Antitrust Transitions

Spencer Weber Waller* and Jennifer Woods**

Antitrust enforcement is entering a period of transition in the United States. The election of Barack Obama as President and his executive branch, regulatory, and judicial appointments will have important consequences for antitrust law and enforcement, although most observers believe that these changes will be relatively modest both substantively and in comparison to the matters of banking reform and economic stimulus.

As part of that process of change, there has been no shortage of advice offered to the Transition Team and now the Administration about how to handle competition policy going forward. Two of the more substantial efforts in this regard have come from well-established antitrust groups with very different perspectives and memberships. Both the Antitrust Section of the American Bar Association and the American Antitrust Institute have offered sophisticated lengthy public advice to the new Administration on how best to proceed in the competition policy field. The reports are very different in nature and reflect the different nature of the institutions that prepared them. This essay takes a brief look at the transition reports offered by each organization and the vision they would offer for the new Administration.

1. Introduction

Antitrust enforcement is necessarily entering a period of transition in the United States. The election of Barack Obama as President will have important consequences for antitrust and enforcement, although most observers believe that these changes will be relatively modest both substantively and in comparison to the matters of banking reform and economic stimulus.

The changes have already begun in terms of key sub-cabinet appointments. Christine Varney, a former Federal Trade Commissioner and experienced private practitioner, has been selected and confirmed to head the Antitrust Division of the Justice Department.1 Jonathan Leibowitz has been selected and confirmed to chair the Federal Trade Commission (FTC) with one vacancy on the FTC yet to be filled.2 Since President Obama is expected to appoint another Democrat to the Commission, this will complete the shift.

1 The article has been revised compared to the print version.
2 J.D. Candidate 2010 and Student Fellow, Institute for Consumer Antitrust Studies, Loyola University Chicago School of Law.


© 2009 Kluwer Law International BV, The Netherlands
of power at the FTC to two Democrats, two Republicans, and one Independent who more often than not has voted with her Democratic colleagues.

Other key appointments are expected at the various sectoral regulators that will have an impact on competition policy. Of even greater impact will be the appointments to the federal judiciary at both the Supreme Court and lower court levels, which will influence the growth of competition policy for decades to come. In addition, the increased Democratic control of the United States House of Representatives and the Senate will have an impact on competition policy through legislation, hearings, and oversight of the enforcement agencies.

The change in competition policy is just a microcosm of the call for change that was a major theme of the Obama campaign and the early days of his presidency. As part of that process of change, there has been no shortage of advice offered to first the Transition Team and now the Administration about how to handle competition policy going forward.3

Two of the more substantial efforts in this regard have come from well-established antitrust groups with very different perspectives and memberships. Both the Antitrust Section of the American Bar Association (ABA) and the American Antitrust Institute (AAI) have offered sophisticated lengthy public advice to the new Administration on how best to proceed in the competition law field. The reports are very different in nature and reflect the different nature of the institutions that prepared them.

The Antitrust Section lists among its general goals:

Enhancing its role as the pre-eminent source for analysis, debate and continuing legal education in the antitrust, competition law, competition policy and consumer protection fields; advocating respect for, and compliance with, the law and legal system; advocating sensible competition principles as a fundamental underpinning of public policy and legislation; promoting effective and even-handed enforcement of the law by public officials, and appropriate use of the law and courts promptly to resolve private disputes; and advocating allocation of sufficient public resources to accomplish these goals; and promoting effective relationships with Congress by providing advice, counsel and testimony on all matters within the Section’s charter.4

In contrast, the AAI describes itself as:

an independent Washington-based non-profit education, research, and advocacy organization. Our mission is to increase the role of competition, assure that competition works in the interests of consumers, and challenge abuses of concentrated economic power in the American and world economies. We have a centrist legal-economic ideology and promote the vigorous use of antitrust as a vital component of national and international competition policies.5

---


In terms of public perceptions, the ABA Antitrust Section is more establishment oriented with the key leadership more often drawn from the defense bar. The AAI considers itself more progressive and is perceived as more sympathetic to the plaintiff’s bar. Neither, however, is monolithic in its membership or views. Both organizations assembled large task forces that represented a cross section of their membership to study and draft their antitrust transition reports long prior to the results of the November election were known.\textsuperscript{6} This essay takes a brief look at the transition reports offered by each organization and the vision they would offer for the new Administration.

2. Continuity and Change

The ABA Antitrust Section’s 2008 Transition Report provided the Antitrust Section’s view on the current state of antitrust and consumer welfare law enforcement and recommendations for the next administration. Glossing over the economic underpinnings of US antitrust law, and taking as a given the continuation of current antitrust politics based on industrial organization economics, the Antitrust Section instead focuses on the practical effects of the Department of Justice and FTC actions and policies on competition and consumer welfare.\textsuperscript{7} In the Antitrust Section’s estimation, the agencies have been generally successful in pursuing and enforcing policies based on bipartisan goals, including increased enforcement of criminal and consumer welfare cases, promoting the US’s international leadership in antitrust law, and providing information to the public through publications, hearings, and workshops.\textsuperscript{8}

The AAI’s recommendations for the next administration go further as evidenced by their title \textit{The Next Antitrust Agenda}.\textsuperscript{9} The AAI bases their vision on a fundamental paradigm shift in the theoretical framework of American competition law enforcement. Unlike the Antitrust Section report that evaluates almost exclusively the administrative and policy effects of US antitrust and consumer welfare enforcement, the AAI evaluates those same considerations through the lens of underlying economic theory. The AAI report sets forth a vision of antitrust policy that includes fundamental changes to the neoclassical economic underpinnings of prevailing antitrust enforcement ideology.\textsuperscript{10} Within the new proposed theoretical framework, the AAI proposes widespread changes in antitrust policy that center around increased enforcement tailored to the particular problems posed by different anticompetitive practices.

\textsuperscript{6} The full membership of the task forces can be found at Antitrust Section, \textit{supra} n. 3, at n. 1, and American Antitrust Institute, 10th Anniversary Booklet 5-6 (2008), <www.antitrustinstitute.org/archives/files/10th%20Anniversary%20Booklet%20LoRes%20Res_072920081337.pdf>, respectively. Professor Waller served as a member of the AAI task force contributing to the chapter on private enforcement.


\textsuperscript{8} Ibid., 2.


\textsuperscript{10} Ibid., 6-7.
3. **Competition Enforcement and Administration**

The Antitrust Section report concerns itself primarily with identifying means by which the FTC and Department of Justice Antitrust Division (DOJ; collectively ‘agencies’) can assuage critics, improve their trial records, and accurately assess the long-term impacts of agency actions. The report elaborates on several key themes as potential remedies to perceived agency shortcomings, including increasing transparency, improving interagency cooperation, maintaining US antitrust leadership abroad, and establishing and maintaining a balance between over-enforcement and under-enforcement.

The Antitrust Section report strongly encourages increased transparency in agency investigations and proceedings in order to facilitate communication between the agencies and transaction parties11 and improve the quality and quantity of information available to the public.12 The Antitrust Section suggests that increasing the availability of information has the potential to improve interagency cooperation, expedite investigations, and provide guidance to other countries in creating and implementing effective competition policy.13

The Antitrust Section and AAI are in nearly complete agreement as to the current state of agency enforcement: more cases should be brought in certain areas14 and with fewer delays. While generally approving of agency tactics and direction, both the Antitrust Section and AAI isolate staffing and budgetary problems in addition to marginal success in litigation and difficulty in identifying violators as obstacles to successful prosecution of antitrust cases. As a result, both reports recommend increasing the agencies’ budgets to accommodate additional staff and training programs and increasing attorney compensation and trial practice opportunities to facilitate retention of experienced and well-trained trial attorneys.15

Recognizing that the agencies have had several high profile defeats in recent enforcement cases,16 several of the Antitrust Section’s recommendations focus on ways in which the agencies can prevail in a greater percentage of cases while remedying a tendency by agency attorneys and administration to self-sabotage inadvertently.17 The Antitrust Section report identifies several shortcomings and failures in the agencies’ litigation strategies and training and makes a number of recommendations aimed at improving the agencies’ litigation records. In particular, the Antitrust Section recommends increasing funding and training for agency attorneys in order to increase staff retention, as well as exchange programs with other agencies and the addition of outside counsel, in certain circumstances, to supplement the agencies’ staffs. Such changes, the Antitrust Section

---

11 Antitrust Section, supra n. 7, 10.
12 Ibid., 8.
13 Ibid.
14 For example, DOJ merger cases, see Antitrust Section, supra n. 7, 3, and monopolization and vertical restraint cases, see AAI, supra n. 9, 56-57.
15 See Antitrust Section, supra n. 7, 11-15.
16 Ibid., 13.
17 See, e.g., Ibid., 12-14.
believes, may ‘enhance the reputation of both agencies as a place to go for qualified lawyers to obtain excellent trial experience’, while improving the agencies’ success rate in difficult cases.

Addressing the need for increased cooperation and consistency between agencies, the Antitrust Section report also recommends streamlining and standardizing investigation processes to the extent possible to remedy disparities in cost and timing between the agencies. For example, the Antitrust Section suggests that interagency battles over regulatory jurisdiction in the merger clearance process could be resolved via coin flip, which would potentially prevent months of interagency negotiation. Similarly, standardizing electronic discovery procedures would remedy the current problem of DOJ-investigated transactions involving more costly production than FTC-investigated transactions.

4. Substance and Ideology

Where the Antitrust Section report hints that the economic theory contained within the Merger Guidelines ‘may no longer reflect current antitrust thinking’, the AAI advocates a much more drastic change. The AAI suggests that a fundamental paradigm shift in American economic theory is necessary to further the goals of antitrust and consumer law in the US. Arguing that the current reliance on neoclassical economic theory as espoused by the Chicago School of Economics is incompatible with both the goals of competition law and the basic ideas of democracy, the AAI advocates a shift to a post-Chicago economic framework that recognizes and embraces the value of regulation and more aggressive enforcement in promoting efficient competition.

The AAI sees the Chicago School as espousing ideas fundamentally at odds with the basic principles of antitrust, including reliance on the self-correcting, fundamentally sound nature of markets, microeconomic price theory models of perfect competition, and the generally efficient nature of vertical restraints. The Chicago School also argues that government regulation functions as an impediment to effective market operation. In addition to supporting limitations on federal regulatory power, the Chicago School believes that state and private antitrust enforcement should be curtailed or abandoned altogether. In contrast to the Chicago School’s generally dim view of government regulation, AAI believes the Chicago School’s shortcomings can be remedied through

---

18 Ibid., 14.
19 Antitrust Section, supra n. 7, 6.
20 Ibid., 7–8.
21 Ibid., 33, AAI, supra n. 9, 6–7.
23 AAI, supra n. 9, 4–5.
24 Ibid.
25 Ibid.
a reliance on post-Chicago principles of regulation-friendly, consumer-based economic thought. 26

For the AAI, a shift to post-Chicago economic theory means shifting the focus of competition law away from a single goal of competitive prices and toward broader aims that include supporting innovation and recognizing the significance of freedom of choice for consumers. 27 A shift toward post-Chicago principles will also require that the concept of ‘consumer welfare’ cease equating to ‘total economic efficiency’ and start reflecting the actual economic position of consumers. 28 According to the AAI, achieving these aims will require increased regulation and government and private enforcement, all of which are incompatible with the Chicago School’s hands-off view of markets and competition. 29 The AAI advocates increased scrutiny of vertical restraints and monopolization and suspicion of concentrated market power in order to address anticompetitive behavior typically dismissed by the Chicago School. 30

5. Specific Policy Recommendations

Focusing primarily on means by which the agencies may streamline their investigations, the Antitrust Section’s report finds few areas in which substantive policy changes should occur. Perhaps the greatest change the Antitrust Section advocates is the drastic overhaul or outright repeal of portions of the Robinson-Patman Act, which the Antitrust Section feels are fundamentally flawed. 31 The Antitrust Section’s concerns lie not only in the potential for the Act to inhibit creative pricing and promotion but also in the fact that defendants have used the Act as a defense against allegations of other antitrust violations. 32

Instead of repealing the Robinson-Patman Act, the AAI recommends amendments to rectify the Act’s shortcomings while preserving potential benefits to consumers. 33 Although enforcement of the Act has languished, the AAI believes that it remains a useful tool to protect consumer welfare and distributional efficiency and provide a level playing field for small businesses. 34 The AAI notes that investigating and prosecuting Robinson-Patman Act cases will require considerable time and effort but should not be disregarded as an option in limited circumstances.35 Regardless of the potential effectiveness of the

---

26 Ibid., 4-6.
27 Ibid., 7.
28 Ibid., 8.
29 Ibid., 6-7.
30 AAI, supra n. 9, 6-7.
31 Antitrust Section, supra n. 7, 61.
32 Ibid.
33 AAI, supra n. 9, 98.
34 Ibid., 130-131. The Robinson-Patman Act has not been used by the FTC in several years and has been ignored by the DOJ since 1976. Ibid.
35 Ibid., 129.
Act as a whole, the AAI suggests repealing Section 3, which prescribes criminal penalties for certain types of price discrimination.\textsuperscript{36}

Consistent with its support for post-Chicago economic principles, the AAI also suggests legislation to overturn the Supreme Court’s decision in \textit{Leegin Creative Leather Product, Inc. v. PSKS, Inc.},\textsuperscript{37} which reversed the per se rule banning minimum resale price maintenance (RPM) agreements.\textsuperscript{38} Alternatively, if \textit{Leegin} remains the rule, the AAI suggests using a structured rule of reason analysis that would treat RPM agreements as inherently suspect in most circumstances.\textsuperscript{39} Although the agencies urged the Supreme Court to abandon the per se rule in \textit{Leegin}, AAI insists that a per se rule is necessary to address the frequently anticompetitive effects of RPM agreements.\textsuperscript{40}

The Supreme Court also recognized the likelihood of anticompetitive RPM agreements, warning that the risk ‘must not be ignored or underestimated’.\textsuperscript{41} However, where AAI sees a strong possibility of anticompetitive behavior, the Antitrust Section concludes RPM agreements ‘can stimulate interbrand competition and is not so inevitable pernicious as to warrant per se illegality’.\textsuperscript{42} The Antitrust Section feels the Supreme Court’s decision did not go far enough, arguing that per se rules at the state level should be abandoned as well.\textsuperscript{43}

In an international context, the Antitrust Section and AAI reports differ somewhat as to the role of US antitrust policy in shaping developing antitrust regimes around the globe. Although both reports recognize the need for consistent policies in countries around the world in order to facilitate international antitrust enforcement, the Antitrust Section repeatedly implies that the US should make efforts to promote modeling of its antitrust regime abroad.\textsuperscript{44} For example, the Antitrust Section report notes that international cooperation may include US leadership in international competition bodies, transparency in US enforcement processes, ‘soft’ cooperation in case handling and technical assistance, and both bilateral and multilateral cooperation agreements.\textsuperscript{45}

Demonstrating less concern for the US’s global antitrust hegemony, the AAI instead proposes evaluating other countries’ regimes in an attempt to further improve and streamline US policy. This is particularly true for areas like cartel enforcement, where regimes like Korea and the United Kingdom have created innovative strategies to root out and prosecute anticompetitive behavior that could also be successful in the US.\textsuperscript{46}

\textsuperscript{36} AAI, \textit{supra} n. 9, 134.
\textsuperscript{37} 127 S. Ct. 2705 (2007).
\textsuperscript{38} AAI, \textit{supra} n. 9, 84. Senate Bill S. 148, introduced by Senator Herb Kohl, chairman of the Senate Antitrust, Competition, and Consumer Rights Subcommittee, is currently pending in Congress and would legislatively overrule \textit{Leegin}. See \textit{Antitrust Legislative Agenda Taking Shape}, FTC: Watch No. 733 (12 Jan. 2009), 1.
\textsuperscript{39} AAI, \textit{supra} n. 9, 58.
\textsuperscript{40} \textit{Ibid.}, 86.
\textsuperscript{41} \textit{Ibid.}
\textsuperscript{42} Antitrust Section, \textit{supra} n. 7, 63.
\textsuperscript{43} \textit{Ibid.}
\textsuperscript{44} See, e.g., Antitrust Section, \textit{supra} n. 7, 17-19.
\textsuperscript{45} \textit{Ibid.}, 17.
\textsuperscript{46} AAI, \textit{supra} n. 9, 24.
The AAI’s report also diverges from that of the Antitrust Section in making a number of industry-specific policy recommendations. Despite the Antitrust Section’s view that industry-specific enforcement is unnecessary and undesirable, its report makes an exception for health care because it combines substantial regulation of providers, participants, and entry into certain sectors with extensive third party insurance and a reliance on intellectual property like patents. In order to appropriately address the unique issues of the industry, the ABA recommends that the agencies engage with other parts of the government knowledgeable in healthcare in order to achieve a greater understanding of the industry and where markets are likely to fail.

Taking a stronger stance on agency enforcement in the healthcare industry, AAI recommends increased federal enforcement to remedy harm to consumers caused by deceptive practices and increased concentration. Noting the state actions have only partially made up for the lack of successful federal enforcement in the healthcare industry, the AAI suggests devoting substantial resources to combat what it sees as a grave threat to consumer welfare. By targeting anticompetitive mergers, price manipulation, and exclusionary behavior, the AAI believes aggressive investigation and enforcement could remove barriers to generic competition and improve services to consumers.

Due to its unique and pressing problems, the energy sector comprises a second key industry for which the Antitrust Section and AAI offer specific recommendations. Concerned about increasing consumer energy concerns and the highly political nature of energy policy decisions, the Antitrust Section warns that the energy sector must be vigilantly monitored for anticompetitive behavior. The Antitrust Section notes widespread concerns among politicians and consumers that high energy prices and record oil company profits in recent years were the result of anticompetitive behavior but cautioned that energy policy and supply and demand also play key roles in determining prices. The Antitrust Section report applauds the FTC for their often politically unpopular moves in investigating the energy sector and proposes that they continue to operate their investigations in the same manner.

Because of the urgent nature and pervasive existence of energy concerns, the AAI argues that effective antitrust policy in the energy sector requires more enforcement action, increased educational efforts, and removal of judicially created exemptions from antitrust laws. Careful attention to the development of new energy technologies will also be necessary to prevent the same kinds of market failures that have plagued other areas of the industry.

47 Antitrust Section, supra n. 7, 41.
48 Ibid., 52.
49 Antitrust Section, supra n. 7, 53.
50 AAI, supra n. 9, 317, 324.
51 Ibid., 319-320.
52 Ibid., 328-330.
53 Antitrust Section, supra n. 7, 39-40.
54 Ibid.
55 AAI, supra n. 9, 351-354.
56 Ibid., 349.
Although both reports single out the healthcare industry and the energy sector as deserving of special antitrust attention, the AAI also discusses media and food production as key economic sectors with unique competition policy needs. In the AAI’s estimation, media oligopolies and a shrinking supply of independent media outlets threaten society’s ‘political and social health’ by limiting the public’s access to alternative viewpoints and vital information.\(^\text{57}\) Similarly, food producers and consumers alike are hurt by existing market structures and practices that have led to rapidly increasing food prices.\(^\text{58}\) Therefore, in both the media and food sectors, like in energy and healthcare, the AAI proposes further research, new legislation, and increased enforcement to combat anticompetitive behavior.\(^\text{59}\)

6. Conclusion

Change will come slowly in the antitrust area. Case selection and investigation takes time, litigation and appeals proceed according to their own timetables, new guidelines have lengthy gestation periods, and international initiatives proceed at the even more leisurely pace of diplomacy. In addition, US competition policy will be dictated as much by circumstances as by deliberate policy choices.

The most durable legacy of current United States antitrust policy is likely to be the continued focus on the criminal prosecution of hard-core cartels. The US anti-cartel program is vigorous and enjoys broad bipartisan support across political and ideological lines. Little if anything in this area is likely to change. The debate, if any, is how to make the current policy more effective, without questioning the basic thrust.

The rest is more subject to debate and new initiatives. Issues such as RPM, vertical restraints, tying, bundling, loyalty discounts, mergers, joint ventures, monopolization, and other civil investigations and cases under the Sherman and Clayton Acts will need to be examined by the new antitrust enforcers for potential changes in case selection, investigation, litigation, and participation as amicus curiae in private antitrust litigation. The new administration is fortunate to have two thoughtful, but very different, roadmaps to follow in the transition reports of the AAI and the Antitrust Section of the ABA.

7. Postscript

Since this essay was originally completed in March, the antitrust transition in the United States has, if anything, picked up in pace. The new heads of the Antitrust Division and the Federal Trade Commission have named their new senior staffs and begun to identify their new priorities.

The most notable public example of the change of direction going forward has been Christine Varney’s May 12th speech at the United States Chamber of Commerce.

\(^{57}\) Ibid., 247.

\(^{58}\) Ibid., 281.

\(^{59}\) Ibid., 248, 281.
where she repudiated the Department of Justice previous report on Single Firm Conduct and stated some of her new priorities. In particular she indicated that ‘it is my hope that the Antitrust Division, drawing upon the significant expertise of my new leadership team, will have the opportunity to explore vertical theories and other new areas of civil enforcement, such as those arising in high-tech and Internet-based markets’.60

---