GT GreenbergTraurig

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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 announces confirmation of Ferguson and Holyoak as FTC commissioners*.

On March 8, FTC Chair Lina Khan announced that Andrew N. Ferguson and Melissa Holyoak had been confirmed to serve as FTC commissioners and that Commissioner Rebecca Kelly Slaughter had been confirmed to serve a second term. Commissioners Ferguson and Holyoak began their terms on March 25. With these confirmations, the FTC is now, after almost a year and a half, back to “full strength” with all five commissioner seats filled.

“Congratulations to Andrew Ferguson and Melissa Holyoak on their confirmations, and to Commissioner Slaughter on her re-confirmation,” Chair Khan said. “I look forward to welcoming Andrew and Melissa to the FTC as we work to vigorously protect Americans from unfair methods of competition and unfair and deceptive business practices.”

[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.

Notably, confirmation of the new Republican commissioners was delayed by a hold imposed by Sen. Josh Hawley (R-Mo.). Sen. Hawley provided his support after speaking with Ferguson, stating that “he particularly emphasized the dangers of concentration in the healthcare sector and how this concentration harms rural healthcare, drives up consumer prices, and degrades quality of care.”

Ferguson was most recently solicitor general of the Commonwealth of Virginia, and previously served as chief counsel to Senate Republican Leader Mitch McConnell. Holyoak was most recently solicitor general for Utah, where she managed, among other things, the antitrust and data privacy divisions. She has spent much of her 20 years of litigation practice focused on consumer protection. Slaughter first joined the Commission in May 2018 and served as its acting chair from January 2021 until June 2021. Previously, she served as chief counsel to Sen. Chuck Schumer of New York.

President Biden nominated Ferguson and Holyoak in July 2023. Ferguson’s term ends Sept. 25, 2030, and Holyoak’s term ends Sept. 25, 2025. Biden renominated Slaughter Feb. 13, 2023, and her term ends Sept. 25, 2029.

2. *Agency issues statement in support of termination of Choice Hotel’s proposed takeover of Wyndham Hotels & Resorts*.

On March 11, Choice Hotels International abandoned its nearly year-long effort to acquire Wyndham Hotels & Resorts in a hostile tender offer, after repeated rejections and failure to gain enough support from Wyndham’s shareholders. Among the reasons for Wyndham’s rejections were anticipated antitrust regulatory concerns, as the parties compete against one another in the franchising of budget hotel lodging.

In response, FTC Bureau of Competition Director Henry Liu issued the following statement:

“I am pleased that Choice Hotels International has abandoned its efforts to seize control of its rival Wyndham Hotels & Resorts. The FTC was closely scrutinizing Choice’s tender offer as well as its efforts to replace the Wyndham Board of Directors with its own hand-picked slate of nominees. Each of these actions posed serious competition questions and their abandonment is a win for consumers.

The FTC will continue to monitor this industry. We will not hesitate to enforce the antitrust laws to ensure that travelers have access to quality, affordable lodging and that hotel franchisors compete on the merits for franchisees.”

3. *FTC appoints Jay L. Himes as new administrative law judge*.

On March 12, the FTC announced the appointment of Jay L. Himes to serve as a second administrative law judge (ALJ), joining ALJ Judge D. Michael Chappell. ALJs are responsible for independent adjudicative fact-finding in the FTC’s administrative litigation and rulemaking proceedings. For the last 16 years, Judge Chappell has been the FTC’s sole ALJ. Himes was a former top antitrust lawyer with the New York Attorney General’s Office, with antitrust experience representing the Open Markets Institute.

“The commission is expanding the number of administrative law judges to help handle an increased workload stemming from FTC rulemakings and enforcement matters as well as reviews of final civil sanctions imposed by the Horseracing Integrity and Safety Authority, a private nonprofit that the FTC oversees,” the FTC said in the announcement.

4. *FTC issues infant formula supply disruptions report*.

On March 13, the FTC issued a report on market factors relevant to infant formula supply disruptions detailing aspects of the market "that rendered it vulnerable to supply disruptions in 2022." The report also outlines a number of considerations for policymakers.

The report follows a request for information launched in 2022 that solicited comments from members of the public, industry, trade groups, and academics.

Among those factors, the report notes that "infant formula market for several decades has been highly concentrated among relatively few manufacturers" and that, in particular, manufacturers for certain specialty infant formula products have long held high market share in their respective categories. In a separate statement, Commissioner Bedoya wrote: "[t]his report underscores the heightened dangers of market consolidation in critical sectors."

5. *FTC releases report on grocery supply chain disruptions*.

Similarly, on March 21, the FTC released its report on the causes behind grocery supply chain disruptions resulting from the COVID-19 pandemic, finding that "large market participants accelerated and distorted the negative effects associated with supply chain disruptions."

The report states that the pandemic "revealed that concentration can undermine market resiliency and create market fragility," noting that "[t[he retail grocery sector has undergone significant consolidation over time, with the top four firms accounting for over 30 percent of the sales in 2019, as compared to around 15 percent in 1990" and that "[m]uch of the consolidation is attributable to larger, national firms acquiring smaller regional chains."

As such, "limited competition can lead to bottlenecks that increase the impact of supply chain shocks on different businesses and consumers while simultaneously creating opportunities for further entrenchment."

Also according to the FTC report, "the pandemic also prompted some larger firms to consider buying manufacturing suppliers, which potentially threatens to make certain supply chains even more concentrated in the future." The FTC has become increasingly concerned about supply chain resiliency in the context of vertical mergers and acquisitions between customers and their suppliers in "critical sectors."

The report's findings follow review of materials received in response to orders the FTC issued in 2021 under Section 6(b) of the FTC Act to various market participants, as well as incorporate publicly available data on industry costs and revenues.

B. Department of Justice (DOJ) Civil Antitrust Division

Antitrust Division, along with FTC and the Department of Health and Human Services, launch inquiry on "Impact of Corporate Greed in Health Care."

On March 5, The FTC, DOJ, and HHS jointly launched a cross-government public inquiry into private-equity investments in health care, issuing a request for information (RFI) and, on the same day, hosted a virtual public workshop soliciting the views of many market participants, including health care practitioners, and discussing anticipating government actions to investigate the impact of private equity investment.

According to the press release, “Private equity firms and other corporate owners are increasingly involved in health care system transactions, and, at times, those transactions may lead to a maximizing of profits at the expense of quality care. The cross-government inquiry seeks to understand how certain health care market transactions may increase consolidation and generate profits for firms while threatening patients’ health, workers’ safety, quality of care, and affordable health care for patients and taxpayers.”

The RFI requests public comment on deals “conducted by health systems, private payers, private equity funds, and other alternative asset managers that involve health care providers, facilities, or ancillary products or services,” including transactions that would be below the HSR Act reporting thresholds. In this regard, the agency continues to probe serial M&A activity whereby a platform embarks on a strategy of growth focused on acquisitions of competitors for which individual deal values are below the HSR threshold.

FTC Chair Khan’s remarks make clear that the agency believes that private equity investment often leads to facilities “slash[ing] staffing and cut[ting] quality” and taking on unsustainable levels of debt through various financing means intended to boost profits in the short term and facilitate a quick exit in a later sale of the business. Through this inquiry, “the FTC will continue scrutinizing private equity roll-ups, strip-and-flip tactics, and other financial plays that can enrich executives but leave the American public worse off.”

C. U.S. Litigation

1. *TCS John Huxley America, Inc. et al v. Scientific Games Corp., et al.; In the US District Court for the Norther District of Illinois, Case No. 19 – 1846.*

On March 28, Judge Robert Blakey denied Scientific Games (SG)’s motion for summary judgment in part, saying makers of a competing product and its distributor showed sufficient evidence to suggest SG “literally cornered the relevant market on casino-grade automatic card shufflers in the United States,” as “virtually all sales of casino grade shufflers in the United States trace back to Defendants.” SG manufactures, sells, and leases automatic card shufflers for use in casino games. Plaintiffs manufacture a competing automatic card shuffler. This case is just one of several among the parties. Plaintiffs now claim SG’s 2008 and 2012 suits were sham litigation pursued to crush the competition. Plaintiffs also claim SG defrauded the patent office to secure patents improperly and then drive out market competitors.

According to plaintiffs, through the procurement of invalid patents and sham litigation, SG monopolized the automatic card shuffler market. In its summary judgment motion, SG argued that the plaintiffs failed to properly identify a relevant market and to support the claims with substantive evidence. The court found that plaintiffs provided sufficient evidence to suggest that SG has cornered the relevant market on casino-grade automatic card shufflers in the United States. The court also denied SG’s challenge to plaintiffs’ damages. According to the court, an antitrust plaintiff excluded from a market by anticompetitive activity is “entitled to recover as damages the difference between what it would have made in a hypothetical free market and what it actually made.” The court determined that the defendants could cross examine plaintiffs’ expert at trial to challenge the plaintiffs’ evidence and expert theory, but would not strike the plaintiffs’ damages model. The court granted SG’s motion with regard to plaintiffs’ lack of evidence to support a claim that SG had specific intent to defraud the patent and trademark office by failing to disclose certain prior art. But otherwise, the court allowed plaintiffs’ claims to proceed.

2. *Cavalleri et al v. [Luxury Retailer],[2] in the US District Court for the Norther District of Ca., Case No. 3:24-cv-01707.*

A luxury retailer is facing a lawsuit alleging illegal tying under both the Sherman Act and the Cartwright Act relating to the terms imposed over the purchase of its high-end handbags. According to the complaint, sales associates screen potential purchasers to determine whether they have sufficient purchase history of other brand products to allow them to qualify to purchase the bag. Prior qualifying purchases include shoes, scarves, belts, jewelry, and home goods. Sales associates are allegedly compensated based on commission, which encourages sales of ancillary, or tying, products because no commission is paid on the sale of the bag, or tied product, itself. According to the complaint, only consumers who are deemed to have purchased sufficient tying products are then considered worthy of purchasing the high-end and highly sought after handbag are shown a bag in a private room and given the opportunity to purchase that particular bag only. Plaintiffs claim that though they spent tens of thousands of dollars on ancillary products, they were denied the ability to purchase a bag. Plaintiffs seek to represent of class of similarly situated individuals.

3. *KPH Healthcare Services, Inc. v. ASR Group International, et al. U.S. District Court, Southern District of New York, 24-cv-01941.*

Several of the largest producers and sellers of granulated sugar in the United States, including Domino Foods Inc. and American Sugar Refining, face a class action lawsuit accusing them of conspiring to artificially inflate the price of sugar.

The antitrust suit, filed March 14 in U.S. District Court for the Southern District of New York, alleges that the sugar companies shared nonpublic information about sugar prices, sales, and demand in order to carry out a price-fixing scheme over the past several years. The plaintiffs allege that victims such as food and beverage manufacturers, retailers, and other direct purchasers of sugar paid unnecessarily high prices as a result of the improper sharing of competitively sensitive information such as prices, volume, sales figures, and other non-public information. Several follow-on lawsuits were filed a week later in Minnesota.

Mexico

Cofece proposes actions to allow Mexicans to buy better quality beef at lower prices.

The Federal Economic Competition (Cofece or Commission) published a study analyzing the conditions of competition and free ability to contract in the market for beef production, distribution, and marketing. The Commission recommended several actions to eliminate regulatory obstacles, modernize production, and encourage informed consumption so that, based on a more competitive market, Mexican families have access to higher quality meat at better prices.

The Commission proposed a series of key actions it claims will facilitate the participation of more beef producers, distributors, and marketers in order to increase supply and improve price and quality for consumers.

1. Reform the Sustainable Rural Development Law, the Livestock Organizations Law, and the Federal Animal Health Law; the National Council for Regulatory Improvement seeks to influence the regulations of 31 states to remove regulatory obstacles and eliminate permits for the movement of livestock and livestock products at the state level, since there are already federal

[2] Client terms and conditions require that we not disclose the name of the defendant.

permits. Eliminating this double regulation would result in a benefit of between 20 and 57 billion pesos per year for Mexicans.

2. Profeco, Federal Consumer Protection Agency (Procuraduría Federal del Consumidor) should implement outreach campaigns so that consumers and marketers recognize the quality and safety characteristics of meat, and so the product is handled appropriately. With better information, prices will be adjusted to reflect the different quality and households will be able to make better purchasing decisions.

3. Design strategies to improve technology and modernize municipal and non-TIF (Federal Inspection Type (TIF, in Spanish)) slaughterhouses, so they achieve certification equivalent to TIF. This will allow the entry of small-scale cattle ranchers and enable more slaughterhouses to process high quality and safe meat, allowing more people to have access to quality beef.

The Netherlands

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

Contractors fined for cartel agreements in tenders.

The Dutch competition authority (ACM) fined two Dutch construction companies (Den Ouden and Bloem Infra) for exchanging sensitive information during a tender for the construction of a schoolyard in Roermond, resulting in fewer competitive bids. Den Ouden confessed to the illegal agreement first and was exempted from a fine, while Bloem Infra cooperated with the investigation and received a penalty of €59,000. The case underscores the importance of fair competition in procurement processes, with the ACM encouraging companies to report illegal agreements to avoid penalties.

B. Dutch courts

Dutch Supreme Court rules on abuse of dominant position due to unequal rates.

The Dutch Supreme Court commented on a dispute between Buma/Stemra and ABMD and its members regarding the use of music licenses for commercial and private use. ABMD accused Buma/Stemra of abusing its power by applying unequal conditions for equivalent services, resulting in unfair competition. The Amsterdam Court of Appeal ruled that Buma/Stemra indeed abuses its dominant position. However, the Supreme Court stated the court did not analyze all relevant circumstances and referred the case to The Hague Court of Appeal for further investigation.

Poland

A. Polish Government Bill Aims to Adapt National Legal Framework to the EU's DSA

Although the DSA has direct effect in the EU member states (no need to transpose it to national provisions), each member state is obliged to ensure the DSA is effectively applied in its legal order by introducing appropriate national rules. The Polish government has recently published a draft bill (the Draft) aiming to adapt Polish law to the DSA's provisions.

1. *What is the Digital Services Act?*

The DSA entered into force Feb. 17, 2024. Its primary objective is to prevent illegal and harmful activities online and the spread of disinformation. The DSA defines the rules regarding the liability of the providers of intermediary services, including online platforms such as marketplaces, social networks, content-sharing platforms, app stores, and online travel and accommodation platforms. In addition, the DSA imposes several new obligations on such intermediaries, the scope of which depends on the nature of the services provided. The new obligations include providing relevant information in the terms and conditions on any restrictions imposed in relation to using the provider's services, transparency reporting, introducing notice and takedown mechanisms, applying measures against misuse and introducing internal complaint-handling systems allowing users to lodge complaints against the provider's decision to remove or suspend access to services, among other things.

The DSA provides for severe administrative fines for noncompliance. In general, failing to comply with DSA obligations may result in a fine of up to 6% of the annual worldwide turnover in the preceding financial year of the intermediary services provider concerned. Providing incorrect, incomplete or misleading information, failure to reply to a request or rectify incorrect, incomplete or misleading information and failure to submit to an inspection may result in a fine of up to 1% of the annual income or worldwide turnover in the preceding financial year of the intermediary services provider or person concerned.

2. *The draft bill in Poland*.

The Draft envisages that powers will be granted primarily to the President of the Electronic Communications Office (UKE), which will become the digital services coordinator, i.e., the entity responsible for all matters relating to supervising and enforcing the DSA in Poland. In addition, the President of the Office of Competition and Consumer Protection (UOKiK) is to be the competent authority with respect to the DSA's provisions applicable to providers of online platforms allowing consumers to conclude distance contracts with traders as well as other consumer protection matters stipulated in the DSA.

The Draft also stipulates, in particular, procedures regarding inspections within proceedings related to infringing DSA obligations as well as rules regarding certification by out-of-court dispute settlement bodies, granting the status of a trusted flagger (i.e., an entity whose notices should be prioritized by online platforms) or a vetted researcher (i.e., an entity enabled to request data from large online platforms and search engines to conduct research on systemic risk in the EU).

The Draft also includes detailed provisions regarding imposing and calculating administrative fines for non-compliance.

The Draft is currently being processed by the Council of Ministers and reviewed by various governmental and non-governmental bodies. The planned date for adoption of the Draft by the Council of Ministers is the second quarter of 2024, after which the Draft will pass to the Parliament.

B. Obstruction of an Antimonopoly Search – Fines Imposed on a Company and a General Partner

The UOKiK president recently imposed fines for obstructing a search conducted as part of proceedings launched in connection with UOKiK's suspicion that Stihl (a major manufacturer of motorized garden tools) was fixing the resale prices of its products with authorized dealers. UOKiK fined one of the dealers concerned and one of its general partners a total of approx. EUR 58,000 (PLN 250,000) of which nearly EUR 35,000 (PLN 150,000) was imposed on the dealer and approx. EUR 23,000 (PLN 100,000) on one of its general partners.

The obstruction of the search involved providing investigators with misleading information regarding which mobile phone was used for businesses purposes in the company, handing over a phone that was not used for business and belatedly handing over the correct phone. According to UOKiK, the delays in handing over the mobile phone used for business purposes hampered the investigation process. Therefore, the UOKiK president fined both the distributor and the general partner who obstructed UOKiK's activities.

The decision is not final and may be appealed before the Competition and Consumer Protection Court.

UOKiK is entitled to conduct unannounced inspections or searches at the premises of entrepreneurs. Searches give UOKiK far-reaching investigative powers but require prior court authorization and demonstrating a suspicion that the search may deliver evidence of anticompetitive practices. The maximum penalty for a company that obstructs a search or an inspection is 3% of its turnover in the preceding financial year. The penalty for an individual who obstructs a search is 50 times the average salary, i.e., currently approximately EUR 90,000 (approximately PLN 390,000).

The investigation into the alleged price-fixing of Stihl products is pending. Under Polish law, a company involved in competition-restricting practices may be fined up to 10% of its turnover in the preceding year. Moreover, fines may also be imposed on the entity exercising a decisive influence on the infringing party (e.g., its shareholder). At the same time, individual managers responsible for carrying out the collusion may face a penalty of up to PLN 2 million. Anticompetitive provisions are null and void. Entities harmed by an anticompetitive agreement may also seek damages in civil court.

Italy

Italian Competition Authority (ICA)

1. *ICA investigates Booking.com for alleged infringement of Article 102 TFEU*.

On March 22, 2024, the ICA started an investigation into Booking.com in order to assess an alleged abuse of a dominant position in the market for online hotel intermediation and booking services.

According to ICA, Booking gave hotels that adhered to its Preferred Partner Program several advantages in terms of visibility of their offer in search results, in exchange for higher commissions and the commitment to offer on Booking.com competitive prices, i.e., no higher than those the facilities apply on their own website or on the platforms of other online travel agencies (OTAs). Furthermore, according to ICA, when Booking.com notices that a hotel offers better prices on other online sites, Booking reserves the right to unilaterally apply a rebate to align its offer with the best offer available online.

In ICA's view, such conduct intentionally hinders effective competition in the market, at least nationally, for online hotel intermediation and booking services, to the detriment of other OTAs and with negative effects on accommodation facilities and, ultimately, on consumers in terms of higher prices and less choice.

2. *ICA fines Verisure Italy for unfair trade conduct*.

On March 26, 2024, ICA fined Verisure Italy S.r.l., a supplier of alarm systems and related services, 4.25 million euro for unfair trade conduct related to misleading promotional activities from 2021 to 30 October 2023 through various communication channels (television commercials, billboards, website). Specifically, it omitted or failed to highlight that, by signing the contract, the Verisure alarm system and devices were not actually purchased but were, instead, only received on a free loan.

According to ICA, from 2022 in the phase of withdrawal from the contract, the company adopted aggressive behavior with a series of actions designed to hinder the termination of the relationship, such as failing to accept or delaying the acceptance of requests for withdrawal, continuing to send invoices in the months following the termination of the service and delaying the de-installation of or failing to de-install the alarm systems.

In addition, the ICA alleges that Verisure began to provide its services during the so-called "cooling-off period" without an express request from the customers. Finally, the provisions – included in the contractual conditions from 2019 to 30 October 2023 – relating to the competent court to which the consumer should turn in the event of a dispute with the company, was considered ambiguous by ICA. Verisure may appeal the decision within 60 days before the Italian administrative Courts.

European Union

A. European Commission

1. *Booking.com notifies European Commission of potential gatekeeper status*.

Booking.com informed the European Commission (EC) of its potential status as a gatekeeper under the Digital Market Act (DMA). The EU defines a "gatekeeper" as a large digital platform providing "core" services like app stores, search engines, and web browsers. The EC has until May 13 to determine if Booking.com meets the criteria. If designated a gatekeeper, Booking.com would have six months to comply with new obligations aimed at regulating powerful online platforms. These obligations include allowing accommodation providers to negotiate on fairer terms and adhering to data collection restrictions and interoperability requirements, enabling easy transfer of listings and customer information to rival platforms. Companies qualify as gatekeepers if their annual turnover within the European Union exceeds €7.5 billion over the previous three years or if they have a market valuation of at least €75 billion, among other criteria.

2. *EC names gatekeepers required to follow DMA*.

As of March 7, 2024, six designated gatekeepers must comply with all obligations outlined in the DMA, which aims to promote fair competition and transparency in digital markets within the European Union. The DMA introduces new rules for key platform services and grants additional rights to both European businesses and end users.

3. *EC launches antitrust probe into Zoetis regarding new dog pain medicine*.

The EC launched a formal antitrust investigation into Zoetis, an animal health company, to examine whether it violated EU competition rules by obstructing the market entry of a competing novel biologic medicine for treating chronic pain in dogs. Zoetis introduced Librela, the first monoclonal antibody medicine approved in Europe for osteoarthritis pain in dogs, offering a new pain relief option, especially for older dogs. While developing Librela, Zoetis acquired another late-stage pipeline product for the same indication but opted not to allow its commercialization by a third party in the EEA, despite that party having exclusive commercialization rights in the EEA. The EC suspects Zoetis engaged in exclusionary behavior in violation of article 102 TFEU (abuse of a dominant position) by terminating the development of this alternative pipeline product. This investigation marks the EC's first formal probe into the exclusionary termination of a pipeline product intended for commercialization by a third party.

B. European Decisions

1. *EC raises concerns over Lufthansa's proposed stake acquisition in ITA Airways*.

The EC has raised competition concerns regarding Deutsche Lufthansa AG (Lufthansa) and the Italian Ministry of Economy and Finance (MEF)'s proposed acquisition of joint control of ITA Airways, as the acquisition might restrict competition on certain routes in Italy's passenger air transport market. Lufthansa and ITA operate extensive networks, and the EC is concerned this merger could reduce competition on short-haul routes to central Europe and long-haul routes to the United States, Canada, and Japan. Additionally, the merger could strengthen ITA's dominance at Milan-Linate airport, making it difficult for rivals to operate there. The companies have until April 26, 2024, to propose solutions. The EC aims to make a final decision by June 6, 2024, which may result in remedies from Lufthansa and MEF.

2. *EC issues statement of objections for providing false information in merger probe*.

The EC accused Kingspan of providing inaccurate, incomplete, and misleading information during its investigation into Kingspan's proposed acquisition of Trimo under the EU Merger Regulation. Kingspan notified the EC of its intention to acquire Trimo in March 2021, but the EC opened an investigation in April 2021 due to concerns about potential negative effects on competition in certain building materials markets. Kingspan and Trimo abandoned the transaction in 2022. Later in 2022, the EC initiated an investigation to determine whether Kingspan deliberately or negligently supplied incorrect, incomplete, and/or misleading information during the merger investigation. The EC alleges that Kingspan provided inaccurate information regarding its internal organization and key factors affecting competition between Kingspan and Trimo, emphasizing that parties involved in merger procedures have a duty to provide accurate and complete information. Failure to do so may result in fines of up to 1% of the company's annual worldwide turnover for each instance of incorrect, incomplete, or misleading information.

3. *Amsterdam Court of Appeal seeks ECJ guidance on cross-border damages claims against power cable cartelists*.

The Amsterdam Court of Appeal has referred several questions to the European Court of Justice (ECJ) in connection with a dispute regarding a question of law between the parties to the underlying litigation. The applicants are government agencies from different countries. The defendants are various companies in the power cable industry. The questions relate to the interpretation of the Brussels I bis Regulation regarding jurisdiction over claims of alleged cartel behavior. Among other things, the Amsterdam Court of Appeal asked the ECJ whether there is a close connection between claims against a main defendant and claims against co-defendants, and whether the Brussels I bis Regulation directly designates the relative competent court. The questions concern various aspects of jurisdiction and damage claims in cartel cases under EU law.

Greater China

Chinese pharmaceutical distributor fined 4% of its yearly sales for excessive pricing.

On March 20, 2024, the State Administration for Market Regulation of China (SAMR) published the complete decision rendered by Shanghai Municipal Administration for Market Regulation (SHAMR) in November 2023 against Jiangxi Xiangyu Medicine Co., Ltd. (Xiangyu Medicine), a distributor of iodinated oil, for having abused its monopolistic power through charging the downstream customer excessive prices from 2016 through 2019. The investigation was launched in November 2020 and closed after three years. As a result, Xiangyu Medicine was fined RMB 1.56 million, which equals 4% of its 2019 sales.

1. *Decision over relevant market.*

In this decision, SHAMR found the ingredient iodinated oil constitutes the relevant market for the case given that on the demand side, iodinated oil is irreplaceable for downstream manufacturers producing iodinated oil injections used for medical imaging in cancer treatment. On the supply side, pharmaceutical manufacturers face substantial difficulties switching to producing iodinated oil in the short term given how long it takes to obtain regulatory approval and the unique and complex production process. SMAMR further determined that China is the relevant geographic product market given the regulatory approval required for foreign-manufactured iodinated oil and the fact that no such approval was ever granted.

2. *Xiangyu Medicine's monopolistic status.*

SHAMR found that Xiangyu Medicine had a monopolistic status in the relevant market from June 2016 to March 2020 (Relevant Period). SHAMR noted there were only three licensed manufacturers in China capable of manufacturing ingredient-calibre iodinated oil during the Relevant Period: two were affiliates in Shanghai and the other was based in Wuhan. Xiangyu Medicine was found to have entered into a cooperation agreement in December 2015 with the Shanghai-based manufacturer pursuant to which almost all iodinated oil manufactured by the Shanghai manufacturer during the Relevant Period were supplied to Xiangyu Medicine. Noting that the Wuhan-based manufacturer was in effect not manufacturing any iodinated oil during the Relevant Period, Xiangyu Medicine was held to be the sole supplier of the ingredient in China, thus monopolizing the relevant market. SHAMR noted the difficulties for the downstream customer to resist the price charged by Xiangyu Medicine given its monopolistic status, and the absence of any new entrant into the market and the inactivity of the alternative competitor in Wuhan during the Relevant Period without elaborating on the causes of such absences.

3. *Excessive pricing by Xiangyu Medicine.*

SMAMR found that the prices charged by Xiangyu Medicine to its downstream customer during the Relevant Period was RMB 4593 per kilo in 2016, increased to RMB 12563 per kilo in 2017, and stayed at RMB 13500 ~ 14500 per kilo during 2018 through 2020, which were all "excessive" from the following three perspectives:

a) SMAMR cited certain comparable sales prices predating the Relevant Period ranging around RMB 1100 per kilo including those charged by an alternative supplier of iodinated oil in 2014 to 2015 to the same downstream customer, and as compared to the lowest price charged by Xiangyu Medicine (RMB 4593 per kilo) during the Relevant Period, it represented a price hike of 310%;

b) SMARM further ran a price-cost comparison noting that Jiangxi Xiangyu's procurement price from the Shanghai-based manufacturer ranged from RMB 700 per kilo to RMB 1127 per kilo, representing an effective 1190% raise as compared to the peak price charged by Jiangxi Xiangyu to its customer; and

c) SMARM particularly noted the price raise during the Relevant Period and concluded that the raise amounted to 188% which was disproportionately excessive as compared to the corresponding raise in the cost of procurement (which amounted to approximately 55.2%).

SMAMR concluded that the "excessive" pricing was unjustified as it was causing the price raises of the downstream injection products during the Relevant Period, and since the injection products were catalogued as one of China's basic drugs paid by the national medical insurance, the excessive pricing was damaging interests of both patients and the national medical insurance fund. As a consequence, SMAMR levied a penalty against Xiangyu Medicine equaling 4% of its total 2019 sales of iodinated oil.

This penalty against Xiangyu Medicine came after a series of similar enforcement actions taken by SAMR to curb high pricing in the pharmaceutical industry. The analysis as detailed above represents SAMR and its local counterparts' typical reasoning leading to penalties, including that (1) the "excessiveness" in pricing is proven by comparison to both comparable sales prices in the market (by the monopolist itself or other competitors under similar conditions) and manufacturing/procurement cost of the monopolist, plus a comparison between the raise in pricing to the corresponding increase in manufacturing/procurement cost, and (2) such excessive pricing if found is likely to be treated as unjustified under the Anti-Monopoly Law if the raise in pricing in end product is noticeable, i.e., with damage to the end consumer.

Japan

A. JFTC Approves Commitment Plan regarding Matching Service

The Japan Fair Trade Commission (JFTC) approved IBJ, Inc.'s Commitment Plan. IBJ is a firm operating marriage agency networks (IBJ Networks) and marriage agencies called IBJ Members.

In general, firms that operate marriage agencies that belong to the marriage agency network (Member Firms) register member information in a system (Matchmaking System) provided by the marriage agency networks for sharing member information. Using the Matchmaking System, they conduct searches for matchmaking partners across different marriage agencies, review applications for matchmaking, and monitor progress after matchmaking. Also, members can use the Matchmaking System to search for matchmaking partners.

In addition to providing the Matchmaking System to the Member Firms of the IBJ Network, IBJ operates a web page called "Area-Page" to attract customers for the Member Firms and conduct training sessions for supporting the Member Firms.

Firms operating marriage agencies can arrange more matches by joining multiple marriage agency networks and joining networks where Member Firms with many members are affiliated.

IBJ had engaged in the following actions for Member Firms of the IBJ Network who also belong to other networks (Multi Affiliate Agencies):

1. IBJ suggested the Multi Affiliate Agencies limit matchmaking between the members of the marriage agency they operate and the members of IBJ Members. They requested that they withdraw from other networks and enforced matchmaking restrictions for Multi Affiliate Agencies who did not withdraw, thus prompting them to withdraw from other networks.

2. For Multi Affiliate Agencies who post their information on the Area-Page, IBJ informed them of their policy not to post the information of the Multi Affiliate Agencies on the Area-Page. They then deleted the information of the Multi Affiliate Agencies who did not withdraw from the other networks, thereby prompting them to withdraw from other networks.

JFTC determined that 1 and 2 above could be problematic under the Antimonopoly Act (Act, Unfair Trade Practices Article 12 [Trade with Restrictive Conditions]).

JFTC considered that the restrictions on matchmaking that IBJ had been engaged in reduced the opportunities for matchmaking for members of Multi Affiliate Agencies as well as the quality of services that marriage agencies provided. In addition, it considered that the deletion of information from an Area-Page reduced the opportunities for Multi Affiliate Agencies to be selected from those who intend to be members of the marriage agencies.

JFTC believed that such conduct may result in the exclusion of firms operating marriage agencies from trading with firms operating marriage agencies, or in the reduction of opportunities for trading between these firms operating marriage agency networks and those operating marriage agencies. In response, IBJ submitted a Commitment Plan. When this Commitment Plan is approved, it has the effect of no longer being questioned for issues under the Act.

An overview of the Commitment Plan, as approved by JFTC, is as follows:

1. Ceasing the suspected violating acts;

2. Compiling action guidelines for compliance with the Act as well as disseminating these guidelines to its executives and employees; and

3. Periodic training for executives and employees and periodic supervision by legal department for compliance with the Act.

B. JFTC Investigates and Reports on Competitive Environment and Institutional Challenges in the Wholesale Electricity Market.

The Japanese government has declared its goal of achieving "carbon neutrality by 2050." JFTC aims to encourage consumers to choose power companies from a wider range of options at lower prices through the revitalization of the electricity market and a sustainable decarbonized society.

As a part of these goals, JFTC investigated competition in the wholesale electricity market, particularly direct transactions between power generators and retailers (referred to as bilateral transactions).

Under the previous Japanese electricity market, 10 companies (known as former general electricity power companies) had a monopoly on power generation, retailing, and transmission in each region. However, deregulation has spurred market liberalization, leading to the emergence of new entrant retailers.

Examining the current market, the 10 former general electricity power companies hold a 70% market share in the power generation sector, covering 50% of the total demand from new entrant retailers. Therefore, it is essential for the new entrant retailers to secure fair trade opportunities with the former general electricity power companies.

JFTC reported that active bilateral transactions between the former power generation companies and new entrant retailers are crucial for market activation. They also recommended the need to extend the contract period for bilateral transactions and rectify area restriction articles to achieve those goals.

Read previous editions of GT's Competition Currents Newsletter.

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