

The change of president in the USA has brought with it new developments in antitrust regulation.

Changing antitrust regulation

By Tefft W. Smith

It has been a year of turmoil, as technology stocks declined, the economy stagnated, the merger wave subsided and the policies of the Clinton administration were reversed. It has also been a year of exciting developments in the world of antimonopoly regulation:

- Microsoft was found guilty of monopolisation.
- Courts blocked the Heinz/Beech-Nut baby-food merger, and a merger of two chewing tobacco manufacturers.
- The Department of Justice (DOJ) challenged the Worldcom/Sprint merger, and has cast serious doubt on the viability of the United Airlines/USAir merger.
- Toys R Us was found to have illegally prohibited suppliers from providing their best-selling toys to warehouse clubs.
- The DOJ continued to aggressively prosecute price-fixing conspiracies, including the Christies/Sotheby's conspiracy.
- The Federal Trade Commission (FTC) broadened its investigation into the pharmaceutical industry, targeting agreements that keep generic drugs off the market.
- Mylan paid US\$100m in the FTC's first attempt to impose a fine for antitrust violations.

While these cases demonstrate the expanding reach of the antitrust laws, antitrust enforcement will likely contract as the Bush administration takes over. President Bush moved quickly to change FTC and DOJ leadership. Timothy Muris now heads the FTC, replacing the aggressive former chairman Robert Pitofsky. Within weeks, Muris replaced most senior

FTC officials with his own handpicked subordinates. At the DOJ, Charles James replaced acting-Assistant Attorney General John Nannes, a long-time Clinton administration deputy. James is widely viewed as pro-business and has also put his own people in place.

The differences between the Clinton and Bush administrations, however, are subtle. Antitrust enforcement enjoys broad bipartisan support. Differences occur at the 'margin', according to both Muris and James. Muris, for example, supports the FTC's pharmaceutical industry investigation, although he has rebuked the FTC for its scepticism of efficiency arguments and its concern over vertical restraints.

Despite some differences, both James and Muris insist that more things will remain the same than will change. Bush will tolerate price-fixing no more than Clinton. Indeed, James recently announced the first criminal indictments in a newly disclosed international price-fixing conspiracy. Horizontal mergers among the top two or three firms will likewise be vigorously challenged, as merging parties continue to push the envelope and as US courts breathe new life into Justice Potter Stewart's familiar observation that 'the sole consistency' in merger challenges is that 'the government always wins'. Fortunately, the Bush administration, if not the courts, are more likely than ever to consider efficiency justifications and creative remedies.

A bigger difference will be more apparent in vertical mergers. Although the US has long been sceptical of so-called 'exclusionary practices' claims and competitor complaints, the Clinton administration revived vertical foreclosure arguments in

AOL/Time Warner and Intel. Muris, however, has expressed scepticism of the antitrust theories relied on in those cases.

Changes in enforcement priorities are likely to appear more pronounced given the EU's enhanced antitrust activism. The GE/Honeywell merger provides a striking example. While the DOJ cleared the merger, the EU challenged it, fearing that GE's aircraft-leasing subsidiary would give its affiliated manufacturing divisions an unfair advantage. This marked the first time the EU forced two US companies to abandon a deal over prior US approval.

As GE/Honeywell demonstrates, perceived gaps in enforcement by the Bush administration will likely be filled by the EU, private parties and state attorneys general. Thus, while changes in economic theory and practical enforcement will surely make some difference in a firm's ability to acquire or contract with its rivals, these changes will occur slowly and at the 'margins'. The bigger differences between clearance and challenge – between legal and illegal – will stem from the parties' efforts to develop a sound and factually supported economic rationale for their conduct. ■

Further information



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