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United States

A. Federal Trade Commission (FTC)

1. *FTC settles antitrust concerns related to mortgage technology deal—Intercontinental Exchange, Inc.'s acquisition of Black Knight, Inc.*

On Nov. 3, 2023, the FTC finalized a consent order related to Intercontinental Exchange, Inc. (ICE)'s acquisition of Black Knight, Inc. On March 9, 2023, the FTC sued to block the proposed acquisition, alleging the merger of two of the largest providers of home mortgage loan origination systems and other key lender software tools would lead to higher prices, less innovation, and less lender choice. ICE has asserted there is "intense competition" from a number of other providers and the transaction would actually make the industry more transparent.

The FTC consent order requires structural relief, such that the merged company will promptly divest Black Knight's Optimal Blue and Empower businesses and other related products to Constellation Web Solutions, Inc. (Constellation). ICE and Black Knight must maintain the viability of the businesses until divestment and provide transition assistance to Constellation to operate the

businesses as successfully as Black Knight had. In addition, the merged company must seek FTC approval for any acquisitions that provide loan origination system and product, pricing and eligibility engine services—the two markets in which the FTC alleged that anticompetitive harm would result from the acquisition absent the required divestment. The consent order also contains additional provisions related to the merged company's use of licenses, hiring, related noncompete and non-solicitation agreements, and a promissory note; further, a monitor will be appointed to ensure compliance with the consent order.

2. *FTC scrutinizes patents improperly listed on the FDA's Orange Book.*

In September 2023, the FTC issued a policy statement warning pharmaceutical companies that it would be scrutinizing the Food and Drug Administration (FDA)'s "Approved Drug Products with Therapeutic Equivalence Evaluations" (commonly referred to as the "Orange Book").

On Nov. 7, 2023, the FTC sent notice letters to 10 companies related to 100 patents the FTC believes are improperly listed on the Orange Book. The patents include everything from brand-name asthma inhalers to epinephrine autoinjectors (or "EpiPens"). FTC Chair Lina Khan explained: "Wrongfully listed patents can significantly drive up the prices Americans must pay for medicines and drug products while undermining fair and honest competition."

On Nov. 20, 2023, the FTC filed an amicus brief in the case titled Mylan Pharmaceuticals Inc., et al. v. Sanofi-Aventis U.S. LLC, et al. further outlining the anticompetitive harm that results from improperly listed patents in the FDA's Orange Book. The antitrust case, brought by Mylan Pharmaceuticals and several affiliated entities, alleges that Sanofi-Aventis engaged in anticompetitive conduct to monopolize the market for injectable insulin glargine, a drug used to treat diabetes. Mylan claims that Sanofi delayed and blocked competition from Mylan's drug by improperly listing several drugs in the Orange Book. In its supporting amicus brief, the FTC explained that improperly listed patents can trigger a stay that delays competition from other drug products and can lead to higher prices and less quality and access.

3. *FTC sues to block health care acquisition in California's I-680 corridor.*

On Nov. 17, 2023, the FTC sued to block John Muir Health's proposed acquisition of San Ramon Regional Medical Center, LLC. Currently, John Muir owns a 49% non-operating interest in San Ramon, while Tenet Healthcare Corporation holds the remaining 51% majority stake. In its complaint, the FTC alleges the transaction will drive up health care costs in California's I-680 corridor, which covers Contra Costa and Alameda Counties in the San Francisco Bay Area. Further, the FTC alleges the transaction will enable John Muir to demand higher rates for its two existing hospitals and San Ramon and would also reduce incentives for the parties to invest in quality improvements. The California Attorney General's Office is expected to jointly file a complaint with the FTC in federal district court.

4. *FTC approves omnibus resolution to streamline process in AI-related investigations.*

On Nov. 21, 2023, the FTC approved an omnibus resolution, which will be effective for 10 years, authorizing the use of compulsory process (i.e., subpoena power) in nonpublic investigations involving products and services that use, claim to be produced by, or detect use of artificial intelligence (AI). Notwithstanding AI's many benefits, it can also be used in harmful ways, including fraud, deceit, privacy infringement, and other unfair practices. According to the FTC, its omnibus resolution will enable its staff to issue civil investigative demands (CIDs) in investigations relating to

AI while retaining FTC authority to determine when CIDs are issued.

B. Department of Justice (DOJ)

1. *DOJ issues complaint and consent decree with Koch Food International to prevent switching fees in chicken contracts.*

On Nov. 9, 2023, the DOJ simultaneously issued a lawsuit against Koch Food International (Koch) under the Sherman Act and Packers and Stockyards Act and a consent decree settling the charges. The complaint alleges that Koch deterred chicken farmers and growers from switching to other chicken processors because the terms of Koch's contracts required the growers to return certain expenses and pay fees and penalties for terminating a contract. DOJ alleges the termination penalty operated as a de facto noncompete clause that violated the Sherman Act and was an unfair practice in violation of the Packers and Stockyards Act, which was passed to protect livestock and poultry producers.

As part of the consent decree entered into the same day, Koch agreed to (1) inform growers of existing contracts that it will not enforce the termination penalty provision, (2) reimburse growers for all termination penalty payments and out-of-pocket legal expenses incurred when Koch enforced the termination penalty provision, (3) refrain from including a termination penalty provision or collecting any termination penalty payments for the next seven years, (4) refrain from retaliating against any grower involved in any termination penalty provision disputes or who cooperated with the DOJ's investigation, and (5) comply with reporting and certification obligations and the final judgment.

2. *Four state attorneys general join DOJ's lawsuit against Agri Stats Inc.*

In September, the DOJ filed a civil antitrust suit against Agri Stats Inc. for unlawfully exchanging competitively sensitive information among broiler chicken, pork, and turkey processors. On Nov. 6, 2023, the attorneys general for Minnesota, California, North Carolina, and Tennessee joined the DOJ's lawsuit.

C. U.S. Litigation

In re College Athlete NIL Litigation, Case No. 20-cv-03919; In the United States District Court for the Northern District of California

On Nov. 3, U.S. District Judge Claudia Wilken ruled in House v. NCAA that not only the original plaintiffs but potentially also at least 184,000 NCAA athletes could proceed with their lawsuit and be grouped into a class that may have been harmed. The lawsuit filed in 2020 seeks $1.4 billion in damages representing name, image, and likeness (NIL) revenue those athletes could have earned had it been allowed during their enrollment. Former Arizona State swimmer Grant House is lead plaintiff in the case; he is joined by former Oregon basketball player Sedona Prince and former Illinois football player Tymir Oliver. On Sept. 22, 2023, the court granted plaintiffs' unopposed motion for certification under Rule 23(b)(2) of a proposed class for declaratory and injunctive relief. The ruling exposes the NCAA and its member conferences to damages up to $4.5 billion after mandatory trebling.

The suit challenges the association's remaining rules regarding athletes' ability to make money from their NIL and seeks damages based on the share of television-rights money and the social media earnings it claims athletes would have received had the NCAA's previous limits on NIL

compensation not existed.

Specifically, the suit claims that football, men's basketball, and women's basketball players at schools in the Power Five conferences are entitled to damages related to the use of their NIL during telecasts of games and that athletes in any sport at a Power Five school are entitled to damages related to social media earnings. If the plaintiffs prevail, most of the money would be spread among athletes in those three sports who have received full athletic scholarships and play — or have played — for a school in one of the Power Five conferences since June 15, 2016. That date is four years prior to when the suit was initially filed, the reach-back period allowed under antitrust law.

Wilken is the same judge who ruled against the NCAA in the landmark O'Bannon v. NCAA and NCAA v. Alston antitrust cases. The case is currently set to go to trial in January 2025 in Oakland, California.

The Netherlands

A. Dutch national competition authority

ACM wants additional powers to address merger enforcement gaps.

The Dutch competition authority (ACM)'s power currently is limited to evaluating acquisitions only where both parties' turnovers exceed €30 million in the Netherlands. When this threshold is not met, ACM may not assess the merger. The absence of scrutiny poses challenges in mergers involving competitions at the local, regional, or niche market levels, or in "killer acquisitions," according to the ACM's Nov. 6 blog post. ACM proposes a "call-in power" that would grant it the authority to assess acquisitions that fall below the turnover threshold within a specified timeframe.

B. Dutch courts

Dutch court sends anchor defendant questions to ECJ.

The Amsterdam Court of Appeal has sought clarification from the European Court of Justice (ECJ) on whether follow-on claims can be filed against an anchor defendant not named in an initial infringement decision and if only an infringing entity can be an anchor defendant. The inquiry revolves around the anchor defendant doctrine outlined in the Recast Brussels Regulation, allowing the addition of foreign companies to a case if there is an existing defendant in that country with a sufficiently close connection to the claims. Furthermore, the court seeks clarification on the close connection in follow-on claims where: anchor defendants were not named cartelists; and whether the anchor defendant's residence in the member state matters when the infringement was only established at the national level.

United Kingdom

A. Digital Markets, Competition and Consumers (DMCC) Bill

The DMCC, intended to provide greater protection to consumers (particularly in digital markets), is continuing its progress through the UK's parliament. In November, the House of Commons turned down an attempt (initiated by Sir Robert Buckland) to expand the scope of collective actions in the Competition and Markets Authority (CAT) to include consumer class actions, but the bill may reappear in the House of Lords. At the same time, the UK government put forward a proposal to try to

reverse the effect of the Supreme Court's decision in PACCAR (in which it held that third-party litigation funding agreements could be damages-based agreements (DBAs) that would be unenforceable unless they complied with the DBA Regulations 2013) in relation to competition class actions; the amendment would provide that a DBA is only unenforceable in opt-out collective proceedings before the CAT if the agreement is with a provider of advocacy or litigation services. The fact that the proposed amendment only addresses cases heard in the CAT has been heavily criticized by several commentators.

The bill's second reading will be in the House of Lords in December 2023.

B. Collective actions for competition damages

CAT certifies video game brand collective proceedings.

On Nov. 21, 2023, the CAT certified collective proceedings brought against certain European entities of a multinational video game and digital entertainment company on behalf of some 8.9 million UK customers under section 18 of the Competition Act 1998 and Article 102 of the Treaty on the Functioning of the European Union for damages arising as a result of the entities allegedly abusing a dominant position by preventing game developers and publishers from accessing consumers other than through the store and network, resulting in users paying more for digital games and add-on content than would otherwise be the case. The claimants' estimate of their aggregate losses is between £0.6 billion and £5 billion (excluding interest). While entities at issue were not required to file a defense prior to the collective proceedings application, they have stated that the case is "*flawed from start to finish*".

Poland

UOKiK president again intervenes against retail chains—Intermarche obliged to refund its suppliers.

The Office of Competition and Consumer Protection (UOKiK) president issued a commitment decision on the unfair exploitation of contractual advantage in the agri-food sector against SCA PR, the company responsible for purchasing at the Intermarche chain of stores.

1. The challenged practices concerned establishing cooperation terms on an ad hoc basis and obtaining discounts despite the conditions stipulated in the agreement not being met.
2. According to the UOKiK president, SCA PR concluded marketing agreements with suppliers of agricultural products and foodstuffs for a given year with a delay, expecting counterparties to take into account the new terms from the beginning of the year. As a result, suppliers, when cooperating at the beginning of the year, were not certain of the terms and conditions on which sales would be settled retroactively. Additionally, the UOKiK president found that suppliers were charged with additional discounts not provided for in the supply contracts. The decision also questions the retrospective discounts that SCA PR obtained from suppliers, despite not generating the required level of turnover in the relevant period.

SCA PR must amend the agreements and refund the questioned discounts to the contractors.

The UOKiK president continuously monitors the relationships between large retail chains and suppliers of agricultural products and foodstuffs. Previously, the UOKiK president imposed significant fines on Jeronimo Martins Polska—the owner of the Biedronka chain—as well as on Eurocash and

Kaufland Poland Markets. In these proceedings, the UOKiK president questioned the rebates due to a retail chain with retroactive effect as well as unjustified fees demanded by retail chains. The proceedings regarding logistics fees charged by Carrefour Polska and Auchan Polska are currently pending.

Italy

A. Italian Competition Authority (ICA)

1. *ICA opens investigation in the market for the production and distribution of glass wine bottles pursuant to Article 101(1) TFEU.*

On Oct. 31, 2023, the Italian Competition Authority (ICA) announced an investigation pursuant to Article 101(1) TFEU into an alleged anticompetitive agreement (or concerted practice) in the glass wine bottle industry. According to ICA, the investigated undertakings (i.e., among others, Berlin Packaging Italy S.p.A., Bormioli Luigi S.p.A., O-I Italy S.p.A., Verallia Italia S.p.A., etc.) have been coordinating their pricing strategies towards customers at least since the beginning of 2022, through coordinated notices containing similar (and unjustified, if compared with raw material costs) changes in list prices.

Together with the Special Antitrust Unit of the Italian Financial Police, ICA has already carried out inspections both at the main offices of the investigated companies and at the premises of other subjects, such as the trade association Assovetro, that might be in possession of relevant elements.

According to ICA, the proceeding is set to be closed by Dec. 31, 2024.

2. *ICA investigates Intesa Sanpaolo and Isybank for unfair commercial practices in digital bank services.*

On Nov. 30, 2023, ICA launched an investigation into Intesa Sanpaolo S.p.A. and Isybank S.p.A. (Isybank, the digital bank of the Intesa Sanpaolo Group) with respect to the transfer of several hundred thousand current account holders from Intesa Sanpaolo to Isybank.

ICA received approximately 2,000 complaints relating to the transfer plan that provided for the transfer of customers that Intesa Sanpaolo defines, in the communication sent to them, as “mainly digital.” Consumers complained that current account holders were not fully aware that their account would be transferred to another operator, since the related communication was delivered via internet banking or via the Intesa Sanpaolo app, without any highlighting and at a time of year that largely coincided with the summer holidays.

ICA highlights that the transfer of current account holders of Intesa Sanpaolo to the Isybank would entail significant changes to their contractual conditions: for instance, physical counters will no longer be used and customer interaction will be done exclusively with a smartphone.

3. *ICA launches sector inquiry into pricing algorithms in air passenger transport for routes to and from Sicily and Sardinia.*

On Nov. 16, 2023, ICA launched an inquiry into the use of pricing algorithms in air passenger transport on the routes connecting the peninsula and Sicily and Sardinia. In ICA’s view, starting from 2022 high price levels have been detected by several entities in periods of peak demand.

According to ICA, airlines have been adopting pricing systems which, using algorithms and data processing software, can differentiate and adapt flight costs over time. ICA seems willing to examine the use of artificial intelligence and machine learning techniques.

ICA's inquiry will concern market function as well as the methods of communicating airline ticket prices and their various components to the public. Due to the new regulatory provisions referred to in Art. 1 of Legislative Decree 104/2023, ICA will be able, based on the outcome of the sector inquiry, to impose behavioral or structural measures on companies to eliminate distortions to competition or to recommend appropriate legislative measures.

European Union

A. European Commission

1. *European Commission rules over State aid cases in the market for railway transportation services in Italy.*

On Nov. 24, 2023, the European Commission issued two decisions in relation to the State Aid proceedings SA.32179 and SA.32953. Such procedures, opened in 2014, investigated (i) the free-of-charge transfers of infrastructure assets between Rete Ferroviaria Italiana S.p.A. and Trenitalia S.p.A. or FS Logistica S.p.A., (companies that belonged to the Ferrovie dello Stato Group, better known as the incumbent rail operator in Italy); and (ii) some compensation paid by Italy to Trenitalia S.p.A., between 2000 and 2014, for the provision of a number of railway freight services.

According to the Commission, the asset transfers mentioned under point (i) did not constitute State aid, as they had been carried out at market conditions. Regarding the payments to Trenitalia S.p.A., the Commission found that most either did not represent a State aid pursuant to Article 107(1) TFEU (as they were not suitable to alter or affect trade or competition within the Single Market) or were measures of aid compatible with EU rules, since they were appropriate, proportionate, and necessary to cover the related costs (namely, the costs for the provision of public services) without having a negative impact on competition and trade within the European Union.

However, the payments for (i) the provision of international railway transportation services through the port of Trieste Marittima (between March 15, 2003 and Dec. 31, 2008) and (ii) certain national connections between the North and the South of Italy (in December 2014) were deemed incompatible with the EU rules on State aid, as (a) the definition of the public service nature of such services was not clear and (b) Italy failed to establish the existence of a market failure on such connections that could have justified the measure.

Accordingly, Italy must recover the incompatible aid from Trenitalia.

2. *Hitachi/Thales set to close following EU approval.*

European Commission has approved Hitachi Rail's $1.66 billion acquisition of Thales, subject to divestitures in France and Germany, mirroring remedies accepted by the UK's competition authority. The European Commission stated that the divestiture package addresses competition concerns and ensures the viability of the purchaser as a long-term competitive force. The deal is expected to close in the first half of 2024, with all necessary clearances obtained.

3. *FIFA scores EU support for agent fee cap.*

The European Commission has advised the ECJ that FIFA's football agent regulations align with EU antitrust laws, citing legitimate goals such as reducing conflicts of interest, protecting inexperienced players, and maintaining contractual stability. These regulations impose limits on agent fees and the number of players they can represent. The European Commission's opinion supports FIFA's claim that excessive commissions create incentives for agents to exert significant influence.

4. *European Commission sends statement of objection to Adobe/Figma.*

The European Commission has raised concerns about Adobe's acquisition of Figma, citing potential competition issues in the design markets. The acquisition of Figma by market leader Adobe raises concerns of creating a dominant company and initiating what is termed a "reverse killer acquisition." As a result, the European Commission has initiated a Phase II investigation, prompted by Adobe's reluctance to offer remedies for the merger's impact on the market. Adobe argues that the products involved are "adjacent." Figma emphasizes the value of innovative developments resulting from the merger. The European Commission has until Feb. 5 to announce its final decision. The outcome of this investigation will shed light on the potential implications of such a significant acquisition.

B. European Decisions

1. *ECJ rules non-competes between potential rivals can limit competition.*

The ECJ clarified the requirements for non-compete clauses to qualify as ancillary restraints under EU competition rules, following a query from the Portuguese competition authority. The ECJ emphasized that such clauses must be objectively necessary and proportionate for agreement implementation to qualify as ancillary restraints under EU competition rules. Mere difficulty or reduced profitability without the restriction is insufficient for classification as ancillary, but clauses may constitute by-object restrictions if competition is sufficiently harmed.

2. *ECJ upholds Altice gun-jumping fine.*

Altice faced penalties for failing to notify authorities during the acquisition and implementation of Portugal Telecom. The ECJ upheld the then-record gun-jumping fine but reduced it afterwards. Altice argued that the fine constituted double punishment and was violative of the principle of proportionality. Additionally, Altice contended that unclear court guidelines on standstill and notification rules contributed to the breach. However, the ECJ disagreed, emphasizing Altice's awareness of the associated risks. Despite faulting the General Court for insufficient detail in its decision, the ECJ maintained the essence of the fine, reflecting the importance of adherence to notification requirements and the consequences for non-compliance in merger transactions.

From this judgment it follows that veto rights and other pre-closing arrangements may enable a party to exercise decisive influence and therefore lead to control. Furthermore, it should be noted that even without a right of veto, there can be control when certain decisions are merely made conditional on obtaining prior approval under penalty of damages.

Japan

A. Results of market study on recycling used plastic bottles released.

In February 2023, the Japanese Fair Trade Commission (JFTC) launched a market study on recycling used plastic bottles, as covered in the March 2023 Competition Currents. The market study was conducted in light of the changes and diversification of distribution channels, including the high recycling rate of 86% for plastic bottles and the spread of initiatives known as “Bottle-to-Bottle” as part of efforts to realize a green society.

There are two routes for plastic bottles collected by municipalities: one is to forward them to the Japan Containers and Packaging Recycling Association (Association), and the other is to process them independently. In recent years, municipalities have been designating Bottle-to-Bottle recycling as a condition for deciding where to sell used plastic bottles in order to raise environmental awareness among residents. Some municipalities are avoiding using the Association to sell used plastic bottles because they are not able to then use the Bottle-to-Bottle designation. Since the Association route and the independent route are in a competitive relationship, the JFTC believes that this may discourage or restrict the use of the independent route, potentially causing a problem under the Antitrust Act.

B. Shareholders of four electric power companies file actions to enforce liability of management regarding cartels.

On Oct. 12, 2023, a total of 40 individual shareholders of four electric power companies filed actions to enforce the liability of the companies, seeking a total of approximately 462 billion yen in damages at Nagoya, Osaka, Hiroshima, and Fukuoka district courts. Shareholders are seeking compensation from the companies for surcharges and other damages ordered by the JFTC. On March 30, 2023, JFTC ordered three of the four electric power companies to pay a total of 101 billion yen in surcharges for violating the Antimonopoly Law by restricting each other’s business activities.

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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