March 11, 2019

Antitrust Month in Review – February 2019

In February, the much-anticipated decision in the AT&T-Time Warner merger appeal was handed down. The appeals court found that the district court did not err in denying the Department of Justice's (DOJ) request to enjoin the deal. In other merger-related news, the Federal Trade Commission (FTC) split three-to-two in clearing Fresenius' acquisition of NxStage Medical, subject to a divestiture. As they did when they voted against the resolution of a different merger investigation last month, two commissioners once again expressed concerns related to vertical integration. Meanwhile, the European Commission cleared several deals with conditions, but blocked Siemens' acquisition of Alstom.

In addition to AT&T-Time Warner, the appeals courts dealt with several other antitrust cases, issuing decisions relating to: the FTC's ability to bring actions for injunctive relief in federal court, the proper jurisdiction for appeals involving *Walker Process* claims, and the interplay between alcoholic beverage sale laws and the Sherman Act.

In the area of pharmaceutical antitrust, the Canadian Competition Bureau announced that it has closed an investigation involving biosimilars, while the FTC announced the resolution of several long-running reverse-payment patent settlement suits.

Below, we discuss these and other developments, including the FTC's recent announcement of the formation of a Technology Task Force to monitor competition in technology markets.

US – DOJ/FTC Merger

FTC Requires Divestiture in Fresenius' Acquisition of NxStage Medical; Commissioners Split 3-2 in Accepting Remedy with Dissent Raising Vertical Concerns

On February 19, the FTC announced that, as a condition of allowing Fresenius Medical Care to acquire NxStage Medical, it is requiring the divestiture of NxStage's bloodline tubing set business in order to address horizontal concerns with the transaction. According to the FTC's press release, without the divestiture, "the proposed merger would harm competition in the U.S. market for bloodline tubing sets that are compatible with hemodialysis machines used in clinics that treat chronic renal failure" because "Fresenius and NxStage are two of only three significant suppliers of bloodline tubing sets used in open architecture hemodialysis machines in the United States." Chairman Joseph J. Simons and Commissioners Noah Joshua Phillips and Christine S. Wilson voted to accept the proposed settlement for public comment and issued a statement. Commissioners Rohit Chopra and Rebecca Kelly Slaughter dissented and each

issued a statement. This is the second instance in recent weeks of the FTC splitting on this line with respect to a merger remedy – the other being the Staples-Essendant transaction.

As with the Staples deal, which we discussed in last month's *Review*, the dissenters here took issue with the vertical aspects of the transaction. According to Commissioner Chopra's statement, Fresenius provides dialysis services and NxStage "is a much smaller medical technology firm that manufactures a machine used for in-home hemodialysis treatment." Therefore, Commissioner Chopra expressed concerns that the transaction may have negative effects on potential new entry into the supply of in-home hemodialysis machines, writing that "the market for in-home clinic supplies is close to a duopsony," and that "[t]he merger essentially eliminates the potential for sales to Fresenius, since Fresenius will have little incentive to purchase in-home hemodialysis machines from a competitor." Commissioner Slaughter noted similar concerns. The majority, however, wrote that the evidence indicated that several firms plan to enter into the supply of in-home machines.

Commissioner Slaughter also noted a concern that the transaction could lead Fresenius to raise its rivals' costs for in-home hemodialysis. The majority found that the evidence did not support this; "[r]ather, it showed that Fresenius likely would continue to sell [its] . . . in-home machines to competitors, and potentially would increase the use of in-home machines dramatically." The majority additionally pointed to the potential "health benefits for dialysis patients" that may result from the transaction, *i.e.*, "an expansion of in-home hemodialysis." Press Release, Fed. Trade Comm'n, FTC Requires Fresenius Medical Care AG & KGaA and NxStage Medical, Inc. to Divest Bloodline Tubing Assets to B. Braun Medical, Inc. as a Condition of Merger (Feb. 19, 2010); Stmt. of Chmn. Simons & Commr's Phillips & Wilson; Stmt. of Comm'r Chopra; Stmt. of Comm'r Slaughter; Paul, Weiss Client Memo., Antitrust Month in Review – January 2019 (Feb. 7, 2019).

D.C. Circuit Upholds District Court's Denial of Injunction in AT&T-Time Warner Merger Case

On February 26, the United States Court of Appeals for the District of Columbia Circuit held that the DOJ failed to show that the district court clearly erred in denying the government's request for a permanent injunction to block the AT&T-Time Warner merger. The DOJ alleged that the transaction would allow the merged firm to exert greater leverage over rival video programming distributors because it would allow the company to threaten to withhold Time Warner video content from AT&T's distributor rivals, and that this would lead to increased programming costs. The lower court found, among other things, that the government failed to meet its burden, and that "real-world" evidence from AT&T and Time Warner undermined the government's theory. The D.C. Circuit held that the district court did not commit clear error in evaluating the evidence and ultimately in denying the government's request for an injunction. U.S. v. AT&T, Inc., No. 18-5214 (D.C. Cir. Feb. 26, 2019); Paul, Weiss Client Memo., D.C. Circuit Affirms District Court's Denial of DOJ's Request for Injunction in AT&T-Time Warner Merger (Feb. 28, 2019).

DOJ Requires Divestiture in Order for Thales' Acquisition of Gemalto to Proceed

On February 28, the DOJ announced that it is requiring Thales to divest its general purpose hardware security module (GP HSM) business as a condition of its acquisition of Gemalto. GP HSMs are "components of complex encryption solutions used by government and private organizations to safeguard their most sensitive data." According to the DOJ, "[t]he proposed settlement requires Thales to divest, as a viable ongoing business, Thales GP HSM Products business. . . . Additionally, because Thales and Gemalto currently compete to develop new products and services, the settlement requires the divestiture of certain intellectual property and research capabilities for products under development." The DOJ resolution, which is subject to U.S. court approval, is consistent with the divestiture required by the European Commission that we discussed in a previous *Month in Review*. Press Release, U.S. Dep't of Justice, Justice Department Requires Divestiture of Thales' General Purpose Hardware Security Module Business in Connection With its Acquisition of Gemalto (Feb. 28, 2019); Paul, Weiss Client Memo., Antitrust Month in Review – December 2018 (Jan. 14, 2019).

US – DOJ/FTC Civil Non-Merger

FTC Settles Reverse-Payment Patent Settlement Suits with Teva Pharmaceuticals

On February 19, the FTC announced that it has reached a settlement agreement that, if accepted by the courts in which the actions are pending, will resolve the FTC's claims against generic pharmaceutical manufacturer Teva Pharmaceuticals Industries Ltd. The settlement calls for the entry of stipulated permanent injunctions with durations of ten years in three pending cases, which, according to the FTC, will prohibit Teva "from entering into a patent infringement settlement agreement that includes a reverse payment transferring value from the brand to the generic." This would include "prohibiting Teva from entering into the two most pernicious and common forms of reverse payments: (1) a side deal, in which the generic company receives compensation in the form of a business transaction entered at the same time as the patent litigation settlement; and (2) a no-AG commitment, in which a brand company agrees not to compete with an authorized generic version of a drug for a period of time." Press Release, Fed. Trade Comm'n, FTC Enters Global Settlement to Resolve Reverse-Payment Charges against Teva (Feb. 10, 2019).

Third Circuit Holds That FTC Lacks Authority to Use Section 13(b) of the FTC Act to Challenge Past Conduct in District Court; Must Conduct Administrative Proceeding Instead

Section 13(b) of the Federal Trade Commission Act allows the FTC to seek injunctive relief in federal district court if it has "reason to believe" that an entity "is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission." Citing this statutory authority, the FTC sued Shire ViroPharma in 2017, alleging that it had violated the FTC Act by engaging in so-called "sham petitioning" before the U.S. Food and Drug Administration (FDA) in order to "maintain and extend its monopoly by delaying the FDA's approval of generic alternatives to Vancocin [antibiotic] capsules." The FTC brought its

suit almost five years after the FDA "rejected Shire's filings and approved generic equivalents to Vancocin," but the Commission alleged that there was a "cognizable danger that ViroPharma will engage in similar conduct causing future harm to competition and consumers." The FTC did not bring an administrative proceeding.

The district court granted Shire's motion to dismiss, and, on February 25, the Third Circuit affirmed. In its opinion, the appeals court held that "Section 13(b) does not permit the FTC to bring a claim based on long-past conduct without some evidence that the defendant 'is' committing or 'is about to' commit another violation," which the FTC's complaint did not plausibly allege. Instead, the court wrote, "[i]f the FTC wants to recover for a past violation—where an entity 'has been' violating the law—it must use Section 5(b)" of the FTC Act and bring an administrative proceeding. FTC v. Shire ViroPharma, No. 18-1807 (3d Cir. Feb. 25, 2019); Complaint, FTC v Shire ViroPharma Inc., No. 17-cv-131 (D. Del. Feb. 7, 2017).

US – DOJ Criminal

On Motion for Reconsideration after Remand of Appeal, District Judge Rules That Per Se Rule Does *Apply in Criminal Customer Allocation Case*

On February 21, in a criminal case alleging an agreement among heir location companies to allocate customers, Judge David Sam of the United States District Court for the District of Utah filed an order granting the DOJ's motion for reconsideration and held that the charged conduct is indeed to be tried under the "Per Se approach." In an earlier ruling, the court held that the alleged conduct was subject to less strict rule of reason analysis. The DOJ appealed Judge Sam's ruling that the per se rule did not apply. However, as we discussed in a prior *Month in Review*, the Tenth Circuit 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. 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); Paul, Weiss Client Memo., Antitrust Month in Review – October 2018 (Nov. 12, 2018).

US – Private Litigation

Fifth Circuit Transfers Walker Process *Appeal Back to Federal Circuit*

On February 15, the United States Court of Appeals for the Fifth Circuit transferred back to the Federal Circuit an appeal in a case claiming monopolization based on fraud on the Patent and Trademark Office (PTO) under *Walker Process*. In doing so, the Fifth Circuit held that it lacked a plausible basis for jurisdiction of the appeal. The case involves antitrust claims brought by Xitronix in federal court in Texas alleging that KLA-Tencor obtained a patent relating to technology for the optical inspection of semiconductors by means of misrepresentations made by KLA to the PTO. The district court granted summary judgment to KLA, finding that the PTO did not rely on the alleged misrepresentations in issuing the patent. Xitronix appealed to the Federal Circuit, but that court, despite the parties' agreement (at the time) that the case was properly there, found that it lacked jurisdiction to hear the appeal and transferred the case to the Fifth Circuit.

According to the Fifth Circuit's opinion, the Federal Circuit transferred the appeal because the case did not involve a substantial application of patent law. As the Fifth Circuit wrote: "Since [2013], the Federal Circuit has incorporated a substantiality inquiry into determinations of its own jurisdiction. In this case, the [Federal Circuit] acknowledged that the case would require applying patent law but disputed the case's substantiality." The Fifth Circuit, on the other hand, wrote that the Federal Circuit's "reasoning depended on several premises that [it found] implausible." In essence, the Fifth Circuit found that "[p]atent law is a necessary element of *Walker Process* claims, and [b]ecause this case presents a standalone *Walker Process* claim, there are no non-patent theories in the case that would divert it to our court. Consequently, it belongs in the Federal Circuit." Therefore, acknowledging "respect for [its] judicial colleagues and gratitude for the litigants' patience over the long pendency of th[e] appeal," the Fifth Circuit ordered that the case be transferred back to the Federal Circuit. Xitronix Corp. v. KLA-Tencor Corp., No. 18-50114 (5th Cir. Feb. 15, 2019).

Second Circuit Holds That Connecticut Alcoholic Beverage Sale Laws Are Not Preempted by Sherman Act

On February 20, the United States Court of Appeals for the Second Circuit held that certain Connecticut laws relating to the sale and distribution of alcoholic beverages were not preempted by the federal Sherman Act. The plaintiff in the case – the operator of Total Wine – mounted a facial challenge to several state law provisions. First, the plaintiff challenged provisions which, according to the court, require wholesalers to each month post prices with the state Department of Consumer Protection and to hold to those prices for the month. The provision provides for a window during which a wholesaler may lower its price to meet the prices posted by other wholesalers, but it may not go below the lowest posted price. These are so-called "post-and-hold provisions." Second, the plaintiff challenged "minimum-retail-price provisions" which, according to the court, require that retailers sell to consumers "at or above" the posted price plus "a markup

for shipping and delivery." Third, the plaintiff challenged a statutory prohibition on "volume discounts and other forms of price discrimination." According to the court, "Total Wine's claim was that the Connecticut regulatory scheme eliminates incentives for alcoholic beverage wholesalers to compete on the basis of price and invites wholesalers to maintain prices 'substantially above what fair and ordinary market forces would dictate.' Total Wine further claimed that Connecticut's regulations inhibit meaningful price competition at the retail level."

The Second Circuit, relying on Supreme Court precedents addressing Sherman Act preemption analysis and subsequent developments in substantive antitrust law, held that the minimum-retail-price provisions of the Connecticut law were not preempted by Section 1 of the Sherman Act because these provisions were "vertical pricing arrangements" and were to be analyzed "under the rule of reason." The court also held that the prohibitions on price discrimination were not preempted by Section 1 of the Sherman Act for two separate reasons: (i) "these provisions impose a unilateral restraint . . . [and] [s]uch a restraint does not implicate the concerns of concerted activity animating" Section 1; and (ii) the provision is a vertical restraint and, as such, "would [not] . . . implicate a category of conduct that [is] per se unlawful." Finally, with respect to the "post-and-hold provisions," the court noted that "[t]he separate, unilateral acts by each wholesaler of posting and matching . . . are what gives rise to any synchronicity of pricing," and thus would not constitute per se violations of antitrust law or "'place[] irresistible pressure on a private party to violate the antitrust laws in order to comply' with" the provisions. Conn. Fine Wine & Spirits LLC v. Seagull, No. 17-2003 (2d Cir. Feb. 20, 2019).

US – Agency News

AAG Delrahim Delivers Speech on Antitrust and "Zero-Price Products and Services"

On February 11, Assistant Attorney General Makan Delrahim spoke at the Silicon Flatirons Annual Technology Policy Conference at the University of Colorado Law School. His topic was "how antitrust enforcers should think about 'free' – or more accurately 'zero-price' – products and services." In his prepared remarks, he said that "[m]ost firms that provide goods at a price of zero are making money somewhere else, either through different products, different consumers, or at a different point in time. Consumers also typically exchange something of value, such as their attention to advertising or their personal or usage data, for these free services." He noted that a firm's "motivation" for charging a zero price can "in some cases" inform whether it "raise[s] competitive concerns," and distinguished between predatory pricing on one hand, and platform balancing or new market entry on the other.

AAG Delrahim noted that "[i]n addition to their many benefits, zero-price strategies also pose challenges for antitrust enforcement," in particular market definition, which often looks at responses to pricing behavior as part of an analysis to determine the boundaries of a market. "We cannot look at the effects of a five percent increase in price," he said, "because five percent of zero is still zero." However, AAG Delrahim said that zero-price situations are still subject to traditional antitrust scrutiny: "The consumer welfare

standard is not limited to looking at price effects. It also takes into account effects on quantity, quality, consumer choice, and innovation. With zero-price goods, it simply becomes more important to focus on these other non-price factors, or to focus on the actual consumers who really pay for the service." He went on to say that "[t]he existence of a free product usually indicates that there is a related positive-priced product and that the economics of those two goods are related. A proper antitrust analysis, in most cases, should consider the free product together with its companion money-making product."

Notably, in closing, AAG Delrahim said with respect to digital platforms: "Concerns over privacy, inadequate notice, unauthorized use of data, and data protection, are legitimate policy issues that need to be discussed, but should not lead to distortions of our antitrust standards to address them." Makan Delrahim, "I'm Free": Platforms and Antitrust Enforcement in the Zero-Price Economy (Feb. 11, 2019).

FTC Establishes Technology Task Force to Monitor Competition in Tech Markets

On February 26, the FTC announced that it is creating a "task force dedicated to monitoring competition in U.S. technology markets, investigating any potential anticompetitive conduct in those markets, and taking enforcement actions when warranted." According to the FTC, the Technology Task Force will "focus on technology-related sectors of the economy, including markets in which online platforms compete." In announcing the task force, the FTC said that "[i]n addition to examining industry practices and conducting law enforcement investigations, the Technology Task Force will, among other things, coordinate and consult with staff throughout the FTC on technology-related matters, including prospective merger reviews in the technology sector and reviews of consummated technology mergers." It is possible that the task force's reviews of consummated mergers could lead to recommendations of post-transaction remedies where harm to competition is found. The Director of the FTC's Bureau of Competition has reportedly suggested that such remedies could include breakups or spinoffs. Press Release, Fed. Trade Comm'n, FTC's Bureau of Competition Launches Task Force to Monitor Technology Markets (Feb. 26, 2019).

EU Developments

European Commission Blocks Siemens' Acquisition of Alstom

On February 6, the European Commission announced that it is prohibiting Siemens from acquiring Alstom, citing competition concerns relating to railway signaling systems and very high-speed trains, *i.e.*, "trains operating at speeds of 300 km per hour or more." According to the Commission, the acquisition "would have brought together the two largest suppliers of various types of railway and metro signalling systems, as well as of rolling stock in Europe." The Commission said that "the parties were not willing to offer adequate remedies to address" the competitive concerns and that it is "highly unlikely that new entry from China would represent a competitive constraint on the merging parties in a foreseeable future."

The parties reportedly proposed remedies, but these were not sufficient according to the Commission. In announcing the prohibition, Commissioner Margarethe Vestager said: "Siemens and Alstom could have obtained our approval for the merger if they had proposed appropriate remedies to address our competition concerns. However, the companies were not willing to propose a clear-cut remedy for either mainline signalling systems or very high-speed trains. We found that the proposed remedies were simply not enough to address our competition concerns."

In particular, with respect to signalling systems, the Commission said that "the proposed remedy did not consist of a stand-alone and future proof business that a buyer could have used to effectively and independently compete against the merged company." With respect to very high-speed rolling stock, the Commission said that a proposed divestiture was of "a train currently not capable of running at very high speeds," and a proposed license for a high-speed train "would not have given the buyer the ability and incentive to develop a competing very high-speed train in the first place." Press Release, Eur. Comm'n, Mergers: Commission prohibits Siemens' proposed acquisition of Alstom (Feb. 6, 2019); Statement by Commissioner Vestager on the proposed acquisition of Alstom by Siemens and the proposed acquisition of Aurubis Rolled Products and Schwermetall by Wieland (Feb. 6, 2019).

European Commission Requires Divestiture in Order for Amcor-Bemis Merger to Proceed

On February 11, the European Commission announced that it is requiring Bemis to divest its European medical packaging business as a condition of the Commission's approval of the Amcor-Bemis merger. According to the Commission, "[a]s regards flexible packaging for medical use, Amcor and Bemis are the most significant players in the EEA and have been competing closely. The merged entity would have created a player three times larger than the second largest supplier, on a fragmented market with many small suppliers. The Commission found that barriers of entry are extremely high on this market, and customers do not easily switch suppliers." The Commission accepted the parties' offer "to divest Bemis' entire medical packaging business in the" European Economic Area. The Commission found no competitive concerns with respect to "flexible packaging for food products" because it found that there were "a large number of alternative suppliers, lower barriers to entry and because it is easier for customers to switch to alternative suppliers." Press Release, Eur. Comm'n, Mergers: Commission approves merger between Amcor and Bemis, subject to conditions (Feb. 11, 2019).

European Commission Clears Air France-KLM's Entry into Virgin Atlantic Joint Venture with Delta and Virgin Group without Conditions

On February 12, the European Commission announced that it has "approve[d] acquisition of joint control over Virgin Atlantic by Air France-KLM, Delta and Virgin Group." The acquisition of "joint control" is a result of Air France-KLM's acquisition of 31% of Virgin Atlantic Limited. According to its press release, "[t]he Commission investigated the impact of the transaction on the market for (i) air transport of passengers[,] (ii) cargo air transport services and (iii) maintenance, repair and overhaul services." Among

the Commission's findings is that "[n]one of the overlapping routes raises competition concerns despite a small number of routes with high combined market shares, because (a) the overlapping routes are direct/indirect overlaps [i.e., one airline provides direct flights between cities where another provides connecting service]; [and] (b) Virgin Atlantic, Delta and Air France-KLM are not close competitors and they continue to face significant competition from other carriers on the routes where the activities of both airlines overlap." Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of joint control over Virgin Atlantic by Air-France-KLM, Delta and Virgin Group (Feb. 12, 2019).

Canadian Developments

Canadian Competition Bureau Announces Closing of Janssen Biosimilar Inquiry

On February 20, the Canadian Competition Bureau announced that it has closed its inquiry into whether Janssen (a Johnson & Johnson subsidiary) "inhibited the entry or expansion of biosimilar products in Canada that compete with Janssen's biologic product Remicade." According to the Bureau's position statement, "the Bureau's inquiry confirmed that Janssen has engaged in, and continues to engage in, conduct that could raise concerns under the Act in certain circumstances. However, the Bureau did not find adequate evidence at this time that this conduct was likely to substantially lessen or prevent competition."

The Bureau investigated two theories of potential competitive harm: predatory pricing and an "exclusionary theory." With respect to predation, "the Bureau's review confirmed that Janssen was offering Remicade at a price below cost to certain hospitals and patients. However, the Bureau did not find credible evidence that Janssen's low pricing strategy was sufficiently widespread that it was likely to eliminate, discipline or deter entry by one or more competitors, so as to substantially prevent or lessen competition in the relevant market. In particular, while Janssen's low prices may have shifted demand from biosimilar products to Remicade, the Bureau did not find that the practice was likely to induce competitors to exit the market or otherwise substantially affect competition at this time."

With respect to the "exclusionary theory," the Bureau looked at Janssen's "contracts with hospitals and public and private insurers that require or induce them to favour Remicade over its biosimilars," and "contracts with third-party infusion clinics that prohibit them from infusing biosimilars to Remicade." It found that these contracts did not merit regulatory action at present because, in the case of the contracts with the hospitals and insurers, prices for Remicade were reduced, and, in the case of the exclusive contracts with the clinics, the increase in costs faced by Janssen's competitors to develop a clinical network were not, based on the evidence, "likely to lessen a biosimilar firm's ability to act as a meaningful competitive constraint to Remicade." Competition Bureau statement regarding its inquiry into alleged anti-competitive conduct by Janssen (Feb. 20, 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:

Robert A. Atkins
+1-212-373-3183
ratkins@paulweiss.com

Jack Baughman
+1-212-373-3021
jbaughman@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

Daniel J. Howley
+1-202-223-7372
dhowley@paulweiss.com

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