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May 9, 2019

## Antitrust Month in Review – April 2019

In April, the multi-venue merger litigation between the Federal Trade Commission (FTC) and paint pigment suppliers Tronox Limited and Cristal moved toward a resolution: the deal parties agreed with the FTC to divest pigment manufacturing plants in North America. The proposed merger was the subject of litigation in two federal district courts and an FTC administrative proceeding. Meanwhile, this past month the Antitrust Division of the Department of Justice (DOJ) announced guilty pleas and charges in three newly-announced investigations. The DOJ also secured a guilty plea in a previously-announced investigation. In other agency news, the DOJ announced the approval by the Steering Group of the International Competition Network of a new multilateral framework on procedures, a set of international due process norms for which the DOJ had been advocating.

Defendants in two private antitrust cases involving monopolization claims related to standard-essential patents saw their motions to dismiss denied. The Sixth Circuit upheld a grant of summary judgment in favor of the defendants in a case in which the plaintiff was pursuing claims that certain actions of a hospital joint venture were *per se* illegal. The court held that the challenged restraints of the venture were not subject to *per se* analysis.

We discuss these and other developments below.

### US – DOJ/FTC Merger

#### *FTC Announces That It Has Settled Litigation Regarding Tronox-Cristal Merger with Divestiture Agreement*

On April 10, the FTC announced that “Tronox Limited and Cristal, two of the largest suppliers of the white pigment chloride process titanium dioxide, have agreed to settle Federal Trade Commission charges by divesting Cristal’s North American titanium dioxide assets, thereby preserving competition in the market for this important and widely used compound.” As we discussed more fully in a prior edition of this *Review*, the deal parties and the FTC had been in litigation since the end of 2017. The FTC won a preliminary injunction from a federal district court blocking the deal in September 2018 and an initial decision from an FTC administrative law judge enjoining the transaction in December 2018. [Press Release, Fed. Trade Comm’n, FTC Requires Divestitures by Tronox and Cristal, Suppliers of Widely Used White Pigment, Settling Litigation over Proposed Merger \(Apr. 10, 2019\)](#); [Initial Decision, In the Matter of Tronox Ltd., FTC Docket No. 9377 \(Dec. 14, 2018\)](#); [FTC v. Tronox Ltd., No. 18-cv-01622 \(D.D.C. Sept. 12, 2018\)](#). [Paul, Weiss Client Memo., Antitrust Month in Review – December 2018 \(Jan 14, 2019\)](#).

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**US – DOJ Criminal***DOJ Secures Guilty Pleas in Several Bid Rigging and Price Fixing Cases, Including First Charges in Insulation Installation, GSA Auction and Commercial Flooring Contractor Investigations*

In the past month, the DOJ announced that it has secured guilty pleas related to:

- “schemes to rig bids and engage in fraud on [pipe and duct] insulation installation contracts” in Connecticut, Massachusetts and New York, which the DOJ noted was “the first conviction in this investigation”;
- a conspiracy to “rig bids at online public auctions of surplus government equipment conducted by the” Government Services Administration (GSA) for the purchase of “computers to resell and recycle” (the first charge in this investigation); and
- a conspiracy “to fix prices for customized promotional products sold online to customers in the United States” (another charge in an ongoing investigation).

In addition, the DOJ announced that it has charged the “former Vice President of Sales for a large Chicago-based commercial flooring contractor” with one felony count alleging participation in a nearly decade-long “conspiracy to suppress and eliminate competition in the commercial flooring market by agreeing with other individuals and companies to submit ‘comp,’ or complementary, bids so that the designated company would win the bidding.” The DOJ expects “many” additional charges in this “ongoing investigation.” [Press Release, U.S. Dep’t of Justice, Insulation Contractor Branch Manager Pleads Guilty To Bid Rigging and Fraud \(Apr. 8, 2019\)](#); [Press Release, U.S. Dep’t of Justice, Texas Bidder Pleads Guilty To Rigging Bids at Online Auctions for Surplus Government Equipment \(Apr. 10, 2019\)](#); [Press Release, U.S. Dep’t of Justice, President of E-Commerce Company Pleads Guilty To Price Fixing \(Apr. 11, 2019\)](#); [Press Release, U.S. Dep’t of Justice, Former Vice President of Commercial Flooring Contractor Charged With Bid Rigging \(Apr. 3, 2019\)](#).

**US – Private Litigation***Courts Deny Motions to Dismiss Monopolization Claims in Standard-Essential Patent Cases*

On April 11, a federal judge in California denied InterDigital, Inc.’s motion to dismiss a monopolization claim brought by u-blox AG. According to Judge Cathy Ann Bencivengo of the United States District Court for the Southern District of California, u-blox alleged that InterDigital, a company with “a portfolio of patents in 2G, 3G and 4G wireless technology,” fraudulently obtained monopoly power “due to its false promise to” a standard-setting organization “to license its [standard-essential patents] on [fair, reasonable and non-discriminatory] terms, which ‘locked in’ its technology as part of the standards.” The

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court relied on the Third Circuit's opinion in the *Broadcom* case to hold that the complaint adequately alleged a monopolization violation: "In *Broadcom*, the Third Circuit stated that, when patented technology is incorporated into a standard, 'measures such as FRAND commitments become important safeguards against monopoly power.' Therefore, in the context of 'a consensus-oriented private standard-setting environment,' 'a patent holder's intentionally false promise to license essential proprietary technology on FRAND terms, . . . coupled with [a standard-setting organization's] reliance on that promise when including the technology in a standard, and . . . the patent holder's subsequent breach of that promise, is actionable anticompetitive conduct.'" The court did also dismiss a promissory estoppel claim, finding that the claim was based on a "licensing declaration that is governed by French law" and that "[u]nder French law, promissory estoppel is not a valid cause of action." [u-blox AG v. InterDigital, Inc., No. 19-cv-00001 \(S.D. Cal. Apr. 11, 2019\)](#).

In another case in the Southern District of California, on April 12, Judge Marilyn L. Huff – also citing *Broadcom* – denied a motion by Wi-LAN to dismiss monopolization counterclaims brought by LG Electronics concerning certain patents held by Wi-LAN related to wireless technology. The court held, among other things, that allegations that Wi-LAN failed to disclose its intellectual property rights and allegations that there were alternative technologies that the standard setting organization could have adopted were sufficient to plead anticompetitive conduct. [Wi-LAN Inc. v. LG Electronics, Inc., No. 18-cv-01577 \(S.D. Cal. Apr. 12, 2019\)](#).

#### *Sixth Circuit Articulates a Test for Ancillary Restraints of Joint Ventures Subject to Rule of Reason Analysis*

The United States Court of Appeals for the Sixth Circuit held on April 25 "that a joint venture's restraint is ancillary and therefore inappropriate for *per se* categorization when, viewed at the time it was adopted, the restraint 'may contribute to the success of a cooperative venture.'" The court wrote that "[i]f the record . . . reveals a plausible way in which the challenged restraints contribute to the procompetitive efficiencies of the joint venture, then . . . *per se* treatment is improper." In so holding, the Sixth Circuit said that it is "follow[ing] the majority of Circuits" in not requiring that restraints be strictly "necessary" for the joint venture in order to qualify for rule of reason treatment.

The court had been presented with the plaintiff's appeal of an order granting summary judgment in favor of the defendants in which the district court held that, among other things, the *per se* rule did not apply to the conduct at issue. The defendants, four hospitals and a joint operating company formed through a joint operating agreement among those four hospitals, were alleged to have engaged in "a series of anticompetitive acts that amounted to a group boycott of" a rival hospital. The plaintiff alleged, among other things, that this conduct included the defendants' coercion of insurers to restrict the plaintiff's access to their networks and to reimburse the plaintiff at low rates, and coercion of physicians to not do business with the plaintiff. The appeals court held that the restraints at issue were "ancillary" and

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therefore subject to rule of reason analysis. [Med. Ctr. at Elizabeth Pl., LLC v. Atrium Health Sys., No. 17-3863 \(6th Cir. Apr. 25, 2019\)](#).

## **US – Agency News**

### *DOJ Announces Approval of New Multilateral Framework on Procedures*

On April 3, the DOJ announced that “the Steering Group of the International Competition Network (ICN) unanimously approved a multilateral framework on procedures among antitrust enforcement agencies globally to promote fundamental due process in competition law investigation and enforcement. The framework is based on the principles of the Antitrust Division’s Multilateral Framework on Procedures (MFP).” According to the DOJ, “[t]his historic multilateral agreement recognizes fundamental principles of transparency and procedural fairness in antitrust enforcement and promotes review mechanisms to ensure that participating agencies abide by these norms.” The DOJ further wrote that “the framework identifies universal due process principles that are widely accepted across the globe, including commitments regarding non-discrimination; transparency and predictability; proper notice, access to information, meaningful and timely engagement, and opportunity to defend; timely resolution of proceedings; confidentiality protections; avoidance of conflicts of interest; access to counsel and privilege; written enforcement decisions and public access to decisions; and availability of independent review of enforcement decisions. . . . [T]he framework complements these substantive norms with review mechanisms designed to ensure meaningful compliance, including consultations, agency reports on implementation, and periodic assessment meetings.” The framework is expected to become effective as of May 15, 2019. [Press Release, U.S. Dep’t of Justice, New Multilateral Framework on Procedures Approved by the International Competition Network \(Apr. 5, 2019\)](#); [ICN Framework on Competition Agency Procedures](#).

### *FTC Holds Hearing on Merger Retrospectives*

On April 12, the FTC, as part of its series of Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century, held a hearing on merger retrospectives. In remarks at the opening of the hearing, Chairman Joseph J. Simons said “[i]n instances where merger retrospective studies are feasible, we can directly test whether a decision not to seek relief was appropriate, and whether remedies were effective in those cases where we did obtain relief. We can also use retrospectives to test the tools that antitrust agencies use in analyzing potentially anticompetitive mergers.” He further noted that retrospectives could play an important role as evidence when the FTC brings a merger challenge. He recognized, however, that retrospectives “raise a number of methodological and feasibility questions.” In her remarks, Commissioner Rebecca Kelly Slaughter said that retrospectives “may be particularly useful in vertical cases when our merger analysis rests on assumptions not merely about price but also about the behavior of the merged firm.” [Prepared Opening Remarks of Chmn. Joseph J. Simons, Hearings on Competition &](#)

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[Consumer Protection in the 21<sup>st</sup> Century: Merger Retrospectives \(Apr. 12, 2019\)](#); [Rebecca Kelly Slaughter, Merger Retrospective Lessons from Mr. Rogers \(Apr. 12, 2019\)](#).

## **EU Developments**

### *Commissioner Vestager Suggests Requiring Companies to Give Rivals Access to Data May be Needed to Address Competition Concerns*

In a speech for the European Consumer and Competition Day in Bucharest on April 4, Commissioner Margrethe Vestager suggested that “one thing we may need to do, to open up competition, is to require companies to give rivals access to their data. Because in this digital age, having the right data can be one of the keys to being able to compete.” She noted that “any access to data would need to be in line with the data protection rules,” and that “collecting data also takes effort and time. So if we insist that companies share it with others, without proper compensation, we could discourage others from putting in those efforts in the future.” She concluded by saying that “we need to work out how to deal with these issues. Because, as data becomes increasingly important for competition, it may not be long before the Commission has to tackle cases where giving access to data is the best way to restore competition.” [Margrethe Vestager, Defending competition in a digitised world \(Apr. 4, 2019\)](#).

### *UK Competition and Markets Authority Blocks Sainsbury’s-Asda Merger*

On April 25, the United Kingdom Competition and Markets Authority (CMA) announced that it blocked the merger of Asda (a Wal-Mart subsidiary) and Sainsbury’s. According to the CMA’s press release, the investigating panel “concluded that the deal would result in a substantial lessening of competition at both a national and local level for people shopping in supermarkets. This would mean shoppers right across the UK would be affected, not just in the areas where Sainsbury’s and Asda stores overlap.” The announcement went on to say that “[t]he CMA’s investigation found that, as well as affecting in-store customers, the merger would result in increased prices and reduced quality of service, such as fewer delivery options, when shopping online. Furthermore, it would lead to motorists paying more at over 125 locations where Sainsbury’s and Asda petrol stations are located close together.” [Press Release, U.K. Comp. & Mkts. Auth., CMA blocks merger between Sainsbury’s and Asda \(Apr. 25, 2019\)](#).

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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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