November 28, 2018

Developments at the Antitrust Division

Recent Enforcement and Policy Developments—New Tools and New Theories

SUMMARY

On November 15, 2018, Assistant Attorney General Makan Delrahim delivered remarks at the American Bar Association Antitrust Section Fall Forum in which he discussed three recent settlements of ongoing civil and criminal investigations and highlighted efforts by the Antitrust Division of the U.S. Department of Justice ("Division") to streamline the merger review process. There are several unusual aspects to the Division's recent actions, including the Division's use of Section 4A of the Clayton Act to recover civil damages where the government has been harmed by anticompetitive conduct and the Division's willingness to police the sharing of information among competitors even where that conduct is not alleged to have had an actual impact on price. Moreover, the Division's recently announced changes to the merger clearance process demonstrate a divergence in timing and process between the Division and the Federal Trade Commission ("FTC"), amplifying the importance of which entity will review a given transaction.

BROADCAST TELEVISION SETTLEMENT

The Division announced on November 13, 2018 that it had reached a civil settlement with six broadcast television companies—Sinclair Broadcast Group Inc., Raycom Media Inc., Tribune Media Company, Meredith Corporation, Griffin Communications LLC, and Dreamcatcher Broadcasting LLC—to resolve a lawsuit alleging that the companies had engaged in widespread, unlawful sharing of non-public, competitively sensitive information.[1] The Antitrust Division filed both a complaint and proposed settlements in the United States District Court for the District of Columbia on the same day it publicly announced the settlement.[2] The complaint alleged that the competitors agreed to exchange "revenue pacing" information and other non-public sales information, which allowed the companies to compare

revenues booked over defined time periods and gain insight into one another's remaining spot advertising for those periods.[3] Assistant Attorney General Delrahim remarked that "[b]y exchanging this information, the broadcasters were better able to anticipate whether their competitors were likely to raise, maintain, or lower spot advertising prices, which in turn helped inform the stations' own pricing strategies and negotiations with advertisers."[4] This information exchange, according to Assistant Attorney General Delrahim, "harmed the competitive price-setting process."[5]

The proposed settlements prohibit the sharing of competitively sensitive information, require the broadcasting companies to cooperate in the Division's ongoing investigation into whether the Defendants or other broadcasting stations shared competitively sensitive information, and mandate the adoption of various compliance and reporting measures for a term of seven years.[6]

This action highlights the importance of implementing strong controls relating to information-sharing. In particular, businesses should keep in mind that sharing competitively sensitive information with competitors can violate antitrust laws, even where the information is not obviously problematic. And, as the Division's action against the television broadcasters demonstrates, the government will not hesitate to initiate enforcement actions even where, in the words of Assistant Attorney General Delrahim, the conduct at issue is not "the type of hard core cartel conduct that the Antitrust Division prosecutes criminally."[7] The Division discovered the companies' information-sharing during its investigation into Sinclair Broadcasting Group's proposed acquisition of Tribune Media Company, which was ultimately abandoned.[8] The Division's subsequent enforcement action should serve as a reminder to businesses that the documents they disclose during a merger review process may have antitrust consequences outside the confines of that review.

SOUTH KOREAN BID-RIGGING SETTLEMENTS

The Division announced on November 14, 2018 that three South Korean Companies—SK Energy, GS Caltex, and Hanjin Transportation—had agreed to plead guilty to criminal Sherman Act violations and pay criminal fines, and had also entered into civil settlements for a bid-rigging conspiracy that targeted fuel supply contracts to United States military bases in South Korea.[9] The companies will pay at least $82 million in criminal fines and approximately $154 million in civil damages for their involvement in the conspiracy.[10]

It is particularly notable that the Division used Section 4A of the Clayton Act, which allows the United States to sue for treble damages whenever it is "injured in its business or property by reason of anything forbidden in the antitrust laws," to recover civil damages from the South Korean companies.[11] It was not until Congress amended Section 4A in 1990 that the government could recover treble damages under the statute, and in the nearly thirty years since that amendment, the government has only filed three Section 4A cases.[12]

In his recent speech at the American Bar Association's Fall Forum, Assistant Attorney General Delrahim emphasized that the renewed focus on Section 4A will not affect the Division's leniency policy, and co-conspirators that come forward to report an antitrust violation will be exempt from treble damages in any follow-on suit under Section 4A.[13] Moreover, Assistant Attorney General Delrahim suggested that cooperating co-conspirators can expect settlement amounts to reflect any cost-savings the Division realized by avoiding extended litigation.[14]

The bottom line going forward: Where an antitrust violation inflicts injury on the United States (as opposed to private parties), companies should expect parallel criminal and civil enforcement actions in which the government aggressively utilizes Section 4A to seek treble damages.

ATRIUM HEALTH SETTLEMENT

During the same week before Thanksgiving, the Division also announced a settlement of a longstanding civil lawsuit alleging that Atrium Health (formerly known as Carolinas HealthCare System) had entered into anticompetitive agreements in violation of Section 1 of the Sherman Act. The settlement came after over two years of negotiations between the Division and Atrium.[15] Atrium is the largest healthcare system in North Carolina and one of the largest not-for-profit healthcare systems in the United States.[16] The case represents a significant victory for the Antitrust Division and a caution to large U.S. healthcare systems. The Antitrust Division filed a civil antitrust action against Atrium in June 2016 challenging provisions in Atrium's contracts with major health insurers that prohibit "steering." Steering is a strategy used by insurance companies to direct patients to certain preferred healthcare providers in order to reduce healthcare costs.[17]

The Division alleged that insurance companies are increasingly designing health benefit plans that give patients financial incentives to choose more cost-effective hospitals and physicians, and asserted in its official statement that increased consumer access to these health benefit plans increases competition, resulting in lower premiums and improved services.[18] The settlement effectively prevents Atrium from circumventing those efforts to lower healthcare costs by insisting on contract terms or otherwise taking actions that would prohibit steering by insurers, and from enforcing anti-steering provisions in its current contracts with insurers. Assistant Attorney General Delrahim heralded the settlement as "restor[ing] competition between healthcare providers in Charlotte, North Carolina."[19]

EFFORTS TO IMPROVE THE MERGER PROCESS: DIVERGENCE BETWEEN THE DIVISION AND THE FTC

Finally, building on announcements regarding its efforts to improve the merger review process, the Division released a model voluntary request letter[20] and a model timing agreement on November 15, 2018.[21] In his Fall Forum remarks, Assistant Attorney General Delrahim claimed that these documents will "increase transparency and predictability" and "help merging businesses and their counsel know what

to expect as part of the merger review process."[22] To help alleviate concerns regarding the new processes, the Antitrust Division published a Frequently Asked Questions memo to assist parties with the new documents.[23]

The model voluntary request letter appears mostly unchanged from the Division's prior practice, with two notable exceptions. The model letter asks that parties be prepared to submit the requested information "within a few days of receipt" of the letter.[24] It also asks parties to submit "all surveys, win-loss reports, and other documents or data showing the competitors from or to which the company won or lost sales/customers of overlap products."[25] In the FAQ accompanying the model letter, the Division (1) echoes the language from the model letter, warning parties that they should be prepared to provide the information sought in the voluntary request letter within the first few days of their HSR filing, and (2) reserves the Division's right to "issue Second Requests even if it has not made voluntary requests."[26]

The model timing agreement extends the statutory 30-day waiting period under the Hart-Scott-Rodino Act and in exchange (1) *generally* limits the scope of document production under a Second Request to 20 custodians, (2) authorizes certification of substantial compliance 30 days after nearly all responsive documents have been produced (using technology assisted review), and (3) limits depositions to 12 employees per company.[27] In its FAQ accompanying the model timing agreement, the Division notes that its goal of concluding investigations within six months is subject to "the parties also work[ing] to produce responsive data, documents, and information quickly."[28] Going forward, the Division "does not intend to deviate from [the model agreement] under most circumstances."[29]

The Antitrust Division's first model timing agreement comes on the heels of the FTC's release of its own updated model timing agreement in August 2018 (first issued in early 2018).[30] Like the Division's model timing agreement, the FTC says its new model timing agreement is designed to facilitate "smoother, more efficient investigations."[31] The FTC Bureau of Competition also expects that future submissions, with limited exceptions, will conform to the new model timing agreement.[32] But the FTC model timing agreement requires parties to agree not to close the proposed transaction until 60 to 90 calendar days following certification of substantial compliance with the Second Request, depending on the complexity of the competition issues raised by the deal.[33] Thus, the FTC is requiring significantly more time than the Division (which requires 60 days post-certification), including an additional 30 to 60 days more than the Division following certification of substantial compliance with the Second Request. The FTC stated that the 60- to 90-day timeframe is "intended to serve as a benchmark and not an upper limit," allowing the staff to spend more than 90 days if necessary.[34] Additionally, the FTC model timing agreement requires that parties provide 30 calendar days' notice before certifying substantial compliance with the Second Request, and 30 calendar days' notice before consummating the proposed transaction.[35] Notably, the Hart-Scott-Rodino waiting period would otherwise expire 30 days after the parties certify substantial compliance with the Second Request.[36] The divergence in process thus puts additional importance on

the issue of clearance, which is the process by which the FTC and the Division determine which agency reviews a given transaction.

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ENDNOTES

1 Press Release, Department of Justice, Justice Department Requires Six Broadcast Television Companies to Terminate and Refrain From Unlawful Sharing of Competitively Sensitive Information (Nov. 13, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-six-broadcast-television-companies-terminate-and-refrain-unlawful.

2 *Id.*

3 Assistant Attorney General Makan Delrahim, "November Rain": Antitrust Enforcement on Behalf of American Consumers and Taxpayers (Nov. 15, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

4 *Id.*

5 *Id.*

6 Press Release, Department of Justice, Justice Department Requires Six Broadcast Television Companies to Terminate and Refrain From Unlawful Sharing of Competitively Sensitive Information (Nov. 13, 2018), *available at* https://www.justice.gov/opa/pr/justice-department-requires-six-broadcast-television-companies-terminate-and-refrain-unlawful.

7 Assistant Attorney General Makan Delrahim, "November Rain": Antitrust Enforcement on Behalf of American Consumers and Taxpayers (Nov. 15, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

8 *Id.*

9 Press Release, Department of Justice, Three South Korean Companies Agree to Plead Guilty and to Enter into Civil Settlements for Rigging Bids on United States Department of Defense Fuel Supply Contracts (Nov. 14, 2018), *available at* https://www.justice.gov/opa/pr/three-south-korean-companies-agree-plead-guilty-and-enter-civil-settlements-rigging-bids.

10 *Id.*

11 15 U.S.C. § 15a.

12 Assistant Attorney General Makan Delrahim, "November Rain": Antitrust Enforcement on Behalf of American Consumers and Taxpayers (Nov. 15, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

13 *Id.*

14 *Id.*

15 Press Release, Department of Justice, Atrium Health Agrees to Settle Antitrust Lawsuit and Eliminate Anticompetitive Steering Restrictions (Nov. 15, 2018), *available at* https://www.justice.gov/opa/pr/atrium-health-agrees-settle-antitrust-lawsuit-and-eliminate-anticompetitive-steering.

16 *Id.*

17 *Id.*

18 *Id.*

19 Assistant Attorney General Makan Delrahim, "November Rain": Antitrust Enforcement on Behalf of American Consumers and Taxpayers (Nov. 15, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

ENDNOTES (CONTINUED)

[20] Department of Justice, Model Voluntary Request Letter (Nov. 15, 2018), *available at* https://www.justice.gov/atr/page/file/1111341/download.

[21] Department of Justice, Model Timing Agreement (Nov. 15, 2018), *available at* https://www.justice.gov/atr/page/file/1111336/download.

[22] Assistant Attorney General Makan Delrahim, "November Rain": Antitrust Enforcement on Behalf of American Consumers and Taxpayers (Nov. 15, 2018), *available at* https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-remarks-american-bar-association-antitrust.

[23] Department of Justice, Frequently Asked Questions, Voluntary Requests and Timing Agreements (Nov. 2018), *available at* https://www.justice.gov/atr/page/file/1111331/download.

[24] Department of Justice, Model Voluntary Request Letter (Nov. 15, 2018), *available at* https://www.justice.gov/atr/page/file/1111341/download.

[25] *Id.*

[26] Department of Justice, Frequently Asked Questions, Voluntary Requests and Timing Agreements (Nov. 2018), *available at* https://www.justice.gov/atr/page/file/1111331/download.

[27] Department of Justice, Model Timing Agreement (Nov. 15, 2018), *available at* https://www.justice.gov/atr/page/file/1111336/download.

[28] Department of Justice, Frequently Asked Questions, Voluntary Requests and Timing Agreements (Nov. 2018), *available at* https://www.justice.gov/atr/page/file/1111331/download.

[29] *Id.*

[30] Federal Trade Commission, Model Timing Agreement (Aug. 7, 2018), *available at* https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_8-22-18.pdf.

[31] Bruce Hoffman, Timing is Everything: The Model Timing Agreement, Federal Trade Commission (Aug. 7, 2018), available at https://www.ftc.gov/news-events/blogs/competition-matters/2018/08/timing-everything-model-timing-agreement.

[32] *Id.*

[33] Federal Trade Commission, Model Timing Agreement (Aug. 7, 2018), *available at* https://www.ftc.gov/system/files/attachments/merger-review/ftc_model_timing_agreement_8-22-18.pdf.

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