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DOJ's "New" Agenda and "Big" Defeat -- Or Is The Real Story More Nuanced?

Christine A. Varney continued to attract attention as she entered her fourth month as Assistant Attorney General for DOJ's Antitrust Division. In a front-page, above the fold article on July 26, 2009, the New York Times reported Varney is encountering resistance in her stated attempt to increase DOJ's antitrust enforcement. While the article attributes recent interactions between DOJ and expert agencies to resistance to Varney's new approach, a more likely explanation rests in the established tradition of presidential administrations balancing DOJ's enforcement efforts with the agendas of other agencies.

Cases or Just Investigations?

Varney began her tenure with a promise to take "vigorous antitrust enforcement action under Section 2 of the Sherman Act." In furtherance of this priority, effective May 11, 2009, Varney withdrew the report "Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act". With this withdrawal, courts, antitrust practitioners and the business community are no longer to use the Section 2 Report for guidance of DOJ's policy with regard to antitrust enforcement under Section 2 of the Sherman Act. In particular, Varney rejected the Report's adoption of the disproportionally test, which, she said, reflected an excessive concern with the risks of over-deterrence and resulted in a preference for an overly-lenient approach to enforcement. This bold first step left many wondering how Varney's "aggressive" approach would affect corporate America in the midst of the recession. Due to the nature of prosecuting Section 2 cases—time-consuming, resource-intensive—and DOJ's checkered success, the Antitrust Division under Varney may choose to use other methods to increase Section 2 scrutiny. Rather than focusing on litigating Section 2 cases, DOJ may simply initiate more investigations. This should not offer much comfort to target companies.

Visible Advocacy … and Pushback

In Varney's May 12, 2009 speech to the U.S. Chamber of Commerce, she also identified the Antitrust Division's need to contribute its expertise to support the Obama Administration's pledge to broad reforms in banking, healthcare, energy, telecommunications and transportation. Since May, the Antitrust Division has taken strides in some of these reform areas, with varying degrees of success. Varney already has shown interest in combating exclusive dealing agreements in the wireless handset industry. With the assistance of the Federal Communications Commission and preliminary support from some in Senate, the Antitrust Division opened an investigation into these agreements.

Although in the early stages, it appears that the Antitrust Division's efforts with the FCC may be more aligned than efforts with another expert agency. The New York Times article claimed a defeat for Varney at the hands of the Department of Transportation when DOT granted final approval for antitrust immunity

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for Continental Airlines' bid to join the global Star Alliance.

On June 26, 2009, the Antitrust Division had filed comments with the Department of Transportation opposing the granting of antitrust immunity to certain airlines, including Continental, and members of the Star Alliance that sought to enter alliance agreements. Continental is obligated to the competitor SkyTeam alliance until October 24, 2009 but wishes to join the Star Alliance led by United Air Lines, Inc. and Deutsche Lufthansa AG. Continental also sought antitrust immunity for coordination with a subset of Star Alliance members on select routes and for a proposed joint venture with United, Air Canada and Lufthsansa. The Antitrust Division argued that the applicants had failed to demonstrate the need for broad antitrust immunity, and raised particular concern that two major domestic competitors would be granted immunity in the transatlantic market that, DOJ warned, might cause effects in the domestic market. Ultimately, DOT granted antitrust immunity to Continental and approval for the joint venture. DOT did, following comments by DOJ, place limitations on the immunity in several markets, including routes between the United States and Beijing, China.

Reports that the DOT snubbed the recommendations of the Antitrust Division oversimplify a complex process involving the Antitrust Division, the DOT, Congress and the White House, for three reasons. First, DOJ had wide support from senior Senators for its antitrust analysis and recommendations related to the immunity applications. Second, DOT granted provisional approval to the airlines prior to Varney's April confirmation. Third, DOJ's recommendations are not necessarily a reversal of the approach taken by the Antitrust Division under prior administrations.

Several members of Congress backed DOJ and urged DOT to consult with DOJ and give "substantial deference to any recommendation by DOJ applying its antitrust analysis." One letter request, by the Committee on Judiciary and Subcommittee on Antitrust, Competition Policy and Consumer Rights, came in December, 2008, well before Varney's confirmation, and reminded DOT of a joint study underway by the United States and the European Union on aviation markets and competition. The Chairman and Ranking Member of the U.S. Senate Commerce, Science, and Transportation Committee joined the debate lauding DOT's typical process of weighing DOJ's views on immunity applications. DOT, however, did not wait for Varney's confirmation or for DOJ's comments on the application before providing provisional approval in April 2009. Following this provisional approval, Senator Kohl further urged DOT to consider recommendations of DOJ and to "adopt any proposed conditions recommended by DOJ which are intended to serve the interests of the government agencies. . ." Upon consideration of DOJ's comments and recommendations, DOT was not persuaded to substantially change its provisional approval. In response to the DOT final order and recently-proposed legislation on aviation antitrust immunity, the House Judiciary Committee is now planning to hold hearings.

What Signal Has Been Sent?

So should antitrust practitioners follow the New York Times and take a strong signal from DOJ's (partial) defeat? At least one antitrust insider – after noting the Antitrust Division's continued support in Congress – concludes "no."

"These types of interactions between the Antitrust Division and sister agencies occur in every administration," notes David P. Wales, partner at Jones Day, former Acting Director of the Bureau of Competition at the Federal Trade Commission and former Counsel to the Assistant Attorney General in the Antitrust Division. Wales adds that "the Antitrust Division usually has a full seat at the table, and I would not advise clients that the recent Department of Transportation interaction

demonstrates a tempering of enforcement by the Antitrust Division under Varney."

The DOT interaction is best described as Varney encountering the intrinsic give-and-take of agency enforcement. Even with many DOJ staff remaining unchanged with the new administration, Varney may see more dramatic results in her goal to increase antitrust enforcement with efforts contained within DOJ than those efforts headed by other expert agencies, which tend to have their own priorities and views on competition policy in the industry. Ultimately, it remains too soon to fully understand the extent of the Antitrust Division's new approach. Varney's actions in the near future are the best indicators of what business can expect by way of antitrust enforcement.
