Asia-Pacific
Economic Cooperation

2012/SOM1/CPLG/024
Agenda Item: 8

Update on Developments – Competition Law and Policy

Purpose: Information
Submitted by: United States

APEC RUSSIA 2012

Competition Policy and Law Group Meeting
Moscow, Russia
12-13 February 2012

UPDATE ON DEVELOPMENTS -- COMPETITON LAW AND POLICY

DEPARTMENT OF JUSTICE, ANTITRUST DIVISION FEBRUARY 2012

The Antitrust Division of the Department of Justice is pleased to provide an update on some of its recent enforcement activity.[1] As many of you know, the Department's antitrust mission is carried out through the work of its Antitrust Division. This has been an extremely busy year for the Division, and I will highlight two successful merger cases the Division undertook in the past year, cases which the Division filed lawsuits to block anticompetitive mergers in the markets for digital do-it-yourself (DDIY) tax preparation products and mobile wireless telecommunications services, respectively. While the products involved in these two cases are very different, the tale of competitive harm told by the government bore, in each of these cases, some striking similarities. In each case, the proposed acquisition was one by a market leader of an aggressive price cutting innovator in a highly concentrated market.

The first of the two proposed acquisitions was that of 2SS Holdings, Inc., which offered the DDIY tax preparation products under the brand name TaxACT, by H&R Block Inc. (HRB). HRB also offered DDIY tax preparation products, as well as other types of tax preparation services. DDIY tax preparation products are offered through three basic channels: (1) online; (2) software that can be downloaded from an Internet website; and (3) software on a disc that is either sent directly to the consumer or purchased by the consumer from a third-party retailer. Regardless of the channel, all DDIY tax

[1] The views expressed are those of the author, and do not purport to reflect the views of the U.S. Department of Justice."

preparation products function in the same way and consist of the same two basic parts: the user interface, which prompts users to provide relevant information, and the underlying tax engine, which processes that information. The user interface is the means by which individuals interact with the tax engine. The tax engine is essentially a complicated software program based upon federal and state tax codes and regulations. DDIY tax preparation product providers typically offer their products in more than one version and at different prices. These differences are often based on factors such as the complexity of the return, the number of returns prepared (for example, whether the purchaser of the product is filing a federal and state return or just a federal return), and the amount and type of support the individual desires in the process. At the time of the proposed acquisition, the three largest providers, Intuit, HRB and TaxAct, had DDIY market shares of 62.2, 15.6 and 12.8 percent, respectively, for a combined total of approximately 90 percent.

For those familiar with the Herfindahl-Hirschman Index (HHI), the pre-acquisition HHI was nearly 4300, and the increase resulting from the acquisition would have been 399, for a post-acquisition HHI of nearly 4,700. This proposed acquisition would therefore have resulted in a significant increase in the concentration of an already highly-concentrated market.

The Department, on behalf of the United States, filed suit in May to block the transaction. The Department alleged that DDIY tax preparation products was the relevant market in which to analyze this acquisition, and that the merger, by combining the second and third-largest providers in that market, would have substantially lessened

competition in the market in violation of U.S. antitrust law. As stated by the Department in its complaint, the proposed transaction would essentially have created a duopoly.

The complaint further alleged that TaxAct had, in TaxACT's own words, been a market "maverick", continually generating market pressure for lower prices and higher quality. The complaint alleged that the acquisition would allow HRB to raise prices and reduce the quality of its DDIY tax preparation products by eliminating the intense competition between HRB and TaxACT. The complaint also alleged that since the post-acquisition market would be comprised of only two well-established and widely-used DDIY tax preparation companies – Intuit and HRB -- the acquisition would likely substantially lessen competition between these two firms by enabling coordination between them. The complaint also alleged it unlikely that entry or expansion in the DDIY tax preparation market would be sufficient to counterbalance the anticompetitive effects of the acquisition, and that the efficiencies asserted by HRB were neither acquisition-specific nor cognizable.

The case was tried before a federal district court judge without a jury over the course of several days in September, during which HRB and TaxACT vigorously contested the Department's allegations. After weighing the testimony and documentary evidence under a preponderance of the evidence standard, from both industry fact witnesses and

economic experts, the court agreed with the Department's position, and permanently enjoined the acquisition.[2]

The second acquisition was AT&T Inc.'s (AT&T) proposed acquisition of T-Mobile USA Inc. (T-Mobile). The market affected by this proposed acquisition would have been that for mobile wireless telecommunications services in markets across the United States. After an extensive investigation, the Department concluded that this proposed transaction would likely have substantially lessened competition in violation of U.S. law, and filed a lawsuit to block this transaction on August 31st. Seven states and the Commonwealth of Puerto Rico joined the United States in this suit.

Mobile wireless telecommunications services allow customers to engage in telephone conversations and obtain data services using radio transmissions without being confined to a small area during a call or data session, and without requiring an unobstructed line of sight to a radio tower. Mobile wireless telecommunications providers offer their services on a variety of devices including mobile phones, smartphones, data cards, tablet computers, and netbooks. An increasingly important group of customers are building mobile wireless capability into new devices, such as e-readers and vehicle tracking equipment. With more than 300 million wireless devices in use in the United States today, mobile wireless telecommunications services play a critical role in the way Americans live and work.

While many customers for mobile wireless telecommunications services are individuals, business entities and government agencies comprise a distinct group of

[2] The Department's complaint and additional filings related to this litigation can be found at http://www.justice.gov/atr/cases/handrblock.html .

customers. Business customers and government customers often select and contract for mobile wireless telecommunications services for use by their employees in their professional and/or personal capacities. These business and government customers typically seek a carrier that can provide services to employees, facilities and devices that are geographically dispersed, hence require services that are available throughout the United States.

At the time of the proposed acquisition, there were four providers of these services capable of serving the entire United States -- AT&T, T-Mobile, Sprint and Verizon (the Big Four) – that together accounted for more than 90 percent of mobile wireless connections to U.S. mobile wireless devices. Because most of these services are sold to consumers in local markets that are affected by competition among the Big Four, the Department's complaint identified local markets in which consumers purchased these services, and identified the nature of the economy-wide competition affecting those markets.

According to the Department's complaint, AT&T and T-Mobile competed head-to-head in 97 of the top cellular marketing areas in the United States, which cover a majority of the U.S. population. They also competed throughout the United States to attract business and government customers. Competition in the mobile wireless telecommunications services market takes place across a variety of dimensions, including price, plan structure, network coverage, quality, speeds, devices, and operating systems. Providers other than the Big Four exist, but they have limited networks that cover only particular localities and regions. Because of their limited

coverage area, they are usually not a reasonable service provider for business and government customers. In addition, those smaller providers face significant competitive limitations, largely stemming from their lack of nationwide spectrum and networks. Among other limitations, the local and regional providers must depend on one of the Big Four carriers to provide them with wholesale services in the form of "roaming" in order to provide service in the vast majority of the United States that sits outside of their respective service areas. These local and regional providers also do not have the scale advantages of the Big Four, resulting in difficulties obtaining the most popular handsets, among other things.

Again, in terms of HHI calculations, in the geographic market comprising the entire United States, the post-merger HHI would have been more than 3,100, an increase of nearly 700 points – a number that substantially exceeds the threshold at which mergers are presumed to be likely to enhance market power. The Department's complaint also alleges that the post-acquisition HHI would have exceeded 2,500 in 96 of the United States' top 100 cellular marketing areas.

According to the Department's complaint, T-Mobile has positioned itself as the "value option" in the mobile wireless telecommunications services market, offering aggressive pricing, value leadership and innovation. T-Mobile has been responsible for numerous "firsts" in the U.S. mobile wireless industry, including the introduction of the first Android handset, Blackberry wireless e-mail, the Sidekick (a consumer "all-in-one" messaging device), national Wi-Fi "hotspot" access, and a variety of unlimited service

plans. T-Mobile has also been an innovator in terms of network development and deployment.

After a detailed investigation, the Department concluded that the substantial increase in concentration that would have resulted from this merger likely would have led to lessened competition due to an enhanced risk of anticompetitive coordination among the three carriers – Verizon, Sprint, and the merged entity – that would remain in the market. The Department also alleged that the merger would eliminate the important head-to-head competition that existed between AT&T and T-Mobile. The complaint further alleged that T-Mobile's elimination from this market would be particularly significant because T-Mobile had been a source of significant competitive pressure in this market. The proposed transaction would also have had the effect of removing an attractive bidder from many bid situations for business and government customers.

Given the expense and difficulty of entering this market with a strong national presence, timely and sufficient entry was found unlikely to occur that would thwart the likely anticompetitive effects of this merger. In addition, the parties were deemed not to have demonstrated merger-specific and cognizable efficiencies sufficient to reverse the acquisition's likely anticompetitive effect.

In addition to the Department's suit, the proposed transaction was also subject to regulatory review in the United States by the Federal Communications Commission (FCC). In late November, the FCC Chairman signaled his opposition to the proposed merger, and indicated that he would refer the proposed transaction to an administrative

law judge. In response to the proposed referral, the parties withdrew their FCC merger application. Pre-trial proceedings continued in the Department's case, however, until December 19th, when the parties announced that they had abandoned the merger. [3]

As the Department has acknowledged many times, most proposed mergers are competitively neutral or pro-competitive. Many mergers that do present competitive issues can be restructured to eliminate the competitive problems. In both of these proposed transactions, however, the Department concluded that the competitive harm was clear. Demonstrating the requisite competitive harm in the context of a litigated merger case is always difficult, time-consuming and expensive. The cases filed by the Department to enjoin each of these transactions, however, demonstrate the Department's continuing commitment to challenging anticompetitive transactions.

Finally, I'll just note that the Antitrust Division's criminal enforcement program has also been very active this past year, during fiscal year 2011 the Division filed 90 criminal cases, and obtained over $520 million in criminal fines.

[3] The Department's complaint and additional filings related to this litigation can be found at www.justice.gov/atr/cases/atttmobile.htm