

Antitrust | May 12, 2009

Obama Administration Repudiates Bush-Era Monopoly Policy, Promises More “Aggressive” Antitrust Enforcement

Just over two weeks after being sworn in as President Obama’s head of the Department of Justice (DOJ) Antitrust Division, Christine A. Varney announced in a May 11 speech that the DOJ was withdrawing a 2008 report issued under the Bush administration that set forth guidelines on the enforcement of the antitrust laws with respect to the unilateral conduct of dominant firms. This announcement, along with recent investigations initiated by the DOJ and the Federal Trade Commission (FTC) under Section 2 of the Sherman Act and Section 8 of the Clayton Act, two antitrust provisions rarely invoked in recent years, signals a clear policy shift toward a significantly more aggressive approach by the federal antitrust enforcement agencies than had been the case under President Bush.

In her first public remarks since being sworn in as Assistant Attorney General for Antitrust, Christine A. Varney announced in a speech delivered before the Center for American Progress on May 11 that “[a]s antitrust enforcers, we cannot sit on the sidelines any longer.” Providing an historical overview of the failures and successes of antitrust enforcement action during difficult economic times, Varney repudiated the recent trend in which “Americans have seen firms given room to run with the idea that markets ‘self-police,’ and that enforcement authorities should wait for the markets to ‘self-correct.’” Varney’s speech, titled “Vigorous Antitrust Enforcement in This Challenging Era,” made clear that under the Obama administration, “vigorous antitrust enforcement” would “play a significant role in the Government’s response to economic crises to ensure that markets remain competitive.”

The strongest indication of the sharp new direction envisioned by the current administration was Varney’s withdrawal of the report issued by the DOJ in September 2008, titled “Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act.” This report,

which had been denounced by three FTC Commissioners at the time it was issued, had aimed to provide guidelines on the enforcement of Section 2, the antitrust statute that governs conduct by firms with dominant market positions, or that attempt to gain such dominance.¹

Varney rejected the Section 2 report’s “great skepticism regarding the ability of antitrust enforcers – as well as antitrust courts – to distinguish between anticompetitive acts and lawful conduct,” its concern with over-deterrence of potentially procompetitive conduct, and its conclusion that extreme caution and hesitancy should be employed in pursuing Section 2 cases. Varney characterized the report as overestimating a dominant firm’s ability to act efficiently, and disavowed one of the primary policy recommendations of the report, the adoption of safe harbors for certain conduct by such firms.

¹ While having a dominant market position is not illegal when acquired through legitimate means, Section 2 prohibits monopolization or attempted monopolization where a firm engages in anticompetitive exclusionary conduct to maintain or enhance its dominance.

Specifically, Varney called into question the report's conclusion that where conduct-specific tests are not applicable, the most appropriate baseline for determining possible Section 2 violations is a "disproportionality test" under which anticompetitive harm must substantially outweigh procompetitive benefits to be actionable. Stating that such an approach allows "all but the most bold and predatory conduct to go unpunished and undeterred," Varney called for "reinvigorated" enforcement that would go "back to the basics" as embodied in earlier Section 2 jurisprudence concerning the specific conduct of dominant firms. Varney pointed to *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), which found an affirmative duty of dominant firms to deal with rivals and customers and rejected the view that the right to refuse to deal is unqualified. Referring to *United States v. Microsoft Corp.*, 253 F. 3d 34 (D.C. Cir. 2001), as an example to follow, Varney stated that the government "will need to look closely at both the perceived procompetitive and anticompetitive aspects of a dominant firm's conduct, weigh these factors, and determine whether on balance the net effect of this conduct harms competition and consumers."

In her concluding remarks, Varney expressed interest in also exploring "vertical theories and other new areas of civil enforcement," giving as an example the "unique competition-related issues" posed by high-tech and Internet-based markets.

Harbingers of the overall policy shift announced by Varney have already appeared. For example, the DOJ, which had not brought a single Section 2 case under the Bush administration, has already initiated an investigation of a possible Section 2 violation in at least one non-public case as of May 2009.

Varney's announcement also comes on the heels of the FTC reportedly commencing an investigation into whether Google and Apple's sharing of two common board members violates Section 8 of the Clayton Act, which prohibits an individual (or individuals from the same firm) from simultaneously serving as a director or an officer of two or more competing firms of a certain size, a situation known as an "interlocking directorate." Section 8 cases have been rare in recent years, providing yet another early indication of a newly-emboldened antitrust enforcement regime.

These developments indicate the almost-certain end of a less interventionist antitrust enforcement approach, in which smaller companies complaining of anticompetitive behavior by larger competitors often turned to the European Commission or other overseas authorities rather than the U.S. antitrust agencies under the Bush administration. The clear early signals under the Obama administration are that smaller companies will be encouraged to bring forth their complaints, firms with dominant industry positions will be closely scrutinized, and exclusionary conduct by these dominant firms will be aggressively investigated and challenged.

This memorandum is intended only as a general discussion of these issues. It should not be regarded as legal advice. We would be pleased to provide additional details or advice about specific situations if desired.

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