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ANTITRUST TRADE AND PRACTICE

Expert Analysis

The DOJ Moves To Terminate The Paramount Consent Decrees

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Last month, the Department of Justice (DOJ) asked a federal district court to terminate the Paramount Consent De-crees (Decrees), a set of rules governing major film studios for the last 70 years. In effect, these rules prohibited movie studios from owning downstream movie theaters and banned a variety of vertical agreements, such as block booking—the practice of bundling multiple films into one theater license. This decision comes after the DOJ said last year that it planned to review almost 1,300 "legacy" antitrust orders to determine which are "outdated" and do little more than "clog court dockets, create unnecessary uncertainty for businesses or … elicit anticompetitive market conditions." See DOJ Office of Public Affairs, *Department of Justice Announces Initiative to Terminate "Legacy" Antitrust Judgments* (April 25, 2018). Pursuant to that process, Assistant Attorney General of the DOJ Antitrust Division Makan Delrahim explained that the DOJ found that the Decrees "have served their purpose, and their continued existence may actually harm American consumers by standing in the way of innovative business models for the exhibition of America's greatest creative films." See DOJ Office of Public Affairs, *Department of Justice Files Motion to Terminate Paramount Consent Decrees* (Nov. 22, 2019). The DOJ emphasized that significant structural changes in the industry, coupled with technological innovations, new movie platforms, new business models, and changing consumer demands no longer make the Decrees necessary. Id. In other words, going to a movie theater is no longer the only way to see the newest film. Consumers can access movies from their homes with just a few clicks of their TVs, tablets, or phones. As a result of this drastic shift in the ways consumers access movies, the DOJ believes a change is needed in how the market is regulated.

The Decrees stem from a late 1930s DOJ enforcement action where the DOJ alleged that the five major film studios of that time—Paramount Pictures, Twentieth Century-Fox, Warner Brothers Pictures, Radio-Keith-Orpheum (defunct as of 1959), and Loew's (now known as Metro-Goldwyn-Mayer)—were engaged in illegal price fixing and monopolization of both the movie theater and film distribution markets with distributors Columbia Pictures, Universal, and United Artists. Importantly, at the time, the five major film studios owned or controlled movie theaters, which was the main driver of the alleged horizontal conspiracy. Specifically, the DOJ alleged that these companies, led by the five major film studios, violated the Sherman Act by colluding to set minimum prices for tickets, divide markets, and bundle films. After years of litigation, the parties involved in the action entered into a series of consent decrees, beginning in 1949, called the Decrees. See, e.g., *United States v. Paramount Pictures*, 1949-1

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Trade Cas. (CCH) ¶ 62,337 (S.D.N.Y. March 3, 1949).

Antitrust Consent Decrees

A consent decree is a settlement between a private party and the government. It is entered as a court order and is enforceable by the court. Consent decrees bind the government and the consenting party to the terms stated in the consent decree. In the antitrust context, private parties often enter into consent decrees as a result of a regulatory investigation into certain anticompetitive conduct. Some third parties prefer to enter into a consent decree rather than go through an expansive regulatory investigation or litigation, as entering a consent decree saves costs and provides certainty to a private party.

The Paramount Consent Decrees

The Decrees had two major components. First, the Decrees prevented major movie studios from being both a creator of movies and a downstream exhibitor of movies through their ownership of movie theaters. Thus, the Decrees forced the movie studios to divest their movie theater businesses. Second, the Decrees banned the following vertical agreements: (1) the setting of minimum prices on movie tickets (known as resale price maintenance); (2) the granting of exclusive film licenses for geographic areas (known as overbroad clearances); (3) the bundling of multiple films into one theater license (known as block booking); and (4) the entering into one license that covered an entire theater circuit (known as circuit dealing). Of note to the Decrees is that, prior to 1979, the DOJ did not include "sunset" provisions—a time when the consent decree expires—in their consent decrees. Thus, the Decrees could have theoretically existed in perpetuity without the DOJ's advocating for their termination.

Practical Implications Of Termination

Given the dynamic changes to the movie industry, such as the proliferation of new distribution channels, it is unclear if the termination of the Decrees will have a major impact on the market. That is, there are significant questions regarding the future of the movie business. See Brent Lang, *The Reckoning: Why the Movie Business Is in Big Trouble*, Variety (March 27, 2017). Further, many of the movie studios at issue here are owned by parent companies that "already have a direct distribution relationship with customers." Brent Lang, *Why Eliminating the Paramount Antitrust Decrees Won't Shake Up the Movie Business*, Variety (Nov. 19, 2019). Practically speaking then, there may not be much concern that these major film studios will be interested in purchasing movie theaters, which was the crux of the DOJ's concern in the 1930s and was the main facilitator of the horizontal conspiracy. Rather, these film studios are more likely to focus their resources on assets that drive business in today's market, such as their direct to consumer streaming services. That said, the door is open for these major film studios to invest in or own movie theaters if they so choose.

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Legal Implications Of Termination

The DOJ has stressed that termination of the Decrees does not mean antitrust scrutiny over the agreements and practices at issue will automatically disappear. Rather, eliminating the Decrees means that any of the formerly illegal practices will warrant typical antitrust scrutiny. Under the Sherman Act, it would be per se illegal were the major film studios to engage in another horizontal conspiracy to fix prices or divide markets. Regarding the vertical practices in the Decrees, Assistant Attorney General Delrahim explained at the American Bar Association's 2019 Antitrust Fall Forum that removing the ban on these practices does not mean that they "are now considered per se lawful under the antitrust laws." See DOJ Office of Public Affairs, *Assistant Attorney General Makan Delrahim Delivers Remarks at ABA's 2019 Antitrust Fall Forum* (Nov. 18, 2019). Instead, he wants the DOJ to "review the vertical practices initially prohibited by the [Decrees] using the rule of reason." Id. Thus, if there is "credible evidence" that shows "a practice harms consumer welfare, antitrust enforcers remain ready to act." Id.

Assistant Attorney General Delrahim seems to be adopting the approach affirmed by the Supreme Court and contemporary antitrust thought that the vertical agreements like the ones in the Decrees are not per se illegal and are subject to the rule of reason. Specifically, in *Leegin Creative Leather Prod. v. PSKS*, the Supreme Court held that minimum resale price maintenance agreements are not per se illegal and must be analyzed under the rule of reason. 551 U.S. 877 (2007). In so doing, the Supreme Court overturned the 96-year old precedent set in *Dr. Miles Medical Co. v. John D Park & Sons Co.*, which held that minimum resale price maintenance was per se illegal. 220 U.S. 373 (1911).

While the amount of challenges will depend on how many agreements are enacted, it will also depend on how the DOJ chooses to allocate their limited resources. On the one hand, it is possible that the DOJ is signaling that it will be fairly permissive with respect to all but the most egregious forms of the practices previously deemed per se illegal. On the other hand, the DOJ could choose to aggressively challenge any formerly prohibited vertical agreement that takes effect once the Decrees are formally terminated. The latter approach may fall in line with the DOJ's current practice. That is, the DOJ has become increasingly interventionist, and continue to file amicus briefs in a variety of cases. This interventionist stance demonstrates that they may want to take a leadership role in how the vertical practices at issue in the Decrees will get reviewed once enacted.

Time will tell how serious the DOJ was when they claimed the termination of the Decrees does not mean antitrust enforcement would disappear from the vertical agreements at issue in the Decrees.

Conclusion

Ultimately, we are unlikely to see any drastic, immediate changes to the movie industry as a result of the removal of the Decrees. Assuming the Decrees are formally terminated by a federal court, any changes will take time to implement. Moreover, studios would still be prohibited from block booking, the most controversial of the removals, for another two years. To truly see how the Decrees' termination will play out, we will have to wait for the previously illegal agreements to enter the movie industry, and see how the inevitable legal challenges to said agreements unfold. As the DOJ stated, each of these agreements will be reviewed under the rule of reason, meaning each will be looked at on a case-by-case basis. Put differently, the specific facts and circumstances of the agreements will dictate the outcome to any potential legal challenge.

Time will tell how serious the DOJ was when they claimed the termination of the Decrees does not mean antitrust enforcement would disappear from the vertical agreements at issue in the Decrees. In any event, however, practitioners in this space would be wise to brush up on vertical price restraint rule of reason precedent, as the door will soon be open for challenges to the vertical agreements that were previously per se unlawful under the Decrees.