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GT Newsletter | Competition Currents | August 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. *Texas federal court grants preliminary injunction against FTC's noncompete ban; Pennsylvania court refuses to grant PI.*

On July 3, the Northern District of Texas granted plaintiffs Ryan LLC and U.S. Chamber of Commerce's motion for a preliminary injunction against the FTC's rule banning noncompete agreements, which will take effect on Sept. 4. The court is scheduled to issue a final ruling by the end of August.

However, on July 23, the Eastern District of Pennsylvania refused to grant a preliminary injunction against the rule following a hearing.

The FTC's rule was promulgated this April and enacted pursuant to Section 6(g) of the FTC Act, which the FTC asserts grants the agency authority to make substantive rules related to unfair methods of

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

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competition. The rule would ban all future employment-based noncompetes and invalidate most existing agreements.

The Texas federal court held that plaintiffs had established (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm in the absence of relief; and (3) that the balance of equities tipped in plaintiffs' favor. Regarding the first element, the court ruled that the agency lacked authority to issue a substantive rule regarding unfair methods of competition—as compared to rules enforcing, for example, the Magnuson-Moss Act of 1975, wherein Congress expressly granted the FTC rulemaking authority. The court deemed the rule, as a blanket prohibition, arbitrary and capricious under the Administrative Procedure Act because it was not tailored to specific categories of harms suggested by the evidence and data collected when considering the rule, including noncompete agreements targeting low-skill, low-wage employees.

However, the Pennsylvania federal court concluded the FTC properly exercised its rulemaking authority when it issued the blanket noncompete ban. The court explained that when taken in the context of the goal of the FTC Act and the FTC's purpose, the FTC is clearly empowered to make both procedural and substantive rules as needed to prevent unfair methods of competition and that "nothing" in the FTC Act expressly limits the FTC's rulemaking power to issue exclusively procedural rules. The court added that "the court rejects ATS's argument that it should read the word 'procedural' but not the word 'substantive' into the statutory text defining the FTC's rulemaking authority."

At the hearing, the Pennsylvania court focused on the question of irreparable harm if the preliminary injunction was not granted. The court was not as receptive to plaintiffs' showing of alleged concrete harms that would arise if the ban were to take effect as scheduled, suggesting that the harms offered here—that employees would leave if they were suddenly unburdened by noncompete agreements, causing plaintiffs to have wasted resources on training—were speculative. Rather, the court suggested that it is equally plausible that the resulting free flow of labor would give plaintiffs the benefit of a broader labor pool.

2. *FTC issues statement regarding termination of Novant Health's Acquisition of hospitals from Community Health Systems.*

On July 1, Competition Director Henry Liu issued the following statement in response to Novant Health, Inc.'s decision to abandon the acquisition of two North Carolina hospitals from Community Health Systems:

> Hospital consolidation diminishes quality of care and increases costs for critical services. Novant's deal with Community Health Systems would have followed this same trend to the detriment of North Carolinians. Now with this deal off the table, Novant and Community Health Systems will continue to compete against one another, delivering better outcomes for patients in both quality of care and price.

A district court rejected the agency's request for a preliminary injunction of the acquisition pending the conclusion of the FTC's administrative trial. The Fourth Circuit Court of Appeals later granted the agency an injunction pending appeal of the original district court decision.

As noted in our February 2024 Competition Currents, the FTC sued to block Novant from acquiring the two hospitals in January. The FTC argued it would lead to higher health care costs for patients while reducing incentives for high quality and innovative care. According to the FTC, if the deal proceeded, Novant Health, one of the largest hospital systems in the southeastern United States, would control nearly

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65% of the market for inpatient general acute care services in the Eastern Lake Norman Area, potentially allowing them to demand higher rates for services.

The hospital systems had argued in April that the FTC's claim was based on inaccurate estimates of market shares in the region.

3. *FTC challenges Tempur Sealy's acquisition of Mattress Firm.*

On July 2, the FTC voted 5-0 to issue an administrative complaint challenging Tempur Sealy's acquisition of Mattress Firm and to authorize the filing of a complaint in federal court in the Southern District of Texas seeking an injunction preventing the acquisition.

The FTC argued that the vertical merger would give Tempur Sealy the ability and incentive to suppress competition and raise mattress prices for millions of consumers through its control over multiple parts of the supply chain. In its complaint, the agency stated that documents collected during its review indicated that Tempur Sealy plans to use its ownership of the retail network to block rivals' access to their "single most important retail channel," potentially leading to higher prices and to rivals' factory closures.

"This deal isn't about creating efficiencies," Director Liu said. "It's about crippling the competition, which would raise prices on an essential good and could lead to layoffs for good paying American manufacturing jobs in nearly a dozen states."

In its own press statements, Tempur Sealy countered, "[t]he bedding industry is highly competitive, offering consumers a diverse selection of products, brands, price points, and purchasing channels" and "[t]here are thousands of brick-and-mortar storefronts across the United States where consumers can purchase bedding products, only a small fraction of which are operated by Mattress Firm." It also highlighted the competitive threats from a growing number of online, direct-to-consumer retailers.

According to the FTC, Tempur Sealy's ownership of Mattress Firm would limit present and future rivals' access to Mattress Firm's floor space and incentivize sales staff to sell Tempur Sealy products instead of those of rival brands.

In a developing trend, the FTC added to its complaint the potential harm to labor, stating that "thousands of workers" would be at risk if the merger ultimately results in rival suppliers reducing output and closing factories in Georgia, North Carolina, Ohio, Wisconsin, Arizona, Colorado, and Utah.

Prior to the complaint, Tempur Sealy offered to commit to maintain Mattress Firm as a multi-branded retailer, including guaranteed slots for third-party manufacturers, as well as to divest stores as needed to assuage concerns.

Commissioner Melissa Holyoak released a concurring statement, agreeing that while vertical mergers generally have less anticompetitive effects than deals between direct competitors, the "substantial evidence" in the companies' own documents of potential harm compelled enforcement action.

4. *FTC publishes interim report on concentration in prescription drug middleman industry.*

On July 9, the FTC published its interim report on pharmacy benefit managers (PBMs), which indicates that six large companies now control 95% of all prescriptions filled in the United States.

The agency launched its study of PBMs in 2022, examining their role as middlemen between drugmakers and insurers and their potential impact on consumers' ability to access and afford prescription drugs.

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Enforcers found that consolidation in the industry has led to a small number of dominant PBMs, all of which are vertically integrated with large health care conglomerates, giving them "significant control" over which drugs are available to patients and at what price.

According to the report, three PBMs now manage 79% of prescription drug claims for around 270 million people. Since PBMs both negotiate with manufacturers for the terms and conditions of prescription drugs and are integrated with insurers and/or other firms involved in the drug supply chain, "they wield enormous power and influence over patients' access to drugs and the prices they pay," principally by steering patients to specific drugs fulfilled only by affiliated pharmacies or mail-order services and/or by imposing onerous contractual conditions.

"These practices have allowed pharmacies affiliated with the three largest PBMs to retain levels of dispensing revenue well above estimated drug acquisition costs, resulting in nearly $1.6 billion of additional revenue on just two cancer drugs in under three years," according to the report.

The PBMs allege that its negotiating tools act as a critical check of "egregious list price increases from drugmakers" and that hampering them would "reward the pharmaceutical industry, leaving American businesses and patients at the mercy of the prices drugmakers set."

The FTC voted 4-1 to allow staff to issue the interim report, with Commissioner Holyoak dissenting. She wrote that "the report does not provide any empirical evidence as to the state of competition in the prescription drug market but rather simply describes the high-level nature of the healthcare system in the U.S." Commissioner Holyoak also pointed out that the agency made no effort to square the findings of this interim report with one from 2005 that largely supported PBMs, finding that they were able to offer lower prices through their ownership of mail-order services.

"Chair Khan's statement fails to identify any scholarship or empirical evidence to support overturning and otherwise ignoring the 2005 report," Commissioner Holyoak wrote. "Instead, she cobbles together structural observations that in her apparent view dispense[] with the need to conduct comprehensive and empirical analysis of the PBM market. I disagree."

Commissioner Andrew Ferguson added that he is "troubled" that the report claims that some PBMs have not yet complied with orders requesting documents about their business practices that were issued over two years ago, warning: "If the PBM Order recipients are engaging in dilatory tactics and are not complying, the Commission should turn to the courts and move to enforce the PBM Orders immediately."

5. *Agency issues another 6(b) order seeking information on "surveillance pricing."*

On July 23, the FTC issued orders to eight companies offering what it calls "surveillance pricing" products and services that incorporate data about consumer characteristics and behavior to determine specific optimal pricing for those consumers. Under Section 6(b) of the Federal Trade Commission Act, 15 U.S.C. § 46(b), the orders seek information about the potential impact of these practices on privacy, competition, and consumer protection.

According to the press release, these products "claim to use advanced algorithms, artificial intelligence and other technologies, along with personal information about consumers—such as their location, demographics, credit history, and browsing or shopping history—to categorize individuals and set a targeted price for a product or service."

"Firms that harvest Americans' personal data can put people's privacy at risk," Chair Khan said. "Now firms could be exploiting this vast trove of personal information to charge people higher prices. Americans

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deserve to know whether businesses are using detailed consumer data to deploy surveillance pricing, and the FTC's inquiry will shed light on this shadowy ecosystem of pricing middlemen."

The FTC again used its 6(b) authority, which authorizes the agency to conduct wide-ranging studies to obtain information to inform future enforcement priorities without a specific law enforcement purpose. The orders generally seek information on the types of products and services being offered; the data sources used for each product, service, and method of collection; customer and sales information; and the impacts on consumers and prices.

In a concurring statement, Commissioner Holyoak took issue with the term "surveillance pricing," writing that "[t]his term's negative connotations may suggest that personalized pricing is necessarily a nefarious practice" and that "we should be careful to use neutral terminology that does not suggest any prejudgment of difficult issues." She also questioned the Commission's resource allocation toward a new 6(b) study when the completion of a final study on pharmacy benefit managers (PBMs), pursuant to 6(b) orders issued years ago, remains outstanding. "During a recent Congressional hearing on the Commission's 2025 budget, each Commissioner promised to support the completion of the PBM study," she noted.

B. Department of Justice (DOJ) Civil Antitrust Division

DOJ Antitrust Division, FTC, and foreign regulators issue joint statement on competition in generative AI.

On July 23, the DOJ and FTC, together with European Commission Executive Vice President Margrethe Vestager and UK Competition and Markets Authority Chief Executive Sarah Cardell, issued a joint statement on competition in generative AI foundation models and AI products.

The regulators identified three specific risks to competition in the AI space "requiring ongoing vigilance."

First, the regulators are concerned about a small number of actors controlling "key inputs," such as data at scale, chips, and other technology to facilitate AI development. According to the statement, "[t]his could potentially put a small number of companies in a position to exploit existing or emerging bottlenecks across the AI stack and to have outsized influence over the future development of these tools."

Second, the regulators are concerned about "large incumbent digital firms" using their position and advantages they have already acquired across "multiple levels related to the AI stack" to "extend or entrench the positions that they were able to establish through the last major technological shift to the detriment of future competition."

Third, the enforcers warned they will closely monitor partnerships, financial investments, and other connections between firms developing AI tools, because "these partnerships and investments could be used by major firms to undermine or coopt competitive threats and steer market outcomes in their favour at the expense of the public."

The statement further adds that "[a]ny claims that interoperability requires sacrifices to privacy and security will be closely scrutinized."

Finally, the statement warns against algorithms that share competitively sensitive information and facilitate price fixing and/or other collusion, which itself has been the subject of litigation by state and federal enforcement agencies on multiple fronts in the last year.

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C. U.S. Litigation

1. *HP Inc. v. Access Advance LLC, et al., Case No. 2484CV01952, Super. Ct. of Mass.*

On July 26, computer maker HP Inc., the successor to Hewlett-Packard, filed a suit in Massachusetts state court alleging that Dolby Laboratories, Mitsubishi, and Philips have created a shell entity called Access Advance LLC to conspire to charge excessive licensing fees for a high-efficiency video coding standard. This new lawsuit is in response to, or at least related to, the defendants' lawsuit against HP in Germany's Unified Patent Court, in which they claim that HP has violated the companies' various European HEVC patents. According to HP, it already owns 70% of the patents required to use the video-coding standard, but these companies (through Access Advance) refuse to grant HP fair, reasonable, and nondiscriminatory use of the remaining patents. By refusing to negotiate a reduced licensing fee, HP claims that these alleged conspirators are using their monopoly patents to obtain an unfair "money grab" with no proportionality to the patents that HP uses.

2. *FuboTV, et al. v. The Walt Disney Co., et al., Case No. 1:24-mc-00070, S.D.N.Y.*

On July 25, various streaming companies responded to an antitrust lawsuit brought by Fubo, an all-sports streaming television service based in New York, that accused the defendants of conspiring to push out competition in the sports-streaming market. Specifically, Fubo claims that the competitors entered into a joint venture to create Venu Sports, a complete sports-streaming service. In response, these competitors claim that Fubo is seeking to restrict competition by avoiding competing with the more robust alternative service. These competitors also claim that Fubo is such a small player in the sports-streaming market that it "has long struggled to stay afloat in a highly competitive market." The court has set an August hearing for Fubo's motion for preliminary injunction, seeking to block the joint venture.

3. *Converge Midstream LLC v. Magellan Crude Oil Pipelines Co., et al., Case No. 202226294, 113th Dist. Ct. of Harris County, Texas.*

On July 29, Texas-based Converge Midstream LP settled its lawsuit against Magellan Midstream Partners and Magellan Crude Oil Co. In the lawsuit, Converge alleged the Magellan entities had monopoly power over transmission of shipments of crude oil from the highly productive Permian Basin to Houston, a hub for energy transport. Specifically, Converge alleged that if customers chose to store their crude oil in Converge storage facilities, Magellan would automatically "downgrade" that crude oil from the highly valued West Texas Intermediate grade to domestic sweet crude, resulting in a significant depreciation in the value of the crude oil on the open market. The terms of the settlement have not been disclosed, but settlement documents may become public in August.

4. *In re: Xyrem antitrust litigation, Case No. 3:20-md-02966, N.D. Cal.*

On July 19, the U.S. District Court for the Northern District of California conducted a hearing on defendant Jazz Pharmaceuticals' motion for summary judgment in a multidistrict lawsuit regarding alleged blocking of generic alternatives to the narcolepsy drug, Xyrem. According to the complaint, Jazz stretched out negotiations with the U.S. Food and Drug Administration to require that all sales of Xyrem (or its alternatives) be distributed from a single, centralized pharmacy. According to plaintiffs—a group of insurers and consumers—this approved FDA restriction made it difficult for generic drug manufacturers to commit the resources needed to compete. At the hearing, the court expressed skepticism that plaintiffs had produced evidence supporting that Jazz's petition to the FDA was, in fact, a sham, and that a generic alternative would have entered the market sooner but for Xyrem's negotiations.

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Mexico

COFECE fines Mexican Council for the Regulation of Mezcal Quality over 4 million pesos for harming mezcal producers.

The Federal Economic Competition Commission (COFECE) fined the Mexican Council for the Regulation of Mezcal Quality and an executive for unjustifiably refusing to provide certification services to mezcal producers from February 2018 to August 2021. The total fines amount to 4,170,311 pesos, and COFECE found the conduct to be intentional. Furthermore, COFECE barred the sanctioned executive from holding a similar position in any company involved in certifying compliance with NOM-070-SCFI-2016 for three years.

The production of mezcal, along with tequila, is a significant source of income and employment for small and medium-sized producers in Mexico. Representing the second most important economic activity in the alcoholic beverages industry, mezcal accounts for 32% of the sector's production and is exported to 81 countries.

These actions are classified as relative monopolistic practices or abuse of a dominant position, where dominant market players abuse their position to displace competitors, restrict market access, or unduly favor certain entities.

The Netherlands

Dutch ACM decisions, policies, and market studies.

1. *ACM approves cooperation between companies for recycling coffee capsules.*

The Dutch Competition Authority (ACM) approved a cooperation agreement between producers of coffee capsules aimed at recycling more plastic and aluminum coffee capsules, even though the producers together represent 90% of the market.

According to the ACM, there are no competition concerns and no exchange of competitively sensitive information. The ACM considered that other producers and waste processors are allowed to participate and the fact that the initiative aims to achieve sustainability goals. The ACM maintains that this decision aligns with the ACM's guidelines on sustainability agreements.

2. *ACM publishes final report on Dutch savings market.*

The ACM recently published its final report on the operation of the Dutch savings market, concluding that a lack of competition between banks largely caused the low saving rates. The Dutch savings market is dominated by a few large banks and several smaller banks with minimal market share. Consumer reluctance to switch to banks lessens competitive pressure on large banks.

The ACM also concluded that the silent coordination between large banks affects the savings market. This coordination is caused by market characteristics such as transparency, homogeneity of products, and symmetry between banks. According to the ACM, banks can easily coordinate savings rates without reaching agreements. But the ACM has no hard evidence that large banks agree to influence savings rates. The ACM made several recommendations to the Dutch legislature to promote competition, and it is now up to the lawmakers to implement new rules to address this issue.

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United Kingdom

A. Artificial Intelligence and UK Competition Law

1. *Joint statement – UK, EU, U.S.*

On July 23, the UK, EU, and U.S. antitrust authorities issued a joint statement on competition in generative artificial intelligence foundation models. The statement sets out shared principles to protect competition and consumers, recognizing that AI markets are global, and that AI poses risks which, if they materialize, will require action before they become entrenched or cause irreversible harm. Key shared principles are fair dealing, interoperability, and choice. The authorities have also agreed to share their understanding of the issues arising in AI markets and to use their powers to address potential risks, such as the concentration of key inputs needed to develop AI technology and the potential for firms to entrench or extend their market power in AI-related markets. See**Error! Hyperlink reference not valid.**.

2. *CMA update on AI work.*

The Competition and Markets Authority's participation in the joint statement follows publication of the CMA's April 11, 2024, updates on its initial review of AI foundation models (FMs), which began on May 4, 2023. The updates outline three key risks to fair, open, and effective competition and how these risks could be mitigated. The risks include (i) firms controlling critical inputs for developing FMs may restrict access to protect themselves from competition, (ii) powerful incumbents exploiting their positions in consumer- or business-facing markets to distort choice in FM services and restrict competition in deployment and (iii) partnerships involving key players could exacerbate existing positions of market power through the value chain. Risk mitigation measures include merger and market investigations and other actions under the new Digital Markets, Competition and Consumers Act 2024, as well as close and continuous monitoring. See CMA outlines growing concerns in markets for AI Foundation Models - GOV.UK (www.gov.uk).

B. Merger control

The CMA is conducting phase 1 investigations of mergers in a variety of sectors, including utilities, health care, financial services, distribution, electronics, pharma, transport, and construction. It is also conducting phase 2 investigations of mergers (including mergers completed before the CMA started a phase 1 investigation) in food manufacturing, telecommunications, betting, construction, and transport. In addition, it has concluded numerous investigations, and we describe its decisions in two of these investigations in more detail below.

1. *Water utilities – Pennon Group PLC (Pennon) / Sutton and East Surrey Water (SES).*

After a phase 1 investigation lasting over six months, on June 14, 2024, the CMA granted conditional clearance to Pennon's acquisition of Sumisho.

Both Pennon and SES are water utilities subject to a strict water industry related merger regime (established by the UK Water Industry Act 1991 (as amended)) that is separate from the mainstream UK regime. Under the water regime, the CMA must refer a merger of two water companies to a phase 2 investigation where it believes that the merger may prejudice the ability of the UK water regulator, Ofwat, to make comparisons between water companies and this prejudice is not outweighed by sufficient customer benefits. These comparisons, which are based on complex financial data provided by the water companies, are key to Ofwat's ability to regulate the performance of water companies, as they are local

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monopolies that do not face normal competition. The comparative approach relies on the existence of a sufficient number of independent water companies in the sector.

At the end of its phase 1 investigation, the CMA found that the removal of SES as an independent company would affect Ofwat's ability to make comparisons and that there were insufficient customer benefits to compensate for this. To avoid a phase 2 investigation, Pennon offered, and after consulting with Ofwat the CMA accepted, undertakings to provide reporting information for SES separately from the rest of the Pennon business, to ensure SES is separately represented on an industry customer advisory panel and to submit to compliance monitoring by Ofwat.

2. *DJ equipment – AlphaTheta proposed acquisition of Serato.*

On May 15, the CMA announced it was referring AlphaTheta's proposed acquisition of its competitor in the supply of DJ software, Serato, to a phase 2 investigation. Serato is the leading global supplier of DJ software, and the CMA found that the merger of the two firms would create a clear market leader with a high market share, almost double that of its next remaining competitor. The CMA's concern was that this would enable the merged business to increase prices and reduce quality and innovation in the market for DJ software as well as weaken competition in the related DJ hardware markets by making it difficult for AlphaTheta's DJ hardware competitors to access DJ software.

The phase 2 investigation was due to end Nov. 27, 2024. However, shortly after the investigation started, the parties decided to abandon the proposed acquisition, and based on their written assurances that this was the case, the CMA cancelled the investigation on July 19, 2024.

C. Competition investigations

1. *School management information systems.*

On May 14, the CMA launched an investigation into alleged abuse of market dominance by Education Software Solutions Limited (ESS), the largest UK provider of school management information systems. The CMA previously investigated ESS, and in 2022 ESS gave binding commitments to the CMA under which it agreed to allow schools to exit early from their three-year contracts. The CMA is now investigating allegations that ESS is making it difficult for schools to switch suppliers by relying on its intellectual property rights to refuse them permission to share with their new provider a copy of the database built using the ESS system. See Investigation into conduct of Education Software Solutions Limited (51427) - GOV.UK (www.gov.uk).

2. *Additional Investigations.*

The CMA continues to investigate other alleged breaches of the cartel and abuse of market dominance rules, a substantial proportion in the digital sector, with others in the construction, fragrance, freelance labour, housebuilding, pharma, and vehicle recycling sectors.

D. State subsidies – UK Subsidy Control Act 2022

1. *Greater Manchester Combined Authority.*

June 7 saw the launch of the second case brought under the UK's new subsidy regime, which came into force Jan. 4, 2023. The case, brought before the UK Competition Appeal Tribunal, involves a challenge by a property developer to a loan granted by Greater Manchester Combined Authority (GMCA) to two property companies owned by a competing property developer. The basis for the challenge is that the £140 million loan from GMCA's housing fund is an illegal subsidy, as it was not made on commercial

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terms that would be available under normal market conditions. See 1642/12/13/24 Mr Aubrey Weis v Greater Manchester Combined Authority | Competition Appeal Tribunal (catribunal.org.uk).

2. *GMCA brownfield housing scheme.*

Under the Subsidy Control Act, any public authority providing a subsidy or making a subsidy scheme must request a report from the CMA. On July 19, 2024, the GMCA requested the Subsidy Advice Unit (SAU) of the CMA to make a report on its brownfield housing scheme. The SAU has 30 working days to review the scheme, and after public consultation ending Aug. 2, 2024, it will issue its report on Sept. 2.

Poland

Polish competition authority tightens grip on no-poach and other labor market agreements.

1. *Explanatory proceedings in the food retail sector.*

The President of the Office of Competition and Consumer Protection (UOKiK) launched explanatory proceedings regarding two leading discount food retail chains in Poland as well as companies providing transportation services to these retail chains. UOKiK is investigating whether the transport companies colluded not to compete for each other's employees, and whether they did so in a coordinated fashion. According to UOKiK, as a result of the investigated practices, transport companies may not have hired drivers working for other participants in the suspected collusion and retail chains may have forced transport companies to comply with the agreement. UOKiK has conducted searches at the companies' premises and is currently analyzing the evidence gathered.

Explanatory proceedings are usually launched at a preliminary stage. They are not launched against any particular entity and involve no fines. Depending on the outcome of such explanatory proceedings (the evidence gathered), UOKiK may launch separate antimonopoly proceedings against a particular entity or entities.

Under Polish law, an entrepreneur involved in a competition-restricting agreement may be fined up to 10% of its turnover in the preceding year, while managers responsible for effecting the collusion face a fine of up to PLN 2 million. Anticompetitive provisions in contracts would be null and void. The entities harmed by an anticompetitive agreement may also seek damages in court.

This is not the first case regarding the labor market in Poland. The UOKiK President previously fined the Polish Basketball League and the Polish Speedway League for collusion on the broadly considered labor market (details of these investigations were provided in the July 2023 and November 2022 Competition Currents).

2. *UOKiK guidelines regarding collusion and abuse on the labor market.*

According to UOKiK, collusion between entrepreneurs in the labor market, such as "no-poach" agreements (an agreement not to recruit workers from each other) and "wage-fixing" (an agreement to fix wages or other types of compensation or benefits) may violate competition law. Such agreements may result in lower wages or slower wage growth and may negatively impact economic development.

To help companies understand which labor agreements may violate competition law, UOKiK published guidelines covering "no poach" and "wage-fixing" agreements as well as agreements fixing other terms of employment (e.g., the number of days of remote work). According to UOKiK, such arrangements by their

very nature may constitute an infringement of competition law, where it is not necessary to demonstrate the effects of the agreements to prove that such anticompetitive agreements occurred (restriction "by object").

UOKiK's guidelines appear to follow the European Commission (EC) Policy Brief on Antitrust in Labor Markets issued in May 2024. The EC also noted that wage-fixing and no-poach agreements generally qualify as restrictions by object under EU law.

Based on the Policy Brief, there may be room to qualify such clauses as so-called "ancillary restraints" which may be permitted if the restraint is:

A) directly related to a non-restrictive transaction (i.e., subordinate to its implementation and inseparably linked) such as vertical cooperation;

B) objectively necessary and proportionate for the implementation of the main transaction; and

C) proportionate to the main transaction (e.g., appropriately limited in its territorial scope or the scope of employees concerned).

The Policy Brief also discusses whether wage-fixing and no-poach agreements could be exempted under Article 101(3) TFEU based on pro-competitive effects. The Policy Brief's authors expressed the view that such an exemption is unlikely, particularly with respect to wage-fixing agreements. With respect to no-poach agreements, the view expressed in the Policy Brief seems to be less categoric.

Actions taken by the UOKiK President as well as the EC demonstrate that arrangements on the labor market may now be under increased scrutiny from competition authorities.

Italy

Italian Competition Authority (ICA)

1. *ICA makes commitments binding and closes further proceedings against several companies linked to Ms. Chiara Ferragni for alleged unfair commercial practices regarding the advertising of Chiara Ferragni-branded, limited-edition Easter eggs.*

On July 4, ICA terminated the proceedings for alleged unfair commercial practices it had launched against Fenice S.r.l., TBS Crew S.r.l., and Sisterhood S.p.A., companies owning the trademarks and personality rights of Italian influencer Ms. Chiara Ferragni and Cerealitalia Industrie Dolciarie S.p.A., a company owning the "Dolci Preziosi" trademark and manufacturer of confectionery products, by accepting the commitments these companies presented.

Similar to the "Pink Christmas" Pandoro (see January 2024 Competition Currents), in this case the sale of Easter eggs branded "Chiara Ferragni" was linked to a charitable initiative, this time in favor of a social enterprise supporting children and young people affected by autism and disabilities (I Bambini delle Fate). In this case, ICA investigated whether the ways in which the companies communicated this initiative to the public were misleading and whether they were suitable to induce consumers to believe that, through the purchase of these Easter eggs, they would have made a concrete contribution to support "I Bambini delle Fate."

In this case, ICA deemed the commitments the companies presented suitable to eliminate the potential elements of unfairness of the commercial practice under investigation. Fenice S.r.l., TBS Crew S.r.l., Sisterhood S.p.A. and Cerealitalia Industrie Dolciarie S.p.A. have committed to donate, over three

financial years, at least EUR 3 million in favor of "I Bambini delle Fate," out of which at least EUR 1.2 million will be donated by the companies related to Ms. Chiara Ferragni.

Following ICA's decision, such commitments are binding on each of the companies. This implies that, in the event of non-compliance, ICA will reopen the proceedings against them to establish the non-compliance, which would expose the companies to a fine of up to EUR 10 million.

2. *ICA fines Italian Football Federation more than EUR 4 million for allegedly abusing its dominant position in the market for organizing competitive youth football competitions.*

On July 1, ICA published its decision to fine the Federazione Italiana Giuoco Calcio (FIGC) more than EUR 4 million for allegedly abusing its dominant position in the market of organizing competitive youth football competitions. According to ICA, FIGC had devised a complex, exclusionary strategy aimed at strengthening its already dominant position and extending it to the recreational-amateur activities market, where it competes with Enti di Promozione Sportiva (EPS).

The first allegation by ICA concerned FIGC's failure to enter into the agreements with EPS required by the Italian Olympic National Committee (Coni) Regulations for EPS in 2014 for competitive activity performances. This precluded EPS from accessing the competitive football events market, thus guaranteeing FIGC a substantial monopoly position.

ICA's second allegation concerned FIGC's use of its regulatory power and dominant position in an abusive manner by qualifying EPS's amateur events for athletes between 12 and 17 years of age as "competitive events," which prevented EPS from competing in amateur tournaments. This eliminated EPS's ability to compete against evens organized by FIGC. In addition, FIGC imposed an agreement between itself and EPS that pre-authorized events concerning athletes up to 12 years of age, who are excluded by definition from competitive activities, thus limiting amateur sports associations affiliated with FIGC and their athletes from participating in tournaments organized by EPS.

Within 60 days of ICA issuing the measure, FIGC can raise an appeal before the Regional Administrative Court of Lazio.

3. *ICA announces creation of its own data science unit.*

On July 22, ICA announced the creation of an in-house unit entirely devoted to data science.

To keep pace with the challenges of digitalization, this new unit, coordinated by ICA's chief economist, will be primarily tasked with supporting ICA's institutional activities. The unit will provide expert advice, develop projects to acquire and analyze data to support ICA's investigative activities in antitrust and unfair trade practice proceedings, and help identify possible anti-competitive conduct through screening activities.

European Union

A. European Commission

1. *European Commission clears Lufthansa's stake in ITA Airways, subject to conditions.*

On July 3, the European Commission conditionally approved the proposed acquisition of joint control of ITA Airways by Deutsche Lufthansa AG and the Italian Ministry of Economy and Finance (MEF). The approval follows a detailed investigation and hinges on compliance with proposed remedies to address

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competition concerns, including commitments to support competition on short-haul and long-haul routes by making assets available to rival airlines, entering interlining agreements, and transferring take-off and landing slots at Milan Linate airport.

The European Commission's investigation revealed potential competition reductions on several fronts resulting from the transaction. The agreed-upon remedies aim to enhance competitiveness and ensure ITA's sustainable operation, even with the MEF retaining a controlling stake.

2. *European Commission clears Cooper's acquisition of Viatris' over-the-counter business, subject to conditions.*

The European Commission has conditionally approved Cooper Consumer Health S.A.S.'s proposed acquisition of the European over-the-counter (OTC) business of Viatris Inc. Cooper manufactures and distributes OTC products, health products, and consumer self-care products. Viatris' OTC business includes personal hygiene products.

The approval follows concerns that the merger would reduce competition in markets for infant laxative enemas in Portugal and earwax removal products in Germany. To address these concerns, Cooper will divest its rights to the infant laxative medicine Bebegel in Portugal and optionally in France and divest its rights to its earwax removal product Otowaxol in Germany and optionally in Ireland. These divestments aim to foster new competition in these markets. According to the European Commission, these commitments fully address the identified competition concerns.

3. *European Commission opens investigation into possible anticompetitive agreements in the online food delivery sector.*

The European Commission has launched an antitrust investigation into possible violation of EU competition law by Delivery Hero and Golvo, two major food delivery companies in Europe. The Commission has concerns that these parties engaged in cartel practices in the online ordering and delivery of food, groceries, and other daily consumer goods in the EEA.

As of July 2022, Delivery Hero has sole control over Golvo, and the European Commission is concerned that the parties entered into pre-acquisition agreements, divided geographic markets, and exchanged commercially sensitive information, leading to a violation of the cartel prohibition of Article 101 TFEU.

B. European Decisions

1. *ECJ upholds most fines in Servier pay-for-delay decision.*

The European Court of Justice (ECJ) has upheld most fines the European Commission imposed on Servier and several generic drug companies for delaying the market entry of a blood pressure medication, while referring specific issues back to the EU General Court to reassess Servier's market dominance and applicable fines. In 2014, the European Commission fined Servier EUR 331 million and several generic drug companies a combined EUR 97 million, finding that they prevented competitors from entering the market.

The ECJ overturned a General Court judgment that reduced the fine by EUR 100 million. The ECJ found that the General Court had wrongly defined the relevant product market in the pharmaceutical sector and referred the case back to the General Court.

In addition, the ECJ overturned a General Court decision annulling the fine regarding another generic medicine manufacturer, Krka. In that decision, the General Court disagreed with the European

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Commission's assessment that the settlement agreement violated Article 101 TFEU. In its judgment, the ECJ held that the General Court had erred as a matter of law, finding there was no doubt about the correctness of the European Commission's assessment of the settlement agreement as a restriction of competition by object.

2. *ECJ clarifies limits of 'economic unit' concept in damages litigation.*

In July 2024, the ECJ ruled that the concept of an "economic unit" has its boundaries and emphasized the importance of procedural safeguards. These decisions arose from national court references concerning damages related to a European Commission decision on a truck price-fixing cartel.

The ECJ had previously defined "undertaking" to include any entity engaged in economic activity, covering multiple natural or legal persons as a single economic unit. In Case C-882/19 (*Sumal v Mercedes Benz Trucks España*), it held that a legal entity not explicitly mentioned in an infringement decision could still be liable for conduct by another entity within the same economic unit.

However, in its latest judgments (Case C-632/22 (Volvo/Transsaqui) and Case C-452/22 (MOL/Mercedes-Benz)), the ECJ clarified its positions, ruling that a parent company cannot be legally served with a summons for antitrust damages through its subsidiary. This applies even if the parent and subsidiary are considered a single economic entity, and even if the subsidiary is located in the country where the plaintiff files the lawsuit.

Additionally, the ECJ ruled that article 7(2) Brussel I-bis should be interpreted to mean that the place of the "harmful event" does not cover the seat of the parent company bringing an action for damages for harm suffered by the subsidiary.

Japan

A. JFTC Finds Cartel of Four Major Insurers.

On July 4, the Japan Fair Trade Commission (JFTC) notified four major Japanese insurance companies (the Companies) of its intention to issue cease and desist orders. The JFTC found that in some of the contracts, the Companies had formed a cartel to adjust premiums in advance.

In December 2023, the Japan Financial Services Agency ordered the Companies to improve their business operations because they had preadjusted premiums under insurance policies with more than 500 companies and local governments. The JFTC is examining these insurance contracts by conducting on-site inspections to ensure they do not violate the Antimonopoly Act.

B. Five manufacturers and distributors of valves for liquefied petroleum (LP) gas containers ordered to pay a total of 709.64 million yen in surcharges.

On June 27, the JFTC issued an exclusion order under the Antimonopoly Act (unfair trade restrictions) and a surcharge payment order totaling 709.64 million yen to five manufacturers and distributors, including Hamai Industries Limited and Miyairi Valve Mfg. Co., Ltd., for jointly raising the sales price of valves for LP gas containers. The breakdown of the surcharges is as follows: Hamai: 454.59 million yen, Miyairi: 148.59 million yen, Miyairi Corporation: 42.44 million yen, Tokyo Miyairi Corporation: 41.25 million yen, and Fuji Koki Co., Ltd. (FUJI): 22.77 million yen.

According to the JFTC, the four companies other than FUJI agreed to raise the sales price of the valves twice in 2021 and 2022. FUJI, which learned of the target price and target increase amount, raised prices even though it was not part of the agreement among the other four companies.

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Valves for LP gas containers are steel containers weighing 50 kg or less, typically for household use. The domestic market size in 2024 is expected to be approximately 7.4 billion yen, with five companies accounting for 100% of the domestic market share.

Read previous editions of GT's Competition Currents Newsletter.

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