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ANTITRUST

Expert Analysis

DOJ Requires Behavioral Remedies for Challenged Merger

The Department of Justice brought several challenges involving mergers and acquisitions, including the conditional approval of the combination of the nation's largest ticketing company with the leading concert promoter, subject to divestitures and restrictions on future conduct by the merged firm; the imposition of substantial fines for a buyer's premature review and approval of ordinary course procurement contracts; and seeking to unwind a completed acquisition of dairy processing operations in Wisconsin.

Other recent antitrust developments of note included a decision by a district court that claims of a conspiracy by broker-dealers to withdraw support for auction rate securities were barred under the implied preclusion doctrine due to a conflict with securities regulations.

Ticketing and Promotion

The Department of Justice announced the settlement of charges by the department and the attorneys general of 17 states that the combination of the world's largest ticketing company with the world's largest promoter of live concerts would lessen competition in violation of §7 of the Clayton Act. The settlement permits the transaction to proceed, subject to divestitures, licensing arrangements and various restrictions on future conduct.

The department and states alleged that the ticketing company dominated primary ticketing for major concert venues for over two decades, with over 80 percent of the market in 2008. According to the complaint, at the end of 2008, prior to the execution of the parties' merger agreement, the live concert promoter had entered the ticketing business with substantial success, using its control of many venues and leading promotion business as a stepping stone. In the short period after the promoter's entry, it has obtained over 15 percent of the market, taking a significant share of business from the ticketing company.

By **Elai Katz**

The complaint stated that the customers most directly and adversely impacted by the merger are major U.S. concert venues, which must obtain primary ticketing services to put on concerts and other events, and that the merger would further increase concentration in the already concentrated ticketing market.

> The combination of the world's largest ticketing company with the world's largest promoter of live concerts is allowed to proceed.

The consent decree is intended to restore the innovation and aggressive competition that the merger would have eliminated by creating two strong ticketing rivals. The settlement requires the ticketing company to divest a ticketing subsidiary that allows venues to manage their own ticketing platform to a sports and entertainment firm with ticketing experience. In addition, the company must license its ticketing software to the second largest concert promoter that also operates major venues.

In addition, the settlement imposes behavioral limitations designed to keep the merged firm in check. The firm will not be permitted to retaliate against a venue that chooses another company's ticketing or promotional services. The merged company will be required to make ticketing services and concerts promoted by the company independently available to venues without explicitly or practically tying one to the other to preserve the competitive strength of ticketing companies that are not vertically integrated. Furthermore, the combined firm will not be able to prevent customers from taking their ticketing data if they choose to leave for a rival ticketing service, thereby reducing switching costs.

Finally, the consent decree requires the notification of any acquisitions of ticketing companies, even if not required by the Hart-Scott-Rodino (HSR) Act's premerger notification rules.

United States v. Ticketmaster Entertainment Inc. and Live Nation Inc., No. 1:10-cv-00139, CCH Trade Reg. Rep. ¶45,110 No. 5065, ¶50,974 (D.D.C. Jan. 25, 2010), also available at www.usdoj.gov/atr

Comment: The U.S. antitrust agencies have historically preferred imposing structural relief (usually divestitures) rather than limitations on future commercial conduct to remedy anticompetitive mergers. In the enforcement action reported immediately above, it appears the conduct remedies were principally addressed to vertical concerns while the structural relief was tailored for horizontal issues.

Premerger Coordination

The Department of Justice announced the settlement of charges that two pork packing and processing companies that merged in 2007 violated the HSR Act by permitting the buyer to prematurely obtain "beneficial ownership" of some of the seller's operations—often referred to as "gun jumping." The department asserted that the seller had stopped exercising independent business judgment in its hog purchases. The parties agreed to pay a $900,000 civil fine.

The complaint alleged that the buyer had taken control of the seller's hog purchasing by requiring submission and approval of hog procurement contracts to the buyer following the execution of the merger agreement but before the expiration

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of the HSR waiting period. The hog procurement contracts had been submitted for approval by the buyer while the department was reviewing the proposed merger for anticompetitive effects related to hog purchasing. The merger itself was not challenged.

Notably, the complaint did not challenge the merger agreement's customary conduct-of-business covenants, which precluded the seller from taking on additional debt or selling major assets and required the seller to carry on its business in the ordinary course consistent with past practice.

United States v. Smithfield Foods Inc., No. 1:10-cv-00120, CCH Trade Reg. Rep. ¶45,110 No. 5063 (D.D.C. Jan. 21, 2010), also available at www.usdoj.gov/atr

Implied Preclusion

Issuers of auction rate securities—bonds and other financial instruments whose interest rates are periodically set at auction—alleged that, toward the beginning of the current financial crisis, broker-dealers acted collectively to withdraw support for the auction rate market in violation of antitrust laws. A district court dismissed the complaint and stated that the claims were impliedly precluded by securities regulations, relying on the Supreme Court's opinion in *Credit Suisse v. Billing*, 127 S. Ct. 2383 (2007).

The court noted that the Securities and Exchange Commission (SEC) had investigated and challenged the conduct at issue in the complaint and that dozens of private securities lawsuits have been brought. The court added that the SEC permitted or encouraged joint underwriting and other interactions among broker-dealers, revealing a serious conflict with antitrust law and the potential chilling of permissible market-promoting conduct if antitrust claims were allowed to proceed.

Mayor and City Council of Baltimore v. Citigroup Inc., No. 08 cv. 7746 (SDNY Jan. 26, 2010)

Daily Newspapers

The Department of Justice announced a settlement of charges that a 2004 transaction consolidating ownership and control of the only two local daily newspapers in Charleston, W.Va., violated antitrust law. The settlement, which is subject to court approval, requires restructuring of the joint operating agreement to reinstate separate control over the editorial operations of the two newspapers, requires the offering of substantial discounts to rebuild the subscriber base of one of the newspapers and obligates continued publication of that newspaper as long as it has not failed financially.

United States v. Daily Gazette Co., CCH Trade Reg. Rep. ¶45,107 No. 4873, ¶50,973 (D. W.Va. Jan. 20, 2010), also available at www.usdoj.gov/atr

Comment: News and advertising markets have undergone dramatic changes in recent times, casting doubt on the assumption that daily local newspapers do not face competition from online media and other sources of news and information.

Dairy Processing

The Department of Justice and several states brought a suit asserting that the completed acquisition of a Wisconsin dairy cooperative's processing plants by the largest U.S. milk processor and distributor violated §7 of the Clayton Act by substantially lessening competition in the school milk and fluid milk markets in Wisconsin and surrounding areas. The complaint alleged that the acquired cooperative eliminated an aggressive competitor and that the two firms had frequently been the two lowest bidders for school milk contracts.

The European Commission announced the approval of the proposed acquisition of Sun Microsystems Inc., a U.S.-based provider of network computing infrastructure and owner of the leading open source database software, by Oracle Corporation, a U.S.-based business software company.

The department stated that the loss of head-to-head competition would lead to anticompetitive "unilateral effects" and that the elimination of an "irrational" pricing rival with excess capacity will make coordination among the few remaining competitors easier and more durable, giving rise to anticompetitive "coordinated effects." The complaint seeks an order requiring the divestiture of the acquired assets, two dairy processing plants.

The complaint noted that the acquisition was not required to be reported under the HSR Act's premerger notification regulations and that the buyer had made over 100 acquisitions in the last 15 years.

United States v. Dean Foods Co., No. 10-C-0059, CCH Trade Reg. Rep. ¶45,110 No. 5064 (E.D. Wis. Jan. 22, 2010), also available at www.usdoj.gov/atr

Comment: The two enforcement actions reported immediately above serve as yet another reminder that completed transactions and transactions not subject to the premerger reporting thresholds may not only be subjected to antitrust investigations but also face the risk of unwinding years after the consummation of the acquisition.

Computer Database Software

The European Commission (EC) announced the approval of the proposed acquisition of Sun Microsystems Inc., a U.S.-based provider of network computing infrastructure and owner of the leading open source database software, by Oracle Corporation, a U.S.-based business software company and provider of the leading proprietary database software. The EC's in-depth investigation of the merger determined that the two firms do not compete in the high-end segment of the database market and that another open source database was expected to replace to some extent the competitive constraint exerted by Sun's database software. The commission noted that Oracle had pledged to release future versions of Sun's database under an open source general public license.

Mergers: Commission Clears Oracle's Proposed Acquisition of Sun Microsystems, IP/10/40 (Jan. 21, 2010), available at ec.europa.eu/competition.

Comment: In November 2009, the U.S. Department of Justice released a statement noting its disagreement with the EC's initial views and asserting that the department concluded that the Oracle/Sun merger was unlikely to be anticompetitive because there were many open source and proprietary database products available.