Antitrust Alert

April 18, 2013

FTC Challenges Exchange of Sensitive Business Information Between Competitors' CEOs as "Unfair Method of Competition"

Consent Order Mandates Antitrust Compliance Program for 20-Year Period

A very recent Federal Trade Commission (FTC) Complaint and Consent Order highlights the enforcement risk faced by companies that share sensitive business information with competitors. The FTC sued using its "unfair methods of competition" authority under Section 5 of the FTC Act, even though the conduct may not have violated the Sherman Act. The fact that the challenged information exchanges involved CEOs of the respective companies underscores the need to include **all** high-level executives in company antitrust compliance programs.

The Case

On April 8, 2013, the FTC announced that Bosley, Inc. ("Bosley") and its parent companies had settled allegations that Bosley illegally exchanged competitively sensitive pricing and other information with Hair Club for Men and Women ("Hair Club"), one of Bosley's competitors.[1] Invoking its Section 5 authority, the FTC asserted that the information exchanges were illegal because they facilitated coordination and endangered competition.[2] The FTC did not allege any actual price-fixing agreement or any actual harm to competition, but asserted that the information exchanges created a risk of competitive harm sufficient to constitute an unfair method of competition under Section 5.

The FTC's investigation likely emerged out of the agency's review of a 2012 merger. On July 16, 2012, Regis Corporation announced an agreement to sell its hair restoration management business, Hair Club, to Aderens Co., Ltd., a Japanese wig manufacturer. Aderans already owned Bosley, another large competitor in the same line of business. Presumably in reviewing the Hair Club/Bosley merger, the FTC found evidence that, for at least four years, the CEOs of Bosley and Hair Club had routinely exchanged detailed, non-public information regarding "future product offerings, surgical hair transplantation price floors, discounting, forward-looking expansion and contraction plans, and operations and performance."[3] The FTC also alleged that "Bosley viewed these information exchanges as business as usual, and indicated that it had similar communications with other competitors."[4]

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[1] Press Release "Bosley, Inc. Settles FTC Charges that it Illegally Exchanged Competitively Sensitive Business Information with Rival Firm, Hair Club, Inc." (4/08/2013), available at http://www.ftc.gov/opa/2013/04/bosley.shtm.

[2] In the Matter of Bosley, Inc., Aderans America Holdings, Inc., Aderans Co. Ltd., Complaint at ¶17. A copy of the Complaint is available at http://www.ftc.gov/os/caselist/1210184/130408bosleycmpt.pdf.

[3] Id. at ¶13.

[4] Id. at ¶16.

Without admitting liability, Bosley and its parent companies agreed to a Consent Order[5] requiring them to, among other things, (i) cease and desist from directly or indirectly communicating any competitively sensitive non-public information to any competitor, or requesting, encouraging or facilitating communications of competitively sensitive non-public information from a competitor; (ii) design and maintain for 20 years an antitrust compliance program; and (iii) submit verified written compliance reports to the FTC at least annually for four years following finalization of the order.[6] The Consent Order defined "competitively sensitive non-public information" to include, without limitation, "information relating to pricing or pricing strategies, costs, revenues, profits, margins, output, business or strategic plans, marketing, advertising, promotion, or research and development."[7]

Certain competitively sensitive non-public information exchanges are exempted from the Consent Order's prohibitions. In particular, the order carves out: (i) communications reasonably related to a lawful joint venture or as part of "legally supervised" due diligence for a potential transaction; (ii) communications regarding rates, other terms of service or willingness to lower rates when made to someone reasonably believed to be an actual or potential customer; (iii) communication of rates to a person reasonably believed to be affiliated with a market research firm; (iv) communications as part of "ordinary and customary participation" in a trade association or medical society; (v) ordinary and customary communications with vendors and independent contractors; and (vi) communications incident to legitimate market research "(such as secret shopping)."[8]

Comments and Lessons

The FTC's complaint is significant because it does not allege the key factors that typically underlie a successful information exchange claim under Section 1 of the Sherman Act: definition of a relevant market, high market concentration, a fungible product with inelastic demand, and an actual anticompetitive effect in the market.[9] Instead, the Complaint alleges that the "tacit understanding to exchange information" "had the purpose, tendency, and capacity to facilitate coordination and served no legitimate business purpose."[10] The Complaint further alleges that the exchange of information "had the effect of reducing Bosley's and Hair Club's uncertainty about a competitor's product offerings, current discounting, [and] geographic expansion."[11]

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[5] Available at http://www.ftc.gov/os/caselist/1210184/130408bosleydo.pdf. Bosley and its parents signed an Agreement Containing Consenting Order. The Decision and Order will become final after a notice and comment period and formal adoption by the Commission.

[6] Id., Sections II, III, IV and VII.

[7] Id., Section I.J.

[8] Id. at Section II.

[9] See, e.g., *U.S. v. Container Corp. of America*, 393 U.S. 333, 336-37 (1969).

[10] Complaint at ¶14.

[11] Id. at ¶15. In its Analysis of Agreement Containing Consent Order to Aid Public Comment at 2, the FTC explained that there are three types of risks to competition associated with exchanges of competitively sensitive non-public information: (i) they may mutate into a conspiracy to restrict competition; (ii) they may facilitate coordination among rivals that harms competition; or (iii) by reducing uncertainty, they may enable rivals to restrict their own competitive efforts. The Analysis is available at http://www.ftc.gov/os/caselist/1210184/130408bosleyanal.pdf.

The scope of the FTC's Section 5 authority and the Commission's use of that authority to attack conduct that might not be unlawful under the Sherman Act have long been the subject of controversy. At the recent American Bar Association Antitrust Section Spring Meeting, both new FTC Chairwoman Edith Ramirez and new Republican Commissioner Joshua Wright acknowledged the importance of providing sufficient guidance to businesses regarding how the agency would enforce Section 5. Chairwoman Ramirez indicated that the best guidance could be gleaned from recent Commission actions and advocated for further development of that authority on an incremental, case-by-case basis. Commissioner Wright, by contrast, stated that more formal guidance is necessary and that he intends to issue a proposed Section 5 Unfair Methods Policy Statement to serve as a "starting point for a fruitful discussion among the enforcement agencies, the antitrust bar, consumer groups, and the business community."[12]

The FTC's Bosley case certainly represents explicit guidance. The case serves as a cautionary tale that any exchange of confidential, competitively sensitive information between competitors without a legitimate business justification creates antitrust risk, regardless of whether there is any actual impact on the market. This case also underscores both the need for effective antitrust compliance programs and the importance of including high-level executives, such as CEOs, in the programs.

[12] What's Your Agenda? Remarks of Joshua D. Wright, ABA Spring Meeting, at 12-13 (Apr. 11, 2013), available at http://www.ftc.gov/speeches/wright/130411abaspringmtg.pdf.

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