November 12, 2018

Antitrust Month in Review – October 2018

This past month, U.S. federal antitrust agencies required divestiture remedies in several deals before allowing them to proceed without an enforcement challenge. Remedies generally involved the divestiture of standalone business units or locations. Notably, in one matter, Federal Trade Commissioner Rohit Chopra dissented from the FTC's agreed-upon divestiture settlement because the buyer of the divestiture assets included a private equity fund which he worried might have incentives misaligned with the FTC's objective of maintaining competition in the affected market.

In private litigation developments, the First Circuit overturned a grant of class certification and a Pennsylvania district court denied class certification because of problems related to the inclusion of uninjured class members in the putative classes. Both of these cases alleged antitrust claims related to the delay of entry into the market of generic pharmaceuticals. In another notable and rare case, a federal judge in Virginia ordered a divestiture remedy in a private challenge of a consummated merger.

In agency news, the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice (DOJ) continued to speak out on patent licensing issues – an area about which he has been quite vocal – and delivered a speech in which he generally downplayed competitive issues related to data. The FTC's hearings on Competition and Consumer Protection in the 21st Century continued.

Outside of the United States, the European Commission cleared several mergers, the United Kingdom's competition authority continued to prepare for Brexit and Canadian enforcers ended their years-long auto parts bid-rigging investigation.

We discuss these and other significant developments below.

US – DOJ/FTC Merger

DOJ Requires Divestitures for UTC Acquisition of Rockwell Collins to Proceed

On October 1, the Antitrust Division filed a complaint and a proposed final judgment which requires United Technologies Corporation to divest Rockwell Collins' (1) pneumatic ice protection systems business and (2) trimmable horizontal stabilizer actuators (THSAs) business – two aerospace businesses – in order to proceed with UTC's acquisition of Rockwell Collins. The DOJ determined that, without the divestitures, the deal would have been a three-to-two merger in the market for ice protection systems and would have also "combin[ed] two of the world's leading producers of THSAs." Safran S.A. will likely purchase the THSAs business. The acquirer of the ice protection systems business was not named, but

will be subject to DOJ approval. The DOJ noted that "[t]he Antitrust Division, the European Commission, and the Competition Bureau of Canada cooperated closely throughout the course of their respective investigations." The Canadian Competition Bureau announced that it will not oppose the acquisition, subject to the U.S. DOJ settlement. The European Commission announced in May that it approved the acquisition, subject to additional divestitures of Rockwell's pilot control business and "UTC's two research projects in oxygen systems." Press Release, U.S. Dep't of Justice, Justice Department Requires UTC to Divest Two Aerospace Businesses to Proceed with Acquisition of Rockwell Collins (Oct. 1, 2018); Press Release, Competition Bureau Canada, Competition Bureau will not oppose aerospace systems acquisition (Oct. 1, 2018); Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of Rockwell Collins by UTC, subject to conditions (May 4, 2018).

FTC Requires Divestitures for Penn National Gaming Acquisition of Pinnacle Entertainment to Proceed

On October 1, the Federal Trade Commission filed an administrative complaint and decision and order which requires Penn National Gaming and Pinnacle Entertainment to divest certain casinos in the St. Louis, Kansas City and Cincinnati markets in order for Penn National to proceed with its acquisition of Pinnacle. The FTC asserted that, without the divestitures, the acquisition would have eliminated head-to-head competition between these two casino operators in these geographic markets. The FTC's position was that the deal would have been a four-to-three merger in St. Louis; and a five-to-four merger in each of Kansas City and Cincinnati. The FTC also cited barriers to entry attributable in large part to a lack of available casino licenses in Missouri, Illinois, Kansas, Indiana and Ohio. Press Release, Fed. Trade Comm'n, FTC Requires Casino Operators Penn National Gaming, Inc. and Pinnacle Entertainment, Inc. to Divest Assets in Three Midwestern Cities as a Condition of Merger (Oct. 1, 2018).

DOJ Requires Divestitures for CVS-Aetna Merger to Proceed

On October 10, the Antitrust Division and five state attorneys general filed a complaint and proposed final judgment in the United States District Court for the District of Columbia requiring CVS and Aetna to divest Aetna's Medicare Part D prescription insurance plan business to WellCare Health Plans – a "buyer-up-front remedy" – in order for the CVS-Aetna merger to proceed. Both CVS and Aetna have Medicare Part D businesses.

The DOJ asserted that, without the divestiture, the merger would have "cause[d] anticompetitive effects, including increased prices, inferior customer service, and decreased innovation in sixteen Medicare Part D regions covering twenty-two states." According to a DOJ Q&A sheet, even though only 16 of 34 regions would have been impacted by the merger, the remedy included Aetna's entire nationwide individual prescription drug plan business because this will "better replicate the competition that would be lost as a result of the merger" by "giv[ing] WellCare business assets and national scale to enable it to compete more aggressively post-merger."

The DOJ further noted in its press release that "[t]he settlement also includes, consistent with other settlements, several provisions designed to improve the effectiveness of the decree and the Division's future ability to enforce it." This includes a provision allowing the DOJ to prove any violation of the consent decree by a preponderance of the evidence. Assistant Attorney General Delrahim recently noted that the DOJ will seek to include such provisions in consent decrees going forward to align the standard of proof for consent decree violations with that of liability for substantive civil antitrust violations. Press Release, U.S. Dep't of Justice, Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed With Merger (Oct. 10, 2018).

FTC Requires Divestitures for Linde-Praxair Merger to Proceed; Commissioner Chopra Expresses Concerns with Private Equity Divestiture Buyer

On October 22, the FTC announced that it is requiring Praxair and Linde to make numerous divestitures in order for their merger to proceed. The parties' settlement with the FTC requires divestitures of various businesses or plants related to "nine industrial gases product markets in numerous geographic markets in the United States." Depending on the type of gas at issue, the FTC defined a number of geographic markets – ranging from local to regional to national to worldwide – in which it asserted the merger would likely harm competition, and alleged numerous barriers to entry. The agreed divestitures include sales to a joint venture formed between CVC Capital Partners (a private equity firm) and Messer Group GmbH (an industrial gas supplier), among others. The FTC noted that "antitrust agencies in Argentina, Brazil, Canada, Chile, China, Colombia, the European Union, India, Korea, and Mexico worked cooperatively to analyze the proposed transaction and potential remedies." Press Release, Fed. Trade Comm'n, FTC Requires International Industrial Gas Suppliers Praxair, Inc. and Linde AG to Divest Assets in Nine Industrial Gas Markets as a Condition of Merger (Oct. 22, 2018).

Commissioner Chopra issued a dissenting statement in which he outlined specific concerns related to the fact that one of the divestiture buyers was a joint venture with a private equity fund, and wrote that he "would have preferred to include additional protections for the public to safeguard against risks often posed by the private equity buyer interest in the divested assets, as well as the level of debt financing and investment horizons involved." Specifically, he "would have preferred terms in the proposed order that would have required prior notice to or approval by the Commission of any asset sales by" the joint venture. He also expressed concerns with "heavy debt burdens" and "opportunistic asset sales" related to "private equity participation." Statement of Commissioner Rohit Copra, In the Matter of Linde AG, et al. FTC File No. 171-0068 (Oct. 22, 2018).

US – DOJ/FTC Civil Non-Merger

Court Grants FTC's Motion to Dismiss Declaratory Judgment Action but Suggests FTC Could Be Sanctioned for Forum Shopping in Pay-for-Delay Action

On October 29, Judge Paul S. Diamond of the United States District Court for the Eastern District of Pennsylvania granted the FTC's motion to dismiss a declaratory judgment action brought against the Commission by Allergan, Watson Laboratories and others seeking relief, *inter alia*, under the Administrative Procedure Act. The declaratory judgment action was filed in Pennsylvania after the FTC voluntarily dismissed its original suit – a generic pay-for-delay case against Allergan, Watson and others – and then refiled the action against Watson and Allergan in California where related private litigation was pending. The court characterized the "FTC's tactics" as "questionable" and suggested that "the FTC's apparent forum shopping may warrant sanctions."

With respect to the claims at issue, the declaratory judgment plaintiffs argued that the FTC did not have authority "to pursue allegations in federal court challenging conduct that occurred, and was completed, entirely in the past." Judge Diamond held that the declaratory judgment plaintiffs failed to state a claim under the APA because the FTC's action in filing its lawsuit was not a "final" agency action under the APA: the "filing of the enforcement action . . . does not determine any rights or obligations and has no legal consequences." Instead, these would "flow from the court's and jury's findings and decisions." The court also held that the declaratory judgment plaintiffs cannot use the Declaratory Judgment Act to "circumvent" the statutory procedure for challenging an FTC action – i.e., defending against an FTC suit for an injunction – and "the matter is not otherwise ripe for review." Endo Pharms. Inc. v. FTC, No. 16-cv-5599 (E.D. Pa. Oct. 29, 2018).

US – DOJ Criminal

Tenth Circuit Finds it Lacks Jurisdiction to Review District Court Order Holding that Indictment Alleging Customer Allocation among Heir Location Companies Is Subject to Rule of Reason Analysis

The antitrust laws proscribe a range of anticompetitive activity, but the U.S. Department of Justice will only bring a criminal antitrust case against defendants who are alleged to have engaged in per se illegal conduct such as price fixing, bid rigging or market or customer allocation.

In a criminal case brought in the United States District Court for the District of Utah, the presiding judge found that the conduct alleged by the DOJ in the indictment – an agreement among heir location companies to allocate customers – was not per se illegal, but rather subject to "rule of reason" analysis used where the conduct at issue does not clearly fall into the categories of per se illegality. In so holding, the district court cited "facts that the alleged agreement was (1) 'structured in an unusual way,'

(2) 'affected a small number of estates,' and (3) 'occurred in a relatively obscure industry (heir location services) with an unusual manner of operation.'" The district court further found that the agreement in question "'on [its] face would not necessarily restrict competition or decrease output, but instead contained efficiency-enhancing potential." Whatever the legal merits of this finding, the order effectively ended the criminal case because of the DOJ's policy to bring criminal antitrust cases only where per se illegal conduct is at issue.

The government appealed this order, and, on October 31, the United States Court of Appeals for the Tenth Circuit held that it lacked jurisdiction to hear the appeal. The court noted 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. However, because of statutory limits on the government's ability to appeal criminal matters, the court held that it could not rule on the merits of the appeal. In relevant part, the applicable jurisdictional statute allows appeals in criminal cases only from an order dismissing an indictment. The Tenth Circuit held that this case "remains actionable and immediately triable following the district court's order. . . . The only effect of the order is to foreclose the Government's preferred avenue for trying the case" and therefore was not "'tantamount' to dismissal." The court additionally declined to grant mandamus relief.

The district court's order therefore stands, and, unless the court reconsiders it, it is highly unlikely that the DOJ will continue to criminally prosecute the matter under the rule of reason for policy and possible Constitutional reasons. United States v. Kemp & Assoc., No. 17-4148 (10th Cir. Oct. 31, 2018).

US – Private Litigation

Court Grants Summary Judgment against Antitrust Claim Asserting FRAND Violations

On October 4, Judge William H. Orrick of the United States District Court for the Northern District of California released a redacted version of his order which, in part, granted summary judgment to Huawei Technologies on an antitrust counterclaim asserted by Samsung Electronics in a suit in which Huawei and Samsung have challenged certain of each other's cellular technology standard essential patents (SEPs). Samsung alleged that Huawei violated Section 2 of the Sherman Act because Huawei "never had any intention of licensing its declared SEPs on FRAND [fair, reasonable and non-discriminatory] terms and conditions, but nonetheless induced [the standard-setting organization] into including Huawei's technology in the standards to exclude alternative mobile technologies, and then filed . . . injunction actions [in China] to coerce Samsung into accepting Huawei's demand for excessive royalties."

Judge Orrick first disposed of Samsung's claim that Huawei refused to deal with Samsung, determining that the claim was not that Huawei refused to deal with it outright, but rather offered licensing terms which Samsung believed to be unreasonable. In particular, Judge Orrick wrote that "refusal to deal cases are inapplicable in the standards setting world." He went on to hold that Samsung failed to present

evidence that "Huawei made intentionally false promises to" the standard setting organization, cited evidence that Huawei had publicly disclosed its opening royalty rate as a basis for negotiation, and "has repeatedly offered to submit [the FRAND] dispute to binding arbitration." Huawei Techs. Co. v. Samsung Elecs. Co., No. 16-cv-2787 (N.D. Cal. Sept. 25, 2018).

Court Orders Divestiture in Private Merger Challenge

In a 149-page opinion released on October 5, Judge Robert E. Payne of the United States District Court for the Eastern District of Virginia granted a motion of a private plaintiff, Steves and Sons, Inc., for equitable relief requiring the defendant, JELD-WEN, Inc., to divest a manufacturing facility it acquired in a 2012 acquisition of a competitor. In 2016, the plaintiff brought a rare private challenge to JELD-WEN's acquisition under the Clayton Act. A jury returned a verdict in the plaintiff's favor, finding that the merger substantially reduced competition in the market for "interior molded doorskin." The jury awarded damages – including damages for past injury and future lost profits – which were trebled to nearly $176 million. In lieu of the future lost profits award, the plaintiff sought equitable relief in the form of a court-ordered divestiture of a manufacturing facility to create "an effective competitor" to JELD-WEN. This week, Judge Payne ordered the divestiture and related remedies. Pursuant to the court's order, the divestiture will be overseen by a court-appointed special master. (As the court noted, incidentally, the plaintiff "is the only entity that has expressed interest in acquiring" the divested plant.)

This case is quite extraordinary. As the court noted: "This is, after all, the first privately brought action under Section 16 of the Clayton Act [establishing a private cause of action for injunctive relief from antitrust violations] to have gone to verdict and, in which, a private party has sought divestiture." In 2012, the Department of Justice investigated the acquisition, but took no action against it. The DOJ filed a Statement of Interest in the case expressing its views on the requested equitable relief, and, although encouraging a divestiture remedy, "note[d] that several aspects of the proposed divestiture appear particularly inconsistent with the goal of restoring lost competition." Indeed, the DOJ explained: should the plaintiff acquire the divested plant, "that would leave only three major doorskin manufacturers, all of which would be vertically integrated. The remaining door makers would have no independent suppliers from which to purchase doorskins, and could be competitively disadvantaged by the divestiture to a rival with which they compete in the molded door market." The defendant has indicated that it will appeal. Steves & Sons, Inc. v. JELD-WEN, Inc., No. 16-cv-545 (E.D. Va. Oct. 5, 2018); Statement of Interest of the United States of America Regarding Equitable Relief, Steves & Sons, Inc. v. JELD-WEN, Inc., No. 16-cv-545 (E.D. Va. June 6, 2018).

First Circuit Overturns Class Certification in Asacol Antitrust Litigation, Holding that Claims Administrator Proceeding to Remove Uninjured Class Members Would Be Improper

On October 15, the First Circuit issued an opinion in which it overturned class certification in a case alleging delay of entry into the market of generic Asacol, which is used to treat ulcerative colitis. In this case, plaintiffs alleged that the defendant pulled Asacol from the market and subsequently introduced Delzicol, a capsule form of Asacol, thus preventing the use of Asacol as a "reference drug" for a generic substitute. "[T]he district court certified a class of all Asacol purchasers who subsequently purchased Delzicol or Asacol HD" (a higher-dosage form) in one of the relevant jurisdictions. The district court did so even while acknowledging "that approximately ten percent of the class had not suffered any injury attributable to defendants' allegedly anticompetitive behavior" because it found that "those uninjured class members could be removed in a proceeding conducted by a claims administrator."

The First Circuit held that plaintiffs could not produce "unrebutted affidavits" which would allow the determination of whether particular individuals suffered injury-in-fact. Here, according to the court, "defendants have expressly stated their intention to challenge any affidavits that might be gathered," and they explained several reasons why individuals may not have switched to a generic alternative. The court held that its "inability to fairly presume that these plaintiffs can rely on unrebutted testimony in affidavits to prove injury-in-fact" prevented class certification. The court went on to hold that "[p]laintiffs' proposed claims process provides defendants no meaningful opportunity to contest whether an individual would have, in fact, purchased a generic drug had one been available" and thus infringed on defendants' Constitutional due process and jury trial rights. Teamsters Union 25 Health Servs. & Ins. Plan v. Warner Chilcott Ltd. (In re Asacol Antitrust Litig.), No. 18-1065 (1st Cir. Oct. 15, 2018).

Court Denies Motion to Compel Arbitration, Holding that Antitrust Claims Do Not "Arise Out of" Parties' Agreement

On October 26, Judge J. Curtis Joyner of the United States District Court for the Eastern District of Pennsylvania denied Johnson & Johnson's motion to compel arbitration of plaintiff's monopolization antitrust claims brought by a direct purchaser of Remicade. The distributor agreement between the direct purchaser and Johnson & Johnson included an arbitration provision covering "[a]ny controversy or claim arising out of or relating to" the agreement. Noting generally that "Sherman Act claims are not precluded from resolution through arbitration," the court nevertheless held that the plaintiff's antitrust claims were not covered by the arbitration provision because the alleged anticompetitive conduct occurred outside of the agreement.

In so holding, the court observed, among other things, that "the arbitration clause itself does not refer to statutory claims of any kind, . . . much less 'antitrust' . . . claims"; that the agreement did "not set or state a specific purchase price for Remicade"; that the "[a]greement does not expressly prohibit anticompetitive

conduct or impose obligations to uphold specific antitrust statutes"; that "whether [the defendant] performed its obligations under the Agreement has no bearing on whether it harmed [the plaintiff] by" engaging in allegedly anticompetitive conduct; and that "Defendants' alleged anticompetitive scheme to inflate prices for Remicade had marketwide effects and could have been committed without the" agreement with the plaintiff. In re Remicade Antitrust Litig., No. 18-cv-303 (E.D. Pa. Oct. 26, 2018).

Court Denies Class Certification in Pay-for-Delay Case, Citing Lack of Methodology to Identify Uninjured Class Members

On October 30, Judge Madeline Cox Arleo of the United States District Court for the District of New Jersey denied plaintiffs' motion for class certification in a case alleging that Celgene illegally delayed entry of generic Thalomid and Revlimid. The court found that the plaintiffs satisfied the Rule 23(a) requirements of numerosity, commonality, typicality and adequacy. However, the court held that plaintiffs failed to meet their burden to show that, with respect to their proposed Rule 23(b)(3) antitrust damages class, "common questions of law or fact predominate over questions affecting the individual class members only."

In so holding, the court cited defendants' identification of the existence in the putative class of uninjured "brand loyalists – customers that would purchase a brand product even if a generic alternative was available" – and "the absence of a method for identifying" these class members. Therefore, because plaintiffs could not prove class-wide injury-in-fact with common evidence, certification of a damages class was inappropriate. The court denied the plaintiffs' motion without prejudice and allowed the plaintiffs to try to cure this deficiency. In its opinion, the court cited the First Circuit's recent Asacol case which found similar problems with a proposed class. The court also found fault with certain aspects of plaintiffs' proposed methodology to identify whether class members' purchases were made within the jurisdictions at issue, and failed to show that a separate Rule 23(b)(2) injunctive relief class was proper. In re Thalomid & Revlimid Antitrust Litig., No. 14-cv-6997 (E.D. Pa. Oct. 30, 2018).

US – Agency News

Patient Right to Know Drug Prices Act Signed into Law

On October 10, the Patient Right to Know Drug Prices Act was signed into law. This law requires in part that patent settlements between branded and generic manufacturers involving biosimilar biological products must be notified to the Department of Justice and Federal Trade Commission. Existing law already requires notification regarding generic drug settlements. Competition issues surrounding actions by patent holders to delay the entry into the market of generic pharmaceuticals have been a focus of the FTC for some time. Patient Right to Know Drug Prices Act.

Antitrust Division AAG Delrahim Continues to Speak Out on Patent Licensing Issues

In a speech delivered on October 10 to the Federal Circuit Bar Association, Assistant Attorney General Delrahim once again expressed his view that a patent holder's licensing conduct generally should not give rise to a Section 2 monopolization claim. In the speech, he stated: "Patent rights function best if an owner retains a right to exclude. That right ensures that any price paid for a patented product or license reflects the bargaining leverage that the patent regime bestows. Depriving a patent holder of this right would skew the bargain away from the free-market incentive scheme that the Constitution and Congress have established. Even worse, it threatens to convert the licensing bargaining process into a compulsory licensing scheme." He went on to describe the Nash bargaining model – which, incidentally, was key to the DOJ's case against the AT&T-Time Warner merger – as a tool to help understand a free-market patent licensing process, noting that "[u]nder that free market system, patent holders may go to court to seek to exclude rivals from using their technology without obtaining a license," and this impacts the parties' relative bargaining leverage. He added, "[f]rom the perspective of competition, the animating principle behind the antitrust laws, patent licensing works best where royalty rates reflect the outcome of free-market competitive bargaining. Using antitrust law to police the unilateral conduct of patent holders threatens to disrupt the foundation of free market bargaining." Makan Delrahim, Remarks at the Federal Circuit Bar Association Global Series 2018 in Ottawa (Oct. 10, 2018).

Antitrust Division AAG Delrahim Delivers Speech Discussing Competitive Issues Related to Data at the University of Haifa

On October 17, Assistant Attorney General Makan Delrahim delivered a speech at the University of Haifa in which he set forth views on competitive issues surrounding the accumulation of data. In his remarks, he suggested that "data—even large amounts of it—may not act as an entry barrier in every digital market." He gave several reasons: "a consumer can share the same data with multiple firms"; "data is often widely available and inexpensive to collect"; "most data has a short shelf-life"; and "for many online platforms and tech businesses, data is an input and not the product itself." Explaining this last point, he said "[a]s with other inputs like labor and capital, a new entrant may not need the same type of data or quantity of data to compete effectively against an incumbent." He went on to say that he "is not yet convinced" that there should be some antitrust duty for "dominant firms to share data with smaller competitors," noting that "we do not generally require firms, even dominant ones, to deal with competitors." Makan Delrahim, "Start Me Up": Start-Up Nations, Innovation, and Antitrust Policy (Oct. 17, 2018).

FTC Hearings on Competition and Consumer Protection in the 21st Century Continue

In October, the FTC held two installments of its ongoing hearings on Competition and Consumer Protection in the 21st Century. Commissioner Rohit Chopra delivered opening remarks for the October 15th-17th session, which addressed issues related to multi-sided platforms, labor markets and "acquisitions

of nascent and potential competitors in digital technology markets." Paul, Weiss partner and co-chair of the antitrust group Jonathan Kanter participated on a panel titled "Nascent Competition: Are Current Levels of Enforcement Appropriate?" FTC Hearing #3: Competition and Consumer Protection in the 21st Century.

In his opening remarks for the session, Commissioner Chopra discussed digital marketplaces, stating that "[t]hese marketplaces do not operate like those we read about in history or in our economics textbooks. If we do not understand them, we are in big trouble." He called for study of questions related to data collection practices, property rights in collected data, the "monetization" of data and the use of algorithms by these marketplaces. He also outlined several questions concerning the regulations imposed by marketplace operators, including whether "marketplace operators show preferential treatment to some sellers over others" and how "marketplace operators engage in setting or regulating prices for sellers on the market." He also asked: "What steps do operators take that have the effect of deterring the formation of new, competing marketplaces? In today's economy, is it even possible to avoid these marketplaces?" Prepared Remarks of Commissioner Rohit Chopra, FTC Hearings on Competition and Consumer Protection (Oct. 15, 2018).

An additional session of the hearings took place on October 23-24 and addressed "the role of intellectual property in promoting innovation from academic, economic, and industry perspectives. The sessions also examined emerging trends in patent quality and litigation, and included the FTC's first wide-scale exploration of copyright issues." Press Release, Fed. Trade Comm'n, FTC Announces Agenda for the Fourth Session of Its Hearings on Competition and Consumer Protection in the 21st Century (Oct. 11, 2018).

EU Developments

European Commission Clears Microsoft's Acquisition of GitHub

On October 19, the European Commission approved Microsoft's acquisition of GitHub. Both companies provide software development platforms. According to its press release, "[t]he Commission found that the combination of Microsoft and GitHub's activities . . . would raise no competition concerns because the merged entity would continue to face significant competition from other players." The Commission examined whether the transaction would allow Microsoft to harm other development platforms by integrating GitHub's features with its own "while limiting integration with third parties'" offerings, and concluded that there were no competitive concerns because "such behaviour would reduce the value of GitHub for developers, who are willing and able to switch to other platforms." Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of GitHub by Microsoft (Oct. 19, 2018).

European Commission Clears Sony's Acquisition of Sole Control of EMI

On October 26, the European Commission cleared Sony's acquisition of sole control of EMI Music Publishing from its joint venture partner. According to its press release, "[t]he Commission found the deal raises no competition concerns, in particular as it will not increase Sony's market power vis-à-vis online platforms." The Commission investigated whether Sony's joint venture partner would have acted as a "constraint on any hypothetical Sony strategy for EMI," and concluded that it would not. Among other things, "[t]he Commission found that authors could credibly threaten to switch away from Sony if it attempted to degrade the value of their publishing rights to the benefit of its recording division." Press Release, Eur. Comm'n, Mergers: Commission approves acquisition of sole control over EMI Music Publishing by Sony (Oct. 26, 2018).

U.K. Competition and Markets Authority Publishes Guidance in Connection with "No Deal" Brexit Competition Statutory Instrument

Noting that it "expects to investigate larger and more complex merger cases as well as carry out a greater number of complex antitrust cases, often in parallel with other jurisdictions including the EU" after Brexit, the UK Competition and Markets Authority (CMA) on October 30 published guidance relating to its role in merger in antitrust investigations if there is a "no deal" Brexit. This guidance comes as the UK government laid a "no deal" competition statutory instrument before Parliament.

According to the CMA, in merger and antitrust cases where "the European Commission relieved the CMA of competence" and reached a final, undisturbed decision pre-exit, the CMA will not open an investigation. In merger cases where the Commission has not reached a decision pre-exit, the CMA will have jurisdiction to investigate "the UK aspects of the merger" in accordance with UK law. The draft statutory instrument "provides that competition regulators and UK courts [will] continue to be bound by an obligation to ensure no inconsistency with the pre-exit EU competition case law when interpreting UK competition law, but that they may also depart from such pre-exit EU case law where it is considered appropriate in the light of particular circumstances." U.K. Competition & Mkts. Auth., CMA's role after Brexit (Oct. 30, 2018); The Competition (Amendment etc.) (EU Exit) Regulations 2019 (draft); Explanatory Memo. to the Competition (Amendment etc.) (EU Exit) Regulations 2019).

Canadian Developments

Canadian Competition Bureau Concludes Auto Parts Bid-Rigging Investigation

On October 19, the Canadian Competition Bureau announced that it had secured its thirteenth guilty plea and concluded its investigation into bid-rigging in the auto parts industry, noting that "[t]he investigations led to 13 guilty pleas and fines totalling more than $86 million, including three of the largest bid-rigging fines ever imposed by the courts in Canada." The investigation began in 2009

following information received through the Competition Bureau's immunity program. Press Release, Competition Bureau Canada, Thirteenth guilty plea concludes auto parts bid-rigging investigations with fines totalling over $86 million (Oct. 19, 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:

Craig A. Benson
+1 202-223-7343
cbenson@paulweiss.com

William B. Michael
+1 212-373-3648
wmichael@paulweiss.com

Jane B. O'Brien
+1 202-223-7327
jobrien@paulweiss.com

Aidan Synnott
+1 212-373-3213
asynnott@paulweiss.com

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

Marta P. Kelly
+1 212-373-3625
mkelly@paulweiss.com

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