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Antitrust risks beyond the deal: When merger investigations lead to civil/criminal antitrust charges and costly follow-on litigation

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Merging parties and their antitrust counsel often think the worst case scenario is that the deal gets challenged and blocked by antitrust enforcers, which, of course, is bad enough. But recent experience in multiple merger investigations demonstrates that the antitrust risks faced by merging companies can extend well beyond the fate of the deal itself.

In recent years, for example, the U.S. Department of Justice's Antitrust Division has brought several civil and criminal prosecutions for anticompetitive conduct uncovered during a merger investigation. The most recent example of such follow-on prosecutions surfaced over the last several weeks when the DOJ announced that it had reached settlements with a number of the nation's largest broadcast television station groups in a civil information sharing investigation.

The DOJ's broadcast TV advertising probe serves as the most recent reminder that merger investigations can expose companies to non-merger related civil or criminal antitrust investigations and prosecutions.

In these cases, the DOJ charged the seven defendants with participating in an unlawful information sharing scheme where they exchanged — either directly or through advertising sales firms — non-public, competitively sensitive information in order to prevent local and national advertisers from negotiating better terms, including lower prices.

Since filing these enforcement actions and the accompanying settlements, the DOJ has publicly confirmed that it uncovered this information sharing scheme during its investigation into a proposed merger involving two of the defendants — a merger that was eventually abandoned after the DOJ and Federal Communications Commission (FCC) raised concerns about the deal's likely competitive effects.

The DOJ has also indicated that it is actively investigating other companies and that this ongoing investigation will likely result in additional charges in the coming months.

The DOJ's broadcast TV advertising probe serves as the most recent reminder that merger investigations can expose companies to non-merger related civil or criminal antitrust investigations and prosecutions, as well as costly follow-on class action lawsuits.

This article provides an overview of the DOJ's broadcast TV advertising probe and outlines key steps that companies can take in order to mitigate the risk that a merger investigation will result in their facing non-merger related civil or criminal antitrust charges.

THE SINCLAIR/TRIBUNE MERGER INVESTIGATION GAVE BIRTH TO THE DOJ'S BROADCAST TV ADVERTISING INVESTIGATION

In May 2017, Sinclair Broadcast Group announced that it had agreed to acquire Tribune Media Co. for approximately $3.9 billion. Although the deal was widely expected to be approved with certain conditions by the DOJ and FCC, the companies ended up abandoning the transaction in August 2018 when the FCC commenced an administrative hearing to determine whether (i) the companies' "proposed divestitures were in fact 'sham' transactions" that would allow Sinclair to continue controlling the divested television stations, and (ii) the companies' "potential … misrepresentation[s] or lack of candor" during the FCC's investigation rendered the acceptance of any other divestiture proposal contrary to the public interest.

After terminating their merger, the companies filed countersuits seeking damages from each other for the deal's failure.

About two weeks before the Sinclair/Tribune merger was abandoned, press reports surfaced indicating that the DOJ was actively investigating whether Sinclair, Tribune, and other broadcast television station groups were unlawfully colluding in order to charge higher prices to national and local advertisers.

Within days of these news reports, Sinclair, Tribune, and several unnamed co-conspirators were named as defendants in various putative class action lawsuits, which have since been consolidated in multidistrict litigation pending in the U.S. District Court for the Northern District of Illinois.

On November 13, 2018, the DOJ brought civil enforcement actions against the following six broadcast television groups for participating in an unlawful exchange of non-public, competitively sensitive information: (i) Sinclair; (ii) Tribune; (iii) Raycom Media Inc.; (iv) Meredith Corp.; (v) Griffin Communications; and (vi) Dreamcatcher Broadcasting LLC.

In its complaint and the accompanying settlements, the DOJ alleged that the defendants participated in an unlawful information sharing scheme where they exchanged — either directly or through advertising sales firms — non-public, competitively sensitive information in order to prevent local and national advertisers from being able to negotiate better terms, including lower prices.

According to the DOJ's complaint, the type of non-public, competitively sensitive information that the defendants exchanged included "real-time pacing information regarding each station's revenues" and "data on individual stations' booked sales for current and future months as well as a comparison to past periods."

The DOJ has asserted that the defendants' information sharing scheme "harmed the competitive price-setting process" because it allowed the defendants to "better anticipate whether their competitors were likely to raise, maintain, or lower spot advertising prices, which in turn helped inform [each defendants'] own pricing strategies and negotiations with advertisers."

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Under the proposed settlements, the defendants will be enjoined from sharing, either directly or indirectly, any non-public, competitively sensitive information with each other or other broadcast television station groups.

The defendants will also be required to "adopt rigorous antitrust compliance and reporting measures to prevent similar anticompetitive conduct in the future," as well as to "cooperate [with the DOJ's] ongoing investigation."

Two days after the DOJ filed these enforcement actions, the head of the Antitrust Division (Assistant Attorney General Makan Delrahim) confirmed in a speech that the DOJ "uncovered this [illegal information sharing scheme] during [its] investigation into Sinclair Broadcasting Group's proposed acquisition of Tribune Media Company…."

In doing so, AAG Delrahim "remind[ed] businesses, as well as the antitrust practitioners that advise them, that agreements between competitors to exchange competitively sensitive information can violate the antitrust laws and lead to a civil enforcement action even if the conduct does not amount to the type of hard core cartel conduct that the Antitrust Division prosecutes criminally."

On December 13, 2018, the DOJ brought civil charges against a seventh company — Nexstar Media Group Inc. — "as part of its ongoing investigation into exchanges of competitively sensitive information in the broadcast television industry."

Prior to filing these charges, the DOJ negotiated a settlement with Nexstar, which recently agreed to acquire Tribune for $6.4 billion, that is identical to the settlements that the DOJ has reached with the other six defendants.

OTHER RECENT EXAMPLES OF MERGER INVESTIGATIONS LEADING TO FOLLOW-ON CONDUCT INVESTIGATIONS AND CLASS ACTION LAWSUITS

Importantly, the DOJ's broadcast TV advertising investigation does not represent an isolated instance of a merger investigation leading to the merging companies facing collateral antitrust investigations and prosecutions. To the contrary, this investigation represents the latest example of merger investigations exposing merging companies to non-merger antitrust charges.

Just last year, for example, the DOJ prosecuted two rail equipment companies that participated in unlawful naked "no-poach" agreements (i.e., where companies that are not parties to a legitimate transaction — such as a merger agreement, joint venture, or joint research and development arrangement — agree not to hire or recruit each other's employees even though they typically compete for the same types of employees).

In bringing this enforcement action, the DOJ confirmed that it uncovered these unlawful no-poach agreements during its investigation into a merger involving one of the defendants. Within days of their settlement with the DOJ, the companies were named as defendants in a putative class action seeking lost compensation for current and former employees.

The DOJ's ongoing criminal investigation into price fixing in the packaged seafood industry serves as another example of the DOJ using evidence uncovered during a merger investigation to bring non-merger related charges against the merging companies.

In 2015, the DOJ uncovered a price fixing conspiracy in the packaged seafood industry during its investigation of the proposed merger between Chicken of the Sea and Bumble Bee Foods. The discovery of this conspiracy resulted in the companies having to abandon their merger; Chicken of the Sea opting to cooperate with the DOJ's criminal investigation in return for receiving leniency under the Antitrust Division's Corporate Leniency Program; and Bumble Bee entering a guilty plea and agreeing to pay a $25 million fine.

To date, two companies (Bumble Bee and StarKist) and four individuals (including Bumble Bee's CEO) have been charged in this ongoing investigation. The companies and one of the individuals who have been charged in this criminal investigation have also been named as defendants in multidistrict litigation brought by various plaintiffs (including large retailers and grocers), which has already resulted in Walmart securing a settlement from Chicken of the Sea for an undisclosed amount.

The DOJ's Tour Buses investigation serves as yet another example of a merger investigation leading to a separate DOJ investigation. In October 2016, the DOJ charged the former Vice President of Information Technology for Coach USA Inc. with obstruction of justice for (i) concealing and attempting to destroy documents and (ii) providing false and misleading statements in connection with a DOJ investigation and litigation related to the formation of a joint venture between Coach and City Sights LLC that the DOJ alleged created a monopoly in New York City's hop-on, hop-off tour bus market. This former executive subsequently received a 15-month prison sentence.

PRACTICE TIPS: WAYS TO AVOID HAVING A MERGER INVESTIGATION GO OFF THE RAILS

Below are several steps that can help companies avoid entering into transactions that raise significant non-merger antitrust risks, as well as navigate the merger review process in a manner that limits the potential for follow-on conduct investigations and class action lawsuits.

REVIEW PUBLIC INFORMATION

Prior to entering into a merger agreement, companies should carefully review publicly available information (e.g., SEC filings, court filings, and press reports) about their counter-party's business and industry in order to identify any government investigations or private litigation suggesting that there is a meaningful risk that the counter-party has recently engaged in anticompetitive conduct.

Such basic research at the outset can help companies avoid entering transactions that will raise significant non-merger antitrust issues during the government review process that can delay or even preclude approval of the deal, as well as result in costly and burdensome follow-on government investigations and private litigation.

ASK THE RIGHT DUE DILIGENCE QUESTIONS

A key due diligence goal of an acquirer is the avoidance of purchasing a company that has significant hidden legal liabilities that will result in future government investigations and/or private litigation. To avoid buying someone else's antitrust problems, acquiring companies should use the due diligence process to fully probe the target company's potential civil and criminal antitrust liabilities.

This can be accomplished through a broad range of questions that request copies of the target company's antitrust compliance manual or policy (the absence of which should lead to other follow-up questions); inquire about the content and frequency of any antitrust training for key employees and employees whose responsibilities create higher antitrust risks; ask for copies of employee whistleblower complaints; and request information about the target company's antitrust legal spending in prior years, including legal fees and settlements related to government antitrust inquiries and private antitrust litigation.

If a transaction involves an industry that has a history of significant anticompetitive conduct, the acquirer can also request to perform an antitrust audit of the target company, which could include interviewing the target company's compliance/legal personnel and employees in units that present the highest antitrust risks.

DUE DILIGENCE ON NO-POACH AND WAGE FIXING AGREEMENTS

During the past two years, the DOJ has made prosecuting no-poach and wage-fixing agreements a top priority. In addition, several State Attorneys General have been systematically challenging no-poach/non-compete provisions used by national chains in their franchise agreements.

Consequently, merging companies should use the due diligence process to determine whether any of their standard employment, franchise, or joint venture agreements contain no-poach/non-compete provisions that could potentially be problematic from an antitrust perspective.

They should also use the due diligence process to investigate whether there is evidence suggesting that their employees or the other company's employees have participated in an unlawful no-poach or wage-fixing agreement. If so, companies should take appropriate steps to terminate any offending contractual provision/conduct and determine whether they should or are required to self-report it.

The companies should also determine whether the existence of these contractual provisions or conduct sufficiently increases the prospects that the antitrust agencies will pursue separate investigations and assess that risk, as well as the risk of private antitrust class actions, in order to determine whether they should terminate their merger discussions, postpone signing a deal pending remedial action, negotiate new pricing terms, or develop contractual language that appropriately allocates the broader antitrust risk.

AUDIT THE SECOND REQUEST PRODUCTION

In most merger investigations that are not closed within the initial 30-day waiting period, the antitrust agencies will request a large volume of documents and data. Prior to producing this material, merging companies should attempt to identify any documents or other information that could pique the agencies' interest or require further explanation/context.

Companies can seek to achieve this objective by, among other things, paying particular attention to the material produced from the files of employees whose documents will likely receive the greatest scrutiny by the antitrust agencies (e.g., board members, senior executives, and sales employees); running searches for language that could raise antitrust concerns (e.g., "gentlemen's agreement," "avoid pricing war," "industry etiquette," and "follow their lead"); and carefully reviewing any communications between their employees and their counterparts at key competitors and customers.

PAY SPECIAL ATTENTION TO COMPETITOR COMMUNICATIONS

As shown by the DOJ's ongoing broadcast TV advertising probe, antitrust enforcers will carefully scrutinize any direct or indirect communications between competitors when conducting a merger investigation. Thus, merging companies should carefully review any information sharing arrangements, joint ventures/competitor collaborations, and other competitor communications in order to evaluate whether such interactions raise any potential antitrust concerns.

AVOID 'GUN JUMPING' VIOLATIONS

While the antitrust agencies understand that competitively sensitive information must be exchanged by merging companies during the negotiating and due diligence processes, they will bring "gun jumping" enforcement actions whenever they uncover evidence showing that the acquiring company effectively gained beneficial ownership of the target company prior to the expiration of the statutory waiting period.

As a result, merging companies, as part of an integration-planning process, should implement appropriate safeguards before sharing competitively sensitive information such as current/future pricing information, strategic plans, operating/production costs, and non-aggregated customer-specific information.

Even if the antitrust agencies ultimately approve the transaction, they could bring an independent "gun jumping" enforcement action that could result in the merging companies having to pay significant fines under the Hart-Scott-Rodino Act and having to disgorge any illegal profits that they received during their unlawful pre-merger coordination.

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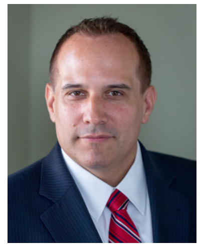
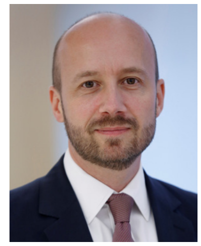
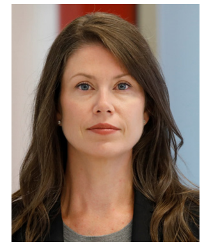

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