GT GreenbergTraurig

GT Newsletter | Competition Currents | June 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 approves consent order in Exxon-Pioneer acquisition, banning former Pioneer CEO from Exxon board seat.*

On May 2, in an effort to resolve antitrust concerns surrounding Exxon Mobil Corporation's $64.5 billion acquisition of oil producer Pioneer Natural Resources Company (Pioneer), the FTC approved a consent order preventing former Pioneer CEO Scott Sheffield from holding a seat on Exxon's board of directors. The FTC alleged in a complaint that Sheffield previously attempted to collude with OPEC representatives to reduce the output of oil and gas in certain areas, which would have resulted in Americans paying higher prices for fuel.

The FTC further contended that Sheffield's appointment to Exxon's board would be anticompetitive because it would facilitate a board interlock among competitors, in violation of Section 5 of the FTC Act. Sheffield already serves on the board of the Williams Companies, Inc., which operates natural gas

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[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.

pipelines, natural gas gathering, processing, and treating operations, and other gas-related businesses that compete with Exxon's operations.

The consent order also prevents Exxon from nominating, designating, or appointing any Pioneer representative to the Exxon board (except certain named individuals) over the next five years, and requires Exxon to adhere to certain Clayton Act Section 8 attestation and reporting obligations for the next 10 years. Exxon is required to provide an initial compliance report within 60 days of the order.

2. *FTC comments on the termination of Altus Group's proposed acquisition of Situs Group's commercial real estate valuation services business*.

On May 21, the FTC issued a statement about Altus Group Limited (Altus) abandoning its proposed acquisition of Situs Group, LLC's commercial real estate valuation and advisory services business, REVS. The FTC said that the agency welcomes the news, given that REVS services "touch on nearly all commercial real estate in the United States by ensuring pension and other fund investors have near-to real-time insight into the value of their commercial real estate assets."

Altus, which provides asset information for commercial real estate, stated in its announcement that it had actively engaged with the FTC over the past six months, but ultimately believed that the transaction would not receive regulatory approval in a timely manner. In not moving forward with the acquisition, Altus and REVS will continue to compete, which the FTC believes will foster innovation in the market.

B. Department of Justice (DOJ)

1. *DOJ announces task force on health care monopolies and collusion*.

On May 9, the DOJ announced the Antitrust Division's new task force on Health Care Monopolies and Collusion (HCMC). The task force will guide the Antitrust Division's enforcement strategies and policies on health care and attend to various competition concerns mutually shared by providers, patients, and other industry professionals, including payer-provider consolidation, serial acquisitions, quality of care, billing, IT services, and misuse of health care data, among other issues.

"Every year, Americans spend trillions of dollars on health care, money that is increasingly being gobbled up by a small number of payers, providers and dominant intermediaries that have consolidated their way to power in communities across the country," Assistant Attorney General Jonathan Kanter said. "[T]he task force will identify and root out monopolies and collusive practices that increase costs, decrease quality and create single points of failure in the health care industry." To that end, HCMC will bring together prosecutors, economists, industry experts, data scientists, investigators, policy advisors, and others to evaluate and address antitrust issues in the health care market.

Katrina Rouse, who has served in the Division for over a decade, will lead the task force. Rouse will serve concurrently as the Division's Special Counsel for Health Care and its Deputy Director of Civil Enforcement.

The HCMC encourages members of the public to share their relevant experiences by visiting the online portal at HealthyCompetition.gov.

2. *DOJ files antitrust lawsuit against Live Nation-Ticketmaster.*

On May 23, the Antitrust Division of the DOJ filed and announced a lawsuit against Live Nation Entertainment Inc. and its wholly owned subsidiary, Ticketmaster LLC, for various antitrust violations. The complaint, filed in the U.S. District Court for the Southern District of New York and joined by 29 states and the District of Columbia, alleges that Live Nation unlawfully exercises monopoly power in the live music market, in violation of Section 2 of the Sherman Act. Attorney General Merrick Garland said that Live Nation's conduct comes "at the cost of fans, artists, smaller promoters, and venue operators," as "fans pay more in fees, artists have fewer opportunities to play concerts, smaller promoters get squeezed out, and venues have fewer real choices for ticketing services." The lawsuit follows a two-year-long investigation of the company's activities within the live music concert market.

The complaint alleges that Live Nation sustains dominance and control over each category of stakeholder in the live music market (fans, artists, promoters, and venues) through various anticompetitive behaviors, including exclusionary conduct and long-term exclusive contracts. The DOJ notes that Live Nation and potential competitor Oak View Group – global operator of stadiums, arenas, and convention centers – have a collaborative relationship whereby Oak View steers clients into signing exclusive agreements to use Ticketmaster for ticketing services, and Oak View avoids bidding against Live Nation for artist talent. The complaint describes this as a "competitive détente" in concert promotions that purposely avoids competition over artists and tours. In explaining the relationship between Live Nation and Oak View, the DOJ also noted that Oak View was co-founded by former Live Nation chairman Irving Azoff.

The complaint further alleges that Live Nation has retaliated and threatened to retaliate against potential market entrants, locked out competition through long-term exclusionary contracts that prevent stakeholders from exploring alternative management companies or other ticketing platforms, blocked venues from using multiple ticketers, and acquired competitors and competitive threats.

For example, in 2021, Live Nation allegedly threatened to retaliate against private equity firm Silver Lake unless one of Silver Lake's portfolio companies, TEG, stopped competing with Live Nation for artist promotion contracts in the United States. The DOJ alleges that these threats succeeded, and that Silver Lake is now seeking to sell TEG.

According to the complaint, Ticketmaster, which is the largest primary ticketer in the United States, has employed various anticompetitive tactics to edge out competitor ticketing platforms such as StubHub and SeatGeek. Further, Ticketmaster has become the default ticketing platform for many artists simply by virtue of Live Nation's control over a large share of the venues in which artists seek to perform. Artists and venues are pressured to use Ticketmaster's services for fear of being locked out of favorable performance venues. Live Nation's dominance is supported by the fact that it manages over 400 musical artists, owns or controls more than 265 concert venues in North America--including more than 60 of the top 100 amphitheaters in the U.S., and has exclusive agreements that entitle it to 70% of the live music ticketing market (and Ticketmaster accounts for at least 80% of all tickets sold for shows at major concert venues).

These circular arrangements ultimately harm concertgoers by allowing Live Nation the latitude to charge fans varied fees, including "service", "handling", "convenience", "per-order", and "processing" fees (which Attorney General Garland described as "exorbitant"), the DOJ argued in the complaint. These arrangements also allegedly insulate Live Nation from the competition that would result in Live Nation updating and/or innovating the technology associated with its ticketing systems, thereby depriving consumers of potentially lower prices and better experiences.

With its lawsuit, the DOJ seeks an order forcing Live Nation to divest Ticketmaster, forcing the termination of Live Nation's ticketing agreement with Oak View, enjoining Live Nation from engaging in anticompetitive conduct, and granting other necessary and appropriate relief.

C. U.S. Litigation

1. *Fed. Trade Comm'n v. US Anesthesia Partners, Inc., No 4:23-cv-03560 (S.D. Tex.).*

On May 13, the United States District Court for the Southern District of Texas granted a motion in favor of Welsh Carson Anderson & Stowe (Welsh Carson), dismissing the FTC's antitrust claims against the New-York based private equity company. The FTC's claims had arisen primarily from a roll-up scheme carried out by US Anesthesia Partners (USAP), a company in which Welsh Carson once held a 50.2% interest, but as of 2017, holds a 23% stake and two out of 14 of board seats. In the alleged roll-up scheme, according to the FTC, USAP bought "nearly every large anesthesia practice in Texas to create a single dominant provider with the power to demand higher prices."

The FTC based its action against Welsh Carson on an interpretation of 15 U.S.C. § 53(b) (commonly referred to as "Section 13(b)" of the FTC Act) that would have allowed a minority, non-controlling investor of a company to be charged under this section for the company's alleged antitrust violations, even without an allegation of any actual ongoing or impending violation by the investor. Judge Kenneth Hoyt rejected the FTC's proposed approach and said that Section 13(b) is not a catch-all statute and does not allow the FTC to sustain claims based upon "long-past conduct" without some evidence that the defendant is currently committing or is about to commit a violation. Judge Hoyt explained that holding a minority, non-controlling interest in a company does not in and of itself constitute an ongoing violation by the interest-holder, noting that the FTC had failed to cite any precedent or support for the proposition that "receiving profits from an entity that may be violating antitrust laws is itself a violation of antitrust laws."

The court explained that Section 5(b) of the FTC Act is a much broader grant of antitrust authority, and looks backward, whereas Section 13(b) looks forward. Therefore, such actions arising from past conduct would instead be brought under Section 5(b). Note that only the claims against Welsh Carson were dismissed from the lawsuit; the FTC's claims against USAP were allowed to continue. See a previous GT Alert regarding the FTC's initial complaint and a recent GT Alert on the decision.

2. *Grant House v. NCAA, Nos. 4:20-cv-03919 CW, 4:20-cv-04527 CW (N.D. Cal. May 23, 2024).*

The NCAA and its Power Five conferences agreed to pay $2.75 billion in damages to college athletes over a 10-year period in a deal that seeks to resolve three pending antitrust lawsuits. According to the firms representing the athlete plaintiffs, Hagens Berman and Winston & Strawn LLP, the agreement also eliminates NCAA and conference rules that prohibit direct payments from schools to athletes and allows direct revenue sharing through new payments and benefits. This settlement resolves three antitrust cases, all brought by athletes claiming the NCAA's rules violate antitrust law.

The split of the $2.8 billion will be determined by sport economists and go to the 10,000 former and current athletes affected by the settlement. The first agreement is "back pay," or payment for work done in the past. This $2.8 billion payment, to be made over the course of 10 years, is geared to the current and former athletes as far back as 2016 that lost out on possible profits from the name, image, likeness landscape post-2021. The NCAA is responsible for 40% of the $2.8 billion using its reserve fund. The conferences are responsible for the remaining 60%.

The current proposal creates a spending cap, similar to salary caps used by professional sports leagues, of no more than $22 million annually for each university, starting in the 2025-26 season. This figure represents 22% of "average media rights, ticket sales and sponsorship revenue of each power-conference school." The settlement does not resolve the issue of players' employment status or the bedrock of the NCAA — that the athletes are amateurs and not professionals.

3. *Gibson et al v. MGM Resorts International et al, Case No. 2:23-cv-00140, (D. Nev. May 8, 2024).*

Chief Judge Miranda M. Du of the U.S. District Court for the District of Nevada dismissed a case against Caesars Entertainment Inc. and other Las Vegas hotel companies accusing them of fixing prices for rooms. Judge Du dismissed the plaintiffs' amended complaint with prejudice, saying a group of consumers who stayed at various Las Vegas locations failed to plausibly allege a tacit agreement between the hotels to inflate room prices using an algorithm.

The court reasoned that this is in part because customers were not required to accept the pricing recommendations of hospitality industry software provider Cendyn Group. The judge also drew distinctions from a Dec. 28, 2023, order that refused to dismiss similar claims in a case against another software provider, noting "the complaint, in that case, included allegations of the exchange of otherwise confidential information between competitors through the algorithm, while this case did not."

The judge continued, "mere use of algorithmic pricing based on artificial intelligence by a commercial entity, without any allegations about any agreement between competitors—whether explicit or implicit—to accept the prices that the algorithm recommends does not plausibly allege an illegal agreement." The judge also commented on the nature of the case as a whole: "This case remains a relatively novel antitrust theory premised on algorithmic pricing going in search of factual allegations that could support it."

The Netherlands

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

1. *ACM determines further investigation required into proposed DPG Media and RTL Netherlands merger.*

The Dutch Competition Authority (the ACM) has competition concerns regarding DPG Media's contemplated acquisition of RTL Netherlands, two rival media companies. According to the ACM, the contemplated acquisition could result in DPG gaining an overly dominant position in the relevant market. The ACM requires further investigation into the proposed acquisition, and if DPG and RTL decide to proceed, the ACM will carry out an in-depth investigation into the transaction's consequences. This is the equivalent of a Phase II investigation in other jurisdictions.

2. *ACM warns suppliers about pressuring retailers to increase prices*.

The ACM has warned suppliers in various sectors about pressuring retailers to raise product prices, which violates competition laws. The ACM continues to monitor compliance, with non-adherence potentially resulting in fines up to €900,000 or 10% of the company's total turnover.

Suppliers can only provide non-binding price recommendations to retailers, ensuring fair competition and better prices for consumers. To assist, the ACM has developed a "price recommendation check" tool for both suppliers and retailers to ensure compliance.

B. Dutch courts

Gelderland District Court: no breach of noncompete clause in employment agreement.

The Gelderland District Court ruled that an individual did not breach a noncompete clause when switching employers in the same industry after the former employer invoked the employment contract against its former employee. The court found that the employee assumed a completely different role with the new employer and that there was no breach because, unlike the employee's previous position within the management team, the former employee became the leader of various factories, responsible for optimizing business processes at the new role.

Poland

Polish Competition Authority publishes new procedural clarifications regarding the FDI regime in Poland

The President of the Office of Competition and Consumer Protection (UOKiK) has published new procedural clarifications for submitting notifications and the conduct of proceedings under the Polish Act of July 24, 2015, on Control of Certain Investments (FDI Act). UOKiK issued its first clarifications in 2020 and now has updated them to align with recent updates and provide guidance on certain procedural and practical issues related to transaction notification obligations under the Polish foreign direct investment (FDI) regime.

The FDI Act provides for two separate FDI regimes. The first, introduced in 2015, refers to acquisition of a material interest or a dominant position in companies of strategic importance which (subject to the other notification conditions stipulated in the FDI Act) (i) operate in certain strategic industries listed in the FDI Act and at the same time (ii) are entered by the Polish Council of Ministers on the list of strategic companies included in the Regulation Regarding Protected Entities (regime regarding listed entities).

The second regime, introduced in 2020 primarily in response to COVID-19, refers to acquisition of a material interest or a dominant position by a purchaser (direct or indirect) that has not had a registered office in an Organization for Economic Co-operation and Development (OECD) country for at least two years in an entity (i) with a registered office in Poland; and (ii) generating revenues from the sales of goods and services in Poland exceeding the equivalent of EUR 10 million in either of the two financial years preceding the notification; and (iii) that is publicly listed in Poland or has specific assets or conducts a specific type of business activity as listed in the FDI Act (regime regarding protected entities).

The published guidelines apply specifically to the regime regarding protected entities where a notification should be submitted to UOKiK. In the new clarifications, UOKiK noted that:

1. One of the conditions that must be met to constitute a notifiable transaction, i.e., no registered office in an OECD country for at least the two years preceding the notification, is not fulfilled in a situation where an entity has been established for less than two years by an entity with its registered office in an OECD country.

2. When analyzing whether a transaction requires notification, the domicile or nationality of the parent entity controlling the capital group of the purchaser should be considered. If this entity is based in or has citizenship of an OECD country, the transaction does not require notification under the FDI Act. UOKiK noted that historically, the main reason for refusing to initiate

screening proceedings has been that the ultimate beneficiary of the foreign investment is based in or a citizen of an OECD country.

3. If a given transaction formally meets the conditions under both the regime regarding listed entities and the regime regarding protected entities, the notification should be filed only to the competent authority under the regime regarding listed entities.

The new clarifications also provide more details on calculating turnover. For merger control proceedings, the rules on turnover calculation may be applied by analogy. Therefore, if the protected entity has earned revenue from a transaction with an entrepreneur higher up in the group who is not part of the notified transaction, that revenue counts. At the same time, the total revenue of a protected entity excludes revenue earned between subsidiaries within the group that is achieved because of the transaction. In addition, the entire revenue of the protected entities should be considered, i.e., not only revenue derived from “protected activities.”

Other significant changes include procedural issues, such as the requirement to notify the European Commission about foreign investments and legalizing foreign documents, and additional clarifications about the two-stage inspection process and sanctions for violations, which include fines and prison terms.

Italy

Italian Competition Authority (ICA)

1. *ICA fines Avis, Hertz, Centauro, Green Motion, Rent, and Drivalia more than EUR 18 million for unfair practices against consumers.*

On May 9, ICA published orders sanctioning car rental companies Avis Budget Italia S.p.A., Hertz Italiana S.r.l., Centauro Rent a Car Italy S.r.l., Green Motion Italia S.r.l., Noleggiare S.r.l. and Drivalia Leasys Rent S.p.A. for more than EUR 18 million for unfair practices against consumers.

According to ICA, the six car rental companies imposed an unjustified fee to handle customers’ fines and failed parking or toll payments. Specifically, ICA disputes the contract clause adopted by each company and posted on their respective websites that required the car renter to pay a lump sum for handling the administrative file related to each traffic violation or failure to pay parking fees during the rental period.

In addition to the fines, ICA ordered the companies concerned to publish an excerpt of the order on their corporate websites and to remove the clauses in question from the contract forms.

2. *ICA publishes a notice about its newly granted powers to initiate general investigations and take remedial action.*

On May 13, ICA published a notice about implementing Article 1, Paragraph 5, Decree Law No. 104 of Aug. 10, 2023, converted with amendments by Law No. 136 of Oct. 9, 2023, which gave ICA the power to initiate fact-finding investigations and take structural or behavioral remedial measures if it finds competition concerns. The law also allows companies to submit commitments in the context of fact-finding investigations.

The new powers enable ICA not only to launch sectoral fact-finding investigations in any economic sector – as also confirmed by a recent Council of State ruling – but also to employ new powers within the same proceeding. After a first fact-finding phase, in the presence of certain circumstances, ICA may start a second remedial phase to identify necessary and proportionate measures to eliminate significant and persistent distortions of competition.

Importantly, at the end of the fact-finding activity ICA may recommend appropriate legislative or regulatory initiatives to improve the functioning of the affected markets, initiate an investigation on specific anticompetitive conduct, or likewise indicate structural or behavioral measures to remedy any competition issues.

Concerned parties may submit written pleadings and documents, as well as commitments aimed at remedying the competitive issues identified by ICA. Commitments can then either be accepted by ICA, which would make them mandatory by the order closing the fact-finding investigation, or be rejected if they will not resolve the competitive concerns.

3. *As of May 1, 2024, a new model merger filing form is in effect*.

ICA adopted a new version of the merger filing form, effective May 1, as well as updated the Notice on Reporting a Merger.

The updates take into account the regulatory changes introduced by Law No. 118 of Aug. 5, 2022 (Annual Market and Competition Law 2021) and Law No. 214 of Dec. 30, 2023 (Annual Market and Competition Law 2022), as well as ensure greater uniformity with the principles in the European Commission's Notice on the Control of Concentrations of July 10, 2007 (Commission Consolidated Jurisdictional Notice).

Among the new features incorporated in the amended documents are the possibility of notifying mergers that do not exceed the thresholds for notification, pursuant to Article 16, paragraph 1-bis, Law 287/1990, as well as the new method of calculating turnover for entities in the credit, banking and insurance sectors.

European Union

European Commission

1. *European Commission designates Booking.com as gatekeeper and opens market investigation into a social media platform, both in relation to the EU DMA*.

The European Commission has designated Booking.com as a gatekeeper under the EU Digital Markets Act Regulation (DMA), due to its significant role as an intermediary between businesses and consumers. This decision was made following the notification of Booking.com in March 2024 (as mentioned in the April newsletter). As a result of this determination, Booking.com has six months to fulfill its obligations under the DMA. The European Commission will monitor Booking.com's compliance with these obligations, and if the company fails to comply, it may be subject to fines.

In parallel, the European Commission has opened an additional market investigation relating to an online social networking service, following on the rebuttal that was submitted in March 2024 arguing that, even if the Commission determines that the platform meets the thresholds, it does not qualify as an important gateway between businesses and consumers.

2. *European Commission voices objections to the acquisition of Air Europa by IAG*.

The European Commission raised competition concerns about International Consolidated Airlines Group (IAG)'s contemplated acquisition of Air Europa because it may limit competition in passenger air transport, especially within, to, and from Spain. IAG and Air Europa operate extensive domestic, short-haul, and long-haul routes. The investigation highlights potential competition reduction on certain Spanish domestic routes, short-haul routes to Europe and the Middle East, and long-haul routes to North and South America. IAG could potentially propose remedies up until June 10, 2024. The Commission has until July 15, 2024, to make a final decision.

3. *European Commission fines Mondelēz for cross-border trade restrictions*.

The European Commission has fined Mondelēz International €337.5 million for obstructing cross-border trade of chocolate, biscuits, and coffee within the EU. The Commission determined that Mondelēz, a global producer, restricted wholesalers and distributors from selling products across borders and abused its dominant market position to prevent sales in certain countries to maintain higher prices. The Commission found that these actions, occurring from 2006 through 2020, hindered market efficiency and harmed consumers by keeping prices artificially high. The fine reflects the severity and duration of these practices, with a 15% reduction for Mondelēz's cooperation.

Read previous editions of GT's Competition Currents Newsletter.

Contributors

United States

- Gregory J. Casas | +1 512.320.7238 | casasg@gtlaw.com
- Stephen M. Pepper | +1 212.801.6734 | Stephen.Pepper@gtlaw.com
- Marc T. Rasich | +1 801.478.6920 | Marc.Rasich@gtlaw.com
- Tarica Chambliss | +1 202.533.2312 | Tarica.Chambliss@gtlaw.com
- Lauren Harrison | +1 214.665.3600 | Lauren.Harrison@gtlaw.com
- Alan W. Hersh | +1 512.320.7248 | hersha@gtlaw.com
- Jonathan Huie | +1 202.533.2356 | Jonathan.Huie@gtlaw.com
- Rebecca Tracy Rotem | +1 202.533.2341 | rotemr@gtlaw.com

Netherlands^

- Hans Urlus | +31 20 301 7324 | urlush@gtlaw.com
- Robert Hardy | +31 20 301 7327 | Robert.Hardy@gtlaw.com
- Chazz Sutherland | +31 20 301 7448 | sutherlandc@gtlaw.com

Poland

- Robert Gago | +48 22.690.6197 | gagor@gtlaw.com
- Filip Drgas | +48 22.690.6204 | drgasf@gtlaw.com
- Anna Celejewska-Rajchert | +48 22.690.6249 | rajcherta@gtlaw.com

Italy

- Edoardo Gambaro | + (39) 02.77197205 | Edoardo.Gambaro@gtlaw.com
- Pietro Missanelli | + (39) 02.77197280 | Pietro.Missanelli@gtlaw.com
- Carlotta Pellizzoni | + (39) 02.771971 | Carlotta.Pellizzoni@gtlaw.com
- Martino Basilisco | +02 7719771 | Martino.Basilisco@gtlaw.com

Administrative Editors

- Becky L. Caruso | +1 973.443.3252 | Becky.Caruso@gtlaw.com
- Emily Willis Collins | +1 512.320.7274 | Emily.Collins@gtlaw.com

GT GreenbergTraurig

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