GT GreenbergTraurig

GT Newsletter | Competition Currents | October 2024

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

In This Issue[1]

United States | Mexico | The Netherlands | United Kingdom | Poland | Italy | European Union | Japan

United States

A. Federal Trade Commission (FTC)

1. *FTC staff opposes proposed Indiana hospital merger.*

On Sept. 5, the FTC staff submitted a comment urging the Indiana Department of Health to deny an application seeking approval of a merger of Union Hospital, Inc. and Terre Haute Regional Hospital, L.P. (THRH), two Indiana hospitals.

Union Health and THRH seek to merge under a proposed certificate of public advantage (COPA), which shields the proposed merger from antitrust scrutiny. According to the FTC's comment, the combination would likely impose higher costs and could lead to worse health care outcomes for Indiana patients, as well as lower wage growth for hospital workers. In particular, the comment alleges that the parties are each other's closest competitors, and the merged entity would have a combined share of nearly 74% of all commercially insured inpatient hospital services in one county in Indiana (Vigo).

[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.

Union Health and THRH filed a COPA application in September 2023. State governments use COPAs to evaluate the merits and oversee a combination of hospitals that might otherwise pose competition concerns. The FTC has long advocated against the use of COPAs due to concerns that the harms from lost competition between the merging parties outweigh the advantages of such combinations.

According to the FTC, it performed a labor analysis and determined that the proposed merger would likely depress wage growth for registered nurses. According to the parties, the merger will expand services, enhance the quality of care, and ultimately improve outcomes while keeping costs down.

The Commission's vote to submit the staff comment to the Indiana Department of Health was 5-0.

2. *FTC fines GameStop CEO nearly $1 million for failure to file HSR notification of open market purchases of Wells Fargo.*

On Sept. 18, the FTC announced a proposed settlement of allegations that the managing partner of RC Ventures, LLC, and chairman and CEO of GameStop Corp. violated the HSR Act for failure to provide notification and observe the 30-day waiting period prior to the purchase on the open market of certain shares of Wells Fargo. The defendant agreed to pay a $985,320 civil penalty to settle the charges.

According to the complaint, the defendant accumulated, through successive acquisitions on the open market, a value of Wells Fargo voting securities that exceeded HSR filing thresholds. Those holdings represented less than 10% of the outstanding voting stock of Wells Fargo. Certain acquisitions resulting in holdings below that percentage threshold can be exempt from HSR Act reporting under the so-called "passive investment" or "investment-only" exemption, but only when the acquiring party "has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."

While the defendant was not a Wells Fargo officer or director at any relevant time, the complaint alleges that, prior to certain acquisitions of shares in the open market that caused his aggregate holdings to exceed notification thresholds, he sent emails advocating for a board seat and made suggestions to Wells Fargo leadership regarding how to improve business.

Notably, the complaint highlighted that open market purchases "require an acquirer to decide affirmatively and actively" to acquire shares, arguing that it was not excusable negligence to be unaware of the HSR Act's requirements in such circumstances.

Neither the complaint nor the Commission's press release stated whether the defendant self-reported the alleged violation or if the corrective filing resulted from a Commission inquiry.

3. *FTC issues statement following WillScot's decision to abandon proposed $3.8 billion acquisition of McGrath RentCorp.*

On Sept. 18, the FTC announced its support of the decision by temporary space solutions provider WillScot Holdings Corp. and business-to-business rental company McGrath RentCorp to terminate its proposed merger. WillScot and McGrath are two of the largest modular and portable storage rental companies both nationally and in several local markets.

"Strong competition in the markets for modular and portable storage solutions is essential to ensuring low prices and high levels of product quality and customer service for businesses and school districts nationwide," FTC Bureau of Competition Director Henry Liu said. "FTC staff worked tirelessly to investigate the potential impacts of the proposed acquisition and found that customers in the

construction, retail, education, and many other industries will benefit from continued competition between these two companies in markets across the country."

The merger was first announced Jan. 29, 2024, and, following HSR notification, the FTC issued a second request for further information and documents.

According to the parties, there was "no commercially reasonable path" to clear the antitrust regulatory impediments to closing the deal. Despite the "extensive and exhaustive" engagement with the agency, WillScot revealed it had made minimal progress and called the regulatory process with the FTC "excessively onerous."

According to a separate press release, McGrath will receive a $180 million termination fee.

4. *FTC files in-house complaint against pharmacy benefit managers alleging use of unfair methods of competition to increase insulin drug prices*.

On Sept. 20, FTC filed an in-house administrative complaint accusing the three largest pharmacy benefits managers (PBMs) of abusing their economic power by artificially inflating insulin prices through rebate arrangements negotiated with pharmaceutical drug makers while at the same time excluding lower priced alternatives from the market.

The complaint alleges that the PBMs are using unfair methods of competition and unfair acts or practices in violation of Section 5 of the FTC Act by negotiating rebates with drug manufacturers and incentivizing them to raise the list prices for insulin drugs. The FTC alleges that drug prices began rising in 2012 when PBMs started threatening to exclude certain drugs from their formularies.

The case followed the Commission's publication in July of an interim report setting forth its initial findings from review of materials obtained from issuing Section 6(b) orders to the largest PBMs in 2022 and 2023. The report generally evaluated the role that PBMs play as middlemen between drugmakers and insurers and the impact they have on drug access and affordability.

The PBMs have generally countered the allegations by stating that they have been critical to "aggressively and successfully" negotiating with drug manufacturers to lower prescription insulin costs for health plan customers and their members.

Bureau of Competition Deputy Director Rahul Rao also issued a separate statement that the Bureau is "deeply troubled" over the role played by certain manufacturers, and that therefore "all drug manufacturers should be on notice that their participation in the type of conduct challenged here can raise serious concerns, with a potential for significant consumer harm, and that the Bureau of Competition reserves the right to recommend naming drug manufacturers as defendants in any future enforcement actions over similar conduct."

B. Department of Justice (DOJ)

1. *DOJ withdraws from 1995 Bank Merger Guidelines.*

On Sept. 17, the DOJ announced its withdrawal from the 1995 Bank Merger Guidelines, stating that the 2023 Merger Guidelines now remain its sole and authoritative statement across all industries, including banking.

The DOJ simultaneously released supplemental commentary in an addendum to the 2023 Merger Guidelines. The addendum identifies common competition issues in bank mergers and outlines which guidelines apply for analyzing those issues. Like the 2023 Merger Guidelines, the addendum is intended to educate potential merging parties and judges about the department's internal merger review process. It neither carries force of law nor binds the agency to any specific enforcement action.

The DOJ noted that, throughout any bank merger review, it works closely with the relevant bank regulators to ensure the complementary and consistent application of the laws within each agency's area of expertise.

2. *United States v. Visa, Inc., 1:24-cv-07215 (S.D.N.Y. 2024).*

On Sept. 24, the DOJ filed a complaint against Visa for monopolization and other unlawful conduct in debit network markets in violation of Sections 1 and 2 of the Sherman Act. The complaint alleges that Visa illegally maintains a monopoly over debit card networks, with the DOJ alleging Visa handles 60% of all transactions in the United States and uses its dominance to thwart the growth of its competitors and prevent others from developing alternatives. The complaint does not seek monetary relief but asks the court to issue an injunction to block Visa from engaging in the alleged conduct. Visa called the DOJ suit "meritless." Visa general counsel Julie Rottenberg said, "Anyone who has bought something online, or checked out at a store, knows there is an ever-expanding universe of companies offering new ways to pay for goods and services."

C. U.S. Litigation

1. *In re College Athlete NIL Litigation, 4:23-cv-01593 (N.D.Cal. 2020).*

On Sept. 5, Judge Claudia Wilken declined to preliminarily approve a $2.78 billion settlement of a class of 184,000 former student athletes who alleged that NCAA rules that prevented student-athletes from receiving compensation for the commercial use of their names, images, and likenesses (NIL) and prohibited NCAA conferences and schools from sharing any NIL revenue with student-athletes were anticompetitive. Judge Wilken declined to approve the settlement due to her concerns about a provision in the settlement barring college athletes from entering private NIL agreements with boosters (meaning entities that promote or assist the school's athletic department or the student-athlete) without NCAA approval. On Sept. 26, the plaintiffs filed a supplemental brief, acknowledging the court's concern about the NCAA's authority over third-party payments. The court has yet to set a new approval hearing date.

2. *International Swimming League, Ltd. v. World Aquatics, 23-15156 (9th Cir. 2023).*

On Sept. 17, the Ninth Circuit reversed and remanded the district court ruling against plaintiffs International Swimming League (ISL) in their antitrust lawsuit against World Aquatics, the international sports federation for water sport competition. ISL claimed that World Aquatics conspired through a group boycott to block ISL from entering the market, maintained monopoly conduct, and interfered with ISL's economic relationships. The panel reversed the district court's summary judgment decision against ISL, holding that ISL had created a triable issue as to whether World Aquatics' rules constituted a per se unlawful group boycott by preventing member federations and swimmers from doing business with ISL without risking draconian sanctions. The panel also ruled that the district court abused its discretion in refusing to certify the proposed damages class.

Mexico

A. COFECE Investigates Possible Existence of Illegal Exclusivities in Cash Payment, Deposit, and Withdrawal Services in Stores

The Investigative Authority of the Federal Economic Competition Commission (COFECE) has launched an ex officio investigation to determine if any company has abused its market power by implementing illegal exclusivities in services that allow people to make cash payments, deposits, and withdrawals in stores.

COFECE indicates that these services are crucial for the Mexican economy, as they facilitate payment for goods and services and access to cash for those without a bank account. The practice of establishing exclusivities by dominant companies forces their suppliers or marketers to offer only their products or services, thus limiting the participation of other competitors.

Furthermore, COFECE notes that cash remains the most common means of payment in Mexico and is expected to continue as such until at least 2027. According to a Bank of Mexico survey, 19% of Mexico's population relies exclusively on cash as a form of payment. Therefore, those without access to traditional financial services need multiple options for making payments, deposits, and withdrawals in commercial establishments. Competition in these services not only promotes financial inclusion but also benefits consumers by offering higher quality products and services, with greater transparency and at lower costs.

If COFECE finds anticompetitive practices, the responsible companies could face fines of up to 8% of their annual revenues. Additionally, the involved executives could be disqualified from serving as executives of a company for up to five years and fined.

B. IFT Plenary Sanctions TELCEL for Engaging in a Relative Monopolistic Practice

The Plenary of the Federal Telecommunications Institute (IFT), which has competition authority powers, has sanctioned Radiomóvil Dipsa, S.A. de C.V. (Telcel) for engaging in a relative monopolistic practice as outlined in articles 54 and 56, section VIII, of the Federal Economic Competition Law.

The alleged conduct involved granting discounts, incentives, or benefits to an indirect distribution channel on the condition that they would not sell the package of cellular equipment with SIM cards and balance top-ups from Telcel's economic competitors in the states of Michoacán, Colima, and Jalisco.

IFT states that this conduct affected consumers by limiting their options to purchase mobile terminal equipment packages and SIM cards, as well as to top-up balances from providers other than Telcel, within that distribution channel. Therefore, the Plenary of the IFT imposed a $90,659,701.72 fine and ordered the cessation and correction of the practice.

C. COFECE Prevents Grupo Xcaret's Purchase of Ferries in Quintana Roo, Mexico

COFECE denied Grupo Xcaret's acquisition of four companies operating ferry routes in Quintana Roo, arguing that the transaction would reduce the number of service providers, limit the options available to users, and decrease incentives for companies to compete in price and quality.

The operations COFECE rejected include the purchase of companies operating routes between Puerto Juárez and Isla Mujeres, the Hotel Zone and Isla Mujeres, and between Cozumel and Playa del Carmen.

COFECE warns that on the Hotel Zone-Isla Mujeres route, the acquisition would have turned Grupo Xcaret into a monopoly, allowing it to raise prices or reduce the quality of its services without consumers having alternatives.

Likewise, on the Cozumel-Playa del Carmen route, the operation would have resulted in a duopoly structure, reducing competition and causing an increase in prices, as well as a decrease in travel options and frequency.

In 2023, almost two million people used ferries to travel to Cozumel, and more than half a million passengers traveled by ferry to the Cancun Hotel Zone.

The Netherlands

Statements of the Dutch Competition Authority (ACM)

1. *ACM publishes guidelines on the DSA for online services providers.*

Addressed to online services providers, the ACM has published guidelines on the Digital Services Act (DSA), explaining the act's rules and application. The DSA is the European Union regulation that contains obligations for providers of online services which aim to make the internet safer and more trustworthy.

A public consultation held among market participants in the digital sector revealed a need for more practical information about the DSA. Besides the published guidelines, additional guidelines for different business types will be also published in the future to explain what rules apply to them.

2. *ACM withdraws filed request for investigating technology company's acquisition of Inflection AI assets.*

The ACM has withdrawn its request for the European Commission to review the acquisition of AI startup Inflection, due to a ruling by the European Court of Justice (ECJ). The ECJ's decision in the Illumina-Grail case limits the Commission's ability to assess deals below notification thresholds unless national authorities, like ACM, have jurisdiction. ACM expressed concerns about the deal's impact on competition and innovation in AI, advocating for new powers to review smaller acquisitions that may still harm Dutch consumers and businesses.

3. *ACM orders cheese producer Royal Lactalis Leerdammer to determine milk price-fixing system in negotiations with dairy farmers.*

The ACM has imposed an order subject to periodic penalty payments on cheese producer Lactalis Leerdammer for unilaterally setting milk prices, which violates the Dutch Act regarding unfair commercial practices in the agricultural and food supply chain.

The ACM has ordered Lactalis Leerdammer to adjust the terms of delivery on the milk price by including a transparent and objective price system, for example. Lactalis must then submit the amended conditions to milk suppliers for approval so that they can still be negotiated. If Lactalis Leerdammer fails to comply within three months, it faces penalties of up to €1.05 million.

United Kingdom

A. Merger Control

1. *Current status.*

The UK Competition and Markets Authority (CMA) opened a number of new merger investigations in September 2024, including mergers in the construction, transport, recreation and leisure, food manufacturing, and paper and packaging sectors. It continues to investigate existing cases, including Phase II investigations in the ventilation, spread betting, and distribution and service sectors. Mergers cleared at Phase 1 include mergers in the utilities and electronics sectors.

2. *Changes to the UK merger regime.*

The UK general election in July 2024 delayed the Digital Markets, Competition and Consumers Act 2024 (DMCCA)'s implementation, which may now take effect in early 2025. Once the DMCCA is in force, the "turnover" threshold will increase from £70m to £100m. An additional acquirer-focused threshold came into effect, resulting in the CMA having jurisdiction over transactions between or involving a party with a UK nexus and an acquirer with a 33% or more share of supply in the UK and £350m UK turnover. New regulations and revised CMA guidance are also expected.

3. *T&L Sugars / Tereos Phase II clearance with procedural penalty.*

On Sept. 3, the CMA cleared T&L Sugars' proposed acquisition of Tereos UK & Ireland retail sugar business. The CMA issued the clearance decision at the end of a Phase II investigation, triggered by concerns that the merger would reduce the number of sugar suppliers to UK customers, such as supermarkets and restaurants, from three to two. Although a three-to-two reduction in competitors is normally at high risk of being blocked, in this case the CMA cleared the acquisition based on evidence relating to Tereos' financial position and the work it had done to improve the UK business' performance. This evidence confirmed to the CMA that the most likely outcome in the absence of T&L's acquisition would be that Tereos UK retail business would close, so a loss of competition was inevitable. Based on these facts and the absence of a less anticompetitive purchaser for the Tereos UK retail business than T&L Sugars, the CMA cleared the acquisition.

The clearance was tempered by the CMA's imposition of a £25,000 penalty on Tereos for failure during the Phase II investigation to provide full information in its response to a CMA notice requiring it to produce minutes and internal documents relating to Tereos' board and corporate governance. The CMA found that Tereos had interpreted the scope of its notice unjustifiably narrowly, which was untenable when viewed in the context of the object of the merger investigation. Announcing the penalty, the chair of the CMA inquiry group that led the investigation stated: "It's important that firms respect the UK merger review process – which includes providing all the information we need to promptly progress our investigation. … Firms and their advisers must not apply their own narrow, artificial interpretation of our formal information gathering requirements – as Tereos has done so here. Had they responded properly [] Tereos could have avoided this fine altogether."

The maximum procedural penalty is currently £30,000, but this will increase to 1% of the total value of a firm's global turnover when the DMCCA comes into force.

4. *Vodafone / CK Hutchison.*

On Sept. 13, the CMA issued its provisional findings on Vodafone Group plc and CK Hutchison Holdings Limited's proposal to combine their respective UK telecoms businesses in a joint venture. The CMA referred the proposal to a Phase II investigation on April 4, 2024.

The CMA has provisionally concluded that implementing the proposal would result in a substantial lessening of competition in the retail and wholesale supply of mobile communications services. It found that the joint venture would create the largest retail mobile operator by revenue in the UK and would lead to price increases for "tens of millions of" retail mobile customers and reduced services, such as smaller data packages in customers' contracts. It also found that the joint venture would reduce the number of mobile network operators (MNOs) in the UK from four to three. As a result, mobile virtual network owners (MVNOs) that do not own their own networks would find it more difficult to secure competitive access terms to an MNO network, restricting their ability to offer the best deals to their retail customers.

Although the CMA has acknowledged that the merger could improve the quality of mobile networks and expedite 5G next generation networks and services deployment, it nevertheless found that these pro-competitive efficiencies would not be sufficient to offset the adverse effects of the merger. Consequently, it is considering whether suitable remedies may resolve its concerns. In a remedies notice published at the same time as its provisional findings, CMA indicated that behavioral (rather than divestment) remedies may be appropriate, including legally binding commitments, overseen by the telecoms sector regulator Ofcom, to deliver specified network investments and to protect both retail and wholesale customers. The CMA has until Dec. 7, 2024, to publish its final report.

B. State Subsidies – CMA SAU

The CMA's Subsidy Advice Unit (SAU) has two functions: (1) to provide non-binding advice to public authorities, in a report, on whether proposed subsidies or subsidy schemes comply with the UK Subsidy Act 2022 (Act), and (2) to monitor and report on the effectiveness of the UK subsidy control regime, which took effect Jan. 4, 2023.

1. *Recent requests for advice.*

In September, the SAU accepted two requests for non-binding advice. One is a joint referral from the Welsh Government and the UK Ministry of Housing, Communities and Local Government to evaluate their assessment of the Welsh Freeports Subsidy Scheme, which is intended to provide tax and other incentives to businesses located within the freeport zone. The other is a request from Plymouth City Council for advice on a proposed subsidy to Plymouth Citybus Limited to secure delivery of 50 zero-emission double-decker buses to cover specified bus routes and related charging infrastructure. Its reports are expected to be issued Nov. 1 and Oct. 23, respectively.

2. *Recent reports.*

In two recent reports, the SAU ordered subsidy providers to account for their assessment that their subsidies are compatible with the Act.

The SAU's report of Sept. 2, 2024, provides advice to Greater Manchester Combined Authority (GMCA) on GMCA's assessment of its Brownfield Housing Scheme. Under the Scheme, GMCA proposes to award subsidies towards the cost of developing brownfield sites for housing in the Greater Manchester area. The Scheme has the status of a Subsidy of Particular Interest (SOPI), as it has the potential to distort competition. It required particularly rigorous SAU consideration to ensure compliance with the Act,

including focusing on a specific public policy objective, proportionate and structured so that it reduces competition distortions to the extent possible. The SAU provided detailed input on GMCA's approach and its compatibility with the Act and related statutory guidance.

The SAU's Sept. 11, 2024, report provided advice on the Department of Energy Security and Net Zero's assessment of its proposed subsidy to Strand 4 of the UK Net Zero Hydrogen Fund. The SAU identified several positive features in the Department's assessment but also highlighted areas for improvement, including a need to reach clear conclusions on certain points and identify the markets potentially affected by the subsidy and the impact of the subsidy on them.

These and the SAU's other reports provide useful guidance for both subsidy providers and subsidy recipients when assessing the risks of giving and receiving subsidies.

C. Consumer Protection

1. *Imminent strengthening of CMA consumer powers.*

The CMA currently enforces UK consumer protection laws under regulations dating back to 2008. It has recently used its enforcement powers to obtain undertakings from several firms, requiring them to cease making misleading claims about their products and services. Examples include misleading claims regarding domestic boilers, mattresses, and online sales of leisure and household deals.

Where undertakings are not available, however, the CMA has no power to impose penalties, but must take court action, which can take time. In a recent case, the CMA challenged a firm's discount and urgency claims, alleging it gave consumers a false impression that they needed to act quickly to avoid missing a deal. The firm declined to provide undertakings satisfactory to the CMA, and the CMA announced in May 2024 that it was preparing to take court action. This procedure will be superseded when the DMCAA comes into force, enabling the CMA to investigate consumer law breaches and, without recourse to the courts, impose penalties of up to 10% of turnover or £300,000, whichever is higher, as well as a range of other remedies.

2. *Dynamic pricing: concert tickets.*

One of the CMA's most recent cases, opened Sept. 5, 2024, concerns the online sale of tickets to Oasis concerts in the UK. The CMA is investigating whether UK consumer laws were infringed and whether consumers were provided with clear and timely information that explained that the price of the tickets would change depending on the level of demand and how this dynamic pricing would operate, including the price they would actually pay for the tickets. One concern is that the system put consumers under pressure to buy tickets within a short time and at a higher price than they understood they would have to pay. The CMA invited consumers to submit evidence of their experience in buying or trying to buy Oasis tickets. This call for evidence has now closed, and the CMA has not yet published the next steps in the investigation.

3. *Greenwashing in the fashion industry.*

On Sept. 18, the CMA published a compliance guide for all fashion retailers, including firms producing clothing, footwear, fashion accessories, and related services such as packaging, delivery, and returns. The guide covers the need to ensure, amongst other things, that environmental claims are clear and accurate; that important information is given sufficient prominence; that all terms, comparisons, fabric descriptions, and imagery used should be clear and not misleading; and that processes should be put in place to ensure that all green claims are correct.

Poland

Polish competition authority fines entities involved in Iveco truck-selling cartel.

The President of the Office of Competition and Consumer Protection (UOKiK) imposed fines of over PLN 238 million (EUR 56 million or USD 62 million) on Iveco Poland and its 10 truck distributors involved in collusion. In addition, UOKiK fined 10 managers responsible for the companies' anticompetitive behavior. The total amount of fines UOKiK imposed on the managers was over PLN 2.5 million (EUR 587,000 or USD 654,000).

Iveco Poland belongs to the Iveco group, which manufactures commercial vehicles, including trucks, buses, and special vehicles. Iveco typically works with Polish companies as local distributors (dealers) to sell their vehicles in Poland.

The decision highlights a nearly 10-year collusion between Iveco and its dealers, in which UOKiK alleges they divided the market by agreeing on the areas where local distributors had sales priority. According to UOKiK, if a potential customer from another region asked for a quotation, the distributor discouraged the purchase (e.g. by offering a higher price) and redirected the customer to a distributor from the customer's region. Iveco enforced this arrangement through rebates and bonuses for sales performance. At the same time, dealers exchanged information and coordinated offers to maintain the market division.

The total amount of fines is PLN 238 million. Out of this sum, the highest fine was imposed on Iveco (PLN 156 million, i.e., EUR 36 million or USD 40 million). The fines imposed on managers ranged from PLN 77,000 (EUR 18,000 or USD 20,000) to PLN 490,000 (EUR 128,000 or USD 128,000). The fines could have been higher, but four companies and four managers benefited from the leniency program, which allows for fine reductions when entities under investigation provide substantial evidence of collusion.

Under Polish law, an entity involved in a competition-restricting agreement may be fined up to 10% of its turnover, while the managers responsible for effecting the collusion face a penalty of up to PLN 2 million. Entities harmed by an anticompetitive agreement may also seek damages in civil courts.

The UOKiK decision is not final, and the fined entities may appeal to the Court of Competition and Consumer Protection.

Italy

Italian Competition Authority (ICA)

1. *ICA carries out dawn raids at the premises of two Italian food companies.*

On Sept. 26, ICA announced that it is investigating an allegedly anticompetitive agreement between food sector companies Amica Chips and Pata.

In ICA's view, the companies have coordinated the price of their products with supermarket chains. Thus, the scope of the alleged cartel would encompass the production and marketing of private label chips produced on behalf of large-scale retail chains. According to ICA, the two companies have also coordinated to divide customers between them.

ICA started the investigation due to a whistleblower complaint. ICA's officials, with the help of the Special Antitrust Unit of the Italian tax police (Guardia di Finanza), carried out inspections in the main offices of the parties as well as another entity deemed to be in possession of relevant evidence.

2. *ICA investigates Infinite Styles Services CO for alleged greenwashing practices.*

On Sept. 25, ICA announced an investigation into Dublin-based Infinite Styles Services CO. Limited (a company managing the Italian Shein website) over certain environmental statements on the website.

According to ICA, the company's statements about a "sustainable" clothing collection may mislead consumers about the quantity of "green" fibers used and that the items are no longer recyclable. ICA also alleges that the company's emphasis on the decarbonization process of its activities appears to contradict the increase in greenhouse gas emissions mentioned in Shein's 2022 and 2023 sustainability reports.

ICA's theory of harm seems to be based on consumers' growing sensitivity of the environmental impact of their consumption choices. In ICA's view, the company tried to convey an image of sustainability of its clothing through (i) generic environmental assertions; and (ii) misleading terms of "circularity" and quality of products.

3. *Event on AI and public enforcement in Rome.*

On Sept. 26, ICA announced that the G7 Competition Summit will take place on Oct. 3-4 in Rome, at ICA headquarters. The meeting will bring together the delegations from the group's seven member countries (Canada, France, Germany, Japan, Italy, the United Kingdom, and the United States) as well as the European Commission. A total of 35 delegates are expected to attend.

The event will feature two closed-door working sessions; the first will focus on current and future horizon scanning and enforcement activities and the second will address policy and regulatory issues. The overarching theme of the discussions will be artificial intelligence and related competition issues, considering the potentially transformative impact of AI on our economy and society.

ICA Chairman Roberto Rustichelli commented that this event will be "a key opportunity to promote cooperation, knowledge exchange and define a common vision on the subject among the member countries."

European Union

A. European Commission

1. *ECJ annuls General Court and European Commission decisions on the Illumina/GRAIL case.*

On 3 September 2024, the Court of Justice of the European Union (CJEU) annulled the General Court's judgment and the European Commission's decisions allowing EU national competition authorities to review concentrations that fall below national (turnover) thresholds. The CJEU found that Article 22 of the European Merger Regulation (EUMR) should not be used as a corrective mechanism for Member States without jurisdiction and reaffirmed that turnover thresholds are designed to ensure a high degree of predictability and certainty in the merger review process.

According to the CJEU, Article 22 EUMR cannot be used to trigger a merger review at the request of a Member State that lacks jurisdiction in the matter under its national competition laws. This decision restores stability to the EU M&A landscape, though its practical impact may be tempered by recent changes in some Member States' national merger control provisions enabling them to request the notification of mergers that do not meet national thresholds if such merger poses potential competitive concerns. See GT Alert for additional details.

2. *European Commission takes note of Member States' withdrawn referral requests regarding technology company's acquisition of Inflection AI's assets.*

The European Commission noted seven Member States' withdrawal of referral requests to review a technology company's acquisition of Inflection AI's assets under Article 22 of the EUMR. This unfolded after the CJEU ruled on the Illumina/GRAIL case, where the court stated that Member States cannot refer a transaction if they cannot review the concentration under national competition law rules. Consequently, the European Commission will not decide these matters.

3. *European Commission publishes policy brief about possible anticompetitive concerns around the generative AI and virtual worlds market.*

The European Commission released a policy brief (see also here) on competition in generative AI and virtual worlds. The policy brief discusses how these transformative technologies may affect competition in Europe while ensuring that their benefits in terms of pricing and innovation are widely accessible.

The policy brief examines market dynamics, emerging trends, and entry barriers in a number of sectors, including manufacturing, retail, finance, education, energy, and healthcare. It proposes an initial framework for analyzing potential issues, such as theories of harm and efficiency benefits. It also addresses potential anticompetitive issues and suggests solutions, including antitrust measures, merger control, and the Digital Markets Act.

B. Court of Justice of the European Union (CJEU) Judgments

CJEU rules that price parity clauses are not necessary to hotel business operations.

On 19 September 2024, the CJEU ruled that Booking.com could not avoid an antitrust damages claim by arguing that its price parity clauses are necessary for its business. These price parity clauses prevent hotels from offering lower prices on their own websites and/or other platforms than Booking.com. The CJEU found that these clauses do not qualify for exemption from EU competition rules, since they are not essential for the economic viability of Booking.com.

The CJEU's ruling states that parity clauses should only be exempt if they are indispensable for a platform's survival. The Court also states that the "free rider" issue does not justify the necessity of these clauses.

Japan

A. Endoscope Disinfectant Market

On Aug. 26, the Japan Fair Trade Commission (JFTC) issued a cease-and-desist order to ASP Japan LLC for violating the Antimonopoly Act (unfair trade practices) by unfairly restricting competition in the sale of endoscope disinfectants.

The order comes after the JFTC conducted an on-site inspection of ASP Japan in December 2022.

According to the FTC, since April 2019, the company had been selling endoscope washers that could only use their proprietary disinfectant. This forced medical institutions to purchase ASP Japan's disinfectants, thereby hindering other companies from selling their own disinfectants.

The Antimonopoly Act prohibits "tying sales," an unfair trade practice that imposes the purchase of one product as a condition for purchasing another.

As of fiscal year 2022, the market size for endoscope disinfectants was approximately JPY 2.7 billion (USD 19 million), with ASP Japan controlling about 70% of the market share.

B. Surcharge Orders for 4 Major Japanese Insurance Companies Exceed ¥2 Billion in Total

As discussed in the August issue of Competition Currents, the JFTC issued notices of disposition to four major Japanese insurance companies (the Companies). The JFTC issued surcharge orders of JPY 155 million (USD 1 million) on Aug. 5, 2024, and JPY 1.9 billion (USD 13 million) on Aug. 8, 2024, for prior price adjustments in corporate insurance. The JFTC also plans to issue cease-and-desist orders to the Companies, requiring them to prevent recurrence. The JFTC alleges the Companies entered into a cartel to adjust prices in advance and engaged in bid rigging by showing insurance premiums in advance.

One of the Companies will be exempted from the surcharge orders based on the leniency system, since the company voluntarily filed its report before the investigation began.

Read previous editions of GT's Competition Currents Newsletter.

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