



Under Obama, Agencies Fight Mergers With Sharpened Teeth

By **Melissa Lipman**

Law360, New York (October 22, 2012, 5:45 PM ET) -- President Barack Obama vowed tougher antitrust enforcement when he entered office four years ago, and experts say he has lived up to his promise, with government agencies now particularly aggressive when it comes to fighting mergers in court. Expect more of the same if he's re-elected, they say.

The current administration has not upended antitrust policy or enforcement — a nearly impossible feat given the more than 100-year history of competition law in the U.S. — but attorneys said they had seen an increasing willingness to litigate cases at the U.S. Department of Justice's Antitrust Division and the Federal Trade Commission over the last four years.

"They've put a real focus on litigating cases, and I do think that more cases have been brought by the agencies in these past four years than may have been brought in other years," said Baker & McKenzie LLP partner Lee Van Voorhis. "The absolute numbers may not bring that out, but I think nevertheless there have been cases brought in these years that may not have been brought under previous administrations."

In an unusual move, then-Sen. Obama made antitrust issues a talking point during his 2008 campaign, criticizing President George W. Bush's administration for lax merger enforcement, particularly when it came to health care.

Since then, attorneys say they have witnessed clear differences from the past administration in both the agencies' willingness to litigate and their approach to litigation, especially with regard to mergers.

"They have publicly stated that they want to litigate more and have hired people with the aim of litigating, [and] I do think there's a message that they're conveying," Van Voorhis said.

Though much of that message has come through speeches — acting Antitrust Division chief Joseph Wayland issued his latest warning in September that the agency was "prepared to go to court ... and when we file a lawsuit, we litigate to win" — it has real effects on actual merger cases, attorneys said.

"That may have an impact for negotiations during investigations and transactions," Van Voorhis said. "One of those implications may be a stiffer spine ... on the part of the agencies in those negotiations."

That change in approach has also kept some deals from ever reaching the antitrust agencies, according to Baker Botts LLP partner Stephen Weissman.

"Something you don't hear about that's hard to measure is the number of deals that aren't consummated or aren't pursued because of the enforcement climate," Weissman said. "A number of antitrust practitioners ... have been much less sanguine about the prospects for getting deals through in this administration than they would have been in prior administrations."

In addition to tougher enforcement, both agencies have hired experienced litigators such as Wayland, who joined the Antitrust Division in late 2010 as deputy assistant attorney general for civil enforcement,

and Edward D. Hassi, who became the FTC's chief litigation counsel for competition in early 2011.

Having more experienced litigators investigating transactions changes the way the agencies approach deals, according to Crowell & Moring LLP counsel Olivier Antoine.

"There's been a conscious effort to boost the litigation capability and the litigation focus both at DOJ and FTC ... and that changes the process. That adds a different level of scrutiny," Antoine said.

One of the clearest examples of the shift from the previous administration is the DOJ's challenge of AT&T Inc.'s proposed merger with T-Mobile USA Inc., attorneys said.

"It's hard to say the result would have been different in the Bush administration, but there were certain techniques used in AT&T-T-Mobile, in the way the government sued very early in the case, whereas in the past administration they may have given remedies ... a real chance before they actually filed litigation," Weissman said. "That was ... almost a 'sue first and get more leverage that way' approach than 'sue only if you can't get a remedy in place.'"

There was also, however, an element of chance to the number of high-profile, largely successful merger challenges the agencies have mounted in recent years, according to Hogan Lovells partner and former FTC litigator J. Robert Robertson.

"What really made the difference wasn't just the will to enforce — that was clearly there," Robertson said.

"It was a combination of luck — getting the right cases — and having very competent litigators like Matt Reilly at the FTC and Joe Wayland at DOJ," Robertson said, highlighting the former head of the FTC's hospital mergers unit and Wayland's work litigating both AT&T-T-Mobile and the H&R Block Inc. challenge. "Without the litigators, we would have just heard speeches."

White & Case LLP partner Eric Grannon argued that the Antitrust Division's increasing interest in bringing in more experienced litigators was primarily a reaction to some losses in major cases in recent years.

"The more recent emphasis on the division's trial capability is about reversing a mixed record on litigation and has nothing to do with politics or ideology," Grannon said. "It's usually only one or two cases per administration where it is even arguable that who was in charge made a difference in whether the merger was challenged, [and] I never once saw politics come into play when I was in the front office."

Another change in recent years has been the increasing level of cooperation between both the DOJ and FTC and their international counterparts, Antoine said. Whereas the agencies had always talked about improving cooperation in the past, that has now turned into concrete, day-to-day cooperation at the staff level between international agencies.

"It also gives more convergence, which often means more scrutiny," Antoine said. "Now we're seeing the European Commission asking for documents they didn't used to ask for because they've seen their U.S. counterpart doing it."

The DOJ has actively cultivated those kinds of changes by, for example, hiring former Freshfields Bruckhaus & Deringer LLP partner Rachel Brandenburger to the newly created position of special adviser on international issues.

"Brandenburger ... is a very, very sophisticated, savvy and experienced [European Commission]

competition lawyer, so bringing that level of talent at the agency helps," Antoine said. "It is part of getting tougher."

Perhaps the most aggressive move former Antitrust Division head Christine Varney made upon taking over at the division in 2009 came almost immediately, as she revoked the Bush-era guidance to enforcing Section 2, the monopolization provision of the Sherman Act, according to attorneys.

Still, there's a difference between changing a policy position and actually overhauling enforcement, according to Grannon.

"They threw out the Section 2 report, but they haven't brought any Section 2 case that I'm aware of," said Grannon, who was a political appointee in the Antitrust Division during the first George W. Bush administration. "It's easy to throw out that piece of paper, but they're not going to bring a case that they can't win in court."

In terms of actual cases, the DOJ has shown an increasing interest in most-favored-nation clauses, contract provisions that guarantee that the paying party in a contract gets the best rate on whatever's being supplied, particularly when it comes to health insurance and in its e-books price-fixing case against Apple Inc. and several publishers.

"But there hasn't been the same systemic thinking, compared to the last administration, on unilateral conduct," Antoine said.

Still one case has the potential to show a more aggressive stance than under the Bush administration: the FTC's investigation into Google Inc.'s search practices.

"The biggest case of the previous generation in the Clinton years was ... the Microsoft case, then of course Bush came in ... and within a few months just settles on really, really easy terms," said American Antitrust Institute co-founding director Robert Lande. "People used to say that Microsoft was World War III. ... Then Google would be World War IV."

The numbers of cases brought can be deceiving, Lande said, because while the numbers often vary little, the substance and degree of difficulty can often highlight how aggressive one administration is as opposed to the next.

"Republicans will point out, 'We brought a number of monopoly cases under Bush,' ... but they're not Microsoft, Microsoft is the monster," Lande said. "To say that, 'Well, we scuttled the Microsoft case, but then we got these two other cases,' well, OK, that's fine, but they're not Microsoft."

If Obama is re-elected come November, attorneys said his current nominee to take over the Antitrust Division, Arnold & Porter LLP's Bill Baer, would be unlikely to shy away from the DOJ's current litigation focus.

"He has a lot of experience and has a very good judgment of what cases are winnable and what cases aren't," Weissman said. "If confirmed, Baer will continue to be a very aggressive enforcer."

--Editing by Elizabeth Bowen and Katherine Rautenberg.

