Published on *The National Law Review* https://natlawreview.com

Competition Currents | May 2024

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Mexico

Cofece launches several investigations into potentially anticompetitive conduct.

On April 9, Mexico's Federal Economic Competition Commission (Cofece) launched an investigation into potential illegal agreements among federal freight transportation suppliers. The probe aims to determine whether suppliers have colluded to avoid competition via price fixing, supply restriction, market segmentation, and/or the exchange of sensitive information. Freight transportation moved 56.8% of Mexico's cargo in 2022, playing a crucial role in industry and commerce.

The investigation could last up to 120 working days and be extended up to four times. If Cofece finds proof of anticompetitive conduct, it may fine the economic agents involved up to 10% of income and impose up to 10 years' imprisonment on individuals who participated in the execution of these allegedly illegal agreements.

In another case, Cofece filed a petition with the Attorney General's Office (FGR) to initiate a criminal investigation against several individuals suspected of colluding to manipulate the sale price of building coating products used in construction. This allegedly anticompetitive behavior could lead to imprisonment of five to 10 years.

In addition to the criminal proceedings, Cofece has initiated an administrative proceeding where the accused individuals are currently presenting evidence and arguing for their defense. The plenary of Cofece will determine the final decision on administrative liability and corresponding sanctions.

In a separate case, Cofece fined Geber Knauf KG, a construction materials manufacturer, and two individuals MXN$1,545,000 for carrying out a business transaction under terms different from those originally approved by Cofece. The company and the individuals incorporated a noncompetition clause into the transaction that was not disclosed to Cofece in the original merger notification, thereby preventing the Commission from analyzing its potential impact on the market and consumers. The parties have the right to appeal the legality of the Commission's actions to the Federal Judiciary.

The Netherlands

Dutch Courts

Dutch Court of Appeal rules that mandatory use of UCI's Centralized Prize Management Platform does not constitute a restriction by object and does not violate the EU antitrust rules.

UCI is the global advocacy organization for the sport of cycling, and all national cycling federations are UCI members and must comply with the UCI Constitution and Regulations, and decisions taken in line with them. The UCI Regulations include rules regarding the payment of prize money. Since the start of the 2019 cycling season, the prize management for men's cycling has been conducted in accordance with the centralized prize management system devised by CPA (Association of Professional Cyclists). Central to this is the mandatory use of the so-called "Centralized Prize Management (CPM) Platform." This is an IT platform, hosted and maintained by Matsport and managed by CPA, on which all data relevant to the settlement of prize monies are made visible. All payments are made by or on behalf of the organizer of a cycling event via the CPM platform to CPA, after deduction of the relevant taxes. Before the Dutch District Court in first instance, Cycling Service c.s. claimed that UCI c.s. violated the cartel prohibition provision of Article 101(1) on the Treaty of the Functioning of the European Union (TFEU) and the dominance abuse prohibition provision of Article 102 TFEU by requiring the mandatory use of the CPM platform by cycling teams, cyclists, and race organizations. The District Court dismissed the claims of Cycling Service c.s., determining that the decision regarding the centralization of price management should not be considered an anticompetitive restriction by object. The District Court further ruled that Cycling Service c.s. had not put forward sufficient arguments regarding the delineation of the relevant market and that, therefore,

it could not assess the alleged anticompetitive effects of the UCI's decision. For the same reason, the existence of dominance within the meaning of 102 TFEU could not be established. The Dutch Court of Appeal dismissed Cycling Service c.s.'s arguments on appeal.

Poland

Polish Competition Authority (UOKiK) publishes clarifications on assessment of fines in antitrust cases.

The UOKiK President published new clarifications on the assessment of fines in antitrust cases to adjust the set of clarifications to recent amendments to the Polish Act of 16 February 2007 on Competition and Consumer Protection (Competition Act) implementing the EU's Directive 2019/1 (ECN+ Directive).

According to the recently amended Competition Act, liability for concluding prohibited agreements or abusing a dominant position is borne not only by the directly infringing entrepreneur but also by the entrepreneur that exercises decisive influence over the direct infringer. The principle of parental liability operates "from the bottom up," allowing liability to be attributed to a parent company for violations committed by a subsidiary. This liability is independent of culpability, which means that the mere fact of violation by a dependent entrepreneur may trigger the liability of the entrepreneur that exercises decisive influence over it. If this is the case, the turnover of the entrepreneurs exercising decisive influence will also be taken into account when calculating the basis for the fine (the maximum fine amount is up to 10% of such combined turnover).

Based on the new clarifications, as a rule, UOKiK will impose a single fine on the direct infringer and the entrepreneur exercising decisive influence. In such a situation, their liability will be joint and several. If the circumstances of a particular case warrant the imposition of two or more fines rather than one, UOKiK will inform the parties before issuing its decision.

Further, according to Article 3(1) of Regulation 139/2004, where the EU national competition authority (e.g., UOKiK) applies national regulations applicable to competition-restricting agreements to agreements that may concern cross-border trade between EU Member States, it must also apply the relevant EU law provisions (i.e., Article 101 TFEU). In such cases, according to the new clarifications, as a rule, a single fine will be imposed for practices violating both EU and Polish competition regulations, without increasing the fine due to the double legal qualification of the violation.

The new clarifications also provide more details on how the fine amount may eventually be affected by various case-specific factors, including the duration of the infringement, nature of the practices, characteristics of the product and the market, the impact of the infringement on the market, and the degree of organization of the infringement, including the potential irreversibility or difficulty in undoing the effects of the infringement. The new clarifications also explain how various mitigating and

aggravating circumstances may affect the amount of the fine. In addition, if the amount of the sanction determined under the new guidelines is grossly inadequate (too low or too high), UOKiK may adjust it further, subject to providing an additional justification.

The new clarifications are effective with respect to antitrust proceedings initiated after 1 January 2024. Although they are not legally binding, UOKiK emphasizes it will follow them, and any deviation from the clarifications will require a justification.

Italy

Italian Competition Authority (ICA)

1. *ICA publishes 2024 update of cumulative turnover thresholds for merger control.*

Pursuant to its resolution published March 11, 2024, ICA adopted cumulative turnover thresholds which, if exceeded, make prior notification of an intended concentration to ICA mandatory.

Starting March 11, 2024, undertakings are under an obligation to notify ICA of any merger or acquisition where (i) the aggregate nationwide turnover of all the undertakings concerned exceeds 567 million euros; and (ii) the individual nationwide aggregate turnover of at least two of the undertakings concerned exceeds 35 million euros.

Such changes in the turnover thresholds—which do not have retroactive effect—are mandated by Article 16(1) of the Italian Competition Law, according to which the ICA must reassess such thresholds on an annual basis in the light of changes in the GDP price deflator index.

2. *ICA closes fact-finding investigation into hearing-aid market.*

On April 15, ICA announced it had closed the inquiry into the hearing-aid market opened in September 2023 pursuant to Article 12(2) of the Italian Competition law.

The investigation produced two primary conclusions. First, confirming ICA's concerns, there is a lack of transparency regarding the pricing and services in the hearing-aid market. Hearing aids and related services are usually sold together. Therefore, even if services represent the main cost for consumers, bundles are structured in a way that make it all but impossible for a consumer to get both technical and price information on each of the devices and the associated services. ICA alerted all relevant authorities about this issue, advocating for an intervention to ensure that consumers receive a clear indication of the price of the devices and of the related services.

Second, ICA's investigation highlighted issues in the National Health System's procurement of

hearing aids. Unclear regulations contribute to compromising the effective implementation of adequate and essential levels of care for the approximately seven million Italians who suffer from hearing problems, 2.5 million of which already use hearing aids. Accordingly, ICA suggests increasing market competition by, for example, introducing “hearing vouchers” for consumers while allowing the relevant administrations to rely on tendering procedures.

3. *ICA initiates proceedings for adoption of precautionary measures against Ryanair for possible abuse of dominant position in the airline ticket booking services sector*.

On April 3, ICA initiated precautionary proceedings against airline group Ryanair for alleged abuse of a dominant position in the markets for scheduled air passenger transport services and the booking and sale of tourist services.

Initiation of these proceedings follows ICA’s September 2023 decision to launch investigative proceedings against the Ryanair Group concerning alleged abuse of a dominant position for precluding purchases of Ryanair tickets by physical travel agencies and/or online booking platforms (OTAs) through its website or offering them worse conditions than those available on its website.

In particular, Ryanair required the passenger’s direct involvement in order to unlock the reservation and, therefore, to be able to check-in and travel—by means of identity identification—and conveyed to the passenger disparaging and untrue information in order to dissuade him/her from using travel agencies to purchase Ryanair tickets. At the same time, Ryanair provided—only to a subset of travel agents that did not include OTAs—the possibility of access to Ryanair’s flight inventory through Global Distribution System platforms. This access, however, was reduced in terms of both the number of flights and routes and the absence of certain price options.

The conduct was allegedly aimed at preventing and/or hindering agency sales of the company’s airline tickets—which typically represent the ‘access point’ for the sale of further services—thus favouring direct sales of airline tickets on Ryanair’s own website.

The investigation procedure had been initiated following several reports from business associations and operators in the travel sector, such as OTAs and agencies, and from consumer protection groups, some of which had subsequently filed for precautionary measures. During the preliminary proceedings, it emerged that the conduct under investigation had worsened, as to both the obstruction of the purchase of Ryanair flights by agencies and the denigratory campaign. Therefore, finding prima facie a serious and irreparable risk for competition on the markets concerned, ICA opened proceedings to assess the adoption of precautionary measures against Ryanair Group.

4. *ICA presents annual activity report for 2023*.

On April 17, ICA presented its 2023 activity report. ICA President Roberto Rustichelli first discussed the importance of the single European market, highlighting how the loosening of the State aid rules risks fragmentation in the context of the temporary frameworks. He also highlighted the different funding amounts deployed by EU member states, as well as the need for a common European sovereign fund and the need to curb the instrumental use of foreign direct investment legislation within the EU.

Second, ICA highlighted the need to stimulate dynamic competition in Italy to reinvigorate the

country's productivity through the diversification of energy sources, the green transition, the reorganization of production chains, digitalization and artificial intelligence, and the removal of barriers to both market entry and exit.

Finally, the report summarized ICA's 2023 focuses, including the digital and data sector, which has seen new investigative proceedings against the largest tech companies, but also the sectors affected by inflationary tensions, such as energy and fuels, banking and air transport, and sectors in which abnormal price increases caused by collusive phenomena have been established, such as glass bottles and cast iron.

The report noted that from January 2023 to March 2024, ICA received 1,271 reports of competition issues; examined 99 merger operations, six of which were sub-threshold; concluded eight proceedings on cartels, six on abuses of dominant position and one on abuse of economic dependence.

Regarding consumer protection, from January 2023 to March 2024, ICA examined 34,595 notifications; and concluded 102 proceedings, 40 with a finding of infringement and 48 with acceptance of commitments.

European Union

European Union

A. European Commission

1. *Zalando broadens its dispute against the European Commission's VLOP status classification decision.*

Zalando, the largest e-commerce fashion retailer in Europe, has initiated further legal proceedings against the European Commission to challenge its classification as a “Very Large Online Platform” (VLOP) under the Digital Services Act (DSA). For reference, under the DSA, the threshold for designation as a VLOP is having at least 45 million average monthly users. The Commission concluded in 2023 that Zalando had 83 million, a number the company is contesting at the EU’s General Court on the basis that it allegedly wrongly included mere

visitors to its retail business. The latest dispute lodged before the EU’s General Court revolves around the calculation of Zalando’s supervisory fee, which the Commission determined based on 47.5 million monthly active recipients of a service, differing from the 83 million monthly visitors used to classify Zalando as a VLOP. Among other things, Zalando questions the lack of a clear and consistent methodology for assessing VLOP status.

2. *European Commission launches 2 in-depth investigations under*

the EU FSR.

The European Commission has launched two in-depth investigations under the EU Foreign Subsidies Regulation (FSR) relating to potential market distortions by two separate consortia in a Romanian public procurement procedure involving the construction and operation of a photovoltaic park. The park is partially financed by the EU Modernisation Fund. Under the FSR, a company is required to notify its public procurement bid when the contract's estimated value exceeds €250 million and the company has received at least €4 million in

foreign financial contributions from a third country within the three last years. Each of the consortia submitted a notification to the Commission. The Commission's in-depth investigation aims to assess whether the alleged foreign subsidies to the two separate consortia provided an unfair advantage to the companies in winning public contracts. After the investigation, the Commission may (i) accept commitments proposed by the respective company if they fully and effectively remedy the distortion, (ii) prohibit the award of the contract, or (iii) issue a no-

objection decision.

3. *Director-General signals Commission appetite to apply Article 102 TFEU to below-threshold mergers.*

Director-General Guersent of the Commission's Directorate-General for Competition has indicated that if the European Court of Justice (ECJ) were to invalidate the Commission's updated Article 22 EU Merger Regulation policy, the Commission would utilize its abuse of dominance powers to address below-threshold mergers. In particular, the

Commission would revert to the ECJ's ruling in the *Towercast* case, which, according to the Director-General, could lead to "messier" situations but would allow for ex post reviews of deals that escape EU and national merger control regimes. The *Towercast* ruling clarified that transactions not subject to ex ante merger control can still be reviewed under Article 102 TFEU if they affect trade between EU member states and impact competition within the requesting member state(s). According to Guersent, using Article 102 TFEU

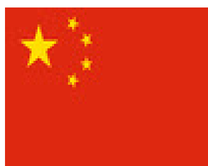
would be more disruptive, and lead to less legal certainty for companies, since it would not be confined to a “six month” post-closing referral time limit.

B. European Decisions

European Commission issues a statement of objections in the context of a merger investigation.

On March 19, the Commission sent a statement of objections to an insulation-panel producer alleging that the company provided false, incomplete, and misleading information during the EU merger control proceeding in connection

with the proposed acquisition of a mineral fiber panel producer. The investigation underscores the Commission's expectation that companies provide accurate and complete information during merger proceedings. For reference, a violation can lead to significant fines of up to 1% of the company's annual worldwide turnover.



Greater China

China Proposes to Simplify Notification Form for the Fast-Track Merger Review

On April 8, China's State Administration for Market Regulation (SAMR) released a proposal to simplify the notification form applicable to the fast-track antitrust review for simple merger cases, including for "foreign" transactions (April Proposal). The public comment period on the April Proposal closed April 22.

China's merger review regime allows parties to the following "simple" merger transactions (including creation of new joint ventures) to elect for a fast-track review procedure: (a) a "foreign" merger transaction whereby a joint venture is created outside of China or a target business outside of China is acquired and in each case such joint venture or target business carries on economic activities in China, (b) a merger transaction between "small" parties whereby the merging parties, if competing in the same market, have a combined market share of less than 15%, or if operating in vertically adjacent markets, each has a market share of less than 25%, or if neither competing in the same market nor operating in a vertical market, each have a market share of less than 25%, and (c)

an incremental consolidation of control in an existing joint venture whereby the existing joint venture was already controlled by two or more parties, and the transaction results in a reduced number of controlling parties enabling the joint venture to be controlled by one or more parties (except that in the case where the joint venture is controlled by one party as a result of the transaction, the controlling shareholder and the joint venture are competitors in the same market with a combined market share exceeding 15%).

Under the fast-track procedure, the parties to the transaction can submit a notification form to SAMR together with a publication form and supporting documents, and after SAMR confirms the completeness of the submitted forms and documents and accepts the simple case, the publication form will be made available on SAMR's website for a 10-day period and any person can object in writing to the applicability of the fact-track procedure during that period. SAMR will continue to review the case if there is no public objection and in a vast majority of those cases, the review will be completed within 30 days following the case acceptance. Despite the swiftness in review, the parties following the fast-track procure are nevertheless required to report comprehensively about the transaction and merging parties in the notification form, including elaborating on the competition effect in the relevant market(s), reporting data on market shares of each merging party and their competitors, etc. The April Proposal, following the recent pro-deal agenda of SAMR, simplifies the information and document requests required in the notification form, thus reducing the administrative burden on the merging parties. Key simplifications included in the April Proposal are as follows:

i. In the above "foreign" merger transactions whereby a joint venture or a target business outside of China is created or acquired without economic activities in China, the merging parties will be exempted from providing (a) data on market shares about themselves and their competitors, and (b) competition analysis. If a "foreign" joint venture is created (without any economic activities within China), the merging parties are required to give a bona-fide estimate on the market share of the new joint venture in each of the three years after its operation.

ii. In the above merger transaction between "small" parties, the merging parties are still required to submit data on market share about themselves and their competitors. That said, in the event that (a) the parties have a combined market share of less than 5% if they compete in the same market, or each of the parties has a market share of less than 5% if they operate in vertically adjacent markets or other non-competing and non-vertical markets, and (b) it is difficult for the parties to obtain data on market shares of their competitors from reliance and recognized sources, such parties may only submit their own market shares and the requirement to report market shares for their competitors is exempted.

iii. In the above merger transactions between “small” parties and with an incremental consolidation of control in an existing joint venture, no competition analysis is required, but SAMR reserves the right to require the parties to submit competition analysis whenever it deems it necessary for its review.

iv. Since China officially joined in 2023 the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents or the Apostille Convention, SAMR made it clear in the April Proposal that it will accept the organization document (e.g., a certificate of incorporation) of the foreign merging parties if it is authenticated by the relevant authority in their home countries. Before China’s acceding to the Apostille Convention, all foreign-government-issued documents (e.g., a certificate of incorporation) must be first legalized by the relevant authority in the foreign country and then by the Chinese embassy or consulate in that country, which is cost- and time-consuming.

In spite of the above simplifications, the April Proposal is also requiring the merging parties to represent in the notification form that none of the information submitted to SAMR for review is untrue or misleading. The April Proposal deleted the “knowledge” qualifier previously available in the representation section, signaling a message from SAMR that it may vigorously enforce against any untrue/misleading reporting whilst it is trimming down what is required to be reported in a fast-track merger review.

[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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National Law Review, Volume XIV, Number 128

Source URL:https://natlawreview.com/article/competition-currents-may-2024