New Theory, New Practice?
Policing Vertical and Conglomerate Mergers with Conduct Remedies

Ryan W. Marth

According to conventional wisdom, the Department of Justice and the Federal Trade Commission prefer structural merger remedies like divestiture over remedies that require ongoing monitoring of post-merger conduct. Structural remedies offer comparative ease of implementation and require less resource allocation for compliance monitoring—and, the argument goes, best allow market forces to take effect in the post-merger world.

Yet in recent consent decrees entered into by the Antitrust Division under Christine Varney, the Division eschewed structural remedies in favor of a set of ongoing restrictions on the merged firms' prospective relations with suppliers, customers, and competitors. In the Google/ITA acquisition, Ticketmaster/Live Nation merger, and other high-profile transactions, the involved parties agreed to refrain from specific allegedly anticompetitive conduct and consented to ongoing monitoring by the Department of Justice.

> These conduct- and conglomerate-based remedies let the Division begin to police vertical mergers while avoiding the possibility of a loss in court.

The agreements reached in these deals may represent the first of a new wave of conduct-focused remedies, at least in certain types of mergers. When Christine Varney took over the Antitrust Division, she indicated that she and her staff would "explore vertical theories and other new areas of civil [merger] enforcement, such as those arising in high-tech and internet-based markets."[1] Because proving vertical theories of harm in court can be more difficult—as they are often

> Continued

inherently speculative—the agreements reached in Google/ITA and Ticketmaster/Live Nation may reflect a new, pragmatic approach to remedying harm arising from mergers. These conduct- and conglomerate-based remedies let the Division begin to police vertical mergers while avoiding the possibility of a loss in court. If this approach continues, we may see more instances in which the government gains enforcement rights over an important emerging market impacted in a merger by agreeing to watch over the future conduct of those operating within it. The specifics of the Google/ITA and Ticketmaster/Live Nation agreements show just how far the government may be willing to go.

Google Acquisition of ITA

The Justice Department became concerned with Google's $700 million acquisition of software company ITA because of its potential to impact the comparative-flight-search industry. ITA owned QXP software, which provides comparative-flight-search functionality to online travel intermediaries (OTIs)—like Hotwire and Orbitz—through a unique pricing-and-shopping system. QXP's system includes the engine that performs the search, seat, and fare-class-availability data, and a proprietary algorithm that analyzes flight possibilities to create a list of available flight options. QXP is the leading provider of pricing-and-shopping-system software in the United States.

Google acquired ITA in order to launch its own online travel-search functionality sites. The merger put Google in control of the system at the core of comparative-flight-search industry. Department of Justice feared that the acquisition would give Google the incentive and ability to either shut off OTI-industry competitors' access to ITA or degrade the quality of flight-search functionality available to them. According to the government, the deal would also give Google access to competitively sensitive information about competitors and raise barriers to entry in the comparative-flight-search market because Google would have ITA's software in its "hands, beyond the reach of potential entrants."

Google agreed to take a number of steps to address the government's concerns. Under the Consent Decree, Google must continue to license and improve QXP for a five-year period. During that time, existing contracts, contract extensions, and new contracts must all be offered on terms that are fair, reasonable, and non-discriminatory ("FRAND"). At the same time, Google must devote resources to the ongoing research, development, and maintenance of QXP so that customer/competitors will continue to receive a viable product. Google also agreed to:

- Refrain from giving preferential treatment to airlines in side agreements;
- Maintain ongoing product development;
- Protect its competitors' competitively sensitive information through the creation of firewalls; and
- Participate in special "fast-track" arbitration proceedings to resolve fee disputes with dissatisfied OTI customers.

Together, the remedies required by the Consent Decree attempt to eliminate many of the risks typically associated with vertical mergers. The FRAND commitments seek to prevent a monopolistic refusal to deal, while the prohibitions on preferential treatment seek to prevent monopoly leveraging.

Ticketmaster/Live Nation Joint Venture

Ticketmaster is the largest primary-entertainment-ticketing company in the United States. Live Nation is the United State's largest concert promoter and also owns or operates 70 major concert venues. The Department of Justice became concerned that the merger planned between the two companies would have an anticompetitive effect on the major concert venue market.

Until 2008, Live Nation was Ticketmaster's largest primary-ticket client. In later 2008, Live Nation obtained its own ticketing software and became its own primary ticket provider. It also began offering primary-ticketing services to other major concert venues. Within two months, Live Nation had gained more than 15% of the primary ticketing market. Shortly thereafter, following Ticketmaster's proposal, the two companies signed a contract dated February 10, 2009 agreeing to merge.

The government feared that the merged firm would extinguish the burgeoning competition generated by Live Nation's entry into the market. The government also had concerns that the merger would diminish innovations in primary-ticketing services and that high barriers to entry existing at the time of the merger—including ticket platform costs and complications, scale and training issues, and demonstrated reliability—would give the merged firm unchecked market power. As a result, the Department of Justice was concerned that the merged firm would also be able to condition access to popular concert content by bundling it with ticketing servicers. The government investigation into the merger revealed that the market was unlikely to produce a viable competitor and that major concert venues would be left without an alternative if the merged company raised prices.

To address these concerns—and allow the merger to proceed—Ticketmaster agreed to steps that created two additional, vertically integrated primary-ticketing services competitors in the major-concert-venue market. Ticketmaster granted a below-market-rate license to its most popular ticketing-technology platform and divested itself of all assets in its second ticketing technology platform to facilitate the creation of the new competitors. In addition, the merged Ticketmaster agreed not to:

- Retaliate against venue owners who choose competing ticket service;
- Condition venue access to concert content on the purchase of ticketing services or vice-versa;
- Use ticketing data in non-ticketing businesses unless the data is shared with competitors; or
- Deny departing clients access to their own ticketing data.

The government believes these remedies and the creation of new viable new competitors will prevent the harm to competition threatened by the merger.

> Continued

Conclusion

Determining whether or not the Google/ITA and Ticketmaster/Live Nation consent decrees signal a fundamental change in the agency's view of proposed mergers may be premature. Both deals involved mergers where the competitive concerns involved vertical foreclosure with little horizontal overlap. And, at least in the case of Ticketmaster/Live Nation, the Justice Department may have felt pressure to "do something" in a high profile case of consolidation in the highly visible entertainment sector. So, the conduct remedies reached in them might simply reflect two unique deals that happened to strike at nearly the same time.

> By taking on oversight of post-merger conduct, the government protects innovation in important emerging markets and sets a precedent that it has a right to do so in these types of deals

But the Consent Decrees reached in both matters seek to prevent the involved firms from using their acquisition to bottleneck competition in industries where the technological barriers to entry are high. Given former Director Varney's stated desire to explore vertical theories when mergers impact industries involving complex technologies, the conduct remedies could signal something more. By taking on oversight of post-merger conduct, the government protects innovation in emerging markets and sets a precedent that it has a right to do so in these types of deals—an ultimate outcome that may result in an increase in consent decrees premised on the ongoing performance and supervision of the involved parties long after the deal in question gets done. Whether this trend continues is an interesting policy question that will have to be tackled by Ms. Varney's successor.

---

1 Christine A. Varney, Vigorous Antitrust Enforcement in this Challenging Era: Remarks Prepared for the United States Chamber of Commerce at 16 (May 12, 2009).

Ryan W. Marth
rwmarth@rkmc.com
Ryan received his J.D., magna cum laude, and Order of the Coif from the University of Minnesota Law School and his B.A., magna cum laude, from St. Olaf College. He practices in the areas of antitrust and trade regulation, business litigation, and mergers and acquisitions.