GAINING A FURTHER STRANGLEHOLD OVER KILLER ACQUISITIONS – BUT AT WHAT COST? THE ADVOCATE GENERAL'S OPINION IN *TOWERCAST*

BY DAVID HENRY[1]

1 David Henry, Counsel, Arnold & Porter (Brussels).

CPI ANTITRUST CHRONICLE FEBRUARY 2023

SASHIMI M&As: MONOPOLIZATION BY A THOUSAND ACQUISITIONS
By Mihkel Tombak

MERGERS AS MONOPOLIZATION
By Allen Grunes

THE RESURRECTION OF THE APPLICATION OF ARTICLE 102 TO MERGERS AND ACQUISITIONS
By Richard Pepper & Roque Botas Armero

GAINING A FURTHER STRANGLEHOLD OVER KILLER ACQUISITIONS – BUT AT WHAT COST? THE ADVOCATE GENERAL'S OPINION IN *TOWERCAST*
By David Henry

ENDING MONOPOLIZATION VIA MERGERS: HOW AND WHY TO RESTORE LEGISLATIVE INTENT BEHIND THE U.S. ANTI-MERGER LAWS
By Ron Knox

UPWARD PRICING PRESSURE FROM DIGITAL PLATFORMS' IMPOSITION OF TAKE RATES ON APP DEVELOPERS
By Ted Tatos

BANK MERGERS ARE SYSTEMICALLY IMPORTANT: A REVIEW OF BANK MARKETS AND THE MERGER REVIEW PROCESS
By Robert C. MacKay

PROTECTING COMPETITION TO INNOVATE IS PROTECTING COMPETITION IN FUTURE MARKETS: TEN LAW REVIEW ARTICLES LEAVE NO DOUBT
By Lawrence B. Landman

Visit www.competitionpolicyinternational.com for access to these articles and more!

GAINING A FURTHER STRANGLEHOLD OVER KILLER ACQUISITIONS – BUT AT WHAT COST? THE ADVOCATE GENERAL'S OPINION IN *TOWERCAST*

By David Henry

Legal certainty has long been a core tenet of European merger control. This legal certainty continues to be eroded, however, by virtue of the continued onslaught against non-reportable transactions. On the one hand, there is the revival of the Article 22 corrective mechanism enshrined in the EU Merger Regulation. On the other hand, there is the Advocate General's recent Opinion in Case C-449/21 - *Towercast*. With respect to the latter, and if followed by the European Court of Justice, dominant acquirers could also have to contend with Article 102 TFEU prohibition proceedings before national competition authorities with all its associated consequences. Granted, the Opinion is premised *inter alia* on the need to further close the perceived enforcement gap surrounding anticompetitive killer acquisitions and, in terms of policy objective, is therefore to be lauded. If followed by the European Court of Justice, however, the Advocate General's Opinion is likely to lead to considerably more uncertainty for the business community with a potentially attendant chilling effect on ultimately benign, or even pro-competitive, transactions.

I. INTRODUCTION

Legal certainty was once a cornerstone of European merger control. Not long ago, the assertion of jurisdiction rested on bright-line tests typically based on the turnover of the parties to a transaction. A welcome corollary of this was that it provided legal certainty. The recent revival of Article 22 of the EU Merger Regulation ("EUMR") has, however, put paid to that. Non-reportable transactions (including those involving a target with no turnover in the EU) are now at risk of being referred upwards for European Commission ("EC") merger control review.

In a more recent development, Advocate General Kokott (the "AG") opined that Article 102 TFEU has full vitality in the context of non-reportable acquisitions by dominant operators suggesting, furthermore, that a mere straight-out acquisition may fall within the purview of Article 102. If followed by the European Court of Justice ("ECJ"), dominant acquirers will not only have to grapple with the potential risk of an Article 22 upward referral to the EC, but potentially face uncertain, disruptive, and protracted Article 102 prohibition proceedings before national competition authorities ("NCAs") with all its associated consequences. Granted, the Opinion is also premised on the need to further close the perceived enforcement gap surrounding anti-competitive killer acquisitions and, in terms of policy objective, is therefore to be lauded. If followed by the ECJ, however, the AG's Opinion is likely to lead to considerably more uncertainty for the business community with a potentially attendant chilling effect on benign, or even pro-competitive, transactions.

II. SALIENT FACTS

TDF Infrastructure Holding S.A.S. ("TDF") had bestowed upon it a legal monopoly on the market for terrestrial television broadcasting in France. Post-liberalisation in 2004, market dynamics were such that only three companies remained on the market, namely TDF (with the largest market share), Itas S.A.S. ("Itas") and Towercast S.A.S.U. ("Towercast"). TDF acquired control of Itas on October 13, 2016 (the "Acquisition").

The Acquisition did not fall within the purview of the *ex ante* mandatory EU and French merger control regimes. This was because the Acquisition did not satisfy the turnover thresholds provided for in the EUMR,[2] and the French Commercial Code.[3] Furthermore, no referral to the EC pursuant to the corrective mechanism enshrined in Article 22 EUMR had been made.[4]

With a view to seeking redress, on November 15, 2017, Towercast complained to the French Competition Authority ("FCA") alleging that the Acquisition constituted an abuse of a dominant position. Towercast was of the view that, via the Acquisition, TDF had impeded competition on the upstream and downstream wholesale markets for digital transmission of terrestrial television services (digital video broadcasting - terrestrial or DVB-T) by significantly strengthening its dominant position on those markets. Citing the seminal *Continental* Can case,[5] the Acquisition was, according to Towercast, an abuse of TDF's dominant position.

On January 16, 2020, the FCA rejected Towercast's complaint (the "Decision"). The FCA found that, while TDF held a dominant position, no abuse of such position had been demonstrated. In the eyes of the FCA, the seminal 1973 *Continental Can* case had been rendered nugatory in the sphere of merger control. Indeed, since the inception of the EU merger control regime in 1989, a clear distinction had been drawn between merger control, on the one hand, and the control of anti-competitive practices under Articles 101 and 102 TFEU on the other. A corollary of this was that the EUMR applies solely and exclusively to concentrations within the meaning of Article 3 thereof, and Article 102 thus finds no application in circumstances where self-standing anti-competitive conduct distinct from a concentration cannot be shown.[6]

---

2 Council Regulation (EC) No 139/2004 of January 20, 2004, on the control of concentrations between undertakings, (2004) OJ L 24/1 (EUMR), Article 1.

3 See Article L. 430-2 of the French Commercial Code.

4 Article 22 EUMR allows for one or more Member States to request the EC to examine, for those Member States, any concentration that does not have an EU dimension but affects trade between Member States and threatens to significantly affect competition within the territory of the Member State or States making the request.

5 See Judgment of the European Court of Justice (ECJ) of February 21, 1973, Case C 6-72, *Europemballage Corporation and Continental Can Company Inc. v Commission*, ECLI:EU:C:1973:22, para. 26 where the ECJ held: "*Abuse may therefore occur if an undertaking in a dominant position strengthens such position in such a way that the degree of dominance reached substantially fetters competition, i.e. that only undertakings remain in the market whose behaviour depends on the dominant one.*"

6 See paras. 131 and 140 of Decision nº 20-D-01 of January 16, 2020, where the FCA states that the application of Article 102 TFEU to concentrations had become obsolete following the adoption of Council Regulation No 4064/89. Similarly, with respect to French law, there is a clear line between the merger control rules and the antitrust rules (they are *"incompatibles et inconciliables"*) such that the FCA cannot reach the conclusion that a below-threshold transaction constitutes in and of itself an abuse of a dominant position within the meaning of Article L. 420-2 of the French Commercial Code.

Towercast challenged the Decision before the Paris Court of Appeal. To little surprise, given the patchwork of diverging views on the matter amongst a number of Member States,[7] on July 1, 2021, the Paris Court of Appeal referred the following question to the ECJ for a preliminary ruling pursuant to Article 267 TFEU:

> "Is Article 21 [EUMR] to be interpreted as precluding a national competition authority from regarding a concentration which has no Community dimension within the meaning of Article 1 of that Regulation, is below the thresholds for mandatory ex ante assessment laid down in national law, and has not been referred to the European Commission under Article 22 of [that regulation], as constituting an abuse of a dominant position prohibited by Article 102 TFEU, in light of the structure of competition on a market which is national in scope."[8]

III. THE AG'S OPINION

On October 13, 2022, the AG delivered her Opinion on the Paris Court of Appeal's question.[9] The Opinion could not have come at a more opportune time given the ongoing focus in Europe on the treatment of non-reportable transactions, and the uncertainties which continue to beset this area of merger control law.

The nub of the issue in this case pertains to the relationship between Article 21(1) EUMR and Article 102 TFEU. The former reads as follows:

> "[the EUMR] alone shall apply to concentrations as defined in Article 3, and [Regulation (EC) No 1/2003] shall not apply, except in relation to joint ventures that do not have a Community dimension and which have as their object or effect the coordination of the competitive behaviour of undertakings that remain independent (emphasis added)."[10]

Giving short shrift to the word 'alone' embedded in Article 21(1) EUMR, the AG opined that the EUMR, as a provision of secondary law, cannot circumscribe the reach or direct applicability of Article 102 TFEU which, as a provision of primary law, is superior to the EUMR in the EU hierarchy of norms.[11] As such, Article 21(1) EUMR does not, as a matter of principle, have a "blocking effect" on a parallel or subsequent application of Article 102 TFEU to a concentration within the meaning of Article 3 EUMR.

Furthermore, according to the AG, the *Continental Can* judgment – which admittedly must be seen against the fact that there was no explicit system of EU merger control at the time that it was handed down[12] – allows for the conclusion to be drawn that Article 102 TFEU is fully applicable to the control of concentrations.[13] *Continental Can* therefore remains good law.

That being said, in the eyes of the AG, and with a view to upholding the principle of legal certainty, there is nonetheless room for the application of the principle of *lex specialis derogat legi generali*, notwithstanding the fact that Article 102 TFEU has the status of directly applica-

7 See e.g. Luxembourg Competition Authority, Decision 2016 FO-04, *Utopia*, of 17 June 2016 which stands in contrast to the situation in Italy where the Regional Administrative Court of Lazio held that a concentration only falls to be assessed on the basis of EU or national merger control rules, see judgment of March 24, 2022, No. 3334.

8 Paris Court of Appeal, judgment nº 20/04300 of July 1, 2021. In support of its claim, Towercast made reference to recital 7 of Regulation 139/2004 which lays down that "Articles [101] and [102], while applicable, according to the case-law of the Court of Justice, to certain concentrations, are not sufficient to control all operations which may prove to be incompatible with the system of undistorted envisaged in the Treaty (emphasis added)."

9 Opinion of Advocate General Kokott of October 13, 2022, Case C-449/21, *Towercast v. Autorité de la concurrence and others*, ECLI:EU:C:2022:777 ("Opinion").

10 See also recital 6 EUMR: the EUMR is "to be the only instrument applicable to […] concentrations [within the meaning of Article 3 EUMR]." See further the following statement made by Sir Leon Brittan Q.C. (then Competition Commissioner) already at the time of the promulgation of the EU Merger Regulation in 1989: "A final point on jurisdiction is the vexed question of Articles [101] and [102]. I know that lawyers are fascinated by this issue. My position is clear. The Regulation cannot alter the meaning of the [TFEU] as laid down by the European Court. However, the Council has in the Merger Regulation repealed Regulation [1/2003] and other procedural regulations in respect of concentrations. This has several consequences. Article [101] is no longer enforceable in national courts in merger cases, but this is not the case for Article [102]. As for the Commission, it will find it very difficult to apply Articles [101] and [102] without the powers and procedures of Regulation 1/2003 and its sister regulations in other fields. Nevertheless, the Commission does have residual, if cumbersome, powers under Article [105]. As a matter of policy, I do not intend to seek the application of the [TFEU] rules in Articles [101] and [102] by any means," Sir L. Brittan Q.C., Address by Sir Leon Brittan to the Bar European Group - London, May 3, 1990: the Law and Policy of Merger Control in the EEC, SPEECH/90/36.

11 See Opinion, *supra* note 9, para. 31 where the AG opined that the prohibition enshrined in Article 102 TFEU is sufficiently clear, precise, and unconditional, thus abrogating the need for a rule of secondary law expressly prescribing or authorizing its application by national authorities and courts.

12 See Opinion, *supra* note 9, paras. 53 and 54.

13 See Opinion, *supra* note 9, para. 52.

ble primary law.[14] In other words, and in terms of practical upshot, a transaction which has been cleared under the merger control rules cannot subsequently be qualified as an abuse of a dominant position under Article 102 TFEU, unless the company in question has engaged in conduct that goes beyond that and which could be found to constitute an abuse.[15] There would therefore be no 'double assessment' of a merger in such scenario, a corollary being that businesses would not have to fear an unwinding order under Article 102 TFEU following merger clearance. Indeed, according to the AG, the imposition of a fine would be more appropriate these circumstances.[16] In practice, therefore, the application of Article 102 TFEU only finds relevance in cases which require control from the outset as a result of the company's market power, but which are not reportable. And, even in such situation, according to the AG, companies would likely only face a fine (rather than a structural remedy) given the primacy afforded to behavioural remedies in Regulation 1/2003 and the principle of proportionality enshrined therein.[17]

Arguably, the AG could have stopped here with her reasoning. The AG goes on, however, to buttress her thinking on the applicability of Article 102 to non-reportable concentrations by drawing attention to *inter alia* the fluidity of Article 102 TFEU's scope of application (especially given that its general examples of abusive practices are not exhaustive).[18] Moreover, and importantly, while the AG's Opinion applies to all industries, emphasis was put on the need to further close the perceived enforcement gap surrounding so-called 'killer' acquisitions to the extent they escape review pursuant to an upward referral to the EC under Article 22 EUMR.[19] Specifically, in the eyes of the AG, Member States – alongside the EC – must, in such circumstances, be able to resort to the (as acknowledged by the AG, weaker) instrument of ex post control under Article 102 TFEU.[20]

IV. COMMENT: A PURSUIT OF KILLER ACQUISITIONS AT THE COST OF LEGAL CERTAINTY?

The AG's Opinion is non-binding yet highly significant. If followed by the ECJ, the chances of which are pretty high statistically speaking, Article 102 TFEU would further tighten the screws on non-reportable transactions. This could, however, come at the cost of introducing a further (unacceptable) layer of legal uncertainty on top of the revived Article 22 EUMR corrective mechanism – *in casu* for operators at risk of being considered dominant – and thus potentially have a chilling effect on what might otherwise be benign or even pro-competitive transactions.

A. A Continued Onslaught on Killer Acquisitions

Nascent operators that gnaw at the fringes of markets are recognised as an important source of fresh ideas, disruptive innovation and provide impetus to the dismantling of inefficient and concentrated markets.[21] There is therefore little doubt that an intention to stifle such emerging operators' ability to deliver lower prices, increased choice and potentially superior quality to consumers through an acquisition is to be thwarted.[22] The issue, of course, is that killer acquisitions often fall outside the scope of merger review and thus remain immune from antitrust scrutiny.[23] This is because, under a mandatory pre-merger notification regime characterised by turnover-based thresholds, where a transaction does not meet these thresholds regulators often cannot assert jurisdiction thereover and the parties thereto are free to proceed to closing.[24]

14 *Lex specialis derogat legi generali* is a legal maxim according to which specific rules are given priority over general rules.

15 See Opinion, *supra* note 9, paras. 60 and 62.

16 See Opinion, *supra* note 9, para. 63.

17 See Article 7(1) of Council Regulation (EC) No 1/2003 of December 16, 2002, on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

18 See Opinion, *supra* note 9, para. 45.

19 I.e. acquisitions by established and powerful companies of emerging companies, for example in the field of internet services, pharmaceuticals, or medical technology and which do not yet have a large turnover and which operate in the same, neighboring, upstream or downstream markets with a view to eliminating them as competitors and consolidate their own market position. See further in this regard European Commission, Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases (2021) OJ C 113/1 (Article 22 EUMR Guidance).

20 See Opinion, *supra* note 9, para. 48.

21 See OECD (2020), Start-ups, Killer Acquisitions and Merger Control, p. 7 available at https://www.oecd.org/daf/competition/start-ups-killer-acquisitions-and-merger-control-2020.pdf.

22 See F. Ederer, Should Killer Acquisitions be Banned, CEPA, September 24, 2021, available at https://cepa.org/article/should-killer-acquisitions-be-banned/.

23 See C. Cunningham, S. Ma & F. Ederer, Killer Acquisitions, 2018, who conclude, from an essentially U.S. perspective, that there are on average approximately 50 acquisitions per annum in the pharmaceuticals industry where an incumbent may acquire innovative targets solely to discontinue the target's innovation projects and pre-empt future competition, a number of which fly below the merger control radar. The EC also acknowledges that it is clear that some anti-competitive mergers do take place below the notification thresholds at both the EU and national levels, see Commission Staff Working Document - Evaluation of procedural and jurisdictional aspects of EU Merger Control, March 26, 2021, SWD(2021) 66 final, p. 35.

24 See OECD (2020), *supra* note 21, p. 17.

In an attempt to bring killer acquisitions within the ambit of EU regulatory control, therefore, Article 22 EUMR has seen somewhat of a revival to the extent that acquisitions that meet neither the EU nor national merger control thresholds have, rather controversially, become increasingly at risk of being reviewed by the EC[25] – witness in this respect Illumina's acquisition of Grail.[26] In tandem, Article 14(1) of the new EU Digital Markets Act ("DMA")[27] has entered into the fray by requiring that so-called "gatekeepers" *inform* the EC of an intended concentration involving other platform providers active in the digital space.[28] Moreover, the DMA makes specific reference to Article 22 EUMR the upshot being that NCAs can request the EC to examine a (killer) acquisition in the digital arena – regardless of whether it is subject to mandatory review by the EC or an NCA.

The AG's Opinion therefore represents a further bid to gain a stranglehold over below-threshold acquisitions by countenancing the invocation of Article 102 TFEU by both the EC and the Member States in this context. From a policy perspective of seeking to subject anti-competitive killer acquisitions to merger control scrutiny, this development is to be lauded. That said, as we know, all that glitters is not necessarily gold. This will likely be the view taken by companies considered dominant should the ECJ follow the AG's Opinion.

B. An Erosion of Legal Certainty?

The increase in legal uncertainty engendered by the Opinion with respect to non-reportable transactions is unfortunate. This is despite the fact that the AG deems it inconceivable that her findings could lead to any uncertainty when she states at para. 66 of her Opinion that:

> "in view of the settled case-law on the direct applicability of Article 102 TFEU and the judgment in Continental Can, those concerned cannot have developed a belief, in good faith, that that provision would be interpreted differently [in the sphere of merger control]."

A key concern here is that the Opinion suggests that a mere acquisition can itself constitute an abuse of a dominant position. Admittedly, this is tempered by the AG's proviso that "the conditions [for the invocation of Article 102 TFEU must] be met" (particularly, it appears, in the context of a killer acquisition). There is, however, no guidance given by the AG as to what these conditions are, thus leaving dominant companies in an unsatisfactory state of legal limbo. As mentioned, such lack of guidance suggests that a mere acquisition by a dominant player without more could be punished. This could have a chilling effect on what might otherwise be pro-competitive, or at least benign, transactions.

Of course, a finding of dominance is a prerequisite for the invocation of Article 102. However, the determination of dominance, particularly in digital markets, can – as practitioners very well know – be fraught with considerable difficulty.[29] Self-assessment may lead to finding of non-dominance, but this does not rule out a finding of dominance in the eyes of the regulator further down the line.

Dominant acquirers may take – albeit admittedly scant – comfort from the fact that the AG, relying on Articles 7(1), 23 and 24 of Regulation 1/2003,[30] deemed the imposition of a fine the only realistic repercussion in the context of a non-reportable transaction by a dominant operator, suggesting that it is a more appropriate solution than dissolution in the event of breach of Article 102. Despite the AG's attempt to somewhat assuage the fears of the business community, however, structural remedies remain a real possibility. Not only does the EC's decision to impose a structural remedy in *ARA Foreclosure* bear testimony to this possibility,[31] but, importantly, Article 10 of the ECN+ Directive explicitly

25 See Article 22 EUMR Guidance, *supra* note 19, and the Practical information on implementation of the "Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases" Frequently Asked Questions and Answers ("Q&A") of December 19. 2022 available at https://competition-policy.ec.europa.eu/system/files/2022-12/article22_recalibrated_approach_QandA.pdf.

26 See Commission decision of September 6, 2022, M.10188, *Illumina/Grail*, not yet published and judgment of the General Court of July 7, 2022, Case T227/21, *Illumina, Inc. v. Commission*, ECLI:EU:T:2022:447.

27 Regulation (EU) 2022/1925 of the European Parliament and of the Council of September 14, 2022, on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828, (2022) OJ L 265/1.

28 DMA, *Id.*, Article 14(5).

29 See https://www.internationalcompetitionnetwork.org/wp-content/uploads/2020/07/UCWG-Report-on-dominance-in-digital-markets.pdf.

30 See Article 7(1) of Regulation 1/2003: where "[…] the Commission […] finds that there is an infringement […] of Article [102] of the Treaty, it may by decision […] impose […] any behavioural or structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end. Structural remedies can only be imposed either where there is no equally effective behavioural remedy or where any equally effective behavioural remedy would be more burdensome for the undertaking concerned than the structural remedy […]."

31 See Commission decision of September 20, 2016, Case AT.39759 - *ARA Foreclosure*, at e.g. para. 147: "No other less burdensome measures can be conceived that would equally effectively remove ARA's remaining possibility to refuse shared use to the part of the household collection infrastructure it owns and ensure access to it."

provides that in the event of a breach of Article 102 "NCAs may impose any […] structural remedies which are proportionate to the infringement committed and necessary to bring the infringement effectively to an end."[32]

Moreover, in this context, and as some commentators have noted,[33] what happens if the abusive conduct in question is perpetrated by an acquisition in itself as is suggested by the AG. Surely a fine cannot remedy what would in such case be an *ongoing* abuse. Clearly a structural remedy – as opposed to a fine – would for all intents and purposes be 'necessary' to bring the infringement effectively to an end.

Contemplation of an acquisition is further marred by the uncertainty surrounding whether, despite merger control clearance in one Member State, that self-same transaction could be subject to Article 102 proceedings in a Member State in which the transaction was not notified[34] – noting in this regard that a few Member States have applied Article 102 to review a concentration *ex post*.[35] In addition, the question remains an open one as to for how long an unreportable transaction by a dominant operator would be exposed to an intervention on the basis of Article 102 (and one which could result in structural remedies). Indeed, query whether, *depending on the circumstances*, such open-endedness in the context of a mere unreportable acquisition could in the event clash with the right to good administration set out in Article 41 of the EU Charter of Fundamental Rights, the importance of which has been emphasised in a number of cases?[36] Given that the ECJ often follows AG Opinions, Member States may wish to already start readying guidance as to within which timeframe, and under what conditions, an Article 102 intervention is likely to be made in relation to – to the extent this is what the AG was referring to – a mere non-reportable acquisition by a dominant company.[37] Guidance on the consequences of a finding of infringement would no doubt also be much welcomed given the AG's muddying of the waters in this regard. To not provide such guidance in this context would at the very least be wholly unsatisfactory from the point of view of legal certainty.

32 Directive (EU) 2019/1 of the European Parliament and of the Council of December 11, 2018, to empower the competition authorities of the Member States to be more effective enforcers and to ensure the proper functioning of the internal market, (2019) OJ L 11/3.

33 See T. Lübbig, K, Bojarojc & D. Wylde, Expanding the merger control toolkit - Is this the end of non-reportable M&A for firms that are deemed dominant?, available at https://riskandcompliance.freshfields.com/post/102i164/expanding-the-merger-control-toolkit-is-this-the-end-of-non-reportable-ma-for.

34 See further G. Nur Mingsar, Bridging the 'Regulatory Gap' in EU Merger Control with Towercast (C-449/21) – A Comparison between Member States, Kluwer Competition Blog, November 16, 2022, available at https://competitionlawblog.kluwercompetitionlaw.com/2022/11/16/bridging-the-regulatory-gap-in-eu-merger-control-with-towercast-c-449-21-a-comparison-between-the-member-states/.

35 See e.g. *Utopia, supra* note 7.

36 See Charter of Fundamental Rights of the European Union (2012) OJ C 326/391, Article 41(1): "Every person has the right to have his or her affairs handled impartially, fairly and within a reasonable time by the institutions, bodies, offices and agencies of the Union (emphasis added)." See also judgment of the General Court of November 10, 2017, Case T-180/15, *Icap and Others v Commission*, ECLI:EU:T:2017:795.

37 See H. Janssen & M. Lawall, ECJ Advocate General: Competition authorities may take action against mergers even if notification thresholds are not met, October 21, 2021, available at https://www.luther-lawfirm.com/en/newsroom/press-releases/detail/ecj-advocate-general-competition-authorities-may-take-action-against-mergers-even-if-notification-thresholds-are-not-met.

CPI COMPETITION POLICY® INTERNATIONAL

CPI Subscriptions

CPI reaches more than 35,000 readers in over 150 countries every day. Our online library houses over 23,000 papers, articles and interviews.

Visit competitionpolicyinternational.com today to see our available plans and join CPI's global community of antitrust experts.