

Public Comment: COVID-19 unlikely to soften merger enforcement posture, Virtual hearings get test run in California

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Public Comment is a weekly column that offers editorial commentary from our Washington DC and Los Angeles bureaus on the US antitrust agencies and the top deals under merger review. The opinions expressed here are those of the writers only.

Companies hoping to use the coronavirus's ravaging effects on markets as a tool in negotiations with US antitrust enforcers are likely in for a big disappointment, according to several antitrust attorneys.

"The antitrust laws don't change due to whether the markets are weak or strong," said the first attorney. "If you're hearing rumors, to the effect that someone thinks they're going to get a break, [get their review done] a little faster, I'm not sure what they're basing that on," he said.

The other attorneys agreed, adding that companies should expect enforcers to carry out reviews with the same scrutiny of potentially anti-competitive behavior that they always have.

"It's a challenging situation, but I don't think the agency is going to wholesale change its analysis of mergers even given the healthcare crisis and economic challenges a lot of companies are facing," said Alexis Gilman, attorney at Crowell & Moring who has prior Federal Trade Commission experience.

The current caveat regarding merger reviews, however, is that they will take more time than usual given the changes that the FTC and Department of Justice announced in recent weeks as most of their personnel telework. The changes include requiring that Hart-Scott-Rodino merger filings be done online and a temporary end to early terminations while the e-filings process is in effect.

Past precedent doesn't help companies hoping for leniency. During the last years of the Great Depression, Thurman Arnold ran an "extremely robust [DoJ] Antitrust Division," said the first attorney. During the 2008-09 financial crisis, "a lot of policymakers were out giving speeches and telling people that the antitrust laws are still in

effect and [not] abandoned,” he added.

In the current crisis, DoJ Antitrust Chief Makan Delrahim is following suit. The DoJ announced last week that it would seek 30-day extensions on timing agreements to ensure there is sufficient time to review deals.

This week the DoJ cleared the merger of **Raytheon** [NYSE:RTN] and **United Technologies** [NYSE:UTX] after the aerospace and defense groups agreed to a number of divestitures following an extended antitrust review.

Several of the attorneys said that the US is still early into the crisis and no one knows what the future - both short and long term - holds. Attorneys representing companies in especially hard hit industries, such as hospitality, may at some point down the road try to use the virus to advocate for their clients, they said.

“I can see a situation where attorneys say, ‘We’ve got a changing market situation and these competitors are weakened, so they need to come together to survive,’ said John Ingrassia, senior counsel at Proskauer. “That may or may not fit the facts, but you can imagine people trying to make arguments like that,” he said.

The first attorney agreed. He said there are many points that go into advocacy arguments, but that “there is not a single off ramp that just says someone whose stock is down 20% due to coronavirus immediately gets a free ride, or someone who just laid off 10,000 employees due to the coronavirus.”

Another of the attorneys cautioned that such arguments also carry a risk for the merging companies that she likened to a double-edged sword: If the argument is that the virus has lessened competition - because rivals have filed for bankruptcy, for example - this would affect the competitive environment. “If one of those companies has gone under because of the pandemic, then the whole competitive environment and analysis are totally different now,” she said.

A fourth attorney added it is probable that parties will try to argue that their transactions should be judged differently due to circumstances around the pandemic. She said she could not provide any examples of this happening at this point, but “talk to me again in six months.”

The proposed combination of casino operators **Eldorado Resorts** [NASDAQ:ERI] and **Caesars Entertainment** [NASDAQ:CZR] is one of the few pending second request reviews with direct exposure to the pandemic. The FTC has been examining the merger since last year and divestitures are expected.

Northern District of CA starts public telehearings

The coronavirus crisis has spurred the US Court for the Northern District of California to experiment with telephonic hearings during civil antitrust proceedings, enabling the public and media to join onto a conference call and listen in.

Now, a similar policy is under review at the Central District of California, which covers Los Angeles and Orange counties, among others.

“It is being considered,” a Central District spokesperson told this news service.

Courthouses in the Southern District of California, which covers San Diego, remain open to the public, a spokesperson for that court system said.

“You can still observe live proceedings,” the spokesperson said in an email. “Some participants are making appearances telephonically, but the courtrooms are open.”

Nonetheless, with each passing day, new orders are being issued by many chief judges that further restrict the operations of federal courthouses. On Thursday (26 March), the Northern District ordered all of its Bay Area courthouses shuttered to public traffic and essential functions consolidated to San Francisco.

One of the first opportunities to witness the new virtual public hearings in action is on the books for 2 April, when US District Judge Beth Labson Freeman is set to preside over a hearing on a motion for legal fees in the recently dismissed antitrust suit *NSS Labs v. CrowdStrike, et al.*

In that case, cybersecurity software testing firm NSS Labs alleged the Anti-Malware Testing Standards Organization (AMTSO) and several member software makers manipulated testing standards to benefit their own businesses.

NSS voluntarily dismissed the suit in December and the sides are now locked in a fight over who should pay for the year and a half-long litigation.

The case was also noteworthy because the DoJ lodged a statement of interest on behalf of the plaintiff, cautioning the court against leaning too far in favor of the standard-setting organization.

A conference call phone number and access code has been made available on the case docket, and parties and the public are asked to dial in at least five minutes prior to the 9 a.m. hearing for a “check-in.” Participants should use a land line over cell phone, when possible, the hearing instructions state.

Live-streamed hearings have become commonplace at the US Court of Appeals for the Ninth Circuit. The Supreme Court of California recently announced it, too, will stream video and audio of proceedings during the public health crisis.

It is probably not unreasonable to assume that these early trials could help influence whether other courts decide to follow suit.

by Esther D'Amico, Victoria Turner and Christopher Kane in Washington, DC and Aldrin Brown in Los Angeles

Grade: Strong evidence

TARGETS

Caesars Entertainment Corporation

BIDDERS

Eldorado Resorts, Inc.

USA

Government

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