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

GT Newsletter | Competition Currents | December 2022

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United States

A. Federal Trade Commission (FTC)

1. *FTC releases policy statement on scope of authority to address unfair methods of competition under Section 5 of the FTC Act.*

On Nov. 10, the FTC released a new policy statement interpreting its enforcement authority under Section 5 of the FTC Act, 15 U.S.C. § 45, importantly announcing it will no longer focus on the "rule of reason" framework commonly used in Sherman and Clayton Act enforcement to determine liability for various unfair methods of competition. Instead, the FTC intends to broaden its enforcement to address these "unfair methods of competition in their incipiency based on their tendency to harm competitive conditions." This new statement reflects a significant departure from the FTC's previous position and continues the current administration's stated intentions to broaden the reach of FTC authority and correct for previous decades of perceived underenforcement.

On July 1, 2021, the Commission rescinded its 2015 Statement of Enforcement Principles Regarding "Unfair Methods of Competition" under Section 5 of the FTC Act. The Commission stated in 2015 that it would apply Section 5 using "a framework similar to the rule of reason," by only challenging actions that "cause, or [are] likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications" and that the Commission is "less likely" to raise a standalone Section 5 claim "if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm."

The November 2022 FTC statement aims to remove this "restriction" and decouple Section 5 standards from those used in Sherman or Clayton Act claims, with the rationale that Congress intended Section 5 to be a standalone authority which is "a central part of our mandate," originally passing the FTC Act "because it was unhappy with the enforcement of the Sherman Act, the original antitrust statute," and saw a gap in the law that the FTC Act was intended to close.

According to the policy statement, use of Section 5 in policing unfair methods of competition will no longer focus on the balancing of procompetitive and anticompetitive effects under the "rule of reason" but will look at actions that "tend to negatively affect competitive conditions." Targeted conduct will therefore be judged under the per se standard, meaning they will be considered

automatically illegal.

Unfair methods of competition, the policy statement explains, are tactics that seek to gain an advantage while avoiding competing on the merits, and that tend to reduce competition in the market. These methods may include loyalty rebates, tying, bundling, and exclusive dealing arrangements that have the tendency "to generate negative consequences; for instance, raising prices, reducing output, limiting choice, lowering quality, reducing innovation, impairing other market participants or reducing the likelihood of potential or nascent competition." In the merger context, unfair methods may include "a series of mergers or acquisitions that tend to bring about the harms that the antitrust laws were designed to prevent, but individually may not have violated the antitrust laws," and "mergers or acquisitions of a potential or nascent competitor that may tend to lessen current or future competition."

The new policy statement also explains that the FTC will be moving beyond the traditional consumer welfare standard to consider impacts on consumers as well as "workers, or other market participants."

The statement acknowledges that procompetitive justifications may exist, but also that the Commission will not undertake a cost-benefit efficiencies type of analysis in challenging conduct under Section 5.

Commissioner Christine Wilson, the lone Republican on the FTC, issued a dissent, stating that the policy "abandons bedrock principles of antitrust that long have been accepted by the Commission, the courts, the business community, and enforcers across the globe" and fails to provide clear guidance to the business community on how to comply with the law. Specifically, she noted that the list of "adjectives that may be invoked to establish facially unfair competition is lengthy, and includes 'coercive,' 'exploitive,' 'collusive,' 'abusive,' 'deceptive,' 'predatory,' 'restrictive,' and 'exclusionary,'" and that such labels are subjective. "Consequently, identifying whether conduct falls under one of the labels depends on the whims and political worldviews of three sitting commissioners."

The statement does not carry force of law but foreshadows how the current FTC will exercise its enforcement authority, signaling perhaps novel theories of harm and enforcement against actions that may not have previously been challenged as Section 5 violations.

2. *FTC further modifies 2019 order that required Praxair, Inc. and Linde AG to sell assets*.

On Nov. 22, the FTC agreed to modify its 2018 consent order that permitted Linde AG's $70 billion merger with Praxair Inc. The change requested by the parties "modif[ied] a lease and shared facilities agreement and a framework product supply agreement between Linde and Messer Industries, GmbH." The assistant director for the FTC's Bureau of Competition did not explain the reasons for the change or rationale for approving it but stated in a letter that the Commission would waive requirements for approval and public comment.

However, Commissioner Rebecca Kelly Slaughter, joined by FTC Chair Lina M. Khan, issued a statement in connection with the modification that "orders with numerous, complicated, and long-standing entanglements like this one are strongly disfavored" and that "[t]he history of this consent order and the multiple modifications that have been necessary demonstrate why such orders are currently and will continue to be disfavored."

B. Department of Justice (DOJ) Civil Antitrust Division

1. *DOJ appeals denial of injunction in UnitedHealth Group and Change Healthcare merger*.

On Nov. 18, the DOJ filed a notice of appeal of a September district court decision that approved the merger of UnitedHealth Group and Change Healthcare. The states of New York and Minnesota have joined the appeal filed with the U.S. State Court of Appeals for the District of Columbia.

The merger combines UnitedHealthcare, the nation's largest health insurer, and Change Healthcare, a health care technology provider and electronic data interchange clearinghouse.

The DOJ originally challenged the transaction alleging that the merger would allow UnitedHealth to obtain competitively sensitive data from its health insurance rivals through the acquisition, which would combine UHG subsidiary OptumInsight and Change, and thereby hamper competition in the health insurance market.

During the bench trial, the district judge questioned the DOJ's argument that UnitedHealth would use other payers' claims data to competitive advantage. UnitedHealth argued it would not access this information due to firewalls and significant financial incentives to protect other payers' data. Optum, a subsidiary of UnitedHealth Group, serves a majority of payers in the United States by providing data and analytics to hospitals, physicians, and health plans.

2. *Additional directors resign from boards in response to DOJ concerns about potentially illegal interlocking directorates*.

As discussed in the November 2022 issue of Competition Currents, the DOJ has begun a campaign of more aggressive enforcement of Section 8 of the Clayton Act's prohibition of interlocking boards between competitors.

This month it was announced that two partners at private equity firm Thoma Bravo resigned from the board of software company N-able under DOJ pressure.

N-able, an IT management services company based in Burlington, Massachusetts, reported in an SEC filing that Michael Hoffman and Kristin Nimsger Weston notified the company of their decisions to resign on Nov. 2. The filing reads: "Thoma Bravo has informed the Company that the resignations are related to Thoma Bravo's proactive efforts to comply with the interlocking directorate provisions of Section 8 of The Clayton Antitrust Act of 1914."

Hoffman and two other Thoma Bravo partners resigned from the board of software company SolarWinds last month after receiving a warning letter from the DOJ antitrust division, as reported last month.

C. Department of Justice (DOJ) Criminal Division

1. *Insulation contracting firm sentenced for rigging bids*.

On Nov. 4, 2022, Axion Specialty Contracting LLC, a construction company, was sentenced to pay $1.3 million in criminal fines for its participation in a bid-rigging scheme, a violation of Section 1 of the Sherman Act to which it had pled guilty previously. This was the third sentencing arising out of the investigation conducted by the Antitrust Division's New York office and the U.S. Attorney's office for

the District of Connecticut. According to court filings, the defendant participated in a five-year scheme to rig bids on contracts for insulation installed around pipes and ducts during construction projects at universities, hospitals, and other buildings in Connecticut.

2. *Justice Department's Procurement Collusion Strike Force announces four new national law enforcement partners*.

On Nov. 15, 2022, DOJ announced the addition of four federal agency Inspector General (IG) offices to its Procurement Collusion Strike Force, a joint law enforcement effort created in 2019 to combat antitrust crimes that impact government procurements. The four IG offices (from the Departments of Energy, the Interior, Transportation, and Environmental Protection) oversee hundreds of billions of dollars in authorized funds and join the 30 existing partners that already contribute to the Strike Force investigation and enforcement efforts.

3. *Kentucky real estate professionals plead guilty to bid rigging farmland auction*.

On Nov. 30, 2022, two Kentucky real estate professionals pleaded guilty to conspiracy to rig bids at a 2018 estate auction for farmland and timber rights. According to court filings in the U.S. District Court for the Western District of Kentucky, the defendants conspired with others to rig bids and demand unlawful payments to artificially suppress the sales prices during the auction. Sentencing for the violation of the Sherman Act has not yet been set.

D. U.S. Litigation

1. *McDonald's Corp. v. Agri Stats, Inc., et al.*, Case No. 1:22-cv-07182 (E.D.N.Y. Nov. 25, 2022).

On Nov. 25, 2022, fast food giant McDonald's sued a group of large pork suppliers, alleging the suppliers conspired to raise the market price for pork. According to the complaint, these suppliers used the data-sharing service Agri Stats to communicate detailed and sensitive information regarding price, production, and demand for pork products in the United States to privately share "benchmarking" reports regarding each competitors' profits and losses. This lawsuit mirrors similar class action cases previously brought against various suppliers of pork, beef, chicken, and other proteins for alleged price fixing in violation of federal antitrust law.

2. *Veritext Corp. v. Bonin*, 2:16-cv-13903 (E.D. La. Nov. 18, 2022).

In mid-November 2022, the Louisiana Board of Examiners and Certified Shorthand Reporters (the "Board") announced it had settled an antitrust class action lawsuit brought by various court-reporter and stenographer companies. These companies alleged that the Board conspired to artificially increase prices for court reporting services in Louisiana by discouraging volume-based discounts and investigating any court reporters who worked for these national companies. Under the terms of the settlement agreement, the Board agreed to terminate all pending formal or informal investigations of court reporters identified in the suit, adopt new antitrust compliance policies, and pay an undisclosed sum in damages and attorneys' fees. On Nov. 22, 2022, the Honorable Judge Ivan L.R. Lemelle approved the settlement and dismissed the underlying lawsuit.

3. *Smart v. National Collegiate Athletic Association*, No. 2:22-cv-02125 (E.D. Cal. Nov. 29, 2022).

On Nov. 29, 2022, several "volunteer" college basketball coaches brought a class-action complaint against the National Collegiate Athletic Association (NCAA), the U.S. rulemaking body for college

sports, alleging the NCAA had adopted rules to improperly restrict the market for college coaches. The NCAA has adopted a rule that limits all 352 Division I colleges to having only three paid coaching positions for any given team, meaning any additional coaches must be unpaid or in volunteer positions. According to the complaint, nearly every Division I college hires these unpaid, volunteer coaches, thereby using the NCAA's rule to create a monopsony that limits the wages schools pay to their volunteer staff and decreases the wages of paid assistant coaches.

The Netherlands

Dutch NCA decisions, policies, and market studies

Amsterdam Court of Appeal rules that Dutch law is applicable on all follow-on-claims in airline cartel case.

The Amsterdam Court of Appeal has ruled that Dutch law is applicable to the follow-on damages claims by litigation vehicles Equilib and SCC. The claims arise from a European Commission decision regarding several airlines' alleged cartel infringement. Regarding the standalone claims, Dutch law is partly applicable and mainly depends on whether the damages can be linked to the period of restricted competition caused by the airlines' actions.

However, since the air freight cartel litigation remains ongoing, further judgments on the damages claim itself have to wait until after the Court of Justice of the European Union rules on the European Commission cartel decision.

United Kingdom

A. Merger control

Wholesale supply of shutters – abandonment of merger after CMA issues meeting.

During a Competition and Markets Authority (CMA) phase 1 investigation, on Nov. 29, 2022, UK shutter wholesaler Mzuri Group announced it had abandoned its proposed acquisition of competitor Shuttercraft Holdings Limited. According to CMA, Mzuri made its decision after attending an "issues meeting" with Shuttercraft and CMA where CMA raised concerns about the merger's impact on competition. The CMA holds an issues meeting during a Phase 1 investigation where the case in question raises complex or material competition issues.

B. Digital markets – regulation

The UK government confirmed on Nov. 17, 2022, that it will introduce the Digital Markets, Competition and Consumer Bill to Parliament by May 2023, with a view to bringing a new Digital Markets, Competition and Consumer Act (DMCCA) into force in October 2023. The DMCCA will introduce several reforms to UK competition and consumer law, by empowering the CMA to intervene in the digital sector to promote competition and transform the CMA's consumer powers by enabling it to impose fines of up to 10% of worldwide turnover on firms it finds have breached UK consumer protection laws. In addition, the CMA's Digital Markets Unit (DMU) will acquire statutory status and will gain broad powers to regulate anti-competitive conduct in the digital sector, including by enforcing a new pro-competition regime that imposes conduct requirements on digital firms the DMU designates as having strategic market status due, among other things, to their revenues and connection with the UK.

C. Music Streaming

On Nov. 29, 2022, the CMA concluded its study of the music streaming market and issued its final report, finding that streaming has transformed consumer access to "vast catalogues" of music and provided a valuable platform for artists to reach new listeners quickly; and that the price for access to music has declined in real terms over the years. Although the CMA has also found that many artists and songwriters find it difficult to earn a living from music streaming, it does not attribute such difficulty to ineffective competition and therefore does not conclude CMA intervention would increase creator earnings. It has, however, expressed the hope that the content of its study will form a basis for policymakers to consider whether additional action is needed to help creators.

D. Mobile Browsers and cloud gaming

On Nov. 22, 2022, the CMA referred to an in-depth, phase 2 market investigation the supply of mobile browsers and mobile browser engines, and the distribution of cloud gaming services through app stores on mobile devices.

Poland

A. Court annuls UOKiK President's decision imposing a record fine in the Nord Stream 2 case.

Court annuls UOKiK President's decision imposing a record fine in the Nord Stream 2 case.

In November 2020 we reported that the President of the Office of Competition and Consumer Protection ("UOKiK President") had imposed a record-breaking PLN 29 billion (approx. EUR 6.5 billion, USD 7.6 billion) fine on Russian gas giant Gazprom, and PLN 234 million (approx. EUR 51 million, USD 61 billion) in total on five other entities. According to the UOKiK President's decision, these companies had created a joint venture (JV) company responsible for constructing and operating the Nord Stream 2 gas pipeline, without obtaining the required merger clearance. Gazprom appealed the decision.

On Nov. 21, 2022, the Competition and Consumer Protection Court ("SOKiK") overturned the UOKiK President's decision and annulled the fines. In its oral reasoning for the judgment, the SOKiK stated that the entities involved in creating Nord Stream 2 had not established a new JV, and the UOKiK President had no authority to assess the consequences to the wider economy or whether they had attempted to evade the law. The UOKiK President expressed surprise at the SOKiK verdict and announced he would appeal the judgment to the Court of Appeal in Warsaw.

The case dates back to 2015, when the UOKiK President received a motion from six companies for approval to form a JV that planned to construct and operate the Nord Stream 2 pipeline. In 2016, the UOKiK President issued a statement of objections saying that the notified transaction could lead to a restriction of competition. In response, the notifying parties withdrew the motion. However, it later came to light that the undertakings had signed agreements concerning both the financing and a number of other authorizations, such as rights to interfere with the operation of the gas pipeline. Also, the financing parties became "quasi" stockholders of Nord Stream 2 by establishing a pledge on its stocks.

According to the Polish Act on Competition and Consumer Protection (Competition Act) the creation of a JV by other entrepreneurs is subject to merger control notification (if the relevant turnover

thresholds are met). To date, in practice the creation of a JV typically has been associated with acquiring shares in such entrepreneur. In the Nord Stream 2 case, the parties argued that a shareholding participation is necessary in order to establish the creation of a JV. The parties, however, did not acquire shares in the JV but instead signed agreements for the financing of the pipeline. The court shared the appealing parties' arguments, which are likely to be further elaborated in the written reasoning for the judgment.

B. Dahua Technology Poland: price-fixing, market partitioning, and hindering search.

The UOKiK President initiated proceedings against Dahua Technology Poland (the exclusive importer and wholesale distributor of Dahua electronic monitoring equipment) and its five distributors for price collusion and market sharing. Seven managers directly involved in the case may also face individual financial penalties.

Evidence gathered during a dawn raid indicates to UOKiK that from 2016, Dahua Technology Poland influenced its distributors' pricing policy by obliging them to apply certain prices. In addition, Dahua Technology Poland set the discount level and promotion terms the distributors were allowed to apply.

Allegedly, if the value of Dahua product sales exceeded the price thresholds Dahua Technology Poland set, a selected distributor could be granted a higher discount on the purchase of Dahua products as well as so-called design protection, and another distributor could not offer the same customer a competing offer for the same transaction.

According to the Competition Act, an entrepreneur involved in a competition-restricting agreement may be fined up to 10% of its turnover. The managers responsible for effecting the collusion face a penalty of up to PLN 2 million (approx. EUR 425,000, USD $445,000).

In addition, the UOKiK President issued a decision imposing a fine of PLN 700,000 (approx. EUR 150,000, USD $155,000) on Dahua Technology Poland for obstructing a search that took place at the company during the preliminary investigation. Notwithstanding officials' request that the company representatives not inform their colleagues about commencement of the search, one of the representatives alerted a colleague. This, according to the UOKiK President, "eliminated the element of surprise." It is not the first fine the UOKiK President has imposed for obstructing inspections or searches.

The UOKiK President's approach in Dahua case has been criticized by some competition law practitioners recently as arbitrary and having no clear legal grounds. In particular, critics note the Competition Act states neither that a company's employees cannot be informed about a search nor that the UOKiK President can impose such an obligation on the undertaking.

A fine for obstructing or rendering the inspection or search impossible (up to the equivalent of EUR 50 million) may be imposed on an undertaking and on a person holding a managerial position or who is a member of the management body of such undertaking (the maximum fine may amount to 50 times the average salary – approx. EUR 72,000, USD $76,000).

Italy

A. Italian Competition Authority (ICA)

1. *ICA fines Mediamarket S.p.A. for misleading advertising*.

On Nov. 3, 2022, the Italian Competition Authority (ICA) fined Mediamarket S.p.A., one of Italy's large-scale retail trade operators in domestic appliances and consumer electronics, EUR 3.6 million for unfair and aggressive commercial practices.

Mediamarket has implemented a strategy in its stores to induce consumers to purchase products presented as standalone items, but in reality the products are tied and sold together with other accessory products, at different (and higher) prices from those advertised on leaflets and in-store signs. In particular, this strategy was applied to products that are typically expensive and perceived by consumers as attractive, such as PCs, tablets, video game consoles, smart TVs, etc.

According to ICA, such conduct constitutes an unfair commercial practice pursuant to the Legislative Decree n. 205/2005, since Mediamarket effectively is restricting consumer freedom of choice, luring them into purchasing products they wouldn't have purchased otherwise.

2. *ICA further extends term for a fine recalculation proceeding following a Council of State decision*.

ICA has extended the deadline to conclude proceedings to recalculate its fine on C.N.S. – Consorzio Nazionale Servizi Società Cooperativa (CNS) – following the finding of its participation in an anticompetitive agreement in breach of Article 101 TFEU, concerning the market for facility management services (ICA case I808).

ICA reduced the fine by 50% given CNS's participation in the leniency program, on top of granting a prior 10% reduction in light of mitigating circumstances, namely that the company's antitrust compliance program was not manifestly inadequate. However, in ICA's view, it was not appropriate for CNS to benefit from a token fine given that its role in the ICA's investigation was, albeit useful, not crucial.

Subsequently, the Italian administrative jurisdictions scrutinized the fine, and the Council of State concluded that ICA failed to provide a significant justification for its assessment of the importance of CNS's contribution to the investigation. In the Council of State's view, even if reexamination again led to the conclusion that CNS's contribution to the ICA's investigation was not significant enough to justify non-imposition of a fine, the acknowledged effectiveness and usefulness of the information justified a further reduction.

Recalculation of the fine is expected by 31 January 2023.

3. *ICA clears acquisition of sole control of Eataly S.p.A.*

On Nov. 7, 2022, ICA announced it had conditionally cleared Food Experience Investments S.à.r.l., an independent, Luxembourg-based investment company, which is an Investindustrial investment group, to acquire exclusive control over Eataly S.p.A., a company active, among other areas, in the retail trade of food and beverages, as well as in commercial catering services. The transaction as originally proposed also entailed a non-competition agreement and a non-solicitation agreement between the parties, both effective for five years from closing.

After assessing the markets in which the parties are active, with particular attention to any overlap between the parties' activities (i.e., the markets for commercial catering services; distribution of food and non-food products of general consumption through large-scale retail outlets; and production of tinned tomatoes and dried pasta), ICA concluded that, given the parties' combined market shares in the relevant markets in Italy, the transaction did not raise competition concerns.

ICA also cleared as “ancillary” to the acquisition the abovementioned non-competition and non-solicitation agreements but specified that they were considered ancillary to the concentration on the condition that their duration was limited to two years.

A. European Commission

1. *Third time’s a charm: EU General Court approves re-adopted cartel fines*.

In 2002, the European Commission fined eight steel manufacturers who participated in a cartel between 1989 and 2000. Five years later, however, the General Court annulled this decision because it was based on a suspended treaty creating the European Coal and Steel Community. In 2009, the European Commission corrected its decision by using EU competition rules as the legal basis instead.

Five of the sanctioned companies then challenged the re-adopted decision, but this time the General Court upheld the decision. However, since the European Commission allegedly violated the companies’ defense rights, the CJEU annulled the decision. Consequently, the European Commission, for the third time, issued a new decision whereby the involved cartel members were fined for price fixing.

Some of the involved companies again appealed, arguing the final decision was unreasonable in its duration and therefore violated the European Convention on Human Rights. In its third judgment, the General Court rejected the appeal and upheld the European Commission decision, finding that the procedure did not hinder the companies’ defense rights.

2. *European Commission conditionally approves proposed merger of salmon farmers*.

The European Commission conditionally approved SalMar’s proposed acquisition of NTS. Both parties are big players in the salmon farming industry and have overlapping activities in Norway and Iceland. According to the European Commission, the merger would have resulted in only two active players on the market instead of three. The European Commission’s approval is conditioned on Salmar divesting its Icelandic subsidiary.

3. *European Commission deems in-depth investigation necessary into Booking’s proposed acquisition of eTraveli*.

According to the European Commission, Booking’s proposed acquisition of eTraveli may lead to a strengthening of Booking’s dominant position in the online travel agency services market.

Even though the UK CMA approved the proposed acquisition, the European Commission deems a Phase II review necessary because Booking did not agree to submit commitments to address the European Commission’s preliminary competition concerns. The European Commission has until March 31, 2023, to finish its Phase II investigation.

4. *European Commission fines styrene purchasers for cartel involvement*.

In a settlement, the European Commission fined five rival chemical purchasers it found colluded on purchase price negotiations of styrene monomer and exchanged sensitive commercial information a combined EUR 157 million. Styrene monomer is an important chemical compound used for the production of plastics, resins, rubbers, and latexes. The cartel coordinated their negotiation strategies

from May 2012 until June 2018 to lower their purchasing prices.

As the first to disclose the cartel's existence to the Commission, the sixth member of the cartel, Ineos, was exempted from any fines. Ineos stated that its employees operated "under the mistaken belief" that because the coordination was improving buyer power and beneficial for customers, it was not a breach of EU competition rules. In 2019, however, the EU General Court confirmed that purchasing cartels are to be considered by-object infringements.

5. *European Commission conditionally approves ALD's proposed merger with LeasePlan*.

The European Commission has conditionally approved ALD's proposed acquisition of LeasePlan. Both parties are leading players in operational leasing and related management services and are active within the EEA.

According to the European Commission, the merger as originally proposed would have resulted in significantly reduced competition in the markets for operational leasing in Czechia, Finland, Ireland, Luxembourg, Norway, and Portugal. Commission approval conditioned on ALD divesting its operational leasing business in Ireland, Norway, and Portugal, as well as LeasePlan's businesses in Czechia, Finland, and Luxembourg.

B. European Decisions

CJEU rules that in follow-on damages claims, parties may be required to create new documents.

In a preliminary judgment interpreting Article 5(1) of Directive 2014/104/EU (EU Damages Directive), the CJEU found that parties may be required to create evidence that is not readily available in follow-on damages claims. This may impact the burden of disclosure in EU Member States and make it easier to lodge private damages claims.

The judgment relates to a follow-on damages claim following the European Commission decision regarding a cartel infringement by truck producers, whereby the Commission fined the producers EUR 2.93 billion for colluding on truck pricing and passing on the costs to consumers to comply with European emission standards. For a more thorough analysis of the ruling, see our cross-office GT Alert.

C. European Policy Developments

1. *Mergers that fall below the notification threshold may still be subject to ex-post assessment*.

In July 2021, the Paris Court of Appeal asked the CJEU for a preliminary ruling to clarify whether mergers falling below the merger control notification thresholds can be abusive if they have a distinct anti-competitive aspect. In her opinion, Advocate General Kokott stated that competition authorities may in fact investigate transactions that fall below the turnover-based thresholds for notifications ex-post based on Article 102 of the TFEU. Since the opinion is non-binding, the CJEU may arrive at a different conclusion and judgment.

If the CJEU agrees with the Advocate General, this would provide another opportunity to review acquisitions, in addition to the so-called Article 22 referrals whereby one or more EU Member States can ask the European Commission to review a transaction that does not meet the notification thresholds.

2. *European Commission publishes draft revised Market Definition Notice*.

After 25 years, the European Commission published a draft revised version of its Market Definition Notice. The amendments and updates to the Notice mainly relate to European Commission practice developments, CJEU case law, and market developments.

The European Commission aims to provide more guidance, transparency, and legal certainty to undertakings to enhance compliance with EU competition law. The revised Notice provides more guidance regarding, inter alia, digital markets, innovation-intensive markets, and quantitative techniques. Parties can submit comments on the draft through Jan. 13, 2023. A final draft is expected in Q3 2023.

Japan

Restructuring of the information system procurement platform

In February 2022, the Japan Fair Trade Commission (JFTC) issued an investigative report on information system procurement in public offices. The JFTC deems it essential to create an environment where various system vendors may easily enter the procurement process. In its report, JFTC said there may be problems under the Anti-Monopoly Act if, for example, other vendors have difficulty participating due to the existence of functions only a specific company can handle and if tenders violate the tendering policy of public authorities.

To address these concerns, the Digital Agency has announced plans to list the prices and specifications of services provided by information technology companies like a catalogue, and to build a readily accessible platform for administrative staff.

National Law Review, Volumess XII, Number 343