GT GreenbergTraurig

GT Newsletter | Competition Currents | February 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. *FTC sues to block Novant Health's Acquisition of two hospitals from Community Health Systems.*

On Jan. 25, 2024, the FTC sued to block Novant Health, Inc.'s $320 million acquisition of two North Carolina hospitals from Community Health Systems, Inc. The FTC argued that this acquisition could lead to higher health care costs for patients and reduce incentives for quality and innovative care. According to the FTC, if the deal proceeded, Novant Health, one of the largest hospital systems in the southeastern United States, could control nearly 65% of the market for inpatient general acute care services in the Eastern Lake Norman Area, potentially allowing them to demand higher rates for services. The FTC is seeking a temporary restraining order and a preliminary injunction to halt the transaction.

[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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2. *FTC launches inquiry into generative AI investments and partnerships.*

On Jan. 25, 2024, the FTC announced it had issued orders to several companies, requiring them to explain recent investments and partnerships involving generative AI companies and major cloud service providers. This inquiry, conducted under Section 6(b) of the FTC Act, aims to examine corporate partnerships and investments with AI providers and their impact on the competitive landscape. The FTC is concerned about potential distortions of innovation and fair competition resulting from these partnerships. Companies involved in multibillion-dollar investments of this nature are specifically targeted. The FTC is seeking information related to the specific investments or partnerships, their practical implications, competitive impact, competition for AI resources, and disclosures to other government entities. The companies have 45 days to respond to the FTC orders.

3. *FTC announces 2024 update of size-of-transaction thresholds for premerger notification filings.*

On Jan. 22, 2024, the FTC approved updated jurisdictional thresholds and filing fees for the Hart-Scott-Rodino (HSR) Antitrust Improvements Act of 1976. These revisions are made annually, with the size-of-transaction threshold for reporting proposed mergers and acquisitions under the Clayton Act increasing from $111.4 million to $119.5 million for 2024. These changes apply to transactions closing after the notice's March 6, 2024, effective date, which is 30 days after publication in the Federal Register. These adjustments are based on changes in the gross national product and consumer price index as mandated by the HSR Act and the 2023 Consolidated Appropriations Act.

For details, please see GT's Jan. 23 Alert.

4. *FTC announces 2024 jurisdictional threshold updates for interlocking directorates.*

On Jan. 12, 2024, the FTC approved updated jurisdictional thresholds for Section 8 of the Clayton Act, which deals with interlocking directorates. In 2024, the thresholds for triggering prohibitions on certain interlocking memberships on corporate boards of directors are set at $48,559,000 for Section 8(a)(1) and $4,855,900 for Section 8(a)(2)(A). These revised thresholds took effect Jan. 22, 2024, upon their publication in the Federal Register.

5. *FTC publishes inflation-adjusted civil penalty amounts for 2024.*

On Jan. 11, 2024, the FTC announced it had adjusted the maximum civil penalty amounts for violations of 16 provisions of law that the agency enforces, in accordance with the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015. The Act mandates annual inflation adjustments based on a prescribed formula. The updated maximum civil penalty amounts, effective upon publication in the Federal Register on Jan. 10, include an increase from $50,120 to $51,744 for violations of specific sections of the FTC Act, the Clayton Act, and the Energy Policy and Conservation Act. Violations of Section 10 of the FTC Act see an increase from $659 to $680. Additionally, violations of Section 814(a) of the Energy Independence and Security Act of 2007 result in an increase from $1,426,319 to $1,472,546. The maximum civil penalty amounts for other law violations within the FTC's jurisdiction are detailed in the Federal Register notice.

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6. *Statement on FTC's securing temporary block of IQVIA's acquisition of Propel Media.*

On Jan. 3, 2024, the FTC issued a statement about the impending IQVIA Holdings Inc. acquisition of Propel Media, Inc.

On Dec. 29, 2023, the U.S. District Court for the Southern District of New York granted the FTC's request for a preliminary injunction to prevent IQVIA Holdings Inc. from acquiring Propel Media, Inc. The court order temporarily blocks the allegedly anticompetitive merger, which the FTC believes would lead to increased health care prices. The acquisition, challenged by the FTC in a July 17, 2023, lawsuit, aimed to give IQVIA a dominant position in programmatic advertising targeting health care professionals. The preliminary injunction is considered a significant victory for the FTC, marking its fourth successful merger challenge in less than a month. The order follows previous wins against Illumina's acquisition of Grail, John Muir's takeover of San Ramon Regional Medical Center, and Sanofi's acquisition of Maze Therapeutics' Pompe disease drug. On Feb. 2, the court approved the parties' motion to terminate the proposed acquisition.

B. Department of Justice (DOJ)

1. *Justice Department joins lawsuit challenging National Collegiate Athletics Association (NCAA)'s transfer eligibility rule.*

On Jan. 18, 2024, the Justice Department joined a civil antitrust lawsuit along with 10 states and the District of Columbia challenging the NCAA's Transfer Eligibility Rule. The suit alleges the rule unreasonably restricts college athletes' freedom to transfer between academic institutions, limiting their eligibility for intercollegiate contests if they transfer more than once, which, in turn, denies them educational opportunities. Plaintiffs in the lawsuit, initially filed by seven states, received a temporary restraining order based on concerns that the rule likely violates the Sherman Act. The amended complaint adds the United States, Minnesota, Mississippi, Virginia, and the District of Columbia as co-plaintiffs.

Assistant Attorney General Jonathan Kanter emphasized the importance of allowing college athletes to freely choose institutions based on their academic, personal, and professional development needs without anticompetitive restrictions. The lawsuit alleges that the one-time-transfer rule unreasonably restrains competition in various Division I sports, forcing athletes who transfer more than once to sit out an entire season before being eligible to compete at their new school. This restriction allegedly limits college athletes' bargaining power and harms both their educational and athletic experiences.

2. *Justice Department and FTC hold trilateral meeting with competition enforcers from Mexico and Canada.*

On Jan. 23, 2024, the Justice Department participated in a trilateral meeting in Mexico City with antitrust enforcers from Mexico's Federal Economic Competition Commission, Canada's Competition Bureau, and the FTC. The meeting covered competition in the technology and platform sectors, the impact on labor markets, and new enforcement tools. Assistant AG Kanter emphasized the shared goal of preserving and protecting fair competition among the three countries, while FTC Chair Lina Khan highlighted the importance of collaboration to promote fair competition and protect the public from anticompetitive tactics.

The foundation for these meetings lies in cooperation agreements from 1995, 1999, and 2001 between the United States, Canada, and Mexico, committing agencies to coordinate and cooperate for consistent and effective antitrust enforcement.

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3. *Justice Department and FTC update guidance reinforcing parties' preservation obligations for collaboration tools and ethereal messaging*.

On Jan. 26, 2024, the Justice Department's Antitrust Division and the FTC jointly announced updates to their standard preservation letters and specifications for government investigations and litigation. These updates address the growing use of collaboration tools and ephemeral messaging platforms in the modern workplace, reinforcing the obligation of companies to preserve materials during such proceedings. Deputy Assistant AG Manish Kumar stated that these updates ensure opposing counsel and companies cannot claim ignorance when conducting business through ephemeral messages, emphasizing that failure to produce such documents may result in obstruction of justice charges.

FTC Bureau of Competition Director Henry Liu emphasized that legal responsibility applies to new collaboration and information-sharing tools, including those with ephemeral messaging capabilities. As companies increasingly adopt technologies that allow for immediate and irretrievable destruction of communications and documents, the FTC emphasizes the need to properly retain such data during government investigations and litigation. This announcement highlights the ongoing cooperation between the Antitrust Division and the FTC's Bureau of Competition in enforcing antitrust laws and addressing related issues.

C. U.S. Litigation

1. *Verax Biomedical Inc. v. Am. Nat'l Red Cross*, Civil Action No. 23-10335 (D. Mass.)

On Jan. 19, 2024, a federal district court in Massachusetts ruled that the American Red Cross (ARC) was immune from antitrust claims because of its federal charter and public functions, largely dismissing an antitrust suit filed by Verax, a Massachusetts company that develops and sells tests for detecting bacterial grown in platelets, including PGDprime. In July 2020, ARC announced plans to stop selling untreated platelets and to perform pathogen reduction treatment (PRT) on all platelets prior to sale. ARC entered into an exclusive dealing contract with Cerus Corp., which produces the INTERCEPT Blood System, the only FDA-approved PRT technology for platelets. Verax alleges that this contract will make it impossible for hospitals to purchase mitigation services from Verax, as the FDA has not endorsed pairing rapid secondary tests like PGDprime with PRT technologies like INTERCEPT.

Verax filed suit against ARC on Feb. 14, 2023. Verax raised three counts under the Sherman Act (tying, exclusive dealing, and attempted monopolization) and three counts under state law (unfair methods of competition and unfair and deceptive practices, defamation, and tortious interference with contractual relations). ARC moved to dismiss all counts on April 17, 2023, and the United States filed a statement of interest under 28 U.S.C. § 517, arguing that contrary to ARC's assertions, ARC could be sued under the Sherman Act. On Jan. 19, Judge Saris dismissed Verax's tying, extensive dealing, attempted monopolization, and defamation claims. The court found that ARC's status as a federal instrumentality, first chartered by the government in 1900, put it outside the Sherman Act's reach. Although the court found the issue "close," the ruling explained that given ARC's charter and public work, it could not be considered a "person separate from the United States itself." Plaintiff's tortious interference and contractual relations claims survived the motion.

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2. *Dexon Computer, Inc. v. Cisco Systems, Inc., et al.*, Case No. 5:22-CV-00053-RWS-JBB (E.D. Tex)

On Jan. 17, five days before trial, a federal district court in Texas fully adopted a magistrate judge's recommendations to (1) preserve plaintiff Dexon Computer's monopolization claims against Cisco Systems and (2) dismiss allegations of an anticompetitive conspiracy in restraint of trade and the alleged anticompetitive tying of service to equipment sales. This case is intertwined with a California federal court litigation Cisco filed against Dexon, where Cisco won an order blocking Dexon from selling counterfeit Cisco products. Dexon sued both Cisco and CDW Corp. in Texas after its antitrust counterclaims were dismissed in the California lawsuit.

Dexon alleges that Cisco is "a monopolist in several worldwide and U.S. markets related to networking equipment and services for the internet" and that Cisco "employed fear, uncertainty, and doubt ("FUD") tactics to foreclose competitive purchases of any product and maintain supracompetitive pricing for its products." Dexon also alleges Cisco "conspired with Defendant CDW to sell Cisco equipment in the Relevant Networking Markets to maintain its supracompetitive pricing in those Markets and exclude other resellers from making sales in the Relevant Networking Equipment Markets to end-user customers in violation of federal and state antitrust laws." Plaintiff asserts the agreement between defendants Cisco and CDW reflects an unreasonable restraint of trade and a conspiracy to monopolize unlawful under Sections 1 and 2 of the Sherman Act. Plaintiff also asserts claims under "Section 1 of the Sherman Act for per se tying the Relevant Product Markets, under Section 2 of the Sherman Act for unlawful monopolization of the Relevant Networking Equipment Markets and for unlawful attempted monopolization of the Relevant Product Markets against Cisco, and under the Texas Free Enterprise and Antitrust Act against Cisco and CDW."

The magistrate judge issued a 150-page report and recommendation ("R&R"), recommending that "CDW's summary judgment motion be granted on the discrete issue of fraudulent concealment but that, due to the necessary credibility determinations, the issue of CDW's specific intent to monopolize be considered in light of a full factual record at trial" and that "Defendants' summary judgment motions be granted as to Dexon's § 1 conspiracy claim… and § 1 tying claim." Otherwise, the magistrate recommended defendants' summary judgment motions be denied.

CDW has since settled out of the action. Both Dexon and Cisco filed objections. Cisco objected to the R&R's determination that a genuine issue of material fact exists as to whether Cisco engaged in anticompetitive conduct. Cisco argued (1) "that the alleged FUD tactics cannot support Dexon's monopoly claims"; (2) "that its resolution of software audits cannot support a Sherman Act § 2 claim," and (3) "that conduct allegedly similar to tying cannot support the monopoly claims." Cisco also objected to the R&R's finding that "there is no genuine issue of material fact that Dexon has not shown antitrust injury." Dexon also objected to the R&R arguing that the "R&R improperly weighed the uncontroverted findings of marketwide harm by its economic expert" and to the finding that "Dexon could not show antitrust injury in its per se tying theory." The parties' objections were rejected, and the judge ordered that the magistrate judge's report and recommendation be adopted as the opinion of the district court.

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The Netherlands

Dutch Competition Authority

1. *ACM publishes draft guidelines regarding the Digital Services Act*.

The EU Digital Services Act (DSA) is part of a package of new regulations on the digital economy aiming to protect companies and consumers against unfair competition or illegal practices, among other things. The DSA will apply in the Netherlands and elsewhere later in 2024, and has applied to large platforms and search engines since 2023. To prepare companies and organizations for what the DSA means for them and what rules they must comply with, the Dutch Competition Authority (ACM) has drawn up draft guidelines, which provide additional explanations and practical examples to guide intermediary service providers on various obligations arising from the DSA.

2. *The ACM updates its Farmer Cooperation Guidelines*.

The ACM has updated its guidelines on competition in the agricultural sector, originally published in September 2022. The updated guidelines outline permissible forms of collaboration among farmers in accordance with competition law rules, and provide concrete tools to help farmers and other market parties in the agricultural sector set up joint sustainable initiatives. The updated guidelines seek to contribute to the sustainable production and trade of agricultural products. Furthermore, the ACM is open to informal discussions with stakeholders regarding sustainability initiatives.

Poland

A. UOKiK fines Dahuan Technology Poland and distributors PLN 36 million for anticompetitive agreement.

The President of the Polish Office of Competition and Consumer Protection (UOKiK) fined Dahua Technology Poland PLN 35 million after investigating price fixing and market sharing within the company's distribution network.

The company is an exclusive importer and distributor of Dahua's electronic monitoring equipment in Poland, operating through its distributors, appointed for wholesale or retail resales.

The UOKiK President's investigation revealed that the company had influenced the pricing policy of its distributors since 2016. The company set minimum prices, provided information on maximum discounts, and imposed rigid prices within promotional frameworks. Distributors were also asked to apply resale prices set by channel partners, with Dahua monitoring the compliance.

The investigation also revealed market sharing wherein the first distributor to report a large-amount deal, with a higher discount and project protection, discouraged other distributors from offering competitive prices for the same project. According to the UOKiK President, such practices restricted customer choice, forcing them to use the first distributor's offer.

UOKiK fined Dahua and its six distributors, and also fined seven managers PLN 739,125.00 (approx. EUR 170,000) in total. The decision is subject to appeal. Under the Polish law, a company involved in competition-restricting practices may be fined up to 10% of its turnover in the preceding year, while individual managers responsible for carrying out the collusion face a penalty of up to PLN 2 million.

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Anticompetitive provisions are null and void. Entities harmed by an anticompetitive agreement may also seek civil damages.

B. Following UOKiK's intervention, Polish Football Association and Ekstraklasa change practices in favor of bookmakers.

UOKiK launched explanatory proceedings regarding the practices employed by the Polish Football Association (PZPN) and Ekstraklasa S.A. (Ekstraklasa)—the organizer of Poland's top soccer league (the Entities). UOKiK's main concern was the method of calculating authorization fees to use soccer games results. UOKiK established that PZPN was charging bookmakers 0.5% of their total gross revenue, rather than revenue only generated in relation to the games organized by the Entities. According to UOKiK this could potentially amount to an abuse of a dominant position.

During the investigation, the Entities changed their method of calculating fees charged for using soccer games results to only consider revenues gained from betting on Polish club games. Additionally, they lowered the fee rate. PZPN is now on track to renegotiate their contracts with betting companies. UOKiK found that such measures are sufficient and decided not to pursue the case further.

The case demonstrates a business agreeing with UOKiK and changing its questioned practices at a preliminary stage to avoid further investigation. This is not always possible, as it depends on various circumstances including the type of the alleged infringement. Explanatory proceedings are a separate type of proceedings, usually launched at a preliminary stage. They are not launched against any particular entity and involve no fines. Depending on the outcome of such explanatory proceedings (e.g., gathered evidence) UOKiK may launch separate, antimonopoly proceedings against a particular entity.

Italy

Italian Competition Authority (ICA)

1. *ICA authorizes acquisition of sole control of Bancomat S.p.A. by Italian asset management company.*

On Jan. 10, 2024, ICA cleared FSI SGR S.p.A.'s acquisition of Bancomat S.p.A. FSI is a major Italian asset management company.

Bancomat, in which some of Italy's main banks have a stake, manages the Italian withdrawal and payment circuits Bancomat, PagoBancomat, and Bancomat Pay. According to ICA, in 2022 more than a third of the debit card transactions in Italy (both in terms of number and of value) were processed through such circuits. With the capital increase to which it committed, as well as the shareholder agreement provisions, FSI will have sole control over the company while holding 43% of Bancomat's share capital.

The merger generated competition concerns for ICA given FSI's control of BCC Pay S.p.A., a digital payment company and provider of wholesale merchant acquiring and issuing services for the ICCREA Group, which relies on Bancomat services. However, as ICA established, the merger does not risk significant anticompetitive effects either in the upstream market of issuing services or in the downstream one for the wholesale merchant acquiring services.

According to ICA, in addition to the fact that BCC Pay's position on the issuing market is marginal, FSI, being Bancomat's parent company, will have no incentive to limit the terms and conditions of the services provided to BCC Pay competitors, as this would go against Bancomat's own commercial interest.

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2. *ICA closes investigation into certain airlines as to a possible anticompetitive agreement regarding raising of airline ticket prices during the holidays*.

On Jan. 2, 2024, ICA closed its preliminary investigation that began in December 2022 against several airlines regarding a possible anticompetitive agreement for economy-class passenger air transport service on routes between the Sicilian airports of Catania and Palermo and the main cities of central and northern Italy: Rome, Milan, Turin, and Bologna.

ICA initiated the investigation based on a consumers' association report, after a press campaign highlighted the price increases for air travel to Sicily during the Christmas holidays. Specifically, the increase in economy-ticket prices was deemed possibly attributable to collusive intent on the part of the airlines operating on those routes. The region of Sicily filed its own complaint.

The investigation, which included office inspections, closed with no charges brought, as the evidence gathered was insufficient to corroborate ICA's claims.

However, ICA maintains that the price surges may stem from reasons other than the alleged collusion. Therefore, on Nov. 14, 2023, ICA opened a sector inquiry to investigate the algorithms used to define airline offers and to identify competition issues.

European Union

European Commission

1. *European Commission accepts Renfe's behavioral remedy package after abuse probe*.

The European Commission has accepted Spanish state-owed railway operator Renfe's behavioral remedy package to prevent abuse of dominance, addressing preliminary competition concerns. In April 2023, the Commission opened a formal investigation into concerns over Renfe's refusal to supply full content and real-time data to rival ticketing platforms. Renfe has committed to, *inter alia*, providing access to all current and future content and data on its online channels to third-party platforms, with specific conditions on receiving access. The remedy package is legally binding for an indefinite period, and a monitoring trustee will oversee compliance for 10 years.

2. *European Commission opens phase II investigation into proposed transaction involving Lufthansa/ITA Airlines*.

The European Commission has opened an in-depth investigation (phase II) into the proposed acquisition of joint control of ITA Airways by Deutsche Lufthansa AG and the Italian Ministry of Economy and Finance. The Commission has concerns the transaction may reduce competition in the market for passenger air transport services on several short-haul and long-haul routes in and out of Italy. The parties offered commitments to eliminate competition concerns, but the Commission found these insufficient. The Commission has until June 6, 2024, to issue a decision.

3. *Six major Norwegian Salmon producers suspected of breaching EU competition rules*.

The European Commission has sent a statement of objections to six Norwegian salmon producers regarding potential EU competition law violations by colluding to distort competition in the market for spot sales of Norwegian farmed Atlantic salmon. The Commission is concerned that between 2011 and 2019 the producers exchanged commercially sensitive information to reduce market uncertainty in spot

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sales, focusing on prices, volumes, and other factors. If confirmed, this conduct would constitute a breach of the cartel prohibition provision of Article 101 of the Treaty on the Functioning of the European Union.

4. *European Commission proposes reforms to the FDI screening regime*.

The European Commission has adopted five initiatives to strengthen EU economic security, mandating that all EU member states adopt a foreign direct investment (FDI) screening regime and take steps to monitor outbound investments. In furtherance of this goal, the Commission released a package of measures including a legislative proposal to address inefficiencies and shortcomings within the current EU FDI screening regime. The Commission proposes to ensure all EU countries have a screening mechanism to review foreign investments in EU companies active in critical areas, including semiconductors, artificial intelligence, critical medicines, and dual-use and military items. The Commission also intends to start assessing EU outbound investments, given concerns that EU investments abroad into certain advanced technologies could bolster foreign military and intelligence. The aim is to harmonize differences between national mechanisms to ensure a level field between countries and reduce foreign investors' compliance costs.

5. *European Commission conducts dawn raids at world's biggest tire companies*.

The European Commission has conducted unannounced inspections at the premises of the world's biggest tire companies – namely Michelin, Bridgestone, Continental, Goodyear, Pirelli, and Nokian Tyres – due to concerns that these companies have engaged in price-fixing behavior. These dawn raids follow scrutiny of the tire market by competition agencies elsewhere.

Greater China

China Raises Turnover-Based Thresholds for Mandatory Merger Control Notification

On Jan. 26, 2024, China released the long-awaited *Amended Provisions on Thresholds for Declaration of Concentration of Undertakings* (Amended Provisions), replacing the original thresholds, which were in place since 2008. Compared with the original thresholds, the Amended Provisions significantly raise the turnover-based thresholds for mandatory merger control notification due to the rapid growth in size of transactions in China since 2008. Fewer transactions are expected to be captured by China's mandatory notification regime with the Amended Provisions in place.

Pursuant to the Amended Provisions, transactions, including mergers, acquisitions, and joint ventures, will be subject to mandatory notification to the Anti-Monopoly Bureau of China (AMB) before implementation (and regardless of whether the transaction occurs) if either of the following two economic tests is satisfied:

1) the aggregate worldwide turnover of all parties involved in the transaction in the preceding financial year is greater than RMB 12 billion (previously, RMB 10 billion), and the nationwide turnover within China of each of at least two of the parties involved in the preceding financial year is greater than RMB 800 million (previously, RMB 400 million); or

2) the aggregate nationwide turnover within China of all parties involved in the transaction in the preceding financial year is greater than RMB four billion (previously, RMB two billion), and the nationwide turnover within China of each of at least two of the parties involved in the preceding financial year is greater than RMB 800 million (previously, RMB 400 million).

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The nationwide turnover threshold as stated in the second prong in each of the two economic tests has been raised 100% from RMB 400 million to RMB 800 million. This will exclude many small- and medium-sized transactions from mandatory notification.

In 2022, China proposed to add a new hybrid test combining both economic indicators of turnovers and market value, intending to capture competition-sensitive "killer acquisitions"—a big company acquiring its nascent competitor—under the mandatory notification regime. The 2022 proposal described the new hybrid test as a concentration transaction where (a) one party involved in the transaction has generated turnover of greater than RMB 100 billion in China in the preceding financial year, and (b) the valuation of the other party involved is no less than RMB 800 million and at least one-third of such party's total worldwide turnover in the preceding financial year is generated from China. Following a year-long discussion within AMB and with the industries, this proposed hybrid test was removed from the final Amended Provisions.

The Amended Provisions retain a provision enabling AMB to intervene in transactions failing the economic tests above, i.e., to require the parties to a concentration transaction to report with evidence to AMB if the proposed transaction may have anticompetitive effect.

Japan

JFTC conducts special survey on efforts to facilitate price shifting of cost increases with respect to "Abuse of Dominant Bargaining Position" under the Antimonopoly Act.

On Dec. 27, 2023, the Japan Fair Trade Commission (JFTC) announced that it conducted a special survey on efforts to facilitate price shifting of cost increases with respect to "Abuse of Dominant Bargaining Position" under the Antimonopoly Act. Under the Antimonopoly Act, if a business operator whose position in a transaction is superior to that of the counterparty unilaterally requests that the counterparty trade with it at a significantly lower price, this may constitute an abuse of dominant bargaining position.

The JFTC conducted its first written surveys of 110,000 business operators (both contractors and purchasers) and its second written surveys of 3,064 purchasers named by contractors in the first written survey. In addition, on-site surveys were conducted in 349 cases based on the results of the written surveys. Then, a letter of warning was sent to 8,175 purchasers whose actions may fall under the Abuse of Dominant Bargaining Position.

The results revealed that price shifting did not follow a rational economic formula as one moved up the transaction ladder, i.e., from consumers to service providers, first subcontractors, second subcontractors, and so on. In the service industry, for example, price shifting was difficult because labor costs are a significant portion of the overall costs, and therefore the overall price. The high costs of a significant input reduced the ability to shift costs among different levels of purchasers. In the supply chain of the building maintenance, security, and road freight transportation industries, there are multiple subcontracting levels, preventing linear price shifting from one level of seller or provider to the next.

In response to these issues, the JFTC has disseminated the Policy under the Antimonopoly Act on price shifting, explaining the policy individually to those firms that received the alert letters.

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