

March 19, 2020

Antitrust Month in Review – February 2020

February was a particularly active month for the Federal Trade Commission (FTC). The Commission sued to block three mergers: one in the shaving industry, one in the coal mining industry and one in the healthcare industry. The FTC also settled a matter involving issues of market allocation and board interlocks. The Antitrust Division of the Department of Justice (DOJ) also had an active month in criminal enforcement, while several states and the District of Columbia lost their bid to block the Sprint-T-Mobile merger. At the end of the month, the United States Court of Appeals for the Seventh Circuit issued a significant monopolization opinion.

We discuss these and other developments below.

US – DOJ/FTC/State Attorney General Merger

After FTC Sues to Block Acquisition of Harry's, Inc., Parties Abandon Transaction

On February 3, the FTC announced that it would seek to block Edgewell Personal Care Company's acquisition of Harry's, Inc., which the FTC says was a "key competitor" in the shaving industry. According to the FTC, "[t]he loss of Harry's as an independent competitor would remove a critical disruptive rival that has driven down prices and spurred innovation in an industry that was previously dominated by two main suppliers, one of whom is the acquirer." In announcing the action, the FTC characterized Harry's as "a uniquely disruptive competitor in the wet shave market" which "forced its rivals to offer lower prices, and more options, to consumers across the country." The FTC alleged that "the proposed acquisition would eliminate important and growing competition among suppliers of wet shave razors, and would inflict significant harm on consumers of razors across the United States." A week after the FTC announced its action, the parties announced that they terminated their merger agreement. [Press Release, Fed. Trade Comm'n. FTC Files Suit to Block Edgewell Personal Care Company's Acquisition of Harry's, Inc. \(Feb. 3, 2020\)](#); [Press Release, Fed. Trade Comm'n. Statement of Daniel Francis, Deputy Director of FTC Bureau of Competition, Regarding Announcement that Edgewell Personal Care Company has Abandoned Its Proposed Acquisition of Harry's, Inc. \(Feb. 10, 2020\)](#).

FTC Sues to Block Formation of Coal Mining Joint Venture

On February 26, the FTC announced that it filed an administrative complaint and an action in federal district court seeking to enjoin the formation of a joint venture to combine the coal mining operations of Peabody Energy Corporation and Arch Coal in Wyoming's Southern Powder River Basin [SPRB], which the FTC alleges "would eliminate the substantial head-to-head competition between the two largest coal miners

in the United States” and “would likely raise coal prices to power-generating utilities that provide electricity to millions of Americans.” The FTC asserts a relevant product market for SPRB coal, which, the complaint alleges, “is distinguishable from coal mined elsewhere in the United States (e.g., the Illinois Basin, the Uinta Basin located in Utah and Colorado, and coal mined in the Appalachian region) by a number of key factors that are important to electric power producers”; and that coal from other regions does not act as a price constraint on SPRB coal, including for reasons related to environmental regulations and shipping costs. The complaint also cites high costs to switch to alternative fuel sources. [Press Release, Fed. Trade Comm’n, FTC Files Suit to Block Joint Venture between Coal Mining Companies Peabody Energy Corporation and Arch Coal \(Feb. 26, 2020\)](#).

FTC Sues to Block Merger of Philadelphia Hospital Systems

On February 27, the FTC announced that it filed an administrative complaint and an action in federal district court seeking to enjoin the merger of Jefferson Health and Albert Einstein Healthcare Network. The FTC alleges that the “proposed merger would eliminate the robust competition between Jefferson and Einstein for inclusion in health insurance companies’ hospital networks to the detriment of patients.” According to the FTC, “Einstein’s GAC [general acute care] hospitals compete significantly with Jefferson’s GAC hospitals in and around North Philadelphia and Montgomery County” and “as a result of the merger, the parties would control at least 60% of the inpatient GAC hospital services market in and around North Philadelphia, and at least 45% of that market in and around Montgomery County.” The FTC also alleges that the combined system “would control at least 70% of the inpatient acute rehabilitation services market in the Philadelphia area.” [Press Release, Fed. Trade Comm’n, FTC and Commonwealth of Pennsylvania Challenge Proposed Merger of Two Major Philadelphia-area Hospital Systems \(Feb. 27, 2020\)](#).

DOJ Requires Divestiture in Plastics Packaging Acquisition

On February 19, the DOJ announced that in order for Liqui-Box, Inc. (a portfolio company of Olympus Growth Fund VI L.P.) to acquire the plastics division of DS Smith, the deal parties will be required to divest certain of DS Smith’s product lines. According to the DOJ, “[w]ithout the divestiture, the proposed acquisition would eliminate competition between two of the primary suppliers of dairy, post-mix, smoothie, and wine BiBs [bags-in-boxes] in the United States.” The DOJ alleged that “Liqui-Box and DS Smith, under its Rapak brand, are two of only three significant U.S. suppliers of dairy, post-mix (e.g., soda syrups and other beverage concentrates), and smoothie BiBs. The companies are also two of only four U.S. suppliers of BiBs that hold and dispense the wine in boxed wines.” The divestiture buyer is TriMas Corporation, which, according to the DOJ “operat[es] in the consumer products, aerospace, and industrial end markets, [and] already sells a variety of packaging products for the health, beauty and home care, beverage, and industrial markets.” [Press Release, U.S. Dep’t of Justice, Justice Department Requires Divestiture in Order for Liqui-Box to Proceed With Acquisition of Plastics Division of DS Smith \(Feb. 19, 2020\)](#).

States Lose Bid to Block Sprint-T-Mobile Merger

On February 11, Judge Victor Marrero of the United States District Court for the Southern District of New York denied the request of several states and the District of Columbia to enjoin the merger of Sprint and T-Mobile. In so ruling, the court concluded that even though the states put forth a strong prima facie case, “a presumption of anticompetitive effects would be misleading in this particularly dynamic and rapidly changing industry.” The court wrote that “T-Mobile has redefined itself over the past decade as a maverick that has spurred the two largest players in its industry to make numerous pro-consumer changes,” and the merger “would allow the merged company to continue T-Mobile’s undeniably successful business strategy for the foreseeable future.” The court also wrote that “Sprint is falling farther and farther short of the targets it must hit to remain relevant as a significant competitor.” The court also cited the FCC and DOJ remedy, which will “arrange the entry of DISH as a fourth nationwide competitor.” [New York v. Deutsche Telekom AG, No. 19-cv-5434 \(Feb. 11, 2020\)](#).

US – DOJ/FTC Civil Non-Merger*Rent-To-Own Companies Settle FTC Market Allocation Charges; Settlement Includes Prohibition on Board Interlocks*

On February 21, the FTC announced that Aaron’s Inc., Buddy’s Newco, LLC, and Rent-A-Center, Inc. – three rent-to-own companies – agreed to enter into consent agreements prohibiting them and their franchisees “from entering into any reciprocal purchase agreement or inviting others to do so, and from enforcing the non-compete clauses still in effect from the past reciprocal purchase agreements.” The FTC alleged “that from June 2015 to May 2018, Aaron’s, Buddy’s, and Rent-A-Center each entered into anticompetitive reciprocal agreements with each other and other competitors. These agreements swapped customer contracts from rent-to-own, or RTO, stores in various local markets. An outcome was that one party to the agreement closed down stores and exited a local market where the other party continued to maintain a presence.”

The FTC also alleged that there had been “prior board-level relationships between” Aaron’s and Buddy’s because the managing partner of the private equity firm that owns Buddy’s served on Aaron’s board. Therefore, under the consent agreements, “Aaron’s and Buddy’s . . . are barred from having any of their representatives serve as a board member or officer of a competitor, and from allowing any competitor’s representative to serve on their boards.” Commissioners Rohit Chopra and Rebecca Kelly Slaughter dissented. Commissioner Chopra criticized the Commission’s acceptance of “three no-money, no-fault proposed orders.” [Press Release, Fed. Trade Comm’n, Rent-to-Own Operators Settle Charges that They Restrained Competition through Reciprocal Purchase Agreements \(Feb. 21, 2020\)](#); [Dissenting Stmt. of Comm’r Rohit Chopra, In the Matter of Rent-to-Own Market Allocation Scheme \(Feb. 21, 2020\)](#).

US – DOJ Criminal*DOJ Announces Indictments and Pleas in Several Criminal Cases*

In February, the DOJ announced two guilty pleas in its ongoing investigations into bid rigging in insulation contracting and a guilty plea in its ongoing price fixing, bid rigging and market allocation investigation in the generic pharmaceuticals industry. The agency also announced indictments in the generic pharmaceuticals investigation as well as in its ongoing investigations of bid rigging of online government auctions; price fixing and bid rigging of commercial flooring products and services; and price fixing of suspension assemblies used in hard disk drives. [Press Release, U.S. Dep't of Justice, Insulation Contracting Firm and Co-Owner Plead Guilty to Antitrust and Fraud Charges \(Feb. 3, 2020\)](#); [Press Release, U.S. Dep't of Justice, Former Generic Pharmaceutical Executive Pleads Guilty for Role in Criminal Antitrust Conspiracy \(Feb. 14, 2020\)](#); [Press Release, U.S. Dep't of Justice, Generic Drug Executive Indicted on Antitrust and False Statement Charges \(Feb. 4, 2020\)](#); [Press Release, U.S. Dep't of Justice, Missouri Businessman Arrested on Antitrust Charge for Rigging Bids at Online Government Auctions \(Feb. 5, 2020\)](#); [Press Release, U.S. Dep't of Justice, Flooring Executive Charged in Antitrust and Money Laundering Conspiracies \(Feb. 5, 2020\)](#); [Press Release, U.S. Dep't of Justice, Two Executives Indicted in Long-Running Antitrust Conspiracy to Fix Prices for Disk Drive Components \(Feb. 14, 2020\)](#).

US – Agency News*FTC and FDA Collaborating to Promote Biologic Competition*

On February 3, the FTC and Food and Drug Administration (FDA) issued a statement describing their efforts to “work together to promote competitive markets for biological products.” As the FTC explained, biological products – or biologics – are medicines “manufactured in a microorganism or in plant or animal cells,” many of which “are produced using recombinant DNA technology.” The statement sets out ways in which the agencies “are collaborating to support appropriate adoption of biosimilars, deter false or misleading statements about biosimilars, and deter anticompetitive behaviors in this industry.” A biosimilar is a biologic that is “highly similar to its reference product, a biological medication already approved by [the] FDA.” The agencies scheduled a public meeting on biologic competition for March 9 and will engage in other public outreach efforts on the topic. [Joint Statement of the Food & Drug Administration and the Federal Trade Commission Regarding a Collaboration to Advance Competition in the Biologic Marketplace \(Feb. 3, 2020\)](#); [Press Release, Fed. Trade Comm'n, FTC, FDA Sign Joint Statement Promoting Competition in Markets for Biologics \(Feb. 3, 2020\)](#); [Paul, Weiss Client Memo., FTC and FDA Collaborating to Promote Biologic Competition \(Feb. 3, 2020\)](#).

US – Private Litigation*Seventh Circuit Reverses District Court Dismissal of Monopolization Claims Against Comcast*

On February 24, the United States Court of Appeals for the Seventh Circuit reversed a lower court's dismissal of monopolization claims brought against Comcast by Viamedia, a competitor for cable advertising representation services. Providers of cable advertising representation services work on behalf of cable systems to place local ads in cable television programming, and can do so on multiple systems serving an area through "interconnects" of those systems. Viamedia alleged that Comcast denied Viamedia access to certain interconnects controlled by Comcast, and that Comcast required cable companies to purchase representation services from it in order to gain necessary access to the interconnect that Comcast controlled. In remanding the case back to the district court, the Seventh Circuit wrote: "Viamedia alleged sufficiently, and at summary judgment offered sufficient evidence, that Comcast violated Section 2 of the Sherman Act. Viewing the allegations and evidence in the light most favorable to Viamedia, Comcast abruptly terminated decade-long, profitable agreements and sacrificed short-term profits to obtain and entrench long-term market power, and used its monopoly power in Interconnect services market to force its MVPD competitors into a relationship that makes Comcast a gatekeeper of its competitors' advertising revenue." [Viamedia, Inc. v. Comcast Corp., No. 18-2852 \(7th Cir. Feb. 24, 2020\)](#).

United Kingdom*CMA Clears Google's Acquisition of Looker*

On February 13, the U.K. Competition and Markets Authority (CMA) announced that it cleared Google's acquisition of Looker without conditions. The CMA examined "whether the loss of direct competition between Google and Looker in the supply of BI [business intelligence] tools could lead to increased prices or reductions in quality," but found that "Google and Looker are not considered close competitors by businesses using BI tools, who can still choose from other providers." BI tools "allow companies to analyse a broad range of business data including sales, finance and advertising data." The CMA also examined "whether Google could leverage its market power in online advertising and web analytics to drive rival BI providers out of the market," but "found that although Google had the ability to make it difficult for rivals to access the Google-generated data they need from online advertising and web analytics services, there was no strong evidence they would have the incentive to do this." [Press Release, Competition & Mkts. Auth., Deal between Google and Looker given the go-ahead \(Feb. 13, 2020\)](#).

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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:

Justin Anderson
+1-202-223-7321

janderson@paulweiss.com

Robert A. Atkins
+1-212-373-3183

ratkins@paulweiss.com

Craig A. Benson
+1-202-223-7343

cbenson@paulweiss.com

Joseph J. Bial
+1-202-223-7318

jbial@paulweiss.com

Andrew J. Forman
+1-202-223-7319

aforman@paulweiss.com

Kenneth A. Gallo
+1-202-223-7356

kgallo@paulweiss.com

Jonathan S. Kanter
+1-202-223-7317

jkanter@paulweiss.com

William B. Michael
+1-212-373-3648

wmichael@paulweiss.com

Jane B. O'Brien
+1-202-223-7327

jobrien@paulweiss.com

Jacqueline P. Rubin
+1-212-373-3056

jrubin@paulweiss.com

Charles F. "Rick" Rule
+1-202-223-7320

rrule@paulweiss.com

Aidan Synnott
+1-212-373-3213

asynnott@paulweiss.com

Brette Tannenbaum
+1-212-373-3852

btannenbaum@paulweiss.com

Daniel J. Howley
+1-202-223-7372

dhowley@paulweiss.com

Practice Management Attorney Mark R. Laramie contributed to this client alert.