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Antitrust Month in Review – July 2019

In July, the Antitrust Division of the Department of Justice (DOJ) announced a significant change in how it will treat corporate antitrust compliance programs. These programs will now factor into prosecutors' charging and sentencing decisions and may allow companies to qualify for deferred prosecution agreements or otherwise mitigate exposure, even when they are not the first to self-report criminal conduct. This provides significant incentive for companies to evaluate their compliance programs in light of the DOJ's new guidance.

The DOJ also agreed to a proposed settlement relating to the T-Mobile-Sprint merger, and announced plea agreements in several criminal cases. The Federal Trade Commission (FTC) reached settlements in a merger case and a pharmaceutical conduct case. The European Commission announced it has begun a formal investigation into Amazon's data use practices.

We discuss these and other developments below.

US – DOJ/FTC Merger

FTC Requires Divestitures in Quaker Chemical Acquisition of Houghton International

On July 23, the FTC announced that it is requiring Quaker Chemical and Houghton International "to divest certain products and related assets to a subsidiary of . . . Total S.A." in order for their deal to proceed. According to the FTC, without the divestitures, competition would be harmed "in the North American market for aluminum hot rolling oil, or AHRO, and associated technical support services, and in the North American market for steel cold rolling oil, or SCRO, and associated technical support services." These oils "are critical inputs in the production of sheet metal," according to the FTC's press release. The parties have agreed to "divest Houghton's North American AHRO and SCRO product lines and related assets." [Press Release, Fed. Trade Comm'n, FTC Imposes Conditions on Quaker Chemical Corp.'s Acquisition of Houghton International Inc. \(Jul. 23, 2019\)](#).

DOJ Requires Divestitures in T-Mobile-Sprint Merger

On July 26, the DOJ announced that it has reached a proposed settlement relating to the T-Mobile- Sprint merger. The agreement requires, among other things, Sprint and T-Mobile to make divestitures to Dish Network. According to the DOJ's press release, "T-Mobile and Sprint must divest Sprint's prepaid business, including Boost Mobile, Virgin Mobile, and Sprint prepaid, to Dish Network Corp., a Colorado-based satellite television provider. The proposed settlement also provides for the divestiture of certain

spectrum assets to Dish. Additionally, T-Mobile and Sprint must make available to Dish at least 20,000 cell sites and hundreds of retail locations. T-Mobile must also provide Dish with robust access to the T-Mobile network for a period of seven years while Dish builds out its own 5G network.”

According to the DOJ’s allegations, “without the divestiture, the proposed acquisition would eliminate competition between two of only four facilities-based suppliers of nationwide mobile wireless services. . . . T-Mobile and Sprint both operate mobile networks and offer nationwide coverage to consumers, and they are particularly close competitors to each other for the roughly 30% of retail subscribers who purchase prepaid mobile wireless service. The combination of T-Mobile and Sprint would eliminate head-to-head competition between the companies and threaten the benefits that customers have realized from that competition in the form of lower prices and better service.”

The settlement is subject to approval by a federal judge. Kansas, Louisiana, Nebraska, Ohio, Oklahoma and South Dakota joined in the proposed settlement. A separate suit brought by several other states to block the merger remains pending. [Press Release, U.S. Dep’t of Justice, Justice Department Settles with T-Mobile and Sprint in Their Proposed Merger by Requiring a Package of Divestitures to Dish \(Jul. 26, 2019\)](#).

US – DOJ/FTC Civil Non-Merger

FTC Reaches Settlement of Monopolization Claims with Reckitt Benckiser

On July 11, the FTC announced that Reckitt Benckiser agreed to pay \$50 million and made other commitments to settle “charges that it violated the antitrust laws through a deceptive scheme to thwart lower-priced generic competition to its branded drug Suboxone, . . . a prescription oral medication used to minimize withdrawal symptoms in patients recovering from opioid addiction.” According to the FTC’s press release, “before the generic versions of Suboxone tablets became available, Reckitt . . . developed a dissolvable oral film version of Suboxone and worked to shift prescriptions to this patent-protected film. . . . Reckitt allegedly employed a ‘product hopping’ scheme where the company misrepresented that the film version of Suboxone was safer than Suboxone tablets because children are less likely to be accidentally exposed to the film product.” The FTC also alleged that “to buy more time to move patients to the film version of Suboxone, Reckitt . . . filed a citizen petition with the FDA reciting the same unsupported safety claims and requesting that the agency reject any generic tablet application” in order “to delay the approval of generic competitors while the FDA reviewed it.” [Press Release, Fed. Trade Comm’n, Reckitt Benckiser Group plc to Pay \\$50 Million to Consumers, Settling FTC Charges that the Company Illegally Maintained a Monopoly over the Opioid Addiction Treatment Suboxone \(Jul. 11, 2019\)](#).

District Court Determines it Has Jurisdiction to Review FTC Denial of State-Action Immunity Defense and Stays Administrative Proceeding

On July 29, Judge Brian A. Jackson of the United States District Court for the Middle District of Louisiana granted the Louisiana Real Estate Appraisers Board's motion to stay the FTC's administrative proceeding against it. In the administrative proceeding, the FTC alleged that the Board's "setting [of] certain 'customary and reasonable' fees for mortgage lenders' agents violated certain federal antitrust rules." The Board asserted that it is immune from the FTC's challenge because it is a state actor. According to the court, "[s]tate-action immunity from suit is applicable when a state establishes that anticompetitive conduct is created, overseen and guided by the state, without influence or control of parties who have not been conferred regulatory powers by the state."

The FTC determined that the state-action immunity doctrine did not apply. The Board appealed the FTC's administrative decision to the Fifth Circuit, but that court "found that the FTC Act did not allow direct appeals from collateral orders." The FTC subsequently declined to stay the proceeding. However, following the Fifth Circuit's observation "that the 'final agency action' language of the Administrative Procedure Act [APA] . . . may allow a district court to review the [FTC's denial of state-action immunity] prior to the final administrative adjudication of the action," the Board moved the district court to issue an order staying the FTC proceedings and to "review . . . the merits of the FTC" state-action immunity determination.

The district court determined that it had jurisdiction to review the FTC's order and issued the stay. In so ruling, Judge Jackson wrote that the APA permitted review "[b]ecause the FTC Order conclusively answers the question of whether [the Board] is entitled to immunity" and "only addresses two of [the Board's] many affirmative defenses and does not involve all of the merits of the underlying case," and because denying review at this stage would deprive the Board of its right to immunity from suit if the "case is erroneously allowed to proceed to trial." The court then determined that the Board met the requirements for issuing a stay (including likelihood of success on the merits) and ordered that the FTC proceedings be stayed. [La. Real Estate Appraisers Bd. v. FTC, No. 19-cv-214 \(M.D. La. Jul. 29, 2019\)](#).

US – DOJ Criminal

DOJ Announces Guilty Plea in Heir Location Services Customer Allocation Case

On July 10, the DOJ announced that defendants in a case alleging a conspiracy "to suppress and eliminate competition by agreeing to allocate customers of heir location services sold in the United States between 1999 and 2014" agreed to plead guilty. The defendants earlier argued that the charged conduct was subject to rule of reason – rather than *per se* – treatment and the district court initially agreed. The DOJ appealed this ruling to the Tenth Circuit, but the court found that it lacked jurisdiction over the appeal of the district court's rule of reason order because of statutory limits on the government's ability to appeal in

criminal matters. Nevertheless, in its opinion, the appeals court wrote that “were the merits of the rule of reason order before us we might very well reach a different conclusion than did the district court,” and spent several paragraphs explaining why. On remand, the district court ruled that “with the benefit of full briefing it is clear that the reasons originally proffered should not negate the application of the Per Se approach” and granted the government’s motion for reconsideration. It is DOJ policy to bring criminal antitrust cases only when the alleged conduct is *per se* illegal, so, had the court not reversed itself, it is unlikely the DOJ would have continued to pursue a criminal conviction. [Press Release, U.S. Dep’t of Justice, Heir Location Services Company and Co-Owner Plead Guilty To Antitrust Charge for Long-Running Agreement Not to Compete \(Jul. 10, 2019\)](#); [U.S. v. Kemp & Assoc., No. 16-cr-403 \(D. Utah Feb. 21, 2019\)](#); [U.S. v. Kemp & Assoc., No. 17-4148 \(10th Cir. Oct. 31, 2018\)](#).

DOJ Announces Guilty Plea in Hard Disk Drive Suspension Assembly Price Fixing Case

On July 9, the DOJ announced that NHK Spring Ltd. agreed to plead guilty to charges related to its alleged participation in a conspiracy to fix prices and allocate markets for hard disk drive suspension assemblies. According to the DOJ’s press release, “NHK Spring reached agreements with co-conspirators to refrain from price competition and allocate their respective market shares . . . Pursuant to their agreements not to compete, NHK Spring and its co-conspirators exchanged pricing information including anticipated pricing quotes, which they used to inform their negotiations with U.S. and foreign customers that purchased suspension assemblies and produced hard disk drives for sale in, or delivery to, the U.S. and elsewhere.” The defendant “agreed to plead guilty, to pay a \$28.5 million criminal fine, and to cooperate in the ongoing investigation.” [Press Release, U.S. Dep’t of Justice, Japanese Manufacturer Agrees to Plead Guilty to Fixing Prices for Suspension Assemblies Used in Hard Disk Drives \(Jul. 29, 2019\)](#).

US – Private Litigation

Third Circuit Upholds District Court Finding of Insufficient Evidence of Antitrust Injury in Robinson-Patman Act Case

On July 5, the United States Court of Appeals for the Third Circuit upheld a district court’s decision in favor of the defendant in a case alleging illegal price discrimination in the sale of cement for ready-mix concrete in the U.S. Virgin Islands in violation of the Robinson-Patman Act. The appeals court wrote that to prove a price discrimination claim “the plaintiff must show that: (1) ‘sales were made to two different purchasers in interstate commerce’; (2) ‘the product sold was of the same grade and quality’; (3) the ‘defendant discriminated in price as between the two purchasers’; and (4) ‘the discrimination had a prohibited effect on competition.’” In addition, the court wrote, “to recover [damages], the plaintiff must have proof of antitrust injury,” which, in this case, required proof of “a causal connection between the price discrimination and actual damage suffered.” The appeal, the court said, “turns on whether [the] plaintiff satisfied the damages requirement by proving antitrust injury.”

The court held that the district court was correct in finding “that the evidence at trial was insufficient to prove antitrust injury.” The court noted that the plaintiff failed to establish antitrust injury in part by “not presenting evidence of lost customers” and that “the evidence at trial showed that [the plaintiff] lost sales and profits for reasons unrelated to the cement discount.” The court also cited evidence that despite not having received the discount provided to its competitor, the plaintiff was “able to compete . . . for three years.” [Spartan Concrete Prods., LLC v. Argos USVI, Corp., No. 18-1942 \(3d Cir. Jul. 5, 2019\)](#).

Court Grants Class Certification to Direct Purchasers in Loestrin Antitrust Litigation

On July 2, Judge William E. Smith of the United States District Court for the District of Rhode Island granted class certification to a class of direct purchasers in a case alleging that Warner Chilcott and Watson “violated federal law through a series of actions intended to delay and suppress generic competition for the oral contraceptive Loestrin 24 Fe.” Among other things, the defendants argued that class certification should be denied because the plaintiffs could not satisfy Rule 23(b)(3)’s predominance requirement. Specifically, the defendants argued that plaintiffs could not present common proof of injury because they could not show that class members would have switched from branded Loestrin to a generic version in the but-for world. However, the court held that it “is fully satisfied that [the plaintiffs’ expert] . . . establish[ed] that the Brand-Only Purchasers each likely would have purchased at least a single prescription of generic Loestrin 24 during the class period in a market with robust, sustained generic competition, given their business interests in meeting their customers’ demand,” and that “it will be for the jury to decide whether [the] theory wins the day, in whole or in part; but for present purposes – class certification – [the] theory more than suffices.”

Defendants also argued that the plaintiffs could not show injury for those class members who purchased only generic versions of the drug. But the court found that the plaintiffs’ expert sufficiently demonstrated “that Generic-Only Purchasers would have paid less for their purchases in a but-for world with robust, sustained generic competition” even if “generic purchasers showed brand loyalty to their branded generics and did not just shift to the cheapest option.” The court wrote that if some purchasers would not have paid less, “the jury will sort out the details” and that “[t]he prospect that a handful of identifiable class members may be uninjured is not a barrier to class certification.” [In re Loestrin 24 Fe Antitrust Litig., No. 13-md-2472 \(D.R.I. Jul. 2, 2019\)](#).

US – Agency News

Antitrust Division Announces New Policy Regarding Compliance Programs

On July 11, Assistant Attorney General for the Antitrust Division Makan Delrahim made a significant and important announcement regarding a change to the Division’s criminal antitrust prosecutorial policy: unlike in the past, corporate antitrust compliance programs will now factor into prosecutors’ charging and sentencing decisions and may allow companies to qualify for deferred prosecution agreements or

otherwise mitigate exposure, even when they are not the first to self-report criminal conduct. The Division also issued new and detailed guidance outlining the factors that prosecutors are to consider in evaluating the effectiveness of compliance programs. [Paul, Weiss Client Memo., Department of Justice Antitrust Division Announces Important New Policy Regarding Compliance Programs \(Jul. 15, 2019\)](#).

EU Developments

European Commission Clears GlaxoSmithKline's Acquisition of Pfizer's Consumer Health Business Subject to Divestiture

On July 10, the European Commission announced that it is requiring “the global divestment of Pfizer’s topical pain management business carried out under the *ThermaCare* brand” in order for GlaxoSmithKline’s acquisition of the consumer health business of Pfizer to proceed. According to the Commission’s press release, “the Commission was concerned that the acquisition would reduce competition for topical pain management products, possibly resulting in price increases in a number of [European Economic Area] countries.” The divestiture package includes a U.S. manufacturing facility, along with “all intellectual property rights relating to the *ThermaCare* products and brand, as well as products under development.” [Press Release, Eur. Comm’n, Mergers: Commission approves GlaxoSmithKline’s acquisition of Pfizer’s Consumer Health Business, subject to conditions \(Jul. 10, 2019\)](#).

European Commission Announces Investigation into Amazon’s Data Use Practices

On July 17, the European Commission announced that it “has opened a formal antitrust investigation to assess whether Amazon’s use of sensitive data from independent retailers who sell on its marketplace is in breach of EU competition rules.” According to the Commission’s press release, “[w]hen providing a marketplace for independent sellers, Amazon continuously collects data about the activity on its platform. Based on the Commission’s preliminary fact-finding, Amazon appears to use competitively sensitive information – about marketplace sellers, their products and transactions on the marketplace.” The investigation will examine “whether and how the use of accumulated marketplace seller data by Amazon as a retailer affects competition” and “the impact of Amazon’s potential use of competitively sensitive marketplace seller information on” how retailers become featured in Amazon’s “Buy Box” which “is displayed prominently on Amazon and allows customers to add items from a specific retailer directly into their shopping carts.” [Press Release, Eur. Comm’n, Antitrust: Commission opens investigation into possible anti-competitive conduct of Amazon \(Jul. 17, 2019\)](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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