

THE OBAMA JUSTICE DEPARTMENT'S MERGER ENFORCEMENT RECORD: A REPLY TO BAKER AND SHAPIRO

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My recent Essay, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, examined the three major areas of antitrust enforcement—cartels, mergers, and civil non-merger—and argued that, contrary to some popular impressions, the Obama Justice Department has not “reinvigorated” antitrust enforcement.¹ Jonathan Baker and Carl Shapiro have published a response, which focuses solely on merger enforcement.² Baker and Shapiro’s argument that the Obama Justice Department actually did reinvigorate merger enforcement is unconvincing.

QUANTITATIVE MEASURES

Baker, Shapiro, and I agree on at least one thing: quantitative measures of enforcement are often misleading. As I argued in my original essay, one of the paradoxes of enforcement statistics as a measure of enforcement vigor is that, with perfect deterrence, there are no anticompetitive acts at all.³ Or, as Baker and Shapiro have pointed out, a small number of investigations could evidence nothing more than the fact that the agencies have become deft at identifying the problematic mergers without investigation.

These are reasons to downplay all quantitative measures of enforcement—both mine and Baker and Shapiro’s. Two former Chairs of the Federal Trade

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1. Daniel A. Crane, *Has the Obama Justice Department Reinvigorated Antitrust Enforcement?*, 65 STAN. L. REV. ONLINE 13 (July 18, 2012), <http://www.stanfordlawreview.org/online/obama-antitrust-enforcement>.

2. Jonathan B. Baker & Carl Shapiro, *Evaluating Merger Enforcement During the Obama Administration*, 65 STAN. L. REV. ONLINE 28 (Aug. 21, 2012), <http://www.stanfordlawreview.org/merger-enforcement-obama-administration>.

3. Crane, *supra* note 1, at 14.

Commission have criticized Baker and Shapiro's methodology on similar grounds.⁴ However, it bears noting that, as a candidate for president in 2008, then-Senator Obama made a written submission to the American Antitrust Institute criticizing the Bush Administration's merger enforcement record using precisely the "raw numbers" approach that Baker and Shapiro now criticize as failing to meet academic standards.⁵ If nothing else, it is surely fair to evaluate the President's enforcement record by the measure that he used to judge his predecessor's.

Sticking for now with quantitative measures, Baker and Shapiro criticize me for failing to follow their previously published methodology, which evaluates a particular administration's merger enforcement vigor by looking at its relationship to long-term historical averages. Baker and Shapiro miss the point, however: my essay was not attempting to ask, in an absolute sense, whether the Obama Administration's enforcement record was vigorous or weak, but was comparing Obama's enforcement record to that of the Bush Administration at the period closest in time.⁶

Baker and Shapiro also criticize me for emphasizing raw numbers rather than numbers adjusted for Hart-Scott-Rodino ("HSR") filings. Actually, my Essay reports both measures. But recall once again that it was only raw numbers that Senator Obama cited in 2008 in comparing the Bush and Clinton Administrations' merger enforcement records.

Beyond that, it is far from clear that the adjustment that both my critics and I make for HSR filings is "more correct" in all circumstances than looking at the raw numbers. What drove HSR filings down in 2009-2010 was the financial crisis, which slowed merger activity. Baker and Shapiro implicitly assume that the ratio of anticompetitive mergers to all mergers remained constant during the financial crisis, but that is far from certain. It is quite plausible that there were *more* anticompetitive mergers proposed during the financial crisis even though the total number of proposed mergers was lower. The failure and exit of many firms during a cataclysmic financial crisis and the corresponding increases in

4. See William E. Kovacic, *Assessing the Quality of Competition Policy: The Case of Horizontal Merger Enforcement*, 5 *COMPETITION POL'Y INT'L* 129, 139-40; Timothy J. Muris, *Facts Trump Politics: The Complexities of Comparing Merger Enforcement over Time and Between Agencies*, *ANTITRUST*, Summer 2008, at 37-38.

5. 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 ("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.").

6. I cannot tell if Baker and Shapiro also mean to criticize me for not making the adjustment they make in their chapter for the change in Hart-Scott-Rodino reporting requirements in 2001. Baker & Shapiro, *supra* note 2, at 30 n.7. If so, it is a hollow criticism since I explicitly was only comparing FY 2007-2008 and FY 2010-2011.

market concentration among the surviving firms may mean that a higher percentage of proposed mergers during a financial crisis will be anticompetitive. Or, consistent with the historical pattern that antitrust enforcement often softens during financial crises, as I have previously documented,⁷ dominant firms may expect to get away with anticompetitive mergers during sharp economic downturns and hence propose more of them.

In any event, my essay did report the number of second requests and investigations adjusted for HSR filings, along with the respective percentage increases over the Bush Administration. Baker and Shapiro object that I did not report merger challenges (as opposed to second requests or investigations) on an adjusted basis but just reported the raw numbers (challenges: Bush 16, Obama 19; transactions restructured or abandoned: Bush 9, Obama 15). The reason I did not is that for both administrations the numbers are so small that reporting on a percentage basis would just create noise. (For the same reason, I also did not report the true fact that the Nixon/Ford Justice Department brought seventeen times more monopolization cases than the Obama Administration, or if adjusted for terms in office, eight and half times as many.⁸) Also, as former FTC Chair Timothy Muris has argued in critiquing Baker and Shapiro's approach, it is far from clear that the number of challenges or consents is a good metric of enforcement vigor.⁹ For example, there are "cheap consents" exacted by agencies just to show that they are doing something. To circle back to our point of agreement, all of this cautions in favor of looking beyond quantitative measures.

QUALITATIVE MEASURES

Turning to qualitative measures, Baker and Shapiro chide me for showing "little awareness of the context in which decisions were made." But the question I was posing was whether the Obama Administration advanced novel legal or economic theories that would push merger policy in a more prohibitive direction. As I pointed out, AT&T/T-Mobile—the case widely cited as evidence of merger reinvigoration—was a four-to-three merger. I presented four examples of four-to-three challenges by the Bush DOJ. Baker and Shapiro do not mention these cases, simply insisting that "conventional wisdom" supports the view that AT&T/T-Mobile was a return to more stringent merger

7. Daniel A. Crane, *Antitrust Enforcement During National Crises: An Unhappy History*, GLOBAL COMPETITION POL'Y, Dec. 2008, available at <https://www.competitionpolicyinternational.com/antitrust-enforcement-during-national-crises-an-unhappy-history>.

8. See William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 448-49 (2003) (reporting that the DOJ and FTC under Nixon/Ford brought seventeen monopolization cases).

9. Muris, *supra* note 4, at 37.

enforcement. Baker and Shapiro criticize my qualitative analysis as “informal and subjective,” but their unsupported appeal to “conventional wisdom” is just that.

Baker and Shapiro are right that cases like AT&T/T-Mobile and H&R Block/Tax Act “changed [the Administration’s] reputation.” During the first two years of the Obama Administration, many antitrust insiders were scratching their heads about why the Administration was not living up to expectations by bringing big, daring antitrust cases. For example, a September 8, 2010, article in the *Washington Post* was entitled “Obama Antitrust Enforcement Looking Like More of the Same.”¹⁰ After the two aforementioned cases—and the Apple e-books case—the pendulum began to swing, and we began to hear about the Obama Administration’s tougher antitrust enforcement. The question I was asking was whether the new “tough-guy” reputation is deserved. Simply pointing back to the enhancement in reputation does not address this question.

Further, if the relevant category is “things that create reputations,” it is worth noting that the Bush Administration did some things that created a reputation for enhanced toughness but that did not show up in the statistics. In particular, the Bush Justice Department’s well-publicized plans to block Google and Yahoo’s advertising joint venture created lots of buzz about the Administration’s willingness to go after deals in the tech sector.

Additionally, I am puzzled by Baker and Shapiro’s assertion that I should have consulted their survey of practitioners. They administered it in March of 2007, which means that it could not tell us anything useful about the Obama Administration’s enforcement record. When Baker and Shapiro recently updated their statistical analysis to incorporate data from the Obama Administration,¹¹ they did not update their practitioner survey.

I am also at a loss to understand Baker and Shapiro’s criticism of my treatment of the two major vertical mergers that have taken place under the Obama Administration—LiveNation/TicketMaster and Comcast/NBC Universal. I described the legal theories as adventurous and credited the Administration for obtaining significant structural and/or conduct remedies. Although they do not fully explain themselves, Baker and Shapiro seem to argue that the Bush Administration never challenged vertical mergers and therefore that anything that the Obama Administration does on vertical mergers—even actions like allowing LiveNation/TicketMaster and

10. See Jia Lynn Yang, *Obama Antitrust Enforcement Looking Like More of the Same*, WASH. POST, Sept. 8, 2010, at A9, available at <http://www.washingtonpost.com/wp-dyn/content/article/2010/09/07/AR2010090706755.html>.

11. See Jonathan B. Baker & Carl Shapiro, *Reinvigorated Merger Enforcement in the Obama Administration*, ANTITRUST & COMPETITION POL’Y BLOG (June 25, 2012), http://lawprofessors.typepad.com/antitrustprof_blog/2012/06/reinvigorated-merger-enforcement-in-the-obama-administration.html.

Comcast/NBC Universal that were roundly criticized by the left—were stronger than the Bush Administration’s response in similar situations. But the Bush Administration did challenge at least one merger in part based on its vertical elements.¹²

The same is true of the Obama Justice Department’s revised remedies guidelines, which the American Antitrust Institute¹³ and many others have read as being more receptive than the Bush Administration’s guidelines to conduct remedies, and which have attracted criticism from some who favor more aggressive antitrust enforcement and who view conduct remedies as licenses for anticompetitive mergers. Baker and Shapiro complain that I should have said whether the revised guidelines would have been used to put some remedy in place on Bush-era mergers that were not challenged at all. I cannot possibly know the answer to that question, nor do Baker and Shapiro suggest one.

Finally, Baker and Shapiro take issue with my statement that an upward revision of the Herfindahl-Hirschman Index (“HHI”) thresholds “suggests that *greater* levels of concentration resulting from a horizontal merger will be necessary to trigger antitrust scrutiny than under the previous regime.” That is literally true—it is what the revisions *suggest*. Baker and Shapiro argue that the suggestion does not reflect reality. And then they slip into an analogy to speeding, where the law has been 50 miles per hour for a long time and everyone drives 70, so the law is changed to 60 and is more strictly enforced. The problem with this analogy is Baker and Shapiro’s quick and unexplained assumption that the new thresholds will be strictly enforced—that the de facto and de jure speed limits will align at 60 rather than the de facto speed rising to 80, as often happens when speed limits are raised. Is it really the case that, after August 19, 2010 (the date of the horizontal merger guideline revisions), most mergers with an HHI over 2500 and a delta over 200 (the new threshold for mergers that are considered presumptively anticompetitive) are being challenged? I doubt it, and Baker and Shapiro do not offer any reason to believe that is the case.

CONCLUSION

Jon Baker and Carl Shapiro are smart, effective economists for whom I have great respect. I have few quarrels with how they or the Obama Administration in general conduct antitrust enforcement. The point of my essay was that antitrust enforcement has become largely technocratic and

12. Complaint at 3, 11-12, *United States v. Monsanto Co.*, No. CIVA 1:07-CV-00992 (D.D.C. Nov. 6, 2008), available at <http://www.justice.gov/atr/cases/f223600/223677.htm>.

13. JOHN E. KWOKA & DIANA L. MOSS, *BEHAVIORAL MERGER REMEDIES: EVALUATION AND IMPLICATIONS FOR ANTITRUST ENFORCEMENT* (2011), available at http://www.antitrustinstitute.org/~antitrust/sites/default/files/AAI_wp_behavioral%20remedies_final.pdf.

independent of political ideology. I have heard nothing that dissuades me from that view.