

What Would a Kerry Administration Antitrust Program Look Like?

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As all readers of *Antitrust Source* know, there is a broad bipartisan consensus as to the important role the antitrust laws play in protecting competition so that free markets can deliver their promise of lower prices and more choices for consumers. In a recent interview for this article, Sarah von der Lippes, Director for Justice Policy for the Kerry-Edwards campaign, when asked what a Kerry Administration antitrust program would look like, responded that Kerry has “a long, strong record of supporting vigorous enforcement of the antitrust laws.” She acknowledged, however, that because of the broad bipartisan consensus in this area, it is unlikely that there would be any major shift in direction from the current Bush Administration.

While Ms. von der Lippes is undoubtedly correct that it is unlikely there would be any major change in direction in antitrust policy in a Kerry Administration, there might well be some differences in emphasis. Many view the second Clinton Administration, under the leadership of Joel Klein and Doug Melamed at the Antitrust Division and Bob Pitofsky and Bill Baer at the FTC, as something of a golden age of antitrust enforcement. The current Bush Administration has done a credible job of enforcing the antitrust laws, but has recently suffered a string of defeats in both merger and nonmerger cases. Whoever is elected, the antitrust agencies will need to focus on what lessons they should take from these defeats. Apart from that, the biggest difference between a Kerry Administration and the current Bush Administration would likely be at the FTC. Over the last three years, under the leadership of Chairman Tim Muris, the FTC has pursued what might be called a “public choice” agenda, with a strong emphasis on governmental and quasi-governmental restraints. We could expect a Kerry Administration to focus more attention on private restraints and exclusionary conduct, as the Clinton Administration did.

With this by way of background, we can examine each of the four major areas of antitrust enforcement to see where else we might see differences.

Cartel Enforcement. The Clinton Administration, under the leadership of Anne Bingaman and Joel Klein, transformed cartel enforcement. During the Reagan and first Bush Administrations, criminal antitrust enforcement focused primarily on domestic, often local, bid-rigging conspiracies in industries like road paving and electrical contracting. Anne Bingaman began the effort to reenergize cartel enforcement by introducing a much-improved corporate leniency program in 1993 and by centralizing responsibility for criminal enforcement in the field offices and one litigation section in Washington, thereby creating a dedicated cadre of experienced cartel prosecutors. These reforms bore fruit under Joel Klein and Gary Spratling with the prosecutions of the global lysine, graphite electrodes, and vitamin cartels. These prosecutions produced record fines and ended conspiracies costing consumers worldwide billions of dollars.

In the current Bush Administration, and especially under the leadership of Hew Pate, the Antitrust Division has continued to make anti-cartel enforcement its number one priority, scoring a number of important successes. While the total fines collected have fallen somewhat since the

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peak year of 1999, the Bush Administration has put even more emphasis on putting cartel perpetrators, both domestic and foreign, in jail. As a result, the average jail sentences for individuals have increased substantially, reaching a high of eighteen months in FY2003.¹ The Division has also continued the effort, begun during the Klein years, of encouraging other jurisdictions to put more emphasis on cartel enforcement and to adopt American-style leniency programs. This effort has been hugely successful. The European Union, which had a long record of tolerating cartels, has become an aggressive enforcer, and even Japan, which not only tolerated but even encouraged cartels, seems to be stepping up its enforcement activities. The Division has also taken steps to strengthen its own enforcement program by supporting legislation increasing the maximum fines and jail sentences for criminal antitrust violations and offering leniency recipients protection from treble damages as an incentive to blow the whistle.

A Kerry Administration would almost certainly continue to make cartel enforcement the Antitrust Division's number one priority, both domestically and internationally. Despite the increased fines and jail sentences, there is every reason to believe that with companies cutting their compliance programs in a misguided effort to reduce costs, cartel activity is still common and that an energetic enforcement program should continue to root out significant cases to prosecute.

Merger Enforcement. One of FTC Commissioner Thomas Leary's many contributions to antitrust scholarship is his review of merger enforcement activity over the last twenty years, showing what he correctly termed "the essential stability" of merger policy over this period.² With one brief exception during the second Reagan Administration, the percentage of merger filings resulting in challenges has remained essentially unchanged over the last two decades.

The second Clinton Administration coincided with the largest merger wave in U.S. history, whereas the current Bush Administration has seen one of the slowest periods of merger activity. The Antitrust Division has nevertheless challenged several high profile mergers, including *United Airlines/US Airways*, *General Dynamics/Newport News*, *EchoStar/DirecTV*, and *Oracle/PeopleSoft*. Parties, however, seem more willing to litigate than in the past. This has led to three consecutive defeats for the two agencies in *Arch Coal/Triton*,³ *Dairy Farmers of America/Southern Belle*,⁴ and, most recently and visibly, *Oracle/PeopleSoft*.⁵ The number of high profile and litigated cases confirms that both agencies have continued to pursue an aggressive merger enforcement program. This, too, could be expected to continue in a Kerry Administration.

Nonmerger Civil Enforcement. As noted above, the area in which we would likely see the greatest difference between a Kerry Administration antitrust program and the current Bush Administration is nonmerger civil enforcement. When Joel Klein became AAG, he set as one of his core strategic objectives re-engaging the courts in the development of antitrust doctrine. This led to a series of significant nonmerger civil enforcement actions, the most notable of which was the Division's action against Microsoft. Probably the most controversial action of the Bush Adminis-

¹ See James M. Griffin, *The Modern Leniency Program After Ten Years: A Summary Overview of the Antitrust Division's Criminal Enforcement Program*, Remarks Before the ABA Section of Antitrust Law Annual Meeting (Aug. 12, 2003), available at <http://www.usdoj.gov/atr/public/speeches/201477.htm>.

² Thomas B. Leary, *The Essential Stability of Merger Policy in the United States*, 70 ANTITRUST L.J. 105 (2002).

³ *FTC v. Arch Coal, Inc.*, Civ. No. 04-0534 (JDB) (Mem. op. D.D.C. Aug. 16, 2004).

⁴ *United States v. Dairy Farmers of Am., Inc.*, 2004 WL 1084551 (E.D. Ky. Apr. 4, 2004).

⁵ *United States v. Oracle Corp.*, 2004 WL 2006847 (N.D. Cal. Sept. 9, 2004).

tration was its settlement of that case after the Division's partial victory in the D.C. Circuit.⁶ Microsoft aside, however, the Antitrust Division has continued to pursue all of the other nonmerger civil cases filed by the Clinton Administration, with mixed success. It won a partial victory in *Visa/Mastercard*,⁷ but lost both the *American Airlines*⁸ and *Dentsply*⁹ cases (the latter is now on appeal). The Division has not, however, initiated any significant new civil nonmerger cases.

The picture is quite different at the FTC which, under Tim Muris's leadership, had a very active nonmerger civil enforcement program, but one largely reflecting its Chairman's public-choice policy agenda. Many of the cases the FTC brought under Chairman Muris's leadership focused on settlements of patent disputes, alleged abuses of standard-setting organizations, and activities arguably protected by the state action or *Noerr* doctrines.¹⁰ All of these reflect the classic Republican view that the most durable restraints are those imposed by government. The FTC also engaged in what some view as a misallocation of its scarce enforcement resources by pursuing an action against an unimportant covenant not to compete in the Three Tenors joint venture between Polygram and Warner.¹¹ The purpose of this action seemed largely to be an effort to resuscitate the *Massachusetts Board of Optometry*¹² framework for a truncated rule of reason analysis, which Chairman Muris helped develop during his previous tenure at the Commission.

One could expect some shift in emphasis in a Kerry Administration toward investigating and prosecuting private restraints of trade and exclusionary conduct, with somewhat less emphasis on governmental restraints. Some antitrust practitioners with Democratic pedigrees (and presumably aspirations) have been privately critical of the current Antitrust Division leadership for not doing more in this area. They have also criticized the Department's amicus brief in *Trinko*¹³ as taking too narrow a view of exclusionary conduct under Section 2. These criticisms do not, however, command a consensus even among supporters of Senator Kerry. Others (including this author) believe the Division has performed a public service by trying to bring greater clarity to this area of the law, in which Professor Einer Elhauge of Harvard has aptly described the existing legal standards found in the case law as "not just vague but vacuous."¹⁴ Some would even criticize the Division for not doing more in this area, which it had an opportunity to do in *LePage's*,¹⁵ but which it ducked by filing an amicus brief that urged the Supreme Court to adopt a "wait and see" approach to the issue of above-cost bundled discounts by dominant firms.¹⁶

⁶ *United States v. Microsoft Corp.*, 253 F.3d 34 (D.C. Cir. 2001).

⁷ *United States v. VISA U.S.A., Inc.*, 344 F.3d 229 (2d Cir. 2003).

⁸ *United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003).

⁹ *United States v. Dentsply Int'l, Inc.*, 277 F. Supp. 2d 387 (D. Del. 2003).

¹⁰ See Joseph J. Simons, Report from the Bureau of Competition, Remarks Before the 51st Annual ABA Antitrust Section Spring Meeting (Apr. 4, 2003), available at <http://www.ftc.gov/speeches/other/030404simonsaba.htm>.

¹¹ *Polygram Holding, Inc.*, FTC Docket No. 9298 (July 24, 2003), available at <http://www.ftc.gov/os/2003/07/polygramopinion.pdf>; see William Kolasky & Richard Elliott, *The Federal Trade Commission's Three Tenors Decision: "Qual due fiori a un solo stello,"* ANTITRUST, Spring 2004, at 50.

¹² *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988).

¹³ See Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner, *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004).

¹⁴ Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 255 (2003).

¹⁵ *3M Co. v. LePage's, Inc.*, 124 S. Ct. 2932 (2004).

¹⁶ See Brief for the United States as Amicus Curiae, *3M Co. v. LePage's, Inc.*, 124 S. Ct. 2432 (2004).

International. We can also expect substantial continuity in the international arena. In her interview, Ms. von der Lippes confirmed that a Kerry Administration would continue the initiative begun by Joel Klein and Doug Melamed near the end of the Clinton Administration, to strengthen international cooperation with other competition authorities around the world. A Kerry Administration would, she said, continue the effort to build the International Competition Network—which was conceived during the Clinton Administration and brought to fruition in the Bush Administration—into an effective tool for promoting both convergence and cooperation among competition authorities worldwide.

Some have criticized the Bush Administration for the tone of its highly vocal criticism of the European Commission for its decision in GE/Honeywell.¹⁷ Others (including this author, who was one of the principal spokesmen for the Bush Administration on this issue) argue that the decision to engage the European Commission in a public debate over the objectives of competition policy served a beneficial purpose in helping to persuade the Commission both to embrace a consumer welfare vision of competition policy and to adopt significant reforms to its processes. These reforms included, most importantly, the appointment of a chief economist with a staff of professional economists to serve as a check on legally trained case handlers who sometimes can become too eager to pursue novel theories, especially in high visibility cases.

A Kerry Administration would likely be no less diligent in defending the prevailing U.S. view that the antitrust laws should be used only to protect competition, not competitors. A Kerry Administration likely would also be equally cognizant of the danger of using the antitrust laws to try to manage competition, rather than simply assuring it can operate free of artificial private restraints and exclusionary conduct. But, as in other areas of foreign policy, a Kerry Administration might seek to deal with foreign competition authorities in a less confrontational—dare one say more “sensitive”—manner than the Bush Administration sometimes has. ●

¹⁷ See William Baer, Former Director, FTC Bureau of Competition, Federal Trade Commission, Remarks at Conference Board Annual Antitrust Program (Mar. 2002) (characterizing the Bush Administration approach as “smash-mouth”).