



Obama's America: Opportunities in the new U.S. Business Climate

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The Obama Administration

What Impact Will It Have On
Antitrust Law?

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**During his campaign President Obama
vowed to strengthen the enforcement of
antitrust law...**

“As president, I will direct my administration to reinvigorate antitrust enforcement. I will step up review of merger activity and take effective action to stop or restructure those mergers that are likely to harm consumer welfare, while quickly clearing those that do not.”



**Perception:
This had a whole lot of components**

1. Increased merger enforcement
2. More of a lead role in cartel enforcement
3. Monopolization becoming an issue
4. Looking at vertical effects
5. Looking at the real world as opposed to the theoretical world
6. More international convergence

What will be the principal factor shaping antitrust law in the coming years?

President of the United States Bill Clinton answered this question:



“It’s the economy, stupid.”

How does aggressive antitrust enforcement fit with the economic recovery plan?

- Some times it gives way

- How many seconds did it take to clear the Bank of America/Merrill Lynch Merger?
- Can we afford in the short run to focus on long term issues?
- Why do we have time for?

- Some times it becomes more important

- Price fixing becomes an even bigger concern
- Mergers that look so “efficient”
- Fewer competitors can mean more risk to competition
- Bigness isn't that big anymore

- So you are bringing in investment ... not taking jobs...



Developments to Date

- Christine Varney named to lead U.S. Department of Justice's Antitrust Division

"For me, Microsoft is so last century. They are not the problem. [The U.S. economy will] continually see a problem -- potentially with Google" because it already "has acquired a monopoly in Internet online advertising." June 19, 2008.
- Jon Leibowitz promoted to Chair the Federal Trade Commission
- DOJ investigating Ticketmaster-Live Nation and Sirius XM/Direct TV mergers
- DOJ probe of refrigeration compressor industry



International Stage

- U.S. no longer the sole director for antitrust law
- Remarks of Neelie Kroes, European Commissioner for Competition Policy, at the 105th OECD Meeting in Paris on February 17, 2009
 - “We say no to the proven failures of protectionism.”
 - Solution to the current recession lies in “a consistent coordinated approach—not only in Europe but around the world.”

The U.S. Supreme Court

- Has not changed just because there is a new president
- Has ruled for defendants the last 16 or so times
- Just denied review in a high profile FTC standard setting case (Rambus)
- Has denied FTC attempts to get review of Hatch-Waxman settlements
- Doesn't like *per se* rules
- Thinks that judges and juries have institutional competence problems
- About to decide *Pacific Bell Telephone v. linkLINE Communications, Inc.*
- Will only change slowly



But the Supreme Court does not decide every case

- Most cases don't get beyond lower courts that have to apply broad principles to specific cases
 - *E.g., Bell Atlantic Corp. v. Twombly*
- The Supreme Court decides *federal* law, not state law
 - *E.g., resale price maintenance*
- The Supreme Court only indirectly tells federal agencies what they can enforce
- The Supreme Court only indirectly affects the private bar
- Even Congress might get involved
- Collusion is still a bad thing
- “Not *per se* illegal” is pretty cold comfort
- ... or a poor excuse – you might be a plaintiff



So what does this mean?

- In general, companies today are probably able to engage in and justify a wider range of conduct as consistent with the antitrust laws
- But they need to be more careful about it
- And “the times they are a-changing,” B. Dylan



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