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ANTITRUST

Expert Analysis

Agencies Challenge Threats to Suppliers And Arrangements With Hospitals

By **Elai Katz**

In a 3-1 decision, the Federal Trade Commission (FTC) agreed to settle charges that a leading pool products distributor engaged in unfair methods of competition in violation of §5 of the FTC Act by threatening to punish manufacturers if they supplied new distributors attempting to enter local markets. The Department of Justice required a divestiture to settle charges that a long-term exclusive arrangement among Montana's leading health insurer and a group of hospitals was unlawful because the arrangement would have doomed a rival health insurer owned by the hospitals.

Other recent antitrust developments of note included AT&T's abandonment of its proposed merger with T-Mobile in the face of a Department of Justice trial and regulatory scrutiny and rulings by district courts that AT&T customers could not challenge the legality of the merger in arbitration. Efforts by private plaintiffs to contest the Continental and United Airlines merger were rejected for failure to define a relevant market.

Foreclosure—Pool Products

The FTC announced the settlement of charges that a pool product distributor used anticompetitive practices to exclude new entrants and maintain its monopoly in violation of §5 of the FTC Act. The commission asserted that Pool Corporation (known as PoolCorp) threatened to stop distributing pool product manufacturers' merchandise if they sold to a new distributor that was attempting to enter a local market.

Invoking its enforcement action in *Toys 'R' Us Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000), where the leading toy retailer was found to have foreclosed "big box" stores' access to toys, a three-commissioner majority stated that PoolCorp's actions foreclosed new entrants from obtaining pool products needed to compete effectively, from manufacturers representing more than 70 percent of sales, without any countervailing efficiency justification. The majority noted that even though incumbent distributors were not targeted and some of the new distributors were ultimately able to buy pool products from other distributors (instead of directly from the manufacturers), the increase in the new entrants' costs harmed competition. The settlement prohibits PoolCorp from using threats and coercion to stop suppliers from selling to competitors.

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Commissioner J. Thomas Rosch dissented and stated that he would have closed the investigation because there was no reason to believe that a violation occurred, as is required for the commission to accept a settlement. He wrote that the evidence did not show that pool product manufacturers acquiesced to PoolCorp's threats but rather that they made unilateral decisions not to supply the new entrants in the various local markets. Mr. Rosch added that there was no evidence of higher prices or other competitive injury to consumers.

Pool Corporation, FTC File No. 101-0115, CCH Trade Reg. Rep. ¶16,665 (Nov. 21, 2011), available at www.ftc.gov

Contracts—Health Insurance

The Department of Justice and the Attorney General of Montana agreed to settle charges that an agreement between five Montana hospitals and Blue Cross Blue Shield of Montana, the largest health insurer in the state, unreasonably restrained trade in violation of §1 of the Sherman Act, substantially lessened competition in violation of §7 of the Clayton Act and violated Montana state antitrust law.

According to the complaint, the agreement provided that the hospitals would obtain health insurance for their employees exclusively from Blue Cross for six years, instead of New West Health Services Inc., a rival health insurer jointly owned by the five hospitals (and a sixth hospital not named as a defendant). New West had been formed by four of the hospitals in 1998 to compete with Blue Cross. In addition, the challenged agreement required the participation of all five hospitals and provided that the hospitals would have two seats on Blue Cross's board if they did not compete with Blue Cross. The department asserted that the arrangement—which would lead to the direct loss of one-third of New West's business and create a negative perception of its strength—would effectively eliminate New West as a viable competitor and significantly increase Blue Cross's market share.

The proposed settlement would permit Blue Cross and the hospital defendants to proceed with the exclusive insurance agreement but would require the hospitals to divest New West's commercial health-insurance business to preserve competition in the sale of commercial health insurance in Billings, Bozeman, Helena, and Missoula. The settlement is also meant to ensure that New West's acquirer has a cost-competitive health-care provider network to enable it to compete effectively by, among other things, requiring the hospital defendants to sign three-year contracts with New West's acquirer on terms that are substantially similar to their current arrangements.

United States v. Blue Cross and Blue Shield of Montana Inc., No. 11-cv-00123-RFC, CCH Trade Reg. Rep. ¶45,111 No. 5244 (D. Montana Nov. 8, 2011), available at www.justice.gov/atr

Comment: Although the agreement challenged in the enforcement action reported immediately above is akin to exclusive contracts and covenants not to compete, generally treated as a violation of the Sherman Act, the department deployed analytical tools and exacted relief typically seen in merger cases. Indeed, the government asserted a claim under §7 of the Clayton Act, which prohibits anticompetitive acquisitions, yet the complaint filed with the settlement papers did not identify the assets or securities that were being acquired.

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Wireless Merger

Following AT&T's abandonment of its proposed acquisition of T-Mobile, the Department of Justice stated that had the transaction proceeded, the combination of two of only four nationwide wireless networks would have raised prices and reduced innovation. The department added that the quick resolution of the government's lawsuit to block the transaction before trial avoided the "unnecessary expense of taxpayer money and government resources."

Federal Communications Commission (FCC) Chairman Julius Genachowski stated that the proposed acquisition would have "done the opposite" of the FCC's goals of promoting competition, innovation and investment in the mobile market.

Justice Department Issues Statement Regarding AT&T Inc.'s Abandonment of Its Proposed Acquisition of T-Mobile USA Inc. (Dec. 19, 2011), available at www.justice.gov/atr and *Statement of FCC Chairman Julius Genachowski Regarding AT&T's Abandonment of Its Proposed Acquisition of T-Mobile USA Inc.*, (Dec. 19, 2011), available at www.fcc.gov

Comment: According to press reports, AT&T agreed to pay T-Mobile's parent $3 billion in cash plus billions in valuable assets, in accordance with the terms of the merger agreement, as a "reverse break-up fee" for failure to close the transaction in the face of a regulatory challenge. These kinds of provisions serve to protect sellers where the transaction faces substantial antitrust risk and the seller is concerned about the harm to its business from prolonged and potentially unsuccessful regulatory review.

Arbitration

AT&T mobile customers invoked arbitration clauses in consumer contracts in an effort to enjoin the now-abandoned proposed acquisition of T-Mobile as a violation of §7 of the Clayton Act. The district court in Manhattan denied a motion to compel arbitration and stated that the demand was foreclosed by the contractual limitation that the arbitrator may only award relief in favor of the individual claimant and only to the extent necessary to provide relief for that party's individual claim. The court observed that the relief sought would necessarily affect the rights of anyone who had an interest in the closing or abandonment of the merger. Several other courts addressing similar motions to compel arbitration reached the same result.

AT&T Mobility LLC v. Gonnello, 2011-2 CCH Trade Cases ¶77,652 (S.D.N.Y.)

Airline Merger

Potential airline customers claimed that the October 2010 combination of United Airlines and Continental Airlines, forming the largest domestic airline, substantially lessened competition in violation of §7 of the Clayton Act. The district court dismissed the complaint for failure to define a viable market, agreeing with the defendants' argument that "the transportation of airline passengers in the United States" was too broad and that the appropriate relevant markets for antitrust analysis are city-pair routes. In elaborating on the inadequacy of a national air travel market, the district court observed that a passenger would never switch to a flight from San Francisco to Newark if the price of a flight from Seattle to Miami increased significantly.

A prior decision denying plaintiffs' motion for a preliminary injunction was affirmed on similar grounds by the U.S. Court of Appeals for the Ninth Circuit in May 2011.

Malaney v. UAL Corp., No. C 10-02858 (N.D. Cal. Dec. 29, 2011), and 2011-1 CCH Trade Cases ¶77,463 (9th Cir. May 23, 2011)

Comment: Private actions challenging mergers that have been approved by federal antitrust agencies, as was the case with the United-Continental merger, rarely succeed. The courts' general deference to agency analysis in these kinds of cases is reflected in the Ninth Circuit's statement, in the decision reported immediately above, that the Department of Justice endorsed the city-pair relevant market.

Stock Exchange Merger

The Department of Justice approved Deutsche Börse AG's proposed merger with NYSE Euronext (operator of the New York Stock Exchange), subject to the German company's divestiture of its significant minority interest in Direct Edge, the fourth largest stock exchange operator in the United States. The department alleged that without the divestiture, the merger, as originally proposed, would have enabled NYSE/Deutsche Börse to influence and lessen the zeal of Direct Edge, an "aggressive and innovative exchange competitor."

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Deutsche Börse holds, indirectly, 31.5 percent of Direct Edge and substantial governance rights in the company and its electronic stock exchanges, EDGA and EDGX. According to the statement, the merged firm will have two years to complete the sale of its stake in Direct Edge, but it will be required to immediately cease from participating in the company's governance, including the resignation of directors on the boards of Direct Edge entities.

The transaction remains subject to the approval of the European Commission, whose antitrust enforcement arm, the Directorate General-Competition, indicated that it may block the merger, according to press reports, particularly because of serious concerns about increased concentration in derivatives.

United States v. Deutsche Börse AG and NYSE Euronext, No. 11-cv-02280 (D.D.C. Dec. 22, 2011) available at www.justice.gov/atr

Online Advertising

The Department of Justice announced the closing of its investigation into Google's proposed acquisition of Admeld, the operator of a supply-side platform that helps online publishers optimize the yield from their display advertising inventory.

The department observed that new firms recently entered in this space and that the risk that the market will "tip" to a single dominant platform was lessened by publishers' reliance on "multi-homing" strategies—employing multiple display advertising platforms and moving business among them. The department cautioned that it would continue to be vigilant in the online advertising market.

Statement of the Department of Justice's Antitrust Division on Its Decision to Close Its Investigation of Google Inc.'s Acquisition of Admeld Inc. (Dec. 2, 2011), available at www.justice.gov/atr

Premerger Notification

The chief executive officer of Comcast Corp. agreed to pay $500,000 to settle allegations that he violated premerger notification laws by failing to notify federal antitrust authorities prior to the vesting of restricted stock units received as part of his executive compensation plan, according to a complaint and proposed consent decree filed by the Department of Justice at the request of the FTC.

The Hart-Scott-Rodino Act (HSR Act) requires persons contemplating mergers or acquisitions of voting securities or assets that meet statutory thresholds to notify the antitrust agencies and observe a waiting period before completing those transactions. Officers and directors who receive compensation in the form of company stock may be required to submit notification and observe the waiting period under the HSR Act before their shares vest or they exercise options, to the extent they will end up holding voting securities exceeding $66 million (adjusted annually) or another HSR threshold and are not otherwise exempt.

The HSR rules exempt acquisitions resulting in the buyer holding not more than 10 percent of outstanding voting securities if they are made solely for the purpose of investment, but this exemption is unavailable for officers and directors.

United States v. Roberts, No. 11-cv-02240, CCH Trade Reg. Rep. ¶45,111 No. 5254 (D.D.C. Dec. 16, 2011), available at www.ftc.gov

Comment: It is difficult to see how the aim of the HSR Act—providing the antitrust agencies with an opportunity to review the competitive effects of mergers and acquisitions before they are consummated—is served by requiring filings from officers and directors who received stock grants or options as a form of compensation and hold less than 10 percent of the company's outstanding equity.