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GT Newsletter | Competition Currents | December 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. *Public predatory pricing workshop.*

The FTC announced a virtual, public workshop to take place Dec. 18, 2024, for economists, academics, and antitrust litigators to discuss the status of case law addressing unlawful predatory pricing practices and whether changes are needed in the legal doctrine to address modern economic realities. The FTC's focus appears to be how "firms can now profitably utilize predatory pricing to achieve market dominance," including, and particularly in, "digital markets."

2. *FTC launches portal for public comments on proposed mergers and acquisitions.*

In October, the Bureau of Competition launched an online merger comment portal, allowing stakeholders and the public to submit comments on transactions that may be under investigation. The portal enables third parties to comment on transactions, providing a menu of options for how a transaction may affect

[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 – "increased prices," "reduced quality," "reduced innovation," "labor market concerns," or "other" – along with the ability to provide narrative comments. Commissioner Holyoak criticized the portal's focus on negative competitive effects and apparent "bias[] against mergers."

B. Department of Justice (DOJ)

1. *Suit to block United Health/Amedisys merger and to obtain penalties from Amedisys for second request deficiencies.*

On Nov. 12, 2024, DOJ filed a complaint to enjoin United Health Group's proposed acquisition of Amedisys. DOJ, joined by Maryland, Illinois, New Jersey, and New York, alleged that the parties are the largest home health and hospice providers in the United States and that the transaction would harm competition in local markets for (i) home health services (generally and separately to Medicare Advantage plans), (ii) hospice services provided to traditional Medicare beneficiaries, and (iii) labor of home health and hospice nurses. The complaint also criticized the proposed divestiture of assets as insufficient in scope and the private-equity-owned buyer as an inadequate operator of the divestiture assets.

Additionally, DOJ included a separate count against Amedisys for violating the Hart-Scott-Rodino Act, alleging that Amedisys certified a response to its "Second Request" known to be deficient in several ways, including that it failed to (i) explain an issue with Amedisys' email archives that impacted its ability to produce emails for certain custodians for one month during the period the deal was under negotiation; (ii) produce certain hard copy documents; and (iii) produce text messages for more than half of the Second Request custodians.

2. *First Circuit affirms win blocking American/JetBlue Northeast alliance.*

On Nov. 8, 2024, the First Circuit affirmed the injunction ending the Northeast Alliance between American Airlines and JetBlue, secured in Massachusetts District Court by DOJ and six states in May 2023. The First Circuit did not agree that the district court's analysis was insufficient or an inappropriate "quick look" analysis, as American alleged. The First Circuit found no clear error with the district court's finding of competition harm, despite the empirical evidence presented of the Alliance's positive impact on output and price, and validated the district court's skepticism of the proffered procompetitive effects, which the First Circuit considered either not legally cognizable or insufficiently supported by the facts.

C. U.S. Litigation

1. *Wolfire Games LLC, et al. v. Valve Corp., Case No. 2:21-cv-00563 (W.D. Wash.)*

On Nov. 27, 2024, U.S. District Judge Jamal N. Whitehead certified a class of approximately 32,000 game developers in a case accusing Valve Corp. of blocking competition by enforcing pricing and other restrictions on games sold through its Steam platform.

The plaintiffs accused Valve of violating antitrust law by enforcing a most favored nations policy allegedly preventing companies from offering cheaper or better versions of games on other platforms. The developers claim the policy allows Valve to maintain its dominance and charge inflated commissions.

In opposing the developers' certification bid, Valve objected to the developers' market definition, arguing the proposed game distribution market wrongly focused only on PC game downloads while excluding gaming consoles and mobile games, and that the market wrongly excludes other forms of PC game distribution, such as physical stores, cloud gaming, and subscription models. Valve also attacked the sufficiency of the developers' commonality and predominance showings, arguing there is not enough

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common evidence showing it has a most favored nations policy for class certification because it requires only "content parity" in its standard distribution agreements for content purchased within a game. However, the judge found Valve's critiques insufficient to defeat certification.

In the class certification order, the judge also rejected Valve's motion seeking to exclude testimony from the developers' expert, who concluded that Valve has a dominant position in the game distribution market and that it maintains that dominance by enforcing its most favored nations policy.

2. *2311 Racing LLC, et al. v. National Assoc. for Stock Car Auto Racing LLC, Case No. 24-2134 (4th Cir.)*

On Nov. 20, 2024, two NASCAR teams voluntarily dismissed their expedited appeal of a denied injunction seeking relief related to NASCAR's attempt to ban any racing teams from the 2025 season that did not agree to sign contracts that included NASCAR's new antitrust release. The two teams had sued NASCAR over the allegedly anticompetitive conduct stemming from the antitrust release, but NASCAR subsequently decided to remove the antitrust release clause and, thus, argued that the appeal need not be expedited.

3. *Alexander Govea v. Nat'l Potato Promotion Bd. d/b/a Potatoes USA, et al., Case No. 1:24-cv-11816 (N.D. Ill.); Karen Pollack v. Cavendish Farms Ltd., et al., Case No. 1:24-cv-11864 (N.D. Ill.); Redner's Markets, Inc. v. Lamb Weston Holdings, Inc., et al., Case No. 1:24-cv-11801 (N.D. Ill.)*

Three class action complaints filed in the Northern District of Illinois in mid-November allege that the four largest potato processors have formed a cartel to fix the prices of frozen potato products. A direct purchaser filed the initial complaint and consumers filed the other two.

According to the consumer complaints, the members of the alleged potato cartel have conspired to artificially raise the prices of French fries, hash browns, tater tots, and other frozen potato products by accessing each other's competitively sensitive data, causing retail purchasers to pay supra-competitive prices.

The consumer complaints allege trade restraints in violation of the Sherman Act, state antitrust law violations, and unjust enrichment. The complaints also seek damages, injunctive relief, costs, and attorney's fees, among other relief. The consumer plaintiffs seek to represent nationwide classes of indirect purchasers who bought the frozen potato products from Jan. 1, 2021, through the present day. According to the consumers, the defendants control nearly all frozen potato product production in the United States, have increased prices "exponentially" since January 2021, and have not lost market share because they refuse to compete on price. The consumers allege multiple instances of one producer increasing prices followed days later by the other purported cartel members following suit. As alleged, this collusion is made possible by Circana's "PotatoTrac" statistical analysis, created using competitive information from the potato cartel members who control market-wide pricing due to their common access to such data.

The complaint brought by grocery store Redner's Markets, Inc. seeks to represent a nationwide class of direct purchasers of defendants' frozen products.

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Mexico

Impact of Draft Constitutional Amendment Decree on Economic Competition

On Nov. 20, 2024, Ricardo Monreal Avila, deputy of the MORENA Parliamentary Group, filed reservations to a Draft Decree that proposes to amend Article 28 of the Mexican Constitution and its transitory provisions (Reservations).

The Constitutional Affair Committee of the Chamber of Deputies had previously approved a Draft Decree (Draft Decree) to the Mexican Constitution that would eliminate seven regulatory bodies, including the Federal Economic Competition Commission (COFECE) and the Federal Telecommunications Institute (IFT), to reduce spending and allocate resources to a proposed Pension Fund for Welfare.

Under the Draft Decree, the COFECE functions would be transferred to the Ministry of Economy, while IFT's oversight of competition and free market access would be transferred to the Ministry of Infrastructure, Communications, and Transportation. Thus, these ministries would enforce the Federal Antitrust Law (LFCE) and substantiate all proceedings related to market regulation.

The Reservations seek to create a single authority for competition regulation and to prevent, investigate, and combat monopolies, monopolistic practices, anticompetitive mergers, and other market efficiency restrictions.

The Draft Decree and the Reservations were approved Nov. 21, 2024, by the Chamber of Deputies and sent to the Chamber of Senators. If the Draft Decree and Reservations receive the Chamber of Senators' approval, issuing secondary laws will be necessary to establish the structure of and powers proposed for the new regulatory body that will absorb the COFECE and IFT's powers.

The Netherlands

A. Dutch Competition Authority (ACM)

ACM provides additional explanation on the DSA.

The Digital Services Act (DSA) introduces a comprehensive set of rules for online businesses, including web hosting services, online marketplaces, and platforms sharing user-generated content. These rules, effective from early 2024, aim to create a safer, more trustworthy, and transparent online environment. To support businesses, the ACM has developed practical guidelines tailored to specific sectors.

The DSA applies to intermediary services that transmit, store, or disseminate user content, with obligations varying by company size, role, and service type. Some rules may apply only to specific parts of a business. Recognizing the challenges for both large platforms and smaller businesses — particularly those without legal teams — the ACM worked with industry associations to create clear, practical guidance. These guidelines focus on web hosting services, online stores, and content-sharing platforms to help businesses understand and comply with the new regulations.

B. Dutch court decision

CBb confirms parent company liability in Samskip cartel case.

The Dutch Trade and Industry Appeals Tribunal (CBb) delivered a final ruling in a nearly decade-long case involving Samskip, which the ACM fined in 2015 nearly one million euros for its involvement via a

former subsidiary in a cartel in the cold storage of fish. The ACM based its fine on the AKZO presumption, i.e., that a parent company with full control over a subsidiary is liable for that subsidiary's anti-competitive behavior.

Samskip challenged the fine, but CBb concluded that there was insufficient evidence to rebut the presumption and that Samskip had been aware of the cartel activities, showing that the subsidiary was not operating independently in the market.

United Kingdom

A. UK Digital Markets Regime

On Nov. 29, 2025, the UK government published the Digital Markets, Competition, and Consumers Act 2024 Regulations (Regulations), confirming that the Digital Markets Regime will take effect Jan. 1, 2025, as set out in the Digital Markets, Competition, and Consumers Act 2024 (DMCCA).

The DMCCA gives the Competition and Markets Authority (CMA) the power to designate firms operating in digital markets as having strategic market status where they have substantial and entrenched market power, strategic significance (e.g., other firms use its digital offering to carry out their business), and last-year turnover exceeding £25 billion from its global operations or £1 billion from its UK activities. This designation subjects these firms to greater antitrust scrutiny.

The CMA's plan for monitoring and evaluating the new regime was also published Nov. 29, 2024.

B. Changes to UK Merger Regime

The Regulations also bring into force, effective Jan. 1, 2025, changes to the UK merger regime set out in the DMCCA. In brief, the quantitative thresholds above which the CMA will have jurisdiction over any merger, acquisition, or joint venture will change. The CMA will have the power to investigate any M&A transaction involving either (1) a target business that generated over £100 million UK revenues in its last complete financial year (an increase from £70 million); (2) parties whose combined share of total supply of any product or service to customers in the UK, or a substantial part of the UK, is at least 25%; or (3) at least one party that (a) has a pre-merger share of at least 33% of the total supply of any product or service to customers in the UK, or a substantial part of the UK, and (b) generated UK turnover of over £350 million in its last complete financial year.

The amended regime will have two other notable features. First, there will be a new "safe harbor" exempting transactions involving parties that each generate UK turnover below £10 million. Second, any firm designated as having strategic market status will have a statutory obligation to notify the CMA before closing any M&A transaction. This is an exception to the voluntary nature of the UK regime, which allows firms to close an M&A transaction without filing for or obtaining CMA approval – although in these circumstances, the CMA has the power to suspend or ultimately to block the transaction where it has concerns that the transaction may adversely impact UK competition.

C. Other News

1. *Behavioral merger remedies.*

The CMA has been conducting a phase 2 investigation of Vodafone's proposed takeover of its mobile phone competitor, Three. The CMA indicated, in its September 2024 provisional findings and remedies notice, that it is considering clearing the acquisition based on behavioral remedies, including binding

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commitments by Vodafone to invest in enhancing network quality, boost 5G connectivity, and freeze pricing plans for three years. The CMA approved the merger on Dec. 5, 2024.

In past merger cases, the CMA has consistently rejected behavioral remedies, indicating a possible change in approach. CMA Chief Executive Sarah Cardell echoed this change in a Nov. 21, 2024, speech on rising to the challenge of delivering growth to the UK economy. In that speech, Cardell announced a review in early 2025 of the CMA's approach to remedies, including the circumstances under which behavioral remedies may be appropriate.

2. *UK national security.*

On Nov. 20, 2024, the English High Court upheld the UK government's decision to require LetterOne to divest its entire shareholding in fiber broadband startup Upp. This is the first court judgment on the UK government's application of the National Security and Investment Act 2021.

LetterOne is owned by a group of Russian nationals, including individuals subject to UK sanctions. The government's notice requiring LetterOne to divest all its shares in Upp was based on concerns that the sanctioned Russian nationals were vulnerable to Russian state leverage, creating risks to UK national security through potential Russian state access to Upp's customer data, the Russian state's ability to disrupt the operation of Upp's network, and Russian state influence over Upp's strategic decisions. In response to LetterOne's appeal against the government notice, the court indicated that it is for the UK government, not the judiciary, to assess national security risks and remedies and that the court's role is largely limited to procedural issues.

3. *Selective distribution and resale price maintenance.*

The UK Competition Appeal Tribunal (CAT) ruled on a damages claim that a specialist running shoe retailer, Up and Running, brought against Deckers, which supplies HOKA running shoes. Up and Running alleged that Deckers acted anti-competitively by refusing to supply them with running shoes. According to Up and Running, Deckers made this decision because the retailer had created a website to sell discounted, out-of-season inventory. Up and Running claimed Deckers' refusal amounted to indirect price control and unfairly restricted their online sales capabilities. Deckers' defense was that it operated a legitimate selective distribution system and that it was allowed to refuse supplies to ensure effective system operation.

The CAT found nothing in Deckers' terms and conditions to support Deckers' arguments. Instead, it found that Deckers' main purpose for refusing to supply was price-related: namely, to restrict clearance sales of HOKA shoes and to restrict sales of its shoes at discounted prices. These were restrictions that entitled Up and Running to damages, with the amount to be decided at a separate hearing.

Poland

A. UOKiK challenges modification clauses in telecommunications contracts based on inflation index.

The Office of Competition and Consumer Protection (UOKiK) investigated telecommunications operator Vectra, finding that Vectra's modification clauses to change subscription fees in consumer contracts based on the inflation index are abusive.

Vectra, a leader in the Polish telecommunications market, implemented inflation clauses in consumer contracts that enabled unilateral price increases. According to consumer complaints gathered during the

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UOKiK proceedings, Vectra introduced price increases shortly after signing a contract, often with no clear justification.

During its investigation, UOKiK found that since 2022, Vectra has used clauses allowing contract amendments based on the inflation index and other unspecified factors, such as increased operating costs. Each increase in the inflation index resulted in Vectra's unilateral right to increase subscription fees. Refusal to accept subscription fee increases resulted in contract termination and early termination penalties. According to UOKiK, such practice shifted the risk of economic fluctuations onto the consumer and reduced consumer clarity regarding the costs and conditions the contract imposed. In its press release, UOKiK indicated that the abusive nature of the modification clauses also stemmed from the lack of provisions benefiting the consumer. Specifically, the contract did not allow for a subscription fees reduction in the event of an inflation index decrease.

The UOKiK fined Vectra PLN 68 million (approx. USD 16.5 million / EUR 15.6 million). The UOKIK decision also obliged Vectra to refund the amount of the unjustified subscription increases to consumers and to inform them about discontinuing the abusive clauses via its website and social media channels.

New electronic communications legislation took effect in Poland on Nov. 10, 2024. Under this law, fixed-term telecommunications service contracts can only be amended in exceptional circumstances. These amendments are permitted when (i) regulations change, (ii) regulators issue new decisions, or (iii) unforeseeable circumstances arise beyond the service provider's control. However, any such amendments are only allowed if the original contract specifically includes provisions for making these changes.

The decision is not final, and Vectra may appeal to the Court of Competition and Consumer Protection. Once it becomes final, the provisions deemed abusive are non-binding on consumers, and should be treated as if they had never been included in the contract.

B. UOKiK initiates explanatory proceedings against supermarket company over promotional campaigns.

UOKiK launched proceedings against the owner of a major discount supermarket chain. UOKiK suspects the company violated collective consumer interests by not disclosing important rules and restrictions surrounding its promotional campaign that took place earlier in 2024.

The company encouraged customers to purchase specific products with the promise of a 100% refund via a voucher. However, the conditions for using these vouchers were more complicated than the advertisements suggested. The UOKiK found that customers faced restrictions when attempting to redeem their vouchers. For example, some vouchers could only be used to purchase items from specific product categories, limiting customers' freedom of choice. According to UOKiK's press release, consumers may not have been informed about the promotion conditions at the time when, incentivized by the promotion, they decided to make a purchase.

UOKiK emphasized that marketing communications must not mislead consumers and that companies must provide consumers with the clear and unambiguous information necessary to make an informed, timely purchase decision.

Furthermore, UOKiK stated that it is currently conducting other explanatory proceedings into advertising campaigns in the retail sector. This demonstrates the authority's increasing vigilance against retail chains marketing practices.

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Under Polish law, a company involved in practices infringing collective consumer interests may be fined up to 10% of its turnover from the preceding year.

European Union

A. European Commission

Booking.com must comply with new obligations for gatekeeper status under Digital Markets Act.

As of Nov. 14, 2024, Booking must ensure that its platform, Booking.com, fully complies with DMA obligations. The European Commission designated the company a "gatekeeper" on May 13, 2024. Specifically, the DMA prohibits the use of "parity" clauses, allowing hotels, car rental companies, and other service providers to offer different (and potentially better) prices or conditions on their own websites or platforms other than Booking.com. Booking is also prohibited from implementing measures with similar effects, such as increasing commission rates or de-listing offers from businesses that provide different prices elsewhere.

The DMA further mandates that service providers now have real-time access to data generated through the use of Booking.com and are permitted to transfer this data to alternative platforms, enabling them to offer more competitive and tailored services.

To comply with the DMA, Booking must submit a report detailing the compliance measures it has taken. This report, along with an independently audited description of its consumer profiling techniques, will be reviewed by the European Commission, which will assess whether the actions sufficiently meet the DMA's objectives. The European Commission's evaluation will also consider input from relevant stakeholders.

B. EU General Court

EU General Court upholds Vodafone's acquisition of Unitymedia, rejecting competitors' appeal.

The EU General Court rejected an appeal over Vodafone's acquisition of all Unitymedia shares. After initially raising concerns about the Vodafone transaction's compatibility with the internal market, the European Commission approved it in July 2019, contingent upon Vodafone meeting commitments to resolve identified competition issues.

Three German companies challenged the European Commission's approval of the acquisition, arguing the Commission erred in assessing the transaction's competitive effects, particularly concerning Vodafone's potential dominance in the German TV signal transmission market.

The EU General Court upheld the Commission's decision, ruling that Vodafone's acquisition of Unitymedia would not eliminate competition, as the merging parties were not competitors in the relevant markets. The court confirmed that the creation of a dominant position does not automatically imply a significant hindrance to competition. Consequently, the Commission concluded that the merger would not impede effective competition in the market for TV signal transmission services in Germany. Therefore, the transaction was deemed compatible with the internal market.

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