be reflected not only in the impact on businesses that lease non-commercial real estate spaces, but also in the employment of thousands of Mexicans and in the prices of the goods and services they offer."

Cofece also pointed out that the real estate sector is a priority sector in which it will continue to focus its efforts due to its growing relevance in the economy and the benefits it represents for Mexicans. According to the National Institute of Statistics and Geography, in 2018, the non-residential real estate leasing sector accounted for about 36 billion pesos of the Mexican economy. Cofece also warned that it will continue to detect and pursue anticompetitive conduct that presumably affects real estate markets in order to accelerate the recovery of this sector, since it was one of the most affected by the COVID-19 pandemic.

2. *Cofece identifies potential barriers to competition in retail e-commerce.*

Cofece's Investigating Authority (IA) has preliminarily determined that there are no conditions for effective competition in Mexico's retail e-commerce market, affecting both sellers and buyers. E-commerce is also key for small and medium-sized businesses to be able to offer their products to a greater number of consumers.

The IA preliminarily determined that there is no effective competition because the markets:

a) Have a high concentration, meaning they are composed of few participants.

b) Are characterized by the presence of network effects; that is, the value of a product or service increases as more people use it.

c) Have other barriers to entry, such as high amounts of investment for their development, the need for technological tools, and investments in advertising, marketing, and public relations.

Considering the above, the IA determined that three possible barriers to competition could be affecting the functioning of this market:

a) Artificiality in some components of marketplace loyalty programs: there are services included in the loyalty programs of some companies, such as streaming services or others, that affect the behavior of buyers, generating an artificial strategy that attracts them.

b) Lack of transparency in the operation of management within marketplaces: marketplaces have an offer management system that, through a series of algorithms, selects and highlights a particular offer that it considers and exhibits to buyers as the best, so the lack of transparency in its operation could be affecting the efficient functioning of these markets.

c) Preferences for their own logistics solutions: Some platforms do not allow their sellers to freely choose the logistics company to use based on convenience, price, and shipping time criteria; this favors the exposure of the products of sellers who contract the service offered by the same platform, encouraging sellers to purchase logistics services from the platforms.

To remove these barriers, the preliminary opinion proposes a series of remedial measures to restore the conditions of effective competition in this market. These measures include:

a) Disassociating memberships from streaming services, as well as any other services not related to the use of this market, as well as avoiding the promotion of these within the marketplaces. This implies that the platforms are free to offer streaming programs and any other service, but these may not be offered as part of the same package of services related to the market.

b) Creating a section on company portals where sellers are informed of all variables and weights considered by the bid management algorithm to choose the featured offer, providing transparency and certainty.

c) Modifying the criteria of the bid management algorithm so the contracting of logistics solutions with a specific economic agent is not considered a variable.

d) Making transparent the standards they consider appropriate to provide the logistics service and thus allow the interested logistics companies to integrate into their platform.

If the preliminary opinion is confirmed and the measures proposed by the IA are implemented, benefits are expected to materialize and competition in the e-commerce markets to improve for the benefit of both buyers and sellers, thus providing greater and better sales alternatives for small and medium-sized companies, as well as better prices and options for the final consumer.

The extract of the preliminary verdict of the IEBC-001-2002 file was published in the Official Journal of the Federation (*Diario Oficial de la Federación*). As of the date of publication, economic agents interested in this procedure could offer comments, enabling the Plenary to issue a final resolution.

The Netherlands

A. Dutch ACM decisions, policies, and market studies

1. *ACM calls for online companies to comply with DSA.*

The Dutch competition authority (ACM) is calling on online companies that transfer, store, and disclose digital content to carefully check what new rules they must comply with under the Digital Services Act (DSA). The DSA is a European regulation that imposes rules on digital platforms to contribute to a safe, predictable, and trustworthy online environment. These rules are intended to better protect consumers and companies and increase the transparency and accountability of online platforms. The ACM stresses the importance of complying with these rules and avoiding potential fines and other penalties for non-compliance.

2. *ACM warns against possible manipulation of the wholesale energy market.*

The ACM is warning market participants about possible manipulation in the energy market. The ACM has identified signals pointing to market manipulation in the form of spoofing. This can lead to higher prices for energy and ultimately adverse consequences for consumers and businesses. The ACM calls on market participants to comply with the rules and be transparent about their trading activities, noting that a fair and well-functioning wholesale energy market is essential for healthy competition. The ACM will continue to closely monitor the market and intervene if necessary to counter manipulation and safeguard the integrity of the market.

3. *ACM investigates a company regarding self-preferencing.*

The ACM has launched an investigation into an online platform due to reports that the platform favors itself and certain companies by way of self-preferencing. Several companies have complained that their offers are less visible, even if they offer the best price and/or quality. There are also indications that the platform favors its own offers or those of specific entrepreneurs and may use entrepreneurs' data to strengthen its own position. The ACM is investigating whether the platform is breaking the law and will hear out the company before taking any actions, such as fines or penalty payments. The ACM wants to ensure that digital markets function properly and is preparing to enforce future digital regulations, including the Digital Markets Act, the DSA, and the Platform-to-Business (P2B) regulation.

B. Dutch courts

Steel industry cartel must pay damages to German railroads.

Deutsche Bahn c.s. initiated a follow-on damages case against companies that supplied steel for the German rail network. According to the European Commission, these companies violated the cartel prohibition provision under Article 101 TFEU and were fined accordingly. According to the Dutch Court of Appeal, Deutsche Bahn provided sufficient evidence that they had purchased products incorporating steel from the cartel participants and that the price of this steel was influenced by the cartel. The companies were held liable for losses suffered by Deutsche Bahn.

Poland

Competition and Consumer Protection Office (UOKiK)

1. *Lafarge Cement's new acquisition in Poland conditionally cleared*.

Lafarge Cement, a key player in cement and concrete production, as well as stone and aggregate extraction, recently acquired some assets of Eurobud Chajewscy, including ready-mixed concrete plants in several locations in Poland.

The UOKiK President conducted an extensive investigation, confirming that concrete producers compete within a 25-kilometer radius on public roads, which is the area where the majority of sales occur. The analysis revealed potential competition concerns in Piła, because as a result of the acquisition Lafarge would own the two main concrete plants in that market, creating an uneven playing field.

The case ended with a remedy to preserve fair competition in the local concrete supply market.

The proposed commitment involves two alternative divestments:

a. Lafarge may choose to divest the ready-mixed concrete plant in Piła together with fixed assets and commodity equipment; or

b. Lafarge may relocate its plant within 25 km from Eurobud's existing plant in Piła (but not further then 25 km from Lafarge's other concrete plants in Piła) and then sell it.

A remedy buyer must be a UOKiK-approved independent entity that will guarantee the continued operation of the concrete plant.

2. *UOKiK imposes EUR 580,000 fine for alleged antitrust violation in solid fuel distribution market*.

UOKiK fined Atex Multi-trade Company, a major player in the import, distribution, and re-sale of hard coal, eco-powder, eco-material, coke, and wood pellets, nearly EUR 580,000 (PLN 2.5 million) for alleged antitrust violations.

During the UOKiK proceedings Atex claimed to operate through a network of associates engaged under agency agreements and expected to act as agents selling fuel commodities on behalf of Atex. Agents were bound to sell products at a fixed price and were not allowed to offer any discount—a limitation inherent in agency.

In certain circumstances, agency agreements may fall outside the scope of prohibition on anticompetitive agreements. However, the UOKiK investigation revealed a deviation in Atex's agreements from the expected characteristics of a genuine agency agreement. UOKiK found that the Atex's associates operated more like independent distributors, assuming business and financial risks associated with coal stock maintenance, insurance, and transportation costs. Ultimately, UOKiK treated these agents as separate entities who should have been able to control the pricing independently and for that reason their cooperation with Atex was deemed anticompetitive.

Atex may appeal the UOKiK decision to the Regional Court of Competition and Consumer Protection.

Italy

Italian Competition Authority (ICA)

1. *ICA investigates Poste Italiane.*

On Feb. 8, 2024, the ICA launched investigation proceedings against Poste Italiane regarding potential breaches of Italian antitrust law.

The action follows claims that Poste Italiane obstructed competitor access to its PostePay payment system, used to market and promote commercial offers in the electricity retail market. ICA suggests that Poste Italiane gave its subsidiary a significant competitive advantage, altering the competitive dynamics in a unique market context—characterized by the end of protected regimes in the supply of electricity and natural gas—where active operators have incentives to attract customers from such protected regimes.

ICA also has initiated proceedings to adopt potential interim measures to restore a level playing field.

Officials from the ICA carried out inspections at the premises of the companies involved.

2. *ICA fines a price-comparison platform EUR 1.48 million for unfair commercial practices.*

On Feb. 20, 2024, ICA fined price-comparison platform Supermoney S.p.A. EUR 1.48 million. The company owns the site of the same name, through which it carries out economic comparison activities relating to, among other things, electricity and gas supply services.

According to ICA, the company spread unsubstantiated claims on savings for electricity and gas supply without providing precise information on the relevant time frame, the calculation and, ultimately, how to obtain such savings. Furthermore, it did not specify that the intermediation activity, carried out through the comparison site in favor of its partners to conclude electricity and gas brokerage contracts, was remunerated and did not define a classification of the commercial offers specifying the criteria used.

Following ICA's preliminary investigation, Supermoney ended the contested conduct by adopting multiple measures to increase information transparency on the offer classification criteria, as well as clarifying that the company carries out commercial intermediation activities in favor of some operators in the sector. Nonetheless, given the importance of price-comparison services for consumers in the electricity and gas supply market and the profits Supermoney obtained though the allegedly unlawful conduct, ICA imposed a significant fine on the company.

The decision can be appealed before Lazio Regional Administrative Tribunal within 60 days.

European Union

European Commission

1. *European Commission publishes revised market definition notice.*

On Feb. 22, 2024, the European Commission published its revised notice on the definition of "relevant market." The revised notice is intended to enable a more uniform approach to competition issues. It is also expected to provide greater clarity on the delineation of markets and the identification of market power.

2. *First European Commission investigation by way of the Foreign Subsidies Regulation.*

The European Commission will examine whether Chinese state-owned train manufacturer CRRC Qingdao Sifang Locomotive, a subsidiary of CRRC Corporation, secured an undue advantage when bidding on a Bulgarian Government contract worth approx. € 610 million.

Greater China

China Supreme Court reverses controversial lower court decision finding refusing to license patents as illegal.

On Feb. 21, 2024, China's Supreme People's Court (SPC) published a final judgment overturning a lower court ruling that found Hitachi Metals had abusively used its market power by refusing to license patents to certain local manufacturers. SPC's reversal reflects its conclusion that Hitachi Metals retained no monopolizing power in the redefined market and thus exempts its act to refuse to license from the scrutiny under China's Anti-Monopoly Law (AML). Hitachi Metals was acquired by Bain Capital in 2022 and renamed Proterial; China's Anti-Monopoly Bureau cleared the acquisition in the same year.

1. *Case at the lower court.*

Hitachi Metals owned around 600 patents in major jurisdictions including 90 Chinese patents regarding production of sintered neodymium-iron-boron (sintered NdFeB), a rare-earth magnet with wide industrial applications from mobile phones to wind turbines. On Dec. 11, 2014, the plaintiff, a Ningbo-based rare earth producer, together with certain other Chinese producers sought to obtain license from Hitachi Metals to implement its sintered NdFeB patents. As the negotiation went nowhere, the plaintiff sued Hitachi Metals for violating AML at the local court in Ningbo, where the plaintiff was located.

Reviewing the case for more than seven years, the Ningbo Court rendered its decision April 23, 2021, supporting the plaintiff's claim that Hitachi Metals had abusively used its monopoly power by refusing to grant the patent license to the plaintiff. The Ningbo Court upheld the plaintiff's view that the relevant market at issue shall be that of the license of Hitachi Metals' global sintered NdFeB patents, leading to the conclusion that Hitachi Metals retained 100% of and thus monopolized the relevant market. Acknowledging that Hitachi Metals' patents are short of a standard-essential patent (SEP), as no technical standard had been worked out in the industry, the Ningbo Court nevertheless found a distinctive market of Hitachi Materials' non-SEP patents alone on the grounds that Hitachi Metals' patents constituted "essential facility" for production of sintered NdFeB products and that Hitachi Metals had repeatedly advertised that its patents were impossible to bypass commercially. The Ningbo Court's decision drew immediate controversy, as it was the first time that a Chinese court found a refusal to license non-SEP patents to be illegal monopolistic behavior. Hitachi Metals appealed the case to SPC.

2. *SPC's final judgment.*

In reversing the Ningbo Court's decision, SPC reviewed expert testimonies including economic analysis presented by both sides. Accordingly, SPC found that substitute technologies did exist based on the following facts: (i) the existence of over 200 manufacturers of sintered NdFeB in the China market, none of which Hitachi Metals has litigated to infringe its patents, (ii) the original product patents for NdFeB filed in the 1980s have already expired and become public knowledge, and Chinese competitors have successfully prosecuted a majority of patents relating to sintered NdFeB since 2016, and (iii) the export and sales of sintered NdFeB by Chinese manufacturers into the United States and other markets have continued over the years despite Hitachi Metals attempting 337 investigations. SPC thus rejected the

Ningbo Court's finding for a distinctive market comprising only Hitachi Metals' patents and concluded that the proper relevant market was that of all patent and non-patent technologies for production of sintered NdFeB.

SPC proceeded to find that Hitachi Metals retained no monopolizing power in the redefined technology market by examining shares of various manufacturers in the downstream product market and assessing difficulty over market entry. SPC noted that the combined shares of Hitachi Metals and its eight licensees in the China market did not exceed 20% and the share in the global market is even lower given the existence of international competitors. SPC further noted Hitachi Metals' patents have not precluded new entry into the market, citing an abundance of manufacturers in the Chinese market and the fact that the plaintiff's own production of sintered NdFeB has actually increased.

By reversing the lower court's decision, SPC ended the controversy that has caused fear that Chinese courts are attempting to use controversial doctrines under AML to impede proper use of commercially important patents.

Read previous editions of GT's Competition Currents Newsletter.

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