Publications

12 MAY 2009

Department of Justice officially departs from Bush antitrust policies

ANTITRUST ALERT

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In an expected yet significant move, the Department of Justice Antitrust division has withdrawn a Sherman Act Section 2 report relating to monopolization that the Bush administration issued in September 2008.

Christine A. Varney, Assistant Attorney General in Charge of Antitrust for the DOJ, stated on May 11, 2009, "the Section 2 report will no longer be Department of Justice policy." Instead of the cautious approach outlined in the report, the Antitrust division "will be aggressively pursuing cases where monopolists try to use their dominance in the marketplace to stifle competition and harm consumers."

Section 2 of the Sherman Act—unlike its Section 1 counterpart—regulates unilateral conduct by prohibiting a firm from illegally acquiring or maintaining a monopoly. This section can implicate a wide range of single-firm conduct, including predatory pricing, exclusive dealing, refusals to deal, bundled pricing, loyalty discounts, and other potentially exclusionary conduct. Varney acknowledges that "Section 2 cases present unique challenges," and in fact, the standards for Section 2 liability are both controversial and in flux.

Indeed, that was part of the rationale underlying the Bush Administration's release of the report—to make single-firm antitrust liability "more clear and administrable," so "businesses are more likely to comply with the law, violations will be easier to identify and remedy, and consumers will be better served." The 213-page report, however, was criticized by some as being too lenient on companies with substantial market power, and for prescribing liability standards that were too difficult to reach. Joining the critics, the Federal Trade Commission expressly declined to adopt the report, even though it participated with the DOJ in the report's underlying hearings.

The DOJ Antitrust Division's express shift in Section 2 philosophy is not a surprise. Christine Varney foreshadowed this policy during her confirmation hearings, where she noted that the conduct of dominant firms could be subject to substantially closer scrutiny than during the Bush Administration. (**Please read our report on her testimony here**.)

Significantly, Varney seemed to cast some blame for the financial crisis on the lack of antitrust enforcement activity: "The recent developments in the marketplace should make it clear that we can no longer rely upon the marketplace alone to ensure that competition and consumers will be protected." This antitrust policy shift also moves the Justice Department closer to European Union anti-monopoly enforcement, which has been substantially more vigorous than in the United States.

Varney's background in private and public practice emphasizes technology and the Internet, so companies in those sectors in particular should prepare for greater DOJ antitrust activity. But companies in all sectors should also be ready because the Justice Department seeks to encourage smaller companies throughout the economy to bring their complaints about improper business practices to the department's Antitrust Division.

The Obama Administration's move for greater antitrust scrutiny of companies may collide with the United States Supreme Court's recent antitrust decisions, which have emphasized the costs of antitrust cases and reduced the potential scope of future antitrust litigation. In 2007, Associate Justice David H. Souter, in *Bell Atlantic Corporation v. Twombly*, warned that "proceeding to antitrust discovery can be expensive." And in 2009, in *Pacific Bell Telephone Company v. Linkline Communications, Inc.*, the Supreme Court foreclosed plaintiffs from establishing a "price squeeze" claim under Section 2 of the Sherman Act. (**Please read our Alert on that decision here.**) In doing so, the Court reiterated its concern about Section 2 claims based on prices that are too low and confirmed that these types of antitrust claims cannot survive except under very limited circumstances--for example when the plaintiff

can demonstrate a defendant's below-cost pricing and a dangerous probability that the defendant will recoup its investment in that below-cost pricing. (For more information, **please read our article in the *Legal Intelligencer***.)

The contours of Section 2 of the Sherman Act are likely to continue evolving over the next several years, and the Obama Administration's activist policy may accelerate that development by generating more cases for the courts to decide. Indeed, because government investigations and lawsuits often spawn private litigation (for another view of this issue, **please click here**) this is the one Administration policy that may have a multiplier effect.