

GT Competition Currents August 2021: European Union, Greater China, Japan

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European Union

A. European Commission

EU broadens scope of General Block Exemption Regulation on state aid.

On July 23, 2021, the European Commission broadened the scope of the General Block Exemption Regulation (GBER) to allow governments to adopt more state aid measures without prior scrutiny. The changes affect state aid targeting the green and digital transitions, the COVID-19 economic recovery, and programs under the EU's seven-year budget.

The extension of the scope of the GBER will allow Member States to implement certain aid measures without prior Commission scrutiny. The revised rules concern: (i) aid granted by national authorities for projects funded via certain EU centrally managed programs under the new Multiannual Financial Framework and (ii) certain State aid measures to support the green and digital transition and that are, at the same time, relevant for the recovery from the economic effects of the COVID-19 pandemic. Exempting such aid from prior notification is a major simplification, which facilitates a quick implementation of such measures by Member States, where conditions limiting the distortion of competition in the Single Market are met.

Exempting aid from the obligation of prior notification is possible thanks to the safeguards embedded in EU programs managed centrally by the Commission. In particular, the support granted in the context of these programs: (i) targets a common-interest objective; (ii) addresses a market failure or

socio-economic cohesion objectives; and (iii) is limited to the minimum amount necessary. The relevant categories of aid are the aid for energy efficiency projects in buildings, aid for recharging and refueling infrastructure for low-emission road vehicles, and aid for fixed broadband networks, 4G and 5G mobile networks, certain trans-European digital connectivity infrastructure projects, and certain vouchers.

Commission opens in-depth State aid investigation into an arbitration award issued against Spain.

On July 19, 2021, the European Commission opened an in-depth investigation to evaluate whether an arbitration award, to be enforced against Spain, could qualify as an incompatible State aid. The beneficiary of the alleged aid is Antin, a company that invested in the renewables sector in Spain and benefitted from a support scheme, established in 2007, which was later modified in 2013. The 2007 scheme had been unlawfully implemented because it had not been notified to the EC, contrary to EU State aid rules, whereas the 2013 scheme had been authorized by the EC.

As the 2013 scheme led to a reduction of the benefit accessible to Antin, Antin initiated an arbitration procedure to request compensation for the foregone support it would have received pursuant to the original scheme. In 2018, an arbitral tribunal found that Spain breached its obligation under the Energy Charter Treaty by modifying the renewables support scheme and ordered the infringer to pay a compensation to Antin. The preliminary view of the EC is that the award would constitute State aid because it grants to Antin an advantage equal to those provided under the 2007 scheme, which had been unlawfully implemented by Spain.

B. European Union publishes a draft of the new VBER Regulation and Vertical Guidelines, now undergoing public consultation.

On July 9, 2021, the EU Commission published a draft of the new Vertical Block Exemption Regulation (VBER Draft) and Draft Vertical Guidelines (Vertical Guidelines Draft) that are set to replace the current Commission Regulation (EU) No 330/2010 of 20 April 2010 (Current Regulation), which expires May 31, 2022. The VBER Draft was published for public consultation, and the deadline for submissions of comments is Sept. 17, 2021. The draft was prepared after the evaluation process launched by the Commission in 2018 that aimed to gather views from stakeholders to determine whether the Current Regulation remained fit for purpose after the 2010 update. The main purpose of the EU regulation and guidelines, both current, and the newly proposed drafts, is to set out the principles for assessing vertical agreements (i.e., agreements entered into between businesses operating at different levels of the supply chain) under TFEU Article 101(1).

The VBER Draft and Vertical Guidelines Draft are said to adapt the current rules in specific areas where the current rules provided a lack of clarity or created gaps, or where the current rules are no longer suited to the market realities. In particular the following areas are covered:

- dual distribution;
- online sales and online intermediation services;
- dual pricing in online and offline sales;
- parity obligations (Most Favored Nation/Customer (MFN) Clauses);
- agency agreements;

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- hardcore restrictions in exclusive distribution, selective distribution, and free distribution;
 - noncompete obligations.

Greater China

On July 12, 2021, Chinese video game streaming platforms Douyu and Huya announced that they would terminate plans to combine after the State Administration for Market Regulation (SAMR) issued a statement blocking the combination. Both Douyu and Huya count Tencent as a major investor. The development is notable as it came against the backdrop of China's recent antitrust enforcement efforts against tech companies and marks the first time a combination has been prohibited by Chinese regulators in the internet space.

As background, Article 21 of China's Anti-Monopoly Law requires business operators to first submit a merger control filing to Chinese antitrust authorities prior to implementing a combination, should either one of two monetary thresholds be met.

- The combined worldwide turnover of all the business operators concerned in the preceding financial year is more than RMB 10 billion, and the nationwide turnover within China of each of at least two of the business operators concerned in the preceding financial year is more than RMB 400 million.
- The combined nationwide turnover within China of all the business operators concerned in the preceding financial year is more than RMB 2 billion, and the nationwide turnover within China of each of at least two of the business operators concerned in the preceding financial year is more than RMB 400 million.

In its statement, the SAMR noted that the proposed combination would “further strengthen Tencent’s dominance in the game streaming market” and allow the company to “restrict and exclude competition.” In addition, the SAMR noted that in reaching its decision, the SAMR had rejected a proposal to add restrictive covenants to the combination, as the plan “would not effectively address competition concerns.” Under the Anti-Monopoly Law, the maximum penalty currently allowed for unreported business combinations is RMB 500,0000. Since 2020, the SAMR has stepped up efforts to tighten its review of business combinations by tech companies.

Japan

A. The JFTC’s policy for the IT giants.

On July 9, 2021, U.S. President Joe Biden signed an executive order to increase scrutiny of large corporations including IT giants to promote competition among companies.

In Japan, the Japan Fair Trade Commission (JFTC) also scrutinizes IT giants to create and maintain a competitive environment in the field of digital platforms. On Feb. 1, 2021, the Act on the Improvement of Transparency and Fairness in Trading on Specified Digital Platforms (ITFTS) went into effect. JFTC stated that it is necessary not only to enforce the Antimonopoly Act but also to consider and take action from a variety of perspectives including appropriate regulations under ITFTS and other regulations, and JFTC will continue to work actively on coordination and cooperation with

the Headquarters for Digital Market Competition established in the Cabinet and other relevant ministries to maintain a competitive environment.

B. Is collusive activity in technology development a violation of competition law?

On July 8, the European Commission decided to impose fines totaling EUR 875.19 million on five German automakers for cartel activities in the development of exhaust gas purification systems. Although cartels usually involve restraint of trade such as price manipulation and market division, this case is unique. It found collusive activities related to technological development rather than factors that directly affect price formation and sales volume.

In Japan, JFTC has never found that collusive activities in technological development alone constitute a cartel. However, according to the JFTC, the act of business operators in a competitive relationship in a specific product market forming a patent pool to mutually use the technology required to supply the product is considered a violation of the Anti-Monopoly Act. Such supply restrictions include obtaining a license for the use of the necessary technology through the pool and jointly agreeing on the price, quantity, and supply destination of the product to be supplied using the technology. Following the European Commission's decision, there may be more progress in the debate on whether technology cartels violate the Anti-Monopoly Act in Japan.

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