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### Varney and Obama's antitrust legacy

By Ed Black, CEO of Computer & Communications Industry Association - 07/14/11 11:57 AM ET

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Following the Obama campaign's criticism of a decade of minimal antitrust enforcement under the George W. Bush administration, the then new Assistant Attorney General for Antitrust came out of the gate flying, at least rhetorically.

A little more than a month into her tenure, Christine Varney—standing at the same podium from which she delivered her farewell speech Tuesday—set the tone for the Obama administration's reinvigorated DOJ Antitrust Division when she rescinded her predecessor's report on monopoly enforcement, which had taken a decidedly minimalist interpretation of antitrust law.

Now, nearly two years later with the announcement that Christine Varney is stepping down, we have reached an inflexion point. Several major investigations are in the queue and the next AAG will be called on to make tough decisions.

Perhaps understandably, the Antitrust Division's first years under the leadership of the Obama administration were relatively uneventful, particularly on the monopoly front where only one major case has been brought. Antitrust cases take time to investigate and very few cases were underway when the Obama administration assumed power. On the merger front, the depressed economy and the uncertain future meant companies were hoarding their available cash and proceeding cautiously. However, times have changed.

The economy, although still lagging, has become more stable. Corporate profits are soaring and well-positioned companies are keen to buy up rivals and assets while they are still relatively cheap. In terms of single firm conduct, several investigations have been lingering at the DOJ for a considerable amount of time.

As a result, the next few months will forge Obama's antitrust legacy and the nation will see if the Department of Justice will keep its commitment to robust antitrust enforcement. To date, the Antitrust Division has been innovative with its use of behavioral remedies and merger conditions, but these are notoriously hard to enforce and do little to preserve competition in the marketplace -- especially in the long run.

The next AAG needs to go beyond tinkering around the edges of anticompetitive

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conduct and take decisive action to stop it in its tracks.

The mega-merger between AT&T and T-mobile and the IBM mainframe investigation are two major cases before the DOJ that demand action. The unchecked reemergence of two of the highest profile monopolies from the 20th Century is not the antitrust legacy the Obama administration or the next AAG desires.

Even under Reagan, who is not celebrated as a proponent of aggressive antitrust enforcement, the Antitrust Division took decisive action to split up AT&T and investigations of IBM were shepherded through both Republican and Democratic administrations. To stress the oft-underappreciated importance of antitrust enforcement, the birth of independent software companies that grew into Silicon Valley and the explosion of the Internet has been the result of antitrust actions -- or the credible threat thereof.

Regardless of the spin of big companies, economic growth and jobs result from dynamic, competitive markets -- more than from stagnant, monopolized ones.

Now, the next generation of innovation is at stake.

AT&T, with its long history of opposing disruptive innovation, from the answering machine to the Internet, looks poised to take control of a huge swath of the vital wireless market and IBM's grip tightens on the vast majority of business data that will comprise the heart of the enterprise cloud computing revolution. In other words, the coming year will be the climax of this defining chapter in antitrust history -- especially for the technology industry.

Ms. Varney's departure at this critical juncture gives some cause for concern.

With major investigations underway, the confirmation process for the new AAG will be highly politicized. Politically connected corporations, especially those with a reputation of running afoul of competition laws, will lobby aggressively against candidates that are likely to be resolute in enforcing the antitrust statutes.

As he agonizes over economic policy and prepares for the next presidential campaign, President Obama and his administration must use this appointment to reaffirm his commitment to competition in the wake of the "too big to fail" economic meltdown and show that he can stand up to corporate pressure. Our future depends on it.

*Ed Black is the president and CEO of Computer & Communications Industry Association.*

**Comments (1)**

Ed, The concept of anti-tust was appropriate when the US was the sole economic superpower, but the globe has become a far more crowded and competitive place since then, we have countries such as China having very well defined objectives and the wherewithall to fully align its considerable influence and potentially overwhelming resource base towards achieving those objectives. When up against that scale of unconstrained competition, the global competitiveness of our largest corporations is severely damaged as a result of anti-trust laws. That and the fact that most of what we buy comes from China and other places which have no such restrictions on their businesses essentially makes such laws obsolete.

You mentioned disruptive innovation in a supportive manner in your article, so I'll remind you that the theory behind disruptive innoavation was actually one developed by Jos Schumpeter (called creative destruction) in which he (and others) demonstrate that anti-trust is essentially unnecessary in a capitalistic society where all are free (and even encouraged) to develop and profit from newer, better ways to do things. A classic example of disruptive innovation was the 'overthrow' of then-monopoly Western Union by the Bell Telephone - completely unaided by anti-trust regulation, and given that the rate of technological change (which is what generally leads to disruptive innovation) is ever increasing, we can expect to see more of that rather than less.

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