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ANTITRUST

Expert Analysis

Tax Software Merger And Creditor Collaborations

By Elai Katz

A district court blocked the proposed merger of the second and third largest providers of tax preparation software, having found that other methods of tax return preparation should not be included in the relevant market. Private parties seeking to challenge AT&T's plans to acquire T-Mobile suffered the requisite antitrust injury to proceed with some of their claims. The federal antitrust agencies issued a policy statement concerning collaborations mandated by the new health care law.

Other recent antitrust developments of note included a ruling by the U.S. Court of Appeals for the Third Circuit that the exchange of credit information without more did not plausibly constitute an illegal restraint of trade and a decision by the U.S. Court of Appeals for the Eleventh Circuit that coordinated negotiations by holders of debt instruments did not violate antitrust law.

Tax Software Merger

Following a nine-day bench trial, the Department of Justice obtained an injunction preventing tax return preparation store and software company H&R Block from acquiring TaxACT, a provider of do-it-yourself tax preparation software. The department alleged that the proposed merger would violate §7 of the Clayton Act by combining the second and third most popular sellers of tax software (with a collective market share of nearly 30 percent) to create a virtual duopoly with Intuit's Turbo Tax (which has over 60 percent of the market).

The merging parties argued that tax software competes with other methods of preparing tax returns, including "pen and paper" and assisted preparation with an accountant or a specialist at a retail tax store and that, as a result, the government's case overstated the parties' market shares. The district court agreed instead with the department's assertion that the relevant product market was limited to "digital do-it-yourself tax preparation products."

The court noted that internal business documents showed that TaxACT viewed other tax software as its primary competition and set its pricing and marketing strategies in relation to those products. And, the court stated, the average price of tax software is around $44 while an assisted tax return typically ranges from $150 to $200 and the major competitors do not set their tax software prices in response to changes in prices for assisted tax preparation services. The court added that using tax software is a very different consumer experience than other modes of preparing tax returns.

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The court also stated that it did not believe a significant number of taxpayers would switch to pen-and-paper in response to an increase in the price of tax software. The court observed that the merging parties' proposed relevant market, including all methods of tax preparation, was so broad that there were "no conceivable alternatives besides going to jail, fleeing to Canada, or not earning any taxable income."

The court stated that the increased concentration in the already concentrated relevant market resulting from the planned merger created a presumption of likely anticompetitive effects based on the market concentration measurement thresholds set forth in the antitrust agencies' horizontal merger guidelines and adopted by many courts.

The court then found that entry or significant expansion by smaller tax software providers was not likely because, among other things, the pool of pen-and-paper customers who might convert to digital has dwindled and established tax software brands exhibit "stickiness" because it is difficult to move prior year tax return data to another provider's program.

Although the court noted that the government did not set out a clear standard to distinguish a "maverick" from any other aggressive competitor, it found that TaxACT consistently bucked prevailing pricing norms and constrained prices such that its acquisition by H&R Block would reduce or eliminate that disruptive force from the market.

The court rejected the merging parties' argument, based on the decision in *United States v. Oracle*, 331 F.Supp.2d 1098 (N.D. Cal. 2004), that unilateral anticompetitive effects cannot be demonstrated where the merging firms' combined market share is below around 35 percent. The court found that the merging parties' expected efficiencies were not enough to rebut the government's showing of likely anticompetitive effects because many of the asserted efficiencies were not merger-specific or verifiable and, the court observed, H&R Block had failed to achieve projected efficiencies in a prior transaction.

United States v. H&R Block Inc., No. 11-Civ.-00948 (D.D.C., Nov. 10, 2011), available at www.usdoj.gov/atr

Comment: The court's detailed and thorough opinion follows the tried and true method of §7 analysis, commencing with market definition and a structural examination of relative market shares, notwithstanding recent efforts in agency guidelines and elsewhere to move away from that model.

Competitor Standing

Sprint Nextel and Cellular South brought suits to enjoin AT&T's proposed acquisition of T-Mobile as a violation of §7 of the Clayton Act in the same court where the Department of Justice brought its case challenging the merger. AT&T moved to dismiss the competing wireless services providers' complaint for failure to allege antitrust injury. The D.C. district court dismissed some claims and sustained others.

The court observed that the antitrust injury requirement aligns private antitrust suits with the purposes of the antitrust laws to prevent abuses by firms seeking to halt the strategic behavior of rivals that may in fact increase competition. Sprint and Cellular South's claims that the merger would lead to higher prices for consumers of mobile wireless services did not constitute a cognizable

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injury because, as AT&T's competitors, they stand to gain from increased prices.

On the other hand, allegations that the additional buying power (sometimes referred to as monopsony power) that the merger will likely confer upon AT&T threatens Sprint and Cellular South's access to the latest and most desirable smart-phones satisfied the antitrust injury requirement because denial of a necessary input is an injury of the type the antitrust laws were designed to prevent.

Sprint Nextel Corp. v. AT&T Inc., No. 11-1600, and *Cellular South Inc. v. AT&T Inc.*, No. 11-1690, 2011-2 CCH Trade Cases ¶77,664 (D.D.C. Nov. 2, 2011)

Health Care Law

The Federal Trade Commission (FTC) and the Department of Justice issued a final policy statement regarding Accountable Care Organizations (ACOs)—groups of health care services providers and suppliers created by the new health care law passed last year, the Affordable Care Act. Through these ACOs, providers will manage and coordinate care for Medicare fee-for-service beneficiaries.

Enforcers were concerned that these collaborations could lead to improper coordination of prices in the private health care market. The FTC and the department recognized that ACOs can provide opportunities for innovation and better care in the Medicare and related commercial market, while achieving cost savings. The antitrust agencies have stated they will apply rule of reason analysis when evaluating ACOs that meet the eligibility criteria for the program.

The antitrust agencies will not challenge ACOs that fall within a safety zone set forth in the policy statement, absent extraordinary circumstances. To qualify for the safety zone, participants in an ACO that provide the same service must have a combined share of 30 percent or less of each service in each participant's Primary Service Area, which is the physical area where a participant has a certain percentage of patients. Primary Service Areas are divided into physician specialties, major diagnostic categories for inpatient facilities, and outpatient categories.

The policy statement recommends ACOs outside the safety zone avoid conduct the antitrust agencies have identified as anticompetitive, such as engaging in improper exchange of price information or other competitively sensitive data with respect to their sale of competing services outside the ACO, and provides for an optional 90-day antitrust review by the agencies of an ACO to determine whether it will likely harm competition. Unlike the proposed statement issued in April this year, there is no mandatory review for those ACOs.

Statement of Antitrust Enforcement Policy Regarding Accountable Care Organizations Participating in the Medicare Shared Savings Program, 76 Fed. Reg. 67,026, CCH Trade Reg. Rep. ¶13,157 (Oct. 28, 2011), available at www.usdoj.gov/atr

Comment: Despite the antitrust agencies' efforts, voiced in their 2010 Horizontal Merger Guidelines, to move away from relevant market definition and market share analysis, the final policy statement reported immediately above relies upon such indicators to examine ACOs, demonstrating that relevant market definition remains a useful and efficient antitrust tool, particularly in providing practical guidance to businesses.

Credit Information Exchanges

A bankrupt clothing retailer, Factory 2-U Stores, alleged that "factors"—firms that provide financing to clothing retailers—illegally conspired to decline to extend credit to the plaintiff in violation of §1 of the Sherman Act and New York's Donnelly Act. Factors play an important role in the garment industry: When retailers buy garment inventory from manufacturers, the manufacturers seek to protect themselves from the risk that the retailer will not be able to pay for the garments by passing that risk along to factors. Factors assume that risk by purchasing, at a discount, the garment manufacturers' accounts receivable for the retailers that the factor deems creditworthy. As such, manufacturers quickly convert their accounts receivable into cash, and the factors attend to collecting from the retailers. In practice, manufacturers are unlikely to sell to a retailer if factors decline to assume that retailer's risk.

The complaint alleged that the defendant factors held meetings and telephone conversations where they exchanged information about Factory 2-U's credit and fixed its credit terms. The Delaware district court dismissed the complaint for failure to allege the existence of a conspiracy in accordance with the pleading standards established in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), and the Third Circuit affirmed.

The Department of Justice announced that it would not challenge First Niagara Bank's acquisition of nearly 200 HSBC branch offices in New York and Connecticut, provided that the parties divest 25 branches in the Buffalo area.

The appellate panel first observed that exchanging information regarding the creditworthiness of customers is not an antitrust violation because such exchanges often serve to protect competitors from insolvent customers. The court also noted that the complaint failed to allege parallel conduct as the factors' decisions to decline, decrease and even increase credit to the plaintiff did not occur at the same time.

The Third Circuit then stated that, in the absence of allegations of direct evidence of a conspiracy, the plaintiff was required to plead "plus factors" to successfully assert a §1 claim but that the complaint did not allege that decisions to decline to extend credit to plaintiff were against the factors' independent self-interest to reduce their individual exposure to credit risk.

Burtch v. Milberg Factors Inc., No. 10-2818, 2011-2 CCH Trade Cases ¶77,660 (Oct. 24, 2011)

Creditor Collaboration

CompuCredit, a financial services firm and issuer of long-term convertible promissory notes, claimed that holders of the notes, now traded on the secondary market, conspired to boycott CompuCredit's tender offer and force it to pay supra-competitive prices to redeem its notes early. The district court in the Northern District of Georgia dismissed the complaint, and the Eleventh Circuit affirmed. The appellate court stated that negotiations about the repayment of a debt are distinguishable from a conspiracy to fix future prices and that other courts found the collaboration among creditors to collect pre-existing debts did not run afoul of antitrust laws.

CompuCredit Holdings Corp. v. Akanthos Capital Management, LLC, No. 11-13254 (Nov. 10, 2011)

Bank Merger

The Department of Justice announced that it would not challenge First Niagara Bank's acquisition of nearly 200 HSBC branch offices in New York and Connecticut, provided that the parties divest 25 branches in the Buffalo area. The department stated that in the absence of the divestitures required by its agreement with the banks, the transaction would have lessened competition in Buffalo for retail and small business banking services.

Justice Department Reaches Agreement With First Niagara Bank N.A. and HSBC Bank USA N.A. on Divestitures ((Nov. 10, 2011), available at www.usdoj.gov/atr

Comment: The proposed combination in the enforcement action reported immediately above is also subject to approval by the Office of the Comptroller of the Currency (OCC). Mergers of commercial banks are reviewed by one of three federal banking agencies—the Federal Reserve Board, the Federal Deposit Insurance Corporation or the OCC—which must obtain a report from the Department of Justice and conduct their own examination, in accordance with the Bank Merger Act of 1966, codified at 12 U.S.C. §1828(c).

Bread Merger

The Department of Justice announced the settlement of charges that Bimbo Bakeries' acquisition of Sara Lee's North American fresh bakery business, combining the number one and three bakers of sliced fresh bread in the United States, would lessen competition for the sale of sliced bread in eight geographic markets, including Los Angeles, San Francisco, Kansas City and the Harrisburg/Scranton area in Pennsylvania. The consent decree requires the divestiture of several brands and associated manufacturing and distribution assets in the identified metropolitan areas.

United States v. Grupo Bimbo, S.A.B. de C.V., No. 11-cv-01857 (D.D.C. Oct. 21, 2011), available at www.usdoj.gov/atr

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