

THE PUBLIC
COMPETITION
ENFORCEMENT
REVIEW

NINTH EDITION

Editor
Aidan Synnott

THE LAWREVIEWS

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

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CONTENTS

PREFACE.....	vii
<i>Aidan Synnott</i>	
Chapter 1	EU OVERVIEW..... 1
<i>Frédéric Louis and Anne Vallery</i>	
Chapter 2	ARGENTINA..... 11
<i>Miguel del Pino and Santiago del Rio</i>	
Chapter 3	AUSTRALIA..... 23
<i>Kathryn Edghill</i>	
Chapter 4	BELGIUM 40
<i>Hendrik Viaene and Delphine Gillet</i>	
Chapter 5	BRAZIL..... 51
<i>Mariana Villela, Leonardo Maniglia Duarte and João Marcelo Lima</i>	
Chapter 6	CANADA..... 62
<i>Cal Goldman, Richard Annan and Michael Koch</i>	
Chapter 7	CHINA..... 72
<i>Michael Gu</i>	
Chapter 8	COLOMBIA..... 88
<i>Enrique Álvarez and Darío Cadena</i>	
Chapter 9	CYPRUS..... 104
<i>Stephanos Mavrokefalos</i>	
Chapter 10	FINLAND..... 111
<i>Tapani Manninen, Anette Laulajainen and Lauri Suokas</i>	

Contents

Chapter 11	FRANCE.....	127
	<i>Christophe Clarenc and Lolita Berthol-Balladur</i>	
Chapter 12	GERMANY.....	138
	<i>Evelyn Niitväli and Marc Reysen</i>	
Chapter 13	GREECE.....	149
	<i>Emmanuel Dryllerakis and Cleomenis Yannikas</i>	
Chapter 14	INDIA.....	167
	<i>Manas Kumar Chaudhuri, Avirup Bose and Nikita Agarwal</i>	
Chapter 15	ITALY.....	183
	<i>Giuseppe Scassellati-Sforzolini, Marco D'Ostuni, Luciana Bellia and Fabio Chiovini</i>	
Chapter 16	NETHERLANDS.....	198
	<i>Tjarda van der Vijver and Dominique Coumans</i>	
Chapter 17	POLAND.....	209
	<i>Anna Laszczyk and Wojciech Podlasiñ</i>	
Chapter 18	PORTUGAL.....	222
	<i>Joaquim Caimoto Duarte, Tânia Luísa Faria and Maria Francisca Couto</i>	
Chapter 19	SOUTH AFRICA.....	237
	<i>Candice Upfold</i>	
Chapter 20	SWEDEN.....	252
	<i>Peter Forsberg and Haris Catovic</i>	
Chapter 21	SWITZERLAND.....	266
	<i>Michael Tschudin, Frank Scherrer and Urs Weber-Stecher</i>	
Chapter 22	TAIWAN.....	277
	<i>Stephen Wu, Rebecca Hsiao and Wei-Han Wu</i>	
Chapter 23	TURKEY.....	299
	<i>Serbüilent Baykan and Handan Bektaş</i>	
Chapter 24	UNITED KINGDOM.....	309
	<i>Ian Giles, Caroline Thomas and Rebecca Williams</i>	

Contents

Chapter 25	UNITED STATES	324
	<i>Aidan Synnott and Bill Michael</i>	
Chapter 26	VENEZUELA.....	343
	<i>Alejandro Gallotti</i>	
Appendix 1	ABOUT THE AUTHORS.....	353
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	371

PREFACE

In the reports from around the world collected in this volume, we continue to see a good deal of international overlap among the issues and industries attracting government enforcement attention. We also see evolution and refinement of approaches to competition law enforcement in several jurisdictions.

Cartel enforcement remains robust. In the pages that follow, we read of the continued – and, in some cases, revised or expanded – use of leniency programmes in several jurisdictions, including Belgium, Finland, Switzerland and the United States. Developments in Australia include the first ever criminal prosecution of a cartel: a case involving the shipping of vehicles to the country. This past year, Brazilian authorities concluded investigations in cartel cases involving dynamic random access memory (DRAM) and optical disc drives, among others. Elsewhere, French and Italian authorities investigated alleged cartels among model agencies, while Cypriot authorities initiated an investigation into an alleged cement cartel. Other cartel enforcement actions have been quite varied: from bicycles in South Africa, to online sales of posters in the United Kingdom and the United States, to luxury cosmetic retail companies in Greece, to alleged pharmaceutical cartels in China and the United States.

In the areas of restrictive agreements and abuse of dominance, several jurisdictions were quite active in investigating firms in the pharmaceutical industry. The chapters from Argentina, Australia, China, Italy, Sweden, the United Kingdom and the United States describe these enforcement efforts. Several jurisdictions – including Argentina, France and South Africa – conducted investigations concerning alleged predatory pricing in various industries. And several jurisdictions, including Finland, Germany and Sweden, undertook investigations regarding companies’ use of user or purchaser data. Of particular note is the report from China, which describes a novel approach to a case there involving loyalty discounts. In that case, the Chinese authorities ‘used concepts that were new to the Chinese antitrust enforcement regime’.

Merger review and enforcement activity remains robust, with a noted significant increase in reviews undertaken by Chinese authorities. The chapters that follow note activity in many sectors: ranging from food retail mergers in Germany and Belgium, to telecommunications mergers in France. The merger of AB InBev and SABMiller attracted regulatory scrutiny in several jurisdictions, including Australia, China, South Africa and the United States. We also see several reports of deals that were abandoned after regulatory scrutiny, including proposed mergers in Brazil, Germany and the United States. The report from Argentina indicates that the Antitrust Commission there is speeding its review of mergers, with a significant decrease in the average time that deals spend under review; and in Portugal, the competition authority

has announced an initiative to streamline merger control proceedings. Finally, the reports from Brazil, China and India note enforcement activities arising out of merger process violations, such as the failure properly to report transactions.

Aidan Synnott

Paul, Weiss, Rifkind, Wharton & Garrison LLP

New York

April 2017

UNITED STATES

*Aidan Synnott and Bill Michael*¹

I OVERVIEW

The past year has been busy for both the Antitrust Division of the United States Department of Justice (DOJ) and Federal Trade Commission (FTC). The agencies investigated numerous mergers, settling several investigations with divestiture remedies and successfully litigating others. The DOJ continued aggressively to pursue price-fixing investigations in several industries, including auto parts, liquid crystal displays, LIBOR, and foreign exchange markets. It also pursued bid-rigging investigations in real estate foreclosure auctions and ocean shipping. The FTC has continued to focus attention on healthcare-related issues, including transactions involving pharmaceuticals. Continuing their practice of engagement with non-United States enforcement authorities, both the DOJ and FTC participated in several meetings and conferences.

II CARTELS

i Significant cases

LIBOR

The DOJ continued its investigation of the London Interbank Offered Rate (LIBOR) and other benchmark interest rates, shifting its focus from institutions to individuals. Two former Rabobank employees who were convicted in November 2015 of wire fraud and bank fraud and conspiracy to commit those acts were sentenced in March 2016 to 12 and 24-month prison terms, respectively.² In June 2016, two former employees of another bank were charged with conspiracy to commit wire and bank fraud and substantive counts of wire fraud for their LIBOR-related conduct.³ And in July 2016, another former Rabobank trader pleaded

1 Aidan Synnott is a partner and co-chair of the antitrust group and Bill Michael is a partner at Paul, Weiss, Rifkind, Wharton & Garrison LLP. The authors thank Maxwell Kosman, Mark R Laramie and Jonathan Silberstein-Loeb for their invaluable assistance in preparing this chapter.

2 Press Release, Two Former Rabobank Traders Sentenced to Prison for Manipulating U.S. Dollar and Japanese Yen LIBOR Interest Rates (10 March 2016), available at www.justice.gov/opa/pr/two-former-rabobank-traders-sentenced-prison-manipulating-us-dollar-and-japanese-yen-libor.

3 Press Release, Two Former Deutsche Bank Employees Indicted on Fraud Charges in Connection with Long-Running Manipulation of Libor (2 June 2016), available at www.justice.gov/opa/pr/two-former-deutsche-bank-employees-indicted-fraud-charges-connection-long-running.

guilty to conspiracy to commit wire fraud and bank fraud.⁴ The DOJ has charged a total of 13 individuals as part of its LIBOR investigation. Four have pleaded guilty, two have been convicted at trial, and the charges against the others remain pending.⁵

Foreign exchange markets

The DOJ's investigation into alleged manipulation of the foreign currency exchange (FX) market also shifted focus towards individuals. In 2016 and early 2017, the two FX dealers pleaded guilty to fixing FX prices and three FX traders were charged with conspiring to fix prices and rig bids for the euro-US dollar currency pair.⁶

Online wall décor

The DOJ continued its investigation into agreements by certain e-commerce sellers of posters, prints and framed art to fix prices on certain products sold in the United States through Amazon Marketplace. In August 2016, a second defendant entity pleaded guilty.⁷ The DOJ has alleged that the defendant and its co-conspirators agreed to adopt specific pricing algorithms, with the goal of offering online shoppers the same price for the same product and coordinating changes to their respective prices.⁸

Auto parts

The now seven-year DOJ investigation into auto part prices continued in 2016. As of February 2017, a total of 65 individuals and 47 companies have been charged.⁹ In 2016, Omron Automotive Electronics Co Ltd,¹⁰ Corning International Kabushiki Kaisha,¹¹

4 Press Release, Former Rabobank Derivatives Trader Pleads Guilty for Scheme to Manipulate LIBOR Benchmark (7 July 2016), available at www.justice.gov/opa/pr/former-rabobank-derivatives-trader-pleads-guilty-scheme-manipulate-libor-benchmark.

5 *Supra* notes 3–4.

6 Press Release, Second Foreign Currency Exchange Dealer Pleads Guilty to Antitrust Conspiracy (12 January 2017), available at www.justice.gov/opa/pr/second-foreign-currency-exchange-dealer-pleads-guilty-antitrust-conspiracy.

7 Press Release, Online Retailer Pleads Guilty for Fixing Prices of Wall Posters (11 August 2016), available at www.justice.gov/opa/pr/online-retailer-pleads-guilty-fixing-prices-wall-posters.

8 *Id.*

9 Press Release, Auto Parts Industry Executive Pleads Guilty to Obstruction of Justice (2 February 2017), available at www.justice.gov/opa/pr/auto-parts-industry-executive-pleads-guilty-obstruction-justice.

10 Press Release, Omron Automotive Electronics Co. Ltd. to Pay \$4.55 Million for Bid Rigging on Power Window Switches (17 March 2016), available at www.justice.gov/opa/pr/omron-automotive-electronics-co-ltd-pay-455-million-bid-rigging-power-window-switches.

11 Press Release, Corning International Kabushiki Kaisha to Pay \$66.5 Million for Fixing Prices of Automotive Parts (16 May 2016), available at www.justice.gov/opa/pr/corning-international-kabushiki-kaisha-pay-665-million-fixing-prices-automotive-parts.

Tokai Kogyo Co Ltd (and a subsidiary),¹² Maruyasu Industries Co Ltd (and a subsidiary),¹³ Nishikawa Rubber Co Ltd¹⁴ and Hitachi Automotive Systems Ltd¹⁵ were among the companies that were indicted or pleaded guilty.

In connection with DOJ's efforts to hold individuals responsible for anticompetitive practices, executives from Nishikawa Rubber Co,¹⁶ Corning International Kabushiki Kaisha,¹⁷ Maruyasu Industries Co Ltd,¹⁸ Tokai Kogyo Co Ltd¹⁹ and Nishikawa Cooper LLC²⁰ were also indicted or pleaded guilty in 2016.

Electrolytic capacitors

In 2016, five companies pleaded guilty to conspiring with competitors to fix prices for electrolytic capacitors sold to customers in the United States and elsewhere.²¹ Electrolytic capacitors store and regulate electrical currents in a variety of electronic products, including computers, televisions, car engine and airbag systems, home appliances and office equipment.²² As of 15 December 2016 a total of nine individuals had also been indicted as part of the DOJ's investigation.²³

Packaged seafood

Two executives of a packaged seafood company pleaded guilty in December 2016 in connection with their roles in a conspiracy to fix the prices of packaged seafood, such as

12 Press Release, Two Japanese Auto Parts Companies, U.S. Subsidiaries, and Five Executives Indicted for Rigging Automotive Parts Bids (15 June 2016), available at www.justice.gov/opa/pr/two-japanese-auto-parts-companies-us-subsidiaries-and-five-executives-indicted-rigging.

13 Id.

14 Press Release, Nishikawa Agrees to Plead Guilty and Pay \$130 Million Criminal Fine for Fixing Prices of Automotive Parts (20 July 2016), available at www.justice.gov/opa/pr/nishikawa-agrees-plead-guilty-and-pay-130-million-criminal-fine-fixing-prices-automotive.

15 Press Release, Hitachi Automotive Systems Agrees to Plead Guilty to Involvement in Anti-Competitive Auto Parts Conspiracy (9 August 2016), available at www.justice.gov/opa/pr/hitachi-automotive-systems-agrees-plead-guilty-involvement-anti-competitive-auto-parts.

16 Press Release, Former President of Auto Parts Company Pleads Guilty to Participating in Body Sealing Products Bid-Rigging Conspiracy (20 April 2016), available at www.justice.gov/opa/pr/former-president-auto-parts-company-pleads-guilty-participating-body-sealing-products-bid.

17 Press Release, Former Executive Indicted for Role in Automotive Parts Conspiracy (11 May 2016), available at www.justice.gov/opa/pr/former-executive-indicted-role-automotive-parts-conspiracy.

18 Press Release, Two Japanese Auto Parts Companies, U.S. Subsidiaries, and Five Executives Indicted for Rigging Automotive Parts Bids (15 June 2016), available at www.justice.gov/opa/pr/two-japanese-auto-parts-companies-us-subsidiaries-and-five-executives-indicted-rigging.

19 Id.

20 Press Release, Auto Parts Industry Executives Indicted for Obstruction of Justice (21 September 2016), available at www.justice.gov/opa/pr/auto-parts-industry-executives-indicted-obstruction-justice.

21 Press Release, Hitachi Chemical Co. Ltd. to Plead Guilty for Fixing Price of Electrolytic Capacitors (27 April 2016), available at www.justice.gov/opa/pr/hitachi-chemical-co-ltd-plead-guilty-fixing-price-electrolytic-capacitors; Press Release, Three Companies Agree to Plead Guilty for Fixing Prices of Electrolytic Capacitors (22 August 2016), available at www.justice.gov/opa/pr/three-companies-agree-plead-guilty-fixing-prices-electrolytic-capacitors.

22 Id.

23 Press Release, Three More Individuals Indicted for Their Roles in Capacitors Price-Fixing Conspiracy (15 December 2016), available at www.justice.gov/opa/pr/three-more-individuals-indicted-their-roles-capacitors-price-fixing-conspiracy.

canned tuna, sold in the United States.²⁴ The DOJ has alleged that the individuals and their alleged co-conspirators negotiated prices and issued price announcements for packaged seafood in accordance with the agreements they reached.²⁵

Generic drugs

In December 2016, two former senior generic pharmaceutical executives were charged for their alleged roles in conspiracies to fix prices, rig bids and allocate customers for certain generic drugs.²⁶ The drugs at issue include doxycycline hyclate, an antibiotic, and glyburide, used to treat diabetes.²⁷ The charges were the result of an ongoing investigation by the Antitrust Division's Washington Criminal I Section with the assistance of the FBI's Philadelphia Division, the FBI headquarters' International Corruption Unit, the United States Postal Service Office of Inspector General and the US Attorney's Office for the Eastern District of Pennsylvania.²⁸

Bid rigging

Real estate foreclosure auctions

The investigation and prosecution of individuals and organisations for bid rigging and fraud in public foreclosure auctions continued in 2016 both in California²⁹ and in Georgia.³⁰

Charges brought by the Financial Fraud Enforcement Task Force (consisting of more than 20 federal agencies, 94 US Attorney's Offices and state and local partners) alleged that the defendants conspired among themselves and with others not to bid against one another,

-
- 24 Press Release, Packaged Seafood Executive Agrees to Plead Guilty to Price-Fixing Conspiracy (21 December 2016), available at www.justice.gov/opa/pr/packaged-seafood-executive-agrees-plead-guilty-price-fixing-conspiracy.
- 25 Id.
- 26 Press Release, Former Top Generic Pharmaceutical Executives Charged with Price-Fixing, Bid-Rigging and Customer Allocation Conspiracies (14 December 2016), available at www.justice.gov/opa/pr/former-top-generic-pharmaceutical-executives-charged-price-fixing-bid-rigging-and-customer.
- 27 Id.
- 28 Id.
- 29 Press Release, Four Northern California Real Estate Investors Convicted of Rigging Bids at Public Foreclosure Auctions (15 December 2016), available at www.justice.gov/opa/pr/four-northern-california-real-estate-investors-convicted-rigging-bids-public-foreclosure-0; Press Release, Two Northern California Real Estate Investors Agree to Plead Guilty to Bid Rigging at Public Foreclosure Auctions (15 November 2016), available at www.justice.gov/opa/pr/two-northern-california-real-estate-investors-agree-plead-guilty-bid-rigging-public-2; Press Release, Northern California Real Estate Investor Agrees to Plead Guilty to Bid Rigging at Public Foreclosure Auctions (29 September 2016), available at www.justice.gov/opa/pr/northern-california-real-estate-investor-agrees-plead-guilty-bid-rigging-public-foreclosure-7.
- 30 Press Release, Georgia Real Estate Investor Pleads Guilty to Bid Rigging at Public Home Foreclosure Auctions (19 August 2016), available at www.justice.gov/opa/pr/georgia-real-estate-investor-pleads-guilty-bid-rigging-public-home-foreclosure-auctions; Press Release, Two Real Estate Investors Plead Guilty to Rigging Bids at Public Home Foreclosure Auctions (11 August 2016), available at www.justice.gov/opa/pr/two-real-estate-investors-plead-guilty-rigging-bids-public-home-foreclosure-auctions; Press Release, Three Georgia Real Estate Investors Plead Guilty to Bid Rigging and Bank Fraud at Public Home Foreclosure Auctions (1 July 2016), available at www.justice.gov/opa/pr/three-georgia-real-estate-investors-plead-guilty-bid-rigging-and-bank-fraud-public-home.

and to designate winning bidders for properties at public real estate foreclosure auctions.³¹ The real estate properties bought at non-competitive prices were then awarded to the conspirators who submitted the highest bids at a second, private auction.³² Because the proceeds of the original real estate auctions are used to pay off the mortgage and other debt attached to the property, with the remaining proceeds being paid to the homeowner, the conspirators paid and received money that otherwise would have gone to pay off the mortgage and other debt holders and, in some cases, the defaulting homeowner.³³ As of November 2016, 59 individuals had pleaded guilty to criminal charges as a result of the ongoing investigation in California. In Georgia, 23 defendants have been charged in connection with the ongoing investigation, 21 of whom have either pleaded guilty or agreed to plead guilty. The collusion allegedly continued until 2011.³⁴

Oil and gas

The CEO of Chesapeake Energy, a major oil and gas company, was charged with conspiring to rig bids for the purchase of oil and natural gas leases in northwest Oklahoma.³⁵ The CEO died in a car crash less than 24 hours after the DOJ announced his indictment.³⁶ The DOJ charged that during the alleged conspiracy, which ran from December 2007 to March 2012, the conspirators would decide ahead of time who would win certain oil and gas leases. The winning bidder would then allocate an interest in the leases to the other company.³⁷

Ocean shipping

The DOJ continued its investigation into an allegedly long-running conspiracy to fix prices, allocate customers and rig bids for international ocean shipping services for roll-on, roll-off cargo, such as cars, trucks and agricultural equipment, to and from the United States and elsewhere.³⁸ Four corporations have agreed to plead guilty and to pay criminal fines totalling more than \$230 million. Wallenius Wilhelmsen Logistics AS, a Norwegian corporation, agreed to pay a criminal fine of \$98.9 million, the largest fine assessed to date.³⁹

31 *Supra* notes 29–30.

32 *Id.*

33 Press Release, Georgia Real Estate Investors Pleads Guilty to Bid Rigging and Mail Fraud Conspiracies at Public Foreclosure Auctions (19 May 2015), available at www.justice.gov/opa/pr/georgia-real-estate-investor-pleads-guilty-bid-rigging-and-fraud-conspiracies-public.

34 Press Release, Two Northern California Real Estate Investigators Agree to Plead Guilty to Bid Rigging and Fraud Conspiracies at Public Foreclosure Auctions (8 July 2015), available at www.justice.gov/opa/pr/two-northern-california-real-estate-investors-agree-plead-guilty-bid-rigging-and-fraud-0.

35 Press Release, Former CEO Indicted for Masterminding Conspiracy Not to Compete for Oil and Natural Gas Leases (1 March 2016), available at www.justice.gov/opa/pr/former-ceo-indicted-masterminding-conspiracy-not-compete-oil-and-natural-gas-leases.

36 Heidi Brandes, Energy pioneer McClendon dies in fiery car crash, a day after indictment, *Reuters* (3 March 2016), available at www.reuters.com/article/us-chesapeake-enrgy-mcclendon-idUSKCN0W42ME.

37 *Supra* note 35.

38 Press Release, Fourth Ocean Shipping Executive Indicted for Price Fixing and Bid Rigging (7 June 2016), available at www.justice.gov/opa/pr/fourth-ocean-shipping-executive-indicted-price-fixing-and-bid-rigging.

39 Press Release, WWL to Pay \$98.9 Million for Fixing Prices of Ocean Shipping Services for Cars and Trucks (13 July 2016), available at www.justice.gov/opa/pr/wwl-pay-989-million-fixing-prices-ocean-shipping-services-cars-and-trucks.

Public school bus auction

In January 2017, following a week-long trial, a federal jury in Puerto Rico convicted four individuals for participating in bid rigging and fraud conspiracies at an auction for public school bus transportation services in Puerto Rico's Caguas municipality.⁴⁰ The convictions arose from a federal antitrust investigation being conducted by the Antitrust Division's Washington Criminal I Section, the District of Puerto Rico US Attorney's Office, the FBI's Puerto Rico Field Office and the US Department of Education Office of Inspector General.⁴¹

Heir location services firms

In January 2016, the owner and President of a Massachusetts-based heir location services provider pleaded guilty to allocating customers with another heir location services firm.⁴² In August 2016, a Salt Lake City-based heir location services provider and its co-owner were indicted for their roles in the alleged heir location allocation conspiracy.⁴³ Heir location services firms identify people who may be entitled to an inheritance from the estate of a relative who died intestate in exchange for a contingency fee from the inheritances to be received. In total, three executives and two companies have been charged as a result of the ongoing federal antitrust investigation into customer allocation, price fixing, bid rigging and other anticompetitive conduct in the heir location services industry.⁴⁴

Water treatment chemicals

The DOJ continued its investigation into alleged collusion to circumvent competitive bidding and independent pricing for liquid aluminium sulphate contracts. In February 2016, two executives were indicted for their roles in the alleged conspiracy.⁴⁵ In June 2016, an Ohio company pleaded guilty, agreeing to pay a \$5 million criminal charge.⁴⁶ According to the documents filed in court, the defendants allegedly participated in the conspiracy by meeting to discuss each other's liquid aluminium sulphate business, agreeing to stay away from each other's historical customers, submitting intentionally losing bids to favour the intended winner of the business, withdrawing inadvertently winning bids and discussing with each other prices to be quoted to municipalities and pulp and paper companies.⁴⁷

40 Press Release, Four School Bus Company Owners Convicted for Bid Rigging and Mail Fraud Conspiracies Involving Puerto Rico Public School Bus Services (26 January 2017), available at www.justice.gov/opa/pr/four-school-bus-company-owners-convicted-bid-rigging-and-mail-fraud-conspiracies-involving.

41 Id.

42 Press Release, President of Heir Location Services Provider to Plead Guilty for Agreement Not to Compete (14 January 2016), available at www.justice.gov/opa/pr/president-heir-location-services-provider-plead-guilty-agreement-not-compete.

43 Press Release, Heir Location Services Company and Co-Owner Charged with Customer Allocation Scheme (14 August 2016), available at www.justice.gov/opa/pr/heir-location-services-company-and-co-owner-charged-customer-allocation-scheme.

44 Id.

45 Press Release, Two Executives Charged for Conspiring to Eliminate Competition to Supply Water Treatment Chemicals (16 February 2016), available at www.justice.gov/opa/pr/two-executives-charged-conspiring-eliminate-competition-supply-water-treatment-chemicals.

46 Press Release, Water Treatment Chemicals Manufacturer Pleads Guilty in Conspiracy Aimed at Eliminating Competition (16 June 2016), available at www.justice.gov/opa/pr/water-treatment-chemicals-manufacturer-pleads-guilty-conspiracy-aimed-eliminating-competition.

47 Id.

Waste treatment

The CEO of a Canadian waste treatment company was sentenced to over five years in jail and ordered to pay nearly \$4 million in restitution in connection with a kickback scheme to obtain subcontracts at a New Jersey Superfund site overseen by the US Environmental Protection Agency and the US Army Corps of Engineers.⁴⁸

ii Trends, developments and strategies

The DOJ continued its efforts to obtain convictions and pleas by responsible individuals as well as corporations. The DOJ believes such convictions and pleas are likely to have strong deterrent effects as the average number of individuals sentenced to jail and the average length of sentences continue to increase. Some of the largest international cartel investigations – LIBOR, FX and automotive parts – all appear to be winding down. Large international collusion investigations have long been the DOJ's focus, however, and it would not be surprising to see the DOJ announce new international investigations in 2017.

iii Outlook

DOJ investigations and criminal antitrust prosecutions will likely continue to increase in 2017, relying on the leniency model to bring to light, and enforce antitrust laws against, conspiracies that would otherwise continue undetected. The DOJ's investigation into price fixing in the generic pharmaceuticals market could be a major 2017 focus. The DOJ brought its first charges relating to that investigation in late 2016, and it is possible that charges against additional individuals or against corporations may follow. The DOJ's investigation into the packaged seafood industry – which also resulted in charges against individuals at the very end of 2016 – could remain a priority in 2017.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Market allocation

In June 2015, the DOJ and the State of Michigan filed suit in Michigan against four hospital systems. The case alleged that the systems illegally made a 'gentlemen's agreement not to market services'.⁴⁹ Three of the four systems settled, but the fourth is litigating.⁵⁰ For its part, the FTC settled charges against a drug testing company that the Commission alleged invited

48 Press Release, Former CEO of Canadian Hazardous Waste Treatment Company Sentenced to Serve 63 Months in Prison for Role in Kickback and Fraud Schemes Against the United States (9 August 2016), available at www.justice.gov/opa/pr/former-ceo-canadian-hazardous-waste-treatment-company-sentenced-serve-63-months-prison-role.

49 Compl., *United States v. Hillsdale Cmty. Health Center, et al*, No. 15-cv-12311 (E.D. Mich. 25 June 2015).

50 Press Release, U.S. Dep't of Justice, Justice Department Sues Four Michigan Hospital Systems for Unlawfully Agreeing to Limit Marketing for Competing Healthcare Services (25 June 2015), available at www.justice.gov/opa/pr/justice-department-sues-four-michigan-hospital-systems-unlawfully-agreeing-limit-marketing.

a competitor to allocate customers.⁵¹ The FTC brought its complaint under Section 5 of the FTC Act, authority that it commonly uses to police invitations to collude.⁵² The case is scheduled to go to trial in April 2017.⁵³

E-books

In March 2016, the US Supreme Court denied Apple's petition for certiorari in *United States v. Apple*. The decision of the Supreme Court made final the determinations of the lower courts that Apple orchestrated a price-fixing conspiracy with five major e-book publishers and raised e-book prices.

The denial of certiorari triggered Apple's obligation to pay \$400 million to e-book purchasers. Combined with the \$166 million paid by the publishers, \$566 million in total has been repaid to e-book purchasers. E-book purchasers will receive reimbursement for the higher prices Apple's conduct caused them to pay through automatic credits at their e-book retailers. They will be able to apply these credits to future purchases.⁵⁴

Performing rights organisations

Performing rights organisations (PROs) provide licences to users that allow them to perform publicly the musical works of the PROs' thousands of songwriter and music publisher members. These licences, which enable music users to obtain access to millions of songs without resorting to individualised licensing determinations or negotiations, raise antitrust concerns because they provide at a single price the rights to play many separately owned and competing songs. The American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music Inc (BMI) are subject to consent decrees that resolved antitrust lawsuits brought by the United States in 1941 alleging that each organisation had unlawfully exercised market power acquired through the aggregation of public performance rights.⁵⁵

In 2014, at the request of ASCAP and BMI, the DOJ opened an inquiry into the operation and effectiveness of the consent decrees. In August 2016, the DOJ announced its determination that no modifications to the decrees were warranted and confirmed that the consent decrees require each organisation to offer 'full-work' licences that convey to users the right to perform publicly, without risk of copyright infringement, all works in ASCAP's and BMI's repertoires.⁵⁶ According to the DOJ's determination, works that neither ASCAP nor BMI could offer music users under a full licence, such as songs with multiple users, were

51 See Decision & Order, *In the Matter of Drug Testing Compliance Group, LLC*, FTC File No. 151-0048 (Jan. 21, 2016).

52 15 U.S.C. Section 45.

53 Division Update Spring 2016, U.S. Dep't of Justice, Division and State of Michigan Sue to Stop Anticompetitive Agreement to Limit Advertising (11 April 2016), available at: www.justice.gov/atr/division-operations/division-update-2016/division-and-state-michigan-sue-stop-anticompetitive-agreement-limit-advertising.

54 Press Release, U.S. Dep't of Justice, Supreme Court Rejects Apple's Request to Review E-Books Antitrust Conspiracy Findings (7 March 2016), available at www.justice.gov/opa/pr/supreme-court-rejects-apples-request-review-e-books-antitrust-conspiracy-findings.

55 Statement, U.S. Dep't of Justice, Closing of the Antitrust Division's Review of the ASCAP and BMI Consent Decrees (4 August 2016), available at: www.justice.gov/atr/file/882101/download.

56 Press Release, U.S. Dep't of Justice, Justice Department Completes Review of ASCAP and BMI Consent Decrees, Proposing No Modifications at This Time (4 August 2016), available at: www.justice.gov/opa/pr/justice-department-completes-review-ascap-and-bmi-consent-decrees-proposing-no-modifications.

ineligible for licensing. In September 2016, however, the US District Court for the Southern District of New York held that the consent decrees were silent on the issue of partial licences. The court held that the consent decrees neither bar the issuance of ‘fractional licences’ for music nor require performance rights organisations to issue full licences.⁵⁷

Steering restrictions

In June 2016, the DOJ filed a civil antitrust lawsuit against Carolinas HealthCare System (CHS), accusing CHS of improperly using its market share in the Charlotte, North Carolina, area to prevent commercial health insurers from steering patients to lower-cost hospitals. CHS is the largest healthcare system in North Carolina and one of the largest not-for-profit healthcare systems in the United States. In September 2016, CHS filed a motion to dismiss the DOJ’s complaint.⁵⁸ The proceedings continue.

‘Pay for delay’

The FTC has continued its enforcement efforts with respect to, and advocacy against, so-called ‘pay for delay’ settlements in which a brand-name drug manufacturer settles a patent infringement suit against a potential generic manufacturer by making a payment to the generic manufacturer as long as it remains out of the market for some period of time. According to a report on drug-patent settlements issued by the FTC in January 2016, pharmaceutical companies entered into substantially fewer potential pay-for-delay patent dispute settlements in fiscal year 2014, the first year after the Supreme Court’s decision in *FTC v. Actavis, Inc.* The total number of such deals filed with the FTC dropped to 21 in FY 2014 from 29 in FY 2013, and 40 in FY 2012 prior to the *Actavis* ruling.⁵⁹

In March 2016, the FTC filed a complaint alleging that Endo Pharmaceuticals, Inc and several other drug companies violated antitrust laws by using pay-for-delay settlements to block consumers’ access to lower-cost generic versions of two different drugs. The FTC’s complaint alleges that Endo paid the first generic companies that filed for FDA approval to eliminate the risk of competition for the drugs and in violation of the Federal Trade Commission Act.⁶⁰ The enforcement action is the first FTC case challenging an agreement not to market an authorised generic drug – often called a ‘no-AG commitment’ – as a form of reverse payment.⁶¹

In a related development, the FTC filed an amicus brief with the US Court of Appeals for the Third Circuit in *In re Wellbutrin XL Antitrust Litigation*, a case involving an alleged reverse-payment agreement between brand-name pharmaceutical company GlaxoSmithKline

57 *U.S. v. Broadcast Music, Inc.*, No. 1:64-cv-03787, 2016 WL 4989938 (S.D.N.Y. 16 September 2016).

58 Press Release, Dep’t of Justice, Justice Department and North Carolina Sue Carolinas Healthcare System to Eliminate Unlawful Steering Restrictions (9 June 2016), available at: www.justice.gov/opa/pr/justice-department-and-north-carolina-sue-carolinas-healthcare-system-eliminate-unlawful.

59 Press Release, FTC, FTC Report on Drug Patent Settlements Shows Potential Pay-for-Delay Deals Decreased Substantially in the First Year Since Supreme Court’s Actavis Decision (13 January 2016), available at www.ftc.gov/news-events/press-releases/2016/01/ftc-report-drug-patent-settlements-shows-potential-pay-delay.

60 *F.T.C. v. Endo Pharmaceuticals Inc., et al.*, No. 2:16-cv-01440-PD, 2016 WL 1253815 (E.D. Pa. 30 March 2016), available at www.ftc.gov/system/files/documents/cases/160331endocmpt.pdf.

61 Press Release, FTC, FTC Sues Endo Pharmaceuticals Inc. and Others for Illegally Blocking Lower-Cost Generic Versions of the Branded Drugs Opana ER and Lidoderm (31 March 2016), available at www.ftc.gov/news-events/press-releases/2016/03/ftc-sues-endo-pharmaceuticals-inc-others-illegally-blocking-lower.

and generic pharmaceutical companies Teva Pharmaceuticals and Anchen Pharmaceuticals. Among other things, the amicus brief argues that the district court erred in concluding that the rule-of-reason analysis prescribed by the Supreme Court's decision in *Actavis* was inapplicable in this case, because, unlike in *Actavis*, the parties' agreement allowed the underlying patent litigation to continue even though it precluded generic entry until the litigation was resolved. The relevant antitrust harm identified in *Actavis*, according to the FTC, is the brand-name company's sharing of monopoly profits with the generic through a reverse payment to prevent the risk of competition. This harm arises whether the generic company drops its patent challenge entirely or simply agrees not to enter during the pendency of that challenge. According to the amicus brief, the relevant consideration under *Actavis* is whether the nature of the restraint is likely to harm competition, and there is no rule-of-reason requirement to show delayed entry or an injury to a specific party.⁶²

Invitations to collude

The FTC has continued to investigate and settle complaints involving a so-called 'invitation to collude' – a scenario in which a firm attempts to induce a competitor into an anticompetitive agreement. Actual anticompetitive agreements are actionable under Section 1 of the Sherman Act,⁶³ but, absent an agreement, Section 1 does not apply. The FTC has taken the position that its powers under Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition,⁶⁴ are broader than Section 1, and thus occasionally uses this authority to police invitations to collude where no agreement was actually reached. This past year, the FTC, relying on Section 5, brought (and settled) a complaint against a nationwide distributor of ductile iron pipe, fittings and accessories.⁶⁵

Vertical restraints

Payment card acceptance rules

In February 2015, the DOJ prevailed in its antitrust challenge to certain 'non-discrimination provisions' in American Express's merchant acceptance agreements. The court found after trial that the specific challenged rules had anticompetitive effects by, among other things, allowing American Express to charge supra-competitive rates to merchants and that American Express had failed adequately to prove countervailing pro-competitive justifications.⁶⁶

American Express appealed to the United States Court of Appeals for the Second Circuit, which reversed and remanded the case with instructions for the court to enter judgment in favour of American Express. According to the appellate court, the government

62 Press Release, FTC, FTC Amicus Brief Urges Appeals Court to Correct Legal Errors in District Court's Antitrust Analysis of Reverse-Payment Agreement (16 March 2016), available at www.ftc.gov/news-events/press-releases/2016/03/ftc-amicus-brief-urges-appeals-court-correct-legal-errors.

63 15 U.S.C. Section 1.

64 15 U.S.C. Section 45.

65 Press Release, FTC, FTC Consent Order Protects Competition in Ductile Iron Pipe Industry (9 August 2016), available at www.ftc.gov/news-events/press-releases/2016/08/ftc-consent-order-protects-competition-ductile-iron-pipe-industry. See also Press Release, FTC, FTC Approves Final Order Requiring Ductile Pipe Distributor to Stop Inviting Competitor to Collude on Pricing (27 September 2016), available at www.ftc.gov/news-events/press-releases/2016/09/ftc-approves-final-order-requiring-ductile-pipe-distributor-stop.

66 *U.S. v. American Express Co.*, No. 10-cv-04496, 2015 WL 728563 (19 February 2015 E.D.N.Y.).

failed to demonstrate that American Express possessed sufficient market power to affect competition adversely in the relevant market, which the appellate court defined as the market for cardholders generally as opposed to the narrower, more specific market for network services that the district court employed.⁶⁷

Monopolisation

In April 2016, the FTC announced that it had settled charges against Invibio, a supplier of high-performance medical implants, for violating federal antitrust law by using long-term exclusive contracts to maintain a monopoly. According to the FTC's administrative complaint, Invibio's anticompetitive tactics inhibited two potential competitors from entering the market for implant-grade polyetheretherketone, known as PEEK, and enabled Invibio to retain approximately 90 per cent of the market. According to the FTC, Invibio adopted an all-or-nothing negotiation strategy for its supply contracts that required medical device makers to agree to use only Invibio PEEK for all or nearly all of their PEEK-containing implantable devices.⁶⁸ Under the final order, Invibio and its corporate parent are prohibited from entering into exclusive supply contracts and from preventing current customers from using an alternate source of PEEK. The order also generally bars the companies from using other contract provisions – such as market share or retroactive volume discounts – that could result in an exclusive arrangement between Invibio and a device maker.⁶⁹

ii Trends, developments and strategies

During the final year of the Obama administration, the DOJ and FTC continued to pursue anticompetitive behaviour vigorously in all areas of economic activity. As expected, the FTC remained vigilant in its policing of 'invitations to collude' under Section 5 of the Act. In addition, the DOJ's enforcement action against CHS and the FTC's enforcement action against Endo Pharmaceutical signal an expansion in their respective approaches to steering restrictions and 'pay-for-delay' settlements, however much the number of such settlements has declined since the ruling of the US Supreme Court in *Actavis*.

iii Outlook

Although it seems reasonable to expect the agencies will continue actively to pursue civil non-merger investigations of potentially anticompetitive conduct, it remains to be seen what posture the agencies will adopt under the new administration of President Trump. The appointment of Tad Lipsky as Acting Director of the FTC's Bureau of Competition may herald little change to enforcement in the short term. Lipsky started his legal career approximately 40 years ago as an attorney in the DOJ's Antitrust Division and he was subsequently appointed Deputy Assistant Attorney General to President Reagan's first Assistant Attorney General, William F Baxter. Likewise, incumbent and former government employees are currently serving as acting Deputy Director of the Competition Bureau and

67 *U.S. v. American Express Co.*, 838 F.3d 179 (2d Cir. 2016).

68 Press Release, FTC, Supplier of High-Performance Polymer for Medical Implants Settles FTC Charges that It Monopolized Sales to World's Largest Medical Device Makers (27 April 2016), available at www.ftc.gov/news-events/press-releases/2016/04/supplier-high-performance-polymer-medical-implants-settles-ftc.

69 Press Release, FTC, FTC Approves Final Order Settling Monopolization Charges Against Supplier of High-Performance Polymer for Medical Implants (14 July 2016), available at www.ftc.gov/news-events/press-releases/2016/07/ftc-approves-final-order-settling-monopolization-charges-against.

Chief of Staff to the FTC's Acting Chairman, Maureen K Ohlhausen. However, the new President will appoint a new head of the Antitrust Division and three of the five members on the FTC. Change at the top of the agencies generally leads to changes in civil enforcement, although rarely to changes in criminal enforcement.

IV MERGER REVIEW

2016 was another active year for the DOJ and FTC in merger review and enforcement. Both agencies investigated numerous proposed acquisitions and required divestitures or sued to enjoin several transactions. The DOJ was successful in winning injunctions to block two high-profile mergers of health insurers. Other transactions were abandoned by the parties after the agencies expressed concern about potential anticompetitive effects.

i Significant cases

Litigated merger challenges

Staples, Inc and Office Depot, Inc

In May 2016, the FTC obtained an injunction blocking the proposed merger of Staples, Inc and Office Depot, Inc, two retailers of office products. In granting the injunction, the court agreed with the FTC on the existence of a nationwide market for 'the sale and distribution of consumable office supplies to large business-to-business customers',⁷⁰ and that the merger would increase market concentration beyond a level that is presumptively anticompetitive.⁷¹

This was the second attempt by Staples and Office Depot to merge. When the two firms attempted to merge in 1997, the FTC was successful in stopping the deal, also obtaining an injunction from a federal district court. At that time, the court found that the proper antitrust market was 'the sale of consumable office supplies through office supply superstores' in various local markets and that the merger was likely to increase concentration in these markets to presumptively anticompetitive levels.⁷²

Aetna Inc and Humana Inc

In July, the DOJ, along with several state attorneys-general, filed suit to block the proposed merger of Aetna Inc and Humana Inc, two health insurers. The government alleged that the merger would lead to the lessening of competition in both the sale of 'Medicare Advantage' health insurance plans – which are private health insurance plans available to senior citizens – and the sale of health insurance on public exchanges under the US Affordable Care Act.⁷³

In January 2017, the government prevailed, when the United States District Court for the District of Columbia enjoined the merger. The court found that the sale of Medicare Advantage plans was a distinct antitrust product market, and that the merger would result in 'presumptively unlawful' market concentration in the geographic markets alleged by the government.⁷⁴ The court also found that the proposed merger would 'substantially lessen

70 Slip. Op., *FTC v. Staples*, No. 15-cv-02115 (D.D.C. 17 May 2016) at 35.

71 Id. at 49.

72 *FTC v. Staples, Inc.*, 970 F. Supp. 1066, 1080-1083 (D.D.C. 1997).

73 Compl., *U.S. v. Aetna*, No. 16-cv-01494 (D.D.C. 21 July 2016).

74 Id. at 3.

competition in [the] counties' where the combined firm would likely have offered health insurance plans on public exchanges.⁷⁵ The parties have announced that they will not appeal the ruling and have terminated their merger agreement.⁷⁶

Anthem, Inc and Cigna Corp

On the same day that the government filed suit to block the *Aetna/Humana* merger, the DOJ and several states also filed suit to block the proposed merger of Anthem, Inc and Cigna Corp. In February 2017, the United States District Court for the District of Columbia issued an order enjoining that transaction.⁷⁷

Tribune Publishing Company and Freedom Communications Inc

In March 2016, the DOJ sued to enjoin the sale of Freedom Communications Inc to Tribune Publishing Company after Tribune won a bankruptcy court auction for Freedom's assets. The DOJ alleged that 'Tribune's acquisition of its most significant competitor would give it a monopoly over newspaper sales in [Orange County and Riverside County in California] and allow it to increase subscription prices, raise advertising rates and invest less to maintain the quality of its newspapers.'⁷⁸ The DOJ secured a temporary restraining order against the transaction, and ultimately the bankruptcy court overseeing the bankruptcy proceedings of Freedom Communications approved an alternative purchaser.⁷⁹

EnergySolutions and Waste Control Specialists

In November 2016, the DOJ sued to block the acquisition of Waste Control Specialists by Energy Solutions. The DOJ's complaint alleges that the 'proposed acquisition [...] would combine the only two licensed commercial low-level radioactive waste [...] disposal facilities for 36 states'.⁸⁰ The litigation remains pending.

Deere & Company and Precision Planting LLC

In August 2016, the DOJ sued to block the acquisition of Precision Planting LLC by Deere & Company. The DOJ's complaint alleges that, if the transaction were allowed to proceed, 'Deere would control nearly every method through which American farmers can acquire effective highspeed precision planting systems.'⁸¹ The litigation remains pending.

75 Id.

76 Anna Wilde Matthews, *Aetna, Humana Abandon Merger, Putting Paths to Growth in Doubt*, *Wall Street J.* (14 February 2017), available at www.wsj.com/articles/aetna-humana-mutually-end-merger-agreement-1487074314.

77 *U.S. v. Anthem, Inc.*, No. 16-cv-01493 (D.D.C. 8 February 2017).

78 Press Release, U.S. Dep't of Justice, *Justice Department Files Antitrust Lawsuit to Stop L.A. Times Publisher from Acquiring Competing Newspapers*, available at www.justice.gov/opa/pr/justice-department-files-antitrust-lawsuit-stop-la-times-publisher-acquiring-competing.

79 Press Release, U.S. Dep't of Justice, *Bankruptcy Court Approves Alternative Purchaser of Orange County Register and Riverside Press-Enterprise*, available at www.justice.gov/opa/pr/bankruptcy-court-approves-alternative-purchaser-orange-county-register-and-riverside-press.

80 Compl., *U.S. v. Energy Solutions, Inc.*, No. 16-cv-01056 (D. Del. 16 November 2016) at paragraph 1.

81 Compl., *U.S. v. Deere & Co.*, No. 16-cv-08515(N.D. Ill. 31 August 2016) at paragraph 6.

Advocate Health Care Network and NorthShore University HealthSystem

In late 2015, in another in a series of challenges to hospital mergers, the FTC initiated an administrative proceeding to block the affiliation of Advocate Health Care Network and NorthShore University HealthSystem – two hospitals systems in the Chicago, Illinois area – and sought an injunction preventing the consummation of the merger pending the outcome of the administrative proceeding.⁸² The FTC charged that the merger would reduce competition, raise prices and harm consumers.⁸³ In June 2016, the United States District Court for the Northern District of Illinois denied the FTC’s request for an injunction.⁸⁴ In October 2016, the United States Court of Appeals for the Seventh Circuit reversed the district court’s decision, temporarily enjoined the merger, and remanded the case back to the district court for further proceedings on the FTC’s original request to enjoin the merger.⁸⁵ Those proceedings remain pending.

Abandoned transactions

Lam Research Corp and KLA-Tencor Corp

After the DOJ raised ‘serious concerns’ about the potential competitive effects of the proposed merger of Lam Resarch and KLA-Tencor, which, according to the DOJ, ‘would have combined a leading supplier of semiconductor fabrication equipment with a leading supplier of [measuring] and inspection equipment’ and thus had the potential to allow the combined firm ‘to foreclose competitors’ development of leading edge fabrication tools and process technology on a timely basis’, the parties abandoned the transaction.⁸⁶ According to the DOJ, ‘KLA-Tencor’s leading position in several metrology and inspection markets could have created the potential for Lam Research to foreclose its competitors by reducing their timely access to key KLA-Tencor equipment and related services.’⁸⁷

Halliburton and Baker Hughes

Several weeks after the DOJ filed suit to block their merger, Halliburton and Baker Hughes abandoned the deal.⁸⁸ According to the DOJ, the transaction, if consummated, ‘would combine two of the three largest providers of oilfield services in the world, it would eliminate substantial head-to-head competition, and it would likely lead to higher prices and less innovation in this critically important industry’.⁸⁹ Although the parties proposed certain divestitures to the DOJ in an attempt to secure approval for the transaction, the government

82 Press Release, FTC, FTC Challenges Proposed Merger of Two Chicago-area Hospital Systems (18 December 2015), available at www.ftc.gov/news-events/press-releases/2015/12/ftc-challenges-proposed-merger-two-chicago-area-hospital-systems.

83 See Complaint, *In the Matter of Advocate Health Network, et al.*, FTC File No. 141-0231 (17 December 2015).

84 *FTC v. Advocate Health Care*, No. 15-cv-11473 (N.D. Ill. 20 June 2016).

85 *FTC v. Advocate Health Care*, No. 16-2492 (7th Cir. 31 October 2016).

86 Press Release, U.S. Dep’t of Justice, Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans, available at www.justice.gov/opa/pr/lam-research-corp-and-kla-tencor-corp-abandon-merger-plans.

87 *Id.*

88 Press Release, U.S. Dep’t of Justice, Halliburton and Baker Hughes Abandon Merger After Department of Justice Sued to Block Deal, available at www.justice.gov/opa/pr/halliburton-and-baker-hughes-abandon-merger-after-department-justice-sued-block-deal (DOJ Halliburton Press Release).

89 Compl., *U.S. v. Halliburton Co.*, No. 16-cv-00233 (D. Del. 6 April 2016) at paragraph 1.

determined that ‘the proposal was inadequate because it did not include full business units, withheld many critical assets and personnel, involved numerous ongoing entanglements between the merged company and the divestiture buyer and generally failed to replicate the robust competition between the parties that exists today.’⁹⁰

United Continental Holdings Inc slot acquisition

In November 2015, the DOJ filed suit to block United’s proposed acquisition of take-off and landing slots at Newark Airport from Delta Air Lines. The DOJ alleged that United already has excess slots and that its acquisition of more would further entrench it at Newark by preventing competitors’ entry or expansion. In April 2016, the transaction was abandoned.⁹¹

Superior Plus Corp and Canexus Corp

In June 2016, the FTC initiated proceedings to enjoin the proposed merger of Superior Plus Corp and Canexus Corp, two Canada-based chemical producers, alleging that the transaction would ‘significantly reduce competition in the North American market for sodium chlorate – a commodity chemical used to bleach wood pulp’, which is used in the manufacture of various paper products.⁹² The parties abandoned their proposed transaction.⁹³

Divestiture and conduct remedies

Valeant Pharmaceuticals, Inc and Paragon Holdings I, Inc

In February 2017, the FTC approved a final order which required Valeant Pharmaceuticals, Inc to divest Paragon Holdings I, Inc, which the FTC alleged Valeant had acquired in violation of competition laws.⁹⁴ According to the FTC, the acquisition ‘eliminated competition between the two companies for the sale of FDA-approved buttons used for three types of [gas permeable contact] lenses’.⁹⁵ The remedy is notable because it required the undoing of a previously consummated transaction.

Charter Communications Inc and Time Warner Cable Inc

After the proposed acquisition of Time Warner Cable Inc by Comcast Corp was abandoned in 2015, the DOJ allowed Charter Communications Inc to acquire Time Warner Cable on

90 DOJ Halliburton Press Release.

91 Press Release, U.S. Dep’t of Justice, United Airlines Abandons Attempt to Enhance its Monopoly at Newark Liberty International Airport, available at www.justice.gov/opa/pr/united-airlines-abandons-attempt-enhance-its-monopoly-newark-liberty-international-airport.

92 Press Release, FTC, FTC Challenges Proposed Merger of Canadian Chemical Companies Superior Plus Corp. and Canexus Corp, available at www.ftc.gov/news-events/press-releases/2016/06/ftc-challenges-proposed-merger-canadian-chemical-companies.

93 Order Dismissing Compl., *In the Matter of Superior Plus Corp. and Canexus Corp.*, F.T.C. File No. 161-0020 (3 August 2016).

94 Press Release, FTC, FTC Approves Final Order with Parent Company of Bausch + Lomb, available at www.ftc.gov/news-events/press-releases/2017/02/ftc-approves-final-order-parent-company-bausch-lomb.

95 Id.

the condition that, among other things, the combined company ‘be prohibited from entering into or enforcing any agreement with a programmer that forbids, limits or creates incentives to limit the programmer’s provision of content to one or more’ online video distributors.⁹⁶

Other transactions

The DOJ required divestitures in several proposed mergers, including: AMC Entertainment Holding Inc’s acquisition of Carmike Cinemas (divestiture of certain theatres, and relinquishment of governance rights in a cinema advertising network);⁹⁷ Alaska Air Group’s acquisition of Virgin America Inc (reduction of codeshare agreement between Alaska Air Group and American Airlines);⁹⁸ Westinghouse Air Brake Technology Corporation’s acquisition Faiveley Transport SA and Faiveley Transport North America (divestiture of freight car brake business);⁹⁹ Nextar Broadcasting Group’s acquisition of Media General Corporation (divestiture of certain broadcast television stations);¹⁰⁰ Huntington Bancshares Inc’s acquisition of FirstMerit Corporation (divestiture of certain bank branches);¹⁰¹ KeyCorp and First Niagara Financial Group Inc (divestiture of certain bank branches);¹⁰² Iron Mountain Inc and Recall Holdings Ltd (divestiture of certain records management assets);¹⁰³ and Anheuser-Busch InBev and SABMiller (divestiture of SABMiller’s entire US business).¹⁰⁴

The FTC similarly required divestitures in a number of deals, including: Energy Transfer Equity, LP and The Williams Companies, Inc (divestiture of Williams’ interest in a natural

96 Press Release, U.S. Dep’t of Justice, Justice Department Allows Charter’s Acquisition of Time Warner Cable and Bright House Networks to Proceed with Conditions, available at www.justice.gov/opa/pr/justice-department-allows-charter-s-acquisition-time-warner-cable-and-bright-house-networks.

97 Press Release, U.S. Dep’t of Justice, AMC Required to Divest Movie Theatres, Reduce NCM Ownership and Complete Screen Transfers in Order to Complete Acquisition of Carmike Cinemas, available at www.justice.gov/opa/pr/amc-required-divest-movie-theatres-reduce-ncm-ownership-and-complete-screen-transfers-order.

98 Press Release, U.S. Dep’t of Justice, Justice Department Requires Alaska Airlines to Significantly Scale Back Codeshare Agreement with American Airlines in Order to Proceed with Virgin America Acquisition, available at www.justice.gov/opa/pr/justice-department-requires-alaska-airlines-significantly-scale-back-codeshare-agreement.

99 Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestiture of Faiveley Transport’s U.S. Freight Car Brakes Business Before Wabtec Acquisition, available at www.justice.gov/opa/pr/justice-department-requires-divestiture-faiveley-transport-s-us-freight-car-brakes-business.

100 Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestitures in Order for Nexstar to Proceed with Media General Acquisition, available at www.justice.gov/opa/pr/justice-department-requires-divestitures-order-nexstar-proceed-media-general-acquisition.

101 Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestitures in Huntington Bancshares Incorporated’s Acquisition of FirstMerit Corporation, available at www.justice.gov/opa/pr/justice-department-requires-divestitures-huntington-bancshares-incorporated-s-acquisition.

102 Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestitures in Keycorp’s Acquisition of First Niagara Financial Group Inc., available at www.justice.gov/opa/pr/justice-department-requires-divestitures-keycorp-s-acquisition-first-niagara-financial-group.

103 Press Release, U.S. Dep’t of Justice, Iron Mountain and Recall Holdings Agree to Divest Records Management Assets as a Condition to Proceed with Transaction, available at www.justice.gov/opa/pr/iron-mountain-and-recall-holdings-agree-divest-records-management-assets-condition-proceed.

104 Press Release, Justice Department Requires Anheuser-Busch InBev to Divest Stake in MillerCoors and Alter Beer Distributor Practices as Part of SABMiller Acquisition, available at www.justice.gov/opa/pr/justice-department-requires-anheuser-busch-inbev-divest-stake-millercoors-and-alter-beer.

gas pipeline);¹⁰⁵ Boehringer Ingelheim and Sanofi (divestiture of animal health products);¹⁰⁶ Abbott Laboratories and St. Jude Medical, Inc (divestiture of rights and assets related to St. Jude's vascular closure device business and Abbott's steerable sheath business);¹⁰⁷ Koninklijke Ahold and Delhaize Group (divestiture of certain supermarkets);¹⁰⁸ Teva Pharmaceutical Industrie Ltd and Allergan plc (divestiture of 79 pharmaceutical products);¹⁰⁹ American Air Liquide Holdings, Inc and Airgas, Inc (divestiture of assets used to produce and supply certain types of industrial gasses);¹¹⁰ Ball Corporation and Rexam PLC (divestiture of aluminium can plants);¹¹¹ and HeidelbergCement AG and Italcementi SpA (divestiture of cement plant and cement distribution terminals).¹¹²

Premerger notification violations

In 2016 the agencies continued to police compliance with the notification and waiting requirements imposed by the Hart-Scott-Rodino Antitrust (HSR) Improvements Act.

Most notably, in July 2016, the DOJ obtained a record \$11 million fine for an HSR violation. According to the DOJ, 'ValueAct, an activist investment firm, purchased over \$2.5 billion of Halliburton and Baker Hughes voting shares without complying with the HSR Act's notification requirements' after the announcement of the merger of Baker Hughes and Halliburton, two oilfield products and services providers.¹¹³ The DOJ's complaint alleged that 'ValueAct purchased these shares with the intent to influence the companies' business decisions – including decisions related to the merger – and therefore could not rely on the limited 'investment-only' exemption to the HSR Act's notification requirements.'¹¹⁴

105 Press Release, FTC, FTC Puts Conditions on Merger of Energy Transfer Equity, L.P., and The Williams Companies, Inc., available at www.ftc.gov/news-events/press-releases/2016/06/ftc-puts-conditions-merger-energy-transfer-equity-lp-williams.

106 Press Release, FTC, FTC Requires Divestitures as Condition to Proposed \$13.53 Billion Deal between German Pharmaceutical Boehringer Ingelheim and Paris-based Sanofi, available at www.ftc.gov/news-events/press-releases/2016/12/ftc-requires-divestitures-condition-proposed-1353-billion-deal.

107 Press Release, FTC, FTC Puts Conditions on Abbott Laboratories' proposed \$25 billion Acquisition of Rival Medical Device Maker St. Jude Medical, Inc., available at www.ftc.gov/news-events/press-releases/2016/12/ftc-puts-conditions-abbott-laboratories-proposed-25-billion.

108 Press Release, FTC, FTC Approves Modified Final Order Preserving Competition among Supermarkets in Seven States, available at www.ftc.gov/news-events/press-releases/2016/10/ftc-approves-modified-final-order-preserving-competition-among.

109 Press Release, FTC, FTC Approves Final Order Preserving Competition in Markets for 79 Pharmaceutical Products, available at www.ftc.gov/news-events/press-releases/2016/09/ftc-approves-final-order-preserving-competition-markets-79.

110 Press Release, FTC, FTC Approves Final Order Preserving Competition among Suppliers of Industrial Gases, available at www.ftc.gov/news-events/press-releases/2016/07/ftc-approves-final-order-preserving-competition-among-suppliers.

111 Press Release, FTC, FTC Requires Ball Corporation to Divest Eight Aluminum Can Plants to Ardagh as a Condition of Acquiring Rexam, available at www.ftc.gov/news-events/press-releases/2016/06/ftc-requires-ball-corporation-divest-eight-aluminum-can-plants.

112 Press Release, FTC, FTC Requires Cement Manufacturers HeidelbergCement AG and Italcementi S.p.A. to Divest U.S. Assets as a Condition of Merger, available at www.ftc.gov/news-events/press-releases/2016/06/ftc-requires-cement-manufacturers-heidelbergcement-ag-italcementi.

113 Press Release, U.S. Dep't of Justice, Justice Department Obtains Record Fine and Injunctive Relief against Activist Investor for Violating Premerger Notification Requirements, available at www.justice.gov/opa/pr/justice-department-obtains-record-fine-and-injunctive-relief-against-activist-investor.

114 Id.

The DOJ also obtained a fine from Duke Energy Corporation \$600,000 for ‘taking control of [a power plant] before filing required HSR Act notifications and waiting for the expiration of the mandatory waiting period for antitrust review’.¹¹⁵ Additionally, the FTC, working with the DOJ, obtained fines from several investors who acquired voting securities in a corporation without observing notification and waiting requirements of the HSR Act.¹¹⁶

Interlocking directorates

In July 2016, the DOJ required two United Kingdom-based companies to restructure their transaction after raising concerns that the transaction, as originally structured, would have resulted in an impermissible interlock between two competitors: one entity would have had a right to nominate a member of the competing entity’s board of directors.¹¹⁷ Section 8 of the Clayton Act generally prohibits the same ‘person’ from simultaneously serving ‘as a director or [board-appointed] officer in any two corporations [...] that are [...] competitors’ unless certain highly technical safe harbour criteria are met.¹¹⁸ The agencies take the position that Section 8 covers both ‘direct’ interlocks (i.e., when the same individual serves as a director or officer of competing corporations) and ‘indirect’ interlocks (i.e., where different individuals serve as directors or officers of competing corporations, but both act on behalf of the same third entity (e.g., a private equity fund)).

ii Trends, developments and strategies

Merger enforcement remains robust and the agencies continue to focus on thorough investigation of the matters before them. The agencies say they will seek to tailor divestitures to address their competitive concerns, and will not shy from challenging transactions which are unable to be remedied by divestitures. The agencies continue to find success when they litigate merger challenges.

International cooperation in merger investigation remains an important tool of the agencies, and indeed several US investigations in 2016 were conducted alongside investigations in other countries.

115 Press Release, U.S. Dep’t of Justice, Justice Department Reaches Settlement with Duke Energy Corporation for Violating Premerger Notification and Waiting Period Requirements, available at www.justice.gov/opa/pr/justice-department-reaches-settlement-duke-energy-corporation-violating-premerger.

116 Press Release, U.S. Dep’t of Justice, Ahmet Okumus to Pay \$180,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements, available at www.justice.gov/opa/pr/ahmet-okumus-pay-180000-civil-penalty-violating-antitrust-premerger-notification-requirements; Press Release, U.S. Dep’t of Justice, Mitchell Rales to Pay \$720,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements, available at www.justice.gov/opa/pr/mitchell-ales-pay-720000-civil-penalty-violating-antitrust-premerger-notification; Press Release, U.S. Dep’t of Justice, Fayez Sarofim to Pay \$720,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements, available at www.justice.gov/opa/pr/fayez-sarofim-pay-720000-civil-penalty-violating-antitrust-premerger-notification; Press Release, U.S. Dep’t of Justice, Caledonia Investments to Pay \$480,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements, available at www.justice.gov/opa/pr/caledonia-investments-pay-480000-civil-penalty-violating-antitrust-premerger-notification.

117 Paul, Weiss Client Memorandum, U.S. Justice Department Requires Restructuring of Transaction Involving Foreign Entities to Address Section 8 Interlocking Directorates Concern, available at www.paulweiss.com/practices/litigation/litigation/publications/us-justice-department-requires-restructuring-of-transaction-involving-foreign-entities.aspx?id=22229.

118 15 U.S.C. § 19.

iii Outlook

It remains to be seen how the new administration in the United States will prioritise merger enforcement. Under a traditional Republican administration, one might expect the agencies to be more selective in the merger challenges they bring. However, the President, while on the campaign trail, did openly question several proposed transactions. The eventual choice of the new head of the Antitrust Division and the nominees to the three open spots on the FTC should tell us a lot about the new administration's priorities.

VI CONCLUSIONS

We expect the agencies' resources will continue to be devoted to merger enforcement and cartel investigations and prosecutions. The President is expected appoint new leadership for the Antitrust Division of the DOJ as well as three new Commissioners at the FTC. We will watch with interest to see who is appointed and how the agencies' enforcement agendas evolve under this new leadership.

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