ANTITRUST IN THE OBAMA ERA: FIVE THINGS YOU SHOULD KNOW

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Peter Sullivan
Joel Sanders
Joshua Lipton

GIBSON, DUNN & CRUTCHER LLP

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1. Change Has Come to America

- We are now experiencing more than just aggressive enforcement
- DOJ and FTC are seeking fundamental changes to antitrust doctrine in a number of key areas
- The reason for this change is that the new Administration is very dissatisfied with how the antitrust laws have operated

Change Has Come to America

- Assistant Attorney General Christine Varney:

  "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.' It is clear to anyone who picks up a newspaper or watches the evening news that the country has been waiting for this 'self-correction,' spurred innovation, and enhanced consumer welfare. But these developments have not occurred."

  - Speech before the U.S. Chamber of Commerce, May 12, 2009.

Change Has Come to America

- ***Change:*** Departure from the core principle that antitrust law should serve to protect the functioning of markets
- Assistant Attorney General Christine Varney:

  "Not only is the Antitrust Division charged with enforcing the antitrust laws, but it also supports the development of competition policy more broadly. In my view, we cannot develop sound antitrust policy merely on a case-by-case basis. Instead, as I have charged the Division's staff, we must consider the overall state of competition in the industries in which we are reviewing potentially anticompetitive conduct or mergers, or providing guidance to regulatory agencies charged with industry oversight. We thus must consider market trends and dynamics, and not lose sight of the broader impacts of antitrust enforcement."

  - Speech before the U.S. Chamber of Commerce, May 12, 2009.

Change Has Come to America

- ***Change:*** Enforcement will now target at the "outer limits" of the Sherman Act
- According to Assistant Attorney General Varney:
  - "While the Department is not proposing any one specific test to govern all Section 2 matters at this time, I believe the balanced analyses reflected in the leading cases interpreting the reaches of the Sherman Act provide important guidance in this regard. . . . .
  - Reinvigorated Section 2 enforcement will thus require the Division to go "back to the basics" and evaluate single-firm conduct against these tried and true standards that set forth clear limitations on how monopoly firms are permitted to behave. There can be no better charter for our return to fundamental principles of antitrust enforcement."

- *Remarks Prepared for Center for American Progress, May 11, 2009*

Change Has Come to America

- ***Change:*** Suggestions that antitrust enforcement will be used to prevent firms from becoming "too big."
- Assistant Attorney General Varney:

  "I think it's a question we all ought to be thinking about, is when we find ourselves in a situation where we have enterprises, <u>beyond just the financial sector</u> . . . , that have over time become too big to fail, what role was antitrust playing? And maybe we need to be thinking going forward of different definitions of actionable, cognizable antitrust marketplaces."

  \- *Question and answer session after speech before the Center for American Progress, May 11, 2009 (emphasis added).*

Change Has Come to America

- ***Change:*** The standards under which mergers are evaluated are being rewritten
  - In September 2009, the FTC and DOJ announced that they are exploring the possibility of updating the Merger Guidelines.
- These changes are likely to be more than cosmetic
  - FTC Commissioner Rosch: refers with approval to two 1960 decisions which advocated a challenge to a transaction "due to considerations neither horizontal or vertical in nature."
  - According to the FTC: "We do not rule out the possibility that a future merger case may lead us to consider whether complaint counsel must always prove a relevant market."

Change Has Come to America

- ***Change:*** Aggressive policing of single firm conduct
- ***Change:*** Increased Criminal Enforcement
- ***Change:*** Active Pursuit of International Cartels
- ***Change:*** Targeting vertical practices

2. DOJ and FTC are putting an emphasis on policing single-firm conduct

- DOJ and FTC have stated that they intend to increase enforcement of single-firm conduct
  - Assistant Attorney General Varney has spoken repeatedly of "reinvigorated" and "vigorous" enforcement under Section 2 of the Sherman Act.
  - FTC Commissioners have stated that they will "be vigilant in investigating and, where necessary, prosecuting Section 2 violations."

DOJ and FTC are putting an emphasis on policing single-firm conduct

- Recent investigations and enforcement actions demonstrate that DOJ and FTC are taking action
  - DOJ investigation of Google Books
  - DOJ investigation in the telecom industry, including AT&T's exclusive deal with Apple for the iPhone
  - DOJ investigation of IBM in the mainframe computer business
  - Media reports indicate that DOJ has begun focusing on single-firm conduct in a range of major U.S. industries, including the airline, railroad, food-processing, high-tech, and pharmaceutical industries
  - FTC investigation of Intel

DOJ and FTC are putting an emphasis on policing single-firm conduct

- DOJ and FTC are seeking to push the limits of the legal standards in this area to enable even more aggressive enforcement
  - When DOJ withdrew the Guidelines for Section 2 enforcement in May 2009, no new guidelines were put in place. Instead, Assistant Attorney General Varney stated that DOJ would look for guidance from "leading cases interpreting the reaches of the Sherman Act." (May 12, 2009 Speech)
    - The "leading cases" identified by Assistant Attorney General Varney included one case from 1951 (*Lorain Journal*) and another case that was recently described by the Supreme Court as "at or near the outer boundary of § 2 liability" (*Aspen Skiing*).
    - Assistant Attorney General Varney failed to list the Supreme Court's latest word on the scope of Section 2 (*Trinko*).

DOJ and FTC are putting an emphasis on policing single-firm conduct

- DOJ and FTC are seeking to push the limits of the legal standards in this area to enable even more aggressive enforcement (cont'd)
  - FTC Commissioners have stated that they view the scope of Section 5 of the FTC Act, which prohibits "unfair methods of competition," as being "broader in scope and deeper in reach" than Section 2 of the Sherman Act.
    - There are no clear standards for enforcement under Section 5.
    - According to one Commissioner, Section 5 should be enforced to prohibit conduct that (a) is "not normally acceptable business behavior" and (b) has the potential to harm consumers.
    - According to another Commission, the FTC will use Section 5 to "go after conduct that fails the most basic tests for fairness, when that conduct has the possibility of harming consumers."

3. Criminal enforcement – including against international cartels – will continue to be aggressive

- $1 billion in criminal fines in 2009
  - Largest amount in 10 years
- Prison sentences are up in 2009
  - Approximately 35 individuals
  - Average sentence 24 months
  - Longest sentence ever for single count Sherman Act violation (4 years)
- Largest fines were in international cartel cases

Criminal enforcement – including against international cartels – will continue to be aggressive

- The DOJ has placed a high priority on protecting federal stimulus funds from fraud, waste, and abuse.
- Assistant Attorney General Christine A. Varney:

"With the higher levels of concentration and economic instability, markets are increasingly vulnerable to collusion and other fraudulent activity. We are especially concerned that the recent infusion of vast amounts of federal funding to distressed industries and stimulus money to federal, state, and local governments may lead to increased collusion and fraudulent activity."

\- *Speech before the U.S. Chamber of Commerce, May 12, 2009.*

Criminal enforcement – including against international cartels – will continue to be aggressive

- **"Red Flags of Collusion Training" for procurement officials**
- **National Procurement Fraud Task Force (NPFTF):**
  - Already brought charges in numerous of civil and criminal procurement cases
  - Already recovered more than $362 million

- Coordinated international antitrust enforcement is on the rise
  - Assistant Attorney General Christine A. Varney:

    "I would like the Division to continue its fruitful collaboration with international antitrust enforcement authorities … I believe that as targets of antitrust enforcement have expanded their operations worldwide, there is a greater need for U.S. authorities to reach out to other antitrust agencies."

    - Speech before the U.S. Chamber of Commerce, May 12, 2009.

Criminal enforcement – including against international cartels – will continue to be aggressive

- Antitrust agencies around the world have taken actions against multinational companies in 2009, often on a coordinated basis, including:
  - European Commission
  - Korea Fair Trade Commission
  - Japan Fair Trade Commission
  - Canadian Bureau of Competition
  - United Kingdom Office of Fair Trading

4. Merger enforcement energized

- Transactions that would have sailed through in the past are now receiving intense scrutiny at the staff level
- Merger Guidelines are being rewritten
- DOJ and FTC are less hesitant to challenge mergers in court
  - Even where they are forced to take novel positions
- The agencies are increasingly pursuing ***closed transactions***
  - *E.g.*, *Ovation Pharmaceuticals* (FTC) and *Microsemi Corp.* (DOJ)
  - The agencies are examining evidence of post-merger pricing

Merger enforcement energized

- DOJ/FTC staffs are willing to use procedural tools to block smaller deals which are not subject to HSR
  - Statement of Commissioner Rosch in *Endocare/Galil* pointing out that the FTC "block[ed] this merger de facto" by refusing to close an investigation.
- For PIs, dramatic relaxation of the FTC's burden of proof
  - FTC: *Whole Foods* – though not a majority decision from the DC Circuit – greatly reduces the burden on the FTC to show a likelihood of success on the merits.
  - District Courts: The "'likelihood of success on the merits' has a less substantial meaning" when the FTC challenges a merger than in other preliminary injunction cases. *FTC v. CCC Holdings Inc.,* 605 F. Supp.2d 26, 36 n.11 (D.D.C. 2009).

Merger enforcement energized

- In *CCC Holdings*, the court declined to look beyond a presumption of anticompetitive effects based on high market shares.
  - "Whether the Defendants' argument that the unique combination of factors in these markets negates the probability that the merger may tend to lessen competition substantially, or whether the FTC is correct that the market dynamics confirm the presumptions that follow its prima facie case, is ultimately not for this Court to decide." 605 F. Supp.2d at 67.

Net result: Given this procedural posture, it is almost impossible to challenge a FTC decision to oppose a merger

5. Enforcers are targeting vertical distribution practices

- Following *Leegin*, state laws appeared likely to become the focal point for enforcement actions against resale price maintenance
  - Dozens of state AGs stated that they would aggressively enforce RPM under state laws
    - Despite the AGs' rhetoric, there have been very few state AG challenges to RPM since *Leegin* was decided
- Lack of uniformity in state law treatment of RPM
  - Resale price maintenance remains per se unlawful under several state laws
  - Under other state laws, RPM claims are assessed under the rule of reason
    - Recent judicial decisions holding that Tennessee and Kansas laws conform to federal law and follow *Leegin*
  - The status of per se rules is unclear in several other states
  - State AG enforcement is not limited to states in which RPM is per se unlawful

Enforcers are targeting vertical distribution practices

- Federal enforcers have recently indicated that they will also look for opportunities to challenge RPM under the rule of reason
- DOJ and FTC have also indicated that they will take an aggressive approach toward applying the rule of reason under *Leegin*
  - Assistant Attorney General Varney recently advocated a "structured rule of reason analysis" under which, following a prima facie showing of "the presence of conditions under which RPM is likely to be anticompetitive," "the burden would shift to the defendant to demonstrate either that its RPM policy is actually – not merely theoretically – procompetitive." (Oct. 7, 2009 Speech)
  - According to FTC Commissioner Harbour, "if a firm makes a business judgment to use RPM, that firm should bear the burden of proving that consumers will not be harmed."

Enforcers are targeting vertical distribution practices

- The long-term implications of *Leegin* remain unclear
  - Attacks on *Leegin* in state legislatures
    - A *Leegin* repealer went into effect in Maryland on October 1, 2009
  - A bill that would make RPM per se unlawful under federal law has been introduced in Congress
  - Unclear whether courts will be receptive to a “burden shifting” approach under the rule of reason

Enforcers are targeting vertical distribution practices

➢ In addition to RPM, federal and state antitrust enforcers are focusing on a range of vertical distribution practices that arguably have exclusionary effects. Some examples include:

- Bundled pricing and market share discounts
- Exclusive marketing arrangements
- Refusals to deal with certain trading partners

What Should We Do? Practical guidance in this enforcement environment

➢ Conduct an antitrust update

- Take a fresh look at your antitrust guidelines and training materials to make sure your guidance is up-to-date in light of the new enforcement trends.

- If you have a large share in any market segment, conduct an antitrust review of your contracting and pricing practices. Review your mechanisms for ensuring legal review of contracts that include provisions that might arguably be exclusionary, such as exclusivity provisions, preferred provider agreements, bundled pricing, or market share discounts.

What Should We Do? Practical guidance in this enforcement environment

- **Consider using the new enforcement regime to your advantage**
  - If a competitor is engaging in exclusionary conduct or thwarting competition on the merits, consider seeking government intervention.

What Should We Do? Practical guidance in this enforcement environment

- **Recognize that your competitors might be thinking the same thing**
  - Consider how your competitors might complete this sentence:
    "*I am unfairly excluded from the marketplace because of ________________________________.*"

What Should We Do? Practical guidance in this enforcement environment

➢ Be aware of your surroundings

- If there is litigation or an investigation concerning another company in your industry, a related industry, or a practice similar to a practice your company employs, be aware that your company may be next.
- Some recent examples:
  - Fuel surcharge cases
  - High technology price-fixing investigations and class actions – DRAM, SRAM, Flash, LCD, and (possibly) Optical Drives
  - LCD and CRT investigations and class actions

What Should We Do? Practical guidance in this enforcement environment

- **In a merger review, the contents of your internal documents could be critical to the intensity and outcome of an investigation**
  - If your company is contemplating any M&A activity, provide document preparation guidelines to every person who may be preparing documents in connection with a potential transaction (including investment bankers).

What Should We Do? Practical guidance in this enforcement environment

- **If there is any suspicion of anticompetitive conduct in your company, consult antitrust counsel immediately**
  - In cartel cases, a difference of hours in making an amnesty application can have dramatic consequences.

Today's Presenters

Peter Sullivan
psullivan@gibsondunn.com
(212) 351-5370

Joel Sanders
jsanders@gibsondunn.com
(415) 393-8268

Joshua Lipton
jlipton@gibsondunn.com
(202) 955-8226

Gibson, Dunn & Crutcher LLP

Find Us

Domestic Offices:

Los Angeles
333 South Grand Avenue
Los Angeles, California 90071-3197
(213) 229-7000

Orange County
3161 Michelson Drive
Irvine, California 92612-4412
(949) 451-3800

Century City
2029 Century Park East
Los Angeles, California 90067-3026
(310) 552-8500

New York
200 Park Avenue
New York, New York 10166-0193
(212) 351-4000

San Francisco
555 Mission Street, Suite 3000
San Francisco, California 94105-2933
(415) 393-8200

Dallas
2100 McKinney Avenue, Suite 1100
Dallas, Texas 75201-6911
(214) 698-3100

Washington, D.C.
1050 Connecticut Avenue, N. W.
Washington, D. C. 20036-5306
(202) 955-8500

Palo Alto
1881 Page Mill Road
Palo Alto, California 94304-1125
(650) 849-5300

Denver
1801 California Street, Suite 4200
Denver, Colorado 80202-2641
(303) 298-5700

International Offices:

London
Telephone House
2-4 Temple Avenue
London EC4Y 0HB, United Kingdom
44-20-7071-4000

Brussels
Avenue Louise 480
1050 Brussels, Belgium
32-2-554-70-00

Paris
166 rue du Faubourg Saint Honoré
75008 Paris, France
33-1-56-43-13-00

Dubai
The Exchange Building 5, Level 4
Dubai International Finance Centre
P.O. Box 506654, Dubai
United Arab Emirates
971-4-370-0311

Munich
Widenmayerstraße 10
80538 Munich, Germany
49-89-189-33-0

Singapore
One Raffles Quay
Level# 37-01, North Tower
Singapore 048583
65-6507-3600