June 18, 2019

Antitrust Month in Review – May 2019

In May, the United States Supreme Court handed down its decision in *Apple* v. *Pepper*, holding that the Court's 1977 decision in the *Illinois Brick* case did not bar app purchasers from suing Apple because, according to the Court, app purchasers purchased apps directly from Apple. The Federal Trade Commission (FTC), in a case brought before its internal tribunal, secured an initial decision requiring the unwinding of a merger of two manufacturers of microprocessor prosthetic knees. The Antitrust Division of the Department of Justice (DOJ) announced resolutions of criminal cases involving alleged bid rigging of pre-release American Depository Receipts and price fixing of the generic drug glyburide used in diabetes treatment. DOJ officials gave speeches discussing antitrust compliance, antitrust and financial services, and the treatment of state-owned enterprises in antitrust enforcement decisions.

We discuss these and other developments below.

US – DOJ/FTC Merger

FTC Administrative Law Judge Issues Initial Decision Requiring Unwinding of Merger of Prosthetic Knee Manufacturers

On May 6, the FTC's Chief Administrative Law Judge, D. Michael Chappell, released an initial decision in which he found that Ottobock's consummated acquisition of Freedom violated Section 7 of the Clayton Act and ordered a complete divestiture. Both Ottobock and Freedom manufacture microprocessor prosthetic knees (MPK). According to the decision, "[t]he Acquisition was not reportable under the Hart-Scott-Rodino Act."

Judge Chappell found "that the Acquisition will significantly increase concentration in the relevant MPK market, which gives rise to a presumption that the Acquisition may substantially lessen competition. In addition, the evidence proves that Ottobock and Freedom are direct competitors in the MPK market, and that such competition has enabled clinic customers to negotiate lower prices and has spurred MPK innovation. This is more than sufficient to meet Complaint Counsel's prima facie burden to show that the Acquisition of Freedom by Ottobock, and the removal of Freedom as an independent competitor, may substantially lessen competition in the MPK market."

Judge Chappell also found that Ottobock's "rebuttal arguments and defenses are without merit," writing that "[t]he evidence fails to demonstrate that repositioning by competitors in the MPK market will be timely, likely or sufficient to prevent anticompetitive effects; that power buyers or limits on insurance reimbursement will constrain price increases in the MPK market; that Freedom at the time of the

Acquisition was a failing (or flailing) company; . . . or that the Acquisition is justified by cognizable efficiencies."

Judge Chappell rejected a limited divestiture proposed by Ottobock, writing that Ottobock failed to establish that "divestiture of Freedom's MPK-related assets will eliminate any likelihood of anticompetitive effects from the Acquisition." In the Matter of Otto Bock Healthcare N. Am. Inc., FTC. Dkt. No. 9378 (May 6, 2019).

DOJ Requires Divestitures in Amcor's Acquisition of Bemis

On May 30, the DOJ announced that it will require Amcor – a medical packaging manufacturer – "to divest three manufacturing facilities and other assets in order to proceed with its $6.8 billion acquisition of Bemis Company Inc." According to the DOJ's press release, "without the divestiture, the proposed acquisition would eliminate competition between two of only three significant suppliers of three medical packaging products that are critical to the safe transportation and use of medical devices." The proposed settlement is subject to approval by a federal court. Press Release, U.S. Dep't of Justice, Justice Department Requires Amcor to Divest Medical Flexible Packaging Assets in Order to Proceed with Bemis Acquisition (May 30, 2019).

US – DOJ Criminal

DOJ Announces Guilty Plea in Pre-Release ADR Bid Rigging Investigation

On May 10, the DOJ announced that broker-dealer Banca IMI Securities Corp. pleaded guilty to "conspir[ing] with other institutions and individuals to submit rigged bids to borrow pre-release American Depository Receipts (ADRs)." According to the DOJ, "Banca IMI pleaded guilty to conspiring to borrow pre-release ADRs from U.S. depository banks at artificially suppressed rates. During the conspiracy, a U.S. depository bank began using an auction-style process for pre-release ADRs and invited Banca IMI and other broker-dealers to submit competitive bids for rates to borrow ADRs. In response, Banca IMI and its co-conspirators intensified their coordination in an effort to increase artificially their profits under the auction-style process. On at least 30 occasions, Banca IMI reached an agreement with one or more co-conspirators as to the bids they would submit to U.S. depository banks. On many occasions, the conspirators agreed that they all would submit the same bid." Banca IMI's sentence is a fine of $2 million. Press Release, U.S. Dep't of Justice, New York Broker-Dealer Pleads Guilty To Violating U.S. Antitrust Laws by Rigging Bids for Financial Instruments (May 10, 2019).

DOJ Charges Heritage Pharmaceuticals with Criminal Antitrust Violations and Enters into Deferred Prosecution Agreement with the Company

The DOJ charged Heritage Pharmaceuticals Inc. for "participat[ion] in a criminal antitrust conspiracy with other companies and individuals engaged in the production and sale of generic pharmaceuticals, a purpose of which was to fix prices, rig bids, and allocate customers for glyburide, a medicine used to treat diabetes," according to a May 31 press release. At the same time, the DOJ "announced a deferred prosecution agreement resolving the charge, under which Heritage admits that it conspired to fix prices, rig bids, and allocate customers for glyburide. Under the agreement's terms, Heritage will pay a $225,000 criminal penalty and cooperate fully with the ongoing criminal investigation. The United States will defer prosecuting Heritage for a period of three years to allow the company to comply with the agreement's terms. The agreement will not be final until accepted by the court." In agreeing to the deferred prosecution agreement, the DOJ noted Heritage's "substantial and ongoing cooperation with the investigation to date, including its disclosure of information regarding criminal antitrust violations involving drugs other than those identified in the criminal charge and the agreement," which "has allowed the United States to advance its investigation into criminal antitrust conspiracies among other manufacturers of generic pharmaceuticals." The DOJ also noted that "a conviction (including a guilty plea) would likely result in . . . exclusion of Heritage from all federal health care programs . . . for a period of at least five years, which would result in substantial consequences, including to American consumers." Heritage also "agreed to pay $7.1 million to resolve allegations under the False Claims Act related to the price-fixing conspiracy." Press Release, U.S. Dep't of Justice, Pharmaceutical Company Admits to Price Fixing in Violation of Antitrust Law, Resolves Related False Claims Act Violations (May 31, 2019).

US – Private Litigation

Court Dismisses Claims of Monopolization by False Advertising

On May 3, Judge William H. Orrick of the United States District Court for the Northern District of California dismissed claims brought by Genus Lifesciences against Lannett Company for monopolization of an alleged market for cocaine hydrochloride nasal spray used in certain procedures by otolaryngologists. (Genus produces a competing medication.) The court also dismissed false advertising claims brought against First Databank, "a pricing list company that compares drug products and their prices so that wholesalers and customers can see all the alternatives available of a particular medication." Genus based its monopolization claims on alleged false statements by Lannett that its medication was FDA approved, that it was a generic drug, and that it is indicated for oral and laryngeal application.

According to the court: "To plausibly allege that false and misleading advertising constituted exclusionary conduct [under Section 2 of the Sherman Act] and overcome a presumption that the effect on competition was *de minimis*, a plaintiff must allege cumulative facts that would prove the statements were (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without

knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible to neutralization or other offset by rivals." The court found that the plaintiff adequately alleged that "the . . . statements are clearly false," were "clearly material," were likely to induce reliance because "the statements fool customers who would not purchase C-Topical or distribute it to patients if they knew it was unapproved," and were made to "customers . . . not knowledgeable about the FDA approval status of prescription drugs." However, the court found that the plaintiff failed adequately to allege the duration of the statements or "[m]ore significantly . . . why [the plaintiff] is incapable of pushing back on Lannett's listing practices through other means." As such, the plaintiff "has failed to plead more than *de minimis* effect on competition from Lannett's false statements."

The court also dismissed a monopolization claim based on how Lannett listed its medication on First Databank's platform, which, Genus alleged, foreclosed potential customers from seeing that its product was a substitute for Lannett's. According to the court, "[e]ven if Genus is able to prove its allegations about Lannett's marketing practices on First Databank's pricing list, that does not establish that it has been substantially foreclosed from [the] entire . . . cocaine hydrochloride market" because there were alternative avenues for potential customers to be informed about Genus's product. Genus Lifesciences Inc. v. Lannett Co., No. 18-cv-7603 (N.D. Cal. May 3, 2019).

U.S. Supreme Court Holds That Illinois Brick Does Not Bar Antitrust Suit by Purchasers of Apps from App Store

On May 13, the United States Supreme Court held that its 1977 *Illinois Brick* case does not prevent consumers who purchased apps developed by third parties from Apple's app store from suing Apple for damages. In general, *Illinois Brick* bars indirect purchasers from suing for damages under the federal antitrust laws. The consumers "allege that Apple has unlawfully monopolized 'the iPhone apps aftermarket'" and charges a supra-competitive 30 per cent commission to app developers, and that this allegedly results in an overcharge to consumers for apps purchased from the app store. According to the Court, "[i]t is undisputed that the iPhone owners bought the apps directly from Apple. Therefore, under *Illinois Brick*, the iPhone owners were direct purchasers who may sue Apple for alleged monopolization." The Court's opinion was authored by Justice Kavanaugh, and was joined by Justices Ginsburg, Breyer, Sotomayor and Kagan. Justice Gorsuch authored a dissenting opinion which was joined by Chief Justice Roberts and Justices Thomas and Alito. Apple v. Pepper, No. 17-204 (U.S. May 13, 2019).

Second Circuit Affirms Dismissal of Group Boycott Claims for Lack of Antitrust Standing

On May 10, the United States Court of Appeals for the Second Circuit issued an opinion in a case in which IQ Dental Supply, a dental supply distributor, alleged that competing distributors engaged in group boycotts of (1) SourceOne, "an online distribution portal" through which IQ sold supplies, (2) state dental associations that did business with the portal and (3) IQ. The court held that IQ lacked antitrust standing

to bring claims for the alleged boycott of SourceOne and the dental associations. However, the court vacated the district court's dismissal of claims for the alleged "direct boycott" of IQ.

As to the alleged boycott of SourceOne by the distributors, the court held that IQ was not an "efficient enforcer" of the antitrust laws. According to the court's opinion, "the Defendants here sought to put SourceOne—not IQ—out of business by undermining SourceOne's new and disruptive online sales model. IQ was not the target of annihilation; it was simply collateral damage. IQ's alleged injury is therefore too indirect." The court also held that "IQ has failed to adequately allege that it is a sufficiently motivated plaintiff," writing that "[w]ith respect to the challenged boycotts, SourceOne is a better-positioned plaintiff than IQ because SourceOne has been more directly injured by the alleged antitrust conspiracy than IQ. And SourceOne has in fact sued the Defendants seeking to enforce the antitrust laws."

As to the "direct boycott claims," the court wrote that "IQ claims that the Defendants pressured the manufacturers to stop supplying IQ, frightened manufacturers away from supplying IQ in the first place, and otherwise disparaged IQ's business to its customers and potential customers." The court held "that IQ is an efficient enforcer and thus has antitrust standing to proceed with its direct boycott claim against the Defendants." IQ Dental Supply, Inc. v. Henry Schein, Inc., No. 18-175-cv (2d Cir. May 10, 2019).

US – Agency News

AAG Delrahim Gives Speech on Antitrust and Financial Services

On May 1, Assistant Attorney General Makan Delrahim gave a speech at the Fordham University School of Law on "Antitrust in the Financial Sector" and addressed several topics. On Section 8 of the Clayton Act, which prohibits "interlocking directorates," he said: "It is not clear from our review of the legislative history that Congress intended to limit the application of Section 8 solely to corporations" and not to other forms of corporate organization such as LLCs. He went on to say: "whether one LLC competes against another, whether two corporations compete against each other, or whether an LLC competes against a corporation, the competition analysis is the same."

On the topic of potential section 1 liability for institutional investors and investment managers, Mr. Delrahim said "institutional investors risk liability under Section 1 of the Sherman Act if they coordinate conduct between competing firms in which they have investments. For example, if an institutional investor has an ownership interest in multiple competitors, and its investment manager calls those competitors and discourages them from entering into price wars, there is a thin line, if any, between common ownership and collusion that violates Section 1." Makan Delrahim, Don't "Take the Money and Run": Antitrust in the Financial Sector (May 1, 2019).

Deputy Assistant Attorney General Alford Discusses Antitrust Division's Treatment of State-Owned Enterprises

In a speech delivered on May 7 at the 2019 China Competition Policy Forum in Hainan, China, Deputy Assistant Attorney General Roger P. Alford reiterated that "state-owned enterprises [SOEs] that are engaged in commercial activity are not immune from [United States] antitrust laws" and "[t]o the extent those companies engage in anticompetitive commercial behavior that harms the United States market, the Antitrust Division will challenge such behavior and subject foreign SOEs 'to the U.S. antitrust laws to the same extent as the activities of privately owned firms.'" Mr. Alford cited a recent statement of interest filed by the DOJ in the Cathode Ray Tube Antitrust Litigation, which says that "actions of a foreign company to join and act in furtherance of an antitrust conspiracy can cause a direct effect in the United States even if that company made no direct sales in the United States." Roger P. Alford, The Pearl of Great Worth: The Common Pursuit of Protecting the Markets (May 7, 2019); Stmt. of Interest of the United States, In re Cathode Ray Tube Antitrust Litig., No. 07-cv-5944 (Apr. 23, 2019).

DOJ Antitrust Division May Now Credit Compliance Programs in Criminal Enforcement Decisions; AAG Delrahim Discusses International Leniency Cooperation

In a recent speech, Assistant Attorney General Delrahim discussed the Antitrust Division's ongoing evaluation of whether and how corporate antitrust compliance programs should be taken into account in the Division's criminal antitrust enforcement decisions. Mr. Delrahim indicated that, unlike in the past, the Antitrust Division may give credit to a company for having a "robust" corporate antitrust compliance program even if that program did not prevent an antitrust violation, although he did not specify what sort of credit may be given.

Mr. Delrahim also said that "the Antitrust Division has begun focusing on potential ways to improve and evolve our leniency practices to better ensure that leniency applicants are able to meet the competing demands of the jurisdictions where they have exposure." He said that "[o]ne area where we are taking steps to improve is to protect against the imposition of duplicative penalties. We hope to ensure that each jurisdiction imposes penalties that reflect the specific harm to its own markets and consumers. One simple way to achieve this goal is for enforcers to have open discussions about our methodologies for calculating fines in specific cases. These dialogues not only may help prevent overlapping fines and decrease unnecessary burdens on parties, but also can ensure that penalties cover the full scope of the harm caused by the cartel." Makan Delrahim, "Algo Esta Cambiando": Innovation and Cooperation Among Antitrust Enforcers in the Americas (May 10, 2019); Paul, Weiss Client Memo., Robust Compliance Programs May Provide Significant New Benefits to Companies Facing Criminal Antitrust Exposure (May 15, 2019).

FTC Bureau of Competition Director Calls on Tech Industry Participants to Identify "Problematic Acquisitions" of Nascent Competitors

In a recent wide-ranging speech that touched on topics such as monopolization, merger enforcement and the FTC's new Technology Task Force, D. Bruce Hoffman, the Director of the FTC's Bureau of Competition, called on tech industry participants to alert the FTC to potential competitive issues when a tech company acquires a nascent competitor. He said: "The bottom line, for right now, is that to find anticompetitive nascent [competitor] acquisitions, we need to do it the old-fashioned way: by looking and asking, and keeping our ear to the ground. And we need your help. Participants in these various industries might well be best-situated to spot problematic acquisitions and bring them to our attention." This is important, he said, because many of these acquisitions are below the threshold for deals reportable under the Hart-Scott-Rodino Act. D. Bruce Hoffman, Antitrust in the Digital Economy: A Snapshot of FTC Issues (May 22, 2019).

EU Developments

European Commission Announces Investigation into Restrictions on Access to Insurance Data Pool

On May 14, the European Commission issued a press release announcing that it "has opened a formal antitrust investigation into Insurance Ireland to assess whether the conditions of access to its Insurance Link data pooling system may restrict competition." According to Commissioner Margrethe Vestager, the Commission is "investigating whether companies wishing to offer their services on the Irish motor insurance market may have been unfairly prevented from accessing a data pool managed by Insurance Ireland for its member companies." The press release notes that "[t]he Commission does not question that data pooling arrangements can contribute to effective competition. The participation in and access to a data pool by insurance service providers may directly benefit consumers in terms of ensuring more suitable products and competitive prices." The "investigation will assess, in particular, whether the conditions imposed on companies wishing to participate in and access the Insurance Link database may have had the effect of placing these companies at a competitive disadvantage on the Irish motor insurance market in comparison to companies already having access to the database." Press Release, Eur. Comm'n, Antitrust: Commission opens investigation into Insurance Ireland data pooling system (May 14, 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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