

The Quick Look



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TREASURY REPORT MAKES RECOMMENDATIONS TO PROMOTE COMPETITION AND SMALL BUSINESS ENTRY IN ALCOHOL MARKETS

On February 9, 2022, the U.S. Department of the Treasury, in consultation with the DOJ and the FTC, released a [report](#) on competition in the markets for beer, wine, and spirits. The report describes the state of competition in beer, wine, and spirits markets across the country, identifies the areas of concern, and provides recommendations that the DOJ, the FTC, and the Tobacco Tax and Trade Bureau (TTB) can follow to maintain and promote competition in these markets. The report is a direct response to President Biden's July 9, 2021 Executive Order, "Promoting Competition in the American Economy," and its stated goal to reduce corporate consolidation and increase competition while paying specific attention to workers and small businesses. To that end, the report puts particular emphasis on the competitive issues hindering the ability of small business and new entrants to compete and the regulation and enforcement remedies that could help alleviate these issues.

The report finds that production in beer, wine, and spirits markets is heavily concentrated. For instance, on revenue basis, the top two brewers account for 65% of the national beer production. Along with price and entry related competitive concerns, the report notes that such concentration may also create potential for tacit coordination among the largest firms. The report also identifies concerns in the distribution and retail tiers of the market. Some of the current competition issues stem from various state regulations that were originally motivated by public health concerns or a desire to limit anticompetitive vertical integration. Many states also have post-and-hold price laws that, according to the report, can weaken price competition and allow distributors to more easily coordinate by reaching and enforcing price agreements. The report finds that these regulations

have had the unintended effect of disproportionately affecting the entry and growth of small businesses without resulting in the expected benefits. Interestingly, the report also finds that there has been a “significant growth in the number of small and craft producers of beer, wine, and spirits” over the last several decades.

Treasury’s main recommendations to the antitrust agencies come in the form of encouragement to the DOJ and the FTC to consider effects on distribution resulting from major brewers acquiring craft brewers, apply “particular skepticism” to efficiency claims put forth by merging parties, take a closer look at vertical transactions that can lead to foreclosure of small firms or new entrants, and to engage with states on state laws impacting competition. The report also encourages the two agencies to consider retrospective studies involving craft brewer acquisitions and assess how the upcoming potential revisions to the merger guidelines can provide guidance on markets that are already highly concentrated. To aid growth of small businesses while balancing public health concerns, Treasury recommends that TTB reexamine labeling rules while reducing regulatory requirements that can act as barriers to entry.

UK TRIBUNAL PROPOSES UNUSUAL TRIAL PROCEDURE TO ADDRESS PASS-THROUGH IN INTERCHANGE FEE CLAIMS

On March 1, 2022, the UK Competition Appeal Tribunal (“CAT”) [proposed an unusual trial procedure](#) to address common issues in the more than 900 interchange fee claims against Visa and Mastercard by merchants currently before the CAT, most notably the issue of the pass-through of interchange rates. The UK Supreme Court previously found that certain interchange rates set by Visa and Mastercard were unlawful under the rationale that they constituted an agreement regarding the minimum price floor on the rates charged by banks. Pass-through concerns the extent to which the merchant passes on the cost of interchange fees increases to customers through increases in its prices, as opposed to alternative responses such as cutting other business costs to compensate.

How merchants respond to interchange fees has implications not only for merchants’ claimed harms in the current set of cases, but also for the related claims in the *Merricks* litigation, a parallel consumer class action alleging that customers were harmed by the pass-through of interchange overcharges by merchants. In order to resolve this and other common issues, the CAT proposed a series of short trials. The CAT president suggested that the issue of quantifying the extent to which merchants pass through unlawful overcharges from interchange fees could be resolved with limited disclosure and an emphasis on evidence offered through a limited number of experts for both sides. The parties would agree not to appeal until the entire procedure has concluded.

The proposal by CAT is the latest development in decades of litigation involving payment networks in the UK and European Union. In August 2020, the UK Supreme Court upheld a previous judgment that Visa’s and Mastercard’s interchange fees consisted a price floor that restricted competition in the acquiring market.

OTHER DEVELOPMENTS

CONTINENTAL LOSES APPEAL OVER STANDING TO CHALLENGE AUTOMOTIVE PATENT POOL AVANCI. On March 1, 2022, the Fifth Circuit ruled that Continental has no standing to bring antitrust claims against the patent pool Avanci over the licensing of standard-

essential patents for connected cars, instructing the lower court to dismiss the auto parts maker's allegations. The Court concluded that the two claims brought by Continental – based on indemnity obligations and a refusal to license – are inadequate to prove the supplier has antitrust standing, or has suffered injuries flowing from an antitrust violation. Additionally, the Court disagreed with the district court's conclusion that Continental's alleged unsuccessful attempts to obtain licenses on fair, reasonable, and nondiscriminatory (“FRAND”) terms from defendants comprise an injury-in-fact conferring Article III standing.

SUPPLY CHAIN IN THE SPOTLIGHT: DOJ AND FBI JOINT INITIATIVE TO INVESTIGATE COLLUSIVE CONDUCT INVOLVING SUPPLY CHAIN DISRUPTIONS.

In light of the supply reduction and price increase observed throughout the COVID-19 pandemic, the DOJ and FBI have set up a [task force](#) to investigate collusion in a range of industries “particularly affected” by supply chain disruptions, which may include potentially anticompetitive activity, illegal price-fixing and wage-fixing agreements, bid-rigging, and market allocation. This is also part of the recent new working group formed among five antitrust enforcers to develop and share intelligence via international cooperation tools “to detect and investigate suspected anti-competitive behaviour and collusion” of companies active in the global supply chain (as we previously reported in Issue 8).

EC SEEKS COMMENTS ON DRAFT REVISED RULES ON COOPERATION AGREEMENTS BETWEEN COMPANIES.

The European Commission has launched a public [consultation](#) for interested parties to comment on two draft revised Horizontal Block Exemption Regulations on Research & Development and Specialisation agreements (“R&D BER” and “Specialisation BER” respectively, together “HBERs”) and the draft revised Horizontal Guidelines. Among the proposed changes, the revisions aim to facilitate companies to cooperate in areas such as R&D and production, to provide further clarification for business as to when they can cooperate with rivals, and to include a new chapter on the assessment of horizontal agreements pursuing sustainability objectives, as well as new guidance on data sharing, mobile infrastructure sharing agreements and bidding consortia. Submissions of comments are due April 26, 2022.

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