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UPDATE ON DEVELOPMENTS -- COMPETITON LAW AND POLICY

DEPARTMENT OF JUSTICE, ANTITRUST DIVISION FEBRUARY 2014

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 some of the work the Division has done in both the civil and criminal enforcement areas.

Civil Enforcement

Product Ratings and Reviews Platforms Sold to Retailers and Manufacturers

In January of this year, the U.S. District Court for the Northern District of California issued an opinion and order upholding the Department's challenge to a consummated merger between Bazaarvoice and PowerReviews, two of the largest companies in the market for product ratings and reviews platforms sold to retailers and manufacturers. Consumer-generated product ratings and reviews have become a ubiquitous part of the online shopping experience and are displayed on retailers' and manufacturers' websites. This feature allows consumers to read feedback from authentic product owners before making a purchasing decision. This content is also a valuable asset for retailers and manufacturers because it can increase sales, decrease product returns and provide valuable structured, product-level data about consumer preferences and behavior. Retailers and manufacturers use product ratings and reviews platforms to collect, organize and display consumer-generated product ratings and reviews online.

According to the Department's complaint in this case, Bazaarvoice was, prior to the merger, the dominant commercial supplier of product ratings and reviews platforms in the United States, and PowerReviews was its closest rival. Before the transaction, PowerReviews was an aggressive price competitor, and Bazaarvoice routinely responded to competitive pressure from PowerReviews. As a result of the competition between the two companies, according to the Department, many retailers and manufacturers received substantial price discounts. As the complaint described, Bazaarvoice sought to stem that competition through the acquisition of PowerReviews. As a result of the transaction, many customers lost critical negotiating leverage and became vulnerable to anticompetitive price increases.

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

The court agreed with the Department's assertion that this transaction violated the U.S. antitrust laws. The Department will file its proposed remedy with the Court on February 12, 2014, and the Court will hold a hearing on the appropriate remedy, if necessary, on April 2, 2014

Airlines merger

In August, the Department, joined by six states, filed a lawsuit to block a proposed merger between American Airlines and US Airways, alleging that the merger would eliminate head-to-head competition between US Airways and American, risked increased coordination between the remaining three legacy carriers – New American, United and Delta, and increased the parties' dominance at Reagan National Airport. In mid-November, the Department filed a proposed settlement with American and US Airways in the U.S. District Court in Washington, D.C., which was approved by the court and will allow the merger to proceed while addressing the Department's competitive concerns.

The Department alleged that the proposed transaction would substantially lessen competition for commercial air travel throughout the United States. As a result, consumers would pay more for less service because the remaining three legacy carriers, United, Delta and New American, would have very little incentive to compete on price. In addition, the resulting carrier would have a monopoly on 63 percent of the nonstop routes out of Reagan National Airport.

The settlement requires the defendants to divest critically important facilities at seven key airports across the United States. Specifically, the parties will divest 104 air carrier slots at Reagan National Airport, serving Washington, D.C., 34 slots at LaGuardia Airport in New York, and 2 gates and ground facilities at each of Logan Airport in Boston, O'Hare Airport in Chicago, LAX in Los Angeles, Miami Airport and Love Field in Dallas. These divestures are unprecedented in scale. These divested facilities are being made available to low cost carriers, allowing these low cost carriers to fly more direct and connecting flights throughout the United States each day. New York, Washington, Los Angeles, Chicago, Boston, Miami and Dallas are among the largest, most important business centers in the United States. Due to access limitations such as slot and gate constraints, key airports in these cities are among the most difficult for an airline to enter and establish a meaningful presence.

These divestures change that limiting dynamic. Making slots and gates available to low cost carriers will lower barriers to entry, providing the incentive and ability for those carriers to invest in new capacity and positioning those carriers to provide significant new competition system-wide. The low cost carriers that acquire the slots and gates will be able to offer increased competition not just on direct flights to and from these key airports, but also on connecting flights nationwide.

The Department had been preparing for trial, scheduled to start in late November, at the time the settlement was announced. By lowering barriers to enter and compete, this settlement will enable low cost carriers to expand their presence, injecting new competition into the marketplace. In addition, the settlement does not just prevent the increased dominance of US Airways at Reagan National Airport, it provides for expanded competition at that airport.

E-books

In my update last year, I reported that the Division had, after conducting an investigation in close cooperation with the European Union and several state attorneys general, filed a lawsuit against five of the largest U.S. book publishers (Hachette Book Group (USA), HarperCollins Publishers L.L.C., Simon & Schuster Inc., Holtzbrinck Publishers LLC (which does business as Macmillan), and Penguin Group (USA)) (collectively "Publisher Defendants") and Apple Inc. for conspiring to raise the price of e-books to consumers. At the time of my last report, four of the publishers, Hachette, HarperCollins, Simon & Schuster and Penguin, had settled with the United States. A settlement was reached with the fifth publisher, Macmillan, in February. The case against Apple went to trial last June.

In its lawsuit, the Department alleged that the Publishing Defendants and Apple were unhappy that competition among e-book sellers had reduced e-book prices and the retail profit margins of the book sellers to levels they thought were too low. To address these concerns, the Defendants devised a new distribution model, the "agency model," under which the Publishing Defendants would sell e-books directly to consumers through Apple and other e-book retailers. Under this model, the publishers would set the prices of e-books sold and Apple – and all other retailers – would take a 30 percent commission as the selling agent. The publishers' agreement with Apple also included pricing grids and a Most Favored Nation clause ("MFN") that required each publisher to guarantee that no other retailer could set prices lower than what the Publisher Defendant set for sales through Apple's iBookstore.

In late July, the U.S. District Court for the Southern District of New York issued an opinion in which it agreed with the Justice Department and states' attorneys general that executives at the highest levels of Apple had orchestrated a conspiracy with the five major publishers to raise e-book prices. Apple executives had hoped to ensure that its e-book business would be free from retail price competition, causing consumers throughout the country to pay higher prices for many e-books. Evidence adduced at trial indicated that the prices of the conspiring publishers' e-books increased by an average of 18 percent as a result of the collusive effort led by Apple.

Under their settlements, each of the Publisher Defendants agreed to immediately lift restrictions it had imposed on discounting and other promotions by e-book retailers and

will be prohibited for a specified period of time from entering into new agreements with similar restrictions. The settlement agreements also required each Publisher Defendant to implement a strong antitrust compliance program, including requirements that each provide advance notification to the Department of any e-book ventures it plans to undertake jointly with other publishers and regularly report to the Department on any communications it has with other publishers. Each Publisher Defendant is also forbidden from agreeing to any kind of MFN provision that could undermine the effectiveness of the settlement.

After trial, the court issued an order that requires Apple to modify its existing agreements with the Publishing Defendants to allow retail price competition and to eliminate the most favored nation pricing clauses that led to higher e-book prices. Apple is prohibited from serving as a conduit for information among the conspiring publishers or from retaliating against publishers for refusing to sell e-books on agency terms. Apple is also prohibited from entering into agreements with e-books publishers that are likely to increase the prices at which Apple's competitor retailers may sell that content.

In addition, the court appointed an external monitor to ensure that Apple's internal antitrust compliance policies will be sufficient to catch future anticompetitive activities before they result in harm to consumers. The monitor, whose salary and expenses will be paid by Apple, will work with an internal antitrust compliance officer who will be hired by and report exclusively to the outside directors comprising Apple's audit committee. The antitrust compliance officer will be responsible for training Apple's senior executives about the antitrust laws and ensuring that Apple abides by the relief ordered by the court. Apple has challenged the role of the external compliance monitor, however. Litigation regarding this aspect of the district court's order is continuing at the appellate level (as will the District Court's underlying finding of liability).

Criminal Enforcement

The Division has also been active over the past year with regard to its criminal enforcement mission. As was the case last year, one of our largest investigations has involved automobile parts.

Auto Parts

The Auto Parts investigation continues to be the largest criminal investigation the Antitrust Division has ever pursued, both in terms of its scope and the potential volume of commerce affected by the illegal conduct. To date, in this investigation of customer allocation, price fixing and bid rigging among manufacturers of parts for installation in automobiles, the Division has filed cases against 24 corporations and 28 individuals, yielding fines thus far totaling more than $1.7 billion.

In general, when purchasing parts, automobile manufacturers issue Requests for Quotation ("RFQs") to automotive parts suppliers on either a model-by-model basis for model or engine specific parts or on a multiple-year basis for standard interchangeable parts supplied globally. Automotive parts suppliers submit quotations, or bids, to the automobile manufacturers in response to RFQs, and the automobile manufacturers award the business to the selected automotive parts supplier for the lifespan of the model – which is usually four to six years. Typically, the bidding process for a particular model begins approximately three years prior to the start of production.

As ascertained in the Division's investigation, for a number of years – the time frame varies depending on the auto part supplier, and the type of part, but in some cases beginning as early as 2000 and continuing until 2011 – the manufacturers of a number of different specific automotive parts would communicate – in person and through various other means – to discuss the bids and price quotations to be submitted to specific U.S. and non-U.S. automobile manufacturers. Pursuant to these communications, the manufacturers agreed, among other things, on the bids and price quotes to be submitted, on the allocation of the supply of specific products to specific automobile manufacturers, and also agreed to coordinate price adjustments requested by the automobile manufacturers. The bids submitted were in accordance with the terms of these agreements. As a result, automobile manufacturers, in the United States and elsewhere, paid collusive and artificially inflated prices for many of the automotive parts they bought for installation in the vehicles they produced.

The investigation is continuing.