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Whither US antitrust?

James W Lowe and Thomas Mueller of Wilmer Cutler Pickering Hale and Dorr LLP look at what the new leadership at the US Department of Justice and the Federal Trade Commission is likely to mean for antitrust enforcement in the US

As president, I will direct my administration to reinvigorate antitrust enforcement [...] I will direct my administration to take seriously our responsibility to enforce the antitrust laws so that all Americans benefit from a growing and healthy competitive free market economy.
Statement of Senator Barack Obama for the American Antitrust Institute (2007).

Candidate Barack Obama had a formal position on antitrust, a rare occurrence for a US presidential candidate. Now President Obama has nominated those who will lead the US antitrust agencies and are charged with implementing his administration's policies. What does this portend for actual enforcement? What changes are likely to be most noticeable?

The reality is that antitrust enforcement is matter- and fact-specific; actual changes in policy, while they can be announced in speeches and statements, can only be implemented through enforcement actions. And each antitrust matter ultimately turns on its particular facts. So, for example, a statement that there will be more scrutiny of mergers between competitors does not necessarily mean that any particular transaction will now be subject to enforcement when it would not have been in the past. The enforcement decision will depend on the application of the facts to the decision rules set by the reviewing agency. And in the US those decision rules are constrained both by the scope of the applicable statutes and the relevant case law. Thus, while we believe we can provide some useful generalisations about the likely direction of antitrust enforcement in the new administration, not every matter will be affected by these changes.

It is possible, based on the statements of those associated or aligned with the Obama campaign, recent scholarship favoured by those commentators and others similarly inclined, and on the enforcement policies of the Clinton administration, to make some broad predictions about the enforcement priorities of the US antitrust agencies going forward. We break down our discussion into the three principal areas of antitrust enforcement: merger, civil non-merger (joint and unilateral conduct) and cartels. We also briefly comment on the likely impact of the worldwide economic downturn on antitrust enforcement. In contemplating the future, it is important to remember that enforcement priorities are always constrained by available resources. The antitrust division of the Department of Justice (DoJ) and the Federal Trade Commission (FTC) have limited budgets and are unlikely to receive significant increases in the near term given other federal budget priorities.

Mergers

The Obama campaign and those purportedly associated with it, along with some key members of Congress, have been critical of the Bush administration's record on merger enforcement, particularly at the DoJ. This criticism has focused on decisions not to enforce in a few high-profile matters such as *Whirlpool/Maytag* and on a perception of lesser scrutiny of other transactions. Whether or not the criticism is fair, its prominence and vigour will put pressure on Christine Varney, the incoming head of the antitrust division, to show that the agency will be more aggressive in the future. Therefore, we expect some strong statements from DoJ in the coming months asserting an intent to be tough on mergers. While it's impossible to predict how this will affect particular transactions, the agency will probably seek to put its new attitude into action by bringing a number of enforcement actions as quickly as possible. This means that parties with transactions that might raise issues on the margins may be more likely to be forced to accept modifications to obtain clearance than might have been true during the past few years.

Changes are likely to be less dramatic at the FTC, largely because the general perception is that it has been more aggressive in merger enforcement than DoJ, generally with the support of both the Republican and Democratic commissioners. It is likely, however, that the new chair of the FTC will want to demonstrate continued aggressiveness and so will want to bring enforcement actions fairly soon. The FTC could try to expand further the use of administrative trials in merger matters, but this would not represent a significant shift in policy, since the Commission has been moving in that direction for some time, as demonstrated most notably in the *Whole Foods* matter.

Across both agencies, three changes seem certain: first, there will be closer review of non-horizontal mergers, particularly vertical transactions. The Bush administration showed little interest in non-horizontal transactions and was generally sceptical as to whether vertical agreements or transactions could result in economic harm. It is likely there will be less scepticism going forward, particularly where significant foreclosure of rivals appears likely. Second, both agencies will be more assertive in seeking out and investigating transactions not subject to the Hart-Scott-Rodino reporting requirements. Although the agencies have already been increasingly active in investigating unreported transactions, particularly given the current dearth of reportable transactions due to the state of the economy, the agencies will now use their resources to look at more unreported

deals, including ones that have already closed. Third, the agencies are likely to seek more extensive remedies in at least some circumstances. One of the criticisms of the Bush administration is that it at times seemed willing to accept remedies that did not fully address the identified competitive harms in order to preserve the underlying transaction. The agencies are likely to seek more onerous remedies in some circumstances (eg, divestitures of complete businesses rather than selected assets) and may seek to block entirely some transactions that the prior administration might have agreed to clear with remedies.

Non-merger civil enforcement

There was only limited non-merger civil enforcement in the Bush administration. What there was occurred at the FTC and was focused on two particular types of conduct related to intellectual property: first, what the FTC characterised as "hold-up" of standard-setting bodies by patent holders, as epitomised by the *Rambus* case; and, second "reverse payment" patent settlements in the pharmaceutical industry, most notably the *Schering-Plough* matter. The DoJ not only largely sat on the sidelines in this area, it sometimes actively opposed the FTC's positions in the courts, particularly in the reverse payment cases (where a branded manufacturer pays a generic manufacturer to settle an infringement action). The two agencies also publicly disagreed about the proper standards to use in analysing monopolisation (dominance) cases under section 2 of the Sherman Act. After the agencies held joint hearings on the scope of section 2, DoJ by itself issued a report on section 2 which three FTC commissioners (including one Republican) publicly rejected and harshly criticised.

As with mergers, there will be pressure on the new agency heads to show that they are seeking out and pursuing both non-cartel collusive behaviour and predatory acts by those with monopoly or seeking monopoly power. The DoJ's section 2 report, if it survives at all, is likely to have substantially diminished influence on the agency's enforcement policies, and DoJ is likely to announce some high-profile investigations and perhaps enforcement actions in the coming months. We also believe that the agencies may support some form of legislation to reinstate per se illegality for resale price maintenance, reversing the Supreme Court's *Leegin* decision.

Cartels

Both Democratic and Republican administrations have embraced criminal cartel enforcement as the cornerstone of their enforcement activities at the antitrust division, recognising that such price-fixing agreements may cause substantial consumer harm and do not raise the difficult issues of weighing both pro- and anti-competitive effects that other antitrust areas implicate. The prior administration has touted the increasing level of fines and growing jail terms as indicators of its aggressive antitrust enforcement.

The Obama administration will most likely seek to continue those trends, particularly in these days of intensive focus on issues of corporate responsibility. These intentions may be complicated by two factors, however. First, given the intention to bring additional enforcement actions in the merger and civil enforcement areas, criminal enforcement may see greater competition for resources from a finite enforcement budget. The fines that have been imposed on cartelists flow into the Treasury, not the antitrust division's budget.

Second, there may be pressure to resolve more matters expeditiously, possibly at sanction levels that do not break new ground. New administrations generally seek to review the status of old continuing investigations and bring them to speedy resolution where possible. In addition, while the Department of Justice has increased the amount of fines collected and length of jail terms imposed, it is developing a large backlog of individual prosecutions, either in the form of publicised indictments of executives located outside the United States or carve-outs of certain employees from corporate plea agreements.

Although the Division's hard line on the jail time needed to reach plea agreements has undoubtedly contributed to increasing average jail terms served, it also has reduced the number of plea bargains. Given the backlog and the need, from a deterrence perspective, to publicise non-US executives being sent to jail, there may be some pressure to demand less aggressive jail terms. Executives actually serving some jail time is widely believed to have the single greatest deterrent effect, and the Division may wish to reassess how much extra deterrence marginal increases in jail terms actually brings about. In an economic climate in which businesses will be even more tempted to engage in price fixing, obtaining plea agreements with culpable executives ought to be a priority.

The economy

We have been asked a number of times in recent months what impact the declining economy will have on antitrust enforcement. Will the agencies forebear from enforcing to avoid furthering economic distress of particular companies or industries? Will anticompetitive mergers be waived through to allow consolidation of distressed assets? What is the likelihood of criminal enforcement continuing at current levels given market distress?

We do think hard economic times have an impact upon antitrust enforcement generally; in mergers, it reduces the number of transactions, freeing up resources for more scrutiny of those transactions that do occur and presenting greater opportunities for merging parties to substantiate cost savings and efficiencies; in cartels, collusion can be more attractive in difficult times and in distressed industries and so there could be an increase in cartel behaviour, resulting in more cases; in dominance matters, it can lead to companies taking more extreme steps to protect their market positions, resulting in predatory conduct that could give rise to enforcement or private litigation.

That said, it is unlikely that the economy will change enforcement standards. The merger review regime in the US has proven capable of addressing the specific dynamics of distressed industries or companies using traditional modes of analysis, for example in *Boeing/McDonnell Douglas* or during the consolidation of the telecommunications and telecommunications equipment industries. We expect the same going forward. Cartel standards in the US are well established and there is no evidence of any interest to adjust them, such as by introducing a "crisis cartel" exception that has been found in other jurisdictions.

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Statements by the new agency leaders and, particularly, individual enforcement actions will tell us much in the coming months about where US antitrust enforcement is headed. But based on what we know today, we expect continuity in criminal cartel enforcement and a noticeable, but not radical, increase in civil enforcement, constrained both by limitations imposed by the prevailing law and by the availability of resources. ■