GT GreenbergTraurig

# GT Newsletter | Competition Currents | August 2022

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

## In This Issue:



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## United States

### A. Federal Trade Commission (FTC)

1. *FTC approves final order requiring Prince International Corp. and Ferro Corp. to divest three facilities amid concerns deal would increase concentration in North American market for porcelain enamel frit.*

On July 5, 2022, at the conclusion of the public comment period, the FTC announced its approval of a final order allowing Prince International Corp., whose parent company is American Securities Partners VII, L.P. (APS), to acquire Ferro Corp., with divestitures. The FTC concluded Prince and Ferro were the two largest enamel frit producers in North America, and that the transaction as originally structured would likely have led to price increases and competitor coordination. As discussed in the May 2022 issue of Competition Currents, per the final order, Prince and Ferro must divest three facilities to KPS Capital Partners, LP. Further, the final order requires APS and KPS to obtain prior FTC approval in future transactions involving these products and markets.

2. *FTC marks one-year anniversary of government-wide initiative to promote competition in American economy*.

On July 11, 2022, the FTC recognized the first anniversary of President Biden's Executive Order on Promoting Competition in the American Economy. *See* July 2021 GT Alert. To implement the Executive Order over the past year, the FTC has worked with various federal agencies to "bolster competition that is hobbled by consolidation, concentration, and other roadblocks, resulting in higher prices, lower wages, declining entrepreneurship, growing inequality, and a less vibrant democracy." The FTC's review of its Merger Guidelines is part of this process, as well as other merger enforcement actions and investigations into private equity roll-ups, reinstitution of restrictions on future acquisitions by firms that proposed anticompetitive deals, and inquiries into the competitive landscape of various industries.

3. *FTC approves final order preserving competition for development and marketing of steroid injectable drug*.

As discussed in the May 2022 issue of Competition Currents, on July 14, 2022, after the conclusion of the public comment period, the FTC announced its approval of a final order settling the complaint it filed in April 2022 relating to Hikma Pharmaceuticals PLC's acquisition of Custopharm, Inc. Per the final order, Custopharm's parent company must retain and transfer Custopharm's corticosteroid drug triamcinolone acetonide (TCA) assets to another of its subsidiaries, Long Grove Pharmaceuticals, LLC. Further, the final order requires Long Grove to maintain the future competitive viability of the retained TCA assets and requires Hikma to seek FTC approval for further TCA-related acquisitions. The FTC had alleged the deal as originally structured likely would mean Hikma would stop developing its own product, thereby harming competition in the TCA market.

**B. Department of Justice (DOJ)**

1. *Justice Department celebrates one-year anniversary of executive order on competition*.

Like the FTC, on July 11, 2022, DOJ recognized the one-year anniversary of President Biden's Executive Order on Promoting Competition in the American Economy. The DOJ spent the past year working on interagency competition policy initiatives in response to "excessive market concentration threaten[ing] basic economic liberties [and] democratic accountability." Specifically, DOJ worked on competition-related efforts with other federal agencies including the Department of Agriculture, Federal Maritime Commission, Department of Labor, National Labor Relations Board, and Surface Transportation Board; worked with the FTC to revise their Merger Review Guidelines; and from the 2019 policy statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments.

2. *Justice Department and National Labor Relations Board announce partnership to protect workers*.

On July 26, 2022, the DOJ and the National Labor Relations Board (NLRB) executed a memorandum of understanding (MOU) memorializing their plans to work together to "better protect and maintain competitive labor markets and to ensure that workers are able to freely exercise their rights under the labor laws" through the labor and antitrust laws under NLRB and DOJ jurisdiction, respectively. The DOJ and NLRB aim to participate in more coordination, information sharing, and joint trainings, with the goal of promoting competitive labor markets and protecting employees from collusive or anticompetitive employment practices, including interference with the right to organize. As noted above, this partnership also meets the goals of the President's Executive Order on Promoting Competition in the American Economy.

3. *Federal contractor pleads guilty to rigging bids on public military contracts in Texas and Michigan from approximately May 2013 through April 2018*.

On July 13, 2022, federal contractor John "Mark" Leveritt pleaded guilty in the Eastern District of Texas to conspiring with others to give the false impression of competition in seven contracting bids, thereby securing government payments in excess of $17.5 million. The defendant also admitted to falsely representing himself to be an employee of one business in order to obtain government contacts set aside for certain qualifying businesses, to staffing the contract work with businesses not disclosed to the government, and to providing government employees with meals, trips, and sports tickets. The agreement involved a guilty plea of Sherman Act violations and a maximum sentence of 10 years in prison and a $1 million fine.

**C. U.S. Litigation**

1. *Marion Healthcare, LLC v. S. Ill. Hosp. Servs.*, No. 20-1581, 2022 U.S. App. LEXIS 19609 (7th Cir. July 15, 2022).

On July 15, 2022, the Seventh Circuit affirmed summary judgment dismissing an Illinois medical clinic's claim that a regional hospital system utilized its "preferred provider" status with Blue Cross Blue Shield to monopolize medical care in the region. The medical clinic alleged that as a result of lower out-of-pocket costs (in the form of lower deductibles) to patients if they used a preferred provider—like the hospital system—patients could not or would not use smaller regional clinics, thus allowing the larger hospital system to drive out competition. The Seventh Circuit rejected this claim, noting that patients still had the option to use regional clinics and simply pay a higher deductible, resulting in the clinics still receiving payment for services. Similarly, the court held that the clinic itself could have become a preferred provider with Blue Cross Blue Shield, thereby eliminating the hospital system's alleged competitive advantage.

2. *In re Packaged Seafood Prod. Antitrust Litigation*, No. 15-MD-2670, 2022 WL 2820740 (S.D. Cal. July 19, 2022).

On July 19, 2022, U.S. District Judge Dana Sabraw denied StarKist Co.'s motion for partial summary judgment on a sprawling, multi-year lawsuit relating to alleged price-fixing of canned tuna. StarKist executives previously had entered a plea agreement with the DOJ, whereby they pleaded guilty to price-fixing their StarKist-branded tuna. However, StarKist also sold canned tuna directly to grocers and other purchasers who marketed the tuna under their own private label.

StarKist moved for partial summary judgment as to this "private label market," claiming nothing in its prior plea agreement or the evidence showed that price-fixing for StarKist-branded products affected the price it charged for private label tuna. Judge Sabraw denied this motion, holding there was evidence StarKist "understood that prices for their branded products were linked to the prices of their private label products" such that price-fixing for one market "would infect other aspects of" StarKist's business. Thus, the court found, even assuming branded products and private-label products constituted two separate markets, a jury could determine whether both markets were linked in the same conspiracy.

## The Netherlands

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

1. *ACM speaks out against lowered turnover thresholds for health care concentrations*.

The Dutch National Competition Authority (ACM) expressed its disapproval of the abolishment of lowered merger control thresholds for health care transactions, stating its concern that the health care sector is creating overly large companies at the expense of accessibility, affordability, and quality of health care in the Netherlands.

Currently, the merger notification thresholds are set at a combined worldwide turnover of EUR 55 million and an individual turnover in the Netherlands of EUR 10 million per undertaking. The Dutch minister of Health, Welfare and Sport's new plans would result in these thresholds being raised to a standard threshold in the Netherlands, i.e., combined global turnover of EUR 150 million and an individual turnover of EUR 30 million in the Netherlands per undertaking. According to the ACM, these higher thresholds risk the emergence of health care organizations with an overly dominant position in the Dutch health care sector.

The minister has nevertheless decided to raise the concentration thresholds. The decision is intended to make the Netherlands more attractive to private equity investors and create more cooperation within the health care.

### B. Dutch Courts

1. *CBb upholds ACM's conditional approval of Sanoma/Iddink merger*.

The Dutch Trade and Industry Appeals Tribunal (CBb) upheld European learning company Sanoma Learning's acquisition of book distributor and publisher Iddink and its online administration platform, Magister, subject to conditions. The ACM conditionally approved the acquisition in 2019.

As part of the remedy package, post-transaction Sanoma will have to open digital platform Magister to other publishers on fair, reasonable, and non-discriminatory terms. The conditions must encourage innovation and maintain a level playing field for publishers. Noordhoff, another educational publisher, had argued in the appeal proceedings that the ACM did not appreciate that Malmberg, a subsidiary of Sanoma and an educational publisher as well, would have access to market-sensitive information about Noordhoff through the Magister platform. According to the CBb, the ACM rightly determined it unlikely that Sanoma and Iddink have the incentive to block competitors by only offering Malmberg learning materials on the Magister platform.

2. *Rotterdam District Court upholds ACM's EUR 12.5 million fines in cold storage and freezing warehouse sector*.

In 2015, the ACM fined Samskip EUR 901,000 for violating the cartel prohibition provision of Article 6 (1) Dutch Competition Act and/or Article 101 of the Treaty on the Functioning of the European Union (TFEU) by coordinating tariffs and/or exchanging competitively sensitive information in the field of fish storage in cold stores.

Samskip received this fine for a former subsidiary that stored fish in the IJmuiden region. The Rotterdam District Court stated that the former subsidiary and Samskip formed an economic unit and therefore

Samskip is liable as a parent company for its subsidiary's violation. The fine is part of a series of fines totaling EUR 12.5 million for anti-competitive agreements between various companies in the cold-storage and freezing warehouse sector in the Netherlands.

The Rotterdam District Court ruled that the fines were correctly imposed and that there was in fact a violation of the cartel prohibition. The EUR 901,000 fine was deemed appropriate in view of the severity of the infringement. The judgment is subject to appeal.

3. *Court of Appeal of 's-Hertogenbosch reinstates existing European Court of Justice (ECJ) case law as regards exclusivity agreements and restriction of competition*.

The Court of Appeal of 's-Hertogenbosch confirmed that an exclusivity agreement is not a restriction by object but may appreciably restrict competition in the relevant market. In such cases, it is necessary to examine to what extent a contract, together with other similar agreements, affects the ability of competitors to enter the market or increase their market share.

This aligns with existing ECJ case law, which states that exclusive purchasing clauses do not have the object of restricting competition and therefore do not fall under cartel prohibition provision of Article 6(1) Dutch Competition Act (and/or Article 101(1) TFEU). In the context of an action for voidability pursuant to Article 6 (2) of the Dutch Competition Act (and/or Article 101(3) TFEU), this type of clause must therefore be examined for its actual effects on the proper functioning of competition on – in this case – the Dutch market (or part thereof).

4. *Rotterdam District Court upholds ACM finding that Bronner criteria were not satisfied in the case of an abuse complaint by a foundation providing .nl domain name monitoring services*.

The Foundation for Internet Domain Registration in the Netherlands (SIDN) is charged with the exclusive management of Dutch .nl domain names. As part of its management duties, SIDN maintains a database of all registered .nl domain names, the so-called .nl zone file. That file is subject to change. In addition, SIDN offers domain monitoring services, where it provides trademark owners with information about possible infringements of their trademarks by identifying similar domain names. Dataprovider also offers domain monitoring services. According to Dataprovider, access to the most up-to-date .nl zone file available to SIDN is essential for the provision of these services. However, SIDN refused Dataprovider access to this zone file. Dataprovider then submitted a request for enforcement to the ACM, claiming the refusal to supply constituted an abuse of a dominant position. The ACM applied the criteria developed by the Court of Justice in its judgment in Case C-7/97, Oscar Bronner ( ECLI:EU:C:1998:569 ) and found in its decision that two of the three cumulative Bronner criteria were not met. More specifically, according to the ACM, access to the .nl zonefile is not indispensable for Dataprovider to offer its domain monitoring services. At the moment, Dataprovider uses crawling, whereby it searches all .nl websites itself. In addition, the refusal to supply is unlikely to eliminate effective competition in the market for domain monitoring services, according to the ACM. As the Bronner criteria have not been met, the ACM found no abuse of an economic dominant position. Dataprovider appealed the ACM's final decision.

On appeal, the District Court ruled the ACM was right not to have to investigate an alleged abuse of a dominant position because the court also was convinced that two of the three Bronner criteria were not met. The court also found that access to the .nl zone file was not necessary for the claimant (and other SIDN competitors) to conduct its business. The District Court upheld the ACM's decision in District Court Rotterdam 7 July 2022, Dataprovider B.V./ACM c.s., ECLI:NL:RBROT:2022:5481.

## United Kingdom

### A. March 2022 UK Competition and Markets Authority (CMA) Report

*On 21 July 2022, the UK Competition and Markets Authority (CMA) published its annual report for the year ended March 31, 2022.*

- The report highlights penalties of £404.1 million the CMA imposed on the parties to anti-competitive arrangements in four cases affecting the supply of pharmaceuticals to the UK National Health Service—the highest penalty level imposed since the UK Competition Act 1998 came into force. CMA opened four new cases in the digital sector, a key focus of future CMA activity, in particular through its Digital Markets Unit, which it established in April 2021 in preparation for proposed legislation, still to be enacted, introducing a new pro-competitive regime for digital markets.
- In the area of merger control, the CMA reviewed a total of 827 M&A transactions during the year, an increase from 600 in the previous year. Of the 60 formal phase 1 investigations the CMA opened, it cleared 34 transactions unconditionally, accepted remedies in six cases, and referred 10 cases to a phase 2 investigation. Phase 2 investigations take several months, so not all of the 10 cases were decided during the year. Of the eight phase 2 investigations that were concluded, three transactions were blocked, two were cleared after remedies were agreed, two were cleared unconditionally, and one transaction was abandoned.
- The report highlighted other activities including CMA recommendations to improve the provision of children's social care, following a market study indicating that children were not consistently able to access care and accommodations to meet their needs, and that the largest providers of placements were not only making higher profits and charging higher prices than would be the case in an effectively functioning market but also carrying high levels of debt, creating a risk of disruption to placements in the event of disorderly failure. In addition, the CMA investigated suspected breaches of consumer protection laws in the leasehold housing market and accepted undertakings from a number of freeholders to remove clauses in leases that provided for ground rents to double every 10-15 years and repay homeowners affected by those clauses.

### B. UK Merger Control

1. *Overheard Catenary Systems*.

The CMA announced July 19, 2022, its intention to refer Bouygues' proposed acquisition of Equans SAS to a phase 2 investigation unless the parties address its concerns by offering suitable undertakings in lieu of a reference. CMA's concerns are that the parties are close competitors in the supply of high-speed overhead electric cables for trains and that they are two of a very limited number of firms currently bidding for a contract to install overhead power cables for the UK High Speed 2 (HS2) rail project. Therefore, the CMA is concerned the merger could soften competition for the remainder of the HS2 tender process.

2. *Chemical admixtures*.

Sika AG's proposed acquisition of MBCC Group also may be referred to an in-depth phase 2 investigation, according to a CMA announcement July 27, 2022, unless the parties submit proposals to address the CMA's concerns within five working days. The CMA is concerned the parties are two of a small number of competitors in the supply of construction chemicals, the merged business would account for over 50% of

the supply of chemical admixtures in the UK, and the merger could result in less choice, higher costs, and reduced innovation for customers.

3. *Engineered foams*.

On July 18, 2022, the CMA referred Carpenter Co.'s proposed acquisition of Recticel NV/SA's engineered foams business for an in-depth investigation, on the basis that this merger of two of only three foam producers with plants in the UK would result in a reduction in competition and increased prices for manufacturers of products using foam.

4. *Ice machines*.

The CMA has published its decision of July 11, 2022, to accept undertakings in lieu of a reference to a phase 2 investigation of Ali Holding's proposed acquisition of Welbilt, a supplier of food service equipment. Following a phase 1 investigation, the CMA found the merger would give rise to a substantial lessening of competition in the UK supply of ice machines. The undertakings involve the divestment of Welbilt's global ice machine business, including all core assets, to Pentair plc.

### C. UK Market Studies & Investigations

1. *Road Fuel*.

The CMA announced July 8, 2022, that it had launched an in-depth study of the UK market for road fuel. The study was prompted by an urgent June 2022 review, which gave rise to concerns about the increasing gap between the price of crude oil when it enters oil refineries and the wholesale price when it leaves oil refineries as petrol or diesel. The CMA found that this gap—the refining spread— increased from £0.10 to nearly £0.35 in the last year, while the gap between the wholesale price and the price to consumers —the retailer spread—remained relatively stable at £0.10. CMA also found that the cut in fuel duty, which the UK government made to mitigate the impact on consumers of substantial rises in fuel prices, had in general been passed on to consumers. The CMA will now use its compulsory information-gathering powers to review the market in more detail, to understand the reasons for the high refining spreads and other features of the market that include long-term wholesale supply arrangements and differences in retail pricing between supermarkets and other suppliers and between rural and urban areas. The CMA will decide by Jan. 7, 2023, whether to make a reference to a full market investigation, and will issue its final market study report by July 7, 2023.

2. *Music Streaming*.

Following a market study commenced in January 2022, the CMA published a proposal not to refer the market for music streaming in the UK to an in-depth market investigation. The market study was prompted by concerns that the market was not operating in the interests of consumers and that competition might not be working well. The CMA considered all aspects of the market, took evidence from a wide variety of contributors, and concluded that the market is delivering good outcomes for consumers, with over 138 billion music streams in the UK in 2021 offering a wide choice of music available to listeners at monthly subscription fees, that have fallen in real terms. The CMA also found that streaming provides opportunities for older songs to be revived and find new audiences, that digitization makes it easier for artists to record and share music and find new audiences, and that the major record labels play a key role in the recorded music sector.

### D. Antitrust Enforcement

1. *Vertical agreements*.

On July 12, 2022, CMA published final guidance on the application of the new UK block exemption for vertical agreements that came into force June 1, 2022.

2. *Pharmaceutical pricing*.

The CMA's July 21, 2022, decision penalized Pfizer and Flynn Pharma a total of £70 million for abusing their market dominance by charging the UK National Health Service excessive prices for the supply of phenytoin, an epilepsy drug. This is the second penalty decision in this case; the 2016 decision was appealed.

3. *Production and broadcasting of Sports Content*.

On July 12, 2022, the CMA opened an investigation into anti-competitive arrangements relating to the purchase of freelance services supporting the production and broadcasting of sports content in the UK. The information-gathering phase of the investigation is due to be completed in January 2023.

### E. Antitrust Damages Litigation

On July 26, 2022, the UK Competition Appeal Tribunal (CAT) granted permission for a collective damages action against a rail operator to proceed on an opt-out basis. The action has been brought on behalf of rail passengers against Govia, which operates three rail franchises on the London to Brighton rail routes. The claim is that Govia charged unfair ticket prices on those routes. The CAT authorized one of two competing class representatives to proceed with the claim. While CAT found that it had the power to appoint joint representatives, it declined to do so in this case.

## Poland

### UOKiK President Launches Preliminary Investigation into Animal Food Market

In July 2022, Poland's Office of Competition and Consumer Protection (UOKiK) launched a preliminary investigation into whether cooperation between Empire Brands (a pet food producer) and retailers infringed competition law, as UOKiK suspects Empire Brands may have imposed resale prices on its distributors. While a producer may recommend prices or impose maximum prices on its distributors, it cannot impose fixed or minimum resale prices, as this would qualify as a "by object" restraint under Article 6 of the Act of Feb. 16, 2007, on Competition and Consumer Protection Act and/or Article 101(1) TFEU. Restrictions "by object" are those that by their very nature have the potential to restrict competition, and as such remain qualified as a "hardcore" restriction of competition under the New Vertical Block Exemption Regulation. According to UOKiK, Empire Brands' practice could have deprived consumers of the possibility of buying cheaper products than at top-down rates. The launch of the proceedings was preceded by a dawn raid at Empire Brands' premises. UOKiK is analyzing the collected evidence.

UOKiK is conducting a preliminary investigation in the case, but not against specific undertakings. If the evidence gathered during the inspection confirms its suspicions, UOKiK may launch antitrust proceedings and bring charges against individual undertakings and/or managers.

Under Polish law, an entrepreneur involved in a competition-restricting agreement may be subject to a fine of up to 10% of its turnover, while the managers responsible for effecting the collusion face a penalty of up to PLN 2 million. For more than 10 years, UOKiK has tended to focus in proceedings on the supplier as the organizer of the distribution chain; however, initiation of proceedings against distributors cannot be excluded.

## Italy

### Italian Competition Authority (ICA)

1. *Italian Competition Authority (ICA) issues fines for more than EUR 3.5 million for abuse of dominance in handover of management of local public road transport in Tuscany*.

In a recent decision, the ICA closed its investigation, which was opened in 2020, against ONE S.c.a.r.l., the outgoing managing consortium of local public road transport in Tuscany, and the companies participating in the consortium. ICA found that ONE engaged in an abusive strategy aimed at hindering the takeover of the local transport service in Tuscany by Autolinee Toscane S.p.A. (AT), which was awarded the related public bid in April 2019, and that it continued to offer its own services well after the Tuscany Region's deadline for the takeover.

According to ICA, after the award of the contract for the management of the local public road transport in Tuscany to AT, ONE put in place a complex "dilatory and obstructive" strategy, refusing to transmit data and information crucial for the transfer of essential goods (such as buses, real estate, data on passengers and tickets, etc.) to the incoming manager, and refusing to sign the deeds that would have transferred the goods to AT.

ICA found that such a strategy, which, in practice prevented AT from providing its service until November 2021, "undermined the occurrence of the positive effects of the competition 'for' the market, damaging both [Tuscany Region] and the final users of the service." The fines ICA imposed on ONE and several companies participating in the consortium totaled more than EUR 3.5 million.

In 2020, ICA issued a preliminary injunction against ONE, ordering the handover of data and documents to AT.

2. *ICA fines Italian subsidiary of Xiaomi Group EUR 3.2 million for unfair trade practices in relation to consumers' exercise of legal warranty for defects*.

ICA fined Chinese technology company subsidiary Xiaomi Technology Italy S.r.l. EUR 3.2 million for unfair trade practices for restricting consumers' exercise of their legal warranty for Xiaomi-branded electronics product defects.

In particular, ICA found that Xiaomi Italy refused legal warranty repair when there were other product defects, even if merely aesthetic—for example, minor scratches on the screen or other external parts—making warranty service conditional on the repair of out-of-warranty damage. In addition, ICA found that Xiaomi Italy made repeated repairs, even when such repairs did not resolve the issue, instead of replacing the product as requested by the customer, thus repeatedly depriving the latter of the purchased good.

Finally, ICA found that, in the case of finding non-application of the warranty, the company demanded that consumers pay costs for defect verification and shipping of the product, and conditioned the product's return on payment of unrequested out-of-warranty repairments. According to ICA, Xiaomi Italy

should have covered the verification and shipping costs, also in the case of non-application of the warranty. Xiaomi may appeal the ICA's decision before the Regional Administrative Court of Lazio within 60 days of the date of notification of the decision to the company.

3. *ICA publishes its 2021 annual report*.

On July 18, 2022, ICA President Roberto Rustichelli presented ICA's 2021 Annual Report.

The Report restores the status quo of competition and consumer law in Italy, looking both at the legislative framework in force – analyzing the latest and possible developments and trends, with particular focus on the imminent adoption of the Annual Law on Competition for 2021, which extends ICA's powers in many areas, including investigations and review of mergers below national notification thresholds – and at the practical enforcement of such laws. In particular, the Report highlights the strength of ICA's enforcement activity under both competition and consumer law in 2021.

Indeed, during the last year, ICA opened 13 new investigations for alleged anticompetitive agreements and abuse of dominance under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU), the corresponding national provisions (i.e., Articles 2 and 3 of Law no. 287/1990), or for abuse of economic dependence under Article 9 of Law no. 192/1998.

In addition, in 2021 ICA closed seven investigations on anticompetitive agreements – two concluded with the issuance of fines totaling EUR 174,532,555, and five with the acceptance of the commitments the investigated companies proposed – and seven investigations for abuses of dominance, in three cases issuing fines for an overall amount of more than EUR 1 billion.

Finally, in relation to merger control activities, the Report highlights that in 2021 ICA had reviewed 73 mergers, opening six "phase-two" investigations (pursuant to Article 6 of Law n. 287/1990). Out of these, five investigations were closed with the authorization of the merger under specific conditions, while in one case the merger was authorized under no further conditions.

As for enforcement of consumer law, in 2021, ICA had concluded 97 proceedings, finding a violation of consumer rights in almost 40 cases, which resulted in fines totaling about EUR 72 million, while accepting commitments in other 35 cases.

## European Union

### A. European Decisions

1. *ECG upholds European Commission's new guidance on Article 22 ECMR*.

On July 13, 2022, the EU General Court (EGC) delivered its judgement in *Illumina, Inc v. European Commission*. The EGC concluded that the Commission is competent to review transactions without a European dimension or that do not fall within the scope of the merger control rules of the individual EU Member States.

This competence is based on new European Commission guidance regarding the referral mechanism set out in Article 22 of Council Regulation (EC) 139/2004 on the control of concentrations between undertakings (ECMR). This means that any transaction that might raise antitrust concerns may be subject to Commission review. For a more comprehensive overview, see our July 2022 GT Alert.

2. *ECG approves European Commission decision not to investigate allegations against Philips*.

On July 13, 2022, the ECG determined that the European Commission's decision not to investigate the alleged abuse of dominance and anti-competitive arrangements of Dutch company Koninklijke Philips (Philips) was correct. In August 2016, Design Light, an Italian organization that supports and promotes European LED-technology, found that Philips had a dominant position in the market due to its dedicated licensing program and many patents on LED-technology.

The European Commission, however, considered the allegations so implausible that it decided not to launch an in-depth investigation of the possible infringements by Philips, based upon a comparison between the infringement of proper market functioning and the necessary efforts to prove the infringement. Design Light may, however, seek damages in the national courts.

### B. European Policy Developments

1. *European Commission conducts dawn raids of grocery delivery services companies Delivery Hero and Glovo*.

According to reports, on June 27 the European Commission conducted dawn raids on online grocers Delivery Hero and Glovo, whose Berlin and Madrid offices apparently were investigated on suspicion of violating the cartel prohibition provision of Article 101 of the TFEU.

2. *Provisional political agreement reached on EU Foreign Subsidies Regulation*.

On June 30, 2022, the European Parliament and the Council announced they reached a provisional political agreement on the EU Foreign Subsidies Regulation (FSR).

With the FSR, the EU aims to close the regulatory gap between EU Member States and non-EU countries by giving the European Commission the power to investigate financial contributions from public authorities of a non-EU country that benefit companies engaging in economic activities in the EU. The FSR also complements the EU's international efforts to modernize subsidy rules within the World Trade Organization.

The FSR grants the European Commission three tools:

- A notification-based tool for "concentrations";
- a notification-based tool for tenders in public procurements; and
- one general tool to investigate all other market situations.

For a more comprehensive overview, see our July 2022 GT Alert.

## Greater China

### SAMR Delegates Duties to Review Certain Concentrations to Selected Provincial Branches

On July 15, 2022, the State Administration for Market Regulation (SAMR) announced that, starting Aug. 1, 2022, it would delegate duties to review the concentration cases eligible for the simple-review or summary procedure, or simple cases, to its five provincial branches in Beijing, Shanghai, Guangdong, Chongqing, and Shan'xi Provinces (each a "Delegated Branch"), with each Delegated Branch leading the review of simple cases that occur within the relevant regions (each a "Relevant Region").

For example, SAMR's Shanghai branch will review the simple cases that occur within a Relevant Region that covers Shanghai and six other provinces in east China including Jiangsu, Zhejiang, Shandong, Anhui, Fujian, and Jiangxi. A case will be deemed to have occurred in the Relevant Region if (i) one applicant is domiciled in the Relevant Region, (ii) in an acquisition deal, the acquired target is domiciled in the Relevant Region, (iii) in a JV deal, the newly established JV is domiciled in the Relevant Region, (iv) the relevant geographic market is a regional market and is largely overlapping with the Relevant Region, and (v) other cases delegated by SAMR.

Following the announced policy, applicants still are required to submit the simple case to SAMR, which will delegate the case to the relevant Delegated Branch and notify the application of its delegation decision. The Delegated Branch will then take charge to accept the case, review the case, and submit its preliminary opinion to SAMR. SAMR will release the official decision based on the Delegated Branch's opinion. The policy also allows an applicant to conduct its pre-notification consultation with the relevant Delegated Branch. SAMR reserves the right to terminate the delegation at its discretion.

According to the policy, the delegation program is effective for three years ending July 31, 2025. It is a trial program to reduce SAMR's workload and increase efficiency for decision-making. However, it remains unclear whether different Delegated Branches will apply different standards of review to cases of similar fact patterns and, where a simple case is eligible for review by different Delegated Branches (e.g., two different applicants are domiciled in two different Relevant Territories), whether an applicant is permitted to elect a particular Delegated Branch to review the case.

## Japan

### A. Cease and Desist Order to Be Issued Against Bid Rigging for School PCs

The Japan Fair Trade Commission (JFTC) issued cease and desist orders for Antimonopoly Act violations (unfair restriction of trade) to 11 companies, including NTT West (Osaka City), for bid rigging for school computers and other products local governments ordered, demanding they prevent recurrence. The JFTC will also issue a surcharge payment order totaling approximately 50 million yen to most of the companies.

The JFTC notified the companies of the proposed actions and will determine a final decision after hearing responses from each company.

### B. Follow-Up – Lawsuit Against Operating Company of Gourmet Website

A restaurant filed a lawsuit in the Tokyo District Court against the operating company of a gourmet website, challenging the fairness of the restaurant's quality valuation on the website. The dispute is whether the operator's change in the algorithm for determining the quality valuation rates constituted "an abuse of a dominant position."

The Tokyo District Court noted that the website, which listed and rated only restaurants that paid a listing fee, had a dominant position over the plaintiff and others like it because the website's rating system significantly impacted whether customers would dine at a listed restaurant on any given day. Moreover, the court stated, restaurants could not cease subscribing to the website because a de-listing would have severe negative consequences. In addition, the restaurants had little say in the website's rating system, and had no choice but to accept the ratings they were given for fear of being delisted or penalized with a lower rating. The court ordered the operator to pay 38.4 million yen.

The operator is appealing the decision.

Read previous editions of GT's Competition Currents Newsletter.

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