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Antitrust Enforcement Declines Under Trump, So Says AAI Report

The Trump Administration has done very little to halt the erosion of competition enforcement in the US, according to a report titled, "The State of Antitrust Enforcement and Competition Policy in the U.S." (the Report), dated April 14, 2020, and prepared by the American Antitrust Institute, a nonprofit advocate of vigorous antitrust enforcement.

The Report notes, "key metrics of cartel and merger enforcement have declined since the Trump administration took over," though the Trump Administration has not been alone in under-enforcement. According to the Report, the cumulative effect of years of lax antitrust enforcement has resulted in "creeping" levels of concentration in many businesses, which has resulted in "tight oligopolies and dominant firms." Given this situation, an increasing number of lawmakers believes that the only way to return a degree of competition to many markets is either economic breakup or regulation.

The Report indicates that the Trump Administration has only exacerbated the systemic trends of declining competition, and assesses other means of antitrust enforcement by state Attorneys General and private plaintiffs. Although the Report gives high marks to state AGs and private plaintiffs, it concludes that neither can "fully substitute for strong federal enforcement."

Merger Enforcement

The Report found that the average annual rate of second requests and challenges by the Department of Justice (DOJ) Antitrust Division and the Federal Trade Commission (FTC) rose 15% and 35% respectively between the Bush2 and Obama administrations, and has fallen by about 20%t for both second requests and challenges between the Obama and Trump administrations. In fact, the Report found that in comparing the 24-year period of the Clinton, Bush2 and Obama administrations, second requests and merger challenges have fallen markedly during the Trump Administration.

The comparison is even clearer when company-specific enforcement actions are considered. Under the Obama Administration, the antitrust enforcement agencies brought successful cases challenging the AT&T acquisition of T-Mobile, the Anthem acquisition of Cigna, the Baker Hughes acquisition of Halliburton, the Sysco acquisition of US Foods and the Staples acquisition of Office Depot. Under the Trump Administration, the T-Mobile acquisition of Sprint (a four-to-three merger) was allowed to proceed. The Antitrust Division permitted the transaction with a "conduct-heavy" order, creating a new rival out of the Dish TV Network. Dish neither has nor had any experience in the national retail mobile communications business.

After years of moving away from "conduct heavy" orders requiring significant amounts of supervision, the Antitrust Division's remedy involving Dish's new entry into the mobile communications business seems to be a distinct step backward and, as the Report states, "contrary to agency advocacy expressing preference for structural remedies." That said, the Report explains that the FTC and DOJ continue to use conduct orders, contrary to their own expressed preferences and advocacy. The Report cites, in addition to the Dish TV case, two other cases where conduct remedies were used. These cases involved the FTC's use of firewalls in the Broadcom-Brocade Communications and Staples-Essendant transactions. The Report calls such firewalls a "particularly unenforceable type of conduct remedy."

The Report also comments on the Trump Administration's loss in challenging the AT&T acquisition of Time Warner. The unsuccessful challenge has, according to the Report, "undermined incentives to challenge future vertical mergers." In this regard, the Report points out that the DOJ failed to challenge the CVS Caremark – Aetna transaction and ignored vertical issues in the merger of Bayer and Monsanto.

The Report claims that merger enforcement in the Trump Administration is in "disarray." It claims that the recently released 2020 Vertical Merger Guidelines (see our prior alert) provide "abbreviated guidance and ideological bias that will create confusion and uncertainty" going forward.

Anticompetitive Agreements

The Report points out a number of inconsistencies and special circumstances with the data received, but generally seems to show less enforcement against anticompetitive agreements during the last three years. For example, the Report states that the "number of individuals convicted of [Sherman Act] Section 1 crimes and sentenced to incarceration by the Trump DOJ declined relative to the Obama administration."

The Report also found that annual incarceration time imposed by the Trump DOJ is low by historical standards. Under the Bush2 and Obama administrations, the average prison sentences were 19 and 21 months, respectively. Under the Trump Administration, incarceration time fell by about 55% to about nine months. Adjusted criminal fines for violation of the Sherman Act, Section 1, were also found by the Report to have fallen during the Trump Administration. The Report indicated that such fines "declined by about 80% under the Trump [administration], relative to the Obama administration."

Unilateral Conduct

The Report begins by saying that the DOJ did not open a single monopolization investigation in 2017 or 2018. This was the "longest span of inattention to dominant firms in the last 50 years." According to data published by the Antitrust Division, though, the DOJ has undertaken 50 investigations between 2000 and 2018 where monopolization was the "primary type of conduct under investigation." The Report states, however, that "since the *Microsoft* case some 20 years ago and a handful of other cases litigated at the same time, the DOJ has actually brought only one comparatively insignificant Section 2 case." The Report concludes, in this regard, that the DOJ approach to Section 2 has been "to look, but not to sue."

Although the FTC has been more active in the area of monopolization, with the exception of a few cases, including Intel and Qualcomm, the FTC's monopolization cases have almost all been in the areas of healthcare and pharmaceuticals. Given recent pronouncements about government investigations by both the DOJ and the FTC into activities of digital platform companies like Google, Facebook and Amazon, time will tell if these investigation result in any significant or long-term enforcement actions. The Report is skeptical, stating that the DOJ in particular has not shown much interest in Section 2 enforcement, and that this provides "reason to doubt" the investigations of Google, *et al.*, will result in any meaningful action.

Antitrust and Patents

The Report states that the FTC continues, during the Trump Administration, to use the antitrust laws to constrain anticompetitive conduct by firms that own standard essential patents. That is, patents that are included in a standard adopted by a standard-setting organization or trade association. In contrast to the FTC, the "Trump DOJ appears to now consistently err on the side of over-protecting IP rights at the expense of competition.".

In this regard, the Trump Administration has reversed many years of its own established position on patent "hold-up." This occurs when standard-setting organizations, with standard essential patents, require patent holders to set royalty rates that are fair, reasonable and nondiscriminatory. Once the standard has been adopted and is being used, the owner of the standard essential patent sues users who are producing products using the standard essential patent because those users would not pay royalty rates demanded by the patent holder that are not fair and reasonable, violating the earlier commitment of the patent holder.

Under the Trump Administration, the DOJ has altered its position on patent "holdup" and withdrew from the 2013 Joint Policy Statement on Remedies for Essential Patents. In fact, the DOJ's 2019 Policy Statement "downplays" patent holdup concerns.

Regulation and Deregulation

As industries are deregulated and government involvement lessened, it is thought that active antitrust enforcement makes the absent governmental oversight unnecessary. According to the Report, the Trump Administration has pushed its "aggressive" deregulatory agenda without any assessment of its anticompetitive impact. "Coupled with a step-down in antitrust enforcement, deregulation is likely to have significantly adverse effects on consumers, workers and innovation."

Conclusion

The Report concludes that the current Administration's under-enforcement has "generated reaction, including the possibility that private enforcement and the states may take a more active role to take up slack due to federal inaction." In fact, recent successes for private challengers in *Messner v. Northshore University Heathsystem*, *Blessing v. Sirius Radio*, and *Steves & Sons, Inc. v. Jeld Wen, Inc.*, may signal the possibility of a larger role for private challenges to merger transactions. Also, state AGs have been increasingly active with regard to merger enforcement. Several states, according to the Report, have brought suit against the T-Mobile – Sprint transaction. In addition, a coalition of states, including California, Iowa, Massachusetts, Missouri and Oregon, submitted comments objecting to the Bayer-Monsanto merger.

The Report cites comments about various reforms pending in Congress, stating that there has been a 75% increase in the number of antitrust-related bills between 2015 and 2017. The Report claims that these legislative proposals appear "to be a response to the cumulative effects of weak federal [antitrust] enforcement, a continued policy of inaction under the Trump administration, and a tightening of standards by the courts." These legislative initiatives include requiring government agencies to study common ownership, the effectiveness of merger remedies and the impact of mergers on wages, employment and innovation. Other proposed legislation would shift the burden of proof to defendants in certain concentrated markets to show that their transaction would not harm competition. Another legislative proposal would amend the Clayton Act to clarify that an acquisition that tends to create a monopsony violates the law. The Report further states that absent a more robust enforcement approach, including a review of already-consummated transactions, "the focus on breakup proposals is likely to intensify."

In conclusion, the Report says, "[c]hange in the way the U.S. promotes competition and protects the market is . . . badly needed." It goes on to say that change needs to involve "more vigorous enforcement of the antitrust laws," which is achievable only through "comprehensive and coordinated legislative reforms that strengthen and clarify the laws." The upcoming November 2020 election will be dispositive in determining the fate of these reforms, as well as the leadership of the regulatory agencies, and the fate of antitrust enforcement going forward.

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