
January 7, 2020

Antitrust Month in Review – December 2019

The U.S. federal antitrust enforcement agencies had an active month in December. The Federal Trade Commission (FTC) announced challenges to two proposed acquisitions, while the Antitrust Division of the Department of Justice (DOJ), in a significant consent decree enforcement action, announced that it is seeking to clarify and extend the term of the final judgment in the 2010 Live Nation-Ticket Master merger case. The DOJ also announced a development in its ongoing criminal investigation of the generic pharmaceuticals industry and the resolution of a civil conduct investigation involving the National Association for College Admission Counseling.

We discuss these developments below.

US – DOJ/FTC Merger

DOJ Seeks to Modify and Extend Live Nation-Ticketmaster Consent Decree

In what it described as “the most significant enforcement action of an existing antitrust decree by the Department in 20 years,” the DOJ announced on December 19 that it intends to move to modify and extend the term of the final judgment which imposed conditions on the 2010 merger of Live Nation and Ticketmaster. According to the DOJ, “[t]he 2010 Final Judgment permitted Live Nation to merge with Ticketmaster but prohibited the company from retaliating against concert venues for using another ticketing company, threatening concert venues, or undertaking other specified actions against concert venues for ten years. Despite the prohibitions in the Final Judgment, Live Nation repeatedly and over the course of several years engaged in conduct that, in the Department’s view, violated the Final Judgment.” Therefore, the DOJ said, “[t]o put a stop to this conduct and to remove any doubt about defendants’ obligations under the Final Judgment going forward, the Department and Live Nation have agreed to modify the Final Judgment to make clear that such conduct is prohibited.” Judge Rosemary M. Collyer of the United States District Court for the District of Columbia granted the motion to reopen the proceedings on December 20 and set a deadline of January 10, 2020 for the filing of the proposed amendments. [Press Release, U.S. Dep’t of Justice, Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster \(Dec. 19, 2019\)](#); Minute Order, U.S. v. Ticketmaster Entm’t, Inc., No. 10-cv-139 (D.D.C. Dec. 20, 2019).

FTC Challenges Two Proposed Acquisitions

On December 17, the FTC announced that it is seeking to block the acquisition of Pacific Biosciences of California (PacBio) by Illumina. The FTC alleges “that Illumina is seeking to unlawfully maintain its

monopoly in the U.S. market for next-generation DNA sequencing (NGS) systems by extinguishing PacBio as a nascent competitive threat,” “that the proposed acquisition is illegal because it may substantially lessen competition in the U.S. NGS market by eliminating current competition and preventing future competition between Illumina and PacBio,” and “that the acquisition would harm competition by reducing the combined firm’s incentive to innovate and develop new products.” According to the FTC, Illumina’s systems use “short-read sequencing technology, which has been the predominant NGS technology in the United States for the last decade,” and PacBio’s systems use “long-read sequencing technology.” However, “PacBio has made significant technological advancements in recent years that have increased the accuracy and overall throughput of its systems, while lowering the cost.” “As a result,” the FTC said, “PacBio is a closer alternative to Illumina than ever before. Customers have already switched some sequencing volume from Illumina to PacBio for certain use cases and applications, and PacBio is poised to take increasing sequencing volume from Illumina in the future.” On January 3, the parties announced that they are abandoning the deal. [Press Release, Fed. Trade Comm’n, FTC Challenges Illumina’s Proposed Acquisition of PacBio \(Dec. 17, 2019\)](#); [Press Release, Fed. Trade Comm’n, Statement of Gail Levine, Deputy Director of FTC Bureau of Competition, Regarding the Announcement that Illumina Inc. has Abandoned Its Proposed Acquisition of Pacific Biosciences of California \(Jan. 2, 2020\)](#).

Also, on December 19, the FTC announced that it is seeking to block the acquisition of the “private label ready-to-eat cereal business” of TreeHouse Foods by Post Holdings. According to the FTC, “Post and TreeHouse are two of only three significant manufacturers and distributors of private label ready-to-eat cereal in the United States. The acquisition would give Post more than a 60 percent share of an already highly concentrated market and eliminate the vigorous competition between them to serve grocers across the country.” [Press Release, Fed Trade Comm’n, FTC Alleges Post Holdings, Inc.’s Proposed Acquisition of TreeHouse Foods, Inc.’s Private Label Ready-to-Eat Cereal Business Will Harm Competition \(Dec. 19, 2019\)](#).

US – DOJ/FTC Civil Non-Merger

National Association for College Admission Counseling Agrees to Change Code of Ethics and Professional Practices in Response to DOJ Investigation

On December 12, the DOJ announced that it and the National Association for College Admission Counseling (NACAC) entered into a proposed consent decree pursuant to which the NACAC will “remove three anticompetitive rules from its Code of Ethics and Professional Practices.” The DOJ alleged that certain rules contained in the code “prevented, or severely limited, colleges from (1) directly recruiting transfer students from another college, (2) offering incentives of any kind to college applicants who applied via a process known as Early Decision, and (3) recruiting incoming college freshmen after May 1.” According to the DOJ, “[t]hese rules [were] drafted, voted on, and enforced by NACAC members,” which include “non-profit colleges and their admissions personnel, and high schools and their guidance counselors.” While noting that “[m]any of [the NACAC] rules appear to strengthen the market for college admissions,” the so-called

“Recruiting Rules . . . were not reasonably necessary to achieve the otherwise market-enhancing rules contained in the [code], and furthermore had the effect of unlawfully restraining competition among NACAC’s college members, resulting in harm to college applicants and potential transfer students.” The consent decree is subject to approval by a federal district judge. [Press Release, U.S. Dep’t of Justice, Justice Department Files Antitrust Case and Simultaneous Settlement Requiring Elimination of Anticompetitive College Recruiting Restraints \(Dec. 12, 2019\)](#); [Compl., U.S. v. Nat’l Assoc. for College Admission Counseling, No. 19-cv-3706 \(D.D.C. Dec. 12, 2019\)](#).

US – DOJ Criminal

DOJ Charges Rising Pharmaceuticals with Criminal Antitrust Violations and Enters into Deferred Prosecution Agreement with the Company

On December 3, the DOJ announced that it charged Rising Pharmaceuticals Inc. for its “participat[ion] in a criminal antitrust conspiracy with a competing manufacturer of generic drugs and its executives to fix prices and allocate customers for Benazepril HCTZ, a medicine used to treat hypertension.” At the same time, the DOJ “announced a deferred prosecution agreement resolving the charge against Rising, under which the company admits that it conspired to fix prices and allocate customers for” the drug. According to the DOJ, “under the deferred prosecution agreement, Rising has agreed to cooperate fully with [the] Antitrust Division’s ongoing criminal investigation. To allow Rising to comply with the agreement’s terms, the United States will defer prosecuting Rising for three years, or until its ongoing bankruptcy proceedings become final, whichever comes first.” The DOJ’s decision to enter into the deferred prosecution agreement was based on, among other things, “the company’s substantial and ongoing cooperation with the investigation to date, including its disclosure of information regarding criminal antitrust violations involving drugs other than those identified in the criminal charge and the agreement. . . . [T]his cooperation has allowed the United States to advance its investigation into criminal antitrust conspiracies among other manufacturers of generic pharmaceuticals.”

The company also agreed with the DOJ’s Civil Division “to pay . . . civil damages for False Claims Act violations predicated on Rising’s antitrust conduct.” The DOJ said that “[t]he agreement . . . requires Rising to pay a \$1.5 million monetary penalty, reduced from the fine of approximately \$3.6 million called for under the U.S. Sentencing Guidelines, due to Rising’s financial condition and liquidation.” The agreements require the approval of a bankruptcy court.

According to the DOJ, “[t]his charge is the fourth in the Department of Justice’s Antitrust Division’s ongoing criminal investigation in the generic pharmaceuticals industry.” [Press Release, U.S. Dept’ of Justice, Second Pharmaceutical Company Admits to Price Fixing, Resolves Related False Claims Act Violations \(Dec. 3, 2019\)](#).

US – Agency News*FTC Announces Workshop on Non-Compete Clauses in Employment Contracts*

On January 9, the FTC will host, at the Commission’s headquarters in Washington, a public workshop which will “examine whether there is a sufficient legal basis and empirical economic support to promulgate a Commission Rule that would restrict the use of non-compete clauses in employer-employee employment contracts.” According to the FTC, “[n]on-compete clauses are covenants in employment contracts that limit the ability of an employee to join or start a competing firm after a job separation. At the workshop, legal scholars, economists, and policy experts will review the current state of the law and economic literature on non-compete clauses in contracts between employers and employees. Academic panels will evaluate the effects of non-compete clauses on labor market participants and their efficiency rationales (if any). The panels also will consider the potential harms to workers that can and should be addressed through the FTC’s rulemaking, law enforcement, or advocacy authority.” The public comment period for the workshop runs through February 10. [Press Release, Fed. Trade Comm’n, FTC to Hold Workshop on Non-Compete Clauses Used in Employment Contracts \(Dec. 5, 2019\)](#).

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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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