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# Conduct-Based Remedies In Merger Investigations

Law360, New York (March 22, 2010) -- Conduct-based remedies typically have been disfavored in merger investigations by U.S. antitrust enforcement agencies because of the cumbersome and costly monitoring required. See U.S. Dep't of Justice, Antitrust Div., Antitrust Division Policy Guide to Merger Remedies. (Oct. 2004).

Rather, conduct-based remedies are used only in certain limited circumstances, such as perfecting structural relief or where the transaction is primarily vertical, rather than horizontal in nature. See, e.g., United States v. Northrop Grumman, Civil No: 1:02CV02432 (D.D.C. Dec. 11, 2002); In re Time Warner Inc., FTC Docket No. 961-0064 (Sept. 12, 1996). In United States v. Ticketmaster Entertainment Inc., Case No. 1:10-cv-00139 (D.D.C. Jan. 25, 2010) and In re PepsiCo Inc., FTC File No. 091-0133 (Feb. 26, 2010) the Antitrust Division and Federal Trade Commission, respectively, imposed conduct-based remedies to resolve the competitive concerns resulting from the transactions.

While these cases probably do not signal a broad policy shift, they serve as an important reminder that conduct-based remedies are part of the agencies' arsenal for relief.

Merging parties therefore must not only consider that an antitrust agency may require such remedies to clear a transaction, but also should consider how such remedies could assist the parties in resolving any outstanding concerns by the reviewing agency.

**Ticketmaster/Live Nation**

On Feb. 10, 2009, Ticketmaster Entertainment Inc., the largest provider of primary ticketing to major concert venues in the United States and world entered into a definitive merger agreement with Live Nation Worldwide Inc., the world's largest promoter of live concerts and the owner or operator of over 75 live entertainment venues.

According to the U.S. Department of Justice Antitrust Division's complaint, after years of using Ticketmaster as its primary ticketing provider, in late-2007, Live Nation entered into an agreement with a German primary ticket provider to use its technology to provide primary ticketing services to Live Nation and third-party venues, and by late 2008, Live Nation became the second-largest primary ticketing company in the U.S.

The Division alleged that the proposed merger would lead to "a high share among providers of primary ticketing for major concert venues" that would result in "less aggressive competition" and "less innovation."

The parties entered into a proposed settlement on Jan. 25, 2010, that required Ticketmaster to license ticket software and divest ticketing assets to two different companies — Anshutz Entertainment Group and either Comcast-Spectacor or another buyer acceptable to the Division.

In addition to these structural remedies, the settlement contained a number of significant conduct-based remedies, including: (1) proscribing retaliation against venue owners who consider or decide to contract with competitors of the merged entity for their primary ticketing; (2) prohibiting the merged entity, either explicitly or practically, from requiring venues to use the their ticketing services to obtain concerts promoted by or artists managed by the merged entity; (3) prohibiting the merged entity from using certain ticketing data in the non-ticketing business; and (4) mandating that the merged entity provide any current primary ticketing client with ticketing data upon request.

In fashioning its remedy, the Division concluded that divestiture and licensing were insufficient to ensure competition was restored post-transaction.

Therefore, to enhance the required structural remedies, the Division imposed significant conduct-based remedies to guard against foreclosure of equally efficient competitors that are not vertically integrated, as well as to lower barriers for customers to switch primary ticket providers.

**PepsiCo's Acquisition of Pepsi Bottling Group and Pepsi Americas**

On Aug. 3, 2009, PepsiCo agreed to acquire the remaining outstanding shares that PepsiCo did not already own of its two largest independent bottlers and distributers, Pepsi Bottling Group ("PBG") and PepsiAmericas ("PAS").

In a related transaction, on Dec. 7, 2009, PepsiCo agreed to continue bottling and distributing in the PBG and PAS territories for the next 20 years certain Dr. Pepper Snapple ("DPSG") carbonated soft drink brands, which constitute about 20 percent of DPSG's U.S. bottler-distributed sales of carbonated soft drinks.

The transaction raised no traditional horizontal concerns: DPSG and PepsiCo remained independent competitors for "branded, direct-store-door delivered carbonated soft drinks" and "branded soft drink concentrate used to produce branded direct-store-door delivered carbonated soft drinks."

But, the fact that a PepsiCo would distribute DPSG brands had the potential to raise competitive concerns if information was shared improperly between the bottling side of PepsiCo and the concentrate side of PepsiCo.

The Federal Trade Commission's complaint alleged that the PepsiCo-DPSG license agreement did not provide adequate protections of "competitively sensitive and confidential information regarding DPSG carbonated soft drink brands" that DPSG provides to PepsiCo pursuant to the agreement.

To remedy this potential problem, the FTC's proposed consent order requires PepsiCo to implement a "firewall" that runs for the length of the license agreement that will prevent access by individuals that could use the information against DPSG. Additionally, the FTC will appoint its own monitor for an initial five year term to assure PepsiCo's compliance with the consent order.

Because both transactions raised issues beyond the traditional horizontal concerns, the agencies' insistence on certain conduct-based remedies is not all that surprising. In fact, the inclusion of behavioral remedies might have been the only way the parties could resolve the outstanding competitive concerns and still proceed with the transaction.

These recent actions demonstrate that the agencies will impose conduct-based remedies in the appropriate circumstances. Equally important, however, is that in some circumstances they will accept conduct-based remedies as the only necessary relief and merging parties should carefully consider whether the facts of their case make the use of conduct-based remedies appropriate.

--By Michael B. Bernstein, Arnold & Porter LLP

*Michael Bernstein is an associate in the antitrust/competition practice group at Arnold & Porter in the firm's Washington, D.C., office.*