January 14, 2019

Antitrust Month in Review – December 2018

In late December, the lapse in federal appropriations curtailed the work of the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ). Prior to that, the FTC's Chief Administrative Law Judge issued an initial decision finding that a proposed acquisition in the titanium dioxide industry would violate Section 5 of the FTC Act. This is the latest development in the FTC's effort to block this transaction. (Last summer, a federal district court preliminarily enjoined the transaction.) Notwithstanding the federal government shutdown, trial in the FTC's suit against Qualcomm regarding certain patent licensing practices is proceeding. Meanwhile, the judge overseeing the CVS-Aetna merger remedy proceeding has expressed concerns with the parties' agreed-upon proposed final judgment filed by the DOJ.

The DOJ Antitrust Division continued to stake out its position with respect to the antitrust implications of so-called FRAND (fair, reasonable and non-discriminatory) licensing commitments made by patent holders: Assistant Attorney General Delrahim withdrew the Antitrust Division's consent to a Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments that it issued jointly with the U.S. Patent and Trademark Office in 2013.

The Seventh Circuit Court of Appeals upheld the dismissal on summary judgment of a containerboard price fixing case. The opinion contains an interesting discussion of the significance of evidence relating to the behavior of firms in what the court described as an oligopolistic market. Elsewhere, the Sixth Circuit issued an opinion concerning the analysis of noncompetition agreements between businesses.

Additionally, there are notable developments in the European Union and Canada.

US – DOJ/FTC Merger

Court Expresses Concerns in CVS-Aetna Merger Remedy Proceeding and, Over the DOJ's Objection, Enters a Hold-Separate Order Pending Review of the Parties' Agreed Proposed Final Judgment

As described in our October *Month in Review*, on October 10, the Antitrust Division and five state attorneys general filed a complaint and proposed final judgment in the United States District Court for the District of Columbia requiring CVS and Aetna to divest Aetna's Medicare Part D prescription insurance plan business to WellCare Health Plans in order for the CVS-Aetna merger to proceed. 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." In what was scheduled to be a hearing on the DOJ's motion to appoint a monitoring trustee to oversee the parties' compliance with the settlement,

on November 29, Judge Richard J. Leon of the United States District Court for the District of Columbia expressed concern upon being informed that the transaction had closed. (The divestiture required by the DOJ has also been completed.)

After a further hearing on December 3, Judge Leon wrote that he is "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." He then ordered the parties to "show cause why [he] should not order CVS to hold its acquired Aetna business as a separate entity and to insulate the management of the CVS business from the management of the Aetna business, and vice versa, until [he] has hade [his] determination as to whether to enter final judgment in this case."

The DOJ, in responding to the order, wrote that "a district court may not evaluate the scope of the government's complaint during a Tunney Act review, even if the court believes that additional claims would have been justified" and that "[t]o inquire about claims that are not in a complaint would violate the separation of powers." The DOJ also argued that the court should not order CVS to hold separate the non-divested assets it acquired in the Aetna transaction because "[t]o the extent that the Court wishes to preserve a remedy for hypothetical violations not alleged in the Complaint, such violations are beyond the scope of the Court's review under the Tunney Act."

After a further hearing, Judge Leon wrote that CVS had agreed to take "constructive and appropriate" steps "to address [his] concerns," including: (i) operating the Aetna health insurance business separate from CVS's pharmacy business; (ii) "maintain[ing] [Aetna's] historical control over the pricing and product offerings brought to market"; (iii) "retain[ing] . . . current compensation and benefits" for Aetna employees; and (iv) "maintain[ing] a firewall to prevent the exchange of competitively sensitive information between CVS Health and Aetna." Judge Leon ordered CVS, during the pendency of the Tunney Act review, to abide by these commitments as well as to submit periodic sworn declarations from CVS "certifying compliance with each of these four measures" (which CVS had also offered to provide). In the Cigna-Express Scripts merger, the DOJ did not require a consent decree and therefore avoided court proceedings.[1] Order to Show Cause, U.S. v. CVS Health Corp., No. 18-cv-02340 (D.D.C. Dec 3, 2018); United States' Resp. to Order to Show Cause, U.S. v. CVS Health Corp., No. 18-cv-02340 (D.D.C. Dec. 12, 2018); Memo. Order, U.S. v. CVS Health Corp., No. 18-cv-02340 (D.D.C. Dec. 21, 2018).

FTC Administrative Law Judge Rules against Tronox Acquisition of Cristal Titanium Dioxide Business

In an Initial Decision released on December 14, FTC Administrative Law Judge D. Michael Chappell sided with the FTC and found that Tronox Limited's proposed acquisition of the titanium dioxide business of The

[1] Paul, Weiss represented Cigna in connection with the antitrust clearance of this deal.

National Titanium Dioxide Company Limited – known as Cristal – "may substantially lessen competition in the relevant market for the sale of chloride TiO2 in North America, by creating a highly concentrated market and increasing the likelihood of coordinated effects." TiO2 is a pigment "used to add whiteness, brightness, opacity and durability to paints, industrial and automotive coatings, plastics, and other specialty products." This decision follows a decision by a federal district court late last summer to issue a preliminary injunction blocking the acquisition, and an earlier decision by the European Commission to allow the acquisition with a divestiture remedy.

Similar to the district judge, Judge Chappell found that chloride TiO2 is the relevant product market and North America is the relevant geographic market. Judge Chappell cited a litany of evidence which he found established the "distinct characteristics" of chloride TiO2 as compared to sulfate TiO2, including its relative brightness, usage by manufacturers, the form in which it is sold, and price differential. Judge Chappell also cited regional pricing differences, among other things, in holding that North America was the relevant geographic market; this is also in line with the district judge's earlier ruling. Judge Chappell went on to find that the proposed acquisition would raise concentration in the relevant market to a level such that the transaction is "presumptively anticompetitive" and that "anticompetitive coordinated effects are in fact likely." Finally, Judge Chappell found that, contrary to the respondents' arguments, entry by alternate producers was not likely, nor were "claimed cost savings [resulting from the acquisition] cognizable."

According to press reports, the parties have offered to divest a manufacturing plant, but it remains to be seen whether the FTC is receptive to this proposed remedy. The administrative law judge's decision is subject to review by the Commissioners. Initial Decision, *In the Matter of Tronox Ltd.*, FTC Docket No. 9377 (Dec. 14, 2018); *FTC* v. *Tronox Ltd.*, No. 18-cv-01622 (D.D.C. Sept. 12, 2018); Press Release, Eur. Comm'n, Mergers: Commission approves Tronox's acquisition of Cristal, subject to conditions (July 4, 2018).

DOJ Requires Divestitures in Gray Television-Raycom Media Merger

On December 14, the Antitrust Division of the DOJ announced that it is requiring Gray Television and Raycom Media to divest "Big Four" (*i.e.*, NBC, CBS, ABC or FOX) affiliate television stations in certain markets in order for their merger to proceed. According to the DOJ's press release, without the divestitures, the combined company would own "two or more Big Four stations in each area" of concern to the DOJ, and "would likely charge cable and satellite companies higher retransmission fees to carry the combined company's broadcast stations, resulting in higher monthly cable and satellite bills for millions of Americans." The DOJ additionally asserted that "[t]he merger would also enable the [combined] company to charge local businesses and other advertisers higher prices for spot advertising in the divestiture markets." The parties must divest stations in the following markets: Knoxville, Tennessee; Toledo, Ohio; Waco–Temple–Bryan, Texas; Tallahassee, Florida–Thomasville, Georgia; Augusta, Georgia; Odessa-Midland, Texas; Panama City, Florida; Albany, Georgia; and Dothan, Alabama. The DOJ's agreement with

the parties is subject to court approval. Press Release, U.S. Dep't of Justice, Justice Department Requires Divestitures to Resolve Antitrust Concerns in Gray's Merger With Raycom (Dec. 14, 2018).

FTC Requires Restructuring of Joint Venture in Acquisition of PET Resin Production Facility

On December 21, the FTC announced that three entities which formed a joint venture to acquire an under-construction facility to produce polyethylene terephthalate (PET) resin used in the manufacture of bottles and food packaging "agreed to restructure their transaction and to accept certain other conditions." According to the FTC's press release, the parties have agreed to a consent order, the provisions of which will "prevent [them] . . . from using their joint ownership of the assets to act alone or in concert to exercise market power, or to transmit competitively sensitive information beyond what is necessary to accomplish the legitimate purposes of the joint venture." The FTC's Decision and Order will require, among other things, that the co-venturers do not acquire more than one third of the joint venture, and that the plant operate as a "tolling" facility whereby the venturers will supply their own inputs to the manufacturing process run by the plant. The FTC appointed a monitor to ensure compliance with the Order. The term of the Order is 20 years.

The under-construction plant was purchased out of bankruptcy, and the FTC noted that "[c]ompletion of this more efficient facility will significantly expand PET and PTA [a related product] capacity and output in North America, benefiting consumers." Press Release, Fed. Trade Comm'n, FTC Imposes Conditions in Joint Venture among Three Producers of PET Resin (Dec. 21, 2018); Decision & Order, *In the Matter of Corpus Christi Polymers LLC, et al.*, FTC File No. 181-0030 (Dec. 21, 2018).

US – Private Litigation

Seventh Circuit Affirms Dismissal of Case Alleging Price-Fixing Conspiracy among Containerboard Manufacturers

In a December 7 opinion authored by Chief Judge Diane Wood, the United States Court of Appeals for the Seventh Circuit affirmed a district court's summary judgment dismissal of a case alleging a price fixing conspiracy among manufacturers of containerboard. Noting that "this appeal concerns the fine line between agreement and tacit collusion, or, put another way, conscious parallelism" among oligopolists, Judge Wood wrote that the court's task was to "ask whether [plaintiffs] have produced any evidence that would rule out the hypothesis that the defendants were engaged in self-interested but lawful oligopolistic behavior," and concluded that "nothing in th[e] record would permit a trier of fact to conclude that the defendants were colluding, rather than behaving in their independent self-interest."

Against the backdrop of the oligopolistic market structure, the court was not persuaded by alleged "lockstep" price increases, noting that those increases were initiated by different defendants over time, and "[s]ometimes companies followed suit over a *month* later" rather than sooner. (The court further noted

that "[e]ven the attempts that saw quick turnaround times do little to raise suspicions. If it is in a company's self-interest to imitate a price leader's increase, why wait to enjoy the benefit?") What the plaintiffs urged as "foreknowledge" of price increases, the court characterized as perhaps "nothing more than somewhat accurate industry prediction." The court also noted that "40% of the attempted increases did not hold." Finally, the court did not credit evidence of frequent meetings and other communications among the manufacturers, writing that the plaintiffs "have no evidence indicating that the executives discussed illicit price-fixing or output restriction deals during their calls or meetings." *Kleen Prods. LLC* v. *Ga.-Pac. LLC*, No. 17-2808 (7th Cir. Dec. 7, 2018).

Sixth Circuit, Applying Michigan Law in Harmony with Federal Law, Holds That Rule of Reason Analysis Applies to Non-Compete Provision in Settlement Agreement between Businesses

On December 20, the United States Court of Appeals for the Sixth Circuit, following Michigan law, held that a noncompetition provision between two businesses is to be evaluated under the rule of reason. The provision in question is part of a settlement agreement between Innovation Ventures ("the maker and distributor of 5-Hour Energy") and Custom Nutrition Laboratories, which, according to the court's opinion, prohibits Custom Nutrition from manufacturing choline "Energy Liquid" for twenty years.

According to the court, Nutrition Science Laboratories acquired the assets of Custom Nutrition and subsequently began to manufacture choline energy shots. Innovation alleged this to be a violation of the noncompete provision of the settlement agreement. The district court, taking guidance from Michigan state law applicable to restrictive covenants in the employment context, reformed the term of "the restrictive covenants to last only three years instead of the original twenty." Both sides challenged this finding on appeal, where Nutrition Science argued that the provision "should be analyzed under the per se rule rather than the rule of reason" (which is used where the conduct at issue does not clearly fall into the categories of per se illegality).

After finding that Nutrition Science was bound by the restrictive covenant, the Sixth Circuit, citing a Michigan state case decided after the district court's decision, found that the state employment noncompete law was inapplicable. Rather, the court applied Michigan's general antitrust law, which "give[s] due deference to interpretations given by the federal courts to comparable antitrust statutes, including, without limitation, the doctrine of per se violations and the rule of reason." Accordingly, the court held that "business-to-business noncompete agreements like the one at issue here must be 'evaluated under the rule of reason.'" The court wrote that because the provisions at issue "do not fix prices or allocate territory," the "application of a per se rule is not appropriate here." The court remanded "so that the parties may provide the detailed record information necessary for the court to apply the rule-of-reason framework." *Innovation Ventures, LLC* v. *Custom Nutrition Labs., LLC*, No. 17-1734 (6th Cir. Dec. 20, 2018).

US – Agency News

Lapse in Appropriations Affects DOJ Antitrust Division and FTC

Due to the lapse in appropriations, activity related to competition enforcement has slowed at both the DOJ and FTC.

According to the DOJ's contingency plan, employees who "are needed to conduct or directly support ongoing criminal trials, prepare for criminal proceedings that have been scheduled for court (including the handling of arraignments, pleas, and sentencing hearings), and conduct or support ongoing civil litigation in which a continuance cannot be obtained" are excepted from furlough. The DOJ will continue to "prepare cases that must be filed due to Hart-Scott-Rodino or statute of limitations deadlines, only when an extension or waiver cannot be obtained and [Antitrust Division] leadership determines that allowing a proposed merger to go forward without objection would pose a reasonable likelihood of peril to property in which the United States has an immediate interest." U.S. Dep't of Justice, FY 2019 Contingency Plan (Sept. 11, 2018).

The FTC closed on December 28, and, according to the FTC's website, "[a]ll FTC events are postponed until future notice." However, the FTC's premerger notification office remains open to receive filings required by the Hart-Scott-Rodino Antitrust Improvements Act. Nevertheless, the FTC is not granting early termination requests. Pending actions have been stayed during the shutdown and for five days after. Status of FTC Online Services During 2018 Lapse in Funding; Order Regarding Scheduling, *In the Matter of Benco Dental Supply Co., et al.*, FTC Docket No. 9379 (Dec. 28, 2018); Order Regarding Scheduling, *In the Matter of Impax Labs., Inc.*, FTC Docket No. 9373 (Dec. 28, 2018); Order Regarding Scheduling, *In the Matter of Otto Bock HealthCare N. Am.*, FTC Docket No. 9378 (Dec. 28, 2018); Order Regarding Scheduling, *In the Matter of Tronox Ltd., et al.*, FTC Docket No. 9377 (Dec. 28, 2018).

Antitrust Division Withdraws Assent to 2013 Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments

In a speech on December 7 to the 19th Annual Berkley-Stanford Advanced Patent Law Institute, Assistant Attorney General Makan Delrahim announced that "[t]he Antitrust Division is hereby withdrawing its assent to the 2013 joint [Antirust Division-U.S. Patent and Trademark Office] 'Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments.'" AAG Delrahim noted that the Policy Statement's suggestion that patent injunctions or ITC exclusion orders could be harmful to competition was out of line with the Division's current thinking. He said that "[s]ince injunctions against infringement frequently do serve the public interest in maintaining a patent system that incentivizes and rewards successful inventors through the process of dynamic competition, enforcement agencies without clear direction otherwise from Congress should not place a thumb on the scale against an injunction in the case of FRAND-encumbered patents." He went on to say that "[t]he 2013 statement has not

accurately conveyed our position about when and how patent holders should be able to exclude competitors from practicing their technologies. We will be engaging with the U.S.P.T.O. to draft a new joint statement that better provides clarity and predictability with respect to the balance of interests at stake when an SEP-holder seeks an injunctive order." Makan Delrahim, "Telegraph Road": Incentivizing Innovation at the Intersection of Patent and Antitrust Law (Dec. 7, 2018).

Principal Deputy Assistant Attorney General Andrew Finch Discusses Industry Concentration and Antitrust Enforcement

In a speech to the Capitol Forum's Fifth Annual Tech, Media & Telecom Competition Conference, Principal Deputy Assistant Attorney General Andrew Finch addressed the ongoing debate over whether "lax antitrust enforcement" has led to increased industry consolidation and concentration. In his speech, he posited that increased concentration in and of itself does not necessarily give rise to antitrust concerns. He said that concentration can result from "dynamic competition based on efficiency" and that "[i]f concentration is the result of more efficient and better firms attracting customers through competition on the merits, we should conclude that antitrust is working exactly as it should." He cautioned that a company's size alone should not give rise to enforcement, rather, he said, "[w]hat we do look for is big firms behaving badly by engaging in anticompetitive conduct, such as collusive, exclusionary, and predatory behavior."

He also said that the DOJ "is looking at common ownership and interlocking directorate issues [where a director serves on the boards of competitors] more closely." As he noted, "Section 8 of the Clayton Act prohibits a person from simultaneously serving as a director or officer of competing corporations." He noted that issues relating to interlocking directorates "become especially important in concentrated markets, where coordination may be easier." Andrew C. Finch, Concentrating on Competition: An Antitrust Perspective on Platforms and Industry Consolidation (Dec. 14, 2018).

FTC Hearing on Broadband Markets Scheduled for January 16

On December 21, the FTC announced that the tenth session of the Hearings on Competition and Consumer Protection in the 21st Century is scheduled for January 16, 2019 at the FTC Constitution Center Auditorium. The hearing is to address "competition and consumer protection issues in broadband markets," including "(i) the evolution of broadband networking and broadband markets since the 2007 Broadband Report; (ii) the identification and evaluation of advertising claims by internet service providers with respect to the delivery speed of content; and (iii) the identification and evaluation of conduct by broadband market participants that may be exclusionary or anticompetitive." The lapse in appropriations may postpone this hearing. Press Release, Fed. Trade Comm'n, FTC Announces the Tenth Session of its Hearings on Competition and Consumer Protection in the 21st Century (Dec. 21, 2018).

EU Developments

UK Competition & Markets Authority Warns Non-Merger-Related Enforcement May Wane Post-Brexit, Pledges International Cooperation, and Publishes Updated Merger Remedies Guidance

In its annual plan consultation document published on December 3, the U.K. Competition & Markets Authority (CMA) noted that because it will be obligated, after Brexit, to investigate large mergers and state aid cases that would have been investigated by European Commission, its other competition-enforcement activity may, because of limited resources, be reduced. According to the document, "[w]hilst we are recruiting and preparing heavily, it is unlikely we will have our full planned complement of staff in place by March 2019. We will need to take tough decisions on our priorities, at pace, to be flexible to our new circumstances. We are obliged by statute to investigate all qualifying mergers and state aid cases. In this scenario, our discretion to carry out other work, such as market studies and further enforcement, will therefore narrow considerably." The CMA also wrote that "[g]iven the cross-border nature of the mergers which will come under our scrutiny and the enforcement investigations we intend to pursue, there is a need for greater international co-operation. We will therefore maintain and continue to build on the strong, mutually beneficial and co-operative relationships that the CMA and its predecessors have worked hard to build with our overseas counterparts." CMA Annual Plan consultation 2019/20 (Dec. 3, 2018).

Separately, on December 13, the CMA published updated merger remedies guidance after the completion of its consultation on the issue. Competition & Mkts. Auth, Merger remedies (Dec. 13, 2018).

French Competition Authority Fines Household Appliance Manufacturers for Alleged Price Fixing

On December 6, the French competition authority announced that it fined six household appliance manufacturers – including Electrolux and Whirlpool – for allegedly agreeing on increases to recommended retail prices for a variety of appliances. The fines totaled 189 million euros. According to the authority's press release, the price agreements were made on "the sidelines of official meetings of [the manufacturers'] trade association . . ., or during secret meetings in restaurants close to the trade association's headquarters in Paris," including famed macaroon shop Ladurée. The release described the scheme: "The consultation on price increases took place in three stages. First, company managers met to define the outlines of price increases before marketing managers then discussed their implementation. Lastly, managers met again to finalise the conditions for price increases and thus ensure better monitoring. Discussions were also conducted by telephone." Press Release, Autorité de la concurrence, The Autorité de la concurrence hands down fines worth a total of €189 million to six household appliance manufacturers, among the largest in the sector, notably for having agreed on price increases (Dec. 6, 2018).

European Commission Approves Thales' Acquisition of Gemalto, Subject to Divestiture

On December 11, the European Commission announced that it has approved Thales' acquisition of Gemalto, subject to the divestiture of Thales' general purpose hardware security modules business, which offers "hardware appliances running on encryption software to generate, protect, and manage encryption keys used to protect data in a secure tamper-resistant module." With respect to specific hardware security modules used on payments systems, "the Commission concluded that the proposed merger was unlikely to have an impact on the level of service or prices because Gemalto has a more limited role in the market. The Commission also found that the merged entity will continue to face significant competition from other players active in that market." The press release notes that "[t]hroughout its investigation, the Commission closely cooperated with other national competition authorities, in particular the US Department of Justice." Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of Gemalto by Thales, subject to conditions (Dec. 11, 2018).

European Commission Approves Quaker's Acquisition of Houghton, Subject to Divestiture

On December 11, the European Commission announced that it has approved Quaker's acquisition of Houghton, subject to the divestiture of Houghton's "businesses related to certain lubricants used to produce steel and aluminium" in the European Economic Area. According to the Commission's press release, "[t]hese commitments fully remove the overlap between Quaker's and Houghton's activities on the markets where the Commission had identified competition concerns." Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of Houghton by Quaker, subject to conditions (Dec. 11, 2018).

Canadian Developments

Canadian Competition Bureau Closes Investigation into Alleged Restrictions Affecting Generic Pharmaceutical Production

On December 20, the Canadian Competition Bureau announced that it closed its investigation into "policies and practices that were alleged to restrict generic drug manufacturers from accessing samples of brand name drugs" (including Celgene's Revlimid) necessary for the generic approval process. According to the Bureau's press release, "[b]efore a generic drug can enter the market, a generic drug manufacturer must prove that their drugs are safe and effective by submitting testing that demonstrates that the generic drug is bio-equivalent to a branded drug. To complete this testing, [generic manufacturers] need access to" brand name samples. The Bureau "found that there is insufficient evidence to demonstrate that competition has been substantially lessened or prevented." According to the Bureau's Position Statement, "at this time the Bureau has not concluded" that the alleged distribution limits "go beyond legitimate measures to ensure safe use of Revlimid or other regulatory requirements." The Bureau further found that the generic manufacturers "were ultimately able to obtain" the samples and "conduct the necessary studies to make the submissions needed for . . . approval." Press Release, Competition Bureau Canada, Competition

Bureau completes abuse of dominance investigation into practices of Celgene, Pfizer and Sanofi (Dec. 21, 2018); Competition Bureau Canada, Competition Bureau Statement Regarding Its Investigation into Alleged Practices of Celgene, Pfizer, Sanofi (Dec. 20, 2018).

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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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