December 12, 2018

Antitrust Month in Review – November 2018

In November, the Antitrust Division of the Department of Justice (DOJ) published its previously announced model voluntary request letter and model timing agreement to be used in connection with merger investigations it conducts. The aim of several provisions in these documents is to streamline the merger review process with the goal of concluding most investigations within six months.

Additionally, DOJ officials gave several speeches of note. Deputy Attorney General Rod J. Rosenstein announced changes to the DOJ's policy concerning individual accountability in enforcement actions against corporations, and Assistant Attorney General Makan Delrahim announced that the Antitrust Division will make renewed efforts to use existing statutory authority to recover civil damages that the U.S. government itself suffers as a result of antitrust violations. Principal Deputy Assistant Attorney General Andrew C. Finch announced that the Antitrust Division is weighing how it might credit a defendant's corporate compliance program in its enforcement decisions.

We discuss these and other significant developments below.

US – DOJ/FTC Merger

Antitrust Division Publishes Model Voluntary Request Letter and Model Timing Agreement to Be Used in Merger Investigations

On November 15, the DOJ Antitrust Division published a Model Voluntary Request Letter and a Model Timing Agreement to be used in merger investigations conducted by the Antitrust Division. A set of FAQs was also published. According to the FAQs, the Division published the model voluntary request letter "to give parties a head start in identifying the kind of information they should be gathering for the Division, so that parties can be proactive and submit the information as early as possible during the initial waiting period" after filing their HSR notifications. The Division notes that "[p]arties should be prepared to provide the information sought in the voluntary request letter within the first few days of their HSR filing." As previously announced by Assistant Attorney General Delrahim, the model timing agreement, among other things, includes baselines of fewer custodians and depositions, and a generally accelerated timeline for merger investigations. According to the FAQs, "[t]he Division considers the provisions in the model [timing agreement] to be standard provisions, and does not intend to deviate from them under most circumstances." Model Voluntary Request Letter; Model Timing Agreement; FAQs.

US – DOJ/FTC Civil Non-Merger

FTC Holds That 1-800 Contacts Trademark Settlements with Competitors Are Anticompetitive

On November 14, the Federal Trade Commission released the public version of an opinion authored by Chairman Joseph J. Simons in a proceeding that, according to the Commission, concerns "issues of enormous import" in "consumer marketplaces that embody the very basic institutions of 21st century commerce." The Commission, on appeal from a decision by the Administrative Law Judge, held that a set of trademark settlements between 1-800 Contacts and its rivals – which required them "to take steps to insure their ads do not appear in response to searches for the other party's trademark terms" – unreasonably restrained trade in violation of Section 5 of the Federal Trade Commission Act.

The Commission found that the agreements were "inherently suspect" and also found "direct evidence of anticompetitive effects." It also found that 1-800 Contacts did "not demonstrate[] valid offsetting procompetitive justifications for the advertising restraints, and that the restraints were not reasonably necessary to achieve the claimed procompetitive benefits." The Commission further found that the "agreements harm competition in bidding for search engine key words, artificially reducing the prices that [1-800 Contacts] paid and the quality of the search engine results delivered to consumers – without offsetting efficiencies." The Commission's decision requires 1-800 Contacts to stop enforcing the offending agreement provisions and prohibits it "from entering into similar agreements in the future. Op. of the Comm'n, In the Matter of 1-800 Contacts, FTC No. 9372 (Nov. 7, 2018).

Commissioner Slaughter issued a concurring statement "strongly support[ing] the Commission's decision and order," and noted that the "case was a worthwhile expenditure of Commission resources . . . because of the importance of competition in online search bidding for both consumers and for competitive entry by online sellers of goods and services." Concurring Op. of Comm'r Rebecca Kelly Slaughter, In the Matter of 1-800 Contacts, FTC No. 9372 (Nov. 7, 2018).

Commissioner Phillips issued a dissenting statement, writing that he "fear[s] the majority's approach will foster uncertainty and undermine trademark policy." He would have required "a more thorough rule of reason analysis, with more credence given to the intellectual property at the heart of the case." Dissenting Stmt. Of Comm'r Noah Joshua Phillips, In the Matter of 1-800 Contacts, FTC No. 9372 (Nov. 7, 2018).

DOJ Seeks Approval for Settlement in Suit Alleging Atrium Health's "Steering" Restrictions Are Anticompetitive

On November 15, the DOJ announced that it has reached a proposed settlement in a civil suit it filed in 2016 against Carolinas HealthCare System (now Atrium Health) alleging that so-called "steering" provisions in its contracts with certain health insurers were anticompetitive. The settlement is subject to court approval under the Tunney Act. These provisions allegedly prevented insurers from "giv[ing] patients financial

incentives to choose more cost-effective hospitals and physicians" and "constrained insurers from providing consumers and employers with information regarding the cost and quality of alternative health benefit plans." According to the DOJ's press release, Atrium may not enforce certain "anti-steering" provisions and may not "seek[] contract terms or tak[e] actions that would prohibit, prevent, or penalize" certain types of steering by insurers going forward. Press Release, U.S. Dep't of Justice, Atrium Health Agrees to Settle Antitrust Lawsuit and Eliminate Anticompetitive Steering Restrictions (Nov. 15, 2018).

US – DOJ Criminal and Civil

DOJ Secures Guilty Pleas and Civil Damages Settlements from Defendants Accused of Rigging Department of Defense Fuel Supply Contract Bids; AAG Delrahim Announces Intention to Seek Antitrust Damages on Behalf of the Government Going Forward

On November 14, the DOJ announced that three companies "have agreed to plead guilty to criminal charges and pay a total of approximately $82 million in criminal fines for their involvement in a decade-long bid-rigging conspiracy that targeted contracts to supply fuel to United States" military bases in South Korea. Notably, in addition to the criminal fines, the DOJ also secured civil damages settlements from the settling defendants relating to the fuel purchases made by the government.

In the announcement, Assistant Attorney General Delrahim said: "Section 4A of the Clayton Act is a powerful yet historically underused enforcement tool that empowers the United States to obtain treble damages for anticompetitive conduct when the government is itself the victim. The Antitrust Division has a long history of vigilantly protecting the interests of American consumers through civil and criminal antitrust enforcement. Going forward, it is my goal to apply that same vigilance to protect the interests of American taxpayers. When a firm cheats the United States by rigging bids, the Division will insist on robust civil settlements like those announced today." Press Release, U.S. Dep't of Justice, Three South Korean Companies Agree to Plead Guilty and to Enter Into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018).

AAG Delrahim elaborated on the Antitrust Division's plan to use Section 4A to seek civil antitrust damages when the federal government suffers overcharges from anticompetitive conduct in a speech delivered on November 15 at the ABA Antitrust Section Fall Forum. Makan Delrahim, "November Rain": Antirust Enforcement on Behalf of American Consumers and Taxpayers (Nov. 15. 2018).

US – Agency News

Principal Deputy Assistant Attorney General Finch Speaks on Antitrust Contributions of Judge Ginsburg; Antitrust Division Examines Role of Compliance Programs in Criminal Enforcement Decisions

On November 6, Principal Deputy Assistant Attorney General Andrew C. Finch (and former Paul, Weiss partner) delivered remarks at the Judge Douglas H. Ginsburg *Liber Amicorum* Conference at George Mason University. In his remarks, citing the writing of Judge Ginsburg and former FTC Commissioner Joshua D. Wright on the topic, Finch said that the Antitrust Division is "considering how best to recognize corporate compliance efforts" in criminal antitrust enforcement. "This includes," he said, "carefully examining whether and how pre-existing compliance programs might merit our consideration, whether at the charging stage or at sentencing." Finch also said that "[w]e at the Antitrust Division share in Judge Ginsburg's goal of driving toward international consensus on the economic principles that underpin antitrust law." Andrew C. Finch, Remarks at Judge Douglas H. Ginsburg *Liber Amicorum* Conference at Antonin Scalia Law School (Nov. 6, 2018).

AAG Delrahim Speaks on Market Power in the "Digital Economy" and Issues Arising in Telecommunications Mergers

On November 7, 2018, Assistant Attorney General Delrahim spoke at a conference of the Federal Institute of Telecommunications in Mexico City. In his speech, AAG Delrahim discussed issues related to market power in the "digital economy," suggesting that using market share as a proxy for market power can be "tricky . . . because a high market share does not always equate to market power." He continued: "[d]epending on the circumstances, a firm with a high market share still may lack the ability to increase price or exclude competitors," but also suggested that "[s]ustained high prices also can serve as an engine of innovation, inviting entry and even disruption by new competitors," and noted that "[h]igh market shares can be fleeting, especially in dynamic markets." He cautioned against barriers to entry erected by regulation that is not "justified by legitimate concerns."

Finally, he discussed merger enforcement in telecommunications. He said that "[g]iven the internet's importance to the digital economy, we are especially focused on gatekeeper or bottleneck concerns in telecommunications mergers. Such problems are best addressed during the merger review process because they become much harder to solve later." Makan Delrahim, Remarks at the Federal Telecommunications Institute's Conference in Mexico City (Nov. 7, 2018).

DOJ Antirust Division Files Amicus Brief Arguing That a Unilateral Refusal to Deal Is Actionable Only If It Makes No Economic Sense

On November 8, the Antitrust Division filed an *amicus* brief in *Viamedia* v. *Comcast*, pending in the Seventh Circuit. In this case, Viamedia, "a spot cable advertising representative" that contracts with cable systems to sell local advertising, alleges among other things that Comcast refused to deal with it by ending its access to the cable interconnects that Comcast manages in Chicago and Detroit. (Interconnects allow the broadcasting of local advertising on multiple cable systems in a given area.) The district court dismissed this claim because "Viamedia failed to 'adequately allege that Comcast's refusal to deal was irrational but for its anticompetitive effects.'" While taking no position on the merits of Viamedia's claims, the government's brief argued that the court should "hold that a refusal to deal does not violate Section 2 unless it would make no economic sense for the defendant but for its tendency to eliminate or lessen competition." The submission of the brief is in line with Assistant Attorney General Delrahim's recent statement that the Antitrust Division has expanded its *amicus* participation in private litigation. Br. of United States as *Amicus Curiae* in Supp. of Neither Party, *Viamedia, Inc.* v. *Comcast Corp.*, No. 18-2852 (7th Cir. Nov. 11, 2018).

FTC Commissioners Testify Before Senate Commerce Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security

On November 27, all five FTC Commissioners testified at a hearing before the Senate Commerce Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security on Oversight of the Federal Trade Commission. Much of the hearing focused on the Commission's consumer protection mission, including data privacy. With respect to the Commission's competition mission, the Commission noted in prepared remarks that "[i]n FY 2017, the antitrust agencies received over 2,000 HSR filings for the first time since 2007, bringing filings in the past fiscal year to the average over the past 20 years." The FTC challenged 45 transactions; most of these were resolved through divestitures, but five resulted in litigation. Prepared Statement of the Federal Trade Commission before the Senate Commerce Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security (Nov. 27, 2018).

Deputy Attorney General Announces Changes to DOJ Policy Concerning Individual Accountability in Corporate Cases

In a speech on November 29, Deputy Attorney General Rosenstein announced changes to the DOJ's policy concerning individual accountability in corporate cases. According to Rosenstein, the revisions were spurned by the practicalities of the DOJ's experience with corporate investigations. Among the notable changes, under the new policy, in both criminal and civil investigations, companies will no longer be required to identify each and every individual involved in the offending conduct. Instead, according to Rosenstein, "any company seeking cooperation credit in criminal cases must identify every individual who was *substantially involved in or responsible for* the criminal conduct," and "a company must identify all wrongdoing by senior officials, including members of senior management or the board of directors, if it

wants to earn any credit for cooperating in a civil case." Further, "civil attorneys now have discretion to offer some credit even if the company does not qualify for maximum credit."

While the DOJ policy now "make[s] clear that absent extraordinary circumstances, a corporate resolution should not protect individuals from criminal liability," the *Justice Manual* explicitly references the Antitrust Division's Corporate Leniency Policy as an instance of an exception to this provision. The Corporate Leniency Policy provides, among other things, that "[i]f a corporation qualifies for leniency . . . , all directors, officers, and employees of the corporation who admit their involvement in the illegal antitrust activity as part of the corporate confession will receive leniency, in the form of not being charged criminally for the illegal activity, if they admit their wrongdoing with candor and completeness and continue to assist the Division throughout the investigation." Rod J. Rosenstein, Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018); Justice Manual, Title 9-28.210 (updated Nov. 2018); Antitrust Division Corporate Leniency Policy.

EU Developments

European Commission Clears Takeda's Acquisition of Shire with Divestiture

On November 20, the European Commission announced that it had cleared Takeda's acquisition of Shire, subject to the divestiture of Shire's in-development biologic treatment for inflammatory bowel disease. The Commission's press release noted that the investigation "focused . . . in particular on biologic treatments for the disease, where Shire's and Takeda's activities overlap." According to the statement, "Shire is currently developing a biologic treatment belonging to the same class of biologics, anti-integrins. It would therefore be expected to compete closely with [Takeda's biologic product] once it reaches the market." The Commission noted that it "was concerned that the takeover, as originally notified, would lead to a loss of innovation and a reduction in potential future competition." Takeda announced in June 2018 that the U.S. FTC was not requiring any divestitures. Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of Shire by Takeda, subject to conditions (Nov. 20, 2018); Press Release, Takeda Pharm. Co. Ltd., Takeda receives clearance from the United States Federal Trade Commission for the proposed acquisition of Shire plc (July 10, 2018).

UK Competition and Markets Authority Finds That PayPal Acquisition of iZettle Could Pose Competitive Concerns

On November 26, the UK Competition & Markets Authority announced that PayPal's acquisition of iZettle, a mobile payments company, could result in PayPal "fac[ing] insufficient competition in the UK." According to the CMA press release, "the merger could result in customers, which include small and medium-sized businesses, paying higher prices or receiving a lower quality service." In addition, the CMA "found that had iZettle not been taken over, it could have provided strong competition for PayPal and potentially benefitted customers by driving future innovation and lower prices." The parties will be given

the opportunity to address the CMA's concerns. If they do not do so, the matter will be subject to further investigation. Press Release, UK Competition & Mkts. Auth, PayPal / iZettle merger raises competition concerns (Nov. 26, 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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