February 12, 2020

Antitrust Month in Review – January 2020

The year began with several notable developments. As we discussed in recent Client Memoranda, the Department of Justice (DOJ) and Federal Trade Commission (FTC) issued draft vertical merger guidelines, and the FTC announced new Hart-Scott-Rodino thresholds. Additionally, a federal court denied the FTC's request for a preliminary injunction against a proposed acquisition. This is the first time the FTC has lost a merger challenge in court in many years. Defendants also had several wins in cases brought by private parties. The Eighth Circuit upheld a lower court's exclusion of expert testimony and grant of summary judgment in favor of a defendant, and two district courts granted motions to dismiss – one in a pharmaceutical case and the other in a case against Uber. The DOJ issued a business review letter regarding a group purchasing organization and required a divestiture in order to allow ZF's acquisition of WABCO to proceed.

US – DOJ/FTC Merger

Court Denies FTC's Motion to Enjoin Evonik's Acquisition of PeroxyChem

In a rare loss for the FTC in a merger challenge, on January 24, Judge Timothy J. Kelly of the United States District Court for the District of Columbia denied the Commission's request for a preliminary injunction to block Evonik's acquisition of PeroxyChem. Both companies are manufacturers of hydrogen peroxide. The FTC argued that the acquisition would harm competition in an aggregated market for "non-electronics grade hydrogen peroxide" comprising standard, specialty and pre-electronics grade forms of the chemical. The court, however, found that the FTC's proposed market definition was flawed and thus the Commission failed to meet its initial burden of showing that the merger would lead to an "undue concentration" in a proper antitrust market.

According to the court's opinion, the FTC's proposed product market was "a substantial departure from the typical way in which a product market is defined" because instead of looking at demand-side substitution (whether consumers view products as substitutes) the FTC relied on supply-side substitution (whether manufacturers shift – or "swing" – from producing one product to another). As the court wrote: "Rather than relying on consumers' ability to constrain prices, supply-side substitution or elasticity focuses on *suppliers'* responsiveness to price increases and their ability to constrain anticompetitive pricing by readily shifting what they produce." Citing the DOJ-FTC *Horizontal Merger Guidelines*, the court examined "whether suppliers' swinging between production of" the various grades of hydrogen peroxide included in the FTC's alleged market "is nearly universal, easy, and profitable," and found that the FTC failed to meet its burden to show this. Consequently, the court determined based on the evidence presented that standard, specialty and pre-electronics grades of hydrogen peroxide were *not* in the same market.

Therefore, the court held that because the FTC failed to define a proper market, it could not properly analyze the competitive effects of the proposed transaction. Absent this, the FTC did not present evidence sufficient to merit a preliminary injunction. The court did note the possibility that the FTC could adduce evidence sufficient for a ruling blocking the transaction in an administrative proceeding at the Commission. The FTC's administrative proceeding in this matter was delayed pending the court's ruling on the preliminary injunction motion.

Relatedly, on January 28, the Canadian Competition Bureau announced that the parties had resolved the Bureau's concerns by agreeing to divest a plant located in Prince George, British Columbia. The parties have reportedly closed their deal. FTC v. RAG-Stiftung, No. 19-cv-2337 (D.D.C. Jan. 24, 2020); Competition Bureau statement regarding Evonik's proposed merger with PeroxyChem (Jan. 28, 2020).

DOJ Requires Divestiture in ZF Friedrichshafen's Acquisition of WABCO

On January 23, the DOJ announced that, as a condition of allowing ZF Friedrichshafen to acquire WABCO Holdings, it is requiring the divestiture of WABCO's steering systems business. According to the DOJ, "[w]ithout the divestiture, the proposed acquisition would eliminate competition between the only two suppliers of steering gears used on large commercial vehicles in North America." The DOJ said that "competition between ZF and WABCO has resulted in lower prices, higher quality, better service, and more favorable contractual terms, and has fostered innovation that has led to the development of features that are integral to the current and future development of" steering technology, and that the acquisition, without the divestiture, would have been a merger to monopoly. The proposed settlement is subject to approval by a federal judge. The European Commission approved the acquisition unconditionally, determining that "the transaction would raise no competition concerns in the European Economic Area." Press Release, U.S. Dep't of Justice, Justice Department Requires ZF and WABCO to Divest WABCO's Steering Components Business to Proceed With Merger (Jan. 23, 2020); Press Release, Eur. Comm'n, Mergers: Commission approves ZF's acquisition of Wabco (Jan, 23, 2020).

US – Agency News

DOJ Issues Business Review Letter Concerning American Optometric Association's Group Purchasing Organization

On January 15, in response to a request from the American Optometric Association, the DOJ issued a business review letter in which it stated that it "presently does not intend to challenge the . . . expansion" of the association's group purchasing organization (GPO) into optometric products. According to the DOJ's letter, the association's membership comprises doctors of optometry who "compete with one another, nonmember optometrists, and ophthalmologists to provide optometric services" and products. The association operates a GPO which currently offers "non-optometric products" to its members and sought to expand its offerings to include optometric products such as contact lenses, and glasses frames and lenses. The GPO, the letter said, "will negotiate discounts on [these] products from multiple manufacturers." In seeking the DOJ's views, the GPO represented that this arrangement "likely will result in discounts, better pricing, and reduced transaction costs for the Association members who purchase optometric products through the GPO;" and that "[t]hese discounts and cost reductions will enable GPO participants to better compete against large retail stores, online channels, other healthcare providers, and vertically integrated manufacturers in the sale of optometric products" and "to charge less for these goods when the members resell them to consumers."

In stating its present intention not to bring an antitrust enforcement action, the DOJ's letter references the DOJ-FTC *Statements of Antitrust Enforcement Policy in Healthcare* and notes, among other things, the GPO's representations that "GPO participants likely will purchase significantly less than 35 percent of the total sales of each type of optometric product sold in the United States," that members are not required to purchase through the GPO, that a third party is negotiating with suppliers and that the GPO will keep its communications with individual members about prices confidential from other members Dep't of Justice Business Review Ltr. (Jan. 15, 2020).

US – Private Litigation

Eighth Circuit Upholds District Court's Exclusion of Expert Testimony Because of Unreliable Benchmark

On January 3, the United States Court of Appeals for the Eighth Circuit unsealed and published an opinion in which it held that the district court did not abuse its discretion when it excluded plaintiffs' expert testimony because it was based on an unreliable benchmark. The court also upheld the district court's grant of summary judgment for the defendants based on a lack of admissible evidence showing causation and injury.

The case involved claims brought by independent supermarkets alleging that SuperValu and C&S Wholesale Grocers engaged in an unlawful territory and customer allocation conspiracy when they entered into an asset exchange agreement (AEA) pursuant to which C&S transferred a Midwestern grocery wholesaler to SuperValu in exchange for SuperValu's New England wholesaler business.

The plaintiffs sought to rely on expert testimony to show that plaintiffs paid supracompetitive prices for wholesale groceries. The expert opined that the prices that Stop & Shop – a large supermarket chain – paid to C&S served as an appropriate benchmark for the prices the plaintiffs would have paid but for the alleged allocation scheme. The district court, exercising its gatekeeping function, found that this benchmark was "unreliable because it was premised on what the court found to be an unfounded assumption that independent retailers' charges . . . followed the same pattern as Stop & Shop." The Eighth Circuit agreed, writing that "the reasoning underlying [the expert's] testimony was not on solid footing because the assumption upon which the report relied was insufficient to validate his opinion." The court further wrote that "[j]ust stating that Stop & Shop is impervious to the anti-competitive actions challenged in this case and reviewing certain correlations during the damage period is not enough. There was too great an analytical gap between the facts of the case and the benchmark chosen by [the expert] to support his opinion that the prices paid by independent grocers and Stop & Shop would move in tandem but for the AEA, and likewise that divergence in those prices demonstrates antitrust injury or impact." The court also wrote that the failure of the expert to account for "non-conspiratorial factors" was "an independent basis for the district court's exclusion" of the testimony. JFM Market Corp. v. C&S Wholesale Grocers, Inc. (In re Wholesale Grocery Prods. Antitrust Litig.), No. 18-2780 (8th Cir. Dec. 20, 2019).

Court Dismisses Pharmaceutical Monopolization Claims for Failure to Allege Proper Relevant Market

On January 6, Judge Jesse M. Furman of the United States District Court for the Southern District of New York dismissed monopolization claims brought by Hospira against Apotex Corp. Apotex claimed that Hospira had monopolized or attempted to monopolize markets for certain drugs that Hospira once supplied to Apotex but later ceased supplying. Among other things, the court found that in asserting markets for individual drugs, Apotex failed to "allege facts that plausibly rule out potentially interchangeable drugs, especially those within the same 'therapeutic classes.' Instead, it simply alleges in conclusory fashion that '[t]here are no products which are interchangeable or substitutable' and that 'there is low elasticity of demand.'"

The court also found that Apotex failed to allege anticompetitive conduct: "Apotex's own allegations reveal that Hospira's conduct was undertaken for legitimate, pro-competitive purposes. The primary conduct alleged in the [complaint] is Hospira's decision to breach the exclusive supplier agreement with Apotex in order to compete directly with Apotex and to supply Apotex's competitors." The court wrote that the "conduct Apotex alleges may well give rise to claims for unfair competition and breach of contract, but it does not give rise to an antitrust claim," and that a "party does not — at least *as a matter of antitrust law* — have a duty to deal with a competitor when, as here, greater profits are available through direct competition." Apotex Corp. v. Hospira Healthcare India Private Ltd., No. 18-cv-4903 (S.D.N.Y. Jan. 6, 2020).

Court Dismisses Predatory Pricing Claims Against Uber for Failure to Allege Market Power and Dangerous Probability of Recoupment

On January 21, Chief Magistrate Judge Joseph C. Spero of the United States District Court for the Northern District of California granted Uber's motion to dismiss a complaint brought by its former rival Sidecar alleging that Uber monopolized or attempted to monopolize a market for ride-hailing apps. Sidecar claimed that Uber engaged in predatory pricing and drove it out of the market.

The court first found that Sidecar plausibly alleged a market for ride-hailing apps and that Uber engaged in below-cost pricing. However, the court went on to find that Sidecar failed to allege that Uber had market power. The court also held that Sidecar failed to allege that Uber had a dangerous probability of recouping its losses from its alleged below-cost pricing – at least in a way that is recognized under Ninth Circuit precedent.

With respect to market power, according to the court, "Sidecar does not allege that Uber has the power to raise market prices above competitive levels simply by reducing its own output, or that Lyft [Uber's alleged competitor in an oligopolistic market] could not respond to such a reduction by increasing its own output. Instead, Sidecar alleges that Uber has disciplined Lyft to the point that Lyft chooses not to compete against Uber [on] price, and that Lyft will respond to Uber's signals regarding increased prices in order to recoup its own losses" from earlier low prices. This "disciplined oligopoly," according to the court, does not serve as the basis for a market power determination in a predatory pricing claim under Ninth Circuit precedent. The court granted leave to amend "[b]ecause it is conceivable that Sidecar could allege that Uber can unilaterally raise market prices by restricting its output." SC Innovations, Inc. v. Uber Techs., Inc., No. 18-cv-7440 (N.D. Cal. Jan. 21, 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:

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