

## HAS THE OBAMA JUSTICE DEPARTMENT REINVIGORATED ANTITRUST ENFORCEMENT?

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The Justice Department's recently filed antitrust case against Apple and several major book publishers over e-book pricing, which comes on the heels of the Justice Department's successful challenge to the proposed merger of AT&T and T-Mobile, has contributed to the perception that the Obama Administration is reinvigorating antitrust enforcement from its recent stupor. As a candidate for President, then-Senator Obama criticized the Bush Administration as having the "weakest record of antitrust enforcement of any administration in the last half century" and vowed to step up enforcement.<sup>1</sup> Early in the Obama Administration, Justice Department officials furthered this perception by withdrawing the Bush Administration's report on monopolization offenses and suggesting that the fault for the financial crisis might lie at the feet of lax antitrust enforcement.<sup>2</sup> Even before the AT&T and Apple cases, media reports frequently suggested that antitrust enforcement is significantly tougher under President Obama.

For better or worse, the Administration's enforcement record does not bear out this impression. With only a few exceptions, current enforcement looks much like enforcement under the Bush Administration. Antitrust enforcement

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1. Senator Barack Obama, Statement for the American Antitrust Institute (Sept. 27, 2007), *available at* [http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07\\_092720071759.pdf](http://www.antitrustinstitute.org/files/aai-%20Presidential%20campaign%20-%20Obama%209-07_092720071759.pdf).

2. Christine A. Varney, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, Vigorous Antitrust Enforcement in This Challenging Era 4-8 (May 11, 2009), *available at* <http://www.justice.gov/atr/public/speeches/245711.pdf>; *see also* Christopher Leonard, *Farmers Tell Feds Considering Antitrust Action that Big Poultry Companies Control Industry*, STAR TRIB. (Minneapolis-St. Paul) (May 21, 2010), [http://www.startribune.com/templates/Print\\_This\\_Story?sid=94618149](http://www.startribune.com/templates/Print_This_Story?sid=94618149) (reporting that Attorney General Eric Holder announced that the Antitrust Division is now "open for business").

in the modern era is a technical and technocratic enterprise. Although there will be tweaks at the margin from administration to administration, the core of antitrust enforcement has been practiced in a relatively nonideological and nonpartisan way over the last several decades.

A cautionary note: one should be skeptical about judging the severity of antitrust enforcement by the number of cases brought alone.<sup>3</sup> If the business community perceives an administration as a tough enforcer, it may propose fewer problematic mergers and engage in less anticompetitive behavior than if it perceives the administration to be weak. Antitrust enforcement vigor should not be assessed solely on statistics but also on qualitative measures.

#### CRIMINAL ENFORCEMENT AGAINST CARTELS

There has long been a consensus that fighting hard-core price-fixing cartels is the Justice Department's most important task.<sup>4</sup> Price-fixing cartels do serious damage to consumer welfare. They are often difficult to detect and can persist for years. Increasingly, enforcement attention has focused on international cooperation to fight global cartels and on the use of leniency and amnesty tools to incentivize firms or individuals to defect from cartels and provide information helpful to cracking the cartel and convicting the responsible parties.

Comparing anticartel enforcement during the last two full years of the Bush Administration with the first two full years of the Obama Administration,<sup>5</sup> the numbers actually suggest greater enforcement vigor under Bush. On a

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3. It bears noting, however, that Senator Obama justified his criticisms of the Bush Administration's antitrust enforcement record largely based on enforcement statistics. *See* Obama, *supra* note 1 ("Between 1996 and 2000, the FTC and DOJ together challenged on average more than 70 mergers per year on the grounds that they would harm consumer welfare. In contrast, between 2001 and 2006, the FTC and DOJ on average only challenged 33. And in seven years, the Bush Justice Department has not brought a single monopolization case.").

4. *See, e.g.*, Belinda A. Barnett, Senior Counsel, Antitrust Div., U.S. Dep't of Justice, *Criminalization of Cartel Conduct—The Changing Landscape* at 1 (April 3, 2009), available at <http://www.justice.gov/atr/public/speeches/247824.pdf> ("It is well known that the Antitrust Division has long ranked anti-cartel enforcement as its top priority."); *see also Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (referring to collusion among competitors as "the supreme evil of antitrust").

5. The Justice Department reports its enforcement statistics based on the federal fiscal year (October to September). Fiscal Year 2009 thus includes five months of Bush Administration activities and several months of early Obama Administration activities, before the new political appointees were in place. I have thus excluded statistical data on FY 2009 and focused solely on full years for both administrations. I have compared just the last two full years of the Bush Administration to the first two full years of the Obama Administration because only two full years are available under Obama, and the last two full years under Bush provide the most temporally proximate comparison. Comparing the Obama Administration figures to a different period during either term of the Bush Administration would not produce materially different observations, with one exception: cartel fines increased dramatically between the first and second terms of the Bush Administration.

statistical basis, the most important figures are arguably the total fines collected, the number of individuals sentenced to incarceration, the total number of jail days sentenced, and the number of grand jury investigations initiated.<sup>6</sup> In three of the four categories, enforcement levels were significantly *higher* under Bush. The Bush Administration collected a total of \$1.31 billion in fines during its last two full years, whereas Obama collected \$1.08 billion in fines during its first two full years. The Bush Administration also secured a greater number of incarceration days sentenced—45,722 days for 2007 to 2008, compared with 36,590 for the Obama Administration in 2010 to 2011. The Bush Administration initiated considerably more grand jury investigations: 66 to 29. The Bush Administration numbers are slightly lower in individuals sentenced to incarceration—70 in 2007 to 2008, compared to 76 for the Obama Administration in 2010 to 2011.

As the Antitrust Division hastened to make clear in its most recent newsletter, fiscal year 2012 is on pace to be a record year for criminal fines.<sup>7</sup> It is likely that the Division's overall record in cartel enforcement—judged statistically—will be roughly the same as the prior Administration's.

Beyond the statistics, there is no basis for believing that firms are engaging in fewer price-fixing conspiracies because of a perception that the Obama Administration is strong on antitrust enforcement. The essential enforcement priorities (international cartels) and tools (leniency and amnesty) have not significantly changed, except that the Obama Administration announced the closure of a number of Antitrust Division field offices that were heavily involved in antitrust enforcement.<sup>8</sup> Antitrust enforcement has become professional and largely independent from the governing administration's political ideology.

#### MERGER CHALLENGES

A second major component of antitrust enforcement is the review of mergers under the Hart-Scott-Rodino Act, which requires premerger notification of mergers and acquisitions meeting certain financial thresholds. Under any administration, only a small fraction of mergers raise antitrust concerns. Also under any administration, only a small fraction of the mergers that raise antitrust

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6. The total number of cartel cases filed is a poor proxy for enforcement vigor, since the number of "cases" attributed to a single price-fixing cartel can vary widely depending on how and when the defendants are charged.

7. Through March 2, 2012, the Antitrust Division had collected \$567 million in fines for FY 2012. *U.S. DOJ Antitrust Division Update Spring 2012*, U.S. DEP'T OF JUSTICE, <http://www.justice.gov/atr/public/division-update/2012/criminal-program.html> (last visited July 14, 2012).

8. See Matthew Volkov, *Career Antitrust Division Attorneys Boggled by Field Office Closures*, MAIN JUSTICE (June 18, 2012, 2:19 PM), <http://www.mainjustice.com/2012/06/18/career-antitrust-division-attorneys-boggled-by-field-office-closures/>.

concerns will be challenged under section 7 of the Clayton Act, the substantive statute governing merger activity.<sup>9</sup> The majority of the cases that raise concern are addressed through structural or conduct commitments to government anti-trust enforcers, or the parties walk away from the merger. Few cases are litigated.

The merger statistics do not evidence “reinvigoration” of merger enforcement under Obama. Focusing on the last two fiscal years under Bush and the first two fiscal years under Obama, the numbers are comparable. In those periods, the Bush Administration conducted more total merger investigations (Bush 185, Obama 154) and more Hart-Scott-Rodino investigations (Bush 152, Obama 127). The two administrations had almost exactly the same number of “second requests” for information under Hart-Scott (an investigatory mechanism that delays the closing of a merger and often forces the merging parties to either negotiate with the government or abandon the merger). From 2007 to 2008, Bush made 52 second requests, and from 2010 to 2011, Obama made 53. The Obama Administration challenged slightly more mergers (Bush 16, Obama 19), and challenges announced by the Obama Administration resulted in more transactions restructured or abandoned prior to filing a complaint (Bush 9, Obama 15), although the numbers are small under both metrics.

These raw comparisons may not be sufficiently informative because of the reduced numbers of mergers due to the effects of the financial crisis. But even adjusted for the number of Hart-Scott filings, the numbers remain comparable, although with a tick up in second requests under Obama. The Bush Administration conducted 0.04 investigations per Hart-Scott filing; Obama conducted 0.05 investigations per filing. The Bush Administration made 0.013 second requests for information per Hart-Scott filing; Obama’s made 0.020—a 50% increase on a per capita basis.

What about qualitative measures? Although there was quite a bit of media hype about some of the Obama Justice Department’s merger challenges, they actually were not theoretically or factually adventurous. AT&T/T-Mobile, the Administration’s top headline grabber, was a conventional challenge to a “four to three” merger (a merger between two firms in a market with four firms) between the second- and fourth-largest firms in a concentrated industry with high barriers to entry.<sup>10</sup> Similarly, the Administration’s enforcement against the pro-

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9. 15 U.S.C. § 18 (2006).

10. The Bush Administration also challenged a number of 4-3, or even less concentrated, mergers. See, e.g., *United States v. Commscope, Inc.*, Case No. 1:07-cv-02200 (D.D.C.) (Dec. 6, 2007) (alleging that, premerger, there were only four companies providing drop cable services); *United States v. Cemex S.A.B. de CV*, 1:07-CV-00640 (D.D.C.) (April 4, 2007) (alleging anticompetitive effects from both 3-2 and 4-3 consolidations in different geographic markets); *United States v. First Data Corp.*, 1:03CV02169 (D.D.C.) (Oct. 23, 2003) (alleging that, premerger, the four largest firms in market had over 90% share); see also *United States v. Cenage Learning Holdings I, L.P.*, Case No. Case No. 1:07-cv-02200

posed H&R Block/TaxAct, NASDAQ/NYSE, and Blue Cross/Blue Shield/Physicians Health mergers were conventional horizontal merger challenges that could have gone the same way under any administration.

The more adventurous theories of harm were on display in the cases the Administration *did not* block—particularly the TicketMaster/LiveNation and Comcast/NBC vertical mergers. Although the Administration required significant procompetitive structural and/or conduct commitments in both cases, it allowed the mergers to proceed.

A merger-related activity that could signal a change in enforcement level is the 2010 revision of the Horizontal Merger Guidelines, a joint project of the Federal Trade Commission (FTC) and the Justice Department. The Obama Guidelines revised the market concentration thresholds under the Herfindahl-Hirschman Index (HHI) upwards from the previous Guidelines, which had been in place since the Reagan Administration.<sup>11</sup> This suggests that *greater* levels of concentration resulting from a horizontal merger will be necessary to trigger antitrust scrutiny than under the previous regime.

On the other hand, the new Guidelines approach could subtly signal a tougher approach to mergers in a different way. One of the changes in the 2010 Guidelines is a demotion of traditional structural measures—such as market definition and market concentration—in favor of more “direct” evidence of competitive impacts. One of the tools proposed for evaluating the potential anticompetitive effects of mergers is an “upward pricing pressure” model, which looks at the premerger profit margins of the merging firms and the diversion ratio of customer demand. Because profit margins are often high in differentiated goods markets, this upward pricing pressure model could be used to predict that many more mergers than previously expected will result in the unilateral exercise of market power. However, any such effects from the Guidelines revisions have not yet shown up.

Another subtle change that could point towards a shift in merger control policy comes from the Obama Administration’s revision to the Policy Guide to Merger Remedies, released in June 2011.<sup>12</sup> The revised guide is more receptive to the possibility of behavioral remedies than its 2004 predecessor. A behavioral remedy allows a merger to proceed, but only subject to conduct commit-

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(D.D.C.) (May 28, 2008) (alleging that merging firms collectively amounted to 35% of sales in relevant market and were among a “few” firms with a significant presence in the market).

11. The HHI measures market concentration as the sum of the square of the market shares of the individual market participants. Since 1982, the Merger Guidelines have provided an indication of how concerned the agencies are likely to be about horizontal mergers based on identification of markets as unconcentrated, mildly concentrated, or highly concentrated based on the HHI. The 2010 Merger Guidelines increased the HHI number required for a market to be considered moderately or highly concentrated.

12. U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES (2011), *available at* <http://www.justice.gov/atr/public/guidelines/272350.pdf>.

ments by the merging parties, such as those employed in TicketMaster/LiveNation and Comcast/NBC.<sup>13</sup> One could characterize a shift toward behavioral remedies as “weaker” on merger enforcement, since it allows potentially anticompetitive mergers to close in order to secure their efficiency advantages. Many who favor more aggressive antitrust enforcement are concerned about any shift away from structural remedies.<sup>14</sup>

In sum, merger control looks statistically comparable in the Bush and Obama administrations. Only subtle changes in the Merger Guidelines could point toward tougher merger review, but they could be potentially offset by other policy changes in the Justice Department’s remedy guidelines.

#### MONOPOLIZATION AND NONCARTEL RESTRAINTS OF TRADE

The final major enforcement category is civil nonmerger cases. This generally includes challenges to monopolizing conduct under section 2 of the Sherman Act and to agreements restraining competition under section 1 of the Sherman Act.

Using the same timing criteria (2007 to 2008 for Bush and 2010 to 2011 for Obama), the numbers do not suggest much of a “reinvigoration” under Obama. The Bush Administration conducted 38 nonmerger civil investigations; the Obama Administration conducted 43. The Bush Administration filed 3 civil restraint of trade cases, the Obama Administration filed 7.

The only headline case in this batch is the challenge to Visa, MasterCard, and American Express’s practice of restricting merchants from giving discounts to customers who use lower-fee cards. While important, this case is round two in the Justice Department’s litigation against the credit card companies. Round one—a challenge to Visa and MasterCard’s restrictions on the issuance of competitors’ cards by their member banks—was initiated late in the Clinton Administration and successfully tried and defended on appeal by the Bush Administration. The Apple e-books case presents some potentially interesting issues, but the Justice Department’s legal theory is conventional—that the pub-

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13. For example, TicketMaster was required to license its ticketing software to two competitors sell its Paciola ticketing company and prohibited the merged firm from punishing concert venues that did not use its ticketing or promotional services. As a condition of their merger, Comcast and NBC were required to make available to online video distributors (OVDs) the same package of broadcast and cable channels that they sell to traditional video programming distributors and to offer an OVD broadcast, cable and film content that is similar to, or better than, the content the distributor receives from any of Comcast or NBC’s programming peers.

14. See American Antitrust Institute, John E. Kwoka & Diana L. Moss, *Behavioral Merger Remedies: Evaluation and Implications for Antitrust Enforcement*, [http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI\\_wp\\_behavioral%20remedies\\_final.pdf](http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf).

lishers agreed to fix e-book prices in violation of the longstanding per se rule against price fixing.

The final category is monopolization cases. Over the eight years of the Bush Administration, the Justice Department filed no monopolization cases. To date, the Obama Administration has filed only one case, hardly evidencing a major shift in tactics. The case, against United Regional Health Care System of Wichita, Texas, was hardly a blockbuster antimonopoly action of the earlier Standard Oil, IBM, AT&T, or Microsoft variety. The Justice Department alleged that the relevant market was for the sale of inpatient hospital services to insurance companies in a geographic area “no larger than the Wichita Falls Metropolitan Statistical Area.”<sup>15</sup> One wonders why this needed to be a federal case at all. In any event, the monopolization theory—that United had a 90% market share in acute inpatient services and used exclusive dealing contracts with insurance companies to stifle competitors—would fit comfortably within the Bush Administration’s monopolization report that the Obama Administration jettisoned.<sup>16</sup>

### CONCLUSION

The analysis presented in this Essay has been limited to antitrust enforcement by the Justice Department’s Antitrust Division. This Essay has not considered enforcement by the FTC, which also enforces the antitrust laws. The FTC is an independent commission and hence acts relatively independently of the President. Recent work examining the FTC by Bill Kovacic, an FTC Commissioner during the Bush Administration, has shown a similar story to the one presented here for the Antitrust Division. At least as a statistical matter, FTC enforcement actions have not increased during the Obama Administration.<sup>17</sup>

Two points stressed earlier should be stressed again: (1) statistical measures of antitrust enforcement are an incomplete way of understanding the overall level of enforcement; and (2) to say that the Obama Administration’s record of enforcement is not materially different than the Bush Administration’s is not to chide Obama for weak enforcement. Rather, it is to debunk the claims that antitrust enforcement is strongly dependent on politics.

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15. Complaint at 7, *United States v. United Reg’l Health Care Sys.*, No. 7:11-cv-00030 (N.D. Tex. Feb. 25, 2011), *available at* <http://www.justice.gov/atr/cases/f267600/267651.pdf>.

16. *See* U.S. DEP’T OF JUSTICE, COMPETITION AND MONOPOLY: SINGLE-FIRM CONDUCT UNDER SECTION 2 OF THE SHERMAN ACT 140-41 (2008), *available at* <http://www.justice.gov/atr/public/reports/236681.pdf> (setting forth principles for determining when exclusive dealing is anticompetitive).

17. *See* William E. Kovacic, *Improving the Institutions of U.S. Federal Antitrust Enforcement*, MLEX MAGAZINE, Apr.-June 2012, at 42, 44-45, *available at* <http://info.mlex.com/media/5786/42%20abex%20kovacic%20us.pdf>.

This examination of the “reinvigoration” claim should not be understood as acceptance that tougher antitrust enforcement is always better. Certainly, there have been occasions when an administration would be wise to ease off the gas pedal. At present, however, there is a high degree of continuity from one administration to the next.