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ANTITRUST

Expert Analysis

Information Sharing and Negotiations For Baseball Broadcast Rights

By
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Two recent developments have brought attention to information exchanges, a complex and subtle area of U.S. antitrust law. In a simple information exchange case subject to antitrust review, competitors have shared commercially sensitive information with one another without agreeing on a common course of competitive conduct (such as pricing, output, or strategy). The allegedly unlawful agreement in an information exchange case, unlike other types of restraints of trade, is the agreement to share information rather than an agreement to eliminate competition on prices or customers, for example. Information exchanges, even among direct rivals, can sharpen competition and, unless accompanied by an agreement not to compete, must be shown to have anticompetitive effects in a properly defined market before they can be deemed unlawful.

The Department of Justice (DOJ) charged satellite video programming provider DirecTV with unlawfully exchanging confidential strategic information with rivals in violation of §1 of the Sherman Act, which prohibits agreements in restraint of trade. DOJ asserted that DirecTV and the other providers agreed to exchange information with one another during negotiations to license the rights to broadcast Dodgers baseball games in the Los Angeles area.

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The DOJ and Federal Trade Commission (FTC) also addressed information sharing in jointly issued formal guidance for human resource professionals involved in competition for hiring employees. The agencies clarified that the market for labor falls squarely within the bounds of antitrust law and that firms competing to hire employees are not exempt from well-settled rules prohibiting unreasonable restraints in markets for other goods and services.

Alleged Orchestrating

The Justice Department accused DirecTV of unlawfully exchanging competitively sensitive information with Cox, Charter, and AT&T about their negotiations for the rights to broadcast L.A. Dodgers games in violation of §1 of the Sherman Act. See DOJ Complaint, *U.S. v. DirecTV Group Holdings*, No. 16-cv-08150 (C.D.Cal. Nov. 2, 2016).

Time Warner Cable had acquired the exclusive right to broadcast Dodgers games in 2013, and shortly thereafter offered other distributors of video programming the opportunity to purchase licenses to telecast the games. At the time, according to the complaint, most Los Angeles cable consumers had limited options for video programming. There were: (1) direct satellite providers, such as

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DirecTV, that could transmit video to subscribers anywhere in the country; (2) wireline cable providers, typically limited to one provider in each given territory, which, depending on the neighborhood in L.A. where a customer resided, included Time Warner Cable, Cox or Charter; (3) telephone companies, such as AT&T (which has since acquired DirecTV); and (4) online video distributors, such as Hulu, which require an Internet connection provided by a satellite, cable or telephone provider. DOJ asserted that distributing live local sports is a significant characteristic of competition for subscribers among video services distributors.

Notably, DOJ brought suit only against DirecTV (and its parent company, AT&T), referring to the company as the "ringleader" of the unlawful information exchanges. (DOJ Press Release, Nov. 2, 2016). While traditional cable companies like Cox and Charter cover concentrated regions within L.A., DirecTV, as a satellite provider, competes for subscribers in the entire city. If any of its competitors decided to launch a local Dodgers channel, DirecTV could lose subscribers unless it also offered that channel. As a result, DirecTV was under more pressure to reach a deal, and its decision to carry the channel would directly impact the decision of the other companies, its direct competitors within the various regions of L.A. Indeed, DirecTV believed that Time Warner Cable had taken advantage of that competitive dynamic when it introduced a Lakers channel in 2012.

According to the complaint, DirecTV's executive reached out to the other companies and orchestrated the exchange of material, nonpublic information about each company's plans to carry the Dodgers channel and the prices discussed during their individual negotiations with Time Warner Cable. DirecTV assured its competitors that it would hold out on purchasing the license and, because everyone was waiting for DirecTV to be the "first mover," no one was at risk of losing consumers to a competitor that had the channel. These information exchanges "corrupted the competitive process" that should have resulted from each company's independent decisions on whether to carry the channel, based on the risk of losing subscribers to its competitors.

The result, according to DOJ, was that each company was less likely to reach a deal with TWC and ultimately consumers were left with little (and in some cases, no) options to watch Dodgers games. The complaint seeks a ruling that the information exchanges violated §1 of the Sherman Act and an order prohibiting DirecTV and AT&T from sharing information with other video distributors about negotiating positions, strategies or tactics concerning potential video programming agreements.

DOJ's complaint stated that competition "is likely to be harmed when competitors with market power in concentrated markets…directly exchange strategic information about current and forward- looking plans for product features on which they compete." The language used in the complaint made clear that DOJ is bringing this case under the rule of reason, where the plaintiff is required to define the relevant market—in both the product dimension and the geographic dimension—and prove actual or likely anticompetitive effects in the relevant markets. In addition, the defendant has the opportunity to provide procompetitive justifications for conduct challenged under the rule of reason.

The context sets this enforcement action apart from many other antitrust cases, especially those involving allegations of information exchanges. First, unlike some such cases, there was no allegation of an accompanying agreement to fix prices or refrain from competing. Second, DirecTV had made public announcements about its Dodgers channel strategy consistent with the private messages conveyed to rivals. Third, the exchange of information was among buyers rather than sellers. Although antitrust laws apply to buyers as well as sellers, the analysis of competitive effects must take into account that buyers often seek to reduce, not increase, prices.

In this case, DirecTV and the other video distributors had an incentive to negotiate lower licensing fees and would likely have passed those savings along to their customers. Finally, the allegedly unlawful information exchanges related to negotiations with a provider that had substantial leverage because of its exclusive access to content that a distinct subset of subscribers found highly desirable. AT&T's general counsel stated that "the reason why no other major TV provider chose to carry this content

was that no one wanted to force all of their customers to pay the inflated prices that Time Warner Cable was demanding for a channel devoted solely to L.A. Dodgers baseball."

The exchanges described in this enforcement action—about negotiating for one contract with one counterparty—also stand apart from many kinds of information exchanges that have been found lawful over the years and that are indispensable for the functioning of some markets. Nearly 100 years ago, Justices Louis Brandeis and Oliver Wendell Holmes recognized (in dissent) that dissemination of information among competitors could enhance efficiency and counterbalance informational advantages, "substituting knowledge for ignorance, rumor, guess and suspicion…without closing the door to adventure" and making possible "intelligent conduct under competitive conditions." See *American Column & Lumber Co. v. United States*, 257 U.S. 377, 412-19 (1921).

Human Resources

The antitrust enforcement agencies also discussed the risks and possible benefits of information exchanges in the employment market. In October 2016, DOJ and FTC jointly issued formal antitrust guidance for human resource professionals, providing instruction on the application of antitrust law to recruiting, hiring, and employment practices of companies. DOJ & FTC, Antitrust Guidance for Human Resource Professionals (Oct. 2016).

The HR Guidance eliminates any doubt that the market for labor falls squarely within the purview of the antitrust laws. Just like producers of traditional goods and services compete for customers, often on the basis of price and quality, corporations compete to recruit and retain employees and do so by offering higher wages, better benefits, more favorable terms of employment or even better job opportunities. Employers are buyers of employment services and, as discussed above, antitrust restriction apply to buyers as they apply to sellers in most cases.

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Before turning to information sharing, the HR Guidance warns that agreements to fix employee wages or to refrain from recruiting competitors' employees (referred to as "no poaching" agreements)—outside the context of legitimate collaborations such as joint ventures and mergers—are per se illegal and will be pursued without inquiry into competitive effects. These types of agreements are akin to "hardcore cartel conduct," the guidance explains, because "they eliminate competition in the same irredeemable way as agreements to fix product prices or allocate customers" and as a result, they should be treated similarly. Going forward, the DOJ announced, allegations of wage-fixing and "no poaching" agreements amongst competitors will be investigated criminally.

Information exchanges, on the other hand, are not per se illegal and would not be subject to criminal penalties. The HR Guidance acknowledges that information exchanges that do not involve implicit or explicit agreements to fix employment terms or to refrain from hiring competitors' employees may be lawful in some circumstances. The HR Guidance does, however, signal the antitrust agencies' intent to focus on information sharing in the employment context and bring civil charges where exchanges of competitively sensitive information are likely to injure competition. Competition is more likely to be stifled where the shared information is about current or prospective wages or benefits, as opposed to historical figures.

The frequency of information exchanges may impact the prospect of anticompetitive effects. And, as with many other areas of antitrust law, the more concentrated the market, the higher the risk of harming competition. The HR Guidance explains that in industries with few employers, sharing of wage information may have the effect of suppressing wages. Yet, transparency can also have the opposite effect, leading firms to raise salaries and bonuses to match their rivals in recruiting and retaining the best workers.

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