
October 22, 2019

Antitrust Month in Review – September 2019

September was another active month in antitrust enforcement and litigation.

The Antitrust Division of the Department of Justice (DOJ) announced that, for the first time, it has agreed with parties to a proposed acquisition to use arbitration to resolve a challenge to a deal. On the same day as this announcement, a court entered the final judgment in the DOJ's challenge to the CVS-Aetna merger case. Here, the DOJ and the deal parties reached a settlement, but the court held extended proceedings before approving the consent decree – a process that drew several objections from the DOJ.

The Federal Trade Commission (FTC) settled two merger challenges. In one of these, it determined that a non-compete agreement between the deal parties was too broad and required the parties to eliminate it. In the other, the FTC required divestitures in a deal involving food distributors.

Courts granted several motions to dismiss in private litigation cases, including a case between health insurers in which a judge found that the McCarran-Ferguson Act exempted the challenged conduct from federal antitrust laws.

We discuss these and other developments below.

In addition, we are pleased to note that Andrew C. Finch returned to Paul, Weiss as Partner and Co-Chair of our Antitrust Group. Andrew rejoins the firm from the DOJ, where he was the Principal Deputy Assistant Attorney General for Antitrust from April 2017 to August 2019. He also served as Acting Assistant Attorney General for Antitrust from April to September 2017. While at the DOJ he oversaw dozens of merger reviews; supervised multiple investigations and litigations; negotiated civil and criminal settlements; and represented the Division in meetings with other federal agencies, members of Congress, state attorneys general and foreign competition authorities.

US – DOJ/FTC Merger

DOJ Announces First-Time Use of Arbitration to Resolve Merger Challenge

On September 4, the DOJ announced that it agreed with the parties to a proposed acquisition to use binding arbitration “to resolve the dispositive issue” of product market definition in the DOJ's challenge to that acquisition. The Administrative Dispute Resolution Act of 1996 authorizes the use of arbitration for such purposes, but this is the “first time the Antitrust Division is using this arbitration authority to resolve a matter,” according to the government's press release. Assistant Attorney General for the

Antitrust Division Makan Delrahim indicated that arbitration “is an important tool” and that the Antitrust Division will use it again “in appropriate circumstances.”

In a subsequent speech, Mr. Delrahim noted that “an arbitrator could be an antitrust specialist or former judge, either with economics training or with extensive experience handling complex antitrust cases. Such an arbitrator could bring an understanding of economic issues and testimony, which should provide for greater accuracy and efficiency.” He also “highlight[ed] three key questions. First, what are the efficiency gains relative to the alternatives? The Division would be more likely to arbitrate if doing so could save significant time or taxpayer money while ensuring that competition and consumers are protected. Second, is the question the arbitrator will be asked to resolve clear and easily can be agreed upon? If not, then arbitration may not be the best use of our or the parties’ resources. Third, would arbitration result in a lost opportunity to create valuable legal precedent? This will depend on the facts of the particular case, but the effect could be mitigated depending on the transparency of the process and the arbitrator’s decision.” This is a significant development, and represents a potential opportunity for companies involved in agency enforcement proceedings to consider. In making the announcement, Mr. Delrahim cited the efficiency and cost-effectiveness of arbitration proceedings. This mechanism also provides the potential opportunity for issues in dispute to be resolved by a subject-matter expert. [Press Release, U.S. Dep’t of Justice, Justice Department Sues to Block Novelis’s Acquisition of Aleris \(Sept. 4, 2019\)](#); [Paul, Weiss Client Memo., DOJ Announces First-Time Use of Arbitration to Resolve Merger Challenge \(Sept. 4, 2019\)](#); [Makan Delrahim, “Special, So Special”: Specialist Decision-Makers in, and the Efficient Disposition of, Antitrust Cases \(Sept. 9 2019\)](#).

Judge Leon Enters Final Judgment in CVS-Aetna Merger Case, Ending Unusual Tunney Act Proceeding

On September 4, Judge Richard J. Leon of the United States District Court for the District of Columbia determined that the proposed final judgment in the CVS-Aetna merger case was in the public interest. Last October, the DOJ and five state attorneys general filed a complaint and proposed final judgment, pursuant to which CVS and Aetna divested Aetna’s Medicare Part D prescription insurance plan business to WellCare Health Plans. The DOJ determined that, without the divestiture, the merger would have “cause[d] anticompetitive effects, including increased prices, inferior customer service, and decreased innovation in sixteen Medicare Part D regions covering twenty-two states.”

The Tunney Act requires, among other things, that “[b]efore entering any consent judgment proposed by the United States . . . the court shall determine that the entry of such judgment is in the public interest.” Normally, this is a straightforward process. In December, however, Judge Leon wrote that he was “less convinced of the sufficiency of the Government’s negotiated remedy than the Government is” and that “neither [he], nor the public has had a chance to evaluate whether the proposed final judgment adequately remedies the harm alleged in the complaint, and more importantly perhaps, whether the complaint as drafted is actually in the public interest.” Judge Leon then proceeded to hold a high profile hearing in which he heard from several entities opposing the settlement. [Memo. Opinion, U.S. v. CVS Health Corp.](#)

[No. 18-cv-2340 \(Sept. 4, 2019\)](#); [Order to Show Cause, U.S. v. CVS Health Corp., No. 18-cv-2340 \(D.D.C. Dec. 3, 2018\)](#); [Press Release, U.S. Dep't of Justice, Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed With Merger \(Oct. 10, 2018\)](#).

US Foods Agrees to Divestitures to Address FTC Concerns about Services Group of America Acquisition

On September 11, the FTC announced that it was requiring US Foods (a food distributor) to divest three distribution centers in order for it to proceed with its acquisition of Services Group of America. According to the FTC's press release, "the proposed acquisition would likely harm competition for broadline foodservice distribution for customers in four local markets and for national and multi-regional customers throughout the country." The FTC said that "Services Group of America, Inc., through its foodservice division, Food Services of America, or FSA, belongs to a consortium of regional distributors known as Distribution Market Advantage, or DMA. DMA competes with US Foods to serve multi-regional and national accounts. . . . [I]f DMA were to lose FSA's distribution centers in Washington, Idaho, and North Dakota from its network, it would become a significantly less attractive option for this set of customers." The FTC therefore required US Foods to divest certain distribution centers in these states. "All three divestiture buyers are DMA members, and the divested facilities will maintain DMA's national footprint," according to the FTC. [Press Release, Fed. Trade Comm'n, FTC Requires Divestitures and Imposes Conditions on US Foods Holding Corp.'s Acquisition of Services Group of America, Inc. \(Sept. 11, 2019\)](#).

FTC Requires Parties to Eliminate Non-Compete Clause in Order to Proceed with Natural Gas Pipeline Acquisition

On September 13, the FTC announced that it is requiring NEXUS Gas Transmission and North Coast Gas Transmission to remove a non-compete clause from their sales agreement pursuant to which NEXUS will acquire North Coast's Generation Pipeline entity, which "owns and operates a 23-mile [natural gas] pipeline in the Toledo, Ohio area." According to the FTC, the "non-compete clause . . . [would] keep[] North Coast from competing to provide natural gas pipeline transportation, for three years after the acquisition closes, in parts of the Ohio counties of Lucas, Ottawa, and Wood," where North Coast has another pipeline. The FTC said that "[t]he Generation pipeline and the North Coast pipeline may be the best alternatives for some large industrial customers in the Toledo area who are located reasonably close to both pipelines. By prohibiting North Coast from competing with the Generation pipeline, the non-compete clause would harm customers who otherwise would benefit from that competition." The FTC alleges that the non-compete provision, "is not reasonably limited in scope to protect a legitimate business interest."

Commissioner Christine S. Wilson issued a concurring statement in which she explained that she "voted to accept the proposed consent agreement because [she] believe[s] that this particular noncompete was

broader than necessary to protect the legitimate interests of the parties” but “that many non-compete clauses are lawful and enforceable.” Commissioners Chopra and Slaughter wrote that “[t]he FTC should always be skeptical of non-compete agreements that unnecessarily suppress competition.” [Press Release, Fed. Trade Comm’n, FTC Puts Conditions on NEXUS Gas Transmission, LLC’s Acquisition of Generation Pipeline LLC \(Sept. 13, 2019\)](#); [Concurring Stmt. of Comm’r Christine S. Wilson, In the Matter of DTE Energy Co., Enbridge Inc. & NEXUS Gas Transmission LLC, F.T.C. File No. 191-0068 \(Sept. 12, 2019\)](#); [Stmt. of Comm’rs Rohit Chopra & Rebecca Kelly Slaughter, In the Matter of DTE Energy Co., Enbridge Inc. & NEXUS Gas Transmission LLC, F.T.C. File No. 191-0068 \(Sept. 12, 2019\)](#).

FTC Releases FY 2018 Hart-Scott-Rodino Data

On September 16, the FTC released the annual Hart-Scott-Rodino Report, which details FTC and DOJ merger review data. According to the FTC, “companies notified the agencies of 2,111 HSR reportable transactions during fiscal year 2018, which is a 2.9 percent increase over the 2,052 transactions reported in fiscal year 2017.” Further, “a total of 39 merger challenges [were] brought to maintain competition in sectors of great importance to consumers, including healthcare, technology, medical devices, energy, and consumer goods and services.” [Press Release, Fed. Trade Comm’n, FTC Approves Fiscal Year 2018 Hart-Scott-Rodino Premerger Notification Report \(Sept. 16, 2019\)](#); [Fed. Trade Comm’n & U.S. Dep’t of Justice, Hart-Scott-Rodino Annual Report, Fiscal Year 2018](#).

US – DOJ Criminal

DOJ Secures Additional Guilty Plea in Freight Forwarding Price Fixing Investigation

On September 17, the DOJ announced that Dip Shipping Company, LLC “agreed to plead guilty to an antitrust charge for its role in a conspiracy to fix prices of freight forwarding services sold to customers in the United States and elsewhere.” The plea agreement includes a \$488,250 criminal fine. The DOJ alleged that “Dip Shipping and its co-conspirators met in the United States and elsewhere to discuss and agree to fix prices.” According to the DOJ’s press release, “Dip Shipping is the first company to be charged and to agree to plead guilty in the Justice Department’s ongoing investigation in the freight forwarding industry.” In November 2018, the Department of Justice announced that two of Dip Shipping Company’s executives pleaded guilty “for their roles in orchestrating a nationwide conspiracy to fix prices for international freight forwarding services, marking the first convictions in this investigation” and “agreed to pay a criminal fine and cooperate with the ongoing investigation.” In June, these executives were sentenced to prison terms of 18 months and 15 months. [Press Release, U.S. Dep’t of Justice, Freight Transportation Company Agrees to Plead Guilty to Antitrust Charge \(Sept. 17, 2019\)](#); [Press Release, U.S. Dep’t of Justice, Two Freight Transportation Executives Sentenced to Prison Terms for Price Fixing \(June 25, 2019\)](#); [Press Release, U.S. Dep’t of Justice, Two Freight Forwarding Executives Plead Guilty To Fixing Prices \(Nov. 30, 2018\)](#).

US – Agency News*DOJ Antitrust Division to Review Antitrust Guidelines for International Enforcement and Cooperation*

On September 12, in a speech on the topic of international comity in antitrust enforcement at the 46th Annual Fordham Competition Law Institute Conference on International Antitrust Law and Policy, Assistant Attorney General for the Antitrust Division Makan Delrahim announced that he has “directed the Division to undertake a review of” the January 2017 DOJ-FTC Antitrust Guidelines for International Enforcement and Cooperation. He said that the Guidelines “make clear our ongoing commitment to applying principles of comity to our own decision making,” but that “[w]e need to ensure . . . that comity is a two-way street. We cannot agree to subject American companies to unfair treatment under foreign laws in the name of comity and avoidance of conflict.” He went on to say: “Any application of comity has to take into account the particular enforcer, including any history of discrimination in favor of its own domestic companies or against foreign companies. We will not defer our own investigation unless we are certain that our foreign counterparts will conduct a full and fair investigation of their own.”

In light of this, Mr. Delrahim said, the Division “will make sure that these Guidelines: (1) first, accurately reflect the latest guidance from our Supreme Court and lower courts; (2) second, adequately reflect the importance of comity to our relationships with international competition enforcers; and (3) third, adequately convey the symmetry that we expect from our international counterparts.” Mr. Delrahim said: “we hope to further strengthen our invaluable relationships with our international colleagues, as we all pursue the common goal of protecting competition.” [Makan Delrahim, “With a Little Help from My Friends”: Using Principles of Comity to Protect International Antitrust Achievements \(Sept. 12, 2019\); U.S. Dep’t of Justice & Fed. Trade Comm’n, Antitrust Guidelines for International Enforcement & Cooperation \(Jan. 13, 2017\).](#)

FTC Developing Several Guidance Documents

FTC Chairman Joseph J. Simons announced that the FTC is currently developing several guidance documents following its Hearings on Competition and Consumer Protection in the 21st Century. The guidance being drafted includes a “document explaining how the antitrust laws might apply to conduct by technology platforms” and “an addendum to the 2006 Horizontal Merger Commentary explaining how staff analyzes acquisitions of nascent competitors and how staff accounts for non-price factors in horizontal merger analysis.”

The FTC staff is also working on “a guidance document on vertical mergers . . . similar to the 2006 Commentary on the Horizontal Merger Guidelines” which “will help explain the staff’s analytic framework for evaluating vertical mergers.” According to Chairman Simons, the document “will make clear that anticompetitive vertical mergers are not unicorns, and there should not be a presumption that all vertical

mergers are benign.” This document is in addition to the FTC-DOJ effort “to develop vertical merger guidelines.”

Chairman Simons made the announcement in a speech on September 13 at the 46th Annual Fordham Competition Law Institute Conference on International Antitrust Law and Policy. Bilal Sayyed, Director of the FTC’s Office of Policy Planning, also discussed the FTC’s work on the guidance documents in a speech on September 10. [Prepared Remarks of Chairman Joseph Simons, Fordham Speech on Hearings Output \(Sept. 13, 2019\)](#); [Prepared Remarks of Bilal Sayyed, Director, Office of Policy & Planning, Fed. Trade Comm’n \(Sept. 10, 2019\)](#).

US – Private Litigation

Court Dismisses Claims in Case Alleging DRAM Price Fixing

On September 3, Judge Jeffrey S. White of the United States District Court for the Northern District of California granted defendants’ motion to dismiss certain antitrust claims brought against manufacturers of dynamic random access memory (DRAM) by plaintiffs seeking to represent a class of purchasers of products into which DRAM was incorporated. The plaintiffs, indirect purchasers, allege that Micron, Samsung and Hynix “conspired to reduce the supply of DRAM in order to drive up prices.”

In dismissing many of the plaintiffs’ claims, the court, among other things, found that plaintiffs lacked Article III standing under the U.S. Constitution because they failed adequately to allege injury from the defendants’ conduct. The court could not “infer . . . that the supracompetitively-priced DRAM component *and* its supracompetitive price wended their way into the DRAM Products Plaintiffs purchased.” The court cited a “lack of detail concerning the varieties of types, makes, and models of the products implicated in the Complaint,” and found that “Plaintiffs do not identify the pertinent OEMs or retailers who manufactured and/or sold the ‘relevant’ DRAM Products.” The court also found “that the named Plaintiffs lack standing to bring claims under the laws of [nineteen states and the District of Columbia] where they do not reside and have alleged no injury.” The court further found that the plaintiffs lacked antitrust standing, and went on to hold that the complaint failed adequately to allege a conspiracy, finding, among other things, that allegations of “public statements, responsive [behavior], membership in trade associations [and] market conditions are just as consistent with innocent behavior as unlawful behavior.” [Jones v. Micron Tech. Inc., No. 18-cv-2518 \(N.D. Cal. Sept. 3, 2019\)](#).

Complaint against Florida Health Insurer Dismissed on McCarran-Ferguson Grounds

On September 20, Judge Paul G. Byron of the United States District Court for the Middle District of Florida dismissed with prejudice a complaint alleging that Blue Cross and Blue Shield of Florida entered into anticompetitive exclusivity agreements with insurance brokers which allegedly denied a rival insurer access to certain Florida health insurance markets. The court found that the complaint alleges that

“brokers help consumers by guiding them through the complexities of health insurance purchasing and enrollment[;] . . . brokers ensure consumers get the best policy at the most affordable price, and they seek to understand each personal situation and create recommendations that complement the client’s financial and medical security needs[;] . . . consumers rely on . . . brokers as expert personal insurance advisors . . . [and] brokers increase the number of policyholders, therefore spreading the risk.” The court concluded: “It is hard to imagine a relationship more squarely at the core of the business of insurance than the one described” in the complaint. The court also found that the exclusivity arrangements were “lawful” and did not amount to coercion, and that the insurer-broker relationship was regulated by Florida law. Therefore, the court held that the contracts were exempt from federal antitrust law under the McCarran-Ferguson Act. [Oscar Ins. Co. of Fla. v. Blue Cross & Blue Shield of Fla., Inc., No. 18-cv-1944 \(M.D. Fla. Sept. 20, 2019\)](#).

Court Dismisses Complaint Alleging Inductors Price-Fixing Conspiracy

On September 24, Judge Edward J. Davila of the United States District Court for the Northern District of California granted defendants’ motion to dismiss a complaint alleging a “multi-year price-fixing conspiracy for Inductors.” The court found that the plaintiffs failed to “plead a single price charged for any product” and instead improperly relied on allegations of increases in “average pricing” of inductors, which come in various types. The court also found that the plaintiffs’ allegation of a conspiracy was implausible, citing, among other things: “the large influx of manufacturers into the inductors market”; a decrease in the defendants’ “collective market share . . . from over 80% to approximately 60%”; the plaintiffs’ failure “to exclude the possibility that the prices for Inductors were due to market demand”; and the plaintiffs’ failure “to exclude the possibility that the price for Inductors was due to the cost of raw materials.” The court also found plaintiffs’ allegations concerning information exchanges and trade association activity to be “too general, too vague and too conclusory,” and that a “pending government investigation is not a ‘plus factor’” suggesting a conspiracy. The court granted plaintiffs leave to amend their complaint.” *In re Inductors Antitrust Litig., No. 18-cv-198 (N.D. Cal. Sept. 24, 2019)*.

EU Development

Margrethe Vestager Re-Appointed to be Commissioner for Competition and Appointed to be Commission Executive Vice-President

On September 9, President-elect of the European Commission Ursula von der Leyen announced that, subject to consent of the European Parliament, Margrethe Vestager will be re-appointed as Commissioner for Competition. In addition, Commissioner Vestager will become an executive vice president of the Commission with a portfolio relating to digital issues. According to President-elect von der Leyen, Ms. Vestager “will coordinate [the Commission’s] whole agenda on a Europe fit for the digital age.” A hearing on Ms. Vestager’s nomination was held on October 8 and a vote in the European Parliament is expected to be held on October 23. [Press Release, Eur. Comm’n, The von der Leyen Commission: for a Union that](#)

[strives for more \(Sept. 9, 2019\)](#); [Press Release, Eur. Parliament, Hearing of Executive Vice President-designate Margrethe Vestager \(Oct. 8, 2019\)](#).

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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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