Kluwer Competition Law Blog

U.S. Dep't of Justice Targets MFN Agreements

Eric J. Stock (Gibson, Dunn & Crutcher) · Tuesday, February 1st, 2011

The U.S. Department of Justice (DOJ) is seeking to curb the use of so-called "most favored nation" (MFN) agreements — a common business practice that the DOJ believes can sometimes result in anticompetitive effects when entered into by a dominant firm. In October of last year, the DOJ commenced an action against Blue Cross Blue Shield of Michigan (BCBSM), a health insurance company, for entering into a series of MFN agreements with hospitals. The DOJ alleges that the MFN agreements had the effect of limiting competition and protecting the market position of BCBSM.

In the health care context, a MFN provision typically means that a health care provider has agreed with a health insurer that the reimbursement rates accepted by the provider from the insurer will be as low (or lower) than the rates the provider agrees to accept from rival insurers. If the provider agrees to a lower reimbursement rate with another insurer, then the provider must then accept that rate (or perhaps an even lower rate) from the insurer protected by the MFN. In the case of BCBSM, the DOJ alleges that BCBSM entered into two types of MFN agreements with hospitals in the state of Michigan — some that entitle BCBSM to the same reimbursement rates as rivals, and some that require hospitals to accept from BCBSM fees that are materially lower than the fees accepted by those hospitals from other insurers.

The DOJ alleges that the MFN agreements in this context, given the characteristics of the market and BCBSM's market position, harm competition by requiring BCBSM's rivals to pay higher prices for medical care and insulating BCBSM from greater competition. The DOJ alleges that BCBSM has a market share of over 60% in the market for providing commercial health insurance in Michigan, and that its MFNs impacted more than half of the 131 acute care hospitals in the state. BCBSM strongly opposes the lawsuit and argues that its MFNs are solely intended to achieve the lowest prices possible for its insureds.

The antitrust case against BCBSM is noteworthy for several reasons. While the U.S. antitrust agencies have challenged MFN agreements in the past, there are few judicial decisions on point. MFN agreements are commonly-used in many industries, and in most cases are procompetitive and perfectly lawful. The DOJ may need to create new law to declare unlawful the MFNs entered into by BCBSM . On the other hand, it is well-established that a vertical restraint can violate U.S. antitrust laws if it is has the purpose and effect of restraining competition and entrenching the market position of a dominant firm. The case may therefore turn on the specific facts of the market, and the real-world impact of the contractual provisions at issue.

The outcome of the BCBSM case will undoubtedly have significant ramifications for U.S. markets and market participants, especially in the health care industry and other industries in which MFNs are frequently used. The case also reflects the emphasis that the Obama DOJ has placed on competition in the health care industry and, in particular, facilitating new entry. Assistant Attorney General Varney pointed to the BCBSM case in a recent speech highlighting the current antitrust enforcement initiatives at the DOJ.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Tuesday, February 1st, 2011 at 4:01 am and is filed under Source: OECD“>Antitrust, Source: UNCTAD

“>Dominance, United States of America

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.