

INSIGHTS

DOJ Sets its Sights on Antitrust Violations in the E-Commerce Marketplace

May 11, 2015

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The Antitrust Division of the U.S. Department of Justice (Antitrust Division) continues to intensify and expand criminal enforcement of the antitrust laws. The results speak for themselves. In fiscal year 2014, the Antitrust Division collected \$1.86 billion in fines and penalties as a result of criminal prosecutions, representing one of the largest collections in its history, including five fines exceeding \$100 million. Equally suggestive of the Antitrust Division's vigor are the prison terms secured for 21 individual defendants, with an average sentence of 26 months – the third highest average ever. Also in fiscal year 2014, the Antitrust Division obtained its first ever extradition on an antitrust charge. But fines and jail terms are not the only way the Antitrust Division has sought to bolster its criminal enforcement efforts. Indeed, the Antitrust Division has expanded its focus to a new and previously undisturbed market – e-commerce.

In April of this year, the Antitrust Division announced its first criminal antitrust prosecution specifically targeting e-commerce. In that case, filed in the U.S. District Court for the Northern District of California, David Topkins, a former executive of an online wall décor retailer, pleaded guilty to a felony charge of conspiring to fix online poster prices. According to the Antitrust Division, from September 2013 until around January 2014, Mr. Topkins and certain unnamed coconspirators agreed to fix the prices of posters sold online via the Amazon Marketplace. Specifically, Topkins and others implemented a complex pricing algorithm and wrote computer code for the purpose of coordinating their respective prices. Pursuant to his plea agreement, Mr. Topkins agreed to pay a \$20,000 criminal fine and assist the government in its ongoing investigation of the online wall décor space.

While the criminal prosecution of a single individual and a seemingly modest fine may seem insignificant when compared to larger cases initiated by the Antitrust Division, the true repercussions of the government's recent focus on e-commerce are likely still to emerge. Mr. Topkins's case almost certainly represents the initial stages of a broader investigation of the online marketplace. The number of online retailers has skyrocketed recently, meaning the marketplace is replete with larger, more influential retailers. It would be unwise to conclude that Mr. Topkins's prosecution was the government's "end game." One need look no further than Mr. Topkins's plea agreement, which explicitly requires his continued cooperation with the Antitrust Division's ongoing investigation. Indeed, Mr. Topkins's cooperation may be the government's investigatory linchpin. Mr. Topkins's actions (and those of his coconspirators) may be suggestive of more widespread efforts to use sophisticated computer code and software to fix online prices, and he may provide useful information about such practices. Bill

Baer, Assistant Attorney General for the Antitrust Division, made this abundantly clear when he commented, "We will not tolerate anticompetitive conduct, whether it occurs in a smoke-filled room or over the Internet using complex pricing algorithms." Translation: online businesses can expect heightened government scrutiny.

What this means for online retailers is that they must regularly scrutinize their business practices to ensure compliance with federal (and state) antitrust laws. Retailers need to be mindful of the risks inherent in e-commerce as well as significant enforcement trends. Armed with this information, retailers can design and implement robust antitrust compliance programs and minimize exposure to costly and burdensome government investigations, which can have very serious consequences. Bracewell & Giuliani's White Collar Criminal Defense and Antitrust/Competition groups have pooled together years of regulatory enforcement and antitrust counseling and litigation experience and have routinely guided clients through these and similar compliance and enforcement issues.